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**NATIONAL SECURITY CONCERNS IN ARTICLE 355 OF THE
CONSTITUTION OF INDIA AND THE NEW HORIZONS OF
“EXTERNAL AGGRESSION”: A CRITICAL APPRAISAL IN THE LIGHT
OF THE JUDGMENT IN THE *SARBANANDA SONOWAL* CASE**

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ABSTRACT

The concept of National Security is one of unfading significance and it is evolving and expanding in the modern times. National security scholarship puts forth two ideas of the concept today. One is the classical concept which looks at national security from the prism of military security only and rather focuses on physical attacks or physical threats to the security of nation states. Two is the modern concept which is not concerned with physical attacks, but encompasses a vast number of non-military elements too, which are concerned with ‘well-being’ of individuals within nation-states, as opposed to mere physical safety. In the present day world, wars do not pose so much of an existential threat to states as other problems like hunger, unemployment, diseases, health, disasters, environment degradation, climate change etc. do. Thus national security will have to accommodate emerging components in the form of food security, water security, health security, environmental security, disaster security, education security and many more. Now Article 355 of the Constitution of India is primarily concerned with the classical concept of national security. This paper is an attempt to discuss the nature of security concerns that radiate from this Article. This paper also attempts to demonstrate how the new horizons of the term “external aggression” as laid bare in the *Sonowal* case is an endorsement by the judiciary of the modern concept of national security.

Introduction

“National Security” has become one of the most evolving concepts of the present times. It is a terminology that has evoked a good degree of debate and discussion in various forums on national governance. But the scope and contours of this term have rapidly changed in the present day. Earlier it was a term that was associated with physical security only. Hence national security as understood in the days of the warring periods was associated with military security and the preparedness of the armed forces in securing a nation from another with whom it was at war. However today we do not live in the age of conventional warfare. Rarely do we see a nation in a state of formally declared war with another country. Today dangers to national security are posed more by terrorism, militant attacks, naxalism etc which are situations falling short of the state of war. These are all nonetheless examples of

physical attacks jeopardizing national security. Such situations, though different from wars, are still a part of the classical idea of national security as they concern themselves more with the physical aspect of security. Today, national security scholarship worldwide tables two views about the concept of national security; the classical/traditional one, which views national security from the military prism alone and the modern/widened one, which strives to bring almost all areas of human endeavor within the compass of the term [1] Thus food security, climate security, health security, water security, environmental security, cultural security etc are just few of the evolving components of the modern notion of national security. This modern concept of national security is structured on the thesis that in the present age the security posture of a nation is as much affected by factors like scarcity of food and water, climate change, insufficient health care facilities, environmental degradation etc., as it is by any forms physical attacks. Hence each one of these is as much a security issue as military preparedness. Today's world affected by COVID19 presents an illuminating example of how health security can affect the overall national security of every country. This is the modern concept of national security.

Article 355 of the federal Constitution of India casts a duty on the Centre to protect the states against external aggression and internal disturbance and also imposes an obligation on it to ensure that the government of the state is carried on in accordance with the provisions of the Constitution. Now when the Constitution uses the twin words, 'external aggression' and 'internal disturbance' prima facie its hint is on issues relating to the physical aspect of security. Hence Article 355 of the Constitution concerns itself with physical security and thus it reflects the classical idea of national security. However, the Supreme Court of India, in the case of *Sarbananda Sonowal vs Union of India* [2], has given a much expanded interpretation to the term 'external aggression.' Speaking in the context of the large scale influx of illegal immigrants from Bangladesh into the state of Assam, the Supreme Court of India said that this amounts to external aggression within the meaning of Article 355. Thus new horizons of interpreting the word 'external aggression' were laid bare by the Court, which had nothing to do with physical attack or physical aggression *per se*. Hence this paper argues that such an interpretation is demonstrative of the new modern concept of national security being endorsed and applied by the Supreme Court of India. This paper also attempts to throw light on the national security concerns addressed by the Constitution of India in Article 355 and engages into a critical analysis of the court's judgment in the *Sonowal* case on some established Constitutional principles.

Objectives of the Study

The objective of this study is two-fold. Firstly it seeks to probe into a complete understanding of Art. 355 of the Constitution, by looking into its Constitutional history and secondly, it seeks to demonstrate how the court's interpretation of the term "external aggression" in Art 355 of the Constitution is a classic illustration of the incorporation of the modern concept of national security, since the court adopts newer and hitherto unknown horizons of interpreting the term.

Methodology of the Study

This paper is a theoretical, doctrinal kind of study and uses secondary data like judgments of the courts, Constituent Assembly Debates, journal articles, reference books etc as the sources. It indulges into a theoretical and critical analysis of the judgment of the Supreme Court to present a new argument about the endorsement of the modern concept of national security.

Article 355 - Its Constitutional History

Article 355 of the Indian Constitution is a very cardinal provision in the Indian federation. It imposes a two-fold obligation on the Indian Union. Before analyzing the provision or before peeping into its history, it would be apposite to read what the provision prescribes. Article 355 reads as under:

Article 355: Duty Of the Union to protect States against external aggression and internal disturbance: "It shall be the duty of the Union to protect every State against external aggression and internal

disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution”.

Pertinent to note that Article 355 of the present Constitution was Draft Article 277A. Dr. Ambedkar had introduced this Article and when the same was debated on the floor of the Assembly, some members doubted that a provision of this kind could interfere with the provincial autonomy of the states. However Dr. Ambedkar explained the reasons that made the inclusion of this Article necessary.[3] He said that within our federation, barring the provisions which permit the Centre to override any legislation that may be passed by the Provinces, the Provinces have a plenary authority to make any law for the peace, order and good government of the province. Thus the Centre’s intervention in these spheres must be deemed to be barred, because that would invade the sovereign authority of the province. This being so, if the Centre were to interfere in the administration of provincial affairs (as provided for in Article 356, draft Articles 278 and 278A) it must be by or under some obligation which the Constitution imposes upon the Centre. The invasion must not be an invasion which is wanton, arbitrary and unauthorized by law. It was with this purpose that Article 355 was introduced into the Constitution.

The duty cast on the Centre by virtue of this Article is two-fold:

1. To protect every State against external aggression and internal disturbance;
2. To ensure that the government of every State is carried on in accordance with the provisions of the Constitution.

It has been said that the two limbs of Article 355 are not interdependent. That is to say, a Constitutional breakdown can take place in a State even without there being a situation of external aggression or internal disturbance [4]. A provision analogous to this one is to be found in the other federal constitutions also, like for e.g. the American and Australian Constitutions. Under the American Constitution, the Central government is duty bound to guarantee to every State a Republican form of government and to protect a State against invasion, and, on application of the State Legislature or , of the Executive (when the Legislature cannot be convened), against domestic violence [5]. Further, Section 119 of the Australian Constitution provides in very express terms that the Centre shall protect every State against invasion, and, on application of the State Executive against domestic violence. There is an important distinction between the Indian provision and the parallel provisions in the American and Australian Constitutions. Under those federal Constitutions, application by the State to the Centre is essential before Central intervention, whereas no such condition is prescribed in the Indian Constitution. Thus there is no pre-condition of a request/application from the State before the Centre can act under Article 355. The Supreme Court of the United States of America has however laid down that if internal disturbance in any State interfered with the operation of the National Government itself, or with the movement of inter-State commerce, then the Centre can send force on its own initiative, without waiting for the application of the State authorities [6]. With this ruling, the requirement of an application by the affected State comes into grave doubt.

Under our Constitution, the terms used are “external aggression” and “internal disturbance”. One must note that though the 44th Amendment Act removed the words “internal disturbance” from the text of Article 352, and replaced it with “armed rebellion” yet the same has not been removed from the text of Article 355. The term “armed rebellion” is narrower in scope than “internal disturbance”. This means that a mere internal disturbance that falls short of an armed rebellion cannot justify a Proclamation of Emergency under Article 352, though it can justify an intervention of the Centre under Article 355. Further Article 356 talks about failure of constitutional machinery in the State. This means that mere “internal disturbance” does not justify a Proclamation under Article 356 unless it results in breakdown of constitutional machinery in the State [7]. This point has also been emphasized aptly in *S R Bommai vs. Union of India*[8], wherein Sawant J. for himself and on behalf of Kuldeep Singh J. has

observed, "Thus it is clear from Art. 355 that it is not an independent source of power for interference with the functioning of the State Government but is in the nature of justification for the measures to be adopted under Arts. 356 and 357. What is, however, necessary to remember in this connection is that while Art. 355 refers to three situations, viz., (i) external, aggression, (ii) internal disturbance, and (iii) non-carrying on of the Government of the States, in accordance with the provisions of the Constitution, Art. 356 refers only to one situation, viz., the third one. As against this, Art. 352 which provides for Proclamation of emergency speaks of only one situation, viz., where the security of India or any part of the territory thereof, is threatened either by war or external aggression or armed rebellion. The expression "internal disturbance" is certainly of larger scope than "armed rebellion". In other words, while a Proclamation of emergency can be made for internal disturbance only if it is created by armed rebellion; neither such Proclamation can be made for internal disturbance caused by any other situation nor a Proclamation can be issued under Art. 356 unless the internal disturbance gives rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. A mere internal disturbance short of armed rebellion cannot justify a Proclamation of emergency under Art. 352 nor such disturbance can justify issuance of Proclamation under Art. 356 (1), unless it, disables or prevents carrying on of the Government of the State in accordance with the provisions of the Constitution" [9].

Analysis of Article 355

In the Indian federation, 'law and order' has been designated to be a State subject. Thus the Centre's intervention under Article 355 would be justified only in cases of grave form of disturbance which is beyond the State's control. In practice, a convention has developed in India too, that the State Government will send a request to the Centre to send help. When a State makes such a request, then the Centre cannot refuse to extend help, in view of the specific obligation cast on the Centre by virtue of Article 355. Also, by reason of the phraseology of Article 355, it cannot also be said that the Centre can never intervene *suo motu*. Thus, the final decision in this regard seems to rest with the Centre [10]. The 42nd Amendment of the Constitution had added a new Article 257A into the Constitution, which enabled the Centre to deploy any armed forces of the Centre, or any other force under its control, for dealing with any grave situation of law and order in any State. Under this Article, the Centre could act without the concurrence of the concerned State Government. Some parallel changes were also incorporated in the legislative entries. Entry 2A was added to List I which reads, "Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment". Consequent changes were also made in entries 1 and 2 of List II to exclude any such force from the purview of the States.

However, Article 257A gave birth to a good amount of controversy and was regarded by the States as an Article that eroded their autonomy. Hence the 44th Amendment Act repealed Article 257A. However, Entry 2A has still been retained in List I thus giving executive and legislative power to take necessary action to deploy armed forces in the State in aid of civil power. This power vested in the Centre can perhaps be justified with reference to Article 355. The fact that Article 352 permits the declaration of emergency in a part of the country because of armed rebellion means that the Centre has to take all possible steps necessary to maintain law and order in any part of the country if there is a serious breakdown thereof. It appears that even under Entry 2A, List I the Centre is entitled to deploy forces *suo motu* in a State to put down internal disturbance in a State and restore peace therein. If there is serious breakdown of law and order in a State the Centre will be justified to send its forces to meet the situation without receiving any request from the State for the same. This result emerges by reading entry 2A, List I, along with Article 355 [11].

Article 355 also stipulates another ground that justifies Centre's intervention in the State and that is, 'to ensure that the government of the State cannot be carried on in accordance with the provisions of the Constitution'. It is in fulfillment of this obligation that the Centre takes over the Government of a State (Article 356) in case of breakdown of the Constitutional machinery therein.

Shri H M Seervai makes an analysis of Article 355 [12]. He says that Article 355, by imposing a duty on the Union to secure that government of every State is carried on according to the provisions of the Constitution recognizes the right of every State to carry on the government according to the provisions of the Constitution. This right flows from the fact that the Constitution of India contains a Constitution both, for the Union and the States. But the right to carry on the government of the State is subject to a liability i.e. a State cannot carry on its government so as to bring about a failure of Constitutional machinery. Corresponding to the liability of the State is a power of the Union to ensure that in case of a failure of constitutional machinery in a State the government of a State is carried on according to the provisions of our Constitution. The power thus conferred, he says, is purposive, the purpose being to ensure that the government of the state must be carried on in accordance with the provisions of the Constitution. To make this power of the Union effective, Article 356 enables the President to impose what is generally known as the President's Rule. Given the purpose for which the power is conferred, any exercise of power designed to achieve a different purpose must be held to be invalid.

Sarbananda Sonowal Vs Union of India

The Supreme Court of India had engaged in the interpretation of Article 355 of the Constitution of India in the famous case of *Sarbananda Sonowal vs Union of India*. [13] This case is even otherwise an important one for a researcher on National Security. But before one can indulge in understanding the court's verdict in this case, it would be befitting to appraise the fact situation that gave birth to the controversy in the *Sonowal* case.

This case considered the problem of the large number of illegal migrants from Bangladesh, into the State of Assam. In the State of Assam, the Illegal Migrants (Determination by Tribunals) Act, 1983, for short called as the IMDT Act, was brought into force, especially to deal with the problem of the influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north-eastern regions of the country and remained in the country, thereby posing a threat to the integrity and security of the said regions. The Foreigners Act, 1946 was already in force in the country which dealt with foreigners in India and the Central government had also passed the Foreigners (Tribunals) Order, 1964 in pursuance of the powers given under the Act. The Act and the Order together laid down a procedure for the detection and deportation of foreigners who had entered into India and continued to stay here without lawful authority to do so. However in the State of Assam, the IMDT Act was brought into force which was given an overriding effect over the other enactments operating in this field. Under Section 3(1)(c) of the IMDT Act, an illegal migrant was defined as a person with respect to whom three conditions must be satisfied, namely, (i) he has entered India on or after 25th March, 1971; (ii) he is a foreigner which means he is not a citizen of India; and (iii) he has entered India without being in possession of a valid passport or other travel documents or any other lawful authority in this behalf. Therefore, if a foreigner had entered India on or after 25th March, 1971, he would be dealt with under the IMDT Act, whereas a foreigner who has entered any part of India including Assam before 25th March, 1971, would be dealt with under the Foreigners Act. Section 4 of the IMDT Act was an overriding provision which laid down that the IMDT Act or the Rule or order made therein shall have effect notwithstanding anything contained in the Foreigners Act, 1946 or the Immigrants (Expulsion from Assam) Act, 1950 or the Passport Act or any Rule or Order made thereunder. Section 8(1) conferred power on the Central Government to make a reference to the Tribunal to decide whether any person is an illegal migrant. This reference could also be made on a representation by an illegal migrant against

any order passed against him under the Foreigners Act not to remain in India. This provision gave special advantage to an illegal migrant in Assam, which was not available to any foreigner in rest of India. Section 8(2) provided that any person may make an application to the Tribunal whether any person whose name is given in the application is or is not an illegal migrant but the proviso to this sub-section imposed a restriction that such an application could be given only by a person who lived within the jurisdiction of the same police station in which the alleged illegal migrant was found or resided. Section 8(3) imposed some further conditions and restrictions, namely, that the application shall be accompanied by affidavits sworn by not less than two persons residing within the jurisdiction of the same police station in which the alleged illegal migrant was found or was residing and a Court Fee of Rs.10/- had to be paid. Section 8-A laid down that any person may make an application to the Central Government for decision by a Tribunal as to whether the person whose name and other particulars are given in the application is or is not an illegal migrant. In view of sub-section (2) of this Section, the application had to be accompanied by a declaration by another person residing within the jurisdiction of the same revenue sub-division in which the applicant resided and further conditions were imposed that no person shall make more than ten such applications or more than ten such declarations. The Central Government could, after making such inquiry, as it deemed fit, reject the application on the ground that it was frivolous or vexatious. In view of the language used in Section 14 there was no right of appeal against such an order as right of appeal was conferred only against an order passed by the Tribunal under Section 12. The order of rejection of the application would enure to the benefit of the alleged illegal migrant and there being no right of appeal it would attain finality making him safe and secure. If the Central Government made a reference it would only initiate the proceedings before the Tribunal causing no immediate prejudice to the illegal migrant and if the Tribunal ultimately held against him, he would have a right of appeal to the Appellate Tribunal. It is also pertinent to note that the IMDT Act contained no analogous provision about the burden of proof as was there in the Foreigners Act. Section 9 of the Foreigner's Act 1946 casts the burden of proving that a person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, upon such person. The Constitutional validity of the IMDT Act and the rules and order passed thereunder were challenged by the petitioner in the instant case.

It was the contention of the petitioner that the procedure provided under the Act was a cumbersome, time consuming and an extremely difficult one, which made it practically impossible to detect and deport the illegal migrants from India. The petitioner thus made out a case that the IMDT Act and the Rules made thereunder in fact serve to shelter and protect the illegal migrants rather than to identify and deport them. The result of the IMDT Act, according to the petitioner was that, there were a number of non-Indians, who surreptitiously entered into Assam after March 25, 1971 without possession of valid passport, travel documents or other lawful authority to do so, and they continued to reside in Assam. Their presence had changed the whole character, cultural and ethnic composition of the area and posed a threat to the security thereof.

Notice some important observations of the court in connection with a discussion about Article 355 of the Constitution. "The Preamble of the Act says that 'the continuance of such foreigners in India is detrimental to the interests of the public of India.' The Governor of Assam in his report dated 8th November, 1998 sent to the President of India has clearly said that unabated influx of illegal migrants of Bangladesh into Assam has led to a perceptible change in the demographic pattern of the State and has reduced the Assamese people to a minority in their own State. It is a contributory factor behind the outbreak of insurgency in the State and illegal migration not only affects the people of Assam but has more dangerous dimensions of greatly undermining our national security. Pakistan's I.S.I. is very active in Bangladesh supporting militants in Assam." [14] The court further remarked, "Bangladesh is one of the world's most populous countries having very few industries. The economic prospects of the people in that country being extremely grim, they are too keen to cross over the border and occupy the land

wherever it is possible to do so. The report of the Governor, the affidavits and other material on record show that millions of Bangladeshi nationals have illegally crossed the international border and have occupied vast tracts of land like "Char land" barren or cultivable land, forest area and have taken possession of the same in the State of Assam. Their willingness to work at low wages has deprived Indian citizens and specially people in Assam of employment opportunities. This, as stated in the Governor's report, has led to insurgency in Assam. Insurgency is undoubtedly a serious form of internal disturbance which causes grave threat to the life of people, creates panic situation and also hampers the growth and economic prosperity of the State of Assam though it possesses vast natural resources. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution"[15].

New Horizons of 'External Aggression'

The term "external aggression" was discussed at considerable length in this judgment of the Supreme Court. This judgment throws vivid light on the different meanings accorded to the term "aggression" as used in Article 355. One must bear in mind that Article 355 uses the words "external aggression" but not "war" as employed in Article 352. Towards this end notice the different definitions of the concepts as considered by the court. It observed, "The word 'aggression' is not to be confused only with 'war'. Though war would be included within the ambit and scope of the word 'aggression' but it comprises many other acts which cannot be termed as war. In *Kawasaki v. Bantahm S.S. Company*, 1938 (3) All ER 80, the following definition of 'war' as given in Hall on International Law has been quoted with approval :

'When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.'

In Introduction to International Law by J.G. Starke (Chapter 18) it is said that the war in its most generally understood sense is a contest between two or more states primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own conditions of peace. With the passage of time, the nature of war itself has become more distinctly clarified as a formal status of armed hostility, in which the intention of the parties, the so-called *animus belligerendi* may be a decisive factor. The modern war may involve not merely the armed forces of belligerent states but their entire population. In *Essays on Modern Law of War* by L.C. Green the author has said that in accordance with traditional international law, "war is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases." [16]. The Court further emphatically remarked that 'the framers of the Constitution have consciously used the word 'aggression' and not 'war' in Article 355'.

Article 1, Chapter 1 of the UN Charter makes use of the phrase 'acts of aggression'. In this context, the International Law Commission has defined the term aggression as any act of aggression including the employment of armed forces by a State against another State for any purpose other than national or collective self-defence or any decision by a competent organ of the United Nations. But at the 1954 Assembly, there was opposition to this definition. In his book *Conflict through Consensus* by Julius Stone (1977 Edn.), the author has described in great detail how after twenty years of discussion by a Special Committee on "aggression" a consensus was arrived at and an agreed definition was approved by the United Nations Assembly on 12th April, 1974 vide Resolution No.3314 (XXIX). The Soviet Union

pressed for inclusion of "ideological aggression" and also "the promotion of the propaganda of fascist-nazi views, racial and national exclusiveness, hatred and contempt for other peoples." Iran pressed for inclusion of "indirect aggression, of intervention in another State's internal or foreign affairs", including "direct or indirect incitement to civil war, threats to internal security, and incitement to revolt by the supply of arms or by other means.". Many States wanted the definition to include "economic aggression". Shri M. Jaipal of India advocated that in view of "modern techniques of coercion" the definition of aggression should have included "economic pressures" and "interventionary and subversive operations." (See page 97 of the book) Julius Stone has quoted the following comments of Charles de Visscher, on the notion of aggression : "aggression, in the present state of international relations, is not a concept that can be enclosed in any definition whatsoever : the finding that it has occurred in any concrete case involves political and military judgments and a subjective weighing of motives that make this in each instance a strictly individual matter." Rapporteur Spiropoulos explained to the International Law Commission that a determination of aggression "can only be given in each concrete case in conjunction with all constitutive elements of the concept of the definition". According to the author what needs also to be kept in mind is that this is precisely because the "aggression" notion is a fact value complex of such vast range. (See pages 108-109 of the book). Therefore, "aggression" is a word of very wide import having complex dimensions and would to a large extent depend upon fact situation and its impact[17].

Further, the judgment also considered an interesting statement made by Dr. Nagendra Singh, India's representative in the Sixth Committee of the General Assembly on the definition of aggression, when there was a large scale influx of persons from the then East Pakistan into India before the commencement of December 1971 Indo-Pak war. He said, "The first consideration, in the view of the Indian Delegation, is that aggression must be comprehensively defined. Though precision may be the first virtue of a good definition, we would not like to sacrifice the requirement of a comprehensive definition of aggression at any cost. There are many reasons for holding this view. Aggression can be of several kinds such as direct or indirect, armed in nature or even without the use of any arms whatsoever. There can be even direct aggression without arms..... We would accordingly support the categorical view expressed by the distinguished delegate of Burma, the U.K. and others that a definition of aggression excluding indirect methods would be incomplete and therefore dangerous.

.....
.....

For example, there could be a unique type of bloodless aggression from a vast and incessant flow of millions of human beings forced to flee into another State. If this invasion of unarmed men in totally unmanageable proportion were to not only impair the economic and political well-being of the receiving victim State but to threaten its very existence, I am afraid, Mr. Chairman, it would have to be categorized as aggression. In such a case, there may not be use of armed force across the frontier since the use of force may be totally confined within one's territorial boundary, but if this results in inundating the neighboring State by millions of fleeing citizens of the offending State, there could be an aggression of a worst order..... What I wish to convey, Mr. Chairman, is the complexity of the problem which does not permit of a four-line definition of aggression much less an ad interim declaration on it." [18] This shows that the stand of our country before the U.N.O. was that influx of large number of persons from across the border into India would be an act of aggression. Thus a very broad meaning of the term aggression seems to have been accepted and this would be a crucial factor in determining the situations where Central intervention can be justified under the scheme of Article 355 of the Constitution.

The court adopted a comparative approach between the Foreigners Act and the IMDT Act. It further remarked, "there cannot be even a slightest doubt that the application of the IMDT Act and the Rules made thereunder in the State of Assam has created the biggest hurdle and is the main impediment or barrier in identification and deportation of illegal migrants. On the contrary, it is coming to the advantage of such illegal migrants as any proceedings initiated against them under the said provision which, as demonstrated above, almost entirely ends in their favour, enables them to have a document having official sanctity to the effect that they are not illegal migrants. As already discussed, the presence of such a large number of illegal migrants from Bangladesh, which runs into millions, is in fact an "aggression" on the State of Assam and has also contributed significantly in causing serious "internal disturbances" in the shape of insurgency of alarming proportion making the life of the people of Assam wholly insecure and the panic generated thereby has created a fear psychosis"[19]. These observations are interesting as they lead us to the conclusion that influx of illegal migrants has been read to be a part of "aggression" within the meaning of Article 355.

Further, the Parliament had enacted the Immigrants (Expulsion from Assam) Act, 1950 to deal with the serious situation that had arisen from the immigration of a very large number of East Bengal residents into Assam. However, on account of Section 4 of the IMDT Act the Immigrants (Expulsion from Assam) Act, 1950 had been superseded and the provisions of the said Act had ceased to apply to the State of Assam. Thus the court observed that by enacting the IMDT Act the Parliament has divested the Central Government of the power to remove migrants from Bangladesh, whose presence was creating serious law and order problem, which fact had been realized by the Central Government as early as in 1950. The IMDT Act, instead of maintaining peace had only revived internal disturbance. Another important enactment, whose provisions had been superseded by Section 4 of the IMDT Act, was The Passport (Entry into India) Act, 1920. Thus in view of this, the court noted, "Section 4 of the IMDT Act has stripped the Central Government of its power of removal of such person from India and also the power of arrest of such person without warrant possessed by a police officer of the rank of Sub-Inspector or above. The above discussion leads to irresistible conclusion that the provisions of the IMDT Act and the Rules made thereunder clearly negate the Constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act which contravenes Article 355 of the Constitution is, therefore, wholly unconstitutional and must be struck down"[20]. Thus it is interesting to note how Article 355 of the Constitution was used as a parameter by the court to invalidate the IMDT Act. Further, the Act was also held violative of Article 14 of the Constitution since the court was of the opinion that it was not enough to keep only the geographical factor in mind in making a classification[21].

The ultimate conclusion of the court was thus, " To sum up our conclusions, the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 are ultra vires the Constitution of India and are accordingly struck down. The Illegal Migrants (Determination by Tribunals) Rules, 1984 are also ultra vires and are struck down. As a result, the Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function. The Passport (Entry into India) Act, 1920, the Foreigners Act, 1946, the Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1967 shall apply to the State of Assam. All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in the manner provided in the Foreigners Act, the Rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964." [22]

Concluding Comments

The decision in *Sarbananda's* case raises deeper questions about the relationship of judiciary and the executive in the area of federalism. One might argue that the Court's declaration of the invalidity of the IMDT Act by the application of the substantive review of the executive and legislative judgment to enact the IMDT Act is a gross violation of the doctrine of separation of powers. It might be argued that the nature of intervention and the extent of intervention in the affairs of the state is a legislative judgment and therefore the court ought not to interfere with it by substituting its own judgment about the efficacy or otherwise of the measures adopted by the Union. Furthermore, immigration is a foreign policy issue, where the nation must speak with one voice. The Court's adoption of a conflicting perspective is extremely undesirable.

On the other hand, the *Sarbanand* case represents a liberal approach of the court in strengthening the hands of the Union government to come to the rescue of the States. In the context of the federal principle, where the court intervenes to strengthen the hands of the Union government vis-à-vis the States, it is neither acting contrary to the doctrine of separation of powers, nor acting contrary to the principles of federalism. In construing the obligation of the federal government under Article 355 to rescue the states from war or external aggression in a liberal manner is a welcome development in the area of Constitutional jurisprudence. It is submitted that the liberal interpretation of the expression "external aggression" is mandated by the circumstances in which the State found itself. Therefore the *Sarbananda* decision should serve as a reminder to be vigilant in guarding the borders of the State[23]. Also this liberal approach presents a fascinating example of the court's endorsement of the modern concept of national security, or atleast an expansion in the classical concept, as it includes something more than the physical dimension of security. The manner in which the court chose to interpret 'external aggression' in this case was indeed expansive as well as innovative. It constitutes a glaring departure from the notion of aggression that was hitherto understood and employed. It did not keep this terminology restricted to some form of physical attacks but construed the influx of illegal immigrants to constitute an aggression/attack upon the cultural ethos of the state of Assam. Hence this case assumes a place of unshaken significance for a study of the shift in the paradigm of national security. Not only has the notion of national security undergone a massive change from classical to the modern concept, wherein it now includes all the 'well-being' aspects within the compass of the term, but this case demonstrates how the classical notion of national security has also witnessed a change. In defining the paradigm of physical security, the court has looked far beyond the mere possibility of physical attacks that jeopardize national security. Hence this case serves as an illuminating example of the change in the traditional/classical idea of national security.

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- [23]. See also *SR Bommai vs Union of India* strengthening the hands of the Union government for protecting Secularism as the part of the basic structure of the Constitution. See also *Luther vs Borden* where the court had to consider the question whether the democratic rebel or the colonial government was a legitimate government of Rhode Island was a political question. On merits, the court held that that the temporary declaration of martial law by the colonial government was constitutional.
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