ABHIVYAKTI LAW JOURNAL
2019-2020

Articles

Essays

Case Comments

Legislative Comments

LL.M. Articles

Teachers' and Ph.D. Research Articles

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Principal's Page

It gives me immense pleasure to present the current volume of Abhivyakti Law Journal. Even the depressing pandemic has not deterred us from engaging with Research work. Both the editorial team and the authors have worked ceaselessly for bringing out the current issue of Abhivyakti Law Journal. I am very happy to have the publication of this issue in both the online and offline versions.

Again, I congratulate the editorial team and all the authors for contributing to this issue. The range of topics grappled with by the faculty and students while writing the articles demonstrates the ever-expanding horizons of the volume. They have discussed Social Security, E-Waste Management, Reforms in ADR Law, Climate Justice, Critique of Education Policy, Citizenship Amendment Act, US Exceptionalism and Paris Agreement, Personalized Pricing, Education as a Service, Politics of Anti-Defection, Transgender Rights, Live-in Relationship, Space Crimes, Competition Law, Gender Equality, Freedom of Govt. Officials, Law of the Sea, Rights of Children, Rape Law, Hindu Law, Amending Procedure under Indian and Australian Constitutions Refugee Crisis, Human Dignity, Law and History, International Humanitarian Law, etc.

Another change introduced in the volume this year is that along with the articles of the Ph.D. scholars, articles by the teachers are also introduced.

This year, too,it has been very turbulent on the judicial circuit with the habeas corpus petitions filed by the activists of Jammu & Kashmir being in abeyance; litigation on suspension of internet in Jammu & Kashmir; review of Sabarimala judgment; controversy over reinstatement of the lady staff of the Supreme Court, levelling charges of sexual harassment against the former Chief Justice of India.

On political front also, there has been quite a stir with the nomination of former Chief Justice of India, Mr. Gogoi, as a member of Rajya Sabha.

However, the most noteworthy thing which has happened this year is the change of role by our former Principal Vaijayanti Joshi with her retirement as the Principal of ILS Law College. Having occupied her office for almost 26 years from the year 1994, she has now assumed the new role of the Director – Academic and Administration, ILS Law College, and continues to be our constant guide in steering ahead the academic journey of the ILS Law College.

The destiny was not very kind this year to see the sad demise of Mr. Ram Jethmalani, Eminent Jurist, former Union Minister of Law and Justice and former Chairman, Indian Bar Council, on 08 September 2019; and Shri Bhaskarrao Avhad, noted Lawyer and a very renowned teacher. The College places on record the deepest condolence for these luminaries who had held our college in a very high esteem.

Dr. Sanjay Jain

Associate Professor and

Additional Charge, Principal

Editorial

It gives us great pleasure to present yet another annual edition of the Abhivyakti Law Journal for the academic year 2019-20.

On the threshold of centenary celebrations, our college, guided by its mission, continues to shine as a beacon of far enduring excellence in education and research pursuits.

Keeping up with the times and great expectations, our students have indeed worked hard to make the college proud. A variety of content in the form of articles, essays, legislative and case comments suggests that the Abhivyakti Law journal, indeed, continues to be a well- favoured rostrum for our students to showcase their intellectual skills, analytical acumen and concerns for the society that we live in. The submissions encompass a myriad of law subjects inclusive of Corporate Laws, International Public Law, Constitutional laws, on the trending Arbitration laws, Gender justice and even laws relating to E-Waste management, Space Crimes and laws to tackle climate change. This reflects our students' keen adherence to enhance their knowledge by way of their comprehension, grip, assimilation, conceptualization and perception of the varied legal nuances.

The present pandemic situation is unarguably an extraordinary situation, but this too will pass and we hope new approaches may arise in the legal scenario to successfully meet the social, economic and environmental challenges on the domestic and international fronts.

Wishing everyone a healthy and happy life.

"Every challenge you face today makes you stronger tomorrow.

The challenge of life is intended to make you better, not bitter."

***Roy T. Bennett,* "The Light in the Heart"**

Faculty Editors

Dr. Banu Vasudevan
Ms. Divya Mittal
Mr. Rohit Bokil

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I, Dr. Sanjay Jain, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dr. Sanjay Jain
Associate Professor and
Additional Charge, Principal
ILS Law College, Pune

Acknowledgments

We congratulate each of the student author who has helped us in bringing out yet another interesting and thought-provoking annual edition of the *Abhivyakti* Law Journal 2019-20

We also appreciate the sincere and diligent editorial skills of our student editors.

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ARTICLES

Analysis of E-Waste Management Regulations of India: Challenges and Recommendations.

Anuja Chaudhury
V BA.LL.B.

I. Introduction

The sudden boom in urbanization and globalisation in the last 50 years has resulted in the rise on the human reliance on electronic products for combating every day to day activity. The cycle of longevity of such electronic machines is shortened by speedy technological advancements, innovation, consumerism and obsolescence. It has been predicted that by 2020, India will have around 32511 metric ton of waste only from desktop personal computers and will be generating an estimated 241500 metric ton of e-waste from laptops, televisions, tablets and mobile phones.[1] The government bodies as well as the active citizens concerned about achieving sustainable development are quickly learning the adverse effects of hazardous wastes as well as significant potential risks posed by them to life and environment. The statistics on the amount of production of e-waste in the country indicates the lack of proper structuration of the assortment, supervision and the salvaging procedure of e-waste in India.

Developing countries like India and other South East Asian countries face a dual problem in the management and regulation of e-waste as they not only have a massive domestic production of such e-waste (owing to the rapid technology evolution in the huge populous country), but also because they become the illegal dumping or importation ground of the same from the developed countries. Such transboundary movement of e-waste from developed country to developing country is inspired by the cheap workforce and flexible environmental policies in such developing countries.

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[1] Ahmed, S., Panwar, R. M. & Sharma, *A Forecasting e-waste amounts in India,* 6 International Journal of Engineering Research and General Science, 324–340 (2014).

II. What does E-waste mean?

Though many researchers have given insight on what entails as e-waste in order to provide a comprehensive definition of the same, essentially e-waste can be meant to include electronic and electrical appliances and gazettes, either discarded or of future use.[2] According to the California Integrated Waste Management Board, mobile phones, computers, televisions, VCRs, music systems, wax and other printers also fall under this category. However, it is not an exhaustive definition and has been kept broad to further include appliances not in contemplation.

Wang while providing a detailed definition of e-waste, describes it as a family consisting of various branches including all personal, commercial, educational, transportation, private and public products which mainly work on power and have some automation to function and meet the requirement.[3] E-waste inevitably includes used electronics which are destined to be reused, resold, salvaged, recycled or disposed.[4] It also includes re-usable electronics which are in partially working conditions and can be repaired.

The E-Waste (Management) Rules 2016 defines e-waste as *"any electrical or electronic equipment, whole or in part discarded as waste by the consumer or bulk consumer as well as rejects from manufacturing, refurbishment and repair processes"*. This is an inclusive definition as it tries to includes all sorts of electronic components.[5] This definition takes inspiration from the one proposed by the European Union Directive which provides that 'waste electrical and electronic equipment (WEEE)' is an electrical or electronic equipment which is a waste including all components, sub-assemblies and consumables which are a part of the product at the time of discarding.[6]

The Basel Action Network defines e-waste by including a wide and developing range of electronic appliances ranging from large household appliances, such as refrigerators, air-conditioners, cell phones, stereo systems and consumable electronic items to computers discarded by their users.

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[1]Dr. Vijay Pal Singh, *Law Relating to E-Waste Management in India: A Critical Study,* 2 International Journal of Management, Law and Science Studies (2018).

[3] Wang, Y., Luo, C., *Characterization of PBDEs in soils and vegetations near an e-waste recycling site in South China.* Environmental Pollution, (2016).

[4] Supra 2.

[5] Electronic waste (management) Rules, 2016, s. 3(1)(r).

[6]Art. 3(1) of Directive 2008/98/EC, available at: https://eurlex.europa.eu/legalcontent/EN/TXT/?uri= CELEX:32012L0019, last seen on 19/01/20.

I. The harmful environmental and health impact of E-waste

Though e-waste normally is an amalgamation of diverse materials, some forming valuable components while others proving toxic to the environment. E-waste can be categorized into hazardous and non-hazardous products depending on factors such as electronic device, model, manufacturer, date of manufacture and the age of the scrap.[7]

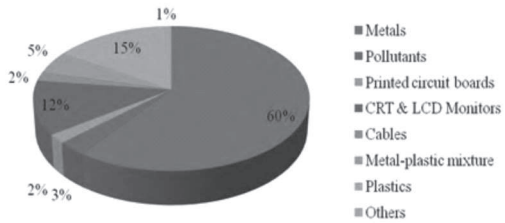

Image 1 – The basic composition of an electronic or electrical equipment[8]

Currently in India, e-waste flows from informal collection and dismantling including scrap dealers who collect end of life WEEE from households and offices and sell them to unauthorised dismantlers and recyclers.[9] However, the dismantling stage to extract precious metals from such e-wastes is employed with harmful processes such as burning and leaching.[10] Toxic chemicals are used to recover valuable metals such as gold, silver and copper using dangerous forms of open-air burning of plastics.

Disposal of e-waste is carried out through filling and incineration.[11] Incineration leads to emission of substances and large amount of residues from gas, cleaning and combustion such as cadmium and mercury. India's disposal system of e-waste is mostly structured informally. The formal sector comprising of government agencies and companies involved in recycle and reuse use proper equipment and try to provide a safe and healthy environment for the disposal of e-waste.[12] However, the predominance of the informal sector compromises the

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[7]Daniel Mmereki and Liu Hong, *The Generation, Composition, Collection, Treatment and Disposal System, and Impact of E-Waste,* E-Waste in Transition: From Pollution to Resource (2016)

[8]F.O. Ongondo, I.D. Williams and T.J. Cherrett, *How are WEEE doing? A global review of the management of electrical and electronic wastes,* 31 Waste Management (2011), available at: https://www.sciencedirect.com/science/article/pii/S0956053X10005659, last seen on 19/01/2020.

[9]R.M. Panwar, Anubhav Sharma, *E-Waste Legislation in India: Study and Comparative Analysis,* 3 Engineering and Technology Journal (2018)

[10]Borthakur, A. & Singh, P., *Electronic waste in India: Problems and policies.* 3 International

[11]Journal of Environment Science, 353–362 (2012).

Supra 9.

[12] Ibid.

suffency of the input material to the formal sector. About 95% of the e-waste in India is treated and processed in urban slums where untrained workers who are paid meagrely carry out practices unsafe for human and environmental health, resulting in air, land and water pollution.[13] Seelampur is the largest informal sector of e-waste dismantling in India with Mandoli, a region near Delhi being a similar place where e-waste burning takes place.[14]

Apart from the environmental damages following the accidental leakages and evaporation of these harmful substances occurring at the electronic wastes dumping sites, there are also numerous health effcts from the continued contact and exposure to these hazardous e-waste materials.

Reports suggest a spike rise in negative birth consequences, cancer, long-term and permanent neurological damage, and end-organ disease of the thyroid, lungs, liver and kidneys.[15]

IV. The Basel Convention, 1989

The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (usually known as the Basel Convention), 1989 came into existence for the purpose of reducing the movement of hazardous wastes between countries, especially the transfer of hazardous waste from the developed to developing countries.[16] It also assists the developing countries in ensuring sound management of their toxic and hazardous waste. The Basel Convention formally began addressing the concerns relating to e-wastes in 2002 after the adoption of the Mobile Phone Partnership Initiative (MPPI). Soon in the Nairobi Declaration, the Secretariat was mandated to implement an environmentally sound management of e-waste.[17]The signatories to the Basel Convention agreed to the impact of the rapid expansion in the transboundary movement of electronic waste and the added risk to human health, especially in developing countries which lacked the capacity for safe management of such wastes and declared the urgent need to promote public awareness of such risks, call for technology development and information

[13]V. Ranganathan, *Health hazards caused by unorganized e-waste disposal*, Yourstory, *available at*: https://yourstory.com/2018/06/unorganised-e-waste-disposal-dangers/, last seen on 19/01/2020.
[14]Miles Park, *Electronic waste is recycled in appalling conditions in India,* The Conversation, *available at:* https://theconversation.com/electronic-waste-is-recycled-in-appalling-conditions-in-india-110363, last seen on 19/01/2020.
[15]Xijin Xu, Yulin Zhou, *Birth outcomes related to informal e-waste recycling in Guiyu, China,* 33 Reproduction Toxicology, 94-98 (2012).
[16]Nivedita Chaudhary, *Electronic Waste in India: A study of penal issues*, 2 ILI Law Review (2018).
[17] Ibid.

exchange on the best management practices and stronger enforcement of the provisions of the Basel Convention.[18]

In December 2012, the Secretariat of the Basel Convention produced a draft Technical Guidelines on the transboundary movements of e-waste. The guidelines aimed to acknowledge the distinction between waste and non-waste and the need of the government agencies to assess and differentiate between bonafide used electronic equipment which is shipped for repair, refurbishment, resale and humanitarian-aid reuse from the defunct electronic waste destined for environmental disposal and unsafe scrap mining.[19] Ultimately, the functioning of the guidelines was to make it more difficult and less cost effective to transfer hazardous junk electronic waste across national boundaries, especially in countries where labour is cheap and the children are placed at risk to recover small amounts of precious metals from e-waste through unsafe procedures.[20]

V. E-waste Management Laws in India

The first recognition of e-waste as a issue that needed to be nipped at its bud was when the Department of Parliamentary Standing Committee on Science and Technology, Environment and Forests in its 192nd Report on the Functioning of the Central Pollution Control Board (CPCB) concluded that e-waste will pose as a bigger threat due to the modernisation of life style and increase in the living standards of people and the augmentation of financial expansion.[21] Soon after, Shri Vijay J. Darda, a member from Maharashtra introduced a Private Member's Bill on Electronic Waste (Handling and Clearance) Bill, 2005 which recognized the improper way of electronic goods by way of Kabariwalas which eventually ends up in landfills causing huge perils to health and environment. Though the Bill lapsed in July 2010, it brought the need for an effective regulation on e-waste in the public eye.

The Hazardous Waste (Management, Handling and Transboundary) Rules, 2003 regulate those waste which have no specific ecological laws, thus provides the law for the management and clearance of e-waste. The rules were

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[18] Oladele A Ogunseitan, *The Basel Convention and E- Waste: Translation of scientific uncertainty to protective policy,* The Lancet, available at: https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(13)70110-4/fulltext, last seen on 19/01/2020.

[19] Ibid.

[20] Ibid.

[21] Supra 2.

amended in 2008 in order to prohibit the cross-border movement of 'perilous waste' by way of categorization, in accordance with the Basel Convention.

Based on the 2008 Rules and understanding the need of the hour to constitute rules to enable resurgence or reuse of useful material from e-waste, the Government introduced the E-Waste (Management and Handling) Rules, 2011. Meanwhile, the Department related Parliamentary Standing Committee on Industry exclusively took up the chapter of e-waste under Medium, Small and Micro Enterprises (MSME) as they are the major contributors e-waste in India.

These rules were replaced by the E-Waste (Management) Rules, 2016 which aim at the recovery and reusage of the useful materials from such e-waste so to provide for an ecological solution to manage all kinds of e-waste. The Rules were made applicable to every producer, consumer, manufacturer, collection centres, e-retailer, dealer, dismantler and producer responsibility organization (PRO) involved in the manufacture, sale, purchase and processing of such e-waste. The Rules mandated the Central Pollution Control Board (CPCB) to include specific guidelines for extended producer responsibility (EPR) and random sampling of e-waste for the testing of Restriction of Hazardous Substances parameters.[22]

These Rules were recently amended to facilitate effective implementation of the same so that the e-waste is channelized towards authorised dismantlers and recyclers and the sector is less informalized than before. The amendments introduced a system of 'revised targets' to be monitored by the CPCB where 10% of the quantity of the waste generated shall be collected during 2017-18 and there shall be a 10% increase every year.[23] There is also a mandatory requirement of registration of the PROs with the CPCB so as to maintain a continuous supervision on the activities of the PROs.

VI. The Challenges faced in the implementation

Despite the wide uproar regarding the need to address the effective management of e-waste, none of the regulations drafted in that direction doesn't stress on the requirement of 'reusing' the collected e-waste by adopting a testing mechanism at the initial stage. A simple evaluation done by the PROs or by the collection centre can reduce the huge cost spent in reprocessing and recycling the waste. There is also a need to address the problem of those discarded products which have not reached the end of their useful life and have just been

[22]Supra 9.
[23]Rupali Sharma and Shahzar Hussain, *E-Waste Management in India,* Mondaq, available at: http://www.mondaq.com/india/x/695996/Waste+Management/EWaste+Management+In+India, last seen on 19/01/2020.

abandoned for being obsolete or out of fashion.

There is also a need to incentivise those involved in the informal sector to move out of the sector which contributes the most to the intoxication of the environment. The sector is run mostly due to the huge manpower with unskilled labour and no specific health and environmental regulation.

It is also necessary to also regulate the health and working conditions of those involved in the process of dismantling and recycling. Most of those involved in the informal sector, earn less than the basic minimum wage while working for more than 12-14 hours a day, and are constantly grappled with respiratory problems, neurological conditions and even detection of cancer at an early age due to the lack of proper safety gears.[24] Those involved also lack proper training and skill, thus exposing them to the risks involved in the improper handling of e-waste.

The Regulations have also not addressed the grave issue of the global dumping or illegal import of e-waste from developed countries like Japan and USA in India. Despite of ratifying the Basel Convention in 1992, there has been no formal ban on the import of such wastes. This eventually results in the accumulation of large quantities of used electronics usually sold to India due to their high capability to repair and the huge demand for raw materials, eventually leads to collection of huge amounts of residue in poor areas without stringent environmental laws.[25]

VII. Recommendations for improvement

In order to make the current regulations more effective to tackle e-waste, the Government is under the duty to properly bridge the gap between the formal and the informal sector. A proper monitored bifurcation must be made in order to utilize the informal sector for the initial stages such as collection and dismantling while leaving the technical stages to the formal sector. The informal sector also needs to be provided with proper training so as to differentiate between the damaged goods and those which can be re-used by using some testing mechanisms. Formalization of the sector must be

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[24]Miles Park, *Electronic Waste is recycled in appalling conditions in India,* The Conservation, available at: https://theconversation.com/electronic-waste-is-recycled-in-appalling-conditions-in-india-110363, last seen on 19/01/2020.

[25]Borthakur, A. & Sinha, K., *Electronic Waste Management in India: A Stakeholder's Perspective,* 1 Electron. Green Journal, (2013).

undertaken by compelling employment of a certain quota of workers from the informal sector in the private sector.

The producers of such products also need to take the responsibility to calculate the end of the life of the products clearly so as to enable to the collection workers to put realistic targets in their plans. They must also bear the responsibility to inform the consumers regarding the public health and environmental damage threat posed by these products and provide simpler methods of discarding them. The government must take initiatives to incentivise the producer companies in form of tax concessions or rebates to ensure compliance to the e-waste regulations.

There is also an urgent need to create a strict compliance system to keep a check on the import flow of e-waste from other countries. The coast guards along India's vast coastline along with the custom officers need to be well equipped to keep a stringent eye on the same. There is also a need to disseminate the authority to do an on-site examination of the informal collection and recycling to the local administration. The state pollution control boards also need to built financial and technical capabilities with additional resources so as to ensure proper implementation of the regulations.

VIII. The Way Forward

In August 2019, India declared that it had banned imports of plastic waste from the developed countries after an amendment of the Hazardous Waste Rules.[26] This was followed after a year of China's ban on the western plastic imports. However, an expose by two civil society organizations claimed in October 2019 of the continued import of such waste in India despite the ban.[27] While the Indian government is slowly becoming mindful while dealing with the giant waste management problem, it sometimes loses its momentum in the implementation stage.

E-waste management requires constant planning to separately collect, effectively treat and to dispose such e-waste while diverting from the adoption of the conventional landfill methods and resorting to open burning. Urgent

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[26]Harry Cockburn, *India bans imports of waste plastic to tackle environmental crisis,* Independent, (07/03/2019) available at: https://www.independent.co.uk/environment/india-plastic-waste-ban-recycling-uk-china-a8811696.html, last seen on 19/01/2020.

[27]Saket Suman, *Malaysia Has Just Returned Plastic Waste From US & UK But India Is Still A 'Garbage Dump' Despite Ban,* India Times (20/01/2020) available at: https://www.indiatimes.com/news/india/malaysia-has-just-returned-waste-from-us-uk-but-india-is-still-a-garbage-dump-despite-ban-504605.html, last seen on 20/01/2019)

integration of the informal sector with the formal sector needs to be undertaken by the government in order to handle the treatment of e-waste in a safe and sustainable manner.

Nokia became one of the few companies in India to make some serious efforts in complying with the EPR by launching the 'Take-Back' campaign in 2008.[28] In April 2019, the CPCB suspended the import permits of ten global technology companies like Apple, Samsung, Motorola, etc. for violating the EPR clauses in accordance with the E-Waste Management Rules.[29] Such steps prove a huge step in the implementation of the e-waste management rules by the Government and increases the sensitisation of the importance to tackle the problem among the masses and the companies.

[28]Sadia Sohail, *E-Waste Management: Nokia sets example*, DownToEarth (04/07/2015), available at: https://www.downtoearth.org.in/news/ewaste-management-nokia-sets-example--41799, last seen on 19/01/2020.
[29]Anandita Singh, *Apple, Samsung in a jam with imports held up at customs*, The Economic Times (12/04/2019) available at: https://economictimes.indiatimes.com/news/economy/foreign-trade/apple-samsung-in-a-jam-with-imports-held-up-at-customs/articleshow/68842287.cms?from=mdr, last seen on 19/01/2020.

Arbitration and Conciliation (Amendment) Act, 2019 – An expeditious or a sluggish step towards pro- Arbitration India?

Jenil Shah
III BA.LL.B.
Pranay Jaiswal
IV BA.LL.B.

"Differences we shall always have but we must settle them all, whether religious or other, by arbitration."- Mahatma Gandhi.

1. A tedious attempt to make the present Act arbitration friendly

Due to overburdened Judiciary, Government has been trying to focus on the subsequent area of alternative dispute resolution in order to curb the embargo of inefficient procedure of resolving disputes i.e. litigation. As digits reflect a probable estimate of 31 million cases are pending in Courts throughout India.[1]

The Arbitration and Conciliation Act of 1996 is one such exclusive statute which supplements the idea of resorting to refer a dispute[2] to Arbitration and other ADR methods. The Act has been molded severely by important amendments of 2015 and the recent one of 2019 removing the various lacunas from the principal Act and further providing more simplicity and substance to the Act.

The former Amendment of 2015 was brought into force with the object of achieving the cost effective, efficient and speedy disposal of the disputes. Nevertheless, the objective was flawed in the implementation as this Act intended to promote arbitration but the practical operation was difficult to execute as the Amendment lacked the system or body that would regulate and govern Institutional arbitration. The latter amendment, had up to an extent, tried to fill the lacunas that were present in the previous Act by bringing in the necessary elements for the purpose of achieving the true object of arbitration by way of promoting and preferring Institutional Arbitration over other means.

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[1] BibekDebroy and Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India,* https://www.niti.gov.in/niti/writereaddata/files/document publication/Arbitration.pdf last seen on 12/01/2020.

[2] The Arbitration and Conciliation (Amendment) Act, 2019, (33 OF 2019) (9th August, 2019).

The Law Commission of India in its 246th Report has emphasized on the lacunas of the *ad hoc* arbitration in comparison to that of Institutional arbitration. The Law Commission, pointed out that the Arbitral Proceedings over time take up the cover of court hearings wherein the adjournments are granted and the lack of interest in the conduct of the same by the counsels involved. However, the scenario in the case of the Institutional arbitration is more structured. The Institutional arbitrations have competency to administer and aid the process. This initiative shall promote party autonomy by providing a set of rules for appointment of eligible arbitrator, procedure to be adhered, which at the end would increase the probability of conducive environment for the arbitration.

The sole purpose of bringing the legislation into existence and making the quintessential changes as per the need of the hour is to regulate and make India pro-arbitration. However, the implementation would be brought into effect when a body or an authority is being established which shall in the furtherance of smooth functioning of the Arbitral institutions would lay down certain prerequisite standards to adhere with, in order to achieve the feat of competent arbitration institution.

2. An Omnipotent Authority for the promotion of Institutional Arbitration: Arbitration Council of India

The Arbitration Council of India (hereinafter referred to as '*ACI*') constituted by the Amendment Act of 2019[3] is vested with significant duties to promote and encourage several alternate dispute resolution methods like arbitration, mediation and conciliation and further discharge duties for the purpose of framing policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration.[4] Subsequently, for the purpose of performing the duties, the Council may discharge various functions *inter alia* the main function of grading of the Arbitral institutions.[5]

The Act lays down the functions that would be entrusted to the ACI for the execution of its determined aims and objectives. Furthermore, the Act provides for the composition of the Council comprising of seven members headed by Chairman who is to be appointed by the Central Government on the consultation of the Chief Justice of India. However, it is important to note that the mode of appointment laid down for these members, stands completely

[3]S. 10, the Arbitration and Conciliation (Amendment) Act, 2019.
[4]S. 43D (1), the Arbitration and Conciliation Act, 1996.
[5]S.43D (2), the Arbitration and Conciliation Act, 1996.

against the idea of autonomy of ACI, as the position of the Chairman would be directly affected and governed by the executive action. The Justice Sri Krishna committee report also made a recommendation that the Chairman should be appointed by the Chief Justice of India. Aftermath of above mentioned change would be dreadful towards the initiative of Institutional Arbitration as the Institution would be under political influence and only those favored by the political influence shall get the preferential grading.[6]

Further, as per the abovementioned role of ACI towards the grading of the Arbitral institutions, the recognition and enforcement of such awards drawn by non-graded Arbitral institutions might result into ambiguity as the Amendment Act completely skips to address the issue of voluntary or mandatory grading of the same.[7]

One of the setbacks of the legislation in the appointment of the arbitrator through designating the graded Arbitral institution may amount to serious complications. As the provision prescribes, the Court shall designate the graded Arbitration institution, within its jurisdiction, which further shall appoint the arbitrator/s.[8] However, it is also provided that the Chief Justice of the High Court would appoint such arbitrator within the panel maintained by the Chief Justice, where the concerned High Court does not have a graded Institution within its jurisdiction. Here, the significant purpose of the Act, which is the promotion of the Institutional arbitration, would be prejudiced as this provision would unnecessarily invite judicial intervention and control which would consequently hamper the party autonomy.

3. Pre-determined qualification of the Arbitrator- a droit or a gauche move?

The Amendment Act has made a significant change in the existing law wherein the Court shall designate a graded institution for the appointment of the arbitrator empanelled with them which was previously vested with the Courts itself for such appointment. However,the appointment of the arbitrators would be subject to the ascertained qualifications which are laid down by virtue of newly introduced Eighth Schedule.

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[6]Ajar Rab, *Arbitration Council of India: The 'Arbitration Regulator'?*, THE BOARDROOM LAWYER, https://theboardroomlawyer.com/2018/07/16/arbitration-council-of-india-the-arbitration-regulator/ Last seen on 15/01/2020.
[7]Ibid.
[8]S. 3, the Arbitration and Conciliation (Amendment) Act, 2019.

The Eight Schedule[9] prescribes that *"a person shall not be qualified to be an arbitrator unless"* which *per se* defines the sphere by limiting the person's scope to act as an arbitrator. It further specifies several qualifications required for a person to become an arbitrator.

The significant demerit about the subject matter of the schedule is that it narrows down the sphere of persons aiming to be appointed as arbitrators. The appointment conditions may also complicate the appointing of foreign arbitrators who might not comply with the conditions laid in the new schedule. This demotivates the foreign parties to choose India as a seat for the arbitration. Also, the qualifications in case of appointment of foreign arbitrator may become a significant issue in cases when a foreign party to the arbitration may desire to appoint a foreign arbitrator, in which case, the schedule is silent about. This holistically defeats the objective of the amendment setting up for India to become an International Arbitration hub.

4. Summation of the Arbitral Proceedings around the time clock

The new amendment provides for a particular time period of six months, from the date of appointment of arbitrator, to the parties of arbitration for the purpose of submitting the statement of claim and defence which *in toto* forms the pleadings. Subsequently, another provision under the new amendment provides that the award shall be delivered within a period of 12 months from the date of completion of pleadings,[10] particularly in the cases of domestic arbitration, but not merely from the date of reference of matter to the arbitrator.[11]

Notably, the earlier position of the Act was that it did not lay down the dedicated time period for the summing up of the pleadings before the arbitral tribunal. However, the earlier law only provided for the period of one year for the delivering of the award with the extension of six months by the consent of the parties or by leave from the Court.

The Section 23 and Section 29A forms an inter-play for the setting up of the timeline for the completion of the arbitral proceedings to which the parties and the arbitrator have to adhere to. Nevertheless, the provision fails to explain the consequences upon any delayed arbitral proceedings. It is to be determined

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[9]S. 14, the Arbitration and Conciliation (Amendment) Act, 2019.
[10]S. 5, the Arbitration and Conciliation (Amendment) Act, 2019.
[11]S. 6, the Arbitration and Conciliation (Amendment) Act, 2019.

whose negligence has contributed in delay of the proceedings whether by the parties or the arbitrator, and if the Court finds that the delay has been caused due to absence of diligence of the arbitrator, it would reduce the fees or take similar action.

Similarly, the amendment uses the phrase "*other than international commercial arbitration*" which tends to exclude International commercial arbitration from the purview of time clock. The section underlines that "*the awards in the matter other than international commercial arbitration shall be made by the tribunal within a period of 12 months from the date of completion of the pleadings*". [12] This clearly reflects the intention of the Parliament wherein the international commercial arbitration has been given a privilege from the time restraints set forth by the Act.

It is obvious from the language of the section that it is trying to achieve its sole objective of making India a hub for International arbitration by providing the parties to the arbitration, freedom from the clutches of the time bound procedure. However, the section does not grant an absolute relaxation to International arbitrations but lays down the proviso which says that efforts and endeavors shall be made in disposal of the dispute and award shall be delivered within the period of twelve months from the date of completion of the pleadings.

5. Scrapping of Section 87: A quintessential move by the Apex Court

One of the important features of the 2019 Amendment deals with the insertion of the new provision which curtails the application of provisions of previous Amendment Act of 2015 with regard to the arbitral proceedings or court proceedings arising out of such arbitration which were commenced prior to the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

The grey area that has resulted by insertion of the said provision has made the effect of existing law more complex and ambiguous. The Section 36 of the principal Act lays down the procedure for stay of the arbitral awards on filing a separate application in cases dealing with the subject matter of payment of money. The controversial provision of Section 36 prior to the 2015 Amendment which spoke of automatic stay of arbitral awards was challenged in the case of *BCCI v. Kochi Cricket Private Limited*.[13] The issue before the bench in this case

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[12] Section 6, the Arbitration and Conciliation (Amendment), 2019.
[13] BCCI v. Kochi Cricket Private Limited, AIR 2018 SC 1549.

was whether the application of Section 36 of the Act post-2015 amendment was retrospective or prospective. It was pointed out by the hon'ble Supreme Court that the position of the application of Section 36 of 2015 amendment shall be made to the arbitral proceedings after 23rd October 2015 or the arbitration related court proceedings arising after 23rd October 2015. The bench comprising of Hon'ble Justice Nariman and Justice Navin Sinha in the above case observed that "*The result is that the BCCI judgment will therefore continue to apply so as to make applicable the salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23.10.2015".*[14]

Notwithstanding with this position, the new Amendment Act under the umbrella of newly introduced Section 87 lays down that the application of the Amendment Act of 2015 would only apply to Arbitration proceeding and court proceedings arising out thereof, which have commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and not otherwise. This has *per se* created a huge loophole in the present Act which is derogatory to the purpose of the Act.

However, the Apex Court in the case of *Hindustan Construction Company Ltd v. Union of India*,[15] scrapped the impugned Section 87 on the grounds of it being 'manifestly arbitrary' and in derogation to Article 14 of the Constitution of India.

The Hon'ble Court also pointed out how the provision was in violation of Article 14 of the Indian Constitution. The Court said that 'the retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also affects the payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. In fact, refund applications have been filed in some of the cases before us, praying that money that has been released for payment as a result of conditional stay orders be returned to the judgment-debtor.'[16]

Hence, the Supreme Court, in order to curtail the attempt of the Parliament to act arbitrary and maliciously, discarded the concerned provision of the Amendment Act thereby securing the interests of the parties.

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[14]Ibid.
[15]Hindustan Construction Company Ltd v Union of India 019 (16) SCALE 823.
[16]Ibid.

6. Curtailment of Mala-fide intention of challenging the Arbitral Award

The Amendment Act of 2019 alters the provision laid under Section 34 which determined the prerequisite condition of expression *"furnishes proof that"* for the purpose of challenging an arbitral award before the court for setting aside of such award by way of substituting the expression *"establishes on the basis of the record before the arbitral tribunal"*. [17]

Initial reading of the holistic provision prior to the amendment gave a wide scope of enquiry to the Court and challenging parties for the purpose of setting aside the arbitral award as the expression *"furnishes proof that"* was interpreted in a way that it would take into consideration other external grounds, facts, evidence, etc. which did not form part of the record before the arbitral tribunal. However, the expression *"establishes on the basis of the record before the arbitral tribunal"* replaced by the new amendment which curtails the challenging parties' scope of taking such external grounds into consideration and therefore confining the arbitration parties within the four boundaries of arbitral proceedings in case of recourse of arbitral award.

The amendment regarding the grounds for challenging the award was brought in line with the case of *M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi*,[18] wherein the Hon'ble Supreme Court held that the speedy disposal of arbitral disputes will be defeated if the party challenging the award relies on the external grounds unless the same grounds have been brought to the notice of the arbitrators. The notable change was brought by the present amendment Act taking into consideration the recommendation of the Sri Krishna Committee and the above discussed judgement.

7. Hush-Hush nature of arbitral proceedings

Arbitration is known for its confidential character as the disputes adjudicated by the forum is private in nature. It might be a cake walk to preserve confidentiality in arbitration than in ordinary court litigation and which forms the important features of arbitration.

At the outset, it should be kept in mind that privacy and confidentiality of arbitration agreements, proceedings and awards may not last forever. To quote American TV commentator, Gretchen Carlson, *"the minute that you go to arbitration, it's 100% confidential, so nobody ever hears about it",*and similar

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[17] S. 7, the Arbitration and Conciliation (Amendment), 2019.
[18] M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi, (2018) 9 SCC 49.

thoughts have been reflected by the Parliament while inserting the provision.

Section 42A introduced under the new amendment states that an Arbitral institution, parties to the arbitration agreement and an arbitrator shall maintain confidentiality of all arbitral proceedings. However, an exception is made for an award out of such arbitral proceedings for the purpose of its implementation and enforcement. Further, an exception is granted to arbitrator for any disclosure made in good faith or intended to be done in furtherance of this Act.[19]

Thus, the new amendment act makes an attempt to recognize and safeguard the interests of parties by expressly mentioning the existence of the principle of confidentiality and hence tries to harmonize the domestic laws with the UNCITRAL Model and provides reasons to the parties for choosing India as a seat of arbitration which in the end strives to boost the objective of making the country as an arbitration hub.

Conclusion

The Parliament whilst drafting the recent amendment act of 2019 has incorporated the recommendations of Justice Sri Krishna Committee only up to a certain extent which does not make the arbitration mechanism inefficacious. However, the amendment Act of 2019 has attempted to provide vast powers to the Arbitral institutions in order to build and nurture an environment which will be arbitration friendly by reducing court intervention and enhancing quality of arbitral proceedings. There are several aspects that the amendment Act could have incorporated into it which were the provisions related to recognition of emergency award through an emergency arbitrator. Similarly, the Sri Krishna Committee report also suggests the mechanism to be incorporated for BITs which seems to completely ignored. Hence, it can be inferred from the above scenario that even this Amendment Act does not seem to be a perfect breakthrough for India for smooth functioning of the International Arbitrations.

[19] S. 9, the Arbitration and Conciliation (Amendment), 2019

Space Crimes: Discussing the Legal Framework and Challenges of Law Regarding Crimes in Space

Krishna Sarkate
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Introduction

It wouldn't be wrong if one stated that Space Law is still in its infancy. Space travel and exploration, although has come a long way since the launch of Sputnik in 1957, is still just at the foothills of the proverbial mountain. Add to that, the extremely niche field of space crimes. It is a recent law, and developments in technology in the past years have required the law to respond. A crime in space has largely been unheard of and is still a matter of fiction to most at this point of time. However, a recent United States case has triggered a discussion about how a space crime shall be dealt with in the future.

One needs to understand the nature of Space Law in order to properly grasp the attributes of Space Crimes. 'Space Law', in its broadest sense, would mean the law governing or applying to outer space and activities in and relating to outer space. Although clearly there is a central body of 'space law', the term would, therefore, act as a blanket to many different types of rules and regulations rather than as denoting a conceptually coherent single form of law.

By nature, it is apparent that 'Space law' is much more similar to branches of 'family law' or 'environmental law', where many different laws are indicated by reference to the material with which they deal rather than being derived from the pure rational development of a single legal concept, such as the 'Contract Law' where 'the law' elaborates a series of concepts within a single blanket.[1]

Legal Principles of Space Law

Space Law also consists of some basic legal principles to be followed by the states, which regulate their further actions. The Outer Space Treaty, 1967 (OST) in which the principles are framed is considered as the Magna Carta of the Contemporary Space Law. Articles I to VIII of the OST describe these principles in detail.

These principles include:-

[1]Francis Lyall& Paul B. Larsen, *Space Law: A treatise,* 2 (2009).

***Art. I*:** The principle of the freedom of exploration and use of outer space and the principle of the benefit and interests of all mankind.

***Art. II*:**The Principle of non-appropriation of Space by nations, including The Moon and other celestial bodies.

***Art. III*:** The Principle of carrying out Space Activities in accordance with the International Law and the UN Charter.

***Art. IV*:** The Principle of using the moon and other celestial bodies exclusively for peaceful purposes.

***Art. V*:** The principle of International Co-Operation and assistance to Astronauts (Treating Astronauts as envoys of mankind).

***Art. VI*:**The Principle of responsibility for national activities in outer space (States bearing responsibility for any governmental or non- governmental actions in space by the said state).

***Art. VII*:** the principle of liability for damage caused by the state's space objects (Liability of launching state with respect to damage to other states or its natural or juridical persons).

***Art. VIII*:** The Principle of registration of Space Objects (Ownership of State Party to the treaty whose object is registered, launched in outer space not being affected on its return on earth or in outer space).[2]

Evolution and development

Space Law is said to be around sixty years old. It's a very modern field of regulation, but it's obvious birth date is widely considered to be as of on the launch of Sputnik I in October 1957. The Cold War between the USA and Russia at the time meant that the launch of Sputnik was going to immensely accelerate the scope of Space exploration. This retrospectively prompted the nations all around the world to start discussions regarding the laws of Space. United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) was established in 1958, in order to ensure the use of space exclusively for peaceful purposes. It originally consisted of 18 member nations, which includes the Soviet Union and the USA.

Space Crimes have been known to be only fictional in the past. Science fiction movies such as *Star Trek* and *Star Wars* have always driven the discussion regarding Space Crimes in our community. Authors like Stephen King were the

[1]Article I-VIII, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies, 1967.

pioneers of this concept through the book, *'Danse Macabre'*.[3] Formally, the Outer space treaty was the first one to give cognizance to Space Crimes. Even the Moon Agreement has fiddled with Space Crimes by prohibiting the establishment of military bases, installations, and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon and other celestial bodies.

But, one major flaw that has always remained with the Conventional Space Law regarding crimes in Space is that the Conventions such as OST and the Moon Agreement have only exclusively talked about crimes by the States. No convention has ever mentioned how a crime by a private individual shall be dealt with, and thus, International Law remains the primary source of dealing with space crimes. One major reason behind the lack of laws relating to Space Crimes being terribly underdeveloped at this point in time, simply put, is that a space crime had not taken place to date. Mankind had not predicted the possibility of commission of a crime in Space, and thus no major Convention, Treaty or Agreement had taken place to actually deal with such a scenario.

The Curious Case of Anne McClain

In August 2019, it was revealed NASA had been reportedly investigating what could be the first-ever alleged crime in space. Astronaut Anne McClain has been accused of identity theft while onboard the International Space Station. Astronaut Anne McClain was recently involved in a six-month mission to the International Space Station (ISS). While she was in space she accessed the account of her estranged spouse from the ISS, and it has been alleged that she did so illegally as a form of identity theft. Lieutenant Colonel McClain defended herself, explaining that she and her partner had been going through a "painful, personal separation", and that the allegations had been a fabrication. She insisted that she had accessed her bank account legally to make sure that there was enough money to pay bills and care for her partner's son. Her lawyer added that the astronaut denied doing any illegal act. Lieutenant Colonel McClain's ex-partner, however, has said he is committed to pursuing her for

[3]Supra 1.

identity theft, filing a complaint with the Federal Trade Commission and another with NASA's Office of Inspector General.[4]

How Anne McClain shall be dealt with according to Space Law

The way of dealing with the Anne McClain case is relatively easy from the perspective of Space Law. The subject (Anne McClain) is a private individual who has been accused. Given these circumstances, customary International Law would take over other Space Treaties in this case, since contemporary Space Law is not yet equipped to deal with individual crimes.

There would be only one pertinent question relevant to Space Law in this case. This question would be:

What criminal law would apply in outer space?

In this case alone, for a US astronaut aboard the International Space Station with a US alleged victim, it may be ascertained that US criminal jurisdiction would be applicable to Anne. Add to this, the Inter Governmental Agreement (IGA) creates guidelines for cooperation between nations that would coexist on the station.[5] The agreement was signed by Canada, the European partner states (Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom), Japan, Russia, and the United States in 1998. According to the IGA, each State would be empowered to exercise jurisdiction over personnel from its respective nation. Therefore, for example, any crime committed by a NASA Astronaut would be investigated by the USA. Thus, any crime on the International Space Station (ISS) would have clear cut consequences relating to the jurisdiction, i.e. the State that the accused belongs to would have jurisdiction to his trial, which in this case, would be the USA.

Challenges and existing solutions regarding Crimes in Space

Things get complicated when the scenario is expanded and possible future crimes are taken into account since the age of space tourism, space

[4]Mike Baker, *NASA Astronaut Anne McClain Accused by Spouse of Crime in Space,* The New York Times, August 23rd 2019, available athttps://www.nytimes.com/2019/08/23/us/nasa-astronaut-anne-mcclain.html Last seen 25/12/2019.

[5]Mark Garcia, *20 Years Ago: Station Partners Sign Intergovernmental Agreement (IGA),* Nasa.gov, available at https://www.nasa.gov/feature/20-years-ago-station-partners-sign-intergovernmental-agreement-iga Last seen 25/12/2019

militarization, and commercial activity is within sights for humanity.

The jurisdiction of Space would come under five international treaties, known informally as The Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention, and the Moon Agreement.

The Outer Space Treaty would most likely apply to crimes committed in space (and not on the ISS). This treaty requires that space exploration is not subject to any claim of national sovereignty and any interstellar bodies like the moon are to be used for only peaceful purposes. The treaty deals with crimes in a similar way to those committed on the high seas. Article VIII of the 1967 Outer Space Treaty states that the State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over the said object, and over any personnel, while in outer space or on a celestial body. Thus, a space criminal would generally be subject to the law of the country of which they are a citizen or the country aboard whose registered spacecraft the crime was committed. Once again, however, the interpretation of this treaty has not been tested and there would be issues if there were crimes involving two citizens of different nations or where there was a private citizen flying another country's spacecraft.

Upcoming Challenges for Laws on Space Crimes

Space, like the high seas, operates under the principle of *res communis*, meaning that no specific country can lay claim to it. National regulations will still apply, but not because of the ownership of territory, as is the case with most laws. International law enables countries to assert jurisdiction outside their territory in a number of ways, including through the principle of nationality, which covers crimes committed by citizens outside their borders, and the universality principle, which allows countries to prosecute anyone for serious crimes against international law, like piracy.

Hypothetically, if a person flies to the moon, steps out of the lunar module, sends it back and stays for four years longer on the moon, they are no longer personnel on the spacecraft. So, while such an individual would have been considered under U.S. jurisdiction because they flew aboard a U.S. vehicle, would this still apply once they no longer worked or lived on that craft? Space law has a unique twist, since the jurisdiction would apply to space objects, and space objects are seen as something launched by humans into outer space. So, if humans manufacture homes out of local material on the moon or Mars, would jurisdiction change because astronauts would no longer be in a habitat or on a craft from an Earth nation?

This is all, of course, conjecture and hypothetical and looking into a crystal ball. But, the ways that space law may change as human spaceflight advances are interesting enough to start thinking about it.

The world witnessed the first space tourism in 2001. Since then, only seven private citizens have paid to go to space. Looking at these scenarios, it has to be noted that Space law will have to evolve regarding, not just the astronauts but also space tourism and launch to space. Additional guidelines and efforts for durable legal frameworks will be needed for the time when Space tourism becomes a reality for the human race. Most of the international laws we have, now apply to Astronauts, but it is not very clear to what extent they may apply to private persons in a commercial human space flight context.

In fact, it is still unclear *where* outer space actually *is* in the legal sense. This is why we still deal with questions like what is the applicable legal framework for commercial suborbital flights. These kinds of issues would have to be clarified in the near future before we send people to live on the Moon or Mars.

These questions will be especially difficult to navigate through, in case a violent crime ever takes place on Mars or another extraterrestrial destination. Crime scene analysis on Mars or the moon would have to be altered from Earth procedures, as variables like blood spatter will look drastically different at those sites, due to the lower gravity. Additionally, since it is much more difficult for humans to survive on a planet like Mars, convicting a theoretical space criminal of murder might prove to be especially tricky.[6]

Conclusion

It is crystal clear that Space Law needs to be immensely developed in order to deal with any space crime. Space, for commission of crimes in space, has well and truly opened up and it is very likely that more space crimes will take place in the near future, especially after observing the eventual extinguishing of exclusivity held by Governmental Organizations, after the recent breakthroughs achieved by SpaceX towards space exploration, and advancements made by Virgin Galactic towards space tourism. As the world prepares for a giant leap into Space exploration in the coming years, it must also be prepared for the possible challenges that are going to arise out of it.

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[6] *Who investigates a crime in space?,* Space.com, available at https://www.space.com/who-investigates-space-crime.html Last Seen- 25/12/2019.

A Stride Towards Equality for International Workers Under the Social Security Regime of India

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Introduction

The Government of India, in the year 2008 introduced special provisions under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter 'the Act') to preserve the sanctity of Cross Border Employment and protect the interests of the workers employed therein. These provisions inserted a new category of workers known as International Workers (IW) in the Act.

Up until 1st October 2008[1], there were no separate provisions for foreign Nationals working in India in relation to their contribution under Provident Fund Regulations. The employers and the workers were faced with the problem of avoiding the double pension provisions as many of the international workers were registered in their home country pension plans. Also, Indian Nationals working in foreign countries were generally made to contribute to the social security schemes in their respective host countries. This caused a burden on the International workers as they had to contribute to two Social Security Schemes for availing the benefit, which in fact was generally lost due to stringent provisions in the countries such as minimum qualifying period of contribution or residence.

Thus, in order to curb the exploitation of the workers and the employers and encourage cross border employment, the Government of India introduced the special provisions under Employees Provident Fund Scheme and Pension Scheme to bring the International Workers within the purview of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 by amending the relevant schemes.

Definition of 'International Worker' as per the Act

"International Worker"[2] means,

- An Indian employee employed in a foreign country with which India has entered into a social security agreement and is eligible to avail the benefits under a social security programme of that country.

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[1]Notification in two schemes of Provident Funds and Miscellaneous Provisions Act, 1952 for (i) Employees' Pension (Third amendment scheme 2008) for International workers (ii) Employees Provident Fund (Third amendment scheme 2008) for International workers EPFO Notification No. Coord ./2(27)Amend/Scheme/Part available at https://www.epfindia.gov.in/site_docs/PDFs/Circulars/YOld%20Circulars/notification_schemes.pdf last seen on 18/01/2020.

[2] Paragraph 83(2) (ja), The Employees Provident Fund Scheme, 1952 and Paragraph 43A (viia), The Employees' Pension scheme, 1995.

- A foreign National employed in India working for an establishment registered under the Act.

However, Indian Employees, holding Certificate of Coverage (COC) from India and contributing to the social security schemes of India, would not be considered as international workers for the purpose of this Act and would be treated like any other domestic Indian employees.

Certificate of Coverage (COC)

A Certificate of Coverage is a document that is required to be obtained by an International Worker so as to avail the benefits under the applicable Social Security Agreement. A certificate of Coverage is issued in the employee's home country by the concerned social security authority in accordance with the provisions under the relevant Social Security Agreement.

The Certificate of Coverage acts as a proof of detachment, pursuant to which the worker can claim exemption from the applicable social security compliances in the host country. The Employees Provident Fund Organisation, India has been authorised to issue Certificate of Coverage to Indian Employees posted to countries with whom India has signed Social Security Agreements.

Stance of Law post Amendment

Pursuant to the amendment, a foreign national working in India is mandatorily required to make Provident Fund and Pension contributions in India at 12% of the International Workers total salary irrespective of the wage ceiling or remission to India barring the exclusions under the Social Security Agreements entered into with various countries. The Employer is also required to make a matching contribution for each International Worker.

Exemptions

International Workers are exempted from double coverage only in the following cases:[3]

- An International Worker from a country with whom India has a Social Security Agreement and the employee is contributing to the social security programme in his home country and enjoys the status of 'detached worker' under the relevant Social Security Agreements.
- An International Worker from a country with whom India has entered into a bilateral comprehensive economic agreement prior to 1st October, 2008 and the employee is contributing to the social security programme in his home country and the said agreement specifically exempts natural persons of either country to contribute to the social security fund of the host country.

[3] Paragraph 83(1) (ii), The Employees Provident Fund Scheme, 1952

Social Security Agreements

A Social Security Agreement is a bi-lateral instrument to protect the interests of the workers in the host country. It, being a reciprocal arrangement, generally provides for avoidance of no coverage or double coverage and equality of treatment with the host country workers.[4]

As of today, India has executed Social Security Agreements with Belgium, Germany, Switzerland, Luxembourg, France, Denmark, Korea, Netherlands, Hungary, Finland Sweden, Czech Republic, Norway, Austria, Canada, Australia, Japan and Portugal.[5]

In absence of a formal agreement with the home country of an international worker, the benefit of reciprocity may be made available at the time of withdrawal of pension scheme.[6]

Provisions covered under Social Security Agreements

Generally, a Social Security Agreement covers three provisions: [7]

1. **Detachment:** employees sent on posting in foreign countries are exempt from making Social Security contributions in the host country for a specific period as per the terms of the agreement provided that the employee is complying under the social security system of the home country.
2. **Exportability:** the beneficiaries (employees) may choose to export the benefits directly to their home country or to a third country, where they reside, without any reduction in the same on retirement or on completion of the assignment. ie. Benefits can be exported.
3. **Totalisation of benefits:** The aggregate period of service rendered by an employee in the host country is to be counted for the 'eligibility' purposes to qualify for the benefits under social security schemes.

Withdrawal of Benefits

Provident Fund[8]

The International Workers can withdraw their Provident Fund accumulations only:

- At the time of retirement from service in the establishment at any time after the attainment of 58 years.

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[4] Ministry of Labour, Government of India (EPFO) *International Workers- Handbook on the special provisions and Social Security Agreements,* available at https://www.epfindia.gov.in/site_docs/PDFs/Operating_SSAs_PDFs/Hand_Book.pdf ast seen on 18/01/2020.

[5] Employees Provident Fund Organisation, India available at https://www.epfindia.gov.in/site_en/International_workers.php last seen on 18/01/2020.

[6] Paragraph 43A (4), The Employees' Pension scheme, 1995.

[7] See Ibid, at 7

[8] Paragraph 83(6), The Employees Provident Fund Scheme, 1952

- On retirement on account of permanent and total incapacity to work due to bodily or mental infirmity.
- On such other grounds specified under the relevant Social security agreement by which the employee is covered.
- On cessation of employment in an establishment covered under the Act, where the international worker is from a country with whom India has a Social Security Agreement.

Pension Fund [9]

The employees who are International Workers can only avail withdrawal of Pension after rendering eligible service for a period of 10 ten years. However, International Workers from a country with whom India has a Social Security Agreement may withdraw the benefits earlier.

Impact

This initiative taken by the Government of India, would benefit the employee as well as the employer in reducing the cost involved due to dual contribution to the social security regulations. Consequently, it would enhance labour mobility and infusion of new skill in the economy, leading to economic growth and development.

However, some areas of concern that come to light in relation to the same are that no specific dispute resolution procedure has been enumerated in all the Social security Agreements which might create a hurdle in reality. Furthermore, as the provisions of the Social Security Agreement differ from country to country, it is necessary that all of them provide for detachment, exportability and totalisation of benefits in the right sense.

Conclusion

Considering the above, International Workers from foreign countries not having entered into Social Security Agreement with India or from countries having Social Security Agreement but the employees have not obtained Certificate of Coverage from their home country shall not be exempt from making the required contributions from the social security regulations in India.

Also, Indian employees working in foreign countries with whom India has not entered into a Social Security Agreement or in countries having a Social Security Agreement but the employees have not obtained Certificate of Coverage from the Employees Provident Fund Organisation, India shall not be

[9] Paragraph 43A (4), The Employees' Pension scheme, 1995.

exempt from making the required contributions from the social security regulations in the host country.

Thus, if the International Worker is from a country not having Social Security Agreement with India or with a country having one but not holding a Certificate of Coverage from the concerned authority in his home country, would be obligated to contribute to two social security regimes in different countries without any equivalent benefits.

This initiative taken by the Government of India provides for avoidance of 'double coverage' and in a way ensures equality of treatment to the workers of both the countries from a social security perspective which in turn helps in protection of the interests and enhancement of cross border employment through mutual cooperation.

The Vicissitude of Competition Law with The Emergence of Data Based Business Models - A Vignette of Data Related Abuses

N Raghav Harini & Atharv Joshi
IV BA.LL.B.

Introduction

Data is complicated. That is the response of many big techs to the regulators around the world. The post Y2K era witnessed the growth of technology companies in particular Google, Amazon, Facebook, and Apple (GAFA). With the escalating digital dependency, governments and their agencies have started considering the public policy contours of big data and big tech. Broadly speaking, big data is subject to three mutually exclusive but related jurisdictions.

I. Data protection law;
ii. Consumer protection law; and
iii. Antitrust law.

The first attempt to define big data was undertaken by a group of economists in 2016. They defined big data as *"information assets characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value."*[1] Subsequently Organisation for Economic Co-operation and Development (OECD) in its policy roundtable reaffirmed this definition.[2] This paper attempts to understand the characteristics of big data and the data related abuses.

Big Data and its Characterstics

Before proceeding to understand the data related abuses, it is pertinent to understand the characteristics of big data and the digital space. Exploitation of consumer data in the value addition process can lead the firm to insurmountable market power. In addition to the indicators given under S. 19(4) of the Competition Act 2002, the following parameters may be taken into consideration while assessing the dominance of a firm.

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[1]De Mauro, Andrea, Greco, Marco, Grimaldi, Michele, *"A Formal definition of Big Data based on its essential Features",* 122 (2016), Library Review.
[2]*Big data: Bringing competition policy to the digital era,* OECD available at https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm, last seen on 16/01/2020.

Data is a type of information goods. Information goods possess three defining characteristics

i. The utility derived from these goods is dependent on the information or the experience these goods contain.

ii. The cost structure of the goods.

iii. These goods are neither rivalrous nor excludable.

Cost Structure

The cost structure of the big data as an information good is an important distinguishing character. In a seminal work by two American economists Carl Shapiro and Hal Varian, they posit that *"Information is costly to produce but cheap to reproduce."* While the initial investments and sunk costs are typically high, the marginal and average costs in data reproduction tend to plummet subsequently. This enables the producer to sell the goods at a substantially low price or sometimes even at free of cost.

The Dynamics of Innovation

Digital economy primarily thrives on innovation. The market participants inherently have an incentive to constantly keep themselves abreast with innovation primarily because the industry witnesses non-price competition than price competition. In industries which are characterized by non-price competition and network effects, one of key questions that looms the antitrust minds is whether the market delineation must account for qualitative assessment rather than quantitative considerations. OECD echoed this sentiment in its policy roundtable by proposing "small but significant non-transitory decrease in quality" test (SSNDQ test) to replace the "small but significant, non-transitory increase in price" test (SSNIP test).[4] An analysis of how users of social media platforms would react to a change in the terms and conditions of the platform is an example of SSNDQ test. A practical application of this test, however, seems puzzling. It is impossible to gauge the type of change that a platform can introduce. A case-by-case analysis is necessary for market delineation rather than a straight-jacket formula. Behaviour of the incumbents, industrial dynamics, potential for new entrants are some of the key factors that have to be considered.

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[3] Carl Shapiro, Hal R. Varian, "*Information Rules: A Strategic Guide to the Network Economy*", 1 (1st ed., 1998).
[4] Supra 2.

Network Effects

Some markets cater to two or more groups of customers and have multiple supply sides, unlike traditional markets. In such markets, the firm acts as a platform and sells two or more different products or services to two or more groups of consumers. The demand of one group is dependent on another, which leads to a cross-dependent market. This generates network effects when the firm needs to balance between the consumers. An example of two-sided market with network effects is the newspaper market wherein two sets of customers are catered to: newspaper readers and advertisers.

However, the network effects of the digital market are divergent from those of other markets. Due to lack of information in the public domain or in need of better information regarding goods and services, consumers of the digital market (specifically search engine and comparison sites) voluntarily seek the assistance of such platforms. This is unlike other platforms (say television or newspaper) where consumers do not voluntarily seek information from the other end. This creates an incentive for such sites to fetch more sponsored information and ultimately the consumers might not be able to distinguish between organic information and sponsored information; they can choose what to display and what not to, creating a search data bias.

The theoretical underpinning of network effects is the increase in market share. When the externalities tip in favour of one firm, it can very well lead to a firm to overwhelming dominance, create entry barriers and vertical foreclosures in addition to switching costs for the consumers.

Multi-homing Effects

A concomitant of non-excludability of data is the multi-homing effects. Consumers can simultaneously, on a real time basis, access rival platforms. A consumer who wishes to buy a phone can simultaneously access Amazon as well as Flipkart. Multi-homing effects bring neutrality in the competitive market. The *"consumers' cross visiting behavior"* as the Competition and Markets Authority of United Kingdom (CMA) describes,[5] tends to pressurize the firms to compete on non-price elements which ultimately, procrastinates or possibly eliminates the tipping effect of the market. While this may be true in the case of online transactional or marketplace spaces, the same is not true with social media platforms. Social media platforms are characterized by high

[5] *CMA (2019),online platforms and digital advertising: Market study interim report*, available at https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study, last seen on 16/01/2020.

switching costs. Regeneration of data in another platform is cumbersome and therefore consumers highly incline towards existing platforms. Thus, although multi-homing effect is pervasive in social media platforms, the same does not translate to reduced market power of the platform.

On the contrary, single-homing by sellers, can lead to a firm to dominant position. In an important market study conducted by CMA, it noted that, *"Google was able to create entry barriers primarily due to the advantages that come from single-homing by small advertisers, Google's better data for targeting and better synchronisation with Google Analytics, and Google's ability to influence advertiser behaviour through its ownership of the search intermediation tool SA360"*.[6]

Data Related Abuses and Competition Concerns

The data protection regulators have comprehensive role in the regulation of the data. As the sentinel of data subjects, their role extends to regulation of data controlling, processing and privacy breach. However, the role of competition law regulators is narrow. The sanctions and warrants of antitrust law in big data are solicited only when the data possession or the data aggregation entails anti-competitive effects. The following are some of the data related abuses that are have garnered the curiosity of market regulators in various jurisdictions.

Refusal to Deal, Exclusionary Conduct, and Essential Facilities Doctrine

A dominant firm might refuse to give access to data to other operators who seek to obtain that data. Exclusive contracts that prevent access to downstream operators can also be analysed under abuse of dominance, if the firm proposing to enter into the exclusive contract is dominant. Prima facie, a dominant entity is not under an obligation to share the data with others, unless the other firm proves that data is an essential facility. The leading cases in this subject matter are *IMS Health*[7], *Microsoft*[8], *Oscar Bronner*[9] and *Magill*[10] which have been cited across jurisdictions. Four important points can be drawn from the ratio of these cases in ascertaining whether a firm is guilty for abusing its dominance.

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[7] Ibid.
IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, Case C-418/01, (European Court of Justice).

[8] Microsoft Corp. v. The Computing Technology Industry Association, Inc , Case T-201/04, (European Court of Justice).

[9] Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs, Case C-7/97, (European Court of Justice).

[10] Radio Telefis Eireann v. Independent Television Publications Ltd, Joined Cases C-241/91 P and C-242/91, (European Court of Justice).

i. The firm which requested the licence intends to offer, new products or services that are not offered by the owner of the intellectual property right or the license, and for which there is a substantial demand;

ii. The refusal is not justified by objective considerations;

iii. The refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of a particular product (in the member state) with an objective to wipe out competition in that market.

iv. The economic, legal and technical viability of creation of an alternative is low or impossible.

Data from an antitrust perspective can constitute a market in itself, an infrastructure or be irrelevant.[11] The user lock-in phenomenon, along with economies of scope and scale enables the firm to offer wider range of services without any additional production costs. This progress in the activities undertaken by the firm, might lead the dominant firm in gaining high market share in not only the data market but also in other markets where the firm seeks to venture. Due to the opportunity costs associated with switching platforms, new entrants can be pushed aside by the dominant firms. Given that data is a non-rival good (unless personal data of consumers is involved), the chances of a successful claim of the data as an essential facility may be high. However there are two problems in recognizing data as an essential facility.

i. The determination of value of data in the data market can be tricky since the application of data differs from one firm to another firm.

ii. A lot of these data sets may contain private and personal data. Data cannot be construed as an essential facility in the orthodox way for the simple reason that these data sets are also subject to data protection laws. Without clear demarcation of ownership and property rights on data, construing data as an essential facility may lead to tangible privacy dilution of the data subjects.

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[11] Greg Sivinski, Alex Okuliar and Lars Kjolbye, *Is big data a big deal? A competition law approach to big data,* 2017,European Competition Journal, available athttps://www.tandfonline.com/doi/full/10.1080/17441056.2017.1362866?scroll=top&needAccess=true, last seen on 12/09/2017.

Price Discrimination

Unreasoned discriminatory pricing by a dominant firm has always drawn antitrust scrutiny. In the case of *Clearstream*[12], Clearstream, an international clearing and settlement depository had charged exorbitant prices from Euroclear Bank compared to other depositories and banks seeking equivalent services. The European Commission observed that the depository was dominant in its market and held that this act constituted a violation under the erstwhile Article 82 of Treaty on the Functioning of the European Union (TFEU) for abuse of dominance.

Among other abuses, data as an infrastructural resource in the value additional chain of a company can lead to price discrimination. By aggregating the information on consumer behaviour such as mode of payment, date of purchase, frequency of purchase, quantity and types of purchase, the firm can customize the display price. Unreasoned price discrimination by a dominant firm can be analyzed under S.4 of the Act. While prima facie, price discrimination[13] can invite the wrath of consumer welfare bodies, from a competition law perspective, price discrimination may not necessarily constitute an abuse (or a vertical restraint). In a classic oligopoly market, the vigour of competition may increase or decrease, if every single firm in the market resorts to price discrimination. Further, the competition is neutralised if the buyers in the market resort to multi-homing. This can increase price competition in the market. A joint report by the French market regulator *Autorité de la concurrence* and its German counterpart *Bundeskartellamt*[14] observed that data- based price discrimination warrants a case-by-case analysis.

Cross-Usage of Data

A dominant firm, by virtue of possession of lucrative datasets, can leverage its dominance into an adjacent market. The firm is in a better position to cater to the consumers and thus has a commercial edge that none of its competitors might have. The French antitrust authority in the case[15] gas suppliers' case and the European Commission in *Apple/Shazam*[16] case and in the *Google Android*[17] case observed that cross-usage of data by a dominant firm in an adjacent market when data is not indispensable or when data is used in an adjacent market on an

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[12]Clearstream Banking AG*,* Case T-301/04, (European Court of Justice).
[13] Marc Bourreau and Alexandre de Streel,*The regulation of personalised pricing in the digital era,*DAF/COMP/WD(2018)150,OECD,available at https://one.oecd.org/document /DAF/COMP/WD(2018)150/en/pdf, last seen on 16/01/2020.
[14]Autorité de la concurrence and Bundeskartellamt, *Competition Law and Data,* 10th May, 2016 available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/ Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html., last seen on 16/01/2020.
[15]GDF Suez,Decision 14-MC-02, (French Competition Authority).
[16]Apple / Shazam, Case M.8788, (European Commission).
[17]Google Android, Case at.40099, (European Commission).

exclusionary basis can be a matter of antitrust concern. However, none of these cases delve into the depth of the issue and it remains to be seen whether the conduct would merit an antitrust analysis.

Data collection as an abuse

Data protection regime is primarily concerned with data collection. The limited role of antitrust law is sought when the immoderate and unrestrained collection of data of a dominant firm results in exploitative or discriminatory conduct. Excessive collection of data can be read into abusive conduct as it may potentially foreclose the market for new entrants. Reckless aggregation of data may lead to incumbency advantage.

In understanding Facebook's model of success, it is pertinent to look at the consumer side of the company. The initial years of Facebook were invested in creating an irreplaceable social media platform by garnering attention of users. It is only in the recent years that the company began to monetize the consumer attention by venturing into display advertising. It is observed that the unwavering attention of users to Facebook, despite multi-homing effects, has pushed the company to dominance. With the possible exception of Instagram, none of the new entrants enjoy a reliable user base. The inability of these entrants to compete on the consumer side of the platform has affected the competition. The evidence collected by CMA indicates that Facebook enjoys a high market power in display advertising. Due to high market power on the consumer side which enables them to extract the data of consumers beyond control, it may invite the intervention of antitrust regulators.

Recently *Bundeskartellamt* investigated Facebook's data collection and held that it amounted to exploitative abuse. It has prohibited Facebook from internal divestiture of its data and assigning data collected from third party sources to Facebook user accounts.

Conclusion

Antitrust jurisdictions around the world have reiterated that there is no regulatory convergence between competition law and data protection law.

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[18]Supra 5.
[19]Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources*, (07/02/2019) available at https://www.bundeskartellamt.de/Shared Docs/Meldung/EN/Pressemitteilungen/2019/07 02 2019 Facebook.html, last seen on 20/12/19
[20]Competition Commission of India, Annual Report 2018-19 pg.38;Competition Commission of India, Annual Report 2017-18,pg.37.

However with emergence of big data, the bright line distinction between regulatory regimes seems to have blurred. S. 21 and 21-A of Competition Act, 2002 provide for referral mechanisms between the Commission and other statutory authority. The annual reports of the Commission, however, bring out the underutilization of these sections, predominantly due to its narrow scope. In the Facebook case before *Bundeskartellamt*, the regulator in analysing key issues revolving around privacy, had coordinated with the data protection authorities and prohibited Facebook from aggregating data from various sources. This is case unique in understanding the correlation between mutually exclusive yet related authorities.

The right to informational self-determination as an important facet of privacy is gaining momentum.[21] This right is indispensable in the digital era since it confers proprietary rights of the data on the data subject (and not on the data controller or the processor). The right to data portability comprises of two attributes:

i. The right to obtain a copy of personal data that has been provided by the data subject

ii. The right to transfer this data directly from controller to controller. [22]

In addition to preventing data dilution, it waters down the interface lock-in phenomenon significantly due to interoperability of platforms. Consequently, competition in the market can be strengthened by eliminating the incumbency advantage. Telecom Regulatory Authority of India (TRAI) in its consultation paper had opined a similar idea that *"data portability must be introduced in the data regulations in order to ensure level playing field."* [23]

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[21] Justice K.S. Puttaswamy (Retd.) v. Union of India, 2017 SCC On Line SC 996.
[22] Article 20, General Data Protection Regulation, (European Union).
[23] Telecom Regulatory Authority of India (TRAI), Government of India, Consultation Paper on Privacy, Security and Ownership of the Data in the Telecom Sector, available at https://main.trai.gov.in/sites/default/files/Consultation_Paper%20 on Privacy Security ownership of data 09082017.pdf, last seen on 16/02/2020.

The Dynamics of Anti-Defection Legislation in India.

Rugved Upadhye &
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II B.A.LL.B.

Introduction

'The evil of political defections has been a matter of concern. If not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it.'

Thus, reads the statement of objects and reasons of the 52nd Constitution Amendment Act, 1985, popularly known as the Anti- Defection Law (Law), brought into focus again by the recent political[1] developments, of legislators switching over to other parties after getting elected, in states like Goa, Karnataka, Maharashtra and Madhya Pradesh. This article seeks to present a genesis and an overview of the law, issues of whether the law has been able to stay true to its objects, and finally the need for reforms.

What is Defection?

A standard dictionary meaning of defection reads, *'falling away from a leader, party, religion or duty, desertion, especially to another country etc.'* Politically, however, the definition becomes more specific. According to a study by the Ministry of Home Affairs, defection means *'the transfer of allegiance by a legislator from one party to another political party or an identifiable political group'*.[2]

It was not until the late 1960s that the phenomena of defections garnered attention. The 1967 Lok Sabha election was an important event that brought forth the politics of defection and the need for addressing this 'evil'.

The 1967 Lok Sabha election and its aftermath

Before the 1967 general elections, room for defections was not much; defections were few as to attract attention. The 1967 electoral verdict shook the Congress Party's hold both at the Centre and in the States. Seeing this as an opportunity to seize power, began a process where non-Congress parties including the far left and far right ignored their ideological differences and

[1]Mian Bashir Ahmad v. State of J. & K., SCC OnLine J&K 15: AIR 1982 J&K 26. Pg. 40,41 Para 38.
[2]P.M. Kamnath, *Politics of Defection in India in the 1980s*, 10 (No. 2) Asian Survey 1039,1040 (1985), available at https://www.jstor.org/stable/2644180, last seen on 23/12/2019.

came together on the basis of 'Minimum Common Programs'[3]. Thus, United Fronts were forged which formed coalition governments in several states including Kerala, Orissa, West Bengal and Punjab. At a later stage, these governments were ousted and the Congress formed coalitions with defectors. In 1967, of the 174 independents elected to the Assemblies in Bihar, Haryana, Madhya Pradesh, Manipur, Punjab, Rajasthan, Uttar Pradesh and West Bengal, 90 joined various political parties.[4] A prime example of this is a Haryana MLA Gaya Lal, who changed parties thrice in a single day, inspiring the phrase 'Aya Ram, Gaya Ram' in Indian politics.

It must be noted that defections were not totally absent before 1967. But what was new now was the magnitude, range and character of these defections. In the decade prior to 1967, there were around 542 defections, while in the year 1967 alone there were 438 such defections.[5] The defectors joining different parties ignoring their ideologies and the proximity in the time of government formations raised many questions. The frequent occurrence of defections not only led to great instability and uncertainty, it also raised ethical questions. Defections, it was realized, were undemocratic, negated the electoral verdict by allowing parties which fail to get the mandate to gather a majority in the house and form a government with the help of defectors, forcing the majority party to sit in the opposition.[6] Thus, attempts were made to control the instances of defections. Following the events after the 1967 election, a committee on defections was appointed under the then Home Minister, Y. B Chavan, in December 1967. It defined a 'defector' as- *"An elected member of a legislature who had been allotted the reserved symbol of any political party, who, after getting elected as a member of either house of the Parliament, Legislative Assembly or Legislative Council of a state or Union territory, voluntarily renounces allegiance to, or association with such political party, provided his action is not in consequence of a decision of the party concerned."*[7] The committee *inter alia*, made 2 important recommendations- a) A bar on

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[3]Subhash Kashyap, *The Politics of Defection: The changing Contours of the power structure in State politics in India,* 10,(No.3),Asian Survey,196, (1970), available at https://www.jstor.org/stable/2642574, last seen on 24/12/2019.
[4]Ibid
[5]Ibid*,* at 197.
[6]*Indian Constitutional Law*, 46 (M.P Jain, 8th ed., 2018)
[7]Paras Diwan, *AYA RAM GAYA RAM: THE POLITICS OF DEFECTION,* 21 Journal of the Indian Law Institute 291, 308 (1979), available at https://www.jstor.org/stable/43950639, last seen on 24/12/2019.

defecting legislators from holding ministerial berths for a year or until they get re- elected, and b) a smaller size of council of ministers both at the Centre and the States.[8]

Following the recommendations of the committee, 2 unsuccessful attempts were made at drawing out anti- defection legislations- one in 1973 and another in 1978. Finally, a successful attempt was made in 1985.[9]

The 52nd Amendment Act of 1985.

Rajiv Gandhi Government introduced the Constitution (52nd Amendment) Bill on January 23, 1985[10] which was adopted by the Lok Sabha on January 30 and by the Rajya Sabha, the subsequent day.[11] Thus, the Constitution (52nd Amendment) Act, 1985 was claimed to be historic as it was adopted on the day commemorating Mahatma Gandhi's martyrdom, as a tribute to his memory. This Act amended the Articles 101(3)(a), 102(2), 190(3) and 191(2) of the Constitution which deal with the matters related to vacation and disqualifications of seats in Parliament and State Legislatures, and added the Tenth Schedule thereto. The Members of Parliament and State Legislatures were henceforth subject to disqualification under the Tenth schedule due to the following provisions:

A member of a House belonging to any political party shall be disqualified for being a member of the House—

(a) If he has voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of 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.[12]

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[8]Ibid.
[9]C. Roy, *Explained: In the Maharashtra, the key legal provision- anti-defection law*, Indian Express(23/11/19), available at https://indianexpress.com/article/explained/explained-in-maharashtra-drama-the-key-legal-provision-anti-defection-law-6133417/, last seen on 24/12/19.
[10]N. S. Gehlot, *The Anti-Defection Act,1985 and the Role of The Speaker*, 52 The Indian Journal of Political Science 327, 328 (1991), available at https://www.jstor.org/stable/41855565, last seen on 26/12/2019.
[11]Pradeep Sachdeva, *Combating Political corruption: A Critique of Anti-Defection Legislation,* 50 The Indian Journal of Political Science 157, 160 (1989), available at https://www.jstor.org/stable/41855903, last seen on 26/12/2019.
[12]Schedule 10, 2(1) The Constitution of India.

The Schedule further provided for the disqualification of an Independent member of a house if he joins any party after such election,[13] whereas a nominated member shall be subject to disqualification if he joins any party after the expiry of a period of six months from the date on which he takes his seat in the house.[14]

The disqualification of a member of a house on the ground of defection is exempted in the case of:

1. A Merger of his original party with another party, only if such a merger has been approved by not less than two-thirds of the members of his legislature party in the house.
2. It is pertinent to note here that the members reluctant to such a merger do not lose their membership of the house and are permitted to function as a separate group.[15]
3. A member elected to the office of the Presiding Officer (Speaker/ Dy. Speaker of the lower house; or Chairman/Dy. Chairman of the upper house) voluntarily gives up the membership of his party immediately before such election or re-joins the party after he ceases to hold such office.[16]

Powers of Speaker and Challenges to It

The Act provided that the decision of the Presiding Officer of a house in matters related to disqualification of members is deemed to be final[17] and he is authorized to make rules for giving effect to the provisions of the Schedule.[18]

This investiture of powers, related to disqualification of members, in the Presiding Officer and the supremacy of his decisions was criticized heavily by legal and political experts. Further, the following provision in the Tenth Schedule also paved way for Legislature-Court confrontation:

[13]Schedule 10,2(2) The Constitution of India.
[14]Schedule 10,2(3) The Constitution of India.
[15]Schedule 10,4 The Constitution of India.
[16]Schedule 10,5 The Constitution of India.
[17]Schedule 10,6 The Constitution of India.
[18]Schedule 10,8 The Constitution of India

Schedule X,7. Bar of jurisdiction of courts*—notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.*[19]

Kihoto Hollohon and Judicial Review

Due to their political exigencies, Presiding Officers were alleged of not acting in an impartial and independent manner while adjudicating cases of defection and of misusing their powers. Since the Presiding Officers[20] are drawn from political parties and enjoy their tenure with the support of the majority party, they were alleged to have decided cases of defections in a manner which would satisfy the interests of their parties. For instance, the manner in which the Lok Sabha Speaker delivered his rulings, in the events which led to subsequent fall of V.P. Singh led National Front Government at the Centre in 1990, lowered the dignity of the office of Presiding Officer. Moreover, the series of confrontations between the Court and office of Presiding Officer became evident when in 1993, Speaker of Manipur Assembly refused to obey the Supreme Court's order in defection proceedings which ultimately led to contempt of court proceedings being initiated against him.[21]

Against the backdrop of such deteriorating political scenario, the Kihoto Hollohon case[22] proved to be a landmark as it established, *inter alia*, the following:

1. Paragraph 7 of the Tenth Schedule is a provision which would require a constitutional amendment to be made in accordance with Art. 368(2) of the Constitution of India for its incorporation. Since this provision affects judicial review under Articles 136, 226 and 227, it is unconstitutional and the Constitution does not stand amended to that extent.[23]
2. The Presiding Officer, acting under paragraph 6(1) acts as a Tribunal and hence, is subject to judicial review.[24]
3. Paragraph 2 is valid and does not violate the freedom of speech, freedom of vote and conscience of the members of the house.[25]

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[19]Schedule 10,7 The Constitution of India.
[20]Supra 10, at 334.
[21]Supra 6, at 52.
[22]KihotoHollohon v. Zachillhu, AIR 1993 SC 412.
[23]Ibid,at Para 3, 24.
[24]Ibid, at Para 3,42.
[25]Ibid, at Para 3.

4. The words "any direction" under Paragraph 2(1)(b) would have a limited scope which would be applicable to a vote given by the member of a house on:

(i) the motion of confidence or no confidence in the government, and

(ii) matters related to major policy or programme which is integral to the political party on the basis of which it approached the electorate.[26]

The constitutional validity of the Tenth Schedule has been upheld by the Supreme Court in a 3:2 decision and it was observed that:

"The main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body politic."[27]

The 91st Amendment Act of 2003

The Anti-Defection law came under severe criticism on the ground that it permitted and encouraged defections in bulk under the guise of the 'split' clause. Paragraph 3 of the Tenth Schedule rescued the members of a house from disqualification for defections when there was a split in their legislature party and such a split had approval of not less than one-thirds of the members of their original legislature party. H.M. Seervai, an eminent jurist, has noted in this regard:

"The fact that to serve their own interests, politicians defined defection in defection Bills so as to exclude "a split" does not alter the meaning of the word. Put in plain language the definition of 'defection' given in the Bill means: if a small number of M.Ps. desert their party they become defectors who must be subjected to pains and penalties; but if a large number of M.Ps. desert their party – say 20 percent – this grand scale desertion ceases to be desertion. But ordinarily, Governments are not 'toppled' by a small number of defections but by a large number of the members of a party leaving it and/or going over to the party to which they had been opposed."[28]

Moreover, it was noticed that large councils of ministers were being constituted by various governments at the Centre as well as in the States to accommodate

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[26]Ibid, at Para 5,49
[27]Ibid, at Para 31,32.
[28]Supra 1.

the defectors. Ironically, on an average, the rate of defections per year increased after the enactment of the Anti-Defection law than ever before.[29] The contention that the splits and defections take place because of the lust of power, and the lure to serve selfish interests and self-aggrandizement was evident when in October 1997, 12 MLAs of the Bahujan Samaj Party and 22 MLAs of the Indian National Congress defected and supported the motion of confidence in the Kalyan Singh led Bharatiya Janata Party government in Uttar Pradesh.[30] Subsequently, all the defectors were rewarded with minister-ships and a jumbo-sized council of ministers comprising of 94 ministers was established. Alleging the biased behaviour of the Speaker of the UP Legislative Assembly, in adjudicating the defection proceedings, the BSP approached the Supreme Court. In the Mayawati judgement,[31] the court disqualified the 12 defecting BSP MLAs on the ground that there was no split as per the provision of Paragraph 3 of the Tenth Schedule.[32]

Against the backdrop of the Mayawati judgement, the 170th Report of The Law Commission of India (1999) observed, *"the provision relating to 'split' has been abused beyond recall"* and recommended the deletion of Paragraph 3 of the Tenth Schedule.[33] Similarly, the Dinesh Goswami Committee Report,1990 and the National Commission to Review the Working of the Constitution (NCRWC) Report, 2002 made detailed recommendations to ameliorate the Anti-Defection legislation.[34]

Thus, The Constitution (Ninety-First Amendment) Act, 2003 was enacted which, *inter alia*, provided:

1. That the size of the Council of Ministers, including the Prime Minister (in the Central Government) and the Chief Minister (in the State Government) shall not exceed fifteen percent of the total number of members of the respective lower houses.[35]
2. That any member of either house of the Parliament or the State Legislature, who is disqualified for being a member of that house

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[29]B. Venkatesh Kumar, *Anti Defection Law: Welcome Reforms,* 38 Economic and Political Weekly, 1837(2003), available at https://www.jstor.org/stable/4413541, last seen on 27/12/2019.
[30]Supra 6, at 51.
[32]*Mayawati v. Markandeya Chand*, AIR 1998 SC 3340.
[33]Supra 30.
[34]170th Law Commission of Law Commission of India Report, Reform of Electoral Laws,(1999), available at https://www.lawcommissionofindia.nic.in/lc170.htm , last seen on 24/12/19
[35]*Indian Polity,* 72.3 (M. Laxmikanth, 5th ed., 2017.)
[36]Ss. 2 (1A), 3(1A) The Constitution (Ninety-First Amendment) Act, 2003.

under Paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a minister for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to either House of Parliament or State Legislature before the expiry of such period, till the date on which he is declared elected, whichever is earlier.[36]

3. That Paragraph 3 of the Tenth Schedule to the Constitution of India stands omitted.[37]

Recommendations

However, the law, despite being hailed as a milestone was not free from loopholes. It has received its share of recommendations from time to time since its inception.

The 170th report of the Law commission of India, 1999, had recommended the deletion of Paragraph 4 (mergers) as well, along with Paragraph 3. However, this provision continues to be an exception to defection.[38]

NCRWC (2002) recommended that the power to decide on disqualification should vest in the Election Commission instead of the Speaker or the Chairman of the House.[39]

Dinesh Goswami Committee on Electoral Reforms, 1990[40] had suggested the following changes in the Tenth Schedule-

1. Limiting the disqualification provisions specifically to voluntarily giving up membership of the party and voting or absenteeism from voting contrary to the to the party whip only in cases of a motion of vote of confidence/no confidence, or a money bill or a motion of thanks to the President's address.
2. Power to decide on the issue of disqualifications should rest with the President/Governor who shall act on the advice of the Election Commission.

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[36]Ss. 2(1B), 3(1B), The Constitution (Ninety-First Amendment) Act, 2003.
[37]S. 5©, The Constitution (Ninety-First Amendment) Act, 2003.
Supra 33.
[38]Ministry of Law and Justice, Government of India, *Report of The National Commission To*
[39]*Review the Working of The Constitution, 2002*, available at http://legalaffairs.gov.in/volume-1 , last seen on 24/12/19.
[40]Ministry of Law and Justice, Government of India, *Report of The Committee on Electoral Reforms, 1990*, available at,
https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf , last seen on 24/12/19.

3. Nominated members should be disqualified if they join a party at any point of time.

Emerging Challenges

The law is significant as apart from a good legislative intent, it was the first time that political parties got constitutional status, and the office of the whip assumed importance. Yet, there are some challenges.

For instance, on 13th November 2019, the Supreme Court upheld the Karnataka Legislative Assembly Speaker's Decision to disqualify 18 'rebel' MLA's of the JDS-Congress Coalition Government. It however, struck down the term of disqualification, allowing the disqualified MLAs to contest the by-polls which were to be held on 5th December 2019. Thus, the court was of the opinion that the speaker in the exercise of his powers related to disqualification does not have the power to indicate the period for which one is debarred from contesting elections.[41]

In Goa, 10 of the 15 Congress MLAs resigned and joined the BJP, but did not attract disqualification under the Act, as it qualified as a merger.[42]

The events following the Maharashtra Assembly elections 2019 have presented a new aspect, after the Shiv Sena broke its pre-poll alliance with the BJP despite getting a clear mandate.[43]

Further, the results of the by-polls to the seats vacated because of defection have presented contradicting pictures of voter's attitudes towards defectors. While 12 of the 13 defectors in Karnataka managed to retain their seats,[44] the voters in

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[41] A.Mathur, N.Dwarkanath, *Karnataka::Supreme Court upholds disqualification of 17 rebel MLAs can contest bypolls,* India Today (13/11/19), available at https://www.indiatoday.in/india/story/supreme-court-upholds-disqualification-of-17-karnataka-mlas-1618372-2019-11-13, last seen on 24/12/19.

[42] *As Karnataka Simmers, Goa erupts;* 10 Congress MLAs break off and join BJP, Hindustan Times, available at https://www.google.com/amp/s/m.hindustantimes.com/india-news/in-massive-goa-setback-congress-loses-10-of-its-15-lawmakers/story-IYyM6CrEWc6gXMoRbW7O4L_amp.html, last seen on 24/12/19.

[43] *BJP loses its oldest ally Shiv Sena*, Economic Times, available at https://www.google.com/amp/s/m.economictimes.com/news/elections/lok-sabha/maharashtra/bjp-loses-its-oldest-ally-shiv-sena/amp articleshow/72010644.cms , last seen on 24/12/19.

[44] *Karnataka bypolls: BJP wins 12 out of 15 seats*, The Hindu-Business Line, available at https://www.google.com/amp/s/www.thehindubusinessline.com/news/national/karnataka-bypolls-counting-of-votes-begins/article30243230.ece/amp/, last seen on 24/12/19.

Satara Lok Sabha constituency rejected the defecting candidate, Udayanraje Bhonsle, who lost by a margin of 87,717 votes. [45]

This deepens the enigma whether the political party to which a candidate belongs, really plays an important role in getting him elected.

Looking at these examples, it can be said that it is about time that the scope of the law should be widened, to include 'mergers' and pre- poll alliances. This would ensure that the mandate of the people is respected and their vote is valued. Further, as seen in the preceding paragraphs, though there are various suggestions to check the powers of the speaker with regard to the law, till these are implemented, the speaker remains in an important position. Therefore, it requires him/her to let go of political inclinations and look beyond what appears to be the case *prima facie*. In examining the merit of the resignations, their consequences and circumstances must also be taken into account. In Madhya Pradesh for example, a group of 22 MLAs resigned from the assembly in March 2020, resulting in the fall of the Kamal Nath government.[46] In such scenarios where the stability of the government is under threat, the resignations ought to be scrutinized more than in any other occasions.

Finally, the law would be more effective if the cases of defection, where monetary or other benefits such as lure of power positions can be inferred *prima facie*, are examined by an ethics committee, which may be set up by the Supreme Court on a case to case basis. Such *ad hoc* arrangement may be envisaged because the nature of the law and its intention is such that it requires an active role of the judiciary in the form of 'judicial activism'. This may ensure that the law is able to stay true to its objectives.

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[45] *Bye Election to Parliamentary Constituency Trends and Results Oct-2019*, Election Commission of India, available at http://results.eci.gov.in/PCBYEOCT2019/ConstituencywiseS1345.htm?ac=45 , last seen on 24/12/19.

[46] *MP political crisis: 22 Congress MLAs from Jyotiraditya Scindia's camp resign on Tuesday; check list here,* Business Today, available at https://www.businesstoday.in/current/economy-politics/mp-madhya-pradesh-govt-crisis-congress-jyotiraditya-scindia-camp-mlas-resign-on-tuesday-march-10-list/story/397942.html, last seen on 17/06/2020.

THE CITIZENSHIP AMENDMENT ACT, 2019 – Constitutionally Sound and Morally Right.

Samraggi Debroy
II BA.LL.B

Introduction

On 12th December 2019, the "Citizenship (Amendment) Bill, 2019" became an Act, and since then we have witnessed unsolicited wave of opinions that divided the country in the name of religion. It has been argued that the Citizenship (Amendment) Act (CAA) compromises the secular character of the Indian State by excluding a particular religious community, and hence unconstitutional. The Opposition and several opinion-makers have said that this will shake the foundations of the Republic[1]. It thus becomes necessary to evaluate the legal dimensions of this amendment in order to assert the constitutionality of this Act.

History of the Act

Part II of the Constitution (Articles 5-11) titled 'Citizenship' addresses the question, "Who is a citizen of India?" It was the Constitution (1950) that first drew the lines between citizens and non-citizens. The demarcation of citizenship seems to have been in response largely in the context of Partition, though not entirely determined by it. [2]

Following that, the "Citizenship Act" came into force in the year 1955. It passed through a series of amendments to give it the shape it flaunts today. Post 1955, it was amended in 1986, 1992, 2003, 2005, 2015 and most recently in 2019. Briefly summarising the Act, it sets out the criteria for the provision of Indian Citizenship. There are various criteria mentioned in the Act, and the ones stated before the 2019 amendment are as follows.[3]

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[1] R. Kaushik & S. Anand, *The CAB meets the test of Constitutionality and Law*, Hindustan Times (12/12/2019), available at https://www.hindustantimes.com/analysis/the-cab-meets-the-test-of-constitutionality-and-law-analysis/story-6sRpQP6hdU9TYfhVWJXtVM.html, last seen on 26/12/2019.
[2] A. Roy, *Indian Citizen: A New 'Setubandhan'?* , 41 (15) Economic and Political Weekly 1421, 1424 (2006).
[3] The Citizenship Bill (passed by Lok Sabha, 30/12/1955).

i) By Birth (the principle of *jus soli*)

ii) By Descent (the principle of *jus sanguinis*)

iii) By Registration

iv) By Naturalisation

v) By Incorporation of Territory

Today along with the Constitution of India, the Citizenship Act, 1955 is responsible for the provision for the acquisition and determination of India Citizenship.

Citizenship (Amendment) Act, 2019

The CAB, 2019 was introduced primarily to grant Indian Citizenship to persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities on ground of religious persecution in Pakistan, Afghanistan and Bangladesh[4]. Thus, it adds another criterion for the provision of Indian Citizenship – persecution of religious minorities of Pakistan, Afghanistan and Bangladesh.

In the Citizenship Act, 1955 in section 2, in sub-section (1), in clause (b), the following proviso has been inserted, :—

"Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;" [5]

Other significant amendment includes that of Third Schedule which made the aggregate period of residence or service of Government in India required as *"not less than five years"* in place of *"not less than eleven years"* for attaining citizenship through naturalization for the above-mentioned communities. [6]

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[4] Ministry of Home Affairs, Government of India, *Parliament passes the Citizenship (Amendment) Bill 2019*, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=195783, last seen on 26/12/2019.

[5] The Citizenship Amendment Bill (passed by Lok Sabha, 11/12/2019).

[6] Ibid

Purpose of Citizenship (Amendment) Act, 2019

The reason cited for this Amendment is "Religious persecution of the minorities in the Islamic states." [7]

Before dealing with the phrasal concept, it is imperative to understand the meaning of the term, "minority". The term minority as used in the United Nations (UN) Human Rights system usually refers to national or ethnic, religious and linguistic minorities, pursuant to the United Nations Minorities Declaration [8].

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is:

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[9]"

However, there is no legislation or article under the Constitution of India that defines the term "minority". It therefore has a broad scope for interpretation.

The following reasons have led to the assertion of the existence of religious persecution:

A. Dishonour of the "Nehru – Liaquat Pact" –

While answering the queries raised in the House regarding the need and purpose of this bill, the Home Minister referred to the Nehru – Liaquat Pact of 1950 which was signed on 8th April, 1950 by the Governments of India and Pakistan.[10] By virtue of this Pact,

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[7] Supra 4.
[8] United Nations Minorities Declaration, *Minorities under international law*, available at https://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx, last seen on 26/12/2019.
[9] Ibid.
[10] Statement by Home Minister, *Statement regarding the Citizenship Amendement Bill, 2019,* Rajya Sabha, (11/12/2019).

"The Governments of both the countries solemnly agree that each shall ensure, to the minorities throughout its territory, complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality. Members of the minorities shall have equal opportunity with members of majority community to participate in the public life of their country, to hold political or other office, and to serve in their country's civil and armed forces. Both Governments declare these rights to be fundamental and undertake to enforce them effectively. "[11]

The premise of this Agreement can be termed as the "Critical Hostage Theory" wherein the governments of both the countries had given each other the assurance that the rights of the religious minorities of the respective countries will be protected. Here the religious minorities of one country shall act as hostage to the other country to ensure the protection of religious minorities of their country.

The Liaquat – Nehru Pact did not succeed due to two reasons. The first being, the dispute involving the unresolved Kashmir and Indo – Pak disputes. The tension generated by these disputes continued notwithstanding the Pact. Secondly, the Government of Pakistan did not enforce the preventive and punitive provisions of the Pact.

Before the ink of Nehru and Liaquat's signature on the Pact dried, the campaign of accusations and hate revived in Pakistan.

[11] Agreement between the Governments of India and Pakistan regarding Security and Rights of Minorities, *Nehru – Liaquat Pact* (08/04/1950), available at https://mea.gov.in/Portal/LegalTreatiesDoc/PA50B1228.pdf, last seen on 26/12/2019.

B. Reports of persecution of minorities

Several reports by international news agencies and human rights organizations like the UN establish the reality of persecution of religious minorities in Pakistan, Bangladesh and Afghanistan.

I) Pakistan

The primacy of Islam stigmatizes non-Muslims as de facto second-class citizens, with reduced human rights, and limited religious freedoms. The United States Commission on International Religious Freedom (USCIRF) condemned Pakistan in 2008 for "severe and egregious religious freedom violations".[12]

Many Pakistani Hindus have had to escape "religious and cultural persecution and government apathy". They are provided with no formal education and the women and girls of such communities are sexually harassed. [13]

ii) Afghanistan

Sikhs, Hindus, Christians, and other non-Muslim minority groups reported continued harassment from some Muslims. They continued to worship privately to avoid societal discrimination and persecution. Women of minority faiths reported continued harassment from local Muslim religious leaders over their attire. As a result, they said almost all women- both local and foreign wore some form of head covering. [14]

Only a few places of worship are open for Sikhs and Hindus, who continue to emigrate because of discrimination and the lack of employment opportunities.[15] The non - Muslim community there faces a lack of justice and an absence of leadership in the parliament for political purposes. [16]

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[12]S. R. Gregory & S. R. Valentine, *Pakistan: The Situation of Religious Minorities* (2009), Writenet, available at https://www.refworld.org/docid/4b01856e2.html, last seen on 26/12/2019.

[13]Z. Ahmed, *Why Pakistani Hindus leave their homes for India?*, BBC (28/10/2015), available at https://www.bbc.com/news/world-asia-india-34645370, last seen on 26/12/2019.

[14]*AFGHANISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT* (2017), available at https://www.state.gov/wp-content/uploads/2019/01/Afghanistan-2.pdf, last seen on 26/12/2019.

[15]Ibid.

[16]S. H. Khokon, *1,792 persecutions on minorities in 11 months in Bangladesh, claims Hindu alliance*, India Today (01/12/2018), available at https://www.indiatoday.in/world/story/1-792-persecutions-on-minorities-in-11-months-in-bangladesh-claims-hindu-alliance-1400065-2018-12-01, last seen on 26/12/2019.

ii) Bangladesh

Over the past 45 years, the Bangladeshi Hindus, with other religious and ethnic minority communities, are undergoing rapid decline. Since 1947, Bangladeshi minority communities have suffered systematic ethnic cleansing that has dropped their population from 23% (in 1951) to 9% (in 2017). The current Hindu population of about 13,00,000 is far short of the number one should expect based on population growth rates.[17]

Abduction of young girls from minority communities, indiscriminate rape, and conversion under threats are very rampant in Bangladesh and used as tools for persecution of minorities and drive them out of the country. [18]

According to the Hindu Post newspaper, 338 hate crimes occurred against members of the Hindu community during the year. The hate crimes included, but were not limited to, physical attacks, including killings and rapes, and real and personal property destruction.[19]

Question of Constitutionality

The Constitutionality of the Act can be argued with respect to:

A. Part II of the Constitution - Citizenship

The Parliament derives its power to regulate the right of citizenship by law from Article 11 of the Constitution of India.

"Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship." [20]

As long as the Parliament passes a legislation that grants citizenship and does not mitigate the spirit of Part II (Articles 5 – 11) of the Constitution of India, it has to be treated as constitutional.

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[17] S. Barua, *Minority Youth: towards inclusive and diverse societies (2017),* available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/MinorityIssues/Session10/Item5/AdditionalStatements/item5%20-%20Bangladesh%20Minority%20Council%20.pdf, last seen on 26/12/2019.

[18] Ibid

[19] Ibid.

[20] Article 11, the Constitution of India.

B. Part III of the Constitution – Fundamental Rights

The loudest criticism of the CAA has been with respect to the violation of Article 14.

Article 14 reads out as:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." [21]

The said Article has two parts – it commands the State not to deny to any person 'equality before law', it also commands the State not to deny the 'equal protection of the laws'. Equality before law prohibits discrimination; is a negative concept. The concept of 'equal protection of the laws' requires the State to give special treatment to persons in different situations in order to establish equality amongst all; is positive in character. Therefore, the corollary to this would be that equals would be treated equally, whilst un-equals would have to be treated unequally[22].

Article 14 has been described variously as follows:

1. "as the basic principle of republicanism "; (per Patanjali Sastri C.J. in *State of W.B. v. Anwar Ali Sarkar)*[23]

2. "as founded on a sound public policy recognized and valued in all civilized States " (per Das C.J., in *Basheshar Nath v. C.I.T.*)[24]

3. "as a necessary corollary to the high concept of the rule of law " (by Subba Rao, C.J., in *Satwant Singh v. Passport Officer*)[25]

Thus, equality as laid down in our Constitution, not only provides formal equality but also provides for real and absolute equality.

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[21]Article 14, the Constitution of India.

[22]*Evolution of Part III*, Annexure 2, available at https://iitr.ac.in/internalcomplaintscommittee/annexure.pdf, last seen on 06/06/2020.

[23]State of West Bengal v. Anwar Ali Sarkar, AIR 1952 S.C.R. 284, 293.

[24]BasheshарNath v. C. I. T., AIR 1959 Supp. (1) S.C.R. 528, 551.

[25]Satwant Singh v. Passport Officer, AIR 1967(3) S.C.R. 525; 542.

The judiciary in India has read the power of Constitutional Review under Article 13 of the Constitution of India by which it has the power to strike down the Parliamentary Laws, if they violate Part III (this is the part which contains Fundamental Rights) of the Constitution. [26]

Therefore, if the CAA is unconstitutional, it has to violate some provision of the Part III. Article 14 - Right to Equality, forms a constituent of Part III. Whether Article 14 is violated or not becomes the central question to determine the constitutionality of the CAA.

If Article 14 is to be interpreted in the manner it actually reads, before applying it to the CAA, it has the power to render all the governmental schemes and policies that bestows the minorities with special and differential power as unconstitutional.

However, the Article 14 has the flexibility of classification. Social justice determines the nature of the individual right. Social justice requires modification or restriction of rights under Part III. Social justice means various concepts which are evolved in the Directive Principles of the State.[27]

While Article 39(b), (c) can provide for a classification, that classification must have a rational relation to the objectives sought to be achieved by the statute in question.

The only purpose which the exclusion of Article 14 will serve would be to facilitate arbitrariness, inequality in distribution. This right under Article 14 will only be available to the person or class of persons who would be entitled to receive the benefits of distribution under the law. In fact the availability of Article 14 in respect of laws under Article 31© would ensure 'distributive justice'.

In Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors., Das C.J., summed up the principle, consistently adopted in subsequent cases, thus:

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely,

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[26]Article 13, the Constitution of India.
[27]KesavanandaBharati v. State of Kerala, AIR 1973 SC 1461.

(i) *that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and,*

(ii) *that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like.*

What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration." [28]

The classification in the CAA is based on two factors: The classification of countries — from Afghanistan, Pakistan and Bangladesh vs rest of the countries, and the classification of people — Hindu, Sikh, Jain, Buddhist, Parsis and Christians vs other sections of people.

Now, the basis of this intelligible differentia (classification) is "oppression" and "minorities". Since these three countries are Islamic in one form or the other, this proposes a perpetuation of the oppression of the minorities.

In E.V. Chinnaiah v. State of A.P., it was held that a legislation may not be amenable to challenge on the ground of violation of Article 14 if its intention is to give effect to Articles 15 and 16 or when the differentiation is not unreasonable or arbitrary. [29]

Therefore, the two — oppression and minorities — are enough grounds for such differentiation. Since the government wants to ensure the life and liberty of these oppressed minorities and wants to protect them through the CAA, this is reasonable in the eyes of the law. The Courts does not second guess the wisdom of the legislation.

The arbitrariness doctrine revived in *Shayara Bano* case[30] by Supreme Court has set the standard of "unfair, unreasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism". This set the precedent for a legislation to be arbitrary and unconstitutional.

[28]Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and Ors., AIR 1959 S.C.R. 279.
[29]E.V. Chinnaiah v. State of A.P., AIR 2005 1 SCC 394.
[30]ShayaraBano v. Union of India &Ors., AIR 2017 9 SCC 1.

Since there exists a well-established criterion of minority-ism and oppression for a reasonable classification as discussed above arbitrariness cannot be applied. The legislation, passes both tests of reasonable classification and non-arbitrariness.

Therefore, in the present case, the CAA offers an expedited process to legitimize the citizenship of illegal immigrants who are 'victims' of religious persecution in their countries – namely Afghanistan, Pakistan and Bangladesh. The legislation, thus, passes the tests contained in Article 14, since the reasonability of persecution and its relevance in better treatment, can serve as a non-arbitrary treatment by the state.

Conclusion

It has been successfully ascertained that the CAA cannot be held unconstitutional by invoking Part II or III of the Constitution. Whether it can be termed as unconstitutional under other provisions of the Constitution is beyond the scope of this article. The Article also does not take into consideration the issues that are speculated to be faced by the residents of Assam for the simple reason that it is beyond the scope of the subject. The nexus of the National Register of Citizens (NRC) with CAA has not been discussed, since the exercise has not yet been drafted and thus for the time being no argument holds water.

The CAA is a narrow window legislation which has been addressed to a specific group of subjects. A pivotal question raised by the protestors has been the non-inclusion of persecuted communities like Ahmaddiyas of Pakistan, Uyghurs of China, Tamils of Sri Lanka and Rohingyas of Myanmar. While all these communities do not come under the scope of this legislation, it is also imperative to take note of the fact that India will continue to provide citizenship to these minorities through the legal front door. It is not necessary for a single legislation to redress every societal wrong. That said, the non – inclusion of other communities in this legislation is not a question of constitutional law but that of policy.

Offences Against Men: A Requirement

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Introduction

Man is regarded as the stronger of the two genders. He is considered to be the "oppressor" and the counterpart gender as the victim. This allocation has existed since the primordial age of Homo Habilis, till the current information era of Homo Sapiens. This allotment is fallacious on the ground of generality; actions of an iota of populace being used to envelop the entire creed under judgement, which has been occurring by generalizing an entire gender on the actions of its subset containing a meagre amount of its entirety, thus subjecting innocents to unjustifiable anger and judgement. The gender earmarked as the oppressor for perpetuity can be a subject of harassment and persecution too; something the Indian law fails to acknowledge in certain areas.

It would be unfair not to acknowledge the fact that women statistically do suffer at a greater degree and at a greater frequency from sexual crimes than their male counterparts. However, it however, would also be unfair if one fails to acknowledge that notwithstanding the fact that statistically, sexual crimes against men are of a lower frequency as opposed to ones against women, sexual crimes against them do occur, ignoring this fact would contravene the Indian Jurisprudence and would be in contravention of the fundamental rights enshrined in the Constitution as well. Whilst safeguarding the rights of women and ensuring their safety is paramount, this has caused an explicit inclusion of a gender in the governing laws which in turn causes indirect exclusion of another one which opposes justice.

Despite the existence of the aforementioned fact, it is quite perceivable even at a prima facie glance at the sections involving the offences of sexual nature, that a clear ignorance is present with regards to the masculine gender *vis-à-vis* these offences. The presence of words like "woman" and "man" when describing the victim and the perpetrators, or their actions thereof respectively illuminates the

fact that one of the genders is neglected when considering sexual offences thus illuminating the clear ignorance and discrimination in the formation of the aforementioned sections.

Explicit Inclusion and Implicit Exclusion

The prevailing laws in the Indian framework suffer from the above mentioned plagues namely explicit inclusion, that refers to the explicit and visible use of gender identifying pronouns in order to direct the application of the laws, meaning that by using words like 'she', 'a woman' the law ensures that this specific gender is solely included and covered under the said law; this causes the problem of implicit exclusion, meaning that due to the aforementioned explicit inclusion phenomenon, one of the genders is visibly included under the scope of the law, this causes for the other gender to have an inability to fall within the purview of the said law. Thus, if such an offence does occur with the gender, no legal recourse is deemed possible. The best method to explain the same would be with an example.

Section 354A of the Indian Penal Code entails the offence of sexual harassment. The wordings of the law are as follows: *(1) A **man** when commits any of the following acts—*

i. *any sort of physical contact or advances which aren't welcomed and contain explicit sexual overture demanding/requesting sexual favours of any sort*
ii. *display of pornography against the will **of a woman***
iii. *making sexual remarks*
iv. *would be guilty of the offence.*

*(2) **Any man** who commits offences in clauses (i), (ii), or (iii) will be punished with rigorous imprisonment of three years and/or fine.*

*(3) **Any man** who commits offences in clauses (iv) will be punished with simple imprisonment of one year and/or fine.*[1]

Thus, as one can observe, the section describes the act of sexual harassment by allocating the males as perpetrators and the females as victims. Thus, the

[1] S. 354A (1), (2), & (3) of the Indian Penal Code, 1960

section engages in explicit inclusion by way of specifically codifying "If a man commits" whereas there is no trace of acknowledgement of any possibility of the converse happening, thus indirectly excluding a gender from the scope of the section.

Such a manner of codification creates a plethora of problems for the gender hereby excluded. In case of occurrence of any such offence, where there exists a case of implicit exclusion, seeking a legal recourse/remedy becomes a herculean task due to the lack of a codified section, Act, or Article. Hence there exists a need for creating a non-gender biased legal codex in order to preserve the rights of both genders rather than a single one.

Societal Implications

One of the primary causes for the lack of involvement of the male gender within these sections is the preconceived and pre-defined gender roles as established since the beginning of time. Men are considered as the "strong" gender, thus this assumption gives rise to two main problems: namely the pre-allocation of males as the aggressor and perpetrator as opposed to victims, and the societal pressure imposed upon them as a result of this allocation of strength, thus forcing them directly or indirectly to act in a certain method i.e. minimal display of affection that can be associated to weakness, and always acting as a pillar of strength regardless of their mental fortitude or state of mind.

Hence, this pre-allocation creates barriers in the psyche of the populace in the form of expectations and desires, such desires being unreasonable in most cases. Associating a gender with strength diminishes the possibility of allowing the same to display anything slightly to the contrary regardless of the turmoil experienced by them in their psyche, causing hesitation in expressing such emotions and even more so in acknowledging their existence.

Due to this, many cases go unreported and stay in the darkness of the shadows. The primary cause of this is the low preference given to any crimes endured by men as such crimes, if illuminated, would result in widespread mortification and humiliation and the magnitude of the crime plummets as a result and the one who experiences the crime suffers from mental agony that arises due to the reaction of the society in response to the illumination of the crime. This further causes severe psychological trauma and long-lasting damage to the victim, which in turn is also incapable of being displayed or acknowledged as it contravenes the expectation levied upon the "strong gender". This societal pressure and denial, and the resulting mental trauma therefore creates another massive problem: Suicides.

Need for Reformation in Laws for Men

A. Suicides

Doctor Vikram Patel, a renowned mental health expert, and a professor at the Harvard Medical School concurs that preconceived ideas and heteronormative allocation is a stimulus to suicide attempts. He says that in cases of male suicides, aspects of masculinity play a role multiple way, for e.g. as a barrier to acknowledgement of mental health problems and help seeking, as well as unique stressors related to being the bread-winner and the higher propensity for alcohol abuse, a key risk factor for suicide."[2]

According to a report published by the National Crime Records Bureau, in 2015, out of 133,623 suicides reported, 68% of these were males.[3]

Reports by the same agency for the years 2013 and 2012 show similar trends, with the male suicide rates skyrocketing, with 89,129 male suicide victims out of 121,650 suicides in 2014 and 96,105 male suicide victims out of 140,361 suicides in 2013. The data extends till 2015.[4,5]

As per the data of the aforementioned report, roughly 40% of suicide deaths the cause of which were marriage related issues were males, and nearly 70% of suicide deaths caused due to fall in societal reputation were males as well. These statistics show that male suicide rates are extremely high and the primary causal connection that exists between suicides and gender herein is societal backlash and marriage issues.[6,7]

Thus, the point these reports illuminate is that the gender that is often overlooked suffers tremendously. The societal expectations and the concept of

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[2] *Reporter's Diary: Looking at male suicides in India,* The Wire, available at https://thewire.in/culture/reporters-diary-male-suicides-india, last seen on 9/1/2019.

[3] National Crime Records Bureau, Government of India, Accidental deaths and suicide report of India, 2015, available at https://ncrb.gov.in/accidental-deaths-suicides-india-2015

[4] National Crime Records Bureau, Government of India, Accidental deaths and suicide report of India, 2014, available at https://ncrb.gov.in/accidental-deaths-suicides-india-2014

[5] National Crime Records Bureau, Government of India, Accidental deaths and suicide report of India, 2013, available at https://ncrb.gov.in/accidental-deaths-suicides-india-2013

[6] Supra 4

[7] Supra 5

ignorance of the suffering need to be amended. The prevalent societal paradigms are detrimental to the fundamental constitution of one's being thus driving one to end one's life, furthermore the lack of acknowledgement of the same in the legal statutes as well as the affected prevailing mindset of the society, and by extension, the judicial framework causes for denial of certain rights of an individual which directly contravenes some fundamental principles enshrined in the constitution of our country thus strict reforms in the laws and judicial framework is needed in order to be more egalitarian.

B. Statistics

Due to the aforementioned reasons, namely the fact that men, being considered as the oppressors and hence not considered as being capable of being the victims of any sort sexual offences, a cross-sectional study, funded by the ICMR, and with clearance by the institutional ethical committee, on gender-based violence against men in the rural area of Haryana was conducted for a period of one year. Herein, in this study, people from age groups as young as 21 years of age, to as old as 49 years old, living in the rural districts were considered as the sample size for this cross-sectional study, and interviews were conducted, whilst assuring utmost privacy.

The result herein total prevalence of gender-based violence was found to be 524 (52.4%) among males. The primary chunk of subjects, experienced emotional violence (51.6%) and then, 6% experienced physical violence, followed by 0.4% who experienced sexual violence by a person of the opposite gender.

Among the sample of 60 male people, the percentage of people who were a target of physical violence within the last year was 2.5%. Wherein the most common was slapping (98.3%) with the least common being with any sort of weapon (3.3%). One-tenth of the cases which were seven males, were cases where physical assaults were severe. In 100%, the spouse was the one responsible for the physical violence.

This was followed by emotional violence:

Herein, among the targets of emotional violence, 85% were criticized, 3.5% were threatened or hurt and 29.7% were insulted in front of others. Out of 516 victims, 20 (3.9%) experienced it in the last year (12 months).

Only 4, out of 1000 respondents, which is 0.1%, had any experience of infliction of sexual violence upon them, out of which only one respondent experienced it in the last year. Herein, one female engaged in employment of physical force on her spouse in order to have sexual intercourse with him, whereas three females engaged in employment of physical force in order to make him perform any sexual act contrary to his will.

The major cause for the violence inflicted was unemployment of the husband at the time (60.1%) succeeded by arguing/not listening to each other (23%) and lastly, addiction of perpetrator (4.3%). Uncontrolled anger, ego problem, etc., accounted for rest of the cases.[8]

The report illuminates that which has been in the shadows for a long time. As corroborated by the report, men do experience violence and harassment inflicted on them by their female counterparts. The violence prevalent herein is of multifarious categories, ranging from physical violence, to emotional and sexual violence. However, a glance at the Indian Penal Code expounds the unequal distribution of rights among the two genders.

This independent study was conducted by private individuals; no national reports or statistical data is available regarding sexual violence experienced by males anywhere. Numerous studies and reports illuminate the numbers, frequency and reported cases of rapes and sexual violence experienced by females, however no such statistics is available for males. Hence, as can be observed, this shows a clear ignorance in acknowledgement by the government, national agencies, and individuals that males can be victims too.

And yet no codified and cohesive law is available for recourse and remedy. No specific section in the Indian Penal Code is present, and no special Act exists to codify the offences against the masculine gender. If one suffers from an act of violence or harassment and is a male, one needs to wade through a labyrinth of legal loopholes, bureaucratic hurdles, and societal perceptions in order to enforce and secure one's rights.

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[8] *A cross-sectional study of gender-based violence against men in the rural area of Haryana, India,* Indian Journal of Community medicine, available at http://www.ijcm.org.in/article.asp?issn=09700218;year=2019;volume=44;issue=1;spage=35;epage=38;aulast=Malik

C. Imbalance of Power and Power Misuse

As rightly said by Edward Abbey: Power is always dangerous. It attracts the worst and corrupts the best. The same is visible in our society. The laws prevailing as of now bestow an astounding amount of power to the female gender not only in the legal spectrum, but in the societal spectrum as well. In the few years since the 2013 *Nirbhaya gang rape* case,[9] the societal and legal paradigms regarding the accused has undergone a tremendous recast. A single accusation henceforth, regardless of its validity and veracity, possesses the capability of causing a cataclysm in one's life. One accusation can create a tempest of turmoil capable of ripping one's life root and stem, if one is accused of a crime of this nature, burden of proof falls on the accused to prove their innocence, rather than the other way. The evidence demanded herein possess a strict criterion and thus, due to the presence of the requirement of proving innocence, lack of the utilization of *Audi Alteram Partem,* and the societal perceptions attached without substance has caused a tremendous power shift in the favor of one gender, thus creating an imbalance of power, which is frequently and tremendously misemployed.

One of the classic and the most recent example of the aforementioned power vacuum and power misuse is the recently resolved case of Sarvjeet Singh Bedi. Herein a man underwent a tremendous ordeal due to the statement of one woman. One social media posting, which, as later discovered, lacked credibility, created a havoc in this person's life and engulfed within itself his time, wealth, and reputation. Notwithstanding the fact that the accused was acquitted, one needs to analyse the damage a social media post by one person caused in another one's life. Whilst the man was undergoing humiliation, degradation, perviousness and court hearings, the accuser herein went to another country to resume her life. After missing 14 mandatory hearings dispersed in a 4-year gap, the accuser herein returned for a single one within which the verdict was delivered.[10][11][12]

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[9] Mukesh v. State (NCT of Delhi) (2017) 6 SCC 1

[10] *Delhi court acquits Sarvjeet Singh in Jasleen Kaur case,* ANI news, available at https://www.aninews.in/news/national/general-news/delhi-court-acquits-sarvjeet-singh-in-jasleen-kaur-case20191025192503/

[11] *Jasleen Kaur case: Sarvjeet acquitted after four years, netizens demand apology from Kejriwal, Arnab for maligning him*, The New Indian Express, available at https://www.newindianexpress.com/nation/2019/oct/26/jasleen-kaur-case-sarvjeet-acquitted-after-four-years-netizens-demand-apology-from-kejriwal-arnab-2053322.html

[13] *Complaint doubtful: Delhi court acquits Sarvjeet Singh in 2015 sexual harassment case,* India Today, available at https://www.indiatoday.in/india/story/complaint-doubtful-delhi-court-acquits-sarvjeet-singh-in-2015-sexual-harassment-case-1613088-2019-10-26

This case is not the sole exception, this case, along with a myriad of others like the same, the Delhi Commission for women in a report published in 2015 illuminated that around 53% of the cases involving the accusation of rape or any sort of sexual violence, are false.[13]

Performing diagnostics and analytics herein reveals the state of affairs within this country. One groundless social media post created a vortex of humiliations and insults aimed at an innocent person, the cause of which rests in the psyche of the society, namely the presumption of guilt on the accused rather than the converse. The case of *"Dimapur Mob Lynching"* stands as a prime example wherein the accused was killed by a horde of angry citizens before the final verdict i.e. before declaration of guilt.

Furthermore, lack of herculean legal penalty in case of registration of a false report, also exist as a primal cause of blatant exercise of misemployment of power.

Hence some definitive legal reforms are paramount as the lack of them creates a power vacuum and enables misuse of power, something which possesses the capability of nullifying the rights promised to the citizens of this country, and thus contravening the spirit of the constitution.

Conclusion

The aforementioned raised issues illuminate the need of reforms in the existing legal framework and the codified laws in order to transform them into being more uniform and egalitarian vis-à-vis all the genders. This shall entail alteration of the existing laws regarding sexual offences in a way that curbs the explicit inclusion and the implicit exclusion present herein. This shall require alteration of gender identifying pronouns in most of the present codified offences such as within the definition of sexual harassment and stalking (Sections 354A and 354D of the Indian Penal Code, 1960, respectively) and creation of new offences primarily targeting offences that are endured by the male stratum of the society such as addition of a new offence within the Indian Penal Code entailing the definition, explanation, and penalty regarding the rape of males, and the like.

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[13] *Does India have a problem with false rape claims?* BBC News, available at https://www.bbc.com/news/magazine-38796457

After creation of laws, implementation holds the preference. The legal framework as it exists today contains multiple lacunas that cause an increase in the magnitude and frequency of the problems faced, thus a reformation in the existing legal framework is paramount if one wishes to reform the laws in order to create a legal equilibrium.

The final step involves introduction of stringent laws in order to curtail the predicament of false allegations. Given that the punishment for rape ranges from ten years to life imprisonment, a false allegation holds within itself the potential to destroy one's life, hence, a concept of check and balance is essential in order to oversee the veracity of the accusations which is lacking in the existing legal codex. This non-existence of consequences causes a removal of the incentive to halt, thus enabling an increase of false claims. An increase in the harshness of the punishment will act as a deterrent in cases of false allegations, and thus will enable alleviation of the hardships endured due to the same.

Existence of Bigotry Towards Transgender Marriages

Srijita Dutta &
Sanchita Pathak
III BA.LL.B.

"It isn't about becoming another person- I already am who I am - I just want my body to reflect that. It's not like I am suddenly changing from the person you've always known-this is more about your willingness to see who I've always been "
- Cooper Lee Bombardier

INTRODUCTION

If you've been a part of the Indian society for a little long, it would be easy for you to decipher the audience this quote targets at. For the longest time, the transgender community has not been considered to be human and have been blackballed from the society. The amount of stigma associated with them has often gone beyond possible limits. To begin with, how do we exactly define transgender? Kessler and McKenna (1978) explained that men and women are the two main categories of gender on the basis of social criteria. People have often understood sex and gender to be one and the same thing whereas in reality a person's sex could be female but the gender to be otherwise. To emphasize more, sex is only restricted on the basis of a biological case. The minute one is born, be it a human or an animal, they are divided into two sexes. And in rare cases, some people are born with ambiguous genitalia (intersex). But when we meet a stranger, the gender is attributed to us on the basis of a variety of behaviours, ranging from body language to the way we choose to carry ourselves.[1] So in simpler terms, sex differences refer to biological features whereas gender differences refer to social attributes. Similarly, the term transgender distinguishes from transsexual. The latter did not exist until a medical diagnosis and logic of treatment took shape. Prior to these developments, there can be individuals who feel that their bodies do not represent the gender that they feel more comfortable and closer to, but they are not transsexual. They fall under the category of transgender. Transgender is an umbrella term that includes the word transsexual and not vice versa.[2]

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[1] John Archer, Barbara Lloyd, *Sex and Gender*, 17 (2nd ed., 2002)

[2] Dr.Sukanta Sarkar, *LGBT Rights: In human rights perspective*, 70 (2016).

Transgender inequality has existed in our country for quite a long period. Starting from not being able to receive education to being harassed in workplaces, they have had to fight for basic human rights which otherwise wouldn't be a task had they been acknowledged by the society. This clearly indicates how on a very basic level, it violates the main part of our golden triangle from the Indian Constitution, i.e. article 14, right to equality. There have been a lot of instances where they have been denied acceptance from their own families which is why they have been devoid of love and affection ever since they have come out of the closet. According to Human Rights Campaign Foundation, a survey among transgender proved that 41.8% of respondents have attempted suicide at least once in their teen years because of the bullying and harassment they had received at certain point of their lives.[3] In addition to the prejudice, there has been one major obstacle in the institution of marriage. One of the biggest paradox lies in the fact that something that is considered divine, consecrate and a significant part of one's life among the Indians is unfortunately still legally inaccessible when it comes to transgender in our own country. On the other hand, other countries have evolved over the time.

GLOBAL PERSPECTIVE ON TRANSGENDER MARRIAGES

In the case of *Corbett v. Corbett*[4], in United Kingdom, Justice Ormrod stated that the law should adopt the chromosomal, gonadal and genetal tests and if all three are congruent, that should determine the person's sex for the purpose of marriage. This judgement beats the point for transgender marriage if they want to marry a person of opposite sex. For example, a person who by birth is a male, and whose gender is supposedly female, will have to compulsorily marry a female because he will be considered a male irrespective of his personal choice of his gender. This judgement was passed in 1970. Few years later, in 1998, the Human Rights Act, also known as Convention Rights, set out the fundamental right to marry that everyone in the country was entitled to. This came into force in October 2000. Under Article 12[5], it protects the right of men and women of marriageable age to marry and to start a family. Then in 2002, the European

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[3]Rokia Hassanein, *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, HRC.org Blog, available at https://www.hrc.org/blog/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen , last seen on 29/12/2019.

[4] Corbett V. Corbett, 2 AII ER 33, (1970, Supreme court of Georgia).

[5]A.12, Human Rights Act 1998 (United Kingdom).

Court of Human Rights ruled that this right extends to transgender and transsexuals. They were allowed to marry as well as enter civil partnerships in the gender acquired by them because of the Gender Recognition Act 2004[6]. Further, in the case of *Attorney - General v. Otahuhu Family Court*[7] in the year 1995 in New Zealand, Justice Ellis noted that once a transsexual person has undergone surgery, he/she is no longer able to operate in his/her original sex. It was further believed that the law has technically no social advantage for not recognising the validity of the marriage of a transsexual in the sex of re-assignment. The court held that an adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex. In another case of *Re Kevin*[8] in the year 2001 in Australia, Chisholm Justice held that there was no formulaic solution to determine the sex of an individual for the purpose of the law of marriage. It was very important that all relevant matters have to be considered ranging from the individual's life experiences to their self-perception. Hence, we notice the pattern followed in the International Human Rights Law that a lot of countries have enacted laws for recognising rights of transgender persons who have undergone, either wholly or partially, sex re-assignment surgery. They have not only provided legal recognition to the acquired gender of a person but it also has provided provisions highlighting consequences of the newly acquired gender status on their legal rights and entitlements in various fields like marriage, succession, parentage, etc.

INDIAN OUTLOOK

According to the section 4 of Special Marriage Act, 1954[9], conditions for a valid marriage act are as follows:

1. *Neither party has a spouse living.*
2. *Neither party is of unsound mind, suffering from mental disorder or subject to insanity which doesn't allow them to give valid consent.*

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[6]*Article 12: Right to Marry, Equality& Human Rights Commission,* available at https://www.equalityhumanrights.com/en/human-rights-act/article-12-right-marry, last seen on 29/12/2019.

[7]Attorney - General v. Otahuhu Family Court, [1995] 1 NZLR 603 (High Court of New Zealand)

[8]Re Kevin [2001] Fam CA 1074 (Family Court of Australia)

S.4, The Special Marriage Act, 1954.

3. *The male has completed 21 years and female has completed 18 years.*
4. *The parties are not within the degrees of prohibited relationship.*
5. *Parties have to be Indians if marriage solemnized in Jammu and Kashmir.*

In the above-mentioned act, none of the provisions seems to be a barrier when marriage takes place between transgender nor are any of these violated if any of the party is a transgender. According to the Principle of Legality of Crimes and punishments, 'nullapoena sine lege' refers to the fact that an act is not considered a crime and deserves no punishment, unless the legislator has already beforehand determined and announced its criminal title and its penalty. If an act is morally rebutted or socially is against a public order, it is not regarded as a crime. Hence, we can conclude that transgender marriage is explicitly not criminalised according to the Indian Laws. But also, there is a lack of specific laws for registering marriages of transgender. The interpretation of this law got a new meaning with the judgment of the case of *Arun Kumar and Sreeja v. Inspector General of Registration and ors.*[10] This case reaffirmed that a person belonging to the third category is entitled to remain beyond the duality of male or female or choose to identify oneself as male or female. This provides a clear path to the transgenders to register their marriages under clause 3 of section 4 of Special Marriage Act, 1954 which seemed to be the only hindrance for them to obtain a legal status post marriage. The recent and first of its kind, is the marriage between Ishan and Surya, that took place in Kerala, who had undergone surgery to become trans man and trans woman respectively. Both of them took the vows as per the Special Marriage Act, 1954[11]. Another example was set forward by the transgender couple, Tista Das and Dipan Chakraborty, who got married in Kolkata on the occasion of National Transgender Day of Visibility. Tista, born as a male, gave herself a new identity as a transwoman after being diagnosed with gender dysphoria in her childhood whereas Dipan, now a trans man, was born as a female, Dipannita[12]. In the case of *Shafin Jahan v. Ashokan KM and ors*[13], it was

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[10] Arun Kumar and Sreeja v. Inspector General of Registration and ors (2019), WP(MD) No. 4125 of 2019 and WMP(MD) No. 3220 of 2019.

[11] *Kerala witnesses first transgender marriage*, The Indian Express (11/05/2018), available at https://indianexpress.com/article/india/kerala-witnesses-first-transgender-marriage-5172148/, last seen on 29/12/2019

[12] IndrajitKundu, *Kolkata gets its first rainbow wedding as transgender couple exchange marriage vows*, India Today (7/8/2019), available at https://www.indiatoday.in/india/story/kolkata-gets-its-first-rainbow-wedding-as-transgender-couple-exchange-marriage-vows-1578360-2019-08-07, last seen on 29/12/2019.

[13] Shafin Jahan v. Ashokan KM, (2018) 16 SCC 368.

said that the individual has the decision entirely of choosing his partner in a marriage. Neither the state nor the court can interfere in that arena. This is because any interference or involvement by the state is indirectly a violation of exercise of right of freedom. Also, it was added that the right to marry a person of one's choice is integral to the liberty and dignity guaranteed to persons under Article 21 of the Constitution of India. One of the most path-breaking judgments came out in the *Arun Kumar* case that upheld the fundamental rights of trans persons to enter into a wedlock under personal laws falling under Articles 14, 19 (1)(a), 21 and 25 and allowed the registration of the marriage that was between a cis male and a trans woman. The Court used the principle of statutory interpretation to hold that in the Hindu Marriage Act, 1955, under section 5, the term bride cannot remain unchanged for a long time. It will include trans and inter-sex who identify themselves as woman. This made all the complications easier and paved ways for transwomen to marry.

CONCLUSION

It is evident that laws related to marriage of transgender are prevalent more in other countries than in India. Even though in certain cases there have been judgments favouring the transgender couples, there still lacks specific and defined acts and regulations that provide for safer and secured measures in case the society does not accept its existence and backlashes at them. Further, the basic rights which otherwise a husband and wife enjoy due to their legal status as a consequence of marriage registrations, would be then made available to transgender couples if any act comes forward in the future. They would thereafter be able to live in the society with their head held high instead of having to hide it from their family and society out of shame and disgrace. It would be a staircase towards equality where love between a certain section of humans wouldn't have to search for society's approval anymore. As rightly opined by Justice Chandrachud in the case of *Shafin Jahan,* he believed that an individual's choice should be respected because it's their own. The recognition of intimate personal decisions should not be on the basis of their society's approval. It is the need of the hour that transgender marriages in India should be welcomed with open hands owing to the abuse that this community has been facing for a long period of time. They deserve celebrations, warm greetings and respect equal to that of any other Indian couple along with the significance that a normal marriage in India has been receiving. We believe that progress cannot happen if it's only the trans people taking efforts by being out in the open, it's also the society that has to truly accept the entire transgender community.

Matrimonial rights come secondary to the acceptance and approval of the transgender community that they have been craving for since the maltreatment towards them has only seemed to be going upward. Also the mere fact that these people have been denied something as necessary and basic as medical rights only because of their gender should be an alarm for the society to wake up and come to terms with the fact that a narrow mindset in general could prove to be very harmful to people who are absolutely no different from us. Do people have opinions about heterosexuals? Does anybody tell them what kind of live they should live or who to love and who to marry? The problem begins when people think they are entitled to decide all of these for them. Though slowly, there have been improvements trying to reach the surface of the law but there's always room for progress.

Contesting the Conventions: Live-In Relationships

Sumedh Kamble
I BA.LL.B.

Introduction

Live-in relationship is an engagement where two or more people, though not legally married, live together under one roof that resembles a marriage. Marriage is a huge legal as well as a social step and to plunge into something of this magnitude requires the couple to be absolutely certain regarding their preferences, compatibility and co-habitability.

The Indian society considers marriage as a divine and an everlasting union. India is a land of traditional and customary values, ethics, culture and religion because of which the bond of live-in relationship has not yet been fully and unconditionally recognised by the society. There is still a huge amount of social stigma and taboo attached to live-in relationships, as it is a kind of association which is entered into without the "sacrament" of marriage. Live-in relationships have always been a subject of deliberation as it rejects and opposes the fundamental societal framework.

As the saying goes, change is the only constant and following this ideology the Indian society has continuously witnessed social transformations in its lifestyle patterns over the past few years. The society is slowly and gradually opening up and accepting the idea of live-in relationships and various other western proclivities which are frowned upon ordinarily.

However, live-in relationships as a concept is not new to the Indian society. Earlier, people of two opposite genders would enter into a written agreement known as "maitrayakarar" to live together, to care for each other and still to be friends and not be tied into a binding legal relationship.

History of live in relationships in India

Eight types of marriages have been mentioned in the Vedas, one of which is the Gandharva type, wherein a man and a woman jointly consent to be married. This type of an arrangement doesnot require the consent of the parents of the couple or of certain specific rituals or processes to formalise the marriage. It is

an arrangement purely based on word of mouth. And yet, it comes under the umbrella of marriage. Perhaps, it is important to mention that the ancient lawgivers and thinkers made sure that dignity and respect is maintained under the Gandharva marriage and saw to it that neither the male nor the female take undue advantage of such an arrangement.

In 1817 AD, Gandharva marriages in India were legalised for some social groups by the Bengal Saddar Court.[1] In the case of *Kamani Devi V. Kameshwar Singh*[2], the Patna High Court decided that an association that has been established as a result of Gandharva marriage is legal and binding. The court pronounced that a husband cannot abscond himself from the responsibility of caring for his wife who was married in Gandharva form. The Patna Court also stated that attendance of nuptial rites and ceremonies involving Homa (prayer before the sacred fire) and Saptapadi(walking of seven steps by the groom and the bride together) is necessary for the celebration of Gandharva marriage. This ruling was quoted in the Apex Court in the case of *Bhaurao Shankar Lokhande and Anr. v. State of Maharsahtra and Anr*.[3]

According to section 114 of the Evidence Act, a bond of marriage will be presumed to have existed between the couple, where the couple have spent a long time together as husband and wife and is husband and wife in the eyes of the law. Hence, a child born out of Gandharva marriage will be considered legitimate and it will have all the rights conferred upon it by the Hindu Marriage Act, 1955.

Judicial perspective.

There is no conclusive law on the subject of live-in relationships in India. There is no code to define the rights and duties of the parties involved in live-in relationships or the children born to such couples. In the absence of a concrete law to define the position of live in relationships, the courts have come forward and provided the much needed clarity with respect to the subject of live in relationships.

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[1] John Dawson Mayne, *A treatise on Hindu law and usage,* Higginbotham, 1878, ... The validity of a Gandharva marriage between Kshatriyas appears to have been declared by the Bengal Saddar Court in 1817 ..."

[2] Kamnai Devi v. Kameshwar Singh, AIR 1946 Pat 316

[3] Bhaurao Shankar Lokhande v. State of Maharashtra and Anr, AIR 1965 1564

In the case of *S. Khushboo v. Kanniammal and Anr*[4] criminal petitions were filed against the appellant (a famous south Indian actress) after she allegedly endorsed and glorified premarital sex in interviews to various magazines in 2005. The Supreme Court held that living together is not an offence and it cannot be an offence. In the case of *Payal Sharma v. Nari Niketan*[5] the Allahabad High Court came up with a bold statement that anyone, may it be a man or a woman, could live together even without being married if they wish to do so. An identical measure was taken by the Apex Court on 15th January 2008 when a bench comprising Justices Arijit Pasayat and P. Sathasivam ruled in favour of legalising a live-in couple as they had been living together under one roof for thirty years. The Indian judicial system has readily accepted the fact that a man and a woman can live together under one roof without getting married if they so wish[6]. This may be regarded as immoral by the society but there is no provision or law that prohibits the couple from cohabitating and that there is a difference between law and morality. The Hon'ble High Courts and the Supreme Court in a number of occasions until recently have shown affirmative signs of recognising the legality of live in relationships and have also showed inclination towards a legislation being enacted towards the protection of rights of couples in live-in relationships. The Apex Court accepted that a long period of cohabitation in a live-in relationship constitutes a legal and legitimate marriage. It also accepted that live-in relationships cannot be considered illegal as there is no law stating the same.[7]

Position of children born out of live-in relationships.

The Hindu Marriage Act, 1955 grants the status of a legitimate child to each and every child born irrespective of the legality of the marriage. Even a child born as a result of void or voidable marriages is legitimate. Hence, there is no requirement of a legal provision to grant legitimacy to the child. In the case of *Radhika v. State of Madhya Pradesh*[8] the Supreme Court held that a man and a woman who are involved in a live- in relationship for a long period of time will

[4] S. Khushboo v. Kanniammal and Anr, AIR 2010 SC 3196
[5] Payal Sharma v. Nari Niketan, AIR 2001 AWC 1778
[6] Ibid.
[7] Ramdev Food Products (P) Ltd. v. ArvindbhaiRambhai Patel, (2006) 8 SCC 726
[8] Radhika v. State of M.P, AIR 1966 MP 134

be treated as a legalised married couple and their child would be legitimate. However, they are not provided with absolute legitimacy. These children are not treated equally like the absolutely legitimate children. For example, these children can only inherit from their parents.

Under the Hindu Law, the off-spring born to couples in a live-in relationship do not enjoy the maintenance right as per the Hindu Adoptions and Maintenance Act, 1956 whereas section 125 of the Cr PC, 1973 makes provision for the maintenance of the children irrespective of their legitimacy status, while they are minors as well as when they grow into adults, where such a child is unable to maintain himself.

In the case of *Dimple Gupta v. Rajiv Gupta*[9] the right to maintenance of children born out of a live-in relationship was upheld.

In Muslim law, marriage is considered as a civil contract between the two people and their families. The illegitimate child does not enjoy the right to maintenance or property rights in lines with the Hindu Law.

Rights of female in live-in relationship

In June 2008, the National Commission for Women to the Ministry of Women and Child Development to involve live-in women partners for the right of maintenance under section 125 of the *Criminal Procedure Code*, 1973. The October of 2008 saw the Maharashtra government bolstering the phenomenon of live-in relationships crediting the proposal made by the Malimath Committee and Law Commission of India, while reiterating that if a female has been in a live-in relationship with a man for a considerably long period of time, she shall enjoy the legal position as given to a wife. It was observed recently that only a divorced wife is recognised and treated as a wife in context of section 125 of the CrPC and where a woman is not married, like in the case of live in relationships, the woman cannot be divorced and hence cannot claim maintenance under section 125 of the CrPC.

Under the Domestic Violence Act, 2005 the female partner in a live-in relationship was accorded protection for the first time which considers woman

[9]Dimple Gupta v. Rajiv Gupta,AIR 2008 SC 0239

who are not legally married, but are living with a male person in a relationship, which is the nature of wife, also akin to wife, though not equivalent to wife. Section 2(f) of the Act, states domestic relationship, as a relationship between two persons who live, or at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or nature of marriage, adoption or are family members living together as joint family. Thus, the definition of domestic relationship includes not only marriage but also a relationship in the 'nature of marriage'.

In the case of *Varsha Kapoor v. Union of India and Ors* the Delhi High Court stated that a woman in a live-in relationship in the nature of marriage has right to file a complaint against the husband and also his relatives.

Conclusion

The concept of live-in relationships has come out in the open and has also gained a significant partial recognition under the law. The Apex court in various cases has held that couples who have been cohabiting for a 'reasonable period of time' shall be assumed to be married and shall enjoy such rights. However, the court has not provided clarification as to how much time shall be considered for the live-in relationship to enjoy a marital status.

Live-in relationships have still not gained legitimacy in the societal sphere. It is still a taboo in the Indian society. Through its various statements and decisions, the judiciary has made an effort to legalise the concept and protect the rights of the parties and the children born as a result of such relationships. The steps taken by judiciary are indeed practical and sensible in approach.

It cannot not be denied that our culture requires an enactment to regulate relationships such as live-in relationships which are only going to grow in number with the changing ideology of the masses and as their ties with the western culture multiply and strengthen. The time has come that efforts should be made to introduce a law to clarify the provisions with regard to the time span required to confer marital status to a relationship, registration, rights of parties and children born out of it. The Parliament should try and enact a separate branch rather than trying to bring live-in relationships under the ambit of the existing laws as such futile approaches would further adversely affect the judicial system.

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[10]Varsha Kapoor v. UOI and Ors,WP (Crl.) No. 638 of 2010.

Evolving A Legal Framework to Tackle Climate Change: A Jurisprudential Proposition

Sumedha Kuraparthy
V BA.LL. B

INTRODUCTION

The challenge of human-induced climate change has been touted to be like 'no other environmental problem that humanity has ever faced'.[1] It is now undisputed that the activities of mankind over the past few centuries have resulted in unprecedented interference in the ecological systems of the Earth leading to fundamental changes in its processes. Such changes, including climate change, are irreversible and potentially catastrophic.[2]

The prevailing legal and policy framework dealing with climate change has proven to be woefully ineffective despite the adoption of the Paris Agreement in December, 2015. The inadequacy of the much-hailed Paris Agreement is reflected in the Special Report of the Intergovernmental Panel on Climate Change of 2018 which warned that despite the commitments under the Agreement, the Global Mean Temperature is projected to increase by 3°-4° Celsius by the end of this century. Additionally, the temperature is projected to reach the threshold level of 1.5° Celsius between the years 2030-2052.[3]

There is now a growing global opinion that the peril that we are in is a direct result of the myopic economic objectives of law and governance,[4] and that we cannot

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[1] Will Steffen, *A Truly Complex and Diabolical Policy Problem,* 21, 21 in Oxford Handbook Of Climate Change And Society (John S. Dryzek, Richard B. Norgaard, & David Schlosberg eds., 2013).

[2] J.W. Rockstrom et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity,* 14 Ecology and Society 2, 32, 33, 51, 54 (2009).

[3] *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emissionpathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty,* Allen, M.R., et al., 65, 66 (2018) available at https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter1_Low_Res.pdf, last seen on 18/01/2020.

[4] Judith E. Koons, *At the Tipping Point: Defining an Earth Jurisprudence for Social and Ecological Justice,* 58 Loyola Law Review 349, 362 (2012).

[5] Nicholas *Stern, Stern Review: The Economics of Climate Change, Executive Summary* iv, v (2006).

afford a "business as usual" approach.[5] Given the magnitude of ecological crisis, it is argued that addressing the problem is not possible without challenging certain foundational values of our systems of law and governance. Therefore, there is a need for a substantial shift, a change that begins with a re-examination of our relationships with ourselves, with future generations and with our environment.

I. NATURE OF THE CURRENT LEGAL REGIME GOVERNING CLIMATE CHANGE

By the late 20th century, the international community had woken up to the reality of climate change. The first significant milestone in the history of climate change governance is the adoption of the United Nations Framework Convention on Climate Change (hereinafter UNFCCC) at the Earth Summit of 1992. Since 1992, the road to an international legally binding instrument with concrete commitments for reduction of anthropogenic emissions of greenhouse gases has been a long and arduous one which culminated with the adoption of the historic Paris Agreement in December 2015.

A. INTERNATIONAL LEGAL REGIME

The prevailing systems of law and governance dealing with environmental law in general, and climate change in particular, are based on certain premises that are categorized as anthropocentric. Anthropocentrism entails precedence of human interests over any others. In the case of early international environmental legal instruments, this approach is reflected predominantly in two forms. The first, based on the utilitarian outlook, sought to maximize the exploitation of nature's resources to cater to the unending needs and wants of humanity derived from the sovereign status of a nation. On the other hand, the second purpose pursued by these instruments was to protect the environment from pollution so as to not violate the human rights guaranteed to the populace. In later stages, the added dimension of intergenerational equity was incorporated whereby the rights of future generations were recognized, but the approach remained anthropocentric.

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[6]Bosselmann K., *Reductionist Environmental Law, in Exploring Wild Law: The Philosophy Of Earth Jurisprudence* 204, 213 (Burdon P., ed.,2011).

[7]United Nations Secretary-General's High-level Panel on Global Sustainability, *Resilient People, Resilient Planet: A Future Worth Choosing,* 1 (2012).

[8]Susan Emmenegge & Axel Tschentscher, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law,* 6 The Georgetown International Environmental Law Review 552 (1994).

[9]Ibid, at 562-564.

However, in a significant departure from the past, the multilateral instruments are beginning to be built on the recognition of the intrinsic value of nature, independent of its utility to the human race, signaling the advent of non-anthropocentrism in the international environmental legal regime.[10]

B. INDIAN LEGAL FRAMEWORK

The climate change law and policy in India is largely a by-product of the developments in the international climate change regime. India is a party to all the major climate change related international instruments namely, the UNFCCC, the Kyoto Protocol,[11] as well as the recent Paris Agreement. Most recently, under the Paris Agreement,[12] India has committed itself to, inter alia, reduction of 33%-35% in the emissions intensity of its economy by 2030 compared to 2005 levels.[13] These commitments are yet to be translated into domestic legislation.[14]

Additionally, the domestic legal framework for the protection of environment includes other legislations that provide for protection of the environment generally,[15] as well as for specific entities of the environment.[16] On the same lines as the international scenario, the common philosophy underlying the Indian approach to the protection of environment through legislation and its climate change policy is the human-centric nature of the content of these laws and policies.

II. THE NEED FOR A DIFFERENT APPROACH

While it is sufficiently apparent that the regime in place to mitigate climate, change has not been successful, it is essential that the reason for the same is unearthed. The reason for this failure is that our current governance systems as a whole are anthropocentric innature, they do not protect the environment

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[10]Ibid, at 568.

[11]Deepa Badrinarayana, *Climate Change Law and Policy in India, in The Oxford Handbook of International Climate Change Law* 689, 691 (Kevin R. Gray, Richard Tarasofsky, & Cinnamon Carlarne eds., 2016).

[12]*India Ratifies Paris Climate Agreement* (Oct 02, 2016), available at https://www.bbc.com/news/ world-asia-india-37536348, last seen on 17/01/2020.

[13]India's Intended Nationally Determined Contribution, *Working towards Climate Justice,* available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf,(last seen on 17/10/2019).

[14]*Carbon Brief Profile: India,* (March 14, 2019, 16:57 PM), https://www.carbonbrief.org/the-carbon-brief-profile-india, last seen on 18/01/2020.

[15]The Environment (Protection) Act, 1986.

[16]The Water (Prevention and Control of Pollution) Act, 1974 and The Wildlife Protection Act, 1972.

[17]Nathalie Riihs & Aled Jones, *The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature,* 8 Sustainability 174 (2016).

adequately simply because it is not their ultimate aim.[17]

An anthropocentric[18] outlook is centered in man and regards man as the final aim and end of the universe. It creates a hierarchy of interests wherein the human interests are considered to be superior to any other interest.[19] In spite of being categorically disproved by modern science,[20] anthropocentric philosophy continues to form the basis of modern-western systems of law. [21]

Furthermore, anthropocentrism incorporates a dualistic notion of the world according to which we are separate from nature, where humans are the subjects and the nature is the object that is meant to be used and even destroyed for human benefit.[22] The error of these twin notions of being separate from nature, and being superior to it leads to the fallacy that we can operate beyond the boundaries that nature has imposed.[23] Such a separation has significant consequences for the environment yet the legal philosophy does not provide our systems with any reason or mechanism to consider nature in the creation and operation of law.[24] By vesting rights only in humans and assigning any relevance to the non-human world only with respect to their value to humans, the latter becomes vulnerable to exploitation by humans.[25] For instance, permitting certain degree of pollution as a trade-off for economic growth; protective legislation only so far as it is desirable for human benefit.

Following the same pattern, the UNFCCC framework, instead of focusing on the root cause of exploitation, gives primacy to 'market fixes' to the corporate economic model that is based on the myth of endless material growth for everyone.[26] The current framework, therefore, is far from being sufficient to tackle climate change.

Hence, there is an urgent need for a paradigm shift in our outlook towards law and governance from being human-centric to being Earth-centric i.e. from

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[18]*The New International Webster's Comprehensive Dictionary of the English Language* (Deluxe Encyclopedic Ed., 2004).
[19]Peter Burdon, *The Great Jurisprudence*, 3 Southern Cross University Law Review 14 (2011).
[20]Ibid.
[21]Supra 4, at 359.
[22] Ibid.
[23]Cormac Cullinan, *A History of Wild Law, inExploring Wild Law: The Philosophy Of Earth Jurisprudence* 12, 13 (Peter Burdon ed., 2011).
[24]Supra 19, at 4-5.
[25]Thomas Berry, *The Great Work: Our Way Into the Future* 72 (1999).
[26]Glen Wright, *Climate Regulation As If The Planet Mattered: The Earth Jurisprudence Approach To Climate Change*, 3Environmental and Earth Law Journal 8, 39 (2013).

anthropocentrism to eco-centrism. One must conceive systems of law and governance with Earth at the center, preserving ecological and human health, incorporating Earth-oriented concepts in the field of law. [27]

III. IS EARTH JURISPRUDENCE THE ANSWER?

As it became increasingly clear that the climate change challenges cannot be resolved by the very same systems that engendered them, the idea of a radical new approach began to develop amongst environmentalists the world over. [28] This school of thought acknowledges that human beings are part of a larger system, the Earth community and that all its entities are inextricably interlinked.[29] It further notes that the resources of the planet are finite, thereby discrediting the limitless economic growth narrative.[30]

Earth Jurisprudence is a nascent, Earth-centric, philosophy of law first introduced by ecological philosopher Thomas Berry in 2001.[31] It aims to facilitate a viable human-Earth community with a legal system that pursues the integral functioning of the Earth process with special reference to a mutually enhancing human-Earth relationship.[32] This philosophy emphasizes that human laws must be circumscribed by fundamental ecological principles and planetary boundaries.[33] A hierarchy of two forms of law has been delineated within the aegis of Earth Jurisprudence. First, 'Great Law' or 'Great Jurisprudence' refers to the fundamental laws and principles that govern the functioning of the universe. They are timeless and unified.[34] In consonance with the current trajectory of environmental law, these principles must be defined in reference to those that are discovered vide scientific enquiry under ecology.[35] Placed below Great Law is 'Human Law' or 'Wild Law' which refers to rules or prescriptions formulated by the legislative authority of a society that are consistent with Great Law and enacted for the purpose of the common good of

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[27]Supra 4, at 52-53.
[28]Supra 26, at 39- 40.
[29]Judith E. Koons, *What Is Earth Jurisprudence: Key Principles to Transform Law for the Health of the Planet*, 18 Pennsylvania State Environmental Law Review 47, 61(2009).
[30]Supra 26, at 40.
[31]Supra 19, at 7.
[32]Thomas Berry, *The Viable Human* in *Deep Ecology for the 21st Century* 5,6 (George Sessions ed.,1995).
[33]Supra 23.
[34]Ibid*,* at 84.
[35]Supra19, at 10.
[36]Ibid, at 8, 11.

the Earth community.[36] As a result, the vital considerations that determine the actual law are - principles of ecology and the moral idea of common good.

Judith E. Koons has set forth the changes that ought to be made in the key components of law and governance on account of transitioning to a system based on Earth Jurisprudence:

- Structure - from the inherently flawed anthropocentrism to eco-centrism.
- Purpose - from the narrow conception of human good to the well-being of the Earth.
- Assumptions - from the principle of permitting pollution to precautionary principle.
- Values - from a restricted view of human economy to an all-encompassing great economy that includes within its ambit the small human industrial economy.

The aspiration is for Earth Jurisprudence to operate in a sphere that preserves human society on one hand, while on the other, a transition is made to a system that adopts a holistic perception towards the planet.

IV. THE PATH AHEAD FOR ECO-CENTRISM

The systems of law and governance internationally have so far been complicit in legitimizing the environmental degradation that has jeopardized our very existence. The said legitimization was enabled by the utter ignorance of the national and international law of certain ecological realities.[39] Such a lacuna must be rectified and the philosophy of Earth Jurisprudence seems to pave the way forward.

Earth Jurisprudence mandates that all human law be operative within ecological limits, and aim for the well-being of the entire Earth community. However, under the modern legal system that commodifies nature leading to a competition between environmental objectives on one hand, and socio-economic objectives on the other, the latter will invariably take precedence over

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[37]Ibid, at 13.
[38]Supra 4, at 362-383.
[39]Klaus Bosselmann, *Grounding the Rule of Law* in *Rule of Law for Nature: Basic Issues and New Developments in Environmental Law* 75, 75-93 (H.C. Bugge& C. Voigt eds., 2013).
[40]Ibid.

the former.[40] A foundational shift is thus necessitated.

One such approach is that of Environmental Constitutionalism. This entails the extension of the elemental principle of rule of law to nature.[41] Although rule of law means no-one is above law, it is not an absolute statement to the extent that any law, even if unreasonable, will be enforceable. Rule of law is grounded with certain requirements regarding the validity of the law itself.[42]

Currently the theory of rule of law is not calibrated to safeguard the environment, it concerns itself only with the rights of humans and their welfare. Therefore, rule of law must be grounded better to elevate environmental well-being to a foundational principle. According to Klaus Bosselmann, this approach involves two aspects: [43]

- Recognition of planetary boundaries as immutable limit on all human activities. This further leads to a hierarchy in elements for sustainable development, i.e., environment comes first, followed by human welfare and lastly, the economy.
- Reflection of this hierarchical order in the design and interpretation of laws.

The process of elevating eco-centrism to a foundational principle begins with a fundamental (i.e., a constitutional) normative commitment. This environmental commitment is to act as a grundnorm that would form the basis of creation and application of laws.[44] Simply put, this would mean that no-one is above nature.[45] A distinction must be drawn between such eco-constitutional state and a state that merely incorporated rule of law and environmental protection into its legal governance. [46]

The pivotal implication of this approach lies in the establishment of eco-centrism as a constitutional parameter to decide validity of laws.

The Indian Constitution is no stranger to the principles of environmental protection. The right to healthy and wholesome environment has been recognized as one of the unenumerated Fundamental Rights under Article 21

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[41] Supra 17, at 7.
[42] Supra 39.
[43] Ibid.
[44] Ibid.
[45] Supra 17, at 7.
[46] Supra 39.
[47] Charan Lal Sahu v. Union of India, 1990 AIR 1480; Subhash Kumar v. State of Bihar & Ors., 1991 AIR 420.

albeit as a right of a person to environment.[47] Furthermore, it lays down environmental protection as an ideal for the state to strive for under Article 48A, and as a non-justiciable Fundamental Duty of a citizen under Article 51A(g).

Although this approach is predominantly focused on domestic legal systems, the significance of an endorsement by the international regime cannot be dismissed. There is no reason why the success and effect of the Universal Declaration of Human Rights of 1948 cannot be replicated.

Going ahead of the normative changes, the following principles can be the grounds for rethinking of law. They are -

(i) Rights of Nature - Legal personhood.

Rejecting the western concept of dualism, the nature may be viewed as a self-organizing and self-manifesting entity, a subject under the law and not a mere collection of objects meant for the use of humanity.[48] It is the essence of Earth Jurisprudence that all Earth subjects possess inherent rights that must be accorded legal protection on account of their intrinsic value,[49] independent of any utility to humans. These are substantial rights of nature and not rights of humans to nature.

(ii) Localization of governance.

It has been proposed that the limitless complexity and diversity of the Earth be reflected in the democratic principles of law and governance, it being of the people and by the people but for the whole Earth community.[50] Localization of governance is a core emphasis of Earth Democracy which acts as a counter to globalization that has resulted in the loss of biological and cultural diversity that we are currently witnessing.[51]

V. CONCLUSION

As the world is gearing up to evolve varied systems to mitigate as well as adapt to climate change, we must examine the efficacy of these systems, both current and future. In order to gain any meaningful insight from such an examination, the reasons, the systems and the actions that have brought the world to the current juncture must be analyzed. Upon such scrutiny, we realize that the philosophical foundations of our modern society were flawed and acting upon

[48]Supra 29, at 53, 55.
[49]Supra 23.
[50]Cormac Cullinan, *Wild Law: A Manifesto For Earth Justice,*91, 133-134 (2003).
[51]Vandana Shiva, *Earth Democracy*, 1, 9-11, 88-89 (2005).

them unrestrictedly has pushed us to the brink of destruction. Hence, basing the plan of action to deal with climate change on those very premises is counterintuitive at best, comprehensively imprudent at worst. Re-orientation of our legal framework has been long overdue.

Climate change is the single biggest challenge that humanity had to face yet. There is no precedent and our current systems are not equipped to deal with it. The humanity is at a crossroads. The approach we choose will make all the difference.

Consequences of USA's Withdrawal from Paris Agreement

Swachita Ravi
III BA.LL.B.

Introduction

With the emergence of a new decade, mankind is faced with an enemy that threatens our very existence: climate change. These two words have brought the world together to unite our resources and fight for survival of life on earth. Global temperatures have been rising about 1°C since 1901, which has led to not only melting of the ice caps in the Arctic, but has also led to the occurrence of wildfires and droughts in various parts of the world. The global sea level has risen about 1.8mm every year causing coastal erosion and storm surges, with projected sea level rising by about 59cm by the end of 21st century. Global efforts have been undertaken to mitigate the effects of global warming and the legal world has emerged as a forefront in this battle, with international cooperation giving birth to international law on climate change. Countries came together to take collective action against global warming and entered into the United Nations Framework Convention on Climate Change (also known as the "UNFCCC"), which led to the signing of Paris Agreement, a paramount step taken under international law in protection of the environment for the future generations. Under this Agreement, countries sought to limit the rise in global temperature under 1.5°C which would substantially reduce the risks of climate change.

Paris Agreement

Under the UNFCCC, the Paris Agreement was entered into in December, 2015 and became effective on 4th November, 2016 with 195 state signatories including China, USA, India and the European Union[1]. This agreement efficiently lays down measures to mitigate emissions of green-house gases while also stating manner in which countries can adapt to the effects of global warming. The agreement also mentions the flow of finance for such measures that must be undertaken in consonance with the agreement. The Paris Agreement is said to be of paramount importance as every state party to the agreement agreed to make individual national contribution to achieve the goals set which are politically motivated and not legally mandated.

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[1] *The Text of the Paris Agreement,* United National Framework Convention on Climate Change, available at https://unfccc.int/sites/default/files/english paris agreement.pdf, last seen on 17/01/2020.

Unlike the Kyoto Protocol which established obligations which are legally binding, the Paris Agreement gives each country the power to voluntarily decide their national contribution (also known as "nationally determined contributions" or "NDCs") towards emission reduction. The long term goal set by the Paris Agreement is to keep the level of global increase in temperature below2 °C above the pre-industrial levels and at the same time, to reduce carbon dioxide emissions by 20% and to bring about 20% increase in renewable and efficient energy[2]. Also, in conformity with the international environmental goals of United Nations, the agreement urges support for sustainable development and conservation of natural resources. Further, by adopting an international mechanism to quantify and classify the damage and loss caused, the agreement sought to address those natural disasters that cannot be prevented.

Impact of Paris Agreement

Implementation of the goals set has been undertaken at the national level by various states that have successfully ratified the agreement. The European Union, which was instrumental in signing of this agreement, has been the vanguard in national efforts with its goal of 40% reduction in greenhouse gas emissions by 2030.The Climate Change Act was passed in the United Kingdom with a view to decarbonize its economic activities and a carbon emission trading system was established as a tool to reduce greenhouse gas emissions cost effectively while providing incentives for the companies.[3]

China, which has the highest percentage of carbon dioxide emission measuring around 29.4%, suffered negative aftermaths with the rise in sea level and melting of glaciers in the area along with droughts which affected the agricultural produce of the country. After experiencing the worst smog in 2011, China issued a National Strategy for Climate Change Adaptation through which forest cover has been increased and coal consumption has decreased significantly. [4]

India, which ranks fourth in global carbon emissions, has been one of the few states which have successfully kept the warming under 2°C. This has been achieved by embracing renewable energy sources especially solar power by forming an alliance with France. Also, in 2019, the Government of India

[2] Ibid.

[3] *Paris Agreement,* European Commission, available at https://ec.europa.eu/clim/policies/international/negotiations/paris_en, last seen on 17/01/2020.

[4] *How China Can Truly Lead the Fight Against Climate Change,* Time Magazine, available at https://time.com/5669061/china-climate-change/, last seen on 17/01/2020.

announced their plan to set higher standard of their pledges, while stating that of the three goals set under the Paris Agreement, the country is already close to achieving two of the goals before the 2030 deadline. Various other activities have been undertaken such as promotion of public transport over private in major cities such as Mumbai and switching from coal-powered plants to other efficient energy sources.[5]

Other countries such as Norway, have taken substantial measures in transportation sector by increasing use of electric cars. The Least Developed Countries have entered into an agreement known as the LDC Renewable Energy and Energy Efficiency Initiative for Sustainable Development, with an effort to achieve sustainable development by facilitating access to clean and renewable energy sources. However, not every country has contributed to mitigation efforts which have led to scattered results.

USA's Withdrawal from Paris Agreement

On October 19, 1993, under the presidency of Bill Clinton, the Climate Change Action Plan was announced to bring back down their emission levels by the year 2000. A Clean Air Fund was established in cooperation with the Environmental Protection Agency to finance local and state level efforts for reducing greenhouse gas emissions. Renewed efforts were undertaken by the Obama Administration to honour the commitments pledged under the Paris Agreement and the White House Office of Energy and Climate Change Policy was established to bring about changes to the earlier climate change policy and increase the national contribution pledged every year.

In November 2019, to the utter surprise of the world community, then President Donald Trump announced USA's intention to withdraw from the Paris Agreement, stating that the agreement was contrary to its economic policies and puts the country at a disadvantage compared to others[6]. Even after the country was struck with the worst hurricane season in 2019 and with recurring droughts in the southwest states, the Trump Administration questioned the existence of climate change and denounced it as being a myth created by other countries especially China to exploit their resources.

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[5] *India signals it is ready to do more to slow down climate change,* The Economic Times, available at https://economictimes.indiatimes.com/news/politics-and-nation/india-says-it-will-do-more-to-slow-down-climate-change/articleshow/70813231.cms?from=mdr, last seen on 17/01/2020.

[6] *Trump begins formal US withdrawal from Paris Agreement,* Climate Change News, available at https://www.climatechangenews.com/2019/11/04/trump-begins-formal-us-withdrawal-paris-agreement/, last seen on 17/01/2020.

Further, permission was given for the construction of the Dakota Access Pipeline, against widespread public protests and concern from environmentalists that the pipeline would pollute the water resources and also cause damage to the habitat of the indigenous Native American population in the region. The Climate Change Policy was also modified by removing barriers placed on fossil fuel industries in order to boost employment and economic returns while cancelling NASA's Carbon Monitoring System which helped keep the carbon emissions of the country in check and eliminated the carbon reduction targets.[7] All environmental policies and plans were also removed or modified in lieu of the withdrawal from international obligations set under the agreement.

Consequences of Withdrawal

Environmental Implications:

The withdrawal will first and foremost hamper the flow of finance into mitigation efforts. Due to USA's refusal to contribute to the Green Climate Fund, developing countries will not get financial support for adopting measures to counter climate change. With the boosting of coal industries to generate employment in the country, the green-house gas emissions of USA are on a constant rise and by 2020, shall contribute to 4°C increase in the global temperature. Scientists have announced that such rise in the temperature shall be irreversible and detrimental to human survival on earth. Natural disasters such as the California Wildfires have been intensified due to such increase in global temperature.[8]

India and China, the largest polluters, have wholeheartedly embraced clean energy policies which will put USA at an environmental disadvantage. Studies have revealed that expansion of fossil fuel industries shall put 2,50,000 American lives at risk every year. Ugly reality of the Dakota Access Pipeline was witnessed by the country with at least five reported crude oil leaks within 6 months of its operation, causing irreparable damage to the surrounding land area.[9] However, with the private sector stepping up, various multinational companies have vowed to decarbonize their production activities and uphold the ideals set under the Agreement. A coalition of 22 democratic individual

[7] *Trump White House quietly cancels NASA research verifying greenhouse gas cuts*, Science Magazine, available at https://www.sciencemag.org/news/2018/05/trump-white-house-quietly-cancels-nasa-research-verifying-greenhouse-gas-cuts, last seen on 17/01/2020.

[8] *Potential Implications of U.S. withdrawal from the Paris Agreement on Climate Change*, Congressional Research Service, available at https://fas.org/sgp/crs/misc/IF10668.pdf, last seen on 17/01/2020.

[9] *Five Spills, Six months in Operation: Dakota Access Track Record highlights unavoidable reality,* The Intercept, available at https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/, last seen on 17/01/2020.

states of the USA called as the United States Climate Alliance has been formed with a view to oppose the climate change policy of the Trump administration and to achieve the targets set by the Agreement within their geographical borders. The question that remains is whether the efforts of the private sector would be enough to alleviate the aftereffects of global warming.

International Economic Implications:

Post withdrawal, the industries in USA no longer have to oblige with the restrictions imposed in regards to their emissions. This in turn has led to cost reduction in production due to exclusion of environmentally conscious practices and machinery.[10] As a result, the products of USA will essentially be priced lower as opposed to those products that have been consciously made to be environmentally sound. The auto industries have expressed their alarm in regards to competitiveness with US manufactures automobiles as investments have already been made to reduce emissions and manufacture fuel-efficient cars.

The economic policy of USA, which was also modified post withdrawal, has imposed tariffs on renewable energy products such as solar panels imported from China, leading to the current US-China trade war. This has resulted in strained international relations between the two countries as climate cooperation is essential in building mutual trust.[11] China will also have to shoulder the burden of meeting the emission targets alone and to help finance the mitigation efforts in developing countries. The withdrawal might also positively uplift China's position to fill the void created by USA in the world market, with countries preferring to import eco-friendly products, thus cementing China's dominance in clean energy projects.

New alliances may also be formed between China, India, EU, Canada and South Africa to accomplish sustainable development goals, which may lead to a shift in the existing international trade trends. Such alliance would also help facilitate flow of finance from developed to developing countries with renewed mitigation and adaptation efforts and enabling North-South climate cooperation. India's position as a global leader in efficient energy will also be

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[10] Supra 8.

[11] *Look to the Solar Industry for Answers About the Trade War's Impact,* Greentech Media, available at https://www.greentechmedia.com/articles/read/look-to-the-solar-industry-for-answers-about-trade-wars-impact, last seen on 17/01/2020.

positively affected in tune with the climate policy of the country and its reaffirmation to the long-term goals of the Agreement. Export of eco-friendly products from India are also expected to rise in the coming years due to use of cheaper clean-energy alternatives in manufacturing processes.

Domestic Implications:

USA's decision to withdraw has been met with widespread protests by the public, with hundred thousand people taking to the streets in various cities to oppose the decision and urge the government of USA to rethink its policies. Detention and arrest of protestors has also called human rights into question and has resulted in various petitions being signed in order to garner global support against Trump administration. Countless campaigns on social media have been started in support of climate change activists with various celebrities championing for the cause and publicly being arrested. [12]

Even the business leaders of the country have spoken up and have announced their contributions towards Paris Agreement. Companies such as General Motors and ExxonMobil stated their intention to undertake measures to combat carbon emissions. CEO of Tesla, Mr Elon Musk, resigned from presidential advisory councils in protest of the withdrawal and other executives such as Google CEO Sundar Pichai and Facebook CEO Mark Zuckerberg committing their company's resources to help overcome global warming.[13] But what is unclear is whether the removal of carbon emission barriers will prompt the industries to exploit the natural resources of the country beyond their reversible limits? The health of countless Americans is on the line and with the increasing carbon emissions of the country, soon the country will have no clean air to breathe.

View of the International Community

USA's drastic move in withdrawing from Paris Agreement has met with resounding backlash from the international community. Countries such as Canada, China, India, Argentina and Germany professed their unwavering support to the agreement with France imposing trade barriers on USA's imports as a reaction. However, there is a growing concern that due to USA's

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[12] *Protesting Climate Change, Young People take to the streets in a Global Strike,* The New York Times, available at https://www.nytimes.com/2019/09/20/climate/global-climate-strike.html, last seen on 17/01/2020.

[13] *Automakers unshaken by Trump's move on Paris Accord,* Automative News, available at https://www.autonews.com/article/20170605/OEM11/170609892/automakers-unshaken-by-trump-s-move-on-paris-accord, last seen on 17/01/2020.

withdrawal, various developing countries may also pull out of the agreement due to lack of support or due to pressure in competing with USA's products.

The withdrawal has also led to a lack of consensus in further climate change conferences. For example: the COP25 held in 2019 was called as a failure as countries were unable to agree on a limit of carbon emissions. Such interruptions in international cooperation might lead to overall collapse of global mitigation efforts, thus endangering other international obligations such as the sustainable developments goals of the United Nations. The differing views of the international community on environmental efforts have also adversely affected trade and economic relations. The European Union refused USA's proposal for trade alliance and reiterated their intention to meet the carbon emission targets in the coming decade, with or without USA's contribution.

Future conferences, including the COP26 to be held in November 2020, will decide how international action against climate change shall proceed, considering the failure of COP25. With the UN Climate Action Summit that was held in 2019, sixty-five countries pledged to completely eradicate greenhouse gas emissions while the private sector companies pledged to bring in zero carbon economy by 2050. However, even this summit was a failure as China refused to increase its commitments under the Paris Agreement while India refused to stop coal industries and the USA conspicuously did not speak at all in the summit.

Keeping in mind the current scenario and the lack of governmental action against global warming, it is the plight and initiatives of private individuals that are instrumental in bringing about awareness and change in the world. The voice of a young woman boldly questioning world leaders on their fanciful ambition of eternal economic growth gained international recognition and Greta Thunberg became an inspiration for global climate change activism. Her speech at the UN Climate Action Summit went viral on social media after she exclaimed emotionally, "How dare you look away from the scientific evidence and claim you're doing enough when the politics and solutions needed are nowhere in sight!". Her speech and her determination in climate change activism brought together millions of people who gathered for climate marches against the inactions of the governments of their countries.

What is yet to be seen is how far such actions and protests influence governmental action. Even with countless petitions and growing public

pressure to tackle the climate crisis, world leaders continue to work towards economic growth and development and have shown little care for environmental impact of their actions. USA's withdrawal from the Paris Agreement may just cause a chain reaction that prompts other countries to let go of their pledges and follow the path to environmental exploitation for economic growth. Even in case of India, while the government has pledged to bring in renewable and clean energy sources, the rise in coal industries would negate any mitigation measures and would eventually contribute to the rising global temperature. Widespread deforestation activities in the name of infrastructure development and financing of technologically advanced projects are undertaken to uplift their economy at the cost of environmental regression. Without government initiatives, the private sector is crippled from taking responsible decisions to help restore the environment and the climate crisis shall continue to plague the earth.

Conclusion

Paris Agreement was a necessary step to promote international cooperation to mitigate global warming but due to unequal efforts, rise in global temperature has accelerated beyond the limit envisioned of 2°C every year. Projections show that increased economic and industrial growth will lead to 62% increase in total carbon emissions and the resulting evapotranspiration, due to warmer air, will lead to devastating thunderstorms and flash flooding. Continued rise in atmospheric carbon dioxide above the 400ppm level would contribute to uninhabitable atmospheric conditions that cannot sustain life. Mitigation efforts are of utmost necessity and the real power rests with the public who must influence and pressure the international community to take environmentally conscious decisions. In the words of Martin Luther King Jr, *"The time is always right to do what is right"* and we must not delay in taking a stand for what must be done to protect the world of tomorrow.

Education: Whether A Service Under he Consumer Protection Act, 1986?

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Introduction:

In Ancient era, Education was a privilege given to a very few in the society. The Guru (Teacher) used to guide his Shishyas (Students) in their path to knowledge and enlightenment. This tradition is famously known as Guru-Shishya Parampara in India. Education in India is always considered as a spiritual devotion and as one of the paths to achieve enlightenment.

In the 21st century, with the industrial revolution and development in international trade and commerce, there has been an increase of business and trade. In this regard, to protect the interest of consumers many laws have been enacted. However, there is no any effective Act which can protect the rights of students as Consumer from the deep rooted network of 'business' of education sector.

Education in India:

In India, education is of vital importance. The makers of Constitution of India considered education as a tool to develop the personality of an individual as well as a need for the progress of the nation. The importance of education was recognized by way of inclusion of Education under Fundamental Rights, Directive Principles of State Policy and Fundamental Duties inthe Constitution. The Articles which recognize Education as a basic human right of an individual are given as follows:

1. Right to education.[1]
2. Right of minorities to establish and administer educational institutions.[2]
3. Right to work, to education and to public assistance in certain cases[3]
4. Provision for early childhood care and education to children below the age of six years.[4]

[1] Art. 21A, Constitution of India.
[2] Art 30, Constitution of India.
[3] Art 41, Constitution of India.
[4] Art 45, Constitution of India.

5. Promotion of educational and economic interests of scheduled castes, scheduled tribes and other weaker sections.[5]
6. A parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.[6]

In the last 20 years, education in India has undergone a major transformation. The shift in emphasis from literacy to quality education has led to an organized education sector but still there is a lot to be done in the field of education and Consumer Protection. Inclusion of Education as Service under Consumer Protection Act is part of it.

Definition of Consumer:

A person who purchases a product or avails a service for a consideration either for his personal use or to earn his livelihood by means of self employment. The consideration maybe: Paid and Promised or partly paid and partly promised. The beneficiary of such goods/services is also consumer, when such use is made with the approval of such person.[7]

Student - Whether A Consumer?

Since education has great importance in our society, the important question arises whether a student is a consumer or not? There are two opposite views in this regard. According to one view, there is no justification to bring educational institutions and students within the purview of Consumer Protection Act.[8]

According to the other view, education has been recognized as a fundamental right and hence education is closely related to future of the students. A heavy fee is charged from the students for imparting education. Thus, educational institutions and students must be within the purview of the law as this will help in imparting better education to the students and will also serve in national interest, as the future of the nation depends on the good education. The views of the different Commissions have not been consistent in this regard. Sometimes, the reliefs are granted whereas sometimes ithas been denied.

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5. Art 46, Constitution of India.
6. Art 51A(k), Constitution of India.
7. S. 2(1)(d), Consumer Protection Act, 1986.

A few rights (non-exhaustive) which are very essential to protect the interests of every student in the field of education are mentioned below:

i) Right to receive good quality education

ii) Right to Safety

iii) Right to get receive all benefits such as library, auditorium, study materials etc.,

iv) Right to be informed

v) Right to be Heard

vi) Right to Consumer Education

vii) Right to seek Redressal

Further, there are ample propositions in case laws to show that student is a 'consumer' and education is 'service' under the Consumer Protection Act:

(i) A candidate who pays fees to a university for appearing in examination is a consumer. Examination and publication of result is a service.[8]

(ii) Failure to issue roll number in time is a deficiency in administrative aspect relating to education service.[9]

(iii) The University is liable for negligence and deficiency of service because the students were deprived of their right to appear in examinations.[10]

(iv) Imparting of education by the state clearly comes within the concept of service as defined under clause (o) sub-section (1) of Section 2 of the Act.[11]

(v) A student is essentially a consumer of services in an educational institution. Therefore, when there is no service there is no right with the college to appropriate fees. If it insists to college fees without imparting education, it will amount to deficiency. [12]

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[8]Manisha Samuel vs. Sambalpur University, (1992) 1 CPR 215 (NC).

[9]Controller of Examination, Himachal Pradesh University v Sanjay Kumar, (2003) 1 CPJ 273 (NC).

[10]Ravinder Singh v M.D.U. Rohtak, (1996) 1 CPR 86.

[11]Tilak Raj of Chandigarh v Haryana School Education Board, Bhiwani, (1992) 1 CPJ 76 (P & H).

[12]Abel Pacheco Gracias v Principal, Bharati Vidyapith College of Engineering, (1992) 1 CPJ 105

Definition of Service:

A service of any description which is made available to potential users and includes, but not limited to, the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.[13]

Meaning and Scope of The Service:

The word 'service' has variety of meanings. The concept of service thus is very wide. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' means 'one or some or all'. The use of the word 'any' in the context has been used in the clause (o) indicating that it has been used in a wider sense extending from one to all. The other word 'potential' is again very wide. Service which is not only extended to actual users but those who are capable of using it is covered in the definition.

Education - Whether A Service?

1. Explanatory and Expandatory Definition:

The first part of definition of Service under the Act includes any description of service and not limited to the provision which makes definition inclusive and not conclusive in nature. The second part of definition states that Service is available to potential and actual users who are capable of using it. The students are potential users in the sense that education as a service is itself created for benefit of students and they are capable of using it. The third part of definition indicates Service should not be free of charge or under a personal service. Education is not free service or contract of personal service as students pay heavy fees as consideration for receiving education.[14]

2. Influence of Advertisement:

Today with modern methods of advertisement in media, every Institution is influencing the minds of parents through various modes of advertisements including print, social and digital media. The object of imparting education by

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[13] S. 2(1)(o), Consumer Protection Act, 1986.
[14] LDA v M.K. Gupta, AIR 1994 SC 787.

institutions is getting neglected and student as consumer is getting influenced with infrastructure and other promotional activities by paying heavy fees as consideration. The modern methods of advertisement in media influence the mind of the consumers and notwithstanding the manufacturing defect or imperfection in the quality, a consumer is tempted to purchase the goods. For the welfare of such consumer and to protect the consumers from the exploitation to provide protection of the interest of the consumers, Parliament enacted the Consumer Protection Act.[15]

3. Relationship of Student and Educational Institutions/University:

A University is the creation of law made by the Union or State Legislature under Entry 66 of List I- Union List and Entry 32 of List II- State List respectively. Education imparted by University/ Institutions can be classified into two parts: a) Core Services b) Ancillary Services

Core Services:

It includes the objects of the University under Section 5 of Central University Act, 2009.

i) To disseminate and advance knowledge by providing instructional and research facilities in such branches of learning as it may deem fit

ii) To make special provisions in integrated courses in its educational programmes

iii) To take appropriate measures for promoting innovations in teaching learning process and inter disciplinary studies and research

iv) To educate and train manpower for the development of the country

v) To establish linkages with industries for the promotion of science and technology

vi) To pay special attention to the improvement of the social and economic conditions and welfare of the people and their development.

Ancillary Services:

These are support services which provided to students to improve the leaning experience and advance academic outcomes. Today ancillary services are important and valuable as every parent looks education as investment to get quality education for their children. Services includes Transport service, hostel

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[15] Skypack Couriers Ltd. v Tata Chemicals Ltd., AIR 2000 SC 2008.

or accommodation facilities, library, auditorium, laboratory, gymnasium, canteen, internet service, supplying study material, books, electronic materials etc.

Above services are provided by institutions to students as student is direct beneficiary of all this services by paying fees as consideration. Institution and Student are inseparable. As without student there cannot be institution and vice versa. The relationship between Student and University/Educational Institution shall be of consumer and service provider when a student only after complying the requirements fixed by the university in terms of its rules and guidelines can claim his entitlement as a consumer of service and if the Institution/ University fails to comply with this requirement then it shall be deficiency in service under the Act.

4. Interpretation of Act:

When Court interpret an Act it must take into consideration the existing social conditions and cannot interpret it in a hyper-technical or highly abstract manner which has no connection with the existing social reality.[16] Today Education as Service is existing social reality and present social conditions have influenced the education to be part of Service field.

5. Objects and Reasons of Act:

It is a well known rule of Interpretation of Statutes that the Court must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act.[17] The object and reasons of Act seeks to promote and protect the rights and interest of consumers. But with Education not part of definition of Service, the administration part of institutions gets free hand to implement the rules and regulations without any manner and process according to the rule of law and students as consumers are devoid of their Consumer Rights leading to ruining their careers and wasting their valuable time.

6. Intention of Legislature:

Education as Service under Act is open to more than one interpretation. Under Twelfth Report on Consumer Protection (Amendment) bill, 2001, CHAPTER II REPORT clause 2.3 proposes The Committee considered the amendment proposed by the Government in details and felt service like Education and matters incidental thereto should be added.[18]

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[16] Ganesh Chandra Bhatt v District Magistrate, Almora, AIR 1993 ALL 291, 295.
[17] S. Gopal Reddy v State of A. P., AIR 1996 SC 2184.
[18] The Consumer Protection (Amendment) bill, 2001 (pending).

7. Beneficial Legislation:

Ambiguity in legislation should be granting rather than denying the benefit. In interpreting a beneficial legislation enacted to give effect to directive principles of the state policy which is otherwise constitutionally valid, the considerations of the court cannot be divorced from those objectives.[19] A student's right to education is circumscribed by the limits of the economic capacity of the State and its developments. The Right to Education is implicit in the right to life and personal liberty guaranteed by Art. 21 must be construed in the light of the directive principles in Part IV of the Constitution.[20] Inclusion of Education in Service shall be one step closer towards achieving the Directive Principles of State Policy.

8. Rule of Ejusdem Generis:

The ejusdem generis rule strives to reconcile the incompatibility between specific and general words.

This doctrine applies when-

i) The statute contains an enumeration of specific words

ii) The subject of enumeration constitutes a class or category

iii) That class or category is not exhausted by the enumeration

v) The general term follows the enumeration

v) There is no indication of a different legislative intent.[21]

The rule is that where specific words have common characteristics and any general words that follow should be construed as referring generally to that class. Education is similar class or category of subject contained in the statute which provides Service for consideration and to protect the interest of Students as consumer the doctrine of Ejusdem Generis should be applicable for inclusion of Education as Service under the Act.

Judicial Approach:

1. *Maharshi Dayanand University v Surjeet Kaur*[22]

A student had enrolled in two courses simultaneously, one full-time course and one correspondence course. The University discovered that such enrolment

[19] Gurucharan Singh v State of Haryana, AIR 1979 P& H 61.
[20] Unni Krishnan J.P. v State of A.P., AIR 1993 SC 2178.
[21] Amar Chandra Chakravarthy v Collector of Excise, Government of Tripura, AIR 1972 SC 1893.
[22] (2010) 11 SCC 159.

being contravention of the rules directed her to enroll only in one course. However, student participated in the both exam and passed in it. However, university refused to confer the degree on student being in contravention of the University rules.

The Supreme Court held that, Statutory laws of the university and consumer protection law both are enacted in order to make the functional activity of the university effective and at the same time to protect the right and interest of the student safe so these two laws should reinforce each other to protect the interest of both student and university. University has the statutory power to enact laws, make ordinances in respect of functioning of the university. If any action taken by the student in contravention to the existing rules and regulation of the university enforced at the time of the action then the student is liable to face the consequences as per the existing rules. Therefore in these circumstances, the student cannot claim relief available in the Act 1986 as a consumer of service.

2. *Anand Institute of International Studies v Sanni Jaggi& Others* :[23]

The students were aggrieved by an institution due to lack of basic educational facilities and false advertisement misguiding them to undertake admission in such institution. It was further found that the institution also lacked required affiliations and was continuing operations without getting the same.

The NCDRC upheld the decision of the District forum and State Commission and ruled in favor of students observing that, inadequate facilities amounts to deficiency in services and false advertisement further promotes unfair trade practice.

3. *Manu Solanki &Ors. v Vinayaka Mission Society* :[24]

The Vinayaka Mission Society had indulged in deficiency of service and unfair trade practice by inducing students with false assurances to admit in the offshore program comprising of two year study in Thailand and two and half year study in their university to avail final degree of MBBS. It was assured that the University was recognized by the Indian Government and Medical Council of India.

The NCDRC relied upon the ratio of Maharshi Dayanand University v Surjeet Kaur case and concluded that, Institutions rendering education, including vocational courses and activities undertaking during the process of pre-

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[23] Revision Petition No 767 of 2019 (NCDRC).
[24] (2020) SCC 7 (NCDRC).

admission as well as post-admission and also imparting excursion tours, picnic, extra co-curricular activities, swimming, sports etc. except Coaching Institutions, will not be covered under the provisions of the Consumer Protection Act, 1986.

International Scenario:

The Consumer Protection Act in countries like USA, UK and South Africa is generally applicable to the relationship between universities and undergraduate students studying for purposes which are outside their trade, business or profession. The Consumer rights provide students to get the information in deciding which university and course to choose, to get fair and balanced terms and conditions from university and help students regarding any complaints if they are dissatisfied with an aspect of the educational service.

Conclusion:

India has one of the youngest populations in an aging world. Education sector has become a deep rooted connected network of business. In a country like India where privatization of education sector and unemployment is on the rise, there is no check and balance system for Institutions/Universities. In view of above mentioned justifications, it is legally and logically supported that Education is Service under the Act. Therefore to conclude, Education should be included in the definition of Service under the Act and University/ Educational Institutions should be within the ambit of Consumer Protection Act, so as to protect and promote the interests and welfare of students as Consumer.

Macaulay's Education Policy Of 1835: How the Indian Education System Was Modernised

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Introduction

If you are an Indian familiar with English, it is probably because of being educated in an English-medium school. But how did English become such a crucial element of the Indian education system? This article aims to understand the transformation of the Indian education system by focusing on the transition from Oriental learning to Western learning.

Historical Context

The British East India Company was a joint stock company. It was a private company that came to India to engage in trade of spices. In the year 1757, Robert Clive won the Battle of Plassey against the Nawab of Bengal called Siraj-ud-daulah, hence laying ground for the establishment of an East India Company in India. The presence of East India Company in India is seen from 1757-1857.

Significance of The Charter Act Of 1813

The above Act passed by the British Parliament (in England in 1813) provided for a greater role by the East India Company in the education of Indians. A sum of 1 Lakh Rupees annually was sanctioned for the above cause. The Charter Act of 1813, was to provide for *"the revival and promotion of Literature and the encouragement of learned natives of India and for the introduction and promotion of a knowledge of the sciences among the inhabitants of British territories"*[1]. A sum of 1 Lakh Rupees was sanctioned for the above cause. The inflow of funds to the British East India Company for educating Indians lead to a very pertinent question- should the funds be invested in Oriental or Western education? This debate lead to a delay in the enjoyment of the allocated funds by the Indians until 1823.The year 1823 marked the creation of the 'Committee of Public Instruction' owing to the greater emphasis placed on the education of Indians.

[1]Clause 43 of 1813, Charter Act

The Orientalist-Anglicist Debate:

The Orientalist-Anglicist debate is a popular debate that clouded the Committee of Public Instruction. A consensus was reached by its members as to which form of educationi.e., Oriental or Western education should be promoted in India. The Orientalists favoured the learning of Sanskrit, Arabic and Persian knowledge and its traditional literature. On the contrary the Anglicists underscored the importance of Western learning to inculcate in Indians, western modes of thoughts so as to *"raise the country from the backward economic, administrative and social conditions."*

However, the Anglicists and the Orientalists concurred that the vernaculars-Sanskrit, Persian and Arabic were not the right medium to propagate a 'modern useful education' since they were too inadequate in structure and vocabulary. The vernaculars also lacked books and the task of translating advanced works of Western learning to vernaculars was tedious and demanding. In the course of time, the Orientalist-Anglicist debate was dwindled to Sanskrit and Arabic versus English. The Orientalist Anglicist debate lingered on without arriving at a conclusion and soared to new heights during Bentick's reign.

William Bentick

Bentick was appointed as the Governor General of Bengal and it was during his rule that the Orientalists-Anglicists dissent escalated. During Bentick's rule it was strongly realized that in order to govern India effectively, the East India Company would need assistance of the Indians. The home authorities in England heavily endorsed the setting up of an education system that would produce capable and trustworthy servants.[2] Moreover, to ease the burden that had befallen upon the British administration in India, the 'Charter Act of 1833'was passed by the British Parliament (England).The Act opened channels for unrestricted European immigrants. This foreign group would now be able to compete with the indigenous inhabitants (Indians) to secure jobs in the East India Company's service. Hence now it would be necessary for the Indians to acquire a western education to be able to land up in government posts. The Charter Act of 1833 also lifted the discriminatory practices on the basis of birth, creed and colour of a person, to seek government employment. This indicated that for the upliftment of Indians, this policy was instrumental as now every

[2]Although anxious to obtain a supply of public servants, the home authorities did not desire the general replacement of Oriental by Western education (Parl Papers,1831-2)

male could compete for government posts, irrespective of his social standing. Moreover, European immigrants could also do the same.

Bentick's Take on The Oriental Versus Western Education

Bentick believed that English was the 'key to all improvement'[3] According to Trevelyan, Bentick was fully sympathetic to the 'extremist English view' to revive India and was merely waiting for an opportunity to effectuate the Western education. Bentick was a liberal Governor-General of India.

In January 1835, a deadlock was witnessed in the Committee of Public Instruction over two specific issues-making English compulsory for the students of Calcutta and Madras who received a stipend from the Government. The second dispute being the Orientalists contending that the scale of the Agra college establishment is insufficient for Oriental learning. Collectively these two problems compelled the Committee of Public Instruction to consult the government for its direction. The matter was referred to Thomas Babington Macaulay.[4]

Cornerstone of Modernisation Of Indian Education System-Macaulay's *'Minute'*

Enough stress cannot be laid on the contribution made by Macaulay in the realm of education. He was undoubtedly responsible to add a unique milestone to the journey of modernisation. His conviction coupled with the Gift of Gab acted as his arsenal. His reform in Indian education system left permanent mark on the fabric of India.

What Is Macaulay's *'Minute'*?

Thomas Babington Macaulay's 'Minute' dated 2nd February,1835 is the soul of modernisation of the Indian education system. It essentially is a speech that expresses and advances his arguments to 'westernize' the traditional nature of the Indian education system. The *'Minute'* is treated as a famous treatise or policy on education, adopted by the British in the Committee of Public Instruction. It was because of this radical education policy that English was

[3]Bentick papers, Bentick to Metcalfe,16th September,1829

[4]The General Committee on Public Instruction constituted equal number of Orientalists and Anglicists; hence the issue was taken to Governor General in Council. This made Bentick (the Governor General) to refer the matter (Oriental Western education) to Lord Macaulay

made the official language of the Government and Courts. Moreover English was adopted as the official medium of instruction. In essence, the 'Minute' stands for educating Indians through English and to acquaint the Indians with a scientific bent of mind.

Analysis of Macaulay's *'Minute'*

The Committee of Public Instruction had funds at its disposal to invest in the intellectual growth of Indians. According to Macaulay, the existing Oriental education was creating a class of people who were the 'champions of errors' and whose education was a 'dead loss'. Macaulay firmly opined that Oriental education grappled with absurd phenomena like how to purify oneself after touching an ass or after killing a goat. If the western education was imposed on the Indians, they would be subjected to the study of useful subjects like Astronomy, Medicine, History, Philosophy, European Science, etc which were not devoid of scientific or literary information, unlike Oriental learning. According to him, if the English literati had not accustomed themselves with ancient Greek and Roman writings, they would have never produced a Shakespeare. He astutely commented"*what the Greek and Latin were to the contemporaries of More and Ascham, our tongue is to the people of India*" This particular comparison highlights the element of modesty Macaulay embodied. And it worked brilliantly to water down the Opposition's (Orientalist's)case. Macaulay passionately put forth his contentions to westernize the Indian education and substantiated it with the example of Russia. He recalled that Russia was civilized due to the introduction of 'foreign languages' in which contained an abundance of knowledge-a plethora of useful information. He aptly commented, "*I cannot doubt that they will do for the Hindoo what they did for the Tartar*". He meant that the British Language facilitated the upliftment of Russians and in the Indian scenario he did not doubt that the British Language would do the same for the Hindoos (Sanskrit). Macaulay added more weight to his speech by talking figuratively. For instance, he questioned that would it be wrong on the builder's part to stop constructing the building which he knew would be deemed 'useless' in the future? The builder here was the British and the building symbolic of Oriental Education.

Different Dynamics

STIPENDS

Macaulay was bewildered by the practice of paying stipends to the students of Sanskrit, Arabic and Persian (oriental learning). He questioned that do Indians need to be paid for eating rice? If not, then why was the East India Company compelled to remunerate the pursuers of Oriental learning? On the other side,

the students were paying their English educators to procure an English education. Macaulay found the practice of paying stipends to students strange.

BOOKS

Then Macaulay focused on the state of books. He contended that Sanskrit and Arabic books were finding no buyers. He supported his contention with data. He said that the Company spent Rupees 23,000 annually to print Oriental books. 23,000 volumes of Oriental books already saturated the library. However, such a production was yielding no returns, as the books had no buyers, merely good quality paper was being squandered to print such books. The effort was obviously going in vain and till then the sale had generated not even Rupees 1,000. On the contrary he asserted that the School Book Society (engaged in producing English works) was known for selling 7,000-8,000 English volumes every year. Moreover, a profit of 20% was also earned by the Society.

Which Language Is Best Worth Knowing?

Macaulay explicitly juxtaposed the languages to estimate which one was 'best worth knowing'. While doing so, Macaulay came off as biased towards his mother-tongue-English. Macaulay remarked that he had no knowledge of either Sanskrit or Arabic. However, he had read translations of the most celebrated works of Sanskrit and Arabic. Furthermore, he asserted that he had not yet then met one person who had refuted that 'a single shelf of a good European library was worth the whole native Literature of India and Arabia'. We understand that Macaulay's emphasis on the distinctions in languages, was brimming with culturally loaded and biased perspectives. He then shifted his attention to poetry and noted that Eastern poetry is held highly by the intellectual elites. However, poetry, he pointed out, is 'work of imagination' and it was well known that 'work' in which 'facts' are recorded, was more esteemed. Further, the outrightly insulted Sanskrit by commenting that historical knowledge extracted from Sanskrit books was 'less valuable' than the historical knowledge gained from trivial excerpts used at preparatory schools in England. Macaulay was quite blatantly downgrading the Eastern languages. He argued that the usage of funds (gained by the virtue of Charter Act of 1813) for the encouragement of Oriental learning would be 'downright spoliation'. In such a way was his hatred towards Oriental learning sensed.

Concluding Remarks of Macaulay

Macaulay was irked by the number of petitions filed by students who had graduated in Sanskrit or Arabic learning. Since these graduates were unable to procure 'employment' it seemed to Macaulay that the deliverance of Oriental learning was the 'wrong' committed against the students and hence, the students claimed 'compensation' for a wrong done to them. By connecting the petition dynamics to the legal premises, Macaulay quite successfully invoked a very strong argument. Macaulay stated that over 500 rupees a month were used to pay stipends to the students of Mudrassa (who are 77 in number). That was a serious loss that had to be eradicated. Henceforth, all the stipends paid to the students would be immediately revoked. Also, consulting the Indians on this front would be a futile exercise since they were not intellectually capable enough to understand what was 'most fit for them'. He intimated that *"It would be bad enough to consult their (Indian's)intellectual taste at the expense of their intellectual health".* What nauseated should be discarded and Macaulay had established that Oriental learning 'nauseated' the Indians. It is a broad generalisation made by him. He mentioned that the creation of a Law Commission in India would very soon render the 'Shastras' and 'Hedaya' of Sanskrit and Arabic redundant and it would be manifestly absurd if generations of students were taught Oriental learning till then. Macaulay discouraged educating Indians in something and about something which would be 'deemed' obsolete in the near future. He wanted to build a class of interpreters who would be the bridge between the English and the Indian masses. It was this class produced that should be given the autonomy to decide for the modification of the vernacular dialects of the country by enriching them with science borrowed from the Western nomenclature. Macaulay observed *"We must at present do our best to form a class who may be interpreters between us and the millions whom we govern-a class of persons Indian in blood and colour, but English in tastes, in opinions, in morals and in intellect."*

KEY TAKEAWAYS FROM THE *Minute*

1.Macaulay would stop printing Sanskrit and Arabic books.
2.No stipends would be given to students.

3.Only the Sanskrit college of Benaras and the Mohemmedan college at Delhi would be kept operational as the hallmark of Oriental learning. However, no stipends were to be given anywhere.

4.It was impressed upon the minds of people that English was better worth knowing than Sanskrit or Arabic.

Loopholes in The Minute

Macaulay's policy is 'imposed' in a way as no discussion was held to hear the other side (Orientalists). H. T Prinsep, identified as an Orientalist stated his 'refutations'[5] after Macaulay gave his speech but were not considered, Prinsep was assured that Macaulay's speech-policy would be reviewed by way of deliberations-but that never happened. Moreover, Prinsep was severely rebuked for exceeding his authority. Hence there was an element of deception in the implementation of Macaulay's policy-as no differing opinions were taken into account. Macnaughten pointed out that how were the Indians supposed to assimilate a foreign culture and expected to be proficient in English, under unfavourable conditions? He argued that Indians interested to learn English were merely seeking it as an instrument of bread-winning and not because they wanted to pursue it. Moreover, Macaulay's education policy isolated the desires and sentiments of Indians. Macnaughten wondered whether Indians studied English for its own sake intrinsically or for the sake of 'pecuniary advantages'. He expressed that a majority of Indians did not wanted to end-up in destitution and hence their natural choice was to acquire an education that met their needs. Prinsep had suggested that Indians should be given the liberty to choose their education. Any deviation from this would lead to 'feelings of distrust and irritation' amongst the Indians. The way in which Macaulay decided to westernize Indian education would result in 'acute suspicion and hostility' towards the British. There was a high possibility of perceiving this step as a 'propaganda' to alter the 'outlook' of the Indian people in general.

What the Court Ruled

The Court ruled that the impetuous and arbitrary action of the Bengal Government in adopting policies, drastically different from the court's opinion, would stir a sense of disaffection amongst Indians as it could be seen as an 'attack on the religion and customs of the Indians' .The Court also opined that the Committee of Public Instruction should go ahead with bringing reforms, but with slow-paced, careful deliberations. Suddenly bringing in a major reform was unpalatable. The Court maintained that earlier, the Indians could gain

[5]Prinsep had made a formal note in refutation of the views stated by Macaulay. The essence of Prinsep's argument in the note was that the most likely method for introducing Western knowledge in India was to 'engraft it upon the Oriental knowledge' (Sharp and Richey, op. cit, part 1, pp.119-126)

Oriental knowledge in Sanskrit/Arabic medium or English medium. However, due to Macaulay's Education Policy of 1835, Indians were not given any choice. They had to get an English education in English language, if they wanted to bag lucrative government posts. Moreover, the court expressed its extreme doubt towards Macaulay's contention that there prevailed in India a widespread desire to learn English. It thought of Macaulay's argument to be fallacious-that a lack of demand for Oriental learning was reflected when students were needed to be paid to learn the Oriental knowledge in Sanskrit/Arabic

Conclusion

Thus, we have analysed how the Indian education system witnessed a transition from …Oriental to Western learning. In short, how the Indian education system was modernised under the British rule!

Dissecting Personalised Pricing: Looking at The Overlooked

Varad Kolhe
V BA.LL.B

INTRODUCTION & CONCEPT OF PERSONALISED PRICING

Whom should the consumers trust- online platforms or brick-and-mortar retailers? Do either of them charge the amount equivalent to the actual worth of the product from consumers? Do digital platforms treat the consumers searching for the same product alike? Is charging prices according to the spending capacity of a consumer fair? All of these concerns arise out of a single practice i.e. 'Personalisation'. The functioning of this practice is identical to its traditional meaning i.e. the process of tailoring the results according to the character and preferences of individual users. If we look at this practice from the perspective of a brick-and-mortar market, it prima facie does more good than harm for the consumers.

However, with the advent of digitization and the rising dependence of consumers as well as retailers on digital platforms, there is a need to actively evaluate such practices from the perspective of their impact on the market. Today it has become a common practice, specifically in businesses such as airlines, hotels, e-commerce to set and monitor the prices by application of algorithms which is a result of the detailed individual data collected by these platforms. However, despite of this practice becoming an indispensable component of the business strategy of digital platforms, the definition and regulation of the same is still blurred.

The US Office of Fair Trading (OFT) attempted to define personalised pricing as, the practice where businesses may use information that is observed, volunteered, inferred, or collected about individuals' conduct or characteristics, to set different prices to different consumers based on what the business thinks they are willing to pay.[1] It can be practiced on an online platform easily due to

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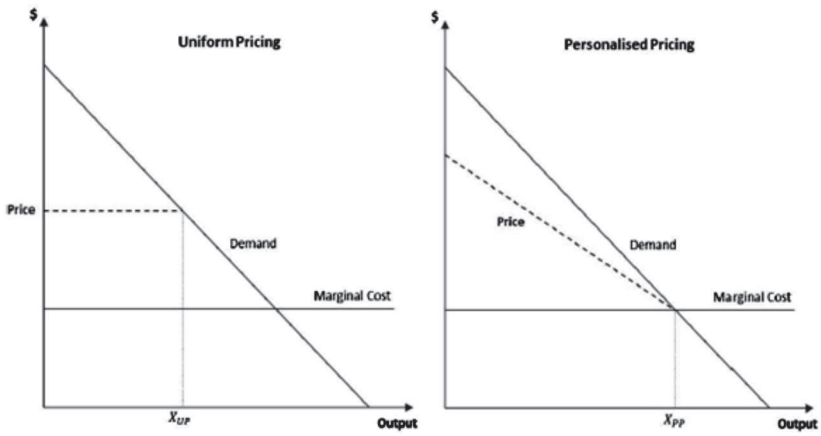
[1]Office of Fair Trading, Personalized Pricing: Improving *Transparency to Improve Trust*, 2 (May 2013), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/personalized pricing note by the united states.pdf last accessed on 24th February 2020

network effects, economies of scale and highly concentrated assets.[2] Different connotations have been employed for this concept; one which is used alternatively is 'price discrimination', which denotes an inherently negative meaning of the concept.[3] In order to understand the rationale and implications of this concept, it becomes necessary to understand the economics surrounding it.

I. ECONOMIC JUSTIFICATION & EFFECTS[4]

Unlike other regimes deeming personalized pricing ("pricing") undesirable,[5] competition regime effectuates pricing to be a bellwether for welfare, from an economics perspective.[6] To comprehend the ramifications of pricing vis-à-vis economic welfare, it becomes appurtenant to first analyze and distinguish the degrees of personalized pricing effectuated.[7]



Note: With uniform pricing (on the left), each consumer pays the same price for each unit. With personalised pricing (on the right), each consumer pays a different price for each unit, as a linear function of the willingness to pay.

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[2]Directorate for Financial Affairs and Enterprise Affairs Competition Committee, Personalised Pricing in the Digital Era, OECD, DAF/COMP(2018)13, www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm (hereinafter 'OECD') last accessed on 24th February 2020

[3]Richard Steppe, *Online Price Discrimination and Personal Data: A General Data Protection Regulation Perspective,* 33 Computer Law & Security Review 768, 769 (2017).

[4]All graphical representations in this section are borrowed from Directorate for Financial Affairs and Enterprise Affairs Competition Committee, Personalised Pricing in the Digital Era, DAF/COMP(2018)13, www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm last accessed on 24th February 2020

[5]*For instance,* Human Rights Law and Social Law.

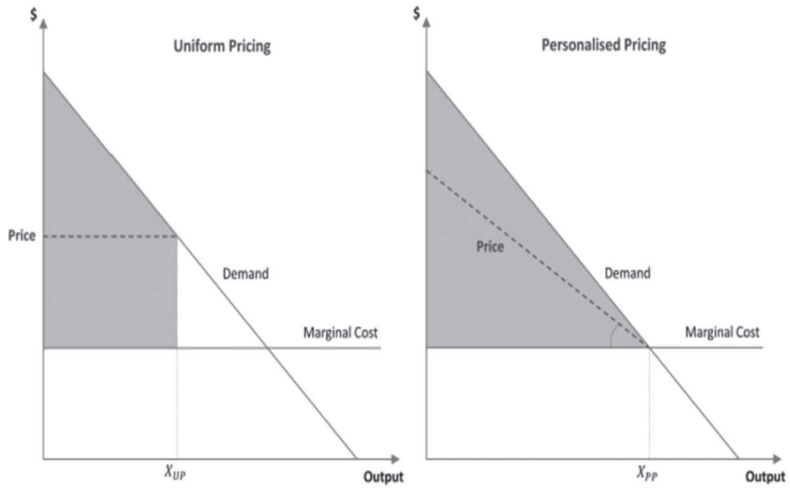
[6]IngeGraef, Algorithms and Fairness: *What Role for Competition Law in Targeting Price Discrimination towards Ends Consumers,* 24 Colum. J. Eur. L. 541 (2018).

[7]Pigou, A.C, THE ECONOMICS OF WELFARE (Macmillan & Co., 1932).

First degree price discrimination refers to a situation in which each consumer is charged an individual price equal to his or her maximum willingness to pay. *Second degree price discrimination* refers to pricing schemes in which the price of a good or service depends on the *quantity* bought. Such schemes are also called 'non-linear pricing' and may involve a quantity discount, or a two-part tariff with a fixed fee and a variable fee. *In third degree price discrimination,* prices differ between groups or types of buyers.

2.1 Impact on Static (Allocative Efficiency)

The impact of pricing on static efficiency can be measured in units of 'social welfare' or 'economic surplus', ubiquitously defined as the sum of consumers' and producers' welfare.

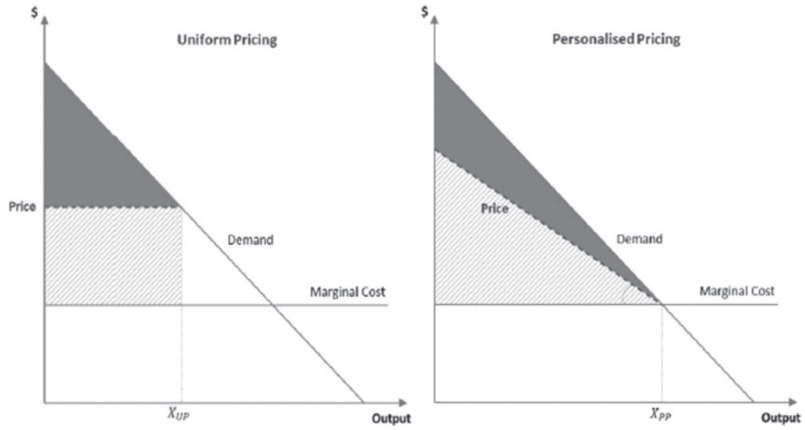


Note: Personalised pricing can increase social welfare / economic surplus, as measured by the blue area.

While preserving the profitability of high-end consumers, pricing has the potential to increase static efficiency by reducing prices for lower-end consumers, who would otherwise be underserved.

1.2 Impact on Distribution Outcomes

Pricing is positioned to a) create a transfer for surplus from consumers with higher willingness to pay to consumers with lower willingness to pay; and b) between consumers and producers.

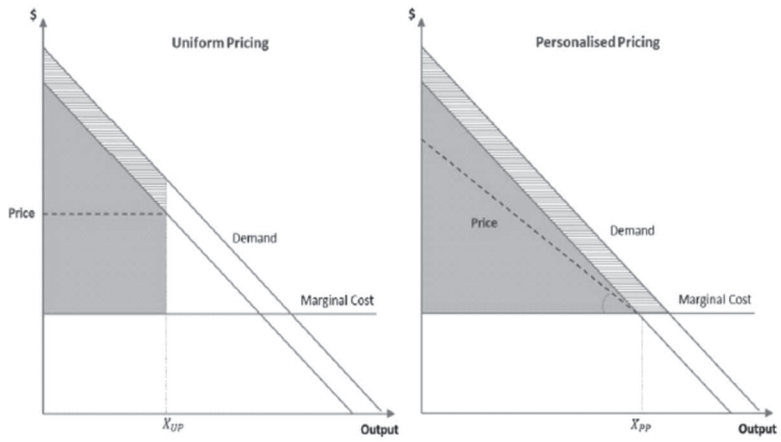


Note: Consumer surplus is represented by the blue area and producer surplus is represented by the stripped grey area. The impact of personalised pricing on consumer and producer surplus depends on the slope of the personalised pricing line between the demand and the marginal cost curves.

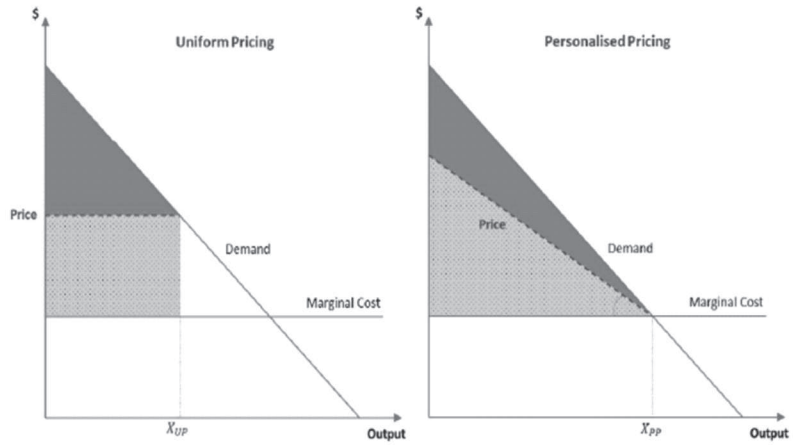
The effect of pricing on consumer surplus and producer surplus is rather ambiguous, and varies fundamentally on the slope of pricing curve.

1.3 Impact on Dynamic Efficiency

While pricing is slated to garner incentives for innovation, it also has the potential to affect the risk of rent-seeking activities, depending on the degree of market power that a particular industry/firm holds.



Note: The light blue area represents social welfare before the innovation takes place, while the striped green area represents the surplus generated by the innovation.



Note: The blue area represents consumer surplus and the yellow dashed area represents deadweight loss through rent-seeking activities by firms. The impact of personalised pricing on deadweight loss due to rent-seeking activities depends on the slope of the personalised pricing line between the demand and the marginal cost curves.

Thus, while the overall impact of pricing on dynamic efficiency may foster innovation and differentiation; it may also induce negative effects by promoting rent seeking behavior especially in regulated industries holding sufficient market power.

1.4 Trade Off: Appropriation Effect v. Market Expansion Effect

As a result, personalised prices over uniform prices lead to a trade-off: some consumers with high willingness-to-pay can be worse off (appropriation effect), while some consumers with low willingness-to-pay can be better off (market expansion effect):

The *appropriation effect* connotes charging higher personalised prices to consumers with high willingness-to-pay compared to the price that they would be charged under uniform pricing. If this is so, those consumers are then worse off with personalised prices;

The *market expansion effect* means charging lower personalised prices to consumers with low willingness-to-pay, and some consumers with low willingness-to-pay who could not afford the product previously under uniform pricing can now purchase it with the low personalised prices.

To sum up, when there is a switch from uniform pricing to price discrimination, social welfare and consumer surplus can both increase, both decrease or social welfare increases while consumer surplus decreases.[8]

II. COMPETITION AND CONSUMER PROTECTION CONCERNS

In this digital age, the strategies adopted by businesses are not based solely upon analysis of the data voluntarily advanced by consumers, but upon the data collected through smart-devices and advanced data analytics.[9] This enables the businesses to constantly overlook consumer behaviour accurately and mould their activities accordingly, however, whether such data has been stored and used with or without the consent of the consumers also raises data privacy concerns. For instance, on the basis of browsing history, purchasing history and cookies, e-commerce websites can easily identify the economic strata of the consumer.

The Competition Act, 2002 aims to promote healthy competition and balance consumer interests. In furtherance of the same, we aim to understand both competition and consumer concerns arising out of targeted pricing. The primary question that arises is whether personalised pricing in the digital economy attracts the requirement of competition enforcement or the welfare aspect of this practice is enough to overlook the antitrust concerns. Further, it is to be ascertained whether both competition and consumer protection regulators will be required to function in harmony to address this concern.

3.1 Need for Competition Intervention

The phenomenon of personalised pricing is based on the consumer's 'willingness to pay' i.e. the businesses are attempting to obtain maximum advantage of the user's spending ability and habits.[10] The trend of differential pricing on online platforms was brought to notice by users of a DVD talk forum website in the year 2000, who shared that by deleting cookies or even otherwise

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[8]Cowan, S., *Welfare-increasing third-degree price discrimination,* 47 (2) RAND JOURNAL OF ECONOMICS47(2), 326-340 (2016); Bergemann, D., Brooks, B. and Morris, S. (2015), The *Limits of Price Discrimination,* 105(3) AMERICAN ECONOMIC REVIEW 921-957 (2015); Aguirre, I., Cowan, S. and Vickers, J. (2010), 100 (4) *Monopoly Price Discrimination and Demand Curvature*, AMERICAN ECONOMIC REVIEW1601-1615 (2010).

[9]OECD, supra note 2.

[10]IngeGraef, *Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination towards Ends Consumers,* 24 COLUM. J. EUR. L. 541 (2018).

they were being subjected to different prices by Amazon for majority of the top selling DVD's.[11] In 2012, it was found that Staples Inc., a US based office retail company's online portal offered the same product for different prices to users based upon their geographical presence.[12] Another aspect of targeted pricing is 'price steering' i.e. personalizing browsing results to place cheaper or costlier goods at the top of the results. For instance, it was found that a travel aggregator platform, Orbitz displayed costlier hotel options for Apple users as compared to PC users.[13] These practices have become a common parlance in the strategies adopted by online businesses.

Now, the elephant in the room is to see whether personalised pricing raises competition concerns? If yes, then whether the Indian Competition Regime is adequate and competent to address such concerns.

Personalised pricing or Price discrimination is an exploitative abuse rather than exclusionary.[14] However, when a business uses it as a tool to target customers of rival companies by offering comparatively lower prices then, it can be considered as an exclusionary abuse.[15] Targeted Pricing or algorithmic pricing from one perspective is promoting competition as well as consumer interests, by opening the markets for new entrants and substantially increasing the reach and accessibility of goods and services which were beyond the expenditure level of individual consumers. In certain markets, pricing through algorithms is an indispensable feature for its efficient functioning.[16] However, algorithms

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[11]Amazon's old customers 'pay more', Business, BBC News, (Sep. 8, 2000),http://news.bbc.co.uk/2/hi/business/914691.stm; On the Web, Price Tags Blur - What You Pay Could Depend on Who You Are", Washington Post, (Sept. 27, 2000), https://www.washingtonpost.com/archive/politics/2000/09/27/on-the-web-price-tags-blur/14daea51-3a64-488f-8e6b-c1a3654773da/. last accessed on 24th February 2020

[12]Jennifer Valentino-DeVries, Jeremy Singer-Vine &AshkanSoltani, *Websites vary Prices, deals based on users information,* The Wall Street Journal, (Dec.24, 2012), https://www.wsj.com/articles/SB10001424127887323777204578189391813881534. last accessed on 24th February 2020

[13]F.J. ZuiderveenBorgesius, *Online Price Discrimination and Data Protection Law,* Amsterdam Privacy Conference, 2015, https://pure.uva.nl/ws/files/2571881/169878_SSRN_id2652665.pdf; Mattioli, D., On Orbitz ,Mac Users Steered to Pricier Hotels, (Aug. 23, 2012), The Wall Street Journal, ,http://www.wsj.com/articles/SB10001424052702304458604577488822667325882. last accessed on 25th February 2020

[14]IngeGraef, supra note 10.

[15]Agustin Reyna, BEUC, *The Price is (Not) right- The perils of Personalisation in the digital economy,* (Jan. 4, 2019),https://knect365.com/complaw-blog/article/82a2cd6d-7c9a-4f65-bbc0-07220f406ce7/the-price-is-not-right-the-perils-of-personalisation-in-the-digital-economy. last accessed on 25th February 2020

[16]Oxera Economics Council, *When Algorithms set prices: Winners and Losers,* Discussion Paper, (Jun. 19, 2017), https://www.oxera.com/agenda/when-algorithms-set-prices-winners-and-losers/ (hereinafter 'Discussion Paper')

increase the susceptibility of collusive outcomes and automatic avoidance of price wars to earn more profits leading to harm to the consumers. The Competition & Markets Authority in its study[17] observed that extensive use of the targeted pricing would make it less likely for algorithms to engage in tacit collusion.

Personalised pricing is not a per se violation of the provisions of the Competition Act, 2002, however, when adopted by a dominant entity it can lead to foreclosure of market by creating barriers for prospective entrants to enter into the market. Differential pricing i.e. third-degree price discrimination is a common business practice employed in various sectors such as airlines, as airlines offer different prices to customers belonging to different factors such as demography. In case of a monopoly, the player can engage in imperfect price discrimination but not in perfect price discrimination due to the magnitude of data required to implement the same.[18] Algorithms determining pricing can also facilitate vertical or collusive agreements with the aid of a mutual vertical market agent.[19] Interestingly, the CCI closed a case against *Ola-Uber*[20], two major cab aggregators where allegations of price fixing and collusion were levelled against them. The Commission observed that both of them possess considerable personalised data to charge discriminatory prices to the disadvantage of the users. However, it was held by CCI that algorithmic pricing by two platforms will per se not lead to collusion. In another instance,[21] CCI disagreed with the reasoning adopted by the DG that Snapdeal did not form a part of the vertical arrangement on the ground that the peculiarities of digital

[17]Competition & Markets Authority, *Pricing Algorithms, Economic working paper on the use of algorithms to facilitate collusion and personalised pricing,* (Oct. 8, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms econ report.pdf . last accessed on 24th February 2020

[18]Karan Singh Chandiok&Lagna Panda, Algorithms and Big Data: An Antitrust Perspective, (Dec. 19, 2018), https://www.vantageasia.com/algorithms-big-data-antitrust-perspective/ . last accessed on 24th February 2020

[19]Discussion Paper, supra note 16.

[20]Samir Agrawal v. ANI Technologies Pvt. Ltd, Uber India Systems Pvt. Ltd., CCI, Case No. 37 of 2018, order dated 06/11/18.

[21]Jasper Infotech Private Ltd. (Snapdeal) and KAFF Appliances (India) Pvt. Ltd., Case No. 61 of 2014, order dated 15/01/2019.

platforms have been overlooked. It observed that these platforms are a parallel distribution channel competing with the brick-and-mortar retailers. Further, in a case concerning Snapdeal[22], the CCI disagreed with the allegations and acknowledged the role of discounts and deals offered to consumers by these platforms as the underlying reason because of which they are flourishing.

In certain markets, pricing through algorithms is an indispensable feature for its efficient functioning.[23] However, algorithms increase the susceptibility of collusive outcomes and automatic avoidance of price wars to earn more profits leading to harm to the consumers. In the EU, there is no specific provision under anti-trust laws governing price discrimination concerns however, the General Data Protection Regulation (GDPR) is competent to address the data protection concerns arising out of the same. However, there is no explicit provision under the anti-trust laws prohibiting this practice.[24] Personalised pricing concerns fall under the ambit of EU Competition Law broadly in two ways: (a) Its impact on demand-side of the market due to its distributional effects in conjunction with implementation of unfair practices- leading to enlarging the surplus with the producers which eventually lead to a spike in the prices; and (b) It can also be deemed as 'excessive pricing' when it is specifically undertaken by a dominant enterprise.[25] Under TFEU, the liability for discrimination is addressed under Article 102© which provides that 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.'[26]

The underlying reason as to why personalised pricing by digital platforms should attract competition enforcement is the 'lack of transparency' in these practices adopted by dominant companies and the unequal treatment offered to consumers buying alike products or services. This is in addition to the adverse effect on competition due to the foreclosure of market for 'second comer'[27].

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[22] *In Re:* Mr. Ashish Ahuja v. Snapdeal.com, CCI, Case No. 17 of 2014, order dated 19/05/2014.

[23] Discussion Paper, supra note 16.

[24] Poort J. &ZuiderveenBorgesius F.J., *Does everyone have a price? Understanding people's attitude towards online and offline price discrimination,* 8 INTERNET POLICY REVIEW 2, Issue 1 (2019).

[25] Agustin Reyna, supra note 15.

[26] Treaty on the Functioning of the European Union (TFEU), article 102, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML. last accessed on 25th February 2020

[27] DIPP Draft National E-Commerce Policy, Department of Promotion of Industry and Internal Trade, Ministry of Commerce and Industry (Feb. 23, 2019).

However, the practices adopted by only dominant entities will raise competition concerns due to the magnitude of consumer data under their control which is eventually utilized to influence consumer preferences and pricing.[28] The user-specific data collected by these major platforms is not accessible to rivals or potential rivals which makes it a powerful entry barrier or an 'incumbency advantage'. [29]

Thus, the current Indian Competition Regime is not adequate to address the emerging concerns of multi-sided platform markets due to its peculiar features which are complex. This particular concern of personalised pricing necessitates the redressal of concerns from all the three perspectives i.e. Competition, Consumer and Data Protection.

2.2 Role of Consumer Protection

A. Understanding Consumers' Attitudes: Notions of Trust and Fairness

Assessing a certain pricing pattern as fair and unfair involves making a judgment as to whether consumers have different personality characteristics or behaviours which serve as determinants to the price they pay for a product. However, making this judgment is a herculean task as the consumers' perception of a practice as fair/unfair may also vary according to the dimensions on the premise of which they are subjected to discrimination. Surveys in the U.S. and EU (see below) tend to suggest that consumers view personalized pricing as unfair.

Competition law and Consumer protection law are tributaries which rather converge into and diverge from the same river basin as 'consumer welfare' and promoting 'innovation driven competition' constitute the focal points of each of these laws. While B2B transaction form the epicenter for competition law, consumer law focuses on the B2C interactions.

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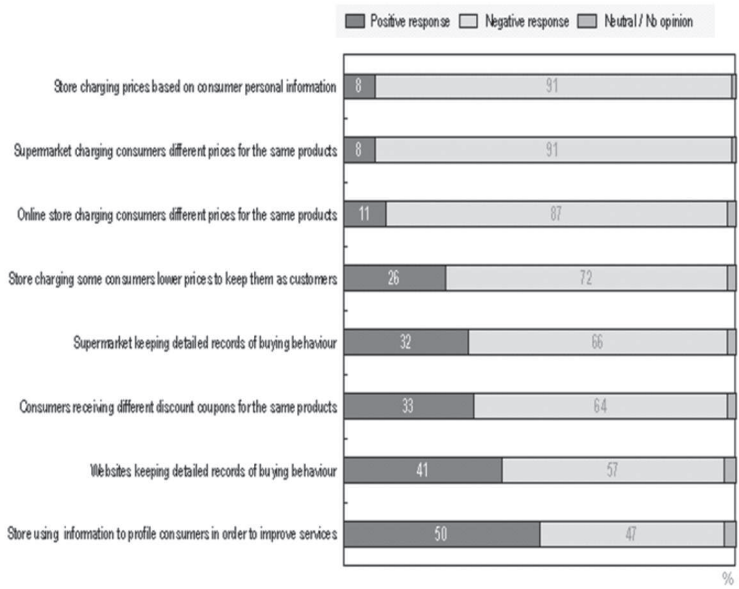
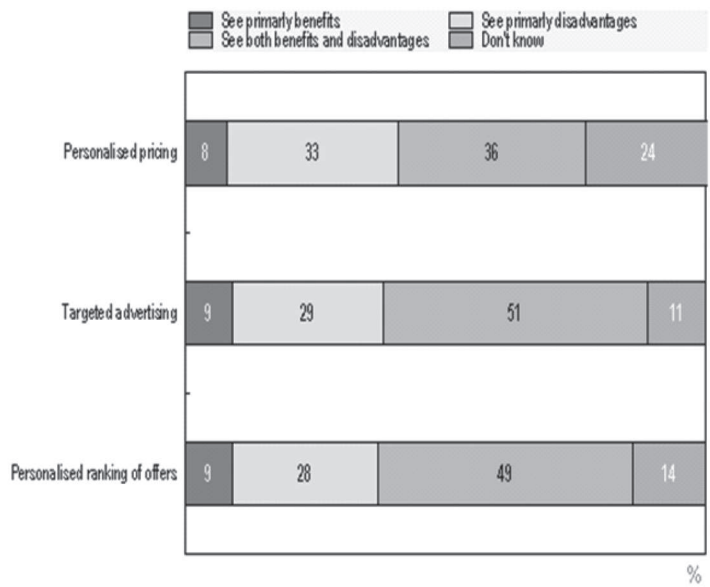
[28]Sophie Lawrance (Bristows LLP), *How can competition authorities react to the antitrust threats of pricing algorithms?,* Kluwer Competition Law Blog, (Apr. 11, 2017), http://competitionlawblog.kluwercompetitionlaw.com/2017/04/11/how-can-competition-authorities-react-to-the-antitrust-threats-of-pricing-algorithms/. last accessed on 25th February 2020

[29]MULTI-DIMENSIONAL APPROACHES TOWARDS NEW TECHNOLOGY, INSIGHT ON INNOVATION, PATENTS & COMPETITION (Springer Publication), https://link.springer.com/chapter/10.1007/978-981-13-1232-8_11last accessed on 24th February 2020



Note: Adapted from the responses to a survey to a representative sample of 1500 US households.
Source: Turow, J., L. Feldman and K. Meltzer (2005), Open to Exploitation: America's Shoppers Online and Offline, Annenberg Public Policy Center of the University of Pennsylvania, https://repository.upenn.edu/asc_papers/35.



Note: Based on a 2018 consumer survey to 21 734 respondents.
Source: EC (2018), Consumer market study on online market segmentation through personalised pricing/offers in the European Union, European Commission, https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf.

The primary concern for UK's CMA is to investigate if consumers are being subjected to 'unfairness' by the digital platforms specifically the vulnerable strata of the consumers. [30]

B. Personalised Pricing: An Unfair Practice?

The criteria to qualify a practice as unfair for the purpose of consumer protection law vary considerably across jurisdictions and tend to have some element of subjectivity.[31] Thus, existing case law and 'blacklists' published in law often serve as yardsticks to qualify specific behaviors as unfair.

However, absent specific precedents which qualify personalised pricing as an unfair trade practice, the only viable alternative is to resort to legal frameworks of a few countries to possibly reach a conclusion. In the US, for personalised pricing to qualify as an unfair practice, the conduct would have to (1) risk causing substantial injury, (2) be hardly avoidable and (3) not counter-balanced by benefits to consumers. The Canadian Consumer Protection Act, for the purpose of determining whether a representation is unconscionable, it may be taken into account, among other things, *"that the price grossly exceeds the price at which similar goods or services are readily available to like consumers",* whereas the Federal Consumer Protection Law in Mexico specifically prohibits discrimination based on certain grounds, such as 'gender' or 'nationality'. Thus, a sensible pathway could entail not to prohibit personalised pricing in itself, but to try to identify specific circumstances under which personalised pricing should qualify as an unfair practice.

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[30]Kevin Coates, UK Government and CMA research *whether online customers are targeted through personalised pricing,* Covington Competition, (Mar. 3, 2019), https://www.covcompetition.com/2018/12/uk-government-and-cma-research-whether-online-customers-are-targeted-through-personalised-pricing/; Press Release, Government and CMA to research targeting of consumers through personalised pricing, (Nov. 4, 2018), https://www.gov.uk/government/news/government-and-cma-to-research-targeting-of-consumers-through-personalised-pricing. last accessed on 25th February 2020

[31]In the US, the FTC Act determines that *"[a]n act or practice is unfair if causes or is likely to cause substantial injury to consumers; cannot be reasonably avoided by consumers; and is not outweighed by countervailing benefits to consumers or to competition."; In the EU, according to Directive 2005/29/EC, a commercial practice is unfair if "(a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed (...)"* ; In Australia, the Competition and Consumer Act does not provide a general definition of unfair practices, but it classifies them in five categories: (1) false or misleading representations; (2) unsolicited supplies; (3) pyramid schemes; (4) pricing-related unfair practices; (5) and other unfair practices, similar approach is also followed in Canada.

C. Transparency in Personalised Pricing

A particularly useful approach to consider is to qualify as unfair any personalised pricing that is non-transparent or does not provide consumers with an option to opt out. The importance of transparency in personalised pricing is associated to the fact that consumers are less likely to engage in actions to protect themselves from being exploited if they do not have the knowledge of the purpose for which that their data is being collected, or that prices are personalised.[32] However, transparency may have different degrees:

- First and most basic, consumers are informed that the price they are offered is personalised.
- Advancing further, firms may be obliged to indicate the main parameters determining the personalised prices.
- Another advanced degree of transparency relates to the prices offered to others, so that a specific consumer can have an anchor price allowing to situate herself across the range of prices offered.[33]

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[32]EC (2018), *Consumer market study on online market segmentation through personalised pricing/offers in the European Union,* European Commission, https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf.; House of Lords (2016), *Online Platforms and the Digital Single Market* - 10th Report of Session 2015-16, House of Lords, https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf.; OFT (2013), *Personalised Pricing - Increasing Transparency to Improve Trust,* Office of Fair Trading, http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/markets-work/personalised-pricing/oft1489.pdf. last accessed on 24th February 2020

[33]Ezrachi, A, and Stucke, M.E., VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (Harvard University Press, 2016).

III. CHALLENGES AND THE WAY FORWARD

One of the most promising sectors of the Indian market, the annual revenue of the e-commerce sector is projected to cross USD 16 billion by the end of 2015.[34] With the e-commerce sector plummeting to new highs, the need of the hour is to ensure a mutually advantageous situation for both the retailers and the consumers, so that the retailers are not driven out of the market and the consumers continue to trust the retailers operating through digital platforms. Digital economy is extremely complex in nature and poses unique and dynamic challenges in handling the concerns arising out of the activities carried through it. Few challenges peculiar to addressing and regulating the issue of personalised pricing are discussed below:

i. Determining the *'Willingness to pay'*- As observed by OECD, determining the actual willingness to pay of the consumers is a major challenge. Since the willingness is measured on the basis of the consumer's actual purchasing history rather than a variable that can be collected and run in a traditional set-up.[35]

ii. Establishing 'Dominance' in the digital economy- Since the practices adopted by dominant entities only will raise competition concerns, in order to hold entities accountable, it is essential to establish their dominance. In the current market scenario, in light of multiple players operating specifically in the e-commerce industry is a very tough threshold to prove.

iii. If personalised pricing is eventually assessed under unfair practices rules in certain jurisdictions, an additional challenge for authorities would be to decide whether to open a competition probe or a consumer protection probe when faced with an issue at hand. This may require certain degree of co-ordination between competition authorities and consumer protection authorities, namely in the large share of countries where competition law and consumer protection law are enforced by different agencies. Further, another potential challenge is to narrow down on the sanctions that may be imposed when personalised pricing patterns qualify as an unfair trade practice. Some indicative trends may be seen below:

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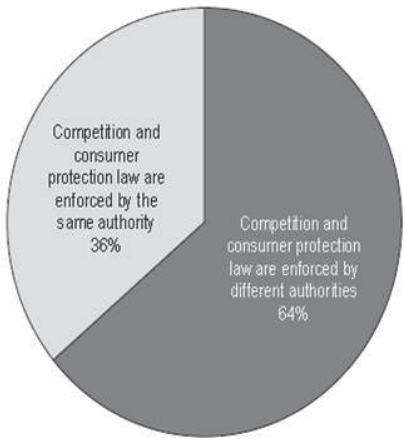
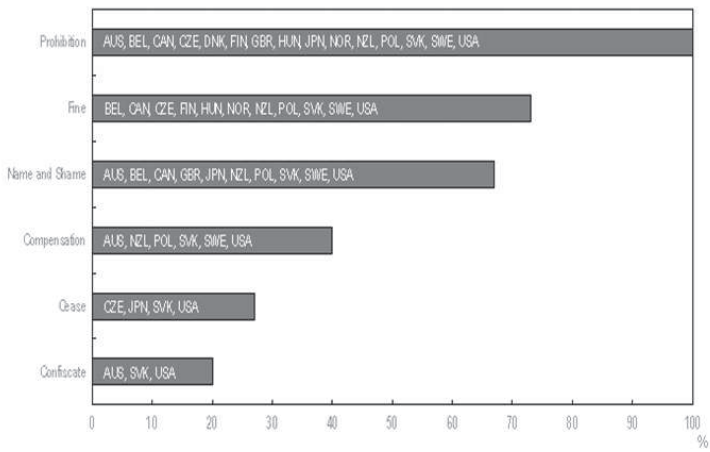
[34] *Fast and Furious: The beginning of multi-year explosive growth,* Thematic, (Nov. 2014), http://www.motilaloswal.com/site/rreports/HTML/635513814725455509/index.htm.last accessed on 24th February 2020

[35] OECD, supra note 2.



Note: The countries where at least one authority enforces both competition and consumer protection law are AUS, CAN, DNK, FIN, IRE, ITA, KOR, LUX, NLD, NZL, POL, GBR and USA.
Source: FTC (2018), "Competition & Consumer Protection Authorities Worldwide", https://www.ftc.gov/es/policy/international/competition-consumer-protection-authorities-worldwide.



Note: Data collected through a survey of approaches to sanctions and enforcement in 15 OECD jurisdictions: AUS, BEL, CAN, CZE, DNK, FIN, GBR, HUN, JPN, NOR, NZL, POL, SVK, SWE, USA.
Source: Faure, M., A. Ogus and N. Philipsen (2008), "Enforcement Practices for Breaches of Consumer Protection Legislation", *Loyola Consumer Law Review*, Vol. 20/4, pp. 361-401, https://pdfs.semanticscholar.org/4b93/ce8e0a689443b68e8fffe55e1caa9334ca05.pdf.

iv. Algorithms fixing prices with the use of Artificial Intelligence (AI) also have a tendency of collusion which will be detrimental to the interest of the consumers[36].

[36]Ezrachi A. &Stucke M.E., *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy,* Harvard University Press (2016)

ESSAYS

Conflict Between Principle of Non-Refoulement And the Law of The Sea

Avani Vyas
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The field of International Law comprises of various sub-branches which are interconnected to each other. This essay will focus on two such branches of law; International Refugee Law and the Law of the Sea.

The principle of Non-Refoulement is one of the cardinal principles of International Refugee Law. It was first recognised in the Convention Relating to the Status of Refugees (CRSR), 1951. The term 'refoulement' is derived from the French word 'refouler', which means to push or force back. Article 33 of the said convention lays down the meaning of the principle, which states that no refugee who has arrived in another State by reason of fear of persecution in his home state on account of his race, nationality, religion, membership of a particular social group or political opinion, shall be forced to return to his home state. This principle is binding on all States, whether they are members of the CRSR or not. However, an important thing to note is that the benefit derived from this principle cannot be claimed as a right by a refugee. Hence, it is not absolute but is subject to limitations.[1]

The law of the sea on the other hand is predominantly governed by the United Nations Convention on the Law of the Sea (UNCLOS), 1982. Article 2(1) of the convention provides that the sovereignty of a Coastal State extends beyond its land and internal waters.[2] Hence, up to a distance of 12 nautical miles from the baseline, the state has complete sovereignty over its territorial sea with the exception of vessels in distress. A state can also exercise limited sovereignty over the Territorial Sea, Contiguous Zone and the Exclusive Economic Zone.

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[1] *Convention Relating to the Status of Refugees,* 1951, United Nations, available at https://www.unhcr.org/4ca34be29.pdf, last seen on 20/09/2019

[2] United Nations Convention on the Law of the Sea, 1982, United Nations, available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, last seen 20/09/2019

One of the mounting issues in the field of international law is the clash that occurs between preservation of human rights and the sovereignty of States. This clash is not just applicable on land, but also in the sea. Migratory practices from the sea are not a new phenomenon.[3] Moreover, with the growing unrest in the Middle East, there have been cases of massive influx of refugees in different States by land and by sea. Logically, this leads to a conflict between upholding human rights and the sovereignty of States.

One of the major problems is the identification of refugees. The CRSR clearly lays down that the principle of non-refoulement is only applicable to refugees and asylum seekers. However, often times it is very difficult to ascertain the true reason behind an individual seeking refuge in another state as most of the times it is a combination of true refugees and economic migrants (i.e. people migrating to another State for a better quality of life). Hence, the State authorities are unable to discriminate and determine who are the true refugees. This in turn leads to the blatant violation of a State's sovereignty with respect to its territorial waters. Furthermore, this also gives rise to rampant illegal immigration of people in a State, which leads to more problems.[4]

One of the exceptions to sovereignty of a state over its internal waters is vessels in distress. The phrase 'vessels in distress' is interpreted, by the International Convention on Maritime Search and Rescue (SAR), as a situation where there is reasonable confidence that an individual or vessel or any other type of structure is under threat from grave and imminent danger and is in need of immediate assistance.[5] However, the problem lies in determining whether a vessel is actually in distress or not. This was the problem in The Aquarius Incident that occurred in June 2018.[6]

In brief, the incident involved a rescue vessel named Aquarius which was run by a German Non-Governmental Organisation (NGO), having more than 600

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[3]S.Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection,* 12 Max Planck Yearbook of United Nations Law 205, 206 (2008) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1798756., last seen on 22/09/2019

[4]R.Barnes, *Refugee Law at Sea,* 53(1) The International and Comparative Law Quarterly 47, 74 (2004) available at http://www.jstor.org/stable/3663136, last seen on 22/09/2019

[5]*The Convention on Maritime Search and Rescue* (SAR), 1979, United Nations, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf last seen on 22/09/2019

[6]E. Papastavridis, *The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?,* Blog of the European Journal of International Law (27/06/2018), available at https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/, last seen 22/09/2019

rescued migrants on board. The Aquarius requested Italian authorities for access to its port and disembarkation, which was subsequently denied by Italy. Even though Italy's stand was heavily criticised by Malta, Spain and France, it was still argued that Italy still reserved the right to refuse entry of the vessel to its port if it was found that the life of the people on board is not at risk anymore.[7]

With respect to the Contiguous Zone, a Coastal state can exercise only enforcement jurisdiction and not legislative jurisdiction. According to Article 33(1) of the UNCLOS, a coastal state may exercise its jurisdiction if there is an apprehension of the infringement[8] of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and for the punishment of such infringement. However, the same state also has to abide by its international obligations i.e. it also has to observe the principle of non-refoulement.[9] Thus, this may lead to a conflict in those cases where a State trying to abide by its international obligations is forced to go against its own laws and regulations listed under Article 33(1) of the UNCLOS.

The right of innocent passage is one of the most important exceptions in the law of the sea. This allows foreign vessels to pass through the territorial waters of a Coastal State with certain restrictions. This right is enshrined in Article 19 of the UNCLOS and it states that a passage is deemed to be innocent until it amounts to a threat to a Coastal State's peace, good order or security.[10]

A conflict between right of innocent passage and the observing the principle of non-refoulement was observed in the Tampa Case of 2001. The Tampa, a Norwegian merchant ship had rescued people off an Indonesian fishing boat on 26th August 2001 on the high seas. The Tampa only had a capacity of 50 people, however after the rescue it was carrying over 433 passengers. In distress, it requested Australian authorities to enter into its territorial waters while positioned at 13.5 miles from the Australian Island of Christmas. The Australian authorities denied permission, however the Master of the ship disregarded it and proceeded to enter the Australian waters. The vessel was subsequently stopped 4 miles from the shore and remained in Australian waters till 1st September 2001, subsequently redirecting the passengers on board to New Zealand and Nauru.[11]

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[7]Ibid
[8]Supra 1, at 35
[9]Supra 3, at 232
[10]Supra 2, at 26.
[11]Supra 3, at 224.

Norway accused Australia of the breach of right of innocent passage however the latter took the defence that the entry of the vessel in its waters amounted to a violation of its national laws on immigration, on which Australia had a jurisdiction with reference to article 19(2) of UNCLOS.[12] Australia also took the defence of Article 25(1) of the same convention which allowed it to take necessary steps in its territorial sea to preclude a passage which is not innocent. Moreover, Article 25(2) also gave Australia the right to take necessary steps regarding the stoppage of any vessel proceeding towards its internal waters.[13]

Even though Australia's acts seem to have been legally valid as per the UNCLOS, the State was still held responsible for violating the principle of non-refoulement. Though the passengers were subsequently directed to a safe state (New Zealand and Nauru), Australia was still held liable as it was the first receiving state for the refugees.[14] Hence, in this case, it was clearly seen that even though Australia acted in accordance with the UNCLOS, it was still held liable under the International Refugee Law.

Both International Refugee Law and the Law of the Sea are crucial arenas of international law and it is imperative that both these fields need to work in harmony rather than against each other. Neither of these laws can take precedence over the other. Hence, there is a need for further development in both these fields so that not only a State observes its international obligations but also at the same time, preserves its own interests.

[12]Supra 2, at 27.
[13]Supra 2, at 29.
[14]Supra 3, at 225.

Entry for Women in Religious Places: Gender Equality Vs. Religious Freedom

Karishma Rajesh
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In September 2018, putting an end to centuries old tradition, the Supreme Court ruled that women, irrespective of their age, can enter Kerala's Sabarimala temple. This verdict given by Supreme Court triggered a widespread debate. On one hand, a section of society supported the judgment, saying that the exclusionary practice violates the rights of women devotees. While the other, held the view that judiciary cannot and should not interfere with the religious sentiments. This belief was also held by the sole dissenting judge, Justice Indu Malhotra. This makes us ponder, what should prevail? Gender equality or religious freedom?

There has always been a tussle between gender equality and religious freedom. Many support the ban of entry of women inside the temple by arguing that religious practice should not be reviewed on the touchstone of gender equality. The rationale for barring women, especially fertile women is deeply embedded in religion. There is a belief that menstruating women are considered ritually impure and are given rules to follow (expand on what you mean by rules and how are they to be followed) (It would be better if you write about where this reasoning is reflected, for example any religious texts or verses which state this). As a result, many people justify the restriction imposed on women from entering the temple premises. Even today, these customs and practices are strictly adhered, due to the belief that they should be followed blindly and without question. However, there are certain questions that need to be answered - can a practice, regardless its nature, be justified in the name of custom? Does any custom evolve arbitrarily?

Before answering these questions, we need to comprehend the idea of 'custom'. A custom evolves when people find any act to be good and beneficial, which is agreeable to their disposition, they practice it and in course of time they are frequently observed, approved and accepted by the community for generations. A certain rule or practice is followed due to some reasons without having any compulsion to do so. Ultimately, the rule or practice becomes a habitual course of conduct in the society giving rise to a custom.

Behind every custom, there is some rationale. It is wrong to assume there was no logic behind the customs. The rationality of every custom is rooted in some scientific reason and not in arbitrariness. The age-old custom of forbidding menstruating women from entering the temple was also driven by a particular rationale. Ancient Vedic seers recognized the principle of energy. It was believed that during menstruation, women are continuously dissipating energy from their bodies. Most religious chants are meant to balance out the energies in our body, and it would interfere with the natural losing of energy during menstruation. Hence, the women are told to keep away so that their natural processes are not tampered with.

Every custom-made, had a reason which was relevant to that time and place. But ultimately people started following the rituals blindly, without trying to comprehend the reason or modifying the ritual as per the time. When there is ignorance about the rationality behind a custom, it gives rise to multiple interpretations. However, the interpretation which was propagated by the people who dominated the era became the dominant idea.

Often certain customs were made to retain the power of the power and to prevent the lower classes from usurping the power thereby forcing them to accept subjugation. This was evident in ancient times when priesthood and teaching was the monopoly of the Brahmins. Similarly, though not all, but at times certain customs were formed to maintain male dominance. Even modern literature has spoken of customs. For instance, 'The Da Vinci Code', written by Dan Brown actually throws light on this issue. He refuses to accept the idea that faith in God is rooted in ignorance of the truth. The book reveals the secret history of the Catholic Church's agenda to maintain the patriarchy and ensure continued dominance of men over women. It asserts that the religion established in the name of Jesus Christ annihilates the intention and the foundation of the beliefs of Jesus Christ. The revelations in the book have the threat of challenging the faith of those who have consigned their very spiritual being upon commonly held convictions which the protagonist slowly unravels to be everything from simple misconceptions to sinister fictions engineered for the purpose of controlling the masses.

The status of women in society is often the outcome of interpretation of the religious text and cultural and institutional background of religious communities. For eons, male-centric or patriarchal customs affected religious texts, subduing the feminine perspective even though in every religion both men and women are granted equal status. The Bhagavad Gita gives every human being the right to worship. If this right is interpreted and commonly

understood as the right to practice one's religion and women are excluded, it violates their fundamental right to religion. Gender discrimination is prevalent in majority of the religions and it is important to have an authority to deal with such gender discrimination.

This is where law comes into the picture. Former CJI, Rangnath Mishra, observed that 'Law is a means to an end and justice is the end'. The role of judiciary is to ensure social order. In a society as diverse as India, judiciary has indeed played a crucial role in striking a social balance by providing justice and rights to the people of the down trodden and disposed class. In 2016, breaking the 400-year-old tradition, women entered the Shani Shingnapur inner sanctum following the Bombay High Court order. Such judgment can stimulate the efforts to abolish gender inequality.

Gender inequality created by religious customs can be corrected by law, and it can help women to realize their rights, and also help them in obliterating their subordinate status. Society and religion are deeply interwoven with each other. Due to the presence of strong value consensus, the mentality of the people is also very rigid, especially when it comes to religion. People are hostile to facilitate change in religious matters and argue that religion is a matter of faith and freedom, and law cannot interfere.

No doubt, freedom of religion in India is a fundamental right. However, any customary practice violating basic rights of an individual cannot be justified in the name of religion. When a practice is questionable in nature, the law has to revoke it for the betterment of the society. The basic purpose of law is to eliminate corrupt practices to ensure social order in the society. For that purpose, law is held to be supreme. When people argue that law cannot interfere with religious rights, somewhere, religion is conceded with superior status over law. As a result, the function and the domain of law are being curtailed. Conditional functioning of the law would do no good. If law cannot change the religious malpractices, then the existence of law is challenged. The patriarchal rules have to change and the patriarchy in religion cannot be allowed to trump right to pray and practice religion.

Currently, Our society is undergoing a transitional period, from a feudal society to a modern society. The old feudal society is being uprooted and is being replaced by a new, modern society. Defenders of the old ideas are being challenged by the adherents of the new. At present, we are neither totally feudal nor totally progressive, but somewhere in between. While we have achieved a certain level of progress in gender equality, but we still have a lot of remnants of

feudalism in our society in the form of religious practices which are against gender equality. A voracious struggle will have to be waged to combat feudal ideas and to destroy the feudal practices in our society, to replace them with modern, scientific practices and ideas.

One way to bring about this change is by ensuring gender equality even in religious matters. If there is a custom which is discriminatory in nature, then that custom needs to be scrutinized. Primary step should be to understand the custom and how it took birth. Then we need to analyse if it is an essential part of the religion and also if the custom perpetrates any sort of injustice. If the custom is detrimental to any individual's rights, then it has to be struck down. This has to be done by law. This changing of the mindset of over a billion people will be a mammoth task, but it alone can be the precursor to the coming physical storm which will sweep away centuries of feudal filth from our country.

Impact of Digitization on Competition Law

Pushpa Yadav
IV BA.LL.B

Introduction

The Competition Act was enacted in the year 2002, replacing the old and obsolete- Monopolies and Restrictive Trade Practices Act, 1969. This legislation also formed the Competition Commission of India. This committee looked upon the activities that took place in the market and eliminated those activities that threatened fair practice.

This act extends to the whole of India except Jammu and Kashmir.

The act tries to implement competition policies. The main aim of the act includes:

- Prevent and punish anti-competitive business practices.
- Unnecessary Government interference in the market

Competition Law in India

The Government of India with a notification dated 165h April 1964constituted the Monopolies Inquiry Commission in 1965.

The main aim of the commission was to examine the extent and effect of concentration of economic power in the hands of certain influential people. The commission also looked into the prevalence of monopolistic and restrictive practices in the important sectors of the economy. The commission was asked to find and look into the factors that were responsible for such concentration of economic power. The commission was also asked to look into the consequences of such practices on the economy and the extent of damage that may be caused. They were also asked to give legislative and other measures to check on such unfair practices. New legislations were also welcomed from the committee if they felt that it was necessary for protecting the public interest

The committee was asked to look into the cause of concentration of power and unfair practice. The committee came to the following conclusion:

- There is an abundance of reasons for concentration of economic power in the private hands, in the history one of the major reasons was kingly favors.
- After independence the importance of the above reason decreased substantially but the ministers in the government took place of the kings.

Growth Of State-Owned Enterprises (1960-1990)

This was an experimental activity. The economic liberalization of India in July 1991 opened the debate. The issue of the debate was whether or not the growth of SOE was able to address the issues of competitiveness in the markets in India. Meanwhile when India decided to sign the World Trade organization Global treaty on 1st January 1995 the debate became even more engaging. Several economic legislations were enacted with respect to certain industries in India. These industries were brought under the control of special statutes. These Industries were kept away from the day-to-day control of the federal government.

Another interesting issue that arose during the same time was whether or not the Monopolies and Restrictive Trade Practices Act (MRTP) and the MRTP commission should continue to regulate the Monopolies and Restrictive Trade Practices in India.

- A committee headed by Mr. SVS Raghavan (RAGHAVAN COMMITTEE) was constituted in 1999 The broad functions of these committee are as follows:

  Changes that may be necessary for combatting trade related anti-competitive practices in the Indian economy

- Suggest /recommend legislative changes for a better economy

They recommended repealing of the MRTP Act and enabling a new law that helps combatting the modern challenges. Taking into consideration the suggestions of the Raghavan committee the Parliament enacted the Competition act 2002 in December 2002 which obtained the presidential assent on 13th January 2003.

Impact of Digitization on Competition Law in India

The introduction of internet has brought about a huge change in all the aspects of human life. From shopping to human interaction to learning every aspect has been digitized. It is like the humans have created a second world for themselves which is virtual and convenient.one such aspect of human life that has been affected by the digitization is the market. Technological developments like the introduction of Artificial Intelligence, big data, greater connectivity, storage capacities have all contributed to digitization. Digitization and online market has been a growing trend in the recent years.

Amazon and Google are the most relevant examples of this trend. Amazon started off as an online bookstore but now sells everything.

In the same way, Google at first ruled in the search engine market but today it has become a trading partner in every aspect of life especially when it comes to doing a business.

In the last two decades there has been innovation in every field including the functioning of the markets and the way a business is conducted. Competition Law owing to its position is very sensitive to even a small change in the market dynamics.

In the olden days oil was the most important resource, the misdemeanor and monopolistic behavior was the reason which led to the enactment of the world's first anti-trust law "The Sherman Act" in 1890. In the 21st century 'data' has replaced oil as the most valuable commodity.

The basic role of Competition Law is to ensure healthy competition in the market but owing to the fact that the digital markets are offering huge benefits to the consumers the ill-effects tend to get ignored.

But Amazon's anti-trust paradox holds a contrary view, according to them the Competition Law and Digital Market should concentrate on harm to competition in the market rather than harm to consumers.

According to the preamble of India's Competition Act 2002, the objective of the act is threefold:

1. Firstly, to prevent any practice that has a negative effect on the competition.
2. Secondly, to promote and sustain healthy competition in the market.
3. Ensure that the interest of the consumers is protected.
4. Ensure that there is freedom of trade in the market.

It is clear from the above discussion that the legislative focus is on preserving competition in the market rather than maximizing consumer welfare. The distinction between consumer welfare and fair competition is more relevant when it comes to online market

The above discussion has also made the fact clear that the policies which are good for consumers does not necessarily have to be good for the competition in the market. The Digital Market holds this fact true. the big market giants like amazon are the best example of such a scenario.

In India, Amazon is running on huge losses but still continues to shower its customers with big offers A similar trend can be seen with Indian company Flipkart where the company functions on huge losses coupled with increasing revenues.

The Competition Commission of India (CCI) is very lenient when it comes to exercising control on the digital market. The CCI refrains from adopting a very heavy-handed approach towards these markets. The competition Commission of India has held that there is no major distinction between the online market and the offline market. The only difference between the two is the channel they use to get to their potential customers. The CCI was also reluctant to interfere in a complaint against Ola citing the reason that they won't interfere in "nascent digital markets".

Network effects and heavy funding are considered as one of the major advantages of operating in the online market. There is cut-throat competition and intense funding wars in the Indian e-commerce markets. The prevalent strategy in these markets seems to be to grow the consumer base even though the company incurs huge losses in the process. The thought process that goes behind such a practice is to continue it until all the competition is finally eliminated and monopoly is established.

Conclusion:

The Indian digital markets are functioning on losses with a future goal of acquiring monopoly in the market. In the above discussion it is also very evident that the CCI is not very keen in exercising the required amount of control on the digital market. The CCi needs to take command and start interfering more often so that the goal with which the commission was established can be fulfilled.

Government Officer's Freedom to Express Political Beliefs India- An Insight

Shrirang Ashtaputre
IV BA.LL. B

Introduction:

The meaning of *"freedom"* has constantly changed with time. In the early medieval ages, it was restricted to achieving and maintaining sovereignty, as in the case of Indian Rajput Kingdoms and later, even the *Swarajya,* founded by Chhatrapati Shivaji in medieval Maharashtra; in the feudal age, it implied independence from bonded labor; in the early industrial ages, it conveyed freedom from inhumane and stringent governmental control i.e., it asserted at individualism and capitalism; and during the Colonial Rule, it was based on achieving autonomy and self-governance. And with the growth of technology and the peace-oriented approach of the mankind, the said term, as of today, is viewed in several dimensions and in the Indian context it is inclusive of several factors which makes life worth living - criticism, privacy peaceful assembly, forming associations, travelling and practicing religion are a few elements which the Constitution promises and safeguards through its Article 19(1)(a)[1].

Particularly, Freedom of Speech and Expression is quintessential for keeping the spirit of democracy alive and curbing dictatorship, making the implementation of human rights easier and possible. Criticism and expression actively guides the Government in undertaking appropriate decisions which catalyzes required progress in every sector. "Speech" and "Expression" include within their ambit several other facets that prevail in the society - while the former explains the means of executing this freedom such as that of press, circulation and even commercial oration and interviews, the latter confirms that these modes of speech are nothing but the ways in which a citizen is "allowed" to express himself. That is to say, that not all forms of speech and expression are permissible and if it abridges the very essence of Article 19(2) of the Constitution, i.e., if its nature is against public order, morality and health and even defamatory[2] in nature, then, its speaker or author could be punished in accordance with the relevant provisions of Law.

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[1] 19(1)(a)Protection of certain rights regarding freedom of speech etc.
[2] Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia [1960 SCR (2) 821]

Catering Freedom of Expression to Government Employees? - Here's How:

Nevertheless, the said freedom is bestowed upon every citizen of the country and direct or indirect participation in politics is considered to be its important facet[3]. Yet, it appears that the State, both at Central and State Level, enacted such Laws which have expressly "curtailed" this freedom of Government Officers, citing it as *detrimental to the interests or prestige of that particular agency.* As observed in *Lipika Pual V. The State of Tripura & Others*[4] the Petitioner, a Government Employee was suspended because she took part in a political rally which was campaigned by a particular party at Agartala and for posting a Face-book post condemning certain candidates of the rival political party the performance of such an act violated Rule 5(4) of the Tripura Civil Services (Conduct) Rules, 1988. i.e. her acts allegedly amounted to "c*anvassing, interfering with or influencing or participating in an election to any legislative or local authority*". Dismissing the contention raised by the Respondents, the Tripura High Court, on 09.01.2020 held that even as a Government servant, she was not devoid of her right of free speech, a fundamental right which can be curtailed only by a valid law, i.e., she can express her beliefs to the extent that they do not contradict the abovementioned provision. Interestingly, this Court distinguished between "attending a rally" and actually "participating in it" and held that mere presence at a political rally did not imply participation therein. This pronouncement upholds to a considerable extent, the Judgment rendered by 5 Judge Bench in *P. Balakotaiah V. The Union Of India And Others*[6], wherein the Petitioner's allegation of dismissal from his services by the Government for attending the private meetings of the Communists was prejudicial to national security within the meaning of Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949 was rejected. Likewise, it perpetuates the rationale pronounced by the Constituent Bench in *Kameshwar Prasad V. Union of India*, wherein Rule 4A of the Bihar Government Servants' Rules, which prohibited the participation of Government Employees in any forms of demonstrations was struck down as there was no proximate cause between the form of speech restricted and the reasonable restrictions so enshrined within the meaning of

[3]Express Newspapers V. Union of India [1986 AIR 872]
[4]WP (C) No. 1363/2019
[5]1958 SCR 1052
[6][1962 AIR 1166]

Article 19(2) of the Constitution.

Interestingly, a bare perusal of these 2 Judgments confirms that they contradict each other - the Tripura HC Judgment bridges them by handpicking excerpts which are suitable for balancing and upholding democracy with the rights of Government Employees in India.

Such an Indian stance appears to be in consonance with the American interpretation on the aforesaid subject matter. In fact, the United States Supreme Court in *United States Civil Service Commission v. National Association of Letter Carriers*[7] held that the *Freedom of Speech and Expression is not violated merely because a Law bars the federal employees from engaging in political conduct such as:*

1. *Organizing a political party or club;*

2. Participating in fund-raising activities for a partisan candidate or political party;

3. *Becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office;*

4. Initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention.

The said restrictions are implemented in one form or the other in India thereby preventing the bureaucracy from taking the reins of governance and politics in their hands. Absence of such regulations may create a scenario wherein the officers would misuse the prestige of their Office and administrative duties for securing their interest which would then, be against the principles of democracy. Besides, for the sake of ensuring proper discharge of administrative tasks, the author believes that such restrictions are justified and truly stands by the following wordings of the Madras High Court:

"If any employee chooses to serve the nation by being a member of a political party, he can do so without continuing as a government servant. If he chooses to serve the nation as a government servant then he should forego his involvement in politics."[8]

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[7] 413 U.S. 548 (1973)

[8] *PTI Employees prohibited to join political parties, asserts HC* September 22, 2016. As retrieved from: (https://www.thehindu.com/news/cities/Madurai/Employees-prohibited-to-join-political-parties-asserts-HC/article16043410.ece)

Conclusion:

On 15.01.2020, India Today reported the order of Mumbai University to send Director of Academy of Theater Art, Yogesh Soman, on compulsory leave for making videos and objectionable comments about Rahul Gandhi. Acting upon the political beliefs during the course of government employment appears to be unjustified in the opinion of the author[9]. Although it is true that by undertaking a government job, a person does not cease to be a citizen as in the case of Indian Jurisprudence[10], in the United States, it has been firmly affirmed that a public employee who expresses himself during the course of his official duties is not citizen for the purpose of the First Amendment[11] - such a stark contrast may imply the latter being unprivileged to express political beliefs in some form or the other, a freedom, which is guaranteed to a considerable extent in India, as inferred from the abovementioned judgment of the Tripura High Court. Thus, the very promoter of Democracy appears to showcase dictatorial sentiments when it comes to the rights of its bureaucrats, who are the very backbone of all the rigorous administrative and intellectual organs of the Government that practically keep it alive. Indeed, discipline and efficiency of Government Employees is held to be proportional to the public order and rather and therefore, a Law regulating the restricting their freedom of speech to a certain extent seems justified[12]. Relying upon the aforesaid, the Author opines that India, at least on paper, seems to be successful when it comes to maintaining a fine balance between the rights and duties of its officers.

[9] *Sahil Joshi Mumbai University Professor sent on leave for remarks against Rahul Gandhi January 15, 2020* As retrieved from: (https://www.indiatoday.in/india/story/mumbai-professor-sent-on-forced-leave-for-comments-on-rahul-gandhi-leaves-students-divided-1637174-2020-01-15)

[10] Supra 6

[11] Garcetti V. Cebellos [547 US 410 (2006)]

[12] O. K. Ghosh And Another vs E. X. Joseph [1963 AIR 812]

CASE COMMENTS & LEGISLATIVE COMMENTS
Code on Wages, 2019

Alex John Pulimood
II LL.B.

The Code on Wages, 2019 was introduced in Lok Sabha by the Minister of Labour, Mr. Santosh Gangwar on July 23, 2019. It seeks to regularise wage and bonus payments in all forms of employment irrespective of the industry, trade or business carried out.

The Code consolidates the following four laws:

(i) the Payment of Wages Act, 1936,

(ii) the Minimum Wages Act, 1948

(iii) the Payment of Bonus Act, 1965, and

(iv) the Equal Remuneration Act, 1976 .

After the Code on Wages Bill, 2019 was passed in Lok Sabha on 2nd August 2019, it was passed in Rajya Sabha and subsequently received the President's assent on 8th August 2019.

Various Implications of the code:

- **Definition of "Wages"**

  The term "Wages" is defined differently under various legislations, thereby leading to unnecessary litigations. While "wages" under the PWA,1936 seeks to include various heads, the MWA,1948 seeks to exclude these from the definitions.

  The Code on Wages provides a blanket definition to the term 'Wages' for the consolidated four acts mentioned above. Therefore, post implementation, this will reduce scope for litigation and bring about more clarity. Section 2(y) of the Code defines the term 'wages'. It includes basic pay, dearness allowance and retaining allowance while excluding other benefits such as bonus payable under law or value of house accommodation given etc. Besides, it introduces a concept wherein if the additional benefits given to the employees exceed 50% of the remuneration or such percentage notified by the government , then that amount in excess will also be calculated as "wages"[1]

- **Concept of "Floor wage"**

  Workmen v. Reptakos Brett & Co.[2] suggested need-based norms

[1]S. 2(y) The Code on Wages, 2019

[2]Workmen represented by Secretary vs Management of Reptakos Brett. And Co. Ltd. AIR 1992 SC 504

established by the 15th Session of the ILC (1957) to be considered for calculating the minimum wage, and that other additional components be included (i.e. children's education, medical requirements etc.)

In 1991, the National Commission on Rural Labour (NCRL) made recommendations to set up a National Floor Level Minimum Wage (NFLMW) to reduce disparities in minimum wages across the country. Currently, the NFLMW is Rs. 176 as on 1 June 2017[3]

Until now, the Indian states were not legally obliged to comply with these recommendations. However now, under the Code on Wages, the minimum wage cannot be below the "floor wage" (it may vary depending on geographical area) thereby making it legally binding. The code further states that if the present wage is above the floor-wage it cannot be reduced[4].

- **Inclusion of all employees**

  Although Payment of Wages Act ensures timely payment of wages, it applies only to persons earning less than Rs. 24,000. Similarly, The Minimum Wages Act, 1948 also applied only to persons employed in the scheduled employments.

  It therefore left out a huge part of the workforce outside the purview of the legislations. The Code eliminates such exhaustive lists and directs that minimum wage be paid for all types of employment whether they are in the organised or unorganised sector.

  Such Universal applicability of the legislations though commendable, may bring about implementation difficulties.

  E.g.:The Office of the Commissioner of Maharashtra observed in 2011 that the multi-functioning, meagrely staffed labour inspectorate in the State would take one inspector three years to make one visit of the 5,062 sites in the non-universalised minimum wage system[5]

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[3]Ministry of labour & Employment , GOI , *Committee on determination of methodology* available at https://labour.gov.in/sites/default/files/Commitee_on_Determination_of_Methodology.pdf last seen on 14th January 2020

[4]S. 9(2) The Code on Wages, 2019

[5]KR ShyamSundar / Rahul S Sapkal, *The many misses of the wage code,* The Hindu Business Line (14/03/2018), available at https://www.thehindubusinessline.com/opinion/the-many-misses-of-the-wage-code/article23245863.ece last seen on 14th January 2020

- **Fines and Penalties**

  The Code allows the employer an opportunity to cure first time contravention of 'certain' incorporated provisions (that is, offences other than payment of amounts lesser than specified in the Code). Previously such an opportunity to cure a breach was unavailable to the employers. Now, the Code prescribes that the Inspector-cum-Facilitator shall allow the employer to rectify and comply with the Code within identified time period and if complied with, no prosecution shall be initiated.

  However, this shall not be granted if violation of a similar nature is repeated within a period of 5 years from the date of first violation[6].

- **Appointment of an "Inspector-cum-Facilitator"**

  The four Acts being subsumed under the Code specify that inspectors will be appointed to ensure compliance with the Code. The post was initially named "Facilitator" , but after parliamentary discussions it was rephrased as 'Inspector-cum-facilitator' so that its powers were not diluted.

- **Payment period**

  Under the Payment of Wages Act , the employers can pay wages to their employees within 10 days after expiry of the wage period, if the establishment has over 1000 employees. However, the Code makes it mandatory for the employer to pay within 7 days from expiry of the wage period, irrespective of the size of the establishment[7].

Conclusion

The Code plays an ideal balance between the interests of the employer and the employee. It attempts to unify the very definition of 'wages' and brings under its purview all forms of employment. This pivotal step will enhance the lives of employees and usher in a new era of reforms.

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[6]PDS Legal , *Code on wages, 2019 - Key features and Highlights,* available athttp://www.mondaq.com/article.asp?article_id=856716&type=mondaqai&r=1&t=5last seen on 14th January 2020

[7]S.17(1)(iv) The Code on Wages ,2019

R.V. Solutions Pvt. Ltd. vs. Ajay Kumar Dixit &Ors.[1]

Joanne Philip
IV BA.LL.B.

I. Introduction:

In this case, the Delhi High Court while referring to the judgments given by the Honorable Supreme Court, laid down that a non-signatory or a third party can be subjected to arbitration without their prior consent, *but only in exceptional cases.* These exceptional cases will be investigated by the court according to the direct relationship of the party to the party who is a signatory to the arbitration agreement, direct commonality of the subject matter and the existence of composite transactions in the agreement between the parties.

II. Facts:

The Plaintiff, *R.V Solutions Pvt. Ltd*., was a company providing quality mobile repairing and maintenance, telecom, IT services and IT solutions to its client for a long period of time and had created a reputation for itself. The Defendants, Ajay Kumar Dixit along with others were ex-employees of the plaintiff company and held senior managerial positions, but abruptly left the plaintiff company and subsequently joined Defendant No. 5 which is the Company. The Plaintiff pleaded that the defendants joined Defendant no. 5 (of which Defendant no. 1 is the CEO), with mala fide intention and misused the private and confidential information of the Plaintiff company to solicit clients, vendors and, staff of the Plaintiff resulting in huge losses. The main issue before the Court was to decide whether the matter can be subjected to arbitration since the Plaintiff argued that Defendant no. 5 is a foreign entity with whom there is no agreement or collaboration.

III. Issues:

1. Can the subject-matter of the dispute be referred to arbitration under section 8 of the Arbitration and Conciliation Act (hereinafter 'Act')?
2. Can third parties therefore be made parties to the agreement?

IV. Analysis:

The High Court, after interpreting Section 8 of the Act, held that it is bound to

[1]SCC Online Del 6419

refer the dispute to arbitration provided that it is the subject matter of the agreement. In order to establish this, the court has relied upon the case of *A. Ayyasamy vs. A.Paramasivam and Ors.*[2] that contains a positive mandate obligating the judicial authority to refer the parties to arbitration in terms of the arbitration agreement.

Further, the Court specified how even non-signatories or third-parties can also be referred to arbitration. For this, reference was made to Supreme Court's judgment in *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc.&Ors.*[3] where it was held that even though occasionally claims are made against or by someone who is not originally a party to the arbitration agreement, it does not act as an obstruction to the agreement and thus, arbitration can be possible between a signatory to an arbitration agreement and a third-party. But it is important to note that this is possible in exceptional cases. Therefore, for a non-signatory to be subjected to arbitration, it is necessary to establish a direct relationship to the party signatory to the arbitration agreement, commonality of the subject matter and existence of composite transactions in the agreement between the parties.

In the present case, it is clearly evident that there is a commonality of facts. Defendants No. 1 to 4 were ex-employees of Plaintiff company and colluded to cause damages and loss to the Plaintiff, and has in fact resulted in heavy losses for the plaintiff. Hence, the common interests make it possible for the matter to be submitted to arbitration.

Conclusion:

The Court has held that even though Defendant No. 5 was not a party to the arbitration agreement with the Plaintiff company, the parties could be referred to arbitration. This makes resolving disputes between parties less time consuming, more flexible and less formal as compared to litigation in courts. Such a decision also gives arbitrators the power to make non-signatory party to the dispute in question which is in the spirit of the Act. This is necessary because the main purpose of arbitration is to avoid the interference of the court and give sole authority to the arbitrator.

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[2] AIR 2016 SC 4675.
[3] (2013) 1 SCC 641.

Indibility Creative Pvt. Ltd. & Ors. Vs Govt. Of West Bengal and Ors[1]

Krishna Sarkate
III LLB

Introduction

This case pertains to 'Bhobishyoter Bhoot' ('Future Ghosts'), a movie with themes of political satire. The said movie was duly certified by CBFC for public exhibition and yet, an unofficial ban was imposed on it by the West Bengal Government.

Facts of the Case

The film, 'Bhobishyoter Bhoot' is a political satire about ghosts who wish to make themselves relevant in the future by rescuing the marginalized and the obsolete. The film dwells on the pristine values of journalism, film making, and politics. The film had a U/A certification for public exhibition, issued by the Central Board of Film Certification (CBFC). But the Petitioner no. 2 received a call on his cell phone, from Dilip Bandopadhyay of State Intelligence Unit of Kolkata Police. He also received a letter from the State Intelligence Unit, calling upon him to arrange a prior screening for senior officials of Intelligence Unit of Kolkata Police to review whether the contents of the film may hurt public sentiments, leading to political law and order issues, to which the Petitioner no.2 declined to. The film was released on 15/02/2019. But it was removed from theatres by most exhibitors due to directions by "higher authorities" with the reason of "keeping the interest of the guests". This Civil Writ Petition was filed as a result of this.

Issues Involved

There was one issue in this case, which was-

Whether State and its agencies have resorted to extra-constitutional means to abrogate the fundamental rights of the producer, director, and the viewers?

Arguments Advanced

Respondents-

1. That neither has the film been banned by the Government of West Bengal nor has recourse been taken to the powers contained in

[1] [WP© No. 306/2019] decided on 11.04.2019

Section 6 of the West Bengal Cinemas (Regulation) Act 1954 or Section 13 of the Cinematograph Act 1952. A chart was filed, indicating that the film was running in ten theatres.

Petitioners-

1. That even a single event showing concerns of law and order wasn't reported, and yet the local police informed the exhibitors to cease screening of the film with immediate effect.
2. That there has been an unlawful interference with the public exhibition of the film by an organized effort on the part of the authorities of the State including the Intelligence Unit of the police in West Bengal.
3. That the attempt by the Police to interfere with the exhibition of the film is destructive of the freedom of Speech and Expression.
4. That the film having received certification for public exhibition by CBFC, the obstruction caused by the state of West Bengal through its Home Department and the Kolkata police amounts to a subversion of the rule of law.
5. That contention of the Respondents is not valid since the chart filed by the Respondents indicated that the theatres still screening the film were all situated outside Kolkata

Judgment by the Hon'ble Supreme Court

1. That State of W.B was bound, once the film has been certified by the CBFC, to take necessary measures to protect the fundamental right to free speech and expression of the producer and the director and, for that matter, of the viewers to see the film unrestrained by extra-constitutional restraints, and that the Joint Commissioner of Police acted beyond the scope of his legitimate authority in directing the producer to arrange for a private screening of the film for a few senior officials.
2. That Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Articles 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency, like the Govt. Of W.B has done in this case.

3. That the Police are not in a free society the self-appointed guardians of public morality and their authority is subject to the rule of law, and thus, cannot enforce the blanket ban on the film.
4. That a compensation of Rs. 20 Lakhs be paid by the Respondents as a consequence of pulling the film out of the theatres for violating the fundamental rights of the Petitioners, and Rs. 1 Lakh be paid as the cost of legal proceedings for the Petitioners.

Author's Critique

The police cannot act as a moral enforcer on behalf of the people. Neither can it restrict exhibition of anything solely on the basis that it might offend someone. Even if the film does attract violence of any sort, it would be the duty of Police to curb the violence, and not stop the exhibition. The reasonable restrictions under Article 19(2) can only be used under the supervision of the judiciary. Art is always subjective and curbing the freedoms of an artist would be against the very principles of democracy.

Pr. Director General of Income Tax (Admn. & TPS) vs. M/s. Synergies Dooray Automotive Ltd. &Ors.[1]

Palak Lall
V BA.LL.B.

Statutory dues come within the meaning of the term 'operational debt' under the Insolvency and Bankruptcy Code ("IBC"), 2016.

In the present case, the National Company Law Appellate tribunal (NCLAT) dealt with five appeals which have been disposed of by the NCLAT by virtue of this common judgement.

The first appeal[2] was preferred by Pr. Director General of Income Tax(Admn. & TPS) against the order of the National Company Law Tribunal (NCLT) , Hyderabad approving the resolution plan of M/S Synergies DoorayAutomative Ltd. without impleading the department as a respondent to the proceedings.

The second appeal[3] was filed by the Principal Commissioner of Income Tax, Mumbai against the order of the NCLT, Mumbai approving the resolution plan of the corporate debtor wherein the total income tax liability was set at one per cent of the crystallised demand.

The third appeal[4] was preferred by the Sales Tax Department, Maharashtra against the approval of the resolution plan by the NCLT, Mumbai. The contention of the appellant was that the Sales Tax and Value Added Tax do not come within the meaning 'Operational debt' and therefore the Sales Tax Department, Maharashtra did not come within the meaning of the word 'Operational Creditor' under the IBC, 2016.

The fourth appeal[5] was preferred by the Sales Tax Department, Maharashtra against the approval of the resolution plan by the NCLT, Mumbai under S.31 of the IBC, 2016. It was submitted that the reduction of Value Added Tax to 1% was against the provisions of the Maharashtra Value Added Tax Act, 2002.

The fifth appeal[6] was also preferred by the Sales Tax Department, Maharashtra against the approval of the resolution plan by the NCLT, Mumbai. In addition to

[1]Company Appeal (AT) (Insolvency) No. 205 of 2017
[2]Company Appeal (AT) (Insolvency) No. 205 of 2017
[3]Company Appeal (AT) (Insolvency) No. 671 of 2018
[4]Company Appeal (AT) (Insolvency) No. 309 of 2018
[5]Company Appeal (AT) (Insolvency) No. 559 of 2018
[6]Company Appeal (AT) (Insolvency) No. 759 of 2018

the plea taken that Value Added Tax is not an operational debt, it was also contended that the resolution plan reduced the claim of the tax department to twenty percent of the amount due.

The main question before the NCLAT for consideration was whether the Income Tax, Value Added Tax or other statutory dues such as Municipal Tax, Excise Duty, etc are 'operational debts' and also whether the legal authorities having statutory claims are 'operational creditors' under the IBC 2016.

The NCLAT analyzed the definition of the term operational debt under S.5 (21) of the IBC, 2016. Section 5(21) reads as under:

"Operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."

The question for consideration before the NCLAT was whether the use of the term 'or' was disjunctive or should it be read to be conjunctive i.e. should it be read as 'and'. The tribunal placed reliance on the case of *Life Insurance Corporation of India v. D.J.Bahadur*[7] wherein it was held that in certain extraordinary circumstances the word 'or' may be interpreted as 'and'. However, where no compelling reason for the adoption of such a course is, however, available, the word "or" must be given its ordinary meaning, that is, as a disjunctive.

The NCLAT held that there was no ambiguity in the definition of 'operational debt' and the legislature did not use the word 'and' and had intentionally used the word 'or' between 'goods or services' including employment and before 'a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, and State Government or any local authority'.

The tribunal further observed that operational debts arise out of the operation of a company or a corporate debtor and the goods and services including employment are essential to keep the company

[7](1981)1SCC 315

operational. Income Tax, Value Added Tax and other statutory dues arise only when the company is operational and such dues therefore have a direct nexus with the operation of the company. And it is for this reason that all statutory dues come within the meaning of 'operational debt'.

For the same reason, the tribunal also held that 'Income Tax Department of the Central Government' and the 'Sales Tax Department(s) of the State Government' and 'local authorities', who are entitled to dues arising out of the existing law are 'Operational Creditors' within the meaning of Section 5(20) of the IBC, 2016.

The Consumer Protection Act, 2019

Sanskruti Desai
II LL.B.

The Consumer Protection Act, 2019 seeks to enhance the interest of consumers and also provide for timely settlement of their grievances while replacing the Consumer Protection Act, 1986.

The previous legislation had 31 sections divided into 4 chapters but the new Act of 2019 contains 107 sections divided into 8 chapters.

While the 2019 Act contains some earlier provisions, few important new concepts have been introduced. The Act provides a mechanism for redressing consumer complaints if there is a defect in a good or deficiency in a service. It establishes three types of bodies: Consumer Dispute Redressal Commissions, Consumer Protection Councils at district, state and national level and it sets up the Central Consumer Protection Authority.

Some fundamental changes introduced in the Act are as follows:

1. The Act incorporates new words which are defined under Section 2, such as 'Advertisement', 'Consumer Rights', 'Design', 'Direct Selling', 'Director General', 'E-Commerce', 'Electronic Server Provider', 'Endorsement', 'Harm', 'Injury', 'Mediation', 'Misleading Advertisement', 'Product and Product Liability', etc.
2. A new explanation has been added to the definition of 'Consumer' under Section 2(7) to include consumers who buy goods or avail services through online transactions.
3. Definition of 'goods' has been amended to include 'food' as defined in the Food Safety and Standards Act. 2006.
4. Definition of 'services' has been amended to include 'telecom'.
5. The Act has introduced the definition of'unfair contracts' to refer to those contracts which contain terms which significantly affect consumer's rights.
6. The definition of 'unfair trade practice' has been further broadened to include misleading electronic advertising, refusal after selling goods or rendering services, to take back defective goods or to withdraw or discontinue deficient services, and to refund the consideration within the stipulated time or within a period of thirty days.

7. Chapter III of the Act deals with Central Consumer Protection Authority which has been set up *'to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class*.[1] Some powers of this Authority are:

- To file complaints;
- To intervene in matters before Consumer Commissions;
- To inquire and investigate;
- To order recall of goods;
- To reimburse price paid for goods and services;
- To issue directions and penalize manufacturers and endorsers for misleading advertisements.

This Authority would work as a regulatory body to prevent violation of consumer rights.

8. Under Chapter V, mediation as an alternative dispute resolution mechanism for admitted consumer complaints has been introduced.
9. The Act allows consumers to file a 'product liability claim' if they suffer an injury because of a defect in goods or a deficiency in services. Consumers can claim compensation in case of any 'harm' caused. 'Harm' has been defined in the Act as property damage, illness or death etc. Claims can be made against a manufacturer, seller or service provider of defective goods or deficient services. This provision is of immense importance looking at the increased business of e-commerce in India.
10. The Authority may impose a penalty of up to Rupees ten lakhs on a manufacturer or an endorser, for a false or misleading advertisement. It can also prohibit the endorser of a misleading advertisement from endorsing any product or service for a period of 1 year.

Changes in Procedural Matters

1. The pecuniary Jurisdictions of each of these commissions have been increased. Now, consumers with complaints valued upto One Crore

[1] S. 10(1), The Consumer Protection Act, 2019.

shall approach District Forums, for one crore to 10 crores to approach State Commissions and above 10 Crores to the National Commission.

The jurisdiction has also been expanded to allow complaints to be made, by the complainant, at the place where he resides or personally works for gain. A consumer can also file a complaint electronically.

2. If the question of admissibility is not decided within 21 days, then the complaint shall be deemed to be admitted.
3. The Consumer Commissions have been given the power of judicial review to rectify errors apparent on the face of the record, thus reducing the burden on account of appeals.
4. The time for preferring an appeal from the order has been increased from 30 days to 45 days from the date of order.
5. An appeal from State Commissions to the National Commission can be made only if there is a substantial question of law involved.
6. Appeal to the Supreme Court can be made only if the complaints originated in the National Commission.

CONCLUSION

The Consumer Protection Act, 2019 has made several changes to the erstwhile legislation, by further empowering customers and adding to the responsibilities of the manufacturers and sellers of goods, and providers of services, thus, widening the reach of the consumer protection regime in India. Now, it becomes vital for consumer-driven businesses to take extra precautions against unfair and unethical business practices and to have strong policies in place for consumer redressal. This is a positive step towards reformation and development of consumer laws under the changing socio-economic environment. Also, the Act attempts to ease and accelerate the process of resolution of consumer disputes by increasing the jurisdiction of the Commissions and by attaching mediation cells. These changes signify an attempt to improve transparency in the marketplace and ensures that consumer interests are above all else.

LLM ARTICLES

Role of Media in Protecting the Identity of Children

Anjali Nair
I LL.M

"Every young boy or girl in his or her heart of hearts craves for recognition and love and he or she becomes the devoted slave of anyone who shows him or her kindness and consideration."

Rabindra Nath Tagore

Introduction

Media is the reflection of our society and it depicts what and how a society works. The current surge in competition among the news channels and newspapers has resulted in the frequent infringement upon the rights of children. The law prohibits the disclosure of photographs and names of a child in conflict with law. Yet, there is an increase in violation of these laws on a regular basis. Shanta Sinha, chairperson of the National Commission for the Protection of Child Rights in 2007 stated that no child who is in conflict with law should be named or his photograph published as this seeks to stigmatize the child[1]. She added, *"We must recognize that the child acts without experience or knowledge of what he or she is doing,".*

The media is what can help keep a tab on the authorities of the country, ensuring that they do not overstep their boundaries. It is thus, integral to a democracy like India, where every individual is allowed her/his say. The expectation from the media, therefore, is to work in tandem with the United Nation's Convention on the Rights of the Child, which India signed in 1992, to make sure children's rights are adequately and accurately covered in the media. The other expectation is to make sure children's voices are represented in the media and while reporting, the best interests of the child are given utmost importance in journalistic practices.

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[1] *Eight- year old labelled serial killer,* Time of India, available at https://timesofindia.indiatimes.com/india/Eight-year-old-labelled-serial-killer/articleshow/2101665.cms, last seen on 30/12/2019

With regard to the protection of the identity of children emphasis is laid on the laws in India which prohibits the publication of the identity of a child who is a victim or is a witness to a case. The Article will also cover the initiatives which can be taken in India with regard to the measures laid down under the Convention on Rights of Child.

The trouble with child rights begins with the very definition of a child by law. Age limits are a formal reflection of society's assessment of the evolution of children's capacities and responsibilities. Age limits regulate children's activities in every phase of life, when they can marry, when they can vote, when they can be treated as adults, and when they can work. These limits differ from country to country and in India from legislation to legislation.

A child means every human being below the age of eighteen years according to Article 1 of UNCRC. This definition of child allows discretion to individual countries to determine the age limits of a child in their own laws. In India various laws related to children define 'child' in different age limit. For the purpose of criminal responsibility, the Indian Penal Code, 1860 finds that no child below the age of seven may be held criminally responsible for an action.[2]

The question of reviewing the definition of the term 'child', in the light of Article 1 of the CRC has been referred to the Law Commission of India, which will consider this matter while undertaking a comprehensive review of the Code of Criminal Procedure, the Indian Evidence Act, and the Indian Penal Code[3].

Rights of Child

The United Nations Convention on the Rights of the Child (UNCRC) that India ratified in 1992 is the most widely ratified human rights treaty in the world. It defines Child Rights as the minimum entitlements and freedoms that should be afforded to every citizen below the age of 18 regardless of race, national origin, colour, gender, language, religion etc .

The UN Convention lays down rights under four broad heads: 1) Right to Survival 2) Right to Development 3) Right to Protection and 4) Right to Participation.

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[2]S.82, The Indian Penal Code, 1860.
[3]*India's Children, essays on Social Policy*, 136 (A.K Shiva, PreetRustagi, RamyaSubrahmaniam, 1st ed., 2015)

The need to protect certain children is undoubtedly greater than others. There are children who are vulnerable in terms of their right to survival, development or participation. They are referred to as Child in need of Care and Protection as per Section 2(14) of the JJ Act, 2015. This includes children in difficult situations, homeless children, children who are victims of crime, children who are perpetrators of crime, trafficked children, orphaned or abandoned and destitute children, refugee and migrant children etc.[4]

Media and Children

The media is the gatekeeper and watch dog of the society. The media acts as a multifaceted institution with multiple activities. The media, as an instrument, can act as a conscience-keeper of a country, a watchdog and an accountability holder. By highlighting key issues, it can not only help raise awareness among people, but also enable them to act as responsible and well-informed citizens. The media is an integral part of a democracy, where every individual is allowed his/ her say[5]. Although, the media can be commended for starting a trend where the media plays an active role in bringing the accused to hook, the media should take special care while dealing with children especially children in need of care and protection. The victims are under enormous mental and emotional strain as it is, and the media's insensitivity when covering their case can destroy the victim's credibility. Therefore, when launching any case relating to children, the media must maintain a balance and take special care while disclosing names and other details of the victims.

Therefore, the media is expected to work in tandem with the UN Convention on the Rights of the Child, signed by India in 1992, to ensure adequate and accurate media coverage of children's right.

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[4]The United Nations Conventions on the Rights of Child, UNICEF, available at https://www.unicef.org.uk/what-wedo/un-convention-child-rights/, last seen on 5/10/2019.

[5]*Children in news*, Child Rights & You, available at http://www.cry.org/resources/pdf/Children in News 2011.pdf, last seen on 06/10/2019

Safeguarding the identity of the child

The recent Kathua Rape and Murder Case involving an 8-year old child sparked the controversy regarding "identity disclosure of victim involved in certain offences". The Hon'ble Delhi High Court comprising of acting Chief Justice Gita Mittal and Justice C Hari Shankar issued notice to 12 media houses including The Times of India, The Hindustan Times, The Indian Express, The Hindu, NDTV, Republic TV, and Firstpost[6]. The bench categorically stated that unfortunately, the nature and manner of reporting of the alleged offence is being affected in absolute violation of specific prohibition of law disrespecting the privacy of victim which is required to be maintained in respect of the identify of a victim. Though the Hon'ble Delhi High Court initiated damage control over the Kathua Rape Case, there is hardly anything that could be done as the identity of victim and accused is widely known.

In India this is just one amongst the many cases that have grossly violated the provisions relating to identity disclosure of child victims. The root cause of the problem is that our society has been unable to determine whether they should accept the disclosure of identity of victim or keep his/her identity in solitude.

I. Prohibition on publication of Identity of Child

Section 74 of the Juvenile Justice (Care and Protection of Children) Act, 2000 lays down that the media should not disclose the names, addresses or schools of juveniles in conflict with the law or that of a child in need of care and protection, which would lead to their identification unless the enquiring authority permits such disclosure in writing in the interest of the juvenile. Cases where the privacy is that of a minor, deserves special interest and protection in order to avoid any damage to the minor's development or environment that may cause trouble to the minor's social life.

Similarly, Article 16 of the Convention on the Rights of the Child (CRC) stipulates that no child shall be subjected to arbitrary or unlawful interference

[6] *Delhi High Court raps media houses for disclosing the Kathua rape-murder,* The New Indian Express, available athttp://www.newindianexpress.com/nation/2018/apr/13/delhi-high-court-raps-media-houses-for-disclosing-kathua-rape-murder-victims-identity-1801019.html, last seen on 06/10/2019.

with his or her privacy, family, or correspondence, or to unlawful attacks on his or her honour and reputation. It also stipulates that the child has the right to the protection of the law against such interference or attacks. Article 40 of the Convention, states that the privacy of a child accused of infringing penal law should be protected at all stages of the proceedings.

In the case of *Principal Air Force Bal Bharti School, New Delhi*[7] v. The Hindustan Times New Delhi the Principal filed a complaint against the newspaper, for publishing misleading, false and distorted news items with regard to a student who was rusticated for committing a Cyber Crime. The respondents were restrained from publishing the proceedings of the case under Section 74 of the JJ Act 2015. The respondents offered an apology before the Press Council of India with respect to the error in the news item it published and the case was disposed of accordingly.

II. Disclosure of identity of victims in certain offences

Section 228A of The Indian Penal Code, 1860 makes disclosure of identity of victims of certain offences punishable. The primary intention behind this provision was to prevent social victimization or ostracism of the victim of a sexual offence and to save the victim from the post offence atrocities of society. Similarly, Section 23 of the Protection of Children from Sexual Offences Act 2012 (POCSO) and Section 74 of the Juvenile Justice (Care and Protection of children) Act 2015 prohibits disclosure of name, address, photographs, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of a victim of sexual offences. However, the sentence in both the sections vary. While contravention of Section 23 leads up to 1-year imprisonment, contravention of Section 228A and Section 74 may lead to imprisonment for up to 2 years. Although, media houses and news reporting agencies are cautious about such law, still there have been instances where there have been wilful or negligent breaches.

In 2007, the National Commission for Protection of Child Rights received complaints on the use of the name and photographs of an 8-year old boy in Begusarai, Bihar[8]. The boy, who was alleged to have killed three children, was referred to in reports as a 'serial killer' and a 'tyrant'. Although the law was clear

[7] Principal Air Force Bal Bharti School, New Delhi v. The Hindustan Times New Delhi, Press Council, available athttp://presscouncil.nic.in/OldWebsite/Decisions/agiant_press/35.htm, last seen on 06/10/2019

[8] *Eight-year-old labelled 'serial killer',* Times of India, available athttp://timesofindia.indiatimes.com/india/Eight-year-old-labelled-serial-killer/articleshow/2101665.cms, last seen on 06/10/2019.

with regard to non-disclosure of the identity of child in conflict with law, violations still exist.

A 16-year-old girl was gang-raped in the case of *State of Punjab v .Gurmit* Singh[9] and the trial court referred to her as a person of loose character. It was in this case that the Supreme Court laid down that the name of the victim in rape cases should not be disclosed by the courts and that the trial should be held in camera as a rule. In addition to that, the court also directed that as far as possible, trials must be conducted by women judges.

In May of 2008, a 14-year-old child was murdered in the most gruesome circumstances- numerous photographs of this child were procured and published by the media; her "character" and personal life were dissected and deemed immoral. The Aarushi Talwar murder case , the details of which have been debated ad nauseam in all the media publications channels (both print and broadcasting), is a classic case[10] of media infringement on the privacy and dignity of the child and her family.

In 2012, a badly battered two-year-old girl was admitted to AIIMS Trauma Centre in New Delhi, by a 15-year-old adolescent girl. The Baby Falak case[11] was covered extensively by the media around the country. However, the coverage also raised a lot of questions about the manner in which the media accessed and disclosed confidential information and photographs of these two children. This case also raised significant questions, for the first time, about the role and responsibilities of different stakeholders in disclosing information about children involved in such cases-be it the police, the doctors, hospital authorities, the Child Welfare Committee, judiciary, the government departments, civil society groups, counsellors, etc. Shockingly, the TV cameramen were allowed by the hospital authorities to film Baby Falak in the ICU.

The Delhi High Court in the case of *A.K Asthana v. Union of India &Anr*[12], directed the National Commission for Protection of Child Rights to set up a committee, which has since formulated the guidelines for media reporting on children in India. Amongst other things, the Media Guidelines stated that:

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[9] State of Punjab v. Gurmit Singh, 1996 AIR 1393

[10] Dr. (Smt.) Nupur Talwar vs State of U.P. And Anr., CRIMINAL APPEAL No. - 293 of 2014

[11] *Who killed baby Falak?*, The Hindu, available a thttps://www.thehindu.com/opinion/lead/who-killed-baby-falak/article3009764.ece, last seen on 5/10/2019.

[12] A.K Asthana v. Union of India &anr, W.P(civil) 787 of 2012

i) The privacy, dignity, physical and emotional development of children needs to be preserved and protected while reporting/ broadcasting/publishing news/programmes/ documentaries etc. on and for children.

ii) Lack of care by the media in this regard may entail the real risk of children facing harm, stigma, disqualification, retribution, etc.

iii) The media shall ensure that a child's identity is not revealed in any manner, including his/her personal information, photograph, school/institution/locality and information of the family or their residential/official address.

iv) The media shall not sensationalise issues or stories, especially those relating to children, and should be conscious of the pernicious consequences of disclosing/highlighting information in a sensational form and the harm it may cause to children.

III. Protection of Identity of witness: Special Status in India

The 172nd Report of the Law Commission (2000), dealing with the review of rape laws suggested that the testimony of a minor in the case of child sex abuse ought to be recorded at the earliest attainable opportunity in the presence of a judge and a child support person. In addition to this it also urged that the court ought to permit the use of video-taped interview of the child or allow the child to testify by a closed-circuit television and that the cross examination of the minor should be carried out by the judge based on written questions submitted by the defense. The commission also recommended insertion of a proviso to Section 273 of The Code of Criminal Procedure,1973 to the effect that it should be open to the prosecution to request the court to provide a screen so that the child victim does not have to face the accused during the trial[13]

[13] *Law Commission of India's Consultation Paper on Witness Protection,* Law Commission of India, available athttp://lawcommissionofindia.nic.in/Summary%20of%20the%20Consultation%20paper%20on%20Witness%20protection%20AND%20Questionnaire.pdf , last seen on 06/10/2019

In Sakshi V.Union of India[14], the petitioner prayed for special measures to be taken at the time of recording statements of children in cases of sexual abuse. The Supreme Court referred to the 172nd Report of the Law Commission and laid down certain procedural safeguards that must be adhered to while conducting trial of child sexual abuse or rape. They were as follows:

i) Special arrangements such as a screen must be provided to ensure that the victim or witness does not have to see the face of the accused.

ii) The questions for cross examination must be framed and given to the Presiding Officer of the Court who must then put them to the victim or witness in a language that is clear and not embarrassing.

iii) Adequate breaks must be given to the victims of child abuse or rape while they give their testimony in court.

Conclusion

Although great advances have been made in recent years in identifying the needs of child victims and in trying to provide appropriate services and remedies for them gross violations of the provisions still exist. The current legislations in India, on the protection of child, are adequate with respect to protecting the identity of child victims, witnesses, child in conflict with law and child in need of care and protection. Yet we see violations on the part of the media on a regular basis. One primary cause for such violations is the lack of harsh punishments. The current legislations impose a fine of Rs 2 Lakhs in case of violations. This is not an exorbitant amount the media houses in India cannot afford. Thus, there is most certainly a need for harsher punishments and fines.

Another way these violations can be curbed is by a simple and mandatory disclaimer that the news reporting organization should give below the photograph of the victim stating that they have acquired permission from the victim or her next kin allowing them bonafide disclosure of materials/photographs/documents that have tendency to make known the name/address/family of victim. This kind of mandatory requirement will impose positive liability on media and people in possession of information with the obligation to show that they had prior approval of concerned person before making identity of victim known.

[14] Sakshi v. UOI & Ors.,1999 CriLJ 5025

Stitching the Gape in Rape

Gayatri Vishal Shirdhonkar
I LL.M.

Introduction

Nirbhaya (Jyoti Singh, 2012 Delhi gang rape case victim), Asifa Babno (Kathua gang rape case victim), Disha (victim of gang rape case in Hyderabad is named so by the police to protect her identity, 2019), Victim of 2017 Unnao gang rape case and many more women have been victims of not just gang rape but also have been victims of our very unavailing criminal justice system. Their pain and suffering have augmented post the unfortunate events when the system takes over the case in order to "investigate and adjudicate" over it. These are just a few cases that have caught the public eye and hence the masses witnessed, firsthand, the shoddy handling of these cases by the authorities. This manifested to be a wake-up call to the nation and thus the demand to scrutinise the system to admit responsibility as well as to bring in reforms in the criminal justice system. Even after so much of protests and public fury over rapes in India, rape incidents keep on happening. Where are we lacking, we need to analyze. Rape is a social problem for it affects all humanity especially all women in different ways besides traumatizing the poor victims. It has been found that one out of every four crimes against children is rape.[1]

The difficulty is the tendency of the criminal justice system process to create secondary trauma (also described as secondary victimisation) of victim-survivors of rape, through ill-informed processes that are 'insensitive' or 'victim blaming'[2]. In an adversarial system like ours, criminal cases become a contest between the accused and the State, represented by the Public Prosecutor. There is minimal role envisaged for the victim, who is the most affected by the crime.

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[1]Adfer Rashid Shah, *The Culture of Rape: Understanding Delhi Rape Horror and Underlying Perspectives,* The Tibet Journal, 43, 50, (2013),https://www.jstor.org/stable/10.2307/tibetjournal.38.1-2.43, Last Seen on 13/06/2020.

[2]Sylvia Walby, Philippa Olive, Jude Towers, Brian Francis, Sofia Strid,AndreaKrizsán, Emanuela Lombardo, Corinne May-Chahal, Suzanne Franzway, DavidSugarman, Bina Agarwal and Jo Armstrong, *Law and Criminal Justice System,* Bristol University Press, 111, 112, (2015), https://www.jstor.org/stable/j.ctv4g1rd0.9 , last seen on 13/06/2020.

Her plight is forgotten in the battle for supremacy between the State and the accused. Instead of being the focus of the debate, she becomes the mere cause[3].

At present, the role of a victim of crime is only at the periphery of the criminal justice delivery system. Once the first information is furnished, the only stage at which the victim comes into the picture is when she is called upon to give evidence in the court by the prosecution. The victim virtually takes a backseat in the criminal justice network. She is neither a participant in the criminal proceedings launched against the offender, nor even reckoned as a guiding element in the process of prosecution or the ultimate decision-making. There is a plethora of instances in which the victim has been subjected to secondary victimization by the acts of the accused or their associates. The law does not afford any relief to the victim by way of monetary compensation or reparation for the harm suffered, except to a limited extent. There has been crass neglect of the victim's needs and interests, even though she ought to be regarded as an important player in the system. The system has no mechanism and no direction to redress the suffering and trauma undergone by her. Except for the cases in which an *ad hoc gratia* amount has been sanctioned by the Government in its discretion, the victim must fend for herself. She must bear the horrifying experience with all its attendant consequences silently and helplessly.[4]

Incongruity in the system

First and foremost, the legislature must atone for the loopholes and discrepancies in the existing legal system to avoid adverse situations. The system is been taken advantage of because of its reformative approach in granting punishments to the accused instead of deterrent approach. The lacuna was realised after the Nirbhaya incident which struck a note at the very foundation of our criminal justice system. The severity of the incident ascertained the need for reforms and in furtherance of the same the Criminal (Amendment) Act, 2013[5] was passed by the Parliament introducing various reforms in the criminal laws, in order to make the system more stringent. This amendment was enacted with an intention to make stricter laws for taking care of crimes against women. This case was the first instance, wherein death

[3]P.V. Reddi, *Role of the Victim in the Criminal Justice process,* Vol no. 18, Student Bar Review, 1, 2, (2006) , www.jstor.org/stable/44306643 , last seen on 13/06/2020.
[4]Ibid,at 3.
[5]Criminal (Amendment) Act, 2013.

penalty was awarded to the convicts charged with rape. The unprecedented shift, even though appreciated, should have been there in the first place as the legislature is expected to put in place, full proof laws, which are prepared for any kind of adverse situation. Another important fact to note here, which details on the lacunas of the system, is the juvenile accused in the case, who was just short of turning a major, was subjected to a short sentence of mere three years for commission of such a heinous offense. Being tried as a minor, his sentence was subjected to the provisions of the Juvenile Justice Act, 2002[6] and not the Indian Penal Code, 1860[7]. This triggered an academic debate on whether the majority age should be reduced to 16 years. Later on, changes were brought in the laws regarding how to treat minors between the age of 16 to 18 committing heinous offences, however the fact remains that the minor in Nirbhaya's case escaped the commission of a high degree of heinous crime with minimum punishment.

Secondly, the executive segment i.e. the police departments must ensure that the investigation is done in an unblemished and bona fide manner while following proper procedures. It must also unchain itself from the shackles of corruption. In the aftermath of the Hyderabad gang rape incident, three police officers were suspended, including a sub-inspector, under the charges of negligence and delay in filing a missing person's report. Even though the police arrested the accused within 24 hours, the girl's family claims that the police personnel wasted a lot of time over the jurisdictional issue and failed to rush to the spot immediately. Further, the family claims that this delay has resulted in the girl's death. Furthermore, the Hyderabad police took the law into their own hands when they shot all four accused on the pretext that the accused tried to run away, when they were taken back to the spot for the purpose of recreating of the incident. The police alleged that the accused tried to attack them, and the situation forced them to shoot in self-defence. In the Kathua gang rape case, four of the initially eight arrested persons were police officers who were accused of destroying evidence. The outcome of these illegal as well as unethical actions of the police is infliction of further legal injuries on the victims as well as their families. As a consequence of such instances, questions are raised on the functionality of the police departments. The people are losing their trust bestowed in the system as it can be seen to be easily manipulated by the ones in power.

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[6]Juvenile Justice (Care and Protection of Children) Act, 2002. *Now replaced by Juvenile Justice (Care and Protection of Children) Act, 2015.

[7]Indian Penal Code, 1860.

Most importantly, reforms should be made in the judiciary which discharges the most crucial functions. These reforms are required in civil as well as criminal machinery. However, the consequences of faulty machinery intensify in criminal matters.

The reforms must include but not be limited to the following measures:

1. Limiting the number of adjournments granted.
2. Increasing the number of benches to reduce the caseload.
3. Establishing specialised courts to investigate matters of particular area of law (for instance, consumer forums established to look into consumer complaints)
4. To have in place a comprehensive action plan by the High Courts for the working of the lower courts as it would result in stricter monitoring of lower courts by the High Courts. Also includes setting of target dates to complete cases pending for a long time. (As the Meghalaya High Court has laid down in its guidelines for lower courts)
5. To reduce the procedural intricacies.
6. Adequate provision for the support staff and infrastructure - to increase efficiency.

In addition to the above-mentioned steps, various such other measures must be adopted to deliver justice to the victims of such heinous crimes in a speedy and effective manner. These measures should be inculcated in the system to avoid the lamentable situations. The most sensationalised case, which shook the entire nation, required a little over seven years to reach its conclusion; despite these seven long years of legal battle, the accused in the case have not been executed. In the Unnao case, the 17year old victim attempted to immolate herself on the street, in front of CM Yogi Adityanath's house, giving in to her helpless circumstances. This is the state of the criminal justice system, wherein, even the cases which go through such high public scrutiny are dealt with in the same manner.

Conclusion

Rape is illegal everywhere. It is a crime, without reference or justification to any other legal principle or standard, in many national and some international legal regimes. In other legal regimes, rape is declared illegal as a result of its relation to other major legal principles, including a form of violence against women that is a violation of human rights; a form of torture that violates human rights; a war

crime and also a crime against humanity; and a form of violence against women that is a form of gender discrimination contrary to the equality between women and men. Rape has also been conceptualised as a violation of bodily integrity and sexual autonomy. Further legal principles that are occasionally used to underpin the illegality of rape, but which are widely regarded as inappropriate and in contradiction to best practice in international principles, include a violation of a woman's honour and a violation of the property of husbands or fathers[8]. This heinous crime thus should have a punishment which answers to the severity of it. The criminal justice system must formulate not just the punishments, but even the procedures in such a way, to dispose these cases in a speedy manner.

Such is the sad state of affairs that the police department of Hyderabad was highly praised for their encounter. This way of dealing with the rape accused was welcomed not just by the family of the victim but by the entire nation. If the aforementioned action was not taken by the police, this case too would have been stretched out for years in the courts and the victim and her family's name and reputation would have been dragged through the mud, similar to what happened in the Nirbhaya's case. Due to this, the nation has patted the backs of the police officers involved in the encounter. The praises have clarified and explained the predicament better than anything else could have. We have to honour institutions as institutions are always credible, actually it is the culture of negative politics and disbelief in everything, which impoverishes the holistic system. State can definitely control rape and all other crimes to a satisfactory level and restore the feel secure psyche to women, just it has to properly utilize the system at place.[9]

Indubitably, the criminal justice system in our country cries for reforms and refinements on many fronts. The inadequacies and aberrations that have been haunting the criminal justice system are too well known[10]. Alongside the above-mentioned concerns, the system, as a whole, must also sensitize itself to crimes of such nature and must take active steps to make the process of administration of justice more convenient for the victims as well as their families. Since the gaps and shortcomings are well known, the time has come for the criminal justice system to take active measures in the direction of overcoming it. The change will be gradual and cannot happen instantaneously; however, it is pertinent to start taking steps in that direction. Also, as an integral part of the

[8]Supra 2, at 129.
[9]Supra 1, at 51.
[10]Supra 3.

society, it is our duty as citizens, to help, in any manner possible, to expedite the process of justice. One of the crucial steps to be taken is to stop the character assassination of the victim and blaming the victim for the incident. Rape and the fear of rape continues to be an issue for many Indian women, even though the conviction rate for rape stands at over a quarter of all cases charged and brought to trial. While this may seem impressive, it should be noted that case law reveals that judges are more likely to pass positive judgements when they consider the victim to fit into the societal acceptable norms of the 'good' woman, that is, a virginal, unmarried girl or virtuous, married woman. Rape is associated with loss of honour for the family or community, and therefore raped women often do not file a report with the police.[11] As the laws evolve, society must evolve simultaneously. This change is going to be imperceptible, nonetheless, if each individual, as a responsible member of society, takes this up, the process can be expedited. By doing the same, we can stitch the 'gape in rape'.

[11]GeetanjaliGangoli, *Controlling women's sexuality: rape law in India,* Bristol University Press; Policy Press, 101, 117, (2011), http://www.jstor.com/stable/j.ctt9qgkd6.9, last seen on 13/06/2020.

Revisiting Section 9 of the Hindu Marriage Act,1955 in Light of J.Puttaswamy Judgement.

Jeffy Alice Jacob
II LL.M.

Introduction

Over the years, family and marital relationships have remained an important institution in every society. However, there have been an increase in the number of marital disputes and remedies for the infringement of marital rights are available in all legal systems. One such remedy is the restitution of conjugal rights provided under S.9 of the Hindu Marriage Act. The remedy, based on the fundamental idea that each spouse is entitled to the company of the other in a marital relationship, is considered to restore harmony between the spouses and help in preventing irretrievable breakdown of marriages. However, this remedy because of its inherent characteristics remain only as a stepping stone for some other remedy or convenience[1] as it often disregards the will of the wronged spouse[2] making reconciliation harder and at many instances serve as a catalyst for the exploitation of women[3].

The right to privacy, though recognized as an inalienable right by many jurists and legislations, internationally, long ago, the debate relating to the right in India was brought to an end only in 2017, when a 9 judge bench of the Supreme Court in *Justice K.S.Puttaswamy (Retd) v. Union of India &Ors*[4], held that the right to privacy is a fundamental right. Taking this judgment into consideration essentially the fact that right to privacy is a fundamental right, this paper intends to analyze whether the remedy of restitution of conjugal rights infringe the right to privacy and whether the provision is constitutionally valid.

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[1]Raj KumariAgarwala, *Restitution Of Conjugal Rights Under Hindu Law: A Plea For The Abolition Of Remedy*,12, Journal of the Indian Law Institute 257 (1970).
[2]M.Vignesh, Saleem Ahmed, *The Futility Of The Provision Of Restitution Of Conjugal Rights (As Under Hindu Marriage Act, 1955) In The Present Scenario* 22,IOSR Journal Of Humanities And Social Science,91,95 (2017).
[3]Vimal Balasubrahmanyan, *Conjugal Rights v. Personal Liberty: Andhra High Court Judgment* 18 (29) Economic and Political Weekly 1263, 1264 (1983).
[14](2017) 10 SCC 1.

Though the remedy of restitution of conjugal rights has its roots in feudal England, it was eventually abolished there. However, it was passed on to the legal system of Colonial India and still survives. Authors like Paras Diwan[5] notes that the feudal concept of women and children as the possession of men was the reason behind the origin of the remedy of restitution rights.

The 23rd Law Commission of England's report on Proposal for the abolition of the remedy, 1969, stated that a court directing individuals to live together is not an effective measure of attempting to bring reconciliation between the husband and wife. Although marriage was considered as sacrosanct in all religions in India, the religious texts did not necessarily provide for remedies or procedures to compel a spouse to return to the other's company. It was in *Monshee Buzloor v. Shumsoonissa Begum*[6] that the remedy in its current form found place in the Indian legal system for the first time. The Privy Council accepted the right of a Muslim husband to file a case seeking his wife to return to his company and possession.Though this case was one between Muslims, the rule was applied to Hindus too, eventually.

Although, overruled by a Division-bench judgment of the High Court of Bombay, Justice Pinhey's ruling in the case of *Dadaji Bhikaji v. Rukhmabai*[7] wherein he observed that the remedy of restitution was foreign to the Indian legal system and cannot be applied in order to compel a 22-year old woman to live with the man to whom she was married during infancy, is one of the oldest judicial decisions that warned the society of the shortcomings of the remedy. Despite these judicial findings, the remedy found a place in the legal system and has ever-since played an important role inupholding the patriarchal and conservative ways of the society. It was Justice Choudhary in *T Sareetha v. T Venkatesh*[8], brought in observations based on Constitution and fundamental rights into Justice Pinhey's ideas about the importance of consent and privacy over individual space in context of restitution of conjugal rights.

The Report by High Level Committee on Status of Women, Ministry of Women and Child Development in 2015 and incidentally the Law Commission[9] had

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[5]Paras Diwan, *Restitution of Conjugal Rights and the Law Commission's Recommendation for reform*, 139, 150 in *Studies in the Hindu Marriage and the Special Marriage Acts* (V Bagga, 1st ed.,1978).

[6](1867) 11 MIA 551.

[7](1885) ILR 9 Bom 529.

[8]AIR 1983 AP 356.

[9]Law Commission Of India, Consultation Paper on Reform of Family Law,7, (2018), available at: http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf, last seen on 24/12/2019.

recommended the deletion of the provision based on two grounds, namely, the recognition of denial of consummation as a ground of divorce has made the remedy irrelevant and that misuse of the remedy as a means to defeat the maintenance claims filed by the wives was rampant in the society.

These recommendations, despite based on the effectiveness of the remedy was not recognized by the Indian legal system and hence the provision still holds good. However, the decision of Supreme Court declaring right to privacy as a Part III right have brought in new strength to the voices seeking the abolishment of the remedy.

It was the Georgian Supreme Court[10] in 1905 which recognized privacy as a remediable common-law right, for the first time. In this case, the use of a photograph in an advertisement of a life insurance company without the person's consent was held to be in violation of his personal liberty which in turn takes away his right to be left alone. Although the US Constitution did not provide a specific provision for the protection of privacy, Justice Douglas in *Griswold v. Connecticut*[11], recognized the idea that proper spacing between individuals is essential in every community and these have to be given legal recognition, while striking down an Act penalizing the use of contraceptive devices stating it to be violative of marital privacy which was one of the zones of privacy. The US judiciary from *Griswold*[12] to *Roe*[13] and even in later decisions, have explicitly held that there exists a right to privacy of individuals that is essential to uphold the liberty, individual autonomy and protect the Constitutionally guaranteed rights like right against self-incrimination, right to life and liberty, right against unreasonable searches and seizure, etc.

Indian judiciary and Right to Privacy

The journey of the right of privacy from being not recognized under the Indian Constitutional law to being recognized as a fundamental right was gradual, yet revolutionary. The Constituent Assembly did not discuss or debate on the right, although a proposal to include a provision similar to the American Fourth Amendment which prohibits unreasonable searches and seizures was moved by K. M. Munshi and Dr. B. R. Ambedkar, was rejected by the Assembly and

[10]Pavesich v. New England Life Insurance Co. 50 S.E. 68 (1905, Georgian Supreme Court).
381 US 479 (1965).
[11]Ibid.
[12]Roe v. Wade, 410 U.S. 113 (1973, Supreme Court of United States).

Somnath Lahiri's proposal for privacy of correspondence was also rejected[14]. It was the latter that was the basis for rejecting the plea of privacy as part of rights guaranteed under the Constitution in *M P Sharma v. Satish Chandra*[15]. This position was furthered in *Kharak Singh v. State of U.P*[16] in which a six judge bench looked into the UP Police Regulations that conferred surveillance power upon those charged of a crime and upheld the same. Justice Subba Rao, however, in his dissenting opinion in the case strongly supported that privacy is an essential ingredient of personal liberty and defined privacy to be that right to be free from restrictions or encroachments on his person whether directly imposed or indirectly brought about by calculated measures. The debate was further developed almost after 11 years in *R.M. Malkani v. State of Maharashtra*[17] in which the court observed that the telephonic conversation of an innocent citizen will be protected against wrongful interference by tapping while the protection will not be extended for criminals. It was the case of *Gobind v. State of Madhya Pradesh*[18], that marks the watershed moment for Indian privacy law in the Constitution, wherein a three judge bench of the Supreme Court while looking into the domiciliary visits of the police to the house of people charged with crime, held that the right to privacy, though not absolute, was implied in Article 19(1) (a) and Article 21.

The Supreme Court in the subsequent cases of *R.Rajgopal v. State of Tamil Nadu*[19] and *People's Union for Civil Liberties v. Union of India*[20] observed that right to privacy was implicit in the right to life and liberty, right to free movement and freedom of speech and expression guaranteed to the citizens and has acquired Constitutional status. Although these cases affirmed the existence of a constitutionally protected right of privacy, the judgments been rendered by benches of a strength smaller than those in the cases of *M. P. Sharma and Kharak Singh,* called for the interpretation by a larger Bench of the Court and finally in the case of *Justice K. S. Puttaswamy v. Union of India*[21], a nine judge bench, declared that right to privacy is a fundamental right falling in Part III of the Constitution of India.

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[14] Constituent Assembly Debates, 30th April, 1947, available at http://parliamentofindia.nic.in/ls/debates/vol3p3.htm, last seen on 26/12/2019.
[15] AIR 1954 SC 300.
[16] AIR 1963 SC 1925.
[17] AIR 1973 SC 157.
[18] AIR 1975 SC 1378.
[19] AIR 1995 SC 264.
[20] (1997)1 SCC 301.
[21] (2017) 10 SCC 1.

Privacy of an individual and restitution of conjugal rights

Even the judgment in Puttaswamy demonstrates the different meanings and definitions of privacy. It can in simple terms refer to the right to be left alone[22] , or the right to be free from intrusions. The international documents on human rights[23] describes privacy to include a collection of rights like privacy of beliefs, thoughts, personal information, home and property. It is grounded on the fundamental ideas of human dignity and autonomy and denotes the extent of interaction of an individual with others, with the society and even the State.[24] Gary Bostwick's[25] renowned framework of privacy as repose (freedom from unwarranted stimuli), sanctuary (protection from intrusive observation) and intimate decision (autonomy to make personal life decisions) was recognized by Justice Chelameswar and J. Nariman in their opinions in the *Puttaswamy* judgment with J. Nariman emphasizing on the need for protection of privacy of choice, personal rights, mind and body. Further, in the case it was held that privacy is a concomitant of the right of the individual to exercise control over their personality. It is this reservation of the private space of an individual against the society's demands or intrusion by any undesirable individual that becomes fundamental in the debate between privacy and remedy of restitution of conjugal rights.

In *T.Sareetha*[26], the appellant, Sareetha, contended before the Andhra Pradesh High Court that the S. 9 of the Hindu Marriage Act was in violation of Articles 14,19 and 21 of the Constitution as it offended the guarantee to life, personal liberty, human dignity and decency. In this case the appellant T.Sareetha, a 16 year old high school girl was married to Venkat, After a while, they separated and Venkat petitioned for restoration of marital privileges. Justice Choudary, found that the S.9 violated the right to privacy of the woman against whom such a decree is sought. Relying *on Gobind's* decision J. Choudary held that privacy of an individual includes the person's decision to participate in sexual

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[22]Samuel Warren and Louis Brandeis, *The Right to Privacy,* 4 Harvard Law Review 193, 195 (1890).

[23] Art. 8 ECHR, A.17 ICCPR.

[24]Artavia Murillo (In Vitro Fertilization) v. Costa Rica, 2012 SCC OnLine IACTHR 30 (Inter-American Commission on Human Rights).

[25]Gary Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision,* 64 California Law Review 1447, 1448 (1976).

[26]Supra 5.

intercourse with another and since it is incidental to cohabitation in a marital relationship, the Court order providing for restitution of conjugal rights violates the privacy of an individual.

The judgment focuses on the premise that privacy of a person indicates his or her undeniable control over own personal identity. J. Choudary observed that marital rights connote two formulations, the first one been that the partners have right for each other and the second been marital intercourse. The judge observed that forced sexual intercourse with the partner will be consequence of an order under S.9 and this not only allows the State to control the personal identity of an individual and takes away the right to decide about the relationships one should have with another but also infringes the rights of the women, considering their status in India.

Post- Sareetha's judgment

However, the Delhi High Court after almost an year of *T Sareetha's* judgment, while considering an appeal wherein the wife challenged the grant of decree under S.9 to her husband by the lower court, decided that the S.9 was constitutionally valid. The court observed that the remedy aims at restoring harmony in marital relationships through judicial pronouncements and Article 14 and 21 of Constitution have no place in the privacy of a home. Justice Rohtagi, after looking into the meaning of the word cohabitation and consortium, observed that though sexual intercourse is one of the elements that make up a marriage, but it is not the summum bonum and opined that Justice Choudary's judgment in *T. Sareetha's* implies that marital relationships only mean sexual intercourse.

The two diametrically different judgments led the Supreme Court in clarifying the stand on S.9 in *Saroj Rani v. S.K. Chadda*[27] wherein the wife, the appellant, pleaded that the remedy is arbitrary and violative of the Constitutionally protected rights. The Supreme Court overruling the judgment in *T. Sareetha* and approving *Harvinder Kaur's* decision held that S.9 of Hindu Marriage Act and Rule 32 of Order 21 of Civil Procedure Code serves a social purpose by re-establishing a marital relationship by giving them an opportunity to settle their problems amicably. The main reason behind the judgment was that Rule 21 was a mere financial sanction and that the law itself does not compel sexual intercourse.

[27] AIR 1984 SC 1562.

Rethinking Section 9 in light of J Puttaswamy's judgment

J. Choudary in *T Sareetha's* judgment analyzed the consequences of enforcing the decree in order to declare the remedy unconstitutional. In a society, where inequality stemmed out of the patriarchal ideologies, family relationships are often subjected to deep inequalities. This along with the societal expectations of homogeneity, put pressure upon women who in most cases are unable to fight for themselves owing to their poverty, illiteracy or fear or any other vulnerability and this, according to J. Choudary and the other people who seek to render the S.9 unconstitutional, makes compelled intercourse a necessary consequence of S.9. Individuals are denied justice in cases of compelled intercourse as marital rape, remains unqualified as rape under the Indian Penal Code. To speak of S.9 as an important tool to save marital relationships, is to avoid the ground realities in most of the households in the society.

Privacy is one of those rights "instrumentally required if one is to enjoy"[28] rights specified and enumerated in the constitutional text. For life to be more than a mere animal existence and to uphold the dignity of every individual is the basis of constructing an egalitarian society and for this protection of privacy of individuals is of foremost importance. By ordering a man or woman to go back to the spouse from whom they withdrew because of reasons that satisfied them, the legal system forces him or her to live in conditions they are not comfortable with and this violates the equality of thought, action and self-realization. When one leaves the company of another and seeks to be left alone, one exercises autonomy in decisions related to personal matters and this is the cornerstone of human dignity. The individual's right to choose and to allow one's body to be used for a particular purpose also forms part of freedom of expression and S.9 is violative of the same.

Conclusion

One argument in favor of the remedy is that in India, where the spouses separate often due to misunderstandings and miscommunications or interference of relatives, the remedy is of considerable importance to give them another chance to build up the marital relationship.[29] However, it has to be realized that the stress or the wear and tear in a marital relationship cannot be sorted by a decree which dictates that the parties have to cohabit. State has to promote a more

[28]Laurence H. Tribe, Michael C. Dorf, *Levels Of Generality In The Definition Of Rights,* 57 University of Chicago. Law Review 1057, 1068 (1990).
[29]J.D.M. Derrett, *A Critique Of Modern Hindu Law,* 292 (1970).

effective method of mediation and counseling in family courts which can help the couples in trying to resolve conflicts. In India's quest to achieve an egalitarian society, provisions like S.9 which are remnants of the colonial period that facilitate exploitation and oppression of the vulnerable are to be removed, bringing more power to the development of every individual.

Amendment Procedure under Indian and Australian Constitution: A Comparative Study

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Introduction

The Constitution of every country plays an important role in this modern world. The Constitution being the source of power in all countries protect the interests and rights of its citizens. It also works as an instrument for smoothening the working of government by laying down the guidelines and creating various constitutional bodies of administration. Most of the countries have written Constitutions like India whereas there are many countries which have unwritten Constitutions like the United Kingdom.[1] The Australian Constitution includes the composition, role, and powers of the Parliament. It also details how the Australian and state parliaments share the power to make laws and thereby clears the demarcation between the powers of Australian and state parliaments. It also explains the roles of the executive government, of the High Court of Australia. An interesting point which is to be noted is that all human rights of Australian citizens such as the right to life, right against torture, equality before the law, right to liberty, right against discrimination based on race or sex are not guaranteed by Constitution of Australia. Anyhow some rights such as the right to religious freedom, right to vote, right to challenge the decisions made by the commonwealth government in the High Court of Australia which is the apex court of Australia. The Constitution of India guarantees the fundamental rights of the citizens of India and also explains the directive principles of state policy. It also elaborates on the role of executive and legislature and also ensures the independence of the judiciary.

The relationship between Australia and India has grown in recent years, encouraged by the confluence of various common interests such as education, energy and resources and interstate trade.[2]Unsurprisingly Australian law has influenced the judicial interpretations made by Indian courts.[3] Both Australian and Indian legal systems share common grounds both in their principle and practice.[4] The judicial interpretation made by the Supreme Court in *Bangalore*

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[1]*How Constitutions Change, A Comparative Study,* 174(Dawn Oliver, Carlo Fusaro, 1st ed., 2011).
[2]Shaun Star, *Australia and India, a comparative overview of the law and legal practice,* 9(1st ed., 2016).
[3]*Comparative Constitutional Law,* 51 (Mahendra P. Singh, 2nd ed., 2011).
[4]Supra 2.

Water Supply and Sewerage Board v. A. Rajappa[5] is a good example of this fact. In this case, the Supreme Court considered the scope of the definition of the term "industry" under sec 2(j) of Industrial Disputes Act, 1947 which had been closely related to an earlier Australian statute. Justice V R Krishna Iyer opined that, while Indian laws must be interpreted within the Indian context, judges may rely upon some guidelines laid down by the Australian statutes. While our shared colonial history shaped the Constitutions of both countries and our early statutes, many judicial interpretations also recognize the similarities in both systems.[6] Both India and Australia are Constitutional democracies having federal system of government.[7] Rule of law prevails in both countries. The appellate jurisdiction is well integrated in both countries. [8]

Amendment procedures of India and Australia

It is a practical fact that a law cannot be static for long. The law must change with the changes and needs of society for maintaining its efficiency. The provisions of the Constitution are not outside the ambit of such amendment power. The procedures of amendment of both Australia and India are discussed here below.

Procedure Under Indian Constitution

The Constitution of India provides three various modes through which amendment can be made. They are;

1. Amendment by a simple majority
2. Amendment by a special majority
3. Amendment by a special majority in both houses of Parliament plus ratification by at least half of the State legislatures.

1. Amendment by a simple majority

Constitution of India provides Articles that can be amended by Parliament by a simple majority as that required for the passing of any ordinary law. The amendments which have been laid down under Articles 5, 169 and 239-A of the Indian Constitution can be made by asimple majority. Such amendments provided under these Articles are specifically excluded from the ambit of

[5]Bangalore Water Supply and Sewerage Board v. A. Rajappa, AIR 1978 SC 548.
[6]Supra 2, at 10.
[7]The Hon Justice Michael Kirby, *Constitutional Perspectives, Essays in Honour of H M Seervai Constitutional Law: Indian and Australian Analogues,* available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_seervai.htm, last seen on 12/01/2020.
[8]The Hon. Michael Kirby AC CMG, *The Australian and Indian Constitutions, Similarities, Differences and the Challenge of Constitutional Choice,* available at http://www.ubplj.org/index.php/dlj/article/download/1697/1517, last seen on 12/01/2020.

Article 368 of the Indian Constitution.[9] Such constitutional provision which can be amended by Parliament or State Legislature by a simple majority, and which does not need any special majority, are such provisions that do not affect the federal character of the Indian Constitution and do not disturb the balance of power between Union and the State.[10]

2. Amendment by Parliament

Indian Constitution also lays down certain provisions which can be amended by the simple majority vote of members who are present and voting in both the Houses of Parliament. Such provisions are adopted for making ordinary statutes. A Bill for making such ordinary statutes may be initiated in either House of Parliament at the instance of the Union Government or the instruction of the State.[11] These provisions can be amended outside the purview of Article 368 of the Indian Constitution. The amendment procedure for such purpose is easy and simple. The following constitutional provisions may be amended by a simple majority at the instance of the Union Government:

(1) Admission of a new state laid down under Article 2,with the consequential Amendment Schedule I which defines the territory of a State and schedule IV which deals with the allocation of seats to a state in the Rajya Sabha.[12]

(2) Provisions relating to citizenship.[13]

(3) Provisions relating to the exercise of power by the state government or any of its officers in respect of a matter in which the law-making power is with the Parliament under Article 73 (2). [14]

(4) Provisions relating to both salaries and allowances of Ministers under Article 75 (6) and its consequential Amendment.

(5) Provisions relating to salaries and allowances of Speaker, Deputy Speaker of the House of the People and the Chairman and Deputy Chairman of the Council of State which is laid down under Article 97 and the consequential Amendment of Schedule II.

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[9]I.P Massey, *The Process of Amendment and the Constitution, A Study of Comparatives,* available at https://www.jstor.org/stable/43950146?read-now=1&refreqid=excelsior%3Aac5b03b6bf3dee174bcbd2fc308544cb&seq=5#page_scan_tab_contents, last seen 14/01/2020.

[10]Supra 1, at 173.

[11]Ibid.

[12]Art 2, The Constitution of India.

[13] Supra 9.

[14]Art 73(2)

(6) Provisions that provide the number of judges.

(7) Provisions which depicts appeals to the Apex Court.[15]

(8) Provisions that provide the review and allowance of the Comptroller and Auditor General.

3. Amendment at the instance of State

Amendment can be made to certain provisions of the Constitution by the Parliament by enacting a law at the instance of the State and some other provisions can be amended in consultation with the state.[16]

4. Amendment by state legislature

Certain provisions provided in the Indian Constitution can be amended by a law enacted by State Legislature for Articles 164(5),186 and 195 would affect the consequential Amendment in Schedule II.[17]

5. Amendment by a special majority: Art 368

The provisions laid down in the Constitution, other than those which are mentioned above can be amended according to the procedure under Art. 368. The procedure is detailed below:

(1) The Amendment may be initiated only at the introduction of a Bill, for such purpose, in either House of Union Parliament.

(2) After the Bill is passed in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of the membership of the House present, Bill shall be presented to the President for his assent. The point to be noted is that the President must give his assent to such Bill, which has been passed by either House of Parliament.

(3) After receiving the Presidential assent, the provisions of the Constitution on which the amendment has been proposed shall stand amended following the terms of Bill. Provisions of the Constitution that can be amended only by a special majority are laid down in Article 368. [18]

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[15] Art 133(3), The Constitution of India, 1950.
[16] Supra 9.
[17] Ibid.
[18] Art 368, The Constitution of India, 1950.

6. Amendment by special majority and ratification of states.

Art 368 of Indian Constitutions provides with two types of amendments. One we have discussed above. i.e. the amendment by special majority. The second type of amendment is the amendment which not only needs a special majority but also the ratification of states. Here, after securing special majority the Bill shall not be sent for receiving Presidential assent until it receives a simple majority of more than 50%of the state legislature. One example of such an amendment is the Bill that introduced the National Judicial Appointment Commission (NJAC). It requires the ratification of at least 15 states out of 29 states. The provisions like Articles 54 and 55 which provides with the election of president, Articles 73 and 162 that lay down the extent of Executive power of both the Union and state, the articles dealing with Judiciary, distribution of legislative powers between the Union and the state, any amendments to the lists enumerated in the VII Schedule and the alterations to the IV Schedule require the ratification of states for amendment.

It is important to note that Article 368 itself can be amended by the special majority vote in Parliament and ratification by the State legislatures is not necessary in this case.[19]

Procedure Under Australian Constitution

The amendment procedure under Commonwealth of Australia Constitution Act is provided under Section 128 of the said Constitution. The provision provides that the amendment to the Australian Constitution shall be carried out only if the proposed bill for alteration has been passed by an absolute majority of each House of the Parliament i.e. the House of Representatives and the Senate. Further, the provision requires that, not less than 2 or more than 6 months after its passage through both Houses the proposed law shall be submitted in each state directly to the electors qualified to vote under the Commonwealth of Australia Constitution Act for the election of members of the House of Representatives and the proposed law has to be approved by the majority of the electors. On the other hand the said provision also provides that, if either Houses of Parliament passes any such proposed law by an absolute majority and the other House rejects or fails to pass such alteration proposed with any Amendment to which the first mentioned House will not agree, and if after a time period of 3 months the first mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without

[19]Supra 18.

any alterations to the Bill which has been made or agreed to by the other House and such other House rejects or fails to pass it or passes it with any Amendment to which the first mentioned House will not agree, the Governor General may submit the Bill and last proposed by the first mentioned House, and either with or without any alterations subsequently agreed to by both Houses, to the electros in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors for the purpose of direct voting shall be taken in accordance with the prescription of the Parliament.[20]

By the reason of Section 8 of the Statute of the Westminster, 1931, the power to amend Sections 1- 8 of the Constitution Act is outside the ambit of the Commonwealth Parliament and established the federation under the Crown of the United Kingdom.[21] Various sections of the Constitution Act extend the authority to amend certain provisions of the Constitution Act with the Commonwealth Parliament relating to matters of detail, in the ordinary procedure of legislation.

Except for such provisions, other provisions of the Constitution can be amended only in the manner provided by section 128, which requires the following procedure of Amendment-

(i) the proposed amendment should be agreed to either by an absolute majority of both the Houses of Parliament or by an absolute majority of one House in two votes separated by at least three months; and

(ii) Then approved by a majority of the electros voting both in the majority of the States and in the Commonwealth. [22]

Provided that, no alternative diminishing the proportional or minimum representation of, or altering the territorial limits of a state or affecting the provision of the Constitution about any state,can become law unless approved by a majority of the electros of that state. Thereafter, the Bill shall be presented to the Governor-General to secure his assent. The difficulty of the procedure of Amendment will be evident from the fact that only eight Amendments have

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[20] Australian Constitution s. 128.

[21] DehaPrasadMohanty, *The Procedure for Constitutional Amendments in the Commonwealth,* available at https://www.jstor.org/stable/43950011?read-now=1&refreqid=excelsior%3A66d52494236c861fd46aac185149b296&seq=1#page_scan_tab_contents, last seen on 16/01/2020.

[22] Supra 20.

been approved so far. A most significant example of the failure at the polls has been the rejection of the Communist Party Dissolution Act, 1950. The Australian Constitution cannot be amended without the direct vote of the people. [23]

Comparative study of Amendment Procedures between Australia and India

The Amendment procedures and formalities in Australia are undoubtedly difficult. Most of the debates and proposals for amendment met utter failures. Only 8 out of 44 attempts for amendments succeeded. This fact shows the rigidity of amendment procedures in Australia. The referendum chosen as the means of amending the Constitution makes the procedure complex. But it can be viewed as a more appropriate procedure in case of matters which affect the federal nature of the union and other serious issues. The provisions relating to the addition of new states, alteration of the area of states, abolition or creation of legislative councils in states, privileges of president, governors, speakers and judges, and citizenship need simple majority only. This will lead to abuse of power. It is evident from the incidents happening nowadays. Particularly the Citizenship Amendment Act, 2019 on which wide protests are going on in many parts of the country. Similarly, the addition of the state of Telangana also met with strong protests which were supposed to be cleared before its implementation. Also, the revocation of Art 370 of Constitution which extended a special status to Jammu and Kashmir was subjected to debates on the matters of the method of revocation, where some sociologists quoted it as a black day for Indian democracy.[24] Matters like citizenship, the addition of new states, alteration of boundaries, creation or abolition of state legislative councils are more serious. Thus, it has to be given more complex procedures for the amendment to protect the interests of people. Here the question as to whether the referendum is ideal for a country like India comes into play. It does not.

The Australian population is nearly 2.47 crores as of 2017, whereas of India it is 133.92 as of 2017. The method of referendum cannot be implemented in a populated country like India but leaving these matters into the hands of parliament freely in the form of the process of a simple majority can be called ridiculous. Serious provisions such as provisions relating to citizenship, creation or abolition of state legislatures, alteration of state boundaries, shall be

[23] Supra 21.

[24] *Art 370: What Happened With Kashmir and Why it Matters,* BBC News (06/08/2019) available at https://www.bbc.com/news/world-asia-india-49234708, last seen on 17/01/2020.

put into the matters which need special majority with the ratification of states to prevent abuse of power to an extent.

It is practically impossible to transplant any laws or procedures from any country into the statute book of another country. Domestic situations prevailing in every country will be different from other countries. We are familiar with the practical difficulties of the mechanical transplantation of statutes of another country into our legal system during the British regime. What we have dreamt of is not an adoption of any laws of other sovereigns blindly without considering our domestic situations.[25] In some matters it is wise and just to peruse the statute book of other countries to oversee what is lacking in our legal system for a better tomorrow. Here in the matter of procedure for amendment also, it will be foolish to transplant the procedures of Australia mechanically. It is just to see how other countries are implementing complex procedures and to oversee what is lacking in our country and work on the same to enforce such laws or procedures in a manner suitable for our country.

Supra 3, at 64.

Gender Justice- A Fiction

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Introduction:

The article emphasizes on gender justice being a fiction in today's time as it points out the misuse of gender-based laws on domestic violence, section 498A and rape. The article depicts doctrinal research based on the NCRB Report (2014)[1] and empirical research where the population selected was Pune city, which includes visiting a NGO called "Men's Right Association, Pune". The mode of data collection was through conducting unstructured interview of the selected Respondent. The research is therefore based on the critical analysis of gender based-laws existing in India today.

The Domestic Violence Act, 2005 was enacted with the object of women empowerment in India and considering the fact that women had been suffering violence from their family members. In recent times however it can be seen that there are occurrences of domestic violence against men as well. There are no provision in any law to protect innocent man against frivolous complaints. As a result of which there have many been cases where women use their rights in making false complaint against their husbands with the motive of harassing them. Moreover, everyone including our government has failed to take any stand on addressing the violence faced by men.

Section 498A of Indian Penal Code, 1860 was introduced by the Criminal Law (Second Amendment) Act, 1983. This section has opened the doors of justice for women who suffer cruelty at the hands of her husband or relatives. The offence under this section is cognizable, non-bailable and non-compoundable offence. It can been seen that section 498A even though a noble law is highly abused over last 30 years. The meaning of cruelty under the section, clearly states that, the law should not be misused by women to file frivolous cases, still number of false cases are being filed. The supreme court in landmark cases given judgments where misuse of section 498A is depicted.

In Arnesh Kumar vs State of Bihar[2] highlighted on following the Procedure of CrPC Section 41A, since Section IPC 498A is being used as a weapon by

[1]Crime in India Compendium, 2014, *National Crime Record Bureau Report (2014),* Ministry of Home Affairs, available at https://ncrb.gov.in/sites/default/files/Compendium/Compendium%202014.pdf, last seen on 13/06/2020.
[2]Arnesh Kumar V/s State of Bihar, 2014 (8) SCC 273

discontented wives. The court based its judgment on the NCRB data. The Court even laid down certain guidelines which the police officer must follow while arresting under Section 498A, IPC or Section 4 of the Dowry Prohibition Act, 1961 and that such arrest must be based on genuineness of the allegation. Furthermore, even the Magistrates must be careful enough not to authorise detention casually and mechanically.

Sushil Kumar Sharma v. Union of India, the Supreme Court observed that complaints under section 498A of the Indian Penal Code were being filed on the basis of personal vendetta[3]"By misuse of the provision, a new 'legal terrorism' can be unleashed" This judgment is criticized for the language as it moreover condemned as it ignored the historical under representation and oppression of women in all stages of life that has given rise to gender inequality within public and private spaces. The judiciary even stated that they are deeply concerned and disheartened that the entire judgment proceeds on the basis that women file false cases," quoting data by the NCRB.

The statistics given in this article is based on the report which was shared by NCRB and Ministry of Home Affairs, India. The current data is from the year 1998-2014 which has been uploaded on the NCRB site.[4]

1. Lakhs of people including, women, old people, and minors are arrested just because their names are mentioned in the FIR lodged under the provision. For E.g. – Even a 2 month old baby girl was arrested with 7 other member of the family. She is the youngest person ever in India against whom a FIR is lodged.
2. Arrested persons' statistics is given as follows. Arrested person since 1998 u/s 498A, total number of cases were 23,04,200 out of which the females were 5, 24,700, minors were 7,373, Old aged were 1, 13486 whereas the convicted persons were 2,60,280.
3. The chargesheet filed under section 498A were 93.6% whereas the arrest made was 14.4% in the year 2012.
4. Suicide is one avenue which exhibited the social trauma and mental status of a man. Every 5.84 min a man is committing suicide in India with family disputes as single largest reason of male suicide. The suicide of men is the basis of debate as they are deprived of basic human rights like equality in eyes of laws. Total suicides in country 131666 of 59744 were married men & 27064 married women.

[3] Sushil Kumar V/s Union of India , Writ Petition (civil) 141 of 2005
[4] Supra 1.

The misuse of this law by women results in immediate arrest of husband as well as old relatives who are bedridden without the presence of prima facie case or sufficient investigation who are put behind bars on non-bailable terms.

The accused on arrest is presumed to be guilty until he or she proves innocence in the court. It is even found that section 498A is easiest way for the women to opt out of marriage who files the case under several reasons[5] such as, Adultery, Incompatibility, Parental interference, Non-disclosure of facts, Pressurized marriage, to enhance their bargaining power in divorce, and even for trivial issues like – demand for shopping, vacations or even addiction to social media. The men who are victims of domestic violence, have no other option under law but the only recourse available to them is to file for divorce under the ground of cruelty.

Even though the judiciary is well aware of the misuse of Section 498A they are washed up by tremendous pressures from activist groups. The amendment of Section 498A has been suggested by Bills, committee reports of Justice Malimath committee[7] who recommended that 498A should be made bailable and compoundable. The amendment has one more objective as it will give chance to the spouses to come together and reconcile any differences that they have. Even Justice Verma Committee Report, 2012[7] fully favoured gender-neutral laws through Criminal Law (Amendment) Ordinance of 2013.

In rape cases a mere statement from a woman is enough to put the accused behind bars. There are few women who fabricate their FIR, destroy or provide half evidence. The Delhi Commission of Women (DCW)[8] have Stated that, women harass the family and the associates of the falsely accused. Recent statistics show that 53.2% of the rape cases filed between April 2013 and July 2014 in the capital were found false Eventually, the accused of such false allegations gets acquitted, but after going through agony. Most of the times, men can't fight back during or after the trials due to loss of faith in laws as well as harassment which can prolong their case.

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[5]Naman Jain, M. D Sleut Detective, *Martyr of Marriage Documentary,*(Press Note), available at https://martyrsofmarriage.wordpress.com/2016/12/04/martyrs-of-marriage-press-note/, last seen on 06/10/2019.

[6]Malimath Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs, Tenth Meeting of Advisory Council National Mission for justice delivery and legal reforms (2016), available at https://doj.gov.in/sites/default/files/Advisory-Council_0.pdf, last seen on 06/10/2019.

[7]Justice Verma Committee Report, available at https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary, last seen on 06/10/2019.

[8]53.2 per cent rape cases filed between (April 2013-July 2014), says DCW, IndiaToday.in New Delhi (29/12/2014), available at https://www.indiatoday.in/india/north/story/false-rape-cases-in-delhi-delhi-commission-of-women-233222-2014-12-29, last seen on 01/10/2019.

In *Amity University* Case,[9] the Delhi HC, honorably acquitted both the accused men by observing that the parents of the women pushed her to implicate both the men, as the women's parents disliked their daughter's friendship with the accused men. In the said case no evidence was found against both the accused. But due to the false rape allegation they had to undergo the criminal trial for 2 years, despite having every proof of innocence. On acquittal the men merely asked the court to return back the dignity that they had lost because of the false accusation.

Syed Ahmed Makhdoom case[10], where a frivolous complaint was filed by Syed's Wife against him, which even led to Syed's separation from his beloved son. Syed later committed suicide as he was tired of false allegations of dowry, domestic violence and separation with his beloved son in 2009[11]. Syed's family lost the case filed against him by his wife as the court believed that Syed committed suicide because of depression and not due to the harassment which he faced from his wife. Syed's family did not pursue the case further. He also recorded a video clip prior to committing suicide in which he had explained all the humiliation, mental torture due to fake allegations and pain which he was suffering by separation from his beloved son.

This is not only one case where families suffered due to misuse of law but there are several cases of men who are victims in India for the misuse of laws.

1. A doctor who committed suicide because he was being tortured by his in-laws for fake alleged case[12]
2. The victim, Pardeep Kumar, 24-year-old married youth committed suicide by hanging himself at his residence, he was working with a private company at the Industrial Area. Pardeep married Antia around six months back and she was pressing him to move out of his parent's house and live separately. And he was under depression as he was being tortured by her in-laws and wife.[13]
3. Accused of molestation by daughter-in-law, man commits suicide- A senior citizen, who had been booked for outraging the modesty of his

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[9]State V/s. PrashantSablani, and Milind Kapoor, on 28 February, 2015.
Syed Anwar Ali Syed Maksud Ali V/s State Of Maharashtra,14 August, 2018.

[10]*Makhdoom's last message to the world* available at http://www.youtube.com/watch?v=KrGmSI-xdTk&feature=email, last seen on 03/10/2019.

[11]*Doctor commits suicide, blames in-laws* available at http://www.jagran.com/uttarakhand/dehradun-city-10140908.html, last seen on 02/10/2019.

[12]*24 Year old youth commits suicide, blames in-laws* available at http://www.hindustantimes.com/Punjab/Chandigarh/24-yr-old-youth-commits-suicide-blames-in-laws/SP-Article1-1062575.aspx, last seen on 02/10/2019.

> daughter-in-law, committed suicide by consuming poison. GajendraMalviya was declared dead with a suicide note, in which he blamed the daughter-in-law and her relatives for the drastic step that he had taken.[14]

Finding out loopholes in our laws and judicial system is not a solution but making the society aware that one should not surrender due to being a victim of such misuse of laws.There is an urgency for the amendment in such laws which are more misused than they are actually been used. Access to justice is the real objective for any law, which should not be overlooked.

Such false cases are increasing up the crime rate of our country. It is possible that the alarming rise in these false cases can lead to a point where people stop taking the real victims seriously. This hits the whole purpose of such a "pro-women" law. The repercussion of such misuse of law in this cases tarnishes the family, career, social life, mental and even the financial condition of the victim of such misused law. Most of such complaints are filed in the heat of the moment over petty issues. There should be some stringent consequences of registering a false criminal complaint as uncalled arrest ruin the future of such innocent men.

"What is at stake, due to rise in such false cases?"

First of all the reputation, privacy, dignity of men is taken away of not just the victim man but also of his family. Secondly there is a trial by media, even if the innocent person is acquitted, the media decides then, they can portrays such person as accused under the public domain.And most importantly there is mental agony and depression are the results of such misuse of laws, which has often leads to suicide.

A question can be asked here, If asking for dowry is wrong, then what about extorting money after filing false cases?

Men's Right Association, Pune,[15] is an organization that specializes in working towards protection & fight for the elusive men's rights and committed to addressing various issues faced by Men. MRA was formed to spread awareness on Men's Rights, help men in distress and raise the serious issues plaguing men.

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[14] *Father in Law commits suicide,* available at http://timesofindia.indiatimes.com /city/nagpur/Accused-of-molestation-by-daughter-in-law-man-commits-suicide-blames-her/articleshow/20451365.cms, last seen on 02/10/2019.

[15] Men's Right Association Website, available at: http:// mensrightsassociation.org/about_us.html last seen on 02/10/2019

MRA works in all spheres of life. They receive overwhelming response to all of our various initiatives. MRA has more than 10,000 members, and their numbers is increasing day by day. MRA is effectively spreading awareness about men's rights to the masses. It is striving hard to change the anti-male mindset of the society, since this anti-male bias is a serious obstacle to the progress of civilization.

There are several activities undertaken by MRA includes-

a) Weekly Sessions & Counseling

b) Free legal aid to men and their families

c) Awareness Campaign on - Sensitize police about gender laws, and recent Supreme Court guidelines regarding implementation of these laws, Upfront arrest of innocent Men on false complaint is very common. MRA made the police aware of misuse data. More than 97% of the cases filed are false. Make general public aware about the plethora of unequal laws against Men (including IPC 498A, Domestic Violence Act, etc.)

d) Letter and Signature campaign

e) Awareness in Schools

f) Raising Men's Issues in Media

g) International Men's Day

A unique initiative is taken by SAVE INDIAN FAMILY MOVEMENT' who have launched a helpline to protect men from suicide, where helpline to protect men from committing suicide. There is no government launched yet which are generally available to women.

An Unstructured Interview was conducted of the Respondent,[16] for data collection and getting his opinion on the issue of increase in the number of false cases against men. A NGO set up with sole purpose to fight for the elusive Men's Rights their honor and dignity. It is a revolutionary concepts. MRA arranges counseling every Sunday 4 PM at Sambhaji Park, Pune for men in distress due to misandry, social attitude and gender-biased laws. MRA helpline received around 20-25 calls daily in which victims seeks for help. The proportion of cases that the NGO come across are -

[16]Mahesh Shinde, President of Men's Rights NGO, Pune, He has been working as a social worker in this area for more than two decades and is well aware of the social problems in this area., Telephone Interview conducted for Research on Gender Justice, on 25/09/2019.

a) Dowry cases: 40 %

b) Domestic Violence: 50 %

c) Divorce related: 2 %

d) Rape / molestation: 8 %

The data available from NCRB since then there has been increase in the number of cases getting registered every year. This is been ever since the law is passed. The conviction rate is hardly 2-3%. The primary demand to minimize their misuse, has always is to have misuse clause. The misuse is unnecessary creating burden even on the judicial system. Strict law against the misusers should be enacted. Till date various petitions made, letters were sent to meet MP, MLA, but the agenda did not go further. Time and again correspondence are made to law authority through letter or thorough tweeter activity.

Suggestions:

It is necessary that this ugly reality needs to change and that women and men are fundamentally equal in this world. The experience shows that social change are not just developmental issues and people from all arenas- media, students and families also have to be involved in the process of change. Some of the suggestion made by the researcher are as follows-

1. Enactment of gender neutral laws especially for Domestic violence and Rape.
2. Inclusion of strong misuse clause under all laws.
3. Higher imprisonment for false cases.
4. New modes of respectful interactions have to emerge between the genders, whether at home, in the community or at the workplace.
5. Empower children and young people to develop and foster gender transformative behavior. Utilize social strategies beginning in early childhood and continuing with adolescents and preparing all to be gender sensitive, equal and caring adults.
6. Develop comprehensive sexuality education and primary prevention as an integral part of school curriculum, including human rights, gender equality, and rights.
7. Create curriculum that challenges gender stereotypes and encourages critical thinking.

Conclusion:

The concept of gender justice implies a comprehensive goal and scheme in protecting the class of subordinated gender from exploitations and denials inflicted by the dominated gender. There is a stereotyping of roles which are played by both men and women. Because of inconsistent gender role stereotypes, domestic abuse cases involving male victims or female perpetrators may not receive equitable treatment within the criminal justice system.

The current situation has definitely changed the dynamics of the term gender justice.The law thereforeshould adapt to be gender-neutral. Justice should be done regardless of the gender of each individual. There is a necessity for emergence of a platform where both the men and women can explore a way to challenge the gender order and move towardsequitable relations to constitute an actions for social change. In a country like India, the significance and need for gender-neutral laws must be acknowledged and highlighted because they help create a safer place for all and help bring about equality in the society.

The Refugee Crisis: Does India need a Specific Legislation?

Pranav Rudresh
I LL.M

Introduction

Article 14 of the Universal Declaration of Human Rights which recognizes the right of a person to seek asylum from persecution in other countries, gave birth to the United Nations Convention related to the Status of Refugees, 1951. The convention has been subjected to amendment only once in 1967 after coming into force in 1954 and is the single unified code enacted by the United Nations General Assembly which defines the term refugee. The convention is not only a rights based instrument but is also based on a number of fundamental principles such as non discrimination etc. It is one of the key documents in identifying the rights of the refugees and immigrants.

The convention has been ratified by 145 state parties.

Position of India on the 1951 Refugees convention:

India is not a party to the 1951 convention or the 1967 protocols; neither does it have a national refugee protection framework of its own. However because of its geographical location, sound economic and military power and liberal democratic structure, India is preferred destination for a significant amount of refugees from all over the world, especially its neighbouring states such as Afghanistan, Bangladesh etc. India respects the mandate of the United Nations High Commissioner for Refugees (UNHCR) on the treatment of other nationals. It respects the principle of Non-Refoulment (A fundamental principle of International Law that forbids a country receiving asylum seekers from returning them to a Country in which they would be in likely danger) for the holders of the UNHCR documents. India has allowed the set up of UNHCR field units in New Delhi and Chennai, which provides registration to the refugees (mainly to the refugees from Afghanistan and Sri Lanka) and also extends support to the government in management of refugee count. UNHCR also works in identification and mapping of such stateless group of people. There is no official estimate of stateless refugees in India, however as of December 2011, UNHCR has identified nearly 2,04,600 refugees and asylum

seekers in India out of which 31,600 have received assistance from the UNHRC[1]. The government of India provides temporary residence to the stateless people. India also acknowledges and follows the principle of non-refoulement.In lack of any specific legislation of its own to deal with the refugee crisis in India, the question whether or not India should become a signatory to the 1951 conventions or not has been debated for a long time.

India is the largest refugee destination in South East Asia. The South Asian region consists of group of multiple nations such as Bangladesh, India, Sri Lanka, Bhutan, Pakistan, Maldives and Nepal. None of these nations have ratified the refugee convention.

With all these factors under consideration, the necessity for India to become a signatory of the 1951 Refugee Convention is debated with both affirmative and negative sides.

Should India become a signatory?

India holds a large population of unidentified refugee population. According to a study done by Institute of Peace and Conflict Studies (IPCS) in December 2007, it has been stated that "India has unwanted refugees which are living in the sphere of political security and are threat to the national security[2]". India has a political system which is referred to as the multi-party system. With a liberal and large democracy that India is, it has been observed that the refugees in some states have been allowed to settle down just to gain the political advantages. Since India is not a signatory to the 1951 convention, it is not possible for the UNHRC to function in India at its full capacity. By becoming a part of the 1951 convention, the United Nations can provide full assistance to the government of India in calculation and identification of all such refugees.

With India becoming a signatory to the 1951 convention, the United Nations can also assist India in the Refugee Status Determination (RSD) operations. The RSD operations are conducted by the United Nations all around the world, despite India not being a signatory to the 1951 convention, the United Nations has completed around 6,800 RSD operations[3]. By December 2014, the UN refugee agency has completed registration work of around 5074 asylum seekers

[1]UNHCR Global Appeal Update, India, 2011, United Nations High Commissioner for Refugees, Available At https://www.unhcr.org/Publications/Fundraising/4cd96e919/Unhcr-Global-Appeal-2011-Update-India.Html, Last Seen on 05/01/2020

[2]*National Refugee Law For India: Benefits And Roadblocks,* Institute Of Peace And Conflict Studies, Available At http://www.ipcs.org/issue_briefs/issue_brief_pdf/51462796IPCS-ResearchPaper11-ArjunNair.pdf, Last Seen 07/01/2020

[3]Refugee Status Determination, UNHCR Data India, Available at https://www.unhcr.org/4cd96e919.pdf, Last Seen 07/01/2020

and 25,865 refugees with the UNHCR India. Thus in absence of India's own legislation for identification and safety measure with refugees, India could use some help from the UN body. India can also seek the help of International Organisation for Migration (IOM) and other such international agencies with experience in managing matters related to refugees.

India has been a member of the UNHCR executive committee since 1995 and that of IOM since 2008. By becoming a signatory to the 1951 convention, India can play more proactive role in affairs of both the organisations. The western countries for a long time have seen the influx of refugees from the humanitarian view point, however in past few decades they experienced that such large influx is a threat to their national security. Thus, they would appreciate a global rising superpower like India to join the world forum in management of the refugees. The UNHCR can facilitate India in preventing any such unidentified influx, and can also help the government in keeping the stats for the refugees.

The 1951 convention lays down some minimum standards for the treatment of the refugees and also specifies some general obligation for the refugees to follow[4]. In the absence of India's own legislation, becoming a signatory to the 1951 convention seems like a welcome option for India. Also with India becoming a signatory, it might compel other SAARC nations to do the same.

While one opinion suggests that becoming a signatory to the 1951 conventions seems to be a decent method of introducing refugee control measures in India; in a study conducted by the Institute of Defence Studies and Analysis a number of experts have suggested their opinion that it is not in India's favour to become a signatory[5]. The Refugee Convention of 1951 has often been criticized to be "European and Western friendly" on many occasions. The 1951 Refugee Convention is drafted to solve the problems of illegal immigration in European and Western nations such as the USA and UK and does not address the issues of illegal immigrations in African or Asian region for that matter .

The refugees in India have been always subjected to kind treatment. The Indian commission or the United Nations High Commissioner for Refugees (UNHCR) has never officially stated as to why India does not want to become a signatory to the convention, but the general reasons have been identified as national security related. Another argument is that if India already does its duty without the ratification of the convention, there is no purpose to sign it. India doesn't even take UN money to look after the refugees. As per a UNHCR data,

[4]United Nations 1951 Refugee Conventions, Article 2

[5]*Challenges Of India With Void Policy On Refugees, Institute Of Defence Studies And Analysis,* available At https://Idsa.In/Askanexpert/India-Has-Not-Ratified-The-Un-Refugees-Convention, Last Seen 11/01/2020

[6]Susan MusaratAkram, *The World Refugee Regime In Crisis,* Volume 93, Cambridge University Press, 213,216 (1999)

there were close to 204,600 refugees, asylum seekers and "others of concern" in India in 2011. It consisted of 13,200 people from Afghanistan, 16,300 from Myanmar, 2,100 from various other countries and the two older populations of around 100,000 Tibetans and 73,000 Sri Lankan Tamils. The UNHCR has financially assisted 31,600 of them[7].

The need for specific refugee legislation: Towards a comprehensive solution

The arrest of 3 Burmese citizens in 2008 who were running from military crackdown in their country, the recent Rohingya crisis, controversies related to the National Register of Citizens (NRC) in Assam and many such events over the last decade has sparked debate whether India should have a specific refugee legislation of its own. To assist the South-East Asian nations for this purpose, a committee named Eminent Persons Group (EPG) was formed by the UNHRC in 1994, headed by former chief justice of India Justice PN Bhagwati. The committee came up with some suggestions in 1997 as declaration on refugees by South-East Asian nations. In 2015, Member of Parliament Shashi Tharoor presented a private bill named The Asylum Bill, 2015. Both the EPG proposals and the Asylum Bill 2015 could have made a significant ground for the making of the Indian refugee legislation[5], however no significant steps have been taken so far.

The system of refugee management in India is based on ad-hoc administrative policies. The current laws that deal with the issues of refugees in India are the Registration of Foreigners act, 1939, the Foreigners Act, 1946, Part II of the Indian Constitution and the guidelines issued by the Indian administration for this purpose.

Apart from the humongous number of refugee influx to India which is dealt with ad-hoc policies, and India not being a signatory to the 1951 UN conventions, there are several other reasons why India needs a legislation of its own for establishing the legal framework for refugees. On the issue of refugees, India hesitates to sign any international convention based on the argument that

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[7]Supra 3 at 202

[8]Sanjeev Tripathi, *Illegal Immigration From Bangladesh To India: Towards A Comprehensive Solution,* available at https://Carnegieindia.Org/2016/06/29/Illegal-Immigration-From-Bangladesh-To-India-Toward-Comprehensive-Solution-Pub-63931, Last Seen on 11/01/2020

the decision to accept a refugee is a unilateral decision and should not involve a bilateral or multilateral agreement. However, granting asylum to refugees which is being governed by a specific law, rather than ad hoc policies, will definitely be understood by other states as a peaceful, humanitarian and legal action under a well established judicial system, rather than a hostile political gesture. India's decisions to accept or reject refugees cannot be spinning around to be interpreted as serving political ends. The refugees should not be accepted on the basis of origin, which has been observed in India allowing Sri Lankan or Tibetan refugees while deporting the Rohingyas refugees. All refugees should be treated equally.

It should be clear that in the name of humanitarian act however, India should not compromise with its national security. Thus an identification process will be important to differentiate between genuine and illegal refugees. The same should therefore be achieved by a specific legislation having strict legal framework for this matter. Thus, the argument of having a separate legal framework that outlines the legal framework of refugees in India looks reasonable.

Conclusion and Suggestions:

On the face of it, India has been very flexible with the treatment of refugees. Given the security scenario prevailing in the country, the matter has come to be more influenced by considerations of national security than humanitarian grounds. India is not the signatory of the 1951 Refugee Conventions or the 1967 amendments for that matter, however India has took assistance from the UNHCR on various occasions and holds permanent office in Delhi and Chennai.

When the procedures of the National Register of Citizens (NRC) was concluded in Assam recently, 19 lakh people could not make it to the final list, when asked about this issue to the home minister as to what the government plans to do with these people, the government seemed to have no particular answer. Same was the situation with the Rohingya crisis had sparked. It is evident that the lack of defined refugee legislation is hurting India for this matter, and also, becoming a signatory to the 1951 conventions does not look like an efficient option. A number of provisions of the 1951 convention don't look suitable for India, for example Article 12 of the 1951 conventions talks about the "Personal Status" clause, which explains that the personal status of the

refugee shall be governed by the "law of the country of his domicile". India itself is a multi religion nation, and as far as personal laws are concerned, guarantees specific personal laws to different religion. It would be hard for to keep a balance in treating the refugee by the personal laws of his domicile and that of India. Similarly article 17 of the 1951 convention talks about guaranteeing employment and wage to the lawfully staying refugee, while it does sound humanitarian, from the context of India where the population is so high the employment rate of Indians itself a concern for the government, to guarantee something like that to the refugees does not seem possible. Apart from these, there are many other provisions which can cause further troubles to India. Thus, becoming a signatory does not seem like a solution to India's problems with refugees.

While most of these refugees seeking shelter in the Indian Territory live in poverty with a limited access to the basic amenities, which happens to be a question for human rights issues, a number of refugees have often posed threat to the national security of the country. Also if India starts to grant proper asylum to the refugees, many of our neighboring nations will deliberately start to send their unwanted population to India. It is also a clear fact that wherever the refugees will reside, they will consume local resources and thus face the wrath and hatred of local population, which has already been the situation of Tamil Nadu, where a number of people protested against the government granting stay to the Sri Lankan refugees. In many states, the local political parties have extended protection to unidentified refugees and they are now living under the protection of what we call "political sphere".

Thus, considering all the above facts, it's clear that India needs a refugee legislation of its own. This has already been practiced by countries such as the United States of America, which passed the United States Refugee Act of 1980, to establish a well-defined structure for identification of refugees and empowering the President to decide upon the stay of unwanted refugees. Although, the government of India currently holds the power to deal with any unwanted refugees, however an established legislation would only empower the administration to deal with this issue, instead of using the ad-hoc policies.

The above explanations suggest that despite India has established a decent and liberal framework to deal with refugees, the lack of specific legislation on the matter makes the practice distorted. The definition of refugees has nowhere been recognized in the Indian legal system. With progressing time and

escalating problems related to refugee, an urgent need for the legislature on this matter would be a welcome move. An established domestic refugee legislation will not only help in the identification of the refugees (which so far is being done on ad-hoc basis) but also help India distinguish between the genuine and illegal immigrants. In addition to this, it will also help India in dealing the refugees with a separate set of rules and regulations while not interfering with the liberty of the local population.

With specific legislation in place, India can adopt 3 methods to deal with the refugees:

1. Voluntary deportation of the refugee to the country of their origin if their lives are not endangered in that country
2. Grant citizenship to the deserving refugee
3. Resettlement of refugees in a third world country

The geographical location of India and some of its undesirable neighbours calls for a refugee law which is strict in nature. The legislation must specify strict procedures for identification of the refugees and setting up of a system to detect the illegal immigrants who might pose threat to the national security, and thereby treat them accordingly. India should also continue taking assistance of international organisations such as UNHRC for this purpose as well. After India has enacted its own law, it could think about signing the 1951 Refugee Conventions.

The issues of refugees, requires more action now than ever before. India's liberal democratic system, sound economy and a potential military power attracts refugees from all over the world, especially from the neighbouring states. Considering all these factors, India needs to develop an unambiguous but powerful position on refugees or migrants for that matter. This would not only help India to fulfil constitutional as well as international obligations, but also provide a defined procedure to deal with refugees.

TEACHERS' AND PH.D. RESEARCH ARTICLES

'Effects Doctrine' Enshrined In Competition Act

Aayush Mayank Mishra[1]

Recently Indian economy has gone through various reforms and certain initiatives have been taken to diversify the Indian economy. After the LPG Policy, various multinational companies were attracted to the Indian market. The first economic reform was LPG Policy in 1991 and the second economic reform was the enactment of the Competition Act, 2002 replacing Monopolies and Restrictive Trade Practices (MRTP), 1969. The Competition Act is considered to investment and has three main pillars:

- Anti-Competitive Agreements
- Abuse of Dominance
- Combinations

The new competition law i.e. Competition Act 2002 was enacted after taking into consideration the recommendations of the Raghavan Committee and deliberations of the Standing Committee on Finance, provided for the establishment of Competition Commission of India (CCI). The Commission is the sole Competition enforcement agency. The regulatory body has been bestowed with the onus to take a pro - active stand to foster and advocate the growth of effective Competition. The establishment of the Appellate Tribunal was warranted for conducting deliberations and help in adjudication for the compensation arising out of claims and for acting as an appellate body to hear appeals against the decisions made or orders passed by the Commission. This was done by passing of The Competition (Amendment) Act, 2007

The economies of the world have become increasingly globalized and with growing cross- border trade, attempts to monopolies markets and restrict fair competition cannot be effectively mitigated by national competition agencies in isolation. Post the economic reforms of 1991, the quantum of international transactions has increased for the Indian market, which also leaves it vulnerable to transnational anti-competitive behaviour. One way of countering it is ensuring extraterritorial jurisdiction of Indian laws over such practices, which is through the effects doctrine.

[1]Was working as Assistant Professor, ILS Law College, Pune

Meanwhile, the origin of competition law can be traced back to United States - the enactment of the Sherman Act in 1890. The US competition laws are considered to be comprehensive and effective and the Indian laws, particularly the Competition Act, is said to be modelled on similar lines. The US has recognised the effects doctrine and even otherwise has an effective mechanism for exercise of extraterritorial jurisdiction. In absence of an international agreement on an anti-competitive framework, the effects doctrine is seen as one of the ways of ensuring national interests are protected in face of international malpractices.

GLOBALISATION OF COMPETITION LAW

From 20th century onwards there has been an explosive growth in the trade and is increasing at the global level. As the trade was increasing day by day therefore now it has been subjected to international law. As trade is the part of international law, it should be governed by it but in certain circumstances or situations the international law becomes silent like the conflicts in relation to jurisdiction of the competition authorities etc. In addition to this, various nation States have adopted their own codes on competition law which further increase the problems.

For instance, if we see in the cases of 'transnational mergers', the said transaction is scrutinized by competition authorities of a variety of States. Due to the varied competition law codes, each authority would have a different perception of what should be permissible and what should not be".

However, competition authorities have recognized that international co-operation is the key to curb down anti-competitive practices which transcend national boundaries, and is possibly the only way to achieve a successful and effective solution."

DRAFT INTERNATIONAL ANTITRUST CODE

Towards the end of the 20th century in 1993, a"Working Group of Experts[2] and the renowned 'Max Planck Institute' formulated a comprehensive proposal which was intended to internationalize competition law, titled as "Draft International Antitrust Code". This Draft Code envisaged the creation of regime based on certain minimum standards 'that were considered to be crucial to the functioning

[2]The International Antitrust Code Working Group was comprised of: J. Drexl, W. Fikentscher, E.M. Fox, A.Fuchs, A. Heinemann, U. Immenga, H.P. Kunz-Hallstein, E.U. Petersmann, W.R. Schleup, A. Shoda, S.J. Soltysinski and L.A. Sullivan.

of any code on competition law, and was presented to the World Trade Organisation and the Organisation for Economic Cooperation and Developed.[3]

The Draft Code was based on a two-pronged model- creation of two institutions. In this model, the first institution, the International Antitrust Panel, was entrusted with the adjudicatory functions and was to hear disputes arising out of the provisions of the Draft Code. Furthermore, the International Antitrust Authority, the second body under the system, was to be vested with administrative and prosecutorial functions.[4] Upon detailed analysis, the Antitrust Authority, was entrusted with the power to appeal National cases to which it was not a party. In addition to this, it had the power to raise claims before the International Antitrust Panel against domestic authorities which were not complying with their obligations and duties under the Draft Code. It also was to guide the domestic States into complying with their obligations under the Draft Code.[5] However, the Draft Code was faced with negative critics at Marrakesh.[6] As a consequence, due to a lack of consensus, the Draft International Antitrust Code was not able to form a part of the numerous treaties annexed to the WTO Charter. Unfortunately, the proposal of the minority group of the Working Experts which advocated for the progressive harmonization of antitrust policies of States with the Draft Code failed to reach the required consensus.

In the subsequent years, another attempt at the internationalization of competition law was made the First Ministerial Conference of the Parties to the WTO in 1996. The European Union was heavily in favour of such internationalization and sponsored for the creation of such a framework within the workings of the WTO.[7] However, as was before, the Ministers were unable to reach a consensus on the substantive issues of such a code. Although, as a compromise, the Ministers did consent to the establishment of another working group to identify the overlaps and interaction of trade with the competition policy.[8] This working group, christened

[3]Claudio Cocuzza& Massimiliano Montini, *International Antitrust Co-operation in a Global Economy,* 19 EUR. COMPETITION L. REV. 158, 160 (1998).

[4]A. Neil Campbell, J. William Rowley & Michael Trebilock, *The Role of Monopoly Laws in the International Trading System*

[5]Andrew D. Mitchell, *Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO*, in WORLD COMPETITION LAW AND ECONOMIC REVIEW 358 (José Rivas ed., 2001).

[6]*OECD Committee Lacks Enthusiasm for Draft International Antitrust Code,* (1993), 65 ATRR 771; and Antitrust Division Official Predicts Scant Prospect of International Code, (1994), 66 ATRR 181

[7]Communication from the Commission to the Council, Towards an international framework of competition rules, COM(96) 284 final, 18 June 1996

[8]1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration, 18 December 1996

the WTO Working Group on Trade and Competition Policy presented its first report in November 1998 to the WTO's General Council and perseveres to keep the issue on the WTO Agenda.

CONCEPT OF EXTRA- TERRITORIAL JURISDICTION

Irony lies in the fact that the notion of extra-territorial jurisdiction comes up as an extension and at the same time, as contradiction to the well-established concept of sovereignty. "Sovereignty, a nation's exclusive right to govern itself, has its roots in public international law but has been internalized to the extent that it has become a cornerstone for the constitutions of various nations around the world. India, in this case, does not show much deviation and has sovereignty mentioned as one of its characteristics in the first line of the Preamble to the world's lengthiest constitution. Similarly, the concept of extra-territorial application finds itself embedded under Article 245(2) of the Constitution which reads as "*(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.*" "Thus, after comprehensively reading about the concept of sovereignty and Article 245(2), one can easily infer that the sole right to govern itself by legislation, enactment and execution of various laws and regulations is vested by and large with India and at the same time, there accrues a right to frame laws that gives it unbridled powers to govern beyond its territory. However, this inference is unacceptable as it is in direct contravention to the concept of sovereignty. Now the daunting question that arises is that can the powers of a sovereign state or one of its government body be unbridled?

For sovereignty and extra-territorial operation of laws to co-exist, an equilibrium between the two has to be achieved. In the case of *GVK Industries Ltd. v. Income Tax Officer*[9], it was put forward by the Supreme Court of India ("SC") that only those extra-territorial laws are valid that have a nexus with India. To put it in a simplified manner, extra-territorial laws that exclusively seek to address/provide a remedy to a cause because of which interests of people in India are getting affected and is per se violating the law of the land, are deemed to be valid. In India, there are no full-fledged laws that are extra-territorial in nature. Nevertheless, exception are there in cases of certain laws that have specific provisions and thereby confirming their extra-territorial jurisdiction.

For instance, Section 4 of the Indian Penal Code, 1860 reads as *The provisions of this Code apply also to any offence committed by (1) any citizen of India in*

[9] Gvk Inds. Ltd. &Anr. V/S The Income Tax Officer &Anr. (2011) 4 SCC 36

any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be. This provision of the Indian Penal Code uses the active nationality principle through which the nationality of the accused is invoked consequent to which the trial is as per the national laws. The nexus that invokes the operation of Section 4 is the nationality of the accused.

Similarly, Section 9 (1) of the Income-tax Act, 1961 provides a deeming fiction to effectively treat income of a non-resident assesses taxable which accrues or arises in India. Section 9, thus is extra-territorial in nature as it is applicable to non-resident assesses, although it seeks to tax only that part of their income which has a nexus in India.

Information Technology Act, 2000 was amended by notification dated October 27, 2009. Apart from its application to the whole of India, its provisions also apply to any offence or contravention committed outside the territorial jurisdiction of the country by any person irrespective of his nationality. In order to invoke its extra-territorial operation, such an offence or contravention should involve a computer, computer system or computer network located in India." Thus, extra-territorial provisions having a nexus with Indian interests are considered to be intra-vireos and valid.

EFFECTS DOCTRINE UNDER MRTP ACT

In India, before the passing and implementation of the Competition Act, 2002 (actual implementation after the amendment Act of 2007) the Monopoly and Restrictive Trade Practices Commission under the Monopoly and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the 'MRTP Act') was functioning to check monopoly of big size firms, stop restrictive trade practices and to protect the consumers. In April 1964, Monopolies Inquiry Commission under the Chairmanship of Justice K. C. Das Gupta, judge of the Supreme Court, was constituted by the Government of India to inquire into the extent and effect of concentration of economic power into the private hands and the prevalence of trade practices that were monopolistic and restrictive in nature in prominent sectors of economic activity except the agriculture industry. The Monopolies Inquiry Commission submitted its report to the Government of India on October 31, 1965. It was observed in the report that "*there were dangers from concentrate economic powers and monopolistic practices and they exist in large measure at present or potentially*". It was felt that the recommendation of the said commission should be given effect to in order to strike a balance between the twin object of the social policy, i.e., economic development and equity." The Government of India agreed with the

Monopolies Inquiry Commission that steps should be taken to ensure that the concentration of the economic power "in private hands did not operate to the common detriment and that a permanent commission should be established by law to control and regulate monopolistic and restrictive trade practices. In pursuance of the recommendations of the Monopolies Inquiry Commission, the Monopolies and Restrictive Trade Practices Commission was established under the Monopolies and Restrictive Trade Practices Act, 1969 passed by the parliament which came into operation from the 1stJune, 1970.

The objectives of the MRTP Act were to provide that the operation of the economic system does not result in the concentration of economic power which would be detrimental to the common interests for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices. It was thought that the above legislation by promoting competition would prevent the traders, manufacturers or producers form indulging in restrictive trade practices and consumer would get a fair deal. As far as the effects doctrine is concerned, "Section 14 of the Monopolies and Restrictive Trade Practice Act, 1969, provided: "*Orders where party concerned does not carry on business in India: Where any practice substantially falls within monopolistic, restrictive or unfair trade practice relating the production, storage, supply, distribution or control of goods of any description or the provision of any service and any party to such practice does not carry on business in India, an order may be made under this act, with respect to that part of the practice which is carried on in India.*" The Effect Doctrine was recognised by the Supreme Court in *Haridas Exports v. All India Float Glass Manufacturers' Association.*[10] In this case, emphasizing on the Effect Doctrine, the MRTP Commission by the virtue of the MRTP Act exercised jurisdiction to pass appropriate orders qua the monopolistic and restrictive trade practices in India, even if an agreement was entered outside India but resulted in restrictive trade practices within India. In this case, Respondent No.1, All India Float Glass Manufacturers' Association is an association of float glass manufacturers in India. In the months of March-April 1998, the said respondent lodged complaints to the Customs Department, alleging that the Indonesian manufacturers of float glass, acting in concert with Indian importers were allegedly indulging in heavy under-invoicing. The respondents were, however, informed by the Customs Department in Calcutta

[10](2002) 6 SCC 600. Also, M/s American Natural Soda Ash Corporation v. M/s Alkali Manufacturers Association of India (as ANSAC v. AMAI case, Civil Appeal No. 3562 of 2000 decided with Haridas Exports v. AIFGMA).

that if they had any genuine grievance, the same could be made before the Designated Authority, Ministry of Commerce dealing with antidumping complaints. On 10th September, 1998, the respondent No.1 filed a complaint before the MRTP Commission under Section 33(1) (j), (ja) and Section 36A read with Section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969 against three Indonesian companies alleging that they were manufacturing float glass and were selling the same at predatory prices in India, and were hence resorting to restrictive and unfair trade practices. The contention was put forward that the sale prices were predatory in nature as they were substantially below not only the cost of production in Indonesia but also the variable cost of production of the product. The alleged complaint showed figures that hinted towards the estimated price of float glass internationally as well as the cost of production of float glass in India with a view to demonstrate that it will be nearly impossible for the Indian manufacturers of float glass to compete with their Indonesian counterparts at the price at which the Indonesian manufacturers were currently selling or intending to sell to Indian consumers. On this basis, it was contended that the sale of float glass by the Indonesian manufacturers at the said price will restrict, distort and prevent competition by pricing out Indian producers from the market. This would result in lowering the production of the Indian industry and consequently the idle capacity and surmounting losses would force the industry to become economically unviable and sick thereby resulting to its closure, which would prejudice the employment in the industry.

The court held that, the MRTP Commission can, inter alia, take action whenever a Restrictive Trade Practice is carried out in India in respect of imported goods or otherwise."It is only in respect of the Indian leg of the restrictive trade practice, can an order under Section 12 A and/or Section 37 be passed. Under Section 33 of the Act what can be registered is only an agreement in regard to which any party to an agreement carries on business in India [Section 35 Explanation I]. But this does not mean that if an agreement is entered into outside India and which results in a Restrictive Trade Practice in India, the MRTP Commission has no jurisdiction. The effects doctrine will apply and Section 2(o) read with Section 2(u) and Section 37 gives jurisdiction to the MRTP Commission to pass appropriate orders qua the Restrictive Trade Practice in India. The MRTP Commission, in such a case, may not be able to stop import but they can come out with an order imposing post import restrictions such as, for example, restriction on selling the imported goods in

India in such a manner which will be regarded as a restrictive trade practice under Section 37.

Also, the MRTP Commission held in *Director-General (investigation & Registration) v. Voltas Ltd.,*[11] that in view of section 14 of the Act not withstanding that the business concern, which entered into agreement with the respondent in India, is carrying on business in a foreign country, the commission can take cognizance of the restrictive trade practice because the said trade practice is being carried out in India.

Post 1991, the industrial policy of liberalisation, privatisation and globalisation was introduced. The MRTP Act was now being considered inadequate to meet the challenges of a modern globalised economy. A committee under the Chairmanship of Shri S.V.S. Raghavan was constituted in October, 1999 by Government of India to examine The Monopolies and Restrictive Trade Practices Act, 1969 and for recommending changes in order to curb monopolies and to promote competition and to suggest a modern competition law in consonance with international jurisprudential trends. Competition Bill, 2001 was introduced in the Lok Sabha on 6 August, 2001 and was referred to Parliamentary Standing Committee for its recommendation. It was passed in 2002 and received the assent of the President in 2003 and subsequently amended by the Competition (Amendment) Act, 2007. The preamble of the Act states, *"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."*[12]

EFFECTS DOCTRINE UNDER THE COMPETITION ACT 2002

The Competition Act was a result of the recommendations by the Raghavan Committee, which was set up in 1999 to study the "efficacy of the MRTP Act and propose measures for promoting competition over and above curbing monopolies. The Committee recommended repealing the MRTP Act and replacing it with the Competition Act, under which the Competition Commission of India was to be established.[13] CCI was established in 2003. It

[11](1994) 79 Comp. Cases 274 (MRTPC).
[12] Preamble, Competition Act 2002
[13]Dr.Alok Ray, *Globalisation and Competition: The Role of a Professional,* THE CHARTERED ACCOUNTANT, 1452 (March 2007).

consists of a Chairperson and ten members as appointed by the Central Government.[14] S. 19 of the Act empowers CCI to inquire into contravention of the Act's provisions on a suomotu basis or on receiving information from any person, consumer or association, or on reference made by the Central or State Government. The Act also provides for search and seizure and leniency provisions.

The MRTP Act did not define cartels and thus an understanding of the same could only be drawn from restrictive trade practices, as defined under S. 2(o). In *U.O.I & Others v. Hindustan Development Corporation and Others*, three essential ingredients of a cartel were identified: parity of prices; agreement by way of concerted action suggesting conspiracy; monopoly, restricting or eliminating competition. Cartels are explicitly defined under the Competition Act under S 2(c). They come under the broad heading of anti-competition agreements under S. 3, on the basis of a presumption that such agreements are bound to distort the competitive process. However, vertical agreements cutting across various levels of the manufacturing and distribution process are not covered under the Act. Exemptions to cartel enforcement are in the form of express notification by the government and reasonable conditions observable under laws of copyright, patents, trademarks et al. as well as agreements for exports.[16]

S. 32 of the Act confers extraterritorial jurisdiction over CCI. The proviso to S. 18 states that the CCI may enter into any memorandum of understanding or arrangement with any agency of a foreign country in order to exercise its functions under the Act, with the prior approval of the Central Government. S. 3 of the Act covers anti-competitive agreements, which authorizes the CCI to inquire into any agreement, even if entered outside India, by parties regardless of whether they are in India if such agreement ?has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.

Thus both S. 3 and 32 provide for statutory recognition of the effects doctrine. However, the only regulations notified with respect to S. 32 are the Competition Commission of India(General) Regulations, 2009 - providing the procedure for enforcement of extraterritorial jurisdiction in accordance with the Code of Civil Procedure, 1908."

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[14] S. 9, Competition Act, 2002
[15] S. 54, Competition Act, 2002.
[16] S. 3(5), Competition Act, 2002

EFFECTS DOCTRINE IN USA

In the US commercial law jurisprudence, the effect doctrine has been developed through the US court's interpretation of the antitrust law to restrain, prohibit and penalise the activities outside the territory having adverse effect on business within the US territory. In 1909, *American Banana* Case,[17] where all the acts complained of were committed outside the territory of the United States, including the defendant's alleged inducements of the Costa Rican government to monopolize the banana trade, the US Supreme Court, categorically denied jurisdiction over the issue on the basis of the traditional territorial principle[18]. However, in the *American Tobacco* case, the US Supreme Court held that, the public policy manifested by the Anti-Trust Act is expressed in such general language that it embraces every conceivable act which can possibly come within the spirit of its prohibitions, and that policy cannot be frustrated by resort to disguise or subterfuge of any kind.... this case discloses a combination with the purpose of acquiring dominion and control of interstate commerce in tobacco by methods and manners clearly within the prohibition of the Anti-Trust Act. Later in the *Sisal* case,[20] the territorial principle was applied more flexibly and the US Supreme Court exercised jurisdiction over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States." In the *Alcoa* case,[21] the United States took action against the Aluminum Company of America and others for adjudication that the named defendant was monopolizing interstate and foreign commerce, "and that it should be dissolved, and to adjudge that such defendant and defendant Aluminum Limited had entered into a conspiracy in restraint of such commerce and for other relief under the Sherman Anti-Trust Act, Sec. 4, U.S.C.A". It was held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize, but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown

[17]American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).
[18]GautamShahi, *Effects Doctrine: Evolution and Execution* (2007) (Unpublished project report under internship programme, Competition Commission of India).
[19]US v. American Tobacco Co., 221 U.S. 106 (1911).
[20]US. v. Sisal Sales Corporation, 274 U.S. 268 (1927).
[21]US v. Aluminium Company of America et al, 148 F. 2d. 416 (1945).

actually to have had some effect upon them. Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them"." Since the Alcoa case, U.S. courts continued to follow the new jurisdictional formula of the effects doctrine.

Tests for the application of effects doctrine:

In the *Timberlane* case[22],the court laid down certain tests which have to be applied before asserting legitimate claim to extraterritorial jurisdiction over alleged anticompetitive conducts. The court ruled in affirmative that the U.S. has a legitimate claim to jurisdiction, but there are some situations where they shouldn't exercise that jurisdiction. Court uses a 3-part test to decide if this is an antitrust issue that the U.S. needs to get involved with:

o There must be some effect - actual or intended (direct or substantial) - on American commerce before the federal courts may legitimately exercise subject matter jurisdiction.

o A greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the US, and therefore, a civil violation of the antitrust laws.

o (as a matter of international comity and fairness) Whether the interests of, and links to, the U.S. -including the magnitude of the effect on American foreign commerce - are sufficiently strong, vis-a-vis those other nations, to justify an assertion of extraterritorial authority.

Also the court provided the balancing tests - Elements to be weighed: Looking at the totality of the circumstances;

- Degree of conflict with foreign law or policy.
- The nationality or allegiance of the parties and the locations or principal places of business of corporation.

[22]16Timberlane Lumber Co. v. Bank of America National Trust & Savings Association. 749 F.2d 1378. Also different standards have been urged by other commentators. Julian von Kalinowski, advocates a "direct or substantial" effect test- "any effect that is not both insubstantial and indirect" should support jurisdiction, a view that was adopted by the district court in Occidental Petroleum v. Buttes Gas & Oil Co.,331 F.Supp. 92, 102-03 (C.D.Cal.1971), affirmed on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). James Rahl turns away from a flat requirement of effects by concluding that the Sherman Act should reach a restraint either "(1) if it occurs in the course of foreign commerce, or (2) if it substantially affects either foreign or interstate commerce." James Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521, 523 (1974).

- The extent to which enforcement by either state can be expected to achieve compliance.
- The relative significance of effects on the U.S. as compared with that elsewhere.
- The extent to which there is explicit purpose to harm or affect American commerce.
- The foresee ability of such effects, and;
- The relative importance to the violations charged of conduct with the U.S. as compared with conduct abroad".[23]

EFFECTS DOCTRINE IN EUROPEAN UNION

The doctrine has been adopted by the European Commission even though the Treaty of Rome or the competition law of European Commission is silent on the extra territorial jurisdiction. The extraterritorial application of Articles 81 and 82 of EC is based on the principles of nationality and territoriality and therefore ensured through the use of three legal constructs, namely the economic entity doctrine, the implementation doctrine and the effects doctrine. The former two doctrines are established doctrines of EC law, as recognized by the European Court of Justice ("ECJ")."In the absence of formal recognition by the ECJ, however, it remains unresolved whether the effects doctrine enjoys the same status.[24] In the vast majority of cases, however, the fact that the effects doctrine has not been formally recognized by the ECJ, will have no bearing on the ability to assert subject matter jurisdiction over non-EU undertakings located outside the EU.[25] The doctrine extends subject-matter jurisdiction to all situations where the economic effects in the EU of anticompetitive actions taken abroad are immediate, reasonably foreseeable and substantial.[26] In the sixth report on Competition Policy in 1977 the Commission restated its view" concluding that

[23]Restatement (Second) of Foreign Relations Law of the United States,s. 40 states that a court should act in the light of such factors as: (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state

[24]R. Whish, Competition Law, Lexis Nexis, 5th Ed., 2003, p. 437. Also, Damien Geradin, Marc Reysen, et. al., Social Science Research Network available at: http://ssrn.com/abstract=1175003.

[25]Subject-matter jurisdiction is the right which States or institutions possess to make their laws applicable to the activities, relations or status of persons, and to the interests of persons in property. Such jurisdiction is exercised by the enactment of legislation, such as Articles 81 and 82 EC, or by the laying down of rules by administrative agencies or by courts. Butterworths Competition Law (Loose Leaf), Volume 3, Issue 71, para. XII/2.

[26]Gencor v. Commission, [1999] E.C.R. II-753, para. 90.

"in terms of legislation, administrative practice and court rulings, the legal theory here-the 'effects' theory-is based on a broad interpretation of the principle that the authorities can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if companies involved are locating and doing business outside the territory, and of foreign nationality, have no link with that territory, and are acting under an agreement governed by foreign law."[27] "The Commission and European Courts have evolved and acquired this jurisdiction by its own while the cases having extraterritorial issues. In the Wood Pulp Case[28], in which a number of Finnish, American and Canadian wood pulp producers outside the EC jurisdiction formed a price cartel and EC members charged with inflated prices. The jurisdiction over these producers was justified on the ground that they were exporting and selling directly to the costumers in the EC through branches, subsidiaries or agents at a price not less than two-thirds of the total shipment, leading to 60% of the consumption of wood pulp in the EC being affected. The Commission held that the relevant pulp producers and trade associations had infringed Article 81 (1) EC all of which had their registered offices outside the Community with only few having some kind of representation, such as a subsidiary, within the EC. The Commission explicitly made reference to the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EC in order to assert jurisdiction. On appeal, Advocate-General Darmon espoused the effects doctrine reflecting a belief among several Advocate-Generals that the doctrine should become an established concept of EC law. In particular, he opined that "*there is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect*".[29]"Again the doctrine was discussed and affirmed in the Gencor case[30] concerning a merger of two South

[27]Competition Policy, Sixth Report on Policy Towards Enterprises- Main Developments in Community Policy, Published in conjunction with the 'Tenth General Report on the Activities of the European Communities', Brussels, Luxembourg (April 1977). This theory is also recognized by the laws of several Member States. The German Act against Restraints of Competition of 1957, for instance, states at Section 98(2): 'This act shall apply to all restraints of competition which have effect in the area in which this act applies, even if they originate outside such area'.Also, in Competition Policy, 2nd Report, point 24, the Commission stated that it and the Court of Justice both considered that the Community had power to act against a non-Community undertaking under Article 85 wherever the effects of the restrictive practice were felt within the common market. E. Nerep, Extraterritorial Control of Competition under International Law 1983.

[28]Wood pulp, (1985) O.J. L 85/1, (Commission decision of 19 December 1984). In appeal to the ECJ, Ahlstrom v. Commission, European Court Judgment of 27 September 1988, European Court Reports 1988, 5193.

[29]Opinion of the Advocate-General Darmon of 25 May 1988 in joined cases 89, 104, 114, 116, 117 and 125-129/85 [1988] E.C.R. 5214 para.57.

[30]Judgment of the Court of First Instance, Case T102/96, Gencor v. Commission, [1999] E.C.R. II753.

African companies, in which the territorial scope of the E.E.C. Merger Regulation (Regulation No. 4064/89) was reviewed and its justification and its justification under international law was put to test. The Court of First Instance of the European Community observed that: "According to Wood Pulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case toa proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community.... application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community" The court applied the three criteria of the doctrine-immediate, substantial, and foreseeable effect held that, "the application of the Regulation to the proposed concentration was consistent with public international law."It should be noted that in Gencor Case, although the Wood Pulp case was referred to and the implementation test was applied in connection with the territorial scope of the E.E.C. Merger Regulation, the effects doctrine was applied for the justification of jurisdiction under public international law.

Reappraising The JallianwalaBagh Massacre: An Entitlement to Retrospective Reparation

Dr. Banu Vasudevan[1]

Introduction

The main focus of this research is to analyze the 100-year-old brutal incident[2], the Jallianwala Bagh Massacre, in the backdrop of the Contemporary International Law Regime and the Human Rights Justice mechanism.

The horrific episode of the Jallianwala Bagh massacre marks a historical watershed in the timeline of the struggle for independence in India.

The Jallianwala Bagh massacre may be labelled as a **"gross violation of international human rights law" and** indeed a **"crime against humanity."** This brutality was committed as a systematic and unrestricted attack directed against a civilian population, with the stark knowledge that this attack would be clearly a grave deprivation of the personal liberty and a gross infraction of the fundamental rules of International Law. Such an inhuman act of persecution, in the contemporary world, based on the collective premises of political, racial, cultural, ethnic and nationality of an identifiable group is highly deplorable and impermissible under any International Law.

In the global context, we may allegorize the Jallianwala Bagh massacre and a few other similar such dark episodes in History such as the Srebrenica massacre, Tiananmen Square Massacre, 1940 Katyn massacre, Mau Mau emergency to name a few. Non- applicability of the limitation period makes it all the more imperative for the present British Government to take the criminal responsibility for the excesses committed by the Imperial Colonial Empire.

An attempt is made here to take a closer look at some of the repressive laws made by the colonial power in blatant violation of the Human Rights used in furtherance of the acts of terrorism by the state.

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[2]Centenary Anniversary of the Jallianwala Bagh tragedy, 13th April 1919 to 13th April 2019, commemorated last year.

Reparation in the form of an official apology and a formal acknowledgement thereby to project history in its true perspective to the world by the present British government, would not only provide for a sense of closure to such horrific incidents of the past of our country, but would also spur forward an impetus in the International arena to encourage confidence and to further the spirit of co-operation amongst peoples so as to promote the cause of international peace and security and to protect human rights and fundamental freedoms.

The author seeks to reassess three pertinent issues here viz;

1. Can the Jallianwala Bagh massacre be labelled as a **"gross violation of international human rights law"** and more so as a **"crime against humanity"?**
2. Some of the repressive laws made by the colonial power in **blatant violation of the Human Rights**, was it not, in fact, for the furtherance of the acts of terrorism by the State?
3. Is it not all the more imperative for the British Government, at present, to take the criminal responsibility for the excesses committed by the Imperial Colonial Empire in India and thus internationally liable to make full **reparation** for the injury caused by such an illegal act?

Jallianwala Bagh Massacre: "A Crime Against Humanity"?

But, then how do we describe the Jallianwala Bagh Massacre?[3]

The Jallianwala Bagh massacre can be labelled as a "crime against humanity" in line with the Rome Statute of the International Criminal Court .

Now, **what constitutes a Crime against Humanity?** In a nutshell it refers to deplorable acts, that, which "shock the conscience of mind" and poses a serious intimidation to the security and peace of the international community.

The British Government and its Imperial Colonial appendage in India had crossed the threshold of inhumanness by committing crime against humanity in peace times by its contemptuous and unethical policies. They are to be fully

[3]The article proceeds with the acknowledgement that India is not a party to the Rome Convention and hence a claim of applicability cannot be made whether prospectively or retrospectively in the present context. But then how do we describe the Jallianwala Bagh Massacre? The Rome Statute has been resorted here to **shroud** the Jallianwala Bagh Massacre under the definition of Crime against Humanity and thus **explain the magnitude of the crime surrounding the incident.**

[4] Article 7, Rome Statute of International Criminal Court, 2002

held responsible *de jure* and *de facto* for the internationally wrongful crimes of murder, massacres, use of weapons leading to indiscriminate havoc, extrajudicial punishments, torture, racial discrimination, political repression, unjust imprisonments, deportations, summary executions inter alia breaching the International laws and International Obligations in denying the Indians their legal rights and freedoms.

The Allied powers were instrumental in initiating the drafting and implementation of the International Laws, soon after the World War II, and also for setting up and arranging for the Nuremberg and Tokyo War Crimes Tribunals and the subsequent trials under it. The Allied prosecution, with one of the leading protagonists being the U.K, had justified the need for the trials of the pogrom of Jews by Nazi Germany. To quote Chief Justice Jackson, in his opening address to the Tribunal in the Nuremberg Trials, "*The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated*".[5]

In this context, the muzzling of the ruthless crime unleashed in the Jallianwala Bagh Massacre and the failure to take the onus for it by the UK government even today smacks of hypocrisy and remorselessness. It is indeed an irony that the makers who had contemplated the laws had failed to apply it on themselves!

The Rome Statute outlines three most serious International crimes of great concern, to the world at large, which the International Criminal Court (ICC) has jurisdiction to prosecute viz Genocides, War Crimes and Crimes against Humanity. The Jallianwala Bagh Massacre would conform to the definition of Crimes against Humanity.[6] Article 7(1) enumerates about 10 types of offences amounting to serious crimes against the humanity and a residual clause which includes other inhuman acts.

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[5] *"Trial of The Major War Criminals Before the International Military Tribunal,"* Library of the Congress, Federal Research Division, U.S.A. Volume 2, 98-99 (1947).

[6] Article 5, 'Crimes within the jurisdiction of the Court', Rome Statute of International Criminal Court, 2002

In accordance to the subclauses of Crimes against Humanity[6] as laid down in Article 7 in Rome Statute[7] the Jallianwala Bagh Massacre conforms to as many as 5 of these subclauses, namely: [8]

1) **Crime of Murder:** The perpetrator, being the British Colonial Government in India, intentionally encouraged the policy of a widespread and systematic attack causing the death of thousands of innocent civilian populations[9]. While Michael O'Dwyer, the lieutenant governor of Punjab, was encouraged to promulgate several orders to restrict the movement and assembly of people in anticipation of agitations and violence, Colonel Reginald Dyer, under the former's orders, unleashed his unforgiveable cruelty on an innocent people who had continued to gather at the Jallianwala Bagh and barring a few protestors, most of them had merely stopped on their way back after attending a local horse and cattle fair which had closed early and some who were returning after offering their prayers at the Golden Temple in celebration of 'Baisakhi', the harvest festival and who were neither aware of these orders and nor did they understand the repercussions of not heeding them.

2) **Offence of Extermination of humanity:** The British Government's gruesome act of indiscriminate firing on a peaceful and unarmed gathering which included, civilian adults, children and even infants, without any prior warning was indeed a 'bloodiest' mass killing in India. It was a calculated step to bring destruction to a part of the civilian population.

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[7]Article 7(1), Rome Statute describes Crime against Humanity which includes the following 10 offences viz Article.7(1) (a) Murder;(b) Extermination;(c) Enslavement; (d)Deportation or forcible transfer of population;(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;(f)Torture; g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court (i)Enforced disappearance of persons; (j) The crime of apartheid;(k)Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[8]Ibid.

[9]Copley, Antony (2006). "*The Butcher of Amritsar General Reginald Dyer by Nigel Collett*". Journal of the Royal Asiatic Society. 16 (1): 101-103

3) **Crime of unjustified Captivity or imprisonment:** The victims were caught in a closed enclosure and the only exit was sealed, thereby resulting in the severe deprivation of their physical liberty with the knowledge that it was a gross violation of the fundamental rules of international norms.

4) **Crime of Torture:** The massacre without a doubt has resulted in severe physical and mental pain on those who actually faced the brutal onslaught and survived, but has also left deep scars of pain and sufferings on the mental and physical health of the kith and kin, and the nation at large who lost them to this deliberate act of barbarity.

5) **Crime of Persecution:** *"Persecution would refer to the intentional and severe denial of the fundamental rights contrary to the International law by reason of the identity of the group or collectivity".*[10] The British Colonial government persecuted a discernible group based on the collated premises of political, racial, cultural, ethnic and nationality, and is thus universally extremely deplorable and impermissible under any International Law jurisprudence.

The Jallianwala Bagh Massacre thus, was nothing short of a serious attack on the value of 'humanness' and an odious disrespect and humiliation to human dignity.

Moreover, unlike genocides and war crimes, the Crime against Humanity is a discrete international crime which can take place in war and also in peace times and therefore must be prosecuted whenever committed.

In the global context, we may allegorize the Jallianwala Bagh massacre and a few other similar such dark episodes in History such as the 1940 *Katyń massacre,*[11] *Mau Mau emergency* (1963)[12] *Tiananmen Square Massacre* (June 1989),[13] *Srebrenica massacre* (July 1995)[14] to name a few.

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[10]Article 7(2)(g), Rome Statute of International Criminal Court, 2002

[11]Paul, Allen (1991). *Katyn: The Untold Story of Stalin's Polish Massacre.* Scribner Book Company. ISBN 978-0-684-19215-4 Bennett, Huw (2012).

[12]*Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency.* Cambridge: Cambridge University Press. ISBN 978-1-107-02970-5

[13]Peter Li; Marjorie H. Li; Steven Mark (2011). *Culture and Politics in China: An Anatomy of Tiananmen Square.* Transaction Publishers. ISBN 978-1-4128-1199-6. Bennett, Huw (2012).

[14]"*Under the UN Flag; The International Community and the Srebrenica Genocide"* by Hasan Nuhanovi?, pub. DES Sarajevo, 2007, ISBN 978-9958-728-87-7

Jallianwala Bagh Massacre: "A Gross Violation of International Human Rights Law".

Although the Jallianwala Bagh massacre very much fits into the definition of a Crime against Humanity, but since India is not a party to the Rome Convention and hence a claim of applicability cannot be made, whether prospectively or retrospectively, in the present context, the author now proceeds to seek justice by qualifying the Jallianwala Bagh massacre as a gross violation of International Human Rights.

It can be said that Human Rights Violation is the genus, a much more comprehensive concept, while Genocides, War Crimes and Crimes against Humanity are its species. The same genre of core Human Rights, protected by the International Statutes and Conventions, were gravely flouted, considering the Jallianwala Bagh Massacre, to be an act of serious Human Rights violations.

Inhumane acts by nature reflect grave infringements of Human Rights. Even one single isolated act, if not committed systematically, but with the intention to destroy partially or entirely any people- national, ethnic, racial or religious groups will constitute violations against the Human Rights. As a deduction, the Jallianwala Bagh Massacre befits this contrivance.

A government or the State is justified only by its capacity to protect the people it governs. But when it misdirects its powers atrociously against the innocent targets, in the garb of repressive policies, it loses all mandate to rule. The State is obliged to observe certain non-derogatory preemptory norms such as not to yield to practices of serious violations of Human Rights and Crimes against Humanity. The International Community, will hold liable not only the State but also the individuals who are responsible for breaching these preemptory norms by either making or following the repressive State policies leading to such crimes against humanity. The traditional concept of state sovereignty now stands modified and hence neither the State heads who direct and nor those who obey them will enjoy immunity with impunity. Orders thus issued and consented by the Colonial Government authorities perpetrating widespread and systematic violations of human rights thus, may be deemed to be international crimes. The Human Rights Law holds the State liable and seeks redressal or compensation, the International Criminal law attributes blame on the individuals and imposes punishments on them. Hence the British Government in UK, its colonizing organization in India and Dwyer and Dyer were all morally and ethically personally liable for the ugly incidents in India.

The Indian leaders and the public were angered by the repressive measures imposed by the British government through the Defence of India Act, 1915 and the Rowlatt Act, 1919 which severely infringed upon their fundamental human rights. In obvious response, several hartals and strikes were observed and one of which was at the fateful Jallianwala Bagh.

The Anarchical and Revolutionary Crime Act, 1919 infamously known as the Rowlatt Act or the Black Act was passed under the Governor Generalship of Lord Chelmsford by the Imperial Legislative Council on 18th March,1919. It was a draconian law passed as a punitive and preventive measure to curb the up-surging political and nationalistic activities of the Indians, which were perceived as threats of revolutionary and terrorist acts of conspiracy against the British hegemony. The Act drafted under the chairmanship of Sir Sydney Rowlatt, a judge from the King's College, Cambridge set out the most crude and cruel solutions by severely depriving the Indians of their civil liberties[15].

The repressive laws, made by the colonial power, was certainly in **blatant violation of the Human Rights** and in fact for the furtherance of the acts of terrorism by the State.

Undisguised imposition of emergency measures in a peaceful situation was uncalled for. The law imposed several curbs to the extent of arrests without warrant, indefinite preventive detention and incarceration of the undertrials without trial or otherwise conducting in camera trials for certain political acts or by conducting trials in a summary manner without a jury by tribunals specially established for the purpose, denying the right to information to the accused concerning the alleged crime and the reason for his arrests, denying the identity of his prosecutors or the evidences presented against him and on completion of his sentence he had to deposit a security with the government and was also prohibited from participating in any social, religious or political activities.Further, the Act bestowed extensive powers to the police to search any place and arrest anyone whom they suspected of without warrantand could be deported on mere suspicion of sedition and revolt; greater control imposed on the press, the disrupting of the rail, telegraph and communication systems especially in Punjab when the protests became more vocal and aggressive[16]. **Thus, the Indians were deprived of their fundamental right of personal expression and the most important right to life and personal liberty.**

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[15] *Khooni Vaisakhi: A Poem from the Jallianwala Bagh Massacre*, 1919 Harper Collins India, 2019 eBook

[16] *Imperial Crime and Punishment: The Massacre at Jallianwala Bagh And British Judgment, 19I9-1920* Helen Fein, 1977 by The University Press of Hawaii

The gross breach and the remedy thereof of the Human Rights under Crimes against Humanity and Human Rights violation has been addressed through several International Treaties and Covenants and tried by International Courts which may be international, national or regional fora. The major international Conventions and Statues viz, the Universal Declaration of Human Rights[17], the International Covenant on Civil and Political Rights[18], the American Convention on Human Rights[19], the European Convention for the Protection of Human Rights and Fundamental Freedoms[20], the Rome Statute[21] bind all subjects of the international community, including the States, international agencies and organizations and individuals to respect some of the hardcore fundamental human rights such as :

Right to Juridical Personality: Every person possesses the right to be recognized as a person before the law;

Right to Life: Every person possesses the right to have his life respected and protected under law and which cannot be deprived in an arbitrary or extrajudicial manner;

Right to Humane Treatment: Every person possesses the right to have his physical, moral and mental integrity respected and which cannot be subjected to cruelty, torture or inhuman or degrading punishment;

Right to Personal Liberty: Every person possesses the right to personal liberty and security and cannot be subjected to arbitrary arrest or imprisonment;

Right to a Fair Trial: Every person possesses the right to fair trial guarantees;

Freedom of Conscience and Religion: Every person possesses the right to freedom of conscience and religion which includes his freedom to profess or to disseminate his faith or belief, in public or in private, by himself or in a group; and also includes

[17]Universal Declaration of Human Rights, 1948
[18]Article 4.2, International Covenant on Civil and Political Rights, 1966
[19]Article 27, The American Convention on Human Rights, 1969
[20]Article 15.2, European Convention for the Protection of Human Rights and Fundamental Freedoms,2000
[21] Rome Statute of the International Criminal Law, 1998.

Freedom of Thought and Expression, Freedom of Association: All of these fundamental human rights had been sadly breached by the repressive Acts and cruelly abandoned in the gruesome Jallianwala Bagh Massacre.

Now, to address the third issue. In such a situation, the State, being the present government in U.K. may be held internationally liable and is obliged to provide full remedy or reparation for the injury caused by such an illegal act.

This alludes to the concept of State Responsibility. International Law confers certain rights and also imposes reciprocal responsibilities on the States and the State thus becomes liable if it were to breach these obligations[22]. It may be the result of a direct breach of a treaty or a violation of another State's territory or when its internal organs or entities exceed their authority.

It is a basic rule under international law that violations of international law must give rise to reparations.

This rule of State practice is established as a norm of customary international law and remains applicable for both international and non- international armed conflicts.

In 1928, the Permanent Court of International Justice stated in the Chorzow Factory case that:

"It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation ... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. [23]

The Geneva Conventions explicitly mention that the States cannot absolve themselves from a liability incurred with respect to grave breaches, arising from military operations, to the civilian population and individual civilians. The States have a serious obligation to protect and take precautionary measures

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[22]Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany vs. Poland)*, (Merits), PCIJ (ser. A) No. 17, 1928, p. 29. Also, Article 1 of the Articles on the Responsibility ofStates for Internationally Wrongful Acts adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State." UN Doc.A/CN.4/L.602/Rev.1, 26 July 2001 (hereinafter "ILC Articles on State Responsibility").

[23]Ibid.

so that the civilians do not become the object of indiscriminate attacks and from acts of threat and violence to their life and property during such hostilities.[24]

The State is liable for the private acts of persons to the extent if they were committed at the behest of or had been subsequently adopted by the State[25]. The Jallianwala Bagh Massacre committed under the British Government's orders and concurrence was in utter disrespect to and an overt and ruthless violation of the human rights.

Thus, the international norm which enjoins the principle of obligation to respect human rights was transgressed by the British Government and in the process committed the internationally wrongful act.[26] An internationally wrongful act of a State, would include any action or commission, if it is attributable to the State under international law and wherein there is a breach of its the international obligation.[27]

The British government thus becomes guilty of crimes by breaching its obligations and violating the rules of *jus cogens*, or a preemptory norm of the International Law based on a universal agreement to prohibit and protect from serious violations of International Human rights inclusive of criminal offences like genocides, war crimes and crimes against humanity.

A State responsible for internationally wrongful acts of gross and serious violations of International Law is, as a result, under an obligation to honour the rights of the victims, survivors and future generations to a remedy and reparation. Reparation may include restitution as far as possible of the original situation, if this is not possible by way of compensation and may even include

[24] First Geneva Convention, Article 51 (ibid., § 2); Second Geneva Convention, Article 52 (ibid., § 2); Third Geneva Convention, Article 131 (ibid., § 2); Fourth Geneva Convention, Article 148 (ibid., § 2).

[25] Article 5 of the Articles on the Responsibility ofStates for Internationally Wrongful Acts adopted by the International Law Commission in 2001: Conduct of persons or entities exercising elements of governmental authority." UN Doc.A/CN.4/L.602/Rev.1, 26 July 2001 (hereinafter "ILC Articles on State Responsibility")

[26] Ibid Article l, Responsibility of States for Internationally Wrongful Acts

[27] Ibid Article 2, Elements of an internationally wrongful act of a State.

disciplinary and penal proceedings and if none of these is possible by way of acknowledgement of or by an apology for the breach of its international obligation. [28]

Generally, the rules of limitation under a law sets out the maximum time during which the legal proceedings may be initiated, after the happening of the event, by the prosecutor or the claimant, and when the specified time passes, no claim can be maintained and if filed will be struck down as time-barred.

It is of special concern to note here that, many of the International Conventions or Declarations or Instruments, which prescribe reparations or prosecution and punishments for the internationally wrongful acts of gross violation of human and humanitarian rights which constitute serious crimes, set out no statutory limitation for seeking justice against such acts[29] and it is immaterial on what dates they were commissioned and whether committed in times of war or peace. Criminal liability must be imposed on both the State representatives in authority and the private individuals who, as the accomplices or principals participate or directly incite others to commit any of these crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Hence, non-applicability of the statutory limitations for prosecution of a crime even when committed many years before, makes it all the more imperative for the present British Government to take the criminal responsibility for the excesses committed by the Imperial Colonial Empire and make reparations for the same.

Cases of Retrospective Reparative and Recompense Justice to Settle the Historic Bruises of The Past with Special Reference to the Several British Colonies:

The *Mau Mau* case is the first historic case which sets the **precedent** that the victims who had endured torture and abuse under the British Colonial Regime have a right to seek claims for remedy and reparation retrospectively from the present British Government. This was perhaps the wheel which rolled on to

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[28] Articles 28 to 37 ILC Articles on State Responsibility, op. cit. (note 1). Also, the Principles 15 to 22 of the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62 (hereinafter "draft Basic Principles and Guidelines").

[29] Principle 6 and 7 of the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62; Article I (b), The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968.

expose the more bloody and controversial post-war conflicts under the British Colonial Era in different parts of the world.

Mau Mau Case:

The Mau Mau Uprising or Rebellion was fought between the 1950s to 1960s in Kenya by the Kenya Land and Freedom Army (KLFA) comprising of several of the native Kenyan tribes (the Kikuyu, Meru, Kamba, Embu and Masai tribes)[30]. They fought for their independence against the British Colonial Rule in the region. However, the Colonial power unleashed its violent imperialistic tactics under the veil of protecting the law and order in its colony against the "criminal" insurgency. The British declared a state of emergency, suspended all civil liberties, carried out mass arrests and treated the Kenyan rebels as murderous criminals and subjected them to gross punishments, forced labour, sexual assaults and extreme torture in the concentration camps. On 12th December, Kenya finally declared its independence from Britain.

However, due to the sustained insistence and evidences collected, even from the British Foreign Office, by some determined Kenyan and British historians and lawyers, the Kenyans campaigned for a public inquiry and compensation. They sought justice for the gross violence of the 1950s over the ruins of which their post-colonial state had been reconstructed. No doubt, the British tried to shrug off its responsibility by citing that it was the obvious result of Mau Mau's own violence or that of a few "bad apples" in the colonial regime.

In June 2013, the British Government went through an out of court settlement with the Kenyans. Christian Turner, the British High Commissioner to Kenya, expressed an official apology for the colonial era serious lapse of human rights. "*The British government recognizes that Kenyans were subject to torture and ill treatment at the hands of the colonial administration and sincerely regrets that these abuses took place*." The British Government also consented to fund the construction of a new monument for the Mau Mau fighters and a monetary compensation of 14 million dollars to the survivors. [31]

Ultimately, the 60-year-old historic war wound was finally assuaged.

[30]Supra 12

[31]www.reuters.com › article › us-britain-kenya-maumau

In the words of Martyn Day, the lawyer who represented the Kenyan plaintiffs that " *……Maybe other parts of the colonial world may take great comfort from the fact that the (U.K.) courts are basically opening their doors, to say that, where you have suffered such severe abuse, you may have a claim."* [32]

This case of success has thus **set a Precedent** for several of the erstwhile British colonies including Malaya, Cyprus, Aden, Northern Ireland, Palestine and of course India, to demand and seek a recompense or reparation from the modern British Government for the excesses committed by its imperial colonial appendage on the people of these places.

Cyprus Case:

Following the example of the Mau Mau Uprising veterans, Cyprus sought to seek justice for similar gross violations of Human Rights when it was under the control of the British colonial power. The *Ethniki Organosis Kyprion Agoniston* (EOKA) nationalist guerilla organisation fought the British troops to end the British colonial rule in Cyprus between 1955-59.[33] The campaign ended subsequently with Cyprus gaining its independence in 1960. In 2012 investigations conducted in Cyprus forced the British Foreign Office to release highly classified documents exposing extreme and violent torture and abuse unleashed by the British army officers and security personnel during this insurgency on those who were arrested and kept in the detention camps as well as on the innocent civilians.

Legal action was demanded by Cyprus in 2012 against the British Government for the excesses committed about 5 decades ago.

The Cypriots won the right to claim damages against the UK tortures at court in 2018. The British Government wanted the case to be argued under the Cypriot laws as a means to possibly escape under the statute of limitations. But the presiding judge dismissed it and held that, *"It seems to me that, in this case at any rate, where a state stands to be held to account for acts of violence against its citizens, it should be held to account in its own courts, by its own law and should not escape liability by reference to a colonial law it has itself made."*[34] The British Government made an out of court settlement with the Greek Cypriots victims by paying to a tune of one million pounds.

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[32] www.bbc.co.uk › news › world-europe-20302280

[33] *Great Power Politics in Cyprus: Foreign Interventions and Domestic Perceptions*edited by Michalis Kontos, Nikos Panayiotides, HaralambosAlexandrou. Cambridge Scholars Publishing2014 ISBN-13: 978-1443853149

[34] Kimathi v Foreign and Commonwealth Office [2018] EWHC 3144 (QB)

The Batang Kali Massacre Case:

The Mau Mau reparation was, again, followed by a demand for review into the 1948 British 'massacre' in Malaya or the Batang Kali massacre. The alleged massacre involved a killing of about 24 unarmed villagers by the British troops in December 1948 at Batang Kali in Malaya when it was a colony of the British empire.[35] The incident lasting up to 1950 occurred during the so-called Malayan Emergency, a counter- insurgency attack by the British troops against a communist inspired revolt in Malaya against it. This was indeed an extremely serious human rights abuse. Two inquiries were held, shortly after the killings, in 1948 and thereafter in 1970. At that point of time, the then Labour British Defence Secretary Denis Healey even instructed the Scotland Yard to create a special investigative team to look into the matter but in 1970, the incoming Conservative government dropped it for want of evidence. The British Government has, however, never acknowledged the fault on behalf of the serious wrong doings of the British army.

The Malaysians insisted on seeking a public inquiry and compensation for the families of the ethnic Chinese victims of this gruesome massacre.

Several personal petitions made to the British Queen Elizabeth II in 1993, 2004, 2008, seeking a reopening of the inquiry, finally yielded with the High Court in London accepting to review their case in May 2012. In September 2012, the Court in its written judgement upheld public hearings and ruled that evidence did support the fact that the British Government was responsible for the deliberate massacre of the innocent civilians in Batang Kali. The British authorities, however, defended the act by claiming that the men encountered were in fact insurgents trying to escape and rejected the call to hold public inquiry.

The UK's Court of Appeal, in March 2014, further upheld the cause of public hearings and compensation, much to the welcome of the Malayan families. But the UK's Supreme Court in November 2015, overruled that the UK government was not obliged to hold a public inquiry on the ground that although the impugned incident may have been a war crime but it was inadmissible as it occurred a long time back. An appeal to the European Court of Human Rights, in October 2018 also faced a similar fate .[36]

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[35]Hale, Christopher (1 October 2013). *Massacre in Malaya: exposing Britain's My Lai. Stroud:* The History Press ISBN 978-0752487014.

[36]Chong and Others v. the United Kingdom (dec.) - 29753/16

The point to be noted here is the consistent efforts made at seeking redressal for justice. It is a case well fought though unfortunately lost. There was an initial ray of hope in the British justice by way of grant of permission for the public trials, yet the ingenious technical arguments to keep the case out of the court by the British Government and the attempts at frightening the claimants with the legal costs covers up the dishonorable and immoral acts committed by the British colonial power.

A more sustained research and "forensic examination" of the history and evidences would certainly lead to much more disclosures on the colonial excesses in the past, be it Indonesia, Palestine, North Ireland, Aden, Vietnam, Algeria, South Iraq and of course India. This shall pave the way for transformative laws and legal fora to mete out reparative and recompense justice to settle the historic bruises of the past.

Instances of Reparation Provided on The Basis of a Unilateral State Act:

Reports provide that Germany provided direct compensation to the inmates who suffered in the concentration camps and to the victims of their medical experiments; while Norway recompensed the victims of anti-Jewish measures during the World War II. [37]

Instances are also not lacking where the present Japanese Prime Minister Abe Shinzo made a formal apology in his very first speech at a Joint session of the United States Congress in 2015 by expressing deep repentance for the war excesses committed by his country's military during the II world war.[38]

Very recently, in June 2020, on the occasion of the 60th anniversary of the independence of the Democratic Republic of the Congo, the Belgian reigning monarch Phillips expressed his deepest regrets for his country's colonial abuse

[36]Chong and Others v. the United Kingdom (dec.) - 29753/16

[37]"*On behalf of victims of pseudo-medical experiments: Red Cross action*", International Review of the Red Cross, No. 142, 1973, pp. 3-21.

[38]*Japanese Apologies for World War II: A Rhetorical Study* by Jane W. Yamazaki. Routledge, 2006

on the people of this country in a letter sent to its President Tshisekedi.[39] Millions of Africans had died in Congo until it got its independence in 1960 from Belgium's bloody colonial rule.

In this context, we may recollect another incident in the time line of India's struggle for Independence, i.e. the ***Komagata Maru*** **incident** of 1914, wherein about 400 passengers on board the ship, who were of the Hindu, Muslim and Sikh origin, were racially discriminated upon and were denied entry into the Canadian waters at Vancouver[40]. Hundred years later this incident was recalled by the Canadian government and the present Canadian Prime Minister Justin Trudeau, in 2016, expressed a heartfelt apology on behalf of his government for the racially discriminatory exclusion laws applied for the victims of this incident, namely the Indian immigrants.[41]

Regrettably, with the passage of time, it is logically not possible to seek restitution of the original situation as it existed before the gruesome incident or call for a trial and penal punishment of Dwyer and Dyer, or even a compensation for the material and non-material injury caused. It may even be argued that even if the victims were to survive to this day to hear the apology, no words can possibly erase the physical and mental pains and sufferings experienced by them. But it cannot also be denied that the Centenary Commemorations of the Jallianwala Bagh Massacre did awaken a sense of solidarity in the Indians to seek justice against this brutal onslaught which has left deep scars of pain and sufferings not only on the mental and physical health of the kith and kin of the victims but also on the nation at large who had lost them to this deliberate act of barbarity.

Hence, the best available choice of reparation would be a formal and civil acknowledgement of the international breach and may be an expression of regret or an official apology of the wrong.

Sadly, the British Government has ignored and refrained from accepting the universal legal tenets of morality, justice and fairness due to their complacency and a lack of a sense of accountability to humanity. Despite a debate in the House of Commons on the issue of formal apology, none of the British Prime Ministers including David Cameron, Theresa May, nor her successor Boris

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[39] www.bbc.com › news › world-europe-53232105

[40] *The Voyage of the Komagata Maru: the Sikh challenge to Canada's colour bar.* Vancouver: University of British Columbia Press. 1989. pp. 81, 83. ISBN 978-0-7748-0340-3.

[41] www.cbc.ca › komagata-maru-live-apology-1.3587827

Johnson have been forthcoming with an apology to the Indian government even at the time of the commemoration of the Centenary Anniversary of the Jallianwala Bagh tragedy.

Conclusion:

Thus, with a sense of justification it is endeavoured here to pin amercement on the British Government in UK and its colonial appendage in India - to the State and its individuals alike, for being part of the unjust pursuance of an abhorrent and inconceivable common policy for committing a crime against peace in our country. Jallianwala Bagh Massacre, was the reflection of their scant regard for the value of 'humanness' and an odious disrespect and humiliation to human dignity which should not have been condoned and not tolerated by the British government. The axiom "The rule of law" or "No one is above law" mandates the government to treat all persons equally under the law. But this mandate instantly becomes susceptible to becoming void if there is a denial by the U K government even to conform to satisfactory norms of human rights of respect and dignity to a class of individuals or individuals in general. Some obligations are owed *erga omnes* i.e. towards the entire international community as a whole. Violating such international obligations and State responsibility can affect the international community as a whole. The stance taken by the U K's present political leadership in not taking the onus for this criminal liability overrules its own convictions of worldwide intolerance of genocides, war crimes and crime against humanity. It is thus a hypocrisy and imposture, that too from an international platform, in merely formulating and devising policies on the numerous terminologies in the several Conventions and the several judicial procedures for the international Tribunals merely in the name of upholding impartial justice.

Tracing a Kashmiri Half Widow's Pursuit for Justice

Ms Divya Mittal[1]

"I often wake at night with an uneasy sense of choking and being throttled. My breathlessness and heart palpitations last all night. The next morning an abysmal sense of soreness swamps me," says Haseena, a 50-year-old woman from the village of Dardpora, in [India-administered/occupied] Kashmir, describing her mental anguish.[2]

Around the world, enforced disappearances have been used as a means of terror and suppression. Despite the plethora of human rights instruments available to us today, instances of enforced disappearances have been occurring across different parts of the globe, from Peru to Nepal, from Guatemala to Morocco, from Turkey to China. Closer home, enforced disappearances have occurred in the internal conflict zones like the North East, around the Red Corridor, parts of Punjab and Jammu & Kashmir.[3]

This paper concentrates on a half widow's access to justice when her husband becomes a victimof enforced disappearance. In Kashmir, women whose husbands underwent enforced disappearance are labelled 'half widows' since their spouse disappeared but are not yet been declared dead. The Association of Parents of Disappeared Persons (APDP) estimates that 8,000-10,000 men have disappeared since 1989, leading to an estimated 1,500 'half-widows' in Kashmir.

In this atmosphere of insecurity and uncertainty in Kashmir, the access to justice for victims[4] of enforced disappearances becomes even more complicated. The U.N. Working Group on Enforced and Involuntary Disappearances in its commentary noted that enforced disappearances cause particular and disproportionate harm to women, on the economic, social, physical, and psychological levels.[5] These women face social, economic,

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[1]Worked as Assistant Professor, ILS Law College, Pune

[2]https://herald.dawn.com/news/1153456

[3]Association of Parents of Disappeared Persons (APDP), *Half Widow Half Wife,* 2011, available at https://jkccs.files.wordpress.com/2017/05/half-widow-half-wife-apdp-report.pdf last seen on 25/02/2018

[4]'Victims' of enforced disappearance is used in the same meaning as the definition of 'victims' in the International Convention for the Protection of All Persons from Enforced Disappearance, 2010, which broadened the meaning of *'victims'* to include *"the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."*

[5] U.N. Doc. A/HRC/19/58/Rev.1 (Mar. 2, 2012)

cultural battles every day, but the most agonizing battles they face is the one against the State. Their quest for justice is one which is circumscribed with multiple impediments.

Struggles of a Half-widow:

To begin with, they live each day of their life in a grey zone. They do not know whether their husbands are dead or alive, and consequently they can neither remarry nor claim their husband's property.

The first question that befalls a half-widow is whether to search for her husband or not. In Paul D'Souza's report, it was found that nearly 9% of the women did not search for their husbands because of societal vulnerabilities including lack of education, lack of proper guidance and not knowing the procedures.[6] The rest 91% of the women who made efforts to search for their husbands responded that access to information on disappeared persons remained the biggest challenge.[7]

Societal norms of Kashmiris do not actively advocate the reversal of gender roles. Therefore, women who break norms and enter the work field for the first time are often looked down upon. Additionally, their skill sets are limited and they end up doing menial task for livelihood.

Besides economic implications, there are social and legal repercussions. Because of the uncertainty about the existence of their husbands, the half-widows do not get official recognition of their status. They are in a state of legal and social limbo.

Within the private sphere women are also more prone to victimization and intra-familial harassment, because they may be seen as a financial burden or divert resources from domestic duties to search for the disappeared.[8]

The absence of husbands thus renders them economically reliant, most often on their in-laws, with their property and custody rights undetermined.[9] Here, the critical issue after the disappearance of the husband is the status of the woman in the family. Her claim over the family property depends entirely on the status she

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[6]Paul D'Souza, *Life-as-Lived Today: Perpetual (Undesired) Liminality of the Half-widows of Kashmir,* 2016, Culture Unbound, Volume 8, available at http://www.cultureunbound.ep.liu.se/v8/a04/cu16v8a04.pdf last seen on 25/02/2018

[7] Ibid

[8]Polly Dewhirst and Amrita Kapur, *The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearance on Women,* 2015, ICTJ Briefing , available at https://www.ictj.org/sites/default/files/ICTJ-Briefing-Gender-Disappearances-2015.pdf last seen on 25/02/2018

[9]Supra 1.

[10] Supra 4

holds.[10] Under Islamic jurisprudence, a widow with children gets one-eighth of her husband's property. A widow without children gets merely one-fourth. A half-widow, till her husband is declared dead, gets nothing. Within Islamic law, there is no provision for the phenomenon of enforced disappearance.[11] Many a son or daughter of a half-widow has been deprived of property rights because of the uncertain status she holds in her in-laws' family. This further pushes half-widows and their children to economic despair.

The existing Islamic edict proclaims that a half widow should be considered a 'widow' after four years of husband's disappearance thereby giving her a right to remarry and claim the property share from the husband's property, the edict however is not being followed in letter and spirit in Kashmir.[12]

Amidst this socio-economic insecurity, women battle their emotional traumas while struggling as single mothers, many of whose children also often show manifestations of trauma.[13]

Half-widows are also unaware of their legal rights. According to D'Souza's report, only 44% of half-widows have ever been to court to access legal recourse regarding the disappearance of their husbands and only 28% of the respondents are aware of the State Human Rights Commission (SHRC).[14]

The right to remedy is a well-established international norm which also finds place in Article 8 of the Universal Declaration of Human Rights. The components of the right to a remedy include the right to justice, the right to truth, the right to reparations and guarantees of non-recurrence. However, half-widows are systematically denied these rights.

Access to Remedy:

Akin to a criminal procedure, the steps in the crime of enforced disappearance should include a fair investigation in search of the truth, punishment to the perpetrators of crime and damages/reparation to the victims of the crime.

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[11]Deya Bhattacharya, *"The Plight of Kashmiri Half-Widows"* (2016), Policy Report No.16 <http://www.thehinducentre.com/publications/policy-report/article8068514.ece> accessed on 25 February 2018

[12]Iqbal Kirmani, *Why are half-widows in Kashmir being denied share in husband's property?,* DNA (13/11/2015) available at http://www.dnaindia.com/locality/srinagar/why-are-half-widows-kashmir-being-denied-share-husbands-property-75504, last seen on 25/02/2018

[13]Supra 1

[14]Supra 4

[15]Laurel E. Fletcher, *The Right to a Remedy for Enforced Disappearances in India: A Legal Analysis of International and Domestic Law Relating to Victims of Enforced Disappearances,* 2014, International Human Rights Law Clinic, Working Paper Series No. 1. Available at https://ssrn.com/abstract=2758955 last seen on 25/02/2018

Fair Investigation: Because of the ignorance of court formalities and police procedures by half-widows, they do not come forward to take the assistance of courts. At the times when they do come forward, the first step of filing F.I.R. is dismissed by the police by stating that the disappeared was a militant. When police refuse to lodge a F.I.R., there is no official record of the arrest nor is there any investigation of the crime. At best, the police usually may file a Missing Person record since filing an F.I.R. would obligate them to investigate the crime.

Some families, while trying to report missing family members, have faced police pressure and intimidation after giving a report. Some have also had to move their plea to a different court just to register a first information report (FIR). It is common for relatives to withdraw complaints due to fear.

Reparations: Reparations cannot bring back the disappeared, but it may provide a practical, economic benefit to women. According to ICTJ, reparations may take different forms, such as monetary compensation, psychosocial support services, healthcare, educational benefits, and housing.[16]

In India, reparations under two governmental schemes provide that a death certificate be issued and the deceased not to be a militant in order to claim for any reparations. If they are able to provide evidence on the aforementioned, relatives are entitled to an ex-gratia payment of Rs 100,000 (1 lakh) and are entitled to a government job for the next of kin on compassionate grounds.[17] This is possible only if it has been more than seven years since the disappearance. A half-widow is caught amongst the social, emotional and legal hurdle of declaring her husband dead, and unless she doesn't declare it so, she cannot avail any reparations.

Even if she manages to receive a death certificate of her husband and attempts to access the possibility of ex-gratia relief, the extent of her success depends on the 'District Screening cum Coordination Committee'. This Committee has been set up by the government in 1990. Peculiarly, the committee is constituted of representatives from the security forces and police as well as other governmental agencies.[18] These are the same state agents who either denied the half-widow her rights or perpetrated the very crime for which she seeks justice.

[16]Supra 6
[17]Supra 4
[18]Supra 1, at 15

Therefore, the chances of justice in such a situation are obviously slim. It is hardly surprising then that this body did not bring any relief to those immediately affected by enforced disappearances.[19]

The correct approach should not require women to trade declarations of death for reparations. As the International Centre for Transitional Justice (ICTJ) report states, declaring a death may seem to impede or remove the state's incentive to investigate, sending a message that women must choose between reparations and truth. Socially, women also need to be aware that accepting reparations do not automatically close the doors of accessing justice. Reparations can be accepted and access to right of truth and right to justice can still be demanded.

Judicial Remedy: Punishment of Perpetrators

The usual route is the filing of habeas corpus petitions at the High Court. On allowing such a petition, the High Court orders an inquiry to be conducted by District Judge or Chief Judicial Magistrate.

On the inquiry's findings, the High Court decides whether to direct the police to file an FIR and conduct the investigation and/or order (in rare cases) the State to pay ex gratia relief to the petitioner.[20]

When High Court directs the police to investigate, the investigation is rife with complications. When an agent of State itself is the perpetrator of crime and is protected by legislations like the Armed Forces (Special Powers) Act, such agent cannot be tried by civilian courts unless Central Government grants permission/sanction.

Such sanctions take time as the file goes to the Home Department in Jammu and Kashmir, which passes it on to the Home Department in New Delhi, which in turn sends it to the Defense Secretary (when the perpetrator indicted by the police belongs to the army) or the Home Secretary (when the perpetrator belongs to the paramilitary forces). It remains unclear as to how many sanctions have ever been granted by New Delhi and whether such grants have actually been followed by prosecutions. [21]

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[19]Parvez Imroz, *Kashmir: Enforced Disappearances in Jammu and Kashmir,* 01/01/2005) available at http://www.afad-online.org/resources/books/healing-wounds-mending-scars/kashmir-enforced-disappearances-in-jammu-and-kashmir last seen on 27/02/2019

[20]Supra 1, at 17

[21]Supra 1, at 17

In some cases, the courts order inquiries and identify the culprits. But the culprits cannot be brought to book as the government of India refuses to grant necessary sanction to prosecute under Section 6 of the Armed Forces (Special Powers) Act.[22]

As can be understood, the judicial process is rife with delays and legislative/administrative obstacles. Many a times, owing to the obstacles in the process, the half-widows and their lawyers stop pursuing the case in court.

There are provisions to try human rights violators in special military courts. Data suggests that during 2001-2009, four (4) cases were under Court Martial proceedings under AFSPA, out of which only two (2) were disposed and in only one case perpetrators were punished. [23]

In 2004 (May 21) only in 2% of cases Armed Forces were punished for human rights violations and rest of 98% cases were not proved. From 1990-1995, 478 complaints relating Human Rights violations committed by Indian Army in the State of J and K were received, out of which only 22 were found true and 52 Army Personnel were punished.[24]

A non-legal remedy lies with the State Human Rights Commission (SHRC). But as mentioned aforesaid, only 28% of the respondents in Paul D'Souza's report [25] were aware of the SHRC. Government is required to respond to SHRC's questions, however, more often, the government either rejects the SHRC's opinion or calls it excessive.

Indian Government vis-à-vis International Humanitarian Law:

In the realm of humanitarian law and specifically enforced disappearances, the UN has introduced the International Convention for the Protection of All Persons from Enforced Disappearance in 2010. India is a signatory to this Convention. However, India has not ratified the Convention. Being a signatory means that India acknowledges the obligations and accepts that it shall not act in contrary to the obligations under the Convention.

It is pertinent to note herein that enforced disappearance and torture goes hand in hand, and India has also not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT).

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[22]Supra 17

[23]Arfat S, *Rehabilitation of the Victims of Conflict in the State of Jammu and Kashmir: A Socio-legal Analysis Rehabilitation,* J Civil Legal Sci 4:159, 2 (2015) available at https://www.omicsonline.org/open-access/rehabilitation-of-the-victims-of-conflict-in-the-state-of-jammu-andkashmir-a-sociolegal-analysis-2169-0170-1000159.php?aid=63100>

[24]Ibid, at 3

[25]Supra 4

India has ratified the ICCPR, the Geneva Conventions, CEDAW, CERD, and the CRC, which all contain provisions relating to the right to a remedy. Notably, India submitted a reservation to the ICCPR, stating that its domestic law conflicts with some of the ICCPR's provisions on arrest and detention.[26] Accordingly, India declared that Article 9 of ICCPR, which deals with arbitrary arrest and detention 'shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State' [27]

Repeated requests of the Working Group on Enforced or Involuntary Disappearances (WGEID) to visit India in order to investigate cases of involuntary disappearances have been met with no response from India.[28] In response to the 3rd Universal Periodic Review of India, contradictory to facts on the ground, India responded that it is cooperating with the Working Group on Enforced or Involuntary Disappearances by reporting facts of cases from time to time.[29]

At the national level, India has legislations that flagrantly violate the rule of law. In Kashmir, current legislations that denies transparent working of the police includes the Armed Forces Special Powers Act (AFSPA), 1990, and the Jammu and Kashmir Disturbed Areas Act, 1992. These laws gave wide extraordinary special powers to "arrest without warrant", "enter and search without warrant any premises", "use force" if it is "necessary to do so for the maintenance of public order".

Conclusions:

For the unique position of Kashmir juxtaposed between conflict of both a domestic nature and an international nature, the Government of India usually takes the stance that the conflicts are of an internal nature and therefore, it is the prerogative of the State to undertake any security measure. Nonetheless, it is argued that when a conflict cannot be determined as either strictly domestic or international, rationality suggests that India should follow a rule of law that is harmonious with the domestic law as well as International Humanitarian Law

[26]Supra 13, at 50

[27]Permanent Mission of India, available at http://www.pmindiaun.org/pages.php?id=867 last seen on 25/06/2020

[28]UN, A/HRC/36/39 (31 July 2017) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/229/14/PDF/G1722914.pdf?OpenElement last seen on 25/06/2020

[29]India's National Report, 3rd Periodic Review of India

and Human Rights. Most scholars have adapted this viewpoint and suggests that Indian government should ensure that victims have an access to remedy, i.e., a right to a remedy, in times of war and peace.

In order to provide transitional justice, it is suggested that the Indian Government set up a process for accessing remedies. One of the schemes adopted could be interim relief where half widows will be entitled to economic relief till the whereabouts of their disappeared husbands are known. It should not be mandatory for the half-widow to declare the husband dead at the time of seeking relief. If reasonable time, perhaps a period of one year, it has passed since the disappearance of the husband, a monthly scheme to aid the wife could be implemented. It should continue till seven years are passed, or till the whereabouts are known, and after the expiry of seven years she should be given full amount of adequate compensation in addition to monthly pension.[30]

Another step would be more legal awareness of their rights through campaigning. Awareness of women's rights and actual access to justice through legal procedures go hand-in-hand. Currently, most of the cases are taken up by lawyers on a pro bono basis. Besides these, the State's legal aid cell should be more active in aiding these women. Some scholars and activists have also suggested the establishment of special bench for expedited hearing.

At the International level, India needs to ratify the International Convention for the Protection of All Persons from Enforced Disappearances (CED) 2010 and UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and provide specific legislations on the subjects of enforced disappearances and torture.

The Indian government has the opportunity to exhibit any seriousness about addressing rights As was seen from the discussions above, there are varied socio-cultural factors that disallow half-widows to accessing their right to remedy. It has been decades since justice has been given to them. The researchers hope that the Indian Government would take the required steps in unburdening some of these issues of the half-widows and help them to re-integrate into society.

Autonomous Weapons and Meaningful Human Control: The Case for International Humanitarian Law

Mr. Rohit Bokil[1]

Introduction:

Over the last decade, there has been a tremendous development in means and methods of warfare. These new machines of war have changed the traditional concept of warfare. These new weapon systems have also brought their own challenges with them. One of the major challenges associated with these new weapons is, their position with respect to laws governing them. The development has happened so fast that the existing laws relating to warfare have proved to be inadequate in regulating them. Applying pre-existing legal rules, concepts and terminology to a new technology may entail certain difficulties in view of the specific characteristics of the technology in question.

Autonomous Weapon Systems (AWS) or Autonomous Weapons are a new breed of weapons which owe their origin to advanced developments in computer and artificial intelligence (AI) technologies. Primarily AWS function without human intervention. It is this aspect of AWS which has questioned their position under the existing legal framework. International Humanitarian Law (IHL) is a set of laws which governs the armed conflicts. IHL is equally applicable to means and methods of warfare. AWS raise the question: to what extent the IHL is applicable to AWS ?

This paper discusses the concept of AWS from the lenses of IHL. Further this paper analyses the concept of 'meaningful human control (MHC). Lastly, the paper attempts to understand the interplay between meaningful human control and AWS.

What are Autonomous Weapon Systems ?

In order to start any discussion on AWS it is necessary to understand the meaning of AWS. Presently there is no universally accepted definition of AWS. The reasons for not having such a definition, are mainly political.

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Before delving into the definitional issues of AWS, it is necessary to understand the difference between automated and autonomous weapons. Automated weapons have certain automated features but they also involve sufficient human intervention. Autonomous weapons on the other hand can select and engage targets without human intervention. AWS once, activated posses the power to fire on their own.

International Committee of the Red Cross has defined AWS as "weapon systems that can learn or adapt (their) functioning in response to changing circumstances in the environment in which (they are) deployed"[2] Another definition available at hand is by the United States, Department of Defence. As per this definition an AWS is a weapon system that once activated, can select and engage targets without further intervention by human operator'[3] But the available definitions share a common thing which is, AWS must have sufficient degree of autonomy. And this degree or level of autonomy distinguishes them from other conventional weapons.

Presently, AWS have not achieved complete autonomy. The autonomous weapons which are currently inducted in militaries around the world, are still dependent on human intervention at some point or other. There are some AWS which can function in fully autonomous mode, but they are currently operated in a mode which requires human intervention.[4] There is agreement that even though these weapon systems do not exist currently, they could be developed in the next twenty years.

Based on the degree of autonomy, AWS can be divided into three categories. This distinction is based on the involvement of human control in the functioning of AWS. The first category is called as "humans in the loop". Weapon systems in this category require the human touch. These weapons select targets on their own and deliver force only upon human command. It means for this type of weapons the decision to use force and the decision to kill is left to humans. The weapon systems which fall in the second category involve

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[2]International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflict: Report Prepared for the 31st International Conference of the Red Cross and Red Crescent 39 (2011),available at: http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm., last seen on 18/06/2020.

[3]Department of Defence Directive No. 3000.09, Autonomy in Weapon Systems, U.S. Dep't Def. 13 (Nov.21, 2012) available at: http://www.dtic.mil/whs/directives/c0rres/pdf/3000, last seen on 18/06/2020.

[4]For example Phalanx CIWS.

"humans on the loop". These weapon systems can select targets on their own and can deliver force with human oversight but humans can still over-ride or change the system's decision. The weapon systems which fall in the third category are known as "humans outside the loop". These weapon systems can autonomously select targets and deliver force without human intervention.[5] The first two above mentioned categories require human intervention. The difference between the first two categories is not whether the human intervention is required but it is about the stage where such intervention is required. Humans in the loop signify the involvement of humans in the primary stage where the weapon system still requires human consent before releasing force. Human on the loop allows humans to interfere with the execution of the decision taken by the system on its own. It is the last chance given to humans to change the decision. If a human decides not to change the decision then the system will execute the decision. On the other hand, humans outside the loop do not accommodate human intervention at any stage.

Many legal scholars believe that the development of weapon systems having AI at par with humans is not possible with the current technology. There is no official suggestion that autonomous weapons will be used.[6] But it is also true that future developments cannot be predicted. One thing that is certain is AWS if deployed, will be used in a complex and dynamic environment where their decision making will be put to test.

Applicable Law:

When it comes to the law governing AWS, one has to look at it from the lenses of legal review of weapons. The aim of legal review of weapons is to prevent the use of weapons which would violate international law in certain circumstances. It is an obligation which asks states to determine the lawfulness of weapons before they are developed, procured or incorporated in a state's arsenal.

Legal review of weapons falls under international law as well as under IHL. Art.36 of Additional Protocol II to the Geneva Conventions of 1949 has incorporated the legal review of weapons. IHL is a special branch of international law which becomes applicable during armed conflicts. IHL also regulates means and methods of warfare. Since, AWS are means of warfare they must undergo the process of legal review. But due to the complexity and ambiguity surrounding AWS, the process of legal review has met a deadlock.

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[5]Marco Sassoli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified,* 90 International Law Studies 308, 309 (2014).

[6]Ibid, at 312.

At the heart of IHL, there are fundamental principles of Distinction[7], Proportionality[8], Precaution[9]and Unnecessary Suffering[10]. Initially these principles were a part of customary IHL. But now these principles have been converted into treaty IHL. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 and another Protocol of 2005 are the primary sources of IHL. But in addition to the Geneva Conventions of 1949 and their Protocols, there are other treaties such as Convention on Certain Conventional Weapons, 1980 which restricts development and use of certain weapons.

In order to determine how IHL is applicable to AWS, it is necessary to understand the standing of AWS with respect to fundamental principles of IHL but the world opinion is divided on this point. The positive opinion believes that AWS comply with the fundamental principles of IHL. Positive opinion argues that the distinguishing features of AWS, especially when they function without human intervention make them adhere to IHL better than humans. Further, AWS are not susceptible to human emotions such as self-preservation and fear hence they can follow IHL principles even in complex environments where human emotions may act negatively with respect to adherence to IHL. The positive opinion has incorporated the belief that AWS pass the test of morality and their use would not defeat the principles of morality. For these reasons the supporters of AWS believe that complete ban on use and development of AWS is unjustified.

On the other hand the negative opinion believes that AWS will not be able to abide by the principles of IHL. It is because of emotions, humans can take difficult decisions in complex environments. For adherence to IHL principles, it is necessary to take every decision from humanitarian angle. In AWS this angle is missing. The negative opinion believes that it is still not clear how AWS can respect the principles of IHL. The advocates of this opinion believe that the AWS have not reached that level of autonomy where they can make the distinction between combatants and civilians in complex scenarios. And a mistake made by AWS will have horrific consequences. For the above mentioned reasons the advocates of negative opinion justify the complete ban on development and use of AWS.

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[7]Arts. 50, 51, 52, Additional Protocol I and Art.13 of Additional Protocol II to The Geneva Conventions of 1949.

[8]Arts.51(5)(b), 57(2)(ii), Additional Protocol I to The Geneva Conventions of 1949.

[9]Art.57, Additional Protocol I to The Geneva Conventions of 1949.

[10]Art.35(2), Additional Protocol I to The Geneva Conventions of 1949.

What is Meaningful Human Control (MHC)?

Ensuring control over weapon systems has been a critical task for militaries around the world. It is important to note that such control must be appropriate and it should be exercised in every possible situation and every theatre of conflict. AWS' use in complex military environment makes the human control particularly important. The degree of human control is directly linked to the special attribute of autonomous weapons, which is their autonomous decision making capability. The important question which warrants attention is that, if higher degree of human control is exercised then it may question the very nature of AWS because as stated earlier it is their autonomy in decision making which separates them from other conventional weapons.

People, who support a complete ban on AWS, base their argument on a premise that the existing laws and especially IHL are insufficient to deal with the unique challenges posed by the AWS. They have also proposed an additional requirement of "meaningful human control" (MHC) over AWS and believe it is this meaningful control which could solve some of the challenges such as liability and responsibility for the actions of AWS. They believe that increased levels of autonomy create an "accountability gap" where in situations of breaches of IHL, no human would have any responsibility.

It was during the discussions on the lethal autonomous weapon systems (LAWS) at the United Nation's Convention on Certain Conventional Weapons in 2014, when "meaningful human control" emerged as an important topic.[12] But it also raised a question of what is "meaningful human control"? Presently there is no clear definition on this topic. The UN Institute for Disarmament Research has pointed out that "the idea of Meaningful Human Control is intuitively appealing even if the concept is not clearly defined." [13]

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[11]See, Bonnie Docherty, *"Taking on Killer Robots,"* Justsecurity.org, May 23, 2014, available at: http://justsecurity.org/10732/guest-post-killer-robots/, last seen on 18/06/2020 Article 36, "*Memorandum for delegates at the Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS)"* available at: http://www.article36.org/wp-content/uploads/2014/05/A36-CCW-May-2014.pdf, last seen on 18/06/2020.

[12]Sarah Knuckey, *"Governments Conclude First (Ever) Debate on Autonomous Weapons: What Happened and What's Next,"* Justsecurity.org, May 16, 2014, available at: http://justsecurity.org/10518/autonomous-weapons-intergovernmental-meeting/, last seen on 18/06/2020.

[13] United Nations Institute for Disarmament Research, *"Considering how Meaningful Human Control might move the discussion forward," The Weaponization of Increasingly Autonomous Technologies,* No. 2,A 2014,, available at: http://www.unidir.org/files/publications/pdfs/considering-how-meaningful-human-control-might-move-the-discussion-forward-en-615.pdf, 2, last seen on 18/06/2020.

At this juncture it becomes necessary to understand why MHC is necessary. There are two opinions about the necessity of MHC. The first school of thought believes that MHC is not an additional requirement with respect to AWS but a principle of design of weapon systems in order to ensure that their use is in conformity with IHL. This premise is based on the assumption that the rules which decide the legality of weapons, are the same whether a human directly uses a weapon or launches an autonomous weapon which independently engages targets. According to the second school of thought which is known as Maximalist, MHC is a separate and additional concept. As per the maximalist approach, it would be illegal if AWS do meet the additional standard of MHC. This view highlights MHC as a new principle of IHL just like other principles. [14]

In the event of no definition, MHC can be used to describe a minimum threshold of human control that is considered necessary but the particulars of which are open to interpretation.[15] At the initial stage, the requirement for MHC is connected to two premises. First, a machine or a weapon system operating without human intervention is unacceptable and is illegal. Secondly, a human pressing the "fire" button without any clarity or awareness cannot be considered as MHC.[16] But as already stated, lack of clarity on the topic of MHC makes it possible to have divergent opinions.

Essential Components of Meaningful Human Control

It is expected that MHC should be able to address three key issues of accountability, ethical responsibility and controllability. If MHC has to address the issue of increased autonomy in weapons systems then it must take into account the different ways in which weapons are used. Informed decision is one of the key features of MHC. Humans posses the sufficient information which helps them to determine the lawfulness of their actions and this ensures accountability and moral responsibility for the actions taken by the humans. It is only possible to ensure accountability for the actions of autonomous weapons if human control is maintained. Controllability is another important aspect of any weapon. A weapon which does not satisfy the test of controllability is

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[14] Michael C. Horowitz & Paul Scharre, *Meaningful Human Control in Weapon Systems: A Primer,* Project on Ethical Autonomy, Working Paper, 1, 7 (2015).

[15]Heather M. Roff and Richard Moyes*"Meaningful Human Control, Artificial Intelligence and Autonomous Weapons."* Briefing paper prepared for the Informal Meeting of Experts on Lethal Autonomous Weapons Systems, UN Conventionon Certain Conventional Weapons, April 2016",available at: http://www.article36.org/wp-content/uploads/2016/04/MHC-AI-and-AWS-FINAL.pdf, last seen on 18/06/2020.

[16]Ibid.

seldom used or deployed. But adherence to this threshold becomes difficult in the case of weapons which launch projectiles. Because once a projectile is launched it is almost impossible to abort or retarget that projectile. Hence there are certain design and technological aspects which must be considered in order to make a weapon more controllable.[17]

Another approach is by Heather M. Roff and Richard Moyes.[18] They have come up with a three layered approach. Each layer represent a stage, where MHC can be exercised. This approach gives special emphasis on use of force by AWS. The first stage is known as 'Ante Bellum'. This is the initial stage and it involves design, development and training with respect to use of force. As AWS are means of warfare, which are used to achieve certain goals and targets, and acknowledging the possibility that AWS may also yield unwanted results, this stage believes exercising MHC in the initial stages of design, development and training. The second stage is called as 'In Bello'. This stage requires MHC during actual attacks. It is expected at this stage that MHC is exercised over functions of distinction between civilian targets and military targets as per the requirements of IHL. It is also expected that MNC be applied to use of force to targets. MNC at this stage involves human controllers selecting AWS from the first layer and actually deploying them in armed conflicts. The third stage is 'Post Bellum'. This stage talks about MHC for the wrongful actions AWS which can be attributed to its human commander. Bridging the accountability gap has been a major consideration as far as AWS and its actions are concerned.

With this approach it is possible to put MHC in practice over direct attacks. If not, then there is a need to re-draft the responsibilities of military commanders and operators of AWS. [18]

Conclusion.

The issue of MHC is an important topic as far as the debate over AWS is concerned. The definitional issues of MHC and its relation to international law are of particular importance. Some argue that due to the unique nature of AWS, these systems will lack MHC which is required to ensure that the use of AWS comply with the rules of IHL. On the other hand some legal scholars believe that the requirement of MHC is already a necessity under international law and weapons which do not have MHC should be illegal but there should be an express provision. [20]

[17]Supra 13.
[18]Supra 14.
[19]Ibid.
[20]Supra16.

It is necessary that the ambiguities surrounding the MHC should be removed and a more nuanced and concrete meaning should be attached to the phenomenon of MHC. There are also responsibilities on human operators to take informed decisions when using AWS.

There are many unanswered questions with respect to MHC. The primary question is what should be the threshold of MHC over AWS. If the threshold is set at a higher level then it will the question the very nature of AWS. On the other hand if MHC is undermined then it might led to accountability gap. More dialogues and discussions are necessary with respect to the degree of autonomy involved in the current AWS and future AWS.

Indignity of Dignity: Towards a more dignitarian disability rights perspective

Dr. Sanjay Jain[1]

In this paper an attempt is made to briefly critique the liberal conception of law[2], however its main objective is to make out a case for refinement and re-alignment of legal conception of dignity through the foregrounding of disability rights perspective; though The author has tentatively shed light on the notion of basic equality by drawing on the work of Professor Jeremy Waldron. For the purposes of this paper it is assumed that both the institution of law and legal conceptions are predominantly abelist[3], perpetuating able-bodism and exclusion of physical and mental disability from the legal discourse. Even though the law engages with the disability, the engagement is not from the perspective of the disabled, rather its vintage point is the knowledge of the so-called experts about the disabilities.[4] Often the objective of the law is to rehabilitate the disabled and reasonably accommodate them on terms stipulated in able-bodied norms. The author opines that such an engagement apart from being paternalistic, dignity incompatible and stereotypical, is also contrary to the letter and spirit of United Nations Conventions on Rights of Persons with Disability (here after UNCRPD) and militates against the notion of nothing about us without us.[5] Comprehended thus, institution of law in its present shape is exclusionary and insensitive to the aspirations and life expectancies of Persons with disabilities (PWDs). This paper is divided into three sections. Section one is a general excursion on jurisprudential analysis of equality and dignity and sections two and three critically locate the treatment of dignity in UNCRPD and Rights of Persons with Disabilities Act 2016. (RPD Act 2016). The author proposes to demonstrate through a case study and analysis of locations of dignity in both UNCRPD and RPD Act 2016 that its value as a concept has not been realized and rather the Indian judiciary, has in fact, openly undermined it.

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[2]Dr. Sanjay Jain *"Towards unrestricted anddisability inclusive legal theory: random reflections"* an unpublished paper, presented in international Conference a "Three-day international conference on contemporary trends in comparative public law" (6th 8th March 2020) part of 14th remembering Prof.S P Sathe event at ILS law College. I thank the anonymous referee for her valuable suggestions and comments.

[3]Fiona kumari Campbell *"Contours of Abelism; the production of disability and Abledness"* Palgrave Macmillan 2009

[4]See Amita Dhanda ," *A Disability Studies Reading of the Law for Persons with Disabilities in India"* in Anita Ghai Ed. "Disability in South Asia Knowledge and Experience" 2018 Sage.

[5]See Amita Dhanda, *"Constructing a new Human Rights lexicon: Convention on the Rights of Persons with Disabilities"* SUR- International journal of Human Rights Vol 5 issue 8, 2008, 43-60.

Section One

Jurisprudential Analysis of Equality and Dignity

There are certain scholars who have tried to make inroads in these conceptions and advocated for the adoption of dignitarian pathway for the promotion, protection and enforcement of the rights of PWDs. In this connection the observation of Jeromy Waldron is most apt, "*Human equality: the principle that holds that we humans, despite all our differences, are to be regarded as one another's equals. Created equal, as it says in Thomas Jefferson's opening claim in the Declaration of Independence. Or, even if not created-…then equal anyway, by nature perhaps or by fixed and fundamental convention*"[6]. The important question with which he engages is "*whether people are being treated and respected as equals, whatever disparities (justified or unjustified) may exist between them in wealth, income, power, and opportunity*"[7]. He develops the model of deep equality, i.e. "*basic moral equality, our status as one another's equals*"[9]. Characterization of basic equality is multi-faceted. Firstly, it may be conceived as Human Worth, i.e. "*Human worth is what is left over when you take merit away or set it aside*" . Secondly, it may also be seen echoing in the idea of Human Dignity, a status term referring to "*the standing of human beings in the great scheme of things, their status as persons who command a high level of concern and respect*"[10].

According to Waldron the basis of equal dignity of every human being is something fundamental about all human beings thereby obligating each of us "*to accord equal moral consideration to one another and to respect each other in the same way*"[11]. Partly, dignity is a legal conception warranting to provide one another the protection of human rights and laws equally, to respect and uphold those rights and to offer consideration of the laws to one another equally. It also enables to bridge equality and liberty. Ethically, human dignity is related to human agency, the ability of humans to choose their own actions as observed by Kant[12]. However, "basic equality", "equal worth", "equal concern and respect" and "human dignity" should not be seen as identical despite the deceptive similarities in them. Rather Waldron advocates the clustering of these terms to formulate a robust principle. All these conceptions operate through a

[6]Jeromy Waldron, *"One Another's Equal: The Basis of Human Equality"* Harvard 2017, Pp. 1.
[7]Ibid
[8]Ibid pp. 2
[9]Ibid pp. 2
[10]Ibid pp. 3
[11]Ibid pp. 3
[12]Tyler Paytas and Tim Henning - *"Kantian and Sidgwickian Ethics -The Cosmos of Duty Above and the Moral Law Within"* Routledge 2020

twin track. Vertically, identifying a particular value or set of requirements necessary for dealings of human persons amongst one another and horizontally, promoting sameness of these values/ requirements across all human persons[13]. E.G. value of human dignity obligating the entire citizenry to treat all human beings of having equal worth irrespective of diversity.

Dr. Ambedkar has also expounded the idea of dignity as one of the bricks constituting the bedrock of the Constitution. According to a noted scholar, the incorporation of conception of dignity under Indian constitution is radically different from its western conception. Notion of dignity as articulated by Dr. Ambedkar in Preamble runs counter to most right-leaning ideologies perceiving corporate body as its quintessential source. Equally, it is also not in congruence with leftist ideology[14] dismissing dignity as 'a bourgeois ruse'. thereby exposing it to degradation. How Dr. Ambedkar alone could capture the empowering significance of the conception of dignity can be gauged quite clearly by noticing its explicit absence from source documents, both formal and informal, foregrounding the blue print of Indian Constitution. For Dr. Ambedkar, conception of dignity was not an abstract notion. Rather he perceived the degradation of dignity forced on him since birth in terms of embargo to sit amidst his class students according to his ranking, having separate piece of gunny cloth for him to squat on and refusal of the servant appointed to clean school to touch that gunny cloth because of his untouchability status dictated by Hindu Social order. "*Could this account for Dr. Ambedkar's prolific use of the term (we find it more than 150 times in his writings and speeches), in a stark contrast to its glaring absence from the archives of the national movement?*" a question aptly raised by professor Rathore.[16]

Thus, the author is influenced to draw insights from the autobiography of Dr. Ambedkar and extrapolate the value of dignity for empowerment of PWDs. Like Dr. Ambedkar, as PWDs, we have been forced to live life of complete and abysmal indignity in terms of total exclusion of physical and mental disability in the mainstream public law discourse, with our isolations in public events,

[13]Ibid

[14]M.N. Roy, *Constitution of free India: A Draft, (Radical Democratic Party India) 1944.:* Draft Constitution of the Indian Republic, foreword by Jaypraksh Narayan (Socialist Party India) 1948.

[15]CWC Expert Committee declaration July 1946; Nehru's objectives Resolution; B.N. Rau's Preliminary Draft Constitution. Indian National Congress Declaration of PurnSwaraj'; And Karachi resolution. See, *Aakash Singh Rathore," Ambedkar's preamble- a secret history of the Constitution of India'* Penguin pub. 2020

[16]Ibid at pp122.

exposing us to shame during social gatherings, absolute prohibitions on us to hold public offices, our stereotypical labeling as byproducts of Past birth's sin or as mere straws unproductive of doing anything and so on.

It is also possible to draw contents of dignity from Gandhian discourse as he also suffered indignity on account of racial discrimination.[17] Whether the magnitude of indignity suffered by Mr. Gandhi due to racism has a complete disconnect with the pathology of untouchables in India is a controversial question, but as a person with disability the author is not prepared to confine the notion of indignity to a particular social hierarchy. Indignity faced as a consequence of any hierarchy be it social, economic, political, or cultural is as degenerating as the indignity suffered by Dalits owing to caste system.

In the 21st century it is untenable to rank demeaning behaviors and to characterize only a particular degradation as indignity. Just because PWD lives in the company of able bodied and occupies a job or role in the establishment dominated by the able bodied does not lead to the conclusion that he is not alienated or insulated or discriminated. In fact, it is a false consciousness to assume that able bodied have the prerogative to speak on behalf of PWDs. It is one thing to speak on behalf of and quite another to speak with a particular class. Often, while purporting to speak on behalf of a particular class, the mainstream subjects/ non-disabled become over confident to represent the disabled, which is far from reality and the truth. As a matter of fact, such a stance perpetuates the indignity and degradation of PWDs, as willy-nilly, by purporting to represent PWDs, the non-disabled may unintentionally tend to impose and officialise the abelist viewpoint as that of the disabled.[18]

Even if it is assumed that unlike Gandhi, Dr. Ambedkar did not enjoy the exit right as untouchable because his indignity was locked in, from the creation of man, as per Rigveda's Purushsukta, until the adoption of preamble of Constitution, the ambit of denial of exit rights to PWDs is far more perverse and pathetic than social outcaste. E.g. in absence of accessible environment at times a wheel chair user or a person with multiple disabilities may not be even in a position to exit from one place to another i.e. from his room to toilet in his own house. Thus, the denial of exit vis-à-vis physical and mental disabled is both horizontal and vertical, a point on which even the Dalit scholarship has

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[17]See *'The Gandhian Constitution of free India"* drafted by Shriman Narayan Agrawal for appearance of dignity. See Pp 122-123 supra note 9.

[17]Feminists like Catherine Mackinnon also invokes the idea of false consciousness and emphasizes on providing the representation to the women. See generally Robin West and C Bowman *"Research handbook on Feminist Jurisprudence"* Edward Elgar 2019.

observed the conspicuous silence and therefore a time has ripe to enable the conception of dignity, i.e. to expand it beyond the hegemony of abelism and locate it in the agonies and anxieties of oppressed.

The author is in consonance with Prof. Rathore's assertion that more than the concept of equality, it is the concept of dignity brooks no gradation; every gradation of dignity is degradation of dignity. Its absoluteness is its hallmark. Instead of pitting indignities against one another, so as to create hierarchy amongst oppressed, the better perspective is to have solidarity for one-another as interdependent human beings as part of democratic republic and class of humanity. Perpetuating the idea that only caste-based degradation is undignified or incompatible with dignity though may be a social reality in context of India, more than a *Masiha*, towering personality of Dr. Ambedkar was able to direct the attention of the Constitutional consciousness towards it very effectively in his role as the architect of Indian Constitution. But what about the class of PWDs bereft of any representation and in complete absence of its own voice and with the domination of voices of those, purportingly to represent PWDs thereby unwittingly or wittingly compelling the PWDs to espouse the false consciousness of conforming to abelism and its norms. What about the violent judicial call given by no less than a legal luminary Justice Holmes, Jr. in *Buck v. Bell*, a 1927 Supreme court case, *"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . .. Three generations of imbeciles are enough",* while upholding a Virginia law authorizing the state to surgically sterilize certain "mental defectives" without their consent.

The author is more than sure that had the aforementioned characterization of PWDs being brought to the notice of Dr. Ambedkar, he would have had immediately constitutionalized physical and mental disability as one of the grounds of Discrimination. Can the characterization of so-called incompetence and unfitness, and allegations of sapping the resources be of any less degradation of dignity in the light of the society by default being completely oblivious to diversity and to the idea that every mankind's body keeps on evolving, than the degradation of a human being based on his or her caste? Such a pitting / binary in my opinion is nothing more than polemics and is bound to

stifle evolution of the politics of excluded. Exclusion assumes significance because only those who are recognized can claim for enhancement of inclusion or improvement of inclusion, but exclusion simply is the other of inclusion, devoid of even acceptance of existence and in fact advocating the annihilation or complete dememorization and therefore attaching dignity against the exclusion would contract the baseline of inclusion, thereby strengthening the vintage point of humanity.

This does not mean that we should not attach significance to the intensity of degradation. However, it is a matter more in the realm of procedure than substance. Thus, formally and ethically any degradation must amount to violation of dignity, but whilst designing remedies the level of intensity may become relevant, more intense the degradation more robust and intrusive the remedy. Whereas, if we try to rank the degradation at the level of substance and exclude certain forms of degradations from the consideration zone, we end up with sub classification of weakest and vulnerable and instead of having dialogue or going into agitation mode in solidarity, we resort to the same as separate and distinct classes, thereby speaking in different and divided voices. This is the danger in indulging preferences in ranks *qua* degradation. Particularly, PWDs are most vulnerable and exposed to the same, as our exploitation, alienation and isolation is not captured by mainstream minority / vulnerability advocacy groups. Professor Santos pitches in very appropriately to address this vacuum by observing that critical theorists and social scientists have never acknowledged the existence of an abyssal line. The conception of an abyssal line draws distinction between "forms of metropolitan sociability and forms of colonial sociability"[19]. The former can be addressed by non-abyssal instruments of regulations and emancipation, as this approach does not dispute basic equivalence and reciprocity among 'us' i.e. those who are like us, fully human. However, abyssal exclusions go beyond the western notion of humanity and address even those who are not like us, who are different from us. For example, persons with disabilities, being different from us, their experiences of exclusion are beyond non-abyssal mechanisms of vindicating discrimination, requiring a new epistemology.

To engage briefly with the issue of absence of the terms physical and mental

[18]See generally, Boaventura de Sousa Santos, *"The End of the Cognitive Empire"* Duke university Press 2018. See also ,Dr. Sanjay Jain *"Non-abyssal and Ableist Indian Supreme Court: The Abyssal Exclusion of Person with Disabilities"* available at https://ohrh.law.ox.ac.uk/non-abyssal-and-ableist-indian-supreme-court-the-abyssal-exclusion-of-persons-with-disabilities July 3,2019.

disability as one of the grounds of non-discrimination in Article 15 and 16, could it be implied that Dr. Ambedkar was an Abelist, completely insensitive to and unmindful of identity of PWDs? To my mind this would be a most bizarre claim to forestall the flight of imagination of a visionary figure. At most it can be contended that in absence of any serious deliberation and ineffective representation of PWDs, he consciously maintained silence over the issue[20]. However, by drafting Article 14, in a ground neutral tone, he made it pregnant with possibilities of incorporating new grounds of non-discrimination. It is implicitly evidenced in the landmark opinion of Supreme Court of India, in *National federation of Blind vs UPSC*[21]

National Federation of Blind, (NFB) established for vindication of rights of the visually challenged filed a writ petition under Article 32 seeking a writ in the nature of mandamus directing the Union of India and the Union Public Service Commission to permit the blind candidates to compete for the Indian Administrative Service and the Allied Services. The petition also sought the direction to UPSC to provide them the facility of writing civil services examination either in Braille-script or with the help of a Scribe. Prima facie the case manifested the demand of application of Reasonable Accommodation (RA) from NFB to UPSC.[22] This case provided the court a unique opportunity to evolve the contours of RA in India.

Although, Court did not explicitly ground the argument of the petitioner in any of the fundamental rights enshrined in Part III of Indian constitution, yet, it rejected the stand of UPSC that none of the identified posts suitable for the physically handicapped persons, and particularly for the blind, required to be filled through competitive examination conducted by the Commission.[23] After going through the list of the posts identified as suitable for visually handicapped (blind and partially-blind) , the court observed "it is obvious that there are number of posts which are required to be filled through the civil services examination and other competitive examinations conducted by the Commission".

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[20]See Hanna Lerner, *"Making Constitutions in deeply divided societies"* Cambridge university Press 2011. Constitutional Silence on a particular matter qua Constitution of deeply divided society may be for a number of reasons, lack of representation, unawareness, absence of consensus, leaving the matter to the wisdom of future Parliament etc.

[21]MANU/SC/0299/1993

[22]However, it is not clear from the judgment whether any such contention was raised on behalf of NFB.

[23]See para 13. Supra Note 12.

More recently while incorporating discrimination on the ground of genetic disorder, Justice Pratibha Singh joined the ranks of Constitutional innovators by observing, "*Article 14 of the Constitution of India prohibits discrimination of any kind. This would include discrimination based on genetic heritage of an individual…. Since the term genetic disorder is capable of myriad interpretations, the differentiation is not intelligible and hence falls foul of Article 14 of the Constitution.*"[24] Seriously problematizing the public private dichotomy by implicitly invoking the German notion of Rights as Objective Constitutional values radiating the entire legal order, the Court observed, "*Thus exclusions such as the ones relating to genetic disorders do not remain merely in the realm of contracts but overflow into the realm of public law. The reasonableness of such clauses is subject to judicial review. The broad exclusion of "genetic disorders? is thus not merely a contractual issue between the insurance company and the insured but spills into the broader canvas of Right to Health Care*" [25]

Section Two
UNCRPD and concept of Dignity

What can be the most apt beginning than to look into UNCRPD, a magna carta of rights of Persons with disabilities, attributing lawness to the principle of dignity, the stand out International convention in this respect. Is it possible to extrapolate the notion of dignity capturing the abyssal exclusion of PWDs? As pointed out above, the notion of inherent /human dignity pervades right from preamble to various provisions of UNCRPD. It is generally referred to in paragraphs (a), (h) (discrimination), and (y) of the preamble, and in Articles 1 (Purpose), 3 (General Principles) and 8 (Awareness-raising) of the Convention. It also echoes in substantive provisions, such as freedom from exploitation, violence, and abuse (Article 16), the right to education (Article 24), and the right to health (Article 25). Although the appearances of Dignity are conspicuous in human rights instruments, there is a fair amount of skepticism amongst academicians about its ambiguous, relative and contested overtones. Nevertheless, there are not many disputes in identifying its minimum core. Each human being possesses an intrinsic worth that should be respected despite some inconsistent behaviors in respect of intrinsic worth.

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[24]United India Insurance ltd. Vs. Jayprakashtayal MANU/DE/0823/2018. Although this decision has been partially stayed by Supreme Court, it has not disputed the substantive points. https://www.livelaw.in/sc-partially-stays-delhi-hc-judgement-striking-down-exclusion-of-genetic-disorders-from-insurance-policies-as-unconstitutional-read-order//

[25]Ibid at Para D 12.

Dignity Discourse in UNCRPD

The author hereby extrapolates the UNCRPD generated dignity discourse by briefly referring to its relevant provisions.

Preamble - To link the UNCRPD with the UN Charter 1945, clause (a) refers to inherent dignity and worth.

In its clause (h,) discrimination on the basis of disability is linked with violation of inherent dignity and worth of human person.

In clause (y), dignity is recognized as one of the bedrock values along with human rights to be promoted and protected by UNCRPD.

One of the purposes of UNCRPD as declared in Article 1 is to promote respect for inherent dignity of PWDs.

One of the foremost principles underlying this convention set out in Article 3 is respect for inherent dignity with its appearance in the beginning of Article 3 over rest of principles viz, individual autonomy, self-determination, independence of person, non-discrimination, full and effective participation and societal inclusion , respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities in children with disabilities.

Then author submits that lexical priority has an underlying purpose to accord categorical status to PWDs as equal human beings. In his famous tanner lectures, prof Jeremy Waldron has distinguished between Sortal and conditional status. A conditional status like marriage, minority, alienage, or bankruptcy is important in the lives of those to whom it applies. But such statuses do not tell us anything about the underlying personhood of the individual who has them. Sortal status, by contrast, categorizes legal subjects on the basis of the sort of person they are. According to him, modern distinctions of sortal status are hard to find, and that is a good thing .[26]

He further elaborates the notion of Sortal status by observing, "*One way of thinking about basic human equality is that it denies that there are differences of Sortal status correlating to differences of kind among humans. The principle of basic equality repudiates a position that once upon a time almost everyone embraced: that the law has to concern itself with different types of human beings. We now hold that there is just one Sortal status: the status of being a*

[26] Ibid at pp 6-7 Supra note 1.

human person. To use Gregory Vlastos's term, we are "a single status society." We acknowledge, to be sure, that there are differences of conditional status: statuses like bankruptcy, infancy, felony, and so forth. But we believe there is just one Sortal status-one kind of human being-under which these possible conditional statuses are arrayed. The principle of basic equality maintains this as a matter of principle and puts it forward critically as a basis for positive law"[27].

Reflecting on the notion of Sortal status, the question which arises for consideration is whether by giving lexical priority to inherent dignity, has the UNCRPD erased the denial of legal capacity and legal personality vis-à-vis PWDs. To explore the same, the author would analyze certain other relevant provisions of UNCRPD.

The state parties are obligated inter alia to foster respect for the rights and dignity of PWDs under Article 8.

In Article 16 dealing with freedom from exploitation, violence and abuse, state parties are obligated to ensure that the physical, psychological and cognitive recovery of victims …. Must take place in an environment fostering welfare, health, self-respect and dignity.

Under Article 24 dealing with right to education of PWDs, state parties are obligated to realise this right without discrimination and on the basis of equal opportunity and must recognize and ensure an inclusive education system at all levels and lifelong learning inter alia directed to the full development of human potential and sense of dignity and self-worth.

Under Article 25 dealing with right to health, State parties are obligated in particular to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity.

In order to generate normatively objective dignity discourse, from all above provisions of UNCRPD, it would be necessary to closely examine the appearances of dignity in all these articles alongside the other values and principles and its mandates. It would be necessary for example to find out whether each of the provisions have deployed 'dignity' contextually or as a bridging principle to link different values underlying the convention. In order to undertake these enquiries, it would be in the fitness of things to present appearances of 'dignity' in UNCRPD in a tabular form.

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[27]Ibid at pp 8 supra note 1.

Sr. No.	Article number	Language	Context
1.	Preamble (a)	the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation.	Foundational value for freedom, justice and peace in world.
2.	Preamble (h)	discrimination against any person on the basis of disability is a violation of the inherent dignity	Discrimination prohibiting value
3.	Preamble (y)	to promote and protect the rights and dignity of persons with disabilities…	Redressal value
4.	Article 1	to promote respect for their inherent dignity.	Purpose value
5.	Article 3	Respect for inherent dignity	General Principle
6.	Article 8	to foster respect for the rights and dignity...	Intrinsic value
7.	Article 16	recovery and reintegration ... in an environment that fosters …. dignity	Intrinsic value
8.	Article 24	The full development of human potential and sense of dignity…	Intrinsic value
9.	Article 25	right to health …raising awareness of the human rights, dignity.	Equality enhancing value.

A careful look at the table demonstrates that appearances of 'dignity' in UNCRPD is not scientifically or methodically planned. In most of the provisions, its deployment is to emphasize on 'intrinsic' worth of PWDs irrespective of the bodily differences and mental variation. It also purports to enhance the degree of equality in respect of equal treatment and serves as a tool to combat disability-based discrimination. The conception of dignity appears in UNCRPD through multiple expressions, viz, dignity, inherent dignity, human dignity. Comity has not made any comment on these varying usages as yet.

Expounding scope of Dignity as a framework principle, Professor Valentina Della et al. observe, "*The respect for human dignity implies the respect for the integrity of each human being considered in his/her physical and moral dimension. By virtue of inherent dignity, all human beings are equal and right bearers and should not suffer forms of discrimination*"[28]. The wording of Article 3(a) and Article 1 introduces a symmetry, in that, promotion of respect for inherent dignity is both purpose as well as principle underlying UNCRPD. While insisting the introduction of conception of respect for inherent dignity in Article 3, the International Disability Caucus (IDC) had observed, "*every person is already born with dignity but it is necessary to ensure its respect*." [29] However, one cannot but be anxious to see express omission of 'Dignity' from Article 5. The omission is perturbing in the light of clause h of Preamble, categorically linking disability-based discrimination as violation of inherent dignity. Principle of dignity recognizing intrinsic worth of PWDs also eludes conception of Reasonable accommodation by conditioning it with disproportionate and undue burden and virtually perpetuates qualification-based model of human hood. In the light of the same, the author questions, whether UNCRPD has bestowed Sortal status on PWDs categorically or with some qualifications?

Professor Tarunabh Khaitan in his famous article[30] has made out a very strong case for dignity as expressive norm. He articulates the following 3 features of expressive norm -

(i) Some actions express meanings which are determinable with some measure of objectivity.

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[28]Ibid at pp 123, Valentina Della Fina, RacheleCera, Giuseppe Palmisano Ed. ,*"The United Nations Convention on the Rights of Persons with Disabilities A Commentary"* Springer 2017.

[29]Chairman's Text as amended by the International disability Caucus" available http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7idcchairamend1.doc. Last Accessed June 14, 2020

[30]Ibid at pp 5-6 TarunabhKhaitan *"Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea"* - Oxford J Legal Studies (2012) 32 (1): 1

(ii) Expressions matter morally *qua* expressions. An expressive norm prohibits the commission of expressive wrongs.

(iii) At least some types of expressive wrongs are proper subjects of legal prohibition/regulation.

Articulating the idea of Expressive norm, he observed, "*Actions may speak louder than words, but they are rarely as clear." e.g.* burning a nation's flag or a religion's holy book, spitting on a person. However, merely saying or giving examples would not suffice and the expressivists are obligated to provide plausible and objective method for determining meaning out of actions. Responding to the same the expressivists contend that Objective and Public criteria can be evolved for meaning determination. The same charge is levelled against the 'dignity' i.e. it being indeterminate and susceptible to subjective interpretation. E.g. what type of actions constitute inherent respect for dignity is practically a very subjective question and its assessment based on objective and public criteria may said to be far from easier. However, upon earnest reflection, one may overcome this impediment, by justifying a particular meaning from an action by invoking background history, its putative justifications, and consequences.

Similarly, Law can come into play in fine tuning differing cultural conventions, in other words, by effective legal interventions, dignity may be used as both 'liberty enhancing' and 'liberty constraining norm', as well as it can be used as a clustering tool to nurture other values like equality, justice etc. Professor McCrudden[31] has neatly summarized the utility of Dignity, in the human rights regime as-

i) 'providing a key argument as to why humans should have rights', (ii) 'helping in the identification of a catalogue of specific rights', (iii) as 'an interpretative principle to assist the further explication of the catalogue of rights generated by the principle', and (iv) 'as itself a right or obligation with specific content'".

To what extent, Dignity can perform each of these functions in the context of a legal instrument, depends upon its design, the language and the context. The author argues that although the UNCRPD maybe the first international convention almost elevating dignity as a distinct enforceable value but still it has not been able to deploy it effectively in its entirety, the major design flaw being its conspicuous absence from Article 5 dealing with Equality. However, one can also advance a counter argument by emphasizing on Article 3, where it

[31]McCrudden *'Human Dignity and Judicial Interpretation of Human Rights'*(2008) 19 European J Intl L 655,680-81

is recognized as one of the general principles, cutting across all the provisions of UNCRPD. Much depends on the approach of UNCRPD committee in capturing its true potential through its general comments and observations. By now I have not come across any earnest attempt on part of the committee to engage with the concept of 'dignity'.

Section Three

Critical reflections on Locations of Dignity in Rights of Persons with Disabilities Act 2016

Coming to India, in RPD Act 2016, appearances of dignity are very few and ineffective in contradistinction with the Constitutionalism of India. In statement of objects of RPD Act 2016, 'respect for inherent dignity' appears as one of the general principles enshrined in UNCRPD, however, it is far from easy to gauge the lawness in this rather peculiar drafting exercise as conventionally, statement of object is not considered as part of the legislation. At the most, it can come into play to resolve ambiguities in a legislation. It makes very interesting appearance in section 3 of RPD Act 2016 alongside 'right to equality' and non- discrimination' as a distinct right, i.e. right to "life with dignity". However, the expression 'life with dignity' is extremely value laden and in absence of an objective base line, may end up sounding merely as rhetorical.[32] In section 13 (5), its appearance alongside right to legal capacity is by way of an obligatory norm, i.e. "*Any person providing support to the person with disability shall not exercise undue influence and shall respect his or her autonomy, dignity and privacy*". In a way, dignity, under dignity under this section performs the dual role of fostering respect for PWDs and to regulate the decision liberty of the support giver. As an expressive norm, section 13 (5) is useful, provided that its overtones are captured in objectively verifiable public standards.

Interestingly, in sharp contrast with UNCRPD, the Parliament of India has deployed dignity to strengthen two very controversial rights enshrined in UNCRPD, i.e. right to legal capacity and right to equality and non-discrimination and therefore normatively, the overtones of former purports to stand on a higher footing in India. However, with regard to later, the mention of right to life with dignity has not deterred or inspired the Parliament from refraining against justified disability-based discrimination. Which goes to show that Parliament itself has undermined the normativity of idea of dignity.

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[32]Ibid .

Recently, the Supreme Court of India went a step further in its paternalistic gloss on the abilities of PWDs, to put precisely the abilities of Blind Persons. The assumption that blind people are not in a position to read the mannerisms of witnesses or to analyse the body language of accused persons and victims,[33] because of absence of visual sight, has been judicially acknowledged and approbated as a legitimate ground to prevent them from entering into the judiciary.[34] In an open display of ignorance, court also held that blind persons cannot read and write, probably it meant that in absence of visual sight , blind person cannot read or write the printed text. The court also down sized the category of disability by creating a judicially suitable notion of disability by holding that, person with not less than 70 % visual sight is eligible to enter in the lower judiciary as a judge. This holding of the court demonstrates how bluntly it berates the value of conception of dignity *vis-à-vis* disability. An otherwise dignity obsessed court has been found awfully wanting in even making a tentative reference to dignity in this case. While displaying open indulgence in 'abelism', the court has not only completely discounted the obliviousness to accommodation of PWDs in judicial environment but has as a matter of fact also justified the exclusion of certain class of disabled from its precincts and in particular its contempt about the abilities of blind persons is striking. Dignity is the first casualty in this discourse and equality has also been given a very regressive turn by the court by classifying blind persons *inter se,* those with 70 % or more sight and less than 70% sight. In fact, the conceptions of equality and dignity have been deployed by the court negatively. With omission of 'dignity' the court undermined the full human-hood of PWD and perpetuated qualification-based model of disability. On the other hand, the invocation of reasonable classification is sheerly influenced by Abelism in its open contempt for Blind persons with less than 70% sight. The path of dignity as articulated by Prof Waldron would have led the court to an altogether different and human

[33]Section 280 of Criminal procedure Code (Remarks respecting demeanor of witness. When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanor of such witness whilst under examination) .and corresponding provision in Civil Procedure code is Order 18 rule 12 ("Remarks on demeanor of witnesses" The Court may record such remarks as it thinks material respecting the demeanor of any witness while under examination.). The important issue which the SC has overlooked completely is whether for observance of demeanor of Witness eyesight is sine qua none. Or whether there are other alternative means for recording the same. What about creation of support mechanism by invoking the doctrine of reasonable accommodation. In many states around the world, juries render valuable assistance to judges. Can we not have similar such arrangement to assist Blind judges.

[34]V Surendra Mohan v. State of Tamil Nadu, (2019) 4 SCC 237

rights justifying result. Court would have first assumed that visual disability is not an impediment per se in performing any functions, including Judicial one. The same would lead the court to explore the new possibilities. It would have evolved mechanisms to enable blind persons to read the printed texts or to help them to read the facial expressions of witnesses in certain cases with the help of assistance and so on. The aforementioned approach would have made the court dignitarian in a real sense, thereby justifying the clustering potential of dignity and equality so eloquently articulated by Waldron. However, by holding otherwise, the court violated the principle of basic equality vis-à-vis Blind and also undermined the significance of dignity as a cross cutting principle underlying UNCRPD.The above discussion shows that dignity and Equality by themselves in absence of effective design of law, and judicial reasoning can fall way short of expectations of marginalised groups.

Summing Up

To sum up, the conceptions of dignity and equality are very robust instruments to foster and cultivate Human rights culture. However, the human rights culture has also to be truly 'HUMAN' to reach out most marginalised and vulnerable sections. Deployment of Dignity and Equality has to go beyond the mainstream of backwardness and must arrest the singling out of Persons with disabilities, their exposure to violence, undermining of their abilities, showing disrespect to them and most importantly their depersonalisation. It has to be borne in mind that the discrimination perceived by PWDs being systemic and structural, prejudice and stigma faced by them being latent and exclusion suffered by them being often unrealisable through the ableist mindset, what is required is a paradigmatic shift in the designing of the laws and policies, focusing on discrimination, prejudice, stigma and exclusion as systemic symptoms rather than viewing the same as individual action. The author emphasizes on exclusion because in absence of exclusion, there cannot be a path of Inclusion and to remedy the exclusion, we need to resort to recognition and respect for inherent dignity. Thus, the author has been able to establish as to how brazenly the abelist have indulged in indignity of dignity and would clamour for abandoning this path sooner than later so as to move towards a dignitarian path of life for PWDs. It would be plausible to enable the PWDs to reclaim space by recognising their intrinsic worth as equal human being. Recognition of Disability as an epistemic conception would help combat discrete/wilful amnesia in inclusion of PWDs in mainstream of society. We have to avoid the invocation of constructed Alterity and "othering" of the Disabled. The author epitomizes by alluding to Professor Anita Ghai *"The process of alterity needs to*

be understood to comprehend the experience of exclusion. 'Alterity' is a term that has been often used to signify 'Otherness'. The 'Other' in the work of Michel Foucault, for instance, consists of those who are excluded from positions of power, and who are often victimized within a predominantly liberal humanist view of the subject. The Other is not simply a description of simple individual differences but refers to the regulated construction of classes of people. Alterity leads to the creation of prejudice and stigma. Initially, the attempt is to construct some group as Other and less than fully human. The next step involves projecting onto it those 'disabled' qualities we reject, fear, or disown in ourselves. It is not difficult to pinpoint ideologies that permit us to think of ourselves as 'normal', good, or worthy, and to think of others we perceive to be not like us in some way-physically, mentally, educationally-as disabled, and therefore not normal, not good, or not worthy. Then we assign qualities to variable human individuals based on their inclusion in this constructed alterity."[35]

[35]Ibid at 247-248 Anita Ghai "*Disability, exclusions and resistance- Indian context"* in Zoya Hasan et al ed. "*The empire of disgust: Prejudice, Discrimination and Policy in India and USA* "2018 Oxford University Press

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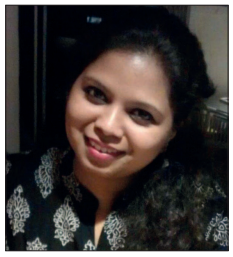

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