ILS
ABHIVYAKTI LAW JOURNAL
2020-21

Articles
Case Comments
Legislative Comments
LLM Articles
Teachers' and Ph.D. Research Articles

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Principal's Page

I am very glad to present this volume of Abhivyakti Law Journal. Both editorial team and the authors have worked very hard to bring out this current issue of Abhivyakti Law Journal. This issue is being published in both online and offline versions.

I applaud the editorial team and all the authors for their contributions to this issue. The range of topics engaged with in this issue is wide ranging from International Insolvency Law, Abortion Laws, Reproductive Rights, Population Control Measures, Locus standi under Competition Law, Law relating to Contempt of Court, Right to Peaceful Assembly under International Law, Right to Dissent, Law Relating to Experimenting with Animals, Impact of Administrative Whip on Lakshadweep, Role of Liquidator, Misogyny, Test of Arbitrability, Arbitration Agreements qua English and French Law, Residual Doubt Theory and Capital Punishment, Law and Love, Law relating to Blockchain Technology to Constitutional Dimension of Criminal Procedure.

The journal also has dedicated sections on case comments and legislative comments. Besides, there are also research papers authored by LL.M. students in this volume. There is also a dedicated section for the papers contributed by teachers and Ph.D. researchers.

This year, too, the judiciary has seen very challenging times. However, the year will be remembered for lack of effective judicial intervention by Chief Justice Bobde and commencement of a very proactive tenure by Chief Justice N.V. Ramana. To exemplify, no sitting of judicial collegium was held during the tenure of Chief Justice Bobde. Moreover, a huge controversy erupted over the comments of Mr. Prashant Bhushan on Justice Bobde resulting in contempt of court

action against him. Like every year, this year too, a number of references to the constitutional bench have remained pending, awaiting final outcome. I hope that during the tenure of Chief Justice Ramana, we would see something different and out of box.

On the political front too, the central government was on back foot over farmers' protest about the three farming reform laws, and despite repeated interactions, the stalemate continues.

Dr. Sanjay Jain

Professor and

Additional Charge, Principal

ILS Law College, Pune

Editorial

We congratulate and appreciate every student for their hard work and efforts in making this edition of the Abhivyakti Law Journal 2020-21 a success once again.

This year marks the inauguration of the commemoration of the centenary celebrations of the Indian Law Society and College. ILS Law college continues to guide and shine as an illuminant in the pursuit of quality education and excellence in research.

The contents of this journal indeed reflect the students' intellectual acumen, analytical skills, environmental consciousness and their concern and sensitivity towards society-related issues and concerns, as expected in the changing global scenario.

The Covid situation has indeed thrown every aspect of life out of gear and into uncertainty.

In spite of these difficult times, the enthusiasm of the students to write and to make their writings a part of the Abhivyakti Law Journal is commendable.

Navigating through these tumultuous Covid times, we have gravitated into a digital classroom scenario. Both the teachers and the students have their own share of challenges to face in this 'new normal' journey. Online lectures, online exams, work from home, studying from home have now become the new normal in education. As teachers, we have adapted the curricula to new teaching platforms and tools that previously we had no experience using. The students on their part are struggling to keep pace with a new virtual learning environment and teaching techniques.

Human experience has, however, shown that perseverance, patience and hard work always leads to better times. Hope to come back to normal classrooms and a safe environment at the earliest!

"The best way out is always through." —Robert Frost

Wishing everyone a healthy and happy life.

Faculty Editor
Dr. Banu Vasudevan
Assistant Professor

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

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

Acknowledgments

We congratulate each of the author who has helped us in bringing out yet another interesting and thought-provoking annual edition of the Abhivyakti Law Journal 2020-21.

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

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ARTICLES

Insolvency beyond borders- Cross-Border Insolvency and its Indian Development

Aditya Shete
II BALLB

It is quite evident that corporations today are no longer bound by geographical boundaries in any manner. Over the years, businesses have mushroomed and franchised all over the world. Joint Ventures, Special Purpose Vehicles, Mergers, etc. have empowered companies to globalise at an unprecedented rate. Practically every developing/developed country today is economically bolstered by MNCs. A recent report by CII-EY on *FDI in India- Now, Next and Beyond* shows that India has the potential to attract annual FDI between $120 billion and $160 billion by 2025, and MNCs have a pivotal role to play in it.[1] Indubitably, they are important entities of the State. However, to quote Uncle Ben, *"With great power, comes great responsibility."*[2] Insolvency is in a quandary as it is, but when such a multi-national company having its subsidiaries in multiple jurisdictions becomes insolvent or goes bankrupt, a plethora of legal as well as technical issues pop up- conflict of jurisdictions, contrasting laws, multiplicity of proceedings, to name a few. It then becomes imperative, for the country to ensure the efficient and hassle-free insolvency resolution of these companies, which is possible if there is a firm cross-border insolvency framework. Is our country then armoured with an efficient Cross-Border Insolvency Law at the moment? No. Let's come back to this after discussing cross-border insolvency and its nuances.

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[1] Confederation of Indian Industry and Ernst and Young Global Ltd., *FDI in India: Now, Next and Beyond - Reforms and Opportunities*, available at https://www.cii.in/PublicationDetail.aspx?enc=ZyOslU3q16KFWblAMhLziXz9TXC1fZ8AVlgkxvpusds=, last seen on 31/03/2021.

[2] A popular line from the movie Spider man 1!

What is Cross-Border Insolvency (CBI)?

Before diving straight into it, let's understand insolvency and bankruptcy briefly. Insolvency is when the debtor is unable to meet the debt obligations due to lack of funds. Bankruptcy, is the stage past insolvency. It's what follows the Insolvency Resolution Process. It is rock-bottom. The key difference is that insolvency can be resolved, while bankruptcy necessarily means liquidation. Cross-Border Insolvency is when insolvency proceedings for the same company or individual are in action under courts of more than one country's jurisdiction. For instance, Multinational Companies have their assets in multiple jurisdictions, and to arrive at an effective and wholesome repayment plan to reimburse creditors, all of these assets need to be accounted for. This is when having cross-border insolvency laws comes in handy.

The United Nations Commission on International Trade Law (UNCITRAL), in the year 1997, drafted a Model Law[3] on Cross Border Insolvency to aid States in equipping their insolvency laws with an international legal framework and thus, lubricating cross border insolvency proceedings. Unlike the international conventions or statutes, the Model Law does not need any kind of ratification by the State. So, any State is free to adopt the Model Law either by incorporating it, after making alterations as needed, in its domestic insolvency legislation or enacting a separate cross-border insolvency legislation. To illustrate, Singapore has adopted it by just appending a special schedule to its omnibus Insolvency, Restructuring and Dissolution Act, 2018.[4] As of today, 49 States have adopted it. The list includes developed states like the USA, Singapore, UK, Australia, as well as developing ones like Congo, Myanmar, Uganda, Chad and Zimbabwe.

Some important concepts of CBI-

1. The COMI scene-

To avoid conflict of jurisdictions and inconsistent domestic insolvency legislations of the countries in which the insolvency proceedings have been initiated, the Centre of Main Interests (COMI) of the debtor has to

[3] United Nations Commission on International Trade Law ("UNCITRAL"), Model Law on Cross-Border Insolvency with Guide to Enactment, G.A. Res.52/158, U.N. Doc. A/Res/52/158, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf , last seen on 31/03/2021. [hereinafter Model Law].

[4] Schedule III, Insolvency, Restructuring and Dissolution Act, 2018.

be determined. It is an indispensable part of the process. This is because, the jurisdiction where the debtor has their COMI, is where the main proceedings take place. Under the Model Law, there's a presumption that the COMI for companies is where their Registered Office (RO) is, and for individuals, their habitual residence in absence of proof to the contrary.[5] Nonetheless, COMI is to be determined by the court hearing the insolvency matter. Factors that then may be considered by them are- location of the majority staff, location of the trading premises, the client base, the place where it has its main assets, etc. There is no straightjacket formula for the same. To add to that, differing approaches have been adopted by the European, US, and Australian Courts. The European approach insists on determining the COMI right on commencement of foreign proceedings. In the landmark *InteredilSrl*[6] case, the ECJ took a position that reference should be made to the location of the debtor's centre of main interests at the very date on which the request to open insolvency proceedings was lodged. Contrasting this, the US and Australian approaches refer to the COMI relatively later in time.[7] The US courts have held that the appropriate time of determination is as at the filing of recognition application. The Australian position is quite similar, only the COMI is ascertained at the time of the Court's verdict on the recognition application. Which of the approaches is ideal is still a debatable topic in international insolvency law. The former seems to be a measure to avoid forum shopping and fraudulent COMI shifting to stall creditors, while the latter, an initiative to ensure the autonomy of the debtor to choose an ideal jurisdiction for its insolvency resolution. The Singapore High Court, recently, in *Re Zetta Jet Pte Ltd (2019)*,[8] held that Zetta Jet Pte ltd, although incorporated and registered in Singapore, had

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[5] Supra 2 at Art. 16.

[6] Case C-396/09 InteredilSrl v FallimentoInteredilSrl [2011] ECR I-09915, para. 55, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=2E1034B288DBB6D1EDE6A3AF11C9A844?text=&docid=111587&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2898592 , last seen on 31/03/2021.

[7] Herman Jeremiah and Kia Jeng Koh, *Timing Is Everything: Different Approaches To The Relevant Date For Determining COMI In Cross-Border Recognition Proceedings,* Mondaq, available at https://www.mondaq.com/InsolvencyBankruptcyRe-structuring/837102/Timing-Is-Everything-Different-Approaches-To-The-Relevant-Date-For-Determining-COMI-In-Cross-Border-Recognition-Proceedings , last seen on 29/03/2021.

[8] Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener), [2019] SGHC 53, available at https://www.uncitral.org/docs/clout/SGP/SGP_040319_FT.pdf , last seen on 30/03/2021.

its COMI in California, USA where it had a wholly-owned subsidiary, Zetta Jet US inc. The court adopted the US approach and determined the COMI as on the date of the recognition application, on the ground that it provided more certainty.

2. The Doctrine of Comity-

The doctrine of comity is an important doctrine of private international law that asserts that courts of one s\State, acknowledge and accept the judicial decrees passed by courts of a foreign State unless doing so militates against the public policy of the State. It acts as a quasi-exception to the principle of non-application of domestic laws to a foreign territory. It is an essential tool to overcome the problem of conflict of jurisdictions. The Model Law promotes the doctrine of comity under para. 214 and 215 of its Guide to enactment and interpretation. Chapter IV acts as an impetus for the cooperation among nations that embrace the doctrine of comity as well as nations that rely on reciprocal agreements for cooperation.[9] India can be considered a mix of the two types, as under S. 44A of the Civil Procedure Code, 1908 foreign decrees are allowed to be recognized and executed, but only if they're passed by the courts that lie in the finite list of 'reciprocating territories' as notified by the Central Government. The Model Law, however, has deliberately benched this pre-requisite of reciprocity to widen its scope.

3. Public Policy exception-

The Courts of one country can outright refuse to recognise a foreign proceeding or undertake any cross-border insolvency related action if it's found that it goes against the public policy of the country. This exception pervades the majority of international conventions and is practically a general principle of modern private international law.[10] The Model Law, too, respects this principle. Art. 6 of the Model Law reads as follows- *"nothing in this law prevents the court from refusing to take an action governed by this law if the action would be manifestly contrary to the public policy of this State."* Particular attention should be given to the

[9] Supra 2, at Chapter IV.

[10] Alex Mills, *The Dimensions of Public Policy in Private International law,* 4 Journal of Private International Law, 1, 1 (2008), available at https://www.tandfonline.com/ toc/rpil20/current, last seen on 1/04/2021.

fact, that the term 'manifestly contrary' is used instead of only 'contrary', and there is no elucidation of 'public policy' in any way. The former is for limiting the situations in which the enacting state can invoke Art. 6, to only exceptional circumstances, and the latter is because public policy is a matter of concern of individual states and needs to be ascertained by the enacting state itself.[11] However, many states have opted to exclude the term 'manifestly' in their domestic legislation to broaden its application. Singapore, Canada, Mexico, South Korea are among the countries that have done so.

The CBI situation in India-

The Insolvency and Bankruptcy Code, 2016, as it stands, has only Ss. 234 and 235 that come close to accounting for cross-border insolvency cases. Regardless, they haven't been notified yet, and do not address the complex issues involved in international insolvencies comprehensively as they rely on cumbersome measures like entering into agreements with foreign countries and issuing a letter of request to foreign courts.[12] Moreover, the moratorium imposed by S. 14 in case of Corporate Debtors, and S. 96 in case of individuals and partnership firms is limited to proceedings within the country.[13] What this means is, neither are proceedings initiated in foreign jurisdictions compelled to stay themselves, nor are fresh proceedings prohibited, by virtue of the said moratorium. The Insolvency Law committee constituted by The Ministry of Corporate Affairs has also opined in its 2018 report that it is "an ad-hoc framework susceptible to delay and uncertainty for creditors and debtors as well as for courts."[14] Even though the legislature has taken a backseat, the judiciary has batted on the front foot in this respect. Recently, Jet Airways had insolvency proceedings going on in both India as well as The Netherlands. The Noord-Holland District Court appointed Administrator and his Indian counter-part, the Resolution Professional were

[11] Supra 2, at Para. 30 of Guide to Enactment and Interpretation.

[12] Ss. 234 and 235, The Insolvency and Bankruptcy Code, 2016.

[13] Ss. 14 and 96, The Insolvency and Bankruptcy Code, 2016.

[14] Insolvency Law Committee, Ministry of Corporate Affairs, Government of India, *REPORT OF INSOLVENCY LAW COMMITTEE ON CROSS BORDER INSOLVENCY,* available at https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf , last seen on 29/03/2021.

allowed by the NCLAT to enter into a 'Cross-Border Insolvency Protocol' that was agreed upon by both parties. India was determined to be the COMI of the company. Moreover, a comity clause was also included in the protocol.[15] Had India a cross-border insolvency legislation, the need to draft such a pact would not have been necessary. In the CIRP of Videocon Industries too, the NCLT allowed the inclusion of its overseas assets in the Resolution Plan.[16]

The 2018 Insolvency Law Committee Report

The Insolvency Law Committee has already released Draft Cross-Border Provisions as Part Z in its 2018 report on Cross Border Insolvency.[17] The provisions are similar to the Model Law with a few changes. Just like the Model Law, there's a presumption of COMI under the draft, but it also introduces a 3-month look-back period clause similar to the EU Insolvency Regulation (Recast).[18] It states that the presumption of the COMI being where the RO (Registered Office) is situated, will be revoked if the debtor changes his RO within three months before the initiation of insolvency proceedings. If the RO is changed before the said period or not changed at all, the presumption sustains. This precautionary clause was added by the committee to steer clear of abuse of proceedings and forum shopping.[19] The duty of ascertaining the debtor's COMI rests with the NCLT, but the Central Government has also been given the liberty to prescribe guidelines for the NCLT to consider if the natural course does not suffice. Concerning the various approaches of determining the COMI as discussed earlier, the committee opined that it was premature to include any firm provision as regards the same at this moment and left it to evolve through experience.[20] The Draft provisions have also sustained the 'manifestly contrary' approach

[15]Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder) vs. State Bank of India and anr., Company Appeal (AT) (Insolvency) No. 707 of 2019.

[16] SBI vs. Videocon Industries Ltd. And ors., MA 2385/2019 in C.P.(IB)-02/MB/2018.

[17] Supra 12.

[18] Recital 31 and Article 3 of the EU Insolvency Regulation (Recast), Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, available at https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri= CELEX:32015R0848&from=en , last seen on 31/03/2021.

[19] Supra 12, at Para. 2.7.

[20] Ibid, at para. 11.8.

to public policy. Currently, the Draft only encompasses corporate debtors, but over time, once the law has passed been well established, the application is likely to be extended to insolvencies of individuals as well.

Is a Cross-Border Law necessary in India, though?

Looking at the available mechanism under IBC, India will have to enter into bilateral agreements with almost every state that has a subsidiary of an Indian MNC and vice versa. The process of negotiating and signing separate agreements with these states individually sounds like a tough row to hoe. Foreign-based MNCs like PepsiCo, Sony, Apple, etc. contribute substantially to the Indian economy. The total FDI in India by the end of 2019 stood at Rs. 32,92, 902 Crores.[21] Indian businesses too, have expanded and established themselves worldwide. Not having a robust framework that deals with cross-border insolvencies can disincentivize foreign companies from investing in India. The IBC, although a fairly recent legislation, has well established itself through subordinate legislations and judicial interpretation. Another perspective that should be considered is that the edifice of IBC is built on the revival of companies and keeping them as going concerns. It prescribes a novel Insolvency Resolution Process before liquidation. MNCs are more than just huge international businesses; they are massive hubs of employment that grant crores of Indians their daily bread. A failed insolvency resolution plan also results in these employees losing their jobs. It is, therefore, the responsibility of our country to ensure that it takes every step possible to simplify and expedite cross-border insolvencies.

Concluding remarks-

Cross-Border insolvencies are nothing new or unprecedented. The first instance of Cross-Border Insolvency dates as back as 1908- The McFadyen case.[22] Besides, the 2018 Report is not the only one that recommends the adoption of the Model Law. The 2000 Eradi Committee Report[23] and the

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[21] Reserve Bank of India, *Census on Foreign Liabilities and Assets of Indian Direct Investment Entities* (2018-19), available at https://m.rbi.org.in/Scripts/AnnualPublications.aspx?head=Annual%20Census%20on%20Foreign%20Liabilities%20and%20Assets%20of%20Indian%20Companies , last seen on 1/04/2021.

[22] In re P. Macfadyen & Co. Ex parte Vizianagaram Co., Ltd. [1908] 1 K.B. 67.

[23] The Eradi Committee, Ministry of Corporate Affairs, Government of India, *Report of the High Level Committee of Law relating to Insolvency and Winding up of Companies 2000,* available at http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law

2001 Mitra Committee Report both[24] have encouraged the Model Law's adoption along with altering the domestic insolvency legislations. Moreover, in January 2020, the Ministry of Corporate Affairs established the Krishnan committee to recommend a set of rules and regulations that would facilitate the implementation of the Draft provisions proposed by the 2018 Report. Taking necessary measures in time can go a long way. To provide impetus to young IBC, which stands for time-bound insolvency resolution and maximisation of assets of the debtor, the mammoth issue of delay and complication due to cross-border insolvency issues cannot be given a cold shoulder anymore. Having considered all this, it is likely that the Indian legislature will soon take progressive steps towards setting up a well-planned cross-border insolvency framework in the country.

%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf , last seen on 1/04/2021.

[24]*Report of The Advisory Group on Bankruptcy Laws* (2001), available at https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225 , last seen on 1/04/2021.

A Study of the Trans-Asian Trajectory of Abortion Laws- Reproductive Rights and Agency

Anvi Londhe &
Smitha Khandige
II BA LLB

Introduction

Reproductive Rights rest on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It is a significant yet sensitive aspect of human rights. Laws surrounding reproductive rights affect women's social, economic, and political circumstances. They also affect the rights of women because they regulate women's sexuality and women's choices about reproduction. Consequently, women's rights concerning abortion, significantly determine the quality of women's rights in general.

This paper focuses on a woman's right over her body and the right whether or not to bear a child. We aim to understand the laws relating to reproductive rights and understand the trajectory of abortion as a method of population control and as a basic human right. To have a valid comparison, we have chosen two of the most populous countries where abortion laws were introduced as a method of population control and which have similar social conditioning towards procreation, similar societal patterns, and approaches towards the rights of females with respect to motherhood. This paper will cover the comparative analysis of the abortion laws of the country and proceed to present a view of the right to abortion in terms of the autonomy and agency a woman has over her own body.

Abortion in India

During the pre-independence era, India was among the countries with the most restrictive abortion laws. Abortion was criminalized & allowed only to protect the mother's life. Induced abortion was criminalized under the IPC Ss.

312 to 316[1] keeping in mind the then British laws[2] and the religious, socio-cultural and ethical background of the Indian society.

S. 312[3] of the IPC refers to unlawful termination of pregnancy in which voluntarily causing miscarriage is a criminal offence with prescribed punishment for both the woman and the medical practitioner. Ss.313 to 316[4] also criminalize related offenses such as causing miscarriage without the mother's consent, infanticide etc. with strict penalties including imprisonment and fine. Although the provisions relating to abortions contained in the IPC had been in existence for more than a century, they were hardly implemented, and though there had been people who advocated reforms now and then, the altered view towards a liberalized law of abortion came about only during the sixties.

The rapid growth of population was a huge problem of Indian society despite the government's efforts to control it through various family planning programs[5]. The population continued to grow at the rate of about 2.2 % per annum for two decades, as per official census data. Due to this sudden surge in the population, legalizing abortion seemed like a viable solution for controlling it. Hence, in 1964 the Indian Parliamentary and Scientific Committee, under the chairmanship of Lal Bahadur Shastri, proposed that abortion should be permitted as a remedy for the failure of contraceptives. In other words, abortion was legalised as a supplement to the existing program of family planning with the main aim to encourage restriction of population growth.[6] In the same year, a resolution passed by the Health Ministry in September 1964 provided for the establishment of a committee under the chairmanship of Shantilal Shah to study problems of population growth. In its report in 1966[7] and recommended deletion of section 312 of the IPC and

[1]Ss. 312, 313, 314, 315 & 316, The Indian Penal Code, 1960.

[2] See Ss. 58 and 59, The Offences Against the Person Act, 1861 (United Kingdom).

[3]S. 312, The Indian Penal Code, 1960.

[4] S. 313, 314, 315 & 316, The Indian Penal Code, 1960

[5] The Planning Commission, New Delhi, The First Five Year Plan, 522-524 (1953), The Planning Commission, New Delhi, The Third Five Year Plan, 675 (1967)

[6] S. Chattopadhyay, *Medical Termination of Pregnancy Act 1971: A Study of the Legislative Process,* 16:4, Journal of the Indian Law Institute, 549, 550, (1974), available at https://www.jstor.org/stable/43950392 , last seen on 29/03/2021.

[7] See Committee to study the question of legalization of abortion, Government of India, *Shantilal Shah Committee Report*, 1966.

emphasised on the need for bringing a special law to deal with the termination of pregnancies by focusing on the hazards of illegal and unsafe abortions. It relied on the changes to the abortion laws in Britain[8] to support the need for the change in India's laws. On the recommendations of the committee, a bill by the name The Medical Termination of Pregnancy (MTP) Bill was passed in 1971[9] and enacted in 1972.

The preamble of the act reads: "*An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto."*[10] The act, consisting of only 8 sections, has stringent regulations, allowing only registered medical practitioners to carry out the termination of pregnancies, called induced miscarriages. It allows pregnancies to be brought to an end in the first three months with the approval of only a single registered medical specialist and the first five months with the approval of at least two medical specialists. It allows induced miscarriages on very specific grounds defined under S. 3of the Act[11], such as when progeny was conceived by the act of rape, when there is a risk to the mother's life, the child suffering from any disability detected before birth, etc. There is a provision for abortion in case the contraceptives fail to work, limited to married women though.[12]It also allows induced miscarriage in cases of pregnancy in children aged less than 18 years, and in cases of persons of unsound mind, with the consent of their parent/s or guardian/s. These provisions are limiting mainly because the grounds on which women can seek abortion are restrictive and the permissible gestational limit for abortion is low considering the advances in medical technology in detecting foetal abnormalities as well as in the wake of wide spread sexual violence.

These provisions of the Act led to several petitions being filed in the courts. Hence, the Medical Termination of Pregnancy (Amendment) Bill[13] was

[8] Statute Law Revision Act 1892 (c. 19) and Statute Law Revision (No. 2) Act 1893 (c. 54) (United Kingdom)

[9] The Medical Termination of Pregnancy Act, 1971

[10] S. 1, The Medical Termination of Pregnancy Act, 1971

[11] S. 3, The Medical Termination of Pregnancy Act, 1971

[12] S. 3 (2)(b)(i), The Medical Termination of Pregnancy Act, 1971

[13] Medical Termination of Pregnancy (Amendment) Bill, 2020 (passed by Rajya Sabha, 16/03/2021).

introduced in the Parliament in 2020. It aims to amend the MTP Act to increase the upper limit for termination from 20 to 24 weeks for certain categories of women and remove this limit in the case of substantial foetal abnormalities and establish Medical Boards at the state level. The Bill allows abortions on the advice of one registered medical practitioner up to 20 weeks, and two practitioners in the case of certain categories of women between 20 and 24 weeks. The Bill sets up state level Medical Boards to decide if pregnancy may be terminated after 24 weeks in cases of substantial foetal abnormalities. This Bill also ensures that the privacy of the pregnant woman is protected**.**

Abortion in China

In China, abortion was legalized in the 1950s. This law[14] came into being during the Maoist era (1949-1979) and was highly restrictive due to the pronatalist policies of the era. The pronatalist policy encouraged child-bearing through child subsidies, and prohibiting contraceptives, abortions, and sterilizations—as a way of encouraging population growth. To enable women to produce more children, they were discouraged and sometimes even forbidden by the Maoist government from accessing abortion and contraception.[15] The Maoist government's activism for a large population was converted into the National Population Policy.

The abortion law was eased in 1953, and contraceptives and abortions under certain conditions became available. In the mid-1950s the law was extended to include pre-existing conditions and disabilities, such as hypertension and epilepsy, and allowed women with certain occupations such as coal mining to qualify. These laws were relaxed in the late 1950s to prevent the number of deaths and injuries that women sustained due to illegal abortions.

The population policy in the post-Maoist era (1979 to the present) is colossally different from the Maoist one. The ban on abortion access was lifted in the late 1970s as the State had achieved its population objective. The

[14] Guide for Contraception and Induced Abortion in China, 1953 (People's Republic of China)

[15] J. Liu, Y. Englert & W.H. Zhang, *Is induced abortion a part of family planning in China?,* Intech open, (2020), available at https://www.intechopen.com/books/induced-abortion-and-spontaneous-early-pregnancy-loss-focus-on-management/is-induced-abortion-a-part-of-family-planning-in-china- , last seen on 28/03/2021.

population had increased from 602 million in 1954[16] to 1 billion in 1984[17]. This extreme demographic growth resulted in the post-Maoist government's fear that the state's economic production could not keep up with the population growth. In 1981, the first post-Maoist government announced that reducing the large population was a necessary task to be achieved by all means, including administrative and economic methods. One of these measures was carrying out the well-known one-child policy, seemingly the most rigorous, birth program in the world. [18]

The one-child policy did not apply to all areas or all citizens, but mainly to the urban population as the enforcement of this policy was more successful there. The government set up family-planning centers in cities, which were used to make sure that female citizens of reproductive age were under the government's surveillance. Further, the approaches to enforce the one-child policy by post-Maoist governments before and after the 2000s were not similar. The governments after the 2000s adopted a more incentivised approach, while the approach in the 1980s and 1990s were mainly punitive in nature.[19]

Currently, the provisions regarding abortion in China are essentially included in the two parts of national legislation called the Code on Maternal and Infant Health 1995[20] and the Code on Population and Family Planning 2002[21]. Access to abortion is regulated by these two codes together with the state's population policy. These codes do not set a time limit on lawful performance of the act or abortion. Further, they do not restrict the legal grounds on which

[16] China population, Country Economy, available at https://countryeconomy.com/ demography/population/ china?year=1954, last seen on 28/03/2021

[17] China population, Country Economy, available at https://countryeconomy.com/demography /population/china?year=1984, last seen on 28/03/2021

[18] See Weiwei Cao, *The Regulatory Model of Abortion in China through a Feminist Lens,* Asian Women- Project of Humanities and Social Sciences, 27, 38, (2013), available at http://www.e-asianwomen.org/xml/00826/00826.pdf, last seen 28/03/2021

[19] See Weiwei Cao, *The Regulatory Model of Abortion in China through a Feminist Lens,* Asian Women- Project of Humanities and Social Sciences, 27, 39, (2013), available at http://www.e-asianwomen.org/xml/00826/00826.pdf, last seen 28/03/2021

[20] Art. 19, Law of the People's Republic of China on Maternal and Infant Health Care, 1995, (People's Republic of China).

[21] Art 19 & 20, Population and Family Planning Law of the People's Republic of China, 2002, (People's Republic of China).

abortion can be carried out, with the exception of Sex Selection as one[22]. If women are clinically suitable for an abortion, they can request it at any registered public or private hospital, without requiring mandatory approval of their doctors or sexual partners[23]. The Code on Population and Family Planning 2002 states that abortion can only be legally performed by registered doctors of gynaecology and obstetrics in public medical institutions or authorized private medical institutions[24].

Comparative analysis between India and China

The primary similarity between the abortion laws of the two countries lies in the lack of agency with the woman seeking an abortion. The difference is in the approaches of the two countries towards the ideas of Human Rights and on certain technicalities. In China abortion is available on-demand, while in India it is available on broad socio-economic and humanitarian grounds.

Rights in China rest on citizenship and not on humanity; they exist only so far as the State has granted by law. The State can deprive citizens of rights based on their political/criminal act or on their class. Human Rights are thus limited to citizen rights. This paradoxically means that 'agency' can only be *granted* by the State and conversely recalled by the State. Further, the State does not see abortion through the lens of personal rights whereby once granted it can only be repealed by a due process of law. Chinese jurisprudence rests on upholding socialism and the needs of the community and State over personal rights. It sees child-bearing as a duty of women towards the community and thus abortion rights vary according to the needs of the State.

The legalisation of abortion was not carried out to take cognizance of women's rights, but because of the change in the State's policy regarding population. Although the regulations in the Maoist and Post-Maoist eras are completely different, they are similar in the sense that they both treat reproductive decision-making and freedom as ancillary to the State's population goals and interests. The woman has no Human or Natural Right to decide whether she will have an abortion; instead, she enjoys such a right

[22] Art. 35, Population and Family Planning Law of the People's Republic of China, 2002, (People's Republic of China).

[23] Art. 19, Law of the People's Republic of China on Maternal and Infant Health Care, 1995, (People's Republic of China).

[24] Art. 36, Population and Family Planning Law of the People's Republic of China, 2002, (People's Republic of China).

only when the State grants it. Her substantive and procedural legal rights and remedies under the laws on abortion are subordinate to and heavily dependent on the needs of the State.

One of the reasons why the regulation of abortion in China superficially looks like an unrestrictive one is that the laws don't endorse doctors' discretion in abortion decisions. The role of doctors is just restricted to being the State's agents because their performance of abortion is subject to the population policy enacted by the State. However, the laws are still restrictive because it allows the State to make reproductive decisions.[25]

While Indian jurisprudence looks at human rights as essential and inherent to people by virtue of them being humans, it still has undertones of collectivism. Abortion continues to be criminalized under the IPC and the MTP Act serves only as an exemption to the IPC. This means that abortion is still viewed as illegal, immoral and as striking the sanctity of life and the MTP Act is the exemption whereby people could avail of abortion only under State authority. Abortion is not viewed as a human right, but only as a secondary right enacted as a means to achieve population control and general health and this idea is reflected in the MTP Act.

Abortion is legal up to the second trimester, but it is at the absolute discretion of medical opinion. Abortion is a qualified right whereby abortion is not available solely on the reason that it is an unwanted pregnancy, but is only available when abortion is requested on criteria that fit into the conditions listed in the MTP Act. The Act also does not define 'health', 'substantial risk', 'seriously handicapped' etc., which leaves the medical opinion on these matters sacrosanct,[26] thus removing even the sense of agency.

The currently liberal-seeming provisions of the MTP Act could become restrictive without a single word of the text being altered.[27]

Apart from the statutory regulation being restrictive, low access to abortion services also adds to the burden by being another barrier. Another similarity

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[25] See Weiwei Cao, *The Regulatory Model of Abortion in China through a Feminist Lens,* Asian Women- Project of Humanities and Social Sciences, 27, 31, (2013), available at http://www.e-asianwomen.org/xml/00826/00826.pdf, last seen 28/03/2021.

[26] N. Menon, *Recovering Subversion: Feminist Politics beyond the Law*, 71 (2004).

[27] A. Jesani & A. Iyer, *Women and Abortion,* 28:48, Economic and Political Weekly, 2591, 2591, (1993), available at https://www.jstor.org/stable/4400452 , last seen on 29/03/2021.

with the laws of both countries is the absolute disconnect between the statutes and the ground reality. While abortion is statutorily accessible to women, in reality, the lack of qualified practitioners and the high cost restrict women's reach to abortion. In both countries abortion is only allowed to be performed by certified medical practitioners. The lack of physicians who are qualified to perform surgical abortion and to administer medical termination in many rural or undeveloped areas restrict access to safe abortion services. In India, according to the Rural Health Statistics (2018-19),[28] there is a 75% shortage of qualified doctors. The requirement of opinion of two providers under the MTP bill of 2020 may further make it difficult for many pregnant women to access abortion between the 20th and 24th week, particularly those in rural areas and small towns.

With abortion being legalized and the wide use of ultrasound techniques, both countries saw a disturbance in the sex-ratios. The live female births were significantly lower as compared to males. Because of the patriarchal setup of the countries and the one-child policy of China, sex-selective abortion saw a rise. Both countries recognized this and banned sex-selective abortion. While China banned sex-selective abortion directly, India banned both pre-natal sex determination, as well as sex-selective abortion. This reflects the larger State attitude towards using legislation as a means to regulate the societal needs of a balanced sex-ratio.

Conclusion and suggestions

Throughout history, abortion norms have been towards the fulfilment of extrinsic social needs regardless of their restrictive or permissive orientations. Women and their right to bodily autonomy and to determine reproduction have rarely been taken into account. This is especially relevant in the case of China where a woman's rights with respect to abortion are not personal legal rights, but State impositions and State needs are regarded higher than the woman's free will.

In the case of India, while the laws are restrictive and still in the language of

[28] Ministry of Health and Family Welfare, Government of India, Rural Health Statistics 2018-19, available at https://main.mohfw.gov.in/sites/default/files/Final%20RHS%202018-19_0.pdf, last seen on 21/03/2021.

population control, the State is moving towards a future of recognizing abortion as a Human Right. An important step towards the liberalization of abortion laws has come in the form of the new Act which extends the availability of abortion, and also provides for abortion to be covered under the right to privacy which is a move towards more agency. Despite the bona fide intentions of the Act, it has some issues that haven't been addressed. Firstly, the scope of the cases that the medical board review should be increased, as it is stated that the board would only review cases related to foetal abnormalities. This can cause problems as women whose pregnancies were caused due to rape or incest, and have crossed the 24-week mark would have no remedy. Secondly, the Act should be more gender-neutral and also include transgender people as the ambiguity can prove to be discriminatory. Thirdly, the Act should remove the ambiguity regarding the inclusion of minors in its privacy clause. However, India will finally realize abortion as a Human Right only when abortion is decriminalised and with the removal of S. 312 from the IPC, the State will no longer be viewed as the authority on reproductive rights, and there by the abortion process would then become more women centric. Decriminalization would also pave the way for access to safe abortions by removing stigma and fear.

The laws ought to move beyond in a liberal form and be brought in line with the principle of respect for women's rights to health and reproductive decision-making. Both countries have a long way to go in this regard.

The Quiddity of Locus Standi under Competition Law: From Confusion to Conclusion

Ayushi Shrivastava
II LL.B.

I. Introduction: Significance of Competition Law

The Indian Constitution under the Directive Principles of State Policy[1] imbibes the basic idea of socialism. In an attempt to assure appropriate social order and economic policy in the country, it has provided both a trigger and a framework for Competition law. It is imperative to note that the subsistence of Competition law is directly linked with the amelioration of the economic scenario of the country. There exists a causal relationship between the two that cannot be denied.[2] In the words of Justice Thurgood Marshall, *"Antitrust laws are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."*[3]

Similarly, the introduction of the Competition Act, 2002 and the subsequent establishment of the Competition Commission of India ("CCI") is often regarded as one of the major economic reforms in the country. The Act facilitates indispensable safeguards not just to the interests of the consumers and market players but for the country's overall economic health too. Although the effect of Competition law varies across countries, the spirit of this framework remains the same. One of the widely accepted objectives of the Competition law is that it promotes economic efficiency by acting as a tool to enhance market responsiveness *vis-a-vis* consumer preferences.[4] The same can also be inferred from the Preamble[5] of the legislation.

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[1] Art. 38, 39, the Constitution of India.

[2] Cornelius Dube, *Competition Policy and Economic Growth: Is there a Causal Factor?* No. 4/2008 CUTS Centre for Competition, Investment & Economic Regulation, 1, 1 (2008).

[3] United States v. Topco Associates, Inc., 405 U.S. 596 (1972, Supreme Court of the United States).

[4] Competition Commission of India v. Steel Authority of India Limited and Anr., (2010) 10 SCC 744.

[5] Preamble, The Indian Competition Act, 2002.

In one of the deliberations[6], over anti-competitive agreements, the Hon'ble Supreme Court of India emphasized on the greater good that the Act aims to protect. In view of keeping healthy competition intact, the legislation extends benefits first to the public at large and eventually to the economy as a whole. The aim hasn't just been to protect the competitors in the market but to protect the competition itself. In this pursuit, economic efficiency, economic development and consumer well-being come out as natural corollaries of striving towards fair and effective competition.

Now, one crucial question that follows from here is regarding the process of regulation. It thus becomes exigent to comprehend who stands in a position to knock on the doors of the regulating authority. The answer to the same lies in the evolutionary concept of 'locus standi' in the Competition law scheme.

II. Locus Standi: The Concept and Some Aspects

As per the Cambridge Dictionary, the term 'locus standi' means *the right or ability to bring a legal action to a court of law, or to appear in a court*.[7] According to traditional practices, any aggrieved person whose rights were denied or the same was adversely affected in any way could bring a case in the court of law in order to seek a remedy. Thus, it was necessary that an 'aggrieved person' approached the court as that would suffice her legal standing. However, with the advent of Public Interest Litigation ("PIL") there has been a shift in how these concerns have been addressed in some areas of law. Likewise, there have been efforts to make locus standi in Competition law rather flexible considering the public interest involved.

There are subjects where the society at large is involved especially in developing countries like India. In such cases, the pattern of public-oriented litigation better fulfills the rule of law if it is to run close to the rule of life. [8] A similar provision can be seen in the Indian Competition

[6] Excel Corp. Care Limited v. Competition Commission of India and Ors., (2017) 8 SCC 47.

[7] *Meaning of Locus Standi*, Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/locus-standi.

[8] Bar Council of Maharashtra v. M. V. Dabholkar and Ors., (1976) 1 SCR 306.

Act, 2002, in Section 19(1)(a), a fragment of which allows inquiry to be conducted by the CCI on receiving information from 'any person'. It is indicative of the resemblance with PIL with regards to the public interest being at stake. The point of public interest being involved in certain cases holds immense importance in the spectrum of Competition law. Even though the discourse between legal injury and its remedy goes hand in hand, the peculiar nature of Competition law automatically makes the dynamics rather complex. A similar instance occurred in the highly contentious case of *Samir Agarwal vs. Competition Commission of India & Ors*[9] regarding the remarks made on locus standi. The case was dismissed by the National Company Law Appellate Tribunal ("NCLAT"), so was the appellant's locus standi as there was no direct injury that the appellant suffered. The reason why this aspect gained traction was because it seemingly violated the intent of the Act. This not only derailed the jurisprudence evolved over time but also contravened the component of consumer welfare which is at the core of this legislation.

The idiosyncrasy of Competition law lies in the interrelatedness of marketplaces which ultimately has the capacity of affecting the community at large. This is a prime aspect that sets it apart from other areas of law where the locus standi is rather limited to the 'aggrieved party' only. In this light, the stance taken by the NCLAT took a rather regressive turn towards locus standi.

III. Provision of Locus Standi in the Indian Competition Act, 2002

The theme of 'locus standi' is embedded under Section 19 of the Act which talks about the CCI inquiring into certain kinds of agreements and dominant position of enterprises. The aim is to check whether there exists a contravention of sections 3 and 4. Further, the provision in sub-clause (a) provides for such inquiries to be taken *suo motu* or on receipt of information from any person, consumer or their association, or trade association, where a fee also has to be paid. In sub-clause (b), a reference made by the Central or State Government or a Statutory Authority also calls for an inquiry.

[9] Samir Agarwal V. Competition Commission of India & Ors., Competition Appeal (AT) No. 11 of 2019, (National Company Law Appellate Tribunal, 29/05/2020).

Now, the term "any person" in section 19(1)(a) is an inevitably vital provision. It conveys the scope of legal standing and also that it doesn't have to be someone who has suffered a legal injury or is personally aggrieved. So, it can be anyone under the sun considering no mention of anything otherwise, explicitly or implicitly. Not only this but the intent behind this provision can also be understood through the 2007 amendment[10]. The terms, "receipt of complaint" was substituted with "receipt of information". This course of action added up in providing a wider scope to this provision.

So, the construct of the legislation has been to keep the doors of the authorities wide open to serve the public purpose of this Act. One of the reasons is the inquisitorial functions performed by the regulatory body. Due to such functions, the CCI aims to conduct inquiries to ascertain the truth rather than just performing the adversarial functions where it would act as an arbiter to find out legitimate facts. Another rationale that supports the inquisitorial nature of the proceedings of the CCI is the substitution of the words, "person or enterprise" in place of "complainant or defendant" under section 35 by the Competition (Amendment) Act, 2007.[11]

It is clear that the purpose of this Act is not only to elucidate and bring into light those practices that have an adverse effect on competition but also to promote and sustain competition in the market.[12] On that footing, the aforementioned meaning of locus standi constituted under the Act is quintessential in serving the object of this legislation.

IV. Varying Interpretations on Locus Standi

Undoubtedly, a case that needs deliberation in this regard is the *Samir Agarwal* case[13]. Initially filed in the Competition Commission of India, the case contended that there existed a hub-and-spoke arrangement

[10] The Competition (Amendment) Act, 2007.

[11] XYZ v. Alphabet Inc. and Ors, Case No. 7 of 2020, (Competition Commission of India, 09/11/2020).

[12] Rajasthan Cylinders and Containers Limited v. Union of India (UOI) and Ors., 2019 (4) SCJ 247.

[13] Supra 9.

between the cab service providers, that are Ola and Uber, and their respective drivers. However, this 2018 case was dismissed by the CCI citing the fact that algorithmic determination of price does not fit in the traditional shoes of hub and spoke arrangements in Competition law.

The case was later brought in for appeal before the NCLAT by an appeal filed by Samir Agarwal. It is here that things took an unpredictable turn. Although the case was dismissed on merits here too, the NCLAT made an important observation regarding the locus standi which caused disquiet in addition to degrading the jurisprudence evolved in this aspect. Ola and Uber contended that for the appellant to file an information it must have suffered a legal injury without which the locus standi is questionable. Thereafter, the NCLAT took its own call to decipher the term "any person" enshrined in Section 19(1)(a) of the Act. It acknowledged that there is an element of flexibility enshrined in the concept of 'locus standi' by allowing public interest litigation, whistleblowers etc. But since there already are provisions for *suo moto* initiations or through a reference made by the government or a statutory authority, the intent behind the terms 'any person' would be rather limited. It would hence refer to those who have suffered a legal injury by virtue of being a consumer or beneficiary of healthy competitive practices. Without this limitation, the misuse would be paramount and might cater to people's oblique motives.[14]

The NCLAT surpassed the laid down principles and took a retrograde step. The idea to limit the scope of locus standi only to those whose legal rights were affected stands in contravention with the very spirit of Competition law besides undermining the importance of the jurisprudence advanced till now. Although, this hasn't happened the first time that such a position was taken. Former appellate tribunal, Competition Appellate Tribunal ("COMPAT") although years ago had also taken similar positions where it had manifested a restricted scope of locus standi.[15] This shows that conflicting views over the subject of locus standi are not something entirely new.

[14] Ibid.
[15] International Cylinder Pvt. Ltd. v. Competition Commission of India, Appeal No. 12/2012, (Competition Appellate Tribunal, 20/12/2013).

The CCI in many investigations has thrown light on to the wide scope of locus standi. In the case of *Shri Surendra Tripathy vs. Great Eastern Energy Corporation*[16], the regulatory body clarified the nucleus of the Act which allows any person to approach the CCI to bring any supposedly anti-competitive act to its notice. There is no need for the person to be personally aggrieved. In another instance,[17] the CCI also highlighted that the quest of the CCI is inquisitorial in nature which is why the person who brings in such information to the Commission is not of much concern as long the information in question is anti-competitive. It thus doesn't need an answer as to whether such inquiries need to be pursued or rejected by the CCI.

Besides, the erstwhile COMPAT has also highlighted the legislative intent in one of its judgments. It stated that the Parliament had prescribed no qualification or condition that would act as a prerequisite for a person to file an information under section 19(1)(a). Nor do Sections 18 and 19 suggest that the Commission would reject such information if the informant did not have a personal interest in it.[18] In yet another case, the COMPAT had clarified why anyone has the locus standi to file an information. It said since the CCI itself has *suo moto* power, anyone can invite its attention to the alleged anti-competitive behaviour or as the case maybe.[19]

Looking back at the *Samir Agarwal* case, it must be noted that the fate of the case met with justice when it reached the Hon'ble Supreme Court. The highest court of India vehemently disagreed with the views of the NCLAT. It passed the verdict and reinstated the limitless reach of the Act in terms of locus. The apex court upheld the widest scope and spirit of Competition law and stated any person without having suffered an injury due to the alleged anti-competitive act is free to approach the

[16] Saurabh Tripathy v. Great Eastern Energy Corporation, Case No. 63 of 2014, (Competition Commission of India, 16/02/2017).

[17] Reliance Agency v. Chemists and Druggists Association of Baroda &Ors, Case No. 97 of 2013, (Competition Commission of India, 04/01/2018).

[18] Surendra Prasad v. Competition Commission of India &Ors., Appeal No. 43 of 2014, (Competition Appellate Tribunal, 15/09/2013).

[19] Motion Pictures Association v. Reliance Big Entertainment Pvt. Ltd., Appeal No. 69 of 2012, (Competition Appellate Tribunal, 17/05/2013).

CCI.[20] This came as a relief after the Tribunal's myopic understanding of the provision.

Naturally, checks and balances are as important as accessibility so that misuse can be minimized. Here, the legislation itself has a mechanism to cater to the 'oblique motives' one may approach the CCI with. The Act expressly states that the CCI has the power to impose a penalty that may extend up to rupees one crore in case a person furnishes any information which he or she knows or has a reason to believe to be incorrect.[21]

In the course of this recent development, it is imperative to look at the latest opinion of the CCI in *Harshita Chawla V. WhatsApp Inc. and Ors*[22]. The CCI has once again clarified its bearing on the position of locus standi in the Indian Competition Act. It said the intent of the Parliament was to create an inquisitorial system where the Commission would investigate competition issues *in rem* as against *in personam*. Besides, the mere fact that the case is filed by an aggrieved party doesn't make it a right *in personam*. It might seem to be *in personam* but the larger question involved here is that of protecting fair and competitive markets which makes it a case *in rem.*

A reflection over these cases might witness divergent approaches but the last words of the CCI and the Supreme Court are indeed reassuring.

V. Concluding Remarks

Locus standi becomes a strong tool for regulating competition in the market. It can either be used to subserve and curtail inquiry in alleged anti-competitive practices or as a catalyst in keeping a check on various practices and guarding the competition in the market.

Its importance increases manifold because of the current times where innovations and remodeling are frequently proliferating. More and more startups are coming up and it is crucial to protect them from being eliminated by other strong market players. That way the broad and

[20] Samir Agarwal v. Competition Commission of India, AIR 2021 SC 199.
[21] S. 45(1)(a), The Competition Act, 2002.
[22] Harshita Chawla v. Whatsapp Inc. and Ors., Case No. 15 of 2020, (Competition Commission of India, 18/08/2020).

extensive mechanism of locus standi could help a lot in maintaining and protecting healthy competition. Extending the ambit of whistleblowers would only enable them to call out anti-competitive practices at a larger scale. The same is also practiced in other jurisdictions like the European Union.

As a matter of fact, the CCI performs inquisitorial functions as opposed to adjudicatory functions,[23] which sets it apart from other regulatory bodies. Here, the larger motive lies in protecting the public interest pursuant to this Act. Thus, in the best interest of the public, the doors of the CCI must remain open for anyone and everyone. In this light, the NCLAT's judgment[24] which restricted the scope of locus serves as a bad precedent. The Apex court and the CCI have time and again recognised and clarified the widespread and multifarious nature of Competition law which aims to protect market distortions. This area of law is gaining traction day by day and an expanded scope of locus standi would therefore help in keeping anti-competitive practices in check. Consequently, it would protect the interests of new-age players and contribute towards the economic development of the country.

[23] Supra 19.
[24] Supra 9.

Contempt of Court- Is it mutilation of free speech?

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III B.A. LL. B

Introduction

Contempt of court is the act of being disrespectful or defiant towards the Court of law and is primarily concerned with the fair administration of justice. It aims to punish any act hurting the dignity and authority of courts or judicial tribunals. Further, it is to ensure that the image of the courts in the minds of the public is in no way simmered down and to uphold the dignity, credibility, and dominion of Courts of Law.

History

Although essentially the law of contempt has its origin in English law, it is not entirely a foreign concept. Since time immemorial there has always been a conscious effort at protecting the sanctity of the image of justice. It was felt that the law on contempt of courts is somewhat uncertain, undefined, and unsatisfactory and to study and scrutinize the same a special committee was set up in 1961 under the chairmanship of Shri H. N. Sanyal, the then additional solicitor general. The committee made a comprehensive examination of the law and problems relating to contempt of court and submitted its report in 1963 which inter alia defined, regulated, and limited the powers of certain Courts in punishing for Contempt of Courts. It is to be noted that the Committee in its report made specific mention of Criminal Contempt, recommending specifically the procedure that has to be followed in cases of Criminal Contempt.

The recommendations, which the committee made, took cognizance of the importance given to freedom of speech in the Constitution and of the need for safeguarding the status and dignity of judicial institutions and they were generally accepted by the Government after having wide consultation with the State Governments, Union Territory Administrations, and the other stakeholders.

After all the recommendations and deliberations, the Contempt of Courts Act, 1971 (70 of 1971) came to be enacted, which repealed and replaced the Act of 1952.The Contempt of Courts Act, 1971 inter alia categorizes Contempt in two categories i.e. Civil Contempt [1]and Criminal Contempt[2].

However, there has been no definition or explanation with regard to the meaning of terms such as 'scandalizing the court', what 'prejudices any judicial proceeding' and 'interferes with the administration of justice'. It is essential to note that the provisions are unexplained and open-ended, thus, leaving scope for its arbitrary and whimsical use.

Cases of Contempt of Court

The Hon'ble Courts over the years through its various judgments have established what would constitute as contempt of court. Some of the landmark cases surrounding cases of contempt of court are as follows:

E. M. Sankaran Namboodripad vs. T. Narayanan Nambiar

The appellant, a Marxist Chief Minister of Kerala, E.M. Sankaran Namboodripad, in a press conference, stated that *"Judges are guided and dominated by class hatred, class interests and class prejudices and where the evidence is balanced between a well-dressed pot-bellied rich man and a poor ill-dressed and illiterate person the judge instinctively favors the former"*.[3] The Kerala High Court found the accused guilty of contempt. The Hon'ble Supreme Court upheld the decision of the High Court and came to the conclusion that appellant's statement was an attack upon the judges which brought dissatisfaction in the minds of people and weakened the authority of law and law courts.

In the light of today's environment, it becomes imperative to remember that acts which bring authority and administration of law into disrepute, disrespect, disregard or which offends the dignity of the court commit the offence of contempt.

[1] S. 2 (b), The Contempt of Court Act, 1971

[2] S. 2 (c), The Contempt of Court Act, 1971

[3] E.M. Sankaran Namboodripad v. T. Narayanan Nambiar, (1970) 2 SCC 325.

Brahma Prakash Sharma and Others vs. The State of Uttar Pradesh

The contemnors were not held to be guilty of contempt of court as the Supreme court was of the opinion that the whole object of contempt proceedings is to protect the authority of the court and safeguard the interest and confidence of the public in the administration of justice and not to shield the judges from any imputation or any defamatory or derogatory statements to which they may be exposed as individuals. The Supreme Court had held that to constitute the offense of Contempt of Court, *"it is not necessary to prove affirmative that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely or tends in any way to interfere with the proper administration of law*."[4]

Baradakanta Mishra vs The Registrar of Orissa High Court & another

In this case, the court explained the distinction between vilification of the judge as a judge and vilification of the judge as an individual. In case of the latter the judge is left to his private remedies which essentially mean that the judges cannot use the contempt jurisdiction for upholding their personal dignity. However, if the attack on the Judge functioning as a Judge substantially affects administration of justice, it becomes a public mischief punishable for contempt[5].

Contempt of Court and Rule of Law

The citizens of this country have reposed faith and confidence in the judiciary to deliver fearless and impartial justice which is the very foundation on which the pillar of judiciary stands. The protections given to court proceedings play an important role in securing the confidence of the people in the society in the judicial system of the country. The Court rightly observed in the *Prashant Bhushan* case that *"when the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded*."[6] And therefore, to protect and maintain the faith of people in judiciary the courts are entrusted with the power of punishing those who indulge in acts which

[4]Brahma Prakash Sharma and Others vs The State of Uttar Pradesh ,1953 SCR 1169.

[5]Baradakanta Mishra v. The Registrar of Orissa High Court &Anr., (1974) 1 SCC 374.

[6] Prashant Bhushan & Anr. Alleged Contemnor(S), (2021) 3 SCC 160.

tend to undermine the authority of judicial institutions in the eyes of general public and bring them in disrepute by scandalizing them and obstructing them from discharging their duties.

Contempt of Court and Article 19

The citizens of India have certain freedoms guaranteed by the Constitution, under Chapter III providing fundamental rights, but these freedoms are not absolute. Clauses (a) to (g) of Arts. 19(1) of the Constitution of India guarantee certain fundamental freedoms. However, the government is empowered to control, curtail and regulate the aforementioned freedoms. Accordingly, clauses (2) to (6) of Article 19 lays down the grounds and purposes for which a legislature can impose reasonable restrictions on the rights guaranteed by articles 19(1)(a) to (g).

Article 19(1)(a) of the Constitution ensures freedom of speech and expression to the citizens of this country which the Supreme Court has itself termed as the 'life blood of democracy'. This means that citizens have the right to express their views and feelings in any way. But this right comes with certain restrictions and Article 19(2) provides for these restrictions. A conscious attempt must be made to strike a balance between fundamental freedoms and the restrictions imposed. In other words, a citizen while exercising right under Article 19(1) is entitled to make a fair criticism of a judge, judiciary, and its functioning. If a citizen while exercising the rights conferred under Article 19(1) exceeds them and makes a derogatory statement which has the ability to undermine the dignity of the court and tarnish the image of judiciary which can ultimately shake the confidence of the public in the judicial fraternity then such an act would fall under the ambit of contempt of court. It is extremely important to note that the court cannot remain a mere spectator or an onlooker when it is under an attack by offenders guilty of contempt of court who use freedom of speech and expression as a cover to lower the authority of Court of Justice.

On one hand, freedom of speech ensures judicial accountability and on the other, law of contempt ensures proper administration of justice. It is important to understand that both freedom of speech and expression and the power to punish for contempt of court are extremely crucial for any democracy. It

cannot be overlooked that *bona fide* and healthy criticism is the most important ingredient for the development of democracy and therefore, the Apex Court should take all the necessary steps to protect the freedom of speech so that the true meaning of democracy is kept intact. But when the criticism has the tendency of lowering down the authority of the judge and obstruct the administration of justice, the Court has the power to punish any such act which tends to demean the value of judiciary under the Contempt of Courts Act, 1971.

Although unwarranted and irresponsible criticism undermines judicial independence; the judiciary must be mature enough to tolerate healthy and fair criticism. Therefore, an equilibrium must be maintained between these two. Keeping this in mind and realizing that there was a need to do away with the traditional and conservative approach, the Indian legislature brought in "The Contempt of Court Amendment Act, 2006". This Act made a significant change by providing in a new Section 13 (b) that states: "The courts may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide."[7] With this statutory amendment, now, defence of truth can be pleaded in contempt of court proceedings if such an assertion of fact was in the public interest and is bona fide and this surely was a great leap forward in ensuring that the power of punishing for contempt is limited to certain boundaries and restrictions.

The Prashant Bhushan Case

The Prashant Bhushan case has been the focal point of any discussion on the contempt powers of the Court in recent times. In the light of the above discussion, analyzing the first tweet made by Prashant Bhushan, the natural question that needs to be asked was whether the said tweets were made in exercise of his freedom of speech and expression guaranteed by the Constitution and made in good faith in the larger public interest or not. The hon'ble Supreme Court observed that the tweets are undoubtedly false, malicious, and scandalous and has the tendency to shake the confidence of public at large in the judiciary and undermine the dignity and authority of the

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CJI. The second part of the first tweet which states, *"at a time when he keeps the SC in lockdown mode denying citizens their fundamental rights to access justice*"[8] criticizes the CJI in his capacity as the Administrative Head of the judiciary of the country. It gives an impression to the layman that CJI has kept the Supreme Court in lockdown and has thereby denied justice to the citizens. It not only undermines the authority of the CJI but also is patently false as immediately after suspension of physical hearing the court started functioning through video conferencing some of which were even attended by Prashant Bhushan.

Insofar as the second tweet is concerned, the criticism is directed against the entire institution of the Supreme Court and the institution of the Chief justice of India. It tries to give an impression to any ordinary citizen that the Supreme Court has a particular role in destruction of Indian democracy in the last six years and the last four CJIs had a particular role in the same.

As much as Mr. Bhushan had a right to freedom of speech and expression, he also had a responsibility especially as an officer of the court who is a lawyer of 30 years standing to remain within the confines of the reasonable restrictions. He being the part of administration of justice has the utmost duty to protect the dignity of law and not indulge in an act which tends to bring disrepute to the institution. The magnanimity of the court cannot be taken for granted and thus court cannot remain as a mere onlooker in dealing with a malicious, scurrilous, and calculated attack on the very foundation of judiciary which has the tendency of damaging the trust and faith that people have reposed in the judicial system. It is pertinent for the citizens to remember that if fearless and impartial courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them. [9]

Conclusion:

The freedom of speech bestowed under the constitution and the independence of the judiciary are the two most essential elements of any democratic set up. Free expression is an absolute necessity in a democracy. The right of free

[8] Prashant Bhushan and Another, In Re… Alleged Contemnors, (2020) SCC On Line SC 646.

[9] S. Mulgaokar v. Unknown, (1978) 3 SCC 339.

expression does not however confer right to belittle others right of person and reputation and therefore right of free expression is subject to reasonable restrictions. It is pertinent to understand that the ability to criticize and ask questions is one of the most fundamental aspects in any democracy, and such an ability must not be curtailed due to apprehension of an extreme and unlikely reaction. Turning a blind eye and believing everything that that comes out from any source, be it the judiciary as well is not something which is expected out of vigilant citizens.

However, it is important for the citizens to remember that while maintenance of freedom of speech is vital, it cannot be done by demeaning or lowering the dignity of the judicial institution. It is therefore necessary to draw a line between fair criticism done in good faith and for public good and scandalous comments which tend to obstruct the administration of justice.

It is extremely important for the people to understand that the law of contempt is not to provide a cloak for judicial authorities to cover up their inadequacy nor is it to suppress healthy and constructive criticism made in good faith against them. The sole objective of contempt of court is the preservation of the administration of justice and to retain the confidence of public in judiciary because if the common people lose their faith in the courts, then the courts will also lose their meaning. And therefore, it is essential to undertake due diligence while addressing an issue of contempt and to distinguish between contempt of court and contempt of judge.

Indefinite Protests and the Right to Peaceful Assembly under International Law

Dewangi Sharma
III BA LLB

The Supreme Court of India in a recent highly controversial judgement held that the Right of the protestors to demonstrate and gather in public places can be restricted because it causes *inter alia* "inconvenience to commuters". The court also laid down a novel and unprecedented principle that protests can only be held at 'designated' places and cannot continue for 'indefinite' durations.[1] The judgement was in relation to a Special Leave Petition filed to disperse the protestors who had organised a sit-in at Shaheen Bagh in Delhi for more than a month. The court takes a very narrow and restrictive view on the right to peaceful assembly when it comments that protests, even when peaceful, cannot be staged at 'any' public space and for 'indefinite' durations, without specifying in any detail about the scope of both these restrictions.

Last year had seen a whirlpool of sustained protests around the world - such as the mushrooming of 'Block the Streets' and 'Occupy' protests organised under the Black Lives Matter movement across America[2], protests against the three Farm Laws occupying the highways on Delhi and Haryana border for more than two months. Such protests or public demonstrations that last for reasonably long durations are usually perceived as sites of nuisance and inconvenience by the general public. This becomes our point of departure to explore the legality of indefinite protests. Protests expressing their deep dissatisfaction against governments, laws, and/or status quo continuing for weeks (and months at end) have become a defining characteristic of the 21st century (such as the anti-CAA protests in 2019 and the nation-wide farmers' protests against the 3 farm laws). Such protests raise important questions concerning the extent to which the right to protest in public places can be

[1] Amit Sahni v. Commissioner of Police & Ors., CIVIL APPEAL NO. 3282 OF 2020 (Supreme Court, 07/10/2020)

[2] L. Buchanan, Q. Bui & J. K. Patel, Black Lives Matter may be the largest movement in US History, The New York Times (03/07/2020), available at https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html, last seen on 30 March 2020

enjoyed by protestors and dissenters when it seriously clashes with the rights of individuals to enjoy and use the same spaces for their day-to-day errands.

Protection available to Peaceful Assemblies

The right to protest and public demonstrations are guaranteed under Article 21 of the International Covenant on Civil and Political Rights (ICCPR)[3] and Article 20 of the Universal Declaration of Human Rights (UDHR)[4]. When read together with the Right to Participate in Public Life (Article 25, ICCPR)[5], the right to peaceful assembly can be seen as an 'essential means for individuals or groups to express their opinion on matters of public interest and to participate in public life'. The UNHRC recently released the General Comment 37 on Article 21 explaining and interpreting the details and contours of the right.[6] The General Comment recognises the relationship between the Right to Peaceful Assembly, the Right to Public Life and the Right to Freedom of Speech and Expression and notes that assemblies that seek to convey a political message have a particular value in democratic societies and should thus 'enjoy a heightened level of accommodation and protection'.[7]

In the last year, there have been protests of extreme political character challenging government laws, policies, actions around the world that have been ongoing for weeks at large, demanding their respective State authorities' attention while occupying public places in large gatherings.[8] Similar to such protests were the ones in India against the farm laws[9] and the Citizenship Amendment Bill, both of which were heavily restrained by the State, and are being led by underrepresented and minority groups - poor farmers in Punjab

[3]Article 21, International Covenant of Civil and Political Rights (ICCPR), 1976

[4]Article 20, Universal Declaration of Human Rights (UDHR), 1948

[5]Article 25, International Covenant of Civil and Political Rights (ICCPR), 1976

[6] U.N. Human Rights Committee, General Comment No. 37 on Article 21 - on Right of peaceful assembly, U.N. Doc. CCPR/C/GC/37 (July 23, 2020)

[7] Id. 32

[8] Hong Kong's Anti-Extradition Law Amendment Bill Movement, The October Revolution of Lebanon, Chilean protests also known as Estallido Social, The Turkish protests, etc.

[9]Saurabh Trivedi, Farmers mark 100 days of Protest, The Hindu (07/03/2021) available at https://www.thehindu.com/news/national/other-states/farmers-mark-century-of-protest-against-farm-laws/article34013803.ece

and Muslim women[10]. The Special Rapporteur to the Right to Peaceful Assembly and Association has once remarked that *the rights in discussion allow such groups, the youth, the indigenous people, etc. to amplify their voice; they give dispossessed people a channel for engagement and a stake in society; and above all, they allow them to thrash out their disagreements in a peaceful, even if messy manner.*[11] The International Law regime adopts a very broad and progressive understanding of the Right to peaceful assembly and protest which should be enjoyed (by individuals and groups) as far as possible without any regulation[12]. It also includes the right to hold protests in public places[13], premised on the principle that 'assembly' is also an equally legitimate use of the public place along with other uses like commercial activity or the movement of vehicles and pedestrian traffic.[14] The right available to individuals to gather and protest in public places does not conflict with other rights of commuters or anyone else who wishes to enjoy and use such places. The rights are to be construed harmoniously and balanced as per the principles of 'pluralism, broadmindedness, and tolerance'.[15] The UN Special Rapporteur also clarifies that individuals exercising their right of peaceful assembly should generally have access to all sites accessible to the public or to whatever site is important for their purpose. Therefore, no peaceful assembly would become illegal or subject to dispersal merely on the ground that it causes some inconvenience to other commuters or users of the same public place. The Spanish Constitutional Court made an important

[10]Anuj Kumar, Women playing prominent role in anti-CAA, NRC protests, The Hindu (09/02/2020), available at https://www.thehindu.com/news/national/other-states/women-playing-prominent-role-in-anti-caa-nrc-protests/article30777618.ece

[11] Statement by The United Nations Special Rapporteur On The Rights To Freedom Of Peaceful Assembly And Of Association At The Conclusion Of His Visit To The Republic Of Chile, available at http://freeassembly.net/news/statement-chile/, last seen on 30/03/ 2021

[12]Written submission prepared by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, United Nations Human rights Special Procedures, 2019, available at https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/SR_FreedomPeacefulAssembyandassociation.docx, last seen on 30/03/2021

[13]Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, available at https://undocs.org/A/HRC/31/66, last seen on 30/03/2021

[14] Supra 7

[15]Ibid.

observation in this respect that the: *'urban space is not only an area of circulation but also for participation'*[16] Similarly, the UN Human Rights Committee notes that "Where they are used to air grievances, peaceful assemblies may create opportunities for inclusive participatory and peaceful resolution of differences." [17]

While emphasizing and recognising the role of peaceful assemblies, the General Comment 37 on Art. 21 also accepts the inherent 'messiness' of protests. It observes that assemblies "can in some cases be inherently or deliberately disruptive and require a significant degree of toleration."[18] The essence of the right would be diminished if any peaceful assembly that causes any disruption in the form of loud noise, disturbance to traffic, inconvenience to commuters, etc. would cease to enjoy the protection under Art. 21. Protests are not supposed to or expected to be restrained, modest and sophisticated displays of public emotion. The Right to Peaceful Assembly would be rendered meaningless if individuals are not allowed to express their dissatisfaction, concern, disapproval, and/or anger in a way that would have any impact on their target audience. The UN Special Rapporteur also noted that the choice of location for a peaceful assembly is very crucial to the "messaging" of the Assembly.[19] Participants in a peaceful assembly must be allowed, as far as possible, to conduct assemblies within the 'sight and sound' of their target audience. Therefore, when law enforcement authoritiestry to upstage demonstrations or protests happening peacefully in public places like parks, grounds or even streets they deny the protestors access to their target audience, thus violating their right to peaceful assembly.

Restrictions and Regulation of Protests

As stated above, Art. 21 of the ICCPR envisages a social and political order where the right to peaceful assembly can be enjoyed, as far as possible, without any regulation. However, the right is not unfettered and is subject to narrowly construed, necessary and proportional restrictions in the interests of national security, public order, the protection of public health or morals, or

[16] Ibid.

[17] Supra 3

[18] Supra 3, at 44

[19]Supra 7

the protection of others' rights and freedoms. It is important to note here that any restriction should be applied in the context of a society based on democracy, the rule of law, political pluralism, and human rights, as opposed to being merely reasonable or expedient.[20] States should apply only the "least intrusive measures" and that "any restrictions should be guided by the objective of facilitating the right".[21] The General Comment also recommends doing a cost-benefit analysis to assess the detriment impact of the restriction on the right of peaceful assembly over the interest it aims to serve. It cautions against the routine and general practice of authorities to rely on vague "public order" justifications to restrict public assemblies.[22]

Thus, the General Comments makes it clear that the Right to Peaceful Assembly is a highly valued and fundamental right subject to very narrow restrictions. In the case of indefinite (peaceful) protests, the government authorities cannot restrict such protests only on the ground that they have been ongoing for more than a stipulated number of days. The authorities can, however, regulate the 'time, place, and manner' of protests on the listed grounds. However, the underlying thumb rule is that a high degree of toleration should be exercised by the State as assemblies can be inherently disruptive, messy, chaotic. Furthermore, the 'time place and manner' restrictions should not undermine the messaging of the protest.[23] In the case of the Shaheen Bagh protest, the site of the location had become the symbol of anti-majoritarian dissent by Muslim women who probably would not be able to gather at any other place and continue to express their dissent in a manner they deem fit and possible.[24] The site of the protest was thus important for the women not only symbolically but also logistically and a complete ban would undermine their protest messaging and continuity. The UN Special Rapporteur has also clarified that free flow of traffic should not take precedence over the Right to Peaceful Assembly and 'prohibition' should

[20]Ibid.

[21] Supra 3, at 37

[22] Supra 3

[23] Supra 7

[24] Rashmi Raghavan, Objection Your Honour! Amit Sahni V Commissioner Of Police & Ors, Public Law Bulletin, Vol. XVIII (2021), available at https://ilslaw.edu/wp-content/uploads/2021/02/January-2021-PLB.pdf, last seen on 30/03/2021

only be a last resort. The Inter-American Court of Human Rights has observed that the State should facilitate rerouting traffic, pedestrian, and vehicular in a certain area to accommodate the protestors.[25]The Supreme Court in the Shaheen Bagh case could have adopted or at least explored alternative less restrictive approaches where the rights of the commuters and the protestors could be balanced.

A very important aspect of the Right to Peaceful Assembly is that the States are obligated to facilitate assemblies and allow such assemblies to take place without unwarranted interference. The authorities need to enable assemblies and protests so that they can achieve their objectives by ensuring that public order is maintained and concerns of traffic, violence, etc. are properly addressed. Therefore, apart from narrowly imposing restrictions and regulations on assemblies State authorities also have a positive obligation to protect the right. Prima facie restrictive regulations that impose limitations in the form of designated places, time durations, etc. without any proper justification would fall foul of Article 21. The General Comment also provides for recommendatory practices through which States could facilitate protests, including the requirement of prior notifications provided that the notification requirements are specified in law and are not implemented in a way that stifles the right. The purpose of the notification would be to ensure better communication between law enforcement agencies and the organizers and allow the authorities to take necessary steps to facilitate the assembly.[26]

In India, there is no single legislation that clarifies the position of law in terms of requirement of prior permission from the State. As a general rule protestors are required to obtain a No-Objection Certificate from the police or at least need to inform the police before organising a protest in a public area and take their permission. The police cannot refuse to grant such permission without giving proper reasons for such refusal.[27] However, the system of prior permissions gives considerable power to the State to disallow protests on unreasonable grounds. If the protestors still decide to gather, the police would then arrest or disperse them even if the protest was peaceful and within permissible limits. Spontaneous protests thus need to depend on the

[25] Supra 7

[26] Supra 3, at 70-73

[27] Himmat Lal K Shah v Commissioner of Police Ahmedabad 1973 AIR 87

benevolence of the State even though international law makes it clear that prior permission cannot be made mandatory.

Dispersal of Peaceful Assembly

Under international human rights law, dispersal is permitted only in rare and exceptional cases such as where a peaceful assembly ceases to be peaceful or there is an imminent threat of violence or incites discrimination, hostility, violence. In case of violence being perpetrated by a few participants, law enforcement agencies should aim to remove only such violent members and use proportional measures, like targeted attacks. Dispersal may also be allowed where an assembly prevents access to essential services, such as blocking the emergency entrance to a hospital, or where interference with traffic or the economy is 'serious and sustained'. The standard of 'serious and sustained' is a relatively high standard and would mean more than instances where a highway was blocked for a few days[28] without seriously impacting the economy, access to essential services, or disproportionately restricting the access to goods. The principle of 'proportionality' and 'necessity' becomes very important when assessing the legality of indefinite protests. 'Encampments' by protestors on public roads for weeks would be subject to dispersal, however, the State should also look into other less intrusive methods before resorting to dispersal or invalidation of an assembly.

Conclusion:

It is important for the State and its agents to communicate with the protestors before they employ extreme measures of dispersal and violence. It is the State's duty under Art. 21 of the ICCPR to facilitate peaceful protests, allow them access to places as per their choice while balancing the rights of others and ensuring public order. Therefore, when the State governments impose regular S. 144 orders to prevent protests and public gatherings without giving proper and reasonable reasons, they fall foul of Art. 21.[29] Peaceful Assemblies enjoy broad protections under International Law and can only be restricted on specific, narrow, necessary and reasonable grounds. These protections do not

[28] Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich (European Court of Justice, Case C-112/00, ECR I-5659, 2003).
[29]Section 144 of the Code of Criminal Procedure (CrPC), 1973 and Article 21, Constitution of India (1950)

stand in conflict with India's domestic law which also adopts a liberal approach towards the right of citizens to protest protected under the right to freedom of speech (Art. 19)[30]. The Supreme Court of India has clarified this position in *Anuradha Bhasin v. Union of India*[31] where the court observed that the State can only use the 'least restrictive measures' to restrict freedom of speech.

In *Doe v. McKesson*, a case dealing with the extent of First Amendment protections available to organizers when a protest turns violent in the US Fifth Circuit Court, Willis J. wrote a dissenting judgement observing the role of protests in America's democracy where he pointed out that Martin Luther King's Montgomery march had 'occupied public roadways, including the full width of the bloodied Edmund Pettus Bridge' , this disruption played a crucial role in furthering the American Civil Rights movement. [32] In Himmat Lal, a judgement which the court cited to justify its order in the Shaheen Bagh matter, the Supreme Court had noted that public places are to be utilised for public assemblies and discussions as well as for movement of traffic and recreational purposes. These purposes do not stand in conflict with each other but only need to be reconciled.[33] There has been an increasing clampdown on protests around the world, especially in India, where the Central government erected fortifications, barricades, barbed wires, and nails to restrict the movement of the protesting farmers.[34] The State's response was highly disproportionate and entirely in violation of Art. 21 which imposes a duty of 'facilitating' peaceful assemblies. The imposition of blanket bans on the exercise of the right of public assembly entirely or in specific places, or at particular times is considered inherently disproportionate as all public assemblies need to be analysed in their individual context and circumstance[35]. Therefore 'indefinite protests' do not per se become subject to the State's restrictions because they have been ongoing for a long duration. When the

[30]Article 19, Constitution of India (1950)

[31]Anuradha Bhasin v. Union of India (2020) SC 1725

[32] Doe v. Mckesson, No. 17-30864 (5th Cir. 2019)

[33]Himat Lal K. Shah vs Commissioner of Police, 1973 AIR 87

[34] Farm Laws: At Delhi's borders police use concrete barriers razor wires to isolate farmers, available at https://scroll.in/latest/985706/farm-laws-at-delhis-borders-police-use-concrete-barriers-razor-wires-to-isolate-farmers last seen on 30/03/2021

[35]Supra 3, at 38

International Law is read together with the domestically protected right to protest, the heavy-handed response of Central and state governments to various protests across the country raises serious concerns over their legality and validity under law.

How much criticism is too much criticism?

Manasi Barve &
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With increasing opportunities for the citizens to express their views and opinions regarding the judiciary, a threat to the Court's authority is rising. Which is why contempt of Court has lately been a blazing issue.

Constructive criticism is an important ingredient for the development of democracy and the Supreme Court has the duty to protect this free speech. Where it exceeds the line of decency, it poses a threat to the authority of the Court and ultimately, justice. The question here is-where to draw the line?

The authors in this article, specifically focus on the criminal contempt power that the Courts hold to punish for scandalising and lowering its authority, with respect to the major trends it follows while doing so.

Introduction

The literal meaning of the word contempt is disgrace or disobedience. Contempt of Court can be defined as disrespect of an order of the Court, interference with the administration of justice, or any act that may pose a threat to the authority of the Court. It is quasi-criminal in nature.[1]

Article 129 and 215 of the Constitution of India deems the Supreme Court and High Courts respectively as 'Court of record' under which they hold the power to punish for the contempt of itself. The Supreme Court also has the power to investigate and punish for contempt under Article 142 of the Constitution[2]. These powers are broadly defined and thus, leave a large room for the Court to interpret the statute and to apply its power of discretion.

Civil Contempt is the deliberate disobedience to any judgment, order, writ, or other processes of a Court. Whereas, criminal contempt is an act that threatens the authority of the Court or interferes in the administration of justice.

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[1] J. R. Parashar v. Prashant Bhushan, (2001) 6 SCC 735.

[2] Delhi Judicial Service v. State of Gujarat and Ors, 1991 SCC (4) 406.

Criminal contempt has been defined as under:

Section 2 (c)[3] "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—

- scandalises or tends to scandalise, or lowers or tends to lower the authority of, any Court; or
- prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

In contempt cases, the judges themselves are the petitioners, judges, and executioners, and begin with the presumption of guilt of the accused.

History of contempt law in India

Like all major laws, contempt law in India too is an offspring of the British administration of justice. During the British Era, the Supreme Court and High Courts were made the Court of record and hence, they had the same powers as the King's Court of England, regarding punishment for contempt.

The first Indian statute on contempt law was the Contempt of Courts Act, 1926. It was enacted to define and limit the powers of certain Courts in punishing for contempt.[4] This act has seen several changes since independence to match with India's democratic spirit. A significant change was brought in by the Sanyal Committee report in 1963 which led to the enactment of the Contempt of Courts Act, 1971.[5] This was the first act to define contempt and separate it into civil and criminal. The latest amendment done under the Act was in 2006, where the defence of truth was added under Section 13.[6]

[3] S. 2 (C), The Contempt of Courts Act, 1971.
[4]*Contempt of Court,* Shodhganga, available at http://hdl.handle.net/10603/26004, last seen on 21/03/2021.
[5]Ministry of Law, Government of India, *Report of the Committee on Contempt of Courts*, 1963, available at: https://indianculture.gov.in/report-committee-contempt-Courts-1963, last seen at 22/03/2021.
[6] S. 13, The Contempt of Courts Act, 1971.

Major judicial trends in contempt law in India:

- **The rationale behind the punishment of scandalising:**

  Contempt jurisdiction keeps the administration of justice unpolluted.[7] In *re Arundhati Roy*[8], the booker prize winner criticized a judgment of the Court in her book for which contempt proceedings were initiated against her. She in her reply affidavit questioned the judiciary's willingness to issue notice on "an absurd, despicable, entirely unsubstantiated petition against her" whilst exhibiting a lack of willingness to entertain a case concerning "national security and corruption in the highest places". While adjudicating these charges, the Supreme Court held that - "When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the Court by creating distrust in its working, the edifice of the judicial system gets eroded."

  The Court has through numerous judgments reiterated the need to regulate criticism to strike out any such act which threatens or challenges the authority of the Courts. The Court's verdict must be respected not necessarily by the authority of its reason but always by reason of its authority. Any conduct designed to or suggestive of challenging this crucial balance of power devised by the Constitution is an attempt to subvert the rule of law and an invitation to anarchy.[9]

  In various cases, the Court has opined that it shouldn't use its power to punish for contempt unless there is 'real prejudice' which can be regarded as 'substantial interference' with the due course of justice.[10] But by countering its own view, the Court in *E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar*[11] observed, "*The law punishes not only acts which do in fact interfere with the Courts and administration of justice but also those which have that 'tendency', that is to say, 'likely to produce' a particular result*."

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[7] Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895.

[8] In re Arundhati Roy, (2003) 3 SCC 349.

[9] In Re: Sanjiv Datta and Ors. v. Unknown, (1995) 3 SCC 619.

[10] Rupesh Aggarwal, *Scandalizing the fallible institution': a critical analysis of the varied judicial approach on criminal contempt,* 3.1 Indian Journal of Law and Public Policy, available at:http://docs.manupatra.in/newsline/articles/Upload/ADE55651-0B73-4CB6-929F-3EBF5392E8D4.1-G__Contempt%20of%20Court.pdf , last seen on 22/03/2021.

[11] AIR 1970 SC 2015.

- **Defamation or contempt?**

  The fact that a statement is defamatory so far as the Judge is concerned does not necessarily make it contempt. When attacks or comments are made on a Judge or Judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what really amounts to Contempt of Court.[12]

  The Supreme Court, however, has expressed the view that libel and criminal contempt for scandalising are not mutually exclusive, and when an allegation made against a judge amount to libel, it can at the same time constitute criminal contempt.[13]

- **Not every criticism amounts to contempt-**

  Under Section 5 of the 1971 Act, fair criticism is considered as a defence for contempt proceedings. Courts are subject to the laws and are not above criticism. Healthy and constructive criticisms are tools to augment its forensic tools for improving its functions.[14]

  In *Rama Dayal Markarha v State of Madhya Pradesh*[15], the Court opined- *"Fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. A fair and reasonable comment would even be helpful to the Judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work."*

  In the case of *PN Duda*[16], the Court observed, "*even allegation of partiality and bias on the part of judges may not amount to contempt so long as it is free from the taint of 'scurrilous abuse' and can be considered to be 'fair comment'*." Although this idea seems fair, the term 'scurrilous abuse' can be extremely subjective and thus, is under the threat of being misinterpreted or bent as per convenience.

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[12] Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.

[13] S Pal, *The Law of Contempt,* 4.195 (5th ed., 2012).

[14] Dr. D. C. Saxena v. Hon'ble Chief Justice of India, 1997 Indlaw SC 1788.

[15] AIR 1978 SC 921.

[16] P. N. Duda v. P. Shiv Shankar and Others, 1988 AIR 1208.

Freedom of Speech and Contempt-

The conflict between the fundamental right to free speech and expression guaranteed under Article 19[1] [a][17] and the Constitutional power of the Courts to punish for contempt of itself has always been a controversial topic. Freedom of speech and expression is the "lifeblood of democracy" but this freedom is subject to certain qualifications.[18]

With regard to the interaction between the fundamental right of free speech and the law of contempt, Ashok Kumar Ganguly, J. speaking for a Division Bench of the Calcutta High Court observed: *"Therefore, two facets of public interests are at play. One is the public interest in ensuring fair and unimpeded administration of justice so that people's faith in the system is sustained and the other is the maintaining of public interest in effective exercise of the freedom of speech and expression. The Court's duty is to ensure that the conflict between the two does not become too acute. So, a balance has to be struck and such balance must rest on a subtle understanding of and a mutual respect for each other's needs."*[19]

In the recent case of *Re: Prashant Bhushan*[20], where a Supreme Court lawyer in his two tweets criticized the office of the CJI alleging the last four CJI's to have inflicted harm on the democracy, the Court propounded: "*while it was not possible to control the thinking process and words operating in the mind of one individual, when it came to expression, it has to be within the Constitutional limits [p. 73]… no doubt that while exercising the right of freedom of speech the fair criticism of the system is welcome and the judges cannot be hyper sensitive even when distortions and criticism overstep the limit. However, the same cannot be stretched to permit malicious and scandalous statements"*

Factors Courts generally consider while convicting for contempt:

1. **You might get away by making general statements:**

   It seems that attacking a judge or attaching motives to them is prohibited,

[17] The Constitution of India, 1950.
[18] Narmada Bachao Andolan v. Union of India, AIR 1999 SC 3345.
[19] Kallol Guha Thakurata v. Biman Basu, Chairman, Left Front, West Bengal, AIR 2010 SC 3328.
[20] In Re: Prashant Bhushan and another, AIR 2020 SC 4074.

but when a general statement is made, there is a good chance of acquittal after consideration of the context.

In a case[21] where the CJI, during his retirement speech stated, "In every High Court, there were at least four to five judges who were practically out every evening, winning and dining either at a lawyer's house or a foreign embassy and that the estimate of the number of such judges was around 90." Although the statement sounds contemptuous, one of the reasons for which the Court acquitted the respondent was that the names of the 90 judges were not mentioned.

Similarly, when Kapil Sibal commented on the integrity of judges and their failure to curb corruption in the judiciary, it was considered a fair criticism.[22] But Prashant Bhushan, in his tweets accusing the past four CJI's specifically, was found guilty of contempt.[23]

2. Your words might have a different impact if you belong to the legal fraternity:

The Court seems to interpret the statements of someone from a legal background in a different light than the ones who are outside the legal sphere.

In *Vincent Panikulangara v. V.R. Krishna Iyer*[24], the Court opined, "*There is an ocean of difference between well informed and ill-informed criticism. Those who have spent years as part of an institution may have occasion to make a thorough objective assessment of that institution. What they say regarding a matter concerning that institution should be viewed differently from a similar statement by an uninformed person*."

Kapil Sibal while addressing young lawyers questioned the integrity and morality of the judicial community. One of the justifications that the Court gave while acquitting him was that he belonged to the legal fraternity and so knew what he was speaking about.[25] When similar statements were

[21] Vishwanath v. E.S. Venkataramaih, 1990 Cr LJ 2179 (Bom).
[22] Hari Singh Nagra v. Kapil Sibal, (2010) 7 SCC 502.
[23] Supra 20.
[24] Vincent Panirulangara v. S V.R. Krishna Iyer, 1983 (2) ILR(Ker) 626.
[25] Supra 22.

made in an affidavit by Arundhati Roy, a writer with no legal background, she was charged for contempt by the Court.[26]

3. **Your conviction might depend on your audience:**

   Whether an offensive speech amounts to contempt might also depend on which ears the words fall. If the audience consists of persons whose confidence in the integrity of the judiciary is not likely to be shaken except on weighty materials, then the prospects of committal will be remote.[27]

   In *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*[28], a resolution accusing two judicial officers of impropriety was held to be contempt of Court, but they weren't convicted as it was meant to remain within the four walls of the bar association. On the contrary in *re Arundhati Roy*[29], the Court held a statement in the respondent's affidavit to be contemptuous, which was presented only to the Court.

Truth as a defence in contempt proceedings:

Section 13[30] of the 1971 Act, places truth as a defence in which the Courts may not punish the convicted contemnors. This provision leaves the Court in a tough spot. If it refuses to address the truth, a suspicion of the aspersions cast lingers in the eyes of the public. If the Court acknowledges the truth, it will effectively admit that the Court is worthy of disrepute for which it has convicted the contemnor. Both ways, the result is the erosion of the confidence of the people in the administration of justice.[31]

This defence depends on the statement being bona fide and in the public interest, however, the decision to uphold these conditions is at the perusal of the Court. A newspaper[32] was charged for contempt for publishing a statement against the then CJI, alleging bias in adjudication in commercial

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[26] Supra 10.

[27] Supra 13.

[28] Supra 12.

[29] Supra 9.

[30] Supra 6.

[31] Aashesh Singh and Isana Laisram, *A Court Beyond the Jurisdiction of Truth: Reflections in Light of the Prashant Bhushan Contempt Case* , 13 NUJS Law Review 5 (2020), available at: http://nujslawreview.org/wp-content/uploads/2020/09/13.2-Singh-Laisram-Enote.pdf , last seen on 22/03/2021.

[32] Court on its Own Motion v. M.K. Tayal and Ors, 2007 Indlaw DEL 912.

property cases so that his sons could get pecuniary benefit out of it. Even though the newspaper reports clearly suggested that the act of the judge was ultra vires, the Court declined to consider the defence of truth.

Conclusion:

"Justice is not a cloistered virtue. she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[33]

The Court has made it clear that the Contempt of Courts Act, acts as merely a guideline and the legislature has no power to edit or limit the contempt power of the Court[34] as the Court gets this unchecked and unlimited power from the Constitution. This power poses a threat of arbitrariness and may turn sideways from what the makers of the Constitution had designed it to be. The daunting part over here is that when such power is actually being used arbitrarily, the only way citizens can dissent it is via criticism. And even this remedy of the public is controlled by the judiciary.

The Court expects its criticism to be well informed and fair. Though this stance seems plausible, the non-uniformity by the Courts in deciding similar cases creates ambiguity, due to which citizens fear criticizing the Court, resulting in major impairment of justice. Although this fear acts as a good deterrent against ill-informed and malicious criticism, it comes at a greater risk of impeding the fundamental right of free speech. The problem here is not the contempt power but the way it is being extensively stretched to impart dread amongst the public.

The judges are presumed to be persons of high morality, but the fact remains that even they are not isolated from the very human nature of defending the institution they believe in, despite the occurring anomalies. There is a good chance that the judges start thinking that they are personifications of wisdom, knowledge, and intelligence; and more importantly, their word is the law and their wish is a command. Humility gradually fades from their mind and demeanour.[35] The possibility of a few judges considering themselves above

[33] Supra 16.
[34] T. Sudhakar Prasad v. Govt. Of A.P. & Ors, (2001) 1 SCC 516.
[35] Justice R. V. Raveendran, *How to be a Good Judge -Advice to New Judges*, Maharashtra Judicial Academy, available at: http://mja.gov.in/Site/Upload/GR/Title%20NO.6(As%20Per%20Workshop%20List%20title%20no6%20pdf).pdf, last seen on 23/03/2021.

the ‘general masses’ cannot be denied, and it becomes further concerning when they are given such unchecked authority. The judges need to act very discreetly while exercising the contempt power and try to have a mind as open as possible to keep the wheels of the judiciary running smoothly.

Surely, the authors agree that the authority of the Court needs to be respected, but an enforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[36] The Chinese proverb iterated in the case of *Venkatramaiah*[37] is best suitable in this scenario, *"As long as you are up-right, do not care if your shadow is crooked."*

[36] Bridges v. California, 314 U.S. 252, (1941, U.S. Supreme Court).
[37] Supra 21.

Animal Experimentation- A Crass Injustice or a Dire Necessity?

Megha Phadkay
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Introduction

As we read this, there are millions of animals including dogs, cats, monkeys, rabbits, guinea-pigs, mice, frogs, and many more animals being kept in laboratories[1]. They are used as lab equipment to run tests on, for cosmetics, drugs, household products, as well as for teaching, maintaining, and practicing the skills for medicine/veterinary professionals. These animals are subjected to monstrous levels of not only physical, but also psychological abuse. They are kept in restraint devices, and caged for years together. They are made to inhale toxic fumes, been applied harmful burning chemicals on their skins, and often witness the deaths of their own species. Some have gross genetic experiments being done on them which results in the growth of an abnormal body parts.

Incidents of animal torture

In 1971, 17 wild-born macaque monkeys from the Philippines were kept in the Institute for Behavioral Research in Silver Spring, Maryland, for researching neuroplasticity and the treatment of strokes. The facility was raided by police and was the first criminal conviction for animal cruelty of a U.S. researcher. The Silver Spring Monkeys case led to the introduction of the 1985 Animal Welfare Act in USA, which ultimately resulted in the first Animal Liberation Front cell being established in North America[2]. The journey in India, though, commenced very late.

Recently, over 42 beagles were rescued from the laboratory of a Bengaluru based pharmaceutical testing laboratory. The rescue mission was conducted by Compassion Unlimited Plus Action, a local NGO. Earlier that year, over

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[1] *Facts and Statistics about Animal Testing,* available at https://www.peta.org/issues/animals-used-for-experimentation/animals-used-experimentation-factsheets/animal-experiments-overview/, last seen on 16/04/2021

[2] Jeffrey M. Schwartz, Sharon Begley, The *Mind and the Brain: Neuroplasticity and the Power of Mental Force*, Chapter 4, 2003, available at https://publicism.info/psychology/mind/5.html, last see on 16/04/2021

156 beagles (now called Freagles) were rescued from the same laboratory.[3]

These are just the few cases that have surfaced against all the other odds. There are surely hundreds of such animals still waiting to be rescued, not only in research labs/ cosmetics/RnD departments of pharma companies, but also in the nation's top educational institutes.

For example, some years ago, the Committee for the Purpose of Control and Supervision of Experiments on Animals (CPCSEA) ordered the confiscation of 37 monkeys who had been horribly abused for years from the National Institute of Virology, Pune. There have been several cases across India in which animals have been confiscated from colleges and research centers.

Sadly, almost all the Bachelor of Medicine and Bachelor of Surgery (MBBS) and veterinary courses in India still use animal specimens to teach the students.

But people are becoming more aware. A survey done by the Department of Pharmacology, Government Medical College, Amritsar, Punjab, showed that the majority of medical students are against using animals in medical education.[4]Another study conducted by the Department of Pharmacology and Physiology, S N Institute of Pharmacy, Yavatmal, Maharashtra, found that an overwhelming majority of students feel that classroom animal experiments cause animals needless pain and suffering.[5]

History and origin of Animal experimentation

Using animals in experimentation is not new at all, but in fact goes a long way back. As per the writing, the Greeks were the first ones to document animal testing, in the 3rd and the 4th century BCE. Aristotle and Erasistratus

[3]*Freeing the Beagles of Bangaluru*, Mint, available at https://www.livemint.com/Leisure/YlTbJlNoLkYYPxxS83J6tO/156-second-chances.html, last seen on 16/04/2021

[4] Mandeep Singh Dhingra et al*, Animal Experiments and Pharmacology Teaching at Medical Schools in India: A Student's Eye View*, AATEX 11(3), 185-191, (2006) , available at http://asas.or.jp/jsaae/jsaae/aatex/11-3-6.pdf last seen on 16/04/2021

[5] SV Tembhurne and DM Sakarkar*, Alternative to Use of Live Animal in Teaching Pharmacology and Physiology in Pharmacy Undergraduate Curriculum: An Assessment of 120 Students' Views*, 1, 1, International Journal of Current research and Review, (2009), available at https://www.ijcrr.com/uploads/2274_pdf.pdf , last seen on 16/04/2021

have been known to use animals in experiments[6]. Most of the landmark experiments that we come across often have used animal experimentation as an important part of procedure. We often cite the Pavlov's dog experiment, but never question the treatment given to it or the way it was handled. The Pavlov's dogs had surgically implanted cannula to measure salivation, which was like a syringe permanently injected in their jaws. Many such experiments like Seligman's "Learned helplessness theory", electrocution experiments performed by Edison to 'justify' his theory involved exploitation of animals on a large scale.

Reasons for using animals in experiments Anatomical similarity between animals and humans make animals a perfect prototype to run the experiments on.

Given the comparatively small size and a shorter lifespan of the animals used, it is much easier to change and control the variables needed to carry out experiments. The other advantage of using animals is the cheap availability and absence of accountability. Moreover, the human body is a very complex system, and we are not even half as close to understanding it. Hence programming a human simulator is not an easy job. But with the current advancements in science and technology, we have been successful in creating artificial systems resembling certain functions of the body, which can be used as an alternative for animals.

Why animals are not the ideal prototypes

Knowing that the reactions to different medicines and their doses change as per the individual and are highly subjective, how can the results be extrapolated based on the observations done on an entirely different species?

In a systematic review reported in BMJ, it was found that therapeutic efficacy in animals often does not translate to the clinical domain[7]. The results from animal experiments cannot be applied to humans because of the biological differences between the species and because the results of animal experiments often depend on the type of animal model.

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[6] Franco NH., Animal *Experiments in Biomedical Research: A Historical Perspective*, 3 (1), Animals (Basel), (2013), 238-273, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4495509/ , last seen on 16/04/2021

[7]Perel P, Roberts I, Sena E, Wheble P, Briscoe C, Sandercock P, et al*.,* 334:197, *Comparison of treatment effects between animal experiments and clinical trials: systematic review*. BMJ (2007), available at https://www.bmj.com/content/334/7586/197 , last seen on 16/04/2021

In 20 reviews analyzing the experiments in which animals (mostly chimpanzees) are used, it was found that only in one experiment, were the animals significantly useful, and the results were unambiguous and consistent with the clinical trials[8]. No reviews existed in which the majority of animal experiments were of good methodological quality.

Even in animals, the same chemical/drug can give two extreme results in different species. For e.g., penicillin is inactive in rabbits, but it is /lethal in guinea pigs. Aspirin, which is used commonly in humans against headaches, kills cats and causes birth defects in rats, mice, guinea pigs, dogs and monkeys. Although Morphine has sedatory effects in humans, it tends to excite animals like goats, horses, and cats.

The FDA has also noted that the chances of a drug being suitable for human patients, even after it has passed all the animal and other laboratory studies, is only 8 per cent[9]. All of about 90 HIV vaccines that succeeded in animals failed in humans.[10]

Alternatives

In 2003, the Pharmacy Council of India (PCI) issued a directive to all pharmacy schools in India to use CAL software in place of classroom animal experiments. In 2003, MCI's Executive Committee concluded: "As an alternative to these tests involving animals, JIPMER, Pondicherry has developed EX-PHARM Blank CD. This CD has been specially prepared as a 100% replacement to animals used in undergraduate courses in Medicine, Pharmacology, and Veterinary Science"[11].

American College of Surgeons has approved the use of the Simulab's Trauma Man simulator as well as cadavers and other simulators such as Syn Bone's

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[8] Andrew Knight, *Systematic Reviews of Animal Experiments Demonstrate Poor Human Clinical and Toxicological Utility*, 35 ATLA, 641–59 (2007), available at https://www.researchgate.net/publication/5663429_Systematic_Reviews_of_Animal_Experiments_Demonstrate_Poor_Human_Clinical_and_Toxicological_Utility , last seen on 16/04/2021

[9] US Department of Health and Human Services, Food and Drug Administration, *Innovation or Stagnation: Challenge and Opportunity on the Critical Path to New Medicinal Products*, (2004), available at https://c-path.org/wp-content/uploads/2013/08/FDACPIReport.pdf , last seen on 15/04/2021

[10]Bailey J, *An assessment of the role of chimpanzees in AIDS vaccine research*., 36 Alternatives to Laboratory Animals ,381–428, (2008), available at https://pubmed.ncbi.nlm.nih.gov/18826331/ , last seen on 16/04/2021

[11] Pharmacy Council of India, letter to PETA India, (2008).

Synman vitro for this training. Organisation for Economic Co-operation and Development (OECD), in its published test guidelines (TG) for the testing of chemicals, has approved Corrositex® (OECD TG 435), Epi Derm TM and EPISKINTM (OECD TG 431) for testing skin and eye irritation and corrosivity. OECD TG 432 gave approval to the in vitro 3T3 NRU phototoxicity test, and OECD TG 428 gave approval to in vitro dermal absorption methods[12].

The Hurel biochip can be used to imitate human internal organs like stomach, kidney, and liver.[13] Harvard researchers have developed a human tissue–based "lung-on-a-chip" that can "breathe" and be used to estimate the effects of inhaled chemicals on the human respiratory system[14].

There are three main advantages of such methods. The first is the millions of animals which you save from the cruel hands of such laboratories. The second is the increased probability of getting the same results in humans as they do not t rely on model systems of animals which are not same as that of humans. The third reason is the reduced monetary investment, as such alternatives are a one-time investment, and can be used in multiple experiments.

Animal welfare perspective.

The welfare of the animal should be judged in terms of not only its physical behavior (reproduction behavior) but also its psychological state. This is because physiological parameters such as plasma cortisol, and heart rate, etc. show same fluctuations both by positive as well as negative experiences. Also, an animal might not visibly show signs of mental abuse due to genetics and environment. Hence a 'feelings-based' approach should be employed,

[12] National Institute of Environmental Health Sciences, National Institutes of Health, *Availability of the ICCVAM Test Method Evaluation Report and Final Background Review Document*, Federal Register 73(227), 71003–4 , (2008) , available at https://ntp.niehs.nih.gov/iccvam/docs/annrpt/biennialrpt2010-508r.pdf , last seen on 16/04/2021

[13] '*Biochip' can replace animals in drug trials*, Cordis, available at https://cordis.europa.eu/article/id/24496-biochip-could-replace-animals-in-drug-trials , last seen on 16/04/2021

[14]*Living, Breathing Human Lung on a Chip A potential drug-testing alternative*, Harvard, available at https://hms.harvard.edu/news/living-breathing-human-lung-chip , last seen on 16/04/2021

which judges the welfare based on the proximity of the animal's current environment, to its natural surroundings and behavior[15].

Constitutional and Legal provisions in India

This was the first law enacted by the parliament to ensure animal welfare, (though exceptions were being made for the use in food and experiments) was the Prevention of Cruelty to Animals Act (PCA Act), 1960[16]:

The committees set up by the Government under this law: -

1. Animal Welfare Board of India (AWBI)[17]
2. Committee for the purpose of Control & Supervision of experiments on Animals (CPCSEA)[18]
3. Institutional Animal Ethics Committee (IAEC)[19] (for small lab animals).

In 2011, the University Grants Commission issued guidelines to ban dissection of and experimentation on live animals in zoology and life science courses for undergraduate and well as post-graduate levels[20]. The Pharmacy Council of India too, published guidelines establishing ban on the use of animals in experiments and dissection in the graduation level, and a general ban on the use of animals irrespective of the purpose[21].

In May 2014, the Ministry added Rule 148-C to The Drugs and Cosmetics Rules, 1945, which bans the use of animal for the testing of cosmetics in India. [22]

Soon afterwards, through Drugs and Cosmetics (Fifth Amendment) Rules,

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[15] Hewson C. J., *What is animal welfare? Common definitions and their practical consequences*., 44 Can. Vet. J., 496–499, (2003), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC340178/ , last seen on 16/04/2021

[16] Prevention of Cruelty to Animals Act, 1960

[17] Ibid., at S.4

[18] Ibid., at S. 15(1), Chapter 4

[19] Rule 13, Breeding of and Experiments on Animals (Control and Supervision) Rules 1998

[20] University Grants Commission, New Delhi ,*Guidelines for discontinuation of dissection and animal experimentation in Zoology/Life Sciences in phased manner*, (2011), available at https://www.ugc.ac.in/pdfnews/6686154_guideline.pdf , last seen on 16/04/2021

[21] Pharmacy Council of India, Guidelines regarding the use of animals in various areas like Pharmacy, Zoology, Veterinary, Medicine, across India, 10-1 (2012), available at https://www.pci.nic.in/Circulars/Animal_For_Dissections.pdf , last seen on 16/04/2021

[22] Rule 148-C, Drugs and Cosmetics Rules, 1945

2014**,** Rule 135-B was added, which banned the import of any cosmetic that has been tested on animals, in India[23].

In 2014, India, being the second nation after Israel, banned the use of animals in testing of household products (including soaps and detergents)[24].

In the case of *Animal Welfare Board of India v. Nagaraja and Ors*[25]and *Narayan Dutt Bhatt vs. Union of India*[26], the Supreme Court gave legal personhood to animals, and extended the rights of a living person to the animal kingdom. In the case of *Karnail Singh and others v State of Haryana*[27], the Punjab and Haryana High Court recognized all animals in the animal kingdom, including avian and aquatic species, as legal entities.

Recently, the old army horses of the ministries of Defense and social welfare, Justice and empowerment, and the Andhra Pradesh government were sold by them to some serum vaccine firms, where they were exploited and ultimately had a painful death. The Supreme Court has issued legal show-cause notices to these ministries, prodding them to specify the reasons for this sale.

Through the lens of Animal welfare

To gauge whether the process is just and fair with respect to the animals being used, the following indicators can be used; - longevity, health, behavior, physiology, immunity, reproduction, expressions.

Principles of animal welfare contain the chief 5 freedoms [28]

1. Freedom from thirst and hunger
2. Freedom from discomfort
3. Freedom from pain, injury, and disease

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[23]Drugs and Cosmetics (Fifth Amendment) Rules, 1945

[24]*Animal testing on soaps and detergents banned in India: Some important facts you should know*, India Today, available at https://www.indiatoday.in/education-today/gk-current-affairs/story/animal-testing-on-soaps-and-detergents-banned-in-india-318987-2016-04-20 , last seen on 16/04/2021

[25]Animal Welfare Board of India vs. A. Nagaraja & Ors., Civil Appeal No. 5387 of 2014

[26] Narayan Dutt Bhatt V. Union of India And Others, Writ Petition (Pil) No. 43 of 2014

[27] Karnail Singh and others v State of Haryana, 2019 CRR-533-2013

[28] Food And Agriculture Organization of The United Nations, *Legislative and regulatory options for animal welfare*, ISSN 1014-6679, 6, (2010), available at http://www.fao.org/3/i1907e/i1907e00.pdf , last seen on 16/04/2021

4. Freedom to express normal behavior (sufficient space, company of own kind)
5. Freedom from fear and distress

- The three R's

  As a guideline for practicing and ensuring animal welfare, the 3 R approach was given by WMS Russel and RL Burch[29], which was later expanded into a 5 R approach.

  1. Replacement – methods which avoid or replace the use of animals
  2. Reduction- to obtain comparable levels of information using fewer animals
  3. Refinement-use of methods that minimize potential pain/ suffering/distress
  4. Rehabilitation
  5. Reuse-after completion of an experiment, the same data sets and statistical findings can be reused for other experiments, if relevant.

Loopholes in the current Indian legislation: One of the major repercussions of accepting funds (in the form of donation/contribution/subscriptions /bequest/gifts) by individuals or local authority[30], by the Committee for control and supervision of experiments on animals, is the dominance of such people on the decisions taken by the committee.

In the Rules[31] and Guidelines[32], overcrowding, lack of hygiene, physical injury, starvation, unethical handling, etc., are stated as the only reasons for the trauma suffered by the animals. Psychological traumas are completely ignored. One of the other major reasons of this trauma is the lack of social interaction, which the animals are accustomed to, in the wild. This prerequisite of keeping the animals with their own kind resembling their natural habitat and social conditions is not stated in the rules.

The penalties stated in the act for not following the rules are too less

[29]WMS Russel, RL Burch, *The Principles of Humane Experimental Technique*, 1959, available at https://caat.jhsph.edu/principles/the-principles-of-humane-experimental-technique , last seen on 16/04/2021
[30] Supra 15 at S. 8
[31] The Breeding of and Experiments on Animals (Control and Supervision) Rules, 1998
[32] Ministry of Environment and Forests*, Guidelines on The Regulation of Scientific Experiments On Animals*, (2007)

considering the given times, and the corporations involved. If the penalty is too less, the corporations will not think twice before breaking the rules and carrying out illegal procedures.

4. The rules do not t state anything on the surveillance, and the finding out of such cases. The cases are unearthed by NGOs or citizens; hence it is not a foolproof system of check. There should be body having the sole function of unearthing such crimes.

Conclusion:

There is a difference between doing experiments scientifically in ethical conditions and abusing animals. Before granting a license to the business, the questions should be asked- 'Are the 5 R/s being followed?', 'Are all the parameters of animal welfare satisfied?', 'Are the five freedoms of animals ensured? If the answer is yes to all the three questions, then, and only then should the permission be given.

Many-a-times, researchers don't publish the results of failed tests. This selective representation of data clouds the people's perspective, and ultimately creates a subconscious bias. Hence there should be a compulsion to publish results of the experiments irrespective of the outcomes, in order to create transparency between scientists and lay-man.

There is a dire need to create an extensive database of the animals used for experimentation. India has no such comprehensive list and hence it is very difficult to estimate the number of animals being exploited. Thorough recording and documenting the use of animals is the first step towards regulating it. Taking these necessary measures in a timely manner will certainly go a long way.

Lakshadweep - An Arbitrary Administrative Whip

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I B.A .LL.B

The islands of Lakshadweep which until now were a place for retreats and enjoyment have now grabbed the attention of the entire country. Located off the Malabar coast in the Arabian Sea, Lakshadweep is a relatively small archipelago with 36 islands, less than 10 percent of them being inhabited. According to the Census[1] 2011 More than 93% of the indigenous population are practicing Muslims. The Central Government has for long tried to have deep inroads into the region and the new Administrator has been helming the islands into unchartered territories bringing in a number of law-and-order reforms. The BJP plans to use these laws to try and bring an ideological saffronisation of the islands especially given the demographical make up.

There have been multiple changes proposed by the Administrator Praful Patel, which have been met with stiff opposition by the indigenous inhabitants, the Opposition, ex- civil servants[2] and people even from within the BJP itself including the Party Chief. There have been hunger strikes and even underwater protests have been carried out. This is concerning because the Administration hasn't even consulted the locally elected politicians of the region. The residents are of the opinion that these proposals hurt not only their livelihood culture but also disturb the fragile ecology of the Islands.

This piece tries to analyze the laws introduced in the Union Territory, its effects on the community, possible motives and the legal framework surrounding these laws by reading the various articles and provisions of the Constitution and a landmark case law.

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[1]Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, Govt of India.

[2]Samyak Pandey, **Lakshadweep** Draft Laws disturbing, against ethos of the island, The Print , 5/6/2021 available at https://theprint.in/india/lakshadweep-draft-laws-disturbing-against-ethos-of-islands-ex-civil-servants-to-pm last seen on 28/6/21.

Laws Introduced

Draft Lakshadweep Development Authority Regulation 2021[3]

This regulation is the most controversial one which allows the administration to acquire land belonging to the residents in order to carry out infrastructure advancements like building highways, railways. According to the new laws, the administration can have a draft plan of any area and can alter, acquire, change it regardless of whether the area is populated or not, the locals would simply be relocated to anyplace the Administration desires. The administration has come up with land laws bestowing all the powers upon themselves to categorize the land as a green zone coastal region which have to be followed. The residents feel that it is unnecessary to construct roads as wide as 15 m in the name of development since these islands are sparsely populated, with small sizes where even the biggest one has an area of 4.9sq km[4] . The inherent rights of the people include a right to life, liberty and property, in such a scenario the residents would always have to live in fear of their property being taken over by the Government. The LDAR[5] is completely silent on the rights of the citizens, it severely takes away the rights to ownership of the indigenous people without being concerned with the rehabilitation of the people so displaced. "The residents fear large infrastructure and tourism projects can destabilize the ecology, and that the notification gives powers to take away landholdings of ST residents[6] . "

Lakshadweep has an Exclusive Economic Zone of 4.02 lakh sq. km, the area of the sea over which a nation has exclusive rights to exploit and use marine resources yet the Administration callously wants to experiment with the fragile ecology of the littoral islands. The land ownership laws have been changed in a forceful attempt to strip the people of ownership rights over their land. With the new law coming into force full ownership status would be lost

[3] Draft Lakshadweep Development Authority Regulation, 2021.

[4] S. Anandan, Widespread resentment in Lakshadweep over a slew of Bad law proposals, The Hindu 24/5/2021 available on https://www.thehindu.com/news/national/kerala/widespread-resentment-in-lakshadweep-over-a-slew-of-bad-law-proposals last seen on 21/6/2021.

[5]Supra note 1.

[6] Vishnu Varma, Explained Lakshadweep Draft Laws, The Indian Express, 2/6/ 2021. Available athttps://indianexpress.com/article/explained/explained-why-lakshadweep-administration-proposals-have-upset-localslast seen on 29/6/2021.

forever, instead the locals would now have to get an NOC towards renewing tier land title every 3 years, default of which will attract a penalty of Rs 2 lakh and a fine of Rs20,000 per day of delay until the NOC is obtained.

These draconian laws send a clear message that the locals have to fall in line with the Government's local and national outlook and act in conformity with it.

Prevention of Anti-Social Activities Regulation

Also known as the Anti- Goonda Act, it is a law under which the Administrator can jail individuals for upto one year without trial. According to the data of the National Crime Records Bureau, the island has the lowest crime rate in the entire country, with the least heinous crimes being committed. Thereby raising questions regarding its necessity after all. "The Draft also contemplates preventive detention by Section 3. Detention based on vague, nonexistent irrelevant charges are sought to be validated by Section 6"[7]. Such laws can easily be abused by the authorities to silence the outcries of the citizens. Hence, the Prevention of Anti-Social Activities Regulation[8] is symbolic of crushing dissent across the country[9] [10]. The people who had participated in the anti CAA, NRC laws are being arrested now and there is also an outcry of excessive police control over the opposition and the protestors. This is a clear attempt to intimidate the people of Lakshadweep.

Panchayat Regulation, 2021

The Panchayat Regulation, 2021[11]. Such a move is especially alarming given that the Panchayats are the only democratically elected bodies present and any attempt to curtail their functions and powers is an attack on the Union Territory's democratic character. The Regulations also propose to take away the legislative, administrative and financial powers of the Panchayats a clear

[7]Kaleeshwaram Raj, Lakshadweep: When the law unsettles everything, The New Indian Express 6/7/2021 available at https://www.newindianexpress.com/opinions/2021/jul/06/lakshadweep-when-the-law-unsettles-everything-2325961.html last seen on 18 /7 / 2021.
[8] Prevention of Anti-Social Activities Regulation, 2021.
[9]Moshumi Das Gupta, 3 Lakshadweep Draft Laws that have triggered controversy, The Print, 28/5/2021 available at theprint.in/india/these-are-the-3-lakshadweep-draft-laws-that-have-triggered-controversy last seen on 29/6/2021.
[10]Tarushi Aswani, This is BJP's Patent Style, The Wire, 19/6/2021 available on https://thewire.in/rights/lakshadweep-bjp-land-reform-jammu-kashmir last seen on 24/6/2021.
[11] Draft Lakshadweep Panchayat Regulation, 2021.

violation of their Constitutionally Guaranteed rights. There have also been talks to take away the powers related to agriculture, animal husbandry, health and education[12]. The Regulations say that anyone with over two children is not eligible to be a member. These orders and draft bills are just 'development designs' according to Praful Patel who wishes to give a complete makeover, an overhaul to the islands and its people so that Lakshadweep becomes a luxury tourist destination.

Animal Preservation Regulation, 2021

The Administration has come up with Animal Preservation Regulation, 2021[13], also known as laws to ban beef, cow slaughter, slaughter of calves, bulls. This is also a matter of contention as an over whelming majority of the people, over 90 percent, are Muslims who have different religious views and tastes and preferences and feel like their rights and liberties are being restricted. While one provision allows for random inspection of any place suspected to have beef , the other mandates for a jail term from anywhere between 10 years to lifetime for slaughter , storage , consumption of beef and a third one makes it clear that the Act cannot be challenged in a court of law[14]. The islands where until very recently liquor was prohibited are now witnessing the Administration remove all restrictions and allow open sale of liquor much to the displeasure of the locals. It is also bewildering why the Government would allow the states of Goa and the North East to continue with their food and cultural practices but would not provide the same protections to the people of Lakshadweep.

Indian Constitution and Definitions

According to the census 2011, the total population of the Scheduled tribes is about 10.43 crore which accounts for 8.6% of the total population of the country. In India, Lakshadweep has the highest population of Scheduled Tribes[15] followed by Mizoram, Nagaland and Meghalaya. In order to safeguard the rights of the Scheduled Castes and Scheduled Tribes, the Constitution has recognized tribes under Fifth Schedule [16].

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[12] Supra note 7.

[13] Animal Preservation Regulation, 2021.

[14] Supra note 7

[15] Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, Govt of India.

[16] Schedule 5, the Constitution of India.

Article 366[17] defines Scheduled Tribes as "such tribes or tribal communities, or parts of or groups within such tribes or tribal communities as are deemed under Article 342[18] to be Scheduled Tribes for the purposes within this constitution". According to Article 342[19], "The President may, after consultation with the governor of the state Union Territory, specify tribes of the particular region as Scheduled Tribes. The Parliament by law may include or exclude scheduled tribes, or parts or groups within them as a tribe within the List of Scheduled Tribes."

The Ministry of Tribal[20] affairs are responsible for the overall development of the Tribals in India. It was set up in 1999, in order to boost the socio-economic development of the Tribal Communities who are the most underprivileged in the Indian society.

Self-Governance in Scheduled Areas

The Sixth[21] and Seventh[22] Schedule of the Indian Constitution recognize the distinctive features of tribes of Peninsula and North- East India, providing for autonomy in the administration of these areas to the Autonomous District Councils and the Regional Councils in order to make laws over the matters of land, forests, inheritance, indigenous customs and traditions of the tribals. The ADCs carry out legislative, executive and judicial functions. Article 371 - A[23] guarantees that no Central law pertaining to the land and its resources applies to Nagaland unless the Assembly ratifies it. These protections were provided to enable states to protect, promote their culture and tradition and the same holds importance in the case of Lakshadweep too which is predominantly a Tribal area.

The Indian Government had introduced the Panchayats (Extension to Scheduled Areas) Act, 1996[24] for ensuring self-governance through the Gram

[17] Art .366, the Constitution of India.

[18] Art. 342, the Constitution of India.

[19] Supra note 14

[20] The Ministry of Tribal Affairs, available at https://tribal.nic.in/ last checked on 30/6/2021.

[21]Schedule 6, the Constitution of India.

[22]Schedule 7, the Constitution of India.

[23] Art.371A, the Constitution of India.

[24]Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996, No. 40, Acts of Parliament, 1996 (India).

Sabhas to the people living in the scheduled areas of India as prescribed under Schedule Five[25]. The scheduled areas were not covered under the Panchayati Raj Act, 73rd Constitutional Act[26] as provided in part 9 of the Constitution. Land Acquisition in PESA areas has laid down a detailed, exhaustive procedure which is essential to be followed in case there is any acquisition of Tribal Land. Forest Rights Act, 2006 [27], was implemented in order to give tribals rights over their land in the forests and allow them to carry out activities therein, also providing families already having rights with legal titles to them.

The framers of the Constitution had laid down these Schedules in order to protect the Tribals and the minorities. The ADCs, Panchayats were an instrument to express the policy decisions of the Tribal Communities. In spite of numerous provisions under schedule 5 and 6, the Government has not provided any safeguards to the people and is instead interested in furthering its own agenda.

International Laws

There have been major developments internationally too in this regard. According to the Declaration on the Rights of Indigenous Peoples, 2006[28] "Indigenous peoples have a right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations[29], the Universal Declaration of Human rights and International human rights law. In New Zealand, Canada, The United States of America the national governments have recognized indigenous land and resource rights from an early date. They have even set up courts and tribunals to adjudicate on these issues. In the US the indigenous can have their own laws and provisions within the reservations.

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[25] Supra note 5

[26] Panchayati Raj Act ,1993

[27] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2, Acts of Parliament, 2006 (India).

[28] United Nations Declaration on the Rights of Indigenous Peoples (2006), United Nations. available on https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html last seen on 30/6/2021.

[29] Charter of the United Nations, 24 October 1945, 1 UNTS XVI available on https://www.un.org/en/about-us/un-charter last seen on 30/6/2021.

Case Law

The *Samatha* Judgement[30] delivered by the Supreme Court is a landmark case in this field. The Andhra Pradesh State Government had decided to hand over tribal land from Scheduled Areas to mining corporations in contravention of the Fifth Schedule[31] of the Constitution. The Supreme Court announced a historic verdict which declared null and void the transfer of land under Scheduled Areas for private mining and upheld the Forest Conservation Act, 1980[32] which prohibits mining in reserved areas.

What is noteworthy is that it was the NDA Government which was in power back then. The Attorney General had opined for a change in the law in order to make it easier for the corporations to carry out nonagricultural activities in the reserved areas. It seems to be very clear that the Government is once again on a full drive mode. It wants to send out a clear message that it will always place its priorities first even if that means some unpopular, criticism worthy laws are framed. Many a times having no direction, implemented hastily with little remorse for all the wrongdoings in the way.

Conclusion:

Although these infrastructure development projects are carried out in the name of industrialization, modern development, history has repeatedly shown us how often these innocuous projects which promise development quickly turn into devastating ones having a disastrous effect on the fragile ecosystem of the region. Such infrastructure projects cannot be allowed at the cost of our forests, waters and animals, many of them endangered. The indigenous are as connected to the land and it forms an important part of their relationship. The culture and identity of the people can be preserved by ensuring their control over land and natural resources as these to a large extent determine the lifestyle and culture of the indigenous. To suggest such a course of action would be to pay no heed to their demands and concerns. We cannot harm one in order to try and bring more growth to the other. The minorities of the country look towards the Government as the protector and defender of their Constitutional rights, it doesn't behave a government of this stature well, one which has an absolute majority in the Parliament, if it cannot safeguard the interests of its minorities. After all the Government of India is the Government for all of India.

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[30] Samantha V. State of Andhra Pradesh and Ors (1997) Appeal (civil), Case No. 4601- 02

[31] Supra note 6.

[1]See section 6, EPF & MPF Act, 1952

Liquidator's Role in the Payment of Employee Benefit Funds

Prachi Bhatia;
III LLB

Introduction

A major repercussion of bankruptcy looms upon the heads of employees, due to their unpaid salaries and non-reimbursement from various funds created for their benefit. For the employees of the company, it is an end to their only source of livelihood and embarkation on a difficult journey of recovery from a failed giant. The law of insolvency and bankruptcy- Insolvency and Bankruptcy Code, 2016 (Code) being considerate to these apprehensions, provided various provisions to protect the interests of such employees. The law is crystal clear on matters relating to the payment of the salaries but hazed when it comes to payment of provident and pension funds. Further, adding more to the translucency, are the conflicting judgements. These funds are created as a social security to employees for their retirement. A part from the employee's salary is deducted and an equivalent amount is deposited by the employers towards the funds.[1] The problem arises when the employer does not deposit or fails to deposit such amount in the account of Employees Provident Fund Organization ("EPFO") or Pension Fund Organization ("PFO"). This article aims to discover the role of the liquidator in the incidence of liquidation; where the employer has failed to deposit the requisite amounts towards the employee benefit funds.

Liquidation under IBC

The Code provides two ways to help creditors recover the amount advanced by them to a corporate debtor who has failed to fulfill its payment obligation- one is Corporate Insolvency Resolution Process ("CIRP") and the second, liquidation. CIRP precedes liquidation. CIRP is the process similar to CPR, an attempt to resuscitate the Corporate Debtor ("CD") and continue its operations as a going concern. When the attempt of revival fails, the process of liquidation commences. In the liquidation process, the assets of the debtor are sold off to satisfy the claims of creditors. All the proceeds from the sale

[1]See section 6, EPF & MPF Act, 1952

are distributed amongst various classes of creditors as per the waterfall mechanism provided in sec 53.[2] The Waterfall mechanism is the chronology of the satisfaction of the claims i.e., whose debts will be satisfied first. One of the categories of creditors is workmen and employees. The Code differentiates between two categories of persons: workmen and employees. For the insolvency process, both employees and workmen qualify as operational creditors (OCs).[3] The definition of 'workmen' is borrowed from the Industrial Dispute Act,1947.[4] However, the Code does not provide any definition for the term 'workmen dues' which is the epicenter of the problem. The Code by not defining workmen dues has created reliance on the Companies Act, 2013. The Code's section in its explanatory clause directs to take aid of sec 326 of Companies Act definition for the purpose of the workmen dues.[5] The scope of definition of workmen dues is extensive, and includes various dues such as all accrued holiday remuneration, funds etc. In the waterfall mechanism the workmen dues for the 24 months are held to be at par with the secured creditors. The first to reach the waterfall is the accumulation of assets.

Liquidation Estate

Sec 35(1)(b) empowers a liquidator to take over the assets of the CD. These accumulated assets of CD are called Liquidation estate. The liquidator holds no power over the assets owned by a third party.[6] Sec 36 lists down all the assets which will form part of the estate and sub sec 4 provides for the excluded assets. Sec 36(4)(a)(iii) excludes all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund from the liquidation estate and classifies as a third-party asset. Thereby denoting such dues as not the assets of the CD but assets of workmen and employees (third party assets) in possession of CD. This possession is consequently transferred to the liquidator with the onset of liquidation.

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[2]See sec 53, Insolvency and Bankruptcy Code, 2016 ("IBC")

[3]Ritesh Kavdia and Shweta Vashishtha, "Employees of Distressed Companies," in *Insolvency and Bankruptcy Code- A Miscellany of Perspectives*, https://www.ibbi.gov.in/, Insolvency and Bankruptcy Board of India, 2019, pp. 89-94

[4] See sec 2(s), Industrial Dispute Act, 1947

[5] See explanation sec 53, IBC

[6]See explanation sec 18, IBC

Glimpse into the Previous regime

Sec 326 of the Companies Act, 2013 provides for overriding preferential payments. The settlement of dues during liquidation were governed by this provision prior to IBC. When it comes to IBC, a significant deviation has been given, excluding all the sums of due to any workman from provident fund/pension fund/gratuity fund. Under the earlier regime, when a company was wound up, workmen dues (including funds) were treated at par with secured creditors. To establish that provident fund that are due will have an overriding effect over all other dues including the ones of secured and unsecured creditors, the Courts used to fall back upon EPF Act provisions.

Why are the funds created?

The Provident and allied funds are created to protect the interests of the weaker section of our society. Owing to the contributions they have made towards the economic growth by ensuring continuous production of goods and various services offered, a safety net was provided in form of funds to support the working class during the superannuated winter of their life. The financial reservoir is filled equally by employers and employees. A part is deducted from employees' salary and an equivalent amount is thrown in the common pool by the employer to constitute these funds. If the employer neglects to remit or diverts the money for alien purposes the fund gets dry and the retirees are denied the meagre support when they need it most. This prospect of destitution demoralizes the working class and frustrates the hopes of the community itself.[7] The whole purpose of creation of such funds gets defeated when employers thwart their contributory responsibility. In 2016, the Joint Parliamentary Committee, in its report had stated, "provident fund, pension fund and the gratuity fund provide the social safety net to the workmen and employees and hence need to be secured in the event of liquidation of a company or bankruptcy of partnership firm."[8]

Constitutional Protection to Employees

The Constitution in form of Art 38, 43 and 21 promotes welfare of the people, gives special consideration to the people from disadvantageous sections.

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[7]Organo Chemical Industries v. Union of India, (1979) 4 SCC 573

[8] Report of the Joint Committee on The Insolvency and Bankruptcy Code, 2015

Article 21: Right to life

Right to life is intrinsically linked to the right of workers to get wages, more specifically PF dues of workmen. The workmen throughout their life save a portion of their income in expectation to live a comfortable life post retirement. The employers by not fulfilling their obligation are depriving their right to live a peaceful life and leaving them on the verge of destitution.

Article 38: **State to secure a social order for the promotion of welfare of the people**

It directs the State to secure a social order for the promotion of social welfare. Social welfare is necessary to attain social justice enshrined in the Preamble of our constitution. It is of paramount importance that constitutional courts come in aid to these classes of employees who are already deprived on account of liquidation of these companies to secure social justice.

Article 43: Living wage, etc., for workers

This article of the Constitution of India envisages that State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavor to promote cottage industries on an individual or co-operative basis in rural areas.

The first charge over the assets

In light of aforementioned articles of Constitution, the Centre enacted a welfare legislation- Employees' Provident Funds and Miscellaneous Provisions Act, 1952. On numerous accounts, situations arose where the welfare legislations were at loggerheads with the bank's rights (secured creditors) on the charge of the assets. The resolution to it was found in the UCO judgment, in which the court was of the view that in determining whether a legislation is a general or a special legislation, focus should be on the principal subject matter and the particular perspective. The dues to the workers were to be settled on priority basis and on account of the legal battle

between the Bank and the Company, the workers cannot made to suffer for an unspecified period, compromising their livelihood and the other social implications.[9] If such sums are being interlinked on par with debts of the creditors of the company, secured or unsecured as the case may be, then it is nothing but diluting the most valuable and inalienable right of a person on par with a property right subordinate to right to life.[10]

Sec 11(2) of EPF & MPF Act creates first charge on the asset of the debtor. The division bench of Gujarat High Court in Indian Overseas Bank vs Employee Provident Fund organization and others[11] held that "What is sought to be recovered by the petitioner-Bank from Respondent No.2 is its debts which are included in Sec 11(2) of the EPF Act. Therefore, there is no hesitation in holding that the Provident Fund Organization was within its power to issue the order of attachment." Thus, a harmonious construction of the provisions contained in Sec 11(2) of the EPF & MP Act, 1952, and those listed in the I & B Code, 2016, it is clear that the provident fund dues assume the first charge on the assets of the corporate debtor.[12]

Conflicting judgments related to Payment of funds

The judgments highlight contrasting hues related to payment of the funds and overriding provisions of the Code.

(i) ***Precision Fasteners Ltd. Vs. Employees Provident Fund Organization***[13]

The judgment evaluates the overriding provision of the Code and whether it stands in conflict with the EPF & MP Act. It was held that the overriding effect of sec 238 of this Code will not have any bearing over the asset of the workmen lying in the possession of the Corporate Debtor because that asset is not considered as the part of the liquidation estate, moreover, to apply sec 238

[9] M/S. UCO Bank vs The Recovery Officer, Madras High Court, 2019, WP No.21976 of 2019

[10] Precision Fasteners vs Employees Provident Fund Organization, 2018 SCC On Line NCLT 27284

[11] Special Civil Application No.4879 of 2017, decided on 10-4-2017

[12] Chidambaram Ramesh, Insolvency Law: First Right for EPF on the Company assets, https://ibclaw.in/insolvency-law-first-right-for-epf-on-the-company-assets-by-chidambaram-ramesh/

[13] Supra 9

over any other law for the time being in force, the other law must be inconsistent with the provisions of the Code, since sec 36(4)(a) (iii) has excluded the PF dues of the workmen from the liquidation estate assets treating it as an asset of the workmen lying with the corporate debtor, sec 53 is not applicable to say that these dues fall within the ambit of liquidation estate.

(ii) ***The Regional Provident Fund Commissioner – I vs. Karpagam Spinners Private Limited***. [14]

In the diametrically opposite end stands this judgement. The court upheld the decision of the liquidator to classify the claims of EPFO extending beyond the period of 24 months as 'other remaining debts and dues.' The contention of EPFO of the first charge over the CD was rejected by the court. The court relying on two judgments of Apex Court held that IBC will override anything inconsistent with the EPF & MP Act.[15] The first charge on the assets under sec 11 is inconsistent with the waterfall mechanism provided under sec 53 of IBC. The judgment established the ascendancy of IBC over EPF & MP Act.

Analysis/Observations: The court, while passing order did not take into consideration sec 36(4) of the Code which keeps the funds outside the purview of the liquidation estate. Thus, the payment of funds will not be at the behest of the waterfall mechanism. The categorization 'of funds due from past 24 months' made at par with the secured creditors and rest as 'other remaining debts and dues' nullifies sec 34 which explicitly states exclusion of funds from liquidation estate.

(iii) ***State Bank of India Vs. Moser Baer Karamchari Union &Anr***.[16]

The appeal was filed by SBI (financial creditor) aggrieved from the decision of NCLT to not to include provident fund dues, pension dues and gratuity fund dues as part of sec 53 of the Code. The NCLAT upholding the decision

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[14]The Regional Provident Fund Commissioner – I vs. Karpagam Spinners Private Limited. NCLT Chennai,2019 SCC Online NCLT 1640

[15] (2018) 1 SCC 407, (2018) 18 SCC 786

[16]State Bank of India Vs. Moser Baer Karamchari Union &Anr.,2019 SCC OnLine NCLAT 447

of the Adjudicating Authority held that while applying Sec 53 of the Code, Sec 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding 'workmen's dues" which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Sec 36(4)(a) (iii). On the other hand, the workmen's dues as mentioned in Sec 326(1)(a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen's dues as mentioned in Sec 53(1) (b), cannot derive any advantage of Explanation (iv) of Sec 326 of the Companies Act, 2013. This apart as the provisions of the Code have overriding effect in case of consistency in any other law for the time being enforced, we hold that Sec 53(1) (b) read with Sec 36(4) will have overriding effect on 326(1) (a), including the Explanation (iv) mentioned below Sec 326 of the Companies Act, 2013. Once the liquidation estate/ assets of the 'Corporate Debtor' under Sec 36(1) read with Sec 36(3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Sec 53, the provident fund, the pension fund and the gratuity fund cannot be included.

(iv) ***Mr. Savan Godiwala (the liquidator of Lanco Infratech Limited) Vs. Mr. Apalla Siva Kumar***[17]

In this case, no fund was created by the CD, in violation of the Statutory provision of the Sec 4 of the Payment of Gratuity Act, 1972. The liability of the liquidator was decided towards the payment of gratuity funds. The court held that in this situation, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate. In a case, where no fund is created by a company, in violation of the Statutory provision of the Sec 4 of the Payment of Gratuity Act, 1972, then in that situation also, the Liquidator cannot be directed to make the payment of gratuity to the employees because the Liquidator has no domain to deal with the properties of the Corporate Debtor, which are not part of the liquidation estate.

[17]Mr. Savan Godiwala (the liquidator of Lanco Infratech Limited) Vs. Mr. Apalla Siva Kumar, 2020 SCC OnLine NCLAT 191

Analysis/Observations: The court took note of sec 36(4) but neglected the concept of 'legal fiction' that imposes an obligation on the employer to pay for funds whether he has created or not. The Corporate Debtor is supposed to have remitted these statutory dues in time; if he had failed to do so, it is assumed by a legal fiction that the 'dues so payable' are still lying as a part of the current assets of the Corporate Debtor.[18] He will be held liable for the payment of the funds as it is an asset of the employee in possession of the CD. The power to not to deal with the properties not in the domain of liquidation estate does not absolve a liquidator's liability towards the payment of funds (third party assets).

Whether penalty and interest on EPF arrears will be considered as excluded assets under the Code?

With the EPF & MP Act overriding IBC, all the payments in the context of provident and allied funds will be as per the former Act. The interest and penalty will be payable by liquidator.[19] The NCLAT directed the resolution professional to release the full amount of provident fund, including the interest thereon in terms of the provisions of the EPF & MP Act, 1952 immediately, as these dues are not to be included as an asset of the corporate debtor.[20]

Concluding Remarks

Taking note of the fallacies of the previous regime, the exclusion of provident fund dues to the workmen/employees from the liquidation estate has strengthened the right of workmen regarding PF/Pension/Gratuity fund dues, by altogether excluding this asset from the liquidation estate leaving it to open to the workmen or to the PF authority to realize their provident fund dues without standing in the line of waterfall mechanism.

The judgments instating special status to all EPF dues are not roses without thorns. They could act as a deterrent to the secured creditors who may be better off in not relinquishing their security in situations where EPF arrears are significantly higher. The addition of interest and penalty alongside

[18] Supra 11
[19] See sec 7Q and 32A, EPF & MPF Act, 1952
[20] Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors., 2019 SCC On Line NCLAT 910

principal amount will only add burden on the liquidator, creating an impediment in achieving the objective of efficient dissolution of the CD. The payment of principal amount and interest is conceivable to an extent, as it germinates from the idea of workmen protection. But payment of penalty to the government due to delay in payment is neither interlinked with the constitutional right of workmen nor in any way extension to welfare schemes. This contention is further strengthened by the literal interpretation of sec 36(4) which only excludes sums due to workman/employee from provident and pension fund. Penalty is not a sum due to workman/employee. It is prudent to bring penalties under the umbrella of sec 53 and classify them as 'government dues.' The liquidator has a mammoth task to balance the interests of the parties inside and outside of COC. Workmen and Employees are justified in claiming their dues. However, anything beyond legitimate dues in the form of penalty is not only shrinking the funds for secured creditors but also putting the bare minimum righteous claim of liquidator of his fees at risk.

The Mother and The Misogyny: Discussing Section 6 of the Hindu Minority and Guardianship Act, 1956 and Its Implication on Principles of Gender Justice

Preeti Gokhale
I LL.B

Introduction:

Patriarchy refers to the rule of the patriarch. It is a system wherein the male head is the superior authority in a family. The term therefore, in general sense relates to male domination. The system not only expects from but also enforces subservience on to women. It manifests in the forms of oppression, exploitation, discrimination, violence and many other forms, plenty of which we get to witness in our society on an everyday basis. In any case, patriarchy as a system which is heavily practiced in the society, humiliates women and pushes them into existing as secondary beings, secondary to the men. Simone de Beauvoir in her work '*The Second Sex*' elaborates on many such aspects by depicting how the male sets up the woman as the *Other,* and considers himself as the 'king of creation'.[1] Therefore, the female being the secondary object, while the male being the subjective default. Feminist movements and institutions advocating for gender justice have been fighting since ages to dismantle this exploitative and oppressive system.

One of the famous slogans of the movement is "the personal is political". This sets the tone to break the notion that the personal and the public sphere are two isolated arenas and are compartmentalised separately, when in fact it is important to understand that the personal sphere is influenced by social structures and public factors in the society. Such public factors can very well relate to legislations including those establishing the status of women, policies on childcare, welfare schemes for women, laws on abortion and so on and it is only through an evolution in principles guiding this legislation, that the structural problems existing in the personal sphere can be solved.

[1] Simon de Beauvoir, The *Second Sex,* 30-31 (Constance Borde, Sheila Malovany Chevallier, 1st ed., 2011).

Simone de Beauvoir elaborating upon how the world has never been equal for men and women, explains on the status of the woman by stating that,

"In no country is her legal status identical to man's, and often it puts her at a considerable disadvantage. Even when her rights are recognized abstractly, long-standing habit keeps them from being concretely manifested in customs. Economically, men and women almost form two castes; all things being equal, the former have better jobs, higher wages, and greater chances to succeed than their new female competitors; they occupy many more places in industry, in politics, and so forth, and they hold the most important positions."[2]

This statement holds true to this day. For the women in our society to be truly emancipated from the clutches of the toxic notions perpetuated by the practitioners of patriarchy, the social structures which influence as well as are born out of the laws need to evolve and inculcate in themselves the true sense of equality.

The specific issue this paper seeks to address in the view of the above discussion is that which exists in the Hindu Minority and Guardianship Act, 1956 (HMGA). The paper will particularly analyse Section 6 which reads as follows:[3]

"6. Natural guardians of a Hindu minor. —The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl— the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

[2]Ibid, at 29.
[3]S. 6, Hindu Minority and Guardianship Act, 1956.

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation. —In this section, the expression "father" and "mother" do not include a step-father and a step-mother."

A natural guardian is one who becomes so by reason of natural relationship with the minor, which means a relationship established by being a parent of the child, thus, natural guardianship is legally presumed when such a relationship subsists. In Hindu law, the concept of guardianship appears to date back to the time of the Vedic Age, when for all practical purposes, the Hindu family was a patriarchal unit with considerable powers resting with the head of the family. Infants were considered to be the property of the father. [4]

Questioning the Precedence Given to the father over the mother

It is pertinent to note that according to Section 6 (a) of the Hindu Minority and Guardianship Act, 1956,[5] endowment of the natural guardianship is firstly awarded to the Father and AFTER HIM, the Mother. Such hierarchy, in a democracy promising equal rights, is nothing but arbitrary and extremely patriarchal. Various Courts, including the Supreme Court many a times, while dealing with matters relating to guardianship have mentioned that the welfare of the child is of the paramount consideration. However, the creation of the unreasonable hierarchy ascribed to parenthood has nothing to do with the welfare of the child and a lot to do with patriarchal constructs instilled in our society functioning through such unjustified laws.

Within the institution of marriage, as is exist in the present day, we often see conduct that is tremendously misogynistic and unequal. In the Indian society, it is in majority of the cases where the woman leaves her natal home and goes on to live with her husband. On the occurrence of any matrimonial discord, the husband more often than not has the upper hand when it comes to economic hold on the assets which exists in their relationship, which includes

[4] Asha Bajpai, *Custody and Guardianship of Children in India,* 39 Family Law Quarterly, 441, 442 (2005), https://www.jstor.org/stable/25740499, last seen on 21/06/2021.

[5] S. 6 (a), Hindu Minority and Guardianship Act, 1956.

the property, the child/children and even the wife. The man, on occurrence of such a discord, can very well throw the wife out of their house and refuse to give her even the access to her own children and forces her to approach the courts for redressal. Even if the father is unfit to be a guardian, the onus is on the mother to sue and prove it to be able to be recognised as the legal guardian of her own child. The father has no such burden since he is presumed to be the natural guardian. Provisions in the law like Section 6 of the Hindu Minority and Guardianship Act, 1956 only reinforce such social inequality and practices by giving the father precedence over the mother in matters of guardianship, leaving her helpless and setting her on a difficult journey just to get access to her own children, for their welfare, something a man does not have to go through since his position is legally sanctioned, creating an unnecessary imbalance in favour of the man.

A peculiar observation herein lies in the fact that, for generations, the flag bearers of patriarchy have relegated the role of women to the domestic sphere, including the functions of child rearing. It is evident in many families wherein women, even if they indulge in participating in the professional sphere outside of their homes, are expected to be 'good mothers' and fulfil their domestic obligations, therefore bear the major responsibilities and burden of raising her child/children. The double labour a woman does is an established fact and even applauded. While it is an incredible feat, it is integral to understand that this double labour is a sanction imposed by inequality of status, that even if a woman performs the same as a man in the professional sphere, the entirety of the domestic burden, once she returns home is still hers. A man can very well contribute to the activity of child rearing, among other chores, lifting the burden off a woman and thereby, establishing equal workload and destabilising the pre-existing exploitative structures. However, most of the times it is the woman who is engulfed in these 'homely duties' and ends up caring for the child alone, naturally, guarding the child, in the true sense. Yet, when it comes to the institutions dealing with legal and economic aspects, two spheres heavily dominated and controlled by men, they grant the man a higher position in the hierarchy as seen in the law above. While the upbringing is imposed completely upon the woman, the legal and economic powers are granted to the men, since in our society, a legitimate child is viewed as an asset and an heir.

Often, the justification given for this imposition is that women tend to be more 'motherly', warm, caring, maternal and so on. While these assumptions might be problematic, these arguments have also been used to justify why a mother should be at par with the father when it comes to natural guardianship. However, equal status must be established, without much deliberation upon the qualities or roles assigned to any particular gender. Why should there be discussion regarding why a mother could be an equal natural guardian where there was none on the father being the first and primary natural guardian?

Legitimacy and the Legislation

Considering sub clause (b) of Section 6 of the Hindu Minority and Guardianship Act, 1956,[6] it is interesting to note here, that in case of an illegitimate child, it is the mother who is the first natural guardian and after her it is the father. This reflects of the exceedingly skewed and faulty perspectives regarding the woman and the illegitimate child. Since such relations exist out of the socially acceptable patterns of liaisons, here the complete burden of the 'socially unsanctioned' act of two people, lies alone on the woman. She is in this case, being the first natural guardian, entirely responsible for the 'illegitimate' child, is subjected to inevitable backlash and ill scrutiny from members of the society, which also sometimes includes being cast out from the acceptable public life of the social structures. However, the man here, can continue with his life with his head held high, without fear of any persecution at the hands of the 'respectable' society.

Since, the objective of the Act has been interpreted as to provide for the 'welfare of the child', there exists no comprehensible explanation or logic to declare the father as natural guardian for a legitimate child and the mother as the natural guardian for an illegitimate one and create this separation within the legislation, since it does not in any way affect the well-being of the child. It can only be assumed that this exits as a reflection of the deeply entrenched double standards that exist, propagated by the culture of patriarchy. When it comes to economic control and the asset of having a valid and legitimate heir, the father is granted all the right. In case the child is illegitimate and therefore, not as valid and accepted according to the standards of social order,

[6]S. 6 (b), Hindu Minority and Guardianship Act, 1956.

the woman is to bear all the responsibilities and hardships that come along with it due to the archaic and outdated mindset of a few.

Discussing the Married Minor

Section 6 (c) of the Hindu Minority and Guardianship Act, 1956,[7] declares that it is not the parents but the husband who becomes the natural guardian of a minor married girl. On the other hand, the natural guardian of a minor husband is still his father and not his wife, were she to be a major. This exposes the hypocrisy of such a provision. Here the inequality of status is obvious. The minor girl's marital status is relevant for the question of natural guardianship but a minor boy's is not, and there exist not logical reason for this assertion at all. It reflects that conception of a marriage is not a relationship of equitable companionship but instead of that where a wife is always subordinate to her husband. Additionally, child marriage is a social evil that exists in our society and the very existence of this sub clause grants legitimacy to child marriage since it declares and the natural guardian of a minor girl as the husband, and therefore, gives socially acceptable recognition to an exploitative, oppressive and inherently inappropriate relationship. A minor girl's fate and life is put in jeopardy since, if she faces any violence or cruelty in her matrimonial home, it will be in the presence and probably by the actions of her new natural guardian, completely contradicting the objective of the act.

The Existing Inequality and Inadequacy of Solutions

The section of the legislation discussed above reflects that, it is the man, who will always be granted natural guardianship, and therefore, there is discrimination against the woman on the basis of sex alone. Not only is it highly misogynist, it also violates the rights of a Hindu woman under Article 14 of the Constitution,[8] which grants to every citizen equality before the law and equal protection of the law.

It is established that if a distinction is to be made, for it to satisfy Article 14, there has to be a reasonable nexus between the classification done and the

[7]S. 6 (c), Hindu Minority and Guardianship Act, 1956.
[8]Art. 14, the Constitution of India.

object to be achieved. Therefore, the existence of intelligible differentia is necessary. However, in this case welfare being the paramount consideration being established as the objective, the classification has no reasonable or logical backing and therefore, violates the rights under Article 14.

In a landmark judgement given by the Supreme Court of India in the case of Ms. Githa Hariharan & Anr vs Reserve Bank of India & Anr[9] the judges recognised both mother and father as natural guardians and that "after" can also mean temporary absence of the father due to a number of reasons or even apathy. In the judgement cited above:

The court spelled out certain situations in which the mother would be the natural guardian even during the lifetime of the father:

(a) when the father is indifferent towards the child;

(b) when the child is in the exclusive custody of the mother;

(c) when the father is incapable of acting as the guardian due to physical or mental incapacity;

(d) when the parents mutually decide that the mother will act as the guardian.[10]

However, these conditions while diluting the absolute effect of the legislation in granting authority first and foremost to the father, still falls short of establishing a definite sense of equality within the structure of marriage and family. The ruling suggest that only when a father abdicates his responsibility or consents to elevate the mother to the status of a natural guardian would the mother's status as natural guardian for her child for her child's property be recognised.[11] Therefore, the priority is still given to the man and it is only when a father exercises a choice to be absent or allows the woman equal status, can the women get the required status. The man here holds the power, through his actions, which then is the basis for allocation of rights of natural guardianship to the woman. Conditional equality is as humiliating as it is redundant in the fight for true equality. It can only be achieved in this case, when both the parents get equal status, at par, without being at the mercy of

[9]Githa Hariharan & Anr vs Reserve Bank of India & Anr, (1999) 2 SCC 228.

[10]Supra 4, at 452.

[11]Ibid.

each other's actions and consequences, since the priority is to ensure welfare and well-being of the child, which can be ensured by either or both the parents.

Conclusion:

Law is dynamic and ever changing. It is made for the people and develops through understanding the needs and requirements of the time. Therefore, there is immense need for scrutiny and reform in this aspect. These reforms should aim to transform the domestic and personal sphere, including the institutions of marriage and family into being much more equitable and just. Simultaneous existence of a need for a harmonious family structure ensuring welfare of the children and a hierarchical structure based on a system of oppression and exploitation will eventually distort concept of domestic structures and their stability in our society. The obsolete mindset of some cannot influence and be imposed upon the rest and cannot be held as the basis to formulate legislations for all. Women can no longer be treated as the 'other' or as a secondary citizen. It is high time that the 'public' spaces recognise and grant them their rights for there to be an equitable, just and balanced system within the configuration of the 'personal' or the private domain. Therefore, there is a need for serious analysis, examination and deliberation upon Section 6 of the Hindu Minority and Guardianship Act, 1956, and alterations are the need of the hour, for our society to get one step closer towards achieving equality, in its true sense.

Subject Matter Arbitrability: Supreme Court Lays Down a Test

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The Supreme Court (SC) in the case of *Vidya Drolia v. Durga Trading Corporation*[1] has recently ruled on important non-arbitrability issues. The judgment is broadly divided into two issues; non-arbitrability of subject-matters and who decides non-arbitrability at the stage of commencement of proceedings. With respect to the former, the Court also laid down a four-fold test to decide the arbitrability of subject-matter. This article examines SC's ruling on subject-matter arbitrability. It also analyses the four-fold test and the four distinct subject matters whose arbitrability was decided by SC by applying the four-fold test.

Arbitrability of different subject matters has been a subject of judicial interest. The SC has recognized again in the instant judgment that it has ultimately come down to the judiciary to set principles and exclude subject matters from arbitrability by virtue of interpretations of Section 2(3) and Sections 34(2)(b)(i) of the Arbitration and Conciliation Act, 1996.

However, this is the first time that the SC has laid down a generalised test for deciding arbitrability of the subject matters. It has referred to a conspectus of judgments to examine the rationale behind deciding arbitrability. It has advanced a four-fold test which is a culmination of the existing law on arbitrability. The test also requires the examination of the following principles while determining the non-arbitrability of a subject matter:

(1) When the dispute has *in rem* effects and these effects do not include subordinate i*n personam* rights arising out of *inrem* rights.

(2) When third party rights are involved in the cause of action; i.e., when the dispute has an *erga omnes* effect. The Court has suggested that such situations would require centralized adjudication and a mutual approach like that of arbitration would not be appropriate or enforceable.

[1] Vidya Drolia and Others v. Durga Trading Corporation (II), (2021) 2 SCC 1.

(3) When the adjudication of a dispute is a matter of public interest and becomes a function of the sovereign and the state.

(4) When a mandatory statute expressly or by implication barres arbitrability.

Analysis of the principles propounded

Rights *in Rem* test and *Erga Omnes* test

The judgment reiterates the principle propounded in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd*[2], that subject matters that pertain to actions *in rem* are not arbitrable; subordinate rights *in personam* that arise from rights *in rem*, however, are arbitrable. Jurisprudentially speaking, a right *in rem* is a relation between the owner and a vague multitude of people and no one is distinguishable from the other; while a right *in personam* is a definite relation between determinate individuals.[3] This distinction will not always lead to a just determination of arbitrability since rights *in personam* that arise from rights *in rem* are enforceable. A copyright is a right *in rem*[4] available against the world at large, however, a specific contractual dispute over its infringement is a right *in personam* action against a particular individual. Similarly, SC in *Olympus Superstructures v. Meena Vijay Khetan*[5] held that an agreement to sale of a property only creates rights amongst the parties to it and thus, a claim for specific performance of such an agreement would be amenable to arbitration. The Madras High Court[6] held that disputes pertaining to patent use and infringement are actions *in personam*, and therefore, are arbitrable.

In common parlance, rights *in rem*, being rights available against the world at large, are considered to have *erga omnes* effect i.e., it affects third parties who are not parties to the arbitration. On such a perusal, the necessity for satisfaction of *erga omnes* effect to prove non-arbitrability may seem

[2] Booz Allen & Hamilton Inc. v, SBI Home Finance Ltd., (2011) 5 SCC 532.

[3] P. J. Fitzgerald, *Salmond on Jurisprudence* 236 (12th ed., 2012).

[4]Eros International Media Limited v. Telemax Links India Pvt. Ltd., 2016 SCC OnLine Bom 2179.

[5] Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khaitan and Others, (1999) 5 SCC 651.

[6] Lifestyle Equities CV v. QD Seatoman Design Private Limited, 2017 SCC On Line Mad 25864.

redundant; however, on a more nuanced approach, the concept of rights *in rem* is different from the concept of *erga omnes* effect. Arbitration being a voluntary dispute resolution mechanism is only binding on the parties; any effect on the non-signatories would render the arbitration ineffective. In the case of *Rakesh Kumar Malhotra v Rajinder Kumar Malhotra*[7], the Bombay High Court held that the dispute pertaining to oppression and mismanagement is not arbitrable since certain parts of reliefs sought were *in rem*. A similar approach was adopted in the case of *Eros International*[8]which permitted the arbitrability of contractual claims arising out of copyrightability. This distinction is significant since on the application of the rights *in rem* test, any dispute that involves copyright is automatically rendered non-arbitrable as laid down in the case of *Booz Allen*[9] *and Ayyasamy v. Paramasivam*[10]. However, on a closer perusal the Court embarked upon the reliefs sought by the parties and whether the ensuing effect may affect third parties. This is to say that the "rights-*in-rem* test" evaluates the subject matter of the dispute, while the "*erga-omnes* test" evaluates the reliefs sought by the parties under the dispute. The judgment, on these lines, has called for satisfaction of *erga omnes* effect in addition to the rights *in rem* test, to prove the non-arbitrability of the subject matter.

State Function test and Legislative bar test

The judgment also incorporates the state function test and the legislative bar test. While looking at the operability of disputes which may be amenable to arbitration, *Booz Allen*[11] observed that a civil or commercial dispute which can be decided by a court can, in principle, be adjudicated by an arbitral tribunal. Certain kinds of disputes have specific laws and forums enforcing them and therefore expressly or impliedly bars the jurisdiction of arbitral tribunal. When a particular nature of disputes by law is reserved for adjudication by a specific forum and/or through a procedure, such forum inherits exclusive jurisdiction despite the existence of an arbitration agreement.

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[7]Rakesh Kumar Malhotra v. Rajinder Kumar Malhotra, 2014 SCC On Line Bom 1146.

[8]Supra 4.

[9]Supra 2.

[10] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386.

[11]Ibid.

Later in *Ayyasamy*[12], SC again recognised the precedence of exclusive jurisdictions empowered by law over arbitration and that it is a matter of principle that when legislations empower special forums to operate in place of civil courts, that it extends to arbitration as well.

This bar can be either express or through implication. For instance, in *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke*[13], it was observed that disputes between a workman and an employer under the Industrial Disputes Act, 1947 (ID Act) could only be resolved through labour courts and tribunals empowered through the statute and that it expressly bars the jurisdiction of civil courts in such cases. This empowerment is a matter of public policy as the legislative intent to establish specialised mechanisms is to protect the interests of workmen and consumers in larger public interest. On the other hand, an implied bar may not be expressly stated in the statute but the scheme of operability of certain disputes implies a bar of jurisdiction to an ordinary civil court, and by continuation to arbitration. This can be illustrated through the case of *Vimal Kishor Shah v. Jayesh Dinesh Shah.*[14], wherein it was observed that certain remedies relating to management and administration of trusts under the Indian Trusts Act could only be sought for before a principal civil court of original jurisdiction and not before any ordinary civil court. Such powers of adjudication are designated only to a certain class of judges, which by implication takes away amenability to arbitration. In the case of *Emaar MGF Land Limited v. Aftab Singh*[15], it was observed that the Consumer Protection Act, 1986 being a special legislation with a special purpose by implication would oust arbitrability.

This is enumerated in the fourth principle as is categorized herein as the Legislative bar test.

State function test can be perceived as the rationale behind a legislative bar. Certain functions of the State being inalienable and non-delegable are also non-arbitrable. The State in these disputes exercises exclusive right and duty to perform certain functions. The state functions referred to here are basically

[12]Supra 10.

[13]Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke, (1976) 1 SCC 496.

[14]Vimal Kishor Shah and Others v. Jayesh Dinesh Shah and Others, (2016) 8 SCC 788.

[15]Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751.

judicial functions and executive powers exercised by the State in dispute resolution.

The judgment also holds certain kinds of disputes expressly to be part of state functions. This includes matters of taxation, criminal proceedings, legitimacy of marriage, citizenship, etc. These disputes have a direct nexus with the sovereign functions of the State, where adjudicating them operates as a duty towards its citizens. Matters pertaining to declaration of titles, rights, status of entities, etc. require a higher ground of responsibility in their adjudication and are considered inalienable powers and functions of the State.

Subject Matters

1. Landlord- tenant disputes

The judgment allows the arbitrability of these disputes as long as they do not fall under the ambit of rent control legislations. These disputes are governed by the Transfer of Property Act, 1882 (TOPA). However, special rent control legislations were enacted to provide statutory rights and protection to landlords and tenants. The instant judgment overruled *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*[16] which had previously held that disputes governed by the TOPA were non-arbitrable.

The judgment is welcomed in calling for the invocation of arbitration clauses in matters between landlords and tenants. It held that such disputes test are not actions in rem but pertain to subordinate rights *in personam* arising from rights *in rem*. It further observed that such disputes do not have *erga omnes* effect and that these kinds of disputes do not relate to sovereign functions under the state function test as well. It also noted that TOPA does not expressly or impliedly bars adjudication through ordinary civil courts or arbitration. However, it has distinguished such disputes from disputes by rent control legislations.

It is observed that the nature of these disputes remains similar when they are governed by the TOPA or rent control legislations. Principles with respect to subordinate rights *in personam* and *erga omnes* effect apply to matters governed by either statute. Despite the inapplicability of the *in rem* and *erga omnes* tests, the subject matter is still not arbitrable because of a special

[16]Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706.

statute in place. The Court has made the legislative bar test to overrule the former once the principal statute governing the disputes changes.

2. Disputes under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act")

The judgment proscribes the arbitrability on matters of recovery of loan and interests due to banks under the RDB Act. It overruled the decision of Delhi High Court in *HDFC Bank Ltd. v. Satpal Singh Bakshi*[17] which had categorically held such disputes as arbitrable.

SC observed that the non-arbitrability is underpinned to the legislative bar test. It states that as the RDB Act provides for creation of special forums such as Debt Recovery Tribunal (DRT) and Debt Recovery Appellate Tribunal (DRAT) as a separate mechanism for these disputes, that arbitrability is barred by necessary implication. It is pertinent to note the observations made in *HDFC Bank* case in favour of arbitrability here. While observing the significance of special forums, it firstly agreed that disputes under rent control legislations or the ID Act which provide for special rights and forums for certain kind of disputes are not arbitrable. However, it distinguished the nature of disputes and operability under RDB Act. Despite the creation of special forums, the purpose of this enactment was to expedite the process of loan recovery. DRTs and DRATs were established to substitute civil courts in these matters in pursuance of "tribunalisation of justice". Unlike other similar welfare legislations, the RDB Act does not provide for any special rights to the banks or the loan debtors and DRTs do not follow specialised procedures for adjudication. It is also pertinent to note here that DRTs were constituted only to adjudicate on matters of loan over the amount of Rs. 10 lakhs and therefore, disputes of similar nature which value below this amount would be open to adjudication by ordinary courts and by continuation, arbitral tribunals.

The instant judgment agrees with *HDFC Bank* in terms of its analysis of rights under RDB Act being *in rem* but disagrees on allowing arbitrability. It states that despite the fact that rights may be *in rem*, the legislative bar test by itself overwrites any contractual obligation. As it focusses on the necessary implication of non-arbitrability through legislation while overruling *HDFC* Bank, it seems that the legislative bar test operates independently of the rights test.

[17]HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815.

3. Fraud

The judgment does not significantly contribute to the jurisprudence on arbitrability of fraud and reiterates the principle propounded in the cases of *Ayyasamy*[18] and *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*[19] that disputes relating to fraud are arbitrable as long they remain a civil dispute. That said, the judgment has overruled the ratio in the case of *N. Radhakrishnan v. Maestro Engineers*[20]which held that in the interest of justice, matters relating to fraud should be left to courts more competent to handle complex matters. The judgment assails the *Radhakrishnan* judgment on two grounds:

1. Public Policy under clause (i) of S. 34(2)(b): SC observed that *Radhakrishnan* proscribed the arbitrability of serious fraud of allegation on public policy grounds. It pointed out that subject matter non-arbitrability under clause (i) of S. 34(2)(b) and public policy of India under clause (ii) of S. 34(2)(b) are two distinct grounds for challenging the arbitral award; to that extent public policy *qua* subject matter arbitrability is distinct from public policy of India. The former is limited to the examination of whether there is an ouster of the jurisdiction of arbitral tribunal and conferral of jurisdiction on special fora; this requires the analysis of the four-pronged test set out in the judgment. The latter is a broader enquiry into the legislative history and public policy considerations of the enactment, and the ensuing rights and liabilities. Therefore, the non-arbitrability of the subject matter cannot be assessed based on whether the statute has a public policy angle, since every statute has a certain public interest.

2. Competence of arbitral tribunal: SC further observed that *Radhakrishnan* treats arbitration as a second-class dispute resolution mechanism; that arbitration is not suited to enquire into public policy questions is grossly undermining the competence of the arbitral tribunal. SC adopted a pro-arbitration stance in observing that a mere possibility of non-compliance with public policy by the arbitrators, when the statute does not proscribe

[18]Supra8.
[19]Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited, 2020 SCC On Line SC 656.
[20] N. Radhakrishnan v. Maestro Engineers and Others, (2010) 1 SCC 72.

the resort to arbitration expressly or by necessary implication, is against the public policy objective of the Act. Moreover, the arbitrators are equally duty-bound to comply with the broader public policy objectives under S. 34 of the Act.

Intra Company Disputes (ICD)

On the application of the four-fold test, the judgment renders ICD categorically non-arbitrable. SC's approach of classifying ICD as one of the non-arbitrable subject matters seems inaccurate. Firstly, remedies to disputes arising out of a shareholder agreement, share transfer agreement or the Articles of Association (AoA) are essentially contractual. Any dispute that emanates from the provisions of the Companies Act 2013 or any other law applicable to the company will be adjudicated on the basis of the statute. Therefore, arbitrability of ICD that are primarily contractual can be arbitrated as long as the four-fold test is satisfied. Secondly, the Court's reasoning that ICD are rights *in rem* and therefore non-arbitrable, is deeply reminiscent of the anomalies of *Booz Allen*[21]; that a dispute is non-arbitrable merely because it is an action *in rem* without examining the *erga omnes* effect or the remedies sought from the arbitral tribunal is erroneous. For example, in a dispute on the validity of the shareholders resolution, the assessment of *erga omnes* effect of the invalidation is crucial; if the parties seek invalidation of a transaction, as long the invalidation affects only the parties, the dispute is arbitrable. The Company Law Board (CLB), in the case of *Sidharth Gupta v. Getit Info services Pvt. Ltd*[22] observed that dilution of shareholding due to issuance of shares did not amount to oppression and mismanagement under Companies Act, 2013 and the dispute being contractual was arbitrable. In another case[23] before the CLB, it was observed that non-compliance of terms of Memorandum of Understanding between a party and company is arbitrable.. The jurisprudence on arbitrability of ICD insists on assessment of consent of all parties to arbitration as the preferred dispute resolution mechanism and examination of *erga omnes* effect. As long as the four-fold test is satisfied, contractual ICD should be arbitrable.

[21]Supra 2.

[22]Sidharth Gupta v. Getit Infoservices Private Limited and Others, 2016 SCC OnLine CLB 10.

[23]Akshya Ispat Udyog Pvt. Ltd. v. Ishwardas Rasiwasai Agrawal, 2014 SCC OnLine CLB 8.

Conclusion:

The four-fold test is a consolidated step to address the determination of non-arbitrability of subject matters. SC's ruling on arbitrability of tenancy disputes and fraud in its pro-arbitration reasoning is viewed on a positive note. For matters pertaining to debt recoveries, the judgment has held against arbitrability in light of the legislative bar principle.

The judgment also classifies certain classes of disputes such as ICD, insolvency, and matrimonial disputes as categorically non-arbitrable. The aftermath of *Booz Allen*[24] and *Ayyasamy*[25] implies that rendering subject matters categorically non-arbitrable or arbitrable leads to uncertainty. For instance, the Hyderabad High Court[26] without employing detailed analysis, held that copyright was an arbitrable subject matter because of its absence in the list given in *Booz Allen.* Judgments such as *Ayyasamy*, however, have observed that copyright disputes may include *in rem* rights and have *erga omnes* effects. To this extent, Justice Ramana's separate opinion is noteworthy which observes that determination of arbitrability on a case-by-case basis by the arbitral tribunal is more appropriate rather than having a blanket bar on certain categories of disputes.

[24]Supra 2.

[25]Supra 10.

[26]Impact Metals Ltd. and Another v. MSR India Ltd. and Others, 2016 SCC OnLine Hyd 278.

The Conundrum of Substantive Law of Arbitration Agreement: Reconciling the English & French Conflict

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Introduction

Business contracts or transactions in the framework of the modern globalised world transcend boundaries. The parties that are based in two different nations can now enter into a commercial relationship by the means of a contract. A natural consequence of the same is that the parties tend to interpret such contract as per the lex loci principles. Since the parties come from a commercial background, they opt for dispute resolution by the means of International Commercial Arbitration. In such cases, arbitrators often face the complex question of the law applicable to such Arbitration Agreement before they can proceed to decide the merits. This problem almost becomes irresolvable when one party belongs to a Civil Law jurisdiction (for e.g., France) and the other one to a Common Law Jurisdiction (for e.g., England).

This Article will focus on highlighting the differences between the interpretative approaches of the Courts of England and France and attempt to reconcile the differences to achieve a harmonious interpretation principle.

The Problem

The world witnessed a glimpse of such a conflict in the Dallah Cases which involved a dispute between Saudi Arabian Company (Dallah Real Estate and Tourism Holding Company) and the Government of Pakistan. Paris, a Civil Law country, was the designated seat of arbitration. The Arbitral Tribunal ruled that the arbitration agreement was governed by French law and upon application of those principles, the Government of Pakistan was bound by the arbitration agreement.

The enforcement of this award was challenged in the UK Supreme Court[1] which also applied French law and held that the Government of Pakistan was not bound by the arbitration agreement. In contrast, the Paris Court of

[1]Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan, 3 WLR 1472, (2005, UK Supreme Court).

Appeal[2] affirmed the decision of the Arbitral Tribunal. The Courts concurred as to the law applicable to the arbitration agreement but gave diametrically opposite decisions.

In, 2020, the Paris Court of Appeal and the English Court of Appeal are yet again at loggerheads in the *Kabab-Ji v. Kout Food Group* Cases.[3] In this case, the dispute was in relation to several agreements entered into by the parties, all of which were governed by the English Law (Common Law), consisting of a dispute resolution clause mandating an ICC arbitration seated in Paris (Civil Law). Arbitration agreement existed between Kabab-Ji and Homaizi Foodstuffs. However, Homaizi underwent corporate restructuring to be named as Kout Food Group, which is the party in the present case.

The issue is, which law is applicable to the arbitration agreement and under that law, whether the Kout Food Group is bound by the arbitration agreement. The English Court of Appeal applied the English Law to the arbitration agreement and held that Kout Food Group was not a party. In contrast, Paris Court of appeal applied the French law to hold that it was a party to the arbitration agreement.

Thus, the conflict here is two-fold. It is in relation to law applicable to the arbitration agreement and whether the party, under that law is bound by the same. Therefore, it is necessary to understand English & French approach individually.

Approach of the English Courts

English Courts when faced with such a problem will resolve it by following the ratio in the landmark Sulamérica Case[4] wherein the contract was governed by Brazilian Law and London was the seat of arbitration. The Court laid down a three-step test as follows;

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[2]Gouvernement du Pakistan – Ministe`re des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company, [2011] CA Paris 09/28533 (Paris Court of Appeal).

[3]Kabab-Ji S.A.L (Lebanon) v Kout Food Group (Kuwait), EWCA Civ 6, (2020 England and Wales Court of Appeal); Kabab-Ji S.A.L (Lebanon) v Kout Food Group (Kuwait), [2020] CA Paris 17/22943 (Paris Court of Appeal).

[4]Sulamerica cianacional de seguros SA v. Enesa Engenharia SA, EWCA Civ 638, (2012 England and Wales Court of Appeal)

1. If parties have expressly chosen the law applicable to the arbitration agreement, that shall apply irrespective of the law applicable to contract.
2. If not, it is necessary to consider if parties have made an implied choice of law applicable to the arbitration agreement.
3. If not, it shall be the law with the 'closest and most real connection' with the arbitration agreement.

In the case above, the Court held that there is a strong but rebuttable presumption in favour of the principle that the law governing the contract (Brazilian law in this case) shall also govern the arbitration agreement. Further, it held that merely a choice of seat which is governed by a law different than the law of contract is not sufficient to rebut this strong presumption. However, this presumption was rebutted on another ground in this case as Brazilian Law had some elements that invalidated the arbitration agreement and the Court was of the opinion that it cannot be the intention of the parties to apply such a law that invalidates the arbitration agreement. Thus, the Court applied the third step and held that the arbitration agreement has its closest and most real connection with the place of seat of arbitration since the Courts at that place exercise the supportive and supervisory jurisdiction necessary to ensure effectiveness of arbitral procedure.

Thus, reading this three-step test with the overall run of cases and the most recent Judgment of UK Supreme Court in Enka v. Chubb Case[5], the entire position can be summarised as follows: - the law of contract will govern the arbitration agreement if it is not rebutted by other factors or that it doesn't invalidate the arbitration agreement. If it does, the Court enters the third step and applies the closest and most real connection test and rules in favour of the law of seat of arbitration.

Approach of the French Courts

The basis of the reasoning of the French Courts lies in the concept of autonomy of arbitration agreement. This concept of autonomy as developed under the French law means that the arbitration agreement claims autonomy from the main contract which contains the arbitration agreement. Common

[5] Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb, UKSC 38, [2020 UK Supreme Court].

law jurists were reluctant to accept this concept initially but accepted it over time and often refer to it as severability or separability.[6] The primary objective of this autonomy was to show that a law different than the law of contract is applicable to the arbitration agreement.[7]

Gradually, a new purpose evolved over time that complimented the original objective. The French Courts began using this principle of autonomy to deviate from the traditional choice of law method and to claim that principle of autonomy is a source of principle of validity of arbitration agreements.

This principle of validity was used by the *Court de Cassation* in the year 1972 in Hecht Case.[8] The dispute concerned a contract governed by French law and one of the parties argued that under French law, the arbitration agreement was invalid. The Court rejected this argument stating that the parties were entitled to conclude an arbitration agreement in situations not authorized by the French law. The Court grounded this reasoning in the principle of autonomy and did not apply any national law to the arbitration agreement. Instead, the Court reasoned that the validity of arbitration agreement was inferred from the intention of the parties to arbitrate. This marked the evolution of substantive rule in the French law such that autonomy of arbitration agreement wasn't confined to its autonomy from the main contract anymore. An additional meaning was provided to it such that it gained autonomy from any law that resulted from the application of choice of law rule.

This substantive rule was firmly entrenched into the French law by the 1993 *Court de Cassation* decision in the Dalico Case[9] wherein the Court held that by the virtue of substantive rule of international arbitration, the arbitration agreement is independent of the main contract and the existence and validity of arbitration agreement is to be assessed, subject to mandatory rules of French law and international public policy, on the basis of parties common intention, there being no need to refer to any national law.

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[6] Fouchard, Gaillard and Goldman on International Commercial Arbitration, 198 (Emmanuel Gaillard & John Savage, 1st ed., 1999).

[7] Ibid, at 199.

[8] Hecht v. Buisman, [1974] Rev. arb. 89 (French Supreme Court).

[9] Municipalite de Khoms El Mergeb v Socie´te´ Dalico, (1994) 1 Rev. arb. 116 (French Supreme Court).

Thus, the French Courts will refer to the common intention of the parties and its existence and effectiveness shall only be subject to mandatory rules of French law and International Public Policy without reference to any national law.

Criticism

English Courts: - The approach of the English Courts shall be criticized for two reasons. First, being that the strong presumption of law of contract to apply to the arbitration agreement completely ignores the concept of separability or severability of the arbitration agreement which clearly indicates that a law different than the law of contract can be applicable to the arbitration agreement. This conclusion is also supported by a combined reading of Article II and Article V of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958).[10] Article II of the same contemplates separability of arbitration agreement and Article V contemplates a different law. This indicates that a separable arbitration agreement can be governed by a different law.[11]

Secondly, because the closest and most real connection test without providing any objective perspective or without offering any concrete connecting factors, rules in the favour of seat of arbitration. Such kind of default rule without any objective analysis makes this test arbitrary and unprincipled.[12]

French Courts: - The approach of the French Courts is criticized because in reality an arbitration agreement cannot be independent of national law and absolute validity cannot be conferred upon the same. Application of their approach implies that an arbitration agreement cannot be void for lack of capacity, for lack of consent or for being non-arbitrable.[13]

On a theoretical level, critics opine that an arbitration agreement is ultimately a contract and a contract cannot be 'valid in principle.' It is only valid if it satisfies the specific conditions as to form and substance under a law which

[10] *The New York Convention – Authentic Texts and Translations,* New York Arbitration Convention, available at https://www.newyorkconvention.org/new+york+convention+texts, last seen on 24/04/2021.

[11] Gary B. Born, *International Commercial Arbitration*, 356 (2nd ed., 2014).

[12] Ibid, at 521-523.

[13] Supra 6, at 230.

governs the contract; such conditions may be liberal but they can't be non-existent.[14]

The above discussion clarifies that the difference between the English and the French Courts exists in legal principles and at the same time both approaches have shortcomings. This makes it imperative to reconcile both approaches in order to find an answer to the question of the law applicable to the arbitration agreement.

Common Points of Resolution

A reconcilable approach is possible and a middle ground can be attained in these two conflicting approaches such that elements of the requirements of both nations are fulfilled while providing a solution.

1st approach: - This can be done by taking into consideration the provisions of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958). The principal aim of the Convention itself is to provide common legislative standards for recognition and enforcement of arbitration agreements and foreign arbitral awards.

Article V (1) of this Convention prescribes the criteria for recognition and enforcement of arbitral award which can be used for determining the law applicable to the arbitration agreement.

There could be some reservations regarding using an article which is meant for enforcement of 'awards' in determining the law applicable to the 'agreement.' Moreover, the criteria for recognition of arbitration agreement is prescribed under Article II. Nevertheless, the correct view of Convention's choice of law rules is that the same rules apply under Article II and Article V of the Convention, i.e., rules of recognition under Article II apply for award recognition under Article V and vice-versa.[15] This preposition solves the problem and Article V can be discussed now.

Article V (1) provides a default choice of law rule that can be applied and reconciles both the approaches. Article V (1) states –

Recognition and enforcement of the award may be refused, at the request of

[14] Ibid, at 231.

[15] Supra 11, at 494.

the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or ***the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.***

The relevant portion of the provision shall be looked at in two parts. The first part clarifies that parties have subjected the arbitration agreement to a law, which shall be treated as the mutual agreement of the parties to apply that law to the arbitration agreement. Commentators opine that both express or implied choice of such law can be made by the parties under this provision. If it comes down to implied choice, it can be deduced by finding out the common intention of the parties which can even be a factual inquiry.

If the first part is not satisfied, then it provides for a default rule that the law of the country where the award was made shall be selected to be the law applicable to the arbitration agreement. The phrase "country where the award was made" refers to the seat of arbitration. This leads us to the same problem that was observed earlier in the closest and most real connection test, that, such default rule is arbitrary and unprincipled. Therefore, this approach of reconciliation is possible only when there is some way of ascertaining either the express or implied choice of the parties.

2nd Approach: - The other provision that can be used is Article V(1)(d) in combination it with the delocalisation theory. Article V(1)(d) provides that ***the parties' can agree on a national procedural law or institutional rules to govern these matters, or can agree on their own rules independent of any system.***

Delocalisation means that international arbitration is detached from control of the law of the place of arbitration and doesn't mean that international arbitration is detached from the national substantive law or in favour of application of non-national principles.[16] Two aspects explain this approach.

[16]*Redfern and Hunter on International Arbitration,* 181 (Blackaby Nigel, Constantine Partasides et. al., 6th ed., 2015).

First, in effect, that an international arbitration is self-regulating and that this is, or should be, sufficient. Which means that when an Arbitration is being governed by an arbitral institution, that institution may be said to have filled the gaps in arbitration procedure and has taken over regulatory functions, by itself laying down rules for the confirmation or removal of arbitrators, terms of reference, time limits, scrutiny of awards, and so on. This aspect if read with Article V(1)(d) of the NY Convention detaches arbitral procedure from a law and subjects it to Institutional Rules chosen by the parties. The second argument in support of the delocalisation theory is that any control of the process of international arbitration should come only at the place of enforcement of the award.[17]

This will enhance certainty as parties will be sure right from the beginning that the law of the forum where award will be enforced will be the law applicable to the arbitration agreement. This eliminates possibility of Courts in England and France taking divergent approaches and ensures that the law in the jurisdiction of the adjudicating forum becomes irrelevant and law of the place of enforcement is to be applied at all times unless the parties explicitly choose a different law to be applied to the arbitration agreement.

Conclusion:

The first approach requires the Courts to figure out the express or implied choice of applicable law as laid down under Art. V(1) of the Convention. There is no disagreement when the parties have expressly selected the law applicable to the arbitration agreement. In case of implied choice, it can be observed that only the means of finding this implied choice is a point of difference. Ultimately, the objective on both sides is to find out the implied choice of law by deducing the common intention of these parties. This common intention shall be given precedence in selecting the law applicable to the arbitration agreement. This can be a factual enquiry. Such factual inquiry can also include an enquiry if the parties were aware of the default application of law of seat as per Art. V(1) of the Convention. If yes, that shall be treated as common intention and law of the forum of the seat of arbitration shall be the substantive law of arbitration agreement.

[17] Ibid, at 182.

The second approach states that irrespective of the place and type of proceedings, i.e., England or France and validation or enforcement respectively, the institutional rules (if selected by the parties) shall govern the arbitral procedure and only the law of the forum of the place of enforcement of award shall be applied for uniformity.

Finally, the easiest solution is in the form of "prevention is better than the cure" approach wherein parties expressly state the substantive law applicable to the arbitration agreement even if they have expressly selected the substantive law applicable to the contract. This will clearly state the law expressly selected by the parties which will be applicable to the arbitration agreement and the adjudicating forums will apply that law irrespective of the fact if they are the forums of a civil law country or a common law country.

The Last Resort: Exploring the Evolution and Growth of The Residual Doubt Theory in Capital Sentencing

Rashmi Raghavan
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Introduction

Capital Punishment is sanctioned by the law of India and has withstood the test of constitutionality in *Machhi Singh v State of Punjab*[1]. In heinous cases of sexual assault of minors or gruesome murder and disposal of rape victims, the masses as well as the judiciary have strongly favoured the death penalty, and Parliamentarians as well as the public have routinely advocated for crueler punishments[2] that will culminate in death like public lynching and castration.[3]

However, it is known that death penalty ought to be the exception and not the norm as the State has a greater responsibility of offering a chance of recovery and reformation to a criminal rather than his swift elimination to create deterrence.[4] In order to conform to greater humanitarian standards set internationally by the International Bill of Human Rights (UDHR, ICCPR & ICESCR)[5], Indian courts must subjectively satisfy themselves that the crime truly belongs to the '*rarest of the rare'* category to award the death penalty.[6] This means that the Court must absolve itself of all doubts about the criminal before sanctioning his death by the State.

The residual doubt theory is recently being used by the highest courts while commuting death sentences of convicts to life imprisonment. This piece tries to trace the growth of the doctrine in the courtrooms of the United States and

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[1](1983) 3 SCC 470

[2]See The Criminal Law (Amendment) Act, 2018.

[3] See Lynching, death penalty, castration: Voices from Parliament on Hyderabad vet's rape, available on https://indianexpress.com/article/india/hyderabad-vets-rape-lynch-the-rapists-says-jaya-bachchan-venkaiah-naidu-calls-it-disgrace-on-humanity-6146563/, last seen on 31/12/2019.

[4] Bachan Singh v State of Punjab, (1980) 2 SCC 684

[5]Being the Universal Declaration on Human Rights, The International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights that advocate for better humanitarian conditions for prisoners and convicts.

[6]Supra note 4

India, where death penalty is still a reality and realizes how it can become a useful mitigation strategy during sentencing.

The Origins

A criminal trial is phased out separately into the guilt phase and the sentencing phase. The guilt phase primarily rests the burden on the Prosecution (the State/the People) to prove that the Defendant was guilty of the offense of a standard "*beyond reasonable doubt*" to determine conviction by a Judge/jury. This is followed by the sentencing phase which marks the conclusion of the trial by selecting a suitable punishment for the guilty by the same Judge/jury. The sentencing phase is particularly relevant as it is no longer about '*whether*' the defendant committed the crime but is about '*how*' the defendant did so and what factors preclude a harsh punishment. The right to a fair trial is not limited to the initial trial but proceeds right up to appeal and clemency.[7] This also means that the convict should be allowed as of right to produce mitigating evidence in his favour. The US Supreme Court in *Lockett v Ohio*[8] held that the Eighth and Fourteenth Amendments[9] require "*that the sentencer, in all but the rarest kind of capital case not be precluded from considering,* as a *mitigating factor*, ***any*** *aspect of a defendant's character or record and* ***any*** *of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."*

The most recognized mitigating factors for convicts include; no prior history of crime, physical/emotional disturbance, true remorse, victim's consent to the crime, being a juvenile, being under extreme duress or provocation or minor participation in the crime itself. [10]Thus, the defendants can seek to prove any of such factors in their favour to a standard of proof of '*preponderance of probabilities'* either by bringing in character witnesses or by experts to tilt the Judge/ jury to award a lower sentence. During such a hearing, the defendant can also seek to produce mitigating evidence in the

[7] M.H. Hoskot v State of Maharashtra, 217 A.I.R. 1978 S.C. 1548.

[8]438 U.S. 586 (1978)

[9] The Eighth Amendment protects against cruel and inhuman punishments and the Fourteenth Amendment provides protection under the Due Process Clause.

[10]See Stephen P. Garvey, What Do Jurors Think? Columbia Law Review, Vol. 98, No. 6 (Oct., 1998), pp. 1538-1576

form of '*residual doubt'* apart from the recognized repository of mitigating factors.

Ergo, '*residual doubt'* is a *lingering uncertainty* about facts, a state of mind that exists somewhere ***between*** *'beyond a reasonable doubt'* and *'absolute certainty'*.[11] Since most convictions can occur when a person is found guilty beyond a reasonable doubt, the threshold for conviction is not the extremely high standard of absolute certainty. Therefore, there remains a certain room for doubt to exist in the minds of the Judge/jury as to the identity of the criminal or circumstances in which the crime occurred. This doubt can be absolutely '*whimsical*' or can be extremely legitimate as to missing evidence, inadequacy of it or improper handling of such material.[12] Thus, juries can still retain doubt after having been satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged.

Such residual doubt is indeed different from traditional mitigating evidence itself. For example, that the offense would not have been committed had the defendant not been under extreme emotional duress is a "traditional" mitigating circumstance.[13] Most mitigating factors focus on the Defendant; either his past or involvement in the crime; but residual doubt is different as it attacks the aspect of **certainty** that the Prosecution seeks to bring about during the guilt phase of the trial. It tries to relook the material and testimonials that were used to reach a guilty verdict to convince a Judge/jury of its fallacies and missing links and/or contradictions so as to deserve a lighter sentence. The objective of introducing such doubt is not to acquit the Defendant and set him free, but to reduce the damage. In other words, even if the defendant is more than 95 percent likely to have committed a capital crime, he may still seek to avoid the death penalty by pointing out the remaining 5 percent chance that he is innocent. Ergo, residual doubt doctrine suggests that the state should kill only when it is ***absolutely certain*** that a defendant is guilty, not merely when it has ruled out all reasonable doubts about his guilt.[14]

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[11]Franklin v Lynaugh, 487 U.S. 164, (1988)

[12]See Jennifer R. Treadway, Residual Doubt' in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor, 43 Case W. Res. L. Rev. 215 (1992)

[13]Ibid

[14] See Jacob Schuman, How to improve sentencing by taking account of probability, New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 18, No. 2 (Spring 2015), pp. 214-272

In the Courtrooms

In the US, the state Supreme Courts usually undertake a three-part review of a capital case. First, the conviction itself is reviewed. Second, the appropriateness of the death sentence is determined by an independent weighing of the evidence to see whether the aggravating circumstances outweigh the mitigating factors. Third, there is a proportionality review to determine whether a death sentence is excessive by comparing the case at bar to similar cases.[15] In India, the appellate court does a similar revaluation of the Trial Court's order by reviewing whether the charges framed were sufficiently proved , whether all aggravating and mitigating circumstances were recorded and adequate weight was given to each of them and whether the crime fits the R-R Test i.e. rarest of the rare category while confirming the death sentence.[16] Thus, most judicial decisions involving residual doubt have usually been made while the sentence was itself being reviewed at the appellate stage.

The first case involving residual doubt was the case of *Franklin v Lynaugh*[17] where the US Supreme Court had to consider whether Texas' sentencing instruction which did not instruct jurors to consider residual doubt even when instructed by the Defendant; violated his Eighth Amendment rights to produce mitigating evidence during his own sentencing. The Defendant argued that by refusing this instruction, the jury was not allowed to entertain any residual doubts that they may have had as to Franklin's identity as the murderer and the extent of his involvement in causing death as opposed to other factors. However, the full Court disagreed to his contentions and rejected the argument that such a refusal to consider '*residual doubt'* would be a violation of the rights of a convict as neither the Constitution nor judicial decisions created an obligation to consider '*residual doubt'*. They also analysed that since this speculation is not directly related to the Defendant but is more about the material placed on record at his trial; it is not a constitutionally required mitigating factor. Additionally, they held Texas policy to be valid as it did not preclude the Defendant from '*arguing*' such a

[15] OHIO REV. CODE ANN § 2929.05(A) (Baldwin 1992).

[16]Supra note 4

[17]Supra note 11

theory before the jury but only did not '*instruct'* them to consider it as relevant. Thus, the Supreme Court by upholding Texas' policy gave states a discretion to decide whether they wanted to allow residual doubt to be considered or not. Further, the California State Supreme Court in *People v Cooper*[18]and *People v Cox*,[19] held that a defendant may be allowed to introduce evidence that supports residual doubt but it is not their constitutional right to do so and is subject to each state's policy on the same.

The Indian Supreme Court dealt with residual doubt for the first time only recently in 2014 in *Ashok Debarmma v State of Tripura*.[20] Here, armed extremists committed arson on a linguistic minority of Bengali settlers, killing 15 people and destroying property. Although 11 people were initially held by the police, charges were framed against the Appellant whose guilt was confirmed and his death sentence was handed and then confirmed by the High Court. The Supreme Court while reviewing his death sentence stated that the High Court had already considered that the Appellant could not be the only person responsible for the entire incident especially when the prosecution also admitted that it was a handiwork of a large group of around 35 people. Therefore, the Prosecution's failure to bring the actual culprits to trial, made the Court entertain a '***lingering doubt'*** as to the Appellant's culpability and ultimately reversed his death sentence into life imprisonment.

Recently, the Court considered the theory's applicability in cases where material evidence was inconclusive in *Ravishankar v the State of Madhya Pradesh*[21], where the Appellant was awarded the death penalty for having abducted and raped a 13-year-old minor and thereafter having killed her and destroying evidence. After having reviewed the charges, evidence and the conviction, the Court remarked its lingering doubts on its review of the death sentence by stating that there were inconsistencies in the statement of three witnesses. Moreover, ligature marks on the victim and in the post-mortem found no mention in the panchnama. Viscera samples and nail scrapings were damaged and did not turn out a conclusive DNA analysis. These were

[18]809 P.2d 865 (Cal. 1991)

[19]809 P.2d 351 (Cal.1991)

[20](2014) 4 SCC 747

[21] (2019) 9 SCC 689

relevant to raise the spectre of doubt in the Appellant's favour and the Court ended up reversing the death penalty and suggested life imprisonment instead. The Court however firmly remarked "*All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal."*

In cases of convictions based on circumstantial evidence, the Court has awarded the death penalty on the rationale that unavailability of direct evidence cannot be used a shroud by miscreants and vandals to commit barbaric crimes. However, in the case of *Sudam v State of Maharashtra*,[22] the Supreme Court remarked that the quality of circumstantial evidence presented in the case could tilt the scales in the Petitioner's favour. Revaluating this material, the Court acknowledged that "*It was possible for the lower courts to assume that the facial injuries on the deceased were left solely by the Petitioner and that the only surviving evidence against the accused seemed to be his motive.*" Recognizing these suspicions and realizing that life imprisonment was not ultimately foreclosed, the Court reversed the Death Penalty.

More so, recently, the Supreme court in *Shatrugan Baban Meshram v State of Maharashtra*[23] explained the viability of the '*residual doubt'* doctrine in American and Indian jurisprudence. The Court after summarizing a line of US Supreme Court decisions came to the conclusion that '*residual doubt'* was not even a mandatory requirement under the Eighth Amendment and had shaky foundations at best.[24] Analysing the previous Supreme Court cases, the Court also realized that 'residual doubt' was accepted in India since the strict standards for imposition of death penalty were not present and life imprisonment was not ultimately foreclosed. The Court also explained that 'residual doubt' could not be sustainable in a case of circumstantial evidence, since the guilt of the accused in such a case would be unimpeachable, therefore, there would be no room for any more 'lingering doubt'. In a way the Court repairs the argument of *Sudam* where death penalty was reversed using residual doubt since the evidence was circumstantial.

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[22](2019) 9 SCC 388

[23] (2021) 1 SCC 596

[24]Ibid

Rationale

The need to treat capital cases differently is evident from the seriousness of the offense as well as the extreme nature of punishment warranted for it. In that sense, each capital defendant also has to be treated separately due to the uniqueness of the individual and the seriousness of the crime. Most criminals are afforded a second chance via parole, probation, early release for good behavior and since such mechanisms are unavailable to a death convict, it enhances the need for individualized consideration before imposing the death sentence. [25] The Courts have realized that simply listing aggravating and mitigating circumstances may not be helpful in consideration as the weight given to such factors is not tangible.[26] Similarly, every murder is capable of shocking the conscience of the society but only a very few rise to the level of social condemnation on a national level. Arguing the prior good record or no further danger of the convict are also subjective factors which may/may not leave an impact on a Judge/jury. Therefore, there is a real danger of discrimination during sentencing that violates the rule of law when it solely considers aggravating and mitigating circumstances, where the death penalty is imposed in gruesome cases like *Mukesh v NCT (Nirbhaya gangrape)* but not to countless other rape and murder cases which equally shock the core of society. The solution lies in creating a responsible Courtroom with an in-depth scrutiny of the entire material on record. The residual doubt doctrine ensures that there is in-depth scrutiny of discarded and partially relevant evidence to ensure a fair sentence to the accused.

Secondly, studies from the Capital Jurors Project in the US shows that Jurors consider '*residual doubt'* as the most relevant mitigating circumstance as the thought of an innocent man condemned was little more than a "ghost" that haunted the law.[27] To make an effective argument on '*residual doubt'* it is important that the counsels focus on the missing links and lingering doubts instead of challenging the entire factual matrix and culpability of the accused[28]. This is because the Court has already found the accused guilty

[25]Supra note 8

[26]Supra note 21

[27]Supra note 10

[28]State v Watson, 572 N.E.2d 97 (Ohio 1991)

'*beyond reasonable doubt'*, thus, challenging culpability would only ensure that the capital sentence is retained and not overturned. Furthermore, when such doubts are argued as being genuine instead of whimsical or flimsy, it gives the Court a genuine opportunity to rethink the stand of lower Courts.[29] This enables the Courts to step in and correct death sentences even when they were based on unavailability of DNA evidence[30] or those based solely on circumstantial evidence.

The residual doubt doctrine that raises the standard of proof for death benefits not only the innocent, but all those trying to lower their sentence based on either an inefficient Prosecution, bad witnesses or tampered evidence which are eternal practicalities of the criminal justice system.[31] However, a cost-benefit analysis of setting a guilty person free versus loss of life of an innocent is an insufficient metric in a fallible justice system.[32] Freeing a convict of death does not mean setting him free. Such doubt only strengthens the need for clear and conclusive proof during sentencing of the criminal.

Finally, there is a fear that giving room for such doubt will impede deterrence via the death penalty. Although the justice system should send a substantive message about the trial it need not happen during sentencing as well. Deterrence is already created when one is found guilty, as the Court condemns the conduct of such reprehensible actions.[33] Punishment is anyway a subjective act based on the individual and the crime. Therefore, the huge burden of deterrence should not be shouldered during sentencing as it could lead to harder, stricter punishments with no room for improvement.

Conclusion:

One of the most fearful aspects of the death penalty is its finality as there is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of

[29]Herrera v Collins, 506 U.S. 390 (1993)

[30]Giarratano v Commonwealth, 266 S.E.2d 94 (Va. 1980)

[31]Supra note 12

[32]Supra note 21

[33]Supra note 14

falsely imprisoning the defendant.[34] The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. With this notion in mind, giving room for such residual doubt to grow only strengthens the prudence doctrine and a more efficient justice system.

[34]See Christina S. Pignatelli, Residual Doubt: It's a Life Saver, 13 Cap. Def. J. 307 (2001)

Right to Marry – Orientation No Bar!

Rucha Kulkarni
III LL.B

Introduction

In 2004, Theresa Goh, a Singaporean swimmer, participated in the Athens Paralympics while being closeted due to fear of public and private outcry. Since 2004, the world has seen an outpouring of legislations and statutes acknowledging LGBTIQ+ rights. Team LGBTIQ+ finished 7th in the Tokyo Olympics, ahead of countries like France or Germany with a total of 32 medals won between them. The Paralympics have also seen a dramatic rise in the participation from out and proud LGBT+ athletes, by continuing to break record numbers of participation by athletes from the community.[1] The growing positive perception of the community amongst the public has played a significant role in helping this come to pass. On the home front, the Kerala High Court in a progressive step has asked the Undergraduate Medical Education Board to consider the representations of NGOs working towards LGBT+ empowerment to remove homophobic content from textbooks. [2]

The law must stay abreast of the changes in society and one of areas which urgently needs to be addressed is same-sex marriages (or SSM) in the country. But in February this year, the Centre has taken a disappointingly regressive stand and has vehemently denied the right to marry for the same-sex couples. To a petition pending in Delhi High Court, it replied with, "despite the decriminalisation of Section 377 of the Indian Penal Code (IPC), the petitioners cannot claim a fundamental right for same-sex marriage being recognised under the laws of the country"[3]. This highlights a gap between the requirements of the time and the legislative apathy.

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[1]https://indianexpress.com/article/olympics/tokyo-2020-a-pot-of-medals-at-the-lgbtq-rainbow-7448286/lite/ last seen on 11/09/2021.

[2]https://www.ndtv.com/india-news/kerala-high-court-asks-medical-education-board-to-review-queer-phobic-content-in-books-2534280 last seen 15/09/21

[3]Soibam Rocky Singh, *Same-sex marriages will cause havoc, Centre tells Delhi High Court* The Hindu, (New Delhi, 25/02/2021) available at https://www.thehindu.com/news/national/same-sex-marriages-will-cause-havoc-says-govt/article33935252.ece last seen on 22/03/2021.

The Evolving Idea of Marriage

Marriage in India and across the world has evolved through the ages, with inter-caste, inter-religion, inter-racial and 'love' marriages which were once considered scandalous but have now become commonplace. Growing acceptance of single-parent families and adoption in India as well, has also defeated the idea that a familial unit consists of two parents and their biological children.

While India has joined the ranks of the countries who have decriminalised homosexuality through the Supreme Court's decision in,*Navtej Singh Johar v. Union of India*[4], there is a need to understand and recognise that there are other rights that need to be made available for these members of our society to be able to live a full life, and the right to marry can be considered a natural extension from here.

We could take the example of Netherlands[5], which in 2001 became the first country to legalise same-sex marriage, the institution of marriage has functioned just as well as before and this is true for other countries that have extended this right to their citizens. But even 20 years later, the Indian stance remains inflexible, the Centre argued in the Delhi High Court "Living together as partners and having sexual relationship by same-sex individuals is not comparable with the Indian family unit concept of a husband, a wife and children which necessarily presuppose a biological man as a 'husband', a biological woman as a 'wife' and the children born out of the union between the two,"[6]. In adhering to the above view, the government seems to be ignoring the fact that there is no data supporting these fears, and therefore such an interpretation by the Centre is but a narrow and archaic construct of what a marriage could be.

India waits, while the world changes

Alan Turing, the man who helped crack the Enigma code but was cornered into committing suicide on account of Britain's homophobic policies at that time, received an apology and a pardon from the government half a century

[4](2018) 10 SCC 1

[5]https://www.government.nl/topics/family-law/same-sex-marriage

[6] Supra 2

after his death. His contribution in defeating Axis Powers and ensuring victory for the Allies in World War II cannot be overstated. He was subjected to chemical castration on account of his 'unnatural' sexual preferences and humiliated[7]. If this was the treatment meted out to someone who rightfully should have been celebrated as a hero, then what is to be said about the unnamed thousands who must have quietly suffered in anonymity in one of the world's most progressive nations. However, Britain seems to have learnt from its mistakes, it enacted a 'Turing's law', which gave posthumous pardon to convicted homosexuals under the sodomy law. In 2014, the law legalising same-sex marriages came into force, and has met with overwhelming support. If the country which introduced homophobia as part of law in India has changed its stance to such an extent, we must note our failure to do the same and in remaining confined to colonial era perceptions.

In the landmark judgement *Obergefell v. Hodges*[8], the Supreme Court of the United States of America upheld same-sex marriage as a fundamental right and stated that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[9] and, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals', a principle applying equally to same-sex couples."[10]

When our Constitution was enacted, it was ahead of its times, our freedom movement stood for ideas that were progressive even for the more developed world then. A newly independent India overtook many developed nations at the time in many social concerns such as the matter of women's suffrage, including countries like Belgium, Greece, Mexico and others. What has changed for us, that we must wait for a new social order to become a norm outside our own country and then imitate it instead of setting an example by bringing forth a more progressive, inclusive and future proof law?

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[7]https://www.independent.co.uk/life-style/alan-turing-new-ps50-banknote-gay-codebreaker-mathematician-sexuality-pardon-a9005086.html last seen on 11/09/21

[8] Obergefell v. Hodges, 576 U.S. 644 (2015)

[9] Obergefell v. Hodges, Cornell Law School, available at https://www.law.cornell.edu/wex/obergefell_v._hodges, last seen on 22/03/2021

[10] Ibid.

The Problem of Being a Miniscule Minority

"*...the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment.*''- K. S. *Puttaswamy v. Union of India*[11]

A unique form of 'minority stress'[12], which is the term used to describe the chronically high levels of stress faced by members of stigmatised minority groups, affects the members of the LGBT community, as they navigate their lives having their sexual orientation being hidden from the public at large. As a result, they often find themselves having to answer insensitive or inadvertent attacks on them from someone who might be unaware of the sexuality of the person they are facing, and having to perpetually face remarks suggesting that their way of life is deviant from the heteronormative way of life.

Minority rights are rights nonetheless. A blind adherence to majoritarianism is not always the best policy, and history is rife with examples to learn from, e.g., Switzerland allowing the right to vote to women only in 1971, rise of Nazis, and the death of Socrates. An ideal democracy must ensure the rights of its majority while making sure that minority rights are not being drowned under the louder voice of the majority.

This primacy of fundamental rights over a democratic process was underlined in the judgement of *Obergefell v. Hodges*, which mentioned that even though such a process was preferable it was not solely to be relied upon where fundamental rights are concerned. "'An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act,' for 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'"[13]

The 9-judge bench in *K. S. Puttaswamy v. Union of India*[14],has also supported this view, "The guarantee of constitutional rights does not depend upon their

[11](2017) 10 SCC 1

[12]https://www.ncbi.nlm.nih.gov/pmc/articles/pmc2072932/ last seen 11/09/21

[13]Supra 7

[14] Supra 10

exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream".

The question we need to address as a country, is whether we should be indifferent when innocents are not being able to live what is essentially a regular life. There is immense misinformation and fear-mongering that still drives people to be opposed to such unions, even though there is no evidence of them having any bearing on the exercise of people's own private rights. With the right education, understanding and myth-busting the same population will more likely than not come out in support of their families or neighbours or friends, who today have to live without the benefits that their heterosexual counterparts take for granted.

Marriage matters

It is true, that a large section of our society is uncomfortable with the idea of same-sex marriage. The claim that such a marriage between members of the same sex would hamper the traditional ideas of marriage has to do mainly with the mindset of the people and is not supported by any data. In fact, it has been observed that such unions seem to have no impact on heterosexual relationships. "Langbein and Yost (2009) study the US context through 2004 and find that same-sex relationship policies have no effects on different-sex marriage, divorce, and abortion rates or on the percentage of children born out of wedlock; Dillender (2015) finds a similar null result using more recent data and focusing on marriage rates".[15] Marriage being a universal institution, one can extend the analysis to Indian scenario as well. However, while such data helps make arguments favouring such marriages stronger for our country as well, it should be plain enough that where the fundamental and private rights of this minority section are concerned, waiting for the majority to concur need not be a prerequisite. Primacy must be allotted to the Constitutional values of equality and non-discrimination.

[15]Christopher Carpenter, Samuel T. Eppink, Gilbert Gonzales Jr., Tara McKay, Effects of Access to Legal Same-Sex Marriage on Marriage and Health, NBER Working Paper Series, 7, Working paper Number 24651, National Bureau of Economic Research, (2018)

Marriage is interwoven with nearly every aspect of human life. It plays a role in child-rearing, financial decisions, residential decisions etc. It is a very personal and integral part of one's life and it has been proved through many studies that a healthy marriage has a positive impact on the life of human beings. "Current marriage is associated with longer survival. Among the not married categories, having never been married was the strongest predictor of premature mortality."[16] This is seen to be true for both heterosexual as well as homosexual marriages, "legal access to SSM in one's state is associated with statistically significant increases in the probability of having health insurance, reporting a usual source of care, and having a check-up in the past year for men in same-sex households''[17]. It is only just that these benefits do not remain the exclusive privilege of one major section of our society but also be available to those minorities that seek it.

It is true that marriage may not be an essential requirement of life, but it definitely is an important step towards living a full life for many people, and it must remain a free choice for people to make for themselves, without undue restriction from the state or society. Also, the legal benefits obtained out of it are certainly important for those who wish to commit. Regular scenarios like furnishing proof of residence in cases of cohabitation, co-owning assets and opening a joint bank account turn out to be a lot tougher for homosexual couples who wish to live together. During the recent pandemic, several LGBT+ couples found that they were powerless toward making medical decisions for their partners even after cohabiting for several years and being married in every sense except legally.[18] For the LGBT+ people that passed away, their partners could put forward no claim to their property and it was inherited by the families, some of whom had socially distanced themselves from the deceased due to social stigma surrounding the community. Heterosexual couples on the other hand can claim inheritance rights, get loans, maintenance, other benefits which they are entitled to by the virtue of being a spouse.[19]

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[16] Marital Status and Longevity in US Population, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2566023/, last seen on 21/03/2021

[17] Ibid

[18] https://time.com/5926324/india-lgbtq-marriage-case/

[19] 270th Law Commission of India Report, Compulsory Registration of Marriages, 28 (2017)https://lawcommissionofindia.nic.in/reports/Report270.pdf last seen on 22-02-2021

"Dr. D.Y. Chandrachud, J. in *Shafin Jahan v. Asokan K.M.*[20], "The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life." There is no reasonable justification in not extending this right to same-sex couples as well. In the *Puttaswamy*[21]judgement the court endorsed non-discrimination on the grounds of sexual orientation, and maintained that equality meant sexual orientation must be subject to even protection. Then again in the historic judgement, *Navtej Singh Johar v. Union of India*[22], the Supreme Court reaffirmed this and declared "The prohibition against discrimination under Article 15 on the ground of "sex" should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation."

Marriage being such an important right in people's lives must naturally be protected by the state and must not be subjected to state backed discrimination. We have undoubtedly taken a step in the right direction and accepted homosexuality as a natural part of our society by decriminalising it, then by the fact that our Constitution mandates non-discrimination it follows that we extend to them the same basic rights which includes the right to marry as well. Unfortunately, instead of prioritising the availability of social and civil rights to all its citizens, resorting to arguments such as same-sex marriages will amount to "a complete havoc with the delicate balance of personal laws in the country"[23] make the government sound like a recalcitrant child.

Yes, homosexuality is no longer a crime under Section 377 of the IPC. But that does not address all the concerns plaguing this community. Expecting them to complacently accept a life that does not deem them a criminal, while denying them other social benefits common to everyone else, including the right to marry, seems to be an unrealistic and selfish expectation.

[20](2018) 16 SCC 368
[21] Supra 10
[22]Supra 3
[23] Supra 2

Conclusion:

"Natural rights are not bestowed by the state. They are inherent in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation."[24]

Marriage is a celebration of love, family and the enduring bonds that human beings forge with one another. These bonds should not be limited by social constructs of what a 'proper' family is. While same-sex marriages might not make sense to those who hold more traditional views, accepting them is a way of honouring the complexities and similarities in human relationships.

If one tries to envision the future, then judging by the history of mankind, such a discrimination will come to an end if not today, a few years later – slavery did, and so did colonialism. Countries that took measures or spoke up against such oppressions went down in history as liberal and reformist. Suppression of no section is a long-term solution; it will be challenged and eventually it will come to an end. Today, over 124 countries have decriminalised homosexuality, many have legalised marriages or partnerships and some are on this path. It is but a natural progression that same-sex marriages will replace decriminalisation as the new standard. India must introspect upon its reluctance to make these changes and how it reflects upon our international image. Our actions today will determine whether our posterity will reflect on our country's decisions with admiration or embarrassment. It is time our lawmakers take up this issue and use their foresight to enact a progressive and enduring law, even at the cost of ruffling a few feathers, so that India is not a follower but a torchbearer of equality.

[24] Supra 10

Blockchain Patenting and Regulation- Need of the Hour

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Blockchain is a distributed ledger technology which can record or track transactions which can be exchanged and authenticated on a peer-to-peer network. Thus, blockchains create a transparent environment without any central intermediary authority to control it. Each transaction or a block is transmitted to all the participants and must be verified at by each participant or node by solving a mathematical puzzle and once it is authenticated it is added to the ledger or the chain.[1] The decentralised nature of the technology is what makes it unique and the hash which is similar to a fingerprint brings in the transparency involved in the transaction and makes the technology prodigious.

Blockchain technology was first noticed publicly when the paper on "Bitcoin" written by cryptographer named Satoshi Nakamoto was published in 2008.[2] Though this paper limited itself to the use of the crypto currency "Bitcoin" this technology has become advantageous with several kinds of uses in the current times. With the advent of the internet and its immense use post 2000s it caused a whirlwind change in the economy and impacted the functioning of people in myriad ways. Similarly, the blockchain technology in today's era has caused uproar in the functioning of. certain things when it comes to management of pharmaceutical supply chains, data management, digital repository, e-Notary services belonging to various industries in an economic region.

The use of Blockchain Technology (BT) in its current form could not have been imagined by anyone a decade ago but currently, there are favourable conditions with several applications and computer programs employing BT,

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[1] S. Vaishali, Demystify the Blockchain: Challenges to Conventional Thinking About Intellectual Property, availableat https://www.scconline.com/blog/post/2018/08/23/demystify-the-blockchain-challenges-to-conventional-thinking-about-intellectual-property/ , last seen on 23/08/2018.

[2]Satoshi Nakomoto, Bitcoin: A Peer-to-Peer Electronic Cash System, available at www.bitcoin.org, last seen on 31/03/2021

thus making it widely relevant. This (BT) has become very handy in various administration processes and seems to be on a global agenda to revolutionise the way in which things are working. In the 21st century, where storage is the most essential feature to store the large amounts of data that is transferred or processed needs a point or node where it can be stored and this technology has found efficient ways to ease the said job. From cloud storage to digital signatures[3] and from stock trading to keeping public records this technology has created within itself an ecosystem in the modern world which makes any innovation relating to it protection worthy. The use of this technology is varied and thus may differ in functionality in different industrial sectors as per their industrial application.

This article emphasises on the rudiments of blockchain technology in terms of patenting and regulation and why it is important to undertake those changes as soon as possible.

BT Patenting:

The blockchain technology and the issue of its patentability have witnessed a roller coaster of approvals and rejections due to the uncertainty revolving around it in various jurisdictions. This technology makes use of computer programs which make it susceptible to patent grants. The law relating to software patents or patents in relation to computer programs differs as per various foreign jurisdictions. The conservative or liberal attitude of countries then comes into the picture which has a considerable impact on the innovation involved in that specific field; in the present scenario it refers to blockchain technology. In major jurisdictions such as the US, UK, EU, Japan, China where there are maximum blockchain patents filed they seem to have accepted this evolving technology and have granted patents to some of the tech or financial giants. Alibaba and IBM are the top applicants with the most blockchain patents in the world.[4] The ***Alice ruling***[5] from the US Courts had stirred up matters relating to software patent when it stated that such patents

[3] National Strategy on Blockchain, Government of India, Ministry of Electronics and Information Technology (MeitY) January 2021, available at https://www.meity.gov.in/ writereaddata/ files/NationalStrategyBCT_%20Jan2021_final.pdf last seen on 13/05/2021

[4]Dashveejit Kaur, Despite layoffs, IBM still leads in blockchain innovation, TechHQ available at https://techhq.com/2021/03/despite-layoffs-ibm-still-leads-in-blockchain-innovation/, 18/03/2021

[5]Alice Corp. v. CLS Bank 134 S. Ct. 2347 (2014, Supreme Court of United States)

which formed an abstract idea were ineligible for patent protection whereas the ***Mayo judgement*** had specified a two-step test to ensure which were patent eligible.[6]

In India however blockchain patents may face uncertainty that hovers over Section 3(k) of the Indian Patents Act. The words "per se" in the section 3(k) of Indian Patents Act were added by an Amendment in 1999[7] in order to comply with the provisions given in the TRIPS has opened it to interpretation. These words were added after carefully considering and reviewing the section by a Joint Committee. and Software patents in India have seen a sort of turbulence. Although a recent judgement given by the Delhi High Court in 2019 in the case of ***Ferid Allani versus UOI and Ors***. holds computer programs patentable in certain circumstances. It was held that "the bar on patenting is in respect to computer programs per se and not all inventions based on computer programs. [8]The Court also observed that most inventions these days are based on computer programs and if the above view is not taken then most inventions in today's time would notbe patentable.[9] Thus it further stated that the words "*per se"* were incorporated in order to grant patents to genuine inventions. The judgement also emphasizes on the need for the invention to have a technical effect or technical contribution. The computer related inventions guidelines need to be considered while granting patents based on this technology. Moreover, these guidelines had contrasting views, the first guideline that came out in 2013 mentioned explicitly as to what constitutes as 'technical effect' and what amounted to 'technical advancement' so as to determine the patentability of Computer Related Inventions but there was an amendment in 2016 that excluded the broader view of patentability offered in the previous guideline. It laid down a ***three-step test*** which was such that patents could only be granted if:

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[6]Mayo v. Prometheus Labs 132 S.Ct.1289 (2012, Supreme Court of United States)
The two steps that laid down in popularly known as the Mayo judgement are as follows:
To determine whether the claims are directed to an abstract idea, a law of nature or a natural phenomenon (i.e. a judicial exception). To determine whether the claims recite additional elements that amount to significantly more than the judicial exception.

[7] Joint committee on patents (second amendment) bill, 1999, Rajya Sabha, *The Patents (Second Amendment) Bill, 1999*, December 2001

[8] Ferid Allani vs. Union of India and Others 2019 Del 11867: (2020) 81 PTC 489

[9] Ibid,

(a) If the contribution could be identified properly

(b) It was denied if the contribution was in the form of business model or algorithm.

(c) If there was a novel hardware or if there was novelty in both computer program as well as the hardware.

The revised guidelines of 2017 [10]ensured protection could be granted to some computer programs but skipped to add the definition of technical effect or contribution meant like its predecessor.

The Computer Related inventions are such inventions which involve the use of computer, computer networks or other programmable, apparatus and also include inventions having one or more features which are realized wholly or partially by means of a computer program or programs.[11] Over the years there have been three guidelines issued to monitor these computer related inventions. These CRIs guideline have been a subjected to the whims and fancies of the makers due to contradicting views of each guideline which has impacted the patent law when it comes to software patenting and thus led to increased ambiguity surrounding it while granting patent to such inventions.

Patent Trolling

With patenting comes problems that are associated with it, one of the problems that may lead to litigation in future is that of "patent trolling". In order to understand patent trolling it is necessary to understand the basic functionality of a patent. A patent becomes an important intellectual property

[10] The three Computer Related Guidelines originating through Indian Patent Office are as follows:
Guidelines for Examination of Computer Related Inventions (CRIs) , Office of Controller General of Patents, Designs and Trademarks 2013, available at https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_36_1_2-draft-Guidelines-cris-28june2013.pdf last seen on 13/05/2021
Guideline for Examination of Computer Related Inventions (CRIs), Office of Controller General of Patents, Designs and Trademarks 2016, available at https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_83_1_Guidelines-for-Examination-of-CRIs-19-2-2016.pdf last seen on 13/05/2021
Guidelines for Examination of Computer Related Inventions (CRIs), office of the Controller General of Patents, Designs and Trademarks 2017, available at https://ipindia.gov.in/writereaddata/Portal/Images/pdf/Revised__Guidelines_for_Examination_of_Computer-relatedInventions_CRI__.pdf last seen on 13/05/2021

[11] Ibid

right when it is an innovation embedded within an invention as the patenting regime works on the fundamentals of economic incentive theory. This theory means that "encouragement of individual effort by personal gain is the best way to advance public welfare." The idea which must have incurred a lot of research and efforts by the creator are nullified if others can benefit out of it without any cost at their hand and thus it becomes essential for them to create a mini-monopoly like structure in the market to protect the interests of the creator. Thus, it becomes necessary to eliminate problems which might hinder with the interests of the intellectual property creator.

"Patent trolling" means a third party who is not a creator nor producer of an intellectual property but takes advantage by filing a patent these are mostly non-practising entities (NPE) whose main aim is to cash on the creations of others by imposing heavy licensing fees on a patented good before the original creator does. This is heavily witnessed in industries that need Standard Essential Patents (SEP) so as to create further advancement or innovation in the field. This also helps them to drive out competitors from the market and it becomes difficult for the start-ups to increase innovative activity due to the huge licensing fees involved. Patent trolling in blockchain may eventually turn out to be a bigger issue at the stage of commencement of patent litigation. Thus, there needs to be a proper check before patent can be granted to such products. This can be done by including more technical members who understand technology and its effects in a better way during the examination process for granting a blockchain patent by the Indian Patent Office

BT Regulation

Regulation plays a vital role when there is introduction of newer inventions in the society this prevents it from any negative repercussions in the long run. Blockchain technology is such a new concept which requires slight regulation in order for the interests of the stakeholders to be protected. The stakeholders involved are financial investors, innovators, consumers and such others who derive even a tad bit of benefit from this technology. Thus, in this tech savvy world there is a constant need to stay updated and to up the game in this ever evolving and revolutionizing digital economy, regulation of blockchain technology must be one feature adopted in the Indian patenting regime to

protect the interests of its various stakeholders[12] This technology has introduced newer aspects such as Smart contracts, Digital signatures which give rise to various security and regulatory concerns. For example, the European Blockchain Partnership (EBP) helps connect countries to cooperate in the establishment of European Blockchain Services Infrastructure to support the delivery of cross-border digital public services and there are such others.[13]

Blockchain are mainly of two types permissioned blockchain and permission less blockchain. The former ones have limited users which attract regulation in different form from the latter ones. The latter ones are more prone to security issues as they are similar to the internet in their functioning it means that anyone with an access to the concerned service provider can alter transactions and thus, they need good data protection and privacy laws in place for the data stored on blockchains to be protected.[14]

One solution to make laws that will help in regulation of blockchains can be adopting a **regulatory sandbox mechanism.** This will regulate the side-effects that blockchain technology could have in the future by carrying out experiments in a controlled environment which will make it easier to govern them eventually. In the present times this concept is adopted by major countries even by India for that matter. This concept is mainly used in relation to the Fintech industry which was the first to grow when it came to Blockchain technology.[15]

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[12] National Strategy on Blockchain, Government of India, Ministry of Electronics and Information Technology (MeitY) January 2021, pg 15-19, available at https://www.meity.gov.in/writereaddata/files/NationalStrategyBCT_%20Jan2021_final.pdf last seen on 13/05/2021

[13] Nadia Hewett, Margi van Gogh & Linda Pawczuk. Inclusive Deployment of Blockchain for Supply Chains: Part 6- A Framework for Blockchain Interoperability, available at http://www3.weforum.org/docs/WEF_A_Framework_for_Blockchain_Interoperability_2020.pdf last seen on 13/05/2021

[14] Eric Piscini, David Dalton & Lory Kehoe, Blockchain & Cybersecurity, available at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-blockchain-and-cyber-security-lets-discuss.pdf last seen on 13/05/2021

[15]Global Technology Governance Report 2021, World Economic Forum, available at weforum.org, last seen on 31/03/2021

The first regulation if it can be said so is in relation to the blockchain technology was the draft bill[16] which banned use of any virtual currency but this too was set aside by the Courts in the country in the case of ***Mobile Association of India versus RBI.***[17] In order to facilitate more innovative activity and advancement in this field there needs to be laws that could pinpoint to the legal person who may be responsible for it. It is also essential as the major issue in this kind of transactions that could facilitate from this technology leads to jurisdictional issue and if it is left unregulated there could be money laundering crimes in case of financial or banking sector or maybe in case of smart contracts that take place using this tech. Incorporating software programs that can be copyrighted as literary works is also essential to get the source code of the applications which functions using the BT technology protected. If the virtual currency gets accepted in the future than the relevant taxation laws in any country will require amendment to incorporate the change.[18]

Conclusion:

In Blockchain's nascent stage of the development the idea of its patenting and regulation depends on the notion of "if not now then when?" to prevent patent litigation problems in the future. There needs to be certain solutions outlined to protect the mass interests of people like firstly, there should be global standards or even national standards that could protect the interests of stakeholders. Secondly there is a need for clarity in legislative intent by the legislators in terms of formulating a law that protects variants originating from such technology and the judiciary should help in the same matter to form one view instead of diverse ones on the subject of software patents to bring in some much-needed clarity. Getting rid of such ambiguity can lead to great change in the way innovators in the technological hub like Bangalore which houses a lot of start-ups react to investment and research and development (R & D) in this technology. Thirdly, there needs to be sector or

[16] Draft Banning of Crypto currency & Regulation of Official Digital Currency Bill, 2019 (this bill was struck down by the Supreme Court of India in March 2020 as unconstitutional), Ministry of Finance, available at https://prsindia.org/billtrack/draft-banning-of-cryptocurrency-regulation-of-official-digital-currency-bill-2019

[17]? Mobile Association of India versus Reserve Bank of India, (2020) 10 Supreme Court Cases 274: 2020 SCC On Line SC 275

[18] Supra 11.

industry specific laws for instance there needs to be a law in place for banking or financial sector to be specific in order to prevent any hazardous activity taking place due to sheer neglect. Fourthly, the issue of patent trolling also needs to be curbed by the Indian Patent Office (IPO) by carefully scrutinizing the patent applications that come to them by appointing a technical person who would aid to understand the technical aspect embedded in such computer-based inventions. Fifthly, the CRI guidelines must also be amended to mention what it means to have a technical effect and whether there is an absolute need to have a special hardware or is it fine to have the general hardware that already exists when it comes to patents related to blockchain technology.

These are some of the changes that could help in bringing positive changes in this revolutionary technology known as blockchain technology as it is here to stay for us and the future generations to come.

The Dichotomy of Our Constitutional Criminal Procedure

Shrishti Kedia
III LL.B

Introduction:

Prevention is an imperative aspect of criminalization, but one that must be regulated with just restriction in order to prevent an overextension of the criminal law.[1] The mechanisms employed to enforce criminal law are inclusive of the utmost coercive powers that authorities of the liberal democracies are sanctioned to exert over their citizens. Therefore, it is rightful to assert that, the rights and duties of citizens are influenced by the manner and substance of the substantive and procedural criminal law to an extent.[2]Criminal law deals with the state's right to use coercive power to limit individual's liberty with the motive of seeking justice for the society, whereas, a liberal constitutional order seeks to protect individual liberty from arbitrary intrusion from the state by placing constitutional limitation on the scope and processes of criminal law. The drafters of any constitution have two choices: to restrict state's power in favor of individual liberty (the liberty perspective) or; to prioritize public order over an individual's liberty (the public order perspective). What we refer to as liberty perspective perceives criminal process in light of limitations on state's power over individual's liberty, the state is answerable for any deprivation of any individual's right or liberty he or she is entitled to. On the other hand, if the public order perspective is preferred, the constitutional rights of a person is restricted in scope and interpretation to empower the state to identify and punish the accused. Here, the criminal process is concerned with making adequate determination of factual guilt and innocence, and promptly punishing the guilty. These two perspectives aren't mutually exclusive binaries, rather they deal with state's priorities and policy. To lean towards one perspective doesn't indicate negation of the other, but it implies prioritization of the

[1] A. Ashworth and L. Zedner, "Prevention and Criminalization: Justifications and Limits," *New Criminal Law Review: An International and Interdisciplinary Journal,* vol. 12, no. 4, pp. 542-571, Fall 2012.

[2] E. Aharonson and P. Ramsay, "Citizenship and Criminalization in Contemporary Perspective: Introduction," *New Criminal Law Review: An International and Interdisciplinary Journal,* vol. XIII, No.2, pp. 181-189, Spring 2010.

chosen perspective in the process of canvassing the constitutional criminal procedure of the state. Through the process of making a decision regarding the domain of a constitutional criminal procedure, the emphasis should lie on balancing individual liberty and public order. This Article throws light on the Indian Constitutional Criminal procedure and it's shift from a *'liberty perspective'* to a *'public order perspective'* as a result of the court's approach towards the constitutional safeguards of the impoverished under criminal process.

The Evolution:

During the Constituent assembly debates, the members of the assembly recognized that the constitutional criminal safeguards involved a balance between the aims of individual liberty and social control. The primary concerns of the debates were to limit State's control during a criminal process and prevent any arbitrary intrusion in the realm of individual liberty. The constituent assembly, in favor of a liberal perspective, came up with criminal process rights to provide with necessary limitation on State power to protect individual liberty against any arbitrary intrusion, even if as a result the State's security interests or criminal process administration was constrained. The Advisory committee had recommended the inclusion of the provision ensuring that *'no person shall be deprived of life, or personal liberty without due process of law'.* The drafting company later on substituted *'due process of law'* with *'procedure established by law'* which sparked protests in the assembly concerning it's misuse by the legislature to authorize use of state's coercive powers in an arbitrary manner.[3] Dr. Ambedkar in agreement with the concerns introduced draft Art. 15A which became Art. 22 providing for criminal process rights immune to abrogation by the parliament. Though many members didn't agree on the adequacy of these rights for providing protection to individual liberty, there was a consensus on the need to have a constitutional provision which provided explicit limitations on criminal process. Finally, The Indian constitution placed the importance of safeguarding certain individual liberty from the State through Arts. 20 to 22 of the Fundamental Rights, Part III of the constitution.

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[3] S. Choudhary, M. Khosla and P. B. Mehta, "Criminal Law and The Constitution," in *The Oxford Handbook of The Indian Constitution,* New Delhi, Oxford University Press, 2016, pp. 794-813.

The Constituent Assembly also passed free India's first Preventive Detention Act, 1950, which provided restrictions over court's power of enquiry into the particulars such as necessity, evidence or grounds of a detention under the said act. The Constitution of India (Art.22) accepts preventive detention as part of the normal administration of law and order in the country and provides for minimal constitutional safeguards where public order and state security are predominant concerns. The constitutionality of the act was challenged in *A.K. Gopalan v. State of Madras*[4] for being in violation of Art. 21 and Art. 19(1)(d). The challenge was repelled by the Bench (of five Judges). The Judges attention was drawn by the Attorney-General to the fact that the Constituent Assembly had wilfully rejected 'due process' in Art. 21 and therefore the examination of the unreasonableness of the law was beyond the purview of the court. It was concluded that whatever the procedure prescribed by enacted law (even if unfair or unreasonable), that itself is a sufficient justification for deprivation of life or liberty.[5] It took the Supreme Court more than 25 years to free itself from the restraints of *Gopalan* case[6] which it ultimately did, in *Maneka Gandhi* case[7], where a Constitution Bench decision of seven judge read into Art. 21 a new dimension: it wasn't enough for the law to prescribe some resemblance of procedure providing for deprivation of a person's life or personal liberty. It was paramount for that procedure to be reasonable, fair and just; opposing to which the law would be held void for violating the security of Art. 21.[8] Moreover, in light of the disastrous conclusions of *ADM Jabalpur*[9] during the emergency of 1975, the Parliament took the initiative to strengthen the power of Art. 21 to enforce judicial protection of rights by bringing in the 44th Amendment under the Constitution Act, 1978 which prohibited the suspension of Arts. 20 and 21 even during an emergency. This became the starting point for a spectacular evolution of the

[4]AIR 1950 SC 27.

[5] F. S. Nariman, "FIFTY YEARS OF HUMAN RIGHTS PROTECTION IN INDIA - THE RECORD OF 50 YEARS OF CONSTITUTIONAL PRACTICE," *National Law School of India Review,* Special Issue (2013), pp. 13-26, 2013.

[6] Supra 4.

[7]*Maneka Gandhi v. Union of India* (1978) 1 SCC 248: AIR 1978 SC 597.

[8]Supra 5.

[9]*ADM, Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521: AIR 1976 SC 1207; The judges of the court held that an order of preventive detention issued at a time when Article 21 was under suspension (i.e., from June 1975) could not be challenged.

law relating to judicial intervention with respect to various cases[10] which were related to the arbitrary use of State power to curb individual liberty.

An Interpretative Shift in Paradigm:

However, while interpreting special criminal laws[11] the Supreme Court made a shift from the liberal perspective to the public order perspective by interpreting the criminal process rights as a step to satisfy public order interest.

In *Kartar Singh v. State of Punjab*,[12] a Bench of five judges rejected the constitutional challenge to the *Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorists and Disruptive Activities (Prevention) Act, 1985, and the Terrorist and Disruptive Activities (prevention) Act, 1987 (commonly known as the TADA*). The Terrorist & Disruptive Activities Prevention Act 1985 & 1987 were a group of statutes- intended to provide provisions concerning the terms of punishment with regards to terrorists, and were considered very drastic. 'Disruptive activity' was defined as including the questioning by speech or act, directly or indirectly, the territorial integrity and sovereignty of India or supporting the cession of any part of India: such speech or act need not be accompanied by any violence or show of force. Moreover, police confessions, unconventionally, became admissible evidence before the special designated Courts.[13] The Justices have conceded that the Acts (TADA) "tend to be very harsh and drastic… containing stringent provisions" making it plainly arbitrary - and thus violative of Article 21. And yet, the TADA Acts, were upheld in 1994, as not violating Article 21 owing to the error in the majority judgement.[14] The Maneka Gandhi's case[15] had established that the procedure established by law shouldn't be arbitrary or unreasonable but the

[10]*M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544; Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 98; Sunil Batra v. Delhi Admn., (1978) 4 SCC 494; Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545; Prabhakaran Nair v. State of T.N., (1987) 4 SCC 238; Subhash Kumar v State of Bihar, (1991) 1 SCC 598.*

[11]Preventive Detention Act, 1950; MISA, 1971; AFSPA, 1958; TADA, 1985 & 1987; POTA, 2002; *1967 Unlawful Activities Prevention Act.*

[12]*Kartar Singh v. State of Punjab* (1994) 3 SCC 569.

[13]TADA, 1985 & 1987

[14]Supra 5.

[15]Supra 7.

question was “arbitrary” or “unreasonable” w.r.t what? The progressive answer would be w.r.t to “deprivation of life and liberty” and not the “law, or the object the law”. Unfortunately, the constitution bench in this case reached a worrisome conclusion by observing: however, arbitrary or unreasonable the procedure for deprivation of life or liberty, however harsh and drastic the provisions of law, they would be valid under Article 21, if the object of the law is laudable.[16] All the judicial embellishments to Article 21- the progress made through the *Maneka Gandhi's*[17] case and the 44th amendment post 1975 Emergency era w.r.t the protection of life and liberty, stood dismantled with *Kartar Singh*[18]. TADA has since been terminated but it remains applicable to the pending cases.[19]After *TADA* came and went, it was replaced with *POTA (Prevention of Terrorist Acts)* in 2002 and now the amended *1967 Unlawful Activities prevention Act*. The sunset provisions succeeding the repeal of POTA in 2004 legalized the arrests made under POTA, notwithstanding its repeal, if the arrests had a nexus to a prevailing POTA case. There are abundant cases under these acts with detained individuals who continue to await trial, facing malnutrition, torture and, many a time, custodial killings. The most recent example of a case where individual liberty was undermined is the *Bhima Koregaon Case* where the day of the anniversary celebrations of the Bhima Koregaon battle was tarnished by violence and it led to the arrest of several activists under the allegation of having "Maoist links". The detainees still await trial since there arrest in 2018 and there have been reports of various human rights violations along with the fact that the courts have refused to grant them bail with regards to the provisions of the *UAPA Act, 1967*. The UAPA specifically disallows anticipatory bail not only for alleged terrorist acts, but for all offences of alleged terrorist activity punishable under the UAPA. The Court’s reluctance to prioritize Individual liberty under the garb of National security has led to reading of the rights restrictively which has further resulted in the expansion of state powers and narrowing down the scope of limitations on them.

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[16]Supra 5.

[17]Supra 7.

[18]Supra 12.

[19]Section 1(4), TADA,1987

Furthermore, the obtuse construal of Article 20-22 by the Court also indicates towards the Court's dominant narrative emphasizing the public order virtues of the criminal process. First, the Court reads down the procedural safeguards that impact the state's ability in finding the truth and punishing wrongdoers. Secondly, by emphasizing on a case-by-case analysis on whether any violation of liberty caused prejudice to the accused, it rejects categorical prohibition against state actions which are violative of such safeguards. As we survey the court's doctrine on constitutional criminal procedure, let's have a profounder look into its approach towards each safeguard individually:

Right Against Self-incrimination: The scope of the right against self-incrimination, provided by Article 20(3) of the Constitution, has been heavily litigated in the Supreme Court. It was through the interpretation of the meaning of 'to be a witness' the court has limited the scope of this right. In *Kathi Kalu v. State of Bombay,*[20] the court held that a person is not a witness when she produces physical objects or provides thumb impressions, handwriting samples or other bodily substance through which she can be identified. The court reasoned that the makers could not have intended to put obstacles in the way of efficient administration of justice through such safeguards and focused on the reliability of the evidence instead of the liberty of the accused. Further, the Code of Criminal Procedure (CrPC) removed the permissibility to draw an adverse inference if the accused refused to answer or gave false answers to the questions posed by the judge, under section 313, about the circumstances against him or her. However, in a series of cases[21], the court has held that although an accused is entitled to remain silent or deny allegation against her under Section 313 of CrPC, an adverse inference can be drawn from such silence or false denial which compels the accused to provide an explanation for evidence against her.

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[20]1961 SC 1808

[21]*Rajkumar v. State of Madhya Pradesh* (2012) 5 SCC 353; *Phula Singh v. State of Himachal Pradesh* (2014) 4 SCC 9; *Nagesh v. State of Karnataka* (2012) 6 SCC 477; *Manu Sao v. State of Bihar* (2010) 12 SCC 310.

Moreover, Compulsion being the sole ground for exclusion of evidence has led to the acceptance of evidence gathered through other illegal means, including through violation of Article 21. In *Yusufalli Esmail Nagree v. State of Maharashtra* [22]*and R M Malkani v. State of Maharashtra*[23]*,* the court implied that discoveries made through a secretly taped self-incriminating conversation of an accused can be used as evidence as it was not compelled, disregarding the violation of Article 21. The Court's approach towards the right against self-incrimination highlights its public order perspective. The scope of protection against compulsions leading to self-incrimination is circumscribed by the usefulness of the evidence so generated in making a determination of guilt or innocence.

Fair Trial Guarantees: In cases of constitutional criminal procedure, the court interprets the purpose of the right to free trial as a tool for accurate determination of factual guilt and innocence. In practice, it leads to reading down of the rights of accused. In case of a denial of fair trial rights, the trial or procedure isn't put aside on the basis of illegality without any establishment of factual prejudice due to such violation. Similarly, despite of the right to speedy trial as a part of the liberty under Article 21, the accused has to establish prejudice as a result of the delay for it to amount as a violation of the right.[24] Moreover, in one line of cases, the court also expressed its discomfort with the 'beyond reasonable doubt' doctrine and wondered whether in an attempt to protect the innocent from being punished, many guilty persons are allowed to escape. The court held that 'proof beyond reasonable doubt is a guideline, not a fetish' and on that reasoning awarded the death sentence to the accused as his retracted, uncorroborated confession to a police officer was

[22]1968 SC 147

[23]1973 SC 471

[24]*Dharmendra Kirthal v. State of Uttar Pradesh* (2013) 8 SCC 368; *Niranjan Sashittal v. State of Maharashtra* (2013) 4 SCC 642; *Mohd. Hussain v. State* (2012) 9 SCC 408.

found to be satisfactory.[25]

Right to Counsel: The right to counsel in a criminal proceeding has been unambiguously considered of core importance w.r.t ensuring a fair trial and has been mandated by Article 22(1) of the Constitution. While it is a well-established right, the scope of the same is less certain. While the Court recognized the right of the accused to a lawyer present during interrogations in a line of cases[26], another question which arose was whether failure to provide for the same rendered confessions inadmissible. The court in State (NCT of Delhi) v Navjot Sandhu[27] rejected this argument and held that such a right is only a supplemental safeguard in order to protect right against self-incrimination. The admissibility of a confession will depend upon denial of the primary safeguard and will be decided on case-to-case basis. The same argument was emphasized when the issue arose in Kasab's case[28].

Finally, the question about whether this Right instills the Right to have an effective counsel arose in *Navjot Sandhu*[29] and it was held that the right cannot be taken thus far while rejecting the applicability of ineffective assistance of counsel as a ground to vitiate trials.[30] In conclusion, the court has refused to consider ineffective assistance of counsel as violative of Article 21.

Conclusion:

Although, the court recognizes the principle of presumption of innocence until proven guilty in individual cases, the public order approach creates a

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[25]*Devendar Pal Singh v State (NCT of Delhi)* (2002) 5 SCC 234. The Court's reasoning was followed in *State v. Karnail Singh* (2003) 11 SCC 271; *Sucha Singh v State of Punjab* (2003) 7 SCC 643; *Gangadhar Behera v State of Orissa* (2002) 8 SCC 381

[26]*Nandini Satpathy v. PL Dani* (1978) 2 SCC 424; *State (NCT of Delhi) v Navjot Sandhu* (2005) 11 SCC 600; *Selvi v. State of Karnataka* (2010) 7 SCC 263

[27](2005) 11 SCC 600

[28]*Ajmal Kasab v. State of Maharashtra* (2012) 9 SCC 1

[29]Supra 27

[30]Supra 3

systematic presumption of criminality against the accused persons as a class.[31] This doesn't bode well for those who face the brunt of police brutality; those who cannot afford lawyers and depend on state and have to be satisfied with whatever quality of legal assistance provided. When Dr. Ambedkar introduced Article 15A in the constituent assembly, he intended for it to provide safeguards for personal liberty of citizens upon arrest and distinguished them from provisions relating to preventive detention. He believed that the exigency of individual liberty should not be placed above the state's interest during an emergency situation. A 'public order perspective' was only intended to be prioritized in special circumstances. However, through its interpretation of constitutional criminal procedure, the Supreme Court perceived the mundane reality of the state as one of routinised emergency, wherein the public order takes predominance as a necessity.

[31]Ibid.

CASE COMMENTS & LEGISLATIVE COMMENTS

S. Kasi v. State Through the Inspector of Police Samaynallur Police Station, Madurai District[1]

Akshya Singh
I LL.B

Introduction

In this case, the Supreme Court laid down that the right to life and personal liberty[2], of an accused, is paramount and cannot be taken away by State without authority of law.

Facts of the Case

On 21.02.2020, the appellant was arrested for house breaking and theft. The appellant filed an application, before the Madras High Court, praying for grant of bail under Section 167(2) of the Code of Criminal Procedure, 1973 as 73 days had passed since his arrest and the chargesheet had not been filed by then. The Single Judge Bench rejected the application for bail on grounds of the Supreme Court's order dated 23.03.2020[3] which extended the limitation period for filing petitions, appeals, suits etc. in respective Courts/Tribunals across the country till further notice due to the Covid-19 pandemic.

Issues Involved

Whether the appellant is entitled to bail due to non-submission of the chargesheet by the prosecution within the prescribed time period under Section 167(2) of the Code of Criminal Procedure, 1973.

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[1] S. Kasi v. State Through the Inspector of Police Samaynallur Police Station, Madurai District, 2020 SCC ONLINE SC 529.

[2] Art. 21, the Constitution of India.

[3] SUO MOTU WRIT PETITION (CIVIL) No(s).3/2020.

Arguments Advanced

Appellant-

1. Section 167(2) entitles a person to default bail in case of non-filing of chargesheet within the stipulated time period. The Supreme Court's order dated 23.03.2020 cannot be read as extending the time period of filing of chargesheet by the Police.
2. The learned Single Judge took a contrary view to an earlier judgement by another learned Single Judge in Settu v. The State[4], which decided that the Court order dated 23.03.2020 cannot be applied on the provisions of Section 167(2) of Cr.P.C.

Respondent-

1. The Covid-19 pandemic, has slowed down the investigation process, leading to delay in filing of the chargesheet and the appellant should not be granted benefit of the same.

Judgement by Hon'ble Supreme Court

1. The Court's order dated 23.03.2020 is not meant to curtail any provisions of the Cr.P.C,1973 or any other statute enacted to protect the personal liberty of an individual. The order was passed for extending the limitation period for filing petitions, applications etc. to provide benefit to "*those who have to take remedy, whose remedy may be barred by time because they were unable to come physically to file such proceedings",* and not to extend the period of filing of chargesheet by the Police under Section 167(2) of Cr.P.C.
2. A coordinate Bench cannot take a contrary view, but can only refer the matter to a larger Bench in case of any doubt as taking a view contrary to that of a coordinate bench could embolden the State and the prosecution to breach the rights of a person. Comity of Courts to be followed and no Judge can make any adverse remark on any other judgement.

The judgement of the High Court of Madras was set aside and appellant was directed to be released on default bail at a personal bond of Rs.10,000 and two sureties to the satisfaction of the Trial Court.

[4] Settu v. The State, Criminal Appeal No.5291 of 2020 (Madras High Court,2020)

Conclusion:

Right to life and liberty are natural rights, they have existed since before the Constitution came into existence. It would be a blunder to alienate a person from rights that are so fundamental to his existence. Right to be granted bail is one such right included in the right to life and personal liberty of an individual, which can be observed by reading together the Article 21 of the Constitution of India and Section 167(2) of CrPC, 1973.

As laid down by Hon'ble J. H.R. Khanna in his dissenting judgement to the ADM Jabalpur v. Shivkant Shukla[5] case, "*The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law."*

The doctrine of rule of law lays down that everyone is equal before law and no one is above the law and imposes certain restrictions on the State when it deals with liberties of the individual, thus protecting the individual's rights against the State.

Bail is the rule and jail an exception[6]is an important principle of criminal jurisprudence.

This becomes all the more important in the current Covid-19 situation, when the over-crowded prisons make it difficult to adhere to the Covid-19 protocols thus, putting the prisoners at a very high risk of infection.

In the case of Rakesh Kumar Paul v. State of Assam[7], "*right for default bail is indefeasible right which cannot be allowed to be frustrated by the prosecution."*

Thus, the restrictions placed due to the lockdown cannot be a reason to curtail the right of an accused to get default bail in case of non-filing of chargesheet within prescribed time. Chargesheet can be filed even after the prescribed time period is over.

All in all, right of an accused to demand justice cannot be taken away.

[5]Additional District Magistrate, Jabalpur v. Shivkant Shukla, (1976) 2 SCC, 521

[6]State of Rajasthan v. Balchand, AIR 1977 SC, 2447

[7]Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC, 67

Amit Sahni v. Commissioner of Police & Ors.[1]

Esha Shashikumar Todkar
III B.A.L.L.B.

Bench- J. Sanjay Kishan Kaul, J. Aniruddha Bose and J. Krishna Murari

Factual Background:

Passage of the Citizenship Amendment Act, 2019 by the Parliament saw nationwide protests against the law over a period roughly ranging from December 2019 to March 2020. One such protest which attracted attention from world over was the infamous "Shaheen Bagh" protest which began from 15 December 2019 and lasted for 101 days until a nationwide lockdown owing to COVID-19 pandemic brought it to an end on 24 March 2020[2]. This sit-in protest which was one of the largest, longest and powerful protests of the decade became the eye of the storm when it blocked an important public route 13A connecting two important cities of Noida and Delhi[3]. This led to the closure of Kalindi Kunj-Shaheen Bagh stretch and the Okhla pass for an indefinite period beginning from 15 December 2019. Tents comprising of about100-200 protestors along with certain semi-fixed heavy metallic structures such as a model of India Gate, a 3D map of India and other makeshift facilities erected by the protestors, blocked the route causing grave inconvenience to the public. Everyday thousands of commuters including school children were forced to take longer routes and leave home few hours in advance to reach their destinations in time as the traffic caused long delays. A petition was filed before the Delhi High Court seeking directions from the court to clear the protest. The High Court held that no specific writ, order or direction could be issued and left it to the discretion of the police to mitigate grievances cited by the petitioner in accordance with maintenance of law &

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[1] 2020 SCC OnLine SC 808; Decided on 7 October 2020

[2] ***Shaheen Bagh's 101-day protest: Timeline of sit-in against CAA*** , available at Shaheen Bagh's 101-day protest: Timeline of sit-in against CAA | Cities News, The Indian Express, last visited on 14/08/21

[3] Prawesh Lama*, An uneasy calm in Shaheen Bagh, one year after protest,* Hindustan Times (17/12/20), available at https://www.hindustantimes.com/india-news/an-uneasy-calm-in-shaheen-bagh-one-year-after-protest/story-ICbGQmdhTarXDLa8PbekiN.html, last seen on 19/3/21

order. However, when the situation remained unchanged, an SLP was filed in the apex court. Supreme Court appointed two interlocutors to find an amicable solution but it did not result into any conclusive outcome. Ultimately the protest had to be cleared in the view of COVID-19 pandemic. However, the Court while disposing this petition made certain crucial observations regarding right to protest and its interaction with other public rights.

Issue involved:

Whether public roads can be occupied indefinitely by an ongoing protest?

Arguments:

Intervening applicants on behalf of the protestors sought to argue that there was an absolute right of protest both in terms of space and numbers and the only applicable restriction would be public order, that too must be reasonable one.

The Solicitor General citing *Himat Lal K. Shah v. Commissioner of Police*[4] and *Mazdoor Kisan Shakti Sangathan v. UoI*[5]*,* argued that holding of protests was subject to regulation by concerned administrative authorities.

The appellant's plea was that public roads could not be allowed to be encroached upon in this manner and that some norms be laid down to avoid such situations in future.

Holding and Rationale:

The Court held that even while democracy and dissent go hand in hand, protests have to be carried on in designated places only and public ways and public spaces cannot be occupied indefinitely while exercising right to peaceful protest. It rejected the plea that indeterminable number of people can assemble to protest. The court while affirming observations made in *Mazdoor Kisan Shakti Sangathan*[6] case reasoned that no fundamental right exists in isolation and that "*it has to be balanced with every other*contrasting right." It further concluded that the administration was under obligation to take action to prevent continued encroachment or obstructions of public ways.

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[4] 1973 1 SCC 227
[5] 2018 17 SCC 324
[6] *Id.*

In quoting Justice K K Mathews as follows-

"Streets and public parks exist primarily for other purposes and the social interest promoted by untrammeled exercise of freedom of utterance and assembly in public street must yield to social interest which prohibition and regulation of speech are designed to protect…"[7] ,

the Court has made evident its stance that protesting on streets cannot be an absolute right, neither in terms of space nor in terms of numbers, for it must heed not just to reasonable regulation but also to corresponding duties inferred from other fundamental rights guaranteed by the Constitution (in this case the right to freedom of movement).

The need to balance the rights of protesters with the right to movement of the general public seems to have prompted the Court to devise "protests in designated places" as a viable midway.

Conclusion:

Once again, the contours of the right to protest peacefully contained in Articles 19(1)(a) & 19(1)(b) came into question in this case. Right to protest is indisputably a sine qua non for proper functioning of a democracy. Popular sovereignty and right of dissent are manifested through the right to protest. Thus, it is undoubtedly the most important and dearly cherished rights which citizens enjoy in a constitutional democracy like India. However, the right to protest cannot be absolute, and has to be regulated if not arbitrarily restricted. The same "self-ruled democracy" that embraces within it the right of its people to register their opinions for/against the acts of the government in the form of protests, casts a pertinent responsibility on all its citizens to respect the rights of fellow citizens while exercising one's own rights. This responsibility can be considered as a facet of the duty to abide by the Constitution and respect its ideals. Although the Court may have not spelled any clear *obiter* on how protests have to be carried on in "designated spaces" and what these designated places will be, the significance of this judgment lies in the fact that the court has reiterated the relative nature of fundamental rights and as regards the right to protest, has brought in a new perspective of "protests to be held in designated places" which can be explored in future to

[7] *Himat Lal K. Shah v. Commissioner of Police* 1973 1 SCC 227

resolve serious conflict of interests arising due to popular protests given that specially long-drawn or sit-in protests may not have an expiry date. The right to freedom of movement is as much a fundamental right which also has to be guarded. It cannot be curtailed except in the interest of general public and Scheduled Tribes.[8] In the words of Justice Kaul, "You may have genuine concerns, but if everybody starts blocking roads and entering public areas…where will it end ?"[9]

It has been contended that the blockage of public roads was in reality caused by unnecessary barricading resorted to by the police. Such contentious claims reveal yet another conflict-conflict between public protestors and law enforcement agencies which inevitably brings these protests into bad light. Instead of preventing protests altogether, if they are given a designated space, this will certainly help keep the spirit of the protests alive, at the same time save it from coming into conflict with other public rights and liberties.

It may be true that some rights are perceived to be more important than others, but these have to be exercised in harmony with other public liberties and rights without placing any of them in jeopardy. This position is also reflected by the "reasonable restrictions" sought to be placed on fundamental rights by the Constitution. No right is absolute. This delicate balance of rights is also very much a part of the democratic fabric. And more often than not this balancing act has to be done by the courts of this land. Acting true to its role of guardian of rights, the apex court in this case has laid down a seminal precedent as regards the balancing of diverse interests in a democracy.

[8] Article 19(5)

[9] *Protest, but don't block roads, SC tells Shaheen Bagh protesters,* available at *Protest, but don't block roads, SC tells Shaheen Bagh protesters - The Hindu*last visited on 15/08/21.

Mukesh and Anr. v. NCT Delhi and Ors.

Kalapi Ruikar
I B. A. LL.B.

One of the most heinous crimes in the criminal history of India- 'The 2012 Delhi Gang Rape'. A young woman and her partner encountered 6 men on a bus, on a dreadful evening in the capital city of India, Delhi. Suddenly, all the doors of the bus were shut, the route was diverted and the girl was brutally raped by the six men while her partner was viciously beaten. One of the attackers was a juvenile, who inserted an iron rod in her private parts and pulled her intestines apart. The impact of the said abuse was so severe that the girl succumbed to death on 29th December 2012. All the accused were arrested and the minor was dealt with separately by the Juvenile Justice Board and convicted for three years. The bus driver committed suicide in his Tihar jail cell while all the other accused were under court trials.

Issues Raised:

1. Whether rape as defined under section 375 of IPC covers the offence entirely?
2. Does such a heinous crime deserve a severe punishment like the death penalty?
3. Can public outrage prove to be a hindrance in the case judgement?
4. Does the juvenile deserve the same punishment as the adults?
5. Are sexual offences against women tried appositely in India?

Arguments Advanced:

- **Prosecution**

Dayan Krishnan, the public prosecutor, contended to show no mercy for merciless convicts and argued the case being "rarest of the rare case". It was opined that there ought to be no benevolence for cruel convicts and that there was enough evidence to prove the said crime.

- **DEFENSE**

The defense lawyer stated that God gives life and he alone can take it and not man-made courts. He pleaded before the court to give another chance to the convicts as reformation is the ultimate purpose of justice. He opined that it wouldn't have been possible for the victim to give a dying declaration as a declaration passed through gestures needs substance.

Judgement Passed:

The court contended that there should be a balance between the mitigating factors (no past criminal history of the convicts, their age, behaviour in jail) and the aggravating factors (gang rape, brutal abuse, attempt to murder). But in the current case, the aggravating factors were way too severe than the mitigating factors. The court called such an act brutal, barbaric and diabolic and held that the evidence presented was sufficient to prove the ruthless and inhuman nature of the crime. As a result, this case was considered to be "a rarest of the rare case". Accordingly, the Delhi High Court awarded a death sentence, and on 5th May 2017, with a 3:0 ratio decidendi, the Supreme Court bench comprising of the then CJI Dipak Mishra, Justice Ashok Bhushan and Justice R. Bhanumathi upheld the death penalty to all the four convicts.

The convicts tried all their ways to delay the execution but to no avail. They approached the ICJ to put a stay on their execution. After repeated review petitions, curative petitions, mercy pleas being filed and rejected, at 5:30 am, on 20th March 2020, all 4 convicts were hanged to death in Tihar Jail. Justice was served!

Author's Critique:

The severity of this crime shook the entire country. The enraged masses had led protest marches to demand justice. Ultimately, it brought great changes in the criminal law system. The criminal law (amendment) act, 2013 was enacted to tackle sexual offences which widened the definition of rape and made punishment stringent. It provided for the death penalty for repeated offenders in rape cases.

Yet, even today, are women really safe in India? Even after implementing such stringent laws, why is the crime rate against women so high? Somewhere, it is the mentality of the society which is on doldrums. It is the

patriarchal approach which has infected the mind-set of the society. Not only men but also women are responsible for suppression of women in the society right since ancient times. Men are put on a pedestal right since childhood. The seeds of equality must be sown in the child from his/her birth itself. Rather than restricting women, it's high time we start respecting them. This fight is not only of and for the women but of the entire society. When all of us would be on the same page, only then it would be a harmonious, secure society in its true sense and spirit. United we stand, together we win!

When a human executes such a heinous act, it implies his mental ability and maturity to understand the same. The juvenile was equally, if not more, responsible for the said crime. Was the age factor sufficient to forgo the punishment for the juvenile? As it is said, justice delayed is justice denied, why did it take 8 long years to serve justice? Such delays create fear and doubt in the minds of people about the trustworthiness of the judiciary. Therefore, it's high time morality awakes, it's high time humanity awakes, and it's high time the NATION awakes!

Vikash Kumar v. Union Public Service Commission and Ors.[1]

Rugved Upadhye
III B.A.LL.B.

Benchmark disability is not a precondition to obtaining scribe for candidates writing an examination; Rights and entitlements recognized for persons with disability must not be denied to them for the reason that they do not fulfil the 'benchmark disability' criteria. Supreme Court espouses inclusive and flexible approach towards the principle of reasonable accommodation as envisaged in the Rights of Persons with Disabilities Act, 2016.

The appellant, a Person with Disability[2], having writer's cramp or dysgraphia, requested provision of a scribe for writing UPSC Civil Service Examination[3] 2018. It was rejected by the UPSC citing CSE Notification 2018 which limited right to a scribe to candidates who are blind, have locomotor disability or cerebral palsy with minimum 40% impairment (Benchmark Disability).

Aggrieved, he approached the Central Administrative Tribunal (CAT) which granted him an interim relief by directing UPSC to provide him a scribe for writing CSE 2018 but his result was withheld. The CAT later dismissed his application on the basis that he does not fulfil the criterion of benchmark disability. He challenged the CAT order and CSE Notification 2018 in a writ petition before the Delhi High Court but the Hon'ble court refused him a favourable judgment on the grounds that he did not even qualify CSE 2018.

Finally, the appellant approached the Supreme Court arguing that:

1 He is entitled to a scribe for writing the examination since he is in possession of relevant medical certification which certify that he has a writer's cramp and requires a scribe.

2 He falls under the category of 'Person with Disability' u/s 2(s) of the RPwD Act, 2016 (The Act) and is entitled to protection under the act

[1] 2021 SCC OnLine SC 84.

[2] Having 6% disability.

[3] CSE.

since his medical condition is recognised as a specific disability and is listed in entry 2(a) of the Schedule of the Act.

3 CSE Notification 2018 is *ultra vires* the S. 20 of the Act as it denies 'Reasonable Accommodation' in the form of a scribe. Similarly, it violates Art. 14 and Art. 16(1) of the India Constitution as it provides for a scribe only to candidates who are blind, have locomotor disability or cerebral palsy and fulfilling the benchmark disability criteria.

The respondents, on the other hand citing the '*extremely competitive'* nature of CSE and the necessity to avoid any probable *'abuse of this facility'* asserted the maintainability of the CSE Rules and the benchmark disability criteria in order to 'preserve the purity of the examination.'

The Hon'ble Supreme Court, through Justice D.Y. Chandrachud, while upholding the appellant's right to a scribe held *inter alia* that-

1. It has been affirmed by various medical authorities that his medical condition i.e., writer's cramp necessitates the facility of a scribe and is a 'Specified Disability' under the Act. To deny him a scribe would infringe the rights guaranteed to him under the Act.
2. The concept of 'Benchmark Disability' is adopted by the Act[4] to give effect to specific welfare schemes such as reservation in education and employment, free education, etc to bring a highly marginalised section of our society to the mainstream and enable them to stand on an equal footing with their able-bodied counterparts. This concept, however should not be used as an impediment to constrict the rights and entitlements guaranteed to the 'Persons with Disability' who are recognised under S. 2(s) of the Act. The CSE Rules 2018 and similar guidelines are therefore violative of the principles enshrined under the Act.
3. Though Articles 14, 16 and 21 of the Indian Constitution do not explicitly include disabled persons in its protective fold, the Act operationalise and give effect to these fundamental rights for them. The state is obliged to ensure the disabled persons the Right to Equality, a Life with Dignity and respect of their integrity equally with others as

[4] S. 2(r), The Rights of Persons with Disabilities Act, 2016.

mandated by S. 3 of the Act. This, irrespective of whether the person has a 'Benchmark Disability' or not.

4. The Act travels beyond being merely a charter of non-discrimination. The hon'ble court pronounces an expansive approach towards the principle of Reasonable Accommodation[5] by the state as well as private stakeholders. The state is obliged to create conducive environment for the disabled persons to assist them overcome various socio-economic, physical or psychological barriers so that they march towards full-realization of their potential and participate as equals in our society.
5. Flexibility in addressing individual needs and requirements is an essential component of Reasonable Accommodation and it cannot be construed in a way which denies each disabled person the customization she seeks.
6. The judgment rendered by the Apex court in V. Surendra Mohan v. State of Tamil Nadu[6] which upheld the state's policy of excluding persons with over 50% visual/hearing impairment from entering the lower judiciary is no longer good law on grounds that it is innocent of the principle of reasonable accommodation.

The most engrossing component of this judgment is the conceptualization of an RPwD generation in India which considers various constitutional and statutory provisions as their birth right as an aid to their special needs which would enable them utilize their maximum potentials to not only survive but thrive as equals in the society. Thus, the hon'ble Supreme Court has come to the rescue of our disabled brethren as a sentinel on *qui vive*and acted as a dyke against discriminatory exclusion and gratuitous denial of protection under the RPwD Act, 2016, not to mention the Fundamental Rights enshrined under the Indian Constitution. Now the mantle needs to be assumed by the executive, along with private stakeholders, to manifest this progressive and empowering pronouncement into a charter of inclusive equality.

[5] S. 2(y), The Rights of Persons with Disabilities Act, 2016.

[6] (2019) 4 SCC 237.

Medical Termination of Pregnancy (Amendment) Bill, 2020

Sanskriti Desai
III LL.B

The Medical Termination of Pregnancy (Amendment) Bill, 2020, was passed by the Lok Sabha in March 2020 and it was approved by the Rajya Sabha on March 16, 2021[7]. The need to bring this Bill was felt after the various High Court and Supreme Court judgements which allowed termination of the pregnancy beyond the term of 20 weeks, which is the limit under the current enactment. Also, the Supreme Court, in its 2017 judgement of Mrs. X and Ors. v. Union of India[8] and the 2009 judgement of Suchita Srivastava and Anr. V. Chandigarh Administration[9], held that "a woman's right to make reproductive is also a dimension of personal liberty as understood under Article 21 of the Constitution of India".

One of the major amendments that has been provided under this Bill is that, where under the current enactment, abortion was allowed only if the length of the pregnancy was less than 20 weeks, this bill increases this limit to 24 weeks and also allows termination after 24 weeks, in certain circumstances. It states that the opinion of one registered medical practitioner shall be required where the length of the pregnancy is less than 20 weeks and the opinion of two registered medical practitioners where the length of the pregnancy is between 20 to 24 weeks. However, the termination between 20 to 24 weeks would be allowed only for a specified category of women which includes rape victims, victims of incest and other vulnerable women such as differently-abled women. What this bill fails to consider under this category of women are those who may cite issues such as domestic differences or abuse or a divorce or the partner's death, where she may want to rethink her choice of carrying forward with such pregnancy. Such a woman would not be allowed an abortion unless she is able to establish that continuing with the pregnancy

[7]Ministry of Health and Family Welfare

[8] (2016) 14 SCC 382

[9](2009) 9 Supreme Court Cases 1

would cause grave threat to her or the foetus' life. The question that arises in such cases is that if safe abortions can be performed at any stage of the pregnancy in case of foetal abnormalities, then they should also be permitted on other grounds such as a partner's death or domestic violence, etc. Also, disability rights advocates argue that foetuses with potential disabilities should not be singled out for abortions. This reinforces the notion that persons with disabilities have less value than persons without disabilities, and that foetuses with abnormalities should be terminated. It should be the discretion of the pregnant person to carry the pregnancy to full term or to abort, irrespective of whether the foetus has a potential disability.

This bill has removed the upper gestational limit by stating that a pregnancy beyond 24 weeks can be terminated on the ground of foetal abnormalities. However, this comes with a condition. A medical board, which shall be established in every state and union territory, shall decide whether the woman can be allowed to get an abortion on this ground. The practicality of such checkpoints in the system is debatable as it acts merely as a bureaucratic hurdle at a time when she needs to take such decision. Considering that this moves the decision making from the woman and her doctor to this medical board, it is an invasion of her right to choose. Also, this process of approvals may lead to delays which may increase the risk of the life of the person seeking the abortion. For a woman to be made to run to various medical boards which are to be established by the government, it is extremely demeaning and it is a violation of her privacy. In the context of this amendment, the Bill absolutely defeats its approach towards a pro-choice framework for abortion laws, considering that it leaves the final decision to a third party and makes the choice of the woman subservient to the opinion of the practitioners or the medical board.

One of the progressive aspects of this bill is that it has replaced the phrase "married woman and her husband", with the phrase "woman and her partner", with respect to termination of pregnancy on the ground of failure of contraceptive devices. This brings unmarried women under the scope of this ground for termination.

This bill has inserted a provision protecting the privacy of the person terminating the pregnancy, where it states that a Registered Medical Practitioner shall not be allowed to reveal the details of such patient and contravention of this provision may be punishable with imprisonment up to one year or fine or both.

Even though the object of the Bill is said to be to strengthen access to comprehensive abortion care and ensure dignity, autonomy and justice for women who need to terminate their pregnancy, this Bill fails to consider an independent woman's choice to terminate her pregnancy in the absence of medical conditions stipulated under the Bill. Overall, this Bill continues to provide a more need-based approach rather than a rights-based approach which is required for laws regulating abortions.

Vineeta Sharma v. Rakesh Sharma and Ors.[1]

Utkarsh Vyas
I B.A., LL.B.

Introduction

The enactment of the legislation 'The Hindu Succession Act, 1956' brought some discriminating laws in terms of negation of the constitutional right of equality and gender parallelism which were against women about succession in the ancestral property. Also, section 6, recognized the special right of a male coparcener to inherit by birth over the coparcenary property as per the survivorship rule. After the amendment in the said Act in 2005, daughters were recognized to be the coparcener at par with that of a son and were empowered with equal rights on the coparcenary property. But, at the same time, this also brought a series of confusions on whether the father needed to be alive when the law was being amended for the daughter's entitlement to such property, also on its application with the retrospective effect. In this case, the incertitude over the existence of the daughter as well as the father on or before the enactment date 9th September 2005 was dealt with.

Issues before the court

- If the amended Section 6 of the Act of 2005 requires the existence of coparcener as on 9th September 2020, for the daughter to claim rights in the coparcenary property?
- Whether the amended Section 6 of the Act of 2005 is to be treated prospectively, retrospectively or retroactively in nature?

Background of the case

Before 2005, the Hindu law Mitakshara acknowledged only sons up to 3 lineal male descendants as the holders of an ancestral property while the amendment in 2005, granted daughters the right as coparceners. However, the confusion over the existence of father and daughter duo was still the bone of contention. To resolve the ambiguity evoked from Section 6 of the amended Act, the Apex Court passed two conflicting judgments. One was *Prakash &*

[1]2020 SCC Online SC 641.

Ors. v. Phulavati & Ors[2] in which the court held that the said section will apply only when the person who acquires interest in the ancestral property by birth (Coparcener) and his daughter both were alive on the date September 9th, 2005 the court also held that the amendment would not apply retrospectively. On the other hand, the court in the case *Suman Surpur & Another. Vs Amar & Ors*[3] held that the female coparceners were to be provided the share upon partition even if the father had died before the amendment came into effect. These contradicting rulings gave rise to the lack of equanimity in the succeeding judgments which was against the basic fundamental rights of the citizen and hence the gates of the Supreme Court were knocked again.

Conclusion and Critiques

In the case of ancestral property, the Apex Court while deciding the matter of daughter's right historically analyzed the Hindu law, the notion of Joint Hindu Family, and various other ancestral laws to conclude their decision. It upheld that the amended Section 6 is retroactive and the right conferred on the daughter in the coparcenary property is by birth and hence, it is not necessary that the father be alive as on the enactment date. Consequently, the decision in the Phulavati case was entirely overruled. As far as self-acquired property is concerned, daughters are class I heirs and are at par with that of a son in every intestate succession**.**

With this, the patriarchal law in belief before 2005 comes to an end, instituting a ray of hope for gender equality and bringing up the trust in the justice delivery system. With this decision, the core fundamental right to equality under 'The Constitution of India' has reached its ground reality. It was indeed a giant leap towards equality and the upliftment of women in society, with this verdict the Court has extended women the respect and right due to them which was to be achieved way long back. The verdict deserves appreciation for a momentous step towards gender equality, although the long period of almost 15 years hinted at the delay in delivering justice. In the meantime, many women were left behind from their legitimate right over the ancestral property and were not able to make claims. Considering the Apex Court as the lender of the last resort, a quicker way for delivering justice is expected to be adopted as it is said that "Justice delayed is justice denied".

[2](2016) 2 SCC 36.

[3] (2018) 3 SCC 343: 2018 SCC Online SC 63

Internet and Mobile Association of India v. Reserve Bank of India, 2020 SCC Online SC 275 (The 'Crypto' Verdict)

Vedang Tonapi
I LL.B

Brief Facts

On 05/04/2018, RBI issued 'Statement on Development and Regulatory Policies'. Under para 13 of the said statement and in the circular dated 06/04/2018 it directed entities it regulates to-

1. Not deal in VCs
2. Not to provide services to any person or business who deals in or settles the VCs.
3. To cease and exit the pre-existing relationship with such entities.

Issued under the powers conferred under the-

a. Banking Regulation Act, 1949
b. Reserve Bank of India Act, 1934 ("RBI Act")
c. Payment and Settlement Systems Act, 2007 ("PSS Act")

Pursuant to this, Internet and Mobile Association of India ("IAMAI") which represents the online and digital services industry along with those engaged in transaction in crypto assets ("Petitioners"), filed writ petitions before the SC.

Issues and Arguments

Contention by the Petitioners

1. RBI has no power to regulate the VCs as the VCs are not a legal tender or currency, but a mere store of value and tradable commodities or digital goods.
2. VCs don't qualify as a credit system, thus it is out of the purview of the Preamble of the RBI Act, 1934. The services rendered by the VC exchanges don't fall under the definition of "Payment System" under the PSS Act, 2007, so as to empower RBI to issue guidelines for proper and efficient management of payment systems.

3. While exercising the Jurisdiction, RBI has failed to apply the test of Proportionality and hence the circular is a colourable exercise of power or Malice in Law.
4. The ban on the banks to provide services to the VC exchanges and VC traders, denies the access to the banking system in the country. The denial of such access is not proportionate and not reasonable. Thus, the circular violates the fundamental right to practise any profession, or to carry on any occupation, trade or business conferred by Art. 19 (1)(g), The Constitution of India.

RBI's Response

1. RBI is well within its jurisdiction to regulate the VCs and VC Exchanges. As the VCs are modes of digital payment, RBI draws its power from S.17 and S.18 of the PSS Act, 2007 to regulate it.
2. Rights mentioned under Art. 19(1)(g) are not unfettered and subject to reasonable regulation.
3. RBI has powers to protect public interest, interest of the depositors and banking institutions. This power to regulate includes the power to prohibit. Thus, it can safeguard banks against the volatility of the VCs and its adverse impacts. There was application of mind when RBI has issued cautionary advisories over past 5 years.

The Judgement

1. The role of the RBI cannot come into play when something acquires the status of the legal tender or when something has all four characteristics or functions of money. Though the VCs have not acquired the status of legal tender, they still digitally represent value and can function as a medium of exchange. Thus, the VCs are well within the ambit of the RBI's regulation.
2. Unlike other statutory bodies, RBI's creation is with a mandate to get liberated even from its creator. It has power to do certain things, even beyond the power of the Central Government. Thus, its decision cannot be placed at a pedestal below that of the executive decision. Thus, the RBI's power of management of currency cannot be taken away.
3. Collateral damage while exercising the powers to achieve RBI's objectives

cannot be assailed as a colourable exercise of power or malice in law. Act done willfully and wrongfully without probable or reasonable cause, constitutes malice in law.

4. Access to banking in an economy is equated with supply of oxygen, thus denial of access to banking for legal trades is not a reasonable restriction and is disproportionate. This violates Art. 19(1)(g) as it fails the test of reasonableness.
5. RBI has not banned the VCs in the country, and it has not found any adverse effect on the banking system while they were in business with the VC exchanges. Thus, RBI's circular fails the 'Test of Proportionality'[4].
6. SC held that RBI's circular should be set aside on grounds of proportionality.

Remarks

The idea behind a VC is deregulation and decentralization of the currency. It is exactly against the purpose of a central bank of a country. Central bank aims to regulate the supply of the currency and interest rates in order to reach the monetary and fiscal targets. The role of the central bank has to be rigid enough to meet the long-term targets, but also to accommodate the short-term threats and changes due to technology. It is just a matter of time that country witnesses a parallel economy due to the VC. RBI needs to take a flexible stand whereby they push for better regulation of VC instead of a direct or indirect ban on the VC. If RBI takes a rigid stand banning the VCs it will lead to VC exchanges operating from countries where India doesn't have jurisdiction. It will delay the understanding of VC and the fintech associated with it, thus increasing the security risks like hacking and frauds like Gainbitcoin etc. Regulation and framework detect activities of smuggling, laundering and at the same time allow the users to speculate and profit from VC investments and for VC exchanges to comply and operate with certainty and ease.

[4]Model Dental College and Research Centre, (2016) 7 SCC 353

The Enrica Lexie Case: Justice delivered on a questionable premise!

Ketan Mutha
III LL.B

Introduction

As the never-ending jurisdictional dispute in the Enrica Lexie case finally ended as the Permanent Court of Arbitration delivered the final arbitral award, India and Italy's -diplomatic relations were jeopardized. The PCA was established as an inter-state dispute resolution tribunal. Hence, the Arbitral award is enforceable and binding, despite the debates surrounding it.

Facts

1. On 15th February 2012, the incident took place around 20.5 nautical miles from the Indian baseline, which comes under India's contiguous zone, near Lakshadweep islands. An oil tanker named "Enrica Lexie" bearing the Italian flag encountered a stifling cross with an Indian vessel named St. Antony.
2. Two marines from the Italian Navyfired and killed two innocent Indian fishermen mistaking them for Indian pirates operating from the Kerala coast.
3. Subsequently, the vessel was intercepted and brought to the Port of Cochin on 16th February 2012. The two Italian marines were arrested based on an FIR lodged with the Neendakara Coastal Police Station under section 302 of the Indian Penal Code, 1806[1].

Legal issue and Arguments

A. The crucial issue proposed in the case was "jurisdiction in penal proceedings regarding a criminal act committed on the High Seas".

- The Tribunal observed that both the countries had concurrent jurisdiction and a valid legal basis for initiating proceedings against the marines[2]. Prima facie, the tribunal should have allowed India to continue with the

[1] See, Sec. 302 Indian Penal Code, 1860.

case as the deceased were Indians and in Indian waters. However, by majority votes, the tribunal agreed and established Italy's primary argument that marines had immunity as state officials and the proceedings were to be conducted in Italy. Also, India had breached its duty by not granting functional immunity to the marines as they were performing their official duty. Therefore, the action was in contravention of Articles 2(3), 56(2) and 58(2).

- In response to the allegation, India stated that even if the marines are presumed to be state officials, they were deployed on a commercial vessel. Therefore, it cannot be termed as an official duty.
- Further, India argued that its domestic legislation gives Indian courts the power to initiate penal proceedings against any person on any ship registered in India, wherever it may be.[3]

B. Italy further argued that in case of an incident in the High Seas, the disciplinary proceedings shall be instituted in the flag State, i.e., Italy.[4] They further contended that India had breached UNCLOS's Article 97(3) by arresting the vessel for investigation.[5] India's rebuttal was that Article 97 is not valid as murder cannot be termed a matter of collusion or any other related to incidental navigation.

Judgement

The five-bench Arbitral Tribunal gave the Arbitral Award on 2nd July 2020. The key points are as follows:

1. The bench decided that the Arbitral Tribunal has jurisdiction over the dispute in response to India's objection.
2. Regarding functional immunity, it was decided with two dissenting votes that the Marines are entitled to immunity concerning their acts and that India is precluded from exercising its jurisdiction over the Marines. Furthermore, India was instructed to cease all the criminal proceedings

[3] V. Katju, *India must not cast anchor in 'Enrica Lexie,* The Hindu (06/07/2020), https://www.thehindu.com/opinion/lead/india-must-not-cast-anchor-in-enrica-lexie/article31996616.ece, last seen on 28/08/2021

[4] See, UNCLOS, Article 91(1)

[5] See, UNCLOS, Article 97(3)

against the marines.

3. India is entitled to compensation for loss of life, physical harm, material damage to property (including to the "St. Antony") and moral harm suffered by the captain and other crew members of the "St. Antony", which by its nature cannot be made good through restitution

Analysis

1. On 15th June 2021, the Supreme Court finally decided to quash all the pending criminal proceedings against the two marines on Italy's assurance that the marines will be prosecuted for their crimes in Italy.
2. On the one hand, the case can be seen as a win-win situation for both countries, and on the other hand, the award does not deal with the justice dispensing system but is a diplomatic settlement between the countries.
3. Most of the counterclaims by India were accepted by the bench. It was a diplomatic win for Italy as the marines were set free from all the criminal proceedings in India. It is improbable that they will be prosecuted in Italy based on functional immunity.

Conclusion:

By submitting and accepting the Arbitral Award, the Supreme Court of India reinstated India's respect towards international law and the UNCLOS. Italy succeeded in obtaining immunity for the marines. This immunity sets a dangerous precedent as it creates a tool for the states to claim immunity for the acts committed by their military and para-military forces on the High Seas. This can lead to an increase in disturbed diplomatic relations.

India celebrated that the tribunal found Italy guilty of violating India's freedom of navigation and would secure compensation amicably decided by both States. The compensation amount of Rs. 10 crores have been accepted to be paid by Italy[6].

[6]S. Ojah, *Enrica Lexie case: on plea by injured fishermen, Supreme Court stays disbursement of Rs 2 crore compensation to boat owner,* Live Law (25/08/2021) Enrica Lexie Case: Supreme Court Stays Disbursement Of Rs 2 Crores Compensation To Boat Owner (livelaw.in), last seen on 26/08/2021

LLM ARTICLES

Constitutionalism in the Tussle Between Judiciary and Legislature

Akshay Vasantgadkar
II LL.M

Indian Democratic Setup

Since its adoption, the constitution has been the supreme law of the land through which the Republic of India is governed. The Indian constitution was adopted after more than two years of debates and deliberation in the Constituent Assembly.[1] Combining the features of the British and the American forms of government and traditional local councils known as panchayats, the Indian Constitution stands distinctive.[2] Probably no other nation's constitution has provided so much impetus towards changing and rebuilding society for the common good.[3] The Constitution of India with the aim of achieving social justice[4] provides for a tripartite national government, which is federal in structure with certain unitary features. In a broader spectrum, the governance of India is divided into three branches- the Executive, Legislature, and the Judiciary. The Executive[5], comprising of the President[6] and the Council of Ministers[7] are the head of the government and

[1] J. P. Misra, *Dr. B.R. Ambedkar and The Constitution - Making in India*, 52 Proceedings of the Indian History Congress 534, 537 (1991), available at www.jstor.org/stable/44142653, last seen on 10/06/2020.

[2] Maureen Callahan VanderMay, *The Role of the Judiciary in India's Constitutional Democracy*, 20 Hastings International & Comparative Law Review 103, 113(1996).

[3] Granville Austin, *The Indian Constitution: Cornerstone of a Nation ,* 54, (1996).

[4] Dr. Shridevi S. Suvarnakhandi, *Social Justice Provision in Indian Constitution*, 6 International Journal of Political Science, (2020), available at https://www.arcjournals.org/pdfs/ijps/v6-i3/1.pdf. Last seen on 03/08/2021.

[5]Art. 52-62., The Constitution of India.

[6]Although the president of India is titular head of state, the president does not, in practice carry out the executive functions of the national Government.

[7] Art. 74-75., The Constitution of India.

enforce the will of the state.[8] The Legislature, that is the Parliament, is considered as the primary organ of a democracy as its aim is to enact laws and ensure that there is a rule of law in the country.[9] The Judiciary deals with the interpretation of laws and administration of justice. A tussle between the legislature and judiciary is often witnessed and thus, drawing a line between the two is required. However, it is difficult to draw this line in our system where the judiciary is the final authority over legislative action. In this tussle, democracy comes under threat in two ways: First, where the judiciary oversteps and curtails reforms sought by the legislature. Second, the judiciary might become susceptible to the legislative might, rendering individual liberty redundant.[10] After 70 years of Independence there is yet to be a happy compromise between the two vital organs of democracy.

To facilitate a happy compromise, the constitution makers in their wisdom have provided for separation of powers between the three organs of the government. This separation aims to prevent the concentration of powers in one organ, maladministration, and poor deliverance of justice to the people. The constitution includes the doctrine of separation of powers in its basic structure. Although not specifically mentioned in the constitution, there are articles which strongly hint for separation of powers, such as a Directive Principle of State Policy directing the state to take steps to separate judiciary from the executive in the public services of the State.[11] The three organs of democracy are significant and play distinct but vital roles in the Indian polity. There are no watertight compartments when it comes to the functions of these branches of government. However, the makers of the constitution have put appropriate checks and balances in place. Though there exists a demarcation between these governmental organs, as democracy matures with time, there ought to be instances when these organs encroach into each other's territories and then a tussle ensues. This article puts forth the respective approaches of the Legislature and Judiciary and how their tussle facilitates the emergence of Constitutional Supremacy.

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[8]M. P. Jain, *Indian Constitutional Law,* 115, (1987)

[9] Art. 79-78., The Constitution of India.

[10] Phiroze K. Irani, *The Courts and the Legislature in India*, 14 International and Comparative Law Quarterly, 950, (1965).

[11] Art. 50., The Constitution of India.

Legislative Approach

The Legislative Assemblies represent the will of the people and communicate their demands to those in power. Merely classifying Assemblies as Legislatures, representative bodies or debating chambers would obscure their true significance.[12] Over the years, the parliament has acquired supremacy to effectively provide governance to effectuate the peoples aims and aspirations. The Parliament is the living embodiment of the people's emotions, needs, sorrows and hope.[13] The constitution confers upon the Parliament the power to make formal amendments to it by way of insertion or repeal.[14] Along with certain privileges' such as immunities from prosecution the sole responsibility to implement the DPSP is also conferred upon the parliament.[1516] These privileges and powers are granted to enable the parliamentarians to function efficiently. The Constitution confers upon the parliament the full and exclusive power to legislate on matters stated in List I and List III.[17]

The Legislative Assembly aims to resolve conflicts, develop healthy social engineering and national integration. It was the constituent assembly's objective to ensure that whenever the parliament exercised its privileges the courts shall not interfere.[18] Since its inception, the parliament has frequently frowned upon the notion that the Supreme court has the sole authority to interpret the constitution.[19] The basic concepts of the constitution have put an emphasis on the plenary powers of the parliament. These powers are exercised within the legislative fields allotted to their jurisdiction under the seventh Schedule of the Constitution. A close analysis of the evolution of the Legislature reveals the absence of legislative supremacy in India.

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[12] Supra 1.

[13] Dr. Subhash Kashyap, *Our Parliament,* 44 (2011).

[14]Art. 368., The Constitution of India.

[15] Art. 37., The Constitution of India.

[16]Art. 105., The Constitution of India.

[17] Dr Durga Das Basu, *Shorter Constitution of India,* 795 (2017).

[18]Supra 2.

[19] A.K. Ghosal, *Jurisdictional Conflict Between The legislature and The Judiciary*, 26 International Political Science Association, 64, 66 (1965), available at https://www.jstor.org/stable/41854061, Last seen on 23/06/2021.

Judicial Approach

A dilemma faced by a democratic polity is how authoritative is the Supreme court's interpretation of the constitution on the other organs of the government. The Supreme court derives authority not only through its wisdom but also from the constitution.[20] One of the prominent examples of how judicial supremacy comes into play can be witnessed in the case of criminals. With respect to such individuals, their rights are rarely represented appropriately or even taken into consideration by the legislative organs of the government. This is where judicial supremacy steps in to protect the rights of certain minorities. There have been instances where the judicial supremacy has not only made a short-term difference but has also paved the way to make a long-term difference.[21] Many prominent members of the constituent assembly have highlighted the importance of Judicial review.[22]

The balance which was earlier prevalent in the governmental institutions have undergone a drastic change. Earlier the governmental system ran under the heavy influence of the legislature but gradually it has been driven largely by the judiciary.[23] Judiciary plays a vital role in keeping a check on the powers of the legislature, preventing the abuse of power. While the Legislature has the privilege to amend the constitution, the judiciary has the authority to measure the degree of amendments if they are violative of the basic structure doctrine.

In India, through Judicial Activism the court has made a significant attempt in establishing judicial supremacy.[24] There have been several instances where

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[20] Scott E. Gant, *Judicial Supremacy and Non-Judicial interpretation of the Constitution*, 23 Hastings Constitutional Law Quarterly 361, (1997), available at:https://core.ac.uk/download/pdf/230127192.pdf. Last seen on 03/07/2021.

[21] Frederick Schauer, *Judicial Supremacy, and the Modest Constitution*, 92 California Law Review 1045, (2004), available at https://www.jstor.com/stable/3481317. Last seen on 11/07/2021.

[22]Ibid.

[23] "Manish Tewari" & "Rekha Saxena", *The Supreme Court of India: The rise of Judicial Power and the Protection of Federalism, The Courts in Federal Countries*, University of Toronto Press 223, (2017), available at https://www.jstor.org/stable/10.3138/j.ctt1whm97c.12. Last seen on 09/08/2021.

[24] "M.M. Semwal" & "Sunil Khosla", *Judicial Activism*, 69 International Political Science Association, 113, 116 (2008), available at https://www.jstor.org/stable/41856396?seq=1. Last seen on 13/07/2021.

the judiciary has used judicial activism as a tool to establish its supremacy. In *Hoskot vs State of Maharashtra*[25] the court brought into life the right to free legal aid from the provision of "procedure established by law" under article 21. One of the Prominent outcomes of judicial activism is the initiation of Public Interest Litigation (PIL). Judicial Activism has indeed strengthened the court's position to the extent that in *Upendra Baxi v State of Uttar Pradesh*[26] and *Sheela Barse v State of Maharashtra*[27] an informal letter addressed to the Supreme Court was admitted as a writ petition. The court signaled a new approach to judicial review of amendments in *Golaknath v. State of Punjab.*[28] Over the years, the Indian judiciary has gradually evolved to establish its dominance in the realm of democratic governance. Unlike the several centuries old judiciaries of United Kingdom and the United States of America, the empowerment of the Indian judiciary took place over a short span of seventy years. A study conducted on roles played by the courts across different constitutional systems revealed that the Indian Supreme Court is not alone in playing a wide range of institutional roles in governance.[29] Thus, it can be inferred that the concept of judicial supremacy holds no ground in the Indian polity.

The Tussle

The seeds of discord between the legislators and the judges in India have been sown since the adoption of the constitution.[30] The Judiciary and Legislature have often been at loggerheads regarding various issues. There have been instances when the courts through their judgments have issued orders relating to policy, which is essentially a function of the legislature. In certain situations, the courts have also passed judgments, which are in direct contravention with the legislative process. On the contrary, to showcase its

[25]Hoskot vs State of Maharashtra, AIR 1978 SC 1548.

[26]Dr. Upendra Baxi and Ors. (Ii) vs State of U.P. And Ors., AIR 1987 SC 191.

[27] Sheela Barse v State of Maharashtra, JT 1988 15.

[28]Golaknath v. State of Punjab, 1967 SCR 762.

[29] Manoj Mate, *Judicial Supremacy in Comparative Constitutional Law*, 92 Tulane Law Review 1, (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955300. Last seen on 19/06/2020.

[30]Samirendra Nath Ray, *The Crisis of Judicial Review in India*, 29 International Political Science Association, 29, 30 (1968), available at https://www.jstor.org/stable/41854244?seq=1. Last seen on 23/07/2021.

dominance, the legislature has even gone to the extent of enacting new legislations retrospectively. This leads to a discord between the two organs of democracy. Such power play has seen the light of the day since the very first amendment of the constitution.

On April 7, 1986, a major controversy arose when the speaker of Tamil Nadu Assembly set aside the judgement of Madras High Court in a criminal case. It was the first time that a High Court's judgement was sought to be summarily set aside by an assembly in India. However, it was withdrawn the very next day.[31] In 1985, the judiciary delivered a landmark judgment establishing that the Muslim women would be entitled to a maintenance, even after the expiry of the iddat period. This revolutionized the judicial interference in personal laws and redefined the boundaries for the same. *Mohd. Ahmad Khan v. Shah Bano Begum*[32] is one of the legal milestones in protecting the rights of women. The verdict of the supreme court was overturned by the legislature who found the verdict politically unsuitable. In 1986, the legislature passed the Muslim Women (Protection on Rights of Divorce) Act, to limit the maintenance paid to a Muslim woman to the *iddat* period. In the case of *S.P Gupta v. Union of India*[33], the supreme court brought into picture the collegium system for appointment of judges of the High Courts and the Supreme Court.[34] Subsequently, the legislature passed The National Judicial Appointment Committee Act to counter the judicial reach of power for the appointment of judges. A series of judgments and amendments followed ensuing the wedge. In the infamous case of *Indira Nehru Gandhi v. Raj Narayan*[35] an appeal was made by the former prime minister against the decision of the Allahabad High Court which debarred her from contesting elections. While, in the case of *Shreya Singhal v Union of India*[36] the blatant

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[31] R. Thandavan, *Judiciary vs Legislature in India: Plea for Structural Reforms*, 47 International Political Science Association 603, 604 (1986), available at https://www.jstor.org/stable/41855273. Last seen on 30/06/2021.

[32]Mohd. Ahmad Khan v. Shah Bano Begum, 1985 AIR 945.

[33]S.P Gupta v. Union of India, AIR 1982 SC 149.

[34]Nakul Dewan, *Revisiting the appointment of judges: will the executive initiate a change?* 47 Journal of Indian Law Institute 199, 200 (2005), available at www.jstor.org/stable/43951965. Last seen on 25/072020.

[35]Supra 6.

[36] Shreya Singhal v Union of India, Writ petition no. 167 of 2012.

use of section 66A of the Information Technology Act, 2000 by the legislature was held unconstitutional by the Supreme Court of India. The Court declared that the section is not only vague and arbitrary but also disproportionately invades the right to free speech. In *I.R. Coelho v Union of India*[37] Schedule IX of the Constitution was brought into question. This Schedule shields a list of laws which are enacted by legislature from judicial review. In the case of *Waman Rao*[38] it was unanimously held by a nine-judge bench, that even if an Act is put in schedule IX, the provisions in the act can attract legal consequences if they are in violation of the basic structure doctrine or fundamental rights enshrined in the constitution.

In the case of *Commissioner of Customs Vs Sayed Ali*[39] the Supreme Court had struck down the levy of certain duties as they were imposed by unauthorized officials. By passing the Customs Bill, 2011 the parliament circumvented the judgement and amended the act authorizing the officials to levy duties retrospectively. Another example of the legislature overriding the decisions of the Supreme Court was observed in *Mahalaxmi Mills v Union of India*[40] under the Essential Commodities Ordinance Amendment 2009 which was passed as an Act. The order passed by the Supreme court was that the center should pay Statutory Minimum Price (SMP) and additional amount of profits to the farmers. The amendment allowed the Centre to pay Fair and Remunerative Price (FRP) instead of SMP and with a retrospective effect of the amendment being applicable to all transactions since 1974. In 2018, the Legislature overturned a Supreme Court order concerning certain safeguards against the arrests made under the Scheduled Caste and Scheduled Tribes law by passing a bill through a voice vote.[41] The Farmers Produce Trade and Commerce Act, The Farmers Agreement of Price Assurance and Farm Services Act and the Essential Commodities (Amendment) Act were enforced by the Parliament in September 2020. A power play between the Judiciary

[37] I. R. Coelho v Union of India, AIR 2007 SC 137.

[38] Supra 10.

[39] Commissioner of Customs Vs Sayed Ali, CIVIL APPEAL NOS. 4294-4295 OF 2002.

[40] Mahalaxmi mills v Union of India, Appeal (civil) 2258 of 2008 (India).

[41] PTI, *Parliament passes bill to overturn Supreme Court order on SC/ST Atrocities Act,* DNA INDIA, (09/08/2018), available at https://www.dnaindia.com/india/report-parliament-passes-bill-to-overturn-supreme-court-order-on-scst-atrocities-act-2647771. Last seen on 21/07/2021.

and the Legislature was witnessed on these farm bills. Petitions were filed in the supreme court to strike down these bills on the grounds of violation of basic structure of the constitution.[42]

Constitutional Supremacy

The Legislature and the Judiciary have been at conflict whenever the question regarding interpretation of the constitution has arisen.[43] To comment upon the legal intricacies and the arguments which have been expressed by legal luminaries and eminent jurists would be impertinent on the authors behalf. What can be observed is that the greatest emphasis of Indian Governance should be on preserving the democratic fabrics of the country. The supremacy of the constitution ensures federalism and demarcates the powers and functions of the various organs of government which are ancillary to and governed by the constitution. India derives its sovereignty from the Constitution. The power to interpret the constitution rests with the judiciary which is the protector and guardian of the Constitution and therefore, the supremacy of the Judiciary gains importance. At the same time, it is the Legislature's responsibility to ensure the performance and efficient implementation of the constitution. It is the Constitution itself which confers certain privileges and immunities on the legislature to ensure the performance and smooth implementation of laws. The Legislature and The Judiciary are complementary organs; whose cooperative functioning ensures the longevity of Democracy. A redressal system which efficiently mitigates the conflicts between these two organs would help bolster the smooth functioning of the federal structure which the makers of the constitution have envisioned. Conflicts should be resolved harmoniously rather than with friction and discord. The more clearly defined the provisions of an enactment, the clearer it is to interpret them reducing the possibilities of a conflict. Utmost care has been taken regarding the language of the constitution. However, at the end of the day the smooth functioning of the constitution is dependent on the people

[42]Hindustan Times, *Farmers' protest: What Supreme Court and Centre said on solution,* Hindustan Times, (16/12/2020), available at https://www.hindustantimes.com/india-news, Last seen on 06/08/2021.

[43] Pratap Bhanu Mehta, *India's Unlikely Democracy: The Rise of Judicial Sovereignty*, 18 Journal of Democracy, 74, 75 (2007), available at https://muse.jhu.edu/article/214443/pdf. Last seen on 12/07/2021.

of India who function according to the grundnorm. Democracy is a team effort depending on the co-operative endeavors and team spirit of the organs of the government. A spirit of reciprocation, arrangement of mutual progress and the determination to run a government with the objective of welfare of the people is the essence of a democratic government. It was through the insurmountable mettle of our founding fathers that the robust democracy of India was forged. In a tussle for supremacy between the judiciary and legislature, the only outcome should be the supremacy of the Constitution that safeguards democratic constitutionalism.

Mental Healthcare Act- Words vs. Reality

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I LL.M.

Introduction

In the schools, students are generally asked to memorize the definition of health given by World Health Organization- "Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity". However, as the schooling phase passes away and we enter in the actual and so-called reality of life, the aspect of mental wellbeing starts being ignored. In addition to the overall ignorance of mental wellbeing, there exists social stigma and taboo in Indian society when it comes to seeking help for medical illness.

The Mental Healthcare Act 2017 (hereafter referred as MHCA 2017) was enacted basically to protect and promote rights of mentally ill persons and to provide better mental healthcare services. India being party to Convention on Rights of Persons with Disabilities and its Optional Protocol, it was necessary to bring the domestic laws at par with international standards and to expressly establish the rights of mentally ill person by the way of legislation.

MHCA 2017 focuses mainly on the human rights of PMI (patient with mental illness)[1]. By recognizing such rights, it is hoped that the stigma and the way mentally ill people are looked at would change for better.

India has taken a bold step in passing the most theoretically progressive piece of mental health legislation in the world[2]. But, passing of the legislation is not sufficient to bring about the necessary and desired change. It is necessary to check whether the law has reached the masses and whether it has achieved the

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[1] S. Math, V. Basavaraju, S. Harihara, G. Gowda, N. Manjunatha, C. Kumar, M Gowda, *Mental Healthcare Act 2017 – Aspiration to action*, Indian Journal of Psychiatry, 660-666, (2019) available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6482691/ last seen on 01/08/2021

[2] R. Duffy, C. Narayan, N. Goyal, B. Kelly, *New legislation, new frontiers: Indian psychiatrists' perspective of the mental healthcare act 2017 prior to implementation*, Indian Journal of Psychiatry, 351-354, (2018) available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6201661/ last seen on 01/08/2021

desired effect. Therefore, it is important to check the public awareness regarding the same.

Many scholars have described this law as a patient-centric legislation. The two main provisions (chapters) which are responsible for this conclusion are- chapter 2 advanced directives and chapter 5 which deals with Rights of persons with mental illness. The provisions of 'advanced directives' are very progressive. Basically, advanced directives mean that the person has right to specify in advance, how he wishes to be or not to be treated. So, before he loses his mental capacity to take decisions, he can already make his decision with respect to treatment. However, for giving such directives it is of crucial importance that there is enough public awareness, firstly, of this provision itself that they have right to make decisions, secondly of the legal aspects and thirdly of the medical aspects. Thus, it becomes of immense importance to ascertain the public awareness regarding the provisions of the act.

Not to forget that, under the act, it is defined as government's duty to promote the provisions of act and to work towards eradicating stigma related to mental health. So, to check the extent to which government has been successful in performing their duty under the act, it is important to ascertain the public awareness. For this purpose, the researcher undertook, Empirical method of research. The research work mainly took quantitative approach, but wherever it was deemed essential the qualitative approach was adopted. The population from which the sample was selected- people above age of 18 and people either pursuing or completed at least graduation. So basically, the population selected was of educated class. The method of sampling chosen was 'Simple Random Sampling'. The method of data collection opted was 'Questionnaire' (attached in the annexure).

The findings are based on 217 responses received, out of which 113 were males and 104 were females. 76 responses were recorded for the age group of 18-25 years, 40 responses from 26-40 years group, 97 responses from 41-60 years group and 4 from respondents aged above 60 years. It is clarified that though data is collected regarding gender, age and educational qualification of the respondents it is only for the purpose of exhibiting the diversity of the sample and not for gender-based or age-based analysis of awareness of the act. The conclusions drawn are general.

Mental Healthcare, what the law says and Public Awareness

The first thing which needs to be assessed is whether people are aware about the existence of law on Mental Healthcare. 59% of the sample is aware about the existence of law. However, awareness of existence of law and awareness of provisions of law are two different things.

Who can provide treatment for mental illness?

Generally, when one talks about mental illness and its medical treatment, it was assumed that people would choose a psychiatrist who actually is a practitioner of Allopathy or modern medicine. However, the act has recognized doctors practicing Ayurvedic, Unani, Siddha or Homeopathy, specialized in treating mental illness can provide the treatment for it [as per section 2 (n)]. This question is of special importance, since, there do exists certain medico-legal legislations such as Medical Termination of Pregnancy Act, wherein doctors practicing only modern medicine are allowed to carry out the treatment or procedures described. Also, it important to know whom to approach in case of mental illness. 59.9% know that all of these medicine practitioners are capable of providing medical help to mentally ill person.

The next basic yet important fact which public must know is the distinction between psychologist and psychiatrist. A Psychiatrist is a person with Medical Degree and who specializes in treating mental illness and can prescribe medicines for the same, whereas, a psychologist is a person who has studied psychology (BSc or BA or postgraduate in that field) but he cannot prescribe medicines as part of the treatment. It is crucial to know that no psychologist can prescribe medications. 87.5% of sample is aware of the difference between psychiatrist and psychologist.

What exactly is mental illness?

Section 2(s) of the act defines mental illness as “a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub normality of intelligence”. So, is Depression a

type of mental illness according to this definition? Firstly, the focus here needs to be on the word 'substantial'. The range and intensity of depression is different in all cases; only severe cases of depression have a substantial effect on thinking, mood, perception etc. Hence, person suffering from depression "May be" and not always be considered as mentally ill. Only 26.7% of sample are aware that depression may or may not be considered as mental illness. People who have opted 'Yes' (44.7%), have generalized the phenomenon of depression and people opting 'No' (28.6%) are not aware regarding severity of the issue of depression.

Further, mental retardation is specially kept out of the purview of the definition. It cannot be denied that people with mental retardation are looked at differently in our society. The question is whether people consider them as mentally 'ill'. 69.1% of the sample is aware that mental retardation is not considered as a mental illness.

Mental Illness is also not to be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in person's community. It should also not be determined based on political, economic or social status or membership of a cultural, racial or religious group. This is a clear statement made in clause 3 of section 3. A perfect example to illustrate this issue would be 'Homosexuality'. In some parts of society, same-sex relationships are still considered not only as immoral but also a mental illness. People take such innocent persons to self-acclaimed babas and also to psychiatrists for treatment. It is for such purposes the act has said that non-conformity with such values and not equivalent to mental illness. Of course, it does not set to disturb the criminal system which seeks to punish immoral acts like rape and murder. 74.7% of sample is conscious that such non-conformity with general social and moral beliefs does not mean that person is mentally ill.

Decision making regarding treatment to mentally ill persons

The first most important right is highlighted under Chapter 3, i.e., the Right to give out Advanced Directives. Advanced Directives basically means the patient informs in advance what line of treatment he chooses for himself. As stated before, this legislation is quite patient centric and liberal. The act gives right to mentally ill person for to be as well as NOT TO BE taken care of

[section 5 (1)]. Only 26% of the sample, are aware regarding this provision. Rest 73.7% think that he cannot make such decisions and it is for only doctors and family members to decide. The majority of population is not aware regarding the autonomy granted in this regard by law.

It is also provided in Section 4(3) that, even if the decision taken by mentally ill person does not seem appropriate in general, it would not be invalid and it would also not be right to say he has no capacity to make decisions at all. The mental capacity to take decisions is not decided by the quality of the decisions taken but by the capacity of understanding the circumstances and understanding the consequences of the decision. 55.8% of sample, are aware about this.

It is necessary for a medical practitioner to consult the mentally ill person or his nominated representative to finalize the line of treatment. And maximum sample i.e., 89.9% is aware of this provision. And it is clearly stated in section 13 of the act, that medical practitioner will not be liable for any unforeseen circumstances on following advanced directives from the person. This provision protects autonomy of person as well the liability of the medical practitioner. 44.7% of people know about this provision.

Important Rights of Mentally ill people

Although there are certain rights scattered under the provisions of the act, the important ones which make a foundational basis of this enactment are enshrined under chapter 5 titled as Rights of Persons with Mental illness, it includes provisions from section 18 to section 28.

Section 18 gives the Right to access the Mental Healthcare. The State through this legislation, has taken a huge responsibility on itself to provide the mental health services to all the citizens. It endeavors to ensure that all its citizens have easy access to these services. And for realizing this, it says that if a mental health service is unavailable in district where person with mental illness resides, he can take treatment from services available in another district and his cost of treatment will be borne by government [section 18 (5)(f)]. This is a very beneficial step taken by government in the interest of public. But strikingly, only 28.1% people are aware of this provision. 43.3% think that there is no remedy available to such person and 28.6% are totally unaware. The beneficiary of the law is unaware of the beneficial provision.

The important factor which comes into play is ‘Money’. People sometimes

avoid the treatment because of the monetary constraints. The act provides that treatment cost of mentally ill person should be covered under the medi-claim insurance [under right to equality and non-discrimination recognized under section 21(4)]. Only 24.4% people know about this beneficial law. While 30.9% are under impression that there is need of such law and it is actually not there. 36.9% are unaware and 7.8% think it isn't covered under the medical insurances.

Transparency in the treatment is one of the important elements when it comes to destroying the social stigma around the mental illness. Section 25 of the act establishes the right to access medical records of a mentally ill person but it also states that the mental health professional may withhold certain information which if disclosed would cause serious mental harm to that person or harm to another person because of that person. Only 35.9% are aware that the legislation has provided for such transparency.

Other important rights under the chapter are, Right to Community living, Right to protection from cruel, inhuman and degrading treatment, Right to Confidentiality, Restriction on release of information in respect of mental illness, Right to personal contacts and communication, Right to Legal Aid and Right to make complaints about deficiencies in provisions of services.

Admission and Treatment

Provisions related to admission, treatment and discharge are elaborated under chapter 12. No person can be admitted permanently in any mental health establishments. The act creates two categories of patients and their admissions- patients which require minimal support in decision making (comparatively less severe cases) are called as independent patients and their admission is called independent admission, the treatment provider would be bound to discharge him when he asks for discharge or after his treatment is over; the second category is of patients with high support needs and his admission is called as supported admission, such admission is limited up to 30 days only and it may be extended by application to the board only in cases where there is a potential threat to patient's life or someone else's life because of him. These technical details do not form necessary part of public awareness

but in general, but it is expected that people should know that no mentally ill person can be permanently admitted. This misconception is also one of the reasons which strengthens the taboo and stigma of mental illness. Only 35% people know that no mentally ill person even of severe illness can be admitted permanently in the mental health establishment. 43.3% people think permanent admission is possible and 21.7% are not aware of the status.

Under section 90 clause (7) it is provided that mentally ill person who has no family or anyone who can takecare him, after his treatment cannot be allowed to stay in a mental health establishment. The mental health establishment is only for providing treatment for mentally ill and not as a center for homeless. The act directs that such person should be transferred to community-based centers and even in absence of such centers, he cannot be allowed to stay in the establishment. This provision may seem harsh, but it actually prevents overcrowding of mental health establishments and prevents them from turning into home for homeless. However, then state must make sure that there are sufficient community centers which support the mentally ill person with no homes. Only 13.4% people are aware regarding this. Majority (67.3%) thinks that mentally ill person with no family can be allowed to stay in the establishment, whereas, 19.4% are not aware.

Emergency Treatment and Prohibited Procedures

The emergency procedure related to mental illness is related includes only 'transportation of person with mental illness to a nearest mental health establishment' where it is immediately necessary to prevent death or irreversible harm to that person or any property or if his behavior is self-injurious [section 94 (1)]. This information/ provision might seem too technical to some people for general knowledge but it is important to know this, so as people would be able to identify the 'gross' misconduct if it happens. On the false name of emergency procedure, rights of mentally ill person should not get violated. From the data collected, it is seen that only 8.2% people are aware of this provision and rest 91.8% is not. Use of shock treatment is strictly prohibited for emergency treatment. [section 94 (3)] However, 58.1% people think that it can be used as emergency treatment.

Section 95 deals with Prohibited Procedures- it prohibits use of Electro-convulsive therapy without use of muscle relaxants and anesthesia, sterilization of men or women as a part of treatment for mental illness and chaining person in any manner.

The mental illness taboo is also related with the myth that all mentally ill persons are given shock treatment. But the actual provision of law says that shock treatment or electro-convulsive therapy can be used only with use muscle relaxants and anesthesia. Only 5.1% of the sample is aware regarding this provision, which is actually a very poor level of awareness. 29% of them are not aware, 19.8% think that it can be used whenever the medical practitioner deems necessary, 34.1% think that it can be used only in emergency cases and 12% think that it cannot be used at all since it is declared as illegal.

Section 95(1)(b) prohibits use of electro-convulsive therapy on minors however clause 2 of the section adds up that, if the psychiatrist is of the opinion that such treatment is necessary it may be given with the consent of guardians and prior permission of Mental Health Review Board. This matter has tendency to awaken the soft corner of any person. As layman shock treatment looks extremely harsh, but its effects and efficiency are scientifically proven. Additionally, safeguards are ensured by making use of muscle relaxants and anesthesia compulsory. Hence, ECT can in fact be used on minors if the treating psychiatrists considers it necessary and on consent of guardians and there is no such blanket ban. Only 31.3% people are aware that shock treatment can be used on minors when it is necessary with consent of guardians. While large number people, 41.9% of the sample thinks that it cannot be used absolutely. 25.3% are not aware and 1.4% think it can be used anytime with consent of guardians.

Restraints and Seclusions

Section 97 expresses that, physical restraints may be used on mentally ill persons but only with authorization of the psychiatrist and when it is absolutely necessary to do so to prevent imminent danger.

It also totally prohibits seclusion and solitary confinement of mentally ill person. Seclusion can also not be part of treatment. People are generally

afraid that if they come out as mentally ill, they would be secluded and kept aloof from the society, which eventually contributes in strengthening of taboo related to mental illness. Hence it is important to make public aware that mentally ill people cannot legally be secluded. Majority of people i.e., 64.5% believe that mentally ill people can be secluded only when it is necessary and it is a part of treatment. 3.2% think they can be secluded anytime and 12.9% are not aware. Only 19.4% people know that mentally ill people can never be secluded.

Research

Another fear which people have is regarding a myth that mentally ill people are used to conduct all kinds of researches. This is absolutely false; it is against the medical ethics and is prohibited. However, they can contribute towards the research being conducted in the field of mental illness and their consent for the same is necessary. But when they are not in a position to give consent, can research still be conducted on them is the question. Section 99 deals with provision for research. It is provided that when such mentally ill person is not in a position to give consent, the same shall be asked from his nominated representative and the State Authority. And the state authority shall allow only if, it cannot be performed on person who can give free informed consent and it is to promote the mental health of population represented by the person, full disclosure to the person can adversely affect the research and the research is within the national and international guidelines for conduction of research. Only 34.6% people are aware of this position regarding research.

Law Enforcement agencies and Mentally illness

There are times when we counter people randomly wondering on street who seem to be mentally ill. Section 100 makes it duty of police officers to take such people in their custody and take such person to mental health establishment for evaluation as soon as possible, and here taking in custody does not mean detaining or imprisoning him. Fair amount (71.9%) of people are aware of this provision.

Another fear which has quite a hold over minds of people is, in the mental health establishments all kinds of mentally ill patients are kept together which also include prisoners or offenders with mental illness, this thought can

threaten any ordinary man. However, it is not so. The prisoners with mental illness are to be kept in a special ward of Medical Wing of the prison. So, they are separated from the healthy prisoners as well and not mixed up with otherwise mentally ill patients in the establishment. Only 19.8% of people are aware of this provision.

Insanity is a valid defense in legal cases. Section 105 answers the question of mental illness in judicial process. If during any judicial process before any competent court, proof of mental illness is produced and is challenged by the other party, the court shall refer the same for further scrutiny to the concerned Board and the Board shall, after examination of the person alleged to have a mental illness either by itself or through a committee of experts, submit its opinion to the court. In general, the burden of proof of insanity lies on person who claims to be insane and it can be challenged by the opposite party. So, while deciding such case courts are asked to consult the Mental Health Review Boards. This acts as check on misuse of defense of mental illness. Although the chances of people getting into court cases and taking defense of mental illness are very rare, but, knowledge of basic law is important since ignorance of law can law can never be a defense. 33.2% of the sample are aware about this law. Rest 66.8% are unaware or have false knowledge.

Suicide and Mental illness

The issue of suicide has high amount of ethical and moral issues involved. The position of law also has been changing with respect to the issue. And there lacks clarity regarding the position, which is also evident from the data collected in this research. Person attempting suicide may or may not be punished under section 309, IPC (which to the date is constitutionally valid) but prima facie he shall be presumed to be under severe mental stress unless proved otherwise. The effects of section 309 of Indian Penal Code are toned down by the section 115 of the Mental Healthcare Act, 2017. It was contended that punishing a person who already is feeling punished in life was nothing but a torture. Only 16.6% of the sample is aware of this stance regarding suicide. 29.5% think that people committing suicide are necessarily punished, 18.9% think that he would be simply considered as mentally ill and be treated for the same, 12.9% think that section 309 which penalizes suicide is declared as unconstitutional and 22.1% are totally unaware.

Awareness regarding Mental Health issues

Under Chapter 6 of the Act which extends from section 29 to section 32, the government has undertaken the duty to promote mental health and create awareness about mental illness and to reduce the stigma associated with it.

When asked as to how much would the respondent would rate public awareness in our society regarding mental health issues on a scale of 1 to 5, 5 being the highest level of awareness, majority of the poll indicated that people think the awareness regarding mental health issues is in general low in our society. Based on the responses collected on an average it is 2.3 out of 5. Taking this ahead, when asked whether the respondent has ever seen/ been to/ heard of any public awareness program regarding mental health or prevention of suicidal tendencies, it was seen that only 26.7% of the sample have seen/been to/ heard of public awareness program regarding mental health or prevention of suicidal tendencies. 41.5% people say rarely they have seen such program. And 31.8% of people have never seen/ been to or heard of such program. This indicates low level of publicity of mental health issues and obviously flowing from that lack of awareness of law related to it. Majority (53%) sample thinks that government has not taken enough efforts. 39.6% is not sure and only 7.4% thinks that government has taken enough efforts to reduce the stigma and taboo related to mental health.

a. Final Data Analysis and Interpretation

Out of 27 questions, for 18 questions, the percentage of correct answers is below 50%. Thus, it can be said that awareness regarding 66.7% of the questions related to general awareness of law related mental health is below 50% and thus low.

The average percentage of correct responses is ‘40%’ here it must be noted that, although 59% of people are aware as to ‘existence’ of law on mental health and illness. The actual percentage of people knowing ‘what law is’ is only 40% on an average.

On calculating the average correct responses only with respect to awareness of rights of mentally ill persons it is found that, on an average only 29% of sample are aware as to rights of mentally ill people.

People themselves have rated the general awareness about this issue as 2.3 on a 5point scale. Translated into percentage unit of measurement, general awareness is about 46%, which is also low.

b. Conclusion and Remarks

The general awareness of provisions of the act can be inferred as- only 40% people are aware and there is lack of awareness in the sample taken. It will be safe to draw conclusion by way of generalization and inductive logic, that there is insufficient public awareness regarding the Mental Healthcare Act, 2017, since the sample taken represents all age groups, both genders and (educated) people from different walks of life. If we specially talk about 'rights of mentally people' (i.e., excluding the general provisions)- only 29% of the population is aware regarding it. The sample selected was restricted to urban and educated class. If the awareness amongst the educated class is so low, one can only imagine how low must be awareness level at grass level and amongst the uneducated class.

The Mental Healthcare Act 2017 is supposed to change the fundamental approach on mental health issues including a sensible patient-centric health care[3], however, as promised the provisions are yet to reach masses. It is suggested that following measures must be undertaken promptly:

1. Conducting awareness campaigns
2. Usage of all platforms of media to spread awareness-Television, Radio, Newspaper, social media, Pamphlets etc.
3. Provision for sick leave for Mental illnesses
4. Making the mental health services more accessible by increasing the number of establishments.
5. Correct representation of Mental Health professionals and mental health issues in the media houses

[3] A. Mishra, A. Galhotra, Mental Healthcare Act 2017: Need to Wait and Watch, Volume 8(2) International Journal of Applied and Basic Medical Research, 67-70, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5932926/ last seen on 01/08/2021

6. More advertisements sponsored by government, informative of the provisions of law related to mental health
7. Inclusion of subject of basic psychology which would promote mental wellbeing and will help remove the stigma around it.
8. Compulsory appoint of Psychologists in school, so that there would be accessibility to younger class. Also, this would make early diagnosis of mental illness easier.
9. Sensitization of public in general and specially children, towards mentally ill persons
10. The government should on priority allocate funds and work towards promotion of the provisions act and removing stigma around the issue of mental illness.

New Scheme of Filing Individual Income Tax Returns: Tax Payers' Response

Shripad Kulkarni
I LL.M

Introduction

The Financial Act, 2020[1] has introduced an alternative option (hereafter shall be called new scheme) of filing individual income tax returns for the financial year 2020-2021. The earlier scheme (hereafter shall be called old scheme) of filing individual income tax returns is also available for the tax payers. The choice of adopting the scheme is given to the tax payer. For the salaried persons the choice is to be informed to the employer as tax deduction at the source shall be carried out as per the adopted scheme. If no choice is informed the tax deduction shall be as per the old scheme. But at the time of actually filing the returns one can change the scheme. For others this choice can be exercised at the time of filing the individual income tax returns. In new scheme many deductions are not available but it has lower tax rates. People shall be filing the income tax returns for the first time after the introduction of the new scheme. (Assessment year 2021-2022) As the scheme is new, its advantages and disadvantage are not known yet, hence it is decided to carry out a survey regarding the preference. Considering pandemic period instead of using interview technique, questionnaire technique is preferred for collecting the data. Since the subject is about income tax, target population is naturally persons filing income tax returns. Snowball sampling technique is used for the survey as it appears to be the most suitable in current pandemic situation. While selecting the questions, care has been taken to have minimum number of close ended questions which will give maximum information. It is seen that it hardly takes one minute to fill the questionnaire; hence a very good response is received. 189 respondents conveyed their responses, which is an adequate sample size to draw generalized conclusions.

[1]S. 115BAC, The Finance Act, 2020.

Sampling Method used

Since the research involves finding out the response to the new scheme of filing individual income tax returns, the sample should be from the population who file income tax returns. In the present research work the snowball sampling technique which is a non-probability technique is used for data collection.[2] In this technique, the researcher begins his work with a few respondents easily accessible and known to him, these respondents then give new names of other respondents and the chain continues[3]. In the present study the researcher first contacted his friends, then those friends contacted their friends and thus the data is collected from these respondents. The respondents are from Pune city only.

Method of Data Collection

A structured questionnaire is used for data collection. The questionnaire is conveyed through Google form link, either to mail ids or to social media groups of the respondents. The ingredients such as clarity, brevity, un-ambiguity, reliability and communicability as stated in book by Rattan Singh[4] have been strictly observed while preparing the questionnaire. The close ended questions for which the specific answers are available have been asked to the respondents. The questionnaire consisted of only ten questions making it interesting to the respondents. Normally very long questionnaires do not get good response. The questionnaire used is as follows:

Questionnaire

1. Gender

Male

Female

2. Age

Less than 40 years

40 years and above but less than 50 years

[2] R. Singh, Legal Research Methodology, 116 (Lexis Nexis, 2nd ed., 2016).
[3] Ibid.
[4] Ibid, at 101.

50 years and above but less than 60 years

60 years and above

3. Occupation

Business

Profession

Service

Retired

4. Are you paying housing loan installments?

Yes

No

5. Are you paying education loan installments?

Yes

No

6. Are you paying life insurance premium?

Yes

No

7. Are you investing in provident fund (EPF, PPF, GPF) and /or National savings certificates (NSC)?

Yes

No

8. Are you paying health insurance premium?

Yes

No

9. Are you paying contribution to National pension scheme?

Yes

No

10. Your choice for filling individual income tax returns.

Old scheme

New scheme

Data Analysis

The data is obtained from 189 respondents and consists of following 10 fields: Gender, Age, Occupation, Housing loan Deduction, Education Loan Deduction, Life Insurance Policy Deduction, Provident Fund Deduction, Health Insurance Deduction, Payment to National pension Scheme and the Choice of the Scheme.

The Google form automatically stores the data in Excel file. As the questions are close ended the data analysis is carried out manually. As the data was stored in Excel file the data could be sorted easily. The data is arranged in tabular form in Table 1 and Table 2.

Table 1: Distribution of Responses (Total Responses 189)

Sr No	Field	Respondents	No	Percentage
1	Gender	Male	130	68.8
		Female	59	31.2
2	Age	Less than 40 years	40	21.2
		40 years and above, but less than 50 years	42	22.2
			91	48.1
		50 years and above, but less than 60 years	16	16
		60 years and above		
3	Occupation	Business	20	10.6
		Profession	30	15.9
		Service	118	62.4
		Retired	21	11.1

4	Housing Loan	Yes No	82 107	43.4 56.6
5	Education loan	Yes No	23 166	12.2 87.8
6	Life Insurance	Yes No	152 37	80.4 19.6
7	Provident Fund	Yes No	148 41	78.3 21.7
8	Health Insurance	Yes No	156 33	82.5 17.5
9	Pension Scheme	Yes No	58 131	30.7 69.3
10	Choice	New Scheme Old Scheme	67 122	35.4 64.6

Table 2: Distribution of Responses Group-wise

Sr No	Field	Respondents	New Scheme	Old Scheme
1	Gender	Male (130) Female (59)	44 (33.85%) 23 (38.98%)	86 (66.15%) 36 (61.02%)
2	Age	Less than 40 years (40) 40 years and above, but less than 50 years (42) 50 years and above, but less than 60 years (91) 60 years and above (16)	14 (35%) 12 (28.57%) 35 (38.46%) 6 (37.5%)	26 (65%) 30 (71.43%) 56 (61.54%) 10 (62.5%)

3	Occupation	Business (20) Profession (30) Service (118) Retired (21)	7 (35%) 14 (46.67%) 37 (31.36%) 9 (42.86%)	13 (65%) 16 (53.33%) 81 (68.64%) 12 (57.14%)
4	All Fields Together	Housing and Other Deductions (81) Only Housing Loan Deduction (1) Only Other Deductions (103) No Deductions (4)	23 (28.4%) 0 (0%) 41 (39.81%) 1 (25%)	58 (71.60) 1 (100%) 62 (60.19%) 3 (75%)

V. Interpretation of the Data

From Table 1, it is clear that the data includes persons from various sections. It is also clear that respondents are investing in houses or other investments; only 4 out of 189 have no deductions (Table 2). Table 1 clearly indicates that the new scheme is preferred only by 67 respondents out of 189 respondents while the old scheme is preferred by 167 respondents; this clearly proves that "Lower response to new scheme of filing income tax returns than the old scheme." This is quite obvious as there are very little deductions allowed in new scheme and hence though tax rates are low people have preferred old scheme. It is also seen from Table 2 that the preference of female respondents to old scheme is marginally less than that of male respondents. But even in the female group the response to old scheme is higher. From Table 2 it is also clear that 68.64% respondents having service as occupation have preferred the old scheme. This clearly indicates that "Persons having occupation as service prefer the old scheme." There are 82 respondents who have housing loan deductions and out of that 59 have opted for old scheme. Thus 71.95 % have opted for old scheme out of 82 respondents. This clearly indicates that "Persons having housing loan prefer the old scheme of filing income tax returns." There are some other interesting findings, in the second age group i.e.,40 years and above, but less than 50 years (42), 71.43% respondents have

given choice for old scheme. One of the reasons may be that housing interest part is considerable in their case for which they can claim a deduction up to Rs 200000.[5] There are 103 respondents who have no housing loan but have some other deductions. In this group also it is seen that 60.19% respondents have opted for old scheme. But of course, this percentage is less than 71.43% which is seen in the group of respondents who have housing loan. Thus, from the data analysis it is clear that old scheme is more popular.

VI. Conclusions

The new scheme introduced by the Finance Act, 2020[6] has given an alternative option to tax payers for filing income tax returns. Since this scheme offers lower rates of income tax, it may prove to be beneficial to some tax payers especially to those who have no major deductions to claim. This is clear from the research as 35.4% respondents have opted for that scheme. Though majority of the respondents have given preference to the old scheme, the importance of the new scheme can't be denied as 35.4% respondents are benefitted by that scheme. These people otherwise had to pay more tax in the absence of new scheme.

[5] S. 24(b), The Income Tax Act, 1961.
[6] Supra 1.

Examining Centre- State Relations and The Indian Federal System with Special Reference to The Farm Laws of 2020

Uma
I LL.M

Introduction:

The framers of the Constitution of India in 1947 faced the unique challenge of fashioning a new country out of one that existed already. They could not implement a unitary system of government for concern over how it would be entirely too reminiscent of the Raj to a newly independent India[1]. And in the wake of the finalization of the Partition, nor could they implement the federal structure seen in countries like the United States of America, since there was a critical imperative for a strong unified India[2].

In the end, the solution they came to was neither of the above. India adopted a unique political structure to suit its unique needs. It has been referred to by many names; 'cooperative federalism', 'quasi-federalism', 'statutory decentralization by many jurists depending on their perspective of its functioning[3]. However, its features remain the same regardless of how we label it: India possesses a federal structure but with a 'great deal of unitary control'.[4]

This study shall explore the conflicts arising between the Union and State governments in this exceptional arrangement. Specifically, the researcher shall focus on the farm laws passed by the Union government in 2020 i.e., the Essential Commodities (Amendment) Act, 2020, The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020 and The Farmers' Produce Trade and Commerce (Promotion and Facilitation)

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[1] A. G. Noorani, *Centre-State Relations in India,* Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America, 3. /4. Quartal 1975, Vol. 8, No. 3/4 (3. /4. Quartal 1975), 319, 322, Retrieved from: https://www.jstor.org/stable/43108472 Last accessed on: 01/03/2021

[2] Ibid, at page 322

[3] Granville Austin, *The Indian Constitution- Cornerstone of a Nation*, 270, (1st ed., 2015)

[4] Supra Note 1 at page 324

Act, 2020. Whether the Union government has the legislative competence to promulgate these laws shall be looked into by the researcher.

This study shall also examine the response of the states to these Bills. States such as Rajasthan and Punjab have passed their own legislations in response to the above laws in an attempt to negate the effect of the former. To what extent that is actually a viable option for them is something this paper shall investigate.

A Brief History of The Indian Federal Model:

It cannot be denied that the unique nature of federalism in the modern Indian State as it stands today is a product of the events and circumstances dating back to its independence from the British, and the Partition that followed it.

The seed of 'provincial autonomy' for British India was planted via the Government of India Act of 1919 and further expanded through the Government of India Act, 1935, though the form of government could in no way be called 'federal' at that juncture. It was only in the years immediately preceding the independence of India that the idea of properly federal system of government began to take shape. After the famously unsuccessful Cabinet Mission Plan, the Objectives Resolution passed by the Constituent Assembly on 13th December 1946 aimed to establish a federal State, with minimal authority to the Centre except in matters of Defence, Communications and Foreign Affairs, and with maximum freedom of authority extended to the Units, along with residuary powers[5]. This was done with the aim of convincing the Muslim League and the Princely States to join India. However, once it was determined that the Partition of India was a foregone conclusion, the Constituent Assembly felt there was no longer a need to continue with the same proposal, and that the needs of India and its people would be better served with a federal government with a *strong* Centre rather than a weak one[6].

The term 'federal' is actually not defined or used to describe the structure of Indian governance anywhere in the Constitution of India. Rather, India is

[5] Benjamin N. Schoenfeld, *Federalism in India*, Vol. 20, No. 1, The Indian Journal of Political Science, 52, Available at: https://www.jstor.org/stable/42743497, Last accessed on 20/04/2021.

[6] Ibid at page 61.

described as a 'Union of States'. This is of note because the term 'federation', proposed by Dr. B.N. Rau was rejected by the Drafting Committee of the Constituent Assembly because of the atypical nature of the Indian federation which was not formed out of several willing states coming together to form a federation, but was rather an 'indestructible Union of states', where the states have no right to secede from the Union[7]. Despite the phrasing and its dissimilarities to the standard model of federalism as in USA or Canada however, the federal character of India's government is quite apparent and indisputable.

Apart from the political construction of the Union and its units influencing the strongly central character of Indian federalism, there were also other considerations at the time of Independence which motivated it. The presence of the authority of Indian National Congress across the nation, and the absence of significant regional politics and parties enabled this model without much opposition. Much of Indian concern at the time was also diverted to 'community rights' rather than the right of states. The tremendous adversities facing India in the areas of agriculture, food distribution, industry, and economic policy were also significant factors which had many members of the Constituent Assembly in favour of a strong Centre for India.

That is not to say there were no detractors to the proposals made in favour of more central authority. Pandit G. B. Pant on the matter of the Union assuming powers on subjects that were to be under the states' authority, said:

"If it is hoped that the provinces can be made to cooperate against their own will by means of central legislation, that hope is not likely to materialize."[8]

That Pandit Pant's words hold a ring of truth, in light of the ongoing conflicts between the Central and State governments, is quite evident by itself.

Indian Federalism at Work:

The nature of India's political structure is often described as 'quasi-federal', 'asymmetric federalism' or 'cooperative federalism'[9], which generally make plain the centralist lean in Constitution of India as was the intention of its

[7]Supra Note 3 at page 238
[8] Ibid at page 249
[9] Ibid at page 231

framers. We can see this at work in many provisions of the Constitution, such as those pertaining to the division of legislative powers, the imposition of Emergencies, and the executive powers of the Union and states, detailed as follows:

The territorial integrity of the Union of India is imperishable but that of the states can be altered or abolished by the Parliament, and the opinions of the state legislatures on such matters are only advisory in nature[10].

The Governors of states, though appointed by the Centre, exercise an enormous amount of influence over the state government, due to wide ranging powers which allow them to reserve Bills passed by state legislatures for Presidential approval, or even dismiss the state government entirely by recommending President's rule[11].

Residuary powers of legislation are vested in the Union and not states unlike in USA, and even with regard to matters in the 'State List' the Centre may carry out legislation if it is considered to be of 'national interest'. Should there be a conflict between a Parliamentary law and a law passed by the state legislature regarding a matter on the Concurrent List, the Parliamentary law shall prevail.

Even with regard to the provisions dealing with the amendment of the Constitution of India, the Union government is granted near unfettered power and the role of the states is limited to ratification after the fact, and that too only in those cases as are detailed under Article 368(2).

That the imposition of Emergency virtually changes the nature of our government from federal to unitary is also very much apparent. The articles on National and Financial emergencies give the Union government sweeping powers of legislation on matters on the State List and to give directions to the state governments during such period. And despite the wishes of the framers of the Constitution, Article 356 has very much not remained a 'dead letter' in the Constitution of India, having been put to use 95 times in the years between 1951 and 1995 alone.

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[10]Supra note 1 at page 322

[11]Ibid.

The power imbalance between the Centre and the States is also quite apparent in fiscal matters; The states are in charge of providing many public services to citizens. However, they are unable to carry out these functions in an optimal manner because their revenue streams are very much limited compared to the Union govt. and there are many limitations on their borrowing power as well[12]. They are, as a result, dependent on the largesse of the Centre to allocate them necessary funds. Growth areas like industries are concentrated in the hands of the Union government and the developmental needs of the states have suffered as a result.

Thus, while India was meant to be federal State with a central bias, the workings of the Indian government show it to be more 'quasi-federal' than 'cooperatively federal' in nature today. In the opinion of the researcher, policy reform which enables the states greater autonomy to generate revenue will ultimately be of benefit to all of India's citizens.

Farm Laws 2020 and Conflicts Between Centre and States:

'Farm Laws 2020' for the purposes of this paper shall refer to the four legislations passed by the Union government in 2020 that are being protested i.e., the Essential Commodities (Amendment) Act, 2020, The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020 and The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020. The researcher shall examine how, if at all these legislations are in conflict with the states' power to enact laws on these subjects.

The legislations passed by the Punjab and Rajasthan legislatures in response to the farm laws passed by the Union government and how they conflict with each other shall also be examined.

Union Government Farm Laws 2020- A background:

The sale and purchase of agricultural products prior to the enactment of the farm laws has been regulated by each state's APMC (Agricultural Produce Marketing Committee) Act. The APMC Regulation of each state sets up APMC 'mandis', which are the only approved channel for purchase of agricultural goods in that state. This is meant to ensure the sale of agricultural

[12]Supra note 8 at page 289

produce at certain prices fixed by the state government, thereby safeguarding the interests of farmers. The state government, through the APMC, regulates the trade of agricultural produce by issuing licenses to buyers and sellers as well as establishing Minimum Support Prices (MSPs) for the purchase of such produce. The state government also generates revenue for itself by levying fees and cess on the trading of agricultural goods under the APMC. This is possible because agriculture[13] and markets[14] are state subjects under Entry 14 and 28 respectively List II of Schedule VII of the Constitution of India.

The farm laws enacted by the Union government in 2020 seek to open up the existing system and make it possible to freely trade in agricultural goods outside the APMCs. This is done in the following ways:

- The laws enable any persons who are in possession of a PAN card to carry out trade in agricultural goods outside the designated APMC markets set up by the state governments.
- No cess or fee needs to be paid to the state government for carrying on such trade.
- The laws also eliminate any restrictions on stock limits of agricultural produce. This, along with the government's introduction of electronic warehousing receipts[15] enables the easier usage of cold chain storage facilities, thereby incentivizing private players to invest in agricultural sectors, and modernizing the supply chain for perishable agricultural goods.
- The laws do not mandate an MSP, though specify that buyers and sellers must enter into an agreement which states a minimum guaranteed price to be paid for the purchase. The laws however they do not provide for any penalizations if the sellers are coerced into selling their produce below the MSP.

[13] Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases- Entry 14, List II, Schedule VII of the Constitution of India

[14]Markets and fairs- Entry 28, List II, Schedule VII of the Constitution of India

[15] electronic-Negotiable Warehouse Receipt (e-NWR)

- The dispute resolution mechanism under the farm laws excludes the jurisdiction of civil courts.

State legislation in response to the Union Govt. Farm Laws:

Since the farm laws greatly alter the existing system for the trade of agricultural produce, as it is regulated by the state governments, there has been much objection to the same by them. States like Rajasthan[16] and Punjab[17] have attempted to curtail the effect of the Union govt.'s farm laws by passing their own laws regulating the sector. Though the Bills have been passed by the State legislature, they are yet to receive presidential assent. The State laws aim to mitigate the effect of the Union government's farm laws in the following ways:

- By mandating a fee on all trades of agricultural produce occurring outside the APMC markets, which shall be collected by the state government and utilized for the upkeep of APMCs and for the welfare of farmers.
- By mandating the sale and purchase of crops at the MSP or above it, with penalties for any attempts to coerce farmers to trade below MSP.
- By allowing for the jurisdiction of civil courts in disputes.
- By allowing the state government to regulate stockpiles of agricultural goods.
- By providing that the APMC Acts shall continue to be in usage across the states and stating that there shall be no legal liability attracted for the violation of the Union Govt.'s farm laws.

Conflicts Arising from the Farm Laws 2020:

It is plainly apparent that there are several conflicts which emerge from the enactment of the Union Government's farm laws with the authority of the states to regulate the agricultural sector. As discussed earlier, Agriculture and

[16] The Essential Commodities (Special Provisions and Rajasthan Amendment) Bill, 2020

[17]The Farmers Produce Trade & Commerce Promotion & Facilitation (Punjab Amendment) Bill 2020, The Farmers Agreement on Price Assurance & Farm Services (Punjab Amendment) Bill 2020, and The Essential Commodities (Special Provision & Punjab Amendment) Bill

markets are state subjects for the purposes of legislation. The farm laws enacted by the Centre encroach upon the states' authority to regulate agricultural markets, ensure MSPs for the welfare of farmers and also collect revenue through the means of fees levied upon transactions conducted in the APMCs.

The legislations passed by the states also conflict with the Centre's legislations by effectively circumventing the provisions which are not agreed to by the states. Since the Bills are yet to receive presidential assent and become law, it cannot be said whether the states will be able to use Article 254(2) of the Constitution of India to by-pass the central legislations or if their Bills will be held repugnant under Article 254(1) instead[18].

The Legislative Competence of the Union Government as regards the Farm Laws of 2020:

To establish whether the Union government has the legislative competence to enact the above given laws, the manner and method via which they were enacted must be seen:

Agriculture is not a subject under the Union List i.e., List I of the Seventh Schedule. In fact, taxes and duties on agricultural income have explicitly been excluded from the purview of the Union List. This is in contrast to the State List, not only agriculture, but also taxes and duties on agricultural income and agricultural land are explicitly mentioned as state subjects.

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[18]Article 254 of the Constitution of India states that:
(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void
(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State

The laws in question have no way of being enacted via the Union List. They were instead enacted under Entry 33(b) of the Concurrent List i.e., List III of the Seventh Schedule which comprises of 'foodstuffs, including edible oilseeds and oils.' This was done by enlarging the meaning to 'foodstuffs' in Entry 33(b) to mean agricultural produce. Section 2(h) of The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020 defines 'farm produce' as: *"foodstuffs, further including edible oilseeds and oils, all kinds of cereals, like wheat, rice, other coarse grains, pulses, vegetable, fruits, nuts, spices, sugarcane, and products of poultry, piggery, goatery, fishery, and diary, intended for human consumption in its natural or processed form, cattle fodder, including oil cakes, and other concentrates, raw cotton, whether ginned or unginned, cotton seeds and raw jutes"*

Thus 'foodstuffs' has been expanded to mean essentially all manner of agricultural produce by the central legislation.

During the course of the Constituent Assembly Debates, Entry 33 of List III was called draft Article 306. When speaking of 'foodstuffs' the concern expressed by the Assembly members was that with the ongoing economic crisis, subjects like 'foodstuffs' ought to be kept under the purview of the Union government at least for a transitional period of fifteen years so that the 'poor man' may not have to suffer under high prices of things like 'foodstuffs and coal[19].

The intent of the Constituent Assembly therefore seems to be allowed the Centre to legislate on matters on 'foodstuffs' for the purposes of keeping prices of purchase reasonable for the common man, particularly during an economic crisis. This is not in consonance with the purposes for which the aforementioned legislations have been passed by the Centre. These legislations essentially seek to regulate the *trade* of agricultural produce and liberalize the same. For these purposes, without a constitutional amendment, it cannot be said that the Union government is competent to utilize Entry 33(b) to legislate on agricultural markets.

[19]Constituent Assembly of India Debates (Proceedings) - Volume X, Friday, the 7th October 1949. Available at: http://loksabhaph.nic.in/writereaddata/cadebatefiles/C07101949.html; Last accessed on: 20/04/2021

Conclusion and Comments:

Federalism is a well-established component of the Basic Structure of the Constitution of India, even with the centralist lean that was formulated by the Constituent Assembly. The farm laws enacted by the Centre are entirely contrary to the ideals of federalism in their encroachment upon the authority of states to govern the matters they have been placed in charge of by the Constitution of India. While the goals sought to be achieved for the modernization and liberalization of the agriculture sector and supply chains for agricultural products in India are admirable, the means by which they have been brought to be are not. The hurried manner of their promulgation, without a parliamentary committee as was demanded by several legislators, is only more evidence to that effect. The states are, as seen the above paper, already at a disadvantage in comparison to the Centre in terms of power. Should the Centre decide to not give presidential assent to the legislations passed by the states, they will undoubtably end up repugnant of the farm laws passed by the former. It may also be possible to argue against and prevail over any challenges mounted over the competency and colourability of the farm laws in question before the Supreme Court. While it may be possible, it is still an unnecessarily antagonistic position for the Union government to take in the researcher's opinion and not in the spirit of a federal constitution. The Central government would be better served, in the researcher's opinion, by cooperating with the states on the matter at hand to create legislation that is more representative of all the stakeholders involved in it.

TEACHERS' AND Ph. D. RESEARCH ARTICLES

Ambedkar, Constitutional Morality and Majoritarian Democracy

Dr. Nitish Nawsagaray[*]

Introduction:

Democracy is often defined as "Government of the people, by the people and for the people." It is also being defined as 'government by discussion'. But these definitions of democracy are inadequate in an unequal society. For Dr. Ambedkar, Democracy should lead to social and economic change in the lives of people without a bloodshed. He considered democracy to be revolutionary in nature, a tool to change the social order. For him, democracy was not merely a rule of majority-but way of life, wherein the minorities should have a sense of security. A guarantee that no one will hit them below the belt.

In recent time, sufficient scholarship has developed in India on constitutional morality as a tool of constitutional interpretation. In the *Naz foundation case,*[1] the Delhi High court invoked the doctrine in interpreting the constitution. The issue before the court was the constitutionality of section 377 of the Indian penal code, which criminalises homosexuality. In this case Chief Justice Ajit Shah, extensively quoted Dr. Ambedkar from his speech in the Constituent Assembly on 4th November 1948[2]. Since then, Constitutional Morality has been invoked by the Supreme Court of India in several other cases. Scholars are divided in answering whether invoking the doctrine of Constitutional morality is a new tool in the hands of judges, which would become an unruly horse. The Attorney General of India, K.K. Venugopal expressed concern from the use of constitutional morality and hoped for its death for otherwise

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[1] *Naz Foundation* v. *Govt. of NCT of Delhi*, 2009 SCC online Del 1762: (2009) 111 DRJ 1, Civil Appeal No. 10972 OF 2013, Decided on 11 December 2013, Supreme Court of India

[2] B. R. Ambedkar's Speech while introducing the Draft Constitution, on 4th November 1948. Available at

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04 Accessed on 22.04.2020 at 3pm

the Supreme Court would become the third chamber of Parliament.[3] In stark disagreement, Professor Upendra Baxi who argues that constitutional morality is not a new phenomenon. He argues that *'The dialectic between public morality and constitutional morality serves well the promotion of constitutional good governance and the production of constitutionally sincere citizens.'*[4]

In India, the first reference to constitutional morality could be found in the writings and speeches of Dr. Ambedkar. Therefore, to understand the present debate on constitutional morality and democracy it is necessary to refer to Dr. Ambedkar and the context in which he invoked the argument of Constitutional morality in India.

Ambedkar on Constitutional Morality and Democracy.

The first reference to Constitutional morality in the writings of Dr. Ambedkar could be found in his book '**What Congress and Gandhi have done to the Untouchables'** published in 1945. This book contains Dr. Ambedkar's criticism of Congress party and Mahatma Gandhi on issues of untouchables. It is basically a plea for a separate electorate for the Untouchables. Public statements, voting records, and numerous incidents showing the isolation and maltreatment of untouchables are presented to support the contention that political separation from Hindu in the electoral system is necessary for the attainment of Untouchables political rights. According to Ambedkar, "Mr. Gandhi's attitude is that let Swaraj perish if the cost of it is political freedom of the Untouchables". In chapter IX, 'A Plea to the Foreigner', Dr. Ambedkar discusses the approach of foreigners in evaluating the Indian freedom struggle. He observes that almost all foreigners who show interest in Indian political affairs often side with of the Congress party. He argues that the foreigners have mistaken in equating the freedom of the Nation with freedom of the people - both are not the same. Words such as society, nation and country are amorphous terms, if not ambiguous. The foreigners are indifferent to a basic question that for whose freedom is the Congress fighting for? He

[3] Available at https://www.bloombergquint.com/law-and-policy/kk-venugopal-attorney-general-constitutional-morality-2

[4] Available at https://www.indialegallive.com/people/inderjit-badhwar/citizenship-amendment-bill-and-constitutional-morality-cab-78632

argues that the reason for such indifference is to be found in the wrong notions of self-government and democracy which is prevalent in the west. He criticises the western notion of democracy. According to the western writers on Politics all that is necessary for the realization of self-government is the existence among a people of what Grote called **Constitutional Morality**. They believe that if in a populace, these habits of Constitutional morality are present, then self-government can be a reality and nothing further need be considered. The second necessity for the realisation of democracy, namely, government by the people, of the people, and for the people, is the establishment of universal adult suffrage.

According to Dr. Ambedkar,

"I have no hesitation in saying that both these notions are fallacious and grossly misleading. If democracy and self-government have failed everywhere, it is largely due to these wrong notions. Habits of Constitutional morality may be essential for the maintenance of constitutional form of government. But the maintenance of a constitutional form of government is not the same thing as a self-government by the people. Similarly, it may be granted that adult suffrage can produce government of the people in the logical sense of the phrase, i.e., in contrast to the government of a king. But it cannot by itself be said to bring about a democratic government, in the sense of government by the people and for the people."[5]

According to Dr. Ambedkar, views of western writers regarding democracy and self-government are erroneous on various counts. First and the most important reason he cites is that the western writers omit to take into account the fact that in every country there is a governing class grown up by force of historical circumstances, which is destined to rule, which does rule and to whom adult suffrage and constitutional morality are no bar against reaching places of power and authority and to whom the servile classes, by reason of the fact that they regard the members of the governing classes as their natural leaders, volunteer to elect as rulers.[6] He was of the opinion that mere existence of Constitutional morality is not sufficient for success of

[5]*Dr. Babasaheb Ambedkar Writing and Speeches*, Vol. 9, Education Department, Government of Maharashtra, 1990, page 203-203.

[6]*Ibid*

democracy. For him, democracy was not only a form of government but something more than that. In a heterogeneous and hierarchical society, who is the 'self' in self-government needs to be determined categorically. Thus, for him, in 1945, having constitutional morality was not sufficient for success of democracy. The governing class who happens to be a natural leader of the servile classes due to historical reasons creates a hegemonic structure where in the governed classes justifies the dominance of the governing classes.

On 15th March 1943 Dr. Ambedkar delivered a speech at Deccan Sabha Poona, wherein he emphasized that a Democratic form of government presupposes a Democratic form of society. The formal framework of democracy is of no value and would indeed be a misfit if there was no social democracy. Democracy was not a form of Government; it was essentially a form of society. Democracy is incompatible and inconsistent with isolation and exclusiveness, resulting in the distinction between the privileged and the underprivileged.[7]

Thus for Dr. Ambedkar, a democratic society is a prerequisite for a democratic form of government. He echoed this concern in many of his speeches when he spoke about Democracy as a form of government. Mere constitutional morality was not an essential for a success of democracy. The meaning of democracy and constitutional morality was much wider than the western scholars for whom, the discourse of democracy was based on a democratic society which was not the same in India.

On 4th November 1948 Dr. Ambedkar again invoked the phrase "Constitutional morality" in his speech on the draft constitution, in context of defending the decision to include the structure of the administration in the Constitution. He quoted at length, George Grote from his work History of Greece, whom he had quoted earlier in his book 'What Congress and Gandhi has done for the Untouchables'[8]. The quotation is worth reproducing in full:

"The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and

[7] *Dr. Babasaheb Ambedkar Writing and Speeches*, Vol. 1, Education Department, Government of Maharashtra, page 222-223

[8] Supra note 5.

obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves.'

What did Grote mean by 'constitutional morality'? Dr. Ambedkar quotes Grote again;

" By constitutional morality, Grote meant…a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution will not be less sacred in the eyes of his opponents than his own."

In 1846, when Grote wrote about the rise and fall of Athenian democracy, he explained that the diffusion of the sentiment of 'Constitutional Morality' throughout society is a prerequisite for a stable, peaceful and free society. Whoever has pondered the history of Athens well knows that the Grecian Democracy was overthrown, not by the spears of conquerors, but through the disregard of constitutional morality by her own citizens.

For Dr. Ambedkar, Constitutional Morality refers to the conventions and protocols that govern decision-making where the constitution vests discretion or it is silent. In the same speech in the Constituent Assembly, he mentioned:

"…Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."[9]

For him constitutional morality is a sentiment to be found amongst the people but unfortunately it was not a natural sentiment in India as democracy is a top dressing on an undemocratic society.

He registered his concern as regards the working of Indian democracy in his final speech in the Constituent Assembly on 25th November 1949. To quote him, verbatim,

"If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgement we must do is to hold fast to

[9]Supra Note 2

constitutional methods of achieving our social and economic objectives…. The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with power which enable him to subvert their institutions"….. The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy."[10]

In the same speech he gave a final word of caution to the nation,

"On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up."[11]

Reading his final speech in the Constituent Assembly, we could draw the following conclusions: -

We must adhere only to the constitutional methods for achieving social and

[10]Available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25 Accessed on 22.04.2020 at 3.30pm

[11]*Ibid*

economic objectives, also individuals should not surrender their liberties at the feet of anyone. This is precisely what constitutional morality is about. In his speech delivered on 25th November 1949, albeit not quoting Constitutional Morality expressly, he however did invoke the idea of Constitutional morality in a different manner. In addition to the above, he raised his third concern about democracy. He emphasised that political democracy is meaningless unless we have social democracy in existence. For him, social democracy was in the trinity of liberty, equality and fraternity. A parliamentary democracy based on adult suffrage will only create political equality. Political democracy if it doesn't address the issue of social and economic equality the people who are the disadvantaged groups will blow up the political structure.

Thus, Dr. Ambedkar's notion of Constitutional morality is not only about formal democracy but something beyond that. Ambedkar added the existence of social democracy as a pre-requisite for a political democracy. He believed that the western notion of democracy based only on constitutional morality was incomplete.

In an address delivered at the Session of the All India Scheduled Castes Federation held on 6th May 1945, Dr. Ambedkar voiced that a democracy that was based upon a majority that constituted not a political majority but a communal majority was deeply dangerous to the notion of democracy. As he put it,

"…in India, the majority is not a political majority. In India, the majority is born; it is not made. That is the difference between a communal majority and a political majority. A political majority is not a fixed or a permanent majority. It is a majority which is always made, unmade and remade. A communal majority is a permanent majority fixed in its attitude…"[12]

Thus, in a caste ridden hierarchical society, where a majority is not a political majority on the basis of political ideology by a communal majority based on the birth of person in a particular community the minorities will never have a bargaining power against the majoritarian community. Can a political democracy which is a rule of the majority ever make a sense in a society which is undemocratic?

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[12]*Communal Deadlock and a way to solve it* in *Dr. Babasaheb Ambedkar Writing and Speeches*, Vol. 1, Education Department, Government of Maharashtra, page 357.

In another speech in Pune, 'Conditions precedent for the successful working of democracy'[13], Ambedkar identifies the observance of 'constitutional morality' as one of the 'conditions precedent' to democracy. In his judgment the constitution only 'contains legal provisions, only a skeleton. The flesh of the skeleton is to be found in what we call constitutional morality'. The framework of constitutional morality would mean that "there must be no tyranny of the majority over the minority" ... "The minority must always feel safe that although the majority is carrying on the Government, the minority is not being hurt, or the minority is not being hit below the belt".

Dr. Ambedkar goes beyond what Grote has defined constitutional morality. For him Constitutional morality means absence of oppression by the majority over the minority. Constitution is not only in the written words but in the spirt of the constitution based on Liberty, Equality and Fraternity.

During a debate in Rajya Sabha on the Constitution (Fourth Amendment) Bill 1954, justifying the necessity of Fundamental Rights in India, Dr. Ambedkar said that,

"…[a] s soon as Swaraj presented itself, everybody thought - at least many of the minorities thought- that there was the prospect of political authorities passing into the hands of a majority, which did not possess what might constitutionally be called constitutional morality. Their official doctrine was inequality of classes. Though there is inequality in every community, or whatever be the word, that inequality is a matter of practice. It is not an official dogma. But with a majority in this country, inequality, as embodied in their Chaturvarana is an official doctrine. Secondly, their caste system is a sword of political and administrative discrimination. The result was that the fundamental rights became inevitable."

In the opinion of Dr. Ambedkar as the majority community who would eventually come to power after independence would not have a sense of constitutional morality the necessity of written Fundamental rights was pertinent. Thus, for him, Fundamental rights are protective gears against the majority in Parliament and people in power who might discriminate against the individual on the basis of the religious or public morality. The official

[13]*Dr. Babasaheb Ambedkar Writing and Speeches*, Vol. 17, part 3, Education Department, Government of Maharashtra, page 475-484.

doctrine of the Constitution is Liberty, Equality and Fraternity. Thus, if the official doctrine of majority based on Religion preaches inequality or curtailment of liberty it would go against the official doctrine of Constitution.

Courts and Constitutional Morality

Constitutional morality has weathered different connotations at different points in time. For George Grote, it meant a culture of reverence for the constitution among the people, which would ensure a peaceful government. But for Dr. Ambedkar, mere Constitutional morality is not sufficient unless we have a democratic society. In absence of Constitutional morality in India he justifies the inclusion of a detail administrative structure in the Written Constitution. It is because of absence of a democratic value in the Indian society the framers of the Constitution had to add Horizontal fundamental rights in Articles 17, 15 (2) and 23 which could be claimed against private citizens. It is an attempt of the framers of the Constitution inculcate Constitutional morality in Indian Society. The Constitution of India is not only a political document but also a document which proliferate socio-political and economic transformation in the society. It incorporates the eternal principles of equality, fraternity, liberty and Justice.

In subsequent years, the Indian Courts made passing references to constitutional morality in its judgments, within different contexts which essentially means two things: firstly, the opposite of popular morality, and secondly, the spirit or essence of the Constitution.

The Delhi High Court, quoting Dr. Ambedkar, adopted his exposition of Constitutional Morality in *Naz Foundation* v. *Govt. of NCT of Delhi*[14], when the Court ruled that Section 377 of the IPC was ultra vires articles 14, 15 and 21. This decision was historic as it secured the space for sexual minorities within the domain of constitutional rights.

The High Court of Delhi, in its detailed verdict declared that section 377 of Indian Penal Code, 1860 which criminalised "unnatural offences" violates articles 14, 15 and 21 of the Constitution of India. Affirming that penalisation of homosexuality is an infringement of the rights to dignity and privacy, the court ruled that"*[t]he way in which one gives expression to one's sexuality is*

[14]Supra Note 1.

at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy."

The court invoked the doctrine of constitutional morality for building the argument towards the decriminalisation of voluntary sexual conduct that falls outside the hegemonic paradigm of hetro-normativity. The court held, that "enforcement of public morality does not amount to a 'Compelling state interest' to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others."[15]

The court further held that, "*Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly*"[16]

The court further indicated that the notion of constitutional morality secures dignity and freedom to individuals and prohibits any affront of diversity even of different sexual orientation. The court juxtaposes the idea of respect for and celebration of diversity with the notion of Constitutional morality. We could say *Naz foundation case* identifies "diversity" as one of the elements of constitutional morality. Since the Constitution of India protects all facets of individual diversity, any conduct that is a reflection of diversity, cannot be criminalised.

The Naz Foundation judgment of the Delhi High Court was reversed by the Supreme court in *Suresh Kumar Koushal* v. *Naz Foundation*[17] but eventually came to be upheld by a larger bench of the Supreme Court in *Navtej Singh Johar* v. *Union of India*.[18] In this case, Chief Justice Dipak Mishra, speaking

[15] *Ibid* para 75

[16] *Ibid* para 79

[17] (2014) 1 SCC 1

[18] (2018) 10 SCC 1

for himself and Justice Kahnwilkar, observed that the courts must not be "remotely guided by majoritarian view or popular perception", they must be "guided by the conception of constitutional morality and not by the societal morality." Further Justice Nariman also asserted that it is not open for a constitutional court to substitute 'societal morality' with 'Constitutional morality' as societal morality is inherently subjective and morality and criminality are not co-extensive. Justice Chandrachud distinguished 'public morality' from 'constitutional morality'. In public morality, "the conduct of society is determined by popular perceptions existing in society", while constitutional morality, "requires that the rights of an individual ought not to be prejudiced by popular notions of society." He mentioned that, "Constitutional morality leans towards making Indian democracy vibrant by infusing a spirit of brotherhood amongst a heterogeneous population, belonging to different classes, races, religions, cultures, castes and sections."

For the first time, the Supreme Court of India invoked the doctrine of Constitutional morality in *Manoj Nirula case*[19]. This case was about the appointment of some ministers to the Union Council of Ministers, against whom charges of moral turpitude and other offences were being tried in the courts. It was challenged on the ground that they were appointed against the provisions of the Constitution as well as the Representation of People Act, 1951. Finding such appointments against the Constitution as well as the law, and existing precedents, the court also found them to be against constitutional morality. Justice Dipak Misra, speaking for himself, Chief Justice Lodha and Justice Bobde, referred to Ambedkar's speech in the Constituent Assembly on constitutional morality and held that, "*The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible (sic) of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional*

[19] (2014) 9 SCC 1

restraints. Commitment to the Constitution is a facet of constitutional morality."[20]

As per Justice Dipak Mishra, commitment to the Constitution is a facet of Constitutional Morality. Also, constitutional morality was essentially used as a synonym for the rule of law.

The next case before the Supreme Court was *State (NCT of Delhi)* v. *Union of India*[21]. In this case the issue concerned tussle of power between the central government and provincial government of Delhi under the Constitution. Chief Justice Dipak Misra, speaking for Justice Sikri, Justice Khanwilkar and himself held that, "*Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every Member of the country right from its citizens to the high constitutional functionaries must idolise the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic set-up promised to the citizenry remains unperturbed. The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution*."[22]

He further added, "Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse."[23]

The court has echoed Dr. Ambedkar's statement made in the Constituent Assembly- Adherence to the Constitution by the citizens and the constitutional functionaries. However, the court has used vague terms such as

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[20] Ibid at para 75.

[21] (2018) 8 SCC 501.

[22] *Ibid* para 58

[23] *Ibid* para 60

'inherent elements in the constitutional norms' 'conscience of the Constitution', 'Constitutional impulse.' Any terms which make the law abstract is dangerous.

In his concurring opinion Justice Chandrachud held that, "*Constitutional morality requires filling in constitutional silences to enhance and complete the spirit of the Constitution. A Constitution can establish a structure of Government, but how these structures work rests upon the fulcrum of constitutional values. Constitutional morality purports to stop the past from tearing the soul of the nation apart by acting as a guiding basis to settle constitutional disputes*"[24]

He further added, "*Constitutional interpretation must flow from constitutional morality*."[25]

For Justice Chandrachud, where ever there are constitutional silences, to enhance and complete the spirit of the constitution, the doctrine of constitutional morality could be invoked.

In *Joseph Shine* v. *Union of India,*[26] the court once again posed 'Constitutional morality' as a counterbalance to 'public morality'. The issue before the court was as regards the constitutional validity of Section 497 of the Indian Penal Code. This section made criminal for a man to have sexual intercourse with a married woman. Though the adulterous man was liable for punishment the married women was not punished as an abettor. The Supreme Court struck done the provision. According to Justice Chandrachud, "*Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity… it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage… The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband…*"[27]

He added that the Constitutional validity of criminal laws "must not be determined by the majoritarian notions of morality which are at odds with the constitutional morality." He observed that, "Criminal law must be in

[24] *Ibid* para 301

[25] *Ibid* para 302

[26] (2019) 3 SCC 39

[27] *Ibid* para 162

consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster."[28]

The court once again ignited the concept of constitutional morality in the *Sabrimala case*[29]. The issue before the court was whether a rule that barred menstruating women between the ages of 10-50 from entering a temple was unconstitutional. More particularly, the question was whether the temple entry restriction could be justified because it was in consonance with 'morality'. The Court held that, "*The term "morality" occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. We must remember that when there is a violation of the fundamental rights, the term "morality" naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution.*"[30]

Thus, the word 'morality' contained in Articles 25 and 26 must mean constitutional morality and not popular morality.

Conclusion:

Dr. Ambedkar expected the constitution to be transformative in nature. He emphasised that a democratic polity should be converted into social and economic democracy. For him in the trinity of 'Liberty', 'Equality' and 'Fraternity', it was Fraternity which has a lexical propriety. Liberty and Equality are meaningless in the absence of Fraternity. In Indian Society Fraternity needed to be cultivated, it is not to be taken for granted. The Constitution of India guarantees justice- social, economic and political-to all the citizens, it protects the identities of minorities, secures the well-being of marginalized and vulnerable individuals, and directs the government to work towards the interests of impoverished classes by policy decisions that have an

[28]*Ibid* para 219

[29]*Indian Young Lawyers Association* v. *State of Kerala*, (2019) 11 SCC 1

[30]*Ibid* para 144.

egalitarian objective and content. These all, form part of the norms of constitutional morality.

Dr. Ambedkar's idea of constitutional morality is multidimensional. On one hand he expects strict adherence to a written constitution by both the people in government and the citizens. He emphasised on resort to constitutional measures for enforcement of rights. He went to the extent of calling "satyagraha as grammar of anarchy". On the other hand, he expects that social and economic transformation in the lives of people without a bloodshed. Through a constitutional method.

For Dr. Ambedkar, 'diffusion of constitutional morality' is a necessary precondition for working of the Constitution. Written constitution often requires persistent efforts to ensure continued adherence to the principles of constitutional morality. There is a silent assumption of an independent judiciary in every written Constitution guided by the principle of Constitutionalism. The Indian Supreme Court by reading Ambedkar's notion of constitutional morality as a tool of interpretation, has performed a constitutional duty to transform a society by upholding the values of liberty and equality. The cases discussed above are attempts made by the court to transform the society by constitutional means. Constitutional courts essentially are anti-majoritarian. They have a constitutional obligation to uphold the rights of individuals against the State who might with the help of majority in parliament take away the rights of individuals. In addition, as the nature of Fundamental rights guaranteed in the constitution are both horizontal and vertical, it also has a duty to be anti-majoritarian against the ruling class of the society when it comes to giving effect to rights of individuals. Constitutional morality is the guiding light in interpreting the constitution. As Justice Chandrachud opined, it is a 'compass is turbulent time'. It could be invoked by the Court when the Constitution is silent.

It is not argued that the court should be *textualist* always. Because it may happen that a textualist judge may hold that the only constitutional rights are those enumerated in the text. Ronald Dworkin in "Taking Rights Seriously"[31] claims that one can *be faithful to an unchanging text* while *supporting*

[31] Ronald Dworkin, *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1977).

changes in interpretation of text. What justifies his claim is perhaps the best-known distinction of his legal philosophy: the distinction between constitutional *concepts* and competing *conceptions* of those concepts.[32]

Dworkin argues that advances in our understanding of the Constitution and of constitutional interpretation requires 'a fusion' of constitutional law and moral philosophy or political philosophy.[33] The Constitutional law of India is to be interpreted on the moral philosophy on which it resides upon. The guiding moral philosophy is the notion of Constitutional morality as propounded by Dr. Ambedkar. The court has to go beyond the text at time to read the constitutional morality of the constitution on which the constitution resides upon. The court is absolutely justified in invoking the Constitutional morality doctrine in interpreting the constitution because the Constitution is transformative, it is designed to transform the social and economic structure of Indian society.

[32]*Ibid* at 134.
[33]*Ibid*at 149.

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