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2018-2019

Articles

Essays

Project Report

Case Comments

Legislative Comments

Ph.D. Research Articles

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Principal's Page

Dear Students,

I am privileged to present the annual volume of Abhivyakti Law Journal to you.

I am very glad to share with you a change that is introduced in this Journal from the current academic year. A new section of articles, research papers written by Ph.D. scholars and faculty members of the ILS Law College is introduced. This will benefit the writers and will enrich the content in terms of variety of subjects and scholarship.

It is encouraging to note the wide range of subjects the students have chosen to write their articles. They have discussed Animal Rights and Human Rights, Law and Technology, Arbitration and Mediation, Constitutional Provisions, Feminism, International Law and many more other areas. I am sure that it will make an interesting reading for all. The articles have unraveled the close connection between law and life.

The year 2018-19 has been an eventful one for legal fraternity. The Supreme Court of India remained in focus for some brilliant judgments popularly called as Sabarimala, Right to Privacy and Aadhar judgment and also for inappropriate procedures adopted while handling the charges of sexual harassment against the Chief Justice of India making us uncomfortable and restless.

The ILS deeply mourns the sad demise of our two teachers Shri H.P. Deshmukh and Dr. Anupa Thapliyal, who taught and shaped lives of hundreds of students and contributed immensely to the growth of the College. The destiny also snatched away Prof. Madhav Menon who gave a new direction and prestige to legal education in India. He was a well-wisher and supporter of the ILS Law College. We pay our respectful homage to all of them. We will always cherish their fond memories.

I congratulate the Abhivyakti Editorial Board for their efforts to produce a quality journal and wish all the students best of luck!

Ms. Vaijayanti Joshi
Principal

Editorial

We invite you to read yet another interesting and thought-provoking annual edition of the *Abhivyakti* Law Journal for this academic year 2018-19.

With our college just a couple of years away from reaching centenary celebrations, it is heartening to see our students refurbish our cherished hopes with their academic excellence. The *Abhivyakti* Law Journal is like a colourful *bouquet* of knowledge wherein each submission of our students is a fragrant and bright flower of learning. The *bouquet* includes thought provoking articles, essays, case comments and legislative comments, and a project report. This edition also introduces a new segment on the research articles authored by the Ph.D. research students of the ILS Law College Ph. D. Research Centre.

This year, once again, our students have further scaled up the ladder of great expectations by making this college journal a forum to present their flowing thoughts on a plethora of Law and Legal affairs. The submissions are on as varied a subject such as Business laws, International Public law, Aircraft and Space laws, on the trending Arbitration laws, Religious Rights and even laws relating to Feminism, Mining, Yoga, River disputes and Animal Welfare. We believe that these reflect our students' keen commitment to understanding, comprehending, grasping, assimilating, conceptualizing and visualizing legal knowledge.

On a side note,

For the future student authors: **"Writing means sharing. It's part of the human condition to want to share things - thoughts, ideas, opinions"** -- Paulo Coelho

And for the readers: **"Whenever you read a good book, somewhere in the world a door opens to allow in more light".** --Vera Nazarian

Faculty Editors
Dr. Banu Vasudevan
Dr. Shaila Daware
Ms. Pronema Bagchi

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

Ms. Vaijayanti Joshi

Principal

ILS Law College, Pune

Acknowledgments

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

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

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Table of contents

ARTICLES

Cubs of the Caliphate: Culpability of Child Soldiers **1**
Alefiyah Shipchandler

Investment Arbitration's Tryst with Constitutional Principles **10**
Sharanya Shivaraman

Entering the Game of Drones: Analysing the Drone Regulations of India **17**
Anuja Chaudhury

Violation of Animal Rights under the Garb of Conservation: A Critique on Zoos **27**
Rashmi Birmole and Srijita Dutta

Mahadayi Water Dispute: Past and the Present **35**
Aanchal Bhartiya

Adultery, No More an Offence: Equality or Delusion **42**
Kashish Singhal

An Instance of Strategic Ambiguity: 'Silence! The Court is in Session' **49**
Mihir Govande

Winding-up and Illegal Transfers : An Overview **55**
Ziauddin Sherkar

Economic Sanctions under International Law: An Overview **61**
Ashna Chhabra

Constitutional Dimensions of Mining **70**
Saranya Mishra

Character Copyrightability: The Pros, the Cons and Everything in Between **79**
Alefiyah Shipchandler

Award of Interest by an Arbitral Tribunal – An Analysis of Jurisprudential Trends **88**
Sharanya Shivaraman

Corruption as a 'Defence' in Investment Treaty Arbitration **94**
Anoop George

Legal Fiction: Unmasking the Unreal **102**
Karan Dodeja and Vaibhav Dubey

Exploring the Unknown Facets of a Startup Organization **110**
Pranav Bafna

Right to Worship vs. Rights of a Deity **119**
Nishant Gupta

Delinquency: Influence of Economic Factors **127**
Surabhi Smita and Anchita Sanghi

Do the Provisions of the Surrogacy (Regulation) Bill, 2016 Justify its Intention? **135**
Saloni Bambi and Simantani

A Feminist Critique of Human Rights **144**
Shrishti Kedia and Sanskriti Desai

India, Let's Mediate! **153**
Arundhati Patkar

Status of Animal Welfare in India: Legal Perspective **159**
Rugved Upadhye

Pushing Barriers in Life and Law : Yoga and Copyright **167**
Rashmi Raghavan

ESSAYS

Open Access to Justice- Live Streaming of Supreme Court Proceedings **173**
Niyati Dasondi

Policy Review on Foreign Direct Investment in E-commerce: A Boon or a Curse? **177**
Debayan Gangopadhyay

Arbitrability of Intellectual Property Disputes **182**
Mahasweta M

Air Crash Investigations leading to Development of Air Laws **188**
Yash Bhale

PROJECT REPORT

A Study on Legal and Economic Impact of the Protection of Geographical Indications (GI) in India with special reference to the State of Maharashtra **192**
Aishwarya Sivadas, Ambika Kajal, Shraddha Trivedi, Priya Agarwal, Anoop George

CASE COMMENTS & LEGISLATIVE COMMENTS

Harsh Mander v. Union of India **195**
Dewangi Sharma

Nandakumar v. State of Kerala **198**
Jahnavi Murthy

Prabhat Steel Traders Pvt. Ltd. v. Excel Metal Processers Pvt. Ltd. **201**
Ayush Wadhi

Sampurna Behura v. Union of India **204**
Dewangi Sharma

Sharda Gautam v. Delhi Urban Shelter Improvement Board **207**
Adithi Rao

Swapnil Tripathi v. Supreme Court of India **210**
Neha Sagam

Union of India v. Hardy Exploration and Production (India) **213**
Salonee Patil

M/s United India Insurance Company Ltd. v. Jai Prakash Tayal **216**
Mallika Joshi

The Fugitive Economic Offenders Act, 2018 **219**
Akshay Kumar

Ph.D. RESEARCH ARTICLES

Giving Political Voice to the Persons with Mental Disability : Some Reflections **222**
Ms. Rajlaxmi Joshi

Disability as Form of Human Diversity in the Context of Panchayat Election : Some Reflections **241**
Mr. D. P. Kendre

Data Protection and Privacy laws in India : An Analysis **252**
Mr. Amitkumar Khatu

ARTICLES

Cubs of the Caliphate: Culpability of Child Soldiers

Alefiyah Shipchandler
V BA.LL.B.

Introduction

The United Nations Convention on the Rights of the Child, 1989[1] ("UNCRC") categorically prohibits the use of children in war operations. Notwithstanding such conventions, minors have been and continue to be used as soldiers in armed conflicts throughout the world. Be it, the American Revolution or the World Wars I and II to the Sierra Leone Civil War and to the modern-day insurgencies, armed conflicts and civil wars in Afghanistan, Colombia, Iraq, Sudan, Syria and Yemen, minors have always been trained and used in combatant roles and for the purposes of propaganda and even for tactical advantages.

As far as the use of children by state armed forces are concerned, several international instruments are in place to disallow the same[2]. However, the dilemma lies in the treatment of child soldiers used by non-state armed forces, as for example in the Islamic State of Iraq and Syria and by terrorist organisations such as Boko Haram in Nigeria. The underlying question that remains to be answered is whether they (the Child Soldiers) are to be treated as victims or perpetrators.

Involvement of Children in War

Many children are forced into armed conflict, while others join with varying degrees of volition. Such children become a part of these conflicts, through four primary methods;

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[1] Art. 38, The United Nations Convention on the Rights of the Child, 1989.

[2] Rome Statute of the International Criminal Court, 1998; International Labour Organization's Worst Forms of Child Labour Convention, 1999; African Union's Charter on the Rights and Welfare of the Child, 1999; Additional Protocols to the four Geneva Conventions of 1949, 1977; UN Security Council Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011) and 2225 (2015).

1) **Voluntary enlistment -** a case in point would be the voluntary enlistment of Palestinian children in fighting oppressive Israeli forces in occupied Palestinian territory.

2) **Legal recruitment or conscription -** Myanmar for example, allowed the recruitment of a large numbers of boys below the age of 18 into the national army from 1962 to 2012. While the country has signed the Optional Protocol to the UNCRC on the involvement of children in armed conflict ("OPAC") in 2000 it is yet to ratify the same.

3) **Lack of viable alternatives -** Minors have also been forced into such conflicts due to poverty, lack of livelihood options, lack of educational resources and even due to lack of protection.

4) **Forced recruitments -** Lastly, children are also forcibly recruited under threats of death or are kidnapped and abducted into armed groups. For example, the Lord's Resistance Army ("LRA"), Islamic State of Iraq and Syria ("ISIS").

However, despite the various methods of recruitment, in reality, can any of them be called anything but forced and manipulated? They are nothing but typical examples of veiled voluntary recruitment arising out of a lack of stable economic and social systems. Whatever be the mode or reason for the recruitment of the children, it is surmised to be manipulative and forced due to lack of stable political, economic and social systems.

Modus Operandi in Forced Recruitment

Children have always been easier to control, manipulate and kidnap or force them from their villages and towns. They are easily brainwashed and susceptible to indoctrination, with fear and violence and rarely if ever, try to fight back.[3] Many children are made to witness their own parents' deaths, or are even forced to be the executioners of family members or someone they know in their village. With little or no parents or family members to return to, the children are also much less likely to try and escape. Children caught escaping are beaten or killed as an example for the rest of the group. Sometimes, the children are the ones who are forced to beat or kill the escapees under threat of their death to help further the brainwashing.[4]

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[3] Colleen Kirby, *Child Soldiers: An Innocence Lost*, Senior Honors Theses, 451, available at http://commons.emich.edu/honors/451, last seen on 16/12/2018.

[4] Ibid.

Some children may also be lured with possessions that are attractive to them, in those areas where the population and community are poor. The attraction of being able to have the things they would otherwise never be able to acquire themselves is a strong motivating factor. The system of addicting the children to substances such as alcohol, tranquilizers, jambaa (marijuana) and crack cocaine is also common.

ISIS and Child Soldiers

It is pertinent to bear in mind that the Islamic State in Iraq and Syria (ISIS) is not a mere terrorist organisation. From its very name, the fundamental goal of the organisation becomes abundantly clear; the establishment of an Islamic State, a Caliphate. It is therefore said that ISIS leaders have paid particular attention to children in the territories controlled by them because the future of any 'State' lies with the next generation.[5] By such indoctrination and the consequent creation of a new generation of fighters, ISIS has attempted to make its elimination in the near future almost impossible, resulting in the creation of **'cubs of the caliphate.'**

ISIS child soldiers come from various backgrounds such as, those born to foreign fighters or emigrants; those born to local fighters; those who had been abandoned and found their way into an ISIS-controlled orphanage; those coercively taken from their parents; and those who had voluntarily joined the Islamic State.[6] This predatory recruitment is composed of four stages: selecting a child recruit, gaining access, obtaining their emotional trust, and intensive ideological indoctrination of the child.[7]

ISIS also gained access to schools where curriculum, based on their extreme ideology and values, had to be taught to the children. A textbook on jihad training, for example, taught the child weaponry, firing, and how to clean and store light weapons. In 2015, ISIS released a video called the '*Al-Farouq Institute for*

[5] Noman Benotman & Nikita Malik, *The Children of Islamic* State, Quilliam, available at https://www.scribd.com/document/319181208/The-Children-of-Islamic-State, last seen on 16/12/2018.

[6] Mia Bloom, *Cubs of the Caliphate: The Children of ISIS,* Foreign Affairs, available at https://www.foreignaffairs.com/articles/2015-07-21/cubs-caliphate, last seen on 16/12/2018.

[7] Asaad Almohammad, *ISIS Child Soldiers in Syria: The Structural and Predatory Recruitment, Enlistment, Pre-training Indoctrination, Training and Deployment*, International Centre for Counter-Terrorism, available at https://icct.nl/wp-content/uploads/2018/02/ICCT-Almohammad-ISIS-Child-Soldiers-In-Syria-Feb2018.pdf, last seen on 16/12/2018.

Cubs', which showed a nine-minute footage of 70 'cubs' being trained for jihad.[8]

It is through these ISIS controlled-schools that recruiters for the Islamic State scout for children who show potential to be a 'Cub of the Caliphate'.[9]

Children in Propaganda Videos

The first official ISIS propaganda video depicting a child executing a prisoner was in July, 2015 (Martinez, 2015; NCTV & AIVD, 2017). The video entitled, '*Uncovering an Enemy Within*', features a boy called Abdullah, who shot two men accused of being Russian spies in the back of their heads. In February 2016, a 4-year-old British child used a remote control to blow up a car with three prisoners. He was given a central role in the video and appeared as though he was taking revenge for his father who had died in an air raid carried out by the global coalition in December 2014. In another video released in January 2017, a toddler who looks no more than 3 or 4 years old is seen shooting a prisoner dead in a ball pit. This early exposal of children to violence is also a tactic used by terrorist organisations to internalize and normalize violence in their minds.

Other Roles of Children

Usually in armed conflicts, the use of children is different as between boys and girls. Boys are more frequently used in battle related tasks and duties, while on the other hand, the girls are dragged into agricultural and housekeeping related tasks and even for sexual exploitation. Child soldiers fulfil many roles, including fighting in direct combat, setting up of explosives, acting as spies, carrying equipment, cooking and domestic labour.[10] Children who show the potential to be spies are trained to spy on the enemy and those with good communication skills are used for preaching in public and publicizing the Islamic Caliphate.

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[8] Lizzie Dearden, *ISIS Releases Video Of Child Soldiers Training For Jihad In Syria Camp For 'Cubs Of The Caliphate'*, Independent, available at https://www.independent.co.uk/news/world/middle-east/isis-releases-video-of-child-soldiers-training-for-jihad-in-syria-camp-for-cubs-of-the-caliphate-10065239.html, last seen on 16/12/2018.

[9] Josie Ensor, *ISIL Suicide Bomber, Aged 14, 'Stripped of Bomb Belt by Iraqi Police*, The Telegraph, available at https://www.telegraph.co.uk/news/2016/08/22/watch-moment-isil-suicide-bomber-in-football-shirt-aged-12-or-13/, last seen on 16/12/2018.

[10] Joanne Corbin, *Child Soldiers*, Handbook of International Social Work: Human Rights, Development, and the Global Profession, Oxford Scholarship Online.

Children are also being used as suicide bombers as they are less likely to be suspected.

Criminal Liability and Prosecution of Child Soldiers under International Law

Until 1977 there were no laws directly addressing child soldiers, but as public awareness of the use of child soldiers expanded**,** Additional Protocols I and II were adopted on 8 June 1977 supplementing the Geneva Conventions of 1949[11], which set the minimum age for the recruitment of children in armed conflicts at 15. The OPAC (2000) has further increased this age to 18.

According to the Convention on the Rights of the Child, a child is "*every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*".[12]

The Coalition to Stop the Use of Child Soldiers defines a 'child soldier' as "*any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular force or armed political group whether or not an armed conflict exists*".[13]

While international documents simply prohibit recruitment and use of children in armed forces or armed groups, none of them state that children should not be prosecuted. International criminal law has distanced itself from prosecuting children and left this option to national legislatures.[14] Quite unanimously, international regulation has been clear when stating that children below the age of 15 cannot be recruited.

While the International Criminal Court ("ICC") does not have jurisdiction over anyone under the age of eighteen, the Rome Statute only makes the conscription of child soldiers under the age of 15 a war crime.[15] This discrepancy and 'grey zone' has left many wondering how the law should view child soldiers between

[11] Geneva Conventions of 1949.
[12] Sec. 1(1), Convention on the Rights of the Child 1989.
[13] Child Soldiers International, available at https://www.child-soldiers.org/, last seen on 16/12/2018.
[14] Darija Markovic, *Child Soldiers: Victims or War Criminals?* Regional Academy on the United Nations.
[15] Art. 8(2)(b)(xxvi), Rome Statute of the International Criminal Court, 1998.

the ages of 15 and 18.[16] If they can be legally recruited, why are they not held accountable for the crimes they commit? Consequently, it follows that children below the age of 15 are absolutely protected, but since the definition of a child soldier spans over children below the age of 18, it follows that children between the age of 15 and 18 can be held criminally responsible as there are no prescriptions stating the opposite.

Additionally, international criminal law does not provide clarity in determining the minimum age of criminal liability. The statutes of various international criminal tribunals are also conflicting on this point. The statutes of the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda remain silent on the issue, while the Serious Crimes Panels in East Timor have jurisdiction over minors over 12 years of age. The Special Court of Sierra Leone ("SCSL") has jurisdiction to prosecute children over 15 years of age. However, the statute of the SCSL strictly regulates prosecution of children under 18 years of age and privileges rehabilitation as opposed to other traditional aims of punishment. The Rome Statute further gives jurisdiction to the ICC to prosecute individuals over eighteen years of age.[17] Domestic systems also fix criminal liability between the ages of 13-15 years.

Actus Reus and Mens Rea and Voluntariness

For a person to be held criminally culpable for any offence it is necessary that the two elements of *actus reus* and *mens rea* are jointly present. However, given the manner and mode of recruitment and training of child soldiers, can criminal responsibility of child soldiers even be discussed? Psychological studies analysing the psychological development of children and their subsequent ability to commit crimes show that it is indeed possible to talk about criminal liability of children to a certain extent (attainment of puberty, the age of discernment or the personality of the child).[18] However, the studies fail to lay down a particular standard of age. This is a problem, in the sense that, from a psychological point of view, while some children may be found culpable under international criminal law notwithstanding their age, others would not.

[16] David M. Rosen, *Armies of the Young: Child Soldiers in War and Terrorism*, Rutgers University Press, 2005.

[17] Fanny Leveau, *Liability of Child Soldiers Under International Criminal Law*, Osgoode Hall Review of Law and Policy, (2014).

[18] Ibid.

It has also been opined that the line between voluntary and forced recruitment is not only legally irrelevant but practically superficial in the context of children in armed conflict.[19] The only way to choose who is held accountable under the law is to know who is criminally responsible; defining voluntariness makes that determination possible.

To the extent that children are civilians, they are protected by the fundamental doctrine of the 'principle of distinction'.[20] As per this principle, parties to a conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants and not civilians. However, once they start actively participating in hostilities, then children above the prescribed age threshold (15 years) who have an active participation in armed operations could, in theory, be held criminally responsible since they lose their protected status.

Voluntariness can thus be assessed using two factors:[21]

1) Whether a child appreciates the consequences of his/her decision and

2) Whether there are viable alternatives to joining the armed forces or groups.

Deterrence, Retribution and Reformation

The prosecution of child soldiers for serious violations of international humanitarian law is considered to be a part of retribution and deterrence, especially in cases where the child has acted consciously and on his own free will. However, most of the children commit crimes because they were ordered to do so, in addition to being under the influence of narcotics, alcohol or are differently coerced into committing serious crimes.[22] Therefore, retribution and deterrence cannot be convincing justifications for the prosecution of child soldiers because child soldiers do not act under free will in most cases.

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[19] Thomas Lubanga Dyilo, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, The Prosecutor v. Thomas Lubanga Dyilo.

[20] Gabriel Swiney, *Distinction between civilians and combatants* 733, 758 in *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 733-758, Vol. 39, No. 3 (2005).

[21] Noelle Qudnivet, *The Liberal Discourse and the "New Wars" of/on Children,* 38 Brook. J. Int'l L. 1053 (2013).

[22] *Coalition to Stop the Use of Child Soldiers*, Global Report 2008, available at http://www.child-soldiers.org/global_report_reader.php?id=97>, last seen on 16/12/2018.

Thus, while child soldiers may face criminal charges, they must also benefit from the protections provided to children who have suffered the trauma and indoctrination of being a child soldier. Just because adolescents are capable of making voluntary and informed decisions does not mean they fully appreciate the consequences of their decisions. They must be offered the possibility of rehabilitation and reintegration into society. Restorative justice and social rehabilitation of former child soldiers is in their best interest and remains to be the core principle of juvenile justice.

Cubs who become Lions

Another scenario which must also be addressed is the position of adults who have committed serious violations of humanitarian law but who were recruited as children. While the existence of *mens rea* remains to be concretely answered in these cases, the fact that the accused adult was recruited as a child should be considered in the final sentencing.

A case in point is that of Omar Khadr,[23] whose father Ahmed, took him to Afghanistan, and introduced him to the Al-Qaeda leaders at the age of 10, sent him for military training at 15 and into the battlefield shortly afterwards. In 2002 at the age of 15, when Khadr was captured in Afghanistan by U.S. forces, he allegedly threw a grenade that killed U.S. Army Sergeant Christopher Speer. Khadr was seriously wounded and transferred to Guantánamo Bay prison, where he was held for a decade and subjected to years of unlawful detention, abusive interrogation and unfair trial in one of the most notoriously abusive detention centres in the world.[24] Khadr is the only child soldier to have been prosecuted by a military tribunal for war crimes and has received an apology and $10.5m compensation from the Canadian government for failing to protect his rights.

In the case of *The Prosecutor v. Dominic Ongwen*,[25] the accused is the ex-commander of the Sinia Brigade of the Lord's Resistance Army (LRA). He was abducted by the LRA when he was 14 years old while walking to school

[23] *Payout for Guantánamo Teenager Could Boost Rights of Child Soldiers*, The Guardian, available at https://www.theguardian.com/global-development/2017/jul/12/omar-khadr-compensation-payout-could-boost-rights-of-child-soldiers, last seen on 16/12/2018.

[24] *Guantánamo Child Soldier Omar Khadr was a Victim Twice*, Child Soldiers International, available at https://www.child-soldiers.org/news/guantnamo-child-soldier-omar-khadr-was-a-victim-twice-over, last seen on 16/12/2018.

[25] The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15.

and subsequently indoctrinated as an LRA fighter. His conscription as a child could be a part of his defence, not in respect of complete acquittal, but perhaps in Court's deliberation on the sentence, should he be convicted. The ICC has issued an arrest warrant against him on three counts of crimes against humanity and on four counts of war crimes and the mandate of the ICC only allows the prosecution of crimes that happened after 2002. At that time, Dominic Ongwen was already an adult. The case shows a willingness of the ICC to consider the angle of victimization as a young child but does not on the same scale allow lack of the *mens rea* requirement on becoming an adult.

Conclusion

Since there is no consensus on the trial and prosecution of child soldiers under international law it, thus, becomes necessary to abide by certain well-established principles. An accused should participate in criminal proceedings with a full understanding of the process and be given the right to be heard. Deprivation of liberty should be used only as a last resort. The right to legal advice and care according to the age must be provided and in addition an opportunity for physical and psychological recovery and social reintegration must be taken care of.

Investment Arbitration's Tryst with Constitutional Principles

Sharanya Shivaraman
V BA.LL.B.

Overview

Arbitration for investment disputes is a relatively private and confidential form of dispute resolution. The Model Bilateral Investment Treaty ("BIT") framework of most nations provides for a dispute settlement mechanism to efficaciously resolve issues between the investor and the host state. The Investor State Dispute Settlement ("ISDS") system is a unique process which allows the parties to an investment treaty to take up their grievances before a tribunal of arbitrators. The ISDS system contemplates a mechanism for investors to bring claims against the state for violating their obligations under the treaty. Questions of public law and treaty related obligations of state are relegated to a forum of private dispute settlement under the investment arbitration regime. There are multiple complexities which arise in this regard. However, through this article, an attempt is being made to examine how an opportunity to arbitrate grievances against a State provides for a unique interaction of constitutional law principles with the investor's claim for economic equality and fairness.

Introduction to Investment Disputes

India's Model BIT[1] provides protection to the investors from direct or indirect expropriation of its investment. Art. 3 and 4 are critical in understanding the protection guaranteed to investors. Art. 3 states that:

3.1 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute:

(i) Denial of justice under customary international law

(ii) Un-remedied and egregious violations of due process; or;

[1] Model Text for the Indian Bilateral Investment Treaty, available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the% 20Indian% 20 Bilateral %20 Investment%20Treaty.pdf, last seen on 20/11/2018.

(iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.

3.2 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Art.

Here, the conduct of the state party towards the investment is regulated by guaranteeing the right of due process to the investor. Similarly, according to Art. 4:

4.1 Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances, to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

4.2 A breach of Art. 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality.

4.3 This Art. shall not apply to any Law or Measure of a Regional or local Government.

4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Art. provided such decisions are taken in furtherance of the Law of the Host State.

4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Art.

Art. 4 guarantees a 'Fair and Equitable treatment' to foreign investors which is congruous to the treatment meted out to the national investors. It places a limitation on the permissible encroachment of this right by defining the purpose for which the right of national treatment can be breached. Hence, the provisions of the treaty clarify the scope of State's power to interfere with the functioning of an investment. If the state party interferes with an investment on any of the

grounds not enumerated in the treaty; a cause of action accrues to the investor to institute a claim against the state party before the agreed forum. In the past, disputes have arisen when domestic laws relevant to the investor were reformed causing prejudice to the investor,[2] inordinate delay in enforcement of an award leading to violation of equitable and fair treatment clause.[3]

The adjudication of claims in international investment arbitration calls for a careful assessment of legitimacy of the state party. The investor in such arbitration has the ability to question, restrict or regulate the conduct of State's sovereign functions according to the rights and obligations guaranteed under the bilateral treaty. Drawing a parallel to domestic litigations, in cases of violation of fundamental or constitutional rights, the citizens have the capacity to challenge the sovereign acts of State. Though the source of these rights i.e. right of citizen and right of investor to challenge State actions is distinct, the nature of these grievances mirrors each other.

Domestic Law, BIT and Rule of Law

The application of international law principles as a governing law does not *ipso facto* preclude the application of the domestic laws.[4] The rights of investors under the BIT are subject to the operation of laws of the place where investment is situated (domestic law).[5] Merely because the investor is an international investor, they cannot escape application of newly made laws on taxation or land acquisition so long as the application of laws adhere to due process and other guarantees of fair and equitable treatment under the BIT.

Moreover, the recent verdict of the European Court of Justice (ECJ) in the case of *Achmea*,[6] bolsters the idea that the availability of arbitration as a forum for settlement of disputes is a function of the essential consent sanctioned by the domestic constitutional framework. In the instances stated below it can be seen that the domestic Constitutional principles interact with the working of the investments in the host country.

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[2] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35 (Dutch BIT Claim), available at https://www.italaw.com/cases/254, last seen on 20/11/2018.

[3] White Industries Australia v. Republic of India, available at https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf, last seen on 20/11/2018.

[4] Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law*, 140–141 (2nd ed., 2010).

[5] Art. 4, Model Text for the Indian Bilateral Investment Treaty.

[6] Slovak Republic v. Achmea B.V. (Case C-284/16).

One of the ways to understand this is by drawing a parallel between the expectation of an ordinary citizen of a country to be treated fairly and have her economic rights protected *vis-à-vis* the expectation of an investor to be treated equally and fairly. The claims of the ordinary citizen and the investor, though distinct in their source and forum where they are pursued, essentially emanate from rule of law.

Rule of law can simply be defined as the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws. International law contains a set of obligations which require the States to act in a non-arbitrary fashion. It is the overarching need to administer rule of law in which the rights of citizens against the States are founded. And it is in this very sensibility, that the investor's rights are couched. This puts forth an interesting question. Whether the regime of investment arbitration conforms to rule of law requirements?

Perhaps, this question will be answered in negative as the most important hurdle of ensuring independence of arbitrators is still not overcome. The problem of ensuring impartiality of arbitrators in light of larger issues of legitimacy looming over the ISDS system, has been a debacle for the ISDS system. Frequent allegations of pro-state or pro-investor bias have been levelled against the arbitrators thereby, jeopardising the impartiality of the arbitrators.[7] These allegations have forced the arbitral community to consider replacing the ISDS system altogether with alternatives such as the Investor Court System proposed by the EU.[8] It is due to the absence of mechanism to effectively tackle challenges to arbitrators' independence and impartiality that the investment arbitration regime has stopped short of conforming to rule of law.[9]

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[7] Gus Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern,* Investment Treaty News, available at https://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/, last seen on 20/11/2018.

[8] *BEUC's Key Concerns about the Investment Court System Proposal*, The European Consumer Organisation, available at http://www.beuc.eu/publications/beuc-x-2015-103_beucs_key_concerns_about_the_investment_court_system_proposal.pdf, last seen on 20/11/2018.

[9] Gus van Harten, *Five Justifications for Investment Treaties: A Critical Discussion,* 2(1) Trade L. & Dev. 19 (2010), available at https://digitalcommons.osgoode.yorku.ca/cgi viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article= 1694 & context=scholarly_works, last seen on 20/11/2018.

Constitutional Rights and Investment Arbitration

According to Art. 1131 of the North American Free Trade Agreement (NAFTA), *"the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."* Though there is no express provision to refer to domestic constitutional principles, the frequent deference to these principles as seen in cases of *Glamis Gold*[10] and *Grand River*[11] can be seen as a means to ensure that the constitutional rights of the local stakeholders which are connected to that of the foreign investor are respected.

In *Glamis Gold*, the Canadian corporation i.e. Glamis Gold engaged in the exploration and extraction of precious metals throughout the continent. In 1994, Glamis Gold acquired mining rights for a proposed open-pit gold mine on US federal lands, in the Californian desert lands known as Imperial Valley. Given the potential ecological damages associated with the firm's proposed mining practices, permission to commence exploration hinged on a thorough environmental review. This review considered, inter alia, the rights of indigenous populations in the area. The firm filed NAFTA claims alleging regulatory expropriation under Art. 1110 and a violation of fair and equitable treatment under Art. 1105.

On the other hand, in the case of *Grand River*, a Canadian cigarette distributor, arranged a business strategy that would mitigate its financial obligations under the contemporary tobacco laws in many US states. Such obligations required tobacco distributors to place large sums into escrow accounts in order to settle claims related to the damaging health effects of cigarettes. However, Grand River attempted to circumvent these State requirements by distributing its product primarily through the quasi-sovereign 'Indian territories' occupied by federally recognized tribes. The major question for the tribunal in the NAFTA case, therefore, was whether US constitutional law and federalism granted US states the regulatory authority to impose their escrow laws on commerce in tribal reservations within a State's territory. In both cases, the Tribunals considered the rights of local or domestic stakeholders which conflicted with the expectations of the international investor. This shows that, though formally such deference is

[10] Glamis Gold v. USA NAFTA, UNCITRAL Award, 16 May 2009.
[11] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, NAFTA/UNCITRAL Award, 12 January 2011.

disallowed, the informal deference to Constitutional principles is a balancing act on the part of the tribunal.

For instance, Argentina has taken the defense that applying treaty-based investment protections in the light of the ensuing financial crisis *"would be in violation of constitutionally recognized rights of its own citizens."*[12] The two cases of *Sempra*[13] and *Continental Casualty*[14] which examined this defence came to contrary decisions. While the Sempra tribunal concluded that a defence of protecting constitutional rights of domestic population was not legitimate, the Continental Casualty tribunal concluded that the constitutional liberties of the State (Argentineans) were supreme.[15] Hence, the extent to which protection of constitutional rights will provide a shield for breach of legitimate expectations of investors will remain to be seen.

The Regulatory Chill Hypothesis

The regulatory chill hypothesis as propounded by investment arbitration scholars envisages a situation whereby the regulatory and legislative actions of state are restricted due to the potential threat of arbitration. This theory presupposes the reluctance on the part of the State to take any action which will jeopardize the smooth functioning of the investment and impose costs of defending a claim against the investor. This theory finds support in the Indonesia's tryst with Pac rim Industries.[16]

The States' sovereign right to act in whichever manner they deem fit is curtailed by their Constitutional obligation to respect the treaty they get into. This is an essential principle of international law (Art. 26, Vienna Convention on the Law of Treaties – Pacta sunt servanda). An interesting scenario is presently taking

[12] CMS Gas Transmission v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005.
[13] Sempra Energy v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007.
[14] Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008.
[15] *Selected Recent Developments in IIA Arbitration and Human Rights*, UN Conference on Trade and Development, available at www.unctad.org/en/Docs/webdiaeia20097_en.pdf, last seen on 20/11/2018.
[16] *Indonesian NGOs to bring government decree on mining to Constitutional Review Court*, MAC: Mines and Communities, available at http://www.minesandcommunities.org/article.php?a=561 last seen on 20/11/2018.

shape as States are negotiating treaties for investments in fossil fuel industry[17]. States which are party to the Paris Agreement are bound to reduce carbon emissions and contribute to lowering global temperature by 2 degrees. This means that the use of all fossil fuel resource has to be severely curtailed.[18] This will also entail severe regulation in the use of the fossil fuel by the very same investors' companies whose rights the States are contracting to protect. Does the State automatically prioritise the citizens' right to clean environment in this regard? If States are callous of these conflicting obligations, there is a likelihood of not only an increase in investment disputes but also a disruption of the environment protection laws itself.

Conclusion

The interaction between the Constitutional law and investment arbitration involves complex questions of law which are relevant in both public and private spheres. There is a need for a greater understanding of the sovereign rights of the State as well as the precise scope of protection guaranteed to the investors.

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[17] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement* , 7 Transnat'l. Envtl. Law 229 (2017), available at https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investorstate-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84#fndtn-information last seen on 20/11/2018.

[18] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement* , 7 Transnat'l. Envtl. Law 229 (2017), available at https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investorstate-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84#fndtn-information last seen on 20/11/2018.

Entering the Game of Drones : Analysing the Drone Regulations of India

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History of Usage of Drones

The rapid technological advancement has impelled man to discover new and fascinating means of solving problems; one of them being the launch of drones. Unmanned Aerial Vehicles ('UAVs') were first used by the Austrians to attack the city of Venice by tying explosives to balloons in 1849.[1] Gradually, models resembling the modern drones known as "*pilotless aircrafts"* began to be used by the US Army towards the end of the World War I, which were launched by catapults and flown using radio control.[2] By the 1930s, British and USA began producing radio-controlled drones for target training. Following the Vietnam war, drones began to be expansively used as decoys in combat, launching missiles and dropping strategies; which were later used dangerously by the US government after the 9/11 attacks.[3]

Progressively, the usage of drones has seeped out from purely military purposes and has now increasingly become a fascination for civilian and commercial application as well. The world's largest supplier, Amazon, in 2013 announced that it was testing the possibility of delivering packages by using drones.[4] After obtaining permission from the UK and the USA in 2015-16, Amazon legally delivered its first package in the UK to the University of Cambridge in 2016.[5]

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[1] Rob Crilly, *Drones first used in 1848*, The Telegraph (20/06/2011), available at https://www.telegraph.co.uk/news/worldnews/northamerica/8586782/Drones-first-used-in-1848.html, last seen on 14/12/2018.

[2] *A brief history of drones*, Imperial War Memorial (30/01/2018), available at https://www.iwm.org.uk/history/a-brief-history-of-drones, last seen on 14/12/2018.

[3] Ibid.

[4] Gregory Wallace, *Amazon says drone deliveries are the future*, CNN Business (02/12/2013), available at https://money.cnn.com/2013/12/01/technology/amazon-drone-delivery/index.html, last seen on 14/12/2018.

[5] Elizabeth Weise, *Amazon delivered its first customer package by drone,* USA Today (14/12/2016), available at https://www.usatoday.com/story/tech/news/2016/12/14/amazon-delivered-its-first-customer-package-drone/95401366/, last seen on 15/12/2018.

Expanding its application far ahead of military usages, drones are increasingly used in new spheres such as media and entertainment, infrastructure, agriculture, mining, disaster management and marine biology. In a recent report, Goldman Sachs estimated a $100 billion opportunity market for drones by 2020.[6] Despite the wide usage of drones, governments have always been reluctant in its usage and they have been heavily regulated across various countries in the world. The increased wariness is due to the unsupervised usage of drones which would jeopardize the national security.

Evolution of Drone Policy in India

Despite the emerging application of drones in India in the commercial sector, regulators in India have consistently raised eyebrows for laying down the standards for the manufacture and operation of drones. India is a signatory and member to the *Convention on International Civil Aviation* ("ICAO") held in Chicago on December 12, 1944. In 2011 the ICAO issued a circular titled Unmanned Aircraft Systems ("UAS") which discussed the rules and regulations for the governance of drones in 2011.[7] It defined Unmanned Aircraft System as an aircraft and its associated elements, which are operated with no pilot on board.[8]

Finally, on October 7, 2014, the Office of Director General of Civil Aviation ("DGCA") issued a public notice illustrating the first notification on drones.[9] The notification recognized the threat of air collisions and accidents due to the lack of regulation of drones and informed that until there was a formalization and harmonization of regulations, all individuals, agencies, and organizations were prohibited from launching a UAV in the Indian airspace.[10]

After a gap of two years, the DGCA released a draft of guidelines for the usage of drones for recreational and civilian purposes on April 21, 2016, and

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[6] *Drones Reporting for Work,* Goldman Sachs & Co., available at https://www.goldmansachs.com/insights/technology-driving-innovation/drones/, last seen on 22/12/2018.
[7] Circular 328 AN/190, *Unmanned Aircraft Systems,* Convention on Civil International Aviation, available at https://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf, last seen on 04/02/2019.
[8] Ibid.
[9] Government of India, Office of the Director General of Civil Aviation, *Public Notice for the use of unmanned aerial vehicle (UAV)/Unmanned Aircraft Systems (UAS) for Civil Applications* (07/10/2014), available at http://dgca.nic.in/public_notice/PN_UAS.pdf, last seen on 16/12/2018.
[10] Ibid.

also invited comments from various stakeholders to be advanced within 21 days. But no action was taken on that circular. In October 2017, it released a new draft of guidelines on the usage of drones and invited comments to be finalised before December 31, 2017. However, the same was criticized to have been merely drafted to fill the necessity to regulate drones and did not provide a robust framework addressing vital issues such as liability caused due to mid-air collision, amongst others.

The Drone Regulations 1.0

On August 27, 2018, DGCA announced the features of the Drone Regulations 1.0 (brought into force on December 1, 2018) to enable safe commercial usage of drones.[11] The Civil Aviation Requirements ("CAR") for the operation of Civil Remotely Piloted Aircraft System ("RPAS") was introduced by the DGCA. Remotely piloted aircraft ("RPA") is an unmanned aircraft, which is piloted from a remote pilot station. A remotely piloted aircraft, its associated remote pilot station(s), command and control links and any other components forms a RPAS. They were issued under the provisions of Rule 15A and Rule 133A of the Aircraft Rules, 1937 and laid down the requirement of obtaining a Unique Identification Number ("UIN"), Unmanned Aircraft Operator Permit ("UAOP") and other operational requirements.[12] The main objective of enforcing these regulations was to establish an all-digital process for the registration and operation of drones across India.

The key features introduced by these regulations are:[13]

I. Categorization of RPAs according to weight:

The Civil RPAs have been categorized into five categories according to the maximum All-Up-Weight (including payload) as indicated below[14]:

1) Nano: Less than or equal to 250g.

2) Micro: Greater than 250g and less than or equal to 2 kgs.

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[11] Press Information Bureau, *Government announces regulations on drones*, Ministry of Civil Aviation (27/08/2018), available at http://pib.nic.in/newsite Print Release.aspx?relid= 183093, last seen on 16/12/2018.

[12] F. No. 05-13/2014-AED Vol. IV, *Requirements for Operation of Civil Remotely Piloted Aircraft System (RPAS)*, Office of DGCA (27/08/2018) [hereinafter 'Drone Regulations'].

[13] Ibid.

[14] Drone Regulations, Supra 11, at Regulation 3.

3) Small: Greater than 2 kgs and less than or equal to 25 kgs.

4) Medium: Greater than 25 kgs and less than or equal to 150 kgs.

5) Large: Greater than 150 kgs.

II. The requirement of obtaining a UIN and UAOP:

Every drone which is wholly owned by any citizen of India, or by Central or State government, or by any company within India shall be required to obtain a UIN as a proof of the ownership of the drones.[15] This implies that any non-resident individual or company or any entity registered outside India is disentitled to obtain a UIN for operating drones in India.

A UAOP is issued to a drone operator after an application is submitted to the DGCA through the requisite platform along with certain documents and fees 7 days prior to the commencement of the drone operations. Such a UAOP is valid for a period of five years from the date of issue which can be renewed and is non-transferrable in nature. Without a UAOP, the operation of drones is prohibited.[16]

Nano drones, micro-drones operating at 60 feet above ground level and below 200 meters in uncontrolled airspace and enclosed premises; and drones owned by the National Technical Research Organization, the Aviation Research Centre or CIA are exempted from the requirement of obtaining a UAOP.[17]

III. Establishment of 'Digital Sky Platform':

The Digital Sky Platform, a software, is one-of-a-kind initiative to create a national unmanned traffic management platform for the implementation of the '*no permission, no take-off*' (NPNT) policy. Users will be required to register their drones and themselves as the pilots, and owners on a one-time basis. For every flight, except the Nano drones, the users are required to seek the permission to fly via the mobile app which automatically processes the request to grant permission or to deny the request instantly. To prevent unauthorized flights and to ensure public safety, any drone without such digital permit will simply not take off. Through this unmanned traffic management platform, the traffic

[15] Ibid, at Regulation 6.
[16] Ibid, at Regulation 7.
[17] Ibid, at Regulation 7.2.

regulator will coordinate the drone airspace closely with the defence and civilian air traffic controllers to ensure that the drones remain within the approved flight paths.

For flying in controlled airspace, every drone, except Nano and micro-drones, is required to submit its flight plan and obtain the Air Traffic Clearance ("ATC"), Air Defence Clearance ("ADC") and the FIC number from the Flight Information Centre ("FIC") at least 24 hours before the operation. They are also required to maintain continuous contact with the ATC.[18]

The Digital Sky Platform went live on December 1, 2018, and has started accepting registrations, and payments for the UAOP and UIN.[19]

IV. Requirement of 'No Permission, No Take-off':

All drones have to adhere to the technological requirement of the '*No Permission, No Take-off'* technology built into their hardware. Pursuant to this, the drone operators have to inform the regulator before take-off about when and where they intend to fly by filing a flight plan.[20] Based on the flight plan, flight approvals will be issued electronically. Thus, registered drones will be able to take off onlyif their flight plans have been approved.

This requirement increases the transparency between the regulator and the operator and enables the regulator to maintain an accurate record of which drones are being flown, thus helping them to narrow the field in the event of any complaint. It also enables the regulators to interact with the active drones to choose an alternative flight plan in case it includes a zone which is restricted to be flown over.

V. The requirement of Visual-Line-in-Sight (VLOS):

The regulations require all the RPA operations to be restricted to daylight (between sunrise and sunset)[21] only, within the visual line-in-sight, irrespective

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[18] Ibid, at Regulation 12.5.

[19] *Digital Sky: Govt starts online portal for drone registration*, Live Mint (02/12/2018), available at https://www.livemint.com/Politics/F6XUdoX4RNIaQp1tGile1H/Digital-Sky-Govt-starts-online-portal-for-drone-registratio.html, last seen on 14/12/2018.

[20] Rahul Matthan, *Opinion: Technological restrictions in the new drone policy*, Livemint (17/10/2018), available at https://www.livemint.com/Opinion DliT4dWBjrqu1EucV0uqCO/Opinion—Technological-restrictions-in-the-new-drone-policy.html, last seen on 14/12/2018.

[21] Drone Regulations, Supra 11, at Regulation 12.3(a).

of the weight of the drones.[22] In visual meteorological conditions, the drones are required to maintain minimum ground visibility of 5 kms and cloud ceiling not less than 1500 ft. (450 mts.).[23]

VI. Operating Restrictions:

The regulations also state certain restrictions on the operation of such drones. Flying area has been divided into three zones:

1) Red zones: It is a no-fly area (includes regions close to airports, national borders, and military bases);

2) Yellow zones: Flying allowed with prior approval;

3) Green zones: They are unrestricted areas.

RPAs are restricted to be flown within a distance of 5 kms from the perimeter of airports at Mumbai, Delhi, Chennai, Kolkata, Bangalore and Hyderabad; within 5 kms radius from Vijay Chowk in Delhi, etc.[24]

VII. Requirements for operation and manufacturing of RPAs:

All drones, except Nano drones operating upto 50 ft. in uncontrolled airspace, are required to be equipped with the following equipments viz,:

1) Global Navigation Satellite System for horizontal and vertical position fixing

2) Autonomous Flight Termination System or Return to Home (RH) option

3) Flashing anti-collision lights

4) RFID and GSM SIM Card/ NPNT compliant for APP based real-time tracking

5) Fire resistant identification plate inscribed with UIN

6) Flight controller with flight data logging capability

The regulations also mandate the requirement of geo-fencing capacity to detect and avoid collision of drones operating in controlled airspace upto 400 ft. The

[22] Ibid, at Regulation 12.2.
[23] Ibid, at Regulation 12.3(b).
[24] Ibid, at Regulation 13.

tracking system of the RPA is required to be self-powered and tamper or spoofing proof to ensure that the data remains unaffected even in the event of RPA accidents.[25]

VIII. Penalties:

The UIN or UAOP issued by the DGCA may be suspended or cancelled in case of any violation of the provisions of the Drone Regulations. Penalties under the Aircraft Act, 1934 will also be applicable in case of any drone causing wilful danger to the life or property of any other person.[26]

Does DGCA truly have the Jurisdiction to Deal with Drones?

Section 2(1) of the Aircraft Act, 1934 defines aircraft as "*any machine which can derive support in the atmosphere from reactions of the air, other than reactions of the air against the earth's surface and includes balloons, whether fixed or free, airships, kites, gliders, and flying machines*".[27] Inevitably, drones or UAS fall under the definition of aircraft and thus falls within the jurisdiction of DGCA.

The stand of the ICAO further strengthens the jurisdiction of DGCA. The ICAO has stated in the past that "*whether the aircraft is manned or unmanned it does not change its status as an aircraft*" because it locates unmanned aircrafts in the continuum of technological advancement of aircrafts.[28] Subsequently, while discussing other regulatory aspects, it delegates the 'State Civil Aviation Authority' to legislate and decide the regulations of drones without creating a separate division, especially for UAVs. As India is a signatory to the Chicago Convention, this certainly holds a high persuasive value.[29]

Are the Drone Regulations 1.0 Restrictive In Nature?

The Drone Regulations while addressing the substantial issues ignore other issues vis-a-vis which may be of concern in the wake of rapid technological advancement. While it is definitely a step ahead from the blanket legal ban, it does fall short broadly on the following grounds:

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[25] Ibid, at Regulation 11.
[26] Ibid, at Regulation 18.
[27] S. 2(1), Aircraft Act, 1934.
[28] Trishee Goyal, *Why Having a Single Regulator Would Upset India's Game of Drones*, The Wire, (17/08/2018), available at https://thewire.in/government/india-drone-regulation, last seen on 14/12/2018.
[29] Ibid.

A. Ambiguity relating to import conditions:

Before the drone regulations came into force, the Notification dated July 27, 2016, by the Directorate General of Foreign Trade ("DGFT") restricted the import of UAS or RPAs unless they receive prior clearance by DGCA office and the import license from the DGFT.[30] On August 23, 2017, the DGCA authorized the Directorate of Air Transport to grant an in-principle approval to any entity seeking permission for importing drones for private use.[31] Although the Drone Regulations do not expressly talk about whether they will supersede these notifications or circulars, it states that any entity intending to import shall require an Equipment Type Approval from the Department of Telecommunications for operating drones in de-licensed frequency bands, an import clearance issued by the DGCA for each drone, an import license from the DGFT, a UIN and UAOP based on the import license.[32]

There also remains an ambiguity regarding the import standardization requirements to ensure the quality, control, and standardization. The lack of policy on quality control of indigenously manufactured drones makes it difficult to decide the legal liability in case of accidents as to whether the device malfunctioned or if it had been incorrectly handled or operated.[33] The absence of import regulations also poses a major security risk.

B. The question of privacy:

The drones operated by the non-governmental organizations pose a threat to the existing privacy laws. Many modern UAVs are equipped with high definition constantly transmitting cameras which make infringement of privacy quite easy, whether intended or unintended. While visual infringement seems to be the only incursion on privacy, it remains a complicated matter as sound recording and data capture enables a drone to be used for far more invasive snooping.[34] Though the draft regulations address the importance of privacy in one line, it is quite vaguely worded and lacks the ability to tackle such an integral issue.

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[30] Notification No. 16/2015-2020, Directorate General of Foreign Trade (27/06/2016).
[31] Air Transport Circular No. 2/2017 (23/08/2017).
[32] Drone Regulations, Supra11, at Annexure V.
[33] Rajeshwari Pillai Rajgopalan, Rahul Krishma, *Drones: Guidelines, Regulations and Policy Gaps in India*, Occasional Paper, Observer Research Foundation (05/03/2018), available at https://www.orfonline.org/research/drones-guidelines-regulations-and-policy-gaps-in-india/, last seen on 12/12/12018.
[34] Ibid.

C. Lack of legal liability provisions in air traffic control management:

The regulations place the legal liability of the UAVs on the operators. However, not every operator has the technical expertise to judge the condition of the UAVs, especially in the event of an accident caused due to malfunctioning. Aspects of third-party liability have also not been addressed in the regulations. Lack of insurance mechanisms also makes the position of the operators very vulnerable in case of damage caused to their drones due to the fault of third parties. Important questions such as factors determining the operation of drones over private property constituting trespass have also been ignored. While usage of airspace remains a right of any drone operator, there is a need for drawing a clear line between trespasses over private property and enforcing such rights.

Effect on the FDI Policy:

Under the Drone Regulations, a Non-resident or a Foreign Owned Controlled Company can neither operate drones in India nor substantially own or control any company which engages in this activity.[35] However, this has not found a place in the Foreign Direct Investment (FDI) Policy of the Reserve Bank of India. Although the Drone Regulations allows a non-resident company to lease its drones to an Indian company, it is rather difficult for such a company to carry out drone operations through a subsidiary or any other entity.[36]

Additionally, while procuring foreign investment, Indian companies will have to ensure that their resident Indian shareholders have the majority stake since a FOCC is not permitted to operate drones. To avoid confusion arising from this dichotomy, either the RBI will have to introduce this restriction in the FDI Policy or the DGCA will have to relax the UIN eligibility norms.[37]

Is Delivery by Drones still a Dream?

Zomato recently announced that it has acquired TechEagle Innovations to carve a path towards drone-based food deliveries in India.[38] However, according to

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[35] Drone Regulations, Supra 11, at Regulation 6.1.

[36] Akhoury Winnie Shekhar, Pavani Nath, *Drone operations legalised for civil and commercial use: what do the regulations mean?* Mondaq (04/08/2018), available at http://www.mondaq.com/india/x/732994/Aviation Drone+Operations+Legalised+For+Civil +And+Commercial+Use+What+Do+The+Regulations+Mean, last seen on 16/12/2018.

[37] Ibid.

[38] Press Trust of India, Top of Bottom of F *Zomato acquires Lucknow-based start-up TechEagle for drone-based food delivery in India*, Hindustan Times (05/12/2018), available at https://www.hindustantimes.com/tech/zomato-acquires-techeagle-for-drone-based-food-delivery/story-pgWaYGMNi7n8RQNVrmEYeP.html, last seen on 16/12/2018.

Regulation 12.18 and 12.19 of the Drone Regulations, drones cannot discharge or drop substances unless specifically allowed. It is also restricted from transferring any animal or human payload.[39] A payload is any weight on the drone which is not required for its flight. It is still unclear whether any lightweight packages and food and drink deliveries would fall under the prohibitions.

The DGCA took a progressive stand this year by formalizing regulations for the operation of drones in India as it helped remove ambiguities. However, the present regulations are riddled with inadequacies and ignore various aspects that the operators will face in the near future. A committee headed by Shri Jayant Sinha will soon publish its recommendations for Drone Regulations 2.0 addressing issues such as airspace management, beyond VLOS operations, etc. This provides some hope that the issues mentioned earlier will be addressed so as to create an atmosphere that promotes the drone industry in India.

[39] Regulation 12.18, 12.19, Drone Regulations, Supra 11.

Violation of Animal Rights under the Garb of Conservation: A Critique on Zoos

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II BA.LL.B.

Introduction

The idea of confining wild animals in enclosures dates back to ancient history. Public zoos evolved with the capture of wild animals which were held in captivity, exhibited as status symbols or objects of curiosity to the wealthy elite.

With the advent of the 19th century, the outlook governing the confinement of the wild animals in zoos underwent a paradigm shift.[1] A newfound, enlightened and scientific concern for wild animals has emerged which incorporates a three-fold objective so as to include research, conservation and education and ushers in a conservationist approach regarding the working of zoos.

An attempt is being made in this article to highlight the incompetence of zoos in the fulfilment of their primary objective of conservation and the apparent disregard of the welfare needs of wild animals and their interests in the process.

Conservation through Captivity: A Flawed Concept

The type of conservation that zoos claim to undertake encompasses a focused form of captive animal breeding with the intent of replenishing threatened populations in the wild, whilst also acknowledging the possibility of their re-introduction into the wild. The Convention on Biodiversity lays special emphasis on the simultaneous execution of ex-situ approaches in consonance with in-situ approaches.[2] In other words, conservational efforts should be inclusive of both captive breeding and restoration of natural habitat. The most prominent flaw in zoos' claim of being 'champions of conservation' is that one cannot salvage wildlife from the thrusts of extinction and loss of habitat by bringing it indoors

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[1] Ministry of Environment, Forests and Climate Change, Government of India, *Two Decades for Conservation and Welfare of Animals Housed in Indian Zoos,* available at http://cza.nic.in/ uploads/ documents/publications/english/2015%20(2).pdf , last seen on 21/02/2019.
[2] Art. 9, The Convention on Bio-Diversity, 1993.

and restraining it behind iron bars. The solution then lies in attempting to reverse the havoc wreaked by human action on natural habitat and by shouldering the responsibility of environment friendly behaviour.

The Convention also highlights the need to re-introduce captive animals into the wild in order to guarantee exposure to natural forces of evolution so necessary for their survival.[3] The risks in the said re-introduction are multiple, posing a threat to associated communities as well as ecosystem functions in both source and destination areas.[4] One of these risks would be that by the institutionalisation of wild animals, the animals in captivity have the tendency to lose the primal survival instincts that other animals in the wild would be well equipped with. This would thereby impact their ability to identify and avoid predators, acquire and process food, engage in healthy social interaction and to find or construct shelter, thereby making the concept of 're-introduction into the wild' a distant dream.

In furtherance of their conservational objective, zoos should endeavour to sustain physically and behaviourally healthy animals.[5] However, it has been observed that in reality, despite efforts to train an animal to realise its natural capabilities, an animal in captivity may still not re-adapt to its natural environment to hunt and defend itself,[6] thereby depriving the animal the opportunity of exhibiting normal behaviour.

Zoos are widely considered to be the principal agents responsible for educating their visitors in an attempt to shorten the gap between human ignorance and rising environmental concerns, with an additional intent of sparking empathy in humans towards wild animals. The basic idea is that if a person witnesses, first-hand and in close proximity, a wild animal and is educated about its needs and problems, that person would be in a better position to empathize with the animal, thereby increasing the prospects of his/her contribution towards environmental protection. On the contrary, critics believe that zoos that educate visitors along

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[3] Ibid.

[4] *IUCN Guidelines for Re-introductions*, IUCN (1998), available at <http://cza.nic.in/uploads/documents/guidelines/english/IUCN_guidelines.pdf>, last seen on 05/02/2019.

[5] Rule 10(1), Recognition of Zoo Rules 2009 with (Amendment) Rules, 2013.

[6] Ministry of Environment, Forest and Climate Change, Government of India, *Zoos in India 2014- Legislation, Policy, Guidelines and Strategy*, available at http://cza.nic.in/uploads/documents/publications/english/Zoo_in_India_2014_Final.pdf, last seen on 05/02/2019.

the lines of conservation are in a scarce minority[7] and lately haven't succeeded in adapting to the changing scenario and continue with the legacy of the past, i.e. displaying animals in conditions that are neither congenial to the animals nor educative or rewarding to the visitors.[8] Zoo visitors have also been identified as a potential source of disturbance and stress to some captive wild animals housed in enclosures tending to induce an intra-group aggressive behaviour in the latter.

Another particularly disturbing trend is a zoo's tendency to prioritize commercial gains over the immediate needs of the animal under its captivity. It would be relevant, here, to mention the condition of penguins in the Veermata Jijabai Bhosale Udyan better known as the Byculla Zoo, Mumbai, where crores of rupees were spent on importing Humboldt penguins from South Korea, a move that in no possibility, could give any credible reassurance of their survival in their natural habitat.[9] But the utter ignorance and incompetence of the Brihanmumbai Municipal Corporation, which manages the zoo, to gauge the unsuitability of Mumbai's climate to a penguin's existence and the failure to replicate its natural habitat resulted in the death of one of the offspring. This may be an example of bitter reality where zoos of today have been reduced from champions of conservation to mere profit-making ventures.

Ethics of Captivity: An Animal Rights Perspective

A careful analysis of the drawbacks in the capability of zoos to contribute to conservation, poses a serious question regarding the underlying ethics in capturing an animal from its natural habitat, a habitat that has been, if not destroyed, grossly depleted on account of human action, commercial hunting[10] and industrialisation. This leads to another question of whether the restraint and captivity of animals within the boundaries of iron cages denies them their right to free and open space and amounts to conservation in its true sense. What sort of conservation is it, morally and ethically, by destroying the natural habitats of the wild animals and then locking them up in enclosures?

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[7] '*Critics Question Zoo's Commitment to Conservation'*, National Geographic, available at <https://www.nationalgeographic.com/animals/2003/11/news-zoo-commitment-conservation-critic/>, last seen on 16 September 2018.

[8] Sumeet Malik, *Environmental Law,* 648 (2nd ed, 2008).

[9] *Penguins at Mumbai's Byculla zoo: BMC's disregard for human, animal welfare*, The Indian Express (01/08/2016), available at https://indianexpress.com/article/blogs/humboldt-penguins-at-mumbai-byculla-zoo-bmc-disregard-for-human-and-animal-welfare/, last seen on 22/02/2019.

[10] State of Bihar v. Murad Ali Khan, AIR 1989 SC 1.

To answer this question, it is important to look at it from an animal rights perspective and the prioritization of species conservation versus the individual animal rights.

Animal welfare involves giving due recognition to animal sentience, i.e., their capacity to feel. Treatment of animals and humans are two stems originating from the same root and any and all transgressions against animals originate from the perceived inequality embedded in the minds of the human race through centuries of the use of animals as trivial commodities. It is reasonable to assume that the term 'welfare' should take into consideration an animal's freedom to live naturally, behave naturally and reproduce naturally. This perspective gives birth to the concept of animal rights which address the inherent and intrinsic value of animals as equal members of the eco-system. It is a determinant of their capacity to possess rights as opposed to the worldwide anthropocentric view, wherein morality is determined according to human standards, beliefs and practices and non-humans are accorded rights based on their utility to the human race. Animal rights' proponents advocate the right of animals to receive equal treatment which justifies a freedom from captivity. They label detention of wild animals in zoos as a form of speciesism, i.e. one species is given less consideration in comparison with another based on its taxonomic difference.[11] How can a human be morally and ethically justified in keeping a wild animal in captivity, albeit for its protection and conservation, when the need for captivity in question has arisen solely due to human domination?

Animal rights are majorly a tricky concept being subject to a number of loopholes and lacunae within the law which is all the more augmented by the lack of awareness and stringent statues. There lies a constitutional duty on the citizens and the State to protect wildlife which extends even to animals held in captivity.[12] However at times, it is the custodians of wildlife sanctuaries and zoos that turn out to be the violators of the aforementioned Constitutional mandate.[13]

In *Animal Welfare Board of India vs. A. Nagaraja,*[14] a species' right to life was found to extend beyond the guarantee of survival out of instrumental value

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[11] Michel D. Kreger and Michael Hutchins, *Ethics of Keeping Mammals in Zoos and Aquariums,*1, 4 in *Wild Mammals in Captivity: Principles and Techniques for Zoo Management (*Devra G. Kleiman, Katerina V. Thompson, and Charlotte Kirk Baer., 2nd ed., 2010).

[12] Art. 51-A (g), the Constitution of India.

[13] P. Leelakrishnan, *Environmental Law Casebook*, 265 (2nd ed., 2006).

[14]Animal Welfare Board of India v. A. Nagaraja, 2014 (7) SCC 547.

to humans, but the right to lead a life with intrinsic worth and dignity. The Court, in course of its proceedings identified a few internationally recognized freedoms as the fundamental principles of animal welfare which included the freedom to *"express normal patterns of behaviour"*, *"against fear and distress"*, *"physical discomfort"* and *"hunger, thirst and malnutrition"*. It was held that these freedoms were equivalent to the rights granted to humans under Part III of the Indian Constitution. The need to evolve rights granted to animals from statutory to fundamental rights, as identified by various other countries in the world, was also recognized by the Court. A majority of zoos fail to accomplish these basic freedoms for the animals which they hold in captivity within enclosures. The Supreme Court of India, in the said case, prescribed the standard of "species' best interest" for determining the extent to which the humans may be permitted to dominate over the wild animals, a term that zoos and authorities have clearly no holistic understanding of !

In another landmark judgement passed by the High Court of Uttarakhand in *Narayan Dutt Bhatt vs. Union of India,*[15] the entire animal kingdom was declared a legal entity having a distinct persona with corresponding rights, duties and liabilities of a living person and the citizens in the State of Uttarakhand were declared "*persons in loco parentis*" for the welfare and protection of animals. This was particularly ground-breaking in the sense of making the cause of an animal count in the eyes of law by recognizing their worth and dignity and providing them with legal status. However, the workability of this legal right seems distant with no elaborate understanding of the technicalities that might arise as a consequence to such a judgement![16] Animal welfare legislations in India like the Prevention of Cruelty to Animals Act, 1960, the Wildlife (Protection) Act, 1972, Transport of Animals Rules, 1978 and certain sections under the Indian Penal Code, though commendable in their efforts at curbing cruelty against animals fail to prescribe sole rights to animals as sentient beings or at imposing any strict liability for the commission of any offence against them. It is increasingly necessary that animal rights take on a more inherent role rather than a prescriptive one. Instead of waiting for a legislative authority to prescribe rights for animals, the animals must be treated as living beings capable of feeling, understanding

[15] Narayan Dutt vs. Union of India, Writ Petition (PIL) No. 43 of 2014, (Uttarakhand High Court, 04/07/18).

[16]The Uttarakhand High Court said animals have legal rights like humans – but who's enforcing the, Scroll.in, available at <https://scroll.in/article/888107/the-uttarakhand-high-court-said-animals-have-legal-rights-like-humans-but-whos-enforcing-them>, last seen on 16 /10/18.

and living in open spaces. They, thus, have the right not to live in captivity, not to be poached, not to be locked inside enclosures in an alien habitat totally unfavourable to the expression of their natural instincts and behaviour, and not to be abused at the hands of authorities and visitors. Tom Regan, a leading animal rights pioneer, has labelled any attempt to usurp individual animal rights to save a particular species or ecosystem as *"environmental fascism"*.[17] It is this inconsistency that would arise if a single animal of a particular species is deprived of its rights in order to sustain the rest of its species which is precisely the case in a majority of zoos existing today.

Zoos in India: An Alarming Reality

Ever since the government of India took cognizance of the alarming rate at which wild fauna was depleting, the zoos evolved as a remedial measure and a potential tool to facilitate the process of ex-situ conservation of endangered wild species. The success so far, however, has been quite limited due to varied ownership pattern of zoos and lack of proper guidelines and standards[18]. Moreover, the zoos in India have visibly departed from their primary objective and shifted their focus to profit-making, turning a blind eye to the interests and needs of their captive animals. What is perhaps most shocking is the lack of accountability and the evasion of liability on part of the zoo officials in the event of any mishap or incident as reflected in a number of Public Interest Litigation petitions filed by earnest animal welfare activists.

In *People for the Ethical Treatment of Animals (PETA) vs. The Central Zoo Authority,*[19] the petitioner questioned the plausibility of conservation of wildlife as the primary objective of a zoo by the practise of detaining and exhibiting species such as pigs and hyenas which do not fall under the endangered category. With sufficient numbers in the wild, for its furtherance, the cause of conservation by the deprivation of a wild animal's right to free and open space is a blatant violation of the fundamental duty as under Art. 51-A(g) of the Constitution. In their arguments, the petitioner highlighted the deplorable conditions in which the

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[17] Tom Regan, '*The Case for Animal Rights'*, 362 (2nd ed., 1983).

[18] Ministry of Environment & Forests, Government of India, *Report of Working Group on Wildlife, Biodiversity, Traditional Knowledge and Animal Welfare for the Eleventh Five Year Plan 2007-2012*, available at <http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_wildlife.pdf> , last seen on 04/02/2019.

[19] People for the Ethical Treatment of Animals (PETA) vs. Central Zoo Authority and Ors, W.P No. 2825 of 2004 (Bombay High Court, 18/07/2005).

wild animals are maintained. Conditions such as barren cages, lack of vegetation, inadequate drinking water, and lack of trained personnel, chained animals and poor medical infrastructure were brought to the notice of the Court in the proceedings. In spite of receiving repeated letters and reports from the petitioner's organization, no efforts were undertaken by the zoo authorities to improve the bad conditions. Furthermore, the location of the zoo in question acted as the very impediment to the expansion of enclosures to meet the biological requirements of the animals housed within.

In *Navin Raheja v. Union of India,*[20] this case succeeded in directing attention towards the protection of animals held in captivity in zoos and zoological parks all over the country. A ghastly incident where a live tigress was skinned alive in a zoological park in Hyderabad was brought to light which led the Ministry of Environment and Forests and the Government of India to take control of the security situation in zoos which was getting out of hand. It was observed that with the exception of the Delhi Zoo, all other zoos and zoological parks in India were within the administrative control of their respective State governments and there was indifference in complying with the directives issued to them by the Ministry.

In another complaint lodged with the Central Zoo Authority and the Union Environmental Ministry, the suppression of the deaths of spotted deer by the Delhi Zoo was exposed[21]. Other irregularities included administration of expired drugs, illegal capture, no clearance of dead animals and a general mismanagement and neglect by the Director of the zoo who does not bother to report or ironically, unaware of.

Thus, it can be safely inferred that such incidents of horrific treatment of animals within zoos are only the tip of the iceberg. It is rather disheartening that zoos which are primarily construed as champions of ex-situ conservation have become part of the problem rather than the solution.

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[20] Navin Raheja v. Union of India and Ors, (2001) 9 SCC 762.

[21] '*Delhi Zoo suppressed deer deaths in May'*, Hindustan Times (02/06/2018), available at <https://www.hindustantimes.com/delhi-news/delhi-zoo-suppressed-deer-deaths-in-may-complaint-lodged/story-27Ayxdy7f9GHmEwlwS4mEP.html>, last seen on 04/02/2019.

Conclusion

An attempt has thus been made in this paper to prove the inability of the institution of zoos to effectively contribute towards the cause of conservation. Zoos and zoological parks are designed to take up the responsibility of conserving species of animals which may otherwise become extinct. But the emerging trend of confining and exhibiting species which are not classified as endangered, and the increased instances of animal abuse and neglect, points to the indifference to this responsibility for mere monetary profits. Zoos cannot continue to breed animal populations that have no home to return to, for, it renders the idea of conservation practically useless. Keeping this in mind, it is strongly contended that ex-situ conservation measures should not be relied upon as the only means of conservation. Urgent efforts need to be undertaken to restore lost natural habitats and reverse the disastrous impacts of human action on the environment. An alternative to zoos could be a semi-naturalistic enclosure, one that closely resembles the natural habitat of the wild animal and stimulates a large part of its natural behaviour, giving it enough liberty to be what nature truly intended it to be[22].

Every animal has the right to live in its natural habitat and its natural instincts and abilities should not be curtailed by placing it in enclosures in the name of conservation, or exhibited to the public in the name of education. The Zoos should in no manner howsoever, be allowed to degenerate into modern menageries for the entertainment of the public at the cost of the welfare of wild animals, a cost which might prove too great to bear.

[22] Stephen Bostock, *Animal Well-Being in the Wild and Captivity*, 130, 140 in *Wildlife Conservation, Zoos and Animal Protection- A strategic analysis (*Andrew N. Rowan., 1st ed., 1994).

Mahadayi Water Dispute : Past and the Present

Aanchal Bhartiya
V BA.LL.B.

Introduction

The river Mahadayi (Mandovi, in Goa), originates from a cluster of about thirty springs in Karnataka. It runs through Karnataka for 35 kilometres before entering Goa and then flows for a further stretch of 52 kilometres in Goa before finally merging into the Arabian Sea.[1] The dispute over this river waters began when Karnataka resolved to make a number of canals and barrages to route the water of the Mahadayi River to the Malaprabha basin (in Karnataka). Keeping in mind the drought hit areas in the State; the diversion of the river water was sought by Karnataka.[2] The Water Resources Ministry in Delhi and the National Environment Engineering Institute, both granted an approval to Karnataka in April, 2002 for the construction of two barrages on the two tributaries of Mahadayi, namely Kalasa and Banduri[3] (which are part of Karnataka). Essentially, these barrages would direct 7.56 thousand million cubic (TMC) feet water from the Mahadayi Basin to the Malaprabha Basin to supply water to the people living in the districts in and around these basins. In July 2002, objecting to this plan, Goa requested the Government of India to constitute a Water Disputes Tribunal.[4]

Now, when the construction of the said projects was stayed, farmers from several villages in Karnataka went on a strike to protest the unavailability of

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[1] *Rajeev Toppannavar, Origin of Mandovi River and the dam's after math,* All About Belgaum (06/05/2016), available at https://allaboutbelgaum.com/specials/origin-mandovi-river-dams-aftermath/, last seen on 05/02/2019.

[2] *What is the Mahadayi River Dispute?* The Indian Express (24/01/2018), available at https://indianexpress.com/article/what-is/what-is-the-mahadayi-river-issue-5037378/, last seen on 05/02/2019.

[3] *All You Need to know About the Mahadayi Dispute*, The Hindu (24/01/2018), available at http://www.the hindu.com/news/national/karnataka/all-you-need-to-know-about-the-mahadayi-dispute/article22522644.ece, last seen on 05/02/2019.

[4] Ibid; Report cum Decision of MWDT, Volume I of XII, P 2, available at http://mowr.gov.in/sites/default/files/MWDT-Vol-1_0.pdf, last seen on 05/02/2019.

water in their areas.[5] Over 500 of these farmers had lined up outside the BJP office in North Karnataka demanding confirmation of the release of the water for their use.[6] The situation got out of hand when the farmers started burning the effigies of BJP leaders when it seemed to them that the ongoing negotiations were fruitless in confirming the availability of water.[7] The main demand of the farmers was that the Mahadayi project should be implemented and that the water be diverted to the Malaprabha Basin.[8]

However, Goa challenged that the said diversion of water would render the people of Goa with shortage of water for their daily needs. In fact, the Goa Water Resources Minister, Mr. Vinod Palyekar went on record to mention that the State cannot compromise on the dispute for the said reason.[9]

Also, the said diversion will have a negative impact on the ecology of the Western Ghats as the wildlife sanctuaries present in the two States are fed by the river Mahadayi and they will be rendered water deficient if such a diversion is allowed.[10] So, for these varied reasons the two States of Goa and Karnataka have been negotiating since 1985 over the waters of the Mahadayi River.

Goa first sought redressal of this dispute through legal means in 2002. In 2006, negotiations between the States failed and Goa refused to settle the matter out of Court. Therefore, it moved the Apex Court seeking the setting up of a special tribunal to resolve the dispute. Goa, in its request, inter alia referred to the allocation of the water to the three basin States (Maharashtra, Goa and Karnataka) and the necessity of constituting an authority to implement the order of the tribunal.[11] Owing to this, the Mahadayi Water Dispute Tribunal (MWDT)

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[5] *Mahadayi Water Dispute: Goa Minister says "no compromise" even as farmers protest in North Karnataka*, Scroll.in (27/12/2017), available at https://scroll.in/latest/862891/mahadayi-water-dispute-north-karnataka-hobbled-by-bandh-protests-organised-across-state, last seen on 05/02/19.

[6] Ibid.

[7] *Mahadayi river water dispute: Violent protests erupt across Karnataka, effigies of BJP leaders burnt*, The Indian Express (27/12/2017), *available at* http:/ www.newindianexpress.com/ states/karnataka/2017/dec/27/mahadayi-river-water-dispute-violent-protests-erupt-across-karnataka-effigies-of-bjp-leaders-burnt-1737880.html, last seen on 05/02/2019.

[8] Ibid.

[9] Supra 5.

[10] Supra 2.

[11] Ministry of Water Resources, Ministry of Water Resources, River Development & Ganga Rejuvenation, Government of India*, Mahadayi/Mandovi River,* available at http://mowr.gov.in/acts-tribunals/current-inter-state-river-water-disputes-tribunals/mahadayimandovi-river, last seen on 05/02/2019.

was set up through a notification dated November 16, 2010[12] under the Inter-State River Disputes Act, 1956[13] presided by Justice JM Panchal. The tribunal was to give a final order on 20th August, 2018.[14]

History and Analysis of the Dispute

It is true that the state of Karnataka faces water shortage and the rivers in this State are mostly rain-fed, which is precisely the reason why Karnataka is in a water dispute with most of its riparian neighbours, including dispute over Godavari and Krishna river waters.[15] Karnataka is also in dispute with its neighbour Tamil Nadu for decades over the Cauvery River waters. The Mahadayi Water Dispute, however resulted because Karnataka failed to adhere to the *"duty of disclosure"* which is a primary duty of any party to a suit in a court of law. It alleged water shortage on one hand but it took the much unexpected step ahead towards suppressing information about where it was actually directing its water resources. The Mahadayi Water Dispute Tribunal, in its order dated 27.07.2016,[16] took cognizance of how there indeed was a trust deficit on part of the upper riparian State of Karnataka in the present dispute. Karnataka was foremost in declaring that it was a drought hit State but it did not mention why and how, in the first place this particular situation had occurred. It was more of an artificial drought than a natural one.

Karnataka had three diversions of its water resources, as stated by Senior-Advocate for Goa, Atmaram Nadkarni. In their reply to the Interlocutory Application (IA) filed by Karnataka, Goa specified "mismanagement" of resources by Karnataka. They mentioned that firstly, a humungous quantity of four-lakh litres of water, per day was diverted from the Malaprabha towards the PepsiCo. unit in Dharwad.[17] It is pertinent to note that had this water been diverted for household use, it would have satisfied the needs of sixteen thousand

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[12] Ibid; Press Information Bureau, Ministry of Water Resources, Government of India, *Setting Up Inter-State River Disputes Tribunal*, 10 February, 2014, available at http://pib.nic.in/newsite/Print Release.aspx?relid=103377, last seen on 05/02/2019.

[13] S. 3, Inter-State River Disputes Act, 1956.

[14] Supra 11.

[15] The two inter-State rivers water disputes have re-surfaced. Since 2014, the main disputant states are Andhra Pradesh and Telangana.

[16] Report cum Decision of MWDT, Volume III of XII, P 544, available at http://mowr.gov.in/sites/default/files/MWDT-Vol-3_0.pdf, last seen on 05/02/2019.

[17] *Bid for Mahadayi*, Down To Earth (06/09/2016), available at https://www.downtoearth.org.in/news/water/bid-for-mahadayi-55485, last seen on 05/02/2019.

people. No steps, however, were being taken towards the reduction of diversion of such water for what is clearly a luxury.

Secondly, Karnataka was going through a great streak of industrial development especially in the Hubali-Dharwad region and while that might sound good, the problem was that the alleged water shortage was due to large amounts being diverted for the establishment of such industrial plants. This particular region already boasts of a total of three forty-five industries as on 31.03.2009.[18] The proposed area in this district for industrial establishment is 3306.19 hectares, out of which 2314.73 hectares have already been developed into industries.[19]

Thirdly, the land used for sugarcane plantation in Karnataka has multiplied several times since its inception.[20] It is ironic and almost unreasonable that while on one hand there is a loud cry about water scarcity, on the other hand there is an indulgence in sugarcane plantations which require a lot of water.

Against the Interlocutory Application (IA) filed by Karnataka in the said tribunal, the order dated 27.07.2016 was rejected on several grounds. And with the rejection of this order, all the proposals of Karnataka Government for diverting the water from Mahadayi River to the Malaprabha basin were also rejected. Mr. Fali S. Nariman represented Karnataka and argued for it as a Senior-Advocate. Karnataka wanted to extract a total of 7.56 thousand million cubic (TMC) feet of water from the river. They said that there are two reasons why they want to extract so much water, one, that Goans do not have need of this water and two, that the water is going into the ocean as a waste.[21] Now, if Karnataka was indeed allowed to extract this water, a couple of things would have happened.

There are three wildlife sanctuaries that are situated on the banks of the Mahadayi river: Mahadei Wildlife Sanctuary, Bhagwan Mahavir Wildlife Sanctuary and Bondla Wildlife Sanctuary. The water source that sustains all three of these sanctuaries comes from the Mahadayi River, in the form of water that has run-off in the four months of Monsoons.[22] This was noticed by

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[18] Report cum Decision of MWDT, Volume II of XII, P 330, available at http://mowr.gov.in/sites/default/files/MWDT-Vol-2_0.pdf, last seen on 05/02/2019.
[19] Ibid.
[20] Supra Note 2; Report cum Decision of MWDT, Volume V of XII, P 885, Report cum Decision of MWDT, Volume III of XII, P 544 (URL?).
[21] Supra 2.
[22] Report cum Decision of MWDT, Volume XII of XII, P 2507 – 2508, available at http://mowr.gov.in/sites/default/files/MWDT-Vol-12.pdf, last seen on 05/02/2019.

the expert witness, Shri Paresh Porob who was appointed by MWDT for facilitating decision making. The rest of the year, the source of water for these sanctuaries comes from the aquifers which also get recharged during the four months of the monsoons. These aquifers besides sustaining these sanctuaries are also a source of water for the agricultural fields of Goa and for the daily household needs of the Goans. This, as important as it is, has never been evaluated in a situation that was present at hand.[23]

Karnataka, most evidently and most conveniently, has not taken cognizance of the disturbance in the ecosystem that would arise as a result of such diversions of the river water. Every river requires a certain amount of water in itself for it to have a natural flow regime and when it is divested of the same water, it tampers the natural flow of the river, thus, hampering the eco system at large.[24] What is essential to also note is that Karnataka mentions as to how the water not used by Goa thus goes waste into the sea. If any river, with Mahadayi being no exception, is divested of water before it meets the sea, what will blatantly happen is that the water from the sea will start retracting towards the land which is most harmful, owing to the salinity of the sea water.[25] This then would be of a grave consequence. When that happens, the water in the aquifers will also be corrupted and the impacts of such an event are obvious: saline water would have to be used for domestic use, wildlife sanctuaries would not get fresh water and the eco system would be largely at risk.

Decision of the Tribunal

After taking everything into account, including the Helsinki Rules or the Water Resources Law of International Law Association, Berlin Conference, 2004, the Tribunal was of the opinion *that "the equitable distribution of the waters of the Mahadayi River was neither necessary nor feasible,"*[26] and therefore, the two States of Karnataka and Goa, in addition to Maharashtra where the

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[23] *Water-Wars*, The Hindu, Business Line (01/08/2016), available at https:/www.thehindubusinessline.com/opinion/editorial/water-wars/article8929217.ece, last seen on 05/02/2019.

[24] *Human impact on Rivers*, Science Learning Hub (19/03/2014), available at https://www.sciencelearn.org.nz/resources/440-human-impact-on-rivers, last seen on 05/02/2019.

[25] *Sharing the Mahadayi*, The Indian Express (20/08/2018), available at https://indianexpress.com/article/opinion/editorials/karnataka-goa-mahadayi-water-dispute-5314708, last seen on 05/02/2019.

[26] Supra 22 at 2696.

river flows for a bit, were allocated the water inequitably. The Tribunal ended up rejecting Karnataka's claim of diverting water of the River for Supa reservoir of the Kali Hydro-Electric Power Project, for generation of hydro-power and also the diversion of an excess of 7 TMC of water that they sought for the Mahadayi Hydro Electric Power.[27] Eventually, Karnataka, in toto, was awarded 13.42 TMC of water, Goa, 24 TMC and the state of Maharashtra got a 1.33 TMC for its in-basin requirements with respect to five projects in place.[28]

Mahadayi, as mentioned earlier, originates in the state of Karnataka. What must necessarily guard such a circumstance is that Karnataka, being an upper-riparian State, owes a duty to the lower riparian States. The lower-riparian State, as mentioned in the order of the Tribunal, is always at the mercy of the upper-riparian State and at a disadvantageous position.[29] This duty, in the present context, can only be owed in the form of releasing adequate quantity of water for the usage of the lower riparian State.

To put it in perspective, Karnataka has a history of defaulting on the orders awarded by a Water Dispute Tribunal. Previously in September, 2016, in the Cauvery Water Dispute, Karnataka was directed by the Supreme Court to supply six thousand cusecs of the river water, per week to the State of Tamil Nadu on the same grounds: duty as an upper-riparian State. Karnataka did not act on this order.[30] Karnataka, in fact, went ahead to inform the Supreme Court that it would not be releasing more water till the month of December, 2016 since it was undergoing a shortage of drinking water.

On August 14, 2018, six days before it was to award the decision, the tribunal gave an over 2000-page report-cum-decision on the Mahadayi Water Dispute. The Tribunal's decision was covered in 12 volumes and it also established the Mahadayi Water Management Authority for the implementation of the said award.[31] This authority is established to own and operate all the projects for diversion of Mahadayi Waters in Karnataka as well as in Maharashtra. The

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[27] Ibid, at 2700.
[28] Ibid, at p 2697 – p 2704; *Mahadayi Water Dispute: in its final verdict, Tribunal allocates 13.42 TMC water to Karnataka, 24 TMC to Goa,* The Indian Express (14/08/2018), available at https://indianexpress.com/article/india/mahadayi-water-dispute-in-its-final-verdict-tribunal-allocates-13-42-tmc-water-to-karnataka-24-tmc-to-goa, last seen on 05/02/2019.
[29] Ibid, at 2583 and 2584.
[30] Ibid, at 2583.
[31] Ibid, at 2705.

order also expressly mentions the constitution of such an authority.[32] The powers, quorum and duties of this authority have been enumerated in express detail in the order.[33]

Conclusion

Karnataka, without a doubt, is one of the water deficient States in our country but as mentioned earlier, diverting humongous quantities of water to the Pepsi Co. unit in Dharwad, multiplying plantations of a water guzzling plant as that of sugar cane and also going through a streak of industrial development in the same area that is going through the water shortage in the first place does not seem to be the wisest thing to do. This is not all.

Being an upper-riparian State, it is involved in disputes with neighbouring States regarding most of its rivers. For example, the Godavari and Krishna water disputes with Andhra Pradesh and Telangana. The Cauvery Water Dispute has also been going on for decades between Karnataka and Tamil Nadu. What proves as an impediment for the claims of Karnataka in most of its water disputes is the history it has, as is the fact that it being an upper-riparian State is at an advantageous situation. In the Mahadayi Water Dispute, Karnataka has ended up alleging completely opposite claims; it is seeking the River waters stating that it is a water deficient State and also asserting that the water is in fact Karnataka's, because Mahadayi is a rain fed river and it originates in Karnataka. It also seems to have overlooked the obvious damage to the ecology that would be a result of the extraction of the kind of water that it wanted to extract. These repercussions will obviously be borne by Goa, being a coastal State.

The Tribunal's decision is undeniably fair and very well thought out and worded. It has taken into account what needs to be taken in to account and more. What is left to see is only if the Management Authority is adept at implementing such an order that binds three powerful States of the country.

[32] Ibid, at 2632.
[33] Ibid, at 2631-2640.

Adultery, no more an Offence : Equality or Delusion

Kashish Singhal
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Introduction

During the British rule over India, the English draftsman was spurred to enforce the Victorian morality through the Criminal Justice System for the Indian society. The beginning of codification of the Criminal Justice System in India began in the 1860s under the authority of the Crown of England. The Indian government which was controlled by the British Parliament introduced its first scrutinized criminal law. Lord Macaulay, who was the chairperson of the First Law Commission of British India (established in 1834 under the Charter Act of 1833 which recommended codification of the Penal Code, the Code of Criminal Procedure and a few other matters) was of the opinion that the acts of adultery or marital infidelity between the parties should not be restricted to an offence and therefore the law should not interfere in these private matters which do not do any public harm. But it was overruled by other members of the Law Commission who were of the opinion that the existing remedy for adultery under common law would be insufficient for the poor natives who would have no recourse against the paramour of their wife and hence it was added to the IPC under Section 497.[1]

The issue of 'Adultery' has always been in controversy ever since it has been added to the Indian Penal Code. There have been many landmark judgments as well which affirms it.[2] The Court took a lenient view on it until the case of *Joseph Shine v. Union of India*[3] was filed in 2017. The petitioner, in the said case, a non-resident Keralite filed a public interest litigation under Art. 32 of the

[1] Joseph Shine v. Union of India, Writ Petition (Crl.) No. 194 of 2017 (Court and date of judgement?).
[2] Yusuf Abdul Aziz v. The State Of Bombay, 1954 SCR 930; Smt. Sowmithri Vishnu v. Union Of India & Anr, 1985 SCR Supl. (1) 741; V. Revathy v. Union of India & Ors, 1988 SCR (3) 73.
[3] Joseph Shine v. Union of India, Writ Petition (Criminal) No. 194 of 2017 (Supreme Court, 27/09/2018).

Constitution. With this petition, he wanted to rescue the Indian men from being penalized for extramarital affairs by vindictive women or their husbands.[4] The trigger for him to file this petition was when a close friend of his from Kerala committed suicide after a woman colleague made a false rape complaint.[5] He wanted the Indian government to scrutinize S. 497 of I. P. C. and S.198(2) of Cr. P. C. to understand the unfairness of these sections. And to his optimism, the Supreme Court has now struck down the 158-year-old law of adultery which had dented into the individuality of both men and women in India.[6]

The petitioner questioned S. 497 of IPC which states that: -

> *"497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."*[7]

This section has several interpretations such as:

First, if a married woman tried to entice or forcefully had a sexual intercourse with a man, the man was burdened to carry the load of the punishment in spite of the fact that the woman was party to the offence.

Second, if a man and a woman with their respective consent come together and have a sexual activity with other than their wife and husband respectively, even then the man will be punished for the offence despite the offence was committed by both of them.

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[4] Nidheesh M.K., *Joseph Shine, adultery law crusader, says he is happy for Indian men,* Livemint (28/09/2018), available at https://www.livemint.com/Politics/0AJo4WhxjSNdEaLt UnrdDI/Joseph-Shine-adultery-law-crusader-says-he-is-happy-for-In.html, last seen on 28/09/2018.

[5] *Friend's suicide was trigger, says Joseph Shine who challenged adultery law*, Hindustan Times, (28/09/2018), available at https://www.hindustantimes.com/india-news/friend-s-suicide-was-trigger-says-joseph-shine-who-challenged-adultery-law/story-79bjEN9t63zgGbxqvfEMSL.html, last seen on 20/07/2018.

[6] *Adultery case: how Supreme Court underlined women's autonomy as facet of human dignity*, the Indian Express, Delhi (27/11/ 2018).

[7] S. 497, Indian Penal Code, 1860.

The S.198(2) of the Code of Criminal Procedure expressly states that:

> *"No person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code."*[8]

The law thus lays down that the aggrieved is the husband, implying that the woman cannot have relationship outside her marriage and that she is merely a chattel or property of man. But equally aggrieved are those wives whose husbands commit adultery without being penalized; for law is not sympathetic to them either for they have no remedy under the laws in this patriarchal society.

There have been cases like *V. Revathy v. Union of India,*[9] or the 42nd Law Commission Report 1971,[10] where S. 497 was challenged or was recommended for review but not much was done to decriminalize S. 497 and 498 of I.P.C. and the respective Cr. P. C provisions. Only S. 497 was reviewed and the Court held it to be a non-criminal offence on 27 September 2018 with a unanimous decision of the 5-member bench of Supreme Court including former Chief Justice of India Deepak Mishra who ruled that adultery may not be the cause of an unhappy marriage but the result of one. The Court held that the right to privacy[11] invariably has to include the right to sexual privacy[12] and hence it cannot be taken away from the people. This statement created a history over the earlier judgments of the Supreme Court[13] which held adultery as a criminal offence and held that the Section does not consider women as an abettor of the crime is constitutionally valid under Art. 15(3) that allows such special provisions for women.[14]

The second most important judgment came in 1985 in *Sowmithri Vishnu vs. Union of India*,[15] by the Supreme Court stating that men were not allowed to prosecute their wives for the offence of adultery in order to protect the sanctity

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[8] S. 198(2), The Code of Criminal Procedure, 1973.
[9] V. Revathy v. Union of India, (1988) 2 (SCC) 72.
[10] 42nd Law Commission of India Report, *Indian Penal Code*, (1971), available at http://lawcommissionofindia.nic.in/1-50/report42.pdf , last seen on 08/02/2019.
[11] Art. 21, Constitution of India, 1950.
[12] *"Matter of Privacy": Key Points in Supreme Court's Adultery Ruling*, ndtv.com, available at https://www.ndtv.com/india-news/adultery-law-husband-is-not-master-of-wife-key-points-in-top-courts-adultery-ruling-1922972, last seen on 20/07/2018.
[13] Supra 2.
[14] Yusuf Abdul Aziz v. State of Bombay, 1954 AIR 321.
[15] Sowmithri Vishnu v. Union of India, 1985 AIR 1618.

of marriage. For the same reason women could not be allowed to prosecute their husband. The judgment retained the offence of adultery as a crime committed by a man against another man. Also the court rejected the idea of getting unmarried women in the picture as that would lead to crusade by a woman against another woman and hence the ambiguity regarding the adultery law remained unresolved. There were strong arguments against it stating that it merely had a strong emotive appeal rather than a valid legal basis to rest upon and that the woman is not being punished,for, it is commonly accepted that it is the man who is the seducer and not the woman.

The third big judgment on adultery came in 1988, *V Revathy v. Union of India*[16] which articulated that not including women in prosecution of adultery cases promoted "social-good" and offered the couple a chance to "make-up" and keep the sanctity of marriage intact.

Also, it asserted that adultery law was a "shield rather than a sword" and the court ruled that it had done no harm in restricting women to be a part of adultery and keeping it a man against man crime. The three judgments gave an unanswered picture that adultery is a crime which is only done by men and women can only be a material in the crime.

Over the years, the Law Commissions have identified and advised the Government on the reforms of a number of laws for the betterment of the country. The 42nd Law Commission of India made several important recommendations for the revision of some of the provisions of IPC.[17]

Another committee which stated the need to revise the Section in I.P.C. as well as Cr.P.C. was made in 2003 headed by Justice V.S. Malimath.[18] The Committee reported that the objective in the chapter of offences against women, under the subheading Adultery (S. 497 of I.P.C.) was: *'The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man. The Committee hence*

[16] V Revathy v. Union of India, 1988 AIR 835.
[17] Supra 10.
[18] Writ Petition (CRL.) No. 194 of 2017.

suggested that Section 497 of the I.P.C should be suitably amended to the effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery……"[19]

It is also pertinent to note that in the year 2011, the Hon'ble Court observed to make an observation about the Section in the case of *W. Kalyani v. State Tr. Insp.of Police*[20] that, ''The *provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband".*

With effective changes in our Indian law from time-to-time our country is trying to create a fair and just society. All these cases and the Commission's recommendations have always proven important so as to understand the background of the Indian laws in detail. The fault that only a man is allowed to report the offence makes it difficult for a woman to win justice with such laws. Not ignoring the plight of men, in such cases, there is no fallacy in saying that S. 497 and 498 and their punishments have created a discrimination between men and women.

The definition of adultery according to law itself pronounces the injustice meted out to women and men equally in the longest possible span of 158 years after this law was passed in 1860 by the law commission formed in 1834. The Section was unfair and should have been declared non-criminal or should have been amended accordingly long back as not only the Fundamental Rights guaranted by the Indian Contitution [Right to Equality (Art. 14), Right against Discrimination (Art. 15) and Right to Life and Personal Liberty (Art. 21)] are violated but also individuality of women as well as men was in question. The petitioner thus had the *"locus standi"*[21] to file the instant Writ Petition challenging the said provisions before the Hon'ble Court under Art. 32 of the Constitution. S. 497 of the IPC implying that woman is a mere chattel of man is no more acceptable. The husband does not own his wife, her personal individuality is important and she

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[19] Ministry of Home Affairs, Government of India, Report *of the Committee on Reforms of Criminal Justice System*, (2003), a vailable at https://mha.gov.in/sites/default/files/criminal_justice_system.pdf , last seen on 0 8/02/19.
[20] W. Kalyani v. State Tr.Insp. of Police & Anr, (2012) 1 SCC 358.
[21] Ibid.

should not be held captive by societal expectations in a patriarchal society as in India.[22] The very fact that the sexual intercourse took place with the consent of both the parties, there is no good reason for excluding one party from the liability. This distinctly repudiates the fundamental right to equality and right against discrimination.[23] Also just assuming that women are incapable of committing adultery is irrational and perverse. Such an assumption is part of 'institutionalized discrimination'[24] which was overruled in 2015 but is still implied in such laws. There is no reason to criminalize consensual sexual intercourse between two adults. So, the provisions of this Section obviously had to be struck down as unconstitutional. India being the signatory to the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") has an obligation to consider the impugned Sections in the light of the current social and global legal scenario and provide information and advocate for women's rights.

Speaking about right to privacy, invariably, it also includes right to sexual privacy. In *Bowers v. Hardwick,*[25] Justice Blackmun said in his dissent that *"depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our nations' history than tolerance of non-conformity could ever do."* And hence there is no reason to criminalize a consented sexual intercourse between two adults.

Although adultery is no more a criminal offence in India but it continues to be a ground for seeking divorce[26] in a civil court which helps the woman who might be aggrieved by her spouse who had a sexual intercourse with another married woman.

On the other hand, some other people from the same society believe that Adultery should not be decriminalized, for, it creates a moral, religious as well as social order in the society and is a necessity in every marriage as it gives a chance to the couple to rethink before coming to the conclusion of having a sexual intercourse with some other person which would eventually (in most of times)

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[22] *'Husband Is Not the Master of Wife', SC Strikes down 158 Year Old Adultery Law under Section 497 IPC,* Livelaw, available at https://www.livelaw.in/husband-is-not-the-master-of-wife-sc-strikes-down-158-year-old-adultery-law-under-Section-497-ipc/, last seen on 27/09/2018.

[23] Supra 3.

[24] Charu Khurana v. Union of India, 2014 SC 1044.

[25] Bowers v. Hardwick, (No. 85-140) [478 U.S. 186].

[26] Section 13(1), The Hindu Marriage Act, 1955.

lead to the dissolution of the marriage even if the affair doesn't work out. It's important to understand that adultery is a moral as well as a public wrong, which causes mental and physical injury to the spouse, children and the family. *"It is an action willingly and knowingly done with the knowledge that it would hurt the spouse, the children and the family. Such intentional action which impinges on the sanctity of marriage and sexual fidelity encompassed in marriage, which forms the backbone of the Indian society, has been classified and defined by the Indian State as a criminal offence in exercise of its Constitution powers."*[27] To specify the difference, all moral wrongs become public wrongs when the overt act or omissions become capable of being distinctly proven to inflict some definite evils either on specific persons or on the community at large. Here, the term evil refers to a 'harm' and not an ethical or moral value.

"Adultery no more a criminal offence but should it be an offence?"- is still the question.

[27] *Adultery Law Is Arbitrary, Says Chief Justice of India Dipak Misra,* ndtv.com, available at https://www.ndtv.com/india-news/supreme-court-verdict-likely-today-on-petition-challenging-adultery-law-1922813, last seen on 20/07/2018.

An Instance of Strategic Ambiguity: 'Silence! The Court is in Session'

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An Introduction to the Play

Shantata! Court Chalu Aahe is a Marathi play written by playwright Vijay Tendulkar and first performed in 1967. The play was written in 1963[1], for Rangayan, a Mumbai-based theatre group. The play is considered a milestone in Marathi theatre for its realistic depiction of modern patriarchal society, the hypocrisy of urban middle-class and the conflict between human needs and societal moral expectations. Over the years, the play has been translated in as many as 16 languages; the English translation of the same is ***Silence! The Court is in Session***.[2] The play draws its characters from an amateur theatre troupe called 'The Sonar Moti Tenement (Bombay) Progressive Association', which is fuelled with social obligation. The play revolves around a spinster group-member Miss Leela Benare a schoolteacher who comes across as a vivacious, unconventional woman in the eyes of orthodox society. As the story progresses Benare becomes the object of scrutiny of all the other group-members. She is put on a mock trial based on suspicions (voiced and endorsed by other members of the group) regarding her character. As the play progresses Benare finds herself being pulled deeper into evil web of accusations and humiliation cast by her fellow group-members. This degradation of Leela Benare portrays the position of women in society through the playwright's lens.

The Calm before the Storm

The play starts with arrival of the theatre troupe consisting of amateur artists, in a village where they are to perform that evening. The troupe plans to perform one of their acts depicting proceedings in the court of law (a fictitious case of *President Johnson v. United States*). When a cast member, Professor Damle,

[1] V.D. Tendulkar, Shantata! Court Chalu Aahe, (2nd ed., 1968).
[2] V.D. Tendulkar, Silence! The Court is in Session, (Priya Adarkar, 1st ed., 2018).

does not show up, it is decided that a local stagehand (Raghu Samant) should be asked to replace him. With a twofold aim of familiarizing Raghu with the process of the play and passing the time amusingly, an improvised, free-flowing 'rehearsal' is arranged and a mock trial takes place. This improvised rehearsal (due to its extemporal nature hereinafter referred to as the game), though initiated for the benefit of new member Raghu Samant turns out to be a cunning setup used as means to trap Leela Benare and subjecting her to suspected accusations. A (mock) charge of infanticide is leveled against Miss Leela Benare, which is based on heresy and observations made by various members of the group and reported by Karnik (who is an experimental theatre actor and prides himself as an actor and director of great substance). At one point suddenly, the game leaves its fictitious premise and brushes with reality when it emerges from the trial that Miss Benare is carrying an out-of-wedlock child from her illicit relationship with Professor Damle, the missing cast-member.

The Game Begins

As the story moves on, Benare breaks her poise confirming some of the suspicions such as the illicit relationship with a married acquaintance and an incest relationship in youth. At this crucial juncture, Tendulkar (the playwright Vijay Tendulkar) skillfully depicts the changes in perspectives of the prosecutors (all the characters except Benare), what starts as a light-hearted make believe eventually ends up as a nonconsensual unjust dispensation of justice. While Benare struggles with the sudden escalation of the accusations against her and at a point lays her secrets bare, the rest of the group is passive, insensitive and detached to the point of sadism. Tendulkar, certainly not a romantic, paints his female characters as entities trapped between societal expectations, constraints and the inherent traits of freedom persisting from within. *Silence! The Court is in Session ("Silence…")* depicts this conflict, the conflict regarding notion of justice amongst the patriarchy or in want of a better term patriarchal masculine society and an independent, hence struggling woman. Backed by the prosecutors' testimony, the game begins with a charge of infanticide and as the game progresses with breakthroughs in Benare's past the verdict asks for the abortion of the fetus. This seemingly unusual and surprising shift of locus of crime, from that of ending a life to that of creating a life against predominant social norms, holds the gist of what Tendulkar has to say. The prosecutors' attention shifts gradually from one fictitious end i.e. Benare accused of infanticide to the other real end i.e. the fact that Benare is carrying a child out of wedlock. The irony lies in the seamless change in the notion of crime i.e. what is first considered as a crime (infanticide) is later used as a verdict. This ambiguity regarding the

exact stance of the prosecutors regarding what is the exact crime committed by Benare, is used strategically by Tendulkar. It shows that for the prosecutors the crime of infanticide or that of pregnancy out of wedlock is insignificant, but the true crime of Benare is her defiance towards patriarchal norms, its ideas of appropriateness. Mr. N. S. Dharan in his article *'Gyno - centrism in Silence! The court is in Session'* writes "*Tendulkar though not a self-acknowledged feminist, treats his women characters with understanding and compassion while pitting them against men who are selfish, hypocritical and brutally ambitious.*"[3]

The whole play seems as a one-sided onslaught on a susceptible Benare. The male characters round up on her as lions around a helpless deer; the only difference being that Benare is not a deer but a lioness and yet can do nothing better than scrabble. All the male characters seem to enjoy Benare's ordeal and use every opportunity to sharpen their knives, exacting revenge for whatever they believe to be Benare's fault. Her faults being, her undermining Ponkshe's intelligence, her unworthy opinion of Sukhatme as a lawyer, her pity for Rokde, her image of Kashikar as a hypocrite, and Karnik's belief that she must have nothing but disrespect for him.[4]

Symbolism, Soliloquy and Strategic Ambiguity

The whole game and the play are spatially confined to one room where the troupe arrives in the morning with the actual play scheduled for the evening on the same day. This spatial confinement symbolizes the entrapment faced by Benare and effectively every woman subjected to the 'game'. We are made aware of this confine during the game when Benare in her most vulnerable state, tries to open the door in order to escape the ordeal, only to hear Raghu Samant explain it to her that the door is accidently locked from outside. He further points out that the only door in the room leading to the way out is locked as she had applied extra force while closing the same in the first place. Here, the room is Benare's confrontation with her past enforced by the prosecutors' malice while the locked door leading to the only way out is her own failed attempt towards forgetting her ominous past, tricking herself to believe that she could live a normal life immune from the prying eyes of the society. Tendulkar

[3] Silence! The court is in session, Shodhganaga, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/7301/5/05_chapter%202.pdf, last seen on 22/11/2018.

[4] Ponkshe, Sukhatme, Karnik, Rokde are all co-artists in this "game". They collectively represent societal patriarchal norms.

has been accused of being obsessed with violence. He agreed that he used it deliberately, not as means to educate the audience with some higher form of knowledge but to emphasize that violent acts are means to various ends. In *Silence…* Tendulkar depicts inherent predatory traits in humans waiting to explode. No amount of role-playing and hypocrisy can hide the fact that the beast of violence, whether physical or emotional, lurks deep within us and that events in the world are not its cause but its result. The external event is but a trigger that awakens the beast within.

As explained above, *Silence…* is a fine example of strategic ambiguity, deployed very craftily by Tendulkar. The exact nature and extent of Benare's scandalous past remains ambiguous. At one point of time Mr. Kashikar (the chairman of the troupe) accidently sees the bottle of poison, which proves a very crucial allegation partially, but then again, he scurries from his place and returns with absolutely no memory and bearing no recognition of the same. Even the confessions of past are narrated by Benare in the form of soliloquy (a soliloquy is a speech often used in a drama when a character speaks aloud to himself or herself, his/her own thoughts and feelings, thereby also sharing them with the audience), with the whole cast and stage 'frozen' in the frame (an instance where except a few, all the other actors and their movements 'freeze', as if in time, while the remaining actors continue with their parts. When the frame 'unfreezes' the actors resume their movements, oblivious of the intervention of the frozen frame and the actions and narrative therein. The narrative of Leela Benare's past in *Silence…* takes place in a 'frozen frame'). As a result, the whole story is communicated only from Benare to 'real' audience with all the prosecutors excluded completely. This isolated confession is confirmed, by the indifferent poise and mannerism of the prosecutors before and after the confessions made in 'frozen frames'. This leads to ambiguity regarding the exact conclusion of the play. Although painted without a hint of kindness and warmth within them, the prosecutors' real motives remain unclear till the end. Their intentions and the extent of their knowledge remain ambiguous throughout the play. This ambiguity reflects the degree of importance attached by the antagonists in every effort made towards finding the amount of truth in all the rumors, suspicions, and heresy about Benare. Though ambiguity has been used strategically in plays, in *Silence…* the use of the same is limited not only to the story, actions and verbal expressions therein but also prevails in the very technique of enactment. The concept of a play has an axiom that the events portrayed therein are not concurrent with reality in absolute sense but are born out of the writer's imagination. In *Silence…* as the characters are rehearsing for the play

within the play, it is an instance of a 'nested' play, where the actual audience are audiences to two plays (nested one within the other), and the characters themselves are audience to their own play, often acknowledging that all that is said or done is merely 'staged' and not 'genuine'. Hence at the end, Mrs. Kashikar (the only female character other than Benare in the play) urges Benare to get ready and consoles her curtly mentioning that it was all make-believe and she was a foolish girl to take it to her heart. Such instances intensify the indifferent, insensitive approach of the prosecutors, which in turn portrays the mindset of the 'dominant patriarchal class' in the society. Strategic ambiguity, being the main tool used by Tendulkar, all the obscurity within *Silence...* doesn't impale the playwright's vision but in fact strengthens it.

The play proved to be revolutionary for both the Marathi and Indian Theatre, and became part of the New Indian Drama phenomenon of the sixties and the first significant modern Indian play in any language to center on a woman as protagonist and victim. The play essentially talks about Benare and effectively about many more like her. Benare who is seen suffering from a scarred past, in one of her monologues confesses to having had relations with her own maternal uncle at a tender age. Benare talks about finding peace and sense of security in this relationship, as a child being unaware of social norms and taboo associated with incestuous relations. Her confessions, without an attempt to defend or justify the 'relationship', leaves no doubt regarding her innocence and lack of guile in this whole scheme. But obviously the relationship had failed resulting in her uncle fleeing. This rejection, desertion had left a lasting impact on Benare, convincing her that the relationship had failed because men invariably see women as objects meant for their pleasure and nothing more than that. This revelation didn't make her a misandrist but made her lose faith in social institutions like marriage and family and the sanctity assigned to them. Her reservations were again shaken at their very core after acquainting herself with Professor Damle. Damle being an intellect was seen by her as a man worthy of her devotion. And for the second time in her life Benare had turned a blind eye to social norms and had presumed a relationship with married Damle. This time she had complete faith that Damle, due to his academic and intellectual virtues, would acknowledge not just her body but also her mind. But when she had informed him of her pregnancy, he had bluntly refused to accept her. And in such a state of mind with two futile relationships having scarred her past Benare receives the prosecutors' assault.

The Uproar and the Following Silence

Throughout the play the prosecutors are not touched by any guilt or burden of any similar conscience, nor are they ever seen breaking out of their bubble of rigid, shallow and cruel patriarchal mentality. Hence the only character, which sways from normalcy to taboos personified, is our Benare; she is the only one who opens her heart over the course of the play. She narrates her moments of weakness but never assumes a self-justifying role or overindulges in self-defense but bluntly explains her suffering and the cost she has paid to be able to live with any degree of normalcy. Subha Tiwari in her article *'Silence! The court is in Session. A strong social commentary'* states *"The whole responsibility of morally upright behavior is bulldozed on women. Men are by nature considered to be willful, wild, childish, innocent and mischievous. Their sins are no sins at all. The society has a very light parental and pampering sort of attitude when it comes to sexual offences of men. In case of women the iron rod gets hot and hotter. No punishment is actually enough for such a woman. There is no respite, no shade and no soothing cushion for a sinning woman. She must be stained and abandoned…"*[5] Benare where she calls life a criminal and fervently asks for it to be hanged voices this sensation. Her exasperation leads her to denounce something encompassing much more than the male society. Her last monologue is directed towards humanity rather than men in isolation. She calls the people around her as remains of humans and humanity having sailed safely and silently through 20th century.

The play in its entirety touches notions of justice, liberty, feminism, gender stratification, relationship between society and law, individualism, capitalism and crime and punishment. The themes are never mentioned explicitly in the script but are strongly felt in the arguments and counter-arguments therein, which strengthens the whole picture in exact colors Tendulkar intended to. The drama ends with Benare left wounded and the question looming in the minds of the readers/audience regarding her future. According to me this is the strongest, highest point of this work as it reminds us of the truthfulness (albeit partial) of the cause and effect depicted in '*Silence! The court is in session'.*

[5] Supra 1.

Winding-up and Illegal Transfers: An Overview

Ziauddin J. Sherkar
V BA.LL.B.

Introduction

India is witnessing an era of complex commercial holdings across geographical borders. At the same time, there is an added impetus to the Insolvency and Winding-up proceedings under the old and new legislations. It is accepted that during winding-up, a company's assets needs to be secured to protect the interests of the creditors. However, disputes between the promoters of a company in such times may lead to certain ill-gotten results. The law provides adequate protection to the creditors in order to safeguard their claims. However, the problem arises when companies being wound-up are plagued with disputes between promoters, wherein one or one set of promoters, seek to defeat the winding-up process to the detriment of the other promoters. The Companies Act, 1956 ("the 1956 Act"), the Companies Act, 2013 ("the 2013 Act") and the Insolvency and Bankruptcy Code, 2016 ("the IBC") have sought to strike a balance between protecting the interest of various stakeholders of the company being wound-up ("the Company"). In recent times, illegal transfers by directors have become a cause for concern.[1]

[1] IANS, *Chit fund case: NCLT orders winding up of Saradha Group's 13 firms*, The Economic Times (12/12/2018), available at https://economictimes.indiatimes.com/industry/banking/finance/chit-fund-case-nclt-orders-winding-up-of-saradha-groups-13-firms/articleshow/67056379.cms, last seen on 09/01/2019.

Provisions under the 1956 Act and the 2013 Act

The 1956 Act	The 2013 Act
S.536 - Avoidance of transfers, etc., after commencement of Winding-up.	**S. 334 - Transfers, etc., after commencement of Winding-up to be void.**
(1) In the case of a voluntary Winding-up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the Winding-up, shall be void.	(1) In the case of a voluntary Winding-up, any transfer of shares in the company, not being a transfer made to or with the sanction of the Company Liquidator, and any alteration in the status of the members of the company, made after the commencement of the Winding-up, shall be void.
(2) In the case of a Winding-up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the Winding-up, shall, unless the Court otherwise orders, be void.	(2) In the case of a Winding-up by the Tribunal, any disposition of the property, including actionable claims, of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the Winding-up, shall, unless the Tribunal otherwise orders, be void.

Locus Standi of the Promoters

The language of the above mentioned Sections reflects an intent to protect the interests of the creditors and their interests in the Company. Both the sections are silent on the right of a promoter to intervene. Therefore, in an appeal filed by the appellant who was the Shareholder/Promoter of the Company, the Supreme Court held that, *"Prima facie, we are of the opinion that this appeal was maintainable and should not have been dismissed on the ground that the appellant did not have locus standi to prefer the said appeal. The appellant is very much concerned with the outcome of the proceedings in as much as, if the ownership of the land in question vests with the Company and proceeds from the sale of this land comes into the kitty of the Company,*

the effect of that would be to reduce the liability of the creditors, particularly the financial institutions. In turn, it may result in reducing the personal liability of the appellant who has given guarantees to the financial institutions for the loan advances to the Company."[2] Therefore, it is evident that the Section envisages a protection of the interests of the Promoter of the Company, especially in cases such as the present one where certain acts were done without their knowledge or approval.

Disposition of the Property during Winding-up

In *Chittoor District Cooperative Marketing Society Ltd. v. Vegetols Ltd.,*[3] a two Judge Bench of the Supreme Court considered a plea for validation of payments made by a Company after presentation of a petition for Winding-up. One set of payments were made before the passing of the Winding-up order and the other set of payments were made thereafter. The Court declined to validate such payments on the ground that there was no proof to clearly specify if the payments were done either under necessity of circumstances to save and safeguard the property of the Company or that there were any commercial compulsions required to carry out its commercial activities.

It is difficult to lay down that all dispositions of property made by a company during the interim between the submitting of a petition for Winding-up and the passing of the order for Winding-up would be illegal.[4] The word "void" does not indicate that every disposition should be ab initio void. In its true sense, the word "void" does not lead to invalidity of all transactions in all circumstances.[5] The final discretion lies with the Court i.e. the power to validate such disposition. There is no provision in the 1956 Act which prohibits enforcement of debt due from a company. The leave of the Court required under sub-section 2 of Section 536 of the 1956 Act is to be granted for the benefit of the creditors or the Company, in general.[6]

Illegal Dispositions – Validity of the Sale Deed

The Gujarat High Court, in an appeal filed for restraining the Official Liquidator, appointed in Winding-up proceedings, from attaching the property claimed to be

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[2] Phatu Rochiram Mulchandani v. Karnataka Industrial Areas Development Board, (2015) 5SCC 244.
[3] 1987 Supp SCC 167.
[4] Pankaj Mehra v. State of Maharashtra, (2000) 2 SCC 756.
[5] Ibid, at 14.
[6] ICICI Ltd. v. Ahmedabad Mfg. & Calico Printing Co. Ltd., (2004) 9 SCC 747.

purchased by the appellants from the Respondent-Company ruled that the properties were purchased after initiation of Winding-up proceedings and no permission or order in respect of the same was obtained from the Court.[7] As per S. 536, such disposition of property after commencement of Winding-up proceedings would be void unless the Court orders otherwise. Therefore, the agreement entered between parties for purchase or sale of property was declared void and the appeal was dismissed.[8]

On the Question of Undervaluation of the Transferred Property

In *Dharmesh Chandrakant Patel v. Official Liquidator of Surat Dairy Co. Ltd.,*[9] the High Court was faced with the issue of valuation of property allegedly sold during the appointment of the Official Liquidator. The Court ruled that a valuation report is only the opinion of an expert with regard to estimated price which the property may fetch, if sold in the open market. But this expert opinion cannot be ultimate, when it comes on record by way of positive evidence before the court that it could fetch much more price in the open market in comparison to what had been opined by the valuer as an expert. The opinion given by the expert cannot be said to be binding on a court as conclusive or the sole guiding factor when the court finds that there is more than one party ready to pay a price much higher than mentioned in the report of the valuer based on the estimates. When it is proved as a positive fact, before the Court, that the price estimated by the valuer is wholly inadequate then the Court may not act upon the valuer's report by ignoring this fact.[10]

The Madras High Court was faced with a case where the consideration paid by the appellant was less than even 50% of the value of the property belonging to the Company.[11] After entering into the agreement for sale, Winding-up proceedings were initiated by the Company. The appellant filed an appeal seeking declaration that the sale deed executed in their favour was valid and binding. The hurried nature of the transaction did not display bona fides of either of the appellants of the Company.[12] The Court dismissed the appeal in light of the

[7] Rushvi Estate and Investments Pvt Ltd. v. Official Liquidator of Shri Ambica Mills Ltd., 2001 Comp Cases (Vol.105) pg.828.
[8] Ibid, at 40.
[9] (2001) 104 Comp Cases 214 (Guj); 40 (1) GLR 373.
[10] Ibid, at 8.
[11] Archean Granites (P) Ltd. v. RPS Benefit Fund Ltd., 2004 (4) LW 558.
[12] Ibid, at 33.

gross undervaluation of the property.[13] On appeal, the Supreme Court fixed a price to be paid by the appellant, with regard to the market value, as a part of the settlement, without going into the question of law involved.[14]

The Legality of Transfer of Shares

The first case that dealt with transfer of shares during Winding-up was that of *Bir Chand v. John Bros.,*[15] before the Allahabad High Court. In this case, the Court refused Seth Bir Chand's plea to rectify the share register for transfer of shares in his name as the debenture holders had a first floating charge over the shares of the Company under liquidation.[16]

In a dispute regarding validity of certain transfer of shares made by the company that was ordered to be wound up, the Delhi High Court directed the official liquidator to register the transfer as the transfer agreement was entered into by free will and accord of both parties and there was nothing to show inequality of bargaining power between parties as the transfer was honest and in the ordinary course of business.[17]

In a case where shares were transferred in favour of the Respondent pursuant to a tripartite agreement when Winding-up proceedings were pending, the Delhi High Court held that provisions of S. 536(2) were attracted.[18] Although, the tripartite agreement entered into by the Respondent with MSL and Divi's Laboratories Ltd., was without any right over shares, as shares had already been transferred in name of Applicant-company in liquidation, the transaction was held to be not bona fide and was declared to be void.[19]

In a case before the Bombay High Court, the Company was ordered to be wound up on 22nd March 1990.[20] The question whether the alleged transfer of 3498 shares in the company under liquidation had taken place before 22nd March, 1990 as alleged by the appellant or after 22nd March, 1990 as averred by the Respondents was itself a seriously disputed question of fact and that question

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[13] Ibid, at 39.
[14] Archean Granites (P) Ltd. v. RPS Benefit Fund Ltd., (2010) 13 SCC 277.
[15] AIR 1934 All 161.
[16] Ibid, at 6.
[17] H.L. Seth v. Wearwell Cycle Company (India) Ltd., 1992 (22) DRJ 354.
[18] Administrator, MCC Finance Ltd. v. Ramesh Gandhi, (2005) 127 Company Cases 85.
[19] Ibid, at 13, 14.
[20] Rathnam P.V. v. Premier Automobiles Ltd., (2011) 168 Company Cases 168 (Bom).

was already pending trial before the District Court.[21] Thus, the learned Judge from whom the appeal arose was fully justified in not granting any relief to the appellant in a Company Application to register such transfer, in the background of such seriously disputed questions of fact.[22]

The IBC Impetus

The 2013 Act transferred the jurisdiction to decide cases of Winding-up due to inability to pay debts from the High Courts to the National Company Law Tribunal ("NCLT"). Meanwhile, the IBC conferred sole jurisdiction on the NCLT to decide proceedings under it.[23]

Subsequently, by way of a notification dated December 7, 2016, the Central Government decided to transfer pending cases of Winding-up from the High Courts to the NCLT.[24] However, it provided an exception, in that, if the petitions had not been served in line with Rule 26 of the Companies (Court) Rules, 1959, only then could they be transferred to the NCLT.[25] The rest of the pending petitions were to be decided by the High Courts by themselves. Therefore, transfers made after commencement of Winding-up, or as in the case of the IBC, after commencement of insolvency, would now be allowed only after the permission, and in the supervision of the NCLT, as distinct from the High Courts. That is the single-most important distinction between the relevant provisions of the 1956 Act and the provisions of the 2013 Act read with the IBC.

Conclusion

The language of the sections in both the Acts gravitate towards the protection of the Company's creditors. However, the legislature is silent about the interests of members who have been kept in the dark, such as co-Promoters. In case of Companies where the promoters come from diverse geographical and cultural backgrounds, coming together is an outcome of common business interests. However, *mala fide* and fraudulent transfers by one set of promoters, especially in the light of the impending Winding-up hurt the interests of the other promoters who are unaware of such disposition. The language of the section needs to be amended to provide a holistic protection to all stakeholders in a Company.

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[21] Ibid, at 29.
[22] Ibid, at 29.
[23] S. 60, Insolvency and Bankruptcy Code, 2016.
[24] Companies (Transfer of Pending Proceedings) Rules, 2016.
[25] Ibid, Rules 5 and 6.

Economic Sanctions under International Law: An Overview

Ashna Chhabra
IV BA.LL.B.

Concept of Sanctions

In the words of L. Forlati Picchio, an Italian author, "*A sanction would be any conduct that is contrary to the interests of the State at fault, that serves the purpose of reparation, punishment or perhaps prevention, and that is set out in or simply not prohibited by international law"*.[1] In terms of International Relations, they can be understood as coercive measures in the hands of States and International Organizations to compel another State or entity to act or refrain from acting in a particular manner. Absence of a unified mechanism governing sanctions in international relations is one of the major reasons that the question of legality is a debate, despite their repeated imposition since decades.[2] Instead of being tools of warfare, sanctions have become conducive to peace, security and co-operation today. Moreover, sanctions, apart from being a result of a violation or ignorance of rules also involve the sanction of law by a sovereign entity.[3]

Since the goal of international organizations today is to promote co-operation and peaceful co-existence among States, the essence of sanctions which in their real sense are weapons of retaliation and compulsion cannot be truly considered in consonance with the primary principles of the United Nations ("UN").

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[1] Emmanuel Decaux, *The Definition of Traditional Sanctions: Their Scope and Characteristics*, 90 International Review of the Red Cross, No. 870, 1 (2008), available at https://www.icrc.org en/international-review/article/definition-traditional-sanctions-their-scope-and-characteristics, last seen on 30/11/2018.

[2] Malcolm N. Shaw, *International Law*, 4 (5th ed., 2003).

[3] Natalia Chirtoaca & Dumitrita Florea*, Sanctions in the International Public Law*, 13 The USV Annals of Economics and Public Administration, Issue 1(17), 264, 265 (2013), available at http:/ /www.seap.usv.ro/annals/ojs/index.php/annals/article/viewFile/513/569, last seen on 29/01/2019.

Concept of Economic Sanctions

Speaking at Indianapolis in 1919, President Woodrow Wilson, an economic sanctions enthusiast, said that, "*a nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the national boycotted but it brings a pressure upon the nation which, in my judgment, no modern nation could resist*". Economic sanctions can be interpreted as a threat of or actual grant or withdrawal of economic opportunities and benefits by States or international organizations against other State(s) to compel a change in policy.

They can be considered to be a result of power-superiority and definitely cannot be categorized as 'equal opportunity' instruments but they also cannot be considered as peculiar instruments confined to be used by greatest powers against smaller States.[4] One of the classic examples in history of the same would be the period of a stormy election of the Secretary General of the Organization of American States, which resulted in accusations by Caribbean States against Costa Rica of using Banana Diplomacy to compel few States to extend their support to the candidate nominated by it. In this scenario, Costa Rica was not a powerful State.[5] Another converse example where a super power was made a target of economic sanctions would be the case of imposition of sanctions by People's Republic of China against the United States which is a superpower.

Legality of Economic Sanctions

The absence of a centralized International Legal system has raised concerns about the legality of measures undertaken by States impacting the economy of the target States. Although the Statute of the ICJ lists four sources of international law, treaties and international customs are the two primary sources and are the means of ascertaining the legality of State conduct, in particular, the legality of economic sanctions.[6] The United States has repeatedly employed economic sanctions and in fact, as of May 1985, it was maintaining seven economic

[4] W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EJIL 86, 93 (1998), available at http://ejil.org/pdfs/9/1/1485.pdf, last seen on 29/01/2019.

[5] Ibid.

[6] L. Oppenheim, *International Law*, 16-18 (H. Lauterpacht, 8th ed., 1955).

sanctions programs against 12 nations.[7] A State's ability to independently formulate policies of trade is a derivative of the principle of sovereignty, which reflects the right of a State to determine that State's own destiny, free from the interference of other nations.[8]

Although the U. N. Charter does not expressly address the sphere of economic coercion, a number of commentators have interpreted Art. 2(4) of the U.N. Charter to include economic and political conduct. Art. 2(4) of the U.N. Charter forbids the threat or use of force against any nation in any manner that is not consistent with the purposes of the U.N. Charter.[9] The question of legality and effectiveness of economic sanctions is a widely debated concern but at the very least, economic sanctions do not generate sombre processions of body bags bringing home the mortal remains of the sons and daughters of the constituents.[10]

Tracing the Sanctions Imposed by U. S. against Iran

A. Scope and Intent of Imposition of Sanctions by the United States

The United States ("the US") attempted to impose Multilateral and International Sanctions on Iran under its Iran Policy since the Islamic Revolution in 1979. During 1980's and 1990's, the US Sanctions were intended to compel Iran to cease the support it was advancing to acts of terrorism and to limit its strategic power in the Middle-East.[11]

Post 2000, the US's other sanctions against Iran were primarily focused on ensuring that Iran's Nuclear Program was only for civilian use. Subsequently,

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[7] J. Curtis Henderson, *Legality of Economic Sanctions under International Law: The Case of Nicaragua*, 43 Washington and Lee law Review, 167, 176 (1986), available at https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2847&context=wlulr, last seen on 28/01/2019.

[8] G. Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 RECUEIL DES CouRs, 48-50 (1957).

[9] U.N. Charter, Art. 2, Para. 4.

[10] W. Michael Reisman, *Assessing the lawfulness of Non-military Enforcement: The Case of Economic Sanctions*, Yale Law School Legal Scholarship Repository, 354 (1995), available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1886&context=fss_papers, last seen on 28/01/2019.

[11] *Timeline: Sanctions on Iran,* Al Jazeera (17/10/2012), available at https:/www.aljazeera.com/news/middleeast/2012/10/20121016132757857588.html, last seen on 02/12/2018.

starting from 2010 to 2015, the international community co-operated with the US and authorized sanctions in order to achieve the goal of persuading Iran to agree to limit its nuclear program.[12]

Subsequently these sanctions were lifted to a substantial extent but in 2018 they were re-imposed in full as a consequence of the US's withdrawal from the Joint Comprehensive Plan of Action ("JCPOA"). They were re-imposed in two successive sets, firstly in August and then in November, 2018.

1) *1st Set of Sanctions* which were re-imposed broadly included limitations on Iran's ability of buying or acquiring US Dollars, trading in gold and other precious metals, trade of aluminum, steel, coal and graphite, issuance of Iranian debt, auto sanctions, moreover, restrictions were also placed upon significant sales or purchase of Iranian rials.[13]

2) *2nd Set of Sanctions* which were re-imposed on 4th November, 2018 and included restrictions on Iran's ports, shipping sector, purchase of petroleum and petroleum-based products, Foreign Financial Institutions ("FIIs") primarily conducting transactions with Central Bank of Iran & other financial institutions, provisions of underwriting services, insurance, financial messaging services to Iran's Central Bank among other limitations.[14]

Immediately post the imposition of the second set of sanctions, the US also placed restrictions on Iran's Energy sector. It primarily disallowed US-owned foreign entities from entering into business with Iran. A few new sanctions were also imposed in addition to the re-imposition of the old ones, according to which the US advanced sanctions against certain companies and individuals suspected of involvement in Iran's Missile Programme and Support for Foreign

[12] *Timeline of Nuclear Diplomacy with Iran*, Arms Control Association (18/11/2018), available at https://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran, last seen on 02/12/2018; Ashish Kumar Sen, *A brief History of Sanctions on Iran*, Atlantic Council (8/5/2018), available at http:/www.atlanticcouncil.org/blogs/new-atlanticist/a-brief-history-of-sanctions-on-iran, last seen on 28/01/2019.

[13] *The return of US Sanctions on Iran: What to know*, Council of Foreign Relations (06/08/2018), available at https://www.cfr.org/article/return-us-sanctions-iran-what-know, last seen on 02/12/2018.

[14] Ibid.

Armed Groups; to be precise 13 people and 12 companies were targeted including groups from the UAE, Lebanon & China.[15] The Trump Administration also announced that any trading partner who engages in trade with Iran will no longer be entitled to trade with the US.[16]

B. Questioning the Legality and Validity of Sanctions Imposed by US

Gholmali Khoshroo, Iran's Ambassador to the UN expressed his disagreement with the legality of the sanctions imposed on Iran. He stated that it was an unprecedented move by a permanent member of the UN Security Council where the entire world was penalised for not violating a Resolution of the UN but for *abiding* by it. Resolution 2231 of the UN was advanced to promote the development of normal economic and trade contracts and cooperation with Iran. However, since the Trump Administration has withdrawn from the JCPOA this resolution stands inexistent. The withdrawal of the US from JCPOA and the re-imposition of sanctions is against the norms of international cooperation, diplomacy and responsibility.[17]

C. Position of International Court of Justice ("ICJ")

The sanctions re-imposed by the Trump Administration and its withdrawal from the JCPOA were challenged by Iran before the ICJ on the ground that they violated the 1955 bilateral treaty between them, with a plea of emergency suspension of the sanctions. The ICJ ordered the US to lift certain economic sanctions impacting the humanitarian goods (life-saving drugs, medicines, foodstuffs, treatments) and civilian aircraft safety. Subsequent to this ruling, US withdrew its consent from 1995 Treaty of Amity with Iran.[18] The US remarked that this decision of re-imposition of sanctions is legal and justified in

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[15] *Trump Administration imposes New Sanctions on Iran*, The Guardian (03/02/2017), available at https://www.theguardian.com/us-news/2017/feb/03/trump-administration-iran-sanctions, last seen on 25/11/2018.

[16] Saeed Kamali Dehghan & Josie Le Blond, *Trade with Iran and you won't trade with US, Trump Warns*, The Guardian (07/08/2018), available at https://www.theguardian.com/world/2018/aug/07/iran-braces-for-new-round-of-us-economic-sanctions, last seen on 28/01/2019.

[17] *Trump's Sanctions against Iran are a Clear Breach of International Law: Gholamali Khoshroo,* The Guardian *(0*8/08/2018), available at https://www.theguardian.com/commentisfree/2018/aug/08/donald-trump-sanctions-iran-international-law, last seen on 20/11/2018.

[18] *Top UN Judicial Body orders US to ease Iran Sanctions*, UN News (03/10/2018), available at https://news.un.org/en/story/2018/10/1022142 , last seen on 02/12/2018.

light of national security and cannot be challenged before the principal judicial organ of the UN i.e. the ICJ. It was also argued by the US that the ICJ had no jurisdiction to rule upon the matter and it was a matter pertaining to national security.[19]

D. Impact of US Sanctions on India

Iran is the 6th largest producer of oil in the world and India is its 3rd largest importer. India relies upon Iran for 17% of its Oil Imports, and as a consequence of the sanctions, India will increase its import from Arab countries to meet its requirements. But according to certain analysts, it is predicted that the Arab countries will be unable to meet the requirements of India and China. In order to implement the sanctions imposed, India will have to divert its resources towards other countries for import of oil which will be a very difficult task.[20]

There is a dual impact i.e. on one side oil prices will increase with the reduction in supply of oil from Iran and on the other hand India has to find an alternative to meet its requirements. China is also a major importer of Iranian oil and has not tried to meet the demands of the US, since it is heavily reliant upon Iran and vice-versa. Therefore, Iran is emerging as an area of Chinese infrastructure investments. 80% Contractors and sub-contractors in oil and gas industry are either American or have an American base. Any sanction against Iran will have a ripple effect on the entire business.[21]

Under the present sanctions, among Iran's exports of condensates, a light form of crude extracted from gas fields is also included which was not covered previously. Iran's biggest importer South Korea discontinued its imports of crude and condensate and similar is the position of the UAE and Japan. In the case of India and China, in both of these countries no cut in imports has been effected as of August, 2018 and in fact, India has increased its imports and a majority of

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[19] RFE/RL, *Reimposition of Iran sanctions are legal, justified, US tells UN Court,* Radio Free Europe Radio Liberty (28/08/2018), available at https://www.rferl.org/a/reimposition-of-iran-sanctions-are-legal-justified-u-s-tells-un-court/29457678.html, last seen on 01/12/2018.

[20] Richa Mishra, *India to US Sanctions against Iran Oil Imports will have a ripple effect on energy value chain*, Business Line (30/07/2018), available at https://www.thehindubusinessline.com/economy/macro-economy/india-to-us-sanctions-against-iran-oil-imports-will-have-a-ripple-effect-on-energy-value-chain/article24555853.ece, last seen on 28/01/2019.

[21] Ibid.

them are being stored at Mangalore.[22] However, the Hindustan Petroleum in particular is very unlikely to carry on import activities with Iran unless India has obtained an exemption from the US.[23]

In July 2018, a meeting between the Indian Foreign Secretary Mr. Vijay Ghokale, and his Iranian counter part Mr. Seyyed Abbas Araghchi was organized which resulted in an agreement between them to explore alternatives to continue oil trade relations between India and Iran in view of the sanctions imposed by the US. According to expert opinion, a crisis is awaiting West Asia if Iran fails to maintain its oil exports. Over the course of the meeting, both the States have decided to maintain the progress of the Chabahar Port Project and also build a partnership to collectively act in areas of counter-terrorism.[24]

These Sanctions will majorly impact the oil prices in India, as Iran is the 3rd Largest Export of oil and restrictions upon the same will lead to an increase in the prices, thereby leading to inflation and rise in the value of the Indian Rupee.[25] Another major setback for India would be the functioning of the International North South Corridor, since India is the founder of the same and these sanctions will adversely impact the functioning if the States in the route decide to be bound by the re-imposition decision of Trump Administration.

E. European Union's step towards a Way Out

The Foreign Policy Chief of EU, Federica Mogherini, stated that a legal entity i.e. a Special Purpose Vehicle ("SPV") will be set up to facilitate legitimate financial transactions with Iran allowing the European Companies to conduct

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[22] Julian Lee, *US Sanctions on Iran Oil will hurt India more than you think*, Economic Times (12/08/2018), available at https://economictimes.indiatimes.com/markets/commodities/views/us-sanctions-on-iran-oil-will-hurt-india-more-than-you-think/articleshow/65374517.cms, last seen on 01/12/2018.

[23] Ibid.

[24] Dipanjan Roy Chaudhury, *India & Iran discuss possible impact of US Sanctions on Bilateral Oil Trade*, The Economic Times (16/07/2018), available at https://economictimes.indiatimes.com/industry/energy/oil-gas/india-iran-discuss-possible-impact-of-us-sanctions-on-bilateral-oil-trade/articleshow/65012800.cms, last seen on 01/12/2018.

[25] Suhasini Haidar, *5 Ways India could be affected by the US Decision to withdraw from Iran Nuclear Deal*, The Hindu (09/05/2018), available at https://www.thehindu.com/news/national/5-ways-india-could-be-affected-by-the-us-decision-to-withdraw-from-iran-nuclear-deal/article23820123.ece, last seen on 01/12/2018.

trade in consonance with EU Law and this will also aid other partners in the world. This decision was made as a result of a meeting between China, France, Germany, Russia, UK and Iran, who, through a joint statement also stated that they will abide by the JCPOA and will work towards its effective implementation.[26]

In furtherance of the EU's commitment to preserve the principles consented under the JCPOA, it has replaced the Annex to Council Regulation (EC) No 2271/96 i.e. the Blocking Regulation. Under the Blocking Regulation of EU, a national of an EU Member State or a legal person incorporated within the European Union who suffers a detriment as a result of another legal person in the EU complying with the U.S. measures, may seek recovery of damages arising from that legal person.[27]

The Way Forward

The UN Security Council i.e. the principal executive organ of the UN has been conferred with the authority under Chapter VII of the UN Charter to interfere in case there is a threat to peace, security or aggression. The UN Security Council has time and again issued sanctions on behalf of States and compelled implementation of such sanctions by the States. However, organs of the UN have been unable to formulate particular standards or procedure to identify the implications of such limitations. Moreover, the UN Security Council has also miserably failed to identify and take cognizance of the adverse impact on the population of the target States. As far as the sanctions imposed by the US are concerned, they were initially adopted with the motive to induce cessation of support extended by Iran towards terrorism and to limit the strategic power and imposition of sanctions was used as an alternative to coercive means. However, the authorities are missing the bigger picture and the ripple effect it has been causing to the economy across the globe.

The sanctions imposed by the US on the oil industry, according to Oxford Economics Analysts, are likely to send Iran into recession. Since, the oil industry

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[26] *Special Purpose for Iran-EU Trade before November*, Financial Tribune (28/09/2018), available at https://financialtribune.com/articles/economy-domestic-economy/94099/special-purpose-vehicle-for-iran-eu-trade-before-november, last seen on 01/12/2018.

[27] IGP&I, *Re-Imposition Of US Nuclear Related Sanctions*, International Group of P & I Clubs (26/11/2018), available at https://www.Igpandi.Org/Article/Re-Imposition-Us-Secondary-Sanctions-Targeting-Iran-May-2018, last seen on 30/11/2018.

is the hallmark of Iran and forms a substantial portion of its GDP,[28] it eventually leads to placing individuals in a state of insecurity and instability. Since the target industries are the primary source of GDP these sanctions are very severe in nature.

The consequences of economic sanctions are far-reaching and an example of the same would be the impact of sanctions imposed on Iran and their effects on India. In addition to the same, it may also impact India's participation in the Shanghai Cooperation Organization since the Chinese Officials are considering making Iran a member of the organization. If the move goes through, it may be construed as anti-American.

The frequent use of economic sanctions as a tool by the powerful states to coerce weaker states to abide by certain standards of conduct might defeat the essence of the UN Charter i.e. promoting the use of non-coercive methods of settlement of International relations. There is a need to analyse the consequences of the sanctions being imposed both upon the states as a whole and on individuals and to adopt them as a last resort and not without adequate analysis and planning.

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[28] *Sergio R. Bustos, US Imposed Sanctions On Iranian Oil Industry Will Cripple Iran's Economy Report Says, USA Today (29/08/2018), available at https://www.usatoday.com/story/news/world/2018/08/29/trump-sanctions-oil-industry-cripple-irans-economy-report/1132277002/, last seen on 30/11/2018.*

Constitutional Dimensions of Mining

Saranya Mishra
V BA.LL.B.

Introduction

Mineral resources are the material foundation for human survival and development and play a vital role in the progress of the society. The mining industry has been central to the development of civilisation, right from the iron and bronze ages, through the industrial revolution, to the current day. There is no doubt that it has huge potential to contribute to the economy and boost economic indicators. The race to tap the full potential of the sector, to further economic interests, has resulted in reckless exploitation of natural resources; through setting up of public-private partnerships or joint ventures, since they allow profit-sharing, in addition to royalty collection[1].

Currently, indiscriminate mining is not only depleting the non-renewable natural resources but also causing significant environmental, health and social repercussions to the country.

This paper deals with the relevant constitutional provisions and the mandate contained therein to protect, preserve and conserve the environment; in light of rights such as the right to employment/work, the right to preserve culture and protection of the interests and rights of indigenous persons and tribes, including Scheduled Tribes. It also briefly addresses the international law in this respect for the domestic constitutional imperative.

Definition and Methods of Mining

Mining is the removal of minerals from the Earth's crust in service of man.[2] There are three basic methods of mining :

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[1] *Mining in Bellary: A Policy Analysis*, Association for Democratic Reforms, available at https://adrindia.org/sites/default/files/EPW_Mining_Article.pdf, last seen on 02/02/2019.

[2] *Extraction of Resources*, Lumen Geology, available at https://courses.lumenlearning.com/wmopen-geology/chapter/outcome-extraction-methods/, last seen on 02/02/2019.

1) Surface mining through open pits and quarries or by digging the mine open. This is the most used method of mining and involves removal of top soil up to the bedrock bearing the mineral so as to extract it.

2) Underground mining, through shafts and tunnels. This is usually undertaken when the mineral is deep below the surface of the earth. Draft mining, hard rock mining and slope mining are all classified as underground mining.

3) Some rather unconventional methods of mining are underwater mining, dredging and extracting minerals and fuel through boreholes.

Mining activities have a multifarious effect, not only on the land, but also on the water and air surrounding the site and the wildlife in the vicinity. Since mining activities are usually located in rural and mountainous areas, the health of the people inhabiting the areas near the mines is adversely affected and there are also ramifications on farmlands, rivers and shorelines. In case of rehabilitation, there is the rather permanent issue of displacement and ensuring resettlement with fair compensation, resultant unemployment and social divide that ensues therefrom. The most affected class of persons are usually the farmers, indigenous people and municipal fishermen.

Mining in India

In India, mining activities have been documented in the Vedas and the Arthashastra, especially mining of copper[3] and continue to hold significance even today. Mining is done largely to reap economic benefits, given that the mining sector has been a significant contributor to the economy.[4] In fact, India is the largest producer and exporter of mica, the second largest producer of barites and the third largest producer of coal. However, being the largest producer is matter of geographical distribution of natural resource, which is neither manmade nor an inherent matter of right, which only insists that minerals and related natural resources must not be mindlessly extracted but instead preserved.

[3] *Mining of Copper in Ancient India*, Indian National Science Academy, available at https://www.insa.nic.in/writereaddata/UpLoadedFiles/IJHS/Vol34_3_1_RShrivastva.pdf, last seen on 02/02/2019.

[4] *India GDP from Mining*, Trading Economics, available at https://tradingeconomics.com/india/gdp-from-mining, last seen on 02/02/2019.

As far economic measures of growth like GDP are concerned, the accelerated growth of GDP cannot coexist with ecologically inclusive growth. Taking into consideration both extremes, development and environment, the Supreme Court has advocated 'sustainable development' to balance development with protection, wildlife ecology and environment. In the words of the Hon'ble Supreme Court:

> *"Indian Society has, for many centuries, been aware and conscious of the necessity of protecting environment and ecology. Sages and Saints of India lived in forests. Their preachings contained in Vedas, Upanishads, Smiritis, etc. are ample evidence of the society's respect for plants, trees, earth, sky, air, water and every form of life. The main motto of social life is to live in harmony with nature. It was regarded as a sacred duty of everyone to protect them. In those days, people worshiped trees, rivers and seas which were treated as belonging to all living creatures. The children were educated by elders of the society about the necessity of keeping the environment clean and protecting earth, rivers, sea, forests, trees, flora and fauna and every species of life."*[5]

Constitutional Aspects

The constitutional aspects related to mining can be divided into four parts, in light of judicial pronouncements.

A. Mineral exploitation and resource depletion, in light of Art. 21, 48A and 51A(g)

Mining, without much exaggeration, poses diverse environmental problems, right from soil erosion due to vegetation and topsoil removal to deforestation and ecological imbalances and consequently, environmental damage. Therefore, preservation of forest, flora and fauna is necessary for human existence. There is further damage caused by virtue of corporations not adhering to pollution guidelines and using pollution control devices.

As regards the constitutional framework for protection of environment, Art. 21, 48A and 51A(g) are of utmost importance. A constitutional duty is cast on the State under Art. 48A to protect and improve the environment and to safeguard

[5] Vishnu Kumar Singhal v. State of Rajasthan, D.B. Civil Writ Petition No. 224 of 2010 (Rajasthan High Court, 25/07/2011).

the forests and wildlife, while Art. 51A(g) provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. The trio read together, reinforce the international commitment made at the Stockholm Conference[6] and emphasise the need to protect, preserve and improve the environment for assertion of right to life. The Hon'ble Supreme Court has observed that:

> *"Environment and ecology are national assets. They are subject to intergenerational equity. Time has now come to suspend all mining in the above area on sustainable development principle which is part of Articles 21, 48-A and 51-A(g) of the Constitution of India. In fact, these articles have been extensively discussed in the judgment in M.C. Mehta case [M.C. Mehta v. Union of India, (2004) 12 SCC 118] which keeps the option of imposing a ban in future open."*[7]

A few more Supreme Court judgements in this context, which affirm and strengthen the constitutional mandate, are as follows:

1) In *Tarun Bharat Sangh, Alwar* v. *Union of India*[8] Supreme Court dealt with mining operations carried out under a license granted by the State Government, which impaired the environment and wildlife within the Sariska Tiger Park (in Alwar District of State of Rajasthan), declared by notifications as a reserve forest, game reserve and sanctuary. Statutory notifications were also violated. The Apex Court constituted a Committee to ensure enforcement of the State notifications and orders of the Court, while also issuing orders prohibiting mining operations in the protected area. It also laid down that mining rights are not private rights in or over the forest land.

2) In *M.C. Mehta* v. *Union of India*[9], the Apex Court directed the monitoring Committee to inspect the mining activity being carried on in the area in question and report the impact, if any, of continuing mining activity on the environment and the safeguards, if any, required to be

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[6] United Nations *Conference* on the Human Environment, 1972.

[7] M.C. Mehta v. Union of India, (2009) 6 SCC 142. See also T.N. Godavarman Thirumulpad v. Union of India, (2009) 6 SCC 142.

[8] 1992 Supp (2) SCC 448.

[9] (2006) 11 SCC 582.

adopted, so as to minimise the adverse effects on the environment; along with other suggestions relevant to the issue of impact of mining activity on degradation of the environment.

3) In *T. N. Godavarman Thirumulpad* v. *Union of India*[10] Supreme Court dealt with mining activity in the Aravalli Hills, especially in that part which can be regarded as forest area or protected under the Environment (Protection) Act, 1986. Such activity was prohibited and banned by the Apex Court. The Court held that when the mining leases were granted, requisite clearances for carrying out operations were not obtained, resulting in land and environmental degradation.

On the international law landscape, the Convention on Biological Diversity, 1992 was adopted at the Earth Summit, which highlighted the need to preserve and maintain the knowledge, innovation and practices of local communities relevant to conservation and sustainable use of biodiversity. The Rio Declaration on Environment, Development Agenda 21 and the Forestry Principles encourage the promotion of customary practices conducive to conservation.

Adherence to the principle of sustainable development is recognised as a constitutional requirement. Sustainable development is very closely related to the inter-generational principles and contemplates meeting the needs of the present, without compromising ability of the future generations to meet their own needs. Thus, a balance needs to be struck between development and protection of environment and ecology. This is the constitutional duty of the State, and the same can be achieved by devising and implementing a coherent and coordinated programme to execute the said obligation.[11]

B. Rights of indigenous people under Art. 29 and Fifth and Sixth Schedule

India is a nation with heterogeneous population, not only in terms of financial parity and religion, but also in terms of culture and tribes. The tribal population which amounts to 104 million people as per 2011 Census, accounts for roughly 8.6 per cent of the total population of India. There are 573 tribes which are

[10] (2009) 17 SCC 764.

[11] A.P. Pollution Control Board v. Prof. M.V. Nayudu, (1999) 2 SCC 718.

recognised as Scheduled Tribes and they have certain special rights and benefits. Despite such constitutional safeguards, tribals are largely unaware of their rights, which is also attributable to their isolation from society as we know it.

Mines and minerals are largely concentrated in the highlands and forests, most of which have remained untouched commercially. Thus, such regions are some of the most impoverished regions, often with limited or no electricity supply, water supply or basic government sanitation facilities and have been traditional habitats of the tribal population. As noted by Supreme Court in *Samatha* v. *State of A.P.*[12],

> *"Land is (Scheduled Tribe's) most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. ... [Consequently], the tribes too have great emotional attachment to their lands."*

Sadly, the forest as well as the tribal occupied area is shrinking, and the process is being speeded up by mining, since corporations are on a constant look out for unexploited virgin mines. As per Amnesty International, one in six of the 87,000 Indians who have been displaced over the past 40 years by the state-owned Coal India Ltd (CIL) is Adivasi[13]. This influx of commercialisation is not only averse to the way of life of tribals, but also completely ignorant of their culture and beliefs. There is also a practice by the wealthy headmen to lease tribal land to mining corporations. Niyamgiri bauxite mining is the most apt illustration of such a situation; however, it is not in all such cases that the Courts are approached and even when they are, the litigation is rather prolonged.

The tribal population, irrespective of special protection accorded to Scheduled Tribes, is also entitled to rights as a minority under Art. 29 of the Constitution of India, as long as they have a distinct language, script or culture.

In addition to Art. 29, there is also the Preamble, which promises social equality and justice. The concept of social justice is essentially meant for orderly growth and development of the personality of every citizen. It engulfs diversified concepts. Though it was originally a doctrine of social construct, it has been at

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[12] (1997) 8 SCC 191.

[13] *India's coal mining ambition hurts indigenous group, Amnesty says*, Reuters, available at https://in.reuters.com/article/india-coal-displacement-tribals-mining/indias-coal-mining ambition-hurts-indigenous-group-amnesty-says-idINKCN0ZT0YP, last seen on 02/02/2019.

the helm of social welfare throughout the Constitution.[14] Apart from that, there are also various Articles of Part IV of the Constitution i.e. Directive Principles of State Policy.

In addition to the above stated general constitutional provisions, Art. 244(1) read with the Fifth Schedule provides for the administration of the Scheduled Areas and Scheduled Tribes in States other than Assam, Meghalaya and Tripura. Art. 244(2) provides for the Sixth Schedule which applies to the tribal areas in Assam, Meghalaya, Tripura and Mizoram. The law in spirit is to "preserve the tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and good governance in the scheduled area".[15] As an additional safeguard, the Central Government appointed the Bhuria Committee to undertake a detailed study and make recommendations as to whether the Panchayat Raj system could be extended to Scheduled Areas. Based on the 1995 report that favoured democratic decentralisation in Scheduled Areas, provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, was enacted by Parliament, extending the provisions of Part IX of the Constitution relating to panchayats to the Scheduled Areas.

On the international law landscape, International Labour Organisation Convention on Indigenous and Tribal Populations Convention, 1957, the ILO Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 and the United Nations Declaration on the Rights of Indigenous Peoples, 2007 set forth "the rights of indigenous and tribal populations which emphasised the necessity for the protection of social, political and cultural rights of indigenous people". The 2007 Declaration also necessitates "respect for and promotion of the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories".

C. Constitutionally protected rights, such as right to work under Art. 19(1)(g)

Mining when undertaken illegally or in contravention of the right to clean and safe environment, cannot be deemed to be protected by virtue of Art. 19(1)(g). Restriction may be imposed on the right under Art. 19(6), and the same shall be valid if it is reasonable and in the interest of general public.

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[14] R.G. Chaturvadi, *Natural and Social Justice*, 405 (2nd ed., 1975).

[15] Orissa Mining Corpn. Ltd. v. Ministry of Environment & Forests, (2013) 6 SCC 476.

It can be argued that in a tussle between the right to carry on mining activities and the right to environment, it would be the right to environment which would prevail in light of general public interest, despite the economic gains from mining; if the mining so done is in glaring contradiction of the settled principles of environmental law and most of all, the notion of sustainable development. In this context, the Supreme Court has observed as follows:

> *"...rights of the petitioners to carry on mining operations are subjected to the directives under Art. 48A and fundamental duties enshrined under Art. 51A (f) and 51A(g) which are also supreme and cannot be violated under the guise of rights under Art. 19(1)(g). Thus, it cannot be said that there is any violation of the rights of the petitioners rather their action to carry on mining activities in such circumstances may cause damage to the rich heritage of our composite culture and natural environment including forests, lakes, rivers etc."*[16]

D. Collusive corruption

The current mining industry is a departure from the exclusive control of state-owned corporations and being public sector prerogative, which further threatens the protection and conservation of natural resources, including minerals. Nonetheless, it is not entirely privatised and still qualifies as 'State' under Art. 12 of the Constitution, the employees therein being largely public servants. A public servant is entrusted with higher responsibilities of a public office and they contribute their best for the just and humane society and should be a guardian of morals. Supreme Court in this regard observed:

> *"If the public servant indulges in corruption, the citizens who are vigilant in all aspects take note of this seriously and develop a sense of distress towards the Government and its mechanism, on a whole it sends a very alarming message to the society at large and to the common man in particular. In any civilised society, the paramount consideration is the welfare of the society and corruption is the biggest hindrance in that process. If the corrupt public servant is not punished, then it will have a negative impact on the honest public servants who will be discouraged and demoralised. Some*

[16] Supra 5.

> *upright officers resist corruption but they cannot alone change the system which victimises them through frequent punitive transfers, threat to their families and fabricating, foisting false cases."*[17]

Corruption and dishonesty pose grave danger to the concept of constitutional governance, the Indian democracy and the rule of law[18]. It is also incompatible with the concept of a socialist secular democratic republic.

Conclusion

In India, mining most affects the vulnerable sections of society, whose lands and forests are acquired without proper resettlement or due compensation and are extensively exploited to the point of destruction, *inter alia* rendering the land unproductive for cultivation, unsafe for cattle grazing. While there is awareness of the principles of sustainable development, more often than not, they are not applied in reality.

It is safe to conclude that the compounding environmental and health costs and damages of mining activities far outweigh their economic and social benefits, the magnitude of which cannot be quantified. Mining is an important revenue-generating industry, however one cannot allow national assets to be placed into the hands of companies without a proper mechanism in place and without ascertaining the credibility of the user agency.

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[17] Ram Lakhan Singh v. State of U.P., (2015) 16 SCC 715; See also Sanjiv Kumar v. State of Haryana, (2005) 5 SCC 517; State of A.P. v. V. Vasudeva Rao, (2004) 9 SCC 319; Shobha Suresh Jumani v. Appellate Tribunal, (2001) 5 SCC 755; State of M.P. v. Ram Singh, (2000) 5 SCC 88; J. Jayalalitha v. Union of India, (1999) 5 SCC 138; Major S.K. Kale v. State of Maharashtra, (1977) 2 SCC 394.

[18] Subramanian Swamy v. Manmohan Singh, (2012) 3 SCC 64.

Character Copyrightability: The Pros, the Cons and Everything in Between

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Introduction

Books have had a place in Man's life since the development of writing itself. With the passage of time, books have become more than just recording devices and with advancements in society, literature and writing styles, fictional characters have also developed. Characters created in contemporary works like Harry Potter, Marvel Comics, and Game of Thrones as well as those like James Bond, who have been in vogue for a considerable length of time, hold a special place in the hearts and minds of both the author and the ultimate reader. However, characters populating existing literary catalogues are a constant source of creative inspiration for other authors as well. While the position of the copyrightability of works of literature is well established, the question that then arises is, whether fictional storybook characters can come within the scope of intellectual property and the rights that it seeks to protect.

The Development of Jurisprudence Concerning Character Copyrightability

Definition of "Character"

A character is said to actually consist of two separable and legally dissimilar parts: character name and a set of physical attributes and personality traits sometimes called a characterization or personality portrait.[1] Almost no judicial cases dealing with the protection of a literary or cartoon character have stripped away the name of the character and separately examined the legal basis for protecting the characterization alone. Instead, the cases seem to assume that

[1] E. Fulton Brylawski, *Protection of Characters – Sam Spade Revisited*, 22 Bulletin of the Copyright Society of the U.S.A. 77 (1974-1975).

characterization is merely an inseparable component of what is called a character.[2] While characters are generally entitled to copyright protection, three distinct characteristics determine a character's copyrightability: its name, its visual appearance, and its personality traits.[3]

When analysing character characteristics, Courts must balance between setting too low a copyrightability threshold permitting authors to copyright common character types like heroes or villains, and setting the bar too high precluding authors from copyrighting even the most novel characters.[4] The issue of character appropriation also highlights the idea/expression dichotomy. Literary characters exist on a continuum. At one end, they may be under-developed, stock characters (villains, heroes, detectives) who are not much more than stereotypical ideas/vague concepts. At the other end, they may be extremely complex, highly developed creative expressions. At what point on the continuum should copyright law step in and how are courts supposed to apply the applicable tests for both copyright subsistence and infringement?[5]

Courts have consistently followed two tests for this purpose,

1) Character Delineation Test

2) Story Being Told Test

I. Character Delineation Test

It is when particular talents and traits can be deemed to be expressive elements as opposed to mere themes or ideas, that the character can be provided protection. In the 1930 case of *Nichols* v. *Universal Pictures*,[6] the Ninth Circuit employed the "*sufficiently delineated*" test. In his opinion, Judge Learned Hand warned that, "*... the less developed a character in a play is, the less it can be copyrighted; that is the penalty an author must bear for marking them too indistinctly*."

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[2] Ibid.

[3] Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 Copyright Law Symposium (1980).

[4] Mark Bartholomew, *Protecting The Performers: Setting A New Standard For Character Copyrightability*,

41 Santa Clara Law Review 341, 343 (2001).

[5] Jani McCutcheon, *Property in Literary Characters - Protection under Australian Copyright Law*, 4 European Intellectual Property Review, 29, 140-151 (2007).

[6] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

Thus, Judge Hand offered the possibility that, independent of the plot, copyright law could protect fictional characters if they were distinctly delineated. A two-part test, it asks if, firstly, the original character's expression is sufficiently delineated to be copyrightable. Secondly, is the infringing character's expression substantially similar to the original character? If the answer to both the questions is yes, then the court will find a reason for infringement.[7] It, therefore, becomes abundantly clear that, if a fictional character is no more than a "*stock character*", it would lack the novel qualities required for copyright protection separate from the work in which it appears.[8]

However, one of the practical problems with the "distinctly delineated" test is that it requires judges to assume the role of literary critics in their analysis of characters[9] and results in isolation of the character and disregards the importance of context. Further, the entire process of characterization or delineation becomes more elusive, with a well-crafted character revealing himself or herself through layers of incidents, interaction with other characters, responses to situations, and their relationship to other stimuli.

II. Story Being Told Test

Another well-known judicial test for the copyrightability of characters is the "story being told" test that originated in the Second Circuit in 1954. In *Warner Bros. v. Columbia Broadcast Systems* (Sam Spade Case),[10] the court held that, "*It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.*"

While some Courts have held that the test in *Warner Bros* is dictum and have declined to follow it, other Courts have argued that the "story being told test" is applicable only in the case of literary characters and not in the case of visual

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[7] David B. Feldman, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 California Law Review 687 (1990).

[8] Gregory S. Schienke, *The Spawn of Learned Hand - A Re-examination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told?* 9 Intellectual Property Law Review 63 (2005).

[9] Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 Wisconsin Law Review 429.

[10] Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc., 216 F.2d 945 (9th Cir. 1954).

characters.[11] On the other hand, some Courts have subjected characters to both the tests. In *Anderson* v. *Stallone*,[12] the court held that the characters from the first three films from the *Rocky* motion picture series were among the most highly delineated characters in modern American cinema, and were *so highly developed* and central to the films that they constituted *the story being told*. Subsequent courts and commentators have, however, claimed that the *Sam Spade* Case sets the bar for copyrightability so high that it effectively denies any character's independent protection,[13] and that it is *"much too restrictive"*.[14]

It can also be observed from established case law that those characters that have made multiple appearances and are a significant part of popular culture have a higher chance of gaining protection. This is because the multiple appearances aid in delineating a character's qualities to a greater extent. This can be seen impliedly in the judgment of the *James Bond case*.[15] Some commentators have deemed this to be a third kind of test; the '*accretion test'*, where, characters who were perhaps insufficiently distinctive when they first appeared on the page, might become so as the public becomes more and more aware of the characters' defining traits and habits by way of sequels.

As far as Indian jurisprudence on the subject is concerned, the case laws are scant, with Courts impliedly establishing that literary characters can be protected under Indian Law.[16] In the case of *Raja Pocket Books* v. *Radha Pocket Books*,[17] the Delhi High Court set a dangerous precedent by directly jumping into a comparative analysis, instead of first ascertaining whether the character of "*Nagraj*" does indeed deserve protection. Further Indian Courts

[11] Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972).

[12] Anderson v. Stallone, 11 USPQ 2d. (C.D. Cal. 1989).

[13] Dorothy J. Howell, *Intellectual Properties and the Protection of Fictional Characters: Copyright, Trademark, or Unfair Competition?* (1990).

[14] M. B. Nimmer and David Nimmer, *Nimmer on Copyright* (2d ed., 2010).

[15] Metro-Goldwyn-Mayer v. American Honda Motor Co, 900 F. Supp. 1287 (C.D. Cal. 1995).

[16] V.T. Thomas v. Malayala Manorama, AIR 1989 Ker 49.

[17] Raja Pocket Books v. Radha Pocket Books, 1997 (40) DRJ 791.

seem to have also followed the '*Story Being Told'* test, rather than the delineation test, where they have looked into whether the character serves as a 'vehicle' of the whole story.[18]

The Uncertainties Involved in Providing Copyright Protection to Fictional Literary Characters

Despite Courts laying down the criteria for granting copyright protection to characters the law in the area still remains quite inconsistent and quixotic. The reason why characters are individually given copyright protection is to ensure that no other person can pick up those characters and use them independently of the work in which they originally appear. In the absence of such protection, the author of the latter can very easily claim the defence of a derivative work, since the only similarity between the two, is then only the character.[19]

Literature, however, can show how copyright protection for characters is problematic in primarily three ways: how much of the character is protected, which characters are protected and whether the characters should be protected at all if they are not "fixed" for the purposes of copyright law.[20]

Fixation and Character Entanglement

The problem that arises is as to how much of a character can be protected. The question that must be answered is where the text of the literary work leaves off and where the character begins. One possible way of answering it is determining the extent to which a character can be separated from their surrounding work.

Literary texts show us that character representation has evolved a great deal over time. Various techniques have resulted in highly complex–narrative forms, such as interior monologue, stream-of-consciousness, or free-indirect style which make it much more difficult to disentangle characters from their texts.[21] For example, first-person narration blurs the boundaries between character and text.[22] Applicability of the copyright law to determine which parts of the text

[18] Arbaaz Khan Production Private Limited v. NorthStar Entertainment Private Limited and Ors., 2016 (3) ABR 467.
[19] Supra 7.
[20] Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 Cardozo Law Review 769, 786 (2013).
[21] H. Porter Abbott, *The Cambridge Introduction to Narrative* (2d ed., 2008).
[22] Supra 20.

ought to be associated with certain characters for the purposes of independent character protection in substantial similarity analysis appears to be an improbably difficult task.[23]

In light of the same, it becomes important to understand the distinction that literature draws between two kinds of character forms; flat and round. Flat characters are defined as personalities constructed around a single idea or quality. Such characters remain comfortingly similar despite changes in their circumstances. On the other hand, round characters, by contrast, are unpredictable, difficult to summarize or recognize at a glance. Characters such as these strike readers as more surprising, more complex and more human. They are harder to fix in the mind, and harder to remember because they evolve throughout their works.[24] In such circumstances, therefore, "fixation" of the character does not meet the threshold of copyright protection and in some cases, there may be no fixation at all.

The problem of character entanglement has to a certain extent been recognized by Courts as well. In the case of *Salinger* v. *Colting*,[25] the Court noted the problem in passing, "*It is difficult, in fact, to separate Holden Caulfield from the book.*"

On similar lines, in the case of *Gaiman* v. *McFarlane*,[26] the Court determined the copyrightability of the character by stating that, "*Although Gaiman's verbal description of Cogliostro may well have been of a stock character, once he was drawn and named and given speech, he became sufficiently distinctive to be copyrightable*."

In this case, a possible question that can be asked is as to where the character of Cogliostro begins and where the literature of the work, in terms of his speech, begins. In the event that his speech remained a part of the work, incapable of being separated, he would remain a stock character for the purposes of copyright law and thus could not avail of copyright protection. So, it is imperative to understand the difference of characters from other literary works.[27]

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[23] Ibid.

[24] Ibid.

[25] Salinger v. Colting, 607 F.3d 68, 73 (2d Cir. 2010).

[26] Gaiman v. McFarlane, 360 F.3d 644 (3d Cir. 2004).

[27] Francis M. Nevins, Jr., *Copyright + Character = Catastrophe*, 39 Journal of the Copyright Society of the U.S.A. 303 (1991-1992).

Word Portraits and Graphic Characters

It has also been observed that unlike characters that have been represented visually, such as in movies, cartoons, or comic books, literary characters are less likely to be afforded such protection, as the *Sam Spade* case[28] demonstrates. Thus, Courts have been more lenient in protecting characters that have some kind of tangible visual elements than in protecting literary characters, whose image relies solely on the imagination of the human mind.[29]

The significant distinction between graphic and verbal renditions of a figure is that in the visual media we can isolate a particular arrangement of lines and colours and call it Donald Duck, but we cannot do the same with mere words.[30] However, a view in support of the copyrightability of graphic characters *vis-à-vis* word portraits is the tendency and urgency with which one character may be distinguished from another. A classic example is that of Burroughs's *Tarzan* and Rudyard Kipling's *Mowgli*. The stories are similar not only for the superficial similarity of their characters – one raised by wolves, the other by apes – but for a shared skeptical attitude toward the benefits of civilization. Both can, and are, read as children's tales and as allegorical treatments of colonialism.[31] Yet no one would mistake *Tarzan* with *Mowgli*; the Indian wolf-boy, is instantly recognizable as a completely different person from the ape-man. This is primarily due to the difference in their appearance.

The Status of Fan Fiction under Copyright Law

Definition of Fan Fiction

Fan fiction, just as the name suggests, is a story created by a fan which typically focuses on television shows, books, and movies. These prose stories take the characters of the original work and place them in new situations, either within the setting of the original or in alternative settings where the characters are recognizable as the same individuals but have different occupations, relationships,

[28] Supra 10.

[29] Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940).

[30] Ibid.

[31] Aaron Schwabach, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (1st ed., 2016).

or lifestyles. While fan fiction may infringe on the content owners' copyright and trademark rights, the fans that create and share it are the biggest and, for some genre works, very nearly the only, market for the owners' works.[32]

With the advent of the internet authors of fan fiction, it can now reach relatively larger audiences, particularly with websites that are dedicated to specific shows and movies. While fan fiction for public domain works does exist (there is fan fiction for some of Shakespeare's plays, for instance), the works that inspire the most fan fiction tend to be multi-part books, films, and television shows that are often in the aforementioned sci-fi and fantasy genres and remain highly lucrative. While most authors and content owners may possibly be unperturbed with fan fiction, certain developments can upset such easy accommodation.[33] An example would be of *slash*; where characters from the original work are used by the fans in romantic and/or erotic situations. While this makes little sense in copyright terms, it does make sense in trademark terms. Trademark law protects some marks, those deemed "famous" rather than merely "distinctive", from tarnishment, even when there is no likelihood of confusion.[34]

Fan fiction, can, in most cases be called a derivative work. Derivative works have been defined as, contributions of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work.[35] Fans frequently make two assertions about why fan fiction is or should be legal. They first point out that fan fiction is non-commercial. Secondly, fans often claim that their work is sufficiently transformative to be considered fair use. A work is transformative when the new work does not merely supersede the objectives of the original creation but rather adds something new, with a further purpose or different character.[36]

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[32] Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan fiction, Outsider Works, and Copyright*, 70 University Pittsburgh Law Review 387 (2008-2009).

[33] Jane M. Becker, *Stories Around the Digital Campfire: Fan Fiction and Copyright Law in the Age of the Internet* , 14 Connecticut Public Interest Law Journal 133 (2014-2015).

[34] Supra 31.

[35] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.

[36] Syndicate of The Press of the Universtiy of Cambridge on Behalf of the Chancellor, Masters and School v. B.D. Bhandari & Anr., 185 (2011) DLT 346.

Conclusion

Even though fictional characters have enjoyed steadily increasing copyright protection, the uncertainty of fictional characters' status in the copyright community has led to a patchwork legacy of confusing doctrine and the misapplication of alternative rationales.

Recalibration of copyright protection for independent characters is therefore necessary and could come in a number of forms, all of which could conceivably ease the problems in copyright doctrine that literary considerations highlight. Answers to copyright's current confusion could address the convergence of trademark and copyright; the implications of the character entanglement and authorial style problem; the lack of medium neutrality in copyright's preference for the visual over the verbal; the inconsistency bedeviling the threshold tests for character copyrightability; or the fixation dilemma raised by verbal characters who require mental "completion" by readers. As is often suggested, copyright law could possibly look to trademark law which as in its own way internalized 'distinctive' as a term of art and established tools and doctrines for identifying it. Other commentators have also suggested a mixture of the two in the form of a 'copy mark', which would be another step towards recognizing the value of characters separate from any single creative work.

Award of Interest by an Arbitral Tribunal – An Analysis of Jurisprudential Trends

Sharanya Shivaraman
V BA.LL.B.

Introduction

Award of interest is a crucial aspect of International Commercial Disputes. The quantum and basis for awarding interest has been called into question frequently before Tribunals and Courts. The Supreme Court recently decided the case of *Vedanta v. Shenzen Shandong Nuclear Power Corporation*[1] which lays down guidelines for the award of 'interest' by an Arbitral Tribunal. The Indian arbitration regime is influenced by a pro-arbitration policy and it is imperative for Courts to maintain an arm's length distance with the decision-making process of the Arbitral Tribunal. The Arbitration and Conciliation Act, 1996 (the Act) provides specific opportunities for the parties to invite the intervention of the Courts, where necessary.

An attempt has been made to analyse the assistance provided by Courts on the issues arising from award of interest in arbitral proceedings. The Article is divided into two parts; while the first part deals with the award of interest *pendente lite,* the second part deals with the award of interest on conclusion of proceedings.

Award of Interest *Pendente Lite*

The award of interest *pendente lite* by the arbitrator has been the subject of substantial judicial debate and reasoning and the position of law on this point still remains unsettled. Two varying judgments of the Supreme Court in this regard, have contributed to a complex and tangled line of jurisprudence.

In the case of *Shri Chittranjan Maity v. Union of India,*[2] the Supreme Court relying on S. 31(7) (a) of the Arbitration and Conciliation Act, 1996, held that an

[1] Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Company Ltd. Civil Appeal No.10394 of 2018 arising out of SLP (Civil) No. 25819 of 2018 (Supreme Court, 11/10/2018).

[2] Chittaranjan Maity v. Union of India, (2017) 9 SCC 611.

arbitrator cannot grant interest for the period between the date of cause of action and the date of award, if the parties by an agreement had resolved that interest shall not be payable. However, the Supreme Court passed a contrary judgment in the case of *M/s Ravechee and Co v. Union of India*.[3] The issue before the Supreme Court was the legality of the grant of pre-award interest by the arbitrator. In the case of *Ravechee*, the General Conditions of Contract specifically restricted the payment of interest on the security deposit. The Court however, held that such a clause will not restrict payment of interest as it dealt with the limited issue of awarding interest on security deposit, whereas the issue of awarding interest on the amount of damages ascertained, remained unaffected by the said clause.

The Court stated that "*A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him." "Thus, the liability for interest pendente lite does not arise from any term of the contract, or during the terms of the contract, but in the course of determination by the Arbitrators of the losses or damages that are due to the claimant. Specifically, the liability to pay interest pendente lite arises because the claimant has been found entitled to the damages and has been kept out from those dues due to the pendency of the arbitration i.e. pendente lite.*"

The decision in *Union of India v. Ambica Construction,*[4] where the power of an arbitrator to grant interest subject to the express bar under the agreement, was distinguished by the Supreme Court in *Ravechee's* case. The Court held that the case of *Ambica Construction* dealt with an award passed under the 1940 Act and hence had limited application to the facts of the present case. Even though S. 31(7) begins with the term "unless otherwise agreed by the parties", the *Ravechee* case allows for the arbitrator to award interest notwithstanding the express agreement. The reasoning of the Court relies on the distinction between liability of interest payable on determination of unascertained damages in course of the *lis* and the liability of interest on damages as per the terms of the contract. According to the Court, the interest that was in question was not in the nature of interest contemplated under the contract, and hence provided for grant of interest pendente lite.

[3] M/s Ravechee and Co v. Union of India, Civil Appeal Nos. 5964-5965 of 2018, (Supreme Court, 03/07/2018).

[4] Union of India v. Ambica Construction, (2006)11 SCC 181.

Between *Chittranjan Maity* and *M/S Ravechee*, there is a clear variation in the approach and reasoning of the judiciary, although these two consecutive cases have similar factual situations. Though the reasoning is directly in conflict with each other in these two cases, the Court in *Ravechee* is silent on the validity of the reasoning provided in the case of *Chittranajan Maity*. In such a scenario, where both cases have been decided by a single bench, it becomes necessary to hear from a larger bench as to which approach is more appropriate. Failing this, there is likely to be immense confusion among the arbitral tribunals and also during subsequent enforcement proceedings where the award of interest will be sought to be enforced.

Award of Interest on Conclusion of Proceedings

The decision-making process of an arbitral tribunal may sometimes be flawed, unreasonable and incongruous with judicial reasoning. Yet, the scope of intervention of Courts to correct the errors in the arbitral award is limited. In case of foreign arbitral awards, Courts have to exercise more restraint. The role of Courts under S. 48 of the Act is only of a supervisory nature and they cannot review awards or correct the errors of the Arbitrator.[5]

The Act allows the Court to resist enforcement only if the award is contrary to the (i) fundamental policy of India (ii) interest of India and (iii) justice or morality.[6] With the limited role of Courts, how can it be ensured that Arbitration practice is infused with judicial reasoning and arbitral tribunals are aware of the scope of relevant legal provisions?

Perhaps the Court's attempt at exposition of the law as laid down in cases such as *Vedanta v. Shenzen Shandong Nuclear Power Corporation,*[7] can help resolve this dilemma. In this case, the Court put forth a comprehensive set of guidelines to assess the interest which can be awarded by an arbitral tribunal. It serves as a reference point for the tribunals in future to award interests within a legally acceptable limit.

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[5] Zee Sports Ltd. v. Nimbus Media Pvt. Ltd., Chamber Summons (Lodg.) No. 114 of 2017 in Arbitration Petition No. 1698 of 2015, (Bombay High Court, 31/01/2017).

[6] Daiichi Sankhyo v. Malvinder Mohan Singh, O.M.P. (EFA)(COMM.) 6/2016, (Delhi High Court, 31/01/2018).

[7] Supra 1.

The Significance of Vedanta v. Shenzen Shandong Nuclear Power Corporation

In 2008, the appellant and respondent Company entered into inter-related contracts for construction of power plant via an Engineering Procurement and Constructions Contract ("EPC"). The contract stipulated an arbitration clause for the resolution of any disputes between the parties. Since Vedanta is an Indian company and Shenzen Shandong is a company incorporated in the Democratic Republic of China, the arbitration between these parties is an international commercial arbitration. The seat of arbitration was designated at Mumbai, India. In 2011, a dispute arose between the parties which resulted in the termination of the EPC Contracts. In 2017, the arbitral tribunal passed a detailed award. The claim was awarded by the tribunal in two parts; first in Indian Rupees and second in Euro.

It was stipulated that:

1) Amount awarded in both Rupee and Euro components shall be payable along with interest at the rate of 9% from the date of institution of the arbitration proceedings provided the amount is paid/deposited within 120 days of the award.

2) In case the respondent fails to pay the amount awarded within 120 days from the date of the Award, the claimant shall be entitled to further interest at the rate of 15% till the date of realization of the amount.

The Appellant in the present case filed objections under S. 34 of the Act before the Delhi High Court. Subsequently, it filed an Appeal against dismissal of objections before a division bench of the same High Court under S. 37 which was also dismissed. Hence, an Appeal by way of Special Leave was filed before the Supreme Court.

Considerations before the Supreme Court:

The Appellant contested the rate of interest awarded on the claim, before the Supreme Court. The Court prime facie noted that "*In an international commercial arbitration, in the absence of an agreement between the parties on Interest, the rate of Interest awarded would be governed by the law of the Seat of arbitration. The rate of interest awarded must correspond to the currency in which the award is given, and must be in conformity with the laws in force in the lexfori.*"

Under the law of the seat of arbitration i.e. the Arbitration Act 1996, S. 31(7) governs the award of interest.

S. 31(.....)

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

The distinction between subsection (a) and subsection (b) needs to be understood. Subsection (a) pertains to the award of Interest for the pre reference and *pendente lite* period, which is subject to the agreement between the parties. In the event there is no agreement between the parties as to the quantum or circumstances where interest can be awarded, the arbitral tribunal has the discretion to award interest. On the other hand, subsection (b) pertains to the post award period i.e. from the date of the award to the date of realization. It is not subject to party autonomy or an agreement between the parties. The statutory rate of Interest is 2% higher than the current rate of Interest prevalent on the date of the award.

Since the award of interest is at the arbitrator's discretion, the Court laid down certain principles or guidelines for the arbitrators.

Firstly, the Arbitrator must account for*"(i) the 'loss of use' of the principal sum; (ii) the types of sums to which the Interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic standpoint;(vii) the rates of inflation,(viii) proportionality of the count awarded as Interest to the principal sums awarded."*

Secondly, the rate of Interest must be compensatory and not punitive, unconscionable or usurious in nature.

The Decision and its Significance:

The Court held that a dual rate of interest i.e. a rate of interest *pendent lite* (@9%) and another rate of interest in case of noncompliance post 120-day period (@15%) was unjustified. Since the Award-Debtor is allowed to challenge the award under S. 34 within 120 days, a higher rate of interest after a challenge has been instituted might foreclose or seriously affect the statutory right to challenge the Award.

The Court stated that "*the Award debtor cannot be subjected to a penal rate of interest, during the period when he is entitled to exercise the statutory right to challenge the Award, before a Court of law*". The proceedings achieve a finality on conclusion of challenge proceedings and hence till the award debtor has a right to challenge the award before a Court of law, he/she cannot be asked to pay a penal rate of interest. This was seriously violative of the principle of proportionality.

The award of Interest @ 9% on the Euro component of the claim was also modified. The Award granted a uniform rate of 9% S.I. on both the INR and the EUR components. Since the parties do not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. Interest rates must have a nexus with the currency failing which it will become unreasonable and punitive in nature. The Court held that the rate of 9% Interest on the INR component awarded by the arbitral tribunal must remain undisturbed. However, with respect to the EUR component, the award - debtor will be liable to pay Interest at the LIBOR rate + 3 percentage points, prevailing on the date of the Award.

Apart from the fact that this decision essentially constitutes a direction for effective exercise of arbitral discretion, it is also significant because it introduces the Indian jurisprudence to modern concepts which are globally accepted standard practise. The Court took into consideration calculation of Interest in accordance with LIBOR plus a margin (between 1 to 3%). It referred to the case of *IOC v. Lloyds Steel Industries Ltd*.,[8] wherein this method was adopted. LIBOR is essentially an average interest rate calculated from time to time, based on inputs given by major banks in London as to their interest rates. Hence the guidelines provided by the Court in this case in levying a reasonable rate of interest especially when the amount awarded is not in the local currency will certainly be crucial in international arbitrations seated in India.

[8] IOC v. Lloyds Steel Industries Ltd., 2007 (4) ARBLR 84 Delhi.

Corruption as a 'Defence' in Investment Treaty Arbitration

Anoop George
IV BA.LL.B.

Introduction

Bilateral Investment Treaties ("BIT") provides protection to investors of the Contracting State by making sure that the other contracting State provides special protections to the investments that are concluded under the BIT. Thus, BIT acts as a safeguard to the investment which instil confidence in the investors to invest in a country. BITs provide mechanisms to address any issues relating to their 'investment' which may arise. States which face claims under BIT have repeatedly managed to defeat foreign investors' claims for expropriation or other violations by alleging that the investments were obtained through corruption. The International Centre for Settlement of Investment Disputes ("ICSID") Tribunals and International Chamber of Commerce ("ICC") have refused to hear the merits of investment treaty claims when the States were able to prove that a corrupt act was involved in contract formation, even where that corruption in fact involved State actors.

Kenya was the first State to defeat a foreign investor's claim by arguing that investors should not be allowed to rely on the arbitral process to uphold rights obtained by corruption. In *World Duty Free v. Kenya,* the ICSID Tribunal rejected an investor's claim over the termination of a concession to run duty-free shops at the Nairobi airport because it found that the investor's CEO had paid a bribe to a former Kenyan president to obtain the concession. The Tribunal held that, "*bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld*."[1] Since the *World Duty Free* case, States have accused foreign investors of corruption in dozens of 'Investor–State Disputes', often with success.

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[1] World Duty Free Company Limited v. The Republic of Kenya (ICSID Case No. ARB/00/7), Award, 04/10/2006.

This article will provide a broad overview of the issue of corruption in Investor-State Arbitration, including issues such as burden and standard of proof. Further, the article will attempt to analyse the defences available to an investor in such situations. The article also discusses specific ways in which States and investors have been penalized for such conduct in the limited number of investment arbitration cases.

Burden and Standard of Proof

The International Arbitration Tribunals are not bound by the strict judicial rules of evidence and are relatively free to determine the burden and standard of proof that apply in such cases. Thus, when faced with corruption allegations, it is the duty of the Arbitral Tribunal to determine the applicable standard of proof. While some Tribunals have applied a 'clear and convincing evidence' standard when assessing corruption allegations, creating the heightened evidentiary standard by pointing to the severe consequences of corruption on the investor's claims, others have rejected the idea that allegations of fraud or corruption automatically require a 'heightened standard of proof'.

It is also common for the Tribunal to place the burden on the investors to disprove the allegation of corruption, as seen in the *Metal-Tech*[2] and *Spentex*[3] cases, where the ICSID Tribunals placed the burden on the investors to prove that payments made to their 'consultants' in connection with their investment in the country were not corrupt.

The Requirement for "Clear and Convincing" Evidence.

The burden of proving bribery allegation is of the highest standard[4] i.e. it requires clear and convincing evidence.[5] *EDF v. Romania*[6], demonstrates that Tribunals will not entertain corruption allegations on the basis of a claim in the absence of clear and convincing evidence. The Tribunal held that "*a corruption charge also requires that the utmost care and sense of responsibility be taken to*

[2] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 04/10/2013.
[3] Spentex Netherlands, B.V. v. Republic of Uzbekistan, ICSID Case No. ARB/13/26, Award, 27/12/2016.
[4] Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, , 15/04/2009, at 103.
[5] Himpurna California Energy Ltd. v. Republic of Indonesia, 25 Y.B. Comm. Arb. 186, 194, 219-220 (2000).
[6] EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, 08/10/2009.

ascertain the truthfulness and genuine character of the evidence that the party intends to offer in support of its claim."[7]

Several justifications are invoked to apply a higher standard than 'preponderance of evidence' or 'balance of probabilities': (1) a higher standard would discourage baseless corruption allegations; (2) a finding of corruption may result in serious consequences such as a criminal investigation.[8]

Evidence of Corrupt Conduct must be Reliable and Attained Lawfully

An audio recording between one of EDF's agents and a staff of the then Prime Minister of Romania was a key piece of evidence that was sought to be admitted, as it captured a bribe being requested. The Tribunal rejected this piece of evidence mainly because;

1) It was held that there was a lack of authenticity and reliability regarding the recording. The expert scrutiny concluded that it had sections missing, including the beginning and end sections, various irregularities and instances of transient sounds indicative of possible manipulation. Thus, the Tribunal concluded that EDF had failed to discharge the burden of satisfying the Court of the authenticity and reliability of the audio recording.

2) The Tribunal held that the recording was not obtained lawfully under Romanian law. In particular, the recording was made secretly at the private home of a Romanian public servant without her knowledge.

Balance of Probabilities

The standard of proof applicable to corruption and fraud claims in an investment treaty case has been contested, with some arguing for Tribunals to apply the general principle of balance of probabilities and others supporting the implementation of a higher standard. Despite a number of ICC awards calling for a standard of proof higher than the balance of probabilities,[9] there have

[7] Ibid.

[8] Andrea Menaker, *Addressing Issues of Corruption in Commercial and Investment Arbitration* 88 (D. Baizeau & R. Kreindler, 2015), available at http://store.iccwbo.org/content/uploaded/pdf/Dossier_XIII_TOC.pdf, last seen on 20/04/2019.

[9] Antonio Crivellaro, "*Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*" in Arbitration – Money Laundering, Corruption and Fraud, 109 at 115 (Kristine KARSTEN and Andrew BERKELEY, 2003).

been relatively few investment cases where the Tribunal employed a heightened standard. Commentators generally support the view that Tribunals should employ the balance of probabilities standard in cases where there are claims of illegality, particularly corruption.[10]

Tribunals seem to sidestep formal discussions of the applicable standard of proof and instead concentrate on the evidence at hand and the probative value of such evidence in accordance with the flexibility and authority afforded to them.[11] A Tribunal may consider all relevant factors to determine whether there is sufficient evidence of corruption, namely whether it is "more likely than not". In this way a Tribunal may still adhere to the adage that "the graver the charge, the more confidence there must be in the evidence relied on", without necessarily applying a higher standard of proof.[12]

This flexibility to consider all relevant aspects stems from the wide discretionary power Tribunals are granted on matters of evidence. A Tribunal is "free to determine the weight and credibility to be accorded to the evidence presented".[13] Furthermore, this flexibility has been confirmed by awards; Tribunals have generally found that claims of corruption may be proven solely by circumstantial evidence.[14]This is especially significant when considering that direct evidence of corruption, such as the admission of bribery in *World Duty Free v. Kenya*,[15] can be difficult to procure.

When an investment Tribunal applies the balance of probabilities standard to allegations of corruption, the question becomes how the Tribunal weighs the evidence provided by both parties. As the Rompetrol Tribunal suggested: "*Whether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence but on the overall assessment of the accumulated evidence put forward by one or*

[10] Carolyn Lamm, Hansel PHAM and Rahim MOLOO, "*Fraud and Corruption in International Arbitration*", 699 at 700-701 (Miguel Angel Fernandez-Ballesteros and David Arias, Liber Amicorum Bernardo Cremades, 2010).

[11] Libananco Holdings Co. Limited v. The Republic of Turkey (ICSID Case No. ARB/06/8), Award, 02/09/2011, at 126.

[12] Ibid at 125.

[13] The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3), Award, 06/05/2013, at 181.

[14] Rumeli Telekom A.Ş. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16), Award, 29/07/2008, at 709.

[15] Supra 1, at 130-136.

both parties, for the proposition or against it."[16] In *Metal-Tech*, the Tribunal demonstrated how various forms of circumstantial evidence, such as the amount of payments awarded, the qualifications of the alleged consultants, the lack of documentary evidence of services rendered and the consultants' relationships with those in power, can and should be contemplated as a whole. Thus, although the Tribunal did not address the burden or standard of proof, it did acknowledge that corruption can be shown through circumstantial evidence and then proceeded to determine whether corruption was established "with reasonable certainty".

A Tribunal may also rely on the drawing of adverse inferences when evaluating evidence in disputes where corruption is alleged.[17] More specifically, a Tribunal can and should require *"an adequate evidentiary showing by the party denying the allegation"* when a party alleging corruption has provided plausible evidence.[18] Thus, when documents or evidence that a Tribunal could reasonably expect to be produced, such as documentary evidence of services rendered by a consultant, are ultimately not provided, the Tribunal may draw an adverse inference. In fact, a number of Arbitral Tribunals have employed this measure.[19] Even if the opposing party is not able to produce the requested documents, it may provide adequate reasoning as to why it cannot comply with the request. The Tribunal found that it is "entirely fair for a tribunal, after giving a disputing party more than adequate extensions of time and notice, to decide that it should consider the other party's application to dismiss the claim in light of such evidence as has been adduced".[20] Even more so in cases of corruption, which by nature involve the deliberate concealment of an illegality, a Tribunal should be prepared to draw an adverse inference where it is a "reasonable conclusion to draw from the known or assumed facts".[21]

In addition to drawing adverse inferences, a Tribunal could consider many factors when examining the evidence before it. These issues may include the

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[16] Supra 12, at 178

[17] Ibid, at 84.

[18] Constantine Partasides, " *Proving Corruption in International Arbitration: A Balanced Standard for the Real World"* , 25 ICSID Review —Foreign Investment Law Journal 60 (2010).

[19] Supra 1, at 246, 256 and 265; Marvin Feldman v. Mexico (ICSID Case No. ARB(AF)/99/1), Award, 16/12/2002, at 178.

[20] Cementownia "NowaHuta" S.A. v. Republic of Turkey (ICSID Case No. ARB(AF)/06/2), Award, 17/09/2009, at 149.

[21] Supra 18, at 60-61.

seriousness of the allegations and, if proven, their legal consequences, the inherent likelihood (or not) of corruption in the circumstances and the difficulty of proving corruption, all of which depend on the specific facts of the case. Where a fact is inherently improbable, the Tribunal may "simply require more persuasive evidence".[22] Finally, when assessing evidence of corruption, a Tribunal may also contemplate the link between the advantages bestowed and the improper advantage allegedly obtained.[23]

Effect of 'Corruption'

The Arbitration Tribunals have to identify the appropriate legal consequences of corruption on a party's claims, and determining factors that are relevant. Following a finding of serious illegality and corruption, a Tribunal must determine the appropriate legal consequences. Where allegations of corruption by the host State form the basis of an investor's claim and in turn corruption is found, a Tribunal will determine whether the host State's wrongdoing constitutes a breach of the substantive protections provided to the investor under the relevant treaty; consequently, this issue will be dealt with at the merits phase.

Yet when an investor is found to have engaged in corruption, the legal consequences do not seem to be as straightforward. The Tribunal must determine whether corruption on the part of the investor is an issue for jurisdiction, admissibility or merits. One legal effect to consider is that an investment Tribunal's award on jurisdiction, regardless of whether corruption is a factor, may be subject to further review, as opposed to a decision on admissibility, which is unlikely to be subjected to further recourse. Moreover, there is debate as to whether treating the legality of the claimant's conduct as a jurisdictional issue and the legality of the respondent's conduct as a merits issue is in line with the "fundamental principles of procedure".[24]

Traditionally the Tribunals have taken an 'all or nothing' approach, but recently commentators and some Tribunals have considered a more proportional approach. All or nothing approach is a result of Tribunals declining the jurisdiction or declaring the claims to be inadmissible. The *World Duty Free* case formed

[22] Libananco Holdings Co. Limited v. The Republic of Turkey (ICSID Case No. ARB/06/8), Award, 02/09/2011, at 125.

[23] Sistem MühendislikÝnÞaat Sanayi A.Þ. v. Kyrgyz Republic (ICSID Case No. ARB(AF) /06/1), Award, 09/09/2009, at 43.

[24] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines (ICSID Case No. ARB/03/25), Dissenting Opinion of Bernardo Cremades, 19/07/2007, at 37.

the basis of traditional approach to corruption. A complete bar to the investor's claims is the outcome of the traditional approach. Thus, all the consequences fall on the investor, with no consequence for the State.

Many arbitral awards have demonstrated how an investment Tribunal may treat illegal conduct on the part of an investor in procuring its investment as a jurisdictional impediment, contingent upon treaty specifications. For treaty-based claims to be entitled to the procedural and substantive protections of the applicable treaty, there must be a qualifying investment. The notion of 'investment' is delineated by most investment treaties in broad terms. One criterion imposed by many treaties is what has been termed a 'host State law' or 'legality requirement'.[25]

When faced with jurisdictional arguments that an investor engaged in fraudulent or corrupt measures in procuring its investment, Tribunals have generally undertaken an examination of the treaty and relevant host State legislation to determine whether it is "in accordance with law" clause and, if so, the parameters of this requirement and whether it was breached.[26] The majority opinion in *Fraport* found the investment to be in breach of this condition, and held that *"because there is no 'investment in accordance with law",* the Tribunal lacks jurisdiction *"ratione materiae"*.[27]

Even if a Tribunal asserts jurisdiction, it may still deny a claimant who has engaged in corruption in relation to its investment the protection of the substantive legal rights contained in the treaty by dismissing the claim as inadmissible as the he has come with 'unclean hands'. The doctrine of unclean hands precludes an investor who effectuated an investment "by means of one or several illegal acts" from enjoying "the protection granted by the host State, such as access to international arbitration to resolve disputes".[28]

In *Metal-Tech*, the Tribunal acknowledged that the outcome in corruption cases might 'appear unsatisfactory' in seeming to grant an 'unfair advantage to the defendant party', but it found that this approach was justified because the idea 'is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a Court or Tribunal cannot grant

[25] Christoph Schreuer, *The ICSID Convention: A Commentary*, 140 (2nd ed., 2009).

[26] Supra 23, at 345.

[27] Ibid, at 334.

[28] Supra 1.

assistance to a party that has engaged in a corrupt act'.[29] In *Kim*,[30] the Tribunal stated that it was 'guided by the principle of proportionality' when deciding the allegations of corruption. It thus found that it was required to 'balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the treaty in total'. As a result, it concluded that the denial of the treaty protections 'is a proportional response only' in the event of 'noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State'.

The Tribunal in *Metal-Tech*, though denied jurisdiction over the investor's claims, did acknowledge the state's 'participation' in the corruption and ordered the respondent to share in the costs of the arbitration.[31]

Conclusion

The corruption defence to Investor - State claims are rooted in widely shared values and is likely a permanent part of international investment law. The 'corruption' defence is a sword available to the States to deny the investors protections under the relevant BIT, which they have been successfully employing. The outcome of such a defence is detrimental to the claims of the investor, to the extent that their claims would not even be considered by the Tribunal. This outcome has given the States an undue advantage over the investors even when the State officials are also a party to the corruption. The parameters of the defence are far from certain, and international investment law has yet to arrive at a reliable solution to the complex incentives that the defence can generate. Many of these issues will likely be worked through over time, through the iterative development of International Investment Law. Given the propensity of Tribunals to shift the burden on investors to prove an absence of corruption, it is particularly important for investors to ensure that they keep accurate records of expenditures made by consultants and also keep copies of project documents in their home country as well as investments' host jurisdiction. The time has come for an ICSID Tribunal to estop a corrupt government from relying on its own corruption as a defence to liability under the terms of a BIT.

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[29] Mark W Friedman, Floriane Lavaud and Julianne J Marley, *Corruption in International Arbitration: Challenges and Consequences,* Global Arbitration Review, available at https://globalarbitrationreview.com/chapter/1146893/corruption-in-international-arbitration-challenges-and-consequences, last seen on 21/11/2018.

[30] Vladislav Kim v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction.

[31] Supra 2.

Legal Fiction: Unmasking the Unreal

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Introduction

Law is so dynamic that it progresses with the change and development in the society. Fast paced growth, accompanied with new thought processes gives birth to new statutes and also witnesses the end of obsolete laws. At times, interpretation of the statutes exactly as intended by the Legislature becomes a tough task. According to Cooley's definition of interpretation, it is an art of finding out the true sense of any form of words i.e. the sense which the authors intended to convey.[1]

Rules of Interpretation are the tools which help us in determining what exactly the statute or the framers of the statute intended to express. Legal fiction is an important constituent of subsidiary rules of interpretation. It can be explained as a proposition which is not an actual reality but is recognized by law and has the acceptance of the courts. The courts believe it to be but in reality they are non-existent. Legal fiction is a legal assumption; such assumption is an innocent or a beneficial assumption made for the advancement of justice.

The Latin maxim *"In fictione Juris Semper Aequitas Existit"* defines *"A legal fiction is always consistent with equity"*. So, there is a consistency between equity and legal fiction. Henry Maine while explaining the Jurisprudence of legal fiction states that there are three agencies viz. 1) Legal Fiction 2) Equity and 3) Legislation through which law is in sync with the society.[2] He also termed fictions as *"Invaluable expedients for overcoming the rigidity of law"*.[3]

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[1] Thomas Cooley, *A Treatise on Constitutional Limitations which rest upon the legislative power of the States of the American Union* (1868).

[2] Henry James Sumner Maine, *The Project Gutenberg EBook of Ancient Law,* available at http://www.gutenberg.org/files/22910/22910-h/22910-h.htm, last seen on 05/02/2019.

[3] Ibid.

Legal fiction

It is difficult to trace the exact history of legal fiction. They were used ever since man was introduced to positive law or his actions were regulated by positive law. The statute or law which in fact introduced legal fiction can be said to be the Bible, the oldest code of law, which states that *"If an ox gores a man or woman to death, the ox must surely be stoned, and its meat must not be eaten"*.[4] But the owner of the ox shall not be held responsible. But if the ox has a reputation for goring, and its owner has been warned yet does not restrain it, and it kills a man or woman, then the ox must be stoned and its owner must also be put to death.[5] The legal fiction which is created in the verses 28 and 29 is that there is a law which states that there exists a primary duty in the owner of an 'offending' thing towards everybody *in rem* to make sure that his thing does not harm or take away anybody's right. The rights of every individual should be protected and no one should be deprived of the enjoyment of his rights. There arises a possibility, at times, wherein there is no law to direct or control one's behaviour which would harm others right. There would always be a pressure on the Legislature to introduce new laws to protect one's rights which may be violated by a petty behaviour or at times by grave offences. Thus, invention of legal fiction would help to overcome such a pressure and remove any inefficiencies and lacunas in the existing statutes to ensure maintenance of proper law and order.

Legal fiction is regularly used in common parlance and is generally introduced for delineating the role and functions of an authority under the Act. The applicability of legal fiction in a particular provision of a statute or in the entire statute depends upon the ingredients and purpose of introducing the legal fiction in that statute. On introduction of legal fiction in a statute the court must assume all such facts and corollaries which are incidental and inevitable. The fiction created must not extend beyond the purpose of its creation by importing another fiction.[6]

The purpose of introducing a legal fiction is to assume a fact which does not exist. The legislature has to be careful that under the garb of such assumption

[4] Exodus 21:28.

[5] Exodus 21:29.

[6] Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver, (1996) 6 SCC 185.

it cannot assume facts which violate the Constitution.[7] This principle was laid down when a statutory declaration related to non-existence of 'creamy layer' was made by the Kerala legislature which was contrary to the reality. In *Indira Sawhney v. Union of India*, the Court held that creating a fiction of existing facts amounts to a disregard of the Constitution.[8]

Legal fiction can be classified on the basis of enactments which brings them into existence where they are expressly stated by using some well-defined terms such as 'shall be deemed' or 'as if' etc. Legislature can create not only one but a chain of legal fictions by the same Act.[9] With the help of deeming provision, facts which are not in existence can be brought into existence. The Karnataka Agricultural Income Tax Act, 1957 states that if any agricultural income is received company, firm or association of persons after the discontinuance or dissolution of the said company, firm or association of persons such agricultural income *shall be deemed* to be the income of the firm and charged to tax as if the firm existed before discontinuance or dissolution.[10]

The Indian Penal Code, 1860 defines the scope of punishments for offences committed by any person beyond India, but liable to be tried under any Indian law for such an offence, shall be tried *as if* such act had been committed within India.[11] It has been held therein that a foreigner who has committed an offence within India is guilty and can be punished as such without limitations to his corporeal presence in India at the time.[12]

Does Deeming Provision Always Create a Fiction?

The word 'deemed' as used frequently by legislatures does not ensure that whenever the word deemed is used it is for the creation of legal fiction. The language used by the draftsman at times can be misleading, wherein, it may give the appearance of legal fiction but it may not be so.

The Excise Act, 1944 read with Central Excise Rules and The Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 stated that the actual

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[7] Indira Sawhney v. Union of India, (2000) 1 SCC 168.

[8] Ibid.

[9] Yellappagouda Shankargouda Patil v. Basangouda Shiddangouda Patil, (1960) 3 SCR 221.

[10] Amended S. 26(4) The Karnataka Agricultural Income Tax Act, 1957.

[11] S.3, The Indian Penal Code,1860.

[12] Mobarik Ali Ahmed v. State of Bombay, 1958 SCR 328.

production at the factory *shall be deemed,* as the annual capacity of production for the purpose of levy of excise duty when annual capacity of production was less than actual production.[13] The Court held that S. 3A(2) dealing with the annual production of manufacturers could be rebutted by adducing evidence. S. 3A(4) provides for such rebuttal. Therefore S. 3A (2) embodies presumption as an evidentiary rule.[14]

The above situation throws light on the rule of evidence which helps us to differentiate between legal fiction and presumption.

Presumptions and Legal Fiction

A fiction assumes something which is non-existent and thereby creates a conflict with reality, but compels the courts to believe the existence of imaginary facts which has the mandate of the Legislature. Legal fiction unless it is in contravention to constitutionality cannot be justified that it consists of mere immaterial facts. 'Presumptions' is a rule of evidence. They assume something which may be true. They consist of conclusive presumptions and rebuttable presumptions, based on the inferences that are drawn by the courts in the interest of justice.

Boundaries of legal fiction

(i) *Parliament cannot create legal fiction inviolable to Constitution*

Aadhaar Judgment: A situation created by Aadhaar wherein it tried to inviolate the Constitution.

The Aadhaar (Targeted Delivery of Financial and others Subsidies, Benefits and Services) Act, 2016(Act) was held to be unconstitutional.[15] Questions were raised regarding collection of demographic information through private entities without providing any counselling to the individuals from whom such information was collected. It was held that such deeming provision under S.59 of the Act justifying the deeds of government pursuant to notification dated 28/01/2009 amounts to retrospective ratification of 'consent' which was never taken prior to obtaining Information from the people. Leaving out 'Informed consent'

[13] S.3A(4),The Excise Act,1944 and Rule 5, The Hot Re-Rolling Steel Mills Annual Capacity Determination Rules,1997.

[14] Bhuwalka Steel Industries Ltd. v. Union of India, (2017) 5 SCC 598.

[15] S. 59, The Aadhaar (Targeted Delivery Of Financial and others Subsidies Benefits and Services) Act, 2016.

tantamount to creation of legal fiction by Legislature and is inviolable to the Constitution.[16]

(ii) *Legal fiction not to traverse beyond the purpose of introduction*

The Maharashtra Cooperative Societies Act, 1960 (Act)[17] provides that the Registrar and any other officer under the Act *shall be deemed* as public servant within the meaning of S. 21 of the Indian Penal Code, 1860.[18] The Court held that such reference will make the officer under the Act to be treated as public servant for the purpose of that Act itself and not otherwise. Therefore, officers under the Act cannot be arrested under the Prevention of Corruption Act, 1947 which deals with corruption among public servants in general.[19]

(iii) *Judiciary cannot introduce legal fiction*

Legal fiction is the creation of sovereign authority. At times courts under the pretext of judicial activism or judicial overreach have tried to traverse into the domain of the Legislature by constructing a provision stating the existence of a legal fiction. The question was that whether a pending approval *'shall be deemed'* to be approved if the time period within which it had to be approved has lapsed.[20] The Delhi Cooperative Society Rules, 1973 states that when a resolution is passed it has to be sent to the Registrar for approval and the Registrar must communicate her decision within six months.[21] The High Court in this case tried to create a legal fiction stating that in the absence of any communication received from the Registrar after the expiry of time period the resolution sent for approval *'shall be deemed'* to be approved. To this, the Apex Court held that the legislature itself has not enacted any deeming provision in the said rule. The High Court cannot create a legal fiction on its own; creation of legal fiction is the absolute prerogative of the legislature.[22] The function of the Court is to ascertain the purpose for which the legal fiction is created and limit itself; it should not expand its purpose or intention.

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[16] Justice K.S.Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1.

[17] S. 161, Maharashtra Cooperative Societies Act, 1960.

[18] Supra 9.

[19] State of Maharashtra v. Laljitrajshi Shah, (2000) 2 SCC 699.

[20] Rafiq Ahmed v. State of UP, (2011) 8 SCC 300.

[21] Rule 36(3), Delhi Cooperative Society Rules, 1973.

[22] Supra 18.

Legal Fiction and Amelioration of the Society:

Strict construction of legal fiction in penal statute

Legal fiction has been used in Statute containing penal provision. Such statute should be interpreted strictly which should not be contrary to the intention of the framers of the statute.

Whether sovereign authority can create deeming fiction contrary to basic principles of natural justice?

The intention of Legislature to safeguard the rights of women by creating legal fiction is clearly witnessed in The Indian Penal Code, 1860[23] in cases related to dowry death of a woman who has been subjected to cruelty or harassment, before her death, by her husband or any of his relative for or in connection with demand of dowry then the husband and his relatives are *deemed* to have caused the death of such a woman. The reason for introduction of fiction in this section is clear that the legislatures are sensitive to the status of the women and the influence of patriarchy in the Indian society. Such a deeming provision makes sure that there is no lax of justice in protecting the rights of women and provides them with equal justice. The interpretation of legal fiction in deeming provision of penal statues is necessary to be strict in order to fulfil the intention of the legislature which is to provide justice and equity.

A deeming provision in the I.P.C., in order to meet the ends of justice, ensures that a person who is accused of crime does not try to escape from the clutches of law by pleading innocence of association. The I.P.C.[24] mentions that wherein any offence of murder, if committed by five or more persons while committing dacoity, then every person so committing, attempting to commit, aiding then by fiction of law would be *deemed* to have committed the offence of murder and would be liable for rigorous imprisonment up to ten years as provided under the provision.[25]

[23] S. 304 B, The Indian Penal Code, 1860.

[24] S. 396, The Indian Penal Code, 1860.

[25] Santlal Gupta v. Modern Coop. Group Housing Society ltd, (2010) 13 SCC 336.

Legal fiction in Procedural law

Legal fiction for specifying the jurisdictional aspect of courts- In the Code of Criminal Procedure, 1973[26], when the Court has found a person guilty for two or more offences under a single trial; the Court shall, subject to S.71 of the Indian Penal Code, 1860, sentence him for such offences, to the several punishments prescribed therefor, which such Court is competent to inflict. The said section contemplates in it that for the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section *shall be deemed* to be a single sentence thereto simplifying certain intricacies of criminal law.

Legal Fiction is used to Curb Whims and Fancies of Investigating Officer

It bounds the investigating officer to consider and take into account all the relevant facts of the case. The Code of Criminal Procedure, 1973[27] provides that if a case comprises of both cognizable and non-cognizable offences, the investigating officer is not given the discretion to investigate cognizable offences only.[28]

Purposive Construction of Legal Fiction in Taxation Statute

Legal fiction should be given purposive construction while interpreting taxation statute. Strict interpretation should be avoided unless certain penal provision is contained in taxation Statute. Taxation statutes have great implication on the life of assessee. In case of any ambiguity, the Court while interpreting the taxation statute, should give interpretation which is beneficial to the assessee.

Legal Fiction Recognizes Legal Representative and other Interested Person as Assessee

The Income Tax Act, 1922 (Act) contemplates an interesting situation wherein S.24B recognizes the legal representative and any other interested person as *an assessee* in case of death of the actual assessee.[29] The legal representative shall be liable to meet any tax liability which would have been otherwise payable

[26] S.31, The Code of Criminal Procedure, 1973.

[27] S. 155(4), The Code of Criminal Procedure, 1973.

[28] State of Orissa v. Sharat Chandra Sahu, (1996) 6 SCC 435.

[29] S. 24B and 46(1), The Income Tax Act, 1922.

by the original assessee had he not died. The Act makes provisions for penalizing the *assessee* in case of non-payment of income tax liability.[30] In this scenario the legal representative who is deemed to be an assessee[31] by way of legal fiction cannot escape the penalty.[32]

Ease of transactions in Stamp Act

The Stamp Act, 1899 states that "Instruments having endorsement '*shall be deemed* to be duly stamped or not chargeable to duty' meaning such endorsement raises a presumption that the instrument is duly stamped.[33] It contemplates that stamp fees originally paid to appropriate authority is as per law. The legal fiction created by way of such endorsements does not restrict additional duties to be levied by appellate authority by exercising review and revisionary power."[34]

Conclusion

After analyzing the scope, applicability and limitations of the usage of legal fiction we can concur with the definition of legal fiction as defined in *Corpus Juris*, stating that a mere fiction of law which is introduced for the sake of justice cannot be stretched to a point which defeats the purpose of its introduction. The development of legal fiction has travelled from the age of positive law as introduced in the Bible to the most recent and censured GST Act wherein legal fiction has been used more than seventy-three times stating its importance. But such applications impose a responsibility on the Legislature that under the garb of legal fiction, it cannot transcend the limit imposed by the Constitution and usurp the basic principle of law and natural justice.

[30] S. 46 (1), The Income Tax Act, 1922.

[31] S. 24B & 46(1) of the Income Tax Act, 1922.

[32] ITO v. T.M.K Abdul Kassim., (1962) 46 ITR 149.

[33] S. 32(3), The Stamp Act, 1899.

[34] Raymond Ltd and another v. State of Chhattisgarh and others, (2007) 3 SCC 79.

Exploring the Unknown Facets of a Startup Organization

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Background

With India having the 3rd largest number of startups in the world, this phenomenal growth story is a testament to the entrepreneurial spirit of aspirational India. While entrepreneurs and startups are worthy of all the limelight, the legislative resolve in creating this environment deserves to be acknowledged. To put things into perspective, only 4 startups were recognized in the financial year ending on 31st March 2009.[1] Whereas, in the Financial Year ending on 31st March, 2018 alone, 2,711 entities were recognized as startups[2] by the Ministry of Commerce and Industry.

The process of establishing a financially sound business is rife with challenges. While entrepreneurs continue to disrupt our daily lives, nothing disrupts an entrepreneur more than the headache of legal compliance. Greater time spent on compliance translates into lesser time available for the core aspects of the business. Therefore, through various relaxations– elucidated in the subsequent paragraphs - the law-making authorities have sought to alleviate the burden on entrepreneurs.

"Startup" as defined by the DIPP

Unlike the general notion of every newly founded business being regarded as a startup, the government holds a divergent view. The Department of Industrial Policy and Promotion ('DIPP') has strategically defined the term '*Startup*' vide its Notification dated 11 August, 2008 as, *"an entity working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation."*[3]

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[1] Ministry of Commerce and Industry, *Statement on Performance of Startups* Rajya Sabha (04/04/2018), available at https://dipp.gov.in/sites/default/files/ru4181.pdf, last seen on 10/12/2018.

[2] Ibid.

[3] Department of Industrial Policy and Promotion, Notification No. G.S.R 364(E), (11/04/2018), available at https://dipp.gov.in/sites/default/files/Startup _Notification11April2018_0.pdf, last seen on 10/12/2018.

In simpler words, any venture which creates or enhances an existing product, process or service, and the said venture has the potential of providing an expansive benefit to the economy shall fall within the *crème de la crème* of 'startups'.

A venture does not get recognized as a 'startup' on a de facto basis. It is obliged to get itself registered with the DIPP for claiming the various concessions offered by the government. The online application is free of cost and can be filed on the DIPP website.[4]

In addition to falling within the ambit of the aforesaid definition, the Ministry of Commerce and Industry vide its Notification No.364(E)[5] has prescribed an additional set of norms to be complied with, for obtaining recognition as a 'Startup'. They are as follows:

1) The Entity must be registered in India as a:

    a. Partnership Firm; (as registered under section 59 of the Partnership Act, 1932); or

    b. Limited Liability Partnership; (as under the Limited Liability Partnership Act, 2008); or

    c. Private Limited Company; (as defined in the Companies Act, 2013)

2) Its turnover must not have exceeded Rs. 25 crores during any of the financial years since its incorporation or registration);

3) It must not be formed by splitting up or reconstruction of an existing business;

4) Further, an entity will be recognized as a startup for a period of seven years from its date of incorporation. In case of a startup, specifically in the biotechnology sector, this period has been extended to ten years from the date of its incorporation.[6]

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[4]Startup India Department of Industrial Policy and Promotion, Government of India, *Startup Recognition and Tax Exemptions,* available at https://www.startupindia.gov.in/content/sih/en/startupgov/startup -recognition-page.html, last seen on 10/12/2018.

[5] Supra 3.

[6] Supra 4.

The potential of wealth creation, employment generation, the inflow of capital and creation of cutting-edge technology, have made Startups the *blue-eyed boys of commerce* in India. To encourage them even further, the State, as well as the Central Government, have offered a slew of concessions to startups. However, due to the lack of legal awareness among the majority of the founders, these benefits go unrecognized. The ensuing paragraphs shall encapsulate the various incentives being offered to startups:

A. Intellectual Property related benefits[7]

1) Examination and disposal of patent applications on a 'Fast-Track' basis;
2) 80% Rebate on Patent filing fees;
3) 50% Rebate on Trademarks filing fees;
4) End to end advisory on the patent application process provided by a panel of 'Facilitators';
5) Startups no longer need to get a confirmation from the Inter-Ministerial Board.

B. Access to Funding sponsored by the Government

1) The government has established a fund dedicated exclusively to Startups. The said fund is known as '*Fund of Funds for Startups*' (FFS).
2) The fund shall participate in the funding mechanism through an Alternative Investment Fund established within the mandate of SEBI (Alternate Investment Funds) Regulations, 2012.[8]
3) The government has already contributed a corpus of Rs. 500 crores and Rs. 600 crores in the Financial Year 2015-16 and Financial Year 2016-17 respectively.[9]

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[7] *Intellectual Property Related Benefits for Startups in India,* Lexology, available at https://www.lexology.com/library/detail.aspx?g=460fb5a2-1274-40f5-916b-9e08b0525228, last seen on 10/12/2018.

[8] *Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012,* SEBI Notification (21/05/2012), available at https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-alternative-investment-funds-regulations-2012-last-amended-on-march-6-2017-_34694.html, last seen on 10/12/2018.

[9] Ibid.

C. Income Tax benefits

1) 100% tax rebate on profits for a consecutive period of three years within the block of first seven years. This rebate is available, subject to the approval of the Inter-Ministerial Board.

2) Exemption on long-term capital gains from investments made in startups provided that:

   a) The concerned gains are invested in a fund notified by the Central Government;

   b) The said Investment is made within 6 months from the date of transfer;

   c) The maximum amount of investment is Rs.50 lakhs;

   d) The investment holds a lock-in period of 3 years.

3) Investments made above the fair market value of a startup,s share have been declared as *tax exempt.*

D. Reservation for startups in Government Tenders

1) Startups are exempted from submission of Earnest Money Deposit or Bid Security in public procurement tenders. This deposit is made to a seller to show the buyer's good faith in honouring a transaction.[10]

2) Reservation for tender allotment to startups has also been provided by various State Governments.

E. Access to Research Parks

1) In furtherance of the vision of '*Startup India, Stand Up India'* the government has proposed to set up 7 new research parks to bolster the Research & Development facilities available for the startups;[11]

2) These Research Parks have been proposed to be set up in some of the premier educational institutions of the country.

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[10] *Easing Public Procurement,* Startup India, available at https://www.startupindia.gov.in/content/sih/en/compendium_of_good_practices/easing_public_procurement.html, last seen on 10/12/2018.

[11] *Government Plans to Set up 7 New Research Parks to Bolster R&D for Startups*, Inc42 (09/05/2017), available at https://inc42.com/buzz/sui-research-parks/, last seen on 10/12/2018.

F. Labour Law related Benefits[12]

1) No Inspection under any labour legislation will be conducted for the first three years.

2) Self-certification of labour law compliance has been granted under nine significant labour legislations.

3) Startups are exempted from complying with the following legislations:

   a) The Building and Other Constructions Workers' (Regulation of Employment & Conditions of Service) Act, 1996;

   b) The Inter-State Migrant Workmen (Regulation of Employment & Conditions of Service) Act, 1979;

   c) The Payment of Gratuity Act, 1972;

   d) The Contract Labour (Regulation and Abolition) Act, 1970;

   e) The Employees' Provident Funds and Miscellaneous Provisions Act, 1952;

   f) The Employees' State Insurance Act, 1948.

G. Environmental Law related benefits[13]

1) Startups which fall under the '*white category'* can self-certify their compliance.

2) An exemption is provided from complying with the following enviornmental law legislations:

   a) The Water (Prevention & Control of Pollution) Act, 1974.

   b) The Water (Prevention & Control of Pollution) Cess (Amendment) Act, 2003.

   c) The Air (Prevention & Control of Pollution) Act, 1981.

H. Easy closure of business

Startups are given a shorter timeline for closure of their business. They can ensure closure within 90 days of submitting the application of winding up.

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[12] Rebecca Furtado, *All About Labour Law Compliances for Startups in India*, iPleaders, available at https://blog.ipleaders.in/labour-law-compliances-startups-india/, last seen on 10/12/2018.

[13] Ibid.

While starting a business in India involves bureaucratic intervention at various stages, the policy *vis-à-vis* Startups reduces the compliance burden significantly. In this regard, the Economic Survey of India for the year 2009-10 had aptly remarked:

> *To assume that all who are entrusted with the task of administering, will do so flawlessly and then to blame them when the system fails; is not the mark of a good policy. The effective strategy is to take people to be the way they are and then craft incentive-compatible interventions.*[14]

Likewise, the author holds the opinion that startup growth story can scale greater heights if the aforementioned approach is given due consideration. While the benefits for Startups are unknown but aplenty, there are some other classical mistakes which startups continue to make.

Mishaps committed by Startups during Incorporation

The journey of an innovator towards becoming an entrepreneur is an exciting one with a steep learning curve. In this journey, innovation – the USP of an inventor - often takes a back seat and the cumbersome task of operating a financially and legally sound business occupies a major part of the promoters' time, energy and resources.

A majority of blunders from a legal as well as a financial standpoint are usually committed right from the early stages of a startup. Very often, these mistakes are identified only when a due diligence process is carried out prior to a funding round. Incomplete legal compliance and inadequate documentation can be a deal breaker and dissuade the investors from contributing to the company's corpus. Therefore, keeping the long term aspirations of an organization in mind, it is imperative that entrepreneurs dedicate ample time and resources to the compliance activities.

Recommendations for Incorporation Strategy

Several aspects have been disregarded by entrepreneurs while choosing the appropriate business structure for their startups. These aspects have been discussed below. Although, the DIPP recognizes only three classes of business

[14] Ministry of Finance, Government of India, *Chapter 2, Economic Survey of India 2010*-11, available at https://www.indiabudget.gov.in/es2009-10/chapt2010/chapter02.pdf, last seen on 10/12/2018.

organizations as startups, entrepreneurs should keep the following points in mind while selecting the appropriate structure:

1) **Sole Proprietorship**: This form of entity should be usually chosen by an entrepreneur who wants complete control over the business as well as the Intellectual Property created or acquired by him. In case an entrepreneur has limited sources of credit, he should consider venturing out as a sole proprietor.

2) **Partnership**: In case of a partnership, the risks and rewards of the entity are distributed between the partners. The Indian Partnership Act of 1932, with a few amendments, has limited requirements for legal compliance by the Partnership Firms. Therefore, in case a startup wants to decentralize its liability without taking on an unreasonable amount of compliance burden, it should consider this option.

3) **Limited Liability Partnership (LLP)**: This structure limits the partner's financial exposure up to his capital contribution or any other amount as agreed between the partners. LLPs are widely regarded as an amalgamation of two corporate structures - a Private Limited company and a Partnership Firm. Further, unless agreed to the contrary, each partner in a LLP structure has equal voting rights regardless of their financial contribution to the company's corpus. Therefore, a partner with a negligible capital contribution would also have the same voting rights as his other counterparts who made a greater financial contribution to the business. This could be a serious impediment to the business when critical decisions are to be made.

4) **Company**: An entrepreneur may opt to get his company registered under the Companies Act, 2013. By incorporating its venture as a company, it is guaranteed perpetual succession and a legal identity independent of its own. Incorporating as a company is a safer option to ensure greater protection of Intellectual Property. Incorporating as a company would entail heavy compliance burden but it also provides a better access to the funding pool.

5) **Trust/ Society**: In case of a charitable or religious institution, the model of incorporation as a trust or society is usually preferred. Although, trusts are privy to tax concessions, incorporating a business

- with a profit motive - as a trust or society can create unnecessary complications for the startup from a legal as well as a financial perspective.

Mistakes made during Legal Compliance and Drafting of Legal Documents

In addition to incorporation, some of the most amateur mistakes are committed by Entrepreneurs during the drafting of documents. With the availability of ready-made templates on the internet, entrepreneurs resort to blatantly copying several clauses from these templates without evaluating its legal consequences. Although India is considered as one of the least expensive countries in so far as legal expenses are concerned, Entrepreneurs still blame paucity of funds as a major hindrance from obtaining sound legal advice. Needless to say, eventually, *the chickens come home to roost*. Some of the legal gaffes generally committed by start-ups have been enlisted below:[15]

1) Entrepreneurs often sign non-compete agreements with their previous employers. This paralyses their ability to get into the same business for a significant duration.

2) Lack of 'Name Search' *vis-à-vis* branding the company or a product, can dilute the brand value in case any existing trademark gets infringed, intentionally or unintentionally.

3) Entrepreneurs often perceive equity as the cheapest source of finance. They dilute a major part of their capital by generously distributing a major portion of it in the early stages of the business. As a result, not only is control over the business being compromised but also the ability to generate funds for fuelling expansion in the later stages gets immeasurably squeezed out.

4) Failure to adequately protect Intellectual Property. If the success of a business hinges on its IP value, then ensuring thorough protection of the same is a *sine qua non*.

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[15] Nancy Fallon-Houle, *13 Most Common Legal Mistakes Made by Startups or Small Business,* available at *https://cdn2.hubspot.net/hubfs/408309/Past%20Bootcamps/Bootcamp_CHI'17/Event%20Presentations/SPS_Bootcamp_CHI'17_Fallon Houle, %20Nancy_Handout_Top% 2013%20Legal% 20Mistakes%20by% 20Startups.pdf,* last seen on 10/12/2018.

5) Failure to cope up with statutory filing. *Ignorantia juris non excusat* (*Ignorance of law is not an excuse*). No matter how young a business might be, mistakes like failure to file its tax returns on time or not complying with company law regulations on a timely basis can be extremely damaging for a company. Further, it is an open secret that investors and bankers do not like missing corporate documentation.

6) In a battle of *David v. Goliath*, i.e. between a Startup and an established business organization, contracts are often used as a weapon to manipulate the entrepreneur and vice versa. Therefore, failure to adhere to the stipulations of a contract can jeopardize the company's operations no matter how revolutionary its blueprint might be.

Analysis

While the destination is beautiful, the journey is extremely cumbersome. Not many entrepreneurs are aware of the difficulties they might encounter and the assistance they might receive along the way. In other words, while the Startup Industry has been the talk of the town, the discussion has been solely directed towards the mind-boggling investment received by a handful of Startups. Not much discussion or analysis has taken place *vis-à-vis* the blunders committed by several startups or the assistance offered to startups by the Government of India.

Conclusion

Indeed, lack of legal as well as financial awareness among entrepreneurs is the major reason why Startups in India fail and through this article, the author has attempted to raise awareness and initiate the reversal of this trend. Regardless of whether legal transgressions arise out of naivety or deceitfulness, it is imperative that Startups stay focused on the bigger picture. In conclusion, to quote from Mr. Natarajan Chandrasekaran's year end address to the employees of the Tata Group *"Our job is to run our marathon, not to be distracted by somebody else's sprint"*.[16]

[16] PTI, *Run our marathon, don't be distracted by somebody else's sprint: Chandra to Tata employees*, The Times of India (27/12/2018), available at https://timesofindia.indiatimes.com/business/india-business/run-our-marathon-dont-be-distracted-by-somebody-elses-sprint-chandra-to-tata-employees/articleshow/67274377.cms, last seen on 07/01/2019.

Right to Worship Vs. Rights of a Deity

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Introduction

India is a country which is so culturally diverse that almost every place of worship has some distinct beliefs, rituals and practices. Hindus constitute much of the population, with the rest being Buddhists, Sikhs, Jains, Muslims and Christians.[1] Hindus revere millions of deities and different beliefs and practices are prevalent in different parts of the nation. Hindu religion is, thus, traditionally plural.

India being a secular state, gives everyone the right to worship.[2] It is a fundamental rule that any dispute arising out of the personal laws of a person will be dealt with in accordance with their respective personal law, as long as it is not contrary to the Constitution of India.[3]

Hindu temples, observe the practice of Consecration known as 'Pran-Pratishtha', which basically signifies 'pouring' life into a deity.[4] In other words, once a deity is installed at a place and mantras are chanted during this practice, God is said to reside in that deity.[5] Courts unanimously recognize this practice and acknowledge such deity to be a legal person.[6] Once such deities are acknowledged as legal persons, a lot of rights are associated with them, leading to a situation wherein the rights of an individual and a deity are in conflict.

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[1] Ministry of Home Affairs, Government of India, *Census of India 2011 Table 21*, available at http://censusindia.gov.in/Census_And_You/religion.aspx , last seen on 04/02/2019.

[2] Art. 25, The Constitution of India, 1950.52367/6/06_chapter%202.pdf, last seen on 04/02/2019.

[3] *Historical Background of Personal Law*, Shodhganga, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/

[4] Anna Aleksandra Œl¹czka, *Temple consecration rituals in ancient India text and archaeology* (1970), available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/4581/total%20document.pdf?sequence=17, last seen on 04/02/2019.

[5] Ibid.

[6] Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of Uttar Pradesh, 1997 (4) SCC 606.

The Sabarimala Case

This conflict of rights has time and again appeared in several cases, including the famous Ayodhya Land Dispute Case.[7] However, in the recent case of *Indian Young Lawyers Association v. State of Kerala,*[8] which dealt with the entry of women in the Sabrimala temple, the position of law regarding this conflict has been settled. The Supreme Court of India through its landmark verdict recognized the entry of women of all age groups in the Sabrimala temple.[9] This decision triggered protests in the matrilineal state of Kerala. Women belonging to the age group whose entry was earlier banned, have themselves come on the streets and are 'ready to wait' in order to protect the celibacy of their God.[10] Meanwhile, a Review Petition has been filed in the Supreme Court, which the Court will be hearing soon.[11]

Significance of the Sabarimala traditions

This landmark judgment deals with various prepositions of law and its interplay with religion. The facts surrounding the issue are as follows- The Sabarimala Temple, dedicated to Lord Ayyappa, is a prominent temple in Kerala which is visited by over twenty million pilgrims and devotees every year.[12] As per a centuries old tradition of this temple, and the *'acharas'*, beliefs and customs followed by it, women in the age group of 10 to 50 years were not permitted to enter the temple. This was attributable to the manifestation of the deity at the Sabarimala Temple in the form of a *'Naishtik Bramhachari'*, who practices strict penance and the severest form of celibacy.[13] Lord Ayyappa is said to have explained the manner in which the pilgrimage to the Sabarimala Temple is to be undertaken, after observing a 41-day *'Vratham'*. It is believed that Lord

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[7] See Vicky Nanjappa, *How a deity came to be a party to Ayodhya suit*, rediff.com, available at https://www.rediff.com/news/report/how-a-deity-came-to-be-a-party-to-ayodhya-suit/20101001.htm, last seen on 04/02/2019.

[8] Indian Young Lawyers Association & Ors. v. State of Kerala, Writ Petition (Civil) No. 373 of 2006 (Supreme Court, 28/09/2018).

[9] Ibid.

[10] Shilpa S Ranipeta, '*SC Ignored Ayappan's rights': Ready to Wait campaign on Sabrimala judement*, The News Minute (28/09/2018), available at https://www.thenewsminute.com/article/sc-ignored-ayappan-s-rights-ready-wait-campaign-sabarimala-judgement-89105, last seen on 04/02/2019.

[11] *With Justice Malhotra on leave, SC unlikely to hear Sabarimala review pleas on Jan 22*, The News Minute (15/01/2019), available at https://www.thenewsminute.com/article/justice-malhotra-leave-sc-unlikely-hear-sabarimala-review-pleas-jan-22-95043, last seen on 04/02/2019.

[12] Supra 9, at 10.

[13] Ibid.

Ayyappa himself undertook the 41-day *'Vratham'* before he went to Sabarimala Temple to merge with the deity. The object of this *'Vratham'* is to discipline and train the devotees for the evolution of spiritual consciousness, leading to self-realization. Before embarking on the pilgrimage, a key essential of the *'Vratham'* is the observance of a *'Sathvic'* lifestyle and *'Brahmacharya'* so as to keep the body and mind pure. The basic objective is to withdraw from the materialistic world and step onto the spiritual path. When a pilgrim undertakes the *'Vratham'*, he separates himself from the women-folk in the house, including his wife, daughter, and any other female members in the family.[14] On the 41st day, after *puja*, the pilgrim takes the *irimudi* (consisting of rice, puja articles alongwith a coconut filled with ghee and other provisions for one's own travel) and starts the pilgrimage to climb the 18 steps to reach the *'Sannidhanam'* for *darshan* of the deity.[15] As a part of this system of spiritual discipline which involves walking from the River Pampa and climbing 3000 feet (13 kms) to the *Sannidhanam*, it has been expressly stipulated that women between the ages of 10 to 50 years should not undertake this pilgrimage.[16] This custom is understood to have been prevalent for several centuries, from the very inception of the temple.

It is pertinent to note that there are about 1000 temples dedicated to the worship of Lord Ayyappa.[17] Interestingly, the deity is in the form of a *'Naishtik Brahmachari'* only at Sabarimala, as the deity had manifested himself here. In the other temples, the mode and manner of worship differs from the Sabarimala Temple.[18] There is no restriction on the entry of women in the other temples of Lord Ayyappa. Women of all ages can worship the deity.

Developments relating to the Case before it reached the Supreme Court

A Division Bench of the High Court of Kerala, in the case of *S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram,*[19]upheld the practice of banning the entry of women belonging to the age group of 10 to 50 years in the Sabarimala temple during any time of the year. This judgment

[14] Ibid.

[15] Supra 9, at 12.

[16] Ibid.

[17] Supra 9, at 15.

[18] Ibid.

[19] S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors, AIR 1993 Kerala 42.

was never challenged before the Supreme Court and therefore attained finality. It is important to mention that none of the women worshippers ever challenged this practice.[20]

In 2006, the petitioners approached the Supreme Court directly, stating that they had learnt about the practice of restricting the entry of women in the age group of 10 to 50 years in the Sabarimala Temple from a few newspaper articles.[21] They sought directions from the Court to ensure the entry of female devotees between the age group of 10 to 50 years inside the temple, and prayed that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, framed in exercise of the powers conferred by S. 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, be declared unconstitutional as it violates Art. 14, 15, 25 and 51A (e) of the Constitution of India. The Supreme Court issued notice and in 2017, referred the same to a Constitution Bench which then allowed the petition.[22]

Arguments advanced before the Supreme Court

The Writ Petition before the Supreme Court was filed by a registered Association of Lawyers, along with interveners who were working in and around Punjab, focusing on issues of gender equality and justice. They arrayed the Travancore Devasom Board, the State of Kerala, the Pandalam Royal Family and the Chief Thanthri as the Respondents. It was argued by the Respondents that none of the Petitioners were devotees of Ayappa and none of them have ever seen the Sabrimala shrine. It was astonishing as well as interesting to know that the Petitioners learnt about the practice in Sabrimala from news articles written by Barkha Dutt and Veer Sanghvi in July 2006.[23] Despite the principle of Locus Standi, the Court entertained the Petition.[24] The main argument put forth by the

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[20] Supra 9.

[21] Barkha Dutt, *Scent of a Woman*, Hindustan Times(01/07/2006), available at https://www.hindustantimes.com/india/scent-of-a-woman/story-yeYQlfBeIdRi7excuVY07O.html, last seen on 20/04/2019; Vir Sanghvi, *Keeping the Faith, Losing our Religion*, Sunday Hindustan Times(02/07/2006), available at https://www.hindustantimes.com/india/keeping-the-faith-losing-our-religion/story-E7YjRP75ZiHKSAjyJcLqDP.html, last seen on 20/04/2019.

[22] Ibid.

[23] Supra 22.

[24] The principle of Locus Standi is a right to bring an action or to be heard in the Court. In the instant case, the petitioners were neither harmed by the action which they challenged in the Court, nor were connected to or had any belief in the deity or Sabrimala temple, due to which the Respondents challenged the maintainability of their petition on the ground of Locus Standi.

Petitioners was that this practice revolved around misogynistic notions of menstruation being impure.[25] They also compared this discrimination to untouchability. They further pleaded that the temple is a public place of worship and hence everyone should be allowed to enter it, irrespective of their gender.

The Respondents, on the contrary, argued that it had nothing to do with menstruation, and vehemently pleaded that if that were the case, they would have been the first ones to stand against it. They referred to the history of Sabrimala and explained how this practice evolved. They argued that after the completion of Consecration, the place becomes an abode of the deity.[26] Even if it is a public place of worship, one is allowed to enter and worship only so long as he/she is willing to respect the rules of that particular place. The Respondents also argued that the deity, being a juristic person, cannot stand or speak for itself in Court and should be treated to be a 'minor' in law. They contended that just as a minor is represented by a guardian, a deity must be represented by a next friend. The Chief Priest who infuses spirit in the deity through the practice of Consecration is considered to be its foster father and hence, a natural person who will represent this artificial person. The Respondents also drew analogy with the principles of Company Law, wherein if the director of a company ends up siphoning money, the shareholders will stand up and question the breach of his duties. Likewise, if the Chief Priest abandons his duty or doesn't protect the sanctity of the temple, the devotees and worshipers can stand up in a Court of law. They explained that it was the worshipers who were fighting to protect the celibacy of Lord Ayappa and not the Lord himself, as portrayed by the media. They further pleaded that the media trial was causing great prejudice to them. The entire debate had been captioned as 'Men vs. Women: Men and Temple on one side and Women on the other'.

It was argued that even if Sabarimala is a public place of worship, it does not mean that the rules of that place can be violated citing individual rights. For instance, if a person goes to a Ganesh temple and says that he will offer chicken as a Prasad (offering) to the God, he will be rebuked that, "This is not your house, do this in your house if your conscience permits it." This basically means that once a person enters a public place of worship, he will have to respect the sanctity of that place because it is not just his/her faith, it is everybody's collective faith.

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[25] Supra 9.
[26] Ibid.

The Respondents also tried to draw a nexus between practices under different faiths.[27] They pleaded that one cannot claim to be a Muslim if they deny the fundamental tenet of Islam i.e. *Shahada* which is based on two precepts, first, on the oneness of God and second, the acceptance of Prophet Muhammad as the last prophet.[28] They further raised a question that if somebody openly challenge these precepts and then say that they want to access or enter the mosque, will they be permitted? No! The logic is the same. One can enter any public place only after satisfying the rules that apply to that place.

The Respondents also appraised the Court about the celibacy of the deity and the need to preserve his celibacy, by relying on various religious texts.[29] While denying the contention regarding menstruation, they gave various examples. One such example was of the Maa Kamakhya Temple in Assam, where a menstruating Goddess is worshipped as a deity.[30] Women are allowed to enter the temple premises during their menstrual cycle, whereas no men are allowed in this temple. Only female priests or sanyasis maintain this temple where the menstrual cloth of Goddess Sati is considered highly auspicious and is distributed to the devotees.[31] So the whole argument constructed around the notion of menstruation being impure and considered as a polluted state of body in religious practices is nothing but a convenient misconception.

The Respondents felt that the rights of the worshiper and the rights of the deity were not in conflict. People who did not believe in the deity were challenging the rights and very nature of that deity. According to the Respondents, the main question to be considered was how those who did not believe in the sanctity of a place could challenge the identity of the place and the deity, and also maintain that their rights should prevail over that of every other person who believes in the sanctity of that place and tries to uphold its traditions.

They argued that this question is similar to whether one can practice in the Supreme Court without satisfying the necessary qualifications of that place.

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[27] Ibid.

[28] *Declaration of faith (Shahada)*, available at https://www.islamicity.org/topics/declaration-of-faith-shahada, last seen on 04/02/2019.

[29] Supra 9.

[30] *The Legend of Kamakhya: How the bleeding Goddess celebrates the 'Shakti' every woman has*, available at https://www.thebetterindia.com/114044/the-legend-of-kamakhya-temple-assam-bleeding-goddess-assam/, last seen on 04/02/2019.

[31] Ibid.

How is it that people choose to respect such rule, without raising the argument that Art. 19 of the Constitution of India give them a Fundamental Right to practice before the Supreme Court? Why should their individual rights not prevail over that of the institution? The Respondents rested their case by stating that there is a fine line between exclusion and discrimination. They pleaded that the diversity of India and the plurality of Hindu traditions were being misunderstood as discrimination. They can be considered as 'religious denominations' under Art. 25 and 26 of the Constitution of India and hence, their rights have to be taken into consideration.

The Verdict

The Supreme Court, by a 4:1 majority, permitted entry of women of all age groups to the Sabarimala temple, holding that devotion cannot be subject to gender discrimination.[32] Indu Malhotra J., a woman herself, dissented with the majority view. Writing one of the most powerful dissents in recent times, Malhotra J. held that the petitions were not maintainable and it was not the Supreme Court's domain to look into such affairs. She held that there exists a difference between diversity and discrimination, something which the majority has completely failed to appreciate. She also held that in matters of faith, the Courts should intervene only if they are *"pernicious, oppressive, or a socially evil, like Sati"*.[33] Thus, Malhotra J., in unequivocal terms, held that the relief sought was outside the scope and authority of the Supreme Court. Now, all eyes are on the Review petition which should soon be heard by the Supreme Court.

Analysis of the Sabarimala controversy

A deity has been given an identity similar to an individual by conferring certain rights on it. The debate does not pertain to the rights of the deity versus the rights of the citizens. The Supreme Court judgement itself clearly states that the conflict is between the rights of different groups of individuals. If we analyse the conflict closely, we would come to the conclusion that the choice relating to religion versus other tenets of life is pre-determined and we are, in reality, left with no choice. For instance, the Respondents drew a nexus between entering

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[32] *Devotion Cannot Be Subjected To Gender Discrimination, SC Allows Women Entry In Sabarimala By 4:1 Majority; Lone Woman In The Bench Dissents*, Livelaw (28/09 2018), available at https://www.livelaw.in/sabarimala-devotion-cannot-be-subjected-to-gender-discrimination-sc-allows-women-entry-by-41-majority-lone-woman-in-the-bench-dissents/, last seen on 04/02/2019.

[33] Ibid.

the Supreme Court as an advocate and entering a temple as a worshipper. It was argued that since both of them are 'public places', just as one cannot practice in the Supreme Court without satisfying the prescribed qualifications; so too, one may enter a public place of worship only after satisfying the rules that apply to that place. But on the contrary, the Respondents have failed to appreciate the rights flowing out of these tenets of life. One tenet is the right to practice as an advocate, which comes under Art. 19 (1)(g) of the Constitution. The other is the right to worship which comes under Art. 25 of the Constitution. Art. 25 itself expressly states that the right guaranteed under it is subject to other rights in Part III of the Constitution. Hence, the rights flowing out of Arts. 14, 19 or 21 of the Constitution are put at a higher pedestal than someone's right to practice their own religion. This is where the problem lies. This effectively means that any right that flows from Arts. 14, 19 or 21; for example, sexual autonomy in the *Navtej Singh Johar* case,[34] or privacy in the *Justice Puttaswamy* judgement,[35] is of a superior nature than the right to religion. It can be construed that religion as an aspect of life has been given a secondary place in the Constitution than individualism or the rights flowing out of individualism. As long as Art. 25 remains subject to Arts. 14, 19 and 21, there is no choice but to put religion second and there is nothing much that one can do about it.

There is a need to contemplate why the rights of the Deity are subordinate to the right to religion of individual devotees. The basis for this subordination is the concept of Secularism. This concept was based on the principle that religion is an enemy of the modernization process.[36] With minor tweaking, this principle has been copy pasted in the Indian Constitution. It is necessary to examine whether this modern version of secularism will work in the Indian society. Religion as it stands today is a manifestation of one's personal and spiritual relationship with the Creator. The moment traditional notions of religion pervade a public space, religion takes the backseat. And hence, it is legally sound to put an end to this barrier of not letting women of menstruating age enter the temple.

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[34] Navtej Singh Johar v. Union of India, W.P. (Crl.) No. 76 of 2016 (Supreme Court, 06.09.2018).

[35] Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., W.P. (Civil) No. 494 of 2012 (Supreme Court, 26/09/2018).

[36] Karl Thompson, *Modernizaation Theory,* Revisesociology,, available at https://revisesociology.com/2017/09/19/modernization-theory/, last seen on 04/02/2019.

Delinquency: Influence of Economic Factors

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Introduction

Crime can be defined as "*An action or omission which constitutes an offence and is punishable by law."*[1] Crime has been defined by various criminologists but it is impossible to arrive at a precise definition, as every society has different norms; violations of such norms maybe considered as an offence in one country but not in another. Emile Durkheim, a French sociologist, in his book '*Rule of Sociological Method'* has explained that there, exists no human society which is unaffected by crime, the forms may change but there will be men in all societies whose behaviours or omissions call for penal repressions.[2]

The continuous changes in the socio-economic factors are considered to be the cause of crime and its structure.[3]In the Ancient times, crimes in the society included only those acts which were committed against the State and not against persons. With the march of time, human reasoning has improved, which has subsequently brought a substantial change in the concept of crime. This particularly has led to the substantial development of criminology as an independent branch of knowledge.

Professor Edwin H. Sutherland, an American sociologist, defines criminology as the body of principles dealing with delinquency and crime as a social phenomenon which also includes making of law, breaking the law and the reaction towards it.[4] Criminology largely focuses on three main areas.

1) *Sociology of law*: making of the law

[1] Oxford English Dictionary (3rd ed., 2010).
[2] Emile Durkheim, Rule of Sociological Method, 65 (1950).
[3] Grzegorz Peszko, *The Influence of Socio Economic Factor on Crime*, 21 Journal Of Humanities And Social Science (IOSR-JHSS) 18, 18 (2016), available at http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2021%20Issue9/Version-6/C2109061821.pdf, last seen on 02/11/2018 [hereinafter 'Grzegorz'].
[4] Sutherland & Cressey, Criminology 3 (1948).

2) *Theories of causation*: the crime
3) *Social responses to crime*: Correctional methods[5]

Economic Factors and Criminology

Karl Marx, the well-known economist, in his theory stated that all human behaviour is influenced by economic factors and not by conscience which in itself, relies on the economic factors and surrounding, thereby establishing a relationship between the economic factors and crime committed.[6] One of the most remarkable theories based on the Marxist approach was propounded by William Adrain Bonger[7], the renowned criminologist, who in his theory has blamed the capitalist system for the birth of crime in the society. According to him, a capitalist society is based on the principle of profit-making and promotion of the selfish interests of the people. In such a society, one tries to maximize his profits with the minimum efforts possible; this situation makes the oppressed section resort to means which they would have not adopted otherwise. He concluded that it is the following economic factors which affect crime in a particular society:

1) *Poverty*: With reference to the analysis of economic conditions in Europe, he found that there was an abnormal increase in the rate of property crimes during cession or economic depression.
2) *Unequal distribution of wealth*: He observed that the capitalist economy due to its monopolistic trend created disparities among different economic sections of the society thereby affecting delinquency.
3) *Competitive tendency*: To meet the requirements of the competitive market and to compete in the market manufacturers resort to unlawful means.
4) *Employment of child and women*: He stated that some women who were not able to look after their children due to preoccupation with their jobs led their children to commit crimes. Moreover, a child when employed earns money which he does not know how to spend and thus may get dragged into criminal activities.

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[5] *GRP200 Criminology and Penology*, University of Nairobi School of Law, available at learning.uonbi.ac.ke/courses/GPR200/document/criminology/CRIMINOLOGY.ppt, last seen on 12/10 2018.
[6] Dr. N.V. Paranjape, *Criminology & Penology with Victimology,* 114 (16th ed., 2015).
[7] Ahmad Siddique & S.M. Afzal Qadri, *Criminology Penology & Victimology*, 63 (7th ed., 1977).

Similar to the views of Bonger,[8] D. M. Gordon stated that it is the capitalist state and conflict between the capitalist state and the socio-economic factors which result in the delinquent behaviour of the people.

Jeremy Bentham,[9] the distinguished English philosopher, in his theory considered profit which was to be reaped from the commission of a crime as the main inspiration for the criminal behaviour of a person and punishment as the only deterrent for it. Thus, the magnitude of the profit or punishment determined whether the crime would be committed or not.

Factors affecting Crime Rate in a Society

According to the various theories propagated by the economists, the factors such as unemployment, poverty, education, etc. are considered to be the primary causes for the rise of crime rate in a country**.**

A. Unemployment

When a country faces widespread unemployment, the population faces a severe financial crisis and major reductions in its income.[10] This provides people with the motivation to resort to criminal and illegal activities to meet their ends. A longitudinal study which sought to establish a relationship between unemployment and crimes had shown that an individual was prone to indulge in criminal activities more during the period of unemployment.[11]

Thornberry and Christenson, scholars in criminal justice, have opined that unemployment appreciably impacts the commission of crimes. They suggested that the crime rates, chiefly those of property crime, escalate during periods of high unemployment.[12]

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[8] D.M. Gordon*, Capitalism, Class, and Crime in America,* 19 (2) Crime And Delinquency, 163 (1973), available at http://www.ncjrs.gov/App/publications/abstract.aspx?ID=10630, last seen on 19/10/2018.

[9] Ibid, at 271.

[10]*Monitoring the Impact of Economic Crisis on Crime,* United Nations Office on Drugs and Crime, Statistics and Surveys Section (SASS) (2011), 8, available at https://www.unodc.org/documents/data-and-analysis/statistics/crime/GIVAS_Final_Report.pdf, last seen on 15/10/2018 [hereinafter 'UNODC'].

[11] Don Weatherburn, *What causes Crime,* 54 NSW Bureau of Crime Statistics and Research 1, 5 (2001), available at http://www.bocsar.nsw.gov.au/Documents/CJB/cjb54.pdf, last seen on 01/12/2018.

[12] Thornberry, T. & R. L. Christenson, *Unemployment and criminal involvement: An investigation of reciprocal causal structures*, 49 American Sociological Review 398 (1984).

Any individual affected by long-term unemployment starts to feel a sense of exclusion and injustice because of which he ultimately loses hope of finding a legitimate source of income and resorts to crime. According to certain police reports the highest crime rate is observed among the unemployed people who are under 30 years of age.[13]

This can thus, explain the relationship between unemployment and increase in property crimes. Such a situation also causes a plethora of violent crimes, since the unemployed people become significantly intolerant and aggressive, particularly within their families.

B. Poverty

Alain Peyrefitte, a distinguished French scholar, stated that '*crime is the child of poverty*'. For long, there has been an established relationship between poverty and crime, though, it would be completely unfair to consider it as the only factor responsible for the commission of a crime.[14]

According to Willem Bonger ('Bonger'), who took inspiration from the studies of Fornasaridi Versea renowned sociologist and criminologist, there exists a close relation between crime and prosperity or good economy. He concluded that the wealthier regions have minimum crime rates and to substantiate this claim he cited the survey of Italy which indicated that among the total number of criminals, 87% belonged to the lower economic class of the society.[15] However, this claim was later rejected by Gabriel Tarde, a well-known criminologist. He did not consider it to be decisive and believed that there existed several other factors which acted as a source of motivation for the commission of crimes rather than poverty being the only factor. He awarded significant importance to social factors as a source of influence in the commission of a crime.[16]

It has been observed that amelioration of poverty can eventually lower the crime rate by enhancing the living conditions of the poor and can thereby deter them from engaging in criminal activities.[17] Thus, establishing a relationship between poverty and crime.

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[13] Grzegorz, Supra 3, at 19.

[14] Grzegorz, Supra 3, at 20.

[15] J.L. Gillen, *Some Economic Factor in the making of the Criminal,* 2 Social Forces 689 (1924), available at https://www.jstor.org/stable/3006211?seq=1#page_scan_tab_contents, last seen on 23/11/2018 [hereinafter 'Gillen'].

[16] Ibid, at 690.

[17] Nickerson G. W., *Analytical problems in explaining criminal behavior: Neo-classical and radical economic theories and an alternative formulation*, 15 Review of Radical Political Economics 1, 1 (1983), available at https://doi.org/10.1177/048661348301500401, last seen on 30/11/2018.

C. Recession and Debt

Recession leads to increased debt, people who spiral into debt become desperate. This specifically increases crimes like theft, since people are more likely to steal to pay off their debts. They thus, adapt to illegal means to make money quickly.

People in such situations also resort to drug abuse often for refuge. A corollary to which is an increase in drug-related crimes, the result of which is an increase in the price of drugs. It is a rational conclusion that such people who do not have the money commit theft to procure drugs.

Violence is one of the other prominent areas where an increase during a recession can be observed. Crimes involving violence also increase when people are inebriated or intoxicated by drugs, this is because people are more likely to get frustrated when times are difficult and therefore turn violent.

Debt can increase stress within the family household and lead to the dissolution of marital bonds. The fight between parents has a substantial effect on children, who often resort to crime, leading to an increase in juvenile delinquency and poor education. The '*Criminal Motivation Theory',* propounded by Bonger, also suggests that economic stress may increase the scope for individuals to engage in illicit behaviour.[18]

D. Education

According to Ehrlich, education determines the impulse for committing both legal and illegal crimes.[19] He established a positive relationship between the level of education and the crime committed. He believed that education affected the decision of committing or not committing a crime. A rise in the education level would indicate better employment opportunities and more people would be employed in high paying jobs. This would, in turn, reduce the motivation and the need for committing a crime.

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[18] Oana-Ramona Lobonþ, Ana-Cristina Nicolescu, Nicoleta-Claudia Moldovan & AyhanKuloðlu, *The effect of socioeconomic factors on crime rates in Romania: a macro-level analysis*, 30 Economic Research EkonomskaIstraživanja, 101 (2017), available at https://www.tandfonline.com/doi/full/10.1080/1331677X.2017.1305790, last seen on 30/10/2018.

[19] Alison Oliver, *The Economics Of Crime: The Analysis Of Crime Rate In America,* 10 The Park Place Economist 30, 30 (2002), available at: https://digitalcommons.iwu.edu/parkplace/vol10/iss1/13, last seen on 15/10/2018.

Further, the unequal distribution of wealth forces those in the lower section of the economic ladder to poverty, depriving them of education and other benefits. These factors in combination are responsible for delinquent behaviour.[20] Lack of education implies a lack of knowledge about the laws and legal activities, as a result of which such ignorant people may resort to crime.

E. Income inequality

The French sociologist Tarde and the Italian criminologist Poletti contended that the increase in crime rates did not have a relationship with the economic development or prosperity, but with luxury and unequal distribution of wealth.[21] The unequal distribution of wealth is considered to be one of the most important factors of criminality. The population belonging to the lower economic class has a sense of deprivation and believes the system to be unjust and wrong; this creates an excuse in their mind and also acts as a motivation for their delinquent behaviour.[22]

Indian Scenario

Poverty and unemployment are the leading contributors to the commission of crimes. In India, criminal statistics visibly demonstrate a direct nexus between poverty and crimes. 50.2% of 31,725 which is the total number of juvenile offenders belonged to the lower economic classes.[23] This clearly indicates that a major share of the people who engaged in criminal activities belonged to the lower economic strata. The studies have also shown that a great number of juvenile offenders come from poor families, with income up to Rs. 25,000 per annum.[24] This signifies a strong relationship between poverty and economic conditions of the people.

It can be observed that poverty sometimes pressurizes a person to the extent of making him a criminal and coerces him to commit a crime. In one such case of Maragatham,[25] the family of the accused had been starving for ten days straight and had no subsistence to survive. Thus, the accused and his wife along with

[20] J.P.S. Sirohi, *Criminology & Penology*, 115 (7th ed., 2011).
[21] Ehrlich I., *Participation in Illegitimate Activities: A theoretical and Empirical Investigation*, 81 (3) Journal of Political Economy 521, 522 (1973), available at https://www.journals.uchicago.edu/doi/abs/10.1086/260058 , last seen on 01/11/2018.
[22] Gillen, Supra 15, at 691.
[23] Supra 7, at 64.
[24] NCRB Ministry Of Home Affairs, Government of India, *Crime in India 2013 Statistics*, available at http://www.nisc.gov.in/PDF/NCRB-2013.pdf, last seen on 03/11/2018.
[25] *In Re*: Maragatham and Anr, AIR 1961 Mad 498.

their infant child decided to end their lives. Consequently, they jumped into a well to put an end to their misery. However, the parents were rescued and the infant drowned and died. They were charged with the offence of attempt to murder under S. 307[26] r/w S.34[27] and S. 309[28] of the Indian Penal Code, 1860. This case is a classic example of how people commit crime because of poor economic conditions. In another case of *Shreerangye v State of Madras,*[29] the accused was deserted by her husband and had no means to continue the survival of her five children and herself. Her financial position exacerbated when her youngest child got ill and she could not pay for the treatment. She had exhausted all possible means but could not arrange for the money and in exasperation ended up drowning herself and her children. She survived and was convicted under S. 302 of the Indian Penal Code, 1860 for the murder of her children. The Hon'ble Madras High Court refused to accept poverty as the motivating factor for the commission of the crime.

Such cases indicate the rigidity and the indifference of the Courts towards the economic status of a person. It is a reasonable assumption that the accused initiated this step only because of her failure to maintain her family. Poverty being the root cause of the problem should be taken into consideration while imposing punishments in such cases.

Criticism

Theories which link economic factors with the commission of a crime are severely flawed because of multiple reasons. Trends in crime rates in India or in any other country cannot be attributed to one particular factor or one particular class of people. People from all economic classes are engaged in criminal activities and not just the people from the lower class, as advanced by various sociologists. In an extensive research conducted by Charles Goring,[30] on three thousand criminals, it was found that there existed no link between the crime rates and the economic conditions of the criminals. He further, concluded that different classes of people resorted to different types of crimes. He elaborated that offences like wilful arson, wilful damage to property were offences committed recurrently by agriculturalists, labour class, and seamen; whereas businessmen engaged in crimes which were acquisitive in nature.

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[26] S. 307, The Indian Penal Code, 1860.
[27] S. 34, The Indian Penal Code, 1860.
[28] S. 309, The Indian Penal Code, 1860.
[29] Shreerangye v. State of Madras (1973) 1 MLJ 205.
[30] Supra 6, at 121.

It is noteworthy that crime rates do not follow a particular pattern during better economic conditions or weaker economic conditions. Crime do not take place because of the influence of economic factors but because of the acquisitive tendency and greedy nature of man. Bonger miserably fails to explain white-collar criminality.[31] The assumption that, it is the poor economic conditions of a man which motivates him to commit a crime forms the foundation of Bonger's theory and does not justify the commission of white-collar crimes.

Lastly, Bonger and Marx greatly relied on capitalism being the root of all problems. However, it is a valid conclusion that crime is an inevitable part of any society whether it be a capitalist or a socialist one. Political and religious offences are frequently committed in socialist countries like Russia and China. The political instability and the general dissatisfaction of the citizens towards their governments in these countries leads to an increase in the crime rates for offences like sedition and treason, having no relation whatsoever with the economic factors. It would thus, be absolutely erroneous to conclude that economic factors alone lead to crimes.[32]

Therefore, the economic factors should not be considered in isolation or as the only factors affecting crime rates in a society. Other factors such as religion and political scenario which lead to crimes like sacrilege, geographical conditions, to crimes like sedition, treason also have a major impact on crime rates. White-collar crimes cannot be explained through Bonger's theory under any possible circumstances. Further, it's agreeable that poor economic conditions might tempt a person to commit a crime but the sole attribution to it would be unfair and inappropriate. There exists a plethora of reasons and motives for indulging in criminal behaviour and hence none of them can be viewed in isolation which however have been completely ignored by the above mentioned theories and analysis.

[31] Supra 6, at 117.
[32] Supra 6, at 119.

Do the provisions of the Surrogacy (Regulation) Bill, 2018 justify its intention?

Saloni Bhambi, Simantini Baraokar
II BA.LL.B.

Introduction

Globally, infertility affects an estimated 15% of couples, approximately about 48.5 million couples. This *global epidemic* has caused people to prefer advanced infertility treatments, one of them being surrogacy. Surrogacy is an arrangement whereby an intending couple commissions a surrogate mother to carry their child.[1] As part of the surrogacy agreement, the surrogate mother waives all her parental rights and agrees to give the baby to the intended parents immediately upon delivery. Even though this practice has existed since biblical times, it has now become both a popular and controversial solution for childless couples to have complete families.

India was the first country to legalise commercial surrogacy in 2002. The new medical tourism policy directed at earning foreign exchange and revenue by permitting foreign nationals to avail the services of Indian surrogate mothers, thereby making it the surrogacy capital of the world by 2012, the market being valued at approximately $500 million per annum.[2]

India thus emerged as a surrogacy hub for couples from different countries but in its wake there have also been reported incidents concerning unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and rackets of intermediaries importing human embryos and gametes. Widespread condemnation of commercial surrogacy prevalent in India has also been regularly reported in different print and electronic media, highlighting the need to prohibit commercial surrogacy and allow ethical altruistic surrogacy.[3]

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[1] The Surrogacy (Regulation) Bill, 2018 (passed by Lok Sabha, 19/12/2018).

[2] *Wellness & Medical Tourism,* Ministry of Tourism, Government of India, available at http://tourism.gov.in/wellness-medical-tourism, last seen on 20/12/2018.

[3] *Cabinet approves introduction of the "Surrogacy (Regulation) Bill, 2016"*, Press Information Bureau, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=149186, last seen on 09/12/2018.

Commercial surrogacy has become so rampant in India that it has now been nicknamed the "rent-a-womb" capital, where couples 'hire' a womb on 'rent' to carry their child[4]. The moral issues associated with surrogacy are quite obvious, yet an eye-opener. This includes the criticism that surrogacy could break the bond between mother and child, interfere with nature and lead to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes psychological afflictions (e.g.: post-partum depression) may come in the way of a surrogacy arrangement.[5]

Landmark Cases

Baby Manji Yamada v. Union of India,[6] was the first case relating to surrogacy decided by the Apex Court. The judgment was passed under the presumption of legality of the surrogacy agreement, with the Court merely commenting on the status of such agreement. Baby Manji Yamada was born to a surrogate mother through invitro fertilization using the eggs extracted from an anonymous female Indian donor and sperm by the intending father, Dr. Yuki Yamada, under the care of Dr. Patel. Due to marital problems, the intending couple decided that in the case of a divorce, the intending father would take care of the baby. With the couple applying for in a divorce one month before the birth of baby Manji, the intending mother returned to Japan. As his visa expired, Yuki Yamada too left for Japan. Though the intending father still wanted to claim the baby, some problems arose. Yamada tried to secure legal documents to take the baby to Japan. But the Japanese Embassy in India refused to grant Manji a Japanese passport and visa. The Japanese Civil Code[7] recognizes only the woman who gives birth to her baby as the mother. The code does not recognize surrogate children. In this case, the woman who gave birth to Manji was Indian, not Japanese; which meant Manji was not entitled to a Japanese passport. Yamada's next stop was the Indian Government. Even though he was her genetic father, at one time, it looked as though he would have to adopt Manji. Since Indian laws didn't address commercial surrogacy, the genetic parents had no option

[4] *Commercial Surrogacy - The Need for Regulation,* Shriya Misra, Legal Services India, available at http://www.legalservicesindia.com/article/1188/Commercial-Surrogacy.html, last seen on 09/12/2018.

[5] 228th Law Commission of India Report, *Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy,* 11 (2009), available at http://lawcommissionofindia.nic.in/reports/report228.pdf, last seen on 09/12/2018.

[6] Baby Manji Yamada v. Union of India & Anr., (2008) 13 SCC 518.

[7] Part IV, Ch. 3, S. 1, Art. 772 (1), Civil Code 1896, (Japan).

but to adopt their own babies thus born via surrogacy. Once again, Yamada was hit by a legal snag viz. the Juvenile Justice (Care and Protection of Children) Act, 2015 which does not allow single men to adopt baby girls.[8] When approached by the press, Dr. Patel insisted that Yamada did not have to adopt the baby, because he was the biological father.[9] Despite this fact, Manji was not allowed to leave the hospital with Yamada.The anonymous egg donor (the genetic mother) had neither rights nor responsibilities towards the baby. The responsibility of the gestational (surrogate) mother had ended when the baby was born. It turned out that none of the three mothers were legally responsible for Baby Manji, because the surrogacy contract was not legally binding with regard to parental responsibilities. It was clear that Yamada and his daughter were caught between two legal systems, neither of which was prepared to handle a case like theirs.

In the meantime, Manji's paternal grandmother, Emiko Yamada, travelled to India to take care of the child in the absence of her father. Due to the Rajasthan riots in 2008, the baby was soon shifted to Gujarat. Emiko filed a petition in the Rajasthan High Court, seeking temporary custody of Manji, on the ground that she was her closest female blood relative in India; until custody could be transferred to her son.[10]

On September 15 2008, the Solicitor General informed the Supreme Court that the decision about Manji's passport was up to the Union government. Yamada's attorney insisted that according to the voluntary guidelines of the Indian Council of Medical Research, intended babies born via surrogacy are to be considered the legitimate children of their biological fathers. A month later, the Rajasthan regional passport office issued Manji an identity certificate as part of a transit document, paving the way for the baby to obtain a Japanese travel visa. It was the first such identity certificate issued by the Indian Government to a surrogate child born in India.[11] The certificate did not mention nationality, the mother's name or religion, and it was valid only for Japan. On October 27, the Japanese Embassy issued the three months old a one-year visa on humanitarian grounds.

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[8] S. 57(4), Juvenile Justice (Care and Protection of Children) Act, 2015.

[9] *Surrogacy Baby born into legal limbo*, The Sunday Times (10/08/2008), available at https://www.pressreader.com/south-africa/sunday-times-1107/20080810/282711927813181, last seen on 09/04/2019.

[10] Ibid.

[11] Bhandari Prakash, *'Identity' for Little Manji,* The Times of India (18/10/2008), available at https://timesofindia.indiatimes.com/city/jaipur/Identity-for-little-Manji/articleshow/3610725.cms, last seen on 20/12/2018.

Less than a week later, Manji Yamada and her grandmother, Emiko, flew to Osaka. Japanese authorities stated at that time that Manji could become a Japanese citizen "once a parent-child relationship has been established, either by the man recognizing his paternity or through his adopting her."

Hence, we can see that the surrogacy contract and the laws which existed back then did not cover a situation like this. It was impossible to determine either the parentage or the nationality of Baby Manji, under the existing Indian and Japanese laws. The situation soon grew into a legal and diplomatic crisis. The case of Baby Manji illustrates the legal complexity and challenges which can arise in the face of emerging technologies.

Highlights of the Surrogacy (Regulation) Bill, 2018

A need to regulate the surrogacy industry arose, leading to the introduction of The Surrogacy (Regulation) Bill, 2018. The highlights include:

1) The Bill, vide S. 4(ii)(b), bans commercial surrogacy (done for money) and only allows altruistic surrogacy (done out of the goodness of heart). The intending couple will only bear the medical expenditure and insurance coverage of the surrogate mother.
2) According to S. 4(b)(I), to qualify as a surrogate mother, one should
   a) Be between 25-35 years of age;
   b) Have been married at least once;
   c) Have had a child of their own; and
   d) Not have been a surrogate mother previously.
3) According to S. 4(c), the qualifications for an intending couple are as follows-
   a) An Indian heterosexual couple;
   b) Legally married for at least five years;
   c) Been unable to conceive in these five years due to infertility on the part of one or both partner(s);
   d) No surviving child, whether biological, adopted or surrogate (an exception has been made in cases where the surviving child of the intending couple is mentally or physically challenged or suffers from a life threatening disorder or fatal illness with no permanent cure); and
4) The 'intending couple' should be a legally married man and woman, above the age of 21 and 18 respectively, who have been medically certified to be infertile.

5) The surrogate mother should be a close relative of the intending couple.

6) The surrogate child will be viewed as the biological child of the intending couple.

7) The Central and State governments will appoint appropriate authorities to grant eligibility certificates to the intending couple and the surrogate mother. These authorities will also regulate surrogacy clinics.

8) Undertaking surrogacy for a fee, advertising it or exploiting the surrogate mother will be punishable with imprisonment for 10 years and a fine of up to Rs. 10 lakhs.

9) If a surrogate mother engages in commercial surrogacy or any other illegal surrogacy procedure, the Court will assume that the surrogate mother's husband, the intending couple or her relative compelled her to do so.

10) While commercial surrogacy will be prohibited, including sale and purchase of human embryo and gametes, ethical surrogacy to needy infertile couples will be allowed upon fulfilment of certain conditions and for specific purposes.

Shortcomings of the Bill

Even though the introduction of the draft Surrogacy (Regulation) Bill, 2018 is a welcome step towards capping the current regulatory vacuum in the commissioning of surrogacy in India, the provisions of the Bill overreaches with a flawed mechanism.[12]

By imposing a ban on commercial surrogacy, the Bill might do more harm to women than good. It would be wise to acknowledge that wherever a gaping hole in demand and legal supply for any product emerges, black markets have been known to surface and thrive. Illegal organ trade is one such example. Indeed, banning the sale of one's own organs (Transplantation of Human Organs and Tissues Act, 2011)[13] and restricting donations to only close relatives and

[12] Nidhi Gupta, *What's wrong with the Surrogacy Bill,* The Hindu (09/09/2018), available at https://www.thehindu.com/thread/politics-and-policy/article9090866.ece, last seen on 9/12/2018.
[13] S. 19A, The Transplantation of Human Organs (Amendment) Act, 2011.

other altruist donors has not come in the way of India being one of the biggest organ markets, especially for kidneys. Similarly, how criminalising abortion had resulted in illegal abortion trade in the U.S.[14]

The demands for surrogacy will not vanish all of a sudden. The proposed Bill may result in the creation of an illegal market which would eventually make the surrogate mothers more vulnerable to exploitation left with no legal recourse when contracts are broken.

The Standing Committee on Health and Family Welfare, in their report,[15] supported the restriction on a woman being a surrogate mother only once, as economic necessity could pave the way for abuse and exploitation. However, the rest of the restrictions, such as exclusion of widows, unmarried and childless women, may have been introduced to reduce economic exploitation or psychological distress of women, or taking into account inadequacy of support system. But ideally, if a woman is willing, her familial status should have no bearing on her ability to be a surrogate mother.

Moreover, these restrictions may take away a chance from genuine couples to find an appropriate surrogate as very few women may be eligible. What the Bill fails to realize is that it is heavy regulation and not narrow criteria which will guarantee the protection of surrogates.

It is the woman's right and choice to use her body as she chooses and sees fit, even if that means being a surrogate. To prevent women from entering into surrogacy contracts is to deny them democratic, economic and reproductive freedom. This perspective casts surrogate parenting as no different from any other wage labour contract. This could violate the woman's fundamental right to livelihood under Art. 21 of our Constitution.

The shortcomings of this Bill also include the arbitrariness of the five-year waiting period to determine infertility, and the bar against homosexual, live-in couples or single parents being intending parents.

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[14] Ibid.

[15] Standing Committee on Health and Family Welfare, Rajya Sabha, *One Hundred Second Report The Surrogacy Regulation Bill, 2016*, available at http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on %20Health%20 and%20 Family% 20Welfare/102.pdf, last seen on 20/12/2018.

The Standing Committee on Health and Family Welfare also agreed that five years is too long a waiting period but maybe the idea behind this is that couples may then abandon the idea of surrogacy and explore other options such as adoption.[16] The Bill's definition of infertility (S. 2(2p)) states– *"Infertility means the inability to conceive after five years of unprotected coitus or other proven medical condition preventing a couple from conception."*[17] But the World Health Organisation's definition of infertility mentions a period of mere 12 months before evaluating the condition[18]. Hence there is an inconsistency between the globally-recognized standard and the Indian standard. Further, infertility is just one of the reasons why people opt for surrogacy. Other situations such as genetic disorders, multiple miscarriages, etc. may also cause people to choose this method, and the Bill fails to take these circumstances into consideration.

As per Art. 14 of the Indian Constitution, all citizens are equal before the law. By acceding the right to have a surrogate child to heterosexual couples alone, the Government has negated the equality that the Constitution guarantees to single parents and homosexuals,[19] especially in the light of the progressive judgement of the Supreme Court partially decriminalising S. 377 of the Indian Penal Code.[20]

Moreover, as per a Supreme Court ruling, long-standing live-in relationships are on par with marriage and children born out of these relationships are legitimate[21]. By limiting the option of surrogacy to legally married couples, the government is countering the acceptability of live-in relationships and setting a wrong precedent.[22]

The Bill questions the reproductive rights of a woman. The right to life enshrines the right of reproductive autonomy, inclusive of the right to procreation and parenthood, which is not within the domain of the State, warranting interference

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[16] Ibid.

[17] Supra 1.

[18] *Sexual and Reproductive Health*, World Health Organization, available at https://www.who.int/reproductivehealth/topics/infertility/definitions/en/, last seen on 20/12/2018.

[19] Supra 13.

[20] Navtej Singh Johar & Ors. v. Union of India through Secretary, Ministry of Law and Justice, W.P. (Crl.) 76/2016 (Supreme Court, 06/09/2018).

[21] Tulsa & Ors. v. Durghatiya & Ors., AIR 2008 SC 1193.

[22] Supra 13.

with a fundamental right. It is for the person and not the State to decide modes of parenthood. It is the prerogative of person(s) to have children born naturally or by surrogacy in which the State, constitutionally, cannot interfere.[23]

Foreign couples cannot avail the services of an Indian surrogate mother. The logic behind this restriction is that India's million-dollar surrogacy industry is due to the exploitation of surrogates here, since commercial surrogacy is banned in most other countries. Even Non-Resident Indians ("NRIs") Persons of Indian Origin ("PIOs") and Overseas Citizens of India ("OCIs") areout of the ambit of the Bill.

The Bill does not define the term 'close relative' thus leading to some ambiguity. A point of concern would be that since the surrogate mother has to be a close relative, there could be a socio-psychological tension, especially if she has to live with the child. Given the predominant patriarchy in our society, a close relative might also be forced to become a surrogate mother for an infertile couple in the family without her free consent and there would be no space for her to complain. The Bill addresses this concern by providing u/S.39 that if a surrogate mother engages in commercial surrogacy or any other illegal surrogacy procedure, the Court will presume that the surrogate mother's husband, the intending couple or her relative compelled her to do so. Hence the basic principle of criminal jurisprudence- *'innocent until proven guilty'*, goes flying out of the window.

Aspects Not Covered by the Bill

Some of the important aspects on which the Bill is silent are as follows-

1) Provision in case the intending couple divorces or dies.
2) Provision for the fundamental right of the surrogate mother i.e. right to privacy.
3) Provision against sex-selective surrogacy.
4) Provision to resolve disputes between the two parties.
5) Provision of breast milk for surrogate child.

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[23] *Insights into Issues: Surrogacy (Regulation) Bill, 2016*, INSIGHTSIAS, available at http://www.insightsonindia.com/2016/12/01/insights-issues-surrogacy-regulation-bill-2016/, last seen on 09/12/2018.

6) Provision of insurance for children born out of surrogacy.

7) Provision for breach of surrogacy contract.

8) Provision of maternity relief for surrogate mother.

Conclusion

The Committee on Health and Family Welfare has in fact suggested an independent agency having quasi-judicial powers to resolve disputes. There is no unanimity within the Committee itself regarding the effectiveness of the provisions of the Bill. Some of the members/ stakeholders of the committee are of the view that banning commercial surrogacy is not the way forward. The practice of surrogacy was being exploited due to the lack of a binding regulatory regime. They suggested that instead of banning commercial surrogacy, a stringent regulatory framework should be put in place to protect the rights of surrogates. They are also of the view that the Bill was mostly based on moralistic assumptions and beliefs thereby placing a burden on the infertile couples and surrogate mothers.[24]

The Bill fails to safeguard the fundamental rights of citizens.The intention behind the proposed Bill maybe for good, but its provisions ignore the changing realities of modern society; they lack in vision and smack of gender discrimination. The Surrogacy (Regulation) Bill, 2018thus passed by the Lok Sabha, on December 19, 2018 in its current avatar, is a retrograde step that has been taken by the Government and must be amended to form a progressive regulatory framework.

[24] Supra17.

The Feminist Critique of Human Rights

Shrishti Kedia, Sanskriti Desai
I LL.B.

Introduction

This article delineates how feminists view human rights framework as a contrivance architected by patriarchal society. It talks about the various strands of feminists and their importance in refining the human rights framework by turning it into an institution which includes the rights of women too. It further talks about the initiatives taken by the United Nations to make human rights framework inclusive of the female perspective through various conventions. Most importantly it subsumes contributions of feminism in our societies and elucidates how it has attempted to tackle problems regarding customary practices, violence against women and girl child and human trafficking.

Feminist jurisprudence provides extremely generous difficulties to human rights law as it is institutionally comprehended. These incorporate both major inquiries concerning the procedures by which human rights are characterized, mediated, and authorized, and additionally inquires into the substance of what is in this way "ensured." And, while the concentration of analysis is on women's experience, a feminist approach may have some ramifications for the rights of all undermined groups of people and bring up issues about social association for the most part. If it were important to offer a single word to catch the quintessence of feminist jurisprudence, in general and in its significance for human rights critique, it is 'inclusion'. The undertaking investigates the experience of women as people barred from legitimate security and from proportionate political and financial power.[1]

According to feminists, Human Rights framework is a product of the male-dominant or the patriarchal half of the world and therefore, it caters to their needs and aspirations thoroughly.[2] While, the 'rights of man' perceived by the

[1] Binion Gayle, *Human Rights: A Feminist Perspective*, 17 Human Rights Quarterly 509-526(2015).

[2] Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights*, 19 Human Rights Quaterly 136-164 (1997).

great liberal scholars did not intend to include women in it originally, the current 'Universal Human Rights' tends to overlook the needs and aspirations of women as a matter of fact. On the contrary with the cultural critique, the essence of the feminist critique of Human rights lies within their focus to promote the idea of including women's rights in the human rights framework. The various strands of feminism work, collectively, may advance this goal.

Liberal feminists

'Liberal Feminists' are the strand of feminism who have managed to advance their goals on a more satisfied level than the others. Their major concern of 'equality of treatment between the genders' has introduced the non-discrimination clause in many human rights treaties. Liberal feminists generally believe in the effectiveness of human rights legal doctrine and institutions.[3]Their method is to work within the field of international human rights and use language inside that discourse.

As per the definition, Liberal feminists are divided into two strands: Doctrinalists and Institutionalists. Karen Engle differentiates between doctrinalists and institutionalists.[4] Doctrinalists usually illustrate an explicit predicament facing women in some or all parts of the world and then demonstrate doctrinally how the predicament leads to an international human rights violation. Their focus is on highlighting circumstances which depicts the violation of women's rights within the fortification of certain existing human rights provisions. Institutionalists significantly scrutinize international legal institutions that are produced for the enforcement of human rights. They examine both conventional human rights institutions and expert women's institutions to establish if and how they defend women's human rights.[5]

Cultural feminists

Cultural feminists focus on the differences between the sexes rather than equality of the sexes. Different measures, as follows, are proposed for the incorporation of the female distinction approach into the human rights framework.

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[3] Karen Engle, "*International Human Rights and Feminism: When discourses meet.*", Michigan Journal of International Law 517-610 (1992).

[4] Ibid.

[5] Ibid.

Caron Gilligan has stated few differences between the genders in order to explain female distinction approach. The first and foremost difference among the sexes is their biological composition. As women are physically weak in comparison to men, it makes them more susceptible to acts of violence, together with sexual violence. Due to her childbearing and lactating abilities she tends to be placed in exceptional circumstances and these abilities act as the presumable biological basis of her pervasive role as a child-bearer. This often leads to the limitation in their activities and responsibilities within the household and reduces her participation in public life. In addition, women's psychological behaviour is frequently argued to be diverse from men. Her relational and non-conflict orientation is especially stressed, and usually some relationship between this and her different biological and cultural factors is claimed.[6]

In its most radical frame, this evaluation rejects law itself as a man centric institution in view of its conceptual, antagonistic character[7]. Most feminists, notwithstanding, consider that the value of law as a methodology exceeds its hindrances.[8] A reorientation of human rights towards the concrete is recommended. In any case, the catalogue of human rights must be changed in light of women's differences. This infers the acknowledgment of new rights, for example, reproductive rights or sexual autonomy rights, and the're-characterization'or 'particularization' of existing rights.[9]It is this exertion of bringing gender-specific infringements under the human rights umbrella which is frequently referred to by the *trademark* 'women's rights are human rights.'[10]

A vital aid in this endeavour is the breach of the public/private dichotomy. Certainly, while human rights were proposed to coordinate the relations among men and the express, women's abuse is for the most part masterminded in a private setting: in practices and customs living in society or at home itself. The feminist call to war 'the personal is the political' is interpreted in the human rights framework as an argument in favour of the horizontal effect of human

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[6] Caron Gilligan, *In a different voice: Psychological Theory and Women's Development* (1982).

[7]John Hardwig, *Should Women Think in Terms of Rights?*, 94 Ethics 441 (1984).

[8] Supra 1.

[9] Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERRSPECTIVES 3, 10 (1994).

[10] Andrew Byrnes, *Women, Feminism and International Human Rights Law, Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation-Some Current Issues*, 12 Australian Year Book of International Law 205 (1989).

rights.[11] Because of this claim, the drafters of the 'Convention on the Elimination of All Forms of Discrimination Against Women' expanded the meaning of discrimination in Art. 1 to 'the political, economic, social, cultural, civil or any other field'.[12]

Public/ private is not the only dichotomy feminists portray as a product of male dominance.[13] The prioritization of the civil and political rights over the socio-economic rights is also one of the objections raised by the cultural feminists. Considering themselves more concentrated in the socioeconomic sphere, they prioritize the need of social and economic rights which belong in the second category of the human rights priority list.

The underlying rationale is that instead of distinguishing themselves exclusively as self-sufficient people, women are more oriented towards the family and other groups or communities than men are. Keeping in mind the end goal to take this social or "associated" nature into account, a concretization and contextualization of human rights, and in addition regard for the "third era" of aggregate human rights, is vital.

Radical Feminists

Radical feminists uphold that all theories in the view of equality or dissimilarity commit the similar error of using a male yardstick. They warn against valuing differences which are a result of a male centric culture which should be destroyed. The key givens are male dominance and female subordination, the essential locus of which is the sexual field. The fact that many women don't see their lives along these lines is clarified by a hypothesis of false cognizance.[14]

Through a completely different perspective, radical feminists arrive at few conclusions similar to cultural feminists concerning human rights. For example: The public/private and different polarities must be separated on the grounds that they are a concealment for the support of male predominance in the fields that are accordingly kept outside human rights scrutiny. The creation of new 'women's human rights' and the re-characterization of existing rights are two

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[11] Supra 2.

[12] Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/36 (1980), reprinted in 19 I.L.M. 33 (1980) (entered into force 3 Sept. 1981).

[13] Supra 2.

[14] Ibid.

means upheld for identification of instances which include women's subordination and of violence against women as human rights violations.

Feminist Triumphs in UN conferences

A. UN World Conference on Human Rights in Vienna, 25th June, 1993

The Bangkok Declaration (1993)was adopted, at the Asian regional preliminary meeting for the Vienna conference, which included the statement that "*while human rights are universal in nature they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."*[15]

Feminists organized and circulated a petition among 120 countries and in women's caucuses, containing the feminist demands for the Regional meetings and the UN preparatory meetings held before the Vienna Conference.[16] In the ultimate document of the Vienna Conference, the universality of human rights was the main focus and cultural relativism presented itself undisruptive in an inversion of the divisive Bangkok statement: "*While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms*".[17] Critiques addressed this reaffirmation of the universality of human rights as "conceivably the most momentous accomplishment of the World Conference".[18]

The disagreements between feminism and cultural relativism was anticipated, but not resolved in the vague phrasing of the clause on violence against women in the Programme of Action, which focuses on the significance of "*the abolition of any contentions which may come up between the rights of women and the destructive effects of certain conventional or customary practices, cultural prejudices and religious extremism*".[19] With regard to children, a firmer position is taken: States are asked to remove customs and practices which discriminate against and cause harm to the girl child.[20]

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[15]Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, 1993 (Bangkok Declaration).

[16] Supra 2.

[17] Vienna Declaration, 1993.

[18] Supra 2.

[19] Supra 17.

[20] Ibid.

B. 1994 International Conference on Population and Development in Cairo

The International Conference on Population and Development held in Cairo in September 1994 was ruled by a restriction between the universality and relativity camps, and the significance of sex in this open deliberation came to the fore. Family planning and population control were the major focus at the conference, and the fundamental question of women's rights to control their bodies free from the imperatives of others, regardless of whether they be the community or relatives, was discussed. The claims of relativists are evident in the report of the Conference in the form of oral and written declarations reserving on certain crucial passages[21]. The reservations were prevalently spurred by religious protests (based in Islam and Catholicism) to abortion and family planning services.

Once more, Feminist concerns appear to have been incorporated all through the meeting. One of the fifteen guiding principles of the Cairo Programme of Action states that "*advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are corner stone of population and development-related programmes*".[22]

C. 1995 World Conference on Women in Beijing

The Beijing Platform for Action reaffirms the universality of human rights, including the human rights of women. In accordance with the Cairo Programme of Action, the Beijing Platform for Action also unambiguously adopts the doctrines of paragraphs 5 and 18 (1) of the Vienna Declaration and Programme of Action.[23] However, the Beijing Platform adds a reference to "*the significance of and full respect for various religious and ethical values, cultural backgrounds and philosophical convictions of individuals and their communities*" made in the content.[24] Nevertheless, the eradication of "harmful cultural practices," with an extraordinary accentuation on female circumcision, is called for in the worldwide structure, and additionally in chapters on health, on violence against women, and on the girl child. It is likewise expressed that

[21] International Conference on Population and Development, *UNFPA,* Cairo, 1994.

[22] Ibid.

[23] Supra 17.

[24] Beijing Declaration, Beijing Declaration and Platform for action, 1994.

Governments should shun summoning any custom, convention or religious thought to avoid their obligations with respect to the elimination of violence against women. Custom is likewise pointed at as a factor adding to victimization of women in regions apart from the "harmful cultural practices" context, for example with respect to ownership of land and access to education.[25]

D. Follow-up to Beijing

2000: The General Assembly decided to hold a 23rd special session to conduct a five-year review and appraisal of the implementation of the Beijing Platform for Action, and to consider future actions and initiatives. "Women 2000: Gender Equality, Development, and Peace for the Twenty-First Century" took place in New York, and resulted in a political declaration and further actions and initiatives to implement the Beijing commitments.[26] The Declaration stated:

> "*We the Governments, at the beginning of the new millennium, Reaffirm our commitment to overcoming obstacles encountered in the implementation of the Beijing Platform for Action and the Nairobi Forward-looking Strategies for the Advancement of Women and to strengthening and safeguarding a national and international enabling environment, and to this end pledge to undertake further action to ensure their full and accelerated implementation, inter alia, through the promotion and protection of all human rights and fundamental freedoms, mainstreaming a gender perspective into all policies and programmes and promoting full participation and empowerment of women and enhanced international cooperation for the full implementation of the Beijing Platform for Action*."[27]

2005: A 10-year review and appraisal of the Beijing Platform for Action was conducted as part of the 49th session of the Commission on the Status of Women. Delegates adopted a declaration emphasizing that the full and effective implementation of the Beijing Declaration and Platform for Action is essential

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[25] Ibid.

[26] UN Women Conferences 2000-2015.

[27] *Report of the Ad Hoc Committee of the Whole of the Twenty-third Special Session of the General Assembly*, June 5, 2000- June 10, 2000, U.N. General Assembly, *Official Record,* A/S-23/10/Rev.1, available at https://www.un.org/womenwatch/daw/followup/as2310rev1.pdf, last seen on 21/04/2019.

to achieving the internationally agreed development goals, including those contained in the Millennium Declaration.[28]

2010: The 15-year review of the Beijing Platform for Action took place during the Commission's 54th session in 2010. Member States adopted a declaration that welcomed the progress made towards achieving gender equality, and pledged to undertake further action to ensure the full and accelerated implementation of the Beijing Declaration and Platform for Action.[29]

2015: In mid-2013, the UN Economic and Social Council requested the Commission on the Status of Women to review and appraise implementation of the Platform for Action in 2015, in a session known as Beijing+20. To inform deliberations, the Council also called on UN Member States to perform comprehensive national reviews, and encouraged regional commissions to undertake regional reviews[30]. Beijing+20[31] endeavored to

1) Renewing political will and commitment;
2) Revitalizing public debate through social mobilization and awareness-raising;
3) Strengthening evidence-based knowledge;
4) Enhancing resources to achieve gender equality and women's empowerment

2018: The following are reports and other documentation on gender-related issues discussed during the 73rd session of the UN General Assembly.

1) In its resolution 71/167, the General Assembly urged Governments to devise, enforce and strengthen effective measures to combat and eliminate all forms of trafficking in women and girls. The Assembly called upon Governments to address the factors that increase the vulnerability of women and girls to being trafficked; to criminalize all forms of trafficking in persons; to strengthen prevention and awareness-raising action and support and to protect victims of trafficking.[32]

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[28] Supra 27.
[29] Ibid.
[30] Ibid.
[31] BEIJING+20, Recommitting for Women and Girls 2015 - UN Women Conferences 2000-2015.
[32] *Trafficking in women and girls: Report of the Secretary-General*, A/67/170 (2012), available at http://www.unwomen.org/en/docs/2012/7/trafficking-in-women-and-girls-2012-a-67-170, last seen on 21/04/2019.

2) In resolution 73/266, the Assembly stressed that the empowerment of women and girls was crucial to breaking the cycle of discrimination and violence that they faced and urged States to allocate sufficient resources to the implementation of policies and programmes aimed at eliminating the practice.[33]

Feminist Methodology and Conclusion

According to the many feminists today, the liberal feminists' approach does not work for the long term. Cultural feminists as well as radical feminists are certain that the human rights framework itself will have to revolutionize in order to incorporate women's rights. They evaluate the human rights framework either for being male-defined or male-deployed, or for being based on intrinsically male theories.[34]

A common quality of feminism which provides for some appealing perspectives for human rights theory is its methodology. Feminist critique is explained as "relative, pragmatic, and inductive".[35] Feminists consider the actual women's experiences as a preliminary point and situate those in their full contexts. They choose an intricate "insider" perspective rather than a basic and conceptual outsider perspective. The intricacy of this method has occasionally helped to justify accusations of essentialism, where the universality of women's experiences was taken for granted. However, if this error is avoided, feminist critique's thorough methodology, with its productive fundamental potential, can be enormously important for human rights theory.

[33] *Report of the Secretary-General*: *Intensifying global efforts for the elimination of female genital mutilation*, U.N. General Assembly, A/73/266 (27/07/2018), available at https://undocs.org/A/73/266, last seen on 21/04/2019.

[34] Supra 2.

[35] Supra 1.

India, Let's Mediate!

Arundhati Patkar
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Introduction

"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser- in fees, expenses and waste of time" - Abraham Lincoln. This article on Mediation seeks to look at some aspects of Mediation that make it a client friendly mode of dispute resolution and why it should be given immediate attention by those who are a part of the legal profession or those who aspire to be a part of it.

Mediation, in a standard textbook definition may be defined as, "*An alternate dispute resolution mechanism in which parties appoint a neutral third party which facilitates the Mediation process in order to assist the parties in achieving an acceptable, voluntary agreement*".[1] However, to be true to the spirit of the process it would be fair to say that it is a forum provided to parties in a dispute where they can allege, argue, discuss, vent, brainstorm and overcome the root cause of their disputes.[2] To understand why Mediation must be promoted, it is important to look at two important aspects of Mediation - the unique features of Mediation and the skill/conduct of the mediator.

Features of Mediation

1) **Informal System-**This mode of settlement being out of the purview of formal legislative enactment helps parties to avoid rigid legal procedures and technicalities of law and reach a solution with mutual consent.[3] Since there are not many procedural formalities, the process of dispute

[1] CBSE, *Legal Studies Class XII* (1st ed., 2014).

[2] T.P Valenti & Tanima Tandon, *Mediation In India-Practical Tips & Techniques,OXFORD: Alternative Dispute Resolution: The Indian Perspective,* 389 (Shashank Garg, 2018).

[3] Dr. N.V Paranjape, *Law Relating to Arbitration & Conciliation in India* (6th ed., 2016).

resolution can begin right away. The simplicity and sense of understanding gives the parties a sense of ownership of the process and empowerment to resolve their dispute themselves and take full responsibility of the outcome as well[4].

2) **Confidentiality**- This is one of the prime features of Mediation. Though this feature has been highlighted in every authority on Mediation, it is best brought out by Ms. Meena Waghray, Chief Mediator at www.outofcourtin, from her personal experience. She writes in one of her blogs that as a young advocate who had just started practising, she saw couples fighting divorce cases in the Family Courts, right in the open, with their private matters now available to the public for discussion and gossip.[5] With the children sitting right there, she wondered what impact it would have on their minds not just at that moment but even when they became adults. She also found counselling inadequate to meet the demands of dispute resolution. That is when she was drawn towards Mediation.

3) **Affordable-** The costs of Mediation are minimal and when compared to traditional litigation they are very low. The court procedures and fees of the lawyers add up to the expenses of litigation.

4) **Speedy-** Mediation as a process is speedier than traditional litigation. According to Senior Civil Judge and Bangalore Mediation Centre's Deputy Director M. Chandrashekhar Reddy, a dispute is settled in an average 1.59 sessions while an average time spent is 126 minutes; complicated issues need five or six sessions[6]

The Mediator

An important part of conflict resolution is understanding the conflict in the first place: the causes, current status, the issues at stake, the interests of the parties and the possible consequences of the continuation of the conflict. This is where

[4]Supra 2, at 390-91

[5] M.Waghray, *The Case for Mediation,* Outofcourt.in, available at- http://blog.outofcourt.in/2017/03/07/the-case-for-mediation/, last seen on 15/12/2018.

[6] Krishnaprasad, *Mediation, a satisfying way to settle disputes,* The Hindu (03/04/2012), available at https://www.thehindu.com/news/cities/bangalore/mediation-a-satisfying-way-to-settle-disputes/article3276009.ece , last seen on15/12/2018.

the traditional process of litigation often fails. In ascertaining the legality of actions, liabilities of the parties etc. the essence of the conflict is lost. Once the aforementioned points are brought out, conflict resolution or management takes no time. This is exactly what a mediator does- he/she brings out the underlying complexities of a conflict. Mediation thus becomes more about equity than equality as the needs of both the parties are given due consideration. Hence the skill of the mediator (on which the success of the Mediation depends to a large extent) lies in how he/she brings out these complexities.

Conflicts can be resolved easily, provided the right techniques are used. So what techniques does a mediator use? *'You cannot shake hands with a clenched fist'* is a quote of Indira Gandhi that can be best used to answer this question. The mediator's role here is to provide for an environment conducive for conflict resolution and opportunities where the parties can open up, stretch their hands forward and then (eventually and hopefully) shake hands.

Here two things become worth mentioning. Firstly, the conduct of the mediator during the Mediation process: he or she must act in an ethically appropriate manner (such as respecting the confidentiality of the process, be non - judgmental and remain neutral throughout the process). Secondly, it is not for the Mediator to provide or suggest solutions, even though they may sound obvious to him or her after having listened to both the sides. This is strictly within the purview of the parties. This amongst others is a primary feature of Mediation, which makes it more 'just' than other forms of ADR or litigation for that matter.

Why Mediation

The responsibility of the legal fraternity to provide speedy justice has been highlighted on a number of occasions by eminent legal personalities, the courts, various law commissions and by the Constitution of India itself.

The National Legal Services Authority ("NALSA") has been constituted under the Legal Services Authorities Act, 1987 which was enacted pursuant to Art.39A of the Constitution of India. Among other initiatives, it has been working to create legal literacy in the rural and slum areas and encouraging them to settle their disputes through ADR Mechanism.[7]

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[7]*Legal Aid- Justice & Law- Law and Order*, Government of India Archive, available at, https://archive.india.gov.in/citizen/lawnorder.php?id=10 , last seen on 16/12/2018.

The Law commission of India observed that the appropriate ways and means to ensure that justice is dispensed should be simple, speedy, cheap, effective and substantial.[8] This is what Mediation essentially is. In *Surjeet Singh v. Harbans Singh*,[9] the Supreme Court expressed its anguish over the length of the period of time to resolve the matter. Mediation again, in this context becomes relevant. Nani Palkhivala, in his book '*We the Nation (1987)'* emphasises on the duty of *lawyers* to ensure that justice is not delayed, as follows: *"The fault is mainly of the legal professionals. We ask for adjournments on the flimsiest grounds. If the Judge does not readily grant adjournment, he is deemed to be unpopular. I think it is the duty of the legal profession to make sure that it cooperates with the judiciary in ensuring that justice is administered speedily and expeditiously, it is a duty of which we are totally oblivious."*

Mediation at the Macro Level

Mediation is an appropriate method to resolve family matters, issues between neighbours etc. But that does not limit Mediation to the domestic sphere. On August 22, 2010, the Supreme Court passed an interim order on a suit filed by Assam in 1988 against Nagaland on a border dispute that they should attempt to resolve this dispute through Mediation. It was the first time a border dispute in the country had been referred to Mediation.[10] Mediation is also looked upon as a viable option for solving commercial disputes. One of the high profile cases involving the partnership dispute between the Amarchand Brothers, a leading law firm in the country, was settled through private Mediation. In fact, looking at the success rate of Mediation, the Central Government on May 3rd, 2018 promulgated an ordinance to amend the Commercial Courts Act, 2015, which makes pre-institution Mediation mandatory prior to instituting a commercial suit for matters that do not require urgent interim relief. The settlement arrived at under this provision shall have the same status and effect as an arbitral award on agreed terms.[11] Mediation has also gone international

[8] 77th Law Commission of India Report, *Delays and Arrears in Trial Courts,* 55 (1979), available at http://lawcommissionofindia.nic.in/51-100/Report77.pdf, last seen 16/12/2018.
[9] Surjeet Singh v. Harbans Singh & Ors, 1996 AIR 135; 1995 SCC (6) 50.
[10] N.D'Souza, *Mediation in Indian Courts,* Forbes (28/09/2010), available at https://www.forbes.com/2010/09/28/forbes-india-judiciary-encouraging-mediation-reduce-baclog.html#955c8e810445 , last seen 16/12/2018.
[11] K Giriprakash, *How Private Mediation helps Corporates Solve Disputes Faster,* The Hindu, (11/06/2018), available at https://www.thehindubusinessline.com/news/how-private-mediation-helps-corporates-solve-disputes-faster/article24138432.ece last seen on 16/12/2018.

with the deliberations at the UN Commission on International Trade Law ("UNCITRAL") on the issue of resolution of commercial disputes through Mediation.[12] A division bench of Delhi High Court has held that it is legal to refer a criminal compoundable case as one under S. 138 of the Negotiable Instruments Act, 1881, to Mediation, thus widening its scope.[13]

The Future of Mediation

Mediation in India is governed by S. 89A of the Civil Procedure Code ("CPC") 1908, but it covers only court-referred Mediation. Pre-litigation Mediation is not yet governed by any law in India.With Mediation rapidly picking up, is it not time for Mediation to come out of the shadows of Arbitration and Conciliation, and have an independent law governing the process which also gives legal recognition to pre - litigation Mediation?

There are many arguments for and against this. Scholars and even several mediators have often argued that a legislation regulating Mediation will defeat the purpose of Mediation itself. Mediation is an informal process and bringing in law may erode this defining feature of Mediation. Many also fear that, once procedure is laid out, it may hamper the freedom that mediators possess.

These concerns can be done away with. The law must not guide or control the manner in which proceedings are conducted but must acknowledge and codify principles. The aim of the legislation should be to clear the uncertainty regarding the enforceability of the outcome of the Mediation. This will also make the method more popular as the parties are assured of a concrete solution to their problem. Another significant advantage of an independent legislation could be the end of confusing it with Conciliation and Mediation can thus develop independently of both Arbitration and Conciliation.[14]

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[12]*Encouraging Mediation to Settle Disputes,* The Hindu, (28/06/2018), available at https://www.google.co.in/amp/s/www.thehindu.com/opinion/op-ed/encouraging-mediation-to-settle-disputes/article24273149.ece/amp/ , last seen on 16/12/2018.

[13]*A Compoundable Offence As One Under Section 138 Of NI Act Can Be Referred To Mediation: Delhi HC,* Live Law, available at https://www.livelaw.in/compoundable-offence-one-section-138-ni-act-can-referred-mediation-delhi-hc/ , last seen on 16/12/2018.

[14] Rasika Narain, *Legislating away the challenges faced by Mediation in India,* Indian Mediation Law, available at https://indianmediationlaw.wordpress.com/2017/09/13/legislating-away-the-challenges-faced-by-mediation-in-india-guest-post/ , last seen on 16/12/2018.

The Role of Lawyers in Mediation

Having said that Mediation is informal and there is practically no requirement of a lawyer, one may ask, what would it mean to a practising lawyer if Mediation is to become a favourable method of dispute resolution ? Laila Ollapally, mediator and one of the three coordinators at the Bangalore Mediation Centre answers this when she says, "*When a lawyer has resolved more cases in a month through Mediation, he gains a reputation of having settled cases quickly*".[15] An added conclusion from this can be that this also increases the credibility of the lawyer, when he/she has a larger number of cases solved to his or her credit.

Conclusion

Mediation may not be the magical solution to all the problems faced by the Indian judiciary, as some types of cases have been expressly kept out of the purview of Mediation as established in the *Afcons Infrastructure v. Cherian Varkey Constructions*.[16] They are: election disputes, representative suits, criminal offenses and cases against specific classes of persons (minors, mentally challenged etc.). However, by all means it has the capacity to reduce the burden of the Indian judiciary. Moreover, as was pointed out by Lord Hewart in *R v Sussex Justices*, *ex parte McCarthy,*" *justice must not only be done but also be seen to be done"*. Mediation ensures this as the parties reach the end of their conflict according to what is just to them and not what is imposed by any external authority. Mediation as a method of ADR and a part of the judicial system creates or seeks to create professionals who are empathetic, ethical and who understand there exists a gap between legal procedures, provisions etc. and human needs in a given conflict, and thus seek to bridge the gap using their expertise. Mediation thus becomes the humane side of the legal system.

Mediation also creates empowered people who are confident of resolving their disputes on their own. Further it serves a very important function of keeping the faith of the people in the judicial system of the country intact, as their disputes get solved by a much easier, faster and cheaper means. Thus one can safely draw the inference that there is more than just one reason to mediate rather than litigate.

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[15] Supra 10

[16] Afcons Infrastructure and Ors. v. Cherian Verkay Construction and Ors, 2010 (8) SCC 24.

Status of Animal Welfare in India: Legal Perspective

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Introduction

"*The law if effectively harnessed, can become the most potent weapon in the fight against animal abuse and exploitation.*"[1] In India, 68.84% population lives in rural areas.[2] Out of which, 70% population is still dependent on agriculture and animal husbandry for their livelihood.[3] The Indian farmers own livestock that includes cattle, buffalo, sheep, goat, pig, and poultry which are around 564 million in number.[4] The agriculture and allied activities are the main source of income of these farmers and therefore, the livestock and poultry are an inherent component of their life. The forest covers 21.54% of the total geographic area of India and is bestowed with rich wildlife flora and fauna.[5] The Indian forests are the habitat for about 1233 avian species and nearly 423 species of mammals.[6] The urban population also rear a variety of pets and birds. Thus, there is an intrinsic relationship between man and animals and both are necessary partners in co-existence in the ecosystem. However, an increase in the human population, urbanization, deforestation, killing of wildlife, poaching, etc. has led to a decrease in the animal population and a gross imbalance in this ecosystem. However, public awareness regarding animal welfare has raised the issues pertaining to

[1] Maneka Gandhi, Ozair Hussain & Raj Panjwani, *Animal Laws of India,* (6th ed., 2016).

[2] Ministry of Home affairs, Government of India, *Census of India 2011 (Rural Urban Distribution of Population),* available at www.censusindia.gov.in, last seen on 27/12/2018.

[3] *India at a glance |FAO in India*, Food and Agriculture Organization of the United Nations, available at http://www.fao.org/india/fao-in-india/india-at-a-glance/en/, last seen on 27/12/2018.

[4] *Key Indicators of Land and Livestock Holdings in India*, NSSO Notification no. NSS KI (70/18.1) (December 2013), available at http://mospi.nic.in/schedule-instructions , last seen on 27/12/2018.

[5] Ministry of Environment & Forests, Government of India, *State of Forest Report 2017*, available at http://fsi.nic.in/forest-report-2017, last seen on 27/12/2018.

[6] *Species- Subject Area: Wildlife Institute of India, Ministry of Environment & Forests*, ENVIS Centre on Wildlife & Protected Areas, available at http://www.wiienvis.nic.in/Database/Species_1067.aspx , last seen on 27/12/2018.

animal population, cruelty to animals etc. *Vox populi* has made the lawmakers introduce legislations for animal welfare and protection.

It is pertinent to understand the several measures undertaken in India throughout the several centuries for animal welfare.

Ancient India

The earliest sacred work of the Hindus, "Rigveda" considered animals as wealth. In many hymns of the Rigveda, the cow has been referred to as *aghanya*, i.e., not to be killed under any circumstance.[7] Strict punishments were suggested for the person who killed an animal. The Rigveda (10/87/16) says: "*The fiend who smears himself with flesh of cattle, with flesh of horses…O Agni, tear off the heads of such with fiery fury.*"[8] The Atharva Veda (1/16/4) warned: *If you intend to kill our cow, horse or man, we shall pierce you with poisonous arrows so that your evil design does not succeed*.[9] The Yajurveda (30/18) awards death sentence to the killer of cows.[10] According to Manu Smriti, *killing an animal just to eat the meat is a deed of a demon* (5/31).[11] Further, it says that *as many hairs the slain beast has, so often indeed will he who killed it without a (lawful) reason suffer a violent death in future births* (5/38). Also, *he who injures innoxious beings with a wish to give himself pleasure never finds happiness, neither living nor dead* (5/45).

King Asoka, (272 BC-232 BC) the emperor of the Mauryan dynasty, issued edicts advocating vegetarianism and offering protection to wild and domestic animals.[12] Medical facilities were established for cattle in the Mauryan kingdom.[13] He was perhaps the first emperor in history to advocate conservation measures for wildlife. An edict mentioned: *"Here no living thing having been killed, is to be sacrificed."*[14] Asoka abolished hunting and slaughtering of animals and birds including wild geese, terrapins, porcupines, rhinoceros, etc. The burning of forests was also proscribed.[15]

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[7] R.T.H Griffith, *The Hymns of the Rigveda*, 155,281,368,408 (2nd ed., 1896)
[8] Ibid, at 467.
[9] W.D. Whitney, *Atharva-Veda Samhita*,18 (C.R. Lanman 1st ed., 1905)
[10] R.T.H Griffith, *The texts of the White Yajurveda*, 258 (1899)
[11] *Manusmriti in Sanskrit with English Translation*, archive.org, available at https://archive.org/details/ManuSmriti_201601/page/n265, last seen on 11/01/2019.
[12] K. Rai, *Ancient India,* 112 (1st ed., 1992)
[13] R. Thapar, *Asoka and the decline of the Mauryas*, 251 (2nd ed., 1997)
[14] Ibid, at 250.
[15] Supra 13, at 264.

British India

From the 1860s, as the British attempted to introduce various chemical drugs in colonial India, experiments on animals became necessary.[16] The Cruelty to Animals Act, 1876 was enacted by the British Parliament in order to limit the practice of experiments on animals and to institute a licensing system for animal experimentations. Thus, experiment on any animal that shall elicit pain was not permissible.[17] This law allowed experiments only for the advancement and research of new discoveries useful for saving, prolonging of life or in reducing the pain and sufferings of living beings.

Constitutional Provisions

Protection and improvement of our natural resources such as rivers, lakes, forests, and wildlife and to be compassionate to living creatures is the fundamental duty of every citizen.[18] Similarly, as per the Directive Principles of State Policy, State is expected to perform the agricultural and animal husbandry activities in modern ways and on scientific lines. Further, it is also expected to take the necessary steps to conserve and improve the breeds of livestock. Ban on the slaughter of cows, calves, milking animals and animals useful for draught operations is also expected from the State.[19] The State is directed to plan for the protection of environment and wildlife while framing any laws and policies.[20]

List II,Seventh Schedule (State list), authorises the state legislative assembly to make laws on the following: "*Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice*" (Entry15) and "*Fisheries*" (Entry 21).[21] As per List III, Seventh Schedule (Concurrent list), both Parliament and State Legislature have the authority to make laws on "*Prevention of Cruelty to Animals*" (Entry 17), "*Forests*"(Entry 17A) and "*Protection of wild animals and birds*"(Entry 17B).[22]

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[16] *BEASTS OF BURDEN: ANIMALS AND LABORATORY RESEARCH IN COLONIAL INDIA,* National Centre for Biotechnology information, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2997667/, last seen on 27/12/2018.

[17] S. 2, The Cruelty to Animals Act, 1876 (United Kingdom).

[18] Art. 51A(g), The Constitution of India, 1950.

[19] Art. 48, The Constitution of India, 1950.

[20] Art. 48A, The Constitution of India, 1950.

[21] Art. 246, The Constitution of India, 1950.

[22] Ibid.

The Eleventh Schedule empowers the Panchayat to make laws relating to, "*Animal husbandry, dairying and poultry*" (Entry 4) and "*Fisheries*" (Entry 5).[23]

The Twelfth Schedule provides for the regulation of slaughter houses and tanneries and formation of cattle pounds. The municipalities are responsible for ensuring these.[24]

Legislative Provisions

The animal welfare and rights which criminalises cruelty to animals was endorsed with the enactment of **The Prevention of Cruelty to Animals Act, 1960.** It aimed to prevent the infliction of unnecessary pain or sufferings on animals. One of the important landmarks achieved through this law was the establishment of the Animal Welfare Board of India ("AWBI") in the year 1962 to promote animal welfare and to check the proper implementation of the anti-cruelty laws.[25]

The Prevention of Cruelty to Animals (Registration of Cattle Premises) Rules, 1978 mandates the registration of premises in which cattle are kept for the purpose of profit.[26] Also, if in any premises milch cattle are kept, the owner of the premises is bound to display a copy of Sec. 12 of The Prevention to Cruelty to Animals Act, 1960.[27]

S. 12 reads as: "*If any person performs upon any cow or other milch animal the operation called phooka or doom dev or permits such operation being performed upon any such animal in his possession or under his control, he shall be punishable with fine which may be extended to one thousand rupees, or with imprisonment for a term which may extend to two years, or with both, and the animal on which the operation was performed shall be forfeited to the Government.*"

The Performing Animals Rules, 1973 mandates compulsory registration for exhibiting or training any "performing animal" for the purpose of any entertainment to which the public are admitted through sale of tickets.[28]

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[23] Art. 243G, The Constitution of India, 1950.

[24] Art. 243W, The Constitution of India, 1950.

[25] S. 4, the Prevention of Cruelty to Animals Act, 1960.

[26] Rule 3, The Prevention of Cruelty to Animals (Registration of Cattle Premises) Rules, 1978.

[27] Rule 9, The Prevention of Cruelty to Animals (Registration of Cattle Premises) Rules, 1978.

[28] In exercise of the powers conferred by S. 38 read with S. 37 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960), the Central Government made the Performing Animals Rules, 1973.

In order to regularise the experiments on animals, **The Experiments on Animals (Control and Supervision) Rules, 1998** mentions that no establishment shall carry on the business of breeding of animals or trade of animals for the purpose of experiments unless it is registered.[29]

Increase in the number of stray dogs and numerous instances of dog bites have become a threat especially in urban areas and adversely there are also many incidences of mass killing/poisoning of the dogs. To curb the menace, the government made the **Animal Birth Control (Dogs) Rules, 2001**or the **ABC rules,** for controlling the stray dogs through sterilisation surgeries without killing or harming them, and permitting only the fatally wounded or sick dogs to be killed or confined.[30] The Rule however prohibits sterilization of pregnant dogs.[31]

The fines levied as per T**he Prevention of Cruelty to Animals (Application of Fines) Rules, 1978** are to be made over by the State Government to the Animal Welfare Board of India.[32] The amount thus made available, is to be exclusively utilised for animal welfare activities such as financial grants to societies and organisations dealing with the Prevention of Cruelty to Animals or involved in animal welfare, maintenance of infirmaries, pinjrapoles and veterinary hospitals.[33]

The transportation of the animals was made safe by enforcing the **Transport of Animals Rules, 1978**.[34] The Rule stipulates that a qualified veterinary surgeon has to issue a valid health certificate that the animals are in a healthy and good condition to be transported by rail, road, inland waterway, sea or air and are not showing any sign of infectious or contagious disease including rabies, while, animals that are diseased, blind, emaciated, lame, fatigued, new-born or having given birth during the preceding seventy-two hours or likely to give birth

[29] In exercise of the powers conferred by sub-section (1) (1A) and (2) of S. 17 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960), the Committee under S. 15 of the above Act made these Rules.

[30] In exercise of the powers conferred by the sub-sections (1) (2) of S. 38 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960), the Central Government made the Animal Birth Control (Dogs) Rules, 2001,

[31] Rule 7(9), the Animal Birth Control (Dogs) Rules, 2001.

[32] Rule 3, The Prevention of Cruelty to Animals (Application of Fines) Rules, 1978.

[33] Rule 4, The Prevention of Cruelty to Animals (Application of Fines) Rules, 1978.

[34] In exercise of the powers conferred by clause (h) of sub-section (2) of S. 38 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960); the Central Government framed the Transport of Animals Rules, 1978.

during transport are banned for transportation. Different classes of animals are to be kept separately and adequate arrangements are to be made for their care and management during the journey.[35]

The Indian Penal Code, 1860 mentions that creating mischief by killing, poisoning or maiming any animal is a punishable offence with imprisonment of two to five years, or with fine, or with both.[36] The Indian Penal Code also criminalises bestiality, the unnatural sex with the animals and the act is punishable with life imprisonment or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.[37]

There was an ardent need for the protection and propagation of wildlife and environment and to safeguard the habitats of conservation-reliant species. **The Wildlife Protection Act, 1972** enacted by the Indian Parliament ensures protection of plant and animal species. This Act, apart from largely prohibiting hunting and harvesting of animals, regulated the ownership issues and trade licences. The Act comprises six schedules which give varying degrees of protection to different species. The Act inter alia provides for the appointment of Director of Wildlife Preservation, the Chief Wildlife Warden, and lays down their powers and the constitution of the Wildlife Advisory Board along with its duties.[38] It also provides for the Central Zoo Authority and recognition of zoos. Besides this, the Act also makes it clear that running a business as a manufacturer or dealer, in scheduled animal articles and cooking or serving of meat derived from any scheduled animal is prohibited and declares, "*Wild animal, etc. to be Government property.*"[39]

The Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009 aims at the prevention, control, and eradication of infectious and contagious diseases affecting animals and for prevention of outbreak or spreading of such diseases from one State to another. The Act enlists 115 diseases as scheduled diseases affecting various species. It makes the reporting of animals infected with scheduled diseases obligatory.[40] This Act authorises the State Government to declare any area to be a controlled area with respect

[35] Rule 8 (1) (e), The Transport of Animals Rules, 1978.

[36] S. 428 & 429, The Indian Penal Code, 1860.

[37] S. 377, The Indian Penal Code, 1860.

[38] Chapter II, The Wildlife (Protection) Act, 1972.

[39] Ss. 49(B) & 39, The Wildlife (Protection) Act, 1972.

[40] S. 4, The Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009.

to any scheduled disease affecting any species of animal in that area.[41] The detention of animals suffering from any scheduled disease and prevention of their entry into or exit from any controlled area has become mandatory. Quarantine Camps and Check Posts to be established, ad hoc.[42]

Judicial Pronouncements

In 2010, Gauri Maulekhi approached the Uttarakhand High court demanding a complete ban on the animal sacrifice in the state of Uttarakhand. It was observed that buffaloes and goats were sacrificed for the *Bhookhal Kalinka Mela* in Uttarakhand. The corpses of buffalos, thus sacrificed were left unattended to rot, which according to the petitioners was obnoxious and not good for public health. In *Gauri Maulekhi v. State of Uttarakhand,*[43] the Court held that, "*The person sacrificing an animal can only sacrifice the same, not for the purpose of appeasing the Gods, as he believes, but only for the purpose of arranging food for mankind.*"[44]

In 2014, Gauri Maulekhi once again approached the Supreme Court of India demanding a ban on the illegal transboundary smuggling of cattle taking place for animal sacrifice in the Gadhimai Temple in Nepal. This was in violation of India's Export-Import policy under the Foreign Trade (Development and Regulation) Act, 1992 which restricted the exports of live cattle and buffaloes without a legal licence to export them. In *Gauri Maulekhi v. Union of India* the Court held that, export of live cattle and buffaloes from India to Nepal would be permitted only under license.[45]

In *Navtej Singh Johar v. Union of India*, the Supreme Court ruled that S. 377 was unconstitutional.[46] However, the respondents were worried about the other aspect of the section, regarding bestiality, if the law is repealed. The Additional Solicitor General for the Union of India expressed deep concerns, "*tomorrow if someone comes with bestiality and says 'this is my choice of partner*'…" D.Y. Chandrachud, J. clarified that the Court was hearing the matter of de-criminalising sexual expression between two consenting adults, and not indeed, between humans and animals. Therefore, the section was repealed only to the extent.

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[41] S. 6, The Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009.
[42] S. 14, The Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009.
[43] 2011 SCC OnLine Utt 2405. Writ Petition (PIL) No. 77 of 2010 and Writ Petition (PIL) No. 73 of 2010 decided on December 19, 2011 (Uttarakhand High Court).
[44] Ibid, at para 8.
[45] W.P. (Civil) No. 881/2014 (Supreme Court, 13/07/2015).
[46] (2018) 10 SCC 1.

In the landmark judgement of the Uttarakhand High Court, *Narayan D. Bhatt v. Union of India*[47] it was observed that, "*...in order to protect and promote greater welfare of animals including avian and aquatic, animals are required to be conferred with the status of legal entity/ legal person. The animals should be healthy, comfortable, well-nourished, safe, able to express innate behaviour without pain, fear and distress. They are entitled to justice.*"[48] The Court conferred this special status of "*living person or legal entity*"to the animals in the State along with issuing a series of directions to prevent cruelty against animals.[49] The Court expressed that "*Animals may be mute but we as a society have to speak on their behalf. No pain or agony should be caused to the animals*."[50]

Conclusion

In spite, of several legislations enacted to protect the animals from cruelty, they continue to be ill-treated. This may be because the punishments imposed for the violation of animal welfare laws are very less. The Prevention of Cruelty to Animals Act, 1960 merely awards a penalty which ranges between Rs.10 to Rs.100 and imprisonment up to three months to a person who tortures animal.[51] Similarly, the highest punishment awarded under the Wildlife Protection Act, 1972 is a fine up to Rs. 25,000 and imprisonment which may extend to seven years for even odious crimes like hunting.[52] Thus, the Acts should be amended so as to make the punishments more stringent for the offenders.

Many private organisations and NGOs have been extensively working for animal welfare over the years, albeit the Government is also making efforts in this regard. In this endeavour to protect the rights of animals and to promote their well-being by these NGOs, the individuals must also extend their support to them. If it is not plausible for the Central and State government machinery to reach the interior parts of the country, then special powers and funds must be provided to the NGOs and panchayats who would implement the government schemes at local level. Mass participation through public awareness campaigns is essential. Moreover, the animals must be conserved, for the future generations to come, as they play a vital role in maintaining ecological balance on the Earth. It is our duty to uphold the inherent rights of animals.

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[47] W.P (PIL) No. 43 of 2014 (Uttarakhand High Court, 04/07/2018).
[48] Narayan D. Bhatt v. Union if India, para 98.
[49] Narayan D. Bhatt v. Union if India, Para 99 (A).
[50] Narayan D. Bhatt v. Union if India, Para 83.
[51] S. 11, The Prevention of Cruelty to Animals Act, 1960.
[52] S. 51, The Wildlife (Protection) Act, 1972.

Pushing Barriers in Life & Law: Yoga and Copyright

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Introduction

Yoga was developed about 2,500 years ago in India as a comprehensive system for holistic well-being i.e. on a physical, mental, emotional and spiritual level. While Yoga is often equated with *Hatha Yoga*, the well-known system of postures and breathing techniques, Hatha Yoga is infact only a part of the overall discipline of Yoga. Today, millions of people use various aspects of Yoga to help raise their quality of life in diverse spheres of life such as fitness, stress relief, wellness, vitality, mental clarity, healing, peace of mind and spiritual growth. The current number of Yoga practitioners is estimated at 200 million people and the market has a potential of billions of dollars.[1] Everything from Yoga mats, belts, bricks to Yoga wear have helped make this ancient spiritual exercise a commercially viable venture. At the outset it seems implausible to believe that something as spiritual as Yoga could fall within the ambit of Intellectual Property Law. The recent case of *Bikram's Yoga College of India v. Evolation Yoga LLC*,[2] a case decided by the United States Court of Appeals for the Ninth Circuit, throws light on the confusion that is created by granting protection to a sequence of Yoga poses.

Although the copyright was restrained and the International Yoga community breathed a sigh of relief, it becomes pertinent to look into the nuances of the arguments in favour and against the copyrightability of Yoga.

Inhaling Yoga into Copyright: Arguments in Favour

(i) *Yoga and Exercise as Choreography*

Bikram Choudhury, the founder of popular franchise *Bikram Yoga* and the originator of '*Hot Yoga*' claimed Copyright protection over 26 Yoga asanas and

[1] Upasana Jain, *Not Just mind and Body, yoga is good for economy too*, India Today (21/06/2018), available at https://www.indiatoday.in/business/story/craze-for-yoga-turns-into-source-of-income-for-many-1265172-2018-06-20, last seen on 28/12/2018.

[2] Bikram's Yoga College v. Evolation Yoga, No. 13-55763 (9th Cir. 2015).

2 breathing exercises which he claimed to have systematically arranged and conducted in a hot room heated at 40° Celsius.[3] Although he agreed that he was not the founder of these asanas, but he claimed that he had systematically arranged them in a way to claim choreographic authorship. For this claim to stand, the elements of choreography must be met. The legislatures of both India and the United States have left it to the Courts to determine what would constitute choreography. Although choreographic works gain protection under the umbrella of dramatic works under the Indian Copyright Law,[4] there is no set definition to determine what constitutes choreography. Interpretation by the Copyright Office in the United States and case laws suggest that it certainly does not include social dance steps or simple routines.[5] A work can be considered as choreography only when a related series of dance movements and patterns are organized into a coherent whole.[6]

Yoga in its traditional form is the holding of physical postures for a fixed time limit either to stretch the muscles or to strengthen them. Initially, it did not constitute a set pattern or routine. However, modern day Yoga includes performing to different kinds of music, either in flows or in pre-determined poses that give the impression of being a coherent whole. Bikram Choudhury also claimed that he had methodically chosen these poses and they portrayed aesthetic beauty and grace. However, the Court of Appeals held that getting into the subjective interpretation of what beauty or what art is, was never within the intent of the letter of the law. Although the Court dismissed Yoga poses as being fairly simplistic and the selection of poses lacking choreographic merit, it is important to ponder upon the issue as to whether a Yoga-dance could meet the threshold of choreographic authorship?

While other dance forms like Ballet gain Copyright on the basis of a systematic arrangement of *Plie, Grand Jete* or *Pointe* techniques, which are also the basic postures in Ballet, would a similar standard be applicable for Yoga?

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[3] Jennifer Freidman, *What the Bikram Copyright Rejection Means for Yoga,* Yoga Journal, available at https://www.yogajournal.com/lifestyle/rejection-bikram-copyright-upheld-means-future-yoga, last seen on 28/12/2018.

[4] S. 13(a), The Copyright Act, 1957.

[5] Copyright Law Revision, H.R. Rep. No. 94–1476, 94th Congress 2d Session, 53-54 (1976), available at https://law.resource.org/pub/us/works/aba/ibr/H.Rep.94-1476.pdf, last seen on 28/12/2018.

[6] Horgan v Macmillan Inc., 789 F.2d at 161 (quoting U.S. Copyright Office, Compendium II: Compendium of Copyright Office Practices § 450.03(a) (1984)), available at https://copyright.gov/history/comp/compendium-two.pdf , last seen on 22/02/2019.

Yoga poses carried out in a continuous manner cannot be discarded merely because they are made up of certain stationary postures whereas other dances have a mixture of movements and stances. The justification that Yoga is a system for improving health and is thus excluded from copyright seems unfounded when an acrobatic-video-routine was granted copyright because it portrayed an artistic message.[7] Thus, if yoga choreography could convey some artistic message, it could claim Copyright protection.

(ii) *Yoga as a Performance*

Under S. 2(h) of the Copyright Act, 1957 ('The Act'), '*dramatic work*' includes a recitation, choreographic work or entertainment in a dumb show. Dramatic work thus considers choreography as an important element, which has already been addressed above. Under S. 2(q) of the Act, '*performance*' is any mode of visual or acoustic presentation which can be done by a recorder, by film or any other means. Thus, according to the Act, for work to fall under the ambit of performance, it should be seen or heard but the manner in which it is projected is left out to incorporate all forms of viewing and hearing. However, most Courts do not agree with such a simplistic definition.[8] They agree that what is important for a dramatic work is that it should be capable of being 'physically performed'.[9] Apart from the mere capability of being performed, the work must have been created for the purpose of being performed, and such purpose would be deduced from the form and nature of the work itself. In other dramatic works, there are screenplays or plots that define everyone's roles. They include actors and the actions that they do to firmly establish the entire screenplay into the definition of a dramatic work. But, in other unobvious situations, it has been tested to see whether the work can be linked to elements of action and performance to confer copyright. That is why, sports, games or news shows that show current affairs do not get copyright protection as there is no element linking them with the predictable nature of a performance.[10] They mostly constitute on the spot works which cannot be choreographed and performed to the minutest level.

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[7] Cologne Higher Regional Court, Reference No: 6 U 117/06, ECLI: DE: OLGK: 2007: 0202.6U117.06.00, Date of Decision: 2/2/2007, available at https://www.justiz.nrw.de/nrwe/olgs/koeln/j2007/6_U_117_06urteil20070202.html, last seen on 29/12/2018.

[8] Institute of Inner Studies v. Charlotte Anderson, 2014 SCC Online Del 136.

[9] Copinger & Skone James, *Copyright* (14th ed., 1999).

[10] National Basketball Association v. Motorola, 105 F.3d 841 (2d Cir. 1997).

Although yogic poses are bodily movements that come within the domain of exercise, that does not mean they are impossible to be staged as a performance. If tomorrow, the best yogis decide to showcase their different styles of yoga on the same platform in order to highlight the different types of this ancient art form, set to soothing music, this fits as a visual presentation, and it could very well fall within the ambit of a '*performance*' as defined under the Act. The law doesn't impose any mandate in respect of a drama or a performance piece with regard to requirement of a story, or a plotline, music or even a message. This also helps bring pantomimes i.e. a musical theatre entertainment without any speech, in its scope. Thus, yogic performances, even without an artistic or ethical message could constitute a '*dramatic performance'* if it is done with the intention of performing it.

Exhaling Yoga from Copyright: Arguments Against

(i) ***Idea versus Expression Dichotomy and The Merger Doctrine***

Although yogic poses are a way to express body movements, Yoga asanas still come under the ambit of ideas. Thus, everyone is free to develop these ideas on their own accord. In situations where the idea can be expressed only in a certain manner, then the ideas and expressions are merged, thus making them non-copyrightable.[11] In the case of Yoga, the asanas themselves are seen as an idea, free to be used and improvised upon by individuals across the world. Copyrighting a sequence of yoga poses like the '*downward dog*' or the '*cat pose*' is hit by the Merger doctrine as there is only one way to do the pose in the traditional manner and other stretches are mere extensions of the same pose. Books authored by BKS Iyengar, founder of '*Iyengar Yoga'* and Bikram Choudhury themselves have copyright protection, however, this by no means grants them a complete control over the poses itself.

The instructions and method for performing a sequence are protected by the *'expression clause'* but final poses like '*pigeon pose*' or '*headstand*' are the endpoint of all instructional materials thus falling under the ambit of ideas. This is better explained by the rule laid down in *Feist*[12] by the United States Supreme Court, where the selection and arrangement of a telephone directory gained

[11] R. G. Anand v. Delux Films & Ors., 1978 SC 1613.

[12] Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991, Supreme Court of the United States).

copyright protection because it was a literary expression, however, the company did not ipso facto get copyright over all the telephone numbers that came within the arrangement system.

(ii) *Originality*

It is now settled by the case of *Eastern Book Company v D B Modak,*[13] that a minimum degree of skill and creativity is essential for works to be considered original under the ambit of S. 13 of the Act. Mere compilation of works or the '*Sweat of the brow'* argument is a rejected protection.[14] Copyright does not protect manual labour, it protects creations of the mind. In the case of Yoga, when postures are compiled or set to music, they cannot be considered original merely because the practitioner decided which pose should be performed at what time. There can be no originality by converting stationary yoga poses into flowing techniques or setting them to music. As long as yoga poses can be linked to their origins, mere tweaks in their scenic arrangement will not qualify them to be original works. Claiming rights for compilation of Yoga poses comes under the ambit of derivative works which require the author to portray a higher level of skill and judgement while choosing and forming the sequence, which is difficult to prove particularly in a Yoga routine.

(iii) *Yoga as a Functional System*

Bikram Choudhury claimed that his technique was more like a healing art: it provided physical benefits as well as mental well-being. Similarly, in *Charlotte Anderson's case,*[15] the plaintiffs claimed that the master had revived the traditional approach of Pranic Healing through his own effort and given it a modern touch. However, systems that perform a function are not entitled to copyright protection. Thus, if a surgeon invents a new method for heart surgery and publishes it, he/she does not get copyright over that technique.[16] The rationale is that such systems fall under the domain of ideas, hence being unprotectable and free for use. A sequence of asanas, in whichever manner designed, can be broadly categorized as a '*system of exercise'*. Thus, the spiritual and material

[13] Eastern Book Company & Ors. v. D.B. Modak & Anr., (2008) 1 SCC 1.

[14] The 'sweat of the brow' doctrine affords protection to those works which are mere extensions of labour. It recognizes efforts as miniscule as those that get one's eyebrow to sweat.

[15] Supra 8.

[16] Baker v. Selden, 101 U.S. 99 (1879, Supreme Court of the United States).

benefits it provides is irrelevant to Copyright law because it is essentially a system of poses that performs the function of keeping people healthy.

Furthermore, if an intellectual property; if it even exists for such a system; it is that of patents because patent law governs those systems or processes that can lead to utility in society. Here it is interesting to note that yoga in itself is an extremely large system of postures. Poses range from those imitating animals, like the frog-pose; insects, like the butterfly-pose; and birds like the pigeon and eagle-pose. Thus, to claim a patent, the degree of novelty is way too high to meet as most permutations and combinations of these body movements are already known to the world, even if they are unable to physically replicate it.

Conclusion

Any spirited individual expending efforts towards Yoga to create something unique and original should receive accolades for the same. This is the foundation of *Locke's Labour Theory*.

Copyright Protection should serve the public at large so as to enhance their communication, knowledge and progress of the arts. However, granting Copyright protection to Yoga, will bar people from accessing Yoga as a legitimate means to good health. Yogic protection impedes such a development, for, when such sequences are copyrighted the knowledge is frustrated as it cannot be communicated to the public without the author's permission. To prevent the piracy of Yogic poses and techniques, the Traditional Knowledge Digital Library of the Indian Government has listed more than 900 asanas and their procedures. However, diligent care must be taken by public spirited groups to ensure that this knowledge remains free for all to use without any bar or licensing. Yoga has helped build the health and wealth of the masses, so this art cannot be monopolized in the hands of a powerful few using the *moonshine defense*[17] of originality or of choreography.

[17] When the defence pleaded is a sham or illusionary, in order to divert the Court, it is termed as moonshine.

ESSAYS

Open Access to Justice- Live Streaming of Supreme Court Proceedings

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Introduction

"*Justice should not only be done, but should manifestly and undoubtedly be seen to be done*".[1] This oft-quoted aphorism was remarked by Lord Chief Justice Hewarts nearly 100 years ago. In the contemporary world, with the advent of technology, it is now literally possible to 'see' justice being done.

According to Jeremy Bentham, open justice is the *"keenest spur to exertion and the surest of all guards against improbity."*[2] We live in a society where fictitious and spurious realities are manufactured by the media. The crux of the information about Court proceedings that we gather from third-party sources is lost during transmission – one third of the facts are excluded by normal frailty of memory, one third by negligence of the media professionals and the remaining one third is lost in the interpretation. Consequently, the society is bombarded with pseudo-realities. Preserving the concept of 'open justice' in the digital age, the Supreme Court has made a laudable move by allowing live streaming of the court proceedings. Termed as the "need of the hour" by the Supreme Court, virtual access to Court proceedings will filter misinformation and misunderstanding of the facts and the role of the courts. During this crucial point of time when there is a serious trust deficit in the working of the courts, live streaming of the court proceedings will not only overhaul the current system and make it more transparent but also restore the credibility of the Indian Judiciary.

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[1] R v. Sussex Justices ex parte McCarthy, All ER 233 (1923, King's Bench).

[2] Jeremy Bentham, *Works of Jeremy Bentham*, 316-317 (1843).

The Need of the Hour?

In the case of *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal,*[3] the Apex Court held that, *"the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained."* Recording and live streaming of Supreme Court cases of constitutional and national importance will increase access to the courts. It would enable and empower the citizens whose rights are affected and who are unable to implead themselves as parties because of socio-economic constraints, and would also aid them in understanding the rationale behind the Supreme Court's judgement. Those who are impacted by the judgements of the Court have the right to be aware of the manner in which decisions are given. Open and public functioning of Courts is essential in building confidence in the administration of justice. Right of access to justice demands that the current technology of live streaming be used to educate people about the judicial decisions that affect them. Recording and live streaming the proceedings of cases of public importance would completely negate the chances of any misreporting, errors or disseminating second-hand information and thereby limit any obstruction to the administration of justice. Allowing the live streaming of submissions of advocates to the courts and comments/questions posed by the Court to the parties to the case is likely to improve the public's understanding of the law and their adherence to law. It will have an educative value and thereby further the principle of Open Justice.

Both the houses of Parliament in India telecast their proceedings live on Doordarshan and this has helped our understanding of governance and functioning of democracy. It is in this line of thought, that perhaps, the Court proceedings in which the public evince keen interest should also be telecasted live. Technology has made modernity possible. The interplay between technology and law will allow the people to have direct access to the happenings in the court room rather than depending on a third-party interpretation of the same. This will then encourage the public to develop their individual opinions based purely upon the merits of the submissions made before the Courts of law.

[3] Secretary, Ministry of Information and Broadcasting, Government of India & Ors. v. Cricket Association of Bengal & Ors., (1995) 2 SCC 161.

Principle of 'Open Justice'

In furtherance of the principle of 'Open Justice', various common law jurisdictions and even International Courts have facilities for audio and video recordings of courtroom proceedings, which are made available through various platforms such as television or the internet. Countries like Canada and Australia permit the recording and televising of their appellate court proceedings to ensure fairness in witness testimony and protection of privacy. Judicial bodies in other countries like the UK, New Zealand, South Africa, and international forums like the European Court of Human Rights (ECHR) and International Criminal Court (ICC) permit a varying degree of recording of their court proceedings. So why should India be left behind in adopting this forum as a means towards open justice?

Ground Rule

There are various factors which must also be taken into consideration while forging the need for live streaming.Privacy, national security, confidentiality of sensitive information especially, in matters relating to rape and sexual assault and commercial matters involving trade secrets and intellectual property needs to be preserved. Live streaming of the cases which would provoke sentiment and arouse passion among communities should be effectively regulated. In order to regulate the livestreaming, the Honourable Supreme Court has issued comprehensive directions to safeguard the interests of the nation and private litigants. In order to determine all the modalities, the guidelines of the Court include (i) the phases in which the live-streaming shall be introduced; (ii) the types of cases for which the live streaming of cases will be provided; (iii) authorising the use of appropriate technology; (iv) the agencies through which the live streaming will be implemented; (v) other facets for implementation; and (vi) laying down norms for the use of the feed.[4]

Conclusion - Lifting of the Judicial Veil

The advancement and diffusion of knowledge is the touchstone of true liberty. The educational value of the live streaming might prove important especially in light of the misleading way in which mass media portrays the Judiciary. Indian citizens should have the liberty to watch their institutions work in real time, just

[4] Swapnil Tripathi & Ors. v. Supreme Court of India & Ors., 2018 SCC 1667.

as they do with Parliament. There could hardly be a more effective 'form or forum' with which the court could unveil itself.

Justice John Marshall Harlan II while casting the deciding vote in Estes, *"The day may come*," he wrote, *"when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in the courtroom may disparage the judicial process. If and when that day arrives, the constitutional judgment called for now would of course be subject to re-examination*."[5] Surely, that day is here!

[5] Estes v. Texas, 381 U.S. 532 (1965, Supreme Court of the United States).

Policy Review on Foreign Direct Investment in E-commerce – A Boon or a Curse?

Debayan Gangopadhyay
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Background

Foreign Direct Investment ("FDI") is the direct investment of foreign companies in fast growing private Indian businesses. E-commerce is heavily funded through FDI as a substantial amount of the industry runs on foreign investments. FDI is regulated by the Department of Industrial Policy and Promotion ("DIPP") under the Ministry of Commerce and Industry which periodically releases FDI Policies on different areas. The latest Consolidated FDI Policy[1] notified by the DIPP in 2017 has laws laid down for the e-commerce sector. The said policy has provided for various regulations on FDI in e-commerce companies. The recently notified policy by the DIPP on 26th December, 2018 has provided for clarifications on the regulations in the Consolidated FDI Policy.

This policy released by the Press Information Bureau[2] has posed quite a few issues to the working of e-commerce industry in India. The policy has clarified the existing FDI Policy of 2017 for e-commerce activities. Thereby, it has reduced the scope of the players in the e-commerce industry ("E-Commerce Entities") to only B2B (Business-to-Business) basis restricting B2C (Business-to-Consumer) basis. This basically means that the E-Commerce Entities will not be able to sell their products to the consumers directly and are only allowed to provide a platform for other sellers to sell. This provides for a very difficult situation for the E-Commerce Entities, especially, the huge corporate giants like Amazon, Flipkart, etc. Most of these E-Commerce Entities have substantial

[1] *Consolidated FDI Policy Circular of 2017*, Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India, available at https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf, last seen on 25/12/2018.

[2] Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, *Review of policy on Foreign Direct Investment (FDI) in e-commerce*, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=186804, last seen on 26/12/2018.

ownership in the largest sellers operating on their online marketplace. These sellers will now have to be taken down from the websites which is a huge loss to the E-Commerce Entities. Further, this is also a threat to the growing usage by the Indian consumer base of e-commerce websites for purposes of sales. The reason behind this is that most of the heavily discounted products available to the consumers are usually provided by the big sellers which are owned by the E-Commerce Entities themselves. The changes are material and significantly impacts the structure and business models of various e-commerce marketplaces which are owned by entities with foreign direct investments.[3] There are other issues with this policy which will be further discussed in this article.

Equity Participation

The most significant aspect of the policy is the restriction on equity participation for E-Commerce Entities in sellers on their e-commerce networks. Following are two relevant clauses of the DIPP policy as given under Clauses (iv) and (v) of paragraph 5.2.15.2.4 of the DIPP policy:

1) *E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory-based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.*

2) *An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.*[4]

The first clause bars the ownership or control of E-commerce Entities in the goods sold over their websites. It clarifies such ownership as when more than 25% of the sold products of the seller are from the market place of the

[3] *DIPP Press Note on the Consolidated FDI Policy for E-Commerce*, Economic Laws Practice, available at https://elplaw.in/leadership/dipp-press-note-on-the-consolidated-fdi-policy-for-e-commerce/, last seen on 28/12/2018.

[4] Supra1.

E-commerce Entity. It further restricts ownership through equity participation in the second clause. Leading online players own or have invested in companies that procure goods in bulk from companies and sell them to their "preferred vendors", which would list the same products at cheap prices. The new rules mean that online market places such as Amazon, Flipkart and Paytm, which are all funded by FDI, cannot exercise any control over their vendors or pricing strategy.[5] This reduces a substantial amount of control of the E-commerce Entities over the functioning of their businesses. The largest incentive for the people to use these e-commerce services to buy valuable products at cheap prices will also be taken away. This may further pose problems and issues for regular companies which sell products through their own pages on the e-commerce websites. Hindustan Unilever, for example, has an exclusive Brylcreem store on Amazon where it sells products not available at retail outlets; ITC Foods partnered with Big Basket recently to bring out a new range of Sunfeast noodles.[6] The policy therefore is extremely problematic for the existing framework of the e-commerce market and a huge concern to the E-commerce Entities.

Equal Treatment of all sellers on crucial aspects

The DIPP policy provide for more stipulations to ensure level-playing field for all sellers. The relevant provisions are given under Clause (ix) of paragraph 5.2.15.2.4 of the DIPP policy as:

> *E-commerce entities providing market place will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce market place entity or other entities in which e-commerce market place entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of market place entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services*

[5] *Digging Deeper | Govt's new e-commerce FDI rules to hurt Amazon and Flipkart*, Money Control, available at https://www.moneycontrol.com/news/business/digging-deeper-govts-new-e-commerce-fdi-rules-to-hurt-amazon-and-flipkart-3347691.html, last seen on 02/01/2019.

[6] Supra 2.

> *to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.*

This policy is beneficial to certain sellers and not to the others. In spirit, an E-commerce Entity should endeavour to run the E-Commerce marketplace as a '*level playing field'* by not favouring any particular sellers and undertaking transactions on an arm's length basis. Once the Reserve Bank of India issues the appropriate notification to incorporate the provisions of the Press Note to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, any breach by an E-commerce Entity of such condition could be proceeded against as a breach of the provisions of the Foreign Exchange Management Act, 1999 (FEMA).[7] The above changes are likely to impact the core business model of the likes of the large E-commerce Entities as they usually have direct or indirect equity holdings in their preferred vendors. The customers buying products sold by these vendors are usually given additional benefits in terms of pricing, fast delivery and cashbacks etc. By virtue of overall control, they could provide large discounts, better user experience and quality control.[8] This policy practically restricts such benefitting practices of the E-commerce Entities and also further reduces the scope of consumer demand as cashbacks and discounts will not be provided at such higher scales as before.

Conclusion

The new DIPP policy on FDI stipulates a lot of unexpected restrictions on e-commerce giants. These giants in India as discussed before have ownership over the most profitable sellers on their websites. This ownership gives them the scope to give huge discounts on their products to the consumers. The clauses providing for equal treatment of sellers limits their scope even more. The discounts and offers is the main inducement of a large number of people to purchase products on these e-commerce websites. Another major concern for the E-commerce Entities is that the policy will be effective from 1st of February, 2019[9] leaving only a month's time to comply with all the new provisions.

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[7] Supra 1.

[8] *Ecommerce Policy: Changes and Its Impact on Indian Ecommerce*, Inc 42, available at https://inc42.com/resources/ecommerce-policy-changes-and-its-impact-on-indian-ecommerce/, last seen on 04/01/2019.

[9] Supra1.

However, the policy if implemented properly can also provide for protection to the rights of small sellers. Equal treatment will compel the E-commerce Entities to provide for the same advantages such as discount offers to the smaller vendors along with the larger ones. The larger sellers under the present policy have far more benefits and advantages than the smaller ones as they are preferred by the E-commerce Entities themselves. Such discriminatory practices will not be possible in the new regime.

Also, certain benefits for the consumer experience from e-commerce websites are provided for in the DIPP policy. E-commerce Entities may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call-centre, payment collection and other services[10] which are huge advantages of shopping on e-commerce websites. It also mentions that post sales, delivery of goods to the customers and customer satisfaction will be the responsibility of the sellers for the protection of interest of consumers.[11] However, whether the policy is fundamentally beneficial will be seen over the course of time.

[10] Supra 1, at Clause (iii), 5.2.15.2.4.

[11] Supra 1, at Clause (vi), 5.2.15.2.4.

Arbitrability of Intellectual Property Disputes

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Introduction

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd,*[1] the Supreme Court enumerated the three facets of arbitrability of a dispute for the first time. These are: 1) Whether the dispute is capable of adjudication and settlement by arbitration; 2) Whether the dispute is covered by the arbitration agreement and 3) Whether the parties have referred the dispute to arbitration. The most important among these facets is the first one, which necessitates an examination of whether disputes, having regard to their nature, can be resolved by a private forum such as an Arbitral Tribunal rather than the Courts. This is also the facet which frequently gives rise to challenges in submitting intellectual property disputes to arbitration. The main point underlying the Intellectual Property Rights ("IPR") arbitrability debate is that the monopoly accruing through IPR is granted and enforced by the State. Further, IPR are rights in *rem*, operating with *erga omnes* (towards everyone) effect. Therefore, public interest demands that decisions relating to grant, amendment and revocation of IPR should be adjudicated by public fora such as the Courts or the authorities established under the relevant statutes. The question whether IPR disputes can be validly referred to arbitration under the law in force must be considered in light of Ss. 2(3)[2] and 34(2)(b)[3] of the Arbitration and Conciliation Act, 1996. As per existing Indian jurisprudence, the arbitrability of IPR disputes can be tested on two bases - the 'Rights test' and the 'Remedies test.'

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

[2] S. 2(3) of the Arbitration and Conciliation Act, 1996 provides that arbitrability of a particular kind of dispute is subject to there being no bar on arbitration of such disputes under any other law in force.

[3] S. 34(2)(b) of the Arbitration and Conciliation Act, 1996 provides that an arbitral award can be set aside if the subject-matter of the dispute is not arbitrable under any law in force.

The Rights Test

The 'rights test' is the generic test which was laid down in *Booz Allen* for determining arbitrability. It is primarily concerned with ascertaining the nature of the rights forming the subject-matter of the dispute and the '*inter partes v. erga omnes'* effect of the outcome. The Court held that all disputes relating to *rights in personam* are arbitrable whereas those relating to *rights in rem* should necessarily be adjudicated by the Courts.[4]

However, actions in *personam* arising out of violations of rights *in rem* (for e.g., a dispute arising from a license agreement) can be subject to arbitration. This fine-tuning laid the foundation for certain classes of IPR disputes to be resolved by arbitration.

The difference between an action in personam and an action in rem is explained in *IPRS v. Entertainment Network India Ltd.*[5] as follows:

> "*Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property."*

In this case, a finding on the legal character and validity of the ownership of a party in the copyright was held to amount to an adjudication of a right *in rem* and the arbitral award was set aside.

The direct inference from the Rights test is that while an Arbitral Tribunal cannot pronounce decisions on matters like the validity or revocation of a patent or trademark which would amount to a decision affecting rights *in rem*, it can decide disputes arising out of a contract or agreement between the parties, such as an assignment or license of IPR. The same can be illustrated in the following terms- "*It can be said that a patent license issue may be arbitrable,*

[4]Supra 1, at 23.

[5]IPRS v. Entertainment Network (India) Ltd., 2016 Indlaw MUM 2266, at 37.

but validity of the underlying patent may not be arbitrable."[6] In *Eros International Media Ltd. v. Telemax Links India Pvt. Ltd.,*[7]it was held that in disputes regarding commercial contracts, if the parties to the contract have consciously decided to refer those disputes to a private forum, then the question of those disputes being arbitrable or non-arbitrable does not arise. Such actions are always in personam, one party seeking a specific customized relief against a particular defined party, and not against the world at large.

A claim in rem is different from a claim for enforcement against an individual. The question of arbitrability of IPR disputes is one which should be determined on a case-by-case basis, having regard to the nature of claims and whether the adjudication would operate only *inter partes* or against the world at large. Actions for breach of contract or infringement and passing off bind only the parties and are arbitrable, because they are subordinate *lis in personam* arising out of *rights in rem*. The same has been aptly illustrated in *Eros International* in the following terms:

> "*In trade mark law it is true that the registration of a mark gives the registrant a right against the world at large. It is possible that an opposition to such an application (before the Registrar) would be an action in rem, for it would result in either the grant or non-grant of the registration, good against the world at large. But an infringement or passing off action binds only the parties to it. Take an example. A may allege infringement and passing off by B. A may succeed against B. That success does not mean that A must necessarily succeed in another action of infringement and passing off against C.*"[8]

Thus, where the action in an IPR dispute is binding only between the parties, the dispute can certainly be arbitrated.

The Remedies Test

The *Booz Allen*[9] judgement dealt with the concept of arbitrability in a generic sense, but not arbitrability of IPR disputes in particular. In addition to the Rights

[6]Lifestyle Equities CV v. Q. D. Seatoman Designs Pvt. Ltd., 2017 (8) MLJ 385.

[7]Eros International Media Ltd. v. Telemax Links India Pvt. Ltd., 2016 (6) Bom. C.R. 321.

[8]Ibid, at 17.

[9] Supra 1.

test, certain High Courts have developed a test known in common parlance as the Remedies test. The Remedies test flows from the Rights test but differs slightly in interpretation. It determines arbitrability on the basis of relief sought by the parties rather than the nature of the rights asserted. The relief sought by the parties should be in *personam*. For example, declaratory relief *in rem* cannot be granted by an Arbitral Tribunal.

In order to apply the Remedies test, a general analysis of the jurisdiction of Arbitral Tribunals is necessary. In principle, an Arbitral Tribunal is a private forum which is an alternate to the civil courts. Thus, every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the arbitral tribunals is excluded either expressly or by necessary implication.[10] The Arbitration and Conciliation Act, 1996, does not make any specific provision terming any category of disputes to be non-arbitrable. Categories of non-arbitrable subjects are carved out by the Courts, based on the principle that disputes of a public nature are not capable of settlement by arbitration.

Further, with regard to classes of disputes which fall within the exclusive jurisdiction of special fora to the exclusion of an ordinary civil court, then as a matter of public policy, such a dispute would not be capable of resolution by arbitration.[11] Neither a civil court nor an arbitral tribunal can grant the requisite remedy in such cases.

In *Eros International,*[12] the Bombay High Court observed that S. 62 of the Copyright Act, 1957, by providing that infringement and passing off actions cannot be brought in a Court lower than the jurisdictionally competent District Court, does not however oust the jurisdiction of the arbitral panel as what S. 62 intends is that such actions are not to be brought before the Copyright Board or the Registrar. Matters related to infringement and passing off entail findings of fact in personam and can very well be decided by an arbitral tribunal; and whatever a civil court can do, an arbitrator can do. The remedies under a statute are not excluded by the parties agreeing to go to a particular forum to

[10] Ibid.

[11] A. Ayyasamy v. A. Paramasivam & Ors., AIR 2016 SC 4675.

[12] Supra 7.

seek those remedies. When arbitration has been recognized as an alternate to the civil courts, the yardstick to determine non-arbitrability is whether an enactment creates special rights and obligations and gives special powers to tribunals, thereby detracting from the powers of the civil courts.[13] Thus, so long as the IPR legislations do not prohibit the grant of relief inter partes by a civil court, the same can also be granted by an arbitral tribunal.

Implications of the Rights test and the Remedies test

The Rights test and the Remedies test are not entirely sufficient to demarcate the boundaries of arbitrability. They are a start, but not enough in the case of IPR disputes, where actions in personam can often turn into a springboard for declarations in rem. A prime example would be actions for infringement, even ones arising out of exceeding the scope of a license agreement. If the Patents Act, 1970, is taken for purposes of illustration, one of the defences to an action for infringement according to S. 107 r/w S. 64 is opposing the validity of the patent itself. Prima facie, an action for infringement is an action in personam arising out of a right in rem. The exception carved out in the Rights test renders the same arbitrable. From the strict viewpoint of the Remedies test, it would still be arbitrable so long as the adjudication of the claim of infringement is concerned. If it is concluded that infringement has indeed taken place, injunctive relief and damages operating *inter partes* can be granted. But the adjudication of a defence or counter-claim challenging the validity of the *right in rem* (underlying that action in personam) can validly be made only by a High Court, and certainly not by an Arbitral Tribunal. The Courts while referring a dispute to arbitration under S. 8 of the Arbitration and Conciliation Act, 1996 are limited to findings on the existence of a valid arbitration agreement covering the subject-matter of the dispute. They cannot go into the merits and substance of the dispute. A party may always raise this defence before the arbitral tribunal for the first time at a later stage. In such a case, the entire arbitration would be frustrated.

Conclusion

While there is no easy answer to the question of arbitrability of IPR disputes, India certainly needs more dedicated jurisprudence on this subject. The ratio in

[13]HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 (193) DLT 203.

Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya[14] demands that the entire dispute should be referred to arbitration without bifurcation of subject-matter issues. Hence, it becomes necessary for the Legislature to clarify how to deal with situations such as the one illustrated above, so that there is no ambiguity as to whether disputes involving questions which may be partly arbitrable and partly inarbitrable can be settled by an Arbitral Tribunal, with the consent of the parties or otherwise. Another option would be to adopt a stance wherein IPR disputes are either arbitrable or inarbitrable *in toto.* However, since India is trying to establish itself as a pro-arbitration jurisdiction, the former would be preferable, because a large number of commercial disputes pertain to IPR. Countries like the US and Switzerland accept arbitration of all IPR disputes, even adjudications of *rights in rem*. India could perhaps borrow something from the legal framework of such jurisdictions, so that while providing clarity to the disputing parties, it will also help promote India as a favourable destination for commercial arbitration.

[14] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Anr., AIR 2003 SC 2252.

Air Crash Investigations Leading to Development of Air Laws

Yash Bhale
I LL.B.

What is Air Law?

International air law is concerned with all the fundamental issues of public international law, mainly: sovereignty, jurisdiction, territory of states and nationality.

Several aspects ranging from hijacking, international air traffic, airline mergers and acquisitions, accident investigations, airplane leasing agreements, safety regulations, environment regulations, Airport laws, aircraft financing are involved in Air law. International organizations, primarily the United Nations (UN) and the International Civil Aviation Organization (ICAO) play a major role in regulation of aviation law.

International air law is a combination of public and private international law. Its purposes are to provide a system of international regulation of international civil aviation and to eliminate conflicts or inconsistencies in municipal air laws.[1]

What is Air Crash Investigation?

Article 26 of the Chicago convention 1944 provides that,[2]

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicting serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident and in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be

[1] Shawcrass & Beaumont, Air Law (4th ed.).

[2] Convention on International Civil Aviation, Chicago, available at https://www.icao.int/publications/Documents/7300_orig.pdf, last seen on 09/01/2019.

present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

Air Crash Investigation in India

The Charkhi Dadri mid-air collision in India, which took place in 1996 over Haryana, has gone down in history as one of the most catastrophic and tragic aircraft disasters in the world. A Saudi Arabian flight and a Kazakh flight collided with each other mid-air in which all 349 people on board were killed. This crash was investigated by the Lahoti Commission and the ultimate cause of the disaster was said to be due to the Kazakhstan airline's flight pilot's failure to follow the Air Traffic Controller (ATC) instructions. The Kazakh pilots lacked Aviation English skills and thus they failed to understand the instructions of the ATC clearly.

This accident had a far-reaching impact, for soon after this incident many changes were made in the Indian as well as in the International aviation laws. Separate air corridors for inbound and outbound airplanes were created, the Ground Proximity Warning System was made compulsory for all the commercial aircrafts operating in the Indian airspace and ICAO also made it mandatory for all the international pilots to have proficiency in Aviation English.[3]

This essay focusses on describing why it was necessary to amend the existing laws and enact new laws in the wake of the various air crashes.

Correlation between Air Law and Air Crash Investigation

When an air crash takes place, the investigation is usually carried out by the Aircraft accident investigation boards of the respective country. The investigations to find out the exact cause of the accident can take from a few months to a few years. After the completion of the investigation, a final report is made which mentions the circumstances of the accident as well as conclusions on its cause.[4] To tackle such unfortunate incidents, crucial and important laws in commercial aviation were developed.

Each year hundreds of aviation related accidents take place and the investigation of these accidents becomes an ongoing process. When the first Conventions were signed during the early 1900's there was little idea about the developments,

[3]Charkhi Dadri Mid Air Collision ICAO, available at https://www.icao.int/MID/Documents/2015/IELP%20Workshop/Sustaining%20Language%20Proficiency.pdf, last seen on 12/03/2019.

[4]Supra 1.

technological advances and the difficulties which would be faced in the due course of time. The not so infrequent air crashes in the past century established the need for investigations exigently. Air crash investigations, in a way, indirectly play a crucial role in drafting new laws, amending and changing the current aviation rules and regulations from time to time. Here we can understand the close correlation between the law-making bodies and the investigation authorities, the importance of the history of the various investigations and how the various International Organizations have learnt from history and made an amendment for their past faults and fallacies in order to make aviation experience smoother than ever.

Ground Proximity Warning System Guidelines (GPWS)

In the 1970's, prior to the development of GPWS, large commercial aircrafts were involved in many Controlled Flight into Terrain (CFIT) accidents per year. CFIT accident is an accident in which an airworthy aircraft, though under pilot control, inadvertently flies into the ground, a mountain, a body of water or an obstacle. Many investigations by the National Transport Security Board (NTSB) of the United States of America (USA) revealed that these accidents could have been avoided by the installation of GPWS.[5]

GPWS is nothing but a warning system which alerts and alarms the pilot in case of flying into an obstacle, terrain, mountain, sea if he is flying too low. This system is very useful when the visibility is very low especially during heavy rains, foggy conditions and at night. ICAO issued some guidelines recommending the installation of GPWS in 1979. The Directorate General of Civil Aviation (DGCA) of India following the same guidelines made it mandatory in India in 1999.[6] After these installations the accidents were reduced to a considerable rate.[7]

The planes fitted with second generation GPWS –EGPWS (Enhanced Ground Proximity System) have been practically involved in the least number of CFIT accidents.[8]

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[5]Controlled Flight into Terrain (CFIT), The Problem That Never Went Away, Robert Sumwalt, US National Safety Board, available at https://www.ntsb.gov/news/speeches/RSumwalt/Documents/Sumwalt_140811.pdf, last seen on 09/01/2019.

[6] Office of the Director General Of Civil Aviation, Ground Proximity Warning System available at http://dgca.nic.in/ftppub/D2I-I7.pdf, last seen on 09/01/2018.

[7]*Airbus, A Statistic Analysis of Commercial Aviation Accidents 1958-2017*, available at https://www.airbus.com/content/dam/corporate-topics/publications/safety-first/Airbus-Commercial-Aviation-Accidents-1958-2017.pdf , last seen on 09/01/2019.

[8]*Honeywell, Just How Effective Is EGPWS?*, available at https://aerocontent.honeywell.com/aero/common/documents/EGPWS-Effectiveness.pdf , last seen on 09/01/2019.

Familiarity with Aviation English

In the early 1950's, the ICAO recommended that English be universally used for International aeronautical radiotelephony operations. Being just a recommendation, many airline pilots were still not efficient in English and this led to frequent miscommunications between the Air Traffic Controllers (ATC) and the airline crew.

Many a times, the pilots were not able to understand the correct instructions, runway numbers, directions, weather conditions all because they were conversant only with their native languages in Russian, Chinese etc. and were not trained to understand English at all.

Thus, this started to result in many Air Ground Communication (AGC) accidents and the Cockpit Voice Recorder (CVR) investigations from these planes further gave the evidence of many miscommunications or even complete lack of communications. Due to this in 2003 ICAO made amendments in its Chicago convention requiring all the international pilots to have the necessary knowledge of aviation English. Further, many proficiency tests in English language were also introduced in this regard.[9]

Conclusion

Thus, the aftermath of the Charkhi Dadri mid-air collision, led to the enactment of the abovementioned laws and the DGCA, Government of India has made it compulsory for all the aircrafts flying in India to be fitted with GPWS and the adherence of the 2003 Chicago Convention requiring all the pilots to have a minimum knowledge of aviation English. These changes have considerably prevented deadly air crashes like Charkhi Dadri not only in India, but also all over the world. According to Airbus SE, the enactment of such crucial laws has resulted in the decrease of fatal accidents by over 95% in the past few years.[10]

The above examples reflect man's endeavours to learn from history and rectify his past mistakes in the journey to save humanity.

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[9]*ICAO Resolutions-A38-8: Proficiency in the English language used for radiotelephony communications,* available at https://www.icao.int/safety/lpr/Documents/A38.8.pdf, last seen on 09/01/2019.

[10]*Airbus-A Statistical Analysis of Commercial Aviation Accidents*, available at https://www.airbus.com/content/dam/corporate-topics/publications/safety-first/Airbus-Commercial-Aviation-Accidents-1958-2017.pdf, last seen on 12/03/2019

PROJECT REPORT

A Study on Legal and Economic Impact of the Protection of Geographical Indications (GI) in India with special reference to the State of Maharashtra.

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Introduction

India is very rich in natural resources and over a period, people in India have advanced their knowledge to make the best out of these available resources. Indian economy is largely based on the agricultural industry. India is also known for its textiles, such as Kanchipuram silk, Musa silk, Tussar, etc. We have numerous varieties of wheat, rice, fruits and food products. Wine from Nasik valley and tea from Darjeeling are very famous in the international markets.

Hence, the Government brought in a *sui generis* law- the Geographical Indication (Registration and Protection) Act, 1999. The Act prevents unfair trade competition in relation to registered GI products, thereby giving protection to farmers and artisans and ensuring that their products are not misused. The GI tag also increases the economic viability of the products in national and international markets and also gives economic benefits to the community having a registered GI. This also encourages producers to continue the traditional work in which they have been involved for generations.

Geographical Indication

Geographical Indication ("GI") of goods is defined as that aspect of industrial property which refers to a country or to a geographical location situated therein as being the country or place of origin of that product. Typically, such a name conveys an assurance of quality and distinctiveness which is essentially attributable to its origin in that defined geographical locality, region or country. Without suitable legal protection, the competitors who do not have any legitimate rights over the GI might hitch a free ride on its reputation. Such unfair business practices result in loss of revenue for the genuine right holders of the GI and

mislead consumers. Moreover, such practices may eventually hamper the goodwill and reputation associated with the GI.

The researchers hence took up four case studies to analyse the current position of GIs in India. These case studies were on Puneri Pagdi, Nashik Valley Wine, Mahabaleshwar Strawberries, and Himroo (GI not yet registered in respect of the same). This research project analysed whether the objectives of the law relating to GI in India has been implemented in its correct sense, and also studied its legal and economic impact. The project was divided into doctrinal and empirical research. Dealing with the historical development of GI; it also focuses on the procedural aspects of registering a Geographical Indicator in respect of a product. The project also entails empirical research wherein a survey has been carried out to evaluate whether the act is beneficial. It concludes by giving suggestions for better implementation of the objectives of the Act so as to benefit the society.

Project Findings

One of the positive outcomes of the GI legislation was the increase in registrations due to promotional and awareness activities of different governmental organisations and NGOs.

Attempts have been made by different State Governments by merging GI promotion with the department of tourism, promoting producer companies. However, these efforts remain restricted to a few areas. The Government has undertaken several steps as a part of the campaign for promotion of Indian registered Geographical Indications (GIs). These include conducting events to promote and create awareness on GIs through social media, involving State Governments, Union Territory Administration and other relevant organizations for facilitation of GI producers. All State Governments have been requested to appoint nodal officers for promotion of Geographical Indications from their respective states, establish facilitation cells for each GI from the state, undertake steps for GI awareness in consumers, undertake training of GI producers, and take effective action against manufacture and sale of counterfeit GI products among others.

The Government's role is also vital in the post GI mechanism to deal with cases of infringement because without government support, most producer groups do not have the resources to effectively defend or promote their GI brand. The enforcement of the Act in other countries is a much more complicated venture as this may pose a variety of constraints including technicalities involved in the registration process in various foreign countries; exorbitant expenses involved

in appointing a watch-dog agency to get information on misappropriation; and huge financial resources needed for fighting legal battles in foreign lands.

There is a dearth of research on potential benefits from GI protection, from an Indian perspective. While many studies have been carried out in Europe on this issue, hardly any systematic assessment has been undertaken by the relevant agencies in India, while identifying the products to be accorded GI status. Extensive gaps exist on operationalizing GIs and this is where the focus of the Government needs to be. Well-crafted policies and strategies on post-GI mechanisms are required for marketing, distribution, branding and promotion of the Indian GI products to realise the commercial potential of Indian GIs. There is also a need for setting up a national level fund for fighting against infringement, brand building and promotional efforts.

Conclusion

The implications of GIs in the context of rural development in India need to be studied especially for sectors like agriculture, fisheries, crafts and artisanal works that provide livelihood for a large section of the poor in India. Studies of the entire supply chain should be undertaken. Without a collective body of empirical evidence on the impact of geographical indications, policy decisions in the developing world will remain uninformed and there will not be sufficient growth in this field, considering the economic conditions of the country.

CASE COMMENTS & LEGISLATIVE COMMENTS

Harsh Mander v. Union of India[1]

Dewangi Sharma
I BA.LL.B.

The Delhi High Court decriminalized 'begging' in the National Capital, declaring it as unconstitutional and violative of an individual's freedom of expression and the right to live with dignity.[2]

The application of the Bombay Prevention of Begging Act, 1959 ('The Act') was extended to the NCT of Delhi by the Centre, through an amendment made in 1960. The harsh and arbitrary Act proscribes '*begging*' as a criminal offence. Furthermore, it prescribes a punishment of imprisonment, which shall not exceed a period of 3 years in case of first conviction and a period of 10 years in case of subsequent convictions.[3] The present petition was filed before the Delhi High Court by a few social activists in 2000, seeking protection of the basic human rights, as well as the Fundamental Rights of the beggars.

The issue before the Hon'ble Court was whether the State has the authority to criminalize beggary. The Petitioners prayed that the State has a responsibility towards its citizens to protect their right to live with dignity and security. There is a social contract between the State and its citizens to protect their Fundamental Rights. Under such obligations, the criminalization of beggary raises the question whether the State has fulfilled its duty towards its citizens.

The Petitioners contended that the provisions of the Act violate Art. 19(1)(a) of the Constitution, arguing that soliciting is a verbal expression and the Act was unreasonable as it imposed restrictions on the expression of poverty and

[1] Harsh Mander & Ors. v. Union of India & Ors., AIR 2018 Del 188.

[2] Arts. 19 & 21, the Constitution of India.

[3] S. 6, The Bombay Prevention of Begging Act, 1959.

vulnerability. They also argued that the Act was inconsistent with the essence of Art.14 as it did not make any distinction on the basis of the purpose for which an individual was involved in begging. It would disable individuals from taking measures (such as begging and soliciting alms) to ensure their bare sustenance and survival. Moreover, it also denied beggars their right to life guaranteed under Art. 21 of the Constitution.

The State responded that it is important to detain persons to ascertain the cause of poverty and also to keep a check on begging. It was mentioned that the Act is a safety precaution but no emphasis was laid on criminalizing begging. The Centre and the Aam Aadmi Party ('AAP') Government had also drafted a Bill to decriminalize begging and rehabilitate beggars while improving their living conditions, but the Bill is still pending introduction and passage in the Legislature.

The bench comprising of Acting Chief Justice Gita Mittal and Justice C. Hari Shankar decriminalized begging in the National Capital and struck down several provisions of the Act, declaring them as unconstitutional.

The Court adopted the view that criminalizing Beggary is the wrong approach to eradicate it and further stated that artificial means to make beggars invisible will not suffice. The Court further emphasized on the fact that the Act *"ignores the reality that people who beg are the poorest of the poor and marginalized in society*."[4] While commenting on the unconstitutionality of the Act, the Bench opined that soliciting alms by verbal expression would be protected under Art. 19(1)(a) and no rational distinction can be made on the basis of the message involved, thus concurring with the views of the Petitioners. The Court also observed that a person who is compelled to beg cannot be faulted for such actions in these circumstances.

The Court also laid emphasis on the responsibility of the Delhi government in this regard and remarked, "*It remains a hard reality that the State has not been able to ensure even the bare essentials of the right to life to all its citizens, even in Delhi*."[5] The Court supported its decision by observing the futility of lodging and detaining beggars as a wastage of public funds. However, the Court granted liberty to the Government to pass a well-thought out legislation

[4] Supra 1, at 31.

[5] Supra 1, at 28.

for criminalizing certain forms of forced beggary and controlling illegal rackets, while being mindful of Constitutional rights.

Thus, in this landmark judgment, the Court upheld the rights of the poor and struck down the age-old Act which stigmatized poverty as a crime. It also stressed upon the State's duty and responsibility to provide a dignified life to all its citizens by alleviating poverty from the society. The Court came to the rescue of the marginalized community and acted within its constitutional mandate by laying down that the actions of beggars are not backed by *mens rea* and thus, the activity of begging is not a criminal offence but merely, a result of helplessness. Now, it is the responsibility of the Government to take conscious efforts to reduce and keep a check on beggary while protecting and safeguarding the rights of the vulnerable sections of the society.

Nandakumar v. State of Kerala[1]

Jahnavi Murthy
V BA.LL.B.

Custody of a major cannot be granted to any person; Court also recognized the right to a live-in relationship

This case came up before the Supreme Court of India as a criminal appeal by special leave petition under Art. 136 of the Constitution of India, from an order of the High Court of Kerala.

The Appellant and his wife were married on April 12, 2017 at the Chakkulatukavu Bagavati Temple, situated in Trivandrum district of Kerala. On the day of the marriage, the Appellant's wife was 19 years old while the Appellant had not yet turned 21. They were married as per the Hindu customs and rituals. After the said marriage took place, they started living together as husband and wife.

The Respondent no. 4 in this case was the father of the wife, who filed a writ of Habeas Corpus before the High Court of Kerala, claiming that his daughter had gone missing. He also claimed that his daughter was in the illegal custody of the Appellant. He had also filed an FIR on April 10, 2017, however, the police did not conduct an effective search to find his daughter. Due to the lack of investigation by the police in this matter, he filed the Writ before the High Court. The Writ was filed on April 25, 2017 and notice was sent to the Appellant and his wife via a special messenger. On April 28, 2018, the Appellant and his wife both appeared before the Court.

In addition to the above-mentioned parties, the Police Sub-Inspector of the Vatgtiyoorkavy Station was also present. The High Court noted that at the time of marriage, the Appellant's wife was of marriageable age as per the Hindu Marriage Act, 1955. However, it was contested on behalf of Respondent no. 4 that the Appellant had not yet attained the age of 21 at the time of marriage and therefore, could not legally get married under the Hindu Marriage Act, 1955. To

[1] Nandakumar & Anr. v. State of Kerala & Ors., Criminal Appeal No. 597 of 2018 arising out of Special Leave Petition (Criminal) No. 4488 of 2017 (Supreme Court, 20/04/2018).

establish the said fact before the Court, the Appellant was asked to produce proof of his age. It was shown that he was born on May 30, 1997 and would attain the age of 21 only in 2018. The High Court of Kerala also held that the photographs of the marriage produced before the Court was not sufficient evidence of the marriage between the Appellant and his wife. The certificate of marriage was not submitted, which gave the Court further reason to declare the marriage to be a void marriage. The submission of the Appellants was that the High Court had passed a judgement which was not permissible in law, about the validity of the marriage. They implored that the Court could have been under the pressure of a social phenomenon and thus passed such an Order. It was contended that since the Appellant's wife was of marriageable age, she had the right to decide whom she wanted to live with. As the Appellant's wife was not a minor, her custody could not be given to her father. The Counsel for the State was also found to be right in his submissions.

The substantive questions of law framed in this case by the Supreme Court were as follows:

1) Whether the marriage in question was a void or voidable marriage as per the Hindu Marriage Act, 1955;

2) Whether the custody of the Appellant's wife could be given to Respondent no. 4; and

3) Whether the Appellant was of marriageable age when the marriage took place.

The aforesaid questions were decided as follows:

1) The marriage could only be construed as a voidable marriage as per the Hindu Marriage Act, 1955 and not a void marriage.

2) The custody of the Appellant's wife could not be given to Respondent no 4 as she was a major.

3) The Appellant may not have been of marriageable age, but had the right to enter into a live-in relationship with his wife, which has been recognised by the Legislature under the Domestic Violence Act, 2005.

So far as the validity of the marriage was concerned, the Supreme Court remarked that it could definitely not be construed as a void marriage under the

Hindu Marriage Act, 1955, but merely a voidable one. Ss. 5 and 12 of the Act very clearly state the conditions of a valid marriage, as well as the definition of a voidable marriage. The Court also held that the Appellant and his wife may not have been in a position to enter into wedlock, but they were not outside the purview of having the right to enter into a live-in relationship. The Supreme Court also took into account, the observations it had made in the case of *Shafin Jahan v. Asokan K.M & Ors*[2], regarding the Writ of Habeas Corpus. In that case, the Court had labelled the Writ as a great constitutional privilege and the first security of civil liberty. A close comparison was drawn with the present case wherein the Appellant's wife was made to appear before the High Court of Kerala and was thrust into the custody of the Respondent no 4 as per the said High Court Order. The Court observed that the High Court of Kerala had failed to take into consideration the constitutional rights provided under Arts. 19 and 21.

In conclusion, the Supreme Court was right in passing a judgement in favour of the Appellant and his wife, as the High Court was hasty in passing a judgement in favour of the Respondents. The Apex Court took into account all the evidences put on record, and also heard both the parties. The Court rightly reached the present decision of putting the onus on the Appellant's wife to decide whom she wanted to live with and also recognised the concept of a live-in relationship, while setting aside the Order of the High Court of Kerala.

[2] Shafin Jahan v. Asokan K.M. & Ors., Criminal Appeal No. 366 of 2018 arising out of Special Leave Petition (Criminal) No. 5777 of 2017 (Supreme Court, 09/04/2018).

Prabhat Steel Traders Pvt. Ltd. v. Excel Metal Processers Pvt. Ltd.[1]

Ayush Wadhi
III BA.LL.B.

No restriction on filing an appeal against an Order of the Arbitral Tribunal by a third party having substantial interest in the subject matter.

Can a third party who has substantial interest in the subject matter of an Order passed by an Arbitral Tribunal under S. 17 of the Arbitration and Conciliation Act, 1996 ('the Act') appeal against such order under S. 37 of the Act? This was the question of law discussed in the case of *Prabhat Steel Traders Pvt. Ltd. v. Excel Metal Processers Pvt. Ltd.,* adjudged by the Hon'ble Bombay High Court.

The petitioner company dealt with several types of steel items including steel coils. The petitioner entered into a conducting agreement with the respondent wherein the coils were delivered to the respondent for storing, handling and recoiling on job work basis. On a given day, the petitioner visited the warehouse of the respondent and found that some of his coils were marked with yellow paint, as those coils were attached/injuncted pursuant to an order passed against the respondents by an arbitrator. The petitioner was not a party to the arbitration proceedings.

A total of thirteen Arbitration Petitions were filed in the High Court under S. 37 of the Act, through which the petitioners prayed for leave to appeal against the Order passed under S. 17 of the Act by the learned sole arbitrator on December 27, 2016. Additionally, they prayed for setting aside of the impugned order passed on November 17, 2017, which granted interim measures against respondent no. 1 and in favour of respondent no. 2, on the ground that the said order was jeopardizing the interests of the petitioner.

The Hon'ble Bombay High Court allowed the petitions by granting leave to file an appeal against the impugned orders and also set aside the said orders, as

[1] Prabhat Steel Traders Pvt. Ltd. & Ors. v. Excel Metal Processors Pvt. Ltd. & Ors., Arbitration Petition No. 619 of 2017 (High Court of Bombay, 31/08/2018).

prayed for by the petitioners. Reference was made to the legislative intent behind omission of the expression 'party' in S. 34 of the Act. It was elucidated that the expression 'party' is deliberately not inserted so as to provide a remedy to a third party who might be affected by the interim orders passed by the arbitral tribunal, for instance, where the property of such third party is in the custody or possession of a party to the arbitration, or in a case of collusive proceedings.

In the present case, the petitioner was totally unrelated to the arbitration agreement between the respondents, but, due to the order of the arbitral tribunal, his interests were severely affected, and hence, he must be given the power to protect the company's interests. The Mischief rule of interpretation of statutes was also applied so as to suppress the incorrect interpretation and apply the one which will provide justice to the parties.

It is submitted that since third parties who are not privy to the arbitration agreement cannot appear before the Tribunal or implead themselves in a S. 17 application and thereby protect their interests, such an interpretation is not only beneficial but also necessary. This is also in consonance with the principle of natural justice that no person shall be deprived of his property without an opportunity of being heard by an appropriate forum. Under the Code of Civil Procedure, 1908, third parties can file an appeal against orders passed in proceedings, if their interests are adversely affected. This ruling of the Bombay High Court has accorded similar rights to third parties whose interests are affected by arbitration proceedings, which are essentially quasi-judicial in nature.

Another important aspect which was emphasised is that S. 17 and S. 9 provide vast amount of powers to the arbitral tribunal and the Courts respectively to provide interim measures to the aggrieved parties, but in certain cases, such interim measures may affect a third party. Moreover, it was laid down that the powers of the Court under S. 9 and powers of the arbitral tribunal under S. 17 to grant interim measures are identical considering the amendment made to S. 17 of the Act, which took effect on October 23, 2015 and thus, even a third party which is affected by an order passed by an arbitral tribunal under S. 17 (interim measure), and has substantial interest in the subject matter of the dispute, either directly or indirectly, will have the remedy of filing an appeal under S. 37 of the Act in order to seek justice.

The fact that the Court took note of the effect of the amendment to S. 17 is to be appreciated, since traditionally, Courts have granted interim remedies even

against third parties who are not a part of the arbitration proceedings, and have also allowed such third parties to implead themselves in the S. 9 proceedings, or appeal against such orders. Once the powers of the Tribunal under S. 17 have been made equivalent to those of the Court under S. 9, it would be highly illogical if a third party could have a remedy against interim orders passed under one section but not when passed under the other.

Judgement of the Hon'ble Bombay High Court was justified because no person should be deprived of his property pursuant to actions of others. In the present case, the petitioners were having substantial interest in the subject matter of the dispute between the parties to the arbitral proceedings. The Court allowed all the thirteen petitions and ordered that the delivery of the coils be made to the petitioners. Hence, there is no restriction with regard to filing such an appeal under S. 37 of the Act, when the same advances the cause of justice, having regard to the facts, circumstances and contractual arrangements in each particular case.

Sampurna Behura v. Union of India[1]

Dewangi Sharma
I BA.LL.B.

Children in our country have fundamental and human rights and the State must acknowledge its role in strongly enforcing a proper system of Juvenile Justice under the Act.

The case was filed in 2005 as a Writ Petition before the Supreme Court of India, with the prayer that the Chief Secretaries and the Director General of Police ('DGPs') of all the States be directed to forthwith implement the Juvenile Justice Act, 2000 in its true spirit. Observing the pathetic condition of juvenile justice in the country, the Court took the case for consideration and finally settled the issue after 12 years in 2018. In the interim, the Act of 2000 was repealed and a new Act was passed in 2015 to improve and strengthen the system of Juvenile Justice in the country.

After the Juvenile Justice (Care and Protection of Children) Act, 2015 ('the Act') was enacted, the Court directed the Central and State governments to strictly comply with the provisions of the Act, but subsequently observed that *only cosmetic changes had been introduced and the overall picture was still gloomy*. The condition of the homes for children across the country was observed to be horrific and the lack of separate prisons for children in many state jails indicated the dilapidated condition of juvenile justice in the country.

The Court lamented the tardy implementation or virtual non-implementation of the Act. It was observed that Juvenile Justice Boards (JJBs) and Child Welfare Courts (CWCs) were constructed in very few districts. The Court also commented that its actions could be criticized as 'judicial overreach', but it still upheld the fundamental and human rights of the children and insisted that the State acknowledge its role in strongly enforcing a proper system of juvenile justice as per the Act.

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[1] Sampurna Behura v. Union of India & Ors., Writ Petition (Civil) No. 473 of 2005 (Supreme Court, 09/02/2018).

The Court listed numerous suggestions and also broadened the scope of the case by directing the Ministry of Women and Child Development ('MCWD'), the National Legal Service Authority ('NALSA'), High Courts and other related agencies that:

1) MWCD of the Central and State governments should ensure that the National Commission for Protection of Child Rights (NCPCR) and the State Commission for Protection of Child Rights (SCPCR) perform optimally;

2) The MWCD must make creative use of technology for the purpose of collecting data and for other purposes connected with the Act, such as maintaining a database of missing children, trafficked children and for follow-up of adoption cases, etc.;

3) Every district in every state must have a JJB that is well-staffed;

4) All authorities such as JJBs and CWCs, Probation Officers, members of the Child Protection Societies and District Child Protection Units, and managerial staff of Child Care Institutions must be sensitized and given adequate training relating to their position;

5) The Chief Justice of each High Court should seriously consider establishing child friendly courts and vulnerable witness courts in each district where trials are required to be conducted with a high degree of sensitivity, care and empathy for the victim;

6) The Chief Justice of every High Court was to initiate *suo motu* proceedings, where appropriate, for the implementation of the Act;

7) Set up meaningful Special Juvenile Police Units and appoint Child Welfare Police Officers (CWPOs) in terms of the Act at the earliest;

8) NALSA was requested to complete a report, preferably before April 30, 2018, to assist all the policy making and decision taking authorities to plan out their affairs;

9) State governments should address the problem of unavailability of funds and ensure proper financial resources and better utilization of funds under the JJ fund;

10) State Governments and Union Territories must be advised to appoint eminent persons from the civil society as visitors, to monitor and supervise the Child Care Institutions in all the districts;

11) State Governments and Union Territories must be advised to ensure that all such institutions are registered so that children can live a dignified life in these institutions and issues of missing children and trafficking are also addressed;

12) The NCPCR and the SCPCRs must carry out time-bound studies on various issues, as deemed appropriate, under the Act. Based on these studies, the State Governments and the Union Territories must take remedial steps;

13) Child Care Institutions must be managed and maintained in a manner that is conducive for children. They should take the assistance of NGOs and the civil society to ensure that the Act serves the purpose for which it has been enacted by the Parliament.

The Court has fulfilled its responsibility by acting as a custodian of the rights and well-being of juvenile offenders, who constitute a vulnerable section of the society. It has also effectively used its power in directing all agencies to ensure the implementation of the Act. It is now the responsibility of the Government and related agencies to implement the Act in its true spirit.

Sharda Gautam v. Delhi Urban Shelter Improvement Board[1]

Adithi Rao
III BA.LL.B.

Right to alternative accommodation, if found to have been dispossessed from public premises under any policy/scheme of the Government, must be met with an element of urgency.

The appeal in this case is that of a regular civil second appeal before the High Court of Delhi, under S. 100 of the Code of Civil Procedure, 1908, against a judgment of the Court of the Additional District Judge-02, Central Delhi. Tara Chand Gautam resided in a slum area in New Delhi, along with his family, since 1974. The area was demolished by the Government in 1984, whereupon the appellant surrendered his accommodation. The appellant was assured allotment of alternative accommodation but despite repeated attempts and calls on the part of the appellant, he never received anything as promised. Subsequently, in 2001, the Slum and Jhuggi Jhopari Department ('Slum and JJ Department') sent a letter to the appellant asking him to furnish certain documents. After furnishing the documents, the appellant received another letter saying that he was not entitled to any alternate accommodation under any existing scheme. The appellant contended that other residents of the locality who had also made similar applications had been allotted the flats. A suit was then filed by the appellant against the defendant i.e. the Municipal Corporation of Delhi and the Slum and JJ Department, seeking allotment of alternate accommodation to him. The Slum and JJ Department filed a written statement pleading that the suit was barred by delay and laches. Reasons given for the same were that as the defendant demolished the property in 1984 under its policy, mere residence of a person could not be a reason for entitlement to an alternative flat. There was a cutoff date set for the purpose of deciding eligibility of the occupant for purposes of allotment of alternative accommodation and the appellant was not found eligible. The defendant denied that any certificate was ever issued to the appellant regarding alternate accommodation.

[1] Sharda Gautam v. Delhi Urban Shelter Improvement Board, Regular Second Appeal No. 367/2016 (High Court of Delhi, 17/07/2018).

The Civil Judge allowed the suit for the reason that the appellant had proved vide letter dated November 13, 2001, that he had applied for alternative accommodation. It also brought forth proof of residence from May 1974 to June 1984 and hence, the appellant was entitled to alternative accommodation and mandatory injunction was issued, directing the defendants to allot residential built up premises in lieu of the demolished slum cluster. Thereafter, the Court of the Additional District Judge set aside the previous order, reasoning that the appellant had produced no evidence of ownership or title of the property claimed and that the appeal can only be in the form of a consideration and not allotment; hence the appellant was refused entitlement.

The substantive questions of law framed by the Delhi High Court were as follows:

1) Whether the appellant was entitled to alternative accommodation if found to have been dispossessed from public premises, under any policy/scheme of the defendant?

2) Whether there is an element of urgency in any scheme of rehabilitation and whether the appellant for the reason of having approached the Court nearly 20 years after dispossession, was disentitled to benefit of any scheme?

The aforesaid questions were decided as follows:

1) Without the appellant proving his eligibility under any scheme, the appellant cannot be entitled to any alternative accommodation.

2) There is an element of urgency in any scheme of rehabilitation and a claim thereunder made after 20 years from the date when the appellant was dispossessed and in which time, the appellant had already settled down elsewhere, would not lie.

The High Court decided the present appeal by relying on the cases of *Dayanand v. Union of India*[2] and *Makhni Kaur v. Delhi Urban Shelter Improvement Board*.[3] According to these case laws, there exists an element of urgency in

[2]Dayanand v. Union of India, Writ Petition (Civil) No. 940 of 2015 (High Court of Delhi, 05/10/2015).

[3] Makhni Kaur v. Delhi Urban Shelter Improvement Board, Writ Petition (Civil) No. 10796 of 2015 (High Court of Delhi, 23/11/2015).

schemes for rehabilitation and they are present for the purpose of preventing homelessness and providing immediate shelter to the needy. Further, it was observed that the appellants were in unauthorized occupation in the first place and had no divested right to alternative accommodation. The appellants did not prove their entitlement under any policy/scheme and therefore could not prove their eligibility. It was also further observed that the appellant had been living elsewhere and the appellant had access to work and his daily life from the period of dispossession to the present date. The question of urgency could not be proved in favor of the appellant. Therefore, no relief was granted to the appellant and the appeal was dismissed.

The petitioners, through this class action, compelled the Court to pen down the conditionalities and the due process before Slum Clearance but failed to prove the existence of any scheme under which they were entitled to any alternate accommodation. Further, no element of urgency was met as the petitioners were dispossessed before 20 years and they have already settled down somewhere else. Hence, the quintessential element was lost.

Swapnil Tripathi v. Supreme Court of India[1]

Neha Sagam
I BA.LL.B

Live-streaming of court proceedings is manifestly in public interest and will result in greater democratic accountability.

Through the present set of petitions filed before the Hon'ble Supreme Court under Art. 32 of the Constitution, the Petitioners prayed for the live telecast of the proceedings of the Court. The Bench that heard the instant case comprised of former Chief Justice of India Dipak Misra, Justice A.M. Khanwilkar and Justice D.Y. Chandrachud. Attorney-General K.K. Venugopalan was requested to submit a report with suggestions to evolve a regulatory framework governing such live-streaming.

The arguments of the Petitioners were as follows:

1) Supreme Court proceedings of "constitutional importance having an impact on the public at large" should be live-streamed in order to make the same easily accessible to the general public;

2) Open trials subject to public scrutiny are necessary because they act as a check against judicial caprice or vagaries and serve as a powerful instrument for creating confidence of the people in the fairness, objectivity, and impartiality of the administration of justice;[2]

3) The right to information is a facet of Art. 19 (1) (a) of the Constitution and for this reason, the public is entitled to witness court proceedings; and

4) An open court system has already been recognized under Art. 145(4) of the Constitution, S. 153B of the Code of Civil Procedure and S. 327 of the Code of Criminal Procedure.

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[1] Swapnil Tripathi v. Supreme Court of India, Writ Petition (Civil) No. 1232 of 2017 with Writ Petitions (Civil) No. 66 of 2018, 861 of 2018 and 892 of 2018 (Supreme Court, 26/09/2018).

[2] Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744.

In light of these submissions, the Supreme Court upheld the plea for live-streaming of court proceedings as an extension of the legal principle of 'open justice' and the true realization of the 'open court system'. The Bench was of the opinion that Courts must utilize technology to augment the principle of open courts by moving beyond physical accessibility to virtual accessibility. The principle "justice should not only be done, but should manifestly and undoubtedly be seen to be done"[3] was reiterated and given a wider meaning, by allowing broadcasting of the proceedings. The Court also gave comprehensive guidelines to monitor the live-streaming of the proceedings. In drafting these guidelines, a balance has been sought between the rights of the people, maintaining the dignity and majesty of the court, the privacy of the litigants and the interests of justice.

The socio-economic conditions in India and the physical limitations of Courts create several infrastructural and logistical barriers that obstruct access to hearings. Litigants often cannot attend proceedings of their own matters. Live-streaming will remove these hurdles and ensure that the right of access to justice, emanating from Art. 21, is enforced meaningfully.

In cases of national importance affecting the lives of the masses, it is essential for them to have knowledge of the arguments made, as well as the rationale behind the decision arrived at by the Court. Dissemination of knowledge about judicial proceedings would be beneficial for litigants, the legal fraternity and the civil society in general. It would be a step ahead of creating awareness and in fact, promote legal literacy among the masses. Additionally, live-streaming will change the dramatic image of Courts as portrayed by various media and people will understand the functioning of Courts in real terms. This historic decision has thus upheld the right of the people to know, as envisaged under Art. 19 of the Constitution.

Courts have always promoted transparency in governmental functioning, and the RTI Act, 2005, has enabled people to attain disclosures with regard to the decisions of the government, and thus, in an environment of ever-increasing transparency, the decision of the Supreme Court to broadcast its proceedings is highly appreciated. Open justice will also ensure good governance and accountability and in doing so, strengthen our democracy.

[3] R v. Sussex Justices, All ER 233 (1923, King's Bench).

Live broadcast will also guarantee proper reporting of cases. It will harmonize the relationship between the media and the judiciary. Further, the media will have to evolve from information-based journalism (where the judgment is merely reiterated) to knowledge-based journalism (where the proceedings and decisions are analyzed and critiqued for the benefit of the people).

Recording of proceedings, as an ancillary benefit, will compensate for the lack in accounts of the institutional history of the Apex Court. Hearings of landmark cases, arguments and counter-arguments made by stalwart advocates, the opinions and decision-making process of the judges, can now be recorded for the future generations.

The decision of the Apex Court marks a progressive change in the Indian legal system. It will serve as an instrument for the education and empowerment of the masses. In the wake of the recent controversies surrounding the Indian judiciary, this judgment has taken a refreshing stance with its effort to bring greater transparency in the functioning of the judiciary. The amalgamation of law with technology for the benefit of the people is yet another move that demonstrates the dynamic and evolving nature of the Indian judiciary.

Union of India v. Hardy Exploration and Production (India) INC[1]

Salonee Patil
III BA.LL.B.

When there is no direct indication of 'seat' in an arbitration agreement, 'place' and 'seat' can be used interchangeably only when the term 'place' is used as a stand-alone and no other condition is postulated.

Arbitration is a leading means of alternative dispute resolution. It lays emphasis on party autonomy to the extent that the parties can designate a place in the arbitration agreement or the terms of reference, indicating that the law of such place would govern the proceedings. However, this does not mean that the Tribunal should hold all its meetings or hearings at that place only. The word 'place' can signify two completely different aspects in an arbitration proceeding, one being the 'seat' and the other being the 'venue' of arbitration. Seat of an arbitration is extremely important as it determines the law which will govern the proceedings, whereas venue is merely the geographical location.

Union of India v. Hardy Exploration and Production (India) INC deals with an issue which commonly arises when the seat of arbitration has not been clearly designated by the parties. The question before the Hon'ble Supreme Court was whether the 'venue' mentioned in the agreement could also be construed as the 'seat' of arbitration.

The arbitration clause was as follows-

> *"Arbitration proceedings shall be conducted in accordance with the UNICITRAL Model Law on International Commercial Arbitration of 1985 except that in event of any conflict between the rules and the provisions of this Art. 33, the provisions of Art. 33 shall govern.*

The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English Language."

[1] Union of India v. Hardy Exploration and Production (India) INC, Civil Appeal No. 4628 of 2018 (Supreme Court, 25/09/2018).

The Union of India ('the appellant') had filed an application to set aside the award made by the Arbitral Tribunal in favour of Hardy Exploration and Production (India) INC ('the respondent') under S. 34 of the Arbitration and Conciliation Act, 1996 ('the Act') before the Delhi High Court. The respondents contended that such an application is not maintainable before the Delhi High Court as the seat is not India, and therefore the Indian Courts would have no jurisdiction over the arbitral proceedings.

It is well-established that once the parties choose a judicial seat, it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the country designated as the seat would apply *ipso jure*.

Any issue arising out of arbitration process may call for application of any one or more of the following laws-

1) The proper law of contract- the law governing the contract which has created the substantive rights of the parties and in respect of which the dispute has arisen.

2) The proper law of the arbitration agreement- the law governing the obligation of the parties to submit the dispute to arbitration, and to honour the award.

3) The curial law- the law governing the conduct of individual reference.[2]

In the absence of any express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of arbitration, meaning, the curial law to be the same as the proper law of arbitration.[3]

The Court in *Bhatia International*[4] had determined that Part I of the Act shall apply to all arbitrations held in India and to international commercial arbitrations held outside India, unless the parties by agreement exclude all or any of its provisions.

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[2] Ibid.

[3] Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors., (1998) 1 SCC 305.

[4] Bhatia International v. Bulk Trading S.A. &Anr., (2002) 4 SCC 105.

However, in *BALCO*[5], the Court held that the Act shall not apply in a foreign-seated international commercial arbitration. It is limited only to the arbitral proceedings that take place in India.

It is well settled that where the parties choose a judicial seat outside India and provide that the law governing the arbitral proceedings will be a law other than Indian law, Part I would not have any application and thus, the award cannot be challenged under S. 34.[6]

In the case at hand, the 'place' of arbitration, connoting the seat, was not agreed upon, and so the Tribunal was required to determine the same in accordance with the provisions of S. 20 of the Act which defines place of arbitration.

The Hon'ble Supreme Court also clarified the law with respect to place, seat and venue. It was observed that 'place' and 'seat' can be used interchangeably only when the term 'place' is used as a stand-alone and no other condition is postulated. However, in the given case, it has been observed that the place was not agreed upon by the parties and in case of failure to agree, it was to be determined by the Tribunal. In case such a condition is postulated, the said condition has to be satisfied so that the place becomes equivalent to the seat. Otherwise, place cannot *ipso facto* assume the status of seat.

The Hon'ble Supreme Court concluded that the High Court had failed to 'determine' the seat of arbitration as required. It was stated that determination is a positive act and it signifies an expressive opinion.

The appeal was allowed and the order passed by the Delhi High Court was set aside concluding that the Courts in India have jurisdiction in this case.

Thus, an arbitration clause has to be read so as to understand the intention of the parties and arrive at a conclusion regarding the designation of the seat and the jurisdiction of the Court. The author subscribes to the view of the Hon'ble Supreme Court that the venue mentioned should not be read as seat without application of reason. Non-application of reason has wide-reaching implications and thus attempts must be made to give full effect to the intention of the parties.

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[5] Bharat Aluminium Company v. Kaiser Aluminium Technical Services INC, (2012) 9 SCC 552.

[6] Eitzen Bulk A/S & Ors. v. Ashapura Minechem Limited & Anr., (2016) 11 SCC 508.

M/s United India Insurance Company Ltd. v. Jai Prakash Tayal[1]

Mallika Joshi
V BA.LL.B.

Denial of health insurance to persons suffering from genetic disorders is unconstitutional.

The Plaintiff took out a mediclaim policy for a sum of rupees five lakhs from the National Insurance Company in September 2000. Thereafter, he shifted his policy to the Defendant Company, the United India Insurance Company, in September 2004. The policy was annually renewed till September 2012. The Plaintiff suffered from HOCM (Hypertrophic Obstructive Cardiomyopathy) for which he had been previously hospitalized and the claims for which were settled. He was again hospitalized in November 2011 and submitted the medical bill to the Defendant. They refused to sanction his claim stating "genetic diseases are not payable on account of them being excluded."

The Plaintiff contended that this exclusion clause was not a part of the original policy and was added subsequently. No notice to that effect was ever given to him and hence he was not bound by it.

The Defendant Company stated that genetic disorders are excluded from payment as per the exclusionary clause in their health policies. HOCM being a genetic disorder, will be clearly excluded from any payment under the policy.

The Trial Court upheld the Plaintiff's claim and stated that fresh clauses could not be added in a policy for renewal.

The Delhi High Court, in exercise of its Appellate authority, considered two questions-

1) Whether the exclusion of genetic disorders was valid and constitutional; and

[1] M/s United India Insurance Company Ltd. v. Jai Prakash Tayal, 247 (2018) DLT 379.

2) Whether the exclusionary clause was applicable to the Plaintiff's case.

Answering the first question, the Court discussed the meaning of genetic disorders. Genes are responsible for various traits that human beings possess. They contain positive as well as abnormal attributes which are transferred from generation to generation. These abnormal attributes are called 'genetic disorders'. There are several medical conditions which can be fully attributed to genes, but there are some which are a combination of genetic factors as well as other external factors. Differentiating between the two is impossible without gene testing, which is a very detailed and expensive test. Adding 'genetic disorders' to an exclusionary clause in mediclaim policies would make it difficult for people suffering from genetic disorders or disorders which may not be fully attributable to genes to avail of basic health facilities.

Art. 14 of the Constitution of India prohibits discrimination of any kind before the law. This includes prohibition of discrimination with regard to the genetic heritage of a person.

Art. 21 deals with the right to life and liberty of an individual. It extends to the right to health as well. The term 'health' implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development.[2] The Court stated that the question of genetic disorders does not merely remain a contractual issue between the insurance company and policy holder, but also spills into the broader issue of right to health as sanctified by Art. 21.

With regard to the second issue, the Court looked at HOCM and its medical attributes. As per common knowledge, HOCM is not always necessarily genetic in nature and the same cannot be conclusively inferred until gene testing is done. The treatment for the same is to insert a device known as Inverted Cardioverter Defibrillator (ICD) to monitor any rhythmic disturbance in the patient to prevent 'sudden death'. This is a routine procedure which had been cleared by the Defendant Company earlier, yet in November 2011, the same routine procedure was rejected by them. The Court examined the evidence produced by both sides. Four doctors were consulted regarding the genetics behind HOCM and they all gave inconsistent views. The only thing clear was

[2] C.E.S.C Ltd. and Ors. v. Subhash Chandra Bose and Ors., (1992) 1 SCC 441.

that to determine whether the Plaintiff's HOCM was genetic, a gene test would have to be done. Hence, the insurance company's exclusion of HOCM as a genetic disorder for the Plaintiff was based not on a scientific fact, but on family history. Exclusion of an entire gamut of disorders merely on the basis of speculation was discriminatory and unconstitutional.

The Court also considered the role of the Insurance Regulatory and Development Authority of India (IRDAI) in setting guidelines for Standardizing in Health Insurance and its position of ambiguity over exclusionary clauses. The 2013 guidelines made provision for exclusion of 'pregnancy, infertility, congenital and genetic disorder' without defining 'genetic disorders'.

Insurance contracts are standard form contracts based on the principle of utmost good faith. The Defendant Company acted in bad faith by excluding genetic disorders without first conducting empirical tests. The High Court rightly struck this action down and awarded the policy claim to the Plaintiff.

The Supreme Court in its judgement, also upheld the decision of the Trial Court and the High Court. It also directed IRDAI to review its guidelines.[3]

[3] The United India Insurance Co. Ltd. v. Jay Prakash Tayal, Special Leave Petition (Civil) No. 29590 of 2018 (Supreme Court, 27/08/2018).

The Fugitive Economic Offenders Act, 2018

Kumar Akshay
II LL.B.

In the wake of recent financial frauds, wherein the billionaires of our country indulged in fraud and fled away to foreign nations with the taxpayer's money in order to evade any legal prosecution, the Government introduced an Act called the Fugitive Economic Offenders Act, 2018, to prevent such culprits from escaping the clutches of the judiciary. The Act adopts non-conviction based asset confiscation as mentioned in United Nations Convention against Corruption and covers economic offences above Rs. 100 Cr. Generally, all the criminal laws are prospective in nature, but this Act is an exception and has retrospective effect. Though the Act has been introduced with good intentions to stop such absconders and keep them within the jurisdiction of our Courts; questions can be raised about the logic of the legislators in bringing this Act, as well as its constitutional validity.

Act provides that the moment a person is declared to be a 'fugitive', he is not allowed to file or defend any civil suit in any Court or Tribunal of the country.[1] This provision goes against the principle of natural justice and the right to life as provided in our Constitution.[2] Moreover, if we look at the second part of the same section, it is difficult to comprehend the rationale behind it. S. 14 (b)[3] of the Act states that:

> *"Any Court or tribunal in India in any civil proceeding before it, may, disallow any company or limited liability partnership from putting forward or defending any civil claim, if an individual filing the claim on behalf of the company or the limited liability partnership, or any promoter or key managerial personnel or majority shareholder of the company or an individual having a controlling interest in the limited liability partnership has been declared as a fugitive economic offender*."

[1] S. 14, The Fugitive Economic Offenders Act, 2018 on the Power to disallow civil claims by the Fugitive.
[2] Art 21, the Constitution of India, 1950 "No person shall be deprived of his life or personal liberty except according to procedure established by law."
[3] S. 14 (b), The Fugitive Economic Offenders Act, 2018.

Here, the legislators have not demarcated the difference between an individual and a company properly. The basic feature of a company is that it is an artificial juristic person and separate from its directors or shareholders. But in this case, the company is facing the consequences of the acts of its promoters, key managerial persons or majority shareholders as if both were the same. The basic idea behind this section is to ensure that the company cuts ties with any such person who is a fugitive economic offender, but it is not easy on the part of the company to change its shareholding pattern overnight. When a company is not allowed to contest or defend itself against a civil claim because of the act of its promoters or majority shareholders, it not only impacts the reputation of the company but also leaves the gullible and innocent minority shareholders to suffer for an offence which they have not committed. The idea behind disentitlement is that the one who has evaded the Indian law should not be given protection under it. But here, even those who have complied with the Indian laws are facing trouble because of the fugitive.

The Act also states that if a person is declared to be a fugitive, his property would be confiscated by the Government.[4] Prevention of Money Laundering Act, 2002 also contains a provision for confiscation but only after the person has been proved guilty.[5] Under this Act, however, property can be confiscated once a person is declared to be a fugitive by the Special Courts. The Act also states that the appeal from the Special Courts lies to the High Court but no injunction can be sought with regard to the confiscated property. Similarly, no express provision has been made as to what would happen to the property if and when the fugitive is acquitted by the higher courts. If we draw another analogy from this Section, the Government wants to bring back the offender by threatening to confiscate his property, which was not an option earlier. The lenders cannot realise their claims from the property because as soon as the fugitive leaves the country, the assets become distressed and it becomes hard to find buyers in the market.[6] Rather, the better approach for the Government would be to execute treaties with foreign governments for extradition purposes, especially with Britain which has become a haven for these fugitives.

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[4]S. 4, The Fugitive Economic Offenders Act, 2018.

[5]S. 5, Prevention of Money Laundering Act, 2002.

[6] This can be seen in the case of Sahara's Amby valley and Vijay Mallya's Kingfisher Goa villa where the villa spread over 12,350 square feet was sold only after three failed auctions by a private treaty.

Another important aspect of the Act is the setting up of Special Courts. The effectiveness of this move can be questioned, considering that the High Courts currently have a vacancy of around 400 judges which makes one ponder as to how and when the Government will actually appoint judges for these Special Courts. Even the pendency of cases in such Special Courts and Tribunals are very high. The Law Commission Report suggests that the top five Tribunals in India have about 3.5 lakhs cases pending before them.[7] Special Courts have become an easy panacea to solve all problems in the country. However, unless these Courts are empowered with some special powers, the pendency of cases will only keep increasing. The Supreme Court has even asked the Government to amend the Code of Criminal Procedure, 1973, and add a law equivalent to S. 339B of the Criminal Procedure of Bangladesh[8] which talks about trial in absentia.[9] Since the whole purpose of this legislation is to bring stringent laws and deterrent punishments for the absconders and secure justice in time, trial in absentia should be an important part of this Act.

Although the Act projects a vision of thwarting future offences of the same nature through strict punitive actions, it should also necessarily conform to the principles laid down by our Constitution and the Government should strongly consider strengthening the judicial construct of the nation. Doing so would add substance to the Act.

[7] 272nd Law Commission of India Report, *Assessment of Statutory framework of tribunals in India*, 36 (2017), available at http://lawcommissionofindia.nic.in/reports/Report/272.pdf, last seen on 21/12/2018.

[8] S. 339B, Code of Criminal Procedure 1898, (Bangladesh).

[9] Hussian & Anr. v. Union of India, Criminal Appeal No. 509 of 2017 arising out of Special Leave Petition (Criminal) No. 4437 of 2016 (Supreme Court, 09/03/2017).

Ph.D. RESEARCH ARTICLES

Giving Political Voice to the Persons with Mental Disability: Some Reflections

Ms. Rajalaxmi Joshi[1]

Introduction

The existence of a fair and equitable legal order makes the society civilised and regulated. Civilised society governed by rule of law is an artefact. A regulated society is always desired as it is a tool to protect the weak and aims to create an exception to the 'survival of the fittest' rule. The protection of the weak and amelioration of the downtrodden are the primary objects of the legal system and also the reasons that justify regulation of society. In its effort to regulate, any legal system deals with rights and duties of a person. The legal system decides who is capable of holding rights and who may be subjected to duties. The person so recognised to be capable of holding rights or being subjected to duties may be a natural person i.e. a human being or legal person like a company. The law and legal system which ultimately is a reflection of social ideology, determines the subjects and objects of rights and obligations. The determination reflects dominant ideology, social, political, economic influences and undercurrents. Thus, the dichotomy between natural and legal persons does not appear to be as clearer as it purports to be. In fact, the natural persons are further sub classified while conferring rights or imposing duties. The experience of legal system shows that being a human has never been an enough qualification for being included in rank of those who were/are entitled to equal rights e.g. slaves, though natural human beings, were deprived of all rights, were property of their masters and could be sold or purchased.[2] For a long time, woman, too were deprived of right to property, right to dissolve the marriage etc. Persons were regarded as untouchables on the basis of their caste and denied rights.

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[2]Dred Scott v. John F.A. Sandford, 60 U.S. 393 (1856, Supreme Court of United States).

Deaf, dumb and mutes were deprived of right to property for a long.[3] And till recently homosexuals were punished for their sexual orientation.[4] Even today the law does not recognise expressly their right to marry, to find family etc. Adding insult to the injury, marital rape is not considered as violation of rights of women in India.[5] The above illustrations do not exhaust the range of violations and denial of faculty of possessing rights by natural human beings.[6]

Not merely denial of faculty to natural human beings to possess right has been treated with complete numbness and indifference rather; the same has been justified on the pretext that the persons are not equal, lower in status, unable to take care of themselves, vulnerable and in need of protection etc. Lack of desired social, economic status or lack of abilities is the commonly accepted grounds for exclusion of social groups from legal framework. It is not just a society but also the legal system which has been involved in the process of 'othering'.[7] Others are those who are not a part of 'us'.

One of the well-known victims of the process of othering is the social group of persons with disabilities ("PWDs") particularly persons with mental disabilities. Along with legal and moral rights this group is even denied a personhood. In comparison with other marginalised groups the pathology of people with mental disabilities is further compounded due to the ambivalent attitude of law towards them. The pathology is not confined merely to the social exclusion but extends to their depersonalisation from legislative and policy zones on the ground of disability. PWDs are always treated as objects of charity rather than subjects of rights. Paternalism and protectionism are at the core of legal reification of PWDs. In short, the consequences of de personalisation are absolute negation of opportunities, rights, autonomy and denial of equality before law.

The Parliamentary Committee's report on Department of Empowerment of Persons with Disabilities (the department was established in 2012 later on

[3] S. 2, The Hindu Inheritance (Removal of Disabilities) Act, 1928; S. 28, The Hindu Succession Act, 1956.
[4] Navtej Singh Johar & Ors v. Union of India, (2018) 10 SCC 1; S. 377, The Indian Penal Code, 1860.
[5] Independent Thought v. Union of India, (2017) 10 SCC 800; See Ss. 23, 28, 43, Sexual Offences Act, 2003 (United Kingdom).
[6] See A. Sen, *Development as Freedom*, (1st ed., 1999). Amartya Sen in his book argues that mere conferment of rights is not sufficient till rights enabling conditions are also created.
[7] B. Pease, *Undoing Privilege- Unearned advantage in a divided world*, 3(2010).

renamed as Department of Empowerment of Persons with Disabilities in 2014) bears testimony to this state of affairs. The analysis of the report shows[8] that only six (i.e. Andhra Pradesh, Madhya Pradesh, Odisha, Rajasthan, Tamil Nadu and Uttar Pradesh) out of thirty-six States and Union Territories have dedicated departments and district social welfare officers appointed to look into issues of disabled persons. This sorry state of affairs is further evidenced by lack of interest shown by the States in not notifying the rules to implement and effectively enforce Rights of Persons with Disabilities Act 2016.[9]

In addition to all this ableist ideology further aggravates the vulnerability of this section. The frame work of the present legal system is able bodied centric. The law and society regard something which is most common as normal or desired. And something that is uncommon or different is disregarded as bad or less or unwanted. The insistence on ability to perform the normative compulsions fixes a frame of normalcy. And those who cannot fit in or those who cannot fulfil the standards of the normalcy are classified as disabled and deprived of their rights. Besides, the notion of ability is subjective and transitional as is made evident from the preamble of UNCRPD emphasising that disability is an evolving concept.[10]

Against this backdrop in this paper the author grapples with legal and political status of persons of unsound mind, who are widely discriminated on the ground of mental disability. Among many rights which are denied[11] to persons with mental disability this paper focuses on their right to political representation in Indian legal framework. The author further inquiries to find out if the present Indian legal system is compliant with the international obligations cast upon by the International Conventions and documents which India has ratified. The discussion runs as follows first there is a brief analysis of importance of right to political representation, the same is followed by analysis of conception of unsound mind. This discussion is then linked with treatment to the concept of unsound

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[8] PTI, *Only six states have dedicated departments for disabled: Parliament Panel,* Hindustan Times (06.01.2018), available at https://www.hindustantimes.com/india-news/only-6-states-have-dedicated-departments-for-disabled-parliament-panel/story-TNDTkYnAHxtzU9aep65ncK.html, last seen on 03/02/2019.

[9] *Disabilities Act: States going slow on roll-out, says study,* The Hindu (04.12.2018), available at https://www.thehindu.com/news/national/disabilities-act-states-going-slow-on-roll-out-says-study/article25664949.ece, last seen on 03/02/2019.

[10] Convention on the Rights of Persons with Disabilities (CRPD), Preamble.

[11] Ss. 5, 13, Hindu Marriage Act, 1955; S.12, Indian Contract Act, 1882; S.6, Transfer of Property Act, 1882.

mind under Indian public law and the compatibility of Indian legal order vis-à-vis right to political representation of persons with mental disabilities.

Importance of Right to Political Representation

Political representation and participation in the electoral process are the hallmarks of democracy and the markers of citizenship. Political representation is a process to participate in the governance and policy making of the country. It provides for a forum wherein citizens can voice their opinions, views and participate and regulate policy framing. Equal opportunity to participate in the process of election and to have political representation is necessary as it would then only guarantee that the laws and policies of the state to be inclusive and made after hearing the representations from all the groups of society sharing different interests, concerns and needs.

The right to participate in public and political life has three components i.e. right to contest elections, right to vote, and right to hold public office. This right has a very strong human right foundation steaming from Universal Declaration on Human Rights ("UDHR")[12] and other subsequent allied convention International Convention of Civil and Political Rights ("ICCPR")[13], Convention on Elimination all forms of Discrimination Against Women ("CEDAW")[14] and United Nations Convention on Rights of Persons with Disabilities ("UNCRPD")[15]. Almost every Constitution enacted in 20th century recognise and protect this right.[16]

On this background the author would like to shed some light on conception of unsound mind.

Analysis of Conception of Unsound Mind

The only legislation i.e. the Indian Contract Act, 1872 offers some guidance to clarify and unravel the notion of unsound mind. Indian Contract Act, 1872 by defining sound mind purports to clarify the meaning of unsound mind. The S. 12 reads: *"What is a sound mind for the purposes of contracting. —A person is said to be of sound mind for the purpose of making a contract, if, at the*

[12] Article 29, Universal Declaration on Human Rights.
[13] Article 25, International Convention of Civil and Political Rights.
[14] Article 7, Convention on Elimination all forms of Discrimination Against Women.
[15] Article 29, United Nations Convention on Rights of Persons with Disabilities.
[16] See S. 3 Constitution Act S.3 1982 (Canada); S. 19 Constitution of Republic of South Africa, 1996.

time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests" (Negative definition).

Halsbury's law of India inter alia assumes that unsound mind is a medical fact.[17] The proof of the same is contingent on medical evidence. It appears that in India the distinction is collapsed between unsoundness of mind as a legal concept and mental illness as a medical disorder thereby later implicating the former resulting in denial of legal capacity. In other words, a person with mental illness should not be essentialised as person with unsound mind as with support in place he/she can on majority of occasion effectively exercise his/her legal capacity.

It would be appropriate to refer to dictionary meaning to shed more right on the meaning of the word 'unsound mind'.

Black's[18] law dictionary defines the word unsound mind as '*Not healthy, esp. not mentally well*'. American jurisprudence which represent trends on American law is categorical in holding that notion of insanity being multi-faceted should not be articulated in a one size fits all approach.[19] Significantly unlike in India where the expression unsound mind is employed, in USA the term incompetent person or insanity is used. Having noted that it is difficult to draw any accurate definition of insanity the authors go on to classify the following types of insanity enabling the courts to form opinion. Forms of insanity or incompetency includes delirium, delirium tremens, delusion, dotage, emotional insanity, feeble-mindedness, hallucination, homicidal mania, imbecility, irresistible or uncontrollable impulse, kleptomania, lunacy, monomaniac etc.[20] The above discussion shows that in USA the law on insanity has assumed considerable sophistication enabling the courts to understand with some degree of confidence the notion of unsound mind. However, a close look on the above forms also suggests that these forms represent the various abnormal mental stages based on the yard stick of normalcy. Therefore, the same is subject to critic of ableism and perpetuation of medical model of disability.

On the other hand, Halsbury's laws of England discusses the above topic under the heading mental health and the same is further divided in to mental disorder

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[17] Halsbury's Laws of India, *Contract*, 44 *(*2nd ed., Volume 9, 2015).
[18] Black's law dictionary, (Bryan Garner, 9th ed.).
[19] America Jurisprudence, 535 (2d ed., Volume 41).
[20] Ibid at 541, for detailed discussion and articulation of the concepts.

and legal capacity.[21]However, neither of the discussion offers any guidance on correlation of unsound mind and insanity with assumption of political offices or vesting of voting rights.

In this connection it would also be beneficial to shed light on judicial approaches to the meaning of unsound mind in India.[22] In its popular but misconceived understanding the term 'unsound mind' is equated with mental illness.

Now the author would like to link this discussion to the right to political representation.

Unsound mind under India Public Law

Having briefly discussed the meaning of unsound mind and insanity it would be appropriate to shed light on how Indian Public law treats the concept of unsound mind. Does it treat unsound mind as a disqualification to exercise political rights or does it recognise need for reasonable accommodation in respect of persons of unsound mind so as to enable them to exercise this right. To give historical context to the discussion it would be desirable to make reference to Constituent Assembly Debates preceding the enactment of Art. 83 (presently Art. 102) disqualifying on the ground unsound mind.[23] First come first in both the draft constitutions the framers had adopted the legal conception of unsound mind that is to say status of unsound mind based on judicial adjudication.[24] So far as

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[21] Halsbury's Laws of England, *Medicine- Mental health, 563(*4thed. Volume 30,1980).

[22] Jyotirindra Bhattacharjee v. Sona Bala Bora and Ors., AIR 2005 Gau 12. The single judge of Gauhati High Court observed " *Besides, the conduct of late Bora itself indicates that he was not a normal person in view of the fact that he instituted a case against his wife and children, picked up quarrel with the members of his family, remained away from the house for a long period and transferred the entire property by way of sale rendering the members of the family home-less. These are few indications of improper mental condition. Of course, merely because a person instituted a case against wife and children or remained away from his house cannot be said to be indications of unsound mind. But if all these are taken together will surely indicate that Late Bora was not mentally sound at the time of execution of the sale deed and, therefore, the sale deed executed by him did not confer any right, title and interest on the appellant." It is important to mention here that in Letter Patent Appeal the division bench of the Gauhati High Court observed "the learned Single Judge was absolutely wrong in taking the view that if all those indications were taken together that would surely indicate that Late Bora was not mentally sound at the time of execution of the Sale Deed…. merely because a person instituted a case against wife and children or remained away from his house, could not be said to be indications of unsound mind. Pertinent it to note that there is nothing on record to prove that Late Bora was ever medically examined to support the contention of the respondents that he was of unsound mind"*.

[23] Art. 83 [COI Art. 201], *Constituent Assembly Debates*, Vol. 8, 19/05/1949.

[24] B. Shiva Rao*, The framing of India's Constitution* (1st ed., Reprint 2004).

Constituent Assembly debates are concerned the main question with which one or two members brought this issue was not whether this ground should be excluded as a disqualification rather the member was concerned about the under inclusiveness of the legal conception of unsound mind. This is evident from Shri. Rohini Kumar Chaudhari's ableist observations "*I hope that soundness of my mind will not be questioned if I say that this clause is not so happily worded as it should be. Sir, I presume that it is the desire of the authors of the Draft Constitution that no person of unsound mind should be allowed to be a member of this House, and I believe that the present House has been so selected, and that no person of unsound mind has been able to creep into this House. Sir, if you allow this clause to stand as it does, it will mean that there will be a large number of persons of unsound mind coming in, because the qualification is there that the man must be declared to be of unsound mind, by a competent court"*. He expressed the concern that in absence of voluntary action on part of the person it is uncommon for the courts to issue a declaration of unsoundness of mind against any person. He wondered whether people admitted in mental asylums in absence of such declaration be not eligible to vote. Expressing the non-feasibility of such declaration at large scale he went on to insist the assembly to adopt a populist and perceptible notion of unsound mind and pressed for deletion of the requirement of judicial determination of unsound mind. He observed that "*we know that in every village and in every town, there are certain number of persons who go about like lunatics, and whom everybody even the child who pelts stones at them, knows to be lunatic*". He further observed "*every villager, every citizen in a town knows that such and such person is of unsound mind, that he is a raving lunatic*".

However, the President tries to assuage the feelings of the member by asking a very pungent question "*but is there any chance of such a person being elected unless the whole electoral is of unsound mind*?" The Hon'ble member Mr. Chaudhari unconvinced with the response of Mr. President made the last ditched effort by observing "*"if you want to leave a loop-hole for persons of unsound mind to come in and have a voice in the selection of members of the future House, you may leave the clause as it is"*. However, Pt. Jawaharlal Nehru while responding to similar observations raised by Mr. Chaudhari in respect of preparation of electoral rolls rigorously defended judicial determination of unsound mind. He observed "*what we want to guard against is this. A person should not be ruled out on account of some prejudices or wrong decision. There must be some guide to the enumerator. The decision*

of a court surely must be recognised by the man who has to prepare the roll".[25] These words of wisdom did ultimately prevail with the Constituent Assembly as it categorically rejected the suggestion of Mr. Chaudhari. However, interestingly while drafting Art. 289-B (presently Art. 326) the Constituent Assembly did not provide for the safeguard of judicial determination of unsoundness of mind.[26] However, it would be farfetched to conclude based on this omission that the Assembly did accept the views of Mr. Chaudhari in respect of electoral rolls while dropping the requirement of judicial determination of unsound mind. Such a view would amount to very half-hearted and contextual reading of Constituent Assembly Debates. Evidently the point made by Jawaharlal Nehru cannot be confined to holding of political offices. His was a broad point and he was clearly guarding against prejudice for people on the arbitrary assumption of an unsound mind. At any rate the controversy should be taken to be concluded in the light of the salutary language of Sec. 16 of Representation of People Act, 1950 restoring sanity to the discourse by providing for judicial determination of unsound mind even in respect of right to vote. However, this does not mean by any stretch of imagination that Indian legal order has adopted a legal conception of unsound mind or insanity in all contexts and even where the legal conception of insanity is incorporated courts are not well equipped with guidelines to adjudicate unsound mind. There is a need for evolution of systematic common law of unsound mind, otherwise inconsistency would continue to rule the roost.[27]

However, the focus of this paper is on political sphere and therefore it would be appropriate to briefly examine the relevant provisions of the Constitution and allied legislations touching the theme of the research.

Right to political representation includes right to contest election from Parliament to Panchayat, right to vote and right to assume political offices. In the following table the author would demonstrate disqualification on ground of mental disability for exercise of these rights.

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[25] Motion Re preparation of electoral rolls, *Constituent Assembly Debates*, Volume 7, 8/01/1949.
[26] Art. 289-B [COI Art. 326], *Constituent Assembly Debates*, 16/06/1949.
[27] See for contradictory reasoning, Chako and Anr. v. Mahadevan, (2007) 7 SCC 363.

Right to Contest Election

Article	**Relevant disqualification for the purpose of this paper**
Art. 84 and 102 Membership of Parliament	Express Disqualification (If of **unsound mind** and stands so declared by a competent court)
Art. 173 and 191Membership of the Legislative Assembly or Legislative Council of a State	Express Disqualification (If of **unsound mind** and stands so declared by a competent court)
Art. 243F (1) Member of a Panchayat	Implicitly disqualified on the basis 'unsoundness of mind'
Art. 243V (1) Member of a Municipality	Implicitly disqualified on the basis 'unsoundness of mind'

Right to Vote

Article	**Relevant disqualification for the purpose of this paper**
Art. 325 and 326 Elections to the House of the People and to the Legislative Assemblies of States	Express Disqualification Unsoundness of mind

Right to hold political office

Article	**Relevant disqualification for the purpose of this paper**
Art. 58 Qualifications for election of President	Implicit disqualification on the basis 'unsoundness of mind'
Art. 66 Vice President	Implicit disqualification on the basis 'unsoundness of mind'
Art. 75 other provisions as to ministers	Implicit disqualification on the basis 'unsoundness of mind'
Art. 76 The Attorney-General for India	No disqualification on the ground of unsoundness of mind

Art. 124 Establishment and constitution of Supreme Court	Express Disqualification **Judges (Inquiry) Act, 1968 S. 3 (5)** Investigation into misbehaviour or **incapacity** of Judge by CommitteeWhere it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any **physical or mental incapacity** ……
Article 148 Comptroller and Auditor General of India	Express Disqualification **shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court**
Art. 157 Qualifications for appointment as Governor	No express disqualification on the ground of unsoundness of mind mentioned in the Constitution.In B.P Singhal[28] judiciary has introduced the disqualification "We summarise our conclusions as under: The compelling reasons including but not exhausting physical/mental disability, corruption and behaviour unbecoming of a Governor".
Art. 165Advocate General for the State	No disqualification on the ground of unsoundness of mind
Art. 164 (1) other provisions as to ministers	Implicit disqualification on the basis 'unsoundness of mind'
Art. 217 Appointment and conditions of the office of a Judge of a High Court	Express Disqualification **Judges (Inquiry) Act, 1968 S. 3 (5)** Investigation into misbehaviour or **incapacity** of Judge by Committee Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any **physical or mental incapacity** ……
Art. 279A Goods and Services Tax Council	No disqualification on the ground of unsoundness of mind
Art. 280 Finance Commission and The Finance Commission (Miscellaneous Provisions) Act, 1951	Express Disqualification S. 5 if of unsound mind

[28] B.P. Singhal v. Union of India, (2010) 6 SCC 331, 372.

As seen above 'unsoundness of mind' is one of the disqualifications for the exercise of these rights. Evidently, a class of citizen who is labelled as being persons of 'unsound mind' is entirely excluded from exercising the right to political representation. None of the Articles or any other provision of the Constitution clarifies and articulates the notion of unsoundness of mind. Even the concept is not defined in the General Clauses Act, 1897.

Unsound mind as a negator of Legal capacity

The term 'unsound mind' is often used in legal literature and made a ground to deny legal capacity. Legal capacity means capacity to hold rights and obligations in the eyes of law.[29] It has two components i.e. to hold a right and to have agency to exercise the right. From the jurisprudential angle a living being is conferred the status of being a person when he or she can be a holder and executor of the right.[30] The denial of legal capacity results in denial of personhood to persons with mental disability. Such exclusion results in denial of dignity to persons with mental disability. Such denial is often referred to as civil death of a person.[31]

When a person is made unsuitable and ineligible to hold a constitutional office or to cast a vote and to contest elections on the ground of unsoundness of mind, the law denies him or her a legal capacity on the basis of ability, particularly mental ability or capacity.

When such provisions and their effects are read in light of the constitutional values and particularly principle of equality (as enshrined in Art. 14) and political justice, the questionarises whether the Constitution really secures equality for persons with mental disabilities.

In light of this question, it is necessary to revisit the notion of equality and the parameters set to judge and differentiate between 'equality' and 'discrimination'. The parameter of mental capacity apparently seems to be a reasonable basis for classification permitted under Art. 14. In order to examine its reasonableness,

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[29]Convention on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12: Equal recognition before the law, Committee on the Rights of Persons with Disabilities, 3.
[30]*Salmond on Jurisprudence*, 299 (P J Fitzgerald, 12th ed., 2016).
[31] L. Series and A. Nilsson, *The UN Convention on Rights of Persons with Disabilities A Commentary,* 350 Article 12 CRPD: Equal Recognition before the Law (I.Bantekas, M.S. Stein, D. Anastasiou, 1st ed., 2018).

it is necessary to decode the parameter. The term mental capacity is expressed in terms of soundness or unsoundness of mind in legal language. The ableist framework of law insists on benchmarks of mental capacity to hold and exercise rights. The set benchmark requires a person to be capable of understanding the consequences of his action and insists on ability to form a rational judgment as a pre-condition for the exercise of the rights. Non-conformists to this set benchmark are branded as persons of unsound mind. Such benchmark is considered reasonable to classify persons. Since the persons belonging to these two different classes are unequal, they are not entitled to equal treatment. Therefore, denial of rights to persons of unsound mind is justified.

This view is based on the notion that both the notions of reasonable classification and unsound mind are neatly demarcated legal categories too well entrenched in the legal system to require any debate or reconsideration. However, in the author's opinion the constructional and judicial interpretation of these two notions is not merely insensitive to contemporary notion of equality but also it odds with the ideals of UNCRPD, an international Constitution of the rights of persons with disabilities.

In this connection the critical question requiring consideration is whether non-inclusion of 'unsoundness of mind' as ground of non-discrimination in Art. 15 and 16 and by incorporating it explicitly in certain other provisions as ground for disqualification and exclusion, has the Constitution recognised and accepted that classification on the ground of unsoundness of mind as reasonable and just? The answer to this question depends upon two views firstly if it is perceived that doctrine of reasonable classification exhaust the mandate of Art. 14 then the answer has to be in affirmative. Whereas if it is assumed that doctrine of reasonable classification is only one of the several vehicles to realise the depth and interstices of conception of equality and particularly if we remind ourselves with the memorable observation of Justice Bhagwati in *E.P. Royappa*[32] that "*equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits*" echoing in subsequent several judgments of the Supreme Court then it goes without saying that the answer is emphatically in negative.[33]

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[32]E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, 38.

[33] See in this connection South West Africa Cases (ICJ 1966) Justice Tanaka "equality principle does not exclude the different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matter differently".

The above propositions and assumptions are based on inclusive constitutionalism advocated in India whereby the notions of anti-majoritarianism and diversity are nurtured. However, when it comes to people with disabilities the so-called inclusive constitutionalism seems to be ineffective and blunt because the notions of anti-majoritarianism and diversity are viewed from ableist perspective. Lack of political representation and social voice on part of this group further compounds the issue of inclusion in the so-called mainstream society.

Right to political representation in India

In independent India, all the components of right to political representation are guaranteed and regulated by the provisions of the Constitution and backed by the Representation of Peoples Act, 1950 and 1951. The adoption of the Constitution was the first step to recognise these rights post-independence. In this connection it is appropriate to allude to the Preamble emphasising to secure to all the citizens 'justice social, economic and political'. In other words, political justice is recognised as one of the foundational values underlying Constitution of India.[34] The actual concretisation of this value in number of dedicated articles in the Constitution to this right speaks volumes about the kind of importance the Constitution attaches to the same.

Besides right to political representation has now human rights trope in light of enactment of protection of the Human Rights Act, 1993 wherein Human Rights are defined in S. 2 (d) as "rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". The above definition makes it evident that though right to political representation might not have been explicitly incorporated in Part III of Indian Constitution with the foundation of human rights perspective it is a catalyst to the attainment of all the fundamental rights guaranteed by Part III of Indian Constitution.

Compatibility of Indian Legal order with Art. 29 of UNCRPD

In this section, we will first briefly discuss the contours of Art. 29 and then investigate whether the right to political representation regime in India enshrined in the Constitution is compatible with the same or not.

[34] M. Nagraj v. Union of India, (2006) 8 SCC 212, 241, 247.

Scope of Art. 29

Following are the main antecedent of right to political representation under UNCRPD a) right to vote, b) right to get elected or to contest election, c) right to political representation and participation directly and indirectly through representatives. It is emphasised that PWDs must be able to exercise this right effectively and on equal basis with others. The Convention also outlines the following rights enabling conditions for effective realisation and enforcement of this right by the state parties.

a) Evolution and supply of accessible voting procedure and material;

b) Maintenance of confidentiality during secret ballot vote;

c) Facilitation of PWDs with use of effective technology to enable exercise of right to stand for election, to hold effectively hold public office and to perform all public functions at all levels;

d) Securing of free expression of will of PWDs as electorate by rendering assistance;

e) Promotion of congenial environment for participation of PWDs in public affairs including Non-governmental organisations in political domain and facilitate their representation in organisations working for PWDs locally to internationally.

In other words, to translate the normative ends of this article as policy guidelines it is necessary to articulate few terms like 'on equal basis with others'. Put plainly the term is not akin to formal equality but rather covers values such 'equal before and under the law' and 'equal protection and benefit of the law'.

Following dimensions of equality can be unfolded from the aforementioned values. General Comment[35] inter alia advocates the following dimensions of equality "(a) a fair redistributive dimension to address socio-economic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for

[35] Convention on the Rights of Persons with Disabilities, General comment No. 6 (2018), Article 5: Equality and non-discrimination, Committee on the Rights of Persons with Disabilities, 3.

difference as a matter of human dignity". The reference may also be made to Catharine MacKinnon's notion of equality as anti-hierarchy.[36] Without a detailed discussion of all these dimensions which is not feasible because of space constraints it can be safely concluded that the idea of equality is very complex and its realisation requires multi-directional and creative measures and the political milieu is not an exception to this norm. At this place it is relevant however, to shed some light on India's obligation under this Article. Evidently the obligation requires the Indian state to enable political participation of PWDs both as voters as well as to contest election. It goes without saying that political parties must also be sensitized by the state to provide space to the PWDs. Apart from this macro level obligations which seem to have not found any significant appeal in legislations, policies and initiatives of government of India pertaining to PWDs there are number of micro initiatives like creation of accessible polling booths, distribution of accessible voting materials, ensuring secrecy and confidentiality of PWDs during the process of voting, accessible electoral campaigns etc. On this front the government has indeed taken some initiatives.[37] One of such initiatives is constitution of a steering committee in Delhi on the directions of Election Commission on accessible elections, primarily with the object to increase an active participation of PWDs in the process of election and to make election process accessible. The committee is entrusted with the task of mapping and identifying PWDs who are not included in the list of voters and to facilitate their enrolment by arranging special camps. Additionally, the committee is to facilitate barrier free environment to make the election process disabled friendly. On substantive level for effective implementation of the right by PWDs the committee is expected to organise training programs to sensitize electoral functionaries. Besides the issue of accessible polling booth and the inclusion of PWDs in electoral rolls has also attracted the attention of the court under several PIL.[38] The matter is now squarely addressed by S. 11 of Right of Persons with Disabilities Act, 2016 casting obligation on Election Commission of India and State Election Commission that all polling stations are accessible to persons

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[36] *Sex equality under the Constitution of India: Problems, prospects, and "personal laws",* 4 International Journal of Constitutional Law 181 (2006).

[37] Manash Pratim Gohain, *Panel to help more disabled people to vote in Delhi*, The Times of India (20/09/2018), available at https://timesofindia.indiatimes.com/city/delhi/panel-to-help-more-disabled-people-vote/articleshow/65878205.cms , last seen on 31/01/ 2019.

[38] *PwD voting rights: ECI, SEC told to file counters*, The New Indian Express (24/01/2019), available at http://www.newindianexpress.com/states./telangana/2019/jan/24/pwd-voting-rights-eci-sec-told-to-file-counters-1929365.html, last seen on 31/ 01/ 2019.

with disabilities and all materials related to the electoral process are easily understandable by and accessible to them.

So far as right to assume political offices is concerned UNCRPD has little to say in terms of Art. 29 however, vis-à-vis Art. 5 we have to critique and problematise the unsound mind legal regime under Indian Constitution although the said regime is under the control of the courts, there is evidence for the proposition that courts have not enough to evolve systematic guidelines for adjudication of unsound mind. Moreover, till date, India has not witnessed any significant case in respect of disqualification of a political office holder on the ground of unsound mind. Besides, despite clear mandate of ensuing effective participation of PWDs in political process hardly any attempt seems to be made even to advocate reservation-based representation to the people with physical and mental disabilities in line with reservations in panchayats for backward classes and women. It is also not inconceivable to have in place nomination of PWDs in line with Anglo-Indians or to have reserved seats in Parliament and State Legislature in line with SCs/STs. Not only these bright ideas have simply remained dormant but increasingly there is a tendency to exclude PWDs from other Constitutional offices like that of judges etc.[39]

Conclusions and Suggestions

Normatively the idea of unsound mind in particular and the notion of physical and mental incapacity in general are too vague to be captured by any objective legal principles and therefore, the time has come to think afresh about this outmoded usage and to take a leap away from medical model of disability.

One such effort which is exemplary has been initiated in UK where by the enactment of S. 73 of Electoral Administration Act 2006, all rules of common law providing legal incapacity on the ground of mental state as a disqualification for right to vote have been abolished. The principle underlying this legislation is also echoed in other progressive jurisdictions like Austria[40], Canada[41] etc. The author would particularly emphasise on S. 66 of Parliamentary Election Act,

[39] V. Surendra Mohan v. State of Tamil Nadu & Ors., 2019 SCC OnLine SC 53.

[40] S. 66, Parliamentary Elections Act, 1992 (Austria).

[41] S. 3 Canada Elections Act S.C. 2000, c. 9; see Kay Schriner, Lisa Ochs, Todd Shield, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and emotional Impairments*, 21 Issue 1, Berkeley Journal of Employment & Labor Law, 454 (2000); see State Laws affecting voting rights of PWD, available at http://www.bazelon.org/wp-content/uploads/2017/11/2016_State-Laws-Affecting-Voting-Rights-of-PWD.pdf, last seen on 04/02/2019.

1992 which apart from abolishing 'mental handicap' as one of the disqualifications against right to vote also creates right enabling conditions for meaningful exercise of this right by PWDs. The trend in these jurisdictions is to adopt a piecemeal approach to address the exclusion of people with mental disability from political process and a positive beginning has been made by redressing right to vote. The trend also clarifies that disqualification based on mere perception amounts to perpetuation of stereotypes and prejudices and therefore have to be abandoned.

This brings us to grapple with a vital question why in some jurisdiction there is this progressive turn of dispensing with the disqualification on the ground of mental disability/ insanity/ incapacity etc. The answer appears to be two-fold firstly the category of mental disability, insanity etc. is too over inclusive to have any objective content and it is increasingly realised that one size fits all approach to all mental disabilities is ill advised. Secondly, the philosophy underlined UNCRPD to espouse the social model of disability is also a reason against perpetuating mental disability as disqualification against voting.

It appears that in India there is extra ordinary indifference to both these considerations. However, in author's opinion in light of ratification of UNCRPD by India categorically and as a reflective and civilised nation she must initiate the discussion for doing away with the disqualification of unsound mind from Indian Constitution and allied legislations in respect of exercise of political rights. Having ratified UNCRPD duty is cast on government of India to take necessary steps and to imitate Constitutional and legislative reforms, policies and programs for imbedding social model of disability in Indian legal order. Besides this general overarching obligation Art. 29 read with Art. 5 of UNCRPD cast obligation on India to take necessary steps to facilitate effective exercise of right to political process of PWDs on equal basis with others.

In author's submission inaction on part of Government of India to redress discrimination on the ground of disability in the political sphere post ratification of UNCRPD is analogues to constitutional nonfeasance.[42] In Author's opinion failure to redress discrimination in political sphere on the ground of disability pre-ratification of UNCRPD would have been discounted as an unintentional

[42] The author owes this idea to her colleague Ms. Swatee Yogessh.

omission. However, post UNCRPD the same cannot any longer be perceived as mere omission rather it should be seen as inaction worthy of judicial and legislative cognizance.

It would not be farfetched to argue that ratification of UNCRPD has resulted in incorporation of right to political representation of PWDs in Indian legal order and against its violations a case can be made out under Art. 226 for violation of Human Rights by any PWD. On the other hand, if it is assumed and there is enough room for the same, that disability-based discrimination in respect of voting amounts to violation of Art. 14, then Art. 32 may also be triggered.[43]

This point is further bolstered from the recently pronounced decision of the Supreme Court in *Justice K. S. Puttaswamy (Retd.) v. Union Of India,*[44] where the court has categorically recognised decisional autonomy as one of the core elements of right to privacy and there is no justification to exclude entire class of people with mental disability from exercising the same lest it is accepted that over inclusion may be condoned while classifying the groups of citizens. As there is enough scholarship for the proposition that mental disability as such does not constitute homogenous class and rather refers to numerous variants of mental disorders even reasonable classification would be the first causality if based on mental disability alone different variants of mental disorders are painted with the same brush.

Finally, from the perspective of dignitary constitutionalism, which is at the core of transformation of society as advocated most vocally by Justice D.Y. Chandrachud in some of his recent judgments, right to political participation should be viewed as intrinsic rather than as an instrumental right. As an intrinsic right connected to the idea of dignity every individual irrespective of his or her capabilities is entailed to the same for its own sake. In other words, right to political representation intrinsic in its character is not contingent but categorical. To bring the discussion to concrete plane the author suggests a twin track approach (a) amendment to the constitution by doing away with the phraseology of unsound mind and (b) legislative intervention specially focusing on persons with mental disabilities to facilitate their political representation both as voter as well as assumption of public offices. The later may be accomplished by way reservation or nomination.

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[43] Jeeja Ghosh & Anr. v. Union of India & Ors., (2016) 7 SCC 761.
[44] (2017) 10 SCC 1, 598.

To sum up looked at from any angle either of Constitutional law or political logic or in terms of rhetoric the inescapable conclusion is to crave for a progressive term to Indian legal order and espouse the cause of a social group i.e. people with mental disability located at the bottom of the margin.

Before resting, the author would like to quote Helen Keller *"Some people see a closed door and turn away. Others see a closed door, try the knob and if it doesn't open, they turn away. Still others see a closed door, try the knob and if it doesn't work, they find a key and if the key doesn't fit, they turn away. A rare few see a closed door, try the knob, if it doesn't open and they find a key and if it doesn't fit, they make one!"*

In the author's opinion it is a high time that we discover the key that would open the doors of justice, liberty and equality to persons with mental disability.

Disability as a Form of Human Diversity in the Context of Panchayat Elections: Some Reflections

Mr. D.P. Kendre[1]

Introduction

There is one strata of society which has historically remained backward and downtrodden, especially in the Indian socio-economic landscape, i.e. Persons with Disability ("PWD"). "Person with Disability" has been defined to mean a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.[2]

Political injustice has been the hallmark in the Indian political sphere. Instances of discrimination against and denial of opportunities to PWDs date long back in history, to the times when the Mahabharata was fought/written. Dhratrashtra was denied the throne because of his Visual Disability. Though he was eligible and qualified for Kingship, he was not found suitable because he was blind. Hence, we see that discrimination against persons with disability has been blatantly practiced since time immemorial.

It is said that elections are the barometer of democracy.[3] This paper addresses the issue related to electoral representation of Persons with disability in Panchayat elections. The paper is divided into two parts: international commitment through ratification of UNCRPD and Constitutional provisions relating to various elections held in India, political representation of disabled and concludes with the observations of the author that for a person to exercise his rights in a democracy like India, they should not only be able to vote and have accessibility to vote but also be able to stand for elections and have access to the election process.

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[1]Working as Assistant Professor, ILS Law College, Pune and Ph.D. Research Scholar, Savitribai Phule Pune University.

[2] S. 2(s), Rights of Persons with Disability Act, 2016.

[3] S.R. Chaudhari v. State of Punjab, (2001) 7 SCC 126.

Provisions in United Nations Convention on Rights of Persons with Disability

Art. 29 of the United Nations Convention on Rights of Persons with Disability (hereinafter referred to as "UNCRPD") extends its coverage beyond the basic right to vote and be elected to public office, and responds to all obstacles and or barriers to the effective enjoyment of the right of participation.[4]

The first part of the provision clearly establishes the principle of equality in the enjoyment of political rights and guarantees to persons with disabilities, their 'political rights and the opportunity to enjoy them on an equal basis with others'. The political rights of persons with disabilities are enshrined as an inalienable right 'on an equal basis with others' and the provision recognizes full inclusion in the opportunity to enjoy political rights, valuing persons with disabilities as equal participants in exercising their political rights.[5]

Art. 4 of the UNCRPD underpins the general obligations on the State Parties to include *inter alia* an undertaking to adopt new legislation and other administrative measures where needed to implement the Convention, to amend or repeal laws, customs, or practices that constitute discrimination on the basis of disability, refraining from any practices that are inconsistent with the Convention and mainstreaming disability into all relevant policies and programs.

In India, Art. 243D (6) of the Indian Constitution provides that:

> "*Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens."*

Here, the term backward class has to be interpreted in a broader scope in order to incorporate the Persons with disability in this Article. The State must also include the persons with disabilities in the backward class making the reservations available for them in order to provide an opportunity to enjoy political rights on an equal basis with others.

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[4] United Nations, Working Group (5-16 January 2004) 12.

[5] General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access of Public service (Art 25), UN Human Rights Committee, UN Doc CCPR/C/21/Rev1/Add7 (12/07/1996).

Political reservations are given in India on the basis of socio-economic backwardness, whereas while measuring socio-economic backwardness, generally only social backwardness is taken into account based on past lingering discrimination on the ground of caste. However, seldom we consider the adverse impact of physical and mental disability on development. Enough evidence is available establishing a cohesive linkage between physical and mental disability and backwardness. As a matter of fact, in the case of physical and mental disability, poverty and illiteracy seems to coexist.[6] In fact the inherently ablest design of society aggravate and compound the alienation of PWDs. UNCRPD has a mandate to redress this alienation and one of the means of such a redressal is political representation/accommodation of PWDs in the decision-making process. Beginning can be made by commencing the process by facilitating their representation in local and self-government.

As has been observed above, there is already a legislative window by way of Art. 243D (6). Social groups of people w ith physical and mental disabilities fit easily in this rubric because of its overall alienation, exclusion, and in the absence of even a minimal representation in almost every life-sphere. Exclusion occurs socially because of inaccessibility and in the absence of mobility to navigate, PWDs either languish behind the close doors of their homes or in institutions or on road. In the absence of effective social security programme, most of PWDs are unable to properly plan their lives nor are they in a position to pursue higher education. This state of affairs aggravates their socio-educational backwardness.

Economic backwardness of PWDs is compounded because of both unemployment and absence of incentives to go for self-employment. Situation has worsened so much so that even a qualified PWDS, despite fulfilling the criteria of eligibility, is not considered suitable for employment by the market or the State. Banking services are almost totally exclusionary, in respect of PWDs, right from access to availing loans for starting one's own enterprise.

To add to this, PWDs are totally irrelevant in the eyes of political parties. Disabled as they are, their social groups are totally invisible from the political space. Barring exceptions like Sadhan Gupta, the visually impaired MPs in parliament and the handful of Panchayat members in some parts of the country, disabled

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[6] Ministry of Statistics and Programme Implementation, Government of India, *Disabled persons in India- A statistical profile 2016,* available at http://mospi.nic.in/sites/default/files/publication_reports Disabled_persons_in_India_2016.pdf , last seen on 21/04/2019

are totally outside the political canvas of the country. Thus, we have established through the above discussion how PWDs face exclusion and alienation all around.

If the Central government can make a case for reservation on the ground of economic backwardness by amending the Constitution,[7] and if the Government of Maharashtra can carve out employment and educational reservations for Marathas,[8] by creating a distinct rubric of socio-economic backward class, then nothing would be further from the truth than to leave alone the Persons with Disabilities from the purview of affirmative action.

However, it appears that the Indian Government does not take into consideration the need of the inclusion of the persons with disability thereby rendering them as unprivileged. This policy of the government or the approach towards the persons with disabilities is in contravention to that of Art. 29 of UNCRPD.

Constitutional Provisions Relating to Elections

'Election' means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir.[9] The expression "election" generally includes registration, nomination, voting, and the manner in which votes are to be counted and the result made known.[10]

Art. 71(1),[11] Art. 243-O,[12] Art. 324,[13]and Art. 329(b),[14] all connote the entire process of election and continues till the declaration of result with the use of the word "election".

A constitutional body has been created for the purpose of holding elections to Parliament, State Legislatures, and offices of President and Vice President

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[7] 103rd Constitutional Amendment, 2019 amending the Constitution of India 1950.
[8]Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments in the public services and posts under the State) for socially and Educationally Backward Classes (SEBC) Act, 2018.
[9] S. 2(1)(d), Representation of Peoples Act,1951.
[10] Raghuni Nayak v. District Magistrate, AIR 1959 Pat 7.
[11] Narayan Bhaskarkhare (dr.) v. Election Commission of India, and Pt. Ram Nathkalia v Election Commission of India, AIR 1957 SC 694.
[12] Jalantasengupta v. State Election Commission Assam, AIR 2008 Gau 88.
[13] Kanhaiya Lal Omar v. RK Trivedi, AIR 1986 SC 111.
[14] Reajeswar Prasad v. State, AIR 1953 Pat 46.

under Art. 324, called the Election Commission of India.[15] Election Commissioners are the persons appointed by the government for the purpose of making enquiry into the existence of corrupt practices in elections and to decide election disputes.

According to Art. 40 of the Indian Constitution, for the Organisation of Village Panchayat, it is the responsibility of the state government to give power and authority to enable them to function as a local self-government. Constitutional mandate related to Panchayat Elections envisages granting greater autonomy than control of State government over Panchayat Elections. 73rd and 74th Constitutional Amendments were brought about in order to give effect to the above Directive Principle of State Policy. By way of this Amendment, Part IX was introduced in the Constitution. Constitutional status was thus granted to Panchayat Raj, to include within the local-self Government system- Gram Panchayat, Panchayat Samiti and Zila Parishad.

As per Art. 243K, election to the Panchayat, it says appointment of Sate Election Commissioner by the Governor and Independent State Election Commissioner to conduct all elections to Panchayat. Every five years, election of Panchayat Raj will be conducted by State Election Commission as per Constitutional Mandate.

The expression "Election to a local authority" mentioned u/S. 2(a) of Maharashtra Municipal Authority Members Disqualification Act, 1986, includes elections held for electing President and other office bearers after general election of the Council.[16]

Constitutional Provisions on Political Representation and the Rights of Persons withDisability

The Preamble of the Indian Constitution declares India to be a Sovereign, Socialist, Secular, and Democratic Republic. This essentially means that every citizen has the right to vote and to contest the election. This principle of adult suffrage has been further enunciated in Art. 326 of the Constitution which states that,

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[15] S. 2(d) Representation of Peoples Act 1951; S. 2(c) Presidential and Vice-Presidential Elections Act, 1952.

[16] Pandurang Dagodu Parte v. Ram Chandra Babu Rao Hrive, AIR 1997 Bom 387.

"The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of Universal Adult Suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence."

Facilitating the Electoral Rights of Persons with Physical and Sensory Disabilities

The Central government has been empowered to regulate through the Election Commission Rules "the manner in which votes are to be given both generally and in the case of illiterate voters under physical or other disability or voters not conversant with the language in which ballot papers are printed or voters under physical or other disability and the procedure as to voting to be followed at elections."

Rule 25 and Rule 27G of the Conduct of Elections Rules, 1961 provide that if an elector is unable due to illiteracy, blindness or other physical infirmity to record his vote on a postal ballot paper and sign the declaration, he shall take the same to an officer competent to attest his signature and request the officer to record his vote and sign the declaration on his behalf, for different types of elections. Rule 32, Rule 40A, Rule 49D(f) and Rule 49P(f) of the Conduct of Elections Rules, 1961 provide that persons accompanying a blind or infirm elector who cannot move without help cannot be excluded from entering polling station. Further, Presiding Officers are required to ensure that physically challenged electors are given priority for entering the polling station, without having to wait in the queue for other electors.

Where a person owing to blindness or other physical infirmity is unable to recognize the symbols on the ballot paper/ ballot unit of the voting machine or to record his vote thereon without assistance, the Presiding Officer should permit the elector to take with him a companion, who is not a minor to the voting compartment for recording the vote on the ballot paper on his behalf.

Handbook for Returning Officers (at Elections where Electronic Voting Machines are used) (2009) states that the list of polling stations should be drawn up, as far as possible, to avoid inconvenience to the old and PWDs. It further stipulates that the polling stations should be set up in the ground floor of a

building and ramps should be provided to ease the entry of 'physically challenged persons'.

A close look at the above mentioned legal regime highlights only one aspect of representation of PWDs in political process. For convenience, this aspect may be termed as 'activist element' of the representation focusing on physical accessibility by the PWDs with respect to the exercise of right to vote and allied matters. However, there is a second important aspect of political representation which may be conveniently described as the dynamic element. This element goes beyond mere physical accessibility and directs attention to meaningful and effective participation of PWDs in political process by way of recognising right to contest elections.

Incorporation of this element in the Indian legal order is free from controversy in the absence of overall consensus in the society. However in the light of unconditional ratification of UNCRPD by India, mandate of Art.29 would also implicate these elements.

Disability Rights' activists have imaginatively used courts to obtain their constitutional rights. Thus a letter written by a Disability Rights group which was registered as a writ in April 2004 just before the Lok Sabha elections made the Supreme Court to take up the accessibility demands of PWDs on provisions regarding ramps, separate queues and Braille sheets in the Electronic Voting Machines. Concurrently, the Supreme Court ordered that the polling officials should be sensitized about the needs of the PWDs and wide publicity should be given to these measures so as to ensure that the PWDs are made aware of it and should come out to exercise their franchise.[17] To ensure easy accessibility for PWDs, Department of PWD made arrangements for providing tricycles at polling stations during Lok Sabha and Legislative Assembly elections in Delhi, Lucknow, Varanasi, Kanpur and Allahabad. A handbook was prepared for providing guidance to Officers. This initiative was appreciated by all concerned and the efforts of the Government were lauded.

That PWDs 'coming of age' politically can also be deduced from the emergence of Viklang Manchs (Federation of the Disabled persons) which are forums of

[17] Interim order in Civil Writ Petition No. 1821/2004 (Supreme Court, 19.04.04), as cited in Pandey Shruti, Priyanka Chirimar, Deepika D'souza, *Disability and the Law*, Human Rights Law Network (2005), jp. 224.

PWDs active in the rural areas of the country. These forums show how disability rights advocacy are no longer an urban phenomenon.

Guiding Principles for Accessibility under the UNCRPD and the Indian Elections

One of the laudable features that the Founding Fathers of the nation embedded in our Constitution is Part XV Elections; which provides for an Independent Election Commission, Universal adult suffrage, maintenance of electoral rolls and all the other fundamentals for conduct of free, fair and inclusive elections. These features have helped the polity to evolve into a vibrant and rich democratic culture marked by the faith of Indian People in the electoral exercise in its nonpartisan nature, and in the basic tenet of 'No Voter should be left behind.'— a perfect blend for inclusion and the consequent everlasting determination and endeavour for maximizing the base of democracy in India.

Art. 324 of the Constitution provides for the Election Commission, its powers and functions for maintenance of the Electoral Roll and conduct of elections in a free and fair manner. Art. 325 provides that no person shall be ineligible for inclusion in the electoral roll on the grounds only of religion, race, caste, sex or anyone of these. Art. 326 provides for the Universal Adult Suffrage to be the basis of elections. The concerned provisions of the Constitution and the law that flows therefrom casts an obligation on the ECI for conduct of free, fair and inclusive elections based on adult suffrage. While the scope of Part XV Elections of the Constitution is very large, this article intends to focus on the 'Accessible Elections'[18] that has been selected as central theme of 2018 'National Voter's Day' celebration. The theme seamlessly integrates into the underlying philosophy of universal adult suffrage and the concept of 'No voter to be left behind.'

A larger recognition to the rights of 'Persons with Disability' come from the Universal Declaration of Human Rights and the United Nations Convention of Rights of Persons with Disabilities (CRPD) that stress upon respect for inherent dignity, individual autonomy and independence of voter, freedom to make one's own choice, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, accessibility etc. 'The Rights of Persons with Disabilities Act,

[18] Election Commission of India, *National Consultation on Accessible Elections (03/07/2018-04/07/2018),* available at http://voicenet.in/data/National Consultationon Accessible Elections_30072018.pdf , last seen on 21/04/2019.

2016 defines a "person with disability" as a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation equally with others in society.' This would in effect mean inherent barriers to inclusion of such persons in the electoral process.

Accessibility is included in the CRPD as one of the key underlying principles, a vital precondition for the effective and equal enjoyment of civil, political, economic and social, and cultural rights by persons with disabilities.

Article 29(a) (i) CRPD requires state parties to guarantee accessibility of the electoral process by providing disabled voters with disability-related accommodations, by implementing the principle of universal design and exercise of their electoral process and providing other facilitative measures to enable their equal right to vote.

Accessibility of Disabled person and problem faced during voting in Elections

Though law has created a provision of wheel chairs and other supportive paraphernalia in order to ensure smooth access of Disabled to the Polling process, be it the physically, or visually challenged, yet what remains to be addressed are the measures to ensure that there is real exercise of choice while voting. For instance, though assistance may be provided to the disabled wherein he is escorted to the polling booth by an officer deputed by the Election Commission to facilitate voting by Disabled, it cannot be ensured that the vote is actually cast in favour of the party who the Disabled wants. It is likely that the Officer may cast that vote for a party of his liking.

The problem is a larger than just this. Another illustration is when names of the parties are printed in Braille Script, but the voter is illiterate and doesn't know how to interpret Braille script. Not only this, if the voter is a Mute person, and the Officer is not conversant with Sign Language, it'll again create problems. Further, if the voter is suffering from some orthopaedic disability, and has no one from either family or friends to escort him to the polling booth, it is highly unlikely that the person will be able to reach the venue of Polling.

Accessibility of Disabled to Contesting Elections

Election Commission has made it compulsory for all candidates willing to contest elections to fill up an online Nomination form. However there is no provision to oversee that the details as dictated by the disabled candidate are actually entered

correctly and are not doctored. Also, there are no provisions for online withdrawal of nomination form, which is again a hurdle in providing effective accessibility to the Disabled.

Poor Representation/Inclusion of Disabled in Laws of the State and Policy Making

Owing to the physical limitations, the Disabled are unable to contest elections and thus do not get elected to State bodies. Thus, laws and policies for their betterment do find their way in Statute Books. This becomes a vicious cycle, as that part of the society which needs the maximum attention and welfare measures and policies go unheard, thus pulling them further down into the web of poverty.

Inadequate recognition of Political Rights of the Disabled across various Legislations

In order to straighten the reservation of PWDs it is necessary to provide them visibility in other sectors like banking, cooperative societies, universities, etc. the presence of PWDs in this sector would raise awareness of the State about their potential and productivity.

1) Maharashtra Agricultural Marketing Act, 1963[19]

Under this Act, three types of committees have been created. To the election of each of these committees, there are reservations for members belonging to the SC and ST community, as also for women. However, again there are no reservations made for the Disabled. This shows the underlying presumption/ intention of the State Legislature that the Disabled cannot perform agricultural activities. This indeed is a reflection of the short-sightedness/ignorance of the State in recognizing the rights of all, inclusive of PWDs.

2) Public Universities Act, 2016[20]

The elections to Student Bodies in the Universities are to be conducted in accordance with this Act. This Act has made a provision for election of a

[19]Available at https://macp.gov.in/sites/default/files/user_doc/APMC_Act.pdf, last seen on 21/ 04/2019.

[20]Maharashtra Public Universities Act 2016 (translated), available at http://www.unipune.ac.in/ Maha_Public_Uni_Act/pdf/Maharashtra% 20Public%20 Universities%20 Act%202016%20 English %20Copy.pdf, last seen on 21/04/2019.

separate Woman Representative in all universities, in addition to other posts. But again, no such rights are recognized for PWDs in this Act.

3) The Maharashtra Co-operative Societies Act, 1960[21]

97th constitutional amendment granted constitutional status to co-operative societies in India. Art. 43B of the Indian constitution expect autonomous, democratic co-operative societies for that purpose free and fair elections are important feature of democracy. It is the responsibility of state government to provide reservation for disabled for participation in election.

Conclusion and Suggestions

It is recommended that no separate vertical reservation be made for PWDs. Instead, what is solicited is reservation among reservation, i.e. Reservation proportionate to their population. For instance, 4% of the seats be reserved for Blind candidates in each of the Backward Classes, SCs and STs, as was recommended by the Indira Sawhney Committee Report.

[21] See. 73BB of the Maharashtra Co-operative Societies Act, 1960.

Data Protection and Privacy laws in India: An Analysis

Amitkumar Khatu[1]

India, on its growth path, is vulnerably located in an unstable region where data theft and cyber security is a major issue. It is logical to assume that the country is under serious threat of hacking, cyber terrorism, online frauds, cyber-attacks etc. The impact on national security is thus serious and such that all institutions and organs of the state must jointly work to counter these challenges.[2]

In the ancient world, keeping personal data was the privilege of the bests within the society. The purpose of storing personal data in this manner was to protect its uniqueness and sanctity on the one hand and also to maintain secrecy on the other. Personal data of the masses was predominantly captured through storytelling or oral traditions and other forms of human expression such as songs and dance.[3]

The purpose for transmission of personal data is very important for young generation in relation to transferring knowledge. Some of the ancient societies developed at a much faster pace than theirs and began to use more advanced methods for record keeping. The sharing of proprietary data from one generation to the other in the tribes and communities can be regarded as the early example of data transfer.

According to John Austin, *"Ownership means a right, which avails against everyone who is subject to the law conferring the right to put thing to the use of infinite nature"*. Thus, absolute right of the individual over the data comprised of his own details and private information is legally justifiable as per

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[2] Megan Santosus, *what is the Worst-Case Scenario for Cyber Attacks? Cyberattacks can have serious implications at the individual, company, and country-wide level*, MyTECHDECISIONS, available at https://mytechdecisions.com/network-security/worst-case-scenario-cyber-attacks/, last seen on 29/12/2018.

[3] Cherri-Ann B, *From ancient to modern: The changing face of personal data*, iapp, available at https://iapp.org/news/a/from-ancient-to-modern-the-changing-face-of-personal-data/, last seen on 01/01/2019

this definition.[4] Thus, in the field of science and technology, the law has an important role to play. While taking the help of jurisprudential aspects of the ownership, the incorporeal ownership includes the ownership over the data.

The law which provides the set of rules for the protection of your personal data means data protection law. In modern societies, in order to empower us to control our data and to protect us from abuses, it is essential that data protection laws restrain and shape the activities of companies and governments. These institutions have shown repeatedly that unless rules restricting their actions are in place, they will endeavour to collect it all, mine it all, keep it all, share it with others, while telling us nothing at all.[5]

The notion of data protection was developed almost four decades ago in order to provide legal protection to individuals against the inappropriate use of information technology for processing information relating to them. According to EU data protection law, Directive 95/46/EC, Art. 1,[6] the data protection means, "In accordance with this directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[7] The General Data Protection Regulation (GDPR),[8] which is a regulation of the European Union about data protection, provides for and privacy of all individuals within the European Union (EU) and the European Economic Area (EEA). The GDPR also provides for rules governing the export of personal data outside the EU and EEA areas. The GDPR has been created to give control to individuals over their personal data and to simplify the regulatory environment for international business. The GDPR has unified the data protection regulation within the EU and it has superseded the Data Protection Directive 95/46/EC.

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[4] Ritwik Sneha, Rishab Garg, *Ownership*, Legal Services India, available at http://www.legal servicesindia.com/article/1281/Ownership.html, last seen on 12/04/2018.

[5] De Montjoye Et Al, '*Solving Artificial Intelligence's Privacy Problem*', Imperial College London Data Science Institute, February 2018, available at https://Www.Imperial.Ac.Uk/Media/Imperial-College/Data-Science-Institute/White Paper_Solvingalprivacyissues.Pdf, last seen on 10/10/2018.

[6] EU Data Protection Directive (Directive 95/46/EC), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN, last seen on 01/01/2019.

[7] Convention For The Protection Of Individuals With Regard To Automatic Processing Of Personal Data, Strasbourg, 1981, Ets 108.

[8] The General Data Protection Regulation, (EU) 2016/679, available at https://gdpr-info.eu/, last seen on 12/10/2018.

Recently, in India, the Data protection Bill, 2018[9] has been introduced. There is no direct definition of data protection in the Bill. But under Ss. 3(29)[10] and 3(30)[11] of the Data Protection Bill, there are provisions about the personal data and protection from breach of personal data respectively. Though the IT Act contains provisions protection of personal data in the form of Ss. 43A and 72A and the various Rules made thereunder, the same are not adequate to cater to the ever changing dynamics of the cyber world.

There are various aspects of data protection like, compliance or monitoring and auditing, Data Activity Monitoring (DAM*),* separation of tasks and access control, etc. On the other hand, there are various challenges for the protection of data and privacy of the individuals, e.g., consent, data localization, individual participation rights, liability standards, role of industry in framing regulations. All these issues have been taken into consideration by the Ministry of Electronics and Information Technology (MeitY). Today, India lacks a unified regulatory approach to data protection.[12] However, India has sectoral laws that govern data protection in particular industries. For example, telecommunications,public financial institutions, and information technology are all regulated via national legislation.[13] Lack of a unified data protection law is huge disappointment to information technology and various sectors in India.

India has still to take care of issues like critical infrastructure protection, cyber warfare policy, cyber terrorism, cyber espionage, e-governance, cyber security, e-commerce cyber security, cyber security of banks, etc. Companies and individuals are also required to cyber-insure their businesses from cyber threats. Indian Government is in the process of formulating a cyber-crime prevention strategy.[14]

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[9] The Personal Data Protection Bill, 2018, available at http://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf, last seen on 29/12/2018.

[10] It means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information.

[11]It means any unauthorized or accidental disclosure, acquisition, sharing, use, and alteration, and destruction, loss of access to, of personal data that compromises the confidentiality, integrity or availability of personal data to a data principal.

[12] Ibid.

[13] The Information Technology Act, 2000, available At:Http://Www.Dot.Gov.In/ Sites/Default/Files/Itbill2000_0.Pdf Last seen on 29/12/2018; See also The Recovery of Debts Due To Banks and Financial Institutions Act, 1993. available at https://www.lexology.com/library/detail.aspx?g=e7b6cb3b-f534-45ba-b1fb-86d7ed39e558, last seen on 29/12/2018.

[14] Kochhar & Co, *Data Security and Cybercrime in India*, Lexology,

In India there are many laws and policies governing data protection and privacy. The Constitution of India does not contain a provision granting a general right to privacy. But 'Right to Privacy' has been recognized by the Indian Judiciary as implicit in Art. 21,[15] and Art. 19 (1) (a)[16] of the Constitution in many cases. The Supreme Court dealt with the scope and ambit of the right of privacy or right to be left alone in *R. Rajagopal v. State of T.N.,*[17] during 1994. In this case the right of privacy of a condemned prisoner was in issue. By interpreting the Constitution in the light of case laws from the United Kingdom and United States, it was held by Justice B.P. Jeevan Reddy that though Art. 21 does not specifically provide for the right to privacy, it could certainly be inferred from Art. 21 of the Constitution.

Recently, this issue was once again raised before the Hon'ble Supreme Court in the case of K. *S. Puttaswamy (Retd.) v. Union of India,*[18] in which case the 'Aadhaar Card Scheme' was challenged on the ground that collecting and compiling the demographic and biometric data of the residents of the country to be used for various purposes is in breach of the fundamental right to privacy embodied in Art. 21 of the Constitution of India. Given the ambiguity from prior judicial precedents on the Constitutional status of right to privacy, the Hon'ble Supreme Court referred the matter to a constitutional bench consisting of nine judges. The Hon'ble Supreme Court rejected the arguments of the Union of India, and while analyzing the nature of right of privacy as regards its origin[19], the Hon'ble Supreme Court held that the right to privacy is intrinsic to and inseparable from human element in human being and core of human dignity.[20] Thus, it was held that privacy has both positive and negative content.

There are other laws on data protection and privacy laws such as the Information Technology Act, 2000,[21] hereinafter referred to as the "IT Act", is an act to which recognizes transactions carried out by means of interchange of electronic

[15] Protection of life and Personal Liberty.
[16] Protection of Certain Rights regarding Freedom of Speech, etc.
[17] Auto Shankar, a condemned prisoner, wrote his autobiography while confined in jail and handed it over to his wife for being delivered to an advocate to ensure its publication in a certain magazine edited, printed and published by the petitioner. This autobiography allegedly set out close nexus between the prisoner and several officers including those belonging to IAS and IPS some of whom were indeed his partners in several crimes. The publication of this autobiography was restrained in more than one manner. It was on these facts that the petitioner challenged the restrictions imposed on the publication before the Supreme Court.
[18] (2015) 8 SCC 735.
[19] Ibid, para 53-65, 531-536, 718, 736.
[20] Ibid, para 459.
[21] Act No. 21 of 2000.

data and other means of electronic communication, which are commonly referred to as "electronic commerce", which is an alternative to paper-based methods of communication and storage of information, etc. In this Act, S. 66 provides that, if any person dishonestly or fraudulently does any act referred to in S. 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to Rs 5,00,000 or with both.[22] Under S. 43A, a body corporate who is possessing, dealing or handling any sensitive personal data or information, and who is negligent in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person, shall be liable to pay damages to the person so affected.Further, S. 72 of the IT Act provides for penalty for breach of confidentiality and privacy.[23] The Section provides for punishment to any person who, in pursuance of any of the powers conferred under the IT Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person. In the year of 2008 the IT Act was amended through the Information Technology (Amendment) Act, 2008. S. 10A was inserted in the IT Act which provide for provisions regarding validity of contracts which are formed through electronic means.[24] The Section also lays down that contracts formed through electronic means "shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose".

There are also other laws on the protection of data and privacy rights in India, such as Right to Information Act, 2005 is not an erosion to right to privacy.[25] Indeed RTI Act established a safeguard against the violation of privacy under S. 8(j),[26] which exempts from disclosure of personal information, which is not serving any public purpose. Further under S.11,[27] a procedure has been established where PIO intends to disclose any information on a request made

[22] Computer related offences.
[23] Penalty for Breach of confidentiality and privacy.
[24] Validity of contracts formed through electronic means (Inserted by IT Amendment ACT2008).
[25] No. 22 of 2005.
[26] Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.
[27] Third party information.

under this Act. The Section provides that a request, which relates to or has been applied by a third party and has been treated as confidential by that third party, and such objections in writing or oral by third party, shall be kept in view while taking a decision about disclosure of information. Rule 3 to 8 of the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 deal with the various provisions relating to data protection and privacy, protection from individual and corporate Sectors.[28]In the Indian Penal Code, 1860 (IPC),[29] the Sections dealing with false entry in a record or false document etc.. i.e. Ss. 192,[30] 204,[31] 463,[32] 464,[33] 468,[34] to 470,[35] 471,[36] 474,[37] 476,[38] etc. have since been amended, thereby bringing electronic record and electronic documents within the ambit of IPC, all crimes to an electronic record and electronic documents just like physical acts of forgery or falsification of physical records. In practice, however, the investigating agencies file the cases quoting the relevant Sections from IPC in addition to those corresponding in Information Technology Act, 2005 (IT Act) like offences under IPC 463,464, 468 and 469 read with the IT Act Ss. 43 and 66, to ensure the evidence or punishment stated at least in either of the legislations can be brought about easily.

Under the Code of Criminal Procedure (CrPC), an investigating officer, to obtain data from an Indian service provider for the purposes of an investigation, usually produces a written order under S. 91[39] of the CrPC,[40] to the person in possession of the "document or thing." Further The Indian Evidence Act 1872,[41] was amended by the IT Act. Prior to the passing of IT Act, all evidences in a court

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[28] Ministry of Communications and Information Technology (Department of Information Technology) Notification G.S.R. 313(E) (11.04.2011), available at http://www.wipo.int/edocs/lexdocs/laws/en/in/in098en.pdf , last seen on 01/01/2019.

[29] Act No. 45 of 1860.

[30] Fabricating false evidence.

[31]Destruction of document to prevent its production as evidence

[32]Forgery.

[33]Making a false document.

[34]Forgery for purpose of cheating.

[35]Forged document.

[36]Using as genuine a forged document.

[37]Having possession of document described in Ss. 466 or 467, knowing it to be forged and intending to use it as genuine.

[38]Counterfeiting device or mark used for authenticating documents other than those described in Section 467, or possessing counterfeit marked material.

[39] Summons to produce document or other thing.

[40] Act No. 2 of 1974.

[41] Act No. 1 of 1872.

were in the physical form only. With the IT Act giving recognition to all electronic records and documents, it was but natural that the evidentiary legislation in the nation be amended in tune with it. The definition part of the Act was amended and the words "all documents including electronic records" were substituted. Words like 'digital signature', 'electronic form', 'secure electronic record' 'information' as used in the IT Act, were all inserted to make them part of the evidentiary mechanism in legislations.

The Indian Copyright Act provides for punishment for piracy of copyrighted matter. S. 63B[42] of the Indian Copyright Act,[43] provides that any person who knowingly makes use on a computer of an infringing copy of computer program shall be punishable for imprisonment of six months which may extend to three years. Fines in the minimum amount of approximately Rs. 1,250, up to a maximum of approximately Rs. 5,000 may be levied for second or subsequent convictions- imprisonment for a minimum term of one year, with a maximum of three years, and fines between Rs. 2,500 and Rs. 5,000. The Credit Information Companies Regulation Act, 2005 (CICRA),[44] provides that, the credit information pertaining to individuals in India have to be collected as per privacy norms enunciated in the CICRA Regulations. The CICRA has established a strict framework for information pertaining to credit and finances of the individuals and companies in India. The Reserve Bank of India has recently notified the Regulations under CICRA, which provide for strict data privacy principles. .

Recently Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016 (the Aadhar Act),[45] has been passed. This Act provides for the issuance of an identification number issued by the Unique Identification Authority of India to citizens of the country. This number will be used to deliver state subsidies directly into the hands of beneficiaries.

The Data (Privacy and Protection Bill), 2017, this Bill was introduced in Parliament proposing to bring privacy under the ambit of legislation.[46] It is not the first time that a Bill on privacy is introduced in Parliament. However, this Bill is different from the previous Bills in the sense that it seeks to take the

[42] Knowing use of infringing copy of computer programme to be an offence.
[43] Act No. 14 of 1957.
[44] Act No. 30 of 2005.
[45] Act No. 47 of 2016.
[46] Bill No.100 of 2017 by Shri. Baijayant Panda, M.P.

consent of an individual for collection and processing of personal data mandatory. The crux of the Bill is that individuals should have the sole right and the final right to modify or remove personal data from any database, public or private, which means right to be forgotten. Express consent of the person must be obtained in respect of sensitive and personal information, for the collection, use, storage of any such data. The Bill covers not only corporations and body corporate, but its ambit extends also to state entities, government agencies or any other persons acting on their behalf.

In August 2017, The Government of India constituted a committee headed by Justice B.N. Srikrishna, former Judge of the Supreme Court of India, to examine issues related to data protection, to recommend methods to address them, and to draft a new data protection law. A white paper was released by the Committee on November 27, 2017, which called for comments from the public by January 31, 2018. The objective was to "*ensure growth of the digital economy while keeping personal data of citizens secure and protected.*" Following principles on which the proposed data protection law were suggested by the Committee: (i) a technology-agnostic law; i.e., a flexible legislation, capable to take into account evolving technologies; (ii) it should apply to private sector entities and to the Governments; (iii) any consent given by the data principle should be genuine, informed, and meaningful; (iv) the law should provide for minimal processing of data, i.e. only for the purpose for which it is sought; (v) the data controller should be accountable for any data processing; (vi) there should be a high-powered statutory authority for enforcement of the relevant statutes; and (vii) there should be adequate penalties in respect of the wrongful acts.[47]

Personal Data Protection Bill, 2018, is a keystone development in the evolution of data protection law in India. With India moving towards digitization, a robust and efficient data protection law was the need of the hour. The Bill has been drafted with an intention to fill in the vacuum that existed in the current data protection regime, and to enhance individual rights by providing individuals full control over their personal data, while ensuring a high level of data protection.[48]

The ambitious project named Digital India would also require very robust and effective cyber security infrastructure and capabilities on the part of Indian

[47] Justice Srikrishna committee submits report on data protection.

[48] *Bill Summary on The Draft Personal Data Protection Bill, 2018*, PRS, available at: http://www.prsindia.org/billtrack/draft-personal-data-protection-bill-2018-5312/, last seen on 20/12/2018.

government and its agencies. There is no international cyber security treaty or cyber law treaty that can help in resolving conflict of laws in cyberspace. Even a simple task of obtaining Digital information from foreign companies like Google takes months to achieve. In today's information age, Internet is the engine for global economic growth and the cyber security initiatives of any country should not impede it.

Lastly it can be said that India is yet to take full and requisite care of data protection and data privacy issues like critical infrastructure protection, cyber warfare policy, cyber terrorism, cyber espionage, e-governance cyber security, ecommerce cyber security, cyber security of individuals and institutions.

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