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Chanakya National Law University Journal

Prof. Srikrishna Deva Rao
Vice Chancellor
National Law University, New Delhi

Prof. Dr. S. Sivakumar
Professor
ILI, New Delhi
Visiting Professor
Chanakya National Law University, Patna.

CNLU Law Journal

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FROM THE EDITORIAL BOARD

In the words of Barbara Tuchman "Books are the carriers of civilization. Without books, history is silent, literature dumb, science crippled, thought and speculation at a standstill". Without books, the development of civilization would have been impossible. They are engines of change, windows on the world and lighthouses erected in the sea of time. They are companions, teachers, magicians, bankers of treasures of the mind and are the humanity in print". In the field of law, a Law Journal is a significant pedagogical tool which introduces law students to judicial processes and their plausible outcomes. Legal issues are often intertwined with their social and economic counterparts, and it is only through a Law Journal that a student of law is able to appreciate the differences and discern the fine line between legal issues and other socio-economic considerations. You have in your hands, the ninth edition of the CNLU Law Journal, a literary endeavour of Chanakya National Law University, Patna. With the last eight volumes, the benchmark that we have set for ourselves is already very high, and with this edition, we only hope to match the high standard that we have set for ourselves. This journal is a holistic compilation of ideas and thoughts contributed by scholars, academicians and students of our esteemed legal fraternity.

ARTICLES

The article titled "Reworking Labour Laws Amid Covid-19 Crisis – A Need or a Reckless Strategy?" the authors Justice Smt. *Mridula Mishra and Ms. Pallavi Shankar* have extensively dealt with the pros and cons of the amendments to labour laws, whether such amendments is just and fair to that labour sections of the society or not analysing the constitutional conflict with the reworking of the labour laws.

In "Vulnerability of Human Rights Ensuing the Pitfall of Judicial Review in India", the author questions that entire question of Article 13 and the purpose which it serves is rather questionable and there is urgency to investigate whether or not the actuality of such an article currently in the Indian Constitution is crucial or not. Article 13 trims down judicial review, and transgresses Fundamental Rights instead of providing protection largely. Thusly stands problematic to the Indian Constitution, equality and dignity of the females in India. Even in the presence and functioning of Article 13 which promise to protect all the citizens from any application of any transgressing law thereby enforces the belief that even in the presence of Article 13 derogative laws remains untouched and do not cease to exist. The author also stated that

the personal laws on domestic issues go unscrutinised even in the presence of Article 13.

In the article "A Critical Analysis of Trial by Media", the author have stressed over the importance of media along with its downside. In this article the author has stated that an efficient legislations i.e. the Contempt of Court Act 1971 is needed for harmonisation of fair trial and free press. The author has discussed the legal precedents to combat with the problem of unfair trial. Concept of media trial and the constitutional provisions regarding freedom of speech and expression are included in the further chapters. The article also has interplay between free speech and fair trial – an international perspective as its sub-heading stating about provisions to regulate media trial in international instruments as in UDHR and ICCPR.

In the article "Application of Economic Tools in Environment & Law: A Step towards Sustainable Development and Green Economy in India", the author has discussed in detail the green economy approach to attain sustainability and at the same time not hamper the development but boost it instead. The article states that this could be done by efficiently applying the economic tools that the sustainability and economic growth goes hand by hand. For this the author has explained the concept of green economy and its principles through statistics. The article shows that the economy and ecology depend on each other and therefore green developments have been proved important in environmental justice. The author also states that even though there has been boost in the Indian economy, polluting can cause long term damage to the economy. The author has further discussed the use of economic tools in aligning it with law and the importance of law in shaping the economy and environment. With the cost effective way, the author concludes that law can help in creating and maintaining the green economy and attain sustainability.

The article titled "Need for Mediation in Healthcare in India", the author has discussed in length that there is a need for mediation in Indian in field of healthcare for any dispute that arises. In the article, the author has stated that the litigation in these matters is uneconomical, time consuming and conflict-enhancing. Therefore mediation will be helpful in resolving the dispute with the interference of a third neutral party that both the parties leave satisfactorily. The author has also given the contention that mediation is a process which may help the patients and their families to achieve everything that they seek after a clinical fiasco. The author also has made a critical analysis of the mediation in the healthcare field and that yet there might be possible issues in implementing it, mediation is the right way to go.

In the article "Child Marriage: Barring the Rights of the Child Bride", the author states that for the progress and development of India, there is a need to ensure gender equality by bringing women on the same pedestal as that to men. This is only possible when girls are provided with access to education,

healthcare facilities, etc. which will help in the physical, mental and emotional development of the child and will also, enhance their decision-making power. However, child marriage is a major constraint in the development of the girl child as it not only restricts her education but also endangers her health and life. The author has comprehensively dealt with the national legislations relating to child marriages and recognised an anomaly that the provisions of these legislations provide for penal consequences on the one hand but confers a status of validity to child marriages on the other hand.

In the article "Different Strands of IP in Sports & E-Gaming Industry: Exploring the Horizons", the authors notes that the quandary of publicity and personality protection in the current IP regime of the e-sports and sports ecosystem, makes it increasingly pertinent to stress upon a community-oriented distribution of IP rights. Lack of legal knowledge, as well as the void of law in our country, has made things tumultuous both for the club and also, the player in order to sustain their economic rights. In these situations, there is nothing that the athlete or the franchise, can do except for approaching the court under the outmoded facets of law. Thereby, there is an increasing need for protecting the IPR in the ever-growing arena of sports and in the myriads of e-sports

In "Emerging Value of the Insolvency and Bankruptcy Code, 2016", the author has made an explanation that resolving insolvency of businesses, default in repayment of creditors, increase in Non-Performing Asset (NPA), corporate borrowers, loans and advances and creditors control over debtor's assets and managing all such illegalities, became a daunting task for the judicial system. The earlier Indian bankruptcy regime was highly fragmented, borne out of multiple judicial forums resulted in a lack of clarity and certainty in jurisdiction. Secured and unsecured creditors, employees, regulatory authorities had different and often competing rights with no common regulatory process to determine the priority of claims. Lack of adequate and credible data regarding the assets, indebtedness and security situation of companies further accentuates the problems. A complete piece of legislation for these matter is brought into light, widely known as the Insolvency and Bankruptcy Code, 2016 (called the "Code" and not an "Act") to consolidate and amend all insolvency statutes and laws relating to reorganisation and insolvency resolution of corporate

In the article "Fundamental Breach under UNCISG – The Delphic Enigma", as per the author, this article sets out the ongoing debate regarding foreseeability under CISG and has presented the views from both the sides. One view is that the foreseeability of a breach is to be determined at the time of conclusion of the contract as the parties rights and obligations freeze at the time of conclusion of the contract which shall be

addressed in the first part of this article. The opponents of the aforementioned view believe that the foreseeability under Article 25 is to be extended to the time of performance of the contract and is not limited to the time of conclusion of the contract. This view shall be addressed in the second part of this paper. The concluding part of this article has brought forth the views of the author on which interpretation of CISG's foreseeability under Article 25 is favoured.

In the article "Relevance of Health Economics, Law & Policy for Economic Growth", the authors have made the note that although, India has considerable health infrastructure in urban areas but rural area till date seems to be largely neglected. The crucial linkages between public health and human rights are well recognised by the Constitution of India in Art. 47 of Part VI, enunciating the duty of the State to raise the level of nutrition and the standard of living and to improve public health. The authors have given in detail that equitable, continuous and broad based investment in women and child healthcare sector the commission also recognises the importance of adequate investment, especially in the most vulnerable and marginalised sections of the society like scheduled caste, scheduled tribes, minorities, disabled and elderly people. If some of the most important steps are taken immediately like more technology-led innovations in healthcare aiding diagnosis, remote monitoring of patients through telemedicine, etc., enabling 100% FDI in hospitals, private equity, more use of generic medicines, advancement in medical tourism, continuation of flagship programmes like Ayushman Bharat, managing medical cost effectively without compromising quality medical care, effective implementation of National Health Policy than India's healthcare scenario will improve dramatically aiding more to economic advancement.

In the article "Insanity as a Defense", the author has looked into the idea of what kind of test is used for the determination of liability and in what all ways and qua what all persons can we apply the well-known standards of objectivity and subjectivity. The author has detailed the above premise and explored it as to how the entry of expert witnesses changed the way, the defence was treated thereto. The author has also looked how the law exists in India and to what extent has it been influenced by the English law. This article's primary focus will be on the idea of how the defence can be misused and is there a possibility that the same is availed in falsely by an accused.

In the article "Legal Recognition of Same-Sex Marriage Rights in India", the author argues that to completely abolish the discrimination faced by same-sex couples, their relationships are required to be legally recognised. Mere decriminalising consensual sexual intercourse between persons of same gender is not sufficient to ensure them social equality as that of heterosexual couples. The author has logically and legally, dealt with all the objections against the legal recognition of homosexual unions which are often misguided in the name of tradition, culture and religion. The author has examined various ways by which homosexual unions can be legally recognised. The judgment in Navtej Johar

case is only the first step in this way of ensuring justice to same-sex couples; many bold steps are still awaited.

In the article "The Medical Termination of Pregnancy Act, 1972 – A Critical Analysis", the author has analysed the Medical Termination of Pregnancy Act, 1972. The major issues that the Act has failed to rectify have been looked into. The author has primarily addressed the question as to whether the fetus has a right to life. Deriving authority from some of the recent decisions of Indian Courts in this regard, the author has reasoned as to why the right to life of fetus should not supersede that of its mothers. The author has proposed that the "compelling interest of the State" should extend only to safeguard the autonomy of an individual to make their respective choices and not to dictate what the choice should be.

In the article "Merger Control & Taxation of Cross-Border Merger and Acquisitions in Australia, New Zealand and India: A Comparative Analysis", the authors have analysed the present legal landscape of the key economic players (Australia, New Zealand, and India) in the APEC region to understand the legal and policy vocabulary that created such favourable scenarios. Furthermore, the authors used macroeconomic countrywise data from these three players to examine their cross-border M&A trends over the past decade, from 2009 to 2018. This article scrutinises the effects and role of legal policy and taxation on cross-border M&As. The authors observe that favourable corporate and tax laws were the key denominators that resulted in a positive effect on cross-border M&As.

In the article "Nationalism: A Curb to Freedom of Speech and Expression?" the author has differentiated between nationalism and expression of dissent. The author has researched on the constitutional aspect of the Jawaharlal Nehru University sedition case and its relevancy in the recent times. The author has dealt with the basic fundamental right and its exception to analyse the concept of speech and expression. The author has also concluded with the statement of importance of democracy and to uphold it.

In the article "Scope of Arbitration in Family Law: Analysis in Light of Developments in Foreign Jurisdiction and Jurisprudence", the author has made a comparative study about arbitration and how can it be applied to lessen the burden on family courts and expanding the scope of arbitration. The author has discussed in details about the existing legislations and policy along with the powers of tribunals under various headings. The author has been successful in providing an analysis that has proved helpful in working off the matters of family issues through arbitration. The author has however also discussed exceptions and hurdles that can be confronted while such issues would be dealt. An emphasis has been laid that such

process would be worth to ease the public and the court of the long exhaustion and expenses.

In the article titled "Special Marriage Act (1954) as a Precursor of Uniform Civil Code", the author has presented a layout of the idea of special marriage as a start of platform for implementation of the Uniform Civil Code. The author has made a critical conclusion about the nature of Article 44 by connecting it with the contemporary Indian scenario.

In the article titled "Local Working Requirements In The Patents Act 1970: A Critical Analysis", the authors focused on the attempts to turn the direction of scholarship towards a concrete and fair approach by listing out other factors that must be considered while deciding an application for compulsory licensing and filing Form 27.

In the article titled Reappraising the Corporate Philanthropy and Rank of Non-Profit Voluntary Organisations in India the author focused on analysing the extensive significance of Corporate philanthropy to quotidian commercial operations in India.

NOTES AND CASE COMMENTS

The journal provides a commentary on the judgment, delivered in Joseph Shine v. Union of India, 2019. The commentary includes a brief understanding of the precedent and questions involved in the case and their analysis in detail. To conclude Adultery was an offence till this precedent was decided by the Hon'ble Supreme Court and after this precedent was decided it is considered to be no more an offence. Under the (IPC) Indian Penal Code, 1860 the Adultery is an Offence. The author feels that Adultery is an act and it should be considered as an offence.

In the case of Karnail Singh and others v. State of Haryana, the comment is that the animals are legal persons with parents. The author states that the purpose of the case comment is to analyse the various aspects of this unique decision, study the background in which it was passed and highlight the lacunae, if any, in the judgment. In the judgment it was said that animals are not merely "things" or "property". They are living beings just like the rest. In view of the cruelty animals are subjected to every day and their "use and abuse" by humans for their own purposes, it is necessary to grant the former with rights. The author concludes that conferring of legal personality on animals must be done after a careful consideration of which rights and/or obligations would be appropriate to extend to particular animals. A more careful analysis of the judgment must be conducted in order to prevent any grey areas in compliance with it. Conferring of legal personality on animals must be done after a careful

consideration of which rights and/or obligations would be appropriate to extend to particular animals. A more careful analysis of the judgment must be conducted in order to prevent any grey areas in compliance with it.

The journal provides a commentary on the judgement, delivered in Jishri Laxmnarao Patil v. The Chief Minister, 2019, and the error in its judgment in upholding the reservation to Maratha community. The authors have stated that the judgment given has been responsible in breaching the ceiling of fifty per cent in reservations as set up by Mandal Commission and most importantly, it deviates from the object of Article 15(4). In this case, the Bombay High Court cited several authorities to determine the scope of judicial review but it did not give any reason whatsoever as to how it found that the Gaikwad Commission was correct with its methodology with regard to adequacy of representation and impact on efficiency in administration.

In "Where will the Jurisdiction Lie? An Analysis of Executive Engineer, Road Development Divisio No. III, Panvel & Anr. v. Atlanta Limited", the issue at hand was in this judgment, the SC was posed with a conundrum of deciding the jurisdiction wherein both the District Court and the High Court enjoyed jurisdiction to hear the matter. This case commentary contains the background of the case and circumstances which led to the final interpretation made by the Supreme Court. In this case commentary, the author has tried to blend the harmonious construction between Section 15 of the CPC and Section 2(1)(*e*) of the Arbitration and Conciliation Act, 1996 to decide the jurisdiction of the Court. The author has explored the intention of legislators while drafting respective provisions to decide jurisdiction in the light of this judgment by the Supreme Court.

In "SC's Mallikarjun Kodagali: Deviating from the Presumption of Innocence and Going Overboard for Evolution of Victimology", the author, expounds how the see-saw, which had been neglecting the victim, has now attached to it more weight than required. Mallikarjun Kodagali v. State of Karnataka is a perfect illustration of the above proposition. The judgment deals with certain issues concerning victim's right to appeal under the Code of Criminal Procedure, 1973. The issue undertaken by the author for analysis, herein, is the one which invited different opinions from Lokur J. and Gupta J. Notwithstanding the fact that the opinion of Lokur J. was the concurring opinion, the author subscribes to the views of Gupta J. in this regard.

The journal provides a commentary on the judgment, delivered in "Kimble v. Marvel: Misconceived Precedent or Stellar Affirmation". The

judgment rendered in Kimble v. Marvel begs the question as to whether the affirmation was by reason of sound judicial interpretation or the coercion of Stare Decisis. According to the author, the present research seeks to analyse the 2015 ruling of Kimble v. Marvel, without the interference of Stare Decisis and defining the contours under which the judgment was rendered (Patent Law or Anti-Trust). The interplay between Rule of Reason and the Patent Misuse theory so elucidated within the judgment shall also form an important segment of the presentation

BOOK REVIEW

The book "The Transformative Constitution – a Radical Biography in Nine Acts" by Gautam Bhatia as reviewed by the author has the potential to explore issues through constitutional lenses. The author has described the issues of technology and its power to control Constitution. The author has reviewed on the interpretation of Constitution in relation to contemporary issues. The author has also discussed on the transformative vision of the book that is inclusive of radical ideas as well and that would be community to property and freedom to work. The author has concluded that it is better to interpret the words of Constitution in a way that on which the fundamental rights thrives rather than being ignored and overlooked.

The book "An Introduction to Animal Laws in India" by P.P. Mitra, as reviewed by the author has the potential to serve interests of lawyers, activists, students, and all human being having compassion for every living element on this earth. This book is a compendious piece of legal materials as it comprises animal related laws, rules and orders passed there under, and the judicial decisions. The author states that this book gives the status of animals in legal sense. The author also states that animal law is treated part of the environmental law, although that is a topic of debate and discussions. The author has dealt with the animal laws on international front resulting in the formation of global animal law. As per laws in India regarding animals, the author has brought up the three major laws for the protection of animals. The book, as the author states, as mentioned the constitutional provisions for protecting the animals. In the conclusion, the author has stated that proper knowledge and awareness is what requires in the implementation of such law and the animal laws are just at a nascent stage.

ACKNOWLEDGMENT

We, at Chanakya National Law University, are jubilant, and at the same time humbled by the growth and augmentation of the CNLU Law Journal which

attracts contributions from the legal luminaries stationed in different parts of the country and abroad and is now a storehouse of a number of enlightening articles on law and legal issues. It is only through discussion, deliberation and debate that law grows and develops, and the Ninth Volume of the CNLU Law Journal celebrates this spirit of enquiry and the faculty of critical thinking which has been amply exhibited by our contributing scholars and students.

No good work is the result of an endeavour of a sole entity. Hard work of a lot of people has gone into the making of this illustrious journal. We extend our gratitude to our faculty advisors Dr. B.R.N. Sharma, Dr. P.P. Rao and Dr. Manoranjan Kumar for their invaluable insight and participation which made the making of this journal very smooth. We owe a lot to our Hon'ble Justice (Retd.) Smt. Mridula Mishra, Vice Chancellor, for her indispensable guidance and encouragement.

We believe that the only purpose of this journal is to sow a seed of curiosity into the minds of our readers young and old, so that they exert themselves to discover some new facets of our legal culture and add to the legal comprehension of the society we live in. Happy Reading!

REWORKING LABOUR LAWS AMID COVID-19 CRISIS -A NEED OR A RECKLESS STRATEGY?

—*Mridula Mishra*[*] *& Pallavi Shankar*[**]

Abstract — This paper attempts to study whether the step taken by most of the States to rework labour laws amid this Covid crisis was a necessary step or a reckless strategy. This is beyond doubts that the Covid crisis has badly affected every nation of the world. India is no exception. The entire economy has gone topsy-turvy. The first challenge before any State remained the health and lives of its people. To put a check on the soaring up Covid cases was the priority. The immediate solution that seemed was a complete nationwide lockdown. This lockdown resulted in another crisis in the form of economic crisis. The lockdown resulted in loss of revenue, loss of livelihoods, deduction of wages, unemployment, several small enterprises where either shut down or were at the verge of shutting down. To come out of this crisis and to bring back the economy back on track the Government has adopted several measures and reforms in its policies. One such measure is reworking of labour laws. This Article would examine the effect of such a move on the part of the State Governments to bring about reforms in the existing Labour Laws.

[*] Vice-Chancellor Chanakya National Law University, Patna.

[**] Teacher Associate Chanakya National Law University, Patna, Phd research scholar, CNLU, Patna.

I. INTRODUCTION

1.1 Labour is an important, indispensable, and active factor of production. The word labour has dual meaning. In one hand it refers to the workforce while in the other it refers to the work carried on by them (skilled, unskilled, technical, etc).[1] There is an inverse relationship between Labour and Productivity. Greater the labour force lesser the productivity. Consequently, in developing countries the condition of workers remains inferior as compared to Developed Nations. There is inequality in labour incomes, and inequality in access to employment. There are different classes of labours which can be found in India – casual, daily workers, self-employed and regular workers. The daily workers are usually paid on a daily basis and are usually without a written contract or social protection. The regular workers include workers employed for a longer term, often paid on a monthly basis, with a contract of employment, and some social protection. Casual workers may have mixed characteristics such as – a lot of casual workers have some continuity in employment relationship like the regular workers, but they do not have any social protection like them. These casual, daily, self-employed, etc represent the informal sector or unorganised sector,[2] because of their not so formal or unorganised nature. India has the largest number of workers from the informal Sector 83.5 % workforce in India belongs to the informal sector.[3]

1.2. India is a welfare State which means the interest and welfare of the workers are to be ensured at every cost. It is implied that the economic growth must not be achieved at the cost of the interest and welfare of workers. Article 246 bifurcates the power between the Centre and the State Government to make laws. List I of the Seventh Schedule (known as Union List) contains the matters on which the Central Government has exclusive powers to make laws. List II of the seventh schedule (known as State List) contains matters which fall within the jurisdiction of the State Government. List III of the Seventh Schedule is also known as the Concurrent List provides for matters on which both the Central Government and the State Governments can make laws. Labour related matters are covered in List III [4] i.e. both the Central

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1 Bannock, G., R.E. Baxter and Evan Davis, (7th edn., 2003), *The Penguin Dictionary of Economics*, Penguin Books, New Delhi., p. 218.

2 As per S. 2(m) of Unorganised Workers' Social Security Act, 2008 "unorganised worker" means a home based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by any of the Acts mentioned in Sch. II to this Act.

3 As per NSSO 2019, for the year 2017-18.

4 Concurrent List, Seventh Schedule Entry No. 22- Trade unions; industrial and labour Disputes. Entry No. 23- Social Security and social insurance; employment and unemployment. Entry No. 24- welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits. Entry No. 36- factories. There is one exception in case of Industrial Dispute concerning Union Employees, the matter will fall in List I.

Government and the State Governments can enact laws in respect of such matters. A State may regulate labour matters either by enacting its own labour laws or by amending those made by the Central Government, to be made applicable to their States. In case of any incompatibility between the Central and State laws, Central laws are to prevail. However, in instance of incompatibility, if the State laws have received assent of the president, then such laws will be applicable in that State.[5]

1.3. The after equation of the Covid exposed workforce to be the worst affected by the ongoing crisis. Both the employers and the workers bore the brunt of the situation. Many small business enterprises were forced to shut down their business, they suffered loss of revenue and loss of production, many workers lost their jobs, there were pay reduction, many were forced to go on unpaid leaves, on large scales the migrant workers had to return to their native places. The whole situation was dilemmatic. It called for taking proper steps and measures on the part of the Government. Labour matter being in concurrent list, some State Governments ,in a bid to introduce pro-business reforms amended and relaxed the respective labour legislations. It was argued by these States that chopping off the supposedly harsh labour laws will attract investment and will once again restart the dormant economic activities of the State. It was further conveyed by the States that the business enterprises without the constraints of the strict labour laws will roar back to health and achieve their latent potential.[6]

1.4. In *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.*,[7] the Supreme Court has observed that the preamble sets out for achieving politico-socio-economic democracy for all its citizens. Dr Ambedkar is regarded as the founder of Economic Democracy in modern India, he has emphasised that socio-economic disparity must be dispelled and socio- economic Democracy must be established as it is essential to strengthen Political democracy. Political democracy will be of no value without ascertaining the economic democracy.[8] The Directive Principles of State Policy[9] has been incorporated to set forth the humanitarian social precepts that were the aims of the Indian Social revolution.[10] Article 36 to Article 51 are in the nature of the directives or guidelines for the State to direct its policies towards achieving the social and economic

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5 Arts. 213 and 254(2) conjointly empowers the State Government to override central laws, subject to the President's assent.

6 Column on "Exemption from Labour Laws: Unleashing the 'New Normal'" by Udit Chauhan and Aditya P Arora, <https://www.barandbench.com/amp/story/columns%2Fexemption-from-labour-laws-unleashing-the-new-normal>.

7 (1996) 4 SCC 37: AIR 1996 SC 2426.

8 Jain, M.P. (5th edn., 2007), *Indian Constitutional Law*, Wadhwa and Company, Nagpur, p. 1363.

9 Borrowed from Irish Constitution.

10 *Kesavananda Bharati* v. *State of Kerela*, (1973) 4 SCC 225.

justice.[11] Article 38, Articles 39(a), (b), (d), (e), Article 41, Article 42, Article 43, Article 43-A, Article 47 are labour oriented.

II. REWORKING OF LABOUR LAWS

2.1. The following States have come up with the reforms in Labour Laws – Uttar Pradesh, Madhya Pradesh, Kerala, Punjab, Haryana, Himachal Pradesh, Uttarakhand, and Gujarat, Assam, Goa. Uttar Pradesh and Madhya Pradesh have come up with the ordinance while others have notified relaxations through Rules made by these States.

2.2. Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020 has been cleared by the Uttar Pradesh State Cabinet to exempt factories and other manufacturing establishments from the operation of all Labour Laws for a period of three years, subject to fulfilment of certain conditions on the part of these factories and manufacturing establishment.[12] These conditions include payment of minimum wages, timely payment of wages within the wage periods, payment to be made in the bank account of the workers and not through cash, to comply with the health and safety provisions given under Factories Act, 1948, and Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, the working hours have been increased from 48 hours a week to 72 hours a week and maximum daily hours have been increased from 9 hours to 12 hours. Employees' Compensation Act, 1923, Bonded Labour System (Abolition) Act, 1976 and laws relating to women and children exists as it is. The ordinance is vague and unclear on the point from which labour laws exemption is granted. It is also silent on the point which category of factories and manufacturing establishments are exempted. As such the ordinance cannot be said to conjure the confidence of the investors.

2.3. The State of Madhya Pradesh promulgated the Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020. The Ordinance seeks to amend the two State Acts, namely, the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and the Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982. The Madhya Pradesh Government has also exempted all new factories from some of the provisions under the IDA.[13] The Madhya Pradesh Government has notified 11 sectors to be exempted from the MPIR[14] Act of 1961 for time indefinite. Small contractors employing up to 20 workers are

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[11] Jain, M.P. (5th edn., 2007), *Indian Constitutional Law*, Wadhwa and Company, Nagpur, p. 1363.

[12] S. 3, temporary exemption.

[13] Industrial Disputes Act, 1947.

[14] Madhya Pradesh Industrial Relations Act of 1961.

exempted from the scope of Contract Labour (Regulations and Abolition) Madhya Pradesh Rules, 1973.

2.4. The Gujarat government adopted an emphatic towards the newly industrial units by exempting them from the scope of labour laws for a period of 1200 days. Section 51, 54, 55, 56 of Factories Act have been relaxed. The working hours were extended up to 12 hours. However, it was mandated to comply with the Minimum Wages Act, 1948, Industrial Safety Rules and Compensation Act.

2.5. The Himachal Pradesh government has also made changes in labour laws in line with State of Gujarat. The working hours were increased to 12 hours a day. Overtime wages were mandatory. The workers were to receive minimum wages as fixed by the Himachal Pradesh Government under the provisions of Minimum Wages Act, 1948.

2.6. The State of Kerala declared that they are not going to compromise on the point of welfare of workers. They would prefer worker's interest over economy. Kerala Government has announced alternative methods to enhance its economy. the new factories were issued licence within one week's time.

2.7. The Punjab Government has also announce exemption from labour laws for certain establishments, working hours were also increased. Initially the Punjab Government declared a hike in minimum wages for workers of all categories but the same was withdrawn after a hue and cry made by the business establishments. Overtime wages were paid.

2.8.Uttarakhand Government exempted all the factories in the State from the application of Factories Act, 1948. The establishments were permitted to work even during the lockdown under specified conditions of maintaining social distancing, sanitation, regular sanitization, etc. Working hours were also increased to 11 hours from 8 hours.

2.9. Haryana Government permitted relaxation in regular working hours to deal with the pressure of work. All the factories were exempted under Sections 51, 54, 55, 56 of the Factories Act, 1948 provisions related to overtime wages were included. The State issued strict guidelines regarding Covid safety norms.

2.10. The Rajasthan Government has also suspended many labour legislations. Working hours were increased up to 12 hours a day. Overtime up to 4 hours were permitted and guidelines for overtime payment were issued.

III. IMPLICATIONS

3.1. The changes in the existing Labour Laws were brought to facilitate the business enterprises regain their strength and latent potential. It was believed without being constrained by labour laws the economic activities will gain some boost, in terms of revenue and production. The explanation for reworking the labour laws was twofold – firstly as a tool to attract investment secondly to promote ease of doing business which was revered as the need of the situation.[15] This Step of the State Government attracted a lot of criticism by the Trade Unions, Political Thinkers and other agencies. A petition was filed before the Allahabad High Court challenging the ordinance passed by the Uttar Pradesh Government and in pursuance of the High Court order[16], the Uttar Pradesh Government revoked its notification concerning working hours, rest intervals and overtime payments.[17]

3.2. *Violation of gross rights of the workers vis-à-vis Constitutional provisions*. – The exemptions given to the establishments under Industrial Disputes Act, 1947 and the Factories Act, 1948 may undermine the basic rights of the workers. Worker's right to raise dispute has been chopped off in cases of layoffs, retrenchment, strike, lockouts, etc. such a move may cast unfettered, unguided power to the establishment to do as they please. The extension of the working hours from 8 hours to 12 hours are unfair and exploitative in nature. These exemptions are as such violative of Article 14 and Article 21 of the Constitution of India.

3.3. The ordinance mandates payment of wages at the rate of minimum wages but interestingly excludes the establishment from the applicability of the Minimum Wages Act, 1948. Since the ordinance does not specify any factors to be considered while deciding the minimum wages, there is a likelihood that the government will have free reign to modify the factors undermining the interest of the poor workers. In instance of any failure to secure Minimum Living Standards through the notified minimum wages, the fundamental rights given under Article 21 and Article 23 will be violated.[18]

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[15] 4 *The Economic Times*, 11th May 2020, <https://economictimes.indiatimes.com/news/economy/policy/labour-lawssuspension-by-states-to-pull-businesses-out-of-crisis-isf/articleshow/75674928.cms?from=mdr> last visited on 7-12-2020.

[16] *U.P. Worker Front* v. *Union of India*, 2020 SCC OnLine All 804.

[17] <https://www.livelaw.in/news-updates/up-govt-withdraws-controversial-notification-for-12-hour-shift-forindustrial-workers-156857>.

[18] As held by the Supreme Court in *People's Union of Democratic Rights* v. *Union of India*, (1982) 3 SCC 235 and *Sanjit Roy* v. *State of Rajasthan*, (1983) 1 SCC 525.

3.4. The exemption under the Equal Remuneration Act, 1976 will pave the way for the unethical and unequal treatment of the workers based on gender, race, caste, or religion. In such a case Article 14 will be violated.[19]

3.5. The suspension of the Trade Union Act, 1926 will paralyse the participation of the workers in the management of the establishments. They will lose their voice and status as a collective entity. The collective bargaining which was an important tool to get themselves heard will be impaired. They will not be in a position to bargain or negotiate the terms of employment. This will amount to a violation of Article 19(1)(c).[20]

3.6. *Turning a blind eye to the DPSP* – The Directive Principles of State Policy act as a check and balance on the State policies. It is a vital tool to ensure the welfare of the people. Article 38 serves a directive to the State to frame policies to secure social and economic justice and to eliminate economic inequalities. Article 39(d) provides for equal pay for equal work for all citizens. Article 42 provides for just and humane conditions of work. Article 43 is committed at ensuring living wages to all the workers and at the same time appropriate working conditions so that the workers can have a decent standard of life and are able to enjoy and avail social and cultural opportunities. Coming up with such amendments clearly means turning a blind eye to the DPSPs which is unwarranted and totally wrong. It hurts the heart and sentiments of our Constitution.

3.7. Commitment to the International Institutions- India is a founding member of the ILO.[21] It has been a permanent member of the ILO since 1922. India has ratified Six[22] out of the Eight core ILO conventions.[23] India is under the obligation to respect and to abide by those standards.[24] But having passed the ordinance, India in a way has dishonoured these international recognized ethical labour standards prescribed by ILO, which is a violation of Article 51(c) of the constitution. It is also important to understand all these guidelines provided under different conventions are in fact *pari materia* to our existing labour legislations. The ILO has also come up with a framework which must be taken

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[19] In *Randhir Singh* v. *Union of India*, (1982) 1 SCC 618, the Supreme Court has held that refusal to pay equal remuneration for equal work amounts to a violation of Art. 14.

[20] Art. 19(1)(c) protects citizens right to form associations or unions.

[21] <https://www.ilo.org/newdelhi/aboutus/WCMS_166809/lang--en/index.htm>.

[22] Forced labour convention (No. 29), Abolition of forced labour convention (No. 105), equal remuneration convention (No. 100), Discrimination (Employment Occupation) Convention (No. 111), Minimum Age convention (No. 138), Worst forms of Child Labour Convention (No. 182).

[23] India has not ratified two conventions, namely, are Freedom of Association and Protection of Right to Organised Convention (No. 182) and Right to organize and collective bargaining Convention (No. 98).

[24] Art. 51(c) requires the state to foster respect for international law and treaty obligations .

into consideration while formulating any policy to address the economic crisis.[25] These are:

- Protecting workers in the workplace.
- Stimulating economic and labour demand.
- Supporting employment and incomes.
- Using social dialogue between government, workers and employers to find solutions.

IV. CONCLUSION

4.1. It is true that Covid is just not a health crisis but equally an economic crisis and a bigger crisis for the working force who are already the marginalised section of population in any country. There were disruptions in trade and business resulting into low revenue and low production, in some instances shutting down of the business establishments. As a result these business establishments reduced the wages of their employees, many lost their jobs, employment opportunities were put to halt, no job opportunities, large scale migration of workers to their native places, etc. The covid took a toll on the lives and livelihoods of the people. To ease out the situation. Some of the States came up with amendments in the existing labour laws.

4.2. While most of the industrial establishments and other business houses suffered, there were some of the sectors which were able to encash the opportunity given by the crisis, namely, healthcare providers, pharmaceutical and medical equipment start ups, messaging platforms, edutech companies, tech-based start ups, digital start ups.[26]

4.2. Considering the crisis, the State Government took the step of reworking the labour laws. But the important question is whether the reworking of labour laws was a necessity, or it is a reckless step. Any labour related legislation should always be enacted with objective of protecting the basic interests of the working class, it must respect their rights to negotiate and bargain with their employers. No Nation can progress if it fails to invest in the human resources of its Nation, or if it fails to increase the share of labour in the country's

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[25] <https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang--en/index.htm>.

[26] Kamini Vidisha, "The Covid-19's Impact on Start-Ups: Make Use of the Opportunity the Coronavirus has Provided, 13.4.2020", *The Financial Express*, <https://www.financialexpress.com/industry/the-covid-19s-impact-on-start ups-make-use-of-the-opportunity-the-coronavirus-has-provided/1926446>.

wealth, or if it fails to strike the right balance between the rights of the investor and the workers.[27]

4.3. The Canadian social activist Naomi Klein in her "Shock Doctrine" has rightly pointed that in case of crisis whether natural or induced the tendency of irresponsible government is to prey upon the vulnerabilities, they bring about such reforms in their policies and governance which are not otherwise permitted in a democratic set up. It is actually to be pondered whether the reworking of the labour laws on part of some States through the ordinance is indicative of the dynamics of disaster capitalism.[28]

4.4. Undoubtedly the crisis has resulted into a lot of chaos but the important question remains what is the justification of bringing such reforms, suspending labour laws and placing the poor working class in the vulnerable position where there is no security of employment or wages? The argument that Covid resulted in a *force majeure* situation where the productivity and revenue immensely suffered and therefore the State acted in such a manner suspending the labour laws sounds weak. Another argument that the suspension is temporary and will end eventually is again nothing more than a lame excuse. The loss it will create will have a longer effect. The suspension and reworking of labour laws can never be a solution. Making the sufferers suffer more cannot help the economy to get back into shape. These labour reforms will pave way for another crisis, it will worsen the condition of the not-so-privileged classes. It will bring down the labour standards which took century to reach where it stood today. Moreover, the Constitutional and International obligations will be violated. Anything at the cost of the embedded Constitutional provisions – Fundamental Rights, DPSPs, etc. will be a violation of the basic human rights or dignity. The aftermath of the reforms in the labour laws points out to loss of basic human rights – in the form of Right to livelihood and Right to conducive working conditions, the problem of unemployment will also aggravate. These marginalised workers form a major part of our population and when the larger population in any society is suffering, facing havoc how can the society ever make any progress. In the words of legendry economist Adam Smith that, "No society can surely be flourishing and happy, of which the far greater part of the members is poor and miserable".[29] Also it is time to adopt Jeremy Bentham's theory of Utilitarianism whereby the State must adopt policies such that "the greatest happiness(pro-labours) to the greatest member (labours) of the society" is ensured.

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[27] 7 Mehta P.R., 12.5.2020, "Ordinances by States to Change Labour Laws are a Travesty", *The Indian Express*, <https://indianexpress.com/article/opinion/columns/industrial-relations-code-india-labour-law-amendmentpratap-bhanu-mehta-6405265>.

[28] <https://www.theguardian.com/us-news/2017/jul/06/naomi-klein-how-power-profits-from-disaster>.

[29] Smith, A. (1937), *An Inquiry into the Nature and Causes of the Wealth of Nations*, The Modern Library, New York, Book I, Chapter VIII, p. 79, para 36.

4.5. The need of the hour is to strengthen the earlier existing labour legislations, to mould the laws to suit to the workers. The State must not compromise on the welfare of its people. Being a welfare State means the interest and welfare of the workers are to be ensured at every cost. It is implied that the economic growth must not be achieved at the cost of the interest and welfare of workers.

VULNERABILITY OF HUMAN RIGHTS ENSUING THE PITFALL OF JUDICIAL REVIEW IN INDIA!

—Deeksha Sharma

Abstract — Judicial review, a weapon in the hands of the Indian Judiciary to run a test in order to analyse whether a law is valid or otherwise. The entire question of Article 13 and the purpose which it serves is rather questionable and there is urgency to investigate whether or not the actuality of such an article currently in the Indian Constitution is crucial or not. Whether Article 13's task of being an element of 'abundant caution", assigned by the Constitution makers is fulfilled by it/or is it failing miserably?

Personal laws which targets to protect domestic issues are designed to protect interests of individual sections of the society but there are numerous laws which unfortunately instead of leading on the positive front in turn end up contradicting the entire purpose which indeed end up violating basic human rights of which females majorly fall prey to.

Personal laws with focal point on domestic issues such as inheritance, adoption and marriages which get away with no administration of scrutiny as they are well protected off of any intervening by a constitutional functionary. Even in the presence and functioning of Article 13 which promise to protect all the citizens from any application of any transgressing law thereby enforces the belief that even in the presence of Article 13 derogative laws remains untouched and do not cease to exist.

Furthermore, Article 13 brings in the age old concept of Historical School of Jurisprudence. Thus becomes a barrier for the Indian Constitution to achieve its transformative vision.

This article has established the irrelevance of article 13 and thus it needs to be abolished or for the better be amended for the positive.

The Constitution was labelled as an impression to revolutions in time-honoured conceptions by the eminent author D.E. Smith.[1] Espying individual as the intrinsic unit of the Constitution bespeaks what the Indian Constitution envisages for, thus demanding laws and structures to be viewed via prism of individual dignity. But does Article 13 of the Indian Constitution abide by it?

Speaking on the true purpose of liberty in the Indian Constitution, Dr B.R. Ambedkar stated that:

> ***"What are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights."***[2]

But do we have this liberty in its true essence? Does every element of the Indian Constitution abide by the same thing? No, it doesn't. In this article, we will see that how Article 13 stands very problematic to the Indian Constitution and curbs its liberty to eradicate the social equalities, thereby standing against its transformative vision. And, also as to how Article 13 is extremely superfluous!

Article 13 renders all laws inconsistent and derogative of fundamental rights as void.[3] Chief Justice Kania in *A.K. Gopalan* v. *State of Madras*[4]*, reasoned its insertion as a matter of "abundant caution", and observed:*

> *"In India it is the Constitution that is supreme, that a law to be valid must be in all conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not. The same result could be achieved even without the aid of Article 13 and the laws transgressing any fundamental rights would be declared void in its absence."*

Hence, Article 13 is not important, but was added to be extra careful in the case of Fundamental Rights in India, considering their supreme importance.

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1 D.E. Smith, India As a Secular State (1963).
2 Parliament of India, *Constituent Assembly Debates*, Vol. VII, at p. 781.
3 Indian Constitution, Art.13.
4 AIR 1950 SC 27.

This view has been supported by the notable Indian jurist and an authority on the Indian Constitution, Mr. H.M. Seervai.[5]

Article 13(3)[6] defines "Law", but closes off Personal Laws from judicial scrutiny. Personal Laws govern matters of family affairs, and have been a major hindrance in the empowerment and dignity of the females in India.[7] They deepen inequality and discrimination not only within the religion between the genders but also between the personal laws of different religions.[8]

India's colonial past roots the birth of personal laws. Hindu and Muslim personal laws were weaponized for the protection of the private realm of individual households from evils of the colonial states, laws which were largely retained by the constitution at the hour of independence. Those which exist today are those that were unfortunately favourable to the native patriarchy. Domestic issues such as adoption, maintenance, divorce, marriage and inheritance are the focal points of such personal laws. They are codified and non-codified, existing in custom and practice.[9]

I. SOME ELEMENTS OF PERSONAL LAWS CAUSING VIOLATION OF WOMEN;

A. Islamic Personal Law

- Muslim men are granted the legal recognition of multiple marriages simultaneously.[10]

- ***Nikah Halala*** is a concept which provides for a stoppage on a Muslim woman to remarry the husband who has divorced her unless she marries another man and consummates the marriage firstly.

- Islamic criminal jurisprudence, entitles no punishment for a woman forced to have sex.[11]

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5 H.M. Seervai, *Constitutional Law of India* 677-678 (1991).

6 Indian Constitution, Art.13, Cl. 3.

7 Prabhash K. Dutta, "Beyond Triple Talaq: How Judiciary has Dealt with Personal Laws against Fundamental Rights", *India Today* (May 11, 2017, 2.44 p.m.), <https://www.indiatoday.in/india/story/triple-talaq-supreme-court-976439-2017-05-11>.

8 Ashok Wadje, "Judicial Review of Personal Laws vis-à-vis Constitutional Validity of Personal Laws", 2 South Asian Journal of Multidisciplinary Studies.

9 "Personal Laws versus Gender Justice: Will a Uniform Civil Code Solve the Problem?", Economic and Political Weekly (June 15, 2019, 5.30 p.m.), <https://www.epw.in/engage/article/personal-laws-versus-gender-justice-uniform-civil-code-solution?0=ip_login_no_cache%3Ddcdf84fb57ee400b01b7bb595f775965>.

10 *Khursheed Ahmad Khan* v. *State of U.P.*, (2015) 8 SCC 439.

11 Vol. 10, "Beirut: Dar al-Kitab al-Arabi n.d.", (June 10, 2019, 2.50 p.m.), <http://www.geo.tv/zs/Zina_article_Final.pdf >.

- In case of succession, a brother's share of the inheritance is double than that of a woman in the same degree of relationship to the deceased. The quantum of property inherited by a female heir is half of the property given to a male heir of equivalent status. [12]

II. HINDU PERSONAL LAW

- Ignorance in the need for equal rights of guardianship of children is majorly highlighted by Section 6(a) of the Hindu Minority and Guardianship Act which gives a father the status of a natural guardian not the mother.

III. PARSI PERSONAL LAW

- On marrying a non-Parsi, the children of the woman are not accepted as being part of the Parsi community however there is exemption for males from such a case.

- Death of a Parsi man whose wife is a non-Parsi restricts such a wife from inheriting the property of her widower, though the children are not faced by any such restriction.[13]

IV. CHRISTIAN PERSONAL LAW

- Under the Christian personal law men are granted divorce in the case of a woman committing adultery however at least two offences by the husband is a must to be proved by the wife in case of adultery resulting in a divorce.[14]

Under some Personal laws, women are also coerced to marry their own rapists instead of receiving legal penalty.

Hence Judicial Review as an indispensable[15] and imperative feature of the Indian Constitution is much under menace.

Hence, If these Laws are allowed to be followed without judicial scrutiny, then there will not only be sexual inequality between men and women of one community, but also inequality between women of one religious community and those belonging to another religious community[16]. Furthermore, not subjecting personal laws to Judicial Scrutiny make fundamental rights of people,

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[12] The Muslim Personal Law (Shariat) Application Act, 1937, S. 40.
[13] The Parsi Marriage and Divorce Act, 1936, No. 6, Acts of Parliament, 1936 (India).
[14] Divorce Act, S. 22, No. 4, Acts of Parliament, 1869 (India).
[15] *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261.
[16] Ajai Kumar, *Uniform Civil Code: Challenges and Constraints* (1st edn., 2012).

especially women more vulnerable to exploitation. Article 13 supports the violation of Articles 14 and 21 of the people of India, by inherently subjecting them to the social morality, and thereby failing its duty miserably.

Justice Chandrachud had even highlighted in the Sabrimala judgment[17] about the inclusion of Personal Laws in "customs and usages" in Article 13, and how they have been creating a menace by not being subjected to judicial review.

Even though in the recent times, codified personal laws, being "laws' under Article 13, have started been subject to Judicial Review, but the exception largely lies to non-codified personal laws, like the Muslim Law largely, and even some parts of the Hindu Personal Law. They cannot face the wrath of Judicial Scrutiny, because they are not codified by the Legislature. Ultimately, submitting judicial review to the whims and fancies of the legislature.

Now, the Federal Court in *United Provinces* v. *Atiqa Begum*[18] observed that the expression "law in force" in Section 292, Government of India Act, 1935[19] applies not only to statutory enactments, but to all laws inclusive of even personal and customary laws. In Article 372 the Indian Constituent Assembly re-enacts provisions of Section 292 Government of India Act, 1935. Article 372(1)[20] talks about continuance of existing laws subject to constitution which clearly indicates the intention of the Constituent Assembly to include personal laws within its ambit. But, its scope is restricted by Article 13. This way Article 13, makes Article 372 meaningless and useless.

> ***Thenceforth Article 13 trims down judicial review, and transgresses Fundamental Rights instead of providing protection largely. Thusly stands problematic to the Indian Constitution, Equality and dignity of the females in India.***

It further upholds the Presumption of Constitutionality of Legislation, placing the burden of proof on people contending that a particular law violates their fundamental rights."[21] The Supreme Court of India however holds that the burden must shift from the petitioner to the Legislature in "hard cases", based on biological distinction between sexes, and legislations discriminating on social class.[22] These cases must be strictly scrutinised by the courts. Hence, this Presumption must be taken away.

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17 *Indian Young Lawyers Assn.* v. *Union of India*, (2019) 11 SCC 1 : 2018 SCC OnLine SC 1690.
18 1940 SCC OnLine FC 11 : AIR 1941 FC 16.
19 Government of India Act, 1935, S. 292.
20 Indian Constitution, Art. 372, Cl.1.
21 Madhu Limaye v. Sub-Divisional Magistrate*, Monghyr*, (1970) 3 SCC 746 : AIR 1971 SC 2486.
22 *A*nuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.

Also, the reasonability test propounded by the Indian Constitution becomes unreasonable because it blinds itself to the by-product, failing to "balance" the State's interests against the rights of affected persons, and whether the involvement of State has a less onerous alternative.[23] This application of Strict Scrutiny often generates opposition against the courts for misusing its powers against the Legislature.

In our opinion, Strict Scrutiny must be constitutionally espoused in Articles 32[24] and 226[25] for fulfilling the task of "abundant caution" of Article 13, shielding Article 15[26] and vulnerable classes. This would also help define circumstances in which this doctrine can be used. It will be in complete conformity with Article 32 by granting the Supreme Court of India, the power to protect fundamental rights in all circumstances; hence conformity with the due process[27] would be achieved. In addition, Article 13 should be repealed, so that personal laws come within Judicial Scrutiny through the aid of Article 372.

Politically motivated addition of Article 13(4)[28], with the 24th amendment[29] to Indian Constitution, by the then Prime minister of India, Ms. Indira Gandhi to overrule an Supreme Court judgment, further restricts the power of the Supreme Court of India, to review amendments made by the legislature to fundamental rights. Thereby making fundamental rights more vulnerable.

Furthermore, another point to be highlighted is that, Article 13 largely brings into effect the Historical School of Jurisprudence, ultimately leaving the human rights to the whims and fancies and much on the spell of people's consciousness. *Ahmedabad Women Action Group* v. *Union of India* [30] *pronouncement further reiterated in the Triple Talaq*[31] *judgment, by Chief Justice Khehar held that, personal laws should be excluded from the ambit of judicial review. They further held that,*

> "While examining issues falling in the realm of religious practices or "Personal Law", it is not for a court to make a choice of something which it considers as forward-looking

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[23] Karan Lahiri, "Difficult Conversations: On Why the Supreme Court's Judgment in the Kerala Liquor Ban Case Represents a Lost Opportunity to Examine Tough Questions on Discrimination", Indian Constitutional Law and Philosophy (January 12, 2016), <https://indconlawphil.wordpress.com/tag/strict-scrutiny/>.

[24] Indian Constitution, Art. 32; (Gives Power of Judicial Review to the Hon'ble Supreme Court of India.)

[25] Indian Constitution, Art. 226; (Gives Power of Judicial Review to the Hon'ble High Courts in India.)

[26] Indian Constitution, Art. 15.

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

[28] Indian Constitution, Art. 13, Cl. 4.

[29] 24th Amendment Act, 1971.

[30] (1997) 3 SCC 573.

[31] *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1.

> or non-fundamentalist. The court does not decide whether a religious practice is prudent, progressive or even regressive. Personal laws and religion are for interpretation as it is and must be accepted in faith of the followers. It is not for the determination by a self-proclaimed rationalist of the same faith. It is not for a court to determine whether religious practices were prudent or progressive or regressive. Religion and "Personal Law", must be perceived, as it is accepted by the followers of the faith. Article 25 obliges all constitutional courts to protect "Personal Laws" and not to find fault therewith. Judicial examination is completely stricken off in the case of assessing the validity of a personal law. Interference in matters of "Personal Law" is clearly beyond judicial examination. The judiciary must, therefore, always exercise absolute restraint, no matter how inviting, compelling and attractive the opportunity to do societal good it may forecast." This view of Chief Justice has been backed by the Constitutional Assembly Debates, in which it was clearly mentioned by M. Ananthasayanam Ayyangar that, there would be amendments in personal laws as and when the members of that particular religion would like it.[32]

Similar is the view of the Historical School of Jurisprudence, which bases the formulation of laws solely by the people, to the people, for the people. According to them, Law should be according to the conscience of people which are being governed by it. Nobody else can decide about it. "Law is formulated for the people and by the people" means that the law should be according to the changing dynamics and needs of the entire population. *Savigny*, the father of this school of jurisprudence announces the consciousness of people as the major and main source of law.

But, should we keep waiting for the consciousness of people to change. Article 13 disregards the Positivist School of Jurisprudence, which is highly followed in India. This school greatly believes in the black-letter law. Even though it has been held by the Supreme Court in the case of *C. Masilamani Mudaliar* v. *Sri Swaminathaswami*,[33] that Personal laws are within the Judicial Scrutiny, but because of Article 13 nobody is following that. This is high disregard for the black letter law. Nevertheless, should we let human rights to be highly violated by this? Or should we keep allowing Article 13 to disregard the Positive school of Jurisprudence, and go by people's conscience?

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[32] Parliament of India, *Constituent Assembly Debates*, Vol. VII.

[33] (1996) 8 SCC 525.

The view of the Chief Justice Khehar in the triple talaq judgment shouldn't be taken as correct as, Notable Indian Jurist H.M. Seervai[34] is of the view that personal laws are so inextricably connected to the entire network of law and therefore it would be difficult to ascertain the residue of personal law outside them. Now, by virtue of this statement personal laws gain protection under Article 25. But the Hon'ble Supreme Court[35] has pointed out that the personal law did not form part of any religion but pertained to 'secular practice associated with religion'. Now, Article 25 involves a separation between religious activities, on the one hand, and secular and social activities on the other, while the former are protected, the latter are not[36]. So, the article makes it clear that secular activity may be associated with religion, though the guarantee of the article does not extend to such activity.[37] Thereby, no protection of personal laws under Article 25.

Apart from failing to achieve its given objective, restricting the ambit of judicial scrutiny, and posing further threats to fundamental rights, Article 13 is also extremely superfluous. It has rightly been held by the Hon'ble Supreme Court of U.S.A., (where the Indian Judicial Review was largely borrowed from), in the landmark judgment of *Marbury* v. *Maddison*[38] that,

> *"with the establishment of a new Political Character, Institution and Constitution, all pre-existing laws inconsistent therewith at once stand displaced and cease to be of any obligatory force without any declaration to that effect"*, making 13(1) useless.

Further, earlier "laws in force" continued under Art. 372(1) being subject to the Constitution fails to the extent of any infringement or transgression, even without Article 13(1).

Articles 245(1)[39], 25[40], makes, law made by the Indian Parliament, subject to the Constitution, thus post-constitution laws would backslide regardless of Article 13(2)[41].

As rightly observed by D.D. Basu, a notable jurist, and an authority on the Indian Constitution, that Judicial Review strings out to the entire length and breadth of the Constitution. Potential of Judicial Review branches from the

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[34] 1 H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 677-678 (4th edn., Universal Law Publishers, 1991).
[35] *Jorden Diengdeh* v. *S.S. Chopra*, (1985) 3 SCC 62 : AIR 1985 SC 935.
[36] *Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689 : AIR 1980 SC 707.
[37] *S.P. Mittal* v. *Union of India*, (1983) 1 SCC 51 : AIR 1983 SC 1.
[38] 2 L Ed 60 : 5 US 137 (1803).
[39] Indian Constitution, Art. 245, Cl. 1.
[40] Indian Constitution, Art. 25.
[41] Indian Constitution, Art. 13, Cl. 2.

Constitution hence Article 13's void will not hold back the court to invalidate a detracting law. In India, it is not simply the formal allocation of powers but an evolving constitutional jurisprudence that has enhanced the powers of judicial review.[42]

It has been held by the Supreme Court in the landmark decision of *State of Rajasthan* v. *Union of India*[43] *that,*

> The Supreme Court held a similar viewpoint that, "So long as a question, arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is for the Supreme Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."

The rule of law in its true essence spotlights the Supreme Court for invalidating anything against the constitutional morals and enforcement of the constitutional limitations. Court can and should rightfully intervene where there is manifest infringement of Constitutional values. Power of judicial review is, thus, obvious in a written constitution.[44] Hence the power of Judicial Review is not limited to one article. But, Article 13 acts as a barrier for the Court to freely exercise its judicial power, by not including Personal laws in its ambit.

Also, Article 32 in no way restricts the Supreme Court in taking up cases related to personal laws. Then why should we allow Article 13, to take away this power from the court?

Moreover, the actuality of Article 13 in the Constitution is not paramount for the question of Fundamental Rights and the degree it is sanctioned to be truncated by the Constitution itself."[45]

A. So, can Personal Laws be considered as laws without the aid of Article 13, so that courts are able to judicially scrutinize it? Yes, they can.

Firstly, the court in *United Provinces* v. *Atiqa Begum* held that "laws in force" in Article 13 contain even personal laws, at a time when the personal laws were highly non-codified.

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[42] Shodhganga, "Policy Making in India, Judiciary v. Parliament", <https://shodhganga.inflibnet.ac.in/bitstream/10603/95978/2/11_chapter2.pdf>.

[43] *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592.

[44] *A.K. Kaul* v. *Union of India*, (1995) 4 SCC 73 : (1995) 30 ATC 174.

[45] *Rudul Sah* v. *State of Bihar*, (1983) 4 SCC 141.

Now, 'Law is the body of principles recognized and applied by the state in the administration of justice."[46] Hence, the answer to the question whether any rule of conduct is law is to be found in the fact whether it is enforced by the courts of law.[47] Personal Laws are rightly enforced by the Courts for solving matters of divorce, succession, inheritance etc, of various religions. Therefore by the virtue of this definition of Law by Salmond, Personal Laws should be considered as Laws. A piece of personal law, although may not be a statutory law also binds citizens, if it has been accepted and enforced by a sovereign, and acted upon by the courts for long.[48]

For upholding the Constitutional Morality, it is not important that any practice or personal law should be codified. What is important is that it abides by the norms of the Constitution. If it fails, then the judges should be able to test its constitutionality. This practice could be done even without the aid of Article 13.

V. CERTAIN, BETTER ALTERNATIVES TO ARTICLE 13, IN OTHER CONSTITUTIONS.

- **Article 36 of the Switzerland Constitution[49]:**

  Restrictions on fundamental rights must have a legal explanation, significantly highlighted in a federal act. Such restrictions must be aligned with public interests as well as the protection of fundamental rights of the rest. Putting a status of sacrosanctity on fundamental rights.

  This tells the situations in which fundamental rights can be infringed. It must have a legal explanation. In India, mostly infringement of fundamental rights have a social explanations, keeping in mind the morality of the society and not of the Constitution. A similar clause must be imbibed in the Indian Constitution as well. This would serve the purpose of the Constitution makers of giving "abundant caution" to the fundamental rights.

- **Article 19 of the West German Constitution[50] :**

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46 P.J. Fitzgerald, *Salmond on Jurisprudence*, 40 (12th edn.).
47 *Raj KumarNarsingh Pratap Singh Deo* v. *State of Orissa*, AIR 1964 SC 1793.
48 *Mithan Lal* v. *State of Delhi*, AIR 1958 SC 682.
49 Switzerland Constitution, Art. 32.
50 West German Constitution, Art. 19.

> *No case may render the essence of a basic right to be duly affected.*

At long last, the Indian Jurisprudence should fathom the cataclysmic nature of Article 13 and repeal it, in order to fundamentally shield the pillars of human rights and dignity of females in India. The importance of Article 372 will then be recognized.

A CRITICAL ANALYSIS OF TRIAL BY MEDIA

—Neha Das

Abstract — Media is a powerful medium and aids in the exchange and communication of ideas and opinion. An independent media is a carrier of courage and plays an active role in the quest of truth in a democracy. But, a free press entails with it the responsibility to realize the consequences of its actions. The interplay between the right to freedom of speech and expression and the right to fair trial has resulted in a conflict between the competing rights. Media has a responsibility to ensure that the matter is thoroughly investigated and the facts are duly verified, analyzed and researched upon and a truthful account of the information is rendered to the readers.

The press cannot exercise its rights in a whimsical manner as the media coverage has a pervasive impression in the minds of the readers about the guilt or innocence of the accused. Any kind of fabrication of the truth adversely affects public opinion and in turn interferes with the smooth functioning of the judiciary and thereby disrupting the status quo. Such interference give rise to legal complexities which hinders the right to fair trial guaranteed by the Constitution. The issue at hand is that of a dichotomy of free speech and fair trial that is apparent in the case where restrictions are imposed on prejudicial publications affecting fair trial and the question is whether such restriction would curb and abridge the freedom of press. There is a dire need to curb the implications of media trial as it affects the criminal justice system and the public at large. To harmonize fair trial and free press, it is necessary to enforce the Contempt of Courts Act, 1971 efficiently. Until the verdict of the Court on a sub judice matter, the media has a duty to report fair and accurate facts with no prejudice whatsoever. Media has to understand the underlying legal consequences and principles of criminal justice system. This paper aims at analyzing the various facets of trial by media by throwing light on judicial pronouncements on the phenomenon of media trail and suggesting measures to combat this problem.

Keywords: Administration of justice, Contempt of Court, Democracy, Free Speech. Media Trial.

I. INTRODUCTION

'Information is the currency of democracy.' Apart from the three organs of the Government, media also forms a cornerstone in a democratic society. As its etymology ('medium') suggests, media is the mechanism through which public opinion is moulded and information is disseminated to the society at large. With the advance of technology, media is not only restricted to television, radio or newspapers but also includes the internet, which is yet another powerful source to bring about awareness and in turn, strengthen the society. Justice Markandey Katju, has also reaffirmed the significant role of media in transforming India into a industrial society from an archaic one.[1] Media creates awareness about socio-political and economic events around the globe. The manner in which media disseminates information creates desirable expression and sentiments.[2]

Article 19(1)(a)[3] of the Constitution of India declares that all citizens shall have the right to freedom of speech and expression which is not an absolute right and is subject to reasonable restrictions imposed by law in relation to contempt of Court, defamation or incitement to offence.[4] Freedom of press flows from Article 19(1)(a) of the Constitution of India. The main objective of our founding fathers to advance such freedom to press was to protect the purveying of information.

The entire judicial process and justice system is subject to public scrutiny by the media and is often referred to as the watch dog of the society. To create a constructive check on the smooth functioning of democracy, media implicitly claims the right to investigate, reveal, expose and criticize and thereby give a fair account of the events. There should be a harmonic balance between the freedom of press and the duty to ensure responsible and accountable journalism. Critical debates and free reporting are conducive factors for the comprehension of the concept of rule of law by the public and a better understanding

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1 Justice Markandey Katju, "The Role the Media should be playing in India", *The Hindu*, 5-11-2011.

2 "Trial by Media: Looking Beyond the Pale of Legality", *Civil Services Times Magazine*, (12-7-2001), available at <http://www.civilservicestimes.com>.

3 Indian Constitution, Art. 19.

4 H.M. Seervai, *Constitutional Law of India* 723 (Universal Law Publishing Co., Vol. 1, 4th edn. 1991).

of the judicial system.[5] The freedom of press stems from the public's right to know and to be informed in a democracy. Media should be extremely cautious while publishing news or cases sub judice as it would otherwise amount to trial by media. There is no doubt that the investigative role of media has been instrumental in keeping a check on the maladministration of government and exposing unlawful actions and crimes. The media has played a commendable role by taking an activist stance in a plethora of cases by pulling in the accused to the hook.[6] However, with the speedy growth of the press, trial by media has become an acute problem.[7]

II. CONCEPT OF TRIAL BY MEDIA

Trial by media can be explained to be the coverage by media which arouses desirable sentiments, creating media frenzy and negative dramatized miniseries regarding criminal justice system, in effect, invoking infotainment (information coupled with entertainment) around a criminal case.[8] The advent of media in all respects has a pre-judicial impact on the accused, suspect, judges, witnesses and the administration of justice in general. The sensationalized coverage of events by the media has given rise to extreme arguments on the debate between free speech and an individual's right to fair trial as advocated by the judiciary.[9] There is a growing tendency on the part of media to incorporate the version of law, crime and justice in a political and social scenario. The concept of independence and impartiality of the judiciary is an essential prerequisite for the due process of law and the right to a free trial should be guaranteed to an accused.[10]

The rat race between cable channels for breaking news thereby the accused getting labeled prior to the commencement of the investigation impairs the right to fair trial and prejudicially impacts the administration of justice.[11] The efficiency of the legal system increases multi fold when guilt is proved by procedure established by law and not with intrusion of external factors in the due process. The judiciary has time and again emphasized the preservation of

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5 Justice R.S. Chauhan, "Trial by Media: An International Perspective", (PL Oct S-38, 2011) <http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=22062>., last visited on 3-9-2018.

6 All Answers ltd, "Effect of Trial by Media Before Courts" (Lawteacher.net, September 2018) <https://www.lawteacher.net/free-law-essays/commercial-law/effect-of-trial-by-media-before-courts-law-essay.php?vref=l> accessed 5 September 2018>.

7 Abolish Rather and Konika Satan, "Judicial Intervention in the Sub-Judice – The Emerging Issues of Trial by Media", Bharati Law Review (2015).

8 Helena Machado and Filipe Santos, "The Disappearance of Madeleine McCann: Public Drama and Trial by Media in the Portuguese Press", Crime Media Culture, (5(2)c146-147).

9 200th Report of the Law Commission on "Trial by Media: Free Speech v. Free Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)".

10 *Ibid.*

11 *Ibid.*

freedom of press to criticize and has subjected to scrutiny the functioning and administration of the judicial process. The only reasonable restriction imposed is the abuse of the freedom guaranteed to the press as absolute freedom corrupts.[12] The media has been constantly toiling to unearth the truth in most cases and has played a central role in delivering justice in the infamous *Jessica Lal case*[13]*, Matoo case*[14]*, Nitish Kataria case*[15] and the *Nirbhaya case*[16]. There needs to be a clear and distinct balance between the freedom of press and right to fair trial in the interplay of litigation and media.[17] The aforementioned cases explicitly highlight the proactive role played by media which would have otherwise resulted in a substantial downfall of administration of justice. The accused was convicted and the case was fast tracked owing to the intervention of media. There have been various occasions wherein the press has covered the case in a professional manner and proved to be the fourth pillar of democracy.[18] What is necessary is that the media should not indulge in investigative reporting but should rather concentrate on informative reporting without conducting any parallel investigative trial which infringe constitutional rights.

It is the duty of the media to ensure that the information that it provides does not infringe the right of the accused nor unduly influences the judicial system in any manner whatsoever.[19] Media has been seen to create a hysteria among the public citizenry in high profile cases like the Sheena Bora murder case[20] or the Arushi Talwar case[21], to name a few, wherein a controversial reporting of the proceeding was done with a critical and unnecessary scrutiny of the victim's personal life. In the ISRO Espionage case[22], the character of two Maldivian citizens was questioned by the press and the media carried out a sensationalized coverage and clouded the public opinion.

Media has been overriding the function of the judiciary by assuming a superior role than what is accorded to it by conducting parallel investigation in quest of evidence and thereby branding the accused or the suspect based on their past conviction records and drawing conclusions by covering articles

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12 *Stroble* v. *State of California*, 1952 SCC OnLine US SC 51 : 96 L Ed 872 : 343 US 181 1952.
13 *Sidhartha Vashisht* v. *State (NCT of Delhi)*, (2010) 6 SCC 1.
14 *Santosh Kumar Singh* v. *State*, (2010) 9 SCC 747.
15 Vikas Yadav v. State of U.P., (2016) 9 SCC 541 : 2016 SCC OnLine SC 1088.
16 *Mukesh* v. *State of NCT*, (2013) 2 SCC 587.
17 Navajyoti Samanta, "Trial by Media-The Jessica Lal Case", Social Science Research Network, (March 2008), available at SSRN: <http://papersssrn.com>.
18 Ruheela Hassan, "Freedom of Media in India-A Legal Perspective", International Journal of Humanitarian and Social Science, Vol. 3, Issue 2 (2014).
19 Madhavi Divan Goradia, *Facets of Media Laws and Indian Constitution*, (Anmol Publications Pvt. Ltd., New Delhi 2005).
20 *Pratim* v. *Union of India*, 2018 SCC Online Bom 630.
21 *Rajesh Talwar* v. *CBI*, 2013 SCC OnLine All 13054 : (2013) 82 ACC 303.
22 *Ram* v. *Siby Mathew*, 2000 SCC OnLine Ker 381 : 2000 Cri LJ 3118.

at every stage of a sub judice case.[23] Such extreme publicized coverage of cases by the media is naturally bound to influence the judiciary as Justice Frankfurter rightly observes that judges are no super human so such irresponsible media investigation ought to affect the rational course of determination thereby hindering the due administration of justice.

Media trial gives rise to a paradox between right to fair trial and the freedom of press. There is no justification for investigative journalism unless done in the interest of public and the actions are bonafide or the justification of truth. Such a defence is claimed under Section 13 of Contempt of Courts Act wherein the Court acts as the supreme and final authority to judge whether the publication done by media amounts to Contempt of Court or is a genuine matter of public importance.[24] It is necessary for the operations done by media to be subject to reasonable restriction and be backed by prior consent. In *R.K. Anand* v. *Delhi High Court*[25], the concept of media trial was defined for the first time by the court to mean *"Impact of extensive pre-trial publicity and coverage on a person's reputation thereby creating a widespread perception of guilt regardless of the verdict given in the court of law*". The issue in this case was the legitimacy and validity of sting operation conducted by NDTV cable channel in a sub judice matter as the very concept of sting operation is deceptive and the authenticity of such evidence is questionable.

III. SCOPE OF THE CONSTITUTIONAL PROVISION OF FREEDOM OF SPEECH AND EXPRESSION

Article 19(1)(a) of the Constitution of India guarantees to every citizen the freedom of speech and expression while Article 19(2) envisages the various reasonable restrictions that the general provision under Article 19(1) is subjected to. With regard to trial by media, the restrictions imposed is in the interest of the security of nation, sovereignty an integrity of the State, public order or in relation to contempt of court, defamation or incitement to offence.[26] The restrictions are a proof that freedom of speech and expression is not an absolute right. There should be a clear balance between the right to fair trial and right to free speech. Trial by media is an off shoot of the rights that flow from Article 19(1)(a) which provide for the freedom of press. The provisions under Article 19(1) should not be read in isolation but in consonance with Article 19(2) which would facilitate the administration of justice which the laws relating to contempt seek to balance by imposing restrictions on prejudicial

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[23] Arpan Banerjee, "Judicial Safeguards Against 'Trial By Media': Should Blasi's 'Checking Value' Theory Apply in India?" Vol. 2, p. 28, Journal of Media Law & Ethics, (2010).

[24] H.M. Seervai, *Constitutional Law of India* 723 (Universal Law Publishing Co. Vol. 1, 4th edn. 1991).

[25] (2009) 8 SCC 106.

[26] P.M. Bakshi, *Press Law: An Introduction*, (BTFRI Publications, 1985).

publications. Freedom of press is pivotal because of the check and balance system that it ensures by restraining the abuse of power in a democracy. The restrictions imposed do not have a set standard to measure the reasonableness but such limitations are deemed to pass the test of reasonableness if they are in no way excessive or disproportionate[27], subject to the facts, circumstances and merit of each case.[28]

The inclusion of the terms '*liberty of thought, expression and belief*' in the Preamble of the Constitution of India by the founding fathers of our nation signifies the protection of freedom of speech and expression. No special privilege was accorded to the press. Dr. B.R. Ambedkar opined that press is yet another way to express an individual's beliefs[29] and the Constitution of India from its very inception, delayed no further in declaring the freedom of press as a derivative of the freedom of speech and expression. However, liberty of such mammoth magnitude carries with it a great scope of abuse. To facilitate the smooth functioning of a political democracy, free press and speech are of vital importance.[30] A definite balance must be struck between the freedom of press and the consistency of the said laws in a democratic society that the Constitution of India cherishes.[31]

The '*direct and inevitable effect test*' was established in the Express Newspaper Case[32], wherein the Court held that a restriction cannot be imposed on the press which would amount to a have a direct impact on its freedom of circulation. In *LIC* v. *Manubhai D. Shah*[33], it was held that it is important to extend to the media the right to freely express its views, sans which would result in a dictatorship and would defeat the whole purpose of a democracy. The right to privacy must also be looked into when media is exercising its right to free speech.[34] For the smooth operation of the due process of justice, it is necessary for the press to exercise its freedom of publication cautiously and responsibly.[35]

IV. JUDICIAL INTERPRETATION OF TRIAL BY MEDIA

The phenomenon of media trial is attached with various nuances and complexities which can be inferred from the judicial pronouncements explaining

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27 *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118.

28 *Gujarat Water Supply and Sewerage Board* v. *Unique Erectors (Gujarat) (P) Ltd.*, (1989) 1 SCC 532 : AIR 1989 SC 973.

29 Constituent Assembly Debates Vol. VII, p. 786 (1.12.1948).

30 *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124.

31 *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 : (1960) 2 SCR 671.

32 *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578.

33 (1992) 3 SCC 637 : AIR 1993 SC 171.

34 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632 : AIR 1995 SC 264.

35 Hamburg, "Free Press v. Free Trial: The Combination of Mr. Justice Frankfurter", U. Pitt. L. Rev, (1965).

the scope and the facets to trail by media. A major lapse in the reporting by media was observed in the Mumbai Terror Attack Case[36] where the coverage by media risked the security of nation by spilling out details about the life of security personnel, police and hostages. Media has been involved in the enhancement of the Target Rating Points (TRP) in a nasty manner thereby contributing to the menace of trial by media. Unless in the interest of the public or for dismantling the truth, the reputation of an individual cannot be jeopardized by the media. Notwithstanding the verdict of the court, the individual's social life is tarnished.[37]

In *Leo Roy Frey* v. *R. Prasad*[38], the court ruled in favour of the media stating that there should be satisfaction beyond reasonable doubt that the publication hinders fair trial in a sub judice matter or it amounts to an imminent proceeding.

In *Rajendra Sail* v. *M.P. High Court Bar Assn.*[39], it was held that it is extremely necessary in the current scenario to check for publications which are contentious in nature. Court can invoke contempt proceedings against the media house which tend to interfere with the due course of justice and their right to free speech is not absolute. This was the ruling in *Court on it's own Motion* v. *Times of India*[40].

In *Harijay Singh, In re*[41], it was held that freedom of the press is not at a higher pedestal than what is guaranteed to freedom of speech and expression. The right of the media to propagate its views is subject to restrictions. One of the effective tool to curb unlimited power in the hands of the media is the Court's power to initiate contempt proceeding. Broadcasting the half baked version by portraying only one side of the story should be strictly checked against since media caters to a huge audience. This was held in *M.P Lohia* v. *State of W.B.*[42]. The role of the media was strictly defined in *Rao Harnarain Singh Sheoji Singh* v. *Gumani Ram Arya*[43] to report matters and not adjudicate sub judice cases. However, if the criticism made by the media is fair, then it wouldn't amount to contempt.[44]

There is a fierce unhealthy competition among the media operators to break the news to the public thereby putting at stake the interest of the public and

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[36] *Mohd. Ajmal Mohammad Amir Kasab* v. *State of Maharashtra*, (2012) 9 SCC 1.
[37] *Kartongen Kemi Och Forvaltning AB* v. *State* , 2004 SCC OnLine Del 65 : (2004) 72 DRJ 693.
[38] 1958 SCC OnLine P&H 52 : AIR 1958 P&H 377.
[39] (2005) 6 SCC 109.
[40] 2013 SCC OnLine P&H 6997.
[41] (1996) 6 SCC 466.
[42] (2005) 2 SCC 686.
[43] 1958 SCC OnLine P&H 21 : AIR 1958 P&H 273.
[44] *Ram Dayal Markarha* v. *State of M.P.*, (1978) 2 SCC 630 : AIR 1978 SC 921.

hindering the trial in court[45]. Thus, the courts have to entail a rather greater pro active role by positively intervening and keeping a check on external factors that tend to interfere in criminal trial.

V. INTERPLAY BETWEEN FREE SPEECH AND FAIR TRIAL-AN INTERNATIONAL PERSPECTIVE

There has been persistent discord between media and the judiciary which is an inevitable dichotomy and there has been constant tussle between the two Constitutional right of free trial and free speech thereby giving rise to dialogue by way of various international instruments.[46] The first of the many international principles that lay down a firm foundation for International Criminal Law is the Nuremberg Tribunal[47], which aims at setting standards of fair trial. The various international and national Human Rights instruments that have emphasized on the harmonious coexistence of fair trial, freedom of media and independence of judiciary are the United Nations, UDHR, ICCPR, ECHR, ACHR and AFCHR. These instruments are limited in scope and non binding in nature.[48] The origin of right to fair trial is said to have begun with the Magna Carta.

Article 3 of the UDHR[49] provides for right to life, liberty and security of persons. Article 6 enshrines about independence of judiciary. Article 10 speaks about independence and impartial tribunal. Article 11(1) provides for the presumption of innocence to ensure fair and public hearing. The ICCPR[50] treaty analyzed the principles laid down in UDHR and formulated principles on the same lines. Article 14[51] sets the minimum standard for fair trial. Article 18 enshrines the freedom of press which implicitly flows from the freedom of speech and expression. Article 14(2) of ICCPR and Article 6(2) of ECHR provide for the principle of presumption of innocence of an accused in a criminal trial until proven guilty. Article 6 of the ECHR, 1950 enunciates the entitlement to every individual a fair and public hearing by an independent tribunal. Provisions on similar lines find its place in Article 8 of the American Convention on Human Rights (ACHR), 1969 and Article 7 of the African Charter on Human and People's Rights (AFCHR), 1981. The aforementioned

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45 Ram Jethmalani and D.S.Chopra, *Media La*w, (Thomson Reuters, Vol. 1, 2nd edn., 2014).

46 Neeraj Tiwari, "Fair Trial vis-à-vis Criminal Justice Administration: A Critical Study of Indian Criminal System", Journal of Law and Conflict Resolution, Vol. 2(4).

47 Sivasubramaniam Bahma, "The Right of an Accused to a Fair Trial: The Independence and Impartiality of the International Criminal Courts", Durham University, (2013), available at 20 Durhum e-Theses online.

48 Furqan Ahmed, "Human Rights Perspective of Media Trial", Asia Law Quarterly, 47-62 Vol. I, No. 1.

49 Universal Declaration of Human Rights, 1948.

50 International Covenant on Civil and Political Rights, 1976.

51 Indian Constitution, Art. 14.

principles are proof of the fact that an impartial judicial system is pivotal to right to fair trial. Article 10 of ECHR provides for the freedom of press.

Freedom of media is of as much paramount importance as is the right to fair trial and independent judiciary and no particular right can outweigh another and this is substantiated by way of numerous international principles which provide for the co habitation of these basic principles.[52] The Madrid Principles in Media and Judicial Independence which was conducted by the International Commission of Jurists in 1994 provide for the principles as under[53]:

1. Freedom of media is constituted under freedom of expression and the various facets of rights of media include seeking, disseminating and imparting information to the public to facilitate the administration of justice.
2. No restrictions should be imposed which are discriminatory in nature.
3. The basic principles are subject to be restricted in case of any sort of prejudice to the defendant.
4. There should be no restrictions of any special nature applied to the reporting of a matter concerning the administration of justice.
5. Every person shall have a right to communicate information about an on going investigation.
6. Secrecy of investigation should be maintained to ensure the principle of presumption of innocence of the accused.

More often than not, truth evolves from the opposing opinions and its suppression would amount to detrimental growth which the freedom of speech aims at fostering[54]. Media is a narration of the happenings in the court and aims at preventing miscarriage of justice. The principle of 'Presumption of innocence' is an important facet of criminal law as the burden of proof lies with the prosecution to prove otherwise, beyond reasonable doubt. The legislative intent behind this is the inference of the legal system that a person, by nature, is innocent and dignified. Unless proven by the procedure established by law, no person can be assumed to be guilty. Even if there remains an iota of doubt in the mind of the judge, then the accused is acquitted because of the underlying jurisprudence that it is better for hundred guilty men to be

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[52] Dr L.V. Singhvi, "Draft Universal Declaration on the Independence of Justice", UN Special Rapporteur, 1989.

[53] The Madrid Principles on the Relationship Between the Media and Judicial Independence, Established by a Group Convened by International Commission of Jurists, its Centre for the Independence of Judges and Lawyers, & the Spanish Committee of UNICEF, 1994.

[54] Gregg Barak, "Mediatizing Law and Order, Applying Cottle's Architecture of Communicative Frames to the Social Construction of Crime and Justice", Crime Media Culture, (2007).

acquitted than a single innocent man to be convicted for an act he has not committed.. Presumption of innocence carries with itself the sacrosanct principles of Right to Equality, Right against Self incrimination, Right to life and personal liberty and the Right to a fair trial in a just and reasonable manner. Media responsibility is of utmost importance to ensure that the cardinal principles contained in various International declarations with respect to individual liberties are not violated.[55] There is a dire need to develop an approach to control the pre judgement of a case by the media and protect the defendant's inherent Constitutional rights.

The concept of neutralizing technique was for the very first time adopted in the case of O.J. Simpson[56]. This technique is not prohibitive but seeks to strike a harmonic coexistence between free speech and fair trial in light of administration of justice.[57] In India, there are a plethora of precedents, *Brij Bhushan* v. *State of Delhi*[58], *Virendra* v. *State of Punjab*[59], to list a few, where in a balance between Article 19(1)(a) and pre censorship has been observed by way of prior restraints[60]. Courts are inherently vested with the power to prohibit media publications in relation to a proceeding, temporarily. The alarming rate at which media has been involved in reporting of sub judice cases is hindering the due process of justice, tampering with the merits of the case and affecting the sentiments of the parties. In *Sahara India Real Estate Corpn.* v. *SEBI*[61], the court realized the need to lay down guidelines on the manner and scope of reporting of pre trial matters by the media. Postponement orders passed by the court on publication, for a temporary duration, is not a punitive measure but a preventive one to maintain an equilibrium between competing rights on the account of failure of the neutralizing technique.

VI. RIGHT TO FAIR TRIAL

The concept of fair trial is a complex right with multiple facets attached to it which manifests in a number of legal rules and the Constitutional foundation of this procedure is observed in Article 21 to facilitate administration of justice. Media houses have to ensure that they maintain a sync between right to privacy, free speech and uplift the cherished principles of a democratic society that the Constitution of India lays down by granting ample protection to the private life of an individual.[62]

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55 *R.* v. *David Edwin Oaks*, 1986 SCC OnLine Can SC 6 : (1986) 26 DLR 20.
56 *State* v. *Simpson*, No. BA 097211 (Cal. Super. Ct filed July 22, 1994).
57 200th Law Commission Report, *supra*.
58 AIR 1950 SC 129.
59 AIR 1957 SC 896.
60 *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780 : AIR 1971 SC 481.
61 (2012) 10 SCC 603.
62 H.M. Seervai., *Constitutional Law of India* 723 (Universal Law Publishing Co. Vol. 1, 4th edn. 1991).

Right to equality underlies with it the Right to fair trial which is an adjunct of Article 21[63] of the Indian Constitution and is a guarantor against any kind of discriminatory action[64] made against the accused or suspect at any stage of the trial. In this way, equal treatment before law is fostered. This was held in *Maneka Gandhi* v. *Union of India*[65]. Further the right to remain silent is a constitutional privilege under Article 20(3)[66] of the Indian Constitution which enshrines the right of an accused against self incrimination[67]. No person accused of any offence shall be compelled to be a witness against himself. Section 316, 315, 313 and 161(2) of the Code of Criminal Procedure Code and various provisions of the Evidence Act, further substantiate on similar lines by giving immunity and protection to an accused at any stage of the trial[68]. Media interferingin a proceeding and affecting the right of an individual to be presumed innocent is gross miscarriage of justice.

The importance of the fundamental right of presumption of innocence was emphasized in *Vishaka* v. *State of Rajasthan*[69]. In *P.N. Krishna Lal* v. *Govt. of Kerala*[70], principle of 'Presumption of innocence' was established to be a part and parcel of a good number of covenants of Indian law. However, the media, with complete disregard to this sacrosanct principle of criminal law oversteps it's boundaries by apprehending a suspect or accused in a trial as the 'convict' which completely clouds a free trail with bias. It was held in *National Legal Services Authority* v. *Union of India* that it is the court's duty to interpret the law of the land without being influenced by the public sentiment aroused by the media.[71] It is important to categorize the stages of a criminal trial into pre trial, actual trial and post trial, as they entail a chain of action and playing with the right at one stage would amount to adverse repercussions thereby drifting the trial and misleading the due process of law[72].

VII. LAW OF CONTEMPT

The genesis of the law of contempt dates back to 1921. The meaning of 'Contempt' has seen a shift from a restrictive definition as an offence against the sovereign to an exhaustive definition to ensure the administration of justice without any undue interference.[73] The general meaning of the term contempt includes any act which shows disgrace, wilful disobedience or any act

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63 Indian Constitution, Art. 21.
64 *Ibid*.
65 (1978) 1 SCC 248 : AIR 1978 SC 597.
66 Indian Constitution, Art. 20, Cl. 3.
67 *Ibid*.
68 Code of Criminal Procedure, 1973.
69 (1997) 6 SCC 241 : AIR 1997 SC 3011.
70 1995 Supp (2) SCC 187.
71 (2014) 5 SCC 438 : AIR 2014 SC 1863.
72 Consultation Paper of Media Law, Government of India, Law Commission of India, 2014 May.
73 Contempt Power of Court, www.legalserviceindia.com/article, last visited on Aug 24, 2018.

in violation of the order of a court tending to lower the dignity of the court.[74] The legislative intent behind the law of contempt is to ensure the due process of justice and secure the sanctity and authority of the judiciary by empowering the court with inherent power to hold an individual for contempt if found obstructing the administration of justice. There have been developments made to the law of contempt of a tremendous magnitude,to act as a powerful mechanism to secure justice.[75] In *Govind Sahai* v *State of U.P.*[76], court emphasized that contempt applied to any conduct that tends to lower the authority of the court or interferes and prejudices fair trial of a proceeding, either pending or imminent.[77]

With the increasing reports of cases of contempt, the Contempt of Court Act, 1952 was subject to scrutiny and a committee named Sanyal Committee was appointed to look into the same. The committee examined the legislation in question and made recommendations along with a draft bill for codification. The primary issue that was analysed was the need to ensure administration of justice and its conflict with freedom of press. The main recommendation was pertaining to the judicial proceeding wherein the knowledge of judicial proceeding came to become a defense to a publisher. This clearly highlighted the importance given to the freedom of press over other issues. The committee further suggested to uphold the continuance of the term 'imminent proceedings' which would attract liability on account of interference. In *Padmawati Devi Bhargava* v. *R.K. Karanjia*[78], the filing of an FIR was considered to be the starting point of the pendency of a judicial proceeding and would amount to sub judice reporting[79]. Great reliance on *A.K. Gopalan* v. *Noordeen*[80] by the Sanyal Committee[81] was observed wherein lodging of First Information Report (FIR) was not considered to be the starting point of pendency of trial nor was it considered to be imminent as a proceeding is said to be imminent only after the arrest takes place. Owing to the shortcomings in the report submitted by the Sanyal Committee, the Joint Parliamentary Committee was constituted which suggested major changes which was incorporated in the Contempt of Courts Act, 1971. Thus trial by media, prejudicing administration of justice and scandalous reporting on sub judice matter were considered to be serious offenses for which the Contempt legislation carried remedies.

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[74] Justice Tek Chand, *The Law of Contempt of Court and Legislatur*e, (University Book Agency Allahabad 4th edn., 1997).

[75] Gordon Borrie and Nigel Lowe, *The Law of Contempt*, (Butterworth & Co. Publishers Ltd., 1973).

[76] AIR 1968 SC 1513.

[77] C.S. Subrahmaniam, In re, 1952 SCC OnLine Mad 283 : AIR 1953 Mad 422.

[78] 1962 SCC OnLine MP 71 : AIR 1963 MP 61.

[79] Surendranath Mohanty v. State of Orissa, 1996 SCC OnLine Ori 216, *Rajendra Kumar Garg* v. *Shafiq Ahmad Azad*, 1956 SCC OnLine All 377 : AIR 1957 All 37.

[80] (1969) 2 SCC 734.

[81] Sanyal Committee Report, 1963.

Article 129[82] and 215[83] of the Constitution of India empower the Supreme Court and the High Court with inherent power to initiate contempt proceedings against anyone hindering the administration of justice. In *J.R. Parasahar* v. *Prashant Bhushan*[84], the aforementioned provision is not independent of Article 19(1)(a) and there is reliance laid on the freedom of speech and expression as held otherwise *Vinay Chandra Mishra, In re*.[85] Under the Contempt of Courts Act, 1971[86], contempt is classified into both criminal and civil. Section 2(c) of the Act defines '*contempt'* to include:

1. *Scandalizing the court*
2. *Interference with the due course of any judicial proceeding*
3. *Interference with the administration of justice*

Section 2(c) includes the term 'publication' which is applicable to all the above mentioned heads of contempt. This implies that any publication that unnecessarily intervenes or interferes with the judiciary or lowers the confidence of the public by misrepresentation of sub judice matters would amount to contempt of court. Any publication which is contentious in nature leading to a media trial would attract contempt proceedings and a limitation can be imposed on the freedom of the press.[87] To not only protect the judiciary but also to uphold the confidence of the public, the Contempt of Courts Act, 1971 was passed.[88]

Section 4 of the Contempt of Courts Act, 1971 provide for the exceptions to contempt which include publication of fair and accurate report of the judicial proceeding which grants immunity to the press from being held for contempt.[89]

Fair reporting is subjective and should be determined on a case to case basis. A one sided report of the act must not be presented to the public. Section 5 of the Act immunizes the media from contempt for reporting of a fair and reasoned criticism made in good faith and made in the greater interest of the society. As long as the statement made is done in bonafide intention and is truthful in all aspect, Section 13(b) of the Act grants immunity for any such publication[90]. The Press Council Act, 1978 has laid down guidelines and

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82 Indian Constitution, Art. 129.
83 Indian Constitution, Art. 215.
84 (2001) 6 SCC 735.
85 (1995) 2 SCC 584 : AIR 1995 SC 2348.
86 The Contempt of Courts Act, 1971, Acts of Parliament, 1971 (India).
87 Law in Perspective: *Media Reporting and Contempt of Court: The Law Revisited* (Feb.13, 2011), <http://legalperspectives.blogspot.com/2011/02/media-reporting-and-contempt-of-court.html last visited on Aug 20, 2018>.
88 *D.C. Saxena* v. *Chief Justice of India*, (1996) 5 SCC 216.
89 *Subhash Chand* v. *S.M. Aggarwal*, 1983 SCC OnLine Del 342 **:** 1984 Cri LJ 481.
90 *Indian Law Institute, Restatement of Indian Law Contempt of Court*, (Saurabh Printers Pvt. Ltd 1st edn., 2011).

restrictions on the media on reporting matters that are sub judice by way of norms and an ethical code. However, these guidelines are limited in their scope and applicability as they are not legally binding.

VIII. CONCLUSION AND SUGGESTION

Media is a powerful medium and aids in the exchange and communication of ideas and opinion. An independent media is a carrier of courage and plays an active role in the quest of truth in a democracy. But, a free press entails with it the responsibility to realize the consequences of its actions. The interplay between the right to freedom of speech and expression and the right to fair trial has resulted in a conflict between the competing rights. There is a dire need to curb the implications of media trial as it affects the criminal justice system and the public at large. To harmonize fair trial and free press, it is necessary to enforce the Contempt of Courts Act, 1971 efficiently. Until the verdict of the Court on a sub judice matter, the media has a duty to report fair and accurate facts with no prejudice whatsoever. Media has to understand the underlying legal consequences principles of criminal justice system. The existing legislation do not encompass modern technological developments of media which amount to legal dilemmas. Media coverage on past conviction or on the character of an accused creates a widespread perception in the minds of the readers about the individual.

Media needs to turn to statute, legal principles, legal judgments and guidelines in order to put away litany of ban and restrictions. Reporters need to develop an informed attitude and understanding with regard to procedure of reporting of court proceeding. A rather more feasible option is to implement strict punitive actions to punish and prevent publication that surpass Article 19(2) to (6) hindering the administration of justice by over weighing Article 19(1)(a). Court should impose punitive measure under the Contempt of Courts Act, 1971 to have a deterrent effect on sensationalized coverage of news. This is a strict liability approach as followed in the UK and US legal system, laid down as the Bench-Bar-Press guidelines[91], to mitigate the effects of pre trial publicity.

Further, journalist sought to be given proper training in certain aspects of law relating to freedom of speech and the restrictions imposed therein, law of defamation and contempt.[92] It must be included in the syllabus for journalism and special diploma on the inter-relation between law and journalism must be taught.

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[91] Bench-Bar-Press Committee of Washington, available at <www.courts.wa.gov/prog>.

[92] 200th Report of the Law Commission on "Trial by Media: Free Speech v. Free Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)".

According to Section 3 of the Contempt of Courts Act, 1971, a judicial proceeding is said to be pending in case of a civil proceeding on the institution by way of filing of a complaint and in a criminal proceeding, under the Code of Criminal Procedure, 1898, when the charge sheet is filed or when the court issues summons or warrant against the accused or when the Court takes cognizance of the matter, until the case is finally decided including appeals or revision petitions.[93] Thus, the definition of 'publication' under the law of contempt gives complete immunity to the media to make publications regarding the case or relating to the character of the accused during the pre-trial stage. Even if the reporting is prejudicially affecting the case but is done before the filing of the charge sheet, the media cannot be held liable for contempt and can get away even after tainting the reputation of the accused. This is a serious and grave lacuna in the existing law as with the advent of technology, the highest degree of investigative journalism is observed during the pre-trial stage of the criminal proceeding.

While under the common law, interference with imminent and pending judicial proceeding amounts to contempt but the Contempt of Courts Act, 1971 only punishes any interference in pending judicial proceeding. The wide and vague scope attributed under the existing law paves way for lacuna in the determination of sub judice period and grants immunity to media without attracting contempt proceedings. The ambiguity lies in the reporting of contentious publication regarding the suspect or the accused during the pre-trial stage before the event of pendency as the vital gap between an accused and a suspect affects the rights of the accused sabotaging the grassroots of justice even prior to it's commencement. Sub judice matters means matter under judicial consideration. The starting point of pendency has gone several amendments in the Contempt of Courts Act, 1926, Contempt of Courts Act, 1952, Report of the Sanyal Committee, 1963 to the existing Contempt of Courts Act, 1971, from filing of FIR, date of arrest, pending and imminent proceedings to the present explanation of pendency under section 3 of the Act. The difficulty in fixing the time onwards which a proceeding may be treated as pending still persists. What the legislature must keep in mind while bringing about an amendment is to identify the point at which there lies a substantial risk of interference with the administration of justice.

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[93] Justice Tek Chand, *The Law of Contempt of Court and Legislatur*e, (University Book Agency Allahabad 4th edn., 1997).

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20. Bench-Bar-Press Committee of Washington, available at www.courts.wa.gov/prog**.**
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26. Sanyal Committee Report 1963.
27. Universal Declaration of Human Rights, 1948.

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31. Justice R.S. Chauhan, *Trial by Media: An International Perspective*, (PL Oct S-38, 2011) http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=22062., last visited on September 3, 2018.

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APPLICATION OF ECONOMIC TOOLS IN ENVIRONMENT & LAW: A STEP TOWARDS SUSTAINABLE DEVELOPMENT AND GREEN ECONOMY IN INDIA

—*Divyanshu Gupta*[*]

Abstract — Over the past few years, every country is tackling with environment degradation and India is one of the few countries in the World whose economic growth has tremendously increased. This economic growth has given rise to many employment opportunities, establishment of industries, rapid urbanization, commercialization etc. But India's remarkable economic growth has been recognized through degradation and pollution of environment, ecological imbalance, water scarcity etc. Considering the size and diversity of its economic structure, environment risks are far-reaching at its heights. The term 'Green Economy' has been capturing around the entire world where every country is now focusing on environmental issues, adopting green economy as their fundamental economy and working towards sustainable development. India so-far is facing the difficulty of co-existence of the conventional economic growth strategy and slow effort to mitigate and adapt to the climate change issues. In present scenario, shutting down of industries or reducing the production system will ripple the Indian economy in the sake of tackling climate change. Adopting the multi-disciplinary Green approach will have negative effects on employment, trade, agriculture activity, business pattern,

[*] 3rd year BBA LLB (Hons), Symbiosis Law School, Pune.

which definitely requires, new policies, fiscal reforms, international trade relations and trade patterns with the other countries, skill development program, extensive research, development of resource efficiency. Judicious consideration and framing of law and policies of manageability factor into the continuous financial choices for boosting framework and assembling can set things moving for putting the Indian economy on the Green Economy way. This article will deal as to how one can apply economic tools in the field of environment attaining sustainable development. These economic tools could help us to develop and better understand the efficiency and working of law and hence, India can adopt the principles of green economy in line with economic development.

Key Words: Green Economy, Sustainable Development, Environment, climate, law, policy.

I. INTRODUCTION: WHAT IS GREEN ECONOMY

The UNEP defines *green economy as one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities*.[1] In simple words, green economy is considered as reduction of carbon emission, resource efficient and social inclusive. After the Global Financial Crisis, 2008, the world has decided to adopt GLOBAL GREEN ECONOMY concept with the aim of reviving the world economy, saving and creating jobs, protecting vulnerable groups, promoting sustainable and inclusive growth, reducing risks from carbon dependency and ecosystem degradation and achieve the Millennium Development Goals (MDGs), 2000.[2] However, the concept itself first emerged with Pearce et al.'s (1989) Blueprint for a green economy for the UK's Department for the Environment.[3] There is no unique definition of the green economy, but the term itself underscores the *economic* dimensions of sustainability or, in terms of the recent UNEP report on the green economy, it responds to the "growing recognition that achieving sustainability rests almost entirely on getting the economy right".[4] Green economy policy measures have also been discussed at length in international negotiations, including UNCED in Rio in 1992. For example, the Rio Declaration

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1 Doreen Fedrigo-Fazio and Patrick ten Brink, Green Economy, What do We Mean by Green Economy? UNEP, (May 2012).

2 Satrajit Dutta, " 'Green Economy' in the Context of Indian Economy", International Review of Research in Emerging Markets and the Global Economy (IRREM), (2016, Vol. 2, Issue 3).

3 Global Green Economy: A Review of Concepts, Definitions, Measurement Methodologies and their Interactions, p. 3, (2017, Vol. 4, Issue 1).

4 Jos Antonio Ocampo, Aaron Cosbey and Martin Khor, the Transition to a Green Economy: Benefits, Challenges and Risks from a Sustainable Development Perspective, United Nations Conference on Trade and Development (UNCTAD), United Nations Environment Programme (UN Environment), United Nations Department of Economic and Social Affairs (UNDESA).

included principles promoting the internalization of environmental costs and the use of economic instruments (Principle 16) as well as eliminating unsustainable consumption and production (Principle 8).[5]

Hence, Green economy strives to achieve growth in income and employment generation by providing public and private investments at domestic level and international level through reduction in carbon emission, enhance resource efficiency and avoid loss of biodiversity and ecological system. In contrast to the current economy where GDP growth is determined through conventional way, in green economy the GDP growth will be determined taking into consideration the ecological impact of the productivity of the country. It will give us with another perspective on GDP, one that can improve environment protection and resource utilization in a rational manner.[6]

II. PRINCIPLES OF GREEN ECONOMY

In 2012, Northern Alliance for Sustainability, an international non-profit organization representing a network of NGO in the northern hemisphere published 8 principles for green economy which was discussed in the workshop held in 2011.[7] These principles as evolved form the basis of Green Economy. The identified principles are stated below[8]:

- The Earth Integrity Principle: The Earth, her characteristic networks and environments, have the basic ideal to exist, prosper and develop, furthermore, to go ahead with the essential cycles, structures, capacities and rules that continue all creatures. Each human has an obligation to make sure and protect her.

- The Planetary Boundaries Principle: This principle states that human needs are dependent on ecological system and there are limits to economic growth. The government must set long-term plans which does not affect ecological imbalance. It should meet the requirements of an economic growth.

- The Dignity Principle: This principle states that every human being in present and in future has a right to livelihood. Poverty eradication and

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5 Cameron Allen and Stuart Clouth, A Guidebook to the Green Economy, UN Division for Sustainable Development, (August 2012).

6 Surya Bhakta Pokharel and Bishnu Prasad Bhandari, "Green GDP: Sustainable Development", (May 5, 2017 5.07 a.m.), <https://thehimalayantimes.com/opinion/green-gdp-sustainable-development/>.

7 A Guidebook to the Green Economy – Issue 2: Exploring Green Economy Principles, <http://www.greengrowthknowledge.org/ sites/default/files/downloads/resource/GE,guidebook Issue2: UNDESA pdf>.

8 *Ibid*.

redistribution of wealth in economical way should be the main priority of the Government and measured in those terms.

- The Justice Principle: This principle ensures that benefits and burdens must be reasonably shared by all. This includes the use of natural resources, access to goods and services and responsibility not to avoid and compensate for all the losses and damages. All institutions, corporates and decision-makers need to be liable to approach principles of responsibility and personal obligation about their choices.

- Precautionary principle: This principle ensures that new products and technologies developed should not have harmful effect on environment, human beings, ecosystem. It should not have destruction and unexpected efforts on humanity and environment. The burden of proof should lie on the person concerned and he/she should avoid the shifting of burden.

- The Resilience Principle: It emphasizes that diversity and diversification are preconditions for sustainability of life. A diversity of organizational models and governance levels needs to be cultivated, along with diversified economic activity that minimizes commodity dependence.

- The Governance Principle: The Governance Principle states that subsidiary democracy must be upheld and revitalized in accordance with the principle of prior informed consent. All policies, rules and regulation need transparent and participatory negotiations that include all affected people. Structural transformation should be driven by appropriate public investments that guarantee benefit sharing.

- Beyond GDP Principle: This principle recognizes that mere GDP should not be used as a measure for progress and growth. But we have to design policy goals in such a way that it takes into account environment, social well-being and environment policies and this will show the real GDP growth.

III. GREEN ECONOMY AND SUSTAINABLE DEVELOPMENT IN INDIA

The main motive of the green economy is to make sure sustainable development and meet a harmonious construction between economic and ecological development as expressed by Brutland Report to a perspective in which socially sustainable development is the aim, ecological sustainability is a

fundamental need and the economy is seen as a tool.[9] India being a member State of United Nations Environment Programme has adopted the 2030 agenda for Sustainable Development. This agenda is a plan of action for people, planet and prosperity.[10] It integrates and recognizes eradicating poverty in all spheres, removing inequality among member States, preserving planet and sustaining economic growth.[11]

India ranked very poor in SDGs 2018 index-112 out of 156 countries assessed.[12] This clearly indicates that India has a long journey to go ahead in achieving Sustainable Development Goals.

In 2013 as a result of air pollution, India suffered a loss of 8.5% equivalent to GDP.[13] Furthermore, World Bank released a report in 2016 that gave the assessment that annual cost of environment degradation in India amounts to about 3.75 trillion equal to 5.7% of GDP.[14] Although the economy (GDP) of our country is increasing, but the negative consequences will be seen in the long run. Sustainability of nature and ecological system has been considered necessary because of the extraordinary vulnerability in terms of life for which we all need to suffer in future or at later stage if there is any extreme change in the structure of an environment causing elimination of a portion of the essential plant and species, diminishing biodiversity and influencing our biological system.

IV. GREEN GROWTH

Green growth involves rethinking growth strategies with regard to their impact on environmental sustainability and the environmental resources available to poor and vulnerable groups.[15] Ministry of Environment, Forest and

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[9] Eva Alfredsson Anders Wijkman, The Inclusive Green Economy Shaping Society to Serve Sustainability –Minor Adjustments or a Paradigm Shift? Mistra, (April 2014).

[10] <https://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development.html>.

[11] *Ibid*.

[12] Sachs, J., Schmidt-Traub, G., Kroll, C., Lafortune, G., Fuller, G., SDG Index and Dashboards 2018, Report 2018, New York: Bertelsmann Stiftung and Sustainable Development Solutions Network (SDSN).

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[14] World Bank, 2013, *India: Diagnostic Assessment of Select Environmental Challenges, Volume 2, Economic Growth and Environmental Sustainability, What are the Tradeoffs?* Washington, DC. © World Bank. (*Volume 2)* <https://openknowledge.worldbank.org/handle/10986/16028 License*:* CC BY 3.0 IGO>.

[15] 13th Finance Commission Report, 2010-2015, (Vol. 1), <https://www.prsindia.org/uploads/media/13financecommissionfullreport.pdf>.

Climate Change has recognized that green growth and poverty eradication will give the vision of Sustainable Development.

Under the Copenhagen Accord, India has advocated its domestic mitigation action as an endeavor to cut the emissions intensity of its GDP by 20–25% by 2020 in comparison to the 2005 level.[16] More recently in its Intended Nationally Determined Contributions (INDCs), India has announced to cut the emissions intensity of its GDP by 33–35% by 2030 in comparison to the 2005 level.[17] Subsequently green development has assumed importance in the environment justice.

This concept has far reaching effort to mitigate climate degradation and in the meantime accomplish economic development that is socially comprehensive and environment sustainable. A developing country like India whose economy is rising at a faster pace, environment effect is threatening as it will place serious constraints on land, water, fuel, energy and high commodity prices.

According to World Bank Report[18], rising temperature and change in rainfall pattern could cost India 2.8 % of GDP and lower the living standards of about half of the country's population by 2050. This will result in low agricultural yields, lower labor productivity and degradation in health. There will be water crisis, food crisis leading to higher demand of essential commodities and higher prices. The amount to which our economy will grow green will depend upon its capacity to cut the quantity of resources required to support the economic growth and development to enhance social equity and employment creation. Green growth and its development will play an important role in balancing these priorities. It has been projected that 30% reduction in particulate emission will lower the GDP about $ 97 billion or 0.7% with very little impact on GDP growth rate.[19] It will significantly reduce the harm done to health by $105 billion which to some extent will compensate the loss.[20]

The entire point of Green economy is to develop an economy which will check the environment issues and scarce use of natural resources. India will have to suffer in the long run if such issues are not taken into consideration. So not only the economy of the country will run smoothly without affecting its GDP growth, but it will also include judicial decision on sustainable

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[16] Green Growth and Sustainable Development in India: Towards the 2030 Development Agenda, TERI & Global Green Growth Institute, <https://www.teriin.org/projects/green/pdf/National_SPM.pdf>.

[17] *Ibid*.

[18] <https://www.worldbank.org/en/news/press-release/2018/06/28/climate-change-depress-living-standards-india-says-new-world-bank-report>.

[19] <http://www.worldbank.org/en/news/press-release/2013/07/17/india green growth necessary and affordable for India says new world bank report>.

[20] *Ibid*.

development for boosting infrastructure and other sectors of the Indian economy on the green economy path.

V. JUDICIAL ACTIVISM AND SUSTAINABLE DEVELOPMENT IN INDIA

After Bhopal Gas Tragedy in 1984, India saw development in the field of environmental jurisprudence and has seen an impressive series of other cases in environment law.[21] One such legislation passed by Parliament was Environment Protection Act 1986. This was an "umbrella" legislation designed to give a framework for Central Government coordination of the activities of various Central and State authorities established under previous laws such as the Water Act and the Air Act.[22] This reality couldn't be ignored that developing countries like India whose economy is developing at a quicker pace and environment degradation in these developing countries and worldwide, experts internationally came with the doctrine called *Sustainable Development,* means a balance between development and environment.

This concept first came into limelight during UN conference on Human Environment held at Stockholm in 1972. But the proper definition came into picture in the Brutland Report of 1987 which defines Sustainable Development as "*development that meets the needs of present generation without compromising the ability of the future generations to meet their own needs."*[23] This report accentuated on the significance of development in terms of economic development and ecological development. The ultimatum is to merge and integrate economic and ecological considerations into decision-making.[24] The world Summit on Sustainable Development in Johannesburg in 2002 was held to address the issue of environment degradation, achieve speedy economic growth and keep an eye on depleting natural resources that future generations will need for their progress and prosperity. The Summit focused on three core issues and identified that in order to achieve sustainable development, economic development, social development and environment protection has to be integrated together.[25]

Indian Judiciary in a bid to preserve ecological system and protect from environment degradation has played an important role in embracing Sustainable Development. The Principle of Sustainable Development for the

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[21] Abraham, C.M., (1991) "The Indian Judiciary and the Development of Environmental Law", South Asia Research, 11(1), pp. 61–69. <https://doi.org/10.1177/026272809101100104>.

[22] <http://www.ecology.edu/environmental-legislation.html>.

[23] Report of the World Commission on Environment and Development: Our Common Future, p. 41. <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

[24] *Ibid*.

[25] <https://www.un.org/development/desa/dspd/2030agenda-sdgs.html>.

first time was adopted in *Vellore Citizens' Welfare Forum* v. *Union of India* and the court held that "Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."[26] In Narmada Bachao Andolan v. Union of India, it was held that "Sustainable Development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance."[27]

In *M.C. Mehta* v. *Union of India*, *"it was held that Development and Environment Protection are not enemies. It is possible to carry to on development activity applying the principles of Sustainable Development, in that eventuality development has to go on because one cannot lose sight on the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and generation of revenue. A balance has to be struck."*[28] In *Indian Council for Enviro-Legal Action* v. *Union of India*, the court held that, "*while economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation, at the same time the necessity to preserve ecology and environment should not hamper economic and other developments."*[29]

These judgments on the interpretation of Sustainable Development by the Supreme Court clearly indicate that importance has to be given to sustainable development and environment and vice-versa. In order to preserve ecological imbalance and degradation, developmental activity has to be regulated. Therefore, we need to adopt stringent economic policies, legislations, laws, regulations and advance technologies which will ensure sustainable development (economic development as well as environment development).

VI. APPLICATION OF ECONOMIC TOOLS IN GREEN ECONOMY AND INDIAN LEGAL SYSTEM-

Essential to an understanding of the law and economics movement is a set of fundamental concepts. The most central assumption in economics is that human beings are rational maximizers of each satisfaction and, in turn, respond to incentives. It is important to realize that economics, as understood here, is not restricted to analysis of monetary issues; there are non-monetary aspects as well. Usually what is aimed through economic reasoning is the improvement of efficiency. A more efficient allocation is one that increases the net value of resources**.** To being efficient is the main goal of all economic regulation.

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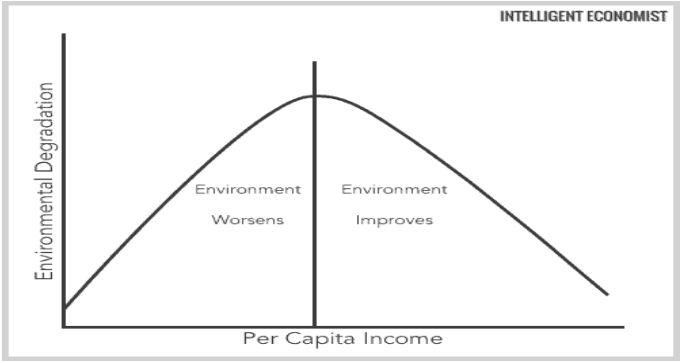
[26] (1996) 5 SCC 647 : AIR 1996 SC 2715.
[27] (2000) 10 SCC 664 : AIR 2000 SC 3751.
[28] (2004) 12 SCC 118.
[29] (1996) 5 SCC 281.

Environment law and economics refers to the use of economic tools and practices in framing laws and policies to study how humans impact the ecosystem and its resources. From a macroeconomics perspective, economic tools are used to study how different taxes and subsidies, laws, regulations and policies promote a healthy environment. At the microeconomic level, economic tools can be used to study how laws and regulations influence the behavior of firms and households to arrive at a predictable environment assessment. The following part of this essay provides for different economic tools that are relevant in determining environment degradation. Analyzing a policy suggests what would be the possible outcome of resource depletion and economic loss, how the country will perceive the new situation and what implication this has for the full array of harmful effects.

VII. ENVIRONMENTAL KUZNETS CURVE

The environment Kuznets Curve is a hypothesized relationship between various indicators of environmental degradation and income per capita.[30] In the initial time of economic development, degradation and pollution increase, but beyond some level of income per capita., the pattern changes and high-income levels economic growth leads to environmental improvement.[31] The contention for Environmental Kuznets Curve testing is that nation accumulates new technology, arrangements for its development and in this way the income of the general population rises and they esteem natural resources when the nation sees extreme improvement in their economy. People at initial stage value development and therefore exploit natural resources and nature. After some accumulation of wealth, they value environment and ecosystem. This is why **EKC's** shape is inverted U curve. The stage of economic development is expressed on X axis and environmental degradation on the Y axis.[32]



[30] David I. Stern, "The Environmental Kuznets Curve", International Society for Ecological Economics, (June 2003).

[31] *Ibid*.

[32] <https://www.intelligenteconomist.com/environmental-kuznets-curve/>.

EKCs are constructed using three models: log-linear, log-quadratic, and log-cubic to explore the relationship between income (constant GDP and per capita GDP) and selected environmental indicators. [33]

Research has been conducted on India in relation to EKC. Most appreciated one, Managi and Jena (2007), has brought out the EKC relation between environmental productivity of three pollutants, such as SO2, nitrogen dioxide (NO2) and suspended particulate matter, and income with the analysis of states level industrial data during 1991-2003. The after effects of the board investigation reveal that scale effect overwhelms over the technique effect and combined effect of income on environmental productivity is negative.[34] A research study from 1960 to 2010 was conducted comparing the relationship between CO2 and GDP. It indicated that there exists N shaped curve for C02 emissions.[35] Which means that there is an increase in technology for environment protection, improved efficiency etc. However, again rising of the curve indicates that as GDP is increasing further this decline in the emission level is not sustained. The economy witnesses a further increase in these emission levels and the tunneling through the inverted U-shaped EKC is temporary.[36]

The improvement of condition and environmental framework with income growth to a great extent relies on the administration arrangements. Approaches to cut down outflows and pollutants will have tremendous effect on the State of EKC. Bringing innovation in environment protection, utilizing alternative modes will create a U-shaped EKC curve. Here are some of the determining factors of policy-making for environment preservation, which are also determinants of the impact of economic growth on the emissions of pollutants.[37]

1. Stages of industrial development, state of technology
2. Types of pollutants: SO2, CO2, contaminated water
3. Economic factors: lower-income countries are less inclined to introduce pollution abatement technology
4. Political behaviour
5. Scale of economic activity

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[33] Rudra A., Chattopadhyay, A., "Environmental Quality in India: Application of Environmental Kuznets Curve and Sustainable Human Development Index". Environ. Qual. Manage., 2018; 1–10. <https://doi.org/10.1002/ tqem.21546>.

[34] Dr. Michael Von Hauff and Mr. Avijit Mistri, "Global Journal of Human-Social Science Research", E: Economics, Global Journals Inc. (USA), (Vol. 15, Issue 1).

[35] <http://www.asianonlinejournals.com/index. php/JOEN/article/view/946/html>.

[36] *Ibid*.

[37] Ota T. (2017), "Economic Growth, Income Inequality and Environment: Assessing the Applicability of the Kuznets Hypotheses to Asia". Palgrave Communications. <https://3:-17069doi. 10.1057/palcomms.2017.69>.

People tend to value those goods which will have positive impact on environment once the income threshold is achieved. At a higher income, people priorities will change as they will value the negative effects of pollution and try to achieve clean environment. In other words, the path of the equilibrium income-pollution starts to decrease when "*the marginal rate of substitution between consumption and pollution declines faster than the marginal rate of transformation between consumption and pollution as income increases.*"[38]

Further, increase in income reflects an increase in size of the country's economy. Keeping the technology effect as constant, an increase in economy leads to environment deterioration. Further as the country develops, the economy shifts towards the service sector and lighter manufacturing, which should have lower emissions per each unit of output (Stern, 2004), thus progressively lowering the local level of environmental degradation.[39] Environment Kuznets Curve might be useful to recognize market driven and arrangement driven instruments when trying to explain the driving forces behind the relative and absolute decoupling of contamination patterns from economic growth. [40] A country with green policy and technology will try to meet economic growth and abate environment degradation with rise in income as already said above. As the motivation behind environment policy is apparently neither to moderate development nor to diminish the output of particular sectors, it is significant that it allows greatest extension for innovative technological solutions to environment problems.

VIII. PROPERTY RIGHTS IN ENVIRONMENT PROTECTION

The property rights are defined as a set of rules and regulations in the use of scarce resources and goods. The set of rules includes obligations and rights, the rules may be codified by law or they may be institutionalized by other mechanisms such as social norms together with a pattern of sanction. [41] Property rights-based measures create right to use natural resources or to pollute the environment up to a predetermined limit and allow these rights to be traded.[42]

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[38] Dr Michael Von Hauff and Mr. Avijit Mistri, "Global Journal of Human-Social Science Research", E: Economics, Global Journals Inc. (USA), (Vol. 15, Issue 1).

[39] *Ibid*.

[40] Protecting the Environment and Economic Growth: Trade-off or Growth-Enhancing Structural Establishment? <https://www.prsindia.org/uploads/media/13financecommissionfullreport.pdf>.

[41] "Property-Rights Approach to the Environmental Problem", in *Economics of the Environment*. Springer, Berlin, Heidelberg, (2000).

[42] Commonwealth Government of Australia, Ecologically Sustainable Development: A Commonwealth Discussion Paper, Canberra, AGPS, (1990).

The possibility of these measures is that if people reserve an option to use natural resources, they will think about these resources for a longer term and deal with them economically. Likewise, the rarer these rights and the more demand is for them, the more they will cost and this will guarantee that the rights are used in the most effective way and that they don't go waste. No one could have felt that natural resources could be ever claimed. To support this assertion, let's take the example of fisheries exploitation in India, assessments done on fishing indicates that there has been over exploitation of nearly two-third of the fish stocks in India and commercial stock has been fully exploited.[43] Overfishing will destroy the ecosystem negatively and alter the ecosystem negatively.[44] In the short run, the size of the stock determines the growth of the stock, which is the flow that may be caught without diminishing stock. In the long run, there is a more complicated relationship between the growth and the size of the stock. The growth depends mainly on two factors: (*i*) the food supply; and (*ii*) the density of fish. The food supply is negatively correlated, and the density positively correlated, with growth.[45] The food supply will be plentiful if the stock of fish is small, but the low density will make it more difficult for the fish to find a mate. However, if there is less food, but the stock is large, it will be easy to find a mate.

Providing property rights in fishing management will check the overutilization of fishing and prevent from fishery collapse. This is because providing property rights where properly defined and effectively enforced will give owner, an incentive to align with underlying natural resource. Providing such property rights have been largely favored and endorsed by economists who are of the view that such a regime would be to sustained growth and development.[46] Further economists have stressed on the fact that giving private property rights in natural resources are essential for growth and development of a nation for a longer period.[47] Let's take another model, urban lakes are among the best wellspring of reviving ground water, however today people have either infringed these lakes or utilized these lakes for dumping waste. These lakes can be restored either by giving complete property rights to the administration or to private entities who can revive these lakes. Giving property rights for the lakes will definitely save the lakes somewhat and revive the sound biological system in the encompassing territories.

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[43] Ashish Fernandes, Sanjiv Gopal, "Safeguard or Squander?: Deciding the Future of India's Fisheries" <http://www.indiaenvironmentportal.org.in/files/file/Safeguard-or-squander-deciding-the-future-of-india's-fisheries.pdf>.

[44] *Ibid*.

[45] Goelzhauser, Greg., "Journal of Land Use & Environmental Law", (Vol. 19, No. 2, 2004), pp. 597–600. Jstor, <www.jstor.org/stable/42842857>, Goran Skogh, "Property Rights and the Environment. A Law and Economics Approach".

[46] Simon Johnson et al., "Property Rights and Finance", 92 Am. Econ. Rev. 1335 (2002), see also Thomas J. Miceli, in *The Elgar Companion to the Economics of Property Rights*, 121 (Enrico Colombatto, ed., 2005).

[47] *Ibid*.

From these examples it, it ought to be certain that open access to a common resource may cause elimination of species and depletion of natural resources. Because of the earnestness of the issue, this situation has been named the tragedy of the commons.[48]

Further, recent economic studies have indicated that environment related problems and pollution arise largely from lack or absence of property rights in the environment.[49] It is due to the lack of ownership or property rights in the natural resources which leads to inefficient resource allocation. It is implied that developing countries have weak property rights over natural resources as compared to developed countries that have strong private property rights. That is why there is over production and over consumption of resources in developing countries.[50] Since property rights in natural resources are not defined, the polluter is not made to internalize the cost of activities upon others. Furthermore, there exists no incentives for victims to initiate actions against the polluter.[51]

Thus, a lawful step of such a nature would guarantee the externalization of costs of his activities by the polluter and create an incentive for the injured person to initiate an action against the polluter. If there should arise an occurrence of a risk to his/her exclusive resources/rights because of contamination; it would make the polluter consider, the unfavorable impact of his activities upon the people in question.

IX. EFFICIENT- LEVEL OF POLLUTION OR MARGINAL COST OF POLLUTION

The efficient level of pollution is the measure at which its total benefits exceed its total costs by the greatest possible amount. This occurs where the marginal benefit of an additional unit of pollution equals its marginal cost[52] or marginal cost of pollution means that an additional environment cost that results in the production of one additional unit.

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[48] *Supra* note 40.

[49] H. Demstez, "Toward a Theory of Property Rights", 57 Am. Econ. Rev. 347, 350 (1967). *See also* Richard Stroup, Environmentalism, Free-Market in the Concise Encyclopedia of Economics.

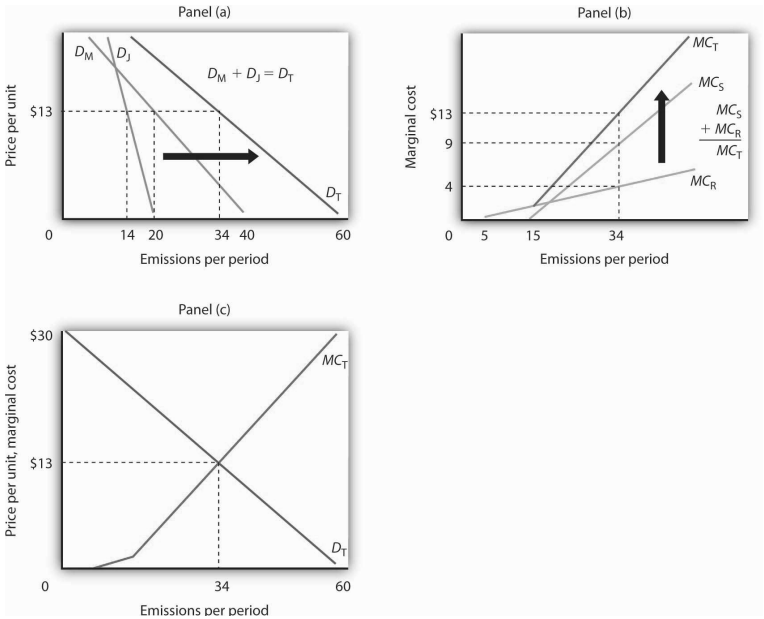
[50] "Graciela Chichilinsky, Kyoto Protocol: Property Rights and Efficiency of Markets" in *Institutions, Sustainability and Natural Resources: Institutions for Sustainable Forest Management* 144 (Shashi Kant and R. Albert Berry, eds., 2005).

[51] Garrett Hardin, "The Tragedy of the Commons", in *The Earthscan Reader in Environmental Economics* 60, 62 (Anil Markandya and Juile Richardson, eds., 1992).

[52] "The Economics of the Environment" from the book Microeconomics Principles, Ch. 18 (v. 1.0). <https://2012books.lardbucket.org/books/economics-principles-v1.0/s21 economics of the environment.html>.

This economic theory says that it is not possible to meet 100% reduction in pollution. People need goods and services to survive and therefore factories producing these goods will definitely pollute the environment. But the question arises to what extent it can pollute the environment. We can understand this from two unique points. First, let's assume that we are starting in a world with no pollution. We value some things more than having an environment entirely free from pollution, and we produce those things up to the point where we decide that an additional pollution is no longer worth it. Or, more realistically, if we start from a relatively polluted world, we can ask ourselves how much pollution we might want to dispose of before the costs exceed the benefits of a cleaner environment.[53]

To achieve at efficient level of pollution, where total benefits exceed its total costs, government can impose tax on industries or industries can adopt certain environment friendly technologies. These things will reduce in marginal cost and total benefits would exceed. Taxes can directly address the failure of markets to take environmental impacts into account by incorporating these impacts into prices.[54] Take this hypothetical example and equating price with tax we can find as how this can help in reducing environment to some extent.[55]



[53] Palgrave Macmillan, "Determining the 'Optimum' Amount of Pollution" in *What Environmentalists Need to Know About Economics*, Scorse J. (2010), New York.

[54] Environmental Taxation: A Guide for Policy Makers, OECD, (September 2011), For more information, please see Taxation, Innovation and the Environment available at <www.oecd.org/env/taxes/innovation>.

[55] *Supra* note 51.

By imposing tax, (panel c) the marginal benefit of the 34th unit of emissions, as measured by the demand curve DT, equals its marginal cost, MCT, at that level. The quantity at which the marginal benefit curve intersects the marginal cost curve maximizes the net benefit of an activity.[56] By imposing tax liability suppose 13$, an industry owner will have to pay certain amount of green tax which will add to his cost. Therefore, he will cut his emission to bear the cost of production or he will adopt an alternate technology which is environment friendly as compared to 60 units when there was no tax liability.

This economic tool is important in pollution measure from an economic perspective is to find the pollution measure at which total benefits exceed total costs by the greatest possible amount, the solution at which marginal benefit equals marginal cost.

X. COST- BENEFIT ANALYSIS

The commonest way of assessing the economic effect of project is through cost-benefit analysis (CBA). CBA compares benefits to costs, and indicates the net benefit (or cost) of a project – the difference between its total benefits and total costs – in order to draw conclusions about its desirability and viability.[57] The essential theoretical foundations of CBA are: benefits are defined as increases in human well-being (utility) and costs are defined as reductions in human well-being. Economists engross in the cost and benefit connected with production or consumption of the next additional unit. For a project or policy to qualify on cost-benefit grounds, its social benefits must exceed its social costs.[58]

While cost-benefit analysis remains controversial as a tool to shape environmental policy, the technique is "*here to stay"* and has become a central instrument for evaluating and justifying regulatory decisions in the developed world.[59]

This analysis is used as a tool to frame any policy and supplement these policies effectively and efficiently. The ideal situation will be if the operational environmental-economic assessment tool can rank both costs and benefits for

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[56] "The Economics of the Environment" from the book Microeconomics Principles, Ch. 18 (v. 1.0). <https://2012books.lardbucket.org/books/economics-principles-v1.0/s21economics of the environment.html>.

[57] L. Emerton, L., "Economic Tools Environmental Planning and Management in Eastern Africa", IUCN - The World Conservation Union, Eastern Africa Regional Office, (Feb. 1999).

[58] Cost-Benefit Analysis and the Environment: Recent Developments – ISBN 92-64-01004-1-OECD, (2006).

[59] Livermore, Michael A., "Can Cost-Benefit Analysis of Environmental Policy Go Global?" New York University Environmental Law Journal, Vol. 19, Issue 1 (2011).

multiple remediation projects, which is the case for cost-benefit analyses.[60] Cost-benefit analysis can either check the costs of different alternatives to reach a certain environment goal or check different environmental initiatives that can be achieved with a certain amount of money.

There are various methodologies to calculate Cost-Benefit Analysis:

- Project definition
- Identification
- Enumeration of costs and benefits
- Evaluation of costs and benefits
- Discounting and presentation of results [61]

The CBA done on Delhi metro indicated that there is a one percent increase in the economic rate of return on investment in the Metro, pegged at 22.5 percent after accounting for the differences between shadow prices and market prices of unskilled labor, foreign exchange and investment in the Indian economy measuring economic benefits and cost of the Metro.[62]

The cost and benefit analysis is a useful tool to predict the damage caused by the environment pollution in terms of its impact of cost which help government and policy-makers to take precautionary measure to minimize the damage and reduce the cost.

> *Therefore, these are some of the economic tools which can be applied in green economy to protect environment and with their assessment, Government can regulate, frame polices and enforce stringent laws to protect environment.* From this perspective, the law can empower and boost the progress into a green economy. They can substitute for greener items by eliminating obsolete technologies, transforming arrangements and giving new driving force. They can fortify market

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[60] Connie Nielsen, Klaus Weber and Camilla K. Damgaard Niras, "Environmental Economic Assessment Tools Remediation Technologies", DMEEPA, Enviromental Project No. 1369 (2011).

[61] Rajesh Rai and T.N. Singh, "Cost Benefit Analysis and its Environmental Impact in Mining, Jr. of Industrial Pollution Control", 20 (1) (2004) pp. 17-24.

[62] M.N. Murty, Kishore Kumar Dhavala, Meenakshi Ghosh and Rashmi Singh, "Social Cost-Benefit Analysis of Delhi Metro", Institute of Economic Growth, Delhi University Enclave, (October 2006).

foundation and market-based components, divert open speculation and bolster greener open acquirement.

The UN General Assembly has declared its conviction "that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law."[63] Rule of law can allow the sustainable use of natural resources by enforcing strict laws and regulations, requiring administrative procedures such as environment impact assessment and defining rules for natural resource exploitation and governance.

- Economic tools such as property rights over natural resource can save our lakes and fisheries which have been exploited to a great extent. Lakes are acted as a dumping ground for many people, however strict laws have to be made to protect these natural lakes.

- There is a more prominent need to discover administrative answers for outline land and groundwater rights. In the coming decades an evenhanded dispersion of water rights will act like the significant test for diminishing agrarian disparities, and if accessible water resources more equitably distributed, it will have a marked impact on the income distribution of farmers.[64] Before legislating law on ground water, it is necessary to review the already existing legislations on ground water and therefore draft policy on groundwater usage. Keeping in mind efficiency and equity, the choice will have to be made whether private or public ownership of wells for extraction of the resource is preferred.[65] For this principle of property rights and CBA have to be analyzed for proper implementation for the usage of water. New method and technology have to be implemented to efficiently use water for agricultural and other purposes.

By 2030, the country's water demand is projected to be twice the available supply, implying severe water scarcity for hundreds of millions of people and an eventual six per cent loss in the country's GDP.[66] Poor implementation of water harvesting should be regulated and enforced through proper

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[63] United Nations General Assembly (2012a), para 7; (2012b), para 10. See also World Bank (2012).

[64] Anindita Sarkar, "Socio-Economic Implications of Depleting Groundwater Resource in Punjab: A Comparative Analysis of Different Irrigation Systems", EPW (February 12, 2011 Vol. xlvi, No. 7).

[65] Rema Devi P., "Groundwater Law in India: Problems and Prospects", (1990).

[66] "Composite Water Management Index: A Tool for Water Management", NITI Aayog, (June 2018), <http://social.niti.gov.in/uploads/sample/water_index_report.pdf>.

channels. Subsequently, economic instruments can assume a significant job in water management and rationalize the policies and law on the use of water management.

- India still need to contribute more on clean innovation and technology by analyzing cost and benefit analysis for environment protection. Further, with the risk of global warming posing a potential threat, it is critical that green marketing turns into the standard and not an exception. This includes recycling of waste, metals, plastic etc. Government has to apply stringent laws to implement green marketing and use this concept. Sustainable marketing is a more radical approach to markets and marketing which seeks to meet the full environmental costs of production and consumption to create a sustainable economy.[67]

- Government can impose Pigouvian tax to lower pollutant emission. It is imposed as per-unit tax on a good, thereby generating negative externalities equal to the marginal externality at the socially efficient quantity.[68] Such example could be imposition of carbon tax on those who emit carbon emissions. Since a Pigouvian tax allows the right to pollute, higher the tax, larger is the reduction of pollutant from the environment.[69] The environmental authority and government can meet the desired level of pollution by setting an emission tax at the appropriate level and frame law and regulation to meet the same.

- In my opinion, people should be made more aware on environment policies, provided environment education in stricter sense about kitchen waste and other organic waste materials, organic kitchen garden, biogas plant, water harvesting system, waste water treatment using aquatic macrophytic plants and suitable plantations as these initiatives have the tendency to cut the fuel consumption, water usages, economize on vegetable purchase, sustainable usages of water resources. These practices will create a positive impact on economic development and sustainable development.

Although there is compulsory education on environment at school level, but same should be provided on a practical and skill bases which can change the behavioral attitude of people on environment development. Proper implementation on law and environment policy can be done to create awareness among people and target youth as youth has the tendency to bring development at a faster pace.

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[67] D.N.V. Krishna Reddy, A Study on Impact of Green Marketing on Sustainable Development (With Reference to Khammam District), Mother Teresa Institute of Science and Technology, (October 13-14, 2017).

[68] Introduction to Economic Analysis, Saylor Academy, (2012) <https://saylordotorg.github.io/text_introduction-to-economic-analysis/s00-license.html>.

[69] Fernando Carriazo, "Economics and Air Pollution", <http://dx.doi.org/10.5772/65256>.

XI. CONCLUSION

There are numerous difficulties and obstructions confronting developing countries in moving their economies to more environment friendly paths. On one hand this ought not avoid the endeavor to critically join environment elements into economic development. Then again, the different obstructions ought to be distinguished and perceived and required to enable and support the sustainable development efforts. Policies have to be implemented more efficiently in India to move towards a "green economy" and achieve sustainable development goals.

The law and economics development apply monetary hypothesis and strategy in the field of law. It attests that the devices of monetary thinking offer the best probability for advocated and steady legitimate practice. It is ostensibly one of the prevailing hypotheses of statute. The general theory is that law is best viewed as a social tool that advances economic efficiency, that financial investigation and effectiveness as an ideal can guide legal practice. The uniting of lawful hypothesis and financial thinking has likewise made new research motivation in the fields of conduct financial aspects: how soundness influences individuals' conduct inside legitimate situations; open decision hypothesis and how aggregate conduct ought to affect enactment; and game hypothesis: understanding vital activity in a lawful setting. Applying economic tools in the field of environment law can help the Government to frame laws more efficiently and effectively and strive conventional economy into green economy. Although Government uses command and control approach to punish environment offenders or shut down the industrial units but using economic reasoning in legal system will not affect the GDP growth and can check scarcity of resources in the long run.

NEED FOR MEDIATION IN HEALTHCARE IN INDIA

—*Rishabh Sharma*[*]

I. INTRODUCTION

The rapid development of technology and the ever-increasing expectations of patients have given rise to immense challenges for the healthcare professionals. Conflicts and disputes routinely occur in the clinical practice. Dissatisfaction of the patient with a healthcare physician or the outcome of the treatment are some common causes of healthcare disputes. Even though it is possible to adequately resolve these disputes at a nascent phase, some cases can take the form of a formal complaint and reach the court for litigation. In majority of the common law jurisdictions, victims of medical malpractice can achieve redressal under the tort of medical negligence from the formal legal system in existence. However, the road to a successful claim for negligence is generally long and harrowing. The process is inefficient and expensive, with the claimants often failing to achieve what they want and deserve.

Mediation is a confidential and voluntary alternative dispute resolution mechanism wherein a neutral third party (the mediator) facilitates the disputing parties to reach an amicable settlement by means of communication and negotiation. The process is used at a global level in resolving family and commercial disputes outside the traditional courtroom. In the mid-1980s, the use of mediation for settlement of healthcare disputes was pioneered in the United States after a crisis in claims of malpractice.[1] Besides warding off litigation suits, healthcare mediation is practised for assisting patients and their families take crucial clinical decisions, such as concerning end-of-life treatment.[2] This article aims to highlight the relevance of mediation in the health and medical sphere, and the sore need for introducing healthcare mediation in India. The

[*] B.A. LL.B. (Hons.), NALSAR University of Law, Hyderabad.

[1] Gerald B. Hickson, James W. Pichert, Charles F. Federspiel and Ellen Wright Clayton, *Law and Contemporary Problems*, Vol. 60, No. 1, Medical Malpractice: External Influences and Controls (Part 1) (Winter, 1997), pp. 7-29.

[2] Nancy N. Dubler and Carol B. Liebman, *Bioethics Mediation: A Guide to Shaping Shared Solutions* (2011).

authors also submit a critical appraisal of the use of traditional litigation in clinical matters, with the overarching aim to demonstrate how mediation is the more appropriate dispute settlement alternative. Finally, this article discusses the notable barriers faced in employing mediation in healthcare, and their concomitant implications on the patient-physician relationship.

II. HISTORY OF MEDIATION IN INDIA

Mediation has always existed in India. There are documentations of peaceful resolution of disputes right from the pre-historic Vedic times, evidently more ancient than the present day adversarial system of law. In *Brihadaranyaka Upanishad*, the earliest known treatise, various forms of arbitral bodies, known as *Panchayats*, like (a) the *Puga*, (b) the , (c) the *Kula*, are referred.[3] These Panchayats dealt with various disputes ranging from matrimonial, contractual, to even criminal nature.[4] The parties to dispute ideally accepted the Panchayat's verdict, thereby exhibiting the binding nature of the Panchayat's authority.

During the pre-British rule, numerous forms of dispute resolution mechanisms gained traction within the business class. The Mahajans commanded everyone's respect and were considered prudent and unprejudiced businessmen. They used to act as mediators between the merchants and assisted in resolution of their disputes.[5] However, during the British regime in India, indigenous local customs and society-based procedures of mediation which had gained popularity in western India began to be considered discriminatory, and the British justice system soon became the foremost system for dispensation of justice in India for about 250 years.[6]

Following India's independence, the concept of mediation gained legislative recognition after the passing of the Industrial Disputes Act, 1947. The appointed conciliators were "charged with the duty of mediating in and promoting the settlement of Industrial disputes."[7] Court-annexed mediation has now obtained a legal sanction. Various Mediation and Conciliation Centres have been instituted in India where court cases are referred to by the Judges.

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[3] Chapter II, Genesis of Lok Adalats, Shodhganga, <http://shodhganga.inflibnet.ac.in/bitstream/10603/127688/13/07_chapter%202.pdf> (last accessed on July 1, 2019).

[4] O.P. Malhotra, Indu Malhotra and Lexis Nexis, *The Law and Practice of Arbitration and Conciliation* (2nd edn., 2006).

[5] History, Mediation Centre: Punjab and Haryana High Court, available at <http://mediationcentrephhc.gov.in/?trs=history> (last accessed on July 1, 2019).

[6] Mediation Training Manual of India, "Mediation and Conciliation Project Committee: Supreme Court of India, Delhi", <https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> (last accessed on July 1, 2019).

[7] Industrial Disputes Act, S. 4, (1947).

This gives the litigants an opportunity for playing their contributory role in disputes resolution.

III. THE NEED FOR MEDIATION IN TODAY'S WORLD

Our legal system is plagued with many problems. Insurmountable delays, exorbitant costs, low judge-population ratios and an excruciating use of the adversarial system are just some of the manifest predicaments. Along with the demand to fulfill their constitutional mandates, courts are further pressured by the burden of private-party litigation. It wouldn't be far-fetched to say that the common man sometimes loses faith in the legal system. Like they say, justice delayed is justice denied. Also, verdicts given by courts often fall short of addressing the substantive issue in question or in granting a practical and effective remedy to the parties. Many find that though they have technical access to courts, substantive access is deterred by the problems of our legal system. How do parties resolve their conflict then? This is where ADR, or more specifically mediation can make a huge difference. It is the right amalgamation of ethics and efficiency. It is true that sometimes, the adversarial legal system is the appropriate avenue to resolve disputes. Situations where there is a huge imbalance of negotiating powers, where parties need some reliable and assuring interpretation of rights or statutes etc. are some examples. But, litigation, in our opinion, must always be the last resort. Even where parties take recourse to litigation, we must employ ways and means to reduce the adversarial element within it and try not to elevate conflict. In any case, other methods of conflict resolution are rapidly gaining popularity and must be employed. It is time we moved over the "one-size fits all" mentality and dealt with every case on its merits. Deciding how to deal with a case is very similar to deciding what course of treatment should be given to a patient. We must examine the root of conflict in every scenario and prescribe the right kind of treatment. At every given point, it is imperative to induce the parties involved in a dispute to behave reasonably and adopt a holistic approach to achieving justice than just herd all kinds of disputes to courts. We shall further examine why the traditional adversarial system is suboptimal and almost inappropriate for resolving disputes in the healthcare arena.[8]

IV. MEDIATION VS. LITIGATION: A COMPARISON

The adversarial system places a heavy reliance on winning and in the process, a deeper wedge is driven between the parties seeking to find a resolution. Neither party wants to understand where the other is coming from. Both the parties are primarily interested in succeeding in the litigation. This might

[8] Rabinovich-Einy, Orna. "Foreword: See You out of Court? The Role of ADR in Healthcare" Law and Contemporary Problems 74, No. 3 (2011).

give the party that ends up winning, some satisfaction, but is otherwise very non-beneficial for all the stakeholders involved. It is uneconomical, time consuming and conflict-enhancing. Most often, parties approach the court looking for a solution to their problems, but the focus is often on winning the case and not on finding a solution or uncovering the truth.[9] In long drawn out legal battles, it is also possible that litigants lose their faith in the system or give up hope of achieving justice. This is where mediation comes into picture. Mediation is a voluntary process entirely based on the consent of the parties involved. Where parties reach a mutually agreed upon decision, it is solidified into a written agreement, which when signed becomes binding on the parties. Mediation urges parties to co-operate, communicate and focus on the future. It does not seek to pin the blame on anyone or result in a situation where one loses and the other wins. It encourages the parties to not focus on the past and even if it does, only to the extent where practical solutions can be realized in order to maintain a sustainable relationship in the future.

Mediation helps provide the parties a holistic view of the dispute in hand. Having a neutral third party to facilitate a conversation helps the process of giving them a multi-dimensional perspective. As mediation is voluntary and based on the consent of the parties, the entire decision-making power rests in the hands of the parties. They are free to offer suggestions and come up with creative solutions that would otherwise have been ignored in a traditional legal setting.

Another advantage of mediation is that it is an extremely flexible process. It is capable of initiation at any point in time: before, during or after litigation. The decision arrived upon by the parties is binding on them, as opposed to the appealable nature of the court rulings in litigation.

V. HEALTHCARE: A VOLATILE SETTING FRAUGHT WITH DISPUTES

In 2015, according to a survey conducted by NLSIU, Bangalore, medical negligence cases saw a 400% rise in the previous decade.[10] The trust-based relationship between a doctor and the patients has begun to wane and increased consumer awareness has led to legal activism, demanding for better quality healthcare services. As we can see, the volatility of the healthcare regime is rooted in aggravated conflicts between healthcare service providers and the patients. This is further strengthened by ideological and intellectual

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[9] Panchu, S., "Enron: What Caused the Ethical Collapse", <http://www.cengage.com/resource_uploads/downloads/0324589735_170401.doc> (last accessed on July 1, 2019).

[10] "Medical Litigation Cases Go up by 400%, Show Stats", ET HealthWorld, December 6, 2015, Available at: <https://health.economictimes.indiatimes.com/news/industry/medical-litigation-cases-go-up-by-400-show-stats/50062328> (last accessed on July 1, 2019).

divides. As can be gathered from the research on this issue, the ground reality of healthcare is somewhat frighteningly volatile and fraught with disputes, generally perceived as setting off costly litigation. Most of these disputes find their catalyst in miscommunication or lack of communication and a major portion of these disputes are taken up by medical malpractice and negligence suits. A lesser but nonetheless, important part of these disputes are non-litigable issues; issues that need intervention and redressal in order to avoid their recurrence and escalation into litigable issues. Another facet of issues that occupy the disputes in the medical arena are healthcare reforms; something that is outside the scope of this paper. Using mediation-based communication skills and ADR as a whole can go a long way in helping improve doctor-patient (and patient-family member) relations and in inducing trust.

VI. MEDIATION: AN EXERCISE IN FILLING GAPS IN THE HEALTHCARE SETTING

In the last decade, the US healthcare system started using mediation for facilitation of communication between patients and physicians after the occurrence of an adverse clinical incident, to resolve claims of medical malpractice[11], ease out tensions in the care-giving team[12], and to help the medical professionals and the families of the patients to take important medical decisions. [13]

Intelligent application of mediation and mediation skills can be useful in achieving a more efficient and less vulnerable healthcare system. The healthcare professionals and government officials must ascertain the way in which conflicts should be handled and the role to be played by lawyers in difficult patient-physician communications. Mediation has significant potential benefits: greater patient safety; restoration of relationships; monetary savings for patients, hospitals, and physicians; among many others.[14] Use of mediation in healthcare helps in avoiding exorbitant litigation costs and receiving compensation sooner, in addition to promoting a discussion that is instrumental in improving patient safety and repairing patient-physician relationships.

Time efficiency is another important factor that makes mediation an effective means of dispute resolution. According to a study in the United States, parties preparing for mediation devoted nearly one-tenth of the time they did

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[11] Chris Stern Hyman, Carol B. Liebman, Clyde B. Schecter and William M. Sage, "Interest Based Mediation of Medical Malpractice Lawsuits: A Road to Improved Patient Safety?", 35 J. Health Pol. Pol'Y & L. 797 (2010).

[12] Dubler and Liebman, *supra* note 2.

[13] *Id.*, at 12.

[14] Carol B. Liebman, "Medical Malpractice Mediation: Benefits Gained, Opportunities Lost", Law and Contemporary Problems, Vol. 74, 135-149 (Summer 2011).

preparing for a trial. [15] Mediation is helpful in reducing transaction costs, giving plaintiffs an opportunity of being heard, and allowing the defendants to acquire information which has the potential of improving the quality of care. If mediation is used at an increased level to work out disputes closer in time to the occurrence of event, compensation will be granted to the plaintiffs much earlier in time, and considerable savings will be realized by both the plaintiffs and the defendants in litigation costs.

There is a notable incongruity between what patients and their families expect after a medical error takes place and the manner in which physicians communicate following these events. Patients and family members are usually looking for an elaborate explanation of what happened, the possible ways in which the problem can be rectified and prevented in the future, and expect to receive an apology from the person responsible.[16] They wish to be reassured about the concomitant medical and financial consequences.[17] More than winning or losing, or even securing compensation, the plaintiffs aspire to evaluate their experience in respect of criteria like vindication, accountability, accuracy, attention, comfort, dignity, empowerment, respect, recognition, efficacy, and justice. After any unforeseen clinical outcomes, open conversation with the patients and their family about what actually happened is frequently avoided by the physicians. The amount and type of information revealed by them varies widely, and they rarely apologize for their negligence.[18] The patient's families are seldom after money. Compensation may be a material concern, however, they are primarily searching for some answers, retribution, admission of responsibility, and apologies. Mediation is a process which may help the patients and their families to achieve everything that they seek after a clinical fiasco. In addition, it serves as an efficacious platform for the physicians to advance a comprehensive clarification of the medical error that occurred and better explain the medical situation of the patient. Often times, especially after the death of a patient, family members hold themselves responsible for having failed to do more, like not spending more time beside the bedside, not having asked more questions, etc.[19] The defense of claims in the traditional adversarial system tends to only augment their grief and guilt. Complete knowledge of the

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[15] Chris Stern Hyman and Clyde B. Schecter, "Mediating Medical Malpractice Suits Against Hospitals: New York City's Pilot Project", 25 Health Affairs (2006).

[16] Thomas H. Gallagher et al., "Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients", 166 Archives Internal Med., 1585-1593 (2006).

[17] Judith Resnik et al., "Individuals within the Aggregate: Relationships, Representations, and Fees", 71 N.Y.U. L. REV. 296-364 (1996).

[18] Lauris C. Kaldjian et al., "Disclosing Medical Errors to Patients: Attitudes and Practices of Physicians and Trainees", 22 J. Internal Med. 988 (2007); Rae M. Lamb et al., "Hospital Disclosure Practices: Results of a National Survey", 22 Health Affairs 73 (2003).

[19] Carol B. Liebman and Chris Stern Hyman, "Medical Error Disclosure, Mediation Skills, and Malpractice Litigation: A Demonstration Project in Pennsylvania", 64–65 (2005), <https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/medical_liability/liebmanreportpdf.pdf> (Last accessed on July 1, 2019.

incident that occurred, and whenever appropriate, acknowledgment of error and assumption of its responsibility by the medical team can help the family member to forgive themselves for failure in prevention of a tragic outcome.

VII. NON-LITIGABLE ISSUES: SMALL INJUSTICES

The distraction with malpractice suits has served to eclipse the significance of other, more common-place disputes that profoundly affect the healthcare arena. Malpractice and negligence suits breed something that is termed by scholars as "defensive communication". This kind of interaction is designed to reduce the risk of liability, however, it in fact aggravates conflict and prevents resolution of genuine disputes.

If we take a closer look at the reality of the healthcare arena, we realize that most of the disputes are related to everyday problems that are faced in hospitals such as unavailability of doctors, being referred to another institution, long waiting time or even the foul mood of the physician. These problems are not major enough to be litigated and are often ignored, but when they add up, they might actually show lapses in the healthcare policy or service delivery mechanisms of the hospitals. These disputes, considered small-injustices, are frequently overlooked and often referred to as "non-litigable disputes."

Upon examination, we have found that these disputes mainly arise due to miscommunication or lack of communication thereof and their recurrence can surely be diminished by putting to use ADR-based communication skills and by employing effective mediation between the hospital or doctor and the complainant. Upon a deeper analysis of statistics, we find that doctors and physicians resort to defensive communication because of the belief that it protects them from liability and the risk of being sued for malpractice and negligence. This mode of defensive communication results in the adoption of a closed and non-transparent way of communicating with the patient and the patient's family.

Since this is contradictory to the hallmarks of mediation, which depends on transparent and active correspondence, defensive communication fills in as a boundary to open communication and to the acceptance of mediation in the clinical setting. Unexpectedly, as past research has uncovered, by keeping up present, orthodox correspondence modes, doctors and hospital staff run the risk of breeding further disputes that are both litigable and non-litigable. This, in turn, results in doctors practising defensive medicine, where their practice is guided by the fear of incurring future liability and not by what is in the best interest of the patient.[20]

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[20] Orna Rabinovich-Einy, "Escaping the Shadow of Malpractice Law", Law and Contemporary Problems, Vol. 74, No. 3, 241-278 (Summer 2011).

It appears that small-scale, non-litigable conflicts are frequently seen as a guaranteed, innate facet of providing healthcare treatment and a result of the lack of or insufficiency of resources at hospitals. Most of the administrative resources and assets at hospitals are diverted to dealing with what the medical community considers as a major threat- malpractice and negligence suits. This is done mainly through risk management by the organizational leadership, higher up the hierarchical ladder, while the staff who deal with ground realities are left to handle with alternate, small-scale, everyday disputes, the transaction costs of which are intangible and often less substantial. Thus, the need to adopt ADR related communication and dispute resolution mechanisms in healthcare settings arises. It could go a long way in addressing the issues dealt with above.

VIII. BARRIERS TO MEDIATING: A CRITICAL ANALYSIS

It is pertinent to note at this point, that the ideas floated above are not easy to adopt. Apart from the various roadblocks mentioned in the paper so far, the most crucial barriers to adopting mediation and negotiation in healthcare, are the lawyers themselves. Lawyers are often reluctant, if not completely averse, to advice their clients to opt for peaceful resolution of disputes rather than going to court. This could be because most lawyers are focused on securing their clients, their rights. They lay emphasis on rules and obligations and categorizing people and occurrences, including damages.[21] Coming from an adversarial system that has conditioned them to limit their client's goals and expectations to what the legal system can offer them, it is not easy to take a creative approach to realize more fulfilling goals.[22] It is also possible that suggesting alternate ways of resolving disputes goes against their innate conditioning, which often results in formulating narrow litigation goals or stressing on purely economic aspects of the case. Understanding the core issues of the client and realizing that their goals are not purely financial, goes a long way in providing the correct advice and route map to solve their dilemmas.

Another barrier to effective mediation is the non-involvement of physicians and doctors at the mediation table. Even if the parties decided to opt for mediation, it is not a popular move to include doctors in the mediation sessions. Even in the US, the defence lawyers advice most of their clients against joining the mediation rounds with the plaintiffs, citing reasons like it not being the "usual practice" or to save their clients from having to hear personal attacks by

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[21] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (2009).

[22] *Id*., at 20.

the aggrieved.[23] When defendant physicians do not participate in the mediation process, there is a resultant loss of opportunity for them and the patients to reconcile their differences, loss of opportunity for the patient and/or their family to forgive and for the physician to be forgiven, loss of opportunity for the transfer and receipt of information, and loss of opportunity to bring reforms in the institutional practices and policies. Their non-participation in mediation also deprives them of a chance to be heard and represented, something that is considered by the procedural-justice scholars as being critical to a fair process of dispute resolution.[24] But this is counter-productive to the entire process of conflict management. Most plaintiffs might be upset at the non-involvement of the doctors in the mediation and might even take it is a sign of nonchalance or an attitude of "don't care". Non-participation of the doctors in the mediation sessions could make settlement all the more difficult. It is true that even doctors deal with emotions of remorse, guilt or anger at being sued but coming to the mediation table is imperative in dealing with these issues. It helps further doctor-patient relationships, open a transparent channel of communication (especially if the dispute arose in the first place because of improper communication between doctor and patient's family) and might even help the parties involved find closure with what happened. Absence of a physician or anyone else who's erudite about patient care might result in overlooking information of clinical importance or giving it too little attention. It is necessary to have someone on the table who possesses technical clinical expertise, is appreciative of the institution's culture, and who holds knowledge of procedure and policy.

If we take a holistic view, it is easy to see that both doctors and patients have everything to lose if something goes wrong. According to a report, complaints of neglect have risen by around 30-40% over the past five years.[25] The common man thinks there is a huge power imbalance in a doctor-patient relationship. It is considered nearly impossible to prove medical negligence by a doctor and book him under the criminal statutes. But today, we live in a world where consumers are becoming increasingly aware of their rights and what to expect in terms of service delivery. [26] The rise of consumer courts and the ease and flexibility with which complaints can be filed, has in fact, helped the trend. Consumers tend to cry negligence whenever they feel a mistake has

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[23] Chris Stern Hyman, Carol B. Liebman, Clyde B. Schecter and William M. Sage, "Interest Based Mediation of Medical Malpractice Lawsuits: A Road to Improved Patient Safety?", 35 J. Health Pol. Pol'Y & L. 797 (2010).

[24] Nourit Zimerman and Tom R. Tyler, "Between Access to Counsel and Access to Justice: A Psychological Perspective", 37 Fordham Urb. L.J., 473-486 (2010);

[25] Anon, 2017. "The Wait Never Ends: Medical Negligence Complaints Rise but Justice Eludes Victims", *Hindustan Times*, https://www.hindustantimes.com/health/the-wait-never-ends-complaints-of-medical-negligence-increase-but-justice-eludes-victims/story-eFDpT6vKYQSVhN0ovgCUBN.html> (last accessed on July 1, 2019).

[26] <www.ETHealthworld.com>, 2015. "Medical Litigation Cases Go up by 400%, Show Stats", ET Health World, ETHealthworld.com <https://health.economictimes.indiatimes.com/news/industry/medical-litigation-cases-go-up-by-400-show-stats/50062328>.

been committed.[27] It has come to a stage where physicians are becoming fearful of treating or handling complex medical cases, wary of possible litigation if something goes wrong. Courts today are jam packed with cases of medical negligence.[28] Doctors, physicians and hospitals are literally in a spot because of the Consumer Protection Act, 1986. So, there is enough evidence to show that the power imbalance between doctor-patient is not as huge or ghastly as it is made out to be. Even doctors have a lot to lose in terms of reputation and clientele. If cases of negligence are proved against them, they could even lose their license to practice. In this scenario, it is not difficult to bring doctors to the mediation table as it is apparent that it is in the best interests of everyone to have an open discussion about what happened.

Let us take a hypothetical example of a 74 year old patient named Arya, who was brought in to the hospital with a heart condition. For hours, the doctors at the emergency care tried their best but the patient lost her life. Now the doctors face a medical negligence suit, instituted by the patient's family. The suit, if litigated, could easily drag on for years together and ultimately only worsen the feeling of anguish for Arya's family. However, if mediation was chosen to first try and peacefully settle the dispute, the conflict could end very quickly and at a much lesser cost. The family would blame the doctors for lack of communication, negligence and may expect an apology or even some compensation. The doctors could try to explain that they did their best, apologize for the lack of proper transparency, stress on the fact that Arya lost her life despite their best efforts and express their utter disappointment and anguish at seeing a patient lose her life even after repeated treatment. This open communication could help everyone involved; help the parties find closure and help the doctors improve the quality of their services in the future based on the complaints they receive from Arya's family.

IX. CONCLUSION: THE WAY FORWARD

What is required is a holistic adoption of mediation practices in the medical setting. But to bring about the prolific use of mediation in healthcare, change in healthcare policy is necessary, in such a way that hospitals have an in-built dispute and grievance redressal cell that specializes in mediating the disputes. It is quite a circular exercise and will definitely be an uphill task, but change is imperative in order to substantially address any of the issues plaguing our legal and healthcare systems. As discussed, mediation is a relatively new mechanism of dispute resolution in the country. On top of that, the healthcare arena is an even newer playing field. However, if we are to avoid each and every dispute from burdening our already over-taxed courts, we must give a serious thought to resorting to ADR, and more specifically, mediation. As is evident,

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[27] *Supra* note 23.
[28] *Supra* note 23.

it comes with its advantages and disadvantages. Even after making use of mediation, reform in healthcare will not be guaranteed. Some might even find mediation to be a poor choice, when they are sure about their rights and their expectations match with what the traditional legal system has to offer. The answer lies in making the right choices at the right time and having alternate systems of dispute resolution in place, if the parties so choose to opt for it. It is understandable that people have their doubts and reservations about turning to mediation when there is a legal system in place. But we cannot turn a blind eye to the inefficiencies of the legal system and the benefits that are gained from adopting mediation instead. Awareness needs to be spread about the advent of mediation in the country and its pros. It would help if mediation were portrayed less as an alien system of dispute resolution and seen instead as an extension and complementary limb of the existing legal system. Nobody is claiming that change will be immediate and efficient. It will come with years of labor and effort from the rightly placed people. Even Rome wasn't built in a day. By virtue of this paper, the authors have merely tried to make a case for why mediation is an appropriate mechanism for grievance redressal in the healthcare arena and how it will become the torch bearer for real change and improvement.

> *"Too often conflict amongst people and organizations has seen recourse to adversarial combat. With mediation we can show that conflict can be resolved and justice rendered by healers and peacemakers."*

CHILD MARRIAGE: BARRING THE RIGHTS OF THE CHILD BRIDE

—*Shubhangi Komal*[*]

Abstract — Swami Vivekananda, once remarked that "No society can progress with men alone" because in such a society there can only be arrested or stunted development. Thus, for the progress and development of India, there is a need to ensure gender equality by bringing women on the same pedestal as that to men. This is only possible when girls are provided with access to education, health care facilities, etc. which will help in the physical, mental and emotional development of the child and will also, enhance their decision making power. However, child marriage is a major constraint in the development of the girl child as it not only restricts her education but also endangers her health and life. Child marriage is a curse on Indian society as it violates the basic human rights of the child bride. It leads to grave unwarranted consequences like early spousal cohabitation which results in premature sexual relations, early pregnancies, malnutrition, infant and maternal mortalities, etc. In this way, it not only robs millions of girls of their rights and dignity but also of their childhood. The present paper has comprehensively dealt with the national legislations relating to child marriages and recognized an anomaly that the provisions of these legislations provide for penal consequences on the one hand but confers a status of validity to child marriages on the other hand. The paper has also considered the international instruments on child marriage which are binding on India thereby, recognizing the fact that child marriages result in violation of right to life and dignity, right to education, right to health and various other rights of the child bride. After analysing the consequences of child marriage, the paper recommends that child marriages should be declared void.

[*] 3rd year student, BA LLB (Hons.) course National University of Study and Research in Law, Ranchi.

I. INTRODUCTION

Rukhmani, a child bride who is now mother of two, expressing her plight says that, "Had I been married later, I'd have learned to read and write. And if I'd studied, I wouldn't have had to work in the scorching heat, harvesting in the fields." Munni, another child bride, regrets being tied to a matrimonial relationship at an early age rather than being sent to school. Due to this, she remained uneducated and could not fulfil her wish to become an independent woman. As a result, now, she has no alternative but to endure regular beatings of her husband.[1] Similar is the situation of many girls across the country who are denied education due to marriage at an early age, which subjects them to exploitation at the hands of their husbands. Despite such miserable condition of child bride, the evil practice of child marriage still persists in Indian society even after seventy years of independence.

The existence even in the threshold of 21st century can be attributed to the cultural norms prevailing in the society since time immemorial. In Indian society, the birth of a girl child is usually unwelcomed because she is considered as an economic burden for the family.[2] Thus, the prime objective of the family revolves around getting the girl child married in order to shift the economic burden, which in turn, encourages the marriage of girls at an early age. Thus, child marriages are ensconced in the very social fabric of India because the Indian society is too hypocritical to acknowledge the fact that marriages can be potentially disharmonious and dangerous sites of human interaction.

Child marriage is a gross violation of human rights of children. Though it ruins the childhood of both the sexes but the repercussions are more seriously detrimental for the child bride who is involved in such a relationship. According to International Centre for Research on Women, child brides are twice as likely to suffer from physical violence.[3] They are also three times more likely to have sexual intercourse forced upon them.[4] Girls who become mothers between 15 and 19 years of age are three times more likely to die in childbirth.[5] Due to this, child marriage has been recognised as a serious form of sexual violence occurring at family level.[6] Thus, it not only restricts the opportunity of education and development of a girl child but also traps her in vicious cycle of pregnancy, malnutrition and maternal mortality.

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1 Nel Hedayat, "What is it Like to be a Child Bride", BBC News (Oct. 4, 2011), <https://www.bbc.com/news/magazine-15082550>.

2 Ashok Kumar and Harish, *Women Power – Status of Women in India* 8 (1991).

3 The International Centre for Research on Women, Too Young to Wed: Education and Action toward Ending Child Marriage 3 (2005).

4 *Ibid*.

5 Alka Barua, et al., "Care and Support of Unmarried Adolescent Girls in Rajasthan", 42 Economic and Political Weekly 54 (2007).

6 Vandana, *Sexual Violence against Women: Penal Law and Human Rights Perspectives* 46 (2010).

The present paper examines the history, various national legislations and international instruments on child marriage along with the consequences of child marriage and further recommends that the most appropriate method to curb this social evil is by declaring child marriages as void marriages.

II. HISTORICAL PERSPECTIVE OF CHILD MARRIAGE IN INDIAN CONTEXT

The origin of the custom of child marriage in ancient India remains dubious.[7] As per the Mitakshara school of law, sixteen years of age was considered as the age of marriage and fifteen years, in case of Dayabhaga school of law.[8] The traces of its origin can be found in medieval times[9] where reasons such as invasions, insecurities and many other socio-cultural reasons forced parents to marry their children at an early age which, with time, turned into a practice and later on, was adopted and accepted as a cultural norm.

During the British period, the reformist movement against child marriage was persuaded by the British customs and thoughts. It was only after the notorious case of *Queen Empress* v. *Hurree Mohun Mythee*[10] that the need to prohibit child marriage was recognised and it gained further importance. In the above-mentioned case, an eleven year old child bride died due to bleeding caused by ruptured vagina on account of forced sexual intercourse committed on her by her husband who was of 35 years of age. Though the Calcutta High Court did not charge her husband with rape as the girl was well within the statutory age to give consent,[11] however, the court severely condemned the rape of the child wife and held that the husband did not have the right to enjoy the person of his wife without regard to the question of her safety.[12]

In 1891, Sir Andrew Scoble introduced the Bill (known as the Age of Consent Bill), which later on took the form of Indian Criminal Law (Amendment) Act, 1891.[13] This Act increased the age of consent from 10 years to 12 years in order to ensure that female children are protected from

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7 It is believed that when Aryans first came to India, they were stranger to the concept of child marriage. In the Vedic period, it was only when the couple reached a mature age, then their marriage was effectuated. In the Smriti period, the appropriate age for girls to enter into matrimonial relationship was 8-10 years of age. It is alleged that the custom of child marriage is a development which took place after the Muslim invasions as it was conceived that the married women were less prone to being the subject of capture by the invaders. Refer to Report of Age of Consent Committee, Government of India, 92 (1929).

8 Mayne, Mayne's Hindu Law and Usage 186 (14th edn.1996).

9 Sudheer Birodkar, "Hindu Social Customs: Dowry, Sati and Child Marriages", <http://www.geocities.ws/films4/hindusocialcustomssb.htm>.

10 ILR (1891) 18 Cal 49.

11 *Ibid.*

12 *Id.* at 62.

13 Act No. X of 1891, published in Gazette of India, (1891), Pt. V.

immature prostitution and from pre-mature cohabitation.[14] Thus, the cases prevalent at those times along with published works which focussed on prohibition of child marriages led to the enactment of Age of Consent Act 1891.[15]

With the intent to reduce the abnormal mortality of young generation, a Bill was introduced by Hari Singh Gour in 1924 in order to amend section 375 of the Indian Penal Code. The Bill rose the age of consent to fourteen years in both marital and non-marital cases. However, the age of consent was reduced from 14 to 13 years in case of marital rape by the Select Committee.[16] This material change was incorporated in the Amendment Act of 1925.[17] It was for the first time that marital rape cases were distinguished from non-marital rape cases. In 1927, the Age of Consent Committee was appointed to review the prevailing situation and suggest few amendments. A crucial observation made by them was that the marriage of a girl under a particular age should be prohibited rather than increasing the age of consent for sexual intercourse, keeping in mind the evil consequences of early marriage and early consummation.[18] Thus, after further investigation and research in this field, the Child Marriage Restraint Act, 1929 was enacted.

A. The Child Marriage Restraint Act, 1929

The Act was enacted to bring about a social reform by curbing the social evil of child marriage and was applicable to all the citizens of India irrespective of their religion. The Act purported to prevent the solemnisation of marriage between two individuals who are below the prescribed age limit, however, left an ambiguous position by not considering the status of marriage performed in contravention of the Act. Initially the Act prescribed 14 years and 18 years as age of marriage for girls and boys respectively. It was by the Amendment Act of 1949 that this age limit of 14 years was raised to 15 years in case of girls.[19] It was ultimately in 1978 that the age of marriage was increased to 18 years for girls and 21 years for boys[20], with a view to control the population growth.

The Act penalised an adult male for marrying a minor girl. A male above twenty one years, who contracted a child marriage, was punishable with simple imprisonment which may extend to three months and was also liable for fine.[21]

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[14] *Id*., Statement of Objects and Reasons.
[15] *Ibid*.
[16] Report of the Age of Consent Committee 11 (1928-29).
[17] Act No. XXIX of 1925, published in Gazette of India, (Oct. 3, 1925), Pt. IV.
[18] *Supra* note 10 at 16.
[19] Act 41 of 1949.
[20] The Act was amended in 1978 by the Child Marriage Restraint (Amendment) Act (Act 2 of 1978).
[21] The Child Marriage Restraint Act, S. 4 (1929).

However, if the male contracting child marriage was above eighteen years and below twenty one years, he shall be punishable with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both.[22] However, no such provision existed for a female adult marrying a minor boy, possibly because such incidents were very rare.

However, the Act remained a dead letter as it failed to achieve the objective for which it was enacted. It was obeyed in its breach more than its observance and due to the socio-cultural set-up of the Indian society, the practice of child marriage remained unabated. As a result, there was a growing demand to eradicate this evil practice by making more effective laws which would provide for stringent punishments. Pursuant to the efforts of National Commission for Women,[23] the National Human Rights Commission reviewed the 1929 Act comprehensively and proposed significant amendments.[24] Accepting all the recommendations, the Central Government repealed and re-enacted the Child Marriage Restraint Act, 1929. Consequently, the Prohibition of Child Marriage Act, 2006 came into effect from January 10, 2007.

III. LEGISLATIVE PROVISIONS RELATED TO CHILD MARRIAGE

A. The Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act, 2006, defines the term "child marriage" as a marriage where either of the contracting parties is a "child"[25] and the word "child" denotes a person who has not completed 18 years of age in case of females and 21 years of age in case of males.[26] The Act was enacted with a threefold purpose (1) to prevent child marriages (2) protect children involved and (3) prosecute the offenders. Its ultimate aim was to eradicate the evil practice of child marriage from the society.

The Act confers a status of validity to child marriage till the time either of the parties chooses to get it annulled.[27] Section 3 of the Act provides that a child, who has been forced into marriage and would be, in all probability subjected to intercourse, has the option of rescuing herself from this relationship by applying to the district court through her guardian or next friend. But how

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[22] *Id.*, S. 3.

[23] The NCW in its Annual Report (1995-96) recommended that (1) the punishment provided under the Act must be made more stringent; (2) marriages performed in contravention of the Act should be made void; and (3) the offences under the Act must be made cognizable.

[24] Annual Report of National Human Rights Commission (2001-2002).

[25] The Prohibition of Child Marriage Act, S. 2(*b*) (2006).

[26] *Id.*, S. 2(*a*).

[27] The Prohibition of Child Marriage Act, S. 3 (2006).

can the law expect a child to find a guardian, usually the one responsible for getting her married in the first place, or another individual as next friend to pull her out of this arrangement? Thus, despite the provision, this option of filing a decree of nullity in the court in order to annul their marriages is far from reality.[28] In fact, even if the judiciary becomes aware of a child marriage, it rarely advices the girl child to exercise her rights to get her marriage annulled as can be inferred from the case of *Assn. for Social Justice & Research* v. *Union of India*[29] In this case, the court rather than directing the legal services authority to provide legal aid or advise the girls to have their marriage declared as void, directed the girl below 18 years of age to stay with her parents and that her parents shall not allow consummation of the marriage till she attains 18 years while her husband was released on bail. No proceedings were initiated for declaring the child marriage as void.

Punishment of imprisonment for up to two years or fines up to one lakh rupees has been prescribed for male contracting parties to the marriage who are above 18 years of age.[30] Same punishment has been prescribed for those who performs, conducts, directs or abets child marriages and others for knowingly promoting, negligently failing to stop or attending and practising in child marriages.[31] Even the parents are to be punished for promoting or permitting child marriage.[32] However, women are exempt from imprisonment under the Act.[33]

It has declared child marriages as cognizable and non-bailable offence.[34] The PCMA confers power on courts to issue injunctions in order to prohibit the solemnization of a child marriage either suo moto or in response to complaints filed by any person or non-governmental organization having reasonable information about child marriages.[35] This law empowers the courts to issue injunctions to prohibit the solemnization of child marriages and if solemnized after such injunction, then such a marriage shall be declared to be null and void.[36]

Despite such quality provisions, the practice of child marriage still continues in the society. In order to curb this evil practice, the law, instead of recognising child marriages as voidable at the option of the minor party, should observe such marriages as void ab initio. This significant change in law has

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[28] Pallavi Gupta, "Child Marriage and the Law", 47 Economic and Political Weekly 49 (2012).
[29] 2010 SCC OnLine Del 1964.
[30] The Prohibition of Child Marriage Act, S. 9 (2006).
[31] *Id.*, Ss. 10 and 11.
[32] *Id.*, S. 11.
[33] *Id.*, S. 13(10).
[34] *Id.*, S. 15.
[35] The Prohibition of Child Marriage Act, S. 13 (2006).
[36] *Id.*, Ss. 13 and 14.

been culminated by the Karnataka Government, which has declared all future child marriages in the State as void.

i. The Prohibition of Child Marriage (Karnataka Amendment) Act, 2016

The reform in the laws on child marriages in Karnataka was initiated by a 2010 decision of the Karnataka High Court which aimed to seek directions for effective implementation of the PCMA.[37] The High Court directed the state to set up a Core Committee with a view to prepare an action plan to prevent child marriages. As a result, Justice Shivaraj Patil Committee was formed with the objective to analyze the constitutional, legal and situational status of child marriage and to make recommendations on the prevention of child marriages.

It was on the special recommendations of the Justice Shivaraj Patil Committee (2011), the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 was passed which declared child marriages as void ab initio or illegal in law. Thus, one can infer that there is no requirement to obtain a decree of nullity from the court,[38] thereby, ensuring zero tolerance for child marriages. Making child marriages void addresses the fact in its current form, the implicit recognition of child marriages by PCMA as a traditional, cultural and religious practice and the onus on girls to invalidate the marriages, therefore, leads to impunity for violations.

The Supreme Court in the prominent case of *Independent Thought* v. *Union of India*[39] praised the Karnataka legislature for taking cognizance of such an important issue and expressed the opinion that child marriages should be recognised as void throughout the country. Thus, there is a need to amend the Act so as to declare child marriages as void, instead of voidable and thereby, prevent this social evil.

B. The Indian Penal Code, 1860

The age of consent as provided by section 375 of IPC is 18 years which clarifies the position that a girl, who is below 18 years of age is incapable of giving consent for sexual intercourse, thereby, recognizing the vulnerability of children. However, the exception to section 375 exempted a husband from committing such a heinous offence with his wife who is not aged below 15. But the Supreme Court in its landmark judgement of *Independent Thought* v. *Union of India*[40] read down this exception and held that sexual intercourse by a man with his wife, who is below 18 years of age, is rape. This criminalised the

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37 *Muthamma Devaya* v. *Union of India*, 2010 SCC OnLine Kar 5452.
38 *M.M. Malhotra* v. *Union of India*, (2005) 8 SCC 351.
39 (2017) 10 SCC 800.
40 (2017) 10 SCC 800.

sexual intercourse in a child marriage, thereby, holding the husband liable for having sexual intercourse with his minor wife.

Child marriages are a form to control the female sexuality and her reproductive rights. Also, as the laws do not provide for any consensual adolescent sexual activity, they, thereby, encourage parents or adolescents themselves to marry early to avoid the risk of legal and social sanction for sexual activity.[41] However, making sexual activities within such marriages punishable is a great step towards its prohibition as criminal sanction for such activities, even though within the fold of marriage, would certainly discourage parents or adolescents to marry at an early age and thus, would further the objective of eradication of child marriages.

The 205th Law Commission Report recommended that all child marriages solemnised between the ages of 16 and 18 should be made voidable at the instance of the minor party whereas all child marriages solemnised before the age of 16 should be void ab initio.[42] The recommendation was based on the fact that the age of consent, at that point of time, was 16 years. However, the Criminal Law (Amendment) Act, 2013 raised the age of consent to 18 years. Thus, keeping this in mind and also the criminalisation of sexual intercourse with a minor wife, one can infer that all marriages solemnised below the age of 18 years should be declared "void ab initio."

C. The Protection of Children from Sexual Offences Act, 2012

Whilst making decisions in context of children, one needs to keep in mind the "best interest of child." The term "best interest of child" has been defined by the Juvenile Justice Act, 2015[43]. As per the definition, best interest of child means that the basis for any decision taken regarding the child should be to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

The Preamble to POCSO provides that the law should be operated "in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child." However, as the girls are made to drop out from their schools in order to engage in a matrimonial relationship at an early age, the intellectual and social development of the child bride is restrained. Also, due to their exploitation at the hands of an adult husband, their physical and emotional well being is endangered which in turn,

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41 Dr Asha Bajpai, Report of Ending Child Marriage: Litigation Strategy Meeting 17 (2015).

42 Law Commission of India, 205th Report on Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws (February 2008).

43 Juvenile Justice (Care and Protection of Children) Act, S. 2(9) (2015).

deteriorates their health to a large extent. So, in order to ensure the best interest of child, the need of the hour is to abolish the practice of child marriage.

Earlier, exception 2 to section 375 of Indian Penal Code provided that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. Thus, sexual intercourse with a minor wife between 15 and 18 years of age was not considered as rape. This was in direct contravention to section 5(n) of the POCSO Act, 2012, as the act of the husband constituted aggravated penetrative sexual assault and was punishable under the Act. Thus, the Act criminalised sexual intercourse in child marriages. However, due to the anomaly created between IPC and POCSO, section 42-A was inserted in the Criminal Law (Amendment) Act, 2013 which provided POCSO with an overriding effect over the provisions of IPC. But the court still continued to give benefit of exception under IPC as can be witnessed in *Yunusbhai Usmanbhai Shaikh* v. *State of Gujarat*[44] *or Mujamil Abdulsattar Mansuri* v. *State of Gujarat*.[45] This lacunae has been filled by the Supreme Court in its recent landmark judgement of *Independent Thought* v. *Union of India* which read down this exception and held that sexual intercourse by a man with his own wife, who is below the age of 18 years is rape. Thus, both the POCSO and IPC were harmoniously constructed such that any form of sexual intercourse by a man with his wife, who is below 18 years of age, can be penalised and thus, aid in the prohibition of child marriage.

D. The Juvenile Justice (Care and Protection of Children) Act, 2015

The Juvenile Justice (Care and Protection of Children) Act, 2015 categorises children into two groups: (i) child in conflict with law and (ii) child in need of care and protection. The phrase "child in need of care and protection" has been defined in section 2(14) of the Act. Clause (viii) of section 2(14) provides that a child who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal act is a child in need of care and protection. The Supreme Court in *Independent Thought* v. *Union of India*[46] recognised married girls experiencing rape as child in need of care and protection but enforcement of this decision is necessary in order to ensure that the local functionaries implement this broadened definition and the facilities made available to child in need of care and protection can be extended to child brides as well. Thus, the child brides who are subject to exploitation at the hands of their husband by virtue of the matrimonial arrangement fall within the ambit of "child in need of care and protection."

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44 2015 SCC OnLine Guj 6211.
45 2014 SCC OnLine Guj 14365.
46 (2017) 10 SCC 800.

Also, clause (xii) of section 2(l4) provides that a child who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage is a child in need of care and protection. This new category overtly reflects the malaise of child marriage. In the common parlance, a child is married against his/her wishes and so, this clause strengthens the hands of the agencies and persons who are involved in the prevention of such marriages.

The officials now, have the power to produce children who are at imminent risk of child marriage before the Child Welfare Committee which may pass orders in the best interest of children and thereby, send the child to a children's home, a "fit facility" or a "fit person" and pass directions relating to counselling, medical attention, legal aid, skills training, education services and other developmental activities.[47] Though the Act provides shelter homes to child in need of care and protection, the courts are unwilling to send married girls who do not want to return to their homes to these shelter homes because these homes lack basic amenities by virtue of which the children are at risk of exploitation.[48] This unwillingness of the courts, thereby, impedes the child bride to exercise viable alternative options to marriage.

Thus, there is an urgent need to provide these shelter homes with basic amenities and ensure a healthy environment at the place so as to avoid exploitation of children, making it a safe place for them to live in. Thus, the courts would then be willing to send "child in need of care and protection" including child brides to these shelter homes and as a result, would provide child brides with the most appropriate and safest alternative. Thus, the officials should ensure effective implementation of the Act.

E. Personal Laws

Personal Laws are the laws which governs marriages and divorces of a particular religion in India and most of the personal laws, either directly or indirectly, validate the practice of child marriages and are in contravention to other laws such as Prohibition of Child Marriage Act, 2006, etc. Thus, the question which appertains here is that: which will have overriding effect? As it is undeniable that preservation of customary laws cannot be given precedence over a minor girl's right to life, health and safety, therefore PCMA should be held applicable on all religions irrespective of their personal laws as was observed in a recent judgement of Gujarat High Court.[49] This view was in unison with

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[47] Juvenile Justice (Care and Protection of Children) Act, Ss. 3 and 37 (2015).

[48] Asian Centre for Human Rights, India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes 1 (2013).

[49] *Yunusbhai Usmanbhai Shaikh* v. *State of Gujarat*, 2015 SCC OnLine Guj 6211.

a judgement of Karnataka High Court[50] wherein it was held that no Indian citizen could claim immunity from PCMA on the ground of belonging to a particular religion. But, first, let's consider various personal laws which are prevalent in India.

i. The Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 is a personal law which is applicable on majority of the population of India as they comprise of Hindus. Section 5 of the Act deals with conditions for a Hindu marriage and lays down that for a valid Hindu marriage, the bridegroom must have completed twenty-one years of age and the bride must have completed eighteen years of age and a marriage in contravention of this section is either void or voidable.

However, one can infer that if there is contravention of the prescribed age-limit, it will neither render the marriage void nor voidable. But the Act contemplates penal consequences for solemnization of child marriages by imposing a rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both.[51] Thus, one can infer that though the Act prescribes penal consequences for child marriage but in its essence, contains provisions which validate the practice of child marriage.

Section 13(2)(iv) of the Hindu Marriage Act provides that the wife can seek divorce if her marriage was solemnised before she had attained the age of fifteen years and has repudiated the marriage after attaining that age but before attaining the age of eighteen years, irrespective of the fact that her marriage was consummated or not. But divorce can take place only when there is existence of a valid marriage. Thus, the legislators, through the existence of such a provision, impliedly accepted the validity of child marriages. Also, if the girl child does not exercise her option of divorce before attaining the age of eighteen years, her marriage will remain valid.[52] The most debatable issue which appertains is that whether the child bride could ever exercise her option of seeking divorce before she attains majority? This is almost next to impossible for her to exercise such an option in a socio-cultural environment which does not even acknowledge the need of her consent to the marriage.

And even if the child bride withdraws from the matrimonial relationship in some or the other manner, her husband can claim for restitution of conjugal rights under section 9 of the Act and she cannot take the defence that she was a minor at the time of solemnization of marriage.[53] This legal incongru-

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[50] *Seema Begaum* v. *State of Karnataka*, 2013 SCC OnLine Kar 692.
[51] Hindu Marriage Act, S. 18 (1955).
[52] *Luxmi Devi* v. *Ajit Singh,* 1995 SCC OnLine P&H 68 : (1995) 2 HLR 299.
[53] *Mohinder Kaur* v. *Major Singh*, 1971 SCC OnLine P&H 229 : AIR 1972 P&H 184.

ity further worsens the status of a child bride and the Act is ambiguous on its position on child marriages.

ii. The Muslim Law

Under Muslim law, every Muslim of sound mind, who has attained the age of puberty, is eligible to contract a marriage.[54] The marriage of a person below the age of puberty is to be solemnized by a guardian and such marriage is not void. However, the minor can annul such marriage by exercising the "option of puberty" but this option is only available if the girl challenges the marriage before turning eighteen and if the marriage has yet not been consummated.[55]

iii. Parsi Marriage and Divorce Act, 1936

Section 3(1)(c) of the Act provides that for a valid Parsi marriage, the bridegroom and bride should have completed 21 and 18 years of age respectively. Thus, the marriage of a girl below the age of 18 years is rendered invalid. However, in the provision on grounds under which a marriage can be declared void, age has not been included as a requisite.[56] This creates ambiguity as to whether child marriages are invalid from the outset or needs to be invalidated through a legal process. The Act is silent on a girl child's right to leave such marriages and do not provide for penalties for violation of the minimum age restriction.[57]

iv. Special Marriage Act, 1954

The Special Marriage Act, 1954 is applicable on all Indian citizens irrespective of their religion and was originally enacted to enable inter-religion or inter-caste marriages. Section 4 of the Act which deals with conditions relating to solemnization of marriage provides age-limit as one of the conditions under clause (c). Section 4(c) lays down the minimum age of marriage for men and women as 21 and 18 years of age respectively and any marriage in contravention of this condition is void under the Act.[58] Thus, the Act renders child marriages void.

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54 N. Baillie, *Digest of Muhammadan Law* 50 (1980).

55 Dissolution of Muslim Marriages Act, S. 2 (1939).

56 Parsi Marriage and Divorce Act, Ss. 30, 31 and 32 (1936).

57 Jaya Sagade, *Child Marriage in India: Socio-Legal and Human Rights Dimensions* 47 (2nd edn. 2012).

58 Special Marriage Act, S. 24 (1954).

IV. INTERNATIONAL INSTRUMENTS RELATING TO CHILD MARRIAGE

A. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women entered into force in the year 1981 and was ratified by India in 1993. The Convention explicitly provides for prohibition of child marriages. Article 16(2) of the Convention states that "the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriage in an official registry compulsory."

The Convention also recognizes the importance of consent for marriage by including article 16(1)(b) which grants the right "to freely choose a spouse and to enter into marriage only with free and full consent." General Recommendation 21 of the CEDAW Committee emphasises that this right is central to a woman's life and her dignity and equality as a human being.[59] Thus, one can infer that as consent cannot be considered "free and full" in case of child bride, thus, there is violation of her right to equality as a human being along with right to life and dignity.

Also, General Recommendation 21 calls for the abolition of provisions which provide for different ages of marriages for men and women based on the fact that countries assume incorrectly that woman have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial.[60] The CEDAW has also focussed on the fact that allowing marriages on payment or preferment of dowries is clear violation of the right to freely choose a spouse and has in its general recommendation no. 29 prohibited such practice, in order to recognise a marriage as valid and the State parties should not recognise such practices as enforceable.[61]

Thus, the Convention not only expressly prohibits child marriages but also considers the phenomena through the lens of health, life, survival and development of the minor wife. It also seeks to ensure enforcement of its provisions by setting up complaint mechanisms.

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[59] UN Committee on the Elimination of Discrimination against Women, CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, UN Doc A/49/38 (1994).

[60] *Ibid*.

[61] UN Committee on the Elimination of Discrimination against Women, CEDAW General Recommendation No. 29: Economic Consequences of Marriage Family Relations and their Dissolutions (2013).

B. The Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child came into force in 1990 and was ratified by India in the year 1992. The Convention does not explicitly prohibits child marriages but recognizes its adverse impact on other rights, notably, right to free expression, to protection from abuse and to protection from harmful traditional practices. The CRC Committee, in its concluding observations, observed that the minimum age of marriage should be 18 years for both male and female.[62]

Article 3 of the Convention enshrines the "best interest of the child" principle. It provides that best interests of the child shall be a primary consideration in all actions concerning children. This represents a shift from the child as being perceived as merely the recipient of privileges that are bestowed at the discretion of the family or the community, and moves towards a more progressive view of the child as the bearer of legal rights under international law.[63] However, as child marriages exposes married girl child to violence, divorce, abandonment and poverty, thus, it cannot be considered as viable and should be declared illegal in order to ensure best interest of the child.

Also, the Convention contains provisions to protect the rights of the children who are at the risk of child marriage. Article 2 of the Convention provides children with the right to freedom from discrimination and requires the State parties to take all appropriate measures in order to ensure that the child is protected against all forms of discrimination. Article 13 grants the right to freedom of expression with exceptions only for the respect of rights or reputation of others, and for protection of national security, public order, public health or morals. Article 28 of the Convention protects the right to education of the children. The CRC seeks to protect children from gendered violence and in the context of child marriage, protection from sexual abuse[64] and from all forms of sexual exploitation.[65]

Also, the Convention responds to the evil of child marriage through article 24(3) by recognising the adverse impact of child marriage on the health of the child. Article 24(3) states that "State parties shall take all effective measures with a view to abolishing traditional practices prejudicial to the health of the children." Recognizing the negative impact of child marriage on the health, education and social development of children, the CRC Committee has

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[62] UN Committee on the Rights of the Child, Concluding Observations: India, UN Doc CRC/C/15/Add.115 (February 2004).

[63] Savitri Goonesekere, *Children, Law and Justice: A South Asian Perspective* (1st edn. 1997).

[64] The Convention on the Rights of Child, Art. 19.

[65] *Id.*, Art. 34.

expressed the requirement of concrete and urgent steps by the State parties to combat child marriages.[66]

C. Regional international instrument

i. South Asian Association for Regional Cooperation

The SAARC was established in 1985 and consists of a number of member states including Afghanistan, Bangladesh, Bhutan, India, Maldives, Pakistan and Sri Lanka. The SAARC, in 2002, established the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. The Convention, recognising the need for assistance and protection of children, referred to child marriage in Article IV which states that "State Parties shall make civil registration of births, marriages and deaths, in an official registry, compulsory in order to facilitate the effective enforcement of national laws, including the minimum age for employment and marriage."[67] Also, in August 2014, they established the first Regional Action Plan to End Child Marriage in South Asia, whose overall objective is to:

"Delay the age of marriage for girls in at least four countries in South Asia by 2018 or alternatively to raise the age of marriage to 18 for both boys and girls delaying early marriage in at least four countries in South Asia by 2018."[68]

V. CONSEQUNECES OF CHILD MARRIAGE

A. Education

Education plays a very important role as a catalyst or agent of social change.[69] Knowledge is an imminent part of education and the whole objective of rendering child marriages void is to ensure that the women is in better position as far as knowledge is concerned. Education enables women to acquire basic skills and abilities and fosters a value system which is conducive to raising their status in society.

The law provides for free and compulsory education to all children of the age of six to fourteen years[70], however, since in Indian society, education is

[66] UN Committee on the Rights of the Child, Concluding Observations: India, UN Doc CRC/C/15/Add.115 (February 2004).

[67] SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, Art. IV 3(*d*) (2002).

[68] South Asia Initiative to End Violence against Children, Regional Action Plan to End Child Marriage in South Asia (2015-2018) 3.

[69] N.J. Usha Rao, *Women in a Developing Society* 27 (1985).

[70] Indian Constitution, Art. 21-A.

not considered necessary for women as they are attributed with the traditional role of child birth and child rearing[71], so, girls are made to dropout from their schools and engage in a matrimonial relationship at an early age. Thus, the child bride's right to education is violated and due to lack of knowledge, they generally have limited decision making power in relation to their own lives. Hence, child marriages limit the opportunities of education and economic independence of a girl, by virtue of which they are more likely to be dependent on their husbands for economic stability and maintenance.

However, in a state like Kerala, where the positive nexus between education and age of marriage is obvious, the literacy rate is an enviable 100% and the average age of women at the time of marriage is 22 years.[72] Thus, in order to raise the position of women in society and ensure their economic and social autonomy, they should be provided with better quality of education. This is only possible when they finish their higher education which will be completed by the age of 22 as by the age of 18 years, a woman can only complete 12 years of her basic education. Thus, the age of marriage should be raised to 22 years in order to afford better chance to a woman to get educated. Thus, by raising the age to 22 years, what is happening in Kerala today can be possible in the whole of India.

B. Health

Before considering the question of mental maturity, first we shall consider the question of physical maturity of a child bride. There is a clear nexus between the woman's age and fertility. At an age below 18 years, the woman's body has not reached complete child bearing capacity. At an age above 18 years, the woman will be more physically strong, thus, incidental effects like infant mortality, death during child birth will be reduced. As child marriages are often accompanied by early and frequent pregnancy and childbirth, so, due to physical incapacity of child brides, the average maternal morbidity and mortality rates are high. The major cause of mortality for girls between 15 and 19 years of age is pregnancy-related deaths.[73] Infant mortality among children of very young mothers is higher (sometimes as much as two times higher) than among those of older mothers. Also, child brides are very vulnerable to sexually transmitted diseases, in addition to early pregnancy as they are unable to negotiate safer sex by use of condoms or refuse sex with their partners in comparison to their adult female counterparts.[74] Also, child brides are less

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[71] Ashok Kumar and Harish, *Women Power – Status of Women in India* 8 (1991).

[72] Indian University Association for Continuing Education, Age at Marriage 76 (1990).

[73] CEDAW & CRC, Joint General Recommendation No. 31 of the Committee on Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18 (2014).

[74] The International Centre for Research on Women, "Too Young to Wed: Education and Action toward Ending Child Marriage" 3 (2005).

likely to receive medical care during pregnancy as compared to their female counterparts.[75]

Thus, if child marriage is made void, then the girl will marry at a higher age which would mean a reduction in the number of children she will bear. This in turn, will be beneficial for her health and will also put a check on the country's population growth.

Coming to the aspect of mental health of a child bride, depression and suicide among them is found to be prevalent.[76] As per 2011 study on child marriages, it is significantly associated with all mental disorder except pathological gambling and histrionic and dependent personality disorders.[77] Also, these child brides are at high risk of developing antisocial personality disorder by three times.[78] Other disorders commonly found in them include major depressive disorder, nicotine dependence and specific phobias.

What is required is a much needed change towards the attitude to marriage. One must realise that it is of utmost importance to make child marriages illegal as it is not only degrading the role and status but also the health of woman in the society. On the other hand, if child marriages are made void, girls will get married at a higher age (of 18 years or above) and an increase in the age will lead to a positive rise in the levels of literacy. The girls, thereby, become physically and mentally prepared for marriages by that time and are also able to negotiate safer sex, which in turn, would reduce the risk of sexually transmitted diseases. This, in turn, will put a check on the country's population growth. This is the foundation stone towards a more progressive society.

C. The Economic Dimension

The economic argument in prohibiting child marriage has a direct nexus with education of the child. In today's economic market, qualifications of a person determine the nature of job he/she will get. However, child marriage curtails the future opportunities of the children to compete for well-paying job as they are not equipped with the required knowledge and qualifications. Thus, by ending child marriage, woman will get a chance to acquire the required qualifications which will ensure their success in the economic front, thereby, promoting gender equality. With the advent of the nuclear model of the family where both the partners are earners, the economic potential of a woman is

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[75] The United Nations Children's Fund, *Ending Child Marriage: Progress and Prospects* 4 (2014).

[76] Yann Le Strat, et al., "Child Marriage in the United States and its Association with Mental Health in Women", 28 Pediatrics Journal of American Academy of Pediatrics 524, 528 (2011).

[77] Vivian E. Hamilton, "The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage", 92 Boston Law Review 1817, 1820 (2012).

[78] *Ibid*.

vast in the modern economic society. So, in order to ensure a better position in the economic market, this potential of the woman needs to be increased. Another point which needs to be focussed is that as gender laws ensure gender equality, thus, economic independence should also form an important aspect of this equality and marriage rather than curtailing, should promote the economic independence of a woman.

According to the Economic Impacts of Child Marriage report, ending child marriage would keep a check on population growth, which in turn, would increase the rate of economic development as larger population reduces the rate of economic development. It was found that ending the practice of child marriage could save the global economy trillions of dollar between now and 2030. Thus, ending the practice of child marriage is not only the morally right thing to do but also the economically smart thing to do.[79]

VI. CONCLUSION AND SUGGESTIONS

Child marriage is illegal per se as it violates the human rights of the girl child by subjecting her to exploitation and endangering her health and life. Despite this, the evil practice is prevalent in our society not only because of the socio-cultural norms but also due to loopholes contained in various legislations on child marriages which confer them with a status of validity. Even the Prohibition of Child Marriage Act, 2006, regards a child marriage as valid unless either of the parties chooses to get it annulled. Also, the judiciary while dealing with cases on child marriage rarely provides legal aid or advises the child bride to get her marriage annulled. If this continues then the practice will never be abolished from our society. Thus, the need of the hour is to bring a law that declares all child marriages as void which can be done by amending the PCMA as has been recently done by the state of Karnataka.

Also, the criminalisation of sexual intercourse in child marriages is evident of the fact that child marriages should be declared void. The punishments for performing child marriages should be made more stringent and the laws relating to maintenance, children begotten in child marriages, etc., should be amended so as to confirm the laws relating to void marriages. Also, all the other legislations, including personal laws, should be harmonised so as to declare child marriages as void. However, implementation of these laws is of utmost importance. The officials appointed under the Act should be trained to deal with such situation and rescue children from such relationships and an official ignorant in the performance of his duty should be penalised.

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[79] "Child Marriage will Cost Developing Countries Trillions of Dollars by 2030, Says World Bank/ICRW Report", The World Bank (June 27, 2017), <https://www.worldbank.org/en/news/press-release/2017/06/26/child-marriage-will-cost-developing-countries-trillions-of-dollars-by-2030-says-world-bankicrw-report>.

As the major factors for persistence of child marriage in Indian society is poverty and lack of education among children. Thus, in order to prevent it: (1) High-quality should be made accessible to girls and they should be provided with incentives – uniforms or scholarships – in order to prevent them from dropping out of schools; (2) Girls should be empowered with information, skills and support networks so that they can grow to become an independent woman; (3) The belief of considering girls as economic burden can be disregarded by enhancing the economic security of poor households. Economic support and incentives should be provided to girls and their families. Also, families should be made aware of the fact that educated girls will earn income in future which will add more value to the family; (4) Parents and community members should be made aware about the consequences of child marriage; and (5) consistent laws and policies should be enacted and effectively implemented.

Thus, declaring child marriages void and adopting the above mentioned strategies will aid in combating child marriages. This, in turn, will ensure good health conditions of the child bride and help her to be economically independent as well. As a result, the potential of women in the society will increase which will ensure gender equality in the country. As Swami Vivekananda said, “There is no chance for the welfare of the world unless the condition of woman is improved. It is not possible for a bird to fly on only one wing.” Thus, prohibiting child marriages will, in turn, ensure the welfare and development of the entire nation.

DIFFERENT STRANDS OF IP IN SPORTS & E-GAMING INDUSTRY: EXPLORING THE HORIZONS

—*Arnav Bishnoi*[*] *& Achint Johri*[**]

Abstract — A football team called Patiala City FC *was established in the year 2015- with a whole lot of academy grown players. In a short span of time, it came to the forefront in the Indian Footballing Arena. Its journey started from the third division of the football league and it won back to back promotion to the premier football league of India and is currently holding the pole position in order to qualify for AFC Champions League, the equivalent to UEFA Champions League of Europe. Due to this feat, the club has become one of the most popular clubs in India, with a large fan base. The club has an impressive Jersey inspired from the rich culture of Punjab, a regal logo/emblem and a thumping motto "*Our blood, Our Sweat, Your Tears*". Its merchandises (Jerseys, Player memorabilia, etc.) were selling like hot cake. The Club's home-grown center forward player, Abhinav Shukla was fundamental to the team's success over these couple of years. His stellar performances made him a top target for European Clubs, but with success came forth, the breach of his image rights, personality as well as privacy. Lack of legal knowledge, as well as the void of law in our country, made things tumultuous both for the club and also, the player in order to sustain their economic rights. Popular video games used his persona in the game without any consent or contract, he has no idea how to go about it. Though the situation is made-up, it might ensue that one our finest athlete loses out on revenue*

[*] 4th Year- BA/LLB, Rajiv Gandhi National University of Law, Patiala
[**] 2nd Year- BA/LLB, Rajiv Gandhi National University of Law, Patiala.

opportunities from the utilization of his image rights and suffers this breach of privacy and fails to tap in the commercial conduits which were worth making fortunes on his right to publicity and also the position of our country's sporting franchisee might be put into jeopardy. In these situations, there is nothing that the athlete or the franchise, can do except for approaching the court under the outmoded facets of law. Thereby, there is an increasing need for protecting the IPR in the ever-growing arena of Sports and in the myriads of E-sports

I. THE BUSINESS CALLED SPORT

In India as well as the United Kingdom, sports cannot be owned by one entity, simply stating, it's incapable of being owned by anyone. Back in the mid-1900 century sports was not being beheld upon as an industry. The celebrated **Webster** dictionary defines it as, "Any physical activity undertook for enjoyment, pastime; such an activity which more or less requires bodily exertion of force and is being carried on according to such rules/ regulations as laid down"[1]

Sports no longer remains a social activity linked with recreation, amusement or victory & defeat and, the sporting events no longer looks anything like such events for the money flowing in has gained a tremendous chunk in such events. Due to the fact that people relate themselves with sports and feel an inherent association to certain sports team/clubs that sports have had become commercially exploitable and generate revenue. For example, in India, the game of cricket has transformed into a colossal commercial diversion attracting mammoth capital, ventures, and profits. Furthermore, in the recent past, leagues like the IPL, Pro Kabaddi, ISL- Football, organizing Formula one race in India has only streamlined sports as a business.

As far as the ownership of sports is concerned, in Britain, they have a settled position under the law that "a spectacle cannot be owned in any ordinary sense of the word",[2] then why so much of money is being invested in sports today and also, a lot of sporting activities being treated as a valuable economic asset? The answer is that the Capability of a sporting event to generate money is no longer constrained to the ticket sale. But there are various analogous commercial rights available in sports, like P.R., building a brand out of a sportsman, licensing of certain rights to the sponsors, which the event

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[1] Definition of Sport, Merriam-Webster, <https://www.merriam-webster.com/dictionary/sport> (accessed 3 May 2019).

[2] *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*, (1937) 58 CLR 479.

organizers exploit in order to earn money.[3] As the economic facet of sports and sporting events amplifies there usurped a prerequisite to protect the economic interests of the players as well as the owners who have invested astronomical amounts in the venture.

- WHY IP RIGHTS?

Intellectual Property Rights (IPR) in sports, chiefly the Trademark & Copyright can be a pragmatic instrument towards the marking of exhausting digressions, inspiring more innovations & inventiveness, sports clubs/groups, big-name status, etc.[4] IPR can protect a franchise and a player to protect its commercial value from fraudsters/ forgers copying their IP without permission and at the same time making sure that inventors and creators get a fair reward for their work[5], give it the monopoly to protect the goodwill and sell the rights which are "*the life-blood of sports events at all levels, right from the elite level athletes down to the grassroots participants*".[6]

There have been a lot of occurrences whereby both the club as well as the player had accrued the benefit from their marketability. Football due to its popularity has benefitted the most from rights selling. Since 2011, **Real Madrid** has been designated as the ambassador of the **"Made in Spain"** brand, signing a deal to promote Visit Spain campaign for the Spanish Government.[7] Another such instance was that of **David Beckham** after he moved to Real Madrid in 2004. Adidas had fashioned an exclusive emblem for him, depicting his bravura of scoring from free kicks  , which was enthused from Michael Jordan's Nike logo  . He had a fall out with club President over absolute ownership of his image rights and before leaving the club prematurely, he had interestingly minted approx. €4 Million from playing football for the Madrid based club but around €19 Million out of commercial endorsements.[8]

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3 Mukul Mudgal, *Law & Sports in India: Developments, Issues and Challenges*, LexisNexis, 2nd edn., 2016.

4 Shrishti Sharma, Sports and IPR, 2 Sports and Legislature 30 (2018).

5 "Intellectual Property and Sports: Tracing the Connections", World Intellectual Property Organization (WIPO), <https://www.wipo.int/ip-outreach/en/ipday/2019/ip_sports.html> (accessed 10 May 2019).

6 Mark Lichtenhein, "Reach for Gold: IP and Sports", 2 WIPO Magzine (2019).

7 "Real Madrid to Promote Spanish Tourism", Kyero, available at <https://news.kyero.com/2011/03/real-madrid-to-promote-spanish-tourism/3579> (accessed 9 May 2019).

8 "Beckham Drives Madrid to Top of Money League", *The Guardian*, <https://www.theguardian.com/football/2006/feb/16/newsstory.sport>; BBC Sport, 2007 (accessed 9 May 2019).

II. TRADEMARK: BRANDING & CORRELATIVE RIGHTS IN SPORTS

It is a costly affair if one decides to stage a sporting event. Use of IPR can help the organizers and franchisee owners to stand apart in the marketplace and help recover the costs of organizing the mega sporting events. Research by **World Trademark Review** has crowned Sports club like **Manchester United** as the trademark champions with the Manchester-based club having 413 marks in its portfolio.[9] The club brand was valued at nearly £1.4 billion as it capitalized from the International registration of marks through digital media rights and other sponsorship deals, for example "between 2015 to 2017 it has enjoyed a 4.6% compound annual growth rate in its sponsorship proceeds"[10]. When it comes to the players and athletes, they too have become more IP savvy, Barcelona FC's **Lionel Messi** leads the chart and has the biggest trademark portfolio with as many as 76 marks registered, breaking down the macro IP bundle into micro shreds circumscribing his logo, name & signature.[11]

■ Brand Protection: The First Step Ahead

A considerable time, energy and money have been disbursed by the event organizers and the clubs to make a brand name. A strong brand has a direct correlation with a higher value for the products and services provided by its sponsors or promoters. The Marketers' pay astronomical amount to get sponsorship/title deal for a prestigious and reputed event or a Sports club, as any sort of association with the big sporting events, which attracts big crowds, gets the brand, higher recognition. If the Brand is properly protected by using IP rights properly, it can be a major source of revenue for the event organizers which is perfectly elucidated by the fact that **Star India** paid a whopping □16,347.50 Cr. to **Board of Control for Cricket in India** (BCCI) for the media rights of **Indian Premier League** (IPL)[12] and **Pepsi**, had shelved out □396.8 Cr.[13] to become the exclusive title sponsor.

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9 Manchester United Tops Premier League of Trademarks, World Trademark Review (WTR), <https://www.worldtrademarkreview.com/brand-management/manchester-united-tops-premier-league-trademarks-messi-overtakes-neymar-player> (accessed 10 May 2019).

10 The International Trademark System and Sports, World Intellectual Property Organization (WIPO), <https://www.wipo.int/ip-outreach/en/ipday/2019/madrid_trademarks_sports.html> (accessed 9 May 2019).

11 WTR, *supra* note 9.

12 "Star India Wins IPL Media Rights for Next Five Years", *The Times of India* (2017), <https://timesofindia.indiatimes.com/sports/cricket/ipl/top-stories/star-india-wins-ipl-media-rights-for-next-five-years/articleshow/60355842.cms> (accessed 3 May 2019).

13 Pepsi Pay Rs. 396.8 Crore to be IPL Title Sponsors, Firstpost, <https://www.firstpost.com/sports/ipl/pepsi-bid-rs-396-8-crores-to-be-ipl-title-sponsors-530517.html> (accessed 3 May 2019).

The Delhi High Court recognized the desirability of brand protection in *World Wrestling Entertainment* v. *Savio Fernandes*.[14] In India, one of the few legislations which provides fortification to sports branding is the Trade Marks Act, 1999. The act provides for registration and protection of Trademarks used for a business or goods and also protects against the use of fraudulent marks. The act follows the Abercombie factors[15], whereinafter stating and following a spectrum of distinctiveness, i.e. giving protection to words which denoted the source/uses of the word or they are wholly invented & fanciful in nature.

The latest trends of brand protection by an individual athlete also includes registration of a winning pose/ celebration like Real Madrid & Welsh footballer Gareth Bale's popular **'**eleven of hearts**'**  pose or Usain Bolt's **'**lightning bolt**'**  pose, these trademarks are called "*Unconventional* or *Non-traditional*"[16] marks. Its growth was bolstered by an **EU Regulation**[17] **which eased the prerequisite of graphic representation** for registration.

A. Cybersquatting: Clear and Imminent Menace

In India except for the **IT Act, 2000** which was hastily drafted. There exists no concrete protection (except Interlocutory Injunctions under **Civil Procedure Code, 1908**) whatsoever from the perils of cybersquatting. The **Trade Mark Act, 1999** provides protection to marks which are registered, **§ 135** (**Passing Off**) provides the remedy of injunction & damages. It forms part of the most common domain name disputes. It is the practice whereby individuals maliciously register a domain name which contains the name of well-known celebrities, registered trademark, etc. and then sells the same to rightful trademark holder or the celebrity. In the past celebrities such as Julia Roberts,[18] Madonna,[19] along with some others have re-claimed the domain names which were either identical, confusing or contained their names in suits against alleged cybersquatters.

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[14] *World Wrestling Entertainment* v. *Savio Fernandes*, 2015 SCC Online Del 6716.

[15] *Abercrombie & Fitch Co.* v. *Hunting World, Inc.,* 537 F 2d 4 (2nd Cir 1976).

[16] Davide Dabergami, Unconventional Marks in Sports- When Celebration Becomes a Trademark, Barzano & Zanardo, <https://www.barzano-zanardo.com/en/approfondimenti/unconventional-marks-in-sports-when-celebration-becomes-a-trademark/> (accessed 11 May 2019)

[17] Regulation (EU) 2015/2424 of European Parliament, EUR- Lex, <https://eurlex.europa.eu/eli/reg/2015/2424/oj> (accessed 10 May 2019).

[18] Roberts v. Boyd, No. D2000-0210 (World Intellectual Prop. Org. May 29, 2000).

[19] Ciccone v. Parisi, No. D2000-0847 (World Intellectual Prop. Org. Oct. 12, 2000).

Football Club Barcelona was put in an unwarranted as well as precarious situation. In *Futbol Club Barcelona* v. *Ali Mohamedali*,[20] an individual from U.A.E. had purchased the domain name **<fcbarcelona.soccer>** and had contacted the football club so as to purchase the same for $400,000. The Catalan club approached WIPO's Arbitration Centre and it pronounced a verdict in favor of the club stating the registered domain name was suggestively deceptive and confusing enough to put any prudent person in a state of pandemonium.

B. Sports Merchandising: Passing off fake as real

When Cristiano Ronaldo made a sensational move to Juventus. The Italian club sold a staggering 5,20,000 Cristiano Jersey in just 24 hours, adding up almost $62 Million.[21] The fans love to associate themselves with the club they support and in furtherance, they buy the jersey, cap and other such merchandise which bore the trademark logo or other official insignias (registrable as ™) of the club. The figure abovementioned accounts for the sale of official jersey and there is a void on data for the sale of replicas, it is projected that the size of replicas supersedes the one that of the original. Top European clubs such as Man Utd, Barcelona, etc. earn colossal amount from the sale of branded merchandise. But it is observed that a lot of entities sell replicas by misrepresentation as well as deceit thereby riding on the popularity and goodwill of the claimant club. This perilous situation has emphasized the requirements for a passing-off action,[22] this case (*Irvine* v. *Talksport*) also recognized the player's right in his image, when Mr. Irvine's (a Formula One driver) image was used in an Advt. without his permission.[23]

In India, the action against this misdemeanor can be claimed under the Trademark Act and Indian courts have quantified that, "although the action of passing-off is normally available to the owner of a distinctive mark, but it is an action not only to preserve the reputation of the plaintiff but also to safeguard the public."[24] Irrespective of the judicial pronouncements, there subsists a limitation to the aegis of law which the trademark owner should keep in mind. In *Arsenal Football Club Plc* v. *Mathew Reed*,[25] Mr. Reed was selling merchandise bearing the trademark *'Arsenal'* & *'Gunners'*. The court gave a dictum in favour of Mr. Reed whereby it was stated that, if a person could prove that

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[20] *Futbol Club Barcelona* v. *Ali Mohamedali*, WIPO Arbitration & Mediation Centre, Case No. D2017- 1257.

[21] Niall McCarthy, "Juventus Have Sold $60 Million of Ronaldo Jerseys in 24 Hours", Forbes, <https://www.forbes.com/sites/niallmccarthy/2018/07/20/juventus-have-sold-60-million-of-ronaldo-jerseys-in-24-hours-infographic/#629ebc67392b> (accessed 10 May, 2019).

[22] *Irvine* v. *Talksports Ltd.*, (2002)) 1 WLR 2355.

[23] *Ibid.*

[24] *Satyam Infoway Ltd.* v. *Siffynet Solution (P) Ltd.*, (2004) 6 SCC 145 : AIR 2004 SC 3540 .

[25] *Arsenal Football Club Plc.* v. *Matthew Reed*, (2001) 2 CMLR 23.

there was **no confusion** in the minds of the consumer as to the source of good, i.e. "no misrepresentation of it being official merchandise" then the person wouldn't necessarily violate the trademark of the club.

III. COPYRIGHT IN SPORTS

Copyright forms an unformidable part of protection for sports in toto (players, teams, brands). In order to protect one's right from flouting and to safeguard its value, the Copyright regime is heavily relied upon by the owners. Copyright in Sports vests in diverse segments preserving the right of the creator, creators image rights, computer games, mottos, books, and team emblem, etc. The Copyright Act of 1957 might cover these catenae of creations and supplementarily protect them but this remains an uncertainty since the act doesn't overtly include them.

- The relation between Right of Publicity, Personality & Copyright Law

The relation between Publicity, Personality and Trademark/Copyright has been a contentious as well as frequently litigated topic in the US Laws.[26] It is worthwhile to note that the right to Publicity varies from that of the Privacy.

The right to privacy opines that this basic concept extends to one's 'right of being left alone'.[27] In this transient world players and other celebrities' publicity is being transgressed with a lot of fans/paparazzi being inquisitive about every single aspect of their personal lives. In *Cohen* v. *Herbal Concepts Inc*.,[28] Plaintiffs photo on the cosmetic product was used. Defendant argued that the mother and daughter were not recognizable in the picture, but the court thought otherwise and damages were being awarded recognizing her image rights. Therefore, in cases of such breach, the athlete can either claim compensation for 'invasion of privacy' or in the form of the avowal of their *'right to privacy'*.[29] Moreover, excluding for compensation being the raison d'être for advocating privacy rights, emphasis can also be laid on the protection it provides to one's autonomy and self-esteem. In Auto-Shankar case[30], the Supreme Court endorsed the view that celebrities right to privacy rights form part and parcel of Art. 21 and had termed it as a horizontal right (surprisingly).

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[26] Joshua Beser, *False Endorsement or First Amendment: An Analysis of Celebrity Trademark Rights and Artistic Expression*, 41 San Diego L. Rev. 1787 (2004).

[27] Louis Brandeis D. and Warren Samuel D., The Right to Privacy, Havard Law Review, 4 (5) (1890), <http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy /Privacy_brand_warr2.html> (accessed 9 May 2019).

[28] *Cohen* v. *Herbal Concepts Inc.,* (1984) 63 NY 2d 379.

[29] Tabrez Ahmad, "Celebrity Rights: Protection under IP Laws", Journal of Intellectual Property Rights, Vol. 16, 7-16, Jan. 2011.

[30] *R. Rajagopal* v. *State of T.N.,* (1994) 6 SCC 632.

Horizontal rights apply to both, against the citizens & fellow citizens unlike most of the Fundamental rights, which applies against the Central/State Govt.

Unlike Privacy rights, the right to Publicity shields an athlete from being commercially plundered by somebody else of his likeness, image or his tag; the player or the celebrity as the case, is "the one to decide when and where, and to be paid for (the exposure)."[31] The celebrities, as well as the players in USA, have had registered their marks in the State of California for it is one of the only laws existing which recognize both, the common law as well as the statutory rights of publicity. It states:

> "*Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising... without such person's prior consent... shall be liable for any damages sustained by the person or persons injured as a result thereof.*"[32]

The matter of *K.S. Puttaswamy* v. *Union of India*, overruled the case of *Kharak Singh* v. *State of U.P.*[33] explicitly stating that the right to privacy is a Fundamental right protected by the *golden triangle*[34] of Constitution Sanjay Kishan Kaul, J. raised up the subject of Personality/ Publicity rights from a meagre common law right to that of Constitutional right which in turn is comprised with the right to privacy under the **Art. 21.** He stated that: "Every person should have definitive control and right over his life and image as depicted to the multitudes and to administer the commercial use of his persona and identity"[35]

As regards the personality rights of a celebrity/player is concerned, the matter involving *Rajat Sharma & Zee Media*[36] had explicitly dealt with this contentious issue which is still at a nascent stage. The Delhi H.C. enumerated that the promotional advertisement put forth by Zee Media in the national newspapers bore a clear reference to Mr. Sharma's well-known TV show *(*Aapki Adalat*)*. This advertisement (promoting anchor-less news initiative) took a dig at some of the renowned TV anchors of India. (*Refer to Appendix*)

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[31] *Lerman* v. *Flynt Distributing Co. Inc.,* 745 F 2d 123, 127-30, 134 (2d Cir 1984) (regarding the scanty public figure's right of privacy and publicity asserting against pornographic magazine for erroneously identifying her as nude woman in photograph).

[32] California Civil Code, § 3344, (West 1997).

[33] *Kharak Singh* v. *State of U.P.*, (1964) 1 SCR 332, 345, 347

[34] The Constitution of India, Arts. 14, 19 & 21.

[35] *K.S. Puttaswamy* V. *Union of India*, (2015) 8 SCC 735.

[36] *Rajat Sharma* v. *Ashok Venkatramani* (Zee Media), CS (COMM) 15/2019.

The court laid high reliance on the principle of **identifiability**[37] and held that Rajat Sharma was clearly identifiable as a celebrity and that such rights transgress the out-of-date laws of advertisement.

Personally, after going through the order, it was felt that the court could have given a bit more analysis into this evolving field. Additionally, a blatant flaw with the narrative that these rights are part of IPR is the "lack of recognition of the role of the public in nurturing and forming publicity rights."[38] It will be apt to state that the fame & recognition, consequential to public exaltation (even dislike, like the Sergio Ramos or Kardashians) is pre-eminent for exploiting personality rights.

A. Image Rights and Endorsements Rights of a Player/Athlete

Each athlete enjoying a zealous fan base is not just a player participating in sport to win, but he is in himself a brand, a commodity which is capable of being traded and creating commercial value. Players like Cristiano Ronaldo, Roger Federer, Lebron James, etc. earn more commercially because of their glimmering image than they do it from the sporting conduits. In India, the Delhi H.C. had recognized this aspect and held that this right vests in an individual rather than an organization.[39] FIFA (the governing council of football) corroborates and promotes the principle which gives players right to explore his/her own image rights by himself and at the same time, the club may also exploit it in a group of players or the squad as whole…[40]

It is to be noted that the concept of image rights is akin to that of goodwill, as stated above, it is no less than an "*intangible asset*" or "*brand*" which has been developed over the period of time by unremitting jaw-dropping performances week-in & week-out. In India, like the U.K., there is no specific legislation defending these rights, and they can take legal action only in cases where any of their legal rights in one of the "**Rag baggage**" of law[41] was infringed or illegal reproduction of their image rights which they own[42] or in

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[37] Prarthana Patnaik, Rajat Sharma v/s Zee Media- Delhi HC'S Latest Order on Personality Rights, SpicyIP, <https://spicyip.com/2019/01/rajat-sharma-v-s-zee-media-delhi-hcs-latest-order-on-personality-rights.html> (accessed 10 May 2019)

[38] Harshavardhan Ganesan, "Reveries of a Publicity Right", SpicyIP, <https://spicyip.com/2017/07/reveries-of-a-publicity-right.html> (accessed 11 May 2019).

[39] *ICC Development (International) Ltd.* v. *Arvee Enterprises*, 2003 SCC OnLine Del 2 : (2003) 26 PTC 245 (Del).

[40] Professional Football Player Contract Minimum Requirements (Circular 1171/2008), FIFA, <www.fifa.com/mm/document/affederation/administration/97/29/01/circularno.1171-professionalfootballplayercontractminimumrequirements.pdf> (accessed 11 Apr., 2019).

[41] Art. 21 of the Constitution of India, "breach of Privacy"; Breach of Confidence under Torts; Trademark Act § 135; Breach of Advertising codes (ASCI), etc.

[42] *Elvis Presley Enterprises Inc.* v. *Sid Shaw Elvisly Yours*, CHANF 1997/ 0686/ 3 E No 1337.

cases where breach of commercial confidentiality took place.[43] Nonetheless they are specifically dealt in football players' contracts, for example, **Clause 4** of the **English Premier League's Standard Contract** vows for the protection of a players image rights, it states that **image** of a player can be used by a club only when it is being used with 2 or more club players and, the image right circumscribes the use of nickname, signature, voice, photo or any virtual/ electronic depiction which is distinctive and related to one's fame.[44]

Lately, this issue has also surfaced in the arena of E-Gaming, whereby Bayern Munich's GK **Oliver Kahn** had successfully sued[45] EA Sports for using his image and name in their football game without any express consent from his side.[46] After the emergence of E-sports, it has become a prerogative for the legislatures to ponder thought upon this issue as well as for us to discuss IPR's in the world of E-sports.

IV. INTELLECTUAL PROPERTY IN THE WORLD OF ESPORTS

In a relatively short span of time, esports has rapidly but surely solidified their position as a highly competitive and spectator-friendly entertainment industry. In 2018 alone, the combined viewership numbers of various esports tournaments and events rose to nearly 400 million, outnumbering the spectatorship of flagship traditional sporting events such as Wimbledon and the U.S Golf Masters.[47] Apart from the success of **'traditional'** eSports titles based on the **Multiplayer Online Battle Arena** (MOBA) and **First-Player Shooter** (FPS) formats, such as **League of Legends** (LoL), **Dawn of the Ancients 2** (DotA 2) and **Counter-Strike**, there is also a seeming convergence of sorts between traditional sports and eSports, represented by the overwhelming success of the **FIFA eNations Cup**[48] **and the e-Premier League**, an international gaming tournament in which players represented and competed as their home

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43 *Douglas* v. *Hello! Ltd*., (2001) 2 WLR 992.

44 Premier League Contract, The IP Mall – Intellectual Property Collection, Univ. of New Hampshire, <https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/Agent%20Contracts%20Between%20Players%20&%20Their%20Agents/6_PREMIER%20LEAGUE%20PLAYERS%20CONTRACT.pdf> (accessed on 11 May 2019)

45 *Kahn* v. *Electronic Arts GmbH*, unreported, 25 April 2003.

46 Ian Blackshaw, "Understanding Sports Image Rights", WIPO, <https://www.wipo.int/ip-outreach/en/ipday/2019/understanding_sports_image_rights.html> (accessed 9 May 2019).

47 Christopher Ingraham, "The Massive Popularity of eSports, in Charts", *The Washington Post*, <https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts/?noredirect=on&utm_term=.1affcebbb590> (accessed 20 Apr. 2019).

48 Jack Morton, "FIFA eNations Cup: Team South Africa is Ready for Battle" 2019, Daily Esports, <https://www.dailyesports.gg/fifa-enations-cup-2019-need-to-know/> (accessed 14 May 2019).

countries on **FIFA 19**, a popular football video game.[49] This has further contributed to the success of the eSports model and its positive reception worldwide amongst the next generation of sports enthusiasts.

The meteoric rise of eSports, however, has also brought with it a host of legal and regulatory complications, which if not addressed and dealt with judiciously, can pose to be major hindrances to its continued growth.

Traditional sports have over time established a stable and sustainable ecosystem of operations and revenue distribution, however, the structure of the eSports ecosystem extensively differs from that of traditional professional sports and as a result, suffers from multiple discrepancies.[50]

The fragmented nature of the industry, with each video game title being distinct from the other and each having a different framework of rules which is pre-programmed into the game by developers, makes the implementation of a common set of guidelines for eSports governance especially challenging. The highly diverse nature of game mechanics in different eSports titles, varying from sports based games to combat and shooter based games, unlike traditional sports which operates on a set of fundamental rules that extend to all events and tournaments involving the sport, also indicates the expansiveness of the eSports edifice, so much so that it can be considered to be a sub-industry in itself, operating as a part of the larger sports industry, further representing the difficulty in formulating an all-encompassing general regulatory framework. Organisations such as the **International e-Sports Federation (IeSF)** and **World Esports Association (WESA)** have been established in this respect, to assist in the regulation of eSports but have largely failed in achieving their purpose, primarily due to the lack of participation of game publishers, who are the prime players in the industry and responsible for organising most of the large-scale eSports tournaments. Publishers, refrain from engaging in such organizations as they see regulation as an obstacle to their profit-making motives. Publishers, unlike tournament organizers in traditional sports events whose operations are restricted to regulating a specific sport, see eSports as a secondary activity, their primary concern being selling the video games they produce. As a result, they often overlook the interests of other stakeholders such as the players and spectators.[51]

- IP Monopolisation - Distribution and Streaming Conflicts between Publishers and Organisers

[49] FIFA 19 - Soccer Video Game, Ea –sports, <https://www.easports.com/fifa> (accessed 13 May 2019).

[50] Roman Brtka, "Intellectual Property in the World of eSports", IPWatchdog <https://www.ipwatchdog.com/2018/04/02/intellectual-property-esports/id=95245/> (accessed 20 Apr. 2019).

[51] Joost, "Esports Governance and its Failures", Medium, <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea> (accessed 21 Apr. 2019).

Esports, at their core, involve competition between players of video games. These video games are essentially creative works produced by various game publishers, hence being capable of protection under Intellectual Property (*Copyright*) Law. Intellectual Property and the revenue derived the refrom, constitute the backbone of the eSports industry. Players, publishers and tournament organizers earn significant sponsorship and broadcasting revenue through the intellectual property involved in video games. The issue raised herein is that third parties are superficially making money from rights that they do not own and in which they do not have an immediate interest from a legal standpoint. There are a number of rights and interests of multiple stakeholders, which need to be balanced when it comes to intellectual property. What is especially difficult is protecting these rights and simultaneously catalyzing the growth of the burgeoning phenomenon that is eSports.[52]

IP monopolization has been a long-standing issue which has plagued the intellectual property framework of eSports. Decision making, with respect to the usage of the games by tournament organizers, broadcasters, teams, and players lie solely with the publishers, who effectively exercise a monopoly over other stakeholders. Since these stakeholders place heavy reliance on the intellectual property (the game) of the publishers, it puts the publishers in a position of unprecedented power, where they can easily exploit any benefits derived by other entities from the usage of their IP and control such usage as well.[53] This has been a cause for much tension between the various stakeholders of the eSports community. In the current scenario, the reproduction of a computer or video game in any form, whether permanent or temporary, for whatever purpose, is subject to authorization from the developer. Such authorization is generally granted through end-user license agreements between the publishers and other entities, but by and large, these agreements expressly prohibit the 'commercial exploitation' of the games, subject to any further agreement to the contrary.[54] Commercial exploitation here refers to the sale, franchising, licensing or merchandising of the intellectual property for economic benefit.[55] A centralized IP structure provides publishers with exorbitant power with regards to the commercial dissemination of their games, raising many ethical concerns for players as well as sponsors.[56] Although publishers have to some extent,

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[52] Richard Wee, "Three key legal Issues Currently Facing the Esports Industry: A Perspective from Asia", LawInSport, <https://www.lawinsport.com/topics/articles/regulation-a-governance/item/three-key-legal-issues-currently-facing-the-esports-industry-a-perspective-from-asia?category_id=115> (accessed 21 Apr. 2019),

[53] Max Miroff, "Tiebreaker: An Antitrust Analysis of Esports", 52 Colum. J.L. & Soc. Probs. 177 (2018)

[54] Brtka, *Supra* note 49.

[55] James, "Commercial Exploitation of Intellectual Property Rights", Clendons Barristers and Solicitors, <http://www.clendons.co.nz/resources/background-papers/intellectual-property/commercial-exploitation-intellectual-property-rights/> (Apr. 22, 2019).

[56] Richard P. Flaggert and Calvin Mohammadi, "Copyright in eSports: A Top-Heavy Power Structure, but is it Legally Sound?", Dla Piper, <https://www.dlapiper.com/en/northamerica/

accommodated their license agreements to allow for streaming of gameplay by players and streamers, it only extends to non-commercial and free streaming, which disentitles individual streamers from prospective revenues.[57]

IP retention by publishers has been a factor behind a number of disputes in the eSports community, relating to the usage rights of third-party entities, the most notable of which is a copyright dispute, the SpectateFaker case, which involved the unlicensed streaming of gameplay by third-party streamers. SpectateFaker is a channel on **Twitch**, a popular video game streaming platform, which streamed gameplay footage of Faker, a League of Legends player. This exact footage, however, was already being utilized by Faker himself on another streaming platform, **Azubu**. Azubu consequently filed a complaint against Twitch for streaming content which does not belong to them. As the actual rights to the footage of the game lay with Riot, the developer of League of Legends, neither of the conflicting parties could claim ownership and Twitch was thereby held non-liable for streaming the disputed footage.[58] This dispute highlights the seeming grey area regarding the right to the usage of in-game footage, gameplay, and other content by derivative entities such as Twitch and Azubu.

A. The Intersection of Antitrust and IP Law

One of the major setbacks caused by IP monopolization is entity overlap. Since the intellectual property rights lie solely with the publishers by virtue of the law[59], they are entitled to utilize the same in whatever manner they please and also the benefits derived from such use. This often leads to the publishers assuming the role of organizers, broadcasters as well as sponsors. The most notable example of entity overlap is seen with Riot Games. Riot is the developer of the popular eSports title **'League of Legends'** (LoL) and also organizes the **'LoL Championship Series'**. Additionally, Riot also controls the broadcasting of the Championship Series.[60] In this way, Riot deprives many tournament organizers and broadcasters of revenue prospects. Apart from losing out on potential revenues, third-party entities may also be able to carry out the dissemination process better effectively, being experts in these processes and having a wider spectator following. It is understandable why publishers such as Riot seek to retain their IP rights as being the developers, they see

insights/publications/2018/09/ipt-news-q3-2018/copyright-in-esports/> (accessed Apr. 22, 2019).

57 *Ibid*.

58 John DiGiacomo, "Copyright Infringement and eSports", Revision Legal, <https://revisionlegal.com/revision-legal/copyright-infringement-esports/> (accessed Apr. 23, 2019).

59 In India, video games are considered to come under the ambit of "*cinematographic work*" according to § 2 of The Copyright Act, 1957 as a "*process analogous to cinematography*".

60 Taylor Cocke, "How the League of Legends World Championship Shaped an Entire Esport", The Esports Observer, <https://esportsobserver.com/esports-essentials-league-worlds/> (Apr. 23, 2019).

themselves better equipped and qualified to regulate the game in tournaments and other events and also for promoting the game. However, absolute control over these rights can sometimes stifle the operations of third-party entities, as was the case with the Riot and OGN (a South Korean video game channel dedicated to eSports) debacle in 2017. **OGN**, which previously broadcasted the **LoL Championship Series** in South Korea and to whom **Riot** supplied broadcasting rights, were relieved from this prior agreement. Following this, Riot entered the South Korean market as the sole broadcaster of the Championship, which wiped out OGN's share in the market.[61]

The biggest losers from the current monopolistic IP ecosystem in eSports are tournament organizers. Tournament organizers work in collaborative arrangements with sponsors and broadcasters. Sponsors provide the bulk of financial input for running the tournament, in return for adequate promotion of the sponsor by the organizer, which varies from sponsor to sponsor. For example, if the sponsor is a computer hardware company, such as **Intel** or **MSI**, they require organizers to specifically incorporate their hardware in conducting the event. Food and beverage companies like **Coca-Cola** and **Red Bull**, require organizers to officially supply their beverages for consumption by spectators and participants. However, if the sponsor is a streaming company such as **Twitch** or **YouTube**, they might require organizers to enter into exclusive broadcasting agreements for streaming the tournament.[62] The problem arises in the case of such category of sponsors, with reference to the organisers further supplying intellectual property not being their own. Organisers enter into contracts with developers for the usage of the game for competitive purposes in events. These contracts are generally not expansive in terms of the scope of the passed-on IP rights extending to their distribution to third-party entities such as sponsors. This is largely done by publishers to prevent entailing the potential loss of revenue through Ambush Marketing by unlicensed sponsors. However, what this also does is greatly hamper businesses with derivative operations dependent on the utilisation of such IP rights for their sustenance.

The thrust of competition law, as well as intellectual property law, is fostering fair competitive markets that ensure consumer welfare (*Competition Law*) while protecting the proprietary work of the competitors (*Intellectual Property Law*). The existing IP monopoly threatens the essence of what competition law seeks to protect, by limiting the market competitors to the publishers, a resultant of the persisting entity overlap ecosystem in the eSports market. Publishers are increasingly endorsing an exclusionary approach by retaining organising and broadcasting operations.[63] What publishers fail to realize is that by not involving independent tournament organisers in the distribution

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61 Miroff, *supra* note 53, at 189.
62 Wee, *supra* note 52.
63 Miroff, *supra* note 53, at 186.

mechanism, they sacrifice mutual spectator growth along with other publishers.[64] Independent organisers such as **ESL**, which organises national as well as international eSports tournaments involving a diverse catalogue of eSports titles for players to compete on including **Counter-Strike**, **DOTA 2**, **StarCraft II** and **Mortal Kombat**. These games have all been developed by separate publishers (*Valve, Blizzard and Electronic Arts*) but are contested under the aegis of **ESL**, allowing for existing spectators of one game to gravitate towards viewing other titles simultaneously being contested in the same event. The success of ESL clearly represents the viability and long-term benefits of decentralised IP distribution.

- Gamertags and Avatars – Protecting the image rights and performance rights of eSports players

Contrary to traditional sports, where the player has control over his image rights, which includes the right to the use of their face or name or likeness, subject to any contract between the player and a sponsor, players in eSports generally control an **avatar** or **Gamertag** (*nickname*) through which they compete. This avatar or Gamertag is in-game and being a part of the game, any commercial aspects of the character lie with the publishers. Therefore, with respect to building player reputation and popularity, the question of image rights arises with regards to who has the control and subsequent **right to monetary gains** from the commercial usage of the **player's in-game image**.

The complexity involved herein is classifying what part of the game and its related content can be considered to be as the IP of the publisher and what can be considered as affiliated to the eSport athlete's image. While the actual footage of the game belongs to the developer, as far as the streaming of footage involving a particular player on streaming platforms is concerned, the player's image rights are affected as the player has a vested interest in the commercial utilisation of his gamertag or avatar.[65]

The legal ambiguity surrounding the ownership of the image rights of virtual identities of eSports players has wide-ranging implications on the commercial exploitation of image rights through licensing and merchandising player likeness'. A perfect representative of publishers exploiting *the image rights* of *eSports players* is the contract entered into by **Riot Games** with contestants of its **League of Legends Championship Series**. According to **§** 5 of this contract, Riot is granted unlimited and unfettered usage rights to the player's in-game avatar. This section completely disentitles players from any potential

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[64] Taylor, *supra* note 60.

[65] Alex Chun, "Esports Players – Do You Know Your IP Rights?", Spark LLP, <https://spark.law/video-game-law/esports-know-your-ip-rights/> (accessed 24 Apr. 2019).

commercial gains made from the usage of their in-game likeness.[66] Players in the Championship Series, as a result, become completely dependent on tournament winnings as sponsorship revenue is literally 'snatched' away from them by the publishers. Taking into account the low probability of coming out on top from a pool of thousands of players, many players make little or no return on their hard work to qualify for such major tournaments. This is especially alarming as unlike traditional sports where players are largely in control of their image rights and earn regular revenue through the licensing of the same, and salary income (in the case of sports like football and basketball, where players are signed to clubs in the capacity of an employee), eSports players have no source of regular income and whatever little income they receive from their teams is sparsely inadequate.[67] These teams, unlike professional clubs in traditional sports, lack an organised structure with directors, management staff and are usually a group of players who play together. This means that teams have to solely rely upon the limited IP they have (*the team name and logo*) for funding themselves through sponsorships and endorsements. In comparison to traditional sports, where teams have a global following which allows for a dearth of sponsorship opportunities, eSports teams are largely unknown in this regard and do not present lucrative sponsorship avenues to the sponsors. The sponsorships they do receive are largely from computer hardware companies, who, unlike their cash-rich as their counterparts in traditional sports, can ill-afford paying handsome amounts to these eSports teams.[68]

The professional teams which eSports players are contracted to often undertake the control and usage of the IP rights of their members through the player's contracts entered into by the members. In addition to losing out on the control of their image rights to their teams, any contracts with brands or sponsors on an individual level further dilute the ownership of their image rights. Considering the young age of the majority of eSports players, a lack of awareness on their part about their image rights further aggravates the possibility of their IP rights being exploited. Teams and sponsors, try to capitalise on the intellectual property of these uninformed young eSports players via the inclusion of exploitative clauses in player contracts. Players can become victim to breaching sponsorship agreements due to such exploitative clauses and also because of the lack of effective communication from the team on conflicting sponsorships. Teams should clearly specify team sponsors to their members to ensure clarity to the players while choosing individual sponsors to prevent the possibility of agreements being breached.[69] To this effect, strengthening the

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[66] Adam Levy, "PWND or Owned? The Right of Publicity and Identity Ownership in League of Legends", 6 Pace. Intell. Prop. Sports & Ent. L.F. 163 (2016).

[67] *Ibid*.

[68] Daniel Alfreds, "IP and Rights Package: Legal Issues to Consider in Esports Sponsorships", The Esports Observer, <https://esportsobserver.com/legal-issues-to-consider-in-endorsements-and-sponsorships-part-1/> (accessed 24 Apr. 2019).

[69] *Ibid*.

licensing system to better protect the publicity rights of eSports professionals is key. Impeding the licensing rights of developers and sponsors is essential in preventing the abuse of these rights. This provides players greater discretion in commercialising their identity in a manner they best see fit, while also ensuring proportional distribution of benefits accrued from the commercial utilisation of player IP.[70]

B. What do the players exactly own?

In-game character/avatar authorship by eSports players is characterised as derivative ownership as the construction of such avatars relies on the existence of a game, without which they rendered useless, supporting the retention of commercial exploitation rights with the publisher. The concomitant nature of avatar authorship coupled with the derivative interpretation of their avatars somewhat weakens the stance of eSports players with regards to claiming copyright protection.[71] However, a point in favour of eSports players here is that the reliance on input (*the game and its programmed code*) does not grant an absolute right of exploitation to the publishers, primarily because of the possibility of an immense number of outcomes when avatar construction extends to the in-game performance of the avatar through the control of the player. Individual players have unique ways of controlling their avatar by way of using different combinations of movements and interactions. The outcomes of these combinations are neither scripted, nor comprehensively pre-anticipated by the publishers.[72] This demonstrates that the larger proprietary concern from the point of view of eSports athletes is of player performance, over the question of avatar proprietorship.

Player performance and its protection under intellectual property law present yet another legal conundrum, specifically with regards to the inherent difference between the artistic expression of skill in eSports versus traditional sports.[73] In traditional sports, a degree of skill and technique underlying the actions of athletes is ever-present and achieved through rigorous practice. The skill an individual athlete possesses and the execution thereof is distinct from his fellow counterparts and entirely unique, thus making it easier to establish copyright originality. In eSports, though there is a similar level of application of skill and technique and practice involved, the execution is through the virtual persona of the player, blurring the lines of distinction between the performances of one player from the other, subsequently complicating claims of proprietorship over a specific style of performance. Although the playing styles

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[70] "Esports Contracts: 5 Things Every Athlete Should Consider", Gordon Law, <https://www.gordonlawltd.com/esports-contracts-5-player-considerations/> (accessed 25 Apr. 2019).

[71] Brtka, *supra* note 50.

[72] Dan L. Burk, "Owning E-Sports: Proprietary Rights in Professional Computer Gaming", 161 U. Pa. L. Rev. 1535 (2013)

[73] *Id.* at 1569.

of the topmost eSports professionals are clearly identifiable and distinguishable to spectators and fans alike, the implementation of these styles by other players cannot be safeguarded against as the execution takes place on digital platforms, which as of now remains unchartered territory in terms of the jurisdiction of copyright law[74].

V. CONCLUSION

The quandary of publicity and personality protection in the current IP regime of the eSports and Sports ecosystem, makes it increasingly pertinent to stress upon a community-oriented distribution of IP rights. The developers cannot claim to be the sole beneficiaries from the IP of their games. Players and teams have, if not an equivalent, but a considerable stake in these games and corresponding elements. With the proposed inclusion of eSports in the **2024 Paris Olympics**[75], eSports players are set to stand on an equal pedestal to traditional sport participants, representing their countries at the grandest sporting spectacle. This puts them in a position, where they can and for their own benefit, should leverage their interests relating to their **'e-Personas'** and game performances.[76]

Sports organisations, at the national and international level should strive to ensure cooperation and competitive balance between players, organizers and developers in the Sports and eSports industry, supporting the parallel growth of Sports as business by adopting a decentralised distribution model. This ensures every stakeholder in this ecosystem is assured a piece of the pie in terms of revenues and a systematic allocation of costs involved in organising, broadcasting, sponsorships, merchandising, etc. between publishers and other third-party entities. Apart from a stable revenue and cost-sharing model, decentralisation also offers more autonomy to participating players and teams with regards to sponsorships and endorsements related to their own intellectual property.

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[74] S. 38 of the Indian Copyright Act, 1957 provides protection to the performance right of authors. The operative word here, however is "author" and the scope thereof. Legally speaking, authorship refers to the producers of the creative work, which in the case of eSports are the publishers. The extension of authorship to the originality of player performance still remains legally unanswered.

[75] Liz Lanier, "Esports Could be in the Olympics by 2024", *Variety,* <https://variety.com/2018/gaming/news/esports-olympics-2024-1202880818/> (accessed 26 Apr. 2019).

[76] Marijam Didžgalvytė, "Labour Rights in Esports", Notes From Below, <https://notesfrombelow.org/article/labour-rights-in-esports> (accessed 26 Apr. 2019).

APPENDIX


ARNAB की Debate
अब कौन सुनेगा?
ANJANA की ज़रुरत थी
सिर्फ़ Kal Tak!
India में अब RAJAT
की अदालत बंद!
ZEEHINDUSTAN
अब एंकर नहीं
ख़बरें खुद बोलेंगी
क्योंकि आप समझदार हैं
ZEE Hindustan becomes India's first news channel to go anchorless, so that there's nothing between you and the truth.
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EMERGING VALUE OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

—Dr. Ashok Sharma

Abstract — In recent era of Indian economy there is an intense level of competition in the corporate world. Every business, be it huge body corporates or the small-scale sole-proprietorship, all of them is working with might and main to dominate domestically as well as globally. But this rapid growth in competition has brought in many illegal and unethical crimes and ways for many businesses to be in a win-win situation, without putting any effort. Resolving insolvency of businesses, default in repayment of creditors, increase in Non-Performing Asset (NPA), corporate borrowers, loans and advances and creditors control over debtor's assets and managing all such illegalities, became a daunting task for the judicial system1. The earlier Indian bankruptcy regime was highly fragmented, borne out of multiple judicial forums resulted in a lack of clarity and certainty in jurisdiction. Decisions were often appealed, stayed or overturned by judicial forums having a concurrent or overlapping jurisdiction. The pro-revival approach of the judicial systems led to delays in the closure of unviable businesses since the standstill mechanism had been misused by corporate debtors. Secured and unsecured creditors, employees, regulatory authorities had different and often competing rights with no common regulatory process to determine the priority of claims. Lack of adequate and credible data regarding the assets, indebtedness and security situation of companies further accentuates the problems.

A complete piece of legislation for these matter is brought into light, widely known as the Insolvency and Bankruptcy Code, 2016 (called the "Code" and not an "Act") to consolidate and amend all insolvency statutes and laws relating to reorganisation and insolvency resolution of corporate.

* Assistant Professor of Management Chanakya National Law University, Patna.

I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC) is the bankruptcy law of India which seeks to consolidate the existing framework

1. The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015.

by creating a single law for insolvency and bankruptcy. The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It has total 255 sections divided into 5 parts, namely:

- Preliminary (1-4)
- Corporate persons (4-77)
- Individuals and Partnerships (78-187)
- Insolvency entities (188-223)
- Miscellaneous (224-255)

The advantages of the code are as follows:

- Eliminates plethora of laws
- Attitudinal shift of Government
- Faster resolution or liquidation process
- Protection to banks

The 2016 Code applies to companies and individuals. It provides for a time-bound process to resolve insolvency. When a default in repayment occurs, creditors gain control over debtor's assets and must take decisions to resolve insolvency within a 180-day period. To ensure an uninterrupted resolution process, the Code also provides immunity to debtors from resolution claims of creditors during this period. The Code also consolidates provisions of the current legislative framework to form a common forum for debtors and creditors of all classes to resolve insolvency.

The major legislations currently governing Corporate Insolvency are:

- Companies Act, 1956, relating to winding up of companies.

- The Sick Industrial Companies (Special Provisions) Act, 1985.

The law of insolvency in India owes its origin to English law. Before the British came to India there was no law of insolvency in the country. The earliest insolvency legislation can be traced to Sections 23 and 24 of the Government of India Act, 1800 (39 and 40 Geo III c 79), which conferred insolvency jurisdiction on the Supreme Court.

Earlier, the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (also known as the SARFAESI Act) was the only Indian law which allows banks and other financial institution to auction residential or commercial properties (of Defaulter) to recover loans. But, the Insolvency and Bankruptcy Code, 2015 was introduced in the Lok Sabha on 21 December 2015 by former Finance Minister, Late Arun Jaitley, which was referred to a Joint Committee of Parliament on 23 December 2015, and recommended by the Committee on 28 April 2016.[6] The Code was passed by the Lok Sabha and the Rajya Sabha on 5 May and 11 May 2016 respectively. Subsequently, it received assent from President Pranab Mukherjee and was notified in The Gazette of India on 28 May 2016.[7]

The Code was passed by Parliament in May 2016 and became effective in December 2016.[8] Section 243 of this Code repeals the Presidency-Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. [9]

The first insolvency resolution order under this code was passed by National Company Law Tribunal (NCLT) in the case of Synergies-Dooray Automotive Ltd. on 14 August 2017 and the second resolution plan was submitted in the case of Prowess International Private Limited. The plea for insolvency was submitted by company on 23 January 2017. The resolution plan was submitted to NCLT within a period of 180 days as required by the code, and the approval for the same was received on 2 August 2017 from the tribunal. The final order was uploaded on 14 August 2017 on the NCLT website.

II. PROCEDURE

The Code proposes the following steps to resolve insolvency:

Initiation: When a default occurs, the resolution process may be initiated by the debtor or creditor. The insolvency professional administers the process. The professional provides financial information of the debtor from the information utilities to the creditor and manage the debtor's assets. This process lasts for 180 days and any legal action against the debtor is prohibited during this period.

Decision to resolve insolvency: A committee consisting of the financial creditors who lent money to the debtor will be formed by the insolvency professional. The creditors committee will take a decision regarding the future of the outstanding debt owed to them. They may choose to revive the debt owed to them by changing the repayment schedule, or sell (liquidate) the assets of the debtor to repay the debts owed to them. If a decision is not taken in 180 days, the debtor's assets go into liquidation.

Liquidation: If the debtor goes into liquidation, an insolvency professional administers the liquidation process. Proceeds from the sale of the debtor's assets are distributed in the following order of precedence2:

i) insolvency resolution costs, including the remuneration to the insolvency professional,

ii) secured creditors, whose loans are backed by collateral, dues to workers, other employees,

iii) unsecured creditors,

iv) dues to Government,

v) priority shareholders, and

vi) equity shareholders.

A plea for insolvency is submitted to the adjudicating authority (NCLT in case of corporate debtors) by financial or operation creditors or the corporate debtor itself. The maximum time allowed to either accept or reject the plea is 14 days. If the plea is accepted, the tribunal has to appoint an Interim Resolution Professional (IRP) to draft a resolution plan within 180 days (extendable by 90 days). Following this the Corporate Insolvency Resolution process is initiated by the court. For the said period, the Board of Directors of the company stands suspended, and the promoters do not have a say in the management of the company. The IRP, if required, can seek the support of the company's management for day-to-day operations. If the CIRP fails in reviving the company the liquidation process is initiated.

1. Inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2019 w.e.f. 16.8.2019.

III. BODIES UNDER THE CODE

A. Insolvency and Bankruptcy Board of India (IBBI)

The Insolvency and Bankruptcy Board of India was established on 1st October, 2016 under the Insolvency and Bankruptcy Code, 2016 (Code). It is

a key pillar of the ecosystem responsible for implementation of the Code that consolidates and amends the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

It is a unique regulator: regulates a profession as well as processes. It has regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities and Information Utilities. It writes and enforces rules for processes, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code. It has recently been tasked to promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of the Code. It has also been designated as the 'Authority' under the Companies (Registered Valuers and Valuation Rules), 2017 for regulation and development of the profession of valuers in the country.

B. Indian Institute of Insolvency Professional

The Indian Institute of Insolvency Professionals of ICAI is a Section 8 Company formed by the Institute of Chartered Accountants of India to enrol and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code, 2016 and read with regulations.

With advent of Insolvency and Bankruptcy Code, 2016 (IBC), considered as one of the major economic reforms, insolvency and bankruptcy law has been consolidated and codified for effective resolution of insolvency and bankruptcy in India. The Code envisages the role of Insolvency and Professional Agencies (IPAs) as intermediaries between the regulator and the professional members, responsible for enrolling, educating, training and regulating the professional members. IPAs are also responsible to protect the interests of other stakeholders in the insolvency resolution process.

IIIP-ICAI after little over three years of its existence, is currently the largest IPA in India. The vision document has been created to spell out and guide the long-term aspirations of the institution, while paving way for ensuing Mission statement drilling down to key strategic/priority areas for implementation in near future. The document also advocates imbibing and exhibiting of certain key values or attitudes in the functioning of IIIPI, as mentioned hereinafter.

C. Institute of Insolvency Professionals

ICSI Institute of Insolvency Professionals (ICSI IIP) is a frontline regulator registered with the Insolvency and Bankruptcy Board of India (IBBI) under the Insolvency and Bankruptcy Code, 2016. ICSI IIP is registered under Section 8 of the Companies Act, 2013 and is a wholly-owned subsidiary of Institute of Company Secretary of India (ICSI). ICSI IIP has vested with the power and authority inter alia to enrol, educate, train and also monitor the performance of its registered members as an Insolvency Professional. Its mandate also includes laying down standards of professional conduct and take steps in the direction of disciplining its members, whenever required.

D. Insolvency Professional Agency

Insolvency Professional Agency of Institute of Cost Accountants of India ("IPAICAI") is a frontline regulator registered with the Insolvency and Bankruptcy Board of India ("IBBI") bearing registration number IBBI/IPA/16-17/03 under the Insolvency and Bankruptcy Code, 2016 ("Code"). IPAICAI is a Section 8 Company incorporated under provisions of the Companies Act, 2013 and is a wholly-owned subsidiary of the Institute of Cost Accountants of India.

IPAICAI is vested with the power to enrol, educate, monitor and regulate the profession of the Insolvency Professionals who are enrolled as the professional members with it. The functioning of IPAICAI also includes laying down the best practices, policies and standards on the different areas developed and emerging areas under the Code, redressing grievances and disciplinary proceedings against the professional members and conducting inspection of its professional members.

IPAICAI has professional members enrolled with it from versatile disciplines which include CMA, CS, CA, Bankers, Lawyers, Management Experts, etc. To ensure continuous growth of the professional members and as a part of continuous learning process, IPAICAI has a proven track record of introducing various initiatives from time to time in the form of IBC Au Courant (Daily Newsletter), The Insolvency Professional: Your Insight Journal (Monthly E-Journal), IBC Dossier (Bulletin on brief of landmark judgments), IBC Case Books (A detailed study of company's insolvency/liquidation process), Preparatory Education Course for Limited Insolvency Examination, Certificate Courses in various domains related to the insolvency and bankruptcy along with the routine series of webinars, roundtables, conference and workshops for the entire professional fraternity across India. Till date IPAICAI also has a proven track record of conducting maximum inspection of its professional members across India with an intent of improving their performance in line with the best practices.

IV. WHO FACILITATES THE RESOLUTION UNDER THE CODE?

The Code creates various institutions to facilitate resolution of insolvency. These are as follows:

a. **Insolvency Professionals**: A specialised cadre of licensed professionals is proposed to be created. These professionals will administer the resolution process, manage the assets of the debtor, and provide information for creditors to assist them in decision-making.

b. **Insolvency Professional Agencies**: The insolvency professionals will be registered with insolvency professional agencies. The agencies conduct examinations to certify the insolvency professionals and enforce a code of conduct for their performance.

c. **Information Utilities**: Creditors will report financial information of the debt owed to them by the debtor. Such information will include records of debt, liabilities and defaults.

d. **Adjudicating Authorities**: The proceedings of the resolution process will be adjudicated by the National Companies Law Tribunal (NCLT), for companies; and the Debt Recovery Tribunal (DRT), for individuals. The duties of the authorities will include approval to initiate the resolution process, appoint the insolvency professional, and approve the final decision of creditors.

e. **Insolvency and Bankruptcy Board**: The Board will regulate insolvency professionals, insolvency professional agencies and information utilities set up under the Code. The Board will consist of representatives of Reserve Bank of India, and the Ministries of Finance, Corporate Affairs and Law.

V. WHO CAN FILE FOR CORPORATE INSOLVENCY RESOLUTION?

- **Financial Creditor:** Person to whom 'financial debt' is owed, and includes a person to whom such debt may have been legally assigned or transferred in accordance with law (including a person residing outside India). Default may be in respect of financial debt owed to any financial creditor of the corporate debtor and not only the applicant financial creditor.

- **Operational Creditor:** Person to whom 'operational debt' is owed and includes any person to whom such debt may have been legally assigned or transferred;

- **Corporate Debtor:** Shareholder of the entity, an individual who is in charge of managing the overall operations, a person who has the control, supervision or oversight of the financial affairs of the corporate debtor;

- **The Code:** Prescribes penalties for false and frivolous petitions.

VI. IS THE INSOLVENCY AND BANKRUPTCY CODE A REMEDY TO ALL BANKING ISSUES?

Insolvency and Bankruptcy Code Bill was introduced in the Indian Parliament by the NDA Government in 2015 but got final clearance in May 2016 Parliament Session. It was believed that this Bill will resolve all the banking issues present in the economy. The main reason to introduce this Bill was to fasten up the long insolvency process which it did. After this Bill, the insolvency process for the company is 180 days with an extension of 90 days, and for startups and small companies, it is 90 days with an extension of 45 days. The question is will it resolve all banking issues and the answer is no, as India's banking industry is going through a very difficult phase. Banks are merging up due to bad loans and all this hustle can't be simplified with this Bill. IBC will only bad debts that are disclosed. Undisclosed bad loans or bad loans that get disclosed after the victim absconds remain untouched. And there are many incidents in past years in which creditors flew away from the country after being unable to pay off the loan that they took. But, the IBC did improve the economic system and the impact can be seen - the economy is clearly stable.

VII. CONCLUSION

Overall this legislation is a huge step towards the ease of doing business in India and has the potential to bring business practices in India closer to more developed markets over the long term. The Insolvency and Bankruptcy Code, 2016, is a progressive legislation that is intended to improve the efficiency of insolvency and bankruptcy proceedings in India. The new legislation provides for the early detection of financial distress and a time-bound process for resolution. However, many details on the IBC's implementation need to be worked out in the regulations, and its success will depend to a large extent on how quickly a high quality cadre of insolvency resolution professionals will emerge and on whether the time-bound process for insolvency resolution will be adhered to in practice.

Operation of IBC, till now, has been spoiled by myriad factors ranging from frivolous challenges posed by operational creditors and promoters to shortage of Judges in tribunals. As a result, an important piece of legislation like IBC,

which was expected to usher in a new era of ease of doing business, may fall into the trap of implementation failure. Timely amendments, which provide more teeth to the Code, can only rescue the process. New amendments of 2019 in IBC should be closely watched and observed in that light.

FUNDAMENTAL BREACH UNDER UNCISG-THE DELPHIC ENIGMA

—*Saurabh Tiwari*[*]

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") was developed by the United Nations Commission on International Trade Law ("UNCITRAL"). It was signed in Vienna in 1980. The convention aims to promote uniformity at the international level in sale of goods. CISG is a self-executing treaty[1] i.e. once signed by a contracting state; the convention becomes automatically effective without the need of a domestic law to bring it into force. The convention came into force on January 1, 1988.[2] Today CISG has 89 signatory states with Palestine being the latest signatory to the convention.[3]

The preamble of CISG sets out the aim of the convention, i.e. "*adoption of uniform rules which govern contracts for the international sale of goods and taking into account the different social, economic and legal systems the convention would contribute to the removal of legal barriers in international trade and promote the development of international trade.*"[4]

Article 7(1)[5] of CISG states: "*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*"

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[*] Student, VIth Semester (3rd Year), Dr Ram Manohar Lohiya National Law University, Lucknow

[1] Harry M. Flechtner, The United Nations Convention on Contracts for the International Sale of Goods, United Nations Audiovisual Library of International Law (2009), <http://legal.un.org/avl/pdf/ha/ccisg/ccisg_e.pdf>.

[2] United Nations Commission on Trade Law, International Sale of Goods, <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>, (May 1, 2019).

[3] Status, United Nations Convention on Contracts for the International Sale of Goods, <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG status.html>, (Jun. 1, 2019).

[4] United Nations Convention on Contracts for the International Sale of Goods, Preamble, Apr. 11, 1980, 1489 UNTS 3.

[5] United Nations Convention on Contracts for the International Sale of Goods, Art. 7(1), Apr. 11, 1980, 1489 UNTS 3.

Thus it is clear that one of the major aims of CISG was to bring uniformity in International Sale of Goods and bring a wider acceptance of this convention around the globe, but there are certain impediments in interpretation of bare provisions of CISG which need to be resolved in order to achieve its aim of wider acceptance.

One of the most important features of CISG is that of fundamental breach which gives the right to parties to rightfully rescind the contract and this paper aims to address the ambiguity prevailing in interpreting the foreseeability of a breach under article 25. Article 25 defines fundamental breach as follows:

> "*A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*"[6]

This concept of a fundamental breach as encompassed in article 25 is important because a fundamental breach gives certain exclusive rights to the party against whom the breach is committed. These exclusive rights include in their ambit the ability of the party to rescind the contract altogether. This is to be done without fixing an additional time for delivery as would be required in any ordinary breach[7], the prerogative of the buyer to be entitled to a substitute delivery[8] and the allocation of risk for defective goods[9]. All the aforementioned exclusive rights are provided on the touchstone of a breach being a fundamental breach. Article 25 constitutes a "*tool with the help of which one can distinguish between a fundamental and a simple breach of contract.*"[10]

Article 25 has three constituents and all need to be fulfilled to brand a breach as fundamental:

- Substantial detriment
- Foreseeability by the parties

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[6] United Nations Convention on Contracts for the International Sale of Goods, Art. 25, Apr. 11, 1980, 1489 UNTS 3.

[7] United Nations Convention on Contracts for the International Sale of Goods, Arts. 49(1)(*a*), 51(2), 64(1)(*a*), 72(1), 73(1) & (2), Apr. 11, 1980, 1489 UNTS 3.

[8] United Nations Convention on Contracts for the International Sale of Goods, Art. 46(2), Apr. 11, 1980, 1489 UNTS 3.

[9] United Nations Convention on Contracts for the International Sale of Goods, Art. 70, Apr. 11, 1980, 1489 UNTS 3.

[10] Ulrich Magnus, *Wiener UN-Kaufrecht, in J Von Staudinger's Kommentar Zum Bürgerlichen Gesetzbuch Mit Einfuhrungsgesetzund Nebengesetzen* (13th edn., 1995) at 255, <http://www.cisg.law.pace.edu/cisg/biblio/ferrari14.html> (Mar. 1, 2019).

- Foreseeability of a reasonable person

German Appellate Court has defined substantial detriment as: "*A breach by which the purpose of the contract is endangered so seriously that, for the concerned party to the contract, the interest in the fulfilment of the contract ceases to exist as a consequence of the breach of the contract* (*and the party in breach of the contract was aware of this or should have been*)."[11]

In other words, "*there will be a fundamental breach of contract by the defaulting party if a party fails to receive the essence of what he was entitled to expect according to the contract*."[12] Thus the fundamentality of a breach does not depend on the quantum of the damages suffered rather it is dependent on whether the breach deprives the parties of the essence of the contract or not.

The element of foreseeability is the second condition which determines the fundamentality of a breach and subsequently affects the consequences which follow. If the above two conditions are satisfied, then the breach would come under the head of a fundamental breach, endowing exclusive rights upon the parties as differentiated from any other breach.

"*Uniform words will not bring the uniform results*"[13] and the current ambiguity surrounding article 25 attest the above statement. The timing as to when is the fundamental nature of a breach of contract has to be foreseeable is controversial and unsettled; whether the relevant time for determining the foreseeability under a contract is at the time when the contract is penned down or when the violation of the contract occurs?[14]

This paper sets out the ongoing debate regarding foreseeability under CISG and will present the views from both the sides.

One view is that the foreseeability of a breach is to be determined at the time of conclusion of the contract as the parties rights and obligations freeze at the time of conclusion of the contract which shall be addressed in the first part of this paper.

The opponents of the aforementioned view believe that the foreseeability under Article 25 is to be extended to the time of performance of the contract

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[11] *Seller (Italy)* v. *Buyer (Germany)* 5 U 164/90, <http://cisgw3.law.pace.edu/cases/910917g1.html>, (15 Mar. 2019).

[12] *Seller (Italy)* v. *Buyer (Germany)* 8 O 49/02, <http://cisgw3.law.pace.edu/cases/020702g1.html>, (1 May 2019).

[13] John O. Honnold, The Sales Convention in Action – Uniform International Words: Uniform Application (1988) 8 J.L. & Com. 207, 207.

[14] Peter Schlechtriem and Petra Butler, *International Sale of Goods UN Law on International Sales* 98 (2009).

and is not limited to the time of conclusion of the contract. This view shall be addressed in the second part of this paper.

The concluding part of this paper will bring forth the views of the author on which interpretation of CISG's foreseeability under Article 25 should be favored.

I. FORESEEABILITY AT THE TIME OF CONCLUSION OF THE CONTRACT

It is a core principal of International sale of goods that the interest of the parties crystallizes at the time of entering of a contract and thus the foreseeability under article 25 shall be determined at the time of conclusion of the contract.[15] This part of the paper will be establish the above statement in light of laws governing the international sale of goods, the idea of fundamental breach in various countries across the globe and other provisions of the convention dealing with foreseeability.

A. Interpretation in light of International character

Before interpreting article 25 and foreseeability in the article, it is necessary to look into article 7(1) of CISG which states that while interpreting the provisions of this convention, regards should be given to the international character of the convention. Taking bid from the same and viewing the international picture with regards to foreseeability that is prevalent around the globe, one finds that the time of foreseeability in fundamental breach is limited to the time of conclusion of the contract. The use of past tense "*était*" rather than "*est*" in the French text," "*tenia*" in place of present tense "*tiene*" in the Spanish text, and "*byla*" in the place of "*yest*" in the Russian texts, convey that the formation of the contract is the relevant point in time to determine foreseeability.[16] Moreover, in International laws governing the international sale of goods, such as the UNIDROIT and European Sale Laws, the time of foreseeability though has not been fixed in the bare provisions but the bare commentaries of the same fix the time of foreseeability at the time of conclusion of the contract.[17]

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[15] Peter Schlechtriem and Butler, *UN Law on International Sales: The UN Convention on the International Sales*, Springer (2009) p. 98 ¶ 112, (Mar. 2, 2019).

[16] Robert Koch, "The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (1998), <https://cisgw3.law.pace.edu/cisg/biblio/koch.html>.

[17] *Ibid*.

This view is affirmed by reference to the rights which the injured party was entitled to expect under the contract[18]; the aggrieved parties' rights and the breaching parties' obligations crystallize at the time of conclusion of the contract and thus the relevant point for determining the foreseeability shall be the same.[19]

In practice, a businessman calculates the risks that may potentially arise under a contract, at the conclusion of the contract.[20] Taking account of the events after the contract has been concluded would increase the risk, burden and cost of one party without giving them a chance to negotiate the terms. A buyer subsequent to the conclusion of the contract may (by just informing the seller that he has contracted to sell the goods to a third party at a particular time) change the nature of a contract from one in which time was not of essence to one where time is of essence.[21]

B. Uniform Interpretation, in coherence with Article 74

The aim of CISG as reflected from the preamble and article 7(1) is, to promote uniformity and, the impulsion of CISG is to provide a homogenous and fair regime for contracts for the sale of goods globally.[22] Hence the foreseeability under article 25 shall be read in consonance with the rest of the provisions of the convention as well as the prevalent laws governing the international sale of goods. In the same bid, reference shall be made to article 74 of the convention which provides,

> "*Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*"[23]

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[18] Robert Koch, "Whether the UNIDRIOT Principles of the International Commercial Contracts may be Used to Interpret or Supplement Article 25 CISG*"* (November 2004), <http://cisgw3.law.pace.edu/cisg/biblio/koch1.html>.

[19] Peter Schlechtriem and Butler, *UN Law on International Sales: The UN Convention on the International Sales*, Springer (2009).

[20] Robert Koch, "The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)" (1998), <https://cisgw3.law.pace.edu/cisg/biblio/koch.html>.

[21] *Ibid*.

[22] United Nations Convention on Contracts for the International Sale of Goods, Art. 7(1), Apr. 11, 1980, 1489 UNTS 3.

[23] United Nations Convention on Contracts for the International Sale of Goods, Art. 74, Apr. 11, 1980, 1489 UNTS 3.

Foreseeability under article 74 of the convention is limited to the time of conclusion of the contract and limits the damages payable to the losses and loss of profits foreseeable at the time of entering and penning down of the contract.

Thus, the avoidance of contract under 'too remote' circumstances which were not foreseeable at the time of the conclusion of contract would be anomalous and would not be justified or in coherence with article 74 of CISG.

Franco Ferrari is of the view that "due to the fact that the fundamental character of the breach relates to the legitimate expectations 'under the contract', i.e., the expectations set forth in the contract and, thus, at the time of the conclusion of the contract."[24] Therefore the contract conclusion shall be the relevant time for determining the foreseeability under CISG.

Professor Ziegel argues that to stretch the relevant time of determining the foreseeability under article 25 beyond the point which is expressly so fixed in Article 74, creates an incongruity between the two provisions of the convention. [25] And it would be illogical to say that a party can avoid the contract on grounds that the same was foreseeable to the parties, but the same circumstances are considered to be too remote to provide for damages under Article 74.[26]

Further, Zeller states that, words under the convention cannot be given meaning in seclusion and while reading a text one shall not tread beyond the expressed boundaries provided in the convention itself and exhorts the interpretations to be made as per the four corners principle. The four corners principle is recapitulation of the interpretative mandate provided in article 7 of the convention and the preamble.[27] The foreseeability under Article 25 shall be read in consonance with the rest of the provisions and should not be divorced from them. This includes references to the promotion of consistency in interpretation and the principle of good faith. Thus,

> "*foreseeability is a general principle of the CISG and must be understood in conjunction with Article 74.*"[28]

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[24] Franco Ferrari, "Fundamental Breach of Contract under the UN Sales Convention, 25 Years of Article 25 CISG", <https://www.cisg.law.pace.edu/cisg/biblio/ferrari14.html>.

[25] Jacob S. Ziegel, "The Remedial Provisions in the Vienna Convention: Some Common Law Perspectives", <http://www.cisg.law.pace.edu/cisg/biblio/ziegel6.html>.

[26] *Ibid.*

[27] Zeller, "*Four Corners* – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods".

[28] Bruno Zeller, "The Remedy of Fundamental Breach and the United Nations Convention on the International Sale of Goods (CISG) - A Principles Lacking Certainty?" (2010) <https://www.cisg.law.pace.edu/cisg/biblio/zeller15.html>, (14 Jun. 2017).

Moreover, the preamble of CISG provides that the act aims to promote adoption of homogenous rules which govern contracts for the sale of goods internationally and it would be anomalous to say that an international instrument which seeks to bring uniformity at the international level in the sale of goods does not have coherence between two of its own provisions (article 74 and article 25). Hence, the foreseeability under article 25 shall be fixed and tested on the anvil of article 74 i.e., the time of conclusion of the contract shall be the relevant time for determining the foreseeability. The abovementioned approach will strike a balance between the two provisions of the UNCISG talking of foreseeability and will also be in coherence with the preamble and article 7 of the convention.

The bare reading of the text of article 25 provides that a substantial detriment is depriving a party of "*what he is entitled to expect under the contract*". The expectations of a contract are formed at the time of conclusion of the contract, and hence it follows innately that the foreseeability should be fastened at the time of conclusion of the contract.[29]

However, the topic of foreseeability under article 25 has spawned only a few case laws, and there has been only one ruling on the timing of foreseeability under Article 25, in which the conclusion of the contract was found to be the relevant time for determining foreseeability.[30]

C. The reasonable persons' perspective

Article 25 also carries an element of a reasonable person and foreseeability in his/her terms. The principle of reasonableness is referred to 37 times in the Convention.[31] It is a basic principle of International law and the same is rooted deeply in the convention as well.[32] These references demonstrate that the principle of reasonableness constitutes a general criterion for evaluating the parties' behavior. The reasonable person standard was brought into the definition of fundamental breach by the proposal of Egypt[33] with the aim to provide more

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[29] Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd English edn., 2005), Art. 25 Para 15, 291.

[30] Appellate Court Dusseldorf (Shoes case) 24 April 1997, <http://cisgw3.law.pace.edu/cases/970424g1.html>.

[31] See generally United Nations Convention on Contracts for the International Sale of Goods, Arts. 8(2), 8(3), 16(2)(*b*), 18(2), 33(*c*), 34, 35(2)(*b*), 37, 38(3), 39(1), 43(1), 44, 46(2), 46(3), 47(1), 48(1), 48(2), 49(2)(a), 49(2)(*b*), 63(1), 64(2)(*b*), 65(1), 65(2), 72(2), 73(2), 75, 76(2), 77, 79(4), 85, 86(1), 86(2), 87, 88(1), 88(2), 88(3), Apr. 11, 1980, 1489 UNTS 3.

[32] Albert H. Kritzer, Editorial Comments on "Reasonableness" as a general principle of the Convention, <http://cisgw3.law.pace.edu/cisg/text/reason.html>.

[33] UNCISG Vienna Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, p. 88, UN DOC. A/CONF.97/C.1/L.106, (March-April 1980), <https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>.

objectivity to fundamental breach test. The reasonable person can also not be taken to have knowledge of something that is not even foreseeable at the time of conclusion of the contract and will take into consideration only those circumstances which are foreseeable at the time of conclusion of the contract.

II. FORESEEABILITY EXTENDING TO THE TIME OF PERFORMANCE

Foreseeability under Article 25 extends to the time of performance and is not limited to the time of contract formation and the same will be posited in this part of the paper. The relevant time for determining the foreseeability under CISG can be gauged by looking into the legislative history of the convention. CISG while in its drafting stage had various proposals by the member states which were debated and adopted or discarded, thus looking into the legislative history of CISG would help clear the ambiguity surrounding the relevant time of determining the foreseeability. The following part of the paper also interprets the relevant time for determining foreseeability in light of the principle of cure as incorporated in article 48(1), which brings out the aim of the convention to keep the contract afoot and performance of the same. Reference is also made to article 8 of the convention.

A. Legislative history with regards to foreseeability

The interpretation of any convention or legislation has to be done in the literal sense primarily and if ambiguity prevails the same shall be interpreted on the touchstone of the intention of the drafters; through its legislative history.[34] The importance of *Travaux préparatoires* as a tool of interpretation is evident by the following view of Professor Lookofsky:

> "*In some quarters . . . the Convention's legislative history . . . ranks high on the list of sources of law: perhaps the next best thing to an official commentary, the travaux are seen as evidence of the founding fathers' collective intent. And indeed, a fair number of the CISG decisions already rendered by certain national courts justify their rulings, inter alia, by reference to this 'process' by which the Convention text came to be...*"[35]

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[34] Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd English edn., 2005) Art. 7 ¶20, 101.

[35] Albert H. Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources", Cornell Rev. of the CISG (1995) 147-187, available at <https://www.cisg.law.pace.edu/cisg/biblio/kritzer.html>.

The CISG is an international instrument and the intention of the drafters must be established in the light of the aim of the convention, thus making any interpretation against the legislative intent or misinterpreting the words chosen or deliberately omitted by the drafters will result in frustrating the aim of wider and uniform acceptance of the Convention and would make the governing idea infructuous.

While analyzing the element of foreseeability under article 25 reference shall be made to the preceding international laws in force governing the International Sale of Goods, such as the ULIS (Uniform Law on International Sale of Goods). Article 10 of the ULIS provides for fundamental breach as follows:

> "*A breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects*" and consequently fixed the time of foreseeability to the time of conclusion of the contract.

The CISG drafters purposely omitted specifying the relevant time and kept it open for interpretation despite the ancestor's express fixation of foreseeability at the conclusion of the agreement.

Looking into the drafting debates of the CISG one finds that, UK made a proposal at the thirteenth meeting[36] of the drafting committee and proposed to fix the time of conclusion of the contract as the relevant time for determining the foreseeability under article 25. The proposal was to add the terms "unless at the time when the *contract was concluded* the party in breach did not foresee or had no reason to foresee such a result" into article 25 (which was then numbered as article 23).

This proposal was debated upon and received criticism from the delegates from Hungary, Finland and Norway who reasoned that,

> "*information provided after the conclusion of a contract could modify the situation as regards both substantial detriment and foresight*."[37] Thus, the proposal was debated

[36] UNCISG, Vienna Diplomatic Conference: Summary records of Meetings of the First Committee (13th meeting), ¶1, A/CONF.97/5 (Mar. 19, 1980), <https://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting13.html>.

[37] UNCISG, Vienna Diplomatic Conference: Summary records of Meetings of the First Committee (13th meeting), ¶2,A/CONF.97/5 (Mar. 19, 1980), <https://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting13.html>.

> upon and in the end the conclusion was reached that, "*The Committee, after deliberation, did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach.*"[38]

It is clear from the legislative history that the foreseeability under article 25 extends to the time of performance and limiting it to the time of conclusion of the contract would be going against the intent of the drafters of the convention.

B. Interpretation in light of principle of cure

The principle of cure is an integral part of the convention and the same is encapsulated in the form of article 48(1) in the convention. Article 48 provides the seller with an opportunity to cure the breach of an obligation, after the date of delivery. Thus the overall aim of the convention is to keep the contract afoot.[39] This principal can be applied while interpreting foreseeability under article 25 and thus it is rationale to extend the time of foreseeability under article 25 to the time of performance providing a window to cure the defect. The above point will be illustrated by the following example:

Alpha (seller) and Omega (buyer) enter into a contract for the supply of Desert Eagle pistols. As per the contract Alpha was to deliver pistols on a certain date, as Omega was in desperate need of the same. After the conclusion of the contract but before the performance, there came a notification of the government of Omega's country which required that for importing pistols after the coming of the notification, the importers have to file certain custom form, signed and stamped by the CEO of the foreign exporter entity and then only the goods can be allowed in the country. Omega informed the same to Alpha. Now, if the time of foreseeability under article 25 is fixed at the time of conclusion of the contract then Alpha is under no obligation to provide for CEO's signature as they'll take the defense of the notification not being foreseeable at the time of conclusion of the contract and thus such interpretation would lead to promotion of willful breach under the convention which will cause substantial detriment to Omega but still, fundamental breach would not be claimed successfully.

While, in the same case if the time of foreseeability is extended to the time of performance, then Alpha is under an obligation of providing the signature so

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[38] UNCISG, Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods, UNCITRAL Yearbook VIII (1977) A/32/17, pp. 25-64, <http://www.cisg.law.pace.edu/cisg/legislative/B01-25.html>.

[39] Bruno Zeller, "Fundamental Breach and the CISG – A Unique Treatment or Failed Experiment?", <http://www.cisg.law.pace.edu/cisg/biblio/zeller12.html>.

as to avoid the substantial detriment to Omega, consequently saving the performance of the contract and also will be in coherence with the principle of cure highlighted above. Ergo the foreseeability under article 25 is to be extended to the time of performance and the same is also evident from the legislative history of the convention. Hence the latter interpretation of foreseeability in the above illustration, under article 25 would avoid instances of willful breach and would lead to a greater acceptance of the convention. Also the convention contains principles of good faith embodied in article 7, and thus it would not be in good faith to allow such a conduct.

C. Interpretation of Foreseeability under Article 25 in conjunction with Article 8

A few commentators such as Bruno Zeller[40] are of the view that foreseeability shall not only be interpreted from the terms of the contract but also from article 8 of CISG. The need to consult article 8 arises from article 25 itself. Article 25, if paraphrased can be summed up as, a breach of an obligation causing substantial detriment to a party is not fundamental if the parties could not have foreseen, or a reasonable person would have not foreseen such a result.

Article 8 along with Article 7 of CISG is considered to be interpretative tool for the convention. As per Zeller, "*Certainty, flexibility and justice are displayed within the CISG and have been given meaning through Articles 7 and 8*."[41]

Article 8(3) particularly directs the court that in order to determine the intent of the parties and the understanding, a reasonable person would have regards shall be given to "*all relevant circumstances of the case, including the negotiations, any practice which the parties have established amongst themselves, usages and any subsequent conduct of the parties.*"[42] Thus, the use of the words *any subsequent conduct of the parties* clearly extends the time of foreseeability in terms of a reasonable person, to the time of performance.

In light of the above provision the foreseeability is to extend to the time of performance, taking into consideration any subsequent act of the parties and negating the assumption of crystallization of foreseeability at the time of conclusion of the contract. It is submitted that the above understanding of the foreseeability is also in consonance of the preamble of the convention.

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40 *Ibid*.

41 Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* 195 (2nd edn., 2009).

42 United Nations Convention on Contracts for the International Sale of Goods, Art. 8(3), Apr. 11, 1980, 1489 UNTS 3.

The point that such an interpretation will not be in coherence with the other provision of the convention is rebutted with the idea that an international convention is drafted for its wider acceptance and to bring uniformity. Article 25 is a sui-generis provision which is different from any other breach under the convention. Treating it at par with any other breach and clipping the wings of the provision by forcing a collective interpretation of the convention with regards to other provisions which fix the time for determining the foreseeability at the time of conclusion of the contract would defeat the aim of the convention.

To limit the time of foreseeability at the time of conclusion of the contract, would act as a technical restriction on the function and aim of foreseeability rule. Such an interpretation would go against the intent of the drafters of the legislation, reducing the protection provided to the injured party.

The function of foreseeability test under article 25 is to protect the just claims of the breaching party and nothing more and therefore to limit the time of foreseeability under article 25 to the conclusion of the contract would be misconstruing the underlying purpose which foreseeability under article 25 seeks to achieve.[43]

III. THE MIDDLE GROUND; AUTHOR'S INSIGHT

The middle ground that this paper tries to achieve is that the foreseeability of the contract should not be limited to the time of conclusion of the contract, so as to free the parties from any subsequent curable impediment which may cause substantial detriment to the other party facilitating and aiding wilful breach. Also, the paper rejects the idea to extend the time of foreseeability under article 25 to the time of performance so as to increase the burden of one of the parties without giving it a reasonable ground and opportunity to negotiate the terms of the contract which have amended and increased its obligation and expenses.

The suggestion that the author has to offer is that, first the reference should be made to the contractual terms and the negotiations made and if the position is not clear as per the importance of a certain obligation then only reference to the foreseeability should be made. Foreseeability is only relevant where the substantial detriment has not been communicated prior to, or at the time of conclusion of the contract. Such an approach is based on views taken by renowned commentators such as Schlechtriem and Robert Koch who have expressed that,

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[43] John O. Honnold and Harry M. Flechtner (ed.), *Uniform Law for International Sales under the 1980 United Nations Convention* 278 (4th edn., 2009).

> "*only when the particular importance of the violated duty has neither been established in the contract itself nor discussed during the contract negotiations, can foreseeability be relevant.*"[44]

Hence before going into the intricacies of the foreseeability under Article 25, reference should be made to the contractual terms and the negotiations and it should be seen that whether the importance of a particular obligation was made clear and discussed in the contract or not. As in the abovementioned example of *Alpha-Omega Desert Eagle*, it was clear from the beginning that an on time delivery of the pistols is necessary and an integral part of the contract. Hence it was very much foreseeable that if the on time delivery is not made to Omega then the party would suffer substantial detriment. Thus there is no need to go into the question of foreseeability of the detriment, and it is clear from the negotiations itself that the time is of essence. However the impediment that comes up after the conclusion of the contract should be easily and reasonably surmountable. Also, the party taking up additional responsibility of overcoming the impediment must be provided with an opportunity to renegotiate the terms of the new obligation and be reasonably compensated for the same. While determining the foreseeability element under fundamental breach regards shall be given to the intent of CISG to get a contract performed, i.e. the principle of cure and this intent is evident from the inclusion of the provisions of curing a breach. Taking a stand which frustrates this basic objective of the convention and totally discards the provisions for curing a breach is not in consonance with the intent of the drafters of the convention.

The question of foreseeability under article 25 has been left deliberately open by the drafters to be determined on a case to case basis. Giving it rigidity by fixing the time of foreseeability at the time of conclusion of the contract or to the time of the performance would put one of the parties in a position which would be detrimental to the other. The relevant excerpt from the relevant committee report is reproduced below:

> "*The Commission, after deliberation, did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach.*"[45]

Hence the middle ground that this paper proposes is that the foreseeability should be determined at the time the willful breach is committed. The

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[44] Schlechtriem/Schwenzer, Commentary on the UN–Convention on the International Sale of Goods (CISG) Art. 25 Para 14.

[45] UNCISG, Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods, UNCITRAL Yearbook VIII (1977) A/32/17, pp. 25-64, <http://www.cisg.law.pace.edu/cisg/legislative/B01-25.html>.

willfulness of a breach is the factor which shall be considered while determining the foreseeability of a fundamental breach. Thus, in the above example the breach's foreseeability is to be determined at the time before the performance but after the conclusion of the contract i.e. when Omega informed Alpha of the new notification which if not abided would lead to substantial detriment to buyers.

The abovementioned interpretation of the CISG is favoured by international authors such as Professor Honnold[46] who is of the view that while determining the foreseeability of the breach, information received post entering into effect of the contract but prior to performance of the same by the parties shall be taken into account. Commentators as Fletchner[47], Liu[48], Mascow[49], have also agreed to the above cited views of Professor Honnold.

The author herein does not only propose that the circumstances and information post contract formation and before performance of the contract should be taken into account. It also clarifies that the other party is under an obligation to inform the party who will have to take care of the changed circumstances to avoid a fundamental breach, of the relevant circumstance which would affect the performance of such performing party.

The duty to inform also draws its authority from the good faith principal incorporated in article 7 of the CISG, which requires good faith to be observed by the parties in performing their duties and obligations and the obligation of good faith supposedly implies at least three other duties: "*the duty to inform the other party of circumstances which might threaten the performance of the contract; the duty to renegotiate the contract in order to salvage the commercial relationship if circumstances permit; and the duty to mitigate damages in the event of a breach*."[50] Good faith is a part of general principal and if there is no clarity in a law or treaty regards should be given to the general principles of law, of which good faith is perhaps the most important, as it underpins many international legal rules. Hence, the party (which will be affected by the changed circumstances and to whom substantial detriment will be caused), is under an obligation to inform the other party of the changed circumstances and this information shall be made prior to the performance of the contract and

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[46] John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* 209 (3rd edn., 1999).

[47] Harry M. Flechtner, "Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C." (1988) 8 Journal of Law and Commerce *78.*

[48] Chengwei Liu, electronic excerpt from *The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and Case Law* (2nd edn., 2005) Ch. 2.3(d), n 106.

[49] Fritz Enderlein and Dietrich Maskow, (1992) 75, 116.

[50] Thomas E. Carbonneau, "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Economic Transactions", 23 Columbia Journal of Transnational Law 580 (1985).

should not be so late that the other party cannot take into note the changing circumstances.

The additional cost and effort made by the party to avoid the substantial detriment should also be compensated and as stated above, if there are substantial changes then the party should also be given the chance to renegotiate the terms as per the obligation of good faith.

RELEVANCE OF HEALTH ECONOMICS, LAW & POLICY FOR ECONOMIC GROWTH

—*Dr. Shivani Mohan*[1] *& Dr. Shweta Mohan*[2]

"*Om Sarve Bhavantu Sukhinah*
Sarv Santu Nir-Aamayaah
Sarve Bhadraanni Pashyantu Maa Kashcid-Duhkha-Bhaag-Bhavet
Om Shaantih Shaantih Shaantih."[3]

Abstract — Economic development of a country is very closely associated with the state of well-being of its people which is now accepted as one of the most important determinant of economic growth and progress. Health is both an objective of development and also a means to it. The most apparent gains from healthy workforce are savings of workdays, improved human resources efficiency, better job opportunities and lengthier and healthier working lives. Countries with weaker health and education conditions often find it harder to achieve sustained growth. A good health always bestows to the nation's economy with economic efficiency, optimum utilization resources, economic growth and development and savings in long run. Although, India has considerable health infrastructure in urban areas but rural area till date seems to be largely neglected. This urban rural difference has created wide interstate disparity in health status. Even after 72 years of independence and continuous growth and development, India's healthcare system is at the rear as compared to other emerging economies. However, the crucial linkages between public health and human rights are well recognised by the Constitution of India in Art. 47 of Part VI, enunciating the duty of the state to raise the level of nutrition

[1] Senior Assistant Professor of Economics, Chanakya National Law University, Patna.
[2] Assistant Professor of Economics, National University of Study and Research in Law, Ranchi.
[3] Inspired from the philosophy mentioned in the Brihadaranyaka Upanishadas verse 1.4.14.
It means that may everyone be happy, may everyone be free from all diseases, may everyone see goodness and auspiciousness in everything, may none be unhappy or distressed.

and the standard of living and to improve public health. The National Human Rights Commission of India has also made several significant recommendations in this regard. In addition to equitable, continuous and broad based investment in women and child healthcare sector the commission also recognises the importance of adequate investment, especially in the most vulnerable and marginalised sections of the society like scheduled caste, scheduled tribes, minorities, disabled and elderly people. Nevertheless, the population of India reflects a very little understanding of the importance of wellness and good health requirements. If some of the most important steps are taken immediately like more technology-led innovations in healthcare aiding diagnosis, remote monitoring of patients through telemedicine etc., enabling 100% FDI in hospitals, private equity, more use of generic medicines, advancement in medical tourism, continuation of flagship programmes like Ayushman Bharat, managing medical cost effectively without compromising quality medical care, effective implementation of National Health Policy than India's healthcare scenario will improve dramatically aiding more to economic advancement.

I. INTRODUCTION

As a human being we have always considered health as our most important asset and therefore, it has always been a matter of our utmost concern irrespective of our age, gender and socio-economic setup. The constitution of India under Article 21 guarantees protection of life and personal liberty to every citizen. The right to life which is the most important and basic of all is also very challenging to define as it has wider application. In *Francis Coralie Mullin* v. *UT of Delhi* [4] *J. Bhagwati, held*

> *"we think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingle with fellow human beings".*[5]

However, the judge also acknowledged that there is no denial that the degree and the content of the components of this right would definitely be

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[4] *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608. *Chet Ram Vashist* v. *MCD*, (1980) 4 SCC 647 : AIR 1981 SC 653.

[5] *Id*., at p. 753.

contingent to the level and extent of economic advancement of the country.[6] Economic development of a country is very closely associated with the state of well-being of its people which is now accepted as one of the most important determinant of economic growth and progress. Squarely based on the experiences of most of the developed nations it is accepted that the vital accomplishment in the major areas in health sector has always paved the way for economic advancement.

Health economics deals in fundamentals of economics which are applicable to the healthcare sector. On one hand, it focuses on the issues of demand for healthcare services its distribution on the other hand, it deals with the supply of healthcare through public and private sector service to mitigate the gulf between the demand for and supply of healthcare amenities in the economy. It is one of the disciplines of economics which educates the society to allocate its resources among alternative uses. Health can be considered as resource as well as investment goods. Improvement in the health condition of the people ultimately enhances the level of human capital of a nation. It is human capital which activates other factors of production. According to the Commission on Growth and Development, population health and economic growth have direct and positive relationship. The foremost role of health is in increasing labor productivity. Healthy workers are less absent from work and are relatively more productive when working. Secondly, there is very close relationship between health and education. It is generally seen that cognitive development and ability to learn have direct relationship with the healthcare facilities provided during childhood. Also a healthy childhood has direct impact on school attendance.[7] Furthermore, adult mortality and morbidity depresses the promising returns to investments in schooling. Improvement in childhood and adult health condition acts as an incentive for future investment in education. Thirdly, there is strong impact of health on savings of the people. The larger is the prospective of lifespan the more is the incentive to save for future, resulting in overall increase levels of saving, wealth and capital with the nation. It is also noticeable that poor healthcare conditions can cost families more, resulting in selling of assets and forcing them into vicious cycle of poverty.[8]

In recent times, the demand for healthcare services has grown-up very fast and at the same time the resources to gather the demand for healthcare services is largely inadequate in supply. The fundamental reason behind increase in demand for healthcare services is not only to safeguard and ensure good health condition but also increase their quality participation in economic

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[6] Mahendra P. Singh (ed.), *V.N. Shukla's Constitution of India*, 192 (Eastern Book Company, 2011).

[7] David E. Bloom and David Canning, "Population Health and Economic Growth" 1 (Commission on Growth and Development, World Bank, Working Paper No. 24, 2008).

[8] David E. Bloom and David Canning, "Population Health and Economic Growth" 1 (Commission on Growth and Development, World Bank, Working Paper No. 24, 2008).

activity. The demand for healthcare is obtained from the responsiveness amongst the people of the country. The significance of health economics is rising particularly in the developing countries largely because of the geographical condition.[9] As discussed earlier, the health of the human capital is very vital for the economic production. Barriers to access in the financial, organizational, social, and cultural domains can limit the utilization of services, even in places where they are "available."[10]

II. RELATIONSHIP BETWEEN HEALTH AND ECONOMICS

Health economics in general parlance is related with available health policy, with respect to different health services and the decision making process in buying and paying for the same. Moreover, it is the subject which helps in the evaluation of the end results of the consumption. Rationality which is one of the most important subject matter of economics, explains that a rational person under these circumstances deals with the questions on pocket payment rather than the decisions about how to contest scrupulous illness or the menace.[11] It has always been a difficult task to attain maximum satisfaction out of the limited resources. Therefore, the decisions related to priorities are extremely crucial. Above all there is no denial that a good health always bestows to the nation's economy in the following manner:

A. Health and Economic Efficiency

There is a very famous idiom that "Health is Wealth". Poor health conditions and poverty are associated to each other as they share direct and positive relationship. Bad health creates pressure even among those who are financially secure. There are many real life instances 'when prolonged illness has driven the economically well-off individuals into financially worse off. Therefore, it is very important to prevent the non-poor families from sinking into poverty trap on one hand and on the other hand reducing the distress of those who are already vulnerable section of the society. A country's economic efficiency improves when per capita productive capacity increases and that in turn depends on physical wellness and soundness of the population. The most apparent gains from healthy workforce are savings of workdays, improved human resources efficiency, better job opportunities and lengthier and healthier

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[9] Shanmugasundaram, Yasodha, *Theory and Practice of Health Economics in India* (Institute of Advanced Studies and Research, Chennai, 1994).

[10] Gulliford M., Figueroa-Munoz J., Morgan M., Hughes D., Gibson B., Beech R., et al., 7 "What Does 'Access To Health Care' Mean?" Journal of Health Services Research and Policy, 186-88 (2002).

[11] Musgrove Philip (2004), *Health Economics in Development*, The World Bank, Washington DC, p. 20.

working lives. Health is both an objective of development and also a means to it. In case of India, a study conducted on lepers in urban areas of Tamil Nadu concluded that if abnormalities and other form of physical defects with them are reduced than the estimated annual incomes of such people with job would improve by more than three folds. It also concluded that if deformity of all 645,000 lepers in India is removed, it would add a projected $130 million to the country's GNP (1985).[12] In 1993, the World Bank, projected that leprosy accounted for only 1% of the country's disease burden and if eradicated, can increase India's GNP enormously. This interesting fact itself is stimulating and enough to realize the effect of absolute removal or near to complete elimination of disease burden in India and the potential impact it will have on GNP.[13] Unfortunately, in 2001, India remained one of the last eight countries to harbor leprosy, with close to 400,000 new cases diagnosed each year.[14] The estimates put India with about two thirds of the global burden of the disease.[15]

B. Health and Optimum Utilization Resources

Economics as a subject deals with the problem of optimum utilization of resources in order to attain maximum efficiency. There is a direct relationship between health and optimum utilization of economic resources of a country. In poor developing economies hefty amount of money is spent on treatment of diseases rather than prevention. This results in wastage of scarce resources. Instead of reasonable investment in health, treatment of diseases becomes priority. A country's productive efficiency can increase if prudent investment is made on healthcare sector. At the same time necessary measures should be taken regarding eradication of diseases to enhance productivity of the labours. Consequently, spending on health helps in better usage of factors of production like land, labour and capital and entrepreneur.

C. Health, Economic Growth and Development

A healthy child a prerequisite for the bright future of the country. Physically and mentally fit children enroll in the school and hence add to the HDI index of the country. Poor health conditions, insufficient hygiene and nourishment unfavorably affect the schooling. Unfortunately, India has the largest number of

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[12] Emmanuel Max and Donald S. Shepard, "Productivity Loss due to Deformity from Leprosy in India" 57 Int. J. Lepr . 476-82 (1989).

[13] World Bank, "The World Development Report - Regional Rural Development; Health Monitoring and Evaluation; Health Systems Development and Reform; Health Economics and Finance; Adolescent Health", 18 Working Paper No. 12183, 1993).

[14] IDA, "India: Second National Leprosy Project", World Bank (July 25, 2019, 10.01 a.m.), <http://web.worldbank.org/archive/website01291/WEB/0__CO-87.HTM>.

[15] *Ibid*.

stunted and malnourished children with the total population of 48.2 million[16]. Jim Yong Kim, president of World Bank, on his visit to New Delhi in June 2016 said,

> *"Stunted children will be less healthy and productive for the rest of their lives, and countries with high rates of stunting will be less prosperous."*[17]

He further said that,

> "The reason I am pushing so hard on stunting is because we have spent a lot of time looking at possible paths of economic development in developing countries. It is my suggestion to the government of India to work with us on stunting. This is the bottom line: if you walk into the future economy with 40% of your workforce having been stunted as children, you are simply not going to be able to compete."[18]

As per the Global Nutrition Report, 2015, about 39% of Indian children five or younger are stunted which is higher than the global average of 24%.[19] This is a threatening position for any economy as it will affect next generation literacy, diminished cognitive skills and will pose several kinds of health associated risks. Besides, there are many empirical and historical studies suggesting a very strong relationship between health and economic growth. Nobel laureate Robert W. Fogel discovers that somewhere between one third and one half of England's economic growth in the past 200 years is due to enrichments in the population's food consumption.[20] There is no denial to the fact that a hale and hearty, educated individual positively creates more wealth than an uneducated and stunted individual.

Therefore, health and economic performance are always interlinked. Countries with weaker health and education conditions often find it harder to achieve sustained growth. As per OECD, a 10% improvement in life

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[16] Swagata Yadavar, "Budget 2018: India's Healthcare Crisis is Holding Back National Potential", IndiaSpend (June 20, 2019, 10.27 a.m.), <www.indiaspend.com/budget-2018-indias-healthcare-crisis-is-holding-back-national-potential-29517/>.

[17] Global Data, 2017, Stunting, The Bill and Melinda Gates Foundation (Feb. 10, 2019, 11 a.m.), <https://datareport.goalkeepers.org/>.

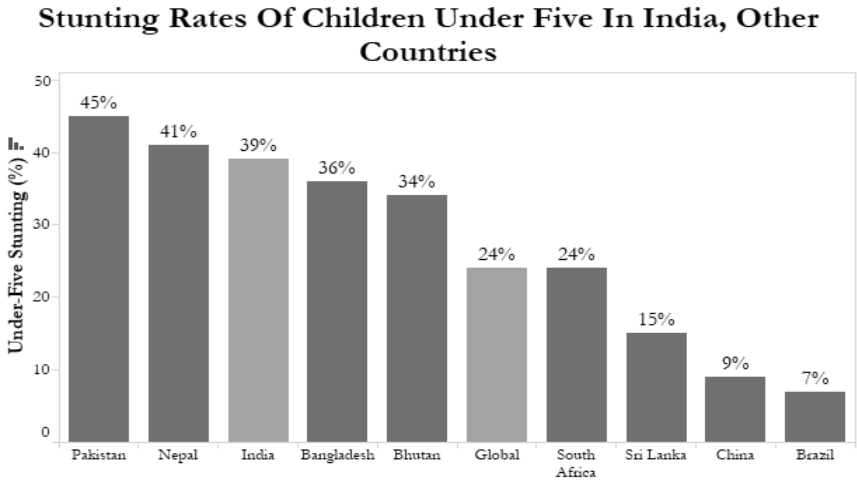
[18] *Ibid*.

[19] *Ibid*.

[20] Mexican Commission on Macroeconomics and Health, *Macroeconomics and Health: Investing in Health for Economic Development* 15 (1st edn. Universidad de las Americas, Puebla, 2004).

A long-term study for England carried out by Robert Fogel, a Nobel Prize winner in Economics, demonstrated the role that health plays in growth particularly in case of developed countries it is largely responsible for their superior economic performance as compared to poor economic country.

expectancy at birth is associated with a rise in economic growth of some 0.3-0.4 percentage points a year.[21] A good interaction between health and the economy always has a direct and positive relationship with economic growth, income, investment, employment and improvement in social environments.



Source: Global Nutrition Report, 2015.

D. Health and Savings in long run

The expenses incurred on health in short run inhibit the occurrence of diseases in long run which in turn amounts huge savings in cost of treatment. A report by World Bank on health showed that in America polio eradication programme saved approximately $320 million and $ 1.3 million over and above of the expenditure made on the eradication of the same.[22] The program's net return, after discounting at even as much as 12 per cent a year, was estimated to be between $18 million and $480 million.[23] Therefore, the expenditure on healthcare in short run has a multiplier effect in the long run in terms of improved health, productivity and savings.

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[21] Julio Frenk, "Health and the Economy: A Vital Relationship 2004", OECD (Mar. 5, 2019, 10 a.m.) <http://oecdobserver.org/news/archivestory.php/aid/1241/Health_and_the_economy:_A_vital_relationship_.html>.

[22] World Development Report, 1993, Investing in Health, World Bank and University Press, New York, (Mar. 11, 2019, 11:12 a.m.) <https://openknowledge.worldbank.org/handle/10986/5976>.

[23] *Id.,* at 19.

III. THE ECONOMICS OF GOOD HEALTH

Healthy population is a motivating factor for the economic growth and development of nation. Human capital is one of the factors of production that instantiates the other factors. Hence, it is the duty of the state to guarantee or ensure sound health standards and education for its population. The importance of healthy human capital can be understood with its potential impact on economic growth and advancement. Most of the developed nations and their rate of economic advancement testifies the above fact. A healthy individual carries out work more efficiently and builds on the growth and prosperity of the nation.

Upgrading the health principles or in other words the HDI Index has been one of the major shove in social and economic development programs of developing countries. The third world countries are the worst affected countries facing the problem of poverty and malnutrition. If the work force of a country is suffering from poverty and malnourishment it is less likely to add into the productivity of the same. Today such countries are facing problems in tackling malnutrition and poverty in order to design effective programs to enhance the worth of their labor force for the inclusive growth and development.

Almost all the developing economies endow a smaller amount of their financial resource in health development programmes. Therefore, to accelerate the growth such countries should meet the requirements laid down by Human Development Index. There is direct and proportional relation between the expenditure on health and economic growth. Good health promotes the rise in income and living standards. In case of India, expenditure on healthcare has always been a challenge.

S. No.		**2015-16**
	State Budget including Central Grants (including Treasury Route)	115933.761
	State Budget (Own Expenditure)	95310.952
	Centre MOHFW	35189.49
	Central Grants Through Treasury	20622.81
	3601	20379.49
	3602	243.31
	Other (Central Govt. Hospitals/Institutions, etc.)	14566.693
	Other Central Ministries* Grand Total (1+2+3+4)	8642.18 140054.55

Source: "Health Sector Financing by Centre and States/UTs in India 2015-16 to 2017-18", National Health Accounts Cell, Ministry of Health & Family Welfare.

Recently, the central government has increased the healthcare expenditure from 0.9% of GDP in 2016 to 1.28 % in 2017-18 however, the overall health expenditure remains one of the lowest among the BRICS countries.[24] As per the World Bank data, 2016, India spends just 0.9 % of public expenditure on healthcare as compared to 7.4% of the world average.[25] Although, in the current budget 2019-20, the allocation of resources for project Ayushman Bharat has been increased up to Rs. 6,400 crore which is definitely a massive expenditure, yet India will have to work very hard towards functional and distress free comprehensive wellness system.[26]

Nevertheless, there is a positive indication towards the healthcare scenario in the country today which points towards an increasing awareness related to diseases and their treatment but at the same time it reflects very little understanding of the importance of wellness and good health requirements.

IV. CRITICAL ANALYSIS GOVERNMENT POLICY, LAW AND HEALTHCARE INFRASTRUCTURE IN INDIA

Health infrastructure is an imperative indicator or vital component of existing healthcare policy and welfare mechanism in a country. Such infrastructure is considered to be the backbone of the economy. Although, India has considerable health infrastructure in urban areas but rural area till date seems to be largely neglected. This urban rural difference has created wide interstate disparity in health status.

One of the prominent features of Indian healthcare facility is that it is provided by the state government at no or minimal cost, but at the same time, the quality of the same is supposed to be non-reliable. Therefore, those who want to avail better health service have no choice rather than to approach private healthcare which is an expensive affair. It is very interesting to know that in our country, the private sector is the dominant player in the healthcare but at the same time there is absence of regulations in ensuring inconsistency in the value and costs of services offered by them. The solutions lie in the hands of local and national initiatives. Though India was known for its cultural and traditional healthcare therapy, today it depends more or less on imported western models of the healthcare system which is based on urban hospitals. All these have been done at the cost of providing inclusive primary healthcare to all. This has completely deserted uniform protective, promotive rehabilitation and public health measures. In a poor country like India out of pocket expenditure

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[24] Ashok Varma, "Budget 2019: Ayushman Bharat Key Programme: What Data Suggests on Need to Speed Healthcare Reforms", *The Financial Express*, July 4, 2019.

[25] *Ibid*.

[26] T.S. Ravi Kumar and Geogary Abharam, "We Need Leap in Healthcare Spending", *The Hindu*, Feb. 7, 2019.

(OOPE) constitutes more than 60% of all health expenses and approximately 63 million people fall into the trap of poverty only because of poor financial protection and terribly high healthcare costs.[27]

The expensive treatment in India and has led to discrimination in the healthcare services. In our country the insurance pays only for the admission and treatment of patient. In the year 2000 government of India made flexible policy for the insurance and permitted corporate players into the insurance sector.

Ease of access to human resources for health facilities has been defined as the "heart of the health system in any country."[28] There is a lack of reliable source which could provide the numbers of health workforce. In case of India majority of the healthcare professionals work in the unorganized and private sector. According to the government of India, there are 1,668 people on one doctor.[29] However, in the last ten years there is an increase in the number of dental surgeons registered with Central/State Dental Council of India.[30] According to one estimate, providing quality healthcare facilities to just 340 million more people may result in increasing additional employment opportunities and an approximately 141 billion INR of savings to be used by the country for more productive investment in the next 5 years.[31]

Recently, The Union Cabinet chaired by the Prime Minister Shri Narendra Modi in its meeting on 15.3.2017, approved the National Health Policy, 2017. The Policy pursues to reinforce and prioritise the role of government in defining healthcare systems in all dimensions like investment in health sector, organisation of healthcare services, prevention of diseases, promotion of technology and encouraging medical pluralism.[32] The existing policy is said to be more patient centric and quality driven. It aims to improve health conditions of the people the country through concerted effort and policy action in all sectors.[33] Its objective is to address various forms of communicable diseases like Tuberculosis, HIV/AIDS, Leprosy, Vector Borne Diseases like

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[27] Indrani Gupta and Mrigesh Bhatia, "Indian Healthcare System", International Commonwealth Fund (Mar. 15, 2019, 12.02 p.m.), <https://international.commonwealthfund.org/countries/india/>.

[28] Central Bureau of Health Intelligence, "National Health Profile 2018", World Health Organisation (Mar. 15, 2019, 12.30 p.m.), <http://www.cbhidghs.nic.in/Ebook/National%20Health%20Profile-2018%20 (e-Book)/files/assets/common/downloads/files/NHP%202018.pdf>.

[29] Press Trust of India, "In India 1 Doctor Serves 1,668 People; 8 Lakh Doctors in Total", *Business Standard*, Feb. 3, 2017, at.

[30] Central Bureau of Health Intelligence, *supra* note 28.

[31] PWC 2017, "Funding Indian Healthcare Catalysing the Next Wave of Growth", Price Waterhouse and Coopers (Mar. 15, 2019, 10.02 a.m.), <https://www.pwc.in/assets/pdfs/publications/2017/funding-indian-healthcare-catalysing-the-next-wave-of-growth.pdf>.

[32] Ministry of Health and Family Welfare, Government of India, "National Health Policy 2017", (June 24, 2019, 12 a.m.), <https://mohfw.gov.in/sites/default/files/9147562941489753121>.

[33] *Ibid*.

Malaria, Japanese Encephalitis/Acute Encephalitis Syndrome etc. The policy also recognises the need to address the increasing incidence of chronic disease like oral, breast and cervical cancer in addition to hypertension and diabetes. Furthermore, the policy envisages to include mental health and population stabilisation programme with enhanced provisions for women's health and gender mainstreaming.[34]

Optimistically, if some of the most important steps are taken immediately like more technology-led innovations in healthcare aiding diagnosis, use of robotic surgeries, radio surgeries, remote monitoring of patients through telemedicine etc., enabling 100% FDI in hospitals, private equity, more use of generic medicines, advancement in medical tourism, continuation of flagship programmes like Ayushman Bharat and last but not least managing medical cost effectively without compromising quality medical care than India's healthcare scenario will improve dramatically.

At this juncture it is very important to understand that the right to health is a fundamental part of our human rights in understanding of a life in dignity. It is very well defined in the preamble of the constitution of the World Health Organisation (WHO) as:

> "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[35]

Furthermore, the preamble states that:

> "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[36]

In order to achieve abovementioned objective WHO in its preamble accepts the responsibility of the government and states "Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."[37] If we look at the Constitution of India, Art. 47 of Part VI, enunciates the duty of the state to raise the level of nutrition and the standard of living and to improve public health.

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[34] *Ibid*.

[35] WHO Constitution preamble, (June 24, 2019, 10 p.m.), <https://www.who.int/about/who-we-are/constitution>.

[36] WHO Constitution preamble, (June 24, 2019, 10 p.m.), <https://www.who.int/about/who-we-are/constitution>.

[37] *Id*., at 29.

> "The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties…"[38]

Moreover, in India, the crucial linkages between public health and human rights are well recognised by the National Human Rights Commission and it has made several significant recommendations in this regard. It has suggested improvements and issued guidelines for the right to healthcare, public hearings for access to healthcare, systematic changes to improve, increase availability and affordability of health services.[39] It has also recommended the incorporation of mental health in primary health services. The commission has passively advocated for "Right to Health" and has been active in promoting basic healthcare services in rural areas, ensuring essential drugs availability at primary healthcare centres, organising regular immunisation programme related to childhood diseases. In addition to equitable, continuous and broad based investment in women and child healthcare sector the commission also recognises the importance of adequate investment, especially in the most vulnerable and marginalised sections of the society like Scheduled Castes, Scheduled Tribes, Minorities, Other Backward Caste, disabled and elderly people. As there is always a chance of intergenerational transmission of poverty and inequality which may lead to irreversible negative impact on the overall all development of the poor marginalised class.[40]

Even after 72 years of independence and continuous growth and development, India's healthcare system is at the rear as compared to other emerging economies. According to the latest UN data, the approximate population of India is 1,350,438,098[41] and it is continuously rising at an alarming rate with enormous diversity. With its diversity it is also bringing an enormous challenge to the healthcare delivery system. This brings into sharp focus the WHO theme of 2018, which calls for "Universal Health Coverage- Everyone, Everywhere."[42] There are certain crucial challenges which need to be tackled to provide healthcare to everyone everywhere particularly in the rural India.

India with 1.37 billion (expected data)[43] billion people has made vital improvement, as average life expectancy has increased to 65 years for male

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38 Indian Constitution, Art. 47.

39 The National Human Rights Commission of India, available at <http://nhrc.nic.in/sites/default/files/NHRCindia.pdf> last accessed on July 25, 2019.

40 The National Human Rights Commission of India, Annual Report 2015-16, (June 17, 2019, 10.30 p.m.), <http://nhrc.nic.in/sites/default/files/NHRC_AR_EN_2015-2016_0.pdf>.

41 Population of India 2019, India Population 2019, Most Populated States (June 19, 2019, 11.40 p.m.), <http://www.indiapopulation2019.in/>.

42 Arvind Kasthuri, "Challenges to Healthcare in India - The Five A's", Indian J. Community Med., 141-143 (2018).

43 India Population, "A Quick Analysis of India Population 2019", (June 19, 2019, 11.45 p.m.), <http://www.indiapopulation2019.in/last visited on 15 Jan., 2019>.

and female. The polio eradication programme although seems to be successful, a larger section of India's population is still struggling and fighting with other types of chronic diseases and poor rural population is facing lot of difficulties in the prevention and treatment of such non-communicable diseases. It is improved healthcare facility only which can enhance labour productivity resulting in the increase incomes of household, ultimately breaking the vicious cycle of poverty.

Currently, the Indian healthcare system presents a complementary situation as high tech medical facilities are available in urban areas on the other end the rural areas are trying desperately to have the same. With the dynamic change in the field, the gaps are likely to widen more in the future. Furthermore, there is a widespread perception that "healthcare has not been a political priority in India" at the same time it can be noticed that majority of the population lacks health awareness. People do not pay attention to their health until and unless they are diagnosed with some serious health issues. The reasons are very clear as low educational status, poor practical literacy, and low priority for health in the population are prevalent among others. A review article on aging and general decline in health found that 20.3% of participants were aware of common causes of prevalent illness and their prevention but showed apathy towards it.[44] A more common reason could be lack of health literacy. However, it is encouraging that general awareness related to health is showing promising results in states like Bihar and Jharkhand demonstrating improved levels of responsiveness and perceptions about maternal health. The behavioral change is because of effective interventions on adolescent reproductive health levels of girls.[45] Indeed, this could be a very encouraging and inspiring condition and at the same time a very clear indication that continuous efforts are needed to enhance awareness levels among all class and segments of the population which have shown promising results. Therefore, government should implement policies to generate awareness of healthy life, by making mandatory the health education in the school and university levels.

While the National (Rural) Health Mission has done much to improve the infrastructure in the Indian Government healthcare system, still a lot of the primary health centers (PHCs) lack basic infrastructural facilities such as proper building beds, regular supply of electricity, wards, toilets, drinking water facility as well as clean labor rooms for delivery. Lack of qualified doctors is another big discouragement to the health-seeking behavior of the

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[44] Arvind Kasthuri, "Challenges to Healthcare in India - The Five A's", Indian J. Community Med., 141-143 (2018).

[45] S.K. Banerjee, K.L. Andersen, J. Warvadekar, et al., "Effectiveness of a Behavior Change Communication Intervention to Improve Knowledge and Perceptions About Abortion in Bihar and Jharkhand, India", 142-151 (International Perspectives on Sexual and Reproductive Health, 39, 2013).

population. Therefore, for the successful implementation of law and policy the basic facilities of the healthcare should be made compulsory.

At this juncture it is very important to accept and recognize that protecting human rights is not only constitutional value but also a constitutional goal. Under the obligation of DPSP of the Indian Constitution, the social services are the responsibility of states. Ironically, the State has very limited revenue which creates high degree of fiscal imbalance for the implementation of such services. Hence, the budget allocation for the states for the said sector should be increased. The state should also endorse traditional knowledge base and expansion and promotions of institutions to carry a national heritage by promoting Ayurveda, Homeopathy and Siddha Medicine which will not only enhance the periphery of prevention and cure of diseases, but will also increase the employment opportunities.

INSANITY AS A DEFENSE

—*Shivanshu Bhardwaj*[*]

Abstract — At times, cinematography triggers curiosity in your brain to an extent that you want to study more about the same. 'Shutter Island' was one such movie which instigated me to research on the defense of insanity, as to how exactly does this defense operates and how things like institutionalization effects the probability of the defense being taken. Through this paper I attempt to explore more into these issues and quench the curiosity of myself and the readers.

To elaborate the scheme, we shall look into the idea of what kind of test is used for the determination of liability and in what all ways and qua what all persons can we apply the well-known standards of objectivity and subjectivity. We shall along with the above premise explore as to how the entry of expert witnesses changed the way the defense was treated thereto. We shall also look how the law exists in India and to what extent has it been influenced by the English law. The paper's primary focus will be on the idea of how the defense can be misused and is there a possibility that the same is availed in falsely by an accused.

Method of the research is descriptive and methodology is doctrinal. Doctrinal writings in relation to the subject has been analysed in the course of this research paper. Reliance has been placed on judicial precedents, official government reports and other reliable sources.

[*] Associate, Cyril Amarchand Mangaldas.

I. INTRODUCTION

The acceptance of the plea of insanity has been an informal practice since many years,[1] the treatment of the accused was not necessarily in a specific manner but each of the accused were treated based on her or his personal circumstances.[2] In this context of informal nature of insanity the first known trial of insanity came up in England – that of Edward Arnold (in 1724).[3] The accused had shot a member of the aristocracy and later pleaded that he was not aware about what he was doing.[4] The evidence adduced by the defense were the statements of the family of the accused and those of the members of the local community, the same indicated that the accused gave way to 'irrational antics and minor acts of violence and damage', however, the prosecution evidence suggested that the accused was capable of forming a steady design.[5] The jury direction in the said case read as follows:

> "When a man is guilty of a great offence, it must be very plain and clear before a man is allowed such an exemption [i.e. the one relating to insanity]…it must be a man that is totally deprived of his understanding and memory, and [should] not know what he is doing, no more than an infant, than a brute, or a wild beast [in order to avoid punishment]."[6]

The above set out what is often referred to as the 'wild beast' test,[7] we can see that this is more of an informal standard than a precise determinant of the existence or lack of intent.[8] The general and otherwise conduct of the accused was taken as a significant factor, the exculpation was not based so much so on the internal mental processes but this behavior of the accused that was said to constitute 'mad condition'.[9] It is said that in this era, mental capacity had cultural and social manifestations and meaning,[10] and so ordinary people who did not possess any specialist knowledge were regarded as competent enough to detect and evaluate insanity.[11] Now let us dwell into specific objectives which have been stated above.

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1 Nigel Walker, *Crime and Insanity in England*, 19 (1968).
2 *Id*., at 42.
3 *R*. v. *Edward Arnold*, 16 St Tr 695 (Surrey Assizes, 1724).
4 *Ibid*.
5 R. Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield", 19(3), Law and Society Review, 487 (1985).
6 Nigel Walker, *Crime and Insanity in England*, 56 (1968).
7 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 108 (2012).
8 J.P. Eigen, "Delusion's Odyssey: Charting the Course of Victorian Forensic Psychiatry", 27(5), International Journal of Law and Psychiatry 395 (2004).
9 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 108 (2012).
10 *Ibid*.
11 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 108 (2012).

II. THE NATURE OF TEST FOR CULPABILITY VIS-À-VIS THE STATUS OF EXPERT MEDICAL EVIDENCE

The two aspects i.e. the test which is to be applied to determine the liability of the accused, and the consideration of expert medical evidence are interdependent onto each other and thus it is pertinent to consider the two of them together, and before considering the specific contours of both of these issues it is important to look into the evolution of both the aspects.

It is well known, most of the offences (murder in particular) mainly is constitutive of two constituents – *actus reus* and *mens rea* – the accused while advocating his exculpation off the offence, argues (this can be done in person or through a counsel, however in the former case adverse inference may be drawn qua the accused about which I shall discuss in the later part of this paper) that he committed the act without necessary *mens rea*, as he was not capable enough of forming one.[12] It should be mentioned here that during this 'era', no differential treatment was meted out to the matters of automatism and they were considered as the cases of insanity itself.[13] An illustration of this can be the trial of William Walker, where in-effect the accused pleaded automatism but was found not guilty based on insanity.[14] In that case the accused stabbed his wife, without there being any evidence of discord between them, the witnesses testified that they did not think that Walter was mad.[15] They said that something extraordinary must have happened with the accused to disturb him off his orderly state.[16]

The case that prompted separate fields for automatism and insanity was the trial of James Hadfield.[17] The accused had attempted to shoot King George III, believing that he would be able to save the world by doing that.[18] It was argued in his defense that instead of a total deprivation of understanding, delusion is the necessary companion of insanity.[19] He was examined by a medical practitioner, who said that every time he was posed with questions relating to lunacy, he acted irrationally.[20] Hadfield was acquitted since he was held to be under the influence of insanity when he committed the offence.[21] The uncertainties of the above matter lead the Parliament to pass the Criminal Lunatics Act of 1800, which was one of the first known separation between the concept

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12 D. Rabin, *Identity, Crime and Legal Responsibility in Eighteenth-Century England*, 2 (2004).
13 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 110 (2012).
14 OBP, *William Walker*, 21 April, 1784 (t17840421–13).
15 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 110 (2012).
16 *Ibid*.
17 *R.* v. *James Hadfield*, (1800) 27 St Tr 1281.
18 *Ibid*.
19 Nigel Walker, *Crime and Insanity in England*, 77 (1968).
20 *Id*., at 76.
21 R. Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield", 19(3), Law and Society Review, 510 (1985).

of insanity and automatism.[22] After the aforementioned Act, it was no longer open to the jury to simply acquit the insane defendant, but they were 'required to specially find if the accused was insane at the time of the commission'.[23] The Act also brought in the aspect of detention of the insane defendants, court now had the power to keep them in custody.[24] This aspect of the probability of indefinite detention proved an enduring feature for the exculpatory insanity.[25] The above reflected a particular attitude towards insane individuals – that they were dangerous[26] – and thus should be institutionalized. This can be further illustrated with what Lord Diplock said in *Sullivan* – that 'the purpose of the legislation relating to the defense of insanity, ever since its origin in 1800, has been to protect society against recurrence of the dangerous conduct'.[27]

The reason that it said above that the aforementioned Act of 1800 had an enduring effect on the pleas of insanity is that, prior to this the accused if successfully pleaded the defense of insanity was left scot-free and he entered back in the society and so there was an incentive for people who were not actually insane to maneuver their way around the same, as they can comfortably go back to their homes.[28] However, after the passage of the Act of 1800 since one would be institutionalized and not just sent back home, the notorious lot abstained from pleading this defense that frequently.[29]

Another effect that came along the abovementioned special verdicts was the rise of psychiatric professionals, which embodied expert know-how qua the knowledge of madness or insanity.[30] These experts conceptualized the notion of insanity as denoted, 'primarily an alienation of feelings, of natural sentiments', and 'spoke to the impulsive nature of the will, which drove the afflicted person into motiveless, revolting activity'.[31] The significance of the abovementioned professions increased from the trial of *Daniel M'Naghten* (the trial is also referred to as the *Mc'Naughten* trial by some, but for the sake of brevity I will be stating it as *M'Naghten* in this Paper). We shall now briefly discuss the same.[32] Apart from the importance of expert evidence which was laid in this case, it is also important to discuss this since later the law globally was inspired from this.

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22 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 111 (2012).

23 Nigel Walker, *Crime and Insanity in England*, 78 (1968).

24 R. Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield", 19(3), Law and Society Review, 515 (1985).

25 *Id*., at 519.

26 R. Moran, "The Punitive Uses of the Insanity Defense: The Trial for Treason of Edward Oxford (1840)", 9, International Journal for Law and Psychiatry 189 (1986).

27 *R.* v. *Sullivan*, 1984 AC 156, 172.

28 *Supra* note 24.

29 *Ibid*.

30 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 113 (2012).

31 Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court*, 78–80 (1995).

32 *R.* v. *M'Naghten*, (1843) 10 Cl & F 200 : 8 ER 718.

In 1843, in an attempt to shoot the prime minister, the accused shot his private secretary, the Solicitor General argued that the accused cannot claim the benefit of the plea of insanity if he had the degree of intellect which permitted him and made him capable of distinguishing between right and wrong.[33] The defense argued that the accused be not made liable since he was under 'fierce and fearful delusion' at the time of killing and thus was unable to control his actions.[34] The jury found the accused not guilty by reason of insanity – this outcome was highly controversial and the M'Naghten Rules were thus framed in response to this.[35] Let us in brief discuss the standards that were set.

The rules majorly are constituted by three tests, first of the three states that the brain should cause such an effect on the person that the accused should not know the nature and quality of his act or that the act is wrong.[36] This test is referred to as *'defect of reason'* and has been interpreted to denote cognitive defect, and cannot 'simply be brutish stupidity'.[37] The second test is referred to as *'disease of mind*', this test specifically triggered the entry of experts into the arena.[38] Another aspect that got its share of consideration with this test was the idea of internal as opposed to external causes (in case of external, instead of causes we better know them as characteristics).[39] It has been held that a 'disease of mind' can be 'functional or organic, permanent or intermittent', but it will be relevant for consideration as long as it pertains to the time of the act of the defendant.[40] The third test further qualified the way defect of reason was to be read and further qualified that this defects be considered when it affects his or her knowledge with respect to the nature of the act or that the same was wrong.[41] The rules also refer to the fact of presumption of sanity and that all the jurors are to be told that every man is presumed to be that unless the contrary is proved.[42]

It has been argued that with the rise of the expert knowledge about psychiatry, the religious views of madness declined and paved the way for 'more secular mappings of the same'.[43] However it is pertinent to consider certain aspects of lay knowledge as well, some of which are even relevant today.

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[33] *Ibid*.
[34] Richard Moran, *Knowing Right From Wrong: The Insanity Defense of Daniel McNaughtan*, 1 (1981).
[35] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 115 (2012).
[36] *Id*., at 118.
[37] *R*. v. *Kemp*, (1957) 1 QB 399.
[38] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 119 (2012).
[39] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 118 (2012).
[40] *Supra* note 37.
[41] Nigel Walker, *Crime and Insanity in England,* 101 (1968).
[42] Richard Moran, *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan*, 173 (1981).
[43] *Ibid*.

The move from *peine forte et dure* to trial by jury[44], gave rise to the era of self-informed jury – with the jurors coming from the community of the accused and were thus expected to bring along both knowledge of fact and that of the accused.[45] Thus we can see that for adjudication what is being looked at is a person's standing in the community from which he comes.[46] Also, this gave rise to an understanding that idea behind human actions can be established by the testimony of independent persons who analyze this in the context of broader cultural acceptability.[47] So insanity or rather madness was taken to be 'entrenched in the common cultural consciousness' – it was considered to be part of common knowledge.[48] In other words no special knowledge was considered necessary and understanding of the lay persons were considered. Some have even gone to the extent of saying that 'the mad and the sad were extremely familiar figures in the early modern physical and mental landscape'.[49] When over the period of time the distinction between jurors and witnesses became strict, role of both of these groups was separated out, but both were considered competent to assess madness.[50]

In this earlier era the plea frequency of the insanity plea being taken was higher (as compared to the contemporary times), and the chances of the same being allowed were also higher. In the trial of Philip Parker, the evidence showed that the prisoner showed 'all the symptoms of lunacy upon him', the jury then concluded that the killing was 'purely the effect of distractions' and so he was acquitted.[51] Likewise during the trial of Alice Hall, there was evidence that 'for a considerable time Distracted, and fancied she was Damned, that she was a Spirit, and not a Woman; and sometimes was so very Outrageous that she was chained in her Bed' seems to have been behind the jury's decision to acquit her on the basis that she was 'under great disorder of mind when she committed the act'.[52] However not all pleas of insanity were successful, one such example is the trial of Earl Ferrers, the accused pleaded that he suffered from sporadic insanity at the time of killing and he did not know what he was doing, but to no avail, he was convicted and executed.[53] Thus it has been rightly said that 'the outward truths and signs of an individual was encoded his inner realities'.[54]

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[44] H.L. Ho, "The Legitimacy of Medieval Proof", 19(2), Journal of Law and Religion, 257 (2003-04).
[45] D. Kerlman, "Was the Jury Ever Self-Informing?", Manchester University Press, 60 (2003).
[46] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 140 (2012).
[47] *Ibid*.
[48] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 141 (2012).
[49] *Ibid*.
[50] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 141 (2012).
[51] OBP, *R.* v. *Philip Parker*, 8 December, 1708 (t17081208–34).
[52] OBP, *R.* v. *Alice Hall*, 17 January, 1709 (t17090117–19).
[53] *R.* v. *Ferrers*, (1760) 19 St Tr 885.
[54] *Supra* note 50.

It should be clarified here that the 'outward truth' refers to the conduct of the individual, in other words a person's general demeanor was to determined whether the individual would be able to avoid punishment.[55] However one should not read in here that while considering the outward signs, the jurors were indifferent to the internal causes of incapacity that may have existed.[56] For instance in the trial of Thomas Nash, the court considered the fact of the accused sustaining injuries during the war which may have impaired his thinking and lead him to behave unusually,[57] thus considering the internal causes of incapacity. We shall now discuss how the evidence or depositions of the experts changed the perception and how were they considered.

Then the globe experienced organization of knowledge vide the scientific revolution,[58] which according to some lead to the 'factualisation' of mens rea and gave rise to subjective understanding of law for criminal liability.[59] The set of individuals comprising of surgeons, medical officers, who came up underneath the abovementioned development were referred to as 'alienists'.[60] Till the time the *M'Naughten* matter came up, the presence of these alienists in the courtrooms for 'madness' related matters had become very common.[61] The depositions of the people of community and the relatives of the accused continued to be taken but the analysis and understanding of these by the experts became more important.[62] Some think that this involvement of experts was purely a result of the development that happened in the context of knowledge and because of the initiatives by the alienists,[63] however there are others who believe that such involvement was not possible without a passive consent of the judiciary itself.[64] In their clinical considerations, factors such as domestic violence, poverty etc. were accounted, some viewed this as retaining the moralization of the concept, rather than purely medicalizing it.[65]

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[55] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 142 (2012).

[56] *Id*., at 143.

[57] OBP, *R*. v. *Thomas Nash*, 12 April, 1727 (t17270412–21).

[58] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 144 (2012).

[59] N. Lacey, "Responsibility and Modernity in Criminal Law", 268 (2001). Note: The term "factualisation" has been used to connote the organization or grouping of knowledge that happened to come up with the knowledge which would establish certain touch stones for the analysis of demeanor and thus bringing in the element of subjectivity.

[60] *Ibid*. The significance of the term alien here was that these people came up to determine the mental state of another" (which in Latin is *alienu*) individual.

[61] M.D. Dubber and L. Farmer (eds.), *Modern Histories of Crime and Punishment*, Stanford University Press,77 (2007).

[62] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 146 (2012).

[63] R. Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials*, Edinburgh University Press, 3 (1981).

[64] J.P. Eigen and G. Andoll, "From Mad-Doctor to Forensic Witness: The Evolution of Early English Court Psychiatry", International Journal of Law and Psychiatry, 159 (1986).

[65] OBP, *R*. v. *John Francis*, 26 November, 1849 (t18491126–41). *See*, Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 147 (2012).

The way in which the things worked were through examination and cross-examination of the expert witnesses. They were asked questions regarding relationship between insane conditions and the offence alleged, and the causes of insanity etc, which was to bring in more certainty.[66] Some questions also related to the generalized queries about the mental condition, such as symptoms of insanity and how to look for its presence in an individual.[67] As the appearance of these witnesses increased in the courtrooms, the distinction between a fact and an opinion hardened, which later became the basis of formalized evidentiary rules relating to expert depositions.[68] It is important to mention here that expert knowledge about insanity emerged off the beliefs that were already entrenched in the common culture, and so one could observe a significant overlap in-between the two.[69] This linkage may have weakened overtime but the two never really became completely segregated of each other.[70]

The importance of asylum should also be stated here, since they gave an organizational condition for the development of the knowledge of insanity.[71] Moreover they also operated as places where accused who was announced not guilty because of insanity could be put until the individual recovers (if, of-course, there is a scope for the same),[72] later on captivity at these asylums or hospitals was mandated for people charged with capital offences.[73] It is pertinent to mention here that the development of these institutions had an impact on the number of insanity plea that were being taken (the reason for which I have already stated above). It is pertinent to be mentioned here that In England, the Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991 has mandated the consideration of the expert witnesses and jury cannot find insanity without the consideration of the same.[74] Also, the rationale behind expert evidence is to take care of the matters that lie beyond the capacity of the jury to evaluate.[75]

Discussion:

Through the above deliberation we can now draw certain inferences. It can be noted that though there has been mentioning of the separation between the

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66 S. Landsman, "One Hundred Tears of Rectitude: Medical Witnesses at the Old Bailey", 16(3), Law and History Review, 445 (1998).

67 OBP, *R.* v. *John Francis*, 26 November, 1849 (t18491126–41).

68 M. Redmayne, *Expert Evidence and Criminal Justice*, 66 (2001).

69 *Ibid*.

70 Martin Wiener, *Reconstructing the Criminal*, 123 (1994).

71 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 154 (2012).

72 Walker, *Crime and Insanity in England*, 204 (1968).

73 M.J. Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*, Cambridge University Press, 281 (2004).

74 S. 1(1) of Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991.

75 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, 157 (2012).

idea of automatism and insanity, it is important for the sake of clarity to state what in-fact I find to be the distinction. Automatism is the more of a temporary occurrence in an individual where an otherwise mentally sane person experiences slots of insanity, and in the defense it is pleaded that at the time of the commission of the offence the accused was acting in the said slot of insanity.[76] In nutshell we can say that the difference is – being insane or under the influence of insanity.[77]

As far as the idea of objective and subjective test consideration is concerned the same was effected by the entry of expert witnesses. As we saw in the above deliberation, before the entry of the these experts, the depositions of relatives and the acquaintances of the accused were considered, and hence the determination was more individual based and the depositions were then analyzed by the jurors or the judge, thus we had something like *pseudo-subjectivity* qua the judge, which sometimes is also referred to as judicial discretion (it should be kept in mind that though the conduct of the individual was independently considered, there still existed touchstones of determination and thus we cannot say that we had subjectivity in a strict sense of the term qua the accused). Then, with the advent of experts the existent knowledge was organized together and thus the jurors and judges were now being guided by certain objective standards which were put forth by these experts, and thus we can say that the discretion that hitherto vested for determination of liability on the adjudicators now weakened, as they were informed with regards to the standards that should be considered to evaluate the liability.[78]

III. INDIA'S TAKE

Having discussed the doctrinal aspect of insanity qua the British jurisdiction, we shall now look into how things are being viewed *at home*. It is a well known fact that most of the Indian laws are inspired from English common law and the law relating to insanity is no exception, and both the courts and the legislature have taken cue from the same.[79]

The Supreme Court of India has recognized that not only is a person's conduct at the time of the offence relevant but also his conduct before and after the commission of offense should be considered for the determination of liability.[80] The court in this case held that since the accused scaled the wall of his mother-in-law's house with the help of a torch and then killed her when she was sleeping, showed that crime was not committed in a sudden burst of

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[76] *Supra* note 23.
[77] *Supra* note 28.
[78] *Supra* note 32.
[79] Sir George Rankin, *Background to Indian Law*, 204 (1946).
[80] *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 : (1964) 7 SCR 361.

insanity but was premeditated and planned – as a result, the court convicted the accused.[81]

The court has further held that if it can be shown that the accused knew what he was doing then he may not be exculpated, so when a husband thinking his wife was not faithful to me killed her by pouring nitric acid on her was convicted of murder, as he was aware that as a result of his conduct his wife may die or get seriously (gravely) injured.[82] Courts have considered the general conduct of the accused in the past and even his history (both family and medical) for the determination of liability.[83] So when the accused even after cooling off of a small quarrel, suddenly beheaded the victim, he was given the advantage of the defense of insanity – this was because evidence was produced to the effect that the accused has fits of lunacy where he thinks that a tiger is coming to eat him up and that he has sleepless nights and even when he slept, he would suddenly wake up and run *to save himself from the tiger* – on the day of offence the offence the accused took the victim to be the tiger.[84]

In an interesting development the apex court had held that even after it is shown that accused was suffering from some 'mental instability' both before and after the commission of the offence, it is still to be shown that at the time of the commission of the offence the accused was not aware of the nature of his act – the plea was rejected in this case.[85] In another case, an accused had history of mental disturbance, however his conduct subsequent to the offense was such that his plea could not be accepted – the accused tried to hide the weapon, bolted the door and later tried to abscond.[86] The above rulings will make better sense if read along with another order of the Supreme Court in which they have categorically said that what is to be proven is not medical insanity but legal insanity at the time of the commission of the offence in order to claim the benefit of the defense.[87]

In India also we presume the accused to be a person of sane mental ability[88] (like in England, as we discussed above in the context of M'Naghten rules), and absence of any exonerating circumstances.[89] It has been further held very clearly that first the prosecution is to establish the case beyond reasonable doubt and then the if he is successful then the onus is on the defense to

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81 *State of M.P.* v. *Ahmadulla*, AIR 1961 SC 998 : (1961) 3 SCR 583.

82 *Hazara Singh* v. *State*, 1957 SCC OnLine P&H 99 : 1958 Cri LJ 555.

83 *Shrikant Anandrao Bhosale* v. *State of Maharashtra*, (2002) 7 SCC 748.

84 *Tukappa Tamanna Lingardi* v. *State of Maharashtra*, 1990 SCC OnLine Bom 443 : 1991 Cri LJ 2375.

85 *Sudhakaran* v. *State of Kerala*, (2010) 10 SCC 582.

86 *Jai Lal* v. *Delhi Admn*., AIR 1969 SC 15.

87 *Surendra Mishra* v. *State of Jharkhand*, (2011) 11 SCC 495. Also See, *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563 : (1964) 7 SCR 361.

88 *Bapu* v. *State of Rajasthan*, (2007) 8 SCC 66.

89 S. 105, The Indian Evidence Act of 1872.

create a reasonable doubt in the mind of the court qua the mental capacity of the accused to form mens rea, if the defense discharges this burden then the accused acquitted.[90]

Discussion:

We can infer from the above discussion that Indian courts have gone more into the practical aspect of the issues and laid down standards which makes the concept more understandable, if compared to English courts (meaning thereby that even Indian courts are not absolutely off the mark and we shall discuss why subsequently) who have given out more of a normative understanding of the concept.[91] It should be mentioned here that the cue for the defenses was taken from the English courts itself but the way they applied it may pitch in a better picture, one of the reason for this is the clear linkages of the principles to the facts.[92] One aspect that should be highlighted here is that there is not provision or direction mutates mutandis to the Act of 1800 in England.[93]

IV. CONCLUSION AND ANALYSIS

I had started the research with the perception that plea of insanity should be very easy to take, at the same time very difficult to prove or question, since, how would one look into the mind of a person who himself starts to act in a peculiar fashion. But as I explored, I could figure out that things are not as basic and simple as one would think.[94] We have gathered some idea about the defense of insanity through the above discussion, we shall now look into some of the aforementioned ideas.

One aspect that altered the frequency of the plea of insanity, was result of the Lunatics Act of 1800, under which institutionalization was mandated.[95] We have already discussed as to why this lead to decrease in the people pleading the defense of insanity.[96] However certain things should still be kept in mind, we saw that institutionalization is what prevents an individual from taking a false plea. However it is very well possible that an individual takes the plea (maliciously that is) and then later after he is institutionalized, spends some time in the asylum and then says that he has become sane now, we need to make some arrangement for these kinds of notorious elements as well.

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[90] *Bhikari* v. *State of U.P.*, AIR 1966 SC 1 : (1965) 3 SCR 194.
[91] *Supra* note 33.
[92] *Supra* note 84, 85.
[93] *Supra* note 23.
[94] *Supra* note 32.
[95] *Supra* note 24.
[96] *Supra* note 28.

Another point that is pertinent to be highlighted here is about the consideration of both the expert and lay evidences.[97] The adjudicator should always keep in mind that the knowledge that has been organized by the expert about the behavior of any insane person has been gathered off the society and thus should keep himself open to some considerations that may arise to which experts may deny existence of insanity but ends of justice demand the grant of the same. A very important aspect that should be kept in mind is that, things may be done in the interest of justice but at the same time things should not become completely discretionary qua the judge and it should be taken care that things do not go back to *pseudo-subjectivity* of the judge.[98]

Some concerns have been raised against the M'Naughten understanding of insanity, that, it is too narrow a concept to cover certain aspects like sudden emotional rush or rapid spurt of feelings.[99] People who argue in these lines fail to understand that a normal person having necessary civic sense will not go around killing people or causing them harm. An individual goes to the extent of killing another only when there is such emotional rush or rapid spurt of feelings (here we are not considering the category of serial killers or *cold-blood* murderers), and thus if we do include such categories then virtually every action may get covered and people in the society will not have any incentive to control themselves and act in a civic and mature manner.

An anecdote that is often told while explaining the inability of a person to know the nature of one's conduct is – when the accused was asked as to why did he cut the head of man sleeping on the pavement, he said, "it would be great fun to see him looking for it when he woke up".[100] In closing I would like to say that only those individual should be given the benefit of the defense of insanity who are, if not exactly like the person in the anecdote, his inability can be somewhat related to him.

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97 *Supra* note 70.
98 *Supra* note 78.
99 Katherine Ramsland, *The Criminal Mind*, 137 (2002).
100 Y.V. Chandrachud, *Ratanlal and Dhirajlal's – The Indian Penal Code*, 96 (2001).

LEGAL RECOGNITION OF SAME-SEX MARRIAGE RIGHTS IN INDIA

—*Shivam Garg*[*]

Abstract — Following the recent decision of the Supreme Court of India in Navtej Singh Johar v. *Union of India* (*hereinafter referred as Navtej case*) *which decriminalizes 'consensual sexual intercourse' between the persons of same gender by reading down Section 377 of the Indian Penal Code, majority of the discussion have centred around the most effective ways to legally recognize the homosexual relationships like those of heterosexual relationships. This paper argues that to completely abolish the discrimination faced by same-sex couples, their relationships are required to be legally recognized. Mere decriminalizing consensual sexual intercourse between persons of same gender is not sufficient to ensure them social equality as that of heterosexual couples. In this paper the author, logically and legally, deals with all the objections against the legal recognition of homosexual unions which are often misguided in the name of tradition, culture and religion. In India, laws governing marriage only recognizes heterosexual unions, depriving same-sex couples the benefits and socio-legal recognition which the heterosexual couples enjoys. In this paper the author examines various ways by which homosexual unions can be legally recognized. One of such ways is the route of recognition through 'civil partnerships' which has been adopted by various countries should be followed in India, but this route seems to be an unsatisfactory intermediate process for granting such recognition. The author is of the view that it is not feasible to seek amendments in personal laws in order to grant legal recognition to such unions which would invoke strong opposition from the majoritarian society considering it as unreasonable interference in their religion. Therefore, the most satisfactory ways for such recognition seems*

[*] B.A. LL.B (IIIrd YEAR), Faculty of Law, Aligarh Muslim University.

to be either the amendment or judicial reading down of the Special Marriage Act, 1954 or to enact a new legislation governing civil rights of homosexual couples. The judgment in Navtej Johar case is only the first step in this way of ensuring justice to same-sex couples; many bold steps are still awaited. Since the hurdle in the way of legalizing same-sex marriage is removed by the Supreme Court, now it is for the Government to legally recognize the same-sex marriage in order to fulfil its duties to ensure fundamental rights and freedoms to all persons.

I. INTRODUCTION

India's LGBT community on 6th September, 2018 won its battle to decriminalize "consensual sex" between persons of same gender. The Supreme Court in *Navtej Singh Johar* v. *Union of India*[1]*, one of its historic judgments,* struck down Section 377 of the Indian Penal Code which criminalizes carnal intercourse against the order of nature excluding consensual carnal intercourse from its ambit and thus decriminalizes homosexuality. While deciding upon the rights of transgender community, the Supreme Court upon the request of Central Government confined itself only to determine the constitutionality of Section 377 of Indian Penal Code and left the question of acknowledging civil rights of the LGBT community untouched. When one lawyer for the petitioners veered into a broader discussion, saying that "what happens in a bedroom is not the end-all, be-all," Chief Justice Misra swiftly steered him back to the constitutionality of Section 377.

> "I think you are questioning whether they can marry," the judge said. "We're plunging into the sea."[2]

Further, Chief Justice and J.A.M. Khanwilkar in their judgment while recognizing the right to the union of LGBT community under Article 21 of the Constitution expressed "*when we say union, we do not mean the union of marriage, though marriage is a union".* CJI clarifies that the scope of this hearing does not cover marriage, adoption, maintenance, etc. He says that whether civil rights would follow would be decided in another lis. Therefore, legal status of same-sex marriage is now an open question. It is a battle won, but the war to get social equality as that of heterosexual couples's remains. This triumph is partially secured and it will gather real meaning only when the community

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1 (2018) 10 SCC 1, available at: <https://www.refworld.org/cases,IND_SC,5b9639944.html> (Last visited on 28 Apr. 2019). (hereinafter "Navtej").

2 Kai Schultz, "India Gay-Sex Ruling: What to Expect", *The New York Times* Sep. 5, 2018.

secures the civil rights such as right to marriage, inheritance, guardianship, adoption etc and the benefits that arise after marriage.

Even in the contemporary society, the institution of marriage is generally regarded as extending only to heterosexual relationship. But as society is gradually becoming more permissive, acceptance of homosexual marriage has recently been forthcoming under various jurisdictions. However, certain jurisdictions retained statutory provisions only to permit heterosexual marriages. Marriage laws in India only recognizes heterosexual unions, depriving same sex couples of the benefits as well as social and legal recognition that married person enjoys. Same-sex marriages are not legally recognized in India and as a result, homosexual partners are denied many of the legal and economic privileges automatically bestowed by marital status. Though, the initial objective of decriminalizing private consensual sex has been achieved, the demand for recognition of their marriage rights is increasing. Mere decriminalizing consensual sexual acts will not end the discrimination faced by persons who are engaged in long-term same-sex union, on par with heterosexual marriages. Certain legal benefits such as succession, maintenance, pension rights, employment benefits under Employees' Provident Funds Scheme, 1952 and Workmen's Compensation Act, 1923 and health benefits that are available to married couples are not available to same-sex couples.

Merely decriminalizing the same-sex acts is not sufficient, legal recognition of same-sex relationships as heterosexual unions is equally necessary. In this regard the observation of Justice Kennedy of U.S. Supreme Court in *Obergefell* v. *Hodges*[3] is worth noting. He observed that though Lawrence invalidated laws that made same-sex intimacy a criminal act but it has only confirmed a dimension of freedom and does not achieve the full promise of liberty and the full promise will only be achieved by legalizing theirs union as that of heterosexual unions.[4] It can only be ensured when the homosexual couples will be provided equal rights as that of heterosexual couples.

The homosexual relationships and heterosexual relationships are hardly differed in their aspects whether psychosocial or social and the same-sex couples as well as their children are likely to be benefitted in various ways from a legal recognition of the relationships as marriage.[5] Now the question arises *"how can it be done? What would be the best possible way to legally recognize the same-sex marriages?"* To answer these questions the author in this paper has evaluated various ways to legally recognize the same-sex relationships in India.

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[3] 2015 SCC OnLine US SC 6 : 192 L Ed 2d 609 : 576 US _ (2015), Director, Ohio Department of Health, et al. (hereinafter "Obergefell").

[4] *Id*. at 12.

[5] George M. Herek, "Legal Recognition of Same-Sex Unions in United States: A Social Science Perspective", 61(6) Amer. Psycho. 607-621(2006). (hereinafter "George M.").

Legal recognition of such relations in India is not merely a political or a legal question but also the religious debates revolve around it. Though, India is witnessing a revolution from a orthodox society towards a society encouraging fundamental values, the opposition in the name of tradition, culture, religion to a liberal legislation has not yet at all vanished. Marriage in India is a matter of personal laws, deeply enlaced with the religious beliefs of the people therefore, any change in their personal laws may be perceived by the faction of religious communities as attack on their beliefs. Also, since homosexuality was illegal till the time of the judgment in *Navtej Singh Johar case*[6], the Special Marriage Act, 1954, which was enacted to recognize special marriages irrespective of religion also provides for the heterosexual marriages only. Further, if Parliament provide marriage rights to LGBTQ community, it will face a plethora of challenges relating to adoption, maintenance, custody rights and inheritance. One example of the same is The Hindu Succession Act, which provides that widow/widower will be the legal heir of man/woman dying intestate. Therefore, what should be the right approach to deal with same sex marriages, the issues are quite vast and complex.

II. SAME-SEX MARRIAGE AND *NAVTEJ SINGH JOHAR CASE*

The main focus of this paper is not to deal with *Navtej Singh Johar case*[7], but certain aspects of this judgment are relevant to the present matter, therefore required to be dealt with.

On the question of recognition of same-sex partnerships and marriage Chandrachud J. is clear that the direction of comparative law leads to the conclusion that, "the law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection".[8] It is pertinent to note that the bench presiding over the matter did not confine its observations to the constitutionality of Section 377 but also assessed the issue of their discrimination. While refraining itself from determining whether same-sex marriage has legal recognition in India, the bench has discussed various constitutional judgments given by the foreign courts which they legalized same-sex marriage. The judgment of Supreme Court of Canada in *Same-Sex Marriage, In re,*[9] in which marriage was interpreted to include same-sex unions was cited as an example of progressive interpretation and to denote the Constitution as living tree which accommodates and addresses the realities of modern life.

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6 Navtej, *supra* note 1.
7 *Ibid.*
8 *Id.* at p. 209.
9 2004 SCC OnLine Can SC 80 : (2004) 3 SCR 698.

To address the dignity of LGBT community, the bench quoted *Michèle Finck*[10] who says that there is increasing consensus that homosexual community should no longer be deprived of benefits that are available to heterosexual, such as ability to contract marriage disposing equal rights and dignity functions. The judgment is instructive to the Legislature to bring various laws or to amend existing laws recognizing same-sex marriages in order to respond rapidly to what the judgment promises to LGBTQ Community. The Judgment comes as a historic victory in the quest for fulfilling the promise of equal rights which includes right to marry. As Justice D.Y. Chandrachud noted,

> "*…this case involves much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship."*[11]

Further, he noted that decriminalization of the same-sex acts is only a first step and the constitutional principles which render the decriminalization of these acts have a broad range of entitlements.[12] LGBT persons are entitled to full constitutional protection, including equality and non-discrimination. This may eventually entail recognition of same-sex partnerships and marriage, anti-discrimination legislation in workplaces, and more. In his judgment he discussed the judgments of various courts of different countries by which they direct their Government either to bring legislation or amend the existing laws in order to recognize same-sex marriages.

The Supreme Court of Nepal in *Sunil Babu Pant* v. *Nepal Govt.*[13] held that every person has an inherent right to marriage regardless of sexual orientation therefore the Government is directed to enact or amend a new law or the existing laws respectively in order to ensure that people with different orientation could enjoy equal rights.[14]

In Oliari v. *Italy*[15] the European Court of Human Rights held that absence of legal recognition of the same-sex couple's relationships who are equally capable to enter into the stable and committed relationships as that of heterosexual couples is the violation of Articles 8, 12 and 14 of European convention

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[10] Michèle Finck, "The role of human dignity in gay rights adjudication and legislation: A comparative perspective", International Journal of Constitutional Law, Vol. 14, Jan. 2016, pp. 26-53.

[11] Navtej, *supra* note 1 at p. 289.

[12] *Id*. at p. 407

[13] Writ Petition No. 917 of 2007, decided on 21-12-2007 (Nepal).

[14] *Ibid*.

[15] 2015 ECHR 716.

of Human Rights. Also in *United States* v. *Windsor*[16] while considering the constitutionality of the federal law (Defense of Marriage Act) which restrict the interpretation of words 'marriage' and 'spouse' only to legal unions between one man and one woman, US Supreme Court held that such interpretation restricting scope of these words to apply only to heterosexual unions is unconstitutional under 'due process' clause. Commenting on the right to marriage Justice Kennedy noted that no union except marriage is as profound as it embodies highest ideals of love, fidelity, devotion, sacrifice and family therefore not permitting same-sex couples to marry is to condemn them to live in loneliness and to exclude them from one of the civilization's oldest institution.[17] By a comparative analysis of jurisprudence from across the world J. Chandrachud concludes that law cannot discriminate against same-sex relationships and must also take positive steps to achieve equal protection. Therefore, this historic judgment is first step towards the recognition of the civil rights of homosexuals and clears the way in India from any hindrance.

III. ARGUMENTS IN FAVOUR OR AGAINST SAME-SEX MARRIAGE

To completely abolish the discrimination faced by same-sex couples, their relationships are required to be legally recognized. Mere decriminalizing consensual sexual intercourse between persons of same gender is not sufficient to ensure them social equality as that of heterosexual couples. But this objective of seeking parity with heterosexual relationships itself may be criticized on various grounds. One such ground is to consider the institution of marriage traditionally a union between man and woman but there is no moral ground to support this view. There were times when slavery was not considered as a social evil, however, the time changed and with the recognition of the humanitarian laws it abolished. The foremost ground on which the recognition of same-sex marriage invites criticism is that the institution of marriage involves procreation which is not possible in the case of same-sex marriages. But if it was so than there would have been attempt to prohibit unions between a sterile women and fertile man or vice versa.[18] Also with the change in time, this is not the sole reason why people choose to come together or marry. They do so for a lot of reasons and one of those is emotional companionship.[19] Also *Homer Clarke* writes that the most significant function of marriage today is that it furnishes emotional satisfactions to be found in no other relationships. For many people it is considered as a refuge from coldness and impersonality

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16 2013 SCC OnLine US SC 86 : 186 L Ed 2d 808 : 570 US 744 (2013).

17 Obergefell, *supra* note 3 at p. 12.

18 Anuradha Parasar, *Homosexuality In India – The Invisible Conflict,* (April 3, 2019 11.02 a.m.) <http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20-%20The%20invisible%20conflict.pdf>.

19 Navtej, *supra* note 1 at p. 136.

of contemporary existence.[20] Further it is claimed that children in such union would be deprived of the experience of either motherhood or fatherhood as a result the normal development of children may be hindered but scientific studies and psychologists are of the opinion that it is not the gender which makes the difference but the love and commitments of parents do. There are various International case laws on the parenting by same-sex couples. In *E.B.* v. *France*[21], the European Court of Human Rights held that application for adoption cannot be rejected merely on the ground that person is living with same-sex partner. Also since 2008 the Revised European Convention on the Adoption of Children of 2008 now expressly contemplates the possibility of adoption by same-sex couples.[22]

The other reason which further complicates the issue of legal recognition of same-sex marriage is the religious connotation of the word 'marriage'. In Indian society still marriage is considered to be a sacramental union, thus a person cannot separate his or her status as a married person from a religious implication.[23] Therefore, the perceived condemnation of homosexuality in most of the religions provide further road block to legal recognition of same-sex marriage. But this conventional notion of preservation of 'sanctity of marriage' has been used several times to oppose inter-racial, inter-caste or inter-religion marriages but legal recognition of such marriage represent a shift from purely religious character of the marriage. Thus marriage has no more remained, only, a religious ceremony and can be performed for the reasons other than religious motives. Opponents of same-sex marriage also argue that if same-sex marriages are recognized, it would start down a slippery slope towards legalized incest or polygamous marriages but this argument is equally flawed as it claims to extend their reasoning to its inevitable consequences. It presupposes a notion that people who support same-sex marriage would also demand for incest or polygamous marriages but if this was so it would have already happened in countries that already have legalized same-sex marriages. Further, demand of legal recognition of same-sex marriage is based on issue of equal rights as that of heterosexual couples. But the argument for allowing incestuous marriage has nothing to do with equal rights. Since no one has the right to marry persons in his or her own family, this is not like the case of persons who wanted rights already possessed by some other persons of same or different gender.[24] The demand of legalizing same-sex marriage is to grant equal rights to deprived group and to raise them to equal pedestal with the general

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[20] *Ibid.*

[21] IHRL 3284 (ECHR 2008), [2008] ECHR 55 : (2008) 47 EHRR 21.

[22] Kees Waaldijk, "Same-Sex Partnership, International Protection", Max Planck Encyclopedia of Public International Law (MPEPIL), March 2013, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1739>.

[23] Shodhganga, "Homosexuality in India", (March 11, 2018, 4.02 p.m.) <http://shodhganga.inflibnet.ac.in/bitstream/10603/191572/18/18_chapter%206.pdf>.

[24] Richard McDonough, "Is Same-Sex Marriage an Equal-Rights Issue?", Public Affairs Quarterly, Vol. 19, No. 1 (Jan. 2005), pp. 51-63 <https://www.jstor.org/stable/40441399>.

population. Granting such rights will not alter the rights of general population but legalizing incestuous marriages would affect everyone's marital rights in ways that many people would feel to be dangerous in extreme.[25] Also J. Indu Malhotra has clarified that consensual relationships cannot be classified along with offences of bestiality, sodomy and non-consensual relationships.[26]

An empirical survey of social science research has shown that there is no difference between a heterosexual or a same-sex marriage in their psychological dimensions and legal recognition of same-sex marriage would bestow substantial psychological, social, and health benefits and that same-sex couples and their children.[27] Further, since marriage is an important institution of the society since the old age, many homosexuals wish to marry because they are a part of this culture and society. They see marriage as ideal institution to enhance their connection and commitment in relationship. Further, to choose a marital partner is an important personal decision, over which others or the State should have no control. Thus, if two people of same gender want to make commitment of marriage, they should be permitted to do so otherwise it would result in depriving them of the benefits and dignity which heterosexual couples enjoy. Mere permitting them to marry will not be sufficient; their marriage should be legally recognized on the parity with heterosexual marriages.

IV. LEGAL RECOGNITION OF SAME-SEX MARRIAGE

Till 2017, 29 countries have legally recognized same-sex marriages. In 2000, Netherland became the first country to legalize same-sex marriage through a Parliament legislation which has given same-sex couples the right to marriage, divorce and adopt children. Belgium in 2003, Canada and Spain in 2005, South Africa in 2006, Norway in 2008, Sweden in 2009, Iceland, Portugal and Argentina in 2010, Denmark in 2012, Uruguay, New Zealand, France, Brazil, England and Wales in 2013, Scotland and Luxembourg in 2014, Finland, Ireland, Greenland and U.S. in 2015, Colombia in 2016, Germany, Malta and Australia in 2017 have also legally recognized same-sex marriages.[28]

It is pertinent to observe that same-sex marriages are not illegal in India but the marriage laws in India do not explicitly permit same-sex marriages, and, in fact reflect a strong heterosexual bias and use terms suggesting only a heterosexual partnership. Therefore, the paper examines various routes for the legal recognition of such relationships and their consequences and concludes by

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[25] *Id.* at p. 5.
[26] Navtej, *supra* note 1 at p. 489.
[27] George M., *supra* note 5.
[28] "Gay Marriage Around the World", Pew Research Center, (Sept 8, 2017) <http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/>.

providing best ways for such recognition. The various routes for recognition of same-sex marriage may be:

1. Recognition of same-sex unions as 'civil unions'; or
2. Recognition by introducing amendments to personal laws; or
3. By amending Special Marriage Act; or
4. By judicial reading down of Special Marriage Act.

V. SAME-SEX UNIONS AS 'CIVIL UNIONS'

Considering the traditional opposition to same-sex marriage in Indian society, one alternative to legally recognize the same-sex unions is to provide them the status of civil unions. Such type of legislations to recognize same-sex unions as civil unions have been enacted by various countries such as U.S., U.K., Australia, New Zealand, Latin American and European Countries. But it is pertinent to note that now all these countries have legally recognized same-sex marriages. Earlier, in U.S.A. such unions were allowed as civil unions or domestic partnerships but not as marriage. Civil Unions only provide legal recognition to the union and provide legal rights to the partners similar but not exactly same as those accorded to spouses in marriages. While, domestic partnerships are a form of relationship that gives limited rights to those couples who live together but wish to remain unmarried or whose marriage is prohibited by law. In U.S.A domestic partnerships are only recognized by city councils and some private companies which provide spousal benefits to the same-sex couples.[29] Thus these alternatives are considered to be a middle ground position which would be able to accommodate the public's apparent beliefs that on one hand, gay people are generally entitled to equal rights and on the other hand that the marriage should be confined to opposite sex relationships. Vermont has adopted the civil unions as alternative to same-sex marriage at the direction of its Supreme Court[30] but objected by the same-sex proponents on the ground that full equality under the law cannot be conferred upon these peoples through "separate but equal" substitute to marriage. "Separate but equal" institutions brand a particular class with badge of inferiority and that they are inherently unequal.[31]

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[29] Nayantara Ravichandran, "Legal Recognition of Same-Sex Relationships in India", <http://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf> (hereinafter "Nayantara").

[30] *Baker* v. *State*, 744 A 2d 864, 886-88 (1999) (requiring the Legislature to provide equal benefits for gay and lesbian couples); see also Vt. Stat. Ann. tit. 15, § 1201 (2007) (providing for civil unions in the State of Vermont).

[31] *Brown* v. *Board of Education of Topeka*, 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 347 US 483 (1954).

Excluding same-sex couples from the institution of marriage, even while creating a "separate but equal" structure giving them all the instrumental benefits of marriage, offends the principle of equal protection guaranteed under Article 14 of the Indian Constitution as it has a effect to communicate that these people are disfavored and that their relationships are less valuable than those of their straight counterparts.[32] Though civil unions or domestic partnerships provide various tangible benefits and state conferred rights but they fail to provide marriage's intangible benefits, such as esteem, self-definition, and the stabilizing influence of social expectations. Although these benefits may be less concrete than, say, tax exemptions, they are no less constitutionally significant.[33] Marriage is not merely a contract entered by two persons to live together but it a deep personal commitment to another person and involves ideals of mutuality, companionship, intimacy, fidelity, and family. Marriage fulfils yearnings for security, safe heaven, and connection that express common humanity and the decision whether and who to marry is among life's momentous acts of self-definition.[34] Further mere recognizing their unions as civil union would not bestow them same status as that of heterosexual couples thus denying them and their children the constitutionally significant privilege of state recognition. State by not recognizing same-sex marriage denies gay people both the self-identification value and the cultural context of marriage. Conferring them with the status of 'married' couple would provide self-definition to same-sex couples and facilitate public understanding of their relationships.

Civil unions cannot be equated with the institution of marriage in a country like India where marriage has historical, cultural and social significance which a civil union does not have. In view of the noble status of marriage in our society, it is not surprising that civil unions will be perceived to be inferior to marriage. Therefore, conferring gays union with the lower status than marriage would be a kind of discrimination on the basis of sexual orientation in violation of their fundamental rights. In *Kerrigan* v. *Commr. of Public Health*[35], the Connecticut Supreme Court held that maintaining the second-class citizen status for same-sex couples by excluding them from the status of marriage is the constitutional infirmity therefore, rejected the "separate but equal" alternative to marriage. Further, if "separate but equal" or civil union model is adopted in India, a new law governing civil union along with other legislations relating to succession, adoption, pension etc. to provide same rights to same-sex couples has to be enacted by Parliament. Also, though the civil union model does not interfere with the religious freedoms but could be opposed on

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[32] Misha Isaak, " 'What's in a Name': Civil Unions and the Constitutional Significance of 'Marriage' ", 10 U. Pa. J. Const. L. 607 (2008), <https://scholarship.law.upenn.edu/jcl/vol10/iss3/6>.

[33] *Id*. at p. 612.

[34] *Goodridge* v. *Deptt. of Public Health*, 440 Mass 309 : 798 NE 2d 941 at 954.

[35] 289 Conn 135 : 957 A 2d 407 (2008).

the ground that it would provide the legislative recognition to the non-marital live-in relationships contrary to Indian Culture. Therefore, recognition of same-sex unions as civil unions does not seem to be the right course.

VI. AMENDMENT TO PERSONAL LAWS

Marriage in India is not merely considered as a union of two persons but has solid socio-religious significance which is evident from the fact that marriage is one of the crucial subjects of the personal laws of different religions whether it is Hindu, Muslim, Christian or Parsis. The marriage among Hindus, Christian and Parsi are governed by the statutes such as Hindu Marriage Act, 1955, The Indian Christian Marriage Act, 1872 and the Parsi Marriage and Divorce Act, 1936 respectively.

Section 5[36] of The Hindu Marriage Act, 1955 that governs Hindus, Sikhs, Jains and Buddhists provides for the conditions constituting a valid marriage and this section merely speaks that a marriage maybe solemnized between two Hindus without referring to the gender of the parties. It also specifically provides for the purpose of marriage the bridegroom should have attained the age of twenty-one years and the bride eighteen.[37] Therefore, since the Act provides no gender specification, no definition of the bride and the bridegroom and no specification that there needs to be both a bride and a bridegroom for the marriage, can a marriage be solemnized between two brides or two bridegrooms under the Hindu Marriage Act? Such interpretation is not possible because every Act must be read as a whole and in context.[38] No provision in a statute and no word in any section can be construed in isolation, the elementary principle of interpreting any word while considering a statute is to gather the *mens or sentential legis* of the legislature.[39] Section 13 (2)(iv) of the Act[40], "that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years" clearly points out the intention of legislature to confine the concept of marriage to heterosexual unions only. Thus, the gender of the bride can be clearly interpreted, nullifying the argument of the recognition of same-sex marriage based on such interpretation. Same is with the Christian Marriage Act which provides that the age of the man shall be twenty one and the age of woman shall be eighteen years.[41] Further, as Muslim Marriages are not governed by a statute, there is no statutory definition of 'marriage', but they are normally considered to be a contract

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[36] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955.
[37] *Id*. § 5(*iii*).
[38] *Padma Sundara Rao* v. *State of T.N.*, (2002) 3 SCC 533.
[39] *Grasim Industries Ltd*. v. *Collector of Customs*, (2002) 4 SCC 297 : AIR 2002 SC 1706.
[40] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955.
[41] The Indian Christian Marriage Act No. 15 of 1872, S. 60.

for the purpose of procreation.[42] Thus, all Indian personal laws appear to envisage marriage as only a heterosexual union.

Same-sex couples having faith in their religion may desire to marry according to the rites, rituals, customs and traditions of their religions and at the same time desire to legally recognize their relationship under personal laws same as the heterosexual marriages are recognized. To recognize such marriages under the umbrella of personal laws two courses are open. First, reading down of the provisions of the legislations governing Hindus and Christian marriages, on the ground that these laws would render unconstitutional up to the extent of prohibiting homosexual marriages as it is discriminatory on the basis of sexual orientation under Article 15 of the Indian Constitution.[43] But in the light of the decision of the Bombay High Court in *State* v. *Narasu Appa Mali*[44] that the personal laws cannot be tested against the touchstone of Fundamental Rights, it may be difficult to convince the Courts to interfere in the personal laws on the grounds of discrimination. Second option which is the final course would be to bring statutory amendments to the personal laws. Though it is a most satisfactory solution of recognizing such marriages but at the same time the most difficult to achieve in practice. Such step would definitely invite strong criticism and adverse reaction from the society since such step would be perceived as interference in the customs and traditions of different religions.

The argument that one's religious faith does not recognize same-sex marriages and the marriage should only be between a man and a woman is well protected under the right to freedom of expression under Article 19 of the Indian Constitution. Everyone is entitled to express their view about marriage of same sex couples – at work or elsewhere. A religious or philosophical belief that marriage should only be between a man and a woman is protected under Article 9 of the European Convention on Human Rights.[45] Therefore, forceful recognition of same-sex marriages under personal laws may be taken as unwanted interference with one's religion. The same thing was taken into consideration by UK's legislature while legally recognizing same sex couples' right to marry through The Marriage (Same-Sex Couples) Act, 2013. The legislation has granted same-sex couples the same opportunities as that of heterosexual couples to solemnize their marriage by way of a civil ceremony and also by way of a religious ceremony provided that religious organization has 'opted in' to solemnizing such marriages. The Marriage (Same Sex Couples)

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[42] Siddharth Narrain and Birsha Ohdedar, "A Legal Perspective on Same-Sex Marriage and other Queer Relationships in India", Orinam, <http://orinam.net/resources-for/law-and-enforcement/ same-sex-marriage-in-india/>.

[43] The Indian Constitution.

[44] 1951 SCC OnLine Bom 72 : (1951) 53 Bom LR 779.

[45] "Marriage (Same Sex Couples) Act: A Factsheet", Government Equalities Office, April 2014, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306000/140423_M_SSC_Act_factsheet__web_version_.pdf>.

Act 2013 provides that same-sex marriages cannot be solemnized on religious premises or by way of a religious ceremony without the express consent of the religious organization concerned. The Marriage (Same Sex Couples) Act 2013 also contains provisions to ensure that if religious organizations and their representative do not wish to solemnize such marriages, they cannot be compelled to do so.[46] This legislation was a beautiful attempt of UK's legislature to balance the right to equality and dignity with the right to religious freedoms. Thus, to face less criticism and revolt from the orthodox society Indian Parliament should enact legislation similar to the Marriage (Same Sex Couples) Act 2013 which would legally recognize the same-sex marriages harmonizing it with the religious freedom.

VII. AMENDMENT OR JUDICIAL READING DOWN THE SPECIAL MARRIAGE ACT

The best and most feasible way to legally recognize the same-sex marriage in India is to recognize it under the Special Marriage Act, 1954 either by seeking a statutory amendment to its provisions or by judicial reading down of the Act. The Special Marriage Act is a secular legislation which provides for the registration for the special form of marriage such as inter-religion, inter-caste or inter-racial and the dissolution of such marriages by way of divorce. While no separate definition of marriage is given, the Act also has heterosexist underpinnings, such as the definition of a 'prohibited relationship' which only considers a relationship between a man and a woman within certain degrees of familial relations. Further, Section 4(c)[47] of the Act provides that for the purpose of marriage the male should have attained the age of twenty one-years and the female age of eighteen years which shows that in existing form it applies only to heterosexual couples. But it is not difficult to recognize same-sex marriages within the framework of the Act. A specific provision declaring the same-sex marriage legal and an amendment to sec 4(c) is required to be made. Even if, in any case, any amendment is made to the personal laws to accommodate same-sex marriages within their framework the Special Marriage Act would have to be amended to accord the same recognition to the relationships between persons belonging to different religions. Such amendment would be easy to be introduced and at the same time cannot said to be interfere with religious freedoms.

Second and the final option is the judicial reading down of the Act to include same-sex marriages on the ground that otherwise it would be

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[46] Paul Johnson, Robert M. Vanderbeck, Silvia Falcetta, "Religious Marriage of Same-Sex Couples: A Report on Places of Worship in England and Wales Registered for the Solemnization of Same-Sex Marriage" , (November 2017), <https://eprints.whiterose.ac.uk/124435/1/Same_Sex_Religious_Marriage.pdf>.

[47] The Special Marriage Act, No.43, Acts of Parliament 1954.

discriminatory against the same-sex couples and hence unconstitutional. The same has been done by the various foreign courts where the laws prohibiting or not allowing same sex marriages were held to be unconstitutional invoking due process and equal protection clause.[48] The Courts in these precedents clearly pointed out that the right to marry is an individual right to liberty which also includes equality component. A group of people cannot be denied the right of marriage granted to others, without a very strong justification, which, the court held, did not exist. In *Minister of Home Affairs* v. *Fourie*,[49] The Constitutional Court of South Africa has held that marriage laws that did not permit same-sex marriages were violative of Section 9(3) of the Constitution, which states: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." There are also several Canadian decisions beginning from a decision of the Court of Appeal for Ontario[50] that held that the existing common law definition of marriage to the extent that it referred to "one man and one woman" violated the equality rights of same-sex couples under Section 5(1) of the *Canadian Charter of Rights and Freedoms* and that reformulated the definition as "the voluntary union for life of *two persons* to the exclusion of all others".[51]

Now, after the *Navtej Singh Johar case*[52], this option is appearing very convincing. The judgment has affirmed the view of Delhi High Court in *Naz Foundation case*,[53] the 'sex' in Article 15 includes sexual orientation thus prohibits discrimination against any person on the basis of his or her sexual orientation. Discrimination on the basis of orientation is grounded in stereotypical judgments and generalizations about the conduct of either sex.[54] Thus, a powerful and sustainable argument can be made that if the Special Marriage Act only recognizes the marriage between the persons belonging to different sexes, it would lead to a discrimination against the same-sex couples based upon their sexual orientation thus would be violative of Article 15 of the Indian Constitution and hence unconstitutional. Accordingly, the Court must have been urged to read down the relevant provisions to permit same-sex couples to marry under the Special Marriage Act, 1954.

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48 *Goodridge* v. *Deptt. of Public Health*, 798 NE 2d 941 (Mass 2003), *Kerrigan* v. *Commr. of Public Health*, 289 Conn 135 : 957 A 2d 407 (2008), *Varnum* v. *Brien*, 763 NW 2d 862 (Iowa 2009).

49 2005 SCC OnLine ZACC 20 : (2006) 1 SA 524.

50 *Halpern* v. *AG of Canada*, (2003) 169 OAC 172.

51 Nayantara, *supra* note 29, p. 107

52 Navtej, *supra* 1.

53 *Naz Foundation* v. *Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1.

54 Tarunabh Khaitan, "Reading Swaraj into Article 15 – A New Deal for All Minorities, in *Law Like Love: Queer Perspectives on Law*", 281-283 (Arvind Narrain and Alok Gupta, eds., 2011).

The other option may be to enact a separate legislation by the Parliament which exhaustively dealt with the civil rights of the transgender community. The Act must deal with the question of marriage, partnership, adoption, divorce, custody of child, succession and inheritance. Since no statute in India defines marriage, the Act may specifically include the definition of marriage and partnership. Marriage should be defined as the legal union of a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or a woman. Also, their union without marriage should also be legally recognized as partnership under the Act. Partnership should be defined as the living together of a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or a woman. The Act must provide that the fact that the religious or customary practices do not permit such marriages or prohibit such marriages will not be a bar against such marriages and such marriage shall be solemnized under the police protection if required. Mere recognition of their union will not suffice, the Act must also provides that the sexual orientation of the married couple or the couple in Partnership shall not be bar to their right to legally adopt a child. Non-heterosexual married couples or couples in partnership will be equally entitled to legally adopt a child as heterosexual couples. Accordingly, their rights of divorce, custody of child, succession and inheritance shall also be dealt under the new legislation.

VIII. CONCLUSION

From the above stated facts and arguments, one can clearly conclude that mere decriminalizing the consensual sex between homosexual people will not ensure them the full equality and dignity in the society. To ensure them their dignity and equality in the society their relationships are required to be legally recognized. The judgment in *Navtej Johar case*[55] is only the first step in this way; many bold steps are still awaited. Since the hurdle in the way of legalizing same-sex marriage is removed by the Supreme Court, various options numerated above are open for the Government to legally recognize the same-sex marriage fulfilling its duties to ensure fundamental rights and freedoms to all persons. The above stated arguments demonstrate that ensuring their union a legal status of civil union though with the equal rights will not stand against the equality principles embodied in our constitution. Such 'separate but equal' model has been struck down by the foreign court[56] on the ground of violation of equality and therefore it might face the similar challenge in the Supreme Court of India. In a society which confers marriage with such religious importance, denial of right to marry to the transgender people will further reinforce discrimination as it would have the effect of treating them

[55] Navtej, *supra* note 1.

[56] *Kerrigan* v. *Commr. of Public Health*, 289 Conn 135 : 957 A 2d 407 (2008).

differently. Considering all the facts such as religious importance of marriage, its importance under personal laws, customary practices, tradition and the wish to marry according to one's religious custom, the most satisfactory course would be the recognition of same-sex marriage under the personal laws but at the same time it is the most difficult task. Any such attempt would be taken as the unreasonable interference with one's religion thus will receive the strong opposition from the society. This fact was very wisely considered by the UK's Parliament in 2013 while recognizing the same-sex through the Marriage (Same Sex Couples) Act, 2013 and balanced the right to equality and dignity with the right to religious freedoms. Therefore, in this scenario, the most viable option appears either to amend or judicial striking down of the Special Marriage Act, 1954 and to enact a new legislation governing these issues. However, the protest and debate witnessed in United States on such similar legislation in illustrates that such course in India would also invite vigorous opposition. But when the rights of a class of citizens are unreasonably denied without constitutional sanction by the reason of majoritarian view, such view should not prevail over the constitutional freedoms even if there is apprehension of public outcry. Besides taking steps for recognizing their civil rights, it is very necessary that such matter should be considered without further delay as this community has already been suffered much. The members of this community were compelled to live a life full of fear of reprisal and persecution. History already owes apology to the members of the transgender community and their family members for the delay in providing redressal for the ignominy and ostracism that they have suffered[57], we should ensure that such apology should not required to be asked in future on account of ignorance, based upon majoritarian norm, of their Fundamental Rights guaranteed under the constitution of India.

[57] J. Indu Malhotra, Navtej, *supra* note 1 at p. 493.

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1972 – A CRITICAL ANALYSIS

—*Aparna S*[*]

Abstract — In this paper, the author has analysed the Medical Termination of Pregnancy Act, 1972. The major issues that the Act has failed to rectify have been looked into. The Act does not recognise women's fundamental right to make reproductive choices. It also makes an unreasonable classification between married and unmarried women when it comes to the matter of exercising the said choice. The author has primarily addressed the question as to whether the foetus has a right to life. Deriving authority from some of the recent decisions of Indian Courts in this regard, the author has reasoned as to why the right to life of foetus should not supersede that of its mothers. The author has proposed that the 'compelling interest of the State' should extend only to safeguard the autonomy of an individual to make their respective choices and not to dictate what the choice should be. The recently proposed Amendment Bill has also been analysed. The author's suggestions have been put forth towards the end.

[*] IV[th] Year, B.A. LL.B. (Hons.), The National University of Advanced Legal Studies, (NUALS), Kochi.

I. INTRODUCTION

Much of the debate concerning abortion centres itself around the 'pro-choice' and 'pro-life' debates. The former is mainly advocated as a liberal standpoint which argues for women's right to make reproductive choices for themselves. The 'pro-life' movement focuses on a much more conservative line of thought by arguing that the foetus is a person having a right to life and considers abortion as ethically and morally wrong.

The position in India is indeed perplexing. The Indian women seem to have acquired the right to abortion through a policy that was mainly intended to serve as a measure of population control rather than upholding the autonomy that they have over their bodies.[1] The provisions for abortion incorporated in Sections 312 to 318 under the Indian Penal Code, were enacted a century ago, in conformity with the English law. Anyone voluntarily causing a woman to miscarry, including the pregnant woman herself, which is not in good faith is subject to the punishment prescribed under the Code. Only those miscarriages done with a purpose of saving the life of the pregnant woman were given an exemption from penal consequences. It is in this backdrop that the Medical Termination of Pregnancy Act was enacted in 1971. It has a three-pronged objective. It has been envisaged: (1) as a measure for improving the physical and mental health of women, (2) as a humanitarian aid when pregnancy is the resultant of any sex crime and (3) on grounds of eugenics, to prevent children from being born diseased and deformed.[2]

II. MEDICAL TERMINATION OF PREGNANCY

A. Medical Termination of Pregnancy Act, 1971

The Medical Termination of Pregnancy Act, 1971 is a piece of legislation enacted with an objective of regulating termination of pregnancies by registered medical practitioners.[3]

Section 3 of the Act enlists the circumstances in which a registered medical practitioner may terminate a pregnancy. The Act authorises the termination of a pregnancy if, continuing it would amount to a risk to the life, physical health or mental health of the pregnant woman or if there are chances that the child when born would suffer from physical or mental abnormalities sufficient to render it handicapped. Furthermore, any such pregnancy may be terminated if it has not exceeded twelve weeks on the opinion of a medical practitioner. If

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1 Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law,* 66 (1st edn., 2004).

2 *Jacob George* v. *State of Kerala*, (1994) 3 SCC 430.

3 Preamble, The Medical Termination of Pregnancy Act, 1971.

it has exceeded twelve weeks, but not twenty weeks, then it should be done by not less than two such practitioners. The explanations appended to the section states that when a woman alleges rape to be the cause of her pregnancy, the resultant anguish caused shall be presumed to injure her mental health. Such a presumption of anguish which would prejudice mental health also extends to situations where a married woman's pregnancy is due to failure of contraceptives used by her or her husband.

One of the most laudable aspects of this legislation is that a woman seeking termination of her pregnancy does not need the consent of her husband or other family members. The consent of the legal guardian becomes necessary only when pregnancy of a woman who has not attained eighteen years or who is a lunatic is sought to be terminated.

Under Section 4 of the Act, it has been explicitly provided that any termination of pregnancy under the Act should be done only in hospitals maintained or approved by the Government. The Act also authorises a medical practitioner to terminate a pregnancy, notwithstanding any of the stipulations provided for under Sections 3 and 4, if he is of the opinion formed in good faith that it is necessary to save the woman's life.[4] He is also protected from being sued in any legal proceedings for the damage which is a consequence of any action done in good faith.[5]

B. Medical Termination of Pregnancy Rules, 2003

Under the Rules, provision has been made to constitute a District Level Committee in which one member shall be a gynaecologist, surgeon or anaesthetist and other members from the local medical profession, NGO and Panchayati Raj institutions of a District.[6] Each committee would function for two calendar years and the tenure of the non-government members cannot exceed two terms.[7] Section 4 of the Rules enlists the qualifications, experience and training that registered medical practitioners should have. A place shall be approved for conducting medical termination of pregnancies only when the Government is satisfied that it is safe and hygienic. Additionally, facilities like "labour table, resuscitation and sterilization equipment, drugs and parental fluid, back up facilities for treatment of shock and facilities for transportation" should be available in the first trimester of pregnancy. Likewise, in the second trimester, "an operation table and instruments for performing abdominal or gynaecological surgery; anaesthetic equipment, resuscitation equipment and

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4 S. 5, The MTP Act, 1971.
5 S. 8, The MTP Act, 1971.
6 S. 3, The MTP Rules, 2003.
7 *Ibid*.

sterilization equipment drugs and parental fluids for emergency use," notified by Government of India from time to time would be required.[8]

III. ISSUES THAT NEED TO BE ADDRESSED

A. Right to make reproductive choices

A bare perusal of the provisions of the Act is enough to indicate that it has not been enacted with a women-centric approach in mind. That MTP Act is an inadequate legislation, designed with intent to serve the interest of family planning programme is now a judicially accepted fact.[9]

Primarily, the Act does not recognise a woman's right to make her own reproductive choices. A woman's right to make reproductive choices is also a dimension of personal liberty as understood under Art. 21 of the Constitution of India. "It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating."[10] In ***Sarmishtha Chakrabortty* v. *Union of India*,**[11] the Hon'ble Supreme Court observed thus: "*The right of a woman to have reproductive choice is an integral part of her personal liberty, as envisaged under Art. 21 of the Constitution. She has a sacrosanct right to have her bodily integrity.*"

Under the Act, a woman who is a victim of rape or a married woman whose pregnancy results from failure of contraceptives are allowed to abort within the statutorily prescribed time limits. It is also so authorised when continuing pregnancy would result in a threat to the life of the mother or if the child, if born would be handicapped. However, an unmarried woman cannot terminate a pregnancy due to failure of contraceptives. Also, a woman cannot abort her child solely because she does not want to be a mother at that particular point of time. It is legally permissible only if it falls under any of the grounds mentioned in the Act. Thus, an unreasonable classification is made between married women and unmarried women insofar as the latter are not allowed to terminate her pregnancy due to failure of birth-control measures adopted by her. This is manifestly arbitrary and hence, violative of Art. 14 of the Constitution of India. A statutory provision needs to be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and/or without adequate determining principle, as also if it is excessive or disproportionate.[12]

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8 S. 5, The MTP Rules, 2003.
9 *Surjibhai Badaji Kalasva* v. *State of Gujarat*, 2018 SCC OnLine Guj 190.
10 *Suchita Srivastava* v. *Chandigarh Admn.*, (2009) 9 SCC 1.
11 *Sarmishtha Chakrabortty* v. *Union of India*, (2018) 13 SCC 339.
12 *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1.

Forcing a woman to continue with an unwanted pregnancy is a blatant violation of her bodily integrity and the resultant mental trauma is detrimental to her mental health.[13] Law cannot perpetuate the oppression of women in any circumstances whatsoever.[14]

i. Rights of the mother v. Rights of the foetus

A stark contradiction can be seen in the reasoning adopted by Courts in different decisions in this regard. For instance, in ***Meera Santosh Pal* v. *Union of India*,**[15] the Supreme Court while granting permission to abort a post 20 week foetus, refrained from looking into the rights of the foetus. It rendered the decision solely from the viewpoint of the rights of the mother. However, in the case of a 10 year old girl, termination of a 32 week old foetus was denied on the grounds that doing so would adversely affect her health as well as the right of the foetus.[16] This decision was subject to a plethora of criticisms and deliberations among the public. The reasoning adopted by the Bombay High Court appears to be very rational and justifiable in this regard. "A woman owns her body and has a right over it. Abortion is always a difficult and careful decision and woman alone should be the choice-maker. Unborn foetus cannot be put on a higher pedestal than the right of a living woman."[17](emphasis supplied)

ii. Is foetus entitled to right to life?

Jacob George* v. *State of Kerala[18] is a case where foetus was rendered to be 'human life from the moment of fertilisation.' It was also observed that since under the MTP Act, termination of pregnancy is permitted only on the three grounds of health, humanity and eugenic, the concern for unborn child was intended by the legislature. The Punjab and Haryana High Court in a recent judgement observed that even in the best circumstances, no law or a person can ethically compel a woman to carry on pregnancy that she does not want.[19] However, from the moment the foetus becomes viable, the situation has to be viewed from the perspectives of the mother as well as that of the unborn child.

At this juncture, it is pertinent to note the observations made by the Bombay High Court in one of the most remarkable recent judgement. "*According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights.*"[20]

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13 *High Court on its Own Motion* v. *State of Maharashtra*, 2016 SCC OnLine Bom 8426.
14 *Anuj Garg* v. *Hotel Assn. of India*, (2008) 3 SCC 1 : AIR 2008 SC 663.
15 *Meera Santosh Pal* v. *Union of India*, (2017) 3 SCC 462 : AIR 2017 SC 461.
16 *Alakh Alok Srivastava* v. *Union of India*, (2018) 17 SCC 291 : AIR 2018 SC 2440.
17 *Supra* note 13.
18 *Supra* note 2.
19 *R* v. *State of Haryana*, 2016 SCC OnLine P&H 18369.
20 *Ibid*.

The Gujarat High Court, in ***Ashaben* v. *State of Gujarat*,**[21] gave an interesting opinion in this regard. The Court after placing its reliance on various foreign statutes and cases observed that "*the right to life of foetus is subject to an implied limitation allowing the pregnancy to be terminated in order to protect the life of a mother.*" In ***Santhi* v. *State of Kerala*,**[22] it was observed that "*by no stretch of imagination can a foetus be equated as a person*." The concept of personhood is hence, not conferred on a foetus despite the life being there from the moment of conception. It was also categorically laid down that the constitutional 'right to life' cannot be claimed at the foetal state of life.

The argument that foetus too has a right to life stems from ethical and moral righteousness. It has been rightly observed that social morality being inherently subjective in its essence,it cannot be used as a means to facilitate undue interference into someone's personal domain.[23] Hence, it is important to recognise the rationale that an unborn foetus cannot be put on a higher pedestal than a living woman.

iii. Compelling State Interest

At the core of this debate is the principle of "Compelling State Interest". In the historic decision of the American Supreme Court in ***Roe* v. *Wade*** [24]**,** it was categorically laid down that "the right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy".[25] However, it was equally emphasized that "the right of personal privacy is not unqualified and must be considered against important state interests in regulation".[26] The State has "*important and legitimate interest in protecting the potentiality of human life*".[27]

In ***Suchita Srivastava*** case,[28] it was observed that in the case of pregnant women, there also exists a "compelling state interest" to protect the life of the unborn child. Provisions of the Act were deemed to be reasonable restrictions on women's right to make reproductive choices. Personal freedom has been held to be a fundamental tenet which cannot be compromised in the name of expediency 'until and unless there is a compelling State purpose.'[29]

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21 *Ashaben* v. *State of Gujarat*, 2015 SCC OnLine Guj 6198.
22 *Santhi* v. *State of Kerala*, 2017 SCC OnLine Ker 14293 : (2017) 4 KHC 681.
23 *S. Khushboo* v. *Kanniammal*, (2010) 5 SCC 600.
24 *Roe* v. *Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973), Supreme Court of the United States).
25 *Ibid*.
26 *Ibid*.
27 *Ibid*.
28 *Supra* note 10.
29 *Supra* note 14.

A remarkable observation made by Justice D.Y. Chandrachud in ***K.S. Puttaswamy* v. *Union of India*,**[30] merits mention here:

> "*The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist.* The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions."[31] (emphasis supplied)

It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction.[32] A woman's right to say no to motherhood is a right that has its origin from the right to live with dignity enshrined under Art. 21.[33] Also notable is the proposition that "*every human being has dignity by virtue of his existence*."[34] Hence, the author is of the opinion that a woman's right to live with dignity cannot be done away with on the premise of compelling interest of the State in securing right to life and dignity of foetus, the existence of which is contentious.

B. Time limit of twenty weeks

The Act prescribes a maximum time limit of 20 weeks for abortions. This has received a lot of due criticisms. Foetal impairments often get detected only in the anomaly scan conducted between the 18th to 22nd weeks of pregnancy.[35] Hence, the fixation of 20 weeks as the upper limit is arbitrary.

i. No uniform policy in deciding post 20 week cases

The MTP Act does not authorise abortions beyond twenty weeks. However, the Supreme Court and the High Courts have been granting and denying permission for termination of pregnancies that have advanced beyond twenty weeks on an individual case basis. This has eventually led to the establishment of a cumbersome procedure to be followed in these cases. Presently, a woman seeking the termination of her pregnancy which has crossed 20 weeks has to file a petition in that regard, which would be referred to a medical board consisting of a panel of health care providers that does not include the woman's

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30 *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1 : AIR 2017 SC 4161.
31 *Ibid*.
32 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.
33 *Supra* note 13.
34 *Ibid*.
35 Q&A: Abortions for Fetal Abnormality, Royal College of Obstetricians and Gynaecologists, available at <https://www.rcog.org.uk/en/news/campaigns-and-opinions/human-fertilisation-and-embryology-bill/qa-abortions-for-fetal-abnormality/>, last seen on 23/6/2019.

own physician.[36] Courts rely on the findings of this medical panel when it has to grant or deny the permission to terminate any such pregnancy. "This requirement has forced women and girls, already in traumatic situations, to seek legal counsel, risk public scrutiny, submit to multiple physical exams by panels of unfamiliar doctors, and ultimately experience significant delays and even denials at the end of the process".[37]

It is on case to case basis that permission for abortions are granted in cases where the foetus has a growth of more than 20 weeks. The Courts allowing or declining termination of pregnancy always depend upon the opinion of the doctors.[38] It may be a rare case where court passes order contrary to opinion of medical boards.[39] This is due to reason that medical and health professionals are the experts in this field. Hence, it is the need of the hour that the Courts follow a uniform policy while deciding on the cases involving more than 20 week old foetus.

IV. PERMANENT MEDICAL BOARDS

In this context, it is very pertinent to note a question raised by a Division Bench of the Supreme Court in ***Alakh Alok Srivastava* v. *Union of India.***[40] The Court observed the need to set up permanent medical boards at the State level to examine the cases till the Amendment Bill became law.[41] The Ministry of Health and Family Welfare has, as a consequence, asked the State and Union Territories to establish such permanent medical boards for urgent examination of cases referred to by the District Courts, High Courts and Supreme Court for MTP beyond 20 weeks so that immediate opinion can be given and urgent action can be taken.[42] However, there is still no clarity as to how these boards would function. Ideally, these permanent medical boards should be hearing the appeals in such cases without involving the judiciary so as to achieve the purpose for expeditious disposal of these matters.

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[36] "Ensuring Reproductive Rights: Reform to Address Women's and Girls' Need for Abortion After 20 Weeks in India", Briefing Paper, 23, Centre for Reproductive Rights (2018).

[37] *Ibid*.

[38] *R* v. *State of Haryana*, 2016 SCC OnLine P&H 18369.

[39] *Ibid*.

[40] *Supra* note 16.

[41] Krishnadas Rajagopal, "SC Rejects Abortion Plea of 10-Year-Old", *The Hindu* (28/7/2017), available at <https://www.thehindu.com/news/national/sc-rejects-plea-seeking-nod-for-10-year-old-rape-survivors-abortion/article19377784.ece>, last seen on 24/6/2019.

[42] Medical Termination of Pregnancy, Press Information Bureau, (9/3/2018), available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=177209>, last seen on 24/1/2019.

A. Violation of International Conventions

The Committee on the Rights of the Child has emphasized on the need to "decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services"[43] and "ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal."[44] The CEDAW recognises that the obligation to respect women's rights warrants the parties to "refrain from obstructing action taken by women in pursuit of their health goals."[45]

The World Health Organisation's observations in this regard are indeed accurate. "Laws and policies on abortion should protect women's health and their human rights. Regulatory, policy and programmatic barriers that hinder access to and timely provision of safe abortion should be removed."[46] The Committee on Economic, Social and Cultural Rights acknowledges that the right to sexual and reproductive health includes "the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health."[47] Restrictive abortion laws as well as the criminalisation of abortion have been observed to undermine autonomy and the right to equality.[48]

B. Contradiction with POCSO Act

A minor is allowed to terminate her pregnancy with the consent of her legal guardian under the MTP Act, 1971. However, under the POCSO Act, 2012, any person who has an apprehension of the commission of any offence under the Act should mandatorily report the matter to the Special Juvenile Police Unit or the local police.[49] Failure to report any such matter is punishable with imprisonment of either description extending upto six months or with fine or with both.[50] Hence, this presents a dichotomy. This also has the potential to lead to

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[43] General Comment No. 15, U.N. Committee on the Rights of the Child, Session 62, CRC/C/GC/15, (17/4/2013) available at <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en>, last seen on 24/6/2019.

[44] *Ibid*.

[45] General Recommendation No. 24, U.N. Committee on the Elimination of Discrimination Against Women, Session 20, Document A/54/38/Rev.1, Chap. I, (4/5/1999) available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>, last seen on 24/6/2019.

[46] *Safe Abortion: Technical and Policy Guidance for Health Systems,* World Health Organization, 2003.

[47] General Comment No. 22, U.N. Committee on Economic, Social and Cultural Rights, Session 48, E/C.12/GC/22, (2016) available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfQejF4lTob4CvIjeTiAP6s-GFQktiae1vlbbOAekmaOwDOWsUe7N8TLm%2BP3HJPzxjHySkUoHMavD%2Fpyfcp3Ylzg>, last seen on 24/6/2019.

[48] *Ibid*.

[49] S. 19, Protection of Children from Sexual Offences Act, 2012.

[50] S. 21, Protection of Children from Sexual Offences Act, 2012.

grave consequences where the minors, in fear of disclosure of their identity, might resort to quacks instead of approaching registered medical practitioners. Therefore, this is a dilemma that needs to be resolved.

V. THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT BILL), 2014

The Ministry of Health and Family Welfare introduced the MTP (Amendment) Bill in 2014[51] which plugged substantially, many loopholes of the Act.

First and foremost, the amendment obliterated "registered medical practitioners". In its place, "registered health practitioners" has been substituted which includes recognised practitioners of Ayurveda, Unani and Siddha as well as recognised nurses and auxiliary nurse midwives.[52] Though this has been subject to a lot of flaks from the medical community, the author feels that this would facilitate an ease of access to such facilities.

The next important change made was to raise the upper limit for abortions from 20 weeks to 24 weeks.[53] This gestational limit of 24 weeks would not apply in cases where there are "substantial foetal abnormalities."[54] The privacy of the woman seeking abortion is also protected by forbidding the registered healthcare providers from disclosing her name and particulars.[55]

Despite addressing somewhat satisfactorily, many of the concerns posed by the Act, the amendment never became law. Presently, it has been stated that in June 2017, the amendments were returned to the Minister of Health and Family Welfare by the Prime Minister's office.[56]

VI. SUGGESTIONS

The Act is undoubtedly, in dire need of reforms. Approaching the whole issue from a women-centric perspective should be the primary step. The proposed amendments to the Act do bode well for this purpose.

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51 Medical Termination of Pregnancy (Amendment) Bill, 2014 (pending).

52 S. 3, Medical Termination of Pregnancy (Amendment) Bill, 2014.

53 S. 4(b)(i), Medical Termination of Pregnancy (Amendment) Bill, 2014.

54 S. 4(c), Medical Termination of Pregnancy (Amendment) Bill, 2014.

55 S. 5-A, Medical Termination of Pregnancy (Amendment) Bill, 2014.

56 Jaideep Malhotra, "A Law Past its Sell-by Date", *The Indian Express*, (16/8/2019), available at <https://indianexpress.com/article/opinion/columns/india-abortion-laws-mtp-act-supreme-court-pocso-5308892/>, last seen on 24/6/2019.

- Hence, it is the need of the hour to do away with the present upper gestational limit within which pregnancies may be legally terminated when the circumstances envisaged by the Act for doing so exists. There should not be any restriction on medical termination of pregnancy, at whatever stage it may be, if the foetus suffers from substantial abnormalities or if continuing with the pregnancy is detrimental to the physical or mental health of the mother. The embargo of 24 weeks, in other cases, for which a provision has been incorporated under the Amendment Act, appears to be reasonable.

  If a woman is of the opinion that she is not in a position to welcome a child into her life, then that in itself should be a sufficient cause to terminate pregnancy. The continuation of an unwanted pregnancy is, in itself detrimental to the mental health of a woman.

- It is also important to recognise that the right to terminate pregnancy under the Act should be made available to all women, irrespective of whether they are married or unmarried. Hence, all women, regardless of their marital status should be entitled to avail the option of medical termination of pregnancy if it occurs as a result of failure of contraceptives used by her or her 'partner' as opposed to husband.

- Furthermore, the need for authorisations from judiciary for medical termination of pregnancy should be obliterated. It creates unnecessary delay and thereby defeats the purpose. The choice of whether to continue with a pregnancy or not, even if termination at that stage may prove dangerous, should ultimately lie with the woman.

  The abortions beyond 24 weeks, if at all necessary, should be done on the advice of a duly constituted Permanent Medical Board, which should dispose of the applications for the same as early as possible.

- The amendment to the existing provisions in so far as they seek to expand the ambit of registered medical practitioners as well as to protect the privacy of the woman seeking abortion must be brought into force at the earliest.

- It is also imperative to have an overriding proviso under the MTP Act whereby the pregnant adolescents seeking abortion under the Act are exempted from the application of Section 19 (1) of POCSO Act.

VII. CONCLUSION

India was indeed early enough to liberalise abortion when compared to other countries. However, the need for reforming it in tune with the changing

scenario is all the more important. The present Act fixes an unreasonable time limit of 20 weeks within which abortions can be legally performed. Furthermore, no uniform policy is followed while deciding applications for abortions when the pregnancy has advanced beyond 20 weeks. The requirement of obtaining judicial authorization is in itself a long-drawn and unnecessary process, often leading to complications which could otherwise have been avoided.

As the various judicial pronouncements have amply elucidated, the right to reproductive choice, or the right to procreate and abstain from procreating falls well within the ambit of the fundamental right to life. The State cannot cite its compelling interest to preserve the life of a foetus while the right to live with dignity of the woman carrying it is at peril. No one other than a woman is entitled to take decisions concerning her body and reproductive autonomy. The State's duty extends only to facilitating her to take those decisions and not to take those decisions for her. The debate should not enter or be judged from the moral-ethical domain. The right to live with dignity of a woman cannot and should not be made subservient to that of the foetus.

MERGER CONTROL & TAXATION OF CROSS-BORDER MERGER AND ACQUISITIONS IN AUSTRALIA, NEW ZEALAND AND INDIA: A COMPARATIVE ANALYSIS

Avin Tiwari[*] *& Dr. Gaurav Shukla*[**]

Abstract — Over the past decades, the APEC region's economic boom has compelled world economies to sit up and take notice. Much of this economic upsurge is attributed to the increased inflow of FDI by way of cross-border M&A's in the APEC Countries, which have successfully contributed to making a competitive and favourable business environment for the same. Under this backdrop, the authors analyze the present legal landscape of the key economic players (Australia, New Zealand, and India) in the APEC region to understand the legal and policy vocabulary that created such favorable scenarios. Furthermore, the authors use macro-economic country-wise data from these three players to examine their cross-border M&A trends over the past decade, from 2009 to 2018.

This paper scrutinizes the effects and role of legal policy and taxation on cross-border M&As. Authors make a deliberate attempt to suggest legal, policy measures and a roadmap for increasing FDI for host countries via cross-border M&As by comparatively analyzing the legal regime of powerhouse APEC giants like Australia and New

[*] Avin Tiwari, UGC-SRF (Law), Ph.D. Scholar, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, (IIT) Kharagpur, West Bengal, India, (M). +91 7602323051, email: avintiwari2016@gmail.com

[**] Dr. Gaurav Shukla, Lecturer in Law, School of Law, University of South Pacific, Fiji, email: gaurav.gauravshukla@gmail.com; gaurav.shukla@usp.ac.fj, (O) +679-3231096, (M). +679-9212456.

Zealand with that of emerging Asian giants, India. While scrutinizing the common factors and indicators that acted as a catalyst in this economic boom, the authors observe that favourable corporate and tax laws were the key denominators that resulted in a positive effect on cross-border M&A's.

Keywords: APEC, Cross-border M&As, Corporation Income Tax, Corporate Law & Policy, Corporate Restructuring, Merger Control, Tax Laws & Investment.

I. INTRODUCTION

Mergers and acquisitions are the essential precursors of globalization.[1] They promote geographical expansion, exploration,[2] and utilization of their core competencies in an expeditious, efficient, and economical manner.[3] The juggernaut of cross-border mergers has caught unprecedented momentum gaining prominence relative to worldwide mergers in the past few years.[4]

Many countries such as the U.K., USA, Singapore, Cyprus, Mauritius, and Russia have specific tax rules that grant tax benefits involving mergers and acquisition transactions by allowing the participating parties a percentage of tax deferral which is levied upon the deal.[5] Once merger and acquisition transactions cross national borders, target countries are reluctant to offer tax incentives to attract the investment and economic growth, because in such cases, relief from taxation practically implies tax exemption, super deductions, tax holidays, and immunity because such countries may completely lose jurisdiction to tax the transaction.[6]

Cross-border mergers are more complex and induced with surprises, and other pitfalls as the number of jurisdictions involved in the transaction have many folds.[7] The ambit of such concerns has expanded as the pace and vol-

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1 P.J. Norbäck, "Globalization and Profitability of Cross-Border Mergers and Acquisitions", 35(2) ET 241, 263 (2008).

2 J.G. March, "Exploration and Exploitation in Organizational Learning", 2(1) OS 71, 82 (1991).

3 J.A. Clougherty, "Cross-Border Mergers and Domestic-Firm Wages: Integrating 'Spill-over Effects' and 'Bargaining Effects' ", 45(4) JIBS 450, 459 (2014).

4 R.L. Conn, "International Mergers: Review of Literature and Clinical Projects", 29 FEA 1, 19 (2003).

5 M.M. Erickson and S. Wang, "Tax Benefits as a Source of Merger Premiums in Acquisitions of Private Corporations", 82(2) TAR 359, 382 (2007).

6 R. Sonenshine, "Determinants of Cross-border Mergers Premia", 150(1) RWE, 187-188 (2014).

7 S. Finkelstein, "Cross-border Mergers and Acquisitions", (Sept 28, 2020), <http://mba.tuck.dartmouth.edu/pages/faculty/syd.finkelstein/articles/cross_border.pdf>.

ume of international cross-border deals have grown exponentially.[8] Domestic mergers and acquisitions are, generally, and on average, socially desirable transactions as less risk is involved.[9] Many countries enjoy tax deferrals, to the extent that they use stock to compensate target corporations or their shareholders.[10] Tax laws should better accommodate cross-border mergers and acquisitions.[11] Mergers and acquisitions are very intricate with different dimensions, and they are attracted and governed by various laws and regulations simultaneously depending on the stakeholders and tax regimes involved.[12]

Further, these transactions are characterized by cut-throat competition in the global market and pressure on the top and bottom-line growth.[13] The trend of upward cross-border M&As has increased with the globalization of the world economy. The 1990s may be considered the "golden decade" for cross-border M&As with an almost 200% increase in the volume of such deals in the Asia Pacific region. Most countries in this region were opening their economies and relaxing their policies, which provided the needed impetus for such deals.

Globalization has significantly increased the market for cross-border M&As. Previously, the lack of market significance and a strict national mindset prevented the vast majority of small and mid-sized companies from considering cross-border M&As. This same reason also prevented the development of extensive academic works on the subject. The complex nature of cross-border M&As resulted in disastrous results for a vast majority of cross-border M&As. The cross-border merger has many complexity levels than regular intermediation, like corporate governance, the average employee's power, company regulations, political factors, customer expectations, and country-specific culture are all crucial factors that could spoil the transaction.[14] The critical drivers of cross-border M&As are complex and sector-specific. For instance, in the industrial sectors, international competition and market pressures drive restructuring due to excess capacity and falling demand. Technological change, particularly in information technology, facilitates firms' global expansion, seeking to capture new market opportunities in fast-changing technologies and pool research and development costs. Enterprises increasingly seek to exploit intangible

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8 F. Stähler, "Partial Ownership and Cross-border Mergers", 11(3) JOE 209, 212 (2014).

9 P. Böckerman, "Geography of Domestic Mergers and Acquisitions (M&As): Evidence from Matched Firm-Level Data", 40(8) RS 847, 852 (2006).

10 A.J. Auerbach and D. Reishus, "The Impact of Taxation on Mergers and Acquisitions", 69 BOER 69, 73-74 (1988).

11 C. Hayn, "Tax Attributes as Determinants of Shareholder Gains in Corporate Acquisitions", 23(1) JOFE 121, 152 (1989).

12 E. Gomes, "Critical Success Factors through Mergers and Acquisitions Process: Revealing Pre- and Post- M&A Connections for Improved Performance", 55(1) TIBR 13, 17 (2013).

13 J.A. Pearce and F. David, "Corporate Mission Statements: The Bottom Line", 1(2) AOME 109, 113 (1987).

14 G. Platt, Cross-Border Mergers Show Rising Trend as Global Economy Expands, (Sept. 28, 2020), findarticles.com.

assets, technology, human resources, and brand names by acquiring complementary assets in other countries and geographical diversification.

Cross-border merger and acquisitions yield dividends in terms of company performance and profits and benefits for home and host countries when successful corporate restructuring leads to greater efficiency without undue market concentration. Advantages from such M&As are intangible in the form of economy-wide spillover effects. They can help revitalize ailing firms and local economies and create jobs through the restructuring process, technology acquisition, and productivity growth. Government policies in areas such as investment, competition, labor, and technology should be sufficiently flexible for firms to engage in such corporate restructuring at the international level optimistically.[15] It is here that New Zealand, Australia, and India become favourite hotspots for cross border M&A activity as listed in the latest Ease of Doing Business Index according to the World Bank annual rating, placing New Zealand in the first place, while Australia ranks 18th and India ranks 67th.[16] This paper focuses on the recent trends and policy frameworks in selected countries to assess their overall business climate and their conduciveness to cross-border M&A activity.

II. RECENT TRENDS OF CROSS BORDER MERGERS AND ACQUISITIONS

Foreign Direct Investment (FDI) across the globe fell by 23% to $1.43 trillion in 2017. This fall is unlike the accelerated GDP and trade growth in 2016 due to a 22% fall in the overall value of cross-border mergers and acquisitions. However, even discounting the large one-off deals and corporate restructurings that inflated FDI numbers in 2016, the 2017 decline remained significant. The value of announced Greenfield investment (an indicator of future trends) also decreased by 14%.[17]

We have analyzed three specific cases: Australia, New Zealand & India.

Australia: The Australian tax system presently is undergoing a legal regime overhaul with legislative amendments and complex rules that affect merger and acquisition transactions in Australia. Australian M&As continued to perform

[15] S. Johansson and N. Kang, Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalization, OECD, (Sept. 27, 2020), https://doi.org/10.1787/137157251088.

[16] Nidhi Sharma, "In World Bank Meeting India Eyes Top 25 Rankings in Ease of Doing Business", *The Economic Times*, (Sept. 26, 2020), <https://economictimes.indiatimes.com/news/economy/policy/in-world-bank-meeting-india-eyes-top-25-ranking-in-ease-of-doing-business/articleshow/59360397.cms?from=mdr>.

[17] UNCTAD, World Investment Report, (Sept. 27, 2020) <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf>.

strongly throughout 2018 with a total value of M&A deals at USD 88.5 billion, surpassing the already robust USD 85.6 billion total for 2017, and becoming the second-highest total deal value over the past decade. Deal volume in 2017 by the number of transactions diminished to 583 from 618 last year, although the overall decadal trend has been upwards, in 2008, there were only 375 deals. Australia's currency, already weak at the start of the year, fell further against the U.S. dollar and Euro as 2018 progressed, with a 13% drop versus the U.S. dollar from January to December 2018.

The latter half of 2018 was strong for Australian M&As, accounting for 71% of the year's total deal value, or USD 62.9 billion. Eight out of the top ten deals by size were announced in the second half of 2018, led by the year's largest deal–the demerger of Coles Group, which opened on the Australian Securities Exchange (ASX) with a value of USD 12 billion. The deal brought Coles back to the ASX as a standalone business when Wesfarmers took it over in 2007. The second largest deal of the year—also announced around the same time, was the USD 6.7 billion sales of a 51% stake in a road project finance and delivery business of the Sydney Motorway Corporation by the Government of New South Wales. Winning bidders were a consortium of domestic investors, Transurban Group and Australian Super, plus overseas institutions like the Abu Dhabi-based Tawreed Investments and Canada Pension Plan Investment Board.

New Zealand: 2018 was a good year for M&A activity, both globally and locally in New Zealand, with strong demand from cashed-up buyers and generally favourable economic conditions providing a tailwind. New Zealand M&A activity remained steady throughout the year, with particularly strong second and fourth quarters. There were many large deals and somewhat unexpectedly–an increase in cross-border transactions, particularly with Europe based buyers. Despite a significant increase in the Overseas Investment Office (OIO) processing times for consent applications, this increase occurred. Merger market statistics show that 29% of deals, where the value was disclosed, were over USD 100 million in New Zealand in 2018, up from 21% in 2017. In 2018, on the global front, the number of M&A deals continued to increase. The total deal value was also steady at USD 3.5 million, and the average deal size was USD 384.8 million. In New Zealand, the total deal value bounced back to 2016 levels, increasing from USD 3.5 billion to USD 8.2 billion. Deal volume was also up, from 119 transactions in 2017 to 135 in 2018.

The outlook for 2020 is for continuing high buyer interest, buoyed by the opportunity to obtain high-value acquisitions in a slightly less seller-friendly market. Nevertheless, concerns around geopolitical and economic volatility, while current last year, are becoming immediate, likely to infect sentiment as the year progresses. Brexit appears increasingly shambolic. Italy could soon be

at the forefront of a new European debt crisis. Venezuela's political calamity is reaching a boiling point, and the U.S. and China have escalated their trade war with New Zealand a possible casualty.

India: Indian economy is the third fastest growing economy right behind the United States and China globally. India's economic transformation and immense market potential have attracted significant interest in the world economy.[18] India is among the top 3 global investment destinations and ranks 10th in FDI inflows in 2016, with trade volumes to USD 44 billion.[19]

The Indian economy has shown promising evidence of increasing depth and maturity, emerging as the world's fastest-growing economy with an annual Gross Domestic Product growth rate of 7.3% in the first quarter of 2018,[20] owing to a robust capital market, as well as market-friendly and competitive, regulatory reforms. In 2018, India recorded its highest ever half-yearly Mergers and Acquisitions (M&As) deal figure of USD 75 billion consisting of 638 transactions, including ten deals in the billion-dollar category, and approximately 52 deals having an estimated value above USD 100 million each, which combined contributed to 93% of total deal value.[21] The year 2018 witnessed 235 M&A transactions amounting to USD 65.5 billion, along with the highest cross-border M&As deal value since 2011 at USD 25 million, which is a notable increase of 5.8 times the total value of the same in 2017.[22] 2018 was a watershed year for M&As in India, surpassing all previous records by crossing the $100 billion deal benchmark across both private equities (P.E.) and M&A transactions.[23]

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[18] A. Afsharipour, "Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies", 44 UCD 1029, 1029-1030, (2011).

[19] UNCTAD, World Investment Report, (Sept. 26, 2020), <https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf>.

[20] S. Ramasubramanian, "Expert Speaks on the Overall Economic Outlook", 16(4) LABJ 21, 25 (2018).

[21] *Ibid*.

[22] A. Chande, "2018 Setting new Records for Indian M&A", Grant Thorton, (Sept. 27, 2020), <https://www.grantthornton.co.uk/insights/2018-setting-new-records-for-indian-ma>.

[23] Grant Thornton, "Annual Dealtracker 14th Annual Edition 2019", (Sept. 27, 2020), <http://gtw3.grantthornton.in/assets/DealTracker/Annual_Dealtracker_2019_V6.pdf>.

Fig. 1: Source : imaa-institute.org

FDI Outward Flows: India, Australia, and New Zealand, In Million US dollars, (2008 – 2018)											
Country/ Region	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
India	20795	16068	15968	12608	8553	1765	11686	7514	5047	11090	11018
Australia	30261	16409	19803	1716	7889	1 441	463	-20059	2321	4881	953
New Zealand	1094	-1001	716	2 682	-433	530	472	-59	7	-222	405
World	1704523	1098755	1374061	1542637	1247020	1344232	1321283	1682404	1587890	1434366	893820
FDI Inward Flows: India, Australia, and New Zealand, In Million US dollars, (2008 – 2018)											
Country/ Region	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
India	47472	35582	27397	36497	23995	28153	34577	44009	44459	39966	42245
Australia	46687	31668	36442	58907	59540	56273	40968	20466	47753	46363	57743
New Zealand	3117	701	-61	4 229	3502	1860	2437	-311	3069	2538	1404
World	1575544	1199437	1480036	1734701	1544762	1585374	1469900	2151843	1986624	1554497	1300742

Fig.2: Source: Panel Data summarized by Author from UNCTAD, World Investment Report 2019.

Cross-border Merger and Acquisition Overview of India, Australia, and New Zealand, 2005–2007 Average, 2016–2018 (Millions of U.S. dollars)

Region/Economy	2005-2007 (Pre-Crisis Annual Avg.)	2016	2017	2018
India	3488	7958	22763	33178
Australia	18979	13592	10704	33265
New Zealand	2775	333	1085	1755
World	729177	886901	693962	815726
Announced Greenfield Investment Project Overview in India, Australia, and New Zealand 2005–2007, Average, 2016–2018, (Millions of U.S. dollars)				
Region/Economy	2005-2007 (Pre-Crisis Annual Avg.)	2016	2017	2018
India	40442	60802	25524	55943
Australia	21801	20590	17411	17099
New Zealand	1522	967	1409	2518
World	748044	806779	697734	980669

Fig. 3: Source: Panel Data summarized by Author from UNCTAD, World Investment Report 2019.

III. STRATEGIC MOTIVATIONS, DETERMINANTS & BENEFITS OF CROSS-BORDER MERGERS & ACQUISITIONS

Cross-border M&As provide an additional set of factors that affect the likelihood that two firms decide to merge.[24] The main reasons and motives for domestic as well as cross-border mergers can be found in the subsequent theories of (*i*) Neoclassical profit-maximization theory,[25] which includes efficiency, strategy and shareholder value as its core value. (*ii*) Principal-Agent theory,[26] which is based upon managerial efficiency and considerations. (*iii*) Internationalization theory in the OLI eclectic paradigm,[27] which is based upon ownership, location advantages, and internalization of a firm. (*iv*) Comparative ownership advantage theory,[28] which is based upon five characteristics of accelerated internalization, i.e., industrial factor endowments, dynamic learning, the value creation, reconfiguration of the value chain, and institutional facilitation and constraints. These theories elucidate the reasons for corporate mergers.[29] Mergers are corporate and business strategies aimed at market access,[30] diversification,[31] expansion,[32] risk reduction[33] and creating a sustainable competitive advantage for the company.[34] There are four distinct yet inter-related motives for M&A viz. strategic, market, economic, and personal.[35] Thus, both mergers and cross-border mergers and acquisitions are essential strategic decisions leading to the maximization of a company's growth.[36]

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[24] I. Erel, "Determinants of Cross-Border Mergers and Acquisitions", 1 JOF 1, 4-5 (2010).

[25] J.P. Neary, "Cross-Border Mergers as Instruments of Comparative Advantage", 74(4) ROES 1229, 1250 (2007).

[26] Bernd Wübben and Dirk Schiereck, *German Mergers & Acquisitions in the USA: Transaction Management and Success* (Deutscher Universitätsverlag, 1st edn., 2007).

[27] J.H. Dunning, "The Eclectic Paradigm of International Production: A Restatement and Some Possible Extensions", 19(1) PMJ 1, 30 (1988).

[28] S.L. Sun, "A Comparative Ownership Advantage Framework for Cross-Border M&As: The Rise of Chinese and Indian MNEs", 47(1) JOWB 4, 15 (2012).

[29] M. Firth, "Takeovers, Shareholder Returns, and the Theory of the Firm", 94(2) TQJOE 235, 237-238 (1980).

[30] P.J. Buckley, "Host–Home Country Linkages, and Host–Home Country Specific Advantages as Determinants of Foreign Acquisitions by Indian Firms", 21(5) IBR 173, 888-889 (2012).

[31] John R.M. Hand et al., (eds.), *Intangible Assets: Values, Measures and Risks* (Oxford University Press, 1st edn. 2003).

[32] K. Shimizu, "Theoretical Foundations of Cross-Border Mergers and Acquisitions: A Review of Current Research and Recommendations for the Future", 10(3) JOIM 307, 347-348 (2004).

[33] Y. Amihud and B. Lev, "Risk Reduction as a Managerial Motive for Conglomerate Mergers" 12(2) BJOE 605, 607 (1981).

[34] K.S. Reddy, "Extant Reviews on Entry-mode/Internationalization, Mergers & Acquisitions, and Diversification: Understanding Theories and Establishing Interdisciplinary Research", 16(4) PSR 250, 251 (2015).

[35] H.D. Hopkins, "Cross-Border Mergers and Acquisitions: Global and Regional Perspectives", (1999) 5(3) JOIM 207, 232-233 (1999).

[36] J.P. Neary, "Cross-Border Mergers as Instruments of Comparative Advantage" (2007) 74(4) ROES 1229, 1250 (2007).

Additionally, synergistic operational advantages are one of the essential objectives that mergers and acquisitions intend to achieve.[37] The combined effect of two corporate entities compared to separate effects is always more beneficial since it reduces expenses relating to production, administration, and selling.[38] It also makes optimum use of capacities and factors of production.[39] Another benefit of integration is reducing competition, saving costs by reducing overheads, capturing a larger market share, and pooling technical or financial resources.[40] A company may also opt for the merger because even though it can expand on its own, it cannot do so due to financial constraints.[41] Merger and acquisition are justified as per unit cost fall when output increases. As a result of the scale effect, the products can be offered at a more competitive price on the market.[42] Other reasons companies opt for mergers are strengthening financial position and the revival of sick companies,[43] the advantage of brand equity,[44] diversification, competitive advantage, and sustainable growth.[45]

In addition to these factors, the geography, quality of accounting disclosure, and bilateral trade increase the likelihood of cross-border mergers between two countries.[46] Cross-border mergers can create market power as it is legal for post-merger combined firms to charge profit-maximizing prices themselves but not for pre-merger separate firms to collude to do so collectively.[47] Similarly, mergers can also have tax advantages if they allow one firm to utilize tax shields that another firm possesses.[48] Such benefits accrue in the form of tax credits, carry forward and set-off of losses,[49] foreign exchange arbitrage gains, etc.[50] Tax efficiency in M&As is another tangible form of financial synergy.[51] However, these synergies are unrelated to the cost of capital improvements and

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37 J. Ali-Yrkkö, "Mergers and Acquisitions: Reason and Results", Discussion Papers No. 792, The Research Institute of the Finnish Economy, (Sept. 20, 2020), <https://www.econstor.eu/bitstream/10419/63797/1/344861414.pdf>.

38 Bernd Wubben, *German Mergers & Acquisitions in the USA: Transaction Management and Success* (Deutscher Universitätsverlag, 1st edn. 2007).

39 Lev, *Supra* note 33 at 607.

40 Erel, *Supra* note 24 at 4-5.

41 F. Trautwein, "Merger Motives and Merger Prescriptions", 11(4) SMJ 294 (1990).

42 Benston and J. George, "Economies of Scale of Financial Institutions", 4(2) JOMCB 312, 339 (1972).

43 The Sick Industrial Companies (Special Provisions) Act, 1985.

44 R.K. Srivastava, "The Role of Brand Equity on Mergers and Acquisition in the Pharmaceutical Industry: When do Firms Learn from their Merger and Acquisition Experience?" 5(3) EP 266, 282 (2012).

45 Alexander Roberts et al., *Mergers and Acquisitions* (Pearson Education, 1st edn., 2003).

46 Erel, *Supra* note 24 at 4-5.

47 *Ibid*.

48 Merle M. Erickson and Shiing-wu Wang, "Tax Benefits as a Source of Merger Premiums in Acquisitions of Private Corporations", 82(2) TAR 359, 382 (2007).

49 The Income Tax Act, No. 43, Acts of Parliament, 1961.

50 R.G. Hansen, "A Theory for the Choice of Exchange Medium in Mergers and Acquisitions", 60(1) TJOB 75, 90 (1987).

51 Hayn, *Supra* note 11 at 152.

other tax benefits.[52] One of the main benefits is that profits, or tax losses, may be transferred within the combined company to benefit from the differential tax regimes.[53]

Moreover, the merged company's net operating losses may be used to shelter the income of the more profitable company before the merger.[54] Thus, often, profit-making firms acquire firms making losses for this purpose.[55] After the economic liberalization, it is noticed that the largest share of Foreign Direct Investments (FDIs) takes the shape of cross-border M&As because the low-cost firms find it profitable to merge with high-cost firms since the monetary union would enhance the competition of goods across countries through a reduction in trade cost, the elimination of exchange rate risk, and improved price transparency.[56]

The general benefit of cross-border M & A activities tends to be a re-organization of industrial assets and production structures globally. This re-organization can lead to greater overall efficiency without necessarily significantly higher production capacity.[57] The economic benefits for the host countries (compared to Greenfield investments) in cross-border M&As are Capital accumulation, Employment creation, Technology transfer, Competition, and Efficiency gains.[58]

IV. LEGAL & POLICY REGIME FOR CONTROL OF CROSS-BORDER MERGERS AND ACQUISITIONS: A COMPARATIVE ANALYSIS

Most countries in the world continued with an upward trend of actively attracting FDI in 2017 compared to 2016. However, the overall percentage of restrictive or regulatory investment policy measures has risen dramatically in recent months, and some countries have become more averse to foreign takeovers. Additional ways and means to strengthen investment screening

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52 S. Lebedev, "Mergers and Acquisitions in and out of Emerging Economies", 50 JOWB 651, 659-660 (2015).

53 Duncan Angwin, *In Search of Growth: Choosing Between Organic, M&A, and Strategic Alliance Strategies* (Bloomsbury Press, 1st edn., 2014).

54 "Mergers and Acquisitions: The Evolving Indian Landscape", PWC, <https://www.pwc.in/assets/pdfs/trs/mergers-and-acquisitions-tax/mergers-and-acquisitions-the-evolving-indian landscape.pdf>.

55 *Ibid*.

56 Nicolas Coeurdacier, "Cross-Border Mergers and Acquisitions and European Integration", 24(57) EP 55, 56-58 (2009).

57 Teresa Curristine, "Improving Public Sector Efficiency: Challenges and Opportunities", 7(1) OECD JOB 6, 9 (2007).

58 S. Johansson and N. Kang, "Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalisation", (Sept. 10, 2020) <https://doi.org/10.1787/137157251088>.

mechanisms are under consideration, particularly in some developed countries. According to UNCTAD's estimates, 65 economies adopted 126 policy measures related to foreign investment in 2017, the highest number of countries over the past decade, and the highest number of policy changes. Out of 126 investment policy measures, 93 liberalized, promoted, or facilitated investment, while 18 introduced restrictions or regulations. The share of relaxing FDI norms and promotion among all actions climbed to 84%, a five-percentage point increase compared with 2016. New restrictions or regulations for foreign investors were mainly based on national security considerations, foreign ownership of land and natural resources, and local producer's competitiveness.

Australia: The history of merger law in Australia has been brief but eventful. The first federal merger law was the statutory scheme focusing on § 50 of the Trade Practices Act, 1974, which came into operation in October of that year.[59] By 1977, it had already undergone two sets of amendments, one of which made fundamental changes to both substance and procedure. However, until 1978, the Trade Practices Commission had not come close to launching any proceedings for breach of the section. In its present amended form, it is seen by some as pitifully ineffectual, and by others as menacingly intense, prohibits any direct or indirect acquisition of shares or assets if the acquisition would have the effect of, or be likely to affect, substantially lessening competition in a market in Australia. The ACCC is the primary market regulator for M&As in Australia. The ACCC is responsible for maintaining market competitiveness in Australia. The ACCC may apply to the honorable Federal Court for granting a divestiture order. The ACCC may also investigate or seek a court order imposing a fine on transactions which affect, or is likely to affect, substantially lessening competition. While assessing a transaction, the ACCC can use its wide-ranging necessary information gathering powers to obtain the information and market data that it deems necessary to assess that transaction's competitive effects in Australia.

Such sweeping regulatory powers vested in ACCC have resulted in Australia's trade practice to seek informal clearance from the ACCC, where a proposed merger could potentially create competition issues in Australia. In its 2008 Merger Guidelines (updated in November 2017), the ACCC lays down the guidelines when the merger parties should seek clearance. It encourages merger parties to make advance notice of a proposed merger where the merged entity upon merger shall have a market share of 20% or more in the relevant market. The ACCC may investigate transactions, even if the merger parties do not seek informal clearance. In circumstances of heightened risk, the ACCC may commence suo moto investigations. The merger parties are required under law to inform the Foreign Investment Review Board (FIRB) under the Foreign

[59] R. Patterson, Australia – The Merger Control Review – Edition 9, (Sept. 21, 2020) <https://thelawreviews.co.uk/edition/the-merger-control-review-edition-9/1172897/australia>.

Acquisitions and Takeovers Act or, in cross-border merger cases, where the proposed merger raises competition concerns in other jurisdictions, mainly where it is subject to a second phase investigation in the European Union or the United States.

The ACCC has recently investigated several closed transactions. In 2016 the ACCC accepted legally enforceable undertakings from Primary Health Care and Healthscope concerning Primary's acquisition of Healthscope's pathology assets in Queensland, completed in 2015 without ACCC clearance.[60] The parties undertook to divest assets to a third party, unwinding the effects of the merger. Separately, in March 2018, it obtained a hold separate undertaking from Qube Logistics while the ACCC reviewed its completed acquisition of Maritime Container Services Pty Ltd.[61] The Australian Foreign Acquisitions and Takeovers Act, 1975 (Cth) (FATA) and its subsidiary regulations administered by the Foreign Investment Review Board (FIRB) deal with the regulation of foreign investments by persons in Australian companies and assets.[62]

New Zealand: The Commerce Act, 1986, regulates M&A activity in New Zealand. The merger control provision prohibits acquisitions of business assets or shares that may affect the already lessening competition in a New Zealand market. The New Zealand Commerce Commission (NZCC) is an independent body of the Crown. It is vested with the power to administer the workability of the Act and look into the applications for the clearance of proposed mergers. The NZCC may approve a proposed acquisition if it is satisfied the purchase will not affect the competition in the market. However, if the applicant can convince the NZCC that the public benefit of the merger outweighs the potential risk to the competition in the market, then permission may be granted. The merger clearance and authorization regime are voluntary. There are no compulsory notification thresholds. Section 47(1) of the Act, the merger control provision, discourages a person from acquiring a business assets if there is a potential risk to the market competition. The NZCC has statutory powers to grant or decline the merger applications for clearance. It can even initiate court proceedings for breaches of the merger control provision. Additionally, in the merger and acquisitions guidelines of July 2013.

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[60] "Primary Health Care Limited – Acquisition of Pathology Assets Previously Operated by Healthscope in Queensland", Australian Competition and Consumer Commission, (Sept. 21, 2020), <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/primary-health-care-limited-acquisition-of-pathology-assets-previously-operated-by-healthscope-in-queensland>.

[61] "Qube Logistics – completed the acquisition of Maritime Container Services Pty Ltd.", Australian Competition and Consumer Commission, (Sept. 5, 2020), <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/qube-logistics-completed-acquisition-of-maritime-container-services-pty-ltd>.

[62] J. Schembri, "Australia: The Acquisition and Leveraged Finance Review - Edition 5", (Sept. 25, 2020), <https://thelawreviews.co.uk/edition/the-acquisition-and-leveraged-finance-review-edition-5/1177153/australia>.

Section 4(3) of the Act, which dealt with the acquisitions made outside New Zealand that may reduce competition in the New Zealand market, was recently amended with the new Section 47-A. Under this section, the NZCC may apply to the High Court for a declaration regarding an overseas person's acquisition. The High Court might make a declaration if it satisfied that–

(*i*) The acquisition has or might hurt the market competition of New Zealand; and (*ii*) If the foreign person has acquired a controlling interest in a New Zealand, body corporate through an acquisition outside New Zealand.

All applications to the High Court must be made within 12 months from the date of the acquisition. However, any declaration made in respect of acquisitions that have already received clearance or authorization by the NZCC will not be entertained. In giving a declaration, the Court has the discretion to make further orders requiring any New Zealand body corporate in which the overseas person has a controlling interest. The court may cease the business in the New Zealand market, or make an order to dispose of the shares or other assets or take any other action that it considers consistent with the purpose of the Act.

The Overseas Investment Act, 2005 (OIA) applies to all acquisitions where–

(*i*) The acquisition is by an overseas person. (*ii*) Where there is 25% or more direct or indirect ownership or controlling assets in the business assets, which is sensitive to land or fishing quota. In such a case, under the OIA, consent must be obtained from the Overseas Investment Office for qualifying transactions. Under the OIA, an overseas person means such an individual who is not a New Zealand citizen; neither does he ordinarily reside in New Zealand. It shall also include a trust, partnership, or body corporate, where an overseas person(s) has/have 25% or more ownership or control; or in which an overseas person(s) holds 25% or more of any class of share; power to control the company's governing body; or voting rights. An acquisition of significant business assets' occurs when the total value of assets of the company, the price paid, or the total expenditure incurred exceeds NZ $100 million.[63] The merger control regime in New Zealand extends to joint ventures that buy shares or assets. Other purely contractual transactions engaged in by joint ventures are governed by the restrictive trade practices provisions of the same Act. Further, the same merger control provision applies to all industries.

[63] Patterson, *Supra* note 59.

India: In India, many laws affect and regulate cross-border mergers and acquisitions; chief among them are: (*i*) Companies Act, 2013;[64] (*ii*) SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 2011,[65] and the Amendment Act, 2017;[66] (*iii*) Competition Act, 2002;[67] (*iv*) Insolvency and Bankruptcy Code, 2016;[68] (*v*) Income Tax Act, 1961;[69] (*vi*) Transfer of Property Act, 1882;[70] (*vii*) Indian Stamp Act, 1899;[71] and (*viii*) Foreign Exchange Management Act, 1999 (FEMA);[72] and other allied laws as applicable based on the merger structure.

The legal provisions concerning mergers and acquisitions are covered under Sections 234 to 240 of the Companies Act, 2013.[73] Section 234 contains provisions for the cross-border mergers of Indian and foreign companies.[74] Further, Companies (Compromises, Arrangements and Amalgamations) Rules, 2016,[75] as amended by the Companies (Compromises, Arrangements, and Amalgamations) Amendment Rules, 2017 (Co. Rules)[76] were issued. It is worth taking note that after the incorporation of the 2017 Rules, a foreign company is allowed to merge with a company registered under the 2013 Companies Act or vice-versa only with the prior Reserve Bank of India approval. With the coming into effect of Sections 5 and 6 of the Competition Act 2002,[77] the Indian merger regulation regime became operational in 2011. The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011, and the Ministry of Corporate Affairs, issue guidelines to regulate the merger regime in India.

Under the merger control regime in India, a 'combination' (an acquisition, merger, or amalgamation) must be notified in advance and approved by the Competition Commission of India (CCI) if it is beyond the prescribed thresholds for assets and turnover or if it does not qualify for any exemptions under the provision. Advance notice to the CCI is a mandatory requirement, and such combinations are subject to a suspensory obligation. Whenever a combination causes or is likely to cause an appreciable adverse effect on competition within

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64 The Companies Act, No.18, Acts of Parliament, 2013.
65 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
66 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (as amended on March 6, 2017).
67 The Competition Act, No. 12, Acts of Parliament, 2002.
68 The Insolvency and Bankruptcy Code, No. 31, Acts of Parliament, 2016.
69 The Income Tax Act, No. 43, Acts of Parliament, 1961.
70 The Transfer of Property Act, No.4, Acts of Parliament, 1882.
71 The Indian Stamp Act, No. 2, Acts of Parliament, 1899.
72 The Foreign Exchange Management Act, No. 42, Acts of Parliament, 1999.
73 The Companies Act, No.18, Acts of Parliament, 2013.
74 *Id.*, S. 234.
75 Notification, Ministry of Corporate Affairs No. GSR 1134 (E) (December 2016).
76 Notification, Ministry of Corporate Affairs No. GSR 368 (E) (April 2017).
77 The Competition Act, No. of 112, Acts of Parliament, 2002.

India's relevant market, the combination will be void. Till 31 March 2018, the CCI had cleared 515 combinations, with a vast majority within the 30 working days Phase I period.

V. THE ROLE OF TAX AND TAX POLICIES IN HOST COUNTRIES IN ATTRACTING AND PROMOTING CROSS-BORDER M&AS

Studies, which have investigated the impact of corporation taxes on the location of mergers and acquisitions, lead to the twin possibilities that an acquisition may arise for efficiency reasons or strategic reasons. The tax rate prevalent in the host country has a positive or negative impact on the acquirer's probability of choosing a target in that country. The effect would generally be negative if the acquirer believed that it could generate higher income than the existing owners, subject to the host country tax rate. However, if the acquirer thought it could reduce costs in the target company, it would also reduce tax allowances. For a given rate of allowances, a higher tax rate would reduce the value of tax allowances these by more, and would, therefore, hurt the probability of the acquisition taking place in that country. Further, if the acquirer intended to close down the operations of the target to improve its market share, then the main effect of the host country tax would be to reduce the price, which the acquirer needs to pay for the target; in this case, as well, a higher tax rate would make an acquisition more likely.

Therefore, the impact of taxes is an empirical issue, and studies suggest that the host country tax rate generally hurts the probability of a company being acquired in the target country. This analogy is consistent with the empirical literature results on the effects of taxation on FDI flows. So, as far as the tax policy in India, Australia, and New Zealand are concerned, it can be said that they are pro cross-border M&As, and with specific tweaks and harmonization of tax policy, an optimally conducive environment for cross-border M&As can be provided for the corporate activity to flourish.[78]

VI. CONCLUSION AND SUGGESTIONS

The present wave of cross-border M&As, while involving a more comprehensive range of countries, is principally taking place in the APEC region. Cross-border M&As occur in all sectors, with some of the more significant mergers in the industrial sectors where adjustments to over capacity and reduced growth prospects are required urgently. Cross-border M&As appear in many high technology sectors to club resources and competencies to remain

[78] Wiji Arulampalam et al., "Taxes and the Location of Targets", 1168 WERPS 1, 30-31(2018).

innovative and competitive, particularly in the service sectors, because of regulatory reform, privatization, and liberalization of trade and investment regimes, can restructure more freely at both the international and national levels. Unlike past decades, these cross-border mergers are driven by consolidating capacities to benefit from scale economies fully and serve global markets. The core competencies and the full utilization of intangible assets are critical to the competitive strategies of multinational firms. These aims may be better achieved through cross-border M&As than any other type of restructuring scheme. Cross-border M&As is beneficial to both the home and host country where it can generate huge profits and yield dividends in terms of company performance as benefits. It leads to greater economic efficiency without undue market concentration. Cross-border M&As can play a role in revitalizing financially ailing firms, local economies and creating jobs through the corporate restructuring process, acquisition of technology, and productivity growth. Different countries have a different stand in their openness to cross-border M&As. Regulatory reform, privatization, and more equitable treatment of foreign firms in public procurement and other Government programs now signal a new openness, encouraging more international merger activity. The ongoing liberalization of foreign investment regimes indicates that a broader range of countries could realize benefits from cross-border M&As. The challenge for Governments is to have a proper mechanism and legal framework in place to attract foreign investment, including M&As, and to realize efficiency advantages and positive spillovers from the interconnections between domestic and international firms.

Transnational corporations are more footloose than ever, with concepts such as host and home countries becoming meaningless. The growing wave of cross-border M&A will demand greater cooperation among countries in framing some sectoral policies, which consider the ever-increasing international nature of firms. Because of these factors, the overall outlook for cross-border M&A activity in India, Australia, and New Zealand looks bright, and with a little harmonization and streamlining of their legal frameworks, especially favourable tax policies will be conducive to cross-border M&As.

NATIONALISM: A CURB TO FREEDOM OF SPEECH AND EXPRESSION?

—Rahul Kumar

Abstract — The wave of Nationalism carries a very popular and patriotic phrase – 'Do not think what the nation does for you but think what you can do for the nation.' It may look very patriotic, but is it democratic to realise or glorify this phrase? So, if it is realised, there will be no place for 'self-realisation' of the people. If the people ascertain that the nation is not doing anything productive for them or committing a wrong with them, the people will obviously raise their voice against it. But it may attract the charge of sedition or stigma of anti-national as the nation has all the means to do so. Then who is wrong, 'the People' or 'the Nation'? Indeed, the students of Jawaharlal Nehru University answered this question in a democratic way by organising an event called 'A country without Post Office'. But the students were framed as anti-national and charged under sedition because as already stated, the nation had all the means to do so.

The paper will analyse the constitutionality of sedition vis-à-vis freedom of speech and expression, the constitutionality of the event (A Country without Post Office) and finally the constitutionality of Nationalism. The paper will also attempt to regain a scope for dialogues between Nationalism and expression of dissent. The paper will keep the JNU sedition case as the main background apart from other constitutional and criminal jurisprudence and will try to examine how the Nationalism armed with sedition is a barrier to achieve the pure form of constitutional democracy in India.

I. INTRODUCTION

A. Defining Nationalism

Once, Martin Luther King, Jr. said that *'The hottest place in hell is reserved for those who remain neutral in times of great moral conflict'*.[1] But he might not have imagined that a condition like a hell may be imposed on someone who does not remain silent in a great moral conflict. Here, the author is talking about the great Indian moral conflict. The conflict which occurs due to unreasonable Nationalism and patriotism forced down into the throats of people. The expression Nationalism contains two terms, *Nation* and *Ism*. The latter term simply means an ideology. Whereas, the former term carries much importance in the present context. The following two questions necessarily need to be examined in order to derive a just definition of Nation. Firstly, does Nation mean only a particular geographical area or territory? Secondly, who and what makes a Nation? While defining Nation, aggregation of people should be given the most importance as they make the Nation for themselves. The essence of a nation is the self-realization of its people, while physical progress and protection of physical boundaries are parts of its existential dimension.[2] There should be a *jural society* too, but it must respect the rights of its people and its duties towards them.[3] Even the Preamble of the Indian Constitution *prima facie* emphasises on 'We The People'. Therefore, a Nation means a very little without its people. Hence, the definition of Nationalism is unjust and unreasonable without the people as they are an integral part of it.

B. Introducing the Conflicts between Freedom of Speech and Expression and Nationalism

The people of a Nation do not have mere animal existence. They enjoy at least some basic human rights to make their life meaningful. India as a democratic state provides those basic human rights as fundamental rights under the Constitution. One of the rights is Freedom of Speech and Expression under Article 19 (1) (a) of the Indian Constitution, which is under a threat nowadays.[4] One of the biggest threats is unreasonable Nationalism. Here, unreasonable Nationalism means the disproportionality between the right of free speech and duty to be patriotic or nationalist. It also includes the modern criteria of being a patriot which has been evolved with the time, which may force a person to chant '*Bharat Mata kee Jai'* to be a patriot. The people who cannot fulfil the

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1 Martin Luther King Jr., thinkexist.com, <http://thinkexist.com/quotation/the_hottest_place_in_hell_is_reserved_for_those/216415.html>.

2 Gopal Guru, *What the Nation Really Needs to Know the JNU Nationalism Lectures*, 9, (2016).

3 Nation, *Black's Law Dictionary*, <https://thelawdictionary.org/nation/>.

4 Indian Constitution, Art. 19, Cl. (1)(*a*).

criteria may be considered as anti-national.[5] Interestingly, freedom of speech does not impose such duty on the citizens. Freedom of speech and expression means the right to express one's convictions and opinions freely, by words of mouth, writing, printing, pictures or any other manner.[6] It must be noted here that it is nowhere mentioned that this right can be exercised only for praise-worthy opinions or convictions and not for criticism or demur. Indeed, the right includes both positive opinion and negative opinion. Freedom of speech should mean that it is unassailed even when the speech hurts. The state cannot prevent open expression of the opinions or views of its people, however hateful to its policies.[7] Nevertheless, if it is a very grave situation where the security, sovereignty of the state, public order, friendly relation with other states, decency, morality is under a threat or in a matter of contempt of court, defamation or incitement of offence, the state may impose reasonable restrictions on the rights of freedom of speech and expression.[8] Here, reasonableness should also be of restrictions and not only of law.[9] That means the restriction must be proportionate to the expected damages.

One of the burning and contemporary instances where the freedom of speech and expression is under a threat is JNU sedition case. The event called 'A Country without Post Office - Against the Judicial Killing of Afzal Guru and Maqbool Bhatt' organised by some Jawahar Lal Nehru University (hereinafter JNU) students at JNU campus on 9 February 2016 received both national and international attention because some students allegedly raised the so-called 'anti-national' slogans against the nation. It is noted that those slogans were held 'anti-national' by the government just because it was demurrable and not patriotic.[10] After around three years, Delhi Police filed 1200 pages charge sheet alleging sedition charges on some JNU students including Kanhaiya Kumar, Umar Khalid and Anirban Bhattacharya under section 124A and 120B of the Indian Penal Code (hereinafter IPC).[11]

In fact, section 124A of IPC itself has the history of being the enemy of freedom of speech and expression. Indeed, it is considered as draconian law

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5 Rekha Sharma, "Manufacturing A Controversy", The Indian Express, (May 17, 2016, 12.01 a.m.), <https://indianexpress.com/article/opinion/columns/bharat-mata-ki-jai-bharat-mata-ki-jai-controversy-rss-2804218/>.

6 *All India Anna Dravida Munnetra Kazhagam* v. *Thiru K. Govindan Kutty*, 1996 SCC OnLine AP 1047 : 1996 AIHC 4509.

7 Vol. IV, Durga Das Basu, *Commentary on the Constitution of India*, 3681, (9th edn. 2018).

8 Indian Constitution, Art. 19, Cl. (2).

9 *N.B. Khare* v. *State of Delhi*, AIR 1950 SC 211.

10 "JNU Protest Row: Will Not Spare those who Raise Anti-India Slogans, Rajnath Singh says", *The Times of India*, (Feb. 13, 2016, 7.00 p.m.), <https://timesofindia.indiatimes.com/india/JNU-protest-row-Will-not-spare-those-who-raise-anti-India-slogans-Rajnath-Singh-says/articleshow/50975823.cms>.

11 "JNU Sedition Case: Kanhaiya Kumar, Umar Khalid named in the Charge-Sheet", *The Indian Express* (Jan. 14, 2019, 7.35 p.m.), <https://indianexpress.com/article/cities/delhi/jnu-sedition-case-chargesheet-kanhaiya-kumar-umar-khalid-5537648/>.

which was brought into the IPC to suppress the voice of our great freedom fighters. Mahatma Gandhi, Lokmanya Tilak were some of them. Unfortunately, the law which was used to suppress the voice of freedom during British rule, today it is used as a weapon to force down the Nationalism in the throats of the people and suppress their original dissent. The provisions of sedition under IPC and its applicability on the JNU students will be discussed in detail in the following sections.

II. CONSTITUTIONAL SCRUTINY OF SEDITION

A. History of Sedition vis-à-vis Constituent Assembly Debate

In 1922 when Mahatma Gandhi was charged under section 124A for sedition, he stated that '*Section 124-A under, which I am happily charged, is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen.*'[12] Indeed, sedition punishes anyone to the extent of life imprisonment who *brings or attempt to bring into hatred or contempt or excite disaffection* towards, the government established by law in India.[13] The grounds given for sedition are too vague and provide discretionary power to the government. Therefore, there is always a high possibility that the government will arbitrarily use this vagueness to suppress the dissent of its own people. However, In *Empress* v. *Jogendra Chunder Bose,* Petheram C.J. at the Calcutta High Court defined the term 'disaffection' as a feeling contrary to affection, in other words, dislike or hatred, which is again very vague. Similarly, 'hatred' is also a vague ground as it can include even the feeling of dislike and hate.[14] Therefore, the grounds given under sedition are too vague and gives discretionary or arbitrary power to the government.

Having a look upon the history of section 124A of IPC which talks about sedition reveals that the said section was not a part of India Penal Code drafted by Macaulay but inserted in 1870.[15] It was inserted in the IPC to deal with the voices of the Indian freedom fighters against British imperialism. Indeed, this section was used to suppress the voice of Indian people even on unreasonable grounds.[16] However, after independence, initially, sedition was included as a ground for restricting freedom of speech and expression under Article 19 (2) of the draft constitution. But, when the draft came for debate in the Constituent

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[12] Suhrith Parthasarathy, "Sedition and Government*", The Hindu*, (Feb. 16, 2016, 00.55 a.m.), <http://www.thehindu.com/opinion/lead/Sedition-and-the-government/article14082471.ece>.

[13] Indian Penal Code, 1860, § 124-A.

[14] Hatred, *Oxford Dictionary*, <https://en.oxforddictionaries.com/definition/hatred>.

[15] Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution*, 84, (2016).

[16] P.D.T. Achary, "Render Sedition Unconstitutional", The Hindu, (Oct. 14, 2015, 1.41 a.m.) <https://www.thehindu.com/opinion/lead/Render-sedition-unconstitutional/article10155199.ece#!>.

Assembly on 29th April 1947, it was trenchantly criticised by Somnath Lahiri. He warned presciently enough that sedition would be used to crush political dissent as it had been used in the colonial times. Consequently, sedition was withdrawn from the Constitution as a ground for imposing a restriction on the freedom of speech and expression.[17] Therefore, we do not need to separately analyse how sedition does not come under the reasonable restriction as the Constitutional Assembly very wisely performed this job. However, it was not the business of the Constituent Assembly to repeal legislation or part of the legislation (IPC). However, the Assembly did insert into Article 13 a proviso that rendered all existing colonial laws void that were inconsistent with the Constitution from the moment the Constitution came into force.[18] But unfortunately, the legislature has never been interested to remove sedition from the IPC yet.

B. Judicial Review of Sedition

However, the Indian Judiciary did scrutinise the provisions of sedition on constitutional yardstick. In 1950, when for the first time, the provisions of sedition were challenged on the yardstick of the Constitution in *Tara Singh Gopi Chand* v. *State,* it was tersely noted by the court that:

> *"India is now a sovereign democratic state. A government may go and be caused to go without the foundations of the state is impaired. A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about. The unsuccessful attempt to excite bad feelings is an offence within the ambit of section 124A. In some instances, at-least the unsuccessful attempt will not undermine or tend to overthrow the state. It is enough if one instance appears of the possible application of the section to curtailment of the freedom of speech and expression in a manner not permitted by the Constitution. The section then must be held to have become void."*[19]

This opinion of the court did direct that sedition is inappropriate in a democratic country. It may be unreasonably used by the government to suppress the dissent or opinion of its own people. Further, it was also noted by the court that provisions of sedition curtail freedom of speech and expression in a manner not permitted by the Constitution of India. Therefore, sedition was

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[17] Vol. III, Speech of Somnath Lahiri, Indian Constituent Assembly, 29 April 1947.
[18] Indian Constitution, Art. 13.
[19] *Tara Singh Gopi Chand* v. *State*, 1950 SCC OnLine P&H 113 : AIR 1951 P&H 27.

held to be *ultra vires* to the Constitution.[20] Subsequently, the Constitution First (Amendment) Act, inserted two terms of wide amplitude, namely, 'in the interest of' and 'public order' in the Article 19 (2) to nullify the effect of the *Gopi Chand Judgment*[21].

Nevertheless, in *Ram Nandan* v. *State of U.P.*, the Allahabad High Court held the section 124-A of IPC *ultra vires* of the Constitution as it imposes a restriction on freedom of speech and expression, not in the interest of general public and thereby infringed the fundamental right of freedom of speech and expression.[22] However, the Supreme Court of India rescued the section 124-A of IPC in *Kedar Nath* v. *State of Bihar,* on the reasoning that any law which is enacted *'in the interest of public order'* can be saved from the vice of constitutional invalidity.[23]

C. Contemporary Analysis of Sedition

Unfortunately, the public order perspective of the Supreme Court in *Kedar Nath*[24] led to the misuse of the provisions of sedition for suppressing the dissent of the people. The misuse of the section 124A can be understood from the data of National Crime Record Bureau (NCRB) which states that most of the people charged with sedition never face trial due to an incomplete investigation by police or lack of evidence against the accused. Furthermore, even if police file charge sheet in few cases and the accused faces trial, the conviction rate is minimal. Between 2014-2017, 112 cases of sedition were booked, and 165 persons were arrested, as per the data from NCRB.[25] So, the arrest rate is high, but conviction rate is low, which shows the amount of misuse of this particular provision of law. It should also be noted here that most of the persons accused of sedition are writers, journalists, cartoonists or activist who do not have any army or weapon to throw the government established by law.[26] They are made scapegoat just because they have a business and a right to express their views or opinions. But the story does not end even when an accused gets an acquittal. Indian judiciary is infamous for its delayed justice. In fact, the process itself is a punishment here. Till the time an accused gets an acquittal, he has already served some parts of his punishment. Therefore, it would not be wrong to quote here that 'justice delayed is justice denied'.

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[20] *Ibid*.

[21] The Constitution (First Amendment) Act, 1951.

[22] *Ram Nandan* v. *State of U.P.*, 1958 SCC OnLine All 117 : AIR 1959 All 101.

[23] *Kedar Nath Singh* v. *State of Bihar*, AIR 1962 SC 955.

[24] *Ibid*.

[25] State/UT-wise Cases Registered, CCS, Cases Pending Trail at the end of the Year 2016, CON, Persons Arrested, PCS, PCV under Sedition from 2014 to 2016 (From: Ministry of Home Affairs), data.govin, <https://data.gov.in/resources/stateut-wise-cases-registered-ccs-cases-pending-trail-end-year-2016-con-persons-arrested>.

[26] *Ibid*.

Furthermore, sedition comes under chapter six of IPC which talks about the offences against the state. If we look at the companions of sedition in the chapter, we find that they are the most serious offences in the IPC. Sedition is the only offence in the chapter six which punishes a speech, unlike others which punish an overt physical act. Here, attention should also be drawn to other sections of IPC which punish speeches. So, we find that sections 153A and 153B of IPC which deals with hate speech provisions gives punishment of maximum three years and five years respectively.[27] However, sedition in contrary gives punishment of life imprisonment.[28] This is quite unfortunate that in a democratic country where opinions or views ought to be appreciated, but on the contrary people are getting life imprisonment for their dissent. Hence, it is justified to say that offence like sedition draws an example of rule by law and not rule of law. Rule by law simply means rule by any law which is laid down by the supreme law-making authority. Whereas, rule of law connotes the rule of law which is based on certain principles of law. The basic concept of rule of law is to control the unlimited exercise of the power by the supreme law-making authority of the country. It is worth noting hare that the Indian Constitution follows principle of rule of law and not rule by law. Therefore, the provision of sedition does not pass the Constitutional scrutiny. Furthermore, the modern use of sedition law is to favour Nationalism and suppress the dissent of the people. JNU sedition case is one of the burning and unfortunate examples of it.

III. CONSTITUTIONAL VALIDITY OF THE EVENT 'A COUNTRY WITHOUT POST OFFICE'

A. Background of the JNU Event

Today, a wave of Hinduism is seen in India with several issues like Cow Vigilance, Ram temple at Ayodhya, Triple Talaq, Kashmir issue, and all coming forefront. These have created an unstable political environment in India. The issue of Dalits and such minority has also crept strongly. Not much time has passed since the shocking suicide of Rohith Vemula at the University of Hyderabad, raised the issue of the poor condition of Dalits in the country. Chaos within the country was blamed as 'Anti Dalits' which led to much dissatisfaction across the country. All these incidents some-where or other suggest a connection to the event.

Some students of the University organised an event named 'A Country without Post Office- against the judicial killing of Afzal Guru and Maqbool Bhatt' on 9th February 2016 to protest the controversial executions of Afzal Guru and Maqbool Bhatt and in support of the 'self-determination' of Kashmir. The

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[27] Indian Penal Code 1860, Ss. 153-A, 153-B.

[28] *Supra* note 23.

event was to show the protest through poetry, art, and music.[29] However, the right-wing student political wing of the University named Akhil Bharatiya Vidyarthi Parishad (hereinafter ABVP) started protesting against the event, which led to a clash between student groups. Later, it was alleged that some so-called 'anti-national' slogans were also raised during the protest which was later confirmed by the Central Forensic Science Laboratory (CFSL).[30] The slogans were:

> *Tum kitne Afzal maroge, har ghar se Afzal nikelega (How many Afzal's you will kill? There will be an Afzal from every home)*
>
> *Afzal ki hatya nahi sahenge (We will not tolerate the murder of Afzal)*
>
> *Kashmir kiajaadi tak, jung rahegi-jung rahegi (Until Kashmir gets freedom, the fight will continue)*
>
> *Kashmir mange ajaadi, hum lad kar lenge ajaadi (Kashmir wants freedom, we will get through the fight)*
>
> *India, Go Back*

Although, it is confirmed that ant-national slogans were raised during the protest, it is not confirmed who raised those slogans. There are several hypotheses associated with that. It is claimed that the videos were doctored upon which this hue and cry happened.[31] Further, it also claimed as per the internal investigation report of the University that the people who raised the so called anti-national slogans were not the students of the University but outsiders who left campus after the event. The organisers of the event distanced themselves from the so-called anti-national slogans.[32] However, the government which has the third largest army in the world got scared of the slogans raised by the few people inside a university campus and consequently imposed sedition charges

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[29] "JNU Row: What is the Outrage all About?" *The Hindu*, (Feb. 16, 2016, 17.41 IST), <https://www.thehindu.com/specials/in-depth/JNU-row-What-is-the-outrage-all-about/article14479799.ece#!>.

[30] Confirmed! Anti-national slogans were raised during pro-Afzal Guru event at JNU on February 9, zeenews.india.com, (May 17, 2016, 9.23 a.m.), <http://zeenews.india.com/news/india/confirmed-anti-national-slogans-were-raised-during-pro-afzal-guru-event-at-jnu-on-february-9_1885790.html>.

[31] Forensic Experts say Kanhaiya Video was Doctored, India Today, (Feb. 19, 2016, 00.06 IST), <https://www.indiatoday.in/india/delhi/story/forensic-experts-say-kanhaiya-video-was-doctored-309626-2016-02-19>.

[32] JNU Row: Outsiders Raised Controversial Slogans, says University Report, India Today, (Mar. 16, 2016, 11.07 am), <https://www.indiatoday.in/india/story/jnu-row-outsiders-raised-controversial-slogans-says-university-report-313473-2016-03-16>.

on some JNU students for raising such slogans without any concrete evidence. JNU Students' Union President Kanhaiya Kumar, Umar Khalid, and Anirban Bhattacharya were arrested by Delhi Police on the charges of sedition and criminal conspiracy under sections 124A and 120B of the IPC.

B. Criminality of the Event vis-à-vis Freedom of Speech and to Assemble

Since section 120B of IPC talks about the punishment for criminal conspiracy, it becomes necessary to take section 120A of IPC into consideration which defines criminal conspiracy. According to the section 120A of the Indian Penal Code, criminal conspiracy is-

> *"When two or more persons agree to do or cause to be done, an illegal act or an act which is not illegal by legal means, such an agreement is designated as a criminal conspiracy. Provide further, no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."*[33]

The definition of criminal conspiracy suggests that organising a cultural event to express the dissent should not invoke this offence. It must be noted that section 120A states that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy. An agreement to commit an offence is a *sine qua non* for criminal conspiracy, which was nowhere associated with the instant event. In fact, the agreement was to protest the Judicial killing of Afzal Guru and Maqbool Bhatt and in support of 'self-determination' of Kashmir through poetry, art, and music which is not an illegal act or legal act by illegal means. According to the university report, the provocative slogans were raised by the outsiders who left the campus after the event.[34]This report states that the students did not even raise those so-called anti-national slogans, however, they faced such a grievous charge of criminal conspiracy and sedition. Here, it can be said that there might be a conspiracy but not on the part of the JNU students but on the part of those outsiders whose mere objective was to derogate the University and its students. However, conspiracy by outsiders is a separate issue which is beyond the scope of this paper.

In *Mohd. Husain Umar Kochra* v. *K.S. Dalipsinghji*[35], the Supreme Court of India said that to constitute a conspiracy there must be a common design and common intention of all to work in furtherance of the common design. Here, it

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[33] Indian Penal Code, 1860, S. 120-A.
[34] *Supra* note 32.
[35] *Mohd. Husain Umar Kochra* v. *K.S. Dalipsinghji*, (1969) 3 SCC 429 : AIR 1970 SC 45.

must be noted that when the persons who raised the provocative slogans were outsiders and unknown to the students, the students could not have a common design which is essential for the commission of criminal conspiracy.[36] Here, common design means a common purpose. Therefore, in the absence of an agreement with a common design to commit an offence, the students cannot be held liable for criminal conspiracy.

The opinion of the Court in *Mogul S.S. Co.* v. *McGregor* deserves a mention here as it was observed by the court that:

> *"An agreement which is immoral or against public policy, or otherwise of such a character that the court will not enforce it, is not necessarily a conspiracy, an agreement, to be a conspiracy, must be to do that which is contrary to or forbidden by law, as to violate a legal right or make use of unlawful methods, such as fraud or violence, or to do what is criminal."*[37]

So, even if an agreement is immoral which means against the public morality, or against public policy which means against the welfare of the public, cannot be necessarily said to be a case of criminal conspiracy. But the event in the instant case was neither immoral as it could not hurt the public morality, nor against the public policy as it was not against the welfare of the public. The event did not even violate any law or used any unlawful method. So, it cannot be said to be contrary to or forbidden by law. Therefore, it cannot be even alleged for a case of criminal conspiracy, leave alone the conviction.

Furthermore, the Constitution of India itself provides its people the rights to express their opinion either solely or in a group under the right to free speech and expression and to assemble peacefully without arms under Articles 19 (1) (a) and (b) respectively.[38] In the instant matter, it is an undisputed fact that the students assembled inside the campus peacefully and without arms. Therefore, they do have the protection under the said provisions of the Indian Constitution.

Now, coming to the charge of sedition which was invoked against the JNU students. Apart from the unconstitutionality of sedition already discussed above, the JNU students cannot be charged with even the existing jurisprudence of sedition. The attention must be drawn to the case of *Kedar Nath Singh* v. *State of Bihar* where the Supreme Court of India held that mere expression of disaffection or disloyalty against the government will not amount

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[36] Fakhruddin v. State of M.P., AIR 1967 SC 1326.
[37] *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.*, 1892 AC 25.
[38] Indian Constitution, Art. 19.

to sedition. The court limited the application of the section to only those acts which have 'tendency to public disorder by the use of actual violence or incitement to violence'. Further, the Judgment authored by B.P. Sinha opined that:

> *"If we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2) of the Constitution of India."*[39]

Although the Court did not hold sedition *ultra vires* of the Constitution, it did limit the application of sedition on some reasonable grounds. Those grounds are 'public disorder' or 'actual violence' or 'incitement to violence'. So now the question is whether the students of JNU have fulfilled these grounds to invoke sedition? It must again be noted that the said event was organised to protest through poetry, art, and music which were not even close to 'public disorder' or 'disturbance' or 'violence'. As per the charge sheet filed by Delhi Police the foundation of a charge of sedition under Section 124A of the IPC against the students is the allegation that they raised 'anti-national' slogans. But the police do not have any concrete evidence that the students who have been named as accused have done any overt violent act. Nor do they have any evidence that the alleged sloganeering led to any disruption of public order or violence.[40] Therefore, it is not just to say that the event fulfils the grounds of sedition laid down in *Kedar Nath*.[41]

The grounds laid down in *Kedar Nath Singh*[42] got the concrete application in *Balwant Singh* v. *State of Punjab* where the appellants raised pro Khalistan slogans (Khalistan Zindabad) but did not do anything further. The court observed that:

> *"It appears to us that the raising some slogan only a couple of times by the two lonesome appellants, which neither evoked any response nor any reaction from anyone in the public can neither attract the provisions of Section 124A or*

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[39] *Supra* note 23.

[40] Manu Sebastian, "JNU Sedition Row: Why Charges Against Kanhaiya And Others Will Not Stand?", LIVELAW.IN, (Jan. 17, 2019, 9.00 a.m.), <https://www.livelaw.in/columns/jnu-sedition-case-why-sedition-charges-against-kanhaiya-kumar-and-others-are-unsustainable-142183>.

[41] *Supra* note 23.

[42] *Ibid*.

> *Section 153A of the IPC. Some more overt act was required to bring home the charge to the two appellants.'*[43]

The court acquitted the appellant while noting down its two discoveries in the case. The followings are the two discovered grounds of the Supreme Court in a sedition case:

1. the act of raising slogans should be accompanied by some overt act;
2. the act should evoke some response or reaction from others.[44]

It is clear from the charge sheet filed by the Delhi Police against the JNU students that there was neither an overt act on the part the students nor they evoke any kind of response or reaction from others.[45] Therefore, in the instant matter, the students do not fulfil the grounds laid down by the Supreme Court of India, to be held liable under the charge of sedition.

Recently, in the landmark case of *Shreya Singhal* v. *Union of India*[46] *where it was stated by the court that there are three basic concepts which are fundamental in understanding the right to free speech and expression. The first one is 'discussion'*, the second one is '*advocacy*' and the third one is '*incitement*.' Mere discussion or even advocacy of particular cause howsoever unpopular is at the heart of Article 19 1 (a) of the Constitution. It is only when such discussion or advocacy reaches the level of incitement that Article 19 (2) of the Constitution kicks in. These three concepts keep much relevance here in the present case as the event was held to have a discussion upon the issue of the execution of Afzal Guru and Maqbool Bhatt and advocacy for 'self-determination' of Kashmir and not for inciting people to apprehend the government.[47] Indeed, neither discussion nor advocacy is justified as incitement. After allegedly raising anti-national slogans by the students, no incident of any kind of violence or disturbance reported there within the campus, but the campus remained peaceful.[48] Therefore, it cannot be said to be a case of sedition.

C. Application of Reasonable Restrictions

Even if the state would have tried to justify its actions under the reasonable restrictions provided under Article 19 (2) of the Constitution of India, it would not succeed as the grounds mentioned under clause 2 of Article 19 majorly deal with a grave circumstance where the sovereignty, security, friendly relation of the state or public order is under a threat. The said clause also include

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[43] *Balwant Singh* v. *State of Punjab*, (1995) 3 SCC 214 : AIR 1995 SC 1785.
[44] *Ibid*.
[45] *Supra* note 40.
[46] *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1.
[47] *Supra* note 29.
[48] *Ibid*.

decency, or morality or in relation to contempt of court, defamation or incitement to an offence.[49] As already discussed, the event did not create a grave circumstance to fulfil the grounds mentioned under the said article rather it was held peacefully.[50] Since there was no violence during or after the event, there was no question of threat to the sovereignty, security, integrity and friendly relation with foreign states. Particularly, talking about 'Sovereignty and Integrity of India' which was added by the Sixteenth Amendment of the Constitution of India with the intention to guard the freedom of speech and expression being used to assail the territorial integrity and sovereignty of the Union.[51] In fact, it restricts freedom of speech and expression which preaches the secession of any part of India from the Union.[52] But the instant event had nothing to do with the secession of any part of India. Therefore, this ground was not invoked. Whereas, expression 'Security of the State' refers to serious aggravated forms of public disorder and not ordinary law and order problem and public safety. In fact, security of the state is endangered by crimes of violence intended to over-through the government.[53] But as already established above, there was neither violence associated with the event nor it led to public disorder nor harmed the public safety. The event was surely not held to overthrow the government. Therefore, the ground of 'Security of State' is not invoked by the JNU students.

The ground of Friendly Relation with Foreign States is not relevant ground in the present matter as the event did not deal in it. Now coming to the expression 'public order' which might be relevant in the matter. The Supreme Court of India in *Ramesh Thapar* v. *State of Madras* did an elaborated analysis of the concept of 'public order' and observed that it signifies that the state of tranquillity which prevails among the members of political society as a result of the internal regulations enforced by the government which they have established. The court further opined that before an act is held to be prejudicial to public order, it must, therefore, be shown that it is likely to affect the public at large.[54] Here, the key word was 'state of tranquillity' which must be affected to invoke the ground of 'public order'. The event or the slogans did not anyway affect the 'State of Tranquillity' as the event was peacefully organised.[55] Therefore, the ground of 'public order' is also not invoked to put a restriction on the event. Whereas, the grounds of contempt of court and defamation are not relevant as their provisions are not suitable here. Finally coming to the

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[49] Indian Constitution, Art. 19, Cl. (2).

[50] *Supra* note 29.

[51] The Constitution (Sixteenth Amendment) Act, 1963, india.gov.in, <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-sixteenth-amendment-act-1963>.

[52] Vol. IV, Durga Das Basu, *Commentary on the Constitution of India*, 3749, (9th edn., 2015).

[53] *Santokh Singh* v. *Delhi Admn*., (1973) 1 SCC 659 : AIR 1973 SC1091.

[54] *Romesh Thappar* v. *State of Madras*, AIR1950 SC 124.

[55] Heena Kausar, "This day, that year: Delhi's JNU Quiet, Bears no Trace of 'Anti-national' Tumult", Hindustan Times, (Feb, 9, 2017, 11.31 p.m.).

grounds of decency and morality which are interpreted as same as lack of obscenity.[56] But obscenity has nothing to do with the instant event. Therefore, it cannot be a ground for restrictions. Hence, even if the government wants to put a restriction on the event on the grounds provided by Article 19 (2) of the Constitution of India, the government cannot justify those grounds against the students' right to freedom of speech and expression.

Hence, both the jurisprudence of constitutional law and criminal law reiterate only one thing that unless or until there is violence or public disorder follows expression of dissent, it does not amount to sedition. Therefore, it is unjust and unfair to even allege the students for the charge of sedition.

IV. CONSTITUTIONAL VALIDITY OF NATIONALISM VIS-À-VIS DEMOCRACY

The journey till now suggests that the JNU sedition case is a better example of unreasonable Nationalism rather than pure sedition. Though, the Constitution imposes some fundamental duties on every citizen towards the nation under Article 51A, which aim to establish patriotism in their hearts for the nation.[57] However, the fundamental duties are always read with the fundamental rights of the people. Therefore, if the Constitution is allowing its citizens to exercise their right of free speech and expression to even criticise the government and its policies under Article 19 (1) (a), the fundamental duties cannot unreasonably take those fundamental rights from the citizens. For instance, if proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It is not right to say that disrespect is shown by not joining the singing.[58] Similarly, if it is patriotic to chant *'Bharat Mata Kee Jai'*, it will not right to say that not chanting *'Bharat Mata Kee Jai'* will be anti-national. It broadly means, if praising the government is patriotism or Nationalism, criticising the government must not be anti-national.

Even the Preamble of The Constitution of India reads as - *We the people of India… to secure all its citizens… Justice, Liberty, Equality, and fraternity*....[59] These words hold very vast application. But briefly, we can say that Liberalism ensures- liberty of thoughts, expression, belief, faith, and worship. Justice ensures social, political and economic justice. Equality ensures equality of status and opportunity whereas Fraternity ensures the dignity of the individuals and the unity and integrity of the nation.[60] These objectives are the very fun-

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[56] *Ranjit D. Udeshi* v. *State of Maharashtra*, AIR 1965 SC 881.
[57] Indian Constitution, Art. 51-A.
[58] *Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615 : AIR 1987 SC 748, 752.
[59] Indian Constitution, Preamble.
[60] *Ibid*.

damentals of the Constitution. Unless these objectives are achieved we cannot imagine an ideal constitutional democracy for India.

However, today, the nation is witnessing the wave contrary to the constitutional democracy. Unfortunately, not expressly praising the nation is being considered as 'anti-national'. Whereas, criticising the nation is considered as more 'anti-national'. As discussed already, JNU sedition case is one of the burning examples of such wave. Since the students criticised the execution of Afzal Guru and Maqbool Bhatt and government's policies against the self-determination of Kashmir, they were considered as anti-nationals.[61] If those students are anti-national then what do we call terrorists who are also 'anti-nationals'? How will we distinguish between these two types of 'anti-nationals'? Indeed, it is unjust and unreasonable to keep the students in such list where only terrorists deserve to be kept.

Now the question arises whether Nationalism *per se* is undemocratic or unconstitutional? The author would say 'No', Nationalism *per se* is not undemocratic or unconstitutional. Only unreasonable Nationalism is unconstitutional or undemocratic. As already discussed earlier, when Article 51A of the Constitution imposes certain fundamental duties which must be read with the fundamental rights, on its citizens towards the nation, it is an example of reasonable Nationalism.[62] But, when these duties start overcoming the fundamental rights of the citizens without providing any reasonable justification, it becomes an unreasonable Nationalism. Mandating the play of the National Anthem in the cinema halls was one of the examples of the unreasonable Nationalism.[63] Though, this was corrected as optional by the Supreme Court later.[64]

Here, it is very important to distinguish between reasonable and unreasonable Nationalism as the latter may lead to racism. In fact, the world has already witnessed it through Hitler and Mussolini. If Adolf Hitler were not there, the second world war might not have occurred. It was the Nationalism which led to the destruction of the world in the world wars. Similarly, Mussolini weaponised Nationalism to promote 'militarism' in Italy, which gave destructive consequences later.[65] Therefore, we can see how Nationalism can kill democracy. The suppression of the JNU event in the name of Nationalism gives a

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61 *Supra* note 29.

62 *Supra* note 56.

63 Krishnadas Rajagopal, "SC makes National Anthem Mandatory in Cinema Halls", *The Hindu*, (Dec. 1, 2016, 4.21 a.m.), <https://www.thehindu.com/todays-paper/SC-makes-national-anthem-mandatory-in-cinema-halls/article16733599.ece#!>.

64 Samanwaya Rautray, "National Anthem not Mandatory in Cinema Halls: SC", *Economic Times*, (Jan. 10, 2018, 4.13 a.m.), < https://economictimes.indiatimes.com/news/politics-and-nation/national-anthem-controversy-a-brief-background/articleshow/62426770.cms>.

65 Mussolini's Use of Militarism and Nationalism on the Italian People, weebly.com, <https://benitmussolini.weebly.com/militarism-and-Nationalism.html>.

glance of the modern version of Hitler and Mussolini era. Thus, people should always think critically about Nationalism, then only they can recognise and accept reasonable Nationalism and reject the unreasonable Nationalism.

V. CONCLUSION

> '*If a nation is creating a void, an emptiness in your life, what kind of nation I am living in?*'[66]

The freedom of speech and expression is the lifeline of any democracy, and stifling, suffocating or gagging this would sound a death knell to the democracy and usher in autocracy and dictatorship.[67] The author believes that the freedom of speech and expression only makes sense if people think about freedom before, freedom during and freedom after speech. But sedition imposes absolute restrictions on all of them. Therefore, now this is the high time to rescue the freedom of speech and expression from the trap of sedition. Further, people should believe in a deliberative, dialogical process of governance rather than the didactic which is based on preaching emotional narratives of Nationalism which ultimately leads to an unreasonable Nationalism. The democratic form of government itself demands its citizens' active and intelligent participation through public discussion.[68] Therefore, unreasonable Nationalism is a threat to the democratic structure of our country hence it should be cured as soon as possible. Therefore, the event, 'A Country without Post Office' was justified both on the parameters of the Constitution and democracy. It would be just to rest this paper with Voltaire's famous words that *'I may not agree with what you say, but I shall defend to death your right to say so'.*

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[66] Rohit Vemula (Part of his Poem).

[67] *LIC* v. *Manubhai D. Shah*, (1992) 3 SCC 637 : AIR 1993 SC 171.

[68] *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) 2 SCC 574.

SCOPE OF ARBITRATION IN FAMILY LAW: ANALYSIS IN LIGHT OF DEVELOPMENTS IN FOREIGN JURISDICTION AND JURISPRUDENCE

—Alex K. Koshy

Abstract — Overburdening and lengthy resolution of disputes have always been a concern in the judicial machinery. As of late alternative methods to litigation have been introduced to reduce the work load on the judiciary. This paper examines the scope of arbitration in the context of family law to alleviate the stress on the family courts. This paper analyses the how foreign jurisdictions have interpreted and applied arbitration to family law while keeps checks on public policy considerations. Furthermore, this paper examines the Indian law regarding arbitration and family matters to establish that there exists a foundation upon which arbitration in family law can flourish. After establishing the scope for growth, North Carolina's family law arbitration statute is examined for India to draw inspiration from and to formulate a draft regulation for arbitration in family law. Arbitration in family law holds a lot of potential but the fact remains that there is a substantial amount of work that must be undertaken. Arbitration applicable to family is also slightly different in principle from that usually applied to International Commercial Arbitration. This is mostly just subjecting arbitration to certain fundamental public policy considerations.

I. INTRODUCTION

Jurisdictions historically have been reluctant to allow arbitration of family law disputes mostly based on concerns of arbitrability of family law matters. Arbitrability of any subject matter is subject to the public policy of the state, which forms the substantive law regarding arbitrability. The huge backload

of cases in family law courts and the tendency to retain family law disputes in the private domain have made jurisdictions look into alternative forms of dispute resolution and with these, attitudes towards arbitration in family law has become increasingly more receptive. Some jurisdictions have simply limited the scope of arbitration to just the financial aspects of the family matter, others have even allowed arbitration in child custody matters. However, the general approach taken by most jurisdictions to address key public policy considerations remain the same. This is done by restricting the unfettered freedom which is seen in commercial law arbitration in generally. Enhanced protections are granted to vulnerable to parties in family law arbitration, and this is either done with the help of case law jurisprudence and enactment of substantive statutory law.

II. RESEARCH QUESTIONS

The questions which the paper wishes are these :

a. What is the response of jurisdictions around the world to arbitration in family law

b. How have jurisdictions who have adopted arbitration, solved the question of arbitrability?

c. What is the position in India regarding arbitrability of family law matters and is there a model legislation upon which India can draft a regulatory framework.

These questions have been broadly addressed in two themes, *First* the analysis of general law of arbitrability both in the international context and the Indian context and *Second,* formation of a regulatory framework for family law arbitration in India drawing inspiration from international jurisdictions.

Part III will address concerns of general law of arbitrability with regard to any subject matter and the evolution of the same. It will also establish that foreign jurisdictions have progressed in their application of extended arbitrability but that in India there is sufficient foundation for the arbitration in family law to flourish but certain changes with regard to public policy considerations could be made. Part IV will examine a model family law arbitration legislation and from which India can draft a regulatory framework on its own.

Before getting into the substantive part of the paper I would like to state that the aim of the paper is not to propose arbitration as a panacea or elixir to the problems in family disputes but rather to propose an alternative to the current system and to invigorate a healthy discussion regarding alternative methods of dispute resolution in the field of family law. The citation style that will be followed will be the 1st edition of Nujs Law review citation standard.

III. ARBITRABILITY

The question of arbitrability of a particular matter has always been a problematic one. The general idea of arbitrability revolves around the public policy considerations. In this part of the paper we first look at arbitrability from an international perspective before examining the arbitrability of family law matters in the perspective of Indian law. This comparison is to highlight the flaws of the international systems and to ascertain whether the same has percolated into the Indian system and if that is the case, to suggest remedial measures.

A. International Perspective of arbitrability of family law

i. Problems Posed By Applicable Substantive law

Jurisdictions around the world refer to arbitration in the broader, more general sense but there has been a tendency to exclude family law matters from them due to some incorrect perceptions of its inclusion being against public policy.[1] This perception among general public has been increasingly challenged and is being subject to change.

The most common obstacle to applying arbitration to family law remains the framing of the substantive law regarding arbitration itself. If the applicable law relating to arbitrability is left vague or open to varied forms of interpretation, it leads to the reduction of efficacy of the arbitration process in general. An example of such an instance would be the Article 1814 of the Code of Civil procedure of Spain.[2] The article mandates that no compromise(out of the court settlement) would be allowed in relation to matrimonial issues. The question is what is included in the ambit of the matrimonial issues. Scholars have argued that the application (interpretation) of this provision simply precludes judicial pronouncements like annulment or divorce from arbitration proceedings and that there is no bar in subjecting matters like property disputes between spouses to arbitration.[3] However, there is disagreement between scholars regarding this interpretation, but the former proposition has been mostly upheld.[4] Vagueness of applicable law will lead to more challenges regarding arbitrability of particular subject matter which may in the broad ambit of family matter (the inclusion of the very subject matter in the ambit may even be challenged) and this is detrimental to the very institution of arbitration since

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1 L.F. Wolfson, *Family Law Arbitration in Canada in Federation of Law Societies*, National Family Law Program, Victoria, British Columbia (2010).

2 The Civil Code of Spain, 1889.

3 M. Boyd, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion, Toronto: Ministry of the Attorney General, Ontario (2004).

4 D. Hodson, Arbitration in International Family Law: The English Experience, the Worldwide Perspective and the International Opportunities, World Congress on Family Law and Children's Rights (2013)

these challenges would end up taking away much of the advantages conferred by the system of arbitration, thus bringing down its overall efficacy.[5]

Progressive jurisdictions keen on accommodating arbitration have amended certain portions of substantive law to clarify what matters would be subject to arbitration. Germany is one such example. Back in 1998, while integrating arbitration into its judicial system, Germany amended Article 1030 of the ZPO (This article is a general provision concerning arbitrability of a number of subject matters).[6]The aim of the amendment was to clarify the position of law regarding patrimonial and non-patrimonial family disputes and its arbitrability (arbitration was allowed in cases of patrimonial cases).[7] Policy considerations still remain relevant and interpretation of Article 1030 ZPO (which governs objective arbitrability of a particular subject matter) still requires a case by case analysis, but this has been argued to be as an ideal position of law relating to arbitrability[8] (since even arbitrators are allowed to apply laws related to arbitrability on a particular subject matter and a objective law would go a long way to uniform arbitration of cases).[9]

ii. Public Policy Considerations

The most potent argument in forwarding an argument advancing arbitration is the huge logjam that is caused in the judicial system due to the sheer number of cases. So, a common argument that is advanced by the proponents of arbitration[10] is that it is in the best interest of the state itself to bring out arbitration framework while balancing them out with public policy considerations. This essentially means that arbitration in family law should not be given the same freedom as can be seen in commercial aspects.[11] It must be noted that State does have a substantial interest in family law matters especially with respect to ascertaining legal clarity and protecting the weaker parties involved in the process.[12]It this the same reason why certain countries do not allow arbitration in matters of child custody,[13] and there are even countries family law arbitration is governed by a specific statute (Australia, where it is governed by Family Law Act, 1975 and it is expressly limited to matters of property,

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5 *Ibid*.

6 Zivilprozessordnung , 1877 (German Code of Civil Procedure).

7 Wendy Kennett, "It's Arbitration, But Not As We Know It: Reflections on Family Law Dispute Resolution" 1 International Journal of Law, Policy and the Family 12(2016).

8 S.U. Gilfrich, *Schiedsverfahren im Scheidungsrecht : Eine rechtsvergleichende Untersuchung des deutschen und des US-amerikanischen Schiedsverfahrensrecht, Tu¨bingen*, Mohr Siebeck (2007).

9 Loukas Mistelis and Stravos Brekoulakis, *Arbitrability: International and Comparative Perspectives*, 330-341, (5th edn., 2009).

10 Jean. Jaurès, "International Arbitration from a Socialistic Point of View", 188 The North American Review 633(1908).

11 Thomas Balch, "Arbitration as a Term of International Law", 7 Columbia L. Rev.15 (1915).

12 J. Paulson, *The Idea of Arbitration*, 277 (2013).

13 Kennett, *supra* note 7.

maintenance and finance[14]). This is what is essentially meant by balancing out policy consideration and arbitrability, to demarcate clearly what specific matters can be arbitrable keeping in mind the public policy considerations of the state which relates, at least to a limited extend, to the socio-economic status of the public.[15]

iii. Modern Trend in The Law Regarding Family Arbitration

Many jurisdictions only grant the decree of divorce once ancillary disputes regarding property, child custody, maintenance is resolved.[16] If a judicial proclamation is needed for granting divorce it might dissuade parties from submitting other family matter disputes to arbitration. These disputes mostly happen during the course of proceedings of divorce and hence tend to be intrinsically linked to one another. In this background it should be of no surprise to observe that the recent calls for acceptance of arbitration in family law matters coincides with increasing de-judicialization of divorce. It must be noted that de-judicialization of divorce has only taken place in uncontested cases.[17] In certain jurisdictions, this process has come into fruition by conferring notaries the authority to grant divorce.[18]

Even in this context, concerns of public policy have cropped up. That is the reason why some jurisdictions have balanced the de-judicialization process with that of public policy considerations. Instances of such jurisdictions include Brazil[19], Peru[20], where notaries are authorized to issue divorce in un-contested cases, albeit cases involving disabled or minor children are not allowed. This step is taken to balance public policy considerations. There are

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[14] The Database for Directives by Family Court of Australia, *Application in an Arbitration*, April 1, 2016, available at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/arbitration/> (last visited on October 2, 2018).

[15] Kennett, *supra* note 7.

[16] Cathy Meyer, Understanding your Final Decree of Divorce, October 2, 2017, available at <https://www.liveabout.com/understanding-your-final-decree-of-divorce-1103069> (last visited on October 2, 2018).

[17] Alan Uzelac, *Transformation of Civil Justice: Unity and Diversity* 133 (2018); Kennett, *supra* note 7.

[18] Family Law in Spain, *Spanish Notaries Given Power to Grant Divorce*, available at <https://www.spanishbarrister.com/spanish-notaries-given-power-to-grant-divorce/> (last visited on October 2, 2018).

[19] Nicuşor Cracuni, *The Divorce by the Public Notary Proceedings*, available at <http://webbut.unitbv.ro/BU2014/Series%20VII/BULETIN%20VII/25_Craciun%202-2014.pdf> (last visited on October 2, 2018).

[20] Procedures in Peru, Translators, Notaries, Legalizations, and Apostillisations in Peru, available at <http://theultimateperulist.blogspot.com/2008/12/6b-official-translations-notarisation.html> (last visited on October 2, 2018).

jurisdictions like Cuba[21], Romania[22] where the notary can even issue divorce in cases (uncontested) where minor or disabled children and involved. This trend also been observed in Eastern Europe countries like Estonia where they have gone a step further by allowing notaries to act as mediators and arbitrators. In affirmation of the role of notaries in this process, a mediation and arbitration tribunal of Chamber of Notaries has also been established.[23]This can be seen as extremely progressive step in integration of arbitration in the family law system.

B. Analysis of Arbitrability From Indian Perspective

India was formed a democratic, secular republic. In furtherance of the secular ideal, India enacted certain distinct family laws that are applicable to different religious communities. The Hindu Marriage Act[24] governs the largest number of people in India (Hindu, Jain, Sikh, Buddhist). There are other Acts such as Christian Marriage Act[25], Special Marriage Act[26] etc. To check arbitrability of family law matters in India, we need to check the applicable law. Civil procedural code[27] guides the procedural law regarding the civil litigation which affects the rights of people. In this context we have to two relevant provisions of the Civil Procedural Code:

i. Section 89, Code of Civil Procedure:

The 129th Report of the Law Commission was radical in its recommendations. It recommended that the courts, in view of reducing the judicial burden, after framing the issues, compulsorily refer the matter to an alternative method of dispute settlement like arbitration, mediation or conciliation.[28] Only after parties subject themselves to one of these methods can they approach the courts. The earlier Section 89 of the Civil procedure Code was repealed in light of the recommendations of this law commission and to accommodate, the Arbitration Act 1940. The law surrounding arbitration was consolidated in the Arbitration and the Conciliation Act 1996[29] and a subsequent parallel amend-

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[21] Cuba Directives, Notaries for Divorce in Cuba, available at <http://www.cubalegalinfo.com/decreto-ley-154-94-divorcio-notarial-reglamento> (last visited October 2, 2018); Yudarkis Veloz Sarduy, Getting a Divorce in Cuba is Routine, available at <https://havanatimes.org/?p=130634> (last visited on October 2, 2018).

[22] The New Civil Code of Romania, 2011, Arts. 375-8.

[23] E. Andresen, "State Tasks of the Public Office of Notary : Belonging to the Domain of National or European Union Law?", 67 Juridical International L. Rev.157 (2009).

[24] The Hindu Marriage Act, 1955.

[25] The Indian Christian Marriage Act, 1872.

[26] The Special Marriage Act, 1954.

[27] The Code of Civil Procedure, 1908.

[28] Law Commission of India, Urban Legislation Mediation as Alternative to Adjudication, Report No. 192 (1988).

[29] The Arbitration and Conciliation Act, 1996.

ment was enacted in the Civil Procedure code, which is Section 89. It must be noted that Section 89, explicitly mentions the process of arbitration.[30]

A comprehensive analysis of the entire Section 89 avails us to the fact that a detailed nodal structure and corresponding procedural aspects has been laid down in this Section to facilitate alternative methods of dispute resolution in all matters involving civil litigation. Order X[31] of the Code of Civil Procedure lays down the procedural aspects of the Court referring the matter to the alternative form a dispute settlement.

ii. Order XXXIIA, Code of Civil Procedure

All matters that can be categorized as a matter on which civil litigation is possible, is essentially governed by the code of civil procedure. This is to say that even proceedings under family law, namely Hindu Marriage Act or Special Marriage Act is subject to the provisions contained in the Code of Civil Procedure. Order XXXIIA of the Code of Civil Procedure specifically talks about subjecting matrimonially proceedings to compulsory settlement procedures, immediately after the charge is framed.[32] This Order in its ambit includes a wide array of matrimonial disputes, including custody of a minor child.[33] A strict perusal of the order, would enable one to take cognizance of the fact that for every suit regarding a matrimonial dispute, there is a independent proceeding which would subject the matter a mandatory settlement proceeding. It is extremely pertinent to note that, Section 89 of the Code of Civil Procedure includes arbitration as one of the methods of out of the court settlement and hence argument can be forwarded that Order XXXIIA includes arbitration in its settlement procedures.[34] This is view is also consistent with the view put forth by a plain reading of the general law application to arbitration, Arbitration and Conciliation Act, 1996.[35]

iii. Arbitration and Conciliation Act, 1996.

There have been noticeable efforts on part of the Indian government to ensure the promotion of arbitration, especially in the sphere of the civil matters. This can be seen with the introduction with the recent amendments to the arbitration and conciliation act[36] and the with the institutional push to introduce

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30 The Code of Civil Procedure, 1908, § 89.

31 The Code of Civil Procedure, 1908, Or. X.

32 Anil Malhotra and Ranjit Malhotra, "Alternative Dispute Resolution In Indian Family Law – Realities, Practicalities and Necessities", available at <https://www.iafl.com/cms_media/files/alternative_dispute_resolution_in_indian_family_law.pdf> (last visited on October 2, 2018).

33 *Ibid*.

34 *Ibid*.

35 See, Part c. The Arbitration and Conciliation Act, 1996.

36 The Arbitration and Conciliation Act, 1996, (Amendment in 2015).

International Arbitration Centres across India.[37]To signal the support to the concept of arbitration, India is a party to New York Convention, 1958[38] which is based on Recognition and Enforcement of Foreign Arbitration Awards.[39] This act, provides guidelines on arbitrability.

The first conceptual clarity that needs to be brought out is the fact that, for a dispute to be arbitrable, it need not be arising from a contract.[40]This dispels the notion that arbitration should be applied only in the context of commercial transactions. In *Renu Sagar Power Co. Ltd.* v. *General Electric Co.*[41] the Supreme remarked that even claims arising out of torts could be subject to arbitration and that it may be even included in already existing arbitration clause between the two parties(in contract), if the tortious claim is sufficiently connected to the transaction. The law regarding arbitrability and powers of the tribunal was further elucidated in *Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*[42]. The question that arose in this case was whether an arbitration tribunal had the power to grant specific relief. The Supreme Court answered in the affirmative and stated that the only requirement for subjecting an issue to arbitration is that it must be a justiciable civil issue.[43] Supreme further went on to say that the powers conferred to similar to that of a civil court which would adjudicate the issue and that the only limitation would be those expressly set out in the statute.

Another landmark to take into account is *Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums*[44]. A party in this case was resisting arbitration on saying that the relevant causes of actions, which were intricately linked to short delivery and tampering with weights (seals) and measures, were criminal sanctions that came under special statues and hence not arbitrable. However, in this case, Supreme Court held to the contrary by saying that arbitrability is matter independent of statuary provisions and if a clause for arbitration existed between parties, this matter would certainly be arbitrable. This is simply an example of dual procedure, first route through arbitration and second (if deemed be) statutorily.[45] This is certainly ground-breaking in determining the scope of arbitrability. Cases of criminal shades can even be made arbitrable

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[37] New Delhi Arbitration Centre, *The Need for International Arbitration Institutions,* available at <https://www.livelaw.in/arbitration-training-india-changing-scenario/http://www.mondaq.com/india/x/664202/trials+appeals+compensation/The+New+Delhi+International+Arbitration+Centre+Bill+2018+An+Institutional+Push+To+Arbitration+In+India> (last visited on October 2, 2018).

[38] The New York Convention, 1958.

[39] P. Singhania, Foreign Awards in India, available at <https://singhania.in/foreign-awards-in-india-new-york-convention-geneva-convention/> (last visited on October 2, 2018).

[40] The Arbitration and the Conciliation Act, 1996, § 7.

[41] (1984) 4 SCC 679.

[42] (1999) 5 SCC 651.

[43] *Ibid*.

[44] (2003) 6 SCC 503.

[45] *Haryana Telecom* v. *Sterlite Industries*,(1999) 5SCC 688.

(with respect to damages) if it is related to the arbitration agreement, the only requirement being that it be subject to express statutory provisions. On perusal of the Act, one of the express mandates that has been made is that (excluding commercial arbitration) the subject matter of the arbitration be decided as per the substantive law of the land.[46] Furthermore, it must be noted that the tribunal is also given the power to determine its own jurisdiction.[47] In addition to this, it must be noted that there exists no express bar with respect to family law matters.[48] The fact still remains that the law should be still made clear as to what limits the powers of the tribunal can extend, so as to balance public policy considerations in the domain of family law. The conclusion of this part would likely point to the fact that there exists sufficient groundwork for arbitration in family law but substantive developments with respect to public policy considerations have to made, if any.

IV. IDEAL FRAMEWORK FOR A FAMILY LAW ARBITRATION LEGISLATION

The starting point for arbitration, like arbitration in any other field, is the contractual agreement between the parties. The parties to the arbitration submit the dispute to an arbitrator who have their trust. There is also the added benefit of choosing an arbitrator who is an expert in the field, a privilege that is normally absent in the traditional system.[49] The agreement forms the basis of the arbitration and is governed by it. The question that arises in the context of family law is how much of it can be subject to arbitration, especially considering public policy considerations which is largely absent in commercial transactions.[50] The aim of the national rules governing arbitration should be to safeguard certain important public policy constraints while letting the parties have the choice within the boundaries so set.[51] For the purpose of framing a policy in the Indian context, we will now examine the family arbitration scenario in the United States, more specifically the one adopted in North Carolina. This paper will examine the policies and boundaries set forth in that statue and show that most of the limitations applied there are largely coinciding with the public policy considerations of India as well.

The impetus to arbitration in United States was given by the Uniform Arbitration Act , 1956[52] and its modified version Revised Uniform Arbitration

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46 The Arbitration and Conciliation Act, 1996, S. 28.

47 The Arbitration and Conciliation Act, 1996, S. 16.

48 S. Kuchwaha, Critical Analysis of Arbitration Law in India, available at <http://www.kaplegal.com/upload/pdf/arbitration-law-india-critical-analysis.pdf> (last visited on October 2, 2018)

49 George K. Walker, "Family Law Arbitration: Legislation and Trends", 21 J. Am. Acad. Matrimonial Law. 521 (2008)

50 *Ibid*.

51 Rebekah Bassano, Family Law and Arbitration, 1 The Proctor 36 (2016).

52 The Uniform Arbitration Act, 1955 (USA).

Act, 2000 (RUAA).[53] The latter was adopted by 47 states, with a view to establish arbitration as a viable alternative to litigation. North Carolina ('NC') was the first ever state to adopt a statue specifically on family law arbitration.[54] Other states did follow suit, but they are not as comprehensive as the NC statute.[55] The family law arbitration act of NC has gained much acceptance on a National scale with the American Academy of Matrimonial Lawyers drafting a model statute based on the NC statute on a national scale.[56] The North Carolina Family Law Arbitration Act[57] mandate specific statuary guidelines for the same. The parties are free to enter into arbitration agreements, based within the boundaries of the statute.[58] However, procedural aspects are mostly not regulated by the statue (like place of arbitration, how to conduct the sessions etc).

A. Restrictions set in place by the Statute

Arbitration of family law, as in other subject matters, arise from the agreement to arbitrate (contract). These agreements can be entered into before or even after the marriage, but child issue pre-martial agreements are deemed invalid.[59] The NC arbitration statute permits all kinds of arbitration on family law except that of grant of marital separation or divorce.[60] Another important question that arises is that whether parties can waive rights while entering into an agreement to arbitrate. NC statute answers this comprehensively. The Statute has allowed some rights to never be waived while the others can only be waived after the controversy has arisen.[61] Rights like Notice of Arbitration Proceedings[62], Conflict of Interest Disclosures[63], Application to the Court by Motion[64] can only be waived after a controversy has arisen while some others like Arbitrator Immunity,[65] Confirmation of Award,[66] Appeals,[67] cannot be waived at any point by either parties.

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53 The Revised Uniform Arbitration Act, 2000 (USA).
54 Georgialee Lang, Time Has Come, 71 Vancover Advocate 517 (2013).
55 *Ibid*.
56 *Ibid*.
57 The North Carolina Family Law Arbitration Act, N.C. General Statute (2006).
58 Lynn P. Burelson, "Family Law Arbitration: Third Party Alternative Dispute Resolution", 30 Campbell L. Rev. 297 (2008).
59 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-41-62 (2006).
60 *Ibid*.
61 *Ibid*.
62 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-42.2(*a*) (2006).
63 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-45.1(2006).
64 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-58 (2006).
65 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-45(*f*) (2006).
66 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-53 (2006).
67 The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-41-62 (2006).

B. Key differences in Family Law Arbitration Statue and General Arbitration

i. Modifiability of Orders passed by the Arbitrational Tribunal

In the context of commercial disputes, once a decision is passed there is rarely a need to modify the same. Family law disputes, however need modification of orders passed. If this were not the case then the cases involving children and spouse maintenance would be outside the scope of arbitration. To tackle this peculiar issue, a provision was added which enabled the arbitrator to modify the order to the extent a court order can be modified.[68]

ii. Revisionary Power to look into Awards including Children

Taking cognizance of public policy concerns, the statute has a provision giving a power of review to the District Court regarding child custody and maintenance awards. This is strictly based on petition of one of the parties.[69] If the party can establish that the award so directed is not in the best interests of the child, the court can vacate the award. This was adopted to placate public policy concerns.

V. CONCLUSION

The paper has strived to examine how jurisdictions around the world have interpreted and applied arbitration in family law. On examination it was seen that a multitude of jurisdictions were opening up arbitration in family law. The paper further dealt into how the arbitrability of such a matter was resolved in these jurisdictions and how concerns of public policy violations were placated. In this background, the substantive law applicable to family law and arbitration was analysed and it was concluded that there was sufficient foundation to establish arbitration in family law but there is still a need to address some concerns. Following this, one of the most progressive legislations regarding family law arbitration was examined. This legislation was a intricate mix of modern progressive thinking while still retaining elements of public policy that are necessary to propagate natural justice. India should take inspiration from this legislation and draft a specific statute that would deal with all these, while resolving any public policy concerns that may relevant in the context of socio-economic conditions of the public. Such a legislation would go a long way in resolving the logjam in the family court system and in the process giving a way to quickly resolve family disputes, that the public generally attribute to the private domain.

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[68] The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-56 (2006).

[69] The North Carolina Family Law Arbitration Act, N.C. General Statute §§ 50-55 (2006).

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SPECIAL MARRIAGE ACT (1954) AS A PRECURSOR OF UNIFORM CIVIL CODE

—Brijraj Deora

"The greatest threat to our Constitution is our own ignorance of it."

—Jacob F. Roecker

Abstract— This research article throws light on the importance of the Special Marriage Act especially in context of the Article 44 of the Constitution of India. The Constitution lays Directive Principle of The State Policy to secure for the citizens a uniform civil code throughout the territory of India but so far it has remained a far-fetched dream only. But few legislations are enacted which comes close to the spirit and essence of the Uniform Civil Code. This Research Article critically analyses one such legislation i.e. Special Marriage Act 1954, which is predominantly considered as a precursor to the Uniform civil Code. This research article also examines that, to what extent the Special Marriage Act 1954 fulfils the idea enshrined under the article 44 of Indian Constitution. The article extensively compares this secular act of 1954 with the prospective Uniform Civil Code and brings out the similarities as well as lacunas to held it as a precursor of Uniform Civil Code. This article concludes with the opinion that conservative society like India would take time to accept secular code like UCC and therefore in order to fulfill the wish of Constitution makers as enshrined under Article 44, need for more legislations like Special Marriage Act cannot be much prolonged.

* 4th year BA LLB (Hons), Gujarat National Law University Gandhinagar.

Key Words- Uniform Civil Code, Constitution, Precursor, Marriage & Secular.

I. INTRODUCTION: ARTICLE 44 MANDATES FOR UCC

In India, Family laws are mostly based on religious affiliations and are thus governed by personal status laws. Some of these laws are state-enacted statues while others are based on customary practices or religious precepts. As these diverse laws are confusing and contradictory, and rooted in outdated precepts, when India adopted its Constitution in 1950, a provision regarding the enactment of a uniform civil code to govern family relationships was included in the Directive Principle of State Policy.

Article 44 of the Constitution in its Directive Principles of State Policy states that "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".[1] This, being a guideline and not necessary to implement, has remained simply a directive principle and has not been introduced in any part of the country.[2]

The farmers of the constitution mandated the state to make every endeavour in this direction, in order that the new code, which initially could be optional, will be well perceived by the masses of a pluralistic society. But apart from enacting a few legislations like the ***Special Marriage Act of 1954*** (an optional civil law of marriage), no attempt has been made by successive governments in this regard.

Even this legislation has seldom been presented as a progression towards uniformity of rights and the controversy is kept simmering only to be brought to a boil every now and then. From the last several decades, within a communalized polity, this debate has become embroiled in the majority-minority political dynamics. There is, therefore, the requirement to build an alternative framework that can help us move away from this polarized equation to explore alternative ways.

The controversy of Uniform Civil Code crop up from the three-way tension between the traditional political impulse to leave communities alone to manage their social life, the modernist political values of 'rule of law' which requires that one law apply to everyone and that everyone should benefit equally from the laws of the state and third, the political imperative of pleasing every constituency possible. The solution in the form of compromise, adopted was that

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1 Indian Constitution Art. 44.

2 1 Paras Diwan and Dr Virendra Kumar, D*irective* P*rinciples* J*urisprudence* 57 (1982).

the Hindu customs were codified by Indian State; special legislations were created for governing domestic and social situations that citizens could opt for but permitted members of religious minorities to choose to follow the rules and customs of their community as interpreted by their community heads. Inherent in this solution is the perception that someone else is better off than we are.

The Supreme Court's constant lament about the state's failure to adopt a uniform civil code as enshrined by Article 44 has always revived a debate but every time it is swept under the carpet.[3] The entire issue has unfortunately been distorted and misdirected from its very inception. Ideologues have deliberately used it as an instrument with which to beat the minorities, and especially Muslims, through the threat of a majoritarian homogenising principle destructive of the precious identity markers seen in the existing diversity of personal laws.

II. SPECIAL MARRIAGE ACT: SPIRIT AND SOUL OF UNIFORM CIVIL CODE

However, it will be injustice to hold that there has been no development in India in making laws that are uniform across religions and cultures. One such example of this is the Special Marriages Act, enacted by the Parliament in 1954, which has the essence of Uniform Civil code to a great extent. This act was enacted to provide for a special kind of marriage by anybody living in India or by Indian nationals living abroad, irrespective of what religion both the parties to the marriage belong to. In many ways, the Special Marriage Act is a common code for the marriage across different religions and thus, similar to the Uniform Civil Code in spirit.[4] But the matter of great concern, as the senior counsel and eminent legal jurist Ram Jethmalani says, is that only few people take recourse to it, and those who are one who do not necessarily believe in religious solemnization of marriage.[5] Therefore, it is imperative to look for questions like, whether the Special Marriage Act is actually similar to the Uniform Civil Code and whether it has actually liberalised and bought forth a common civil law in India?[6]

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3 *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556 : AIR 1985 SC 945.

4 Kameshwar Choudhary, "Anatomy of the Special Marriage Act", 26(52) Economic & Political Weekly 2981, 2983 (1991).

5 Partha S. Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil Code*, 249.

6 Shiv Sahai Singh, U*nification of* D*ivorce* L*aws in* I*ndia* 287-288 (Deep & Deep Publications 1993).

A. It liberates individuals from traditional formalities

Special Marriage Act is a kind of legislation which intends to liberate individuals from the traditional knots and coercive collectivities in the matter of marriage and thereby recognizes the independence of individuals in the society. It is also criticized to the ground that the formalities attached and procedure prescribed for special marriages under this act, provides enough time and scope for family; caste and community to harass those who wish to take recourse to the act.[7] As per the personal laws, a Muslim can marry a Hindu only if one of the party converts to the religion of the other. But, a way out to this problem can be traced on the Special Marriage Act. This act only prescribes the condition of mutual consent among parties, soundness of mind and certain procedural requirements.[8] Therefore, this act provides for completely different recourse where there are no religious requirements, which are of paramount consideration in the personal laws. Thus, a sound mind person of any religion having prerequisite age can validly solemnize his/her marriage without any hindrance. It can be validly concluded that the marriage prescribed under this Act is not ritual centric and is not based of age old customs and ceremonies.

The concept of traditional marriage involves two families of same religion or community, thus the 'social domain of marriage is circumscribed which partly contributes to the prevalence of the evil of dowry.[9]' Whereas, the Special Marriage Act 1954 envisages a situation of marriage between any two persons irrespective of their caste and religion.[10] Thereby, it recognizes the independent identity of individual and liberates him/her from traditional coercive collectivities in the matter of marriage. But as a matter of concern, it cannot be denied that the audience actually, this act could target is very small in number as only few citizens have took recourse to it so far.

B. Compulsory registration of marriage performed under this act

Special Marriage Act also prescribes for essential registration of a marriage solemnized as per this act, which is not the necessary requirement of other legislation like Hindu Marriage Act.[11] It is the only ceremonial necessity prescribed by this act. However, it is not necessary to be from separate religions to get married under this act, which means two Hindus can very well decide to get married under this act instead of the Hindu Marriage Act. Therefore, all

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7 Kameshwar Choudhary, "Anatomy of the Special Marriage Act", 26(52) Economic & Political Weekly 2981, 2983 (1991).

8 J. Duncan M. Derrett, "Private International Law and Personal Laws *(Based on Duggamma* v. *Ganeshayya)",* 14(4) The International and Comparative Law Quarterly, 1370-1375 (1965).

9 *Ibid.*

10 Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

11 *Broja Kishore Ghosh* v. *Krishna Ghosh*, 1988 SCC OnLine Cal 99 : AIR 1989 Cal 327.

marriage solemnized under this act requires compulsory registration whereas it is optional in most personal laws.[12] In personal laws the requisite condition for marriage is that it should take place as per customs and practices of the said religion.[13] Thus, it is practically difficult to keep count of the number of marriages taking place and also when there is no legal record it is also difficult to protect rights of the people in such a model. But compulsory registration creates a way out for this and makes it easier to keep count of marriages and in case of abuse of it, relief can be granted quickly as the magistrate records it and thus it can effectively prevent the abuse in many situations.[14]

C. Protects the property rights

Another significant feature of this act is that it allows people of different religions to marry without converting, which essentially protect the right of such person in the property that he would have inherited.[15] This would not have been the case in the personal laws, where if any person converts into the religion of spouse, such person shall lose all claims over the property he was getting in inheritance. Although this Special Marriage Act has a number of features and benefits but the major advantage brought to the society is the secular character of this act. In conservative society, mixed marriages always cause a great degree of hue and cry and therefore Special Marriage Act has to some extent, been able to provide machinery but, again the problem lies in the fact that only eloping couples avails it and that too mainly because they do not want to face their orthodox families with the proposition. Therefore, it is not well accepted in society yet and the public shall react very similarly to a Uniform Civil Code. In this regard, this act has the essence and spirit of the Uniform Civil Code and hence, it is been widely recognized as the precursor of Uniform Civil Code.

III. SPECIAL MARRIAGE ACT AS A PRECURSOR OF UNIFORM CIVIL CODE

The framers of the Constitution have promised the Uniform Civil Code to the Citizens of India and therefore the State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. The authors of the Indian constitution, by the term 'Uniform Civil Code' envisaged a commonly enforceable set of laws governing marriage, divorce, adoption, inheritance and other familial and personal matters. But, even after long span of 60 years from independence, Indian Legislature could not fulfill this promise

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[12] Kameshwar, *supra* note 7.

[13] *Deoki Panjhiyara* v. *Shashi Bhukrishan Narayan*, (2013) 2 SCC 137 : AIR 2013 SC 346.

[14] Olivier Herrenschmidt, "The Indians' Impossible Civil Code", 50(2) European Journal of Sociology, 309-347 (Jewish Institutions and Practices 2009).

[15] V. Siddhartha, "Special Marriage Act, 27" Economic & Political Weekly 66, (1992).

for several political and social reasons. Except a few legislations like ***Special Marriage Act 1954,*** no significant enactment could be found on the lines of Uniform Civil Code. It is undeniable that India's long history of cultural and political pluralism does not permit for the immediate imposition of such a code. No previous pan-Indian polity had imposed such a code, preferring for the most part to let communities follow their ways, even when they were found abhorrent. The British were more or less the first to interfere in social custom by enacting change in the abolition of sati, child marriage etc. Even they did not intervene in other matters such as polygamy, triple talaq, Hindu Undivided Family etc. Thereafter, Indian legislature came up with secular legislation of Special Marriage Act 1954. It is therefore, one such legislation that provides way out for marriages out of the religious boundaries. It is thus, many times recognized as the precursor of the Uniform Civil Code. Some of the features that justify its recognition are:

A. Secular Nature

It has been a popular consensus that the Special Marriage Act is similar to what the Uniform Civil Code would be. To further strengthen this, it is to be noted that both these legislations disregard religious boundaries. Like the Special Marriage Act is a form of secular code for marriages, in the similar manner the Uniform Civil Code shall also be a code transcending all religious boundaries for personal laws. Another similarity between these two legislations lies in their subject matter, where both deals with personal laws of marriage, divorce and the like. It is not just limited to their subject matters, but many other provisions of the Special Marriage Act are similar to what a potential Uniform Civil Code would contain.[16]

When the Special Marriage Act was passed in 1954, it was not at all well accepted by the people. As soon as this act was enacted, there was a great hue and cry about it, especially within religious minorities like Muslims. It was felt by these religious minority groups that it is a deliberate step to suppress their religious freedom and force a secular code.[17] India during that Post-Independence period was facing great turmoil and communal trouble and thus, this laid to tension over the questions like, Should the Uniform civil Code be adopted as envisaged under article 44 of Indian Constitution? The extent, to which people were adhered to their personal laws, makes it difficult to bring uniformity in the diversity of personal laws. The acceptance of such code was another ordeal looking at prevalent Indian society. Loss of culture was the most prevalent fear amongst all major religions. Religious minorities like,

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[16] Flavia Agnes, "Hindu Men, Monogamy and Uniform Civil Code", 30(50) Economic & Political Weekly, 3238-3244 (1995).

[17] Shabbeer Ahmed and Shabeer Ahmed, "Uniform Civil Code (Art. 44 of the Constitution) A Dead Letter", 67(3) The Indian Journal of Political Science, 545-552 (2006).

Muslims were entrenched with the belief of superiority of their religion and any step towards its religious practice seems like threat to them. This is one of the major reasons why orthodox Muslims preclude themselves from accepting Special Marriage Act even today.

B. One law for all

Adding to the list of similarities, Uniform Civil Code also does not supports the idea of plurality of laws. Like SMA provides validity to each and every legal marriage which could not fall under ambit of valid marriage by personal laws, UCC, if enacted would also abolish innumerable personal laws and establish a common code for all religions. Essentially, Special Marriage Act brings different subject matters (like Hindu, Muslims etc.) within the preview of single legislations and hence provides for similar treatment to all with regard to the issue of marriage. Uniform Civil Code would also seek to achieve the same status, though on larger scale, with regards to the laws governing marriage, divorce, adoption, inheritance and other personal and familial matters. Therefore, to the great extent, Special Marriage Act is, one of the few existing legislations, having the spirit of uniform Civil Code.

IV. CRITICISM: SMA LACKS THE ESSENCE OF UNIFORM CIVIL CODE

However, there are various criticism to these beliefs also, which says that Special Marriage Act cannot be a precursor to the Uniform Civil Code and can in no way justify the impact a UCC will have on the nation.

A. Special Marriage Act is an optional code

Foremost among these criticisms is that Special Marriage Act is an optional legislation where only people who willing to marry outside their religious customs and traditions and are thus voluntarily taking recourse to it would be affected by its provisions. Whereas if Uniform Civil Code implemented, it will not be an optional code and thus it shall be binding on all citizens of India. It will not provide any choice of taking recourse to it or not but would mandatorily bind everyone coming under its preview.[18] Primary reason behind it is that an optional code would prove to be a redundant legislation where everyone is continuing with their personal laws and therefore it would not serve any purpose. Also the compulsory nature of code will completely deprive people from following their religious practice and therefore would ignite communal unrest

[18] S.S. Nigam, "A Plea for a Uniform Law of Divorce", 5(1) Journal of the Indian Law Institute, 47-80 (1963).

and disharmony.[19] Another view says that it will lead to feeling of arbitrarily imposition of Hindu law upon minorities. Whereas SMA does not give rise to such feelings as it is optional.

B. Distinct nature of both legislations

Another significant difference between the Special Marriages Act and the prospective Uniform Civil Code is the nature of these two legislations. The Special Marriage Act is a procedural law that prescribes the procedure to solemnize marriage under it. Whereas the UCC shall be a substantive law, incorporating all necessary rules, regulations and codes of conduct to be followed by people of all religions. Thus, for example, the UCC shall prescribe the laws for property division whereas the SMA simply states the procedure one needs to follow (like signing the papers) under property law of one's own religion after marrying with person of different religious affiliations. Therefore, SMA does not bring a new set of rules, it simply provides a way out for people to marry outside their religion. Special Marriages Act nowhere affects the Hindu Code Bill or the Sharia Law of Marriage but UCC would exactly do so, if it comes into effect, as it will introduce new set of rules. As long as legislation does not affect the existence of personal laws, it is accepted by the masses atleast moderately. But a staunchly religious country like India has in no way been prepared for a complete overturning of their lifestyle with reference to their personal laws. And until any legislation does that, it cannot be termed as a precursor to the Uniform Civil Code.

V. NEED OF SECULAR LEGISLATIONS LIKE SMA

A. The problem with personal laws

After the commencement of Indian Constitution, the foremost legislations that were enacted along the religious lines were the Hindu law reforms of the 1950s. Although these are widely construed as a clear violation of Articles 14 and 15 of the Constitution (equality and non-discrimination on the basis of religion), the applicability of this law is over 80% of our population. Therefore the question that crop up, whether it has helped bring social transformation and changed gender relationships within Hindu society becomes critical. On some occasions, the continuation of the Hindu Undivided Family property is perceived as its main lacuna. However, several discriminatory aspects of the Hindu cultural ethos that govern the Hindu law of marriage, divorce and matrimonial life are seldom held up for scrutiny.[20]

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[19] Syed Nadeem Farhat, "Hindu Marriage Law: Need, Impediments and Policy Guidelines", 12(2) Policy Perspectives, 131-146 (2015).

[20] Flavia Agnes, "Hindu Men, Monogamy and Uniform Civil Code", 30(50) Economic and Political Weekly, 3238-3244 (1995).

Taking the case of Muslim laws also, the Maintenance to divorced Muslim women granted through the Shah Bano ruling[21] in 1985 was opposed by the community, who then brought about a legislation—the Muslim Women's Act of 1986—which denied Muslim women the right of maintenance under the uniform statute, Section 125 of the Criminal Procedure Code (CrPC).[22] Through a progressive interpretation of this Act in Daniel Latifi (2001), the Supreme Court (as well as various high courts) upheld the right of divorced Muslim women to a fair and reasonable settlement for life. This right of settlement is far superior to the earlier one under the secular statute, Section 125 of the CrPC.

If it is accepted that all personal laws, customs and practices are patriarchal, where does the process of change to bring in gender-just laws begin? Here, we must accept two premises: First, our laws are uniformly gender-unjust. They contain specific forms of gender injustice and each must be addressed within its own specificity.

Second, law is dynamic and gets formulated within the contested terrain of litigation. Our Constitution provides us the yardstick for testing its gender discrimination. A Supreme Court verdict is the law of the land, and one from the high court is binding on all lower courts under its jurisdiction. This provides scope to challenge the specific oppressive provision.

B. The Way Forward

Another strategy to break the stalemate is to enact specific legislations, which will apply to women uniformly across communities. Therefore in order to address these kinds of issues, a uniform legislation should be enacted which shall apply to all masses without any restriction of cultural and religious boundaries. After independence one such attempt made was the enactment of Special Marriage Act 1954.[23]

Though this act being an optional code provides way out to various issues, it appears to suffer from disuse due to its stringent procedure for registering the marriage. No efforts seem to have been made to make this law relevant to those venturing into inter-religious marriages, which have now been given a communally-tinted term, "love jihad". So, despite the prevalence of this Act, conversion and hasty marriage seems to be the only option for those venturing into marriages of choice against the wishes of their parents.[24] In a communally

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[21] *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556 : AIR 1985 SC 945.

[22] Shiv Sahai Singh, *Unification of Divorce Laws in India* 287-288 (Deep & Deep Publications 1993).

[23] M.P. Jain, "Matrimonial Law in India", 4(1) Journal of the Indian Law Institute, 71-98 (1962).

[24] "Not Made in Heaven: Changing Marriage Laws will not Necessarily Make Marriages More Equal", 48(37) Economic and Political Weekly, 8 (2013).

charged atmosphere, the one-month notice period stipulated under the Act may pose a threat to the life of the couple. There is an urgent need to modernize and popularize this statute.

Therefore, this discontentment gets projected in public discourse as a concern for the plight of victims of personal laws, who need to be liberated from their barbaric laws through the enforcement of a uniform civil code and many more legislations like Special Marriage Act 1954.

VI. CONCLUSION

Therefore the debate regarding whether the Special Marriage Act can be termed as a precursor to the Uniform Civil Code is endless. But it is certainly clear that, in a country like India, implementation of the Uniform Civil Code is a huge task and it would require complete acceptance from people in order to avoid uproar after implementation. Though the Special Marriage Act is a great development in the legal regime of India, it being optional legislation does not requires such a strong support from the masses. The idea of Uniform Civil Code envisages that all religions shall be bought to the same level by the mechanical implementation of one uniform code of personal laws throughout the whole country. However, it seems a far-fetched dream even today, as the minorities, particularly the Muslims, fears that the character of their religion would lost its importance if the personal laws are scratched. Therefore, one optional legislation like the Special Marriage Act is not enough to ensure that the country is ready for the UCC; it is a process that has to be bought about slowly. A number of similar legislations need to be enacted, implemented and accepted by the Indian masses for a Uniform Civil Code to be possible, even in the near future.

LOCAL WORKING REQUIREMENTS IN THE PATENTS ACT, 1970: A CRITICAL ANALYSIS

—*Sakshat Bansal*[*] *& Ananya Vajpeyi*[**]

Abstract — India, as a developing nation has tried to strike a balance between the interests of its citizens and intellectual property owners, despite facing extreme pressure from the developed countries. Building on this notion, importation never sufficed as working of a patent locally since it, along with being detrimental to the economy in the long run, robbed a nation of an opportunity to build capacity for manufacturing a patented invention locally. There is historical evidence that the Indian diplomats and law makers were of the same opinion and envisioned a nation that took full advantage of a foreign patentee. Despite such historical development, the Indian Judiciary, recently, set a precedent that allows a patentee, to get away satisfying the public demand only through importation. What it necessarily means is that there is no compulsion to manufacture locally, rather it must be decided on a case to case basis. The reason which they give to justify their position is the economies of scale argument which only looks at the economic viability of manufacturing the patented invention locally. This vague approach of the court leaves a lot of room for exploitation by the patentee since now he is in a position to take advantage of the atmosphere of no compulsion. To avoid such a situation in the absence of guidelines from the court, this paper attempts to turn the direction of scholarship towards a concrete and fair approach by listing out other factors that must be considered while deciding an application for compulsory licencing and filing Form 27.

[*] Assistant Professor, Jindal Global Law School, Ph.D. Scholar at NLSIU, Bangalore.
[**] Student, Fifth Semester, B.A. LL.B.(Hons), Jindal Global Law School.

I. INTRODUCTION

The basis of communication is perception. When we express our ideas to another person, the burden on the listener is how he interprets and understands them, while the burden on the speaker is to express his intention clearly. If we look at it historically, when this process goes wrong, it can lead to catastrophic state of affairs. This transudes, from the situation of a conversation to the development of an idea from its historical basis. It might happen at times, that historically an idea was meant to be something else, but over time, with its varied interpretations, it ends up being contrary to what gave birth to it. This paper intends to focus on a very similar situation which has occurred in India recently. The year 2014 was vital for the realm of intellectual property protection in our nation, as it stood witness to a case which gave quite an antithetical interpretation to the existing law[1].

The law in question is Section 84 of the Indian Patents Act of 1970[2], which talks about compulsory licensing. It states 3 grounds for the grant of such license – (i) the satisfaction of the requirements of the public; (ii) the patented invention is not available at reasonable prices and finally, (iii) the patented invention is not worked in the territory of India[3]. The third one is the point where we begin our analysis. 'Worked' as a word of law, can have a very wide meaning, including numerous commercial activities which can pass muster as utilization of a patent. The contention has always been whether importing the product from other nations and not manufacturing it locally can suffice as 'working' of the patent in the territory of India.[4]

Coming back to the case mentioned above, *Bayer Corpn*. v. *Union of India*[5] *(hereinafter Bayer case*) in 2014, held that a patentee can be exempted from local manufacture if they are able to show proper cause. It is one of the multiple aims of this paper to prove that since this position taken by the court is contrary to the historical intention of the Indian diplomats and law makers who view compulsory local manufacture as the key to utmost benefit of the economy, the refusal to grant a compulsory license on the basis of non-working, has to be done with extreme caution. The court has mis-interpreted what this law was meant to be and as result, bestowed a spear of exploitation in the hands of multinational pharmaceutical companies.

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1 *Bayer Corpn*. v. *Union of India*, 2014 SCC OnLine Bom 963 : AIR 2014 Bom 178.

2 Patents Act, 1970, S. 84.

3 Patents Act, 1970, S. 84(1).

4 B.N. Pandey, Prabhat Kumar Saha "Local Working under the TRIPS Agreement: Flexibilities and Implications for India" (2018) 60/3 JILI <http://14.139.60.114:8080/jspui/bitstream/123456789/47597/1/020_Local%20Working%20Under%20The%20Trips%20Agreement%20Flexibilities%20and%20Implications%20For%20India%20%28312-331%29.pdf>.

5 *Supra* note 1.

This fear of exploitation is one of the most prominent motivations for writing this paper along with the intention to organize and contribute to the existing pool of knowledge. In order to achieve this, we have divided this paper into 4 parts. Part 1 attempts to give the reader a theoretical understanding of what the problem is along with the contrasting stances taken by the developed and the developing nations. This will be followed by Part 2, listing the evidence we have found in order to interpret the historical intention of Indian law makers and diplomats. Part 3, after this, will be an attempt at explaining the facts and judgment of the Bayer case and how it has led to its antithetical conclusion along with which it will also attempt to showcase the case to case basis approach put forward by the court. Part 4, is where we highlight the need of detailed guidelines to deal with the gap left open by the court and list out factors the must be considered, attempting something that has not been discussed by scholars until now, turning the spear of exploitation into a gift benefiting both the giver and the receiver. This suggestion is put forward, keeping in mind that international politics is a web of agendas, and agendas change time and again. The historical intention might be contrary but it cannot be allowed to become an impediment to ultimate benefit. Moreover, it must be clarified that the suggestion does not necessarily advocates compulsory local manufacture, rather it focuses on ensuring that patentees act in the most honest and reasonable way possible while filling and filing Form 27.

For this, the methodology we have used is Descriptive and Analytical Legal Research, combined with Applied and Pure Legal Research. The initial part of the paper uses the former while the later can be seen towards the end. We start with the description of existing evidence for understanding the historical intention of the Indian diplomats which will then be analysed in a way to conclude that importation was never a part of working a patent on Indian territory. This is followed by the elaboration of the judgment, still under the influence of the descriptive method followed by a critical analysis of the same. The Applied and Pure research method is evident in the last part of the paper, where we have tried to propose a new solution to the existing legal contradiction. There are certain factors that must be kept in mind while granting or refusing a compulsory license where the grounds of non-working are invoked, or else the patentee might be in a position to take advantage of the country's expanding markets without any actual transfer of technology.

It is also vital to mention that the evidence collected has been analysed through an inductive approach. This basically means that we have gone from observing particular instances to reach a definite conclusion which opened a gateway to caution as we looked at the judgement of the court. This has helped us in finding the focal point of our research along with the motivation to minimize exploitation.

In addition to this, one must note that both secondary and primary sources have been used in the formulation of this research paper.

II. A THEORETICAL UNDERSTANDING OF THE PROBLEM

Before we delve into the matters of evidence, intentions and baffling precedents, let us look at some basic definitions, views, pros and cons, the existing literature has to offer in the matter of importation as working of a patent in India. Beginning from what patent law is and why does is it garner so much importance in the international sphere, we will go into the vitality of working requirements and how do the current international conventions make room for them, in developing nations particularly, and finally, sum up with the debate between the developed and developing nations that has prevailed for quite some time.

To understand the need of patent law and local working requirements, the best approach will be to understand the two kinds of ways to look at the law of patent protection[6]. One view looks at it as a bundle of rights, while the other one treats it as an obligation on the patentee.

The first view is a comparison between the right to own private property and the ownership of a patent. They can be equated on the grounds that both enable the owner or the patentee to exclude a third party's right over their property. This view does not cast any obligation on the patentee, merely bestows him with protection for his invention. This can be used to understand the need of patent of law. The other important factor which can be used to understand the vitality of patent law is incentive creation[7]. If a person makes a quantum leap in his field through innovation, the world will definitely welcome the idea with open arms, often resulting in easy duplication or imitation of the invention proposed. This will harm the interest of the inventor as he gets no benefits out of his efforts, discouraging innovative thinking. To prevent such a situation from arising, a right to exclude others from using his invention is given to him through a patent. The exclusion of the public at large from revolutionary information is a social cost the market has to pay for progress. In addition to this, we must discuss the principle of 'national treatment' which establishes the general principle of necessary protection to all innovators, domestic or foreign.[8] This is enshrined in Article 27.1 of the TRIPS agreement

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6 Feroz Ali, "Picket Patents: Non-Working as an IP Abuse" (2016) 12 Indian J L & Tech 1.

7 Kumariah Balasubramanium, "Pharmaceutical Patents in Developing Countries: Policy Options" (1987) 22 Economic & Political Weekly.

8 *Supra* note 7.

which ensures that there is no discrimination between a patentee of foreign origin and a domestic one.[9]

Now that we have understood the general level of protection given, we must understand the exception and the reason for such deviation. For this, we will look at the second view through which we can look at intellectual property protection, discussed above, which entails that the complete picture of patent law can be painted only when we consider it as an obligation along with it being a bundle of rights.[10] Under this view, the rights and incentive of the patentee is given importance, but is contrasted with the need of the public. It casts an obligation on the patentee, making them responsible for the sufficient diffusion of knowledge to the pool of ideas of the nation that grants the patent and also benefit it commercially.

This is the exception to the general rule of giving equal protection to all. When a foreign agent demands a patent in the territory of a nation, that nation has the right to demand from the patentee a promise to benefit their economy, at the failure of which the exclusionary right given to the patentee can be taken away.[11] This is what used to happen earlier, known as the forfeiture of a patent, which was later abolished after the Paris Convention in 1883.[12] As an alternative, compulsory licensing was proposed[13]. But before we go into that, we must understand the theory behind attaching such a covenant to the bundle of rights that is a patent. There is always an underlying intention of the patent granting nation to make full use of the knowledge that is being patented[14]. This intention then translates into being the local working requirements of a patent. Through these requirements the domestic law of a nation ensures that when an innovation enters their market, the know-how of it is completely diffused into their knowledge pool along with it benefiting the economy by providing employment. Local working will generally refer to the patent being commercially exploited, which is a very broad term and can also include importation. But as soon as importation is involved, it can lead to a situation where the product is not manufactured locally at all, creating a state of affairs where the diffusion of knowledge is impaired. However, one must contrast this situation from one where manufacturing patented invention locally is compulsory in law but not feasible in practice.

To protect the interests of the patent granting nation, in light of the above argument, the international standards, specifically the Paris Convention also

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9 TRIPS: Agreement on Trade-Related Aspect of Intellectual Property Rights (1994) Art. 27.1.
10 *Supra* note 6.
11 Malet Arega, "Defending Local Working" (2019) 10 Am U Intell Prop Brief 28.
12 *Ibid*.
13 *Ibid*.
14 Bernard Olcott, "Realistic Aspects of Working Foreign Patents" (1963) 45 J Pat Off Soc'y 315.

allows the nations to define 'local working' according to their own needs.[15] It can be argued against the general belief that local working requirements are always economically unfavourable as they discourage foreign agents from entering the domestic market, by pointing out the fact that such requirements must be viewed in the context of the local conditions.[16] The Ayyangar Committee report correctly points out the fact that even though this can be beneficial for all in the short run, it will harm the economy of the patent granting nation in the long run.[17]

This begs the question that since local working requirements falls under the domain of post grant liability rule, what are the consequences when there is a violation in completing these requirements? We have mentioned it above briefly as compulsory licensing. It is a right that the patent granting nation retains and can be utilized on various grounds including the 'non-working' of a patent. It allows a third person the access to the patented product or process, making imitation easier, in exchange for a remuneration to the patentee. This was an attempt at striking a balance between complete revocation of a patent and the interest and incentive of the patentee.[18]

Up to this point in the paper, we have elaborated upon what the basic terms of law that define the local working of a patent, are. This must be followed by the policy consideration of a developed and a developing nation. The developed nations are the hub of technological innovation, progressing rapidly in leaps and bounds. It then goes without saying that they would want less stringent working requirements as they would be able to manufacture it locally and then sell it in the international market. The developing countries on the other hand would be in favour of strict working requirements, trying to extract as much benefit as they can from the grant of a patent. The historical evidence of this can be inferred from one instance where between 1900 and 1958 the developed countries had an absolute majority in the international conventions, there were multiple attempts at ensuring more freedom for the patentee.[19] Gradually the participation of the developing nations increased and it was after the signing of the TRIPS and the Doha Declaration that the considerations of the developing nations came into lime light and they were given enough room to alter domestic law accordingly.[20] They need to ensure transfer of technology, sufficient availability of the product and developing a capacity to locally manufacture the patented innovation through their domestic law.[21]

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[15] Paris Convention in its Article 5-A (2) reads – "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licences to prevent the abuses which might result from the exercise of exclusive rights conferred by the patent."

[16] *Supra* note 6.

[17] Ayyangar Committee Report, 1959, Para 30, p. 15

[18] *Supra* note 6.

[19] *Supra* note 7.

[20] WTO Ministerial Declaration of 14 November 2001 (Doha Declaration).

[21] *Supra* note 4.

In light of this intention, importation in no way could be seen as something that is sufficient for local working. However, under the pressure of the developed, the developing have lost their bargaining power and conceded to less stringent working requirements which now can include importation as sufficient working of a patent[22]. In addition to this, both the sides have tried to argue their stance based on Article 27.1 of the TRIPS agreement. The developed, on one hand, argue that 27.1 leaves no room for allowing working requirements in the domestic law, developing, on the other hand argue the contrary. This conflict was deepened by the presence of Article 5A of the Paris Convention which ensured that the member nation would be able to regulate abuses of the granted patent. A deep analysis of both these Articles indicate that non-discrimination, as mentioned in Article 27.1, is the general rule to which Article 5A is the exception. This is concluded with the idea of balancing public policy objectives with international agreements, in mind. In addition to this, it is also supported by the objective of the Doha Declaration which stood for enabling the member nations to decide the grounds on which compulsory licenses can be granted. It is at this juncture, that one must remind themselves of the fact that the basic purpose of TRIPS was to ensure easy transfer and dissemination of technology as highlighted in Articles 7 and 8. In this context, the question that arises is that how can one assume that TRIPS envisioned no local working requirements?

III. THE ORIGINAL INTENTION

It is finally time for us to look into the evidence which will rid the mind of any doubts about India's protective stance since the beginning of international politics for the nation, which was specifically against importation as working of a patent. The advocates of the court's decision in the Bayer Case might argue that if India was so worried about the foreign manufacturers entering the territory and taking advantage, why did they agree to sign the TRIPS in the first place which forced the lawmakers to relax numerous requirements, increasing the incentives for the patentees but at the same time putting the domestic market at risk? We have already seen in the section above that local working requirements are in fact allowed by TRIPS, however along with this, we will also try to explain how India had no other option but to change its stance at the international front during the Uruguay Round, despite which, it still maintained its strong position against importation particularly.[23]

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[22] A.V. Ganesan, "Negotiating for India" in Jayashree Watal and Antony Taubman (eds.) *The Making of the TRIPS Agreement: Personal Insights from The Uruguay Round Negotiations* (2015).

[23] *Supra* note 22.

The root of India's position against importation as working of a patent, lies in the Ayyangar Committee Report of 1959[24]. After independence, the government felt that India required a revised and more consolidated Patent law, for which it appointed, first, the Bakshi Tek Chand Committee followed by Justice N. Rajagopala Ayyangar Committee. It is the second one that made sure that importation was never considered as working of a patent.

It starts by acknowledging that absence of local manufacture is not always harmful as it tends to locate the industry in a place where it is most commercially viable.[25] But let us consider the theory we have mentioned above, the theory that local working requirements were to ensure that the patent granting nation extracts as much benefit as they can out of the foreign product being introduced in their market. Based on this, the report lists out the following benefits of local manufacture – (1) saving foreign exchange, (2) the absorption of surplus labour, (3) the utilization of the country's scientific and technical talent, (4) utilization of material not being used up till now, which would also have beneficial consequences for other industries, (5) the increase in the technical know-how of the nation due to the establishment of a new industry, (6) the utilization of bye-products which will lead to a diversified economy, (7) greater security particularly in emergencies and economic independence arising out of self-sufficiency.[26] No country having a sophisticated foreign policy, would opt out of these benefits and secure a foreign agent, until and unless it is subject to high international pressure. The developed nations ensure that their own markets are protected to the highest extent, meanwhile they gear up to penetrate and take advantage of the markets that the developing nations offer. This can be seen from an instance cited in the report which shows us the reality of the market politics developed nations engage in. It mentions a statement by Floyd L. Vaughan speaking about the Patent in law in the United States, he says, "it is a contravention to our patent law and economic injustice to the American manufacturer to allow a foreigner to take out a patent in this country merely for the purpose of reserving the United States as a market for his patented product, which is manufactured abroad exclusively."[27] Further, the report mentions that allowing such patent will benefit the economy of the home country to which the foreign agent belongs with little to no advantage for the country granting the patent[28]. In addition to this, it also talks about a possibility where such patent can be misused in order to deliberately harm the economy of the patent granting nation. After a glance at this report, it must be clear that there always has been a greater benefit with not allowing importation as working of a patent and that India was definitely being pushed to oppose this idea since the very beginning.

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[24] Ayyangar Committee Report, 1959.
[25] Ayyangar Committee Report, 1959, Para 30, p. 16.
[26] *Ibid.*
[27] Ayyangar Committee Report, Para 32, p. 16.
[28] Ayyangar Committee Report, Para 38, p. 18.

At this juncture, we must move on to the time where India was negotiating its patent law on the international front before the signing of the TRIPS. This is vital in order to understand that even though India caved under the international pressure created by the United States and signed an agreement which made its patent protection even more stringent, it remained opposed to the idea of allowing importation as working of a patent. For this, the best source would definitely be the personal account of the man who negotiated on India's behalf at the battle ground of diplomacy. Mr. A.V. Ganesan was the man behind the negotiation which made India enter a completely different realm of patent protection. In his personal account, he recollects the time when he was framing India's stance at the Uruguay Round. He clearly expresses India's reservation about signing a single undertaking comprising of agreements affecting numerous sectors, forcing the member nations to view the Uruguay Round as a package deal.[29] First and foremost, India was reluctant about having a stringent patent protection as it felt that it would make it impossible for the government to ensure affordable health care for its citizens.[30] Before the Act of 1970, India had the Patents and Designs Act of 1911 which did nothing for local manufacture and made the India Pharmaceutical market reliant on importation. This led to massive lobbying in favour of local manufacture. Thereafter, came the new Act of 1970 which proved to be turning point for the pharmaceutical industry, which then progressed in leaps and bounds.[31] Being subjected to such a strong history in favour of producing products within the territory, it becomes more or less obvious that India would never have agreed for something that dragged it back into the vicious circle of reliance on importation.

Coming back to the previous point, if India was sceptical about stringent patent protection then how did it agree to sign the TRIPS agreement? This can be understood with the help of a picture that was hung in the office of Carla A. Hills, the chief negotiator on the behalf of the United States at that time. It is the scene where President Bush is handing her a crowbar, telling her to make good use of it.[32] The crowbar in the picture is nothing but Section 301 of the Omnibus Trade and Competitiveness Act of 1988. It authorized US to retaliate against any nation that violates international trade agreements[33]. This is sufficient to understand the manner in which the Unites States must have negotiated during the Uruguay Round, pressurizing the developing to mould their law, ultimately benefitting the developed. India, despite its tempting offer of expanding markets and surplus labour, fell victim to this crowbar. Mr. Ganesan recalls that India was under pressure as the US threatened harm to its garment exports. Not only this, our nation also had many academic tie-ups with the US

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29 *Supra* note 22.
30 *Ibid*.
31 *Supra* note 6.
32 Louis Uchitelle, "A Crowbar for Carla Hills" *The New York Times* (10 June 1990).
33 Omnibus Trade and Competitiveness Act, 1988.

between universities and governments which were also at the threat of ending if it did not sign the TRIPS.[34]

Another factor responsible for this change was that up to this point India has not opened itself to the global economy and even though it was still far from it, they had started taking initial steps in that direction.[35] This change in approach forced India to maintain a cooperating stance in front of other nations or it would have harmed India's future in the global economy. In addition to this, other developing nations had started caving under the pressure of the threat of retaliatory actions of the US and it was a matter time before they dissuaded from their stance against stringent patent protection.[36] This change in stance was met with opposition on the home front. The domestic producers were not happy and so was the poor public who saw expensive healthcare in the near future.[37] While this happened, it was clear that India at this stage was not worried about importation as it saw no reason for the foreign agent to not manufacture in their territory, giving credit to their unexplored expanding domestic market and increasing labour force[38]. This assumption can be taken to mean that India had envisioned that they had full capacity to manufacture and a situation where import satisfies the market would not arise. This has to be viewed in the context of previous arguments prevailing against importation in order to understand the general stance of the nation.

The agendas on the international front kept changing during this time, but what remained constant was the opposition against importation. This can be inferred from an article written by Justice Y.R. Krishna Iyer in the year 2000 which was much after the signing of the TRIPS. He highlights the importance of a welfare state in a developing nation by saying that "the humbler the Indian human, the higher is the state's duty to protect the person." Along with this he credited the 1970 Act and the fact that importation was not treated as working of a patent with success of the pharmaceutical industry[39]. This clearly shows that the interpreters of the law in India, even after TRIPS, did not consider importation as the working of a patent.

IV. THE BAYER CASE: AGAINST ALL ODDS

In 2011 Natco applied for a compulsory license before the Controller General of Patents (hereinafter, Controller). Their short struggle lasted one year and in 2012, they were given the permission to manufacture Nexavar, which was patented by Bayer. The Controller in his decision relied upon

[34] *Supra* note 22.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*.
[38] *Ibid*.
[39] Y.R. Krishna Iyer, "Human Health and Patent Law" *Frontline* (October 2014).

Section 83 (c) of the Indian Patents Act[40] along with a reasoning that equated what a licensee can do to what a patentee can do. This was done through Section 90 (3) which states that no license can be worked through importation. This was read in a way that since no licensee can work the license through importation, no patentee should be allowed to do the same. This was objected upon by Bayer as this meant that the licensee was similar to a patentee.[41] They took the case to the Intellectual Property Board which merely assumed that importation can be considered as working as it was not a contested position in the case[42]. They proceeded to grant the patent on the basis of public requirement which was the first ground in Section 84 of the Indian Patent Act[43]. Further, with regards to importation, they made it clear that it can be allowed if India lacks the capacity to manufacture the product, making room for analysis on a case to case basis. From then on, the case then went to the High Court of Bombay which gave the final conclusion which was antithetical to the historical intention we have proved above.

One interesting thing to mention here, is the fact that the court took upon itself to outline a brief history of the patent law in the country, in the judgment itself. For this, they have used the Ayyangar Committee report as well. It is actually surprising that despite reading the Ayyangar committee report in detail, the court refused to take into account the importance of excluding importation as working of a patent.[44] They say that Section 90 of the erstwhile Act, which talked about situations where the reasonable public demand remained unsatisfactory, is now enshrined in Section 84 (7)[45]. The old section contained the words 'manufacture in India' which were deliberately not made a part of the new section. This was taken to mean a change in the intention to allow importation as working of a patent. Based on the fact that authorities have always made sure to read Section 84 from a lens of Section 83, the court should have concluded that importation cannot be allowed but instead, they further the decision of the appellate board by holding that once the patentee has satisfied the Controller that the patented invention cannot be manufactured in India due to a sufficient cause, they can be allowed to import as long as the public demand is met.

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[40] Patents Act, 1970, S. 83(*c*) (that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to transfer and the dissemination of technology, to mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.)

[41] *Supra* note 6.

[42] *Bayer Corpn.* v. *Union of India*, 2014 SCC OnLine Bom 963 : AIR 2014 Bom 178 : (2012) IPAB 148 Para 18.

[43] Patents Act, 1970, S. 84(1)(*a*) ("the reasonable requirements of the public with respect to the patented invention have not been satisfied").

[44] Ayyangar Committee Report, Para 30, p. 16.

[45] Patents Act, 1970, S. 84(7).

However, they did not stop here, bringing Form 27 into the picture. Form 27 is the annual responsibility of the patentee to show that his patent is being satisfactorily worked in the territory of India. The High Court interpreted that since the form has importation as one of the criteria under the heading 'working the patent', the law makers clearly wanted to make room for importation to satisfy public demand. Over here, the court has turned a Nelson's eye to the fact that the form has local manufacture under the same heading. Read from a lens of Section 83, a more reasonable reading of the form would be regarding importation as a relevant factor when the drug is being locally manufactured.[46]

The court has tried making room for a scenario where the patentee can be excused from local production if he has sufficient cause. While this decision had benefited the foreign patentee, it opens the floodgate of importation which has the potential to drown the domestic industry if misapplied.

The next obvious question that arises is how can it be misapplied? Before we go into this question, let us understand the 3 scenarios that arise when importation is allowed –

(i) where there is negligible importation and the public demand is satiated mainly by local manufacture.

(ii) where the public demand is satiated partly by local manufacture and partly by importation.

(iii) where the public demand is satiated only by importation.

In scenario number three, it may appear that public demand is satiated and the imported product is cheaper since arduous local production would have resulted in an expensive finished product, we should never forget that this will be a blessing only in the short run. This is also the approach taken by the court when analysing the problem. It prescribes only the economies of scale factor when deciding the importation question. However, in the long run, a foreign patentee would continue to take advantage of the expanding market without sharing the technical know-how of the patented invention.[47]

V. CONCLUDING REMARKS AND THE SUGGESTIONS

As mentioned above, this is the part where a suggestion is proposed to deal with the vagueness created by the court through the Bayer case. This suggestion is by no means a holistic and all-encompassing guideline, rather it is a mere attempt to take legal scholarship in the direction of a concrete and fair

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[46] *Supra* note 6.

[47] Ayyangar Committee Report, Para 30, p. 16.

approach. In furtherance to this, first the approach of the authorities at all three levels must be highlighted.

The first level is when the case was before the Controller of Patents in Mumbai. The Controller took an approach which was along the lines of the historical intention described above. The fear of a long-term harm to the nation led the Controller to conclude –

> "Unless such an opportunity for technological capacity building domestically is provided to the Indian public, they will be at a loss as they will not be empowered to utilise the patented invention, after the patent right expires, which certainly cannot be the intention of the parliament."[48]

In addition to this, after an analysis of the Indian law while keeping the international standards in mind the Controller recorded that –

> "it is clear to me that the Paris Convention and the TRIPS Agreement and Patents Act 1970, read together do not in any manner imply that working means importation. I am therefore convinced that 'worked in the territory of India' means '***manufactured to a reasonable extent in India***'."

The twist in the tale happened at the level of the appellate board. As opposed to the strict stance of the Controller against treating importation as working of a patent, the appellate board propagated a method which isolates each case from the other, making room for a possibility to allow importation if manufacturing is not feasible. The board has held that –

> "In a given case there may be an invention which cannot be manufactured in India and it is also possible that there is an invention where the reasonable requirement of the public itself is small in number and setting up a factory just for the purpose is not practicable. TRIPS says that authorization and other uses must be dealt with ***on a case to case basis***. Therefore, we cannot decide that "working" totally excludes import, or that "working" is synonymous to import and that if there is no manufacture in India, then there is no working. In any event, we are not furnished with any evidence regarding this aspect viz., whether the appellant in its facility in India, which admittedly the appellant does not deny, could not have manufactured this drug. So, with regard to Section 84(1) (c), we find that the word 'worked' must be decided on

[48] *Natco Pharma Ltd.* v. *Bayer Corpn*., (2012) 50 PTC 244.

> a case to case basis and it may be proved in a given case, that 'working' can be done only by way of import, but that cannot apply to all other cases."[49]

This is a clear indication that instead of the general rule of not treating importation as working of a patent, the Tribunal wanted to make a room for the situations where manufacturing locally is not economically feasible.

This approach was then accepted and furthered by the High Court by holding that –

> "The guidelines viz. Section 83 of the Act in particular states that the patent is not granted so as to enable the patent holder to enjoy a monopoly with respect to the importation of the patented article. Thus, it would presuppose that some efforts to manufacture in India should also be made by the patent holder. This is further supported by the other considerations set out in Section 83 of the Act to be applied in construing 'worked in territory of India'. Section 83(c) of the Act provides that there must be transfer of technological knowledge to the mutual advantage of the producers and users of the patented article. In this case, the user of the knowledge of the technology is the patient in India i.e. cancer patients. Section 83(f) of the Act provides that patent holder should not abuse his patent so as to inter alia adversely affect international trade. As against the above, Form 27 as prescribed also gives an indication that importation could also be a part of working in India. Therefore, as rightly held by the Tribunal, it would need to be ***decided on case-to-case basis***. It would, therefore, follow that when a patent holder is faced with an application for Compulsory License, it is for the patent holder to show that the patented invention/drug is worked in the territory of India by manufacture or otherwise. Manufacture in all cases may not be necessary to establish working in India as held by the Tribunal. However, the patent holder would nevertheless have to satisfy the authorities under the Act as to why the patented invention was not being manufactured in India keeping in view Section 83 of the Act."[50]

They have necessarily pointed out how it might seem that through Sections 83 and 84, the Indian law makers, have tried to exclude importation as

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[49] *Bayer Corpn.* v. *Union of India*, 2014 SCC OnLine Bom 963 : AIR 2014 Bom 178 : (2012) IPAB 148.

[50] *Bayer Corpn.* v.*Union of India*, 2014 SCC OnLine Bom 963 : AIR 2014 Bom 178.

'working' of the patent but it must be noted that importation has been included as a criterion in Form 27, which can mean that they had envisioned a situation where it might not be economically feasible to import. Thus, they hold that the approach of the tribunal to take a case to case basis approach in such matters is the most appropriate solution.

At present, lack of economic feasibility seems to be favouring the total importation, which is contrary to the Ayyangar Committee report. The historical intention explained above is merely to understand the gravity of caution that must be kept in mind while analysing the application for a compulsory license. What we object upon is the way the court has exempted this, not that it has exempted this. The court puts the patentee in a position where he gets an opportunity to explain himself as to why no local production has happened. It is purely at the discretion of the patentee as to what reason he gives as the court has not outlined any guidelines or compulsions, following which, an honest reason for the absence of local manufacture may not be produced by the patentee. Not only this, it can be argued that since Form 27 is the threshold to ensure that the patented invention is being worked, the absence of such guidelines and the presence of the vacuum created by the decision of the court, renders this form futile. In addition to this, Professor Shamnad Basheer in *Shamnad Basheer* v. *Union of India*[51] had brought the various questions of implementation regarding Form 27 into lime light where the Controller, instead of taking action remained nonchalant. When statistics like these exist, Form 27 should be made more concrete by the court through specific guidelines not vague by introducing anomalies like a case to case basis analysis.

Calculating costs and benefits of domestic manufacturing encompasses under its domain several different factors and the results vary from sector to sector. Therefore, detailed guidelines/check list for the patentee, focusing on factors like imitative capabilities of the host state, infrastructure assessment, annual turnover and profitability of the companies, economic and social well-being of the host state, etc, becomes crucial. In the absence of a check list from the side of authorities, patentee can fill the details in the Form 27 according to his convenience by neglecting the public interest feature of TRIPS and Section 83 of the Patents Act, 1970.

[51] *Shamnad Basheer* v. *Union of India*, 2015 SCC OnLine Mad 299 : AIR 2015 Mad 250.

REAPPRAISING THE CORPORATE PHILANTHROPY AND RANK OF NON-PROFIT VOLUNTARY ORGANISATIONS IN INDIA

—Nandita S. Jha[*]

Corporate philanthropy takes expanded extensive significance to quotidian commercial operations in India. For leading companies, corporate philanthropy goes well beyond simple donations. They engross in a variety of philanthropic activities, such as volunteer initiatives, community service and educational or cultural projects. Often, such engagement is part of a larger framework of corporate social responsibility that also covers issues such as ethical business conduct, diversity and protection of the environment.

Firstly, the speedy development of the economy over three decades of strong economic progress, with a synchronized rise in internal wealth, promises well for the latent for philanthropic giving. Second, the Indian Companies Act of 2013 regulates Corporate Social Responsibility (CSR) and mandates higher corporate spending towards specific sectors. Third, global interest in India's social and economic development is high – reflected in important levels of external funding – and it has become the largest recipient of international philanthropic flows, while external financing from foreign direct investment (FDI) and personal remittances have increased as a percentage of GDP. Meanwhile, official development assistance (ODA) as a percentage of Gross National Income (GNI), has decreased.

Although research in this area have been emphasizing the strategic relevance of corporate philanthropy. It is debated that companies can and should

[*] Assistant Professor Research Scholar, CNLU Patna.

strategically use their benevolent activities to create win-win opportunities for themselves and for the beneficiaries of their philanthropy.[1]

Although the strategic relevance of corporate philanthropy is widely accepted, its effectiveness varies substantially. Few companies achieve significant lasting societal impacts with their philanthropy, and even fewer manage to accomplish both sustainable social effects and significant economic returns. Most companies' philanthropic activities lack a cohesive strategy and are conducted in a piecemeal fashion, causing investments in corporate philanthropy to often simply dissipate.

In most cases, executives dismiss this ineffectiveness as an inevitable part of philanthropic engagement. By doing so, they misjudge the situation. There is no reason to treat a company's charitable activities less professionally than the core business.

But to what extent should corporate philanthropy be related to a company's core business? From an ethical perspective, is it legitimate to require corporate charitable activities to contribute to the company's bottom line by providing market benefits or advancing internal business operations? We think that this is clearly the case. Only philanthropic activities that both create true value for the beneficiaries and enhance the company's business performance are sustainable in the long run. Initiatives that don't fulfill these two objectives are easily threatened in difficult economic situations. Also, charitable activities that are not win-win solutions may not reach their potential and are often regarded within the company as negligible side activities. To achieve a sustainable and robust approach to corporate philanthropy, companies must direct their charitable engagement from both an ethical and an economic point of view.

I. MODELS CORPORATE PHILANTHROPY

Although many executives have started to pay more attention to corporate philanthropy, the strategic direction of their companies' philanthropic activities often remains superficial and poorly controlled. One reason is a poor understanding of managerial options in this area.

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[1] J.J. Chrisman and A.B. Carroll, "Corporate Responsibility — Reconciling Economic and Social Goals," Sloan Management Review 25, No. 2 (winter 1984): 59–65; M.R. Porter and M.R. Kramer, "The Competitive Advantage of Corporate Philanthropy," Harvard Business Review 80, No. 12 (December 2002): 57–68; and C. Smith, "The New Corporate Philanthropy," Harvard Business Review 72, No. 3 (May–-June 1994): 105–116.

A. Model 1: Market Orientation

Some Board put a strong emphasis on the expectations of stakeholders such as customers, employees, regulating agencies or neighboring communities. These executives strive to enhance their companies' competitive situation by designing their corporate philanthropy according to external demands. Trying to live up to the expectations of important stakeholders, these companies hope to achieve competitive advantages such as improved marketing and selling capabilities, higher attractiveness as an employer or better relationships with governmental and nongovernmental organizations. Such as ICICI Foundation, HCL Technologies run Rural Development Projects on PAN India basis.

Executives who adopt a market-oriented approach to corporate philanthropy tend to put stakeholder expectations at the center of their considerations. Such companies may be more interested in influencing stakeholder attitudes than in actual social outcomes. However, market-oriented corporate philanthropy can achieve remarkable societal benefits too. Because such initiatives are usually directed toward meeting stakeholder demands in order to affect stakeholders' attitudes, the activities often serve to satisfy crucial needs.

B. Model 2: Competence Orientation

There are some executives, on the other hand who, when deciding on the nature of their charitable engagement, focus on internal issues. In particular, they align corporate philanthropic initiatives with their companies' abilities and core competencies. In so doing, they avoid distractions from the core business, enhance the efficiency of their charitable activities and assure unique value creation for the beneficiaries.

The pro bono projects conducted by many consulting companies represent an example of this kind of philanthropic activity. For instance, McKinsey & Co. offers free consulting services to non-profit organizations in social, cultural and educational fields. Beneficiaries include public art galleries, colleges and charitable institutions. Each year, the company conducts about one hundred such projects worldwide, using its employees' unique knowledge of non-profit causes. Besides meeting its responsibilities toward society, McKinsey explicitly cites its employees' excitement, inspiration and development as major motives to engage in these activities.

Some companies syndicate an external, or market, orientation with an internal, or competence, orientation, while others focus on just one perspective on corporate philanthropy. Still others do not adopt a strategic orientation toward their philanthropic activities at all. The desired degree of internal and external

orientation indicates one of four specific approaches to corporate charitable activities:

1. **Exterior/Peripheral Philanthropy**: Companies that practice peripheral philanthropy have charitable initiatives that are mainly driven by external demands and stakeholder expectations. Most such companies see corporate philanthropy as a means to better position themselves within their competitive environment. Their philanthropic engagement is usually unrelated to their core activities, but they are attempting to translate positive reputation effects into concrete bottom-line impacts.

The strategic consequences of peripheral philanthropy are mixed. Companies may be able to reap benefits from enhanced reputation. Their philanthropic image may help stimulate customer demand for their products and services. Also, they may improve their ability to attract and retain qualified employees or enjoy lessened public and regulatory scrutiny. However, peripheral philanthropic activities often do not tap a company's core competencies, may lack credibility and may appear superficial. Companies may end up engaging in charitable activities in a wide array of fields with contributions that are hardly distinctive.

On the other extreme, some companies design their peripheral philanthropy very comprehensively. Such companies risk confusing and impairing their business focus. Their social initiatives can distract both monetary and managerial resources from the business's core activities and can contribute to strategic ambiguity.

Consider the case of the Indian steel producer Tata Steel Ltd., based in Jamshedpur, India.[2] Founded in 1907, Tata Steel acquired a strong philanthropic heritage from its charismatic founder, Jamsetji Nusserwan Tata, who ran his business with a strong sense of social responsibility for the Indian nation's welfare. As a result, Tata Steel pioneered many employee welfare measures in India, introducing the general eight-hour working day in 1912, free medical treatment in 1915, maternity benefits in 1928 and a pension system in 1989. Tata Steel also virtually ran the city of Jamshedpur. The company

[2] See H. Bruch and U. Frei, "Tata Steel 2005: The Vision of Harmonizing Profitable Growth and Social Responsibility," University of St. Gallen Case No. 405-023-1 (St. Gallen, Switzerland: University of St. Gallen, 2004)

provided a wide array of services, including water and power supply, landscaping, street sweeping and civil construction work. Tata Steel ran hospitals, schools and a college with 30,000 students. For many years, these far-reaching social welfare practices substantially enhanced Tata Steel's reputation and provided the company with significant advantages. It was able to attract and retain the talent necessary for its continued success, even though the area around Jamshedpur provided little infrastructure. In addition, the company enjoyed excellent labour-management relations and was spared from strikes for decades. Tata Steel was also able to create an enormous level of satisfaction and loyalty among its workforce.

However, in the early 1990s, the typical problems of peripheral philanthropy started overshadowing its benefits. Tata Steel's wide array of noncore activities impaired the company's ability to focus on the core steel business. As one of the company's vice presidents put it, "Tata Steel realized that it was necessary to review its approaches to the sustenance of its business and to the great social responsibility that was on its shoulders. The problem was how to grow into an efficient world-class business corporation without losing the image of a socially conscious employer." The company's philanthropic activities were widespread but strategically ambiguous, and this was eventually viewed as an impediment to future growth. These developments threatened to erode Tata Steel's position in the marketplace and put its very existence at risk.

Tata Steel suffered from inefficiency, and the company's oversized workforce boosted payroll costs. By the early 1990s, Tata Steel's payroll peaked at 78,000 employees, almost 10% of whom worked providing services for the town or medical services. The drawbacks of Tata Steel's approach to corporate philanthropy became obvious after the liberalization of the Indian economy in 1991 led to increased competition. Top management at Tata Steel suggested far-reaching changes, including massive workforce reductions and a substantial redesign of the company's social welfare programs.

It was only through a difficult change process that Tata Steel's top management was able to get the company back on track. Given the philanthropic heritage of the company, B. Muthuraman, managing director since 2001, did not want

to jeopardize Tata Steel's reputation as an employer of choice and outstanding corporate citizen. There was consensus in top management that change was inevitable, but it should not involve an abandonment of the company's engagement in corporate philanthropy.

Today, Tata Steel is a highly profitable company with plans for substantial growth. However, even in early 2005, after substantial workforce reductions, about 1,400 of Tata Steel's 40,000 employees were still working in city services or medical services. The company was spending about $21 million each year to carry out those tasks, and the company's refocusing and downsizing processes were slated to continue. As this example illustrates, peripheral philanthropy may be appropriate under certain circumstances. It can help companies attain benefits that are vital both for themselves and for key stakeholders. In such cases, it may be both ethically and economically crucial for the company to jump in and meet stakeholder needs. However, such initiatives usually cannot be sustained in the long run.

2. **Bound Philanthropy**: Companies emphasize a pronounced competence orientation in their philanthropic initiatives. Adopting an approach that we call constricted philanthropy, executives at these companies hope to use synergies between their main activities and their charitable activities. These executives harness their companies' core competencies for social purposes, but do so while largely neglecting an external stakeholder perspective.

The strategic impacts of constricted philanthropy are mixed. Using existing expertise, resources and facilities enhances the efficiency of the company's philanthropic initiatives. In some cases, executives may even see opportunities to transform their companies' cultures and their employees' mindsets by linking philanthropic and business activities. These managers strive to imbue a sense of responsibility throughout the corporation and to cultivate a sense of innovation by engaging corporate competencies in new areas.

3. **Dispersed Philanthropy:** Corporate philanthropy in many companies is characterized by a general lack of strategic direction. Such initiatives are largely uncoordinated. Neither top executives nor typical employees have a comprehensive overview of the company's activities, and there are

no clear-cut decision criteria that explain why specific charitable projects are chosen. As a result, these companies may engage in a multitude of small projects without a guiding theme. Funding is spread more or less arbitrarily across various institutions in differing areas.

The consequences of this piecemeal approach, which we call dispersed philanthropy, are usually not particularly favourable for either the company or the beneficiaries of its philanthropy. The negative aspects of peripheral and constricted philanthropy multiply here. For instance, dispersed philanthropy increases the problem of strategic ambiguity. Neither external stakeholder needs nor internal business considerations guide the company's philanthropic engagement. Both managers and employees may find it hard to understand why the company is doing what it is doing. Also, the impacts of dispersed philanthropy tend to be minimal. Operating in areas far from its core competencies, the company is not able to realize internal synergies. At the same time, the multitude of different projects prevents the company from focusing its efforts on certain stakeholder groups and providing them with substantial benefits.

4. **Strategic philanthropy**: The most effective approach to corporate philanthropy, which we call strategic philanthropy, integrates an internal and an external perspective. It applies the same professional management principles to corporate philanthropy as to any other field of business operations. Executives align philanthropic efforts with the core competencies of their companies, thus using the company's unique abilities to benefit society. However, they also take into account stakeholder and market expectations so that the company may benefit from the effect of its philanthropic activities in the marketplace. Companies with this approach to corporate philanthropy achieve sustainable results with regard to both their stakeholders' needs and their own competitive advantage. While providing substantial benefits for society, they can gain opportunities to learn how to apply their core competencies in new business areas, boost their employees' intrinsic motivation, stimulate customer demand and enhance their attractiveness in the labour market. They maintain and even strengthen their identity by aligning their social engagement with the overall company mission and vision.

IBM's Reinventing Education grant program is a classic example of strategic philanthropy.[3] Launched in 1994, Reinventing Education aimed to improve school systems and drive education reform in the United States and other countries. To achieve this aim, IBM provided IT solutions in areas like communication between homes and schools, teacher professional development, student assessment and data management and analysis. Reinventing Education drew heavily on IBM's employees' specialized skills to provide solutions for technological problems. By August 2004, the program, which is still ongoing, had completed three rounds of grant awards to schools and school districts and had, in 2004, issued grants valued at more than $70 million. However, only about 25% of those contributions were given in cash, while 75% consisted of research and consulting time, software and technical equipment.

The Center for Children & Technology in New York estimates that by 2004, more than 90,000 teachers and millions of students were using educational technology tools created through Reinventing Education. The program was working in 25 sites across the U.S. and in nine countries in Asia, Latin America, Europe and Australia. Besides offering significant contributions toward the improvement of public education, Reinventing Education also provided IBM with important strategic advantages, such as enhancing its reputation. From 2000 to 2003, IBM continuously remained in the top five of Business Ethics' 100 Best Corporate Citizens list. In addition, the company received the 1999–2000 Ron Brown Award for Corporate Leadership. Reinventing Education also boosted IBM employees' pride and loyalty. And the program enabled technological learning, skill transfer and the development of new technologies with commercial potential. For instance, as part of the Reinventing Education initiative IBM staff developed new drag-and-drop technology for the Internet that also could be used for commercial purposes. IBM also created "Watch-me!-Read," an innovative voice-recognition software application for children. Although initially designed as part of the philanthropic initiative, these innovations also had substantial commercial potential. Because of Reinventing Education, IBM was eventually able to make its K-12

[3] See R.M. Kanter, "IBM's Reinventing Education (A)," Harvard Business School Case No. 9-399-008 (Boston: Harvard Business School Publishing, 2001).

> education business profitable even though that business had been losing money before the program started.
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> As this example illustrates, strategic philanthropy enables companies to fully realize the potential of corporate philanthropy both for its beneficiaries and for the company. However, strategic philanthropy also entails substantial commitment on the part of management. It requires sound planning and careful implementation, and executives need to clearly focus their companies' charitable activities. For example, Reinventing Education was clearly directed toward providing technological solutions to barriers to reform in K-12 education, and projects were only initiated if they addressed that issue. Without such a clear focus, corporate social engagement is likely to drift away from strategic philanthropy.

Since India has a complex philanthropic and non-profit environment, with multiple organisations providing funding and implementing activities in areas such as education, primary health care and rural development. Some organisations are exclusively funders, others focus on implementing programmes and some perform a hybrid role providing funding to other organisations while carrying out programmes themselves. Private funding of this nature can come from corporate foundations, CSR from private companies, annual spending from public trusts and spending by family foundations and other organisations that receive donations with the goal of distributing them for a specific purpose.

The philanthropic sector in India is not regulated by a single government agency and there is no private or public organisation that consolidates information for all philanthropic organisations, nor an association of these organisations that performs this role. This is made even more complex by the fact that any non-profit legal entity involved in education, health care, religion or community development can be referred to as a ''foundation'' and can be legally registered under the same legal structures that regulate charitable institutions in India. While CSR is regulated by the MCA, non-profit organisations are registered under various Registration Acts – both at the central and State levels. Public trusts are regulated by the States through Trusts Acts; however, in the absence of a Trust Act in a particular State, the principles of the Indian Trusts Act 1882 apply. Hence, Non-Profit Voluntary Organisations in India generally take three legal forms: trusts, societies, and limited (Section 8) [4] not-for-profit companies.

[4] Companies Act, 2013

Moreover, the Indian philanthropic ecosystem has no reporting standards. While the United States, for example, has the Internal Revenue Service (IRS) 990 forms that compel all foundations to report their activities annually, there is no equivalent standard in India, resulting in the absence of data about private philanthropy in terms of allocation, sectors targeted, geographical distribution, or the ultimate impacts of these expenditures.

The consolidation and publication of CSR information from the MCA represents a strong commitment to transparency and a first step towards assessing the effectiveness of this mechanism to fund social spending directly through private expenditure. It will also help in understanding the impacts on company profitability and could influence the overall level of CSR spending. Preliminary results, using difference-in-difference estimations[5] , show that company profitability had been negatively impacted by the CSR mandate and, in some cases, reduced resources spent through this channel. Other estimates show that corporations spending less than 2% of their profits on CSR increased such expenditure after the introduction of the Companies Act of 2013, but others spending more than 2% reduced their spending [6] For these reasons, continuous monitoring of the evolution of CSR is crucial to establish the ultimate effects of this regulation.

With about 20 lakh NPVOs registered in India there is considerable confusion among corporates on their legitimacy and credibility. Corporates, especially the small and medium ones need a trusted marketplace or intermediary to be able to identify and partner with a NPVOs for their CSR compliance.[7]

Partnerships with civil society organizations carry forward corporate initiatives for integrated and inclusive development across diverse domains including affirmative action, healthcare, education, livelihood, diversity management, skill development, empowerment of women, and water, to name a few.

BSE Sammaan is a first of its kind initiative in the world which enables companies to undertake effective CSR activities by connecting them to non-profit and non-government agencies that have legitimate records.

Sammaan brings together BSE's exchange capabilities along with Confederation of Indian Industry's (CII's) strong industry connect and Indian

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5 Mukherjee, A., R. Bird and G. Duppati (2018), "Mandatory Corporate Social Responsibility: The Indian Experience", Journal of Contemporary Accounting & Economics, Vol. 14(3), pp. 254-265.

6 Dharmapala, D. and V. Khanna (2018), "The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013", International Review of law and Economics, Vol. 56, pp. 92-104.

7 BSE Sammaan visit <www.bsesamman.com>.

Institute of Corporate Affairs's (IICA's) knowledge expertise to enable effective CSR compliance.

Though researcher put forward that the role of a charities regulator (I use 'charities' here onwards to include not only NGOs, but all charitable non-profit organisations such as trusts, Section 8 companies, associations etc), should be to effectively secure compliance with the charity laws of the land in a fair, transparent and non-partisan manner, free from political influence to enhance public trust and confidence in both the regulator and the charities. Moreover, it should make the regulatory process as simple and cost effective as possible.

The Indian law could be called the law for non-profit public benefit organisations. Because charity is a concurrent subject, the parliament can make laws with respect to charities and charitable institutions under entry 28 of the concurrent list in the seventh schedule of the constitution. The states could, enact the same law using the central law as a model, for their jurisdictions. A comprehensive reform of NPVOs will ensure both accountability and impartiality in the Philanthropic sector.

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SC'S MALLIKARJUN KODAGALI: DEVIATING FROM THE PRESUMPTION OF INNOCENCE AND GOING OVERBOARD FOR EVOLUTION OF VICTIMOLOGY

—Vivek Krishnani

I. AN INSIGHT INTO THE ISSUE AT HAND

Ever since it came into existence, the criminal justice system has been a see-saw which has, on one of its two ends, the rights of victims and on the other, that of the accused persons. Too much relative weight on either of the ends leads to outcomes unwelcome. Accordingly, a perfect balance, despite being practically unachievable, is constantly sought by the Legislature and the Judiciary. The author, in this article, expounds how the see-saw, which had been neglecting the victim, has now attached to it more weight than required.

Mallikarjun Kodagali v. *State of Karnataka*[1] is a perfect illustration of the above proposition. The judgment deals with certain issues concerning victim's right to appeal under Section 372[2] of the Code of Criminal Procedure, 1973 (hereinafter "CrPC"). The issue undertaken by the author for analysis, herein, is the one which invited different opinions from Lokur J. and Gupta J. Notwithstanding the fact that the opinion of Lokur J. was the concurring opinion, the author subscribes to the views of Gupta J. in this regard. It must be noted that the issue at hand arises from the introduction of the proviso to Section 372,[3] with effect from 31st December, 2009:

> *Whether the victim can file an appeal in the High Court without seeking leave to appeal?*[4]

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1 *Mallikarjun Kodagali* v. *State of Karnataka*, (2019) 2 SCC 752 (hereinafter "Kodagali").
2 The Code of Criminal Procedure, 1974, No. 2, Acts of Parliament, 1860, S. 372.
3 *Ibid.*
4 *Kodagali*, *supra* note 1.

II. TRACING THE VICTIM'S RIGHT TO APPEAL AND THE ACCUSED PERSON'S POSITION IN THE CRIMINAL JUSTICE SYSTEM

To answer the question, it is imperative upon us to first briefly understand the evolution of victim's right to appeal and the position of an accused person. To begin with, reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the United Nations in the 96th Plenary Session on 29th November, 1985:

> "*Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.*"[5]

In the aforementioned, the use of the phrases "*judicial and administrative mechanisms*" and "*enable victims to obtain redress*" clearly include the right to appeal of victims. The reasoning that underlies the linkage of these rights with the idea of justice for victims is simply because one of the most fundamental ideals of retributive justice. What has been inflicted upon a victim needs to be done right, not only by his own compensation but also by the punishment of his offender. Therefore, even though under the scheme of the CrPC, the prosecution of an offender is primarily the responsibility of the Executive[6], the interests of the victim cannot be undermined.

The plight of victims begins the moment they have been subjected to the crime. Accordingly, the attention of criminologists has been directed to control of victimisation and protection of victims of crimes.[7] Recognised methods of the same include, but are not restricted to, compensation to the victims of crimes and adequate punishment to the offender. Mindful of the same, the proviso to Section 372 has been included effect from 31st December, 2009 and the recommendations of the Justice Malimath Committee[8] in this regard have been acknowledged to have played an important role. Herein, the victim has been provided, a right to prefer an appeal against *first*, acquittal of the accused,

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5 General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", United Nations (Nov. 29, 1985), <http://www.un.org/documents/ga/res/40/a40r034.htm>.

6 *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 : AIR 1980 SC 1510.

7 Law Commission of India, One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973, Law Commission of India (Aug. 22, 1996), <http://lawcommissionofindia.nic.in/101-169/report154vol1.pdf>.

8 Dr. Justice V.S. Malimath et al., Report of the Committee on Reforms of Criminal Justice System, Ministry of Home Affairs (Mar. 28, 2003), <https://mha.gov.in/sites/default/files/criminal_justice_system.pdf> (hereinafter "Malimath").

second, conviction for a lesser offence or *third* imposition of inadequate compensation.

Having said that, International Criminal Jurisprudence is based on the age old Blackstone's ratio, which enjoys wide acceptance in various jurisdictions even present day. Blackstone's idea is that *it is better that 10 guilty persons escape than that one innocent suffer*. In the author's opinion, it is from this fundamental principle that the various rights of an accused stem.

One of the most cardinal rights of the accused in fact, is to be presumed innocent until proven guilty. This right forms the basis for the rules relating to burden of proof as envisaged under the Indian Evidence Act as well. The burden of proving its case beyond reasonable doubt is that of the prosecution[9] and the accused has to simply create a doubt in the minds of the judge[10].

Which amounts to saying, the accused person should not become a victim to the criminal process because the plight of an accused, not in fact guilty, is far more problematic than that of the victim. In such cases, the accused person faces much more humiliation which unfortunately does not end after the verdict of not guilty. The society continues to perceive him as a criminal. Consequently, any right of the victim, howsoever important on the face of it, should not excessively undermine the basic rights of an accused.

III. THE DICHOTOMY: "WITHOUT SEEKING LEAVE TO APPEAL?"

In the instant case, one of the accused is a Member of the Legislative Assembly and it is contended that for this reason the State did not challenge the acquittal. In such cases, certainly the accused person, being at an influential position to drive the system in his favour, should not be left to public prosecutor. It may be noted that in various instances that the public prosecutor has in fact not fulfilled his duties properly[11] owing to factors like the influence of government.

Additionally, even when the public prosecutor withdraws prosecution of an accused and established application of mind on his part, it cannot be conclusively stated that such a decision was entirely free from government influence. Accordingly, the victim should have a right to appeal as the same is linked with the idea of justice. Particularly, in cases like the present one, the victim's

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9 The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, S. 101.

10 *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*, AIR 1964 SC 1563.

11 *Zahira Habibullah Sheikh* v. *State of Gujarat*, (2004) 5 SCC 353 : AIR 2004 SC 3467; *Laxman Rupchand Meghwani* v. *State of Gujarat*, (2016) 57 (2) GLR 1671.

only redressal mechanism becomes an "appeal". This is not where the two opinions deviate.

It is the question of seeking leave from the court for appealing that has invited differing answers from Lokur J. (concurring) and Gupta J. (dissenting). This becomes important particularly, because *the accused person is not in every given case, a member of the legislative assembly and guilty in fact*.

The essence of the concurring opinion, in this regard, can be best explained by the following excerpt from the introductory part of the judgment:

> "*The rights of victims of crimes is a subject that has, unfortunately, only drawn sporadic attention of Parliament, the judiciary and civil society.. we still have a long way to go to bring the rights of victims of crime to the centre stage and to recognise them as human rights and an important component of social justice and the rule of law.*"[12]

Whereas the dissenting opinion, which has made an effort to accommodate the rights of both victims and accused persons, can be understood from the following:

> "*the proviso to Section 372 of Code of Criminal Procedure, 1973 (for short 'CrPC') must be given a meaning that is realistic, liberal, progressive and beneficial to the victims of the offences. However, at the same time, one cannot ignore the rights of the accused and the procedure prescribed by law.*"[13]

The majority opinion on this note has been to allow the victim of a crime to appeal *without seeking a leave* from the court. Acknowledging that a victim has a right to appeal, under the CrPC, and partly concurring, the minority opinion has stated the contrary. In the author's view, the minority view is not only more prudent but also well reasoned. The majority opinion simply negates the rights of an accused person in criminal proceedings and various ramifications that result from their reasoning.

IV. RAMIFICATIONS AWAITING THE CRIMINAL PROCESS OWING TO THIS JUDGMENT

In the author's opinion, the ratio of this judgment with respect to the seeking of leave is problematic. Although the minority judgment amply discusses

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[12] *Kodagali*, *supra* note 1, at ¶ 2.
[13] *Kodagali*, *supra* note 1, at ¶¶ 78 and 79.

the concerns, the prevailing view lacks analysis of the issue. With a catena of cases, a victim's right to appeal has been discussed. However, the aspect of leave seeking is not analysed by Lokur J. Allowing a victim to appeal without seeking leave from the court is off putting for four major reasons, which the author has expounded below.

A. *First*, this requirement is legally implied and undermining this would amount to negating the intention of the Legislature

The proviso to Section 372 is silent as to the conditions that need to be satisfied for filing an appeal. However, as observed by Gupta J., because the provision of Section 378[14] was already in place when the proviso was included, the conditions provided therein need to be read into the same.

A beautiful illustration has also been provided in this regard, wherein there are two victims A and B. Say, A files a complaint and sets the wheels of justice moving and the case now has become a complaint case. Later, the accused gets acquitted and the complainant wants to file an appeal in the High Court, he will have to seek special leave to appeal whereas B, who had not even approached the Court at the initial stage, will be entitled to file an appeal without seeking leave to appeal. This aptly conveys why allowing an appeal without a leave is problematic.

B. *Second*, seeking a leave does not infringe a victim's right to appeal but not seeking it does violate rights of the accused

While victimisation needs to be controlled, privatisation of the criminal process by allowing an unconditional right to appeal to a victim is undesirable. Merely imposing a condition of seeking a leave does not curb the right of victims herein. In fact this has no impact on the victim's rights and all it does is make room for long-standing predicaments for the accused who might eventually establish its innocence.

Raghuvansh Dewanchand Bhasin[15] is a perfect illustration of how an accused person could come within the trap of criminal procedure and face humiliation despite not being guilty. It does not take much to bring in a person within the purview of crime and raise allegations against them in criminal proceedings. Registering of false complaints and cases is not uncommon and the same only brings humiliation to the accused person. Innocent citizens are often termed as accused, which is not intended by the legislature.[16] In fact, repeat-

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[14] The Code of Criminal Procedure, 1974, No. 2, Acts of Parliament, 1860, S. 378.
[15] *Raghuvansh Dewanchand Bhasin* v. *State of Maharashtra*, (2012) 9 SCC 791.
[16] *Dadu* v. *State of Maharashtra*, (2000) 8 SCC 437.

edly, instances of misuse of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 against people of other community have come into light.[17]

From a societal perspective, allowing appeals without leaves would further aggravate the plight of such an accused. In this regard, the longer the criminal proceedings go on, the more difficult it becomes for the accused person. The author opines that the see-saw is not giving due weight to the accused by not asking as a matter of requirement a leave to appeal. Accordingly, the requirement of a leave would ensure that the accused does not have to go through the exaggerated trouble. Hence, scrutiny of every appeal which the victim prefers should be done in order to ascertain whether the matter is worth looking into or not.

C. *Third*, admitting appeals without a leave would disregard the law of evidentiary burden

The evidentiary burden on prosecution has been placed by the Legislature for a reason. Once the trial court has acquitted the accused person, the prosecution should again establish why an appeal lies against such acquittal by seeking a leave.

Another way of perceiving this is that the presumption in favour of innocence of the accused gets buttressed by the order of acquittal rendered by the trial court. Allowing the prosecution to appeal without seeking a leave would be a blatant disregard of the presumption of innocence and it would in fact negate the intention of the Legislature regarding evidentiary burden.

D. *Fourth*, the number of pending cases will reach to an altogether new level

This argument of the author expounds how delay in criminal process is bound to result if this case is followed as a precedent. Pending cases are accumulating in high courts despite all the means and methods adopted to reduce the arrears. In fact, more than 13 lakh criminal cases are pending before high courts in India.[18] This adds up to the delay which is caused in effecting justice. Many times such inordinate delay contributes to acquittal of guilty persons either because the evidence is lost or because of lapse of time, or the witnesses

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[17] *Jones* v. *State*, 2004 SCC OnLine Mad 922 : 2004 Cri LJ 2755; *Sharad* v. *State of Maharastra*, 2015 SCC OnLine Bom 5507 : (2015) 4 Bom CR (Cri) 545.

[18] FE Online, "Over 4 million cases pending in High Courts of India, lower courts more burdened with 2 crores cases", Financial Express (Dec. 27, 2018), <https://www.financialexpress.com/india-news/over-4-million-cases-pending-in-high-courts-of-india-lower-courts-more-burdened-with-2-crores-cases/1426165/>.

do not remember all the details or the witnesses do not come forward to give true evidence due to threats, inducement or sympathy.[19] Whatever may be the reason it is justice that becomes a casualty.[20]

A question now arises that how is the requirement of leave linked to this. The answer is simple. Because every appeal will be admitted without a leave, even those matters will be heard on appeal that do have merit or are not worth the court's time. This would add to the backlog of cases pending before the higher courts and further burden them. Another way of looking at this is that this would lead to some redundant cases being heard by the court at the cost of some important ones which could have been given the time that was wasted on the redundant ones.

Considering the present day scenario in India, this concern pertaining to delay is one of the biggest reasons behind the author's claims. Accordingly, a leave requirement should be mandatory as it in no way curbs the rights of victims and in fact upholds the rights of accused.

V. CONCLUDING REMARK

After having presented the arguments aforementioned, the author concludes by holding in high regard the dissenting opinion of Gupta J. in *Mallikarjun Kodagali* v. *State of Karnataka*.

A very important aspect pertaining to seeking of leave for appeal is that there is a possibility that the Court does not give reasons for refusing to grant leave to file appeal against acquittal.[21] The author acknowledges that this becomes problematic and this might in fact undo the benefit of the right to appeal given to the victim. However, considering that such non-application mind could be challenged before a higher court and appeal could be so granted, there should not be any problems with the imposition of the condition of seeking leave.

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[19] Malimath, *supra* note 8, at ¶ 1.24.
[20] *Ibid*.
[21] *Goyal Enterprises* v. State of Jharkhand, (2008) 13 SCC 570.

KIMBLE V. MARVEL: MISCONCEIVED PRECEDENT OR STELLAR AFFIRMATION

—*Aditya Gupta*[*]

Abstract — A clause in the license agreement which requires the licensee to continuously render royalty payments even after the expiration of the patent rights has been a very controversial issue in practice. With the infamous United States Supreme Court Ruling of Brulotte v. Thys Co.,[1] *and its subsequent affirmation in Kimble v. Marvel, the legality of continued royalties seems to be a settled provision of law in the American Jurisprudence. Although, the judgment rendered in Kimble v. Marvel begs the question as to whether the affirmation was by reason of sound judicial interpretation or the coercion of Stare Decisis. The affirmation was also critiqued as being a transparent garb for clothing a decision rendered under the Anti-Trust laws as one rendered within the contours of the Patent Law. The interplay between the Rule of Reason and the Per Se rule on one hand with that of the Patent Misuse Theory on the other was alarmingly unclear. The three were presented as being so closely related that the two distinct dynamics of law could very well be addressed as excessive legislation on the same subject-matter. With the Ninth Circuit Court and the Federal Court reluctantly barring Post-Expiry Royalty, the Supreme Court was also witnessed as being averse to adhere to the Brulotte Rule. The present research seeks to analyze the 2015 ruling of Kimble* v. *Marvel*, *without the interference of Stare Decisis and defining the contours under which the judgment was rendered (Patent Law or Anti-Trust). The interplay between Rule of Reason and the Patent Misuse theory so elucidated within the judgment shall also form an important segment of the presentation. Most importantly, the stand of the Indian*

[*] Eight Semester (IPR Hons), National University of Study and Research in Law, Ranchi; Jharkhand;

[1] 1964 SCC OnLine US SC 210 : 13 L Ed 2d 99 : 379 US 29 (1964).

Jurisprudence shall be assessed with reference to continued royalties, both within the Patent Law and the Competition Law.

I. INTRODUCTION

A clause in the licensing agreement which requires the licensee to continuously render royalties has undeniably been a very controversial issue in practice. Innumerable litigations concerning such payments have been brought forth for the scrutiny of the courts. Contentions ranging from deferring of risks to stifling innovation have time and again been cited in favour of continued royalties. Although, all such contentions and arguments have been in vain because of a per se prohibition on payments of royalties after expiration introduced in 1964 and affirmed in 2015.

The US Supreme Court has always broadened the horizons of the Patent Misuse Doctrine ever since its inception in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*[2] The doctrinal counter movement which was indulged into by the Circuit Courts and the District after the *Brulotte*[3] judgment was finally put to rest half a decade later in *Kimble* v. *Marvel*.[4] The Supreme Court has reaffirmed the *Brulotte* ruling despite the oprobrium it had witnessed across the judicial and the academic spectrum.[5] The affirmation was again marred by academic criticism and was deemed to overlook the jurisprudential developments of the late 20th Century and the early 21st Century. The argued shift from the Patent misuse to Rule of Reason was sought to limit the scope of applicability of the former to ensure better distribution of risk and a better economic environment.

The Ninth Circuit Court which dealt with the issue prior to the writ being filed before the Supreme Court, was also as reluctant to adhere to the *Brulotte* Rule.[6] The dissenting opinion of the *Kimble* ruling and the widespread repugnance of the majority ruling begs the question as to whether the affirmation was an effect of sound statutory interpretation or a judgment rendered under the coercion of *Stare Decisis*. The affirmation was also critiqued as being a

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2 1917 SCC OnLine US SC 86 : 61 L Ed 871 : 243 US 502, 515 (1917).

3 *Brulotte* v. *Thys Co.*, 1964 SCC OnLine US SC 210 : 13 L Ed 2d 99 : 379 US 29 (1964) [Sup Ct (US)].

4 *Kimble* v. *Marvel Entertainment, LLC*, 2015 SCC OnLine US SC 4 :192 L Ed 2d 463 : 135 S Ct 2401 (2015) : 576 US _ (2015).

5 Molly McCartney. "Caught in the Web of Stare Decisis: Why the Supreme Court's Holding in Kimble v. Marvel was Wrongly Decided", 16 Wake Forest Journal of Bussiness and Intellectual Property Law, 492 (2016).

6 The Court called the decision counter-intuitive and based on an incorrect economic policy. *Kimble* v. *Marvel Entertainment Inc.*, 727 F 3d 856 (9th Cir 2013).

transparent garb for clothing a decision rendered under the Anti-Trust laws as one rendered within the contours of the Patent Law. The reason for strict adherence to the Patent Misuse and the blatant disregard of the Rule of Reason has been the cornerstone of the critique witnessed by *Kimble.*

The present research directly elaborates the *Brulotte* rule and analyses the judgment of the Supreme Court in *Kimble* v. *Marvel.* The advantage that academic research enjoys is that unlike judicial interpretations it is not marred by policy concerns. Thus, the judgment of *Kimble* shall be analysed without the interference of the doctrine of *Stare Decisis.* The historical underpinnings and the evolution of Patent Misuse along with its current understanding in light of its relevance with the Rule of Reason shall also form a segment of the present research. Most importantly, there is a dearth of literature explaining the legality of continued royalties within the Indian Jurisdiction; a segment of the paper has been dedicated to address the Indian stance on post-expiration royalties.

II. BRULOTTE RULE AND KIMBLE AFFIRMATION.

The present research hinges on the reasoning employed by the majority while affirming the *Brulotte* rule. The *Kimble* court in 2015 abjured an opportunity to bid adieu to the per se prohibition on post expiration royalties of patents, a move which was highly sought after by the American legal diaspora.[7] The *Kimble* case was being viewed as an opportunity to frustrate the *Brulotte* ruling or at least revise it to meet the requirements of the 21st Century, in turn the decision upheld an arguably archaic and misconceived rule of law.[8]

A. The *Brulotte* Rule

From the lower courts calling the *Brulotte* rule as counterintuitive[9] to the Seventh Circuit Court remarking the rule to be *'out of touch with the Supreme Court's current thinking'*[10]*,* the aversion of the judiciary regarding the implementation of the rule has been a matter of public spectacle. Not only has the judiciary been reluctant to apply the rule, the academic commentary has also not been very forgiving.[11] The decision has often been said to be a misplaced

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7 The same can be evidenced by the nine *amici curie* filed in support of *Kimble* as opposed to only five filed in support of *Marvel;* Also see: K. Mullaly, "Your Friendly Neighborhood Patent License: Should Royalty Payments Based on Postexpiration Use Be Per Se Unenforceable?", 42 Preview of the United States Supreme Court Cases, 238 (2015).

8 Jim Day and Erik Olson, "Three Significant Upcoming Patent Law Decisions Expected from the Supreme Court and Federal Circuit", Fabella Braun and Martel LLP (Sep. 20, 2018), <https://www.bakerdonelson.com/files/March%20IP%20Roundtable%20Outline.pdf>.

9 *Kimble* v. *Marvel Entertainment Inc.*, 727 F 3d 856 (9th Cir 2013).

10 *Scheiber* v. *Dolby Laboratories Inc.*, 293 F 3d 1014 (7th Cir 2002).

11 Herbert J. Hovenkamp, Brulotte's Web, 11, Journal of Competition Law and Economics, 527 (2015).

fear of monopoly which was not tied to antitrust concerns.[12] The widespread criticism of the rule begs the question as to what is the *Brulotte* ruling. This section attempts to answer the same.

In the present case, the Thys Company sold hop-picking machines which incorporated several patents. The company extracted a licensing fee in lieu of the machines. The licensing agreements did not discuss the last date for payment of royalties and thus the royalty payments continued after the patent expiration. The purchasers subsequently discontinued the payment and a case of infringement was registered against them. With an 8:1 division of the bench Justice Harlan delivered the minority opinion while Justice Douglas delivered the majority opinion and the licensing agreement was commented as being a *'bald act of policymaking'*. The majority judgment is responsible for a per se ban on post-expiration royalties on patent licensing agreements.

Although, the dictum rendered in the case of *Brulotte* was not a novel line of judicial reasoning, it was arguably brewed in the same barrel as some of its predecessors. Precedents supported the conclusion drawn by the *Brulotte* Majority. Authors quote that the first issue of post expiration royalties adjudicated by the US Supreme Court in *Scott Paper Co.* v. *Marcalus Mfg. Co. Inc.*[13], wherein it was held that "*any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws.*" Subsequently, the Third Circuit Court followed a similar line of reasoning, where it was held that the patent monopoly was spent on the expiration of a patent and any attempt to exact royalties after the expiration of patent term was unenforceable.[14] Thus, it can very well be submitted that *Brulotte* furthered the jurisprudence of the time and should not be arraigned as the harbinger of the Per Se prohibition of Post Expiration Royalties.

B. *Marvel* v. *Kimble* a misconceived precedent?

In the interval of 40 years between the *Brulotte* rule being promulgated and the *Kimble* dispute being considered for adjudication by the Supreme Court, the Per Se prohibition had witnessed abundant criticism. With Justice Posner providing a very blunt and uninhibited criticism in *Scheiber* v. *Dolby Laboratories Inc.,*[15] along with Justice Berzon further strengthening the anti-

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[12] Maxwell C. McGraw, "Kimble v. Marvel Entertainment, LLC: Economic Efficiency Caught in the Web of Improper Judicial Restraint", 65 University of Kansas Law Review, 177 (2016).

[13] 1945 SCC OnLine US SC 152 : 90 L Ed 47 : 326 US 249 (1945).

[14] Also discussed in *Brulotte* judgment, while considering the dimensions of Patent Misuse. *Ar-Tik Systems Inc.* v. *Dairy Queen Inc.*, 302 F 2d 496, 510 (3rd Cir 1962).

[15] 293 F 3d 1014 (7th Cir 2002).

Brulotte reasoning in the 2007 case of *Zila Inc.* v. *Tinnell*[16] *and the academic diaspora publishing various articles explaining the impracticality of the Brulotte* rule[17], the stage was set for an amendment to the prohibition with the *Kimble* dispute.

The *Kimble* litigation was concerned with the licensing agreement of a toy, over which a patent was obtained in 1991. Kimble had previously sued Marvel for patent infringement, the litigation was finally concluded with a settlement agreement between the parties. Kimble `royalty on 'net product sales was obtained. Neither did the agreement stipulate any period for which the royalties were to be paid nor did the agreement stipulate any reduction in the royalty rate after the expiration of the payment. Later Marvel 'stumbled across' the *Brulotte* rule and declared that they had no obligation to continue to render royalty payment and thus began the *Kimble* v. *Marvel* spectacle.

The plaintiff argued for a departure from the Per Se prohibition, in favour of a case-to-case Rule of Reason approach. The court would have to take into account the anti/pro competitive features of a licensing agreement and the economic effects which are most likely to register from the enforcement of the agreement. While substantiating the argument, Kimble argued that the Patent and Economic Policies favour a departure from the per se prohibition.

With a divided bench (6:3), Justice Kagan delivered the judgment which affirmed the Per Se prohibition on post-expiration royalty arrangements, crippling the concerns which were time and again cited against the *Brulotte* rule. The majority opined that a licensing agreement which provides for payment of royalties after the expiration of the patent, incorrectly extends the rights accrued from the patent.

The most controversial dictum of the judgment which also forms the basis of the present research was that, the dispute has been adjudicated entirely within the contours of the Patent law and not the Anti-Trust Law. While the latter provides for a wider scope of judicial interpretation and construction, the applicability of the former is statutorily dictated and there is minimal scope of judicial interpretation. Thus, any economic consideration cannot be submitted for adjudication because of the limited interpretative scope of the Patent Act.

C. Kimble without Stare Decisis

Various authors have time and again remarked that the affirmation by the *Kimble* court was not a result of sound judicial interpretation but a judgment

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[16] 502 F 3d 1014, 1020 (9th Cir 2007).

[17] "Michael Koenig, Patent Royalties Extending Beyond Expiration: An Illogical Ban from Brulotte to Scheiber", 2 Duke Law and Technology Review,1 (2003).

rendered to respect *Stare Decisis.*[18] *The Court explicitly remarked 'an argument that we got something wrong- even a good argument- cannot by itself justify scrapping a settled precedent.'* The Court quoted the famous statement of Justice Brandi that it is more important the principle of law be settled than it be settled right. The fact that *Brulotte* was a case of statutory construction overlapping with the tenets of Contract Law, the force of stare decisis is at its acme.[19]

Despite an unequivocal confession that the principles underlying the *Brulotte* rule might be incorrect, the court declined to frustrate the settled principle of law. Posner J.'s blunt criticism of the rule and the blatant reliance on stare decisis by the Kimble court shows that even the judiciary is covertly ashamed but too proud to concede.[20] The conclusion of the judgment also relied on the fact that Congress had never intervened to hold that the Per se rule should be departed from.[21] The force of Stare Decisis and Congressional conduct made a very strong case against the overruling of the precedent.

The dissenting opinion in *Kimble* v. *Marvel* also raise some genuine concerns about the application of Stare Decisis. The dissenting opinion delivered by Justice Alito, expressly states that Stare Decisis should not be perused to uphold a groundless and harmful precedent. Also, the fact that Congress has not indulged into the analysis of the viability of a precedent should not be considered as a source of authority to a bad law.[22]

III. PATENT MISUSE AND ECONOMIC CONCERNS

The Patent Misuse doctrine is essentially a construction of courts to eliminate the patentees to extend the monopoly granted by the registration of a patent.[23] The doctrine is an equitable remedy which is analogous to the 'unclean

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[18] A. Balto and A.M. Wolman, "Intellectual Property and Antitrust: General Principles", 43 IDEA : The Journal of Law and Technology 395 (2003); also see: Herbert Hovenkamp, "The Rule of Reason", 70, Florida Law Review, 96 (2018).

[19] S.P. Waxman. "May You Live in Interesting Times: Patent Law in the Supreme Court", 17 Chicago Kent Journal of Intellectual Property, 214 (2017).

[20] Esther Valerie Mongare, "Patent Term Under Review, Kimble v. Marvel Entertainment LLC: Patent Term and Innovation", SSRN Electronic Journal, (2018).

[21] The majority cited the case of *Watson* v. *United States*, 2007 SCC OnLine US SC 76 : 169 L Ed 2d 472 : 128 S Ct 579 : 552 US 74, 82-83 (2007), where to court considered that no congressional interference for 14 years accorded extra precedential importance to the judgment. Also see: Sherri L. Burr et. al., *Modern Intellectual Property and Unfair Competition Law* 85-90 (6th edn., Foundation Press, 2017).

[22] B. Orbach, "Antitrust Stare Decisis", 15 Arizona Legal Discussion Paper, 1 (2015).

[23] Feldman, R.C., (2003), "The Insufficiency of Antitrust Analysis for Patent Misuse". Hastings Law Journal, 55, p.399.

hands' doctrine of Tort Law. It denies the enforcement of a patent if the patentee abuses the privileges granted by the patent law.[24]

A. Historical Development and Underpinnings

The 1917 case of *Motion Picture Patents Co.*[25], has often been credited to have developed the affirmative defence of patent misuse.[26] The patentee did not allow the purchasers to show moving pictures printed on competitors' film. The Court reiterated the principles underlying the registration of patents and laid down that the patent grant must be limited to the invention described in the claims of the patent. Subsequently, the doctrine was further substantiated in *Morton Salt Co.* v. *G.S. Suppiger Co.*[27] Suppiger required that licensees of its patented salt depositing machines use Suppiger's unpatented salt tablets. The *Brulotte* case drew its importance from the fact that the Patent Misuse doctrine was freed from the shackles of tie-in arrangements and was implemented in the purview of Post expiration royalties.

The federal courts of the late 20th Century attempted to limit the scope of the patent misuse doctrine.[28] The case of *Princo Corpn.* v. *International Trade Commission*[29] has been given special emphasis in this respect. With *Princo.* the concluded contours of Patent Misuse made a showing of substantial anti-competitive effect in the relevant market an essential element of proof in most misuse cases.[30]

B. Patent Misuse and Anti-Trust Analysis

The Patent Misuse as has been declared in the *Kimble* case, does not consider any economic or competitive repercussions of the alleged misuse. An antitrust analysis particularly the Rule of Reason, which was sought as a replacement to the per se prohibition by Kimble, rigorously examines whether an agreement unreasonably restricts competition.[31] It means performing and

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[24] Daryl Lim, "Patent Misuse and Antitrust: Rebirth or False Dawn", 20 Michigan Telecommunications and Technology Law Review, 299 (2013).

[25] *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 1917 SCC OnLine US SC 86 : 61 L Ed 871 : 243 US 502 (1917).

[26] Cassandra Havens, "Saving Patent Law from Competition Policy and Economic Theories: Kimble v. Marvel Entertainment LLC", 31, Berkeley Technology Law Journal, 371 (2015).

[27] 1942 SCC OnLine US SC 1 : 86 L Ed 363 : 314 US 488 (1942).

[28] *Virginia Panel Corpn.* v. *Mac Panel Co.*, 887 F Supp 880 (W.D. Va. 1995); B. Braun Medical Inc. v. Abbott Laboratories Inc., 124 F 3d 1419, 1426 (Fed Cir 1997); *Mallinckrodt Inc.* v. *Medipart Inc.*, 976 F 2d 700, 706 (Fed Cir 1992).

[29] 616 F 3d 1318 (Fed Cir 2010).

[30] R. Stern, "Kimble: Patent Misuse through the Lens of Patent Policy and Not Antitrust Policy", 38 European Intellectual Property Law Review, 183 (2016).

[31] Daniel Fundakowski "The Rule of Reason: From Balancing to Burden Shifting", 1 Perspectives in Antitrust, 2 (2013).

analysing any potential anticompetitive effects of a patent license and whether there are pro-competitive effects that outweigh the anticompetitive effects.[32]

The doctrine of Patent Misuse before the promulgation of *Kimble* v. *Marvel* was remarked as a 'Patent-Antitrust Double Helix'[33], wherein an antitrust analysis could have been indulged in to specify whether or not the concerned agreement is covered under the Patent Misuse Doctrine. In the year 2014, Prof. Daryl Lim published an article immediately before the Kimble case was up for adjudication before the United States Supreme Court and feared that the Supreme Court might disrupt the understanding of the Patent Misuse which was developed by the Federal Circuit Courts. The Supreme Court brought his fear to reality when they explicitly declared that a Patent Misuse case could not indulge in an antitrust analysis.

Other authors have also opined that a rule of reason approach is far superior than a per se prohibition on the provision of Post-Expiration Royalties. For instance, an article published in 2016 in the Journal of Intellectual Property Law, espouses the view that a patent monopoly does not essentially necessitate a leverage or coercion in and of themselves.[34] The modern antitrust principles coupled with traditional judicial tools to confront fraud and coercion, are much better suited than per se or artificial rules that presume a harm or use of leverage that may not in fact be present. The argument fostered is one of merit, not all patents ensure a leverage over an extremely competitive market, all they accord is a possible market power.

Instead of providing a blanket prohibition, which stems from the reasoning that all patents entitle the patent holder to coerce the market into self-harming contractual relationships, the Courts should actually inquire into the fact whether the questioned practice imposes an unreasonable restrain on competition, taking into account. If the answer is affirmative, the Courts can very well declare the agreement void and restore what is espoused in *Kimble,* otherwise by following this approach, the court stifles various patents which probably required a longer time to realize the investment.

IV. CRITICISING *KIMBLE*

Innumerable academic papers since the promulgation of the *Kimble* v. *Marvel* ruling in 2015 have strongly criticised the affirmation of the *Brulotte* rule. These criticisms can be broadly categorized in two different concerns.

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[32] Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (US Department of Trade and the Federal Trade Commission) (2007).

[33] Lim, D., (2013), "Patent Misuse and Antitrust: Rebirth or False Dawn?", Mich. Telecomm. & Tech. L. Rev., 20, p. 299.

[34] L. Warren and L. Wale, "Rule of Reason for Post-Expiration Patent Royalties", 11, Journal of Intellectual Property Law and Practice, 37 (2016).

The first one being concerns which stem from the legal principles involved in the promulgation of the rule, and the second one being the concerns which stem from equity and are not necessarily dependent on legal principles. For the sake of brevity, the former is labelled legal concerns and the latter is policy concerns.

A. *Policy Concerns*

- Economic Inefficiency

The *Brulotte* judgment itself provided for contracting clauses which could be incorporated to negotiate around the *Brulotte* prohibition. *Kimble* followed the same trend and enumerated the contracts which are not prohibited by the ruling. Authors have often suggested that these measures clearly indicate the court's acquiescence of the fact that the rule being promulgated by them comes with its fair share of economic headaches.[35]

The alternate contracting arrangements are an economical inefficiency in themselves. The Courts expect that the parties draft and word their licensing agreement specifically keeping in mind the drafting plot embodied in the judgments. If such a trend of judicial intervention is allowed, the list of judgments which would require compliance would become very labyrinthine.[36]

- The 'stumbled across' contracting manoeuvre.

The most important policy concern relating to the Per Se prohibition stems from the fact that it can very well be perused as a tool to mislead the licensor into lower royalty rates. The factual scenario in *Kimble* v. *Marvel* is a classic example of this exercise. Marvel argued that they have 'stumbled across' Brulotte and subject to the rule enunciated therein they are not willing to pay any royalties to Kimble henceforth. Marvel's submission seems to be a bit too convenient.

Parties which do not possess the legal acumen or the resources might be unaware of the *Brulotte* rule shall be at the losing end of the licensing agreement[37]. The parties which are well aware of the rule would ensure lower roy-

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[35] McGraw, M.C., 2016. "Kimble v. Marvel Entertainment, LLC: Economic Efficiency Caught in the Web of Improper Judicial Restraint". U. Kan. L. Rev., 65, p.177.

[36] A similar view was posited in the Amicus Brief of Memorial Sloan-Kettering Cancer Center in conjunction with other research centres. *Kimble* v. *Marvel Entertainment, LLC*, 2015 SCC OnLine US SC 4 :192 L Ed 2d 463 : 135 S Ct 2401 (2015) : 576 US _ (2015), 2015 WL 673668

[37] J. Rantanen, "Exorcising the Spirit of Justice Douglas", PATENTLYO (Oct. 20, 2018), <https://patentlyo.com/patent/2015/04/exorcising-justice-douglas.html> (last visited Oct 20, 2018) Also see: S. Doyle, "Brulotte Rule upheld despite suspect economic rationale", LAWS360 (Oct. 20,

alty payments extended over a longer period and subsequently can take refuge in the Per Se ban to frustrate the agreement. Thus, opportunistically taking unfair advantage at the cost of the other parties.

B. Legal Concerns

- No statutory construction

The Kimble Court repeatedly argued that the *Brulotte* rule was based on statutory consideration of Patent Law and Contractual Law. Thus, emphasizing the effect of Stare Decisis on the judgment. Whereas, the fact of the matter is that apart from a passing reference made to the Article 8 of the American Constitution, no specific interpretation of singular provisions of the patent law was indulged into by the Brulotte Court.

- Assumption of coercion and leveraging

The *Brulotte* court had opined that post expiration royalties increase the duration of the patent monopoly accorded to a patent by the sovereign authority. Such interpretation is erroneous subject to the fact that registration of a patent essentially embodies a 'Right to exclude', which entitles the patent holder to exclude any person from infringing his patent.[38] With the expiration of the Patent, the Right to Exclude also expires[39] and the technical know-how encapsulated by the registration is open to exploitation by the general public. The relationship between the licensor and licensee is not accrued from Patent Laws but from the contractual relationship they have previously indulged into.

The only case where the post-expiration royalties can extend the scope of a patent is when the patent enjoys tremendous market power and the licensor is able to coerce the licensee into an extended payment period for the patent. As has been previously elaborated, not all patents enjoy such market power and the Supreme Court's assumption is completely misplaced.

- Post-expiration licensing of Trade Secrets-*Listerine* Case

The Per Se ban on Post Expiration Royalties stifles competition because it disincentivises the registration of a patent, which is necessary to ensure that the patent comes into the public domain. The inventor can instead of registering his invention as a patent can protect his invention as a Trade Secret. There

2018), <http://www. americanbar.org/content/dam/aba/publications/antitrust_law/ at303000_ ebulletin_20130122.authcheckdam.pdf>.

[38] Herbert J. Hovenkamp, "Brulotte's Web", 11, Journal of Competition Law and Economics, 527 (2015).

[39] A. Balto & A.M. Wolman, "Intellectual Property and Antitrust: General Principles". 43 IDEA: The Journal of Law and Technology, 395 (2003).

is no prohibition on exacting Post-Expiration Royalties from Trade Secrets. The following two cases can further elaborate the scope of this hypothesis:

Warner-Lambert Pharmaceutical Co. v. *John J. Reynolds Inc.*[40], popularly known as the *Listerine* Case. The case involved the licensing of the formula which was required for the production of Listerine. A licensing agreement was entered into with Dr. Lawrence for the Listerine formula. By the time the case was instituted a royalty amount of almost $2.2 billion had already been paid with an accrued income of over $1.5 billion due to be paid every year. Although, the Listerine Formula had been completely in the public domain and had even once been published in the National Formulary and Journal of American Medical Association. The fact that the formula was public knowledge was not attributable to negligence by the plaintiff or any of his predecessors. The question was whether after 75 years of paying royalty, the plaintiff was supposed to continue the rendering of royalties? The Court answered in affirmative and declared that there is no bar on the payment of indefinite royalties and that the term of royalty payments shall be determined according to the terms of the licensing agreement.[41] Another such instance where post-expiration royalties in case of trade secrets was allowed is *Aronson* v. *Quick Point Pencil Co.*[42]

- A nuanced understanding of Patent Misuse

The jurisprudence behind the application of patent misuse witnessed significant development ever since the *Brulotte* judgment. Although, thoroughly critiqued[43], the *Princo* case has had a very important impact on the understanding of the Patent Misuse Doctrine. With the *Princo* ruling patent misuse jurisprudence was substantially entangled with Anti-Trust concepts. The judgment unequivocally provided that misuse occurs when and only when the patentee *"impermissibly broadens the physical and temporal scope of the patent grant with anticompetitive effects*".

Kimble reaffirms the doctrine of cases holding that misuse is not antitrust and does not need a showing of actual anticompetitive effects. Without a deliberation over the Federal Circuit Courts' stride in the understanding of Patent Misuse the Supreme Court overruled the Circuit Courts' 40 years' worth of efforts.

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40 178 F Supp 655 (SDNY 1959).

41 Wie Lin Wang. "A Study on the Legality of Royalty Collection Clauses after Expiration of Patent Rights", 15 The John Marshall Review of Intellectual Property Law, 214 (2016).

42 1979 SCC OnLine US SC 33 : 59 L Ed 2d 296 : 440 US 257 (1979).

43 S. Zain. "Misuse of Misuse: Princo Corp. v. International Trade Commission and the Federal Circuit's Misguided Patent Misuse Jurisprudence", 13 North Carolina Journal of Law and Technology, 95 (2011).

V. INDIAN PERSPECTIVE

A. Indian Perspective

The history of patent misuse can be traced back to the Tek Chand Committee Report which submitted its interim report on 4th August, 1949 with recommendations for prevention of misuse or abuse of patent right in India and suggested amendments to sections 22, 23 & 23A of the Patents & Designs Act, 1911 on the lines of the United Kingdom Acts, 1919 and 1949. Based on the recommendations of the Committee, a bill was introduced in the Parliament in 1953. However, the Government did not press for the consideration of the bill and it was allowed to lapse.

With the advancement in the statute on the patent abuse hypothesis over the globe, the Indian government in the year 2008 presented a Department-Related Parliamentary Standing Committee Report on "Patent and Trade System in India". The Department of Scientific and Industrial Research has evocated the indispensability of a strong licensing system in the country for ensuring business development.[44] A resolution of the abovementioned legal conundrum is necessary for strengthening the licensing system.

Be that as it may, the oppression remains is that the Indian courts are yet to propound any judgment based on patent abuse precept unequivocally. Nonetheless, in *Telefonaktiebolaget LM Ericsson* v. *Competition Commission of India*[45] the issue of abuse of patent rights resulting in anti-competitive consequences was raised, which in a nutshell is the essence of patent misuse. The defendant companies, Micromax and Intex, had accused the plaintiff company, Ericsson, of abusing its position of dominance. Ericsson had entered into separate licensing agreements with Micromax and Intex in respect of Standard Essential Patents. It was alleged that Ericsson was extorting unfair royalty rates and limiting the development of technology in the relevant field by seeking such high royalties, since the Indian manufacturers were being denied market access. The Competition Commission of India in its order held that the practices adopted by Ericsson were against the principle of FRAND (fairness, reasonableness and non-discrimination). The court held that pressurising the implementer to accept non-FRAND terms amounted to abuse of dominant position.

The ground for allegations against Ericsson was section 4 of the Competition Act which prohibits abuse of dominant position by any enterprise. Demanding excessive royalties was read into denial of market access which

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[44] Department Related Parliamentary Standing Committee on Commerce, 88th Report on Patents and Trade Marks Systems in India (Parliament of India) (2018).

[45] 2016 SCC OnLine Del 1951.

constituted abuse of dominant position. The question of whether seeking royalties beyond expiry of patent also constitutes abuse of dominant position has not yet being raised.

As has already been observed by the researchers in the present research, there is an acute paucity of literature on the issue of post-patent royalties in India except for a 2009 Delhi High Court judgment[46] which simply holds that patent-holder cannot demand post-patent royalties, without actually proffering any rationale for the same. The court clearly observed that:

> *"Where the statute provides that the patent is allowed only for a limited period, the license of the patent cannot extend beyond that limited period. A license agreement for patents can be valid only during the currency of the patent. Where the patent itself expires, the license of the patent also expires".*

A similar unsubstantiated rule has been propounded by Dr. Versha Vahini, who opined that within the Indian Legal Spectrum an agreement requiring royalties to be paid even after the patent has expired constitutes as being a practice which hampers competition.[47]

However, whether such practice is anti-competitive in nature is yet to be examined. Accordingly, keeping in view the above perceptions made, the researchers do not falter in saying that the Indian judicial system is a long way behind the truth and now it is the need of the hour that judiciary must consider such misbehaviours and solidly settle upon it.

VI. RECOMMENDATIONS AND CONCLUSION

The majority in *Kimble* relied on the doctrine of Stare Decisis to uphold the *Brulotte* rule. What should have been considered as a guide to judicial interpretation was accorded the credence of a God and thus, deviation from it was conscientiously abhorred. The purpose of the doctrine is to ensure stability of laws to ensure stability in commercial agreements and to allow the public to enter into legally binding covenants, with absolute certainty. The trade-off between stability and reasonability is one of essence here. Trading reasonability for stability should not be indulged into by the Courts. Reasonable laws are far more important than stable laws, as was highlighted in the dissenting opinion. While acknowledging that *Brulotte* may hinder innovations or obstruct competition in some circumstances, the Court doled the responsibility on the

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[46] *National Research Development Corpn.* v. *ABS Plastics Ltd.*, 2009 SCC OnLine Del 605 : (2009) 40 PTC 613.

[47] Versha Vahini , *Indian Competition Law* 137 (1st edn., Lexis Nexis).

Congress to legislate the relevant prohibition. This violates the sanctity of the three pillars understanding of a democratic setup and the idea of Separation of Powers.

As far as the Indian Jurisdiction is concerned, it is an accepted fact that the IP jurisprudence of Indian Courts lags far behind that of its Western Counterparts. Although, the applicability and understanding of Post Expiration Royalties is nowhere to be found within the legislative framework or the Judicial Opinion. The skewed dictum available provides a very unsubstantiated prohibition on continued royalties, the reasoning and authorities to which are nowhere to be found. What is necessary is the judiciary and legislature along with the relevant governmental institutions (Example: Competition Commission of India) duly take this into account and frame a policy which addresses the present conundrum.

The collection of royalties from expired patent presents a plethora of pros and cons. Thus, a blanket prohibition of such arrangements cannot be appreciated as a solution. What is required is a carefully drafted set of rules which amongst them provide a guiding list of relevant and irrelevant effects of such agreements which should be appreciated in individual cases. The guiding principles shall ensure a stability in judicial pronouncements and a shall confirm that the scales of justice are levelled.

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JOSEPH SHINE V. UNION OF INDIA CITATION: (2019) 3 SCC 39 CASE COMMENT

—M. Sri Atchyut

Case Comment on Joseph Shine v. Union Of India:

Citations - (2019) 3 SCC 39 Or (AIR 2018 SC 4898)

Abstract — The case commentary is about the latest precedent decided by the Hon'ble Supreme Court of India of *Joseph Shine* v. *Union of India*[1]. It is about the Section 497 of the Indian Penal Code, 1860. The commentary includes a brief understanding of the precedent and questions involved in the case and their analysis in detail. This study of the present case helps in detailing and particularizing the changes or the amendments made in the Section 497, 1860 of the Indian Penal Code, 1860 and the position of law thereto.

In my limited understanding of the Precedent which is based on the concept of Adultery under Section 497 of the Indian Penal Code, 1860 and while interpreting the necessary paragraphs of the said judgment and also about the said section on date.

It helps a person to understand whether it is a wrong or not though maximum number of the people in the country are aware and know what is right and what is wrong.

Finally, the title itself suggests that it is the action or an activity involving the acts like law - breaking which in itself includes acts like criminality and which helped the people know that the law has been replacing itself over the period of time

* B.A. L.L.B (Third Year Student), Symbiosis Law School, Hyderabad, Symbiosis International (Deemed) University

1 *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39.

Further this study will analyse on the legality of the said Section, the amendments in the light of the decision of the Hon'ble Supreme Court of India. The case study and the current legal proposition will form the essence of this Paper.

I. INTRODUCTION

The concept of Adultery is outlined in various laws. The present paper mainly concentrates on the concept of Adultery which is mentioned under Section 497, Indian Penal Code, 1860 although the same deals with the Adultery under the Hindu Marriage Act, 1956 which is mentioned as "*Voluntary Sexual – Intercourse"* in the said Statue. The adultery under the Section 497 is a criminal offence which is punishable under the penal provision as above mentioned.

The Act if committed and is proved to be guilty shall be punished with *"imprisonment of either description for a term which may extend to five years, or with fine, or with both"* therefore this act provides punishment only for men and not for women. Therefore this act has found to be discriminatory by the Hon'ble courts under the adulterous acts so the section has been decriminalized by the Hon'ble Supreme Court very recently.

Adultery as an offence is decriminalized but the outcomes of such an Act, have greater impact on the society at large. At the most the Act even when decriminalised still manages to retain the element of *"mens rea"* therefore an Act followed by *"mens rea"* is now going unpunished. The consequences of such a decision, is that a Criminal Act is no longer accounted for under the Indian Penal Code, 1860. It is so that this research paper is an attempt to examine the deviation from the Supreme Court Judgement, how the present scenario can also have an adversarial affect. Further it is observant from the given paper that the idea and the outcome of this is to cover all the areas and legal possibilities that might arise in various circumstances.

It is further so that the – legal analysis, case law explanatory and the subjective interpretation of the topic mentioned above form the basis in explaining the topic in an all comprehensive manner.

II. COMMENT ON JOSEPH SHINE V. UNION OF INDIA

Citations - (2019) 3 SCC 39 (or) AIR 2018 SC 4898

A. Brief Analysis

Equality as guaranteed by the Indian Constitution shall be one of the important considerations in deciding the rights of women in the society. Many a provision is enshrined in the Indian Constitution to ensure that every citizen leads a life of dignity. Every citizen despises unwanted intrusions. Therefore, it is needless to say that every woman is guaranteed the right of privacy, which is the fundamental aspect of dignity.

Legality of gender subordination is no concept or choice that shall be allowed to persist. The governing law shall prevail over and above the societal norms. The Supreme Court is right in echoing that its views which are in consonance with the present-day societal norms and values shall not be overshadowed or persuaded by the or the exhortations in the precedents that governed the bye gone days and which are no longer pertinent to the evolved norms of the present day. Age old customs and traditions of the past based on prejudices and predilection have no place and time has come for the same to give way to the progressive thoughts of the modern generations who regard marriage as a partnership between equals in which bigotry has no place and where there is only caring and sharing. Their concern is common in all spheres of matrimonial companionship.

Courts have firmly persuaded people to come out of the obnoxious stance that a woman is a man's property. We have left far behind the dark years; a new era has dawned on us. Henceforth, let us not look back; but, march forward. In fact, the citizenry of the Country did well in asking the Supreme Court to give a relook and examine afresh the current relevance of Section 497[2] of the Indian Penal Code, 1860. The Supreme Court acceded. And, indeed we have advanced skillfully and with ease.

The court in the instant judgment has spoken of consent as a tool and noted that when the consent of the husband is obtained the adulterous act committed is made good. The law of adultery is made to punish the man in the absence of consent that too on the complaint of the husband of the woman, who is a party to the Act of adultery. Therefore, such a law which encourages male chauvinism and egotism has to be necessarily considered as feudal and unbalanced. Any such law can never fit into the constitutional scheme and hence cannot be allowed to be on the statute book any longer. Nonetheless, if one has to take another view and if the penal provision has to stay, it requires drastic redrafting to remove the absurdities and balance the interests of men and women evenly. I prefer to take the latter view.

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[2] Indian Penal Code, 1860 (Act No. 13 of 2013).

It is significant to note that the adulterous acts have multiple off shoots. Some men and women in the absence of threat of incarceration may freely indulge in such acts, which are henceforth not punishable. Adultery may now become rampant on account of unbridled freedom backed by fearlessness due to absence of law. Viewed from the Indian Context, many women would sure be the victims at the hands of the husbands for reasons not far to seek. Many sections of women in the Country are still languishing under the old school of thought that a husband is whole and soul. Instances of adultery may from now on lead to increase in number of couples having no concord in matrimonial relationship. Some such acts may result in physical and psychological estrangement between the spouses. Nevertheless, adultery continues to be a ground for divorce.

A man who may be having an extra martial relationship and who is not interested in leading family life with his wife may openly and blatantly indulge in acts of adultery to force the wife to seek divorce or remain a silent sufferer. In Paragraph 8[3] while dealing with the question if Section 497 of the IPC is contravening Arts. 14 and 15 of the Indian Constitution- the courts have read into the verbatim of Arts. 14[4] and 15[5] with an alienated view of protecting women alone and not with a overbearing view of the societal impediments, which have been successful in protecting women by a virtue of institution of marriage. The social security offered by way of marriage, cannot be taken away by interpreting Arts. 14 and 15 to be violative of discrimination elevated under Section 497 of IPC. Keeping in view the dictum in the precedential guidance in the decision of the Supreme Court which upheld the constitutional validity of the section of law dealing with restitution of conjugal rights, it is trite to mention that the provisions of the Articles of the Indian Constitution dealing with fundamental rights have to be guardedly applied while dealing with personal laws of marriage and offences related to marriage.

Further, it is the job of this Supreme Court to bridge the gap and to make it a punishable offence when committed within four walls of marriage by either of the spouse. It is so that Arts. 14 and 15 cannot be interpreted in a manner to strip the women of her right to lead a protected marital life, especially when the same is protected by law through various family laws in the country. The Fundamental rights so to speak shall be prevailing all through the acts of a man and women, their interpretation cannot dilute the element of offence under Section 497 of IPC that is in-turn an impediment to such fundamental rights.

The golden triangle, when put within the facade of Section 497 of IPC, does no doubt elevate the gender gap; however, the same will never dilute

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[3] *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39, p. 78.
[4] Constitution of India, Art. 14.
[5] Constitution of India, Art. 15.

the offence of adultery. Instead of annulling the law, the gender gap can be bridged by amending the penal provision suitably. No doubt, an offence is an act or omission made punishable by law; the act of adultery though not made punishable, the Society at large still considers such an act as an unacceptable act or wrong. Hence, Arts. 14, 15 and 21 can only be invited and allowed to have a role play while suitably interpreting the law or redrafting the law. The section of law could have been read down and could have been suitably interpreted to meet the needs of the present day; further, resort could have been had to Art. 142.

B. Response to Paragraph 50

In response to Paragraph 42[6] be it stated that the criminal character always flows into the act of Adultery, as the act is committed with *mens rea*; *mens rea* is evident as the act is committed conscientiously with the knowledge that the persons committing are violating the promises made to their respective spouses or one of them, as the case may be, and as such persons always prefer to commit the acts of adultery in secrecy. They intend to hide the act from the spouse of the participating party and literally indulge in the act of cheating. As marriage governs the cohabitation between man and women, when either of them invites a third party of any gender to participate in such cohabitation with intent to cheat, such illegal act shall be punishable and therefore such illegal acts shall be fastened with criminal liability.

III. CONCLUSION

To conclude Adultery was an offence till this Precedent was decided by the Hon'ble Supreme Court and after this precedent was decided it is considered to be no more an offence. Under the (IPC) Indian Penal Code, 1860 the Adultery is an Offence. The author feels that Adultery is an act and it should be considered as an offence.

The study helped the author to understand the concept and he is of the opinion that Adultery must be considered as an Offence and now it an is act which is not punishable under the law which had prescribed the punishment for said offence and now it has been decriminalized by the Hon'ble Supreme Court in this case.

Therefore, to conclude it can be said that Adultery is no more a punishable offence under the Section 497 of the Indian Penal Code (IPC), 1860 and the same law had provided for the punishments for persons involving in such offences before passing of the precedent. The law is no more an offence and is discussed, response is given to the Precedent in detail.

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[6] *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39, p. 98.

CASE COMMENT: KARNAIL SINGH AND OTHERS V. STATE OF HARYANA ANIMALS ARE LEGAL PERSONS WITH PARENTS

—Pankhuri Bhatnagar

Abstract — On 2nd June, 2019, the Punjab and Haryana High Court made history by passing an applaudable judgment declaring that all animals are 'legal persons' and have their own set of rights, just like human beings do. The purpose of the case comment is to analyse the various aspects of this unique decision, study the background in which it was passed and highlight the lacunae, if any, in the judgment.

In Karnail Singh v. State of Haryana, the plight of 29 exported cows was assessed. This became part of a much larger debate about the various rights and freedoms animals possess. Although there are numerous pre-existing statutory laws and constitutional provisions for protection of animals, they merely punish humans for committing certain crimes with respect to animals. They do not accord the status of a legal person to animals, nor do they talk about giving them any separate rights. Animals are not merely 'things' or 'property'. They are living beings just like the rest. In view of the cruelty animals are subjected to every day and their 'use and abuse' by humans for their own purposes, it is necessary to grant the former with rights.

My research has highlighted certain lacunae and contradictions in the judgment of the court, which must be addressed in order to prevent any grey areas in compliance with it. The progressive interpretation adopted by the Indian Judiciary is also worthy of admiration. I believe the idea behind the order to be appropriate and backed by legal reasoning. It is an ardent hope that this decision would act as a

stepping stone for improving the plight of animals and will bring an end to speciesism and animal cruelty.

I. INTRODUCTION

On 2nd June, 2019, the Punjab and Haryana High Court made history by passing an applaudable judgment[1] declaring that all animals are 'legal persons' and have their own set of rights, just like human beings do. In its 104 page order, the court recognized that all animals have honour, dignity and certain other inherent rights, which must be protected by law. The entire animal kingdom, including aquatic and avian species are declared to be legal entities having a distinct persona, along with corresponding rights, duties and liabilities of living persons.

The Bench issued 29 mandatory directions pertaining to the welfare of the 'animal kingdom' including directions relating to veterinary care, housing, and food for animals. This remarkable judgment ensures that animals will not be treated like mere property. They are no longer an object for humans to 'use and abuse', rather, humans have now been given the responsibility to be a parent or guardian to animals (loco parentis). The judgment has been applauded by various animal rights activists who believe it should be enforced in all States and not just be limited to Punjab and Haryana.

II. FACTS OF THE CASE

The matter was brought to light in *Karnail Singh v. State of Haryana*. Certain police officials were on patrolling duty on Meerut Road. They received information regarding export of cows to Uttar Pradesh in trucks. A police picket was laid down at the Haryana-Uttar Pradesh boundary. Both trucks were stopped while crossing and 29 cows were recovered. The drivers and conductors were apprehended. The cows were medico-legally examined and sent to the nearest Gaushala. The petitioners were convicted and sentenced by the learned Trial Court to undergo imprisonment for a period of two years and to pay a fine of Rs. 1500/- each for the offence under Sections 4B/8 of Punjab Prohibition of Cow Slaughter Act.[2]

The present case was a revision petition against this judgment, whereby the conviction was maintained but the sentence was reduced from two years

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1 *Karnail Singh* v. *State of Haryana*, 2019 SCC OnLine P&H 704.

2 S. 4-B - Any person desiring to export cows shall apply for a permit to such officer, as the Government may, by notification, appoint in this behalf, stating the reasons, for which they are to be exported together with the number of cows and the name of the State to which they are proposed to be exported. He shall also file a declaration that the cows for which the permit for export is required shall not be slaughtered.

to six months by the Appellate Court. Since the case involved the export of 29 cows in appalling conditions from Uttar Pradesh to Haryana—a distance of at approximately 600 kilometres, an effort was made to understand what these animals actually go through. Justice Sharma pronounced, *"We must show compassion towards living creatures. Animals might be mute but we, as a society are to speak on their behalf. No agony or pain should be caused to them."*

III. BACKGROUND

The fact that animals require protection from certain human Acts has been recognized by various legislative enactments and has even found a place in the Constitution of India. The following is relevant in this regard-

A. Constitutional Provisions

It is the fundamental duty of all citizens under the Constitution[3] to have compassion for living creatures. It should be the endeavour of the State under Article 48 to organize agriculture and animal husbandry and to take steps for preserving and improving the breeds. The State Government is responsible for protecting and improving the environment and for safeguarding the wild life of the country as per Article 48-A of the Indian Constitution.

B. Statutory Enactments

There are various Acts wholly dedicated to affording protection to animals, such as Prevention of Cruelty to Animals Act, 1960 (PCA Act), Wild Life (Protection) Act, 1972 and the Biodiversity Act, 2002. Under the Penal laws of India, certain acts such as killing, poisoning, maiming or torturing an animal have been declared cognizable offences.[4]

Transport of Animals Rules, 1978, requires that animals must be healthy and in good condition while transporting. The animal should not be transported if it is fatigued, diseased or unfit for transportation. Furthermore, pregnant and the young are required to be separately transported. The Drugs and Cosmetics Rules (Second Amendment) 2014, prohibited testing on animals for cosmetic products all over India. Any cosmetic which has been tested on animals cannot be imported to India.[5]

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3 Indian Constitution, Art. 51-A, cl. (g).
4 Ss. 428 and 429 of the Indian Penal Code, 1860.
5 R. 135-B of the Drugs and Cosmetics (Fifth Amendment) Rules, 2014.

Apart from these, there are various other rules that have been framed under the POC Act.[6] Thus, we can see there is a pre-existing legal framework regarding the protection of animals. However, these provisions merely punish humans for committing certain crimes with respect to animals. They do not accord the status of a legal person to animals, nor do they talk about giving them any separate rights. Furthermore, the penalties imposed under these rules are insufficient. In some cases, only 10-50 rupees fine is imposed which is wholly unjustified as the value of the life of the animal. Thus, there is a need to provide legal rights to animals.

There have also been numerous judicial pronouncements in India whereby animal cruelty was penalized and certain rights of living creatures were recognized. The Supreme Court has held[7] that *"animal welfare laws have to be interpreted keeping in mind animal's welfare and their best interests, subject only to exceptions arising out of human necessity"*.

The Bench further held that animals have internationally recognized[8] freedoms:

(i) freedom from hunger, thirst and malnutrition;

(ii) freedom from fear and distress;

(iii) freedom from physical and thermal discomfort;

(iv) freedom from pain, injury and disease; and

(v) freedom to express normal patterns of behaviour.

These 5 freedoms are read into Sections 3 and 11 of PCA Act. They are to be protected by the Central Government, States, Union Territories, MoEF and AWBI.[9]

Thus, the pre-existing laws and their creative interpretation on part of the Indian Judiciary had adequately laid down the groundwork for passing of the present judgment.

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[6] Other important rules include: Prevention of Cruelty to Animals (Dog Breeding and Marketing) Rules, 2017, Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017 Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017, Animal Birth Control (Dogs) Rules, 2001, etc.

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

[8] Ch. 7.1.2 of the Guidelines of OIE, World Organization for Animal Health.

[9] Animal Welfare Board of India is a statutory body to advise the Ministry of Environment and Forests, Government of India.

IV. ANALYSIS OF THE JUDGMENT

A few questions come to mind while analysing the judgment:

- Is there even a need to extend legal rights to animals?
- What is the legal basis for providing these rights?
- How closely are animals related to humans?
- Whether an animal can be accorded a legal personality?
- If these rights are indeed given, what would be their nature of implementation in the society?
- Is the decision appropriate and are there any lacunae in it?

These questions shall be analysed systematically in the following sections.

A. Need for extending rights to animals

- Animals cannot speak for themselves - We must show compassion towards all living creatures. Animals might be mute but it is our responsibility to speak on their behalf. No pain or torture must be caused to them.
- Religious grounds - In Hindu Mythology, every animal is associated with a God. Every God is believed to have his own vahana, such as *Ganesha's vahana* is a rat. Certain animals are considered to be sacred, and it is important to protect them and in turn protect the religious sentiments of the various communities, example – cows are sacred for Hindus.
- Maintenance of ecological balance – The extinction of any species can upset the equilibrium in the ecosystem. According to the United Nations report of 2019,[10] almost one million species are facing extinction in the near future due to human influence on their natural environment.
- Use and abuse of animals – Animals are subjected to various forms of cruelty every day. Whether it's a bullock who is constantly whipped and made to push overloaded carts all day around, or a farmer selling eggs produced by 'battery hens', or electrocuting fur bearing animals to obtain damage free fur so that we privileged humans can wear fur coats.

[10] Maddie Burakoff, "One Million Species at Risk of Extinction", The Smithsonian (6-5-2019, 10.04 a.m.), <https://www.smithsonianmag.com/science-nature/one-million-species-risk-extinction-threatening-human-communities-around-world-un-report-warns-180972114/>.

- Animals are not 'property' - Animals breathe like us and have emotions. They have a right to life and bodily integrity, honour and dignity.

- Animals are entitled to justice – There is a need to take the animals' interests directly into account, as Parties to the legal action, rather than as the object of rights. The World Charter for Nature has proclaimed "every form of life is unique, warranting respect, regardless of its worth to man".

Thus, there is a pressing need to extend legal rights to animals also.

B. Basis of giving rights

When animals evolved, a kind of entity came into existence which is capable of experiencing the goodness or badness of its own condition. Thus, we can say that animals also have certain interests, or conditions for their welfare. Animal rights advocates have contended that having a welfare or interests is a sufficient ground for being entitled to rights. In fact, humans too claim rights on the basis of our interests and welfare. As such, the basis for awarding rights to animals is justified.

If animals do not have rights, they are not persons, which leaves them to be things. But animals are not mere things, since they are living beings with lives and interests of their own. It is thus, essential to provide them with protection in the form of rights, through the means of human laws.

C. How closely are animals related to humans?

In his book[11] "The Rights of Nature" Mr. David R. Boyd has beautifully dealt with the understanding of animal minds with respect to emotions, intelligence, self-awareness, altruism and many other factors comparative to human beings.

Emotion: It is well established that elephants mourn their dead. They linger over a family member's body with what looks like sorrow and African elephants even have a burial ritual in which they cover the bodies of dead relatives with leaves and dirt.

Intelligence: Humans were supposed to have the biggest brains, and thus the gold medal, in animal intelligence. However, studies have revealed that brains of Homo Sapiens are outweighed by those of dolphins, elephants and whales. Also, the brains of dolphin's have more spindle neurons than us. Intelligence and even maths, is not only limited to humans. Archerfish can instantly

[11] David R. Boyd, *The Rights of Nature : A Legal Revolution That Could Save the World*, 205-207 (ECW Press 2017).

calculate complicated mathematics of distance, speed, and time when blasting their prey with jets of water.

Self-awareness: Experiments have reflected that dolphins, orcas, Eurasian magpies, elephants, and some primates recognize themselves in mirrors.

Altruism: Altruism refers to behaviour benefiting someone who is not a close relative, despite some personal cost or risk. Certain lab tests have shown that rhesus monkeys will consistently choose to go hungry if their decision to secure food would result in another unrelated rhesus monkey being subjected to an electrical shock. Humpbacks are known to respond to the distress calls of other species like seals that were being attacked by killer whales.

Communication: Chimpanzees greet each other by touching hands, similar to human handshakes. Whales repeatedly breach (leap out of water) to transfer messages to other whales. Speaking of native languages, blue whales produce different patterns of tones and pitches depending on where they're from! Birds that live on the border of two territories often become bilingual, meaning they are able to communicate in the singing parlance favoured by groups of both territories. And in case some people only consider 'speaking in human languages' as 'communication', we also have talking parrots in many States.

These studies have proved to be extremely enlightening and have shown us that animals can also exhibit emotions, have a good memory, speak in their native languages and exhibit numerous other characteristics that were earlier believed to be restricted only to humans. Mankind may be yet to discover many other characteristics too.

The animals are comparable to the pre-stone age man when only the limbs were used by Man for his routine works. At that point, both Man and animals enjoyed the same law – Law of the jungle. While man has evolved exponentially since then by exploiting application of their brains, animals are still there, but that should not deny animals the rights which would have accrued to man during the pre-stone age era.

D. Whether an animal can be accorded a legal personality

Salmond stated[12] "A legal person means any subject-matter other than a human to which the law attributes personality. This expansion, done for sufficient and good reasons, of the concept of personality beyond the category of human beings is one of the most noteworthy feats of legal imagination..."

[12] Fitzgerald P.J., *Salmond on Jurisprudence*, 304 (12th edn., 2016).

The SC has held[13] "the concept of 'Juristic Person' arose out of necessities due to human development. The very words 'Juristic Person' connote the recognition of an entity to be a person in law, which it would otherwise not be. In other words, it is not an individual natural person but an artificially created person which is recognised in law to be such."

The law can "choose which persons to create or recognise" just as it can choose "which rights or other relations to create or at least recognise". Thus, Nekam asserts[14] that anything *"can become a subject of rights, whether a plant or an animal, a human being or an imagined spirit".*

The question of whether or not new legal persons can be created thus appears to be a moot point. It seems, as Lawson argues, that there is no "limit in logic ... to the number of legal persons that may be interpolated at any point in human relations".[15] Thus, we can conclude there is nothing inherent in the concept of legal personality which prevents its extension to animals.

E. Nature of implementation of rights

As legal persons, animals would be recognised as Parties to legal actions. Hon'ble Justice Sharma has clarified *"There is no conceptual problem with the fact that animals' inability to speak means that they would require human legal persons to act as their representatives and to interact with the courts and the legal system on their behalf. As I noted above, it is quite acceptable for a legal person's rights and interests to be exercised and protected by another legal person acting as the "administrator" of those rights."*

Thus, animals' rights would be enforced in the same manner as the rights of an infant, minor, or person of unsound mind are dealt with, i.e. through a parent or appointed guardian. Appropriate guardians may include animal welfare bodies or individuals with a particular interest, or familiarity with the concerned animal. The guardian can represent the interests of an individual or a group of animals. Hence, there is no difficulty regarding implementation of these rights.

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[13] *Shiromani Gurdwara Prabandhak Committee v. Som Nath Dass*, (2000) 4 SCC 146 : AIR 2000 SC 1421.

[14] Alexander Nekam, "The Personality Conception of the legal entity", 3 Harvard UP 25, 29 (1938).

[15] Tony Lawson, "Theory of the Corporation: Towards a Social Ontology of Law", 41 Cambridge JE 1505 (2017).

F. Is the decision of the bench appropriate?

On a complete analysis of all the aforementioned factors, I believe the judgment to be appropriate, backed by legal reasoning, in conformity with existing law and overall, a very progressive step taken by the Indian Judiciary.

The intent behind the decision is not to say that animal's interests must prevail over those of other legal persons. Rather, it requires the Court to explicitly acknowledge the animal's interests, the way it acknowledges those of other legal persons party to the proceedings, and weigh their interests against those of the other Parties. It must be noted that the order does not demand that animals should possess every conceivable legal right. Neither are animals to have the same rights as humans, nor is it necessary that all animals possess identical rights.

G. Are there any lacunae in the judgment?

While it is indeed a commendable idea, the lines are still blurry in terms of its enforcement.

On an in depth analysis, certain lacunae have been observed in the court's decision. The order states that catching fish through harmful methods like bottom trawling and cyanide blasting would be disallowed. However, there is no explicit mention in the 104-page ruling against the slaughter of animals other than cows. In fact, the Prevention of Cruelty to Animals Act, 1960, says that animals can be killed for food if they aren't subjected to unnecessary suffering. The Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, also specifies the species which can be slaughtered.

Further, there is a self-contradiction in the judgment. While laying down, *"No one shall use animals for drawing any vehicle," the judgment says, "carts pulled by animals must be given the 'right of way'"*. These self-contradictions have affected the merit of the order to some extent, however the general idea is still praiseworthy.

V. CONCLUSION

The judgment puts an end to speciesism, which is the belief that some animals' lives and experiences are inferior to those of humans or other animals simply because they are members of a different species. The bench's decision acknowledges that all living beings have the capacity to suffer in the same way and to the same degree as the 'human animals' we share our lives and homes with.

The progressive interpretation adopted by Justice Rajiv Sharma is also worthy of admiration. He had earlier given a similar right to river Ganga[16] stating that it is a living entity and will thus, enjoy all corresponding rights. Such progressive judges and decisions are what lead to social reforms, and are a fine example of judicial activism in our country.

Orwell's statement[17] that *"all animals are equal, but some animals are more equal than others"* is more or less apt to describe the differential treatment of human and non-human animals that was prevailing in our legal system. While all human animals are legal persons, non-human animals were put in the category of 'property'.

Conferring of legal personality on animals must be done after a careful consideration of which rights and/or obligations would be appropriate to extend to particular animals. A more careful analysis of the judgment must be conducted in order to prevent any grey areas in compliance with it. The apparent contradictions and lacunae must be addressed. The judgment has been a wonderful stepping stone and I hope that this would lead to better treatment of animals and the enactment of more thorough and elaborate animal protection laws.

There is a growing global movement to recognize non-human animals as legal persons. It is an ardent hope that with this judgment, the plight of animals would improve significantly and Orwell's popular saying shall lose its meaning. *The animal beings with whom we share our world deserve to be treated not as means to human ends, but as ends in themselves. Their liberation is in our hands... "Live and Let Live"*

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16 *Mohd. Salim v. State of Uttarakhand*, 2017 SCC OnLine Utt 367.

17 George Orwell, *Animal Farm*, 313-314 (1st edn., 1945).

CASE COMMENTARY
TITLE: HAS THE BOMBAY HIGH COURT GONE TOO FAR IN VALIDATING EXCESSIVE RESERVATION?

—Parth Soni & Patel Aniket

Abstract — The preamble of India mentions India being a democratic and socialist country. However there are challenges attached to it such as upliftment of socially and educationally backward classes. To phase these kind of issues, the constitutional assembly inserted article 15 and article 16. Under article 15(4) the state is given power to make separate provisions for socially and educationally backward classes. Reservation has been a bone of contention since independence because of its misuse as well as conflict of interest. There exists conflict of interests between various classes when reservation is provided to some of them. Appropriate examples being the Gujjar community issue in Rajasthan, Jat reservation issue in Haryana, Patel Andolan in Gujarat, etc. Similar situation arose in state of Maharashtra whereby the Maratha community started agitations to get them included in socially and educationally backward classes. For the purpose of same, Maharashtra government appointed Gaikwad commission to inquire into backwardness of Maratha community. Later, on basis of the commission report government provided 16% separate reservation to Maratha community. When it was challenged in the High Court of Bombay on various grounds, it put stay on the move initially. However later in present case, two judges bench lifted the stay. Present case study attempts to analyze the judgment on basis of various issues such as the breach of ceiling of 50% in reservations previously set up by Mandal Commission case, Reliability of quantifiable data obtained by Gaikwad

* 3rd year, Gujarat National Law University
** 3rd year, Gujarat National Law University

commission and other commission reports, the legislative competence, colorable exercise of power etc. Now the reservation has reached to 68% total in state of Maharashtra. It is concluded that the enactment of the Act is subverting the very object of article 15(4). It is analyzed how far the court has gone in validating excessive reservation.

Dr. Jishri Laxmnarao Patil.... Petitioner

Versus

The Chief Minister and ors... Respondent

(Maratha Reservation Case)

Delivered on: June 27, 2019 (High Court of Bombay)

I. JUDICIAL REVIEW

It was opined by the High Court that the First Amendment to the Constitution which inserted Article 15(4) gives power to state to make any special provision for the purpose of advancement of the weaker classes. It was contended in present case that the motive of legislature cannot be questioned. However, In ***M.R. Balaji case***[1] Supreme Court held that the state is supposed to proceed objectively. The classification made by state of a class being 'Backward Class' is subjected to judicial review.[2] ***In Triloki Nath Tiku* v. *State of J&K***[3] Supreme Court held that court can always interfere if there is no valid ground to classify a class as 'socially and educationally backward classes'.

II. RULE OF 50% CEILING

The government of Maharashtra seems to have gone too far in providing reservation to Maratha community. The ceiling was set up by *Mandal commission case*[4] in 1993 whereby state cannot exceed the reservation limit of 50%. However in present case the state exceeded the limit drastically by providing 16% separate reservation to Maratha community. It was surprisingly defended by the high court of Bombay while validating the move taken by state. While validating the reservation, High court lifted the stay previously put up by *Sanjeet Shukla case*.[5]

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1 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649.
2 7 D.D. Basu, *Commentary on Constitution of India* 2825, (9th edn. 2016).
3 *Triloki Nath Tiku* v. *State of J&K*, AIR 1969 SC 1 : (1969) 1 SCWR 489.
4 *Indra Sawhney* v. *Union of India*, 1993 Supp (3) SCC 217 : AIR 1993 SC 477.
5 *Sanjeet Shukla* v. *State of Maharashtra*, 2015 SCC OnLine Bom 501.

In *Mandal Commission case*[6] honourable Supreme Court held that the cap of 50% should be exceeded only in exceptional circumstances. Whether exceptional circumstances existed or not depends upon the socio-economic conditions of community.

It is argued before the court that constitution nowhere prescribes any reservation limit and the 50% ceiling is misconception. However, in M.R. Balaji case[7] the Supreme Court stated with no uncertainty that,

> *"A special provision contemplated by article 15(4) reservation of posts and appointments contemplated by article 16(4) must be within reasonable limits. The interests of weaker sections of the society that are at a first charge on the states and the centre have to adjust with the interests of the community as a whole. The adjustment of these competing claims is obviously a difficult matter, but if under the guise of making a special provision, state reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4)."*

In present case also, the Maratha community is given 16% separate reservation which clearly subverts the object of article 15(4)[8]. There were other instances when the reservation exceeded beyond reasonable limit such as reservation of 68% of seats in the technical institutes and medical institutes in Mysore which was struck down by Supreme Court.[9] The same rule was reiterated in *Rajendran case*[10]. It was held in plethora of cases that reservation less than 50% would be upheld but the reservation beyond 50% would be invalidated.[11]

Further, the High Court considered judgment of Supreme Court in ***S.V. Joshi* v. *State of Karnataka***[12] in which it was held that if quantifiable and reliable data is available, the state can breach 50% ceiling. However, Gaikwad commission appointed by Maharashtra government had take only sample data for the purpose of drawing conclusions with regard to backwardness of Maratha community. Even Dr. B.R. Ambedkar was also of the opinion that reservation should be confined to minority seats.[13]

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6 *Supra* note 4.
7 *Supra* note 1.
8 Indian Constitution, Art. 15, Cl. 4 *inserted* by The Constitution (First Amendment) Act, 1951.
9 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660 : AIR 1972 SC 1375.
10 *C.A. Rajendran* v. *Union of India*, AIR 1968 SC 507.
11 *A. Peeriakaruppan* v. *State of T.N.*, (1971) 1 SCC38 : AIR 1971 SC 2303.
12 *S.V. Joshi* v. *State of Karnataka*, (2012) 7 SCC 41.
13 *Supra* note 4.

Following these rules, even the carry forward rule was also struck down in *Devadasan case*.[14] In ***State of Kerala* v. *N.M. Thomas***, the court held that,

> "*Not more than 50 per cent should be reserved for backward classes. This ensures equality. Reservation is not a constitutional*[15] *compulsion but is discretionary according to the ruling of this Court in Rajendran's case.*"

Hence, in author's opinion the excessive reservation of 68% would subvert the object of article 15(4).

III. DRAWING INFERENCE WITH REGARD TO BACKWARDNESS OF COMMUNITY FROM COMMISSION REPORTS

For the purpose of analyzing the current socio-political status, the Maharashtra government appointed Gaikwad commission. Quantifiable data has become a necessity for the purpose of reservation. Recently, in the case of ***Gurvinder Singh* v. *State of Rajasthan***[16] the court looked into validity of 5% reservation provided to five castes. The court looked into report made by state backward class commission whereby the data was inadequate to classify the 5 castes as backward class. The move of 5% reservation was struck down on the ground that the data was not quantifiable.

Further there is no data to support inadequate representation in various sectors. The Maratha community has given twelve chief ministers to state. The commission didn't consider their adequate representation in all the sectors.

Previous committee reports such as **Khatri Committee** as well as **Bapat Committee** didn't favor the argument of Maratha being a backward class. They were also shown as a forward Hindu class by the 2nd report of backward class commission. Backward communities become forward ones with time passes but how a community which was forward 60 years ago suddenly became backward?

Further, the Gaikwad commission report was more based upon the economic backwardness of the community. It was stated in the report that more than 85% of the people from Maratha community were having income of less than 25 thousand rupees. Further the judgment also considered the data provided by report that Maratha community is the leading one of those engaged

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[14] *T. Devadasan* v. *Union of India*, AIR 1964 SC 179.
[15] *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : AIR 1976 SC 490.
[16] *Gurvinder Singh* v. *State of Rajasthan*, 2016 SCC OnLine Raj 8306.

with the life of Dabbewala (tiffin service providers) in Mumbai. The commission found that out of 4800 total families, 4600 belong to Maratha community. In the opinion of Author, it would be misconception to consider the business of Dabbewala as of lower category. Further, there is no relevance of economic condition with social conditions. If someone is earning lesser, it doesn't mean they are socially and educationally backward. The words used in constitution are '**socially and educationally backward class'** and not '**socially and economically backward class'**.

It is also stated in the report that more than 98% families of the community don't prefer to enter into inter religion marriages. However it is social condition of not only Maratha community but of whole India.

Further the High Court considered that almost 77% of Maratha community is engaged with agriculture. However, severe social and educational backwardness cannot be determined on basis of that data since there is no relevance between agriculture and backwardness. In India, most of the families are dependent on agriculture but no inference can be made that they all are socially and educationally backward people.

IV. LEGISLATIVE COMPETENCE AND COLOURABLE PIECE OF LEGISLATION

The impugned Act[17] does not have the legislative competence and it was a colourable exercise of legislation.

Firstly, the Legislatures of the States do not have the power to determine the 'Socially and Educationally Backward Class' after coming into force of the Constitution (One Hundred and Second Amendment) Act, 2018. Article 338-B[18] and Article 342-A[19] have been inserted vide the Amendment Act which provides for the establishment of National Commission for Socially and Educationally Backward Classes (SEBC). It is only through this procedure, a citizen can be said to be belonging to SEBC in relation to that State. Hence, the power is now vested with the President to notify the socially and educationally backward classes. The declaration of backward class by State Legislature is, thus, unconstitutional.

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[17] 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, No. 62, Acts of Maharashtra State Legislature.

[18] Indian Constitution, Art. 338-B, *inserted* by The Constitution (One Hundred and Second Amendment) Act, 2018.

[19] Indian Constitution, Art. 342-A, *inserted* by The Constitution (One Hundred and Second Amendment) Act, 2018.

The newly inserted sub-clause (7) to Article 338-B provides that where the National Commission has made a report with regard to a particular State then a copy of that is to be submitted to the State which will then place it in the legislature of the State with a Memorandum to explain what action the State is proposed to take with the reasons. Therefore, it is not permissible for the State Legislature to provide a status of socially and educationally backward class to the Maratha community without consulting the National Commission of Backward Classes. Sub-clause (9) of Article 338-B makes it mandatory for both the Union and the State Governments to consult the National Commission for Backward Classes on all major policy matters affecting the socially and educationally backward classes. This has to be done along with following the procedure of another newly inserted Article 342-A.

Article 366 (26-C) as inserted by the same Amendment provides for the definition of Socially and Educationally Backward Classes as "...such backward classes as are so deemed under article 342-A for the purposes of this Constitution." Hence, without following the procedure of Article 342-A, the State cannot define what SEBC is. The Act, therefore, becomes unconstitutional.

In ***M. Nagaraj* v. *Union of India***[20], the Supreme Court, in unequivocal terms, held that the State cannot breach the ceiling limit of 50% established in *Indra Sawhney*[21] case. If it is done, it would violate Article 16. Nagraj case was later affirmed by the Supreme Court recently in *Jarnail Singh* v. *Lachhmi Narain Gupta*[22].

Secondly, the interim order[23] was passed by the High Court of Bombay in 2014 to stay the implementation of the ordinance which provided 16% reservation in favour of Maratha community. Thereafter, the legislature passed the SEBC Act, 2018 in pursuance of the recommendation given by Justice Gaikwad Commission. The High Court, here, ignored the very settled position of law that the Legislature cannot overrule or reverse the judgment of the Court without resolving the very basis of the judgment.[24] It is no more *res integra* to annul the decision of the Court, the legislature can come up with a legislation. It is constitutionally impressible and goes against the spirit of Article 50[25].

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[20] *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.
[21] *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477.
[22] *Jarnail Singh* v. *Lachhmi Narain Gupta*, (2018) 10 SCC 396.
[23] *Sanjeet Shukla* v. *State of Maharashtra*, 2015 SCC OnLine Bom 501.
[24] *Cauvery Water Disputes Tribunal, In re*, 1993 Supp (1) SCC 96 (2).
[25] Indian Constitution, Art. 50.

In ***Goa Foundation* v. *State of Goa***[26]**,** the Court held that *"A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers."* That restriction, as per Cauvery Water Disputes case, also applies to an interim order passed by the Court. What the legislature did was indeed a colourable exercise of legislation. It is very well established that what cannot be done directly, cannot be done indirectly.

Therefore, Section 2, 3 and 5 of the Act can be said to be a colourable exercise done by the Legislature and hence, violates the Constitution.

The High Court held that the provision of Article 15 and 16 are enabling power as per *Indra Sawhney*[27] judgment and therefore, the State Legislature can provide for the reservation to SEBC. But the State has to recognize the compelling interest and then exercise a great caution to implement it. But here, in this case, the Court did not find any illegality to interfere with the findings of the Gaikwad Commission. Judicial review may not extend to the policy decision but the Court in ***Bir Singh* v. *Delhi Jal Board***[28]**, held that,** *"The data which is the basis of the satisfaction of the State being verifiable, is* open to judicial scrutiny *on the limited ground of relevance of the circumstances on which the satisfaction is moulded."*

The legislature has to show that there was an "extraordinary situation" prevailing which prompted it to come up with the reservation for Maratha community. Unless the report of Gaikwad Commission or the Legislature provide enough reasons of prevalent "extraordinary situation", then the ceiling of 50% cannot be breached by the Legislature. Therefore, the judgment of Bombay High Court is against the precedent set up by the Supreme Court in *Indra Sawhney*[29] *case in which the Court made following observation:*

> *"We hold and declare that the limit of reservation should not exceed 50%. However, in exceptional circumst`ances and extraordinary situations, this limit can be crossed subject to availability of quantifiable and contemporaneous data reflecting backwardness, inadequacy of representation and without affecting the efficiency in representation."*

In this case, the Bombay High Court cited several authorities to determine the scope of judicial review but it did not give any reason whatsoever as to how it found that the Gaikwad Commission was correct with its methodology

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[26] *Goa Foundation* v. *State of Goa*, (2016) 6 SCC 602.
[27] *Supra* note 20.
[28] *Bir Singh* v. *Delhi Jal Board*, (2018) 10 SCC 312.
[29] *Supra* note 20.

with regard to 'adequacy of representation' and 'impact on efficiency in administration" (grounds which were later affirmed in Nagraj case).

The above mentioned grounds clearly establish that the legislature was incompetent, that there was colourable exercise of legislation and that the Bombay High Court erred in its judgment while upholding the reservation to Maratha community

WHERE WILL THE JURISDICTION LIE? AN ANALYSIS OF "EXECUTIVE ENGINEER, ROAD DEVELOPMENT DIVISIO NO.III, PANVEL & ANR. V ATLANTA LIMITED[1]

—*Sumit Kumar Gupta*

Abstract — Often Courts have been posed with an issue to determine the jurisdiction where parties file simultaneous cases according to their convenience in more than one court. In this judgment, the SC was posed with a similar conundrum of deciding the jurisdiction wherein both the District Court and the High Court enjoyed jurisdiction to hear the matter. This case commentary contains the background of the case and circumstances which led to the final interpretation made by the Supreme Court. In this case commentary, the author has tried to blend the harmonious construction between section 15 of the CPC and section 2 (1) (e) of the Arbitration and Conciliation Act, 1996 to decide the jurisdiction of the Court. The author has explored the intention of legislators while drafting respective provisions to decide jurisdiction in the light of this judgment by the Supreme Court. The interpretation of the word "courts" in Arbitration act played a crucial role in determining jurisdiction. Albeit the preliminary issue of the case is well established in the court of law, the core issue of the case involved a dispute wherein section 2(1) (e) of the Arbitration Act was given precedence over the section 15 of the CPC. Ultimately, the author agreed with the verdict given by the Supreme Court stating that if there will be an option given to choose the jurisdiction between a High Court under ordinary original civil jurisdiction and a District Court having the principal civil court of original jurisdiction then the preference should be given to the High Court.

[1] *State of Maharashtra* v. *Atlanta Ltd.*, (2014) 11 SCC 619.

I. INTRODUCTION

A contract came into existence between Public Works Department, Maharashtra ("Appellant") and Atlanta Limited ("Respondent") wherein the respondent was awarded a contract for the construction of Mumbra bypass which came in the jurisdiction of District Court, Thane. In the event of dispute, an arbitration seat was fixed at Mumbai. Dispute arose between the parties and both challenged through arbitration. Having not satisfied with the arbitral award, the appellant and the respondent filed a suit simultaneously (on the same date) before District Judge, Thane and before the Bombay High Court respectively. The Supreme Court while analyzing the definition of "Court" contained in section 2(1) (e) of the Arbitration and Conciliation Act, 1996[2] found that Bombay High Court would have jurisdiction to entertain this suit.

The Supreme Court dealt with two underlying principle of law. The preliminary issue was whether two suits about the same arbitral award can proceed simultaneously in two different Courts (where jurisdiction lies with both the Courts). The issue of central importance in this case was which two Courts (i.e. District Court, Thane and the Bombay High Court) would have jurisdiction to try this challenge of an arbitral award. Section 2(1) (e) of the Arbitration Act gave jurisdiction to two courts to determine the jurisdiction. It defined the Court to signify the Principal Civil Court of original jurisdiction in a district and the High Court in exercise of its ordinary original civil jurisdiction. This case raised very important issue about the jurisdiction of the Courts.[3]

The author in this case comment analyzed the judgment made by the Supreme Court. This comment will start with the background and the intention of the legislators while drafting a section of the Act. The author will endeavor to enlist the reasoning given by the Court to reach the conclusion. The next part will deal with pointed arguments on how two interpretations can be drawn from the given provision of the respective Acts. At the end, the author will try to blend a harmonious construction between section 15 of CPC[4] and section 2(1) (e) of the Arbitration and Conciliation Act, 1996. In the end, this case comment will talk about the impact by the interpretation given by the Court and which the author thinks should be a correct position of law by analyzing precedents and statutes.

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2 Hereinafter "Arbitration Act".

3 *Commentary on the Arbitration and Conciliation Act*, Justice S.B. Malik, (7th edn., 2015)

4 S. 15 of the Civil Procedure Code states that - The Court in which suits to be instituted: Every suit shall be instituted in the Court of the lowest grade competent to try it.

II. LAW PERTAINING TO JURISDICTION

Dealing with the preliminary issue, the law is amply clear that when the suit is filed in two Courts by both parties and where both the Courts have jurisdiction then the remedy can be found in Section 42 of the Arbitration Act.[5] This section mandates that the court wherein the first application was filed shall alone have the jurisdiction arising out of such challenge.[6] It became evident that a suit arising out of the same matter and dealing with the same question of law cannot proceed simultaneously in two courts. Further, section 2(1) (e) of the Arbitration Act gives jurisdiction to both the principal Civil Court of original jurisdiction in a district and the High Court in exercise of its original civil jurisdiction. The only condition stipulated by this section pertains to the subject matter of the arbitration which forms pivotal part while reaching the conclusion with regard to jurisdiction.[7]

The court, while interpreting these sections of the Arbitration act, has given exclusive jurisdiction to the principal courts and the High Court exercising its original civil jurisdiction. The court has further said that the jurisdiction to set aside the award given in the arbitration is vested in the superior-most civil court of original jurisdiction available in the district.[8] In the event where there is only City Civil Court in the Greater Bombay then the Principal Civil Court of original jurisdiction will be the High Court of Bombay.[9]

III. THE DECISION IN ATLANTA LIMITED

The High Court of Bombay, in this case, relied on section 24[10] and transferred proceedings from the Court of District Judge, Thane. The High Court held that the parties were common to both matters and the same award by the arbitration proceedings is under scrutiny in the given case. The High Court consolidated both petitions (i.e. one at the District Court Thane and one at the High Court, Bombay). The HC said that if both proceedings will run simultaneously then two Courts will render decisions on the same matter which may be conflicting. Ergo, the HC heard the matter.[11]

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5 S. 42 of the Arbitration and Conciliation Act, 1996.

6 *ITI Ltd*. v. *District Judge*, 1998 SCC OnLine All 359 : (1998) 3 AWC 2244.

7 *Jindal Vijayanagar Steel (JSW Steel Ltd.)* v. *Jindal Praxair Oxygen Co. Ltd*, (2006) 11 SCC 521.

8 *Shivam Housing (P) Ltd*. v. *Thakur Mithilesh Kumar Singh*, 2015 SCC OnLine Pat 6005.

9 *Khetan Industries (P) Ltd*. v. *Manju Ravindrapasad Khetan*, 1994 SCC OnLine Bom 163 : AIR 1995 Bom 43.

10 S. 24 of the Code of Civil Procedure Code, 1908.

11 *Ibid*.

The above determination of the High Court was challenged through Special Leave Petition.[12] While, disposing the preliminary issue, the Court held section 42 cannot be invoked in the present petition as both the challenges were filed on the same day in respective Courts. The SC, in view of the conclusions drawn by the respondent, upheld the judgment given by the High Court and laid down that section 2(1) (e) confers the power to adjudicate and dispose of the issues arising out of an arbitral award to the High Court in exercise of its ordinary original civil jurisdiction. The Supreme Court relied on the legislative intent arising out of the given statue.

IV. SHOULD SECTION 2(1) (E) OF THE ARBITRATION ACT BE GIVEN PRECEDENCE OVER SECTION 15 OF THE CPC?

The core of the case involves a dispute wherein section 2(1) (e) of the Arbitration Act was given precedence over the section 15 of the CPC. It is appearing that court was correct in reaching its conclusion but it is important to analyze on different streams of reasoning associated with it for reaching the conclusion. The author delves into different approaches of reasoning which should have been taken by the court to arrive the said conclusion.

A. Should we confer Jurisdiction to Principal Civil Court of original jurisdiction when compared to High Court of having ordinary original civil jurisdiction?

First of all, we need to analyze the section 2(1) (e) of the Arbitration Act. The legislators have used the word "means" which connotes that the provision is direct and should be interpreted with restriction. This section also contains "include" which makes the act inclusive of only two courts. The legislators have exhaustively explained the term to corroborate that only restricted meanings can be applied to find out the jurisdiction of courts.[13] This definition provides restrictive interpretation of the "courts" and is narrower as compared with the section 2(c) of the Arbitration Act, 1940. The earlier act included civil court but the 1996 act changed it to only principal civil court of original jurisdiction.

Further, the legislators have used the word "principal". The bare perusal of this word connotes about the court of first instance, first in importance or main or chief. It is suggestive of status and importance related with the jurisdiction.[14]

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[12] *State of Maharashtra* v. *Atlanta Ltd*., (2014) 11 SCC 619.

[13] *Globe Congeneration Power Ltd.* v. *Hiranyakeshi Sahakari Sakkere Karkhane Niyamit*, 2004 SCC OnLine Kar 155 : AIR 2005 Kar 94.

[14] *Sundaram Finance Ltd.* v. *M.K. Kurian*, 2006 SCC OnLine Mad 56 : AIR 2006 Mad 218.

The language of this section nowhere suggested that a hierarchically superior court should be given jurisdiction as compared to the inferior courts. It only talked about giving jurisdiction to Principal Civil Court of original jurisdiction in a district and endeavored to include the High Court in exercise of its ordinary original civil jurisdiction. Further, the CPC in its entirety applies to the proceedings enumerated under the Arbitration Act.[15] The jurisdiction of the courts should be entirely governed by the provisions given in the CPC. Section 15 of the CPC overlooks the procedure in which a suit can be filed in the Court of the lowest grade competent to try it. Therefore, the question of conferring jurisdiction to the High Court should not arise as long as Principal Civil Court of Original Jurisdiction is governing over the area of where dispute arose.[16]

In the present case, the construction of Mumbra Byepass falls well within the territorial jurisdiction[17] of District Court. Further, the subject matter of arbitration relates to the construction of Mubra Byepass. There is no other court in the vicinity of Thane where Principal Civil Court of original jurisdiction was exercised. Ergo, harmonious construction between section 15 of CPC and section 2(1) (e) of the Arbitration Act consolidates the law that District Court of Thane should have jurisdiction to try this suit as it is the Principal Civil Court of original jurisdiction.

B. Can the jurisdiction be given to the High Court having ordinary original civil jurisdiction over the Principal Civil Court of original jurisdiction?

The Supreme Court in this case laid down that High Court having ordinary original civil jurisdiction shall have precedence over the Principal Civil Court of original jurisdiction.[18] The Supreme Court took the different approach in determining this conclusion. In this section, the author shall endeavor to take different reasoning which should have been taken by the Supreme Court.

The appellant, in this case, vehemently contended that section 15 of the CPC should be taken into consideration before determining the jurisdiction. But, it has been well established that section 15 did not confer the jurisdiction directly to Courts.[19] It acts as a guidance to decide jurisdiction.[20] This section

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[15] *Nila Construction Co.* v. *Sanghi Industries Ltd.*, 2005 SCC OnLine AP 846 : (2006) 1 ALD 486.

[16] *Ibid*.

[17] *Rattan Singh Associates (P) Ltd.* v. *Gill Power Generation Co.*, 2007 SCC OnLine Del 19 : (2007) 146 PLR 2.

[18] *Commentary on the Code of Civil Procedure*, Mulla, 16th edn.

[19] *Konthan Kesavan* v. *Varkey Thomman*, 1963 SCC OnLine ker 270 : AIR 1964 Ker 206.

[20] *Madipalli Venkatachellam* v. *Madipalli Suryanarayanamurty*, 1939 SCC OnLine Mad 456 : AIR 1941 Mad 129.

has laid down the rule of procedure which has to be followed for jurisdictional matters.[21] In addition to this, let us investigate the intention behind the legislation of the Arbitration Act, 1996. Section 2(1) (e) of this act is in *pari materia* with the section 2(c) of the Arbitration Act of 1940. The only difference is that this act of 1996 restricts subordinate courts from hearing arbitral matter and it expressly included High Court in exercise of its original civil jurisdiction.[22] If the High Court will be abstained from having jurisdiction then the District Court would always have the jurisdiction thus excluding the High Court from exercising its original civil jurisdiction. This would make the inclusion of "High Court" nugatory and redundant. The objective of the Parliament must be achieved while interpreting the term "Court" under section 2(1) (e) of the said act.[23]

In addition to this, use of the word "*subject matter*" must be interpreted so as to reveal the intention of the Parliament. This term would include the matter such as contracts. It should be construed to mean the relief awarded by the arbitral award.[24] The award can be in terms of specific performance, money etc.[25] Further, "subject matter" is confined to Part I of the Arbitration Act. It has a direct connection with the process of dispute resolution. The purpose of this act is to identify the court which will have supervisory control over the proceedings of the arbitration. "Hence, this section refers to a court which would essentially be a court of the seat of the arbitration process."[26] This was also enunciated in *Balco* case.[27] Besides, section 2(1) (e) of the Arbitration Act has not made any reference of place of business, where parties reside, dwell etc. It is solely based on the subject matter of the arbitration aligned with the subject matter of the suit. The emphasis is made on the subject matter.[28]

Ergo, the harmonious construction of section 15 of the CPC and section 2(1) (e) blended with the intention behind the inclusion of "High Court" and interpretation of "subject matter" used in the Arbitration Act yielded the result that High Court in exercise of its ordinary original civil jurisdiction should be given precedence.[29]

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21 *Mohini Mohan Das* v. *Kunja Behari Das*, 1943 SCC OnLine Cal 90 : AIR 1943 Cal 450.
22 *Ibid*.
23 *Ibid*.
24 *Tata International Ltd.* v. *Trisuns Chemical Industry Ltd*., 2001 SCC OnLine Bom 905 : (2002) 2 Bom CR 88.
25 *Trammo DMCC* v. *Nagarjuna Fertilizers and Chemicals Ltd*., 2017 SCC OnLine Bom 8676.
26 *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc*., (2012) 9 SCC 659.
27 *Ibid*.
28 *Id.,* || 13.
29 *Supra* note 3.

V. CONCLUSION

Atlanta Limited clearly demonstrated an important aspect of how Courts are going to approach when confronted with the jurisdictional issues. The Supreme Court was posed with a very crucial issue of determining jurisdiction where both parties filed their suit simultaneously under the above mentioned acts in two courts, in which both Courts enjoyed jurisdiction to hear the matter presented. [30] The Supreme Court, in its verdict, analyzed the definition of "Court" contained in the arbitration act.

The harmonious construction of section 15 of the CPC and section 2(1) (e) of the Arbitration Act[31] in this case needed a different approach to reach the conclusion drawn by the Court. The author delved into the procedural guidelines given by section 15 along with interpreting intention behind the legislation of the Arbitration Act. It can be safely concluded that if there will be an option given to choose the jurisdiction between a High Court under ordinary original civil jurisdiction and a District Court having principal civil court of original jurisdiction then the preference should be given to the High Court.

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[30] Nitin Desai, "High Court v. District Court, Where will your Section 34 Arbitration Petition Lie?", July 5, 2019, <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/2224/html/1.html?no_cache=1>.

[31] *Commentary on Law of Abitration and Conciliation*, Justice R.S. Bachawat, (5th edn., 2010)

THE TRANSFORMATIVE CONSTITUTION- A RADICAL BIOGRAPHY IN NINE ACTS

—Gautam Bhatia

— *Gursimran Singh*[*]

"We have it in our power to begin the world over again", "On 26th January 1950 India will be an Independent country". These are the words of Thomas Paine and Dr. B.R. Ambedkar which Gautam Bhatia has used in the very beginning of his book "The Transformative Constitution". The title of the book and the quotes connote similarity as both talk about bringing a change. But why would Ambedkar state that the Indian Independence would be achieved on the date when the Constitution will come into effect i.e. on 26th January 1950?

I. NATURE OF THE CONSTITUTION

While the Britishers had already left India in 1947, what did Ambedkar meant by the independence which the Constitution aimed to achieve? The answer is that he recognized the potential of the Constitution to begin the functioning of India all over again. These two quotes by Thomas Paine and Dr. Ambedkar are like thread which sews all the words, reasoning and logic encompassed on the pages of Bhatia's book together and lay down in simple terms what the author uses 9 chapters and 9 judgments along with a prologue and an epilogue to explain.

The author in the prologue firstly tries to cull out the objective of the Constitution as to whether it is a conservative document or a transformative one. Interpreting Constitution as a conservative document would limit the understanding of the Constitution as merely a culmination point of the National movement resulting in self-government or transfer of power.[1]

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[1] B.N. Rao, India's Constitution in the Making 1 (Calcutta: Orient Longman 1960).

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[*] (3rd year- BA LLB)-School of Law, Lovely Professional University Phagwara.

But if exalted as transformative one, Constitution could be understood as a document which resulted in the formation of a new order that 'blotted out', 'abandoned', 'obliterated' the past.[2]

While rescuing the second interpretation from being called a mere assumption, author lists and then counters the arguments supporting the conservative nature of the Constitution. Firstly the Constituent assembly was no revolutionary body as it was not democratic; secondly, the government framework was heavily borrowed from the Government of India Act, 1935 including various arbitrary provisions of preventive detention; thirdly the form of government chosen (Westminster) can at best be called evolution from rather than a destruction of the old system. The last broader argument which gives Constitution the shade of conservatism is the nature of the national movement led by the Indian National Congress which had ignored and sidelined labour, agrarian and various subaltern and marginalized struggles. These arguments collectively put bloat on the Constitution-making process on the basis of which the final document itself can only be called a conservative document.

To support a transformative vision of the Constitution and counter the above-mentioned arguments, the author exculpates the process as well as the document from being called conservative through the following arguments: Firstly that the pre and post-constitutional government structure is non-comparable. The "Constitution created a federal democracy with all the juridical and political instruments of individual, federal, local, and provisional self-governance" based on universal adult franchise and equality of citizenship which was non-existent prior to the enactment of Constitution; secondly the subject of imperial government had now become a citizen of a republic connoting a change in legal relationship between the individual and State; thirdly the Constitution sought a thorough reconstruction of State and society itself which had suffocated the freedom and equality in India and lastly the author counters the broader argument of conservative Constitution by differentiating the national movement from the framing of the Constitution and dubbing the latter process as much more inclusive of the ideas left excluded by the dominant National Movement.

II. CONSTITUTIONAL TRINITY

The structure of the book is in three sets of cases pertaining to Equality, Liberty and Fraternity. Adopted from the French revolution these three words are entrenched in the Preamble to the Constitution but at the same time have much more detailed meaning and nuances than its French counterparts. Studied individually to discuss the potential of the 'Transformative Judgments' deliberated in the book, the transformative potential of this constitutional trinity as

[2] *Virendra Singh* v. *State of U.P.,* AIR 1954 SC 447: (1955) 1 SCR 415.

per the author can only shine through when read together. The dependence of these three terms on each other as per the author is mutual. The meaning of fraternity itself cannot be understood as the subordination of individual interests for the greater good but has to be understood in a sense which fully realizes the liberty and equality of each individual. The issues of untouchability, the subordination of a group to another, etc. which had resulted in a divided society were to be demolished by the Constitution formulating a society based on the principles of equality, liberty and fraternity.

III. DIRECTION TO INTERPRETATION

It is necessary to understand that the Transformative Constitution is along other things a mode of interpreting the Constitution and as per the author a very compelling one "when viewed in light of its text (Constitution) and context (of framing)." He reaches this conclusion through various arguments which study first the history of Independent movement and other parallel 'subaltern movements', the reading of constitutional assembly debates, making an argument with the help of both that the Constitution was written with a transformative vision and then discussing the individual judgments which as per the author fit the transformative vision of the Constitution.

The reason for such a framework to interpret Constitution is necessary because the words in the text cannot be separated from the complete text as a whole, the text cannot be separated from the history of its framing and the history of framing cannot be separated from the history of the thoughts and struggles which had shaped the understanding of the founding fathers. It is important that these movements and struggles of hundreds of years against the alien ruler and against indigenous social and economic domination be read as an interpretive tool. And if this struggle is not considered while interpreting the constitutional text then it will be a great disservice to that struggle itself which gave us independence.

IV. DISCUSSION ON RADICAL IDEAS

All the chapters follow this general outline stated above and make for a fascinating read. The author has at the end of various chapters given ideas which are radical as well as seminal and are worth discussing. One among them is the idea of 'community of property' discussed at the end of the sixth chapter titled 'The Freedom to Work'. The author firstly argues that the housework done by a woman in a household remains unremunerated and it being enforced by gendered roles within the family structure makes it comparable to begar as both share common roots of oppressive social structure. To remunerate this unpaid labour of a woman there is a need to give her an equal enforceable right in the matrimonial property bought after marriage regardless of it being

owned by the husband to recognize her economic contribution to the household work.

The book has at several instances put to stark nakedness our various assumptions regarding laws which rhetorically are meant to protect citizens like UAPA, NSA and AFSPA but are used by the State to declare a perpetual emergency. The courts have failed to recognize their own role in supporting the ADM Jabalpur jurisprudence directly or indirectly which is otherwise abhorred unequivocally by everyone.

V. REALIZING THE TRANSFORMATIVE VISION

The book is a collection of radical thoughts, which need to be realized by means of court through its judgments in the future. For Bhatia, it is not just the ends that matter but also the means by which those ends are to be achieved. And the most revolutionary of them i.e. Public Interest Litigation is the one which is not transformative as per the author since this procedure (of PIL) itself is absent in Pre-Constitutional movement, in the Constitutional assembly debates and the Constitutional text itself. The author has critiqued the procedural irregularities that take place in the PIL hearings to enable the court to take quasi-legislative and executive actions. The PILs as per author "misunderstands the role of the courts in our constitutional scheme vis-à-vis popular democracy" which is also a major contradiction in the book. Although the author has been careful about the role the courts have to play in a popular democracy like India but has at the same time supported decisions of the court which could be easily be termed as quasi-legislative like that of providing reservation for Transgender.[3]

An idea like 'community of property' discussed in the book the author asserts can be realized through judicial creativity. But the author has failed to answer if this creativity will be different from the usual wide reading of Article 142 (along with Article 23), an approach which the author has criticized in his book.

The text of the book presents an impactful reading of the Fundamental rights. The impact of this book or the idea of a transformative vision can only be realized when the courts further the transformative vision of the Constitution through their judgments in the future. The book makes a very compelling case that the Constitution belongs to margins that were never seen or touched or were deliberately ignored by individuals or groups empowered either by the State or by social structures. This is what makes the book in the author's own words 'a contrapuntal canon'. The book reaffirms and widens the

[3] *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.

role of the Constitution and the constitutional court to end discrimination by the State and individuals over the less powerful.

In many of the recent judgments of the Supreme Court on Adultery,[4] Section 377,[5] Sabarimala[6] and the one on reservation[7] have in one sense or another accepted the transformative vision of the Constitution which aligns with what the author has argued in the book. Like in the recent judgment on reservation, Justice D.Y. Chandrachud remarked that ".. a meritorious candidate is not merely one who is talented or successful but also one whose appointment fulfils the constitutional goals of uplifting members of the SCs and STs and ensuring a diverse and representative administration."[8] This is the kind of transformative reading of the constitutional provisions which can give full membership to the individuals left out and even if included are abhorred as unmeritorious.

It is necessary to point that one does not have to buy this book to understand what Bhatia wants to assert. You can follow his writings on this issue on news websites, his blog[9] and his several papers on SSRN[10] all of which are freely available on the web. The book provides a much more comprehensive historical and philosophical analysis of constitutional making as well as legal analysis and must be preferred over such sources. Further what is important is his choice of a publisher i.e. Harper Collins and not any academic publisher which would have made the book more expensive. The book is priced at 699 but is available online on discounted rates and must be bought by everyone including law students, lawyers, academicians, activists but most importantly by the judges of our Constitutional Courts.

VI. CONCLUSION

The vision of Transformative Constitution is ever evolving and has the potential to explore issues through constitutional lenses which may seem futuristic as the author as explored in the Epilogue to his book while discussing the role of technology over people's lives and how the private regimes of power deal with it. It is argued that the intersection of technology and constitutional rights is something which transformative constitutionalism cannot ignore as the technology-filled future is much scarier for the constitutional principles. In this sense the book has opened various topics which are related to technological self-determination that can be studied in future as the 21st century has just

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4 *Joseph Shine* v. *Union of India*, (2018) 2 SCC 189.
5 *Navtej Singh Johar* v. *Union of India*, (2018) 1 SCC 791.
6 *Indian Young Lawyer's Assn.* v. *State of Kerala*, (2016) 16 SCC 810.
7 *B.K. Pavitra* v. *Union of India*, 2018 SCC OnLine SC 3341.
8 *Ibid*.
9 <Indconlawphil.wordpress.com>.
10 <https://papers.ssrn.com/sol3/results.cfm?RequestTimeout=50000000>.

started and there is a lot more to come in the technological sphere which will face constitutional challenge and there and then the transformative role of the Constitution will have to be realized in much more progressive manner.

And if the court chooses to be progressive in its approach to constitutional interpretation then there will be a fight between the interpretations which the court will have to choose. The fight will be between the Constitution as a living tree or Constitution as a transformative document. The approach of a transformative Constitution is to check the constitutionality of an issue on the grounds of the text of the Constitution and the context in which it was made. The contemporary problems may in principle be similar to the ones which our constitutional framers faced at that time, but the substantial link between the problem and its principle might seem so thin that it could be overlooked even by progressive judges in future. And at those junctures, the courts might choose living tree constitutionalism over the transformative one. This is the point where the future works on Transformative Constitutionalism should focus to make a convincing framework where the Fundamental Rights can thrive despite the sneaky methods that technology uses to limit those rights.

P.P. MITRA, AN INTRODUCTION TO ANIMAL LAWS IN INDIA

(Thomson Reuters, Gurgaon, 2019), ISBN 978-93-89046-31-1

—Dr. Prakash Sharma[*]

Animal law has several dimensions according to their position to human society and environment. There are factors like habit, convention, amusement, convenience or pleasure which determine and establish association of human with animals. According to the ancient Indian philosophy animals are 'sentient' beings and are capable of interacting with humans. The idea was that since God is omnipotent and omnipresent it exists in both living and non-living entities, including animals, plants, caves, *etc*. This is supported by the ancient Indian literature that treats animals as morally equivalent to humans and in certain occasion above humans. For ancient India, nature was God and accordingly we have developed a sense of environmental ethics that brought values into practice, for instance it was believed that it is in the interest of all (living and non-living) to live in harmony.

Over the course of time there has been distinction made between human beings as law's subjects and animals as law's objects (classifying animals as property). Of course, the essence of law is classification and every legal category is a product that determines the manner in which disputes between parties are resolved, however, the process of classification ought to be fair.[1] Now, since the coherence of a legal category depends upon the validity of the processes of classification from which the category is derived, this classification of animals being property and not legal persons, takes away any possibility of possessing the basic rights and freedoms of legal persons, including freedom of movement and protection from harm. It is for this reason, a true survey of animal law requires the inclusion of discussion of 'utilitarian' versus 'deontological' conceptions of animal 'personhood'; revealing either 'Bentham's utilitarianism' or a 'welfarist sensibility'.[2] This perhaps calls for some plausible

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[*] Assistant Professor, Vivekananda Institute of Professional Studies, New Delhi. Vivekananda School of Law and Legal Studies,

[1] Wendy A. Adams, "Human Subjects and Animal Objects: Animals as 'Other' in Law", 3(1) Journal of Animal Law and Ethics 31, 32 (2009).

[2] *See generally* Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Royal Exchange, London, 1823). (In determining ethical responsibility to animals, Bentham

questions, for instance, whether acceptable usage of animals depends on a transcendental arithmetic of how much hedonic pleasure/pain is derived from them or whether usage is a question of autonomy based on particular characteristics of the 'animal in question'.

Robert Nozwick provide a concise but admirably effective explanation when he writes that animal welfare constitutes "utilitarianism for animals, Kantianism for people."[3] For instance, the legislation regulating the treatment of animals, around the world, follows an 'animal welfare ethic', where law permits exploitation of animals (provided it is significantly beneficial for humans). This further strengthened by the fact that no country in the world, for instance, has prohibited the use of animals for medical research or as a source of food.

Having said this, the present trend is move from philosophical argument of 'animal welfare law' to 'animal rights movements'. The latter concept argues for 'humane treatment principle' for animals.[4] It suggests that the infliction of unnecessary suffering on animals by using cruel and harmful techniques employed on animals are unnecessary, in the sense that they do not produce human benefits or that such benefits can be achieved in other ways.[5] Since much is now known about the content and degree of animal suffering, and it is increasingly difficult to deny that animals suffer in a variety of ways, not just physically.

I. ANIMAL LAW AND ENVIRONMENT LAW

Environmental law and animal law share many common elements and goals, but also exhibit many fundamental differences. Environmental law, with its intricate layers of international, State, and local laws, is an established law. In fact, without having any reference in United Nations Charter, environment law has developed immensely. It has witnessed development of concepts like sustainable development, public trust doctrine, *etc.*, which no longer represent international environment law as preservationist but conservationist. On the other hand, there have been massive developments in the field of animal law.

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wrote that the threshold question is "Not, Can They Reason? Nor, Can They Talk? But, Can They Suffer?", *id.* at 311); John Rawls, *A Theory of Justice* (Oxford University Press, London, 1972) (describing moral personhood as depending on two factors: first, a conception of their good, and second, a sense of justice and desire to act upon that sense, *id.* at 505), and Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge University Press, New York, 1992) (arguing that animals do not have moral standing, but, nevertheless, humans must place moral constraints on their treatment of animals, which is pertinent in discussing a version of liberalism).

3 Robert Nozick, *Anarchy, State and Utopia* 35-42 (Basic Books, New York, 1974).

4 Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* xxiii-xxiv (Temple University Press, Philadelphia, 2000).

5 Gary L. Francione, "Animal Welfare and the Moral Value of Nonhuman Animals", 6(1) Law, Culture and the Humanities 1-13 (2009).

In India, as on today, animal law is treated as part of environment law.[6] It is treated as part of greater 'environmental management', which represents three values, namely intrinsic, instrumental and technical. In fact, few suggest that the animal law section often exists within the broader environmental law section.[7] However, there will be always be a debate whether animal law is part of environmental law or it is an independent subject on its own.[8] Presently, animal law faces many of the same legal and strategic challenges that environmental law faced in seeking to establish a more secure foothold in India.

II. ANIMALS IN INTERNATIONAL LAW

Since the latter half of the 20th century saw mankind paying an emphasized attention to environmental protection and within that to animal protection. Sustaining our environment for the next generation in a properly manner is a key issue. The analysis demonstrates five International Conventions, namely, Ramsar Convention, 1971; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1975 (Washington Convention); Bern Convention, 1979; Bonn Convention, 1983; and the Convention on Biological Diversity, 1992. All of them have a fundamental role in animal protection. Ramsar Convention provides international platform for international cooperation and national action and for the conservation and wise use of wetlands and their resources. Bonn Convention ensures a global framework for the conservation and sustainable use of migratory animals and their habitats. Bern Convention deals with the protection of European Wildlife and nature habitats. Washington Convention protects endangered plants and animals. Convention on Biological Diversity deals with the protection of the whole wildlife.

The increasing emergence of animal matters on the international platform, and their newly gained prominence in public discussion of international character has resulted in the formation of global animal law. It is emerging as a novel and promising discrete branch of international law.[9] This area of law acknowledges the transboundary reality of human-animal interactions and demands. Being multi-directional it has potential of operating horizontally as comparative animal law and vertically from the perspective of the international, supranational and regional level. Take for example the impact of climate on animal

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[6] Interestingly, when Prevention of Cruelty to Animals Act, 1960 was enacted the Environmental Law in India was in the nascent stage.

[7] *See*, Werner Scholtz (ed.), *Animal Welfare and International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2019).

[8] *See*, Pamela Frasch and Joyce Tischler, "Animal Law: The Next Generation", 25(3) Animal Law 303-340 (2019) (Authors argue that Animal Law has seen a dramatic increase in the levels of knowledge and understanding that students bring with them as they start survey animal law classes, *id*. at 305).

[9] Charlotte E. Blattner, "Global Animal Law: Hope beyond Illusion: The Potential and Potential Limits of International Law in Regulating Animal Matters", 3(1) Mid-Atlantic Journal on Law and Public Policy 10-54 (2015).

migration.[10] Climate change is predicted to have many varied impacts on species around the world, therefore there is an urgent to better react to the problem climate change poses for animal migrations.

III. ANIMAL LAW IN INDIA

Presently, three major laws are directly related to animals in India *viz*. the Prevention of Cruelty to Animals Act, 1960, the Wildlife (Protection) Act, 1972 and the Biological Diversity Act, 2002. Apart from these direct laws, there are various references of animals in different Indian legislations where animals are protected for resource or property purposes. In India, the whole matrix of animal laws centres around three concept. *First*, is the protection of animals for the betterment of agriculture and development animal husbandry. Being an agrarian society for time immemorial, animals have been treated as properties for private individual as well as for the State. Therefore, the protection and preservation of these properties are obligation of the State.[11] *Secondly*, animal law is based on 'ecological purposes' and 'environmental utility' which has got force from international conventions and treaties, initially during 1940s, and more precisely from 1970s onwards.[12] This type of animal laws is very wider in theory and Indian Judiciary has performed tremendous role to protect wild animals and birds for the purpose of the preservation of biodiversity and conservation of ecology.[13] *Thirdly,* animal laws in India is purely based on ethics or morality which is oldest form of animal rights or pure animal law. Here animals are protected only for their welfare and not for human resource or human environment.[14] Apart from these, several rules and regulations are being framed by States or local bodies in India relating to slaughter houses or bio wastes but those are mainly subjects of public health and sanitation vested upon States[15] or Municipality[16] and those cannot be treated as animal laws.

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[10] Thomas T. Moore, "Climate Change and Animal Migration", 41(2) Environmental Law 413-406 (2011).

[11] Entry 15 of State List in Schedule VII of the Constitution of India, 1950 and earlier Entry 20 of Provincial List in Schedule VII of the Government of India Act, 1935.

[12] Arts. 48-A, 51-A(*g*) and Entry 17-B in Concurrent List of Schedule VII in Constitution of India, 1950 are examples of such type of animal protection.

[13] *See*, P.P. Mitra, *Birds*, *Wetlands and the Law: Indian and International Perspectives* (Thomson Reuters, Gurgaon, 2019), Partha Pratim Mitra and Prakash Sharma, "Development but Not at the Cost of Biodiversity: A Plan for 'Living in Harmony with Nature' ", Modern Diplomacy (May 20, 2020), available at <https://moderndiplomacy.eu/2020/05/20/development-but-not-at-the-cost-of-biodiversity-a-plan-for-living-in-harmony-with-nature/>.

[14] Entry 17 in Concurrent List of Schedule VII in Constitution of India or earlier in Entry 22 in Concurrent List in the Government of India Act, 1935 or 1890's legislation as "Prevention of Cruelty to Animals".

[15] Entry 6 of State List in Schedule VII of the Constitution of India.

[16] Entry 18 in Schedule XII of the Constitution of India.

IV. THE BOOK

The astute book,[17] is a compendious piece of legal materials as it comprises animal related laws, rules and orders passed thereunder, and the judicial decisions. The book comprises of seventeen chapters along with an introduction and conclusion. The book has drawn an outline of the current regulations under Indian law and international perspective for use of animals in farming and agriculture; the keeping of animals in zoos; using of animals as carrier, transportation of animals, the keeping of animals as pets; the use of animals in experimentation and the protection of wildlife and endangered species, *etc*.

The Foreword of the book has been written by Justice K.S.P. Radhakrishnan, former judge of Supreme Court of India who delivered the landmark judgment of *Animal Welfare Board of India* v. *A. Nagaraja,*[18] which established new dimension of 'animal law jurisprudence' in India. Earlier, he had also pronounced judgments on eco-centric environmentalism[19] and regulation of slaughter houses.[20]

The book gives a good foundation of the subject covering position of animal within human law and the legal concept of animal, domestic animal and wildlife in Indian and international law. Also, at the moment, every battle has to be fought over and over again in each country as those trying to help animals seek to justify new laws and restrictions.[21] In this regard, the second chapter starts with a basic question whether animal can be regarded as person and not as property established in existing legal system. The meaning of animal rights, position of animals under law of torts, provision of animals on the highway along with the scienter rule,[22] position of animals under criminal laws and the principles of ownership of animals are minutely discussed in this chapter.

In national law, States simply regarded animal as either useful or vicious and thus protect only the economic value of wildlife as a source of food and clothing. While welfare advocates consider that all species should be protected for ethical and humanitarian reasons and environmentalists urge that particular species should be protected for ecological reasons.[23] The next chapter titled *Animals in International Law* examines guidelines of World Health Organization of Animal Health (OIE) on five freedoms of animal

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17 P.P. Mitra, *An Introduction to Animal Laws in India* (Thomson Reuters, Gurgaon, 2019).
18 (2014) 7 SCC 547.
19 *Centre for Environmental Law, World Wide Fund-India* v. *Union of India*, (2013) 8 SCC 234.
20 *Laxmi Narain Modi* v. *Union of India*, (2014) 1 SCC 243.
21 David Favre, "An International Treaty for Animal Welfare", 18 Animal Law 237(2012).
22 *Supra* note 18 at 14.
23 Patricia Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* 596, 597 (Oxford University Press, New York, 2009).

welfare.[24] The role of Universal Declaration on animal welfare, World Health Organization for animal health and Internal League for animal right, European Union's Convention on animal and various International Conventions for wild animals have been highlighted here. David Favre argues that concern for individual animals seldom exists in the international realm.[25] Favre opines that "when there are limitations on methods of killing, capture, or transportation, it is usually out of concern that the natural resource should not be wasted rather than concern for the pain and suffering of individual animals. There is no international anticruelty treaty."[26] The Indian Supreme Court has also lamented on similar line that there is no international agreement to ensure the welfare and protection of animals and International community should hang their head in shame, for not recognizing their rights all these ages.[27]

The other chapters cover the constitutional position of animals in India,[28] various measures related to cattle preservation and livestock improvement,[29] the prevention of cruelty to animals[30] subsequently animal slaughter,[31] animal sacrifice[32] and experimentation on Animals.[33] The author reveals that there are some regulations on clinical trials and medicinal tests prevailing in India.[34] Besides circus, magic show, animal race are platforms where animals are performing for human entertainment and human income. Chapter Ten, examines the use of animals for '*jallikattu'* in Tamil Nadu, '*tonga'* race in Rajasthan and bullock cart race different parts of the country.

Chapter eleven analyzes laws on transport of various animals by different modes, transportation of animals before slaughter for food, general conditions for maintaining general hygiene and sanitary practices by food business operators, the regulations for loading of animals and guidelines for space requirement during transportation.[35] The book has also mentioned various provisions of different carriage laws in India where animals are defined as goods. The book covers chapters on treatment of animals in case they catch any particular

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[24] *Supra* note 17 at 25.
[25] David Favre, "Wildlife Jurisprudence", 25 Journal of Environmental Law and Litigation 459-510 (2010).
[26] *Id*., at 475.
[27] *Supra* note 18 at para 47.
[28] *Supra* note 17 at 40.
[29] *Id*., at 49.
[30] *Id*., at 71.
[31] *Id*., at 94.
[32] *Id*., at 134.
[33] *Id*., at 141.
[34] Law Commission of India, 261st Report on Need to Regulate Pet Shops and Dog and Aquarium Fish Breeding (2015).
[35] *See* also the Law Commission of India, 269th Report on Transportation and House-Keeping of Egg-Laying Hens (Lawyers) and Broiler Chickens (2017).

disease,[36] their trade,[37] and measures pertaining to the conservation of wild animals.[38] Earlier author has already published his book on conservation of wild animals.[39]

Chapter fifteen is very useful for law scholars which explain about the role of judiciary on animal protection in India.[40] Many cases of Supreme Court and High Courts have been discussed on animal protection and analyzed about judicial activism to protect the wildlife and animals and the application of doctrine of '*Parens Patriae'*. The recent trend of Indian judiciary has been observed to include animals within the concept of 'person' under Article 21 of the Constitution mainly with the ratio of *A. Nagaraja case*.[41] Likewise, the remaining chapters cover the authorities for protection of animals in India,[42] projects and policies[43], including consumer protection and animal welfare in India.[44]

In the concluding chapter, the author has reminded about urgent need for introduction of the 'Animal Law' subject in the legal curriculum of the country (on the line with the European and American law schools).[45] The roots of such thought originate from the decision of the Kerala High Court,[46] wherein the court asked, "If humans are entitled to fundamental rights, why not animals?"[47] In 2015, the Bar Council of India included 'Animal Protection Laws' in the curriculum as one of the subjects to be taught to the law students.[48] Perhaps, introduction of animal rights advocacy programs in law schools would serve the vital needs of educating students and the public about the inadequate protection the law provides to animals. This could be possible when the animal rights advocates are with a background in advocacy, psychology, economics, business, medicine, philosophy, and ethics.

V. CONCLUSION

To understand any area of law, it requires not only knowledge of the relevant legislation and cases but also an appreciation of how the law 'in the

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36 *Supra* note 17 at 184.
37 *Id*. at 191
38 *Id*. at 199.
39 *See* also P.P. Mitra, *Wild Animal Protection Laws in India* (LexisNexis, 2016).
40 *Supra* note 17 at 239.
41 *Supra* note 18.
42 *Supra* note 17 at 258.
43 *Id*. at 279.
44 *Id*. at 296.
45 *See* Partha Pratim Mitra, "Introduction of Animal Law in Continuing Legal Education", 46(4) Indian Bar Review 240, 241 (2019).
46 *N.R. Nair* v. *Union of India*, 2000 SCC OnLine Ker 82 : AIR 2000 Ker 340.
47 *Id*. at para 13.
48 BCI: LE: Circular No: 4/2015 Dated 28th September 2015.

books' is interpreted and applied. Animal Law continues to gain momentum as a recognised field of legal study in other parts of world,[49] however, in India it is in a nascent stage. The relatively new field has witnessed little research, particularly into the operation of Centre and State animal welfare legislations. The book appears to be a timely addition for an emerging field of law where the legal protection for social and biological needs of animals has been explained. This branch law is a combination of statutory laws and case laws, concerning the interests of animals or the interests of humans with respect to animals. The book is written in lucid language with crisp style. The book has the potential to serve the interests of lawyers, activists, students, and all human being having compassion for every living element on this mother earth.

Prakash Sharma[50*]

[49] For development of Animal Law in Australia and New Zealand, *see* Peter Sankoff and Steven White (eds.), *Animal Law in Australasia—A New Dialogue* (Federation Press, Sydney, 2009). In United States of America, *see* David Favre, "The Gathering Momentum", 1 Journal of Animal Law 1, 9-14 (2005). In People's Republic of China, *see* Amanda Whitfort, "Evaluating China's Draft Animal Protection Law", 34(2) Sydney Law Review 347-370 (2012).

[50] * Assistant Professor, Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies, New Delhi.

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