ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 2
Issue I

August 2020

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES

ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
The Institute is NAAC Accredited 'A' Grade, recognized by UGC under section 2(f)
& NBA Accredited for MCA Programme

ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 2
Issue I

August 2020

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES

ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
The Institute is NAAC Accredited 'A' Grade, recognized by UGC under section 2(f)
& NBA Accredited for MCA Programme

VIPS STUDENT LAW REVIEW

EDITORIAL BOARD

Prof. Dr. Rashmi Salpekar - Editor
Dean, Vivekananda School of Law and Legal Studies (VSLLS)
Vivekananda Institute of Professional Studies (VIPS)
E-Mail ID: rashmi.salpekar@vips.edu

Prof. Dr. Shilpa Khatri Babbar - Member
Professor & Director (Academic Excellence and Public Relations and Protocol of VIPS)
Vivekananda Institute of Professional Studies (VIPS)
E-Mail ID: shilpa.khatri.babbar@vips.edu

Prof. Dr. Rajni Malhotra Dhingra - Member
Professor, VSLLS, VIPS
E-Mail ID: rajnimalhotradhingra@vips.edu

Prof. Dr. Navjeet Sidhu Kundal - Member
Assistant Professor, VSLLS, VIPS
E-Mail ID: navjeet.s.kundal@vips.edu

Ms. Ankita Kumar Gupta - Member
Assistant Professor, VSLLS, VIPS
E-Mail ID: ankita.gupta@vips.edu

Issue I August, 2020 ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Chief Patron

Dr. S.C. Vats
Founder and Chairman, Vivekananda Institute of Professional Studies, Delhi

Patron

Prof. R.Venkata Rao
Chairperson, Vivekananda School of Law and Legal Studies
and Vivekananda School of English
Former Vice Chancellor, National Law School of India University, Bangalore

Honorary Advisory Board

Prof. Dr. T.V. Subba Rao
Professor Emeritus
Vivekananda School of Law and Legal Studies
Former Professor, NLSIU, Bangalore

Prof. Dr. Manoj Kumar Sinha
Director
The Indian Law Institute (Deemed University), New Delhi

Prof. Dr. Kanwal D.P. Singh
Professor, University School of Law and Legal Studies
G.G.S. Indraprastha University, Delhi

Mr. Pravin H. Parekh
Senior Advocate, Supreme Court of India
President, Indian Society of International Law, New Delhi

Mr. Rakesh Munjal
Senior Advocate, Supreme Court of India
President, SAARC-LAW, India Chapter

Publisher and Printer's Detail

Published and printed by Registrar (Academics & HR) **on behalf** of Vivekananda Institute of Professional Studies. **Printed at** M/s Star Forms, Plot no.37-38, Gali no.4, Libaspur Extension, Industrial area, Village Libaspur, Delhi. **Published from** AU Block - Outer Ring Road, Pitampura, Delhi-110034. **Editor** Prof. Dr. Rashmi Salpekar

Student Core Team Assisting The Editorial Board

Anshu Sharma
Fifth Year, B.A. LL.B., 03317703816

Muskaan Singla
Fifth Year, B.B.A. LL.B., 35817703516

Surbhi Burman
Fifth Year, B.B.A. LL.B., 13317703516

Disha Joshi
Fourth Year, B.A. LL.B., 05517703817

Tanya Karnwal
Fourth Year, B.B.A. LL.B., 13017703517

Ishaan Banerjee
Third Year, B.A. LL.B., 40317703818

Kriti Mishra
Third Year, B.A. LL.B., 10717703818

Pritthish Roy
Third Year, B.A. LL.B.,15117703818

EDITORIAL NOTE

VIPS Student Law Review is an annual, blind peer-reviewed journal which provides a platform to law professionals, research scholars and students to meaningfully engage in discussions pertaining to law, justice and society. It helps in bringing to the forefront the contemporary issues which are relevant for academic as well as legislative research. The inaugural issue of VIPS Student Law Review, Volume 1 received an overwhelming response and was a great success. VIPS Student Law Review, Volume 2 occupies a unique place in the developing legacy of our journals. Its timely publication during the time of ongoing pandemic was a challenging task. The global, unprecedented pandemic of COVID-19 implied calling on special measures to deal with the task at hand. The unwavering perseverance of all the stakeholders, ranging from authors to faculty to the student team, ensured the timely publication of this issue. This era has also taught us the importance of technology and the need of its adaptability in the education sector. It reflects the committed tenacity and motivated effort of our institute to continuously contribute to the ever growing area of law.

We are, thus, extremely pleased to present VIPS Student Law Review, Volume 2. Our Journal received an overwhelming response of 136 submissions to the call for papers and we are sincerely humbled by the same. The articles selected for publications are lucid, nuanced and tackle contemporary discussions. The research papers selected are not only addressing the issues erupted due to COVID-19 pandemic but are also covering various other relevant contemporary issues which needs to be highlighted.

Ms. Anuja Misra and Ms. Chitra Ahluwalia have critically examined the position of colour trademarks and their acceptability. Ms. Nikita Mittu has compared the system of corporate governance in India and the U.S.A. Dr. Raghuvinder Singh and Ms. Arti Sharma have comprehensively analysed the various aspects of the right of Muslim women to marry on divorce. Mr. Jayanta Boruah has addressed the relevance of international humanitarian law and the Syrian refugee crisis. Ms. B. Yamuna Saraswathy and Mr. R.B. Rishabh have addressed the position of scientific criminal investigation in India. Ms. Ananya Jain undertakes a deep study of the DRM technology and the principles of copyright law in lieu of copyright in ebooks. Ms. Akanksha Badika and Ms. Pragya Mishra write about the intermediary liability regime in India. Ms. Kanak Mishra writes about Narco-Analysis and the Brain Mapping tests through 'Fluid' consent. Mr. Akshit Bhardwaj has expressed his views on sports law jurisprudence in India and the challenges that lie ahead. Mr. Manan Katyal analyses the legality and application of single-color trademarks in India with

reference to *Christian Louboutin S.A.S. v. Abubaker and Ors*. Ms. Merrin Muhammed Ashraf discusses the feasibility of adoption of an inquisitorial model and the impact on the criminal justice system in India. Mr. Rishabh Soni examines the reliance on force majeure clauses to escape liability; with special reference to COVID-19. Ms. Ananya Sanjiv Saraogi and Ms. Vallabhi Rastogi discuss the impact of the pandemic on various walks of life. Ms. Mansi Mishra comprehensively evaluates the relation between merchant bankers and the function of due diligence. Mr. Rupesh Sunil Dhengre and Ms. Omeshwari Pancham analyse the issue of mercy petitions from a socio-religious perspective along with the legal dimension. Ms. Adiba Khan and Ms. Gunjan Kanoongo assess the increased domestic violence cases in light of COVID-19 and the subsequent lockdown. Ms. Nidhi Chhillar and Ms. Ritika Sharma give a holistic account of honour killings. Ms. Samavi Srivastava and Mr. Rounak Doshi critically assess the Biological Weapons Convention. Ms. Manasvita Tejsi and Mr. Mridull Thaplu call upon the criminalisation of marital rape.

The Journal presents three articles under the 'Case Comments' section. Mr. Hartej Singh Kochher explores two contradicting verdicts, delivered by the Competition Commission of India on the issue of "buyers' cartel". Mr. Raj Krishna and Mr. Kumar Mukul Choudhary discuss custodial death in light of *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon*, 2019 SCCOnLine SLSC 14 (Sri Lanka). Mr. Jaideep Singh Lalli analyses the Supreme Court verdict of *Chebrolu Leela Prasad Rao & Ors. v. State of A.P. & Ors*.

I thank our reviewers for reviewing the articles timely and for giving their inputs. Special mention to the COO, VIPS and their staff for their support. I am thankful to the Editorial Committee for releasing the issue in time.

Dr. Rashmi Salpekar
Prof. and Dean, VSLLS, VIPS
Editor

TABLE OF CONTENTS

CASE COMMENTS

POSITION OF COLOUR TRADEMARKS, ACCEPTABILITY AND RELATED ISSUES: A COMPARATIVE ANALYSIS

Anuja Misra* and Chitra Ahluwalia**

Abstract

With the growing awareness of the essence of a trademark ranging from small businesses to multinationals, there is a constant development in adopting innovative and unconventional marks. One of such marks, bloomed to the full in recent times are the colour marks; although, they too, in the tedious process of recognition and protection as trademarks, have faced countless impediments. The essence of the paper brings out the same with a comparative analysis of three jurisdictions. Where the Shade Depletion Theory depicts how monopoly over a finite number of colours may lead to ultimate depletion of the colours in public domain, the Confusion Theory suggests innumerable shades of one colour on the Pantone Scale leading to extreme confusion amongst the purchasing public. Another aspect while protecting colour marks the Doctrine of Functionality which relates to the functional or descriptive aspect[1] of the mark. Pink toned milkshake cartons may be presumed as a strawberry product; similarly, monopolising red colour for a fire extinguisher where red represents the colour of danger and high descriptiveness. The second chapter of the paper mentions the plight of the Indian judiciary faced with insuperable difficulties in establishing rights over 'colour combinations' subject to acquired distinctiveness after admittedly hesitating to grant single colour monopolies. Realising the importance that a colour or its combinations play in a trade dress, courts have addressed it through precedents like Colgate Palmolive in light of the unwary consumers. The third chapter of the paper discusses the exclusivity of colour marks across European Union being reluctant in protecting these marks as compared to US where obtaining exclusive right over colour marks is more flexible. The last part of the paper has

* Assistant Professor, Maharashtra National Law University, Nagpur.
** Associate, Kunal Khanna & Co.

1 Section 9(1)(b), Trademarks Act, 1999

been concluded by raising relevant concerns and providing suggestions regarding the registrability of colour marks. The pace at which businesses are realising the importance of trademarks is impressive and should be tackled with caution as well as creativity.

Colour Mark as a Non-Conventional Trademark

The Indian trademark act in its definition of a trademark states that "a mark which is capable of being represented graphically and which is capable of distinguishing goods or services of one undertaking from those of other undertakings." Since colour at the outset aid in enhancing the visual appeal of a mark, they serve as good graphical representations of a mark. Also, since colours are so distinct that they remain in the minds of the public and help them to identify the goods as coming from the same source, they have proved to be a powerful representation in marketing and advertising. The flashing siren red of Louboutin's[2] sole and the soothing blue colour of Tiffany have great ability of attracting the consumers and henceforth acquire distinctiveness by secondary meaning. As commercialisation grows in the capitalist market, there grows a need to protect such marks.

The European Union has always been apprehensive about granting colour marks. They were from the beginning totally against trademark of primary colours for a simple reason that the primary colours are basic colours and monopolising these basic colours would not only shrink the public domain but also limit its use. Also it has to be kept in mind that if no protection at all is given to these marks then it can lead to widespread copying and deceptively similar competing products will enter the commercial market likely to cause confusion in the minds of the public. A similar thing happened in the Louboutin case where the court did not grant injunction to it against the other competing products and as a result Louboutin suffered great loses in its business.

Colour attributes to the visual perceptibility of a mark and when a word combined with a colour denotes or signifies the products of a brand name, it serves as a successful trademark. What was held in the *Re Owens-Corning*[3] case was that "the colour pink may signify roof insulation, by virtue of both its physical resemblance to, and factual connection with pink roof insulation. Also through the connection of a myth, examined below, the sign pink may associate itself with roof insulation."

2 Kabak, M.L., "*Are Colour Trademarks Valid? : A Sneak Peak at Louboutin's Appeal for Trademark Protection for Red Soled High Fashion Heels*" (2012), http://www.sanfranciscobusinesslawyerblog.com/2012/04/islouboutins-red-sole-for-women-shoes-a-valid-trademark.html.

3 Re Owens-Corning Fiberglass Corp. 774 F.2d 1116 (1985).

Colours play an important role in communicating a lot to people. Like generally we have an assumption that the colour red signifies love or blue signifies peace or green signifies envy and so on. Thus, colours sometimes play this important role of communicating about the products belonging to the trade name company and that is how people remember it and associate the colour with the mark. In the case of *Qualitex v. Jacobson*[4], the court overturned the notion of generic application and held that the ironing pad had acquired its use of the colour green and hence it shall be associated with the company on grounds of secondary meaning. When a colour is being used for a particular product or brand it is easy for people to remember or trace the origin. This is exactly how colours become a 'sign' protected as a trademark.

Colour Depletion Theory

It has been made clear that if a trademark acts as a sign, it can distinguish between the products of one from another like the purpose of any other trademark; or if it has acquired a secondary meaning, then it can be registered as a valid trademark. However there are certain impediments in the way of colour mark being registered. They can be discussed under:

- Colour depletion theory
- Shade confusion theory
- Doctrine of functionality[5]

The colour depletion theory states that the colours which act as a sign for the registration of trademark are limited in number and when a company acquires trademark on a colour, there becomes one colour less from the existing range of colours available for the public to use. Also, if we see it from the manufacturer's point of view, then they will have one less option for choosing a colour as trademark and this will go on with the remaining manufacturing companies who want to register colour as marks, till all the colours are exhausted. In the case of *Campbell soup Co. v. Armour & Co.*[6], the plaintiffs who used to have their goods packed in red and white packaging barred the defendants from using similar colours. While the defendants got a valid trademark on the colour which acted as a sign and was distinctive in nature, it was still contended that the request to have a monopoly over the two colours was not desirable. This would encourage other manufacturers too, to have their colour marks registered leading to a situation where all the colours would

4 *Qualitex Co. v. Jacobson Products Co.* 514 U.S. 1300 159 (1994).

5 Vana, J.L, *"Colour Trademark"* 7 TIPLJ 387 (1999).

6 F. Supp. 114 (E.D. Pa. 1948).

be claimed monopoly upon, and there would be no colour left in the public domain. This situation, forget the difficulties which it brings with it, is not feasible.

However, in the case of *Qualitex*[7], the U.S Supreme Court rejected the view and held that there are a wide range of colours and the shades of those colours and that the mere granting of trademark to a colour would not lead to a limited supply of colours. The court gave this opinion keeping in mind that the manufacturers would be positioned at an inconvenience if they were refused the right to register these marks as trademarks. But if there is a finite number of colours, then granting protection to all of them would lead to an increase in the number of infringement litigations where the use of any colour mark would violate the registration of the said colour as a trademark.

Shade Confusion Theory

When we talk about shades of a colour, the basic assumption is that if a single colour is registered as a trademark, then the usage of its different shades would lead to confusion. This is not taken into account only when dealing with infringement procedures but also the confusion that the customers will face while purchasing goods. Confusion can be created in the minds of the public by using a slightly different shade of colour when going for a trademark registration[8]. The names and colour codes of different shades of the colours can be found on the *"Pantone Scale[9]"*. However, even though the scale provides apt colour codes for the sake of registration, it seems meaningless when we talk about 'likelihood of confusion' in the minds of the public because howsoever colours there may be specified distinctively on the scale, the close shades of a colour will seem the same to an average person of imperfect recollection[10]. What these manufacturers of like products do once they know that a specific colour has been trademarked by the other company, is that they select a close shade of the same colour from the Pantone Scale and file for registration, least caring about the deceptive similarity that it causes. For e.g. the colour shades of Cream Pink and Petal Pink seem all the same to a layman unless the proper code number is specified. This affects not just the brand owners but the general public.

Functionality Aspect of Colour Marks

The doctrine of functionality in colour marks considers keenly the functional aspect of the marks. In cases where a colour is descriptive of its nature in the sense that it provides a

7 *Supra* note 4 at 3.

8 Denoncourt J, Intellectual Property Law, 146 (3rd ed. 2012).

9 *'Find a Pantone colour',* https://www.pantone.com/color-finder.

10 *Amritdhara Pharmacy v. Satyadeo Gupta, AIR 1963 SC 449*.

technical result, then the mark is not workable under the trademark law to get protection. This is done to stop the monopoly over the functional aspect of the mark. This can be elucidated further by help of an example. The colour Black absorbs heat faster and the reason why it is used in non-stick utensils of different companies so as to help food cook faster. If Prestige acquires a monopoly on this black colour on utensils then the other non-stick utensil companies would not be able to even establish a market. This would lead to an anti-competitive practice and hence not desirable under the trademark law. The colour Red painted on fire extinguishers which usually signifies danger, if monopolised by one company would prove to be a setback for the other fire fighting equipment companies.

The functionality doctrine concept under colour trademarks which is not favourable to colours providing a functional element can best be explained with the help of two cases- *Christian Louboutin S.A*[11] and *Maker's Mark Distillery, Inc*[12]. The doctrine seconds the view that such colours cannot be granted monopoly even if they have acquired distinctiveness in the market by secondary meaning[13]. In the *Louboutin* case, the court refused YSL's objection to the use of red colour on soles. The court said that "we see no reason why a single colour mark in the specific context of fashion industry cannot act as a brand or source identifier." Also the court gave protection to the red colour on the sole of Louboutin based on acquired distinctiveness of the brand as it wasn't serving any functionality element. YSL could keep any other colour on the sole as identification. In the other case of *Maker's Distillery,* the plaintiff sued the defendant Jose Cuervo on the use of dripping wax seal on its tequila bottles. The district court barred the defendant from using the red wax seal on the cap of the bottle to which the defendant responded that it was an aesthetically functional feature and appealed to the U.S. Court of Appeals. The apex court upheld the decision of the district court banning the defendant from using the red dripping wax seal on the bottles they were selling.

Therefore, it can readily be concluded that the colour marks are in fact unconventional in its very nature, since they bring along many impediments in their way. Issues in relation to the limited number of colours, confusion amongst the similar/ slightly similar shades of the same colour as well as the functionality aspect making the mark descriptive in nature, wherein the descriptiveness serves as an absolute ground of refusal, are some of the speed

11 *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.,* 696 F.3d 206 (2d Cir. 2012).

12 *Maker's Mark Distillery, Inc. v. Diageo North America, Inc.,* United States Court of Appeals for the Sixth Circuit, 679 F.3d 410 (2012).

13 ZadraSymes, L, *"Sounds, Smells Shapes and Colours Protection and Enforcement of Non-traditional Trademarks in the U.S."*, http://vipo-online.org/wp-content/uploads/2011/10/Sounds_Smells_Shapes_and_Colors-tm-protection-US.pdf.

breakers in the smooth adoption of such marks. The shade depletion theory has been well explained by the US courts in the landmark *Qualitex* judgement stating that refusal to grant protection where a particular colour is associated by the consumers exclusively to such proprietor only, may cause losses to such entity, however on the other hand has also acknowledged that granting protection to over all colours, which lead to an increased infringement cases. Shade depletion theory on the other hand, involves the *Pantone Scale* which provides for a wide range of colours leading to confusion between different shades of a single colour. Another major impediment involved in adoption of a colour is in relation to the functionality aspect of a colour linked with the type of goods/services being provided under it. The functionality is linked directly to the descriptive nature of a mark which has been catered symbolically by the US Courts in *Maker's Distillery*.

Colour Trademark: Position in India

Initial Stage of Non-Acceptance in India

In the Trademarks Act 1999, the definition of "trademark" and the word "mark" both include 'combination of colours' to be acceptable for registration of a trademark provided it is such a graphical representation that it is capable of distinction. Initially the Indian judiciary was a little influenced by the European Union ideology of not granting protection to colours as trademarks because of the colour depletion theory and hence granting monopoly rights over a colour was out rightly rejected.

This was reflected in the case of *Colgate Palmolive*[14], where the court was hesitant in granting a colour a trademark to the red and white trade dress of Colgate giving the reason that both red and white are basic colours and are descriptive in the sense that they depict the colour of tooth and gum. *Prima facie* the court rejected but an exception was held in this case that no party can claim a monopoly in a particular colour but if there is a combination of colours that has been long used by a manufacturer company and due to secondary meaning has been imprinted in the minds of the customer as coming from that particular company only, then such combination could qualify for trademark protection provided it fulfils all the other criteria of a valid trademark. Also if the colour combination, layout, packaging and the overall get up have been attached to a product for quite some time, then in that case, if the competitors come up with a deceptively similar product, there is a very high chance of the public being misled and if the trade dress or the colour is not registered, then, there is only by way of passing off that the infringed can claim their right.

14 (1998) 1 Comp LJ 171 MRTPC.

Shortly thereafter, the judiciary realised the growing importance of trade dress and colour as a trademark and that it casts a lasting impression in the minds of the customers who begin to associate that particular mark with the product. As per the definition given in the act, combination of colours or even a single colour serves as a trademark although a trademark consisting of combination of colours stands at a better chance of having the mark registered as it would face less opposition and also because of the distinguishability factor. It is seen that at present, in India, the courts are more at ease when it comes to granting trademarks to a combination of colours which on the other hand in case of a single colour, a stronger evidence as to its validity is required. "The judiciary understands the mental association of the colour in the mind of an average buyer[15]." As per the Trademarks Manual guidelines, 'in exceptional circumstances a single colour can be considered for registration if the colour is capable of denoting the origin of a product or service and has acquired a high level of distinctiveness.' The judiciary is still a little unconvinced about granting protection to a single colour but keeping in mind the mental association of the people they have started to change their practice on the pretext that if a company has in fact gained reputation in the market for being associated with a particular colour then it would be unfair if he has to bear infringement costs and loss to his repute because of other deceptively similar marks in the market.

Trade Dress Issue and Stand of Judiciary

Trade dress generally refers to the outer facade or the packaging of a product that makes it visually appealing. It is a form of intellectual property and is nowhere as such defined or protected under a different act. Its sanctity flows from the Trademark Act 1999, under section 2(zb)[16] that defines trademark to be inclusive of *"shape of goods, their packaging and combination of colours."* Protection to trade dress began to be given after the manufacturer company without due registration of his trademark established quite a repute and goodwill in the market, and then was threatened by the other party who tried to bring in the market a deceptively looking similar product quite similar to the earlier goods by its outer appearance or packaging. Thus in the cases of alleged infringement of the trade dress, the owner has to prove his established goodwill along with substantial damage to it. The concept of trade dress has been taken from the U.S Lanham Act[17]. A trade dress may include in addition to packaging, graphics, design, shape, size, colour combination, texture or placement of words on it amounting to the general outer appearance of the product.

15 *Rupa and Co. Ltd. v. Dawn Mill Co. Ltd.* AIR 1998 Guj 247, (1999).

16 "Trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods their packaging and combination of colours.

17 Section 43(a), US Lanham Act, 1946.

The *Colgate Palmolive Co. v. Anchor Beauty Care Pvt. Ltd.*[18] is an important case addressing the issue of trade dress in India. In that the court said that "It is the overall impression that customer gets as to the source and origin of the goods from visual impression of colour combination, shape of the container, packing etc. If illiterate, unwary and gullible customer gets confused as to the source and origin of the goods which he has been using for longer period by way of getting the goods in a container having a particular shape, colour combination and getup, it amounts to passing off."

The court in the case held that there was no monopoly on the particular colour but since similar reproduction of the combination of colours created a likelihood of confusion in the minds of the people, there was a ground for stopping the defendants.

Registrability Issue

Trademarks are generally composed of words or letters or accompanying slogans, but since the recent developments in the law of trademarks has brought in various types of trademarks, there has been considerable controversy regarding colours as a trademark. In India for the registration of a colour, the shade has to be graphically represented on a sheet of paper whereas in U.S. and E.U. the representation is done on the Pantone scale. Even after having all these requirements for registration of the colour on a sheet of paper, in India there are some problems that cannot be done away with when it comes to colour marks. Some of the problems include shade confusion theory and the material to which it is applied. At the time of registration, the applicant is not supposed to submit a sample of the material to which the proposed colour needs to be applied, which makes it all the more difficult to ascertain that over a period of time the shade fades away or changes when applied to a different material, making it extremely difficult to keep a legal record of such legal requisites.

Keeping this entire debate aside the Indian judiciary, which was earlier apprehensive about granting trademarks to colours, now has started believing that colours and the trade dress constitute an important part of the product because of the mental association that it casts in the minds of the consumers. It is now comparatively relaxed in this regard but still suffers from certain hurdles in registration of a single colour as a trademark. There are some desired suggestions that need to be applied for the registration process of colour trademarks which have been separately dealt with in the last part of the paper.

Concluding the position of the colour marks within India, it can be seen that, the initial phase of introduction of these unconventional marks, the Judiciary was essentially hesitant

18 2003 (27) PTC 478 Del.

in offering monopoly to colour marks. This was also reflected in the case of *Colgate Palmolive* where it was pointed out that the combination of red-white was descriptive in nature as it represented the gum-tooth assemblage. However, the court was flexible enough to acknowledge the mental association of the colours by the consumers in respect of only one product thereby providing that such monopoly can only be granted in cases where a mark has acquired a secondary meaning in its favour by the public at large. It cannot be ignored that the concept of trade dress has also been recognised in the same judgement by the Indian courts wherein the overall getup including the colours as shown within the packaging reflects the knowledge of consumers in respect of that product. Indian courts have been comparatively open to adoption of colour combinations instead of monopolising a single colour wherein exceptional circumstances may have to be proven. In practicality, there may be several issues a proprietor may have to face for obtaining protection over his unconventional mark including the graphical representation of a colour, fading away of the colours or the change in the shade of a colour when applied to a different material. Indian courts have usually kept a traditional approach while incorporating new concepts in the field of any intellectual property, however we have witnessed an increased number of instances wherein they have come out of this comfort zone and accorded protection over unconventional marks.

Position across Other Jurisdictions

The TRIPS Agreement, to which all the member states have to be in coherence with provides with a standard definition of Trademark as, "*any sign or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combination of colours as well as any combination of such signs, shall be eligible for registration as trademarks.*"[19]

European Union

The legislation dealing with the registration of Trademark in European Union is the EU Directive which has defined Trademark in Article 2[20]. The registration and enforcement of Community Trademark is regulated by the "Council Regulation on Community Trade Mark" (CTMR).

19 Article 15(1), Agreement on Trade Related Aspects of Intellectual Property Rights, 1995.

20 Article 2**:** A Trademark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertaking.

The purpose of trademark is essentially to differentiate one's products from others. The concept of trademark protection in European Union is considerable young as compared to US, which is why it has been centralized.[21]

The TRIPS Agreement expressly mentions that 'combination of colours' can be registered as a trademark but does not mean to exclude the registration of a single colour.[22] Whereas there has been no explicit mention on the same in the definition under the EU Directive but it abides itself by the definition under TRIPS and the list given in its definition of trademark is hence not exhaustive. Following this, the trademark laws of many of the members of the EU have directly incorporated the registration of colour marks as well, which includes the German and Latvian laws.

Fulfilling the registrability criteria can be difficult when it comes to colour marks. From the time period of 1996 to 2012, the OHIM had received around 880 applications pertaining to colour trademarks, out of which only 276 had been accepted and approved.

However, the criteria to apply for the registrability of a colour mark had been laid down in the *Sieckmann's case*[23], according to which the graphical representation of a trademark should be "clear, precise, self-contained, easily accessible, intelligible, durable and objective".

However, in the *Libertel case*[24] of 2003 the general criterion of Sieckmann was observed to be applicable for colour trademarks as well. The court further held that the graphic representation of a colour mark can be fulfilled by consisting of a "description in word, a sample of the colour combined along with the description and designating the colour through an internationally recognised identification code." The court therefore laid down two essentials to get a protection over a colour mark:

1. Capable of graphical representation
2. Capacity to distinguish

21 Taylor Piscionere, *Imitation may not Always be the Sincere Form of Flattery: Why Colour Wars in the United States and Europe may result in Brand Dilution and Colour Depletion*, 25 Pace Int'l L. Rev. 43 (2013).

22 D. GERAVIS, THE TRIPS AGREEMENT: DRAFTING, HISTORY AND ANALYSIS, 2nd Ed. (Sweet & Maxwell) (2003).

23 *Ralf Seickmann v. Deutsches Patent*. C-273/00

24 *LibertelGroep BV v. Benelux*. C-104/01

In the case of *Heidelberger BauchemieGmBH*[25], filed an application for registration in the German Patent and Trademark Office consisting of a "rectangle having the colours blue on the top and yellow below it", which was to be used in connection with the building materials the application was rejected on the ground that it was impossible to represent the sign graphically and neither did it have any distinctive character. Upon an appeal to the Federal court in the present case, the ECJ gave certain guidance regarding the issue. ECJ confirmed the decision by stating that even though single colours are protectable but a combination of colours which is in every conceivable form" may not be able to fulfil the requirement of graphical representation. The court further observed that while dealing with applications relating to combination of colours the exact ratio or proportion must be provided by the owner.

This could lead us to the conclusion that, a liberal approach in order to fulfil the criteria of 'graphical representation' may lead to incorrect decisions and legal uncertainty. It would allow too much monopolization of the mark and the consumers would also not be able to differentiate the products from others.[26]

Therefore, if a mark comprises of multiple shades the accuracy should be higher and the proportion of the colours should be specifically mentioned in the application.

In the 2010 case of *BCS v. John Deere*[27], registration application for the combination of colours green and yellow to be used with respect to agricultural machines was applied on the basis of acquired distinctiveness of the colours in the market. There was evidence to prove the long subsisting use of the colours which was interpreted as an indication to the source or origin by way of books, catalogues and trade fairs and that there was a long persisting usage of the colours which was even recognised by the consumers within the relevant market.[28]

Cadbury had also been successful in protecting the colour purple with respect to its packaging of which was bearing the pantone number 26854c. The court in this case also held that the mark had acquired so much distinctiveness that the consumers associate it with the product of the applicant. Evidence in the form of public survey was also submitted in regard of the same.

25 C-49/02, Heidelberger BauchemieGmBH

26 R 799/2004-1, First Board of Appeal, July (2005), IKEA (Blue & Yellow)

27 T-137/08

28 Hogan Lovells, *Green+Yellow=John Deere; Protection Granted for an Abstract colour Trademark*, Lexology, July (2010), Available at https://www.lexology.com/library/detail.aspx?g=565d82e7-9c70-4d35-b68d-4dc7975c4204

Trade Dress

Trade Dress in European Union is considered to comprise of the product design along with its packaging. Although the relevant statute does not provide with any explicit definition for trade dress, but has been cited in many case laws and has differed across various jurisdictions. The Community Trademark Law extends protection to trade dress only when the particular requirement for distinctiveness has been met. The ECJ has time and again emphasised that the standards to assess the distinctivity is uniform for all types of marks.

The rationale for granting protection to trade dress depends on the subject matter under which it is to be protected. From the perspective of Trademark, a trade dress which has acquired distinctiveness and secondary meaning within the relevant sector of the market can be protected. Moreover, if protected under designs the trade dress should not be an imitation or already publicly known.[29]

United States

Registration of trademarks in US is governed under the Lanham Act and registration procedure is done at the United States Patent and Trademark Office (USPTO). Since trademarks are territorial in nature, the act provides protection to the registered trademarks only in US and after the registration; it is notified to all the other states as well. The act provides liability against the infringer to sue them being a legitimate and viable owner of the trademark.[30] Section 45 of the act defines the trademark and what all could constitute to be a trademark.

The statutory definition does not seem to expressly mention colour mark as a type of trademark and hence not eligible for protection as per the traditional ongoing rule. However, for a long period of time it was not extended to colour marks until the landmark judgement of *Qualitex Co. v. Jacobson Product Co.*[31] For a better understanding of the case, it is necessary to know about the situation prevailing 'Pre-Qualitex' as well.

Pre-Qualitex Position

Previously, colour mark was not recognised or not considered to be capable of registration and the rationale behind the said contention was that it being a 'weak mark', the consumers cannot identify and indicate the origin or source of goods. This has been observed in a

29 Report of Trade Dress Protection in Europe, Sept (2007) pp 1-6.

30 Section 32, US Lanham Act, 1946.

31 514 U.S. 159 (1995).

plethora of judgements.

In the case of *Diamond Match Co. v. Saginaw Match Co.*[32], the court refused the application for registration on the ground that a single colour mark would not be able to serve the purpose of the trademark and hence could not be registered. Thereafter, the court in the case of *Campbell Soup Co. v. Armour & Co.*[33] *(1949)* dealing with the same issue denied the trademark to "horizontal red and white Campbell's soup labels" to the owner. The court reasoned its decision by saying that it would lead to colour monopolization, depletion in colours available as well as confusion of shades. If trademark is given over a particular colour it will grant them the exclusive rights to restrain anyone to use the colour. However, the traditional practice did not bar the registration of a colour absolutely but it was held that in order to make the colour an essential feature of the mark, it should be so intricately connected with the mark or design that the manufacturers of similar products know what they may be allowed to pursue with.

However, in the case of *Re Owens-Corning Fibreglass*[34], the Court of Appeals for the Federal Circuit brought about a twist by stating that the tradition of not granting colour trademarks should be done away with and should be scrutinised or judged as per the facts and circumstances of each case. The fact that Owens-Corning used the colour pink in connection with his insulation products for over 30 years, has acquired distinctiveness among the consumers over a period of time. The court observed that the colour was arbitrarily chosen and could not be connected to the products in any way, and therefore had acquired a secondary meaning. But the judgement was unable to bring about a significant change in the minds of the judges, following which the seventh and ninth circuit courts refused to comply with this decision. This ideology was subsisting until the U.S. Supreme Court decision in the *Qualitex* case.

Post-Qualitex Position

The plaintiff company used to manufacture iron pads that were 'Green-Gold' in colour since 1950s for the purpose of dry-cleaning. The court in this case out rightly accepted that the green-gold colour has acquired distinctiveness among the consumers so much so that it has acquired a secondary meaning and therefore granted the colour mark.

32 142F, 727.

33 175 F.2d 795.

34 774 F.2d 1116.

Trade Dress

It is pertinent to discuss the concept of Trade Dress with regard to issues under colour marks. Trade dress is a form of intellectual property which comprises of the visual elements of the product or its packaging which makes it easier for the consumers to identify the source or its origin.[35]

The Lanham Act does not per se grant recognition to Trade Dress, but Section 43[36] provides for certain remedies available against the infringement of trade dress, when not registered. It states that when a plaintiff files a suit for unregistered trade dress, he shall bear the burden of proving that the "matter sought to be protected is not functional." Thus, one requirement on which it clears its stance is that it should not be functional in nature. Therefore, it is possible to protect trade dress in US till the time it is not functional in nature and of course distinctive in character.

Journey so Far

Having discussed the position of colour trademarks in the European Union and the United States, one thing has prominently been brought into light that nowhere do we have an express denial of the recognition of colour marks as trademarks. The Lanham Act might not expressly recognise it, however in EU or in India the phrase 'combination of colours' is mentioned. Where on one hand the TRIPS Agreement which sets out the minimum standards to be followed by the member countries includes in its understanding of the term 'sign', letters, numerals, figurative elements and combination of colours and any combination of such signs[37], the EU Directive and the Lanham act have in a way by identifying packaging and trade dress exhibited flexibility in extension of protection to instances where the mark through its colour has established association with the attached brand name and has gained popularity among the public for the same.

Agreed that the packaging not only comprises the colour scheme in the backdrop but a combination of that with probably lines or a pattern or how a particular brand name is written, it all adds up to enhancing the visual appeal. Even so, the colour plays a predominant role in the association of the trademark with the manufacturer company that advertises and markets

35 Rituraj Shrivastava, *Trade Dress: Concept*, Mondaq, Sept (2013), http://www.mondaq.com/india/x/262928/Trademark/Trade+Dress+Concept+And+Indian+Practice.

36 § 43 (15 U.S.C. § 1125). False designations of origin; false description or representation:
(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

37 Article 15 of the TRIPS Agreement.

it. Hence colour trademarks have garnered importance lately By way of 'combination of colours' and 'packaging' many countries all over the world are trying to expand protection to intellectual creativity.

Conclusion and Suggestions

Conclusion

Colours tend to leave behind an impression in the mind of the viewer. It becomes easy for people to identify and recognise things through colour marks. The recent trademark trend has been to look for innovative ways which are fascinating enough for the consumers of the relevant market. A single colour or a combination of it tends to distinguish the products of one owner from the products of others. It also forms a part of the packaging of the product and is even covered under the ambit of trade dress essentially. However, issues regarding monopolization of a colour can be reconsidered and ignored when the relevant market tends to link that particular colour to the product of the trademark owner. Recent trends have shown a development and modernised ideas have been inculcating with the acceptance of colour marks in US and EU.

However, certain level of clarity is needed as far as the registration of colour marks is concerned. Courts have a major role in laying down certain minimal standards to be fulfilled in order to get registration of a colour mark as a trademark. The two main requirements put forward and reaffirmed in cases like *Sieckmann*and *Libertel* includes the possibility of a colour to be capable of graphical representation and the existence of acquired distinctiveness of that colour within the consumers.

Indian courts have now chosen a liberal path in respect of the same issue for example, PayTm has now been granted a trademark over the colour combination of white and blue. However, the judiciary still seems too apprehensive while granting single colour marks as trademarks due to the fear of monopolization and further a misuse. However, the functionality aspect is also one of the major issues while speculating such cases because the justification for the same has been that if the colour is of a functional character it cannot be registered under trademark, same can be observed from the major dispute between *Colgate v. Anchor*.

A balanced approach could be the ideal situation wherein the interests of both the trademark applicant as well as the consumers should be kept in mind. The courts have to judge from the point of view of a person of an average intellect. Colour marks are therefore yet at an

infant stage wherein the judiciary has to play a major role by putting forward the facts and circumstances of each case.

Suggestions

In spite of the colour mark serving as a good trademark, there exist still certain hurdles to the successful registration of the same. Following are some suggestions that can help overcome these issues:

1. As already discussed, Indian scenario is still a little hesitant in granting colour trademarks to a single colour. To this issue, proper guidelines should be set out by the Trademark registry, outlining the problems that can crop up and how to deal with such problems along with ascertaining experienced people who shall deal with the same.

2. With respect to colours, the confusion as to the particular shade of the colour is bound to happen. Robust registration search systems should be made that can find out the exact difference between the colours and also whether there is a chance or likelihood of the public getting confused with the two colours or not.

3. Another issue that was raised was that the shade of the colour proposed to be registered depends on the material that it is applied to, and may change if applied to another material. In this regard, the Registrar along with asking for the exact shade of the colour from the *Pantone scale* should also ask the applicant to furnish along with the colour, a sample of the material to which the colour is proposed to be applied as a live example so that the exact shade of the colour can be registered. To prevent further confusion, the Registrar should have the powers to restrict the applicant to that particular shade only and prevent him from using the colour on a different material as submitted.

4. The issue that came up in the *Nexium* drug case was that people identified drug with the colour bringing up the stance that in India, trade dress is becoming increasingly important in the pharmaceutical sector. Before the registration of a particular colour to a drug, efforts should be made to ensure that it does not coincide with another drug of the same or similar colour and if so, then either the applicant should be notified to change the shade of the drug colour or a public notice should be issued along with big advertisements ensuring that the public which consumes these essential drugs are in no way confused by either the name of the company or the colour.

5. Special individual recognition should be given to trade dress in order to make these two branches i.e. trademark and trade dress, different and eliminate confusion. Also, it would be easier for the courts to litigate on matters when they know what the subject matter pertains to.

On a clear establishment of the fact that colours not only play a vital role in creating a lasting impression in the minds of the public thereby making it way easier for them to choose the product of a company of their choice amidst hundreds of alternatives of the same product available in the market, it goes on to add a visual appeal to the product. Even though a lot many cloth detergents companies have gone for the regular white and blue packaging, with their respective trademarks a part of the same, we have diversity with *'Ariel'* choosing the colour green and *'Tide'* choosing an absolutely out of the box, unrelated colour orange for its packaging to create this lasting impression in the minds of the public ensuring and making the best efforts with their creative thinking so that their product cannot be confused with another's at all costs.

However, the paper surely raises concerns about monopolising particular colours majorly the primary colours, which have been many a time refused by the courts until and unless they are presented in a combination with other colours or are different shades on the pantone scale or have proven the strength of their mark to be well known having earned secondary meaning after years of operating in the market. Be it Cadbury's purple or PayTm's blue, all had to go through a rigorous tussle in the courts to prove their strength of the mark, although examples like Christian Louboutin's red sole[38] does give us a hint that there is light at the end of the tunnel after all!

38 *See,* Anand and Anand, *'Single-colour trademarks – enforcement of Christian Louboutin's 'red sole' trademark',* World Trademark Review, 19 December 2019, https://www.worldtrademarkreview.com/single-colour-trademarks-enforcement-christian-louboutins-red-sole-trademark

Comparative Analysis of Corporate Governance in India and USA

Nikita Mittu*

Abstract

Corporate Governance is the process of ensuring that management activities take place with transparency and efficiency. It is the responsibility of the Board of Directors of a company towards the shareholders. It is required to incorporate a culture which ensures maximization of the visions and mission of the company in relation to its performance.

This paper will discuss the concept of Corporate Governance, its origins in the international market and the process of Internal Governance in markets of India and United States of America. It further discusses Corporate Governance practices followed by companies in India and USA, thereby analysing the similarities and the difference between the two established legal systems, including internal control, Committees, Independent Director and their duties and Audit Committee. Furthermore, this paper discusses the cases which led to the need for Corporate Governance in India and USA and established the legal provisions for the same. In the conclusion, the paper gives a summary of the provisions of Corporate Governance in India and USA in relation to its implementation ad impact.

Introduction

Corporate governance is the method of creating effective relationships to ensure corporate direction of the company. The main responsibility of corporate governance i.e. the oversight and control of management activities hence lies on the Board of Directors of the company, who are appointed by the shareholders. As we come down from the managerial graph of any company, responsibilities are diluted along the graph. Further, additional participation to corporate governance lies upon the shareholders, who appoint the Directors, employees, the creditors and suppliers. A Board of the company has numerous responsibilities related to

* Advocate, Bar Council of Delhi

management of the business and reporting the same to the shareholders. Hence, Corporate Governance is the responsibility and work accomplished by the board of directors of a company in order to ensure effective functioning of the corporation to yield maximum value of the company.

Thus, Corporate Governance, hence essentially revolves around the board of directors of a company. It provides structure and directly affects the performance of the company.[1]

Academic and Legal Definitions

Organisation for Economic Co-operation and Development (OECD) defines 'Corporate Governance' as the "procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making."[2]

'Corporate Governance' is defined by Institute of Company Secretaries of India as, "the application of best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility, for sustainable development of all stakeholders".[3]

"The act of steering, guiding and piloting—describes what boards [should] do when in session. It does not describe and is not a proxy for the board itself, nor any other party or activity outside the boardroom. Regulators (to set rules), proxy advisers (lobbyists on behalf of shareholders and other interests), and shareholder meetings (communications) are all important, but none is corporate governance."[4]

Further, corporate governance acts as an accountability to capital generators and investing agencies.[5] It is the management's control which ensures effective functioning of the

1 James McRitchie, 8/1999.

2 Annual Report, European Central Bank, 2004 (Aug. 04 2020, 2:35 PM), https://stats.oecd.org/glossary/detail.asp?ID=6778.

3 Smita Jain, Corporate Governance — National and International Scenario, (Aug. 04. 2020, 2:42 PM), https://www.icsi.edu/media/webmodules/programmes/33nc/33souvearticle-smitajain.pdf.

4 Peter Crow, *Corporate governance: Is our understanding flawed?*, (Mar. 12, 2020, 10:05 AM), https://www.petercrow.com/musings/on-corporate-governance-is-our-understanding-flawed.

5 Bruce Weber, Dean of the Lerner College of Business at the University of Delaware, at the inaugural meeting in November of the newly reconstituted advisory board for the John L. Weinberg Center for Corporate Governance.

company by working in its best interest and making the shareholders accountable to elect directors and auditors.

Corporate governance is generally the practice which affects the control of a business in a company. It not only affects the persons who control the companies but the allocation of risks and returns from the business of the company to persons including stockholders and directors.[6]

Concept of Corporate Governance

When we talk about any corporation, the first aspect which comes to the mind is the goodwill of the company and output it generates. In order to ensure an impact on the public, investors as well as the shareholders, every corporation prepares its management with utmost care. Corporate governance is the set of rules and regulations which ensure an effective corporate functioning of any company which decides its existence and accountability in the market. It exhibits a balance between the interest of the stakeholders of the company and the public. It includes all aspects of management within its ambit including the internal controls and the disclosures required by a company in its functioning. Internal controls ensure that the financial and the accounting details of the company are reliable and the disclosure of the information at every level ensures transparency to the Board. The National Association of Corporate Directors (NACD) was established in the United States of America (USA) to ensure effective leadership in board of directors of the company.

NACD published 'Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies'[7] to improve the concept of corporate governance. Hence, it suggested that a Board of Directors shall be the first essential requirement to ensure 'long term value creation', thereby leading to transparency in the practices of the company to the shareholders. It suggested that directors of the Board should be from difference academic backgrounds to ensure diversity of skills and experience on the Board. This Board should be accountable to the shareholders only and shall be independent from the management of the company. [8]

6 Business Roundtable, *Principles of Corporate Governance,* (Apr. 04, 2020, 12:30 PM), https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/.

7 *Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies,* (Apr. 04, 2020, 12:46 PM), https://www.nacdonline.org/insights/publications.cfm?ItemNumber=2686.

8 Pallak Bhandari, *Corporate Governance: A Comparative Analysis in India and the US,* (Apr. 01, 2020, 11:30 AM), https://pdfs.semanticscholar.org/4a7d/6a7c1479c42f04227c61e1b0bd57ede189e6.pdf.

Corporate Governance in India

Corporate Governance plays a crucial role in the economic condition of India. From 1991, the economy in India has seen a better size of the stock market.[9] For Indian market to ensure more foreign direct investments, the companies in India need to focus more on 'Shareholders value maximization'.[10] Although the concept and attempts of corporate governance has existed since 1961 globally, it is observed that only in 1992 did India take an initiative by reforming the Securities and Exchange Board of India (SEBI). SEBI ensured supervision and standardization of stock trading leading to formulation of corporate governance rules and regulations. Later, Confederation of Indian Industry (CII) was formed in 1996, which led to laws essential for companies in India to act for corporate governance.

Kumar Mangalam Birla Committee and Narayan Murthy Committee were formed, which were constituted under Securities and Exchange Board of India, whereby they were required to substantiate the meaning and importance of corporate governance for the companies in India. After an in-depth understanding and analysis of the companies, clause 49[11] was then introduced for listed companies with SEBI relating to listing contracts, which was later reformed after cases like Satyam, WorldCom, etc. to deal with issues which led to dismantling of these company's structure and management, thereby degrading the economy of the country.[12] Clause 49 of the Listing agreement provides for a minimum number of independent directors, board members, committees, code of conduct, audit committee rules and limitations, etc. Financial penalties were imposed on companies which did not follow the principles as laid down in Clause 49.[13]

On improving corporate governance in a company, the relation of the company with its stakeholders improves. Since corporate governance ensures that the property is protected

9 L. Som, *Corporate Governance Codes in India*, Economic and Political Weekly, vol. 41, no. 39, pp. 4153-4160, 2006.

10 R. Ramakrishnan, *Inter-relationship between business ethics and corporate governance among Indian companies*, International Seminar at The Institute of Management, NIRMA University, Ahmadabad, January 5-7, 2007,(Mar. 24, 2020, 01:30 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1751657.

11 Clause 49 of the Listing Agreement by Securities Exchange Board of India (SEBI) is applicable to all the listed Companies under SEBI w.e.f. Oct. 01, 2014. It provides for listed companies to ensure optimum combination of directors in the Company including executive and non-executive directors and include at least one woman director. It essentially includes the rights of the shareholders, the responsibility of stakeholders and directors and the disclosures required by the company to maintain transparency.

12 N. Sanan and S. Yadav, *Corporate governance reforms and financial disclosures: A case of Indian companies*, IUP Journal of Corporate Governance, vol. 10, no. 2, pp. 62-81, 2011.

13 K. Han and Y. Lu, *Corporate governance reforms around the world and cross-border acquisitions*, Journal of Corporate Finance, 2013.

and the registration of ownership is effectively and securely done, this benefits the company's capital mobilization. In order to receive funds, the company requires to be transparent in their disclosure of funds. Companies have to ensure that the funds are received and are effectively allocated.[14]

Clause 49 of the Listing Agreement

Clause 49 of the Listing Agreement is the agreement between the company and the stock exchanges on which it is listed, such as National Stock Exchange and Bombay Stock Exchange. This clause provides for the system set up relating to all the information necessary for the Stock Exchanges from the company. In order to ensure that India is able to participate in the competitive business around the world effectively, there led to the constitution of the regulatory framework to ensure corporate governance for listed companies. The Code of Corporate Governance published in 1998 by Confederation of Indian Industries (CII) was one of the first codes in Asia.[15]

Corporate governance is governed internally and externally. External factors include the market and the competition. Internal factors majorly include the internal functioning of the company. Internal governance of a company is done by the shareholders and directors. The board of directors are required to ensure that the financial statements of the company are audited. Executive compensation is provided to the members of the board for the purposes of compensation. In countries like the USA, the shareholders do not decide on the compensation amount. However, in India, Kumar Mangalam Birla Committee was constituted in 2000 by the Securities and Exchange Board of India (SEBI) which provided that it is the responsibility of the board of the company to provide for guidance in regard to leadership and strategy, management of the company independent of objective judgement and accountability to the shareholders of the company.[16]

Hence, the Board of Directors of a company has a huge responsibility for which it is required to be updated and acquire all necessary information to take important decisions of the company. In the case of *M.S. Pharmaceuticals Ltd. V. Neeta Bhalla and Anr.*,[17] the three judge bench of the apex court held that the Managing Director or the Joint

14 *Supra* note 8.

15 Sanjay P.S. Dessai, Dr. I Bhanumurthy, *Corporate Governance in India Clause 49 of Listing Agreement,* (Aug. 05, 2020, 10:51 AM), https://www.researchgate.net/publication/228122798_Corporate_Governance_in_India_Clause_49_of_Listing_Agreement.

16 Report of the Kumar Mangalam Birla Committee on Corporate Governance, (Apr. 04, 2020, 12:56 PM), http://www.nfcg.in/UserFiles/kumarmbirla1999.pdf.

17 *M.S. Pharmaceuticals Ltd. V. Neeta Bhalla and Anr.,* (2005) 8 SCC 89.

Managing Director may have different responsibilities in the company; however, they have the responsibility to ensure that the business of the company is conducted effectively. Therefore, in this case, the signatory of the dishonoured cheque is liable under Section 141(2) as the liability of the concerned person office or position in the Company.

Further, in the case of the *Uttar Pradesh Pollution Control Board v Mohan Meakins Ltd.*[18], the Supreme Court opined that any person who holds the office of a Manager or in charge of the conduct of the company is liable under Section 47[19] of Water (Prevention and Control of Pollution) Act, 1974.

Analysis of Clause 49 and Sarbanes Oxley

Clause 49 of the Listing agreement has been based on the principles of Sarbanes-Oxley Act, 2002 (SOX Act). Sarbanes-Oxley Act, 2002 was ensued for listed companies on US stock exchanges. The SOX Act was passed by the U.S. Congress to aid the investors from fraudulent financial reporting. It broadly covered four areas, corporate responsibility, the increase in criminal punishment, accounting regulation and providing for new protection. The similarities include the number of directors, rules in relation to insider trading, etc. The main difference between Sarbanes-Oxley and SEBI is that under Sarbanes-Oxley, reports of fraud or annihilation lead to 20 years of imprisonment, however, SEBI can initiate criminal proceedings or charge a fine leading to delisting of the company.[20]

The aim of both the legislations is the same, however the structure of SOX Act and Clause 49 are different.

Under Section 404 of the SOX Act, the Management and the auditors establish internal controls for financial reporting ("ICFR")[21]. However, under Clause 49, all aspects to corporate governance are covered and it is not restricted to only financial reporting.

1. Under the SOX Act, the responsibility of internal control lies on the board, which is the certifying authority. However, under Clause 49, Chief Executive Officer (CEO) and Chief Financial Officer (CFO) are the certifying authority[22] for internal controls and are responsible for frauds in the company.

18 *Uttar Pradesh Pollution Control board Vs. Mohan Meakins Ltd.*, (2000) 2 SCALE 532.

19 Offences by companies

20 *Supra* note 10.

21 Sarbanes-Oxley Act, 15 U.S.C., 2002.

22 Securities and Exchange Board of India Act, Listing Agreement, Clause 49, Para V.

2. Under the SOX Act, a committee is established by the board, to ensure financial and accounting reporting. In cases where no such committee is established, directors of the board are considered as member of the audit committee whereby such directors are independent directors. However, the frequency of the meetings is not specified in the SOX Act. Under Clause 49, such details are specified, whereby it is provided that audit committee should consist of at least three directors as members, the audit committee should also consist of Independent Directors constituting two-third members of the committee, and at least one member of the audit committee shall have experience in relation to accounting and management of finance.

3. SOX Act and Clause 49, both require an independent director as a member of the audit committee. However, Independent director is defined differently under both laws. SOX Act defines independent director as a member without consultation fees, whereas Clause 49 defines independent director as:

   - A Director taking only director's remuneration and takes no other monetary benefits.
   - Is not related to any of the management members or the promoters of the Company.
   - Has not been an executive in the previous three years and also did not hold the position of partner in any legal or audit firm of the Company.
   - Does not hold the position of a service provider or supplier to the Company.
   - Holds up to two percent of voting shares of the Company.

4. Under the SOX Act, Section 301 provides for duties of the audit committee in relation to resolution of complaints and process of retaining them. Such complaints maybe of audit, accounts and internal controls[23] of the Company. However, Clause 49 provides for 'Investors Grievance Committee'. Therefore, it may be noted that SOX takes in account the accounting related issues with specificity.

5. Under SOX Act, a code of conduct should be declared and if such code of conduct is not accepted, the reason for the same should be duly mentioned. However, under Clause 49, it is mandatory to publish a code of conduct on the website of the Company. The senior management is required to adhere to such code of conduct. Code of conduct under Clause 49 is also applicable to stakeholders, however under SOX Act, the code of conduct is only applicable to the financial members of the Company.

23 *Supra* note 15, Section 301.

Case Studies

1. Enron Corporation was one of the biggest companies of America. In 2001, Enron inflated its earnings by 600 million dollars since 1994 by using shell companies and did not disclose its losses in its financial statements. Eventually, Enron had to file for bankruptcy protected in 2002 since its stocks had been reduced to less than $0.75 from $90.75 and the employees lost their savings and the investors of the company lost their equity in the company worth billions of dollars. Enron Corporations was one of the biggest failures of the capital markets in America. This failure was considered to be of the audit committee of the company since it did not have a model of corporate governance to rely on. The audit committee works in accordance with the regulation and SEC which provided for gaps and irregularities in the corporate governance system in the US in early 2000s. The Directors of Enron were paid with the stocks to ensure their interests to be same as the shareholders. This however, led to pressure on the executive members to want higher stock prices using any procedure and prevented the independent directors from questioning the creative accounting process. Further, the audit committee set up Enron was not itself well equipped to accounting practices since it did not hold the knowledge or expertise in accounting practices.

   The Enron scam was due to the inefficiency of the theories of the corporate governance model, the agency theory and the stakeholder theory. The efficient market hypothesis failed since the performance was connected with the compensation, the Board of Directors and the management of the company had close relations and the financial reporting method was ambiguous. Further, it would have been preventive if the stakeholders including supplies and customers were not made part of the management decisions.

2. The Satyam scandal[24], which is also known as 'Enron of India', is considered to be one of the biggest corporate frauds in the country, in which, 94% of the money reflected in the books of the company was shown as the earning of the company, which led to the investor losing around $2.2 billion. In 2015, the Chairman, B. Ramalinga Raju was held liable[25]. The Satyam Computer was established in 1987 and listed on the Bombay Stock Exchange in 1991. These were the few IT companies in the country which recognized the importance of outsourcing in the industry; Satyam Infoway, which was its subsidiary, was the first Indian company from the IT industry to be listed on the NASDAQ.

24 *Chintalapati Srinivasa Raju vs Securities and Exchange Board of India*, AIR 2018 SC 2411.

25 *Satyam Computer Services Ltd.* Before the Securities and Exchange Board of India, 2015 SCC OnLine SEBI 157.

In 2008, the stocks of the Company fell when the acquisition of Maytas was a failure and Satyam Computer Services was forbidden with the World Bank for the next eight years because of charges of data theft and bribery against the Company. Despite the panel of independent directors on its board, the Company faces issues due to lack of an effective corporate governance model. Therefore, Raju was forced to resign from the position of Chairman by accepting the transactions amounting to fraud which were almost of $1 billion (Rs. 7000 crores) and the intention to replace the fictitious assets of its company's with that of Maytas'. The Board of Directors, employees and the auditors (PricewaterhouseCoopers) of the Company were not aware of these activities and intentions for many years. Hence, the Government of India was forced to disband the Satyam board and thereby appointed a competent board of directors.

After the Satyam scandal, the government implemented the Companies Act, 2013 to prevent such frauds in the future. Furthermore, various amendments were initiated in Clause 49 of the Securities and Exchange Board of India (SEBI) to ensure effective market regulation. These amendments led to power with the board of directors and audit committees of the board, requirement of at least one woman director on the board and rotation of the audit company every ten years. However, the major reason behind the issues of corporate scandals lies with lack of effective enforcement and fraudulent practices.

3. The corporate scandal of Wells Fargo & Co. further raised the need of requirement of corporate governance. As the CEO pushed the employees to ensure every customer buy eight products of Wells Fargo, this led to higher pressure on employees who had to meet the requirements by working extra, failure of which would lead to their termination in two months. Hence, the employees started accounts and credit cards for customers without authorization and signatures which creation of over 1.5 million such accounts in a period of 6 years.

   L.A. Times conducted an investigation in 2013 which exposed this scandal and in 2016, Wells Fargo agreed with the regulations in Los Angeles and paid a fine of $185 million. Further it was found that the unethical behaviour of the employees was caused due to the incentive program of the company was against the corporate values. The report suggested that as the Company had fired over 5000 employees for such behaviour, this was no solution to the problem as the issue was the sales goals created by the Company.

Conclusion

It is observed that the laws like the SOX Act, 2002 and Clause 49 under the Indian legislation are similar in regard to the purpose and function, whereby they aim to protect the stakeholders of the companies. These laws are amended in order to maintain governance on the corporate activities. The Corporate governance featured under the Indian legislation is stringent and also forms part of the Companies Act, 2013; however certain provisions like PCAOB (Public Company Accounting Oversight Board), which is a non-profit corporation created under SOX to ensure effective audit in the company, the PCAOB is not included under clause 49.

Under SOX, PCAOB has the power to ensure audit, inspection and regulate the activities of the auditors or the firms of auditing in the USA. These powers are provided to Indian organisations through the Institute of Chartered Accountants of India (ICAI), whereby it provides for the act of auditing and inspecting the activities of the auditors. However, ICAI does not have the power to make regulations in regard to code of conduct of the auditors. Further, it is observed that certain terms, like internal controls have not been exhaustively defined under the Indian legislation, i.e., Clause 49 and Companies Act, 2013. However, SOX defines internal controls and intends to implement the same with the Committee of Sponsoring Organisations, which is constituted to implement the framework of internal controls in the companies. Such provisions provide a clear and better understanding of the terms and the Committee constitutes the aspect of reliability for the companies. Indian legislation may also begin to provide an unambiguous and reliable meaning of internal controls which would thereby help with the investor's interest and cooperation.

Hence, it may be concluded that by studying the provisions of corporate governance under US laws and Indian laws, the aim and purpose of the provisions are the same in reality. Indian laws, though, have a wider aspect of implementation, however SOX addresses non-compliance and crimes with a stringent view. Therefore, it is essential that amendments are made in order to ensure effective implementation of the Acts owing to the changing times and requirements in the market. This shall ensure that the corporate governance system is strong and reliable.

Syrian Refugee Crisis and its Impact on International Humanitarian Law

Jayanta Boruah*

Abstract

Due to several internal, socio-economic and political crises, Syria is witnessing the human barbarism. Inhuman tortures, and brutalities have made the headlines of daily newspapers in India. Although this crisis was initially an internal issue, subsequently, International interference gave it a global status and has also increased the rate of Refugees. The International Humanitarian Law is therefore expected to protect the rights of the victims and the Refugees in the Syrian Crisis and at the same time it is also expected to point out the wrong doings of those who are actively involved in this inhuman war. But, the facts in and around Syria proves the reverse stand. This Article will therefore make an attempt to analyze the success of the law keepers in implementing the International Humanitarian Law in the case of Syrian Civil War.

Keywords: *Syrian Crisis; Humanitarian Law; Human Rights; Refugees; and ICRC.*

Introduction

International Humanitarian Law (IHL) includes rules and regulations to defend and protect the aspects of humanity during war and conflicts. Its main aim is to establish a regulatory framework to provide relief and protection to the sick and wounded soldiers in armed conflicts, either International or Non-international.[1] Its aim extends to the providing of protection to the civilians from the impact of war by regulating the means and methods of war and the weapons to be used in such conflicts.[2] Protection to the civilians also include protection to those who are displaced during armed conflicts (mostly wars), generally

* Research Scholar, North-Eastern Hill University, Shillong.

1 THE SYRIAN REFUGEE CRISIS: REFUGEES, CONFLICT, AND INTERNATIONAL LAE, 5-7 (Al-Marsad, Democratic Progress Institute).

2 GEOFFREY COM, THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH (Wolters Kluwer Law & Business, New York, 2012).

known as refugees.[3]

Meaning of International Humanitarian Law

IHL is generally termed as the law of wars and its main objective is to regulate the conduct of war.[4] It positively provides protection to human rights of the non-combatants and civilians in war situations and negatively restricts the rights of the combatants by providing norms on the means and methods of warfare. The main foundations of IHL are- the Four Geneva Conventions and the Two Additional Protocols to the Geneva Conventions backed by several treaties and customs related to warfare.[5] Since refugees are mostly displaced due to war situations therefore the factors relating to refugees and their influences come under the domain of IHL.

Meaning of Refugee

A Refugee is generally a person who has been forced to leave his/her country of residence due to fear of being persecuted, war or violence. They are the people who most often face the fear of being persecuted on the grounds of race, religion, rationality, political opinion or membership in a particular social group.[6] From this we can conclude that following are the main reasons that in majority of cases leads to the situation where a normal citizen is forced to gain the status of a refugee-

a. Violence due to war,

b. Ethnic and Tribal conflicts,

c. Racial and other forms of discrimination,

d. For being a member of a particular political group,

e. Due to invasion of a rival country conducting inhuman tortures on native civilians, etc.

3 Olivia Dunn, *The Syrian Refugee Crisis: Making a Case for State Obligation and Humanity,* ROMAPO COLLEGE OF NEW JERSEY (Jun 01, 2020, 01:11 AM) https://www.ronapo.edu/law-journal/thesis/the-syrian-refugee-crisis-making-a-case-for-state-obligation-and-humanity/.

4 *Supra* note *3*.

5 Martti Koskenniemi & Paivi Leno, *Fragmentation of International Law? Postmodern Anxieties,* 15(3), LJIL (Jan. 15, 2020, 01:11 AM) https://doi.org/10.1017/S0922156502000262.

6 *What is a Refugee?*, UNHCR (Jan. 12, 2020, 02:17 AM) https://www.unrefugees.org/refugee=facts/what-is-a-refugee/.

Although the issue of refugees are stated above, the causes are very dynamic and multi-dimensional, they may differ from place to place or even from time to time. In most cases refugees are interchangeably referred to as 'Internally Displaced Persons (IDP)' but there is a huge difference between the two. Refugees are those who take shelter by crossing international borders while the IDPs are those who are forced to leave their residence but they don't cross the international borders rather they take shelters in schools, public places and so on. The reasons for people being internally displaced although are similar to those of refugees, but they might be different in most cases like for instance, environmental disasters like Tsunami, Flood Earthquake, etc. and therefore they might not come under the scope of IHL. While refugees are mostly forced to leave their land due to wars and conflicts.[7]

It is estimated that around the world nearly 67% of refugees are from the five countries-Syria, Afghanistan, South Sudan, Myanmar and Somalia. So, there is no doubt that Syria suffers from a huge problem of Refugees and also of IDPs. [8]

International Legal Perspective on Refugees

The subjects of protecting the Rights of the Refugees as well as of those who seek asylum have always been under consideration of both International Customary Laws as well as International Treaty Laws. Under the International Customary Laws, the Principle of Non-Refoulement and the provisions of Universal Declaration of Human Rights are recognized. Principle of Non-Refoulement means that no State shall force their Refugees to return back to their home State, where such Refugees can be subjected to torture and exploitations. The Principle further provides for right to life; right to freedom from torture, cruelty, inhuman treatments and other basic forms of human rights to the Refugees.[9] This Principle, besides forming a core aspect of the International Customary Laws on Refugees, has also been recognized under the Convention on the Status of Refugees, 1951 under Article 3 and Article 33.[10] While the Universal Declaration of Human Rights provides for respecting the human rights of all human beings merely on the ground of them being born as humans in

7 Martti Koskenniemi & Paivi Leno, *Fragmentation of International Law? Postmodern Anxieties*, 15(3), LJIL (2005) (Jan 15, 2020, 01:12 AM) https://doi.org/10.1017/S0922156502000262.

8 A GUIDE TO INTERNATIONAL REFUGEE PROTECTIONAND BUILDING STATE ASYLUM SYSTEMS, 15-19 (UNHCR, Inter-Parliamentary Union For Democracy For Everyone, 2017).

9 Vanya Verma, *Syrian Refugee Crisis and Its Implication on International Law,* IPLEADERS (Jun 01, 2020, 03:11 AM) https://blog.ipleaders.in/syrian-refugee-crisis-implications-international-law/emp/.

10 *Convention and Protocol Relating to the Status of Refugees,* UNHCR (Jun 02, 2020, 01:11 AM) https://www.unhcr.org/en-in/3b66c2aa10.pdf#zoom=95

this planet. This particular Declaration is the epitome of all legal sources for protecting the basic human rights as well as for recognizing majority of the International Customary Laws. Under Article 14(1), the Convention has given all human beings the right to seek and enjoy asylum in any country from persecution.[11] This particular provision is very important for all the Refugees in order to live a life with dignity since it entrusts upon all the States a corresponding responsibility of providing shelter to the Refugees within their countries rather than expelling them or returning them back to their home States.

Under the International Treaty Laws, the major source of Laws governing the Rights of Refugees originates from the Convention on the Status of Refugees, 1951 and the 1967 Optional Protocol.[12] The scope of this 1951 Convention was however initially limited to the Europeans who became refugees due to several instances that occurred prior to January 1951 but the Optional Protocol of 1967 made the provisions of this Convention applicable to all Refugees irrespective of any time deadline, thereby making it globally applicable. The Convention brought into existence the Office of United Nation High Commissioner for Refugees (UNHCR) with the main function to provide protection to the Refugees and to assist the Governments of the respective States in bringing solutions to the issues related to Refugees. This Convention has provided a multidimensional approach towards solving the issue of increasing Refugees across the globe which includes legal, political as well as ethical perspectives. Under its legal perspective, it seeks to provide an universal guideline for protecting the Rights of the Refugees; under its political perspective, it enables the States for establishing mutual corporation for sharing the burden of Refugees thereby recognizing one another internationally accepted principle of Burden Sharing and finally its ethical perspective is highlighted from the fact that almost 140 States have signed the Treaty accepting their responsibilities of protecting the Rights of most of the vulnerable sections of population that comes within the ambit of this Convention.[13] The Convention seeks to protect the Rights of the Refugees through several provisions, the approach of which can be categorized into three broad categories, via-

a. Naturalization and assimilation- under this approach the States are made responsible to allow the Refugees with the minimum facilities for getting assimilated within the State and they must be given access to valid documentation. No penalties on them shall be imposed for their illegal entry within the State territories and they shall be given access to the Courts of Law

11 Universal Declaration of Human Rights, 1948.

12 *Supra* note 9.

13 *Supra* note 10.

b. Access to Basic Services- under this approach the Convention has made all its signatories responsible for granting equal treatment as regards public services and assistance are concerned, to the Refugees in the similar manner as they are provided to the Nationals.

c. Employment- the Convention has also made the States responsible for granting the Refuges access to employment and access to Justice against any exploitations made on them in the same manner as they are provided to the Nationals.[14]

Besides these main International Laws on Protection of the Rights of Refugees, there are several other International Laws that more or less provides protection to such Refugees, some of which includes- The Geneva Convention of 1949 and the Additional Protocols that provides for extensive set of Rules protecting the humanitarian Rights of Individuals during the warfare. These set of Rules seek to provide protection to the civilians from the hostilities of war, who are not parties to the war and includes- health workers, aid workers, children, women, etc. and also to those who were involved in the war but later surrendered or got captured or injured or due to any other reasons has become non-parties to the hostilities. The Geneva Convention of 1949 was a combination of Four Geneva Conventions that were previously enacted while the two Additional Protocols strengthened the Rights of the Victims of both International and Non-International Armed Conflict respectively. There is a Third Additional Protocol that recognizes the Red Crystal with the same status as that of the Red Cross and the Red Crescent.[15]

Further there are several International Human Rights Laws that protects the Rights of the Refugees and the Asylum seekers from gross human rights violations like- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also recognizes the Customary International Law of Non-Refoulement; The Convention on Rights of the Child where Article 2 provides the children of Refugees protection from discriminations, Article 3 provides for their best interests, Article 6 provides such children with the Right to life, survival and development, Article 12 provides them with the Right to be heard, etc.; the International Covenant on Civil and Political Rights also grants the Refugees with several Rights, like- Right of freedom from inhuman cruel treatment, Right to liberty of movement, etc. in whichever territory they reside; the International Covenant on Economic, Social and Cultural Rights provides such Refugees with the Right

14 *Supra* note 9.

15 *The Geneva Conventions of 1949 and Their Additional Protocols,* INTERNATIONAL COMMITTEE OF THE RED CROSS (Jun 03, 2020, 01:45 AM) hhttps://www.icrc.org/en/document/Geneva-conventions-1949-additional-protocols.

to have a minimum standard of living for having a proper physical and mental development including other Rights like Right to education; Similarly all Human Rights Conventions like- Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; etc. seek to provide protection to different categories to Rights of the one or more classes of Refugees.[16]

Even Protection of the Rights of Refugees can be sought from the International Criminal Law, like the Rome Statute of International Criminal Court which provided that the International Criminal Court shall have jurisdiction for trying cases related to genocides, war crimes and all crimes that are against the very notion of humanity. This law seeks to provide protection to all human beings including Refugees from cross-border criminal offences, like forceful prostitution, sterilization, pregnancy, or any other like kinds of sexual violence. In the Judgements of International Tribunal for the Former Yugoslavia for Rwanda, activities like enslavement, rape, genocides, torture, etc. were declared as criminal offences against humanity. And based on such Judgements, the Rome Statute becomes relevant in determining the criminal activities that makes someone being excluded from the status of Refugee.[17]

Background of Syrian Crisis and its Impact on IHL

The Syrian civil war has a very long history and legacy, there is not a single cause that can be attributed to be the main cause of the war. However, the genesis of the war can be traced from 31 January, 1973 when Hafez al- Assad, the then President of Syria implemented a new Constitution whereby the condition that for being the President, one must be a Muslim was withdrawn. Since then many Muslim rival groups took arms against the government and started raising attacks to overthrow it. Later after the death of Hafez al-Assad in 2000, his son Bashar al-Assad became the President but most of his critics had opined that he failed to address any constructive reforms and to implement them. However, Assad later in 2017 opined that these protestants are merely Jihadis who were raising their voices against his secular democratic principles.[18] One another reason that can be attributed as a cause of this civil war is the huge socio-economic inequalities that mostly occurred due to the Free market policies introduced by Hafez al-Assad and then further accelerated by Bashar

16 *Human Rights and Refugee Protection (RLD 5),* UNHCR (Jun 01, 2020, 12:47 AM) https://www.unhcr.org/3aa5bd900.pdf.

17 *Supra* note 10.

18 Associated Press, *Rebels in Syria's largest city of Aleppo mostly poor, pious and from rural backgrounds,* FOXNEWS (Jan. 15, 2020, 01:47 AM) https://www.foxnews.com/world/rebels-in-syrias-largest-city-of-aleppo-mostly-poor-pious-and-from-rural-backgrounds.

al-Assad. Due to these open market policies, only a few nationals that belonged to the Sunni-merchant class having good relations with the governments were able to get jobs and maintain their families. While on the other side, there prevailed absolute poverty amongst the non-supporters of the government who later started joining the armed rebellion.[19] Moreover, the great immediate cause for this outbreak can be attributed to the massive and intense draught that occurred in 2008 and lasted till 2011 which led to several issues like-severe crop failure, increase in food prices, huge migration of farming families to urban centers that further increased the burden over the available resource stock, since lakhs of refugees from the Iraq war were already taking shelter there. This drought is alleged to be the result of anthropogenic global warming and it indicates that climate change which is an environmental concern is also a reason behind this war.[20] At last, the major reason behind this outbreak is the outburst of frustration amongst the Syrian citizens, since they were constantly restricted from exercising their basic human rights like freedom of expression, assembly, association, etc. They were all either curtailed by stringent measures or by repeatedly declaring emergencies.[21]

At present this crisis has led to gross human rights violations. The recent chemical attacks in a Damascus suburb has impacted millions of Syrian populations that has also led to the huge increase in the rate of migration of refugees in order to escape this inhuman action in 21st century civilization. It is not the only instance; in other words, it has been near about a decade that Syrian population is experiencing the other side of human civilization that we sitting at home cannot even dare to imagine. There is no doubt that now Syrian civil war has become the epitome of a humanitarian crisis. It is estimated that over 6 million people have been Internally Displaced and 5 million Syrian refugees have been relocated to neighboring countries. The people who want to flee from this war situation and to survive require medical support, pure drinking water, food and such other basic stuff, but unfortunately all these are rarely available.[22] In such a situation, it becomes difficult to decide, whether to die in war or to die in search for survival?

19 Rozanne Larsen, *Youth exclusion in Syria: Social, Economic and Institutional Dimensions*, JOURNALIST RESOURCES (Jan 15, 2020, 11:13 PM) https://journalistsresources.org/studies/international/development/youth-wxckusion-in-syria-economic/.

20 Francesco Femia & Caitlin Werrel, *Syria: Climate Change Draught and Social Unrest,* THE CENTER FOR CLIMATE & SECURITY (Jan. 15, 2020, 12:14 AM) https://climateandsecurity.org/2012/02/29/syria-climate-change-draught-and-social-unrest/.

21 Ian Black, *Human Rights Watch says virtually nothing has been done to improve human rights in 10 years of his presidency* THEGUARDIAN (Jan. 15, 2020, 12:13 AM) https://www.theguardian.com/world/2010/jul/16/syrian-human-rights-unchanged-assad.

22 Rahma Aburas, et al., *The Syrian conflict: a case study of the challenges and acute need for medical humanitarian operations for women and children internally displaced persons,* BMC MEDICINE (Jan 16, 2020, 01:23AM) https://www.mobi.ncbi.nlm.nih.gov/pmc/articles/PVC5946430/.

According to the United Nation High Commissioner for Refugees (UNHCR) the rate of Syrian Refugees will increase as the war progresses. But although the civil war is the primary reason for the suffering of Syrian Refugees, there are many other secondary causes that led to the massive suffering of these refugees.[23] First being that, due to the increase of birth rates in the refugee camps, the neighboring countries who initially gave shelter to these refugees are now facing shortage of resources to supply to their camps and even natives of those countries are not willing to adopt those refugees for which most of such countries are closing their international borders for these refugees, thus violating their obligations under the Convention of 1951. Second, since the war is still in progress the number of refugees is increasing as already mentioned.[24] In such a situation, it is obvious that refugee camps will be overcrowded. For instance, from the shelters in Idlib and Aleppo governorates many people had been forced to escape to safer place due to the ongoing war while many are still unable. Third, the refugees are still provided with some sort of reliefs by International Organizations and to some extent by neighboring countries, but the conditions of IDPs are even more pathetic since the governance of Syria has broken down for which they are mostly devoid of any security agencies and safety measures when war takes place and even in normal situations due to economic crisis they are unable to afford even the basic needs for their survival including healthcare facilities, education, etc. Further, the injured and disabled persons remain at the receiving end during war and even after the war.

Due to the war and emerging hostilities several infrastructures are also getting destroyed and those that are left undestroyed are wanting repair and so are in a non-functioning stage. For instance, the Allouk pumping station that was serving water to more than 400,000 people in and around Hasakeh, stopped functioning from 30 October, 2019. This water pump is very critical since it was used to supply water to more than 400,000 people. But its repairing is highly difficult since its servers are located near the front line where the hostilities are at the top. This is a great evidence, which proves that civilians who are not part of any hostilities are made to suffer without any of their cause.[25]

Further the health scenario is also pathetic. In most cities like in AI HoI, hospitals are failing to provide adequate facilities to treat the needy. Cases of malnutrition and injuries from weapons are mostly registered among whom many suffers from critical stages since they were not able to receive preliminary medical treatment, and this has made their situations

23 *Ibid*.

24 Sans Frontierers, *Unacceptable Humanitarian Failure*, MEDICINES SANSFRONTIERERS (Jan. 16, 2020, 01:17 AM), https://www.msf.org/syria-unacceptable-humanitarian-failure.

25 *Refugees and Displaced people in Syria,* ICRC (Jam 15, 2020, 01:11 AM), https://www.icrc.org/en/where-we-work/middle-east/syria/syrian-refugees.

even more difficult.[26] At one side resources are limited while at the other side many are unable to get access to whatever resources are available.

Among the millions of refugees, the majority are children, whose parents are in a dismal condition since while escaping the fear of death in their motherland, they are forced to enter a situation where they have only two alternatives- either to buy food for their children or to defend them from cold. While many such parents do not possess the money even to afford either of those alternatives. Most of such refugees take shelter in countries like- Lebanon, Iraq and Jordan but the residents and the refugees who are already there are suffering from severe conditions especially when the harsh winter arrives, since the present infrastructure is not enough to support all of them. Even it is estimated that around 2 million children have been devoid from going to school which shadows the future of the country besides affecting the present. Further, the children in the refugee camps had to work very hard like carrying water from distant places at the age of hardly 4-5 years in order to survive.[27] Most of the children in the refugee camps are suffering from physical and mental traumas created by this devastating war. Physical injuries however more or less may get healed with the passing of time but the fear is about the mental trauma that these children are undergoing. Most of them have experienced the emotions of losing their parents and are witnessing unprecedented violence In Front of their eyes and that also at the age when they should have been playing in kindergartens. Recently, UNICEF stated that over 500 children were injured or killed in this war in the first three quarters of 2019.[28] Such is the situation which makes a question relevant that if these children survive this phase of inhuman legacy then in the near future will they be able to live the life of a normal human being in this world?

As of January 2020, more than 380,000 people were killed in this war, as reported by Syrian Observatory for Human Rights. The death consisted of military personnel, government soldiers, armed rebel troops, and most importantly civilians including children.[29] While a report from SNHR in 2018 stated that 82000 victims were forcibly made to disappear by the Syrian regime which includes 14,000 confirmed deaths. Similarly, it is reported that girls of 6-8 years of age are brutally raped or converted to sex slaves while boys of same age group being tortured and are forced to conduct public killings.[30] In this year only, on January 1,

26 *Supra* note 22.

27 *Supra* note 24.

28 '*Children in Syria bearing blunt of intensifying violence*, UNICEF (Jan. 15, 2020, 11:12 PM) https://www.infomigrants.net/en/post/21848/children-in-syria-bearing-blunt-ofintensifying-violence-unicef.

29 *Syria death toll tops 380,000 in almost nine-year war: Monitor,* LIVEMINT (Jan. 16, 2020, 03:1 AM) https://www.livemint.com/news/world/syria-death-toll-tops-380,000-im-almost-nine-year-war-monitor-11578143112160.html.

30 Jamey keaten, *UN report lays out agonies faced by Syrian child amid war*, LOCAL 12 (Jan. 16, 2020,

eight civilians including four children were killed in a Rocket attack in a school in Idlib by Syrian government.[31] Nothing can be a better example than this about the violation of not only humanitarian rights but also internationally recognized principles of humanitarian law.

Role of Humanitarian Organizations

The International Committee of the Red Cross (ICRC), that is an international organization historically working for the protection of humanity in war as well as conflict situations, and which has also contributed to the development of the IHL, is requesting the warning parties to spare the civilians and their infrastructure. Further, the ICRC is recommending not to attack those who want to flee from the war and has prohibited attacks that are indiscriminate in nature and are on hospitals, schools, etc. They have further issued restrictions on indiscriminately firing of Rockets and Mortars that are blindly targeted into the urban cities from either side of the Front Line. [32]

ICRC along with the Syrian Arab Red Crescent (SARC), which is providing reliefs to the sufferers of this civil war, are extending their support to an Emergency Response Center providing for first aid reliefs and also a neonatal Intensive Care Unit within the pediatric hospitals in the Idlib city. The ICRC has also established two polyclinics and provided three mobile health units in Western Rural Aleppo serving the escapers of war from Idlib and nearby areas. ICRC and SARC together are striving hard to protect the IDPs and to make them survive by providing daily food and other stuff in the relief camps. For instance, a recent report of ICRC on January 03, 2020 provided that a collective kitchen organized by SARC with the assistance of ICRC has been providing food with a target of serving 37,500 newly emerged IDPs, while they had been able to provide only 7,500 household kits in the city of Idlib. [33]

Similarly, few other international groups and activists are helping these victims of war to make life a slight better than hell. For instance, on December 30, 2019 Ireland welcomed 50 Syrian Refugees including 27 children under the Irish Refugee Protection Program.[34]

03:1 AM) https://local12.com/news/nation-world/un-report-lays-out-agonies-faced-by-syrian-children-amid-war.

31 Matilda Coleman, *Four Syrian Children killed in New Year's attacks on School*, UPNEWSINFO (Jan. 16, 2020, 02:13 AM) https://upnewsinfo.com/2020/01/01/four-syrian-children-killed-in-new-years-attack-on-school-news-from-syria/.

32 *Supra* note 24.

33 *Ibid*.

34 Alison Bray, *Fifty Syrian Refugees promised the warmest of Irish welcomes*, HERALD.IE (Jan. 16, 2020, 02:13 AM) https://m.herald.ie?news/fifty-syrian-refugees-promised-the-warmest-of-irish-welcomes-

While on the other hand, there are many more left who are claiming that they have not received any assistance from any of the international or regional groups.

Conclusion

It shows that humanity has a lot to learn from what is happening in Syria. It must be taken as an example for addressing conflicts in the future in any part of the world. While from IHL perspective, it also shows that there is much to be developed in order to avoid a massive conflict in the near future particularly in this nuclear age. The IHL advocates more or less, will now have to adopt a two way approach- first a protective and defensive approach where the main agenda will be to provide relief to the victims of the Syrian war, to monitor and to condemn violation of humanitarian law and the second approach- prevention and deterrence approach where they must spread the lessons taught by this war through the passing time to the entire world fraternity so that a fear is created in the minds of the young generations, thereby proving as a deterrence, to avoid themselves from getting involved in such huge conflicts. It is the responsibility of all of us to adopt this dual approach by providing donations and assistance in whatever manner we can to those victims and at the same time we must also frame our opinion about their pathetic stories and must educate our upcoming generations about the consequences that such conflicts can lead to.

Fortunately, now we can hope that after seeing such devastating consequences, no political party in this democratic civilization would dare to undermine public opinion. Further, this might act as a great lesson for the governments to learn before drafting and enacting any policy against the majority. Moreover, it appears that such conflicts are merely the result of economic disparity which is again caused by improper planning and settlement. The Syrian crisis was fueled by the drought of 2008 which is attributed to be the result of climate change. All these indicate that in the near future humanity might seem to be fighting for every resource in the same manner since we all are aware about the present state of the global atmosphere. Every beginning has its end and every end has a new beginning, similarly we can hope that this Syrian crisis will come to an end and then will lead to a new beginning.

38823817.html.

RIGHT TO MARRY OF MUSLIM WOMEN ON DIVORCE : AN ANALYSIS

Dr. Raghuvinder Singh* and Arti Sharma**

Abstract

Divorce alters the status of married woman and can leave her destitute. The condition of Muslim women, especially the poor ones, is pathetic than the divorced women belonging to other communities for twin reasons; firstly, because of the husband's unilateral and private declaration of divorce; Secondly, after divorce she is entitled to claim maintenance for a limited period. Therefore, in such circumstances, remarriage is better option for her. However, remarriage is also not easy for a woman because of the stigma attached to the word 'divorce'. Thus, in such a scenario the law should be such that it encourages remarriage of divorced women. Therefore, in this paper, an attempt is made to analyze the grey areas, in the present Muslim law, as regards the right to marry of Muslim woman on divorce are concerned and also to provide suggestions for the existing grey areas.

INTRODUCTION

Divorce in '*vinculo matrimonii'* is a Latin phrase meaning divorce from the bond of marriage.[1] A kind of divorce of husband and wife dissolving the marriage tie; reverting the parties to their unmarried status from their matrimonial obligations and parties once again acquire the right to marry a person of their choice. It is different from 'an annulment' since it ends the marital status, whereas an annulment substantiates that a marital status never existed. It is also different from a *menso et thoro* which is a divorce from bed and board that means separation of parties by law, than a dissolution of the marriage.[2]

When the relationship between married couples runs aground, it is better to resort to the remedy of divorce for the welfare of the parties and family as a whole.[3] However, the

* Professor, Department of Laws (Himachal Pradesh University).

** Ph.D. Research Scholar, Department of Laws (Himachal Pradesh University).

1 BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 1450 (8th ed. 2004).

2 *Ibid*.

3 Furquan Ahmed, "Muslim Law" LII ASIL 797 (2016), (May 30, 2020, 04:20 PM), http://14.139.60.114:8080/

segregation of family unit has always brought upheavals and vagrancy in the life of the Muslim women especially the poor ones, for two reasons; firstly, because of the unbridled and arbitrary power of the husband to pronounce unilateral talaq upon his wife; and secondly, after divorce, she is entitled to maintenance for a limited period called iddat, and then she is left to the vagaries of fate. Although, she can claim maintenance under Section 125 Cr.P.C., however, that too only if her former husband consents to it.[4] In such circumstances, the option of remarriage after divorce can be proved to be very helpful to protect her from destitution. Nonetheless, it is also true that after divorce, there are fewer possibilities for women getting married easily than men.

Table 1 below shows the divorce rate, according to Census 2011, in the Hindu and Muslim communities. The divorce rate is defined as the total number of divorces of males/females in a particular community during a specific year to the total married males/females of that community.[5] Thus, the divorce rate formula is;

"Divorce rate = D x K/P

Where D is the total number of divorces in one year, P is the population at risk of divorce and K is a constant 1000"[6]

Table 1- Divorce Rate in the Year 2011

	HINDU	**MUSLIM**
FEMALE	2.64	5.64
MALE	1.54	1.60
TOTAL	2.09	3.66

Source: Census of India 2011[7]

jspui/bitstream/123456789/43231/1/27_Muslim%20Law%20%28793-842%29.pdf.

4 S.N. MISRA, THE CODE OF CRIMINAL PROCEDURE, 1973, 136 (Central Law Publications, Allahabad, 17th ed. 2010).

5 CLIFTON D. BRYANT and DENNIS L. PECK (ED.), 21ST CENTURY SOCIOLOGY A REFERENCE HANDBOOK, Vol. 1, , (May 30, 2020, 04:25 PM); https://books.google.co.in/books?id=C6g5DQAAQBAJ&pg=PA277&lpg=PA277&dq=divorce+refined+ratio+formula&source=bl&ots=dYf1RLkXIN&sig=ACfU3U09ihSkEZ5NgYEwA59MqvQvmBLbDg&hl=en&sa=X&ved=2ahUKEwjPu6zQudjpAhUryjgGHXiPA8Q6AEwD3oECAsQAQ#v=onepage&q=divorce%20refined%20ratio%20formula&f=false.

6 *Ibid.*

7 C-3 Marital Status by Religious Community and Sex – 2011, (May 29, 2020, 01:04 PM), https://censusindia.gov.in/2011census/C-series/c-3.html.

Table 1 shows that the divorce rate is higher in the Muslim community than the Hindu Community. The divorce rate for Hindus is 2.09 and for Muslims is 3.66, which implies that there are 2 divorced Hindus per 1,000 married Hindus and there are 3.7 divorced Muslims per 1,000 married Muslims. Across gender, the gap is larger because most men remarry but women cannot, hence, the disparity.[8] There are 5.6 divorced Muslim women per 1,000 married Muslim women, while there are 1.60 divorced Muslim men per 1,000 married Muslim men. In the Hindu community, there are 2.64 divorced Hindu women per 1000 married Hindu women, while there are 1.54 Hindu divorced men per 1000 married Hindu men. This means that after adjusting population and marital status, Muslims are more likely to be divorced than Hindus, and Muslim women bear almost the whole burden of this difference.[9]

To skew the Muslim women's divorce rate and to save them from destitution after divorce, there is a need for improving the legal status of Muslim divorced women by the codification of Muslim personal law, in such a way that could broaden the range of their right to marry after divorce. Article 25(2) and Article 44 read with Entry 5 of the Concurrent List contained in the Seventh Schedule empower the state to regulate secular affairs surrounding religion and to enact measures of social welfare and reform.[10] Further, on this, Mohammad Ghouse[11] argued that in matters relating to marriage and divorce and other aspects relating to personal law, the state can validly enact measures of social welfare and reforms in the Muslim Personal law. Reforms so made and replacement so made of the Muslim personal law is valid and not unconstitutional.[12]

Presently, the matters relating to marriage and divorce are governed by the Muslim Personal law (Shariat) Application Act, 1937 (hereinafter called the Muslim personal law), which makes the principles of *Shariah* applicable on the right to marry of Muslim women after divorce. The rules governing the matters of marriage and divorce under the Muslim personal law, however, are not expressly codified and are, thus, governed according to the prevailing customs and usages. These customs and usages provide for certain impediments on the right to marry of Muslim women after divorce. In this paper, an attempt is made to

8 Yugank Goyal, *Hindu and Muslim: The True Picture Of Divorce*, (Mar 17, 2020, 12:25 AM) https://www.livemint.com/Opinion/ydCWT2mGxmg4d9NXrMaxEI/Hindus-and-Muslims-The-true-picture-of-divorce.html,

9 *Ibid*.

10 The Constitution of India, arts. 25(2), 44.

11 Mohammad Gouse, *Personal Law and the Constitution of India*, (Mar.17, 2020, 10:04 AM) http://14.139.60.114:8080/jspui/bitstream/123456789/736/15/Personal%20Laws%20and%20the%20Constitution%20in%20India%20.pdf.

12 *Ibid*.

analyze the right to marry of Muslim divorced women and the present impediments on the right to marry of Muslim women after divorce, as provided by the prevailing customs and usages and also to suggest some remedies.

Right to Marry as a Human Right

The right to marry and to form a family is a human right, universally recognised by all the civilized nations. As a human right, it occupies a significant place in the Universal Declaration of Human Rights (hereinafter called UDHR) passed by the UN general assembly on December 10, 1948. As per Article 16(1) of the UDHR, all men and women of full age, without any discrimination on the basis of race, nationality or religion, have the right to marry and to found a family. Further, it provides that the family being a natural and fundamental unit of society is entitled to be protected by the state.[13] Furthermore, it provides that the marriage shall be entered into by the intended spouses only with their free and full consent.[14] Besides this, similar provisions are contained under Article 23 of the International Covenant on Civil and Political Rights, 1966 (hereinafter called ICCPR). Whereby, Article 23(2) provides that the right to marry and found a family of all men and women of marriageable age shall be recognised. And, article 23(3) of the said convention provides that no marriage shall be entered into by the intended spouses without their free and full consent.[15] Also, in 1979, the UN general assembly, adopted a Convention for the Elimination of all forms of Discrimination against Women (hereinafter called CEDAW) which also contains similar provisions for women. The convention, vide Article 16, provides that the state parties shall take all appropriate measures to remove discrimination against women in all matters relating to marriage and family relations. Further, it specifically provides that the state parties shall ensure, on the basis of gender equality, the same rights to enter into marriage, to freely choose a life partner, and to enter into marriage only with their free and full consent.[16] India is a state party to these conventions and covenants and, as such, is bound to give effect to them. Further, Article 253 read with Entry 10 and 14 of the Constitution empowers the Parliament to make laws to give effect to the said Conventions.

13 Universal Declaration of Human Rights, 1948, art. 16.

14 *Ibid*.

15 International Covenant on Civil and Political Rights, 1966, art 23.

16 Convention on the Elimination of all forms of Discrimination against Women, 1979, art 16.

Right to Marry as a Constitutional Right

In India, every adult individual has a right to marry a person of his/her choice and form a family. In *Lata Singh v. State of U.P.*,[17] and in *Shakti Vahini v. Union of India and Others*,[18] the courts have recognised that an individual's exercise of choice in choosing a life partner is an integral aspect of the right to life and liberty, and therefore, is protected under Article 19 and 21 of the Constitution. In the *Shakti Vahini Case*, the court observed;

> "The petitioner is a major and was free to marry anyone she liked or live with anyone she liked. Since there is no bar to an intercaste marriage under Hindu Marriage Act or any other law, no offence was committed..."[19]

Further, the learned Justice observed;

> "[W]hen two adults consensually choose each other as life partners; it is a manifestation of their choice which is recognized under the constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected..."[20]

That means, for exercising the right to marry; firstly a person must be of the age of majority according to the law to which he is a subject; secondly, two adults consensually choose each other as their life partners; and thirdly, if such law creates a bar, then, he or she can remarry only after removal of that bar.

Right to Marry of Muslim Women on Divorce and Muslim Law

Under Muslim law, certain impediments are provided for contracting a valid marriage. A marriage in contravention of these impediments is either rendered void or irregular. Here we are concerned with impediments on the remarriage of a Muslim divorced woman and their effects on her second marriage.

Muslim Divorced Woman and Incapacity to Marry during *Iddat* Period

Iddat or *idda* may be defined as the period during which it is obligatory for a woman, whose marriage has been dissolved either by death or divorce, to remain in seclusion, and

17 *Lata Singh v. State of U.P.,* AIR 2006 SC 2522 (India).

18 *Shakti Vahini v. Union of India & ors*,, AIR 2018 SC 1601 (India).

19 *Ibid*.

20 *Ibid*.

to refrain from marrying another man.[21] According to Fyzee, the most suitable definition of *iddat* is 'the term, by the completion of which, a new marriage is rendered lawful'.[22] According to Section2(b) of the Muslim Women Protection of Rights on Divorce Act, 1986, the period of *iddat,* 'in the case of a divorced woman, is; (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is enceinte, i.e., pregnant, at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier.'[23]

The purpose of imposing abstinence from marrying another man during iddat period is to ascertain whether the divorced woman is pregnant by the estranged husband or not, so as to avoid confusion of parentage.[24] Muslim personal law provides that if a woman undergoing iddat marries another man; her marriage would be rendered irregular under Sunni law and void under Shia law, as the Shia law does not recognize the difference between irregular and void marriage. Marriages, that are irregular under Sunni law, are void under the Shia law[25]

The Lahore High Court, at one instance, treated the marriage contracted during iddat period, under Sunni law, as void.[26] However, in *Mohammad Hayat & Ors. v. Mohammad Nawaz & Ors.*,[27] when again the question about the validity of such a marriage came up for consideration, the court held that a marriage contracted between Sunni parties, during *iddat* period, was only a *fasid* marriage and not *batil* and the children born of such a marriage were held to be legitimate.

Where a Muslim divorced woman remarries, while she is undergoing *iddat* period, the Muslim personal law prescribes the following consequences on her second marriage:

Under Sunni Law[28]

a) If her second marriage is consummated, then, on divorce; firstly, the woman would be entitled to proper or specified dower, whichever is less; secondly, even though the children born of such a marriage would be legitimate but it would not create mutual rights of inheritance between the parties.

21 Sir Dinshaw Fardunji Mulla, PRINCIPLES OF MAHOMEDAN LAW, 343 (22nd ed. 2017).

22 Tahir Mahmood (ed.), Outlines of Muhammadan Law 81 (5th ed. 2008).

23 The Muslim Women (Protection of rights on Divorce) Act, 1986, sec. 2(b).

24 *Supra* note 21 at 343.

25 *Supra* note 21 at 350.

26 *Supra* note 21 at 350, *Jhandu v. Mst Mussain Bibi ,* (1923) 4 Lah. 192.

27 *Supra* note 21 section 257(2*), Mohammad Hayat & ors v. Mohammad Nawaz & ors,* 1935 Lah 622.

28 *Supra note* 21 at 350.

b) If her marriage is not consummated then, no legal effects from such a marriage would flow on divorce.

Under Shia Law

(a) The second marriage of the divorced woman, while she is undergoing *iddat*, would not create any civil rights or obligation between the parties and;

(b) Children born of such a marriage would be illegitimate.[29]

The Waiting Period under Hindu law

Before 1976, the Hindu Marriage Act, 1955, by the proviso attached to Section 15, prohibited the parties to marriage from remarrying before the elapse of one year from the date of the decree of divorce from the court of the first instance till the date of their second marriage.[30]

One of the purposes, of the said prohibition, was to avoid the confusion as to the parentage of the child born. However, the said proviso was deleted by Section 10 of the Marriage Laws (Amendment) Act, 1976 on the recommendations of the Law Commission of India. The commission recommended that the considerations of the parties and the freedom to marry, available to parties, outweigh the object of the proviso.[31]

Muslim Divorced Woman and the Right to Remarry Former Husband until Nikah Halala is Performed

Nikah halala is made up of two Arabic words. Nikah meaning 'union of sexes' and in law it means 'marriage'. Marriage, according to Muslim law, is a contract for legalisation of intercourse and procreation of children.[32] Halala means 'halal' or 'to make permissible'. Thus, nikah halala is a practice to make a marriage permissible which has become forbidden. Remarriage between parties becomes forbidden as soon as talaq becomes absolute.

Before proceeding further it is necessary here to understand different kinds of divorce under Muslim personal law, as the practice of nikah halala is closely connected with it. Divorce,

29 *Ibid.*

30 MAYNE'S, TREATIES ON HINDU LAW & USAGE*, 417(*Bharat Law House, New Delhi, 17th ed., 2014).

31 Law Commission of India, 59th Report on *Hindu Marriage Act, 1955 and Special Marriage Act, 1954,* (March, 1974), at p.30.

32 *Supra* note 21 at 338.

under Muslim law, is divided into three categories; firstly, divorce which proceeds at the instance of the husband is called *talaq*; secondly, *khula* or *mubara'at* are types of divorce by mutual consent; thirdly, divorce by a judicial decree at the suit of husband or wife.[33] Divorce (*Talaq*) which is at the instance of the husband is of three types vis. *Talaq-e-ahsan*, *talaq-e-hasan* and *talaq-ul-biddat*. *Talaq-e-ahsan* is a single pronouncement of the formula of talaq by the husband during a *tuhre*, followed by a period of abstinence, which is called, *iddat*.[34] A talaq in *ahsan* mode becomes irrevocable and complete as soon as the period of iddat expires.[35] *Talaq-e-hasan*, is a form of divorce whereby the formula of talaq is pronounced thrice by the husband in successive *tuhrs* and no intercourse takes place during any of the three *tuhrs*.[36] Talaq in *hasan* mode becomes irrevocable and absolute on the third pronouncement, of the formula of talaq, irrespective of iddat.[37] Talaq-ul-biddat or triple talaq is pronouncing the formula of talaq thrice in single *tuhr*. It becomes irrevocable and absolute immediately on the pronouncement of the formula of talaq. As the talaq becomes irrevocable at once hence, it is also called *talaq-i-bain* i.e. irrevocable talaq.[38] The practice of triple talaq has been set aside by the Supreme Court on August 22, 2017 by a majority of 3:2.[39] Later, by passing the Muslim Women (Protection of rights on Marriage) Act, 2019, the Parliament has made it void and illegal.[40]

Khula is a divorce at the instance and consent of the wife, whereby, she offers or agrees to give consideration to her husband for her release from the marital tie.[41] As soon as the offer is accepted by the husband, it becomes *talaq-i-bain*.[42] *Mubara'at* is a divorce by mutual consent of both the parties. Herein, the offer may proceed at the instance of the husband or the wife, but once, it is accepted by either, it becomes complete and operates as *talaq-i-bain*.[43]

Ameer Ali says, 'When the power of reconciliation is lost, the separation becomes *bain* or absolute, while it continues, the talaq is simple *raja* or reversible.'[44] When a definite

33 *Supra* note 21 at p. 400.
34 *Shayara Bano v. Union of India*, LNIND 2017 SC 415 (India).
35 *Supra* note 21 at p. 408.
36 *Supra* note 21.
37 *Id*. at 409.
38 *Id*. at 408.
39 *Supra* note 34.
40 The Muslim Women (Protection of Rights on Marriage) Act, 2019, sec. 3.
41 *Supra* note 21 at 414.
42 *Ibid*.
43 *Ibid*.
44 SYED AMEER ALI, STUDENT'S HAND BOOK OF MOHAMMEDAN LAW, (S.K. Lahiri & Co.,

and complete separation takes place the parties so separated cannot remarry without the woman undergoing the formality of nikah halala.[45] However, the question which arises here is whether every irrevocable or absolute talaq creates a legal bar on remarriage and incumbents a wife to perform nikaha halala? To this the court, in Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan,[46] held that the formality of *nikah halala* was not necessary in the case where the husband had repudiated his wife by *ahsan* or *khula* mode. It is only in the case, when, the husband has repudiated his wife by pronouncing three *talaqs* against her, as in the case of *talaq hasan* and *triple talak*, it is not lawful for the couple to remarry again unless; firstly, the divorced wife observes *iddat* of divorce; secondly, she marries someone else; thirdly, the marriage is actually consummated with the other husband; fourthly, the latter husband has divorced her or dies after actual consummation of the marriage.[47]

The rule was framed to limit the husband's proclivity to pronounce *talaq* in Arabia. The check was intended to control a jealous, sensitive, but half-cultured race, by appealing to their sense of honors.[48]

Consequences of the Practice of *Nikah Halala*

A marriage performed in contravention of the formality of *nikah halala* is irregular and not void.[49] However, courts in pre-independence India have taken a different discourse as in *Saiyid Rashid Ahmed v. Anisa Khatun*,[50] case. The facts of the case are that the plaintiffs were the brother and sister of the Ghiyas-ud-din, who would have been the heirs, if respondents no. 1 to 6 were unable to establish their claim to be a widow and legitimate children. The dispute is related to the succession to the estate of Ghiyas-ud-din, a Muhammadan, who died on April 04, 1920. On September 13, 1905 he pronounced the triple talaq in the presence of the witnesses, though in the absence of his wife. Though, the later received Rs. 1,000/- as payment of her dower on the same day for which a registered receipt was produced. There was also prepared a *talaqnama*, a deed of divorce on September 17, 1905. Anisa Khatun, respondent no.1, challenged the validity of divorce on two grounds that the divorce was pronounced in her absence and second that after as husband and wife for fifteen years and five children were born to the couple. Thus, Ghiyas-ud-din did not

Calcutta 6th ed. 1912).

45 *Ibid*.

46 *Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan,* AIR 2010 Bom. 109 (India).

47 *Supra* note 20 at 83, 124; *Mrs. Sabah Adnan Sami Khan v. Adnan Sami khan*, AIR 2010 Bom.109 (India)

48 *Supra* note 45.

49 *Supra* note 20 at 430.

50 *Saiyid Rashid Ahmed v. Anisa Khatun*, AIR 1932 PC 25 (India).

intend to divorce her. The Privy Council held that triple talaq pronounced in the absence of wife by Ghiyas-ud-din was valid and immediately effective. The validity and efficacy of the talaq would not be affected by Ghiyas-ud-din's mental intention. Further, since the respondent had not undergone *nikah halala* after divorce, the Privy Council held that she was not legally married to Ghiyas-ud-din and the children born were held to be illegitimate, resulting in the rejection of her claim for succession.

Again, in *Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan*,[51] the husband of the woman tried to misuse this practice against the claims of the wife. However, the court held that the formality of *nikah halala* was not necessary in the case where the husband had repudiated his wife by *ahsan* or *khula* mode.

Nikah Halala: An International Perspective

Mahmood, in 'Muslim law in India and Abroad', said that the laws in Egypt, Iran, Jordan, Kuwait, Morocco, Philippines, Sudan, Syria, USE and Yemen, had totally derecognized the concept of triple talaq... the so-called device of halala for legalizing remarriage between the parties, which required wife's intervening marriage to someone else and subsequent divorce from him, also stood abolished in these countries.[52]

On Remarriage Mother Loses the Right to Custody (hizanzt) of Minor

Under Muslim personal law, the right of the mother to the custody (*hizanat*) of the child is greater than the father. She is entitled to the custody of her male child till he attains seven years of age and her female child until she has attained puberty.[53] This right of a mother to the custody of her minor male/female child continues, although she has been divorced by the father of the child.[54] However, the mother, upon remarriage with a person stranger to the child, forfeits her preferential right to the custody of the minor child.

In *Mir Mohamed Bahauddin v. Mujee Bunnisa Begum Sahiba*,[55] the question before the Madras High Court was, whether, by the reason of marriage to a stranger, the mother loses the right to continue to have the custody of the minor child? The Court held that the custody of the child could not be given to a woman, who had married a second husband, as

51 *Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan,* AIR 2010 Bom. 109 (India).

52 TAHIR MAHMOOD*, MUSLIM LAW IN INDIA AND ABROAD*, 145, (Lexis Nexis, Delhi 2nd ed. 2016).

53 *Supra* note 20 at 446-447.

54 *Ibid.*

55 AIR 1951 Mad. 280 (India).

it was not possible for her to take care of the child and look after her well being. Further, the court observed that the mother of the child was firstly answerable to the husband and took care of his comforts before she could invest time for her child. Furthermore, the court observed that where there was a father who was not totally unsuitable or there were other relatives who could take care of the child, the mother, who had remarried, was not at all the person to whom the custody should be given. Again, in *Arafathunnisa v. T. I. Zeeyavudeen, Taraja Beevi and Mohammed Yasin*,[56] the Madras High Court, while deciding a similar question, observed that if a woman married a person who was not related to the child within the prohibited degree i.e. a stranger, then, as per the Mohammedan Law, she was disqualified to have the custody of the child and therefore, the court held that, though under the Mohammedan Law, she was entitled to have the custody of her girl child, till she attained puberty, as, she had married a stranger, therefore, she was not entitled to have the custody of the child.

However, the Bombay high court, in *Irfan Ahmed Shaikh v. Mrs. Mumtaz*[57], observed that there was no hard and fast rule under Mohammedan law that the mother became disqualified for the custody of her minor child, the moment she married a stranger regardless of the wishes and welfare of the minor child. The court, further, observed that in such cases the court must see the treatment to be met out to the child at the hand of her stepfather, with whom the mother had remarried. So also, the Andhra Pradesh high court, in *Saiful Islam Habeeb Ali v. Asma Begum*[58], held that the mother, who had married a second husband, was entitled to the custody of the minor child, as the child expressed her desire to stay with the mother only. Further, the court observed that solely based on the personal law, the father could not claim custody of the child since it is settled that in case of conflict between the personal law and the consideration for the welfare of the child, the latter should prevail over the former.

56 *Arafathunnisa v. T. I. Zeeyavudeen, Taraja Beevi and Mohammed Yasin*, (May 19, 2020, 12:25 AM) https://indiankanoon.org/doc/1429323/

57 AIR 1999 Bom 25.

58 Saiful Islam Habeeb Ali v. Asma Begum (A.P.)(D.B.) : Law Finder Doc Id # 502869, (May 31, 2020, 09:00 PM) https://www.lawfinderlive.com/Judgement.aspx?v=3n8ya6tOyaEIFYyx1n4feYc6Yq9yADGuQLat%2bMEuws4wd2vBKwBllKDlD26oLm5QE1BPCmkW%2f88zvrwWqtyyp8pCdmTrpVMvWqdmV%2fvZOZLDF5PiN89UMMSm20j9RGDyF1He0hioRRUZrj3Cfy0xN%2fgLld4tc13OjraJEQ6myPiVYA7TQypOZ6XFN9ykIesYUhpUqMBGm0ul99lcvZKtzm80XTPpPDdsmnmpWFLHi7KTJeMBmylakIZV4xybFgNigb%2botg2XdGHdOnmxfXiNSzXaVGXMV0rqcs0M9XmaU4TISQmY7BtIlrNRANYYd%2fkN2vuOnOoYukB3%2b8EJbcTbRksYjA9q%2bnG4E%2bOWztJiF8VqcqGb201rwPAqwXdb1OrOqVPMJ5RcYJTwG%2fo%2fShA7%2bQcc%2fv4K3oWDzqyqkjBWoXIAXO%2fRlwYHmF9B1l%2by8iaHpeRwKAgQrEFnWylJh6r64vhfmEeUMmm9bKHXoGFGibo%3d.

Therefore, it is evident that the Bombay and Andhra Pradesh high court went beyond the dictates of the Muslim personal law in a case where the minor child was capable of expressing himself/herself, however where the child could not express his/her wishes, as in case of Mir *Mohamed Bahauddin v. Mujee Bunnisa Begum Sahiba* and *Saiful Islam Habeeb Ali v. Asma Begum*, the Madras high court did not go beyond the dictates of Muslim personal law, that disqualifies a mother, upon marriage, of her right to custody.

Muslim Women's Right to Custody of her Children upon Remarriage: An International Perspective

Today, almost all Muslim countries follow traditional *fiqh* rules, which divide the functions of parents into that of a custodian and guardian. The custodian is, generally, the mother of the child, who is responsible for the physical care and upbringing of the child up to a certain age, and the guardianship always rests with the father, who has the duty and authority over financial matters of the child. However, if the mother, after divorce, marries a person who is not a close (*mahram*) relative of the child, she forfeits her preferential right to custody of the child. In some Muslim countries, this traditional *fiqh* rule is considered as discriminatory against women and to grant the mother of her right to remarry, without the fear of losing custody of her children, has been modified by the statutory laws.

In Iraq, a mother has a preferential right to the custody of her children, as long as, it is in their interest. Article 57 of the Personal Status Law, 1959 has increased the maximum age to 15 years to which a mother is entitled to retain the custody of her children. After 15 years of age, a child himself can choose with whom he wants to stay.[59] Furthermore, before 1986, the mother used to automatically lose her right to custody of her children upon remarriage with a person not related to the child. To guarantee the mother's right to have a happy marital life, the legislator intervened in 1987 to repeal and redraft para 9b and 2 of Article 57 of the law. Now after 1987, vide article 57(2) of the law, the right to custody of mother remains valid after her marriage, provided, inter alia, that the court is satisfied that no injury would be caused to the child.[60] In case of a dispute between the father and the mother, regarding the custody of the children when the mother has remarried, the court is expressly empowered to decide the matter in the interest of the children.[61]

59 Article 57(5) of the Personal Status Law of 1959, (Aug 06, 2020, 04:30 PM) https://www.refworld.org/pdfid/5c7664947.pdf.

60 Article 57(2) of the Personal Status Law of 1959, (Aug 06, 2020, 04:30PM) https://www.refworld.org/pdfid/5c7664947.pdf.

61 *Ibid*.

In Morocco also, upon divorce, the mother has a preferential right to the custody of her children until the children attain the age of 15 years.[62] Upon the completion of the age of 15 years, a child himself is entitled to decide with whom he wants to stay. Further, a mother may forfeit her right to custody of her child, if she remarries a person, who is not within the prohibited degree of relationship or who is not a legal representative of the child.[63] However, Article 175 of the code provides certain circumstances in which the remarriage of the custodian mother does not result in the loss of the custody of her children, i.e., if the child is under 7 years of age or if such separation would inflict harm on him; if he suffers from some illness or is handicapped; or if she is the legal representative of the child.[64]

In United Arab Emirates (UAE) also, a mother has the preferential right to the custody of the child, after her, the father, then the maternal grandmother, then paternal grandmother and so on. A mother is entitled to the custody of her male child until he attains the age of 11 years and the female child until she attains 13 years of age.[65] However, the court is expressly empowered to increase the prescribed age limit in the interest of the child. Further, Articles 143 and 144 of the law provide certain conditions upon which a custodian may be disqualified from the custody of the child. Although, Article 144(1) of the law, inter alia, provides that a mother may forfeit her right to the custody of her children if she has married a person not related to the child, but the law also specifically states that the court is empowered, in such a case, to decide otherwise in the interest of the child.

Thus, Iraq, Morocco, and UAE, by way of codification of the rule, that the mother will not *ipso facto* lose her right to custody of her children and by expressly empowering the court to decide in the best interest of the child, have not only protected the right of the mother to remarry a person of her choice but also has gone beyond the dictates of traditional *fiqh* rule which denies the custody of the child to her in case she marries a person not a close relative of the child.

Conclusion and Suggestions

The rules and customs, discussed above, are centuries old and these should be changed keeping in view the changing needs of the society. Social reforms should be brought in the

62 Article 166, the Moroccan Family Code (Moudawana) of February 5, 2004, (Aug 05, 2020, 04: 45PM) http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf.

63 Article 174, the Moroccan Family Code (Moudawana) of February 5, 2004, (Aug 05, 2020, 04: 45PM) http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf.

64 Article 175, the Moroccan Family Code (Moudawana) of February 5, 2004 , (Aug 05, 2020, 04: 45PM) http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf.

65 Article 156(1), Federal Law No. (28) of 2005 On Personal Status, (Aug 05, 2020, 03:30PM) https://legaladviceme.com/legislation/140/uae-federal-law-28-of-2005-on-personal-status.

present Muslim Personal law by way of codification, to ameliorate the plight of Muslim divorced woman and to save her from destitution. Thus, it is concluded and recommended that;

1. The rule relating to the waiting period, under Muslim law, has twin purposes; firstly, to allow parties to reconcile within iddat period of three months; secondly, to know the paternity of the child in the womb, if any. Hence, it is recommended that the period of waiting should be reconsidered, in case of iddat period running beyond three months, as the same is required for knowing the paternity of the child. Moreover, a similar provision under the Hindu Marriage Act, 1955, has been deleted keeping in view the freedom of marriage available to the parties to the marriage. Secondly, with the advancement of modern medical techniques of blood test and DNA testing, now, it is easy to determine the paternity of the child. Also, the courts in India have started using these methods for determining the disputed paternity of the children.[66] Further, the law commission of India has also recommended to include blood test and DNA testing methods as proof of paternity in addition to the non-access rule under Section 112.[67]

2. Nikah Halala: The practice of nikah halala is necessary in case of triple talaq and talaq-e-hasan. Since, the practice of triple talaq has been declared void and illegal by the Muslim Women (Protection of Rights on Marriage) Act, 2019, the Muslim women would be considered as a legally wedded wife, and would not be required to undergo the formality of nikah halala. As far as, the practice of nikah halala in the case of talaq-e-hasan is concerned, the practice restricts a Muslim divorced woman's right to marry her former husband, thereby, restricting her right to choose her life partner. It is, not only, against her human right to marry and found a family, as enshrined under Article 16(1) of Convention on Elimination of all forms of Discrimination against Women, but also, against her right to autonomy and dignity as envisaged by the Constitution under Article 19 and 21.[68] In *Navtej Singh Johar v. Union of India*,[69] the court observed;

   "[A]utonomy establishes identity and the said identity, in the ultimate eventuate, becomes part of dignity in an individual."

66 *Radhey Shyam v. Pappi*, AIR 2007 Raj 42, *Vandana Kumari v. P. Praveen Kumar*, AIR 2007 AP 17 (India).

67 The Law Commission of India in 185th Report on the Indian Evidence Act, 1972 (March, 2003).

68 *Supra* note 15.

69 AIR 2018 SC 4321 (India).

Thus, the practice is against her right to autonomy, which in turn is against her dignity. Under Article 51-A (1) (e), the state is duty-bound to renounce practices that are derogatory to the dignity of the women. Therefore, it is recommended to abolish the practice of nikah halala by making an appropriate law.

3. On remarriage, the mother loses the right to custody of minor: Although, the paramount consideration, in custody cases, is the best interest of minor children, but the remarriage of the Muslim mother should not be a ground for depriving her of her parental right of custody. She should be treated as a normal and independent woman. This practice restricts a mother's right to marry on divorce, guaranteed by the Constitution, by creating a threat of losing the custody of her children. Further, it is also violative of her human right to equality, in matters relating to marriage and family, as enshrined under Article 16(1)(d) of CEDAW, which provides for the same rights and responsibilities of men and women in matters relating to custody of children, irrespective of their marital status. The law commission of India has also highlighted the need for reconsideration of this rule as it would easily create a bias against the mother.[70] Besides, Iran, being a Muslim country, has also abolished this rule by expressly codifying that a mother does not forfeit her right to custody after remarriage. Therefore, it is recommended to reconsider this rule.

70 The Law Commission in Consultation Paper on Reform of Family law (August 31, 2018) at page 78 para 3.50.

INDIA'S CALL ON SCIENTIFIC CRIMINAL INVESTIGATIONS

B. Yamuna Saraswathy* and R.B. Rishabh**

Abstract

"Most Indian investigators work towards getting a confession rather than investigating the case. It is the easiest way to get a conviction in court – and the laziest."

Avirook Sen, Aarushi

Law is adaptive in nature so as to keep in nexus with the transforming social order. Law is being interpreted by the judiciary and so the judiciary must be kept updated with the various advancements occurring in the society. Gone were those days where criminals had no access to the technology and criminals today are the ones who take up sophisticated and contemporary means to commit crimes. This shows that there is a need to crack them down using equivalent scientific/ psychological tests. The constitutionality of the scientific tests like polygraph, P-300, narco analysis are in question because during the recent times these tests have been gaining judicial acceptances, which it did not previously receive. So now there is an exigency for serious consideration regarding its constitutional validity from the perspective of human rights.

Keywords*:* Article 20(3), Criminal investigation, P-300, Polygraph, Narcoanalysis.

INTRODUCTION

The basis of law is justice. The criminal law has got a major role to play in every civilized society in the world. The presence of criminal law provision can be seen among the citizens of the state in his day-to-day living. Still, the Indian criminal law is not found to be up to the mark. The investigation by the police forms the foundation of the Indian criminal justice system. The duties of the police are to investigate the matter, ascertain the facts, compile

* Student, School of Excellence in Law, Tamil Nadu Dr. Ambedkar Law University, Chennai
** Student, School of Excellence in Law, Tamil Nadu Dr. Ambedkar Law University, Chennai.

their conclusions and then present the whole to the court to figure out whether the person accused is guilty or not. Nowadays getting bail for a criminal case is not regarded as a big deal. So there are a number of cases wherein the person accused has been acquitted due to lack of evidence and the person who had suffered the trauma is left helpless. The trial judges do not hold an upper hand in the criminal justice system because they have to only rely on the conclusions or materials presented before them by the police. Therefore if the investigation methods applied are not up to the standards, if the witnesses become pugnacious, if there are no enough evidence or zero evidence, the judge presiding the trial is left with no other option other than to give the person accused the 'benefit of doubt' because law generally requires proof and confirmation beyond reasonable doubt. In India, the main problem is that there are many to defend the rights of the accused but no one to think about the victim. Criminals nowadays have been incorporating or applying hi-fi and sophisticated techniques to commit the crimes. The police often resort to third degree methods during police investigations to extort the truth from the criminals. India of all countries being a civilized society and governed by the principles of rule of law cannot permit such methods. The principle which India has been following is that 'evil cannot be destroyed by another evil' in any case. Therefore, all the methods adopted by the police in interrogations must be well within the permissible limit provided in the legal frameworks. Thus, the investigators nowadays seek the help of scientific evidence as it combines both science and law. They incorporate a number of scientific techniques like polygraph, brain mapping and narco analysis etc. in order to extract the truth from criminals in extraordinary cases. The fundamental principle in applying all these scientific methods is to promote the rule of fair play, unbiased approach and use these scientific evidences both by investigators and forensic experts.

Crime detection has turned to be easier due to the application of forensic science. Forensic science is regarded as a powerful soldier in the army of justice administration. When an investigation seems to be weak, forensic science acts as a strengthening agent of such investigation. The needs of forensic science have arrived because criminals are clever enough these days that they hardly leave any evidence to catch them. In *Som Prakash v State of Delhi*[1], polygraph, P-300 and narco analysis were stated to be the rebellious tools of forensic science but prove to be very beneficial in criminal investigation.

1 *Som Prakash v. State of Delhi*, AIR 1974 SC 983 (India).

Scientific Tests and their Validity:

P-300

P-300, which is also known as brain mapping is used as an interrogative method on criminals in the recent era. Here the subject is made to wear a headband with sensors and electrodes with the help of a physician mostly a neurosurgeon. These electrodes help in detecting the Multifaceted Electroencephalographic Response (MERMER) emitted from the subject's brain. MERMER is a mere brain wave emitted by the subject when he recognizes something said or shown to him in his memory. Hence it is clear that the electrodes will not detect any MERMER from subjects who does not have any related memory i.e., innocent persons. These brain waves are recorded with the help of EEG-ERP Neuro Scan Recording system which will later be studied and analysed by a neurosurgeon. The results thus arrived will help the investigation process and in collection of any evidence. It is crucial to note that this test does not involve any oral response from the subject.

Polygraph

Polygraph or a lie detector uses the psychological variations in the subject's body to analyse him. In this method, the psychiatrist attaches various probes on the subject's body which detects the variations in his heartbeat, blood pressure, pulse rate, skin conductance etc. It is believed that when a person lies he becomes nervous and his heartbeat, pulse rate increases as a result. For this purpose, a base line of the subject's psychological character is determined and then the interrogative questions are asked. So, any variation from such baseline will lead to the fact that the subject has lied in the specific interrogation. It is notable that this test does not involve any direct invasion in the subject's body.

Narco Analysis

Narco analysis also known as truth serum is one of the controversial scientific investigation methods. In this method, 3 grams of sodium pentothal is mixed with 3000 milliliters of distilled water and then administered in the subject's body along with 10% of dextnose for a period of three hours with the help of anesthetist. In medical terms, the drug injected exposes the neural membranes in brain to chloride ions which results in inhibition of the subject. This mixture kind of hypnotises the subject and makes him attain a stage where he cannot repress any of his emotions or facts while the interrogation is made. In layman language it can be said that the subject attains a drunken stage because of this sedative drug. Hence it is easy for the officers to extract truth from the subject which will help their investigation process. As said earlier, it is one of the controversial methods because

it involves direct invasion of drug in the subject's body. Any misstep in the mixture or dose level will lead the subject to comatose stage or even death. This can be said as a sophisticated barbaric method used by the investigation officers.

Constitutional Validity

During the past few years, the investigation methods have seen a shift from third degree interrogations to scientific methods. The officers nowadays are keen in extracting the truth using their wits rather than their fists. But the question here is, won't it amount to self-incrimination if the statement is made by the subject himself with the help of scientific investigations? This attracts the question of legal validity under Article 20(3) of The Constitution of India[2]. The article runs as follows: "No person accused of any offence shall be compelled to be a witness against himself". Thus, any statement made under these scientific tests will be considered as testimonials and not taken as an evidence as it attracts bar under Art. 20 (3). It is also significant to note that mostly every country around the world entitles its citizens the right to remain silent. Similarly, in India the witnesses and accused are protected by the law from self-incrimination. This part analyses the extent of legal validity of such scientific tests.

Polygraph and P-300 uses only probes and electrodes and does not involve any direct invasion. The investigation is made only with the help of analysis given by the doctors after getting the psychological reports of the patient. In these tests, the subject doesn't even give any oral responses while the investigation is made. Thus, there are no statements made by the accused and what is not said cannot be considered as a statement. The bar on self-incrimination is attracted only when there is a statement. Therefore, there is no reason to stop using this kind of scientific methods. The courts in India have acknowledged polygraph and P-300 as constitutionally valid scientific tests and the reports or analysis made from such tests can be used as evidence before the court of law.

As of narco analysis, it is still controversial as it involves administration of drugs into the subject's body. In this test the mental state of the subject is compromised with the help of sedatives as discussed above. The important question that should be considered in narco analysis is the consent of the suspect. Under Indian Laws, every human has the right to presumption of innocence and therefore forcing to undergo the narco analysis test would result in intrusion of privacy. Furthermore, while considering the legal validity of narco analysis, it is pertinent to take into account that an oral statement is made by

2 INDIAN CONST. art. 20(3).

the subject during the test which in the end might result in self-incrimination. Some high courts in India have upheld the validity scientific tests including narco analysis in cases like *Ramchandra Reddy v. State of Maharshtra*[3], *State of Bombay v. Kathi Kalu Oghad*[4] and *Nandhini Satpathy v. P.L. Dani & Anr*[5]. The constitutional validity was given in these cases because of the view that the legal permission got before the test is conducted does not amount to self-incrimination. However, the recent judgment of three judge bench consisting of the then Chief Justice K.J. Balakrishnan, Justice R.V Ravindranan and J.M. Panchal of the supreme court of India held narco analysis as unconstitutional and violative of Article 20(3) in the case *Smt. Selvi and Others v State of Karnataka*.[6] To that end, narco analysis is unconstitutional in India as of now. Nevertheless, it can be used for helping the investigation process and in collecting evidences.

Evidentiary Value

The Indian Evidence Act, 1872[7] regulates the confessions and admissibility of evidence before the court of law. A material or confession to become evidence must fulfill various factors and the court may either accept or reject such evidence. Section 24 to 30 of this act provides for admissibility of confession by the courts. These provisions clearly provide that any confession made in an unstable mental state or by way of inducement or threats cannot be accepted as evidence by the courts. Therefore, it is clear that any statement made by the accused during narco analysis test cannot be accepted as evidence because it is made under the inducement of narcotic drugs and the accused will not have a stable mind in such cases. This stand was taken in the *Smt. Selvi case*[8] where the Supreme Court decided narco analysis to be unconstitutional and not legally valid even if the consent of the person is attained by the authorities before such test is conducted. The narco analysis test also attracts bar under other criminal laws such as Indian Penal Code[9] and Criminal Procedural Code.[10] As per Sections 352, 323, 324, and 328 of Indian Penal Code, inflicting hurt to extort information or inducing any dangerous drugs in a person's body is a serious offence which is punishable under the court of law. This makes narco analysis a legally invalid scientific investigation method under all the criminal laws of the country. However, Section 45 of the

3 *Ramchandra Reddy v. State of Maharshtra*, Cr. L.J. July 2006 P.2401 (India).
4 *State of Bombay v. Kathi Kalu Oghad,* AIR 1961 SC 1808 (India).
5 *Nandhini Satpathy v. P.L. Dani & Anr,* AIR 1978 SC 1025 at 1032 (India).
6 *Smt. Selvi and Others v. State of Karnataka,* AIR 2010 SC 1974 (India).
7 The Indian Evidence Act, 1872 (India).
8 *Supra* note 7.
9 The Indian Penal Code, ACT NO. 45 OF 1860 (India).
10 The Criminal Procedural Code, ACT NO. 2 OF 1974 (India).

Evidence Act allows expert opinion in certain cases which makes the reports of scientific investigation methods such as polygraph and brain mapping a valid one.

Highlights and Challenges of Scientific Investigations

The polygraph and brain mapping tests are similar in some ways. Both tests need a well-trained doctor and equipments or machines to analyse the activities of the subjects. The polygraph uses probes on the subject's body whereas the brain mapping uses electrodes on the subject's brain. But in the end both the tests analyse the psychological behavior of the subject only. The highlights of these tests are that they do not involve any threat to the subject's health as there is no direct invasion in the body. Furthermore, the reports can be used as evidence before the court of law as it is constitutionally valid. Nevertheless, these tests are not free from shortcomings. The reliability of these tests still remains to be a questionable one. A person can easily deceive the polygraph test by knowing the tactics of the interrogations made. The person undergoing the test shall remain calm by having a stable mind which will not affect his polygraph report. On the other hand, an innocent may become a victim of the polygraph test due to his apprehension towards such test which in turn will give a false report. As in the case of brain mapping, it involves a huge amount of money to conduct these tests and the reading of such reports is not always easy which might end in misreading by the doctors.

In this ever growing scientific age, the investigators opt to use narco analysis rather than polygraph or brain mapping as it highly helps in the interrogation process even though it cannot be produced as evidence before the court of law. The drawbacks of narco analysis are lot more than that of the other tests. Firstly, this test has a high probability of affecting the subject's health. Any wrong mixture of the sedative can lead the person to comatose stage or even death. It is to be noted that the level of dosage depends on the subject's health conditions and varies from person to person. Thus, there is a high degree of going wrong in the mixture. Furthermore, it is not worthy to put a person's life at stake for a scientific test which cannot even be used as evidence in courts. Secondly, it is not proven that the statements made by the subject under the test are factual and truth. This is because; when a person is at inhibition stage it is not certain that he only speaks the truth, he can also talk about any fantasy of his own regarding the questions asked. Hence the reliability of narco analysis test is considerably low. Finally, even though narco analysis is a sophisticated scientific test, it is still being considered a form of third degree torture in psychological aspect.

Conclusion

The state governments and central authorities in India work in a correlated manner. Working in such a correlated manner has enhanced the investigative capabilities of police department. It is evident that in India there is a very low criminal conviction rate[11] and the situation needs to be checked on. These scientific techniques would be very helpful in bringing out the truths from the criminal thereby increasing the conviction rate. In *Aarushi murder case*[12], *Nithari killings case*[13], *Telgi scam*[14] and *Mumbai Bomb blast case*[15], the scientific criminal investigation methods were used which hastened the justice. Various courts in India have given judgments favoring these tests. Nowadays, as we already mentioned that the criminals have been using science and technology in performing their criminal offences has now compelled the drafters to rethink on the part of criminal justice to seek the help of scientific community in helping the investigators and the courts. To add on, the provisions in the evidence act which are more than a hundred years old are now found to be inadequate in today's rapidly growing science and technological world. Mostly these tests have been carried out only in high profile cases. Slow and steadily these scientific tools of investigation can become a legal alternative to the third degree physical torture while in police custody. In *D.K. Basu v. State of West Bengal*[16] the Supreme Court has rightly held that there is an urgent need to develop scientific tools of investigations and interrogations because torturing the accused by using third degree methods is nothing other than a huge hit at the principles of rule of law.

Suggestions

1. A clear policy must be enacted by the parliament regarding the scientific investigation methods inculcating the standards to be followed while conducting the tests by making them non violative of the fundamental rights guaranteed by law.

11 Arun Bothra, *Why is our conviction rate so low?,* THE NEW INDIAN EXPRESS (Feb.21, 2019, 10:04 AM), https://www.newindianexpress.com/opinions/2019/feb/21/why-is-our-conviction-rate-so-low-1941680.html.

12 *Aarushi Talwar & Anr. v. CBI*, (2013) 82 ACC 303 (India).

13 *Surendra Koli v. State of U.P,* (2011) 4 SCC 80 (India).

14 Anupama Katakam, *The Truth Serum Trial,* FRONTLINE (Mar.12, 2004, 10:10AM), https://www.google.co.in/amp/s/frontline.thehindu.com/the-nation/article30221420.ece/amp/.

15 *Ruling on the 1993 Mumbai bomb blasts, Supreme Court sends a strong anti-terror message*, TOI (Mar. 22, 2013, 11:00AM), http://articles.timesofindia.indiatimes.com/2013-03-22/edit-page/37935918_1_blasts-case-bomb-blasts-tada-court.

16 *D.K. Basu v. State of West Bengal,* AIR 1997 SC 610 (India).

2. In this changing world, development and advances in science and technology must be adopted by the law so as to ensure fair play with the criminals who have started using developed crime techniques and thereby serve justice.

3. With lower criminal conviction rate in developing countries like India, the scientific investigation methods should be adopted for the greater good because the public interest prevails over the individual rights and interests.

4. The legislations such as Indian Evidence Act and Criminal Procedural Code (CrPC) must be amended for providing evidentiary value for these scientific criminal investigations.

5. Article 20(3) of the Constitution of India must be amended to provide legal validity for these scientific criminal investigations at least in high profile cases.

COPYRIGHT IN EBOOKS: A TUSSLE BETWEEN DRM TECHNOLOGY AND PRINCIPLES OF COPYRIGHT LAW

Ananya Jain*

Abstract

Market of eBooks in India is expanding and people have failed to take note of the copyright issues that it brings for authors and the publishers, due to the ease of copying and distributing work over the internet involving negligible time and cost. The situation has compelled Copyright owners in digital sphere to use technology and software to restrict the rights of purchaser of an eBook. This new technology, called Digital Rights Management (DRM) brings with it a protective environment for the Copyright owner but at the same time, curtails certain rights which are conferred on the consumer by the Copyright Law, in order to ensure a balance between interests of the Copyright owner and the public at large. This paper argues against the fundamentalist view that people have taken of the DRM technology who see it as a bane to Copyright Law effecting various well settled principles of First Sale and Fair Use. Present paper suggests some technological and policy changes in the DRM technology to find a middle path which provides the opportunity to apply these principles in the digital environment while appreciating the challenges faced by the Copyright owners in protecting their material online and that the principle laid down for the physical work cannot be applied on as it is basis for the digital world.

Keywords: Copyright, eBooks, Digital Rights Management, Doctrine of Fair Use, Doctrine of First Sale.

INTRODUCTION

If anyone wants to buy a latest bestseller book in any genre, the person has various options as to how s/he wants to procure the book. Either the person can buy a physical copy of the book from a bookstore, can order a copy online or can opt to buy an eBook that s/he can

* Student, Symbiosis Law School, Pune.

read on any electronic device like kindle, tablets or phones. Technology of eBooks in lay man's terms refers to the electronic version of a book that can be read on a variety of electronic devices.[1] This technological advancement has brought about a lot of advantages for the consumers, making the book available to a large number of people spread over a large geographical area at low cost and in a more efficient manner. This wide reach has also facilitated the author and the publisher to reap more benefit from royalties and sales respectively, reducing the high cost of physically printing each copy of the book. The market for eBooks in India is believed to make a great potential and is currently valued at US$ 221 million in 2020 and is expected to grow at a rate of 8.8% and reach US$ 295 million by 2024.[2]

However, emergence of digital technologies has posed a great challenge to the authors and publishers to protect their copyright in books published in digital formats or as eBooks from the possibility of an individual to copy and manipulate the work. Traditionally, copyright infringement dealt with the physical imitation of the copyrighted work, and the unauthorized sale and distribution of the copyrighted work. The new technologies have brought with them, new and easier ways of infringing copyright in digital work that might have a greater impact on the author owing to its faster and wider reach.[3] Such social, economic and technological challenges require legal responses and the Copyright Act is no exception to the general rule. One of the legislative response to the issue was the introduction of Section 65A and 65B to the Copyright Act, 1957[4] (herein after referred to as 'the Act') vide the Copyright (Amendment) Act, 2012[5] which lays down liability for any person who circumvents a technological barrier used to protect copyright in digital works.

Present paper presents a viewpoint on the software of Digital Rights Management (DRM) which is used to protect copyrighted material online and detect copyright infringements. The paper would further analyze the threats posed by the application of DRM technology on various well settled Doctrines of Copyright Law like the Doctrine of First Sale and Fair Use and how certain policy and technological changes can be used under the current system to ensure that the purpose of the Copyright Law i.e. to ensure a balance between the rights conferred on a Copyright holder to be adequately rewarded and the right of consumers to access information by ensuring free flow of ideas and information, is always upheld.

1 *eBook*, Cambridge Dictionary, (May 29, 2020, 12:05 PM), https://dictionary.cambridge.org/dictionary/english/ebook.

2 *eBooks,* Statista, (May 30, 2020, 2:13 PM), https://www.statista.com/outlook/213/119/ebooks/india.

3 Siriginidi Subba Rao, *IPR in the ensuing global digital economy,* 19 Library HiTech, 179, 182 (2001).

4 The Copyright Act, 1957, No. 14, Act of Parliament, 1957 (India).

5 The Copyright (Amendment) Act, 2012, No. 27, Act of Parliament, 2012 (India).

Ownership v. License Dichotomy

It is not uncommon for a person 'buying' an eBook online to believe that s/he is the owner of the eBook. Therefore, the relevant question that arises is that, whether the purchaser really is the owner of the eBook purchased, or is s/he really only a licensee. The truth is that the eBook publishers merely license the purchaser the right to access the book and there is no transfer of actual title.[6] License is the permission granted by the Copyright owner, of revocable nature, giving the right to do an act which would otherwise be considered as unlawful.[7]

In the landmark case of *Vernor Vs. Autodesk*[8], the US 9th Circuit District Court, held the user of a software to be a licensee and not an owner as the title was retained by the company and restrictions were put on their transfer and usage. The analogy can be used in respect on eBooks as well, as even the terms and conditions of the so called 'sale' of eBook does not transfer the title of the eBook and puts complete restriction on its transfer and distribution. One of the clauses from the Terms of Use for the Amazon Kindle India, which is the most used eBooks platform in India, is reproduced below:

"**Use of Kindle Content**: ....Kindle Content is licensed, not sold, to you by the Content Provider.

Limitations: Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party...."[9]

Hence, it can be said that an eBook is only licensed to the so called "purchaser", and limited rights to access the book is conferred under the license unlike the sale of a physical copy of a book which transfers the title and confers various other rights to the consumer.

Digital Rights Management (DRM)

Digital Rights Management, usually shortened to DRM refers to a system established for the purpose of protecting copyrighted material in electronic media and is used to guide the proper utilization of the digital content. It helps in trading, tracking and monitoring the

6 Lukas Feiler, *Birth of the First-Download Doctrine—The Application of the First-Sale Doctrine to Internet Downloads Under EU and US Copyright Law,* 17 Stanford-Vienna TTLF Working Papers, 2013, 16-18.

7 Henry Campbell Black, Black's Law Dictionary 1059 (10th ed. 2014).

8 Vernor v. Autodesk, 621 F.3d 1102, 1110–11 (2010).

9 *Amazon.in Kindle Terms of Use*, Amazon (May 30, 2020, 1:00 PM) https://www.amazon.in/gp/help/customer/display.html?nodeId=200771440.

digital data in order to prevent any copyright infringement and to catch hold of such cases.[10] Section 14[11] of the Act confers certain exclusive rights on the copyright holder in a literary work including the right to reproduce and distribute the work to public. DRM acts as an additional protection for the intellectual property by blocking third parties from doing any act which the copyright holder has the exclusive right to do.

It is easier to understand the working a DRM through an example. Suppose an author decides to publish his book online and launch it as an eBooks, the first layer of protection of the work is given by the Copyright Act, which protects the work from any infringement. Another layer of protection is provided by the new regime of DRM, through which the work can be assumed to be locked and can only be accessed by a person who is authorized and has a key to the lock. This extra protection becomes of prime interest of any eBook publisher due to the infringement becoming much easier and very hard to control when its starts to spread in the electronic world.[12]

However, with the pace at which technical advancement is happening in the world, it won't be long before people would find a way to circumvent the protection of DRM and start infringing copyrighted work without getting caught. Therefore, in order to protect the sanctity of DRM or any other software designed to protect copyrighted work, the Indian Legislature introduced sections 65A and 65B into the Copyright Act, making it unlawful to circumvent such technical protections, through Copyright Amendment Act, 2012. An action was taken even though India is not a party to the WIPO Internet Treaties, namely, WIPO Copyright Treaty[13] (WCT) and WIPO Performers and Phonograms Treaty[14] (WPPT), which makes it obligatory for contracting parties to lay down an adequate and effective legal solution against a person involved in unauthorized tampering of the rights management system being used by Copyright owner to protect his Intellectual Property.

Section 65A clause (1)[15] of the Act lays down penalty for anyone who circumvents the applied technological measure, used to protect rights of the copyright holders conferred on

10 Gulshan K. Sachdeva, *A Digital Right Management and IPR in the Information Age*, 1 International Journal of Librarianship and Administration, 13, 14-16 (2010).

11 The Copyright Act, Section 14 (1957) (India).

12 Frederick W. Dingledy, *What is Digital Rights Management?*, William & Mary Law School Scholarship Repository (2016), (May 30, 2020, 01:00PM), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1121&context=libpubs.

13 World Intellectual Property Office Copyright Treaty on Protection of works and the rights of the authors in digital environment, Dec. 20, 1996.

14 World Intellectual Property Office Performers and Phonograms Treaty on the rights of performers and producers of phonogram in digital environment, Dec. 20, 1996.

15 The Copyright Act, Section 65A (2012).

them by the Act, with the aim of copyright infringement, of imprisonment that could be extended to two years, along with fine. However, clause (2) lays down various exceptions to the above penal measure.

Section 65B[16] of the Act makes any person who tampers with rights management information without consent or sells, distributes or communicates to public, copies of the electronic work having knowledge about the rights management information being tampered with, shall be liable for imprisonment that could be extended to two years, along with fine.

Therefore, DRM plays a primary role in ensuring that authors are properly compensated for their work and rights of the authors are very well protected and further DRM technology is protected through statutory law. However, technology of DRM, as seen in its current form, does not complement the purpose of Copyright Law of maintaining a balance between the rights of Copyright holder and the consumers.[17] Though protecting rights of the author, it puts unregulated constraint on the consumer with no freedom of dealing with the books as per his wish, thereby affecting the free flow of information. Besides posing threats to Privacy of the users and making the use of eBooks complicated, the system grossly violates two very well settled principles of Copyright Law i.e. Doctrine of First Sale and Doctrine of Fair Use.

Doctrine of First Sale

Copyright Act confers certain exclusive rights on the Copyright holder by virtue of section 14 of the Act. Such exclusive right in case of literary work includes the right to reproduce the work in any material form, to issue copies to public, to make translation and to communicate the work to public. One of the most important right is the right to distribute copyrighted work to public or to authorize such distribution. However, the right of distribution is only related to copies that are not already in circulation by virtue of section 14(a)(ii) of the Act[18]. This means that the Copyright holder has exclusive right to regulate first sale of the copy of a book and once such copy is sold to a purchaser legally, the Copyright holder loses the right to regulate subsequent use and sale of the copy. This is known as the Doctrine of First Sale. This Doctrine acts as a favorable defence in cases of copyright infringement as it makes the Copyright holder incapable of exerting control over copies that are already sold to a purchaser. The Doctrine was first applied by the US Supreme Court in the case of

16 The Copyright Act, Section 65B (2012).

17 Divyesh Pratap, *Is 'Fair Use' of Copyrighted Work a thing of the past?,* Lexpress (Aug 30, 2015,08:00AM), http://www.lexpress.in/law-development/digital-rights-management-provisions-and-indian-copyright-law.

18 The Copyright Act, Section 14(a)(ii) (1957).

Bobbs-Merrill Co. v. Straus[19], where it was categorically laid down that one who has sold a copyrighted article, loses all the rights to control subsequent sale and hence, the publisher has no right to control the price at which a subsequent retailer sells the book.

It is important to understand that the right granted under the Doctrine is to resell the copy of the work and not to make unauthorized copies. The purchaser only has the right to resell the legally obtained genuine copy of the copyrighted work and the purchaser is not entitled to make or distribute any illegitimate copies of the work. This means that the purchaser cannot buy one copy of the eBook and then go on to duplicate it to make 50 illegal copies of it and then seek protection under the Doctrine. The Doctrine only confers a right to resell the one copy which was legally obtained.

The issues that arises in digital sphere brings up the question of whether the Doctrine is applicable to digital materials including eBooks and specially in case where there is a mere license to use the copyrighted material. In respect to the first question i.e. whether the Doctrine of First Sale can be applied in cases of digital products, it can be said that under the current system, most ePublishers use DRM technology which restricts copying and transfer of the work and this clearly acts as a threat to the Doctrine as it is restricts purchasers from further utilizing the copyrighted material as per his own wishes and the Copyright holder retains full control over the eBook.[20]

There is no jurisprudence on this issue in India and the same has not yet been discussed by Indian judiciary. Therefore, one has to analyze judicial decisions in other jurisdictions to bring in more clarity. The US District Court of Southern District of New York, in the case of *Capitol Records, LLC v. ReDigi Inc*.[21], held that consumers does not have any right to resell the digital music owned by them. The Defendant ReDigi provided a platform to resell digital music that was purchased from iTunes after a software called Media Manager had authenticated the file. After verification, the file would be uploaded on remote Cloud Locker, from where anyone could purchase the music. Once purchased the music file could no longer be accessed by the first purchaser. The Court denied the defence of First sale Doctrine and held it be a copyright infringement as the user was creating a copy and uploading it on the cloud server. The Court further held that the Doctrine is applicable only to material items that the Copyright holder has put into the stream of commerce. The same line of reasoning can be applied in respect of eBooks as well, to conclude that in the present scenario, law does not facilitate the applicability of First Sale Doctrine to eBooks.

19 *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

20 Joseph Gratz, *Digital Book Distribution: The End of the First-Sale Doctrine?*, LANDSLIDE (2013).

21 *Capitol Records, LLC v. ReDigi* Inc., 934 F. Supp. 2d 640, 655 (2013).

With respect to the second question i.e. whether Doctrine of First Sale can be applied to licensed products, it is important to analyse the judgement of United States Court of Appeals for the Ninth Circuit, in *Vernor v. Autodesk, Inc.*[22], wherein the Court held that the Doctrine does not extend to licensees of the digital copy but only to legal owners of the copyrighted material. Further, licensee is governed and restricted by provisions of the license agreement. Therefore, in case of license where the company retains the title, and only confers a non-exclusive license with restriction on copying and distributing, no right to resell by the way of First Sale Doctrine can be claimed. Therefore, it is clear that in the current judicial scenario, the Doctrine of First Sale does not apply to digital products and eBooks.[23]

The lack of any judicial decision or any legislative intent to extent the Doctrine of First Sale to digital products actually brings in a question of whether is it not really feasible to apply the historic well settled principles of Copyright Law in the current situation or has it really become obsolete owing to the fast paced technologically changing environment. One of the most evident fall back for Digital First sale Doctrine would be loss of control that the Copyright holder can assert over digital content, which are at a high risk of being easily and quickly exchanged between people as compared to tangible products. This would not only give the consumers an easy chance of piracy but would have a huge impact on the sale of eBooks as people can purchase a copy of the eBook through the secondary market place at cheaper cost with no difference in quality. Therefore, Digital First Sale Doctrine may have an adverse effect on the authors and publishers of eBooks due to loss of revenue and high risk of piracy.[24]

Therefore, the publishers of eBooks are compelled to use techniques like DRM and licensing in order to protect their copyrighted work and hence, granting Digital First Sale rights would not be a great idea under the present circumstances. However, the author is not in favor of completely separating the Doctrine from digital products and suggests designing of the First Sale Doctrine in a way to ensure balance between rights of the Copyright holder and that of the consumers to alienate their property.

The author proposes a system that could be called “Digital Transfer Doctrine”, whereby the eBook publishers are bound by law to modify their licensing agreement to permit licensees to resell the eBook license, in such a way that a part of resale price has to go to

22 Vernor v. Autodesk, 621 F.3d 1102, 1110–11 (2010).

23 Tanya Aplin, Copyright Law in the Digital Society (1st ed., 2005).

24 Eurie Hayes, *Digital First Sale: Friend or Foe?,* 22 Cardozo Arts & Ent. L.J. 853, 854 (2005).

the Copyright owner.[25] Royalties on sale in secondary digital market tries to maintain a balance between the interest of Copyright owner and user, while appreciating the difference between physical books and eBooks. Allowing resale of digital books brings in a unique risk non-degrading digital files, connected with a vast and boundaryless distribution system, and hence, the benefit sharing on resale would help the Copyright owner offset some risks posed by this new system.[26]

Further, stakeholders of an eBook can utilize the technology called 'Rights Locker Architecture', which would enable the publisher to store the content on a remote server, rather than it being stored locally on each device. When a consumer wants to access the eBook, it shall be directly done from the server, after verifying the authentication of the request.[27] This would help facilitate the application of the Doctrine by preventing the creation of any copy of the work. When any consumer decides to resell his license, access of the consumer to the eBooks from the server would be cancelled and would be granted to purchaser in the secondary market, thereby preventing any chances of a duplicate copy still remaining with the first purchaser as no copy was ever stored locally with the consumer and s/he was only granted access through the server.

It is not feasible to apply the Doctrine of First Sale on as it is bases to eBooks as it might ignore some of the valid risks that Copyright owner might face. On the other hand, the complete non-application of the given Doctrine would give unrestricted control to the Copyright owner and hamper rights of the consumer to alienate their property and be entitled to free flow of information. Therefore, no change in the statuary law is required as it already recognizes the Doctrine of First Sale. However, a detailed guideline by the Government allowing royalties for resale as well would indeed serve the purpose of Copyright Law of maintaining a clear balance.

Doctrine of Fair Use

Copyright Act as also discussed earlier, by virtue of section 14 confers certain exclusive rights on the Copyright owner, including the right to distribute or make the work available to public. Any person who violates any of these rights can be made liable for

25 Kristin Cobb, *The Implications of Licensing Agreements and the First Sale Doctrine on U.S. And EU Secondary Markets for Digital Goods*, 24 Duke Journal of Comparative & International Law 529, 536-542 (2014).

26 Sarah Reis, *Toward A "Digital Transfer Doctrine"? The First Sale Doctrine In The Digital Era*, 109 Northwestern University Law Review, 174, 194-197 (2015).

27 Tomas Sander, *Golden Times for Digital Rights Management?,* 5 Financial Cryptography, 64, 68-71 (2002).

copyright infringement. However, these rights are not absolute in the sense that under certain circumstances a person doing an act which would otherwise amount to copyright infringement cannot be held liable for the same as it falls under the scope of 'Fair Use'. The Doctrine of Fair Use is laid down under section 52 of the Act[28], which states certain acts that are exempted from the purview of copyright infringement. Under the Copyright Act, Fair Use in respect of literary work includes use of the copyrighted work for private use including use for research or for purpose of review or criticism or to report it as news. Purpose of the Doctrine is to encourage creation of new works and to develop knowledge. This is based on the belief that if copyright is absolute and unrestricted, adverse economic incentives would be created.[29]

In the case of *Chancellor Masters and Scholars of the University of Oxford v Narendra Publishing House and Ors.*[30], the Delhi High Court has very rightly summarized the Doctrine of Fair Use. The Court laid down that the very purpose behind the Doctrine is to maintain a balance between the rights conferred on the Copyright owner by the law and the opposing interest of enriching public domain. Therefore, it legitimizes reproduction of copyrighted work for private use and not for making commercial gains. Doctrine aims at promoting creativity by enriching the public domain, however, at the same time it condemns and prohibits blatant copying of protected work. However, digital market has brought about new challenges to the application of the Doctrine. Publishing an eBooks brings with it a certain set of challenges not faced by a publisher in the physical world and hence, the application of the traditionally Doctrine of fair is on as it is basis would not be the greatest idea.[31]The application of the Doctrine is dependent on the use of the copyrighted material for private versus public use. Such a distinction has been eroded in the digital environment where an individual has the capability to put the work on the internet to reach people across the globe who can use the same and utilize the work for private use. Therefore, in such cases even though the copy of the work is used only for private use of the third party, its availability over the internet to a large number of people may work in derogation of the interests of the Copyright owners.[32] Therefore, publishers of eBooks are compelled to use

28 The Copyright Act, Section 52 (1957).

29 Sangharsh Pandey, *Changing Mechanisms in Copyright Ontology: Digital Rights Management,* Manupatra, (June 1, 2020, 10:00 AM) http://www.manupatra.com/roundup/328/Articles/digital%20rights%20management.pdf.

30 *University of Oxford v Narendra Publishing House and Ors.*, CS(OS) 1656/2005 (India).

31 Shih Ray Ku R, *The creative destruction of copyright: Napster and the new economics of digital technology*, 69, The University of Chicago Law Review, 263, 275-276 (2002).

32 Megha Nagpal, *Copyright Protection through Digital Rights Management in India: A Non-Essential Imposition,* 22 Journal of Intellectual Property Rights 224, 228 (2017).

technologies like DRM in order to restrict the unauthorized usage which in turn also has the effect of restricting certain activities that would fall under the ambit of Fair Use and hence, the digital work brings in its own set of new issues into the world of Copyright.

DRM technologies permits only certain kind of access to the copyrighted material and forbids all other, thereby having the effect of preventing use of the work in a way that would otherwise would had come under the purview of Fair Use. Therefore, DRM technology is in direct derogation with the well settled principle of Fair Use, giving the Copyright holders in digital environment an upper hand over their work and hampering the rights of fair users, who might now become liable for copyright infringement of the digital work as any kind of Fair Use is also prohibited[33]. However, the author is of the belief that certain tweaking of the DRM technology might help it foster the Doctrine of Fair Use rather than hamper it. The author proposes a system where in a person can utilize copyrighted material for any purpose falling under the Fair Use category, only after an authorization through remote or local means has been granted through the DRM, which would be further monitored by a Rights Expression Language.

The author proposes a hybrid approach to the authorization process involving two types of authorization for different situation, in case a person wants to make Fair Use of the copyrighted work. Through this approach a person may seek authorization locally, for a set of preauthorized uses which clearly fall under the scope of section 52 of the Act, and for permissions that are not preauthorized, the person would have to seek the authorization through a remote process, showing adequate proofs in order to receive a digital key necessary to use the material beyond the scope of preauthorization. Remote authorization would help curb the issue created by the ambiguity of the scope of Fair Use and try to accommodate uses that do not directly fall under the scope of the Doctrine.[34]

With the help of a built in authorization mechanism combined with the subjective authorization though remote process, the Copyright holder would be able to provide a reasonable opportunity to the public to make Fair Use of the copyrighted material. As there would be no incentive for the Copyright holder to introduce such a mechanism, Parliament has to make the required amendments in the Copyright Law in order to obligate the same.

Once an authorization has been granted, the person to whom the authorization has been given will have the capability of using the material beyond the scope of the license and

33 James T C, *Indian Copyright Law and Digital Technologies*, 7 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 423, 430-434 (2002).

34 Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use,* 20 HARVARD JOURNAL OF LAW & TECHNOLOGY, 50, 81-84 (2006).

the DRM restriction are removed in respect of the purpose for which the authorization was availed. This makes the copyrighted material again susceptible to easy copying and distribution. Therefore, the stakeholders of an eBook have to further lay down an another layer of technological protection called "Rights Expression Language" (REL). It is used to lay down clear set of rules for the usage of the copyrighted material once the authorization is granted. Even after the authorization to use the copyrighted material is granted, REL ensures that user cannot use the material in whatever way s/he deems fit. The right granted to use and access the digital content may be given with certain restrictions on the time period, geographical extent of use, devices and certain other restrictions.[35] Also the number of time and the frequency at which it can be accessed can also be limited. Therefore, this would ensure that once the authorization is granted, the user does not have a blanket right to use the copyrighted material and REL can be imposed to limited such rights and monitor the activities to prevent any chances of copyright infringement.[36]

Such a mechanism is not full proof solution and might come with certain drawbacks, however, it has the capability of conferring the right of Fair Use to the public while taking into consideration the unique risks that are faced by the copyright holder in digital sphere, thus maintaining a balance between the rights of copyright holder and the public at large.

Conclusion

In the coming future, India is going to witness a steep growth in the market for digital goods including eBooks, which would bring with it a wide range of legal issues besides the technical issues as already being faced. The difficulty faced to apply well settled principles of Copyright Law is one such legal issue that needs to be addressed by the Parliament and the judiciary.

Consumers and the Copyright owners in digital work have to adapt to the new digital environment and the first step towards achieving that is through building a sense of trust in the system. eBook publisher have to be more open and transparent about their licensing policies and make the consumers well aware before persuading them to buy the eBook, that they are mere licensee of the eBooks and no title is transferred to them.

The Indian Legislature, Judiciary and also the public at large have to accept and appreciate various new issues that the digital world has brought to the copyrighted material and

35 Stefan Bechtold, *The Present and Future of Digital Rights Management,* Springer, 597, 600-605 (2003).

36 Deirdre Mulligan & Aaron Burstein, *Implementing Copyright Limitations in Rights Expression Languages,* Springer, Apr. 12,2020, 01:00AM), https://link.springer.com/chapter/10.1007/978-3-540-44993-5_9.

that application of the law drawn to protect the physical work cannot be applied without modification to suit the new environment. Copyright owners have to be more careful and vigilant than ever to protect their work online and hence, have to be given extra protection than traditionally conferred to them.

The paper argues against fundamentalist viewpoint that people have towards the new technology of DRM, who see it as a tool only capable restricting the access to the copyrighted material. Fundamentalists are against the adoption of such a technology as they view it as a bane to the Copyright world and believe that it hampers the Doctrine of First Sale and Fair Use, which are considered to be the two strong pillars of the Copyright Law which are required to ensure a balance between the rights of the Copyright holder and the interests of public. While discussing the various concerns against DRM technology, the paper shows that it is more flexible than it is commonly perceived to be and a little framework change in it can help foster the purpose of Copyright Law.

The DRM technology is believed to be the heaven for the Copyright owners and hell for consumers, however, people fail to understand the middle path between these two extreme opinions. It is difficult to think of a balanced DRM system which protect the rights of the Copyright owner and that of the society at large, but the suggestions presented in the paper show that it is not impossible. The potential of DRM to create a balance and information friendly environment is by large still unexplored by the humans. Just like all technologies, even DRM is malleable, and people shall not miss an opportunity to create a value addition design that fulfills the requirements of the well settled principles of Copyright Law while appreciating the difference in environment created in the digital world. Further, Parliament and the Judiciary is duty bound to lay down better Laws for protection against the circumvention of any such technological measures and encourage and facilitate the formation of a new system in a Copyright friendly manner.

ASSIMILATING INTERMEDIARY LIABILITY REGIMES IN COPYRIGHT INFRINGEMENT

Akanksha Badika* and Pragya Mishra**

Abstract

The concept of intermediary liability has always been a bone of contention as intermediaries at times become medium of infusing infringing content on the web. In this modern era, where circumvention becomes rampant and massive, the copyright holder loses control on its dissemination. This article will primarily focus on the evolved intermediary liability regimes which have evolved to the rescue of copyright holders and their assimilation in Indian judicial environs as these intermediaries play a pivotal role in circumvention of material all over the world. Firstly, the article would introduce the concept of intermediaries and their conditional liability in the digital world uploaded by third parties in wake of numerous judgments with a brief discussion on their accountability as per the US DMCA and EU Directives on Copyright Act. Secondly, the article would analyze the historical background and evolution of the regime in realms of copyright laws in India and other sovereigns resulting from digitization and the need to curb circumvention of infringing content being the intellectual domain of its rightful copyright holder. Subsequently, the article assesses the qualifications of an intermediary within the purview of IT Act (hereinafter, "the Act"), Indian Copyright Act and recent judgments. Thereafter, the article would explore the synergy between Indian legislative framework, combating the above mentioned in light of Intermediary Guidelines Rules, 2018 and judicial precedents highlighting how digitization has made more vigilant yet inept in harmonizing safe harbour exception to import immunity to intermediaries. Conclusively, the article would suggest the alternatives available to infer the conception with a more preferable option, minimizing the discrepancies of the present mechanism to make copyright laws inhibitory rather than following a 'take-down' approach post-infringement when the damage has already materialized.

* Student, NMIMS Kirit P. Mehta School of Law, Mumbai.
** Student, NMIMS Kirit P. Mehta School of Law, Mumbai.

Keywords: *Intermediary Liability, Red Flag Test, EU Directives on Copyright Act, US DMCA, Intermediary Guidelines Rules, 2018.*

INTRODUCTION

The principle of intermediary liability has always been a bone of contention because intermediaries often become a tool for infusing web-based infringement content. In this new age, in which circumvention is widespread and huge, the holder of copyright loses power over its dissemination. Recent judgements have held intermediaries as not liable as they come under the safe harbour provisions of Sec. 79 of the Act, others have held them liable despite safe harbour which at times is vaguely applied. Dynamism has been the epicentre of a ubiquitously contemporary world. The emergence of e-commerce and digitization has always been a boon for the society as it has provided a platform for discussion; however it has also been a bane for copyright holders, as intermediaries disseminate information at the click of a mouse.[1] In the process of such circumvention of infringing content the copyright holder gradually loses control over this dissemination, impacting the society at large as if they do not feel confident about posting content over the net, their freedom of speech and expression does get curbed. This article will primarily focus on the intermediary liability regimes which have been evolved to the rescue of copyright holders and their assimilation in Indian judicial environs as these intermediaries play a pivotal role in circumvention of material all over the world.

The word 'intermediary' in Indian context has been defined as storage, transmission, receipt of information or message or provision of any service related to information on behalf of another person and includes- telecom and network service providers, search engines, internet auction websites, internet service providers, etc.,[2] the definition has been widened to include the enumeration after the IT (Amendment) Act, 2008. In EU, the E-Commerce Directives define intermediaries as any person providing an information society service, which in turn is defined as a remunerated service at individual's request by electronic means[3],

1 R. S. Gowda, Sonakshi Banerjee, *Intermediary Liability – The Inconsistencies in the European Union Jurisprudence*, The Indian Journal of Law and Technology (Nov. 10, 2018), http://ijlt.in/index.php/2018/11/10/intermediary-liability-the-inconsistencies-in-the-european-union-jurisprudence/#_edn2. *See* Lemley MA, "*Rationalising Internet Safe Harbours*", Journal on Telecommunication and High Technology Law (2007).

2 The Information Technology Act, 2000, § 2 (w).

3 E- Commerce Directive 2000/31/EC article 2(a) & rec.17-18, cf. Directive 98/34/EC article 1(2) as amended by Directive 98/48/EC. *See* Faculty of Law, UiO, *Intermediary Liability for Copyright Infringement in the EU's Digital Single Market*, University of Oslo, (Nov. 10, 2018) https://www.duo.uio.no/bitstream/handle/10852/60876/Thesis-Intermediary-Liability-for-Copyright-Infringement-in-the-

Recital 18 further clarifies that it includes not only internet contracting but also services not paid for as it constitutes an economic activity.[4] In US, the DMCA the term intermediaries are known as 'service providers' to broaden their ambit to include even universities which provide students with access to information,[5] the definition includes transmission, routing and providing connection,[6] with some eligible conditions for limitation.

The old Copyright Act, 1957 did have provisions relating to secondary liability for copyright infringement much before the advent of internet. These provisions along with ISP liability provisions[7] of the Act, have formed the base for safe harbour provisions in India until Intermediary Liability Rules of 2011 were framed and published. There have been a host of case laws which have changed the statutes, one among them being, *Super Cassettes Industries Ltd. v. MySpace Inc. Ltd.*[8], wherein the court had opined that intermediaries should be responsible in uploading content on the website and should carry due diligence for the same at the time of infringement rather than conducting the same after the damage has already occurred. The court further handed down that legislative mechanism in India and USA are completely different and post infringement measures can work there but India needs to have more pre-infringement measures to prevent copyright infringement in the online world. During this case, the defendants, MySpace had enough opportunity to change the work by obtaining permissions from the customers, inserting advertisements to the plaintiff's works. However, the 2012 Amendment to the Copyright Act has significantly stifled such possibilities to materialize. In of *Avnish Bajaj v. State of Delhi*[9], the Court observed that Baazee.com had failed to practice the requisite due diligence because its filters were defective and allowed pornographic material, despite the post containing salacious material, the intermediary could not justify any amendments in its policy to counter the likelihood that such content could be published on the website.

EU-s-DSM.pdf?sequence=1&isAllowed=y.

4 Recitals 2 and 19 of Directive 98/48 state that services as used in the definition cited is to be understood as defined in Treaty on the Functioning of EU (TFEU) Article 57: services which are "normally provided for remuneration".

5 Akanksha Kumar, *Intermediary Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as Tarde Barrier*, 19 J. Intellec. Prop. Rights 272, 274. (2014).

6 Digital Millennium Copyright Act, 17 U.S. C. § 512(k)(1)(A) (1998). *See* Mohammad Sadeghi, The Knowledge Standard for ISP Copyright and Trademark Secondary Liability: A Comparative Study on the Analysis of US and EU Laws, Brunel University London (2013) 48, https://bura.brunel.ac.uk/bitstream/2438/8922/1/FulltextThesis.pdf.

7 IT (Amendment) Act, 2008, S. 79 & S. 81, IT (Amendment) Act, 2008.

8 *Super Cassettes Industries Ltd. v. MySpace Inc. Ltd.,* IA Nos, 15781/2008 & 3085/2008 in CS(OS) No. 2682/2008.

9 *Avnish Bajaj v. State of Delhi,* (2005) 3 CompLJ 364 Del.

The Intermediary Safe Harbour: An Escape Route

A safe harbour provision provides for a conditional immunity to the intermediaries for liability of third-party infringers. The safe harbour rules have evolved over times in different jurisdictions and accordingly formed the much-needed backbone in ensuring intermediaries are not pestered for infringements or illegal activities in the digital space which has unrestricted flow of information. However, the immunity provided to intermediaries is subjected to conditions in international spheres.

International Approach

In the EU, a sectoral and vertical approach is followed for intermediary liability. The ECD divides the liability –exempt intermediaries in three distinct categories based on which the liability of an intermediary depends, those have been mentioned in Art. 12, 13 and 14 of the ECD. If the ISPs function as conduits for information i.e., only transmission or providing access, then the ISPs are exempt from liability.[10] If the information received by a client is transmitted in a communication network where the intermediary stores the information in a 'safe, temporary and intermediate manner' solely for the purpose of transmitting the information to other recipients of the service, then the intermediary is also not liable solely for the storage of such information (popularly known as caching).[11] The intermediary's responsibility will depend upon the knowledge of contents of the information where the ISP provides for the storage of the receiver's information. If they have no actual knowledge of the infringing content, they are pardoned and the Article have different thresholds of civil claims which depends upon the degrees of awareness of the infringing material to the operator.[12]

The US has twin conditions for enabling intermediary to claim immunity, which have been embodied in Section 512 of the DMCA, which further create four safe harbour provisions: for conduits, there exists no monetary liability, only injunctive relief, for caching, the liability is limited to only those ISPs who upon notification to take down infringing content, take it down expeditiously, for information residing at the direction of users, the liability arises only when the ISPs had actual knowledge about the infringing content and they do not actively take efforts to disable access after a notice and when the ISP provides a referral or link to an online location or domain, the liability does not arise provided the conditions

10 E- Commerce Directive 2000/31/EC Article 12(2).

11 E- Commerce Directive 2000/31/EC Article 13.

12 E- Commerce Directive 2000/31/EC Article 14(1)(a).

of aforementioned case are fulfilled about the actual knowledge of infringing content.[13] The case of *Doe v. MySpace*[14] also illustrates that an intermediary cannot be held responsible for third party communications and how they are protected extensively, where MySpace was not held liable when minors interacted with sexual predators after lying about their age, the US Court held that MySpace cannot be held liable for any communication published by third parties and the case of negligence was dismissed.[15]

Indian Legal Regime

The intermediary liability regime in India has evolved over the years. Initially, the IT Act did not provide for any safe harbour significantly it was after the *Avnish Bajaj v. State*[16], where the managing director was able to escape because of inadequate intermediary liability and the amendment thereafter in 2008, which brought in the requisite broadening of the intermediary liability by inserting Section 79 of the IT Act, which provides immunity to intermediaries from all unlawful activities if they cater to the due diligence and other condition provided in the Section. According to the Section, it only includes those cases in which the intermediaries do not have any knowledge or control over the information that is being transmitted.[17] Moreover, the intermediary will only take down the information upon receiving actual knowledge of the same.[18] The Intermediary Guidelines 2011 clarified the conditions for claiming safe harbour under the IT Act and later the judgements of *Shreya Singhal v. Union of India*[19] and *MySpace*[20] case also added to the existing literature of intermediary liability of the 'actual or specific knowledge requirement'. *M/s Luxottica Group SPA v, M/s Mify Solutions*,[21] also clarified the laws regarding interaction of Intellectual Property Rights with e-commerce platforms, wherein an e-commerce platform cannot escape the liability if it allows for storage of counterfeit goods, advertises marks of

13 Kumar, *supra* note 7, at 275.

14 *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

15 Smitha K. Prasad et al., *Intermediaries –Messengers or Guardians? How India and US deal with the role and liability of intermediaries*, Legal Services Newsletter, US-India Business Council (2013). See Stefan Kulk, Internet Intermediaries and Copyright Law: EU and US Perspectives 216-220 (Kluwer Law International BV 2019) (2019).

16 *Supra* note 11.

17 Malvika Kapila Kalra, *Intermediary Liability under the Information Technology Act: Time for an Amendment?,* Bar & Bench (July 28, 2019), https://www.barandbench.com/columns/intermediary-liability-under-the-information-technology-act-time-for-an-amendment.

18 IT (Amendment) Act, 2008, S. 79 (3) (b).

19 *Shreya Singhal v. Union of India*, (2013) 12 S.C.C. 73.

20 *Supra* note 10.

21 *M/s Luxottica Group SPA v, M/s Mify Solutions*, CS (COMM) 453/2016.

plaintiff, stating that active participation would render them liable.[22] Further, the Copyright Amendment in 2012 had broadened the safe harbour for 'transient or incidental storage', thereby indicating how and why the storage of content is actually effectuated.[23]

To claim immunity under the Act and the Information Technology (Intermediary Guidelines) 2011, the function of such intermediary of ISP should be restricted to providing ingress or where the intermediary doesn't modify the information uploaded by a third party or does not select the receiver or does not initiate the process and the intermediary follows Rule 3 of the guidelines issued in 2011, namely publishing of rules and regulations which informs the user not to host, share or display any information which belongs to some other person and over which he possess no right or infringes any patent or copyright or any other Intellectual Property Right.

Despite all the efforts of the of the government to make the laws related to intermediaries simpler, however everything was in vain and in the year 2013 mouthshut.com along with the other petitioners like Shreya Singhal challenged the validity of Section 66 and Section 79 of the IT Act and claimed it that these Sections are infringing their Right to Freedom of Speech and Expression under Article 19 of the Constitution. The main reason for mouthshut.com to file the case was that they had received humongous amount of take down notices which is infringing their freedom of speech. According to the owners of the website it is "privatisation of censorship"[24]. The apex court gave its decision in the petitioners favour and ordered reading down of Section 79.

Under the Indian legal regime, one of the difficulties arising in pretext of Copyright law was the scope of Section 51(a)(ii), however in *MySpace*[25] judgement, the same was clarified to include even cyberspace, however the broad interpretation of the word 'place' as virtual space would effectually require more consideration as online platforms are more vulnerable as the control is lost eventually over the content.[26]

However, in these cases even, can an intermediary claim immunity in cases of public advertisements which they agree to publish, as then the ISP possess actual knowledge

22 Chadha & Chadha Intellectual Property Law Firm, *Tracing the Development of "Intermediary Liability" in India*, Lexology (Apr. 3, 2020), https://www.lexology.com/library/detail.aspx?g=be8df572-55b1-499a-85cf-8b44b59ee0bc.

23 *Supra* note 17.

24 Sourav Datta, *This Supreme Court petition could be a big step in the fight for Internet democracy in India*, Scroll.in, (Sep 18, 2014), https://scroll.in/article/678539/this-supreme-court-petition-could-be-a-big-step-in-the-fight-for-internet-democracy-in-india.

25 *Supra* note 10.

26 Ananth Padmanabhan, *Give Me My Space and Take Down His*, 9 IJLT 1, 7 (2013).

about the illegal or infringing content not enough to shield them from liability in the garb of being an intermediary as per Sec. 79 of the Act, as while advertising, they act more like a publisher.[27]

Fixing Liability on Intermediaries: Increased Digitization and its Impact

With rampant digitization and massive dissemination of information, intermediaries can heavily influence the way content is read worldwide. As a result of which the Intermediary Guidelines have proven to be useful wherein the liability has been more clearly specified for various categories of intermediaries, though not as segregated in types of intermediaries in terms of functional variations as that in US or EU. It becomes really impossible for intermediaries to filter content or even be aware about the content which could have been published by over millions of populations across the world due to digitization and increased computer literacy, hence the red flag test, with subjective and objective elements, to understand an intermediary's liability about the knowledge factor to fix liability becomes important. *Viacom v. YouTube*[28] has significantly demonstrated this point, where Viacom sued You Tube for copyright infringement of content which belonged to Viacom and uploaded on You Tube by third party users, to which You Tube claimed immunity under S. 512 of the DMCA, the court ruled in favour of YouTube based on the red flag test and further observed that real knowledge involved clear and observable violations of sensitive information and not general understanding of its existence and YouTube had already followed the notice and take down procedure.[29] However, the take down approach only has remedied the damage after it has materialized but not looked after the damage which has already occurred due to infringement, it becomes really easy for an intermediary to escape liability without the need to monitor content. This way, the intermediaries claim vast immunity from liability as there are no civil or criminal claims against them. However, the intent of the Act was to absolve them from criminal liability as has been reinstated in the Standing Committee Report on the IT Amendment Act.[30]

27 P. Reddy, *Do Online Advertising Platforms Qualify for 'Intermediary Liability' Protection?*, Spicy IP (Aug. 7, 2016), https://spicyip.com/2016/08/do-online-advertising-platforms-qualify-for-intermediary-liability-protection.html.

28 *Viacom v. YouTube*, 07 Civ. 3582, (LLS).

29 Amlan Mohanty, *Intermediary Liability for Copyright Infringement in India: Few Thoughts in the Wake of Viacom v. Youtube [Part I]*, Spicy IP (July 8, 2010), https://spicyip.com/2010/07/intermediary-liability-for-copyright.html.

30 Ministry of Communications and Information Technology (Department of Telecommunications), *Sixty-Eighth Report Standing Committee on Information Technology (2008-2009),* PRS India (February 17, 2009), https://www.prsindia.org/sites/default/files/bill_files/scrTRAI.pdf.

Under the Intermediary Guidelines Rules of 2018, Rule 3(8) of the Guidelines, mention a take-down approach, according to which an intermediary shall, upon receipt of specific information in the form of a court order or upon notification by the Government or its agency, remove or disable access to material legally restricted under Article 19(2) of the Indian Constitution no later than 24 (twenty-four) hours. It is a robust step because it helps in protecting the rights of the intermediaries and the users as it is becomes a herculean task for the intermediaries to examine all the uploaded documents or content and check the validity of the same. After this Rule, the intermediaries are required only to examine those documents for which the court has specifically asked them to do so. However, the factors on which the content should be removed have still not been clear. In addition, the Draft Rule does not cover the request for taking down of content in case of infringement of Intellectual Property which was there in the earlier Rules.

Under Rule 3(5) the intermediary needs to provide information or assistance as asked for by any government agency or assistance concerning security of the State within 72 (seventy-two) hours of communication. This step of providing assistance is a welcoming step however; the provision to ask for assistance is really wide giving too much power to the government agency immense powers to request any kind of assistance. In addition, the rules have just mentioned the government agencies and do not specify which kind of government agency. Therefore, the revision to Rule 3(5) is necessary to clarify which all rights of assistance is vested to the government agencies and to whom.

Moreover, according to Rule 3(9) intermediaries must also deploy automated tools for proactively identifying and removing unlawful information or content[31] however, the criteria for installing automated tools is unclear, because there is no explanation under the Draft Rules as to how such automated tools can detect unlawful information or content. The Rules do not define the term 'unlawful information or content' the absence of which creates confusion and inconsistency between intermediaries.[32] The usage of automated tools has been previously discussed in the landmark

31 The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, Rule 3(9).

32 *Supra* note 15.

case of *Sabu Mathew George v. UOI,*[33] where the Supreme Court directed the respondents, Google, Microsoft and Yahoo to 'auto-block' sex determination advertisements. They also ordered establishment of a 'nodal agency' whose main work is to provide a list of blocked websites to the search engines[34].

In addition, Rule 3(7) of the Draft Intermediaries Guidelines makes it compulsory for all the intermediaries incorporated with more than 5 million users in India to get a permanent registered office in India and appointment of a nodal officer for all time coordination with the different Law Enforcement Agencies. The particular rule does not elucidate the method to calculate the numbers of users. An intermediary's number of users can be determined using different methods such as the registered user or active regular members, or number of installations or VIP users etc. This leads to a lot of uncertainty, as it is very difficult for an intermediary to determine whether or not it has passed the threshold of fifty lakh[35]. Moreover, registering also leads to a lot of burdensome formalities and statutory compliances.

Recent Judicial Observations: Stringency or Harmony?

The recent judicial response on intermediary's liability in cases of copyright infringement, will help us delve deeper into the intricacies of the Act and Copyright Act, especially when no objective tests exists for determination of fixing accountability on an intermediary, one can always determine the type of intermediary and its involvement with target audience while considering the same.

In case of *M/S Shree Krishna International Film Productions v. Google India and YouTube LLC*[36], the plaintiff was alleging that the defendants had been reproducing various sound recordings, cinematographic films and audio-visual recordings of the plaintiff on its platform

33 *Sabu Mathew George v. UOI*, 2017 (1) RC R (Civil) 175.

34 CCG NLU Delhi, *Roundup of Sabu Mathew George vs. Union of India: Intermediary liability and the 'doctrine of auto-block'*, Legally India - News for Lawyers (Feb 3, 2017), https://www.legallyindia.com/views/entry/roundup-of-sabu-mathew-george-vs-union-of-india-intermediary-liability-and-the-doctrine-of-auto-block.

35 *Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018*, PRS India (Jan 3, 2019), https://www.prsindia.org/billtrack/draft-information-technology-intermediaries-guidelines-amendment-rules-2018.

36 *M/S Shree Krishna International Film Productions v. Google India and YouTube LLC,* CR No.2198 of 2016.

without authorization, the defendants on the contrary argued that they were intermediary and had no knowledge of the infringing content, as they cannot plausibly evaluate each user generated or user uploaded content. The court ruled that defendants should have taken down the content after getting a notice for the same from the plaintiff as per the Intermediary Rules, 2011, the defence that proper notice procedure under the Rules have been catered to is invalid as the burden was on defendant to locate the URL even if the same was not mentioned in the notice. The decision has been appealed in Punjab and Haryana HC and has been admitted by the Bench, the grounds being- Status of You Tube as intermediary under the Act, no notice in furtherance of Article 51(a)(ii) prior to filing infringement case, no URL mentioned in the notice, 15 of the 18 works were assigned to Shemaroo which was not party to the suit.[37]

Also in case of Fermat Education v. Sorting Hat Technologies P. Ltd[38], the court observed that the defendant, Unacademy (managed by Sorting Hat Technologies) had about 200 questions and answers of the plaintiff (2IIM-CAT course), copied in literary and video form, the issue was whether Unacademy was an intermediary and can claim safe harbour and if not, whether the same was fair use under Sec. 52(1)(i) of the Copyright Act. The court held that Unacademy was not an intermediary as the Terms and Conditions stated that user content could be created by Unacademy itself, publication can only occur only after being approved by Unacademy and they have editorial control over the content being uploaded, hence Unacademy was not qualified as an intermediary. Also, when the defendants claimed fair use, which is an exception to infringement, the court held that Unacademy was paying consideration to educators for furnishing content hence, it was a business venture and the same will not come under fair use exception.[39]

In the case of *Amway India Enterprises Pvt Ltd v. 1Mg Technologies Pvt Ltd & Anr*.[40], the court observed that most of the e-commerce platforms are actively involved and thus cannot come under the safe harbour provision of Section 79 given to intermediaries. It was held that the e-commerce platforms will be liable for fine if they fail to comply with the statutory requirement given in the Intermediary Guidelines.

37 Akshat Agrawal, *Shree Krishna International Film Productions v. Google India and You Tube LLC: Revisiting the Intermediary Liability Jurisprudence in the Indian Copyright Law*, IPR MENT LAW (Dec. 8, 2019), http://iprmentlaw.com/2019/12/08/shree-krishna-international-film-productions-vs-google-india-and-youtube-llc-revisiting-the-intermediary-liability-jurisprudence-in-the-indian-copyright-law/.

38 Fermat Education v. Sorting Hat Technologies P. Ltd, CS(OS) 330 of 2018.

39 Sreyoshi Guha, *Unacademically Speaking: Madras HC Upholds Copyright Claim in 2IIM-CAT Questions*, Spicy IP (Aug. 22, 2018), https://spicyip.com/2018/08/un-academically-speaking-madras-hc-upholds-copyright-claim-in-2iim-cat-questions.html.

40 *Amway India Enterprises Pvt Ltd v. 1Mg Technologies Pvt Ltd & Anr*, CS (OS) 410/2018.

Analysing the Judicially *Cold-Shouldered* Aspects of Intermediary Liability

Intermediaries play a significant role in case the data uploaded is an infringing content, however their liability has to be matched with the interests of third party provider of information, who significantly has no role to play as per the Act and Intermediary Guidelines, hence a balance between freedom of speech and intermediary liability (following the chilling effect after the take down approach) needs to be achieved. A lot of intermediaries lack the ability to determine legality of expression, the qualifications and objective due diligence requirements have not been mentioned under the rules, third party provider of information is not informed about the take down, no mechanism for put back, no reasonable rejection by intermediaries is accepted, no transparency in take down procedure, procedural lacuna exists as there are no CPC or CrPC provisions with respect to it.[41] Also, one of the criteria to affix responsibility should be the nature of interaction an intermediary has with the target audience, here we can say the level of interactivity be categorised as- active, passive or intermediate and then, it will be even easier to compute damages.

Conclusion and Suggestions

Intermediary liability regimes have undergone tremendous change as now the liability depends upon the role intermediary plays in dissemination of infringing content. However, the Copyright Act should always follow an inhibitory approach rather than a notice and take down approach where the damage is remedied long after it has materialized and when the copyright holder gets apprised of the fact of such infringement. The diligence system should be clearer on the type of content that is infringing and what action an intermediary should take and the degree to which such action may be taken as intermediaries cannot always act as censorship boards inhibiting freedom of speech which is a Fundamental Right. At times, these intermediaries do over comply and take down content even if it does not result in copyright infringement in order to avoid the consequences as per the research done by Centre for internet and Society, Bangalore.[42] However, more clarity on working of these intermediaries is required and the blocking orders by governmental agencies should also take into consideration the aftermath of these intermediaries. Wilful blindness to infringing content can always lead to following an approach which will diminish the possibility of inhibitory approach.

41 Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet, 2011*, Centre for Internet and Society (2011), https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf.

42 *Supra* note 30.

Automated mechanisms have also proved to be ineffective in determining copyright infringement as they rely on matching technologies in order to detect such infringements and have been criticized by rights holders and fair use advocates. Hence, a clear approach in defining the law clearly and then focusing towards its implementation can to some extent balance the intermediary liability regimes with freedom of speech and expression. The Draft amendment rules, 2018 are somewhere vague in nature. However, the State has tried to take a liberal approach to solve the earlier problems raised by the earlier rules.

A few suggestions to ascertain intermediary liabilities are as follows:

- **Harmonisation of conflicting laws**- The conflict between the safe harbour provisions under the Act and IPR laws in India need to be in harmony. The legislators and the judges should have a balanced view towards ascertaining intermediary liability.
- **Restricting the safe harbour window**- The legislation should mention the specific acts of intermediary that would lead to disqualification of an ISP from escaping liability under Sec. 79 of the Act in copyright infringement cases.
- **IT professionals as *amicus curiae* for determination of intermediary liability** - It would be more objective in ascertaining the Intermediary's liability by having an opinion of a reasonable IT professional working in some other intermediary having similar target audience other the intermediary in question. Such IT professionals can act as *amicus curie* in adjudging the liability as InternetLab had presented an amicus curiae brief where Facebook was alleged liable due to a fake profile generated on the platform of the plaintiff.[43] When third party information provider is willing to fortify, no real knowledge is ascribed to the intermediary, and if not, the intermediary is liable to actual knowledge.

With such balanced view, India can successfully assimilate the Intermediary liability regimes in cases of copyright infringement keeping in view rampant dissemination of content in this digital world.

43 Dennys Antonialli & Thiago Oliva, *InternetLab Files Amicus Curiae Brief in a Federal Supreme Court Case that Can Change Internet Intermediaries' Liability Regime in Brazil*, InternetLab (Dec. 14, 2018), https://www.internetlab.org.br/en/news/internetlab-sends-contribution-to-the-stf-on-the-constitutionality-of-article-19-of-the-brazilian-internet-civil-rights-framework/.

SQUINTING AT THE NARCO-ANALYSIS AND THE BRAIN MAPPING TESTS THROUGH 'FLUID' CONSENT

Kanak Mishra*

Abstract

In today's scenario where science has reached its zenith, the law of the land does not wish to lag behind by keeping technology distant from the legal domain. Criminal investigation in India has time and again considered the admissibility of some of the most exceptional and technologically advanced forms of gathering evidence through the Narco-analysis test and brain mapping test. Both these tests involve cognitive sub-systems that play a significant role in determining the criminal intent of an individual. The study of the formation of criminal intent by the theory of culpability, however, is quite an abstract process. So, if it is feasible to read a person's mind through science and technology to gather all such information, without any overt efforts, then why not use this instead? The reasons attributed to the denial of the evidence obtained through these tests and arguments in favor of their admissibility are many. Therefore, the purpose of this scientific – legal paper shall be to deal with the intricacies of both these tests through the lens of 'fluid consent.'

INTRODUCTION

Science and technology have become the driving forces of the current epoch. Scientific advancement has also seeped into law, which is known to adapt to the changing social order. With the increase in population, the rate of crime is also consequently increasing, thereby multiplying the burden on law enforcement and courts. With a sudden surge in the crime rate over the years, the change in the types of crimes and criminal mindset can also be attributed to technology to an extent. However, the role of technology in determining criminal intent or human behavior is still deliberated with a pinch of salt. Scientific tests like Narcoanalysis and Brain Mapping, are increasingly being brought up time and again as a viable source of evidence in the name of the evolution of law and the changing societal

* Student, Jindal Global Law School, Sonepat.

order. These tests have time and again been brought under judicial scrutiny for being violative of fundamental freedoms enshrined in the constitution. The efficiency of drug-induced tests, along with its potential health effects, privacy violation issues, as well as torturous techniques, are also deemed to be a threat.

This paper aims to further the understanding of scientifically induced tests and the scope of its use and misuse. A rigorous effort has been made to interpret various landmark precedents of National and International value to analyze the constitutional and evidentiary value of these tests in the light of Articles 20(3) and 21 of the Constitution as well as Sections 27 and Section 29 of Indian Evidence Act, 1872.

Narco-Analysis Test

Narco analysis test is a type of deception detection test which is conducted by infusing the truth serum into the subject's body, causing a state of "hypnotic trance," and thereby "monitoring the blood pressure and heart rate continuously."[1] The word narco is derived from the Greek word 'narkc,' which means "anesthesia" or "torpor". Narco-analysis is the inducement of deep-sleep or the state of 'hypnosis' through injections of drugs on the patients.[2] The primary drug used in this test is Sodium Pentothal or Sodium Amytal (also known as the "truth serum"), which is heavily criticized for being hazardous and lethal.[3] The technique in which these drugs are administered, and the subject's consciousness is monitored continuously.[4] In this test, the subject goes through four stages out of which the second stage, i.e., the 'hypermnesia' stage that occurs after the first stage of 'hypnosis' is the most relevant one wherein it is believed that the subject becomes incapable of "suppressing the memories associated with the relevant facts." The inducement of this stage evokes a "re-integration of the disassociated personality" while the patient is in a dream-like state of mind. It is medically proven that the drugs given decrease the extent of anxiety and fear, which results in reduced pressure on the subject's 'ego'.[5] This makes

1 *Narco-analysis Test: An analysis of various Judgements of Indian Judiciary* | Semantic Scholar, (Jun. 19, 2020, 10:00AM), https://www.semanticscholar.org/paper/Narco-analysis-Test%3A-An-analysis-of-various-of-Barnwal-Ambedkar/54f79559f6e51bc2c4ab1e09582960274259dcd7.

2 J. S. Horsley, *Narco-Analysis*, 82 Journal of Mental Science 416 (1936), (Jun.19, 2020, 11:00AM), https://www.cambridge.org/core/article/narcoanalysis/01140C736B73C7A15E709FCF97047A33.

3 Linda M. Keller, *Is Truth Serum Torture?*, SSRN JOURNAL (2004), (Jun.19, 2020, 11:00AM), http://www.ssrn.com/abstract=599143.

4 Bannur Muthai Mohan, *Misconceptions about narco analysis*, IJME (2007), (Jun. 19, 2020, 11:20AM), http://ijme.in/articles/misconceptions-about-narco-analysis/?galley=html.

5 George H. Dession et al., *Drug-Induced Revelation and Criminal Investigation*, 62 The Yale Law Journal 315 (1953), (Jun.17, 2020, 12:00PM), www.jstor.org/stable/793442.

it easier for the subject to 'relive' that particular crime scene or traumatic situation. And it is only after this stage that a series of explanations, persuasions, and other forms of psychoanalysis procedures are performed that can stimulate the flow of associations in the brain of the subject to obtain oral responses.[6] The process of conducting a Narco-analysis test resembles that of psychotherapy. It is conducted under the supervision of registered medical practitioners "consisting of a physician, an anesthetist, and a clinical psychologist or a psychiatrist."[7] The responses of the subject and video-recorded and sent along with a brief report to the concerned authorities for the formal process of collection of evidence.

Brain Mapping Test

This test is also famously known as the P300 Waves test. Its close variants are the lie detector test, also known as the Polygraph test. Brain-mapping, on the other hand, evaluates the physical fluctuations in the brain of the subject to detect the possibility of a potential lie. This test does not require the subject in an unconscious state and nor does it necessarily require the presence of medical professionals. Unlike narco-analysis, no verbal exchanges between the subject and the interrogator take place during the tests.[8] Such tests work on the principle of 'target stimuli,' wherein upon certain audio-visual display, the neurons of the subject get triggered, and this produces a 'different' response from what a reasonable person in an ordinary course of nature would produce. A guilty person would thus pay more attention to the critical stimuli rather than the control stimuli, and this behavior would help in the detection or evaluation of lie by the experts.[9] The critical stimuli being the 'target word,' that gets invoked by the brain upon a visual or verbal representation of the crime, whereas the control stimuli being the neutral words for the purpose of psychotherapy.

Despite many successful criminal guilt determinations, the polygraph or P300 Waves tests have been under constant doubt for the way an accused can prep themselves before partaking the test. Considering the logic of determining guilt through the polygraph test is the amount

6 Horsley, *supra* note 2.

7 A.S. Dalal & Arunava Mukherjee, *Constitutional And Evidentiary Validity Of New Scientific Tests*, 49 Journal of the Indian Law Institute 529 (2007), (Jun 19, 2020, 01:00PM), https://www.jstor.org/stable/43952091.

8 Court equates brain-map, narco-test - Indian Express, (Jun 19, 2020, 02:00 PM) http://archive.indianexpress.com/news/court-equates-brainmap-narcotest/615711/.6,19]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

9 William M. Waid & Martin T. Orne, *The Physiological Detection of Deception: The accuracy of polygraph testing can be affected by such variables as attentiveness, drugs, personality, and the interaction between examiner and subject*, 70 American Scientist 402 (1982), (Jun. 19, 2020, 03:00 PM), https://www.jstor.org/stable/27851548.

of attention a subject pays to the critical stimuli, it seems easy to tailor the test to be less detectable, be it by consuming drugs or any other form of medication. Constructing various scenarios to cover up the actual situation, preparing answers to the questions that are most likely to be asked, tackling body movements, gestures and expressions accordingly, all way in advance, are some other ways in which a P300 Wave test or a lie-detector test may lose its value as a legitimate form of evidence.[10] A Polygraph and Lie-Detection report[11] which came up as an opposition to employee screening in the U.S. completely debunks the accuracy of such tests and points out that "the physiological responses measured by the polygraph are not uniquely related to deception," i.e., some other responses also accompany the same which are consciously made by the subjects. An example of such a response could be that of fear, which might arise out of the related questions asked by the interrogator. Also, it is not just the mere process or technique of the tests which should be under consideration. Still, even the slightest chance of error while and after the performing of the transaction of the polygraph test too should be given relevance. In a U.S. case of Daubert v. Merrell Dow Pharmaceuticals Inc.[12], it was noted that even though the attribution of accuracy can be given to the brain-mapping tests for sixty to seventy percent, yet, there remains a substantial amount of accuracy which might get hindered due to the type of environment under the test, the qualifications of the examiner and involvement of a subject with the crime.

Thus, on the face of it, both the tests, be it the Narco-analysis test, or the Brain mapping test, seem problematic enough to be taken as a primary piece of evidence. However, the following section shall hopefully be able to determine if these tests can be taken up as a piece of secondary or corroborative evidence. The upcoming section deals with some of the most prominent arguments proposed by various jurists and scholars trying to locate the specificity of scientific tests. The next section shall be an attempt to introduce a detailed understanding and analysis of the arguments pinned in the previous section.

The Argument Proposed on the Violation of Article 20(3) - The Right against Self-Incrimination

The primary issue with the narco test is a constitutional one, which is that the involuntary administration of the truth serum, leading to testifying against oneself in a hypnotic state, is violative of the right against self-incrimination. Article 20(3) of the Constitution of India

10 *Id.*

11 "*The Polygraph and Lie-Detection: Committee to Review the scientific evidence on the Polygraph*", WASHINGTON D.C.: NATIONAL ACADEMIES PRESS 2003, 212-213.

12 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 US 579 (1993).

holds the right against self-incrimination to be a fundamental right. This right ensures that any accused should not be made to make any statement against their will. Hence, it is pertinent to evaluate how the concept of 'will or consent' comes into play under the Narco-analysis test.

The landmark Indian judgement of Selvi v. State of Karnataka[13] provides a detailed analysis against the use of the narco-analysis test. Still, unfortunately, while explaining the rule against self-incrimination, the court draws out comparisons with foreign[14] and Indian[15] judgements which deal with confessions and admissions to the police only. The court, despite discussing the difference between the words voluntary and compelled, missed considering the disputed territory of how 'consent' works under the Narco Analysis Test.

The jurisprudence on the matter of the validity or admissibility of the Narco-Analysis Test in India has been severely restricted only to the admissions and confessions to the police. The cases cited above acknowledged that while undergoing the Narco Analysis procedure, the subject is compelled to make an involuntary admission under the influence of heavy drugs (while the subject is in a hypnotized state) that severely block the brain's ability to engage in the standard cognitive process but failed to acknowledge the concept of fluid consent.

Selvi[16] case had its flaws, but it was also an incredibly transformative judgement because of the way it dealt with the idea of the 'state.' It shows the gradual shift of the Supreme Court from viewing any case at hand only through the lens of crime control, to now liberally understanding the domain of criminal psychology alongside valuing the due process of law.[17] Thus, by collating the two ideas of crime and the right to life of an accused, the judgement indeed laid down an improved framework of the modern criminal investigation. While the case, firmly established that determining the guilt of the accused solely based on either the Narco Analysis Test or brain mapping test would be violative of the right to self-incrimination under Article 20(3) of the Constitution, it also grappled with the issue of violation of Article 21, i.e., the Right to Life and personal liberty of the individual. The right to life angle of the case, discussed in detail the scope of the word 'compelled' in Article 20(3). The reasoning in the case describes that when an accused is either coerced or

13 *Selvi and Ors. v. State of Karnataka*, (2010) 7 SCC 263 (India).

14 *Brown v. Walker*, 161 US 591 (1896).

15 *Nandini Satpathy v. P.L. Dani*, 0139 MANU SC 1978 (India).

16 *Selvi v. State of Karnataka, supra* note 14.

17 Gautam Bhatia, *Privacy and the Criminal Process: Selvi v State of Karnataka* (2018),(Jun. 18, 2020, 2:00 PM), https://papers.ssrn.com/abstract=3166849.

is made to confess against himself, then it would amount to being compelled. Such coercion would be the exact opposite of the word 'voluntary' and, thus, would be a violation of the right against self-incrimination. This reasoning of the court sufficiently addresses the inherent opposition between the terms - coercion and voluntariness, but it fails to engage in the scientific conundrum about the concept of consent revocation while a person is undergoing any drug-induced test.

In the famous Canadian case of Horvath v. R,[18] it was held that statements extracted through narco tests would be inadmissible as evidence because a person cannot be said to have made a statement of his own will when hypnotized. This case, unlike the Selvi[19] case, recognizes that although before the commencement of the test, the subjects are made to sign certain documents affirming their consent for the test, how does one evaluate if the consent seizes to exist in due course of the test? How does the law then grapple with this scientific mystery of consent when a person is heavily drugged? Does it distinguish between conscious consent against subconscious admissions that may not have been made if conscious?

The Argument Proposed Under Article 21- The Right to Life

Both these scientific tests violate Article 21, i.e., "Protection of life and personal liberty" on two grounds. Firstly, conducting such tests without the permission of the court would be violative the procedure established under law.it is because, the ambit of Article 21, i.e. Right to life, includes the "substantive due process of law".[20] Secondly, in Maneka Gandhi v. Union of India[21], Subba Rao, J. opined that an essential element of personal liberty is 'privacy'. Hence it is not just the liberty of an individual that is infringed but also their privacy when they are forced to undergo such tests without their consent.

Arguments Proposed for the Inclusion of Narco-Analysis Test Results as Evidence

Furnishing the test results derived by Narco analysis and brain mapping tests as corroborative evidence is premised on the idea of a valid 'consent.' The first argument given by scholars is generally that when a subject is made to undergo scientific tests, no compelled testimony seems to be extracted, which the Nandini Satpathy v. P.L. Dani[22] case describes in detail.

18 *Horvath v. R*, 385 C.C.C. 44 (1979).

19 *Selvi v. State of Karnataka, supra* note 14.

20 *Id.*

21 *Maneka Gandhi v. Union of India*, 0133 MANU (SC 1978) (India).

22 *Nandini Satpathy v. P.L. Dani,* 0139 MANU (SC 1978) (India).

As at the beginning of the test, the subject consents out of their own free will, to get exposed to the conditions mentioned above, the argument of compelled testimony cannot be raised. This argument was rejected by the court in Selvi[23] by reasoning that a compelled testimony is the one which is extracted not just by exercising physical threats or violence per se but also by intimidation methods, tiring interrogative process, psychic torture, environmental coercion, etc.

Scholars' second argument is that, even during the various stages of the test, no force is applied onto the subject, and it is only the drugs that are infused to merely block a certain thought process of the brain, in which case no scope of a hindrance with the personal knowledge of the subject remains. This argument was clarified by the court in the case of State of Bombay v. Kathi Kalu Oghad[24] wherein the court differentiated between "to be a witness" and to "appear as a witness." Thus, the 'Personal knowledge' that can be attributed to a person by 'being a witness' either orally or in writing is the same when extracted from a subject in a hypnotic trance under narco test and brain mapping tests. And would, therefore, amount to a compelled testimony.

Fluid Consent

With respect to both the arguments stated above, it can be said that the idea of consent in the case of scientific tests such as these becomes hugely debatable. While the subject may give their consent at the beginning of the procedure, the point at which their consent would seize during the test is not taken into consideration. This amounts to a flawed understanding of how consent works, and a subsequent continuation of the test would then be tantamount to a clear violation of privacy. Both the arguments as proposed by given by multiple scholars and jurists time and again do not take the 'fluidity of consent' into consideration. Their understanding of consent is limited to a static concept, that is incapable of changing once given. This is extremely problematic and deserves more attention. Thus, an understanding of consent as a fluid consent would help such scientific tests gain a heightened degree of certainty.

23 *Selvi v. State of Karnataka, supra* note 14.

24 *State of Bombay v. Kathi Kalu Oghad,* 0134 MANU 43-44 (SC 1961) (India).

The Argument Proposed for Section 27 of the Indian Evidence Act, 1872[25]

Also, no rational nexus can be attributed to the argument of constructive custody during the Narco test, wherein the team comprises of "one anesthetist, one physician, and one clinical/ forensic psychologist."[26] The concept of custody under Section 27 of the Indian Evidence Act, 1872 includes Constructive custody[27] , too, in which the accused is not physically present in the court. Still, his freedom is monitored by the legal authority in some way or the other outside the court.

Extraction of any admission through scientific tests in the presence of the above-stated team members can be attributed as a 'legal authority outside the court' because the ultimate aim of the medical professionals conducting the scientific tests on the subject would be to extract the admission or involvement in any crime. This would amount to constructive custody under Section 27 of the Indian Evidence Act, 1872, and would also be violative of Article 20(3) of the constitution and hence should be admissible as evidence.

The Argument Proposed for Section 29 of the Indian Evidence Act, 1872[28]

It is also argued by some that the hypnotic state of the subject can be compared to that of a drunk person. And in such a situation, Section 29 of the Indian Evidence Act, 1872 comes to the rescue, which states that merely "because a person is drunk and is made to answer questions which he need not have answered", then such evidence cannot be dismissed as

25 Section 27 in The Indian Evidence Act, 1872 (India). How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

26 Mohan, *supra* note 4.

27 *Aghnoo Nagesia v. State of Bihar,* AIR 119 (1966) (India).

28 Section 29 in The Indian Evidence Act, 1872 (India). Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.—If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him., , https://indiankanoon.org/doc/962897/ (last visited Jun 19, 2020

being irrelevant altogether. The underlying argument being that in the hypnotic stage of the Narco-analysis test, the state of the subject resembles the inebriated state. Hence, such evidence cannot be considered as inadmissible on the lines of Section 29.

This analogy is seriously flawed as it equates drunkenness with the hypnotic state of a subject while undergoing a scientific test. The difference between the two lies in the fact that while the former would amount to 'extorting communication,' the latter would constitute 'using the body for extracting evidence.'[29] This difference was laid down in two U.S. cases of *Armando Schmerber v. California*[30] and *United States v. Holt*.[31]

Conclusion

The formulation of these tests was done by the scientists to make efficient the process of a criminal investigation by providing the most relevant-direct evidence. So, no malafide intention can be attributed to the interrogators, to be able to reject the admissibility of the test. The types of drugs administered in the process and the authenticity and accuracy of such a test are the two aspects that are the most contested in the case of scientifically obtained evidence. It is not an unfamiliar fact that the drugs administered for the tests, do cause pain. These drugs are also harmful as they restrict a person's ability to suppress their memories and hence, would amount to torture (as and when India ratifies UNCAT) in violation of Article 1 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) if done without the consent of the subject.[32] Conducting the test in the absence of the subject's consent would amount to a violation of Article 21 and 20(3) of the Constitution of India. Additionally, it is also pertinent to note that irrespective of the subject's consent at the beginning of the test, the consent can be revoked at any point during the test, and this prima facie makes the scientific tests violative of privacy. The arguments advanced in favor of scientific tests based on Sections 27 and 29 of the Indian Evidence Act of 1872 cannot be sustained because of the concept of constructive custody and the difference between the state of drunkenness and hypnosis, respectively.

29 The Legal Blog, Narco-analysis & Polygraph Tests: Constitutional Validity, (Jun. 19, 2020, 07:00PM). http://www.legalblog.in/2011/05/narco-analysis-polygraph-tests.html (Jun. 19, 2020, 07:00PM).

30 *Armando Schmerber v. California*, 384 757 (1966).

31 *United States v. Holt,* 218 245 (1910).

32 Narco-Analysis and the Indian Criminal Justice System: | Economic and Political Weekly, (Jun. 19,2020, 07:00PM), https://www.epw.in/journal/2008/36/commentary/narco-analysis-and-indian-criminal-justice-system.html.

The drugs administered during Narco-analysis and other like scientific tests work on the highest cognitive level of the brain. If the doses are given in the wrong proportion, then the tests could turn out to be lethal. Additionally, some or the other uncertainties always loom such technological procedures. Hence, it is pertinent to allow the Narco-analysis test and the brain mapping test only with a pinch of salt. Both these tests can be used cautiously, as a last resort, in determining guilt only as corroborative evidence and not as a primary piece of evidence.[33] Corroborative evidence derived through either the Narco-analysis test or brain-mapping test would indeed prove out to be very useful in the cases wherein the accused wants to plead innocence, especially in the cases of high-profile criminal investigations and terrorism-related matters.[34] It is essential to realize that while the results of such tests are admissible as corroborative evidence in the court, it is not the most sound form of evidence. Law enforcement authorities should be extremely cautious in running after these tests for extracting evidence. This is because such tests are still novel in a developing country like India. Hence, only those cases that are at the forefront of media coverage get to see the application of Narco-analysis or brain-mapping tests. It takes a reasonable person to determine the hue and cry created by the media in prominent cases. The Arushi murder case was an apt example of the extent to which media trials can affect the verdict of a case.[35]

Law, as we know, is not limited to the legislation itself, it is a 'living process,' which evolves. Hence, it is imperative to imbibe all sorts of technological advancements into the law, as long as fundamental principles of law, or the rights of individuals are not sacrificed. But considering the ways in which these tests undermine the concept of fluid consent, its application with or without consent of the subject should be resisted. A viable option would be to encourage the use of these tests only after exploring the alternatives that value the subject's static as well as fluid consent. So, by the end of this paper, I believe that I have addressed some pertinent concerns regarding the two scientific tests, namely, the narco-analysis test and the brain mapping test, which would hopefully be used and not misused in the future.

33 South Asia Human Rights Documentation Centre, *Narcoanalysis: A Dangerous Mirage*, 42 Economic and Political Weekly 2857 (2007), (Jun. 19, 2020, 08:00PM), https://www.jstor.org/stable/4419780.

34 Rights activists hail Indian truth drug ban, The National, (Jun. 19, 2020, 08:00 PM), https://www.thenational.ae/world/asia/rights-activists-hail-indian-truth-drug-ban-1.524656.

35 Tribune News Service, *Lessons From Arushi Case Tribune india News Service,*(Jun. 19, 2020, 09:00 PM), https://www.tribuneindia.com/news/comment/archive/lessons-from-aarushi-case-481820 .

Changing Dimensions of Fantasy Games in India and its Legality

Akshit Bhardwaj*

Abstract

Technological advancements have paved way for a digitalized community across the world providing minute-to-minute access to different sports games played across diverse regions. With grand winnings that are just a click away requiring the right combination of skills and arrangement of real players, the young managers are virtually managing their own dream team after meticulously examining their career statistics. This has resulted in wide viewership and has provided significant access to e-games including fantasy sports in India. However, the existence of fantasy sports is yet again under scrutiny even when the judicial pronouncements have been in their favour in the past. With no specific laws and guidelines, the users and companies are still waiting for the government to strike a balance between gaming laws and their application on fantasy games.

This article analyses the statutory position of skill- based fantasy games in India while examining the recent judicial trends. It further identifies the challenges that are experienced by the online gaming industry that can potentially damage the growth of fantasy games. Lastly, the article proposes suitable measures to safeguard the interest of all stakeholders.

Keywords- The Sports (Online Gaming And Prevention Of Fraud) Bill 2018, Fantasy Sports Games, Dominant Factor Test, Challenges, Self- Regulation

Introduction

The evolution of fantasy sports games can be traced back to the United States, wherein offline records of fantasy sports players exist since 1960.[1] These records constitute data of sports

* Student, Amity Law School, Delhi.

1 Eddie Brown, *The history of fantasy football*, The San Diego Union-Tribune (Aug. 09, 2020, 10:00

like football etc. and provide details of their account holders.[2] Due to the rise in domestic leagues and commercialized international events, fantasy sports games are becoming a part of this culture. Significantly, a recent study of the Broadcast Audience Research Council (BARC) establishes that the game of cricket draws 93% of sports viewership in India.[3] It further reveals that other sports like kabaddi, wrestling, and football are also gaining popularity due to the advent of homegrown leagues and mass commercialization.[4] The growth of young athletes and the interest of youth in sports has contributed significantly to the viewership of sporting events leading to more revenue for broadcasters and streaming industry.[5] This has eventually contributed to the growth of fantasy sports games in India, making it a $150 Billion market due to the formation of multiple competitive platforms.[6]

According to a report prepared by the *Pennsylvania Gaming Control Board*, the characteristics of fantasy sports can be defined as:

"a fantasy or simulation sports game or contest involving athletic events in which a participant owns or manages an imaginary team and competes against other participants or a target score for a predetermined prize determined by statistics generated based on performance by individual athletes participating in actual professional athletic events, provided the outcome shall not be based solely on the performance on an individual athlete, or on the score, point spread, and any performance of any single real team or combination of teams."[7] In simpler terms, fantasy sports enable individuals to act as managers or team coaches while creating their own team involving real-world professional players participating in a particular contest. However, due to its dynamic nature fantasy sports cannot be restricted to a particular definition.

AM), https://www.sandiegouniontribune.com/sports/chargers/sdut-the-history-of-fantasy-football-cure-2014jul28-story.html.

2 *Ibid*.

3 Ians, *Cricket draws 93% of sports viewers in India: BARC*, Business Standard (Aug. 09, 2020, 04:10 PM), https://www.business-standard.com/article/news-ians/cricket-draws-93-of-sports-viewers-in-india-barc-119060400786_1.html.

4 Kunal Dhyani, *Cricket accounts for 93% of sports content consumption in India: BARC*, Inside Sport (Aug. 04, 2020, 04:15 PM), https://www.insidesport.co/cricket-accounts-for-93-of-sports-content-consumption-in-india-barc/.

5 *Ibid*.

6 Rohan Abraham, *A $150bn market: How fantasy sports transformed cricket fans from being spectators to stakeholders,* The Economic Times (Aug 09, 2020, 08:19 PM), https://economictimes.indiatimes.com/magazines/panache/a-150bn-market-how-fantasy-sports-transformed-cricket-fansfrobeingspectatorstostakeholders/articleshow/70185196.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

7 David M. Barasch, *Fantasy Sports Report*, Pennsylvania Gaming Control Board (Aug. 09, 2020, 08:30 PM), https://gamingcontrolboard.pa.gov/files/communications/PGCB_Fantasy_Sports_Report_2016.pdf.

These sporting platforms/companies work on the notion of providing an array of contests to the public, ranging from paid leagues to free entries. The users accessing these services get an opportunity to test their sporting expertise by picking teams from a real-world player pool for the upcoming matches. Such drafts are drawn up using virtual credits provided for each game by the host. Weighted credit scores are given to players based on their recent form. For example, if there are 100 credits available, users must pick 11 players within the allotted budget. Moreover, marquee players hold the highest credit against their names. The participants are ranked based on the points earned by their selected players during the contest according to their on-field performance and scoring metrics for the relevant match. Companies have created their marking system for the activities carried out by the athletes during a contest.

Regulatory Framework Governing Skill Games in India

Participation and engagement in sports is an extensively practiced, recreational, and social activity that offers opportunities for customer engagement, brand advertisement and promotion, and involvement of fans.[8] Significantly, to regulate those offering complex competitive formats such as board games or fantasy sports, Indian laws distinguish between game involving 'skill' and game involving 'chance', and specify a strict prohibition on participation and the offering of 'chance' games for consideration, while at the same time taking a more favorable position with 'skill' games.[9] A historic characteristic of Indian law has been the distinguished treatment granted to games of skill and games of chance, with the former allowed and the latter prohibited.[10] The above differentiation appears to originate from India's traditional gambling treatment, where while it features throughout the millennia in Indian culture and history, it is associated with negative connotations and societal stigma.[11]

Public Gambling Act, 1867 and Prize Competitions Act, 1955

India's gaming framework at the national level is regulated by the Public Gambling Act, 1867, and the Prize Competitions Act, 1955. The Public Gambling Act, 1867[12] (hereinafter "PGA") criminalizes and prohibits the activity of gambling in the public forum and the keeping of a '*Common Gaming House*' in India. According to *Black Law Dictionary*,

8 *Games of Skill in India: A Proposal For Reform*, The Sports Law & Policy Centre, (Aug. 09, 2020, 10:00 AM), https://drive.google.com/file/d/0B6LE5s8UEIKGZXNKNGRnQk94ZEE/view.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 The Public Gambling Act, 1867, No. 03, Acts of Parliament, 1867 (India).

Gambling refers to "*the act of risking something of value for a chance to win a prize.*"[13] Gambling is not defined in the PGA, however, the Act has incorporated the definition of '*Common Gaming House*' referring it as *"any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place, or otherwise howsoever."*[14] It can be concluded that an act to qualify as gambling essentially requires chance, consideration, and a prize. Furthermore, it is safe to assume that web-servers that facilitate online gaming houses fall within the ambit of PGA.[15]

Moreover, the Act exonerates the liability of any game involving mere skills, thereby excluding the '*game of skills*' from any liability.[16] Games based entirely on participant's skills and knowledge and involve a factor of little or no luck would not, therefore, be considered illegal because such legislation or law imposes no penalty on games comprising of skills. Although, PGA does not define the ambit of the game of skills or any other factor to interpret the term '*mere skill*'. However, in the case of *State of Bombay v. R.M.D. Chamarbaugwala*[17], the court interpreted a game of "*mere skill*" as the game which primarily includes skills and enunciated that it will be only applicable to games that are preponderantly of skill, and in-spite of a certain degree of chance the game preponderantly remain a game of skill.

The Prize Competitions Act, 1955[18] (hereinafter "PCA") further sets out regulatory guidelines for the rewards and operation of prize competitions across the country. Under PCA, a prize competition can be defined as any competition providing a prize for the answer/ solution that is achieved through arranging or setting up pictures, puzzles, numbers, etc. It governs the restrictions and application on the conduct and hosting of a prize competition or a game. The Supreme Court while determining the background and intent of the legislature behind PCA's enactment enunciated that games that are predominantly based on skill are excluded from the regulatory framework and liability terms of the PCA.[19]

13 *Black's Law Dictionary* 750 (4th ed. 2009).

14 Section 12, The Public Gambling Act, 1867, No. 03, Acts of Parliament, 1867 (India).

15 Anand Jayachandran & Aditya Prasad, *All In or Fold – The Legal Conundrum of Real Money Online Poker,* India Corporate Law (July 10, 2020, 10:15 AM), https://corporate.cyrilamarchandblogs.com/2019/07/real-money-online-poker-legalities/.

16 *Supra* note 14.

17 A.I.R. 1957 S.C. 699.

18 The Prize Competitions Act, 1955, No. 42, Acts of Parliament, 1955 (India).

19 *Supra* note 17.

Furthermore, according to the Seventh Schedule of the Indian Constitution (List II, Entries 34 and 62), the state governments have been vested with the power to make betting and gambling legislation for their respective territory. Hence, where there is a state gambling legislation state, it prevails over the PGA. Consequently, many states in India in addition to the PGA have introduced legislation regulating gambling and gaming within their jurisdictions. These state regulations are essentially in accordance with the PGA, and also exempt games that involve skills as a predominant factor.

Conundrum between Game of Skills and Game of Chance

Dominant Factor Test

To adjudge a game as of a skill or chance it is important to take into consideration the facts and circumstances as the deciding factor of each case.[20] To determine the true character of a game, U.S courts have established a "Dominant Factor Test". Significantly, this test acknowledges that most of the games include some form of chance and thus focuses upon deciding whether luck or the skill involved is the most important factor in choosing the winner in those situations where predominantly skills are required.[21] In the case *Bayer v. Johnson*[22] Appeals Court of South Dakota (U.S.) held that: *"The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game."* Perhaps, the test elucidates that the mere influence of chance alone does not affect the nature of the game. Rather, it entails that the element of chance must achieve a certain degree of significance before it makes a game illegal.

Despite the evolution of this test, issues have persisted regarding its application. Initially, U.S courts failed to interpret whether the application of the test is in quantitative terms or in qualitative terms. Consequently, the Supreme Court of Washington explained that: *"The measure is a qualitative one; that is, the chance must be an integral part which influences the result. The measure is not the quantitative proportion of skill and chance in viewing the scheme as a whole."*[23] Thus, it can be safely concluded that the "Dominant Factor Test" is qualitative and not quantitative.

20 *Manoranjithan Manamyil Mandram v. State of Tamil Nadu*, A.I.R. 2005 Mad 261.

21 See *Roberts v. Comm. Inv. Club of Woonsocket*, 431 A.2d 1206, 1211 & n.5 (R.I. 1981).

22 349 N.W.2d 447, 449 (S.D. 1984).

23 See *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 163 (Wash. 1965).

Indian Position & Dominant Factor Test

Courts in India have adopted a similar approach as laid down by the U.S. precedents. The test of predominant nature has been applied to identify the true character of the game.

Game of Rummy

In the landmark case of *State of Andhra Pradesh v. K. Satyanarayana*[24] (hereinafter "Satyanarayana Case"), the court held that even though there is a slight risk involved in the game of Rummy, it is a game of skill as it is predominantly based on the skill of the player playing the game. The court further held that: *"The "three card" game which goes under different names such as "flush", "brag" etc., is a game of pure chance. Rummy, on the other hand requires a certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We, cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill."*

Interestingly, the court in the above case adopted a two-step test to identify the nature of the activity. These steps involved: firstly, to identify whether the game in question is mainly and preponderantly a skill game, and secondly, whether the organization involved in the operation of these games is making any gain or profit from such activity except for the service fee charged for operations of the game. For the Game of Rummy, the court opined that it majorly requires skills to learn and understand the fall of the cards and needs considerable skills to finish the game and win. The logic behind identifying the true nature of a game has been applied by the legislation and the courts, however, the additional step pertaining to the determination of profit and gain that has been received by the organizer stands a point of issue. This is because if a game is a game of skill then the gambling laws and other allied provisions must not be applied under any given circumstances. This further creates a tussle between the fundamental rights of a person to carry out free trade and business guaranteed under Article 19 of the Constitution and the gambling statutes. It further jeopardizes business models with irrelevant and illogical differentiation.[25] Nevertheless, the *Satyanarayana Case* has laid down the foundation of clearing the confusion pertaining to skill games and chance games by applying the dominant factor test.

Horse Racing

Horse racing has been a part of the rich heritage and traditions and has served as a stage to display strength and valour. While dealing with aspect of wagering in it, the issue before

24 A.I.R. 1968 S.C. 825.

25 *Supra* note 8.

the Supreme Court was whether wagering on horse races constitute a game of skill or chance. In *K.R. Lakshmanan v. State of Tamil Nadu*[26] (hereinafter "*Lakshmanan Case*"), the Supreme Court held that: "*Horse-racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning-post. 'Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. We, therefore, hold that wagering or betting on horse-racing - a game of skill does not come within the definition of 'Gaming' under the two Acts.*"

The court by this ruling allowed wagering on horse racing and declared it as a lawful activity that is outside the scope of PGA and PCA. The court formed such a basis due to the availability of numerous publication and information that assists the participant to learn about the maintenance of horses and the nuances of racing. Furthermore, with the application of such knowledge and the right information about the past performances of the horse and the racer, a high degree of skills get involve to determine the outcome of the race. The court also reiterated the principle of the dominance of skills as laid down in the *Satyanarayana Case* while ruling out the aspect of high degree of chance.

The landmark ruling in the *Lakshamanan Case* has special significance as it was the first time that a game directly related to field sports was declared legal in terms of betting. *Lakshmanan Case* and the *Satyanarayan Case* paved way for the fantasy games companies and sports enthusiasts to combine their skills online. The observation of the courts in these two cases rightly supports the legality of the skill based fantasy games as there are major skills involved in choosing the winning team and the right combination.

The Curious Case of Poker

The legality of poker games is surrounded by uncertainties and societal stigmas. Lack of clear and comprehensive legislation clarifying its status and legality has resulted in uncertainty regarding its operation in India. The Supreme Court had earlier propounded that there was no scope for the use of one's skill to reach the desired result in games such as poker, double up, blackjack and Pacman because electronic setups relied upon to play these games might be manipulated and therefore the chances of winning are no more in control of the player who is using his skills.[27]

26 (1996) 2 S.C.C. 226.

27 *M. J. Sivani v. State of Karnataka,* A.I.R. 1995 S.C. 1770.

However, the efforts of the Indian Poker Association (IPA) to legalize poker games have resulted in two favorable judgments from the Karnataka High Court and the Calcutta High Court based on their State legislation on Gambling. Although, these two decisions did not delve into the legality of poker altogether, resulting to be limited in nature. The Karnataka High Court in *Indian Poker Association v. State of Karnataka*[28] held that poker, if played like a game of skill, does not require a license and is legal when played in such a manner. However, the court did not test its legality by determining its nature and is therefore considered as a narrow interpretation. In *Indian Poker Association v. State of West Bengal*[29], the court by prima facie considering the game of poker outside the purview of West Bengal Gambling and Prize Competitions Act, 1957 considered it to be legal. Both these judgments have not relied on the "Dominant Factor Test" to identify the true characteristics of the game of poker.

However, the Gujarat High Court after perusing the rules of the game held that *'Texas Hold Em Poker'* was a game of chance and thus prohibited under Gujarat Prevention of Gambling Act, 1997.[30] The court relied upon the observations made in *Satyanarayan Case,* wherein the Supreme Court considered the '*3 Card Game'* like a game of pure chance and therefore declared it illegal. Furthermore, in *M/s Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal and State of NCT*[31], the District Court (New Delhi) distinguished between games played in a physical space and those played on an online platform, and opined that playing 'games of skill' for money is lawful only when played in the physical form. Additionally, the court observed that when games are played on an online forum, various factors are involved that influence the degree of chance, and the predominance of skill over chance becomes uncertain, as other elements like arbitrariness, cheating, and collusion take over. Although, due to withdrawal of the original petition the observation of the court was subsequently set aside.

It can be concluded with regards to the observations made by different courts that poker is primarily a game of chance. However, different positions adopted by various states and lack of a common precedent is adding to the ambiguity regarding its current position. Predominantly, there are high chances involved in the Game of Poker when played online as rightly highlighted in the above case. Due to unreliable algorithms, the operating system might favour any person playing online even though he/she has displayed a minimum amount of skills. However, if a suitable regulation/ measure can be carved out to overcome this uncertainty, the courts must reapply the established tests to reach a balanced outcome.

28 2013 SCC OnLine KAR 8536.

29 WPA No. 394 of 2019 (High Court of Calcutta, 29/08/2019).

30 *Dominance Games Pvt. Ltd. v. State of Gujarat and Ors.*, (2018) 1 G.L.R. 801.

31 Suit No. 32/2012 (Delhi District Court, 17/09/2012).

Legality of Fantasy Sports in India

According to a recent study released by the Massachusetts Institute of Technology (MIT), the majority of sports fantasy games are based on skills rather than luck.[32] The researchers at MIT by analyzing the win/loss ratio and statistics of thousands of fantasy players involved in different sports over multiple seasons have concluded that a fantasy game is inherently a contest that rewards skill.[33] This adds to the rampant rise of online fantasy games that are flourishing amongst the virtual sports managers. Moreover, the dimensions of the online gaming market in India have been growing with revenues reaching approximately Rs. 43.8 billion in Financial Year 2018-19 and are expected to reach Rs. 118.8 billion by 2023.[34]

To effectively deal with the rise of fantasy sports games, Nagaland enacted *Nagaland Prohibition of Gambling and Promotion and Regularization of Online Games of Skill Act, 2015*. Prior to the enactment of this Act, fantasy sports games were not explicitly considered as 'game of skill' under any other policy or judgment. The State of Nagaland through this Act introduced a licensing regime to expressly recognize '*virtual sports fantasy league games*' and '*virtual team selection games*' as the skill based games.[35] Additionally, the State of Sikkim enacted *Sikkim Online Gaming Regulation Act, 2008* that legalized online betting in sports games. The majority of Indian States except Sikkim and Goa have enacted legislation barring betting and gambling after placing their reliance on PGA.

Significantly, the High Court of Punjab and Haryana in 2017 (hereinafter "*Dream 11 Case*") had held that a fantasy sports game was predominantly a game based on skills.[36] In this particular case, the plaintiff moved to the court against fantasy sports game company "Dream11" (defendants) alleging that the game was not based on skill and that Dream11 was conducting business that was covered within the definition of gambling in the State of Punjab. The High Court relied upon the *Lakshmanan Case* and opined that *"petitioner himself created a virtual team of a cricket match between two countries by choosing players, who were to play for two countries collectively and after forming a virtual team as per his own selection, knowledge and judgment, which is thoughtful will, he joined various leagues and after registration which was declared before participating, was not about possibility of winning or losing like horse riding not every bettor is winner."*

32 Jennifer Chu, *Study: There's Real Skill In Fantasy Sports*, MIT News Office (Aug. 07, 2020, 10:00 AM), http://news.mit.edu/2018/hosoi-study-skill-fantasy-sports-1107.

33 *Ibid*.

34 IFSG & KPMG, *The Evolving Landscape Of Sports Gaming In India*, KPMG (Aug. 02, 2020, 11:00 AM), https://home.kpmg/in/en/home/insights/2019/03/online-gaming-india-fantasy-sports.html.

35 *Supra* note 8.

36 *Varun Gumber v. Union Territory of Chandigarh and Ors.*, 2017 CriLJ 3827.

Consequently, the plaintiff's appeal was dismissed by the Supreme Court by upholding the observations made by the High Court in favour of the defendants.[37] This resulted in legalizing skill-based fantasy sports game in India. However, this does not imply that every fantasy game that is created is a game of skill. The Supreme Court at any given time possesses the power to test the merits of the game by determining its character.

Although, there have been instances in multiple States wherein the legality of skill games have been challenged even though when the Supreme Court has affirmed that skill-based games are legal. Recently, in *Chandresh Sankhla v. The State of Rajasthan and Ors*[38], a Public Interest Litigation was filed before the Rajasthan High Court alleging that Dream 11 constitute betting and gambling, and is illegal. The respondent company (Dream11) pleaded that Section 12 of the Rajasthan Public Gaming Ordinance, 1949 grants immunity of game involving "mere skill" and Dream 11 has been held to be a game involving skills (majorly). The court after considering the view adopted by the Punjab & Haryana High Court and the Bombay High Court dismissed the PIL while ruling that skill games are legal as exempted by Section 12 and out of the purview of Gambling laws.

Significantly, the Bombay High Court in *Gurdeep Singh Sachar v. Union of India and others*[39] ([hereinafter "*Gurdeep Singh Case*"), dismissed a Criminal Public Interest Litigation by placing its reliance on previous judicial pronouncements of the Supreme Court and other High Courts. The court upheld the legality of online fantasy sports gaming in India and asserted that such games preponderantly involve skills. The court further opined that unlike betting, the outcome of any team winning or losing in fantasy sports was not dependent on any team losing or winning in the actual world.

However, the Bombay High Court's decision in the *Gurdeep Singh Case* was challenged before the Supreme Court in 2019. Furthermore, the Union of India had also filed an appeal before the court. Subsequently, the petitions were clubbed and were jointly dismissed by the Supreme Court while upholding that Dream 11 facilitates a game of skill.[40] However, the Supreme Court had allowed the Union of India to apply to the Bombay High Court for a specific review for the application of Goods & Services Tax (GST) to Dream 11's operations. Thereafter, the State of Maharashtra filed a special leave petition challenging the Bombay High Court's ruling in the *Gurdeep Singh Case* and subsequently, the court

37 *Varun Gumber v. Union Territory of Chandigarh and Ors.*, Diary No. 27511/2017 (Supreme Court of India, 15/09/2017).

38 Civil Writ Petition No. 6653/2019 (High Court of Rajasthan, 14/02/2020).

39 (2019) 75 G.S.T. 258 (Bombay).

40 SLP (Crl.) Diary No. 42282 of 2019 and SLP (Crl.) Diary No. 43346 of 2019.

ordered a stay on the effect of the Bombay High Court's ruling and has initiated fresh hearings after notifying all the parties.[41] Interestingly, to determine the scope of Good & Services Tax (GST), the court has to pierce the veil to identify the true character of the activities. With the rise of such platforms, there is a possibility that the court might get into the merits of such operations. If the second step of the two-step test established by the court in *Satyanarayan's Case* which lays down to identify the profit or gain made by the organizer of a skill game except for the service fee, there are chances that the court can restrict the activities of the fantasy companies.

This order has created problems for the existing judicial pronouncements that are in favour of online fantasy games.[42] Nonetheless, the question that now persists is whether the Supreme Court will end the speculations regarding the legality of fantasy sports games in India, once and for all.

The Sports (Online Gaming and Prevention of Fraud) Bill, 2018

The Sports (Online Gaming and Prevention of Fraud) Bill, 2018 aims to maintain the integrity of sports in India by curbing fraudulent activities and regulating the commercial nature of sporting events.[43] The Bill primarily addresses the corrupt practices that are prevalent in sports such as spot-fixing, inside information etc., and proposes to punish the offenders.[44] It further proposes to regulate the online betting structure including the functioning of fantasy games by introducing systematic licensing for the operators.[45] Additionally, it lays down the procedure for renewal and suspension of such licenses that have been obtained under the Bill.[46] Significantly, Section 20 of the Bill seeks to establish an Online Sports Gaming Commission[47] that will perform the following functions;[48] a) to keep check on the activities of Online Gaming Websites; b) tracking illegal activities and

41 SLP (Crl.) Diary No. 42282 of 2019.

42 Rishabh Bhardwaj & Neil Deshpande, *Supreme Court Stays Operation Of High Court Judgment On Online Fantasy Sports In India*, Khaitan & Co. (Apr. 14, 2020, 10:00 AM), https://www.khaitanco.com/thought-leaderships/Supreme-Court-stays-operation-of-High-Court-judgment-on-online-fantasy-sports-in-India.

43 Gaurav Laghate, *Shashi Tharoor moves bill to regulate online gaming*, The Economic TimeS (Jan. 15, 2020, 06:48 AM), https://economictimes.indiatimes.com/news/economy/policy/shashi-tharoor-moves-bill-to-regulate-online-gaming/articleshow/67534323.cms?from=mdr.

44 *Ibid.*

45 Section 15, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

46 Section 19 & Section 20, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

47 Section 11, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

48 Section 13, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

suggesting suitable measures to curb illegal functioning of Online Gaming Websites; c) to monitor suspicious betting trends of the user including the Licensees; d) coordination with State and Central law agencies to limit illegal transactions; e) to prepare special reports pertaining to Online gaming for the Central Government; f) to grant, revoke and suspend licenses and to decide fees for renewal and other applications. It is to be noted that Section 14 of the Bill sets out the ambit of Online Sports Gaming.[49] It states that no person shall engage in any online gaming activity except through an Online Gaming Website formulated under the Bill, and no person shall host any Online Gaming Server or Website without a prior License obtained under the Bill.[50] The provision further discusses the punishment in the form of imprisonment for a term 1 year and 3 years respectively and fine for the contravention of the above mentioned.[51] Consequently, the provisions of the Bill address the major concerns of functioning and governance of betting and gambling that have never been discussed in the past.

However, the Bill suffers from certain irregularities as it does not particularly state the name of the games that can be declared as a skill or chanced based games. Furthermore, the element of solving a dispute within a reasonable time arising between different stakeholders is also missing in the proposed draft. It is also important that the role of all stakeholders including the service platforms and the governmental agencies must also be clearly determined to avoid overlapping and unnecessary interference.

Although, in view of the success of sports leagues in India the Bill if implemented can prove to be a major contributor to the revenue regime. Significantly, Justice Mudgal, who headed the probe on IPL spot-fixing and betting scandal, himself added that legalizing betting in India would help the government generate income by reducing illegal spot-fixing, betting, etc.[52] Interestingly, the Indian Premier League, one of the richest league in the world places itself at the top of the offshore betting companies' revenue list across the world.[53] Moreover, the Betfair Exchange in 2018 traded a total of $4.3 billion, which is just a small part of the overall legal betting transactions taking place across the world.[54] Additionally, on 5

49 The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of 2018.

50 *Ibid*.

51 *Ibid*.

52 *Mudgal for Legalised Betting*, The Telegraph (Apr. 29, 2020, 11:30 AM), https://www.telegraphindia.com/sport/mudgal-for-legalised-betting/cid/1335100.

53 Somshuvra Laha, *Legally illegal, but you can bet online in India*, The Hindustan Times, (May 21, 2020, 01:15 PM), https://www.hindustantimes.com/india/legally-illegal-but-you-can-bet-online-in-india/story-SW04haVrqOq1MzlFBvOjiP.html.

54 Vithushan Ehantharajah, *Professional betting and how it works during IPL*, Cricbuzz (Mar. 22, 2020, 10:42 AM), https://www.cricbuzz.com/cricket-news/107235/professional-betting-and-how-it-works-

July 2018, the Law Commission of India (headed by Justice B.S. Chauhan) tabled its final report on the prospect of legalizing online betting in India.[55] The Commission functioning under a 2016 order passed by the Supreme Court concluded that it is difficult to prohibit the practices of betting and gambling, although, it is desirable to formulate a regulation to oversee such activities.[56] In countries like the U.S. thee ae over 20 States that have legalized sports betting and are relying on it to cover the budget deficit in 2020.[57] It is expected that in total, sports betting will account for $1 billion in taxable gross gaming revenue this year, with the vast majority of this tax income coming from the 4 leading markets namely New Jersey, Nevada, Pennsylvania, and Indiana.[58] Indian Government should also consider such possibilities to cover the deficit by implementing such Bills.

One of the many reasons against legalizing sports betting is morally based. However, law and morals are not correlated. All the state should and has done to ensure a balance between law and morality is to control actions that for certain people do not perform well on a moral compass; such as drinking, smoking, etc.[59] With respect to the criminalization of betting in sports, we must bear in mind that criminal legislation will only be involved in the event of a breach. There is a gambling or betting agreement between two parties resulting in one party winning and the other losing, and such an arrangement is unlikely to be public harm or a danger to society's morality.[60]

In light of the above, The Sports (Online Gaming and Prevention of Fraud) Bill 2018 has taken into account all the necessary provisions for the smooth regulation of fantasy sports and betting activities. The licensing regime proposed by the Bill will act as an established structure that will guide companies to follow a systematic mechanism. Also, the system of levying fines for the breach of the provisions of the Bill will reduce the chances of contravention as it can lead to suspension and cancelation of the license.[61] In addition to

during-ipl-cricket-rcb-csk-mi-cricbuzzcom.

55 PRS Legislative Research, *Legal Framework: Gambling and Sports Betting Including Cricket in India*, PRS Legislative Research (Mar. 22, 2020, 10:50 AM), https://www.prsindia.org/report-summaries/legal-framework-gambling-and-sports-betting-including-cricket-india.

56 *Ibid*.

57 Charles Norton, *Why States Are Betting On Sports Gambling To Cover Budget Deficits*, Forbes (Jul. 1, 2020, 12:15 PM), https://www.forbes.com/sites/charlesnorton/2020/07/01/why-states-are-betting-on-sports-gambling-to-cover-budget-deficits/#2075ab965255.

58 *Id*.

59 Snehal Walia, *Legalisation Of Sports Betting In India: What Is The Best Bet?*, Lex Sportiva (Jun. 4, 2020, 11:45 AM), https://lexsportiva.blog/2020/06/04/legalisation-of-sports-betting-in-india-what-is-the-best-bet/#_edn7.

60 *Ibid*.

61 Section 20 & Section 22, The Sports (Online Gaming and Prevention of Fraud) Bill, 2018, Bill No. 259 of

this, the penal provisions of the Bill will act as a deterrent against the threat of fraudulent and illegal operations. However, the Sports (Online Gaming and Prevention of Fraud) Bill 2018 lapsed due to the dissolution of the Assembly prior to the 2019 elections. It has not been reintroduced, although, it is considered to be an important foundation for the regulation of sports activities in India.

Challenges Faced by Fantasy Sports in India

The *Dream 11 Case* has changed the landscape of paid online skill fantasy games in India. According to industry estimates, there are nearly 50 to 80 companies scrambling for users in this market with Dream 11 emerging as industry leaders due to hefty investments made by Tencent and Kalaari, while others such as Fantain, Halaplay, and My Team are also witnessing major attention.[62] Perhaps this judgment has laid down a foundation for the industry's surge over the last few years.

However, as different states have the power to control the affairs of gambling within their territories through their legislation, the users and companies are in a constant dilemma to identify between skill and chance-based games that qualify as legal games in different states. Moreover, stakeholders broadly face the following challenges:

I. Lack of a Common Precedent- Games such as Poker and Rummy suffer due to irregularities and vague interpretations laid down under state legislations. Moreover, due to multiple legislations in different states, it becomes difficult to establish a common understanding throughout the country as PGA does not have the authority to rule over the state law.

II. Data Privacy and Data Protection - Right to Privacy is a fundamental right enshrined under Article 21 of the Indian Constitution.[63] A user registering on a paid fantasy sports website needs to provide his personal details including his bank account and PAN Number to withdraw his winnings (if any). The user providing this information gives exclusive access to the operating company. As new companies are entering the market and facilitating the use of fantasy websites, the users are creating their accounts on multiple platforms to experience

2018.

62 Rahul Sachitanand, *Despite Initial Success, Fantasy Gaming May Need A New Strategy*, The Economic Times (Apr. 16, 2020, 12:30 PM), https://economictimes.indiatimes.com/industry/media/entertainment/despite-initial-success-fantasy-gaming-may-need-a-new-strategy/articleshow/68867473.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

63 *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1.

different games. However, there is a significant risk that these details might not be completely protected and secured due to the lack of a policy to regulate the functioning of these companies. With the advent of server hacking, and consistent breaches leading to data leaking, the details of users and companies face an imminent danger that requires immediate attention.

III. Lack of a Regulatory Framework- Due to the absence of a *sui-generis* policy to administer the functioning of skill games in India, companies are facing difficulties in executing a systemic business model. With the changing dynamics of technology and gaming interface, a policy to address the issues relating to gaming infrastructure is a necessity. Additionally, at the central level there is no procedural and substantial framework to govern online establishments. Moreover, the lack of clarity regarding games that form part of a legal regime further adds to the problems faced by companies.

IV. Fair Play and Dispute Resolution- A major challenge for the companies is to design a fair-play violation policy that ensures stringent adherence to the guidelines laid down in the rules and regulations. According to the *ThreatMetrix Gaming and Gambling Cybercrime Report*, nearly one out of 20 new accounts are created for fraudulent transactions.[64] This suggests that this rapidly rising industry is affected by fraud and has become a prime target for fraudsters.[65] Moreover, the lack of a dispute resolution mechanism further adds to the problems as the disputes being dynamic in nature require a suitable procedure to resolve the issues of the users.

Conclusion & Recommendations

Skill gaming in India is experiencing tremendous growth that is driven by technological advancements, innovation, and changing patterns of consumer consumption. The current state of regulatory environment and perception of individuals would require this industry to develop policies and procedures such as self-regulation, maintaining high standards of corporate governance, honesty, and accountability. It is imperative that different stakeholders must collaborate with self-regulatory bodies such as the Federation of Indian Fantasy Sports (FIFS) to organize their structure according to a formal code of conduct. Organizations like FIFS promote self-governance for fantasy sports by creating a system

64 Team Springworks, *The importance of background checks in the gaming industry*, Springworks, (Aug. 09, 2020, 12:15 PM), https://blog.springrole.com/the-importance-of-background-checks-in-the-gaming-industry-1be8bdf7326.

65 *Ibid*.

of common industry practices and organizes research-oriented studies to focus upon the changing dynamics of sports industries. It further establishes a complaint and redressal mechanism for the users to resolve their issues and queries pertaining to the functioning of online fantasy games.

Furthermore, the government at the central level must formulate a *sui-generis* policy to promote and establish guidelines for the operation of skill-based games. For example, Malta Gaming Authority has issued *The Skill Gaming Regulations, 2017* to provide a broader framework and logical criteria for the assessment and characterization of a game of skill and their functioning. These criteria consist of multiple conditions such as nature and objective of a game, the required skills, and eligibility to participate.

In addition to this, the government must address the issue of obtainment and the protection of the user's data. This issue can be resolved by the companies by following a set of principles such as end-to-end encryption of the user's transaction to safeguard his details and banking operations. Additionally, a secured system must be developed to store sensitive information of the users. These initiatives would not only reduce the ambiguity pertaining to skill games but will also improve consumer protection while ensuring growth of an industry that contributes to the development of all stakeholders.

Little Red Riding Lawsuit :

An Analysis of The Legality and Application of Single-Color Trademarks in India, With Reference To Christian Louboutin S.A.S. v. Abubaker and Ors.

Manan Katyal*

Abstract

With the shift in international trade, the manner in which brands choose to manifest themselves in the global domain has been modified considerably. Trends worldwide are being experienced which result in the deviation from conventional to non-conventional trademarks, which include a variety of components beyond the traditional words, figures, shapes, etc. This paper focuses on signifying the importance of such a shift and incorporating single-color trademarks into the Indian legislation in light of the implications of its absence, and furthermore, how the position established by the Indian Trade Marks Act, 1999 has failed the development of the jurisprudence on single-color marks across the world. The case of Christian Louboutin S.A.S. v. Abubaker and Ors., comes into play as it shows how a multi-million dollar multinational organization, which has catered to society's crème de la crème for the past three decades, after attaining trademark protection for its red-soled footwear in more than 35 countries worldwide, including India, has been failed by the Delhi High Court in asserting a right over its own distinctive image and single-color mark. A critical analysis of this judgment highlights the impact of the limitation imposed by the exclusive interpretation of the legislation and the archaic and restrictive approach adopted by Courts while assessing matters related to single-color marks. More importantly, this paper suggests that these marks play an invaluable role in strengthening and invigorating an inadequate trademarking regime by widening its applicability, approach and functionality. Lastly, this paper proposes that the impact of inclusivity in trademarking on the economics of trademarks,

* Student, Symbiosis Law School, Pune.

business operations and national market and economy is a proposition considerable enough to allow their adoption under the Indian Trade Marks Act.

KEYWORDS: Non-traditional trademarks, Single-color trademarks, Trade Marks Act 1999, Christian Louboutin

INTRODUCTION

Initially, the purpose and function of trademarks was to act as a source identifier[1], but with the increasing dynamicity of international trade and globalization, the approach has experienced a shift towards providing an immersive and distinguishable brand experience. In coherence to this, businesses worldwide are exploring the infinite opportunities provided by non-conventional or non-traditional trademarks. Such marks have often been considered to be the most striking branding strategy of the 21st century.[2] The technological revolution persuaded many companies to experiment with 'extreme branding' with the aid of color, sound, smell, tastes or even 3D and holographic images.

An integral element of non-conventional trademarks is single-color marks, which associates a specific color with a brand, possessing a certain degree of acquired distinctiveness. Color psychologists and experts hold that through marketing studies and analysis, color can increase brand recognition by up to 80%.[3] Single-color trademarks act as a more potent source-identifier than a conventional trademark as practical employment of these marks have shown visual aspects of brands that transcend languages.[4] For example, a candy bar wrapped in a purple packaging, irrespective of whether the text on the wrapping is in Greek or Japanese, would instinctively allow consumers to associate it with Cadbury.

Hence, single-color marks encompass a full spectrum of sensory perception beyond commonplace visual signs and bear a high potential of economic value, leaving a greater degree of commercial impression on the consumers with its unique appearance, smell, touch or experience.

1 Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense,* 108 YALE L J 1687, 1695 (1999).

2 LINDSTORM MARTIN, BRAND SENSE: BUILD POWERFUL BRANDS THROUGH TOUCH, TASTE, SMELL, SIGHT AND SOUND 205-6 (1st ed. 2006.)

3 Jill Morton, *Why Color Matters*, COLORCOM (Aug. 09, 2020, 10: 02 AM), https://www.colorcom.com/research/why-color-matters.

4 Margaret A. Boulware, *Emerging Protection for Non-Traditional Trademarks: Product Packaging & Design,* Baker & McKenzie LLP 68 (2015).

Single-Color Marks as Non-Traditional Trademarks

Concept of Non-Traditional Marks

Traditional or conventional trademarking includes a variation between words, figures, symbols, numbers, combination of colors, etc. but of late trademarks have undergone a revolutionary change and have proved to serve a holistic purpose. Modern innovative technology has produced more products to see, smell, touch, taste or hear than people would otherwise get through their non-augmented faculties. Corporations are no longer limiting their scope to only provide a tangible good as they are witnessing a shift towards selling experiences alongside commodities or services. Hence, the new form of trade requires a new form of trademarks, which go beyond the traditional trademarks in nature, characteristics, scope and economic potentials.[5] The development of non-traditional marks proves to show that trade mark law is subject to a dynamic process from which new types of marks may constantly evolve.[6] These marks are of great commercial value to an enterprise and an important part of evolving business strategy and intellectual property portfolio.[7]

Color is arguably one of the most potent tools in packaging, which a single-color mark perfectly encapsulates. Multiple studies of eye movement have reiterated that colors prompt the fastest response of any aspect of a package.[8] It can serve as a fundamental base to assert brand identification and distinction in consumers. The impact and significance of a color in trademarking would be further discussed.

International Jurisprudence on Single-Color Marks

Although a single color had been protectable as a trademark globally, it was only in the 1980s that its registrability was recognized in a judicial precedent. This was a result of the *Think Pink* campaign launched by Owens-Coming Fiberglass Corp. by insulating its fiberglass with a pink tint.[9] This campaign was the genesis which led to the development of the jurisprudence on single-color trademarks around the world. From here on, the impetus required by such marks to develop globally was predominantly contributed by the United States and European Union.

5 Lisa P. Lukose, *Non-traditional Trademark: A Critique,* J. IND. L. INS. 197, 198 (2015).

6 WIPO Secretariat 'New Types of Marks' (SCT/16/2) Sep. 1, 2006, at 57.

7 GRAHAM DUTFIELD & UMA SUTHERSANES, GLOBAL INTELLECTUAL PROPERTY LAW 73 (2nd ed. 2008).

8 D. P. MITTAL, TRADE MARKS: PASSING OFF & GEOGRAPHICAL INDICATIONS OF GOODS, 1.15 (2002).

9 *Re Owens-Coming Fiberglass Corp.*, 774 F.2d 1116 (Fed. Cir. 1985).

Contributions by the US

The authority relating to single color trademarks in the US is *Qualitex v. Jacobson*[10] where the court ruled that there would be no *per se* bar to registration as long as the mark meets the imperative condition of acquired distinctiveness. Trademarks, in their own essence, do not possess the ability to be inherently distinctive. Only once they have been associated with a brand and have acquired the distinctiveness by generating a secondary meaning for themselves, they can be legally registrable. The threshold of acquired distinctiveness can only be passed through consistent usage and market reach with the passage of time. In other words, the mark must have acquired a secondary meaning or a considerable level of significance, which differs from its most obvious and literal interpretation, throughout a substantial period of time.

This is the dominating reason because of which single-color trademarks have remained in the public domain. The mandate that the proprietor must be able to indicate the distinctive nature of the mark is rather restrictive due to the subjective interpretations a color may allow. More often than not, courts are of the opinion that a pure color can never have inherent distinctiveness, but leave open the scope of it being acquired through the process of time.

The acceptance that single-colors can acquire distinctiveness in order to be associated with a brand defied the principles heretofore established across the world and still continues to operate as a precedent even for the more contemporary issues. Since the *Qualitex* case, numerous companies have been successfully able to register their single-color marks, such as UPS[11], 3M[12], Tiffiany & Co.[13], etc. under the United States' trademark legislation.

Additional Mandates Imposed by the EU

The EU, however, adopted a more skeptical and cautious approach by further complicating the law on single-color trademarks and introducing an additional pre-requisite of graphical representation, which poses as a strong barrier to non-traditional trademark registration. A mark can only be graphically represented if its nature, description, features, technicalities, etc. can take the form of a pictorial representation, written description or both, concisely and accurately. Nonetheless, the implications of this condition were slightly more relieved for single-color marks due to the prevalence of a uniform system to standardize colors and

10 *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

11 Registration No. 2131693 (registering brown as applied to vehicles).

12 Registration No. 2390667 (registering canary yellow as applied to adhesive notes).

13 Registration No. 2359351 (registering robin's egg blue as applied to boxes).

reduce them to a specific and definite shade. This system graded colors by allotting them a numeric code, serving as their unique identifier worldwide. The most prominent example of such is the Pantone Matching System (PMS), apart from the lesser popular ones, such as CMYK, RAL and RGB. Since color standardizing techniques ensure consistency, courts have found them to be admissible while analyzing the graphical representation of single-color marks.

In the forefront of the precedents on graphical representation, lies *Sieckmann v. Deustsches Patent und Markenant*[14], which ruled that a single color could be represented graphically through a "*clear, precise, self-contained, intelligible, durable and objective*" manner.[15]

The irony of the whole situation came into play in 2017 when the EU Trade Mark Implementing Regulation (EUTMIR)[16] was passed which overrode the requirement of graphical representation in the EU altogether. This ultimately loosened the noose around companies on trademarking their non-traditional marks. However, the mandate of graphical representation still subsists in countries such as India, Australia, China and most of Latin America.

Protection through International Agreements

Single-color marks have quite literally left a huge mark worldwide that it even finds itself seeped into the purview of various international treaties, but most particularly covered by the following:

1. The International Registration of Marks under the Madrid Agreement and the Madrid Protocol, 1891, (to which India has been signatory since April 8th 2013)
2. The International Classification of the Figurative Elements of Marks, as established by the Vienna Agreement, 1973
3. The Trade Mark Law Treaty, 1994
4. The European Union Community Trade Marks Regulations, 1996

Despite that these marks are not explicitly mentioned in the definition clause of the TRIPS Agreement of 1994, a plain reading of the section suggests that since it provides an inclusive and open-ended definition, it is wide enough to include such unconventional marks within its ambit.[17]

14 (2003) Ch 487 ECJ.

15 *Id.* at 511. Also see *Libertel Group BV v. Benelux Merkenbureau*, (2004) FSR 65 (ECJ: Sixth Chamber).

16 Regulation (EU) 2017/1001.

17 *Supra* note 5.

Law on Color Trademarks in India

The Trade Marks Act 1999

The Trade Marks Act 1999 (hereinafter referred to as 'the Act'), as metamorphosed from the Trade and Merchandise Marks Act 1958, functions as the leading legislation in India which governs and regulates the qualifications and procedure of registrability of trademarks and the rights and liabilities of their holders.

Section 2(1)(zb) reads:

> *"'trade mark' means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors."* [18]

Section 2(1)(m) reads:

> *"'mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof."* [19]

Hence the conditions to be qualified for a registered trademark in India are similar to those as contributed by the EU, i.e. graphical representation and acquired distinctiveness. Additionally, a mark must not fall within the absolute grounds for refusal of registration as provided under Sections 9 & 10 of the Act.

The Manual of 2015 by the Ministry of Commerce

In order to compliment the Act, the Ministry of Commerce and Industries released The Manual (Draft) of Trademarks Practice and Procedure of Indian Trademark Registry. The Manual analyzed that Section 2(1)(m) does not exhaustively cover the categories of legally protected marks and due to its open-ended nature determined that single color packaging has the potential to be classified as a valid trademark, subject to judicial scrutiny on a case-to-case basis.[20] Adopting a cautious stance towards assessing distinctiveness for colors, the Manual states:

> *"As color per se is not normally used by traders as a means of brand identification, unlike words or pictures, consumers are not in the habit of*

18 Section 2(1)(zb), Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India).

19 Section 2(1)(m), Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India).

20 Dev Gangjee, *Non-Conventional Trademarks in India,* 22(1) NLSI R. 67, 86 (2010).

> *making assumptions about the origin of goods and services based solely on their color or the color of their packaging. It follows therefore, that a single color will only in exceptional circumstances be capable of denoting the origin of a product or service. Marks consisting of a single color will usually be liable to objection under Section 9(1)(a) of the Act because they inherently lack the capacity to distinguish."* [21]

The Manual also suggests that unless colors are used in a special or particular pattern or arrangement, it is not an imperative that the color would lend distinctiveness as a badge of origin,[22] i.e. the colors may be considered generally decorative or a mere property of things, and not sufficiently distinctive as a trademark.[23]

Case Study of Christian Louboutin S.A.S. v. Abubaker & Ors.

Background of Christian Louboutin

French footwear designer Christian Louboutin sells more than five hundred thousand pairs of shoes bearing his name each year[24], generating an average annual revenue of $300 million through its 71 stores spanning 29 countries. At prices between $400 and $6,000 a pair[25], these high-heels are fashion's ultimate symbol of status and opulence.[26] In a comparatively short span of time, Louboutin's brand skyrocketed as it had been spotted on many of their high profile clients, including celebrities, global icons and even the royalty. Over the years, the red sole has become a great visual cue, widely recognized by consumers as a trademark of the Louboutin brand[27] and shaken the fashion industry to its core. Louboutin, apart from trademarking its red soles in more than 35 countries across the world is also a valid holder of a total of eight marks in the Indian Trademark Registry[28] since 2008.

---

21 Ministry of Commerce & Industries, Section 12.2.5, The Manual (Draft) of Trademarks Practice and Procedure of Indian Trademark Registry, 2015 (May 28, 2015).

22 *Id.* Section 5.2.1.

23 *Supra* note 20.

24 Lauren Collins, *Sole Mate: Christian Louboutin and the Psychology of Shoes,* NEW YORKER (Aug. 09, 2020, 11:30 AM), http://www.newyorker.com/reporting/2011/03/28/110328fa_fact_collins.

25 *Ibid.*

26 *High Net Worth Shoppers Rank Luxury Brands on Multiple Criteria,* LUXURY INSTITUTE BLOG (Aug. 09, 2020, 11:45 AM), http://blog.luxuryinstitute.com/?p=993.

27 Alison Frankel, *Louboutin Red Sole Trademark Case: Color War at the 2nd Circuit,* THOMSON REUTERS (Aug. 09, 2020, 12:10 PM), http://blogs.reuters.com/alison-frankel/2012/01/06/louboutin-red-sole-trademark-case-color-war-at-the-2nd-circuit/.

28 Indian Trademark Registration Numbers 1644051, 1839047, 1922048, 1931553, 2341890, 2341891, 2341895 & 2341896.

Analysis of the Judgment

Genesis of the Dispute: The Original Civil Petition

The case finds its origin from the Original Civil Petition filed in the Delhi High Court, adjudged on 25th May, 2018 by a Single-Judge Bench comprising of Justice Valmiki J. Mehta.[29] In this matter, Louboutin had filed for an injunction against the Respondent, a Mumbai-based company named Abubaker, who had been manufacturing and selling footwear bearing a red sole, alleging infringement and passing-off. Not only was the placement of the mark on the sole problematic, but the shade used by the Respondent appeared to be strikingly similar to the one globally used by Louboutin.

The judgment manifests a sense of peculiarity as on one hand the Court acknowledges Louboutin's trademarks of its red sole, as granted by the Registrar of Trademarks,[30] and on the other hand considered multiplicity of colors as a *sine qua non* for the interpretation of Section 2(1)(m). In conclusion, the Court isolated a single color mark from the scope of Act and stated that if the red sole cannot qualify as a valid mark under the Act, then it corresponds to the validity of its trademark.

The court also relied on the functionality doctrine, a well-established principle of trademark law which invalidates any mark that may be functional in nature.[31] Any feature of a product that may be considered functional cannot be trademarked in order to prevent a brand from unduly monopolizing it and in the larger scheme of events, to foster healthy competition. Section 9 of the Act declares functionality as an absolute ground for refusal by stating that color is applied to certain goods for the purpose of creating appeal, resulting in aesthetic functionality and the use of color performs only a non-trademark function, as it is a characteristic of the goods.

Appeal to the Division Bench

Subsequently, an appeal was filed to a Division Bench comprising of two judges of the same court, which released a homonymous judgment on April 11th 2019.[32] The Court ruled that the Single Judge was incapable of rendering an accurate decision due to the limitation of representation on behalf of the Respondents and any determination could only be provided after a deliberation of their case. Also, the procedure adopted by the Single

29 *Christian Louboutin S.A.S. v. Abubaker and Ors.*, 2018 (74) PTC 301 (Del) (India).

30 *Supra* note 28.

31 *See* Qualitex.

32 *Supra* note 29.

Bench, of determining a trademark matter *suo motu* by the Court on its very first hearing, was looked down upon. In conclusion, this Court adjudged to set aside the judgment of the Single Bench and ridiculed the lack of procedural compliance, but reinstated the original civil petition by referring this case to a different bench. Regardless of the consequences, the Division Bench had implicitly agreed with the rationale provided in support of the previous judgment, without going into the merits of the case.

Criticism of the Judgment

Narrow Interpretation of Section 2(1)(m)

Section 2(1)(m) defines a mark within the scope of the Act. On a bare reading, without an in-depth interpretation of the statute, the nature of the section is open-ended, inclusive and, more importantly, inexhaustible. Noticeably, it uses the word 'includes' while enlisting examples of permissible marks and not 'is limited to'. The Bench analyzed the legislation to have *deliberately* and *intentionally* used the expression 'combination of colors' and is of the opinion that the legislators carefully omitted a singular color. This signifies the narrow interpretation of the section as the Court looked deeper into it than necessary. A primary function of any statute is to be accommodating towards the advancements or developments in the jurisprudence of the law as well as with the time, which the open-ended nature of the section aimed to fulfill. Unfortunately, a motive the court had completely overlooked.

Disregards Louboutin's Registered Trademarks under the Indian Trademark Registry

As specified, Louboutin holds 8 valid trademarks with the Indian Trademark Registry.[33] Irrespective of whether the court deems the Louboutin's trademark status to be tenable, it essentially allowed the Respondent to pass-off and misuse a registered trademark under Indian law and override the status of registration granted by the Registrar of Trademarks. The jurisprudence of trademarks in India recognizes both a statutory and common-law remedy in order to protect the mark of a proprietor, both of which were bypassed by the judgment. By disregarding these registered trademarks while stating that the single-color mark cannot qualify as a trademark, the Bench set a very dangerous precedent that may prove to be detrimental in upholding the value, status and integrity of not only trademarks, but intellectual property as a whole.

33 *Supra* note 28.

Violates Sections 29(1) & 31 of the Act

Each of the conditions of infringement, as provided under Section 29(1) have been fulfilled in this case and each of the resultant circumstances have been actualized as under Section 29(4). Irrespective of whether such a mark is within the common practice of the industry, it was infringed by Respondent, who, rather than being penalized, was awarded the case. Additionally, the judgment omitted the consideration of Section 31 which affirms that there exists a *prima facie* presumption in the validity of a registered trademark in any legal proceedings, as the Bench failed to provide the benefit of the doubt to the Petitioner regarding the acquired distinctiveness of the brand.

Neglects the Application of Section 2(1)(zb)

Each mark contesting registration under the Act must pass the two conditions under Section 2(1)(zb); the mark must be capable of being graphically represented and distinct/ distinguishable. As put forward, single-color trademarks can be graphically represented through international color standardizing systems. Louboutin's red can be graphically represented on the Pantone scale as PANTONE 18-1663 TPX Chinese Red.[34] Moreover, Louboutin has acquired its distinctiveness through the differentiation of their product from the prevalent standards in the fashion industry in the past three decades. At the time of its conception, no brand had ventured into capitalizing on the color of the soles of a pair of stilettoes. Also, through the passage of time, the mark has become a symbol of high fashion and a unique brand identifier, not only to a fashion-savvy person, but even an extra-terrestrial.

Overlooks Indian Jurisprudence and Precedents on Trademarks

Previously in the same court, in the case of *Christian Louboutin S.A.S. v. Pawan Kumar & Ors.*[35], the Bench relied on the following in determining the red sole as a distinct trademark: (i) Louboutin's status as a well-known luxury brand in over 60 countries; (ii) extensive and continuous use of the red sole trademarks since 1992; (iii) knowledge of Indian customers of the red sole trademarks; (iv) Louboutin's status as the sole licensor of the red sole trademarks and several successful enforcement actions in the past and (v) extensive promotion of the red sole trademarks in India. However, the Single Judge failed to give their regard towards this precedent and a contradictory judgment had been released. Not only so, but with respect to the cancellation or revocation of registered trademarks

34 *Pantone 18- 1663 TPX Chinese Red,* PANTONE (Aug. 09, 2020, 12:05 PM), https://www.pantone.com/color-finder/18-1663-TPX.

35 (2018) 73 PTC 403 (Del) (India).

that the Single Bench had moved for, neither did the Act nor its bylaws authorize the court to invalidate the registration on a *suo motu* basis. The Hon'ble Bombay High Court has previously held on this matter that a court has this exceptional authority only when the invalidity of registration is raised by the Respondent at an interim stage.[36] The court also cautioned that such discretionary power can only be exercised as a consequence of a considerable threshold of *prima facie* proof being submitted before the court establishing the ex facie illegality or fraud involved in securing the registration from the Trade Marks Registry.[37] Since this condition was not met in the present case and the motion of revocation was solely raised by the Bench, it was in contravention with the precedent set by the apex court.

Should the Indian Legislation Focus on Inclusive Trademarking by Adopting Single-Color Marks within its Ambit?

In the absence of an encompassing legislative system, various grey areas tend to appear with respect to the application of laws, which ultimately led to inconsistent judicial pronouncements. The battle fought in *Christian Louboutin SAS v. Abubaker* was not one specifically for single color marks but was a fight for a greater representation of inclusive trademarking in India. Many a times, the Indian judiciary has turned a blind eye towards maintaining an inclusive approach with ruling on non-traditional trademarks,[38] which have only deepened the ambiguity with respect to their legality.

In a nutshell, the essence of this section moves to substantiate the case for the adoption of single color marks within the Indian legislation, as this approach strengthens and invigorates a national trademark regime. As non-traditional marks, most notably single-color marks, instill flexibility within a trademark system, they can serve the most integral and fundamental purposes of trademarks in a more efficient and effective manner, as compared to traditional marks. From functions such as enforcing product differentiation to enhancing branding, single-color marks witness an all-pervasive impact on the trademarking regime. The chain reaction that this has on business operations w.r.t. the economics of trademarks can allow businesses to expand their market reach and experience greater profits. With limited trademarking, not all business can take advantage of their intellectual currency, which as the recent age has shown, can be of any form and feature. Inclusivity in trademarking allows business to expand their brand presence in unprecedented ways. Further, stronger

36 *Lupin Ltd. v. Johnson & Johnson*, 2015 (61) PTC 1 [BOM] [FB] (India). See also *Shakti Bhog Foods Ltd. v. Parle Products Pvt. Ltd.*, NM (L) No. 2178 of 2012 along with Appeal (L) No. 674 of 2012 (India).

37 *Ibid.*

38 See *Britannia Industries Ltd. v. ITC Ltd.*, (2017) 70 PTC 66 (Del) (India); *Cipla Ltd. MK Pharmaceuticals*, (2008) 36 PTC 166 (Del) (India).

trademarks have a significant influence on the domestic market and economy as it allows the Indian legislation to be more consistent and compliant with international trends and practices in trademarking, providing a lucrative growth to both FDI and foreign exchange.

How Does the Adoption of Single-Color Marks Strengthen & Invigorate a Trademark Regime?

Product Differentiation & Identification

Any form of trademarks across the world primarily aim towards product identification & differentiation.[39] Single-color trademarks are a more potent source-identifier than a conventional trademark as they manifest visual aspects of brands that transcend languages.[40] Clinical psychology and neuroscience tell us arguably that color is a very powerful tool in learning and educational settings as our brain can recall a color stronger, faster and with a greater sense of recollection than it can for words or figures.[41] Color psychologist and expert, Jill Morton goes beyond to hold that through marketing studies and analysis, color can increase brand recognition by up to 80%.[42] Courts have also been of the opinion that if a color is sufficiently distinct and peculiar, it has the power of overriding all of the brand's other trademarks and can serve as a sole primary mark.[43] As a conclusion, colors have a greater weightage in our minds, which allows us to associate and link it with a brand in a way that traditional trademarks would be incapable of. While making consumer choices, a consumer would, hence, be able to identify and differentiate a product bearing a single-color mark in an unprecedented way, allowing trademarking to be more effective and impactful.

Protects the interests of the Consumer

As the identity of a brand has been embedded deeper in our minds with the help of color, these marks assist in protecting the consumer, one of the fundamental objectives of trademark law. An ordinary consumer is riddled with a myriad of choices in the market, which can only be filtered through their image of the brand. This protection can be against deceptive and unethical trade practices, misrepresentation or even extended by providing a standard of authentication. Not only so, but once product identification and differentiation

39 V. V. Solpe, Managing Intellectual Property 39 (5th ed. 2016).

40 *Supra* note 4.

41 Mariam Dzulkifli & Muhammad Mustafar, *The Influence of Color on Memory Performance: A Review,* 20(2) MALAYS. J. MED. SCI. 3, (2013).

42 *Supra* note 3.

43 Dyson Ltd's Trade Mark Application, 2003 RPC 47.

is enhanced, a consumer's search costs reduce considerably, which plays a compelling role while exercising consumer choices.

Allows Branding to Adopt a Wider Approach

Additionally, single color marks provide a wider approach in low literacy areas. Companies are continually endeavoring to expand into a new consumer base, market or territory and with single color trademarks, they are able to provide a multi-sensory perception. Visual perceptibility cannot be the unconditional prerequisite for developing a brand image.

In low-literacy areas, people often perceive and connect brands with the corresponding color of the product or its packaging. As the illiterate populace is more susceptible to being misled or misguided, their only source of identification is a color, which to them surpasses language. They simply cannot rely on the arrangement of characters they cannot decipher in a word mark or shapes and figures they have no relatability towards in a shape mark. Not only so, but non-conventional marks in general have tapped into the market of specifically catering to visually impaired people where they identify goods through their scent, feel and sounds.[44]

Provides an Enhanced Appeal

Selling a product with which a consumer can associate a memory or an experience, has been proven to be more appealing and attractive. Modern-day marketing doesn't limit itself to a mere product or service, but to a whole immersive and memorable experience. Attaching a memory or a cultural significance to a product makes it more preferable as it doesn't only provide a good, but a holistic service. In this way, colors have often been used to express an emotion or a sensation with which a consumer can attach with the brand.

Taking the example of Christian Louboutin, the reason why the color red was chosen to represent the identity of the brand is because it is flirtatious, the color of passion and irresistible by men.[45] Analyzed through a historical sociological approach, the color red was reserved only for the nobility, as it signified power, status and privilege,[46] and in

44 Lisa P. Lukose, *Non-traditional Trademark: A Critique,* J. IND. L. INS. 197, 198 (2015).

45 *Why Christian Louboutin Heels Have a Red Sole*, CULTURE TRIP (Aug. 09, 2020, 01:15 PM), https://theculturetrip.com/north-america/usa/new-york/new-york-city/articles/why-christian-louboutin-heels-have-a-red-sole/; *The Secret Behind the Red Soles of Christian Louboutin,* CATAWIKI (Aug. 09, 2020, 01:20 PM), https://www.catawiki.com/stories/4533-the-secret-behind-the-red-soles-of-christian-louboutin.

46 Susan Stamberg, *The Color Red – A History in Textiles,* NPR (Aug. 09, 2020, 10:00 AM), https://www.npr.org/2007/02/13/7366503/the-color-red-a-history-in-textiles.

order to allow his consumers to break from the constrains of society, he opposed from the industry standard to have a monochromatic or black sole. Only by employing one color, Louboutin has expressed his ideology and intent behind the whole brand.

Effect of a Stronger & More Inclusive Trademark System on the Economics of Trademarks and Businesses

Contribution to the Intellectual Currency of a Business

The modern economy has taken a complete shift from the *brick and mortar* economy, where wealth was measured through the possession of assets, to an economy governed by intellectual currency.[47] The number and diversity of a firm's IP is now paid an unprecedented weightage while ascertaining its wealth, market value and economic potential. In the long run, the competitiveness of the business organizations and their economic prosperity is enhanced by their trademarks and brand image.[48] In other words, the more trademarks an organization owns, it acts as a factor in reassuring investors and other stakeholders of their economic position, reaffirming their market reach, market value[49] and investment in R&D, and furthermore, enhancing their intellectual currency.

Including single-color trademarks would provide a comprehensive and thorough system which allows businesses to cover aspects of its trade dress that would've otherwise been unprotected and unregulated. This only opens the doorway for brands to counterfeit and pass off marks of another, which technically are excluded under law, but for the development of which, an uncountable sum of money, innovation and research has been invested. These marks go beyond the scope of traditional trademark protection and opens various avenues for brands to capitalize on their creations. This form of trademarking can be viewed as an additional tool to create exclusive rights[50].

Results in the Reduction of Marketing Costs

As firms in countries with a weaker system of trademarking cannot legally protect each aspect of their trade dress, they expose their brand to multiple risks. This subsequently

47 Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth,* WIPO 55 (2003).

48 *Brand - Reputation and Image in the Global Marketplace*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Aug. 09, 2020, 02:30 PM), https://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf.

49 Christine Greenhalgh & Mark Rogers, *The Value of Innovation: The Interaction of Competition, R&D and IP,* 35(4) R POL. ELSEVIER 562, 577 (2006).

50 Irene Calboli, *Beyond Patents: The Problems of Non-Traditional Trademark Protection for Medicines and Health Technologies,* 51 INTL. R. IP & COMP. L. 1, 4 (2020).

translates into enhanced costs as compared to their counterparts in order to differentiate their products and strengthen their brand image. These costs can arise in the form of extraordinary promotional or marketing costs, costs incurred towards innovation and product development, and investments made to reinforce or emphasize their Unique Selling Proposition (USP). As counterfeiting and imitating goods muddle the perception of consumers with relation to originality, source and quality, such costs are primarily incurred to combat the counterfeited or imitated goods being sold in the market due to lack of protection provided by the legal regime. Under an inclusive trademarking system, a brand would not be compelled to expend a great amount towards aggressive marketing and promotion as the distinctive image of each element of their dress can be legally protected, allowing their products or services to be easily identifiable.

Boosts Innovation & Invention

Stronger trademarks also stimulate innovation and invention with the interplay between IP and competition. Trademarks regulate competition in the market as it grants the holder an exclusive right to monopolize their mark, restricting the power of competitors to make an undue profit. As competition and innovation are inversely related due to the entry of a large number of rivals in the market,[51] limiting competition through trademarking facilitates and encourages innovation. Once businesses are provided with security of protection against new entrants in the market, by stronger trademarks, it is perceived as an economic incentive to invent and as a tool to monetize on innovations into more and new aspects of their trade dress that previously fell within the public domain. These undertakings require substantial amount of expenditure and resources, they can only be entered into if foreseeably a business can be afforded protection.

The sole of a stiletto had often remained as an afterthought for any footwear designer, up until the rise of Louboutin. The brand's ability to attain a trademark moved the designer to adopt this unique and innovative take towards branding by trademarking a part of a stiletto often overlooked. With the protection granted worldwide, Louboutin has been incentivized to make the most of the sole by using innovative techniques to amplify its sales.

Allows Budding Companies to Establish their Unique Selling Proposition (USP)

Broader trademarking policies can assists micro, small and medium companies in finding their USP. As a nascent company, in order to compete with market leaders, it is essential to establish a competitive edge and a unique and differentiable identity. Smaller brands are

51 Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship,* 120(2) QUART. J. ECON. 701, 703 (2005).

required to be more creative and inventive while developing their mark and brand image. In order to facilitate this, they often employ non-traditional trademarks to stand out from the norms. Considering the example of Christian Louboutin, in the early 90s, multinational brands such as Manolo Blahnik, Fendi and Gucci, just to name a few, were the frontrunners in the international luxury footwear market, each being valued at more than a hundred million dollars. The red sole played a huge role in allowing Louboutin to establish his mark and surpass his competitors, which had been reigning the market for half a century. It was *sole*ly on this mark that he was able to establish a secure customer base and attract media publicity with his unconventional take on the fashion industry

Effects on the Domestic Market and Economy

Reinforces the Flow of FDIs

Once a country is able to strengthen their trademark regime, the most primary and direct impact is on the inflow of FDIs, due to the enhanced appeal of the national market to the international economy. Quite naturally, a stronger legal system attracts and incentivizes businesses to expand operations as it assures security of their intellectual property and also contributes significantly to the ease of doing business.[52] Also, if a country's policies at are par with the developments on an international scale, expansion becomes a more harmonious process.

Often, businesses choose to avoid expanding into countries where they can foresee that they would not face utmost protection. As a matter of fact, around 25% of leading American, German and Japanese high-tech firms have been reluctant from investing, either directly or through joint ventures, in countries with weaker IPRs in order to prevent decade-long legal battles and also to avoid the complexities regarding their functioning.[53] Therefore, it is quite reasonable for business to take a precautious approach by inclining themselves towards expanding and diversifying in countries where they feel that every aspect of their intellectual property would be protected.

Further, econometric studies have indicated that FDIs respond positively and elastically to stronger IPR regimes, most notably towards trademarks.[54] Empirical work demonstrates that

52 Amanda Perry, *An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality,* 15(6) A.U. INTL. L.R. 1627, 1632 (2000).

53 Edwin Mansfield, *Academic Research Underlying Industrial Innovations,* 77(1) R. ECON. & STATS. 55, 59 (1995).

54 Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer,* 9 DUKE J COMPARATIVE & INTL. L 109 (1998).

the strength of trademarks have important effects on multi-national enterprises' decisions on where to invest and whether to transfer advanced technologies and capital.[55]

To substantiate this school of thought, Park[56] and Reynolds[57] had developed a trademark rights index, which served as the standard for comparing and measuring the development of a country's trademark system. This index includes coverage (referring to the types of names and symbols which can be legally protected), procedures (which considers the degree of enforcement of rights and restrictions on the holder) and implementation of international treaties. As per a study conducted by the OECD over a period between 1990 and 2005, with a range of 120 countries, it was suggested that a 1% increase of the indices of trademark protection corresponded a 3.8% increase in FDI.[58] In conclusion, intricate and specialized trademark policies have been witnessed to be a factor in influencing investment decisions to a great degree.

Augments the GDP

While analyzing the bigger picture, a direct correlation can be found between the strength of a country's trademark protection and its economic competitiveness. In the words of the International Chamber of Commerce:

> *"…the countries that are perceived as having the strongest IP protection are routinely found to be among the most economically competitive countries in the WEF (World Economic Forum) surveys … those (countries) perceived as having the weakest IPR systems tend to rank among the bottom for growth and competitiveness."*[59]

The most noticeable impact can be discerned through the GDP. IP-intensive industries have been accounted as one of the most significant contributors to GDP in the US, as single-handedly in 2014, they had added a value of USD 6.6 trillion to the GDP which was 30% higher than that of 2010, out of which trademarks played the second largest

55 Keith E. Maskus, *Intellectual Property Rights In The Global Economy*, 151 (2000)

56 Walter G. Park, *Do Intellectual Property Rights Stimulate R&D and Productivity Growth,* AMERICAN U. J. 77, 90 (2003).

57 Taylor W. Reynolds, *Quantifying the Evolution of Copyright and Trademark Law,* AMERICAN U. J. 145, 151 (2003).

58 Cavazos Cepeda et al., *Policy Complements to the Strengthening of IPRs in Developing Countries*, 104 OECD TRADE POLICY 21 (2010).

59 International Chamber of Commerce, *Intellectual Property, Source of Innovation, Creativity, Growth and Progress* 7 (2005).

role, after patents.[60] According to a study conducted on the effect of IP on the German economy between the period of 1999-2009, trademarks have a viable potential to influence a country's GDP with the strongest economic impact, ahead of patents and designs by a great margin.[61]

Positively Influences Imports & Exports

Moreover, empirical evidence prescribes that, *ceteris paribus*, countries with stronger trademarks are able to attract more imports and facilitate a greater volume of exports. Interestingly enough, the application of trademarks seems significantly important in increasing exports of relatively low-technology goods, for e.g. clothing and other consumer goods.

This is because under a more developed system, the goods produced by foreign firms would be lesser exposed to imitation and counterfeiting, hence incentivizing them to boost their exports.[62] This starts off chain reaction ultimately resulting in lowered costs of exporting, as global firms would not find themselves in a predicament to discipline local imitators through decreasing their prices in order to appear more competitive, aggressively market themselves or even undertaking legal action.[63]

Upgrades the Quality of Goods & Services

In an industry, which witnesses a large number of firms producing the same line of products, a competitive advantage can only be obtained by higher quality products. The operation of stronger and more inclusive trademarks upholds the quality of goods and services as it represses counterfeiting and infringement. This prevents free riding by firms with lower investments in R&D and innovation off of the products of their counterparts and producing lower quality products. This process is particularly important in the case of food products, beverages, pharmaceuticals, cosmetics, etc. where counterfeited goods can prove to be hazardous or injurious. Not only so, but it ups the ante for the standard of goods available in a national market, allowing it to be internationally competitive and simultaneously enhancing consumer expectations. This creates a ripple effect as firms would be compelled to invest a greater deal of resources in innovation to enhance their product quality and grasp a greater market share.

60 *Ibid.*

61 Andreas Bielig, *Intellectual Property and Economic Development in Germany,* 39 EU. J LAW & ECON. 607 (2015).

62 Keith E. Maskus & Mohan Penubarti, *How Trade-Related are Intellectual Property Rights,* J. INT'L ECON. 227, 234 (1995).

63 M. Scott Taylor, *TRIPs, Trade, and Technology Transfer,* 26 CAN. J. ECON. 625, 626-27 (1993).

Additionally, brands producing higher-quality products once trademarked would have assured returns on their products as trademarking allows them to monopolize over a market, product or service. Once a firm can foreseeably predict returns, they are encouraged to uphold the quality of their products, if not to enhance it, in order to maintain their consumer base. After all, a brand's trademark is not only an identifier of its source but also of its quality.

Conclusion

The decision of the High Court in *Christian Louboutin S.A.S. v. Abubaker and Ors.*[64] can be viewed as a setback to intellectual property law development in India as the judiciary deemed it appropriate to adopt such an archaic approach in the realm of trademarks. The Court showed inconsideration towards the magnitude to which non-conventional trademarks, specifically single-color trademarks, have increased in terms of popularity and consumer-response, not just globally but even in India.

One of the pressing questions of the case is the unclear and unspecified ambit of a 'mark' under the Act[65], continually unanswered by the Judiciary. The definition utilizes the word 'includes', from which it can be construed that the list of marks in the section is not exhaustive and not limited to the conditions provided in the section. The basis of the judgment is on a presumptuous ground as the Hon'ble Single Judge construed the interpretation of the section to not include any other ground for granting trademark protection. Ambiguity in statutory interpretation opens the doors for an inconsistent and incoherent judiciary, which in turn may invalidate and discredit the sole purpose for which a piece of legislation may have been enacted.

Middle-income economies have come to account for most trademark applications filed across the world, i.e. 54 percent.[66] To a considerable extent, this trend has also been witnessed in India. According to the WIPO, India received 2.5 times more trademark applications by GDP in 2011 than it did in 1985.[67] Undeniably, it is experiencing a spurt in the number of trademark applications and with the marks protectable under traditional trademarking limiting more day by day, businesses would be indubitably compelled to shift to non-traditional trademarks. This foreseeable shift, however, cannot be accommodated by the Trade Marks Act, 1999 presently.

64 (2019) 78 PTC 262 (Del).

65 Section 2(1)(m), Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India).

66 *Supra* note 48.

67 *Ibid.*

As single-color marks invigorate existing policies to provide a more realistic and an *avant-garde* touch, their inclusion would only strengthen and expand a trademarking regime by not only fulfilling its integral purposes in a more efficient and effective manner, but would also allow trademarks to go beyond the conventional scope of appeal, applicability and relatability. As a result, such an impact creates a ripple effect on businesses and the economics of trademarks, which cannot be overlooked as an actor in benefitting the national economy overall.

Hence, the Legislature is ultimately met with two options; it can either expand the scope of its trademark regime in order to accommodate the growth in trademarking being experienced or be left behind on a global sphere by letting its businesses and economy take the blow for its regressive approach.

A Shift to Inquisitorial Model: Assessing the Challenges to India's Criminal Justice System

Merrin Muhammed Ashraf*

Abstract

The criminal justice system in India is largely adversarial in nature. The Malimath Committee Report (2003) found faults with the adversarial system for failing to secure conviction of the accused persons without delay and proposed a shift to the judge-controlled inquisitorial system. This recommendation of the Malimath Committee has now found favour with the Union Home Ministry that is reportedly deliberating wide-ranging changes to India's criminal justice system with a view to secure higher conviction rates and speedy disposal of cases. This article examines whether adoption of an inquisitorial system is an appropriate measure to salvage India's ailing criminal justice system. The article critically examines the arguments in favour of adoption of an inquisitorial system and the benefits that are claimed to flow from it. It is seen that though inquisitorial system is better at arriving at a less erroneous verdict, adversarial system ensures procedural fairness to the parties, especially the accused. Moreover, India's institutional preparedness to shift to a judge-controlled procedure under the inquisitorial system without jeopardizing the rights of the litigants is also doubtful. Therefore, instead of a shift to inquisitorial system, the article proposes reformation of the existing system so that it satisfactorily meets the ends of criminal justice. In that regard, the article highlights two out of the many issues that plague India's criminal justice system -- failure to ensure a level-playing field for the indigent accused and failure to adequately protect the rights of victims – and suggests solutions for the same.

Introduction

The Union Ministry is reportedly mulling wide-ranging changes to the criminal laws of the country by amending the Indian Penal Code, 1860, the Code of Criminal Procedure,

* Student, The National University of Advanced Legal Studies, Kochi.

1973 and the Indian Evidence Act, 1872.[1] One of the changes proposed is the adoption of inquisitorial system of criminal justice or at least some elements of it.[2] The expectation is that a judge-controlled procedure of the inquisitorial system will result in speedy disposal of cases and larger number of convictions than the lawyer-led trials of the adversarial system.[3] In fact, the Malimath Committee Report of 2003 also recommended a shift from the adversarial to the inquisitorial model.[4]

This article aims to examine whether adoption of the inquisitorial system would be an appropriate measure to cure India's ailing criminal justice system and whether higher conviction rate is a goal worth pursuing at the sake of fair trial rights of the accused. A change in the criminal justice system will have implications beyond the court-room; it has the potential to impact popular perception of legitimacy of the criminal law process.[5] An important issue to be considered is India's preparedness to deal with the consequences of giving more power to the judges, particularly for the rights of the parties involved. Instead of a wholesale shift to inquisitorial model, the author suggests reformation of the existing system in order to satisfactorily meet the ends of criminal justice.

Adversarial System *versus* Inquisitorial System – A comparison

Adversarial system and inquisitorial system are the two major criminal justice systems practiced in the world. While adversarial system emerged from the common law tradition, inquisitorial system owes its origin to Roman law and is adopted by civil law countries.[6] Though both systems have as their primary objective punishment of those guilty of crimes, the method adopted to achieve this objective differs greatly.

In an adversary system, as the name suggests, the trial is envisaged as a contest between the two parties (the prosecution, representing the victim, and the defence) who strive to establish their version of facts as the truth with the help of evidence. The prosecution is required to prove the guilt of the accused beyond reasonable doubt.[7] The accused is also

1 Rahul Tripathi, *IPC, CrPC in for change as Union home ministry tries to speed up justice*, The Economic Times (Jan. 7, 2020, 10:00AM), https://economictimes.indiatimes.com/news/politics-and-nation/ipc-crpc-in-for-change-as-mha-tries-to-speed-up-justice/articleshow/73063397.cms?from=mdr.

2 *Id.*

3 *Id.*

4 MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM 265 (2003) [hereinafter, *Malimath Committee report*].

5 Janet Ainsworth, *Procedural Justice and the Discursive Construction of Narratives at Trial: Global Perspectives*, 4 Languages Cultures Mediation 79 (2017), (Jan. 07, 2020, 11:00AM), https://digitalcommons.law.seattleu.edu/faculty/807.

6 *Id.* at 79.

7 K.N.C. Chandrasekharan Pillai, R.V. Kelkar's Criminal Procedure 346 (6th ed. 2018).

given fair opportunity to defend himself and is also given important rights like the right to remain silent.[8] In an adversarial trial, it is the parties that control the narrative presented before the court; they decide the evidence to be presented, the witness to be examined etc.[9] Adversarial system lays emphasis on live testimony of witnesses before the court and their cross-examination by the opposite side.[10] Thus, adversarial system is based on the premise that 'contested and oppositional presentation of facts best reveal the truth'[11].

The role of the judge in an adversarial trial is limited and he is often equated to a neutral and passive umpire.[12] He is not involved in the pre-trial investigation. He also does not control the evidences to be presented and the witnesses to be examined. His role is limited to deciding the case in favour of one side or the other solely based on the controverted facts and evidences presented before him by the partisan advocates. He has no latitude to go beyond the evidence placed.[13] Therefore, adversarial system results in a party-controlled criminal trial.

Coming to inquisitorial system of criminal justice, we see a role-reversal. Here the judge plays an active role to determine the truth. The trial is preceded by an elaborate pre-trial investigation under the supervision of '*juge d'instruction'* or the investigating magistrate.[14] The investigation is conducted by the state officials in a neutral and objective manner by collecting both evidences that favour the accused and those against him.[15] In order to properly conduct investigation, the investigating magistrate is empowered to issue warrants, direct search, arrest the accused and examine witnesses.[16] The findings of the investigation are presented as a dossier to the trial judge.[17] Therefore, the judicial officials, rather than the parties determine what information should be presented in the trial, in what order, and for what purpose.[18]

8 *Id.*

9 Y.S. Vijay, *The adversarial system in India: Assessing challenges and alternatives* 3, (Jan. 08, 2020, 11:00AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147385.

10 Ainsworth, *supra* note 5, at 80.

11 Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World,* 38 Wm. & Mary L.Rev.5,13, (Jan. 08, 2020,11:00AM) https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2757&context=facpub.

12 Vijay, *supra* note 9.

13 J M Adele, *Similarities and Comparative Analysis between Inquisitorial and Adversarial Legal Systems* 8, (Jan. 08, 2020, 11:00AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3077365.

14 *Adversarial and Inquisitorial System of Justice,* LawTeacher, (Jan. 08, 2020, 11:00AM), https://www.lawteacher.net/free-law-essays/criminal-law/adversarial-and-inquisitorial-systems-of-justice.php.

15 Vijay, *supra* note 9.

16 *Id.*

17 *Id.*

18 Ainsworth, *supra* note 5, at 81.

Before the trial judge also, the parties' role is limited to suggesting the questions to be put forward to the witnesses.[19] The actual questioning of witnesses is mainly done by the judges and the parties have very little say in the mode and manner of examination of witnesses. However, more than live testimony of witnesses, the judge largely relies on written statements.[20] The judge in an inquisitorial trial is therefore not tied down by the narratives presented by the parties. He is the ultimate fact-finder.[21]

There has always been a debate as to which of the two systems is preferable. While inquisitorial system is lauded for its ability to arrive at less erroneous verdicts, the adversarial system is perceived to be better at ensuring procedural fairness to the parties, especially the accused.[22] However, now very few countries follow the pure model of either adversarial or inquisitorial model. Now what we see is a convergence of legal systems – countries with inquisitorial systems are borrowing elements of adversarial system and vice-versa.[23] As Prof. Goldstein stated:

"It is becoming increasingly apparent to criminal justice scholars that single theory models of criminal procedure – whether termed inquisitorial or adversarial – are being stretched beyond their capacity by the phenomena they are designed to control. Virtually everywhere, formal systems of charge and adjudication cannot possibly be enforced in accordance with the premises underlying them."[24]

Why is there a Demand to Change India's Criminal Justice System from Adversarial to Inquisitorial?

From the limited information available from news reports, the reason behind the present proposal of the Union Ministry to adopt an inquisitorial model seems to be to address the issue of low conviction rate in the country. As per the latest available data of NCRB, the pendency of criminal cases in the court has reached its highest level since the turn of the 21st century.[25] This delay in disposing of cases is also evidenced by the large number of under-

19 Vijay, *supra* note 9, at 4.

20 Ainsworth, *supra* note 5, at 81.

21 *Id.*

22 *Id,* at 87 and 90.

23 Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. Rev. 567 (1996), (Apr. 09, 2020, 11:00 AM), https://scholar.smu.edu/smulr/vol49/iss3/13

24 *Id.*

25 Deepti Jain and Tadit kundu, *Why the wheels of justice turn ever slower in India,* Livemint (Dec. 25, 2019, 09:00AM), https://www.livemint.com/Politics/1vsBJNtsqgpzUlV31BbmWL/Why-the-wheels-of-justice-turn-ever-slower-in-India.html.

trial prisoners languishing in jails.[26] The data also reveals that conviction rate is quite low in case of serious crimes like rape, rioting etc.[27] Even as far back in 2003, the Malimath Committee had noted that India's criminal justice system is virtually collapsing under its own weight as it is slow, inefficient and ineffective[28] and that people are losing confidence in the system[29]. One of the major recommendations of the Committee for remedying the situation was also adoption of inquisitorial system or at least certain elements of it.[30]

A major criticism against the adversarial system is the passive role played by the judge. Instead of endeavoring to ascertain the truth, the system requires him to confine himself to the facts and evidences presented by the parties, however faulty or convoluted they may be. The Malimath Committee Report noted:

"The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth."[31]

In an adversarial system what the judge looks for is not truth but proof[32] and whichever side is able to put forward the best proof according to the evidentiary rules wins the case, regardless of whether it is the actual truth. Since the trial is envisaged as a combat between the two parties, each of them put forward only that evidence which favour them.[33] Such an approach fails to give complete presentation of facts and thwarts the discovery of truth. As a consequence, in many cases there seems to exist "a gap between judicial truth and what actually happened"[34]. This leads to many guilty persons escaping and sometimes innocent persons getting convicted. It is expected that a transition to an inquisitorial model with a judge-controlled investigation and trial will remedy this situation by enabling the judges to determine the truth without being tied down to procedural rules and parties' version of facts.

26 Vrinda Bhandari, *India' s criminal justice system; An example of justice delayed, justice denied,* (Dec. 25, 2019, 09:00AM), https://www.firstpost.com/long-reads/indias-criminal-justice-system-an-example-of-justice-delayed-justice-denied-3475630.html.

27 Jain, *supra* note 25.

28 Malimath Committee Report, *Supra* note 4, at 181.

29 *Id.* at 186.

30 Malimath Committee Report, *supra* note 4.

31 *Id.* at 27.

32 Dr R.Venkataraman, Former President of India as quoted in Malimath Committee Report.

33 Adele, *supra* note 13, at 8.

34 Daniela Berti and Gilles Tarabout, *Questioning the Truth. Ideals of Justice and Trial Techniques in India 1* (Mar. 5, 2020, 09:00AM), https://hal.archives-ouvertes.fr/hal-01612781.

Another criticism usually raised against the adversarial system in India is the high standard of proof required to establish the guilt of the accused. This is proffered as another reason for the dismal rate of convictions. The standard of proof required is 'proof beyond reasonable doubt'. The Malimath Committee observed in its report that such a high standard of proof would make it difficult to secure the conviction of accused "on whom the burden is very little and who hires a very competent lawyer, while the Prosecution, on whom the burden is high, is very often represented by persons of poor competence."[35] The Committee, therefore, recommended a lowering of standard to the inquisitorial system's "the court's conviction that is true" that requires only the inner satisfaction of the Judge".[36]

Before proceeding to examine whether an adoption of the inquisitorial system is the most appropriate way to strengthen the criminal justice system in India, the author would like to point out certain faults in the Malimath Committee's arguments for a shift to an inquisitorial model. Firstly, it is important to note that India's criminal justice system is not truly adversarial but it contains some elements inspired from the inquisitorial system. Our criminal laws already contain provisions to enable a judge to play a more active role in a criminal trial. For instance, Section 311 of CrPC allows the court to examine any person as a witness even if he was not called as one by the parties. Similar power is given to the court under Section 165 of Evidence Act also. Section 319 of CrPC empowers the court to proceed against persons other than the accused if it appears from the evidence that such person/persons is also concerned in that very offence or in a connected offence. This section is premised on the doctrine *judex damnatur cum nocens* a*bsolvitur* (judge is condemned when guilty is acquitted).[37]

More importantly, the presence of Section 313 of CrPC puts into doubt whether the judge in a criminal trial in India is expected always to be a silent spectator to the contest between the two sides. This section permits the court to question the accused at any stage of a trial without previously warning him, with a view to enable the accused to personally explain the circumstances appearing in evidence against him. The section also imposes a duty on the court to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called or his defence. While the statement of the accused under Section 313 is not substantive evidence, according to Section 313(4), it may be taken into consideration at the trial.[38] Section 313, hence, makes way for a direct interaction between the judge and the accused in order to get a wholesome picture of the

35 Malimath Committee Report, *supra* note 4, at 125.

36 *Id,* at 270.

37 *Arun Dube v. State of Madhya Pradesh*, 11991 Cri LJ 840, 845 (MP) (India).

38 PILLAI, *supra* note 7, at 447.

facts.[39] However, the courts have repeatedly warned that the above-mentioned sections should not be regarded as authorizing an inquisitorial interrogation of the accused.[40] The judges should make use of these sections *"without unduly trespassing upon the functions of the Public Prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses".*[41]

Secondly, the Malimath Committee's recommendation to lower the standard of proof to establish the guilt of the accused will constitute a violation of India's obligation under Article 14(2) of ICCPR which makes it a human right for a person charged with a criminal offence to be presumed innocent until proven guilty according to law[42]. Commenting on this right, the Human Rights Committee stated that by reason of presumption of innocence, the burden of proof is on the prosecution which has to prove the charges beyond reasonable doubt.[43] Therefore, convicting an accused without proving his guilt beyond reasonable doubt will constitute a serious violation of human rights.

The Malimath Committee's recommendation to adopt the standard of proof used in French and German inquisitorial systems i.e. 'the court's conviction that is true' seems to be based on a wrongful understanding that this standard is same as 'proof on preponderance of probabilities'. As the International Commission of Jurist pointed out, what this standard actually refers to is the free reign given to judges in an inquisitorial system to assess the legality, admissibility, and persuasive force of evidence according to their inner conviction, without being tied down by evidentiary rules as in the adversarial system.[44] When it is said that the guilt of the accused is determined based on the 'inner conviction of the court', what it actually demands is a persuasion of the court, based on its free conviction, that the accused is guilty beyond reasonable doubt.[45] Hence, the standard of proof required in both adversarial and inquisitorial system to convict the accused is the same.[46] It is also to be noted that the European countries that have adopted the inquisitorial system are also

39 *Id,* at 443.

40 41st Law Commission Report, The Code of Criminal Procedure, 1898 (1969) 204.

41 *Ram Chander v. State of Haryana,* AIR 1981 SC 1036 (India).

42 International Covenant on Civil and Political Rights, art. 14(2), Dec. 16, 1996, 999 U.N.T.S. 171.

43 UN Human Rights Committee, General Comment 13, art. 14.

44 International Commission of Jurist, *Review of the Recommendations made by the Justice Malimath Committee from an international human rights perspective* 21, 22 [hereinafter *ICJ Position Paper*], (Apr. 19, 2020, 08:00AM) https://www.icj.org/criminal-justice-reform-in-india-icj-position-paper-review-of-the-recommendations-made-by-the-justice-malimath-committee-from-an-international-human-rights-perspective/.

45 *Id.*

46 *Id.*

signatories to the ICCPR and are also bound by the European Convention on Human Rights, both of which require a proof beyond reasonable doubt to rebut the presumption of innocence of an accused.[47]

With these pointers in mind, the next section critically examines the benefits to India's criminal justice system that are claimed to flow from a shift to an inquisitorial system.

Is Inquisitorial System a Panacea to India's Ailing Criminal Justice System?

According to Malimath Committee, shift to a criminal justice system that has 'quest for truth' as its focus will *'reduce the level of criminality in society by ensuring maximum detection of reported crimes, conviction of the accused persons without delay, awarding appropriate punishments to the convicted to meet the ends of justice and to prevent recidivism'*[48]. The committee proceeded on the rationale that giving judges investigative powers and more control over the trials will lead to higher rate of conviction. One cannot help note the fact that securing higher rate of convictions seems to be the primary concern of the Committee and rights of the accused takes a back-seat. No doubt, determination of guilt is the main objective of any criminal law process. However, in the pursuit of this objective, considerations of ensuring a fair trial and protection of rights of the parties, especially the accused, should not be ignored.

Inquisitorial system is definitely preferable to the adversarial system in terms of the latitude given to the judge to find out the truth for himself, instead of being subjected to the materials presented by the partisan advocates. His control over the entire process of trial and investigation helps to ensure that important evidences are not overlooked and that the trial process is not unduly delayed by the dilatory tactics adopted by the counsels. However, with an active judge taking center-stage, there also comes the danger of departure from impartiality and objectivity that is expected from a judge. This is because when the judge plays the dual role of an investigator and a judge, it makes it difficult for him not to be prejudiced against the accused at the start of the trial.[49] Moreover, the limited role of the defence counsel in an inquisitorial system makes it even more difficult to persuade the judge to give due weight to the exonerating factors. That inquisitorial system allows for a greater scope of bias was also expressed by Prof Lon L. Fuller and according to him, "an

47 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(2); ICCPR (n 42).

48 *Malimath Committee Report, supra* note 4, at 21.

49 Adele, *supra* note 13, at 7.

adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known"[50]. His proposition was later confirmed by an empirical social experiment conducted by two professors of psychology and a professor of law which suggested that adversary evidentiary presentation is better at overcoming the biasing effect of pre-trial expectancies about a defendant's guilt than the inquisitorial model.[51]

It is also said that adversarial system does a better job in securing procedural justice.[52] Procedural justice is different from substantive justice. While the latter occurs when there is an accurate determination of facts and application of law to the facts, the former occurs when the litigant is satisfied that the system has operated in a fundamentally fair manner.[53] Thus, an individual may feel that he has been treated fairly even when the judgment actually went against him. Similarly, a person who has won the case may not be satisfied with the system if he feels that he has not been treated fairly.

Experiments conducted by social psychologist Tom Tylor suggests that procedural justice or feeling of 'being treated fairly' has three components – (i) the party felt able to give voice to their side of the story; (ii) the adjudicator gave evidence that they had been listened to; and (iii) throughout the process, the party felt that they were treated with dignity and respect. Inquisitorial system, with its judge-controlled procedure, provides limited opportunity for the parties to shape their cases. The judge decides what information are relevant and written witness statements are preferred over oral examination of witnesses. All these contribute to the parties ending up feeling totally excluded from the trial process. In contrast, adversarial system provides litigants a greater control in shaping the narrative through their lawyers. Witnesses are also examined live before the court and this gives them a chance to tell their story directly. As a result, parties' perception of procedural justice is said to be greater in an adversarial system.[54]

Further, shifting to an inquisitorial model necessitates an examination of India's preparedness for the same. Giving judges more power will have implications for the entire system, especially for the rights of the accused. Safeguards need to be created in order to check the possibility of abuse of power by the judges. It is highly doubtful whether our

50 Lon L. Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 34 (Harold Berman ed., 1971).

51 Allan Lind et. al., *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decision Making*, 62(2) Virginia Law Review 271, 282 (1976).

52 Ainsworth, *supra* note 6, at 90.

53 *Id.* at 88.

54 *Id.* at 90.

existing institutions and laws are capable of facilitating a transition to inquisitorial system without jeopardizing the rights of the litigants. It is also wrong to assume that a shift to an inquisitorial system will make India's criminal justice system more efficient when other deeper-rooted causes for its failure, unconnected to the type of system, are left unaddressed. These include lack of resources, both in terms of funding and personnel, inefficient police investigation, corruption, confession-oriented approach, police torture etc.[55]

Finally, whether we adopt an adversarial or inquisitorial system, it is of utmost importance that the system complies with the human rights principles. As the International Commission of Jurists observed: "*Human rights must be the benchmark for any criminal justice system... the rights of the accused must be at the center of all proceedings, and the rights of the victim must be protected at all stages*"[56]. When the Malimath Committee recommended lowering of safeguards available to the accused in order to secure greater conviction, it proceeded on the wrongful assumption that all accused are well-informed of their rights and are capable of engaging counsels to defend their case.[57] This is anything but the truth. A large number of criminal defendants and prisoners are poor who are unaware of their rights.[58] Even if securing higher rate of conviction is assumed as the aim of an effective criminal justice system, lowering the protections available to the accused is not the right way of achieving it, taking into consideration the inherent imbalance in the position of prosecution (backed by the state apparatus) and the accused, in terms of power and resources.[59] It is interesting to note that India is reconsidering the Malimath Committee's recommendation to adopt inquisitorial elements at a time when many countries that were traditionally following the inquisitorial model are shifting to an adversarial system of criminal justice in order to infuse greater procedural fairness.[60] In fact, the Malimath committee had also admitted that the fair trial rights of the accused are better protected in an adversarial system.[61]

Given the uncertainty about the supposed benefits that may flow from adoption of an inquisitorial system and the lack of institutional preparedness to make such a shift, a better alternative would be to reform India's existing criminal justice system by infusing it with dynamism and efficieny. Apathy of the judges and the consequent judicial gaming at the

55 *ICJ Position Paper, supra* note 45, at 11.

56 *Id.*

57 *Malimath Committee* Report, *supra* note 4, at 19.

58 Ministry of Law and Justice, Government of India, Report of the Expert Committee on Legal Aid: Processual Justice to the People, 70 (1973)

59 *ICJ Position Paper, supra* note 44, at 23.

60 Ainsworth, *supra* note 5.

61 Malimath Committee Report, *supra* note 4.

expense of justice[62], no doubt, lead to acquittal of guilty persons and conviction of innocents. As mentioned earlier, Indian criminal laws already contain provisions to enable the judges to play an active role during criminal trials by calling for witnesses and questioning the accused in order to get a complete picture of facts. However, as Justice Sudhansu Dhulia commented, these provisions remain largely a dead-letter as it is very rarely that a trial judge calls upon persons as witnesses on their own.[63] Judges must shed this reticence when the need demands and must endeavor to "discover the truth and advance justice"[64] by making use of the powers given to them by the criminal laws. However, whenever he endeavors to don such an active role, care must be taken not to step into the shoes of the prosecution or the defence counsel. He must act "without any hint of partisanship and without appearing to frighten or bully witnesses"[65]. Suitable training must be imparted to judges, especially at the trial level, on how to make use of these provisions at appropriate times without affecting the impartiality and objectivity expected from them and without prejudicing the rights of the litigants.

Suggestions for Reforms

A shift to an inquisitorial system, without adequate safeguards and institutional reforms, is likely to do more harm than good. However, this is not to suggest that the adversarial system practiced currently in India is without any problems. In this part of the article, the author highlights two of the many issues that plague the criminal justice system of our country – *first*, failure to ensure a level-playing field for the indigent accused and; *second*, failure to adequately protect the rights of the victims.

Adversarial system of criminal trial proceeds on the assumption that "State using its investigative resources and employing competent counsel will prosecute the accused who, in turn, will employ equally competent legal services to challenge the evidence of the prosecution"[66]. In other words, the system pre-supposes equality of arms between the parties involved and the truth is expected to emerge from their confrontational presentation of facts. Hence, if the parties are not equally situated in terms of resources, the narrative presented before the court is likely to be one-sided, resulting in factually wrong decisions. In India, it is a known fact that many of the accused persons are poor and lack resources to engage the

62 Allan Lind et. al., *supra* note 51, at 271.

63 Justice Sudhansu Dhulia, *Role of courts in the administration of criminal justice*, (Jan. 20, 2020, 09:00AM), http://ujala.uk.gov.in/files/ch2.pdf.

64 *Ram Chandra v. State of Haryana (*1981) 3SCC 191 (India).

65 *State of Rajasthan v. Ani alias Hanif & others* (1997) 6 SCC 162 (India).

66 *Supra* note, 59.

services of a competent lawyer.[67] Many of them are also uneducated and therefore incapable of defending themselves in the court of law and asserting their constitutionally guaranteed rights.[68] Without ensuring adequate representation for the accused, much of the ideals that our criminal justice system seeks to achieve, like equal rights, fairness, and accuracy remain as just ideals. In order to remedy this situation, our laws confer on the accused the right to get legal aid for his defence at State's cost.[69] However, more often it is seen that the defence counsels employed by the government for the accused do not take much interest in their case due to the low amount of honorarium paid and lack of any incentive from the government.[70] As a result, even state legal aid fails to create a level-playing field for indigent accused. In such situations, the judge should play an important role to ensure that the rights of the accused are adequately safeguarded during both the investigation and the trial phase. Also, the government must take steps to strengthen the legal aid service by creating incentives for competent lawyers to come forward.

The second issue that the author would like to focus is on the limited participation of victims in the criminal proceedings. Earlier the author mentioned about how the adversarial system gives more control to the litigants to shape their case than the inquisitorial system. However, in practice, as litigants are represented by the lawyers before the court, the creation of legal narratives is often done by them and the litigants have very little say in it. The lawyers carefully prepare the answer that their clients need to say before the court, as a result of which the litigants are deprived of the ability to tell their story in the terms that they think are significant.[71] Such an approach is especially disadvantageous to the victim, whose role in the criminal justice process in India, is limited to that of a prosecution witness.[72] Even though the victim is the prime source of evidence and we rely on them for reporting the crime, representation of victim's interest and their participation in the trial is very limited.

67 PILLAI, *supra* note 7, at 346.

68 *Id.*

69 Code of Criminal Procedure, 1973, s. 304; Indian Const. art. 21, as construed by the Supreme Court in *Hussainara Khatton (4) v. State of Bihar*, (1980) 1 SCC 98 (India).

70 Mitali Vani, *Right to Free Legal aid and Legal Aid Functionaries under the Legal Services Authority Act, 1987*, 44 (Apr. 19, 2020, 07:00PM), http://nja.nic.in/Interns_Report_2015-16/Research%20Report%20Mitali%20Vani%2027-11-15.pdf.

71 Ainsworth, *supra* note 5, at 91.

72 Anupama Sharma, *Public Prosecutors, Victims and the Expectation Gap: An Analysis of Indian Jurisdiction*, 13 Socio- Legal Review 87, 98, (Apr. 19, 2020, 07:00PM), http://docs.manupatra.in/newsline/articles/Upload/116BE5E2-14EF-4753-BD49-3E308403D5E7.pdf.

The victims rely on the prosecutor to prosecute their case with efficiency and to secure them justice. However, the role of a prosecutor is perceived as a minister of justice and it is considered that his duty is to place before the court whatever evidence is possessed, whether it is in favour of or against the accused.[73] The court in several cases has opined that the 'impartiality of prosecutor's conduct is as vital as the impartiality of the court itself'[74] and that he must not be overly concerned with securing convictions[75]. However, such an approach may run contrary to a victim's expectation from his/her prosecutor. Added to this is the prosecution lethargy resulting from overload of cases, unsatisfactory remuneration and lack of competency. The option of private prosecution is also limited in India as CrPC requires the private prosecutor to act under the directions of the public prosecutor.[76] All these lead to a sense of dissatisfaction among the victims who feel that their grievances are not adequately represented by the prosecutor. Their role during the trial is also limited to answering questions put forward by the counsels. In this respect, inquisitorial system seems to be better accommodative of the interests of the victims as they play a more active role in the investigatory and trial stage. They get an opportunity to say their version of the story directly to the judge. 'The victim is given voice, validation and respect in more, and better, ways than in the adversarial system.'[77]

In order to meet the expectations of victims from our criminal justice system, several steps can be taken. One is to institute a mechanism to enable the victims to complain about the unsatisfactory performance of their prosecutor like, failure to present crucial evidences or to adequately represent their interest before the court. There is also a need to give more participatory rights to the victims. Today we see the sorry situation of victims receiving little to no communication about the status of their case from the prosecutor and they having to helplessly depend on case diaries to know the progress of their case.[78] In this regard, Malimath Committee's recommendation is truly notable. It recommended giving the victims the right to participate in the proceedings which includes right to advance arguments after the prosecutor, right to know about the progress of the investigation and right to move to the court to ask for further investigation etc.[79]

73 *Ghirrao v. Emperor*, (1933) 34 Cri LJ 1009, 1012.

74 *State of Tamil Nadu v. L. Ganesan*, 1995 Cri LJ 3849; *Manu Sharma v. State* (NCT of Delhi), (2010) 6 SCC 1 (India).

75 *Sheonandan Paswan v. State of Bihar*, (1983) 1 SCC 438 (India).

76 Code of Criminal Procedure 1973, s. 302 (India).

77 Arie Freiberg, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms*, 8 Eur. J. Criminology 82, 93 (2011).

78 Sharma, *supra* note 73, at 102.

79 Malimath Committee Report, *supra* note 4, at 270-271.

Lastly, the author also suggests the infusion of restorative justice principles while prosecuting crimes. Restorative justice essentially calls for restoring the parties, especially the victim, to the position that he/she occupied before the commission of the crime. While the usual sentencing practices may fulfill the state's interest in creating deterrence, it may not alleviate the physical/psychological impact of the crimes on the victim. Though India has taken some steps in this direction by introducing victim compensation scheme[80], it is cumbersome and largely inadequate to practically help the victim.[81] Restorative justice requires giving the victims a say in the sentencing process. Other means of achieving restorative justice like victim-offender mediation, family or community group conferencing, community service[82] are also worth considering. Adopting restorative justice principles will not only repair the injuries and trauma suffered by the victims and improve their satisfaction of the criminal justice system, but it will also help to ease the pressure on our over-crowding prisons.

Concluding Remarks

Adoption of an inquisitorial system is not going to be a panacea to all the problems that currently plague India's criminal justice system. Instead, it may give rise to new issues like abuse of power by courts, derogation of the rights of accused etc. Therefore, a better approach would be to reform and strengthen the existing system by tackling issues like crunch of resources and man-power, inefficiency in police investigations, corrupt practices etc. Moreover, while safeguarding the rights of the accused, it is important not to forget the victims. Their confidence in the criminal justice system must be improved by ensuring their adequate representation and participation and not by achieving higher rate of conviction and lowering the safeguards available to the accused.

80 Code of Criminal Procedure, 1973, S. 357 (India).

81 Mehak Bajpai, *Advancing of Restorative Justice in Criminal Law in India and Germany: A Comparative Study* (Jun. 19, 2018), https://journals.sagepub.com/doi/full/10.1177/2516606918765495.

82 See, *What is Restorative Justice?,* Centre For Justice & Reconciliation at Prison Fellowship International (May 2005) https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf.

Analyzing the Enforceability of Force Majeure Clause in Light of COVID-19

Rishabh Soni*

Abstract

Now with the spread of COVID-19 and impositions of lockdown in India, the economy has also suffered; the entire supply chain has broken and businesses are finding it difficult to survive. In these tough times, one most talked about remedy in various types of contracts affecting Businesses, rent agreements, etc., is the emergence of force majeure clause by parties to do away with their contractual liabilities.

Many companies always have a force majeure clause in their agreements to survive during tough times like these. Force majeure clause saves the bonafide party who was very much interested in performing its obligation under the contract but was not able to fulfill its part due to certain factors beyond their control and without any negligence on their part. There are also cases where more and more businesses though not having any force majeure clause in their agreements but are still coming forward to claim the remedy on account of the contract becoming impossible to perform and thus claiming the remedy of frustration of contract.

This paper tries to find out the circumstances under which courts will allow businesses to claim the force majeure remedy in discharging their liability under a contract. Paper also tries to compare the recent judgments given by Court in India and the United States in analyzing the test which needs to be satisfied before granting the remedy of force majeure. The paper also discusses the possible future tussles between insurance companies and businesses in settling claims and losses which the businesses have suffered on account of COVID-19.

* Student, Amity Law School, Delhi.

INTRODUCTION

The impact of novel coronavirus (COVID-19) pandemic has not only affected the physical health of humans but at the same time it has also impacted the health of economies of all the nations, and as a result of which businesses are finding it difficult to survive and most of them are unable to fulfill their contractual obligations. Restrictions on travel and imposition of lockdowns have impacted all the industries and more particularly international trade and trade of non-essential items have come to a standstill. In these tough times, the term which is gaining importance as a remedy seeker for businesses is the force majeure clause in business contracts.

Now after the lockdown has started to partially open in a phased manner, more litigations are coming on the subject matter of enforcing this force majeure clause as a defense by businesses to abstain from liability arising from contractual obligations We are seeing that many suppliers either want their contractual obligations to be delayed or their contract should be terminated. Many companies are citing reasons like restriction in movement, stoppage of production, increase in costs, labor shortage, and broken supply chains as the main factors for enforcement of force majeure as a remedy. Even big companies like Gateway terminals, Adani ports, Indian oil, Mangalore refineries, etc. have already invoked force majeure clause and many more are likely to join them.[1] The force majeure remedy which according to many was only a part of formality and rarely used remedy is now proving to be very fruitful and everyone is flipping their contracts to look for force majeure clause.

Many countries worldwide are also issuing force majeure certificates to firms, for instance on Feb 17, 2020, the China Council for the promotion of International Trade (CCPIT), revealed that it had issued about 1600 force majeure certificates to firms in 30 sectors, covering contract worth over $15 billion.[2] Even the Indian government through the department of expenditure, Ministry of Finance vide its order dated Feb 19, 2020, issued an office memorandum for procurement of goods. This memorandum states that COVID-19 could effectively be covered under force majeure clause because it is a natural calamity and directed the departments to enforce the same.[3]

1 Poorvi Sanjanwala and Kashmira Bekliwal, *What is Force Majeure? Legal Term Everyone Should Know During Covid-19 Crisis*, THE ECONOMIC TIMES (May 22, 2020, 10:42AM), https://economictimes.indiatimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms.

2 *CCPIT Issues the Force Majeure Certificates of Novel Coronavirus Disease (COVID-19) for Enterprises*, CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE (May 22, 2020, 10:45 AM), http://en.ccpit.org/info/info_40288117668b3d9b017080e1f9b5072f.html.

3 *Force Majeure Clause Office Memorandum*, DEPARTMENT OF EXPENDITURE (May 22, 2020, 11:00

Meaning of Force Majeure

The term 'force majeure' has been defined in Black's law dictionary[4] as "an event or effect that can neither be anticipated nor controlled". Force majeure is being used as a clause in contractual agreements from the past, but it has started to gain importance only in recent times after the outbreak of the pandemic. *Force majeure is a contractual provision to deal with uncertain situations due to which contractual obligations could not be performed and these situations can't be acknowledged at the time of entering into the contract*. Generally, a force majeure clause provides a temporary reprieve to parties from performing their obligations under the contract if the events mentioned in the force majeure clause are satisfied.

Entire Jurisprudence on force majeure has been beautifully summarized by Justice RF Nariman of the Supreme Court in the case of *Energy Watchdog v. CERC*.[5] Generally, a force majeure clause includes events beyond the control of parties to contract like an act of God, earthquake, fire, flood, terror attack, epidemics, etc. and the circumstances which are necessary to be fulfilled for the applications of this particular clause and also the aftermaths of enforcement of this clause like whether the contract will be permanently frustrated or is being only delayed for a particular period. In the Indian context, although there is no direct mention of the term force majeure, some linkage to it can be drawn from the concept of contingent contracts[6] as laid down under the Contracts act. Section 32 mainly deals with a situation when a particular contract is contingent on happening of an event and when this event becomes impossible then indirectly contract also gets impossible to perform. Force majeure clause is a very important aspect of any contract and its absence can lead to a very difficult situation for parties. This clause is now being seen to be a part of various types of contracts like power purchase and manufacturing contracts, real estate contracts, supply contracts, etc.

AM), https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.

4 *Meaning of Force Majeure*, BLACK'S LAW DICTIONARY (May 22, 2020, 01:15 PM), https://blacks_law.enacademic.com/11167/force_majeure.

5 Justice Nariman in *Energy watchdog v. Central Electricity Regulatory Commission and Ors.*, (2017) 14 S.C.C. 80 (India), quoted "Force majeure" is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. In so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract".

6 Section 32, The Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872 (India).

Method of Enforcing Force Majeure Clause and the Effect of it on Contracts

Generally in the original contract, only the method of enforcing the force majeure clause should be mentioned and it is up to parties to bilaterally agree on the method for its enforcement, but most of the times parties prefer to enforce this clause by giving notice to the other party and intimidating him/her about the enforcement of same. This notice can be given by one party informing the other about the occurrence of such an event or it can also be given if the force majeure event continues to happen for a prolonged period. These two methods of enforcement will differ with different contractual agreements. Now coming to the effect of this enforcement party enforcing it generally has 2 remedies:

a. Party will be allowed an extension of the period to fulfill his contractual obligations.
b. Party will be allowed to terminate the contract and settle their monitory concerns.

Alternate Remedy Available to Parties in case of No Force Majeure Clause in their Contract and the Doctrine of Frustration of Contracts

There are various cases in which the original contractual agreements between parties do not have any force majeure clause and yet they are unable to fulfill their contractual obligations. So in these particular cases, the only remedy which is generally available with the parties is that of the frustration of contract as governed by Sec. 56.[7] Section 56 is based on the maxim *"les non cogit ad impossibilia"* which means that the law does not compel a man to do what he cannot possibly perform. This doctrine seeks to protect the interest of the party who has suffered on account of the subsequent impossibility of the subject matter of contract.[8] It means that every contract is based on the assumption that parties to contract will be able to perform the same when the due date of the performance arrives. Now if because of some event, the event has either become impossible or unlawful, then the contract becomes void, and liability of the party will also be terminated and the essence of the contract will be frustrated.

The courts in India have held in numerous cases that the word "impossibility" as used in Section 56 should always be interpreted in a practical sense and not in the literal and strict

7 Section 56, The Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872 (India).

8 *Ibid*. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

sense and courts should always try to ensure that the object of a contract is fulfilled even if certain changes need to be done. In the leading English law case of *Tsakiroglou & Co. Ltd. v. Nobel Thorl GmbH,*[9] House of Lords observed that even though the contract had become more onerous to perform, it was not fundamentally altered and in this case, the contract was very much possible to perform but at the cost of an increase in freight price.

Moreover, the majority of eminent reference work on contract law has concluded that a rise in cost or expenses has been stated not to frustrate a contact.[10] Thus, to justify this statement a contract will always come under the purview of Section 56 even if it is not an absolute impossibility, but the contract has been fundamentally changed. This particular principle was given by the court in the *Satyabrata Ghose* case.[11] Further, in this case, the Court held that the changed circumstances make the performance of the contract impossible and the parties are absolved from further performance of it as they did not promise to perform an impossibility.

Now the question arises as to what will happen to partial obligations that have been performed before the contract became fundamentally frustrated. To this particular question, Indian law is very much clear with no doubts that if a particular contract is declared void after entering into it then it will be governed by the concept of restitution as laid down in Section 65.[12] So basically Sec. 65 provides that a party who has received any advantage before the contract became void, then he/she is bound to restore that benefit so that parties can be put in the same position as they were in if the contract had never been executed.

A Hypothetical Example Highlighting Force Majeure Clause in a Contract

Company A of (Ludhiana) entered into a contract with Company C of (Mumbai) on 15 February 2020 for the supply of 600 tons of steel. For fulfillment of delivery, a time period of 2 months was given. There was also a force majeure clause in the contract entered in between both the parties in which they both agreed that in case of any uncertain event beyond their control affecting the subject matter of the contract, a grace period of 1 month will be given. But this was subject to notice being given by party affected within 10 days from happening of that event. Now on 25th March 2020 nationwide lockdown was announced by the government, thereby affecting the supply of non-essential goods. As a

9 *Tsakiroglou & Co. Ltd. v. Nobel Thorl GmbH*, [1962] AC 93.

10 JOSEPH CHITTY, CHITTY ON CONTRACTS (31st ed., 2012).

11 *Satyabrataghose v. Mugneerambangur & Co. & Anr.*, 1954 S.C.R. 310 (India).

12 Section 65, The Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872 (India).

result of this event A's consignment was struck for about 20 days on the border of Gujarat and Maharashtra. On 13th April 2020, A sent an email to B conveying him about the actual situation and enforcing the force majeure clause and demanding grace of another 1 month as the consignment was sent back to Ludhiana (Punjab). So now in this particular case, A will be allowed to enforce the force majeure clause as the delay was not in his hand and he made all possible efforts to fulfill the contractual obligations on his part.

Exceptions to the Applicability of Force Majeure Clause in Contracts

Generally, force majeure clauses are applicable without any restrictions, but at the same time, a party cannot hide its negligence and mal intention behind the force majeure clause. So where the non-performance is caused by the usual and natural consequences and not the uncertain consequences which are beyond the control of parties, their force majeure cannot be enforced under those cases. Further force majeure can also not be invoked simply because the contract has become financially and commercially more difficult to perform[13]. So parties taking shelter under the force majeure clause need to convince the court that the force majeure event was beyond their control and the event could not be stopped even after ensuring due diligence & taking all possible steps. These steps will vary as per the facts of each case. However, generally, these include looking for alternate suppliers, an alternate mode of transport and funding, etc. Now broadly analyzing, the event of force majeure must pass the following 3 test:-

a. Unpredictability- It involves that the event amounting to force majeure should be unpredictable and unforeseeable.
b. Irresistibility- The event of force majeure must make the execution of contractual obligations impossible.
c. Externality- It means that the force majeure event must not be created by the default or negligence of the party.

The Increasing Possibility of Businesses Claiming Loss Caused to them from Insurance Companies

There is a greater chance of various big companies claiming the losses suffered by them from insurance companies and trying to bring the claims within the ambit of business interruption insurance policies. It would however be very interesting to see in the coming

13 *Punj Sons Pvt. Ltd. v. Union of India,* A.I.R. 1986 Del 158 (India).

times as to what stand courts take on these claims by companies. Now if we look at the business interruption policies in general, we find that these policies can very much be issued as a separate stand-alone policy.

But in India these are incorporated in Fire policy or machinery loss policy and offer protection to the net profit, compensating for the increase in the working costs, etc.[14] So for the business interruption policy to cover the loss on account COVID-19, experts believe that it is necessary for the property insured to suffer physical damage due to covered perils, and it is very unlikely that such policies would cover losses caused due to COVID-19.

It also needs to be noted that the courts in the U.S have held that if a particular condition deprives the use of insured property, then that particular condition will be covered in sanctioning the claim for the loss occurred to the property. But the similar reasoning for approval of claims will not be applicable in India, firstly because of the specific wording in the insurance contracts in India and secondly US decisions would only be applicable if there is a presence of COVID-19 at the insured property, it also needs to be looked into here is that here in India most of the businesses are suffering losses not on account of being closed as a result of the presence of COVID-19 on their premises, but due to lockdown restrictions being imposed by the government.[15] Now we need to see in the coming times what view will the courts adopt in these matters and there may be some cases in which courts also adopt liberal view.

The Courts of the U.S.A and Force majeure

Many US states have given a narrow interpretation to force majeure as a remedy and have clarified that force majeure will qualify as a defense only if the contract specifically mentions for it to include events like pandemics etc. However, the state of Idaho have interpreted force majeure clauses more broadly and in a recent Idaho Supreme Court case, the court found that denial of building permit will be qualified as a force majeure event where the contract specially defined to include other events which are beyond the control of parties to contract.[16] Another major consideration that courts in the US are giving is that of foreseeability of the event. It is very much clear that COVID-19 as such cannot be foreseen

14 Manish Jha, *An Expert Explains: Can Business Interruption Insurance Cover COVID-19 Claims?*, THE INDIAN EXPRESS (April 16 2020, 07:57AM), https://indianexpress.com/article/explained/explained-can-business-interruption-insurance-cover-covid-19-claims-6363831/.

15 *Ibid.*

16 Steffan Hasselblad, *How To Tell If COVID-19 Qualifies As A Force Majeure In Your Contracts*, IDAHO BUSINESS REVIEW (June 16, 2020, 01:30 PM), https://idahobusinessreview.com/2020/06/16/how-to-tell-if-covid-19-qualifies-as-force-majeure-in-your-contracts/.

from before and also the majority of cases will come under it. But at the same time courts are not granting defense of force majeure to contracts related to supply of medical goods and contracts entered before December 2019.

Moreover like the recent judgment of Delhi High Court, courts in the US are also not giving strict meaning to the term impossibility in performing the contract and courts in the US have found that an even a 40% change in crop price throughout a single growing season did not make performance impossible.[17] Now concerning the occurrence of an event on account of an act of god, no court yet has examined whether a pandemic such as COVID-19 will qualify as an act of god.

Some Important Recent Judgments of Courts in India Interpreting and Deciding the Ambit of Force Majeure Clause in Light of COVID-19

The first major case interpreting the provision of force majeure after COVID-19 was the case of *Halliburton Offshore Service v. Vedanta Limited & Anr.*[18] (Delhi High Court). In this particular case, in the year 2018, Petitioner Halliburton was granted a contract by Vedanta for integrated development of oil and gas fields in Rajasthan for which he also furnished bank guarantees and the petitioner was given the time by 31st January 2020 to complete the project, which was eventually extended and the date was 31st March 2020.

The petitioner further demanded an extension, however, he was denied the same, and then on March 18, the petitioner sent a letter to respondents stating that he is invoking force majeure clause due to COVID-19 for extension of the deadline to complete the project. However, to these response respondents shown their disagreement and enforced bank guarantees against the petitioner which was extended by the petitioner during the signing of the contract. Petitioners moved Delhi high court to restrain the defendants from invoking bank guarantees.

The main issue in this particular case was whether the Petitioner can restrain respondents from invoking bank guarantees in case of non-acceptance by respondents for extending the deadline regarding completion of the project due to ongoing COVID 19. Delhi High Court noted that the alleged non- performance of the contract cannot be executed on the ground of force majeure as claimed by petitioner. *The Court acknowledged that COVID-19 was very much a force majeure event, but at the same time also held that delay on account of*

17 *Ibid.*

18 *Halliburton Offshore service v. Vedanta Limited & Anr.,* (O.M.P (I) COMM) No. 88/2020 & I.As 3696—3697/2020 (High Court of Delhi, 20/04/2020).

the petitioner was not due to COVID-19 as petitioner was already given 2 extensions to complete the project and that too before the lockdown was announced by the government.

The Court also observed that simply enforcing COVID-19 as a force majeure clause will not absolve the liability of parties to contract and they need to show that the non-performance was the direct result of COVID-19 and therefore this is to be determined from facts & circumstances of each case.

The Court also gave few points which were to be considered in each case before granting the relief to the party claiming force majeure clause on account of COVID-19. These are

a. Conduct of parties before outbreak
b. Deadlines for completion in contract
c. Steps that were taken to complete the contractual obligation
d. Other compliances that were required to be made.

Another important judgment concerning the application of the force majeure clause in tenant-landlord dispute is the case of *Ramanand and Others v. Dr. Girish Soni and Another (Khan market case)*[19].

In this case also, the Delhi High court after analyzing various clauses of the contract entered in between landlord & tenant, came to the decision that as such there was no mention of force majeure event in the agreement, but still, on account of prevailing situations, the Court agreed to allow a time frame to the tenant to pay rent but rejected their request of quashing the rent for a period of lockdown.

Conclusion

Force majeure clause in contracts is proving to be of great help to genuine parties who have suffered without any fault on their party and it can very much be claimed as a defense by a party to contract to abstain itself whether temporary or permanently from performing the contractual obligation, but it needs to be seen here that there is no straitjacket formula which will be applicable in all cases of an force majeure event to save a party from fulfilling its contractual liability. Courts will always analyze the facts & circumstances of each case and will always look into the actual reasons due to which contract was not been able to be performed either temporarily or permanently.

19 *Ramanand and Others v. Dr. Girish Soni and Another,* C.M. APPL. 1848/2020 (High Court of Delhi, 21/05/2020).

After this, if the force majeure event was a reason for causing delay or termination then the court can allow the party to claim shelter under the doctrine of force majeure. But in today's time businesses relying on the force majeure, will be required to show and convince the courts that the actual reason for non-fulfillment of the contract was COVID-19 and they were having no fault on their part. Also, we have seen in the recent judicial pronouncements that courts have adopted a strict approach towards granting relief on account of force majeure clause in contracts, so business solely relying on force majeure needs to be extra cautious and should approach courts only when they have been genuinely affected by the force majeure event and not to hide for their mistake.

LOCKDOWN IN INDIA - A MAJOR SETBACK?

Ananya Sanjiv Saraogi* and Vallabhi Rastogi**

Abstract

The current pandemic situation created an outburst in the whole world. The Indian Prime Minister had announced nation-wide lockdown on March 24, 2020 which continued for at least three months. During this period, there was a complete shutdown of industries and employable sectors; the economy of the nation was drooping down. The employment rate has fallen down which has in turn largely affected the migrant workers. These daily wagers had experienced a turmoil as they could not be transported to their hometowns. Apart from the less privileged population, the other sect faced the issue of job security. The motto, "Unity in Diversity" has tumbled under an exception; celebration of festivals and pilgrimages are forbidden.

Meanwhile, the education system has adopted the advanced methods of teaching the students at the primary and secondary level. Technology is the new mode of transmission of knowledge, whether the mode is easily accessible or not is the current question. The efficiency of the teachers and students has been affected along with the comfort level shared between them. Currently, India is a developing nation where there are various districts and villages which lack the basic resources like electricity and network towers to avail the facility being provided by the country.

The source of information, in the current situation, is the media which has taken undue advantage of being in power to impart the information. The ethical and moral principles including unbiasedness has seemed to be washed away with the pandemic. Unnecessary detailing on areas of lesser concern and direct comments without authentication of data has become the main agenda of the media. This paper has tried to elaborately explain the above-mentioned issues and discuss the consequent sub issues.

* Student, Symbiosis Law School, Noida.
** Student, Symbiosis Law School, Noida.

Keywords: COVID-19, migrant workers, media, education, travel, lockdown

Employment

Novel Coronavirus created a line of tension across the globe followed by the lockdown in nations including India. The Lockdown has created a great fall in the economy of the world and created a space of recession. The IMF had recently reported the future of Lockdown being worse than the Great Depression.

India has reportedly been handcuffed in a similar situation – complete lockdown has caused a big crisis for industries including MSMEs in this period of confinement. The non-functioning of various sectors which involve the workforce has thrown up a bigger question of the issue of employment. The economy of the nation has drooped and so has the rate of employment. According to reports by CMIE, there has been a great shoot up in the rate of unemployment in India from March 2020 to April 2020 by an approximate difference of 14.77%.[1]

Automobile, Aviation, Tourism and Hospitality sectors have witnessed major setbacks in economical graphs. The research would mainly be confined to the various kinds of employees affected by the pandemic and the future prospects of employment specially for the upcoming graduates.

Migrant Workers

The most affected in this lockdown period have been migrant workers – the vulnerable cult. The nation-wide lockdown had created a rift among the workforce; the lot was eager to return to their homeland. March 24, 2020 was the beginning of the series of lockdown and on March 29, 2020 the Ministry of Home Affairs had passed an order citing all the employers from the "*industries, commercial establishments or shops*" to pay the wages to the employees till the continuation of the shutdown. Several companies had approached the Supreme Court against MHA's order.

Meanwhile, upcoming weeks of first lockdown noticed a rush of migrant workers on the streets of Bandra (Mumbai). Similar events were witnessed in Gujarat and Delhi. The main demand of workers was to be transported to their hometowns, the reason being loss

1 Unemployment rate in India, CMIE Report
March 2020 – 8.75 % (India): 9.41% (Urban) and 8.44 % (Rural)
April 2020 – 23.52 % (India): 24.95 % (Urban) and 22.89 % (Rural).

of livelihood of these people, no food or shelter. Another reason was that the harvesting season had begun and these migrant families act as labour at minimal rates. State borders were closed and farms located on the borders faced problems related to workforce [2]. Due to shortage of labour, transportation of essential goods had become a major issue for the farmers.

India is the second most populated country in the world thereby, the majority of the work is dependent on man labour. Migrant workers belong to the labour force and form the backbone of the Indian economy. Transportation had been prohibited during lockdown thereby stalling them. Workers had adopted other means of travel i.e. by foot. These workers are the ones who either work on contractual basis or without contracts. Manufacturing industry, Tourism industry, or restaurants – workers are required in every form. But with reduction in demand of certain goods from the given industries due to the pandemic, requirement of labourers would also reduce.

Various events and government policies for the migrant workers are worth mentioning. Bengaluru had witnessed the most heart-melting incident. Post the announcement of lockdown, approximately 200 to 250 huts were burnt down and few days later 60 huts were set on fire in the district of Kalaburagi[3]. These huts belonged to those migrant workers who had departed before the lockdown.

Kerala had a positive impact on the migrant workers. The state comprises a larger population of this labour. '*Apna Ghar* project' has provided relief to the workers while *Roshni* has been helping migrant children to stay in school and also educate them [4]. Kerala has been the first state in the country to provide relief in the form of food and shelter to the workers in such dire situations.

Shramik Special Trains, Indian Railways initiative, was introduced to deport migrant workers since lockdown. Surprisingly, certain media reports have stated that migrant workers have been charged an amount they could not afford for which they had to take loan from their relatives but the news has not been confirmed yet. The current report that has been affirmed to is that more than half of the fares are being borne by the Central Government and the rest by the State.

2 Lola Nayar, Jyotika Sood, Yagnesh Kansara & Salik Ahmad, *100 Million and More Indian Jobs Are at Risk After COVID-19 Lockdown. Is Your Job Safe*, Outlook.

3 Mustafa Plumber, *Burning Huts of Migrants Taking Advantage of Lockdown Unfortunate: Karnataka HC*, Live Law.

4 Dr Jamon Mathew & Jose M A, *Political Interference for Migrant Welfare: An Evaluation of Kerala Model,* PKP., at 657, 660.

The Supreme Court has recently passed the MHA's order by stating that the payment of wages need to be paid to the employees after settlement with employers. If employers are unable to come to consensus with employees then the two parties may approach the requisite labour authorities. This has been a relief for migrant workers as their travel would be curbed in lieu of being paid thereby maintaining their safety and reducing the spread of virus.

Government might provide relief which may not be a permanent solution to unemployment and recovery of the economy.

Uncertainty in Jobs

Lockdown had caused a complete shutdown including workplaces. Assured by the extension of lockdown for a longer period, companies, enterprises adopted work from home concept. Various commercial and industrial establishments have also adopted the concept but there are no specific guidelines on the method of working for employees. In the whole chaos, employees currently are not assured of their job security. There are chances that the companies may sack employees as the current situation is worse than the recession period.

Even if there is job certainty, there has been salary cut for the employees. Most of the private companies have reduced income by 15% to 25% for the individuals earning a certain amount. The security or cleaning staff or lower income groups have been saved from the cut. But the recipients have suffered a backlash as they are facing multiple problems. While their food and shelter has been taken care of, rest of the income has to be spent for payment of fees or loan payment for the rest of the family specially if the individual is the sole breadwinner.

Salary cuts, work from home are some of the issues which do not guarantee job security but act as factors of job stagnancy. Untimely requirement from client's needs to be entertained by employees. There are no specific hours of work and various companies have also warned of laying off employees. In such scenario's individuals have been forced to think about changing their job but they are unaware of the unavailability of new jobs. Although new jobs may be provided but the joiners are required to stay on a standby period till the situations have not settled. This further creates grave concern for these individuals and the ones searching for a new job as they are unable to live on their savings.

Sectors that have barely been affected by the pandemic are the e-commerce platforms, medical including pharmacy, hospitals, telecom industry which have been functioning in the

crisis. While the e-commerce platforms faced difficulties in supplying goods to consumers due to lack of workforce, the healthcare sector has evolved with the maximum employment rate. Individuals working under this sector have not faced the wrath of unemployment or recession.

India has been in a dire situation in terms of economy and economists believe that V-shaped recovery is difficult to attain. Even though analysts have mentioned in a promising note that closing of the lockdown will flock to fresh demands for which workforce is required, the achievement of the same seems like a far- fetched dream.

Future Prospects

Rate of unemployment has been growing steadily thereby raising various questions in regard to the employment. Every year universities produce new graduates – the final human products for placement in best companies or firms. The lockdown period has proved to be a barrier for the graduates to present their skills as the placements of these students are currently on hold. Complexities would arise once normality comes into form as these graduates would have to prove their worth in the market which already consists of the players who have better experience and abilities to build the company. Inviting newcomers would involve high risk as every industry sector would require analysts, individuals with the capability to lift the economy.

India has adopted the policy for utilization of the local products so as to build the SMSEs. The campaign of Make in India has strengthened further due to pandemic.

Also, the graduates who have been looking forward to foreign education would have to search for various other online platforms to build their skills. Universities like Stanford and Harvard have introduced certificate courses for aspirants. The future of the upcoming generation is under question, their education is dependent on the income of the current generation and the economic growth of the nation.

Media

Media regarded as the fourth pillar of democracy was once restricted under the Vernacular Press Act, 1878 due to the criticism of the British. The Indian Constitution enabled these rights through Article 19(1) but the present media has been misusing these rights.

In the current pandemic situation, especially during the lockdown, the media was the bridge between the citizens and actions of the State. This further build responsibility on the

broadcasting channels, editors and journalists to be accurate and unbiased in their speech and written material. Publishing articles or reports require information and various media platforms have been unable to find the source due to the situation.

Due to COVID-19, monotony has befallen on the news. The reason could be the unavailability of resources, approaching well-acknowledged individuals who could throw light upon the issue. Technology has bridged the gap but the analysts or researchers providing data are unsure of the accuracy. The news related to society has all been based on mere instances and not proven facts and figures.

Neutrality

The fundamental principle in mass media and communication is neutrality – in research, speech and articles. Opinions are to be formulated by the readers, listeners or authors who are not employed by news publishing houses or media houses.

Presentation of the daily events have included media reporters; writers being biased in their display. News is to be portrayed on the basis of facts and figures or the major decisions taken by the government. The span of time the news is depicted is for a short while. While the figures on coronavirus have been regularly displayed due to the government guidelines, the rest of the information has always been biased i.e. in criticism or favour of the government. Only one side of the story is presented thereby hampering the construction of opinions in an individual's mind.

Reports on the reason for the spread of coronavirus had mainly targeted the religious cult which had arrived in Delhi for a meeting. The other factors like the infusion of people from infected countries and lack of awareness program among masses were not given due attention. Also, the cover over the plight of migrant workers were not being discussed during the initial days of lockdown.

Indian media has begun to lose the basic ethical standards to be followed to represent particular news. Usage of jargons have become common which has further degraded the quality of news and aroused misinterpretation among the masses.

This has led the media to the doors of law due to the misuse of their right. Alongside the fundamental right to speech are reasonable restrictions which involve not to defame an individual. Arnab Goswami, an Indian journalist and television news anchor, was charged for defamation for questioning one of the politicians from the opposing party over silence on the lynching case. Recently a legal notice of defamation was issued against a media

house for portraying an actor's death as an act of cowardice [5].

Questions raised on the appropriate use of right and negation of duties while dealing with presentation of current events.

Social Media

Misinformation is never welcome in this field as media is the medium through which the individuals are informed. Social media is the current hub of the tech-journalism. News about Uttarakhand forest fire were doing rounds until the authorities confirmed the pictures were previous years and that the fire was not of that intensity as reported by various social media platforms.

The new-age of journalism, social media has covered the generation of all times, especially in the pandemic situation. It has created an obstacle for the news channels as this platform tends to fabricate the news. But apart from this social media has played a role in raising questions that the broadcasting channels have unable to publish. Questions on the employability rate, the conditions of migrant workers and views of the public on the ongoing events. 'Bois Locker Room' was one such incident which had reached the court due to the reports filed against it on social media.

The platform has been passing certain statements which are not verified by the authorities and due to the coronavirus, there is no policing on the statements. The platform enables individuals to attack each other without realizing their duties as a citizen of India. There have been various cases that have been reported on defamation, stalking and use of indecent language through comments or personal conversations with the users. This has led to lack of sensitivity among the users. Statements that could mentally affect another individual as a virtual conversation does not depict the personality of the person. The political comments and direct attack on the government without any authentic data has created a doubt on the awareness of the parliamentary privileges these individuals do not possess. Since direct comments on the stature of an individual could only be made in the Parliament as the parliamentarians are given the privilege to do so.

In a population of almost a billion and a smaller number of employees in cyber security to control the misuse of the platforms, awareness about proper conduct on social media is mandatory.

5 Tanurag Ghosh, *Aaj Tak Served Legal Notice for Spreading Misinformation On Sushant Singh Rajput's Death*, LAW STREET JOURNAL, (Jun. 05, 2020, 08:00AM), https://lawstreet.co/crime-police-and-law/aaj-tak-legal-notice-spreading-misinformation-sushant-singh-rajput-death.

Forsaken Data

The pandemic had restricted the movement of individuals due to lockdown. In such occasions the public was to be made aware of the ongoing events. The international treaties or policies, India's take on their relations with other nations, the funding scheme, government's schemes for the financial stability of the public and most important the current situation of the pandemic-- these events were brilliantly landscaped by the media as the information was government authorised. But such information was available only to the financially growing media houses, the local media houses in different parts of the country were facing grave issues. The local media centres are unable to display the news as the data collected would require government's approval which would be ineffective without it.

Issues being faced by the prisoners in the cells; the concern has not been showcased by the media. The Maharashtra government released certain prisoners on temporary bail to reduce the spread of COVID19. But are the prisoners being provided proper sanitation or are their basic rights being protected? – such questions have rarely been raised by the media. Women are being subjected to domestic violence and every day such cases are being reported but there is no debate in the media about the same. Is the media restrained from questioning or is it neglecting these issues considering it to be trivial?

Need of Artificial Intelligence

Artificial Intelligence has been a ray of hope in relation to technology. Its adoption has benefited sectors and researchers. AI has been collecting data to distinguish between the behavior of a human and machine through machine learning. While the AI can be misused in commission of crimes, it can also be used for assistance in finding the culprit through the data of such individuals or through DNA.

AI in the media could be used in eliminating fake news through its processed data. AI has the capability to adjust in accordance to the situation and give solutions related to the situation. The adaptability and decision-making power are quicker due to its algorithm. Recently WHO had also taken the aid by collaborating with Facebook so as to eliminate misinformation [6]. Humans are bound to get misguided from the ethical values required in the field of media.

AI could in future hold flags of neutrality, equality, peace which the human race has been debating on, if utilized in a proper manner.

6 Geetika Sachdev, *Artificial Intelligence: A shield against 'fake news'?*, India AI, at 2.

Education

The education system in India has been in a crippled and debatable state for quite some time. Education is a privilege which is still denied to the majority of the population. Education is the key which can socially elevate the poor, restructure the society, free it from its prejudiced and intolerant norms and boost the economy of the nation. Despite making education free for children of 6-14 years of age under the Right of Children to Free and Compulsory Education [7], India still comprises a huge fraction of the illiterates in the world.

The UNESCO while releasing its Global Monitoring Report in the year 2015-16 revealed that India has the largest population of illiterate adults in the world and that the country ranks 106th out of the 127 countries. Though this report was based on 2001 census statistics but the reason behind such low ranking has not changed much. Most of the aggrieved individuals, generally the rurals, that are able to make it to educational institutions are burdened to pursue only those fields that help in money making. Higher education suffers due to poor infrastructure, untrained teachers, lower government incentives, unjust public funding, unplanned curriculum for growth [8]. Adding on to the issue, government school teachers remain absent most of the time majorly due to their full time election duties or for several other excuses which goes unnoticed. However, these loopholes were trying to be reduced by awareness, night schools in villages and several other improvement measures. By the time results of such measures were to be analyzed, the outbreak of COVID19 deepened the crack of these loopholes. COVID19 outbreak has been deemed a global health emergency [9]. This pandemic has increased the inequality and intensified the breach in the education system.

Disparity in Resources = Difficulty in Access

While the country continues to fight against the perils of COVID-19, a gradual but relatively equal issue is posing a threat to this nation's progress. The teaching environment has completely changed. Online classes and tutorials are being conducted to educate the children, that is, virtual classes are being conducted instead of physical ones. This pattern of imparting education can be said to be a trial and error method as it has not been analyzed and examined earlier. One does not know whether it would prove to be a success. This can also be a medium that can give way to greater problems due to unequal distribution of

7 INDIA CONST. art. 21 A.

8 Pawan Agrawal, *Higher Education in India: The Need for Change*, ICRIER, June 2006, 5-7.

9 Catrin Sohrabi, et al., *World Health Organization Declares Global Emergency: A Review of the 2019 Novel Coronavirus (Covid-19),* 76 Int. J. Surg., 71-76.

wealth and resources across the nation. Mission Antyodaya, a nationwide survey of villages conducted by the Ministry of Rural Development in 2017-18, showed that approximately 16% of India's households received one to eight hours of electricity daily. For most of the parents, considering their income, sending their child to school is the maximum they can spend. Further expenditure on renting/buying computer devices and affording internet facility is not an option. The lower strata of the society do not have resources to avail the privilege of online classes for their children. It is also to be noted that some students of an institution, who can avail such devices, may be living in remote areas where the network connectivity is poor or negligible. They have no option but to miss those classes since they cannot leave their houses to get a network range, otherwise, it would have induced them into risking their lives when the entire nation was in a lockdown. Poor connectivity can be an issue on either end. Even the teacher may be a resident of a place where signal failures are common. According to the 2017-18 National Sample Survey report on education, only 24% of Indian households have an internet facility, while 66% of India's population lives in villages, only a little over 15% of rural households have access to internet services.

Self-Evaluation

Furthermore, several teachers have to be trained to operate online portals. They may not be accustomed to using such technological devices for imparting education. They may not be comfortable when it comes to virtual teaching. Few might be conscious with their pronunciation, voice modulations, intonations and may experience difficulty in speaking without an actual, physical audience. While physically present in class the students adapt themselves according to the teacher's dialect and expression. Generally, a teacher comes to know when a student is mentally absent though physically present in class. However, this changes when it comes to virtual education. Students know that even if they don't pay attention to what the teacher shares, they would not be pointed out and scolded. Therefore, most of them may take this method of teaching as unserious. With such lack of concentration, it is not the teacher who is at loss exactly but the students. In this pandemic situation, many might opine that only the education of high school (class 10) and intermediate level (class 12) are a concern since the primary classes do not have much to lose. Even the Government has laid relatively greater emphasis on higher levels by discussing their problems. However, the primary classes form the roots and fundamentals of any education system. The primary levels hold equal importance with the senior levels. Without primary education, which teaches the basics that form the prerequisite of higher levels, focusing on the latter would be a waste.

Imparting Knowledge - An Issue?

Other than online classes, parents are also a source of educating their children. Under lockdown, primary schooling is parents' responsibility. However, this will only be applicable when the parents, themselves are literate and educated. The parents, who are uneducated, are unable to teach and impart knowledge as far as syllabus is concerned. This also makes way for inequality as literate parents are at an edge whereas the illiterate lag behind. The measures taken by Government and various Non-Governmental Organizations to run rural schools and night education camps for the rural workers prior to this pandemic have also come to a standstill. Internships and student volunteer programs are other areas adversely affected by COVID-19. To illustrate a few, medical and law students require internships, since online classes would not suffice them. Practical experience and observations are a must for specific professional courses and the students cannot only rely on theory and watching online videos.

Admission Process- A Dilemma

Many private universities are enrolling students on the basis of interviews only rather than aptitude tests or merit basis. This might not be an issue where such practice was prevalent prior to lockdown. However, it might be unfair in cases where prior to the lockdown, private colleges conducted aptitude tests and interviews both or only aptitude tests or enrolled on merit basis. Candidates who are uncomfortable with interviews or had put in several hours of practice to prepare for aptitude tests are now at a disadvantaged position since these universities are enrolling students through interviews. Candidates might lose their opportunity to study in their dream college. Whom do they have to blame? They cannot blame themselves for working hard and putting in efforts. There might be students who have shortlisted colleges on the basis of their admission procedure, long before the start of their class 12^{th}. However, now the candidates have to either miss their opportunity or put in further efforts to prepare for the interview in such a short span which would not have been the case, had it not been for this public health emergency.

Considering all these issues, one might say that COVID-19 has adversely affected the education sector and most importantly, the future of the youth which will eventually, mould the progress and growth of this nation.

Travel and Transport

According to the World Travel and Tourism Council, India's Tourism has contributed Rs. 16.91 Lakh Crore that is 9.2% to India's GDP in 2018. It provides 8.1% of its total employment. On the contrary, this Council had projected that travel could fall by 25% in 2020 putting at risk 12-14% of the jobs in the sector, which implies 50 million jobs at risk, globally, but the global pandemic outbreak might further worsen these figures. According to estimates from CMIE's Consumer Pyramids Household Survey, travel and tourism accounts for five per cent of total employment in India (nearly 20 million jobs).

Unplanned Agenda

Travel is the single most important contributor to disease transmission [10]. The first steps to prevent transmission to others include taking precautions (mask and sanitizing equipment), avoiding close contact and ensuring adequate isolation. At the community level, people were asked to avoid crowded areas and postpone non-essential travel to places with ongoing transmission [11]. With having several people in its grip, several nations have imposed travel restrictions not only within their boundaries but have also denied people to enter their borders. Indian Government was astute enough to suspend travel and impose shutdown strategies to avoid cases of transmission and curb the spread at an early stage. This abruptly announced lockdown across the nation, though done to prevent the spread, was perceived as a hard hit by a few since there was no planned agenda for recovery and the people were not prepared with sufficient resources.

Religious Inadvertence

India, being a nation where religions like Hinduism, Islam, Sikhism, Buddhism trace their origin, had to intervene in the religious affairs due to this global outbreak. With travel bans, people were unable to celebrate festivals including Eid-al-Fatr, Easter, Baisakhi and travel to holy shrines and other religious institutions. Some had to let go their age - old traditions and customs while some were unable to go on pilgrimages. Such inability to fulfil their divine and sacred beliefs has caused resentment among the orthodox followers. Saudi Arabia suspended the year round Umrah pilgrimage to curb the widespread, however, Iran witnessed large regional outbreaks since it did not intervene in the religious pilgrimage [12].

10 Shahul H Ebrahim, et al., *Covid-19 And Community Mitigation Strategies in A Pandemic,* BMJ, at 368.

11 Tanu Singhal, *A Review of Coronavirus Disease-2019 (Covid-19),* 87 Indian J Pediatr. 281-286 (2020).

12 Ebrahim, *supra* note 11, at 368.

State of Abandonment

With state borders being sealed, international flights being banned, buses and trains stopped, several people who were away from their hometowns or migrated to different states for work were left stranded, away from their families and friends and some even in a completely unknown place. With no work for the daily wagers, going home was a better choice but since no mode of transportation was available, few succumbed to their misery when walking hundreds of miles to meet their family while some were subjected to the police brutality on their way back home [13]. During the lockdown, few of the poor migrants had to stay in quarantine camps outside state borders with no clue as to when would they be allowed to travel to their native districts and live with their family. The Economic and Political Weekly stated that this situation was "reminiscent of the partition era, when refugees were forced to shift their entire household within the span of a few hours, the groups of migrants can be seen walking on highways, with the entirety of their belongings on their shoulders". Several newspapers reported that many labourers were so desperate to return to their villages that they hid in tankers and trucks, defying the lockdown and social distancing orders and travelled to their respective hometowns once the state borders were opened. Few succeeded to reach their destination without being noticed by the authorities while the others were stopped when the vehicles were inspected.

Livelihoods at Stake

With people following the lockdown and containment orders, livelihoods were at stake. Not only were there production halts, but also offices, business chains, outlets and stores remained shut allowing only a marginal fraction of essential services owners to provide for the basic amenities. Another reason for the stores being shut was that they received no supplies from the manufacturers with the ongoing travel restrictions. Inhabitants of remote areas are some of the people who were majorly affected due to the lockdown, since they had limited access to essential necessities including food and medicines. Some people are practicing work from home during the lockdown while some who are without any work have become lethargic, less productive and lost their workflow. This has psychologically and mentally strained them.

With the lockdown being lifted in orange and green zones, certain industries, offices, firms and shops were opened. However, labourers, workers and employees continue to face inconveniences with the inability of local trains, metros and buses. Those who have their

13 Bhupen Singh, *Media in The Time of Covid-19,* 55 EPW. 1 (2020).

workplace at far off places are either unable to turn up or report late. Moreover, even if these public transports start, people might fear travelling to avoid congestion and ensure their safety.

With all these increasing concerns, it is quite evident that a planned and well-structured agenda for recovery is necessary to reinstate, if not improve, the nation back to where it was prior to this public health emergency.

CONCLUSION

The novel coronavirus outbreak which was declared a public health emergency by the World Health Organization has adversely affected innumerous sectors across the globe. Not only has it suspended their operations but has also put them in a state from where revival is quite strenuous and distressing. This global outbreak has magnified the complexities and initiated novel challenges. With India still falling under the category of Third World nations, it would require effective measures for a favourable and satisfactory retort. Normalcy has become a long-lost dream! People have given up their conventional habits and usual comfort zones in order to survive and adjust in these extraordinary circumstances. New procedures have been adopted for sustenance.

Travel, tourism and education were the first set of sectors being severely hit by the pandemic. With no vaccination or effective solution available, the Government's strategy of imposition of lockdown and travel ban was more than necessary. However, taking such restrictions into consideration many businesses have taken a backslide and some are even on the verge of extinguishment. With no transportation and distribution of goods to retail stores, shops are devoid of the products and customers are returning empty handed. Moreover, in the near future people will have to self-regulate their travel. Instead of leisure travel, people will have to choose to confine themselves to their homes except for purposes which are essential. An article published by the Business World reported that social distancing has become the prevalent norm and sectors like travel, tourism and entertainment are not expected to recover soon.[14]

The increasing slope of unemployment and stumbling income levels have widened the extent of impact, COVID-19 has had. With travel regulations, revenues in the

14 Ishwinder S. Suri, *Impact of Covid on Indian Economy and Road Ahead for corporate Sector,* BUSINESS WORLD, (Apr. 30, 2020, 11:00AM), http://bwdisrupt.businessworld.in/article/Impact-of-COVID-19-on-Indian-Economy-and-Road-Ahead-for-Corporate-Sector-/30-04-2020-190322/.

transport industry have experienced a slump. Many employees might have to be sacked if similar scenarios continue to disrupt the revenue generation. This can be for other sectors as well. As a result of which another issue of job security props up. One can anticipate that people would be employed on a contractual basis rather than full time in the coming months. Work from home may be the new normal concept. With being confined at homes, most of them will have no choice but to shift to digital and internet economy- online education, online groceries and shopping, online jobs. Businesses which cannot be carried on without the internet will be forced to restructure their marketing strategies.

Educational institutions will have to identify and create a comprehensive way that is easily accessible for both the students and the teaching fraternity. Until then, virtual classes over the internet have to serve the purpose. Both the students and the faculty need to understand the gravity of the situation and act cooperatively. Helping one another will pave the way forward.

With everything getting digitalized, people might shift from print media to digital media in the upcoming phase. Though, much of the media which is corporate-owned has surrendered, a small section is still courageously following journalistic ethics [15] to highlight what news is actually all about. Instead of becoming a tool regulated by the 'Big Corporate Houses', the media must focus on outlining the actual concerns which have been neglected or otherwise overlooked. There are some vulnerable aspects which require urgent attention of not only the Government but also the people. However, the media has failed to bring such susceptible and sensitive situations to light. The escalation of misinformation through fake news has been another alarming issue during this critical phase which needs to be taken care of.

The citizens need to remain poised to understand and survive these grave circumstances. Being panic stricken and blaming others for the global outbreak is not the solution. At this time, India as a nation requires its people to cooperate with the measures adopted by the Government and form a recovery plan which might alleviate the perils and help in restructuring the society back to where it was prior to this public health emergency.

15 Singh, *supra* note 14.

DUE DILIGENCE EXERCISE: DEMYSTIFYING THE DUTY OF MERCHANT BANKERS IN INDIAN SECURITIES LAW REGIME

Mansi Mishra*

Abstract

The Securities and Exchange Board of India, after much deliberation, adopted a disclosure based regulatory regime. This framework rests on the disclosure of relevant details by issuers, acquirers and intermediaries about their products, themselves and the regulations for facilitating informed decision making by potential investors. Adequate, timely and fair disclosures form the cornerstone of any disclosure mandated by the Board. In this regard, merchant bankers have been vested upon with the solemn onus of exercising due diligence by examining veracity of disclosures made by issuers in securities' transactions. This duty has attained gravity because it decides the fate of companies inclined to enter the securities' market. It is a means of preventing unscrupulous companies from defrauding investors and other stakeholders. Consequently, it becomes essential to regulate the duty of due diligence and prevent collusion by merchant bankers with issuer companies. This gives rise to various questions: - What is the statutory framework that governs due diligence by merchant bankers? What is the standard of this due diligence? How to determine the threshold of materiality of disclosures to be made by merchant bankers? What are the penalties for negligence in due diligence? Are there any factors that mitigate such penalties? In this article, the author shall provide answers to all the aforementioned questions. The author shall further provide analytical insights as to whether the interpretations and approaches adopted by the Regulator are effective in regulating due diligence exercise and furthering the aim of investors' protection.

INTRODUCTION

Since the inception of Securities and Exchange Board of India ("*SEBI*") in 1992, the capital markets in India have witnessed systematic reforms for protection of interests of investors.

* Student, National Law Institute University, Bhopal.

The most beneficial reform from investors' perspective has been the shift to a disclosure based regulatory regime. This framework involves disclosure of relevant details by issuers and intermediaries pertaining to themselves, the market, the products and the regulations in order to facilitate the investor to take informed investment decisions.[1] As such, SEBI is mandated to protect the interest of the investors and the securities market, and in pursuance of the same, it monitors both initial and continuous disclosures. In order to obtain assistance in smooth functioning of the disclosure based regime, SEBI enacted the SEBI (Merchant Bankers) Regulations, 1992 ("*Merchant Bankers Regulations*"). Merchant Bankers play a unique role in advancing the aim of investor protection by ensuring veracity of disclosers made by an issuer or an acquirer in the offer documents and other public documents. This process is termed as due diligence. Thus, the importance of due diligence conducted by merchant bankers cannot be over-emphasized.[2] This article seeks to discuss the obligation of conducting due diligence vested upon merchant bankers in Indian securities law regime and scrutinize certain aspects pertaining to it. Part I discusses the statutory framework providing for merchant bankers' duty of exercising due diligence in various securities transactions. Part II delves into the aspect of the standard of care and caution required to be exercised by merchant bankers while discharging responsibilities related to due diligence. Part III elucidates upon the importance of determining materiality of information for disclosure during due diligence, and the test prescribed for assessing such materiality. Part IV seeks to identify and examine the factors that result in mitigation of penalty for negligence by merchant bankers due diligence. Part V concludes the article and stresses upon importance of clarification of anomalies.

Statutory Framework

SEBI monitors the authenticity and adequacy of disclosures by casting solemn onus on merchant bankers to conduct due diligence before an offer document or other public documents are made available to potential investors. Currently, the legislation forming the foundation of merchant bankers, statutory duty of due diligence is the prescribed Code of Conduct under the Merchant Bankers Regulations, adherence to which is mandatory[3]. The Code of Conduct requires a merchant banker to protect the interests of the investors and to fulfill its obligations in a prompt, ethical and professional manner[4], while exercising

1 *Office of Investor Assistance and Education*, Securities and Exchange Board of India,(May 2, 2020, 11:00AM), https://investor.sebi.gov.in/ipms.html.

2 *In the Matter of IPO of PG Electroplast Limited in Respect of M/s. Almondz Global Securities Limited*, 2012 SCC OnLine SEBI 117, ¶9 (India).

3 Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992 §3.

4 Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992, Code of Conduct §3.

due diligence and independent professional judgment at all times.[5] The aim behind such an obligation is the adequate supply of true information to the investors and making them aware of the underlying risks associated with an investment decision.

The Code of Conduct further requires merchant bankers to make timely disclosures to the investors in a timely manner in accordance to the applicable regulations and guidelines to enable investors to make a balanced decision.[6] In the words of the Securities Appellate Tribunal ("*SAT*") in the matter of *Enam Securities Private Limited v. SEBI*[7]:

"*The Code of conduct places an onerous duty on a merchant banker not only of protecting the interest of the investors but also of ensuring that adequate disclosures are made in a timely manner without making any misleading or exaggerated claims and to render best possible advise to the clients. A merchant banker is required to maintain high standards of integrity, dignity and fairness in the conduct of its business and is required to promptly inform the Board any violation or non-compliance of the regulatory framework that come to its notice*".

While Merchant Bankers Regulations is a blanket legislation governing the merchant bankers' duty of due diligence, there are regulations pertaining to specific securities transactions requiring merchant bankers to conduct due diligence. When acting in the capacity of an underwriter, SEBI (Underwriters) Regulations, 1993 mandate merchant banker to exercise of due diligence, independent professional judgment and proper care.[8] In a buy back transaction, the merchant banker appointed by the company under the SEBI (Buy Back of Securities) Regulations, 1998 is required to verify the contents of draft letter of offer as well the public announcement to ensure that they are true, fair and adequate by performing due diligence. The same has been incorporated in the provisions[9] of the SEBI (Buy Back of Securities) Regulations, 2018 as well. Furthermore, the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 provide for appointment of merchant bankers as lead managers to the issue who are required to conduct due diligence and satisfy themselves about the veracity of disclosures made in the offer documents.[10] Additionally, merchant bankers are obligated to carry out due diligence and verify the

5 *Id.* §4.

6 *Supra* note 5, §8.

7 *Enam Securities Private Limited v. SEBI*, 2012 SCC OnLine SAT 29, ¶3 (India).

8 Securities and Exchange Board of India (Underwrites) Regulations, 1993, Code of Conduct for Underwriters §5.

9 Securities and Exchange Board of India (Buy back of securities) Regulation, 2018 §16, §25(viii).

10 Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 §121 §24(3).

disclosures under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008[11]. The same has been reiterated under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011[12].

Despite such regulations in place for merchant bankers' duty of due diligence, there is no statutory framework laying down binding due diligence norms governing and elaborating upon the said duty. The blanket legislation and the detailed legislations for each securities transactions simply provide for the duty, instead of giving clear directions as to the necessary steps that the Regulator expects the merchant bankers to take in the due diligence process. Furthermore, there are no basic guidelines that could clarify the essential requirements of the process, neither is there any codified minimum threshold which, if not met with, would amount to negligence. SEBI recognized the same in 2011, and approached the Association of Merchant Bankers of India ("*AMBI*"), now Association of Investment Bankers of India ("*AIBI*"), to frame guidelines for due diligence for its members.[13] The Regulator had instructed AMBI to include norms for verification of corporate records and specific instructions on the method of conducting due diligence of promoters, company management and group companies for protecting investors' interest. Thereafter, AIBI brought out the Due Diligence Manual ("*Manual*") in 2012.[14] However, the Manual is merely indicative in nature and does not have the force of law, as stated in the Manual[15] itself. Even so, no steps have been taken till date towards imparting to it the imperative binding value so as to provide merchant bankers with guidelines recognized by SEBI. Another limitation of the manual is that it has set out guiding principles for due diligence to be performed only within the scope of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. Interestingly, even though formulated on the behest of SEBI itself, the Manual has never been cited as a recognized or generally accepted set of rules of due diligence by SEBI, SAT or any Court of law, which could be useful for merchant bankers in understanding SEBI's

11 Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 §26(2) (India).

12 Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 §12; *see SEBI v. Meghraj SP Corporate Finance*, 2006 SCC OnLine SAT 632, ¶3.11(India).

13 Mehul Shah, *Regulator Wants Due Diligence Norms for Merchant Bankers*, Business Standard (Jan. 20, 2013, 10:58 PM), https://www.business-standard.com/article/markets/regulator-wants-due-diligence-norms-for-merchant-bankers-111070800042_1.html; Bijith R, *AMBI Gets Cracking on Due Diligence Guidelines for Merchant Bankers*, Financial Express (Aug. 31, 2011, 07:13 AM), https://www.financialexpress.com/archive/ambi-gets-cracking-on-due-diligence-guidelines-for-merchant-bankers/839377/.

14 *About Us*, ASSOCIATION OF INVESTMENT BANKERS OF INDIA,(Apr. 30, 2020, 09:00AM), http://www.aibi.org.in/about.asp

15 *Due Diligence Manual*, Association of Investment Bankers of India (Aug12, 2012, 09:00AM), http://www.aibi.org.in/AIBI%20Due%20Diligence%20Manual.pdf, p.6.

stance. Therefore, there continues to persist unavailability of detailed guidelines of binding character prescribing basic steps to be followed by merchant bankers which SEBI would consider to constitute proper due diligence.

Standard of Due Diligence

The disclosure based regime in Indian securities market is not static, but possesses an evolving character. As a result, the process of due diligence itself is dynamic and complex in nature. Whilst due diligence is not defined in any statue, in practice the phrase generally constitutes collection of information about the acquirer or an issuer that would assist the merchant bankers in drafting and assessing the disclosures made in the offer documents.[16] The particulars which are required to be disclosed are intended to give a clear picture to a member of the company or prospective investors to the purpose for which the securities are being transacted and by whom.[17] However, both the Manual and the Code of Conduct are silent as to what is the standard of due diligence that is expected from merchant bankers involved in securities transactions.

This gap with respect to the requisite standard created by the silence has been attempted to be filled by the judicial precedents, which reveal that due diligence is concerned with efforts made, *bona fide* conduct of the merchant banker concerned and the facts and circumstances amid which such merchant banker acts.[18] There is no prescribed strait-jacket formula or fixed benchmark of due diligence and the law requires only 'reasonable diligence' even from the experts including merchant bankers.[19] In order to better put forth the standard of due diligence, it would be pertinent to mention the case of *Chander Kanta Bansal v. Rajendar Singh Anand*[20], wherein the Honorable Supreme Court had held that due diligence in law means reasonable diligence and doing everything reasonable and not everything possible. The meaning of the expression "due diligence" was elaborated upon by the Apex Court in the following words:

> *"According to Oxford Dictionary (Edn. 2006) the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort.*

16 *Supra* note 16 at 30.

17 *Shirish Finance and Investment (P.) Ltd. v. M. Sreenivasulu Reddy*, 2002 (1) BomCR 419, ¶58 (India).

18 *Imperial Corporate Finance & Services Pvt. Ltd. v. SEBI*, 2005 61 SCL 197 SAT, ¶21(India).

19 *Almondz Global Securities Ltd. v. SEBI*, 2016 SCC OnLine SAT 219, ¶39; Shadi Lal Batra v. Unknown, AIR 1968 Delhi 283, ¶17(India).

20 2008 (5) SCC 117.

> *As per Black's law Dictionary (18 Edn.), "Due Diligence" means the diligence reasonably expected from, and ordinarily expected by, a person who seeks to satisfy a legal requirement or to discharge an obligation. "Due Diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs".*

In another case of *SEBI v. JM Morgan Stanley Private Limited* [21], SAT had placed reliance upon the dictionary meaning of the said words as defined in the Law Lexicon (2nd Edition) which provided that diligence implies the care and prudence as is usually by persons of common or average care and prudence. Whether or not there is a lack of due diligence runs from the facts of each case and ultimately, there is no hard and fast rule as to what constitutes lack of due diligence.[22] In fact, it has been held that the merchant banker cannot be expected to look at each and every statement and information provided by the issuer with suspicion unless the facts and circumstances at the relevant time so demand.[23] In order to prove a fault in due diligence, there must be a convincing preponderance of evidence, as held by the Supreme Court in the case of *Pandurang dattatray Khandekar v. Bar Council of India* [24]. The Apex Court further clarified that before any violation of the concept of due diligence is found, there must be an enquiry and the finding must be sustained by a higher degree of proof than that required in a civil suit, but falling short of the proof required to sustain a conviction in a criminal prosecution.

However, upon observation, it becomes evident that this standard of reasonableness has acquired a stricter enforcement in the current regime. That is to say that the reasonableness cannot be equated with immunity from exercising due care. In fact, the disclosure based regulatory regime has resulted in imposition of heavier responsibility on merchant bankers of issuers of securities in respect of the accuracy and completeness of the information disclosed by them.[25] The premise underlying such a standard of due diligence is that the access to securities market for issuers and acquirers, as per the case, is conditional upon the disclosures verified by the merchant bankers. Probably, that is the reason why SEBI has tightened its approach in interpreting the established standard of prudence. It follows from the above that a merchant banker is not required to assume the role of a detective and look at every statement or document possible. In other words, the job of due diligence performed

21 2005 SCC OnLine SAT 79, ¶6.

22 *Supra* note 19.

23 Order in matter of *M/s. Karn Merchant Bankers Limited,* AO No. EAD/BJD/BKM/99/2017-18, ¶15.

24 AIR 1984 SC 110, ¶6.

25 Ad-Interim Ex-Parte order in the Matter of *Bharatiya* Global *Infomedia* Ltd., 2011 SCC OnLine SEBI 155, ¶2.9.

by merchant banker cannot be limited to mechanical perusal of documents submitted to it. Neither can it be equated to disclosing whatever is given to it by the issuer. Rather it involves exercise of reasonable diligence to ensure adequate, true and fair disclosures in an offer document, prospectus or other public documents. This standard has been rightly set at reasonableness expected from a prudent person. However, the push of the Regulator towards stringency and stricter enforcement has tended to dissolve the element of reasonableness, even though the orders and judgments continue to pay lip service to it. This has given rise to the need of codification of the standard in the Code of Conduct itself in order to provide a clear picture to the merchant bankers with regards to the dynamics of the role that SEBI expects them to perform. Such codification also becomes imperative for assisting merchant bankers to differentiate between what could amount to a negligent conduct and what kind of actions by merchant banker could give rise to charges of collusion.

Materiality of Disclosures

The guiding principle in any disclosure-based regulatory regime is the need for the issuers of securities to provide the potential investors with full, accurate and timely disclosure of all relevant information in respect of the issuer and the security being issued.[26] The underlying object of disclosure provisions in Merchant Bankers Regulations is to ensure that the offer document contains all disclosures that are material for the applicants permitted to participate in the transaction to take an informed investment decision.[27] The merchant bankers discharge the duty of ensuring that the aforementioned requirement of adequacy of material disclosure is met with. Hence, it becomes pertinent to analyse the concept of materiality, which assists merchant bankers in determining as to what is material enough to disclose. The analysis of materiality serves the purpose of shaping the content of mandatory disclosures. Additionally, it crystallizes the content of non-mandatory disclosures made for the sole purpose of clarification in order to avoid misstatements. While the mandatory disclosures are straightforward in nature and do not involve exercise of professional judgment on part of the merchant banker, it is the clarifying disclosures whose absence can result in potential misstatements. The Merchant Bankers Regulations do not provide any threshold of materiality of disclosures. This glaring absence of a threshold renders scope for conflict between the judgment of materiality of a particular disclosure by SEBI and by the merchant banker. Another plausible consequence constitutes merchant bankers getting away with omissions in disclosures resulting from collusion with issuer companies, on the

26 *Supra* note 3.

27 *Kotak Mahindra Capital Company Limited v. SEBI*, 2016 SCC OnLine SAT 201, ¶14 (India).

pretext that in that their reasonable and professional judgment, the particular information was not material enough to be disclosed.

The vacuum around the position with regards to materiality of disclosures in offer documents by merchant bankers was put to an end in 2016 in the SEBI Adjudication Order in the matter of *M/s Electrosteel Steels Limited ("ESL") and M/s Electrosteel Castings Limited ("ECL")*.[28] ECL was the parent company of ESL and the former had promoted the latter in 2006 post a Memorandum of Understanding (MoU) with the Government of Jharkhand for setting up a steel manufacturing plant. Iron ore being a core raw material in the manufacturing process, ECL had applied to Ministry of Environment and Forests ("*MoEF*") for project clearance for obtaining iron ore mining blocks in Jharkhand. The said application got rejected in January, 2009. However, the matter of rejection was being reconsidered by the MoEF on request made by the Government of Jharkhand in July, 2009. In the meanwhile, ESL floated an Initial Public Offering ("*IPO*") in March, 2010 and completed the same in September, 2010. The MoEF gave the clearance only after the completion of the IPO. The substantive legal question for consideration before SEBI was whether the rejection of the application made by ESL to MoEF with regards to project clearance constituted 'material' information which ought to have been disclosed in the offer documents pertaining to ESL's IPO.

SEBI *vide* its Adjudication Order penalized, among other parties, the merchant banker in the case for failure to exercise due diligence by not disclosing the rejection of the said application which constituted 'material' information for prospective investors. With regards to the materiality of disclosures by merchant bankers, SEBI observed the following:

> "*Assessment of the materiality of an event or development requires a contextual determination that takes into account all of the relevant circumstances, including the nature of the event or development and its consequences to the issuer's business.… Thus, true and adequate disclosure is said to be made, if the disclosure is accurate and not misleading and does not omit a fact that is either material itself or is necessary to understand the facts that have been disclosed, so as to enable the investors investing in the issue to take an informed investment decision*".

SEBI further clarified that the subjective assessment or optimistic views of the issuer do not have any role to play in materiality analysis done by merchant bankers. Instead, the test of materiality is of objective nature. SAT, while upholding SEBI's finding with respect to the

28 Adjudication Order in the matter of *M/s Electrosteel Steels Limited and M/s Electrosteel Castings Limited*, AO No. AK/AO- 8-12/2016 (2016).

materiality of information, observed that the letter and spirit of the disclosure requirement is such that by disclosing every material event in clear terms, there is no scope left for judging the degree of materiality.[29] The emphasis has to be placed on disclosure, not otherwise. In other words, the merchant banker has to disclose even when the issuer has doubts regarding existence of element of materiality in the information concerned. The only facts that can be ousted from the purview of disclosure are those which the issuer is undoubtedly sure of lacking relevance to the issue.[30]

While SEBI favored the assessment of materiality from the perspective of a reasonable investor, SAT limited the scope of subjective analysis and shifted the onus upon the issuer to be sure about any piece of information being irrelevant. Furthermore, the SAT order mandating to disclose all information that is relevant to the issuer without determination of the relevance of that information to the investors runs contrary to the mandate of Merchant Bankers Regulations. In this regard, the Code of Conduct explicitly provides that merchant banker has to ensure that adequate disclosures are made in order to achieve the aim of enabling investors in making a balanced and informed investment decision.[31] Another significant observation, in the opinion of the author, is that the principle enunciated by SAT requiring blanket disclosure of all the information is also in contrast with the established standard of due diligence requiring exercise of care, caution and analysis on merchant bankers' end instead of mechanical disclosure by them. Hence, there is an anomaly in interplay of materiality and standard of due diligence expected from merchant bankers by law.

The emphasis on disclosure is justified; but disclosure of information of dubious significance has been held to accomplish more harm than good.[32] The vice of dubious disclosures lies in the fact that this leaves the potential investors with analyzing a bulk of information and nuanced task of identifying the material information on their own. Unlike merchant bankers, who are technical experts, the investors might suffer from high risk of over passing the material information amidst the dubious disclosures owing to their lack of expertise. Such an outcome is in sharp contrast to the aim that SEBI sought to achieve through a disclosure based regime. Not only does dubious disclosure undermine the sanctity of investors' protection, it also undermines the exercise of independent professional judgment that merchant bankers are envisaged to exhibit under the Merchant Bankers Regulations.

29 *Electrosteel Steels Limited* v. *Securities and Exchange Board of India,* 2019 SCC OnLine SAT 244, ¶16 (India).

30 *Id.*

31 *Supra* note 5 §6.

32 *TSC Industries, INC. v. Northway, INC.*, 1976 SCC OnLine US SC 119, ¶19(India).

Therefore, use the objectivity test while determining whether or not any information is material enough to be disclosed in a due diligence exercise is well founded. However, lack of clarity continues to exist because of the inconsistency created post SAT's ruling in *Electrosteel Steels Limited* case. It shall be interesting to see the degree of reliance that shall be placed on this case in future cases involving the question of materiality.

Factors Mitigating Penalty for Faulty Due Diligence

When merchant bankers fail to exercise due diligence, SEBI exercises its powers vested upon it under Section 11B of the SEBI Act, 1992 by imposing monetary penalty for violating due diligence requirement. Section 11B(ii) empowers SEBI to issue directions to intermediaries if the regulator deems it fit in the interest of the securities market and the investors. In some cases, the penalty may take the form of merchant bankers being restrained from accessing the securities market under the aforementioned provision read with Section 11A. The question arises as to whether there are any mitigating factors that result in exoneration of merchant bankers from penalty, or do all due diligence violations result in heavy penalties irrespective of any circumstance whatsoever. The following three factors have been identified for the purpose of this analysis:

i) violation of due diligence requirement on account of an inadvertent error;
ii) non-cooperation by company in providing information; and
iii) absence of harm to investors despite non-disclosure

Violations Due to Inadvertent Errors

The first factor essentially denotes the situation wherein the merchant bankers conducted the due diligence in a *bona fide* manner, and omitted to disclose certain information owing to a genuine error. The question arises as to whether the law has underlined any difference of treatment between mere inadvertent or technical lapse and deliberate non-disclosure by the merchant bankers. This was answered in the affirmative by the Supreme Court in *Hindustan Steel Ltd v. State Of Orissa*[33] by observing that a penalty for failure to carry out a statutory obligation cannot be ordinarily imposed unless the party obliged acted deliberately in defiance of law. Furthermore, refusal to impose penalty shall be justified if the breach is venial that flowed from a *bona fide* belief. SAT placed reliance on this judgment in 2003 in the case of *Doogar & Associates Ltd. v. SEBI*[34], where the merchant banker in the case

33 1970 SCR (1) 753, ¶7.
34 2003 48 SCL 115 SAT, ¶6.

was penalized by SEBI for filing the public announcement required to be filed with SEBI after it was already published in the public domain. SAT overturned the penalty imposed by the Adjudicating Officer and the merchant banker was let off because "*it had acted bona fide*". However, in another case in *J.M. Financial Investment Consultancy Services Ltd.* v. *Ananta Barua*[35], SAT refused to entertain the contention that the failure to exercise proper due diligence was not intentional. Interestingly, yet another change in approach was observed in 2004 in a subsequent judgment in the case of *SEBI v. Cabot International Capital Corporation*[36] where the Bombay High Court pronounced that if a breach was merely technical and unintentional, it does not merit penal consequence, and it ultimately depends on the facts of each case. In the same year, i.e. 2004, SAT placed reliance on the aforementioned judgment in the case of *Reliance Industries Ltd. v. SEBI* [37] and absolved the merchant bankers of penalty on the ground that the breach could not be called deliberate.

Ultimately when the Supreme Court was met with this question in 2006 in the matter of *Chairman*, *SEBI vs. Shriram Mutual Fund*[38], the Court held that penalty is attracted as soon as the contravention of any obligation as contemplated by SEBI Act and the Regulations framed hereunder is established and hence, the intention of the parties committing such violation becomes wholly irrelevant. The aforementioned ruling was further relied upon by SEBI in *Corporate Strategic Allianz Ltd*. Order[39] where the merchant banker acting as lead manager had failed to disclose track record of public issues managed by it and certain intangible assets of the issuer on its website. SEBI did not agree to the contention that the breach was not willful, and penalized the merchant banker for failing to exercise proper due diligence.

Hence, erroneous interpretation and error in judgment were earlier recognized as a mitigating factor especially if such interpretation was honest and bona fide to the knowledge of the merchant banker. As per the author's observation, there has been a shift in approach to a more stringent imposition of penalty in disregard of absence of element of deliberateness. This shift is a welcome one in furtherance of SEBI's aim of investor protection. Since the merchant bankers cater to the securities law regime critically by preventing unscrupulous companies from accessing the market, it calls for measures for propelling the merchant bankers in discharging their duties with utmost care and caution, leaving no scope for connivance and negligence. A minor inaccuracy, intentional or not, might result in massive

35 (2001) 30 SCL 357 SAT), ¶15.

36 *SEBI v. Cabot International Capital,* (2004) 2 CompLJ 363 Bom, ¶31(India).

37 2004 SCC OnLine SAT 69, ¶11.

38 (2006) 5 SCC 361, ¶15.

39 Order in the Matter of *Corporate Strategic Allianz Ltd*, AO No. NP/AS/AO/20/2017 (2017), ¶20.

losses to the potential investors who rely on due diligence reports and the offer documents certified by merchant bankers. However, care must be taken to keep this strict regulatory approach balanced out in order to avoid overregulation, which is turn deincentivizes independent judgment. Nonetheless, the norm of disregarding the element of intention and tightening the standard while examining the violations of due diligence norms by merchant bankers has been rightly adopted by the Regulator in India.

Non-Cooperation by Company in Providing Information

The second factor deals with question as to whether non-cooperation by a company in providing information to merchant bankers during the due diligence process can mitigate the penalty for omission of the information withheld by the company. Perusal of approach by SAT[40] in this regard disseminates that merchant bankers cannot merely escape the responsibility by shifting the blame on the company without verifying the veracity of information. The allegation by merchant banker that the company concerned did not cooperate does not hold much weight while disproving lack of care while exercising due diligence on part of the merchant banker[41]. Furthermore, absence of anything on record to show that merchant banker took any proactive step to find out the correct information or made a specific query in this respect from the right source of such information weakens the plea of non-cooperation by company.[42] This leads to the observation that passively disclosing whatever is provided by a company and not independently exercising reasonable diligence to ensure adequate, true and fair disclosures amounts to failure comply with the Code of Conduct. The regulator considers the mitigating circumstance of non-cooperation only when the circumstances reveal that merchant banker did not have any means of knowing or reasonably anticipating of the existence of any information or document[43]. Another factor that has lead SEBI to exonerate merchant bankers was that the information withheld by a company could not have been obtained in public domain.[44] On the other hand, the argument of non- production of documents by company has been observed to hold no ground when the information captured by available disclosures made to merchant banker could have led to the concealed information.[45] Interestingly, even the case of an information

40 Order in matter of *M/s. Karn Merchant Bankers Limited*, AO No. EAD/BJD/BKM/99/2017-18 (2017), ¶15.

41 Order in the Matter of *Medicamen Biotech Limited,* AO No. Order/KS/VB/2019-20/4864 (2018), ¶14.

42 *HSBC Securities & Capital Markets (India) Pvt. Ltd. v. The Whole Time Member,* SEBI, 2008 SCC OnLine SAT 25, ¶12 (India).

43 *Almondz Global Securities Ltd. v. SEBI,* 2016 SCC OnLine SAT 219, ¶38.

44 *Supra* note 42, ¶13.

45 *Supra* note 44.

asymmetry combined with non-availability of information in public domain does not put an end to exercise of independent judgment. In such cases, merchant bankers are expected to bring the violations and gaps in disclosures made by the company to SEBI's notice.[46]

However, SAT's ruling in the case of *SEBI v. Imperial Corporate Finance & Services Pvt. Ltd*.[47] has highlighted another facet of this independent duty of merchant bankers. In this case, the promoter of the issuer company concealed his criminal records from the merchant banker. Later, the merchant banker was anonymously tipped about the pending criminal litigation just a few days before the issue and there were no available means to verify it. Additionally, the concerned promoter refused to cooperate. As a result, the offer letter did not contain the information about the litigation and the merchant banker was penalised by SEBI. When the case came before SAT, it overturned the penalty by holding that the merchant banker duly discharged the independent duty of verifying the anonymous tip of criminal records. Merely because the verification could not be completed before the issue was complete was out of merchant banker's control. While criticizing the levy of penalty by SEBI, SAT also remarked, "*one must not carry the concept of due diligence to ridiculous levels*".

Hence, it can be deduced that by virtue of exercise of independent judgment, merchant bankers are vested with additional responsibility of verifying the information provided by the company. Additionally, they are entrusted with vigilance of corporate entity they're offering services to and act as a point of contact between the regulator and the corporate entity. Therefore, non-cooperation on part of a company in providing information leads to condoning of penalty only in extreme circumstances where there is an absolute absence of means of gathering the information withheld. In other cases, the success of plea of non-cooperation depends upon the extent of independent pro-active steps taken by merchant banker for verifying information. To understand this with the help of an illustration, assume that there are two merchant bankers- A and B. Both of them erred in conducting due diligence by not disclosing about a pledge on shares of the companies they were acting for. Subsequently, both of them claimed that the respective companies failed to provide them with the pledge documents. The fact that A tried to obtain the documents independently from the Registrar of Companies, unlike B, shall strengthen A's plea of non-cooperation, compared to B's plea. This is yet another interpretation by the Regulator for providing incitement to merchant bankers in discharging their duties with utmost prudence.

46 *Supra* note 45, ¶9.

47 2005 61 SCL 197 SAT.

No Harm Caused to Investors

This factor refers to a situation wherein even though a merchant banker omitted to include any information from the offer documents, etc., but such omission did not cause any harm to the investors concerned. Whether or not such a situation would warrant overturning or reduction of penalty has been answered by SAT on various instances, but after taking account of factual circumstances. A significant case in this regard is *SEBI v. Imperial Corporate Finance & Services Pvt. Ltd.*[48] In this case, the matter concerning the criminal case pending against Chairman and Managing Director (CMD) of the issuer was not disclosed in the letter of offer, and merchant banker was suspended from accessing securities market for three month. It was alleged that merchant banker acted negligently while exercising due diligence. A pivotal fact was that the omitted information was subsequently revealed in a clarification letter issued by the merchant banker to the investors after the issue was closed for subscription. Additionally, an exit option was given to the investors before allotment. Considering the fact that potential harm to the investors was averted because of the clarification letter, SAT reduced the penalty from suspension for three months to just fifteen days. SAT reiterated the aforementioned approach in a subsequent case[49] where the merchant banker had omitted to disclose a detail in the public announcement but disclosed it through another remedial announcement. The penalty was overturned and the merchant banker was let go with a warning in view of no harm causes to the investors.

However, a shift in approach can be observed in *Electrosteel Steels Limited* case discussed in Part III, where SAT refused to condone a technical violation despite the fact that no loss was caused to investors because ultimately, the license was obtained post the IPO. A possible repercussion of the approach in *Electrosteel Steels Limited* case being followed in the future might be unnecessarily harsh consequences for the merchant bankers in some cases. Furthermore, it might cause an imbalance between the twin objectives of investor protection as well as development of securities market because merchant bankers are an essential part of the securities market. Nevertheless, the lack of harm being caused to investors is more often than not an unintentional result of a merchant banker's faulty due diligence. Thus, it should not be overlooked by the Regulator. Corporate governance practices in companies shall take a backseat if non-disclosures by merchant bankers would be condoned where the investors do not suffer from a monetary loss by pure coincident. Even though the absence of harm caused to investors has been previously treated as a strong

48 *Id.*

49 *SEBI v. JM Morgan Stanley Private Limited*, 2005 SCC OnLine SAT 79, ¶16; *see Chona Financial Services Pvt. Ltd.* v. *SEBI*, 2005 SCC OnLine SAT 100, ¶16; *also see SATCO Securities and Financial Services Ltd.* v. *SEBI*, 2005 SCC OnLine SAT 7, ¶18 (India).

mitigating factor against penailising merchant bankers, the approach has righty been taken a divergence from. However, *Electrosteel Steels Limited* case is an isolated one and has not been relied upon by any other case till date. Therefore, it shall be entrancing to see SEBI's treatment of such situations in cases in the future.

Conclusion

While the different transactions and clients requiring customized styles of conducting due diligence calls for flexibility for merchant bankers, regulation cannot be disregarded. The need for regulation of merchant banker stems from the imminent role they play in the market. In pursuance of the same, the Merchant Bankers Regulations and the Code of Conduct has provided for indicative principles that are to be adhered to at all times. Even so, there persists a lack of any legally binding and codified course of action indicating the course of due diligence. This gap has been attempted to be filled by SEBI and SAT through their rulings by establishing standard of due diligence, threshold of materiality and factors condoning penalty. The analysis of these rulings sheds light upon a shift towards stringent approach of tackling instances of inaccuracies and misdemeanors by merchant bankers. This tightening of due diligence norms seems promising in reinforcing the aim of investors' protection and combating collusion by merchant bankers with issuer companies. However, measures should be taken to increase clarity with regards to what the Regulator expects from merchant bankers while discharging duty of due diligence, in form of indicative guidelines having the force of law. Till then, the steps prescribed in Due Diligence Manual of AIBI can prove helpful to merchant bankers in conducting efficient due diligence.

THE USE AND MISUSE OF MERCY PETITIONS : ITS GROWTH AS A DEFENCE

Rupesh Sunil Dhengre* and Omeshwari Pancham**

Abstract

Mercy Petitions have been a matter of discussion for a long time, in terms of social values, cultural beliefs and political ideologies. While all religions ardently believe in the concept of forgiveness and mercy, they also talk about punishing one who does crimes. But the question lies here: should punishment is declared, go as far as awarding death penalty? As soon as capital punishment is declared, victims may have the option to ask for mercy and to be forgiven from the death penalty, depending on the law governing them. This is so because some countries do not have provisions for mercy petitions, and some have no place in their law for death penalty.

As it always happens in laws, the loopholes in the law is used to the advantage and leaves scope for misuse and abuse of the law. In the context of mercy petitions to escape from death penalty, it was either no time limit to file mercy petition or difference in approach taken by different governments over the years. India has learnt from its mistakes and has been on its path to improvement.

Keywords: - *Mercy, Punishment, Death Penalty, Capital Punishment.*

INTRODUCTION

One of the most debated agendas that in law today is the issue of 'mercy petition', be it at the national or at the international level. Times are moving forward and different countries across the globe are moving towards abolishing death penalty, however, India is working towards reforms on mercy petition and death penalty.

Mercy Petition is asked for when one is awarded a death penalty. The Constitution gives provision for mercy petition which may be granted by the President under Art. 72 and the

* Student, Maharastra National Law University, Nagpur
** Student, Maharastra National Law University, Nagpur

Governors under Art. 161 of the Constitution. This means that the one can ask for mercy petition (which may be granted or rejected subsequently) only after the death penalty has been pronounced.[1]

Even after 7 decades of Independence, our law has been subjected to many hurdles in terms of its application and this hold true even towards the issue of mercy petition (and its execution). Only to state a few are long delays stretching over numerous years, inefficiency in pointing out clemency cases, etc. The negative effects of the present structure for implementation of the law relating to mercy petition, especially the part that is imposed upon the prisoners is termed by many as a 'misery' which is far beyond the utmost suffering permitted under Art. 21.[2]

Although most countries having a law on mercy petition do not contain an entailing provision that clarifies the time limit for the execution of a death penalty, it has been widely recognized by countries that delay in the process may be violative of the humane treatment of a convict. Such delay often leads to mental health issues among convicts as well.

In *Sunil Batra v. Delhi Administration*[3] the court had held that when one is kept in isolation and solitary confinement leads to violation of Art. 21. Further, in *T.V. Vatheeswaran v. State of Tamil Nadu*[4] the Honourable Supreme Court held that the retardation of two years is violative of Art. 21 and also held that such retardations may be the ground for shuttling of capital punishment.

The 262nd Law Commission Report brought attention to the fact that 140 countries had already abolished death penalty, implying that it did not need a law on mercy petition. However, on the basis of the 'Retributive Theory' of punishment, the provisions for death penalty is defended, which means that the law on mercy petition is also present in India. Deflecting from the words of the father of the nation, Mahatma Gandhi, 'an eye for an eye will make the world blind', the law for death penalty exists and mercy petition is a solution to the strict punishment. This is done in order to bring some relaxation on the harshness of a punishment like death penalty.

1 Satendra Pratap Singh, *Mercy Petition v. Death Penalty*, LEGAL SERVICE INDIA, (May 11, 2020, 10:04 AM), http://www.legalserviceindia.com/legal/article-974-mercy-petition-vs-death-penalty.html.

2 Rajgopal Saikumar, *Negotiating Constitutionalism and Democracy: The 262nd Report of the Law Commission of India*, Vol. 12(1) Socio-Legal Review 81, 81-107 (2016).

3 *Sunil Batra v. Delhi Administration*, (1978) 4 S.C.C. 494 (India).

4 *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 S.C.C. 68 (India).

Religious Values Attached to Mercy Petitions

Religion is a set of beliefs that a group of people follow. Although the world has seen a lot of religions, but the core values of all the religions have certain ones in common. Generally, these are those values which empower the human civilization as a whole including love, compassion, peace, mercy. To look at mercy from a religious point of view might add more perspective, especially in the Indian context.

The Islamic preaching are also very strict about heinous crimes (which in the modern times might attract death penalty) and has also laid down that "whoever saves a life, it is as though he has saved the lives of all men. whoever kills a person, it is as though he has killed all men". At the same time, it has been said that according the Quran and the Sunnat in Islam, forgiveness and mercy is allowed even to the extent of pardoning a murderer if he is forgiven by the victim's family.[5] There is a differential criteria of possessing the power to grant forgiveness in a situation, it lies with the State[6] and in the other, it seems to be in the hands of the victim/victim's relatives. But it does establish the presence of values of forgiveness and mercy, even for the most serious crimes.

Even in Christianity, dating back at least to the New Testament era, the power to grant pardon for various crimes lied with the head/leader of the state. One of the earliest formal inclusion of this power in the Constitution was done by the USA, however its meaning and scope of it was left to be interpreted by the judiciary. This power starkly reflected the powers that were given in the hands of English monarchs who were believed to hold the power of pardoning, politically equivalent to pardon sins committed by the convict. Moreover, it was considered as an act of kindness by the monarch and which could not be demanded to be granted as a matter of right.

The judiciary has played a significant role in taking forward this line of thought. In United *States v. Wilson*,[7] it was held that "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed". This interpretation of the nature of forgiveness power was reviewed and then upheld accurately

5 UK Border Agency, *Country of Origin Information Service: Pakistan*, HOME OFFICE OF UK BORDER AGENCY (May 11, 2020, 11:00 AM), https://www.refworld.org/pdfid/4b5827122.pdf.

6 RFE/RL's Uzbek Service, *Uzbek President Pardons Dozens Of Inmates On Eve Of Eid Al-Fitr*, RADIO FREE EUROPE/RADIO LIBERTY (May 11, 2020, 09:00AM), https://www.rferl.org/a/uzbek-president-pardons-dozens-of-inmates-on-eve-of-eid-al-fitr/29288052.html.

7 *States v. Wilson*, 32 U.S. 150 (1833).

by the Supreme Court in *Burdick v. United States*[8] case and therefore it paved the way for mercy petitions.

Hindus considers the Bhagavad Gita as its sacred book and Lord Krishna is believed to have been an ardent follower of it. It is said that in the Mahabharata, around five thousand years ago, he had referred and read the Bhagavad Gita.[9] It is also said and widely believed that all the animals that passed away during the war that took place in the Kurukshetra attained their initial and original form after the end of their lives.

The Vedas in many documents also refers to the term "Prayashchita" finds mention and explanations. This is a reflection of how early the genesis way laid down for the forgiveness and mercy shown towards those who repent their mistakes. It formed the essence of the Indian society and till dates such values can be seen deeply imbedded into the Indian culture and value system.

Mercy Petition: Boon Or Bane?

Mercy Petitions were brought with the intention of saving those, in other words, showing mercy to those, who had been wronged while trying to deliver justice. When a convict goes through the fear of being hanged till death and craves for mercy be shown to his/her life, it is expected that it will serve as an incentive to correct his behaviour and action if he is pardoned his life. This is the main intention behind mercy petitions – ultimately, to correct the behaviour of the convict.[10]

Many developed countries like the United States of America and Canada also have a law relating to Mercy Petitions. India too has a law relating to it, mentioned in the Constitution under Art. 72 and Art. 161. It is believed to add a 'humane touch', in the hands of the President, to the otherwise strict laws that are in place when there are harsh provisions like that of capital punishment – it creates a balance. It authorizes the State to look at the matter from a case to case and from a more holistic view as examining a mercy petition requires to look beyond legal provisions and evidences. At the same time, there is no obligation on the President or the Governor to accept all such mercy petitions. Most of the petitions till date have been rejected.

8 *Burdick v. United States*, 236 U.S. 79 (1915).

9 Eternal Religion, *The Only Proven God of Mercy, Forgiveness, and Love*, ETERNAL RELIGION (May 12, 2020, 06:00 AM), https://eternalreligion.org/the-only-proven-god-of-mercy-forgiveness-and-love/.

10 Prashanti Upadhyay, *Mercy Petition: Boon or Bane?*, LEGAL SERVICES INDIA (May 10, 2020, 01:23 PM), http://www.legalservicesindia.com/article/2026/Mercy-Petition-Boon-or-Bane.html.

In the Ranga Billa Case,[11] the scope of Art. 72 was discussed wherein capital punishment was pronounced for one of the convicts. The right of having reprieving power of president specifically of the mercy petition was bought into question. Herein, the mercy petition filed by the convict was rejected by the President which led him to file a writ before the Apex Court challenging the element of discretion available at the behest of the President while deciding on such cases of mercy petition. He argued that it was arbitrary that the President denied his mercy petition, allowing him to be hanged till death, without giving any reason for rejecting his petition. However, the Honourable Supreme Court upheld the rejection given by the President and held that he holds discretionary powers and may pronounce such a rejection without giving reasons.

The above ratio was once again upheld by the Honourable Apex Court in *Kehar Singh v. Union of India*[12] wherein it also explained that a person cannot demand his a mercy petition to be accepted. The granting of pardon or reprieve by the President was an act of being lenient towards convict and therefore it is a privilege and cannot be claimed by the convict. Getting his pardon granted is not a right.

It might seem like that the law is unfair to the convict, however, it must be taken into account that the Constitution of India confers a right to the convicts for making an appeal for mercy but, At the same time it also imposes a duty on the Presidents and the Governor to duly evaluate all the relevant facts and circumstances before deciding on whether to allow the mercy petition or not.as at last it's not the duty of the president or the governor to take decisions on any mercy petition promptly so as to not delay the process.

In 1983, the Supreme Court shifted its position on putting a time limit[13] of three months for the discarding a petitions which were filed under Art. 72 or Art. 161, or under Sec 432 or Sec 433 of the Criminal Procedure Code. Despite having such a mechanism in place, Afzal Guru's case is worth mentioning. He was sentenced to death on the accusation for being involved in the Attack on the Parliament happened in 2001. At first, the execution of his sentence was stayed due to a clemency petition filed in the Supreme Court. Again, a mercy petition was filed in 2013 which was eventually rejected by the President, the execution of his death sentence was delayed. Thereafter, he was finally hanged till death in the Tihar Jail in February 2013 and his cremation rites were also carried on within the jail premises.

11 *Kuljeet Singh @ Ranga v. Union Of India & Anr.*, AIR 1981 S.C. 1572 (India).

12 *Kehar Singh v. Union of India*, (1989) 1 S.C.C. 204 (India).

13 *Sher Singh & Ors. v. State of Punjab*, AIR 1983 S.C. 465 (India).

Similar was the case of Yakub Memon who was held guilty of being involved in the Mumbai serial blasts. He too was awarded a death sentence. He exhausted all his legal remedies before invoking the provision of filing a mercy petition before the Governor of Maharashtra. However, when all his remedies exhausted and he was not granted pardon, death sentence was finally executed on him.

Keeping in mind the abuse of remedies that were partaken purposely to hinder the execution of their death sentence, the Centre has urged the Supreme Court to limit the time for filing mercy petition to seven days after pronouncement of death sentence. This development took place as a response to recourse to multiple legal remedies being taken by the various accused, on by one, in the Nirbhaya Rape Case.

The Case of Yakub Memon: A Paradigm Shift

Another controversial case involving mercy petition has been that of Yakub Abdul Razak Memon, who was accused of criminal conspiracy in the Mumbai serial blasts of 1993. He was awarded death sentence and it was set to be executed on 30th July 2015. However, looking at the history of mercy petitions and the politics behind it reveals how the process of granting or rejecting a mercy petitions how involves individual thoughts and beliefs.

In April 2014, the President of India had rejected the mercy petition filed by Yakub Memon after having received the recommendation, reliefs and advice from the council of ministers, headed by the newly elected Prime Minister, Narendra Modi. The fact that a change in the government brought into action the law related to mercy petitions and execution of death sentences reflects on the role of politics on this matter.

In 1997, there was only one mercy petition pending before the President, the authority that either grants or rejects the request of a mercy petition. By 2014, this number rose to 28 pending mercy petitions. However, with the change of the government, a new perspective on mercy petitions was seen in action. The mercy petition of Yakub Memon was rejected by President Pranab Mukherjee.

If looked at who held the post of Presidents before President Pranab Mukherjee had different opinions on the subject and issues related to the 'capital punishment' and the harshness of death penalty. President KR Narayanan, President APJ Abdul Kalam and President Pratibha Patil were all hesitant to take a call on the question of death penalty. The discomfort in taking such tough calls was widely being observed in the previous governments, which

changed in 2014.[14] In fact, in 2012, when President Pratibha Patil was questioned as to why she was not acting on the petitions, she sought to the defence of Art. 74 of the Constitution and saying that she could not act on her own as she is supposed to take suggestions on the matter as per the aid and advice of the council of ministers. However, the Supreme Court had already mentioned in Kehar Singh v. Union of India[15] that the President of India under Art. 72 of the Constitution can go into the merits of the case in spite of that it has been judicially concluded and may come to a conclusion that may not be the same as the Court.

The entire scenario had changed by May 2015 wherein the Rashtrapati Bhawan records show that none of the mercy petitions were pending. It displays how with a change of the government, the approach towards a serious matter like mercy petitions changed. It shows the paradigm shift from a hesitant outlook on death sentences and mercy petitions to one where action and decisions are taken head on.

In most cases, when a decision is not taken on mercy petitions, the situation, especially of the convict, is left in a limbo. Taking prompt decisions is therefore an important aspect. It was stated in *Madhu Mehra v. Union of India*[16] that Art. 21of constitution grants the right to life and personal liberty as a fundamental right also implies that getting a speedy trial is also one part of this right. This aspect of having the right to life and personal liberty equally applies to discard of a mercy petitions.

In the famous case of *Bacchan Singh v. State of Punjab*,[17] the Supreme Court had also addressed an issue in performing a capital punishment. The Court observed that if there is no uniformity in the manner how a capital punishment is then it can often lead to the process being arbitrary. This has the potential to violate the right to equality under Art. 14 of the Constitution. This has led to different approaches of different governments who came to power on the issue of mercy petition exercised by the titular head of President.

The Nirbhaya Rape Case: Creating a Balance

In recent times, one of the most controversial cases related to death penalty and mercy petition has been that of the Nirbhaya Rape Case wherein the convicts were awarded with death sentence. However, because of the lengthy process involved in filing mercy petitions,

14 Manish Tewari, *The Politics of Mercy Petitions*, DECCAN CHRONICLE (May 14, 2020, 02:25 PM), https://www.deccanchronicle.com/150722/commentary-op-ed/article/politics-mercy-petitions.

15 *Supra* note 12.

16 *Madhu Mehra v. Union of India,* (1989) 3 S.C.R. 775 (India).

17 *Bacchan Singh v. State of Punjab,* AIR 1980 S.C. 898 (India).

as well as filing it before authorities multiple times, the death penalty was being postponed as by considering the facts of the case they had committed an extremely heinous crime cause of which death sentence was awarded to them. But due to the delay in executing it, the society's outcry for 'justice delayed is justice denied' led the Honourable Supreme Court in putting a cap on the delays in the procedure.[18]

On repeated delaying of executing the death sentence of accused due to filing of mercy petitions, the Honourable Delhi High Court said that the law cannot be abused by always resorting to it at the eleventh hour.[19] The Supreme Court was urged by the Government at the Centre to certain guidelines to end such malpractices. It sought for a move which would be in favour of the victim and society-centric (to bring back faith in the rule of law) and for the limiting the convict to file for mercy petition beyond seven days.[20] The Supreme Court confirmed that the right to file for mercy petition with the convict was rather being used a privilege, and was against the interest of the victim. Since the death penalty was awarded as a penalty for the sufferance of the victim, such privilege was not approved by the Apex Court. Therefore, a bench comprising of Chief Justice Bobde and Justice Surya Kant issued a notice to the Centre to modify the execution guidelines.

Focusing on the necessity to amend or re-outline the current rules which initially brought up to assure the interest of a death row convict. But the Solicitor General Tushar Mehta presented before the Court that these rights and privileges was being abused as an instrument to postpone the execution of the death sentence and it required reconsideration. He argued before the Court that "There is no time-limit for availing the legal and constitutional remedies available to a death row convict. The court should now take into account the interests of victims and society and lay down the guidelines which are in furtherance of the already laid down guidelines for the accused". The execution of the death sentence was delayed twice as three of the convicts were yet to exhaust their legal remedy to file for mercy petition.

18 Times of India, *Mercy plea: Supreme Court to consider seven-day limit*, Times of India (May 11, 2020, 10:00AM), https://timesofindia.indiatimes.com/city/delhi/mercy-plea-sc-to-consider-7-day-limit/articleshow/73818059.cms.

19 Aditi Singh, *You Always Come at the Eleventh Hour: Delhi Court Seeks Report from Tihar in Nirbhaya Convicts Plea to Stay Execution of Death Warrant*, Bar and Bench (May 11, 2020, 04:25 PM) https://www.barandbench.com/news/litigation/you-always-come-at-the-eleventh-hour-delhi-court-seeks-report-from-tihar-in-nirbhaya-convicts-plea-to-stay-execution-of-death-warrant.

20 Aditi Singh, *Nirbhaya: No stay on trial court order postponing execution of convicts, HC directs convicts to avail all legal remedies within 7 days*, Bar and Bench (May 11, 2020, 04:25 PM), https://www.barandbench.com/news/litigation/breaking-nirbhaya-no-stay-on-trial-court-order-postponing-the-execution-of-convicts-directs-convicts-to-avail-all-legal-remedies-within-7-days.

Highlighting that how rules were abused, the Centre said that denounced convicts and specially if there were multiple (as in the Nirbhaya Case),should be embraced with a procedure to document corrective appeal in the Supreme Court in a steady progression to defer execution of capital punishment granted to them. It was addressed to the court to fix a specific time limit in which as convict could for a curative petition after dismissal of survey appeal by the Supreme Court. The service said the rules set somewhere around January 2014[21] for seeking mercy petition and execution of capital punishment considered the interests of those waiting for capital punishment and this must be adjusted by another arrangement of solutions which considered the interests of the person in question, their families and larger public interest.

The implementation of the Centre urged the Apex Court to order all subordinate courts and relevant authorities, including state governments, to enforce a sentence of death penalty within seven days from the date of rejecting the mercy petition that was filed. It was urged that this be enforced without any effect of a pendency of review of order or a curative petition filed by other convicts. With this, there was a shift in the law relating to mercy petitions from being inclined towards a convict a more balanced approach. This made sure that while the right to file for a mercy petition by a convict is still effective, the delaying of giving justice to the victim is not hampered.

Conclusion

The existence of death penalties in a legal system paves the way for use of mercy petitions. Death penalties have become a norm when the case falls within the category of 'rarest of the rare' which means that the court often faces cases which it has not faced before. Therefore, even the laws sustaining mercy petitions have evolved over the years and to be fair, it is still evolving. The dynamic nature of the law owing to new emerging situations has inevitably led to developments in the jurisprudence of the law governing mercy petition in India, mostly through judicial activism.

Indian culture witnesses the genesis of values of mercy and forgiveness to way back. In a country where moral values are deeply imbedded, it is only an enhancement of the beliefs of the people that the concept of mercy petition was included in its grundnorm. It was revealed by news outlets that the convicts of the Nirbhaya Rape Case went through a breakdown when the news reached them that their mercy petitions had been denied on them. This meant that their next step was to prepare themselves for their hanging. To get a

21 *Shatrughan Chauhan v. Union of India,* (2014) 3 S.C.C. 1 (India).

hold on the tensed situations, the Gita was also read out to them.[22]

Politics and different approaches taken by different governments has played a role in what verdict is given on a mercy petition, and under the current government (starting from 2014), all pending petitions were also discharged. However, as we have seen in the Nirbhaya Rape Case, the repeated use of the mercy petition provisions one by one at the eleventh hour led to delaying the execution death sentence. Therefore, the Centre urged the Supreme Court to formulate regulation to set a time bar of 7-days beyond which a convict awarded death sentences cannot seek to file a mercy petition. Now it lies in the hands of the Supreme Court as to how it will form guidelines to ensure use and prevent misuse of the mercy petition. Since the Supreme Court has previously shied away from formulating regulation on mercy petition, it is awaited to see if it will finally take a call now that the Centre has submitted its plea.

22 Ananya Bharadwaj, *Night Before Hanging, 16 December Rapists 'Crying Bitterly', Counsellors read Gita to them*, The Print (11 May, 2020, 05:30 PM), https://theprint.in/judiciary/night-before-hanging-16-december-rapists-crying-bitterly-counsellors-read-gita-to-them/384186/.

A Surge in Domestic Violence : Manifestations of the Virus

Adiba Khan* and Gunjan Kanoongo**

Abstract

The Coronavirus Pandemic has transformed into an era that has caused distress on a global scale. Inevitable quarantine has resulted in multiple problems like reduction in daily physical activities, psychological stress due to either lack of work or being trapped inside a place especially, if the individual is staying alone. The pandemic has already been the cause of several negative repercussions. But there are still indirect effects that have not been identified by the authorities. During such difficult times, persistent problems have only worsened. Recession is an issue encountered by various economies around the globe. Poverty has become widespread and almost all activities have come to a halt. One problem which has further contributed to such troubled times is Domestic Violence.

India is already considered to be country unsafe for women. The crime rate against women and children remains at a consistent, all-time high. The justice system has failed to curb or even address this issue decently over and over for decades. The Coronavirus induced a nationwide lockdown similar to most countries all over the world. This has also caused growing concerns for the victims of domestic violence in India. The victims of domestic violence are trapped indoors with the perpetrator and only a few to no remedies to avail.

The paper aims to discuss the issue of domestic violence independently and in the light of coronavirus. It aims to study the state action concerning the same and suggest changes that could help the victims of domestic violence in India and countries all over the world.

* Student, Symbiosis Law School, Hyderabad.
** Student, Symbiosis Law School, Hyderabad.

INTRODUCTION

The beginning of this decade was a new start for everyone around the world, a chance for setting up new businesses, pursuing higher education, getting married, or starting a family. But since the incipience of COVID-19, the world has been in complete lockdown. The Coronavirus originated in Wuhan, China but gradually found its way to almost every country on the planet.[1] Approximately, 7.42 million people worldwide have been tested positive for the virus.[2] Almost every sector and industry across the globe has taken a hit from the lockdown. The impact of coronavirus is so enormous that stock markets everywhere observed their most significant decline. The oil prices have seen the lowest crash in 21 years as there is a major drop in oil consumption.[3]

While the world is struggling to get back on its feet from the effects of COVID-19, there is another issue that has broken out- Domestic Violence. The United Nations has said that the increase of domestic violence across the world is acting like a shadow pandemic. Abuse has risen by about 20% as people have been urged to stay at home.[4]

Authorities around the globe have urged people to stay home while failing to see the heightened domestic responsibilities generated by the lockdown. The people most prone to such abuse are children who are required to stay home all day, elderly people who are particularly unsafe to the virus, and toddlers who can no longer be babysat with reliable neighbours. These people do not have any choice but to remain indoors.

If domestic abuse was a virus in itself, the lockdown not only expanded its breeding rate but also modified its DNA into a more vicious alternative. Other contributing circumstances involve the ability of the abuser to exert persistent scrutiny over the telephone, the decreased work of the courts, the failure and anxiety of travel to counselling centres, the uncertainty of virus infection in such centres and the growing financial dependency of women who are more prone to encounter salary reductions and job losses during the pandemic.[5]

1 Muhammad A. Shereen et al., Suliman Khan, Abeer Kazmi, Nadia Basheer & Rabeea Siddique, *COVID-19 Infection: Origin, transmission, and characteristics of human coronaviruses*, 24 J.A.R. 91, 92 (2020).

2 Lisa Schnirring, *Global COVID-19 cases top 7 million, deaths exceed 400,000*, CIDRAP (June 19, 2020, 10:00 AM), https://www.cidrap.umn.edu/news-perspective/2020/06/global-covid-19-cases-top-7-million-deaths-exceed-400000.

3 Jazmin Goodwin Business et al., Laura He & Mark Thompson, *Global oil prices bounce back after hitting 21-year low*, CNN (June 19, 2020, 10:05 AM), https://www.cnn.com/2020/04/21/investing/global-stocks/index.html.

4 *Stopping lockdown domestic abuse on my street*, BBC NEWS (June 19, 2020, 10:10 AM), https://www.bbc.com/news/av/world-53014211/coronavirus-domestic-violence-increases-globally-during-lockdown.

5 Harshitha Kasarla, *India's Lockdown Is Blind to the Woes of Its Women*, THE WIRE (June 19, 2020,

Increased drinking at home or forced abstention from alcohol due to the local wine shops being closed can provoke the abuser and complicate the relationship between the abuser and domestic violence. The child helpline received 92,000 calls in 11 days of the lockdown being enforced.[6] The inaccessibility of contraceptives and abortion services further impedes domestic abuse. This is particularly true because the country's top hospitals have ceased elective surgery and perform only crucial or life-saving surgery.

Domestic Violence: An Independent Concept

Definition of Domestic Violence

The universally accepted definition of violence against women is provided by the United Nations Declaration on the Elimination of Violence against Women (1993). It states that "*any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life*."[7] The United Nations' definition is rooted in gender-based origins of domestic violence stating "*violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men*."[8] This definition broadly covers it but is not restricted to, three spheres of domestic violence, i.e., "*violence occurring in the family, within the general community, and violence perpetrated or condoned by the State*."[9] The definition not only highlights the physical aspect of violence but also includes aspects of psychological harm undergone by survivors of such violence. It also considers aspects of private as well as public life.

In India, the enactment of The Protection of Women from Domestic Violence Act, 2005 introduced the legal definition of domestic violence. According to Section 3 of the Act, the act of abuse constitutes both an action and an omission which may lead to any physical injury or hurt inflicted on the woman that leads to a threat to life and limb, overall well-being including psychological health and physical health of the women and an act that may include any kinds of abuse; or any kind of harassment, hurt, physical injury or a threat

10:15 AM), https://thewire.in/women/indias-lockdown-is-blind-to-the-woes-of-its-women.

6 *Coronavirus lockdown | Govt. helpline receives 92,000 calls on child abuse and violence in 11 days*, THE HINDU (April 8, 2020, 11:00 AM), https://www.thehindu.com/news/national/coronavirus-lockdown-govt-helpline-receives-92000-calls-on-child-abuse-and-violence-in-11-days/article31287468.ece.

7 United Nations Declaration on the Elimination of Violence against Women art. 1, Dec. 20, 1993, General Assembly Resolution 48/104.

8 *Ibid*.

9 *Ibid*.

to endangering the woman with a purpose of forcing her to meet illegal demands of the perpetrator for dowry or other objects economically or otherwise valuable to the woman whether directly through her or indirectly through a person known to her; or implies a threat on the victim herself or a person is known to her by acts mentioned previously, or any kind of threat to the well-being of the woman whether psychological or physical.[10]

Domestic Violence has become a topic of concern over the last few decades. This increase in concern has been rooted in the constant struggles made by women for the acknowledgement of these problems faced by women globally. The strife to spread awareness about crimes against women, sensitize the issues and fight the defensive behavior of female survivors towards these crimes has led to the minimal increase in awareness about domestic violence. India is a country with a huge rural population (*Rural – Urban distribution: 68.84% & 31.16%)*[11] and a discriminated rate of literacy in women as compared to men (58.8% rural women were literate as compared to 78.6% rural men. 79.9% urban women were literate as compared to 89.7% urban men. A total of 65.5% women were literate as compared to 82.1% men).[12] These factors can be regarded as perpetuating factors of domestic violence.

History of Domestic Violence

The roots of domestic violence in India can be roughly placed around the post – Vedic period. During this period, it was observed that the birth of a daughter was regarded as a shameful event and was perceived to have brought upon disaster to the family. The birth of a son, on the other hand, was regarded as a blissful event.[13] The establishment of women as the biologically superior sex did not affect the social status of women. There is sufficient evidence to prove that the largely patriarchal society has rendered women the inferior sex and regards women as minors throughout their lives irrespective of their actual age. Thus, requiring women to be protected by males throughout their lives. This imposition of roles as protector and subordinate has been instilled in the minds of individuals throughout innumerable generations and results in men treating women in a brutal, barbaric manner in the guise of being a protector even in today's 'modern society'.[14]

Del Martin, in her book on Domestic Violence, has observed that "*Wife-beating, is a complex problem that involves much more than the act itself or the personal interaction*

10 Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2006 (India).

11 *Census of India, 2011, Rural Urban Distribution of Population*, Government of India (June 19, 2020: 11:30 AM), https://censusindia.gov.in/2011-prov-results/paper2/data_files/india/Rural_Urban_2011.pdf.

12 *Id*. at 10.

13 Rinki Bhattacharya, Behind Closed Doors: Domestic Violence In India 16 (Rinki Bhattacharya ed., Sage Publications 2004).

14 *Id*. At 17-18.

between husband and wife."[15] Further explaining, she pointed out that the domestic violence is rooted in the perception of the concept of marriage in society and the attitude of the society towards women as an entity in that concept of marriage throughout history. She also emphasizes on the sustenance of these kinds of violence by the "intricacies of civil and criminal law and delivery system of social service agencies."[16] The World Development Report of 1993 depicts that out of the total disease (physical and non-physical) burden on women (in the age group of 15 – 44), 5% constitutes rape and domestic violence.[17]

Domestic Violence in India: Perpetration

Domestic Violence Portrayed by the Media

An established author of a book on domestic violence, Rinki Bhattacharya, has also made a documentary film named 'Char Diwari' on the same subject. In her book, she has provided instances where she came across the varying and shocking perceptions of domestic violence by individuals belonging to various sectors that are considered to be the pillars of any society like the executive branch of the Government. While making her documentary, she interviewed an Additional Commissioner of Police (ACP) in a suburban Mumbai police station. The Officer was eager in pointing out the number of false cases filed under section 498A of the Indian Penal Code that penalizes the husband of a woman or the relative of the husband for subjecting her to cruelty.[18] However, in the same year, lawyer Flavia Agnes pointed out that barely 100 cases were filed under the section and the conviction rate was negligible.

The ACP did not agree for his interview to be publicized and thus, it could not be depicted in the movie. However, another ACP stepped up and cited frustration at home, workplace issues or jealousy as excuses for abusive behavior among men. This incident only gives a brief account of how gross misconceptions regarding violence against women are instilled in individuals belonging to systems that have a responsibility of protecting the citizens.

The producers of the movie themselves, the Department of Women and Child in the Ministry of Social Welfare, New Delhi, refused to provide funds for English subtitles because it would tarnish the image of 'Indian Husbands and the sacred notions of marriage in India'.[19]

15 Del Martin, Battered Wives XIV (Rev. Ed., 1980).

16 *Ibid*.

17 World Bank, World Development Report 1993: Investing in Health (1993).

18 Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

19 *Supra* note 13 at 19.

This further highlights the ignorant attitude of authorities that have a responsibility to uproot domestic violence. In the times of a pandemic, the ignorance of these authorities can be twice as dangerous as it already would be under normal circumstances.

Another study observes the various legal factors that perpetuate domestic violence, these include, but aren't restricted to, "Lesser legal status of women either by written law and/ or by practice; Laws regarding divorce, child custody, maintenance and inheritance; Legal definitions of rape and domestic abuse; Low levels of legal literacy among women; Insensitive treatment of women and girls by police and judiciary."[20]

Statistical Reports on Domestic Violence

India in most of its regions and states at least ticks off three of these five factors, which can be posed as a dangerous threat to the safety of women.

As per data issued by the Ministry of Home Affairs in 2013, in consensus with the National Crime Records Bureau of India, the differences between filing, registration and conviction of cases are visible in the given table:

Table 1:

Year	Cases registered	Cases charge-sheeted	Cases convicted	Persons arrested	Persons charge-sheeted	Persons convicted
2009	7803	1641	236	641	695	9
2010	11718	4330	415	182	323	5
2011	9431	4499	17	695	713	3

Source: Ministry of Home Affairs[21]

The number of cases charge-sheeted out of the number of cases registered was only 47% in 2011. The number of cases with a definite conviction is a bare minimum and the number of persons convicted is negligible.

During a pandemic, the victim is locked in with the perpetrator with very little means of escape. It is difficult for them to avail medical resources even with government easements. The opening of liquor stores by the state[22] has further caused a worrisome situation for

20 Heise L.L. Et Al. Pitanguy J. & Germaine A., *Violence Against Women. The Hidden Health Burden*, *In* World Bank Discussion Papers 225 (The World Bank Ed., 1994).

21 Shri R.P.N. Singh, *Unstarred Question No. 283 - Lok Sabha*, Ministry of Home Affairs, (June 19, 2020, 11:50 AM), https://www.mha.gov.in/MHA1/Par2017/pdfs/par2013-pdfs/ls-260213/283.pdf.

22 Ministry of Home Affairs, *Notification No. 40-3/2020-DM-I(A)*, GOVERNMENT OF INDIA.

alcohol-related violence against women. In a study published in the Indian Journal of Medical Sciences, it was stated that alcohol abuse had a direct relation with chances and degree of abuse.[23] The study shows that use absence of social support to the woman also denies her an out from the situation she is in.[24] Social Support, here, means the support of maternal family members. Under normal circumstances, the support of family members could be possible if available, however, due to the pandemic, acquiring their physical support has become more difficult than it already was.

The factors that usually perpetrate domestic violence seem to have become worse throughout the pandemic, thus posing a big question on the safety of women in their own homes. The state needs to review its policies on the safety of women for the pandemic and otherwise to improve the situation.

"There is a conflict in our houses, more than 8,500 women were murdered by their spouses and family members, and 1,03,272 cases of domestic abuse were recorded in 2018. Domestic violence is a fact that subsisted before the coronavirus and has grown as a consequence of the lockdown because women are barred in with their abusers. The pressure and stress of the perpetrator's home and work duties are released on women" said Anuradha Kapoor, Director of Swayam, an NGO in Kolkata.[25]

"The kind of violence that is being inflicted on them now is much more serious. We had a woman locked up in a room asking us to call the police to save her because she was afraid of her life. Another woman who was pregnant was beaten so badly that she and her 5-year-old daughter fled the house and walked home to her parents in the middle of the night. Young girls have also been seeking help because they are being abused by their brothers and fathers," she added.[26]

This is likely because this responsibility has traditionally been carried, and remains to be disproportionately supported, by women. The contrast is even more skewed for Indian women who do more uncompensated care and work at home than women in any other country. Indian women spend up to 6 hours a day working at home, which is more than an hour spent by men.

23 Anju H. Khosla et al., Dua Deepti, Devi Lajya & Shyam S. Sud, *Domestic Violence in pregnancy in North Indian women*, 59 I.J.M.S. 195, 197 (2005).

24 *Ibid*.

25 Jagriti Chandra, *NCW records sharp spike in domestic violence amid lockdown*, The Hindu (June 15, 2020, 10:00 AM), https://www.thehindu.com/news/national/ncw-records-sharp-spike-in-domestic-violence-amid-lockdown/article31835105.ece.

26 *Ibid*.

Domestic Violence and State Action

Lockdown Resulting in Surge of Abuse Cases

The Ministry of Health and Family Welfare has issued guidelines to state that abortion has been categorized as an essential service, but the Government needs the same mandate. Gender disparity and violence are an entrenched part of our daily lives and cannot be eradicated during the pandemic. But this cannot be the reason for us to set it aside while we're 'fixing' the pandemic. Our lopsided balance of household work and domestic violence need not worsen.[27]

The National Commission for Women has displayed a large number of cases being filed for domestic violence since the lockdown began. Domestic abuse constitutes an abuse of a person, physically, psychologically, sexually, emotionally, and financially. When a person is harmed, the victim faces other perils such as depression, post-traumatic stress disorder, and chronic illness. The people most sensitive to such harm are women but women, children, house help, elderly and men can also be a victim to it. As people are exacted to stay inside, the perpetrator can be triggered due to stress, anxiety, financial dilemmas, or any other disturbances.

An examination carried out by the Hindustan Times revealed data on two aspects. In some of the states in the country, there has been an increment in the number of grievances about domestic abuse while in some states there has been a reduction in the number of complaints and calls collected by the helpline. This review assists in explaining that it is challenging for the victims to record a complaint during the lockdown since they reside with the perpetrator.[28]

The Delhi Police in April recorded about 2,446 cases associating to women out of which 600 were for abuse against women, 23 for rape, and 1612 for domestic force. In Telangana and Rajasthan, the number of complaints has declined. While on the other hand, states like Punjab saw an enormous increase in grievances about domestic abuse. The Punjab State Commission for Women states that there have been at least 30 complaints every day for domestic abuse since March. It has also affirmed that before the lockdown, there were only one-third calls booked for domestic violence.[29]

27 *Supra* note 5.

28 Dhamini Ratnam, *Domestic violence during Covid-19 lockdown emerges as serious concern*, Hindustan Times (June 04, 2020, 11:00 AM), https://www.hindustantimes.com/india-news/domestic-violence-during-covid-19-lockdown-emerges-as-serious-concern/story-mMRq3NnnFvOehgLOOPpe8J.html.

29 *Ibid*.

Problems Arising Due to the Circumstances

Although there are many state-funded and private forums available that provide help and shelter to such victims, no support can be provided due to the lockdown. Since the police across the country are busy handling the duties assigned to them for reducing the spread of COVID-19, there is no place where these victims can register a complaint about investigations. Since domestic violence is a civil dispute, it has to be filed in the lower court. But due to the ongoing situation, the courts are only hearing emergency cases like bail pleas.

Another dilemma that has arisen out of this is retaining the perpetrator in confinement. Due to the stern rules of obeying social-distancing, prisons cannot sustain a high number of offenders. Parole has to be awarded and the perpetrator goes back home. Some High Courts in the country have received intimation of the condition and have enacted special orders to manage domestic abuse cases. The Jammu and Kashmir High Court proclaimed a command affirming that it will exercise a case on their own of domestic violence during the lockdown phase and also implemented regulations for organizing a special fund and designating special secure areas like drugstores and supermarket shops for victims to report domestic abuse without alarming the perpetrator. The state government of Karnataka has said that all the helplines, shelter homes, counsellors, are running throughout the day to attend to the victims of abuse.[30]

Activists also point out that the moment there is a shortage of food, as in a crisis like this when there is not much commercial activity, the immediate victims are the daughters and mothers in the house. The same is true of health care, as the total spending on women's health in families is expected to reduce further in this period of ongoing economic stress. "The likelihood of women in abusive relationships and their children being exposed to violence is dramatically increasing, as family members spend more time in close contact and families face additional stress and potential economic or job losses," the WHO said in its note.[31]

The World Health Organisation has also pointed out how violence against women has a significant impact on the survivor's health. They have pointed out that this has various implication including "*physical, mental, sexual, and reproductive health problems, including sexually transmitted infections, HIV and unplanned pregnancy*," apart from the

30 *Supra* note 28.

31 Shemin Joy, *Coronavirus Crisis: No lockdown for domestic violence*, Deccan Herald (June 09, 2020, 11:15 AM), https://www.deccanherald.com/specials/insight/coronavirus-crisis-no-lockdown-for-domestic-violence-829941.html.

obvious physical injuries and impact on physical health.[32]

With women also succumbing to losing jobs in the lockdown, their vulnerability has risen. In many events, whatever bare minimum amount women make is handed over to their husbands, and they are stripped of their right to do what they wish to with their own money. This is another contributing factor for violence, many activists say. There seems to be no acknowledgement of this problem by the Government. The financial independence of married women has posed many threats to the safety and security of women, not just in India but across the World.

Young girls are more vulnerable during the period of COVID-19, as families are trying to get then married. Karnataka State Commission for the Protection of the Rights of the Child Rights Chairperson Antony Sebastian recently highlighted the recent spike in such cases in the state. With the police and authorities focusing on the implementation of the lockdown, families are using it as an opportunity.[33]

It's not just the estimates, but also the psychological and social influence that the lockdown would have on women. "There is every cause to examine, as more advanced studies have proposed, that there is an increment in gender-based abuse during such crises," Jayashree Velankar of women's organization stated.[34]

Ineffectiveness of Divorce in lockdown

Divorce, as described by the Oxford Dictionary, is 'the legal ending of a marriage'.[35] But when you approach the Indian courts for a divorce, you are put through the legal wringer and you come out spinning, with or without a divorce, a few years later. Incorporation of a few changes would go a long way in making this a less cumbersome process.

A divorce case ends up lasting longer than the duration of a marriage. In India, most divorce cases go on for decades with no sign of instant relief. In the United States of America or the United Kingdom, acquiring a divorce is more accessible. With the rise of domestic violence cases in the country, likely, divorce cases will also rise. The already present system in India can make a separation for couples difficult and they may have to reside with each other for a more extended period, meaning that the victim is at more risk of abuse from the perpetrator.

32 *Ibid*.

33 *Ibid*.

34 *Supra* note 31.

35 *Little Oxford Dictionary, Thesaurus and Wordpower Guide*, 2nd ed. 2005.

Striking a Ray of Hope

Uttar Pradesh, India has one of the world's most recorded cases of domestic violence in the region. The police also introduced a new domestic violence helpline to report a spike in the number of incidents. On the front page, a newspaper advertisement printed the words "Suppress corona, not your voice." The police have decided to require a female officer to deal with these incidents and the police should have the right to prosecute the suspect.[36]

A local phone line has been set up in the Thar region in India to take calls from isolated women. These helplines receive calls and also deliver food to people who are in need. Through this process, they can check up on these vulnerable women to see if they are doing better, or are they still being abused.[37]

To counter the increasing domestic violence during the Coronavirus pandemic, the Pune Zilla Parishad was motivated by the virus control manual. Abusers in the Pune district will now be disciplined with institutional quarantine if a case of domestic violence is brought against them. Ayush Prasad, CEO, Pune Zilla Parishad, narrated to The Hindu, "Globally, there has been a sharp surge in domestic violence cases during the pandemic. So, we have taken this proactive step to preclude similar cases from occurring in the Pune rural region. The definition of a particular case is as given by the Protection of Women from Domestic Violence Act 2005 and the Criminal Law (Amendment) Act, 2013 (Nirbhaya Act)."[38]

Small but dedicated organizations like the Gauravi Centre, established by Sarika Sinha in Bhopal is aiding the vulnerable people during the Pandemic. These people include abused women, sex workers, Muslim minorities, homeless people, and transgender communities. They all come together to contribute towards their community to ensure that the families most affected by the virus are aided. The centre has collaborated with 18 other organizations to distribute food, rations, and clothes to the needy. The centre strives to contribute and educate the women to stand up for themselves. They hope to inculcate the value of self-dependence so that they do not face any kind of abuse in the future.[39]

36 *The shadow Pandemic: Lockdown and domestic violence*, Kartavya Sadhana (June 19, 2020, 10:30 AM), https://kartavyasadhana.in/view-article/lockdown-and-domestic-violence-writes-prachi-patil.

37 *Stopping lockdown domestic abuse on my street*, BBC News (June 19, 2020, 10:30 AM), https://www.bbc.com/news/av/world-53014211/coronavirus-domestic-violence-increases-globally-during-lockdown.

38 Shoumojit Banerjee, *Coronavirus lockdown | Pune zilla parishad plans tough action to check domestic violence*, The Hindu (April 18, 2020, 12:15 PM), https://www.thehindu.com/news/national/other-states/coronavirus-lockdown-pune-zilla-parishad-plans-tough-action-to-check-domestic-violence/article31371216.ece.

39 *How women in India are helping those most vulnerable during the coronavirus pandemic*, Actionaid UK (June 20, 2020, 10:00AM), https://www.actionaid.org.uk/blog/news/2020/05/26/how-im-helping-indias-

The All India Council of Human Rights Liberties and Social Justice has filed a petition for safeguarding victims who have faced domestic abuse, especially during the COVID-19 lockdown. The bench of the Delhi High Court consisting of Justices J.R. Midha and Jyoti Singh ordered the Central Government, the Delhi Government and the Delhi Commission of Women to direct a meeting to discuss the matter at hand during these troubled times and to come up with a solution which should be implemented at once.[40]

There needs to be a decent way out of a country with deep-rooted patriarchal values, where women are expected to accept anything that is thrown of their direction. With the continuation of the lockout, the term of imprisonment for the sufferers is only extended. Fighting these predators and the beasts that prey on the frangibility of women is as important as tackling the pandemic. Administration and law enforcement officials need to realize the gravity of the matter. Women's health cannot be put on hold until we win the battle against the pandemic. The administration will take corrective measures without deviating from the COVID-19 work plan to protect and support victims of domestic abuse.[41]

It is believed that these measures will go a long way in uprooting domestic violence from society both during and after the pandemic. The urgency of the situation and the need for immediate and effective state action needs to be acknowledged by Governments across the globe.

International Perspective

Abuse Not Constricted to India

Every city across the globe has declared a lockdown due to the surge in coronavirus cases. The already identified vulnerable group- the abused women and children- has had it worse than others. As has been mentioned, the individual who abuses also is confined indoors. The vulnerable people are at more risk of being abused this way. Other parts of the world have also seen an increase in domestic violence cases.

Hubei province, the origin point of the Coronavirus, had reported thrice the number of domestic violence cases to the police. Activists in the region had notified that the number went from 47 reports from the previous year to 162 in just the last 2 months.

---

most-vulnerable-women-during-the-coronavirus-pandemic.

40 *Pandemic Triggers Domestic Violence*, The Leaflet (June 20, 2020, 10:20 AM), https://theleaflet.in/pandemic-triggers-domestic-violence/.

41 *Ibid*.

Wan Fei, a police officer who established a charity for fighting against abuse informed the Sixth Tone website, "The epidemic has had a huge impact on domestic violence. According to our statistics, 90% of the causes of violence [in this period] are related to the Covid-19 epidemic."[42] This is a pattern that is being reported everywhere across the globe. The situation in Brazil has also deteriorated. Adriana Mello, a judge specializing in domestic abuse cases from Rio de Janeiro stated, "We think there has been a rise of 40% or 50% and there was already really big demand. We need to stay calm to tackle this difficulty we are now facing."[43]

Activists in Italy informed that they received a large number of text messages and emails asking for assistance. "One message was from a woman who had locked herself in the bathroom and wrote to ask for help. For sure there is an overwhelming emergency right now. There is more desperation as women can't go out"[44] said Lella Palladino, from EVA Cooperativa, an activist group for the prevention of violence against women.

Activist Movements across the Globe

Spain had enforced strict rules during lockdown to ensure no one stepped out of their homes. They were fined if they left their homes. But the government made sure that women had the right to go report any abuse they faced. This was after a woman had been murdered by her spouse in Valeria, five days before the lockdown. The increased danger to women and children was a foreseeable side effect of coronavirus lockdowns, activists said. Increased violence is a trend that is replicated in many crises, including war, economic crisis, or disease outbreaks, although the quarantine rules present a particularly important challenge. There have been demands in several countries for legal or regulatory reforms to represent the increased danger to women and children in quarantine.

In the United Kingdom, Mandu Reid, leader of the Women's Equality Party, called for additional police powers to remove the victims from their homes for the duration of the lockdown and for the government to waive court fees for security orders.

The prosecutor in Trento, Italy, has ruled that, in cases of domestic violence, the attacker must flee the family home and not the victim, a move praised as "fundamental" by the CGIL trade union. The union asserted, "Being confined to home because of the coronavirus

42 Emma Graham-Harrison, Angela Giuffrida Helena Smith in Athens & Liz Ford, *Lockdowns around the world bring rise in domestic violence*, The Guardian (March 28, 2020, 09:15 AM), https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence.

43 *Ibid*.

44 *Ibid*.

is difficult for everyone, but it becomes a real nightmare for female victims of gender-based violence."[45]

In Germany, the leader of the Green Party, Katrin Göring-Eckardt, said this week that she feared the lives of thousands of women living with abusive spouses and called on the government to free up funds for safe houses. "The spaces in women's safe houses are small even during normal times,"[46] she said to the German media, urging the government to acknowledge the renovation of empty hotels and guest houses and the conditions for people who are vulnerable to leave their homes. Her colleague, Katja Dörner, said that house visits should proceed in situations where there is evidence that children have been exploited despite rules banning contact.

Officials in Greece said they were speeding up a program to help women cope with issues arising from the issue of confinement. "Recognizing that this is usually an issue in times of crisis, we're working around the clock to get the message out. Once official figures are released next week, and we know the true scale of the problem, we'll be enlisting TV channels as well as social media and the mainstream press. There is no question in my mind that with the economic impact of the crisis this will get worse"[47] said Maria Syrengela, who heads the General Secretariat for Family Policy and Gender Equality

SUGGESTIONS

State Action

- Consideration of financially deprived victims of abuse is necessary. The Government may facilitate technological assistance in police stations or other Government sanctioned/recognized safe places across the country. The victims can go to these places in specific time slots to prevent overcrowding and attend their hearings.
- The Government should set up psychological assistance units with multiple objectives that can be developed upon further in due course of time. The first objective would be to provide emotional support to the victims of such abuse. The second objective would be to conduct regular local surveys across the country to keep a check on existing and potential cases of abuse. It is important to note that the questions asked in the survey should preferably be indirect so that the

45 *Ibid.*
46 *Ibid.*
47 *Ibid.*

victim discloses full information without fear of the perpetrator inflicting further harm. These surveys may be conducted on the phone for the pandemic. The third objective would be to set up safe houses for women in uncontrollable or extremely violent situations. These safe houses may be made in a way to ensure social distancing and the safety of women.

- A huge contributor to this type of abuse is a lack of financial security and basic resources. To overcome this, a specific amount of state fund should be allotted for those requiring financial aid. This would remove the financial stress and reduce the risk of stress-induced violence against women. It has also been observed that men resort to alcohol when in times of difficulty. This habit soon develops into alcoholism which, again, is a leading cause of violence against women.

- A highly neglected possible solution to the problem is psychological assistance to the perpetrators themselves. The Government should implement programs and initiatives to help the men understand how their courses of action during times of stress may affect people around them.

- Men across the globe must be sensitised to these issues carefully and help them develop better Emotional Quotients to prevent the risk of violence against women. This absence of psychological or emotional awareness is what ultimately causes men to react in inhumane and unlawful ways.

- It is a dire need of the current society for its individuals, irrespective of gender, financial status or any other differentiation to be psychologically sensitised. Therefore, the Government should make efforts to remove the stigma around mental health.

- Going forward, States must promote the creation of alternative reporting mechanisms; increase shelter options; improve protection and justice capacity; retain critical sexual and reproductive health programs where victims of domestic and sexual abuse are frequently reported and supported; support independent women's groups; financing economic protection measures for women workers, especially those working on the frontlines of the pandemic or in the informal economy, and other groups disproportionately affected by the pandemic, such as migrants, refugees, homeless and trans women; and collecting detailed data on the gendered effects of COVID-19.[48]

48 *The COVID-19 shadow pandemic: Domestic violence in the world of work: A call to action for the private sector* | Digital library: Publications, UN WOMEN (June 20, 10:20 AM), https://www.unwomen.org/en/

Course of Action for Friends and Family of Aggrieved

- The right to record domestic violence to the police is always open. Nevertheless, if the victim does not plan to do so, they can set up a security system for themselves, with a secure message to inform the people with whom they live when confronted with an unsafe circumstance.
- It is prudent to have a friend, family, neighbour or someone nearby notified in the case of intensifying peril. It is also necessary to explain this to trusted family members or friends so that the perpetrator can be held accountable.
- There are also many helplines for domestic violence and useful online counselling websites that victims can utilize for welfare purposes.
- People with previous injurious, destructive inclinations and anger control difficulties must strive to keep their stress as low as feasible. Exercising self-care, reducing media exposure, taking on online motivation programs, or soliciting remedy by counselling can make them better.
- Parents must keep in mind that their temporary lack of control may have a more profound influence on their child than they apprehend.
- When your loved one tells you that she is at risk, it's a good idea for her to make a safety plan with the assistance of professional support service. This may include, for example, putting some money away and ensuring that she has access to a mobile phone via contact with emergency services.
- When your friend is still engaged in a legal matter with an abusive ex-partner, be sure to know that community law centres and legal aid programs are also offering online advice to clients.[49]

Judicial Course of Action

- With the lockdown being imposed, it is tough to have fast-tracked courts and to have regular hearings. The government should take suitable actions to assure that the victim is protected like improving the scheduling of the trial, filling in the vacancies of the judge, and, of course, the necessary Virtual Courts.
- The courts should do away with so much needless paperwork while listing any required lockdown hearings, the same can be done when routine court hearings recommence.

digital-library/publications/2020/06/brief-domestic-violence-in-the-world-of-work.

49 *Ibid.*

Organisational Course of Action

- The COVID-19 pandemic is an opportunity to reconsider how the private sector will collaborate with other stakeholders to end domestic violence. With the removal of locks as women return to work, there will likely be a further rise in demands for assistance in the workplace to aid survivors of domestic abuse.
- Organizations must also be prepared to scale up their activities in the medium and longer-term. The private sector should be at the forefront of creativity, dialogue, and cooperation with governments, workers' unions, service providers, and non-governmental organizations.[50]

Conclusion

It is important to note that domestic violence was a global pandemic even before the outbreak of COVID-19. According to data obtained by the United Nations, 243 million women and girls between the ages of 15 and 49 in the world have been exposed to sexual or physical abuse by an intimate partner over the last 12 months. Put differently, one in three women has witnessed physical or sexual harassment at some stage in her life. LGBTQ+ people face equally high rates of aggression. As the Inter-American Commission on Human Rights and the United Nations have pointed out, countries must have a gender viewpoint in their response to the COVID-19 crisis.[51]

Victims of domestic violence must remember not to blame themselves for what is happening to them. Violence is unacceptable and the perpetrator has to be held accountable. Victims must not make excuses for the perpetrators' actions. Accepting these acts will lead to a vicious cycle of violence. However, understanding this may not be possible for everyone because of the society or environment they were brought up in. In a country like India, it has been a long-known practise to instil the idea of husband worship in the minds of young women. This perpetuates the notion that a husband is equivalent to God and can do nothing wrong.

The urgency of the situation and the need for immediate and effective action needs to be acknowledged by Governments across the globe. It is believed that the aforementioned measures will assist the concerned authorities in uprooting domestic violence from society.

50 *Helping women at risk of domestic violence during the coronavirus pandemic* - ABC Life, (June 20, 10:20 AM), https://www.abc.net.au/life/helping-at-risk-dv-women-during-coronavirus/12110004.

51 *A Double Pandemic: Domestic Violence in the Age of COVID-19*, Council on Foreign Relations (June 21, 2020, 11:30 AM), https://www.cfr.org/in-brief/double-pandemic-domestic-violence-age-covid-19.

HONOUR KILLING : PRESERVING HONOUR OR ATTRACTING IGNOMINY

Nidhi Chillar* and Ritika Sharma**

Abstract

Honour killing is one of the most serious offences against humanity. Women have been viewed as property from time immemorial and that is the reason that the present patriarchal society is unable to accept the fact that women have the right to choose their male counterparts. It is expected from them to live according to the norms of the families and the community she lives in; even the slightest deviance may lead them to lose their lives. The situation becomes worse when the woman falls in love with a man who is from a different caste. It is believed that inter-caste marriage brings dishonour to the family and this is the reason that many girls have fallen prey to honour killing. The families kill their daughter, sometimes even her male counterpart to preserve what they think to be the honour of the family. The Khap Panchayats also have a major role to play in honour killings. Khap Panchayats which are seen as the authority to preserve the tradition and custom of the villages often instigate and engages in the brutal act of honour killing.

Honour killing is a crime not only against an individual but the society as a whole. Various measures have been taken by the legislature to enact strict laws against honour killing. Judiciary has also played an important role in punishing the perpetrators of such a brutal offence.

The present paper tries to cover the topic "honour killing" in detail. The paper tries to focus on the causes responsible for honour killing, the infamous cases on honour killing, how the Khap Panchayats have played a major role in instigating honour killing. The paper has also tried to bring in light the consequences of honour killing and to describe the laws to protect the victims from honour killing, the response of the

* Student, Vivekananda Institute of Professional Studies, Delhi.
** Student, Vivekananda Institute of Professional Studies, Delhi.

judiciary on such crimes. The paper has also provided for the desired solution to combat the menace of honour killing.

The paper is primarily concerned with India, however, certain cases that took place outside India has also been highlighted to understand the concept better. The paper has also analysed the judicial response in Honour Killing cases.

Keywords: *honour killing, honour, caste, patriarchy, Khap Panchayats, dishonour, murder, homicide.*

INTRODUCTION

Killing females in the name of honour expresses a despotic society dominated by arbitrary culture

- Khaled Hishma

Honour killing is one of the barbarous offences. An honour killing is a homicide of a member of a family by the other members of the family, due to the belief that the victim has violated the norms of the community or a religion thereby bringing shame to the honour of the family.[1] Honour killing is nothing but a plain murder in the name of so-called honour. Women have been thought of as a chattel and her chastity a matter of honour. She is brutally killed if she marries, or loves someone who is not of the same caste or religion. The perpetrators justify themselves by citing that the acts of the victim have brought shame to the family and they killed the victim to preserve the honour of the family, with no sign of remorse.

Most of the time, it is the woman who fell prey to honour killing but there can be no denial of the fact that men can also be victims of honour killing by the members of the family of the women with whom is believed to have an inappropriate relationship.[2] It is sad to note that in many countries the data of honour killing are not sufficiently collected and the cases are often difficult to be traced as the cases go unreported or the family members of the victims register or report the cases as suicides or accident.[3]

1 Seied Beniamin Hosseini & C Basavaraju, *Study on Honor Killing as a Crime in India- Cause and Solutions*, 2(1) MYSINTCON 90 (2015).

2 *"Honor' crimes in India: An Assault on Women's Autonomy" Al Jazeera English (Aug. 02, 2020, 10:05 AM), https://www.aljazeera.com/indepth/opinion/honour-killings-india-assault-women-autonomy-180314090856246.html.*

3 Hillary Mayell, "*Thousands of Women Killed for Family "Honor"*", National Geographic News, 12

Causes of Honour Killing

There are various factors responsible for honour killing. Some of them are discussed below:

- Dressing in a way unacceptable to family or community norms.
- Denying arranged marriage or being in a relationship with a man of the caste lower than the girl's caste. It is one of the major reasons for honour killing. In a recent *Kevin Murder Case*, Kevin Joseph who belonged to a Scheduled Caste was murdered for loving a girl named Neenu, who is a Malankara Catholic.[4]
- A woman wanting to obtain a divorce without the consent of the husband. It is considered as a shame for the husband's family.
- Allegation on the character or morale of the women. Sometimes the mere allegations are enough, however false they may be. It is believed that the women should be chaste and pure, any deviance from the prescribed norms is considered as a shame for the whole family.
- If a woman is raped it is believed that it brings dishonour to the family, it is especially the case when the woman becomes pregnant.
- Having an extramarital affair is perceived as bringing dishonour to both the families i.e. the husband's family and the girl's family.

Infamous Cases Related to Honour Killing

Honour killing has often led to major high-profile murders of women in the name of dishonour brought on the family. Honour killing is often done by a male member of a particular family claiming that the action of that woman has defamed the name of the family or its prestige. Such crimes are widely suspected to be underreported and they take place throughout the world. The UN estimates that around 5,000 women and girls are murdered each year in so-called "honour killings" by the members of their families.[5] Honour killings are widely reported in the regions of the Middle East and South Asia but most of these crimes occur in countries like Bangladesh, Brazil, Canada, India, Egypt, Iran, Italy and the United States. The crime of honour killing is not limited to women and girls rather is also on the rise against LGBTQE, particularly gay men.

February 2002, (20th March 2020), https://www.nationalgeographic.com/culture/2002/02/thousands-of-women-killed-for-family-honor/.

4 Shaju Philip, Kerala court finds 10 guilty in case of honour killing, The Indian Express, 23 August 2019.

5 The Horror of 'Honor' Killings' Even in US, Amnesty International, (20th March 2020), https://www.amnestyusa.org/the-horror-of-honor-killings-even-in-us/.

Manoj-Babli Case

The infamous Manoj-Babli honour killing case shocked entire India when a couple from Kaithal district, Haryana were brutally murdered just in the name of ignominy which was brought to the family by the act of the couples. The cruel act was carried out on the orders of Khap Panchayat as the couples married in the same *gotra* which took place in June 2007. On June 23, two decomposed bodies were found from Barwala branch canal in Hisar.[6] The investigations unfolded the shocking details about the case. According to the reports, the couples were forcefully asked to accept each other as brother and sister. When they both denied, the vengeance of the family members came into the picture. The couples were forcefully fed pesticides and were brutally strangled to death. The dead bodies were thrown in the canal. The families of couples lived in Karoran Village, Kaithal. Manoj's family consists of five members. Similarly, Babli's family included five members with the only earning member who was her eldest brother. Manoj's mother confessed that she knew about Babli long before they decided to marry each other. In April 2007, Manoj and Babli got missing from their houses. It was alleged that Manoj has eloped Babli to Chandigarh and they got married to her at a Durga temple which was a mere commitment to one another transcending their willingness to abide by societal norms.[7] The Khap Panchayat intervened and annulled the marriage. However, Babli's relatives were chasing Babli and Manoj even after the Court provided police protection to the couples. Even after all the security and protection of the police and the efforts of the couples to escape, they were kidnapped, beaten and were strangled to death. Their bodies were wrapped in a gunny sack and were dumped in the Barwala Link Canal in Hisar District. The case was brought before the trial court convicted the accused and the policemen who did not comply with their duties rather misused their powers. There were constant threats to the judge also, who gave the verdict in the matter. The matter went for the appeal in the High Court of Punjab and Haryana Court and the four convicts were awarded death sentence.[8]

Qandeel Baloch's Case, 2016

The pattern and the reason for killing in this are not new at all. A Pakistani social media celebrity named Qandeel Baloch was murdered ruthlessly by her brother. She was drugged and asphyxiated by her brother when she was sleeping in her parents home in Multan.

6 Nitish Katra muder case: what you need to know, The Hindu (Aug. 03, 2020, 11:35 AM), https://www.thehindu.com/news/national/Nitish-Katara-murder-case-what-you-need-to-know/article15423924.ece.

7 Death sentence commuted in Manoj-Babli case, THE HINDU, 12 March 2011.

8 Manoj-Babli honour killing: SC allows plea against acquittal of accused, The Times of India (Aug. 05, 2020, 11:40 AM), https://timesofindia.indiatimes.com/india/Manoj-Babli-honour-killing-SC-allows-plea-against-acquittal-of-accused/articleshow/9844060.cms.

Autopsy reports confirmed the same. Her brother Waseem confessed that he murdered her sister as she was bringing disrepute to their family's honour and reputation.[9] The murder was widely condemned all over the world by several famous personalities.

Ghazala Khan's Case, Denmark, 2005

Ghazala Khan was the Danish woman who was killed by her brother as she married against the will of the family. It was confessed by her brother that the murder was ordered by their father to save the honour of the family. It was being mentioned by the family that the girl was involved in an intimate relationship with Emal Khan, three years before her marriage.[10] After the confession of her feelings, she was badly beaten up by her mother and was locked inside the home in isolation. After they were married, the family member played a trick to kill the couple. They pretended to meet and reconcile the issue. They convinced the couples to meet at a railway station and this was the location where both Emal and Ghazala were shot. The accused were convicted in the court proceedings and were awarded requisite punishment.

Bhavna Yadav Death Case, 2014

Bhavna Yadav was a 21-year-old Delhi University student who was strangled to death by her parents just after three days of her marriage. This was because she married against her parents' wishes. This case was one of the most shocking cases as so-called honour crimes rarely involve middle class educated families in big cities.[11] The girl was brutally killed for marrying her batchmate as according to the family, she brought disgrace to their reputation.[12]

Khap Panchayats and Honour Killings

What is Khap?

Khap is a cluster of villages, where every boy and girl is deemed to be brother and sister. Thus, they cannot form the ties of affinity within a khap[13].

9 Qandeel Baloch's absconding brother arrested, THE HINDU, 06 October 2019.

10 Lewis Frazier, "What You Should Know about the honor killing of Ghazala Khan", BBC NEWS, 15 September 2017.

11 Bhawna Yadav,"Small dreams of Delhi 'honor killing' victim", BBC NEWS, 21 November 2019.

12 Urban honor killings: Backlash against change, The TIMES OF INDIA, 23 August 2015.

13 Kachhwaha, K. 2011. Khap Adjudication in India: Honouring the Culture of Crime, International Journal of Criminal Justice Sciences Vol 6 Issue 1 and 2 January-June/July-December (Combined Issue).

Khap Panchayats and their Role in Honour Killing

Khap panchayat is the traditional local judicial body active in north-western states like Haryana, northern Rajasthan, the rural belt of Delhi and western Uttar Pradesh.[14] The leadership of the Khap Panchayat is decided on the parameters of caste, status, gender and financial status etc.

The very mention of khap panchayat brings to our minds the horrifying picture, where the couples are brutally killed for loving each other against the norms of the community.[15] According to the Justice Verma Committee Report, the Khap Panchayats have no sanction under law.[16] The Khap Panchayats have always tried to maintain caste order by preventing inter-caste marriages and debarring *sagotra* marriages. These practices have severely restricted the individual's freedom to choose their life partners. This further unduly emphasises a woman's honour, thus, not only controlling her sexuality but also her marital choice by stigmatising inter-caste marriages.[17]

Khap Panchayats are considered as the custodian of the customs, culture and traditions of the community. Khap Panchayats are seen opposing the marriage within the village, *Sagotra* marriage; marriage within the khap and inter-caste marriages.

The Khap Panchayats does not allow the violation of the above-stated norms. Any violation of these norms attracts strict and barbarous punishments, often leading to humiliation and even the murder. In *Arumugam Servai v. State of Tamil Nadu,*[18]the Hon'ble Supreme Court pointed out that there is nothing honourable in "honour killing" and, it is nothing but a shameful and barbaric murder.

Consequences of Honour Killings on the Society

Honour crimes are usually considered as a convenient expression to describe the incidents of violence and harassment caused to the young couple intending to marry against the

14 Kachhawah, Kavita (2011): Khap Adjudication in India- Honouring the Culture with Crimes (ICJS, Vol 6 Issue 1 & 2 January-June/July-December 2011).

15 Japdeep Singh & Anju Beniwal (eds.), Panchayati Raj and Rural Development (Pointer Publishers, Jaipur, 2015).

16 Government of India, "*Report of the Committee on Amendments to Criminal Law*" (January 2013).

17 Chakravarti, U. 1993. '*Conceptualising Brahmanical patriarchy in early India: Gender, caste, class and state'*, Economic and Political Weekly, Volume (14): 579-85. See also; Baxi, P., Rai, S. M. and Ali, S. S. 2006. *'Legacies of common law crimes of honour in India and Pakistan'*, Third World Quarterly, Volume (7): 1239-53.

18 *Arumugam Servai v. State of Tamil Nadu*, (2011) 6 S.C.C. 405.

wishes of the so-called community or the concerned family members. However, the terms of such kind are often used as catchy phrases and not as apt and accurate expressions.[19] It has been widely observed that men are also targeted by honour killings. The consequences are far more negative. Honour killings are not at all honourable. It is a wrong perception in the minds of the perpetrators that by killing the couples who have disobeyed the norms and the rules of the community would lead to deterrence and no other individual will think of taking any step of this kind. This misconception has led to the deaths of many innocents. There are perils of falling in love. A kind of mental trauma and a deep fear of being killed is usually instilled in society by such acts of honour killings. People begin to fear to fall in love. Love becomes a tool to commit crimes of such sort.

Laws to Protect the Victims from Honour Killing

There is no specific legislation on honour killings as of now and it is generally considered as murder or culpable homicide. However, there are various provisions contained in various statutes and the Constitution that deals with the same. These provisions are discussed below:

- Honour killings are the cases of murder and homicide both of which are the grave offences under the Indian Penal Code (IPC). Section 300 of the IPC deal with murder while Section 299 and 301 deal with culpable homicide not amounting to murder. Since the honour killing is committed with the intention of killing the victims because their acts have brought the dishonour to the family, therefore, the act of honour killing falls within the murder and culpable homicide.[20]
- The members of Khap Panchayat or the family can be made liable under Section 302 of the IPC for instigating to commit suicide those who have violated the norms of the community.[21]
- Since the honour killing particularly targets the woman, it is against Article 14 of the Constitution which provides for the Right of Equality before the Law. Honour killing has given rise to Gender Violence[22].
- Killing someone in the name of honour is violative of Article 21. Article 21 guarantees the right to life and personal liberty. The family members and the

19 Law Commission of India, "*242nd Report on Prevention of Interference with the Freedom of Matrimonial Alliances: A suggested Legal Framework*" (August, 2012).

20 Puneet Kaur Grewal, "*Honour Killings and Law in India*", *5* IOSR JHSS 28, 28.

21 *Ibid*.

22 Seied Beniamin Hosseini, C Basavaraju, "*Study on Honor Killing as a Crime in India-Cause and Solutions*", 2(1) MYSINTCON 90, 91 (2015).

Khap by killing the victim violate Article 21. Every person has the right to live and the capital punishment can only be given as per the rule established by law. Since neither the Khap Panchayats nor does the family members authorised to invoke capital punishment by law, they act in violation of Article 21.[23]

- The Special Marriage Act, 1954 came into force to legalise the marriage solemnised outside the caste, religion or within the same village, khap or gotra. Thus, making such marriages completely legal. The couples belonging to different castes can thus marry under the Special Marriage Act, 1954[24].
- Scheduled Tribe and Scheduled Caste (Prevention of Atrocities) Act, 1989 was enacted to protect the SC's and ST's from any kind of humiliation and atrocities. The Act is connected with honour killings as most of the cases of honour killing are committed in connection to caste and religion.[25]
- The Protection of Human Rights (Amendment) Act, 2006 contains provisions for protecting the individual rights of human beings. It also provides for the establishment of the National Human Rights Commission, the State Human Rights Commission and Human Rights Courts for better protection of Human Rights.[26]

Judicial Response

Every society has its customary practices. Some practices are good for society while others may turn out to be bad. Honour killing is the most barbaric and brutal nature of the customary practice. The judiciary has always condemned Honour killing through its judgments and has been successful in awarding appropriate punishments to perpetrators.

In the *State of Uttar Pradesh v. Krishna Master and Another*[27], the accused were guilty of murdering six members of the family in the name of honour killing. The Hon'ble Supreme Court in its judgment observed that killing six members of the family on the flimsy ground of saving the honour falls within the rarest of the rare cases. The Supreme Court thus awarded rigorous imprisonment for life and a fine of ₹25,000 each, in default, RI for two years.

23 *Supra* at 29.

24 *Ibid*.

25 *Supra* at 91.

26 *Ibid*.

27 *State of Uttar Pradesh v. Krishna Master and Another,* Criminal Appeal No. 1180 of 2004, decided in 2010.

In *Lata Singh v. State of U.P. and Another*[28], the Supreme Court of India observed that the caste system is dividing the nation into two parts. It was observed that inter-caste marriages are in the national interest as they will result in destroying the caste system. The Supreme Court further stated that India is a free and democratic country, and once a person becomes major, he/she has every right to marry any person who he/she likes. If the parents don't agree with the choice of their child what they can do is that they can cut their social relations with the child but cannot threaten or harass them. The Court held that such threats and harassment are wholly illegal and those who commit these shall be severely punished.

The decision of the Supreme Court in *Arumugam Servai v. State of Tamil Nadu*[29] is noteworthy. The case arose in connection with the violation of certain provisions of Scheduled Tribe and Scheduled Caste (Prevention of Atrocities Act), 1989. The Supreme Court observed that the act of Khap Panchayat (khatta Panchayats) in Tamil Nadu in encouraging the honour killing is wholly illegal and is needed to be ruthlessly stamped out. The court further observed that the Khap Panchayats by indulging in such acts takes the law in their hands, and amount to kangaroo courts, which are wholly illegal.

The Supreme Court in *Bhagwandas v. State (NCT of Delhi)*[30] observed that "*honour killing for whatever reason would come within the category of rarest of rare case deserving death penalty*."

Present Situation

In the present situation, crimes of honour killings are taking novice and distinctive forms. It is increasing day by day and there has been no break in the increment if the same. The National Crime Record Bureau statistics depict that honour killings in India have grown by more than 76%-79% from 2014 to 2015.[31] While 28 murders were reported under this category in 2014, this number jumped to 251 in 2015. Moreover, there are many cases which go unreported. The data available is only of the cases which are reported. There have been thousands of cases in the interiors which are not reported.

28 *Lata Singh v. State of U.P. and Another,* (2006) 5S.C.C. 475, AIR 2006 SC.

29 *Arumugam Servai v. State of Tamil Nadu,* (2011) 6 S.C.C. 405.

30 *Bhagwandas v. State (NCT of Delhi,)* (2011) 6 SCC 396.

31 National Crimes Record Bureau, Ministry of Home Affairs, "*Crimes in India*" (2016), (20th March 2020) https://ncrb.gov.in/sites/default/files/Crime%20in%20India%20%202016%20Complete%20PDF%20291117.pdf.

Desirable Solutions

- There is a need for the transformation in the attitude of the people. Inter caste-marriage should not be viewed as a stigma. There's no honour in an honour killing.
- Honour killing should be made a separate offence as it would help in bringing more clarity for the law enforcement agencies.
- Legal Protection should be given to the couples who are threatened for marrying against the wishes of their families.
- Severe Punishments should be awarded to the perpetrators of the offence to give a strong message to all.
- Regular statistics should be collected, studied and analysed to decide the steps that must be taken to combat such crimes.

Conclusion

To sum up, it is important to note that the very act of honour killing itself defies the very rule of nature. Nobody has been embodied with the right to take anybody's life. This authority vests in God only. A mere misconception of false honour and ego leads to such heinous crimes. This has proved to be the greatest setback on the entire social structure. In the name of honour, plain murder is executed. People do not understand that for whom they do such acts, those people of society will never support in any circumstances, whatsoever. In the end, it is only the blood relations who stand in the situations of crisis. The incidents of honour killings have always been a debatable one. It is a stain on society. There is a need to understand that taking life just for the momentary pleasure of maintaining one's honour, status and reputation in society cost huge amounts in the long run.

THE BIOLOGICAL WEAPONS CONVENTION: LEGAL LACUNAE AND THE WAY FORWARD IN LIGHT OF COVID-19

Samavi Srivastava* and Rounak Doshi**

Abstract

Biological Weapons are weapons of mass destruction that may cause various forms of damages. The use of Biological Weapons substantially impacts a considerable population all over the world. With the advancement of technology, the need of development of a Convention which prevents the development and usage of such weapons has become an agenda of paramount importance. Efforts have been made all over the world to curb the menace of use of biological weapons, and so far, one of the most successful steps taken in this regard has been the excogitation of the Biological Weapon Convention which prohibits the production, use, and proliferation of Biological Weapons. This paper provides an insight into the recent allegations against China for manufacturing the virus that led to the COVID-19 pandemic; which constitutes a violation of the BWC. The authors will discuss in detail the salient features, working, implementation, as well as shortcomings of the Convention, and will critically assess and analyse the present global position on the said issue while stressing upon the need of certain amendments to ensure the proper functioning of the BWC.

INTRODUCTION

In today's time and age, biomedical advances have made it possible to control features of living organisms in helpful manners, prompting breakthroughs in health, the economy, farming, the life sciences, and other sectors. Research in biology and the opening of biological laboratories across the world has provided a platform for the development of vaccines and solutions to even the deadliest viruses and diseases that humankind has ever faced. Nevertheless, in times such as these, its negative repercussions cannot be overlooked. Such technological advancement is also the path to the development of biological weapons

* Student, National Law Institute University, Bhopal.
** Student, National Law Institute University, Bhopal.

that threaten international peace and human security.[1] Rapid advances in biotechnology and the proliferation of biological weapons capabilities have already posed serious threats to society by enabling the production of biological weapons with unique and unpredictable characteristics.[2] They have unprecedented rates of proliferation and are hard to trace, therefore being able to pass off as natural occurrences, making them the perfect weapons for hostility. In fact, biological weapons are considered to fall under the umbrella of "Weapons of Mass Destruction"[3] and even in *Nuclear Weapons* Advisory Opinion, the International Court of Justice has specified that the use of weapons of mass destruction tense to be a prohibited activity.[4]

The fundamental question that arises is; how do we distinguish between biology being used for peaceful purposes and harmful ends. To provide some clarity, WHO has defined biological weapons as microorganisms or toxins that are delivered and discharged intentionally to cause disease and death in people, animals, or plants.[5] Toxins refer to those poisonous products of organisms that are lifeless and incapable of reproducing themselves.[6] Further, Biological Weapons consist of two inalienable parts – a weaponized agent and a delivery mechanism.[7] The harmful or negligent use of these biological weapons can cause serious harm at the national and international levels.[8] They may cause socio-political-economic harms that are terrifying.[9]

The Biological Weapons Convention (hereinafter "BWC") is the first multilateral treaty that prohibits the development, production, stockpiling, and use[10] of biological weapons.

1 S.C. Res. 1540 (April 28, 2004).

2 Erik Frinking Et Al., *The Increasing Threat Of Biological Weapons Handle With Sufficient And Proportionate Care* 20-21 (The Hague Centre for Strategic Studies, 2017).

3 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports p.226, ¶228.

4 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports p.226, ¶264.

5 *Biological Weapons,* World Health Organization, (June 18, 2019, 10:00AM) https://www.who.int/health-topics/biological-weapons#tab=tab_1.

6 Jozef Goldblat, *The Biological Weapons Convention-An Overview,* International Committee of the Red Cross, (June 18, 2019, 10:00AM) https://www.icrc.org/en/doc/resources/documents/article/other/57jnpa.htm.

7 *What are Biological and Toxin Weapon?,* Biological Weapons Convention, (June 18, 2019, 10:00AM), https://bwc1972.org/home/the-biological-weapons-convention/about-biological-weapons/.

8 Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization,* 478 Mich. J. Int'l L. Vol. 20:447 Spring (1999).

9 Joseph P. Dudley & Michael H. Woodford, *Bioweapons, Biodiversity, and Ecocide: Potential Effects of Biological Weapons on Biological Diversity: Bioweapon disease outbreaks could cause the extinction of endangered wildlife species, the erosion of genetic diversity in domesticated plants and animals, the destruction of traditional human livelihoods, and the extirpation of indigenous cultures,* Bio Science Vol. 2 Issue 7 583 (2002).

10 U.N. BWC, 4th Review Conference, U.N. Doc. BWC/CONF.IV/9 (Dec. 6, 1996).

It bans an entire category of weapons of mass destruction (hereinafter "WMD"). After all the preparatory sessions in the United Nations' Office of Disarmament Affairs forum starting in 1969, the BWC opened for signature on April 10, 1972, and entered into force on March 26, 1975.[11] It currently has 183 states-parties.[12] Its conception was based on the acknowledgment of the dangerous nature of biological weapons.

In recent times, this discussion on biological weapons and the BWC has specifically gained a lot of relevance and importance because of COVID-19, also known as the coronavirus, a deadly disease spread by a virus through rampant human to human transmission that has brought the world to a standstill. Emanating from China,[13] it has wreaked havoc on the lives of many people. It has displaced and disrupted humankind and their activities globally. As of June 14, 2020, coronavirus has killed more than 430139 people and infected nearly 7787271 persons across the globe.[14] The virus has caused world trade to fall by around 30% and also seriously impacted cultural and sports events all around the world.[15] and[16] A lot of speculation has been made regarding the emergence of Covid-19. Various media outlets[17] have claimed that Covid-19 is a Biological Weapon artificially developed by the People's Republic of China in its high-security biochemical Wuhan lab to cause a substantial amount of harm to other nations and severely impair the global economy.

Recently on April 3 2020,[18] a complaint against the People's Republic of China before the United Nations Human Rights Council (hereinafter UNHRC) was jointly filed by

11 *Biological Weapons,* United Nations Office for Disarmament Affairs, (June 18, 2019, 10:00AM), https://www.un.org/disarmament/wmd/bio/.

12 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, United Nations Office for Disarmament Affairs, (June 1, 2019,11:00 AM), http://disarmament.un.org/treaties/t/bwc.

13 *Rolling Updates on Coronavirus Disease (COVID-19)*, World Health Organization, (June 1, 2019, 11:00AM), https:// www.who.int /emergencies/diseases/novel-coronavirus-2019/events-as-they-happen.

14 *Covid-19 Dashboard by the Centre for Systems Science and Engineering at Johns Hopkins University,* Coronavirus Resource Centre, (May 14, 2020, 09:00AM), https://coronavirus.jhu.edu/map.html.

15 Stephen Hall, *This is how COVID-19 is affecting the world of sports,* World Economic Forum (April 9, 2020,09:00AM), https://www.weforum.org/agenda/2020/04/sports-covid19-coronavirus-excersise-specators-media-coverage/.

16 *Trade set to plunge as COVID-19 pandemic upends global economy,* World Trade Organization (April 8, 2020, 09:00PM), https://www.wto.org/english/news_e/pres20_e/pr855_e.htm.

17 Sandhya Sharma, *Coronavirus is a bio-weapon experiment gone wrong, suspect global experts,* ET Prime (February 11, 2020,09:00PM), https://prime.economictimes.indiatimes.com/news/74068009/economy-and-policy/coronavirus-is-a-bio-weapon-experiment-gone-wrong-suspect-global-experts%20dated%20February%2011,%202020;%20https://www.news18.com/news/opinion/biological-weapons-and-biosecurity-lessons-from-the-covid-19-war-2615103.html; *$20 trillion lawsuit in US against.*

18 Dr. Adish C Aggarwala, *Complaint to the United Nations Human Rights Council, Geneva* (April 3, 2020,09:00AM), https://www.livelaw.in/pdf_upload/pdf_upload-372096.pdf.

the International Council of Jurists and All India Bar Association for the violations of International Human Rights and Serious Violations of International Humanitarian Laws. The complaint places its focus on the conjecture that COVID-19 is a carefully assembled biological weapon, aimed at crippling major countries in the world leaving only China as the beneficiary.[19] Moreover, on April 21 2020, a petition against the People's Republic of China for using the biological weapon was filed by the Attorney-General of the State of Missouri in the United States District Court for the Eastern District of Missouri Southeastern Division.[20]

Further analysis of this accusation and the relevance of the BWC forms the crux of this paper. It has been broadly divided into four parts- the history and status quo of the BWC, the legal lacunae and loopholes that persist within the BWC, past-allegations of non-compliance, and suggested solutions and changes which could be incorporated by the BWC.

History and Status of the Biological Weapons Convention

The usage of biology for the advancement of weapons made for hostile purposes or armed conflict was discovered by mankind many years ago, as early as the 12th century AD. Biological toxins have historically been used as destructive forces against armies as can be seen in instances such as of the year 1155 when the Roman Empire used human bodies to poison water wells in Italy during the battle of Tortona, 1495 when the Spaniards mixed wine with the blood of patients suffering from leprosy to sell to their French enemies, or more recently in 1863 when Confederates, or British forces, sold clothes of patients suffering from yellow fever and smallpox to troops in the United States.[21] In modern times, during the first World War, many countries initiated the development of biological weapons on a military scale, and allegations were made that Germany infected horses that were being shipped to the Allied powers with anthrax or glanders, thereby making use of biological toxins.[22]

19 Dr. Adish C Aggarwala, *Complaint to the United Nations Human Rights Council, Geneva* para 5, p. 25 (April 3, 2020,11:00 AM), https://www.livelaw.in/pdf_upload/pdf_upload-372096.pdf.

20 The State of Missouri v. The People's Republic of China, 1:20-cv-00099-SNLJ, (Jun. 19, 2020, 09:00AM), https://www.courthousenews.com/wp-content/uploads/2020/04/missouri-china.pdf.

21 Stefan Riedal, *Biological Warfare and Bioterrorism: A Historical View*, National Center for Biotechnology Information, (Jun. 19, 2020, 09:00 AM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200679/.

22 Jamie Bisher, *Anthrax sabotage in Finland or Baron Von Rosen's sugar-coated anthrax weapon,* Military History, (Jun. 19, 2020, 09:00 AM), http://www.geocities.ws/jamie_bisher/anthrax.htm.

Subsequently, the dangers of using biological weapons became abundantly clear to the international community. In order to ameliorate the situation, the League of Nations drew up a protocol that prohibited the use of chemical and biological weapons in warfare, and it was signed by member States at a conference held in Geneva in 1925. Being brought into force in 1928, it came to be called the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare[23], or more commonly, the Geneva Protocol. However, the shortcomings of the Protocol were inescapable as many countries, especially the major powers such as the United Kingdom, France, and the Soviet Union, reserved the right to legally use such weapons in retaliation.[24] Further, there was no mention of the production or storage of such weapons in the Protocol, thereby allowing countries to accumulate large quantities of biological and chemical agents.

The adoption of the Geneva Protocol did not prevent the usage of biological weapons, examples being the second World War and the Vietnam war. There was a need for a more definitive convention that had to be adopted and implemented, and in hopes of the same, the United Nations started working towards the disarmament of biological weapons. Initially, most nations were unwelcoming of this suggestion, but this position was drastically altered once the then President of the United States, Richard Nixon, announced his support for renunciation of biological weapons.[25]

At the very onset, the BWC specifies in its preamble that it finds its foundation in the Geneva Protocol and adheres to all its principle and objectives. The essence of the convention is the prohibition of the storage, development, or usage of any biological weapons or toxins for hostile purposes or armed conflict.[26] It places a positive obligation of due diligence on each member State to prohibit and prevent the development of such weapons in their territory or area of jurisdiction[27], further iterating that no member State shall in any way assist or induce another State to acquire any biological toxins, weapons or the equipment thereof.[28] The BWC envisages a world free of biological weapons and therefore stipulates that all

23 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65.

24 Julian Perry Robinson, Public Health Response to Biological and Chemical Weapons 110, World Health Organization (2d ed. 2004).

25 Jonathan B. Tucker and Erin R. Mahan, President Nixon's Decision to Renounce the U.S. Offensive Biological Weapons Program (National Defence University Press, 2009).

26 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 1 (1972), 1015 U.N.T.S. 163.

27 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 4 (1972), 1015 U.N.T.S. 163.

28 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 3 (1972), 1015 U.N.T.S. 163.

existing biological weapons, toxins, or equipment must be destroyed or diverted to peaceful purposes within nine months of it being brought to force.[29] There is also an undertaking of cooperation that exists among the states to ensure the application of the stipulations of the convention.[30]

It must be acknowledged with due care that this prohibition on the usage of biological weapons is not absolute; it is only for purposes that are not prophylactic, peaceful, or protective.[31] In fact, the convention urges all Member States to participate in the fullest exchange of research and knowledge to develop themselves in the field of biology. It clarifies that there is no intention to hamper any technological or economic developments arising from research in this field.[32]

Finally, it asserts that any complaint one member State has with another regarding breach of obligations of the convention can be addressed to the Security Council of the United Nations. Upon consideration, it may investigate the matter further.[33]

This convention, like most international treaties, relies hugely on State cooperation and confidence-building. In order to pursue the successful implementation of the convention, the member States hold review conferences every five years to discuss developments in the implementation of the stipulations as well as future plans and endeavours of the countries. Implementation Support Units (hereinafter ISUs) were established in the sixth review conference for administrative support and assistance as well as the national implementation of the BWC.[34] There have been eight review conferences so far, the most recent one being held in 2016,[35] the results of which found most state parties disappointed as there was minimal consensus amongst the members. Therefore, despite the presence of a Final Document that commanded agreement of all members, the text of the same was barely different from the same of the seventh review conference.

29 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 2 (1972), 1015 U.N.T.S. 163.

30 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 5 (1972), 1015 U.N.T.S. 163.

31 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 1 (1972), 1015 U.N.T.S. 163.

32 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 10 (1972), 1015 U.N.T.S. 163.

33 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 6 (1972), 1015 U.N.T.S. 163.

34 *ISU,* Biological Weapons Convention, (Jun. 19, 2020, 09:00AM), https://bwc1972.org/home/the-biological-weapons-convention/isu/.

35 U.N. BWC, 8th Review Conference*,* U.N. Doc. BWC/CONF.VIII/4 (Jan. 11, 2017).

Despite the seemingly bleak future of the BWC, it has suddenly emerged as a convention of immense relevance and deliberation following the allegations of its violation by China. The conjecture that the coronavirus was manufactured by laboratories in China intentionally is a clear violation of the very essence of this convention. However, it has been maintained by China consistently, as by all other countries faced with similar allegations in the past, that its laboratories dedicated to biological research are only for peaceful developmental purposes.[36] Whether or not the allegations against China have any veracity is beyond the scope of this article, however, the extent of the legal lacunae that plagues the BWC has been explored extensively and is discussed in the next part.

Legal Lacunae and Loopholes of the BWC

The BWC is undeniably a crucial step that the international community has taken towards disarmament. It is a specialization of the text of the Geneva Convention and highlights that chemical and biological weapons ought to be differentiated in order to truly achieve complete weapons reduction. However, there are certain shortcomings of the Convention which act as barriers in allowing it to reach its full potential.

The first major impediment in the BWC is incontrovertibly evident in the very first article itself. The article states that "*each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain microbial or other biological agents, toxins, weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict*".[37] It seems to be a forthright article, however, there is no clear definition of "weapons, equipments or means of delivery" that has been agreed upon by the State parties.[38] Biological weapons had been defined as those the design of which indicated that they could have no other use than for hostile purposes, or that they were specifically intended to be used for such purposes.[39] Initially, Switzerland, stating that since there is no clear definition provided by the convention, held the right to determine for itself what would constitute a biological weapon.[40] The explanation offered by Switzerland was that since there are hardly any

36 *Biotechnology in China,* National Center for Biotechnology Information, (Jun. 19, 2020, 09:00AM), https://www.ncbi.nlm.nih.gov/books/NBK236101/

37 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 1 (1972), 1015 U.N.T.S. 163.

38 Julian Perry Robinson, Public Health Response to Biological and Chemical Weapons 110, World Health Organization (2d ed. 2004).

39 *Documents on Disarmament*, United States Arms Control and Disarmament Agency (1970).

40 *Switzerand: Ratification of Biological Weapons Convention,* United Nations Office for Disarmament Affairs, (Jun. 19, 2020, 09:00AM), http://disarmament.un.org/treaties/a/bwc/switzerland/rat/washington.

weapons which are peculiar to being used only for hostile purposes, it ought to decide for it what auxiliary means fall within that definition.[41] The United States of America, albeit agreeing to the limitation of this definition, objected to this reservation and maintained that a country must not unilaterally reserve with itself the right to determine what constitutes a weapon as that undermines the very essence and authority of the BWC.[42] In today's rapidly developing world where new advancements in science and technology take place regularly, such a clear distinction between a weapon and machinery is difficult to observe. This has commonly been recognised as the 'dual-use dilemma', where the results of well-intentioned scientific research can be used for both good and harmful purposes. There is no black and white differentiation, and the BWC has no clear definition of what constitutes 'weapons, equipment, or means of delivery' to navigate this grey area. Hence, its stipulations are always at risk of being subverted.

Secondly, another glaring limitation present in the first article is the specification of the prohibition of only those biological weapons which use toxins or agents for hostile purposes or armed conflict. The convention explicitly allows the use of biological toxins or agents for peaceful, prophylactic, and protective purposes.[43] While ipso facto this seems to be a straightforward stipulation, it is perhaps the most controversial article of the Convention. In research facilities, in the initial stages of research and development, and perhaps even later, it is difficult to stratify the research into hostile and peaceful slots. Just as to manufacture an antidote one must deal with the toxin that would develop the antibodies required for such a cure[44], for developing vaccines, protective equipment, and other prophylactic research, a laboratory will have to host the biological toxin in question. Thus, the difficulty here arises in ascertaining the intention of the member State while handling these biological toxins and agents. This could have been solved by appropriate measures of verification of such intentions coupled with accountability for the same, however, attempts towards the same have so far been unsuccessful.

The third Review Conference of the BWC had tasked a group of experts called VEREX (verification experts) to discuss potential measures of verification to determine the purpose of research as well as the adherence to the Convention by the State Parties.[45] Based on the

41 *Switzerand: Ratification of Biological Weapons Convention,* United Nations Office for Disarmament Affairs, (Jun. 19, 2020, 09:00 AM, http://disarmament.un.org/treaties/a/bwc/switzerland/rat/washington.

42 *Documents on Disarmament*, United States Arms Control and Disarmament Agency (1970).

43 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 1 (1972), 1015 U.N.T.S. 163.

44 *International Programme on Chemical Safety,* World Health Organization, (March 13, 2020, 11:00 AM), https://www.who.int/ipcs/publications/training_poisons/guidelines_poison_control/en/index7.html

45 U.N. BWC, 3rd Review Conference, U.N. Doc. BWC/CONF.III/23 (Sept. 27, 1991).

report of this group, an Ad-Hoc group was established to create a legally binding protocol regarding verification to strengthen the Convention.[46] However, the recommendations of this ad-hoc group were never adopted due to differences between the member States.[47] Currently, no binding verification mechanism exists to ensure compliance with the Convention.

An Accountability Framework for the BWC reporting on national compliance to the Review Conferences was initiated in the First Review Conference itself, however, government reports remained unsystematic and lacked uniformity and compliance. In 2006, there were only 22 national reports to the Sixth Review Conference from among 155 States Parties.[48] The BWC has no stipulation which obliges the Member States to declare the possession of such banned weapons, the laboratories engaged in research and development surrounding biological agents which could be used for hostile purposes, or the usage of biological agents in non-prohibited activities. There is no limitation to the quantity or type of toxins that are permissible as per the Convention. Further, no external organisation outside the framework of the BWC has the legal authority to implement any verification mechanism. This essentially serves the member States with a carte blanche with no accountability, where submitting themselves to the inspection of the BWC is merely voluntary.

Thirdly, the nebulous line that divides research for peaceful and hostile purposes also infests as a problem while reading Article 3 of the BWC in consonance with Article 10. Article 3 states that each State Party to this Convention undertakes not in any way to assist any State in manufacturing or otherwise acquiring any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.[49] Further, Article 10 states that the States Parties to this Convention undertake to facilitate and have the right to participate in the fullest possible exchange of equipment, materials and scientific and technological information for the use of biological agents and toxins for peaceful purposes in order to avoid hampering the economic or technological development of States Parties to the Convention.[50] Firstly, without a clear and uniform understanding of what constitutes a 'hostile purpose', these articles regrettably act as contrary forces. Most machines and equipment using biological toxins, or even otherwise, are not exclusive in their usage; as

46 *Press Release DC/2688*, United Nations Media Coverage and Press Releases (March 13, 2020, 11:00AM), https://www.un.org/press/en/2000/20000313.dc2688.doc.html.

47 The Biological Weapons Convention: An Introduction, United Nations Publication 22-23 (2017).

48 Nicholas A. Sims Et Al., An Accountability Framework of the BWC 4 (2010).

49 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 3 (1972), 1015 U.N.T.S. 163.

50 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 10 (1972), 1015 U.N.T.S. 163.

such, they can be weaponised. Since the BWC's *raison d'être* is disarmament, co-operation in the exchange of biological agents is hard to accommodate without leaving room for misuse. Secondly, Article 10 promotes co-operation in exchange for technology which has led to a significant technological gap between the developed and developing countries as most developed countries exchange information without accommodating other countries which are behind in technological developments, as was acknowledged by the Member States in the Fourth Review Conference of the BWC.[51] This has hampered economic growth in developing countries, contrary to its intention.

The fourth shortcoming presents itself in the observation that countries are often reluctant to disclose information regarding their military facilities. Their own plans and actions are 'information' and those of another state is 'propaganda'.[52] This resistance in co-operation might stem from international politics, but it creates a perplexity with regard to the BWC as it is dependent on confidence and meaningful co-operation amongst the member States for successful implementation. The secrecy surrounding biological research could create suspicions and lead to allegations of breaches. Further, in order to get ahead in the arms race, countries might act on those suspicions, true or not, and embark on their defensive, or offensive, weapons programmes.

The fifth problem is the complaint mechanism as stipulated in the Convention. The BWC provides for a complaint mechanism in case the aforementioned allegations do arise. Article 5 of the BWC provides that the state parties may consult each other to solve any problem in relation to the objective of the BWC.[53] Article 6 of the BWC states that any State Party to this Convention which finds that another State Party is acting in breach of obligations may lodge a complaint with the Security Council or the Secretary-General[54] of the United Nations, which, based on the evidence provided by the complainant, it may take into consideration for further investigation.[55] However, due to the secrecy surrounding such research discussed above, it is very difficult for a member State to gather such information which has enough force for the UNSC to initiate investigations. Nonetheless, there is no instance when parties have used the procedure prescribed under Article 6 of the BWC. This

51 U.N. BWC, 4th Review Conference, U.N. Doc. BWC/CONF.IV/9 (Dec. 6, 1996).

52 Jeff Gerth, *Military's Information War is Vast and Often Secretive,* The New York Times (Jun.11, 2020,11:00AM), https://www.nytimes.com/2005/12/11/politics/militarys-information-war-is-vast-and-often-secretive.html.

53 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 5 (1972), 1015 U.N.T.S. 163.

54 U.N. BWC, 3rd Review Conference, U.N. Doc. BWC/CONF.III/23 (Sept. 27, 1991).

55 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Art. 6 (1972), 1015 U.N.T.S. 163.

may be because of its highly political nature of formally accusing another State Party of non-compliance. Further, if any allegations are against the permanent members of the Council, which is a probable condition considering they are leading powers in technological and military advancements, they can veto any investigation which may have been conducted.[56] Additionally, there has been no punishment specified in the stipulations of the BWC which may be accorded to defaulting parties. Another forum for addressing such complaints can be the International Court of Justice.[57] However, member states often have reservations to their declarations to the ICJ limiting its authority and jurisdiction on certain matters[58], thereby often rendering this topic of investigation out of bounds.

The sixth and final issue that cripples the BWC has been the lack of available funds for its functioning and the negligence and lack of assistance of Member States in this regard. In the 2018 Meeting of the State Parties, it was affirmed that "the financial problems encountered by the BWC result from: (a) Structural non-payment, which is a persistent pattern of non-payment of contributions within the calendar year, creating a consistent deficit in the revenues available for the work of the intersessional programme as well as accumulated debts currently in excess of $130,000; (b) Delayed payment, which is a payment within the budget year, but later than the thirty days expected upon receipt of the invoice, such that funds may not be available at the time they are required; (c) Inadequacy in applying the Financial Regulations and Rules of the United Nations to the agreed programme of work of the BWC, in light of the requirement that full funding is on hand before staff contracts are signed or meetings are held and thus have led to difficulties in extending ISU contracts, as well as to cancelling (or reducing) meetings agreed in the intersessional programme"[59]. Further, in 2016, the Implementation Support Unit of the BWC distributed a document prepared by the Financial Resources Management Service (FRMS) of the United Nations which states that 62% of the State Parties owed a total of US$ 96,519 to the Convention between 2001-16 only.[60] This has significantly hampered the effective implementation of the BWC, as well as the smooth functioning of the ISU and convening of meetings in the future.

56 UN Charter, Art. 27 (1945), 557 U.N.T.S. 143.

57 ICJ Statute, Art. 36 & 40 (1945), 33 U.N.T.S. 993.

58 ICJ Statute, Art. 36 (1945), 33 U.N.T.S. 993.

59 U.N. BWC, Elements of a Decision on Measures to address the Financial Predictability and Sustainability of the Convention, U.N. Doc. BWC/MSP/2018/CRP. 1 (Dec. 4, 2018).

60 Kathryn Millett, Financial Woes Spell Trouble for the Biological Weapons Convention, in Health Security Vol. 15 (2017).

Allegations of Non-Compliance

Ever since its implementation, there have been many instances of allegations of non-compliance with the BWC. At several review conferences, States Parties have openly accused others of violating the provisions of the BWC. For instance, during the Third Review Conference, in 1991, Australia, the United Kingdom, and the United States blamed the Soviet Union for manufacturing biological weapons,[61] and at the principal meeting of the Fifth Review Conference,[62] in 2001, the United States made claims against four States Parties, namely Iraq, Iran, North Korea, and Libya for violating the BWC. Discussed further are those cases which have received the most attention amongst such allegations.

The Sverdlovsk Case

In the year 1980, an accusation against the Soviet Union for maintaining an offensive biological weapons programme which included production, weaponization, and stockpiling of biological warfare agents was made by the United States of America.[63] An airborne release of anthrax spores from a Soviet biological facility, which caused an outbreak of anthrax in the city of Sverdlovsk in 1979,[64] was considered to be the basis of this accusation. The Soviet Union attributed the breakout of this infection to the sale of anthrax-contaminated meat in violation of veterinary regulations.[65] Interestingly, this incident is eerily similar to the current case of the spread of the coronavirus. Subsequently, various meetings of scientists from all over the world were held to evaluate the Soviet account of the incident, but to no avail.[66] Finally, in 1992, after the internal disintegration of the Union of Soviet Socialist Republic,[67] the Russian authorities admitted that a breach of the BWC had been committed.[68]

61 U.N. BWC, 3rd Review Conference, U.N. Doc. BWC/CONF.III/23 (Sept. 27, 1991).

62 U.N. BWC, 5th Review Conference, U.N. Doc. BWC/CONF.V/17 (Nov. 22, 2002).

63 *Keeping an eye on Russia,* The New York Times Magazine, (Jun. 09,2020,09:00AM), https://www.nytimes.com/1981/11/29/magazine/keeping-an-eye-on-russia.html.

64 *Soviet City exposed to Lethal Germs*, The Kansas City Times p. A2 (March 19, 1980).

65 *Anthrax in Humans and Animals,* World Health Organization (4d ed. 2008); U.N. BWC, 1st Review Conference, U.N. Doc. BWC/CONF.I/SR.12 (Mar. 25, 1980).

66 Robert Lee Hotz, *Anthrax Deaths Tied to Soviet Lab: Biological warfare: Finding by U.S., Russian researchers raises possibility that international treaty was broken in 1979 outbreak that killed 68 people,* The Los Angeles Times, (Jun. 09,2020,09:00AM), https://www.latimes.com/archives/la-xpm-1994-11-18-mn-64333-story.html.

67 *The Collapse of the Soviet Union,* Office of the Historian, (Jun. 09,2020,09:00AM), https://history.state.gov/milestones/1989-1992/collapse-soviet-union.

68 Jozef Goldblat, *The Biological Weapons Convention-An Overview,* International Committee of the Red Cross (Jun. 09,2020,09:00AM), https://www.icrc.org/en/doc/resources/documents/article/other/57jnpa.htm.

The "Yellow Rain" Case

In 1981, the Soviet Union was again accused of violating both the Geneva Protocol and the BWC by the US government.[69] The accusation was based on the production, transfer, and use of Trichothecene Mycotoxins (a group of toxins).[70] The Soviet Union unequivocally rejected the allegation. US charges were based on observers who reported that an adversary airplane had been showering a toxic yellow material on fields. The USA used several reports from chemical laboratories to substantiate their case. However, the veracity of the proof was increasingly questioned[71] as broad systematic endeavours in a few labs neglected to affirm the initial positive reports of Trichothecenes.[72]

The Cuban Allegation

In 1997, the United States of America was accused by Cuba for committing biological aggression.[73] Cuba alleged that an American crop-spraying plane was witnessed releasing an unknown mist into the air.[74] A few months later, the Cuban National Pest Control Center discovered Thrips palmi, a bug that feeds on many agriculturally important crops, for the first time in Cuba.[75] The Cuban government requested an investigation under Article 5 of the BWC. After inspecting the proof from the two nations, States Parties submitted reports to the Chairman of their meeting. Of the 12 States Parties that made entries, 9 commented that the data didn't bolster the Cuban charges and 2 (China and Vietnam) said that no concrete conclusion could be drawn.[76]

Iraq Accusation

In the year 2002, the USA and the UK accused Iraq of non-compliance of the BWC.[77] Iraq

69 US Department of State, Press Release (Sept. 13, 1981)

70 US Department of State, Press Release (Sept. 13, 1981)

71 U.N. GAOR, 37th Sess., UN Doc. A/37/259 (Dec. 1, 1982); U.N. GAOR, 36th Sess., UN Doc. A 36 613 (Nov. 20, 1981).

72 J.P. Robinson Et Al, Yellow Rain in Southeast Asia: The Story Collapses, MIT Press, Cambridge Mass. (1990).

73 Jenni Rissanen, *The Biological Weapons Convention,* Nuclear Threat Initiative (Mar. 1, 2020, 09:00AM), https://www.nti.org/analysis/articles/biological-weapons-convention/.

74 Jenni Rissanen, *The Biological Weapons Convention,* Nuclear Threat Initiative (Mar. 1, 2020, 09:00AM), https://www.nti.org/analysis/articles/biological-weapons-convention/.

75 Jenni Rissanen, *The Biological Weapons Convention,* Nuclear Threat Initiative (Mar. 1, 2020,09:30AM), https://www.nti.org/analysis/articles/biological-weapons-convention/.

76 Raymond Zilinskas, Cuban Allegations of Biological Warfare by the United States: Assessing the Evidence, in Critical Reviews in Microbiology 173-227 (2008).

77 Erhard Geissler, Chemical and Biological Warfare and Arms Control Developments, in SIPRI Yearbook: World Armaments and Disarmament (Oxford University Press, 1992)

became a member of BWC in the year 1991[78] when it also agreed to disclose information of all of its weapons of mass destruction and undertook to destroy them.[79] The UNSC created a body called UNSCOM[80] to review Iraq's chemical, biological, and missile abilities and accommodate their annihilation. It was revealed that Iraq's biological weapons program produced anthrax bacteria, ricin, botulinum toxin, aflatoxin, and wheat cover smut fungus.[81] Iraq professes to have finished its natural weapons program in 1991, but it is generally accepted that Iraq kept up the program all through the 1990s. These convictions are substantiated by Iraqi attempts to hide its program from UNSCOM overseers. In 1998, Iraq suspended collaboration with UNSCOM leaving numerous issues unanswered.[82] The gathering was disbanded and supplanted with the UN Monitoring, Verification, and Inspection Commission (UNMOVIC).[83] On November 8, 2002, the UNSC adopted Resolution 1441 expecting Iraq to allow unlimited access to UNMOVIC controllers. However, Iraq has neglected to reveal numerous subtleties of its biological weapons program to UNMOVIC.[84]

These cases further go on to prove that despite actions and evidence pointing to violation of the Convention, it has proved difficult for State Parties to actively use the Convention to prohibit such acts. This is substantiated by the fact that the complaint mechanism of the BWC has never been invoked so far.[85] This is indicative of the assertion that the BWC ought to incorporate a few changes and solutions in order to further its goal of complete disarmament.

Improving The BWC

In pursuance of the previously discussed shortcomings of the BWC, certain alterations and additions to the Convention may go a long way in improving its implementation and efficiency.

78 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, United Nations Office for Disarmament Affairs.

79 S.C. Res. 687 (April 8, 1991).

80 S.C. Res. 687 (April 8, 1991).

81 John Pike, *Biological Weapons Program: History,* Webmaster (Nov. 3, 1998), https://fas.org/nuke/guide/iraq/bw/program.htm.

82 *Collapse of Iraq-UNSCOM Relations*, Disarmament Diplomacy, (Mar. 21, 2020, 09:00AM), http://www.acronym.org.uk/old/archive/20iraq.htm.

83 S.C. Res. 1284 (Dec. 17, 1999).

84 *Press Release SC/7664,* United Nations Meetings Coverage and Press Releases (Feb. 14, 2020, 11:00PM), https://www.un.org/press/en/2003/sc7664.doc.htm.

85 Wanda Archy, *The Biological Weapons Convention (BWC) at a Glance,* Arms Control Association (Mar. 13, 2020, 09:00AM), https://www.armscontrol.org/factsheets/bwc.

> "*Endogenous reinforcement can be intelligently steered, in such a way as to put flesh on the bare bones of the BWC, and to do so with a care for internal balance so that all its sectors move forward together. Its sectors include a regime of compliance, a regime of development, a regime of permanence, and a prospective regime of research.*"[86]

The most limiting barrier in the effective execution of the stipulations of the BWC is the lack of a clear distinction between peaceful and hostile purposes of biological agents or toxins. This ambiguity is justified due to the nature of research that goes into the development of biology-related technology. Therefore, for the BWC to be successful in preventing the development and usage of toxins for hostile purposes, a verification mechanism can be established which confirms compliance with the Convention and monitors the nature of research taking place in member States. Inspiration may be taken from the establishment of the IAEA (International Atomic Energy Agency) that verifies whether a State is living up to its international commitments to not use nuclear programmes for nuclear-weapons purposes.[87] Treaties concerned with non-proliferation, such as the NPT (The Treaty on the Non-Proliferation of Nuclear Weapons), entrust the IAEA as their nuclear inspectorate.[88] It has been granted extensive powers and authority through the Additional Protocol to the safeguards agreement which enhances its abilities of verification.[89] A similar Agency or organization which ensures the implementation of the BWC by conducting safeguard activities such as verification of reports submitted by State Parties, scheduled and unscheduled on-site inspections of facilities, laboratories or other locations containing biological toxins and equipment, verification of biological material inventory, surveillance measures, etc. will significantly increase the compliance of State Parties to the Convention and eventually play a role in building confidence amongst them by lifting the veil of secrecy.

The problem of the lack of accountability can be approached keeping in mind the Canadian proposal of an Accountability Framework at the Sixth Review Conference of the BWC.[90] An annual meeting of the State Parties of the BWC can be conducted where the focus would be on a State's accountability of its biological research and development to other States. Each State Party would report its actions towards the fulfilment of the stipulations of the BWC, article by article. This would ensure that the structure of the Framework

86 Nicholas A. Sims Et Al., An Accountability Framework of the BWC 200 (2010).

87 Statute of the International Atomic Energy Agency, Art. 2 (1957), 276 U.N.T.S. 3.

88 *IAEA Safeguards Overview: Comprehensive Safeguards Agreements and Additional Protocols,* IAEA, (Feb. 14, 2020, 11:00PM), https://www.iaea.org/publications/factsheets/iaea-safeguards-overview.

89 *Additional Protocol,* IAEA, (Feb. 14, 2020, 11:00PM), https://www.iaea.org/topics/additional-protocol.

90 Nicholas A. Sims Et Al., An Accountability Framework of the BWC 200 (2010).

would already be known to the members. To enforce a sense of uniformity, a general list of questions and criteria may be provided based on which the members can proceed with their reports.

The difficulty in observing Articles 3 and 10 of the BWC conjointly can also be solved if, in a meeting such as this, any exchange of biological research, equipment, or agents and toxins of a significant decided quantity is declared. This declaration could be substantiated by a report of its nature and usage by the receiving country. This would ensure that such exchange is accounted for and is solely being used for peaceful purposes and economic and technological development. This meeting need not be annual, but the essence is regularity.

While a meeting such as the one discussed above may go a long way in increasing transparency, other forms of Confidence Building Measures (hereinafter CBMs) can be adopted to increase trust and allay insecurity amongst member States. CBMs are agreements between parties for the exchange of information regarding military and security activities along with verification.[91] Keeping the BWC in mind, these measures could include prenotifications of tests conducted for biological equipments, joint training programmes fostering biological research and development, exchange programmes for sharing such research, on-site visits by officials, etc. These measures will ensure that usual developmental activities aren't mistaken for being hostile and thereby reduce suspicions.

The complications in the complaint mechanism pose a menace to the foremost purpose of minimizing the use of Biological Weapons. A remedy to this predicament could be a modified version of the remedy used by the IAEA. In the IAEA, a separate organ deals with the investigation of complaints of non-compliance; when this organ finds some violation by a state party, then it may refer the matter to the UNSC.[92] The proposal here is that a new representative body of state parties should be established, like the one in IAEA rather than the United Nations, having the sole authority to deal with the investigation of matters of non-compliance. In adjudging complaints of violations of the BWC, the newly established representative body of the state parties should play the primary role in doing the investigation, when this body finds a violation then it must report it to the UNSC, which shall further take suggestions of the representative body whilst making a decision. Additionally, following an already proposed suggestion during initial negotiations,[93] the

91 Simon JA Mason & Matthias Siegfried, Confidence-Building Measures in Peace Processes, in Managing Peace Processes: A Handbook for AU Practitioners, Vol. 1 57-77 (African Union and the Centre for Humanitarian Dialogue, 2013).

92 Laura Rockwood, Legal Framework for IAEA Frameworks (IAEA Library, 2013).

93 The Biological Weapons Convention: An Introduction, United Nations Publication (2017).

permanent members of the UNSC should waive their right to veto with regards to matters or resolutions related to investigations of complaints.[94] This suggestion would also facilitate in upholding the principle of natural justice *nemo judex in causa sua*.[95] No specification of punishment for violation of provisions of BWC is also a major concern. As William Blackstone said, "*It is a settled and invariable principle of law, that every right when withheld must have a remedy*".[96] As we have already suggested the relegation of the UNSC from its status as the primary investigation authority in cases related to the BWC, thus we propose an alternative way for punishing the responsible state; reparations[97] in the form of restitution,[98] compensation,[99] and satisfaction[100] must be demanded from the responsible state under the Responsibility of States for Internationally Wrongfully Acts (ARSIWA).

Finally, every organization needs financial adequacy to manage its functions. The lack of funds[101] has been the least addressed issue in BWC's review conferences since its inception.[102] The measures to ameliorate the financial sustainability of the Convention ought to be urgently addressed. These could involve asking the UNODA to send invoices to the state parties at earliest and asking them to pay their past evaluated contributions without further delay. Additionally, creating a contingency fund of 10% to the cost estimates for a year would facilitate in meeting the unforeseeable requirements.[103] Moreover, a mechanism for enhancing liquidity within a budget year would succour; a reserve fund, financed by voluntary contributions should be created to serve this purpose. This reserve fund should focus on generating contribution amounting to at least 50% of the expected annual expenditure;[104] it shall be utilized as a method for financing costs of mandated exercises.

94 *Press Release GA/12091,* United Nations Meetings Coverage and Press Releases (Mar. 20, 2020,09:00AM), https://www.un.org/press/en/2018/ga12091.doc.htm; Gareth Evans, *Should the UN Security Veto be Limited?,* World Economic Forum (Feb. 5, 2020,08:00AM), https://www.weforum.org/agenda/2015/02/should-the-un-security-council-veto-be-limited/.

95 Adrian Vermeule, *Contra Nemo ludex in Sua Causa: The Limits of Impartiality*, 384 - 420 Yale L.J. (2012).

96 William Blackstone, *Commentaries on the Laws of England* 23 (1765).

97 Responsibility of States for Internationally Wrongful Acts, Art. 34 (2001).

98 Responsibility of States for Internationally Wrongful Acts, Art. 35 (2001).

99 Responsibility of States for Internationally Wrongful Acts, Art. 36 (2001).

100 Responsibility of States for Internationally Wrongful Acts, Art. 37 (2001).

101 Jenifer Mackby, *BWC Meeting Stumbles over Money, Politics,* Arms Control Association (Feb.11, 2019,11:00AM), https://www.armscontrol.org/act/2019-01/news/bwc-meeting-stumbles-over-money-politics.

102 Prevention, Response and Recovery, in Countering Bioterrorism: The Role of Science and Technology (Institute of Medicine and National Research Council, 2002).

103 U.N. BWC, Elements of a Decision on Measures to address the Financial Predictability and Sustainability of the Convention, U.N. Doc. BWC/MSP/2018/CRP. 1 (Dec. 4, 2018).

104 U.N. BWC, Elements of a Decision on Measures to address the Financial Predictability and Sustainability

In furtherance, a firm budget should be created. Proper accounting of financial documents should take place every year. Furthermore, it is proposed that careful consideration should be given to the arrears of a particular State Party before electing its citizen as an officeholder under the BWC. All the non-state parties that attend a BWC meeting should be asked to pay a certain amount of contribution in respect of the meeting attended. At the very least, the financial condition of the BWC should be an agenda in upcoming BWC meetings and conferences.

Conclusion

Conventions and Protocols play a large role in ensuring peace and stability globally. Each State voluntarily accepts a Convention and the text of the same is also decided based on the consent of the member States.[105] This requires cooperation and trust, both of which are severely hampered if feelings of suspicions infest within international relations. Additionally, wars have historically been a recurring hurdle that societies have had to face, and often they have had catastrophic results on civilians due to the usage of certain inhumane weapons. Biological weapons are a dangerous and intractable form of weapons and can destroy societies with ease if not eliminated. Therefore, a Convention such as the BWC potentially acts as a source of trust and cooperation and a barrier between humanity and a dystopian society; its goals of the elimination of biological weapons are essential for the survival of mankind. The suggestions contained in this paper are a glimpse of how the Convention can serve its purpose to its fullest.

As for the question of China and the allegations posed against it; if such allegations are true, then China would have violated the BWC. If China has manufactured the virus as a biological weapon[106], it is a direct violation of Article 1 of the Convention which prohibits the development and usage of biological toxins for hostile purposes. Further, even if China claims that in such a circumstance there was no government involvement, the mere presence of such a BW programme within their territory would constitute a violation of the duty of due diligence stipulated under Article 4 of the Convention. However, due to the shortcomings of the BWC, prima facie it cannot be conclusively held whether there was a violation of the BWC or not. China, like all accused countries, will maintain that any and all biological laboratories are only used for peaceful and developmental purposes. Due to

of the Convention, U.N. Doc. BWC/MSP/2018/CRP. 1 (Dec. 4, 2018).

105 Vienna Convention on the Law of Treaties, Art. 9 (1969), 1155 U.N.T.S. 331.

106 Dr. Adish C Aggarwala, *Complaint to the United Nations Human Rights Council, Geneva* para 5, p. 25 (April 3, 2020,08:00AM), https://www.livelaw.in/pdf_upload/pdf_upload-372096.pdf.

the barriers of secrecy, lack of evidence, lack of proper definition of what could constitute a biological weapon, no obligations to declare biological research and development, and no verification mechanisms, the veracity of either claim will be implausible to determine beyond doubt.

The BWC is in dire need of certain changes to improve its efficiency and validity, the most important of which is a verification mechanism that instills a sense of accountability in the State Parties. Each State ought to make collective efforts to build confidence and negate feelings of suspicion and secrecy which are the main reasons behind the escalation of an international crisis. They must also bear the onus of financing the BWC more responsibly as it is a Convention that will only become more and more essential with developing technology and intelligence.

To ensure that no country, organization, or group of people use the loopholes in the BWC to cause harm to the society, and to ensure that in case of pandemics such as today's coronavirus, the trust and security amongst countries are not shattered, it is imperative that these inconsistencies be addressed and rectified. This will be the international community's quantum jump towards mankind.

MARITAL RAPE - NEED FOR ITS CRIMINALISATION IN INDIA

Manasvita Tejsi* and Mridull Thaplu**

Abstract

Matrimony is a sacred bond that ties two people, and two families, together. However, if this matrimony is without consent or the people involved in the marriage are not content, then it can turn sour. Our society is inclined towards a patriarchal system from the ancient times of hunting and gathering. So, it comes as a nature for men to display emotions of dominance. Looking around the globe, law and order has a huge role in prescribing and limiting standards for human conduct. Under the Indian Penal Code, 1860, the laws have been made and appropriate punishment for the same have been provided. Neverthess, what most of the people fail to comprehend is that these laws were made by the British a long time ago. At that time, Marital Rape was not considered a crime which can be one of the reasons why it was exempted under the penal laws. This research paper substantiates and focuses solely on evolution of the rights for women; mainly the effects of Marital Rape; and the reasons how it is in violation of the Constitution of India.

Keywords: - Marital, Rape, Woman, Section 375, Dowry, Harassment, Legality, Domestic Violence, Wife

INTRODUCTION

For a long time, people believed that a woman's duty in her married life is to look after her husband, bear children, take care of household matters, cook and provide emotional and sexual needs to her husband. This was first noted in Manusmriti which is considered to be an ancient legal text and has been used to formulate the Hindu Law.

imaṃ hi sarvavarṇānāṃ paśyanto dharmamuttamam |
yatante rakṣituṃ bhāryāṃ bhartāro durbalā api ||[1]

* Student, Rajiv Gandhi National University of Law, Punjab.
** Student, Rajiv Gandhi National University of Law, Punjab.
1 GANGANATHA JHA, MANUSMRITI WITH THE COMMENTARY OF MEDHATITHI 9.6 (Vol. 2,

The same text states that it is the duty of a man to protect his wife, even if he is physically weak. This kind of stigma has been created by the society itself and men assume the role of dominance, sometimes taking it too far. The women were not given the status similar to that of their male counterparts and, before marriage, were considered the property of their fathers, and after their marriage, were considered the chattel of their husbands.[2] The father could wed off his daughter to whomsoever he deemed fit. The woman had to provide her husband with an offspring for continuation of the family line. If her husband could not provide her with an offspring, she had to get impregnated by her brother-in-law.[3] This made the woman believe that being sexually available to her husband and providing progenies was a necessity and her duty; she could never decline her husband's wishes.[4] Manusmriti contained all the laws and principles which were in the earliest days followed by the people of the subcontinent irrespective of their caste, creed or sex.

Women were considered to be the slave of man and the ill practices like Sati and child marriages were prevalent in the country but the situation in the country changed after the movement of Raja Ram Mohan Roy. Even Mahatma Gandhi took a great initiative to improve the social conditions of the women because it was the first time in the Indian Independence Struggle that women participated in the same and were at par with their male counterparts. The outcome of these very movements was a Constitution which gave equality to the women and almost all the rights that are given to the men; be it Right to Vote or Right to contest elections. Post-Independence, there were improvements and advancements in almost all the fields and focus on the life being given to woman could be made better. They were rather discriminated on the basis of their gender. The women have always fought for their rights and this was one of the main reasons why the status of women and men was equated in the Indian Constitution. There were many legislative reforms taken after the independence of the country to strengthen women and improve their status in the country so that no discrimination takes place with them. With the introduction of a Constitution, women have been granted equal social as well as political rights to that of men.

Women have been given the freedom and all the support from the constitution so that they can help in shaping the future of the country. The recent example of *Mangalyaan* is worth quoting because the whole team in the same consisted mostly of female scientists. Even though women have achieved great heights and are striving in almost all the fields whether it is education, law enforcement agencies or science and technology, there are many areas where our country lags behind.

University of Calcutta, 1920).

2 *Id.* at 9.3.

3 *Supra* note 1, at 9.59.

4 *Id.* at 5.154.

Marital Rape

Marital rape in layman's terms can be explained as a person having sexual intercourse with their spouse without their consent.

According to Section 375 of the Indian Penal Code –

> *"Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other body part, or foreign object, without the consent of the victim."*[5]

However, there is an exception provided which says that if non-consensual sexual intercourse takes place between a married couple, in that case, it will not amount to rape[6]. Domestic violence refers to the violent or aggressive behaviour within the home which involves the violent abuse of a spouse or partner[7] which takes place with a woman because the husband in all the circumstances is powerful and most males comprehend that marriage gives them the right to have sexual intercourse with the wife at any point of time whether she is willing or not. This is the face of a patriarchal society; this act is detrimental to the institution of marriage. IPC, 1860 provides for rape and punishment for rape under section 375 and 376, respectively.

Marriage is a form of social bonding between both the spouses and everything in this institution needs to have the consent of both; Justice Ahmad in the case of *Bodhisattwa Gautam v. Subhra Chakraborty* said that this *"cruel act, in turn, destroys the entire psychology of a woman and pushes her into deep emotional crises"*[8].

Marital Rape is a crime in almost all the countries of the world wherein they have either made amendments to the existing law or added a new law for the same. Marital Rape has been criminalised in around 150 countries of the world wherein countries have brought amendments in their law for criminalising marital rape. In the United States, marital rape is a crime in all the 50 states whereas in the United Kingdom the maximum legal penalty for marital rape is life imprisonment. In countries like the United Kingdom[9], Fiji it was criminalised due to decision delivered by courts, in some countries like Brunei[10] the offence

5 Section 375, The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

6 Exception to Section 375, The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

7 Section 3, The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

8 *Bodhisattwa Gautam v. Subhra Chakraborty,* (1996) 1 S.C.C. 490 (India).

9 *R. v. R,* [1992] 1 AC 599 (UK).

10 Section 375, Brunei's Penal Code.

is explicitly criminalised. In some countries like Bangladesh, India[11] the law for marital rape does not exist because women are considered the property of the husband and the state does not interfere in the institution of marriage.

Many legislations have been passed in the country to check violence towards the woman such as dowry, domestic violence or cruelty but amongst them is marital rape that has not yet been criminalized in the country. Marital Rape is inhumane and the woman knows that she has to live her whole life with the perpetrator which has a substandard physical and mental effect on her. It is a very under-reported crime in the country because most of these women know that going to the authorities will be futile as there are no laws for marital rape; they can also face social boycott.

In the 21st century, when society is well aware of their rights and needs, laws need to be amended. Indian Penal Code, 1860 provides that having sexual intercourse with a wife who is under 15 years of age, is a crime. However, there existed a loophole in this situation, According to the Prohibition of Child Marriage Act, 2006, In India, *child marriage* is only voidable and not void which means that it is not immediately illegal[12]. The minor party, when attains the age of major, can file for divorce within one year of attaining majority otherwise, the marriage is considered legal. But there existed a lacuna in the law under which there was no provision for men asking for consent with their wife aged 15-18 years, and this provided a window for husbands to have sexual intercourse with their wives till they reach the age of majority.

The Hon'ble Supreme Court in the case *Independent Thought v. Union of India*[13] raised the age of consent for marital sexual intercourse in the case of a minor wife to 18 years which was earlier 15 years for the Exception because it was violative of Fundamental Rights as well as provisions of the POCSO act of the minor wife thus amounting to discrimination between minor girls on their marital status. Though the Hon'ble bench did not comment anything on the issue of Marital Rape in a case where the age of wife is above 18 years and added that the issue presented before the court was only regarding the marital rape of a girl who is below 18 years of age and it should not be observed in any way for that of above 18 years. The court did not comment on the issue of "marital rape" where the victim is an adult wife, thus the main lacuna in the law still exists in the country.

However, Under the Protection of Women from Domestic Violence Act, 2005, the definition of domestic violence is given under Section 3(a) which says that *"harms or*

11 *Supra* note 6.

12 Section 3(a), The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).

13 *Independent Thought v. Union of India,* (2017) 10 S.C.C. 800.

injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse".[14] Sexual abuse mentioned under this definition includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman[15], which in turn gives a chance to wives to initiate legal proceedings. The drawback of this act is that it is more civil in nature than criminal. It does not provide for a period of imprisonment. Rather it provides for compensation, monetary gain, restraining and protective orders.

Effects of Marital Rape

Marital Rape leaves scars in the life of a woman; they include physical, psychological and mental health issues which hurt the emotional as well as the physical wellbeing of the women in the long run. This section is widely bifurcated into psychological and health issues that a woman may encounter during or after rape.

Psychological Effects

Women who have had encounters relating to Marital rape have had cases of depression, PTSD, fear, self-esteem issues, rape trauma syndrome and also being sexually unstable, unavailable or dysfunctional.[16] As soon as a woman is married, she is expected to fulfil her husband's sexual desire. The first time any female must have experienced this, it must come as a shock to her that such a thing might be required without her consent. Any occurrences after that must seem dreadful but numb to her but she knows there is no use denying or not obeying her partner. The woman feels her family name will be tarnished. So, she feels this pressure to maintain her family's name.

Rape Trauma Syndrome is the medical term given to the response that survivors have to rape and it is the natural response of a psychologically healthy person to the trauma of rape[17]. This may be immediate or may occur after months or even years. The victims may feel humiliated or degraded. The victims may also feel confused as to why this happened

14 Section 3(a), The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

15 Section 3(d), The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

16 Campbell, R., Dworkin, E. and Cabral, G., *An ecological model of the impact of sexual assault on women's mental health. Trauma, Violence, & Abuse*, PUBMED.GOV (June 10, 2020, 08:15 AM), https://pubmed.ncbi.nlm.nih.gov/19433406/.

17 *Surjibhai Badaji Kalasva v. State of Gujarat*, (2018) 59 (3) G.L.R. 2498.

and how could they not help themselves during the incident. Some victims may also blame themselves for being weak not to stop it or for not wanting sexual intercourse as their husbands want them to[18]. A quintessential psychological aftereffect of rape also is self-blame due to which the victim undergoes Post-Traumatic Stress Disorder because of the feeling of helplessness; not being able to help yourself from being raped and self- blaming their self to justify it.

As this issue is not even looked at as a problem so, victims may feel shame and embarrassment telling anyone about it. They feel that this is a taboo and talking about it with other people will raise eyes and questions. In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*[19], a criminal complaint was filed based on a consensual affair and a questionable finding of rape due to failure to marry. Also, in a hearing for criminalizing marital rape, Hon'ble Delhi High Court in 2018 said that: *"Force is not a pre-condition for rape. If a man puts his wife under financial constraint and says he will not give her money for household and kids expenses unless she indulges in sex with him and she has to do it under threat."*[20] All these situations put mental pressure on the victim and their children if they have any. This can cause the children to have a severe mental breakdown or go into clinical depression. It, therefore, becomes evident that such acts not only destroy a woman and her life but also have severe impacts on the health of the children leading to a whirlpool effect.

Health Issues

Although there is a provision provided in the Protection of Women from Domestic Violence Act, 2005[21], but that accounts for only civil liability for sexual abuse. The psyche behind the violent act can be to show dominance and to instil fear that if they do not get what they desire, they may resort to violence.

Most women suffer from perpetual soreness due to frequent rapes. This eventually leads to having broken ribs, knife wounds, marks on their body due to the assault, black eyes. These are just a few examples of what women may experience. Most victims have reported feeling sore and bleeding from the vaginal tract. Bleeding occurs due to intense rupture of

18 Ann Burgess and Lynda Holmstrom, *Rape Trauma Syndrome*, American Journal of Psychiatry 981-986 (1974).

19 *Supra* note 8.

20 *Delhi HC on marital rape: Marriage doesn't mean wife always ready for physical relations with her husband* THE FINANCIAL EXPRESS (Aug. 05, 2020, 11:45 AM), https://www.financialexpress.com/india-news/delhi-hc-on-marital-rape-marriage-doesnt-mean-wife-always-ready-for-physical-relations-with-her-husband/1248987/.

21 *Supra* note 7.

the vagina.[22] Those forced to have anal sex can report bleeding, pain and irritability. They may feel nausea if are somehow reminded of the incident of abuse. Amidst this unwanted pregnancy can also be caused and this further causes mental and psychological pressure on the victim[23]. This can call for premature motherhood and can seriously impact the infant in question. Infertility can also be caused due to vaginal rupture and this can cause the victim to never have children. This can seriously deteriorate the victim for the future if they would ever actually want to start family planning. They can be scarred for life. This can also drive the victims to take their own life. With the notions revolving around marital rape, and the victim not being able to tell anyone anything about the abuse, the victim may think of suicide as the only option.

Marital Rape Laws in India

Our country has advanced in almost all of the fields and there have been many amendments and new legislations in our country, but till date marital rape is not considered to be an offence in the country. The laws for protecting a woman in the institution of marriage does not exist and the matters related to the same are left to the discretion of the court.

Under Section 375 of the Indian Penal code, has mentioned exception that – *"Sexual intercourse by a man on his own wife, who is above 18 years of age, is not rape"*[24]

Under the Indian Penal Code, the instances where punishment is awarded to the husband under marital rape is as follows:

i. When the age of wife is between 12-15 years, there can be imprisonment up to 2 years or fine or both;[25]

ii. When the age of wife is below 12 years, there must be imprisonment for term which shall not be less than 7 years but can also extend to life and shall also be liable to fine.[26]

iii. When the wife is judicially separated, there can be imprisonment up to 2 years and fine[27]

iv. When the age of wife is above 18 years, the rape is not punishable.[28]

22 *Supra* note 12.

23 Sarkar J., *Mental Health Assessment of Rape Offenders*, 55(3) Indian J Psychiatry 235243 (2013).

24 *Supra* note 6.

25 Section 376(1), The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

26 *Ibid.*

27 Section 376A, The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

28 *Supra* note 6.

Hence, we can conclude that once a female crosses the age of 18 thereafter as a wife, she has no legal protection if she is sexually harassed by her husband which is also a direct attack on her human rights. It is very shocking because the Constitution has set 18 years as the legal age for marriage whereas the law will protect only those females from sexual abuse which are below 18 years of age and beyond this age limit there exists no remedy for the women.

Thus, it is depicted that the law which is meant for the safety of the victims, is not able to protect those who are victimised and have gone through the trauma of marital rape because according to the obsolete law, marriage in itself has given the consent to have intercourse at any point of time after the marriage and the consent of the female is not needed. Violence takes place with a woman due to which she has to submit herself to sexual activity and further on, she gets hurt physically as well as emotionally. Our judiciary, as well as the legislature, is still silent on the very fact that "*Is marriage a license to rape"?*

The Report of 42nd Law Commission[29] talks about the removal of exception of Section 375 from the IPC because it is discriminatory towards women and is not in accordance to the law. Even the Report of 172nd Law Commission[30] was in favour of removing the exception to Section 375 thereby making marital rape a criminal offence but more than 10 years have passed and no action has been taken on the same issue.

Constitution of India on Marital Rape

This law which seemingly permits marital rape can be challenged on several grounds some of which are enumerated herein. According to the Indian Constitution, all the laws which are passed by the legislature should follow the basic structure doctrine of the Constitution. If any law is in contravention of this, it can be declared as unconstitutional by the Courts. Any law or provision, if made, in favour of marital rape it would have to be in consonance with the basic doctrine of the Constitution.

Article 14

Article 14 of the Indian Constitution[31] guarantees the Fundamental right of equality before the law and equal protection of the laws within the territory of India. However, criminal law is still silent on the discrimination that is faced by the victims of marital rape. The

29 Law Commission of India, *42nd Report on Indian Penal Code, 1860* (June, 1971).

30 Law Commission of India, *172nd Report on Review of Rape Laws* (January, 1998).

31 INDIA CONST. art. 14.

Exception to Section 375 of IPC is a discriminatory law for the married women because there is a new stratum of women created by this law who will not get protection from the law if they face sexual harassment from their husbands which does not fulfil intelligible differentia because it is arbitrary, artificial and evasive.

Section 375 does not include rape which is done by a husband to his wife. Protecting a person from the ambit of Section 375 of the IPC based on the marital status is discriminatory and it violates the Article 14 of the Indian Constitution. Rape or marital rape is one and the same thing and the only difference is that the victim is married in the latter case, and everything else is similar to what is in the rape. It is, in turn, difficult for a married woman because she has to live her whole life with the perpetrator and they are dependent on their husband. In the real sense, this exception encourages the husbands to commit forced sexual intercourse because they know that the same is not punishable under the law. Hence, marital rape is in clear violation to Article 14 of the Indian Constitution because equal protection is not available to the female victims and it does not pass the twin test laid down in Article 14 of the Constitution in terms of intelligible differentia and reasonable nexus.

Article 21

Article 21 of the Indian Constitution says that:

> *"[N]o person shall be deprived of his life or personal liberty except according to a procedure established by law."*[32]

In the case of *Kharak Singh v. State of Uttar Pradesh*[33], the Hon'ble Supreme Court held that *"[b]y the term "life" as here used something more is meant than mere animal existence"* There have been many cases where the Supreme Court has interpreted this article and given a whole new shape to it. Under Article 21, there are many rights which are given to the citizens which include the right to health, dignity, safe environment, sexual privacy, human dignity, among others. In the case of State of *Karnataka v. Krishnappa*[34] , the Hon'ble Supreme Court held that *"[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.",* it further held that rape in itself is a serious blow to the self-esteem and dignity of the victim and it degrades her, leaving behind a traumatic experience.

32 INDIA CONST. art. 21.

33 *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 1295.

34 *State of Karnataka v. Krishnappa*, (2000) 4 S.C.C. 75 (India).

Right to Healthy and Dignified Life

In the case of *C.E.S.C. Ltd. v. Subhash Chandra*[35], the Hon'ble Supreme Court held that Right to Life also includes the Right to live a healthy and dignified life which is one of the most important things to maintain the individuality of a citizen in the country[36]. The exemption to Section 375 is a violation to the right to the good health of a married woman because marital rape causes emotional, psychological and physical problems to a woman and puts her into depression, moreover in the case of forceful sexual intercourse, there always exists a chance of transmission of STDs to the victim. There are many cases held by the Hon'ble Supreme Court wherein it talks about rape as a crime against the society and also violative of Article 21 of the Indian Constitution[37]. Hence the exemption to Section 375 of IPC is in clear violation to the woman's right to live a healthy and dignified life because sexual intercourse without the consent of the woman challenges her dignity, as well as her health, therefore it violates the very basic structure of Article 21 and is unconstitutional.

Right to Sexual Privacy

There are numerous cases in the Apex Court where it has been held that Right to Privacy is to be protected constitutionally under Article 21.[38] Therefore, any type of forceful sexual act to a woman is a violation of her privacy as it is her body and she has full right to consent to it and protect it. If we talk about sexual privacy the same has been discussed by the Hon'ble Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan*[39] where it was held that "*[e]very woman is entitled to her sexual privacy and the same is not open to for any and every person to violate her privacy"*. However, the exemption of marital rape in the IPC is violative to the right to sexual privacy of a married woman because nobody should force her to have sexual intercourse against her will. Therefore, this exemption is in violation with the Right to Privacy and therefore should be held unconstitutional.

Right to Bodily Integrity

A woman is the owner of her own body and all the decisions regarding her bodily matters are to be taken by her, without the interference of anybody, whether it is having sexual intercourse or not; that is something which is to be decided by a woman and she has the

35 *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 S.C.C. 441 (India).

36 See also *Bandhua Mukti Morcha v. Union of India* (1997) 10 S.C.C. 549, *Francis Coralie v. Union Territory of Delhi,* A.I.R. 1981 S.C. 746.

37 *The Chairman, Railway Board v. Chandrima Das*¸ A.I.R. 2000 S.C. 988 (India).

38 *Govind v. State of Madhya Pradesh*, A.I.R. 1975 S.C. 1378.

39 *State of Maharashtra v. Madhukar Narayan*, A.I.R. 1991 S.C. 207.

right to deny the same and nobody can force her; in the eyes of IPC if a woman denies sexual intercourse and is forced into it, the same is termed as rape but if a married woman is forced into sexual intercourse by her own husband, the same is not rape. Hence, the exemption to Section 375 is a violation of a married woman's right over her own body because marriage does not mean that consent for having sexual intercourse is not needed.

Hence, the exemption to the Marital Rape under Section 375 of the Indian Penal Code is in clear violation of Article 14 & 21 of the Indian Constitution. This exemption does not pass the tests of "just, fair and reasonable law" and the test of reasonable classification because it is not a fair law and is discriminatory towards a married woman and makes a distinction towards them. This exemption is now obsolete and needs not to be present in the IPC, rather India should also take strict measures to guard the rights of the married woman because there is a large portion of women who are victims of marital rape but they do not have a law which can support them; the only remedy available to them is the Section 498A of the IPC and the Domestic Violence Act. The Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mandikar* [40] held that "*A prostitute had the right to refuse sexual intercourse if she is being forced and the same is being done without her will; not withholding the same will amount to Rape.*" This is a vast problem, Indian judiciary in a plethora of cases have criminalised almost all types of rapes but made an exemption to marital rape due to which a large fraction of the females is victimised.

Human Perspective

A majority of people are in favour of not criminalizing marital rape. This creates the face of public opinion and portrays the nation in an incorrigible light. These arguments have gained momentum because most people in India are culturally active and believe that the laws that defined India a thousand years ago are prevalent even today. Moreover, these arguments hold no place in the current times because this exception is discriminatory. Here are some arguments and their rebuttal.

Arguments against Criminalising Marital Rape

The Sanctity of Matrimonial Institution

The first argument regarding not criminalizing marital rape is that it would destroy the sanctity of the marriage and this would furthermore destroy the family. The sacred bond that a husband and a wife share would be broken and the meaning of marriage would be

40 *Ibid.*

lost. Criminalization of marital rape would mean that the state is entering the fine line between home and law which creates a brick wall situation for the judiciary. Providing a legislation for the same would mean that the state is crossing boundaries and going beyond its jurisdiction. Marriage is between two people and any decision encroaching upon this line can be met with opposition and harsh criticism.

Marriage is Consent

Marriage is how two individuals enter into a legal union in their personal capacities. Similarly, people have argued that if these individuals have entered this contract on their volition then the woman has already consented to the marriage. If the marriage is not by her own choice, the parents are responsible for matching the matrimonial relation and that is considered as consent. The tradition of not asking for the woman's consent is widely prevalent. The consent of sexual relationship is thought to be given, to the husband, while consenting to marriage or getting their marriage fixed by their parents. Arranged marriage and forced marriage are two entirely different concepts. Arranged marriage is when both parties are willing to get married upon meeting each other whereas forced marriage is when either one of the parties is not consenting for marriage.

Cultural Boundaries

People have been taught to follow certain traditions, norms and values since they were infants. These values have been etched into one's brains and anything that may go beyond it or does not match the frequency is termed to be taboo. These socio-cultural norms have taught people that it is normal for a man to expect from his wife to fulfil his sexual needs. Culture is what makes a nation.

Pseudo Cases

A large majority of the people have also argued that if legislation is made on marital rape, some wives will use this as a tact to get out of their marriages or to intimidate their partners into doing anything, threatening to use the said legislation. In the case of *Arnesh Kumar v. State of Bihar,* the Supreme Court held that [s]ection 498A is being used as a weapon by disgruntled wives rather than a shield[41]. It would then be the men who would come under the scrutiny of the judiciary every second. This can create a ruckus in judicial proceedings as a plethora of false cases can be filed which will delay the justice of more quintessential cases. India still does not have the means to compensate for all the cases being delayed from years.

41 *Arnesh Kumar v. State of Bihar*, (2014) 8 S.C.C. 273.

Pre-existing Legislation

The Protection of Women from Domestic Violence Act, 2005 is said to be the remedy for marital rape. Arguments are made that if this legislation is already in force, there is no need for a separate legislation for the same in the state. Marital rape can be considered under Section 3(a) *"harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse"*.[42] An existing provision has been provided to foresee sexual and verbal abuse at the hands of the husband.

Arguments in Favour of Criminalisation

Sanctity is Distorted

When a man has sexual intercourse with his wife without her consent, the sanctity of matrimony has already been tainted. There is no option of going back and claiming that marital rape can be exempted as it is crossing the boundaries of issues between a man and his wife. Similarly, High Court of Gujarat, in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*[43], held that the "*[n]on-consensual act of marital rape violates the trust and confidence within a marriage and the prevalence of marital rape in India is what has damaged the institution of marriage"*. The Court while hearing the case observed that marriage does not make the wife a chattel of the husband and it does not give the right to violate the dignity, autonomy and privacy of the woman by coercing her into a sexual act without her free consent. The court added and said that the time has come when we need legislative intervention into the matter so that this serious problem gets solved in the earliest possible time. When the concept of sanctity has been contradicted, this argument becomes ethically flawed.

Consent is Important

The Prohibition of Child Marriage Act, 2006, makes child marriage voidable rather than void[44]. Parents can marry off their minor offspring to anyone and the children cannot take a divorce or an annulment from their spouse until they are not minor anymore i.e. 18 years of age. However, Section 375 of IPC, 1860 prohibits sexual intercourse of a man with wife

42 *Supra* note 12.

43 *Nimeshbhai Bharatbhai Desai v. State of Gujarat,* 2018 SCC OnLine Guj 732.

44 *Supra* note 14.

less than or of 18 years of age.[45] This, however, creates a loophole for those who are above 18 years of age. They have to co-inhabit with someone who may or may not force them into sexual activities against their consent. This is an old tradition that pledges marriage is consent. Being in the 21st century, these archaic laws can be changed according to the advancement of society.

Changing of Culture

Taking the mythology 'Mahabharat', it is believed that Yudhishthira bet his wife in a game of 'chauras' against Duryodhana. From ancient times, women have been objectified and have been treated as a mere chattel. In marriages, the giving away of the bride is called 'kanyadaan' by the father to the husband. A girl is deemed to be foreign to her family members and is believed to be owned by her husband. Old traditions like this should be logically debated upon and it has to be understood that in this era, women have rights and cannot be objectified. The cultural paradigm should be encouraged. This would help in evolution or banishment of old traditions which seem irrelevant.

A Criminal Liability

The Hindu Marriage Act and the Domestic Violence Act provides the women with a means so that they can remove themselves from a threatening situation in turn for a civil liability. People have argued that if there is an existing legislation for domestic violence which is inclusive of 'sexual abuse', then why do the women of India need another legislation. The Protection of Women Domestic Violence Act, 2005, only provides the offenders with civil liability. Moreover, in civil liability, the perpetrator can get away with just providing compensation to the victim. For this crime, the perpetrator needs to be imprisoned. This will set an example for the rest of the society that this crime needs to be recognized and the state will not turn a blind eye to such behaviour.

Conclusion

Justice Krishna Aiyar in the case of *Rafiq v. State of Uttar Pradesh* said that *"A Murderer kills the body but a Rapist kills the soul"*.[46] The State says this is not sacrosanct and it is the sole business between a husband and wife; the state has already made laws relating to marriage e.g. dowry, cheating, cruelty and divorce. It is the firm belief of this paper that there is an immediate need to criminalise marital rape. Adding marital rape to the list would

45 *Supra* note 25.

46 *Rafiq v. State of Uttar Pradesh*, 1980 Cr. L.J. 1344 S.C.

be nothing but a huge success for India towards healthy mental development. The state also said that criminalising marital rape would "destabilize the institution of marriage"[47] and it can be easily used to "harass husbands". When an act has already been done to taint the very sacrosanctity of marriage, how would getting justice for the very same act destabilize the marriage of the two individuals? The marriage has already been destabilized when the spouse tried or did sexually abuse their partner. The second point of 'harassing husbands' can be met with fast-track courts and their speedy trials. Setting up of various other fast-track courts all over the country would help in solving this issue of false cases. Sacrosanctity and harassment of husbands should not be reasons behind not criminalising marital rape. This could be cited as missed justice on the part of the legislature and the judiciary. There has to be a stringent punishment for marital rape. Consent should not be considered as given on the grounds of having a spouse; this is highly subjective. Marital Rape should be added as a ground for divorce which cruelty does not cover as marital rape in itself is not a law in the current scenario of the Indian Justice System.

In 2019, Advocate Anuja Kapur filed a petition in the Supreme Court to make marital rape a ground for divorce; a two-judge bench comprising of Justice S.A. Bobde and Justice B.R. Gavai, asked the petitioner to file for relief in the High Court.[48] When the state itself can be rigid in not taking any steps in furtherance of marital rape, then it can take years to get the act criminalised. There is a need to criminalise the same because these steps are necessary to be taken so that the married woman can also use the law to address their grievances. Marital rape will only be criminalised when the distinction between rape and marital rape is understood.

Sensitisation of marital rape is the need of the hour. As a society, we are tremendously cultural and put traditions on a pedestal. This ceases the need of discussing about taboos. Turning a blind eye towards these taboos will not solve the problem itself; the problem still looms. Marital rape cannot be put in force until the very own citizens of the nation are familiar itself with the same. Even if marital rape becomes a crime, there would have to be a thorough explanation of the said act/statute. Awareness of marital rape would have to be made in order to achieve the zenith of justice. Various organisations have been committed towards the same but until the citizens do not bring the attention of the judiciary to how grave the issue already is, no big steps will be taken. Studies show that 70 per cent of women have experienced physical and/or sexual violence from an intimate partner in their

47 *Nimeshbhai Bharatbhai Desai v. State of Gujarat,* 2018 SCC OnLine Guj 732.

48 *Marital rape as ground for divorce: SC asks petitioner to approach Delhi HC,* BUSINESS STANDARD (Aug. 06, 2020, 02:00 P.M), https://www.business-standard.com/article/news-ani/marital-rape-as-ground-for-divorce-sc-asks-petitioner-to-approach-delhi-hc-119070100334_1.html.

lifetime.[49] This goes against the very thing our forefathers fought for- fundamental rights. Article 14 and Article 21 of the Indian Constitution talks about equality and freedom of life and liberty. India needs to take a decision on the furtherance of marital rape. In a land where goddesses are revered and worshipped, India can certainly not afford to stay silent on this issue any further. Doing so would be a gross miscarriage of justice.

49 World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, *Global and Regional Estimates of Violence against Women,* WORLD HEALTH ORGANISATION (Aug. 06, 2020, 02:30 PM), http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/.

Buyers' Cartels – Two Differing Opinions by the Competition Commission of India

Hartej Singh Kochher*

Abstract

The author, by way of this study, would shed light on how the CCI has given diametrically differing views in two separate cases on the issue of "buyers' cartels". The two cases would be contrasted and studied and the legal rationale behind them would be understood. Further, this paper will also dwell on the proposed change under the Draft Competition (Amendment) Bill, 2020 to amend the definition of a 'cartel' under the Act. The impact of the proposed change would be gauged and finally, the author will offer his suggestions on the "buyers' cartels' jurisprudence of the CCI and the proposed change to the definition of a 'cartel'.

Critical Analysis

Competition Commission of India (hereinafter referred to as "CCI"), is the regulatory expert body[1], tasked with addressing competition concerns in the Indian market. It was constituted under the Competition Act, 2002. According to the author, the CCI, in its domain, has functions which can be divided into four broad spheres- (i) to prevent anti-competitive agreements in the market; (ii) to prevent the abuse of a dominant position enjoyed by an enterprise in a market; (iii) to regulate combinations which are proposed and finally; and (iv) competition advocacy.

Under the first sphere, i.e. to prevent anti-competitive agreements, the CCI has powers to strike against "*Cartels*". The Competition Act gives us an *inclusive* definition of a cartel, stating that it "*includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services*".[2]

* Assistant Professor of Law, ICFAI Law School, Hyderabad.

1 The status of the CCI as a regulator performing roles which are administrative, quasi-judicial and that of an expert body in nature has been emphatically stated in *Brahm Dutt v. Union of India*, A.I.R. 2005 S.C. 730 and more recently, in *Mahindra Electric Mobility Ltd. v. CCI*, (2019) SCCOnline Del 8032.

2 Section 2(c), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

Hence, according to this definition, an '*agreement*' which points to some '*collusion*' is necessary to constitute a cartel.

Section 3 of the Competition Act, is the operative provision, which explicitly prohibits '*anti-competitive agreements'*.[3] One such sub category of anti-competitive agreements which are frowned upon are agreements between parties engaged in "*identical or similar trade of goods or provision of services*".[4] It is under this sub-category, that the Act, explicitly mentions any agreement between 'cartels' to be presumed as an anti-competitive agreement[5] if it satisfies any of the following circumstances- (i) it fixes prices; (ii) it fixes output; (iii) it divides the market; or (iv) it enables bid rigging or collusive bidding.[6]

While the CCI has adjudicated upon various cases which deal with 'cartels' per se, there have only been two instances[7], where the regulator has been specifically called on to settle action against what could be called "*buyers' cartels*".

It was in *Pandrol Rahee Technologies Pvt. Ltd. v. Delhi Metro Rail Corporation and Ors.*[8] (hereinafter referred to as "*Pandrol*") that a question pertaining to a buyers' cartel, came up before the CCI for adjudication, for the very first time. Anti-competitive conduct was alleged by the informant, in light of subsisting agreements, by the five Opposite Parties in the procurement of the *"rail fastening systems for ballastless track in metro rails"* in India. An argument for abuse of dominant position was also advanced.

It was claimed that the Delhi Metro Rail Corporation (DMRC) had not initiated any tendering process for the said procurement. This tendering process was stated to be an incumbent responsibility upon a public body. Other Metro rail projects in different cities were also recommended the procured products by the DMRC.

In the final decision, the procurer was adjudged to be a consumer i.e. a buyer, per the majority's opinion, since the "*production chain can be said to end where the last transaction takes place and after which point the utility of the product or service is consumed by the person who buys it*". This criterion, of being the end consumer, of a good or service, was satisfied by the DMRC and the other metro projects. As per the opinion, even though this

3 Sections 3(1), 3(2), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

4 Section 3(3), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

5 The burden, hence, shifts on the parties accused thereof to disprove.

6 For a more detailed discussion on the conditions, please see Sections 3(3)(a), 3(3)(b), 3(3)(c), 3(3)(d), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

7 In the research of the author.

8 Case No. 3 of 2010 (Competition Commission of India, 07/10/11). One order given by the majority and one dissenting order. This study will only be confined to the majority order as the dissent did not address any of the issues relevant for this study.

was a public body, it was an entity which was a representative consumer on behalf of the public, and a consumer was expected to know what was best for him. Consequently, a consumer could freely select a product by exercising consumer choice.

The legal rationale advanced was that the considerations stated under Section 19(3), which are taken into account to determine appreciable adverse effect on competition, did not contemplate a purchaser to be able to cause competitive harm. Further, Section 3(3), categorically, states that sub-units forming a cartel, are required to be engaged in "*identical or similar trade*"[9], and the term '*acquisition*' was not stated in the definition of '*trade*'[10] under the Act. Hence, any sort of acquisition i.e. purchase, did not fall in the definition of a 'trade' and thus, no purchaser/ consumer could be brought under the bounds of Section 3(3). As a consequence, a buyers' cartel would be outside the regulatory jurisdiction of the CCI.

After some considerable gap, a second case pertaining to buyers' cartels came up for hearing before the CCI in the form of *XYZ v. Indian Oil Corporation Ltd. and Ors.*[11] (hereinafter referred to as *"XYZ"*). As per the information supplied by the informant, the Opposite Parties had allegedly indulged in collusive/ joint tendering. Three public sector oil companies were the Opposite Parties, and the tender was concerned with procurement of services of Tank Trucks for transportation of LPG cylinders. The CCI, while detailing the factual matrix of the case, clearly expressed that *"...the Commission notes that in the present case the Informants have alleged an existence of a buyer/purchase cartel. Section 3(1) and 3(3)(a) covers both sellers' as well as buyers' cartel..."*

According to the decision, Section 3(1), which prohibits anti-competitive agreements, explicitly used the term '*acquisition*'. Pricing fixing[12] by a cartel is to be treated as a per se violation under Section 3(3). Hence, it was clearly mentioned in the verbiage of the Act itself that fixing of a purchase price by a cartel was a violation. As a result, buyers' cartels came under the jurisdiction of the CCI.

However, taking into account a peculiar aspect of buyers' cartels, it was observed, *"... the creation of 'buyer power' through joint purchasing agreements may rather lead to direct benefits for consumers in the form of lower prices bargained by the buyers"*. Thus, *"... treating buyers' arrangement/cartel, at par with sellers' cartel may not be appropriate"*. Hence, each case, with its unique factual matrix, needs to be adjudicated upon individually while taking the possible benefits to a consumer of a buyers' cartel into account.

9 Of either goods or services.

10 Section 2(x), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

11 Case No. 5 of 2018 (Competition Commission of India, 04/07/18).

12 Section 3(3)(a), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

The CCI did not venture to discuss the definition of "*trade*" as it had referenced in the *Pandrol* case. To the author, the reasoning given in *Pandrol* seems to stand on firm legal footing and the decision in *XYZ* is erroneous.

Section 3(3) of the Act states the "*identical or similar trade*" criteria and even though the Opposite Parties in *XYZ* were in the identical/ similar trade, they were '*acquiring*' the service (of the trucks) for their consumption, thereby, becoming end users of the service. They were not going to further 'trade' in the services they acquired, thus, satisfying the letter of the law, strict interpretation followed in *Pandrol*. A consumer, as per a strict reading of the Act, cannot be interpreted to be a constituent of a cartel. Buying goods or services for final consumption cannot be stated to be a '*trade*' under the Act.

An even more perplexing omission is regarding the absence of *Pandrol* in the *XYZ* order. This situation followed even after *Pandrol* being the only other case the CCI had inquired into pertaining buyers' cartels. This leads to a scenario where precedent ceases to be of concern and ad-hoc adjudications can be made in any matter. If a previously decided case is referred to explicitly, its decision-making rationale can be relooked at. It can be affirmed fully or partially or overruled fully or partially. It gives a certain stability to the jurisprudence.

In the present scenario, we have two wildly differing opinions regarding the ability of the CCI to inquire into buyers' cartels. If *XYZ* is the correct law, then the Opposite Parties in the *Pandrol* matter slipped through the jurisdiction of the CCI. If *Pandrol* is correct, the CCI should have not gone beyond the preliminary inquiries in *XYZ,* after it realized that the case pertained to buyers' cartels.

Further, if the previous case was referenced and specifically overruled, a situation with two diametrically opposing decisions in the same realm would not have come into being. It has been held by the Apex Court itself that "*The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs".*[13] In light of the two different perspectives on the issue of buyers' cartels, it is the individual, who cannot gauge the impact of his transaction and thus, cannot determine whether he or she is falling foul of the Competition Act or not.

In the opinion of the author, a possible line of argument in *XYZ,* to justify the inclusion of a buyers' cartel within the definition of a 'cartel' under the Act, could have been the fact that

13 *Union of India & Anr. v. Raghubir Singh (Dead) by LRs. Etc.*, A.I.R. 1989 S.C. 1933.

the definition given and stated in full above, is inclusive in nature and thus, not exhaustive.[14] Hence, a buyers' cartel, can be envisaged within the definition of a cartel itself. However, no such reasoning was pursued. In spite of this, the hurdle created by the definition of 'trade' not containing the word 'acquisition' remains. It becomes pertinent to note that the definition of 'trade' furthers that '*control of goods'* constitutes a trade.[15] When a buyer buys a good, it comes within his or her control, hence, a consumer could be brought under the definition of trade. This would, plainly, be quite a stretched legal reasoning.

Adding to the intrigue is the recommendation of the Competition Law Review Committee (CLRC) to incorporate the word 'buyer' in the definition of a cartel.[16] Based on the recommendations of the CLRC, a Draft Competition (Amendment) Bill, 2020 has been put out in the public domain to seek comments from the public at large. The Draft Bill, in consonance with the recommendations of the CLRC has duly proposed to amend the definition of 'cartel' in Competition Act, 2002 by incorporating the word 'buyer' in it.

Under Section 2(c), the definition of a cartel as proposed to be amended by the Draft Bill would be (with proposed amendments underlined and in italics):

> *"cartel" includes an association of producers, buyers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit or control or attempt to limit or control the production, distribution, sale or price of, or, trade in goods or provision of services."*[17]

However, no amendment is proposed to the definition of 'trade'. Hence, the questions raised by the reasoning in the *Pandrol* order still remain. The CLRC, in its report while suggesting the said amendment, only referenced the *XYZ* decision, and stated that in its decisional practices, CCI has recognised that Section 3(1) and 3(3), cover both buyers' and sellers' cartels.[18] Thus, the *Pandrol* decision seems to have been completely discarded and the way forward seems to be in sync with the reasoning advanced in *XYZ*.

14 Section 2(c), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

15 Section 2(x), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

16 Ministry of Corporate Affairs had constituted a Competition Law Review Committee ("CLRC") in 2018 to ensure that the Act *"is in sync with the need for strong economic fundamentals". Government constitutes Competition Law Review Committee to review the Competition Act*, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:00 AM), https://pib.gov.in/PressReleseDetail.aspx?PRID=1547975.

17 Draft Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIRS (Apr. 28, 2020, 11:00 AM), http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf.

18 *Report of the Competition Law Review Committee*, GOVERNMENT OF INDIA, MINISTRY OF CORPORATE AFFAIRS (May 20, 2020, 10:05 AM), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

Rathnayake Tharanga Lakmali v. Niroshan Abeykoon: Sri Lankan Supreme Court Recognises Custodial Death as a Violation of Right To Life

Raj Krishna* and Kumar Mukul Choudhary**

Abstract

Police brutality is a point of concern for the entire world. Post the George Floyd incidence, questions have been raised all over the world on the extent of force which can be used by the law enforcement agencies for maintaining law and order. Similar questions were also raised before the Supreme Court of Sri Lanka in the case of Rathnayake Tharanga Lakmali v. Niroshan Abeykoon wherein the Court held that custodial death violates right to life of an individual and therefore, is prohibited by law.

In the light of the above facts, the authors in this case comment have analysed the judgement of the Sri Lanka Supreme Court. The authors have also discussed about the impact this judgment will have on the Sri Lankan constitutional and human rights jurisprudence. Furthermore, the authors in this case comment have also discussed about the significance of this ruling for the Indian legal system.

Introduction

"The rule of law doesn't mean the police are in charge,
but that we all answer to the same laws"

- Edward Snowden

Custodial torture is a major disgrace for a society governed by rule of law. The most pertinent question before any adjudicating authority dealing with the issue of police brutality is that, to what extent deference may be provided to law enforcement agencies in matters of use of force for implementation of law. Furthermore, whether rule of law should be implemented

* Student, Chanakya National Law University.
** Student, Chanakya National Law University.

by courts in formal sense or substantive sense while determining these questions? Should authorities be given free hand or should they be held accountable for their acts just like a common man? There are many such questions which pop up when we discuss about the use of force by police authorities.

The U.S Supreme Court has answered these questions by way of qualified immunity. Initially the Court held that *"[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."*[1] As a result police officials were provided with immunity from civil suits for their actions. But for grant of such immunity mental intent of the police officers has to be seen which should not be malicious. However after sometime this requirement was also diluted. Furthermore to protect the officials the courts applied the test of reasonableness instead of trials to see whether the action of the official would reasonably violate law or any constitutional principle.[2] As a result cases of police brutality increased in United States.

Recently, similar questions were raised before the Sri Lankan Supreme Court[3] i.e. to what extent deference may be provided to law enforcers in their act of use of force upon general public. The Supreme Court of Sri Lanka in the landmark judgment has held that "*extra-judicial killing of a detainee in police custody violates the fundamental right to life of an individual, despite the fact that there is no explicit right to life mentioned in the Sri Lankan Constitution.*[4]*"* Furthermore, the standard of evidence required to make police accountable must not be too burdensome. This would make contention of victim too hard to prove and would give a free hand to the law enforcement authorities.[5]

Facts of the Case

This Fundamental Right application was filed by the wife of the deceased Rathnayake Tharanga Lakmali, on behalf of her husband Ranamukage Ajith Prasanna who died in a Police Custody on September 18, 2010. The petitioner in her application contended before the Supreme Court that her husband was wrongly arrested and detained. After arrest, her husband was subjected to torture, cruel inhuman treatment and was eventually killed by

1 *Pierson v. Ray*, 386 U.S. 547 (1967).

2 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

3 *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon*, 2019 SCCOnLine SLSC 14 (Supreme Court of Sri Lanka).

4 *Id.* at 14.

5 *Id.* at 12.

the police officials in the custody. As a result, several police officers from the Embilipitiya Police Station were made respondents in this case.[6]

However, the respondents argued that the arrest of the deceased was a lawful arrest and the deceased was not subjected to any torture, cruel, inhuman or degrading treatment. Furthermore, the Respondents claimed that the death of the petitioner's husband was merely accidental and thus justified by law.[7]

Critical Analysis of the Judgment

On the basis of arguments of both the parties and the post mortem report, the three-judge bench of the Supreme Court held that the respondents and the State have infringed the Fundamental Rights of Ranamukage Ajith Prasanna guaranteed to him under Articles 11[8] (which says *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*) and 13(1)[9] (which says *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*) of the Constitution. The Court in its judgement further observed that, the Sri Lankan legal system provides for investigation, inquiry, trial, and punishment by proper authorities. As per Article 13(4) of the Constitution, *"no person shall be punished with death or imprisonment except by order of a competent court.[10]"* Though the Constitution of Sri Lanka does not explicitly recognize right to life. However, it has been held that Article 11 (freedom from torture) read with Article 13(4) (freedom from arbitrary punishment) recognizes, by necessary implication, right to life under Sri Lankan Constitution.

This judgment of the Sri Lankan Supreme Court has been hailed as a landmark judgment for holding constitutional values and essential principles of victim justice. It should also be appreciated for being given in a nation which holds such a grim record in the field of protection of human rights.[11]

---

6 *Id*. at 4-5.

7 *Id*. at 9.

8 Article 11 "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Constitution of Sri Lanka 1978.

9 Article 13(1) "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The Constitution of Sri Lanka 1978.

10 Article 13(4) "No person shall be punished with death or imprisonment except by order of a competent court." The Constitution of Sri Lanka 1978.

11 U.N High Commission for Human Rights, '*Report of OHCHR Investigation On Sri Lanka*' 16 September 2015, A/HRC/30/CRP.2.

In this judgement another contention raised by the respondents was that the victim was an aggressive criminal having relation with underworld and doing contract killings. Therefore, deference should be provided to police in matter of extensive use of force. To prove this point, they also relied upon *Jeganathan v. Attorney General,*[12] wherein the Supreme Court held that *"The petitioners' allegations against the 4th and 5th respondents if proved will carry with them serious consequences for these respondents. Furthermore, the allegations are of a very serious nature. They must therefore be strictly proved. This degree of cogency is seriously lacking in these proceedings which must fail.*[13]" This implies that to support the proposition that allegations of torture and extra-judicial killing which are of a very serious nature must be strictly proved.[14] But in the present judgement, Court did not accept the above-mentioned proposition. The Court further held that, even though victim was barbaric criminal causing severe law and order problems. But on the day of encounter, police took him out with minimal security.[15] They have even not entered the record of such investigation in their record book.[16] Furthermore, by way of post-mortem report it came to the knowledge of the court that severe injuries have been caused to the victim in the police custody. The court held all of these evidences are sufficient proof of improper working of police.[17] The Supreme Court further held that merely because prisoner is a hardcore criminal, it does not power the authorities to commit gruesome acts upon the prisoner and take his life and liberty away without proper application of the law. This could be gathered from following words of the court- *"Our legal system provides for investigation, inquiry, trial and punishment by proper authorities which is the base of democracy and the Rule of Law. As per Article 13 (4) of the Constitution, no person shall be punished with death or imprisonment except by order of a competent court. Hence, even a convicted criminal has a right not to be arbitrarily deprived of his life except in accordance with procedure established by law.*[18]" By these words courts not only recognised the right of the prisoners but it also incorporated principles of rule of law in substantive sense i.e. substantive version of the rule of law described by Tamanaha as the "social welfare" concept, which "imposes on the government an affirmative duty to help make life better for people, to enhance their existence, including effectuating a measure of distributive justice.[19]" The Supreme Court of

12 *Jeganathan v. Attorney General*, (1982) 1 Sri LR 294 (Sri Lanka).

13 *Supra* note 3.

14 *Ibid.*

15 *Id.* at 10.

16 *Id.* at 9.

17 *Id.* at 14.

18 *Id.* at 12.

19 BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1644 (Kindle ed. 2004).

Sri Lanka vide this judgment imposed the duty upon the government and the executive to look after the rights and interest of the prisoners to protect their basic fundamental rights.

However, there are certain grounds on which this judgment can be questioned. Some of the grounds are as follows: -

Restrictive Constitutional Interpretation

On page 13 of the judgment, the court has recognized that Constitution is a living document and should be interpreted liberally.

> *"The Fundamental Rights Chapter in our Constitution does not expressly refer to a right to life. However, the Constitution, as a living document, should not be construed in a narrow and pedantic sense. I am of the view that constitutional interpretation should be informed by the values embodied in it.*[20]*"*

However, at the time of ratio, the court has emphasized upon its earlier judgment[21] in which the Court has recognized life as a mere existence and distinct from dignified existence. Thus, it can be said that right to life has not been recognized by the Court in its absolute sense which in turn puts rights of weaker section of public in jeopardy.

Evasive Approach of the Court

The Supreme Court took nearly 10 years to deliver this verdict, whereas the Sri Lankan Constitution under Article 126(5)[22] (which says *"The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.")* provides that petitions related to fundamental right should be disposed of within two months of filling.

However, the Sri Lankan Supreme Court in another case[23] has held that this regulation is not mandatory. This creates a negative impact upon the ambitions of general public to stand against wrongs committed by state. It brings uncertainty in their mind with regards to time and resource required to protect their rights.

---

20 *Supra* note 3.

21 *Sriyani Silva v. Iddamalgoda*, *Officer-in-Charge, Police Station Paiyagala and Others* (2003), 2 Sri LR 6 (Sri Lanka).

22 The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

23 *Visuvanagam v. Liyanage,* [1983] 1 Sri LR (Sri Lanka).

Non Determination of Duty

The Sri Lankan Supreme Court in its judgement observed that fundamental rights have been violated under the constitution. But still it did not order the investigation of killing. Furthermore, it also doesn't determine that whether the killing was intentional or not. The court in its judgement also failed to understand that monetary compensation may be sufficient for victim, but not for the public in general. The court in this matter should have decided that what amounts to ex-judicial killing or torture along with what liability can be imposed upon accused if such acts were committed. If the same would have been done then the judgment of the court would have created a deterrent impact upon the authorities which may have retracted such horrendous acts in future.

Significance of this Ruling for the Indian Legal System

This judgment of the Sri Lankan Supreme Court is even important for the Indian Legal System. In India, police encounters, custodial deaths and brutalities are common phenomenon and courts often find themselves incapable of dealing with such issues. The Supreme Court of India in *D.K Basu*[24] judgement has laid down guidelines pertaining to arrest which has also been incorporated into the provisions of Cr.P.C and Evidence Act. But, still the approach of police officials towards torture and brutalities has not been transformed in any sense. According to latest report of N.C.R.B, since 2005 to 2017 more than 1300 people either died or disappeared from police custody[25].

There are provisions in Cr.P.C., which provides for enquiry by judicial magistrate in case of custodial death. But only in 20% of the above-mentioned cases these enquiries were ordered.[26] This undoubtedly shows lethargic approach of courts and authorities to act against custodial death or torture. The main reasons behind custodial deaths are ancient investigative approach of police and too much burden of work upon officers.[27] This results into confession by way of torture and brutality. Although, Supreme Court always condemned this manner of confession. But lacklustre approach of lower courts in dealing with enquiries does provide police officers deference for their actions. This approach of lower courts has on many occasions restricted authorities from taking action against culprit

24 *D.K. Basu v. State of West Bengal,* (1997) 1 S.C.C. 416.

25 *Excerpts from the W.P. (Crl.) No. 354/2019*, LIVE LAW (June 10, 2020, 10:00 AM) https://www.livelaw.in/pdf_upload/pdf_upload-369455.pdf.

26 *Ibid*.

27 *Bound by Brotherhood*, HUMAN RIGHTS WATCH (June 12, 2020, 10:05 AM), https://www.hrw.org/report/2016/12/19/bound-brotherhood/indias-failure-end-killings-police-custody.

officers because deference provided to them by lower courts.[28] These tactics of judiciary and authorities has further undermined the right of weak and vulnerable.

Furthermore it is also an accepted view in the Indian Legal System that police encounters are necessary. The Supreme Court of India while dealing with the legitimacy of encounters has pointed out in *Public Union for Civil Liberties v. Union of India*[29] that *"if the version of the police with respect to the incident in question were true there could have been no question of any interference by Court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the Court to say how the criminals should be fought.*[30]*"*

Even Section 46 of the Code of Criminal Procedure permits police encounters in India. The acceptance of validity of encounters in our legal system is based upon a misleading fact. The fact is that the State and the accused are on the same footing and the authorities do not have any other option than encounters.[31] This assumption can be rejected with the help of present judgment of the Sri Lankan Supreme Court. It is because in this case the court deviated from the strict proof and recognized the unequal footing of the petitioner and the respondent in the given case.[32]

The Indian courts should also follow their Sri Lankan counterparts in cases involving police brutality instead of saying that they cannot do much.[33] The Indian Courts should accept that police hold sheer power of state sovereignty from which the citizens require thoughtful protection, who are no way close to police power.

Furthermore, Parliament has a responsibility to protect vulnerable people from the access of the law enforcement agencies. Hence it is expected from the legislature that they will bring legislation to limit the extensive use of force by police officials. For this purpose, they can rely upon recommendations of 273rd report of Law Commission.[34] Furthermore,

28 *Ibid*.

29 *Public Union for Civil Liberties v. Union of India*, A.I.R. 1997 S.C. 1203.

30 *Ibid*.

31 The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

32 *Ibid*.

33 Utkarsh Anand, *Courts Can't Do Much: SC Adds 'Peace' Caveat to Hear Pleas Against Police Crackdown on Jamia, AMU Students Tomorrow*, NEWS 18 (June 9, 2020, 11:00 AM), https://www.news18.com/news/india/courts-cant-do-much-its-law-and-order-problem-sc-refuses-to-hear-plea-on-violence-in-jamia-2425595.html.

34 Law Commission of India, *Implementation Of United Nations Convention Against Torture And Other Cruel, Inhuman And Degrading Treatment Or Punishment Through Legislation*, Report No. 273 (Oct. 2017).

the law commission has also annexed a draft prevention of torture bill[35] which could help legislature in forming a new law. Therefore, it could be anticipated and wished that parliament possibly will bring a law in future to prevent torture in this vibrant democracy in order to protect the rights of most vulnerable in the society.

CONCLUSION

This judgment of the Sri Lankan Supreme Court may not be of much significance for the Western democracies. However, in a country like Sri Lanka which has history of torture and war crimes,[36] recognition of constitutional principles and rule of law is a great achievement.

This judgment further brings a new hope that Sri Lanka will now ensure rights to its prisoners and vulnerable. Even though this judgment can be criticized on various grounds but it deserves an appreciation because this judgment has recognized the rights of the prisoners and other constitutional principles. The Court vide this judgment has tried to remind the authorities that even a convicted criminal has a right not to be arbitrarily deprived of his/ her life except in accordance with procedure established by law.

At last the authors will like to conclude by saying that the judges while deciding the case of police brutality should remember the lines of Justice White [U.S. Supreme Court Judge] from the case of *Wolff v. McDonnell* wherein he observed that, *"A prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons."* [37]

35 *Ibid*.

36 *Supra* note 11.

37 *Wolff v. McDonnell*, 418 US 539.

Dissecting The 100% Reservation Case: Case Analysis of Chebrolu Leela Prasad Rao & Ors. v. State of A.P. & Ors.

Jaideep Singh Lalli*

Abstract

This paper is first and foremost, an exercise of separating the ratio from the obiter for a 152-page judgment to allow the reader to engage with the reasons given by the Court for arriving at its decision with considerable ease and provides an account of the author's opinion not just on the Court's reasoning but also on the unfair criticism that the judgment has received from other academicians. Discussing the SC's view on Andhra Pradesh's policy of reserving 100% seats for the post of school teachers in Scheduled Areas for local S.T. candidates to conclude that the Apex Court's preoccupation with the constitutional repugnancy of a reservation to the tune of 100%, relegated the issue of examining the justification for the policy to haughty disdain that lacked reasonable substantiation.

Keywords: 100% reservation, Chebrolu Leela case, Scheduled Areas, teacher absenteeism

Introduction

Judicial review of reservation and preferential treatment policies has been quite the spectacle ever since cases like *Kesava Iyenger v. State of Mysore*[1], *M.R. Balaji v. State of Mysore*[2], *T. Devadasan v. Union of India*[3], *State of Kerala v. N.M. Thomas*[4], *A.B.S.K. Sangh (Railway) v. Union of India*[5] and a catena of others started to surface in the realm of academic scrutiny. The instant case is yet another intriguing instance of the Apex Court's

* Student, Universal Institute of Legal Studies, Punjab.

1 *Kesava Iyenger v. State of Mysore*, A.I.R. 1950 Mysore 20.

2 *M.R. Balaji v. State of Mysor*e, A.I.R. 1963 S.C. 649.

3 *T. Devadasan v. Union of India*, A.I.R. 1964 S.C. 179.

4 *State of Kerala v. N.M. Thomas,* A.I.R. 1976 S.C. 490.

5 *A.B.S.K. Sangh (Railway) v. Union of India*, A.I.R. 1981 S.C. 298.

exercise of its power of judicial review of a policy which in its opinion fails to pass the test of rationality. Jurisprudence on the essentials of the constitutional scheme of equality (specifically, that of access to educational and public employment opportunities) has undergone marked interpretative change throughout the period since the late 1950s; all of which achieved finality to a considerable degree in the nine judge bench judgment of *Indra Sawhney v. Union of India*[6]. Principles like the 50% ceiling on vertical reservation, creamy layer exclusion and compelling reasons (like backwardness, inadequacy of representation and efficiency) developed in *Indra Sawhney* have enjoyed axiomatic judicial imprimatur since their consecration in *M. Nagaraj v. Union of India*[7]; the same trend has been followed more recently in *Jarnail Singh v. Lachhmi Narain*[8]. The *Chebrolu Leela Prasad Case* is a further addition to the long list of judgments that have predicated their rejection of outlandish reservation proportions on the principles evolved in *Indra Sawhney*. However, it appears that the *ratio decidendi* of the Court is preoccupied with the abhorrence of the 'percentage' amount prescribed for the reservation, to the exclusion of providing enough reasoning for why the actuation or reason of ushering such a 100% reservation policy is itself repugnant.

Contextualising the Judgment's Discussion

Factual Matrix: Tracing Governmental Obstinacy

The seemingly problematic reservation policy under challenge in the instant case was not the starting point of the controversy. The genesis of the issue was that the Governor of the erstwhile State of Andhra Pradesh (hereinafter abbreviated as 'A.P.'), in exercise of his powers under para 5(1), Schedule V to the Constitution of India issued G.O.Ms. No. 275 (dated Nov. 5, 1986) by which the posts of teachers in educational institutions in the scheduled tribe (hereinafter abbreviated as 'S.T.') areas had to be reserved for S.T.s only. But in Aug. 1989, the notification was quashed by the A.P. Administrative Tribunal. Another notification, G.O.Ms. No. 73 (dated Apr. 25, 1987) had been issued to amend G.O.Ms. No. 275, by which non-tribals were allowed to hold the post of teachers in the scheduled areas till such time any qualified local tribals were not available. Subsequently, non-tribals who had been appointed as teachers in such areas filed a writ petition in the High Court of A.P. against termination of their services. The High Court then declared G.O.Ms. No. 73 and the advertisements pursuant to that notification as violative of Article 14 of the

6 *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477.

7 *M. Nagaraj v. Union of India*, (2006) 8 S.C.C. 212.

8 *Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors.*, (2018) 10 S.C.C. 396 (India).

Constitution of India. Later, the Government issued a new notification (G.O.Ms. No. 3 dated Jan. 10, 2000; hereinafter referred to as 'the impugned notification') that provided for 100% reservation for the posts of teachers in schools located in Scheduled Areas in A.P. to the local S.T. candidates only, out of whom 33 had to be women. A 'local S.T. candidate' was one who either himself was continuously residing or whose parents had continuously been residing in the scheduled areas of the district of which they were residents since Jan. 26, 1950. The tribunal set aside this notification again. Thereupon, writ petitions were filed at the A.P. High Court, where a three judge bench upheld the constitutionality of the impugned notification by majority. The aggrieved parties then preferred appeals to that decision at the Supreme Court, following which, the matter was referred to a Constitution bench of five judges (comprising Arun Mishra, Indira Banerjee, Vineet Saran, M.R. Shah and Aniruddha Bose, JJ.). The bench delivered a unanimous opinion on the legal questions referred to it. The case was decided on Apr. 22, 2020, and the judgment was delivered by Justice Arun Mishra. The bench came down heavily on the government for its obduracy in pushing for a policy that had previously been declared invalid by the tribunal, by issuing a new notification with a similar purpose.

The Majority Opinion Imbroglio: Scrutinising A.P. High Court's Reasoning

The A.P. High Court's majority ruling upholding the validity of the 100% reservation notification was based on four basic arguments: firstly, that the Governor possessed the power to issue the notification as per para 5(1), Schedule V to the Constitution, the non-obstante clause of which overrides all other provisions in the Constitution including Part III; secondly, that the policy was based on intelligible differentia and the classification had a nexus with the object sought to be achieved since the reservation was being provided in light of absenteeism of staggering proportions, of teachers in schools situated in scheduled areas; thirdly, the Court sought to legitimise the necessity for the impugned policy by shrouding it with the claim that the scheme aimed at increasing literacy in scheduled areas by way of ensuring that teachers are available; and fourthly, the Court attempted at using the scope allowed in *Indra Sawhney* for the existence of exceptional scenarios where the 50% ceiling limit could be relaxed in to say that the ceiling limit wasn't an absolutist ordainment.

The minority opinion of the High Court naturally, projected an entirely different viewpoint. The judge asseverated that providing 100% reservation by its very nature was the antithesis of the constitutional structure of equality of opportunity, since the impugned policy was discriminatory not just to the open category, Scheduled Caste and Other Backward Classes candidates but also to those S.T. candidates who did not pass the arbitrarily fixed 'local S.T.

candidate' threshold. It was emphasized that the exception for the 50% ceiling permitted little relaxation, and that absenteeism by itself was not sufficient to justify the dogmatic policy. All these arguments were eventually considered by the five judge Constitution bench to arrive at its final decision.

Overview of A.P.'s Legal Framework on Reservation: Rules in 'Act'ion

The percentage amount of reservation to be provided to different classes in A.P. was substantively regulated by Rule 22 and 22A of the A.P. State and Subordinate Service Rules, 1996 (hereinafter referred to as 'the Rules'), which had been made under the proviso to Article 309 of the Constitution of India. The A.P. Regulation of Reservation and Appointment to Public Services Act, 1997 ((hereinafter referred to as 'the 1997 Act') *inter alia*, ensured that the scheme of reservation specified in Rule 22 is observed. The Act itself however did not spell out any percentage specifications for reservation. Apart from this scheme of reservation, as per Presidential Order[9] issued under Article 371D of the Constitution, aspiring candidates of any category could not apply for teaching posts outside the district/zone of their residence, which is why the Appellants asserted that the impugned notification would result in unfair ramifications since residents belonging to other categories in the scheduled areas would be completely deprived of the opportunity to apply (because, they can neither apply for the posts of these areas due to the 100% S.T. reservation and nor can they apply for posts outside such areas since the Presidential order prohibits that). The impugned notification in the instant case, issued by the Governor under para 5(1), Schedule V to the Constitution referred to the Rules and not to the 1997 Act for a modified application of the reservation percentages.

Accordingly, one of the main questions in the instant case at the Supreme Court was with respect to the scope of the Governor's power under para 5(1), Schedule V to the Constitution, since the Appellants had misgivings about interpreting the Governor's power under that provision to mean unbridled modification; and also because this power of modifying or creating exceptions (conferred on the Governor by para 5(1) of Schedule V) existed only with reference to an Act of the Parliament or the State Legislature. Naturally, the question of whether this power could be exercised with reference to the Rules was confounding. Needless to say, this issue found its way to the Constitution bench's attention, as the judgment provides a lengthy exposition on the law surrounding this quandary.

9 Andhra Pradesh Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order (1975).

Detestable 100%: Sifting the Prolix Judgment

The five judge bench declared the 100% reservation policy to be *ultra vires* on the basis of four propositions: firstly, the Court held that the Governor could not have promulgated the policy with reference to the Rules (which were an amalgamate piece of subordinate legislation) under para 5(1), Schedule V powers because these powers could only be exercised in relation to an Act; secondly, the impugned notification's conflict with the Presidential Order results in consequences that upset the constitutional balance of equality; thirdly, 100% reservation has no place in the jurisprudential scheme of Article 16; and fourthly, the cutoff date, i.e., 26th Jan. 1950 is unreasonable. Each one of these propositions is accompanied by related questions of constitutional interpretation in the judgment, which is where complexity intensifies.

Extensive Modification or Inaccurate Legislative Reference: Where did the Governor Go Wrong?

As explicated earlier, the impugned notification was issued by the Governor under para 5(1), Schedule V to the Constitution, a provision which only allows the Governor to make exceptions or modifications to an Act as regards its application to a specific Scheduled Area. The two questions arising from this verity are: (i) 'can the Governor exercise this power without reference to any Act?'; (ii) 'does the Governor have the power to modify the reservation scheme to such an extent that the percentage scheme is entirely replaced by a new one?'.

The answer to the first question is already crystal clear. The answer to the second one is still somewhere in a boundless sea of uncertainty. The judgment relies on past precedent to clarify that there is no rationale behind limiting the word 'modification' only to such modifications that do not make any radical transformation.[10] With that, the Court also refers to judgments that speak for a more restrictive interpretation of the word 'modification'. However, the Court fails to provide any clarity on which side lays down the correct law. Towards the end of the discussion on the problem posed by the second question, the Court does say "the exceptions and modifications are created by the law, which is already applicable in the area. It is not the formulation of a new law which is contemplated under Para 5(1) of Schedule V…The power of modification cannot extend to rewriting the entire statute". Albeit, the Court makes these general remarks, but it is still unclear whether the Court regards the change in the percentage scheme (from those under Rule 22 to 100% local S.T. candidates) as an action that seeks to 'redraft the complete statute' under the false garb

10 *Puranlal Lakhanpal v. President of India*, A.I.R. 1961 S.C. 1519.

of mere modification or whether it only objects to the Governor's peccadillo in referring to the Rules (and not the 1997 Act) for making a modification in policy which is valid in as much as it's merely a modification and not a complete repudiation. It is unequivocal that the Governor has erred in exercising his power under para 5(1), but inexactitude remains as to whether the 'excessive modification flaw' has been committed or not. The judgment further provides countenance to the analysis of how the combined effect of the impugned policy and the Presidential Order is glaringly discriminatory not just to the open category incumbents but also to those of other disadvantaged sections.[11]

100% Reservation for Chronic Absenteeism: Is the Justification Reprehensible or the Percentage?

The judgment in the instant case proffers two reasons to advance the assertion that 100% reservation is incompatible with constitutional requirements. Firstly, as per *Indra Sawhney* reservations for S.C.s, S.T.s and O.B.C.s under Art. 16(4)[12] are not founded on the 'proportionate representation' principle (reservation for a specific class proportionate to the population of that class in the area for which the reservation has to be made), instead, they are based on the 'adequate representation' concept (which contemplates larger considerations of social backwardness, inadequacy of representation and administrative efficiency for arriving at a decision on the percentage). For this reason, 100% reservation for S.T.s cannot be permitted merely because it is sought to be enforced in Scheduled Areas (with a sizeable S.T. population) as, such a percentage defies logical corollaries of the precepts of adequate representation (one of which is Dr. B.R. Ambedkar's recognition that reservations under Article 16 are to be confined to a minority of seats[13]). The court also added that unlike in art. 330 and 332 of the Constitution (which follow the proportionate representation principle), the proposition that only tribal teachers could effectively teach tribal students could not be affirmed for such employment. Secondly, the significance of the 50% ceiling is reiterated to insist that the discriminatory effects of this percentage amount (when placed in the context of the Presidential Order) validate its spurning.

The Court does not shy away from engaging with the characterisation of the need for the 100% reservation policy, as is propounded by the Respondents. The Respondent side contended that due to serious dearth of requisite facilities and inaccessibility, teachers in

11 The right to affirmative action through reservation that the Indian Constitution assures to other disadvantaged sections like SCs & OBCs, stands to be whittled down because of the impugned scheme as it provides for reservation of all the seats only for a specific vulnerable group, i.e., the STs of the concerned region, to the exclusion of SCs & OBCs.

12 Indian Const. art. 16, cl. 4.

13 Constituent Assembly Debates, 30 Nov. 1948.

Scheduled Areas were not turning up to teach, which led to phenomenal absenteeism of non-tribal teachers; this in turn necessitated a reservation policy by which local tribal teachers could be provided for whom accessibility wouldn't have been an issue, since they would've been local residents. According to the Respondents, this peculiar predicament was sufficient to warrant the 100% stipulation. The Apex Court emphatically disagreed. The judgment's non-acceptance of this justification was based on a two-pronged argument: firstly, the absenteeism complication could have been taken care of by providing "better facilities and other incentives"; and secondly, the decision to release the impugned notification was not taken on the basis of any verifiable data, but only on the ground of absenteeism. Albeit, the four propositions tendered for declaring the impugned policy as unconstitutional form a well-founded and compelling *ratio* in their conglomerate capacity, yet, the two pronged argument meant to counter the 'absenteeism justification' seem half-heartedly proposed at best and inadequate at worst. This is because the application of the generic platitude of 'other alternatives' can be extended to almost any justification for a reservation, for instance, it can be argued that a reservation policy motivated by inadequacy of representation should be rejected because 'other alternatives' exist in the form of providing 'better facilities and perks' at the educational level to incentivise students from disadvantaged communities to work harder for enhancing their merit positions. This is not to say that the impugned policy of 100% reservation is anyhow valid just because one of the sweeping arguments against its justification is perfunctorily explained.

Similarly, it is unfortunate that the Court does not explain what it implies by insinuating that required data wasn't collected and the policy was only based on absenteeism. The Court's only mention of this argument in the entire judgment deserves to be reproduced *in extenso* for clarity: "The decision to issue G.O. Ms No.3/2000 was taken not on verifiable data, but it was taken on the basis that there was chronic absenteeism of nontribal teachers in the schools in scheduled areas." It is uncertain whether the Court was doubting the veracity of the 'absenteeism justification', because the sentence structure implies that the Court regards the subject of the verifiable data to be different from the justification that the Respondents provide. The question of what this 'verifiable data' was supposed to indicate remains eclipsed by incertitude. It would still be instructive to acknowledge that it is plausible that the Court was trying to make an 'insufficient factual foundation' argument to say that Respondent's justification cannot be accepted on face value without necessary statistics.

This examination of the Court's response to two parts of the policy's analysis, i.e., the content of the policy (100% reservation) and its actuation (the absenteeism justification) reveals that the Court was not shaken as much by the justification that the respondents

provided as it was by the magnitude of the reservation's percentage. This translated into a preoccupation with establishing that the impugned policy is *ultra vires* because it specifies for reservation to the tune of '100%' seats (a condemnably disproportionate stipulation), and in this absorption with the alarming percentage specification, focus on engaging with the absenteeism explanation was inexorably lost.

Judgment's Legal Elucidation: Regrettable for Banality or Desirable for Stare Decisis?

The judgment's reasoning may not seem to have been guided by a significant degree of novelty *ex facie*. Most of its *ratio decidendi* is a mere reproduction of portions from past precedents that are germane to the discussion of the issues referred to the Constitution bench in this case. That by itself should not inspire any disparaging critique to refer to this as an instance of unoriginality, as long as the precedent being cited is relevant to rendering a decision characterised by a consistent application of established dictum. The judgment deserves plaudits for contributing some clarity to the difference between the Governor's power of modifying and creating exceptions to the application of Acts for specific Scheduled Areas under para 5(1), Schedule V of the Constitution and the Governor's law making powers under para 5(2), Schedule V. Its discourse on non-obstante clauses in the Constitution and their relationship with Part III also irons out the wrinkles in that regard, since it provides a conclusive pronouncement to the effect that exercise of powers under non-obstante clauses in the Constitution cannot escape the scrutiny of Part III rights and the Constitution's basic features.

Concluding Remarks: Addressing Unwarranted Denigration

It is lamentable that academia is fraught with instances of unfair critiques that use cherry picked lines from a judgment to present a dismal (but apocryphal) picture. Sadly, even the *Chebrolu Leela Prasad Case* has not remained immune to this phenomenon. The judgment has recently been lambasted for purportedly expressing disdain and tacit contempt for tribal culture.[14] That critique is uncalled for in so far as the judgment does not, firstly, extend 'primitive' as an adjective to tribal culture as a blanket ascription. The judgment's emphasis on the lack of access to education and healthcare which invariably imply exposure to scientific living (and not one rooted in divine reveries) provides ample context to understand what exactly the Court means by integration of tribal people who have lived primitively in isolation for decades. Saying that the judgment makes scornful generalizations is an exercise

14 Amit George, *Tribal Culture(s) and the Supreme Court: A Critique of Chebrolu Leela Prasad & Ors. v. State of A.P. & Ors.*, Bar and Bench (Apr. 28, 2020, 9:07 AM), https://www.barandbench.com/columns/tribal-cultures-and-the-supreme-courta-critique-of-chebrolu-leela-prasad-ors-v-state-of-ap-ors.

in unnecessary sensationalism. Secondly, labeling the judgment as an ethnocentric account of tribal culture is preposterous in light of the objective context of national integration and commitment to an educated & scientific way of life, supported by healthcare, which the judgment provides as a vision for tribal people. The judgment at no point seeks to address the tribal people as disgraceful savages that need occidental reformation. It merely acknowledges the history of disenfranchisement of tribal people and thereby presses the need for their meaningful integration into the national life through representation, education and healthcare. Therefore, the surmise that the judgment exhorts its readers to harbour a hankering for cultural uniformity is gravely misplaced.

This careful examination of the judgment and the opinions of its critics discloses that the five judge bench has applied the principles developed in past precedents consistently to the facts of the instant case. With a reasoning mostly based on well-established constitutional requirements like the 50% ceiling, the adequate-proportionate representation dichotomy and data collection to establish foundation, the judgment really is old wine in new bottles.

CONTACT US

The Editor
VIPS Student Law Review
Vivekananda Institute of Professional Studies
AU Block, Outer Ring Road, Pitampura, Delhi 110034
Email: vips.studentlawreview@gmail.com / rashmi.salpekar@vips.edu
Website: www.vips.edu
Telephone Nos. +91-11-27343401,27343402, 2313403

THE EDITOR
VIPS STUDENT LAW REVIEW
VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES
AU Block (Outer Ring Road) Pitampura, Delhi-110034
E-mail: vips.studentlawreview@gmail.com, Website: www.vips.edu