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VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES

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(Affiliated to GGSIP University & Approved by BCI & AICTE)
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EDITORIAL NOTE

VIPS Student Law Review VOL 3 is the 3rd issue of the annual law journal of Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies. It is a blind peer-reviewed journal which provides an opportunity to the legal fraternity to interchange contemporary thoughts on law and justice. While the previous Volumes were great success, Volume 3 had received even more overwhelming submissions. The pandemic has been a yearlong now in the whole world and it still continues to claim more lives and suffocate the human race. The second wave of the pandemic was even deadlier than we could ever imagine and it shook the nations beyond imagination. But the human spirit is one not to break so easily, its spirit of life and quest for evolving keeps on enduring and this issue of our Journal stands testimony to it.

Academic writing is no simple task as it needs not just an unwavering attention of the human conscious, but to also be able to mould one's ideas and solutions into words and frame them into cogent compositions for constructive reference. The on-going conflicts of Palestine, the strife in Myanmar and the insurgency in Afghanistan highlights why 'freedom of speech & expression' is one of the most sacred of rights and one of the most indispensable of duties. It is the platform of our Journal that illustrates the most in-expellable qualities of Academic Writing that is ensuring the continuum of discourse and to affront truths that are the toughest to face.

The human brain when under constant confrontation with such extraneous testing situations along with the looming third wave of the pandemic has the tendency to dissociate everything and focus on 'survival', no more, no less. But the Authors of this Volume have shown unprecedented dedication towards Academia and we would like to congratulate them for showing such calibre in these testing times.

Thus, we hereby present the VIPS Student Law Review Volume 3. This time our Journal has received over a 100 submission and we are sincerely overwhelmed by the same. The selected articles are a multitude of contemporary topics with unparalleled discernment that seep beyond the boundaries of just law.

Mr. V. Sudhish Pai in his article recounts the legacy of Mr. Soli Sorabjee. The article narrates the exemplary life of Soli Sorabjee by providing anecdotal details about Mr. Soli Sorabjee's early life, significant cases, and his interests outside the field of law. Ms. Shivani Chawla has critically examined the conditions of human trafficking in India during the pandemic and analyses how traffickers have made use of the internet to their advantage.

Ms. Samriti Verma and Mr. Anuj Kumar Tiwari have discussed the importance of the Victim Impact Statement in the criminal justice system and its effectiveness, feasibility, potency and adverse effect on the sentencing process in India. Ms. Lovleen Sharma comprehensively analyses the process of psychological autopsy in India and compares the position of its admissibility in India and USA. Ms. Neha Tripathi and Mr. Anubhav Kumar explore the concept of judicial dissent, its importance and compares the stance of judicial dissent in the South Asian countries. Ms. Shivya Juneja and Mr. Divyanshu Priyadarshi throw light on the emerging concept of Work From Home and the need for a right to disconnect to help create a balance between the rights of an employee and the work demanded by employers. Mr. Sarthak Aryan and Mr. Jayanta Boruah enumerate the need to serve justice to the victims of the Chamoli Disaster and the need for companies to be made liable for their negligent acts which disturb the ecological balance. Ms. Namrata Chakraborty and Mr. Himanshu Anand critically analyses the contemporary Gram Nyayalayas after the 2008 enactment and lay special emphasis on its sustainability as against the Panchayat ideology. Mr. Deepansh Tripathi deliberates upon the need to pay attention towards the rapid increase of debris in Outer Space and discusses the various international conventions and collective efforts by the international communities to deal with this problem. Mr. Ravi Singh Chhikara and Mr. Abhinav Arora advocates that the government should takes a paternalistic role and enact a different pre-publication regulatory framework for video-on-demand platforms. Mr. Girish Ahuja and Ms. Aparna Singh examines the utility model, analyse its advantages, compare our needs with other established nations, and ultimately advocates to formulate a utility model system for India. Mr. Kushal Tekriwal discusses the concept of Corporate Social Responsibility Frauds focusing on Ghost Beneficiaries and criticising the current regulatory framework in its functioning to tackle the effect of such transactions. Mr Prateek Khandelwal analyses the obstacles of the framing of provisions on cross-border insolvency, studies the various flaws that were made by other countries in adopting the Model Law and how Indian drafters have taken notice of it and have tried to incorporate such learnings in its report. Ms. Nishita Arora and Ms. Hiba Nasir highlight the need for compulsory licensing of the vaccine, with regard to India and South Africa's petition at the WTO. Mr. Tejash Bhandari scrutinizes the gender discrimination that exists in the family laws of India, the need for a Uniform Civil Code and summarily discusses the judicial response received by UCC through various cases. Ms. Neha Maria Antony defend an increasingly endangered 'right to protest' in the digital space and traverses the judicial response received by the right to protest. Mr. Sagnik Sarkar examines the difference between betting and gambling and the tests like 'mere skill v/s chance' and 'substantial degree of skill' operate in categorizing games as gambling activities. Ms. Gunjan Garg examines the POSH Act and how it can help prevent sexual harassment in the virtual workplaces as well. Mr.

Kshitij Dahiya comprehensively discusses the cyber defense mechanism and intelligence capabilities needed for monitoring the state and non-state factors towards cyber threats, cyber violence and cyber-attacks in India.

The Journal presents two articles under the 'Case Comment' section. Ms. Prerna Dhingra through the case of *Chief Election Commissioner of India v. M.R. Vijayabhaskar and others* analyses the freedom of expression of media, the concept of open courts, freedom and the constraints of judicial conduct, in the context of the digital era. Mr. Sarthak Bhardwaj examines the case of *Amit Sahni v. Commissioner of Police*, wherein the right to protest and free speech is balanced as against the right of citizens of free movement.

The Journal presents two articles under the 'Legislative Review' section. Mr. Kavish Arora discusses the atrocities of Pakistani Hindus in the absence of legislation and sheds light on the various benign provisions of the Hindu Marriage Act pertaining to registration of marriage, termination of marriage which aims to protect the minority Hindu community. Mr. Ayush Garg critically analyse the law of liability with regard to compensating the victims of damage caused by a nuclear accident and propose solutions to the flaws in the law.

The Journal presents one article under the 'Book Review' section. Ms. Shweta Shukla reviews the book of 'Moot Problems'. She delves into the purpose of the book, analysing the utility of the book for readers and emphasizes on skills that the reading of the select few propositions in the book, will help one develop. She also provides a brief assessment of the experience that the readers can hope to garner from the different types of propositions in the book.

Lastly I would like to thank our Editorial Board Members, the Members of our Student Core Team assisting the Editorial Board and the expert reviewers for all their dedication and efforts which led to the timely publication of this Volume. I would also like to thank Dr. S.C. Vats, Prof. R. Venkata Rao and all members of the Honarary Advisory Board. Special mention to the COO, VIPS and the staff for their support.

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

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An Era Comes To An End: Soli- A Great Lawyer and A True Friend*

V. Sudhish Pai**

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https://vslls.vips.edu/vslr/

Soli Sorabjee's passing on April 30 once again unkindly reminds us of human mortality- of the proximity of death to life- a life so full, rich and meaningful. It is given to only a few to be endowed with great qualities of head and heart, don many hats and play many roles with distinction and elan, yet retain the human touch and be considered a legend. Soli Jehangir Sorabjee is certainly one among them- one of the all-time greats both as a lawyer and a human being. His was a personality so warm and vibrant, a career so versatile and glittering.

Soli was born on Sunday, March 9, 1930, in Bombay. He was the only child of his parents- aristocratic and wealthy. Nani Palkhivala's father Ardeshir Palkhivala and his uncle had made a palanquin for Soli's grandfather Hormusjee Sorabjee. Soli was a pampered child but not a spoilt one. As he said his love of books who were his constant companions began at a very young age and continued all through.

Graduating in Economics from St. Xavier's College, he did his law at the famous Government Law College, Mumbai where among his teachers were the illustrious Nani Palkhivala and Yeshwant Chandrachud, later Chief Justice of India. He passed out with flying colours winning the Kinloch Forbes Gold Medal in Roman Law and Jurisprudence. He started the general practice of law in 1953 in the chamber of the legendary Sir Jamshedji Kanga where his immediate senior was Khursedji Bhabha who chiseled the young juniors. Among others under Bhabha's pupilage then was Fali Nariman. Soli soon came into his own and made a name. He was fully a product of the original side of the Bombay Bar. He started appearing and arguing in the Supreme Court even in the late 1950s particularly in cases involving questions of constitutional law. Justice Venkatachaliah remembers Soli as a young boy arguing in the Supreme Court before the Court found its permanent abode in the

* This article was initially published on LiveLaw on May 1, 2021 and is available at https://www.livelaw.in/columns/an-era-comes-to-an-end-soli-a-great-lawyer-and-a-true-friend-173447. We express our sincere gratitude to Mr. V.Sudhish Pai for consenting to give his article for publication in our journal.

** Senior Advocate, Supreme Court of India.

present premises. Soli always recalled one of his earliest significant cases in the Supreme Court – a case relating to citizenship. He had prepared himself thoroughly and believed he did the case well but his opponent C.K. Daphtary appearing as Law Officer for the Union Government demolished his arguments within minutes. As he sadly tied up his papers and was about to leave, there was a tap on his back. It was Daphtary with a word of consolation and encouragement- 'you have done well, young man, don't worry; these things keep happening.' It was a tonic and from then on Daphtary was always Chandubhai. Sorabjee wrote this in his tribute to Daphtary on Daphtary's passing away in 1983and added that he looked forward to the day when he could join Chandubhai on the other shore and sit and exchange pleasantries and chat with him. Sadly, for us that day has arrived –Sorabjee has joined Daphtary on the other shore leaving us to mourn the loss and celebrate his life and work.

One cannot miss mentioning that as a young lawyer in the mid-1960s appearing before a Bench presided over by Justice Subba Rao, Sorabjee found the Court fully in his favour. But he knew that there was a judgment that squarely covered the case against him. He expected the opposite side to cite it, but they did not. The matter spilt over to the following day. Sleep eluded Soli, he was in a fix as to what was to be done. The following day also the other side did not cite the case. Sorabjee in all fairness and true to his cloth as an officer of the Court, brought the case to the Court's notice and tried to distinguish it but did not succeed. The case was decided against his client but he earned a good night's sleep and what is more a high reputation for fairness and the goodwill of the Bench. There can be no better role model, no higher tradition of professionalism. Years later as Attorney General speaking at the obituary reference to Chief Justice Sabyasachi Mukharji in October 1990, he said quoting Carlyle that tradition is an enormous magnifier, but traditions are not like instant coffee, each generation would have to imbibe and cherish them. Teachers and seniors should lead and teach by example. Soli lived this and his chamber was a nursery for training a large number of distinguished men of law who rose at the Bar and some on the Bench.

Sorabjee steadily rose in the profession. He was designated Senior Counsel in 1971. In his long and eventful career, he appeared in a number of landmark cases and helped to mold and lay down the law. That list is very long. In 1977 with the Janata government in power, he was appointed Additional Solicitor General when S.V. Gupte was Attorney General and S.N. Kacker Solicitor General. He shifted to Delhi permanently and carved out a niche for himself in the Supreme Court Bar. Almost at the beginning of his career as ASG, it fell to him to defend the Union in the well-known Assembly Dissolution case. Soli mentioned

that conferences with Prime Minister Morarji Desai for taking instructions would be early in the morning by 6- 6.30. Morarjibhai had also advised him to give up taking liquor and asked him to meet him sometime to take lessons in that regard. Soli said that fortunately or unfortunately he did not heed that advice. His commitment to civil liberties and human rights and his contribution to upholding them is significant and well known. Justice Krishna Iyer once remarked that in all those cases dealing with prison reforms in the late 1970s there was a conspiracy between him and Soli as the law officer of the Union to initiate and bring about reforms to humanize the criminal law and conditions in prisons.

He was Additional Solicitor General in 1977-79 and Solicitor General in 1979-80. He was appointed Attorney General in December 1989 which position he occupied for about a year and he was again AG in 1998-2004. He decorated that position. When he took over as AG in 1989, he had said that he did not see his role as that of a 'hatchet-man' of the government of the day. His mentor Palkhivala greeting him on his appointment had said the same about his role- the guardian of public interest and the protector of human rights. He could be critical of the government whose principal law officer he was much like his eminent predecessor Motilal Setalvad.

Soli was conferred with many awards and degrees. He was a champion of human rights, his work in that field being internationally acclaimed. All these achievements are some of the bare details of his illustrious career but they do not reveal his great qualities of head and heart which he did not wear on his sleeve. He was a great human being-warm and affable. As was said of his great senior Kanga, he was always full of sunshine and one loved to bask in its warmth.

Soli was a sound lawyer and a skilled advocate. He was deeply rooted in legal theory: theory is the most important part of the dogma of the law as Holmes said. He was a charming and persuasive advocate. He was always very polite but firm. Gentle in manners, unfailingly courteous and polite, he was grace personified. Great liberality of thought, the catholicity of outlook combined with sturdy independence were his hallmarks. So also, his total fairness, objectivity and impartiality. Hero of many a battle and celebrated causes, he was a noble warrior who bore his scars and honors with philosophic indifference. It may be said that he brought to bear a moral eminence on a highly mercenary and at times unprincipled legal profession.

He could take a principled stand on any question or case. When a coalition partner of the NDA was keen to have a State government dismissed invoking Art 356, Soli as AG told Prime Minister Vajpayee that such action would be unsupportable and that he would take

the responsibility of explaining the legal nuances. He told the PM that his shoulders were broad enough to take the onslaught of any politician. Once there was a talk about having a new Attorney General. The Prime Minister shot it down telling his party and the cabinet that in that case, they would have to look for a new PM too, that when Vajpayee was the PM, Sorabjee would be the AG.

Sorabjee was greatly concerned with the fall in standards in public institutions and systems and the legal profession and bemoaned the lack of accountability as a prime reason for many of our present-day ills. He was a strong and outstanding ethical pillar of the Bar. With his departure, the tribe has further dwindled. The only footprints that remain on the sands of time are those that are formed and grow out of a man's character and competence. All outward embellishments are grounded in the weakness of human nature. He hated ostentation and did mention that to colleagues often- that simplicity is a virtue that decorates a man's character. On a visit to the US as Attorney General, he said he did not require a suite and asked the Embassy not to spend dollars on him. He believed with Nani that fame is a vapor, popularity an accident, riches take wings, only one thing endures-character. He was of the view that to preserve basic values, everyone- whether he be a public functionary or a private citizen- should display a degree of vigilance and willingness to sacrifice. He himself was an exemplar.

In an atmosphere where the pursuit of the higher and nobler ideals of the legal profession is becoming increasingly difficult, where ploughing the lonely furrow of scholarship is becoming rare and where half-baked ideas reared by accident have sway, Soli Sorabjee belonged to a refreshingly different genre.

He was a 'cultivated man' to use the felicitous expression of Frankfurter. Literature and music were his soulmates. He was a lover of jazz as well as poetry. He was fond of it primarily because, as he once explained, jazz represents free speech and expression, its essence being improvisation, an important element of Soli's advocacy too. Equally well known is his love for books, particularly poetry. Great poetry teaches one how to live, said Mathew Arnold; Soli is an example. "A lawyer without history or literature is a mechanic, a mere working mason, if he possesses some knowledge of these, he may venture to call himself an architect." Sorabjee possessed these aplenty and he was an architect par excellence. He was fully aware that law is the principal institution through which a society can assert its values. His idea was to take a holiday and complete reading his books. But that never happened.

The man was as great as the lawyer- an extremely gracious person. His claim to eminence

rests as much on his great humanity and urbanity. I have heard this: A monk dedicated to the service of leprosy afflicted had sought Sorabjee's help in some legal matter. When he went to Delhi to meet and thank the lawyer, Soli rushed inside and came out with a cheque for a munificent sum as his own contribution to the noble cause. A noble exemplar of a noble profession.

Soli was keenly interested in horse racing. He was introduced to it at a young age as his father owned and raced horses. There is a photo of Soli as a young boy wearing a full suit leading a winning horse owned by his father. It was not uncommon for him to assess both judges and opposing counsel in racing terms- the best was put in Part I and the worst in Part V B. He was an excellent raconteur and had an amazing capacity for mimicry.

It is interesting that once while he was in London and called the British Rail to book a ticket to Scotland, he was trying to spell and mention his name but the operator told him that she had heard about him and knew his name. He was so well known even outside the legal circle.

My association with him began when I was a law student and wrote to him seeking his advice. I got a sound robust reply emphasizing what is professionalism and that it is not money-making. He reiterated the same idea in writing his appreciation for my book- *Legends in Law*. At a personal level, he has been to me a very dear and revered friend, philosopher and guide for about four decades - one to whom I could turn in times of joy and celebration or any problem for encouragement and support. The functions for release of my first two books- *Legends in Law - Our Great Forebears* and *Working of the Constitution*: *Checks & Balances* were overseen and organized by him at the India International Centre. He would have been among the speakers at the release of my book on Justice M.N. Venkatachaliah a few days ago but for his indifferent health. However, I was happy to learn from Mrs. Sorabjee that he did watch the function. My son Sushant interned in his chambers and was looked after and guided with grand paternal care. He would insist that Sushant attended all his conferences, took him to the court in his car and ensured he knew about the cases beforehand so that he could easily follow his arguments in court. Whenever we met, he was solicitous of my comfort ensuring that I am teetotaler and vegetarian got some soft drink and vegetarian dishes. We would converse on questions of law and matters of public importance. Whenever he wanted some reference to any case or quotation, he would telephone me. This continued till about a year ago. I recall all this with joy and nostalgia including meetings at his home in Delhi or Bangalore or at hotels. When I rang him up to greet him on his birthday on March 9, Mrs. Sorabjee answered the

call and said he was not feeling good and that she would convey to him my greetings. I did not want to disturb him thereafter having regard to his health. But my great regret is that I will never be able to speak to him again. As he said with reference to Daphtary, I will have to wait till I get to the other shore. As the poet said, *Oh! for a touch of the vanished hand/ And the sound of a voice that is still.* How we wish we were spared this occasion for some time longer and the cause of demise was not the monstrous pandemic.

Sure-footed time will tread out lesser figures. While the West is still lighted with his radiance, it is well for us to pause and reflect. He has some lessons to teach us if we care to stop and learn, lessons quite at variance with most that we practice and much that we profess. The love and respect with which we pay tribute to him is a measure of his magnificent contribution to human rights and constitutionalism, his commitment to professionalism and values.

Carlyle wrote that a well-written life is almost as rare as a well-spent one. Soli Sorabjee's life was truly well lived. Words cannot capture and contain a life so full and sparkling. He will be fondly remembered and sorely missed. He has not left behind any memoirs or autobiographies just as his mentor Nani Palkhivala with whom Soli also believed that autobiographies may hurt the feelings of some and hence, they are best avoided. As Daphtary remarked, 'the unwritten autobiographies are the best.'

Goodbye Sir, may the flight of angels lead you to your eternal rest and may your legacy abide with us.

Pre-empting a Rise in Human Trafficking: A Deadly Side Effect of the Covid-19 Pandemic

Shivani Chawla*

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Abstract

The impact of the COVID-19 pandemic on human trafficking has not even spared the deceased. In India, the body of a 42-year-old man, who allegedly died of coronavirus, was exhumed after two months of his death in a case of suspected organ theft. Human Trafficking can adjust to any type of situation and the COVID-19 pandemic is a jackpot for traffickers. Human trafficking during the COVID-19 pandemic has expanded from sex work. The traffickers all over the world have now shifted their energy into capturing victims fit for child sexual exploitation, forced labour, bonded labour and organ trafficking which is the focus of this paper. This paper also addresses the root causes of human trafficking during the COVID-19 pandemic and how the traffickers have not deterred in targeting their victims during nation-wide lockdowns, ban on cross-border movement and other restrictions. Poverty, economic inequality and unemployment are some of the vulnerability factors of human trafficking which have been further exacerbated by the COVID-19 pandemic. This paper analyses how traffickers have made use of the internet to their advantage to zero in on susceptible victims without fearing repercussions. Special emphasis has been given to the conditions of human trafficking in India during the pandemic. Accordingly, this paper identifies the problems that intensify human trafficking in India amid the pandemic and provides preventive methods to control the same.

* Advocate, Delhi High Court

Introduction

The on-set of the pandemic caused by the novel virus, COVID-19 has devastated the human lives, economy and education system of several countries. Nations all over the world have imposed curfews, lockdowns and travel bans to break the chain of the virus. However, while the gargantuan efforts of every nation to curb the spread of COVID-19 is appreciated, these restrictions have led to an increase in criminal activities against those who are economically vulnerable.[1] As per the warnings of the United Nations Office on Drugs and Crime (hereinafter referred to as "UNDOC"), the economic upheaval caused by the outbreak of the pandemic has led criminal enterprises to illegally profit via human trafficking.[2] Human trafficking is the unfortunate aftermath of infectious diseases. It is targeted at men, women and children for sexual exploitation, forced labour, removal of organs, begging, prostitution, forced marriage, etc. In 2014, trafficking of orphans was a consistent danger in West Africa after the outbreak of Ebola.[3] Similarly, it is apprehended that human trafficking will thrive in the changing circumstances caused by the COVID-19 pandemic. The stay-at-home quarantine has not derailed traffickers in their quest to trap vulnerable victims. On the contrary, the traffickers have chosen the internet as their modus operandi to entice gullible adolescents and adults surfing various social media platforms. With the rise in casualties due to the pandemic, States have had to divert their resources from combatting the growing illegal trade in human trafficking to other significant community needs. Part I of this paper outlines the growing global pandemonium caused by human trafficking during the COVID-19 pandemic. Further, it focuses on how the victims of human trafficking are selected amid a pandemic. It also brings into perspective how the traffickers have adapted to the 'new normal' through the internet and used it to their advantage. Part II of this paper throws light on the measures taken against the elevated risk of human trafficking in India during the COVID-19 pandemic, or lack thereof. The COVID-19 pandemic has questioned the competency of the Anti-Human Trafficking regime in India thus, this paper, endeavors to bring forth recommendations to combat human trafficking in India without overburdening one particular sector with all the responsibility.

1 David S. Abrams, *COVID and Crime: An early Empirical Look*, J Public Econ, (2021); Suyash Das & Soumya Bhowmick, *Pandemic-induced unemployment in India: Criminal activities on the rise*, Observer Research Foundation (Mar. 23, 2021, 10:45 AM), https://www.orfonline.org/expert-speak/pandemic-induced-unemployment-india-criminal-activities-rise/.

2 United Nations Office on Drugs and Crime, *Impact of the COVID-19 Pandemic on the Trafficking of Persons*, (May 17, 2021, 11:00 AM), https://www.unodc.org/documents/Advocacy-Section/HTMSS_Thematic_Brief_on_COVID-19.pdf.

3 Catherine Z. Worsnop, *The Disease Outbreak-Human Trafficking Connection: A Missed Opportunity,* 17(3) Health Security, 181-192 (2019).

The Uphill Trajectory of Human Trafficking during the Covid-19 Pandemic: A Global Perspective

The Evolution of Human Trafficking over the years

In laymen terms, human trafficking or trafficking in persons is defined as "the crime of carrying someone into slavery by force or by fraud, regardless of whether or not the person goes willingly with the trafficker."[4] Human trafficking has been predicted not only to be one of the largest growing businesses in the world[5] but also the world's fastest-growing crimes.[6] It has been more than 2 decades since the negotiation of the Palermo Protocol on Trafficking[7] in 2000 and the trafficking regime has expanded from the exclusive preoccupancy in prostitution[8] to the exploitation of other marginalized communities like the labour sector in the form of modern slavery and forced labour.[9] The International Labour Organization estimated that the business of forced labour generates the US $ 150 billion of illegal profit every year.[10] However, not every victim of trafficking is either subjected to sexual exploitation or forced labour. Trafficked persons may also be used for other purposes like organ harvesting. It is a basic understanding that victims of trafficking are captured through coercion, intimidation or threat of grievous hurt however, there is more complexity to human trafficking than that. Poverty, unemployment and other alike disparaging means have opened up avenues for organized crime groups and are now the root causes for human trafficking.

Human Trafficking: A Crime of Opportunity

Human trafficking is a crime that flourishes in situations of disparity. Armed conflicts and

4 Cassandra E. DiRienzo & Jyoti Das, *Human Trafficking and Country Borders*, 27(4) International Criminal Justice Review, 278-288 (2017).

5 Toby Zhu et al., *Curriculum in Action: Teaching Students to Combat Human Trafficking*, 52 Education And Urban Society 1351-1371 (2020).

6 Dr. Ewelina U. Ochab, *The World's Fastest Growing Crime*, Forbes, (Jun. 8, 2021, 2:01 PM), https://www.forbes.com/sites/ewelinaochab/2017/07/29/the-worlds-fastest-growing-crime/?sh=7308a3283aae.

7 United Nations Human Rights, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, (Jun. 8, 2021, 2:07 PM), https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.

8 Rutvica Andrijasevic, *Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns*, 86 FEMINIST REVIEW, 24–44 (2007).

9 Prabha Kotiswaran, *The Sexual Politics of Anti-Trafficking Discourse*, 29 Fem. Leg. Stud., 43–65 (2021).

10 International Labour Office, *Profits and Poverty: The economics of forced labour*, 13 (2014).

wars are classic examples that drive human trafficking.[11] During the dire times of war and armed conflicts, women and children were the scapegoats for traffickers.[12] Refugees and migrants also found themselves in a state of vulnerability.[13] Similarly, the lockdowns in 2020 pushed by the pandemic affected 81% of the world's workforce[14] and forced around 71 million people into poverty.[15] The education system of 194 countries took a serious hit with 90% of the world's students being affected by the closure of schools.[16] Thus, it would be unwise to not apprehend the rise in human trafficking cases during the COVID-19 pandemic. Despite being aware of the dangers of human trafficking, several countries had no other option but to focus all their resources to overcome the COVID-19 pandemic. Countries all around the world were in a catch-22 situation as humanitarian operations were stopped worldwide owing to the measures taken against the pandemic.

The new social distancing norms forced on the society during the COVID-19 pandemic would make one assume that there would be a decline in human trafficking cases however, that is not the case. One must also not forget that human trafficking during the 'new normal' does not only bring out a new generation of victims but also intensifies the exploitation of those victims who are currently in need of rescue but are stuck in limbo. To prevent the COVID-19 pandemic from turning into a trafficking pandemic, we must identify the vulnerable communities susceptible to trafficking. Through this paper, the author endeavors to highlight the fact that the marginalized section of society is at an imminent risk during this pandemic. Recognizing the most likely victims of trafficking during the COVID-19 pandemic is the first step towards eradicating the abhorrent trade of human trafficking.

The Victims

The UNDOC Report on trafficking in persons in 2018 estimated that out of all the trafficking victims, 59% were used for sexual exploitation, 34% were victims of forced labour and the remaining 7% were trafficked for miscellaneous purposes.[17] The traffickers have set up a

11 United Nations Office on Drugs and Crime, Global Report On Trafficking In Persons – In The Context Of Armed Conflict (2018).

12 *Id.*

13 *Id.*

14 International Labour Organisation, (Jun. 8, 2021, 3:46 PM), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_740877.pdf.

15 Daniel Gerszon et al., *Updated Estimates of the Impact of COVID-19 on Global Poverty,* World Bank Blogs (May 18, 2021, 12:21 PM), https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty.

16 United Nations Educational, Scientific and Cultural Organization, *Education: From Disruption to Recovery*, (May 19, 2021, 5:06 PM), https://en.unesco.org/covid19/educationresponse.

17 United Nations Office on Drugs and Crime, Global Report on Trafficking in Persons (2018).

pattern wherein mostly the economically affected, marginalized groups, adolescents, single mothers and labourers are preyed upon.[18] According to Ghada Waly, the executive director of UNDOC, women and girls makeup over 70% of the trafficking victims whereas one third is covered by children.[19] From the pattern adopted by the traffickers. it may be safe to deduce that over time, the victims of human trafficking are being selected not so much for the nature of the work but for the conditions of the work. The dependency of human traffickers on the catastrophe caused by COVID-19 is a testimony to the same.

There has been a paradigm shift in the nature of victims of human trafficking. Some of the most affected categories of victims prone to be targeted for trafficking during the pandemic are children and labourers. Commercial sexual exploitation of children is increasing given the confinement measures and the financial hardships brought about by the pandemic.[20] Unskilled workers and unaccounted migrants with no social protections are most vulnerable to human trafficking.[21] Another form of human trafficking expected to boom during the pandemic is organ trafficking. It has been growing since the pre-COVID-19 era.[22] Organ trafficking succeeds in hiding in plain sight due to its tricky nature. In some countries, organ trade seems to be consensual however, there is always an element of deceit in it. 10% of all organ transplants are reckoned to be done via organ trafficking.[23] Kidney being the most prominent organ for the illicit trade, it is estimated that around 10,000 kidneys are trafficked annually worldwide in the black market.[24] Males from rural areas representing the marginalized sections of the society and facing financial crises are likely to be tricked into the clutches of traffickers.[25] Ban on cross-border travel to curb the spread of coronavirus

18 Trafficking In Persons Report 2012, (May 19, 2021, 6:00 PM), https://2009-2017.state.gov/documents/organization/192587.pdf

19 United Nations Office on Drugs and Crime, *World Day against Trafficking in Persons Statements (2020)*, (May 17, 2021, 12:59 PM), https://www.unodc.org/endht/en/statements.html.

20 Europol, *Catching the Virus Cybercrime, Disinformation and the COVID-19 Pandemic* (2020).

21 United Nations Office on Drugs and Crimes, *Trafficking in Persons & Smuggling of Migrants*, (May 20, 2021, 4:05 PM), https://www.unodc.org/e4j/en/tip-and-som/module-7/key-issues/root-causes.html.

22 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings*, (2013).

23 Channing May, *Transnational Crime and the Developing World*, Global Financial Integrity, (May. 27, 2017, 8:34 AM), http://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf.

24 Denis Campbell & Nicola Davison, *Illegal kidney trade booms as new organ is sold 'every hour*, The Guardian, (May 21, 2021, 1:37 PM), https://www.theguardian.com/world/2012/may/27/kidney-trade-illegal-operations-who.

25 Victor Jack, *COVID-19 a 'Perfect Storm' for Organ Trafficking Victims*, Sci. Dev. Net. (May 21, 2021, 2:30 PM), https://www.scidev.net/global/features/covid-19-a-perfect-storm-for-organ-trafficking-victims/.

and the stigma of receiving organs of a deceased COVID-19 patient has resulted in a lack of transplant surgeries in hospitals.[26] Fewer altruistic organ donations might lead to a low supply and high demand thereby increasing the trade of organ trafficking globally.[27]

The Role of the Internet in Facilitation of Human Trafficking during the COVID-19 Pandemic

On March 23, 2020, a statement by the Federal Bureau of Investigation (FBI) was released warning parents against online child exploitation.[28] It was apprehended that school closures and social distancing measures enforced to mitigate COVID-19 would potentially increase the online presence of children thereby putting them at an inadvertent risk.[29] It is an indisputable fact that children and adults alike would be depending on the internet to flee from the boredom of self-isolation during the pandemic. Thus, it would be safe to assume that the warnings published against online exploitation should be heeded by all. Human trafficking organizations are like organisms adapting to varied environmental changes. These adaptations make the organizations strive for survival by taking up unconventional methods. The usage of the internet is one such method for the exploitation of unexpected opportunities.

An experiment was conducted by an internet-monitoring app for parents called Bark to illustrate the dangers of grooming by online predators.[30] In this experiment, a 37-year-old mother went undercover and posed as an 11-year-old-girl online using photo manipulation wherein she was approached by online sexual predators on social media platforms like Instagram, Snapchat, TikTok and Kik within minutes.[31] Thus, if left unsupervised, impressionable children can be subject to sexual grooming and psychological abuse.[32] COVID-19 has exacerbated the conditions of online sexual exploitation of children. The worsened situation can be observed where:

i. Parents who are under immense stress due to the 'work from home' policy are

26 *Id*.

27 Seán Columb, *Tracking Down Organ Traffickers and their Victims*, Thomas Reuters Foundation News (May 21, 2021, 2:46 PM) https://news.trust.org/item/20200923161904-x3ozy.

28 FBI National Press Office, *School Closings Due to COVID-19 Present Potential for Increased Risk of Child Exploitation*, (May 20, 2021, 5:25 PM), https://www.fbi.gov/news/pressrel/press-releases/school-closings-due-to-covid-19-present-potential-for-increased-risk-of-child-exploitation.

29 *Id*.

30 Bark, *Social Media Dangers Exposed by Mom Posing as 11-Year-Old, 20 February 2020*, (May 28, 2021, 7:43 AM), https://www.youtube.com/watch?v=dbg4hNHsc_8.

31 *Id*.

32 *Id*.

not in a shape to keep an eye on their child thereby allowing them to entertain themselves online without any parental restrictions;[33] and

ii. Parents who have lost jobs, especially in marginalized sections, are forced to live-stream sexual abuse of their children in exchange for payment.[34]

It is quite unbelievable to imagine a scenario where parents – the epitome of protection – are themselves endangering the lives of their offspring to bring food to the table. Nevertheless, humans never fail to surprise. In April 2020 two people were arrested in Cebu and Luzon for the cybersex trafficking of eight minors aged between three and fourteen including their children and cousin.[35] Monitoring of young girls has been halted with the shut-down of schools and social service institutions due to the Covid-19 pandemic. Taking unscrupulous advantage of this, older men are approaching gullible female adolescents on apps like Tinder, Instagram, Twitter, Snapchat, YOLO, and Lemon to 'groom' them and gain their trust till schools reopen.[36] Traffickers, under the garb of sexual exploitation, are soliciting these trapped victims to expand their drug ring.[37]

There are several Samaritans who believe in using social media platforms for the better good. The same is demonstrated by the posts and tweets circulated by Indians for COVID-19 relief resources all over the country.[38] However, good is always accompanied by evil. There are several children in India who have lost both their parents to the second wave of the pandemic thereby putting them at risk of child trafficking. 'Save the Children' a children-centric organization is urging people not to share the details of these orphaned

33 John Carr Obe & David Danelo, *Keeping Children Safe Online During Lockdown*, Global Initiative Against Transnational Organized Crime (May 24, 2021, 1:06 AM), https://globalinitiative.net/analysis/keeping-children-safe-online-during-lockdown/.

34 Tech Against Trafficking, *The Effect of COVID-19: Five Impacts on Human Trafficking*, (May 26, 2021, 4:28 PM), https:// techagainsttrafficking.org/the-effect-of-covid-19-five-impacts-on-human-trafficking.

35 Rappler, *'Trapped with abusers,' 7 kids rescued from sex trafficker in Luzon*, (May 29, 2021, 6:54 PM), https://www.rappler.com/nation/258987-trapped-with-abusers-children-rescued-from-sex-trafficker-luzon.

36 Criminal Investigations and Network Analysis, The Effects Of The Covid-19 Response On Criminal Network Activity And Investigations (2020).

37 Thomas A. Reppetto, *Crime Prevention and the Displacement Phenomenon*, 22 Crime And Delinquency, 166–177 (1976).

38 Jennifer Hassan, *In Desperate Hunt for Oxygen and Hospital Beds, India Turns to Twitter*, The Washington Post (May 27, 2021, 9:48 AM), https://www.washingtonpost.com/world/2021/04/28/india-coronavirus-social-media-help/.

children online to protect them from being seized by traffickers.[39] As the saying goes, one bad apple spoils the entire bunch, similarly, the illegal acts of traffickers through the internet tarnishes the good it is used for.

Trafficking of organs illegally is not a new phenomenon but using the internet to take part in such a trade openly is a digital liability. The year 2012 saw a collaboration between Facebook and the transplant surgery team at John Hopkins wherein an initiative was taken to allow people to specify their organ donor status on their Facebook pages.[40] On the first day of this initiative, there was a 2,200% increase in the online organ donor status registration in the United States of America[41] and a net six-fold increase in fourteen days.[42] The aforesaid initiative was derived to encourage more organ donation through technology. However, the same can be very easily misused by organ traffickers. Organ trafficking can take place anywhere on the web, be it under the comments section of an article or on the posts of a social media platform like Instagram.[43] The EU law requires the removal of such illegal content as soon as it comes into the knowledge of the authorities.[44] However, this is a global stumbling block that needs to be addressed with responsibility. The promotion of illegal organ trafficking on such social media intermediaries is the current norm. With no legislative intent to hold such websites or social media platforms accountable, a boost in the trafficking industry in the near future is inevitable.

The onslaught of the COVID-19 pandemic gave traffickers an opportunity to tap into the niche online trafficking trade. Loss of income and employment during the pandemic has made people try out unconventional practices to overcome their financial hardships. People are trying their hand at earning money through social media by selling their organs online.[45] Organs are now synonymous with prized currency on the 'red-market' due to low supply. It is not only the traffickers who are the orchestrators; several people in desperate need of money are also reaching out to others by advertising their organs. A Delhi based

39 Save The Children Fears Trafficking And Abuse Amid Social Media Pleas To Adopt India's Covid Orphans, (May 29, 2021, 5:30 PM), https://www.savethechildren.net/news/save-children-fears-trafficking-and-abuse-amid-social-media-pleas-adopt-india%E2%80%99s-covid-orphans.

40 Andrew M. Cameron, *Social Media and Organ Donation: The Facebook Effect*, 36 Journal Of Legal Medicine, 39-44 (2015).

41 Andrew M. Cameron et al., *Social Media and Organ Donor Registration: The Facebook Effect*, 13 Am. J. Transplantation, 2059, 2060-2062 (2013).

42 *Id.*, at 2060–2061.

43 Charlotte Aagaard, *Instagram Used as Platform for Illegal Organ Trafficking*, Danwatch, (May 30, 2021, 6:49 PM), https://danwatch.dk/en/instagram-used-as-platform-for-illegal-organ-trafficking/#:~:text=%E2%80%9CHi%20Sister%2C%20do%20you%20want,trafficking%20takes%20place%20in%20Iran.

44 *Id.*

45 Jack, s*upra* note 25.

homosexual youth worker, after having lost his jobs and sick of living with his homophobic parents posted his desire to sell a kidney on various Facebook pages[46] after being influenced by several other similar pages.[47] The page, 'Selling of Kidney' has been active for almost a year and the comments of the sellers increased two-fold from April 2020 to September 2020 (the lockdown period) as compared to the previous eight months.[48]

To use the internet to facilitate human trafficking one needs, a smartphone, an internet connection and means to receive payment all of which are readily available today. It is not only easy to enter the industry of human trafficking but also to access, download and produce content promoting the same.

The Ramifications of Covid-19 on Human Trafficking in India

India is a hub for the trafficking of persons. In 2019, the National Crime Records Bureau (hereinafter referred to as "NCRB") recorded up to 2,260 reported cases of human trafficking all over India.[49] Out of the 6,616 victims, 2,914 were children and 3,702 were adults.[50] Whereas the rescued victims accounted for a whopping number of 6,571.[51] However, the statistics do not match up to the menace of human trafficking thereby making one assume that there is a vast underrepresentation of the actual cases. Shame and stigma are reasons that prevent victims from coming forward. It is also imperative to point out that the rescued victims include those trafficked victims that were captured a year or two before. Blissfully ignorant, the authorities are tied up during the COVID-19 pandemic in other ventures to monitor underground trafficking. The data pertaining to human trafficking in India has been published only till 2019 making the statistics of human trafficking in 2020 the most dreaded after the descent of the COVID-19 pandemic. At the beginning of the first wave, all humanitarian projects were put on hold by the government to tackle the rapid rise of coronavirus cases. Consequently, the government of India imposed a lockdown for its 1.3 billion residents and focused all its energy to curb the spread of coronavirus. The lockdown has led millions of people in rural as well as urban areas to surge on the path

46 Facebook, (May 31, 2021, 3:42 PM), https://www.facebook.com/pages/category/Hospitality-Service/Do-you-want-to-sell-your-kidney-for-money-112291630421319/.

47 Jack, s*upra* note 25.

48 *Id.*

49 The National Crime Records Bureau, *Crime in India, 2019, Statistics*, 3 MHA, 973-975 (2019).

50 *Id.*

51 *Id.*

of unemployment during the first and the second wave of COVID-19.[52] India is indicated to be emerging as a poverty-stricken nation post-COVID-19 with 12 million poor people being added to its population.[53] Poverty and economic disparity are magnets that attract human trafficking.[54] The government of India made herculean efforts to protect its citizens from the first wave of the COVID-19 mayhem by focusing on the medical conditions of the country. However, they did not factor in the long-term effects of COVID-19, human trafficking is one of them, on the marginalized section of our societies.

Child Trafficking: The Reality of COVID-19

During the first wave in 2020, over 11 days of lockdown, 92,000 cases of child abuse were reported.[55] Female children as young as 12 were being trafficked for forced marriages by their parents since they would have one less mouth to feed.[56] A daily wage worker in construction, grasping at straws for survival tried to sell his four-month-old baby to a rich couple.[57] The lack of internet access in rural regions is an impediment in attending daily classes thereby making children vulnerable to child labour.[58] According to the National Commission for Protection of Child Rights (hereinafter referred to as "NCPCR"), the pandemic has left 1,742 children orphaned, 7,464 children with only one parent and 140 children abandoned.[59] Thus, making children the prime target for human trafficking. To make matters worse, the data collected by NCPCR is not yet complete.

COVID-19 is nothing short of a disaster[60] and in the event of disasters, children are bound to become primary targets for exploitation.[61] In 2005, the National Disaster Management Authority (hereinafter referred to as "NDMA") was set up under the Disaster Management

52 Mahesh Vyas, *Double-digit Unemployment Rate Returns*, Economic Outlook (May 31, 2021, 10:36 PM), https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2021-05-24%2011:01:18&msec=696.

53 Neha Nimble, *COVID-19: How the Pandemic May Increase Human Trafficking in India,* Feminism India (May 31, 2021, 11:04 PM), https://feminisminindia.com/2020/06/22/covid-19-human-trafficking-increase-in-india/.

54 H.D. Pandya, *Human Trafficking and Poverty: A Critical Connection*, 2 Proceeding Of 2nd International Conference On Poverty And Sustainable Development, 1-6 (2015).

55 Leeza, *Human Trafficking and Exploitation in India During the COVID-19 Pandemic*, Migration & Anti Human Trafficking Cartias (May 31, 2021, 10:50 PM), https://www.caritas.org/2020/07/human-trafficking-and-exploitation-in-india-during-the-coronavirus-pandemic-hitting-children-hard/.

56 *Id.*

57 *Id.*

58 *Id.*

59 Re: Contagion of COVID 19 Virus in Children Protection Home, Suo Moto W.P. (C) No. 4 of 2020 (India).

60 The Disaster Management Act, 2005, § 2(d), No. 53, Acts of Parliament, 2005 (India).

61 Bachpan Bachao Andolan v. Union of India and Ors., W.P. (C) No. 75 of 2012 (India).

Act, 2005 for prevention, management and recuperation of disasters. In the wake of COVID-19, the NDMA should have had the hindsight to formulate a plan[62] to protect and rehabilitate victims of trafficking.

Recognising the increasing peril of child trafficking and receiving information of potential trafficking cases after relaxation of lockdown, a Public Interest Litigation was filed before the Supreme Court of India by an NGO namely, Bachpan Bachao Andolan.[63] In this particular matter, the petitioner urged the Hon'ble Court to direct the NDMA to frame Policies or Guidelines to prevent the trafficking of children in the wake of COVID-19 and see to its mandatory implementation.[64] Furthermore, it was requested that the Ministry of Home Affairs be directed to activate Anti-Human Trafficking Units to take adequate action against child trafficking including but not limited to identification of potential and/or known traffickers, sharing and monitoring of intelligence with the Centre.[65] Apart from this, The Hon'ble Court also mulled over the formation of a committee of eminent personalities to look into this menace.[66]

Anti-Trafficking Regime in India during the COVID-19 Pandemic: Is it a Farce?

The increasing tidal wave of trafficked cases in India during the pandemic disproportionately impacted the vulnerable section of society. In response to these concerns, The National Human Rights Commission (hereinafter referred to as "NHRC") constituted a committee of experts to analyze the human rights of the people vis-à-vis the impact of the COVID-19 pandemic. The committee recommended the issuance of a 'Human Rights Advisory on Combatting Human Trafficking in Context of the COVID-19 pandemic' (hereinafter referred to as "the Advisory").[67] The Advisory furnished by the NHRC in December 2020 aimed to help the Central Ministries and State Government(s) battle human trafficking. The Advisory focused on the following measures to combat human trafficking in India:

Security and Preventative Measures

Some security and preventive measures include starting a 24/7 toll-free helpline for active reporting, tracking and monitoring of human trafficking cases. Special surveillance is to be

62 *Supra* note 60, at § 6(2).

63 Bachpan Bachao Andolan v. NDMA and Ors., W.P.(C) No. 000483 of 2020 (India).

64 *Id.*

65 *Id.*

66 *Id.*

67 National Human Rights Commission, *Human Rights Advisory on Combatting Human Trafficking in Context of the COVID-19 Pandemic* (2020), (Jun. 1, 2021, 2:36 PM), https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20on%20Human%20Trafficking.pdf.

installed at every transport hub to trace suspicious persons and hone in on the exclusive spots for trafficking. Repatriated and rescued victims to be made comfortable by recording their testimonies via video conferencing in courts. Data on rescued victims and missing persons to be updated expeditiously. Particular attention is to be given to rural areas by providing livelihood opportunities through existing schemes, monitoring non-attendance of school by children and intercepting cases of trafficking by setting up a Vigilance Committee.

Accessible Legal Benefits

The District Legal Service Authorities (hereinafter referred to as "DSLAs") was recommended to create awareness on the horrors of human trafficking, appoint advocate for requisite legal help and provide compensation[68] to the survivors of human trafficking.

Rehabilitation of the Survivors of Human Trafficking

The survivors are to be compensated financially under different Acts. The Magistrate may be authorized to disburse the financial compensation to the victims. Monitoring cells to be set up for timely payment of minimum wages to the labourers. Vocational training and online skill development programs to be set up in view of the COVID-19 protocol and resumption of online education of child victims.

Operation of Anti-Human Trafficking Units

Anti-Human Trafficking Units to be set up in all districts of States/Union Territories with priority to districts prone to trafficking. The Anti-Human Trafficking Units must be well equipped with physical and digital infrastructure and ensure police enforcement agencies to be sensitized with the standard operating procedures on the prevention of human trafficking vis-à-vis COVID-19 containment guidelines. These units must include 24/7 open protection homes for rescued victims with adequate counselling to those who are traumatized. The norms of social distancing and the necessary protocols must be maintained by the victims and the staff of the protection homes.

An Anti-Human Trafficking Unit acts as law enforcement with an anti-crime structure. However, it must be questioned whether such units are the only solution to contain human trafficking? A study evaluating the status and efficacy of Anti-Human Trafficking Units all over India between 2010-2019 intimated that only 27% of the Anti-Human Trafficking Units in 16 States and Union Territories were operational and 225 units existed only

68 The Code of Criminal Procedure, 1973, § 357A, No. 2, Acts of Parliament, 1974 (India).

in bureaucratic files.[69] Pushing for implementation of such Units especially during the COVID-19 pandemic seems nothing short of a token response rather than a genuine effort. The NHRC has placed too much dependency on the Anti-Human Trafficking Units without taking into consideration that establishing such units just might not be enough. Thus, on May 31, 2021, the NHRC issued three more advisories to the Centre and State/Union Territories regarding:

i. The mental health of vulnerable populations,[70]

ii. Release and rehabilitation of bonded labourers;[71] and

iii. Safeguarding rights of informal workers.[72]

Fragile mental health, violation of the rights of bonded labours and the disparaging plight of informal workers witnessed during the beginning of the COVID-19 pandemic are some of the conditions that make prime targets for human trafficking. Accordingly, the NHRC has addressed a letter to the secretaries of Union Ministries of Health and Family Welfare, Labour & Employment and Women & Child Welfare, the chief secretaries of states and administrators of UTs to submit reports on action taken within four weeks.

It is commendable that the NHRC had the insight to produce several advisories addressing the issues of human trafficking while juggling the destruction caused by the COVID-19 pandemic. However, after a thorough perusal of the Advisories, it is painstakingly clear that they have been created under obligation and their recommendations might be too impractical to implement. The recommendations made by the advisories require significant financial aid and might be fruitful only if the Central Government and State Government(s) are up to the task. The NHRC requires an 'Action Taken Report' to follow up on the conditions of the victims of human trafficking during the pandemic. It is pertinent to keep in mind that

69 Sanjog & Tafteesh, *A National Study on the Status of Anti Human Trafficking Units in India (2010-2019)* Ahtu Watch, (Jun. 1, 2021, 3:06 PM), https://www.sanjogindia.org/wp-content/uploads/2021/04/AHTU%20Watch%20-%20A%20National%20Study%20on%20Status%20of%20Anti%20Human%20Trafficking%20Units%20in%20India%20(2010%20to%202019).pdf.

70 National Human Rights Commission, *Human Rights Advisoty on Right to Mental Health in view of the second wave of COVlD-19 pandemic* (Advisory 2.0), (Jun. 1, 2021, 2:38 PM), https://nhrc.nic.in/sites/default/files/ADVISORY%20MENTAL%20HEALTH.pdf.

71 National Human Rights Commission, *Advisory to identify, release and rehabilitate bonded labourers during Covid-19 pandemic*, (Jun. 1, 2021, 2:40 PM), https://nhrc.nic.in/sites/default/files/ADVISORY%20BONDED%20LABOURERS.pdf.

72 National Human Rights Commission, *Human Rights Advisory on safeguarding the rights of informal workers during the second wave of the COVlD-19 pandemic (Advisory 2.0)*, (Jun. 1, 2021, 2:42 PM), https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%202.0%20on%20Informal%20Workers.pdf.

the Advisory on Combatting Human Trafficking in Context of the COVID-19 pandemic was issued in December 2020. Five months later, the second wave of the COVID-19 pandemic has exacerbated the living conditions of our society, however, the Action Taken Report against human trafficking has not been furnished by either the Central Government or the State government(s). Theoretically, these Advisories are the way to go forward in the fight against human trafficking, however, without the political will, inter-departmental coordination in every State and accountability mechanisms, they are only paper.

Conclusion & Recommendations

The COVID-19 pandemic has created havoc worldwide by not only spreading its severe acute respiratory syndrome but also magnifying the ever-growing business of human trafficking. The pandemic has been the cause for self-isolation and financial distress which have further given birth to inter-personal violence, homelessness, unemployment, disrupted family life and increased internet screen time by gullible children. To top it all, the situation has been aggravated by overwhelmed health care providers, under-staffed law enforcement agencies and under-qualified social workers. The impact of COVID-19 on the status of human trafficking in India is currently in the grey zone with incomplete data, however, the history of human trafficking and its sweet spots is insightful. India, stricken with poverty after the destruction of the COVID-19 pandemic may very well be welcoming an elevated risk of trafficking during and after the pandemic. The efforts taken to fight human trafficking in the midst of the COVID-19 pandemic by the Indian government is abysmal, to say the least. The author is, thus, compelled to make the following recommendations:

Involvement of Healthcare Service Provider

The healthcare professionals of the country must also have a trained eye for probable indicators of disguised trafficking and must offer resources to such victims which may not be available elsewhere. The healthcare service system can be used as a tool for community awareness against the factors and dangers of human trafficking. Healthcare facilities can display posters on human trafficking. These posters, apart from reinforcing stereotypical sex trafficking victims can also display other vulnerable modes of trafficking like organ removal, begging etc. and garner the attention of a diverse community.

Healthcare facilities can make at-risk patients aware of their options by providing them with human trafficking helplines, location of shelter homes and other services. The COVID-19 pandemic has revolutionised telemedicine and taking advantage of the same, healthcare providers can keep an eye out for red flags for possible exploitation at home in any form.

The healthcare facilities can voluntarily collaborate with non-governmental agencies providing necessities like food, clothes and shelter and make them accessible to patients/ victims. Healthcare providers can also advocate for timely minimum wages to informal workers and unskilled labourers in the healthcare sector.

Involvement of the Private Sector and Entrepreneurial Thinking

The private sector currently needs to sensitize itself to the financial position of labourers and must do its part by not being responsible for unemployment in the labour sector. Coalitions between the private sector and government encouraging entrepreneurial spirit is crucial. They can create a workspace for the unemployed by engaging in online platforms and creating new ventures to provide opportunities for those who may succumb to human trafficking if left to their own devices. This model prevents the human trafficking of the unemployed altogether.

A Human Rights-Based Approach

There is a significant amount of reliance on Anti-Human Trafficking Units to combat human trafficking however, it is advisable that a holistic approach must also be adopted alongside the enforcement of the law. While there is a need for rule of law to prevail, the responses against human trafficking must also be based on human rights. The amalgamation of human rights, healthcare and social services should be prioritized.

Active Involvement of NGOs for Collection of Data

The whole world is currently ravaged by the COVID-19 pandemic and no one is immune to it. Nevertheless, some countries have handled the containment measures better than others. The pandemic does not affect every country uniformly and one should make use of this. The data on prevention, risk and rehabilitation of human trafficking during COVID-19 is different for various countries. It is thus, vital to accumulate the same from other countries and apply it judiciously. It would be appropriate to set up NGOs specifically for the collection of accurate data on the impact of COVID-19 on trafficking in persons instead of overwhelming the Anti-Human Trafficking Units. The United Nations Trust Fund for Victims of Human Trafficking can offer financial help to the leading NGOs of every country who need more support during the COVID-19 crisis.

Accountability on Platforms Fuelled by the Internet

There is no question that the internet is a bane in context with human trafficking, more so during the COVID-19 pandemic. Unsupervised children and impressionable young adults

can easily be trapped by human traffickers. Therefore, social media platforms should be burdened with responsibility if they are alerted with irregular content promoting organ trafficking and the sexual exploitation of children.

Indian legislature has promulgated the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 wherein social media platforms are considered intermediaries enabling 'online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.[73] Illicit content depicting sexual abuse or rape is to be regulated by social media intermediaries.[74] Thus, traffickers can be prevented from exploiting victims online by making these intermediaries accountable. The online content regulators must immediately track the person behind posts, articles and stories that even hint at human trafficking.

Bridge the Lacunae of the Transplantation of Human Organ Act, 1994

The Transplantation of Human Organ Act, 1994 was promulgated to criminalize the illegal sale of organs and streamline the process of organ donation. The implementation of this legislation has been severely criticized because of a significant increase in illegal kidney and liver transplants. The destitute and the unemployed have taken to the illegal sale of organs during the COVID-19 pandemic as iterated above. There is a very big flaw in the Transplantation of Human Organ Act, 1994 which encourages traffickers to victimize the vulnerable. The committee in charge of authorizing altruistic donations can monitor the same however, they do not have the authority to check bank accounts for payments because of illegal organ trafficking. It would be beneficial to overcome this particular legal loophole.

Certain areas of the world, including India, are going to struggle against the lashes of the COVID-19 pandemic for the unforeseeable future. Just as the government of India is preparing for the third wave of the pandemic, it is suggested that human trafficking may also be taken into the loop in the battle against a humanitarian pandemic in a pandemic.

73 The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, § 2(1) (w) (India).

74 The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, § 2(4) (India).

Efficacy of 'Victim Impact Statement' in Indian Criminal Justice System in the Light of International Experiences

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Abstract

India has one of the lengthiest and oldest criminal justice systems, which has continued since the Vedic period but the Britishers implemented it systematically. Primarily our Criminal Justice System was accused centric but nowadays the Indian courts' approach is shifting towards victim centric and thus, Victim Impact Statement (VIS) could play a pivotal role in bringing the criminal justice administration into action. The modern legal countries like the US, UK and Australia have already adopted VIS, India having one of the strongest legal systems in the world needs to adopt it without any hesitation. The Criminal Justice System now recognize the active role of the victim and can be helpful for the prosecutor also because they can analyze victim's physical, emotional and psychological level from the information given by the victim. In a recent judgment[1] Hon'ble Justice D.Y. Chandrachud has stressed on "testimony of Disabled witness/victims cannot be considered weak or inferior and further issued a guideline to make Criminal Justice System more disabled friendly". In a leading judgment,[2] the highest court of the land has very strongly advocated and recognized the role of the Victim Impact Statement in the justice delivery system. The Supreme Court believed that the Victim Impact Statement can be a game-changer. This paper explains the importance of the Victim Impact Statement in the criminal justice system and its effectiveness in justice delivery. We

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1 Patan Jamal Vani v. State of Andhra Pradesh, (2021) Crl. App. No. 452, (SC).
2 Mallikarjun Kodagil v. State of Karnataka (2018) (SC).

have also compared India with International Jurisdictions for better implications in different scenarios in the light of landmark judgments. The merits and demerits have been discussed throughout the paper and will also highlight its feasibility, potency and adverse effect, if any, on the sentencing process in India.

Introduction

The Victim's role in the Criminal Justice System has been of little significance. If the crime has been committed, then it has been considered that the crime has been committed against the state on the one hand and committed by the accused on the other hand. But with the passage of time, the position of the victim in the criminal justice system has changed. The major improvement which has been done by the various countries related to rights of victims which specifically granted the victims "right to say" in the criminal proceeding.[3]

The Input of the Victim at the stage of a criminal proceeding is divided into three categories:[4]

1. The role played by the victim in the sentencing process.
2. The role of the victim in the post-conviction stage.
3. Compensation to the victim and punishment to the accused person.

The United Nations, in the Seventh Congress adopted a "*Declaration on the Prevention of Crime and the Treatment of the Offender*"[5] which deals with victims of crime and abuse of power. In the declaration, Part A[6] specifically deals with the "views of the victim must be presented at the stages of criminal proceedings" considered to be imparting the victim a fair treatment.

In this paper, the Research Question is: Whether the Victim Impact Statement during the trial enhances the participation of the Victim in the proceeding or otherwise this statement gives an adverse effect on the Sentenced of Accused Person i.e., the Severe or the Lenient

3 Ministry of Law & Justice, *Toward Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-trial and trial stages of rape Prosecutions in Delhi,* Government of India (Mar., 2015) https://doj.gov.in/page/towards-victim-friendly-responses-and-procedures-prosecuting-rape-study-pre-trial-and-trial.

4 *Id.*

5 U.N. Cong. 7th Sess., *Prevention of Crime and the Treatment of the Offendor,* U.N. Doc. A/CONF.121/22/Rev.1 (Aug. 26, 1985), https://digitallibrary.un.org/record/114498?ln=en.

6 *Id.* Part A, (On access to justice and fair treatment of crime victims).

which kind of Sentence after using the Victim Impact Statement?

Sentence to the accused person brings great satisfaction to the victim of the crime because the victim has been the most affected party whose interest cannot be ignored in any circumstances. But at the stage of sentence hearing, the accused enjoys a valuable right. The right which is enjoyed by the accused is the "right to be heard" before passing any sentence by the court of law and if this right of the accused is violated by the court, then sometimes it goes very root of the case and also vitiate the trial if the irregularity can't be cured by the court. But there is as such no provision for the hearing of the victim. To some extent, western countries have adopted this right in the term of "Victim Impact Statement". This term can also be referred to as "Victim Opinion Statement or the Victim Impact Evidence".[7]

The Victim Impact Statement means the statement given by the victim in any criminal proceeding of harm or the loss which is suffered by the victim at the time of the commission of the crime. According to the American jurisdiction, this term also includes the opinion of the victim related to the appropriate sentence to the accused person. This statement basically gives a mouthpiece to the victim's experience from that crime in the court of law so that the court can reach some conclusion from this statement while giving a sentence to the victim. The information given by the victim in the form of a statement that expresses the various harms obtained by the victim from that crime such as physical, emotional, psychological etc.[8]

Victim Impact Statement in International Perspective

This concept could be traced back to the 13th century, wherein the English Common Law, there was a dividing line between civil actions and criminal actions, the crown provided a mechanism to give the victim a right to speak. During the 18th century, the jurisdiction of the American Courts transformed from private action to state action and also the crime. Thus, from this, a new series of rights to the victim emerged in the judicial system of the various countries. The rights are given by the various jurisdictions not only to the victim but to the family of the deceased victim and also providing the opportunity of being heard at all the stages in the criminal justice process.[9]

7 K. Chockalingam, *Restitution to victims of crime in India–Recent developments,* 21(2) INDIAN JOURNAL OF CRIMINOLOGY (1993).

8 Andrew Sanders & Hoyle Morgan, *Victim Impact Statement: Don't work, can't work*, CRIM. L. REV. 4 (2001).

9 Mark Stevens, *Victim Impact Statements Considered in Sentencing*, 2(1) BERKELEY J. CRIM. L, 3 (2000).

The President's Task Force on Victims of Crime basically addressed the right of participation of victims at the stage of sentence hearing: "Victims do not have the right to present their views before the court of law. A judge without knowing the actual grievance from the victim's own mouth cannot evaluate the seriousness of the crime committed by the accused. So, the judge cannot give a valuable decision without giving the opportunity of being heard to the victim."[10] The United States Code under the Crime Victims' Rights Act[11] provided the various rights of the victim in which right to be heard in the proceeding and right not to exclude the victim from the proceeding unless the circumstances require. The evidence of victims will be held in camera and opportunity will be provided to the victim to directly address his grievances in the court proceedings. Hearing of the victim at this stage is crucial.

The US Congress passed in 1982 the Victim and Witness Protection Act, whose objective was to enhance the role of victims in the criminal justice system. This Act specifies the criteria to consult the victim in obtaining the views of the victim on the issues such as dismissal, plea negotiation etc. Also, this Act amended the Federal Rule of the Criminal Procedure i.e., Rule 32 includes the Victim Impact Statement in the report of pre-sentence which has to be supplied by the Probation of US Department to the sentencing judge. The report will include the information regarding the harm in the form of non-argumentative and will also include the medical impact assessment of the victim.[12] Rule 32(i) (4) which identifies the right to speak of the victim before imposing the sentence to the accused person. It is considered a mandatory duty on the court to inform the victim about this right to speak at the time of sentencing.[13] Senate's Statement highlights the purpose for giving the opportunity of being heard to the victim; "At the stage of sentencing when the victim invokes his right then it is believed that three types of victim impact have been provided to him such as victim's character, the impact of crime on the victim and to his family members and also the recommendations in the sentencing process."[14]

10 White House – Washington D.C, *President's Task Force on Victims of Crime: Final report*, Office for Victims of Crime (Dec., 1982), https://ovc.ojp.gov/library/publications/final-report-presidents-task-force-victims-crime#:~:text=President%20Ronald%20Reagan%20created%20the,victimized%20by%20crime%20every%20year.

11 United States Code, 1994, U.S. House of Representatives, § 377(1).

12 United States Justice for All Act, 2004, 108-405, U.S. House of Repre4sentatives; Crime Victims' Rights Act, 18. U.S.C, § 3771(a)(2).

13 150 Cong. Rec. S4268, *Crime Victims' Rights Act,* U.S. Senate (Apr. 22, 2004) https://www.congress.gov/congressional-record/2011/06/08/senate-section/article/S3607-3 (remarks of Sen Kyl).

14 Congress Rec, *supra* note 13.

In Canada, section 2 of the Victims of Crime Act, 1996[15] deals with the principles for the victims of crime in which the Victim Impact Statement is considered to be the essential part of the criminal justice process and the victim has the right to prepare the statement and after preparing this statement the court takes into consideration this statement at the stage of sentencing.

The International Criminal Court was the first International Court that provides recognition to the rights of the victim. The Rome Statute of ICC, 2002 made explicitly the provision for the right to participation to the victim and also includes the right to reparation to the victim.[16]

Rationale behind using the Victim Impact Statement

There are two models in countries like the USA which highlight the participatory role of the victims in the sentencing process. According to the first model of the USA Victim Impact Statement can be prepared in the written form and introduced at the time of sentence hearing which is attached with the pre-sentence report. The Second model of the USA provides the opportunity to the victim to give an oral account of his written disclosure.[17]

In the countries such as the U.S., Australia and India where the adversarial system exists which do not give much participatory rights to the victim at the stage of criminal proceedings. So, it is evident from this that the victim is considered to be a mute spectator in the proceeding or considered as a witness to the crime but various studies suggest that there has been growing emergence of this concept i.e., participation of the victim in the sentencing process in the criminal justice system. In the Criminal Justice System, the prosecutor represents the grievances of the victim before the court but with the emergence of this phenomenon, the victims have himself right to place before the court his grievances so that the court can convict the accused.[18] The rationale behind using the victim statement in the proceeding is to give a healing effect to the victim as well as to his family members. For example, the impact of a victim statement in the proceeding can be illustrated by an ex of robbery because, in this offence, the victim himself is in the best position before the court of law to explain the amount of money or other material things which has been lost

15 Victims of Crime Act, 1996, RSBC, Parliament (Canada), § 2.

16 U.N. GA Rome Statute of ICC, Jul. 17, 1998, art. 64(2), (2002).

17 G.S. Bajpai & Shirya Gauba, Victim Justice: A Paradigm Shift in Criminal Justice System in India, p. 65 (Thomson Reuters) (2016).

18 US, DOJ, *The Report on the President's Task Force on Victims of Crime,* Office of Justice – U.S. (May., 1986), https://www.ojp.gov/pdffiles1/ovc/102834.pdf, at p.9.

by the victim.[19]

Constitutionality of the Victim Impact Statement in the US

To strike down the unfair sentencing statutes, the principle of proportionality can be a well-recognized criterion. To impose liability on the accused person, neutral sentencing should be the key component. The use of the Victim Impact Statement in the sentencing process was initially addressed by the Supreme Court of US in the case of *Booth v. Maryland*,[20] Booth stabbed the elderly couple with a knife several times so that the couple could not identify the booth. The trial judge allowed the jury to take into account the Victim Impact Statement which will elaborate the impact of the incident on the victim as well as on his family members. The Supreme Court reverses the sentence of death and held that the jury cannot allow taking into account this type of statement in the death penalty proceedings. Thus, the Supreme Court of the US by 5 to 4 margins held that the use of the Victim Impact Statement is unconstitutional.

The reliance of the jury on the statement of the victim as well as to his family member could divert the jury from deciding the matter and the impact statement given by the victim can be inconsistent with the jury's decision process which has been required in the capital cases."[21] Thus, the court held that at the stage of sentencing, the use of victim impact statements was inconsistent with the Eighth Amendment.

In *Paynee v. Tennessee*[22] in this case, the Supreme Court overturned its earlier decision. The Court concluded that the Eighth Amendment was not a bar to the use of victim impact statements. A person named Payne killed a woman Christopher and Lacie, Christopher's two-year-old daughter but her three-year-old daughter Nicholas survived the incident. He was caught for the murder of the mother and the daughter, while deciding the penalty upon the accused, the four witnesses gave their testimony regarding the reputation of the accused person. On the other hand, from the prosecution side, the maternal grandmother of the surviving child i.e., Nicholas was allowed by the court to testify. The jury gave a death sentence to Payne which was appealed by him to the US Supreme Court regarding the objection raised by Payne and contended that the trial court should not allow the testify from the maternal grandmother. Payne relied on the US Supreme Court earlier decision in the Booth case and argued that this type of statement could not be admitted in the evidence

19 White House, *supra* note 10.

20 (1987) 482 U.S. 496.

21 *Id.*, at pp. 500-501.

22 (1991) 501 U.S. 808.

and also violated the Eighth Amendment rights. But the court rejected the contention and stated that:

> *"The State plays a pivotal role in the Criminal Justice System and is free in the death penalty as well as in other cases to adopt new procedure where the impact of the statement given by the victim could be said as another form or the method from which the victim informs the sentencing authority about the grievances caused by the accused person and decision of Booth case does not hold good and taking into account the victim impact statement serves the legitimate purpose."*[23]

Thus, the Supreme Court in this case finally overturned the decision given in the booth case and allowed the victim impact statement as evidence while deciding the sentencing in any case. The evidence of the Victim Impact Statement now can be accepted by the courts as part of the judicial process. The information given by the victim to the court regarding the grievances will give benefit to the victim.[24] Thus, the Court held that in the Victim Impact Process, judges should participate so that they can ensure that the victim has been given full opportunity to present their grievances at the sentencing stage.[25]

The debates continue regarding the use of victim impact statements in the criminal justice system and the role of enforcement agencies in this process. The law enforcement agencies play a very active role in this process because they provide the information to the victim about this right to participate in the proceeding from the very beginning. The opponent of using the victim impact statement argued that the law enforcement agencies will have to spend their valuable right in informing the victim about this participatory right and the accused will never be caught because of the involvement of the agencies in the rights of the victim.[26] In recent years, the enforcement agencies established the programs which related to the assistance to the victims and these programs provide various services to the victims of the crime such as informing the victim right to participation and the right to compensation. The victim service providers play a very active role in the organization of the program and also ensure that victims of crime are informed of their rights.[27] The criminal justice system now recognizes the active role of the victim in the dispensation of justice and can

23 115 L.Ed. 728-729

24 115 L.Ed. 734-735

25 115 L.Ed. 2d 735

26 Ellen K.Alexander & Janice H.Lord, *Impact Statements: A Victim's Right to Speak- A Nation's Responsibility to Listen,* OFFICE OF JUSTICE – U.S. DOJ (1992).

27 *Id.* at p.10.

be helpful for the prosecutor also because they can analyze the victim's physical, emotional and psychological level from the information given by the victim.

Effect of using Victim Impact Statement

The 'phrase effect of using victim impact statement' means the actual satisfaction of the victim while giving the statement regarding his views on the crime at the stage of sentencing in the criminal justice system. In 1981, the study conducted by the National Institute of Justice revealed that the satisfaction of the victim with the criminal justice system has been increased because of the satisfaction of the participation in the process.[28]Another study which was conducted in 1982 revealed that the participation of the victim in the process sometimes punished the accused severely. Robert Wells stated that using a victim impact statement sometimes recovered the victim from the psychological effect and also healed the wounds.[29] This participatory right of the victim sends a purposive message that the judicial system cares about the rights of the victim. Thus, providing the statement to the sentencing authority is a new phenomenon in the process of the criminal justice system and also helpful for the judges in determining the proper punishment for the accused.

Outcome of Sentencing by using Victim Impact Statement

According to Section 8(1) of the New Zealand Victim Offences Act, 1987 states that the primary function of the victim statement is to inform the decision-making authority because this statement will highlight the victim's own perception regarding his physical, mental and psychological harm which has been suffered by the victim as well as to his family members also. So, from using this statement, the judges can decide more seriously the sentence which must be imposed on the accused guilty of the crime while taking into account the victim statement but on the other hand, the critique of the victim impact statement may enhance the sentence of the accused person. An important point came into consideration that whether the use of victim impact statements will give severe punishment to the victim or not ?[30]

Sanders argued that this statement will not affect the decision-making process of the

28 Barbara Smith & Susan Hillanbrand, *Non-Stranger Violence: The Criminal Courts Responses,* 15(3) JUSTICE SYSTEM JOURNAL 3 (1992).

29 Dcborah P. Kelly, *Delivering Legal Services to Victims: An Evaluation and Prescription,* 9 JUSTICE SYSTEM JOURNAL, 62 (1982).

30 Andrew Ashworth, *Victim Impact Statements and Sentencing*, Criminal Law Review (1993) Westlaw UK at p.3.

authority but is helpful in deciding the case so that justice can be achieved to the victim. The court only uses this statement as evidence and this statement will give the accused severe punishment is only a misnomer. Another important issue that can be highlighted after taking into account the outcome of the statement is whether in the sentencing process, the use of victim impact statements will lead to unjust punishment to the accused or not ?[31]

There are two models existing in the criminal justice system, the first model is the conventional model of the criminal justice system in which offences have been committed by the accused only against the state and give primacy to the state to deal with the accused. According to Andrew Ashworth, "each case sentence must be proportionate according to the seriousness of the offence and based on the principle of protection to the society."[32] The second model in the criminal justice system is the restitutive model where the crime has been committed by the accused against the victim and under this model; the accused provides compensation to the victim. This restitutive model places the welfare of the victim at the topmost priority. According to Ashworth, participatory right in the criminal justice process in written or oral submission at the stage of sentencing is the core of the restitutive model and held that VIS will not cause unjust punishment to the accused.[33]

Analysis of Victim Impact Statement in Indian Context

In India, people generally believe that the Criminal Justice System does not provide sufficient legal remedies to the victims of the crime and is considered to be the most neglected person in the whole process of justice. From setting the criminal law into motion to the trial of the case, the entire focus of the criminal justice system is on the accused and the system completely forgets about the rights of the victim.[34] The accused has been provided all the rights during the pre-trial, trial and post-trial stages. With the advancement in the Criminal Justice System, the focus has not completely shifted on the victim but some provision has been changed to protect the rights of the victim in this system. In the Criminal Justice System, two types of rights have been provided to the victims of any crime such as (1) the Participatory right of the victim in the Criminal Justice Proceedings (2) the right to seek compensation. The main grievance of the victim in the Criminal Justice System is the inadequacy of the provision which allows the victim to participate in the proceeding.[35]

31 Sander & Morgan, *supra* note 8.

32 Andrew Ashworth, Sentencing and Justice pp. 69-72 (6ed Cambridge Univ. Press) (1992).

33 D. Miers, *The Responsibilities and Rights of Victims of Crime,* 55 MLR 482 (1992).

34 Bajpai & Gauba, *supra* note 17.

35 White House, *supra* note 10.

The Malimath Committee on the Reform of Criminal Justice specifically deals with the victim's perspective and recommends that the victim shall have the right to participate in the Criminal Trial. In *Shyam Narain v. State (NCT of Delhi),*[36] the court observed that the purpose of imposing the sentence on the victim is to realize the accused of his fault which sometimes cannot be cured because of the commission of the crime, not only against the society but also against the victim as well as to his family members. The purpose of giving punishment is to ensure a society that they will not suffer from the harm again and again. The principle of proportionality must be observed while deciding a case between when the offence has been committed on the one hand and the penalty imposed on the other hand. Thus, while deciding the case the court must adopt an approach from which judges can take into account the repercussions of the crime on the victim.

In the *State of M.P. v. Saleem,*[37] the Supreme Court held that the punishment imposed on the accused must not be irrelevant but also consistent with the repercussions of the crime on the victim.

In *Satya Prakash v. State,*[38] for the first time Delhi High Court in this case, evolved the concept of participation of the rights of the victim in the trial process and took into account the circumstances of the crime committed by the accused and also the impact of crime on the victims as well as to his family members. The Court balanced the sentencing process and compensation to the victim under Section 357/357A of the Criminal Procedure Code.

In road accident cases, when the victim died the most sufferer in these cases, the family members of the victim and the court observed that judges should take into consideration the effect of the crime on the family members of the victim and the court relied on the case of *Rattan Singh v. State of Punjab* where Justice Krishna Iyer, observed the weakness of jurisprudence where the law did not give much attention to the victims of the crime. The court observed that though the matter of this case falls under the domain of road accident cases, but now this is the time to import the concept of Victim Impact Statement which is enshrined in the western criminal justice system. The court held that summary inquiry should be conducted to ascertain the relevant facts and the required documents for deciding the matter. The SHO of the jurisdictional police station will conduct the summary inquiry and lodge a report such as "Victim Impact Report" and both the Victim Impact Report and the Police Report should be submitted in the road accident cases before the Metropolitan Magistrate.

36 (2013) 7 SCC 77.

37 (2005) 5 SCC 554.

38 (2013) 3 MWN (Cri) 373.

The Court directed in this case for the preparation of the Victim Impact report and held that: "It is a responsibility upon the judges to take into consideration the effect of crime and also the repercussion not only on the society but also on the victim and their family members and where the victim died such as in road accident cases, where the precious and valuable human life cannot be restored by the accused of the crime but giving the opportunity of being heard to the family members of the victims so that they can present their views on the sorrow will fulfil the objective of the criminal justice system and the compensation to the victim or in the case where the victim died, to the family members of the victim will provide some solace." The court highlighted this serious issue pertaining to the victims of road accident cases where the victims come from the lower strata and are the sole bread earner in the family. That is why providing compensation to the victim's family members will fulfil the needs of the family. The Court, in this case, elaborated the format for Victim Impact Report. In this report, the following aspect will be covered by the SHO such as the nature of injuries sustained, any medical treatment received by the victim and the loss of earnings from the incident etc. But in the western criminal justice system, the term used in the jurisprudence such as "Victim Impact Statement" because of the sensitivity attached to the victim.[39]

In *Mallikarjun Kodagil (Dead) v. State of Karnataka*[40] in this case, Supreme Court felt the need for Victim Impact Statement while awarding the convicted person an appropriate punishment at the stage of sentencing and also, in this case, the court highlighted various issues related to the protection of the rights of the victim because during the trial of any case the victim can be considered by the court as a witness in the proceeding but not as the victim of the crime. At the trial stage, the victim has to be represented by the prosecution in the criminal justice process and his impact statement of the crime remain unexpressed and there is no such provision in the criminal justice system that gives the participatory right to the victim but non participation of the victim in the process sometimes lead to the secondary victimization where the victim marginalized during the trial. The trial process has been organized in such a manner where the personal appearance of the victim is restricted at all the stages of the trial.

The Court relied in this case on a declaration such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which led to the movement of empowerment of the rights of the victim and led to the various reforms in the criminal justice process. To provide the victim the right to protection and right to participation in the

39 (2013) 3 MWN (Cri) 373.

40 (2019) 2 SCC 752.

process and these statements provide most of the answers to the question. These statements can be made in any form such as oral or in written form by the victims of crime regarding how the crime and the criminal impacted on the life of the victim. So, these statements are in the form of providing additional information to the court which is not available before the court. In this Victim Impact Statement, certain types of aspects included such as medical expenses incurred in the treatment of the victim, lost wages etc. Thus, in this case, the court held that due recognition must be given to the Victim Impact Assessment so that the court can convict the accused for the appropriate sentence. Section 235(2) of the Criminal Procedure Code; give a right to hear to the accused person on the question of sentence. It is the mandatory duty of the judges to hear the accused and take into account all his material evidence while deciding the quantum of sentence of any case. The great disadvantage of this provision is that this right has been provided only to the accused person and not to the victim of any crime. The victim of crime can express his grievances only through the prosecution and there is no such provision in the Indian Criminal Justice System.[41]

The Victim Impact Assessment can be considered as an additional tool in the hands of the court who introduced this concept by an experiment in Delhi court. Hearing the victim at the stage of sentencing in person or through the impact statement could be crucial. So, considering the Victim Impact Statement in the court will help the court in taking the balanced approach i.e., deciding the quantum of sentence to the accused as well as the monetary compensation to the victim.[42]

Conclusion

The Victim Impact Statement has now been accepted in the Criminal Justice System of the western world and may be used in any type of case whether the cases of simple assault or the death penalty cases and using the victim impact statement will ensure fair justice to the victim and also ensure fair trial to the accused. Countries like the USA, Canada and Australia have made the Victim Impact Statement mandatory in their Criminal Justice System. It is high time that the Indian Criminal Justice System should also adopt this provision in its system. The Idea of using a victim impact statement is to give fair and equal treatment to both the parties to the proceedings and using this statement cannot be disadvantageous to the accused person because it protects the rights of the victim. To assess the factors i.e., aggravating as well as mitigating in deciding the quantum of sentence to the accused, so it will be appropriate for the court to hear the victim at the stage of sentencing.

41 The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, § 235(2).

42 Satya Prakash v. State (2013) 3 MW.N (Cri) 373.

Modern India needs a well modern Criminal Justice System, which must include a 'Victim Impact Statement', without which our whole Criminal Justice System seems incomplete. The laws enforcement agencies must inform the victim about this participatory right and the prosecutor must coordinate with the victim and the ultimate authority vested with the judges. For the effective use of this statement, the presence of the victim with the Public Prosecutor at the trial will give a new dimension to the criminal justice system. The victim in the criminal justice system has been bestowed with appeal right provided under the proviso to Section 372 of the Criminal Procedure Code.[43] Thus, the prosecutor will be under obligation to consult the accused at all the stages of the trial. Further, providing assistance to the victims of the crime is of great importance because sometimes the victim suffers irreparable harm which has a long-lasting impact on the victim. Therefore, the law enforcement agencies, as well as the judicial system of the country, should take into account the needs of the victims sincerely. Thus, the participative approach will generally have the potential to reduce the gap and to promote an inclusionary society and the judicial system of India should make necessary reforms for allowing the victim impact statement at the stage of sentencing. This statement will not affect the final judgments given by the court in any criminal case. It will provide the court with additional information and also ensures fairness in the process for the accused and the victim.

43 The Code of Criminal Procedure, *supra* 41, § 372.

PSYCHOLOGICAL AUTOPSY

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Abstract

The most unswerving technique to reconnoiter the correlation linking meticulous background of the departed and suicide is psychological autopsy. It is a process involving the restoration of the events which led to death by thorough examination to find causes, motives and circumstances of the deceased with emphasis on suicide risk factor. It provides a picture of the profile of victim and helps makes a relation between the chain of events and resultant act of death. It has a valuable contribution for public at large by providing an efficient method to understand the physic of an individual and circumstances before death which leads the examiner to find the cause of death.

Introduction

The term 'Psychological Autopsy' refers to the process of analyzing the psychological condition of the departed preceding his/her death by construction of events leading to death, wherein the cause of death is to be determined.[1] In this procedure the evaluation is made about what the person thought prior to the death, their personality and behavior in order to discover the reason of suicidal death.[2] Mental evidences are collected to elucidate unclear deaths and suicides.[3] Originally, it was a method to provide clarification regarding the manner in which death ensued in cases where cause of death is unknown or vague, factors which lead to death and information about the deceased by analyzing the mental and

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1 Khan FA, Anand B, Devi M G, Murthy K K., *Psychological autopsy of suicide-a cross-sectional study*, 73(8) INDIAN J PSYCHIATRY 47 (2005).

2 Vasudeva Murthy C R, *Psychological Autopsy-A Review,* 3(3) AL AMEEN J MED SCI 177 – 181 (2010).

3 Geeta Saxena & Vineeta Saini, *Psychological autopsy- A Way to Revealing the Enigma to Equivocal Death* IJFSC Aug. 28, 2017 1-18 (2017).

bodily disorders suffered by the deceased. It is conducted by determining the psychological aspects of the victim by the method of interviews and investigators examine the documents to understand the actions, traits, routine, practice and history of the victim preceding to death.[4] In its quintessence, psychological autopsy denotes an autopsy analytical process that pursues to disclose the intent of the decedent through an in-depth reviewing assessment through designed interviews of informants as well as an examination of pertinent records.[5] The evidence is collected from the interview of members of family and contacts or person who was in touch with the deceased prior to the death. At present psychological autopsy is regarded as most consistent and effective to understand the cause of death.[6]

Objectives

The process of psychological autopsy targets towards attaining four objectives. The first objective is to give details regarding the circumstances which led to death as it helps the family to accept the reason of demise of the loved one and understand how the death has occurred. The second objective is to find consistency between the physical evidences and psychological evidences to know the clear state of facts. The third objective is to contribute in the direction of the investigation and progress of study to prevent the cases of suicide.[7] The last goal is to refine suicide assessment and prevention techniques with a goal to reduce the number suicides. The process is useful in cases of suicides, in understanding the motive and intention in crimes, in formulation of policies by institutions like prisons to prevent cases of suicidal deaths.[8]

Methodology

While conducting the investigation of death, the role of medical examiner being the forensic pathologist while conducting the autopsy is to define the reason of death by observing the circumstances of death and manner in which death has occurred.[9] The mental health professionals and behavioral science investigators possesses the expertise to evaluate a

4 Litman, R.E., *500 psychological autopsies*. 34 Journal of forensic Sciences, 638-646 (1989).

5 Isometsä et al., *Psychological autopsy studies--a review*. 16 Eur Psychiatry 16:379-85 (2001).

6 Kumar P, Ashok J, Sankar S, Sayiram S, Vasudevan *A. Psychological autopsy: The psychological assessment of an equivocal death. Sri Ramachandra*, 3 J Med 1-41 (2007).

7 Shivangi Joshi, Importance of Psychological Autopsy Legal Desire (Jul. 16, 2020), https://legaldesire.com/importance-of-psychological-autopsy/.

8 Khan, *supra* note 1.

9 Golda Sahoo, *Legal Validity Of Psychological Autopsy In Suicide Cases: A Medico-Legal Analysis*, 3(1) Indian Law Journal On Crime & Criminology, 2456-7280.

range of factors including the behavior, thoughts, feelings, and relationships of a person who is related to dead person to carry forward the basic purpose of determining the manner of death, reasons of death by assessing the lethality (suicide) and Psychotherapeutic value to the survivors.[10]

The investigation must always begin from the crime scene. It is recommended that the informants must be selected on case-to-case basis depending upon proximity with the deceased especially soon before death. Information may be collected from the best available sources. As much as possible, information should be gathered from authentic sources. To safeguard a correct balance amid the grief perseverance and recall bias, the ideal time for discussion seems to be 2-6 months. It is necessary that the process should respect the veracity of the deceased, allow processing of emotions, and give reasonable time to informants to respond to questions. The data collected is categorized into three classifications i.e., *Firstly,* fact-based data (age, marital status, occupation); *Secondly,* personal data (relations, routine, alcohol/drug use, causes of trauma); *Thirdly*, secondary data (family history, police records, diaries).

The US Perspective of Psychological Autopsy : Protocol to Conduct an Equivocal Death Interview

It is pertinent that the ethical codes and practices should be adhered to while gathering the data from the interviewers as the family of the deceased is sensitive regarding the information to be revealed and used for the purpose of investigation.[11] In order to get firsthand information which is free from tutoring and clear in the mind of the informant, the information should be collected within a time span of maximum six months[12] so that the quality of the information is maintained.[13]

The ethical considerations in an interview are very important as the honor of the departed need to be appreciated. The facts or issues which the family or friends of the deceased does not want to be revealed except for the purpose of investigation must not be revealed in the public domain, there should be non-disclosure of personal statement. The interviewer must

10 Davies, J.A, Emer, D.M, *Role of and technique in forensic psychology Forensic medicine: Clinical and pathological aspects*, 1(2) Journal of Medicine 705-721 (2003).

11 Beskow J, Runeson B, Asgard U., *Psychological autopsies: Methods and ethics. Suicide Life Threa*t, 20 Pub Med 307–23 (1990).

12 Seguin M, Lesage A, Turecki G, et al. *Life trajectories and burden of adversity: Mapping the developmental profiles of suicide mortality,* 37 Psychol Med 1575–83 (2007).

13 Brent D, Perper J, Kolko D, et al. *The psychological autopsy: Methodological considerations for the study of adolescent suicide*, 6 J Am Acad Child Adolesc Psychiatry 27-362 (1988).

make the schedule of the interview in a very flexible manner to accommodate the time and convenience of the informants, especially keeping in mind the loss of the loved one of the informant. The communication can be made through electronic mediums or a phone call to avoid the delay and refusal rate.[14] The privacy of the informant should be ensured by the interviewer by developing a relation of trust and confidence. It is the duty of the interviewer to take informed consent and maintain confidentiality and anonymity of the informants and the information.[15] The interviewer needs to possess certain skills like clarity of language both verbal and written, decent language, and writing verbatim as has been informed by the informant, simple questions should be asked. It has to be ensured that the information is not exaggerated. It should also not be added or deleted. Intentional or unintentional false information can be given by the informant, a cautious approach should be there while the interview is being taken.[16] The information should be recorded after taking the consent of the informant to add to credibility of the statements.

Case Studies - USA

In this case, a British lady, married an American soldier based in England, where their first child was also conceived and born. The second child, also conceived in England, was born after the couple had returned to the United States. The husband proved to be one of the strangest and rare sexual psychopaths encountered by this examiner. The defendant had repeatedly left family in an attempt to escape but was returned by the husband, habitually with force. She was unable to return to her native England because, while the older child had been born in England and thus had English citizenship, the younger child had been born in the United States and could thus not be removed without the father's consent. During the few years of their marriage, the husband's paranoid tendencies became more and more apparent. Finally, on the night of the killing, he had quite suddenly stated that he was convinced that both of his children were fathered by his brother, who had never been in England, and that these two little bastards would have to be murdered. He gave the wife a choice among having the children strangled, drowned or shot - but emphasized that they would certainly be dead the next morning. After the husband fell asleep, the defendant then shot and killed him. The psychiatric autopsy revealed that the victim had been hospitalized in a military hospital where the physicians had been aware of his psychosexual deviations and tendency toward violence. The defendant had been hospitalized in a private psychiatric

14 Saxena & Saini, *supra* note 3.

15 British Psychological Society, *Ethical aspects of psychological autopsy*. 84 Acta Psychiatrica Scandinavica 482-487 (1990).

16 Hawton, K., Appleby, L., Platt S., Foster, T., *The psychological autopsy approach to studying suicide: a review of methodological issues,* 50 Journal of Affective Disorders 269-276 (1998).

hospital for a short time as a result of the torture and abuse inflicted by her husband, a classic case of wife battery. All this was well documented. In addition, numerous neighbors came forth with testimonies that they had repeatedly seen the defendant with black eyes, bruises and other types of injuries, and that she had bitterly complained about this abuse by her husband and had pleaded for help. The fact that the deceased's brother could not possibly have been the father of the two children was proved without any doubt. Under these circumstances, the finding of the deceased was one of sexual psychopathy, paranoid personality, finally progressing to a true paranoid psychosis, with displays of extreme violence, wife battery, sadistic tendencies and the distinct possibility of homicide. Since very little could be found in the literature to justify a psychiatric autopsy on the victim in criminal proceedings, a famous work of fiction, supposedly based upon fact was introduced, the novel by the Austrian author, Franz Werfel, "*Not the Murderer but the Murdered is Guilty*".[17] The presiding judge consulted on two different occasions with all the judges hearing criminal cases in this jurisdiction before permitting the psychiatrist to testify, who dealt exclusively with the victim and not with the defendant. While the charge was one of "*murder, open*," the jury returned a verdict of voluntary manslaughter, which was upheld upon appeal to a higher court.[18] Within a few months after this case, which received some publicity, two other and rather similar cases came to trial. One was a slightly retarded black woman, age 35, who had killed her common-law husband, who in the past had beaten her repeatedly, once shot her very seriously, and had made numerous threats against her life. On that particular occasion, he had been drinking, again displayed violence and further threats toward the defendant, whereupon she shot and killed him. The psychiatric autopsy of this victim revealed a propensity toward excessive drinking, gambling, assaults and violence. It revealed that the defendant was justified in her fear for her life, since it was not unreasonable to assume that the victim may have proceeded to homicide, and that the defendant acted like other reasonable persons may have acted under similar circumstances. While the charge was one of murder, the jury returned a verdict of voluntary manslaughter, with ten years' probation, without any term in j ail if the defendant abides by the terms of probation.[19] The third case concerned a 20-year-old black man, who shot and killed his step-father, who on that particular night had gone with an axe after the defendant's mother, the victim's wife, in an attempt to force her out of her locked car where she was trying to protect herself against his homicidal threats. In the past the victim had very frequently assaulted, battered and injured his wife, at one time fracturing her nose, assaulted and

17 Franz Werfel Franz: Nicht der Morder. Der Ermordete ist Schudig. eine (K. Wolff, Munchen) (1920).

18 State of Arizona v. Wendy Irene Anne Jones (1976) U.S.T. 13 Cr. No. 93879 (U.S.).

19 State of Arizona v. Ida Mae Jones. (1978) U.S.T 27 Cr. No. 98666 (U.S.).

injured the wife's 13-year-old daughter, his step-daughter, necessitating hospitalization of the child, and made numerous threats, at times with knives, against the lives of all of his family members. The psychiatric autopsy of the deceased revealed a boisterous, aggressive, self-centered, domineering, tyrannical person, who spent most of his time drinking in a veterans' club, without evidence that he had ever been in the military service. It further proved numerous acts of violence and threats of violence while at work, so that most of his coworkers and acquaintances were afraid of him and frequently had to interfere when he lunged at or assaulted some of his companions in the barroom or at work. The evidence revealed that he had had one psychiatric hospitalization for alcoholism, at which time assault and violence were recorded. He reacted to the extreme in any argument and could not brook any differences with his demands and opinions. The diagnosis of chronic alcoholism in a paranoid personality, with episodic acute intoxications, manifestations of prior serious violence, and possible homicidal tendencies was made. The jury returned a verdict of not guilty and freed the defendant,[20] possibly on the basis that he was acting in defense of his mother, partially also in self-defense, and that he was justified in his fear of the assaults and threatened assaults committed by the victim, and that the past history of the victim amply demonstrated his dangerousness.

Status of Psychological Autopsy in India

In India, the use of process of psychological autopsy in investigation process is in its nascent stage. Though it has been used in various criminal cases but it is still in developing stage both theoretically and in its practical application.

Legislative Provisions

In Indian legal system all the forensic reports or expert's opinion or opinion of third party when relevant, are admissible under Section 45. In India, the Courts have the discretion to consider the result of reports of psychological autopsy under Section 45 and 51 of the Indian Evidence Act, 1872 as it provides for expert opinion. Section 45-51 provides for relevancy of opinion of third persons. These provisions are exceptional in nature as in general practice evidence of those facts can only be given which are in the knowledge of witness but under these sections' expert evidence becomes important as in order to form opinion on technical and professional matters Court exercises its discretion to consider the opinion of experts.[21] Also whenever the opinion of any living person is relevant, the

20 State of Arizona v. Robert Lee Carruthers. Jr., (1978) U.S.L.R 134 42 Cr. No. 100359 (U.S.).

21 The Indian Evidence Act, 1872, No. 1, Acts of Parliament, § 45.

grounds on which such opinion is based are also relevant.[22]

Indian Cases – Psychological Autopsy

In the 2006 Nithari Case,[23] forensic psychologists were also involved in the inquiries of the dishonorable 2006 Nithari killings, where 19 dead bodies were found in the backyard of Moninder Singh Pandher's house at Nithari village in Noida, Uttar Pradesh. He was charged with murder and rape.

In the Sunanda Pushkar[24] case of 2014, the famous Indian businesswoman who was also the spouse of a former Indian diplomat and politician Shashi Tharoor was found dead in inexplicable state of affairs in hotel room. The post mortem report revealed it as a sudden and unnatural death while investigating team suspected a suicide. The Special Investigation Team (SIT) conducted a psychological autopsy by interviewing her family members and friends to comprehend the psychological state of the deceased and to investigate the conflict between her and her husband. Shashi Tharoor was charged for the offence of abetment of suicide of his wife Sunanda Pushkar.

In the Burari[25] case of 2018, the entire country was traumatized when the mass suicide of 11 family members was reported in the Burari area in Delhi. The ten family members were found hanging under strange conditions while the oldest member of the family was strangled. The psychological autopsy was conducted by the Police of Delhi as they found certain books at the crime scene to apprehend the psychological condition of the victims which helped them to find the reason of mass killing. The police finally concluded that it was a case of a ritual gone wrong thus leading it to 'mass suicide'.

Shortcomings of the Procedure

The approaches adopted for the evaluation are uncertain which questions the admissibility of psychological autopsy as evidence in the Courts due to shortage of uniform devices

22 *Id.,* § 51.

23 Shilekh Mittal et al., *Psychological Aspects of Serial Killings,* 7(2) Journal of Punjab Academy of Forensice Medicine and Toxicology 58-60 (2007).

24 Sumit Kumar Singh, *Sunanda Pushkar death case: SIT relied on forensic psychological autopsy*, DNA India (May. 15, 2018) https://www.dnaindia.com/delhi/report-sunanda-pushkar-death-case-sit-relied-on-forensic-psychological-autopsy-2615149.

25 HT Correspondent, *Psychological autopsy of Delhi's Burari family confirms suicide,* Hindustan Times (Sep. 14, 2018), https://www.hindustantimes.com/delhi-news/burari-psychological-autopsy-confirms-suicide/story-tJ2OYJFVNbhtvFgmy19rJK.html#:~:text=The%20psychological%20autopsy%20report%20of,suicide%2C%20police%20said%20on%20Thursday.&text=Strangulation%20marks%20on%20Devi's%20neck,to%20register%20a%20murder%20case.

and methods, biasness on the part of the informant, time gap between the incident and the interview.[26] The information linked to victim's psychological situation and behavior may be misleading by the third-party informants who are interviewed by the psychologist either purposely or unconsciously.[27]The reliability of the statements of informant is also questionable as they may be unacquainted with specific issues or may deliberately suppress information.[28]

Conclusion

It is a reliable method for the field of forensic science that empowers our investigation team to solve the crimes. The analysis of developments made in USA regarding the concept can be appreciated and adopted in India. In Indian framework, the acceptance of the concept is farfetched as there is lack of research work[29] in the field. At present, evidence collected by the procedure can be of corroborative value and not substantive value as the concept has lacunas like bias in the perception of informant, the want of skill and knowledge of interviewer. Also, the structure and method of procedure needs to be well defined and consistent in all cases. As regards the admissibility and evidentiary value in Indian law, the procedure can be covered under the criteria of expert evidence and Courts can take into consideration the result of the procedure but Courts are not bound by it. The psychological autopsy report becomes admissible since it may be the only available tool to be verified by the Court as the nature and mental condition of the deceased can be informed to the Court only by the informants, it also gains importance under evidence law by applicability of Rule of necessity.

26 Snider JE, Hane S, Berman AL. *Standardizing the psychological autopsy: Addressing the Daubert standard,* 36(5) Suicide Life Threat Behav 1-45 (2006).

27 Murthy, *supra* Note 2.

28 Menon V, Varadharajan N, et al' Psychological autopsy: Overview of Indian evidence, best practice elements, and a semi-structured interview guide, 62(6) Indian J Psychiatry 631-643 (2020).

29 Snider *supra* note 26.

Constitutional Courts and Judicial Independence: Conceptualising Judicial Dissent in South Asian Perspective

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Abstract

Constitutions in modern democracies have become a focal point in their quest to embrace maximum realization of rights to its citizen and imposing limitations on the government. The dissenting opinions of Constitutional Courts in many jurisdictions have played a significant role in upholding aspirations of the constitution and have been a pertinent cause of change in course of nations' legal history. Although, its publication historically has not been universal but gradually even civil law countries are beginning to allow dissenting opinions. It is also because one of the key dimensions in permitting its publication is increased transparency and Judicial Independence which is pertinent in upholding the rights of the individual against the state. However, the academic enquiry on dissenting opinions by constitutional theorists and academicians has been largely confined to few countries like United States, Canada, Australia or other European countries. This paper endeavours firstly, to explore the concept of dissent and its importance in affirmation of judicial independence and autonomy; secondly, the paper also analyses the role of judicial dissent by laying down a structured understanding of how the courts in countries based on the affirmation of liberal constitutionalism aim to achieve the democratic values; and lastly, the paper deals with judicial dissent in South Asian countries specifically from the perspective of India, Pakistan, Nepal, Bangladesh and Sri Lanka. The paper aims to analyse the practice

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of judicial dissent prevalent in these countries based on their unique constitutional framework which has developed out of their deeply ingrained cultural values and social and political history.

Introduction

Constitutionalism has come up to be affirmed, in some form or the other, in almost all the parts of the world since the late twentieth century.[1] The majority of the countries have constitutional democracies in place that embrace some form of human rights, rule of law, judicial review, limited government and separation of powers.[2] Today, the notion of constitutionalism has moved beyond boundaries and we can see varieties of constitutionalism emerging in different parts of the world, like, transnational constitutionalism and regional constitutionalism, among others.[3] In the wake of social, political and economic transformation undergoing around the world, South Asian countries are also no exception . Due to rapid transformation, global attention has been directed towards the development of constitutionalism and specifically analysing the role of constitutional courts in South Asia, a region which features courts robustly committed to judicial review and often sceptical of the political process but protective of groups and attentive to recognizing and entrenching diverse group interests.[4] The developments in relation to comparative constitutional studies with a specific focus on liberal constitutional democracy in South Asian countries, has led to a vast arena of literature focusing on the discourse in the field of ideologies dominating on the understanding based on the prominence of "Asian values" on one hand and "universalistic view of democratic constitutionalism" on another.[5] Most of the developments and transitions in these South Asian countries have raised immense interest and need for analysing the role of constitutional courts in developing and maintaining the constitutional ethos and norms,

1 Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century (O.U. Press, 1993).

2 Louis Henkin, *A New Birth of Constitutionalism: Genetic Influence and Genetic Defects, In Constitutionalism, Identity, Difference, And Legitimacy: Theoretical Perspectives*, Michel Rosenfeld Ed., 39-53 (1994)*; See also,* Nevil Johnson, *Constitutionalism: Procedural Limits and Political Ends, In Constitutional Policy and Change In Europe* Joachim Jens Hesse & Nevil Johnson Eds., 46-63 (1995).

3 Mark Tushnet, *Editorial*, 14 *Int. J. Const. L.* 1-5 (Jan., 2016); *See also,* Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 Penn. State. Int'l. L. Rev. 89 (2008); *See also*, Vicki C. Jackson, *Constitutional Engagement in A Transnational Era,* 59(2) AJCL 602 (2010).

4 Jamal Greene, Madhav Khosla, *Constitutional rights in South Asia: Introduction*, 16(2) *Int. J. Const. L.* 470 (2018).

5 Karen Engle, Culture and Human Rights: *The Asian Values Debate in Context*, 32 N.Y.U. J. Int'l L. & Pol. 291 (2000)*; See also,* Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 Harv. Hum. Rts. J. 109 (1998).

and at the same time protecting and upholding the fundamental basis for the existence of constitutionalism.

In this context, the role of the constitutional courts is understood as having a principled connection with the idea of establishing rule of law.[6] The notion that democracy and fundamental human rights and values can be best safeguarded by judicial review has now worldwide come up to be firmly established.[7] The stability and effectiveness of judicial power in ensuring the implementing rule of law is guaranteed by the independent judiciary.[8] An independent judiciary is thus, considered necessary for both judicial review and protection of human rights.[9] Judicial independence is often perceived to be of paramount importance, however, in the real world, judges face all sorts of constraints.[10] Judiciary can often land up being politicised and in such cases, maintaining independence might seem to be a difficult task.[11] Maintaining the autonomy of judges require 'internal autonomy' which basically allows and accord justification for judges to maintain their 'intellectual integrity' whereby they assert their freedom by expressing their separate opinions by willingly not subscribing to the reasoning they don't believe in.[12] However, the dissenting opinions though intriguing but receive less attention because it is often perceived that dissenting opinions have less

6 Kevin M Stack, *The Practice of Dissent in the Supreme Court*, 105 The Yale L. J. 2235; *See also*, Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice Response*, 72 Tex. L. Rev. 305 (1993).

7 Richard Bellamy, *Political Constitutionalism: A Defence of the Constitutionality of Democracy*, Cambridge, CUP (2007); *See also*, Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judge: A Comparative Study of Courts and Democracy*, OUP 135 (2002); *See also*, Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism*, MA: Harvard University Press 1 (2004).

8 David Boies, *Judicial Independence and the Rule of Law*, 22 Wash. U. J. L. & POL'Y 057 (2006); *See also*, Garnaas-Holmes, Daniel, *Judicial Review: Fostering Judicial Independence and Rule of Law,* 5 Law and Justice in the Americas Working Paper Series. (2007).

9 Edward A. Purcell Jr., *The Ideal of Judicial Independence: Complications And Challenges*, 47 Tulsa L. Rev. 141 (2013); *See also,* Scott Douglas Gerber, *A Distinct Judicial Power: The Origins Of An Independent Judiciary*, OUP 1606-1787 (2011).

10 Charles Gardner Geyh, *Judicial Independence As An Organizing Principle*, 10 Ann. Rev. L. & Soc. Sci. 185, 191–92 (2014); *See also,* Louis Michael Seidman, *Ambivalence And Accountability*, 61 S. Cal. L. Rev. 1571, 1571 (1988). University of Memphis, *The Fragile Fortress: Judicial Independence In The 21st Century*, 47 U. Mem. L. Rev. 999 (2017). University of Memphis, *Judicial Independence: Theory and Practice*, 47 U. Mem. L. Rev. 1249 (2017).

11 Ran Hirschl, *The Judicialization of Politics*, The Oxford Handbook of Political Science - OUP (2018); *See also*, Entin, Jonathan L., *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, Faculty Publications 367 (1990); *See also,* Bjoern Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, 23(5) Pac. Rev. (2010).

12 R. Bader Ginsburg, *The Role of Dissenting Opinions*, 22 Minn. L. Rev. 1-8 (2010); *See also*, Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future?* 38 Osgood Hall Law Journal 495-516 (2000); *See also*, W. J. Brennan, *In Defense of Dissent*, 37 Hastings L.J. 427-438 (1985); *See also*, John Alder, *Dissent in court of last resort: Tragic choices?* 2 Oxf. J. Legal Studies 233, 221-246 (2000).

authoritative legal force and precedential value.[13]

Constitutional Courts in South Asia have undergone a huge transformation in recent years and thus, this leads us to analyse the pertinent role of the judiciary specifically in relation to establishing the importance of judicial dissent in South Asian countries. This paper thereby seeks to analyse and discuss the value of dissenting opinions by constitutional courts in South Asian perspective by delving upon specific discourse in favour and against judicial dissents. Secondly, the paper analyses the value of judicial dissent in the light of the liberal constitutionalism framework and assertion of dissent as a pillar of judicial independence. Thirdly, the paper incorporates a comparative constitutional discourse in relation to judicial dissent in specific relation to South Asian countries.

Concept of Dissent and its Relevance in the Affirmation of Judicial Power

A significant expansion in Judicial power over decades can be adduced to the *sui generis* nature of its Constitutional courts. In modern constitutional democracies, it does not only adjudicate legal dispute but also deals with political questions in greater detail, different from Supreme Courts.[14] South Asian countries are also not untouched by the emergence of Constitutional courts post 1980s when many experienced a departure from authoritarian rule to a more open political structure.[15] In this context, the role of constitutional courts in different legal systems attains prominence in affirming judicial power and the privilege of publishing a dissenting opinion finds itself at the core in realising judicial independence.[16] A dissenting opinion relates to a result arrived by a judge different from majority or plurality opinion while adjudicating a dispute on principles, interpretation or applicability of a law. Charles Evans Hughes, former Chief Justice of United States famously said, *"a dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting*

13 Goads-Roszkowski, *Communicating Dissent in Judicial Opinions: A Comparative, Genre-Based Analysis*, 33 Int J Semiot Law, 381–401 (2020). Also see Antonio Scalia, *The Dissenting opinion*, 19 J. Sup. Ct. Hist. 33 (1994); *See also*, Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts*, 47 U. MEM. L. REV. 1123 (2017).

14 Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 4 Ger. Law J. 1352 (2013).

15 Tom Ginsberg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, 2 Global jurist Advances (2002).

16 David Vitale, *The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis*, 19 Rev. Const. Stud. 83-108 (2014).

judge believes the court to have been betrayed."[17] J D Heydon, former Justice at the High Court of Australia in his essay advocating for dissents, explained the threat to 'judicial independence' posed by the internal pressure in courts to conform and collaborate in single judgments.[18]

It is however important to note that the idea of publishing dissent does not find a normative acceptance in different jurisdictions. Constitutional theorists and legal academicians across the world, for long, have been involved in the perennial and tempting debate on the practice of publishing dissenting opinions by the Constitutional courts of last resort and its value in upholding constitutional framework.[19] Many believe that publication of dissent dilutes institutional legitimacy and has the potential to shake the public's faith in courts[20] whereas theorists who favour its publishing advocate for its importance in contribution to the evolution of law.[21] In this part of the paper the author endeavours to unravel the concept of dissent and its importance in affirming judicial power through some landmark dissenting opinions.

Understanding Dissent

It is no doubt that the concept of separate dissent is a common law creation. Historically the British common law tradition was premised on the idea of individual opinion of judges (seriatim) while hearing cases in appeal.[22] This had not only acceptance but also impacted major countries in publishing dissent.[23] In the civil law tradition, once controlled by continental power in Europe the emphasis was laid in 'collective judgment 'of the court, resulting in non-publication of disagreements, if any.[24] However, Katlin Kelemen argues that publication of dissenting opinion is now permitted even in Civil law countries, with

17 Charles Evans Hughes, *The Supreme Court of United States: Its Foundations, Methods and Achievements, An interpretation*, New York - CUP 68 (1936).

18 J D Heydon, *Threats to Judicial Independence: The Enemy Within* ,129 Law Q. Rev. 205 (2013); *See also,* Andrew Lynch, *Collective Decision-Making: The Current Australian Debate*, 21 European JOURNALS of Current Legal Issues (2015).

19 Vitale, *supra* note 16.

20 Carissima Mathen, *Dissent and Judicial authority in Charter Cases*, 52 UNBLJ 321 (2003).

21 Hughes, *supra* note 17 ¶ 68.

22 K. Zobell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell LQ. 187-91 (1959).

23 Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future?* 38 Osgood Hall Law Journal 495-516 (2000).

24 R. Bader Ginsburg, *The Role of Dissenting Opinions*, 22 Minn. L. Rev. 1-8 (2010); *See also,* Kelemen, *supra* note 14.

few exceptions.[25] In this pretext it is quintessential to understand the relevance of writing a dissenting opinion. At this stage, one may argue that a dissenting opinion does not affect the application of law in the adjudication of dispute at hand and while writing opinion is the way of communicating the decision, what does dissent do? Why do Judges dissent? What is the need for dissent? What is that they wish to achieve? Some contend dissent is a futile exercise as it "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[26]

Dissents as generally understood are not only a deviation from the majority, but it entails within itself a sea of dimensions. It is a reflection of flaws in legal analysis by the majority and at times is also prophetic in nature.[27] In modern democracies, dissent is a manifestation of liberal constitutionalism and constitutional values as it encourages a discourse for a futuristic aspiration of a country in terms of social, economic or political rights.

In Defence of Dissent

Publishing a dissenting opinion has always been favoured as a "right to dissent."[28] It has been contended as great and cherished freedom and that it is "inherent in the constitution of Supreme court."[29] Elucidating on the privilege of publishing dissent Justice Antonio Scalia said. "*To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more or less differing views of one's colleagues; to address precisely the points of law that one considers important and no others; to express precisely degree of quibble, or foreboding, or disbelief, or indication that one believes the majority's disposition should engender- that is indeed an unparalleled pleasure.*"[30] Dissent, therefore, is ideally located in constitutional values of free speech and Judicial Independence, it would be not an exaggeration to state that it is a prerequisite to ensure Judicial Independence.[31]

25 Kelemen, *supra note* 14 at p. 1345; *See also,* Saulle Panizza, *L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale,* GIAPPICHELLI ED., 110–19 (1998).

26 L. HAND, THE BILL OF RIGHTS 72 (Harvard University Press 1958).

27 W. J. Brennan, *In Defense of Dissent*, 37 HASTINGS L.J. 427-438 (1985); *See also*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

28 Vitale *supra* note 16.

29 Bora Laskin, *The Supreme Court of Canada: A final court of and for Canadians,* 29 CAN. BAR REV. 1038 (1951).

30 Antonio Scalia, *The Dissenting opinion*, 19 J. SUP. CT. HIST. 33 (1994).

31 Andrew Lynch, *Is Judicial dissent constitutionally protected*, 4 MACQUARIE LAW JOURNAL 81 (2004); *See also,* Julia Laffranque, *Dissenting opinion and Judicial Independence*, 8 JURIDICA INTERNATIONAL 162 (2003); *See also,* Andrew Lynch, *Dissent: the rewards and risk of Judicial disagreement in the High court of Australia,* 27 MELBOURNE U.L REV 724 (2003).

The dissenting opinion also ensures that none of the views is suppressed[32] and many have argued the quality of judgment is improved if a dissenting opinion is allowed.[33] Many of these dissenting opinions are not rancid but in the future course either are cited in other jurisdictions or in the same country they pave way for new perception on an issue. Hence the constitutional values of free speech and the right to dissent are those roots that enable strong dissenting opinion and have affirmed its contemporary relevance in modern constitutional democracies.

It is also remarked as judicial innovation which contributes immensely to the evolution of law.[34] It is important to note that dissents do not necessarily have to live through to become tomorrow's majority but in fact, can be instrumental in swinging majority judges if circulated prior to its publication and can be used as internal corrective measures.[35] Additionally a dissenting opinion can always be revisited to enquire in the application of law from the prism of already present dissent. Dissents tend to travel across jurisdictions, which is another key argument often used to lucidly convince theorists and academicians alike of the benefits of publishing dissents. There exists various famous dissent which are a testament of its importance in not only the evolution of law in the specific country but even in other jurisdictions. It is important here to discuss how some dissents have changed the course of a country's legal system while upholding liberal constitutionalism and ensuring that the ideals of constitutions and aims are not vanquished. Justice Harlan's dissent in *Plessy v. Ferguson*[36] is one such example. The case dealt with racial segregation in private laws and while the majority upheld the constitutional of the law in "separate but equal" doctrine but Justice Harlan in the US thirteenth and fourteenth amendment took a progressive view and disagreed with the majority's legal analysis while observing "*our constitution is colour blind*" This magnanimous and liberal view is hailed as the focal point of change in United States history and its quest to end Racial discrimination. In similar nature, Justice Curtis dissent in *Dred Scott v. Stanford*[37] or Justice Holmes dissent in *Lochner v, New York*[38], Justice Stone in *Gobitis*[39]*, or* Justice Black in *Adamson*[40] have been powerful dissents of the

32 John Alder, *Dissent in court of last resort: Tragic choices?* 2 Oxf. J. Legal Studies 233, 221-246 (2000).

33 *Id.*

34 Hughes *supra* note 17; *See also,* L'Heureux-Dube *supra* note 12.

35 Ginsberg, *supra* note 12, *See also,* Cass R Sunstein, *Why Society needs dissent*, Harvard University Press 168 (2003).

36 (1883) 109 U.S. 3 (U.S.A.).

37 (1857) 60 US 393 (U.S.A).

38 (1905) 198 US 45 (U.S.A).

39 Minersville School Dist. v. Gobitis, (1940) 310 U.S. 586, 601, (U.S.A) (Stone, J., dissenting).

40 Adamson v. California, (1947) 332 U.S. 46, 68 (U.S.A) (Black, J., dissenting).

century which have changed the course of the country. These are prophetic constitutional values in form of written separate dissenting opinions which affirmed that the judiciary has a role to play in realizing liberal constitutional and progressive values of the country.

The practice of publishing dissenting opinions by constitutional courts in Asia is no different and has also been a reflection of the same ideals. Although it has received less attention in terms of academic enquiry. In Asia, prominently only India has been the subject of enquiry on dissenting opinion.

Judicial Dissent: Comparative South Asian Perspective

The field of comparative constitutional studies has been heavily dominated by western philosophical influences, however, constitutional law scholars today have accepted the existence of varieties of constitutionalism around the world heavily influenced by regional and cultural values.[41] Asia has been a subject matter of vibrant constitutional discourses for a long, with the idea of fusing western understanding with the distinct Asian legal and political traditions.[42] In the early 21st century, these countries developed vibrant constitutional structures and had written constitutions as a norm, though heavily influenced by social and political movements.[43]

In the post-World War II era, it came to be established that no political institution, even a democratic one, can suppress the basic liberties of individuals. Post-war constitutional drafting, hence, focused on two major issues: firstly, the recognition of basic rights and its protection against infringement by state and its entities; and secondly, the establishment of constitutional courts to enforce and protect these rights against possible violations.[44]

These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be counter majoritarian, able to protect the substantive values

41 Peer Zumbansen, Comparative, *Global And Transnational Constitutionalism: The Emergence Of A Transnational Legal-Pluralist Order*, 1 Global Constitutionalism 16–52 (2012); *See also* Waluchow Wil, *Constitutionalism*, *The Stanford Encyclopedia of Philosophy* (Spring 2018, Edward N. Zalta ed., Stanford University Press).

42 Lawrence Ward Beer, Ed., *Constitutionalism in Asia, Asian Views of the American Influence*, 89 Reprint Series in Contemporary Asian Studies, (1988); *See also*, Rasulov, A. *Central Asia and the Globalisation of the Contemporary Legal Consciousness,* 25 Law Critique 163–185 (2014).

43 Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia*, Edward Elgar Publishing Limited (2014).

44 Doreen Lustig, J H H Weiler, *Judicial review in the contemporary world—Retrospective and prospective*, 16(2) *Int. J. Const. Law* 315–372 (April 2018).

of democracy from procedurally legitimate elected bodies.[45] This gave rise to the difficulty of a non-elected body (the judiciary) dictating the elected body on the conduct of its affairs that it is against the aspirations of the people.[46] In this global wave of democratization, parliamentary sovereignty is perceived as a waning idea and judicial review came to be firmly excepted and formalised.[47] Due to its peculiar legal and political traditions, specifically which is deeply rooted in the ideas based on cultural relativism, Asia has often been perceived as the most difficult regional system for establishing rule of law.[48]

In the wake of this enhanced role of the judiciary, a sign of institutionalization of a court is the practice of dissent. Dissenting opinions only make sense when a judge sees a real possibility of shifting the position of the court over time.[49] Meaningful analysis of Judicial dissent from a comparative South Asian perspective can, therefore, accord a balanced understanding of how the specialised constitutional courts, on legitimate grounds, can affirm their convictions and voice their opinions freely based on sound legal and constitutional reasoning.

India

India in South Asian Countries has been hugely influenced by the British common law system and since its Independence has permitted publishing dissenting opinions. It has identified publishing dissent as a pertinent dimension of judicial independence which is reflective in its constitutional provision which empowers the Judges in India, who do not concur with the majority opinion to deliver a separate dissenting opinion.[50] Judicial independence has been at the core of the democratic landscape of India. Dr. B. R Ambedkar considered India's constitutional architect remarked, "*There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself*

45 See, Tom Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases*, CUP, (2003).

46 Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America*, Yale Univ. Press 215 (1997).

47 Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of American Politics (2d ed., 1986); *See also*, Neal Tate., The Global Expansion of Judicial Power (Torbjorn Vallinder ed., NYU Press 1995).

48 Donnelly, J., *The Relative Universality of Human Rights*, 29 (2) Human Rights Quarterly 281-306 (2007).

49 John Alder, *Dissent in court of last resort: Tragic choices?* 2 Oxf. J. Legal Studies 233, 221-246 (2000).

50 India Const. art. 145(5) states that "no judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

and the question is how these two objects could be secured."[51]

Dissenting opinions by Indian constitutional courts have had a large impact on the creation of new rights and in upholding liberal constitutionalism. The first famous dissent which opened up a debate of liberal construction of law was seen as early as 1950 in the case of *A K Gopalan v. State of Madras*[52] where the politician Gopalan was arrested under preventive detention laws and the majority upheld it as "procedure established by law".[53] Justice Fazal Ali dissented from his brother judges and held, "all the fundamental rights enshrined in the constitution do not act as separate codes unto themselves and have to be read together as they overlap." He also vehemently criticized the restrictive reading of Procedure established by law. The dissent travelled through legal history and paved the way for a liberal construction, after 28 years in *Maneka Gandhi*.[54]

Recently in *KS Puttuswamy v. Union of India*[55], while declaring the Right to Privacy as a fundamental right, the Indian Supreme Court vindicated the dissenting opinion by Justice Subba Rao in the case of *Kharak Singh v. Union of India*.[56] India's most celebrated dissent came in the case of *ADM Jabalpur v. Shivkant Shuka* when a national emergency was imposed suspending the Fundamental right of all its citizens. Justice H R Khanna spoke to his consciousness and remarked, "*A dissent in a court of last resort... is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed*."

These three famous dissenting opinions have helped in the evolution of law apart from being the enquiry of academic discourse. It has upheld the aspiration of the Indian constitution and displayed the independent character of the Judiciary in India. Today the number of dissents may seem seemingly low yet the rich practice of publishing dissent in India is engraved in its constitutional values.

Pakistan

Pakistan is represented mostly, by its apparent tensions between civilian and military rule,

51 Dr. B. R. Ambedkar, VIII Constituent Assembly Debates 258 (May 24, 1949).

52 AIR 1950 S.C. 27.

53 Dr K.S Rathore, *Procedure established by law vis-à vis Due process: An overview of right to personal liberty in India*, Uttarakhand Judicial & Legal Review.

54 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

55 (2017) 10 SCC

56 AIR 1976 S.C. 1207.

which has shaped the history of the country. Undergoing constitutional instability for long, the country has been defined by extra-constitutional pressures on its formal constitutional system. Pakistan's past constitutional history outlines the nature of the judicialization of politics that the country has witnessed.[57] Regime legitimization through judicial endorsement in wake of direct martial rule has been often cited as an example of judicialization of politics in Pakistan.[58] Unstable constitutionalism and an undesirable judicialization of politics have been its unavoidable outcomes.[59]

The judiciary in Pakistan has undergone huge turmoil and has seen different phases of judicial acquiescence, judicial activism and judicial restraint. The significance of judicial independence is embedded in the Constitution of Pakistan with the Preamble proclaiming "…the independence of the judiciary shall be fully secured."[60] In *Muhammad Aslam Awan v. Federation of Pakistan*, the Court stated that "*Judicial independence both of the individual Judge and of the Judiciary as an institution is essential so that those who bring their causes/ cases before the Judges and the public in general have confidence that their cases would be decided justly and in accordance with law.… The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law.*"[61]

Recently, the issue of judicial dissent came to the limelight when, Justice Qazi Faez Isa wrote a 28-page dissenting note, in continuation of an order passed on February 11, 2021, by the five-judge bench of the Supreme Court of Pakistan headed by Chief Justice, Gulzar Ahmed, barring Justice Isa from hearing cases involving the Prime Minister of Pakistan, Imran Khan.[62] Justice Isa in his dissent observed "most resilient and finest institutions were

57 *For more discussion see,* Osama Siddique, The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement, Unstable Constitutionalism: Law and Politics in South Asia (Mark Tushnet and Madhav Khosla, Eds. Cambridge University Press (2015)

58 Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d' Etat & Common Law*, 27 Cornell Int'l L. J. 49 (Winter) (1994).

59 Moeen H. Cheema, *The "Chaudhry Court": Deconstructing the "Judicialization of Politics" in Pakistan*, 25 Wash. L. Rev. 447 (2016); *See also*, Siddique, *supra* note 57, (However, the term "Chaudhry Court" is befitting for two reasons: (1) the most important judgments from this era always involved benches led by Justice Chaudhry and share several common characteristics in terms of ideologies, methods, arguments, and outcomes; and (2) despite the controversial and complex issues involving mega-politics adjudicated by the Court during this period, its judgments are unusual for a near absence of any dissenting notes. On major matters, the Chaudhry Court essentially operated as a monolith).

60 Islamic Republic of Pakistan const. Preamble.

61 Muhammad Aslam Awan v. Federation of Pakistan*,* (2014) SC.M.R. 1289.

62 Hasnaat Malik, *Isa writes Dissenting note to SC's Feb 11 Order*, The Express Tribune. (Feb. 21, 2021), https://tribune.com.pk/story/2285367/isa-writes-dissenting-note-to-scs-feb-11-order.

those where candour, transparency and legitimate dissent existed" adding that executive transgressions if remain unchecked, judges being restrained, then ultimately the citizens will suffer.[63] Justice Isa has been undergoing trial for misconduct on the grounds of non-declaration of offshore properties; this matter was highlighted by a journalist in 2019.[64] Shortly, thereafter, the Supreme Court of Pakistan laid down guidelines explaining how judges ought to act if they are called to review a majority judgment.[65] While dealing with the matters of constitutional importance in relation to review matters in Justice Isa case, Zulfikar Ali Bhutto case and Panama gate case, the guidelines issued provide that any judge hearing a review ought to show restraint and maintain judicial dignity, particularly when they had already expressed an opposite view in the original matter, also emphasizing on the presence of minority judges in the review petition, subject to their availability.[66]

There has been a history of dissent in Pakistan, whereby the judges have aimed at establishing a duty on the judiciary to uphold the constitutional principles, to implement principles of Islam and thus to establish liberty, equality, tolerance and social justice.[67] Justice A R Cornelius's historic dissent in *Maulvi Tamizuddin Khan v. Federation of Pakistan* stands in the face of judicial courage in the history of Pakistan, wherein he negated the applicability of the doctrine of necessity to validate military coups.[68] Similarly, Justice Munir in *Jibendra Kishore v. Province of East Pakistan*, stood in affirmation for providing relief to minorities against discriminatory practices by the government.[69]

However, even on the face of it, there are certain complex issues in relation to judicial dissent in Pakistan, firstly, lack of heterogeneity and diversity in the composition of the court, secondly, over- judicialization of politics, in addition courts are equally conscious of their image in public if they side with the political parties.

Nepal

Nation-building in Nepal has been considered really difficult because of political

63 *Id.*

64 Justice Qazi Faez Isa and others v. The President of Pakistan and others, Const. P. No.17 & 19 Of 2019 & C.M.A. No.7417.

65 Hasnaat Malik, *SC offers Guidelines for Dissenting Judges*, The Express Tribune. (Feb. 23, 2021), https://tribune.com.pk/story/2285701/sc-offers-guidelines-for-dissenting-judges.

66 *Id.*

67 Cornelius A. R., Law and Judiciary in Pakistan, 10 (S. M. Haider ed., Lahore Law Times Publication 1981).

68 Maulvi Tamizuddin Khan v. Federation of Pakistan, (1955) PLD Sindh 96 (Pak.); *See also,*, Usif Patel and Two Others v. The Crown, (1955) PLD Federal Court 387 (Pak.).

69 Jibendra Kishore v. Province of East Pakistan, 1957 PLD 9 (Pak.).

aspirations and its constitutional history post-monarchic state and complications relating to constitutionalism.[70] The Preamble of the Constitution of Nepal lays down commitment towards having an independent, impartial and competent judiciary and concept of the rule of law.[71] Supreme Court of Nepal in *Bharatmani Jungam & others v. Office of the President & others* took up the task of ordaining the formation and adoption of the new Constitution.[72] The judiciary in Nepal has played an important role in affirming economic, social and cultural rights by acknowledging the justiciability of the right to food security and food sovereignty, education, employment, health and reproductive health, Right to healthy environment amongst others.[73]

However, under the new Constitution and the political influences, the debated surrounding independence and accountability do arise.[74] In one of the notable dissenting opinions, Justice Regmi held that government should form a special investigating team in consultation with the office of the Attorney General or immediately initiate the investigation of alleged extra judicial killing by Centra Investigation Bureau as per section 12 of the penal code.[75] In November 2020, the five-judge constitutional bench refused to issue an interim order challenging the Nepal Communist Party Vice-Chair Bamdev Gautam's appointment to the National Assembly, however, one of the judges Justice Ishwar Prasad Khatiwada, gave a dissenting opinion and contested the appointment of Bamdev Gautam to the National Assembly.[76] The politicisation of court in Nepal and the transition subsequent has not been peaceful, there have been illustrations to showcase the excessive interference of executive and legislature over the judiciary, leading to a state of a constitutional crisis. When Justice Karki prosecuted three former Chiefs of Nepal Police on a corruption charge, she was

70 See generally, Zhu, G & Kouroutakis, *The Role Of The Judiciary And The Supreme Court In The Constitution-Making Process: The Case Of Nepal*, 55 (1) *Stanford Journal Of International Law* 69-82 (2009).

71 NEPAL Const. 2015, Preamble.

72 Bharatmani Jungam & others v. Office of the President & others [Supreme Court] Nov. 25, 2011, Writ No. 68- ws-0014, 4–5 (Nep.).

73 Madhav Kumar Basnet and others v. Government of Nepal, WN 069-WS-0057, 2014; See also, Suman Adhikari & others v. Office of the Prime Minister, NKP 2074 BS (2015). Prakashmani Sharma v. Nepal Government, SCN, Writ No. 064 (2009). Prem Bahadur Khadka v. Nepal Government of Nepal, WN 2064/0719 (2008). Women for Human Rights, Single-women Group and Lili Thapa v. Prime Minister and Office of Council of Ministers, NKP, 2062 BS (2005). Reena Bajracharya and Others v. Royal Nepal Corporations, Cabinet Secretariat and Others, NKP 2057 BS 376 (2002)

74 David Pimentel, *Judicial Independence at Crossroads: Grappling with Ideology and History in the New Nepali Constitution*, 21(2) Ind. Int'l & Comp. L. Rev.

75 Sunil Ranjan Singh v. Government of Nepal and others (067-wo-1043).

76 Adv Dinesh Tripathi v. Office of the President and others (077-cc-003); *See also*, Ram Kumar Kamat, *Path to NA, Cabinet Cleared for Gautam*, The Himalayan (Nov. 12, 2020) https://thehimalayantimes.com/nepal/path-to-na-cabinet-cleared-for-gautam.

charged on the grounds of biasness and an impeachment motion was brought against her, similar kinds of instances have been noted in relation to weakening the judicial system and further the interest of the elites.[77] Nepal has a long way ahead to achieve the goals of judicial independence and judicial impartiality, only then the value of judicial dissent can be fully realised without the fear of facing huge opposition from the legislature and the executive.

Bangladesh

Bangladesh is perceived as an unstable democracy, for almost the majority of its existence, it has been under military-autocratic and nearly autocratic regimes.[78] The Constitution of Bangladesh affirms a democratic form of governance and establishes constitutional supremacy, judicial review, judicial independence and enumerates certain rights.[79] In Bangladesh, judicialization of politics has recently embraced the phase of unprincipled and unpragmatic judicial intrusion into "mega-politics".[80] There are various illustrations of judicial involvement in political issues.[81] However, in one of the dissenting opinions with regard to the validity of the Thirteenth Amendment, Justice Ali held it to be valid and not violative of the basic structure of the Constitution of Bangladesh on the grounds of republican and democratic structures of the state.[82] Dissenting opinions depending upon the political climate of the country is generally not a norm, there has been high intolerance in the country for those who dissent, including the judiciary, civil society and bureaucracy.[83] Thus, in light of such constitutional instability, there is a need for structured augmentation and institutional freedom in relation to the judicial role in Bangladesh.

Sri-Lanka

The Government of Sri Lanka has undertaken the task of transforming the civic space,

77 Ram Kumar Bhandari, *Nepal: Politicisation of the Supreme Court and its Impact on Justice Process in Transition*, JUSTICEINFO.NET (May 22, 2017) https://www.justiceinfo.net/en/33394-nepal-politicisation-of-the-supreme-court-and-its-impact-on-justice-process-in-transition.html.

78 Tushnet, *supra* note 57.

79 PEOPLE'S REPUBLIC OF BANGLADESH. CONST.

80 Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 93–118 (2008).

81 Mosharraf Hossain v. Bangladesh, (2004) 56 DLR (AD) 13; *See also,* Dr. Mohiuddin Farooque v. Bangladesh, (1998) 50 DLR (HCD) 84, 97; *See also,* Siddique Ahmed v. Government of Bangladesh and others*,* (2013) 65 DLR (AD), Abdul Mannan Khan v. Bangladesh, (2012) 64 DLR (AD) 1, Saleem Ullah v. Bangladesh*,* (2005) 57 DLR (HCD) 171.

82 Abdul Manan Khan v. Government of Bangladesh, (2012) 64 DLR (AD) 1, 472.

83 Md. Rizwanul Islam, *The Lack of Dissent in Judgments*, THE DAILY STAR (Oct. 12, 2017) https://www.thedailystar.net/law-our-rights/the-lack-dissent-judgments-1474249.

leading to curtailment in freedom of speech and expression.[84] Even the judiciary has been targeted in government sanctioned abuses. International human rights watchdogs like Amnesty International have also expressed their concern on the status of rule of law and "political victimisation" undertaken by the government under the leadership of Gotabaya Rajapaksa.[85] There has also been huge political interference against those charged with the prosecution of serious human rights violations, due to which the courts in Sri Lanka have been struggling to maintain their independence.[86] There are various factors that emerge in relation to judicial independence and judicial dissent in Sri Lanka, firstly, the appointment process is highly political and manipulated, in 1988, a seven year junior judge was preferred as a Chief Justice, only because the President was not in favour of the senior-most judge because of his dissenting opinions.[87] Secondly, such influenced and manipulated appointments of Chief Justice leads to curtailment and control of the exercise of judicial power by other judges.[88] As remarked during the tenure of Chief Justice Silva, there were far fewer dissenting opinions.[89] Also, the impeachment of Chief Justice Shirani Bandaranayake, accord support to eroding democratic institution in Sri Lanka.[90] Failing judicial standards in Sri Lanka is a result of institutional breakdown and failure of political will, until the political influences are minimised, the role of the judiciary in the sphere of constitutional structure will remain disputed.

Conclusion

Judicial independence can be threatened by external and well as internal biases. Impartiality and independence of judges have been firmly established, rooted and deeply engrained in the idea of constitutionalism. With the global wave of democratization sweeping the world, the South Asian countries specifically because of their long-standing history of

84 M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, Colombo (1982).

85 Lakshman Marasinghe, *The Evolution of Constitutional Governance in Sri Lanka*, 8 Colombo (2007); *See also*, L.J.M. Cooray, *Constitutional Government in Sri Lanka* Colombo 1796-1977.

86 Marasinghe, *Constitutionalism: A Broader Perspective*, Colombo 33 (2004); *See also*, H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, Op. Cit. 412.

87 Wickramaratne, *Fundamental Rights in Sri Lanka*, Op. Cit. 81.

88 Victor Ivan, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* 3 Maharagama 221 (2007).

89 Kishali Pinto-Jayawardena and Lisa Kois, *Sri Lanka: The Right Not to be Tortured: A Critical Analysis of the Judicial Response,* 9 Columbo (2009); *See also,* Weerawansha v. Attorney General, (2000) 1 LRC 407.

90 Hensman, Rohini, *Independent Judiciary and Rule of Law: Demolished in Sri Lanka*, 48 (9) Economic and Political Weekly 16-19 (2013).

colonization and distinct cultural, political and social values, have been often perceived to be structured on differing forms of constitutionalism. Each of these countries, India, Pakistan, Bangladesh, Nepal and Sri Lanka, in some form or the other, have established judicial independence within their own constitutional framework, but often the role of the judiciary has been analysed with much caution and attention. Recently, the role of the courts in almost all these countries have been the subject matter of concern due to various reasons, over-judicialization of politics has been a major element that has emerged in this context and has brought back the attention and the need to re-visit the role of dissenting judgments in these jurisdictions.

Though the notion of having separate judgment is widespread in the European Union, it often has a more deeply seated justification to it, depending on the "internal-autonomy" and "independence" of individual judges. As history has been evident that courts can readily be used as a tool for furthering maligned interests of the political elites as well as bureaucrats, the idea of judicial dissent can be overlooked. Judicial dissents undeniably in certain cases have been accepted in future by larger benches as a correct interpretation or standing on a principle of law. In addition, a lack of judicial dissent can also lead a person to question the independence and vibrancy of judicial institutions in a country. In certain jurisdictions, lack of judicial dissent can be reflective of extraneous pressures or internal pressures by senior most judges or can also be because of deeply engrained deference or judicial practice of concurrence. However, even in such cases, it cannot be denied that even judiciary is fallible, therefore, it becomes important, that the judges retain their impartiality and individualistic understanding of what the Constitution actually stands for, and also to further the aspirational goals of the Constitution.

In this context, the political upheaval and unrest which the South Asian countries have been facing, the presence of judicial dissent can showcase the robust existence of judicial institutions to balance the extremities of governmental powers and to protect the citizens against such excesses. In India, judicial dissents though have been in existence but the issue of political and bureaucratic dominance over judiciary cannot be denied altogether, with instances of suppression of dissent being apparent even in the judicial sphere, all that is concerning in such cases, is maintaining the sanctity of constitutional values and morals in terms of democratic ethos. In Pakistan, the judiciary has been involved heavily in political matters, which has led to a tussle of war between the judiciary, on one hand and the legislative and executive wing on another. Though one can find traces of judicial dissents in Pakistan, yet, the judiciary has been often over-shadowed and tossed aside whenever it has vehemently opposed or been in complete disregard of the interests of the elites. In

Nepal, due to huge political upheaval and constitutional difficulties, the judiciary has yet to emerge as a strong institution on the face of constitutional developments which needs to be undertaken currently. However, there are dissenting opinions in the constitutional history of Nepal, but often the judges who decide against the interests of the governing parties remain unprotected and are either impeached or corruption charges are levied against them. In Bangladesh and Sri Lanka, due to suppression of dissent, the judiciary has always suffered due to political excesses, and because of politically motivated judicial appointments, lack of structured institutional mechanism, the judiciary remains in the shadows of the governing elites. In light of this, there is a need to enhance the identity of judicial institutions in South Asian countries to further the process of democratization, however, having said that, it would require first hand, to establish a stagnant constitutional mechanism in place for the judiciary to work independently within its constitutional boundaries; for much of these South Asian countries, this yet remains to be realised in practica.

WORK FROM HOME AND THE NEED FOR RIGHT TO DISCONNECT: AFTERMATH OF THE COVID-19 PANDEMIC

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Abstract

The Covid-19 pandemic has disrupted the work culture of people and organisations across the world. 'Work-from-Home' (WFH) has become the norm in many organisations. It allows employees to keep their jobs, continue working towards the growth of the organisation and limit exposure to the virus. However, WFH comes with its own set of downsides, where, the slow breakdown of work-life balance is the most common problem. The right to disconnect aims at giving a right to employees to not answer any work-related calls or Emails beyond working hours and on holidays. There is data which shows that during the pandemic many employers assign work even after scheduled working hours. Since the job market is at an all-time low, an employee has no option but to complete the task given or carry the risk of being removed from the job. This type of work culture has begun to show side effects on the mental and physical health of employees and hence a law needs to be put in place to protect the well-being of such persons. Indeed, there may be certain exceptional circumstances where an employee needs to put in extra hours. For such exceptional situations a policy must be in place which should also compensate employees for working extra hours. Supriya Sule, a Member of Parliament had introduced a private members bill, the Right to Disconnect Bill in 2019, aiming to give employees the right to refuse work related calls after office hours. The bill lapsed. However, the question that remains is whether we need a law to demarcate our work and personal life. This paper attempts

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to discuss the pros and cons of having such a right to disconnect and provides suggestions to create a balance between the rights of the employees and the work demand by employers.

Introduction

The new Corona virus (Covid-19) is an infectious disease that had first shown its traces in China and now has spread to nearly every country in the world. In December 2019, the first case of the unknown virus was registered in Wuhan, a city in Eastern China which initially began as an epidemic but became a globally affected pandemic. This disease is not airborne but is contagious. It spreads from person to person because of which WHO has suggested, to follow respiratory hygiene, hand hygiene and practice the method of social distancing, which means to maintain a minimum distance of 1 meter from yourself and others. Therefore, in order to control the rate of infection, the biggest lockdown was imposed by the Government of India on 24th March 2020. On May 12th, 2020, Hon'ble Prime Minister of India, Shri Narendra Modi, had announced a special package of Rs. 20 lakh crores to be given to the citizens of the country which would be equivalent to India's 10% GDP with the basic aim to provide aid to the people to fight the COVID-19 pandemic. During his address to the nation, he announced a campaign of making India a Self-Reliant country, also called the Aatma Nirbhar Bharat, that aimed for getting the growth of India back. The five major pillars of this movement were stipulated to be, Infrastructure, Economy, Vibrant Demography, System, and Demand.[1] The impact of Covid-19 has shown disruptions in the economy of the entire world and no one knows how long this impact will be witnessed. Every sector of the economy is facing troubles and during this period, the Indian Industrialists are making the employees, "Work from Home" (WFH). This is a benefit for the employees as they are at least not unemployed during this crisis. The transition to the Work from home model, was smoothly done by the IT industry, where they continued to provide service to their clients without any obstructions such as lowering the productivity or compromising with the quality, and this was possible only because of two reasons, that is, its strictness towards quality check and availability of communication bandwidth from homes even in small towns.[2]

But if the concept of "Work from Home" is a benefit to the Employers, it has shown an

1 PIB Delhi, *Press Release - Aatma Nirbhar Bharat Package – Progress So Far*, Ministry of Finance (May 12, 2020) https://pib.gov.in/PressReleasePage.aspx?PRID=1638112.

2 Dr Sridhar Mitta, *Work from home has been 'successful' during Covid-19 lockdown. What next*, The Economic Times (Apr. 30, 2020) https://economictimes.indiatimes.com/magazines/panache/work-from-home-has-been-successful-during-covid-19-lockdown-what-next/articleshow/75470580.cms?from=mdr.

opposite impact on the Employees because all the boundaries of work conditions have been removed and most of the employers approach the employees on their will, despite the working hours being fixed between 9 am to 5 pm. During the period of lockdown, the employers and the employees are digitally connected mainly through emails or occasional calls, but often the employers take undue advantage of their liberty to use these connections anytime they want. The employees in this lockdown are no longer going to or coming from work, because of which their personal life and work-life has been mixed. This has caused disruptions in the work-family balance and often leads the employees to reach a situation of burnout which affects their mental health.

In a study done in 2016, it was found that the non-working hours, would not be considered as leisure time and the employees were supposed to be available for any work given by the authorities because the employee's activities would be constrained and then there will be a restriction in his recovery from work.[3] The 'always-on' culture, where it is expected to reply to any work-related call, at any point of the day decreases the energy levels of the employees and it is necessary to change this norm. It is very important for the employees to work with their maximum efficiency but if the employees are not satisfied with their working conditions, they will not be able to give their fullest potential to the company. Optimum utilization of resources is considered to be a key factor in the success of any company and if that is not fulfilled, it will be a loss to not only to its profits but also affects its growth. Employees can give their best performance only when there is a proper balance maintained between their private and work life, and until and unless the work pressure is moderate and balanced they will not be capable enough to perform to their best ability. It is necessary for the employees to disconnect themselves from work and spend time with family and friends to give them the motivation to work with diligence. There exists a co-responsibility between both the employer and the employee to establish a 'right to disconnect', where the employee must adapt to the skill of disconnecting from work after working hours are over and the employer must respect this right through a change in the work culture and making some policies.[4] Therefore for a better workforce environment, it is a need to make a law that gives the employees the right to reject any work assigned by their superiors after the prescribed working hours, that is, 9 a.m. to 5 p.m.

3 Jan Dettmers, Tim Vahle-Hinz and et al' "*Extended Work Availability and Its Relation With Start-of-Day Mood and Cortisol*" 21(1) Journal of Occupational Health Psychology 105-118 (2016).

4 Jessica Fairbairn of Harris & Company LLP, *The Right to Disconnect: The Darker Side of Mis□Managed Flexible Working Arrangement* Employment Law Conference (2019) https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/TheRighttoDisconnect.pdf.

The Need and Origin of Right to Disconnect

The right to disconnect is a right established for Employees to disconnect themselves from their work, or the employees will have the right to say no to any work-related communications, that is, calls, messages or emails during non-working hours. A lot of countries have already included the right to disconnect in their law, and this right has also been mentioned in the policies of some MNC's. In this situation, even if the employer tries to contact the employee after working hours, the employee is under no obligation to answer that call or mail immediately.[5]

Due to the spread of Covid-19, Work from home will be the new normal for the majority of the companies, but this new system has shown a lot of negative impacts on the health of the employees. While working from home, the employees are not physically separated from the work environment, because after the working hours are over, and the clock strikes 5 pm, there is no shutting down of computers or departing to homes, which was a daily routine when the employees were working from their office. The present situation is, that the employees are sitting in the same environment throughout the day because of which the employees can reach a point of Burnout which is termed as 'Burnout Syndrome'. Restlessness, Stress, Anxiety, Insomnia, Cognitive Overflow Syndrome (COS) and backaches are some of the side effects that people faced from working continuously from home as the country entered the fifth week of lockdown that was imposed to prevent the spread of the Coronavirus.[6]

Working from home, during this lockdown has reduced the interaction of employees to any person other than their family which can lead to isolation and loneliness. Several studies were done for statistically calculating the weighted average effect of certain factors such as the odds ratio of social isolation, loneliness and living alone where it was found that the odds ratio stood at 1.29, loneliness was 1.26 and living alone was 1.32, to an average of 29%, 26%, and 32% respectively, which has increased the likelihood of mortality rate.[7] The employees are supposed to fulfil a deadline that is assigned to them by their authorities, because of which there is a need to work extra despite the fixed working hours. During the time where employees were working in the office, they were paid for the overtime they

5 Von Bergen, Clarence & Bressler, Martin & Proctor, Trevor, *On the Grid 24/7/365 and the Right to Disconnect*. 45(2) Employee Relations Law Journal. 3-20 (2019).

6 Ha Ngoc Do, Anh Tuan Nguyen and et'al., *"Depressive Symptoms, Suicidal Ideation, and Mental Health Service Use of Industrial Workers: Evidence from Vietnam,"* 17(8) International Journal of Environmental Research and Public Health 29 (2020).

7 Holt-Lunstad J, Smith TB, Baker M & et. al., *Loneliness and social isolation as risk factors for mortality: a meta-analytic review*., 10(2) Perspect. Psychol. Sci., 227-237(2015).

did but in the case of work from home, employees work day and night without any extra money received for overtime and they are not in a situation to refuse any work given by the authorities because there is always a fear of losing their job. The rate of unemployment was 8.75% in March and had reached its peak, which was 27.1% at the end of the week, that is, May 3 after which it began to decline. In the first three weeks of June the unemployment rate had dropped from 17.5% to 11.6% and now stood at 8.5%.[8] Therefore it becomes necessary to bring a law, that is, the right to disconnect for the employees to protect their interests. This right is necessary under circumstances to make sure the balance between work and private life and also to prevent depression, anxiety or any other health issue. This right becomes more important when the work from home hours are extended because that would mitigate the overall anxiety and stress level that employees might feel because of the impact of Covid-19.[9]

The present scenario has ultra-connected the world, where many countries have realized right to disconnect to be a significant boundary between work and home. The importance of the right to disconnect was first realized in France which was the first nation to enact this legislation. In January 2017, a new employment law was passed by France that would allow all the workers in an organization with more than 50 employees to negotiate the conditions of 'right to disconnect' from work after the working hours are over.[10] Article 55 under Chapter II "Adapting the Labour Law to the Digital Age" of the Labour Code was introduced by the labour minister Myriam El Khomry that aimed to protect the workers against the problems that arise with the progressing digital technology in the workplace. They realized that working day and night not only affects the well-being of the employees but also productivity and therefore it was a need to disengage the employees from work. The first case concerning right to disconnect was filed against a British Company, named Rentokil Initial. This company was charged 60,000 euros, for failing to respect the right to disconnect of one of its employees .[11] The concept of 'always on' indicates that every employee is permanently connected through digital tools and other sources of connection and therefore it was a necessity to disconnect the employees from work after working hours for their optimal well-being. We work in a result-oriented society because of which there is always an urge to work more than the allotted time and give the result, therefore it is an

8 CMIE, *Monthly report, 2020*, Centre for Monitoring Indian Economy (Apr., 2021) https://unemploymentinindia.cmie.com/.

9 Stoewen, Debbie L. "*Wellness at work: Building healthy workplaces*" 57(11) The Canadian veterinary journal , 1188-1190 (2016).

10 Pansu, Luc. *Evaluation of 'Right to Disconnect' Legislation and Its Impact on Employee's Productivity* 5 International Journal of Management and Applied Research. 99-119 (2018).

11 *Id.*

automatism and clearly an addiction to unlock phones every 10 minutes. The possibility of immediate connectivity can sometimes create a false expectation of constant availability, which causes employers to contact workers outside their work hours, thus making them feel in a state of permanent alert.[12] Italy had passed the law of right to disconnect in 2017. However, the main purpose of the Italian Law was to make dependent work more flexible, accompanying the changes produced in the labour market because of the advancement of new digital technologies.

As a matter of fact, before passing the French Law, there were no collective agreements, that were dealing with the matter of disconnection, as opposed to the pronounced activity.[13]. Similarly, the legislature of the Philippines' had introduced a bill that would provide the right to disconnect after working hours. Netherlands, Luxembourg, Québec, India and Canada had all proposed the idea of adopting such a right. In November 2018, Spain adopted the "Data Protection and Digital Rights Act." The major aim of this act was to provide the right to disconnect during holidays and resting periods. New York is said to be a "city that never sleeps," and in spite of this, a bill had been introduced by the legislature that gave the employees a right to disconnect from work-related communications. Employers with over ten employees would benefit from this law as it would prohibit their employees to attend to any emails or call during the course of the normal working hours (except in situations of an emergency).[14] Even Spanish Lawmakers realized the importance of disengaging the employees from work after working hours, therefore they recently passed a new regulation to protect the interests of the employee. All the companies in Spain would have to establish detailed internal policies related to right to disconnect after working hours are over (irrespective of headcount) under this new regulation. The policies apply to all the employees who are home-based workers and even management workers.[15] The employees who were working remotely would be guaranteed the right to disconnect too, according to the Spanish law. In 2014, Daimler, a German automobile maker, had introduced a software that would automatically delete emails, an employee would get during a vacation. Therefore, whenever a Daimler employee was on a vacation, and a work-related email was sent to him, there were three options available, if it is an emergency situation, mail a colleague, or he can either delete the mail, or the last option is to email again once the

12 Secunda, Paul M., *The Employee Right to Disconnect*, 9(1) NDJICL, Article 3 (2019).

13 Fairbairn, *supra* note 4.

14 The Right to Disconnect Bill, 2018, No. 211 of 2018, Bill by Supriya Sule,

15 Lois Rodriquez and Nadège Dallais, *Outside The US, Countries Are Increasingly Recognizing An Employee Right To Disconnect* The Employer Report, (Dec. 19, 2018) https://www.theemployerreport.com/2018/12/outside-the-us-countries-are-increasingly-recognizing-an-employee-right-to-disconnect/#page=1

employee is back from his vacation.[16] The European Union had voted in 2015 to regard the time spent in commuting (to and from work) as work.[17]

The Indian Position

The never-ending demands of the Employers made us realize the need for the right to disconnect to be consolidated by a law in India, therefore, the right to disconnect bill has been recently introduced in Lok Sabha by Mrs Supriya Sule who is a Nationalist Congress Party politician and also a Member of the Parliament. MP Supriya Sule had introduced a private member bill called the "Right to Disconnect Bill, 2018" with the basic idea of reducing work-related stress. A private Member is one who is a member of the Parliament but is not a minister, that is, not a member of the Cabinet (Executive). In India, the Private Member Bill discussion is done on alternate Friday afternoons throughout the session time which is generally between 2 pm and 6 pm. The drafting of the PMB's is done by the MP's themselves or by their offices and the Parliament Secretariat checks for its legal consistency. Since India's Independence, the last being 1970, only 14 Private Member Bills have become law. The recent bill that was introduced by Mr Tiruchi Siva in 2014 was "The Rights of Transgender Persons Bill", which was passed in the Rajya Sabha after a gap of 45 years since the passing of the last Private Member Bill. The introduction of a PMB can be only done with a month notice along with the copy of 'Statement of Objects and Reasons' which describes the reason behind the introduction of the bill.[18] The relative precedence of Private Members' Bills after their introduction, as regards the subsequent legislative stages, is determined by a ballot held in accordance with the orders made by the Chairman. If the bill is passed on the ballot, a draw of lots is held on the day not less than fifteen days before the day of the draw of lots.[19] After the introduction of the Right to disconnect bill in 2018, which aimed at relaxing the work-life of employees, a lot of debates and discussions took place. The major aim of the bill was to empower the employee with the liberty to not respond to employer's calls, texts or emails after office hours with the basic aim of

16 M. Kaufmann, *Deutsche Konzerne Kämpfen gegen den Handy-Wahn*, Spiegel Job & Karriere (Feb. 17, 2014) http://www.spiegel.de/karriere/erreichbar-nach-dienstschlussmassnahmen-der-konzerne-a-954029.html, (Reference is made to the internal politicy of the German company Daimler).

17 Press Release No 99/15, *The journeys made by workers without fixed or habitual place of work between their homes and the first and last customer of the day constitute working time,* Court of Justice of the European Union (Sept. 10, 2015) https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-09/cp150099en.pdf.

18 Lok Sabha Secretariat, "*Private Members' Bill and resolutions,"* Lok Sabha Secretariat (16th ed., Published under Rule 382 of the Rules of Procedure and Conduct of Business in Lok Sabha, New Delhi-110 005, 2019).

19 Shakdher, "*S. L. The Process of Legislation,"* Lok Sabha Secretariat (New Delhi, 2nd edn., 1967).

striving for a work-life balance and reducing work-related stress and anxiety. This bill was applicable to all those companies having an establishment of more than 10 employees and aimed to ensure compliance. The Employee Welfare Authority was to be set up, which would have included the Ministers of Communication, Labour and IT. Section 7 of this bill also stated that if an employee chooses not to respond to his employer after his stipulated work hours, no disciplinary action can be taken against him. According to the bill, overtime compensation would have been provided to all those employees who work outside of the agreed-upon conditions. Apart from this, the Government of India would have been obliged to provide, employee counselling, digital detox centres, and other resources that would enable an employee to connect with the people around him and help him to free himself from all kinds of digital distractions.[20] This bill is yet to be discussed in Lok Sabha.

It has been observed that less than 5% of the private member bills are even debated in Lok Sabha. According to a research done in 2015, barely 5% of private bills were discussed in the 13th Lok Sabha, whereas the 14th Lok Sabha discussed 3% of the bills, while the 16th Lok Sabha discussed only 2.85% of the private member bills.[21] There have been 165 Private Member Bills introduced in the Rajya Sabha over the last three years, whereas, only 18 PMBs were discussed. According to Parliamentary Rules, a private member's Bill that is introduced but not discussed in Rajya Sabha lapses when Member retires and there is an expectancy of 6 years for a private member bill to be discussed, before its lapse.[22]

Why the Bill was not Viable?

It was believed that even if the right to disconnect was introduced as a law, the implementation would have been a huge challenge. If the working hours were fixed from 9 am to 5 pm, and, any mishap occurs after working hours, the employees can easily refuse to not come and help because they have the right to disconnect from calls related to work after working hours are over. It was believed by the HR of Indian companies that the backlog of work was a reality in India, because of which disconnecting would not have been possible and therefore they believed that this bill would not be viable in India. In recent years, a perception also seems to have been built that the passage of such a bill would mean that the government is incompetent and far removed from the needs of the people. As a result, the

20 The Right to Disconnect Bill, *supra* note 14, Cl. 18.

21 Ministry of Parliamentary Affairs, *Statistical Handbook 2019*, Government Of India (Apr. 3, 2019) https://mpa.gov.in/.

22 PRS, *Private' efforts at legislation: How they are made, how often they succeed,* PRS Legislative Research (Nov. 6, 2018) https://hi.prsindia.org/node/822221.

passage (and even discussion) of PMBs is not encouraged and therefore at times the private member is requested to withdraw the bill and the government re-issues the bill on the same rationale.[23] The bill lapsed because of lack of discussion in Lok Sabha but MP Supriya Sule has planned to take this up again in her next tenure because of her will to make a law on right to disconnect.

The laws that deal with matters related to labor and employment are called labor laws. These laws were established with the major aim to resolve any conflict between the Employee and the Employer in matters related to pension, wages, or insurance of employees, etc. These Labour laws of our country apply to IT Industries as well, where they are referred to as Employment Laws or Industrial Laws. Certain Labour Laws such as the Factories Act, 1946, The Industrial Disputes Act, 1947, and other Labour laws of the State do not apply to the IT industries, but apart from these, all the other laws are applicable to IT Industries.[24]

Certain statutes have mentioned the fixed working hours or the rules regarding payment for overtime work. Section 59(1) of Chapter VI of The Factories Act, 1948, clearly states that if a worker is doing overtime, that is, working more than nine hours on a day or either working more than forty-eight hours in any week, he shall be entitled to extra wages that would be twice his ordinary rate of wages.[25] The same is mentioned under Chapter VI of The Mines Act 1952 where it clearly states under Section 30(1) that, no adult employed above ground in a mine shall be required or allowed to work for more than forty-eight hours in a week or either work for more than nine hours on any day.[26] Section 33(1) states those laws that are regarding overtime rules where it is clearly mentioned that in a mine, if a person works for more than nine hours in any day above ground, or either works below ground for more than eight hours in any day or works for more than forty-eight hours in any week, whether below ground or above ground, for such overtime work, he shall be entitled to wages that would be twice his ordinary rate of wages, and the time period of overtime work shall be calculated on a weekly or daily basis, whichever is more favorable to him.[27] Apart from these, other laws such as the Minimum Wages Act, 1948, also state the same under Section 24(1). This section mentions the number of hours that shall constitute a normal working day. In the case of an adult, the normal working hours would be 9

23 *Id.*

24 Sulekha Kaul, *India: Labor Laws In India - (Indian) Industrial Disputes Act, 1947*, MONDAQ (Sept. 6, 2017) https://www.mondaq.com/india/employee-rights-labour-relations/625206/labor-laws-in-india--indian-industrial-disputes-act-1947.

25 The Factories Act, 1948, No. 63, Acts of Parliament, § 59.

26 The Mines Act, 1952, No. 35, Acts of Parliament, § 30.

27 *Id.,* § 33.

hours whereas, in the case of a child, it will be 4 hours.[28] Taking into consideration the Contract Labour (Regulation & Abolition) Act, 1970, whereas as per Rule 79 of the Act, it is compulsory for every contractor, to maintain a Register of Overtime work by every employee in Form XXIII which would contain all the details relating to hours of extra work, overtime calculation, name of the employee, etc.[29]

Section 19(1) of the Plantation Labour Act, 1951 also expressly mentions that no adult worker shall be allowed to work on any plantation in excess of [forty-eight hours] a week and no adolescent or child for more than [twenty-seven hours] a week. Clause 2 and Clause 3 of Section 19 mentions that if an adult worker works on any plantation in excess of the number of hours that constitute a normal working day or even for more than forty-eight hours on any day or in any week, he shall, with respect to the overtime work done, be entitled to twice the rates of ordinary wages: Provided that no worker as such shall be allowed to work for more than nine hours on any day and not more than fifty-four hours in a week. Work done on any closed holiday, in any week in the plantation, will be a case of overtime work, and therefore that worker shall be entitled to twice the rates of ordinary wages.[30]

Even when it comes to the employment of women, there have been special laws made that gives certain rights to them, that would protect their interests, where clause (b) of Sub-Section 1 of Section 66 of the Factories Act, 1948 states that no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m., provided that the State Government may, by notification in the Official Gazette in respect of a class or description of factories or any factory or group, make changes in the limits laid down under clause (b), but such a variation shall not authorize the employment of any woman between the period of 10 p.m. and 5 a.m.[31] The Apprentices Act, 1961, also mentions that no apprentice shall be required or allowed to work overtime. But if the approval has been taken by the Apprenticeship Adviser who shall grant such an approval only if he is satisfied that such overtime is in the public interest or in the interest of the training of the apprentice. The daily hours of work of an apprentice shall not be more than 8 hours per day and weekly would not be more than 45 hours and not less than 40 hours. However, in the case of a short term apprentice, he may be engaged to work up to the maximum limit of 48 hours in a particular week and the training hours of an apprentice should not be between

28 The Minimum Wages Act, 1948, No. 11 Acts of Parliament, § 24.

29 The Contract Labour (Regulation & Abolition) Act, 1970, No. 37, Acts of Parliament, § 29.

30 The Plantation Labour Act, 1951, No. 69, Acts of Parliament, § 19.

31 The Factories Act, supra note 5, § 66.

10:00 p.m. to 6:00 a.m. except when the prior approval has been taken from the Apprentice Advisor.[32] Therefore, it becomes evident from the above-mentioned facts that it has been stated in law, that every worker who is under employment of a particular company under any industry, has been prescribed the fixed working hours and the employer has to abide by the mentioned laws.

This should be noted that India has ratified the Hours of Work (Industry) Convention, 1919, which was adopted by the General Conference of the International Labour Organisation. This Convention specifies the maximum work hours for industrial undertakings, where it should not exceed eight hours in a day and forty-eight hours in a week. In situations where it is a necessity to carry out the process continuously, the maximum working hours in a week should not be more than fifty-six hours.[33]

Suggestions and Conclusions

As we move towards the modernization of the existing concept of labour rights, there are certain laws that are ignored in the way. right to disconnect can be considered as a rest period for employees because every employee has the right to maintain their work-life integration, productivity, and health. This agenda was also discussed in the 107th Session of the International Labour Conference, 2018. The practice of effective disconnection is equally important and inclusive of digital connection. It is necessary that while signing the employment contracts, the clause of right to disconnect should be clearly mentioned, where the option of negotiation should be available to the employees. If there is non-compliance in following the policies, there should be legal actions that should be taken against the companies and if any situation arises where there is a need to work extra hours, then the payment for overtime should be provided to the employees.

Apart from this, a Charter can be established that mentions all the details (the procedures about exercising the employee rights) where exceptional circumstances of working extra and the policy of disconnection is clearly mentioned so that there is compliance at all levels of management. Most importantly, Employee welfare Committee /Authority should be there for both private and corporate, in spite of the company having 10 or more than 10 employees because basics need to be corrected first. Exploiting an employee and taking advantage of their situation is wrong and therefore such an exploitation must be controlled

32 The Apprentices Act, 1961, No. 52, Acts of Parliament, § 15.

33 International Labour Organization (ILO), The Hours of Work (Industry) Convention, 1919, Jun. 13, 1921 U.S.T. 19 1311 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C001.

because the profit-making entities can go up to any extent.

The quest for an effective disconnection and a demographic change in the workplace culture could help in changing the norm because the mind set of blaming the work culture is wrong. Managers of the companies will have to set up systems to regulate the use of digital tools to make sure that the family time of the employee is respected. Our legislators did not provide a detailed, rigid regulation in favor of individual autonomy, but now it is a necessity to have an enforceable solution with the minimum set of general rules for digital disconnection.

Liability Dimension of the Chamoli Disaster in Uttarakhand under the Legal Framework

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Abstract

The Constitution of India under Article 48-A directs the state to protect the environment, but in reality, the projects sanctioned by the state in the name of development and economic benefits are leading to environmental degradation. In recent times, the frequency of environment-related disasters in India has increased which are claiming more and more lives. The latest being the Chamoli Disaster in Uttarakhand that happened on February 07, 2021, in which 72 people died and 133 are still missing or declared dead. After such disasters, the public or private agencies involved, escape the liability by giving meagre fines or insufficient compensations to the victim's family in most cases, and nothing is done for the environmental restoration. National Thermal Power Corporation Limited (NTPC) and Kundun Group are involved in the two hydroelectric power projects, the Tapovan-Vishnugad project, and the Rishi Ganga Project respectively, in the eco-sensitive buffer zone of the Nanda Devi Biosphere Reserve. These companies were involved in improper muck disposal, use of explosives, and stone crushing activities in the river beds, even after the warning by the locals, orders by the courts, tribunals, and state pollution boards. The paper will try to enumerate the sources of justice to the victims of the Chamoli Disaster. Until and unless justice is not served to the victims of such disasters and companies are not made liable for their negligent acts which disturb the ecological balance, disasters like Kedarnath, Baghjan, and Chamoli are bound to happen in India again and again.

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Introduction

On Feb 07, 2021, a deadly flash flood devastated the Chamoli district of Uttarakhand, India at around 10 A.M. The lake breach at the Nanda Devi Sanctuary triggered a flash flood, which carried mud and other debris down the steep slopes. The flash flood hit the Raini village and two hydroelectric power projects (hereinafter referred to as HEPs) by National Thermal Power Corporation Limited (NTPC), the Rishi Ganga Project, and the Tapovan-Vishnugad project claimed 72 lives, and 133 are still missing.[1] The flood devastated the eco-sensitive valleys of Rishi Ganga, Dhauliganga, and Alaknanda, and its effects were observed several km downstream.[2]

Whenever any incidents of such a massive scale occur everyone including the public, media, and policymakers shows a sense of urgency to find the immediate cause. Debates and discussions are organized to find the immediate cause of the incident but as time passes public and policymakers slowly forget about the incident. The Chamoli tragedy happened just 60 km north-east of the area where Kedarnath Flash Floods occurred in 2013 claiming the lives of around 169 people and 4021 people were reported missing.[3] Constant human interference in the disaster-prone upper regions of the Himalayan valley close to the glaciers can lead to similar environmental disasters. According to the report submitted in 2013, by the Char-Dham committee which was appointed by the Hon'ble Supreme Court, the hydropower projects will have an irreversible and deleterious impact on the biodiversity and ecosystem of the region.[4] The same was reiterated by the Kedarnath expert committee, which in its report warned about the exploitation of the highly sensitive zones of Uttarakhand and the need to re-evaluate all the hydropower projects above 2000 meters. But the recommendations of these committees were not accepted.[5]

There is a correlation between rights and duties, when tragedies like the Chamoli disaster take the lives of hundreds of workers and impact the biodiversity of the eco-sensitive region

1 Nivedita Khandekar, *A Month Since Chamoli Disaster, Scientists Have Reason to Anticipate More*, THE WIRE (Apr. 16, 2021, 00:31 PM), https://science.thewire.in/environment/uttarakhand-chamoli-disaster-not-a-standalone-incident-more-to-come/.

2 Bhim Singh Rawat, *Tapovan Vishnugad HPP: delays, damages and destructions*, SANDRP (Feb. 20, 2021, 13:28 PM), https://sandrp.in/2021/02/20/tapovan-vishnugad-hpp-delays-damages-and-destructions/.

3 NIDM, Uttarakhand Disaster 2013, 04 (National Institute of Disaster Management, New Delhi 2015).

4 Shivani Azad, *Why hydel projects in the Himalayas are worrying,* The Times Of India (Feb. 09, 2021, 16:31 PM), https://timesofindia.indiatimes.com/india/why-hydel-projects-in-the-himalayas-are%20worrying/articleshow/80761439.cms.

5 Himanshu Thakkar, *Report of Expert Committee on Uttarakhand Flood Disaster & Role of HEPs: Welcome recommendations:*, SANDRP (Apr. 29, 2014, 17:28 PM), https://sandrp.in/2014/04/29/report-of-expert-committee-on-uttarakhand-flood-disaster-role-of-heps-welcome-recommendations/.

permanently then there are violations of rights, which means there is a breach of duty by someone. This paper tries to establish the liability dimensions of the Chamoli disaster so that similar disasters in the future could be averted.

Geography and Ecology of Chamoli District and the Nanda Devi Biosphere Reserve Region

The Raini village which was severely impacted by the flash flood is located in the Chamoli district of Uttarakhand, India. It has been famously known around the world for the Chipko Movement. With the elevation ranging from 800 meters to 8000 meters, the Chamoli district consists of high mountain ranges, it includes Nanda Devi which is the sound highest peak in India.[6] According to the 2011 census, the Chamoli district had a population of 391,605.[7] The high-altitude area of the district consists of glaciers and snow peaks which are the perennial sources of water in India. The Chamoli flash flood occurred on the Rishi Ganga River, which is a tributary of the Dhauliganga River, and it meets the Alaknanda River further downstream. The rivers in the districts flow with great force in the deep gorges and narrow channels, making them suitable for hydropower projects.[8]

On Feb 07, 2021, the flash flood occurred due to a landslide in the surrounding areas of the Nanda Biosphere Reserve. It was inscribed by UNESCO as the World Heritage Site in 1988. The reserve with unique topography and geographical location is the habitat of 1000 plant species with several native species with 10 endemic species and 225 near-endemic species. The reserve also has 312 floral species with 17 rare species, and it is renowned around the world for its Valley of flowers. The reserve is the refuge of many endangered species like Snow Leopard, Himalayan Black Bear, Himalayan Musk Deer, etc.[9]

The Nanda Devi National Park is a glacier basin surrounded by rising peaks like a fortress. It is drained by the Rishi Ganga River through deep gorges where the Rishi Ganga hydropower project was, in the beginning, the Rishi Ganga Power Corporation Limited (RGPCL) and latter under the Kundun Group. Around 15,000 people live in the Biosphere reserve with 45 villages and other local communities in the buffer zone of the reserve. The

6 *Chamoli Geography*, Government of Uttarakhand (Apr. 19, 2021, 22:33 PM), https://chamoli.gov.in/geography/.

7 Chamoli District: Population 2011-2021 data, Census 2011 (Apr 19, 2021, 22:40 PM), https://www.census2011.co.in/census/district/575-chamoli.html.

8 PTI, T*racing the Ganga's intricate waterweb*, The Hindu, (Aug 10, 2021, 18:33 PM), https://www.thehindu.com/news/national/other-states/tracing-the-gangas-intricate-waterweb/article33775391.ece.

9 UNESCO, *Nanda Devi Biosphere Reserve, India, United Nations Educational, Scientific and Cultural Organization* (Apr. 30, 2021, 15:28 PM), https://en.unesco.org/biosphere/aspac/nanda-devi.

transition area of the reserve consists of 55 villages.[10]

The hydropower projects are severely impacting the ecological balance of the region.[11] The Raini village which is situated in the buffer zone of the Nanda Devi Biosphere Reserve was severely impacted by the flash floods. The resident of the village had warned the authorities about the illegal mining and blasting activities going in the name of the Rishi Ganga Project. The villagers also filed a PIL in the Uttarakhand High Court in 2019 alleging that blasting activities and stone crushing on the river bed on the Rishi Ganga River that was suspected to could cause a huge impact on the local ecology of the region, and also their access to the forest was cut due to these operations but the matter remained sub-judice.[12]

Cumulative Impact Assessment and the State's Negligence

In the past, a large number of hydro projects have suffered damages due to flood-related disasters in Uttarakhand but no lessons were learned from them. In 2013, the Tapovan-Vishnugad project suffered damages due to heavy rain and flash flood. Before this incident in 2012, the Uttarkashi district of Uttarakhand saw a similar disaster in which more than 29 people lost their lives, many went missing and the loss of property remained unassessed.[13] After the disaster, the Uttarakhand State Disaster Mitigation and Management Centre (DMMC) submitted a report in October 2012, which recommended strict regulation of development activities and projects near the rivers and streams. It warned about the use of explosives in the unstable, fragile and disaster-prone Himalayan terrains for construction purposes and recommended banning blasting activities. In its report, the DMMC also recommended the need for a policy that will regulate the activities and firm executive action to ensure compliance with these policies.[14] But the warnings and recommendations of the DMMC were ignored and the hydropower projects especially the Rishi Ganga project

10 *Id.*

11 Pratiba Naitthani & Sunil Kainthola, *Impact of Conservation and Development on the Vicinity of Nanda Devi National Park in the North India*, 08, Journal Of Alpine Research (2015).

12 Neeraj Santoshi, *Uttarakhand flood: Raini villagers had raised alarm before HC around 2 years ago*, Hindustan Times (Feb. 07, 2021, 22:57 PM), https://www.hindustantimes.com/cities/dehradun-news/uttarakhand-flood-raini-villagers-had-raised-alarm-before-hc-around-2-years-ago-101612720348122.html.

13 *India monsoon floods kill 34 in Uttarakhand*, BBC (Aug. 06, 2012, 11:56 PM), https://www.bbc.com/news/world-asia-india-19144580.

14 *Investigations in the areas around Okhimath in Rudraprayag district on the aftermath of landslide incidences of September*, 2012, A report, DMMC, 35(2012), https://dmmc.uk.gov.in/files/pdf/Okhimath_Report_Final.pdf.

carried out massive blasting activities in the sensitive areas.[15]

In 2013, the National Mission for Sustaining the Himalayan Eco-System (NMSHE) is one of the eight national missions of NAPCC, NMSHE in its mission document of June 2010, recommended the creation of ecological buffer zones around the 4 pilgrimage sites commonly referred to as Char-Dham to protect the highly eco-sensitive Himalayan region. According to the NMSHE, the construction of roads to be prohibited beyond 10 km from the pilgrimage sites and national parks and sanctuaries in the region to be kept as protected places with no human intervention. But the recommendations of the mission were completely ignored and massive construction projects like Char-Dham all-weather road projects were carried out.[16]

The Ministry of Environment and Forest commissioned a study for the Cumulative Impact Assessment of HEPs on aquatic and terrestrial biodiversity in Alaknanda and Bhagirathi Basins, which was to be conducted by Wildlife Institute of India (WII), Dehradun. In 2012, WII submitted its report and suggested that 24 out of 70 projects in the Upper Ganga region should be stopped due to their impact on ecology.[17] But the suggestions of WII were not implemented.

In 2013, after the Kedarnath disaster,[18] the reluctant MoEF appointed an Expert Committee to study the role of HEPs in the Kedarnath Tragedy, on the direction issued by the Hon'ble Supreme Court in the case of *Alaknanda Hydro Power Co. Ltd. v. Anuj Joshi & Others*.[19] The Kedarnath expert committee in its report submitted in 2014, that out of the 24 HEPs recommended being reviewed by the WII, 23 HEPs should be stopped as they will have

15 Prashant Jha, *Uttarakhand: Locals red-flagged blasting near sensitive areas of Nanda Devi for Rishiganga hydel project years ago*, The Times Of India (Feb. 08, 2021, 22:58 PM), https://timesofindia.indiatimes.com/city/dehradun/locals-red-flagged-blasting-near-sensitive-areas-of-nanda-devi-for-rishiganga-hydel-project-years-ago/articleshow/80739332.cms.

16 *National Mission moots eco-zones for Himalayas*, The New Indian Express (Jun. 26, 2013, 08:40 AM), https://www.newindianexpress.com/nation/2013/jun/26/National-Mission-moots-eco-zones-for-Himalayas-490627.html.

17 Wildlife Institute of India, *Assessment of Cumulative Impacts of Hydroelectric Projects on Aquatic and Terrestrial Biodiversity in Alaknanda and Bhagirathi Basins*, Uttarakhand, Final Interim Report, Ministry of Environment and Forests, Government of India, at 76-78 (2011), http://forestsclearance.nic.in/writereaddata/AdditionalInformation/AddInfoReceived/Interim_Report_Hydro_CEIA_WII_28May2011.pdf.

18 *Supra* note 2.

19 Civil Appeal no. 6736 of 2013 (SLP (C) no. 362 of 2012).

a disastrous impact on the biodiversity of the region.[20] The report also warned about the exploitation of the highly sensitive zones of Uttarakhand and the need to re-evaluate all the hydropower projects above 2000 meters. But the warnings of the Kedarnath committee were blatantly ignored and construction works on 23 HEPs continued unabated.[21]

Tapovan-Vishnugad HEP under NTPC

In 2020, the officials of Uttarakhand Pollution Control Board (UPCB) made a field visit to the muck disposal site of the NTPC's Tapovan-Vishnugad HEP, after the orders of the Hon'ble National Green Tribunal (NGT) in the case of *Gram Pradhan & Residents of Tapovan v. the State of Uttarakhand*.[22] After the field visit the officials reported that the slope of the muck dump was hazardously double the standards. The UPCB submitted its report to the NGT on March 2020, based on the field observations, and stated that NTPC has violated the muck disposal norms laid down by the MoEF at the Tapovan-Vishnugad HEP.[23] The UPCB made certain recommendations to minimize environmental impact and to prevent the muck from reaching the Dhauliganga river system. But when the UPCB officials re-visited the muck disposal site in October 2020, it was observed that the NTPC had not acted upon measures suggested by them and ignored its recommendations. So, in December 2020, the Uttarakhand PCB fined the NTPC Rs. 57.96 Lakh for violating much disposal norms and environmental degradation. At the NGT, the NTPC admitted to its fault and assured the Tribunal to restore the site as directed,[24] but it was all too late and the irreversible damage was done.

Rishiganga HEP under RGPCL

Time and again the locals of the world-famous Raini village who are known for their

20 Expert Body, *Assessment of Environmental Degradation and Impact of Hydroelectric Projects During the June 2013 Disaster in Uttarakhand*, Ministry of Environment and Forests, Government of India, at 220-226 (2014), http://gbpihedenvis.nic.in/PDFs/Disaster%20Data/Reports/Assessment_of_Environmental_Degradation.pdf.

21 Himanshu Thakkar, *Report of Expert Committee on Uttarakhand Flood Disaster & Role of HEPs: Welcome recommendations*, SANDRP (Apr. 29, 2014, 17:28 PM), https://sandrp.in/2014/04/29/report-of-expert-committee-on-uttarakhand-flood-disaster-role-of-heps-welcome-recommendations/.

22 Original Application No. 61/2019.

23 Uttarakhand Pollution Control Board, *Expert Committee's Report on Much Disposal and Management in Tapovan - Vishnugad Hydroelectric Project*, Original Application No. 61/2019, National Green Tribunal, at 9-10 (2020), http://www.indiaenvironmentportal.org.in/files/file/muck-disposal-Tapovan-hydroelectric-project-report-NGT.pdf.

24 Megha Prakash, *Invitation to Disaster: Even before the Uttarakhand disaster, NTPC was violating muck disposal norms at Tapovan project*, Gaon Connection (Mar. 01, 2021, 23:21 PM), https://en.gaonconnection.com/uttarakhand-disaster-ntpc-violating-muck-disposal-norms-at-tapovan-project/.

symbiotic relationship with the Himalayan ecosystem had warned about the effects of the Rishi-Ganga HEP on the highly eco-sensitive area of Nanda Devi Biosphere Reserve. In 2008, the villagers protested against the illegal blasting activities and stone crushing on the river bed carried out by the developers which were affecting the wildlife.[25]

While in 2019, the villagers of Raini villagers did not celebrate the Chipko Andolan Anniversary to register their protest against the Rishi-Ganga HEP and the Kundan group (current owner of the Rishi-Ganga HEP) for blocking their pathway to Gaura Devi Smriti Van.[26]

The villagers also filed a PIL in the Nainital High Court in 2019 in *Kundan Singh v. State & Others*,[27] alleging that blasting activities and stone crushing on the river bed on the Rishi Ganga River could cause a huge impact on the local ecology of the region.[28] The High Court passed two orders in which a stay order was imposed on the use of explosives and mining of the river bed without supervision and prior permission from the concerned authorities, and the court also directed the Uttarakhand Pollution Control Board and District Magistrate of Chamoli to inspect the project site. But nothing was done and the matter has remained sub-judice, and the warnings by the locals were ignored.

The villagers of Raini also went to the NGT but no relief was provided to them. NGT formed a committee with the same indifferent local officials. When these officials visited the site for field inspection the locals were not even consulted. [29]

The State's Liability

The two projects namely Rishi Ganga Project and the Tapovan-Vishnugad project were carried out by two companies. According to the latest reports, Rishi-Ganga HEP was under the Kundun Group which is a private sector company. The Tapovan project was under the NTPC. As per the view of the Hon'ble Supreme Court seven judges Constitutional Bench in *Pradeep Kumar Biswas case*,[30] a body is a state if it is financially and administratively

25 Staff Reporter, *From Gaura Devi to Rishi Ganga Hydel Project*, Garhwal Post (Apr. 06, 2021, 19:48 PM), http://uttarakhand.org/2008/08/from-gaura-devi-to-rishi-ganga-hydel-project/.

26 Vineet Upadhyay, *Uttarakhand HC slaps state, Centre with notice on Rishiganga Power Project*, The Times Of India (May 16, 2019, 13:51 AM), https://timesofindia.indiatimes.com/city/dehradun/hc-slaps-state-centre-with-notice-on-rishiganga-power-project/articleshow/69348280.cms.

27 Writ Petition No. 116 of 2018 (PIL).

28 *Supra* note 10.

29 Jay Mazoomdaar, *Behind hydel project washed away, a troubled trail to accident in 2011*, The Indian Express (Feb 11, 2021, 07:49 AM), https://indianexpress.com/article/india/hydel-power-project-uttarakhand-flash-flood-glacier-burst-chamoli-district-7183561/.

30 Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.

under the control of the government. It is implied that NTPC is a state within the meaning of Article 12 of the Constitution of India since the government of India holds the majority of shares in the company i.e., 51.02% shares.[31] So, NTPC must conform to the constitutional mandates under Article 48-A of the Constitution.

According to the doctrine of *Parens Patriae*, the state is the sovereign owner of all the resources, so it should act to protect environmental resources. When the resources are damaged which are held by the state in public trust, or there is a harm to the welfare of the public, by another entity then as per the doctrine of *Parens patriae*, the states have the standing to seek relief based on its role as guardian, or its quasi-sovereign interest in the welfare of the people.

Civil Liability under Public Liability Insurance Act, 1991

To ascertain the civil liability in the cases of environmental damages and to provide relief to the victims, the Constitutional Bench of the Supreme Court of India in the case of *M.C. Mehta & Anr. Etc v. Union of India & Ors.*[32] introduced the new rule of Absolute Liability as to the part of the Indian Legal system which will have no exceptions that were laid down in the case of *Ryland v. Fletcher*.[33] Bhagwati C.J., who was arguing for this case said that-

> *"We must develop new values and establish new norms to adequately address the new issues that emerge in a highly industrialized economy. We cannot allow the law in England, or for that matter any other foreign nation, to constrain our judicial thought. We don't need the crutches of a foreign legal system any longer. We are certainly ready to accept light from any source, but we must first create our own jurisprudence."*[34]

The rule of absolute liability is implemented through the Public Liability Insurance Act, 1991. Section 3 of the Act makes the owner liable to provide relief to the victim on the principle of no-fault. As per the schedule, the reimbursement of medical expenses incurred is up to Rs. 12,500, and in cases of fatal accidents there will be additional relief up to Rs 25,000. In case of total permanent disability, the relief will be up to Rs. 25,000 and in case damage to private property Rs. 6000 depending upon actual damage. Under the principle of Absolute Liability, the acts make the owner is liable to provide relief to the victims of

31 Editors, *NTPC says Govt pares stake to 51.02%*, Business Standard (Mar. 05, 2020, 14:50 PM), https://www.business-standard.com/article/news-cm/ntpc-says-govt-pares-stake-to-51-02-120030500753_1.html.

32 1987 AIR 1086.

33 (1868) LR 3 HL 330.

34 *Id.*

environmental damages, and as per Section 4 of the Act, it is the duty of the owner to take out insurance policies against liabilities to give relief. Thus, it may be implied that NTPC and Rishi-Ganga Power Co., is absolutely liable pay compensation to the victims of Chamoli Disaster.

Criminal Liability under Sections 268 and 269 of IPC, 1860

As per Section 268[35] of the Indian Penal Code, 1860, a person is liable for causing public nuisance without *Mens Rea*. A common nuisance is also not excused under this Section. Section 269[36] of IPC, provides that an individual is liable for any negligent acts which are likely to spread disease dangerous for life. [37]

As per the "Polluter Pays Principle", the NGT dismissed the appeal of NTPC and upheld the penalty of Rs. 57.96 Lakh imposed by the UPCB for violating muck disposal norms and environmental degradation.[38] At the same time, the reported violations of environmental norms by the Kundan Group at Rishi-Ganga HEP,[39] ignorance of the constant warnings by the locals,[40] and illegal stone crushing and blasting activities at the buffer zone of the Nanda Devi Biosphere Reserve had an irreversible impact at the ecosystem. Thus, it can be said that the NTPC and Kundun Group becomes criminally liable for this disaster.

Conclusion

Immediately after the Chamoli Disaster, another incident of landslide occurred in the Chamoli District, Uttarakhand near the Indo-China border. The Sumna avalanche claimed the lives of 15 BRO workers who were working on a road construction project.[41] Experts have warned disaster that there will be more Glacial Lake Outburst, flash floods, landslides

35 Indian Penal Code, 1860, § 268-*"A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage."*

36 Indian Penal Code, 1860, § 269- *"Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."*

37 *Supra* note 33.

38 *Supra* note 22.

39 *Supra* note 25.

40 *Supra* note 24.

41 Gopeshwar,*15 BRO workers killed in Sumna avalanche from Jharkhand*, Deccan Herald (Apr. 28, 2021, 05:18 AM), https://www.deccanherald.com/national/north-and-central/15-bro-workers-killed-in-sumna-avalanche-from-jharkhand-979732.html.

in the Himalayan regions. As per the Policy Brief 2018, by the Divecha Centre for Climate Change, IISC, Bengaluru,[42] the average temperature of the Himalayas has risen more than the global average. So, it is implied that there will be many more disasters like Kedarnath and Chamoli in the future if these unchecked, unregulated, and uncontrolled construction projects are carried out in the highly eco-sensitive zones of the Himalayas.

The cumulative impact assessment of the Rishi-Ganga HEP and Tapovan-Vishnugad HEP highlights the importance of the environmental impact assessment committee report. Dr. Madhav Dhananjaya Gadgil in The Hindu documentary regarding the landslide incidents in the Western Ghats region talked about the environmental impact assessment reports in India and said that: "*This is a state lawlessness that the environmental impact assessment reports are written elsewhere and completely fabricated reports are accepted...*"[43] He also highlighted the need for independent, free and fair reports. The states and other authorities need to understand the importance of these reports before sanctioning projects in the eco-sensitive regions to strike a balance through sustainable development. The district and state administration need to take warnings seriously by the local villagers and tribals as they are much more familiar with the ecosystem of the region. These local communities could be used to monitor and check the activities carried out by public or private companies in eco-sensitive areas. The state needs to examine thoroughly the suggestions, recommendations, and guidelines of the committee appointed by the courts or MoEF. There should be a mechanism for the implementation of the directions given by the courts and tribunals.[44]

Time and again justice has been betrayed like the Bhopal Gas Leak Case or the Baghjan case in which the amount of compensation was very less; similarly, the fine levied on the NTPC for environmental degradation is also insufficient for eco-restoration and no action has been taken against the Kundun Group. So, from the facts and circumstances of the Chamoli Disaster, it may be inferred that NTPC and Kundun Group are Absolutely Liable for the disaster that took place in Chamoli, based on the Principle of Sustainable Development as well as they have incurred both criminal and civil liabilities. Therefore, penalties and punishments shall be more stringent on the promoters of such deadly projects who value economic gains more than human lives and environmental concerns. The concept of sustainable development demands a middle way between economic development and environmental protection, it still prefers environment above economic growth, since without maintaining ecological balance no matter how high economic growth is achieved, intragenerational and intergenerational equity could not be restored.

42 Ashutosh Kulkarni, Rajiv Chaturvedi, et. al., *State of Himalayan glaciers and future projections, Policy Brief, by the Divecha Centre for Climate Change*, IISC, Bengaluru (2018).

43 Wounded Hills: *A documentary on the environmental issues of the Western Ghats*, The Hindu (Jan. 17, 2020), https://www.youtube.com/watch?v=rTV-56QagQM.

44 *Supra* note 21.

The Role of Nyaya Panchayat in Delivery of Rural Justice in India: A Critical Analysis

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Abstract

Although the Constitution of India assures of an all-round justice delivery to all the corners of India, the real-time portrait of the rural justice administration speaks otherwise. During the first few years of independence, India was familiar with the operation of Nyaya Panchayat which was, in turn, founded on the Panchayat ideology of participatory grassroot justice. Despite being an instance of indigenous justice instrumentality, the efficiency of it faded with time as we reached 1970-80s. After making several attempts towards the revival of this ideology, the Parliament finally enacted the Gram Nyayalayas Act, 2008 in order to re-establish the indigenous form of dispute resolution system by way of learning lessons from past failures. However, a revisit to the current Gram Nyayalaya System leaves us in surprise that the span of 11 years from the date of the enactment till the date does not reflect any considerable changes in the portrait of justice delivery across rural India, except a sharp departure from the erstwhile Panchayat ideology. Hence, the present article explores the status of the rural justice system from the perspective of the role of Nyaya Panchayats and seeks a comparison of scenarios before and after the independence. Further, the article conducts a critical analysis of the contemporary Gram Nyayalayas after the 2008 enactment, with a special emphasis towards its sustainability as against the Panchayat ideology. In light of the analysis conducted, the authors have henceforth put forward suitable suggestions in this context.

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Introduction

The periphery of justice, though, is enshrined in the Preamble of the Indian Constitution,[1] the ideals enshrined in it are a product of the 1917 Russian Revolution. Being a proportionate mixture of various constitutions and borrowed clauses, the Constitution of India has not only envisioned the incorporation of justice through its Preamble but also adopted the same vision in its letter and spirit through the Directive Principles of State Policy.[2] Emphasizing on the 'Justice' as the Preamble of the Indian Constitution[3] speaks of, it altogether reflects the attainment of three kinds of justice: Social, Economic and Political, to all of its citizens. Time and again, the three prime organs of the Constitution have been striving to ensure such security of justice among all the Indian citizens, irrespective of diversity and heterogeneity. To achieve this purpose, there was a glaring need for recognizing and regulating the lower tier administration system while considering the full-fledged diversity and necessity for uniform access to administration of justice in the nooks and corners of the country. The Panchayati Raj, despite its existence through the Gram Panchayats and Nyaya Panchayats in the context of executive and judicial hierarchy respectively, was infamous as a blunt weapon with no constitutional status. Although, the 73rd Constitutional Amendment Act of 1992[4] successfully blessed the aged Panchayati Raj Institutions in India with due Constitutional recognition, the said instruments acted as an administrative component more efficiently than as the indigenous dispute settlement bodies due to the absence of any effective judicial power vested with the Nyaya Panchayats. With a view to restore this balance disorder and sheer deficiency in securing access to justice at the grassroot level, the Gram Nyayalayas Act[5] was enacted in 2008 to once again bring another breakthrough in rural level by revitalizing the role of Nyaya Panchayats in the delivery of justice and its ideals in rural India. The present article, therefore, analyses the differences between the roles of Nyaya Panchayats and Gram Nyayalayas, in light of the real-time portrait of the indigenous justice delivery system in India.

1 INDIA CONST. Preamble.
2 INDIA CONST. art. 39A.
3 *Id.* at Preamble.
4 INDIA CONST. Part IX, *amended by* The Constitution (73rd Amendment) Act, 1992.
5 The Gram Nyayalayas Act, 2008, No. 4, Acts of Parliament, 2009 (India).

Erstwhile Nyaya Panchayats - The Scenario in Pre & Post - Independent India

Pre-Independent India

The advent of Nyaya Panchayat relates back to the Village Courts Act, 1888[6] under which the first Nyaya Panchayat was established in Madras. Subsequently, at that time, many other states followed the footsteps of Madras, subject to certain modifications and alterations in their respective legislations. Further, in 1907, the existence of the Nyaya Panchayat was highlighted by the Royal Decentralisation Commission with regard to its constitution and powers in administration as well as adjudication of petty cases, both civil and criminal.[7] More or less, the jurisdiction of the Nyaya Panchayats in civil cases was confined to the suits relating to recovery of movable property, liquidated damages that had arisen from a contract, compensatory damages caused by cattle trespass etc. In contrast, the Nyaya Panchayats in the criminal cases were not conferred the power to impose imprisonment but only fine in extreme circumstances. The procedure adopted in Nyaya Panchayats was flexible and not strictly based on the Indian Evidence Act,[8] the Code of Civil Procedure[9] and the Code of Criminal Procedure.[10] The members of Nyaya Panchayats were chosen based on an election, either direct or indirect,[11] and the lawyers had no right to appear and plead before it in most of the states in India.[12]

Post - Independent India

The process of rural justice evolution was initiated in independent India with the Constituent Assembly being entrusted with the drafting of the Indian Constitution. Although the Constituent Assembly maintained a firm stance in establishing a judicial hierarchy proceeding from the courts at the district level at the bottom, there was continuous demand in and outside the Constituent Assembly of adopting an indigenous and decentralized dispute resolution system. Village Panchayats were often claimed as the concrete form for

6 The Tamil Nadu Village Courts Act, 1888, No. 1, Acts of Tamil Nadu State Legislature, 1889.

7 II Law Commission of India, *14th Report: Reform of the Judicial Administration*, Ministry Of Law, Government Of India, ¶ 3, p. 874 (1958), https://lawcommissionofindia.nic.in/1-50/ Report14Vol2.pdf.

8 The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

9 The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908 (India).

10 The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

11 Law Commission of India, *supra* note 7, at 883, ¶ 10.

12 Law Commission of India, *supra* note 7, at 884, ¶ 14.

grassroot level of dispute resolution system through Nyaya Panchayats.[13]

Further, the role of village panchayat shaping Indian history was again brought to the limelight by the Law Commission of India in its 14th Report, 1958. It is evident from the report that the panchayat was mainly an autonomous product by villagers for their convenience without having qualified professionals or standard legal procedure to resolve the disputes.[14] However, despite the recommendations of the Civil Justice Committee (Rankin Committee), 1924-25[15] to confer both civil and criminal disputes to the Nyaya Panchayats, the nature of the disputes entrusted with these bodies were simple in nature which would otherwise intend to disrupt the harmony of the rural environment. The Law Commission, therefore, concluded that the Panchayats were vested with a wide authority and command to act in accordance with the will of common rural people.[16]

The 14th Report of the Law Commission of India on 'Reform of the Judicial Administration'(1958)[17] was therefore founded on the autarchy of the Village or Nyaya Panchayats as the self-governing units. Proceeding further, Nyaya Panchayats although were exempted from the strict application of the Civil or Criminal Procedural laws, the customary rules based on its general respect were allowed to be applicable for adjudicating the disputes.[18]

Despite carrying out the ideals of indigenous access to justice, the decisions arisen from the disputes were devalued due to the ambiguity underlying the nature of disputes and the relevance of these bodies in the judicial administration. As Upendra Baxi and M. Galanter[19] specify that the effectiveness of Nyaya Panchayat in several states was declined miserably by the end of the 1970s with the rise of case filings in courts at district level. On one

13 Videh Upadhyay, *A Study to Review and Strengthen Nyaya Panchayats in India: Including Aspects of Constitutionality of Nyaya Panchayats with Reference to the Nyaya Panchayat Bill, 2009,* Samarthan - Centre For Development Support, (May. 2011), https://www.pan chayat.gov.in/documents/20126/0/A+STUDY+TO+REVIEW+AND+STRENGTHEN+NYAYA.pdf/5af4bd57-d247-b36d-9ca3-a972f49077a1?t=1554869249980&hLDf=false&hLDf=false&hLDf=false&hLDf=false&hLDf=false.

14 Law Commission of India, *supra* note 7, at 874, ¶ 3.

15 III Civil Justice Committee, *Report of the Civil Justice Committee 1924-25*, Government Of India (1925), https://indianculture.gov.in/report-civil-justice-committee-1924-25.

16 Law Commission of India, *supra* note 7, at 876-877, ¶ 8.

17 Law Commission of India, *supra* note 7, at 874.

18 Law Commission of India, *supra* note 7, at 883, ¶ 11,

19 U. Baxi & M. Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, Upendrabaxi.In, 1979, http://upendrabaxi.in/documents/Panchayat%20justice%20an%20indian%20experiment%20in%20legal%20access.pdf (last visited on Mar. 8, 2021).

hand, the 1962 Study Team on the Nyaya Panchayats constituted by the Ministry of Law[20] portrayed the bright future of the Nyaya Panchayats, yet on the other hand, the rate of total case filings considerably dropped in states like Uttar Pradesh, Bihar, Rajasthan etc. Thereafter, when another study was undertaken in 1982 by Meschievitz and Galanter,[21] the evidence of the existence of Nyaya Panchayat had almost disappeared from these states. The study thus identifies several drawbacks and abnormalities underlying the structure and authority vested with the Nyaya Panchayat System. There are various loopholes in the said system, so discovered by the 1982 study. *Firstly*, there were limitations in funding capacity. *Secondly*, there was ambiguity in the jurisdiction to hear disputes. *Thirdly*, the adjudicators or the Nyaya Panchas were necessitated to strictly follow the substantive laws, whereas most of them were laymen. *Fourthly*, no legal knowledge is required as an eligibility criterion for recruitment as Nyaya Panchas. The criteria for recruitment were the minimum age limit of 30 years and written as well as reading ability of Hindi. *Fifthly*, there was absence of impartiality and fairness in delivering justice. The Nyaya Panchayats were a failure in terms of striking a balance between customs and codified laws, maintaining fairness, transparency and conscience in terms of reaching an amicable settlement between the parties.[22]

Considering the above discoveries, it is axiomatic that the experiences gained from the operation of the Nyaya Panchayat and the data coupled with its efficiency portray a glaring need for rural justice reforms with respect to its restructuring and revitalizing the power, jurisdiction, composition and statutory recognition of the Nyaya Panchayats, by means of an active interference of the Indian policy makers.

Reviving Nyaya Panchayats into Gram Nyayalayas - An Attempt from 1986

The journey of the revival of the extinct Nyaya Panchayats was first initiated when the Law Commission of India submitted its 114th Report in 1986.[23] The Report was published on Gram Nyayalayas with an objective to shift the Nyaya Panchayat model towards a new dawn. The 114th Report stressed and suggested the various points as the key to such

20 Ministry of Law, *Report of the Study Team of Nyaya Panchayats*, Government Of India (Apr., 1962), https://indianculture.gov.in/report-study-team-nyaya-panchayats-1962.

21 C.S. Meschievitz, M. Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution,* 2 The Politics of Informal Justice 47, 61 (1982).

22 *Id.* at 57, 70.

23 Law Commission of India, *114th Report: Gram Nyayalaya*, Government Of India (Aug. 12, 1986) https://lawcommissionofindia.nic.in/101-169/Report114.pdf.

reconstruction. *Firstly*, encouraging the idea of participatory justice.[24] *Secondly*, need for adjudicators having knowledge in local culture, customs and conditions.[25] *Thirdly*, there must be a village court consisting of a panel of three (3) members, out of which the head of the panel shall be a judicial official, along with two (2) lay-judges. The judicial official must be selected from the State-cadre of judges as maintained by every state, and the lay-judges would be appointed through a selection process by the panel of the concerned District Magistrate and the District & Session Judge.[26] *Fourthly*, although Nyaya Panchayat members were selected through a democratic direct election process, the law commission suggested no democratic election process for Gram Nyayalayas.[27] *Fifthly*, the Report did not specify any pecuniary jurisdiction vested with the proposed Gram Nyayalayas[28] but conferred subject-matter jurisdiction in civil cases to the Gram Nyayalayas by enclosing a list of civil subject matters, thus protracting the scope of this system unlike the case of Nyaya Panchayats.[29] *Sixthly*, the 114th Report recommended the grant of criminal jurisdiction to Gram Nyayalayas comparatively wider than earlier it had been with Nyaya Panchayats. The reason behind the same is the constitution of the proposed adjudicatory panel consisting of judicial officer and lay-judges.[30] *Seventhly*, unlike earlier, the lawyers were proposed not to be exempted from appearing and pleading before the Gram Nyayalayas.[31] With regard to the application of the Procedural Laws, the Law Commission of India recommended the exclusion of the Civil Procedure Code and the Indian Evidence from the Civil case by way of adopting a simple procedure, though the Code of Criminal Procedure was still allowed to be applicable.[32] *Eighthly*, the idea of site travel or mobile court was proposed in the operation of Gram Nyayalayas in order to collect evidence from local dispute sites and facilitating the resolution process as accessible as possible.[33]

Therefore, through the 114th Report, the Law Commission of India for the very first time introduced a hybrid model, founded on the combined features of formal courts and the erstwhile Nyaya Panchayats, with the sole aim to boost the rural justice administration in India.

24 *Id.* at ¶ 1.2 (1), 3.2, 5.9.
25 *Id.* at ¶ 3.3.
26 *Id.* at ¶ 3.7, 5.13, 5.16.
27 *Id.* at ¶ 3.5, 5.15.
28 *Id.* at ¶ 6.2.
29 *Id.* at 27, ¶ 3.11, 6.2.
30 *Id.* at ¶ 3.12, 6.3, 6.10.
31 *Id.* at ¶ 6.11.
32 *Id.* at ¶ 6.7.
33 *Id.* at 31, ¶ 4.4, 6.6.

Enacting the Gram Nyayalayas Act, 2008

Mostly, the recommendations so suggested in the 114th Report of the Law Commission of India[34] was attempted to transform into reality by way of enacting the Gram Nyayalayas Act, 2008.[35] Where on one hand, the proposals regarding mobility and frequent site visits were included in this Act, the concept of 'participatory justice' was completely excluded from the purview of the Act. Therefore, a quick analysis of the Gram Nyayalayas Act clearly evinces not only the departure from the erstwhile Nyaya Panchayat system but also the Recommendations moved forward by the 114th Law Commission Report of 1986.[36] There are various departures witnessed in the Act of 2008. *Firstly*, the erstwhile Nyaya Panchayats were exempted from the strict application of the procedural laws, both civil and criminal. The 114th Report, however, recommended such an exemption in civil matters and not in criminal matters, in which such application was proposed to be reduced a bit. On the contrary, the Act of 2008 maintains the stance by providing application of procedural laws in criminal cases, provided that those cases will be heard through summary trials at the first instance. The application of the criminal procedural laws will only be allowed if the Nyayadhikari thinks it fit and necessary to apply.[37] *Secondly*, for civil matters, the Gram Nyayalayas Act prescribes a standard procedure that reflects the departure from many significant provisions of the Code of Civil Procedure, 1908[38] in terms of substantial clauses. To deal with any incidental matter involved in a civil proceeding, Section 24(6) of the 2008 Act confers the power to the Gram Nyayalayas to adopt any procedure as it deems fit and reasonable for the purpose of preserving the ends of justice.[39] *Thirdly*, the Indian Evidence Act of 1872 is exempted from application in both criminal and civil cases tried by the Gram Nyayalayas. Therefore, the Gram Nyayalaya by virtue of Section 30 of the statute[40] is empowered to receive and regard any report, document, matter, statement or information as evidence if it may be of assistance to decide a dispute, irrespective of its inadmissibility under the Indian Evidence Act. *Fourthly*, for civil matters, the Gram Nyayalayas Act mandates conciliation[41] as the primary resolution method to follow at the first attempt. Such conciliation must proceed in accordance with the manner directed by

34 Law Commission of India, *supra* note 23, at 56 - 58.
35 The Gram Nyayalayas Act, *supra* note 5.
36 Law Commission of India, *supra* note 23, at 56 - 58.
37 The Gram Nyayalayas Act, *supra* note 5, § 18, 19.
38 The Code of Civil Procedure, *supra* note 9.
39 *Id.* at § 24.
40 *Id.* at § 30.
41 *Id.* at § 26.

the High Court followed by the establishment of a panel of conciliators[42] to be maintained by the Gram Nyayalayas. *Fifthly*, a panel consisting of one judicial officer and two lay-judges was the model proposed by the Law Commission 114th Report of 1986, due to the presence of persons familiar with substantial laws and local customs, in the adjudication panel. The Gram Nyayalayas Act 2008 portrays a sharp departure from such model by laying down that the composition of each Gram Nyayalaya will be chaired by a single adjudicator or Nyayadhikari, qualified to be a Judicial Magistrate of the First Class at the least. Hence, the absence of experienced adjudicators is well-evident from this composition structure.[43] *Sixthly*, the lawyers were explicitly barred from appearing before the majority of the erstwhile Nyaya Panchayats, whereas the Gram Nyayalayas Act re-establishes the concept of legal representation by stipulating no such bar on the lawyers. In this respect, the Gram Nyayalayas Act of 2008 broadly accepts the adversarial system of adjudication as mentioned in the 114th Report.

An Analysis of Ground-Level Justice Delivery with reference to the Erstwhile Nyaya Panchayats and the Current Gram Nyayalayas Model

Delving deeper into the concept behind equal access to justice, the Gram Nyayalayas Act, 2008 by no stretch of imagination endeavours to preserve the spirit of panchayat ideology by means of adopting fair legal representation, conferring wider civil and criminal subject-matter jurisdiction. Although the panchayat ideology promotes amicable dispute resolution, the Gram Nyayalayas unlike the erstwhile Nyaya Panchayats, departs from the same and re-establishes the adversarial mode of adjudication. Nonetheless, the present scenario of the Gram Nyayalayas, apart from the adjudication process, also promotes the amicable dispute resolution method in civil cases by providing due importance to the Conciliation mode.[44] Hence, the nature of the Gram Nyayalayas Act 2008 with respect to the Panchayat ideology is revitalized in the sense that it was recreated with certain departures from the original ideology in order to suit the needs of a dynamic society.

It is pertinent to mention at this juncture that out of all the Indian states, only the states of Madhya Pradesh, Rajasthan and Maharashtra had implemented the system of Gram Nyayalayas more efficiently than other states. This being said, shows the preliminary

42 *Id.* at § 27.
43 *Id.* at § 5, 6.
44 *Id.* at § 26, 27.

statistics as extracted from a 2013 study[45] that Madhya Pradesh topped with 89 Gram Nyayalayas in terms of effective operationalization of the statutory Gram Nyayalayas. Rajasthan being the second-highest in that respect, effectively operates 45 Gram Nyayalayas followed by Maharashtra with 9 Gram Nyayalayas. The drastic gap between the second and third highest positions with 45 and 9 Gram Nyayalayas respectively reflects an unfortunate reality of the access to delivery of justice at the grassroot level, even as of today.

Further, the study highlights multiple findings[46] with regard to the success of Gram Nyayalayas Act in reality. *Firstly*, the Gram Nyayalayas so existed today in these states are similar to Judicial Magistrate First Class Courts which are just renamed as Gram Nyayalayas in the course of designated village visits on certain days and for the sake of statutory compliance under Section 6 of the Act of 2008. Section 6 of the Act makes it mandatory to head each Gram Nyayalaya by a Nyayadhikari, qualified to be a Judicial Magistrate of the First Class.[47] *Secondly*, the Nyayadhikari who headed the Gram Nyayalaya in these states also heard the same criminal matters paralleled with the Judicial Magistrates First Class in regular courts. This is because the criminal cases of at least two out of three Gram Nyayalayas were shared in a docket with the regular Magistrate's court. This phenomenon, by no stretch of imagination, aids to fade away the ideals of ground-level rural justice delivery enshrined in the concept of Panchayat Raj.[48] *Thirdly*, although the external setup and the court decorum in these Gram Nyayalayas were appropriate, the real-time scenario with respect to the professional representation, legal application, proper examination and other procedural applications were significantly poor and extraordinarily low in quality. Unlike the statute mandates, the Gram Nyayalayas today lack in conducting the conciliation mode of resolution by way of maintaining an expert panel, due to a shortage of resources in terms of skilled manpower or location barriers.[49]

Fast-forwarding the screenplay from 2013 to the current scenario, it has been noticed from various files available on the Government of India website that the Central Government has been aiming to sanction a significant quantum of financial assistance to various states in order to accelerate the process of establishing more number of Gram Nyayalayas

45 Official Debates of Rajya Sabha, *Written Answers to Unstarred Questions: Working of Gram Nyayalayas*, I Parliament Of India, Session Number 225, p.145, (Mar. 19, 2012) https://www.rsdebate.nic.in/handle/123456789/606517?viewItem=browse.

46 Shishir Bail, *From Nyaya Panchayats to Gram Nyayalayas: The Indian State and Rural Justice*, 11(1) Socio-Legal Review 83, 97-98 (2015).

47 *Id.* at 97.

48 *Id.* at 97.

49 *Id.* at 98.

followed by its effective operation. For example, recently as of January, 2021, the State of Andhra Pradesh received a sanction of approx. 59 lakhs from the Centre for the purpose of incorporation and operation of 42 Nyayalayas.[50] At the same time, the scheme[51] formulated in 2017 with regard to effective operation and assistance to the Gram Nyayalayas across the country is being extended from time to time,[52] to expand the reach of rural justice by letters, spirit and also in quantity.

However, at the same time, if the quality is the determining factor to look into, it can easily be observed from the aforesaid discussions and observations of the new law and reality, that the modern Gram Nyayalaya system, by substantially departing from the erstwhile Village ideology, recreated a new hybrid system only in letter but not in spirit. Considering its role in the criminal justice delivery system, we can safely assume from the data available that the Courts of judicial magistrates of first-class currently play the similar and parallel roles as that of Gram Nyayalayas in reality - which automatically leads to no autoimmunity of the rural justice system from the regular court procedure and adds due stress to the vice of pendency. On the other hand, while talking about civil disputes, there is a mere possibility that the village ideology can still be followed in such cases due to no strict application of procedural laws and facilitating the parties through an amicable mode of resolution at the first attempt. The Gram Nyayalayas Act nonetheless is an applaudable attempt, but without having a tint of erstwhile Panchayat ideologies retained at its core, it eventually reflects no difference from the existing justice system in India, containing a plethora of unsettling concerns till date.

Conclusion

Nyaya Panchayats carrying the ideals of a village panchayat were at a standstill despite receiving several attempts to revive its operation since the time of independence. After evincing the failure of these institutions, the Gram Nyayalayas were brought into the picture to strike a difference in contributing to a meaningful rural justice reform. The

50 Ministry of Law and Justice, *Central Assistance towards Recurring and non-recurring expenditure for establishing and operationalising 42 Gram Nyayalayas in the State of Andhra Pradesh-regarding*, Government Of India (Jan. 21, 2021), https://doj.gov.in/sites/default/files/GN%20 Sanction%20 Andhra%20Pradesh.pdf.

51 Ministry of Law and Justice, *Establishing Gram Nyayalayas by the State Governments- General guidelines for central assistance to be provide to the States*, Government Of India (Dec. 16, 2009), https://doj.gov.in/sites/default/files/gmn_1.pdf.

52 Ministry of Law and Justice, *Continuation of the Scheme for Establishing and Operationalising Gram Nyayalayas from 01.04.2017 to 31.03.2020-Regarding*, Government Of India (Oct. 27, 2017), https://doj.gov.in/sites/default/files/GN%20cont.%20order.pdf.

problem however lies in the idea of adopting differential features i.e. focusing too much on bringing different features and shifting from the mainstream village ideology founded on participatory justice. The current Gram Nyayalayas, thus, took the perfect shape of a formal court, losing the very traits of rural justice ideology. In these circumstances, a need of the hour is to make meaningful attempts to return to the erstwhile Nyaya Panchayat system with internal modifications or amendments, so as to preserve the originality of panchayat ideology and contributing effectively as well as expeditiously in the rural justice delivery with the concerted effort of the Central and State Governments.

Inadequate Environmental Laws and Increasing Pollution in Space

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Abstract

Pollution has been one of the core concerns when we look at the position of our planet. However, little is being done to throw light upon and examine pollution in Space. This paper attempts to do that and call attention to the grave repercussions that humankind will face due to the rapid increase of debris in Outer Space. Initially, the paper will trace the root cause of pollution and elaborate on the different kinds of pollutants such as chemical effluents, biological effluents and nuclear material, which poses an imminent danger. Furthermore, the paper will illustrate the risk on the Earth's environment due to imbalance in outer space. Then the paper will critically examine the most significant Article of the Outer Space Treaty concerning space pollution (Article IX). Later, the paper will list the various international conventions and collective efforts by the international communities to deal with the predicament. Lastly, the paper will put forward several proposals of multiple theorists and scholars to deal with the orbital debris problem in the outer space environment and the possible way forward.

Introduction

It is said that wherever humans go, they tend to leave their mark. This can be in the form of development or destruction. Humans are witnessing how badly the ecology is imbalanced, be it the depletion of the ozone layer, or emission of greenhouse gases, leading to the rise in the earth's overall temperature. Human has substantially exploited the Earth's resources, and now it is time to expand our horizon to Outer Space.[1] We have international treaties like *Kyoto Protocol, Paris Agreement and UNFCCC*, but none of them pays attention to the

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1 Christol, *The modern international law of outer space*, 77(4) Am. J. Int. L. 937-939 (1982).

problem of pollution in Outer Space.[2]

Since both the public and the private entities have begun launching and utilising satellites and making the process easier and less expensive to launch satellites into orbit. This expansion is giving rise to the problem of *space debris*.[3] The time is not too far when there can be a point of cascading exponential increase in space debris, leading to problems like debris collides, which might ultimately result in unusable Earth orbits. This is known as *Kessler Effect*.[4] Pollution is a threat to human existence, be it on the surface of earth or in outer space.[5]

Understanding the Contamination of Space: Space Debris

Veiling behind the curtain of development to justify the acts is always the tendency of humans, but this devastation has been multiplied extensively[6] because of increased space activities.[7] The source of outer space pollution is divided into *forward contamination* and *backward contamination,*[8] former occurs due to the result of human activities such as launching satellites[9] whereas the latter refers to any unpropitious change caused in the Earth's environment due to the introduction of an extra-terrestrial matter.[10]

Space debris is defunct human-made objects in space; it can also be referred to as Space Junk

2 Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future,* 3 Studies in Space Laws 998 (2008).

3 Gabrielle Maxey, *Clearing some Space* Yumpu (2009) https://www.yumpu.com/en/document/read/7998329/taking-care-of-business-university-of-memphis.

4 ESA, *The Kessler Effect and How To Stop It*, European Space Agency (2012) http://www.esa.int/Our_Activities/Space_Engineering_Technology/The_Kessler_Effect_and_how_to_stop_it.

5 Nandasiri Jasentuliyana, *The Role of Developing Countries in the Formulation of Space Law*, XX(II) Annals AIR & SPACE L. 95 (1995).

6 Thierry Senechal, *Orbital Debris: Drafting, Negotiating, Implementing a Convention,* Research Gate (2007) https://www.researchgate.net/publication/37999896_Orbital_debris_drafting_negotiating_implementing_a_convention.

7 Stephen Gorove, *Pollution and Outer Space: A Legal Analysis and Appraisal* 53(5) N.Y.U. J. Int. L. & Pol. 59 (1972).

8 Sandeepa Bhat, *Sustainable Space Development: Need for a Change in the Liability* IISL – AAIA Sept. 24-28, 2008 at 319.

9 European Space Policy institute, The Fair and Responsible Use of Space' (Wolfgang Rathgeber, Kai-Uwe Schrogl, Ray A. Williamson eds. Springer) (2010).

10 Major Bernard K. Schafer, *Solid, Hazardous and Radioactive Wastes in Outer Space: Present Controls and Suggested Changes*, 19(1) Cal. W. L. Rev. 1 (1988).

or Waste in simple terms.[11] It is the most potent form of space pollution found extensively in orbits, caused by fragmentation of space shuttle, satellite or inoperative payloads. This overcrowding of space will give rise to frequent incidences of collisions of objects with existing debris which will proliferate secondary fragments, and the chain will continue.[12]

One crucial factor that needs to be taken into account is that all the space debris are relatively very small, ranging from a few millimetres to several centimetres. Hence, the major problem is not with the size but with its high velocity, wherein actual danger[13] is when these micro-particulate matters with high velocity collide with other space objects, extra-terrestrial bodies or with humans (astronauts),[14] because that is where there is a possibility of an even bigger havoc.[15] This floating junk will result in damage of property, unpropitious effect on the costs of space missions and most severely on Astronauts' lives.[16]

Past Instances of Collision

The first-ever collision incidence was in 1996 when the French CERISE spacecraft collided with a European Ariane rocket.[17] In January 2005, a U.S. rocket collided with the third stage of a Chinese CZ-4 launcher.[18] In February 2009, an Iridium satellite collided with a spent Russian satellite, resulting in close to 2,000 debris pieces over 10 cm long.[19]

Threats Surpassing Fragmented Particles to Outer Space

Air pollution and harmful chemicals are polluting Earth and impacting outer space

11 Scientific and Technical Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, *Technical Report on Space Debris* United Nations (1999) https://digitallibrary.un.org/record/276455?ln=en.

12 I.A.S.L – Univ. of Cologne, Environmental Aspects of Activities in Outer Space: State of the Law and Measures of Protection (Karl-Heinz Böckstiegel ed. Springer) (1990).

13 Donald Kessler and Burton G. Cour-Palais, *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, 83 Journal of Geophysical Research 2637 (1978).

14 Fishman, *Space salvage: A proposed treaty amendment to the agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into space* 26 J. Int. L., 965 (1985).

15 NASA, *Interagency Report on Orbital Debris*, (NASA, Orbital Debris Quarterly News, April 2005)

16 Viikari, *supra* note 2.

17 NASA, *Orbital Debris qutarly news*, (Vol 1 Issue 2, NASA, Sept 1996)

18 Leonard David, *U.S.-China Space Debris Collide in Orbit*, Space News (2005) https://www.space.com/969-china-space-debris-collide-orbit.html.

19 Becky Iannotta , *U.S. Satellite Destroyed in Space Collision*, Space News (2009) https://www.space.com/5542-satellite-destroyed-space-collision.html.

undesirably.[20] In outer space, the source of chemical release is from the use of solid rocket fuels in spacecraft, which is composed of *hydrogen chloride, aluminium oxide, water, hydrogen, carbon monoxide, and carbon dioxide*.[21] These compounds have an adverse impact on Outer Space and might also be harmful to the atmospheric balance of Earth because it is still undetermined what will happen if these compounds enter the atmosphere of Earth.[22]

The next threat is from *Nuclear-propelled spacecraft;*[23] human civilisation has already witnessed severe destruction by a nuclear weapon in World War II. There is a constant threat to planet Earth and an amount of destruction beyond our imagination in case of explosions of nuclear substances in the vicinity of space.[24] In the crash of the *Russian satellite Cosmos 954 in 1978,*[25] this nuclear-powered satellite disintegrated on re-entering the Earth's atmosphere and scattered toxic radioactive debris over certain parts of Canadian territory.[26]

Applicability of Principles of International Environment Law in Outer Space

The existing conventions and treaties do not effectively conserve the outer space environment. Thus, it becomes essential to explore the possibility of importing customary environmental law principles into the space sector.[27]

20 NASA Policy Directive, *Biological Contamination Control for Outbound and Inbound Planetary Spacecraft,* National Aeronautics and Space Administration, (2016) https://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPD&c=8020&s=7G.

21 Carl Q. Christol, *Protection of the Space Environment: Debris and Power Sourc*es Kluwer Law International 260 (1995).

22 Vishakha Gupta, *Critique of the International Law on Protection of the Outer Space Environment,* 14(1) Astro Politics (2016).

23 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, U.N. GA - UNOOSA, art. IV, 1962.

24 Melissa K. Force, *The Legal Landscape for Nuclear Spacecraft: International Environmental Law and Space Law* 35 Asian Journal of Air and Space Law 146–47 (2012).

25 W.K. Gummer, F.R. Campbell, G.B. Knight, J.L Ricard, '*COSMOS 954*, *The Occurrence and Nature of Recovered Debris,* C. Pub Co. (May., 1980) https://inis.iaea.org/collection/NCLCollectionStore/_Public/12/595/12595268.pdf.

26 He Qizhi, *Towards a New Regime for the Use of Nuclear Power Sources in Outer Space*, 25 Journal of Space Law 97 (1996).

27 Roberts, *Traditional and modern approaches to customary international law: A reconciliation* 95(4) Am. J. Int. L., 757, 791 (2001).

Let us examine the feasibility of the same, starting with the case of *Trail Smelter,*[28] where it reiterated the Principle 21 of Stockholm that *"No state has the right of permit use of its territory in such a manner as to cause injury to the territory of another state or properties"*. It will be challenging to inculcate this principle because the whole concept of Territorial jurisdiction or State boundary is not applicable in the scenario of outer space.

Another relevant international environmental norm is the *Polluter pays principle*, which states that *Whoever is responsible for damage to the environment should bear the costs associated with it*.[29] This principle directly holds the polluter liable and compel them to pay the cost to repair the damage they have caused to the environment.[30] Though it emerged largely as an economic principle, it also has legal implications in international environmental liability.[31] However, an embodiment of this principle in the space sector is ridden with ambiguities and makes the reparation mechanism deficient.[32] The challenge here is not to identify the Polluter of space pollution, taking the reference from the Convention On International Liability For Damage Caused By Space Objects, the Polluter will either be the launching state, manufacturer state or it can even be a private organisation like *SpaceX* who independently create space objects.[33] The issue that arises here is that, *to whom the compensation will be given*? In case of space pollution, *who will be the party calming the compensation?* This fundamental question nullifies the applicability of the principle of Polluter pays in the Space sector.[34] Other environmental law principles, including *Sustainable development, Intergenerational Equity or Principles of Integration*, do not hold any value in the space sector and need more clarification and scholarly work to generate the debate.[35]

28 United States v. Canada (1941) Arbitral Trib., 3 U.N. Rep. [Int'l Arb. Awards 1905].

29 FEE, *The Impossibility of Harming the Environment,* Foundation for Economic Education, (May. 1, 2002) https://fee.org/articles/the-impossibility-of-harming-the-environment/.

30 Karl-Heinz Bockstiegel, *ILA Draft Convention on Space Debris,* 1994 German Journal of Air and Space Law 395, 400.

31 Roy E. Cordato, *The Polluter Pays Principle: A Proper Guide for Environmental Policy,* IRET (2016) http://iret.org/pub/SCRE-6.PDF.

32 Nandasiri Jasentuliyana, *International Space Law and the United Nations,* (1995) Kluwer Law International 45.

33 Risley, *Examination of the need to amend space law to protect the private explorer in outer space* 26 Wes. Sta. Univ. L. Rev., 47 (1999).

34 Fawcett, Outer space: New challenges to law and policy 19(3) Oxford, UK: Clarendon Press, (1984).

35 David Tan, *Towards a New Regime for the Protection of Outer Space as the Province of all Mankind*, 25(1) Yale J. Int. L. 145 (2000).

Elucidating the Position of International Treaties

One of the first treaties to address environmental concerns of Outer Space is the *Partial Nuclear Test Ban Treaty of 1963*. It prohibits the employment of nuclear weapons in the atmosphere, underwater, and in outer space to prevent radioactive fallout in space.

In order to create liability[36] on Nations, it became essential to define the term *"Space Object"*. The Liability Convention[37] is the first space convention to provide a definition which states:-

> *"The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof".*[38]

This definition was crucial as it helped establish the joint and several liability[39] of all launching states in case of any misshaping.[40] Even though, the Outer Space Treaty is in existence for more than five-decades but still fail to define "Space Object" even after using the term in Article X.[41] Now the focus was on "*space debris"* and can be traced through an attempt by *UNCOPUOS in 1977.*[42] However, it was not fruitful because the problem was raised as a side issue to *crowding of the geostationary orbit.*[43]

Then in the same year, the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977* prohibited military or other hostile uses of techniques which, could change the dynamics, composition or *structure of outer space*". Finally, in 1992, the General Assembly realised the gravity of the problem of pollution in outer space and urged States to pay more attention to the protection and the preservation of the outer space environment.[44] Special emphasis was given to the problem

36 Foster, *Convention on international liability for damage caused by space objects*, 10 CAN.. Y.B. INT. L., 137 (1972).

37 U.N. GA Res. 2777 (XXVI), *Convention On International Liability For Damage Caused By Space Objects,* Sept. 1972 UNOOSA 1971.

38 *Id.*, art. I (d).

39 *Id.*, art. V.

40 Armen Rosencranz, *Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT'L & COMP. L. REV. 309 (2002).

41 Robert C. Bird, *Procedural Challenges to Environmental Regulation of Space Debris*, 40 AM BUS LJ 635, 637 (2003).

42 UNCOPUOS, *Space Debris Mitigation Mechanism in Japan* (2009), http://www.oosa.unvienna.org/pdf/pres/lsc2009/pres-05.pdf.

43 Jer-Chyi Liou and Nicholas L. Johnson, *Risks in Space from Orbiting Debris*, 311(5759) AAAS SCIENCE 340 (2006).

44 Bhat, *supra* note 8, at p.319.

of collisions of space objects with space debris.[45]

Outer Space Treaty could be the Game Changer

The enactment of the Outer Space Treaty is considered a historic event.[46] The combined effort of the U.N. General Assembly and the Legal Subcommittee of COPUOS, which is also considered the Magna Carta of space law, lead to the creation of the Outer Space Treaty. When the treaty was being drafted, space activities were too exorbitant, and it was highly unenforceable for the drafters of the treaty to think of space junk as a severe concern. As a result, today, we have only one provision that abstractly discusses the *Environmental protection of Outer Space, Article IX*[47] of the Outer Space, 1966.

Article IX of the Outer Space Treaty is described as a bunch of imprecise terms. In order to thrive better understanding, the Provision of Article IX has been divided into three distinguished paragraphs.

First Paragraph of Article IX

It is difficult to extract out the real intent of the treaty's drafters, but the term *"guided"* does not clarify whether member states have to mandatorily conform to the principle of cooperation and mutual assistance or merely consider it before undertaking an activity. This discretion on the parties can lead to a situation of conflict while interpreting.[48]

45 U.N. GA, *International Cooperation in the Peaceful Uses of Outer Space*, 4th Comm. 70 Sess. (1992) UN Doc. A/RES/47/67.

46 United Nations Committee on the Peaceful Uses of Outer Space, *Status of International Agreements Relating to Activities in Outer Space*, (2015) A/AC.105/C.2/L.295.

47 *Supra* note 23, art. IX, (*In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment.).*

48 Reynolds, Merges, Outer space: Problems of law and policy 3 Harv. J. L. & Tech 275 (1990).

It is also important to highlight here is that the starting sentence of the first para of Article IX was imported from the *1963 UNGA Resolution*. It promulgates the principle of international "*cooperation and mutual assistance*" with respect to space activities. It mandates that parties to the Outer Space Treaty give due regard to other states' interests while exploring outer space. However, unlike the 1963 UNGA Resolution that applied to *all States*, Article IX applies only to the "State Parties" to the Outer Space Treaty.[49]

In the last line of the first paragraph, the phrase *"corresponding interests"* fails to provide a lucid meaning. From a rational human-centric perspective, it is construed to include only the harm caused to *future space activities*; with such unidirectional interpretation, it dilutes the whole relevance of the provision.[50] Also, this provision limits the scope of considering the *precautionary principle* as a measure to deal with the situation.

Second Paragraph of Article IX

It is the only provision in the entire Outer Space treaty that expressly addresses the *protection of the outer space environment*. It starts by stating that the *"States Parties to the Treaty shall pursue studies…"*. The use of *"shall"* in this sentence implies that the party states will mandatorily have to pursue studies of outer space even if not engaging in any space activity. But the provision fails to further assist as to *what sort of studies have to be pursued,* wherein this interpretation is left on speculation of states. Also, this provision does not take into account the great divide between the Developed and Emerging nations as there will be a discrepancy in states' financial resources, scientific & technological capabilities and infinite other barriers.[51]

The terms *"harmful"* and *"adverse change"* are subject to multiple interpretations, and the interplay between these two terms results in another anomaly. The provision does not clarify aspects like, *for whom the contamination must be harmful*; *for whom the change must be adverse*[52] or *whether the contamination is harmful to celestial bodies, future space experiments, or to the Earth's atmosphere*.

49 Natalie Pusey, *The Case for Preserving Nothing: The Need for a Global Response to the Space-Debris Problem*, 21 Colo. J. of Int'l. Envtl. L. & Pol'y. 425 (2010).

50 Lawrence D. Roberts, *Addressing the Problem of Orbital Space-Debris: Combining International Regulatory and Liability Regimes*, 15(1) B.C Int'l. & Comp. L. Rev. 51(1992).

51 Olga Stelmakh, *Space Debris: Emerging Challenge, Common Concern and Shared Responsibility: Legal Considerations and Directions towards a Secure and Sustainable Space Environment*, 13 Int'l Inst. Space Law, 353, 357 (2013).

52 N. Trendle, *Negligence and the Right to Support: Bognuda v. Upton & (and) Shearer*, 28 V.U.W. L. Rev. 416 (1971).

The provision also leaves the word *"contamination"* undefined. As the article does not explicitly address other kinds of pollution and Contamination, in common parlance means the discharge of *chemical effluents*. So, it leaves us with the doubt that, *whether to draw an inference, the article only refers to the harm caused to outer space through the release of chemical contaminants*.[53]

The terms *"where necessary"* and *"appropriate measures"* augment the abstractness of this article. There is no definite authority to set standards for «necessary» and «appropriate measures». In a strict sense, these terms will be interpreted according to the «quantity of contamination» instead of «quality of the environment,» undermining outer space environmental sustainability.[54]

The term "avoid" obligates the member states only to shun certain activities but *what actions must be "avoided" are not specified*. This obscurity highlights the depth of human-centrism ingrained in this Article which reflects the intent of drafters, who merely for the sake of creating some obligation on state parties, created this provision.[55]

Third Paragraph of Article IX

The core issue in the third paragraph is with the term *"reason to believe"*. This term is subjective and provides ample power in the hand of the concerned State party to decide whether they want to seek international consultation or wants to avoid by rebutting the existence of *"reason to believe"*.[56] There can also be a possible scenario when the state party attempts to manipulate facts to adduce faith in their venture and negate any prospect of harmful interference with outer space. Due to the absence of any yardstick to determine the truth the states can easily manipulate this term in their favour.

Even when the member state is willing to seek consultation but the provision is silent on the fact that *from whom to seek these international consultations*. As the provision fails to mention any international body to whom the State party can go and seek consultation in case of any potential harm or interference to outer space.

Article IX also fails to impose any firm obligation on the state parties. The only direct

53 Howard A. Baker, *The Sci-Lab Perception: Its Impact on Protection of the Outer Space Environment* 30 Colloq. L. Outer Space, 121, 127 (1988).

54 Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 Yale J. Int'l L. 1 (1984).

55 Aldo Armando Cocca, *Convention on Registration of Objects Launched into*. 1 Space Manual on Space Law 177, 178 (1979).

56 Bin Cheng, Studies in International Space Law, 383 (Oxford: Clarendon Press) (1997).

prohibition in the Outer Space Treaty is given in *Article IV*, which forbids the placing of nuclear weapons in the orbits around the Earth.[57] But the Treaty is silent on the situation when there is a violation of any provision of the Outer Space Treaty, in other words, there is no mechanism of sanction in case of violation.[58]

The Way Forward

Despite various proposals advanced by scholars and institutions, some of them workable, the international law on outer space is stagnant; there has been no significant development in treaty law since the enactment of the Moon Agreement, 1979. Meanwhile, the outer space environment continues to be polluted by spacefaring nations.

The present international legal system is not adequate for protecting the outer space environment, no binding standards have been adopted so far, nor any binding guidelines exist to help space actors determine appropriate levels of debris mitigation.[59]

Proposals by Scholars to Remedy the Mechanism

Space Debris Mitigation Convention proposed by *Thierry Senechal*. Convention highlights the harmful consequences of space debris, and require the parties to mandatorily undertake certain measure for debris mitigation at national and international levels.[60]

Howard Baker attempts to harmonise international space law and international environmental law. He envisions a *Protocol for the Protection and Preservation of the Planetary Environment* with general principles and specific obligations. The protocol shall contain fundamental principles of environmental law: (1) principle of common planetary concern; (2) principle of good neighbourliness; (3) principle of precautionary measures; and (4) principle of sustainable development.[61]

The International Association for the Advancement of Space Safety (IASS), proposed the establishment of *International Removal, Maintenance and Servicing of Satellites*

57 Gupta, *supra* note 22.

58 Joseph Pelton, Space Debris and Other Threats from Outer Space (Springer Science & Business Media) (2013).

59 Ping Yiding, *Application of Image Restoration in GEO Space Debris Survey*, (2016), http://aero.tamu.edu/sites/default/files/faculty/alfriend/S7.3%20Ping.pdf.

60 James Lampertuis, *The Need for an Effective Liability Regime for Damage Caused by Debris in Outer Space* 13 Mich. J. Int'l. L. 447 (1991).

61 Agatha Akers, *To Infinity and Beyond: Orbital Space-Debris and How to Clean It Up*, 33 U. La Verne L. Rev. 285 (2012).

(INREMSAT), which shall assist with the removal of space debris and non-functional satellites.[62]

The Inter-Agency Space Debris Coordination Committee (IADC) is an international body made up of national and multinational space agencies to coordinate space debris-related activities. Participating States have to give a voluntary undertaking with a view to mitigate space debris, and have to develop domestic standards and nationally binding laws.[63]

Removing those spacecrafts that have reached the end of their mission operations from the functional densely populated orbit regions.[64]

Some scholars advanced the idea of the imposition of a *"space access fee"*. Every State encroaching on outer space shall be liable to pay it. The fund created out of such a fee shall be used to clear out the existing debris.

This paper highlights the gap and the grey area in Environmental Laws, in the area of pollution in Space. At an international level, there is a devoid of adequate legislation regulating the outer space activities and hold accountability in case of any misshaping in space. The problem of Space Debris is not the only issue, but other major developments which are happening in space and can become a threat to humanity in the future. The slow legislative development in the area of Space portrays a lack of seriousness on part of the member states. Without any policy initiatives, the world will encounter serious constraints in meeting the demands and dealing with contemporary issues of Outer Space.

62 European Space Policy institute, *supra* note 9.

63 J.C. Liou, David Jarkey, *Orbital Debris Mitigation Policy and Unique Challenges for Small Satellites*, 19(2) NASA Orbital Debris Program Office Small Satellite Conference 4 (2015).

64 Nicholas Johnson, *Origin of the Inter-Agency Space Debris Co-ordination Committee*, ARES Biennial Report (Jan. 1, 2014) http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20150003818.pdf.

AN UNVACCINATED WORLD: THE INTELLECTUAL PROPERTY RIGHTS CONUNDRUM

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Abstract

In the aftermath of the COVID-19 pandemic the world has witnessed a globally disrupted economy, demolishing health sectors, food shortages and mass unemployment, with the World Bank Forecast officially declaring a global recession. With a few promising vaccines already in production, the situation necessitates that an egalitarian approach is adopted towards their distribution as well. However, a report by the People's Vaccine Alliance is suggestive of the fact that a few wealthy nations have already hoarded orders for a majority of the most competent vaccines in production. This demonstrates the vast socio-economic inequality between the affected countries in terms of their vaccine affordability power. This has led to a significant time in the IPR regime globally, with the core issue being the choice between safeguarding the public health at large or the private interests of the Pharmaceutical Companies developing these vaccines. In an effort to ensure that the existing socio-economic inequality does not impact the availability of vaccines in under-developed and developing nations, India and South Africa have petitioned the World Trade Organisation requesting a waiver of certain requirements under the TRIPS Agreement pertaining to the awarding or implementation of Intellectual Property rights with regards to COVID-19 vaccines and other medical technologies until a global 'herd immunity' is achieved. This paper argues the need for compulsory licensing of the vaccine, with regard to India and South Africa's petition at the WTO. Firstly, the paper highlights the existing polarity between different nations with

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respect to their vaccine affordability power. Further, it analyses how India can be a potential ally for third world countries in terms of their access to the vaccine if the petition is approved. Finally, the paper also discusses how the existing legal framework, both at the domestic and international levels, validates the solution proposed by the petition.

Introduction

"The Coronavirus united the world in fear but divided it in response"
- Gabriela Bucher, the Executive Director of Oxfam.

The year 2020 has been the most challenging time of the 21st century, with the Covid19 pandemic claiming more than 1.5 million lives at present. The germane measures that several countries began implementing around the month of March, to contain the spread of the virus resulted in almost a third of the world population being under some form of restrictions. The ramifications that ensued included an adversely impacted economy, disrupted enterprises, health sector, food security, and mass unemployment in particular and have led the world into a recession as per the World Bank forecasts.[1] India itself saw more than 10 million cases with approximately 1,45,000 deaths.[2]

Significant efforts are being made to study, diagnose and develop a vaccine for the disease by the Pharmaceutical Industry owing to the urgency of the situation, due to which more than a hundred vaccine candidates have reached clinical trial levels with a few of them reaching Phase III efficacy testing while vaccines developed by Pharma Companies like Pfizer, BioNTech, Sinovac, Gamaleya Research Institute have been approved in their respective countries of origin.[3]

With the vaccines few weeks away, wealthy nations such as USA, Britain, France, etc., have pre-booked the vaccine supply as a result of which countries with 14% of the world population have hoarded orders for 53% of the most competent COVID-19 vaccines as

1 Thin Lei Win, *Poor Countries seen missing out as rich nations hoard Covid19 vaccines*, The Jakarta Post (Dec. 9, 2020, 9:41 AM), https://www.thejakartapost.com/news/2020/12/09/poor-countries-seen-missing-out-as-rich-nations-hoard-covid- 19-vaccines.html.

2 WHO, *Coronavirus Disease (COVID19) Dashboard*, World Health organization (Dec. 19, 2020, 9:41 AM) https://covid19.who.int/table?.

3 RAPS, *Covid 19 Vaccine Tracker*, Regulatory Affairs Professionals Society (Dec. 19, 2020) https://www.raps.org/news-and-articles/news-articles/2020/3/covid-19-vaccine-tracker.

reported by the People's Vaccine Alliance (PVA).[4] The World Health Organization (WHO) in light of this has also issued a warning showing concern over accessibility and availability of the COVID-19 vaccine in the developing and under-developed nations. WHO Chief *Tedros Adhanom Ghebreyesus* shared similar concerns and stated: *"We need to prevent vaccine nationalism. Sharing finite supplies strategically and globally is actually in each country's national interest*".

The response to the pandemic by different countries, in terms of their vaccine affordability power shows the socio-economic inequalities among them and such advance agreements create an atmosphere of apprehension that the foremost approved vaccines would be overpriced and unattainable to a majority of the world population with the wealthy nations being an exception.

As a result of such apprehension, India and South Africa petitioned the World Trade Organisation on October 2, 2020, under the rights granted to WTO member states by virtue of Article IX (3) and (4) of the Marrakesh Agreement,[5] to permit all WTO members to waive certain requirements contained in TRIPS Agreement that deal with the awarding or implementation of Patent Rights, Trade Secrets, Industrial Designs and Copyrights with regards to COVID19 drugs, vaccines, diagnostics and other medical technologies until we have achieved global 'herd-immunity'. The petition entails a pressing request for harmony and unrestricted exchange of technology and expertise at the global level to ensure that rapid responses for dealing with COVID19 can be promptly put into action.[6]

This article analyzes why the proposal by India and South Africa, backed by other low-income countries, should be accepted and how India can contribute significantly in battling the COVID19 pandemic.

4 Winnie Byanyima, *We must have a #PeoplesVaccine, not a Profit Vaccine*, UNAIDS (Dec. 9, 2020), https://www.unaids.org/en/resources/presscentre/featurestories/2020/december/20201209_we-must-have-a-peoples-vaccine.

5 Brook Baker, *South Africa and India's proposal to waive recognition and enforcement of Intellectual Property Rights for COVID19 Medical Technologies Deserves Universal Support, but countries also have to take domestic measures*, Info Justice (Oct. 11, 2020), http://infojustice.org/archives/42686.

6 Council for Trade Related Aspects of Intellectual Property Rights, "*Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa*," World Trade Organization, IP/C/W/669, Oct. 2 (2020).

The Inequality Crisis

A recent study published in *BMJ*, a leading medical journal, estimates 3.7 billion adults waiting to get their hands on Covid-19 vaccines, which calls attention to the importance of coming up with calculated and equitable strategies to ensure that the supply of the much-awaited Covid-19 vaccines can meet its demand, more particularly in low and middle-income countries.[7]

In another study published in the same journal, scholars from *Johns Hopkins Bloomberg School of Public Health* in the United States, examined the reservationsmade for the Covid-19 vaccines by countries around the world, ahead of their regulatory approval, showing a grim reality that is the delay that will be caused in making these vaccines accessible to nearly quarter of the world population until at least 2022.[8]

This shows an unpromising scenario being created for low and middle-income countries asthe study conducted by Johns Hopkins Bloomberg School and the PVA's report aforementioned provides an overview as to how wealthy countries have obtained a future supply of billions of Covid-19 vaccine doses while the access of the same in poor countries remains inadequate. The year 2020 speaks for itself when it comes to the burden on the healthcare systems worldwide. WHO also, in this line recognised and showed concern for the fragile health systems as the rapidly increasing demand and strain on them as well as the healthcare workers threatened to leave the infrastructure unable to operate effectively?[9]

The pandemic has not only disturbed the world healthcare systems but has also caused significant economic distress, especially to the developing and underdeveloped countries that encountered significant constraints in offering effective and affordable healthcare for their citizens in an already weak healthcare system. The global economy has suffered almost 11.7 trillion dollars due to the coronavirus pandemic till now, with 83% of this cost spent by 36 wealthy nations against 0.4% by low-income countries in order to cope

7 PTI Washington, *Quarter of world may not have access to Covid-19 vaccine until 2022: Study*, The Hindu – Business Line (Dec. 16, 2020), https://www.thehindubusinessline.com/news/world/quarter-of-world-may-not-have-access-to-covid-19-vaccine- until-2022-study/article33343545.ece.

8 *Id.*

9 WHOI, *WHO releases guidelines to help countries maintain essential services during the COVID19 pandemic*, World Health Organization (Dec. 19, 2020), https://www.who.int/news/item/30-03-2020-who-releases-guidelines-to-help-countries-maintain-essential-health-services-during-the-covid-19-pandemic.

with it, as per a reportby Oxfam, an international NGO.[10]

India- A Potential Ally

The current situation is similar to the time when the world was busy developing a treatment for HIV. The statistics at the time were equally scary with the treatment for AIDS being available to only 0.1% people.[11] The Antiretroviral (ARV) drugs were predominantly available with the manufacturing companies having patents on these medicines, resulting in them costing an exorbitant US $10,000 to $15,000 per patient per year.[12] This called for developing patent laws that accommodate the production of alternatives to expensive medicines, that would lower the cost of those medicines and make them affordable. The *Doha Declaration on TRIPS and Public Health* played an important role by ensuring large-scale availability of the generic versions of patented medicines.

On August 30, 2003, the World Trade organisation adopted an agreement permitting exports of drugs manufactured under Compulsory Licenses by the member states, subject to certain conditions in order to reduce legal barriers on such exports and ensure that the nations that lack manufacturing capacity could gain advantage from such Compulsory Licenses.

A majority of the developing nations then lacked the means to domestically manufacture the HIV Vaccine much similar to the situation today with respect to the Covid-19 vaccine. The industrial reality was that patents in the countries that were producing the drugs could become a hindrance for several importing countries in accessing generic medicines despite several nations arguing that the non-existence of Patents in various countries on the African Continent was evident of the fact that IPR should not have been an impediment to HIV treatment.[13] The *Joint United Nations Programme on HIV/AIDS* along with WHO, on December 1st, 2003 declared HIV/AIDS as a global public health emergency due to lack of a treatment, subsequently announcing a drive to get 3 million people to have access to

10 Correspondent, *Global Cost of Coronavirus: $ 11.7 Trillion*, Business Today (Dec. 16, 2020, 5:46 PM), https://www.businesstoday.in/current/world/global-cost-of-coronavirus-this-is-how-much-covid19-pandemic-ha s-cost-the-world-economy/story/425100.html.

11 Gellman B., *An Unequal Calculus of Life and Death; As Millions Perished in Pandemic, Firms Debated Access to Drugs; Players in the Debate Over Drug Availability and Pricing*. The Washington Post (Dec. 27, 2000), https://www.washingtonpost.com/archive/politics/2000/12/27/an-unequal-calculus-of-life-and-death/4f6d22c0-d918-441c-b6e9-e270554bc73b/.

12 1 Perez-Casas C, Mace C, Berman D, Double J, Accessing Arvs: Untangling The Web Of Antiretroviral Price Reductions (Geneva: Medecins Sans Frontieres/Campaign for Access to Essential Medicines) (2001).

13 A Attaran, L Gillespie, *Do patents for antiretroviral drugs constrain access to AIDS treatment in Africa?* 286(15) JAMA 1886 (2001).

ARV by 2005. It isnoteworthy that by the year 2008, 95% of donor-funded ARV market at the world level consisted of generics, predominantly manufactured in India.

India played a significant role during this time as a number of developing countries were able to access generic ARVs owing to India's manufacturing and exporting capacity.[14] As a result,there existed skepticism in the public health arena when India began awarding patents for pharmaceutical inventions in 2005 in accordance with the TRIPS Agreement. However, the Indian legislature had incorporated public health safeguards, including strict patentability criteria, the possibility for opposition to granting of patents and also entailed provisions regarding Compulsory Licensing.

India has over the years made its reputation as the 'Pharmacy of the World', being responsible for manufacturing 60% of the world's vaccine supply. With Covid-19 vaccine's starting to reach the population in countries such as the UK and USA, the developing and under-developed nations are thus starting to turn to India, that can mass produce vaccines that are effective and cost much less than its expensive counterparts.[15]

The Legal Framework

The TRIPS Agreement, adopted concomitantly with the constitution of the WTO in 1994, targets to establish a globally harmonized IP regime that would ensure equitable legal standards among the member states.[16]

The aforementioned treaty, under its article 31 provides for the concept of compulsory Licenses with regards to Patents, for those member States whose National Laws also provide for the same. The provision refers to compulsory licensing as "*other use without authorisation of the right holder*". The aforementioned concept can be understood as an abrogation of another person's Intellectual Property Rights. It is an exceptional legislative right granted by the Government to allow, either itself or any other interested entity, to utilize, produce, access, or offer for sale, a patented invention or process without the

14 Brenda Waning, Ellen Diedrichsen, Suerie Moon, *A lifeline to treatment: the role of Indian generic manufacturers in supplying antiretroviral medicines to developing countries*, 13(35), J. Int. Aids. Soc. 113 (2010).

15 James Oaten & Som Patidar, *With a reputation as the 'pharmacy of the world' India is geared to mass-produce COVID19 vaccines*, Abc News (Dec. 19, 2020), https://www.abc.net.au/news/2020-12-19/inside-covid-19-vaccine-development-in-india/12980614.

16 Hillary Wong, *The Case of Compulsory Licensing during COVID19*, 10(1) J Glob Health, 43 (2020).

permission of the intellectual property owner.[17] These involuntary and mandatory Licenses can be granted for IP Rights such as Patents, Copyrights etc. A Compulsory License granted for a Patent purport to provide a safeguard against the abuse of the exclusive rights bestowed upon the owner of such patent in furtherance of public interest. It may also be granted to provide protection against the lack of use of a patented invention.[18]

The TRIPS agreement provides for compulsory licensing on fulfilment of certain conditions such as previously failed attempts by the applicant to acquire a private License from the owner of the patent. However, such mandatory requisites can be bypassed during a national emergency, circumstances of utmost urgency or public non-commercial usage. The provision restricted the use of a Compulsory License only for distribution in the local markets of the member State granting such Licenses thereby excluding the countries lacking manufacturing capacity from the benefits of the concept of Compulsory Licensing.[19]

Many developing countries were required to grant patents for pharmaceutical products for the first time on adoption of the 1994 treaty.[20] Emerging anticipation that Pharmaceutical Patents would lead to a surge in the price of medicines worldwide resulted in various occurrences around the world to challenge such rules, ultimately leading to the formulation of the WTO's Doha Declaration on the Agreement on TRIPS and Public Health in 2001.[21]

The Doha Declaration calls for the Patent laws to be construed and enacted in a way that encourages equitable access to medicines globally. The said declaration had the effect of easing the rules related to Compulsory Licensing as provided in the TRIPS Agreement. The Doha declaration, by virtue of Paragraph 6 (implemented by the WTO in 2003) provides for exemption from the 'domestic market' condition in Article 31(f) of TRIPS, on compliance of certain conditions.[22] The provision allows member countries to make use of compulsory licenses to manufacture generic pharmaceuticals and offer them for export to those least developed nations that lack sufficient manufacturing capacity in the pharmaceutical sector.[23] This provision has also been incorporated in the TRIPS Agreement

17 Manpreet Kaur, *Compulsory Licensing - Bridging The Chasm Between Competition Policy and Intellectual Property Law - Patent Law In India,* Legal Service India (Dec. 18, 2020), http://www.legalserviceindia.com/article/l275-Compulsory-Licensing-.html.

18 *Id.*

19 Raadhika Gupta, *Compulsory Licensing under TRIPS: How far it Addresses Public Health Concerns in Developing Nations*, 15 J. Int. Prop. Rights 357, 358-59 (2010).

20 Ellen't Hoen, Jonathan Berger, Alexandra Calmy & Suerie Moon, *Driving a Decade of Change: HIV/AIDS, patents and access to medicines for all*, 14 J. Int. Aids. Soc. (2011).

21 *Id.*

22 Raadhika, *Supra* note 20.

23 *Id.*

by way of an amendment in 2017. The Declaration permits each member country to specify the grounds for the grant of such compulsory licenses. It also empowers the member states to establish what constitutes National Emergency, Circumstances of Extreme Urgency or Public Health Crises for the purpose of Compulsory Licensing.

Domestically, The Patents Act 1970 deals with Compulsory Licensing under Chapter XVI, consisting of sections 82 to 94. Broadly, the Patents Act provides for compulsory licenses on two grounds, namely, Abuse of Patent Rights (Section 84) and Public Interest (Section 92).[24]

The patents Act 1970, by virtue of section 84 lays down certain circumstances for awarding of Compulsory License. When the rational demands of the public for such patented product have not been met, or, when such patented invention is not priced at an affordable rate, or, where the patented product is not worked in the territory of India. A Compulsory license under the aforementioned provision can be granted to an individual provided that the patent was granted at least 3 years ago.

The Act, under section 92 authorises the State to declare, through a notification, for the award of Compulsory Licenses in cases of Public Interest, irrespective of the time that has lapsed since the grant of such patent. This provision is applicable in times of a National Emergency, Circumstances of Utmost Urgency or for Non-Commercial usage.

Once the aforementioned proclamation has been made by the State, any interested individual can apply for obtaining such license to the Controller of Patents. The Controller shall grant such a license on the terms and conditions that he deems fit and also ensure the availability of such patented products to the population at the cheapest rate possible.

Conclusion

The COVID-19 pandemic thus has led to an important time with regards to the Intellectual Property Rights regime globally, with the fundamental issue being the dilemma between safeguarding IPR of individuals or the public health at large, which in general is resolved through private licensing.[25]

The current regime is one where big Pharmaceutical Companies who are funded by third-party investors and/or the Governments tend to keep the monopoly rights on medicines or

24 Shamnad Basheer & Mrinalini Kochupillai, *The 'Compulsory Licence' Regime in India: Past, Presence and Future*, Oct. SSRN Elec J., (2005).

25 Jennifer Hillman, *Drugs and Vaccines Are Coming—But to Whom?*, Foreign Affairs (May. 19, 2020), https://www.foreignaffairs.com/articles/world/2020-05-19/drugs-and-vaccines-are-coming-whom.

vaccines by holding on to the technology used for such inventions to give a boost to their profits.

The COVID-19 pandemic has served a devastating blow to the healthcare systems of the countries around the world especially to the developing and underdeveloped nations having barely standing economies. With the vaccine development reaching the final stage, wealthy nations have started hoarding them and this act of bulk buying, according to a PVA statement, risks 9 out of 10 people in 67 poor countries remaining without any access to the vaccine,[26] resulting in a situation where either these countries would be taking on huge debts or a majority of their population would remain unvaccinated. This creates a situation ominously similar to the initial response days during the HIV crisis leaving poor nations without a vaccine for years.

The proposal put forward by India and South Africa maintains that several underdeveloped nations might encounter legal difficulties besides institutional hurdles, even with the flexibilities such as the provision for parallel imports available under the TRIPS Agreement.

An Oxfam report[27] showed that although the wealthy nations increased their financial aid to developing countries by $5.8 billion for social protection, the figure that comes as more shocking & upsetting is that this help is equivalent to less than five cents for every $100 raised for battling the ongoing pandemic. The fact is further supported by PVA claiming that AstraZeneca, the pharmaceutical company manufacturing the Oxford vaccine, that promised making the vaccine available on a nonprofit basis to the developing world, can only provide enough to vaccinate 18% of the global population by 2021.

As the present unprecedented time has nations working incessantly for developing and manufacturing Covid-19 vaccines, distribution of the same internationally remains a daunting challenge. India has turned out as a prominent entity during this time for the purpose of manufacturing the vaccines with data supporting India's adequate manufacturing capacity, and that it would be sufficient to meet the demand both domestically and globally.[28]

Therefore, it is submitted that by way of scrupulous forethought and policy formulation, the developing nations can make attempts towards ensuring public health while still conforming with TRIPS.

26 DW, *Coronavirus: Rich Countries hoarding COVID vaccines, campaigners warn*, DW Akademie (Dec. 1, 2020), https://www.dw.com/en/rich-countries-hoard-coronavirus-vaccines/a-55879841.

27 Ct. Business Today, *supra* note 10.

28 Sohini Das, *Covid-19: Vaccine production is not a problem for India, Cold Chain is*, Business Standard (Nov. 17, 2020, 12:35 AM), https://www.business-standard.com/article/current-affairs/covid-19-vaccine-production-is-not-a-problem-for-ind ia-cold-chain-is-120111600288_1.html.

Regulating the Unregulated Video-on-Demand Platforms in India

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Abstract

The exponential growth of the popularity of video-on-demand platforms has brought a new regulatory challenge for the legislature. This paper ultimately advocates that it is high time that the government of India takes a paternalistic role and enacts a different pre-publication regulatory framework for video-on-demand platforms. The paper first clarifies the real intention behind the regulatory policies for motion pictures in the Indian context. It then throws light on the real test to determine whether the content should be regulated or not. Further, the paper elucidates how the pre-publication regulatory framework would prove better than the post-publication regulatory framework. It then examines the possibility of reasonable restrictions under Article 19(2) of the Constitution of India, 1950. It clarifies how non-regulation of the VOD platforms is violative of Article 14 of the Constitution of India, 1950. In light of this, the article gives the possible solutions to the existing loophole.

Introduction

It is generally believed that motion pictures relieve the stress of human beings.[1] However, they also affect our lives badly if we watch them unconsciously.[2] Some of the content available on the video-on-demand (hereinafter the 'VOD') platforms such as Netflix,

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1 Janet Singer, *How Watching Movies Can Benefit Our Mental Health*, PsychCentral (December 20, 2018) https://psychcentral.com/blog/how-watching-movies-can-benefit-our-mental-health/.

2 Franklin Fearing, *Influence of the Movies on Attitudes and Behavior*, 254 The Annals of the American Academy of Political and Social Science 70, 71 (1947).

Amazon Prime, Disney+ Hotstar etc. is inherently dangerous for children.[3] Some parents are not acquainted with the fact that highly obscene material, seditious, hate literature, treasonous content having the potential to encourage their children to follow the immoral paths flow through various channels of the internet with relative ease and minimal restrictions.[4] Consider the ideas propagated through these television series: '*Gigolos*', an American reality web series is about the lives of five male escorts. In Episode 7 of Season 1, a character meets a client whose fetish is simulating being dead during sex. In Season 3, one of the characters meets a client and convinces her to have sex in a public restroom. '*Game of Thrones'*, an American fantasy drama web series has several scenes exhibiting incest including one where a father does sex with his daughters. '*Gandii Baat*' is a web series featuring a separate erotic-themed story in each episode from rural India. The web series depicts that how people of rural India are deeply affected by their dark fantasies. Apart from men, the web series shows the rural women who would go to any degree for the sake of sex.

What kind of ideas are generated when the children watch this content? Undoubtedly, the effect of motion pictures particularly on children and adolescents is extensive since their immaturity makes them more willingly suspend their disbelief than the grown-ups.[5] It has been observed that they remember the visuals of the motion pictures and try to imitate what they have seen.[6] Despite these known facts, the central issue is that several countries[7] including India do not have any specific mandatory guidelines, laws or policies for content regulation on VOD platforms.[8] This has created a regulatory vacuum in this field because the same content which might be censored in cinemas and television can be viewed uncensored on these platforms by any person including a child of any age. Thus, technology advances today pose new and daunting questions that challenge the current state of existing regulatory laws that were enacted before the advent of VOD platforms. Considering its different nature in terms of the amount of user control, this paper ultimately

3 Sidneyeve Matrix, *The Netflix Effect: Teens, Binge Watching, and On-Demand Digital Media Trends* 6(1) Jeunesse: Young People, Texts, Cultures 119, 120 (2014).

4 Michael D. Mehta, *Censoring Cyberspace,* 30(2) Asian Journal of Social Science 319, 319 (2002).

5 Movies, Media, and Children, American Academy of Child and Adolescent Psychiatry (March 2017), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-Movies-090.aspx.

6 *Id.*

7 Suwon Kim & Daewon Kim, *Rethinking OTT regulation based on the global OTT market trends and regulation cases*, 20(6) Journal of Internet Computing and Services 143, 143 (2019).

8 Ashok Upadhyay, *No content regulation on online streaming platforms, RTI reveals*, India Today (October 10, 2019), https://www.indiatoday.in/television/celebrity/story/riverdale-actor-cole-sprouse-reveals-he-was-arrested-and-zip-tied-during-george-floyd-protest-1684571-2020-06-02.

urges the Government to enact a separate pre-publication regulatory framework for video-on-demand platforms.

In this light, it is the objective of the paper to evaluate the best possible policy consideration to regulate VOD platforms in India. This paper analyses the real intention behind the current regulatory framework and then clarifies that the test for determining whether the content should be regulated or not is the effects test and not the control test. This paper also argues that VOD platforms cannot be left unregulated in the guise of freedom of speech and expression provided under Article 19(1) of the Constitution of India. It can be reasonably restricted under Article 19(2) on several grounds. This paper also explains how the absence of any regulatory framework for VOD platforms violates Article 14 of the Constitution.

Analysis in India's Context

The Real Test of the Regulation – The Effect Test

The primary reason for not applying the regulatory laws applicable to platforms other than VOD platforms is because of the unique feature of complete control on the sequence of content in VOD platforms as against very limited control in other platforms. For instance, in the cable service platform, the viewer can at most change the channel when he wishes to skip the particular part of the motion picture. He cannot jump to the next part of the motion picture. However, in VOD platforms, the viewer can skip that particular part whenever he feels so. In other words, he has the option to jump to the next part of the motion picture. The test that whether the content provided by any platform should be regulated or not is not decided by the feature that how much control that platform offers to its viewers, instead determined by the nature of effects that its content will produce on its viewers. In other words, it is the effects test which is the only deciding factor and not the control test.

To understand the effects test, it is pertinent first to trace the reasons for bringing the regulatory policies for motion pictures. It is necessary first to understand that why the duty to censor the movies was delegated to authorities and not to the viewers. A report was released in 1928 on the issue of censorship and the exhibition of films in India.[9] It suggested mandatory censorship of motion pictures because they having a substantial effect on the community than any other media.[10] Similarly, the reasons behind regulation

9 Shubhangi Heda, *CMDS Policy Paper: How to Regulate India's Video Streaming Services*, Centre for Media Data and Society (November 15, 2019), https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf.

10 *Id.*

can be traced from the Statement of Objects and Reasons of Cable Television Network (Regulation) Act, 1995 which states that "*due to cultural invasion in many quarters by the western culture, a lot of undesirable and unregulated programs as well as advertisements are becoming available to viewers without any kind of censorship.*"[11] Thus, it was always the effect of the content on the community that mattered for regulation and not the amount of viewer's control on the content. The feature of the extent of control provided by that particular platform was never taken into consideration. In fact, before the advent of the VOD platforms, motion pictures could be watched on CDs and DVDs. Interestingly, CDs and DVDs provide the same amount of control to viewers as provided by VOD platforms. However, even then, motion pictures downloaded on CDs and DVDs were subjected to censorship laws.

In the constitutional debates, when the issue arose as to under which list in Schedule 7 the exhibition of the film should be placed, it was agreed by all that the films are regarded as an "*important educational medium and play a significant role in building the national character.*"[12] Consequently, it was decided that the exhibition of the film is to be made a union subject. In the landmark judgment of *Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. vs. Cricket Association of Bengal & Others,*[13] Apex Court held that "*[...] most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. Television is unique in a way in which it intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It has tremendous appeal and influence over millions of people. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far.*" Interesting to note, the courts did not observe that the regulation in Television platforms is necessary because of the limited amount of viewer control on the content. Instead, it emphasized the effect it produces on the viewers.

The Indian Cinematograph Committee (ICC) setup up in 1928 stated that the public could not be left to decide whether the content is appropriate for society or not.[14] It indicates that the mere feature of control on the sequence of the content cannot be a reason to accept that it is a control-enabling platform. Because the viewer cannot be left to decide whether the content is appropriate or not, it is the authority that has to determine the nature of the

11 Cable Television Network (Regulation) Act, 1995, Act No. 7, Acts of Parliament (India).

12 Constitutional Assembly Debates (August 31, 1947) http://loksabhaph.nic.in/writereaddata/cadebatefiles/C31081949.pdf.

13 Secretary, Ministry of Information and Broadcasting, Govt. of India vs. Cricket Association of Bengal & Others, AIR1995 SC 1236 (India).

14 Mehta, *supra* note 4.

content prior to its publication and to remove the inappropriate content.

In a case study conducted on the censorship policies in India, it was observed that "*cinema is the most alluring-visual medium and has the maximum effect on people. If the effect violates the prescribed norms of authority, the authority censors the effect-producing films.*"[15] Thus, the regulatory bodies were never concerned with the viewers' control of the particular content. Regulatory bodies were always concerned with the effects of the content on the viewer.

The preceding discussion clearly shows that stress has always been only on nature and its effect on the community and not on the amount of viewer's control on the sequence of the content. The discussion, therefore, always moves around the impact of motion pictures on the viewers.

Failure of Courts in Interpreting the Provisions of The Cinematography Act, 1952

Currently, the role of censuring of films in India is played by the Central Board of Film Certification (CBFC) i.e., the regulatory body in India, under Section 5A and 5B of the Cinematographic Act, 1952.[16]

Section 5A of the said Act empowers CBFC to certify and classify a film according to its suitability for public exhibition.[17] Section 5(B) (1) lays down the grounds for non-certification by CBFC. It empowers the CBFC to stop the broadcast of the film or any part of it if it is "*against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.*"[18]

This mandatory certification acts as a regulatory framework for films to be exhibited publicly in India. While the films shown in cinemas are subjected to certification under this Act, the video-on-demand platforms do not require such certification under the Act.

Though, a separate regulatory framework for VOD platforms is argued, the courts could also bring them under the Cinematography Act to give appropriate remedy until the legislature enacts a separate regulatory framework for them so as to temporarily fix the loopholes in the regulation policies. This can be inferred from the relevant case laws to be

15 Aditya Kumar Panda, Case Study: Film Censorship in India, 4(2) Scholedge International Journal of BusinessPolicy & Governance 7, 7 (2017).

16 The Cinematography Act, 1952, Act No. 37, Acts of Parliament (India).

17 *Id.,* § 5A.

18 *Id.,* § 5(B)(1).

discussed hereinafter.

In the case of *Mr. Padmanab Shanker v. Union of India,*[19] the issue that was raised was that whether the transmission or broadcast of any films, cinemas, or serials and other multimedia content through the internet will come within the definition of cinematograph under clause (c) of Section 2[20] of Cinematography Act, 1952. It was aptly argued that the definition of cinematograph is an inclusive one and it will include modern gadgets as well. However, the court stated that the cinematograph is an equipment that includes a camera that creates a film and the machine which exhibits or displays a film. The Court observed that the internet works differently and thus, it is difficult to accept that films or serials exhibited through the internet will constitute films within the meaning of Clause (dd) of Section 2 of said Act.[21] In fact, it is difficult to even accept that there is even an exhibition through the internet. The internet contemplates the transfer of files in response to the requests made by the users. The Court added that the provisions of the IT Act could take care of content objected by the petitioners. Guidelines placed on the Code for Self-Regulation of Online Curated Content Providers do not create enforceable rights in favour of citizens. Thus, the Court denied to provide any remedy and held that the transmission or broadcast of any films, cinemas, or serials and other multimedia content through the internet would not come within the definition of cinematograph under clause (c) of Section 2 of Cinematography Act, 1952. However, the court did understand the gravity of the issue. It can be inferred from the fact that the Court in the hearing as well as at the time of giving the final order, expressed the concern that this matter should invite the State to examine the issue and find a solution.[22]

This decision was based upon the wrong interpretations of the provisions of said Act and thus, the decision is patently erroneous. It is not even a sound decision. For instance, if pornography or any content which endangers national security is made available on VOD platforms, then the observation that the internet contemplates the transfer of files in response to the requests made by the user and thus, it cannot be regulated seems unsound. What matters is not whether the content is being provided at the request of the users, but the nature of the content and its effects on the users. Take another example. Suppose a user requests a particular DTH service such as Tata Sky a specific film on its subscription-based channel specially created only for its customers. Then observation that the content was provided at the request of the user and thus, it cannot be censored seems unsound.

19 Mr. Padmanab Shanker v. Union of India, ILR 2019 Kar 4630 (India).

20 § 2(c) - "cinematograph" includes any apparatus for the representation of moving pictures or series of pictures.

21 § 2(dd) - "film" means a cinematograph film.

22 Mr. Padmanab Shanker v. Union of India, ILR 2019 Kar 4630 (India).

Since the Act does not expressly state its application to the exhibition of films irrespective of any medium, it is crucial to examine the legislature›s intention behind its enactment for its correct interpretation. The intention of enacting the Cinematography Act is clear from its Preamble which says "*An Act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs.*" [23] Section 3 provides the intention of constituting the board which says that the board has been constituted for the purpose of sanctioning films for public exhibition.[24] Section 4 provides that any person wanting to exhibit any film has to apply to the Board for the certificate. The board has then to duty to examine the film. It may then "*sanction the film for unrestricted public exhibition*", or "*sanction the film for public exhibition restricted to adults*", or "*sanction the film for public exhibition restricted to members of any profession or any class of persons*", or "*direct the applicant to carry out modifications in the film before sanctioning the film for public exhibition*"; or "*refuse to sanction the film for public exhibition.*" [25]

It is clear from these provisions that the interpretation of terms exhibition and public exhibition determines the applicability of the Act. However, neither the Act nor any judgment clearly defines these terms.

So, now the central issue is what should be the possible and ideal interpretation of the term exhibition and following that, whether the video-on-demand platform exhibits the films?

The relevant landmark case to find the answers for these questions is *Super Cassettes Industries v. Central Board for Film Certification*[26] wherein the issue that was framed was whether the DVDs or VCDs made or produced by the Petitioners, and sought to be sold or offered for sale with the label that they are meant for private viewing only, require prior certification by the CBFC under Section 5A CG Act. The petitioners contended that the films produced by them were not being sold for 'public exhibition' within the meaning of the Cinematographic Act. So, since they are being sold for private home viewing, they do not require certification by the CBFC. However, it was held that the words "any person desiring to exhibit any film" in Section 4 under CG Act should be understood as "any person desiring to publicly exhibit any film". Court took the notice of the case *Garware Plastics and Polyesters Ltd. v. Telelink*[27] in which two tests were propounded to determine whether a film can be said to be shown to the public - (a) by determining the character

23 The Cinematography Act, 1952, Act No. 37, The Preamble (India).

24 *Id.,* § 3.

25 *Id.,* § 4.

26 Super Cassettes Industries v. Central Board for Film Certification, 2011(46) PTC1(Del) (India).

27 Garware Plastics and Polyesters Ltd. v. Telelink, AIR 1989 Bom 331 (India).

of the audience. (b) determining the nature of the relationship between the owner of the copyright and the audience. Applying the latter test, it was held that an audience that pays for watching the film "cannot be considered as domestic viewers of the owner of the copyright. They must be considered as members of the public." It was held that the viewers of a cable TV network may be watching it in the privacy of their homes but would still be considered as a section of the public. The mere labelling by the filmmaker or distributor that the film is "meant for private viewing" will not exempt the film from prior certification under Section 5A of the CG Act. It was held that "once it leaves the shop where the film is purchased, neither the maker of the film nor its seller, has any control on whether it is viewed by one person or by a hundred, or whether it is viewed in a place to which the public is invited or in the private confines of a home. Therefore, the interpretation of the words 'public exhibition' has to necessarily be contextual keeping in view the essential purpose of the CG Act. Even if there is no audience gathered to watch a film in a cinema hall, there are individuals or families watching a film in the confines of their homes, such viewers would still qualify as members of the public and at the point at which they view the film that would be an 'exhibition' of such film."

The same jurisprudence can be applied to the nature of the exhibition of films by VOD platforms. The audience that pays for viewing content available on the platforms constitutes a section of the public. The mere assertion by platforms that the content is for private viewing will not exempt it from prior certification under 5A of the CG Act. Further, the moment the content gets available on the platform, neither the maker, not the platform has any control over it. It can be viewed by one person or by many and it can be viewed by people gathered by invitation in halls or in the private confines of a home (since content can now be easily viewed on T. V.)[28] Thus, the individuals or families watching a film on T.V having installed with the Netflix app in the confines of their homes perform it as the members of the public and the viewing of that film can be safely called as exhibition of film. Thus, the motion pictures exhibited through VOD platforms will constitute films within the meaning of Clause (dd) of Section 2 of the said Act.

Incompetence of Information and Technology Act (hereinafter the 'IT'), 2000

Section 67, 67A, and 67B of the IT Act punishes for publishing or transmitting obscene material, or material containing sexually explicit acts, or material depicting children in the sexually explicit act in an electronic form.[29] However, the major problem with the IT Act

28 Netflix Help Centre, *How can I watch Netflix on my TV?*, https://help.netflix.com/en/node/33222.

29 Information and Technology Act, 2000, Act No. 21, § 67, § 67A and § 67B (India).

is that it does not regulate the expression before its publication. Rather, it regulates it after the expression has been published.

The need of the hour is pre-publication censorship (prior restraint) and not post-publication censorship (subsequent punishment). While prior restraint is an authorities required action on objectionable expression *before* its publication, subsequent punishment, on the other hand, is an authorities required action on objectionable expression *after* its publication.[30] Thus, under a subsequent punishment, the harmful expression would have already been published before the authorities take action, whereas under the system of prior restraint, the harmful expression, if banned, never reaches the audience.[31] The problem with post-publication censorship is that it takes several days to get an injunction order from courts against the expression. The final order granting an injunction against the broadcasting of such expression becomes redundant as it would have reached viewers already till then. After that, it becomes impossible to undo the damage completely. IT Act empowers only the subsequent punishment. Thus, they cannot remedy the injury caused to the viewers.

Additionally, the system of prior restraint affords the public greater certainty about the limits of the law with a lesser risk of severe consequences.[32] In other words, under the prior restraint system, the public would know what is permitted and what is forbidden in law without incurring the consequences of criminal or similar sanctions in the event an erroneous interpretation is made. Under a regime of criminal or civil sanctions, creators can test the limits of freedom of speech and expression only by making that content and risking themselves. Whereas in the pre-restraint process, they have definitive rules to know what is constitutionally protected. Thus, pre-publication censorship is to be preferred over post-publication censorship.

Insufficiency of Self-Regulatory Code Signed by Video-On-Demand Players

In a bid to protect themselves from severe regulations, video-on-demand platforms have recently signed a self-regulatory code. [33] They have undertaken not to show any content "disrespectful to national symbols and religions." Further, the players are required to ensure that they do not make available any content that shows "children engaged in real or

30 Thomas I. Emerson, The Doctrine of Prior Restraint, 20(4) Law and Contemporary Problems, Autumn 648, 648 (1955).

31 *Id.at* 657.

32 *Id. at* 659.

33 *Netflix, Hotstar, 7 other streaming platforms sign 'self-regulation code*', The Week (January 18, 2019*),* https://www.theweek.in/news/biz-tech/2019/01/18/netflix-hotstar-7-other-streaming-platforms-sign-self-regulation-code.html.

simulated sexual activities", or promotes terrorism or have been banned for distribution by online video service by any court or under any law. It also provides a mechanism for consumer complaints.

There are many unwarranted issues associated with the self-regulatory codes. Sometimes, creators might even remove the content that possibly is even protected by Freedom of Speech and Expression, simply because of being over cautious or say, to prevent themselves from going into the unlawful zone.[34] This would keep the viewers away from the content which might be useful for it. For instance, some creators are afraid to produce content that speaks against the government. Some may remove only that content, that is prohibited but may fail to raise the constitutional challenge in courts. Some may even want to pursue the constitutional challenge but eventually alter or abandon their content due to fear of indulging in the process of litigation.

Thus, it should be the authorities who should be given the task to decide the nature of the content. Aggrieved by the decision of the authorities, the creator of the expression should have the opportunity to appeal in the courts. This will protect the viewers and expression if the court decides in favor of it.

Reasonable Restrictions can be Imposed under Article 19(2)

Article 19(1)(a) of the Constitution of India, 1950[35] guarantees Freedom of Speech and Expression.[36] However, this right is subject to certain reasonable restrictions provided under Article 19(2).[37] These restrictions can be imposed "in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

The content on Video-on-demand platforms cannot be left unregulated in the guise of freedom of speech and expression or creative freedom. In fact, the Judiciary has also always emphasized on maintaining a balance between the legitimate excision of the right of freedom of speech and expression and the abuse of freedom of speech and expression. In the remarkable case of *S. Rangarajan and Ors v. P. Jagjevan Ram and Ors,*[38] Court

34 Speiser v. Randall, 357 U.S. 513, 526 (1958).

35 The Constitution of India, 1950 (India).

36 *Id.,* Art.19(1)(a).

37 *Id.,* Art.19(2).

38 S. Rangarajan and Ors v. P. Jagjevan Ram and Ors, (1989) 2 SCC 574 (India).

emphasized on the importance of pre-censorship and admitted that

> *"even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has a unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instill or cultivate violent or good behavior. With these qualities and since it caters to mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market, place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary."*

The Court further held that "*censorship is permitted mainly on social interests specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society.*"

Why does it not Hamper Creative Freedom?

To answer this question, we must ask ourselves whether we want to protect the content showing creativity or the content which corrupts the minds of the young children in the guise of creativity. Consider this. Most of the violent acts shown go unpunished in their shows or films and are sometimes even presented as humor. Further, the consequences of human suffering and loss are rarely depicted.[39] It has been observed that children of age eight or below are unable to differentiate between reality and fantasy. [40] It makes them learn and adopt as reality whatever they watch. It, in turn, makes them believe that the world is a mean and scary place. Consequences include anxious feelings, loneliness, withdrawal from friends, bad dreams, sleeping problems etc. It has also been observed that children aged between 8 and 12 years who view violence are often frightened that they may be victims of violence or a natural disaster.[41] It has also been observed that alcoholic drinks are the most commonly portrayed products on VOD platforms. Rather than showing them in a bad light, they are shown as substances of enjoyment and power. For instance, a British drama series 'Peaky Blinders' has in fact, glorified the usage of alcohol and cigarettes. Studies

39 Kyla Boyse, *Television and Children: Your Child*, University of Michigan Health System (July 9, 2010), https://nanopdf.com/download/television-and-children-5aded7e791b95_pdf.

40 *Id.*

41 *Id.*

show that "*exposure to drinking in movies increases the likelihood that viewers themselves will have positive thoughts about drinking*."[42]

Foregoing discussion rather shows that the content available on these platforms endangers safety, health and peace. Would it be a sound policy to protect every content despite its perilous nature? Thus, the regulation of the video-on-demand platforms would filter out the inappropriate content along with the protection of the actual creativity which adds value to the community and protect children from every disturbing content. This kind of content weakens the "*children's moral consciousness and pollute children's soul and consequently, affects healthy growth of children or even cause adolescent crime.*"[43]

Additionally, the same view that immoral content cannot be protected in the guise of creative freedom was explicated in the case of *K.A Abbas v. Union of India*.[44] In this case, censorship of films was challenged in the Supreme Court on the ground that it violates the right to freedom of speech and expression. Petitioner contended that "*Freedom of expression cannot, and should not, be interpreted as a license for the cinemagnates to make money by pandering to, and thereby propagating, shoddy and vulgar taste*."

Court held that the classification of films "*according to their age groups and their suitability for the unrestricted exhibition is regarded as a valid exercise of power in the interests of public morality, decency etc. This does not violate the freedom of speech and expression.*" *Most importantly, the court propounded "that the social interest of people overrides individual freedom*." Court further held -

> *"Further it has been almost universally recognized that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its coordination of the visual and aural senses. The art of the cameraman, with trick photography, vista vision and three-dimensional representation thrown in, has made the cinema picture truer to life than even the theatre or indeed any other form of representative article. The motion picture is able to stir up emotions more deeply than any other product of article. Its effect particularly on children and adolescents is very great since*

42 *Id*.

43 *The Advantages of Internet Censorship Media Essay*, UK ESSAYS (January 1, 1970), https://www.ukessays.com/essays/media/the-advantages-of-internet-censorship-media-essay.php?vref=1.

44 K.A Abbas v. Union of India, AIR 1971 SC 481 (India).

> *their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen."*[45]

Thus, it has to be admitted that censoring vulgar or disturbing content cannot always be considered as an act of suppression of creative ideas. They are sometimes necessary for human flouring .[46] Moreover, studies show that policymakers cannot trust individuals to determine what's better for them.[47]

Article 14

VOD Platforms Form a Different Class than Other Platforms

Article 14 of the Constitution of India provides that "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*" [48] It ensures that 'equals are treated alike'.[49] However, it does not mean that 'unequal south to be treated equally'.[50] Where persons or groups of persons are not situated equally, to treat them as equals would itself be violative of Article 14 as this would itself result in inequality.[51] Therefore, Article 14 allows the classification. However, this classification must be rational, that is to say, it must be based on some qualities and characteristics which must have a reasonable relation to the object of the legislation.[52]

The VOD platforms are different from other platforms. The creators who express their ideas through the VOD platforms form a different class than the creators who express their ideas through other platforms. The distinguishing factor is the amount of control on the sequence of the content available on platforms. On VOD platforms, viewers have complete control over the sequence of the content. While watching, the viewers have full control to skip any part(s) of that specific content. A viewer can watch only that part of the content which he wants to watch at that point of time. On the other hand, other

45 *Id.* at 22.

46 On the Role of Censorship, The School of Life, https://www.theschooloflife.com/thebookoflife/on-the-role-of-censorship/.

47 Gary T. Marx, *Censorship and Secrecy, Social and Legal Perspectives*, International Encyclopedia of the Social and Behavioral Sciences (2001), https://web.mit.edu/gtmarx/www/cenandsec.html.

48 INDIA CONST. art. 14.

49 M Jagdish Vyas v Union of India, (2010) 4 SCC 150 (India).

50 *Id.*

51 M.P Jain, Indian Constitutional Law 909 (8 edn. 2018).

52 Vikram Cement v State of MP, (2015) 11 SCC 708 (India).

platforms do not provide any control over the sequence of the content. Viewers are bound to watch the content in the sequence in which it was directed by its creators. The existing regulatory framework contemplates the features available on other platforms only. It does not contemplate this distinguishing factor. Thus, subjecting VOD platforms to the existing regulatory framework would be violative of Article 14 as it would be equivalent to treating unequal alike.

Existing Classification Fails to Achieve the Required Goal.

Every legislation comes with a specific goal to achieve. Article 14 empowers the legislative bodies to make classification so as to achieve the required goal. However, the classification, which although can be reasonable, if it falls short of achieving the required goal of the legislation would be said to be violative of Article 14 of the Constitution of India because of not having any reasonable nexus with the objective of the legislation. The current regulatory framework is to be examined on this premise only.

Here, the underlying purpose of the regulation on motion pictures is to protect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or to prevent contempt of court, defamation or incitement to an offence.

As has already been discussed that VOD platforms and other platforms form a different class because of the factor of the amount of user control on the sequence of the content. However, it is argued that even after classification, which although is reasonable, the goal of the classification is not being achieved. The purpose of the regulatory laws is to protect the interests provided under Article 19(2). However, this goal is not being achieved by this classification. Complete denial of bringing VOD platform under the regulatory laws indicates the contemplation by the legislature that (a) motion pictures available on VOD platforms don't have the potential to harm the interests that State ought to protect under Article 19(2), and (b) motion pictures available on platforms other than VOD platforms have the potential to harm the interests that State ought to protect under Article 19(2). However, as illustrated, the content available on VOD platforms does have the potential to harm the interests that ought to be protected by State. This can be understood by answering this question: Whether the Television service providers would be allowed to show the web series as illustrated in the Introduction.

The foregoing discussion shows that the legislature has rightly demarcated the line between VOD platforms and other platforms on the factor of the amount of user control on the

sequence of the content being shown on respective platforms. However, the objective of the classification would be fulfilled only when both the classes are regulated differently.

Conclusion

Video-on-Demand (VOD) is a streaming media service offered directly to an audience via the internet. This platform has overtaken the task done by television through cable, satellite, etc. There are several different VOD platforms currently working in India such as Netflix, Amazon Prime, Hotstar, Voot, etc. The VOD platforms have no regulatory body above them to govern the content provided to its audience as against the presence of respective regulatory bodies for cinemas and televisions.

Through this article, the significance of censorship of the content provided by VOD platforms is explored in various aspects. The two landmark cases in the Supreme Court of India namely *K.A. Abbas v. Union of India*[53] & *S. Rangarajan and Ors v. P Jagjevan Ram* and Ors[54] build up a foundation for the importance of censorship and pre-censorship of VOD content in India. Both the cases were subjected to be in the matrix of hampering and violation, respectively of our Fundamental Right [Article 19(1)(a)]. In the case of *K.A. Abbas,* it was held that the classification of films according to the age group and their suitability for the unrestricted exhibition is regarded as a valid exercise of power in the interests of public morality, decency etc. Similarly, in the case of *S. Rangarajan,* the Court emphasized the importance of pre-censorship and admitted that Censorship by prior restraint is, not only desirable but also necessary in a country like India. The Court further held that "censorship is permitted mainly on social interests specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society."

Even before these two landmark cases were brought to light, a report in 1928 suggested mandatory censorship of motion pictures because they have a substantial effect on the community than any other media. Keeping this in mind, the article analyzed the implication of the unregulated content on the viewers. It established that it is the effects test and not the control test to decide on the question that whether the platform should be regulated or not.

The type of content available on the VOD platforms is of all kinds and multiple genres. The content available on these platforms is chosen by an individual and watched on demand. Basis this premise there should be a balance of an individual's choice and autonomy factors. An autonomy-rich formulation of dignity and educational value, in certain situations, will

53 K.A Abbas v. Union of India, AIR 1971 SC 481 (India).

54 S. Rangarajan and Ors v. P Jagjevan Ram and Ors, (1989) 2 SCC 574 (India).

enable the individual to choose among a pool of more distinguished content. In this sense, the balancing exercise is a combination of subjective (choice) and objective (autonomy) factors, both of which have to be taken into account by the Court.

Looking at the current scenario, the presence of an unbiased autonomous body is a must. Total censorship of the content will do more harm than benefit as it could increase the case of film piracy and other violations of the IT Act. Moreover, it would turn a VOD platform into a television or mainstream cinema.

UTILITY MODEL SYSTEM: NEED OF THE HOUR FOR SMALL INNOVATORS

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Abstract

Utility models, also referred to as petty patents or short-term patents, form the second tier of patent protection. They only differ from the existing patent law in a couple of facets, viz. duration of protection, the standard of inventiveness required, procedural examination, and more financial viability. This paper argues for the adoption of a utility model law for India and how it will be beneficial specifically for small and medium-sized enterprises. The paper explores the presence of provisions of utility models in various multilateral agreements as well. The paper garners support for the incorporation of a utility model law by drawing a comparison with other Asian countries viz. China and Japan to further illustrate upon the fact that such an adoption will result in multifarious benefits in the form of alleviating the technological gap with the West. It will stimulate the domestic innovators to independently and wilfully come forth with their innovations for monetization of the same as well as for public welfare. Lastly, the paper also tries to identify various approaches and policy suggestions through which this model can be established in India as the mere idea would not be beneficial. A developing country like India needs to introduce a new model after careful consideration of the country's environment and needs. Thus, the aim of this paper is to understand the utility model, analyse its advantages, compare our needs with other established nations, and ultimately formulate a utility model system domestically.

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Introduction

The utility model has been used to protect countless small innovations all over the world.[1] They are much easier to attain than regular patents and are ideally suited for small companies due to a less stringent procedure and also because they are more financially viable than the standard procedure of patent protection. This model is considered to exist as an addition to the existing patent protection system specific to the needs of small inventors and companies. The concept behind setting up patent protection is to promote 'innovation' and 'development' while protecting the rights of the inventors. However, the rigorous standards of the TRIPS agreement (which does not even mention the utility model) do not do well to protect the inventions[2] which do not possess a very high level of inventiveness and are created through a rather simpler procedure.[3] Some of the major countries that use the utility model are China, Korea, Japan, and Germany.[4] Most of these products have less technicality and short commercial life. Utility patents are especially really well suited for developing countries like India for reasons such as: the increasing role of small-scale innovators in the economy; help them by providing legal protection for inventions; enhance innovation throughout the country; are low cost to acquire.

The basic rule of grant of utility model protection is if the innovation is 'novel' and has 'utility', though it may differ from country to country.[5]

Due to the large number of innovations requiring protection and documentation along with Government initiated schemes like 'Make in India', India's scenario is most suited for the application of this model.[6] Nevertheless, India is one of those countries where the utility model is yet to be incorporated into its patent protection system. This paper aims at introducing the concept of utility patents while discussing its dynamics and requirements. It will also discuss the urgent need for its application in India and a comparative study with countries already thriving on this model.[7]

1 World Intellectual Property Organisation, *Making Intellectual Property work for businesses*, International Chambers of Commerce - WIPO (2011) https://www.wipo.int/edocs/pubdocs/en/intproperty/956/wipo_pub_956.pdf.

2 Paris Convention for the Protection of Industrial Property, Fra.-Eng.-Swed., arts. 1, 2 & 4, (Mar. 20, 1883), 21 U.S.T. 1583; 828 U.N.T.S. 305 [hereinafter Paris Convention].

3 Malathi Lakshmikumaran & Shilpi Bhattacharya, *Utility Models: Protection for Small Innovations*, 46 JILI 322, (2004).

4 *Id.* at 322.

5 William R. Cornish, Cases and Materials on Intellectual Property 191-192 (3d ed. 1999).

6 Jaya Bhatnagar & Vidhisha Garg, *India: Patent Law in India*, Mondaq (Dec. 13, 2007) https://www.mondaq.com/india/patent/54494/patent-law-in-india.

7 *Id.*

Utility Models in International and Multilateral Agreement

Paris Convention

The Paris Convention for the Protection of Industrial Property of 1883 covers within its ambit patents, industrial designs, trademarks, and, inter alia, utility models.[8] As a consequence, the contracting states are bound to the obligations as enunciated under Article 2 of the Convention. Article 2(1) asserts non-discrimination against foreign nationals of any contracting state vis-à-vis protection and enforcement of any national utility model regime.[9] Paris Convention, however, does not obligate the contracting parties to introduce a utility model regime in their municipal law. It is left to the will of the countries to formulate a utility model framework. In furtherance of the same, the Convention does not prescribe any minimum required standards, if any contracting party tries to incorporate such a system.[10]

A priority period of 12 months has also been granted to the right holder within which the holder can register the utility model in other contracting states.[11] Article 5(A) imposes limitations upon forfeiture, revocation, and compulsory licenses on patent law which are applicable, *mutatis mutandis*, to utility models to prevent abuses.[12] Therefore, it leaves space for the state to incorporate the scheme of compulsory licenses for furthering innovation or promoting the public interest.[13] Lastly, since the Paris Convention poses no obligation upon any contracting state, thereby, if a country wishes to have such a regime, they have a right to tailor it following the prevalent socio-economic conditions and infrastructure.[14]

The Trade Related Aspects of Intellectual Property Rights Agreement

Ambiguity over utility models didn't subside even after the Trade Related Aspects of Intellectual Property Rights Agreement. The Agreement has posited minimum standards that each signatory state has to follow before inculcating their own intellectual property law regime. However, it does not prescribe any standards that need to be adhered to for

8 Paris Convention, *supra* note 2, art. 1.

9 Prof. G. H. C. Bodenhausen, *Guide to The Application of The Paris Convention for The Protection of Industrial Property*, BIRPI, (1967).

10 Henning Grosse Ruse Khan, *The International Legal Framework for The Protection of Utility Models*, 15 ICC (2012).

11 Paris Convention, *supra* note 2, art. 4.

12 *Id.*, at art. 5(A)(5).

13 Khan, *supra* note 10.

14 Uma Suthersanen, *Utility Models: Do They Really Serve National Innovation Strategies?,* QMUL The Innovation Society & Intellectual Property (2019).

utility models.[15] Furthermore, the TRIPS Agreement also does not obligate any signatory state to formulate the utility model system in their municipal law, therefore, the countries are free to employ their utility model law, specifically among the small and medium-sized enterprises.[16] Article 2(1)[17] refers to compliance of the Paris Convention by all the members of the TRIPS Agreement which primarily entails the obligations created under the Paris Convention, including the aforementioned utility model, as a part of the Agreement. In conclusion, this Agreement does not add any substantial obligations upon the signatories.[18]

Other Patent Treaties and Agreements

Patent Cooperation Treaty of 1970 serves the purpose of facilitating patent applications in a unified procedure. The treaty also takes into account the encouragement and protection of utility model applications procedurally. The Treaty enables the protection of the patentees over a broader geographical area. With effect from 8th December 1998, India has also been a member country of this treaty.[19] Article 2(i)[20] that defines "application", defines the same to be an application for the protection of an invention and is inclusive of utility models. Thereby enabling the procedure for filing of an application for utility models. Furthermore, subject to specific exclusion, any reference made in the treaty to a patent is to be construed as, inter alia, utility models.[21]

Another significant treaty that governs the patent law is the Strasbourg Agreement Concerning the International Patent Classification. The Agreement commences with an assertion that it would be in general interest if a universal adoption of a uniform system is adopted and that it would also lead to better relations with the industrial property field and harmony in national legislation.[22] However, like the other treaties on the same subject matter, this also does not assert any obligation upon the contracting states to formulate the second tier of patent protection.

15 Cornish, *supra* note 3.

16 Kardam, *Utility Model –A Tool for Economic and Technological Development: A Case Study Of Japan*, WIPO - IPI (2007).

17 Trade Related Aspects of Intellectual Property Rights, Marra., art. 2(1), Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

18 Khan, *supra* note 10.

19 Kardam, *supra* note 16.

20 Patent Cooperation Treaty, Washg., art. 2(i), Jun. 19, 1970, 28 U.S.T. 7645 [hereinafter PCT].

21 *Id.*, at art. 2(ii).

22 Strasbourg Agreement Concerning the International Patent Classification, (Mar. 24, 1971), 26 UST 1793.

Application in India

Considering utility models are very easy to obtain, have a lax application procedure and are inexpensive, the same would be extremely advantageous for India.[23] This would encourage the common man to participate in the innovating procedure and provide easy access to the IP protection system, moreover, it would create a source of income and occupation through the use of the invention. The quick registration procedure leads to a faster way to exploit the product economically through a grant of license.[24] The inventiveness is increased among the people as they are required to invest much less in the registration and protection process. This essentially acts as an incentive to encourage people's need to be developed and innovative. One may come to the conclusion that the utility model in itself acts as one such incentive.

Indians ranging from small entrepreneurs to small agriculturists are creating new products and inventions so as to ease their everyday work and increase productivity in their daily tasks. Most of these inventions are the result of hardships and adversities. If they are provided with proper protection of the utility model it would lead not only to a source of income for these small-scale hard-working people but also encourage them to develop more ideas. Later they can be licensed for further use, benefitting not only the people at large but also the innovator. The National Innovation Foundation has started working on the documentation of many such innovations.

To state a few under Grassroots Technological Innovation Acquisition Fund (GTIAF), Shri N. Shakthimanthan from Tamil Nadu has designed a manually operated water lifting pump which ensures high discharge at low costs compared to conventional hand pumps and can transfer water from one field to another field.[25] Shri K.S. Sudheer[26] from Kerala has designed a side-stand gear lock system which prevents a person from starting his motorcycle unless he pushes the stand upwards, to prevent accidents. He works as a mechanic in a small workshop. Shri Kanak Das from Assam[27] has designed a device that transmits energy

23 Kardam, *supra* note 16.

24 *Id.* at 69.

25 NIF, *Technology Manual – Do it yourself - Shaktimainthan Pump*, National Innovation Foundation India (Jun. 6, 2021), http://nif.org.in/upload/Shaktimainthan-Pump.pdf.

26 NIF, *Technology Manual – Do it yourself - Side Stand Gear Lock System for Motor Cycle (Hero Honda)*, National Innovation Foundation India (Jun. 6, 2021) http://nif.org.in/upload/Side%20stand%20retracting%20device.pdf.

27 NIF, *Technology Manual – Do it yourself - Transmission of energy from shock absorber for smooth riding of bicycle on uneven road*, National Innovation Foundation India (Jun. 6, 2021), http://nif.org.in/GTIAF.

from shock absorber for a smooth ride over uneven roads. If such inventions are granted utility model protection they can be marketed and attract more investment, creating an income source and contributing to the improvement of daily lives. Most of the inventions if we notice are based on the daily issues faced or observed by these innovators in their respective regions and thus serve a larger purpose.[28] By getting IP protection they will be widely recognized and could prove useful for the whole nation and also the international market.[29]

Organizations similar to the National Innovative Foundation are also realizing the value of small-scale innovations and recording them.[30] It must be recognized that even though a high level of merit does not exist adding some value to it could lead to a transformation, at the same time providing a legal framework to the innovators to prevent copying and help garner more funds. Another benefit of the utility model is that it can help develop the indigenous pharmaceutical industry, and to do so the 'swiss type claims' or 'second use'[31] or drugs needs to be allowed. Swiss-type claims refer to claims to the manufacturing process and not to the active ingredient.

Now under Section 3(d) of the Patents Act, one cannot patent the use of a known compound, and thus even if a new use of the known compound is discovered it would not be patentable. We must understand that in the pharma industry research continues even after the drug is patented and it tends to have more than one use. But if the utility model is implemented it would assess the 'use' of the compound to understand its novelty even though the substance is already in the public domain. For example, Aspirin was initially just used for headaches but later research revealed it also helped heart patients. This would boost research and development in traditional medication[32] and the indigenous pharmaceutical industry.

Lastly, another advantage for the utility model is that it helps protect traditional knowledge, creating inventions based on facts and issues of the indigenous population. In this way, we economically develop the population by increasing the average income in rural areas and also help solve many of the regional issues. Furthermore, the statistics show that the number of patent applications of the residents exceeds the patent applications from non-residents

28 Md Zafar Mahfooz Nomani & Faizanur Rahman, *Intellection of Trade Secret and Innovation Laws in India* 16 JIPR 341, (2011).

29 *Id.* at 344.

30 Honey Bee, *Power Generating Pumping Machine*, 27(4) Honey Bee Publish Practices 17 (2016).

31 EPO, *Guidelines of Examination: First or further medical use of known products*, European Patent Office (Mar. 01, 2021), https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_vi_7_1.htm.

32 Ajeet Mathur, *Who Owns Traditional Knowledge?*, Indian Council For Research On International Economic Relations, Working Paper No. 96 (Jan. 2003), https://www.icrier.org/pdf/WP96.pdf.

in countries like Japan and Thailand.[33] India, on the other hand, needs more efforts on the domestic front, considering its size, population and underdeveloped domestic industry. The utility model can help bring about such a change and create more resident patent applications. One must not assume that India does not have an intention for growth rather the country has heavily invested in the development of the patent system by introducing legislations like the Geographical Indication of Goods Act, Plant Varieties Protection Act, and Farmers Rights Act etc. Apart from that, modernization of IP offices and assisting small, medium and micro-sized enterprises (SMMEs) to take advantage of the global IP system.

Application of Utility Models in other Asian Jurisdictions

Japan

Japan was among the first nations to have adopted a utility model regime. Japan drew inspiration from the German Utility Model Law, 1891, and formulated its own with some modifications.[34] The intention behind the formulation of the utility model law regime back in 1905 was to furnish protection to inventions that were less significant vis-à-vis inventions that were patentable and to stimulate the small and medium-sized enterprises to innovate.[35] In Japan, the structure of enterprises, the philosophy of competition, and the intellectual property regime are complementary.[36] Since inception, the utility model differed from the patent law in respect of the standard of inventiveness required, duration of protection and less stringent examination. The utility model law of Japan allows protection to any device capable of having industrial applicability subject to the fact that it is not in the public domain and has not been mentioned in any publication.[37]

After due amendments, the protection term for a utility model was raised to 15 years, along with the ability to have multiple claims and request examination system. Some of the factors which appealed most to the Japanese companies include *firstly*, the cost of

33 Kardam, *supra* note 16.

34 Peter A. Cummings, *From Germany To Australia: Opportunity For A Second Tier Patent System In The United States*, 18 MICH. STATE J. INT. LAW 297, (2010).

35 Utility Model Act, Act No. 123 of 1959, art. 1 (Japan) [hereinafter Utility Model Act].

36 Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries*, 38 EPW 209, (2003).

37 Utility Model Act, *supra* note 34, art. 2 & 3.

applying utility model was reduced as compared to that of a patent application.[38] *Secondly,* lower standards of inventiveness, novelty, and utility like that of the German utility model law are required.[39] *Thirdly*, application was processed expediently which predominantly enabled the small and medium sized enterprises to safeguard their innovations and reap the benefits,[40] and *lastly*, 15-year protection period.[41]

This regime resulted in a colossal growth in the number of utility model applications being filed.[42] In light of the upsurge in the filing of utility model applications, the introduction of an amendment bill to include clauses such as shorter-term protection and an abbreviated system of the examination was vehemently opposed and eventually abandoned. The reason for the same was the fact that it was primarily exploited by individuals and small and medium-sized enterprises. In furtherance of the same, in 1991, a research report issued on Industrial Structure brought into light the fact that a higher ratio of working rights was possessed by individuals and small and medium-sized enterprises than large enterprises.[43] However, the amendment of 1993 coupled with the rapid industrial development which led to much better innovations resulted in a downfall in the filing of utility model applications.[44]

Domestic applicants outnumbered international applicants, which demonstrates the utility model regime's effectiveness, given its major objective was to foster indigenous ideas.[45] The benefit of the utility model legislation formulation was realised to the extent that the technical divide between the West and Japan vanished.[46] Moreover, the utility model law until the mid-1990s can be said to be one of the relevant factors for industrialization and rise in domestic innovation in Japan till the mid-1990s.[47] Utility model applications caused a progressive impact on Japan's economic growth post-war. Furthermore, invention patent

38 Dan Prud'homme, *Creating a "model" utility model patent system: A comparative analysis of the utility model patent systems in Europe and China*, IP Key Project Working Paper Series for China's State Intellectual Property Office, (Dec. 1, 2014), https://ssrn.com/abstract=2541900.
Cummings, *supra* note 34.

39 *Id*.

40 Natalie M. Derzko, *Using Intellectual Property Law and Regulatory Processes to Foster the Innovation and Diffusion of Environmental Technologies*, 20 Harv. Envtl. L. Rev. 3, (1996).

41 Uma Suthersanen, Utility Models and Innovation in Developing Countries, UNCTAD - Int. Cent. T.S.D. Project on IPRs and Sustainable Development, (Feb. 2006).

42 Kardam, *supra* note 16.

43 Nobuo Monya, *Revision of the Japanese Patent and Utility Model System*, 3 PAC. RIM L. & POL'y J. 227, (1994).

44 Kardam, *supra* note 16.

45 *Id.* at 38.

46 *Id.* at 43.

47 Cummings, *supra* note 34.

applications had a substantial indirect effect, representing more central industrial invention by stimulating follow-up applications of utility model which were expediently disseminated for commercial use.[48]

The implementation of the utility model has played a crucial role in developing progressive modifications in technology.[49] Moreover, it has been observed that there is an added pressure on the patent laws as far as protection of minor technical inventions is concerned with the respective countries who have not formulated any utility model law yet.[50] As can be observed, Japan's total factor productivity facilitated the application of the utility model law while also promoting technical catch-up with the West.[51] Thus, it can be construed that the utility model system of Japan invigorated the individuals and small and medium-sized enterprises.

Lastly, an essential lesson that could be learnt considering the incorporation of the Japanese utility model regime in the municipal law is that it has the potential to enhance the economic and industrial capability if used meticulously.[52]

China

China has followed a three-tier of protection in the form of 'innovation patent, 'utility model patent', and 'design patent' respectively since the enactment of its patent law in 1984.[53] Considering the aspect of China's the then social and economic level of development, it was observed that adopting a utility model will drive results in the field of creation of inventions for a long term. Other countries which had adopted the utility model have had affirmative social effects, pursuant to the fact it was easy to set-up, could be acquired at a low cost, and that the workload of examination would alleviate.[54] Moreover, at that time China was lagging behind the developed countries, in terms of technology, thus, the experts were inclined to the view that adopting a utility model regime will address China's urgent

48 Keith Maskus & Christine McDaniel, *Impacts of the Japanese patent system on productivity growth*, 11 Jpn. World Econ. 557, (1999).

49 Derzko, *supra* note 40.

50 Jerome H. Reichman, *Legal Hybrids between the Patent and Copyright Paradigms*, 94 Colum. L. Rev. 2432, 2459 n.117, (1994).

51 Maskus, *supra* note 48.

52 Suthersanen, *supra* note 41.

53 Cummings, *supra* note 34.

54 Sangyo Kozo Shingikai & Chiteki Zaisan Seisaku Bukai, *6 Modalities of Future Utility Model System*, IIP Bulletin (Jan., 2004), http://www.iip.or.jp/e/summary/pdf/detail2003/e15_06.pdf.

needs.[55]

Secondly, owing to the historical conditions, the level of science and technology in China is still lagging behind those of developed countries. The utility model system would meet the urgent needs of China, as a developing country.

The first facet of China's utility model regime which led to its development is its lower standard for patentability. The standard covers within its ambit the need to have substantive features and signify advancement.[56] Secondly, since the grant of an application is contingent upon fulfilment of preliminary examination only, it reduces the time of granting protection substantially and can be curtailed to a mere three months.[57] Thirdly, the cost of seeking protection is a fraction of the cost of the patent, it gives a medium to the inventors to secure protection expeditiously and cheaply.[58]

The Chinese utility model patent is considered to be a treasure and having an amplified technical as well as commercial value.[59] The incorporation of a utility model patent stimulated a transitional shift from a dependent-innovating country to an independent-innovating country.[60] In furtherance of the same, it has been noted that small and medium-sized enterprises file patent applicants in huge numbers and the majority of it consists of applications for registration of utility model patents.[61] One of the possible explanations which the upsurge in the filing of utility model applications reflects is the upwards growth in China's innovative sector. Moreover, people are becoming more cognizant of intellectual property rights.[62] It is seen from 1988-1998, utility model patent had generated a remarkable affirmative effect on China's economic development. On the other hand, during the term 1999-2009, invention patent had a much more significant impact than the utility model on the total factor productivity. Though, it does not mean that utility

55 Shoukang Guo, *Current Issues and Perspectives of Utility Models in the People's Republic of China*, 1 J. World Intell. Prop. 941, (1998).

56 Patent Law of the People's Republic of China, Regulations of the Sixth National People's Congress Meeting, 1984 (China), art. 22.

57 Victor Wang, *Utility Model Patent: An Essential and Improving Patent Scheme in China*, 23 Cardozo J. Int'l & Comp. L. 695, (2015).

58 *Id.* at 704.

59 Binqiang Lui, *China Utility Model Patent: Trash or Treasure - A Data-Based Analysis*, 54 IDEA 225, (2014).

60 Runhua Wang, *A Defense of Utility Models: The Case of China*, YJIS, (2015).

61 Haijun Jin, Yuli Tu & Shutong Wang, *Government-Backed Patent Funds in China: Their Role as Policy Tools to Promote Innovation by SMEs*, Tech Monitor (Oct., 2013) http://www.techmonitor.net/tm/images/f/f1/13oct_dec_sf2.pdf.

62 Suthersanen, *supra* note 41.

model lost its significance but subject to factors like development of industry, upgradation in technological innovations and new government enforced innovation policy led to this shift.[63] The small local enterprises have put the utility model regime to good use which implies that innovation is taking place which is of a high-value but at a lower level of the enterprise.[64] Also, it is pertinent to mention that the small and medium-sized enterprises and individual inventors have been hugely benefitted by the learning opportunities furnished by the utility model patent in the field of technology.[65]

Chinas' utility model patent has proved substantial for domestic applicants. It can be seen from the statistics that more than 2 million utility model applications have been filed by domestic applicants in comparison to a mere 3,000 by foreign applicants.[66] The number of utility model protection granted has been on a rise as well.[67] The massive number of applications and protection granted further demonstrate that the primary goal of implementing the utility model law, which was to advance China in the technological and scientific fields[68] and to stimulate the spread of innovation, was accomplished.[69]

Policy Implementation

It is common to hear industry opposition to the utility model as it restricts competition mostly in the European markets, since the contribution of utility patents in the country's growth is quite unclear. Thus, for developing countries like India, it should be preferable to create a policy of "intellectual property leapfrogging" rather than blindly relying on the experiences of countries that already have a utility model. As we note from the comparative study of various countries, Japan has seen a diminished role in the utility model in today's age. To have an effective utility model one needs to carefully consider the cost-benefit analysis, taking into account their impact on the economy on a long term basis, analysing

63 Yanyun Zhao & Siming Liu, *Effect of China's Domestic Patents on Total Factor Productivity: 1988-2009*, FTP - ZEW (2011), https://ftp.zew.de/pub/zew-docs/veranstaltungen/innovationpatenting2011/papers/Liu.pdf.

64 Suthersanen, *supra* note 41.

65 Dan Prud'homme, *Utility model patent regime "strength" and technological development: Experiences of China and other East Asian latecomers*, 42 China Econ. Rev. 50, (2016).

66 WIPO, *Statistical Country Profiles,* World Intellectual Property Organisation (Mar, 2020) https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN.

67 European Patent Office, Facts and figures – China, European Patent Office (Sept. 10, 2020) http://documents.epo.org/projects/babylon/eponet.nsf/0/4A4FBE35B9A6BB7CC125830600500F4F/$File/facts_and_figures_china_en.pdf.

68 Kardam, *supra* note 16.

69 Guo, *supra* note 55.

the target market, and spreading awareness amongst them. Looking at the generalized points above there could be three broad approaches embraced by India being a developing country.[70]

Status Quo Approach

In this, the country does not make any changes to the existing IP regime and that is due to the fact that the economic conditions of the country do not show any scope of significant contribution through the utility model. One needs to accept that there will always exist certain displeasure from innovators as to the time and procedure of acquiring a patent. Before introducing a utility model, a country should carefully consider why incremental inventions need protection and why would it be overall more favourable to the nation. We can safely assume from the points mentioned previously that India will not benefit from the status quo approach and is better off with a utility model.

Accretion Approach

This method basically states that a country's existing patent regime must not be changed completely but some minor changes must be introduced. Instead of introducing a utility model, existing law could be expanded into new subject matters and new materials. Historically many countries have relied upon the design law to protect the small-scale inventors and it enshrines a very wide range of matter.[71] However, it is also to be noted that it cannot fully protect functional inventions and thus does not cover all aspects. In India, the patent system has expanded into wider subject matters such as semi-conductors, plant varieties, and SMMEs but still, the system is not able to cover all requirements of small artisans and their innovations, thus leaving them without legal protection.

Emulative Approach

This approach involves creating new rights from scratch and is one of the most comprehensive approaches of all. It would of course also be one of the most expensive approaches but one must understand that by applying this approach the long-term benefits to the industry and increased international interaction would weigh out the cost.

Now, after looking at the various approaches a developing country must focus on the policy essentials a particular country should enforce while introducing a new utility system in the nation.

70 Suthersanen, *supra* note 41.

71 Statue of Monopolies, 1623 No. 8, Acts of English Parliament (U.K.).

Subject Matter Protection

Utility models must consciously exclude certain subject matter from the protection similar to the ones under the patent law. For example, necessary strictness must still be maintained with pharmaceutical drugs and biological material as we ultimately cannot harm something with a vested interest in public policy.

Term of Protection is Renewal Based

The terms for granting patent protection to utility patents are of utmost importance, as it should not be too short leaving no time for any significant contribution by the product or any development in the same. It should never exceed the standard patent term of 20 years as this would blatantly undermine the standard patent protection procedure. The most acceptable term considering existing utility models is a minimum of 3 years which can be renewed up to 10 years.

Non-Examination System

For the initial period of registration this should be primarily applied in any utility model. This formulates the basis for a utility model, i.e., ease of registration and less stringent standards.

Compulsory Examination Report for the Second Stage

In case of renewable-based term it is necessary as it would prevent unnecessary extension of products which may not require protection.

Compulsory Examination Report at the Time of Infringement Litigation

It should be the responsibility of the utility patent holder to pay for and produce a comprehensive examination report proving the novelty and inventiveness of the product in question, before any infringement litigation.

Renewal fees

Apparent from a name itself that certain fees will be charged upon the renewal of patents, this would help prevent unwanted utility patent renewals and innovators would also think upon the economic viability of the same.

Novelty

Developed countries with existing utility models have introduced universal novelty. If one

adopts a lesser level of novelty, i.e., at the domestic or regional novelty that it would lead to issues in enforcement.

Government Action

Introducing utility model which is something very new to the country and thus would require some effort and hard work from the relevant stakeholders such as the government agencies, patent lawyers, and patent agents. This is essential for proper implementation and creation of "a utility model culture". In furtherance of the same, it will include an awareness education training program, helpdesk services, web and print literature, innovation fairs, etc. to inform potential users of how the new system works and how it differs from existing standard patent and designs systems.

Cross-Licensing/Compulsory Licensing

The last question remains that whether compulsory licensing should be included at present in the standard patent system. This would be useful when there will emerge two conflicting rights and a subsequent inventor would not be able to exploit the patent utility model without infringement. This would be essential in the case of a non-examination system.

Conclusion

After examining the various aspects of patents, one can come to the conclusion that small and medium sized enterprises do not file patents because of the cost involved. The same reason also restricts them from investing in research and development.[72] The initial investment in the commercialization of a new product is an essential aspect to determine its commercial success, thus the emphasis on the cost. In an open market like ours, with constant modification and up-gradation of technology, patent protection comes at an increased cost therefore utility model protection is well suited for small and medium-sized enterprises with its low cost. These businesses can invest in small-scale innovation which will help them sustain their businesses.[73] It can be fair to state that the purpose of the utility model system is the reduction of the cost associated with acquiring protection, to the extent that it becomes affordable by small and medium-sized enterprises.

To further the government's objectives for developing the Indian patent system, next amendment of the Patent Act should incorporate the patent utility model. This would

72 Wang, s*upra* note 60.

73 Suthersanen, *supra* note 41.

inevitably provide better standards for living and facilitate to domestic enterprises. Having a utility model for smaller patents would allow a stricter procedure for a standard patent system; there would be no need to dilute the patentability requirements for incremental or high end inventions. The common argument raised against the current system is that it grants patent protection to trivial patents, which will not be the case after the utility model. India does not even require a new administrative infrastructure for successful implementation as it would be similar to the patent offices and the examinations can be done there itself, the only requirement is legislative changes. Furthermore, the nation's socio-cultural background is conducive to such a system, the success of it will depend on the creativity and participation of people which India is definitely not lacking in. Now, if we factor in the real intention which the utility model law serves by promoting invention, it can only be a step forward for India to inculcate such a system. As illustrated from the examples of Japan and China having such a law will help attenuate the technology gap between India and other technologically sophisticated countries. As also highlighted in the discussion above utility model law empowered many nations in the technological filed which inevitably resulted in an improved quality of innovations. Lastly, it has been deciphered from various data across the world that adopting a second tier of patent protection enables the domestic innovators to come forth with their innovation to monetize the same. The statistics very clearly show that utility model is availed more by the domestic applicants rather than the foreign applicants.

But we need to understand that the idea of implementing the Utility Model is not enough, since it requires precise policy formulation as well. Apart from that awareness and creation of use amongst the target population by the ones who are involved in policy making is also essential. While the utility model is a very advantageous and progressive idea but it can be easily exploited, to avoid that the policy makers must ensure a strong and stable legislation and an equally stronger implementation would lead this a long way. For a country like India such Utility Model System is one of the most vital ways through which innovation can be boosted.

CSR and Ghost Beneficiaries: The New Age Fraud Mechanism

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Abstract

Corporate Social Responsibility is a concept that rests on the idea of giving back to society while taking the benefits it offers to the business. This concept is meant to drive private funds and expertise for the public's welfare. This concept as added in the Companies Act, 2013 under Section 135 where, unlike other countries, Corporate Social Responsibility has been made mandatory in India for all those companies who qualify the conditions given in the section. Hence, it opens up various avenues to scrutinize companies and increases compliance thus, it makes a lot of room for criticism on compliance and regulatory mechanisms and how the current law may not be sufficient or effective in ensuring Corporate Social Responsibility which takes place in the country. It has certain loopholes within the system which provides for companies to exploit, leading to corporate frauds. One of the new age fraud mechanisms has been in the form of ghost beneficiaries. This research paper discusses the concept of Corporate Social Responsibility Frauds focusing on Ghost Beneficiaries and criticising the current regulatory framework in its functioning to tackle the effect of such transactions. It considers various nuanced aspects involved for companies to undertake such illegal routes, thereby addressing the detection to be paramount within the legal framework. The Authorities have indeed placed a robust and vigilant system to maintain a system of checks and balances and provide for a government cum investigation mechanism. The paper also in light of the above, provides certain recommendations which could make the system more efficient.

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What are CSR Frauds? – A Perspective

There has been an evolution in Corporate Social Responsibility (CSR) Frauds and despite the initiatives taken by the Government and Legislature, the issue of such frauds still pertains, and many go unreported and undetected. The mandate of CSR via Section 135 of the Companies Act (referred to as Act), 2013 has made various companies adapt the social costs and acts more as a source of compulsion opening up areas of non-compliance with the law.[1] It can be very well said that when the CSR was a voluntary activity, the events of frauds were quite low as compared to a situation today resulting in a regressive impact.[2] Since CSR has become mandatory with Section 135, several companies have come under the scrutiny of CSR Frauds. However, the current law is insufficient to detect CSR Frauds specifically for ghost beneficiaries acting as a challenge for the authorities to track the offending company which is acting behind the veil of such beneficiaries.

When CSR was made mandatory, it was already pointed out that the risk of exploitation was quite vulnerable considering the charitable trusts and organizations which are present and the number of companies to which it would apply.[3] As per Ratan Tata, it would lead the 'venal' companies to escape and attempt to 'short-circuit' the funds back to the company from the organizations with which they are connected.[4] This often leads the promoters to gain all the wealth as he is behind the majority of such transactions.

Fraud, as defined under Section 447, refers to company affairs including an act/ omission/ concealment of any fact or abuse of position with an intention to deceive and gain undue advantage or injuring the interest of the company/shareholders/creditors irrespective of leading to a wrongful gain or loss.[5] Culling out the principle from the above, CSR frauds may be defined as those fraudulent activities whereby the said company conceal the required funds which are to be shown in its books of accounts and retain the majority of the funds which can happen in various forms with an intent to deceive. Such gains which are concealed from various external stakeholders and the public at large who are unaware of

1 The Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 135 (India).

2 Qamar Ali Jafri, *Triumphs and Failures of Corporate Social Responsibility in India*, Ipleaders (Jul. 25, 2018), https://blog.ipleaders.in/csr-triumphs-failures/ (Last visited on August 13, 2021); *see also* Sachin P. Mampatta, *As CSR Spends Touch Rs 12,000 Crore, Investigators Stalk Ghost Beneficiaries*, The Wire (Dec. 13, 2019), https://thewire.in/business/as-csr-spends-touch-rs-12000-crore-investigators-stalk-ghost-beneficiaries.

3 Panchali Guha, *Why comply with an unenforced policy? The case of mandated corporate social responsibility in India*, 3(1) POLICY DESIGN AND PRACTICE at 58, 67 (2020).

4 *Id.*

5 The Companies Act, *supra* note 1, at §447.

such fraudulent activities leads to promoting a positive social image and reputation which in turn benefits such companies.

Taking cognizance of such matter, many regulatory authorities and even companies such as Deloitte and Ernst & Young (EY) who specialize in such monitoring and implementation of activities being exposed to such occurrence of frauds by the companies, have often issued guidelines from time to time in order to refrain from such malpractices.[6]

Need and Interest to Legal Community

There has been a significant increase in the CSR expenditure in India over the past few years whereby close to INR 12,000 crores was spent as of March 31, 2019.[7] Since then, the economy has been hit by major blows including the COVID-19 Pandemic, whereby, the object and purpose of CSR become even more important, which the Government has been cognizant of and has been taking appropriate steps.[8] Additionally, white-collar crimes in India even after stringent measures included by various regulatory mechanisms has increased in the corporate sector due to the failure on the part of the company and the regulatory authorities to act on such deviations resulting in an increase in frauds.[9]

The legal community comprising of the Government, various Regulatory Authorities, and legal professionals thus, have a major role to play to remove such hindrances and set guidelines towards mitigating such frauds from a holistic perspective to cater the needs of all who are affected by it. The implementation of CSR during such a crisis has a major role to play to promote the social behaviour of the businesses. The legal framework as a whole can eradicate the issues arising out of the non-legal sphere i.e., being the issues of governance, transparency, monitoring, implementation etc. resulting in the creation of CSR Frauds. Moreover, in a situation like this, the need for vigilance is of the utmost importance coupled with the execution and implementation process.

6 Deloitte, *Corporate Social Responsibility Advisory Services: Reducing Risk, Increasing Value* (2017); Ernst and Young, *Corporate Social Responsibility in India: Re-Engineering Compliance and Fraud Mitigation Strategies 6* (2020).

7 Sachin P. Mampatta, *supra* note 2.

8 Divya J Shekhar, *Inside the reshaping of CSR in India during Covid-19*, Forbes India (May 06, 2021), https://www.forbesindia.com/article/take-one-big-story-of-the-day/inside-the-reshaping-of-csr-in-india-during-covid19/67821/1.

9 Ernst & Young, *Weak governance and lack of due diligence pose a grave risk to CSR programs: EY survey*, (May 06, 2020), https://www.ey.com/en_in/news/2020/05/weak-governance-and-lack-of-due-diligence-pose-a-grave-risk-to-csr-programs.

Types of Frauds

CSR constitutes of a variety of frauds as mentioned above which exposes the company. The list is merely an illustrative one and not an exhaustive one. Firstly, CSR is often used by companies to increase their reputation even though the ultimate goal isn't served, instead, it acts as a marketing tool for instance in the case for Lifebuoy soap whereby they conducted awareness programmes relating to their product to drive behaviour change of consumers towards their brand acting as a marketing strategy.[10] Secondly, the issue of conflict of interest arises during the formulation of the CSR Policy whereby its members direct the funds towards certain trusts and NGO's (set up even by various political parties) extracting private gains as well as political gains from the allocated expenditure such as in case of ghost beneficiaries which will be explained later. Furthermore, there are a few projects which are carried out by various political parties where various funds are being misappropriated under the purview of CSR, for instance, the establishment of the Statue of Unity where five PSU's contributed around INR 150 crores marking it as CSR under conservation of national heritage which was categorized as totally unauthorized.[11] Such transactions lead to wrongful classification in order to dodge the liabilities and go against the notions of disclosing a true and fair picture of the business.

Why are CSR Frauds Committed?

The key to the successful implementation of a CSR Policy for a company lies with proper monitoring of law along with ensuring checks and balances at each stage. Checking the efficacy of the CSR Programmes involves utilizing and implementing various aspects including the strategy, assessment of the external and internal risks and the integrity shown by the companies who have the onus to implement such programmes. The Report by EY on CSR states the major reasons for the occurrence of CSR Frauds lies in the non-maintenance of proper governance structure and lack of due diligence on the implementation partners.[12] The Report further highlights major findings, one of which shows the over reliance on the third party to execute programmes without a proper due diligence policy and checking of the past record of implementation partners.[13] Due diligence policies provide a certain

10 Arundhati Ramanathan, *What qualifies as CSR and what does not?*, Livemint (Mar. 25, 2015) https://www.livemint.com/Companies/bAKkTMlOxdT5VZigmD7p3H/What-qualifies-as-CSR-and-what-does-not.html.

11 Pushpa Sundar, *Using CSR Funds for Political Gain*, The Wire (Dec. 22, 2018) https://thewire.in/business/modi-government-csr-political-gain.

12 Ernst and Young, *supra note 6.*

13 *Id.*

structure to a program and act as a precautionary step for the company to advance into a fraudulent situation.

Further, the concept of ghost beneficiaries has also emerged in regard to the commission of CSR Frauds by companies. A ghost beneficiary is a concept whereby the parent company (who is initiating the CSR), transfers funds to some third-party individuals or organizations for the purposes of CSR activities, however in reality such existence of third-party individuals and organizations is questionable. It extends to a situation whereby a new company is floated by the parent company who is spending the CSR funds itself. Though the legitimacy of the formation of such a company under the same group could be valid, however, the transactions of the company for the purpose of CSR and its due accounting makes it a complicated issue.[14]

For instance, a company allocated capital for livelihood creation under its CSR program whereby money was supposed to be spent on a well to help in the irrigation needs for the farmers, however on analysing the project reviews, it was observed that the planned well wasn't suitable to cater the needs for irrigation and the reason 'irrigation purposes' was nothing but false assertion to deceive the regulatory authorities.[15]

There have been instances whereby the misuse of CSR funds have come into light with respect to ghost beneficiaries, one of them being the incident where a social activist was paid 45% of total CSR funds in the form of 'consultation fee' amounting to INR 13,36,500 from an NGO in Karnataka who in turn received from a company.[16] Similarly, another NGO came under scrutiny for supporting the concept where such NGO received funds from a European manufacturer and aviation company Airbus.[17]

There exist few people with dishonest intent who attempt to de-fraud the authorities by implementing CSR policies through organisations with a questionable existence, though not necessarily. Lack of transparency by the requisite authorities and the management of such companies is one of the factors which could hide the activities of these beneficiaries from scrutiny.[18] There also exists ineffective structuring of the CSR projects due to ineffective

14 Sachin P. Mampatta, *supra* note 2.

15 *Id.*

16 Yathiraju, *45 per cent of CSR funding paid to activist as 'consultation fee' to avail funds*, The Indian Express (Jul. 15, 2018) https://www.newindianexpress.com/states/karnataka/2018/jul/15/45-per-cent-of-csr-funding-paid-to-activist-as-consultation-fee-to-avail-funds-1843525.html.

17 Rajesh Ahuja, *CBI files FIR against corporate lobbyist, NGO over misuse of CSR funds*, Hindustan Times (Nov. 17, 2017) https://www.hindustantimes.com/india-news/cbi-files-fir-against-corporate-lobbyist-ngo-over-misuse-of-csr-funds/story-278i8W6UCK8l2hIdl8lr0M.html.

18 Ernst and Young, *supra note 9.*

setting up of committees and the lack of dedication of the Board of Directors (BoD) to implement the projects which in turn has led to the creation of fake CSR Projects. Thus, in the light of poor governance mechanism, the issues of detection and investigation become critical as also highlighted by the survey conducted by EY.[19]

Detection of CSR Frauds

In order to prevent the fraudulent acts occurring in relation to the CSR activities, detection of such activities at an early stage becomes crucial. One of the primary steps for detection then necessitates undertaking a fraud risk assessment at a periodic basis by the company which would help in bringing to light any transactions or any scheme which would probably invite legal trouble for the company.[20]

In the existing framework set up by the Legislature, the focus has been on the anti-corruption laws whereby stringent measures have been placed for an offence being committed under its ambit. Proper records need to be maintained for countering such measures but, in cases involving such ghost beneficiaries, even proper records are unable to lead towards the result. The organizations and trusts under whom such funds are transferred by the parent company, need to provide a report to incorporate CSR via Form AOC-4. This form becomes the essence of the current topic because the form is not accountable to be audited by external auditors as compared to other documents and acts as a lacuna, stated by Bhaskar Chatterjee.[21] In this regard, the concept of auditing emerges whereby conducting an external audit extending to such forms can be helpful to detect the CSR Frauds, even for ghost beneficiaries. Any such transaction or a policy implementation implying fraudulent activities having come under the scrutiny of the Auditing Company, empowers them to report such fraudulent to the Central Government and thereby acting as a major obstacle for the companies to carry out their dishonest intentions in relation to CSR. In this light, the scope of forensic audit has been expanded to encompass all the fraudulent activities and closes any existing legal loopholes.

Furthermore, it has been observed that there hasn't been any centralized repository for public

19 Ernst and Young, *supra note 6.*

20 Federation of Indian Chambers of Commerce and Industry (FICCI*), Corporate Resiliency: Managing the Growing Risk of Fraud and Corruption A Holistic Approach 12 (Sep., 2013) https://ficci.in/spdocument/20310/FICCI-Deloitte.pdf.*

21 Dinesh Narayan, *How Indian companies are misusing public trusts to launder their CSR spending*, The Economic Times (Oct. 21, 2015), https://economictimes.indiatimes.com/news/economy/finance/how-indian-companies-are-misusing-public-trusts-to-launder-their-csr-spending/articleshow/49474584.cms.

trusts where any information could be available on such trusts unlike for the companies which have the Registrar of Companies, hardly making the former come under the radar of the regulatory authorities. While the Indian Trusts Act may provide for such a repository, it covers only private trusts and thus, makes public trusts susceptible to the preferred mode for fraudulent activities by the companies in the nature of ghost beneficiaries.[22]

Investigation of CSR Frauds

The Companies Act emphasises on a better way to regulate companies from a holistic point of view including stringent penal provisions. The provisions for fraudulent activities extends to any suspicious nature of the defaulting company which may include non-rotation of the auditing partners in a short period of time to conflict of interests between shareholders and the BoD to the formation of the company etc.[23] Moreover, the problem of non-rotation of auditing firms was highlighted by the Naresh Chandra Committee of 2002 in light of the auditing failures and thus tried to recommend bridging such gaps.[24] The issue of non-auditor rotation was prevalent under the 1956 Act whereby the auditors were appointed for a long period establishing a good client base, thus raising suspicion over concealing fraudulent transactions. However, that issue has been solved to an extent via Section 139 (2) of the 2013 Act.[25]

Section 206 – 229 under Chapter XIV of the Act deals with the various provisions in regard to the investigation.[26] These provisions imply the seriousness of an offence to be classified as a fraud as per the legislature. Moreover, it specifies that a violation should have sufficient backing for initiating an investigation under the Act as specified in the above-mentioned provisions.[27]

The provisions also list down the establishment of vigilant whistleblowing mechanisms and places emphasis on the importance of an independent director who may be given a larger role to play in relation to any third-party transaction and disclosures. The statute further provides for an appointment of a Serious Fraud Investigation Office (SFIO) under Section

22 *Id.*

23 The Companies Act, *supra* note 1, at § 7-8,36,38,66,76A & 140.

24 Ministry Of Finance, Report Of The Committee On Regulation Of Private Companies And Partnerships (July, 2003) http://reports.mca.gov.in/Reports/3-Naresh%20Chandra%20committee%20report%20on%20regulation%20of%20private%20companies%20and%20partnerships,%202003.pdf.

25 The Companies Act, *supra* note 1, at § 139 cl 2.

26 The Companies Act, *supra* note 1, at § 206-229.

27 *Id.*

211 and 212 of the Act to tackle such fraudulent acts committed by the companies.[28] SFIO is a fraud investigation agency set up by the Central Government which has experienced experts over various sectors involving banking, corporate affairs, taxation, forensic audit, capital markets etc.[29]

The role of an SFIO is towards detecting and investigating probes in relation to any frauds being carried out. The Investigating Officer by the SFIO has been empowered under Section 217, whereby he can extract all the information and documents from employees for the alleged fraud committed by the company.[30] On such procurement of all the information and guidance, then report is to be submitted to the Government within the specified period upon which the latter may initiate the proceedings before a Special Court and the provisions in tandem to the Code of Criminal Procedure, 1973 shall apply.[31]

Conclusion and Suggestions

It is observed in India where a concentrated shareholding pattern is followed, the majority of board members do not involve themselves as much as they are supposed to in such activities, and even if they do, they act as mere cronies to the promoters which act as a detriment for the interests of the company and the people associated with it. Though Section 135 ensures the creation of a CSR Committee, such committees have very less involvement of the top management as required for supervision implying less control over the functioning of the committee. In order to have a proper governance and monitoring mechanism, the system of checks and balances within the committee can act as an aid to provide for such gaps. Under the present regime, the committee requires a minimum of one independent director which in effect may not hold enough authority and thus they could have no effect on the decisions taken by the committee. With regards to this, having a majority of independent directors should be mandatory so that the committee will exercise its mind to the best of its ability and ensure the protection of the existing minor shareholders of the company. The duty of an independent director extends to implement best policies for corporate governance and ensure a proper framework towards unscrupulous activities going against the conduct laid down by the company for the protection of the interests of various persons.[32]

Recently, the policy of a stringent mechanisms for whistle-blower policy has also emerged

28 The Companies Act, *supra* note 1, at 211-212.

29 *Id.*

30 The Companies Act, *supra* note 1, at § 217.

31 The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

32 The Companies Act, *supra* note 1, at Schedule IV.

as explained above. An establishment of a whistle-blower committee can itself solve the issue to an extent where the composition doesn't involve the top management and anonymity with respect to such complaints are given the highest priority. Such morals can help the members of the company itself to restrict the unscrupulous activities in mitigating CSR Frauds to an extent.

Another system of checks and balances can occur by imposing stringent measures with related to the committee's functioning via a periodical review over the activities being conducted as well as via checking their efficacy through the appointment of auditors as per the Act. Moreover, since the aim is to foster a robust compliance mechanism and proper review of the work, a Secretarial Auditor as per Section 204 of the Act,[33] Rule 8 of the Companies (Meetings of Board and its Powers) Rules[34] and Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules[35] may also be an alternative whereby such appointment provides for a disciplined approach to evaluate and improves effectiveness for ensuring proper checks and balances. In addition, every Secretarial Auditor can monitor a company that is eligible for carrying out CSR activities, thereby ensuring that companies do not escape from their CSR obligations.

Lately, through the Companies (Amendment) Act, 2019, provisions for CSR violations have been made specific and vigilant measures for monitoring unspent CSR funds have now been accounted for.[36] The positive impact of CSR can be truly beneficial to the society. However, companies try to avoid such expenditure and after looking at the above analysis, it can be said that there exist various anomalies in the law with respect to ghost beneficiaries which the companies take an advantage of. In light of this, the role of SFIO becomes essential to establish itself as the nodal agency for matters pertaining to frauds. For the SFIO to fulfil its duties, certain compliance measures should be undertaken as mentioned above in order to reduce CSR Frauds through Ghost Beneficiaries.

33 The Companies Act, *supra* note 1, at § 204.

34 The Companies (Meetings of Board and its Powers) Rules, 2014, Notification G.S.R. 240(E), 2014, Rule 8 (India).

35 The Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, Notification G.S.R. 249(E), 2014, Rule 9 (India).

36 The Companies (Amendment) Act, 2019, No. 22, Acts of Parliament, 2019, § 21 (India).

THE 'UNPOLISHED' CODE BARRICADING CROSS-BORDER INSOLVENCY IN INDIA

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Abstract

Cross-border insolvency is not a nascent term and is used widely across the world. However, when it comes to its codification in various nations, what is new is that it has to be studied with different sentiments, ideas and thoughts. The concept of cross-border insolvency revolves around resolving insolvency disputes of the companies having assets in more than one nation. This paper analyses, in brief, the beginning of the cases which involved the concept of cross-border insolvency in India and across the world. It further put its weightage on how the current legislation on cross-border insolvency in India is insufficient and how it hurdled the judiciary in coming to a conclusion in various landmark cases on cross-border insolvency. For India, in the current scenario, it is extremely important to expand its economic horizon. It is required for India to have a decent ranking in ease of doing business to attract investment across the globe. Realising its desideratum, Indian drafters have framed a draft based on the Model Law while taking account of Indian socio-economic conditions and by analysing the cross-border insolvency laws adopted by other countries. This paper not only analyses the journey of Indian drafters from facing the obstacle to the framing of provisions on cross-border insolvency but also studies the various flaws that were made by other countries in adopting the Model Law and how Indian drafters have taken notice of it and have tried to incorporate such learnings in its report.

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Introduction

With increasing globalization, there is an upsurge of debtors having assets and creditors in more than one country. As most of the countries around the world have an open economy and easy accessibility, investors around the world are now stretching their hands outside their home country for investment. So, in such a situation, there is a pressing need to have standard laws to protect the interest of various stakeholders, i.e., cross-border insolvency laws.

In this unprecedented time of COVID-19, the importance of cross-border insolvency has been jacked up, with many companies, who have their assets in more than one country, falling on the verge of insolvency. Having proper and established provisions on cross-border insolvency is not only the need of the hour but also a significant tool kit for maintaining healthy business relations between different countries. United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("The Model Law")[1] is one such landmark step towards the harmonization of insolvency laws across the different nations. The development of the Model Law was not a one-day process, the drafters of Model Law have codified it by gaining experience from the cases of insolvency between various countries and the hurdles faced by them. In India, the intense need to have sufficient cross-border insolvency laws had been realized through the occurrence of cases like *Amtek Auto Ltd.*[2], *Videocon Industries*[3] and *Jet Airways*[4], which posed many questions on the existing 'unpolished' provisions on cross-border insolvency and also identified the loopholes in it. From gaining knowledge and understanding the scope and merit of adopting the Model Laws from various countries like the United States, Singapore, etc., Indian drafters too have drafted a report on cross-border insolvency and have tried not to divert or amend it to a large extent, a factor which has been analyzed in later part of the paper. Before gaining in-depth knowledge about cross-border insolvency, one needs to analyze its origin and understand its aim and purpose.

Development of Cross-Border Insolvency

Background

Before delving into the saga of the Indian cross-border regime, it is pertinent to understand

1 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 1997.

2 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

3 State Bank of India vs Videocon Industries Ltd. & Ors., CP (IB)-02 (MB)/2018, (Jun. 6, 2018).

4 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, (Jun. 20, 2019).

that the construction of codified laws on cross-border insolvency was a long and incremental process. In the late 18th century, the onset of the industrial revolution led to multilateral businesses and transactions that forced countries to cooperate in order to boost the economy.[5]

The credit of origin of cross-border insolvency cannot be given to one country as it was developed in different forms in different countries.[6] Be it *Solomons vs Ross*[7], a landmark case in England's bankruptcy regime which played a pivotal role in the evolution of international bankruptcy law, or the *Maxwell* bankruptcy case[8] in which standard provisions were laid down relating to insolvency in the form of the Maxwell Protocol by the United States and the United Kingdom courts.[9] Similarly, many cases can be marked as the critical juncture in the journey of codification of cross-border insolvency laws like the *Lehman Brothers* case.[10] In addition to this, other efforts were made by countries worldwide to develop cross-border insolvency laws, such as Singapore's 'old territorial approach,'[11] United States' 'universalism,'[12] and Honk Kong's 'Modified Universalism.'[13]

Inception of the Model Law

After continuous efforts, finally, the Model Law was endorsed by the United Nations General Assembly in 1997.[14] The main aim of the Model Laws was the standardization of insolvency laws across the world.[15] As stated earlier, due to globalization and technological advancements, companies started to establish their empire in more than one country. Since there were no uniform laws related to insolvency, it created a great hassle during the

5 The Transformation of Economic Systems, Lumen Boundless Sociology, (last visited on Jun. 22, 2021), https://courses.lumenlearning.com/boundless-sociology/chapter/the-transformation-of-economic-systems/.

6 Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, Sage Journals (last visited on Jun. 19, 2021), https://journals.sagepub.com/doi/full/10.1177/0256090920946519.

7 Solomons vs Ross, (1764) 1 H.BI. 131n.

8 Maxwell vs Dow, 176 U.S. 581 (1900).

9 *Id.*

10 Lehman Brothers vs International (Europe), Re, (2011) EWHC 1233 (Ch).

11 Halimi, Ryan, *An Analysis of the Three Major Cross-Border Insolvency Regimes* (2017). University of Chicago Law School Chicago Unbound, http://chicagounbound.uchicago.edu/international_immersion_program_papers/47.

12 *Id.*

13 *Id.*

14 *UNCITRAL The Model Law on Cross-Border Insolvency (1997)*, United Nations Commission On International Trade Law, (last visited on Jun. 15, 2021), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

15 *Id.*

insolvency of a company. The Model Law does not compel or force any country to adopt its provisions, rather the countries, on their own initiative, with modification or amendments (according to their country's economic and social conditions), can adopt the Model Laws to bring regularity and to create predictability on insolvency proceedings.[16]

The Model Law defines cross-border insolvency as the situation where either the debtor has assets in two or more states or where the creditors belong from different states. The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases, i.e., access, recognition, relief (assistance), and cooperation.[17] Due to UNCITRAL's extensive efforts, many countries have realized the strength of the Model Law and have adopted the same with some amendments. For example, the United States, while adopting the Model Law, incorporated the foreign insurance companies but omitted banks and railways.[18] On the other hand, the United Kingdom while adopting the Model Law omitted credit institutions and insurance undertakings.[19]

By seeing so many developed countries adopting the Model Law, it becomes even more essential to analyse the basic economic objective it serves. During insolvency, every concerned party, i.e., management of the corporate entity, its creditors, its debtors etc., try to save themselves from the detrimental effects of insolvency. To this end, the Model Law endeavors to serve the interest of all the stakeholders. It ensures that creditors are not affected because of the liquidation by safeguarding the regular business activity, which helps in asset protection and higher valuation of the entity. Meanwhile, it also averts the liquidation when the continuation of the business is more fruitful for the stakeholders.

The Saga of Multilateral Insolvency in India

Insolvency and Bankruptcy Code, 2016,[20] ("Code") a legislative framework that has accelerated the insolvency regime in India. Though the Code emulates UK insolvency legislation yet, it is a comprehensive framework customized according to the requirement of the domestic market.[21] The Code, though, is a relatively new legislation, but the pace

16 *Id.*

17 *Id.*

18 Ishita, *supra* note 6.

19 *Id.*

20 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament,2016, (India)

21 Rakesh Nangia and Neha Malhotra, Tweaking IBC for cross-border cases, The Hindu Business Line, (last visited on Aug. 14, 2021) https://www.thehindubusinessline.com/business-laws/tweaking-ibc-for-cross-border-cases/article33545085.ece.

at which it has stabilised the insolvency and bankruptcy system in India is appreciable. However, India refrained from incorporating a comprehensive framework for cross-border insolvency in 2016 because the lawmakers were skeptical, moreover, India lacked an ecosystem to handle not only multilateral but even domestic insolvency. There were no dedicated tribunals for bankruptcy, no consolidated law on the subject and lack of Insolvency or Resolution Professional and Informational Utilities. Furthermore, even though a legislation on domestic insolvency was much needed, Indian lawmakers were ambitious in combining individual insolvency and corporate insolvency and after that were hesitant to rush into legislating a framework for multilateral insolvency.

In response to this, a twin-section provision, section 234 and 235, was incorporated in the Code as a stopgap measure to deal with insolvency, which involves companies with multi-national or cross-border trading and business across nations. The provision under section 234 confers upon the Central Government the right to enter into a bilateral agreement for application of the Code to assets or property lying outside India of the corporate debtor, including a personal guarantor of a corporate debtor, situated outside India through a reciprocal arrangement.[22] In addition, when there is dispute regarding assets situated out of India, then an application can be made to Adjudicating Authority to investigate the matter under section 235. If the Adjudicating Authority is satisfied, then it may issue a letter of request to a court or an authority of such country competent to deal with such request and with whom a reciprocal arrangement has been established pursuant to section 234 of the Code.[23]

22 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, § 234 (India).
"(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.
(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified."

23 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, § 235 (India).
"(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.
(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request."

The existing provisions in the Code, which are dealing with cross-border insolvency, offer certain logistical challenges. When we have different agreements with different countries, it will be difficult to know at any given point of time whether there is a bilateral agreement signed by the country in issue or not. It might happen that while dealing with a corporate debtor having assets in two different nations, the court might face a deadlock due to contrary provisions in two agreements which can cause an unnecessary delay that is not promoted by the Code. Since it is difficult to have treaties or agreements with all countries, therefore the process of getting the letter of request from the concerned adjudicating authority and the satisfaction of adjudicating authority and directing it to the court is also a burdensome process as the debtor's assets are located in a different jurisdiction.[24]

Furthermore, India's experience in matters of reciprocal agreements has not been encouraging because for recognition of foreign judgements and proceedings, India has section 13 and 44A of the Civil Procedure Code, 1908,[25] which deals with the execution of decrees passed by courts in the reciprocating territory. Reciprocating Territory means any country or territory outside India, which the Government of India has declared via official gazette to be a reciprocating territory.[26] If a certified copy of any decree of the reciprocating territory is filed in an Indian court, then the same be executed as a court in India had passed it. However, this does not work in India as every time, there is a delay which will create an immense problem when the issue revolves around insolvency. Time is the essence of this Code.[27]

Since the provisions related to bilateral treaties or agreements are not the best way to deal

24 *Id.*

25 The Civil Procedure Code, 1908, No. 5, Acts of Parliament, 1908, § 13 and § 44A (India).
"Section 13 - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except..."
*"Section 44A - Execution of decrees passed by Courts in reciprocating territory.-- (1) Where a certified copy of a decree of any of the superior Courts of [2] *** any reciprocating territory has been filed in a District Court, the decree may be executed in [3] [India] as if it had been passed by the District Court."*

26 The Civil Procedure Code, 1908, No. 5, Acts of Parliament, 1908, § 44A Explanation - 1 (India).
"Explanation 1.-- "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and superior Courts, with reference to any such territory, means such Courts as may be specified in the said notification."

27 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, Preamble (India).
"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders..."

with cooperation between jurisdictions, therefore, there is a pertinent need for specific legislation. Moreover, the recent Indian insolvency cases signified why bilateral agreements are insufficient to handle the growing Indian market, where assets of companies are spread across various nations. Therefore, we need a comprehensive legal framework and rules to deal with cross-border issues, and a treaty cannot be a substitute for a multilateral instrument that allows cooperation between various sovereign states. The adoption of the Model Law will be a prelude to the future course of cooperation in insolvency cases and other types of cooperation that will happen. Foreign creditors will not be reluctant to invest in Indian entities as they will be assured of the return if things go the other way.[28]

Judicial Take to Safeguard the Interest of Indian Creditors

While it was expected that the Code would have a space for the law relating to the cross-border insolvency and thus its non-inclusion made the insolvency regime in India incomplete, the absence was majorly felt by the creditors who have their capital invested in companies that are confronted with cross-border insolvency issues because the current legislation requires a specific bilateral agreement[29] and non-existence of the same which gives the Judiciary discretion to render the judgement, causing delay and immense loss to such entities.

Recently, in the *Amtek Auto Limited* case,[30]an automobile part manufacturer company's assets were lying in Japan, Thailand, Singapore, the United Kingdom, and few other nations came under scrutiny. While in some of these countries, Amtek was either undergoing restructuration or receivers were appointed by the respective judicial authority. In India, however, creditors found themselves helpless because most of the value lay in these assets, which were part of various subsidiaries or group companies, and the creditors could not reach out to them. Besides, the foreign receivers and administrators were unwilling to cooperate as they were bound by their legislations and confidentiality agreement. The creditors were stranded as they could not incorporate any data in the Information memorandum due to a lack of a framework that deals with such clauses. Therefore, any information with regard

28 Ministry of Corporate Affairs, Report of the Insolvency Law Committee On Cross Border Insolvency, (2018).
"*Increasing foreign investment: Even though foreign creditors have a remedy under the Code presently, adoption of the Model Law will provide added avenues for recognition of foreign insolvency proceedings, foster cooperation and communication between domestic and foreign courts and insolvency professionals and so on...*"

29 *Supra* note 22.

30 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

to assets and their value was entirely hypothetical, which eventually caused immense loss to Indian lenders.[31]

Similarly, it is pertinent to note the case of *Videocon Industries*,[32] which involved investors and creditors of various sovereign nations, petroleum giants, and Indian Government Corporations.[33] Similar to *Amtek Auto,*[34] Indian creditors felt handicapped because of the absence of specific legislation dealing with cross-border insolvency.[35] Though, now the court has allowed the inclusion of Videocon's foreign diversified businesses in the Corporate Insolvency Resolution Process in India.[36] This again has triggered the debate of having standalone legislation else such absence of a framework to deal with multilateral insolvency will result in a significant loss in value of such companies.

It was with *Jet Airways (India) Private Limited*[37] that the judiciary had to step in to plug the gap caused due to the absence of a framework in cross-border insolvency. In India, when the company was not in operation and most of the aircraft were grounded, lenders decided to take over the management as they lost confidence in the erstwhile promoters of the company. In the meantime, in the Netherlands, where Jet Airways had its European hub, the company had defaulted to a number of its lenders.[38] An aircraft was grounded at the Schiphol Airport, Amsterdam, over non-payment of dues to a European Cargo firm, and a winding-up petition was filed in the Netherlands. NOORD – Holland District Court ordered an ex-parte winding-up order, and an administrator was appointed.[39] In the meantime, some trade creditors filed insolvency petition in India, and that is when the main lender –

31 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

32 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

33 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

34 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

35 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

36 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 12 February 2020.

37 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.

38 Introduction to Cross-Border Insolvency, Nishith Desai Associates, (last visited on Jun. 21, 2021) https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction -to-Cross-Border-Insolvency.pdf.

39 *Id.*

the State bank of India – also decided to file a petition.[40] In response to it, an intervention application was filed at the National Company Law Tribunal ("NCLT") on behalf of the Dutch Administrator to notify NCLT that there is already an order passed and to request NCLT to consider passing some suitable order for cooperation and dialogue between the Dutch Administrator and the Indian Resolution Professional ("RP"). However, NCLT observed that there was no provision and mechanism in the Code, at that moment, to recognise the judgment of an insolvency court of any Foreign Nation, especially when the company is registered in India. Thus, NCLT ordered that neither can they take this order on record nor the NOORD – Holland District Court have the appropriate jurisdiction, therefore the request for intervention was rejected by the NCLT. Further, the court directed the Indian RP to ignore and disregard the proceedings in the Netherlands and prohibit getting in touch or have any open cooperation or dialogue with the Dutch Administrator.[41]

An appeal was made in the National Company Law Appellate Tribunal ("NCLAT")[42]. The NCLAT understood the implications and not only stayed the order of prohibiting cooperation but also ordered Indian RP and the Dutch Administrator to coordinate and work out a mechanism for cooperation and an amicable settlement plan.[43] They worked in accordance with the Model Law to decide the way ahead along with the responsibilities of the stakeholders, where the main proceedings would be and also recognise the independence of each court. Everything was virtually operated in the shadow of the Model Law, and they came out with '*Cross-Border Insolvency Protocol*'[44] which all the party fairly agreed that the best solution would be to maintain the neutrality and sovereignty of the courts in India as well as the Netherlands, giving superiority to the domestic law, clearly agreeing that nothing will be done which is contrary to the public policy of both the nations and recognising the Indian proceedings as the 'centre of main interests' while the Dutch proceedings will be the 'non-main insolvency proceedings.' Moreover, it was also agreed that the costs arising in the Netherlands would be paid out of the corpus costs that are created in India, and that any asset sold out in the Netherlands would be accounted as a sale consideration and will not be utilised as a part of the overall distribution that would be done under Indian law. Not only

40 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.

41 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.

42 Jet Airways (India) Ltd. (Offshore Regional Hub) v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 12 July 2019.

43 Jet Airways (India) Ltd. (Offshore Regional Hub) v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 12 July 2019

44 Jet Airways (India) Ltd. (Offshore Regional Hub) v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 26 September 2019.

that, even the fees of the Dutch Administrator was agreed to be paid out of this common corpus. In fact, to the extent, NCLAT set aside the judgement of NCLT through which it was dictated that the Dutch Administrator had no jurisdiction in India and consequently he was not permitted to take part in Jet Airways' Committee of Creditors meetings.[45]

Indian lawmakers were initially reluctant because they wanted the insolvency law to stand on its feet and proposed to incorporate the Model Law in the Code when they have the confidence that the Indian judges and the practitioners were prepared enough to be able to deal with cross-border insolvency, particularly those cases coming from advanced economies which already have cross-border insolvency legislation in place for many years. Though the concerns were legitimate, however as a growing economy Indian market is capable of coping with the Model Law as demonstrated by domestic insolvency legislation, where India has done exceptionally well. Further, these cases make out the perfect situation to accelerate the enactment of specific legislation.

The case of *Jet Airways*[46] showed that Indian stakeholders are sophisticated and mature enough to be able to play on the playground of cross-border insolvency. Now, it is not that India is not prepared, rather Indian professionals are at par with International professionals, Indian Lenders are exposed to the global market and conditions, Indian judges are capable, and with some capacity building in learnings of the international experience, India will thus be able to cope up with future challenges in the global market.

Though, courts have skimmed the provisions of the Model Law structure and have applied the same while deciding cross-border insolvency issues. However, *Jet Airways'* case neither as a protocol nor as a precedent came out as a substitute of the Model Law. India does need specific legislation because this as a precedent was successful in one case but may not work in another case.

India's Initiative to fill Global Model 'Holes'

The Law Commission has drafted a Report on Cross Border Insolvency in 2018 and put India on the road of success in cross-border insolvency regime,.[47] By adopting the Model Law, India will have various advantages, which will help India improve its economic condition

45 Jet Airways (India) Ltd. (Offshore Regional Hub) v. State Bank of India, Company Appeal(AT)(Insolvency) No. 707 of 2019, Order dated 26 September 2019.

46 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.

47 Ministry of Corporate Affairs, Report of the Insolvency Law Committee On Cross Border Insolvency, (2018).

on the international level. To proceed with the same motivation, India has imbibed various learnings before adopting the Model Law. For India, adopting the Model Law should not just be a mere formality so as to improve its ranking in 'Ease of Doing Business'. However, its aim should be to sincerely solve disputes on insolvency and to fulfil the basic aim and purpose which the Model Law propagates. If we measure the success of the Model Law by measuring the number of countries adopting it, then we will miss the viewpoint of drafters to a great extent.

If we analyse the provisions of the countries who have adopted the Model Law, we can somewhere come to the conclusion that the countries have, to some extent, exploited the flexibility provided in the Model Law, which has defeated the harmonization and uniformity which was the objective of the Model Law.[48] To explain this contention, lets dive into the provisions of exclusions adopted by various countries. Countries like New Zealand, Romania, US etc, have excluded various financial institutions and insurance undertakings from their cross border insolvency laws.[49] By the exclusion of various financial institutions from the ambit of cross border insolvency laws, the matter or issues involving dispute regarding financial assets or disputes where these institutions can be party to it, would escape as these would not be covered under the ambit of model law. So, when we look down to the grassroot level, the very motive or reason of bringing countries at the same pedestrian to solve cross border insolvency issues is defeated.

But if we analyse 'Report of Insolvency Law Commission on Cross Border Insolvency', 2018, we see that India has recognised this problem and mentioned that exclusion and inclusion of entities will be done by Central Government based on its experience, thereby protecting its own interest and also keeping par with the aim and purpose of the Model Law.[50]

It is well understood that every country has its own laws to govern and maintain public peace and order. It has its own fundamental duty to protect the interest and rights of its citizen. In almost every country, the fundamental rights of the citizen are considered supreme and any law made in contravention of it is considered *void ab initio*. The drafters of the Model Law have also paid heed to it and in Article 6. The Model Law's public policy provision states that this should be invoked only if the foreign order in question was "*manifestly contrary to public policy*". The word 'manifestly' in general terms means that 'in a way that is clear

48 *Supra* note 14.

49 S. Chandra Mohan, *Cross-border Insolvency Problems: Is the UNCITRAL The Model Law the Answer?*, Volume 12 Issue 3 Int. Ins. Rev., 199, 223 (2012).

50 *Supra* note 47.

or obvious to the mind'. But many countries have failed to recognise the importance of it and here comes the concept of exclusion of public policy, which is again detrimental to the aim and purpose of the Model Law. However, some countries like Japan have removed the word manifestly to increase the scope of the interpretation of word public policy.[51] These examples show how most of the countries though have adopted the Model Law but have somewhere down the line failed to live up to its expectation. Indian drafters of the Model Law have referred to this issue and has decided to keep 'manifestly' to uphold the idea of the Model Law. The list does not end here, there are other provisions also like the issue of foreign representatives and the power and access with the country in dispute, which various countries have restricted to safeguard their interest and thereby defeat model law purpose, but Indian drafters have taken into account these aspects and have worked on it to keep the basis of UNCITRAL model law.[52]

By analysing the deviation that various countries have made from the Model Law defeats the very object of it. According to Professor Fletcher, *"The proof of the Model Law is in the enactment. The crucial question is not the number of States which take a conscious decision to enact the law but the extent to which they do so, both individually and collectively"*[53]. Thus, according to him, what matters is not quantity but the quality of the Model Law adopted. Indian drafters, to some extent, have paid attention to keep the essence of the Model Law but have left the interpretation of certain provisions according to the experience that it will gain over a period of time.[54] For India, it is still a long road ahead. India should make sure that in the race of adopting the Model Law, instead of securing its rank in the competition, which would benefit it in the short run, it should focus on the quality in adopting the Model Law.

Conclusion

There is an imminent need for India to adopt the Model Law, particularly in light of various

51 *Id.* at 214.

52 *Supra* note 47.

53 Dr. Hamiisi Junior Nsubuga, *The call for harmonisation of cross-border insolvency laws to enable cross-border filing and litigation in the East African community*, Volume 30 Issue 12 Int. Co. & Comm. Law Rev. 659, 668 (2019).

54 *Supra* note 47.

cases like that of *Jet Airways*[55], *Amtek Auto Ltd.*[56], and *Videocon Industries*[57]. Adopting the Model Law would not only bring more certainty to the system but also generate trust in the foreign investors & creditors. This will foster the Indian economy and help India climb up in the 'Ease of Doing business'.

The concerns of lawmakers to enact provisions of the Model Law along with the Code were legitimate and proved to be propitious for India. However, if the nation is now not catered to with a comprehensive framework on cross-border insolvency, it can hinder the growing economy. Further, one should understand that the Law on cross-border insolvency would not change or intrude into the substantive Law of India, instead, it will only facilitate India with global recognition and boost its cooperation with other sovereigns.

For India, implementation of legislation on cross-border insolvency is not a thing of great difficulty and merely one that can be achieved through judicial cooperation between insolvency tribunals of India and foreign states. As judicial cooperation in such cases will entail virtual joint hearings, this will require the Indian Insolvency and Bankruptcy judicial system to build capacity to understand and work along with its foreign counterparts.

Besides, there ought to be a consensus between the lawmakers that the legislation on cross-border insolvency should remain a light touch regulation because such multilateral instruments should not intend to impose a large number of obligations on the foreign counterpart, rather, the foreign representatives should only be subject to their legislation and the rules governing a particular case. Beyond that, the jurisprudence should develop with the case laws as there will be a danger in over-regulating such legislation in the initial stage because the flexibility that the Model Law provides needs to be kept intact in the legislation adopted by India. To this end, the adoption of the Model Law should not be the yardstick for India to measure its success, because the real victory for India would only be the successful implementation of insolvency laws in solving the cross-border issues without any substantive condemnation.

55 State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019, Order dated 20 June 2019.

56 Corporation Bank vs. Amtek Auto Ltd. and Others, CP (IB) No. 42/Chd/Hry/2017, Company Appeal (AT) (Insolvency) No. 219 of 2019.

57 State Bank of India vs Videocon Industries Ltd. and Others, CP (IB)-02 (MB)/2018, Order dated 6 June 2018.

EVALUATION OF MULTICULTURALISM AND GENDER EQUALITY IN FAMILY LAWS OF INDIA FROM UNIFORM CIVIL CODE PERSPECTIVE

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Abstract

In the last few years, the need and demand for UCC has amplified due to the increase in the politicization of religion. Also, the divide between communities has deepened which has posed a threat to the principle of Secularism embodied in the Indian Constitution. Both, religious minorities as well as majority, have expressed views against UCC because minorities think that the majority will exhaustively try to oppress the minorities and exert their influence by way of UCC and the majority thinks that the minorities will play the victim card and get away with their religious practices. Due to large number of personal laws, the curbing of evil practices has become very difficult. By the enactment of a uniform law, these evils will be easier to abolish and will promote gender equality. This paper deals with the question of how UCC can ensure gender justice in India. The paper scrutinizes the gender discrimination that exists in the family laws of India. Further, the relation between UCC and Gender justice in family laws of India has been established, followed by summarizing the judicial response received by UCC from the judiciary through various cases. Lastly, some suggestions, on the implementation of UCC to ensure gender justice without harming the sentiments or practices of religious communities, have also been incorporated in the paper.

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Introduction

Indian society is divided on basis of caste, creed, religion, customs and region and is heterogeneous in every aspect of life. Therefore, the family laws which govern them also vary. Religion and customs are the main basis on which laws are formed and followed by different communities. Personal laws in India are divided into different factions for Hindus, Muslims, Christians, Parsis, etc. on the basis of marriage, succession, divorce, maintenance, adoption, inheritance and guardianship. All family laws differ on various aspects but a common thread between all of them is that they remain patriarchal in nature and treat women unequal to men. Given that the Constitution of India embodies the Right to Equality and the strong protection that Supreme Court (SC) has provided to Gender Equality (For example, the judgement of Supreme Court in the Sabrimala Temple case) it is astounding how the government has not taken the necessary measures to change these laws to keep them in line with our constitutional and moral values.

Though the government has taken a big step towards gender equality and against women oppression by criminalising triple talaq but similar changes have to be brought for all family laws as most of the family laws still reflect patriarchal dominance of men which was there at the time when these laws were framed. The defence which is time and again given by the religious communities for following these women oppressive laws is their right to religious freedom guaranteed by Article 18 of the Constitution. Parliament also does not want to reform these laws as their majority votes come from vote bank politics done on religion. These laws have served neither purpose, they do not protect the rights of the religious communities nor do they protect the rights of women of these communities. These separate family laws have divided communities internally as well as externally because some practices which are considered unacceptable in one religion are practiced in another religion very often. This has led to tensions between the communities as both oppose the views/practices of each other.

The Constitution makers always had in mind the idea of a Uniform Civil Code seeing the diverse population of India that is the reason Article 44 of the Indian Constitution also provides for a Uniform Civil Code (UCC) to be provided by the State for its citizens which shall be applicable throughout the territory of India. Constitution came into existence in 1949 but still the State has failed to provide a UCC even after 71 years have passed. The UCC debate has been opposed by all religious communities as they all consider that a uniform code would interfere with their religious practices. The present-day government which, in an informal way, is related to RSS (a right-wing organisation) has further increased the

possibility of a UCC being drafted in a way that might be unjust for other communities. If a UCC is to be drafted for it to be successful, it should be done by taking into account all the voices raised equally.

Family Laws and Gender Discrimination

The women movement against gender discrimination can be traced back to a report which came out in 1974 that highlighted various discriminatory practices in India against women. The title of the report was "Towards Equality" and was authored by Vina Mazumdar and Lotika Sarkar, member of the 'Committee on the Status of Women in India' (1974-75). After the release of this report, all the issues of gender inequality came into the limelight. The government also started to bring in laws against such discriminatory practices. The report mainly criticized the British policy on personal laws brought in and termed them women oppressive.

The main objective of these laws was to separate different communities on different grounds and prevent the feeling of unity among them. Britishers did not want to intervene in the personal laws of religious communities as they were not very well versed with these laws and did not want to have any sympathy towards women. This policy of non-intervention in the family law resulted in stagnation and lead to the outcome that "*the two systems could neither absorb nor adjust to socio-economic changes. Social tensions inevitably arise in situations when the law does not answer the needs arising from major social change*".[1]

In many religious practices, women are not considered equal to men and when one goes through personal laws of any religion it is certainly clear that these are laws are gender discriminate. Some examples of gender discriminate personal laws are:

Muslim Law

Women in Islam have always been given equal status to that of men as far as the Holy Book of Quran is considered. However, Muslim wives have been given a secondary status and are considered inferior to men. The practice of Polygamy in Muslim law is the most brutal practice in any personal law. In Shia law, there is a concept of Muta marriage in which Muslim males can marry for a definite period of time to a female and there is no maximum limit on how many times a male can contract this type of marriage. Before Triple Talaq was criminalized by the Supreme Court, it was practiced widely in the Muslim community. It was a highly discriminatory practice that placed women inferior to men in

1 Towards Equality, Report of the committee on the status of women in India, (1974).

the matter of divorce. Divorce practices such as "*Talak-ul-Sunnat*" and "*Talak-ul-Biddat*" are discouraged in the Holy book of Muslims, as these practices give an upper hand to males and increase the chances of Muslim women being exploited.

Also, discriminatory practices can be seen in Muslim succession laws, wherein when two people of the opposite sex but of the same degree inherit the property of the deceased, the males are given three-fourth of the remaining property, whereas the females are only given one-fourth share of the remaining property. Muslims laws are more progressive than Hindu laws in terms of succession but discrimination still exists. As far as maintenance under Muslim personal law is concerned, it is only to be paid for the *Iddat* period and not beyond that but it can be claimed by the wife beyond the *Iddat* period under section 125 of the Code of Criminal Procedure.

In the famous case of *Mohd. Ahmed Khan vs. Shah Bano Begum*[2] , the Supreme Court held that the Uniform Criminal Code in India is also applicable to Muslims. As expected, the then-congress government overruled the judgement by passing the Muslim Women (Protection of Rights on Divorce) Act, 1986 due to the fear of losing Muslim votes. After the passing of this act, Muslim maintenance was no longer to be governed by CRPC and no maintenance was to be paid by the husband after the *Iddat* period.

Hindu Law

The law for Hindus was the same as it was for Muslims with regard to marriage before the Hindu law was codified in 1955. Polygamy was also allowed in Hindus before the codification of the laws. In Hindu Undivided Family (HUF) women were not coparceners and were only members of the family, except in a few states like Karnataka, Maharashtra, Tamil Nadu and Andhra Pradesh where an state amendment was brought to change this practice. With regard to such a practice, women were not given a share in the coparcenary property and were considered a liability on the family.

Women were also not allowed to be a Karta (head of the family in HUF) and only males could be the head of the family. Similarly, when the partition of property is done in an HUF, despite females being legal heirs, they have no right in the partitioned property. This position of law have changed after an amendment in the Hindu Succession Act, 1956. After the 2005 amendment, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son, and she will have a share in the property, at the time of partition, and can be a Karta if she is the eldest in the family.

2 Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1945 SC 1985.

In general Hindu law also, females do not hold any property apart from the "Stridhana". However, this rule has been changed by the Women's Right to Property Act, 1937 which gives women the right to hold property after the death of their partner. This legislation was introduced by the British after the abolition of *Sati pratha* as the number of widows increased. The Hindu Minority and Guardianship Act, 1956 states that a woman cannot be a guardian during the lifetime of her husband and the Hindu Adoption and Maintenance Act, 1956 does not give a woman the right to adopt children. Unlike Muslim law, the Hindu law is codified but still gender discrimination can be seen in these laws even today.

Several laws which discriminate between men and women have been challenged in the courts from time-to-time arguing that Article 14 of the Constitution makes discrimination on any ground invalid. In *Mary Roy vs. State of Kerala,* the Supreme Court held that the Indian Succession Act, 1925 superseded the Travancore Christian Succession Act, 1916 without touching upon the constitutionality of the Travancore act.[3]

Gender Justice and Uniform Civil Code

There already exists a Uniform Criminal Code in India by which each and every person belonging to any caste and creed is governed. A Uniform Civil Code will also promote uniformity and unity in the nation, which will directly help India to become a full-fledged secular society as our Constitution makers had dreamt of. This code will also be impartial for all members of the society, belonging to different social statuses. Presently, all personal laws remain communal in nature and only extend to the people following those religions. They are not civil in nature and some of them are even not codified, for example a number of Muslim laws. These personal laws which are not codified are not bound by the Constitution as they are not passed by the Parliament.

The adoption of a UCC will ensure that such practices are abolished as they will be codified and no rights given by the Constitution shall be violated by the code. Although, there are many reasons for which a UCC is needed, but the most important of all is that it will ensure gender justice. Also, the people who have opposed UCC for various reason, to the contrary, have agreed that it will be very useful in achieving equality. The opponents of UCC claim that their respective personal laws are already very liberal and progressive. They argue that their laws are already gender neutral and ensure equality. The reality is quite different, there are gender discriminatory practices in all religions and therefore, UCC is necessary. The Parliament is trying to codify all personal laws to bring them under

3 Mary Roy v. State of Kerala, AIR 1986 SC 1011.

the Constitution, but due to the deep roots of these personal laws in the Indian Civilization, it will not be easy. The UCC debate has been opposed by all religious communities because they consider that a uniform code would interfere with their religious practices

In a developing world, a country like India which is the largest democracy in the world cannot let such discriminatory practices be followed. Equality, in all views, is a very important principle on which a nation is judged. Gender justice has been dealt by our Constitution in two parts: Article 39 which is the part of the Directive Principles of State Policy gives direction to the state to direct its policies to ensure gender equality and Article 14 which is part of Fundamental Rights gives the Right to Equality to all people living in India. Also, Article 44 which directs the state to provide UCC to all its citizen is a step towards ensuring gender justice. Laws that do not discriminate on the basis of gender may exist as they are even after the implementation of UCC, but laws that discriminate on the basis of gender have to be repealed. Politics, proceeded in the name of religion, will also come to an end when all the communities will be governed by a set of uniform laws. Today, the government has started many schemes to encourage women empowerment, but still these religious practices have become a major hindrance in achieving that goal.

Uniform Civil Code and Judicial Response

Time and again judiciary has played a very important role in reminding the government of its duty to provide a UCC to its citizens through several judgements. Recently, the Supreme Court asked the Central government about its plan to bring a UCC because of the absence of uniformity in laws and which led to "total confusion" in marriage, succession, divorce, inheritance laws of different religious communities.[4] The Supreme Court also highlighted the failure of the State to provide a UCC to its citizens of , which our Constitution makers had dreamt of.

The apex court praised the state of Goa for implementing UCC across the state and also protecting the rights of religious communities.[5] The apex court in the case of *Mohd. Ahmed Khan vs. Shah Bano Begum*[6] had highlighted the importance of UCC and by resorting to

4 Correspondent, *SC declines to direct Parliament to form Uniform Civil Code,* India Today (Dec. 7, 2015), https://www.indiatoday.in/who-is-what-is/story/what-is-uniform-civil-code-why-is-it-in-news-275056-2015-12-07.

5 Krishnadas Rajagopal, *Government has failed to bring in Uniform Civil Code, says Supreme Court,* The Hindu (Sept. 14, 2019), https://www.thehindu.com/news/national/government-has-failed-to-bring-in-uniform-civil-code-says-supreme-court/article29412592.ece.

6 Mohd. Ahmed Khan, *supra* note 2.

Section 125 of CrPC awarded maintenance to Shah Bano Begum. In this case, by resorting to Section 25 of CrPC, the court had clearly indicated the criminal law is applicable to all equally and is uniform, unlike civil law which differs from religion to religion. The Supreme Court, in the same case, held that it was the responsibility of the state to bring a UCC and not of the people or judiciary as only the state has the legislative competence to do so. The court observed that if a UCC is not implemented then the court has to do justice on a case-to-case basis, due to a lacuna in a legislation, injustice cannot be allowed to happen. Although, the court also observed that a uniform code for all the communities is a difficult task yet it is necessary for giving a better meaning to the constitution.

In yet another case of *Ms. Jordan Deigndeh vs. S.S. Chopra,*[7] Justice D.Chinnappa Reddy highlighted the urgent need of UCC and referred the judgement giving in Shah Bano Begum's case. In this case, the court observed that the non-implementation of UCC has led to problems as was seen in the present case. In the landmark judgement of *Sarla Mudgal vs. Union of India*[8] wherein a Hindu male converted to Islam to contract a second marriage, it was held by a two-judge bench of the Supreme Court that such marriage would be considered bigamous and void, and would attract punishment under section 494 of the Indian Penal Code.

The Supreme Court observed that if there was a UCC then such cases these could have been avoided. Furthermore, the court directed the central government to file an affidavit stating all the steps taken towards implementation of UCC. This direction was later treated as *obiter dicta* by the Supreme Court and in *Lily Thomas vs. Union of India and Others*[9] Justice Saghir Ahmad further clarified that no direction was issued to the Central government to formulate a UCC in the Sarla Mudgal Case, for this he took the support of the *Ahmedabad Women Action Group and Others vs. Union of India*[10] judgement. It was further advised by the court that if UCC is not brought, at least the Law Commission or the National Commission for Minorities can help communities develop these laws and then codify them. In 2003, a three-judge bench of the SC in *John Vallamattom and Anr. vs. Union of India*[11] delivered a judgement which was highlighted by media as a call by SC for UCC.[12] In this case, the Supreme Court dealt with the constitutionality of section 118 of

7 Ms. Jordan Deigndeh v. S.S. Chopra, AIR 1985 SC 935.

8 Sarla Mudgal v. Union of India, (1995) SCC 3.

9 Lily Thomas v. Union of India and Others, AIR 2000 SC 1650.

10 Ahmedabad Women Action Group and Others vs. Union of India, (1997) SCC 3.

11 John Vallamattom and Anr. Vs. Union of India, AIR 2003 SC 2902.

12 Vir Sanghvi, *Towards a Uniform Civil Code*, Vir Sanghvi (Jun. 02, 2014), https://virsanghvi.com/Article-Details.aspx?key=1066

the Indian Succession Act.

The main allegation of the petitioner was that this section discriminated between Christians and Non-Christians. The Supreme Court held that the section in consideration was unconstitutional. The Supreme Court has also stressed the need for codification in its various judgements. In *Smt. Seema vs. Ashwant Kumar*[13] the apex court dealt with compulsory registration of marriages in detail. In personal laws, procedural laws are also important along with substantial laws. If any procedure is not carried out with due diligence, then the weak party will suffer the most. The Supreme Court in this case issued directions to the Central and all the State governments to make registration of marriage compulsory. This case was decided by a two-judge bench of the Supreme Court which indirectly called for a uniform procedural law on marriages. When the position on registration of marriages was evaluated by the Supreme Court, the position was surprising. At that time, only four states provided for compulsory registration of marriages viz. Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh and only five states viz. Bihar, Orissa, Assam, Meghalaya, and West Bengal had provisions providing voluntary registration to some religious communities.

Now, under the Special Marriage Act, 1954; Indian Christian Marriage Act, 1872; Parsi Marriage and Divorce Act, 1936; and Hindu Marriage Act, 1955 registration of marriage is compulsory. However, a marriage can be registered either before or after the completion of the customary practices i.e., at the discretion of the parties getting married.

Suggestions

The suggestions mentioned below are to promote equality between people and abolish gender discriminatory practices. The government has to proceed step by step in order to ensure UCC is implemented in the right way. The following are the steps in which government can proceed:

The government has to reform all religious personal laws by involving people from all religions. Thus, the committee formed has to have gender-neutral participation. Different committees should be formed for different religious communities as all religions have different personal laws. All members should be appointed by means of elections which should take place at the national level and the members appointed should have the consent of the Parliament. A special majority in the committee would be required to introduce reform

13 Smt. Seema v. Ashwant Kumar, AIR 2006 SC 1158.

in any law. All debates over the reformation of personal laws should take place inside the community between the people who don't have any propaganda attached to it. The self-acclaimed representatives of a particular religion should not interfere in these debates by fighting amongst themselves. The committees would be required to take suggestions from every stratum of people in their community. These suggestions would then be placed before the parliamentary committee which will check that they comply with the Constitutional values.

After step one is completed, when all the committees give their respective reports the drafting of UCC should be started. The main concern of the minority groups is that a Hindu-majority parliament will formulate a UCC which will mainly reflect Hindu customs and traditions but if the committees in step one is formed from all religious communities this concern will not arise as all minorities will be in authority. At this stage, a Drafting Committee should be formed with the same standards as were there for committees formed in step one. At this stage, Parliament's role comes into the picture where it will codify the law and at the same time ensure no injustice is done to any community but at the same time make minimum interference in the code drafted by the drafting committee.

Once the drafting of UCC is completed, the government should start awareness campaigns to aware women of their rights and how to exercise these rights. A permanent Commission for Women should be formed which will do this work and also update UCC from time to time if there are any loopholes found in it that perpetuate gender injustice. This commission should be formed with the same standards as were there for Drafting Committee in Step two. Apart from the above functions, the commission will also handle all issues related to Gender discrimination even if they are internal matters of a particular religious community.

> "*This plan for the implementation of a uniform civil code aims to allay the fears of minority groups through its process of including a wide spectrum of voices in the discussion. It further aims to challenge the patriarchal assumptions about women by making gender equality the substantive goal of the code. By doing so, the hope is that the resulting uniform civil code will be accepted by all religious communities and that the constitutional promise of gender equality will, at last, be given effect. Finally, the continued monitoring of gender and religious concerns by the Commission should advance reforms that are necessary for women to take advantage of their newly achieved equality.*"[14]

14 Shalina A. Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code,* 83 Indian Law Journal 695, 717 (2008).

Conclusion

The basic meaning of UCC is a code that covers all civil laws of the society. This code will unify all family laws of all religions under a single code and will be applicable to all citizens in an equitable and fair manner. In a developing world, a country like India which is the largest democracy in the world cannot let such discriminatory practices be followed. Equality in all senses is a very important principle on which a nation is judged. In India, women are worshipped as goddesses and play a very important role in nurturing the future generations. Mothers inculcate values in children, but if women don't get proper rights, education, self-respect and good social status then how will they nurture the future generations.

There is famous quote given by Mahatma Gandhi, "*If you educate a man, you educate an individual, if you educate a woman, you educate the whole family, rather society.*" The laws which currently form part of our family laws are outdated and a generation gap is clearly visible in them. These laws have to be amended to bring an end to the patriarchal nature of the social system which India is following. A very progressive development towards gender equality was the 2005 amendment which was brought to Hindu Succession Act, 1956. Various judgements as discussed above, clearly indicate that the judiciary is in favour of a UCC, but it cannot direct the state to formulate and implement the same, because Article 44 which states that the State shall provide UCC to its citizens is given under Part IV of the Constitution i.e., Directive Principles of State Policy, which are not binding on the government.

PROTEST: DEFENDING THE RIGHT TO PROTEST IN THE DIGITAL AGE

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Abstract

The right to protest has been a characteristic of the democratic experience, which becomes crucial in the full enjoyment and participation of the rights of the citizens and the duties of the State, the performance of which is owed to the people. In India, the particular historical context in which we evolved as a nation, is perhaps more noted in the flavor of the exercise of the right to protest in various forms and connotations. It is no secret that in this time and age, much of life's happenings have moved to the digital space, and protest too, has moved into the world of pixels. This brings with it several questions when it comes to the exercise of the right to protest in the digital age, and the standards therein. Most pertinently, the paper narrows down the use of the digital means to protest and the stifling of the same, traced through two notable recent events- that of the internet shutdowns in various parts of the country and the farmers protest with its related underpinnings in the digital space. Ultimately, the paper seeks to defend an increasingly endangered right to protest, particularly, in the digital space.

Introduction

The journey of a democracy to a healthy autocracy is often foreshadowed by incidents that reveal the stifling of the right to protest.[1] The voice of the people in a democracy, the voice of the true wielders of power, is expressed through the notes of protest and India, with its chequered history, has valued the right to protest even at the time when oppression reigned

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1 MOISÉS ARCE & ROBERTA RICE, *The Political Consequences of Protest,* in PROTEST AND DEMOCRACY, (University of Calgary 2019).

supreme.[2] From the glorified days of the freedom struggle, where the symbol of daily life, salt, was used as the hallmark of peaceful protest, to the pixelated times of today, where comedians are shackled down for cloaking the truth in humor – we have certainly come a long way in so far as the right to protest is concerned.[3] However, it is pertinent to assess the direction of this path, considering the rights of the individuals and the broader mandate of the interests of the state, especially in national security.

Understanding the right to protest usually begins with the Constitution of India which, being the supreme law of the land, guarantees, though indirectly, a right to protest. Though much has been said about the same, particularly in light of the judicial decisions thereon, the time is ripe for a revisit to the ideals of the Constitution and reassessing the contours of the right to protest. While the term 'protest' itself is absent from the text of the Constitution, it is believed that the right to protest is animated in the contours of Article 19 (1)(*a*) allowing for the freedom of speech and expression and Article 19(1)(*b*) which protects the freedom to assemble peaceably and without arms.[4] These are subject to the reasonable restrictions envisioned under the subsequent provisions and carve out situations encompassing the sovereignty and integrity of India, the security of the state, public order and so on.[5]

The ties it has to the Constitution along with the exigencies of modern times makes the right to protest all the more complex when we seek to translate the same onto the nuances and specific intricacies of the digital world. Incidents like the Arab Spring have shown the power of social media and other digital tools in organizing mass protests and translating it into the real world making it a sublime exercise in evaluating the pressing need to bring clarity into the digital realm and the right to protest.[6] It is also of concern the ways in which social media and such tools can be used to further anti-national elements and threaten the nation as a whole, making this a delicate question to consider.

Aided by judicial wisdom in protecting the right to protest and expanding its reach, the early stream of jurisprudence, particularly when it came to constitutional interpretation, indicated a healthy atmosphere for the voices of protest. However, we are now faced with a series of events that have shocked the collective conscience of the nation; which requires a

2 Dalip Singh, *Protest Movements in India,* 52 The Indian Journal of Political Science 448 (1991).

3 Mallika Soni, *'A Lump of Salt': Significance of Dandi March led by Mahatma Gandhi,* Hindustan Times, (Mar. 12, 2021), https://www.hindustantimes.com/india-news/a-lump-of-salt-significance-of-dandi-march-led-by-mahatma-gandhi-101615525901443.html.

4 India Const. art. 19, cl. 1(a) & art. 19, cl. 1(b).

5 *Id.,* Art. 19(2), Art. 19(3).

6 John G. Browning, *Democracy Unplugged: Social Media, Regime Changed, and Governmental Response in the Arab Spring*, 21 Mich. St. U. Coll. L. Intl L. REV. 63 (2013).

revisit to the right to protest and defending it, particularly in the digital age. It also becomes incumbent to traverse the judicial response to this issue and attempt to align it with the changing contours of the right to protest.

Revisiting Recent Events- The Right to Protest in the Digital Age

In the span of a few months, clouded over by a pandemic, there took place a series of incidents which when assessed from the point of view of the freedom of speech, right to assemble peacefully and in effect, the right to protest; represents an alarming picture. In tracing the events that transpired, including the internet shutdowns and the involvement of digital media in the farmer's protest, the right to protest and its changed appearance is sought to be assessed and hopefully, defended.

The Internet Muffled – Shutdowns and the New Normal

It is perhaps enough to say that India has been referred to as the 'internet shutdown capital of the world'.[7] In an excruciatingly short period of time, an unprecedented number of internet shutdowns were imposed in various parts of the country.[8] And one common thread runs through most of these instances – the shutdowns were ordered as a result of emerging protests or in anticipation of protests. Comprehending this requires a two-pronged approach – one wherein the digital space is seen as a volatile ground where hate and ignorance run amok and the other, where it is seen as a space for healthy dissent and to bring the voices of millions in the country to the fore, in a supreme boost to increase democratic participation. The reality may lie somewhere between these two considerations and more often than not, we have been witnessing to the devastating and truly unbelievable potential of the digital space. But does this warrant a presumptuous encroachment of the constitutionally guaranteed right to protest? In shutting down the internet, thereby cutting off access to communication tools and information channels, and stifling the right to protest, does this, in any way satisfy the tests laid down by the judiciary to assess the legality of such actions? A corollary arises here – what would be the clear and present danger, why should there be a question of proportionality, when there is no one to hear the voice of protest?

Perhaps the variance at which the events have happened is attributable to the way in

7 The Hindu, *Parliament proceedings - India is 'Internet shutdown' capital of world: Anand Sharma,* (Feb. 5, 2021), https://www.thehindu.com/news/national/india-is-internet-shutdown-capital-of-world-anand-sharma/article33761366.ece. *See also* BBC, *Why India Shuts Down The Internet More Than Any Other Democracy?,* (Dec.19, 2019), https://www.bbc.com/news/world-asia-india-50819905.

8 The Wire, *Over 100 Instances of Internet Shutdown in India in 2020, Says New Report,* (Mar. 4, 2021), https://thewire.in/tech/over-100-instances-of-internet-shutdown-in-india-in-2020-says-new-report.

which the digital space is viewed, as opposed to its real-time counterpart. The crucial consideration here is that much of the world's discussion is now happening online, in a shift that was accelerated by a pandemic. An interesting parallel can be drawn between the political discussions held in tea stalls in villages in a younger India, and the discussions that happen on social media platforms. The scale is perhaps incomparable, but the spirit of discussion remains. In drawing this out further, imagine a situation where an entire village perhaps is asked to stay within their homes and to not communicate with those around them, which may be in anticipation of several threats to the government. Such an action would be untenable in consideration of the fact that it violates multiple constitutional values and fundamental rights in one go. But why is it that, such an action is done on a large scale in the digital space, by way of internet shutdowns, first in Jammu and Kashmir[9] and later in Delhi[10] seem to be creeping in as the norm?

Digital activism has become a phrase thrown around with both caution and abandon with the sudden resurgence of youth-led and technology driven activism and participation leading center stage in what was once a dry land of silent suffering.[11] The Indian experience seems to reveal a distinction and differential treatment to the right to protest in the digital space and otherwise. This goes in contrast to the principle espoused by the United Nations Human Rights Council which requires that the rights of the people available to them offline have to be protected online as well.[12]

Perhaps we may look back at the time when the internet was down when the service provider was experiencing technical failures or glitches. Today, it takes one order from the government, under rules appended to archaic legislation, to cut off communication with the world, to limit and completely restrict access to what is equated to a voice in the digital world.[13] The political maneuvering behind the current events reflects a return to the earlier

9 Outlook India, *'Fundamental Right': All You Need To Know About Longest Internet Shutdown In Kashmir,* (Jan. 10, 2020), https://www.outlookindia.com/website/story/india-news-sc-says-internet-fundamental-right-all-you-need-to-know-about-kashmirs-longest-internet-shutdown/345478.

10 CNN, *India Cuts Internet Around New Delhi As Protesting Farmers Clash With Police*, (Feb. 3, 2021), https://edition.cnn.com/2021/02/01/asia/india-internet-cut-farmers-intl-hnk/index.html.

11 Digital Activism Decoded - The New Mechanics of Change, (Mary Joyce, ed., 2010).

12 United Nations Human Rights Council [UNHRC], Res. 38/l.10, *The Promotion, Protection And Enjoyment Of Human Rights On The Internet*, U.N. Doc. A/HRC/38/L.10/Rev.1 (July 4, 2018). *See also* UNHRC, Res. 24/5, *The Rights To Freedom Of Peaceful Assembly And Association*, U.N. Doc. A/HRC/RES/24/5 (October 8, 2013).

13 Indian Telegraph Act, 1885, Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017.

decades of free India's political history which marks a season for increasing protests.[14]

While recognizing the right to peaceful protest, the Supreme Court in *Amit Sahni v. Commissioner of Police & Others*[15] also took note of the intricacies and the changing contours of protest in the digital age. The Court, interestingly observes –

> *"…we live in the age of technology and the internet where social movements around the world have swiftly integrated digital connectivity into their toolkit; be it for organizing, publicity or effective communication. Technology, however, in a near paradoxical manner, works to both empower digitally fueled movements and at the same time, contributes to their apparent weaknesses. The ability to scale up quickly, for example, using digital infrastructure has empowered movements to embrace their often-leaderless aspirations and evade usual restrictions of censorship; however, the flip side to this is that social media channels are often fraught with danger and can lead to the creation of highly polarized environments, which often see parallel conversations running with no constructive outcome evident."*[16]

While the Court does recognise the impact digitalization has had on protests, the same is interpreted narrowly, perhaps owing to an optimal underestimation of the potential of digital tools, particularly, social media. Nevertheless, the recognition of the changing dynamics and utility of the familiars of the digital age will have immense consequences, at least in the jurisprudential development of the same.

It is interesting to note that in the period separated by a few months, we saw a judgement finding the right to internet as a fundamental right,[17] while the judiciary also delivered the judgement in *Anuradha Bhasin*[18] where the court recommended the setting up of a committee including the members of the government, to assess the merits of an internet shutdown that the very same government had ordered. This is reminiscent of Atlee's words – "democracy means government by discussion, but it is only effective if you can stop people talking."[19]

14 David H. Bayley, *Public Protests and the Political Process in India*, Pacific Affairs, (University Of Columbia) 1969, 10.

15 Amit Sahni v. Commissioner of Police & Others, AIR 2020 SC 4704.

16 *Id.,* ¶ 18.

17 Faheema Shirin R.K. v. State of Kerala, AIR 2020 Ker 35.

18 Anuradha Bhasin v. Union of India, AIR 2020 SC 1308.

19 Clement Richard Atlee, British Statesman and former Prime Minister, Speech at Oxford (June 14, 1957).

The Farmers' Protests – The Differential Right To Protest

From all that has been said about the farmers' protest in India, it is perhaps hard to categorise it as an isolated incident. Particularly viewed from the angle of the right to protest, it is evident that the protests were just an eruption of emotions by people who had been slowly leached of their rights. This gradual crescendo culminated in a series of events, which has been subject to intense debate and global scrutiny.[20] In spite of the burning issues that arise in the proposed laws themselves, the protest was especially characterized by an invasion into the digital space and subsequent crackdown on the same, which forms the area of focus in this paper.

Perhaps the most characteristic impact of the clash between individual's rights and the government came up in the recent toolkit issue, where materials expressing opinions on the farm laws were drawn up and allegedly circulated on WhatsApp groups and with environmental activists outside India. In an astonishing stamping exercise, the whole event was characterized as a 'global conspiracy' and aimed at promoting 'disaffection against India' and encouraged incitement of violence.[21] At the root of the issue lie ubiquitous tools of the digital age – a Google doc, hyperlinks, websites, WhatsApp groups, Zoom calls and electronic devices.

The issue here can be broken down into smaller parts of a whole. If the tools in question are taken into perspective, it can be seen that these are tools that are commonly used by everyone, ranging from kindergarten students to the upper echelons of the government and the power that such tools hold, in terms of reach and ease of communication cannot be ignored. Following the line of logic in the toolkit issue, there is essentially a dangerous precedent in terms of governmental action where anyone, anywhere, in possible harmless use of a document can be questioned, detained and labelled anti-government owing to the way it was perceived or the extent to which it was shared. In either of these situations and perhaps more permutations and combinations of such instances, there is one commonality. The individual herein is made to bid adieu to their constitutionally protected rights, for reasons that are vague, out of their control or those which they might not even be made aware of until they find themselves in a jail cell. Applied to a larger set, the right to protest is severely threatened, especially in the absence of proper procedural checkboxes to

20 Natasha Behl, *Can India's Protesting Farmers Restore its Democracy?,* (Dec. 8, 2020), https://www.washingtonpost.com/opinions/2020/12/07/can-indias-protesting-farmers-restore-its-democracy/. *See also* Al Jazeera, *Indian Farmers Brave Tear Gas as they Protest Aganst 'Black Laws',* (Nov. 26, 2020), https://www.aljazeera.com/news/2020/11/26/india-farmers-march-to-delhi-against-new-laws.

21 State v Disha A. Ravi, Bail App. No. 420 of 2021, MANU/OT/0008/2021, ¶ 3,4.

safeguard the individual's rights.

Turning back to the Constituent Assembly Debates, particularly where the discussion on the right to assemble peacefully and without arms was discussed, we find that the learned Jaipal Singh Munda, brought up the consideration that the term 'without arms' might be detrimental to certain communities which carried items like bows and arrows as a normal part of their life and which could be construed as exceeding the limits of the constitutional safeguard.[22] The same concern can be reinterpreted in the digital age where the 'arms' so mentioned may in fact be keyboards and websites and in common use by a majority of people.

We also find a labelling exercise where the voices raised against the farm laws were labelled as a 'larger conspiracy to perpetuate violence by secessionist forces and the protest against the farm laws was merely a facade to conceal the real sinister designs'.[23] Though the legal battle in this regard is far from over, the court finds that investigation authorities 'cannot be permitted to further restrict the liberty of a citizen on the basis of propitious anticipations.[24] Does the intention of the voice matter? In the Twitter Joke Trial a tweet meant as a joke, (which had violence against an airport mentioned therein) was seriously prosecuted which notably drives home the point that the intention of the person doesn't really matter.[25] Applied to the farm laws scenario, it may hold true as well, considering that there are larger state interests like security are claimed to be at stake. The question of intention and the blurring of the same ensures that the line between fun and serious is often not demarcated before action is taken.[26] Caricatures, cartoons[27] and jokes[28] have also come under scrutiny, and have been shown to be enough to stifle the freedom of speech, further highlighting these critical issues. Again, it would become pertinent to assess if the

22 Constituent Assembly Debates, December 2, 1948 *speech by* Jaipal Singh Munda, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02, ¶ 7.65.

23 State v Disha A. Ravi, Bail App. No. 420 of 2021, MANU/OT/0008/2021, ¶ 21.

24 *Ibid*. ¶ 27.

25 Paul Chambers v. Director of Public Prosecutions, [2012] EWHC 2157 (QB). See also Kelsey et. al., *Discipline And Resistance On Social Media: Discourse, Power And Context In The Paul Chambers 'Twitter Joke Trial',* http://orca.cf.ac.uk/70258/1/Kelsey%20and%20Bennett%20-%20Discipline%20and%20resistance%20on%20social%20media.pdf.

26 Sahana Udupa, *Nationalism in the Digital Age: Fun as a Metapractice of Extreme Speech,* 13 International Journal of Communication (2019).

27 Outlook India, *Contempt Proceedings Against Comic Illustrator Rachita Taneja For Criticising Supreme Court,* (Dec. 2, 2020), https://www.outlookindia.com/website/story/india-news-contempt-proceedings-against-comic-illustrator-rachika-taneja-for-criticising-supreme-court/365970.

28 BBC, *Munawar Faruqui: Bail For Jailed India Comic Who Did Not Crack A Joke,* (Feb. 5, 2021), https://www.bbc.com/news/world-asia-india-55945712.

situation could be diffused by reading in a requirement of intention in such cases. But in the digital space, this intention becomes harder to read, as millions of users interact with the content and might spur action in a myriad of ways, making it harder to assert the individual intention from the purported effects it has on the larger set.

In executing a sharp detour, we may consider the other side of the debate. India is, and has been, volatile in every sense of the term.[29] It becomes a duty of paramount importance to hold together the threads that bind this country together in light of the sheer diversity and conflicting interests that abound on its soil. The digital world, interpreted from this angle, brings in a fertile ground for the spread of misinformation, fake news and incitement to violence. Where tensions run high and a spark is all that is needed, the digital space is the perfect ground to allow hatred and violence to spread like wildfire. Revisiting the earlier judicial observation (that investigation authorities 'cannot be permitted to further restrict the liberty of a citizen on the basis of propitious anticipations') it can perhaps be argued that the said observation was not inclusive of the nature of the digital space and the implications thereof. If the entire issue was relooked at, purely from the angle of the digital age and its intricacies, then the whole debate comes to revolve around the potential threat that even the most seemingly harmless activities done in the digital world pose.

While these events have been raging on, there was also the much-debated matter of the suspension of a number of Twitter accounts.[30] While the instructions from the concerned ministry were to be considered in the probability of the threat to the sovereignty and integrity of India, it is the process in which it was done that was perhaps problematic. If we consider social media to be a platform for the exercise of one's right to freedom of speech and expression, then a blanket suspension without mechanisms like proper notice and hearing fumbles with this right. Twitter itself has highlighted its self-proclaimed free speech advocacy and the potential effect of the governmental requests, and in effect, it seems like a balance that was sought to be struck on the part of the platform which sought to substantiate its actions as in evolving a via media that seems to have quelled the flames somewhat.[31] But this leaves many crucial questions unanswered. For instance, Twitter claimed that

29 Bidyut Chakarabarty, Indian Politics and Society Since Independence, (Routledge 2008).

30 The New York Times, *Twitter Blocks Accounts in India as Modi Pressures Social Media,* (Feb. 10, 2021), https://www.nytimes.com/2021/02/10/technology/india-twitter.html. See also BBC, *The Indian Government's War With Twitter,* (Feb. 12, 2021), https://www.bbc.com/news/world-asia-india-56007451.

31 Twitter Safety, *Updates On Our Response To Blocking Orders From The Indian Government,* (Feb. 10, 2021),https://blog.twitter.com/en_in/topics/company/2020/twitters-response-indian-government.html.

the suspension was on the basis of a 'properly scoped request from an authorized entity.[32] This however, does not mitigate the procedural safeguards built into the protection of an individual's constitutionally protected right where the suspended account owners were not notified of the reasons for suspension or to defend themselves in any manner. In revisiting the *Maneka Gandhi* judgement,[33] it becomes pertinent to look at what has transpired and in balancing the purported criteria for imposing this restriction, the manner in which it was exercised, and the ends it sought to achieve.

With the constitutional values at stake, the judicial response in this regard has to be assessed. The right to protest in itself has been recognized within the constitutional framework by the courts in several precedents including that of *Ramlila Maidan Incident v. Home Secretary, Union of India and Others*[34] and found that there was a duty on the part of the state to aid in the right of protest of the citizens.[35] It is also too soon for the memories of the CAA Protests and the Delhi Riots to fade from our minds and there too, state action was heavily questioned. The role the digital space played in these instances also offers much insight into the developing contours of protests and the threats inherent therein, particularly when the questions involved are voices against the governmental policies and actions.

Similar is the case with the peculiar interpretation of protests by limiting it 'designated spaces' and curtailing 'indefiniteness'[36] which, interestingly enough becomes the hallmarks of the digital world where there seems to be no traceable beginning or end to dissent or protest and clearly, where there cannot be a designated space as such.

Conclusion

Digital tools have exhibited a great potential in bringing the masses closer to the democratic process and in providing 'remarkable opportunities' for increasing and encouraging public participation.[37] It is also argued from one side that the potential for digital tools to be employed in protests is severely hampered by the fact that they have to be specifically

32 The Guardian, *Twitter Suspends Hundreds Of Indian Accounts After Government Demand*, (Feb. 2, 2021), https://www.theguardian.com/world/2021/feb/02/twitter-suspends-hundreds-of-indian-accounts-after-government-demand.

33 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

34 Ramlila Maidan Incident v. Home Secretary, Union of India and Ors, (2012) 5 SCC 1, ¶ 245.

35 Himat Lal K. Shah v. Commissioner of Police, Ahmedabad, (1973) 1 SCC 227.

36 Arghya Sengupta, *The Supreme Court Judgment in Shaheen Bagh is Not Binding Law,* (Nov. 20, 2020), https://vidhilegalpolicy.in/blog/the-supreme-court-judgment-in-shaheen-bagh-is-not-binding-law/.

37 Barry R. Schaller, *The First Amendment in the Digital Age: Protecting Free Speech (and Other Values)*, 25 Sacred Heart University Review 1 (2009), ¶ 14.

honed as vehicles to carry protest, as in their normal form, they happen to be very diverse objects.[38]

As affirmed in *Anita Thakur and Ors. v. Government of Jammu & Kashmir* the courts have recognized that 'a distinguishing feature of any democracy is the space offered for legitimate dissent.'[39] It has also been laid down by the judiciary that the right to protest, '*is crucial in a democracy which rests on participation of an informed citizenry in governance. This right is also crucial since it strengthens representative democracy by enabling direct participation in public affairs where individuals and groups are able to express dissent and grievances, expose the flaws in governance and demand accountability from State authorities as well a powerful entity. This right is crucial in a vibrant democracy like India but more so in the Indian context to aid in the assertion of the rights of the marginalized and poorly represented minorities.'*[40]

Several moves made by the government including the Data Protection Bill[41] and the 2021 Intermediary Rules under the Information Technology Act[42] indicate a growing tendency to clamp down on the digital space and to restrain movement and freedom within the same, while also allowing much leeway for the government and its agencies.[43] While there are legitimate concerns that the government is trying to meet while laying down such measures, it is contended that the same cannot be in tune with the democratic principles that India aspires to hold up.[44] Though it is accepted that the digital age is murky at best, which evolves, mutates and transforms at a pace that legislations find hard to keep up with, the actions taken in this regard seem to be reflecting the stance of the rulers who wish to take the easy way out. After all, who can protest using digital tools, if access to the internet and telecommunication networks is, in itself, entirely cut off?

Democracy is a delicate balancing act. In a country like India, which is both volatile and vulnerable, the impetus would certainly fall on the government to stifle protest, particularly

38 Sandra González-Bailón & Ning Wang, *Networked Discontent: The Anatomy of Protest Campaigns in Social Media,* 44 Social Networks (2016), https://www.sciencedirect.com/science/article/pii/S0378873315000659?via%3Dihub.

39 Anita Thakur and Ors. v. Government of Jammu & Kashmir, (2016) 15 SCC 525, ¶ 12.

40 Mazdoor Kisan Shakti Sangathan v. Union of India, AIR 2018 SC 3476, ¶ 54.

41 The Personal Data Protection Bill, 2019, 373 of 2019.

42 Information Technology (Guidelines For Intermediaries And Digital Media Ethics Code) Rules, 2021.

43 Torsha Sarkar, *New Intermediary Guidelines: The Good and the Bad,* DTE, (Feb. 26, 2021), https://www.downtoearth.org.in/blog/governance/new-intermediary-guidelines-the-good-and-the-bad-75693/.

44 C. Raj Kumar*, Human Rights Implications Of National Security Laws In India: Combating Terrorism While Preserving Civil Liberties,* 33 Denver Journal of International Law and Policy 195 (2020).

in the digital space where things can quickly get out of hand. Here, it becomes vital to distinguish the ideal that democracy is not a balancing act between the government and the people. It is a balance between the interests of the people and the constitutional rights that are owed to them.

A brief glimpse at India's history would reveal that at any time when the constitutional rights were threatened, it was the judiciary that stepped in to protect the people of the Indian soil. While the judiciary has had a chaotic trajectory in recent times, it is hoped that a resurgence of judicial activism will step into the causes of the digital age, before it is too late. Adapting constitutional rights to the digital age is indeed an uphill task, particularly when a quandary of interests has to be balanced, as seen in the case of the right to protest. Nevertheless, a balance has to be struck and the characteristic prudence should perhaps make way for a healthier atmosphere for the voice of dissent. This requires upholding the constitution as supreme, and refusing to chip away at the rights proudly wielded by the people. As a nation that was wrought with the mantle of protest, it is important that the legacy be carried forward, regardless of the age we are in.

Is Gambling Safe Haven for Taxation? Understanding the Applicability of GST Laws in the Gambling Industry

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Abstract

Artificial Intelligence and haptics technology has transformed the way people used to play games in pre-technology times. Earlier, almost all games were played physically like cricket, football, tennis, but with the development of computer games, all these games have been transformed into a virtual form. Though such development is a laudable effort on the part of the developers, certain issues need to be settled before such games can be incorporated into the commercial market. One such concern is the effect of taxation in gambling games. The paper not only covers the taxation aspect of the online gambling games but also other newer forms of gambling like Fantasy League sports, Rummy, Poker and Horse Racing. The idea behind the analysis is to understand whether the current Goods and Service Tax (GST) regime is comprehensive enough to tax such games, considering when GST was introduced, such games were not quite popular. The paper seeks to understand the difference between betting and gambling and how tests like 'mere skill v/s chance' and 'substantial degree of skill' work in categorizing games as gambling activities. The paper also undertakes an analysis of different judicial pronouncements to understand the interpretation of sec 7 of the CGST Act. Lastly, the paper tries to answer the questions like whether Rummy and Poker can be classified as gambling? If the taxation aspect changes if Rummy is played online and offline? What happens if the game has both the element of skill and chance? And whether Horse Racing will also be considered as

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gambling activity under the test of 'mere skill v/s chance'? In the end, the paper concludes the discussion by giving certain recommendations to clear this murky position of taxation.

Introduction

The gambling industry has a long history in the Indian subcontinent. The idea of winning money from the occurrence of a contingent event in which neither party is personally vested has attracted people from different age groups. Since it provides a certain thrill and excitement, the scope of gambling has expanded from mere buying of lotteries tickets and horse racing to fantasy league, Teen Patti and other online betting games. With the emergence of new ways of gambling the issue of taxation has become complicated. The problem with the current Goods and Service Tax (GST) regime is that it was formulated at a time when these new manifestations of gambling were not popular in India. So, now when authorities try to levy the tax in these sorts of gambling games, a multitude of issue arises like whether these gambling activities are taxable under GST or whether earnings from fantasy league or online gambling are a skill-based vocation or pure luck-based games.

The important thing which needs to be understood is that the issue of taxation on gambling depends upon the test of 'mere chance or skill'. The test states that only those activities which give an outcome based on luck shall be taxable since it does not fall under the actionable claim, whereas those returns which are gained from the skill-based game are either exempted from taxation or placed in a lower bracket of tax slab. Thus, when GST was introduced in 2017, the same principle was applied in regards to gambling based income.[1] To determine whether the newer forms of taxation like fantasy league or Teen Patti will fall under the GST regime, it first needs to be determined whether it falls under the ambit of game of skill or chance and then only the issue of taxation can be solved. Before that even, it is imperative to analyse the nature of different types of luck-based before determining their tax liability.

Types of Luck Based Games

Before undertaking the discussion of different types of gambling, it is important to understand the ambit of gambling and how it is different from betting. The initial Finance Act, 1994,[2] defined gambling and betting under the same bracket as "*putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the*

1 GST COUNCIL, BRIEF HISTORY (2017).

2 The Finance Act, 1994, No.32, Acts of Parliament, 1994, §. 65B (15).

outcome of a game or a contest, whose result may be determined by chance or accident." Afterwards, the Law Commission of India in its 276th report stated that betting is the act of putting money or any other stake in the prediction of the outcome of the event.[3] If the event is successful the person wins the money. Such an event is always done against a second party, who places the bet against the prior party. One of the important considerations is that neither party should have any kind of control over the outcome of the event. The term 'betting' is generally considered synonymous with that of wagering.[4]

Whereas, on the other hand, gambling includes a game of chance or a game of skill or a combination of both. The same was stated in sec 9 of the UK Gambling Act.[5] Such activities would include poker, pool, fantasy league and games of similar nature. In the case of *Bimalendu De*,[6] the court held that gambling would include making a bet where the player has a chance to make a profit based on either their skill or luck. Such games not only include chance but also include some skill and are played to win a certain amount. The same was again reiterated in the case of *Public Prosecutor v Veraj Lal*,[7] where the court stated that gambling includes placing of a stake by the player in a game where the result is determined by the skill of the player, but in the case of betting the winning of the prize is solely dependent upon the happening or non-happening of an event which is based on chance. It is important to note that gambling comes under entry 34 of List II of Schedule VII, whereas lottery comes under entry 40 of List I of Schedule VII.[8] It means that the government have excluded lottery from the ambit of gambling and because of that the same shall not be discussed.

Therefore, it can be concluded that wagering, includes within it is ambit gambling, betting and gaming. Gambling entails the occurrence or non-occurrence of an unpredictable event. An important distinction between betting and gambling is that in gambling, the stakes or wager is placed on an event without any clue on the outcome; whereas, in betting the stakes are placed on an event, the outcome of which is based on the performance of the players which are influenced by their skills.[9]

3 Law Commission of India, Report No. 276: Legal Framework: Gambling And Sports Betting Including In Cricket in India (2018).

4 *Id*.

5 United Kingdom Gambling Act 2005, c. 19, § 9 (Eng.).

6 Bimalendu De v. Union of India, AIR 1995 SC 1770.

7 Public Prosecutor v. Veraj Lal Sheth, AIR 1915 Mad. 164.

8 India Const. sch. VII.

9 *Supra* note 4.

Coming back to the types of gambling which are as follows:[10]

Fantasy League

In this game participants create their own imaginary teams using the real players of different teams scheduled to play in different matches. The winning or losing of the game depends on the performance of the real players. For example, if a game is scheduled between Delhi Capital and Kings XI Punjab, then participants get to choose the players from the squad of the teams and once the match starts, the performance of each player in the match will affect whether the participant wins or loses.[11] In this sort of game, the winning is not solely based on luck but depends on the skill of the participant in identifying the ability of the player and carefully selecting one particular player over the other. So, it is thus not merely betting only, but gambling also since it is based on the skill of the participant.

Poker/Teen Patti

Teen Patti or Flush is a type of card poker in which the skill of the participant is required to understand when to make a 'call' or when to 'raise'.[12] The game is not only based on luck but much of it is based on the skill of the player, since the winner is determined by the person who remains in the game till the completion of the hand and has the best hand or highest hand.[13] So, it can be said that it is not betting but a skill-based gambling game. But interestingly, the Kerala High Court in the case of *Ramachandran*[14] held that playing rummy for the stakes shall amount to offence under the Kerala Gaming Act, 1960.

Horse Racing

Horse racing has always been placed in a separate category from all other gambling based games. In horse racing, the bet is placed on the horse, i.e., which horse will win or which horse will come in which position. In reality, the bet is placed not only on the horse but also on the jockey who rides the horse. The skill of the jockey determines the outcome of

10 *The Curious Case of the Indian Gaming Laws*, Nishith Desai Associates, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Curious_Case_of_the_Indian_Gaming_Laws.pdf. (last visited Jun.14, 2021).

11 Gaurav Laghate, *How Fantasy Sports Is Becoming A Multi-Billion Dollar Business Globally*, The Economic Times, (Mar. 23, 2018), https://economictimes.indiatimes.com/news/sports/how-fantasy-sports-is-becoming-a-multi-billion-dollar-business-globally/articleshow/63436060.cms?from=mdr.

12 Danish Ansari, *How to Play Teen Patti and What Are The Rules You Should Know?,* Republic World, (Apr. 8, 2020), https://www.republicworld.com/technology-news/gaming/how-to-play-teen-patti.html.

13 *Learn Teen Patti*, Teen Patti, https://teenpatti.octro.com/learn-teen-patti/index.html. (last visited on Jun. 13, 2021).

14 Ramachandran K v. The Circle Inspector of Police, 2019 (2) KLJ 26.

the race.[15] It is not merely a luck-based game but rather requires a highly skilled person to understand the track, the capability of each horse, the jockey and other nuances before placing the bet. It is because of these reasons, that it has always been kept separate from betting and gambling. Even the Supreme Court has determined in the case of *Laksmanan*[16] that betting on horse racing is a skill-based game since factors like fitness and the skills of the horse is assessed by the person before placing the bet.

Test of Game of Skill versus Game of Chance

The issue of tax on gambling activities is revolving around the test of 'game of skill' or 'mere chance'. It means that whether the placing of wager took place in a game the outcome of which will be determined by the skill of the participant or by pure luck or mere chance. It may also happen that, certain games are in combination of both skill and chance and in that scenario, courts have held that since there is an element of skill present, so, it will be classified as a game of skill rather than a game of chance. The principle has its foundation in the case of *Rex v Fortier*,[17] where the court held that "*a game of chance and a game of skill are distinguished on the characteristics of the dominating element that ultimately determines the result of the game*."

The court in the case of *Chamarbaugwala*,[18] have interpreted the phrase 'mere skill' to be such games which are mainly based on skill. The court further held that when the success of the competitions largely falls under the skill of the participant, such game will not fall under gambling. It further held that even if the game is based on a game of luck but if there is an element of skill, then such game will be known as a game of skill.

In the USA, apart from the test of mere chance and skill, another test that is applied called the "*Dominant Factor Test*" as laid down in the case of *Morrow v State*.[19] It states that whether a game is a game of skill or a game of chance is to be determined based on the fact that which one of the elements, skill or chance, is dominant in that particular game. The case laid down three qualifications that have to be satisfied to classify gambling activity as a game of skill: *firstly*, Participants must have been able to make an informed judgement based on their skill and sufficient data, *secondly*, the general class of the participants must

15 Cindy Pierson Dulay, *Horse Betting: Types and Terms*, Live About, https://www.liveabout.com/betting-types-and-terms-1880416 (last visited on Jun. 15, 2021).

16 K R Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153.

17 Rex v. Fortier, [1957] 13 QB 308 (K.B.).

18 State of Bombay v. RMD Chamarbaugwala, AIR 1957 SC 699.

19 Morrow v. State, 511 P. 2d 127, 129 (Alaska, 1973).

have the required skill and participants must have the opportunity to exercise the same and *lastly*, the result must be decided based on the skill of the participants.

For example, in the game of poker, both the element skill and chance are present. As per this test, it is to be determined which factor, i.e., skill or chance is dominant in that game. To classify poker as a game of skill, it has to be ensured that, *first*, all the participants have the required skill to play the game; *second*, all the participants have the opportunity to excise the skill; and *finally*, the winning in poker is decided based on the skill of the player (like bluffing, raising, folding- which requires honed skills) rather than mere chance. Based on that, the court in the case of *State v Gupton*,[20] held that an athletic game is not a game of chance but rather a game of certain honed skills.

From the above discussion it can be concluded that any such competitions where the winner is decided by draw of lots can be categorized as gambling, since the game does not require any skill to determine the outcome, and the games in which the dominant factor are the skill cannot be classified as gambling.

Applicability of Tax in Different Types of Gambling Games

As discussed, different types of gambling have a different effect on tax which is determined based on the test of mere chance v/s skill and dominant test theory. In this section effect of tax on fantasy sports, Teen Patti and horse racing shall be analysed in a detailed manner through judicial pronouncements. It is important to note that under sec 7(2) of the Central Goods and Service Tax (CGST) Act, items mentioned in schedule III will not come under the ambit of supply. Gambling/betting other than the actionable claim is mentioned in schedule III, which means that only actionable claim which falls under the ambit of gambling is considered as taxable supply and are charged 28% GST on the full amount. Whereas, if the item is not gambling under schedule III, then it means it is a skill-based games and the normal rate as given in the official notification 11/2017 will be charged.[21]

Fantasy Sports

As discussed in the prior section,[22] fantasy sports are a sort of gambling in which participants pick their own teams and the result of their contest depends on the player's

20 State v. Gupton, 30 N.C. 271.

21 CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS, NOTIFICATION NO. 11/2017-CENTRAL TAX (RATE) (2017).

22 Section I.I of this paper.

actual performance in the field. For example, if there is an IPL match between KKR and MI, then participants in a fantasy league would pick their squad from the team list of players. And then the winner of the fantasy league would be determined by the player's actual performance in the field. Thus, it has been contested for quite some time now, whether fantasy league can be taxed under GST provision or not. In other words, does fantasy league falls under the ambit of gambling.

There have been two High Court cases in this regard and both have placed the same ruling that fantasy league is not gambling as it requires a good amount of skill. The first case is by the High Court of Punjab and Haryana,[23] where the facts were that the plaintiff was a registered player in the platform of Dream 11 which hosts fantasy league tournaments. In the course of one cricket match between Ireland and Afghanistan, the plaintiff placed a bet of Rs 24,000 which he lost. Thereafter, he again participated in a football tournament and placed a bet of Rs. 26,000 and he lost that also. So, in the end, the plaintiff lost Rs. 50,000 in total. Afterwards, he made an application stating that he was a victim of illegal gambling and alleged that it was not a skill-based game but rather a game of mere chance.

Court after going through the facts and relying on the position of the *Lakshmanan case*[24] held that competition in which success depends on the skill of the participants were not to be considered as gambling even if there is an element of chance or luck is present, provided that, the predominant requirement of the game was skill. So, it can be seen that the court has used both the test of chance versus skill and the test of dominant factor. The court further held that playing fantasy league requires the same level of skill, judgement and discretion as in any other skill-based games. Participants have to use their judgement to assess the relative worth of their squad against all other available players. So, it can be deduced that there is an element of skill and it predominantly influence the outcome of Dream 11 fantasy games. Hence, it was held that the element of skill pre-dominated the outcome of the fantasy game and that they were games of 'mere skill' and could not amount to gambling. The order was challenged in the Supreme Court which was dismissed and as of now, this remains the current position of fantasy sports.[25]

Another case that was recently decided by the Bombay High Court,[26] also dealt with the issue of fantasy league sports. In this case, the facts were that a PIL was filed against

23 Shri Varun Gumber v. UT of Chandigarh, CWP No 7559/2017.

24 K R Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153.

25 *India: Fantasy Sports Games As 'Games of Skill'*, Ss Rana & Co., (Sept. 6, 2018), https://www.lexology.com/library/detail.aspx?g=4c8f352b-7eb1-49b2-b081-849b6d560b94.

26 Gurdeep Singh Sachar v. Union of India, (2019) 75 GST 258 (Bom).

Dream 11 stating that Dream 11 was carrying illegal operations of gambling and wagering under the guise of online fantasy sports gaming and it violated sec 7 of the CGST Act[27] read with 31A of the CGST Rule, 2018.[28]

The petitioner contended that section 7 of the CGST Act provided that activities mentioned in schedule III would not be considered as a supply of goods and services and would therefore be exempted from the levy of GST. In entry (f) of Schedule III, it is mentioned that actionable claims other than betting and gambling were to be charged GST. Furthermore, as per rule 31A (3) of the CGST Rules, 2018, it states that the value of the actionable claim in the form of gambling were to be charged 100% of the face value of the bet. In reading both the provision of Act and Rule together, it would mean that gambling is not excluded from the ambit of GST and that GST shall be charged at the rate of 100% on the face value of the bet made by the participant. Based on this interpretation the petitioner alleged that the entire amount paid by the player would be the basis of calculation for GST, whereas, the rate of 28% is currently being charged for gambling activities.

The defendant on the other hand took the precedent of the *Varun Gumber* case[29] and stated that participants do not bet on the outcome of the match, but rather participants play the role of the selectors and based on the performance of the player the winner of the contest is decided. Thus, it was rather a game of skill than a game of chance. It was important for the defendant to establish it as a game of skill or else they would have to pay 28% GST on the entire amount. However, if it was proved that it was a game of skill, then it would have been charged like any other business establishment.

Court after analysing the arguments of both sides and relying on the *Laksmanan* case[30] held that games played on Dream 11 were game of skill and not chance. It further ruled that the result of any gambling is determined by mere chance and in that regard, if any money is placed then it would be qualified as gambling. Since this is not the case with Dream 11, so it is a game of skill.

The court also ruled against the petitioner on the issue of GST evasion. The court ruled that since it was not a game of chance the application of sec 7 of CGST Act and clause 31A of CGST Rule would not have any application. Those would only come into the application when Dream 11 would have been categorized as gambling which would have happened if it

27 Central Goods and Service Act, 2017, No. 12, Acts of Parliament, 2017, § 7.

28 Central Goods and Service Rules 2018, Rule 31A.

29 Shri Varun Gumber v. UT of Chandigarh, CWP No 7559/2017.

30 K R Lakshmanan v. State of Tamil Nadu, AIR 1996 SC 1153.

was regarded as a game of chance. But, since this was not the case, the court held there was no violation of the GST provisions. Furthermore, the court also held that the amount pooled by the players in the escrow account is an 'actionable claim' as the same is to be distributed amongst the winning members as per the outcome of the game. Now, since the amount so collected falls under the purview of 'actionable claims' it would mean they are exempted from the levy of GST under sec 7 of the Act, as the provision states that "*actionable claim other than gambling…*" which indicated actionable claim is excluded. Since Dream 11's platform is not like betting or gambling, the High Court ruled that money pooled by the players cannot be subject to GST. The court lastly, held that Dream 11 is liable to pay GST to the extent there is a supply of goods or service from the platform at the rate of 18%.[31]

The question was again raised recently in the case of *Chandresh Sankhla*[32] in the Rajasthan High Court in 2020 on the question whether fantasy sports are gambling games. The High Court relied on the judgment of the P&H High Court and Bombay High Court and held the same view that fantasy sports are a game of skill. The court indicated the dismissal of pleas by the Supreme Court and held that matter regarding fantasy sports is settled for now and thereby dismissed the case.

Poker and Rummy

Gambling in poker games like Flush or Bridge are century-old games and have been continued for a long time and have become part of some traditions. Deducing whether Poker is a game of chance or skill is a difficult test because *prima facie* it seems like the luck factor is pre-dominant in such games. But a closer look and detailed analysis suggests that the player only needs mathematical knowledge to deduce the winning hand. The issue has become widespread and it came for judicial scrutiny in the case of *Karan Mutha v State of NCT*.[33] In this case, the petitioner's house was raided by the Delhi Police and he was found to be playing Poker. He was booked under the Delhi Gambling Act. The petitioner contended that Poker is a game of skill and that it is thus exempted from the application of the Delhi Gambling Act. But disappointingly, the petition was withdrawn out of the court and the petitioner sought to approach the trial court first before any decision can be made.

In another case of *Dominance Games Pvt Ltd v State of Gujarat,*[34] the petition was filed under Article 14,19, 21 and 226 of the Constitution for quashing of the order and contending

31 *Supra* note 11.

32 Chandresh Sankhla v. State of Rajasthan, DBC WP No 6653 of 2019.

33 Karan Mutha v. State of NCT, W.P., (Cri.) 3066/2018.

34 Dominance Games Pvt. Ltd. v. State of Gujarat, Special Civil Application No. 6903/2017.

that Poker is a game of skill and not a game of chance and should not be covered under the exemption of the Gujarat Prevention of Gambling Act, 1887. The court took the principle of 'substantial degree of skill' as decided in the case of *R.M.D Chamarbaugwala*,[35] and held that judging other players by their poker face cannot be the lone criteria in deciding a particular game is a game of skill. Such deceiving would fall under the act of bluffing, deceiving and duping of the players. To determine whether a game is a game of skill has to be judged whether a player can with a substantial degree of skill have any control over the game and can change the outcome of the game. Court also differentiated between Rummy and Poker and held that the former requires skill in holding and discarding the cards, whereas, the latter is just misguiding the players by keeping a poker face and thus cannot pass the test of the substantial degree of skill. It held that the history of Poker suggested that it is a game of luck. The Court held that if a game of skill is played with a stake, then such game will be considered as gambling. Thus, it means that Poker is not a game of skill altogether but Rummy is a game of skill. But if Rummy is played for stakes, then it would be characterised as gambling.

Thereafter, in the case of *Play Games 24x7 Pvt Ltd v Ramachandran K*[36] the facts were similar to that of the last case. The petitioner was playing Rummy for stakes and was arrested under the Kerala Gaming Act. Interestingly, the court in this case held that Rummy is a game of mere skill and even if it is played for stakes, it can never be treated as gambling. But the question as to whether playing Rummy for stakes would amount to gambling have to be decided on a case-to-case basis. Factors like, what is the manner in which the games are conducted and what are the stakes involved in the matter are required to be analysed. If the players are just playing Rummy without any side betting, then notification protects the parties involved in it. But, if it is played for any stakes, then the issue might be different which has to be dealt with on a case-to-case basis.

Till now, all the decisions of the different High Courts have been murky. Some have held both Poker and Rummy are gambling. Some have held Rummy as a game of skill and Poker as a game of chance. But the decisions of two High Courts and the Supreme Court (i.e., High Court of Kerala and the High Court of Gujarat) have held that Rummy is a game of skill but would get the character of gambling if played for stakes. Such varied opinions make the application of GST provision in Rummy difficult.

The matter was further unsettled by the Supreme Court in the case of *Mahalakshmi Cultural*

35 State of Bombay v. RMD Chamarbaugwala, AIR 1957 SC 699.

36 Play Games 24x7 Pvt Ltd v. Ramachandran K, W.P. (C.) No. 35535 of 2018.

Association,[37] where the petitioner was arrested for playing online Rummy for stakes by the Chennai Police. Thereafter, a writ petition was filed in the High Court which held that playing Rummy for stakes would amount to gambling. So, the appeal was filed in the Supreme Court. The court before deciding the case took reference to the *Satyanarayana* case[38] and held that the order/notification on which the petitioners were arrested did not deal with the online Rummy and thus arrest was not appropriate. The court further held that whether the current provision of gambling also includes online gambling was to be decided by the government.

It can be concluded by saying that the court differentiated between playing Rummy offline and online and that each would have different ramification or else the court would have included online Rummy under the ambit of offline Rummy. This makes the matter ambiguous, cause after analysing all the cases four scenarios arise. *Firstly*, if Poker is played with or without stakes, it would amount to gambling as it is predominantly a game of chance. *Secondly*, if Rummy is played without any stakes, then it would amount to be a game of skill. In that case, reading sec 7(2) of CGST Act with rule 31A of CGST rules would mean that it would fall under schedule III and will not be charged GST @ 28% on the full amount. *Thirdly*, if Rummy is played for stakes, then it would amount to be a game of skill played for money and would amount to gambling. In that case, it would fall under schedule III of sec 7 of the CGST Act. It essentially means that it would be charged 28% of the full amount the player has won. But most states have banned gambling. So, this provision would not be of much use. *Fourthly*, if Rummy is played online for stakes, it would be like online gambling. However, the position is unsettled in this regard. The court in the case of *Mahalakshmi* tried to differentiate between Rummy for stakes played online and offline and said it cannot read the former into the latter. This would mean that the above principles laid would apply to offline gambling only. In that case, it would be difficult to determine whether profit from online rummy would be taxable. The matter remains murky in this regard.

Horse Racing

Horse racing from the starting has been given a special privilege and has been differentiated from the other sorts of gambling as discussed above.[39] The issue as to whether horse racing is a game of skill or chance was settled in the case of *KR Lakshmanan v State of Tamil*

37 Mahalakshmi Cultural Association v. The Director, Inspector General of Police, Special Leave to Appeal (C.) No(s).15371/2012.

38 State of Andhra Pradesh v. Satyanarayana, AIR 1968 SC 825.

39 Section I.I of the paper.

Nadu.[40] In this case, the court held that betting on a horse is a game of skill rather than a game of chance since various factors have to be taken into account, like the form and fitness of the horse, the skill of the jockey and horse, inherent capacity of the horse and the distance of the race, before any betting decision can be made.

Only when the person can assess all the factors correctly, only then the person has the chance to win the prize money. The court held that "*horse-racing is a sport which primarily depends on the special ability acquired by training…Jockeys are experts in the art of riding. Between two equally fast horses, a better-trained jockey can touch the winning-post*." So, meaning thereby, that betting on horse racing is pre-dominantly a game of skill rather than a game of chance as the player can predict the outcome of the result based on one's skill, whereas, in lottery/gambling the outcome is based only on mere luck.

Now, the question comes as to how the prize earned from horse racing would be taxed since in sec 7(2) of the CGST Act, 2017 it is only mentioned that items mentioned in schedule III will not be considered as supply of goods and service. And in schedule III only actionable claims other than betting and gambling is mentioned. There was some sort of ambiguity in this regard which was clarified in the case of *In Re: Vijay Baburao Shirke*[41] where the applicant owned a number of horses that he used to send in different horse racing competitions. Upon winning the competition he used to get a certain amount of prize money. The issue was whether the amount so received by him would be charged under GST and if charged, what would be the rate of such charge. The Appellate Authority for Advance Ruling held that petitioner owned horses that participated in different competitions organized by different organizers. The organizers are the recipient of these horses and the activity of the petitioner enables the organizer to arrange an event that the public may attend. The horses supplied for these races are specialized ones. They are bred and reared through a defined procedure. Thus, the activity of the applicant is providing the services of specialized and trained horses for the race. Therefore, essentially the question arises whether the petitioner is covered under the scope of supply u/s 7 of the CGST Act and consequentially liable to pay GST.

The components of supply under section 7 of the CGST Act are that there should have been a supply of services, that supply has been made for consideration, and the supply has been made in course of business. Thus, viewed from the above position, it would mean that the petitioner supplies specialized horses to the organisers for racing purpose and if his horse

40 KR Lakshmanan v State of Tamil Nadu, AIR 1996 SC 1153.

41 In Re: Vijay Baburao Shirke, Order No. MAH/AAAR/RS-SK/23/2020-21.

wins the race the petitioner receives the prize which is the consideration for the service. Furthermore, the petitioner undertakes the activity of rearing, maintaining the special horse according to the requirement of each race. So, it can be stated as "*Business*" u/s 2(17) of the Act. Thus, it can be deduced that the petitioner has fulfilled all the components of supply u/s 7 of the Act.

Furthermore, under the CGST Act, the GST council releases the service exempted from the GST duty. It means the services not mentioned in such an exemption list would be taxed. So, under notification No. 17/2017[42] the taxable supply is mentioned with its rates. Since the petitioner is not covered by the exemption list, so he will be covered under the notification. As per that notification, the petitioner shall be charged 18% GST. Thus, in the final order, the authority held that prize money earned through horse racing would be covered under sec 7 of the GST Act, dealing with supply and thus GST at the rate of 18 % would be charged on the amount received.

Conclusion and Suggestions

After thoroughly analysing all the parts and variation of gambling it can be stated that the matter is settled with respect to only certain games. Still, a large number of issues are remaining which are yet to be resolved to have a concrete view of the subject matter. The matter is made more complicated since each state has its own rules because of which, in some states certain gambling games are allowed, but in some states it is banned. This creates a hindrance in enacting uniform gambling laws to settle the matter.

Apart from that, many issues are yet to be decided to bring finality on the matter such as whether the GST shall apply to online gaming; whether the test of pre-dominated skill and chance versus skill test will also be applied to online gaming/multi-player gaming or not; whether an online game of skill played for stakes would turn such games into gambling; whether the online game of Ludo will be regarded as game of skill or chance? There is no clarity regarding different computer/mobile games played for stakes.

The whole gambling games sector lacks taxation rules which makes it a haven for tax evasion. To tackle these aspects, it is suggested that laws of different foreign nations can be analysed to incorporate them into our GST regime. Like in the European Union, the whole gambling business is exempted from taxation.[43] On the other hand, in the United Kingdom

42 *Supra* note 25.

43 Gurudas Khurana, *Goods and Services Tax in Casinos: Understanding the Fiasco of Taxability*, 8 RGNUL Fin. Mer. L.R. 125, (2020).

there are separate laws that deal with the taxation of different types of gambling.[44] In New Zealand, Value Added Tax is charged on the amount actually received by the organiser rather than the whole amount.[45]

Furthermore, in the 276th Law Commission Report,[46] it was suggested that since online gambling are conducted over the telephone and internet, it should come under List I of Schedule VII of the Constitution. This would mean that the central government would have the right to make uniform law governing online gambling.

Apart from that, it is suggested that parliament should make a model law for gambling so that states would have the option to make laws similar to model laws and thus then it would have some sort of uniformity.

And lastly, it is suggested that the model of horse racing should be followed by every state. Every state has exempted horse racing since it is a skill-based game. So, skill-based games should be exempted by all the states so that certain uniformity can be achieved in this regard.

It should be kept in mind that it has only been four years since GST has been applied in the country. A large number of issues are still being analysed to determine their impact on GST and one of them is gambling. It can only be said that in due course of time, with various judicial pronouncements and legislative amendments the matter would gain some clarity.

44 *Supra* note 4.

45 *Supra* note 43.

46 *Supra* note 4.

APPLICABILITY OF THE POSH ACT TO THE VIRTUAL WORKPLACE: ASSESSING THE NEW NORMAL

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Abstract

With India still recouping from the severe blow of the second wave of the COVID-19 pandemic and preparing to enter the third wave, all organizations have been compelled to shift to the virtual mode and re-evaluate their plans and policies once again. One significant aspect that has come under scrutiny is the adequacy of the policies to counter sexual harassment of women employees at the workplace. Since remote working is here to stay for a while, it has become extremely critical for organizations to update these policies in line with the changes of the 'new normal'. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act" or "the Act") mandates every employer employing ten or more employees to constitute an 'internal complaints committee' to deal with complaints regarding sexual harassment against women at the workplace. While the POSH Act broadly defines the term 'workplace', it does not explicitly encompass the concept of a workplace without physical existence, i.e., a 'virtual workplace'. However, with work-from-home being declared as the new normal, uncertainty looms over the protection of women from sexual harassment in the virtual workplace. Thus, this paper seeks to understand whether the POSH Act can be applicable to sexual harassment in the virtual workplace as well. Further, the paper also delineates common instances of sexual harassment in the virtual workplace and suggests possible solutions to combat the same.

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Introduction

Sexual harassment of women at the workplace is a long-standing menace in India, which made workplaces hostile towards them. The issue is even more sensitive in case of an imbalance of power between the parties vis-à-vis the employer and the employee. As per the World Bank's Women, Business and Law Index of 2021, India currently ranks at 123 out of 190 countries, on the parameter of women's employment rights from an economic perspective.[1] The study measures, among other things, the regulatory response of the participating nations against sexual harassment of women at the workplace.

On the legislative front, pursuant to the Hon'ble Supreme Court of India's directions in its landmark judgment of *Vishakha v. State of Rajasthan*[2] ("Vishakha Guidelines"), India enacted the POSH Act to combat the menace. The Act was enacted as a compendious statute to provide every woman with a safe and secure environment at the workplace, free from sexual harassment.[3] This objective is achieved, not just by preventing but also providing quick redressal mechanisms to women aggrieved from sexual harassment at the workplace.

While the implementation of the Act has become stronger, the number of reported cases has been on a rise. In a study conducted by ComplyKaro Services, a government-empaneled advisory firm specializing in POSH training, 14 percent increase in reporting of sexual harassment complaints was seen in the BSE 100 companies[4] in FY2019 as compared to FY2018.[5] A similar trend was noticed in the Nifty-50 companies as well,[6] attributing the rise in complaints to increased compliance and awareness.

In 2020, with the onslaught of the COVID-19 pandemic, work-from-home ("WFH") has become the 'new normal'. Post the first wave of COVID-19 in March 2020, several

1 The World Bank Group Women, Business and Law Index, 2020, World Bank (Oct. 2021) https://openknowledge.worldbank.org/bitstream/handle/10986/35094/9781464816529.pdf?sequence=7&isAllowed.

2 AIR 1997 SC 3011.

3 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament [hereinafter POSH Act], Preamble.

4 Comply Karo, *Top 100 companies by market capitalization, listed on the Bombay Stock Exchange* Money Control (Aug. 24, 2021), https://www.moneycontrol.com/stocks/marketinfo/marketcap/bse/index.html.

5 Comply Karo, *Indian Companies Report 14% Increase in Sexual Harassment Cases in FY19*, Comply Karo (Sept. 26, 2020), https://complykaro.com/press-coverage/.

6 Kiran Kabtta Somvanshi, *Sexual Harassment Plaints at Nifty Companies Hit a Record*, The Economic Times, (Aug. 12, 2019), https://m-economictimes-com.cdn.ampproject.org/c/s/m.economictimes.com/markets/stocks/news/sexual-harassment-plaints-at-nifty-companies-hit-a-record/amp_articleshow/70640973.cms?fbclid=IwAR2zAEw9GQOgCwZDjNMn3z0ZMBbESH65c7ABB_ZeHAHxmFYMzqObF4PNe8g.

organizations including Google, Facebook[7] and TCS, had announced WFH on a long-term basis, with high hopes of staggered re-opening.[8] However, the second wave of COVID-19, along with the apprehended possibility of a potential third wave has diminished any chances of the physical reopening of workplaces, at least till universal vaccination of masses is achieved.

In light of growing prevalence of WFH and hybrid workplaces,[9] protection of women from sexual harassment at the virtual workplace has become a major concern for employers. This is evident in light of the increased number of reported cases of workplace sexual harassment during the last year.[10] Since the beginning of the pandemic in March 2020, the National Commission for Women in India has reported an increase of over five times in cases of online sexual harassment of women at the workplace.[11] However, a 2.6 percent dip in the sexual harassment complaints has been noted in the Nifty 50 in FY 2020 from FY2019,[12] according to the data from 44 companies.[13] The decline can be attributed to lack of awareness, poor compliance and ineffective redressal mechanisms within these companies.

7 Shelly Singh, *Companies see work-from-home as a viable long-term option if regulatory issues can be addressed*, The Economic Times (Apr. 05, 2020), https://economictimes.indiatimes.com/news/company/corporate-trends/companies-see-work-from-home-as-a-viable-long-term-option-if-regulatory-issues-can-be-addressed/articleshow/74985839.cms?from=mdr.

8 Sonal Khetarpal, *Post-COVID, 75% of 4.5 lakh TCS employees to permanently work from home by '25; from 20%*, Business Today (Apr. 30, 2020), https://www.businesstoday.in/current/corporate/post-coronavirus-75-percent-of-3-5-lakh-tcs-employees-permanently-work-from-home-up-from-20-percent/story/401981.html.

9 Brain Kropp & Joe Coyle, *How to Talk to Employees About Reopening*, Harvard Business Review (May. 27, 2021), https://hbr.org/2021/05/how-to-talk-to-employees-about-reopening.

10 Namrata Singh, *Mumbai: Sexual Harassment Goes Online, Complaints Pour In*, Times Of India, (May. 31, 2020), https://timesofindia.indiatimes.com/city/mumbai/sexual-harassment-goes-online-plaints-pour-in/articleshow/76114455.cms.

11 Express News Service, *After COVID-19, cases of online sexual harassment spiked by 5 times*, The Indian Express (Jun. 15, 2021), https://indianexpress.com/article/cities/ahmedabad/after-covid-cases-of-online-harassment-spiked-by-5-times-7137386/. (The following observation was made by Rekha Sharma, Chairman of the National Commission for Women at a digital dialogue, "*Addressing Sexual and Gender-based Violence in the Post COVID World*", organised by Gujarat National Law University (GNLU) in 2020. The statistics can be accessed at http://ncwapps.nic.in/frmReportNature.aspx?Year=2020).

12 Nasrin Sultana, *Sexual Harassment cases sees a marginal decline in India's largest companies*, Live-mint, (Sep. 6, 2020), https://www.livemint.com/companies/news/sexual-harassment-cases-see-a-marginal-decline-in-india-s-largest-companies-11599384167896.html.

13 The Companies (Accounts) Amendment Rules, 2018 No. 105, Rules of Central Government. (It mandates companies to disclose compliance with provisions of the POSH Act, including information with respect to the number of POSH complaints filed, disposed-off and pending in the particular financial year. The said disclosure is to form a part of the Companies' Annual Report to be submitted by the Board of Directors under Section 134 of the Companies Act, 2013).

In order to understand applicability of the POSH Act to the virtual workplace, the author has divided the research paper into five parts. In Part I, the author provides an overview of the enactment of the POSH Act and the objective behind this legislation; Part II discusses the concept of 'workplace' and 'extended workplace', as defined in the POSH Act; Part III discusses the applicability of the POSH Act to a virtual workplace; Part IV provides suggestions to counter sexual harassment at the virtual workplace, and finally, Part V concludes the analysis envisioning the way forward.

Understanding the Legislative Framework of the POSH Act

The Act is the first statute introduced for combatting sexual harassment against women at the workplace. Prior to 2013, due to the absence of such a standalone statue, other legislations were relied upon for seeking remedy against sexual harassment within the confines of the workplace. However, the legislations were inadequate in their applicability and extent of protection. They are, namely, The Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act")[14]; The Indian Penal Code, 1860[15] ("Code"); and Schedule V of the Industrial Disputes Act, 1947 (Unfair Labour Practices)[16].

The Standing Orders Act is limited in its scope as it is applicable only to industrial establishments that employ at least hundred workmen.[17] It is pertinent to note, that the scope of both 'workmen'[18] and 'industrial establishments'[19] as used in the Standing Orders Act, is much narrower than the scope of 'aggrieved women'[20] and 'workplace',[21] as used in the POSH Act. However, the Standing Orders Act protects both male and female workmen from sexual harassment.

The Code on the other hand, contains numerous provisions protecting women from a wide array of offences. However, there is no provision that specifically addresses offences committed at the workplace. Redressal mechanism under the Code, requires criminal

14 The Industrial Employment (Standing Orders) Act, 1946, No. 20, Acts of Parliament.

15 The Indian Penal Code, 1860, No. 45, Acts of Parliament.

16 Industrial Disputes Act, 1947, No. 14, Acts of Parliament.

17 (State amendments made by Maharashtra and Karnataka by reducing the limit to establishments employing 50 or more workmen).

18 Industrial Disputes Act,1947, *supra* note 16, § 2(s).

19 Standing Orders Act, 1946, *supra* note 14 § 2(e).

20 POSH Act, *supra* note 3, § 2(a). (The definition of 'aggrieved woman' under Section 2(a) of the POSH Act covers all women, including a student, customer or intern, irrespective of the status of employment).

21 POSH Act, *supra* note 3, § 2(o). (The definition of 'workplace' under Section 2(o) of the POSH Act covers industrial establishments as well).

prosecution to be initiated in an appropriate court of law, which includes section 354A which deals with sexual harassment by a man and punishment for the same; section 354B which deals with assault or use of criminal force to woman with intent to disrobe; section 354C that deals with voyeurism; section 354D that deals with stalking and section 509 that deals with insulting the modesty of a woman.

Other legislations such as the Central Civil Service Rules 1965, Protection of Human Rights Act 1993, SEBI (Employees Service) Regulations 2001, Gender Sensitization & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013 are extremely specific and limited in their application. Thus, the existing laws had failed to provide sufficient legal safeguards to protect women from instances of sexual harassment at the workplace. The POSH Act filled this lacuna in the existing statutes by not only protecting women from sexual harassment at the workplace, but also ensuring a convenient and approachable grievance and redressal mechanism, available within the premises of the workplace itself. The Act is in line with India's international law obligations as an authorized signatory of the Convention on Elimination of All Forms of Discrimination Against Women ("CEDAW")[22] along with principles recognized at the International Labour Organization's ("ILO") Seminar, 1993[23] and the Beijing Declaration and Platform for Action, 1995.[24]

Understanding the Ambit of Workplace under the POSH Act

Definition of 'Workplace' under the POSH Act

Section 3 of the Act states that "*no woman shall be subjected to sexual harassment at any workplace*". At this stage, it is imperative to understand what comprises a workplace. The Vishakha Guidelines neither prescribed any definition of 'workplace' nor did it lay down any factors to determine whether a place visited by the aggrieved woman would be covered under 'workplace' or not. This shortcoming made it difficult to determine the scope of the workplace under the Vishakha Guidelines. In the absence of any prescribed definition, it would not have been wrong to restrict the meaning of 'workplace' to the typical office set-

22 CEDAW Convention mandates every ratifying nation to take all appropriate measures to eliminate discrimination against women in the field of employment Sep. 3, 1981 art. 11.1 U.S.T. 743.

23 Tripartite Regional Seminar on Combating Sexual Harassment at Work, Manila, 22- 26 Nov. 1993. (It recognised that sexual harassment of women at the workplace was a form of gender discrimination).

24 The Beijing Declaration and Platform for Action, 1995, (It adopted pursuant to the United Nations Fourth World Conference on Women, 1995 recognized 'sexual harassment at the workplace' and 'gender discrimination' under the ambit of 'Violence against Women' and the need to prevent the same).

up.

However, the POSH Act recognized that acts of sexual harassment might not be limited to the primary physical location of the office set-up. The Act also went a step ahead to broaden the conventional understanding of 'workplace' to include places other than the primary physical space accessed most commonly by the employee. This was achieved through introduction of Section 2(o) in the Act.

Section 2(o) of the POSH Act, which provides a non-exhaustive and inclusive definition of workplace, includes:

i. *"any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;*

ii. *any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;*

iii. *hospitals or nursing homes;*

iv. *any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;*

v. *any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey; [and]*

vi. *a dwelling place or a house."*

A closer look at Clause v of the above definition reveals that the legislature did not intend to limit the scope of 'workplace' to just the traditional office setup. The intention of the legislature, in fact, was to cover any other place frequented by the aggrieved woman "*during or arising out of the course of employment*" under the ambit of 'workplace'. For example, transportation taken to commute to and from the place of employment. Thus, by the two-fold virtue of the Act being a beneficial legislation intended to protect women and

due to the broad wording of Section 2(o), it should be interpreted liberally. Additionally, Section 2(o) of the Act introduces the concept of notional extension of the workplace, often known as 'extended workplace'. Due to the broad and open-ended wording of the clause, what would comprise a "workplace" would be determined on a case-to-case basis subjectively.

Judicial Precedents and Subsequent Interpretations

The principle of 'notional extension' is often applied to instances under the Workmen Compensation Act, 1923 to extend beneficial labour laws to circumstances in which the duration of employment cannot be limited to 'time' or 'place' of the particular work, in which the worker is engaged. [25] The principle of notional extension came first for consideration before the apex court in *Saurashtra Salt Manufacturing v. Bai Valu Raja and Ors*.[26]. The court held that the "*theory of notional extension of the employer's premises will include an area which the workman passes and re-passes in going to and in leaving the actual place of work*." Thus, both 'time' and 'place' may be reasonably extended to determine the contours of the 'workplace' subjectively.

With respect sexual harassment at workplace, the concept of "extended workplace" was first discussed in *Saurabh Kumar Mallick v. Comptroller & Auditor General of India*.[27] The case was decided by the Delhi High Court in 2009, i.e., before the enactment of the POSH Act in 2013. The accused in this case had challenged the applicability of the Vishakha Guidelines as sexual harassment of the senior woman officer had taken place not in the office, but at the Glen Officer's Mess, where the complainant was residing. The court noted that the rationale behind the formulation of the Vishakha Guidelines was to prevent sexual harassment of women at the workplace and provide for strict action against the guilty party. Keeping this in mind, the court observed that taking a narrow and pedantic interpretation of the term 'workplace' by restricting the meaning to the colloquially understood 'traditional office' would simply defeat the objective of the Vishakha Guidelines. The court further observed that with the advent of information technology, the internet and computers, the setup of an 'office' has experienced revolutionary shift from physical to the virtual mode. Therefore, a narrow definition of 'workplace' cannot be adopted anymore. Keeping in mind the recent trends, a person cannot be allowed to get away with sexual harassment on the reasoning that the place was not covered under 'workplace'. The court also noted that "*In a case like this if such an officer indulges into an act of sexual harassment with an*

25 General Manager, B. E. S. T. Undertaking, Bombay v. Mrs. Agnes, (1964) 3 SCR 930.

26 AIR 1958 SC 881.

27 (2008) 151 DLT 261.

employee, say, his private secretary, it would not be open for him to say that he had not committed the act at workplace, but at his residence and get away with the same."[28] The court further mentioned a few general guidelines (but not determinative factors), which may be considered for ascertaining whether a particular place falls under the ambit of workplace or not. These include proximity from the place of work; control of management over such place/residence where the working woman is residing; and such a 'residence' has to be an extension or contiguous part of working place. The court, thus by giving a broader meaning to the term 'workplace', quashed the writ petition and ordered the department inquiry to continue its investigation.

In another case prior to the enactment of the POSH Act, the Supreme Court gave an expansive interpretation of the term 'workplace'. In *D.S Grewal v. Vimmi Joshi*,[29] an army officer posted in Sonmarg had sent an offensive letter to the complainant, who was working as a teacher in an army school situated in Pithoragarh. The apex court broadly interpreted the term 'workplace', and held that the accused's place of posting, i.e., Sonmarg would be included within the workplace of the complainant. The court further found the management of the school guilty of violating the Vishakha Guidelines.

In *Ayesha Khatun v. State of West Bengal*,[30] the court while recognizing the absence of the definition of the term 'workplace"' in the Vishakha Guidelines opined that logical meaning should be given to the expression 'workplace' so that the purpose for which the Vishakha Guidelines were framed, is not made unworkable. The court held as follows:

> *"Workplace, in my view, cannot be given a restricted meaning so as to restrict the application of the said Guidelines within the short and narrow campus of the school compound. Workplace should be given a broader and wider meaning, so that the said Guidelines can be applied where its application is needed even beyond the compound of the workplace…for providing a suitable and congenial atmosphere to her in her place of work where she can continue her service with honour and dignity."*[31]

Post the enactment of the POSH Act in 2013, courts have taken the same stand of liberally interpreting 'workplace' in the interest of protection of women from sexual harassment.

28 *Id*.
29 (2009) 2 SCC 210.
30 (2012) SCC OnLine Cal. 1860.
31 *Id* at ¶ 12.

In the case of *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*,[32] the Bombay High Court stated that "*the definition of 'workplace' is inclusive and deliberately kept wide by the Parliament to ensure that any area where women may be subjected to sexual harassment is not left unattended or unprovoked for*."

In the matter of *Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors.*,[33] the accused had sexually harassed the colleague-complainant during one of the outstation trips to Hyderabad. The internal committee formed had terminated the accused. The Delhi High Court held that the outstation trip would be covered under the ambit of 'workplace' since it was undertaken for official purposes as opposed to private capacity.

Judicial Pronouncements- Sexual Harassment at the Virtual Workplace

Most recently, in the case of *Sanjeev Mishra v. Bank of Baroda*,[34] the point of contention was regarding the interpretation of what comprised 'workplace' since the alleged act occurred through text messages where both the complainant and the petitioner resided in different states. The Rajasthan High Court held that due to the digital world, different bank branches situated in different states will be considered as one workplace on a digital platform. Thus, the case recognized online sexual harassment (during the course of employment) under the ambit of 'workplace'.

Therefore, the settled position of law is that all possible places which might be accessed by the aggrieved woman in connection with, during, or arising out of the course of her employment will be covered under the ambit of 'workplace' under the POSH Act. This will also be in line with the ILO's stance on the matter, which reiterated that the understanding of the workplace should not be "*restricted to the physical environment of the workplace; it must take into account the 'access' that a perpetrator has to the harassed by virtue of a job situation or work relation*".[35] Additionally, ILO, through the Violence and Harassment Convention, 2019,[36] recognized harassment through work related communications, including those enabled by information technology.[37]

32 (2014) SCC OnLine Bom. 814.

33 (2015) SCC OnLine Del. 11026.

34 (2021) S.B. W.P. (Civil) No. 150/2021, (It is important to note that the relevant legislation in the case was the Bank of Baroda Officer Employees' (Discipline and Appeal) Regulations, 1976).

35 Nelien Haspels, Zaitun Mohamed Kasim, Constance Thomas & Deirdre Mccann, "Action Against Sexual Harassment At Work In Asia And The Pacific 22, 126 (International Labour Organization (2001).

36 Violence and Harassment Convention, 2019 (C-190), Jun. 10, 2019 International Labour Organization.

37 *Id.,* art. 3(d).

Applicability of the POSH Act to Virtual Workplaces

Are Virtual Forms of Sexual Harassment Recognized Under The POSH Act?

Due to the broad definition of the term 'sexual harassment' under the POSH Act,[38] virtual forms of harassment will also be covered under the purview of the Act. Moreover, it has been held by courts that sexual harassment occurring through virtual mediums, including SMS[39] and WhatsApp texts[40] will be covered under the Act.

In a WFH setup, unwarranted calls and texts at odd hours, use of indecent emojis, inappropriate jokes/remarks, initiating personal conversation at the pretext of work-related discussions, sexist comments, sexually provocative clothes and/or posters appearing in the background of video calls, taking screenshots of video calls without consent of the parties involved, gender-based work discrimination, etc. has nullified the need of a typical physical office setup for sexual harassment to take place.

Will the POSH Act be applicable to Virtual Workplaces as well?

The Delhi High Court in the case of *Saurabh Kumar Mallick*,[41] correctly recognized the undefinable boundaries of the workplace, especially with the emergence of information technology and high-speed internet. Work arising out of or during employment is no more restricted to the four-corners of the office in the 21st century. Every employee is nowadays required to travel to destinations outside of the primary office for business meetings. Therefore, giving a restricted meaning to the term 'workplace' will not just defeat the purpose of the Act, but also render it redundant. As it can be seen from the judgments discussed above, the position of law is clear that sexual harassment can take any form-physical verbal or otherwise.[42] Thus, it can be said that sexual harassment through online medium in the virtual workplace will be covered under the ambit of the POSH Act.

The question for consideration is whether personal homes of employees and other such private spaces will be considered as 'workplace' under the POSH Act. In the current times

38 POSH Act, *supra* note 3, § 2(n). (Section 2(n) of the POSH Act broadly defines the term 'sexual harassment' as, any unwelcome sexually determined behavior, which includes verbal or non-verbal conduct, remarks, gestures, etc. whether physical or otherwise).

39 Jahid Ali v. Union of India, (2015) W.P.(C) No. 11182 of 2015 (Del); *see also* Ajay Tiwari v. University of Delhi, (2012) W.P (C) No. 1288 of 2012 (Del).

40 Shambhoo Singh Raghuvanshi v. High Court of M.P. & Ors., (2021) L.L.R. 186.

41 Saurabh Kumar Mallick, *supra* note 27.

42 POSH Act, *supra* note 3, § 2(n) *see also*; Manisha Sharma v. Union of India & Ors. (2006) LPA No. 489 of 2004, Del.

of WFH during COVID-19, people are carrying out duties arising out of employment from their homes. While this has blurred the line between personal and professional workspace, it is to be noted that the use of home premises is nevertheless being done for activities "*arising out of or during the course of employment*". Therefore, by application of the ratio established in the case of *Saurabh Kumar Mallick* and others mentioned above, homes and other personal spaces of employees should be covered under the ambit of 'workplace', for the determination of sexual harassment (provided the personal spaces are being used for carrying out obligations arising out of employment). The same will be effectuated by a harmonious reading of Section 3 along with Section 2(o) of the POSH Act. However, determination of what will comprise a 'workplace' would be subjective, provided a direct relationship between the alleged act and employment is established.

Suggestions for Countering Sexual Harassment at Virtual Workplaces

The mandate to uphold the objectives of the POSH Act statutorily falls upon the employer. This involves the legal obligation to not only comply with provisions of the Act, but also disseminate information, raise awareness and sensitize employees on matters of sexual harassment at the workplace.[43]

Duties of Employer

In addition to the duties prescribed under the regulatory framework, the following pointers can be considered by employers for the prevention of sexual harassment at the virtual workplace:

Facilitating Online Complaint Filing and Redressal Mechanism

The employers may consider launching an online complaint filing portal and redressal mechanism with provisions to upload and attach soft copies of documentary evidence, audio/ video clips, screenshots, etc. Moreover, in order to abide by the prescribed timelines of inquiry as dictated under the POSH Act,[44] quick redressal of sexual harassment complaints should be facilitated through virtual media. This can be achieved by facilitating remote working of the Internal Committee ("**IC**"), rather than waiting to hold in-person meetings.

43 POSH Act, *supra* note 3, § 19, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, Rules of Central Government, Rule 13 [Hereinafter "POSH Rules"] *see also*; Samridhi Devi v. Union of India, 125 (2005) DLT 284.

44 POSH Act, *supra* note 3, § 11(3)(4). (The Act prescribes the inquiry to be completed within 90 days of filing of complaint).

The inquiry report should be available in soft copy for the benefit of all concerned parties.

Improving Efficiency of the Local Committee

For the unorganized sector, access to the Local Complaint Committee may be restricted due to multiple lockdowns. Online filing of complaints through mediums such as She-Box should be further developed and promoted. This is of utmost importance since 95 percent of the workforce employed in the unorganized sector comprises women.[45]

Redrafting and/or Amending the Existing POSH Policies

The employers may consider redrafting and/or amending the existing POSH policies to extend the scope of 'workplace' to provide protection against sexual harassment at the virtual workplace. Additionally, while the Act only protects women against sexual harassment, employers may consider drafting gender-neutral POSH policies. This comes in light of recent statistics[46] and emerging incidents[47] of sexual harassment against men at the workplace. Lessons can be drawn from gender-neutral POSH policies of various Indian companies including WIPRO, Tech Mahindra Foundation, Taj Group of Hotels, etc.

Addressing Confidentiality Concerns

The Act, by placing utmost concern on confidentiality of the complainant and the witnesses, prohibits dissemination or publication of any information relating to the inquiry proceedings in any way.[48] Employers may consider strengthening the same by the use of non-disclosure agreements and software blocking screenshots/screen capture during video calls.

45 Government of India, *Report on Study on Working Condition and Privileges of Women in the Unorganized Sector in India,* Ministry of Women and Child Development (2016).

46 ET Bureau, *Even men aren't safe from sexual harassment at workplace: Survey* The Economic Times (Aug. 27, 2010), https://economictimes.indiatimes.com/special-report/even-men-arent-safe-from-sexual-harassment-at-workplace-survey/articleshow/6389438.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
(In India, in a joint survey conducted by Economic Times and Synovate in 2010, 19 percent of the 527 male respondents admitted to having faced sexual harassment at work.) *see also;* U.S. EEOC, *Statistics of Charges of Harassment Filed,* U.S. Equal Employment Opportunity Commission (Aug. 24, 2019) https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 (In USA, 16.8 percent of the total complaints concerning sexual harassment at workplace, filed with the Equal Employment Opportunity Commission in 2020, were filed by men).

47 Devika Agarwal, *Vijay Nair Sexual Harassment Case: Rising Incidents Against Men Emphasize Need for Gender Neutral Laws in India,* First Post, (May. 17, 2017), https://www.firstpost.com/india/vijay-nair-sexual-harassment-case-rising-incidents-against-men-emphasise-need-for-gender-neutral-laws-in-india-3452286.html.

48 POSH Act, *supra* note 3, §§ 16 & 17.

Social Media Policy

Employers may adopt a "Social Media Policy" binding on all, which restricts sharing of personal information/data/pictures, etc. of others without their consent. The policies may also specify certain do's and don'ts, for example regulation of the content allowed to be shared on social media which directly concerns the company/employer, guidelines for official meetings and calls, prohibition of indecent language/gestures/behavior, appropriate dress code during meetings, virtual meeting etiquettes, etc.[49]

Corresponding Liability of The Employer

The Act imposes a two-fold duty, primarily on the employer, to provide a safe working environment at the workplace,[50] vis-à-vis *first,* prevention and *second,* redressal.[51] This duty is not just limited to constitution of an IC, but also upholding the purpose of having such a committee in place.[52] 'Prevention' involves carrying out training and sensitization programs[53] for all, including colleagues, visitors and beneficiary of services provided.[54]

In case of non-compliance of these duties by the employer, a corollary provision penalizing the same is absent, from both the Act and the POSH Rules. Section 26 of the Act does prescribe a general penalty of Rs. 50,000 for any non-compliance of the Act.[55] However, the amount is not proportional to either deter non-compliance or encourage compliance, on part of the employer. This is visible from absence of any penal action taken against Twitter India, for non-constitution of an IC for 6 years.[56] Moreover, the Act is unclear about cancellation of '*what specific business license*' in case of a repeated/continued non-compliance of the POSH Act.[57]

49 Masooma Ranalvi, *POSH Act now to stop harassment at virtual workplace*, LIVE-MINT (Jul. 08, 2020) https://www.livemint.com/opinion/online-views/act-now-to-stop-harassment-in-the-virtual-workplace-11594217747525.html.

50 POSH Act, *supra* note 3, § 19.

51 Vidya Akhave v. Union of India & Ors., (2016) 6 AB. R 506.

52 X v. Union of India (2021) 1 SCT 264.

53 POSH Act, *supra* note 3, § 19, POSH Rules, *supra* note 43, Rule 13.

54 X, *supra* note 52 at ¶ 25.

55 POSH Act, § 26(1), No. 14, Acts of Parliament, 2013.

56 OP India Staff, *Twitter operated without committee against sexual harassment as required by the Indian law for more than six years: Report*, OPINDIA, (Jun. 25, 2021), https://www.opindia.com/2021/06/twitter-india-operated-without-sexual-harassment-committee-for-6-years/.

57 POSH Act, *supra* note 3, § 26(2)(ii).

Conclusion

With the rapid increase in the number of COVID-19 cases in India, it is unlikely that organizations will resume physical operations on the same scale as before. Remote workplaces are here to stay for a while, especially with most organizations permanently shifting to remote offices in a bid to cut costs and increase productivity. With this, sexual harassment is not expected to decrease, but take newer forms. Therefore, what is required is a strict policy of zero-tolerance to sexual harassment against women in any form.

Taking into consideration the current circumstances, both positive and negative trends have emerged. On one hand, while multiple organizations such as HUL, ICICI Bank have taken positive steps including training and sensitization during the lockdown to curb the menace.[58] On the other hand, there has also been an increase in the number of pending POSH complaints filed in the BSE 500 companies. According to a study conducted by Comply Karo Services, a 12 percent increase in the number of pending POSH complaints has been observed in FY2020 from FY2019.[59] This increase in the number of pending POSH complaints was pegged at 275 percent in FY2020 from FY2016.[60] While much progress has been noted since the enactment of the POSH Act, there is still a long way to go. Thus, given the changing face of virtual workplaces and the dynamics of sexual harassment, it is pertinent for all organizations, public and private, organized and unorganized alike to re-evaluate the policies and improvise.

58 M. Saraswathy, *Why there has been an 8% increase in sexual harassment complaints at Nifty50 firms*, MONEYCONTROL, (Oct. 6, 2020) https://www.moneycontrol.com/news/business/companies/why-there-has-been-an-8-increase-in-sexual-harassment-complaints-at-nifty50-firms-5926501.html.

59 Comply Karo Staff, *India INC. Fails to Settle Sexual Harassment Cases*, COMPLYKARO, (Oct. 24, 2020) https://complykaro.com/press-coverage/.

60 *Id*.

Cyber Defense Policy Framework and Response Mechanisms Towards the Cyber Threats and Emerging Cyber Warfare

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Abstract

The domestic infrastructure contradicts the defensive structure of the global agencies, which has resulted in the awakening of the notion of cyber security and thus enhanced surveillance over the web world. A comprehensive and situational approach must emerge from social, political and legal reforms, which necessitates cyber defense mechanism and intelligence capabilities for monitoring the state and non-state factors at the same time towards cyber threats, cyber violence and cyber-attacks. The challenges posed are increasingly complex, and the need of the hour is a multi-disciplinary approach by various stakeholders to the responses and solutions. This paper argues that facing global cyber threats with local resources is not enough. Countries need to do more internally and internationally than just prepare antivirus, firewall or data encryption provisions to prevent cyber-crimes. Capital investment needs to be made in formulating cyber defense strategies and framework, strengthening international institutions and regulators and there needs to be a crisis protocol in place to provide cushioning to global financial systems.

Introduction

Cyber-attacks have the potential of leaving the world in a more disintegrated state than the novel-coronavirus pandemic (COVID-19). According to a study conducted by Specops

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Software, cyber-attacks are expected to cost the global economy $6 trillion dollars per year by 2021.[1] Such attacks have surged by 260% during the COVID-19 pandemic with phishing emails being the most popular attack vector.[2]

This makes it all the more imperative for countries to be proactive in preparing for the potential cyber-attacks collectively. Facing global cyber threats with local resources is not enough. Multilateralism is the need of the hour. Countries need to do more internally and internationally than just prepare antivirus, firewalls, and enable data localisation, pseudonymization and data encryption provisions to avert cyber wrongdoings. Capital investment needs to be made in formulating cyber defense and cyber offense strategies and frameworks, strengthening international institutions and regulators. There needs to be a crisis protocol in place to provide cushioning to global financial systems.

It is noteworthy that contemporary developments in cyber space have exposed to a variety of threats to national security, privacy, data protection and retention and others which is further necessitating rigorous measures vis-à-vis the development of cyber infrastructure. The information revolution has transformed lives across boundaries with increased dependency over the web framework and network which brings forth cyber challenges in the form of security, warfares, intelligence, threats and others concerns. The continuous evolution of threats in various degrees is mandating the political as well as policy corridors to address the looming concerns with immediate and intense attention thereby addressing the vulnerabilities and challenges.

Cyber Defense

Cyber defense[3] by the very virtue means pre-defensive measures to safeguard data and organisational assets from unauthorised cyber threats and attacks. It involves a wide array of activities to enable an organisation to protect itself against attack. It includes attack detection capability to spot when hackers/attackers are targeting the firm; response and reaction capabilities to repel them; and cyber deterrents to reduce the organization's appeal to the attacker.

1 Correspondent, *India third among countries targeted by cyber attackers*, Campaign India (Jul. 19, 2020), https://www.campaignindia.in/article/india-third-among-countries-targeted-by-cyber-attackers-report/462313.

2 Abhijit Ahaskar, *Coronavirus related cyberattacks surge by 260% during lockdown, Kerala most targeted: Report*, Livemint (May. 21, 2020), https://www.livemint.com/technology/tech-news/coronavirus-related-cyberattacks-surge-by-260-during-lockdown-kerala-most-targeted-11590054440090.html.

3 Rob Schrier, *A Case for Action: Changing the Focus of National Cyber Defense*, The Cyber Defense Review, no. 2 2019, at 22, 23-28.

In addition, it provides specialist technical analysis to map out and protect the path attackers might use to breach an organisation's sensitive data and provides security strategies[4] to assure that the organisation runs its operations seamlessly without any paranoia of losing valuable assets.

Ever since World War II, warfare has dramatically changed.[5] India is continually trying to put safeguards for the same for instance the Indian armed forces have set up a specialised wing to counter Biological, Chemical and Nuclear ('BCN') warfare. BCN warfare was regarded as the warfare of the future but now with threat perceptions changing across the spectrum introduction of cyber and electronic warfare is being duly taken cognizance of. To make the defense[6] mechanism fool proof, the following efforts are worth mentioning:

- Data from the Directorate General of Commercial Intelligence and Statistics shows that power sector equipment like transmission line towers, conductors, industrial electronics, capacitors and fittings which are made in India, are still being imported. This poses a deep risk to our grid system.
- Procuring equipment from abroad including present Chinese OEMs (original equipment manufacturers) in Indian Air force Systems poses a huge risk to India's security establishment, and institutions that constitute the forefront of national security.[7]

The socio-economic infrastructure is thereby in ardent need of developing a strong cyber infrastructure that would effectively address the growing need for a cyber defensive and offensive mechanism to battle the increasing number of sophisticated malwares. The security concepts, assurances and risk management shall strive to secure and protect the cyber space. With the ever-increasing number of e-commerce activities and with the onset of the digital economy, cyber security is a growing concern for India's critical infrastructure.

Susceptibility of Financial Institutions towards Cyber Threats

Cyber threats have also emerged significantly with respect to the financial system across

4 James E McGhee, *Liberating Cyber Offense*, 4 Strategic Studies Quarterly, 46-63 45 (2016).

5 Michael Preciado, *If You Wish Cyber Peace, Prepare for Cyber War,The Need for the Federal Government to Protect Critical Infrastructure From Cyber Warfare*, 1 Journal Of Law & Cyber Warfare , 99-154, 100 (2012).

6 Martin R Stytz& Sheila B. Banks,*Toward Attaining Cyber Dominance*, 1 Strategic Studies Quarterly, 53, 55-87 (2014).

7 FJ Cilluffo&JR Clark,*Building a Conceptual Framework for Cyber's Effect on National Security*, 2 Journal Of Information Warfare, 1-16, 1 (2016).

the world especially with the advent of digital financial services such as mobile money transfers, and robust online banking systems. Some of the cyber-attacks include attacks on money transfer, ATM operations, malicious software integrated into banking systems, destruction of hardware and data of users, and disruption of internal operations.

According to an estimate by the International Monetary Fund (IMF), financial institutions could incur on an average hundred-billion-dollar losses annually due to cyber-attacks.[8] This would disrupt the financial stability across the globe, thereby eroding banks of their profits. Non-banking and other financial institutions might not only lack liquidity post such attacks rather have the potential of becoming insolvent altogether.

It is believed that cyber-attacks have the potential of leaving the targeted institution unable to operate again. In June 2018, hackers stole $530 million from Japan's Coin check cryptocurrency exchange.[9] In the absence of cyber insurance or support from the government, the exchange was left in turmoil. In 2016, the infamous malware attack on Bangladesh's Central Bank robbing it of more than $80 million brought the entire country's financial system to its knees.[10]

Financial institutions become easy targets because of their crucial role in intermediating funds. On top of it, the insurance market for cyber risk is not that significant. Most financial institutions especially in emerging economies do not carry cyber insurance. And, even if they do, the coverage is limited owing to challenges in evaluating risk because of uncertainty about cyber exposure, underestimating of risk due to lack of data, and potential contagion effects.[11]

Financial systems are also susceptible to systemic risks arising from the concentration of the Information Technology (IT) industry, whose firms use operating systems, programs, cloud servers, and electronic network hubs. Interconnected banks and transfer markets can allow shocks to spread quickly throughout the financial system. Cushioning against which is the need of the hour. While private cyber insurance[12] policies are offering data covers, they themselves can fall prey to the systemic risks. This raises a need for the public sector

8 *Estimating Cyber Risk for the Financial Sector,* IMF BLOG (Jun. 22, 2018), https://blogs.imf.org/2018/06/22/estimating-cyber-risk-for-the-financial-sector/.

9 *Japan's regulator urged Coincheck to fix flaws before $530 million cyber theft*, REUTERS (Feb. 2, 2018), https://www.reuters.com/article/uk-japan-cryptocurrency-idUSKBN1FL6PL.

10 *Malware suspected in Bangladesh bank heist,* REUTERS (Mar. 11, 2016, 10:00 AM), https://www.reuters.com/article/us-usa-fed-bangladesh-malware-idUSKCN0WD1EV.

11 Emanuel Kopp et al., *Cyber Risk, Market Failures, and Financial Stability*, IMF Working Paper WP/17/185 2017, at p. 25, 25-31.

12 Jeffrey A Franklin, 3 *CYBER INSURANCE FOR LAW FIRMS,* GPSOLO 57, 58-61 (2016).

to ensure that losses from cyber-attacks at one location do not give rise to systemic risks.

Further, the issue of regulatory arbitrage is a major reason of worry to national authorities. Financial institutions have no universal policies to regulate fintech products. While some countries have altogether banned virtual currencies, some have taken different approaches to regulate them. It is noteworthy that fintech products being digital by the very virtue cannot be contained within national borders, thereby giving rise to cyber frauds in less regulated jurisdictions. To address this lacuna, there needs to be international coordination and cooperation much to bring about clarity in the virtual space jurisdiction and safeguard the global digital products and services beforehand. Also, giving whistle-blower-like protection to employees/any other person concerned to disclose any such attack on the financial organisation is highly recommended.

Susceptibility of Organizations to various Cyber Attacks

Other organisations are equally susceptible to such attacks. A malware attack on one branch of an organization can spread rapidly through the highly interconnected IT system. This could have twofold consequences – material financial losses and diminished reputation of the organisation. Further, an organization might not disclose or publicly announce occurrence of such an attack, fearing attracting more such attacks and/or for the fear of reduced market valuation and loss of business.

Some of the valuable suggestions for the various stakeholders to counter Cyber Security Risks include undertaking thorough cyber security due diligence as part of proposed M&A transactions; due diligence in relation to key suppliers' data handing and IT security practices; cyber audit of such suppliers; Implement robust cyber security governance arrangements which should include incident response and business continuity plans; staff training on cyber security risks, especially social engineering attacks; monitoring and auditing of personnel to manage insider risks; and imported equipment should be thoroughly tested to prevent any 'trojan' or malware slipping through.

Cyber Threats to the Law Firms

Law firms being a hotspot of client information pose an attractive target for many cyber criminals as they have the capability of exposing information of not only themselves rather the numerous clients also who with faith and protection in terms of attorney-client privilege

place their valuable data[13] and information[14] with the firm.

The reason why cyber-crime pertaining to law firms is growing exponentially is because more and more companies are going virtual; that too without instituting adequate safeguards or proper training to the personnel. In May 2020, a New York-based media and entertainment law firm, Grubman Shire Meiselas & Sacks, catering to celebrity clients like Mrs. Priyanka Chopra Jonas, Lady Gaga and Nicky Minaj was cyber attacked. As per the reports[15], data including contracts, non-disclosure agreements, email addresses, phone numbers, and personal correspondences were stolen and threatened to be disclosed on public platforms.

This raises serious concerns for law firms around the world to protect their data uploaded on drives or servers especially amidst the Covid-19 crisis. One such measure adopted by the New York State Bar Association, post the cyber-attack, was to approve a recommendation by its committee on technology and the legal profession to require New York attorneys to take at least one cyber security Continuing Legal Education (CLE) credit every two years[16]. The proposal, however, still needs to be approved by the New York CLE board.

With respect to India, it is suggested that cyber security[17] courses should be incorporated in law colleges to equip future lawyers with better cyber protection knowledge and skills. Also, law firms need to invest in having a more robust IT department in order to make an online transfer of information within and outside the firm seamless and fool proof. Further, cyber law should become a mandatory subject for judiciary exams at the district level to ensure that even the civil judges are well equipped with technical know-how and can take required *suo moto* actions to ensure cyber protection in and around their areas in addition to sensitising their staff on the subject.

Cyber Defense mechanisms that can be adopted by law firms include frequent independent cyber risk audits to identify the weaker points of a server/integrated network in time; like

13 The Information Technology Act, 2000, No. 21, Acts of Parliament, Section 2(o).

14 *Id.,* Section 2(v).

15 Ashley Collman, *Hackers who stole files from a law firm to stars like Lady Gaga and Drake doubled their ransom to $42 million and threatened to release 'dirty laundry' on TrumpHackers who stole files from a law firm to stars like Lady Gaga and Drake doubled their ransom to $42 million and threatened to release 'dirty laundry' on Trump*, (May 15, 2020, 04:17 PM) https://www.businessinsider.in/international/news/hackers-who-stole-files-from-a-law-firm-to-stars-like-lady-gaga-and-drake-doubled-their-ransom-to-42-million-and-threatened-to-release-dirty-laundry-on-trump/articleshow/75757377.cms.

16 *NYSBA Eyes Mandatory Cybersecurity CLE Credit, Citing Attorneys' Heightened Cyberrisk,* New York Law Journal (June 15, 2020) https://www.law.com/newyorklawjournal/2020/06/15/nysba-eyes-mandatory-cybersecurity-cle-credit-citing-attorneys-heightened-cyberrisk/?slreturn=20200614094501.

17 *Supra* note 13, section 2(nb).

audit companies conduct audit reviews; conducting impact assessments and response plans;[18] review third-party supplier contracts to ensure that they appropriately address privacy and data protection issues, and do not transfer cyber-related risks to any organisation; manifest and review data breach response plans; lay down guidelines/specifications for third-party video conferencing applications such as Zoom, Google Meet, etc to abide by; advise clients how data protection rules of a country apply to a business and ensure compliance across the data life cycle; advise them on privacy, data protection and cyber-related legal[19] and commercial issues; build cyber risk and privacy compliance tools; get their valuable data insured; and draft guidelines for the staff to follow to rebuild from a data breach or cyber incident.

Mitigation of Risks

As cyber threats have no national boundaries, the role of international institutions becomes pertinent. International organizations like the Financial Stability Board, the Bank for International Settlements, and the International Monetary Fund can play a major part in designing internationally coordinated policies, supporting information sharing, collecting data, helping resolve cyber disputes, and containing systematic risk.

The world governments need to adopt a coordinated responsive measure to systemic cyber threats, enter into bilateral/multilateral pacts as countries do to fight terrorism, pollution, and climate change, amongst others.[20] The governmental bodies need to collect more consistent and complete data, quarterly for instance, on the frequency and impact of cyber-attacks or such attempts. This would help assess threats for the financial sector and help formulate policies on the same. It is pertinent to note that cyber threat is more of a policy matter than an IT matter on the present date. Collection of data would also incentivise reporting of breaches pertaining to privacy laws such as the European Union's General Data Protection Regulation[21], and further could be used to form a comprehensive assessment on the path and likelihood of cyber-attacks and formulate adequate policies to defend the same.

In a nutshell, assistance needs to be provided by international institutions to member

18 Chris Arney et al., *Cyber Education via Mathematical Education,* The Cyber Defense Review, no. 2 2016, at 49, 49-60.

19 Stefano Mele, *Legal Considerations on Cyber-Weapons and their Definition*, Journal Of Law & Cyber Warfare, no. 1 2014, at 52, 52-69.

20 Nir Kshetri, *Diffusion and Effects of Cyber-Crime in Developing Economies*, Third World Quarterly, no. 7 2010, at 1057, 1057-079.

21 General Data Protection Regulation, 2016, No. 679, Council of the European Parliament, (EU).

countries in order to improve their supervisory and regulatory frameworks and in setting up realistic vulnerability and recovered testing, effective supervisory practices, and contingent planning systems.[22]

It is noteworthy that while redesigning products, services and/or revamping the entire operations of an organisation might help avoid cyber risks; the possibility of new vulnerabilities coming up with the advent of new practices persists.[23]A global survey conducted by IMF with global central banks, regulatory bodies, fintech firms, and banks revealed that regulators still lacked behind in regulating the upcoming technological innovations in the fintech and tech sector and needed to ensure consumer and data protection, interoperability across users and national borders, and cyber security concerns. A shortage of coders, i.e. software developers and programmers was also observed in the survey.[24] While sandboxing facilities have been launched by various regulatory bodies around the globe, regulations for all upcoming technological developments are yet to see the light of the day.

Further, at the cost of increasing the expenses of an organization and making operations harder, security measures such as firewalls, data encryption, business continuity planning, and imparting adequate training to employees, can be considered as plausible intermediate cyber defense techniques.[25]Additionally, organizations can also transfer risks to third parties such as cyber security vendors or cyber insurance companies, but it is pertinent to mention that inadequate experience and lack of information among such third parties and overestimation of their ability to defend such risk and provide insurance cover can make these firms susceptible to financial losses and being bankrupt themselves. Also, the possibility of them becoming targets of hackers themselves cannot be ruled out.

Furthermore, national and international regulatory authorities need to provide incentives and protection from the press, to organisations, to promptly and accurately report any occurrence of cyber-attacks without fearing any loss of reputation or business.[26] Data of the same needs to be collected systematically and in a highly confidential manner in order to analyse and assess the digital footprints of attackers. Considering cyber-attacks are

22 Timothy Goines, M. *Overcoming the Cyber Weapons Paradox,* 4 STRATEGIC STUDIES QUARTERLY, 86, 86-111 (2017).

23 R Symonds, *Innovating the Prioritization of Cyber Defense*, 2 JOURNAL OF INFORMATION WARFARE, 12, 12-15 (2017).

24 Christopher Wilson et al., *Cybersecurity Risk Supervision*, INTERNATIONAL MONETARY FUND. MONETARY AND CAPITAL MARKETS (SERIES) 19/15, 7, 14-17 (2019).

25 Ball, Desmond, & Gary Waters, *Cyber Defense and Warfare*, 2 SECURITY CHALLENGES, 91, 91-98 (2013).

26 Lin, Herbert S, *Reflections on the New Department of Defense Cyber Strategy: What It Says, What It Doesn't Say*, 3 GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS, 5, 5-13 (2016).

intrinsically criminal in nature; regulatory authorities should coordinate rapidly with law enforcement agencies of the country. Also, these regulatory authorities need to have the ability, techniques, and authority to adapt their responses as quickly as cyber threats erupt, thus need to be imparted adequate training.

Cyber Insurance

The administrative, technical and physical cyber safeguards are proactive to an attack, whereas cyber insurance is reactive to an attack. Cyber insurance is a relatively new insurance product catering to the business needs of data, to hedge risks against effects of cybercrimes such as malware, ransomware, distributed denial-of-service (DDoS) attacks, or any other method used to compromise a network and sensitive data. The threat may be internal or external. It is important to note that cyber security defense cannot be replaced with cyber insurance, as it forms an integral part of the overall cyber security machinery of an organisation. Cyber risk insurers understand the cyber security position of an organisation to issue a policy and can-do proper valuation of data. The size of the cyber insurance market is believed to be about USD 3 billion[27]. The U.S. is the biggest cyber insurance market; however, Europe and Asia are following in their footsteps due to the introduction of strict cyber and data protection regulations and amplified attacks across the world.[28]

The capabilities of the insurance industry to address novel challenges which exhibit the multi-dimensional and transnational nature of cyberspace all suggest that insurance is especially well suited to perform a pivotal role in stabilizing the domain.[29]

Determination of an engineering risk through data analysis of the insurance statistics database with respect to cyber risk coverage provided to transnational players can help determine systemic risks. Underwriters would take on the core function of assuming corporate cyber risks before providing policy coverage. A company's behavioural response to the risk environment can be influenced largely by the insurers, which supply financial incentives to deter policyholders from investment due to an increase in cyber risk in one sphere or encourage investment by extending liability coverage in a risky investment thereby assuring

27 *Cybersecurity*, National Association Of Insurance Commissioners (May 27, 2021), https://content.naic.org/cipr_topics/topic_cybersecurity.htm.

28 Michael Siegel et al., *Cyber Insurance as a Risk Mitigation Strategy,* The Geneva Association (Apr 10, 2018) https://www.genevaassociation.org/research-topics/cyber-and-innovation/cyber-insurance-risk-mitigation-strategy.

29 SA Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as "Compliance Managers" for Businesses*, 43(2) Law & Social Inquiry, 417, 417-440 (2018).

the policyholder.[30] Again, the possibility of a cyber insurance firm going bankrupt cannot be overruled.

Challenges with regards to Cyber Defense

Cyber threat insurance transcends most commercial insurance lines. Unfortunately, cyber insurers do not have the underwriting experience or data analytics understanding to create underwriting arrays or data sets. This challenge not only affects insurers but re-insurers as well.[31]The Chief Information Security Officers of large corporations have reservations with respect to the insurance industry as they view insurers valuing the company based on cyber vulnerabilities[32] that exist in the system and may use that liability to provide a claim in the event of a breach that too, subject to terms and conditions. This reality makes it difficult to maintain the equilibrium of risk management and security.[33]

The cascading impact of cyber attacks greatly threatens insurance underwriters for instance if manufacturing firms rely solely on the industrial internet of things for their platform, then a cyber attack could disrupt manufacturing across an entire industry. The insurer underwriting such firms would incur massive losses from a single attack.[34]The aggregation risk of cloud computing and shared service providers amongst others are challenges that cyber security professionals face which are not yet comprehended by the insurance industry.[35]

The legacy of future technology development is based on the current cyber vulnerabilities in the environment. The cyber risk analysis market and technology market are evolving in cohorts. There are emerging start-ups focused on risk modelling and ratings that provide solutions to improve cyber insurance risk models. Examples include Bitsight, Security Scorecard, and FICO security score.[36]

30 *Id.*

31 *Id.*

32 Max Smeets, *The Strategic Promise of Offensive Cyber Operations*, 3 Strategic Studies Quarterly, 90, 90-113 (2018).

33 *Id.*

34 *Id.*

35 OECD, *Enhancing the Role of Insurance in Cyber Risk Management*, OECD Publishing (Dec. 08, 2017), http://www.oecd.org/publications/enhancing-the-role-of-insurance-in-cyber-risk-management-9789264282148-en.htm

36 Michael Siegel et al., *Cyber Insurance as a Risk Mitigation Strategy,* The Geneva Association (Apr. 10, 2018), https://www.genevaassociation.org/research-topics/cyber-and-innovation/cyber-insurance-risk-mitigation-strategy.

Modern hedging mechanisms could eventually include the monetary cost of cyber risk which will have to be shared across myriad stakeholders and different market segments. A cyber–Federal Deposit Insurance Corporation that incorporates some share of losses, especially among the most vulnerable and exposed firms, cannot only help offset costs; it can also provide cyber threat intelligence[37] sharing mechanisms.[38]

The Way Forward

The coordinated efforts of various stakeholders shall be a major breakthrough towards cyber defense. Various agencies across the borders need to work in close association and cooperation in order to curb cyber threats. Some of the major efforts and a way forward in this regard could consist of: *Firstly*, a coordinated effort at the global level to collect data in order to develop a greater understanding of the risks, nature and source of attacks and more importantly their impact on the global or domestic financial system. *Secondly*, reducing regulatory barriers, standards, terminologies, and regulations in different countries to facilitate better communication. *Thirdly*, a collaborative effort to improve the threat intelligence, resilience, responses and incident reporting to financial supervisors and law enforcement agencies seamlessly. The barrier between the private and public sectors needs to be reduced. Countries need to collaborate to share information more readily and be proactive, unlike the present pandemic where most of the responses are reactive. *Fourthly*, crisis preparation and response protocol need to be developed within regions and globally. Affected organizations should know whom to call during a crisis. *Fifthly*, averting cybercrimes by having a mandatory Know Your Customer (KYC) policy in place before opening/operating any social media account. The data of the same can be encrypted and pseudonymised for privacy concerns. *Lastly*, sensitising the general public and the youth at large about the repercussions of indulging in any such activities and apprising students and corporates of cyber ethics and the need for developing internet usage maturity should be a prime concern of policy makers across the world.

While the defense mechanism[39] is comparatively more robust in developed economies, it

37 EJ Mandt, *Integrating Cyber-Intelligence Analysis and Active Cyber-Defense Operations,* 1 Journal Of Information Warfare, 31, 31-48 (2017).

38 D. Disparte, *A Cyber Federal Deposit Insurance Corporation?: Achieving Enhanced National Security*, *7*(2) PRISM, 52, 52-65 (2017).

39 SL Russell & SC Jackson, *Operating in the Dark: Cyber Decision-Making from First Principles*, 1 Journal Of Information Warfare, 1, 1-15 (2018).

is the emerging economies that are gradually switching to online mode of operations[40] that need international attention and collaboration immediately in order to make a more secure and seamless digital ecosystem.[41]

Conclusion

It is imperative to note that the pace at which the business houses, companies, law firms, and educational institutions have started operating in the virtual space, any virus that hits the machines in the near or far future has the potential to disrupt all data and bring the whole world economy to a standstill.

With information, no longer confidential and safe, it possesses the risk to overthrow the ruling parties across the world by disclosing their shady deals, can make the stock market take a dip, make law firms lose cases and their clients eventually by revealing the truth behind the matter, and leak all the examination papers and entrance tests that are saved in the virtual space to assess the intelligence of students. Repercussions can be far worse than what can be anticipated.

Thus, cyber frauds, threats, attacks are largely known to impact the national security, social well-being and economic fabric of the country pointing towards the ever-growing demand for a secure cyber environment to protect the citizens in real time. Therefore, it is essentially ardent to have employees and staff with basic cyber security[42] skills along with adequate budgets for advanced infrastructure, training and resources to develop required skills. An effective cyber surveillance system can only come into existence with requisite skill development, which consequently provides for a secure action plan in case the need to combat cyber-attacks arises.

40 C Maathuis et al., *Developing a Cyber Operations Computational Ontology*, 3 Journal Of Information Warfare, 32, 32-49 (2018).

41 Michael Sulmeyer,*Campaign Planning with Cyber Operations,* 3 Georgetown Journal Of International Affairs, 131, 131-37 (2017).

42 Sitara Noor, *Cyber (In) Security: A Challenge to Reckon With,* 2(3) Strategic Studies, 1, 1-19 (2014).

To Report or Not to Report: Zooming in the Case of Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Ors.

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Abstract

Complexities are witnessed when there is a juggling act carried out amongst the crucial pillars forming the edifice of democracy namely: Freedom of speech & expression; Right to information of citizens; Accountability of judges. These concepts are not juxtaposed to one another rather complement one another; resultant is the flourishing of democracy with sophistication. Scrutinization by means of putting everything in the eyes of the public results in the ushering in of utter transparency. But the pertinent question is- Should there be limitations as to what forms & should form part of the public domain? Therefore, constraints on public scrutiny must have solid parameters. One of the 2021 landmark judgments delivered by the Hon'ble apex court is- Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Others[1] This judgment analyses appurtenant questions surrounding freedom of expression of media, the concept of open courts, freedom & constraints of judicial conduct, all given in the context of increasing contours of the digital era.

Introduction

In roughly over 3 decades following globalization, we have witnessed exponential strides in technological developments. Every domain has adopted technology to usher inefficiency. An open- arm approach in terms of technological adoption has also been witnessed in one

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1 Chief Election Commissioner of India v/s M.R. Vijayabhaskar, 2021 SCC Online SC 364.

of the organs of government namely, the judiciary. The very recent launch of SUPACE (Supreme Court Portal for Assistance in Court's Efficiency) by the Supreme Court's AI Committee shows the Indian apex court's commitment in harmonizing artificial & human intelligence.[2]

Use of Artificial Intelligence, though not a substitute to the existing system, is definitely aiding courts- ranging from e-filing & the use of video conferencing apps like Cisco WebEx, to live streaming of proceedings making justice delivery system accessible to masses- particularly when the world has witnessed one of the toughest & worst times in over a period of decades in the form of COVID-19 pandemic.

A discussion on transparency, accountability and live streaming of court proceedings will be incomplete if the reference to Swapnil Tripathi v/s Supreme Court of India[3] case is not made; the judgment[4] made the stance crystal clear to the effect that right to access justice is inherent and flows from Article 21[5] of the Indian Constitution that contemplates right to life and personal liberty, except according to procedure established by law. Lord Chief Justice Hewart appropriately said, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done." 26th of September, 2018 is the day on which a curtain was unveiled that changed the entire face of the Indian legal system, i.e., we get to see how justice is done.[6] Live streaming of court proceedings in present came as a present to us through the said judgment.

Live streaming of court proceedings is definitely one crucial aspect of freedom of speech & expression but the extent of the permissibility of streaming by reporting the undocumented part, i.e. to say, oral remarks not forming part of the judgment, is another facet to the coin that may pose perplexing situations. However, post the judgment delivered in *Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Others*, this perplexing question has received its rational answer.

2 Srishti Ojha, *Won't Let Artificial Intelligence Do Decision Making; Judges' Autonomy & Discretion Will Be Retained : CJI Bobde*, Live Law (Apr. 06, 2021) https://www.livelaw.in/top-stories/supreme-court-artificial-intelligence-portal-supace-chief-justice-sa-bobde-172220.

3 Swapnil Tripathi v/s Supreme Court of India, (2018) 10 SCC 639.

4 *Id.*

5 INDIA CONST. art 21.

6 The SC's Decision to Reveal it All: Understanding the 'Live Telecasting' Judgement; Swapnil Tripathi and Ors. v. Supreme Court of India and Ors., 9 CPJLJ (2019) 305.

Structure of Judgment

Total Number of Paragraphs: 51[7]

Decision: Unanimous; no dissent

Bifurcation of paragraphs as under:

- Factual Background/Matrix: Paragraphs 3 to 12
- Proceedings before the Supreme Court as this SLP:[8]
  - Contentions of Petitioners through Learned Senior Counsel: Paragraph 14
  - Contentions of Respondents through Learned Counsel: Paragraph 15
  - Legal Position & Analysis with respect to Issues: Paragraphs 17 to 49
    1. Open Courts & the Indian Judiciary: Paragraphs 20 to 25
    2. Freedom of Expression of the Media: Paragraphs 26 to 32
    3. Public Discourse, Media Reporting & Judicial Accountability: Paragraphs 33 to 37
    4. Freedom & Constraints of judicial conduct: Paragraphs 38 to 49
  - Conclusion: Paragraph 50 & 51

Factual Matrix

A tabular representation of facts (contained in Paragraphs 3 to 12) will make them quite comprehensible. Therefore, Table 2.1 may be referred to in this regard:

Table 2.1

DATES	ASSOCIATED EVENT(S)
26 February, 2021	Announcement of Elections by the Election Commissioner (EC) to various Legislative Assemblies, inter alia Tamil Nadu Legislative Assembly
12 March, 2021	EC addressing the issue of observance of COVID-19 protocols during elections vide means of letters to the Presidents and General Secretaries of all national & State political parties.

7 *Supra* note 1.

8 SLP (C) No. 6731 of 2021.

6 April, 2021	Polling scheduled for Tamil Nadu Legislative Assembly elections.
9 April, 2021	EC's another letter to political parties stating that COVID-19 related protocols not followed by candidates; continued breach of the norms to result in banning of public meetings and rallies.
16 April, 2021	Result of continued breach of norms: EC ordered banning of public meetings, street plays and rallies between 7 P.M. & 10 A.M. Another letter by EC re-emphasizing on the strict adherence of COVID-19 related safety protocols. Representation by the respondent for EC to take adequate precautions & measures to ensure the health & safety of officers in the counting booth. No response by EC on respondent's representation Result: Respondent approached High Court u/ Article 226 of the Indian Constitution and sought direction for fair counting on May 2' 2021 (scheduled counting day) with COVID-19 protocols in place.
26 April, 2021	Hearing before the Division Bench of the Madras HC
27 April, 2021	Complaint by an individual against EC's officials u/s. 269/270/304 r/w 120B of IPC, 1860 Filing of counter- affidavit & miscellaneous application by EC
30 April, 2021	Order passed by DB of Madras HC; miscellaneous application closed
2 May, 2021	Counting of Votes (Tamil Nadu Assembly Elections)

Contentions

Petitioner through Learned Senior Counsel

It was contended on behalf of the Election Commissioner that the oral remarks of the High Court of Madras to the effect that the institution (EC) "*is singularly responsible for the second wave of COVID-19*" and that it "*should be put up for murder charges*" neither had relevance to the controversy nor were supported with any proof or material and that the EC was also not given an opportunity to explain their stance on ensuring the requisite protocols.

Further contentions were such that the oral remarks being reported in media have resulted in EC's image being tarnished and people's faith wobbling. Furthermore, the judiciary must be cautious while making its observations on another constitutional body, herein the EC.

EC cannot be attributed liability for it formulated guidelines and took adequate measures and, that the enforcement of ensuring protocols is the matter of State machinery.

Moreover, elections can't be responsible for the surge in cases of COVID-19 since states where no elections were held also witnessed an exponential surge in the cases.

The balance between the conduct of court proceedings and freedom of media must be maintained, for reporting of undocumented part of judgment viz. oral remarks exceed the boundaries of judicial propriety.

Respondents through Learned Counsel

The averments of respondents were such that, owing to the wide range of powers conferred on EC, it was responsible for enforcement of the requisite protocols & measures related to COVID-19 during elections.

Ratio Decidendi & Analysis

The matter was placed before the Division Bench of the Hon'ble Supreme Court of India comprising: Hon'ble Justices- Dhananjaya Y.Chandrachud & Justice M.R. Shah. The judgment in the SLP (C) No. 6731 of 2021 was delivered singularly by Hon'ble Justice Dhananjaya Y. Chandrachud to which there was no dissent expressed by Hon'ble Justice M.R. Shah, hence, the decision, in this case, was unanimous.

Date of judgment- May 06, 2021

Open Courts & Indian Judiciary

Paragraphs 20 to 25 of the judgment have been beautifully carved out to discuss the aspect of open courts (in both physical & metaphorical sense) and, public scrutiny being intrinsic for transparency whilst ensuring public faith & confidence in the system and also quintessential for safeguarding valuable constitutional freedoms; its exception being "in-camera" proceedings in exceptional cases, inter alia sexual abuse.

It was further observed that an open court system ensures that judges act in accordance

with law & probity. However, there are certain exceptions to the rule of open courts as aforementioned including the fact that the purpose of scrounging truth & ensuring fair trial will be defeated if witnesses are subject to public gaze.

The court made reference to the cases of *Mohammad Shahabuddin v/s State of Bihar*[9] wherein the concurring opinion noted that an open court grants right to access and entry to all people; *R v/s Socialist Workers Printers, ex p Attorney General*[10] wherein the disciplinary effect on judges' conduct is witnessed when there is the presence of public and press in courts, summing up the role of public hearings on judicial conduct; *Shridhar Mirajkar v/s State of Maharashtra*[11] wherein it was rightly observed that open courts pave way for and maintain the confidence of the general public as well as keep the conduct therein wholesomely checked; & *Swapnil Tripathi*[12](supra) highlighting the significance of live streaming of judicial proceedings furthering the ends of the open judiciary.

Freedom of Expression of Media

Paragraphs 26 to 32 of the judgment observe the aspect of freedom of expression of media. Article 19(1) (a)[13] that speaks of freedom of speech and expression is wide enough to include the right to freedom of press within its amplitude, that is to say, freedom of press is constitutionally guaranteed fundamental right. Furthermore, freedom of media extends to reporting of judicial proceedings. However, the freedom of speech & expression not being absolute in nature places reasonable restrictions as envisaged under Article 19(1) (2) of the Indian Constitution.[14]

The Hon'ble Apex Court emphasizing on the importance of freedom of media referred to 1st principle of the Madrid Principles on the Relationship between the Media and Judicial Independence:[15]

> *"1. Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and*

9 (2010) 4 SCC 653.

10 (1974) 3 WLR 801.

11 (1966) 3 SCR 744.

12 *Supra* note 3.

13 INDIA CONST. art. 19, cl. 1(a).

14 INDIA CONST. art. 19, cl. 2.

15 Madrid Principles on the Relationship between the Media and Judicial Independence, (Mar. 1994) http://www.icj.org/wp-content/uploads/1994/01/madrid-principles-on-media-and-judicial-independence-publication-1994-eng.pdf.

> *convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence."*

In furtherance of the same, it was also observed that media has undergone revolutions & refashioned itself given the technological advancements &, internet ushering in an era of digitization. Thus, technology has brought about significant changes and resultant is new reality.

The court also made reference to a bunch of cases namely, *Express Newspaper (P) Limited v/s Union of India*[16] wherein it was held that free press/ freedom of press is implicit in the language of Article 19(1)(a) of the Indian Constitution providing for freedom of speech & expression; *LIC v/s Manubhai D. Shah (Prof.)*[17] wherein it was observed that in a democratic set-up particularly, dissemination of news & views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Indian Constitution; & the judgment of *Swapnil Tripathi*[18] (supra) duly acknowledging the inevitability of the revolutionized technology in the judicial system ensuring virtual accessibility.

Public Discourse, Media Reporting & Judicial Accountability

Paragraphs 33 to 37 of the judgment scrutinize the aspect of public discourse, media reporting & judicial accountability. The Hon'ble apex court observed that not just reporting of verdicts that are pronounced in the courts of law are crucial but, equally essential are the quirks of counsel(s) & judges that facilitate useful context for the study of law. Further observation was made as regards the apprehension of the "virtual extensión" of open courts is concerned, which accordingly was stated to rather bolster the judiciary's integrity. Public participation vide means of open viewing of courts as live streaming of proceedings promotes the limb of access to justice.

The apex court duly acknowledged the cases of *Attorney General v/s Leveller Magazine*[19] wherein Lord Diplock observed-"The principle of open justice requires that the court should do nothing to discourage fair and accurate report of proceedings; & *Mirajkar*[20] (supra) case wherein it was observed that publicity of court proceedings generates public

16 1959 SCR 12.
17 (1992) 3 SCC 637.
18 *Supra* note 3.
19 [1979] A.C. 440.
20 *Supra* note 11.

confidence; a reference to widespread reporting of Lokmanya Tilak's first sedition trial was also made wherein anti-colonial publications played a crucial role in circulating his words far and wide when he struggled to access legal aid.

Freedom & Constraints of Judicial Conduct

Paragraphs 38 to 49 of the judgment whilst emphasizing judiciary's independence from the legislature & executive, discusses a vital aspect of freedom & constraints of judicial conduct that form the two ends of the same spectrum. The Hon'ble Apex Court observed that live streaming is, therefore, quintessential when a constitutional body like High Court cannot be impleaded and oral remarks by such authority have implications on another constitutional body, herein the EC. The further observance was made as regards creativity & spontaneity of thought through oral remarks aiding both, the court & lawyers, moreover, enriching our jurisprudence in the process.

The court further observed that it is the higher courts that are tasked with the role of balancing not just the two spectrum ends, namely freedom of judicial conduct on one and constraints on judicial conduct at another, but also the two independent constitutional bodies- the Madras High Court & the EC in the present case.

The court also observed that caution must be exercised on the part of judges when making off- the cuff remarks in open court for judicial language is a window to a conscience sensitive to the constitutional ethos. The court further observed that oral remarks are made off the judicial record & the court being a staunch proponent of freedom of media to report court proceedings, disposed of the appeal finding no substance in EC's prayer to restrain media from such reporting.

The discussion became fructified when the observations were duly supported with references to the cases of *Sirros v/s Moore*[21] wherein Lord Denning observed that the judges must act honestly and judicially and in such a scenario, they are not to be plagued with allegations of ill will or malice or biasness; *Kashi Nath Roy v/s State of Bihar*[22] wherein the court observed the significance of appellate and revisional courts in correcting the errors committed by sub-ordinate courts and that judges in sub-ordinate courts must not be inflicted condemnation for such error(s) "unless there is something else and exceptional grounds"; *Dr. Raghubir Saran v/s State of Bihar*[23] wherein an observation & advise was

21 [1975] Q.B. 118.
22 (1996) 4 SCC 539.
23 (1964) 2 SCR 336.

made to the effect that higher courts must enable sub-ordinate courts to freely express their opinion ;& *A.M. Mathur v/s Pramod Kumar Gupta*[24] wherein highlighting the significance of judicial restraint and discipline, an important observation was made to the effect that the judges "cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses.."

Conclusion

In this case, the appeal and pending applications (if any) were held to be disposed of; observing that the oral remarks are not a part of the official judicial record, and therefore, the question of expunging them does not arise.

However, through this very case, media has been given herculean power to report even the undocumented part of the judgment thereby making the Indian judiciary more cautious in its approach while making remarks of any kind which has a tendency to put it in jeopardy.

This case has further proven that media, which is said to constitute the 4th pillar of democracy, its very objective of democratizing & ensuring transparency can only be fructified if it is permitted to report justice. A twin objective will then be further achieved, of maintaining public faith & confidence in the judicial system of its nation on one hand and, giving virtual extension to freedom of speech & expression that constitutes freedom of media, on another.

Furthermore, an exact reporting of court proceedings by media is always better than a media trial. An honest, complete and diligent reporting must be done without a speck of sensationalization to usher in transparency & a true democratic regime.

24 (1990) 2 SCC 533.

An Approach Towards Balancing Fundamental Rights: Amit Sahni v/s Commissioner of Police

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Abstract

On October 7, 2020, the Supreme Court of India delivered a landmark judgement in the case of Amit Sahni v. Commissioner of Police. This ruling was pronounced in the backdrop of several protests organized by citizens to voice their dissent against an allegedly discriminatory central legislation. In this verdict, the Supreme Court acknowledged that the right to express discontentment against governmental actions is a fundamental right, albeit not exercisable in a manner that indefinitely occupies public spaces or is detrimental to the rights of other citizens. As demonstrations remain an integral part of India's political landscape, the Supreme Court's attempt to strike a 'balancing' act between competing fundamental rights is of great constitutional importance. This case comment is an attempt to undertake a critical examination of the judgement and ascertain whether the jurisprudence developed is consistent with the constitutional scheme. This case comment shall scrutinize the judgement by firstly studying the Supreme Court's ruling on various issues. It shall then proceed to critically evaluate the Supreme Court's reasoning as against established precedents and doctrines. Finally, this essay shall conclude by highlighting the way forward for the rights of demonstrators in India, post the Amit Sahni v. Commissioner of Police judgement.

Introduction

In early 2020, as the COVID pandemic unleashed its wrath around the world, the Indian populace found itself fighting two battles at once. Not only did the people face

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an unprecedented public health crisis, the entire country, including Delhi, but was also staggered by widespread protests.[1] On 12th December 2019, the Indian Government enacted the Citizenship Amendment Act ("CAA").[2] The CAA was criticized by scholars and politicians for being *allegedly* discriminatory.[3] Against this enactment, a large women led congregation assembled at Delhi's Shaheen Bagh to voice their discontentment against the law.[4] As the demonstrations gained momentum, members of civil society raised concerns over the road blockades by the protesters, resulting in increased traffic and inconvenience to commuters.[5] However, as the pandemic's wreckage became uncontrollable, in March 2020, the government was constrained to impose a nationwide lockdown.[6] Shortly thereafter, the demonstrators abandoned the protest site owing to the mandatory requirement of adherence to social distancing norms. Months after the protests ceased, the Supreme Court heard a petition which sought the removal of the protestors. The primary argument posited by the petition was that the annihilation of public spaces by the protestors is impermissible within our constitutional scheme. A three-judge bench of the Supreme Court, led by Justice S.K. Kaul, in *Amit Sahni v. Commissioner of Police & Ors.*[7] ("Shaheen Bagh judgement"), decided in favour of the petitioner and attempted to strike a balancing act between two competing fundamental rights — free speech and free movement.

As protests remain an integral part of India's political arena, the jurisprudence laid down by Supreme Court in the Shaheen Bagh judgement will have wide ramifications on determining the validity of similar demonstrations, most notably, the farmers' protest, in times to come. Hence, this case-comment is an attempt to undertake a comprehensive study of the judgement. The structure of the case-comment is as follows. The paper shall begin by laying down the facts of the case and trace its journey before reaching the Supreme

1 *Anti-CAA protests escalate across India*, The Hindu Business Line, (Dec. 19, 2019), https://www.thehindubusinessline.com/news/national/anti-caa-protest-internet-shut-down-in-parts-of-delhi/article30346740.ece.

2 The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).

3 Gautam Bhatia, *It is everybody's Constitution,* The Hindu, (Jan. 1, 2020), https://www.thehindu.com/opinion/lead/it-is-everybodys-constitution/article30446190.ece.

4 *Shaheen Bagh: The women occupying Delhi street against citizenship law*, BBC News, (Jan. 4, 2020), https://www.bbc.com/news/world-asia-india-50902909.

5 *People have right to protest but can't block roads, says SC on Shaheen Bagh protest*, Hindustan Times, (Feb. 18, 2020), https://www.hindustantimes.com/india-news/people-have-right-to-protest-but-can-t-block-roads-says-sc-on-shaheen-bagh-protest/story-OJkbNvQMt0cLiUQ0J5rDJN.html.

6 Nistula Hebbar, *PM Modi announces 21-day lockdown as COVID-19 toll touches 12*, The Hindu, (Mar. 24, 2020), https://www.thehindu.com/news/national/pm-announces-21-day-lockdown-as-covid-19-toll-touches-10/article31156691.ece.

7 Amit Sahni v. Commissioner of Police & Ors., (2020) 10 SCC 439. (Hereinafter referred to as, "Shaheen Bagh Judgement").

Court. In the second part, the paper shall examine the Supreme Court's treatment of the case and examine its findings on various issues of constitutional importance. The third part of the case comment shall proceed to critically analyze the reasoning of the Court and in the fourth and final part, the paper shall conclude by highlighting the way forward.

Facts

As the events leading up to the Shaheen Bagh judgement are etched in public memory, the paper shall briefly summarize the factual scenario of the case, before proceeding to analyze the rationale of the judgement. The case traversed across jurisdictions, including the Delhi High Court, and the Supreme Court, before reaching its determinative end. In the subsequent sections, the paper shall examine the rulings of both, the Delhi High Court and the Supreme Court.

Findings of The Delhi High Court

Prior to arising for determination before the Supreme Court, the matter was dealt by the Delhi High Court. In *Amit Sahni v. Commissioner of Police & Ors.,*[8] ("Amit Sahni"), the petitioner sought the police authorities' aid in opening up the Kalindi Kunj-Shaheen Bagh Stretch, in addition to the Okhla underpass, which allegedly remained inaccessible due to the ongoing CAA protests. A division-bench of the Delhi High Court, led by the Chief Justice, ordered the police authorities to react in accordance to law and order and work towards opening the roads. It was also observed that, *"the larger public interest as well as the maintenance of the law and order"*, had to be balanced.[9] However, the Court refrained from issuing any specific direction, as the volatility of the situation required spontaneous decisions by law-enforcement authorities, capturing the pulse of the rapidly changing situation.[10] Accordingly, the Writ-Petition was disposed off on the first day itself.

It is apposite to note that the Delhi High Court, without attempting to delve into a thorough constitutional analysis, attempted to navigate a path, wherein both, the demonstrators, and the policing authorities, have the liberty to act in furtherance of the larger public interest. By not ordering the immediate suspension of the protests, the Court permitted the demonstrators to exercise their free speech, and simultaneously, empowered the police to take necessary steps to prevent any unexpected aggravation of the situation.

8 Amit Sahni v. Commissioner of Police & Ors., 2020 SCC OnLine Del 117.

9 *Id.* at 5.

10 *Id.* at 6.

The Supreme Court's Ruling

The petitioner, however, unsatisfied by the Delhi High Court's judgement, knocked on the doors of the Supreme Court by way of a Special Leave Petition ("SLP"). The Supreme Court, in order to develop an *"out of the box solution"*,[11] had appointed two interlocutors, namely Senior Advocate Sanjay Hegde and mediator-trainer Sadhana Ramachandran, to interact with the protestors and arrive at a common-ground of resolution.[12] Despite the interlocutors' efforts, no settlement could be reached and the Supreme Court, based on the findings of the report, noted that *"the views reflected in private conversations with the protestors were somewhat different from the public statements made to the media and to the protesting crowd in attendance"*.[13] Though the Supreme Court's effort at mediation provided to be unsuccessful, the pandemic came in as a *force majeure* and halted all activities. In pursuance of the nationwide lockdown, the protests at Shaheen Bagh, and elsewhere, ceased.

For all practical purposes, the petition before the Supreme Court had become infructuous as the intended purpose of making protestors vacate the site was achieved by the pandemic. This was acknowledged by the three-judge bench hearing the matter, led by Justice S.K. Kaul. It was noted, *"really speaking, the reliefs in the present proceedings have worked themselves out"*.[14] Despite the relief sought in the petition already being realized, the Supreme Court decided to pass rulings *"on the subject on account of its wider ramifications"*.[15]

Therefore, the Supreme Court elucidated on the issue before it for determination, that is, whether the right to protest can be restricted on the ground that it causes inconvenience to commuters. Supreme Court's observations and holdings were on a diverse set of questions, hence, in the subsequent sections, the paper shall engage with them independently.

On Protests

The Supreme Court recognized that the roots of India are buried deep in protests and independence was attained only after consistent resistance against the colonial rulers.[16] However, the aggressive forms of protest necessary in the by-gone era, are not sustainable

11 *Supra* note 7, at 9.
12 *Id.*
13 *Id.* at 10.
14 *Id.* at 12.
15 *Id.* at 13.
16 *Id.* at 16.

in a modern, constitutional democracy. The right to protest is located in Articles 19(1)(a)[17] and 19(1)(b)[18] of the Constitution, namely the right to free speech and expression and the right to assemble peacefully without arms. In any participative democracy, citizens are entitled to participate in the democratic processes of the country so as to enable them to exercise their right to choice. It was rightly pointed out that the right to protest, similar to all other fundamental rights, is not absolute and subject to several 'reasonable restrictions' enumerated in Articles 19(2) and 19(3) of the Constitution.[19]

An interesting observation, vis-a-vis protests, was furthered by the Supreme Court in the Shaheen Bagh judgement. While discussing the case of *Mazdoor Kisan Shakti Sangathan v. Union of India & Anr.*,[20] which was about regulating protests at Jantar-Mantar, the Court noted that fundamental rights do not exist in compartmentalized isolation, rather interact with each in a synergy. In such a situation, it is possible that two competing fundamental rights clashes with each other. To resolve this tension, constitutional courts are required to refrain from giving primacy to one fundamental right over the other, rather strike a harmonious balance between the two competing rights, so that both of them can thrive in mutual co-existence. In the Shaheen Bagh case, the two competing rights were the right to free speech and the right to assemble peacefully, as opposed to Indian citizens' right to move freely anywhere in the country granted under Article 19(1)(d).[21] Hence, a balancing act was necessary to adjust the right of protestors with the right of commuters to move around unhindered.

17 India Const. art. 19, cl. 1 — *(1) All citizens shall have the right—*
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions [or co-operative societies];
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;(g) to practise any profession, or to carry on any occupation, trade or business.

18 *Id.*

19 India Const. art. 19, cl. 2. — (2) *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*
(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

20 Mazdoor Kisan Shakti Sangathan v. Union of India & Anr., (2018) 17 SCC 324.

21 *Supra* note 17.

On public spaces and restrictions

This brings us to the Supreme Court's articulation of the nature of the Shaheen Bagh protests and how it chose to balance it against the larger public interest. The Supreme Court noted that while the right to protest is an essential part of Indian polity, protestors cannot be allowed to takeover public spaces indefinitely.[22] The Supreme Court held, *"We cannot accept the plea of the applicants that an indeterminable number of people can assemble whenever they choose to protest"*.[23] The Supreme Court further expressing its disagreement with the alleged permanent occupation of public spaces by the protestors, said, *"We have, thus, no hesitation in concluding that such kind of occupation of public ways, whether at the site in question or anywhere else for protests is not acceptable and the administration ought to take action to keep the areas clear of encroachments or obstructions"*.[24] The Court also expressed displeasure with the way the Delhi High Court disposed off the Writ-Petition and noted that it should have monitored the matter.[25] Finally, the Court noted that all protests arising in the future shall be subject to the legal principles enunciated in the Shaheen Bagh judgement.[26]

Analysis

The judgement has marked a paradigm shift in the understanding of protest jurisprudence in India. By holding that future demonstrations shall be subject to principles enunciated in the Shaheen Bagh judgement, its ramifications become far-reaching and wide. In the existing situation, where several other demonstrations, including the months-long farmers protest is underway, an analysis of the Shaheen Bagh judgement is warranted. The paper, in the subsequent sections, shall assess the soundness of the Shaheen Bagh judgement and attempt to show that the Supreme Court missed an opportunity to lay down a comprehensive test of balancing.

Rule of Restraint

A fundamental principle of constitutional law is that rights determination must be a fact-

22 *Supra* note 7, at 17.
23 *Id.*
24 *Id.* at 19.
25 *Id.* at 20.
26 *Id.*

based exercise.[27] In *Government of NCTD v. Inder Pal Singh Chadha*,[28] it was held that constitutional issues must not be determined unless the facts before a court make it absolutely necessary to do so. No constitutional issue can ever be decided in a vacuum, and more importantly, a writ-court confines itself to the narrow points raised before it.[29] Until a constitutional court does not have access to all the relevant facts, the adjudication process would remain marred with inconsistencies. A repository of complete facts allows courts to visualize an issue comprehensively and further its rights-reasoning in a structured manner. On the other hand, when the judiciary decides constitutional issues in the abstract, without due regard to the facts, the reasoning is often oversimplified as judges, in the absence of complete facts, have to rely on their limited conception of the future possibilities. As held by the Supreme Court in *State of Madras vs V.G. Row*,[30] ("V.G Row) reasonable restrictions on a fundamental right have to be applied after duly considering *"all the circumstances of a given case"*.[31] For the sake of completeness, in the V.G. Row case, the Supreme Court struck down an impugned section of the Criminal Law Amendment (Madras) Act, 1950 as it did not conform to Article 19(4) of the Constitution.

Notably, the Shaheen Bagh judgement pursued a point of constitutional interpretation, when it did not need to. As mentioned earlier, the Supreme Court had noted that *"the reliefs in the present proceedings have worked themselves out"*.[32] Hence, in such a scenario, where the petition was rendered infructuous, the court should have exercised restraint and not have found the need to, *"pen down a few more lines for clarity"*.[33] The endeavor of the court to determine whether the protestors caused inconvenience to the commuters was thus analyzed in the abstract and was against the rule of restraint.

Improper Application of Balancing

It is now established that the question before the Supreme Court in the Shaheen Bagh judgement did not require determination. However, the Court still pursued the issue and engaged in constitutional analysis. In this section, the paper shall test whether the Supreme

27 Shrutanjaya Bhardwaj, *"Balancing" Dissent, Protest and Urban Mobility: The Shaheen Bagh Judgment*, The Centre for Advanced Studies in Human Rights, The Human Rights Blog, (Nov. 23, 2020), https://casihrrgnul.wordpress.com/2020/11/23/balancing-dissent-protest-and-urban-mobility-the-shaheen-bagh-judgment/.

28 Government of NCTD v. Inder Pal Singh Chadha, (2002) 9 SCC 461.

29 *Supra* note 27.

30 State Of Madras vs V.G. Row, AIR 1952 SC 196.

31 *Id.* at 15.

32 *Supra* note 14.

33 *Supra* note 7, at 13.

Court applied the balancing test appropriately. To reiterate, the issue before the Supreme Court was whether the fundamental right to peaceful assembly and free speech be restricted if it is causing inconvenience to commuters.

The contemporary elucidations on the doctrine of balancing can be traced back to the case of *Subramanian Swamy v. Union of India*,[34] where the Supreme Court while rejecting a challenge to the constitutional validity of criminal defamation held that Article 19(1)(a) has to be 'balanced' against the right to reputation under Article 21. The normative understanding of the doctrine of balancing suggests that when one fundamental right conflict with another, both of them have to be harmoniously construed.[35] Balancing presupposes the equal standing of fundamental rights. As a subordinate fundamental right need not be balanced, it can simply be 'trumped' by a superior fundamental right.[36] Some scholars have argued that Article 25, right to freedom of religion, is placed on weaker footing within Part-III of the Constitution, owing to its language which makes the right subject, "*to the other provisions of this Part"*.[37] The "subject to" clause in Article 25 is unique as the members of the Constituent Assembly chose to limit only the right to freedom of religion as against *"other provisions of this Part"*.[38] However, the position of Article 25 is an exception, and all other *equal* fundamental rights have to balance in a manner where they can meaningfully coexist.[39]

The obstacle with the doctrine of balancing is that it has never properly been described by the judiciary and is invariably applied to restrict free speech against unenumerated rights under Article 21, the ambit of which, is ever growing.[40] This results in the judiciary 'trumping'

34 Subramanian Swamy v. Union of India, (2016) 7 SCC 221.

35 Gautam Bhatia, *The "Balancing" Test and Its Discontents*, Indian Constitutional Law and Philosophy, (May 20, 2016).

36 Shrutanjaya Bhardwaj, *"Balancing" Away Free Speech: Some Thoughts*, Socio Legal Review, (Dec. 16, 2020), https://www.sociolegalreview.com/post/balancing-away-free-speech-some-thoughts.

37 India Const. art 25. *(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

38 *Id.*

39 Shrutanjaya Bhardwaj, *Individual Religious Freedom is Subject to Other Fundamental Rights*, (2019) 7 SCC J-29.

40 *Supra* note 36.

fundamental rights, that is, prioritizing one right over the other, rather than harmoniously balancing them. The Supreme Court, in the Shaheen Bagh judgement, appears to have 'trumped', rather than 'balance', the competing fundamental rights at stake. The reasons for this argument are as follows. Firstly, the Supreme Court did not identify the right or law, against which it was balancing the fundamental rights to free speech and peaceful assembly. The grounds of limiting the right to free speech and peaceful assembly are exhaustively delineated in Articles 19(2) and 19(3) of the Constitution. By not engaging in a thorough analysis of why these rights need to be restricted beyond the permissible constitutional limits, the Court has left several important questions unanswered. Questions like, is mild inconvenience to commuters enough to restrict demonstrations, or the implications of availability of alternate routes, have found no place in the judgement, hence, leaving the door wide open for speculation on future instances. Restricting fundamental rights, without meeting the conditions under Articles 19(2) and 19(3) cannot be categorized as a balancing act.

Secondly, balancing is an exercise that must occur only in accordance with the doctrine of proportionality.[41] The doctrine suggests that rights can be restricted only when no other alternatives are available in the facts and circumstances of the case. Furthermore, the doctrine of proportionality requires the Court to adopt reasoning that is least restrictive to a fundamental right.[42] Thus, it is a settled position of law that balancing does not empower courts to arbitrarily overpower one fundamental right to accommodate another. In the absence of an appraisal of evidence to determine inconvenience caused to commuters, or an attempt to find a path that curtailed the right to free speech and peaceful assembly in the least restrictive way, the Supreme Court has applied the doctrine of balancing improperly.

Conclusion

The Supreme Court, in the Shaheen Bagh judgement, missed an opportunity to properly define the contours of the doctrine of balancing. Though the Supreme Court endeavored to uphold tranquility by ensuring public spaces remain accessible to all, its rationale could have been strengthened by a thorough analysis of constitutional issues, rather than simply dealing in the abstract. The Supreme Court had an opportunity to rectify this error when

41 Arsh Rampal, *Guest Post: The Shaheen Bagh Review Order – An Unreasonable Restriction on the Right of Assembly*, Indian Constitutional Law and Philosophy, (Mar. 30, 2021), https://indconlawphil.wordpress.com/2021/03/30/guest-post-the-shaheen-bagh-review-order-an-unreasonable-restriction-on-the-right-of-assembly/.

42 Modern Dental College & Research Centre v. State of Madhya Pradesh, 2016 SCC OnLine SC 373.

a revision petition was filed against its judgement in the Shaheen Bagh case.[43] However, the Supreme Court, by the same three-judge bench, led by Justice S.K. Kaul rejected the review petition and held that it's earlier ruling, *"does not suffer from any error apparent warranting its reconsideration"*.[44] By the virtue of this dismissal, the Shaheen Bagh judgement and its precarious jurisprudence, has attained finality. It is indisputable that no demonstration, protest, or sit-in can hold public spaces — meant for collective use of the citizenry — under hostage. However, the Supreme Court, by only cursorily examining the rights at stake, has left many questions unanswered. It remains to be seen how the Shaheen Bagh ruling forms and shapes protests in the future.

43 Debayan Roy, *Supreme Court judgment on Shaheen Bagh protests "judicial sanction" for "police excesses": Review petition in SC*, Bar & Bench, (Nov. 16, 2020), https://www.barandbench.com/news/litigation/supreme-court-shaheen-bagh-judgment-right-protest-review-petition-police.

44 Kaniz Fatima v. Commissioner of Police, Civil Appeal No. 3282/2020.

The Hindu Marriage Act of Pakistan: A Spearhead of Social Change

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Abstract

Since the partition between India and Pakistan, the Hindus residing in Pakistan have been desiring their personal marriage law system. This is because the minority Hindu community in Pakistan have been subjected to gross injustice and oppression since time immemorial. Moreover, there have been abundant atrocities faced by the women belonging to the Hindu community. The only way to curb the atrocities faced by the Hindu community was to develop their own personal law system governing marriages. This breakthrough was achieved in the year 2017 when the Hindu Marriage Act was passed in Pakistan. The paper herein firstly will discuss the atrocities and problems faced by Pakistani Hindus in the absence of legislation. Secondly, it will discuss the various benign provisions of the landmark Hindu Marriage Act pertaining to the registration of marriage, termination of marriage which aims to protect the minority Hindu community. Further, it sheds some light on the concurrence of Hindu Customary law and the Hindu Marriage Act.

Introduction

Since the partition between India and Pakistan, the Hindu community in Pakistan has been on the receiving end of discrimination and marginalization. Pakistan is home to Christians (1.59% of the population), Hindus (1.60% of the population), Qadianis (0.22% of the population) and others (0.07% of the population) and the vast majority of Muslims (96.28% of the population).[1] The minority religions are regulated through laws including Christian

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1 Pakistan Bureau of Statistics, PBS, 1998. *Census: Religious Minorities*. Islamabad: Pakistan Bureau of Statistics.

Marriage Act, 1872; Parsi Marriage and Divorce Act, 1932; Sikh Anand Marriage Act, 2007 and others. However, even though the Hindus are the largest minority in Pakistan, they did not have any marriage laws until the enactment of the Hindu Marriage Act of 2017.

The need for a Hindu marriage law was imminent as there were numerous cases of physical attacks, forced conversions, the social stigmatisation of the Hindu minorities in Pakistan.[2] Furthermore, the obligation to enact a marriage law governing the Hindus came from the Pakistan constitution as well. The Constitution of Pakistan holds that *"the protection of the law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan"*.[3] The impugned provision acknowledges the fact that the rule of law provides protection against arbitrariness, tyranny, and caprice.[4] This means that the constitutional footing of Pakistan requires the presence of a law which will regulate human conduct whenever necessary. The constitution also sets out the protection of the interest of minorities and allow them to profess their religion freely.[5] It is also an unequivocal fact that sometimes, the cultural or religious verdict may serve as the purpose of the law, which is the case of the Muslim law of inheritance.[6] The enactment of an Act was not only important for recognizing Hindus as an integral community of the country but also to mitigate the plight of women who have been subject to continuous harassment and physical agony. The females from the Hindu community were often prone to abduction and forced conversion of faith, it was believed a codified law would protect the plight of Hindu women in Pakistan.[7] A law was also required to inculcate the minorities into the legislative framework and also to provide them equal rights in accordance with the constitutional framework.

The Hindu Marriage Act of 2017 brought fresh air into the family law regime in Pakistan. Earlier there were a load of problems because of an absence of legislation which caused numerous legal and procedural irregularity. The same shall be espoused upon in the subsequent section by the author. Moreover, the Act became a milestone in Pakistan as it incorporated the essentials of marriage, terms through which a marriage may be solemnized, conditions through which marriage can be terminated and the basis through

2 Anwar Jqbal, *"1,000 Minority Girls Forced in Marriage Every Year: Report"* (Dawn, 2017) accessed 21st February 2021. Available at - https://www.dawn.com/news/1098452.

3 The Constitution of Islamic Republic of Pakistan 1973, Art. 4.

4 Shaukat Ali Mian vs Federation of Pakistan, 1999 CLC 607 (1999).

5 The Constitution of Islamic Republic of Pakistan 1973, Art. 2A.

6 Syed Nadeem Farhat, "*Hindu Marriage Law: Need, Impediments and Policy Guidelines"*, Policy Perspectives: The Journal of the Institute of Policy Studies, 12(2), pp.131-146.

7 Jqbal, s*upra* note 2, *"1,000 Minority Girls Forced in Marriage Every Year: Report"* (Dawn, 2017).

which such termination can take place. The Act is also aimed to act as a watershed against the atrocities faced by the Hindu minority community in Pakistan.

Absence of Legislation: Issues and Problems

Apropos the partition between India and Pakistan in 1947, a separate state of Muslims was created wherein marriages of Hindu minority were not recognized, leaving Hindu women without any protection.[8] Marriage is considered to be an essential institution in Pakistan, in terms of moral and social obligation.[9] The choices made in marriage determines a women's adult life and how she will be looked up by the world.[10] Women belonging to the Hindu minority in Pakistan have been deeply affected by the lack of legislation in the country. The presence of oppressive and discriminatory national laws has affected the plight of the women belonging to the Hindu community. Women belonging to the minority communities like those of the Hindu community have faced and usurped physical, mental, emotional, and psychological violence. Pakistan had seen a surge of intolerance towards religious minorities. As intolerance towards religious minorities grew in Pakistan, so did the practice of forced conversions.[11] While there exist different methods to force someone to covert religion, there are two common methods that exist in Pakistan – bonded labour and forced marriage.[12] An example of this is that most of the bonded labourers in Sindh belong to the Hindu minorities which are considered to be scheduled tribes.[13] These forced conversions have made the Hindu minorities vulnerable not only to those who are compelled with "larger ideological" motives but also to those who are involved in petty monetary gains.[14]

In furtherance, the absence of legislation meant that there was no mechanism to register and regulate aspects of Hindu Marriage and even divorces between the individuals. No mechanism for registration and identification of marriage implied that there would be complications with regards to the transfer of property, identity documents, travel documents and many more. Another problem that arose due to a lack of legislation is that there was no

8 Saleem Shaikh & Sughra Tonio, "Kidnapping, forced marriage: Pakistan's Hindu women hope for protection in new law", (Reuters, 2017), https://www.reuters.com/article/us-pakistan-women-marriage/kidnapping-forced-marriage-pakistans-hindu-women-hope-for-protection-in-new-law-idUSKBN17E11J .

9 Filomena M. Critelli, *Between Law and Custom: Women, Family Law and Marriage in Pakistan*, 43 Journal of Comparative Family Studies 5, 2012.

10 *Id.*

11 'Forced Conversion of Minority Girls and Women in Pakistan' World Sindhi Congress. 5 (UNPO, 2017), https://unpo.org/downloads/2075.pdf.

12 *Id.*

13 *Id.*

14 Tahir Mehdi, Hindu Marriage: Untying the Knots, (Dawn, 2015), https://www.dawn.com/news/1224870.

way to substantiate a marriage. In any case of a bigamous marriage, the aggrieved party had no way to establish a bigamous marriage by the opposite spouse as there was the absence of any proof of marriage. Moreover, this legal gap has hindered the rights of women and children the most. Lack of legal documents would imply that women could be thrown from their matrimonial home and there would be no legal recourse for the same. Moreover, the absence of marriage documents would mean that any child from an impugned marriage would be considered illegitimate. This implied that both wife and children would lose their legal status as heirs of the deceased.

The extremely weak legislation and lack of implementation of existing laws have not only affected the matrimonial rights but also the human rights of women. Adding to that, there was an absence of a regulatory framework to deal with marriages amongst the non-Muslim minorities in Pakistan.[15] The religious minorities perform and register marriages in accordance with their religious practices and thus, no consideration is given to the age of a child.[16] Any executor of child marriage would not be punished as there would not be any registration or a record of such marriages.

These problems of and suppression of women and children were at their peak. The problems arising because of a lack of concrete legislation was evident. These issues were first highlighted in the 1970s but they could not be formalised.[17] Moreover, to tackle the problem even the Parliament tried passing the Hindu Marriage Bill thrice – in 2008, 2011 and 2012 but it did not bear any fruits.

The Landmark Hindu Marriage Act, 2017

After a massive hue and cry the landmark Hindu Marriage Bill was finally adopted on 9th March 2017. It is considered to be a milestone as it is the first personal law for Pakistani Hindus, applicable in Punjab, Baluchistan, and Khyber Pakhtunkhwa provinces.[18] The Sindh province has already formulated its own marriage law.[19] Another significance of this law is that Hindus being one of the largest minorities did not have any law governing them. The new law has aimed to not only bring a breath of fresh air to the family law regime in

15 "Child Marriages in Pakistan", The Institute For Social Justice (ISJ) (Institute for Social Justice, 2017), http://www.isj.org.pk/child-marriages-in-pakistan/.

16 *Id.*

17 Mehdi, *supra* note 14.

18 'Pakistan Senate passed Landmark Hindu Marriage Bill', (The Hindu, Feb. 18, 2017), https://www.thehindu.com/news/international/Pakistan-Senate-passes-landmark-Hindu-marriage-bill/article17324249.ece.

19 *Id.*

Pakistan but also to protect the rights of women and children. This Act vividly encourages the perception that women should have documentary proof of their marriage as pointed out by Michael when he said, "the incumbent government was committed to protecting and promoting human rights, including the rights of women and minorities".[20] In furtherance, he suggested that the Ministry of Human Rights also "took the initiative to protect the rights of the minorities after obtaining a no-objection certificate from the Ministry of Religious Affairs."[21]

Hindu Customary Law along the lines of Hindu Marriage Act

Since time immemorial, Hindus have owned their customs and traditions in high regard. The earlier customs and traditions are being followed by the Hindu community till now. It is pertinent to note that Hindu customs have portrayed having strong and life-long bonds with spouses. The Ramayana describes a woman as '*dharmapatni'* which means "a friend and adviser to be associated by the husband in religious rites and ceremonies".[22] While the Mahabharata depicts a social obligation and mentions that those who have wives "fulfil their obligations in the world", may be able to live a true "family life", and may be able to stay "happy and lead a full life".[23] One can construe that both of the holy literature depicts that a man and woman has to live together in the faithful ties of holy matrimony. The Act describes a Hindu marriage as –

> *"The union of Hindu male and Hindu female solemnized under this Act and includes the marriage solemnized before the commencement of this Act in accordance with the law, religion and customs having force of law relating to Hindu persons."*[24]

On the perusal of the definition of Hindu marriage, it is vivid that the Act would apply to men and women belonging only to the Hindu community. Moreover, the Act has been given a wider ambit to not only include marriages solemnized after its commencement but before too. The act would not apply to a non-Hindu marrying a Hindu, which was earlier an acceptable part of Hindu customary law.[25]

20 "Pakistan Parliament Passes Landmark Hindu Marriage Bill", (The Indian Express, 2017), http://indianexpress.com/article/world/pakistan-parliament-passes-landmark-hindumarriage-bill-4563476/.

21 *Id.*

22 Raza, *supra* note 8.

23 *Id.*

24 The Hindu Marriage Act 2017, § 2(e).

25 Raza, *supra* note 8.

In furtherance, the Hindu customary law requires that certain customs, traditions, and procedures be followed during the solemnization of marriage. Moreover, there are various rites and rituals that hold spiritual importance under the Hindu customary law.[26] However, if any tradition which is unlawful or has not been uniformly observed among the Hindus for a continuous and uniform period of time, that tradition cannot be validated as a customary right.[27] If we scrutinize the essence of the Act, it can be contemplated that just like the Constitution of Pakistan abides and follows the *Shariah*, the Hindu Marriage Act accepts the laws within Hinduism.[28]

Registration and Documentation

The act through its Section 6 mandates that every marriage between Hindus should be registered in accordance with the Act within fifteen days of its solemnization. Moreover, the Act declares that "the marriage register shall be open for any inspection and shall also be held as an evidence of its contents or any certified extracts".[29] In furtherance, the original register's information may be put "on extract to be shared with the applicant on provision of such fees".[30] The impugned section allows proper verification that is required, so as to get details of the marriage as mentioned in the *Shaadiparat*.

Shaadiparat, as defined under the Hindu Marriage Act is the –

> *"Certificate of marriage issued by marriage registrar, which certifies the solemnization of Hindu marriage."*[31]

A *Shaadiparat* is a document similar to the *Nikahnama* in Muslims, it is considered to be proof of marriage between the parties.[32] It is a document whose existence can be found in every Hindu Marriage Bill but was officially recognised as a valid legal document in 2017. The document holds a high value as the same has to be signed by the pundit and has to be registered with the concerned governmental authorities.[33] Thus with this document, a Hindu will now have a credible, authentic and legally binding record of marriage. The *Shaadiparat* includes important details such as the date of marriage, name of union town/

26 *Id.*

27 The Hindu Marriage Act 2017, § 2(b).

28 Raza, *supra* note 8.

29 The Hindu Marriage Act 2017, § 6(2).

30 *Id.*

31 The Hindu Marriage Act 2017, § 2(i).

32 *Supra*, 11. Aparajita Mishra, *"Critical Analysis of Hindu Marriage Laws in Pakistan",* IPLEADERS, https://blog.ipleaders.in/critical-analysis-hindu-marriage-laws-pakistan/#_edn13.

33 Raza, *supra* note 8.

council where the spouse belong, particulars of the groom, particulars of the bride along with her signature, particulars of groom along with his signature, signature of two witnesses, and signature of the registrar.[34] In furtherance, the Act ensures that if any individual makes or gives false statements or particulars in the *Shaadiparat*, he/she shall be punished with either simple imprisonment or fine or with both.[35] Moreover, the marriage registrar is expected to make three copies of *Shaadiparat*, one for the bride, the other for the groom and the last one for the marriage registrar itself.[36]

Conditions of Marriage through the contours of Hindu Marriage Act

The Hindu culture is ever-growing with customs and traditions. Perpetuating endogamous customs are vividly seen in society. However, Section 4 of the Hindu Marriage Act mandates certain conditions that must be fulfilled for a valid solemnization of marriage. The parties are required to be of a sound mind and capable of giving a valid consent at the time of marriage.[37] It is necessary that both the parties are not below eighteen years of age and that they do not come under the degrees of prohibited relationship.[38] In furtherance, the Act prohibits polygamy and polyandry.[39] Even though polygamy is commonly practiced in Islam, it has been kept prohibited for the Hindu Community as the Hindu culture declares it to be forbidden.

Section 10 of the Act authorizes that if the conditions of Section 4 clauses (c) and (d) are proved to be true then the marriage can be declared as null and void. Clause (c) of Section 4 prohibits any form of degree of prohibited relationship, while Clause (d) prohibits the existence of any other spouse at the time of marriage. The Act also considers the option of Voidable Marriages as enunciated under Section 11 of the Act. Section 11 states that "any marriage can be declared voidable and may be subsequently annulled by a decree of nullity passed by the court if – a) marriage has not been consummated owing to the impotence of the respondent; b) both parties were below the age of eighteen during the solemnization of marriage; c) consent obtained through coercion or fraud; d) the respondent at the time was pregnant by some other person other than the petitioner".

Decree of Termination of Marriage

An integral facet of the Hindu Marriage Act 2017 is the provision which deals with the

34 The Hindu Marriage Act 2017, Schedule A.
35 *Id.*, § 23 (2).
36 *Id.*, § 7 (4).
37 *Ibid.*, § 4(a).
38 *Id.*, § 4(b) & 4(c).
39 *Id.*, § 4(d).

termination of Hindu marriages in Pakistan. The termination clause just like the Act has been given a wider scope and it includes marriages solemnized before and after the commencement of the Act. This implies that any Hindu married individual can use this provision of the Act to terminate his/her marriage if, after the solemnization of marriage, he/she has been treated with cruelty[40] or has been deserted for more than two years.[41] A marriage can also be terminated if the other party has ceased to be Hindu or has converted to another religion[42] or has renounced the world by entering any religious order.[43] In furtherance, a spouse can apply for a decree of termination if the other party has been suffering from incurable leprosy[44] or has venereal disease in a communicable form or HIV Aids[45] or has mental order to an extent that the petitioner cannot be reasonably asked to live with the party.[46]

The Act also seeks to provide much needed protection to women. Section 12 also incorporates rights provided only to Hindu women to seek a decree of termination of the marriage. It provides that any Hindu wife may file a petition for termination of marriage if the husband has married again or has a wife alive from any marriage before.[47] Thus, providing protection to women in case their husbands commit bigamy. A wife can also seek termination if the husband has failed to provide her maintenance for 2 years.[48] Furthermore, a decree of termination can be availed if the husband has been sentenced to imprisonment for 4 years or more.[49] Moreover, termination of marriage can be availed if the marriage was solemnized before the wife attained the age of 18.[50]

Security & Safety of Women and Children

The Act also protects and ensures the rights of women and children. Section 13 of the Act is a benign provision that ensures financial security and upliftment of women and children. Section 13(1) of the Act gives the wife power to oppose the decree of termination on the grounds of financial hardship that may behest her. In furtherance, Section 13(2) mandates the responsibility of the courts to not pass a termination decree unless adequate provision

40 *Id.*, § 12 (1)(a)(i).
41 *Id.*, § 12 (1)(a)(ii).
42 *Id.*, § 12 (1)(a)(iii).
43 *Id.*, § 12 (1)(a)(vii).
44 *Id.*, § 12 (1)(a)(v).
45 *Id.*, § 12 (1)(a)(vi).
46 *Id.,* § 12 (1)(a)(iv).
47 *Id.*, § 12 (2)(a).
48 *Id.*, § 12 (2)(b).
49 *Id.*, § 12 (2)(c).
50 *Id.*, § 12 (2)(d).

for maintenance for the child being born out of the marriage has been made.

Conclusion and Recommendations

> *"In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law."*
>
> - Charles De Montesquieu

Law spearheads a social change. Ever since the partition of India and Pakistan, the Hindu minority were oppressed not by the majority but also by the people within their own community. The Hindu Marriage Act 2017 spearheads a social change in Pakistan wherein the rights of the minority Hindu community, women and children are aimed to be protected and uplifted. A social change was observed with the passing of the Act as for the very first time the rights of the Hindu minorities were given the limelight. By giving the spotlight to the minority community the government paved a way for their upliftment and to stop the oppression they have faced.

The Hindu Marriage Act 2017 is a landmark provision not only for the minority Hindu community but also for other minority communities as it showcased the direction in which the Pakistan government seeks to move forward. It was a win for the Pakistani Hindus as they finally got their personal law system which they have desired since independence. In furtherance, with the Pakistan legislation taking this historic step in improving the conditions of the Hindu minority community, the ties between Hindus and Muslims can also be improved. A positive feeling of brotherhood can be hoped for between the two religious' communities.

The presence of valid legal documents and other legal provisions will positively benefit Hindu women and children. The cases of kidnapping, child marriage, forced conversions, and forced marriages can be hoped to diminish because of this Act. However, this is only possible if there is a concrete implementation of the Act. Till now no appropriate steps have been taken to implement the law, which will only hinder the aim of the legislation. In furtherance, Hindus should be provided with more personal laws to govern aspects such as adoption and inheritance. This will ensure stronger legal protection to the safety and security of women, whilst also enabling equality with men. Also, the laws should be applied in a flexible way rather than applying them rigidly to ensure protection and financial security to women and children as to safeguard them from vagrancy.

Critical Analysis of Civil Liability for Nuclear Damage Act, 2010

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Abstract

India did not have any particular laws on responsibility for nuclear harm under civil law. Instead, it enforced the general law on damages outside of contractual provisions. However, the ambitious Indian civil nuclear program needs increased international cooperation. Future partners in that cooperation include implementing liability legislation based on international conventions on nuclear liability to provide their export industries with legal certainty. In May 2010, the Indian parliament adopted draft legislation on liability. The President confirmed the draft legislation on September 21st, 2010, thus making it law. The 2010 Civil Responsibility for Nuclear Harm Act defined a system to compensate victims of damage caused by a nuclear accident, to impose liability and to define compensation procedures. In recent years, one of the finest policy initiatives has been the Civil Responsibility for Nuclear Harm Act 2010. The exercise was important because, for the first time, nuclear energy and the implications of pursuing such a source of energy were discussed extensively in Parliament. The consequence was a liability law that had extraordinary domestic political acceptability but appeared to defy traditional international practice in several respects. Owing to the liability issues of the operators and the manufacturers, this Act has been fraught with speculation, with suppliers reluctant to invest in nuclear energy due to fear of incurring liability. The international nuclear community, led by supplier countries and manufacturers, argued that in order to be consistent with the existing practice of international nuclear liability law, the legislation should be revised. This paper aims

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to critically analyse the law of liability in this context and also propose solutions to the flaws in the law.

Introduction

The shock of the Bhopal Gas tragedy, where a gas spill at Union Carbide factory in Bhopal City killed about 20,000 people in 1984 is one of the world's worst industrial disasters. Even today it shocked the confidence in the legal framework of the country. It is an established fact that, we as a society failed to redress the grievances of the poor and the helplessness of suffering masses. It raised a question- What could we have done differently for fixing liability and responsibility and providing compensation to victims? If we had a proper statutory framework in place of traditional tort law, could we have provided remedy officially? These questions haunted our lawmakers for decades. With Indians' ever-increasing population; industries' hunger for energy has also increased which couldn't be met with the traditional fossil fuel-based power industry. Today India has over 32 nuclear power plants in operation with a capacity of 4780 MW with potential disaster risk and at the backdrop of the India-USA Civil Nuclear Deal.[1] Parliament finally came up with a Civil Liability for Nuclear Damage Act, 2010 to cure monetary compensatory lacuna with respect to Nuclear Installations.[2] This Act was passed amid the backdrop of the Fukushima *Daiichi nuclear accident* and it allows private companies to take part in India's Nuclear programme, one of the requirements of USA companies to claim insurance in their home states.[3] This Act has further amended the *Atomic Energy Act of 1962* amendments enabling private interest in the Indian nuclear programme.[4]

In this article, we will critically analyse the legal framework and Civil Liability for Nuclear Damage Act 2010 to see where any lacuna or grey area still exists in its interpretation.[5]

The Legislative Framework in India

Hans Kelsen perceives the 'Constitution' as *"a template that serves as genesis of statutes,*

1 U.S. Department of State, www.state.gov/p/sca/c17361.htm.

2 Jayanta Kumar Ghosh, *The Civil Liability for Nuclear Damage Bill, 2010: Looking Back*, Looking Forward 1 NSLJ 15 (2012).

3 Sudha Ramachandran, *Japan's nuclear disaster spooks India,* Asian Times Online http://www.atimes.com/atimes/South_Asia/MC17Df02.html.

4 Atomic Energy Act, 1962, No. 33, Acts of Parliament, 1962 [hereinafter Atomic Act].

5 Civil Liability for Nuclear Damage Act, 2010, No. 38, Acts of Parliament, 2010 [hereinafter Civil Liability Act].

determiner of the state organs, and foundation of all orders of the state" needless to say it shall be as firm and unchangeable as possible.[6] But what if the text of the constitution is ambiguous? Then it falls under the domain of interpretation, the art of listening to the *"Sound of the Silence"*.[7]

Needless to say, this art has been developed by many Jurists of the Catena School of Thoughts.[8] The theory of *"textualist"* championed by Justice Scalia of the Supreme Court of the United States who promoted interpretation, emphasised on what the text would reasonably be understood to mean, rather than upon what it was intended to mean.[9] *"Doctrinairism"* championed by Mark Garber who promoted contemporary constitutional controversies shall be solved by interpreting past precedents. The focus of this school of thought is the idea that the principle underlying a past decision provides the standard for interpreting the Constitution in future cases.[10] According to Justice Robert Jackson in its *"Prudentialism"*, *"if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact".*[11] *"Purposive interpretation"* championed by Justice Aharon Barak of Supreme Court of Israel, put forward this theory of interpretation which demonstrates its sensitivity to the uniqueness of a Constitution in the balance it aims to strikes between subjective purpose that is the intent of the authors of the Constitution, and objective purpose that is the intent of the system.[12]

The Constitution of India has its own interpretation development for *textualists* to *Purposive Interpretation*. From *A.K Gopalan V. State of Madras* where the court refused to infuse the Principle of Natural justice under "procedure established by law",[13] wherein Shankari *Prasad V. Union of India*[14] where "law" under Article 13(2) was being interpreted where the court held that the term "law" does not include an amendment to the constitution

6 Lars Vinx , The Guardian Of The Constitution: Hans Kelsen And Carl Schmitt On The Limits Of Constitutional Law, 28 (Lars Vinx ed., trans., Cambridge University Press 2015).

7 Laurence H. Tribe, *Soundings and Silences*, 115 Mich. L. Rev. 26, (2016).

8 Nishita kapoor, *All About Interpretation of Statutes*, Latest-Laws https://www.latestlaws.com/wp-content/uploads/2018/06/All-about-Interpretation-of-Statutes-By-Nishita-Kapoor.pdf.

9 Antonin Scalia, A Matter Of Interpretation: Federal Courts And The Law, 144 (Amy Gutmann et al., ed., Princeton University Press, 1997).

10 Mark A. Graber, A New Introduction To American Constitutionalism, 80 (OUP, 2013).

11 Terminiello v. City of Chicago, 93 L. Ed. 1131: 337 U.S. 1 (1949).

12 Aharon Barak, Purposive Interpretation in Law, 371 (Sari Bashi trans., Princeton University Press, 2007) (2005).

13 A.I.R. 1950 S.C. 27 ¶ 21.

14 A.I.R. 1951 S.C. 458 ¶ 13.

by parliament to *Kesavananda Bharati V. Union of India*[15] where the court held that parliament's power to add, alter or repeal Article, did not include the power to abrogate or alter the basic structure of the constitution, *Maneka Gandhi V. Union of India* where while interpreting Article 21 of the Constitution, the Court overruled *A.K Gopalan* and held that "procedure established by law" must have reasonableness and adhere to the principle of Natural justice.[16]

Questions of compensation for violation of Fundamental rights have always found favour in Courts. To illustrate in *Bhagalpur blinding case*[17] where the issue emerged before the high court was whether the court can grant pay to one who may have endured illegal confinement or substantial damages because of the state and whether the victim can move a writ petition in place of a civil suit. Justice Bhagwati, ordered the state to meet the costs of lodging these men in a visually impaired home in Delhi. From this judgment of the court, a compensatory approach of the court could be seen in *Rudual Shah v. State of Bihar*[18] where the Supreme Court granted Rs 35,000 as remuneration against the State of Bihar to the advocate who was kept in prison for a very long time after he had been vindicated by the Sessions Court. In Criminal Jurisprudence as well as in some different spaces, the compensatory tendency had denoted its noteworthiness like in the case of infringement on quality of life[19] right to livelihood[20] slum dwellers[21] hawker's[22] clinical care,[23] education[24], sexual harassment.[25]

Courts have attempted by interpretation to remedy environmental damage by *MC Mehta V. Union of India*[26] where the court has propounded the Doctrine of Absolute Liability whereby the operator of the plant alone would be held liable for all the damages occurring in the event of industrial disaster irrespective of the exception provided in *Rylands V.*

15 (1973) 4 SCC 225 ¶ 209.

16 (1978) 1 SCC 248 (V. Y. Chandrachud) ¶ 48, 49 & 56.

17 Khatri v. State of Bihar, A.I.R. 1981 S.C. 928 (PN Bhagwati J) ¶ 4.

18 A.I.R. 1983 S.C. 1086 ¶ 11 & 12.

19 Francis Coralie v. Administrator, Union Territory of Delhi, A.I.R. 1981 S.C. 746 ¶ 9.

20 Olga Tellis v. Bombay Municipal Corporation, A.I.R. 1986 S.C. 180 ¶ 31,37.

21 Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, A.I.R. 1997 S.C. 152 ¶ 13, 25.

22 Sodan Singh v. New Delhi Municipal Corporation, A.I.R. 1989 S.C. 1988 ¶ 17.

23 Permanand Katara v. Union of India, A.I.R. 1989 S.C. 2039 ¶ 7 & 8.

24 Mohini Jain v. State of Karnataka, A.I.R.1992 S.C. 1858 ¶ 17 & 21.

25 Vishakah v. State of Rajasthan, A.I.R. 1997 S.C. 3011 ¶ 3.

26 1987 A.I.R. 1086 ¶ 31.

Fletcher[27] like the Act of God, the mischief of Third Person etc. Courts have further in *Indian Council for Enviro-legal Action V. Union of India*[28] had developed the Polluter Pay Principle whereby enterprises that pollute shall compensate for their Act.

Atomic Energy Act, 1962

It is an established position of statutory interpretation that language of Statute shall be provided with natural meaning as clear from obiter of Justice D.A Desai that,

> *"... If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self-defeating."*[29]

To truly ascertain the meaning of law court can take into account historical facts of the statute as rightly observed by Justice Mukherjee:

> *"It is a settled canon of construction that the interpreter should place himself, as far as possible, in the position of those whose words he is interpreting and the meaning of certain words and terms used in an ancient document or a statute can be properly explained only by reference to the circumstances existing at the time when the statute was enacted or the document was written"*[30]

This statute was formulated to assist in the development, control and use of atomic energy for the *welfare of the People* of India. The Government has constituted Atomic Energy Regulatory Board (AERB) under Sec. 27 to further this objective, the board is mandated to ensure that there are no undue threats to health and the atmosphere from the use of ionising radiation and nuclear technology in India. As of now the Act on Atomic Energy and the Laws authorize only the central Government to carry out such actions relating to the use and processing of radioactive material and the production of atomic energy.[31] It will be appropriate here to quote *Section 3 of the said Act* that gives authority over atomic energy

27 (1868) LR 3 HL 330 (U.K.) (Lord Cairns) ¶ 6.

28 1996 A.I.R. 1446 ¶ 37.

29 R.S Nayak v A.R Antulay., AIR 1984 S.C. 684 ¶ 18.

30 Doypack Systems Pvt Ltd v UOI, A.I.R. 1988 S.C. 782, 797 ¶ 61.

31 Atomic Act, *supra* note 4, S. 3(a).

to the Central Government.

Similarly, Sub-rule (2) of Rule 1 of the Rules on Atomic Energy (Factories) 1996 implies, in particular, that specific law extends exclusively to all factories operated by the central Government and engaged in the enforcement of the provisions of the Act on Atomic Energy, 1962.

In the case of *G Sundarrajan v. Union of India*[32] The Supreme Court held that all the expert teams were prompt with regards to the protection of the Kudankulam Nuclear Power Plant, both in terms of people's lives and property and the atmosphere. Therefore, As expressed in the Atomic Energy Act, the Court had to respect the national nuclear policy of the country, and the same had to be applied in the interests of the health of the people and the economic development of India. The Court's ruling was in consonance with the current Indian Nuclear Policy.

The Act and the Rules lay down that only the Central Government has the right to use hazardous material in factories for mining or power generation purposes.[33] Rationale is, for safety purposes, that the Government, which is directly accountable to the citizens of the world, bear the duty to prevent nuclear substances from falling into the wrong hands and take significant steps to produce atomic power.[34] The knowledge that could often be necessary for the protection of the Government should not be disclosed to private parties, and this law was thus in the interest of the country and its citizens. This strictness when it comes to nuclear installation is due to past incidences suffered by the world. We hear name few to elaborate

The Industrial Disaster of Other Countries: A Comparative Analysis

We have two cases. The first one is *the three-mile Island accident* and *the Chernobyl disaster***.**

32 (2013) C.A. No. 4440 S.C. ¶ 189.

33 The Atomic Energy (Amendment) Act, 2015, No. 5, Acts of Parliament, Statement of Objects and Reasons.

34 Atomic Act, *supra* note 4, § 16.

Three-mile Island accident[35]

Three-mile accident occurred on 28th-March-1979. This accident has occurred at the Three Mile Island unit 2 nuclear power plants near Middletown.[36] The calculation estimated a cost of US$ 1,034 billion and the clean-up was expected to be finished by 1986, but the overall clean up took 14 years, and 2, 23 million gallons of water were processed primarily to get the toxic material out of it. Thus, we see how long it takes to resolve the repercussions of a nuclear accident and the cost of the destruction caused by it.

Chernobyl Disaster[37]

This is the worst power reactor disaster that occurred in Ukraine on 26th-April-1986.[38] This disaster occurred about 20 km south of the border with Belarus. It has contributed to the exposure of vast numbers of toxic material which were released. Approximately 36 hours after the crash, 45,000 residents of Pripyat who lived within 4 km of the incident site were evacuated by bus.[39] The town remained uninhabited until today. From the 76 villages residing within a distance of 30 km in the field around the crash site, nearly 1, 30,000 people had to be evacuated by 5 May 1986. In Belarus, Russia and Ukraine, more than 4000 cases of thyroid cancer were detected in children and adolescents (0–18 years) diagnosed in 1992-2002.[40]

India-US Treaty on Civil Liability

The U.S.-India Civil Nuclear Agreement or Indo-U.S. nuclear deal is known as the 123

35 WNA. *Three Mile Island Accident*, World Nuclear Association, (Mar., 2020) https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/three-mile-island-accident.aspx.

36 (2021), https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html (last visited Aug 14, 2021).

37 WNA, Chernobyl Accident 1986, World Nuclear Association, (May., 2021) https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/chernobyl-accident.aspx.

38 Editorial, *Chernobyl disaster* - Causes & Facts, Encyclopaedia Britannica (2021), https://www.britannica.com/event/Chernobyl-disaster.

39 Nuclear Energy Association, *Chernobyl: Executive summary*, Organization for Economic Co-operation & Development Nuclear (2021) https://www.oecd-nea.org/jcms/pl_28265/chernobyl-executive-summary#:~:text=Introduction,large%20quantities%20of%20radioactive%20substances.

40 ICRN, International Chernobyl Portal of the ICRIN Project (Nov. 17, 2020) http://www.chernobyl.info/index.php?userhash=564160&navID=12&LID=2.

Agreement negotiated between the United States of America and the Republic of India.[41] A joint statement by the Indian Prime Minister Dr. Manmohan Singh and then U.S. Minister Dr. Manmohan Singh was the basis for this agreement on July 18, 2005. Under President George W. Bush, India agreed to divide its civilian and military nuclear facilities and put all its civilian nuclear facilities under the International Atomic Energy Agency (IAEA). In return, the United States agreed to work with India towards full civil nuclear cooperation.

It took more than three years for this U.S.-India deal to come to fruition as it had to go through several complicated phases, including the modification of U.S. domestic law, especially the Atomic Energy Act of 1954, a civil-military nuclear separation plan in India, an inspection agreement between India and the IAEA and the grant of an exemption to India by the Nuclear Suppliers Alliance, an export control cartel. In its final form, the agreement places those nuclear facilities defined by India as 'civil' under permanent safeguards. It allows for broad civil nuclear cooperation while excluding the transfer of 'sensitive' equipment and technology, including civil enrichment and reprocessing products, even under IAEA safeguards.[42] On August 18, 2008, the IAEA Board of Governors agreed, and on February 2, 2009, India signed an agreement with the IAEA on India-specific safeguards.[43]

Following the entry into force of this Agreement by India, inspections began in a phased manner on India's 35 civilian nuclear installations in its Separation Plan. In U.S.-India relations, the agreement is seen as a watershed and adds a new aspect to international non-proliferation attempts.[44] The IAEA approved the safeguards agreement with India on August 1, 2008, following which the United States approached the Nuclear Suppliers Group (NSG) to grant India a waiver to commence civilian nuclear trade. On September 6, 2008, the 48-nation NSG issued India a waiver to enable civilian nuclear technology and fuel from other countries. The introduction of this waiver made India the only recognized nuclear weapons country that is not a party to the Non-proliferation Treaty (NPT) but is

41 Mitesh Agrawal, *U.S. - India Civil Nuclear 123 Agreement*, Stanford Edu (Feb. 20, 2015) http://large.stanford.edu/courses/2015/ph241/agrawal1/.

42 NTI, *Nuclear Suppliers Group*, The Nuclear Threat initiative (Jul. 14, 2020) https://www.nti.org/learn/treaties-and-regimes/nuclear-suppliers-group-nsg/.

43 IAEA, *IAEA Board Approves India-Safeguards Agreement*, International Atomic Energy Agency (Aug. 1, 2008) https://www.iaea.org/newscenter/news/iaea-board-approves-india-safeguards-agreement

44 Jayshree Bajoria & Esther Pan, *The U.S.-India Nuclear Deal*, Council on Foreign Relations (Nov. 5, 2010) https://www.cfr.org/backgrounder/us-india-nuclear-deal.

also authorized to engage in nuclear trade with the rest of the world.[45]

Civil Liability for Nuclear Damage Act, 2010

Brief Object of the Statute

It is a 38 Act of 2010, to understand the nature of the act Statement of Object and reasons (hereinafter SOR) accompanied by appears to be helpful as an external aid. However, they cannot be used to determine the true meaning of the active part of the statute.[46] None the less as rightly observed by Justice Lahoti in *Bhaiji V. Sub-divisional Officer Thandla*:

> *"Reference is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances concerning the statute, and the evil which the statute sought to remedy".*[47]

Though it is not a hard and fast rule, Courts have time and again made an exception and used it in determining the operative part of a statute. In *Subodh Gopal Case*[48] SOR is used to judge the reasonableness of an Act under Art. 19(1) of the Constitution. It is being used to judge reasonable classification under Article 14 of the Constitution.[49] It appears as a tendency of the Court to use SOR when it comes to remedial statutes. To substantiate Court used SOR for judging Chapter VI-A (permanent Lok Adalat) in LSAA, 1987[50], Sec 7-A of PCA, 1947[51], Sec. 7(1) of Provincial Small Cause Courts Act, 1887[52] to name a few. SOR of present concern indicates that the legislature intended to clear uncertainty regarding trans-boundary liability and liability during transport of nuclear material amid the international legal framework of 1960 Paris Convention, 1963 Vienna Convention, 1997 Protocol to amend Vienna Convention and 1997 Convention on Supplementary Compensation for nuclear damage. These mandates creating special funds in the special drawing rights and party›s obligation to contribute for the same and that India, though not a party to these treaties, needed to develop a statutory framework with the demand of

45 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) - UNODA, 317 U.S.T., https://www.un.org/disarmament/wmd/nuclear/npt/ (last visited Aug 14, 2021).

46 State of WB v. UOI, A.I.R. 1963 S.C. 1241, 1247, (Sinha CJ.).

47 (2003) 1 SCC 692, 700, (Lahoti J.) ¶ 11.

48 *State of WB v. Subodh Gopal Bose*, A.I.R. 1954 S.C. 92 ¶ 38.

49 A Thangal Kunju Musaliar v M Venkatachalam Potti, AIR 1956 SC 246, 265 ¶ 50.

50 Bar Council of India v. UOI, (2012) 8 SCC 243, 255 ¶ 2.

51 *Arivazhagan v. State,* A.I.R. 2000 S.C. 1198, 1202 ¶ 11.

52 *Kedarnath v. Mohan Lal Kesarwar*, A.I.R. 2002 S.C. 582, 585 ¶ 7.

growing nuclear industry and compensation regime that this Act aims to provide for.[53] This is further asserted by the extended title of the same, which gives a general description of the Act›s object and purpose.[54] This Act intends to provide civil liability for nuclear damage and prompt compensation to the victims of nuclear damage through no fault liability channelling liability to the operator and *modus* to claim compensation.[55]

This statute appears to be enacted with the object of promoting the general welfare in response to urgent social demand and intended to impact social vice by operating directly towards curing liability regime; from the natural reading of the same, it is clear that it is a remedial statute[56] hence liable for liberal interpretation is warranted to as «to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved»[57] needless to say, it shall be done «without rewriting or doing violence to the enactment».[58] However, to truly appreciate this statute's mandate, we have to appreciate the Act's operative provisions.[59]

Nature of Liability under the Act

The Act is clear about the allocation of responsibility for nuclear damage. The operator is strictly liable (which is in line with the general principle internationally) for nuclear damage arising out of a nuclear incident[60] except in the case of a force majeure event, in which case the central government takes the risk.[61] The Act has defined Nuclear Damage as any loss of life or personal injury, property damage. It also takes into account loss of environment, and any loss of income attributed to environmental damage as in the case of the tourism industry or agriculture-related activates or any cost for preventive measures and any other economic loss as far as permitted by the general law of civil liability[62] which is attributable due to radiation inside the installation, nuclear fuel, and products or nuclear material coming in or out from installation. The operator›s liability is essentially capped at

53 Civil Liability Act, *supra* note 5, Statement of Objects and Reasons.

54 Amarendra Kumar Mohapatra v. State of Orissa A.I.R. 2014 S.C. 1716 ¶ 51.

55 Civil Liability Act, *supra* note 5, Preamble.

56 *Central Railway Workshop, Jhansi v. Vishwanath,* A.I.R. 1970 S.C. 488, 491, (Dua J.) ¶ 8.

57 *Raghuraj Singh v. Hari Kishan,* A.I.R. 1944 P.C. 35, 38, (Ld. Atkin) ¶ 9.

58 Steel Authority of India Ltd v. National Union Water Front Workers, A.I.R. 2001 S.C. 3527, 3535 ¶ 9.

59 Manoharlal v. State of Punjab A.I.R. 1961 S.C. 418 ¶ 5.

60 Civil Liability Act, *supra* note 5, at § 4.

61 *Id.* at § 5.

62 *Id.* at § 2(g).

a maximum of 1500 Crore Rupees.[63] The central government is at liberty to specific new amounts from time to time.[64] To mitigate the operator's financial burden if liability exceeds the maximum capped amount burden will be borne by the central government about any particular nuclear incident is capped at an equivalent of 300 million Special Drawing Rights (SDR) of the IMF.[65] Further operators are mandated to take insurance policies.[66] Further, the cause of concern appears to be when liability exceeds the maximum capped amount as Act is silent, making implementation arbitrary in cases of grave nuclear incidences. The Act has also established authorities in the form of claims commissioner and commission to adjudicate claims[67] who shall dispose of claims within three months by following the Principle of Natural Justice?[68]

Liability of the Supplier

The Indian Nuclear liability regime has provided a stumbling block for would-be suppliers. In most civil nuclear plant operating countries, operators are liable for any nuclear incidence and undertaking liability insurance.[69] However, in India, a noticeable exception is provided whereby, after paying compensation, operators can take recourse against suppliers for damages. Such recourse depends upon terms of indemnity contract and when an incident is caused due to any act or omission in part of the supplier or any person authorized on his behalf or any incident caused due to any patent or latent defects sub-standards services on the part of the supplier.[70] This stand of the statute makes suppliers› position venerable as liability for the operator is fixed at 1500 Crore rupees, if any incident happened due to the above-called conditions, the supplier would be contractually liable to indemnify the operator.[71] Such a stand is further asserted by Rule 24 of Civil Liability for Nuclear Damage Rules of 2011 wherein any contract shall have a clause for indemnity.

63 *Id.* at § 6(2).

64 *Id.* at § 6.

65 *Id.* at § 6(1).

66 *Id.* at § 8.

67 *Id.* at § 9 & § 19.

68 *Id.* at § 16 & § 32.

69 Faizanur Rahman, *Civil Liability for Nuclear damage Act, 2010: A Critical Analysis*, Enrg. Law Repts. Jun., 2018, 149, 152.

70 Civil Liability Act, *supra* note 2, at § 17.

71 *Frequently Asked Questions and Answers on Civil Liability for Nuclear Damage Act 2010 and related issues* (Feb. 08, 2015) https://www.mea.gov.in/press-releases.htm?dtl/24766/Frequently_Asked_Questions_and_Answers_on_Civil_Liability_for_Nuclear_Damage_Act_2010

Liability under Tort Law

Furthermore, as per Sec. 46[72] Act shall be in addition to, and not in derogation of, any other law for the time being in force and that nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, instituted against him. Its natural reading makes operators liable, but the question is whether suppliers can also be held liable under tort law. This question needs to be looked at with due consideration of the Doctrine of Harmonious Construction and Rules of Construction of Remedial Statutes.

Firstly, as stated by Venkatarama Aiyar J, "The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that; if possible, the effect should be given to both. This is what is known as the rule of harmonious construction".[73] This principle has been utilized for curing disharmony between provisions of two separate statutes altogether.[74] For instance, Sec. 32 of SEBI Act, 1992 provides that the provision of this Act shall be in addition to and not derogation of the provision of any other law. Court held that SEBI Being a Special Act should be read in harmony with the provisions of the Companies Act 1956; they shall work in tandem for the public at large[75].

Secondly, as a general rule of Remedial construction, courts ought to give "widest operation which its language will permit and what mischief sought to be remedied by the enactment"[76] and this practice is followed in social benefit-oriented legislation like the Consumer Protection Act that intends to provide compensation[77] The only limitation is that it shall be construed in such a manner not to do violence to the language of the Act.[78] It is a fact that the present Act provided for recourse to operators against suppliers and tortious liability of supplier against operator or victims is not expressly prohibited by statute, with due regard to the above mentioned rules of construction and facts, it can rightly be construed that Suppliers can be held under Tortious liability by operator and victims.

72 Civil Liability Act, *supra* note 5, at § 46.

73 VenkataramanaDevaru v. State of Mysore, A.I.R. 1958 S.C. 255, 268 ¶ 29.

74 Jogendra Lal Saha v. State of Bihar, A.I.R. 1991 S.C. 1148, 1149 ¶ 6 & 8.

75 Sahara India Real Estate Corp Ltd v. SEBI, (2013) 1 SCC 1, 57, 60 ¶ 58.

76 Sayad Mir Ujmuddin Khan v. Ziaulnisa Begum, (1879) I.L.R. 3 Bom. 422, pp. 430-431. (Sir James Colville) ¶ 9.

77 State of Karnataka v. Vishwabharathi House Building Co-Op Society, (2003) 2 SCC 412, 429 ¶ 12.

78 Lucknow development Authority v. MK Gupta (2003) 2 SCC 412, 429 ¶ 2.

Conclusion

From above mentioned Statutory Provision and relevant Case laws, it can rightly be concluded that Civil Liability for Nuclear Damage Act, 2010 is a step in the right direction on part of the legislature. Though this act is rigid with controversies regarding liability towards suppliers, maximum liability cap towards operators and government and the fact that it overturned the Absolute liability Principle and limited Polluter pay principle. That doesn't mean the legislature was void of its competence, on the contrary legislature was well within its competence. The Act is in addition to other relevant laws of the land and by no means, frustrating application of other laws such as tortuous common law liability. Furthermore, it has given the Central Government power to change the liability cap with regards to existing situations and it being a remedial statute by itself will be afforded by courts with liberal interpretation. Hence, it can be concluded that the legislature was well within its competence, and rights of victims are well protected in this Act.

RASHMI SALPEKAR AND GAURI GUPTA, *MOOT PROBLEMS* (VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES, 2021)

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Abstract

Moots Courts have come to be widely revered as a co-curricular activity which is crucial for a law student to gain an insight into the practical aspects of the law. A simulation of real-life courts, they are deemed to be an effective tool for nurturing advocacy and acquainting students with the art of arguing and court craft. This particular book is one written with the purpose of practical training of students. An amalgamation of twenty-six moot problems, based on varied areas of law with the problems ranging from direct to complex and intricate, this book presents a variety of options for one to choose from. The review hereby seeks to delve into the purpose of the book, analyzing the utility of the same for readers and emphasizing on skills that mere reading of these select few propositions will help one develop. Furthermore, a brief assessment of the experience that one can hope to garner from the mix and match of the different types of propositions has been carried out to highlight the importance of the book.

Introduction

"Knowledge without practice is like a glass eye, all for show, and nothing for use".

- George Swinnock

More often than not, "Don't judge a book by its cover" is a wise advice to heed. However, this book is one where the title says it all. Ironically, unlike the actual substance of the

book, the title is straightforward and enough for one to discern what exactly the book is about. An initiative by Vivekananda Institute of Professional Studies, 'Moot Problems' is an absolute delight for anyone looking to get a taste of what mooting in a law school is all about.

However, for a novice not yet introduced to the world of late nights and relentless readings, what a 'Moot" is may itself prove to be an enigma. The term 'moot' *per se* signifies two different meanings. On one hand, the generic meaning of the word denotes it to be something that has *'little or no practical relevance'*, while on the other, as in this context, it is something *'subject to debate'*.[1] Borne out of an old english word *mōtian* which meant 'to converse',[2] wherein at least in the legal context it stays true to its origins, wherein *moots* till date serve to do just that, enable discourse and conversation over issues that range from far-fetched legal fictions of today which may resonate with the reality of the future, to issues that legal professionals grapple with on a day-to-day basis.

A Moot Court is that training ground, toiling in which, accustoms and prims a law student for the nit and grit of actual courts. Nothing can beat experience, especially in a Court of law where practice remains crucial for excellence and heaps of knowledge alone prove to be inefficient for attaining success.

This book is one with no solutions to the multiple propositions it contains. A book with only questions and issues with no answers, it's meant to inculcate the love for mooting in everyone and provides them with an opportunity to demarcate the legal issues as per their perspectives.

Understanding the Purpose behind the Book

To fully appreciate the value ingrained in a book, understanding its purpose remains to be an essential prerequisite. Meant for either class activities as a part of the teaching pedagogy, or for intra institute activities and national competitions, the college has taken the importance placed in moots as a technique to build skills to heart. An amalgamation of Moot Propositions, the preface of the book makes it clear that the very impetus of every section of this book has been to impart a learning process.

In the foreword, Professor R. Venkata Rao also describes the book to be *"a sincere*

1 Lexico, '*Meaning of Moot'* LEXICO, https://www.lexico.com/definition/moot (last visited on Aug 6, 2021).

2 *Id.*

attempt of vslls, vips, delhi to share with the legal fraternity qualitative mooting issues.…in keeping with the its objective of providing tools for qualitative legal education". Professor T.V. Subba Rao also reiterates the importance of such simulations for law students while appreciating the initiative. Yet, unless one is able to understand *why* is it that such grave importance is placed in mooting, they won't be able to invest the amount of hard work and patience that moots command.

Importance of Mooting

On the face of it, the advantages of moots are obvious, wherein the very concept of mooting is considered to be an essential part of law school. In 2020 itself, Justice Deepak Gupta while bidding adieu to supreme court observed in his virtual farewell that *"Young Lawyers should learn Court Craft by sitting in courts instead of spending time in Bar Rooms"*.[3] Yet, for young law *students* with their myriad of lectures and academic commitments, the opportunity to spend time in Courts, apart from their abysmally short internships is hard to come by.

Moreover, observance alone is not sufficient to inculcate the skill of thinking on their feet in them. Moot Courts prove to be the perfect activity to fill in for the required practice needed, giving the students a chance to articulate the arguments by themselves and most importantly learn the skill to respond to the grilling of judges in the competition.

Moot Court Competitions are often a simulation of real-life cases, which help the students engage and think about the contemporary legal issues from both perspectives. It ingrains in the participants the ability to balance their views and maintain neutrality while considering the case from the perspective of both sides.

A key tool to augment oratory skills, research skills as well as providing a fair share of experience in drafting, moots also inculcate the participants with Court etiquette and do well in acquainting the students with mannerisms that are expected of a lawyer. By virtue of being a team activity, moots also make one more sensitive to the importance of time management and teamwork. Moots serve well to keep the students on their toes and have their minds churning which is key for their advancement.

This practice is also crucial for a student to decide about the field of law they wish to

3 Shruti Mahajan," Sit *in Courtrooms, not Bar rooms to learn Court craft from Seniors", Justice Deepak Gupta's advice for junior lawyers*, Bar And Bench (May. 7, 2020), https://www.barandbench.com/news/sit-in-courtrooms-not-bar-rooms-to-learn-court-craft-from-seniors-justice-deepak-guptas-advice-for-junior-lawyers.

pursue, because as the renowned painter Rembrandt said, *"Practice what you know, and it will help to make clear what now you do not know."* Mooting provides a platform to explore different fields of law and delve into them with the support of faculties and peers ease.

What this Book can do for Students

Moots are something more than just a mere test on various parameters such as knowledge of the facts, research prowess, drafting skills, and creativity displayed in the argumentation. It involves the development of certain intangible skills that a mooter gains but doesn't notice in light of the tangible skills that overshadow its impact. These are the ones that a student can imbibe by sheer analytical reading of the proposition as well.

The filtering of relevant facts out of the entire proposition is something that is analogous to a lawyer's role of demarcating the important facts from everything that has been told to them by their client. Facts remain to be that foundation around which any lawyer curates their narrative, thus if one is able to improve the skill to read, notice and retain the important details of their brief, that is a virtue that helps tremendously in arguing the case. Even Justice Deepak on his farewell had further noted that *"One should always be thorough with the facts of the case, even if they are not very thorough with the law"*.[4]

Furthermore, while many of the propositions in the book have stipulated issues at the end of the problem, there is a significant number of propositions which don't. This in itself is an opportunity for the reader to effectively try and demarcate the crux of the issue that again like demarcating the relevant facts is crucial because, without the correct issue, no one can curate the correct argument. One wrong argument is enough to destroy a case and often in real courts acts as the make-or-break factor.

Delving into the Intricacies of the Text

Moving to the actual substance of the book, consisting of a total of twenty-six propositions which have been curated by the faculty of Vivekananda Institute of Professional Studies, their alumni and one sole proposition from even their current students, the book touches base over a multitude of issues from different areas of law.

The book in itself is bifurcated into two parts, wherein on one hand Part 1 of the book lays down a myriad of propositions centered international law, on the other the Part 2 of the

4 *Id.*

book is based upon issues in national law. The majority of the propositions fall under the head of national law and deal with various issues of contemporary relevance in the realm of law.

The content of the book, apart from listing the name of the pages, streamlines navigation by giving a brief of the issue between the parties enabling one to pick and choose a problem in their sector of choice. Although a minute addition, this in my opinion saves the book from pushing its reader into boredom or discouraging them due to being stuck with a problem which they aren't interested in or don't have use of.

An interesting aspect of the moot propositions is that most of the problems center around juxtaposition of different areas of law and also those which are emerging fields currently at a nascent stage. An acute example is that of the case of *Republic of Alderan v. State of Naboo*,[5] which is based on space law and involves the juxtaposition of Geneva Conventions in addition to the Outer Space Treaties and leaves you scratching your head and wondering amongst other things whether a person aboard a spacecraft which crashes in foreign territory is a spy or an astronaut.

Similarly, there is also the case of *State of Sangala v. State of Joshen*,[6] which deals with a problem concerned with ICCPR and Fourth Geneva Convention, primarily concerned with the dispute between two states and the right of people to enjoy and utilize their natural wealth and resources, and the inherent right to marriage.

Another proposition that stands out is that of *Mehmood v. State*,[7] which involved the issue of a juvenile repeated offender who is charged for Dacoity with murder and calls upon the reader to navigate the circumstances of the moral vacuum of insufficiency of the sentence in the circumstance, and the added dilemma of the same happening before the amendment of the Juvenile Justice Act, making a stricter punishment not only difficult to procure but also unviable as per the word of law.

The book also consists of propositions that explore the much-debated law provisions and their applications, like the proposition of *Mathew v. State*,[8] wherein this case is centered on the provision of bail to an individual accused of abatement to suicide, much akin to the renowned case of Arnab Goswami who was in a similar predicament before the Bombay

5 Aaditya Vikram Sharma, *The Republic of Alderan v. The State of Naboo,* MOOT PROBLEMS 58 (2021).
6 Dr. Rashmi Salpekar, *The State of Sangala v. the State of Joshen,* MOOT PROBLEMS 3 (2021).
7 Aditya Vyas et al., *Mehmood v. State*, MOOT PROBLEMS 108 (2021).
8 Dr. Deepti Kohli, *Mathew v. State,* MOOT PROBLEMS 101 (2021).

High Court in 2020.[9]

These dynamic propositions with unexplored areas of law and moral dilemmas are contrasted by the brief straightforward ones which are evidently there to merely guide the participant as to the practical application of the law, like that of *M/S FNG v. M/s SGG*,[10] which is a brief straightforward proposition revolving around predatory pricing and other anti-competitive practices, with specifically curated issues of whether the party is even dominant in the relevant market and if it violates the contextual clause of section 4 of the Competition Act. This is a great example of what many of the small propositions from the book are trying to do. For a student with no practical knowledge of anti-trust laws, it might not be obvious that dominance needs to be specifically proven before abuse of dominance is, which is where the issues alone act as a lesson in their own right.

Furthermore, it consists of such an array of propositions, that apart from their subject matter, there are moot propositions of varying lengths as well, with problems as small and direct like in the case of *EnviroSamwell v. Union of Clanrita*,[11] which concerned a disputed water treaty between two states, and is barely two pages long, in contrast to the complex and comparatively detailed case of *State of Tarkocia v. State of Plourad*,[12] which is a case concerning the right to forest and water, wherein despite being relatively on the same subject matter, the latter is more nuanced and extensive.

Ultimately, this bifurcation and the mix and match of the different types of propositions on different areas of law all combine to render an overall holistic experience and sufficient in achieving the ultimate aim of acting as a reference material for students to practice and enhance their skill set.

Conclusion

Norman Lewis at the very start of his much-revered book 'Word Power Made Easy', tells his readers *"Don't read this book! Instead, work with it"*[13], this advice was one meant to guide and enable his readers to make the most out of their experience. This remains true for anyone who seeks a learning experience and wishes to maximize the benefit they derive

9 Karan Manral, *Arnab Goswami detained: All you need to know about abetment to suicide case,* Hindustan Times (Nov. 4, 2020) https://www.hindustantimes.com/india-news/arnab-goswami-detained-all-you-need-to-know-about-abetment-to-suicide-case/story-KCQ0EbYsbqrIv7fKsi4f7H.html

10 Gauri Gupta, *M/s FNG v. M/s SGG,* MOOT PROBLEMS 137 (2021).

11 Amita, *EnviroSamwell v.Union of Clanrita*, MOOT PROBLEMS 93 (2021).

12 Dr. Shivani Verma, *The State of Tarkocia v. The State of Plourad,* MOOT PROBLEMS 24 (2021).

13 Norman Lewis, Word Power Made Easy 1 (Garden City Publishing Co., Doubleday, 1949)

out of a piece of text, wherein thus, a bare reading of any moot proposition without analysis cannot prove to be a fruitful experience, because again, as Lewis aptly puts it "*Learning, real learning goes on only through active participation"*.[14]

The propositions in the book, and the book as a whole, have the capacity of being as dynamic or as monotonous as the reader wants it to be. With the right mindset, this book is nothing short of an amalgamation of invigorating riddles that one could explore and savor. Filled with legal issues that are both futuristic and practical, it can adequately prove to be quite the mental exercise for all and sundry.

Even without a practical simulation of presenting arguments, the intellectual experience that can be garnered by mere analysis of the propositions is enough to bring about a radical change in an individual by sharpening their skills of deduction and enriching their very way of thinking. Albeit a holistic learning experience in itself, moot propositions alone cannot equip anyone with expertise in the knowledge of the law, but what they can do is act as tools to enable one to sufficiently learn the application of the law.

As said before, this is a book of mere questions with no answers, but any lawyer who has the skill to narrow down a set of facts that are filled with elements meant to misdirect, any lawyer who is able to filter what is relevant from all that is not, one who can present their arguments succinctly, can phrase them coherently, has the aptitude to prioritize the important arguments in favour of time, or to phrase it simply, any lawyer who can demarcate and understand the problem, with basic research skills, would be able to draw the answer for their client in court.

This book, edited by Prof. (Dr.) Rashmi Salpekar and Ms. Gauri Gupta, is an ode to the importance of moots by the Vivekananda Institute of Professional Studies which sought to undertake a measure for holistic development of the Court skills in upcoming lawyers by imbibing it in the academic curriculum of their own students and opening avenues for those of other colleges. This is a stellar effort sure to benefit students who make an honest effort to use this book for augmentation of their skills and even those academicians who are looking to follow this lead and inculcate mooting into their own curriculum.

14 *Id.*

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