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MESSAGE FROM THE PATRON

NLUALR is a mirror to the quality research orientation of students of NLUJA, Assam. Like any other National Law University, this University represents India with talented students from all over the country, pursuing studies in divergent disciplines and honing inter-disciplinary approach towards pertinent national issues. As diligent students, acquiring and disseminating knowledge in different shades of life, the contributors to this journal are serving the great cause of social aspiration to accomplish right to know more and to update information regarding socio-legal problems and their solutions.

This fourth volume of the journal covers a wide range of research areas containing adequate and relevant data, appropriate analysis, thought povoking ideas and new insights along with deep vision of socially desired pursuit of Justice. Articles and reviews published in this issue contain contributions from students, researchers and academicians. It includes writings in the diverse areas of Crimes on the Internet, contemporary issues in International Laws, Intellectual Property Rights, Personal Laws, Environmental Ethics etc.

The National Law University, Assam Law Review is the result of untiring and relentless efforts of the Editorial Board consisting of talented and zealous students devoting their precious time, without impairing the high pursuit of learning and study, under the guidance of the Faculty Advisory Board. The students involved in publication of this Review, on account of the keen interest they have adduced in bringing out this issue, deserve special congratulations.

As a patron of NLUALR, I wish all success to this issue and hand over to readers to read, evaluate, comment and encourage the budding scholars to work with new zeal for social service and community welfare through constructive, creative and innovative suggestions to solve social-legal problems and eradicate social evils.

MESSAGE FROM FACULTY ADVISORY BOARD

The National Law University and Judical Academy, Assam has come out with yet another volume of its student run peer reviewed journal. It is one of the flagship journals or our University that has helped towards providing a platmorm to the legal fraternity in giving a concrete form to their academic labours. Law plays a vary distinctive role in maintanining and regulating the society in all spheres. Therefore it is very important that different stakeholders unite and collaborate on issues which confront the society and its growth. The Journal is a compilation of outstanding papers from numerous disciplines submitted by legal academicians, students and scholars associated with the legal and other disciplines. A remarkable breath in terms of disciplines, experiences and backgrounds will help to enrich legal scholarship.

One of the key objectives of research should be its utility for the upliftment of the individual and the society. This journal attempts to capture and document debates around topics of law and other multidisciplinary fields such as Jurisprudence, Intellectual Property Regime, International Relations, Personal Laws, History, Economics etc. This journal is an endeavour of the University in incorporating different ideas into a single platform, with the sole aim of making a contribution towards legal scholarship and policy formulation.

Here, we would also like to acknowledge the guidance and support of our Patron and Vice-Chancellor, whose support has been invaluable in bringing forth this issue at a time like this. We would also like to acknowledge the work of the Editorial Board for their commitment and dedication towards a successful completion of the entire process that goes into publication of an issue. The journal has been fortunate to draw upon their individual and collective knowledge, talent and judgement in creating the compilation of this issue. We would also like to thank our esteemed Authors for their valuable contributions to our journal and hope to enjoy their support and contributions in the future.

EDITORIAL

The National Law University Assam Law Review (NLUALR), a peer reviewed journal, completes five years of its existence in 2020 and amidst the challenging times that we find ourselves in, this minor milestone acts as an inspiration as well as a source of joy for all of us. NLUALR started in the year 2015 with the objective of collecting, processing and dispensing the tenets of legal academia for the benefit of the legal community at large: the students, academics, practitioners, and for everyone who finds a semblance of hope in free dispensation of speech and expressions without any unwarranted restrictions. As was envisaged by Professor Gurjit Singh and implemented at the hands of Professor Vijendra Kumar, the Law Review has, over the years, strived for excellence in terms of the research we present to our community, remaining inclusive and restrictive at the same time, the former for ideas from all walks of life in staunch belief that each idea has power to revolutionize the world, and the latter for maintenance of academic excellence. Subsequent editorial boards have attempted to ensure the adherence to these supreme ideals, this time it was our responsibility to carry the baton, we present to you our most sincere attempt at that. Let yourself be the judge for our utmost contribution towards and dedicated to the legal fraternity

In this issue, we have selected articles on numerous topics ranging from the diverse fields of Pubic International Law, Constitutional Law, Intellectual Property Rights, Environmental Law, Family Law, Criminal Law and Law of Contract.

Akshat Tiwari and Adwaita Bhattacharyya in their article, *"Internet Infidelity: An Unfamiliar Version of Adultery"*peek into the idea of infidelity in the online realm post the decriminalization of adultery by the Supreme Court and seek to examine the existing legal framework for the inclusion of online affairs in personal laws.

Nidhisha Garg in her article, *"Fountain Shows and Laser Shows: Whether 'Works' under the Copyright Act, 1957?"* attempts to enquire if fountain shows and laser shows could be brought within the ambit of copyright protection, by extending it to works of authorship and examines the suitability of such protection from the perspective of "live shows/performances" as per the Copyright Act of 1957.

Angad Singh Makkar in his note/comment, *"Eco-centrism in the Juridical Realm: Implications of Mohd. Salim v. State of Uttarakhand"* examines the aspects of ecocentric environmental jurisprudence by analysing the seminal *Mohd. Salim* case before the High Court of Uttarakhand, which granted the status of juristic entities to Ganga and Yamuna rivers along with figuring out if judicial pronouncements are the best way to adopt ecocentrism in the Indian legal system.

Ketayun H. Mistry and Cheshta Tater in their article, *"A Comparative Study Of Genocide: Preventing the Crime in The Age of Internet"* make an extensive study on the concept of genocide, based on a comparative analysis. The paper also attempts to figure out the perpetration of such a crime and its prevention in the internet age by relying on contemporary examples of the day.

Purva Anand and Rohit in their article, *"Intellectual Property Rights in Outer Space: A Reality Check"* highlight the pressing need to reconcile the nature of Intellectual Property Rights with that of the nature of Space Law- in a bid to protect the Intellectual Property Right issues in outer space. Lamenting on the inadequacies and inconsistencies of the existing legal framework, they propose some recommendations in the end; paving the way for further deliberation.

The case of Kulbhushan Jadhav created quite a furore around itself in international politics as the ostentatious nemeses India and Pakistan were at logger heads again. Atul Alexander in his case/comment, *"Deconstructing The Jurisprudence Of The International Court Of Justice In Jadhav Case (India v Pakistan)"* attempts to not only provide a detailed descriptive analysis of the most recent decision by the ICJ, in the Jadhav case but also discusses the prospects and implications of the same. The author strongly believes that it is the existing geopolitical environment that will determine the closure or non-closure of the entire dispute.

Kamaljit Kaur and Bipasha Khatana in their article, *"Judicial Review as A Means of Control and Co-ordination In Interdependence Amongst The Three Organs Of Government: A Comparative Study"* attempt to highlight the significance of Judicial Review. Taking the three jurisdictions of the United States of America, the United Kingdom and India, for a comparative study, the authors have traced the importance of this tool through a series of judgments; further focusing on the role played by the judiciary.

Aniruddha Kambhampati in his article, *"Cultural Imperialism: An underpinning in the Hindu Succession Act"* critiques the provisions of the Hindu Succession Act, for their oppressive language and specific sections, specifically with respect to the women. The author calls for the modification of Sec. 15 and Sec. 6 of the Act to bring them in consonance with Art. 15 of the Constitution and various Supreme Court Judgements, as recent as *Vineeta Sharma v Rakesh Sharma* (even though the paper was written before the verdict that was passed on 11 August 2020, with respect to Daughters' Rights in Joint Family Property).

Neeti Nihal in her article, *"Standard Form Contracts: A Step forward or A Step Backward"* analyses the Standard Form Contracts, its advantages and disadvantages along with the legal implications it can have over consumers and drafters alike. The author has necessitated the existence of such contracts, albeit with certain modifications as have been inducted via the Consumer Protection Act, 2019.

Shreya Daggar in her article, *"AnalyzingChagos Archipelago Dispute"* looks into the advisory opinion passed by the International Court of Justice, in pursuance of the request forwarded by the United Nations General Assembly on the 25th of February, 2019. The advisory opinion which was passed in favour of Mauritius, directs the United Kingdom to return the Islands of Chagos Archipelago is one of the recent instances in the 21st century, where the aspect of decolonisation was discussed in details by the Court. The paper delves into the legal grounds on which the advisory opinion was given and how the political climate in the international arena has almost entirely stood against colonialism when crucial questions of self-determination and sovereignty of States and human rights were discussed in the dispute at hand.

Pemmaraju Lakshmi Sravanti in her paper titled, *"The Status of Adoption in Islamic Law: A Critical Analysis of the Law and Precedents"* discusses the laws regarding adoption or rather the lack of it under Mohammedan Law, where the provision of a mode of guardianship as Kafalah system is allowed. With the existing laws and precedents, the paper analyses the status of an adopted child in Islamic Jurisprudence, especially whether the present system looks into guarding the best interests of the child.

Adrija Datta in her paper titled, *"Lucidification of the Legal Language: Solving the Problem of Legalese"* addresses inquiries on the starting point of legalese, characterizing highlights of legalese, legitimization

for proceeding with the work of legalese in authoritative records. The paper continues into the exploration and also proposes plain language drafting as a useful option in contrast to legalese, and follows the source of plain language drafting, its favourable circumstances; and explains the experience of nations who have made the move, and created bits of knowledge to assist start with plainlanguage drafting in India, who is yet to take the leap.

Apurv Shaurya in his paper titled, *"Moral Foundation of Criminal Liability: The Indian Perspective"* discusses about the fact of codification of laws with the advent of British rule in India and the co-relation between the laws and morality. The paper also delves into the aspect of studying the decline in 'legal moralism' and further discusses the juristic approaches taken by Hart, Mill, Duff amongst others. The analysis on why the most appropriate theory for the Justice System in India will be the theory of criminalisation by Duff and Feinberg has been addressed.

Priyanka Sarmah in her paper titled, *"Resource Rights and Forest Governance (Implementation of Forest Rights Act 2006 in Assam)"* analyses the nuances of co-relating relationship between a man and nature with respect to co-existence and stringent rules and regulations of forest governance. The paper attempts to understand the efforts made in lieu with the decentralization of forest governance with the initiatives of Joint Forest Management in 1988. The dynamisms of land rights of communities which dwell in the forest have been discussed with regard to the forest surrounding Guwahati city.

Drishya B. Shetty and K. Mythiraye in their paper titled, *"Electronic Agents, Legal Personality: Considerations in the future of Contracts"* talk about the idea of discussing Artificial Intelligence (AI) as party developed to be capable enough of formation and performance of contract. The intervention of AI will lead to an almost replacement of human being if taken from a futuristic point of view. The legal framework and essentials have been deliberated upon as the need would arise in coming times.

Ananyo Mitra in his paper titled, *"The Rule of Interpretation of International Treaties in Indian Courts"* points towards the major issue of counter-majoritarianism. It has also been deeply analysed that the Indian judges and courts have duly sought the help of International treaties in areas where legislations were missing in the municipal laws of India. The interpretation and application have been aplenty.

We would like to thank offices of the Vice Chancellor and Registrar of National Law University and Judicial Academy, Assam for their never-ending support as we went through the process of publishing this edition of the Law Review. A special mention of our gratitude towards our staff members at the University must be done for all of their assistance towards us during this time. We would also like to express our gratitude towards our contributors for their patience and cooperation with our editorial team. This pandemic has shown us the limitations of the structures that we have been thriving on as a civilisation, it has made is apparent that we must do better, which is why all the help that we have had during this time is of great significance for which we are all very thankful. We hope you, the reader, find our contribution informative and forgive us for any mistakes; kindly do reach out to us if you have any queries or would like to make any suggestions for the future editions.

Stay safe!

Note: The view(s) of the author(s) in their respective articles do not necessarily represent the views of the Editors.

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A COMPARATIVE STUDY OF GENOCIDE: PREVENTING THE CRIME IN THE AGE OF THE INTERNET

Ketayun H. Mistry and
Cheshta Tater[1]

Abstract

Genocide is seen as the world's most heinous crime, owing to the number of deaths involved. Despite popular thinking, genocide is not limited to a large group of people being massacred i.e. it being limited to its physical characteristics. The travaux preparatoires of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and all past instances show that the purpose behind such gory killings is not to kill, but to annihilate the group's identity and their culture. Even after 71 years of the Convention being in place, there remains ambiguity around the basic definition of Genocide which refers to the 'intent to destroy the group'. Legal scholars have argued that such an intent is actualised only by physical and biological destruction, however, through this article, we argue that destruction may also be sociological and cultural. We examine physical genocide as a means to the end of socio-cultural genocide, propagated and incited even by means such as the internet and social media. Hatred against protected groups is at a high, even in the post-modern liberal world, through the medium of the internet. Delving into the psychology of hate and genocide, we attempt to configure the beginnings of common loathing, which seek an urgent need to be identified in international criminal law as the markers of the intention to commit genocide, especially for timely prevention.

Keywords : Cultural Genocide, Internet, International Criminal Law, Prevention, Intent

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INTRODUCTION

The crime of Genocide has existed since humans divided themselves into groups. Billions have been persecuted by this crime of hate such as a group of Moravian Protestants, in 1782, in Ohio killed 96 Christianized Delaware Indians, illustrating the then growing contempt for native people.[2] 1915 witnessed the Armenian Genocide. Between 1933 and 1945, which is during the Holocaust, six million Jews, five million Slavs, Roma, Jehovah's Witnesses, disabled, homosexuals, and various political and religious dissidents were killed.[3] It was only after this dark period, in 1948, that Genocide was recognised in International Criminal Law under the Convention on Prevention and Punishment of the Crime of Genocide ["Genocide Convention"]. By 1998, the Rome Statute of the International Criminal Court ["Rome Statute"] recognised the prevention of Genocide as a jus cogens norm.[4] More recently, 300,000 people have been killed in Darfur, and former Sudanese President Omar al-Bashir is still wanted for the same.[5] The impending genocide of Uighurs is no longer behind the curtains either. But genocide is not just mass killing. It is the deliberate destruction of a group of people, based on their ethnicity, nationality, religion, or race.

Although the crime remains the same, there's a stark difference in the laying of the foundation for the commission of the crime. During the Holocaust, fear was instilled in all groups of the society against the Nazi Ideologies. In contrast, the 21st century stands testament to governmental policies supported by the media becoming the epicentre for orchestrating hate and crime. Any and every kind of divide between people in exploited on social media in the present times by various methods such as hate speech, fake news, and politically funded posts and advertisements, among other things. Further, globalisation and international co-dependency have caused a butterfly effect which is seen in terms of growing contempt towards various minorities all around the world, coupled with 'nationalism'. Globalisation and the internet are said to have brought the world closer, while in reality, they have torn us apart.

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[2] Donald L. Fixico, 'When Native Americans Were Slaughtered in the Name of 'Civilization' (*History,* 31 August 2018) <www.history.com/news/native-americans-genocide-united-states> accessed 23 May 2019

[3] 'The Holocaust' (*United To End Genocide)*, <endgenocide.org/learn/past-genocides/the-holocaust/> accessed 23 May 2019

[4] Malcolm N. Shaw, *International Law* (7th edn, CUP 2016) 89

[5] 'Sudan' (*United To End Genocide)*<endgenocide.org/conflict-areas/sudan/> accessed 23 May 2019

The Catch-22 surrounding the Genocide Convention

The Genocide Convention, the Rome Statute, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), and the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) define Genocide as:

> "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group."[6]

Despite the crime being of such grave nature, the Convention lays down a high burden of proof that requires the perpetrator to have a specific intent to destroy a protected group.[7] Although 'any' of the aforementioned five acts would qualify as an act of genocide, the Convention has been narrowly interpreted such that genocide is only an act of physical or biological destruction of a group.[8] Thus, forcible transfer of children of a group to another group, despite being in the text of the Convention, would not classify as an act of genocide for it is an enterprise which does not target the physical or biological existence of a group, but only destroys the elements which give that group its own distinct identity and allow its future growth. That is to say, any

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[6] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art II; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 6; Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 art 4; Statute of the International Criminal Tribunal for Rwanda, UNSC Res 355 (8 November 1994) UN Doc S/RES/955 art 2(2)

[7] International Criminal Law Services, *Genocide*,(International Criminal Law & Practice Training Materials) 4

[8] *Prosecutor v Radislav Krstiæ*, (2004) IT-98-33-A, Appeal Judgement, [25]

and all actions directed towards the cultural or sociological characteristics of any individual group are discounted and do not amount to genocide. This allows the perpetrators to obliterate this cultural identity. Such strategic extermination allows perpetrators to achieve their objective without actually fitting into the textbook definition of genocide. This is contrary to the aims of the Convention. Therefore, the interpretation of the definition must be widened, especially in order to prevent the deaths of many peoples and cultures.

Specific Intent to Destroy

The UN General Assembly was of the opinion that genocide is to human groups what homicide is to individual human beings.Thedenial of the right of existence of human groups shocks the conscience of mankind, resulting in great losses to humanity in the form of cultural and other contributions represented by these human groups.[9]

Ethnocide can be carried out in various forms such as prohibition of usage of a particular language even in private relations,[10] destruction of religious texts,[11] monuments, destruction or dispersion of documents or objects of historical, artistic, or religious interest and of religious accessories,[12] etc. as was provided for in the Draft Convention for the Prevention and Punishment of the Crime of Genocide.

Presently, there must be conclusive proof that the perpetrator of genocide intended for their actions to result in the destruction, in whole or in part, of a protected group,[13] where such a protected group necessarily has to be either a national, religious, racial, or ethnic group. It is the mens rea, in the form of dolus specialis, which gives genocide its distinct identity and differentiates it from an ordinary crime and other crimes under international humanitarian law.[14] Thus, in every case of genocide, the perpetrators' desired to extirpate the distinctive and undesired characteristics of a group. Unfortunately, so, the sole destruction of the group's culture is currently not identified as a crime under the Genocide Convention,[15] even though the victims' only 'fault' is his or her national, religious, racial, or ethnic identity.

[9] UNGA Res 96 (11 December 1946) UN Doc A/RES/96
[10] Draft Convention on the Prevention and Punishment of the Crime of Genocide (6 June 1947) A/AC.10/42 art I (2)(3)(c)
[11]ibidart I (2)(3)(d)
[12]ibidart I (2)(3)(e)
[13]*Prosecutor v Georges A. N. Rutaganda*, (1999) ICTR-96-3-T, Appeal Judgement, [59]
[14]*Prosecutor v. Goran Jelisic*, (2008) IT-95-10, [66]
[15]Malcolm Shaw (n 3) 206

Genesis of the Crime of Genocide

In order to prevent any crime, it is imperative to learn the reasons and situations behind its commission, so as to mitigate them. Researchers who investigated the reasons behind the occurring of the Holocaust were separated into two parts—the first wave of these researchers searched for aws in the German character and culture, and the latter looked more towards situational determinants. It was sometime then that psychologists' attention began turning towards the social-psychological forces involved in such prejudice.[16]

Consequently, according to an experiment performed by Stanley Milgram, the people who were most emotionally developed in society were able to resist the power of those authoritarians who wielded the power to affect millions of lives in society.[17] On the contrary, the people with a less developed emotional quotient were most susceptible to social systems, and norms without ever questioning them. In the context of genocide, the latter would turn in Jews, round up the Gypsies, and shoot Tutsis on sight. As Milgram had suggested, all that was required was an authority (state, church, popular opinion) to deem the killing legitimate or, in the case of copycat killing, just the perception of permission.[18] It all begins with the brainwashing of a group to create a sense of abhorrence towards another group.

Cultural Identity

For decades, cultural rights have been a neglected category of human rights.[19] Although some of the international human rights treaties provide for their protection, none of them formulates a comprehensive definition or enumeration. This is due to the undefinable character of the word 'culture'. The definition developed in the UNESCO Universal Declaration on Cultural Diversity regards culture as a set of distinctive spiritual, material, intellectual and emotional features of society or a social group.[20] It encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions, and beliefs, and by far is the most inclusive definition.

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[16] Steven K. Baum, *The Psychology Of Genocide: Perpetrators, Bystanders, And Rescuers* (CUP 2008) 2-3
[17]ibid 5
[18] ibid
[19] Janusz Symonides, 'Cultural Rights: A Neglected Category Of Human Rights' (1998) 50 I.S.S.J. 559-572
[20] UNESCO, *Universal Declaration on Cultural Diversity* (Resolution of the 31st General Conference of UNESCO, 2001) 68

History stands proof that people who form the minority and do not conform to the majority's beliefs and norms in society, are faced with the most infringement of their rights.[21] The International Covenant on Civil and Political Rights (ICCPR) was the first internationally binding document that included a provision specifically recognising minority rights. Article 27 of the ICCPR[22] grants minorities the right to live as they choose––in accordance with their traditions, customs, and beliefs. The concept of cultural identity is brought forward in General Comment number 23 to the aforementioned article: "[...] the protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned..."[23]It is pertinent to note that the abovementioned rights fall under the notion of the supposed 'right to cultural identity'––a term commonly used in soft law instruments, and international legal discourse, but overlooked by legally binding instruments under international law.[24] However, the violation of this right to cultural identity has no remedy under the international customary law.

Conditioning people in society to partake in the crime

On January 30, 1939, at Reichstag, Hitler said, "I want today to be a prophet again: if international Jewry inside and outside of Europe should succeed in plunging the nations once more into a world war, the result will not be the Bolshevisation of the earth and therefore the victory of Jewry, but the annihilation of the Jewish race in Europe."[25]

Such propagation of hate made some experts believe that a combination of certain traits and world views creates prejudice. Some experts focus on the personal and social-group threat while others pinpoint feeling states and key emotions.[26] Be that as it may, the amount we despise and whom we detest seems to vary between cultures. This hate is then incited in people, and the feeling to act upon it by dictators like Hitler, Mao, Tojo among others.

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[21] Sylwia Stryjkowska, 'Cultural Rights and Cultural Identity in the Case-law of the Human Rights Committee' (2017) 7 Adam Mickiewicz University L. Rev 120
[22] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[23] UN Human Rights Committee (HRC), 'CCPR General Comment no. 23: Article 27 (The Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5
[24] Sylwia Stryjkowska (n 20) 121
[25]United States Holocaust Memorial Museum, 'Hitler Speaks Before The Reichstag' (*Holocaust Encyclopedia)* <encyclopedia.ushmm.org/content/en/film/hitler-speaks-before-the-reichstag-german-parliament> accessed 23 May 2019
[26] Steven K. Baum (n 15) 25

At first sight, it might seem easy to say that one and/or a set of elite demagogues, such as Pol Pot and Milosevic, orchestrated a genocide. But when you put more thought to it, this set of demagogues is only the spark that an already prepared haystack needs to be set alight.[27] The people in Germany and around that area had grown up with anti-Semitic myths which reflected in fairy tales (such as, the Grimm's' Jew in the Bush), Plays of Shakespeare (such as, the Merchant of Venice), state-sponsored statues which belittled the Jewish culture (such as, the Judensau). These people were brought to hate Jews even if they had no first-hand experiences to compare with.

It began with the isolation of the Jews as a race as the ones who tortured Christ, then it came to the whole of Europe having separate laws and areas of settlement for them, later it led to public floggings and false accusations of crime just for being a Jew. Thus, people were filled with a sense of fear and hatred that had no end. It was a tipping point for those members in that society showing restraint due to fear of the law. They were given the go-ahead by these demagogues to vent out this instilled anger and hate towards this group of people. This resulted in a physical carnage of an entire group.

We see the root of the problem lies in social conditioning and stereotypical portrayal of a group of people which then leads to their isolation in society, which is capitalised on by the demagogues, with the outcome of genocide.

The influence of Media on the society

One might wonder why the twenty-first century and the liberal world needs to study the propagation of hate and crime, especially considering how aware, 'woke' and sensitive the society is now. Unfortunately, the reality is far from this myth. In an era of social media, new-age communication devices and dramatic shifts in traditional news media, it has become more important than ever to examine the nexus between media and mass atrocity. Social scientists have observed how online activity have a direct correlation with acts of violence.[28] Since these technological developments have the capability to severely amplify the voice of hate, cultural-hate is at its peak. Although this very technology

[27] ibid 6

[28] Zachary Laub, 'Hate Speech on Social Media; Global Comparisons' (*Council on Foreign Relations,* 7 June 2019) <www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons> accessed 10 January 2020\

can be used to mitigate these crimes, it is also being utilised to vilify adversaries and assemble fanaticism.[29] Media sites, the radio and quick journalism have resulted in the spread of information wherein people can take a stand. This helps generate help and donations from Good Samaritans across the world as was seen during April 2019 where people stood up and spoke out for the sufferings of people in Rwanda. But the end it leaves us perplexed about whether the positive use of media is enough to help prevent genocides.

Countries prohibiting global access of the internet to its citizens are creating echo-chambers of hate amongst their masses, while at the same time limiting the world's knowledge of their crimes. The world is also witnessing a rise in the butterfly effect of right-wing politics alongside liberal and human rights activism. Just as Milgram suggested, the emotionally stunted fall prey to this hate and untruths,[30] easily available to them on the internet, without ever trying to acquire complete knowledge. This is then spread by millions, creating a domino effect and making hate-related crime 'popular' on the internet. As more and more people have moved online, experts say, individuals inclined toward racism, misogyny, or homophobia have found niches that can reinforce their views and goad them to violence.[31]

All social media platforms have certain community guidelines to filter out hate-speech, but certain content is still very well available under the freedom of expression guaranteed by the same Covenant, ICCPR, which protects a peoples' cultural identity. Furthermore, the dark-web has no such filters and allows free movement of all sorts of crime. In such times, the international community is left with but a few actions to ensure cultural protection to the people at risk:

a. Identify cultural genocide as an end achieved by means such as physical genocide, and thus, recognising cultural genocide as a legal crime by itself;

[29] Dipanjan Roy Chaudhary, 'Christchurch attack: Violent extremists use social media to spread hate speech, says Board of Directors of the International Dialogue Centre' (*Economic Times*, 16 March 2019) <economictimes.indiatimes.com/news/international/world-news/christchurch-attack-violent-extremists-use-social-media-to-spread-hate-speech-says-board-of-directors-of-the-international-dialogue centre/articleshow/68435984.cms?from=mdr> accessed 7 January 2020

[30] Steven K. Baum (n 15) 5

[31] Zachary Laub (n 27)

b. Identifying cultural genocide at an early stage so as to take steps to prevent cultural destruction and physical and biological destruction; and

c. Generating evidence by media profiling and tracking the dissemination of hate.

Physical Genocide: Means to an End

More often than not, physical and biological genocide are the results of the trickledown effect of cultural genocide. Historians, free from the shackles of lacunae in international law, have researched and long documented the complexity and multifarious aspects of genocide. According to them, it is necessary to not look for specific intent in the mind of a single perpetrator but to understand the patterns that could be seen in a group of people who aimed at destroying an entire group.

After the Nuremberg Trials concluded, the Polish censured the Nuremberg trials for its indifference for the Polish and Jewish cultural destruction by the Nazis.[32] They conducted their own trials in accordance with the International Military Tribunal. The Supreme National Tribunal was established in 1946 for the trial of major Nazi criminals active in Poland during the occupation in accordance with international and Polish criminal law.[33] Its formal jurisdiction was to adjudicate war crimes, but seeing their inadequacy to capture Nazi criminality, the tribunal adopted Raphael Lemkin's definition of genocide (and the word itself, in its Polish translation) and interpreted the term as incorporating all crimes stipulated by the Polish decree, adding the concept of 'cultural extermination'.[34] This tribunal explored the 'negative' and 'positive' aspects of genocide and devoted a major share of the judgment to cultural genocide.[35] Two of the six groups of crimes that were identified were titled 'genocidal' and referred to as cultural aspects rather than the physical aspects.[36] They pertained to cultural and religious repression, such as the Germanization of Polish children racially suited, and complete destruction of Polish culture and political thought,[37] in other words by physical and spiritual genocide."

[32] AV Prusin, 'Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948', (2010) 24(1) Holocaust And Genocide Studies 1, 4; Leora Bilsky and Rachel Klagsbrun, 'The Return of Cultural Genocide' (2018) 29(2) EJIL 383

[33]ibid

[34]ibid

[35] Leora Bilsky and Rachael Klagsbrun (n 31) 384

[36] ibid; *Prosecutor v Greiser* (1948) Case no. 74 7 UNWCC LR of Trials of War Criminals [112], [114]

[37] ibid

The discussion held in the United Nations General Assembly on 25 October 1948 reveals the chasm between supporters and objectors to the inclusion of cultural genocide in the Convention.[38] The former believed that a group can be destroyed by destroying its cultural foundations,[39] or that cultural genocide is always a part of physical genocide and at times its precursor, and that, therefore, excluding cultural genocide can thwart efforts to prevent physical genocide.[40] Later on, they decided to exclude cultural genocide from the definition of genocide.

Similar to the Holocaust, the Tibetan case involves a sustained and explicit discourse of cultural genocide. Claims of physical genocide by China against the Tibetans were first made after the Dalai Lama fled Tibet in 1959 and are still made by the top leaders of the Tibetan émigré administration.[41] Amidst this physical carnage, they were forced to leave their homes, barred from speaking their language and they faced cultural persecution under the garb of the 'Cultural Revolution' propagated by Mao.

The Indian Americans, the Aborigines, the Sudanese, the Rohingyas and almost every other culture that faced such kind of physical persecution in the form of mass killings, have also been subjected to various means of subjugation and made to lose their culture. Schools run by such fanatic governments taught that such cultures were illiterate, uncivilised and unworthy. Their religious traditions were barred. Local languages were banned from being spoken. Their cultural artefacts and literature destroyed. If people wanted to protect themselves and their families from any harm then they were forced to re-locate, thus efficiently breaking up the communities. All of this led to sparse knowledge among the new generation about the roots, existence, and beauty of these various, targeted groups. Thus, cultural genocide was effectuated without there ever being an opportunity of preventing or stopping the perpetrators from eradicating entire cultures.

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[38] UNGA, 'Continuation of the consideration of the draft convention on genocide' (25 October 1948) UN Doc. A/C.6/SR 193-207

[39] ibid 205-206

[40] ibid 193-207

[41] Barry Sauman, *Cultural Genocide and Asian State Peripheries* (Palgrave 2006) 28

Identification of Socio-Cultural Genocide

The Genocide Convention punishes genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.[42] However, each of these acts requires various stages of preparation to develop into a punishable offence. Social scientists believe that these acts, including genocide itself, are predictable. For example, Genocide Watch's Glenn Standard has created a brief listing of the stages of genocide formation.[43] These stages are just as inexorable as they are predictable. The study of the ten stages laid down by the Glenn Standard is as futuristic as it is historical. If one looks back at these barbaric acts, even before the Convention was thought to be drafted, these signs are very much visible. Incidentally, every genocide in history has started as an ethnocide or cultural genocide and could have been stopped if identified and punished at earlier stages. For instance, one can identify each stage and the possibility of a genocide in the history of the Native Americans. Experts and scholars have spent years trying to prove 'intent' to destroy the Native Americans. On the face of it, the answer seems as simple as the Europeans' need and greed for conquest, land and resources, but the reality is complex and rooted in the cultural differences.

In the first stage of Classification, the people are divided into 'us' and 'them'. This divide is unavoidable in human beings as it begins as soon as life does, with the differentiation of man and woman. In the context of genocide, the classification is created between various races, ethnicities, religions, and even sects of these religions. In the early sixteenth century, when a vast majority of European colonists arrived at the present United States of America (USA) and Canada, with a sense of their own civilizational superiority, they immediately developed a distaste for the Native Americans. Thus, a divide on the basis of ethnicity was created. What followed was the Symbolisation, stemming from the Native Americans' relative nakedness and lifestyle, to distinguish between 'us' and 'them'. Classification and Symbolization are universally human and do not necessarily result in genocide.[44]

Entering into the third stage of Discrimination, the civil and legal rights of the inferior groups are denied. If the situation worsens,

[42] Genocide Convention (n 5) art III

[43] UNESCO (n 19) 32

[44] Gregory H. Stanton, 'The Ten Stages Of Genocide' (*Genocide Watch*) para 2 <www.genocidewatch.org/genocide/tenstagesofgenocide.html> accessed 24 May 2019

the inferior group members are equated with animals, vermin, insects or diseases. This is the stage of Dehumanisation, which overcomes the normal human revulsion against murder.[45] Hate propaganda is spread amongst masses. This stage was seen in the colonial USA when newspapers, Indian Experts" (who were often clergymen), and politicians all subscribed to the notion that the extinction of the Indians was justified and inevitable, thus immersing a colonial citizen in the information that buttressed the thought collective, was superficial and subject to distortion.[46]They were determined to conquer the land and exterminate or colonise the 'animal-like' civilisation they called 'Red-Indians'. For the colonists, colonial expansion was God-ordained, and the inferior had to give way to the superior.[47] Some writers are also of the opinion that Europeans intentionally inflicted Indians with a disease, usually with blankets infected with smallpox.[48]

It is crucial to understand that genocide cannot be committed without the agenda or compliance of the government in power of the perpetrating state. Special army units or militias are often trained and armed, and plans are made for genocidal killings[49] at the stage referred to as 'Organisation'. The first century of the European colony in the USA was marked by wars and massacres, the First Anglo-Powhatan War, Pequot War and the Massacre of 1622, amongst others.

The phase which follows is Polarisation where the extremists take all efforts to pull the two groups apart, prohibiting inter-sectional marriages as well as social interactions. Secondly, euphemisms are used to give way to their true intentions, by building armies and militia for "purification", "counter-terrorism", and "killing them before they kill us". This is the phase of Preparation and is punishable under Article III of the Convention as public incitement[50] and conspiracy[51] to commit genocide. The eighteenth-century outlook towards the Native Americans was influenced by Enlightenment thought[52] that the Indians could be "improved" and would eventually be brought into

[45] ibid para 4
[46] ibid
[47] Lawrence Davidson, *Cultural Genocide* (Rutgers University Press 2012) 22
[48] Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas* (City Light Books 1997); Barbara Alice Mann, *The Tainted Gift: The Disease Method of Frontier Expansion* (Praeger Publishers 2009)
[49] Gregory H. Stanton (n 43)para 5
[50] Genocide Convention (n 5) art III (c)
[51] ibid art III (b)
[52] Lawrence Davidson (n 46) 29

"civilization".[53] This is the thought which marked the beginning of perhaps the largest and longest cultural genocide known to humankind. The Indians were forced to sell their lands to the Europeans,[54] and the bison, which were primary to Indian culture and sustenance, were killed in huge numbers.[55] "Praying towns" were established for converted Natives where farming habits were taught to the 'barbarians', Indians were converted to the Christian faith, and the English language was enforced. United States government forcibly assimilated Native peoples into "American" society by discouraging or criminalizing Native culture, language, and religion.[56] The policy was to "Kill the Indian, save the man".[57] Finally, the focus was shifted to the Indian children, who were abducted from their homes and put into Christian and government-run boarding schools,[58] which is punishable under the present Convention.[59]

Soon, victims are identified, the property of the victims is expropriated, and death lists are made. In this stage of Extermination, sometimes, victims are sent to ghettos and concentration camps, or even starved to death.[60] This marks the beginning of the genocidal massacres. However, every time the Europeans tried to bring upon physical harm to the Indians, the latter reacted. Thus, the problem for the Europeans was that physical genocide was not achievable. Enslavement, removal and Christian conversion were now the ways to extermination.[61] Therefore, there exists much debate around the classification of extinction of Native Americans as genocide. For only when Extermination begins, the act is finally legally recognised as a

[53] Brian W. Dippie, *The Vanishing American: White Attitudes and U.S. Indian Policy* (University Press of Kansas 1982) 5

[54] Yasuhide Kawashima, *Puritan Justice And The Indian, Middletown* (Wesleyan University Press 1986) 205-224

[55] Jeffrey Ostler, 'Genocide and American Indian History' in Jon Butler (ed), *Oxford Research Encyclopaedia of American History* (OUP 2015) 15

[56] Brenden Rensick, 'Genocide of Native Americans: Historical Facts and Historiographic Debates' in Samuel Totten and Robert K. Hitchcock (eds), *Genocide of Indigenous Peoples: Genocide: A Critical Bibliographic Review* vol 8 (Transaction Publishers 2011) 22

[57] Richard H. Pratt, 'The Advantages of Mingling Indians with Whites' in Francis Paul Prucha (ed), *Americanizing the American Indians: Writings by the "Friends of the Indian," 1880-1900* (HUP 1973) 46–59

[58] Indian Country Today, 'Cultural Genocide Veiled As Education—The Time For Healing Is Now'(*News Maven* 22 June 2014),<newsmaven.io/indiancountrytoday/archive/cultural-genocide-veiled-as-education-the-time-for-healing-is-now-vBOUQUlvUky9sxP6Ukg3BA/> accessed 25 June 2019

[59] Genocide Convention (n 5) art II(e)

[60] Gregory H. Stanton (n 43) para 8

[61] Lawrence Davidson (n 46) 24

‘genocide’. It is indeed too late to save dignities and the lives of many by this stage. At this stage, only a rapid and overwhelming armed intervention can stop genocide.[62] Unfortunately, the ‘sovereignty’ of nations in the present times allows them, most often than not, to deny this intervention. The acts of extermination are often legalised by the governments in power as can be seen in countries such as China, Myanmar and India, among others. Even in the modern USA and Canada, the remaining Native Indians are considered second-class citizens. The Indians, the foremost and primary occupiers of the territory, were only granted citizenship in their lands in 1924 in the USA,[63] 148 years after independence. It is evident that the case was of not only war and territory, but more about the racial superiority of the ‘Whites’ who established such policies that a human group faces ‘existential threat’.[64] Meanwhile, in Canada, Indians were mandated to send their children to Indian Residential Schools to “Christianise” them until the 1990s. The Natives fought for the basic legal rights until 2013 when they finally met success. However, the point to be noted is that these legislations of the USA and Canada such as the ‘American Indian Religious Freedom Act’ and the ‘Indian Act’ are still not void, and exist as relevant bodies of law indicating that the Indians are still considered ‘different’ from the other citizens.

The final stage is Denial where, as the name suggests, the perpetrators deny that they committed any crimes, and blame the result of the circumstances on the victims for their ‘impurity’ and ‘disturbing values’. The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They continue to govern until driven from power by force when they flee into exile.[65] Thereby, national and international institutions pursue these genocidalists, and once extradited, they are tried by the appropriate tribunal.

Drawing a contrast from the atrocities against the Native Americans, there now exist international organisations to prevent the act of genocide, make efforts to stop it, or punish the perpetrators. In the older times, it was difficult to keep a count of the number of

[62] Gregory H. Stanton (n 43)para 9
[63] Indian Citizenship Act 1924
[64] ‘Native Indian Tribes Facing ‘Extinction?’ *(Al Jazeera,* 3 March 2012)<aljazeera.com/programmes/insidestoryamericas/2012/03/201232105745688586.html> accessed 20 October 2019
[65] Gregory H. Stanton (n 43) para 10

genocides which occurred, especially most of them were given the names of 'war', 'colonisation', or 'conquest'. Most of these genocides could have been, and can be, prevented if high risks groups are identified in time, and actions are taken to prevent loss of culture and human life. Even in present times, multiple 'ethnic-cleansing' processes are in progress, and even though largely condemned by the international community, little to no ray of hope is visible.

Genocides in the Modern world

The world today has seen numerous occasions, as explained previously when hate drives one group to employ a variety of means to ensure that the other group does not survive, and their culture is diluted to such an extent that they risk extinction. We now analyse two instances in recent history, as in the case of the Uighur Muslims and that of the Rohingyas. Through timely identification of cases at the cultural genocide stage and its due recognition under the Genocide Convention, there would be a greater chance to save the lives of millions of victims and that punishment could be better meted out to the perpetrators.

The Case of Uighur Muslims of China

In 1949 when Mao came into power, 80% of the Xinjiang Province in North-West China was populated by the Uighur Muslims. They had their cultural ties to multiple Central Asian Countries. It so occurred that over a period of time the Han Chinese, backed by Mao took up most of the skilled labour jobs and the Uighurs became a part of the labour class. The background for their persecution was laid down by Mao who employed different policies to keep the Uighurs from seceding. Slowly subtle policies towards creating a divide were left behind and more targeted and open approaches were adopted. Different discriminatory practices included that of banning them from sports events in 2014, the surrender of religious items like the Quran and change of language in schools.[66]

This targeted process takes place quicker in the age of social media which acts as a mechanism which spreads hate with just the click of a finger. The widespread hatred goes on increasing under the guise of freedom of speech on various media platforms. This makes life

[66] Eset Sulaiman, 'China Bans Uyghur Language in Schools in Key Xinjiang Prefecture'(*Radio Free Asia,* 7 July 2018) <www.rfa.org/english/news/uyghur/language-07282017143037.html> accessed 11 January 2020

further difficult for the targeted group until an extremely graphic and disturbing act takes places which shocks humanity and creates an uproar. In the case of the Uighurs, it was the creation of the Internment.

Re-education camps which are shrouded in secrecy. It estimates that there could be as many as one million Muslims who have been detained there.[67]There they are forced to renounce the Muslim religion and Uighur language and memorize and recite Chinese characters and propaganda songs.[68] These are methods used to erase a culture and force the people to forget their origins by brute force.

Lastly, the media is such that much can be hidden and false news be spread as easily as the dissemination of correct information. The perpetrators make use of it to their own advantage. The Chinese government had denied all claims of the existence of these camps previously and now they are calling them voluntary re-education camps. “You can see the Chinese government basically changed its position over time,” said Maya Wang, a senior China researcher at Human Rights Watch.[69]The variety of pre-calculated measures applied by Chinese officials in justifying their conduct stating the protection of a united China which needs to cleanse itself from the unwanted additions in itself lays bare to what is unambiguously a deliberate and calculated campaign of cultural genocide which has seen multiple protests but no legal action can be taken against it until there is physical harm involved.[70]

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[67] ‘Up To One Million Detained in China’s Mass ‘Re-Education’ Drive’,(*Amnesty International*)<https://www.amnesty.org/en/latest/news/2018/09/china-up-to-one-million-detained/>accessed 25 May 2019

[68] Editorial Board, ‘China Has Launched A Massive Camp Of Cultural Extermination Against The Uighurs’*Washington Post* (7 January 2019) <www.washingtonpost.com/opinions/global-opinions/china-has-launched-a-massive-campaign-of-cultural-extermination-against-the-uighurs/2019/01/07/efe03c9c-12a4-11e9-b6ad-9cfd62dbb0a8_story.html?utm_term=.d06e563f8c87> accessed 29 May 2019

[69] Peter Martin, ‘How China Is Defending Its Detention Of Muslims To The World’*Bloomberg* (19 April 2019) <www.bloomberg.com/news/articles/2019-04-19/how-china-is-defending-its-detention-of-muslims-to-the-world> accessed 23 May 2019

[70] James Leibold, ‘Despite China’s denials, its treatment of the Uyghurs should be called what it is: cultural genocide’ (*Genocide Watch,* 25July 2019) <www.genocidewatch.com/single-post/2019/07/25/Despite-China%E2%80%99s-denials-its-treatment-of-the-Uyghurs-should-be-called-what-it-is-cultural-genocide> accessed 11 January 2020

The Case of Rohingyas

Another culture that is being targeted today is that of the Rohingya people. The Rohingyas are an ethnic minority, mostly residing in the Rakhine State on the West Coast of Myanmar. They differ linguistically and religiously from the Buddhist majority in Myanmar.[71]
The ethnic minority is considered the most persecuted minority in the world.[72] More than 6.8 million Rohingya have fled from the Rakhine state since August 2017 to various states especially Bangladesh.[73] The story of this persecution has its roots in Britain's colonization of Burma, and modern-day Myanmar's refusal to recognize the existence of a people who have existed for thousands of years.[74]

It is imperative to recognize the historical context and the fact that the Rohingya community, which claimed long-standing roots in Rakhine state, had endured progressive intensification of discrimination over the past 55 years.[75] Myanmar's 1948 citizenship law did not allow the Rohingya to get citizenship, rendering them stateless.[76] The restrictions against the Rohingya were manifold, it started with basic fundamental rights such as the right to vote, to build permanent homes or receive education being denied. They often experience extortion when marrying, having children, when building a new home and may have their names arbitrarily changed by officials creating the official family lists.[77] Their Mosques have been closed or destroyed.[78] All of this shows the extensive efforts taken by the Myanmar Government to actively prevent the Rohingya and their culture from being given due legal recognition and all the other benefits a citizen would normally receive.

The Human Rights Council in its twenty-seventh special session on human rights discussed the situation of the minority Rohingya Muslim population and other minorities in the Rakhine state of Myanmar.[79] Witnesses in different locations had given concordant

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[71] Eleanor Albert and Andrew Chatzky, 'The Rohingya Crisis'(*Council On Foreign Relations,* 5 December 2018) <www.cfr.org/backgrounder/rohingya-crisis> accessed 23 May 2019

[72] UNHRC, 'Human Rights Council Opens Session On The Situation Of Human Rights Of The Rohingyas And Other Minorities In The Rakhine State' (*Office Of The High Commissioner for Human Rights,*5December2017)<www.ohchr.org/EN/News Events / Pages/ isplay News.aspx? NewsID=22491 & LangID=E>accessed 3 June 2019

[73] 'Peoples At Risk' *(Genocide Watch)*<www.genocidewatch.com/countries-at-risk> accessed 24 May 2019

[74] Erin Blakemore, 'Who Are Rohingya People?' (*National Geographic,* 8 February 2019)<www.nationalgeographic.com/culture/people/reference/rohingya-people/> accessed 23 May 2019

[75] Eleanor Albert and Andrew Chatzky (n 70)

[76]ibid

[77] A.K. Tay and others, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (UNHCR 2018) 12

[78] ibid

[79] Erin Blakemore (n 73)

reports of acts of appalling barbarity, including deliberately burning people to death inside their homes; murders of children and adults; indiscriminate shooting of fleeing civilians; widespread rape of women and girls; and the burning and destruction of houses, schools, markets, and mosques.[80] This clearly fit within the criteria of gross human rights violations and they were recognised as a persecuted minority. Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights spoke about credible indications that those violent campaigns had targeted Rohingyas because they were Rohingya, noting that similarities in the patterns and modus operandi, over time and a large geographic area, seemed indicative of organized planning of a campaign of violence.[81]

According to the international organisation Genocide Watch, it has reached the cusp of stages Eight 'Persecution' and Nine 'Extermination', for determination of Genocide.[82] Multiple Military Officials and Political Leaders are facing charges of War Crimes, Crimes against Humanity and Genocide. Bangladesh, Gambia, amongst other nations have openly spoken about Myanmar being charged with Genocide, but all of the backlash throughout the world was only seen when millions of people were displaced, killed or died.

We see this strikingly similar narrative run by all groups who try to curb a culture's growth. These are the kind of red flags to be watched for and then appropriate action is taken to investigate the alleged crime. Both the Chinese and the Myanmar government have faced severe backlash over the respective crisis, but no concrete steps have been taken to protect the Uighurs or the Rohingyas whose populations have dropped drastically, and where millions have disappeared astonishingly without any idea of their whereabouts. To overcome this kind of lacunae that allows such powerful bodies to get away with these devious crimes, we suggest that Cultural Genocide be included under the definition of Genocide. It is necessary to step in before an entire culture is destroyed. It is only when that happens that the aim of the convention to prevent Genocide will be effectuated.

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[80] SS Mahmood and others, 'The Rohingya People of Myanmar: Health, Human Rights, and Identity' (2017) 389 Lancet 1841–1850

[81] ibid

[82] 'Peoples At Risk'(n 72)

Measures to Prevent Genocide

As discussed earlier, despite the crime being of such grave nature, the Convention lays down the requirement of dolus specialis. The Convention was meant to serve as the legal instrument par excellence to resolve the legal issues of the Charter of the International Military Tribunal for the Trial of Major War Crimes, 1945[83] that dealt with inhumane treatment towards people of a particular ethnicity, religion, culture, linguistic, or political background.[84] Thus, "murder, extermination, enslavement, deportation, and other inhumane acts"[85] when committed on the basis of race or religion, but without the proven intent to eliminate the group in whole or in part, is outside the scope of the Convention.[86] Thus, the requirement of specific intent has made the Convention deficient.

Non-inclusion of Cultural genocide as a punishable crime under International Criminal Law

A person is defined by their identity, so are groups. The destruction of such an identity commences by means of destroying heritage or religious structures, text, literature, and prohibition of usage of a particular language in private conversations. Then the threat to the group is more than a simple loss of culture—the threat is of a complex series of systematic events that aims to destroy the group in its entirety. It is not the people individually that the perpetrator wishes to destroy, but it is the group and its identity which is the target. This particular element of the crime is what differentiates it from other crimes such as mass killings. However, the lack of recognition of 'ethnocide' or 'cultural genocide' is the lacuna which allows the killings to happen. For Raphael Lemkin, therefore, the essence of genocide was cultural–a systematic attack on a group of people and its cultural identity; a crime directed against the difference itself. The wilful destruction of a people and their culture, with attacks specifically directed at the eradication of their way of living, religion, language, is part of the term Cultural Genocide. Cultural Genocide found itself being

[83] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 1999) 568

[84] Charter of the International Military Tribunal for the Trial of Major War Crimes (8 August 1945) A/CN.4/5 art 6(c)

[85] ibid

[86] M. Cherif Bassiouni (n 82)

considered as an important part of only the Draft Convention to prove the crime of Genocide.

In his research, Lemkin focused on the cultural elements of the crime: “genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.”[87] In the following years, the term ‘ethnocide’ evolved and is now more often considered strictly as the policy of destroying other cultures. Consequently, such practices as exterminating a culture have been called a cultural or passive genocide, although they do not necessarily involve the physical destruction of a group.

The world in the past and today has seen multiple instances where minorities are being forced to give up their culture to save themselves from persecution by the dogmatic authorities. Even though Cultural Genocide and ethnocides are being carried out, this subject has not been addressed significantly under international law.

The atrocity can be prevented in the first seven stages, however, for such purposes, the Convention needs to be amended to have a provision for socio-cultural genocide as a preventive measure to genocide.

The requirement of Procedural and Executive Changes

The Convention does not have an implementational system [88] and provides that persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by an international penal tribunal.[89] The matter is admissible in the International Court of Justice (ICJ) only when both the parties to the case are the Contracting States.[90] Similarly, only

[87] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (The Lawbook Exchange 2008) 79

[88] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (28 October 1994) UN Doc E/CN.4/Sub.2/1994/56

[89] Genocide Convention (n 5) art III

[90] ibid, art IX

Contracting States can call upon the relevant organs of the United Nations (U.N.) to take action under the Charter of the United Nations (UN Charter) as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts punishable under the Genocide Convention.[91] It is to be noted that only the victimised nation can approach a judicial or quasi-judicial body for remedy, however, often the victimised group is often oppressed by their very own nation, which is the perpetrator. In such a case, the group has no legal representative nor any recourse, unless the Security Council,[92] a third party via the Prosecutor,[93] or the Prosecutor (proprio motu)[94] decides to interfere which is rarely the case. Such deficiencies in the Convention allow perpetrators to exploit the provision for their benefit and allows them to escape from legal charges, going scot-free. It is time that the Convention is amended and made stricter, binding the entirety of the international community to its provisions. Moreover, it is crucial that the Convention lays down provisions to prevent the crime, and in order to do so, the concept of dolus specialis or 'specific intent to destroy' needs to be understood and widened.

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[91] ibid, art VIII
[92] Rome Statute (n 5) art 13(b)
[93] ibid, art 14(1)
[94] ibid, art 15

CONCLUSION

In this article, we explored the psychology behind hate and genocide, and how the current Convention, along with the ICTR, ICTY and Rome Statute, fails to 'prevent' genocide. We have also seen how the excessive 'definitionalism' has led us to a position where the burden of proof lies excessively on the victims and their representatives. For the same, we have analysed several cases of the past, and of the present to see how certain protected groups were deprived of their culture, traditions, languages, and way of living. Consequently, they were massacred, only to satisfy the 'superiority complex' of another group.

Diversely, the authors have identified and explored projects such as the Minorities At Risk Project and Genocide Watch's Glenn Standard which identify threatened groups and, on a scale of one to ten, measure their proximity to an impending genocide. Early identification of such groups shall aid to prevent worse atrocities from occurring. But unless the acts of earlier stages such as Polarisation and Preparation are not identified, prevented and punished, the perpetrators will escape the law. Having said that, the execution of a law, especially in the cases of extradition, also needs to be strict to extract charged persons from their havens. With over ten countries at high risk of genocide, it is high time that the Convention be amended and interpreted to include socio-cultural genocide as a crime with as high gravity as an attempt to commit genocide.

It was 'genocide' which was once referred to as a 'crime without a name'—and this act, according to Raphael Lemkin was inclusive of socio-cultural genocide, in fact, the latter was the essence of genocide. However, in the power-play and politics of several countries, the sufferings of many are simply neglected or termed as 'violation of minority rights' or 'human rights violation'. But these groups aren't always minorities, and neither are the crimes too small to merely be called violations of human rights. Confining such grave acts to dolus specialis alone serves only to highlight its unreliability rather than remedy it. The very possibility of this change increases the stakes in international law.

ANALYZING CHAGOS ARCHIPELAGODISPUTE

Shreya Dagar[1]

Abstract

A major development took place in the Chagos Archipelago dispute as the International Court of Justice provided its advisory opinion requested by the General Assembly on the 25th February, 2019. The dispute initiated with the separation of the Islands of Chagos Archipelago from Mauritius three years before its independence by the United Kingdom, its former administering power. The International Court of Justice has decided in the favourof Mauritius anddirected the United Kingdom to return the Islands back to Mauritius and complete its long pending decolonization. The advisory opinion has certainly provided a direction to the long-standing dispute and has evoked the anti-colonial sentiment in the international arena. It discusses the crucial questions of self-determination, sovereignty and human rights that the dispute involves. In the paper that follows, the author deals with the analysis of the said advisory opinion followed by its aftermath. The United Kingdom still refuses to return back the Chagos Archipelago to Mauritius dismissing the advisory opinion. In such a scenario, it presents a problem of the remedies available to Mauritius. In the light of this, the paper further deals with the critique of the international legal enforcement mechanism.

Keywords: Sovereignty, Self-determination, Decolonization, Advisory Opinion

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INTRODUCTION

On February 25, 2019, the International Court of Justice (ICJ) provided an advisory opinion requested by the General Assembly on the Chagos Archipelago dispute which has been going on for many years now.[2] The dispute is between Mauritius and the United Kingdom (UK). Mauritius was a colony of France before Mauritius and its dependencies namely Seychelles and Chagos Islands were transferred to Britain under the Treaty of Paris of 1814. Mauritius gained its independence on March 12, 1968. Three years before this, Britain separated the Chagos islands to carve out a 'British Indian Ocean Territory' in 1965. A year later, in 1966, the UK leased the biggest island in the Chagos Archipelago, Diego Garcia, to the United States to create an air base.

Even though, Mauritius became independent in 1968, it has not been granted independence in its entirety as the Chagos Islands which essentially belong to it are held by the British in violation of the international law. The ICJ has granted its advisory opinion in the favourof Mauritius and has directed Britain to declare the independence of Chagos Islands by transferring their control back to Mauritius. Britain has refused to comply with the decision of ICJ arguing that the advisory opinion is not binding on either of the states.[3]This is problematic as the dispute involves questions of customary international law such as sovereignty, self-determination and human rights. However, considering the UK's unwillingness to submit the dispute to the ICJ, there seems to be no other remedy available to Mauritius in the international legal system. This lack of justice is a manifestation of the deficiencies of international legal system.

In the paper that follows, the author begins by describing the history of the Chagos Archipelago which proves that it has always been

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[2] *Legal Consequences of the separation of the Chagos Archipelago from Mauritius* (Advisory Opinion) General List No. 169 [2019] ICJ Rep

[3] Karen Pierce DCMG, Foreign & Commonwealth Office, *Statement and explanation of vote on the resolution on the British Indian Ocean Territory by Ambassador Karen Pierce*, UK Permanent Representative to the UN, Resolution on the British Indian Ocean Territory (2019)<https://www.gov.uk/government/speeches/resolution-on-the-british-indian-ocean-territory>

regarded as a part of Mauritius. This is followed by a summary and an analysis of the advisory opinion of the International Court of Justice provided on the questions requested to it by the General Assembly. The paper, then, deals with the developments post advisory opinion which reflect the anti-colonial sentiment among the states. It goes on to critically analyze the deficiencies of the international law with reference to the remedies available to Mauritius.

History: Chagos Archipelago as a part of Mauritius

Chagos Archipelago has always been a part of Mauritius. The ICJ, in its advisory opinion, has provided enough evidence to confirm its links with Mauritius. [4]The United Kingdom administered the Chagos Archipelago as a dependency of the colony of Mauritius between 1814 and 1965.[5] Theord in ances made by Governors of Mauritius in 1852 and 1872, liststhe Chagos Islands as the dependencies of Mauritius.[6] Section 90(1) of the Mauritius Constitution Order of 26 February 1964 which was promulgated by the United Kingdom Government, defined the colony of Mauritius as "*the island of Mauritius and the Dependencies of Mauritius*".[7]Article 73(e) of the Charter[8] requires UN Member States which administer "*territories whose peoples have not yet attained a full measure of self-government to transmit regularly to the Secretary-General for information purposes*" information related to the economic, social and educational conditions in the territories. United Kingdom, being the administrative power of the Mauritius regularly submitted information under this article to the General Assembly in accordance with General Assembly resolution 66 (I) of 14

[4] cf(n 2) 13

[5] See Sir Lowry Cole's *Despatch from Mauritius, List of Dependencies (British) of Mauritius (1826)*, FCO 31/3836 (19 Sept. 1826); See also Records of the Chief Clerk's and General Departments, *Records of the Colonial Office*, U.K. National Archives, Selected maps from CO 700/Mauritius4, Minor Dependencies of Mauritius(circa1829) <://files.pcacpa.org/mu- uk/Annexes%20to%20Memorial/MM%20Charts.pdf (last accessed 14 Feb. 2018> Figures 12-17

[6] Governor of Mauritius and the Council of Government Ordinance 1852, SI 1852/20; Governor of Mauritius and the Council of Government Ordinance 1853, SI 1853/14; Governor of Mauritius, its Dependencies, and the Council of Government Ordinance 1872, SI 1872/5

[7] Mauritius (Constitution) Order 1964, s 90(1)

[8] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI<https://www.refworld.org/docid/3ae6b3930.html> accessed 23 December 2019

[9] cf (n 2) 13, [29]

December 1946.[9] This information, with regard to Mauritius as a non self-governing territory, was included in many of the reports of the Fourth Committee (Special Political and Decolonization Committee) of the General Assembly where the Chagos Archipelago werereferred to as the dependencies of Mauritius.[10]

The talks between the UK and the representatives of Mauritius regarding the detachment of the Chagos Archipelago concluded in a Lancaster House agreement on 23rdSeptember 1965. Subsequently, in the same year on 8thNovember, a new colony which was called the British Indian Ocean Territory was established.[11] This included Chagos Archipelago, detached fromMauritius and the Aldabra, Farquhar and Desroches islands, detached from Seychelles.[12]Since then, the UK has been administering Chagos Archipelago as a part of the British Indian Ocean Territory.[13]

Advisory Opinion of the International Court of Justice

The court first decided whether it had the jurisdiction to provide the requested advisory opinion. The arguments presented against the jurisdiction were majorly placed on the premise that it is a complex and internal dispute between two states. However, the General Assembly ingeniously framed the questions, in a way, so as to emphasize on the actual international law violations disguised as a mere bilateral dispute between two states deciding which would infringe the sovereignty of the UK. After it established that it has the jurisdiction for the same, it went on to decide on the merits and answered the questions put to it by the General Assembly. The first question dealt with the incomplete decolonization of Mauritius when it was granted independence in 1968 as the Chagos Islands were separated from it before its independence. The second question was with regard to the consequences of the continued administration of the Chagos Archipelago by Britain under the international law. It also questioned

[10] ibid
[11] British Indian Ocean Territory Order 1965
[12] ibid at s 3; Also, see Telegram from the U.K. Secretary of State for the Colonies to the Governor of Mauritius, No. 298, FO 371/184529 (8 Nov. 1965), [5]
[13]cf (n 2) 13-14

the inability of Mauritius to implement programs for the resettlement of Chagossians who had been removed from the Islands or precluded from coming back.

Decision of the issue of Jurisdiction of the ICJ to provide the requested Advisory Opinion

The main contention of the opposing parties is that, it is a bilateral dispute involving complex set of factual issues which are not, consensually, brought before the International Court of Justice for its resolution. Therefore, the Court should decline to provide an advisory opinion on the matter. However, it recalled that in its advisory opinion in the case of *Western Sahara*[14] it concluded that, what was required by the Court is "*the sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character*". It found that it had the sufficient information required to proceed with the advisory opinion. Furthermore, the Court stated that the General Assembly does not seek the resolution of a bilateral dispute by putting the questions to it. But that the advisory opinion provided by the Court would assist the General Assembly in the proper discharge of its functions towards decolonization.

Decision of the ICJ on the first question

While examining the first question the court considered the content, nature and scope of the right to self-determination and recalled that the United Nations charter included the provision enabling non-self-governing territories ultimately to govern themselves. The Court stated that "*the adoption of resolution 1514 (XV) represents a defining moment in the consolidation of State practice on decolonization*" and that "*both State practice and opinio juris at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-*

[14] *Western Sahara Case* (Advisory Opinion) [1975] ICJ Rep. 28-29, 46

determination." The Court held that the administering powers must respect the right to self-determination of the non-self- governing territories with respect to their territory as a whole. It examined the functions ofthe General Assembly in the cases of decolonization and considered the General Assembly Resolutions which are applicable in relation to the law on decolonization. In the Court's view, "*by inviting the United Kingdom to comply with its international obligations in conducting the process of decolonization of Mauritius, the General Assembly acted within the framework of the Charter and within the scope of the functions assigned to it to oversee the application of the right to self-determination*". The Court recalled the circumstances in which Mauritius agreed for the detachment of Chagos Archipelago and held that the detachment of the Island "*was not based on the free and genuine expression of the will of the people concerned*". TheUK argued that the detachment commenced with the free consent of Mauritius and relied on the minutes of the Lancaster House meeting in 1965.

This raises certain questions vis a vis the admissibility of the minutes of the meeting, capacity of the Mauritian delegation to give consent for such detachment and the validity of the consent. In the case of *Qatar v. Bahrain*[15], the Court discussed about this issue with regard to the minutes dated 25th December 1990. While taking into consideration the circumstances in which the agreement had been drawn up, it held that the minutes of the meeting, which listed the commitments that the parties had consented to, were to be construed as an international agreement which created rights and obligations on the parties. Therefore, the minutes of the meeting is a valid evidence which favors the United Kingdom in the present case. However, if considered in accordance with the geo-political circumstances of the present case, we will see that the consent of the Mauritius with regard to the detachment of the Chagos Archipelago was extracted by an ultimatum and Mauritius was left with no other alternative but to

[15] *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain*) [1996] ICJ 112

[16] Geoffrey Robertson QC, 'Who owns Diego Garcia? Decolonization and Indigenous Rights in the Indian Ocean' [2012] UWAL Rev.<http://www.austlii.edu.au/au/journals/UWALawRw/2012/1.pdf> accessed 20 December 2019

acquiesce to the demands of the United Kingdom.[16] Moreover, the Mauritian delegation was not the representative of the Mauritian people. It was not a sovereign nation at that time therefore, any decision related to the sovereignty or which affects the sovereignty cannot be taken at all. Restrictions which effect a state's liberty do not necessarily affect its independence unless they subject that state to the legal authority of another state.[17]The consent given by the Mauritian delegation cannot be said to be free as it was given by Mauritius when it was actually, under the political and economic subjugation of UK. Therefore, the consent was not valid.

The Court in the present case answered this question by examining certain documents which pointed to the fact that the consent of Mauritius was not free and valid. The Memorandum of the United Kingdom Foreign Office reflects the intention of the UK which is to detach Diego Garcia and other Islands in the Chagos Archipelago prior to its independence from Mauritius and to put it under the control of UK[18]. "*The UK considered that it had the constitutional power to take such action without the consent of Mauritius but that such an approach wouldexpose it to criticism in the United Nations.*"[19] It was indicated by the same document that taking prior acceptance from Mauritius of the detachment of the Chagos Archipelago would solve much of this problem. Furthermore, the document also talked about presenting the news of the detachment to Mauritius at the last moment or as "*fait accompli*".[20]

<u>*Decision of the ICJ on the second question*</u>

While answering the second question put to it by the General Assembly, the Court analysed the different consequences arising under the international law from the continuing default of the UK. The Court had already established that the decolonisation of Mauritius was not completed lawfully therefore the continued administration of the

[17]*Austro German Customs Union Case* [1931] PCIJ Series A/B No. 41
[18] U.S. Defence Interests in the Indian Ocean 1964
[19]cf (n 2) 24, [95]
[20] cf (n 18) [12]

Islands constituted "*a wrongful act entailing the international responsibility of that state*".[21] It directed the UK to end its control on the Islands while the other states must cooperate with the United Nations in its endeavour to complete the decolonisation of Mauritius. The Court stated that it involves the legal interest of all the states since the respect for the right to self-determination forms an obligation ergaomnes.[22] As far as the resettlement of the Mauritian nationals, especially Chagossians is concerned, the Court found that the actions of the UK constitute human rights violations and that the General Assembly should address the issues of protection of their human rights during the completion of decolonisation.[23]

Developments Post the Advisory Opinion

In a resolution adopted by the United Nations General Assembly on May 22, 2019, it voted in favour of a six-month deadline for the UK to cease its control on the Chagos Archipelago and return the Islands back to Mauritius to complete its decolonisation.[24] The 116 to 6 vote evidenced the anti-imperialist sentiment in the international community after the Advisory Opinion provided by the International Court of Justice. The states which backed Britain in the motion included Hungary, Israel, Australia, the United States and the Maldives. However, the six-month deadline has passed, as on November 22, 2019 while the UK still refuses to relinquish its hold on the Islands. Such an adamant stance by the UK exhibits an utter disregard for the international law.

It was in 1964 when Mauritius was negotiating the conditions for its independence with the UK, London was planning to enter into a secret trade deal with the United States with respect to the Chagos Archipelago. A group of 60 islands which were located 600 kilometers off the coast of the Indian subcontinent provided as a convenient and a perfect strategic site for defense operations. It is majorly due to this

[21] cf (n 2) 42, [171]
[22] ibid 42, [180]; (see *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, 102, [29]; see also *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, 32, [33])
[23] ibid 43, [181]
[24] UNGA Res 73/295 (22 May, 2019) UN Doc A/Res/73/295

defense deal between the United States and the UK that it remains reluctant to give up the control of Chagos Archipelago.

Implication of the International Legal System

As the advisory opinion is non-binding upon the parties, it presents questions with respect to the remedies available to Mauritius against UK. UK has been illegally holding the Islands and blatantly violating international law. Its unwillingness to submit the dispute to ICJ implies that it is aware of the breach of international law it has committed by continuing the administration of the Chagos Archipelago. The evils of colonialism have persecuted numerous peoples of the world in the past which is why there is a strong opposition against UK as is evident from the General Assembly motion. A country, which itself has been a victim of colonial rule, would not support an act which is remnant of colonialism and the UK's continuing administration of the Islands confirm its imperialist attitude. Clearly, Mauritius is left without any remedy even when there is a violation of customary international law. It is in such cases that a law like international law, suffering from the Austinian handicap[25] fails to protect its subjects that is, the states. The international law mechanism would not become operative unless the consent requirement has been satisfied by both the parties involved, as in this case.[26] Until then, the matter would be viewed as a mere bilateral dispute between two states. However, this would appear unfair if the positions of the two parties are taken into consideration. UK is clearly in a dominant position as compared to Mauritius.

Many a times, states have resorted to unlawful means to tackle another state's noncompliance of international law when international legal mechanism did not come to their rescue or they did not trust in its potential.[27] What kind of a legal regime would it be where operational noncompliance[28]is treated as acceptable or the only way possible. Many

[25] J. Austin, *The Province of Jurisprudence Determined* (W.E. Rumble ed, 1995)
[26] *S.S. Lotus case* [1927] PCIJ Series A No. 10, 18
[27] See, e.g., Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT'L L. 1, 1 (1999).
[28] Jacob K. Cogan, 'Noncompliance and the International Rule of Law' (2006) 31Yale J. Int'l L
[29] K. Waltz, *Theory of International Politics* (Addison-Wesley Publishing Company 1979); J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (OUP 2005)

scholars have even gone to an extent to say that compliance is merely a consequence of the rational and self- interests of the states while emphasizing on the irrelevance of international law.[29] The fact that international legal system is deprived of the executive and legislative processes analogous to the state's legal system justifies these flaws however, it fails to provide any recourse to the unfairness and unjustness it causes. It follows from the above arguments that international law can be manipulated and controlled by powerful major states, evident from the power to veto actions in Security Council. As in the present case, Mauritius cannot indulge in operational noncompliance to get its Islands back against a more powerful state like the UK. In such a scenario the international political pressure created on UK seems to be the only ray of hope for Mauritius.[30]After the decision of the ICJand the motion passed by the General Assembly, UK is well aware of the fact that the international community is against its continuing default. It has refused to give back the Islands and the deadline set up by the General Assembly for the same on November 22, 2019 is long passed. Even thought head visory opinion is non-binding, it doesprovidean authoritative and a comprehensive law regarding the ongoing situation of ChagosArchipelago and its peoples. Therefore, there is bound to be international political pressure defying which would tarnish the UK's reputation among the states.

CONCLUSION

Austin did not regard international law as a law because it is inconsistent with his theory of law from which its validity can be sourced.[31] It lacks a sovereign to induce compliance via threat of punishment. Whereas, H.L.A. Hart considered international law to be a law but not a legal system.[32] Clearly, international law has changed much as we see it today

[30] Julian Borger and Owen Bowcott, 'Chagos Islands: isolated UK and US face thrashing in UN vote on ownership' (*The Guardian,* 21 May 2019)<https://www.theguardian.com/world/2019/may/21/chagos-islands- un-expected-to-call-for-end-of-british-control> accessed 23 December 2019

[31]cf (n 25)

[32] H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 1994) 236

[33] Andrew T. Guzman, 'A Compliance-Based Theory of International Law' [2002] 90 Cal. L Rev. 1823-1887

when compared to the times of these scholars. However, certain deficiencies still exist. Generally, these deficiencies are not manifested because mostly, states do comply with the rules of international law, not from the fear of general sanctions but reputational sanctions.[33] These reputational sanctions adversely affect the international image of the State thereby sabotaging its military, trade and other relations with international bodies. However, in the present case, reputational sanctions havebeen unable to induce compliance by the UK as of yet, since it continues to be adamant on its decision.

UK's unwillingness to return the Chagos Islands is attributed to the strategic importance of the Island of Diego Garcia which indirectly involves US into the tussle. Therefore, USA being a dominant player in the Global arena would also face international political pressure. Moreover, the ICJ in its Advisory Opinion has stated that it involves the question of right of self-determination which provides for an obligation ergaomnes, thereby recognising the legal interest of all the states in the dispute regardless of whether they are affected or not. If the US continues to be a part of the abovementioned deal with the UK, it may undermine its image in the international arena. In such a scenario, it would be better for UK to give the control of the Chagos Archipelago back to Mauritius while it remains on lease and let Mauritius get the benefit of the lease and also decide on the fate of the people displaced from that Islands. This would also be in the interests of USA which would continue to benefit from its air base in Diego Garcia. The UK therefore, cannot justify its actions taking the refuge of the deal anymore since Mauritius has stated repeatedly that it would not affect the military base operating in Diego Garcia if it gets the control of the Chagos Archipelago back.[34]

[34] Sixth National Assembly, Parliamentary Debates, First session, Friday 12 July 2019

FOUNTAIN SHOWS AND LASER SHOWS: WHETHER 'WORKS' UNDER THE COPYRIGHT ACT, 1957?

Nidhisha Garg[1]

Abstract

This article sets out on an enquiry related to whether copyright protection may be extended to works of authorship which are dynamic and spontaneous in nature, by taking fountain shows and laser light shows as the specific examples. Since both these works and other analogous works of such nature lack an express inclusion in the statute and are also not well represented in the judicial pronouncements, the author felt it appropriate to conduct this inquiry.This has been done by first enumerating the ingredients which are essential for a subject-matter to be endowed with copyright protection; followed by an attempt to prove that these works of art satisfy all of these pre-requisites. The subsequent section of the article engages in a comparison with the positions in the United Kingdom and that in the United States of America. The comparative study is indicative of the recent trends in foreign jurisdiction, that is, an inclination toward inclusion of novel kinds of works within the scope of copyright protection. The article is concluded by affirming that indeed, both laser shows and fountain shows are potential subject matters for copyright protection. In addition, throughout, an extensive analysis has also sought to be done to decide under which category the said works of art could fall for protection, and the author finally reaches the conclusion that they are suitable for protection under the category of "live shows/performances" under the Copyright Act of 1957. However, because this suggestion is yet devoid of any legislative or judicial backing, the author concludes this article with a suggestion regarding introduction of an amendment bill in the Parliament for insertion of such works within the realm of copyright protection, in order to keep up with the recent developments in the field, the world over.

***Keywords*:** Fountain shows, Laser Light Shows, Copyright Protection, Live shows/performances

INTRODUCTION

For a long time now, academicians have been exploring the contours of Copyright Law within the realm of Intellectual Property Law in India. However, there remains but one niche domain, which is yet to be touched upon; that is the issue of whether copyright can subsist in a subject matter which is dynamic, spontaneous and temporary. Fountain shows and the Laser Light Shows are two of the most prominent examples of such works.

The ingredients essential for a valid copyright to subsist under the Indian Copyright Act, 1957 (hereinafter the Act). As per Section 13 of the Act, read with Section 38, copyright in India shall subsist in the following works,

1. "*Original literary, dramatic, musical and artistic works,*
2. *Cinematographic films*
3. *Sound recordings*
4. *Performance*"[2]

This is an exhaustive list because by virtue of Section 16 of the Act:

"*copyright cannot be said to subsist in any subject matter except the ones enumerated here*."[3]

Resultantly, any attempt that seeks to include novel kinds of works within the current ambit of copyright law in India, must necessarily be restricted to the above list only.

Clearly, works in the nature of a fountain show or a laser light show cannot be categorized either as a cinematographic film or as a sound

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[2] Copyright Act 1957, ss 13 and 38
[3] Copyright Act 1957, s 16

recording. The only class, if any, under which the above-mentioned two kinds of works can fall are the first and the last categories. Within the first category as well, it is quite evident that these cannot be said to be either literary or dramatic works. It can't be literary for the simple reason that they are seen and not read by the people. They cannot be dramatic for under Section 2 (h) of the Act,

"*the dramatic work must be fixed (recorded), either in writing or otherwise. Also, a dramatic work subsists only in three kinds of work, a recitation, choreographic work or entertainment in a dumb show*."[4]

Therefore, the only task that remains for us is to see whether, through interpretation of the statute or of any landmark authority, we can safely conclude that works like fountain shows or laser shows fall within the ambit of either 'performance' or that of 'musical or artistic works'.

An Attempt to Classify Laser and Fountain Shows Under the Current Statutory Regime

The only reason why the author thought it fit to include 'musical works' within the scope of this inquiry is because many a time, both, fountain shows as well as laser shows are accompanied with music and more often than not, the musical component forms a crucial part of the display, to the extent that it can safely be said to constitute the Unique Selling Point (hereinafter referred to as the USP) of the program. What remains to be seen, however, is whether the term 'musical works' under section 13 of the Act includes works that contain 'only music' or can the 'musical work' be accompanied with certain other auxiliary components as well. This question is answered in the negative because of express exclusion of "any action intended to be performed along with the music" from the definition for "musical work" under Section 2(p) of the Act. Therefore, there seems to be a statutory restriction on inclusion of the same within 'musical work'. The next class within this category is that of "artistic works".

[4] Copyright Act 1957, s 2(h)

As far as artistic works are concerned, Section 2 (c) of the Act defines an artistic work to mean

"*(i) a painting… and (iii)* ***any other work of artistic craftsmanship***."[5] The above definition cannot be said to be exhaustive because it contains a residuary clause to the tune of 'any other work of artistic craftsmanship'. In fact, the Delhi High Court too elaborated upon the above point as under:

"***The definition of artistic work' has a very wide connotation*** *as it is not circumscribed by any limitation of the work possessing any artistic quality.* ***Even an abstract work, such as a few lines or curves arbitrarily drawn would qualify as an artistic work.*** *It may be two or three dimensional. The artistic work may or may not have visual appeal.*" [6]Such a broad construction has the potential to encompass within itself any and every subject matter; possibly all kinds of subject matter which contain even a minute and trivial element of "art" associated with them.

Also, unlike "dramatic work", the definition of "artistic work" does not expressly mention that the work of art must be fixed.

Given this wide scope, it may very conveniently be concluded that fountain and laser shows are capable of receiving copyright protection as artistic works. There remains but one question of law which needs to be answered before we can arrive at such a conclusion.

Most works that have previously been included under this category have had one thing in common. They are static in nature, whereas both fountain and laser shows are dynamic in nature.

Stativity is not an ingredient of copyright and therefore, subject matters which are in motion are also given protection, but under a different category. Even under foreign jurisdictions, it is difficult to find precedents in which protection has been endowed upon artistic works which are dynamic.

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[5] Copyright Act 1957, s 2(c)
[6] *Microfibres Inc and Ors v Girdhar and Co and Ors*2009 (40) PTC 519

Under the Indian law as well, the only dynamic subject matters which are expressly protected under the Act are performances. However, it is therefore essential that we now examine the scope of, 'performance'.

The definition of "performance", as substituted by Amendment Act of 1995, under Section 2 (q) of the Act is being reproduced below:

"(q) 'performance'... means any ***visual*** *or acoustic presentation* ***made live by one or more performers;***

(qq) 'performer' includes an actor, singer...or ***any other person who makes a performance****..."*[7]

With respect to performers' rights, it needs to be seen whether presence of a natural human person is a condition precedent for the performance. It may be argued that prima facie a fountain show cannot be said to be a performance for want of a human face to it. But, can it be said that it is a pre-requisite for the audience to be able to see the performance. By that stretch of argument, even puppet shows would tend to fall outside the purview of copyright law. In a puppet show as well, all that the audience can see is the dancing doll and not the face of the person who is actually pulling the strings, which makes the dolls move. Therefore, the contention that fountain shows cannot fall within a performer's rights for want of a face to it, fails. There is a performer, only he works from behind the screens.

Since the definition of 'performer' includes a residuary clause to the tune of, 'any other person who makes a performance', it shouldn't be a difficult task including laser and fountain show performers within its purview as well. Applying the principle of *sui generis*, fountain and laser shows can be said to be an extension of a 'snake charmer'. The show of a snake charmer is analogous to that of a fountain/laser show. It is contingent on the snake. Every day, with every show, the snake, being a living organism, will not make the exact same moves. The spontaneity of the show is the main crux of the show. The audience is

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[7] Copyright (Amendment) Act 1994, s 2(q)

interested in the snake and its dance, not in what the charmer is doing. Even if he were to play his Been (the instrument) from behind the curtain, still the fame of the show would remain unaffected.

With regard to an artistic work, there exists another small but significant aspect, and that is the coinciding areas of 'artistic work' and 'design'. But, any inclination to include laser shows within the ambit of 'design' under the Indian Design Act, 2000, must be ruled out at the very onset, since it is a well-established principle of law as held in *Con Planck Ltd. v Kolynos Incorporated*[8] that "*the fundamental distinction between a design and a simple artistic work lies in the applicability of the former to some other article.*" The mere fact that the laser lights taken together form a two-dimensional configuration under the definition of design will not suffice for it to qualify as a design. This is because the configurations are not being used further for the development of an industrially useful product.

Another argument that may be raised against the existence of a performance may be that with the advent of technology it is possible to run a laser show/fountain show mechanically. However, use of machines by an author was never an obstacle to the claim of copyright. If that were to be the case, even photographs wouldn't be copyrightable, however that is not the case.[9] It could be argued that all that the photographer does is to merely click on a button and the photograph gets formed automatically. To quote Burrow Guilles, "*the photograph is a "mere mechanical reproduction of the physical features*".[10]

However, this is not true. The photographer puts his mind and brains behind the photograph. He applies his skill and knowledge for taking various decisions like, from what angle, which side and what view needs to be captured etc. Therefore, the beauty of the photograph depends upon the skills and creativity (vision) of the person clicking the picture. Similarly, the person responsible for handling the fountain

[8] *Con Planck Ltd. v Kolynos Incorporated* (1923) 2 KB 804

[9] B. Scruggs, 'Should Fashion Design Be Copyrightable' (2007) 6 North Western Journal of Technology & Intellectual Property 122

[10] *Meshworks Inc v Toyota Motor Sales*528 F.3d 1258 (2008)

or laser shows, invests considerable amount of his time, effort, skills and creativity in planning the dynamics of the show.

Whereas the phrase "live shows" has not been used by the Act, the same has been used by the Delhi High Court in Sanjay Kumar Gupta &Ors. v. Sony Pictures Networks India Pvt. Ltd.[11] as follows:"*Under Copyright Act, it is only a literary…or* ***live shows/performers' rights*** *which are subject matter of a Copyright…*"

Therefore, "live shows" have been included within the purview of Copyright protection. This judgment, however, fails to describe the type or nature of live shows. Consequently, any show which is being performed live may receive the protection. The question then is what constitutes a live show. According to the author, the main element of a live show is that the show must be enjoyed at the same time at which it's being performed. The performance and the enjoyment of the same by the audience shouldn't be separated by time.[12] Both, laser as well as fountain shows fulfil this condition. Since all the pre-requisites for a performance are being complied with, laser shows, and fountain shows may be given copyright protection under a "performance" under Section 38 of the Act.

But before finally concluding, it won't do us any harm to compare our position with that present in two other jurisdictions, which have more often than not, also shaped the development of many Indian laws.

Comparative Analysis

Position in UK

The position in the United Kingdom doesn't seem to be very different from that in India. This is primarily because the Indian Copyright Act is to a large extent, inspired by the law in force in the United Kingdom, that is, the Copyright, Design and Patent Act, 1988. The only two

[11] *Sanjay Kumar Gupta &Ors v Sony Pictures Networks (India) Pvt Ltd*AIR 2018 (Del) 169
[12] *Music Broadcast Private Limited v Indian Performing Rights Society Limited* 2011 (113) BomLR 3153

additions prescribed by the UK legislation in the list of permissible subject matters for copyright protection, when compared to India are "broadcasts" and "typographical arrangement of published editions".[13]

However, notwithstanding the definite scope of the statute, courts in Europe have often tried giving a liberal interpretation so as to bring new and varied kinds of subject matters within the purview of protection. Way back in 2006 itself, the Supreme Court of Netherlands gave copyright protection to something as volatile as the scent of a perfume.[14] The court identified the presence of three objective factors due to which it was convinced that the same could be the subject matter of copyright protection. These were:

Could be recognized by a sensory perception;

1. Possessed an original character; and
2. Bore the personal stamp of the author.[15]

The court noted that, "*the Intellectual Property Code does not exclude works which are accessed by smell....copyright protects the rights of authors in* ***all works of the mind, whatever their type, form of expression, merit or purpose.*** *A perfume was capable of constituting a work of the mind if it showed the input of its author.*"[16]

If the copyright protection could be afforded to the smell of a perfume, inclusion of fountain and laser shows within the purview of the protection does not seem to be a far cry. While there might be skepticism related to the logistical aspect of exercise of rights safeguarded to an author of a perfume, there seems to be absolutely no problem in the exercise of rights by the author of a fountain/laser show. Since we are attempting to include fountain/laser shows as performance, it would be helpful to look at a performer's rights in India.

A performer has the following rights in his/her performance:· "1. *Right to make a sound recording or visual recording of the*

[13] Copyright, Design & Patent Act (United Kingdom) 1988, s 1
[14] *Kecofa v Lancome* [2006] E.C.D.R 26
[15] C. Seville, 'Copyright in Perfumes: Smelling a Rat' (2007) 66 (1) Cambridge Law Journal 49
[16] Copyright, Design & Patent Act (United Kingdom) 1988 (n 12)

performance;·2. Right to reproduce the sound recording or visual recording of the performance;·3. Right to broadcast the performance. 4. Right to communicate the performance to the public otherwise than by broadcast."[17]

Both fountain and laser can be recorded as a video, the video recording of the same can be reproduced and it can also be broadcast. The fact that rendering copyright protection to such matters wouldn't have to compromise with the exercise of the performer's rights is another strong reason in favor of their inclusion.

<u>*Position in US*</u>

Section 102 of Title 17 (Act of 30 July 1947) of the United States Code provides for the Subject Matter of Copyright in the United States.

"§102. *In general (a) Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include...... (5)* ***pictorial, graphic, and sculptural works****; and* ***other audiovisual works****....*"[18]

"Pictorial, graphic, and sculptural works include two-dimensional and ***three-dimensional works of fine, graphic, and applied arts****...*"[19]

The three ingredients which have often been reiterated by the courts in the United States are:

1. Minimum level of independent and original creation.
2. Merger of Idea and Expression.
3. Usefulness. [20]
4. Even though the above elements are being satisfied by both fountain and laser shows, the words, "pictorial" and "graphic" do

[17] Indian Copyright Act 1957, s 38A
[18] United States Code Title 17, s 102
[19] United States Code Title 17, s 101
[20] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 93

not find an express mention in the Indian Copyright Act, 1957. Even a residual clause to the tune of "other audiovisual works" seems to be missing from the Indian Act. Therefore, there needn't be any deliberate attempts under the United States jurisprudence for inclusion of fountain shows and laser shows within copyright protection. In fact, the Federal Court of Appeals of the Second Circuit has indeed held water fountains to be works of manufacture, and their designs as worthy of patent protection.[21] In response to the counter views, the court opined as under:

5. "It is perfectly clear that these designs are of the three-dimensional or configuration-of-goods type. The "goods" in this instance are fountains, so they are made of the only substance fountains can be made of, water. We do not see that the dependence of the existence of a design on something outside itself is a reason for holding it is not a design "for an article of manufacture. The designs of inflated articles such as toy balloons, water toys, air mattresses, are not apparent in the absence of the compressed air which gives them form, as the water pressure here gives shape to the fountain."[22]

6. Scholars have time and again, vouched for expansion of the subject-matter scope of copyright protection to various works of art, some even temporary in their existence. These include cake,[23] tattoos,[24] spontaneous oral conversations[25] etc.

7. Nonetheless, for the lack of such express and automatic inclusion under the Indian scenario, it becomes necessary for us to take positive steps, either by way of liberal construction of an authority or by proposal of an amendment to bring these works under the protection of copyright. Moreover, unlike *In re Hruby*, this paper

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[21] *In re Hruby* (1967) CCPA 373 F 2d 997
[22] ibid
[23] M. Pollack, 'Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal' (1990) 12 Cardozo Law Review 1477
[24] M. C. Minahan, 'Copyright Protection for Tattoos: Are Tattoos Copies' (2015) 90 Notre Dame Law Review 1713
[25] K. Dunlap, 'Copyright Protection for Oral Works - Expansion of the Copyright Law into the Area of Conversations' (1973) 20 Copyright Society U.S.A. 285

is not directed toward protection under the Design or the Patent, instead, seeks to vouch for Copyright protection.

The general rule that almost all Indian authorities have reiterated is that Copyright cannot subsist in a concept, a view or an idea, mere outline or theme of a work, locale or setting of a story and other like matters.[26] But, the caveat which accompanied such statements was that,

"*Although, there is no copyright protection for an idea, concept, principles or discovery, there may be a valid copyright in an original form of expression of an idea, concept or discovery.*"[27]

The subject matters which are currently under our inquiry, are not ideas or concepts in abstraction. Rather, they are tangible and objective expressions of that which their authors intend to communicate to their audience.

There are a variety of entertainment companies in India, which organize various laser shows. The company as a separate legal entity might possess a copyright for the sum total of services that it provides. For example, Emaar Properties, the owner of Burj Khalifa owns the rights for the laser show that happens there.[28]

This article does not intend to deal with those rights. This article only intends to look into whether there subsists any right in the author, that is, the person who is behind the creation of the laser or the fountain show. Usually, in most jurisdictions, a body corporate may own a copyright but only a natural person can be the author of the work.[29]

No doubt, there is a factor of spontaneity in these works. These are essentially dynamic in that every fountain show and laser show is substantially different from the other. A film once made, or a book once written, and a song once recorded, after publishing, remains the same, captured for eternity. That is not the case with shows exhibiting puppets, shadows, fountains etc. One of the selling features of such works is the

[26] *R.G. Anand v Deluxe Films*AIR 1987 SC 1613
[27] *Twentieth Century Fox Film Corporation v Zee Telefilms Ltd. &Ors.* (2012) PTC (51) 465 (Del)
[28] Faisal Masudi, 'How Burj Khalifa Puts On Its Stellar Light Shows?'*The Gulf News* (Dubai, 28 December 2018)
[29] *Asia Pacific Publishing Pte. Ltd. v Pioneers & Leaders (Publishers) Pte. Ltd.* [2011] SGCA 37

potential for portraying a wide gamut of patterns. The shows cannot be identical lest the authors would begin to lose out on their audiences. An analogy may be drawn with stand-up comedy. In order to have a long career, the comedian is required to continually work upon and update his jokes, otherwise the audience might get bored of him.

In light of the above enunciated arguments, it is humbly submitted that they be included within the category of, "live show/ performance" in order to be able to receive copyright protection. The fact that there currently exists no case law in the Indian jurisprudence that comes even close to declaring subsistence of copyright protection in such works of art, is probably reflective of the suspicions in the minds of authors regarding a decision in the negative. Therefore, the above statement is only a primary conclusion, and more so, a hope for the future. Resultantly, the need of the hour is beyond that. The rapid expansion of the scope of Copyright's protection in other jurisdictions, demands that some solid steps/initiatives be taken in India as well.

CONCLUSION

R. Anthony Reese opines that for a subject matter to get copyright protection, it must fulfill two conditions:

1. "The subject matter should be copyrightable, in that it must have been declared as eligible for copyright protection, by either the statute or by a judicial or quasi-judicial decision (The Copyright Board and Appellate Authority).

2. It must ful fill the conditions to ful fill for qualification of protection."[30] These conditions can be enumerated as under:

(i) Originality[31]

(ii) *De minimis* level of creativity.[32]

Since the second element is being complied with, (both fountain and laser have the potential of being original with an immense scope

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[30] R. A. Reese, *What if we could Reimagine Copyright* (ANU Press 2017) 113

[31] *Boisson v Banian Ltd* (2001) 273 F. 3d U.S. 262 270

[32] *Feist Publications v Rural Telephone Service Co.* (1991) 111 S. Ct. 1282

for creativity) it is only the first element that remains to be fulfilled here, that is, being declared worthy of protection by either the legislature or the judiciary.

Reese also strongly advocates that expansion of copyrightable subject-matter must be the act of a legislature, more so than an administrative or judicial decision. Among other reasons that he has quoted, the most persuasive one was that the inclusion of a novel subject -matter might entail defining of rights and their limitations, which is the sole jurisdiction of the legislature.[33]

Moreover, the primary purpose of the copyright legislations in a democracy is to encourage the creative instincts of its population.[34] Any attempt to limit the scope of its protection shall have adverse effects, in that it will stunt the creativity of authors, which is contrary to the very purpose of copyright statutes. Therefore, so as to further the objective of boosting creativity in a democracy, it is also the humble suggestion of the author that a bill be introduced in the Parliament with regard to the same.

[33] R. A. Reese(n 29) 117

[34] U.S. Constitution, art 1, s 8, cl 8; See also S. R. Gordon and R. W. Clarida, 'Robin Thicke's Legal Battle with Marvin Gaye's Heirs' (2014) 31 Entertainment and Sports Law17

"CULTURAL IMPERIALISM: AN UNDERPINNING IN THE HINDU SUCCESSION ACT"

Aniruddha Kambhampati[1]

Abstract

Section 15 of the Hindu Succession Act (HSA) encapsulates Iris Marion Young's concepts of oppression and cultural imperialism. The Section reflects the dominant thinking that a woman has no family of her own- it is either the husband's or the father's that she lives in. It is in tune with the cry for patriarchy and the inherent patriarchal nature of a family unit and thus, must be amended, and the order of succession altered.It is contended that the Section is ultra vires the Indian Constitution since the difference between the way an issueless intestate man's estate and an issueless intestate woman's estate devolves is based only on gender, which violates Article 15(1)- this much was held in 2012 in Mamta Dinesh Vakil v Bansi Wadhwa by the Bombay High Court, but the judgment being passed by a single bench, is not yet binding. It is also submitted that Omprakash v Radhacharan, which is an example of the adverse effects of Section 15, was incorrectly decided by the Supreme Court since the Parliament's intent while introducing it was to send the suit property back to the source and not to a stranger. Besides, it is no longer res integra that succession laws are not only about those who are entitled to the property, but also about those who should be disentitled. By not treating a woman as an independent individual capable of transferring her property to her blood relatives, moreover, the law also suggests that the woman has a limited stake in the property, and thus what was sought to be removed by Section14(1) of the HSA still clearly lingers in the scheme of succession. The manner in which Section 6 has been interpreted, too, is testament to this.

Key Words: Oppression, Cultural Imperialism, Patriarchy, Hindu Succession Act, Section 15

INTRODUCTION

Her husband had died of a snake bite within threemonths of their marriage and she was promptly thrown out of her matrimonial home by her in-laws. Forty-twoyears later, an issueless Narayani Devi died intestate and the same in-laws who had not batted an eyelid before having driven her out found themselves in the middle ofacourtroom battle. No, this was notover the way they had(mal)treated her- rather, it was a 'hard case'[2] that revolved around the question ofwho would succeed to Narayani's property.The highest court of the country, after commenting that sympathy and sentiment had no place in determining the rights of a party which were otherwise clear, dismissed Narayani's mother's appeal, thus handing over Narayani's property to her deceased husband's heirs.

If all that was needed for the safety of women was enactment of laws, then those in India are on velvet. But reality stings. Laws are often not enforced effectively, are observed in the breach, the evil seen as an accepted practice, or women are defeated by "hard cases".[3]Sometimes, laws are not even gender-neutral because of the socio-political and historical context they find themselves in. In this paper, the author seeks to explore one such law- Section 15 of the Hindu Succession Act, 1956-[4]through the eyes of Iris Marion Young and hope to establish a case for why it should be declared unconstitutional. In addition to this, the author would also look at Section 6 of the Act and try to make sense of (again, with the aid of Young's writings)why the Section has been interpreted the way it has been. The paper within its structure first lays down the crux of Section 15.Thereafter the concept of oppression as Young describes it and argues that the Section fits her model of it. In

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[2]*Omprakash &Ors v Radhacharan&Ors*2009(7) SCALE 51[10]

[3]Prabha Sridevan, 'A Law That Thwarts Justice' *The Hindu* (Chennai,26 June 2011)<www.thehindu.com/opinion/lead/a-law-that-thwarts-justice/article2137110.ece> accessed 22 July 2020

[4]Hereinafter referred to as "HSA" or "the Act"

the prejudicial scheme of the Section whether it is ultra vires to the Constitution of India has been discussed when compared to Section 8. Whether Section 6 of the Act is completely void of the discrimination it sought to remove is also one of the aspects that this paper addresses.

Part I- Section 15: An Explanation

Section 15[5] of the HSA advocates a uniform scheme of succession to the property (both moveable and immovable[2]) of a female Hindu who dies intestate. The gravamen of the Section is that the order of succession to the said property would depend on the source of its acquisition.[3]Sub-section(2), which is the exception to the Section, lays down the rule that in the absence of any child (or child of a pre-deceased child) of the intestate, her property if inherited form her parents[4] would devolve upon the heirs of her father and if inherited from her husband or her father-in-law[5] would devolve upon the heirs of her husband.[6]

If, however, the property in the hands of the intestate was of any other nature- i.e., property not inherited from her parents, husband or father-in-law- or if she had a child, sub-section(1) of the Section would dictate the mode of succession. According to this provision, the first in the order of succession are her children, children of a predeceased child and her husband.[7] If none of these three are present,

[5]**15. General rules of succession in the case of female Hindus. -**
(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16, -
(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
(b) secondly, upon the heirs of the husband;
(c) thirdly, upon the mother and father;
(d) fourthly, upon the heirs of the father; and
(e) lastly, upon the heirs of the mother.
(2) Notwithstanding anything contained in sub-section (1), -
(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.
[6]*Balasaheb v Jinwala* AIR 1978 Bom. 44
[7]*Bhagat Singh v Teja Singh* AIR 2002 SC 1

the property in question would go to the next in line: the heirs of her husband.[8]Standing behind them are her parents[9] and then the heirs of her father[10]followed by those of her mother.[11]

Thus, the effect of Section 15(1) of the HSA is to put the blood relations of a Hindu woman in an inferior position to her husband's heirs. This leads to a situation where her own relatives will never be able to inherit in case there is even a remote heir of the husband, which is akin to what happened to Narayani Devi's mother.[1] Section 15(2), meanwhile, clarifies that the source of the property would be the basis for determining inheritance rights.

Section 15's Vices

Iris Marion Young's paradigm of oppression incorporates not just the injustice that some people suffer because a despotic power coerces them, but also that which they suffer because of the daily practices of a 'well-intentioned liberal society'.[17]In sum and substance, oppression in her mind could also be structural rather than the result of a few people's choices, with its causes embedded in unquestioned norms and habits.

Taking cue from this, the author argues that Section 15 of the HSA too suffers from the vice of structural oppression, the structure here being reflective of the idea that a woman has no family of her own- it is either the husband's or the father's that she lives in. Thus, while the marriage of a man does not make a difference in the way his property devolves when he dies intestate,[18] the marriage of a woman changes the pattern of inheritance for her properties.[19]The woman is treated

[8]Hindu Succession Act, s 15 (2) (a)
[9]ibid 15 (2) (b)
[10] That Section 15(2) (b) does not contemplate the possibility of the intestate's *mother-in-law* passing down her property to her is a rather curious exemption, something that will be discussed in due course of this paper.
[11]cf (n 8) s 15(1)(a)
[12]ibids 15(1)(b)
[13]ibids 15(1)(c)
[14]ibids 15(1)(d)
[15]ibids 15(1)(e)
[16]*Omprakash* (n1).
[17]Iris Marion Young, *Justice And The Politics Of Difference* (Princeton University Press 1990) 41
[18]cf(n 8) s 8
[19]ibids 15(1)(b)

not as an autonomous individual capable of transferring her own property to her blood relatives, but as a quintessence of her husband.

One of Young's Five Faces of Oppression is *cultural imperialism*, which she describes as involving the universalization of a dominant group's culture and experience, and its establishment as the norm.[20]This transpires because some groups have exclusive access to the means of communication and interpretation in a society.[21]A parallel can be drawn here to Wendy Webster Williams' argument that women's equality as laid down by legislatures and delivered by courts can only be an integration into a pre-existing, predominantly male world.[22]

As far as Section 15 of the Act is concerned, the dominant patriarchal idea that a woman has no family of her own has been universalized to such an extent that the Section seems absolutely unremarkable to legislators and judges, who are the people that matter.The fact thata High Court reckoned that a married woman is different from a 'mere woman'[23] and thesad reality thateven *distant* heirs of the husband are*still* preferred to succeed to the intestate'snatal familyis testament to this. It is worthy to note that though the intention of sub-section(2) of the Section- whichis to ensure that the property left behind does not lose the real source from where the intestate woman had inherited it-[24] may be well-meaning, it does not help that the same intention is non-existent in the case of succession to an intestate Hindu *male's* property. Moreover, legislations such as this- while purportedly aimed at ameliorating the conditions of women-[25]can only reflect the shared life experiences of individuals. With particular reference to Section 15, this takes the color of a largely male hue not only because there were hardly any women in the then Parliament, but also because society systemically supports male supremacy.

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[20]cfYoung (n 17) 59

[21]Nancy Fraser, 'Social Movements Vs. Disciplinary Bureaucracies: The Discourse Of Social Needs' (1987) 8 CHS Occasional Papers 1

[22]Wendy Webster Williams, 'The Equality Crisis: Some Reflections On Culture, Courts, And Feminism' (1982) 7 Women's Rights Law Reporter 151

[23]*SonubaiYeshwantJadhay v BalaGovinda Yadav*AIR 1983 Bom 156

[24]*Dhanistha Kalita v Ramakanta Kalita*AIR 2003 Gau 92

[25]Cf (n 8) Statement of Objects and Reasons, s 6

Young says that stereotypes that the culturally dominated are stamped with so permeate in society that they are not even noticed as contestable- the idea that Hindu women once married change their families is but such a stereotype. Consequently, this dominant view has been internalized by the dominated to such an extent that even those who are educated and politically "woke"have held back from making claims to property because of a belief in women's lesser rights.[26]This creates, for Hindu women in India, the experience of 'double consciousness', which is the sense of always looking at one's self through the eyes of others.[27] Young further contends that while an encounter with another group could pose a challenge to the dominant group's prerogative to universality, it reinforces its position by bringing other groups within its ambit of dominant norms and has little space for the experience of other groups. An instance of such brushing-under-the-carpet of the lived experiences of the culturally dominated by the dominant group in the case of the HSA can be seen in the resistance that the Select Committee of 1948 faced when it suggested the abolition of the coparcenary.[28]

Thus, Section 15 of the HSA when viewed through the lens of Young would undoubtedly be an illustration of cultural imperialism, with the hegemonic male Hindu society imposing its beliefs and experiences on the rest of the population and projecting itsviews as representative of humanity as such.

Section 15: A Case forUnconstitutionality

In *Omprakash*,[29]the intestate's in-laws (who had not even enquired after her in the forty-twoyears after they had ousted from the matrimonial home) succeeded to her self-acquired property vide Section 15(1)(b) of the Act. Though it is acceptable that the Courtcould not have gone beyond the intention of the legislature, the enigma here is that it did

[26]Srimati Basu, 'The Personal And The Political: Indian Women And Inheritance Law' in Gerald James Larson (ed),*Religion and Personal Law in India* (Indiana University Press 2001)
[27]W. E. B Du Bois, *The Souls Of Black Folk* (New American Library 1969)
[28]Indian Council of Social Science Research,*Status Of Women In India: A Synopsis of the Report of the National Committee on the Status of Women* (ICSSR 1975)
[29]cf(n 2)

not even give effect to its intention. Narayani's lawyer argued that because the *intent* of the Parliament while introducing Section 15 was to send the property back to the source and not to a stranger,the logical corollary in this case would be to let her parents succeed to the property as it was earned via the money they had spent on her. This argument was rejected by the Court.

The judgment can be attacked on another front: that of ignorance of the principles of equity, justice, and good conscience. It seems like the Court overlooked the general principle that succession laws are not only about those who are entitled to property, but also about those who should be disentitled. Though he has been criticized for projecting a myth that all disparities between men and women in the matters of succession had been alleviated with the advent of the HSA in 1956,[30] Mulla observesthat Section15(2) is based on the grounds that property should not pass to anindividual 'whom justice would require it should not pass'.[31] Here, the court directed the property to the very people who behaved heartlessly with the deceased (and who did not maintain a relationship with her when she needed it the most)when it should ideally have denied them the *locus standi* of claiming the property of the deceased who they had ignored for over four decades.To back this line of argument, one could also impute the logic behind Section 25 of the Act, in which a murderer is disqualified from inheriting the property of the person he or she has murdered.[32] While this might sound like a logical leap since a murder is no doubt a much graver offence than throwing one's daughter-in-law out of a house, the point the author wishesto drive home is that the deceased person would notwant a person who had wronged him or her to inherit their property. This is in line with what was held in *Riggs v Palmer*[33](albeit that too was a case involving murder) and Section

[30]Madhu Kishwar, 'Codified Hindu Law: Myth And Reality' (1994) 29 Economic and Political Weekly 2145

[31]Fardunji Mulla, *Principles Of Hindu Law* (21st edn, LexisNexis Butterworths 2013)

[32]AyushiSinghal, 'Female Intestate Succession Under The Hindu Succession Act, 1956: An Epitome Of Inequality And Irrationality' (2015) 4 Christ University Law Journal 150

[33]115 NY 506 (1889)

23(1)(a) of the Hindu Marriage Act, 1955 which prods the Court to make sure that the person claiming relief is not taking advantage of his or her own wrong.

While Section 15 of the Act, as we have seen, stipulates that the order of succession in the case of a female Hindu would vary according to the source of acquisition of property, the source would not be a determinant of succession for a Hindu *male*.[34]This opens the Section to constitutional challenge under Article 15 of the Indian Constitution, which prohibits the State from discriminating against any citizen on a number of grounds, one of which is sex. The test here is whether the discrimination alleged is based *solely* on sex or has some other justification.[35] When the question of the constitutionality of Section 15 was put forth before the Bombay High Court in 1983,[36]it rejected the argument that the impugned Section was violative of Article 15 and held that the object of the Section was two-fold: 'maintaining the unity involved in the family kinship and maintaining continuous succession to property in favor of the family when occasion to succession arises'.[37]Thus, the discrimination so made was adjudged to be based not *solely* on sex but also on family ties.

In 2012,[38] however, the same High Court altered its position in this regard. It observed that what was being envisaged by the Act could not plausibly be to keep the property within the family, as if that were so, Section 8 of the Act would notallow for the possibility of the property of a Hindu male being inherited by daughters, sister's daughters and sister's sons. This line of argument being shot down, it was concluded by Dalvi, J. that the *only* basis of discrimination present in the impugned Section was sex. That being the case, it was *ultra vires* of Article 15 and therefore invalid. However, this judgment was passed by a single bench and needs to be affirmed by a division bench before its holding is binding.

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[34]cf(n 8) s 8

[35]*Ammini E. J. v Union of India*AIR 1995 Ker 252.

[36]cf*SonubaiYeshwant*(n23)

[37]ibid [24] (Justice Masodkar)

[38]*Mamta Dinesh Vakil v Bansi S. Wadhwa*T.S. 86/2000-T.P. 917/2000

Keeping aside the fact that women are allowed to will their property to whomsoever they please (for testamentary succession is beyond the scope of this paper),[39]one could argue that Section 15(2)- by not treating a woman as an independent personality with the capacity to transfer property to her natal family- insinuates that a woman has a limited stake in the property. Indeed, this was argued by Justice A.M. Bhattacharjee in *Hindu Law and the Constitution* when he asked why the source of acquisition of property should be a determinant for its devolution in the case of a Hindu woman when it was not so in that of a Hindu man.[40]In an off-shoot to this contention,that clause (b) of sub-section (2) to the Section does not even contemplate the *possibility* of a *mother-in-law*being the source to the intestate's property only buttresses my claim that the whole scheme of the Section contemplates that women have a limited hold over their property.While this might not be an air-tight argument, for even Hindumen in that sense do not have *complete* control over the order of succession of their property if they die intestate (the very nature of dying intestate precludes any control), the fact remains that the source of the property is irrelevant in the case of male Hindu intestates, and this, as is argued, only reinforces patriarchal notions of the family. If the "limited estate" rule could be done away with, there surely exists a case[41]to get rid of or at least amend those parts of Section 15 which the author has argued are oppressive toward and prejudicedagainstthe intestate and her natal family.

It is sad that despite the 174th and 207thLaw Commission Reports[42]noting that there exists a patrilineal assumption of dominant male ideology in the Section and recommending for its amendment,the Amendment Bill[43] which has placed the heirs of the husband and the intestate's natal family on equal footing has not yet been passedby the

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[39]cf(n 8) s 30

[40]A. M Bhattacharjee and Asok K. Ganguly, *Hindu Law And The Constitution* (3rd edn, Eastern Law House 2018)

[41]J.M. Duncan Derrett, 'The Hindu Succession Act, 1956: An Experiment In Social Legislation' (1959) 8 The American Journal of Comparative Law 485

[42]Hereinafter referred to as "LCRs"

[43]TheHindu Succession (Amendment) Bill 2015

Parliament. Moreover, neither the LCRs nor the Amendment Bill felt the need to amend sub-section(2) of the Section, which was held unconstitutional in *Mamta Dinesh*.[44]At the risk of repetition, it is assertedagain that this near refusal to recognize that Section 15(2) treats men and women unequally is reflective of the universalization of the idea that a woman has no family of her own.

As Justice Prabha Sridevan aptly put it, the law in this case views a male's and a female's estate through different spectacles: her autonomy over her property is less complete than his.[45]In light of this, parity is sought in cases of intestate succession.

The Two Faces of Section 6

Earlier it was briefly mentioned that the proposal of the Select Committee of 1948 of doing away with the concept of the coparcenary was met with stiff opposition. The idea of making daughters coparceners was likewise rejected. More than fiftyyears later, the Parliament in 2005finally granted a right by birth to daughters,[46]but the provision was still not shorn of problems. And one such problem is discussed here.

While the cases *Prakash v Phulvati*[47] and *Danamma v Amar*[48] revolved around theconundrum of whether theAmendment Act of 2005 would have prospective or retrospective application, in neither was there any deliberation on who exactly the "coparcener" in the words "daughter of a coparcener" in sub-section (1) of Section 6 was.[49] In the

[44]cf*Mamta Dinesh* (n38).

[45]cfSridevan(n 3)

[46] Hindu Succession (Amendment) Act2005, s 6

[47](2016) 2 SCC 36

[48]2018(1)SCALE657

[49]6. Devolution of interest in coparcenary property. -

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindufamily governed by the Mitakshara law, the daughter of a coparcener shall, -

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

[50]Poonam Pradhan Saxena, *Family Law Lectures* (2nd edn, LexisNexis Butterworths 2004)

former, it was held what was required for the application of Section 6 (1) was that the daughter and her father coparcener be alive on the date of the amendment. In *Danamma,* the court granted coparcenary rights to the daughter therein despite the fact that her father had died prior to the date of commencement of the Amendment Act. Neither *Phulvati* nor *Danamma*, however, would come to one's aid in the scenario that adaughter of a *female* coparcener comes to court claiming coparcenary rights along with her mother.

A literal interpretation of Section 6 would undoubtedly warrant such a child to claim a right by birth in her mother's interest in the coparcenary,[50] since the Section also provides that "*any reference to a coparcener*" would be "*deemed to include a reference to a daughter of a coparcener*". However, it has been argued that a right by birth exists primarily with regards to ancestral property- which is property inherited by a Hindu from his father, grandfather and great-grandfather- and that Section 6 only enables a daughter to claim a birth right in such property.[51]The extension of this argument is that sincethe property in the hands of the daughter would not be ancestral as against her children, they would not have a right by birth in it. Another contention put forth in support of the stand that the children of a female coparcener are not entitled to a share in their mother's coparcenary interest is that a combined reading of the LCRs, the Parliamentary Debates, andthe Statement of Objects and Reasons provided after Section 6 on the point would show that it is primarilythe daughter's interest that is being protected and not her child's. Theirinterests would already be protected in their father's family, and besides, since her children would already be coparceners in their father's family, they cannot *also*be coparceners in her family, sincecoparcenary in two families is not provided for by classical Hindu law. Though there has hardly been any litigationover this issue, it would not be too far-fetched to assume that in the event such a dispute arises before it, the court will apply the mischief rule[52] of statutory interpretation and argue that the scope of Section 6 should

[51]cfMulla (n31) 315
[52]*Heydon's*case3 Co Rep 7a

be confined to making daughters coparceners- not their children as well.[53]

While this line of reasoning in sound in logic, it is open to criticism since it continues to perpetrate the idea that a man's coparcenary in a sense trumps that of a woman's, which, again, is reflective of the effect that cultural imperialism can have. In establishing the man's coparcenary as the norm,children are automatically taken under the wing of their father's coparcenary and not their mother's. That there has been no debateoverwhy the children of a female coparcener do not have a right by birth to a share in their *mother's*coparcenary interest rather than their *father's* can be linked to Young's contention that cultural imperialism involves the imposition and universalization of stereotypes on the dominated in such a manner that they become unremarkable and uncontestable.

Thus, while Hindu law has been criticized even before the coming of the Constitution for the obtrusive inequalities that it perpetuated, one does not have to look too closely to notice that gender inequalities lurk even in subsequent enactments.

[53]Shivani Singhal, 'Women As Coparceners: Ramifications Of The Amended Section 6 Of The Hindu Succession Act, 1956' (2007) 19 Student Bar Review 50

ECO-CENTRISM IN THE JURIDICAL REALM: IMPLICATIONS OF *MOHD. SALIM V STATE OF UTTARAKHAND*

Angad Singh Makkar[1]

Abstract

The framework of environmental ethics and rights has long been mainly divided into two main schools of thoughts: anthropocentrism and ecocentrism. Anthropocentrism, as the term suggests, is concerned with human interests and views environmental protection and conservation in light of the same; ecocentrism, on the other hand, expounds upon the intrinsic value of all constituents of nature. Though anthropocentric thought is reflected in most environmental legislations and judicial decisions, the past decade has witnessed the nascence of eco-centric environmental jurisprudence. The Uttarkhand High Court's decision in the case of Mohd. Salim[2], granting the Ganga and Yamuna rivers juristic entity status, has been touted as a prime example of ecocentric dictum; drawing parallels with New Zealand's legislation granting legal rights to the Whanganui River.[3] This paper analyses the potential for ecocentric jurisprudence in India, through a review of the judgment in Mohd. Salim, and later on, in Narayan Dutt Bhatt.[4] Further, this paper will assert that legislative action, and not judicial pronouncements, is the ideal route through which ecocentrism can be internalized into the Indian legal system. The overarching question that begs to be asked herein is whether the principles ecocentrism espouses are desirable, achievable and implementable; for only then can one optimistically foresee an ecocentric legal framework in India's future.

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[2]*Mohd Salim v State of Uttarakhand* 2017 (2) RCR (Civil) 636

[3]Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

[4]*Narayan Dutt Bhatt v Union of India* 2018 (3) RCR (Civil) 544

***Keywords*:**Ecocentrism, Anthropocentrism, Judicial Activism, Legislative Reform, Juristic Entity

Eco-Centrism: An Overview

Henry David Thoreau, an American writer of the 19th century, is considered the pioneer of eco-centric thought, as he deplored urbanism and its vices, and called for a deeper appreciation of wilderness.[5] Since then, there have been numerous approaches towards acknowledging and upholding the rights of non-human entities, be it animal liberationist movements or the notion of '*holism*', which correlates respect for non-living natural features such as mountains to the respect for property rights in human society.[6] Nonetheless, ecocentrism, in its most commonly accepted form, entails the removal of humanity from the centre of the universe in order to replace it with nature.[7]

A proponent of ecocentrism would argue that one must not protect the environment merely in the interests of human welfare and well-being, rather environmental protection and conservation must stem from a broader understanding of nature's intrinsic value.[8] Biologist Lewis Thomas articulated this parallel interrelation between nature and human beings expertly by stating, *"Earth is not a planet with life on it; rather it is a living planet"*.[9]Similar sentiments were echoed by Norwegian philosopher Arne Naess while coining the term 'deep ecology',[10] which calls for egalitarianism among all forms of life and stresses upon the inherent value of nature. For deep ecologists, the underlying problem is the Western mindset of consumerism, which prioritises material needs and insatiable human greed over ecological concerns.

On the other hand, anthropocentrism bases its position on the Kantian argument that human beings alone should be ascribed moral values, given their ability to use reason and language.[11] It is even argued

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[5] JE De Steiguer, *The Age of Environmentalism* (McGraw Hill 1997) 9
[6] Linda Hajjar Leib, *Human Rights and the Environment*, vol 3 (MartinusNijhoff Publishers 2011) 29, 31-32
[7] ibid28
[8] ibid27-28
[9] ibid33
[10] Arne Naess, 'The Shallow and the Deep, LongRange Ecology Movement' (1973) 16 Inquiry
[11]Leib (n 5) 27

that anthropocentrism should not necessarily be seen as synonymous with an excessive and greedy exploitation of natural resources; in doing so, a distinction is sought to be drawn between the pursuit of 'proper' ends and 'improper' ends by human beings.[12] However, an environmentalist would rebut such arguments by highlighting the false assumption of human superiority made by proponents of anthropocentrism. Using criteria of mental and communication abilities to exclude non-humans from moral consideration is extremely problematic as well, given that the same can be used to subject infants and people with mental disabilities to inferior treatment.[13] Furthermore, merely pointing to the grave ecological harm and crises suffered over the last four to five decades illustrates the massive drawbacks of various countries' predominantly anthropocentric objectives, and the need to imbibe an eco-centric perspective. Look no further than the deleterious impact of unprecedented levels of climate change, brought about by a gradual, yet relentless, pursuit of human needs and wants at the cost of ecological stability and conservation.

Unsurprisingly, since the Stockholm Declaration in 1972, the eco-centric-anthropocentric debate has often translated into a tussle between ecological preservation and development on the international stage. However, more often than not, eco-centric principles are shot down as idealist, with the most landmark environmental declarations having predominantly anthropocentric underpinnings.[14] For instance, Rio in 1992, Johannesburg in 2002 and, most recently, the UN Rio +20 Summit all failed to endorse the intrinsic value of nature.[15] Visionary worldviews explicitly upholding eco-centric principles, such as the Earth Charter in 2000, have failed to gain traction and are buried under overwhelmingly anthropocentric academia.[16] Nevertheless, Ecuador's inclusion of the *Rights for Nature* in its Constitution in 2008,[17] as well as Bolivia's *Law of the Rights of Mother Earth* put forth

[12]ibid

[13]ibid

[14] Paul Cryer, Helen Kopnina, John Piccolo, Bron Taylor and Haydn Washington, 'Why Ecocentrism is the Key Pathway to Sustainability'(*MAHB*, 4 July 2017) <mahb.stanford.edu/blog/statement-ecocentrism/> accessed 10 October 2018

[15]ibid

[16]ibid

[17] Republic of Ecuador Constitution 2008 art 71-74

in 2010,[18] are encouraging steps showcasing an increasing assimilation of ecocentrism within legal systems. Questions of implementation and feasibility *inter alia* loom large still, and it is in this light that one must review the Uttarkhand High Court's recent decisions.

Case Studies: *Mohd. Salim* And *Narayan Dutt Bhatt*

The Uttarkhand High Court raised a few eyebrows, to put it lightly, through its judgments in the cases of *Mohd. Salim* in 2017 and *Narayan Dutt Bhatt* in 2018 which granted juristic entity status to the Ganga and Yamuna rivers, and the entire animal kingdom respectively. While the former has been subsequently stayed by the Supreme Court of India, the fate of the latter is still hanging in the air and, as of now, holds binding legal value. Irrespective of the precedential value of these judgments however, they are being touted as the flagbearers of ecocentrism in the Indian judicial sphere. It is imperative to evaluate then exactly how ecocentric these judgments are. Furthermore, as mentioned earlier, the suitability of the judicial channel for bringing about a substantive shift towards ecocentrism is brought under scrutiny through these judgments as well.

Proceeding chronologically, Mohammed Salim had filed a public interest litigation in the Uttarakhand High Court challenging the illicit construction and encroachment along the Ganga, while also bringing up the Government's failure to constitute the Ganga Management Board in accordance with the Uttar Pradesh Reorganization Act, 2000.[19] The High Court noted these concerns and passed an order mandating eviction of private parties from Government land and directing the Central Government to constitute the Ganga Management board *inter alia*.[20] This matter came up again before the High Court in its much-acclaimed judgment in March 2017, where it expressed extreme displeasure at the lack of action taken to implement the aforementioned order.

[18] Law of the Rights of Mother Earth 2010
[19] *Mohd Salim v State of Uttarakhand* Writ Petition (PIL) No 126 of 2014
[20] ibid

The Court proceeded to note that *"this situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna"*.[21] Foreshadowing its ultimate decision, the Court then expounded upon the case of *Yogendra Nath Naskar v Commission of Income-Tax, Calcutta,*[22] wherein it was held that a Hindu idol is a juristic entity endowed with certain rights. It was also noted, through the case of *Shiromani Gurudwara Prabandhak Committee, Amritsar v Shri Som Nath Dass&Ors.,*[23]that the recognition of an entity as juristic person is for subserving the needs and faith of society. Having established its ability to declare even an inanimate entity a juristic person, the Court finally stated that *"to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons"*.[24] The constitutional mandate of

Articles 48-A and 51A(g) was referred to as well, while the Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand were deemed to be *persons in loco parentis* of the rivers.[25]

Unsurprisingly, the High Court's ruling raised a host of concerns and issues, pertaining to the extent of the rights of these rivers and, as a corollary, their liability in cases of floods et al. The Uttarakhand government specifically challenged the ruling by questioning *inter alia* whether people affected by river floods could sue the Chief Secretary of State and whether there would be a financial burden imposed on the State.[26] Accordingly, the Supreme Court of India stayed the operation of the High Court's ruling in July 2017,[27] leaving this matter up in the air for the time being.

[21]*Mohd Salim* (n 1) [10]
[22]1969 (1) SCC 555
[23]AIR 2000 SC 1421
[24]*Mohd Salim* (n 1) [16]
[25] ibid[19]
[26] 'Ganga And Yamuna Lose "Living Entity" Status as Supreme Court Stays Uttarakhand HC Judgement' *India Times* (7 July 2017) <www.indiatimes.com/news/india/ganga-and-yamuna-lose-living-entity-status-as-supreme-court-stays-uttarakhand-hc-judgement-325383.html> accessed 12 October 2018
[27]*The State of Uttarakhand v Mohd Salim*Petition(s) for Special Leave to Appeal (C) No(s) 016879/2017

The final decision of the High Court is certainly eco-centric, insofar as it expressly places the rivers on the pedestal of living persons, and in doing so, forms a strong legal basis for their protection and conservation. However, it would be fallacious to characterize the High Court's judgment as eco-centric, as the reasoning involved in reaching its final decision is indisputably anthropocentric. The Court even explicitly states that these rivers *"support and assist both the life and natural resources and health and well-being of the entire community"*.[28] The declaration of the rivers as juristic entities is merely a tool to effectively ensure that the Ganga Management Board carries out its tasks for the purposes of irrigation, rural and urban water supply, hydro power generation and so on. Essentially, even while granting rights to these rivers, the Court cannot separate itself from arguments based on human needs and sustenance; the Ganga and Yamuna rivers aren't living persons because their intrinsic value so demands, rather they are living persons because human needs so require.

Next in line on the Uttarakhand High Court's eco-centric agenda was the case of *Narayan Dutt Bhatt*, with the Court delivering its final judgment in July 2018. The Court issued a range of specific directions to the Uttarakhand government and other concerned authorities with regards to the prevention of cruelty against domesticated animals, in response to the petitioner's allegations that animals involved in transporting goods across the Indo-Nepal border were being cruelly treated. While doing so, the Court sweepingly declared that *"the entire animal kingdom including avian and aquatic are legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person"*.[29] Moreover, it is notable that the Court declared *"all citizens throughout the State of Uttarakhand (as) persons in loco parentis as the human face for the welfare/protection of animals",*[30] greatly diluting any potential locus standi issues in animal protection cases.

[28] *Mohd Salim* (n 1) [17]
[29] *Narayan Dutt Bhatt* (n 3) [99]
[30] ibid

Unlike its reasoning in *Mohd. Salim*, wherein the Court primarily advanced human interests while appearing deceivingly eco-centric, the Court actually incorporated an eco-centric rationale herein. Particularly, it stated that "*animals breathe like us and have emotions. The animals require food, water, shelter, normal behavior, medical care, self-determination*".[31] Furthermore, while relying upon the Apex Court's ruling in *Animal Welfare Board of India v A. Nagaraja,*[32] the Court propounded that *"animals should be healthy, comfortable, well-nourished, safe, able to express innate behaviour without pain, fear and distress",*[33]and that animals are *"entitled to justice"*.[34] Given the cognizable difference between an inanimate river and animate animals, it is perhaps easier to reconcile the distinct approach in the aforementioned two cases. The Uttarkhand High Court clearly found it more 'natural' to adopt a predominantly ecocentric approach towards entities capable of drawing human empathy, in comparison to inanimate rivers which, despite their 'holy' status, are mainly seen as sources to satisfy human needs.

An Eco-centric Indian Legal Framework: Desirable? Achievable? Implementable?

On a more macro level, an intriguing question that emerges from a perusal of the aforementioned judgments is whether the legal notion of juristic person is amenable to ecocentrism. To wit, if a foundational pillar of ecocentrism is to recognize the intrinsic value of all forms of life, then the act of elevating a river or an animal to the status of a human being is arguably falling short of that fundamental ideology. One could rebut this contention, however, by asserting that the determination of an approach as ecocentric or anthropocentric must be guided by the motives and reasoning behind it, and not necessarily the final result. Thus, the inability to quantify, or spell out, the value of other forms in life in non-human terms (i.e. the concept of 'juristic

[31]ibid[83]

[32](2014) 7 SCC 547

[33]*Narayan Dutt Bhatt* (n 3) [98]

[34]ibid

entity') should not be used to overlook the eco-centric motive behind the approach. For instance, in *Miglani*, the Court declared the Gangotri and Yamunotri glaciers, rivers, streams et al to be juristic persons with fundamental rights. It can be argued, as done in the analysis of *Mohd. Salim* above, that the decision was actually supported by anthropocentric arguments and, hence, this ruling too cannot be deemed to be eco-centric *per se*. However, if this were not the case, and the rivers had actually been elevated to the status of a juristic entity purely as an affirmation of their intrinsic value, then there is equal potential to categorize this approach as either eco-centric or anthropocentric. As legal arguments in favour of elevating rivers or other ecological bodies to the status of legal entity are increasingly raised in courts across the world, this contentious question–whether ecocentrism is achievable in the juridical realm – should assume more importance.

Nonetheless, proceeding with the assumption that the Uttarakhand High Court adopted differing degrees of eco-centric reasoning in its two landmark cases, one must ascertain the ideal route for implementation of eco-centric principles in the Indian legal system in the imminent future. First things first, the Uttarakhand High Court must be lauded for its willingness to take charge of a rapidly deteriorating situation, especially vis-à-vis the Ganga and Yamuna rivers. Rather than limiting itself to the unproductive judicial framework for protection of rivers, dating back to the *Kanpur Tanneries* case,[35] the Court attempted to truly give new impetus to this cause through its ruling. Similarly, theruling in *Narayan Dutt Bhatt* also aims to provide a much stronger legal foundation for future animal protection cases, be it merely through its precedential value or, as mentioned earlier, the further relaxation of locus standi to ease the litigation process. Judgments influenced by eco-centric principles are, in this sense, definitely desirable, insofar as their willingness to disrupt the norm[36]

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[35]*MC Mehta v Union of India* 1988 AIR 1115

[36]Urmi Goswami, 'Will Granting Legal Rights to Rivers Like the Ganga, Change the On-Ground Situation?' *The Economic Times* (25 March 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/will-granting-legal-rights-to-rivers-like-the-ganga-change-on-ground-situation/articleshow/57818653.cms> accessed 12 October 2018

draws much-needed attention to these pressing environmental issues and also set the wheels in motion for a gradual shift away from our unsustainable anthropocentric ideals.

However, hurdles of implementation remain inadequately dealt with so far, and the Uttarkhand High Court must be held accountable for exacerbating this task, rather than providing meaningful assistance with it. Firstly, it must be noted that though the judicial channel provides a rapid route for creating legal rights for non-human entities, as it is devoid of legislative red tape, judgments usually end up lacking the institutional depth that can be achieved through well-drafted legislations;[37] a direct comparison of the *Te Awa Tupua*legislation and the case of *Mohd. Salim* blatantly reveals the same.

To elucidate, on the very day of the Uttarkhand High Court's verdict, New Zealand enacted legislation granting legal rights to the Whanganui river: *Te Awa Tupua*.[38] Naturally, given their similar objectives, subject-matter and timelines, one is inclined to draw a parallel between the environmental activism of the Uttarakhand High Court and that of the New Zealand Crown. Essentially, through the New Zealand legislation, the right to sue and to be sued were officially endowed upon the *Te Awa Tupua*, which is to be represented by a guardian, *TePouTupua*.[39] This Act came into force after eight years of negotiation between the Whanganui Iwi tribe and the Crown, and provides for a strategy group, *TeKopukanaTe Awa Tupua*, to represent stakeholders' interests. Thus, the framework of this Act is extremely inclusive and creates a nested-community governance within the broader legal framework,[40] while providing a feasible strategy for implementation. It is undeniable that there exist numerous differences in the two aforementioned situations, foremost among which are the lengths of these rivers - Whanganui river is merely 290 km, whereas the Ganga's length is recorded to be slightly over 2500 km! - and,

[37] Erin L. O'Donnell and Julia Talbot-Jones,'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 28 Ecology & Society

[38]Te Awa Tupua(n 2)

[39]O'Donnell and Talbot-Jones(n 36)

[40]ibid

consequentially, the number of affected parties. Nevertheless, the Whanganui river legislation could possibly serve as a roadmap to practically accomplish the eco-centric goals set out by the Uttarakhand High Court. This is because the Whanganui river legislation takes comprehensive steps to ensure minimum impediment in its enforcement, whereas the ruling in *Mohd. Salim* serves as merely an idealistic, blanket order without the means to be effectively enforced. For instance, the Whanganui river legislation, through its meticulously drafted 126 sections, covers exactly what the legal effect of declaration of *Te Awa Tupua*status entails (Section 15) or what the particular functions of the river's strategy group, *TeKopuka,* are (Section 30), *inter alia*. On the other hand, the ad-hoc judicial approach followed in *Mohd. Salim* is rife with lacunae, be it the lack of explanation pertaining to what amounts to 'harm' to the rivers, or any mention of the potential transboundary disputes such a judgment could raise (possibly, intra-State within India, or inter-State between India and Bangladesh, for instance).[41]

Further, judgments from lower courts always run the risk of being undermined by future Court rulings;[42] yet again, look no further than the Supreme Court order staying the ruling in *Mohd. Salim*. In this light, it must be asserted that the legislative channel, given its ability to provide for a more meticulous and rigorous process of deliberation and stakeholders' involvement, remains the most productive avenue to plant the seeds for an eco-centric legal framework. In the context of the Ganga and Yamuna rivers particularly, the Indian legislature must take a leaf out of New Zealand's book and provide for clear structures, funding and rules tailored to these specific situations, with the judiciary then tasked with upholding the tenets of said legislation. Thus, it is only once India's legislature is able to lay down an eco-centric bedrock that judgments in the mould of *Mohd. Salim* and *Narayan Dutt Bhatt* can hold practical value.

[41]ibid
[42]ibid

CONCLUSION

Despite the well-intentioned efforts made by the Uttarakhand High Court through its rulings in *Mohd. Salim* and *Narayan Dutt Bhatt* to implement a much-needed and desirable eco-centric legal framework, the analysis undertaken above reveals that an overture of this magnitude can only be effectively undertaken by the Indian legislature. Even if the High Court had addressed certain notable concerns arising out its rulings - which it sadly failed to do - it still would've been unable to devise the structured and comprehensive framework that a legislative body can come up with, as was done by the New Zealand Crown. The foundational shift required in the Indian legal system must, and can only, be achieved through careful negotiation and deliberation, rather than through the judicial channel's impromptu efforts. One can only hope then that the Uttarakhand High Court's judgments, and the public support they've garnered, jolt the Indian legislature into long-overdue action premised on eco-centric principles!

INTERNET INFIDELITY: AN UNFAMILIAR VERSION OF ADULTERY

Akshat Tiwari and Adwaita Bhattacharyya[1]

Abstract

In this present digital age, internet is one of the greatest benefits accrued from technological advancements. It has led to a new era of transformation in the process of communication. With the easy access and availability of internet human life has been made much easier than what it was about a decade ago. Social media comes as the most convenient outcome of such technological advancements which has changed our outreach to the entire world, creating a global space wherein each and every one can participate. As a result of this, increased interactions and encounters with known and unknown people have become a common phenomenon of daily life. Beginning with such virtual interactions there comes the whole idea subsisting a relationship online which is again a common idea these days. Such relationships when carried out outside a marriage is where the problem of "internet infidelity" arises. While infidelity is an act condemned under law and provisions have been made thereby to provide relief to the aggrieved partner, presently internet infidelity finds no mention in laws. An interesting issue to be considered at this juncture is the event of decriminalization of adultery by the Apex court. The implications of such an act on the institution of marriage is yet to be witnessed. Thus, this paper tries to elaborate upon the idea of infidelity in marital ties considering the event of adultery no longer being considered as an offence and look into the effects if any on the increased number of cases of online affairs. Therefore, it is pertinent at this outset to understand the definition of infidelity and the consequences thereof and thereafter look upon the existing legal framework of the country to include the idea of online affairs in personal laws at the least to protect the interest of a cheated partner and ensure justice.

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***Keywords**:*Internet, Infidelity, Adultery, Law, Online Affair

INTRODUCTION

As Bill Gates says, "*The internet is becoming the town square for the global village of tomorrow*", our lives in the contemporary times is ruled by the internet. 'Internet'- a word, whose existence was hardly to be found in our lives about 20 years back, is our go-to person for anything and everything today. With the proliferation of technology to an extent where everything is literally available at the tip of our fingers, our lives have been transformed out and out with the appearance of internet therein.Over the decades, our involvement over the internet has increased manifold where internet has been the platform for individuals to reach out to the world globally. Beginning with e-mails and spreading its outreach towards commerce, banking, education and governance, the internet has swamped it all. With the advancement of technology and expansion of internet there is hardly any sphere of human life left which does not find its presence in the electronic world today. There has been an overwhelming increase in the accessibility to resources, news and information by virtue of internet. It has opened a new avenue for communication and socialization altogether. On one hand while this facilitates connections over the globe providing new opportunities and avenues, on the other hand it aids in the development of virtual relationships as well.

With the increased engagement over social media platforms like Facebook, WhatsApp, Instagram, a new genre of interpersonal relationships have been created namely, '*Online or Virtual Relationships*.' The internet holds the capability to act as a technological toolin expeditingthe process of two individuals to come across each other without any physical interaction. The launch of various mobile applications like WhatsApp, Facebook, Tinder, Bumble, Happn further facilitate the initiation of such virtual relationships. The evolution of such online relationships have serious implications on face-face to relationships.

When the impact of two phenomenon are looked into in collusion, one being growth of virtual relationships and other being decriminalization of adultery, the future consequences upon marital ties are yet to be unveiled. The effect of the Supreme Court judgement could be anticipated to critically endanger the institution of marriage

fostering the risk of extra-marital affairs. Therefore, at such a juncture it becomes pertinent to re-visit the civil and criminal laws of our country pertaining to infidelity and examine whether they are efficient enough to safeguard the interest of a spouse tormented by treachery of his or her partner. It further calls for attention to look into the feasibility of accommodating internet infidelity, which is acting as an accelerating force in dissolution of marriages in the contemporary times. On one hand while the internet comes with its perquisites of easing our life, its ills, destroying the institution of marriage cannot be overlooked. In light of the same, there stands a need for immediate attention to modify the existing laws to cater to the present needs and protect relationships in the country by minimizing the sufferings of a betrayed partner.

What is infidelity?

Infidelity can be plainly defined as performing an action or a state of being unfaithful towards one's spouse or other sexual partner.[2] Looking from the perspective of law, as only marriage as an institution receives legal sanction, infidelity can be defined as *'a violation of the marital agreement, a betrayal of one's trust, and a threat to the marital bond'*.[3] In common parlance infidelity is cheating a partner in a romantic relationship. It includes any act of one of the spouse which amounts to treachery and betrayal to the other. An act of infidelity can be extremely tormenting and is considered as the most troubling event to occur within a marriage next to domestic violence.

Reasons for infidelity

The various factors driving a partner to indulge into a relationship outside marriage are many in number. The primary reasons which can be accounted for such acts include an early or a wrong marriage, physical dissatisfaction with one's spouse, emotional disconnect over a period of time, need for excitement in life as the prominent ones amongst many others. Lower levels of marital satisfaction leading to emotional disconnect thereby facilitating attraction to another person outside marriage have been accounted for a greater event of betrayal. Permissive attitudes toward infidelity increase a couple's risk and are more likely to occur in liberally minded individuals. Co-habiting couples also face greater risk of betrayal when compared with wedded couples, and

[2]John Simpson and Edmund Weiner (eds), *Oxford EnglishDictionary* (OUP 1989)
[3]Angelina Mao andAhilya Raguram, 'Online Infidelity: The New Challenge to Marriages' (2009) 51 Indian J. Psychiatry<ww.ncbi.nlm.nih.gov/pmc/articles/PMC2802380/> accessed 31 January 2020

couples in which one or both spouses have previously been divorced face a bigger threat.[4]

Types of infidelity

Infidelity can be associated with many words like *'cheating, adultery, unfaithful, extramarital or stepping out'*.[5]

Infidelity can be classically divided into two categories, emotional and sexual. Emotional infidelity includes having deep feelings for someone other than your partner which causes you to feel the need or want of togetherness and quality time.This could involve dissipated thoughts of that person, and also feeling of willingness or intimacy.[6] Sexual infidelity or adultery includes having a sexual or physical relation with someone other than your partner.Basically being involved in the act of sex outside marriage qualifies for the aforementioned act.

With the increased involvement over internet comes the idea of "internet infidelity" as a new realm to the idea of infidelity which deals '*with partners being associated with each other for some emotional or physical attraction by some online medium*'.[7] Viewing porn websites, flirting online, having an online affair, sexting are acts which come within the purview of cybersex.

Thus, marital infidelity can be observed by several activities including: *"...having an affair, extramarital relationship, cheating, emotional connections that are beyond friendships, internet relationships, pornography use*"[8] with the addition of carrying out such acts by an online medium without any physical interaction.Of such types

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[4]Manoochehr Taghi Pour, 'Infidelity in Marital Relationships' (2019) 4(2)PPRIJ <edwinpublishers.com/PPRIJ/PPRIJ16000200.pdf> accessed 31 January 2020

[5] FD Fincham and RW May, 'Infidelity in Romantic Relationships' (2017)13 CurrOpin Psychol<ww.ncbi.nlm.nih.gov/pubmed/28813298> accessed 31 January 2020

[6]M Jeanfreau, A Juricha and M Mong, 'An Examination of Potential Attractions of Women's Marital Infidelity', 42(1)American Journal of Family Therapy <www.tandfonline.com/doi/abs/10.1080/01926187.2012.737283> accessed 31 January 2020

[7] JP Schneider, R Weiss and C Samenow, 'Is it really cheating? Understanding the emotional reactions and clinical treatment of spouses and partners affected by cybersex infidelity' (2012)19(1) Sexual Addiction & Compulsivity: The Journal of Treatment & Prevention <www.tandfonline.com/doi/abs/10.1080/10720162.2012.658344> accessed 31 January 2020

[8] SP Glass and TL Wright, 'Justifications for extramarital relationships: The association between attitudes, behaviors, and gender' (1992) 29(3) The Journal of Sex Research <www.jstor.org/stable/3812938?seq=1#metadata_info_tab_contents> accessed 31 January 2020

of infidel acts, adultery happened to be a criminal offence under law before striking down of the concerned provision by the Apex Court.

Adultery No Longer an Offence: What Now?

"*Adultery can be a ground for divorce. It can be part of civil law involving penalties. But why a criminal offence*?"[9] inquired Justice Deepak Misra while reading the judgement deciding the constitutional validity of section 497 of the Indian Penal Code, 1860. Section 497 was read as "*if a man has sexual intercourse with another's wife without the husband's "consent or connivance", he is guilty of the offence of adultery and shall be punished*"[10]. Under the adultery law, only the husband of the woman had the right to file a case against the man with whom she commits adultery. Along with section 497 of Indian Penal Code, 1860, the Supreme Court has struck down section 198 of Code of Criminal Procedure, 1973 which allowed the husband to bring charges against the man with whom his wife has committed adultery while the woman had no such right. The 150-year old archaic law was staggeringly sexist founded on ancient notions of the man being the perpetrator and the woman being the victim. It treated women as a "property" of men and tantamount to their subordination while the Constitution guarantees them equal status as of men. The Court thus decriminalised section 497 stating it as a "*flagrant instance of gender discrimination, legislative despotism and male chauvinism"*.[11]

Adulteryis committed willingly and knowingly with the knowledge that it would certainly hurt the feelings of one's spouse, children and family. Such a grave and intentional action, which impinges on the sanctity of marriage and sexual fidelity, encompassed therein which forms the backbone of the Indian society was rightly classified and defined as a criminal offence.The Court keeping a pragmatic view seeks to transform laws to cater to the needs of the present held that considering adultery as a criminal offence would mean immense intrusion into the extreme realm of privacy in the matrimonial sphere, diluting the adultery laws can have deep-rooted implications on the institution of marriage. The decriminalization of adultery can be an incentive to involve in such a relationship as there remains to provision proving to be a deterrence. Moreover, the Court held that

[9]*Joseph Shine v Union of India*(2019) 3 SCC 39

[10]Indian Penal Code 1860

[11]Joseph Shine (n 9)

adultery is often not the cause of dented relationship rather is a result and that no punishment can ensure commitment between two parties. As an outcome, adultery stands as a ground for divorce under the civil laws of the country and not a criminal offence anymore.

Justice is commonly perceived as fairness in protection of rights and punishment of wrongs. While it is completely fair to strike down the provisions of adultery as it undermined the interests and rights of women under law, deleting it from the criminal purview can have far-reached implications. When either of the spouse discovers that his or her partner was involved in an adulterous relationship with another person, it causes tremendous pain and agony. Trust and commitment are the two soul essentials for a marital relationship and no punishment can ensure that for sure; however lack of punishment for an act as severe as adultery can make relationships more hostile and vulnerable towards the breach of commitment. Adultery is an act of treachery and betrayal of severe nature which causes paramount mental trauma, a sense of dejection and immense anguish. A betrayal of such nature calls for intervention of law to punish the offender irrespective of his or her gender to ensure justice to the cheated partner. It is upon the couple to decide whether they wish to conciliate and live together further or wish to dissolve their marriage and hence adultery being a ground of divorce is fair and justified as well. However, what about the sufferings and injustice caused by such an act of unfaithfulness? Mere separation cannot be compensation of the grief and betrayal. In order to ensure law does not intervene in the realm of privacy of one's life, grave injustice must not be caused to the betrayed spouse with no longer there being a criminal provision to punish the treacherous act.

At this outset, when impact of decriminalizing adultery on the sanctity of a marital bond is highly unpredictable and time beholds the answer to the decision of the Supreme Court being a boon or bane, the growing instances of infidelity over the internet is alarming. Presently, internet infidelity finds no existence in the laws of our country and is a blind spot thereof. The absence of any statutory provision concerning the same, and a conflicting stance set by the judiciary as precedents ignites a debate on the topic. Thus, it becomes pertinent and apposite in the context of the adultery judgement to analyze the various facets

of relationships emerging over the internet and their relevance to have specific legal provisions to govern the same to ensure justice and equity.

What is Internet Infidelity?

A 29-year-old married woman, a home maker was diagnosed with moderate depression following the discovery of her husband's chats of a sexual nature with his cyber chat partner via Internet. She had become increasingly suspicious of her husband's actionand a subsequent search of the recent chat room conversations revealed that he had been sex chatting.[12] She was devastated with a similar encounter with the act 'cheating' for the second time, and her distress was further aggravated by her husband's strong denial on the issue as infidelity to her as he was merely 'chatting' with his cyber partner and such an act could not be counted in for infidelity according to him.

Internet chat rooms have thus introduced unprecedented dynamics into marital ties where on one hand you can enjoy the stability of a marriage and on the other reap the benefits of the thrills of dating; both at the same time. '*With the development of the Internet, the definition of infidelity now includes a romantic and/or sexual relationship with someone other than the spouse, which begins with an online contact and is maintained mainly through electronic conversations that occur through e-mail and chat rooms'*.[13] Evidently, there is no physical interaction between the two individuals and the relationship is carried out only via the internet by messages, email and chat rooms. The lack of any face-to-face involvement triggers a whole debate as to whether online relationships outside marriage can be considered to constitute infidelity.

Chatroom contacts and the act of online infidelity known as 'sex-ting' in common parlance constitutes infidelity firstly because, the institution of marriage involves a physical and emotional exclusivity between the spouses, and any kind of sexual involvement with another person outside marriage is not acceptable. Secondly, such interactions over the internet which have a sexual color attached are carried out in secrecy, hidden from the partner and the revelation of the same comes with a sense of treachery and betrayal though there was no physical involvement. Thus, the consequential nature of the chatroom liaisons,

[12] Angelina Mao (n 3)
[13] ibid
[14] Angelina Mao (n 3)

which comes, associated with a sense of breach of trust and betrayal evidently qualifies as the act of infidelity.[14] Such liaisons can be carried out by maintaining a continuous relationship with one person or with random and multiple erotic chat encounters with a number of online users.

In the days of Tinder and Bumble showing us attractions outside marriage, and SnapChat and WhatsApp, allowing constant private contact with others, maintainingsecrecy being easier, the idea of infidelityhas become more complicated. Infidelity is no longer a specific act involving physical interaction; sexting, cybersex, emotional and virtual intimacy, using the internet to meet sexual partners along with physical affairs all constitute online cheating. The threads that tie these very different acts together is the internet which facilitates maintaining secrecy and anonymity. Moreover, the convenience offered by internet in facilitating such relationships is immense. A WhatsApp application and a Wi-Fi connection is all you need to get started, that's it! Thus, when a person wilfully with all his mind and intention engages in act associated with sexual colours, even though not physical but virtual, the same has equally severe implications and causes similar disturbance as any other act of infidelity does.

A marriage is grounded on lines of strong moral and cultural code where sexual as well as emotional exclusivity between the partners is a requisite. The sanctity of marriage presupposes equivocal honesty on parts of both the spouses as well as faithfulness in actions and conduct. Any act of infidelity thus is against moral and cultural ethics of public opinion surrounding marriage, moreover causing immense pain and distress to the betrayed partner. Considering the aftermath of the disclosure of an act of infidelity which comes with hell lot of sufferings and pain in cases of sexual or emotional infidelity, the consequences of internet infidelity are identical. Therefore, the perfidious relationships emerging over the internet might be virtual in nature but the core idea and the consequences thereof are similar to that of infidelity as classically defined, and thus cheating over the internet necessarily need to be understood as infidelity and be reacted upon accordingly. The sole reason for excluding such cases from the idea of infidelity being the medium by which they are carried cannot negate the consequence caused and the intention involved, which in no way is different from any act of infidelity.

As they say, "*betrayal is in the eyes of the beholder*", the definition of betrayal by an act of infidelity differs with varied perspectives. While for some betrayal necessarily involves physical intimacy others perceive it to be emotional connection with a person outside marriage or even secrecy maintained can be associated with the same. The fact remains there can be no universal definition of betrayal. Nevertheless, commitment and trust is the soul of a marital bond and betrayal consequentially trembles the foundation of the pious tie. However, whatsoever be the reason, the act of betrayal has severe implications on the other spouse leading to a sense of utmost dejection. Infidelity thus extends its wrath upon the entire family especially if there is any child associated thereof. Moreover, it stands as one of the major reasons for seeking divorce and finally leads to the end of a family. Infidelity often breaks the trust or faith of one partner on the partner and thereby causes mental trauma agony to the partner cheated.

The idea of internet infidelity is very fresh and young, unfurling its ills upon the institution of marriage and thus find no mention in the provisions of law securing marital ties. The pain, agony and emotional distress caused to the aggrieved partner has no recourse available hence. Even when a spouse is seeking for divorce on grounds of an extra-marital affair sustained over a period over the internet, the judiciary has diverging opinions about the same. Therefore, it becomes pertinent here to understand the consequences attached with cybersex affairs and the need for a constructive legal provision for governing all such cases.

Consequences of Internet Infidelity

A marriage is a pious tie involving utmost commitment, selfless dedication and bountiful trust between two individuals associating two families thereby. "*Happily married ever after*" is a dream that every individual seeks to achieve and nobody every wishes to go through the ordeal of separation from his or partner for reasons whatsoever maybe. Dissolution of a marriage involves distress and disdain, wherein a relationship, which was supposed to act as a support system, becomes the infelicitous source of pain and agony in life. The whole period of emotional turmoil for the individuals as wells as the families often comes attached with unfortunate legal battles seeking justice for the wrong committed. Personal laws like the Hindu Marriage Act, 1955, the Dissolution of Marriage Act, 1939, the Divorce Act, 1936, govern the

disputes arising marital ties for Hindus, Muslims and Christians respectively, which include divorce, judicial separation and others including the grounds under which a marriage can be legitimately dissolved.

An act of cruelty is a valid ground for seeking divorce under the Personal laws.[15]Cruelty simply put is a conduct of one, which is adversely affecting the other. It can be defined as the "*willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to reasonable apprehension to such a danger"*.[16]Cruelty may be mental or physical, intentional or unintentional. While physical cruelty is easier to interpret as it involves acts of physical aggression and violence, *"no uniform standard can ever be laid down to decide upon what exactly constitutes 'mental cruelty'.*[17]*Further, the Courts over time have enunciated certain illustrative but not exhaustive grounds to decide upon cases of cruelty. In the mentioned instances it is prescribed to look into the complete matrimonial life of the parties and then based on the comprehensive appraisal of the matter it is to be judged whether the other party can be asked to reasonably put up with such a conduct. The Court held that mere coldness or lack of affection cannot be considered to be a ground to constitute mental cruelty. The conduct of the spouse should be sustained over a period of time to make the married life for the other spouse intolerable. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty*. It was held by the Supreme Court in the leading case of *Shobha Rani v. Madhukar Reddi*[18] that "*to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse"*. The act must be of the type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce.

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[15] Hindu Marriage Act 1955, s 13 (1) (ia); Dissolution of Marriage Act 1939, s 2 (viii) (b)
[16]*Parveen Mehta v Inderjit Mehta* (2002) 2 SCC 706
[17]*Samar Ghosh v Jaya Ghosh* (2007) 4 SCC 51
[18] AIR 1988 SC 121

An act of infidelity strikes at the foundation of marriage and the result of internet infidelity is no different. Along with that, it hits hard upon the stability of a family, the basic unit of any human society. The impacts of such illicit relationships and the battle between the spouses affects the family in totality especially impacting children in a very negative manner. No child deserves to witness the separation of their parents and the pain associated thereof.

In the lack of any statutory provision pertaining to internet infidelity, drawing a logical conclusion from the aforesaid assertions of the judiciary it is imperative that internet infidelity amounts to mental cruelty. In cases where one of the spouse in involved in arelationship involving sexual and emotional intimacy, however by the medium of internet, the same causes immense distress and pain to the other spouse and after such an act of treachery it is not legitimate to expect the spouse to live with his or her partner. The mere fact that the person never meets his or her sexual partner and continues the whole affair over the internet does not make it less severe to exclude the same from the purview of mental cruelty.

The Court took a contrary view about the same while hearing a matter when it said that "the mere fact that the husband has developed some intimacy with another, during the subsistence of marriage, and failed to discharge his marital obligations, as such would not amount to cruelty."[19]Agreeably a mere lack of affection in a relationship or unsuitable compatibility between the partners cannot be attributed to cause mental cruelty, but cases involving intimate conversations having a sexual colour persisting over a long period of time can surely be tormenting.Taking a contrary view in another matter the Court upheld that, "*Social media and e- communication has dramatically increased infidelity, not only because of the increased risk of meeting someone for the first time through the Web, or reconnecting with someone from the past through social networking sites, but also as a means, to perpetuate a potential affair."*[20]Had this been a case about 15 years ago wherein you meet a friend from hundreds of miles away, the relationship was likely to die out because the process of calling and writing to each other was complex. In the present era of Facebook, emails, and texting, people can maintain and intensify what, in the past, would have been 'near misses".

[19]*Pinakin Mahipatray Rawal v State of Gujarat* AIR 2014 SC 331

[20]*Bhartiben Bipinbhai Tamboli v. State of Gujarat* (2018) 2 GCD 1069

Therefore, with the judiciary acknowledging the potential of online affairs destroying relationships legitimizes the issue and establishes serious concerns as well. Moreover, the conflicting opinion taken by the Courts at various instances further calls for constructive provisions governing such affairs to ensure a fair decision grounded on similar lines of law to decide upon such matters increasing exponentially. To include internet infidelity by introducing the same as a valid ground for divorce attributing it to causing mental cruelty is essential to secure justice to the faithful partner and mayhem caused by the treachery of his or spouse.

The potential threat posed by such online affairs on marital homes is further aggravated by increasing websites promoting extramarital affairs online. Gleeden, the first extra-marital dating website for married and unfaithful people having a tag line of, '*Taste adultery and try discreet relationship with a lover*' boasts of 3.5 lakh Indians of its total 40 lakh members with top cities including Mumbai, New Delhi and Bengaluru.[21] Ashley Madison with a fascinating tagline of '*Life is Short! Have an Affair*' is also an extra-marital dating affair has seen a 90% increase in new membership year-on-year in the last eight months with India ranking 10th among the 53 member countries. The figures are shockingly alarming. Solene Paillet, Head of Communication Management of Gleeden remarks on the decriminalisation adultery that the step taken by the Supreme Court marks a beginning for India towards modernity finally coming out of the taboo of infidelity and open relationships. It would probably be a 'sentimental revolution' changing the outlook of Indian men and women towards marriage and relationships.

International Perspective

"*The pleasure is synthetic, the pain is genuine. Doesn't matter if it was a non-contact sport*"- and thus internet infidelity is indeed infidelity. The modern and developed countries of the world known to be at the pinnacle of development all consider well within the ambit of infidelity laws of their country. One can do whatever they feel like over the "World Wide Web" conveniently and anonymously which lead to an addiction hard to shake off. Taking this view in mind, the family courts in the United Kingdom, consider online relationships as infidelity against the

[21] Himanshi Dhawan, 'How Infidelity Thrives in the Age of Internet'*The Times of India*(Mumbai September28, 2018)<timesofindia.indiatimes.com/home/sunday-times/how-infidelity-thrives-in-the-age-of-internet/articleshow/65997155.cms> accessed 31 January 2020

common idea that it does not amount to infidelity because hooking up with someone is seen as cheating in the eyes of law.

In 2013, a study carried by Texas University, US found that online acts of infidelity are equally painful as those committed in person. This makes it evident that people have the ability to be more vulnerable online it being more convenient, which facilitates a greater emotional response which is equally devastating as an offline response. A study conducted by University of Florida found that the anonymity maintained in online relationships escalate the engagement of the participants which includes sharing details about one's personal life which leads to a development of a desire for sexual intimacy.

There is no study-based on online relationships in India, but advocates dealing in matrimonial cases come across aggrieved spouses seeking divorce on grounds of internet infidelity when online relationships start affecting family life due to neglect towards the spouse as well as children. Such cases are cited for causing acute mental agony and trauma. Evidently, there stands a need to have a re-look into the laws of our country and bring the idea of internet infidelity within its purview. The devastating effect of unfaithfulness upon the entire family which include innocent children, have far-fetched implications on their lives as well. Thus, extensive studies be carried upon considering the implications of online affairs on the primary institution of family and thereafter laws be formulated accordingly to provide justice to a person who suffered for no reason and the mayhem caused in his or her life which includes the devastation of a family.

CONCLUSION

It is the duty of the jurists and lawyers to separate the black and white of law whenever it blends to form grey. Evidently the current stand of the judiciary on the issue of internet infidelity the situation is no different. The contrasting opinion of the various Courts being put forth in matters of infidelity makes rendering justice to the aggrieved even more difficult. The jurisprudence of Indian laws on such matters is extremely bleak with the entire issue lying at the discretion of the Court. Howsoever, in the contemporary digital times, there has been a growing trend of online affairs and its adversities affecting families adversely. Taking cue from Western countries, it is high time for India to re-look into the laws of the nation and call for the necessary modifications.

While the legislations stay silent of the said issue, the position of the judiciary is in jeopardy. Looking upon the anguish and miseries that online affairs cause to the marital ties, with no law in support of the aggrieved partner, the situation becomes miserable.

Therefore, taking into consideration the alarming growth of such online affairs and considering it implications, the definition of adultery such be expanded to cover the same therein. With limited research and discussion on the said issue in the country the issue calls for immediate attention. On one hand, the implications of decriminalizing adultery can be hardly foreseen, while on the other the number of instances of online affairs is ever increasing. Undoubtedly, with the advancement in technology and its easy availability to the people, maintaining an affair online, anonymously is an easy affair. At such an outset, there cannot be a blind eye put to the miseries of the grieving partner. The pain, agony and grief caused by such online affairs is in no way less than any other act of infidelity and thus it should be a valid instance of causing trauma to a spouse amounting to mental cruelty.

To conclude with, the implications and adversaries of an online affair are grave enough to spoil a well-settled family. It directly hits upon the institution of marriage thereby destroying a family whose consequences are to be borne by the aggrieved spouse and other family members, especially if there is a child therein. The fact that such illicit relationships are carried out by an online medium is no relief. Forcing a betrayed partner to continue staying with a partner who has cheated upon her is highly unfair and unjust. Therefore, to render justice internet infidelity necessarily needs to be brought in the purview of personal grounds and be considered a valid ground for separation. While the feasibility and possibility of criminalizing such acts cannot be negated though not very pertinent in the current legal framework, there is definitely scope for incorporating the same as a ground for divorce and considering the same to be a an instance of mental cruelty causing immense anguish to a faithful and honest partner. Such acts of internet infidelity being morally and ethically incorrect should also be considered legally incorrect as well.

INTELLECTUAL PROPERTY RIGHTS IN OUTER SPACE : A REALITY CHECK

Purva Anand and Rohit[2]

Abstract

Outer space exploration has an amplified potential by private participation and joint cooperative venture, which raise the need to protect the Intellectual Property Rights germinating in Outer Space. Firstly, there is a need to reconcile the nature of Intellectual Property Rights which are territorial with the nature of Space Law which aims at 'benefit for all'. Secondly, the legal regime is inadequate and inconsistent. It follows the 'extension of territoriality' principle to prescribe domestic legislation in Intellectual Property issues occurring in outer space which raises the inherent conflict between territoriality and res communes. The issue of the protection of Intellectual Property Rights concerning the outer space initiatives due to the impetus of technological development is yet to be addressed. Lack of a common and effective mechanism posed several challenges regarding the protection of the Intellectual Property Rights in Outer Space. The existing domestic laws are either non-existent or do not have an extended application to outer space, creating a gap wherein the protection offered to Intellectual Property cannot be enforced and thereby there is a need for a harmonised international legal framework of Public International Law. In this paper, the term "Intellectual Property" is limited to the limited understanding of 'Industrial Property' which means patents for inventions, industrial designs, trademarks, etc. This paper aims to analyse the nature of Intellectual Property Rights, the existing Treaties governing the subject, the applicability of conventions to Intellectual Property Rights in space and the unanswered questions therein.

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Keywords: Intellectual Property Rights, Outer Space, Common Heritage, Space Law, International Conventions

Introduction: Why Develop Intellectual Property Rights in Outer Space?

The Commercialisation of Outer Space: Entry of Private Players

Outer space operations which provide for huge potentialities shall inevitably be utilised frequently for commercial gain.[1] The Outer Space Treaty, under Article VI,[2] gives a silent nod of approval to private entities i.e. "non-governmental entities" participating in outer space ventures. Privatisation entails commercialisation of space activities, and the State parties hence consciously anticipated and recognised private entities.

In the modern commercial world order, outer space has emerged as the upcoming instrument for gaining economic and political power. *"It is the latest spiritual and economic frontier to challenge free enterprise capitalism."*[3] Simultaneously, the vast resources required for space ventures has led to States to promote and encourage private participation and collaborations.

The shift of focus from only State actors to both governmental (State) and non-State actors in outer space ventures indicates both public-private interests need to be balanced.[4] These private entities, being profit oriented initiatives, wish to secure financial returns, gain a market advantage and protection of the intellectual property rights ("IPRs") for the creations and inventions in an 'outer space setting', namely- a moving space object, a stationary space station, or outside any such space object. The private sector (being profit driven in nature) must have a sufficient incentive to invest in commercial activities in outer space- herein, affording protection to intellectual property used, transmitted or resulting from space activities becomes imperative.[5]

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[3] Diederiks-Verschoor and V. Kopal, *An Introduction to Space Law* (Kluwer Law International 2008) 106

[4] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (adopted 19 December 1966, entered into force 10 October 1967) 610 UNTS 205 art 6 (OST 1967)

[5] Art Dula, 'Private Sector Activities in Outer Space' (1985)19 Int'l Law 159, 159.

[6] Philippe Achilleas, 'New Space Legal Issues' (8 April 2016) UNOOSA <http://www.unoosa.org/documents/pdf/copuos/lsc/2016/sem2-301.pdf> accessed 1 January 2020

IPR act as a competitive weapon[6], which shall either exclude the unauthorised utilization of intellectual property or shall generate tremendous income and goodwill being accrued to the private entity through licensing out any invention.[7]Absence of a strong legal regime shall hinder non-State financial investment[8]. Potential shall lie fallow in outer space and consequently any gain- whether financial, technological or even societal, rendered negated. [9]

International Cooperation in Outer Space: Joint Ventures

Another change in the dynamics of the Space Activities can be observed with the development of international collaborations having commercial objectives. The two marked developments in this sphere are the Space Benefits Declaration[10] by the UNCOPUOS and the International Space Station ("ISS") governed by the Inter Governmental Agreement (of 1988[11] and later of 1998[12]). Article VIII of the Outer Space Treaty provides the registering State with "jurisdiction and control" of the Space Object and personnel thereof.[13] This opportunity extends territoriality and domestic laws and thereby could help create a favourable legal edifice for money oriented ventures. This led to the Inter Governmental Agreement for an expressly commercial nature and drawing sanction from the Outer Space Treaty, as the sole collaboration attempt to extend inter-state commerciality to outer space.

[7] Diederiks (n 1) 111

[8] Bradford Lee Smith, 'Towards a Code of Conduct for the Exercise of Intellectual Property Rights (IPR) in Space Activities-Moderation of the Monopoly?', Colloquium organized by Ceradi-Luiss-Guido Caru and European Centre for Space Law/European Space Agency (11 November 1996) Roma

[9] Robert G. Howell and Linda Vincent and Michel D. Manson, *Intellectual property Law: Cases and Materials*(Edmond Montgomery Publications Limited 1999) 1027

[10] Henry R. Hertzfeld, 'Bringing Space Law into the Commercial World: Property Rights without Sovereignty' (2005) Chi J Int'l L 81, 81-99

[11] Yanal Abul Failat and Anél Ferreira-Snyman, *Outer Space Law: Legal Policy and Practice* (Globe Law and Business Limited 2017)

[12] Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, UNGA Res 51/210 (13 December 1996), UN Doc. A/AC.105/572/Rev 1 (Space Benefits Declaration)

[13] Agreement among the Government of the United States of America, Governments of Member States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station (29 September 1988) Space Law—Basic Legal Documents, D.II.4.2

Later, the Space Benefits Declaration mandated the spirit of "international cooperation" and conceptualised a method to secure the commercial interests of the collaborating States in outer space. It granted collaborating States the complete autonomy to enter into Joint Venture Cooperative Agreements, to decide on all commercial aspects- including IPRs; thereby it created an international regime relating to IPR issues in outer space[14].

Is the current Legal Regime adequate?

Although there exist legal frameworks for Intellectual Property in outer space, they at present suffer from inefficacies, inconsistencies and inherent differences with the founding principles of both national law and founding principles of IPRs.[15] The current reality can be best expressed by borrowing the words of Professor Bin Cheng, *"A number of Treaties have been concluding relating to the outer space, and some of their provisions are directly relevant but unfortunately, these are not always consistent."*[16]

There are certain inherent challenges in the application of IPRs to the outer space arena. An urgent need is for creating harmonized international norms with respect to specific issues involving IPRs in outer space[17]; namely-

1. Protectability of Earth-based inventions due to outer space activities,
2. Protectability of inventions in outer space; further the law applicable to determine upon whom the right is conferred,
3. Penalty for infringement of existing patents by the usage of protected Intellectual Property in outer space.[18]

[14] Agreement Among The Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station (29 January 1998) 1998 T.I.A.S. 12927 <https://www.state.gov/wp-content/uploads/2019/02/12927-Multilateral-Space-Space-Station-1.29.1998.pdf> accessed on 19 December 2019 (IGA 1998)

[15] OST 1967, art 8

[16] Nandasiri Jasentuliana, *International Space Law and United Nations* (Kluwer Law International 1999) 46

[17] Diederiks (n 1) 112; G. Laferranderie and D. Crowther, *Outlook on Space Law over the next 30 years*(Martinus Nijhoff 1997) 363-371

[18] Sa'id Mosteshar, *Research and Invention in Outer Space, Liability and Intellectual Property Rights*(Nijhoff Publishers and International Bar Association 1995) 71

Protection of IPR concerning outer space initiatives due to the impetus of technological development remains unaddressed. Lack of a common and effective mechanism posed several challenges and a need was felt to bring the concept of Intellectual Property within the prevailing system of trade. The IPRs in space technology, specifically related to voice, image and data transmission, involve highly labyrinthine and important legal and technical issues.[19]

Undoubtedly, there are adverse implications for both the industry and the states due to the lack of adequate laws and a regulatory mechanism. Hence, there is need of an international legal regime to settle disputes relating to the ownership issues, rights of distribution, use and transfer of data and confidentiality.[20]

Are the inherent natures reconciliable: Territoriality v Res Communis?

Territoriality of IPRs

IPRs are highly territorial and are governed by national legislation. According to the Black's Law Dictionary, the word 'territorial' means "having to do with a particular geographical area"[21] and territorialism in the legal context means the applicability of law whereby the damage or contract formation determines which country's law should be applied. Thereby intellectual property, be it copyright, trademark, patent or other rights, can only be acquired, protected and exploited within a particular area of the State in which they are registered. The "territoriality principle" hence undertakes two functions: (i) it outlines the territorial extent of the IPR i.e. the physical boundary within which an IPR is recognized, and (ii) provides the applicable legal rules governing its protection.[22] Under the territoriality principle, the validity of a right can exclusively be adjudged only by officials of the registering jurisdiction.[23]

[19] Francis Lyall and Paul B. Larsen, *Space Law* (Ashgate Publishing Limited 2007) 183

[20] ibid; Diederiks (n 1) 112

[21] Sandeepa Bhat B., *Space Law in the Era of Commercialisation* (EBC 2010) 210

[22] World Intellectual Property Organisation, 'Intellectual Property and Space Activities' (April 2004), WIPO <https://www.wipo.int/export/sites/www/patent-law/en/developments/pdf/ip_space.pdf> accessed 25 December 2019

[23] *Black's Law Dictionary* (7 edn, West Group 1999) 1642

Due to the emergence of profit-oriented ventures in outer space, the concept of territoriality faced a major challenge. With the rapid advancement in science and technology, the creation of the human mind[24] also found its place in outer space and the issue of IPR in outer space became a growing issue. On contrary to the driving principles of IPR, international space law acknowledges two primary fundamentals: (i) the exploration/investigation and use of outer space should be for the benefit /development of the mankind,[25] and (ii) the principle of non-appropriation of outer space by any nation or State.[26] IPRs are a competitive weapon[27] and are of great significance. It is contended that the austere application of the IPR laws may conflict with the above-stated principles.

"The Common Heritage of Mankind" Outlook

To achieve betterment of humankind by exploring outer space and to ensure that it does not become a resource pool to facilitate the self-motivated interest of the states and individuals, it is imperative to create sound international institutions that protect the status of space as a common heritage.[28] "Global Commons" are natural assets outside the jurisdiction of any nation, per instance the high seas and the Antarctic[29]. Led by the principles of Common Heritage of Mankind (CHM)[30], they are available to all but not subject to any manner of proprietary control.

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[24] Stephen P. Ladas, *The International Protection of Industrial Property* (Harvard University Press 1930) 17

[25] Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L12/1

[26] ibid

[27] OST 1967, art 1

[28] OST 1967, art 2

[29] Bradford Lee Smith, 'Towards a Code of Conduct for the Exercise of Intellectual Property Rights (IPR) in Space Activities-Moderation of the Monopoly?', Colloquium organized by Ceradi-Luiss-Guido Caru and European Centre for Space Law/European Space Agency, Nov. 11, 1996, Roma

[30] Report of the World Commission on Environment and Development, 'Our Common Future' (1994) UN Doc A/42/427

Oscar Schachter, way back in 1952, remarked the outer space as a "common property of all mankind, over which no nation would be permitted to exercise domination"[31] and was declared as a common heritage. Later in 1961, the United Nations General Assembly declared outer space to be "*res communis*" and unsusceptible to national appropriation.[32] The Outer Space Treaty, 1967 (OST)[33] in Article II, expressly recognized the status of outer space as a common heritage. Its commercialisation was brought by the investments of the private players in the industry of space exploration with the expectations of profits or returns on the investment made by them. But this expectation of profit does not appear to be compatible with the idea of equitable sharing stressed by CHM.[34] Also, it was argued that CHM has no meaning until the technology becomes as freely available as air and water.[35] Now it is argued that the guiding principles of IPR law and International Space law present an innate dichotomy.

Over the time, two broad interpretations of the principles of CHM has been drawn: (i) one considers it to be an extended version of the principle of *res communis* and logically considers exploration a communal enterprise and therefore discourages commercialisation of space, and (ii) the other emphasizes on the complete freedom of exploration of CHM areas,[36] which paves a way to facilitate the unwarranted exploitation of the global commons. Now, there can be many reasons attributed to the emphasis on no IPR philosophy in the guiding treaties of outer space law. Firstly, it is argued that the use and exploration of the outer space is a scientific venture and not a commercial one.[37] Secondly, that at the time of the formulation of these treaties, socialism was on the rise.

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[31] Organisation for Economic Co-operation and Development, 'Glossary of Statistical Terms-Global Commons' (25 September 2001), https://stats.oecd.org/glossary/detail.asp?ID=1120 accessed 28 December 2019

[32] Arvid Pardo*, The Common Heritage:Selected Papers on Oceans and World Order* (Valletta: Malta University Press 1975) 176

[33] United States Congress, Special Committee on Space and Astronautics, *Space LAW: A Symposium* (Washington: Government Printing Office 1959)

[34] UNGA Res 1721 (XVI) (20 December 1961)

[35] OST 1967, art 2

[36] Nicolas Mateesco Matte, *The Common Heritage of Mankind and Outer Space: Toward a New International Order for Survival*(Institute of Air and Space Law, 1987) 12

[37] K. Baslar, *The Concept of Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) 44

Extra-Territorial Application of IPR: An Attempt at Reconciliation

Harmonious exploration and use of outer space by the states, does not require a specialized solution but a 'fundamental extension of morality'.[38] It is argued that a more obligatory and central legal framework is required at the global level so that the private players are obliged within the ethical limitations. Moreover, if the private players are going to exercise a major share in space exploration, the regulatory mechanism must enforce binding obligations on them. But at the same time, the new legal framework or regulatory mechanism has to be ethical and moral, so as to not dilute the essence of the CHM principles.

The signing of the Paris Convention[39] was one of the historical and far-reaching leap which not only widened the scope of IPRs in the context of territoriality, but also at the same time was an attempt to formulate and provide a guarantee to the IPRs at the global level. Multilateral instruments governing the protection and regulation of the IPRs intended to abridge the differences and gaps in IPR protection across nations.[40] Instruments like Paris Convention[41] and the Berne Convention[42] of the WIPO and the TRIPS Agreement[43] of the WTO extended the territorial nature of the IPRs and provided an environment for a common uniform platform for international cooperation.

According to the TRIPS Agreement, the IPRs regarding the inventions/creations made in outer space but used on the Earth will be governed purely by the existing domestic Intellectual Property system.[44] But the existing domestic system of IPRs did not provide any provision which can be considered as directly applicable and uniform to the cases

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[38] SJ Shackelford, *The Tragedy of the Common Heritage of Mankind* (Stanford University Law School, Environmental Law Society 2009)
[39] Shefali Raizada, *Space Law: Emerging Trends and Policy* (Satyam Law International 2018) 97
[40] G. Hardin, *The Tragedy of Commons* (American Association for the Advancement of Science 1968) 162
[41] Paris Convention for the Protection of Industrial Property (20 March 1883) 21 UST 1583 (Paris Convention)
[42] World Trade Organisation, 'Intellectual Property: Protection and Enforcement' WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> accessed 30 January 2020
[43] Paris Convention (n 39)
[44] Berne Convention for the Protection of Liberty and Artistic Works (adopted 9 September 1886, entered into 5 December 1887) 1161 UNTS 30

of IPRs in outer space. There is a need to harmonize *"the inherent conflict between the principles of territoriality of Intellectual Property laws and the res communis nature of international space law"*. This can be settled through a coordinated approach and arrangement which can be undertaken by the global community. In outer space, only a unique set of global rules will be applicable.

What is the existing Legal Regime surrounding Intellectual Property in Outer Space?

Space Law is a subset of Public International Law, governing primarily through customary practices and treaties.[45] In the broader sense, the sources of Space Law include international Conventions, international customs, general principles of law and judicial decisions.[46]

Undeniably, the role of the United Nations has been central to the creation of the present body of laws governing the outer space arena. It was understandably the only logical forum under which norms and principles regulating space activities would be formulated.[47]

Changed Pattern of Development in Space Law

It is submitted that there has been a change in the pattern of legal development of Space Law in the foregoing decades. During formulation stage, Space Law showed a predominance of Treaty Law leading customary developments, i.e. law anticipating for the actual technological advances.[48] The new trend is to adopt a soft-law approach[49], i.e. adopting non-legally binding documents showing international consensus, facilitating developments as are necessary in light of technological developments and introduction of new players.

[45] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organisation (entered into 1 January 1994) 1869 UNTS 299 (TRIPS Agreement)
[46] ibid, art 27(1)
[47] MJ Listner, 'The Ownership and Exploitation of Outer Space: A Look at Foundational Law and Future Legal Challenges to Current Claim' (2003)1 Regent J Int'l Law75, 76
[48] The Statute of the International Court of Justice, 33 USTS 993 art 38(1)
[49]Leo B. Malagar and Marlo Apalisok Magdoza-Malagar, 'International Law of Outer Space and the Protection of Intellectual Property Rights' (1999) 17 BU INT'L L J 311, 328

The Space Treaties and Declarations

Pivotal matters of Space Law are laid down in five treaties:

1. The Outer Space Treaty;[50]
2. The Agreement on Rescue and Return of Astronauts;[51]
3. The Liability Convention;[52]
4. The Registration Convention;[53]
5. The Moon Treaty.[54]

The General Assembly has also adopted five sets of legal principles for governing outer space. Among these, for the issue of IPRs, the Space Benefits Declaration[55] is highly relevant.

The primary treaty among these is the Outer Space Treaty of 1967. Article I of the Outer Space Treaty envisages the use of outer space for "the benefit and in the interests of all countries" irrespective of their development and encourages international cooperation in scientific investigations.[56] The concept of offering protection to Intellectual Property shall further this object in two regards- (i) IPR protection encourages greater scientific investigations and joint programs since there are no fears of appropriation of benefits, and (ii) it encourages states to place scientific inventions in the public domain, which can be further developed. Article II[57] of the Outer Space Treaty embodies the non-appropriation principle, discussed above. Article III of the Outer Space Treaty promotes "international cooperation" in outer space activities.[58]

[50] ibid

[51] Malcolm D. Evans, *International Law* (4 edn Oxford University Press 2014) 118-123; F. Dunk et al., *Handbook of Space Law* (Edward Elgar 2015) 5

[52] OST 1967, art 6

[53] Agreement on the Rescue of Astronauts, the Return of Astronauts and Return of Objects Launched into Outer Space (adopted 19 December 1967, entered into force 3 December 1968) 672 UNTS 119

[54] Convention on the International Liability for Damage Caused by Space Objects (adopted 29 November 1971, entered into force 1 September 1972) 961 UNTS 187

[55] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15 (Registration Convention)

[56] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 21

[57] Space Benefits Declaration (n 10)

[58] OST 1967, art 1

Article VIII[59] of the Outer Space Treaty provided the registering launching state with "jurisdiction and control" over the (i) Space Object, and (ii) any personnel thereof. The term "launching state" is not defined in the Outer Space Treaty and for its interpretation, Article I(c) of the Liability Convention and Article I (a) of the Registration Convention can be looked at. The term "launching state" means the States which launches, procures the launch of the Space Object, including those States from whose territory or facility it is launched.[60] There can be multiple launching states.[61] Furthermore, the "State of registry" implies a launching state who undertakes the registry in compliance with Article II of the Registration Convention.[62]

Article II of the Registration Convention mandates the State to register the space object, upon its launch into Earth orbit or beyond, by means of an entry into a registry maintained by it. [63]The State of registry should then furnish necessary information to the Secretary-General of the UN as soon as practicable.[64]

Furthering the object of international cooperation in Article III of the Outer Space Treaty, the Space Benefits Declaration adopted by the UN General Assembly in 1996 became the first principle on outer space expressly dealing with the issue of IPRs.[65] It granted States participating in international collaborations i.e. international cooperation in the exploration and use of outer space, to determine all aspects of their participation and conferred the complete autonomy to enter into Joint Venture Cooperative Agreements on a mutually acceptable basis.[66] This autonomy is subject to two conditions: (i) the terms should be fair and reasonable, and (ii) should comply with the

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[59] OST 1967, art 2

[60] OST 1967, art 3

[61] OST 1967, art 8

[62]Registration Convention, art 1 (a)

[63]Registration Convention, art 4 (1) (a)

[64]Registration Convention, art 1 (c)

[65] Registration Convention, art 1

[66]Registration Convention, art 4

rights and interests of the parties concerned, including IPRs. Therefore, it expressly declared Intellectual Property Right as a legitimate right and interest of the State/party.

International Agreements and Conventions

Another relevant aspect for the legal framework of IPRs in outer space is the Inter Governmental Agreement of 1998 (IGA 1998)[67], an international multilateral agreement between 15 participating nations[68] governing the ISS; superseding the Inter Governmental Agreement of 1988. It established a successfully enforced long term framework for cooperation and acts as a precedent for future multilateral collaborations.[69]

Article 2 of the IGA 1998 declares the ISS shall be developed, operated in conformity with international law principles and Space Law Treaties and that no provision except Article 16 can be interpreted to modify the rights and obligations of the Partner States.[70] Article 16 of the IGA 1998 deals with cross-waiver of liability among the Parter States concerning outer space activities.[71] Yet, under Article 16(3.)(d)(4) of IGA 1998, Intellectual Property claims are expressly excluded from the operation of the cross-waiver principle.[72] Therefore, the principles outlined in the Outer Space Treaty are applicable and Intellectual Property claims are maintainable in the ISS.

Article 5 of the IGA 1998 deals with Registration, Jurisdiction and Control; it imports the mandatory principles of registration under Article II of the Registration Convention.[73] Further, referring to Article VIII of the Outer Space Treaty and Article II of the Registration Convention, the State of registry retains jurisdiction and control over

[67] Nandasiri (n 14) 46
[68] Space Benefits Declaration (n 10)
[69] IGA 1998 (n 12)
[70] Mark Garcia, '20 Years Ago: Station Partners Sign Intergovernmental Agreement (IGA)' NASA <https://www.nasa.gov/feature/20-years-ago-station-partners-sign-intergovernmental-agreement-iga> accessed 5 January 2020
[71] ibid
[72]IGA 1998, art 2(1) and 2(2) (a)
[73] IGA 1998,art 16

(i) the registered space object, and (ii) over nationals in the ISS; although this is subject to any arrangements to the contrary.[74]

For IPRs, the agreement expressly elaborates jurisdiction under Article 21. It imports the meaning of "Intellectual Property" as defined under WIPO.[75] Further, the activities relating to IPRs are deemed to occur in the territory of the Partner State of registry of the space object/element. This jurisdiction is unaffected by the participation/collaboration by any entity of another Partner State.[76] The two main questions answered within this provision are- acquisition of IPRs from activities carried on-board the space station and protection against infringement of IPRs recognised on Earth, on-board the space stations.[77] Aboard the ISS w.r.t IPR issues a strict principle of territoriality is followed. The very nature of IPRs is to follow territorial jurisdiction for both aspects- their recognition and existence and the protection afforded by such rights.[78]

The International Conventions affording protection to Intellectual Property are also relevant in this regard. The World Intellectual Property Organisation (WIPO) was the first international organisation of the United Nations which aims to "promote the protection of Intellectual Property worldwide"[79]. The two primary international Conventions with regards to Industrial Property are the Paris Convention[80] and the Patent Cooperation Treaty[81]. The Paris Convention affords national treatment, right of priority in applications. Grant of Patents by each contracting State is independent of one another, whereas for Marks, Industrial Design and Trade Names if are duly registered in the country of origin, a request for protection in the Paris Union must be accepted.[82] The PCT creates a uniform international application procedure. The 'WIPO Convention' being the most widely accepted with 192 contracting parties[83] has adopted a wide

[74] IGA 1998, art 16(3)(d)(4)
[75] IGA 1998, art 5
[76] IGA 1998, art 5(2)
[77] The Convention Establishing the World Intellectual Property Organization (entered into force 14 July 1967) 828 UNTS 3 art 2
[78] IGA 1998, art 21(2)
[79] Sa'id Mosteshar (n 16) 161
[80] ibid 134
[81] World Intellectual Property Organisation, 'Summary of the Convention Establishing the World Intellectual Property Organization (WIPO Convention)' WIPO <https://www.wipo.int/treaties/en/convention/summary_wipo_convention.html> accessed 3 January 2020
[82] Paris Convention (n 39)
[83] World Intellectual Property Organisation, 'Patent Cooperation Treaty' WIPO <https://www.wipo.int/pct/e/texts/articles/atoc.html> accessed 3 January 2020

and inclusive definition of Intellectual Property which has further been adopted in Article 21 of the IGA 1998, as the definition accepted by the Partner States. It is submitted that the IPR arising out of space activities lies within the ambit of the WIPO's definition of 'Intellectual Property'. This brings the IPR generated in outer space aboard the ISS into the umbrella of WIPO's definition.

Further, Article 27(1) of the TRIPS Agreement[84] of the WTO defines patentable subject matter, elaborating that "patents shall be available for any subject matter and patent rights are enjoyable without discrimination as to the place of invention"[85] This mandates that patents generated in outer space are treated as under domestic law and under the same conditions as if it were created anywhere on Earth.[86]

Application of IPRs in Outer Space

Keeping in mind the above stated legal regime, the predictable and settled position of law relating to certain issues regarding the application of IPRs in outer space can be outlined.

Intellectual Property Developed on Earth

Earth-based inventions, although created due to outer space activities or dealing with space technology, ought to be treated as any other invention on Earth and gaining protection under normal patent laws.[87] The law of the nations in which such inventions, etc. are registered is applicable.

Intellectual Property Created in Outer Space

To protect IPRs in outer space, the place of creation of the intellectual property is an important determinant. The law of the flag (territoriality principle i.e. control of the state of registration) is made applicable via the Space Treaties irrespective of whether the activities generating the creation occur aboard a space object[88] or by personnel in outer space/outside the space object.

[84] World Intellectual Property Organisation, 'Summary of the Paris Convention for the Protection of Industrial Property (1883)' WIPO <https://www.wipo.int/treaties/en/ip/paris/summary_paris.html> accessed 3 January 2020

[85] World Intellectual Property Organisation, 'Contracting Parties Paris Convention' WIPO <https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2> accessed 3 January 2020

[86] TRIPS Agreement (n 43)

[87] TRIPS Agreement, art 27(1)

[88] World Intellectual Property Organisation, 'Intellectual Property and Space Activities' (April 2004) WIPO <https://www.wipo.int/export/sites/www/patent-law/en/developments/pdf/ip_space.pdf>accessed 25 December 2019

For international cooperation projects, the terms governing Intellectual Property mutually agreed to by the parties in the Joint

Venture Cooperative Agreements are followed due to the Space Benefits Declaration. Such bilateral agreements are an indispensable tool for developing international cooperation[89] and must be respected. Finally for innovative activities aboard the ISS, under the IGA of 1998, IPR claims are maintainable and the activities relating to IPRs are deemed to occur in the territory of the Partner State of registry. This jurisdiction is unaffected by the participation/collaboration by any entity of another Partner State.

Apparent Inadequacies in the Legal Framework

This frameworks for Intellectual Property in outer space suffers from inefficacies, inconsistencies and inherent differences. Firstly, due to the absence of a universally accepted definition and delimitation of "outer space", there exists an "overlap zone" in between the sovereign airspace of a nation and outer space which is common for all. This creates an ambit of uncertainty which shall lead to States attempting to exercise jurisdiction over this overlap zone, interfering with the territorial sovereignty of another nation.

Secondly, the jurisdiction is awarded to the registered launching state. Wording of the Registration Convention- "name of launching states or state"[90] implies there may be multiple launching states for a single space object. Also, although the registration of a space object in a national and an international register with the UN Secretary General is mandatory, yet the entry in the register is to be made "as soon as practicable".[91] This creates uncertainty, regarding the law applicable and jurisdiction in cases of multiple launching states with pending registration.

Proposed Recommendations

In outer space a unique set of global rules will be applicable. It is due to the involvement of multiple State and non-State actors and increased

[89] Diederiks (n 1) 122

[90] ibid

[91] Chia-Jui Cheng, *The Use of Air and Outer Space Cooperation and Competition* (Nijhoff 1998) 196

profit-orientation of outer space ventures, that space activities have separated themselves from the generalised IPR laws.

Collaboration Specific Agreements

Firstly, Joint Venture Cooperative Agreements and other such Bilateral/Multilateral Agreements which establish mutually agreed terms governing a specific collaboration or space mission should be encouraged as a primary means of mutually determining the laws, jurisdiction, proprietary share and other legal aspects concerning intellectual property in outer space. Such agreements contain detailed and elaborated solutions for conflicts that may arise in the future.

They, therefore, act as a preliminary means of resolving anticipated conflicts, but are successful only for the specified collaboration and cannot create a harmonized law governing IPRs in outer space. Possibly adopting a multi-tier structure similar to the IGA 1998 is a solution to develop international space law. These agreements, therefore, need to be governed by an umbrella legislation which creates an international legal regime.

Therefore, to encourage development and to maximize the collective utilisation of outer space technology, there is a need to formulate an international legal regime, expressly about intellectual property, which is simple, reliable, predictable and settled. [92]

Harmonising Domestic Laws

In many cases, the inconsistency and discontinuity in the application of IPR laws in outer space generally arise since there is an absence of any provisions directly applicable to outer space or due to no legislation extending its application to outer space.

For example, the ESA does not have any laws directly relating to the IPRs in space and therefore for ESA-registered objects any European Partner State may *"deem the activity to have occurred within its territory"*.[93]And only Germany and Italy have extended the

[92] Registration Convention, art 4 (1) (a)
[93] Registration Convention, art 4 (1)

applicability of their domestic Intellectual Property laws protecting the inventions on-board the ISS's European Module. Therefore for protecting any intellectual property developed aboard the ESA-registered objects, a patent application has to be registered only with either Germany or Italy. Registering the patent in the other European territories, despite them having jurisdiction, shall not offer any protection. There is an urgent need as stated by Bin Cheng, "to persuade all the States concerned to take the necessary steps to extend the relevant parts of their national laws to outer space."[94]

A Uniform Legal Regime Internationally

Further, there exist many inconsistencies in the current domestic IPR laws across the world and there is a need to harmonise the domestic laws via an international legal regime. For example, only three countries- the USA, Canada and the Philippines, follow the first inventorship principle whereas the remaining follow the first to file principle. Also, the impact of the difference in IPR laws domestically can be seen by the 1989 Berlin Case[95] in which the copyright of ESA over satellite images had been violated. The case had failed since under German laws, only "personal intellectual creations" i.e. created by a natural person are protected.

A method to achieve an internationally applicable instrument could be through an international convention or by any other declaration drafted by the UNCOPUOS. It is submitted that while it is the most optimal solution; it suffers from two practical defects- firstly, it shall be difficult to gain the international consensus expeditiously and secondly, it is a rapidly developing area which requires an updated framework for its regulation which shall be difficult. Alternatively, a solution involving an international organisation of the UN i.e., WIPO shall be able to meet the demands of a legal framework effectively. Rules to determine jurisdictions along with a 'Model Law' drafted by WIPO which partner-States can adopt as domestic laws shall meet the dual purpose- (i) to extend their application to outer space and (ii) to harmonize domestic laws globally.

[94] Diederiks (n 1) 113
[95] IGA 1998, art 21(2)

JUDICIAL REVIEW AS A MEANS OF CONTROL AND COORDINATION IN INTERNDEPENDENCE AMONGST THE THREE ORGANS OF GOVERNMENT: A COMPARATIVE STUDY

Dr.Kamaljit Kaur[1] and Bipasha Khatana[2]

Abstract

Separation of powers is a ubiquitous doctrine that claims its omnipresence in almost all the state machineries across the world. The conundrum attached to this percept is the transgression of the powers assigned to each of the triad organs of the state-legislative, executive and judiciary. This paper attempts to highlight the significance of an effective constitutional tool, Judicial review that endeavours to sustain the interdependence of the three organs by performing the 'coordinating' and 'controlling' functions contingent on the spontaneity and need of the hour. The comparative study delineates the ubiquity of the tool of judicial review in the varied systems along with highlighting the divergent perspectives attached to the same. The importance of this tool is traced through a series of judgments that highlight the trends followed by the judiciary conveying the aforementioned dual functions for striking a balance between the organs. Ultimately, the paper concludes on the efficiency of this mechanism that solely depends on the effective performance of both the positive and the negative functions by the judicial branch.

Keywords: Separation of Powers, Judicial Review, Coordination, Control

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INTRODUCTION

Separation of powers is one of the most significant doctrines, omnipresent in almost all forms of political systems delineated through historical epoch. Most pertinent illustration to vouch for the ubiquity of this doctrine is the Vatican City. "*Article 1, paragraph 1 of its (Vatican) constitution distinguishes the three powers, but also states that the Pope as the head of the Vatican state possesses the full extent of legislative, executive and judicial power*."[3] Though, the power flows from the religious dogmas in this country, the remarkable feature still remains that the monocratic system based on Christian philosophy also uses the principle of separation of powers.[4] The western legal systems render plethora of usage of the separation of power theory depending on their constitutional tradition and other socio-cultural dynamics defining the respective constitutional principles of each state.

Before proceeding with the lacunas associated with this eternal constitutional doctrine, it becomes essential to first attempt to define the meaning of 'separation of powers'. "*The 'doctrine of separation of powers' is by no means a simple and immediately recognizable, unambiguous set of concepts. On the contrary it represents an area of political thought in which there has been an extraordinary confusion in the definition and use of terms*."[5] The simplest meaning attached to this principle is the division of power between three distinct branches of the government: the legislative, executive and judiciary.

'Separation of power' is the effective embodiment of the spirit which lies behind the political systems to honour the principles of constitutionalism and rule of law. Both these credos foster the supremacy of law in order to prevent any usurpation of power by any organ of the government and thereby act as a bastion against the threat of despotism or tyranny. Therefore, the principle of 'checks and balances' hold relevance and goes hand in gloves with the triadic notion of separation of power. A scheme of checks and balances involves a

[3] Cristina Lafont, *Philosophical Foundations of Judicial Review*(OUP 2016) 265
[4] K. Loewenstein, *Political Power and the Governmental Process*(UCP 1957) 203
[5] M. J. C. Vile, *Constitutionalism and the Separation of Power*(OUP 1967) 97

degree of mutual supervision between the branches of government and, therefore, a degree of interference by one branch into the functions and tasks of the other.[6]

However, pragmatically speaking, the rationale behind the percept of checks and balances may have to be strengthened to suit the tailored legal situation or the spontaneous demands of the hour. Such strengthening becomes important when Judicial Review is used as an effective measure to ensure proper control and coordination. The oscillating degree of coordination and control amid the three wings of the government becomes a challenge for the constitutional machinery to bolster the principle of rule of law especially when there is interdependence among the three organs. Such perils can be heeded when the organs crave to amass power to establish a supremacy over the other organ and such an instance is quite blatant in the legislative acts attempting to overturn the judicial rulings. Hence, Judicial Review acts as a means of control and coordination to effectuate the interdependence without asserting the supremacy or concentration of power in one hand.

Judicial Review as an Effective Tool

The meaning of the polysemic terminology- 'separation of power' has already been pondered upon. Throughout its history, the 'separation of powers' has received effusive praise and vitriolic opprobrium in equal measure.[7] On a similar footing, Judicial review is one of the most debated philosophies that roots in the problem of indeterminacy due to disagreements amidst the triad organs. The inception of such disagreements begins from the abstract constitutional provisions which need to be considered when any legitimate action is to be taken in congruence with the changing societal situations. In a democratic society the practice of constitutional review raises questions about who should conduct such a review along with tacitly acknowledging the difficulty of justifying any such delegation by bestowing final authority

[6] ibid
[7] ibid

upon a specific actor or institution at the expense of others.[8] Another significant aspect of the normative understanding of this constitutional axiom is the legitimacy attached to the delegation of the constitutional review of the legislative acts by the judicial branch of the government, that is, the courts.

Judicial review is based on the theory of limited government and supremacy of constitution. The focus of judicial review is on the assimilation of constitutionalism with the democratic notion of self-government and this notion of democracy differs from state to state. The juristic opinion on the legitimacy of judicial review is highly divided and there are strong arguments advanced from both the sides to support their claim. Judicial Review is seen as the result of a compromise between two potentially incompatible normative goals which are protection of minority rights and democratic self-government[9] and an act that costs us the democratic procedure. The supporters of the judicial review consider it as a modest price for greater benefits. Hence, on one hand, it is seen as a tool of democratic control over the Legislature and the Executive and on the other hand, as a tool of coordination to enhance smooth interdependence.

Bickel, an exponent critic of the legitimacy of the judicial review, has coined a terminology called 'counter-majoritarian difficulty' aiming to draw the attention of the people to an apparent defect in the system of judicial review. This discernible defect is represented as the thwarting of the will of the actual people in majority when the courts through judicial review declare the unconstitutionality of the legislations. Such an argument is based on a flawed percept that differentiates between the legislators and the individual petitioners and accommodates only the former as the determinant in 'will of the people'. Also, to see that this majoritarian rule does not overpower or encroaches the minorities right, Judicial Review is needed to give power to each and every citizen to exercise their will, especially who are in minority ruling. This legal contestation is necessary when there is an established mismatch with

[8]cf Cristina (n 3)
[9]R. Dworkin, *Law's Empire* (Harvard University Press 1986) 470

the relevant interest of the citizens.[10] Hence, it does not counter majority but define the boundary of majority which does not extend to encroach the minority rights.

Another perspective that involves dubiety attached to judicial review is that sometimes the individuals who make use of their right to legal contestation are merely taken in their role as private persons subject to the law, and not also in their role as citizens who are co-authors of the law.[11] Waldron is of the view that citizens who utilize their right to legal contestation are simply exercising a private right as individual persons and not a political right as citizens, hence, portraying citizens' use of legal contestation as an attempt to obtain an unfair advantage over other citizens who limit their participation to the normal political process.[12] The idea is that citizens who look to judicial review after having been outvoted in the political process are simply trying to get 'greater weight for their opinions than electoral politics will give them'.[13] However, when this idea is brought under scrutiny, it takes slight observation to unravel the defect in such propounding because firstly, there is no limitation on anyone to undertake the right to legal contestation. Moreover, the attempt to wield more power in the hands (the persons initiating the judicial review) is constricted to getting a fair opportunity to address one's skepticism with respect to the constitutionality of the act in order to honour the principles of natural justice. The mere fact that certain citizens initiate a legal process to contest a piece of legislation does not preclude other citizens from litigating their cases, presenting their own legal arguments, picking their preferred venues, and so forth and even after the process has reached a final verdict in the Supreme Court, nothing prevents citizens from mobilizing for a referendum on an amendment proposal or similar political measures.[14] The right to legal contestation in no circumstance can be interpreted to have rendered the citizens a right or entitlement

[10] P Prettit, *Republicanism: A Theory of freedom and Government*(OUP 1997) 186
[11] cf Cristina (n 3)
[12] Jeremy Waldron, 'The Core of the Case Against Judicial Review' [2006] YLJ 1346
[13] ibid
[14] cf Cristina (n 3)

to pronounce the decision of a case. Such a right to legal contestation is in consonance with the dogmatic credos of natural justice giving the right to request for a hearing based on justness and fairness. Such a review delineates an opportunity for a reason-based argument for and against the constitutional validity of the legislation and even in cases where the constitutionality is upheld, the case is scrapped off after satiating the parties (including legislature) with a full proof rationale. The chance of political influence is also negated from the picture as the judicial branch renders the hearing to each petition on the basis of merit. Furthermore, Judicial Review has to be understood as an apolitical process that a citizen has at their disposal.

Comparative Study on Judicial Review

Judicial review is a significant tool of the constitutional machinery and the reconciliation of the notion of constitutionalism with the idea of democratic self-government. This idea of self-government varies with the varying conception of democracy across different nations. Every country while undertaking governance of their respective nations endeavours to coordinate and control amid the various organs to ensure that the credence of good governance is upheld along with shielding the rights of the individuals on priority basis. And since, this mechanism of coordination and control is dependent on the historical, social and political backdrop of a country there is a variation in the constitutional machinery and state system of each state. Hence, it can be validly asserted that judicial review, as a tool of coordination and control differs from country to country.

The concept of judicial review owes its inception to the country of United States of America. United Kingdom has a stark political system practicing parliamentary form of government elucidating a limited form of judicial review in lieu of only human rights violation as an effect of ratification of the European Convention of Human Rights (ECHR). This chapter will therefore deal with the judicial review of the legislative action and its aftermath along with the judicial review of the judicial appointments in the aforementioned countries

in addition to the country of India to undertake a comparative perspective to understand the problem at hand.

Mechanism of United States of America to use the tool of Judicial Review

United States of America has staged many of the radical constitutional features and judicial review is one such example. The beginning of judicial review in the American society is associated with the landmark judgment of *Marbury v Madison*[15]. In the instant case, there was a conflict between the Judiciary Act, 1794 and the US Constitution with respect to the powers of the SC to issue writ of mandamus. According to Chief Justice Marshall, "*the Constitution gives the judicial branch the power to strike down laws passed by Congress, the legislative branch*. This is the principle of judicial review. Thus, it has been recognized since this decision that it is *'emphatically the province and duty of the judicial department to say what the law is'*."[16]Also, the judgment rendered the judicial branch an equal pedestal as that of the legislative and executive branch of the government, thereby nullifying the contingency of supremacy between the organs. Before this benchmark judgment was pronounced, the seeds of judicial review were already sown in 1794, when in *United States v Yale Todd*[17] the Court affirmed that the Constitution gives the judicial branch the power to strike down laws passed by Congress. Thus, it has been recognized since this decision that it is 'emphatically the province and duty of the judicial department to say what the law is'. Even the views of Bernard Schwartz affirm in favour of judicial review in US as he stated that "*The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America*."[18]

Even though it is crystal clear that judicial review is a part of the constitutional machinery of American system, it becomes imperative

[15]5 US 137 [1803]
[16]ibid
[17], US [1794]
[18] Bernard Schwartz, *The Powers of Government*(Macmillan, 1963)19

to state that there is no express provision that provides for judicial review in the US Constitution. The jurisprudence of Article III and IV of the US Constitution establishes the power of the Supreme Court to protect the supremacy of the law which acts as a threshold for this constitutional apparatus. The same view was affirmed in *Reed v Town of Gilbert, Arizona*[19] , stating that despite the absence of an 'explicit' provision for judicial review the accouterment of judicial review is 'tacitly' incorporated under the above-mentioned constitutional provisions of United States. Justice Frankfurter in *Gobitis case* endorsed this implied incorporation by stating that "Judicial review is a limitation on popular government and is a part of the Constitutional scheme of America."[20]

After having a glance at the American society, it is proved that there is no skepticism attached to this arrangement. Mr. Justice Field in *Norton v Shelby County*[21], had unequivocally stated that an unconstitutional statute 'is...as though it had never been passed.' [22] A court must decide in each case whether the legislative act controls the decision. When the court has once decided that the statute cannot be applied in the case before it because it is contrary to a constitutional pro- vision, it will follow this decision on established principles when the same point is raised under analogous situations, but the statute is not destroyed. When the situation is changed by the removal of the constitutional bar, there seems to be no reason, in the absence of other considerations of policy, why the court should consider itself bound, because of its prior decision, to hold the act inapplicable.[23]

The next probable stage after having exercised the power of judicial review and declaring an act as unconstitutional, there can be three probable situations that can be witnessed as a reaction from the legislative branch. The *first* one being the simplest amongst the three is the state of anomie on the part of the legislature. Expounding further,

[19] [2015] SCC OnLine US SC 52
[20]*Minersville School Dist v Gobitis* [1940] SCC OnLine US SC 106
[21] [1886] SCC OnLine US SC 194
[22] 'What Is the Effect of a Court's Declaring a Legislative Act Unconstitutional?' (1926) 39/3 HLR373,378
[23]ibid

it means the state of 'inaction' on the part of the legislature when any piece of legislation is declared to be unconstitutional by the judicial branch.

The *second* situation could be an affirmative action on the part of the legislature that is an unequivocal aftermath of the operative action undertaken by the judiciary. In *Stenberg v Carhart*[24], the Supreme Court of the United States dealt with a Nebraska law according to which performing "partial-birth abortion" was made illegal and the health of the mother was not given any impetus while ascertaining the legitimacy of the act. The repercussion associated with the non-abidance of the law or performing an act contrary to the law was the revocation of the license of the medical practitioner. As an effect, the law was struck down on the grounds that criminalization of the "partial birth abortion[s]" envisaged in Nebraska statute violated the due process clause of the United States Constitution, as interpreted in *Planned Parenthood v Casey*[25] and *Roe v Wade*[26]. However, after a period of 7 years, the court reversed the rationale laid down in the instant case in *Gonzales v Carhart*[27]. The court upheld the validity of the Partial-Birth Abortion Ban Act, 2003 and affirmed that it did not impose an undue burden on the right of abortion available to women by the constitutional principle of due process.

Further, the *third* situation can be a supplementary reaction on the part to the judicial act of declaration of the unconstitutionality of the legislative acts. This can be elucidated in the *Employment, Department of Human Resources of Oregon v Smith*[28] where the two employees were rejected the unemployment benefits under the state policy as their removal was because of the 'misconduct'. 'Misconduct' involved the ingestion of an illegal drug called 'peyote'. United States Supreme Court affirmed the state's power to deny unemployment benefits to a person who is fired for violating a law that prohibits a

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[24] 530 US 914 [2000]
[25] [1992] SCC OnLine US SC 102
[26] [1973] SCC OnLine US SC 20
[27] [2007] SCC OnLine US SC 25
[28] [1988] SCC OnLine US SC 74

certain action, which was in the consumption or use of peyote in the instant case, irrespective of the act being a part of a religious rite or a ceremony. The court, in fact, encouraged the legislative intervention in the case so as to render appropriate redressal mechanism to interpret the situation at hand in coherence with the First amendment to the US constitution. However, as an aftereffect to this judgment, the legislature unfurled the right which was accommodated for in the above-mentioned case by the judges by passing a separate piece of legislation called as Religious Freedom Restoration Act, 1993.

United Kingdom's version of use of the tool of Judicial Review

UK is the common law country with unwritten constitution. UK follows the concept of Parliamentary sovereignty. Dicey in his work '*Introduction to the Study of the Law of the Constitution*' delineates that the idea of Parliamentary sovereignty represents the 'dominant characteristic' in the British Constitution.[29]Parliament in Britain is the supreme legislative body that can make and/or unmake law, thereby observing the role of a sovereign as has been expounded by Austin in his definition. The structural basis of sovereignty could be deduced from the fact that the British Parliament has the potent to override the fundamental rights and abrogate the common law doctrines via unequivocal expression through its legislations.

Supremacy of parliament was also affirmed "in *Blackburn v Attorney General* reiterating that parliament can enact, amend and repeal any legislation it pleases and that the sole power of the courts is to decide and enforce what is the law and not what it should be—now, or in future."[30] The fact that the subsequent British parliaments are not bound by the acts of the preceding parliaments itself testimonies the sovereignty of Parliament in Britain.

Despite the Parliament Sovereignty, it is bound by certain limitations. *Firstly*, Statute of Westminster, 1931 abridges the power

[29]Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) OJLS 709,734
[30] F A Trindade, 'Parliamentary Sovereignty and the Primacy of European Community Law' (1972) TMLR 375,402

of the parliament to enact laws for its dominions without their consent. In fact, the British Parliament can only enact laws at the request of the dominions and it is not obligatory for the dominion legislatures to incorporate all the legislations enacted by the British Parliament. Therefore, this was the first instance when the absolute sovereignty of British Parliament was compromised with.

Secondly, the parliamentary sovereignty of the British Parliament was challenged in *R (Jackson) v Attorney General*[31] popularly known as Fox hunting case where the validity of both Parliaments Act, 1949 and Hunting Act, 2004 was challenged which was later decided in affirmative, i.e. both the acts were held as valid. But in this case, question of parliamentary sovereignty was raised. Since, the parliament abridged the powers of the House of Lords it could be seen as a limitation to the powers of the parliament in one way. Challenging the validity of the legislation of the parliament in the court was seen as an attack on the sovereignty of the parliament. This case apparently acted in the capacity of judicial review of the legislation despite the fact that the lordships clarified their stance as not challenging the sovereignty of the parliament as was laid down in *British Railways Board v Pickin*[32].

Thirdly, it is highly debated across the world that the association of Britain with the European community has actually attacked the parliamentary sovereignty of the nation. The European Communities (EC) Act, 1972 and European Conventions on Human Rights especially Human Rights Act, 1998 had already diluted the sovereignty of British parliament when it joined the EC in 1973 by amending the laws in schedule 4 and repealing the laws in schedule 8 of the United Kingdom statutes that were in conflict with the existing community law. It was not sure whether the "British judges will continue to accept the present doctrine of parliamentary sovereignty (under which judges give unquestioning obedience to the will of Parliament) or whether they will opt for the new principle of the primacy of Community law which

[31] [2005] 4 AII ER 1253

[32] 19 [1974] 1 AII ER 609

is expounded by the European Court and which Parliament has attempted to entrench in the proposed European Communities.[33] This is evident from the recent case *R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Development*,[34] where court declare that sections 1 and 3 of the Civil Partnership Act 2004 (to the extent that they preclude a different sex couple from entering into a civil partnership) are incompatible with article 14 of the ECHR and Fundamental Freedoms taken in conjunction with Article 8 of the Convention.

Since the Judiciary has limited power to declare a domestic law as unconstitutional or incompatible, it rarely acts as a control over Parliament. Also, judiciary while exercising this limited power of upholding Human Rights coordinate with the Parliament in upholding the Fundamental Rights of the people. The question of overpowering the Judiciary does not arise because of the fact that Parliament is itself supreme and the steps towards the dilution of its supremacy has entailed the call for Brexit as well.

Indian system of bringing Judicial Review to aid

India is a democratic country which renders supreme status to the rights of the people. Hence, the act of Legislature and Executive infringing the Fundamental Rights is subject to Judicial Scrutiny. For the same purpose, Article 13 provides that all the posts and pre-constitutional law must adhere to the basic scheme of the constitution which includes the rights of the persons. Therefore, Judicial Review is inherently implied in our Constitution. Supreme Court has held in *L Chandra Kumar v Union of India*[35]that Judicial Review is the basic structure of Indian Constitution. Thus, there is no doubt regarding the legitimacy of Judicial Review in Indian Constitution.

Once the Supreme Court declares the law as unconstitutional, Legislature has the three probable options available; to actively encroach upon the decision of the court, to promote the decision of the

[33]Pickin, ibid
[34] [2018] UKSC 32
[35][1995] 1 SCC 400

court or to give way to Judicial decision without acting upon it. A court's decision is always binding unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.[36] If the parliament merely declares that the decision of the Court shall not be binding then it tantamounts to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise.[37]

SC in *Ujagar Prints II v Union of India*,[38] held that because of the curative action of the competent legislature the earlier judgment becomes inoperative and unenforceable and that cannot be called as an impermissible legislative overruling of the judicial decision. In *People's Union for Civil Liberties v Union of India*,[39] it has been held that legislature cannot override the decision of the court by empowering instrumentalities of the state to disobey the same but legislature can change the basis of the decision prospectively or retrospectively so as to render the decision ineffective. The Hon'ble Supreme Court decides as to whether its earlier judgment has been rendered inoperative or is no more a good law because of the subsequent legislative enactment of the Parliament on the basis of two situations -*first*, what was the basis of the earlier decision; and *second*, what, if any, may be said to be the removal of that basis.[40]

Parliament has on occasion acted in coordination with the Supreme Court and on other occasion has tried to control the judiciary by surpassing the Judicial Decisions. The instances for the former include the passing of the 'The Muslim Women (Protection of Rights on Marriage) Act, 2019 in consonance with the *ShayaraBano v Union of India*[41], passing of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 furthering the cause of Women Rights along with the Supreme Court ruling in *Vishaka v*

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[36]*Shri Prithvi Cotton Mills Ltd. v Broach Borough Municipality*, [1969] 2 SCC 283
[37] Prithvi Cotton Mills, ibid
[38] [1989] 3 SCC 488
[39] [2003] 4 SCC 399
[40]*Bakhtawar Trust v MD Narayan*, [2003] 5 SCC 298
[41] [2017] 9 SCC 1

State of Rajasthan[42]. The instances for the later part include the passing of The Muslim Women (Protection of Rights on Divorce) Act 1986 in overruling the Supreme Court decision in *Mohd. Ahmed Khan v Shah Bano Begum*[43].

It is thus clear that every aforementioned country providing for the Judicial Review or stepping towards inculcating the principle of Judicial Review, have experience it as a tool for controlling and coordinating among the legislature, the executive and the Judiciary. All the three countries find the instance of both the situation.

Analysis

Judicial Review is the inevitable tool to ensure checks and balances that help in controlling and coordinating among the three organs. Judicial Review tries to control the legislative and the administrative branch of the government so that they do not surpass the limit of their power and thereby misuse the same by sabotaging the other branch's prerogative. Judicial Review also acts as a coordinating tool when it facilitates reviewing a legislative or an executive action and upholds the same. The basic presumption of constitutionality of Judicial Review rests in its coordination function.

It is seen that all the previously mentioned countries find it incessant to peruse the tool of Judicial Review. This expedient tool has been used for different purposes in varied countries with different political setup. For example, the use of judicial review as a tool for dilution of the parliamentary sovereignty in UK[44] is quite different than the controlling and coordinating mechanism followed by the American and Indian judicial branches respectively. In *R (Miller) v Secretary of State for existing the European Union*[45], the scope of prerogative powers granted to the Crown was in question. The Supreme Court held that the prerogative powers that are exercised by the government through the Prime Minister cannot be utilized in order to negate the rights that

[42] AIR [1997] SC 3011
[43] [1985] 1 SCALE 767
[44] cf R (Jackson) (n 31)
[45] [2017] UKSC 5

are rendered by the primary legislations of the Parliament. Hence, here the judicial review acted as a coordinating tool to shield the rights of the legislature against the prerogatives conferred upon the executive branch of the government.

It is true that Legislature attempts to overpower the Judicial Judgment by showcasing its supremacy at every nook and corner of the process. However, American and Indian courts have tried to coordinate with the other branches of the government while undertaking the process of judicial review in order to shun the occurrence of an era analogous to Lochner era which is quite detrimental to the society of any country. For example, in India, after the passing of The Muslim Women (Protection of Rights on Divorce) Act 1986, Supreme Court upheld its constitutionality in the case of *Daniel Latifi v Union of India*[46]. Similarly, in the USA, Supreme Court upheld the validity of the Partial-Birth Abortion Ban Act in the case of *Gonzales v Carhart*[47]overruling the case of *Stenberg v Carhart*[48]. Let us now take a glance at the way in which the tool of judicial review is practiced in each of the countries- USA and India.

Judicial Approach in USA tantamounting to 'control' and 'coordination'

Firstly, in the*Steel Siezure*[49]case *(Youngstown Sheet & Tube Co. v Sawyer)*, "Justice Jackson presented a modest, but thorough-going interpretation of the complex doctrine of separation of power." The case pertained to review the extent to which the President could use her/his powers and "Justice Jackson rejected the principle of self restraint and opted to vote to invalidate the action of the president." He said "The Constitution enjoins upon its branches separateness but interdependence, autonomy but reciprocity," and the President's powers are "not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress." Similar opinion on this highly

[46] [2001] 7 SCC 740
[47] [2007] SCC OnLine US SC 25
[48]530 US 914 [2000]
[49]343 US 579

debated doctrine has been expressed in variety of cases.[50] This case delineates the controlling tendency of the courts while undertaking the process of judicial review. However, a liberal approach has now been assimilated into the judicial system of the American courts by which the courts aim at striking a balance while oscillating between controlling and coordinating functions via judicial review.

In *United States v Carolina Freight Carriers Corp*.[51], it was held that the Court should not substitute its "own wisdom or unwisdom" for that of administrative officials who have not exceeded their power. In *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v United States*,[52] it was held that the court "should not substitute inferences of its own for those drawn by the I.C.C." Both the cases illuminate the coordinating approach of the American judges.

However, the judges also opted for the controlling approach when it was expedient for serving justice to society at large. In *SEC v Chenery Corp*.[53], "where the Court sustained an S.E.C. order it had rejected earlier, the court said that the administrative process warranted as a good way of applying law in specialized fields, but that its effectiveness was threatened when it was used "as a method of dispensing with law in those field."

In *West Virginia v Barnette*[54], the controlling behaviour of the judiciary was expressed as the court held that "it was the very purpose of the Bill of Rights "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts". However, a coordinating approach was followed when the court refused to "grant protection of the Constitution to the secular activities of the Jehovah's Witnesses" in *Prince v Massachusetts*.[55] Similarly in *Dennis v United States*[56] the court in a majority opinion

[50] *Eisler v United States*, 338 US 189; *Kedroff v St. Nicholas Cathedral*, 344 US 94
[51] 315 US 475
[52] 322 US 503; *ICC v Jersey City*, 322 US 503
[53] 332 US 194
[54] 319 US 624
[55] 321 US 158
[56] 341 US 494

upholding the validity of the Smith Act of 1940 and of the convictions under it of the eleven Communist leaders in New York, portrayed its inclination to opt for a coordinating role.

Judicial Review as a 'coordinating' and 'controlling' tool in India

Secondly, in *M.P. Oil Extraction* v *State of Madhya Pradesh*[57], the court said that the power of judicial review of executive and legislative action must be kept within bounds of the constitutional schemes so that there may not be an occasion to entertain misgivings about the role of judiciary in out-stepping its limits by unwarranted judicial activism.

In *Bandhua Mukti Morcha v Union of India*[58], a coordinating function was performed by the Indian judicial branch when it affirmed that the presumption of bonded labour will follow in all the cases where the labour is forced which would ultimately entitle all the benefits rendered by the legislative act to the bonded labour. Similarly, in *Vishaka v State of Rajasthan*[59], the legislative branch of the government coordinated with the judicial action by virtue of which the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was in essence in sync with the Vishakha guidelines rendered by the honorable Supreme court.

In *Harish Rawat v Union of India*[60], the Supreme Court quashed the emergency proclaimed by the Uttarakhand governor and ordered that the floor test must be conducted prior to proclaiming the emergency. Thereby the judicial branch coordinated with the legislature overriding the controlling actions of the executive branch of the government.

However, judiciary took over a staunch stance in the interest of justice for the girl child in the case *Independent thought v Union of India*[61] where in the judiciary recognised the marital rape of a girl child

[57] [1997] 7 SCC 592
[58] [1984] SCC (3) 161
[59] AIR [1997] SC 3011
[60] [2016] SCC OnLineUtt 387
[61] [2017] SCC OnLine SC 1222

married below the age of 18 years irrespective of the inconsistency present in exception 2 of section 375 of the substantive Indian penal code, 1860. Hence, such a controlling move of judiciary could be termed as 'judicial activism' wherein the interest of the people takes the front seat over all other factors in the entire political system. But judicial activism should be practiced with caution. This proposition is made on the basis of the observations in *S.R. Bommai v Union of India*[62], wherein it was categorically stated thus: "Before exercise of the court's jurisdiction sufficient caution must be administered and unless a strong and cogent prima facie case is made out, the President i.e. the Executive must not be called upon to answer the charge." Even Justice Jackson in *West Virginia v Barnette*[63], affirmed that "the doctrine of judicial activism which justifies easy and constant readiness to set aside decisions of other branches of Government is wholly incompatible with a faith in democracy and in so far it encourages a belief that judges should be left to correct the result of public indifference it is a vicious teaching."

The former Chief Justice of India, Justice Ahmadi has stated *"Sometimes this Activism has the potential to transcend the borders of Judicial Review and turn into populism and excessive"*. Activism according to him is *"populism when doctrinal effervescence transcends the institutional capacity of the judiciary to translate the doctrine into reality, and it is excessive when a court undertakes responsibilities normally discharged by other coordinate organs of the government"*.[64]

Also, in *State of Rajasthan v Union of India*[65], "Of course, it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities." Hence the controlling function should be performed only in extraordinary

[62]AIR [1994] SC 1918
[63]*West Virginia*(n 54)
[64] Pradhan Rasmi, 'Doctrine of Judicial Review in India: Relevancy of Defining Contours' (*Legal Services India*) <http://www.legalservicesindia.com/article/1679/Doctrine-of-Judicial-Review-in-India:-Relevancy-of-Defining-Contours.html> accessed 30 January 2020
[65] [1977] 3 SCC 590.

circumstances when the public interest and general will is at stake or else the judicial review should endeavour to coordinate with the other branches of the government as it has been held that the persons holding constitutional offices are presumed to have necessary competence and the acts performed by them are also presumed to be constitutional in nature unless proved otherwise.[66]

However, when performed with caution judicial activism in the form of judicial review can take pivotal role in the development of the society and the system. In *Swaraj Abhiyan (I) v Union of India*[67], the direction of Supreme Court to the Ministry of Agriculture pertained to the revision of the Drought Management Manual. Further it also directed for setting up National Disaster Mitigation Fund. Hence, such an activism becomes a driving push for the entire system to work efficiently.

There can also occur a distress like situation when the legislature threatens to overrule the Judiciary especially in transgressive and aggressive manner. For e.g. *Obergefell v Hodges*[68]faces a constant threat of being overruled by the Congress by enactment of legislation. This constant threat gives a sense of insecurity to the minority and therefore Judicial Review is the only tool which is left for the citizens for the implementation of their rights. However, the Congress after three years of the judgment comes up with a law affirming their rights. On the same line in India, *NALSA Judgment*[69] affirmed the self-determination of gender identity, which upended commonsense notions about transgender identities only being valid if certified by the medical establishment. However, the Transgender Persons (Protection of rights) Bill, 2018 provided that their Gender Identity be subjected to a certification by a District Screening Committee and those wishing to identify as either a man or a woman will need to go through gender affirmation surgery which is completely against the Supreme Court judgment which states that the only thing needed to acknowledge a

[66]*Manoj Narula v Union of India* [2014] 9 SCC 1
[67][2016] 7 SCC 544
[68] [2015] SCC OnLine US SC 6
[69]*National Legal Services Authority v Union of India*, [2014] 5 SCC 438

person's gender identity is their word for it. Hence, a coordinating function has been performed by the legislature suo moto when such an inconsistency was removed in the 2019 bill albeit the conundrum of its inefficiency still follows.

It is therefore necessary in the democratic self-governed institution that the Judicial Review act as a measure to control the injustices carved out of the legislative and administrative action and as a tool of coordination to uphold the dignity of democratic institution and the Constitution of India. Albeit judicial review is a very useful tool for any democratic system valuing the dogma of separation of powers but it remains all the more expedient if foresighted self-restraint is practiced by the judicial branch as much as possible while maintaining controlling checks or coordinating balances dependent on varying situations at hand.

CONCLUSION

Separation of Power cannot be separated in a water tight compartment and hence the interdependence among the three organs of the government is inevitably fluid in nature. Hence, the triad organs are bound to interact within this interdependency. While interacting, they may either project themselves as superior in a way to control the other organs which may eventually lead to the abuse of power due to concentration of the power in the hands of a single organ. On the other hand, they may work in coordination jointly furthering the cause of a common enterprise called as the constitution and upholding the Rule of Law and Due Process of Law. However, none of the country will find either of one of the options exercised because of the varying and diverse functions and interests of the society and the government. Hence, both control and coordination need to be exercised as a measure of Checks and Balances in order to avoid the misuse or tyrant use of power. Therefore, Judicial Review emerges as an effective tool of control and coordination.

Judicial Review is the legitimate exercise of power by the Judiciary. It is the judicial review which keeps the legislative and the

administrative action within the bounds of the constitution. USA, and India find Judicial Review as an effective measure of control and coordination in enhancing the effective application of Separation of Power. UK, however, finds it as a tool for the dilution of their notion of Parliamentary supremacy.

It is because of the Judicial Review that the abstract concepts of Human Rights and Human Dignity are given priority as the Legislature may work on the principle of Majoritarian rule but the Judicial Review respects and calls for the opinion of every individual in case, they have argument against the law which violates their rights. Hence, Judicial Review is upholding the goal of Legislature by upholding the Human Rights. Judicial Review, if used with the purpose that it was adopted for, it will be the basic tenant of the Constitution and the question won't be who is exercising power over whom but rather the question would then be whether the principles of Rule of Law and of Due Process are given due consideration or not. And this is only possible when Judicial Review is used as a means of control and coordination in a balanced manner associated with pragmatic approach.

LUCIDIFICATION OF THE LEGAL LANGUAGE: SOLVING THE PROBLEM OF LEGALESE

Adrija Datta[1]

Abstract

The law is a profession of words.

- David Mellinkoff

Law is a field which has embraced conservatism, it is perhaps best reflected in the archaic words still in used by lawyers and legislators. While laws have changed with time, the language of law has not.Legal language still preserves archaic words and verbosity, features which are remnants of the earlier centuries. This has led the legal language to be extremely complex. The incomprehensible verbiage found in legal documents is termed as legalese, which almost makes it feel like a dialect or sub-language of English. Lawyers are wordsmiths who twist words in a manner, that its meaning cannot be untangled from them.Verbosity makes law distant from the common public, creates problems in comprehending legal documents and consumes much of the productive time. In light of the aforementioned problems and criticism from scholars, a handful of countries such as New Zealand, USA, Canada, Australia and Hong Kong have shifted to plain language drafting. Their experiences give India valuable insights on how to make the transition to plain language drafting

The research paper aims to answers questions on the origin of legalese, defining features of legalese, justification for continuing the employment of legalese in legal documents. The second half of the research paper suggestsplain language drafting as a practical alternative to legalese, traces the origin of plain language drafting ,its advantages and elaborates the experience of countries who have made the shift and develop insights to help initiate plain language drafting in India, who is yet to take a leap.

***Keywords**:* Legalese, legal language, plain language drafting, precedents, plain language movement

INTRODUCTION

Legalese was introduced to India by the British. Just as the British Rule in India introduced legal language to India, invasions and conquests of Britain by Normans, Saxons and Vikings led to the development of a complex legal language in Britain. Written law emerged during the Anglo-Saxon period; the Anglo-Saxon language was complexwhich led to an even more complex Anglo-Saxon law. The Conquest by Vikings introduced Norse language to the pre-existing legal language, in fact the word 'law' itself was borrowed from Norse language. In 1066, the Norman conquest sawFrench-speaking Normans occupy all relevant positions and French became the dominant language in the then expanding royal courts.[2] Around the same time, Christian missionaries started spreading messages of divinity. The amalgamation of Latin, French and Norse languages resulted in the highly complex British legal language. In the 17th Century, practicing lawyers had to be well versed in the Latin, French and English in order to be well established. Since then, progression towards simplicity has taken place. However, the legal language is still verbose and perplexing.

India borrowed and retained the British language. Much like its counterpart, the Indian legal language was complex and verbose. A study of 300 sentences from 11 acts passed between 2000 to 2007concluded that 94% of the sentences used in these acts were complex.[3] Modern Indian laws still have long titles which insist that the law in addition to its subject matter covers "matters connected therewith or incidental thereto".[4]Likewise, proviso is a customary feature of Indian law.[5]

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[1]Adrija Datta, 3rd year, B.A. LL.B. (Hons.) candidate, KPMSOL, Navi Mumbai

[2] Peter Tiersma, *Legal Language* (University of Chicago Press 1999)

[3] Jaya Verma, 'Legal English Used In Indian Law System: A Study Of Syntactic Complexity In Indian acts' [2015] 1(11) International Journal of Communication, Languages & Literature11

[4] Namrata Mukherjee and Shankar Narayan,'Manual on Plain Language Drafting ' (*Vidhi Centre for Legal Policy,* 2017)<https://vidhilegalpolicy.in/wp-content/uploads/2019/05/DraftingManual_Vidhi.pdf> accessed on 12 January 2020

[5]ibid

The complexity and verbosity of legal language is attributed to the following features of legal language:

1. Latin maxims: While Latin as a language has long become obsolete, Latin maxims are very commonly found in law. These Latin maxims have English translations which can easily replace them. However, people have preferred to continue using Latin maxims due to the legacy attached to it. Some of the common Latin maxims are: Res Ipsa Loquitor (the thing speaks for itself), A fortiori(With even stronger reason).

   Latin maxims are not to be used with technical terms. Technical terms maybe borrowed from Latin but, refer to specific and defined concepts. 'Tort' and 'bailment' are examples of two technical terms which convey a specific meaning.

2. Archaic words: Older words like hereof, thereof, and whereof (and further derivatives, including -at, -in, -after, -before, -with, -by, -above, -on, -upon) are used in legal English with the aim to avoid repeating names or phrases. However, the use of archaic words which many people cannot understand leads to confusion.

3. Doublets and triplets: Words which have the same meaning are said twice. For example: "null and void","terms and conditions", "perform and discharge". There is a justification to this practice, in olden days when laws were unwritten, repeating words with the same meaning was prevalent as it helped people remember the laws better.

4. Long sentences:A study revealed that average length of sentence in Indian acts was 53.[6]Thisis quite high compared to the average length of words in modern English which is between 15 and 20. Government of England prescribes the

[6] Verma (n 3)

number of words in a sentence to be not more than25.[7] Research shows that when there are 14 words in a sentence, comprehension is about 90% and when there are 43words in a sentence, comprehension level declines to 10%.Further, this research was conducted in a native English Language speaking country, comprehension in India which is not a native English-speaking country is estimated to be lower.[8]

5. Use of passive voice: Lawyers deliberately use passive voice to de-emphasize or obscure the actor. The use of the third person singular and plural is predominant. Passives words is commonly used to embodyimpersonality, objectivity and authoritativeness; this may explain why they are common in court orders.[9]Passive voice is also perceived to be more formal than active voice. However, they make the sentence obscure and hard to understand.

   An experiment conducted by Robert and Veda Charrow[10] demonstrates the problem of using passive voice.They had a group of subjects, citizens who were eligible for jury duty, listen to a tape recording of jury instructions. The subjects were toparaphrase what they heard. Almost half of the information was missing from some of the paraphrases. They attributed the difficulty to particular types of grammatical constructions, such as the occurrence of multiplenegatives and the excessive use of passive sentences and of nominalizations.

6. Words are used in an unusual context: The word 'action' in a non-legal sense means movement. In legal language it refers

[7] Sarah Vincent, 'Sentence length: why 25 words is our limit' (4 August 2014) Gov UK < https://insidegovuk.blog.gov.uk/2014/08/04/sentence-length-why-25-words-is-our-limit/> accessed 30 January 2020

[8] Ann Wylie, 'How to Make Your Copy More Readable: Make Sentences Shorter' (2009) PRSA<http://comprehension.prsa.org/?p=217> accessed 29 January 2020

[9] Tiersma (n 2)

[10] Robert P. Charrow and Veda R. Charrow, 'Making Legalo9olo Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979), 79 Columbia Law Review

> to filing a complaint. Similarly, 'such' usually means 'of this kind'. However, legally it is interpreted to mean 'this'. Likewise, 'shall' in a legal sense is obligatory and mandatory, 'shall' just denotes a strong assertion but, is not mandatory. In*State of UP v.Manbodhan Lal Srivastava*[11], the Supreme Court faced challenges in interpreting 'shall'. The court held that the meaning of the word 'shall' in any statute is interpreted as mandatory, but is not necessary that is used always in mandatory sense.

Despite the complexity in legal language, many lawyer and jurists still prefer using legalese.

Arguments in Favor of Legalese

<u>*Principle of precedents*</u>

'*Stare decisis et non quieta mnovere*'-is the principle to abide by the precedents and not to disturb settled points. The principle of precedents upholds the legitimacy and permanence of court judgments. An unfortunate byproduct of this constant review of past cases is that antiquated terms effects the wordings in a new case.

In case of contracts, people rely on format and wordings used in contracts before it. Some lawyers stick to the format while drafting to save efforts required in drawing up a new contract. Others are fearful of challenging those contractsas the format and wordings have been used continuously used for many years and people think that it is set in stone. They think that the precedent format is fool-proof and find it difficult to challenge it. For many lawyers, precedents come pre-legitimized. As a result, deviations from the form, especially more structural or innovative deviations, are disfavored. Necessary changes to use the form in the new transaction are more apt to be as limited as possible to "do the job."[12]

[11] A.I.R 1957 S.C 912 (V 44 C 136 Dec.)
[12] Claire A. Hill, 'Why Contracts Are Written in "Legalese"' (2001) 77 Chicago-Kent Law Review <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3347&context=cklawreview> accessed 17January 2020

"The legal fraternity does not want to delete unnecessary words or use shorter sentences. Deletions have met a high threshold of justification. Provisions or words cannot be omitted just because it clutters up space. Only words and provisions that are fatal are considered for omission. On the other hand, inclusion of new boilerplate that doesn't seem to help but couldn't hurt requires much less justification."[13]

Innovation and challenge to precedent is considered to be radical and people in the legal fraternity avoid it to the best extent possible.

Legalese is a basic requirement of lawyer's job:

A chisel is prerequisite to a sculptor's job, likewise words are prerequisite to a lawyer's job.

Every profession has technical terms which only the people of that profession or closely related profession can understand. To illustrate, a doctor is supposed to know all the medical terms. Similarly, a lawyer should be well-versed with legal terms.Legal documents are meant for lawyers to understand and interpret for their clients.

Legalese can be compared with the coding language used by computer programmers;it is sufficient that lawyers and programmers understand the language they use even if others distant to the field don't understand it.

Law schools prepare students sufficiently to interpret legalese, dedicating one to two semesters for teaching legal language and terminology to law students.

Avoid misinterpretation of legal documents

Verbosity in legal language is an attempt to be precise A justification for dedicating a part of the academic year to legalese is that in ordinary communication, people are expected to communicate with an attempt to understand what is being said. But in the legal context, people are expected to misunderstand what is being said. For

[13]ibid

this stated reason, it is important for lawyers to use words in a way that gives a very narrow scope for interpretation. This intricacy of legal profession should not be ignored as multiple interpretations would lead to numerous cases and a lot of chaos.Lawyers are expected to estimate the possibilities of misuse of a legal document and prescribe for it. Legal documents are subject to intense scrutiny by lawyers trying to find loopholes to exploit.Drafters, in anticipation of such attacks, obsessively try to cover every base, plug every loophole, and deal with every remotely possible contingency.[14] If an attempt is made to simplify law, ambiguities might be created and most lawyers prefer to not run the risk.

Alternatively, in some cases lawyers try to be vague in order to escape liability and deliberately misinterpret in. They may use vagueness in order to escape responsibility, this is especially true in standard form contracts.

Judges and lawyers prefer legalese

Many lawyers and judges believe in the charm of legalese rather than the practicality.An Australian judge opined that plain language is an excuse for split infinitives and wolly thinking. Another Judge, Callaway J of the Victorian Court of Appeal described certain re-drafted provisions of the as reflecting 'the language of the pop songs.'[15]

In India there is limited research done documenting the preferences of lawyers and judges. One research paper suggests that lawyers and judges in India prefer legalese, stating:

"They are experts (especially the judges and lawyers) who feel that legal language as it is good and there is no necessity of making it plain, user-friendly, easily understandable/comprehensible to laypersons and so on. There are some linguists and veteran English professors who advocated continuation of the same legal language."[16]

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[14] Rameshwar Barku Dusunge 'Legal English: Background and Perspectives' (2018) 18(3) Language in India <http://www.languageinindia.com/march2018/rameshwarlegalenglish1.pdf> accessed 17 January 2020

[15] GM & AM Pearce and Co. Pty Ltd v RGM Australia Pty Ltd. (1998) 16 ACLC 429 at 432

[16] Vaibhav Jaypalrao Sabnis 'Legal Language as 'English for Specific Purposes': A Study' (2017) DBAM < http://dbamlaw.in/wp-content/uploads/2018/07/MRP-Executive-Summary.pdf> accessed 30 January 2020

An honorable High Court Judge opined that "the legal fraternity is used to the archaic words, intricate language, foreign words and phrases and so on. They feel quite comfortable using it. Hence, simplicity at the cost of beauty is unexpected and unnecessary."[17]

Monopolize the legal profession

Tiersma, a renowned researcher who has studied the history of legal language claims," Lawyers did not invent Law French, or today's legal language, for the purpose of monopolizing the profession. It developed naturally, under the influence of diverse languages and cultures, as well as the growing complexity of the legal system and the shift from predominantly oral to mainly written communication. Yet to some extent, legal language does have the effect of enabling lawyers to retain their virtual monopoly on providing legal services."[18]

Others have criticized lawyers for continuing to use archaic words, long sentences when there was a scope for simplification.It is one of the few tricks used by lawyers to retain clients.Complex words are used to inculcate the feeling that law as a subject is alien to their clients. Legalese ensures that their clients stay at their mercy for understanding the aspects of law. These tricks help them monetise and monopolize their profession. There is a long-standing practice of clerks changing per page, continuing this legacy forward, some lawyers are still known to charge more for using complex words and making the sentences incomprehensible. Owing to its obscurity, legal language has strengthened the role of lawyers and given them the power they long for.[19]

A senior professor of English from Kolhapur University echoed similar sentiments. He feared that if laypersons are at ease with legal language, then advocates and lawyers will be less necessary which will consequently affect the earning and prestige of legal fraternity.[20]

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[17] Sabnis (n13)
[18] Tiersma (n 3)
[19] Ina Veretina-Chiriac 'Characteristics and features of legal English vocabulary' (2012) Studia Universitatis < studiamsu.eu/wp-content/uploads/20.-p.103-107.pdf> accessed 31 January 2020
[20] Sabnis (n 13)

Complex English is viewed as a reflection of social status

In India there is a perception that a person's fluency in English reflects their social status or their level of skill. Thus, Indians have often tried to use complex words, irrespective of the fact that the meaning is lost in perplexity.

For example, it has been said about late Justice Krishna Iyer's language, "It is not the language of those who praise simplicity in language on account of their inability to enjoy the vast expanse of the English dictionary."[21] His complexity in words propelled him to fame and earned him nationwide recognition and respect. Whereas, the linguistic endeavor of his American counterpart Felix Frankfurter, as Associate Justice of the United States Supreme Court, was harshly criticized by Harvard Scholars. This is a reflection of different mindsets prevailing in India and U.S.A.[22]

Another illustration is of an Indian Parliamentarian, Dr. Shashi Tharoor. He is celebrated in India for his rich vocabulary and complexity of English. His use of sesquipedalian words to propelled him to popularity. In contrast, politicians from other countries who serve native English-speaking people, keep their sentences and words short ensuring that the common public understands it.

Legalese provides Indian lawyers and jurists a perfect opportunity to use foreign words borrowed from French and Latin. They can also use words and language which are alien to their peers and get a sense of gratification. They feel that simplifying the language would be an insult to their ego.

Plain Language Drafting

Plain language drafting (PLD)can be defined as a language that communicates directly with the audience for which it is written. It enables the reader to comprehend a piece of writing in the first

[21] Bharadwaj Sheshadri 'My favourite English-man: on Justice V.R. Krishna Iyer'*The Hindu*(10 September 2018) <https://www.thehindu.com/opinion/op-ed/my-favourite-english-man/article24909470.ece> accessed 31 January 2020

[22] U.S.A is the pioneer of plain language drafting

reading. The focal point of PLDis the needs of the reader rather than the writer.

The call for simplification of legal language started two centuries ago. Thomas Jefferson ago suggested a law student to acquire "…. the most valuable of all talent, that of never using two words where one will do."Some prominent authors such as George Orwell and Jonathan Swift had also called for simplification of legal language. A famous speech which summarizes the problem of legalese was delivered by Will Rodgers who during his speech at American Bar Association said: "the minute you read something and you can't understand it you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer. Every time a lawyer writes something, he is not writing for posterity, he is writing so that endless others of his craft can make a living out of trying to figure out what he said…"[23]

Robert C. Wydik, one of the early proponents of PLDopined:

"We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is "(1) wordy, (2) unclear, (3) pompous, and (4) dull."[24]

In light of these criticism PLD emerged, benefiting the adopters in ways enlisted below.

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[23] Jyoti Sagar 'Whereof they're ipso facto words: India needs to simplify the 'language of the law'' *Economic Times*(2 March 2018) <https://economictimes.indiatimes.com/blogs/et-commentary/whereof-theyre-ipso-facto-words-india-need-to-simplify-the-language-of-the-law/> accessed 17 January 2020

[24] Richard C. Wydick, 'Plain English for Lawyers'(1998)4th ed., Durham: North Carolina: Carolina Academic Press

Advantages of PLD

Ease of business

The difficulty in comprehending legal documents consumers much of the productive time and diverts attention from the more focal areas.

According to an article in Harvard Law Review argues that lawyers should not be indispensable in business agreements. A contract should not take countless hours to negotiate. Business leaders should not have to call an attorney to interpret an agreement that they are expected to administer. A world where disputes caused by ambiguity disappear.[25]

In 2014,GE Aviation's digital-services business signed 100 plain-language contracts. Their experience shows that plain language contracts take 60% less time in negotiations and thus help the time of business men.They stand testament to the fact that high school-level language and shorter documents can produce (but still iron-clad) contracts.[26]

Further, disputes and court cases will arise irrespective of the fact whether legalese is used or PLD is used. There is no evidence to suggest that PLDresults in more legal disputes. Furthermore, it suggests the reverse. A well-drafted PLD document demands lower judicial interpretation, compared to heavy worded legalese documents. [27]

Countries who have implemented PLD secure some of the highest ranks in Ease of Doing Business index.

[25] Shawn Burton, 'The Case for Plain-Language Contracts' (*Harvard Business Review* , February 2018) <https://hbr.org/2018/01/the-case-for-plain-language-contracts> accessed 10 December 2019

[26] Monish Darda , 'Contracting Doesn't Have To Be Complicated' (*Forbes,* June 2019)<https://www.forbes.com/sites/forbestechcouncil/2019/06/05/contracting-doesnt-have-to-be-complicated/#18f7176de828> accessed 29 December 2019

[27] Peter Butt, 'Legalese versus plain language' (2001) 35 Amicus Curiae<https://pdfs.semanticscholar.org/71da/ea8a2c07322e310e96e9043b971497846222.pdf> accessed 13 January 2020

Table No. 1 Ease of Doing Business ranking of countries practicing PLD (2019 data)[28]

Country	Ease of Doing Business Index rank	Rank in enforcement of contracts
New Zealand	1	23
Hong Kong	3	31
USA	6	17
UK	8	34
Australia	14	6

One of the many parameters these countries rank high on is enforceability of contracts. India ranks low in the Ease of Doing Business Index (India ranks 63rd), especially in enforcement of contracts(India ranks 163rd out of 190 countries). If PLD is adopted, itwill lead to a better of understanding of contracts and the enforceability may increase.

Better understanding of judges

One of the reasons why lawyers employ complexity in words is to make the paperwork harder for the opponent lawyer to comprehend. Without proper comprehension the lawyer will find it difficult to counterargue. This often backfires, as the opponent lawyer is not the only person who faces difficulty in comprehending the paperwork. The judges will also face difficulty in comprehending the argument put forth by the lawyer, putting the lawyer in an unfavorable situation.The unwillingness todepart from traditional practices of drafting has resulted in legalese which is inaccessible not only toeveryday readers, but also many lawyers.[29]

A study from 1987 concludes that lawyers may also run great risks if they use legalese when writing documents intended only for judges. Sometimes the wording used by lawyers is so complex, people inside the legal fraternity such as judges and their aides fail to

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[28] *World Bank* (16th Edt., 2019)

[29] Joseph Kimble, *Lifting the fog of legalese* (Carolina Academic Press, 2006) xi

comprehend it. "Lawyers who write in legalese are likely to have their work judged as unpersuasive and substantively weak. Perhaps even more worrisome for these lawyers personally is the finding that their own professional credentials may be judged less credible.'[30]One experienced trial judge sitting on the California Court of Appeal wrote: "I read briefs prepared by very prominent law firms. I bang my head against the wall, I dash my face with cold water, I parse, I excerpt, I diagram and still the message does not come through. In addition, the structural content is most often mystifying."[31].

Lord Denning one of the most revered judges suggested people to not use long words unless the hearers or readers understand them. According to him, a lawyer fails if a hearer has to guess meaning of the word or look it in the dictionary. He further emphasized that a lot of speakers and writers do not appreciate this simple truth. They use long words so as to 'show off'."[32]

Judges not only experience problem while understanding arguments advanced by lawyers, the complex language used in some statutes poses a problem to judges. Lord Justice Harman while interpreting Housing Act, 1957 of USA said:

'To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a sloughof despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side'.

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[30] Robert W. Benson and Joan B. Kessler,' Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing' (1987) 20 Loy. L.A. L. Rev. 301 <https://digitalcommons.lmu.edu/llr/vol20/iss2/2> accessed 17January 2020

[31]Letter from Los Angeles Superior Court Judge Ronald E. Swearinger (temporarily sitting on Cal. Ct. App.) to Robert W. Benson (Oct. 15, 1984.)

[32] Denning A. T, *The Closing Chapter* (published 1983) 67

In USA, multiple surveys show that over 80% judges would prefer to see plain language drafting.[33]Even the new generation of lawyers want to adopt PLD. A survey in New Zealand shows that 77% of future lawyers who are currently undertaking legal training and who use legalese documents in their work said that they would like to change to plain English.[34]

Betterment of consumers

Consumers have no bargaining power in standard form contracts. They only have the option of accepting or refusing an offer, this little freedom is also constrained by the contracts being incomprehensible and long. Through adding clauses in fine print, companies use standard form contracts to exploit the consumers. This issue has magnified in the era of technology. Almost every website asks its users to agree to terms and conditions, resulting in millions of contracts being formed every day without one party having little to no understanding. Using a simpler language will allow the consumers to read and understand conditions properly and take better decisions.

Globalization

Globalization is a product of treaties and contracts. Legalese has evolved differently in different countries. Often, legal documents of one country has to be translated to suit the legalese of another country. Some suggest there should be a global legal language, similar to plain English to smoothen the process of globalization.

While aglobal legal language has many dimensions to explore, organizations such as International Language and Law Association (ILLA) formed by proponents of plain language drafting:Lawrence Solan, Peter Tiersma and Dieter Sein are working towards drafting and formulating it. They aspire to make lawyers and linguistics work together on the language of law in the international context.

[33] Harrington and Kimble, 'Survey: Plain English Wins Every Which Way' (1987) 66 Michigan Bar Journal 1024; Kimble and Prokop, 'Strike Three for Legalese' (1990) 69 Michigan Bar Journal 418; Child, 'Language Preferences of Judges and Lawyers: A Florida Survey' (1990) 64 Florida Bar Journal 32

[34] Stephen Hunt,' Drafting: plain English versus legalese' (1995) Waikato Law Review <http://www.nzlii.org/nz/journals/WkoLawRw/1995/9.html> accessed 31 January 2020

Bring law closer to society and upholds democracy

When people can't live in isolation from law, how can law beisolated from them.

Due to the omnipresent nature of law,it's imperative that people have some amount of understanding of law. Law is deeply rooted in society and while non-lawyers don't have to understand the roots, they should be able to see the tree from afar. Legalese prevents this from happening and the bushes of complex words make it hard for an ordinary person to see the tree.PLD can act as an enabler for the inclusion of non-lawyers in the legal field.[35]

Furthermore, in order to be a democracy in the truest sense, it is important that citizens know what they are choosing. The principle of Rule of Law presupposes that those who are affected by a law should be in a position to ascertain its meaning and effect.[36] An incomprehensible set of laws paves the wave for authoritarian delinquents to twist and turn the law , as they deem fit.[37]

Criticism of PLD

PLDis not without faults. To start with, there is no clear definition of plain language drafting. Many who believe thatplain language emerges from language prevalent in a society. Thus, as the language changes, the laws would have to change. This would require many amendments to be made and the meaning will be lost in frequent translations.

PLD as a topic has seen limited research. A small body of research has claimed that there is no evidence to suggest that PLDincreases comprehension. In the previously mentioned experiment of Robert and Veda Chow, when a simplified version of the tape was played, the comprehension did increase, it was however concluded that

[35] New Zealand Law Society, 'Clear, plain language powerful in making the law accessible' (*New Zealand Law Society,* December 2016)<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-902/clear,-plain-language-powerful-in-making-the-law-accessible> accessed 4 January 2020

[36] TK Viswanathan, 'Legislative Drafting: Shaping the Law For the New Millennium' The Indian Law Institute)111

[37]ibid at p 110

it was highly unlikely that there would ever be complete understanding.[38] Despite the criticism, PLD can in no way be said to fare worse than legalese.

Table no. 2: Counters to justification for legalese

Ground	Legalese	PLD
Principle of precedents	Maintains consistency, difficult language is a byproduct.	Plain language precedents can be developed.
Requirement of a lawyer's job	Lawyers and judges are the only one who will read legal documents.	Often people within the legal fraternity have difficulty in comprehending documents drafted in legalese
Preference of judges and jurists	Some judges and jurists favor legalese.	Judges from countries who have adopted plain language drafting, mostlyfavorPLD.
Monetize legal profession	Keep customers at the mercy of lawyers for understanding legal documents and earn.	Customers prefer documents written in plain language due to better comprehension.
Avoid misinterpretation of documents	Employing complex language doesn't reduce the risk of misinterpretation. In fact, meaning of a sentence is lost in complexity.	Simple high school level English can be used to give rise to iron clad documents.
Customers	Help companies escape liability by using vague terms.	Customers will have an improved understanding of terms and take better decisions.

PLDin other countries

Although the call for simplification had lasted for more than two centuries, plain language emerged only in 1970s. It started off by a few insurance companies who had the procedure laid down in a simple language.[39]

In U.S.A, these efforts were followed by legislative action.In 1972, President Nixon ordered that "layman's terms" be used in the Federal Register. In 1978, an executive order was issued stipulating clear and simple government regulations. In 1998, the Clinton administrationobligated federal agencies to use plain English. Followed by the U.S. Securities and Exchange Commission publishing A Plain

[38] Chow (n 9)
[39] Ian Turnbull, 'Drafting Simple Legislation' (1995) 12 Australian Tax Forum 249

English Handbook for people drafting security disclosure documents, the same year. In 2010, the U.S. Congress passed and President Obama signed the Plain Writing Act, whose stated purpose was "promoting clear government communication that the public can understand and use."Obama's administration noted that plain language can make a huge difference by saving money and making it far easier for people to understand what they are being asked to do. The agency, which was responsible for administering the law, issued guidance on plain language that remains in effect.

USA was followed by United Kingdom. In 1982, the government of UK issued a White Paper ordering department to count their forms, remove unnecessary ones, simplify the rest, and report their progress annually to the prime minister.

The journey towards PLD in New Zealand happened in two ways. Companies around the country identified the advantages of PLD and drafts contracts in a simple manner. Meanwhile, the legislature rewrote old laws in a simplified manner. In 2017, a bill was introduced in the Parliament of New Zealand to promote the use of plain English in official documents and websites, and required the Government to start making plain English the standard for all official public and private communication in New Zealand.

In Canada, the transition to PLD was possible only for the efforts and commitments of corporates. In 2008, two international organizations Clarity and PLAIN were founded. These organizations promote plain language movement. They attempt to simplify the language used in many fields such as medicine, technical writing, plain finance. The international organizations provided much needed steam to the plain language movement and since then many countries have realized the need to make the transition to plain language drafting.

The experience of these countries shows that transition to PLD is a process which cannot happen overnight. Convincing lawyers to develop plain language precedents is the biggest challenge due to the pre-conceived notions of lawyers, lawyers need to be motivated and

have to understand the merits of legalese for a smooth and proper transition. Furthermore, there will always be more scope for simplification and refining laws.

PLD in India

India like its counterparts faces problems in comprehending legal documents. The problem of legalese has been recognized Indian jurists and linguists. India has taken baby steps towards simplifying legalese. In 2009, Vidhi's Manual on Plain Language Legislative Drafting was released. The manual simplified some parts of existing acts in plain language, it can serve as an importantguideline for making the transition to plain language drafting, in the Indian context.Prof. K.L. Bhatia[40] and B R Atre are two eminent Indian scholars who have an advocated the use of plain language drafting. Atre in his book states "in legislation, words used without a purpose or employed needlessly is not merelya tedious imposition upon the time and attention of the readers, it also creates a danger because every word used in a statute os construed so as to bear a meaning, if possible."[41]More recently, Society of Indian Law Firms (SILF) took an initiative to promote use of plain English. SILF plans to organize awareness and training campaigns to familiarize its members with the concepts of plain English.[42]

The members of SILF which include some of the prominent law firms in the country, are keen to implement PLD. SILF proposes to organize and conduct training sessions for its member firms on tips and techniques for use of plain English.

SILF advocate a few rules to start the process with, the recommendations are:

- AvoidLatin and jargon and long sentences
- Adopt the use of "active" voice rather than "passive voice"

[40] K. L. Bhatia, *Textbook on Legal Language & Legal Writing* (3rd Edition, Universal Law Publication 2016)

[41] B. R. Atre, Legislative drafting: Principles and Techniques (published 2017, Universal Law Publication)

[42] Jyoti Sagar, 'Language and Law: The Incomprehensible Lawyer [Part II]' (Bar and Bench, 2018) <https://www.barandbench.com/columns/language-law-incomprehensible-lawyer-part-ii>accessed on 30 January 2020

- Teach law students how to imbibe the spirit of plain language drafting. There should be a credit program for the purpose mentioned.

SILF also proposes to make efforts for introduction of plain English in legislative process – both primary and delegated legislation – by raising awareness and collaborating with relevant governmental agencies.

A major challenge to PLDin India is that court documents exist in multiple languages. Countries which have made transition are homogenous, most people speak in English and all the court proceedings are in English. If India is to make the transition, documents in multiple languages will have to be translated.

CONCLUSION

The research paper concludes that legalese should become obsolete and merits the use of PLD. PLD which is a subset of plain language movement which calls for simplification across all fields like shipping and medicine. The ultimate aim of plain language is to increase understanding across all spheres and fields and make the world simpler to understand.

PLD and plain language movementis more so relevant to India where most people don't have good command over English.India needs to recognize the benefits of PLD and embark on a never-ending journey towards PLD and learning from the experiences of other countries.

MORAL FOUNDATIONS OF CRIMINAL LIABILITY: THE INDIAN PERSPECTIVE

Apurv Shaurya[1]

"When law and morality contradict each other,
the citizen has the cruel alternative of either losing his moral sense or losing his respect for the law."
- Frederic Bastiat[2]

Abstract

The ancient legal system of India was initially based on an amalgamation of law and morality. With the advent of the Britishers, statutory laws were brought and codified laws replaced religious moral laws. However, these codified laws too weren't totally devoid of morality and the laws made by the British, and made by the Indian parliament after Independence, both demonstrate what is called 'Legal Moralism' i.e. the enforcement of societal morals through law. However, with the recent judicial activism, several laws have been altered and the present Article is an analytical attempt to study the decline in 'Legal Moralism' in India. The Article also discusses the juristic opinion of Devlin, Hart, Mill, Feinberg and Duff on the role of morality in criminal law and tries to ascertain as to which theory of moralism suits the Indian justice system. The hypothesis is that there is a sharp decline in legal moralism and paternalism in India and the courts are diluting the role of societal morality but it is impossible for them to keep it at bay and due to Indian diversity, they are struggling to keep a definite approach. Also, Duff and Feinberg's theory of criminalisation are the most appropriate theory for the Indian Justice System.

Keywords - Morality, Constitution, Criminal Law, Paternalism, Legal Moralism.

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[2] Frederic Bastiat, *The Law* (4th edn,Foundation for Economic Education, 2004)8

INTRODUCTION

The debate over the relation between law and morality is as old as the debate over what both these terms mean. While there are different schools who propose different view as to what is law, the term morality also is very broad and generally has two different meanings, one descriptive, and one normative meaning. When we look at the descriptive meaning, Morality is a certain code of conduct, meant to be followed and accepted by the members of the society. On the other hand, normative meaning of Morality is what a rational person would do in a given condition.[3]

The relation between law and morality keeps on altering depending on the school of thought that is employed in the observation. Like in the Positive Law School of Thought, a rule is a law if made by a proper authority in a proper way, and its goodness or badness I.e. its moral basis is immaterial[4] and Austin even separates Law and Positive Morality. On the other hand, in one kind of natural law school thought, there is no clean division between the notion of Law and Morality.[5] But these notions keep on evolving and now Positivists also argue that even though there is no 'necessary' connection between law and morality but there may be some necessary connection between law and morality for the existence of a form of law as law.[6] The notion that law is hundred percent devoid of any moral element thus, does not remain as accepted as it used to be, and its accepted that elements of morality are present in different forms of law in different degrees.

When we come to the criminal liability, it is an accepted notion that not every person who is immoral is criminal, however we can argue that all criminals are immoral since committing crime in itself is an immoral act.[7]Thus, when we talk about criminal liability, we can assume

[3] 'The Definition of Morality', (*Stanford Encyclopedia of Philosophy*, 17 April 2002).<https://plato.stanford.edu/entries/morality-definition/>accessed31 January, 2020

[4]Allan D. Cullinson, 'Morality and foundation of Legal positivism' (1985)20 Valparaiso University Law Review 61,62

[5]Natural Law, (Internet Encyclopedia of Philosophy) <https://www.iep.utm.edu/natlaw/>accessed31 January, 2020

[6] Robert S. Summers, 'Professor Maccormick on HLA Hart legal theory' (1983)31 The American Journal of Comparative Law 481, 483

[7] Allan W. Mewett, 'Morality and Criminal Law' (1962)14 The University of Toronto Law Journal 213, 214

that it has a moral underline, But, also it is not the only thing and a crime "*Must be something more than the violation of group morality or custom*".[8]However, there should be a violation of a moral code in order to give rise to a criminal liability. A criminal liability thus always has a moral foundation which can be identified, if not limited.

But the way "*Law is not like fire which burns the same for the Persians as for the Greeks*"[9], morality too, is variable, and subjective. As difficult as it is to define morality, it is equally difficult to catagorize acts as moral or immoral. Morality varies from person to person and state to state, and as HLA Hart himself notes, conventional morality may relate to only the real and fancied needs of a particular society.[10]When it comes to India, Indian scenario has demonstrated variance in the way the legal system deals with the issue of morality. Prior to the Mohammedan Law and the establishment of codified statutory laws under the British Rule, The Hindu Law that prevailed was mixed with religion, customs and morality.[11] For Hindu Jurists, Law is just "*a collection of human practices or customs based upon principles of morality and natural justice*"[12] accepted by the society, and as Justice Desai notes since Law of Ancient India was not from any sovereign, it is in the nature of morality.[13] The subjective and normative part plays such a huge role in Hindu law that customary Hindu practices have the capacity to even override the written texts of Hindu Law.[14] This simply means that popular or public morality that is generally accepted is a source of law stronger than the texts themselves.

The Hindu Law with the advent of the Muslims was replaced by Mohammedan Law, and when the British arrived, the codified laws started getting introduced in the legal system. The Indian community however, played no role in the drafting of the Indian Penal code[15] and

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[8]Richard C. Fuller, 'Moral and the Criminal Law' (1942)32 Journal of Criminal Law and Criminology 624, 624

[9] P. K. Menon, Hindu Jurisprudence, (January 1975) 9 (1) The International Lawyer 209, 209

[10]Peter Cane, 'Morality, Law and Conflicting Reasons For Action'(2012) 71 (1) The Cambridge Law Journal 59, 63

[11]U.C. Sarkar, 'Hindu Law: Its Character and Evolution' (1964) 6 (2/3) Journal of the Indian Law Institute 213, 220

[12] P. K. Menon (n 8)

[13] Madhu Kishwar, 'Codified Hindu Law: Myth and Reality' (1994) 29 (33) Economic and Political Weekly 2145, 2147

[14]*The Collector of Madura v Moottoo Ramalinga Sathupathy* (1868) 12 MIA 397, 436

[15]Atul Chandra Patra, An Historical Introduction to the Indian Penal Code (1961) 3 (3) Journal of the Indian Law Institute351, 365

thus, the element of morality and local customs from the Indic perspective diminished in the criminal Law. James Stephen and J.S. Mill had held the opinion that for Indian legal system to modernise, it is important to erode the native legal systems as they run on whims and caprices.[16] But, acts that were considered immoral by the Britishers themselves, like homosexuality, did find a place in the Indian Penal Code,[17] therefore we can safely conclude that even though the Britishers applied a positivist approach towards the Indian legal system, morality wasn't something that was totally left out of the equation despite the Indian Penal Code being drafted on Bentham's principles.[18] The answer to the question of whether the scale of morality was as per societal norms of India or of Britain, lies in the fact that the IPC was drafted mirroring the English Substantive law[19]and it resembles to it so much even in structure that 16 out of 24 chapter heads from Macaulay's Code were near to exactly same as they were in the English Codes.[20]

Post-Independence, the Constitution of India came into force and became the checkpoint for the laws made prior to its commencement.[21] Within 70 years, multiple criminal laws have been held unconstitutional for e.g. earlier, 66A of the Information Technology Act,[22] 303 of Indian Penal Code, 1860.[23] However, these laws are precisely not those which involve what is called a 'Moral turpitude'. When it comes to acts that involve a moral turpitude, the Supreme Court has passed many judgments observing different approaches towards different acts for e.g., The Supreme Court decriminalized Suicide, Homosexuality and Adultery, however criminalised Triple Talaq, and while Beastiality along with public obscenity is still a crime, bigamy

[16]David Skuy, 'Macaulay and the Indian Penal Code of I862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century'(1998) 32 (3) Modern Asian Studies 513, 514

[17] Indian Penal Code 1860, s 377

[18] David Skuy (n 16) 524

[19]ibid 541

[20]ibid 539

[21] Constitution of India, 1949, art. 13

[22]*Shreya Singhal v Union Of India* AIR 2015 SC 1523

[23]*Mithu Etc. Etc. v State of Punjab* 1983 SCR (2) 690

even though has been held immoral, is not uniformly held to be criminal in nature.

This leads us to the question that, what is the modern India's approach towards immorality as a ground for criminalisation? For the same purpose, we need to first take a look over the principle of 'Legal Moralism' and then understand how it has been translated into judgement given by the Hon'ble Courts of India.

The Principle of Legal Moralism

The debate of relationship between law and morality gives rise to a number of principles and one of these principles is 'Legal Moralism'. The principle of legal moralism can be understood as, the duty of law is to criminalize what is held to be morally wrongful. As R.A. Duff puts it, it is a "*Family of views about the proper aims and scope of the criminal law according to which the justification from criminalising a given type of conduct depends on the moral wrongfulness of that type of conduct*."[24] There are many proponents of legal moralism like James Fitzjames Stephen, Emile Durkheim, and most importantly Lord Patrick Devlin. The principle of Legal Moralism has been countered by H.L.A. Hart and J.S. Mill who also segregate between Legal Moralism and Paternalism. HLA Hart identifies Paternalism as the legal force through which an individual is protected from harm caused to himself by his own acts[25] while in moralism the consequence of the act affects other members of the society. Mill and Hart differ on their opinion towards Paternalism, with Mill criticising and Hart tolerating it.

Even though we have seen the differences between Moralism and Paternalism, one thing that is common between them is the coercive nature.

Morality and Formation of Criminal Liability

Before we move forward towards understanding the specific principles, we need to understand how morality gets enforced as a criminal liability.

[24]R.A. Duff, 'Towards a Modest Legal Moralism' (*University of Sterling*)<https://dspace.stir.ac.uk/bitstream/1893/22002/1/Duff%20Legal%20Moralism%200612.pdf>accessed31 January 2020

[25]HLA Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 31

As discussed earlier, not all immoral acts are criminal in nature. Hereby, we need to understand three points that gives a few immoral acts the power to give rise to criminal liability.

Relationship between Immorality and act

As Mewett argues[26], criminal law does not concern itself with the mental element of morality, but only the act. When a person is accused of an immoral act, the immorality is not in the mentality of the act, but in the act itself. A man who is held of acts that are allegedly immoral, will not be called immoral if he only keeps in it his mind and does not act upon it.

Thus, immorality does not lie in the mental element of a person rather in the physical act. When a person is called immoral, it means he is actively engaging in the immoral act rather than just keeping in his mind about it. This however is a general principle and people who are habitual offenders are out of its purview.

Thereby, Criminal Liability when arises, the foundations always lays on immoral acts.

Role of Society in the formation of Criminal Liability

The very next agency that gives morality the capacity to produce criminal liability is the very society in which someone exists. Lord Devlin was a vocal debater for homosexuality law in Britain and argued that public morality should be upheld. According to Lord Devlin,[27]The society has the right to protect its own existence. And there are few moralities that is held by the public and it keeps the society together. Thus, when someone goes against these public moralities, it means that he or she is breaking the bond that keeps the society together. Hence, since the society has the right to protect its existence, and any deviance leads to erosion of public morality that breaks the society's bond, the society has the right to use the law and declare such deviance as criminal in order to protect its own existence.

[26] Allan W. Mewett, 'Morality and Criminal Law' (1962) 14 The University of Toronto Law Journal 213, 213

[27]Ronald M. Dworkin, 'Lord Devlin and Enforcement of Morals'(1966)75 Yale Law Journal 986, 989

However, this right is not unlimited and the law should not only be resting on 'Disgust'. There should be a real feeling of re-probation, and the disgust felt should be real instead of a manufactured one[28]. This differentiates the criminal deviance from the moral deviance and gives power in the hands of the society to regulate what is 'criminal'. Emile Durkheim argued that a crime is not a crime independently, but because it is condemned in the society. It is immaterial if an act does any harm to any person or not, the very fact that it is against the common conscience or morality of the society makes it a wrong inherently.[29] Durkheim also viewed punishment and its proportion as nothing but a reaction to the breach of common conscience and it is a symbolic expression of the outraged common conscience.[30]

Role of State in the formation of Criminal Liability

Taking the approach of the positive law school of thought, we can assert that the state or the competent law-making authority is a primary tool in choosing the moral foundation on the basis of which a criminal liability is formed. Even though much criticized, John Austin even when segregated Law from Positive Morality, also admitted that sometimes Law and Morality and so tangled up, that it becomes difficult to separate them. In his own words, it can be understood that "*it is sometimes expedient to include in the corpus juris a part of what is really positive morality, because positive law is not intelligible without it*".[31]

Jeremy Bentham himself said that no one can be under a threat without the threat of punishment. This threat becomes a part of the obligation, and therefore when it comes with a decree from the sovereign, it makes a 'wrong' synonymous to 'Punishable'.[32] Hence, when the state forms a law, it also chooses the morality on the basis of

[28] Eugene V. Rostow, "The Enforcement of Morals'(1960) 18 (2) Cambridge Law Journal 174, 180
[29]H.L.A. Hart, 'Social Solidarity and Enforcement of morality' (1967) 35 (1) The University of Chicago Law Review 1, 6
[30] ibid 7; *See Also*, Emile Durkheim, *The Division of Labour in Society*(3rd edn, Simpson transl. 1964) 90
[31] Isabel Turégano Mansilla, 'Reconstructing Austin's Intuitions: Positive Morality and Law', in Michael Freeman and Patricia Mindus (eds.), *The Legacy of John Austin's Jurisprudence* (Springer, 2013) 291, 298
[32]Andrew Stumpff Morrison, 'Law is the command on Sovereign : H.L.A. Hart Reconsidered' (2016)29 Ratio Juris 364, 365

which the law stands and is intelligible, thus being a key factor laying the foundation of a criminal liability.

Also, When the said act has been made into a crime, a criminal liability arises out of it, and along with the moral reason because of which it was made into a criminal act, a new morality is attached with it, that is the moral duty to obey the law, according to Dworkin.[33]

For a law to uphold its function in the society, it clearly has to be understood that it serves not only the purpose of the state but also of the society and to classify something immoral as criminal, it should stand to the test of both society and the state. An immoral act no matter how it is perceived by the society, cannot be called a crime till it is given a criminal sanction by the state, and an act that is found to be morally just if is criminalized, it falls in the category of over-criminalisation.

Principles for Identifying the Criminal Liability

The prior discussion had established that there are various moral underlines that gives rise to a criminal liability, however not everything immoral is criminal. One needs to apply different principles in order to understand what immoral acts are criminal in nature and any person found doing any such act should be held criminally liable.

These theories and principles are discussed as below -

Devlin's Theory of Public Morality

Lord Devlin propounded this theory of his as a criticism of the Wolfenden Committee Report that recommended that it is not the business of law to regulate the private life of people and hence homosexuality should be decriminalised.[34] Devlin propounded that the society is based on many moralities that are shared and hold the entire society together, and any act that shakes this morality can lead to the disintegration of the society if it is allowed to continue.[35]

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[33]Carlos S. Nino, 'Dworkin and Legal Positivism' (1980) LXXXIX Mind 519, 519

[34] 'Wolfenden Report, 1957', (*British Library*)<https://www.bl.uk/collection-items/wolfenden-report-conclusion>accessed31 January, 2020

[35]Ronald M. Dworkin (n 27) 987

Lord Devlin also gave three principles that makes this theory flexible enough to continue with the progressing society.[36] These principles are-

1) *There must be toleration of maximum individual freedom.*

The principle says that there should be tolerance of an immoral act in the society till the point it is not causing the disintegration of the society. Once the act starts causing the destruction and damage to the shared public conscience, it loses the freedom and the society gets the right to protect its integrity by declaring the act as criminal.

2) *The shift in tolerance must be recognised.*

Devlin argued that the law and society should also recognise that the tolerance of society is also dynamic in nature and with time, they keep on changing. The law should keep on changing on the basis of the changing social tolerance towards acts that are against the public conscience in order to be just and effective.

3) *Privacy should be respected.*

The third principle of Lord Devlin is that the privacy of individual is to be given importance. It however is not sacrosanct, and things done in private sphere that do not conform with the public morality can be made criminal, depending on its impact on the societal integrity.

To identify what public morality is, Devlin uses his wit as an English Judge and propounds 'the twelve men' rule. According to Devlin, if at anytime, twelve people from the society are drawn out randomly, and they unanimously agree that something is moral, then it is safe to call it is the conscience of the public and it forms a part of the public morality.[37]

Hart's theory of Criminal Liability.

H. L.A. Hart is a legal positivist however, he lays some emphasis on morality as well and does not agree to the 'Command Theory' of Austin and argues that people follow law for a moral obligations mostly, and not due to coercion.[38]

[36] Hamish Stewart, 'Legality and Morality in H.L.A. Hart's Theory ofCriminal Law'(1999) 52 SMU Law Review 201, 213

[37] *Eugene v Rostow* (n 28) 177

[38] William C. Starr, 'Law and morality in HLA Hart's Legal Philosophy' (1984) 67 Marquette Law Review 673, 683

When it comes to role of morality in giving rise to criminal liability, it can be observed that it is not in the same line with his theory of criminal law.[39] The theory of Hart regarding Morality and criminal liability is very much visible in the Hart-Devlin debate and his book *Law, Liberty and Morality*. Hart argues that treating paternalism and moralism together as one is a misconception.[40] Hart in a way advances the 'Harm Principle' that was advocated by J.S. Mill[41] and according to which, as Mill puts, *"The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others"*.[42] The Harm principle restricts the moralistic and paternalistic argument that the state has the power to enforce what is morally correct.

Hart holds that while moralism is unacceptable, paternalism is necessary policy and criticises Mill for being unnecessary afraid of Paternalism.[43] He argues that paternalism should exist not because society finds a few things a person does to himself as immoral, but because there are various elements that diminish the value of consent and a person might take a decision without appreciating the consequences, or to pursue temporary desires.[44] Further, Hart argues that with legal moralism, there is a risk that the majority will start dictating how everyone should live. Merely because we adhere to democratic principles does not mean we will maximise the risk.[45] Further Hart argued that enforcement of legal moralism would lead to unjustified brake on social mores.[46]

Hart argues that Legal moralism means simply two things, first that the societal morals cannot change, which is absurd, and second that one cannot challenge the view of the majority, which is contrary to the principle of democracy.[47] He argues that without the law enforcing

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[39] Allan W. Mewett (n 6) 216
[40]Heta hayry, 'Legal Paternalism and Legal Moralism: Devlin, Hart and Ten' (1992) 5 Ratio Juris191, 194
[41]J.S. Mill, *On Liberty* (J.W. Parker and Sons, London, 1859)
[42]ibidat 6
[43]ibid at 195
[44]Christine Pierce,'Hart on Paternalism' (1975) 35 Analysis 205, 205
[45]Heta Hayry (n 39)209
[46]Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 The Journal of Ethics 21, 23
[47] Hamish Stewart (n 36) at 215

public morality, it is possible that societal morals would develop in future, which otherwise would be hindered with legal moralism.[48]

Feinberg's Offense Principle

Joel Feinberg formulates a very interesting principle called the Offense principle in the volume 2 of his book *The Moral Limits Of Criminal Law*.[49]Offense, as per Feinberg is a mental state of a disliked kind, for e.g. Shame, Disgust etc. Feinberg argues that it is justified to criminalise acts that are offensive (not necessarily harmful) to the people apart from the actor himself. The Offense Principle is a principle for acts that are not Harms, and are necessarily less serious in nature than them. For a person to be offended, he or she must have 1) Suffered a disliked mental state, 2) that has been caused by an act that can be attributed to someone, 3) he resents the other person for causing him offense.

In order to explain his idea of what offense can be, he first gives 31 stories as examples, and then highlights six different types of offenses, that are ,

1) Affronts to senses,
2) disgust and revulsion,
3) Shock to moral, religious and patriotic sensibilities,
4) Shame, embarrassment and anxiety
5) Annoyance, Boredom and Frustration, and
6) Fear, humiliation, anger.

Feinberg argues that it is state's business to regulate acts that are offensive to the senses, which in common, generate a sense of extreme disliked mental state, but it should not be dealt as seriously as the acts covered in the Harm Principle.

Fein bergargues thatwhen it comes to punishment, it should be based on responsibility and blameworthiness, and when it comes to

[48]HLA Hart (n 29) 13
[49]Joel Feinberg, *The moral limits of criminal law (Book 2)* (OUP, London, 1987)

blameworthiness, it derives its relevance from the essential function of punishment, that is acting the symbolic device of public reprobation.[50] Even though the justifying aim of a rule is to prevent private or public harm, Feinberg claims that criminal law, "*whether or not it be assigned a moral justifying aim, employs an inherently moral (judgmental) constitutive process, and that process, in conjunction with the formal principle of fairness, is what underlies the concern with blameworthiness in sentencing.*"[51]

Duff's Theory of Criminalisation

In his book *Answering for Crime,*[52] R.A. Duff argues that we, are moral agents, and thus are responsible for being punished for some morally wrongful act. Duff states that since we are a moral agent, we are answerable to other moral agents as well, in light of being together in a moral community.[53]

Duff states that legal moralism holds one 'important truth' that criminal law's primary concern is moral wrongdoings. Its function is to identify certain moral public wrongdoing and give appropriate punishment for it (as part of retributive theory of punishment). Duff argues that there are many moral wrongdoings like betraying a friend, insulting a colleague over his ideas, but we are not responsible for them as it is held that it is not 'Law's business'. What differentiates moral wrongdoings and criminal acts is their nature of being a 'Private' or 'Public' wrong. Duff discusses Mill and Feinberg's Harm Principle to argue that the criminalisation should be of any act that causes or creates a risk of harm 'To others', making it a public wrong.[54]

Duff also argues that Moral wrongfulness is not the reason for criminalisation but a justification. The reasons lie in other factors, like harm, however, it is justified by the moral wrongfulness of the conduct.[55]

[50]Joel Feinberg, "Unswept Debris From the Hart-Devlin Debate' (1987) 72 Synthese 249, 254
[51] ibid 257
[52]RA Duff, *Answering for crime: responsibility and liability in criminal law* (Hart Publishing, London, 2009)
[53]ibid at 47
[54]ibid at 82-89
[55]ibid

The act that should be criminalised, should necessarily be immoral, however, it should also cause harm. If there is no harm to others, there is no crime (Here he takes harm as a setback of interests). Duff thus opposes the legal paternalistic approach, and holding immoral acts as 'private' and 'public', argues that we are moral agents, and only answerable to other moral agents for the moral wrongdoings that causes a setback to others.

Indian Justice and Legal Moralism

As discussed earlier, the Indian society has always recognised the role of morals when it comes to law. We have already observed how morality played role in the ancient laws of India. When it comes to India, Constitution of India also realises the role of morality in Law. The term 'Morality' finds mention in the Constitution four times. First, as a ground of reasonable restriction on Freedom of Speech and Expression,[56] then on right to form associations or unions[57] as a restriction on Freedom of conscience and free profession, practice and propagation of religion[58] and Lastly, right to manage religious affairs.[59] It is thus evident that the Constitution does not consider all aspects of law to be detached from Morality. However there are specific offenses where morality plays a major role and can be looked into to understand the developing stand of India on the role of morality in Law.

Obscenity

When we look into the statutory Laws of India, going by the chapter heading[60] of Section 292 of the Indian Penal Code, it is a section that is there to protect the public morals. The section criminalises distribution of obscene material and thus tries to fulfill its duty to conserve the moral welfare of the state.[61] it was introduced through Obscene Publications Act[62] to give force to International' Convention

[56] Constitution of India 1950, art 19(2)
[57] ibid at art 19(4)
[58] ibid at art 25(1)
[59] ibid at art 26
[60] Indian Penal Code 1860, Chapter IV
[61] H.S. Gaur, *Textbook on the Indian Penal Code* (6th edn, Universal Law Publishing, 2016) 405
[62]Obscene Publications Act (7 of 1925)

for the suppression of or traffic in obscene publications[63]. In the 'Indecent Representation of Women (Prohibition) Act,[64] it has been recognised that indecent depiction of women can "*deprave, corrupt or injure the public morality or morals.*"

The idea that immorality can 'corrupt' people reflects old English judgements, particularly the *Shaw vs. DPP Case.*[65]In the case of Shaw, the appellant was found publishing obscene materials which is details of the prostitutes in London, living off their money and conspiring with the advertisers and was held guilty of 'corrupting the public moral'. Lord Simonds in the decision opined that "*there remains in court of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for*".[66]

The crime of corruption of morale isn't a crime totally unheard though. Socrates was held guilty of corrupting the youth and ultimately was given the punishment of death.[67]

The principle thus, isn't something that is totally alien to the jurisprudence of criminal liability. It maybe contested that the judgement of *Shaw v DPP* is against the very basic legal maxim of '*Nulla Poena Sine Lege*',[68] but however, it cannot be ignored that the case highlighted the notion of common law that, conduct that are aimed towards corruption of public morale are misdemeanour.[69]

Even in the case of *R v Hecklin*[70], the test of obscenity was based on whether an alleged obscene object has the capacity to immorally influence and corrupt the minds of those whose minds are open to such

[63] (1923) League of Nations, Treaty Series , vol. 27, p. 213
[64] Indecent Representation of Women (Prohibition) Act, 1986 (No. 60 of 1986)
[65]*Shaw v DPP* (1962) AC 220
[66]Allan W. Mewett (n7) at 215
[67] ibid 214
[68]K.W. Lidstone, "Social Control and Criminal Law' (1987) 27 The British Journal of Criminology31, 31
[69]Allan W. Mewett (n7) at 214
[70]*Regina v Hicklin* (1868)LR 3 QB 360

immoral influences. If yes, then the object would be held to be obscene and criminal in nature.

Also it has been noted that many sexual offenses are premised upon the notion that they can morally corrupt the victim or accomplice.[71] Even acts like selling cigarettes to minors, selling pornography and other similar acts are also held to be criminal precisely on the same ground that they have the capacity to morally corrupt the victim. Thus the Indian Statutory laws not only affirm the pre-independence British notion that laws have the duty to protect the public morals, but also that things actually are capable of corrupting public morals. In 2015, Comedy group AIB ran into trouble for hosting a roast show[72] and FIRs were demanded on the allegation that youth gets inspired by actors using filthy language and is against the Indian Culture.[73]

Courts in Indian scenario however have diluted the role on morality and the notion that everything that appears to be obscene needs to be criminalised. Even though the court initially in the matter of *Ranjit D. Udeshi*[74], which was the first case before the apex court "*invoking the constitutional guarantee against the operation of the law regarding obscenity"* accepted the Hecklin Test and Justice Hidayatullah held a book to be obscene on the ground that all the explicit content adds no social gain and there is nothing good coming out of the book as no one in the machine-age is interested in the secondary themes, The court in the case of *Aveek Sarkar*[75] rejected the 'Hecklin Test' and propounded the 'Community Standard Test' and held that "*obscenity has to be judged from the point of view of an average person, by applying contemporary community standards*".[76] The court also noted that the actual message should be kept in mind and cited *Bobby*

[71]Allan W. Mewett (n7) at 216

[72] Saurabh Gupta, 'AIB Roast runs into trouble with Maharashtra Government' (*NDTV*, 02 Feb 2015) <https://www.ndtv.com/india-news/aib-roast-to-be-investigated-for-obscenity-says-maharashtra-government-736454>accessed31 January, 2020

[73] 'A complete timeline of AIB Knockout: Who said what', (*Hindustan Times*, 17 Feb 2015) <https://www.hindustantimes.com/entertainment/a-complete-timeline-of-aib-knockout-who-said-what/story-qgTgpKcpp4JWK4lBQfqLeM.html>accessed31 January, 2020

[74]*Ranjit D. Udeshi v State Of Maharashtra* 1965 SCR (1) 65

[75]*Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257

[76]ibid para 24

Art International & Ors. v Om Pal Singh Hoon[77] in which the court looked into matter of the movie 'Bandit Queen's scene where there was depiction of nudity and while deciding the matter noted how the scene with nudity in the *Steven Spielberg* movie *Schindler's List* was meant to invoke tears, pity and horror, and only the pervert would be aroused in a scene like this.[78]

Thus, we can see a decline in Legal moralism with which the Court actually began and now instead of looking into social gains, they court goes into observing the real intent behind the act or the alleged obscene content. This allows an individual to bring off-beat content more towards the mainstream without the society dictating him on morality and only those content that by their original intent are perverted in nature, would be held criminally obscene.

Bigamy

Prior to the enactment of the Indian Penal Code, Bigamy or even polygamy precisely wasn't an offense in traditional Hindu or in Muslim Law.[79] The introduction of Bigamy as an offense, came again from the British idea of immoral practice. Before Macaulay was about to draft the IPC, England had Offenses Against Persons Act, 1928 to outlaw bigamy.[80] Thus it is no far-stretched assumption that the criminalisation of Bigamy and Polygamy did not originate in India due to Indian morals, but British.

The IPC has worded the bigamy law in such a way that even though it is secular in text, When the IPC was eventually drafted, for all the practical purposes, only Christians would come under its purview,[81] however with subsequent passing of laws that made second marriage void among Hindus,by the virtue of the Section 17 of Hindu Marriage

Act[82] a Hindu (along with Sikh, Jain and Buddhist) cannot keep two wives, but a Muslim male can have upto four wives. Also a Muslim

[77]*Bobby Art International & Ors. v Om Pal Singh Hoon* (1996) 4 SCC 1
[78]ibid at 13
[79] Kiran B. Jain, 'Vice of Bigamy and Indian Penal Code: Ramifications of an Archaic Law' (1990) 32 (3) Journal of Indian Law Institute 386, 387
[80]ibid 387
[81] 'Offense of bigamy under Indian Penal Code, 1860 (*Shodhganga*) <https://shodhganga.inflibnet.ac.in/bitstream/10603/201840/7/07_chapter%202.pdf> Accessed31 January, 2020, 16
[82] The Hindu Marriage Act (Act 25 of 1955)

female too cannot have two husbands. The court in the case of *Venugopal K. Aged 42 v Union of India*[83] has held that its the fifth marriage for which a Muslim male can be held guilty under Section 494 IPC.

It is worth noting that this is same interpretation of Bigamy Law in Israel too which has been modeled on the pattern of English Law and Muslims (Moslems) are immune from the law and are allowed to marry four times.[84] Even though the Gujrat High Court also agreed upon the US Supreme Court's observation that polygamy is injurious to the public morals,[85] the criminality of such act, to an extent, is dependent on the religion of the individual, and thus, even though the immorality is uniform, the criminality isn't, which defeats the notion of Criminal Law itself.

Sutherland notes, "*Uniformity or regularity is included in the conventional definition of criminal law because law attempts to provide evenhanded justice without respect to persons. This means that no exceptions are made to criminal liability because of a person's social status; an act described as a crime is crime, no matter who perpetrates it.*"[86]

In the case of Bigamy, we observe the criminal law breaking its nature and enforcing morality selectively through Section 494 of IPC, which in the Legal moralist perspective fits no scholar or jurist.

<u>Adultery</u>

Under Section 497 of the IPC, Adultery was an offense in India till the landmark Judgement of Joseph Shine[87] in which it was decriminalised. Justice A.M. Khanwilkar went into the religious texts of Judaism and Christianity and noted that even though adultery is a crime in the ten commandments, however when an adulterous woman

[83] WP(C) No. 4559 OF 2015
[84] P. Shifman, 'The English Law of Bigamy in a Multi-Confessional Society: The Israel Experience' (1978) 79 (1) The American Journal of Comparative Law 79, 79
[85] *Jafar Abbas Rasool Mohammad Merchant v State of Gujrat* Criminal Misc. Application No. 14361 of 2010, Para 32
[86] Edwin H. Sutherland and Donald R. Cressey, *Criminology*(10th edn, Lippincott, 1978) 6
[87] *Joseph Shine v Union of India* WP (Cr) No. 194 OF 2017

was about to be stoned to death, Jesus said 'He that is without sin among you, let him first cast a stone at her'.[88] Then he further goes into Quran and finds Adultery as an offense punishable by death but in Gautama Dharmasutra, the punishment for adultery is two years of chastity.[89]

The State took the classic Devlin's argument that acts which outrages the modesty of the society ought to be criminalised[90] However, the court noted the J.S. Mill approach towards legal moralism that held that the act of Adultery is morally wrong but it is not the sufficient condition to criminalise it.[91]

The said judgement has to be one of the most evident decay of Legal Moralism in India as the court admitted that an act even though morally wrong is not criminal in nature.

Homosexuality

Homosexuality is the centre of all the debates for and against legal moralism. In fact, the debate between Lord Devlin and HLA Hart actually started when the Wolfenden Committee Report opined that Homosexuality should not be criminalised and it should not be the affair of the state to regulate what an individual does in his private affair and hence, the Supreme Court of India in details observed the Devlin-Hart Debate in the judgement of *Navtej Singh Johar*[92]that eventually led to the historic decriminalisation of Homosexuality in India.

The court held that constitutional morality and is above social morality and noted that "*It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality.*"[93] The court quoted Dr. Ambedkar, who in turn quoted George Grote's

[88] ibid *A.M. Khanwilkar J.* at para 3
[89] ibid para 4-5
[90]*Joseph Shine* (n 86) at *Indu Malhotra J.* para 9.2
[91] ibid para 16.2
[92]*Navtej Singh Johar v Union of India* WP (Cr.) No. 76 OF 2016
[93] ibid para 116

definition of Constitutional morality as "*a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control…"*.[94] Quoting Dr. Ambedkar, the court noted that Constitutional morality is not something natural, rather it is cultivated and this remains to be the duty of the state, including Judiciary to pave way for it.[95] The Court quoted the Judgement of *Government of NCT of Delhi vs Union of India*[96] where it was observed that Constitutional morality requires "*existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain*".[97] The court noted the importance of the word 'Fraternity' as a constitutional goal and quoted Dr. Ambedkar again, stating that "*There should be varied and free points of contact with other modes of association. In other words there must be social endosmosis. This is fraternity, which is only another name for democracy".*[98]

It is pertinent to note that in the entire judgement, the court, like adultery, did not accept homosexuality or any other sexual orientation as immoral, rather held it as an innate feature of an individual's identity that cannot be changed at will.[99] The reliance of the entire judgement has been made on the supremacy of the Constitutional Morality over Social morality.

Triple Talaq

In the case of *Shayara Bano*[100] the Court in 3:2 ratio historically decided that the practice of 'Talaq-e-biddat' was unconstitutional in nature. In the majority judgement, the court noted the ruling of *Javed v State of Haryana*[101] in which it was held that the legislation is competent to regulate or prohibit any practice on the ground of public

[94] ibid para 112
[95] ibid para 114
[96] Civil Appeal No. 2357 OF 201
[97] ibid at para 12; *See Also*, *Navtej Singh Johar* (n 92) para 142
[98] *Navtej Singh Johar* (n 92) para 143
[99] *Navtej Singh Johar* (n 92) *Indu Malhotra J.* at 46
[100] *Shayara Bano v Union of India* WP(C) No. 118 of 2016
[101] Writ Petition (civil) 302 of 2001

order, morality and health in the interest of social welfare and reform. Merely because a practice is permitted in a religion does not mean that it will gain sanctity.

The court observed that the practice of triple talaq is not only violative of fundamental right and is arbitrary, it is also sinful under the Hanafi School itself which tolerates it.[102]

Working on the judgement of the Supreme Court, the Legislation criminalised the practice of Triple Talaq[103]. The statute is one of the contemporary instances where the state criminalises something that has been held contrary to public morality and raises the question as to whether such criminalisation is the state's outright imposition of 'Public morality' over the private affairs of Individuals and whether such Legal moralism is contrary to the principle of individual liberty and minority affairs and imposition of majority's opinion on minorities in the name of democracy, as HLA Hart feared, or is it legitimate.

Decriminalisation of Suicide and introduction Passive Euthanasia

Section 309 of the Indian Penal Code criminalises attempt to suicide, however with the Mental Healthcare Act, 2017[104] a presumption of mental stress has been introducted and unless and until proved otherwise, a person cannot be prosecuted under Section 309 of IPC.[105]

The battle to end the state-forced paternalism towards suicide has been a long one. In the case of P. Rathinam[106], the Supreme Court held Section 309 IPC unconstitutional as violative of Article 21 as it criminalises right to die. The court held that the contour of morality broad and hence it is very hazardous and bold to say that suicide per se is a criminal act. Later in the matter of Gian Kaur[107] the Section was again held Constitutional. In the matter of Aruna Shaubaug[108]the Supreme Court introduced Passive Euthanasia and framed guidelines

[102]*Shayara Bano* (n 99)341
[103] the Muslim Women (Protection of Rights on Marriage) Act, 2019 (NO. 20 OF 2019) s. 3
[104] Act No. 10 of 2017
[105]ibid s. 115 (1)
[106]*P. Rathinam v Union of India* 1994 SCC (3) 394
[107]*Smt. Gian Kaur v The State Of Punjab* 1996 SCC (2) 648
[108]*Aruna Ramchandra Shanbaug v Union Of India* WP(Cr.) No. 115 OF 2009

for it, and in the matter of Common Cause[109]the Court upheld the judgement of Aruna Shaubaug.

The introduction of Euthanasia and watering down of Attempt to Suicide in India is a decline of paternalism, something which neither Devlin nor Hart would have supported, but Mill would have. Duff points that the problem with Euthanasia is that if it is permitted then the definition of murder is to be changed, and instead of murder being killing a human, it will have to be killing a human without his consent.[110] But when it comes consent, Devlin argued that there is no question of consent as killing someone is immoral, so even if there is consent, society can still impose morality through Law while Hart believed that in euthanasia, there are many factors that can diminish the quality of consent. Mill differs from both and opined that it should not be a matter of state till someone else is harmed.[111]

CONCLUSION

The distinction between Law and morality has always been there in India. The *Yajnavalkya Smriti* deals with Law and morality in different chapters[112] and the IPC mentions the term 'Unlawful and immoral purposes' at four different places.[113]The word 'and' acts as the conjunction to signify that Code recognises the difference between unlawfulness and immorality, however, immorality alone cannot be sufficient. The court in the case of *Mr. 'X' vs Hospital 'Z'*[114]has even recognised that "*moral considerations cannot be kept at bay"* and that "*Rights that advance public interest or morality would be enforced*".

But, Upon an analysis of different crimes, we can clearly see a decline in the legal moralism as well as the paternalism that used to prevail in the Indian Justice System with occassional exceptions. The most evident form of decline of Legal moralism would be the watering

[109]*Common Cause (A Regd. Society) v Union Of India* WP(C) NO. 215 OF 2005
[110] R.A. Duff (n 51) 212
[111] Christine Pierce, 'Hart on Paternalism' (1975) 35 (6) Analysis 205-207
[112] 'Ancient Indian Jurisprudence' (*Banaras Hindu University*) <http://www.bhu.ac.in/mmak/resent_article/JusticeKatjusLec.pdf>accessed31 January, 2020, 6
[113]*See*, Indian Penal Code1860, s 361, 372, 373
[114] Appeal (civil) 4641 of 1998

down of obscenity laws as well as the decriminalisation of Adultery. The courts are now more open towards separating morality from Law in personal affairs, especially marriages. In *Payal Sharma vs Superintendent*[115] the Court held that Live-in-Relationships maybe immoral according to society, but its not criminal and there is a difference between Law and Morality.

The criminalisation of Triple Talaq however is a strong mark of legal moralism but there is not much to fear from such move if we consider Hart's reason for opposition of Legal Moralism that it would restrict the development of new morals. The court in close analysis has already found that Triple Talaq in Islamic law itself is sinful. Something that is against the values of Quran itself cannot be forseen as developing a new moral but only into a sinful custom.

When it comes to bigamy, the Indian Legal system is actually and evidently struggling to enforce morals while maintaining personal laws, and this is why even though Bigamy is held immoral, it is not an offense for muslims and criminal law is breaking its nature of being a uniform law in order to permit selective legal moralism, which is not appropriate in any case.

There has been significant decline in Paternalism in the legal system too. Since prostitution is not a criminalised in India[116] and with the watering down of Attempt to Suicide and introduction of Passive Euthanasia, the fall in Paternalism is evident. The decriminalisation of Homosexuality *per se* isn't a decline in Paternalism or moralism though, rather it is the recognition of change in societal morals. The court recognised Homosexuality as something that is natural, unlike adultery where the court straightforward held it be immoral, but decided to decriminalise it as it wasn't criminal in nature. It is pertinent to note that the part of Section 377 that criminalises Beastiality is still operative.[117] A true decline in Legal moralism in the matter of

[115] C.M. Habeas Corpus Writ Petition No. 16876 of 2001

[116] Tulsi Sonwani, 'Prostitution in Indian Society: Issues, Trends and Rehabilitation (*UGC*) <https://www.ugc.ac.in/mrp/paper/MRP-MAJOR-SOCI-2013-25158-PAPER.pdf>accessed31 January2020

[117]*Navtej Singh Johar* (n 92) Conclusion iii

homosexuality would have been had the court would have opined that Gay relationships are unnatural, but its not law's business to govern it. A very vocal supporter of this view is Hon'ble Justice Markandey Katju who through his blog opined the same.[118]However, the court even when opined that societal morality cannot be enforced against constitutional morality, it had to declare Homosexuality as not immoral or unnatural. This isn't a decline in moralism, rather recognition of change in societal morals, something that Devlin himself propounded to make moralism elastic to changes.

Coming to the most relevant Jurists to associate with Indian Legal moralism, with the existence of watered-down Obscenity law, its clearly leaning towards the idea of Feinberg and with a decline in Paternalism but holding up with diluted Moralism, the theory of R.A. Duff fits the Indian Legal System. The Court in the case of *Koppula Venkat Rao*[119] has alreadyheld that "*Moral guilt must be united to injury in order to justify punishment*" which precisely is Duff's theory of criminalisation that Morality is the justifying factor in punishment and not the reason for it. Just like the court, he also emphasized on actual harm or injury as the reason for criminalisation rather than only morality.

With the decline in both, Moralism and Paternalism with exceptions in matter of Bigamy and Triple Talaq, the court clearly cannot hold and follow Hart, Mill or Devlin. R.A. Duff along with Feinberg thus, stands to be the most suitable jurist when it comes to the role of morality in Law as the Indian Legal system continues to strive for maximum freedom while not discarding morality completely.

"*Two things fill the mind with ever new and increasing admiration and reverence, the more often and more steadily one reflects on them: the starry heavens above me and the moral law within me.*" - Immanuel Kant[120]

[118] Markandey Katju, 'Gay Relationships and Gay Marriages' (*Satyam Bruhyat - Justice Katju*, 23 May, 2015)) <http://justicekatju.blogspot.com/2015/05/850-pm-23.html>accessed31 January 2020

[119] Appeal (crl.) 84 of 1998

[120] Immanuel Kant, *Critique of Practical Reason* (Mary Gregor tr. Revised edn. CUP 2015) 129

RESOURCE RIGHTS AND FOREST GOVERNANCE (IMPLEMENTATION OF FOREST RIGHTS ACT 2006 IN ASSAM)

Priyanka Sarmah[1]

Abstract

The creation of the governance of forest was initiated from the colonial period. Prior to the advent of the Britishers forest was treated as a common property resource which did not held any restriction for the communities.The question of governing the forest sows the seeds of conservation later during the 19th century. The trajectory of resource extraction to conservation paved the foundation of the human- wildlife debate torn between the human-centric and the park-centric approach. This paper will try to examine the nuances of the man and nature relationship altering from co-existence to conflict with the growth of stringent rules and regulations of forest governance. The management of forest resources through conservation policies was a part of the colonial rule which continued its legacy in the post - colonial period as well. The difference laid in the fact that during British period forest resources were extracted for profit generation while in the later period conservation was the core motive. This continuation of conservative approach gave rise to people – centric and park centric debate arising dissatisfaction and discontentment among the local communities. Through this paper an attempt would be made to understand the coherent efforts made for effective decentralization of forest governance, with the initiatives of Joint Forest Management in 1988and its uneven implementation. To undo the historical injustice Scheduled Tribes and the Other Traditional Forest Dwellers (Recognition of the Forest Rights) Act 2006 known as Forest Rights Act (FRA)2006 which hailed of providing rights to land and resources within the forest. This paper looks at the various dynamisms of land rights of forest dwelling communities in the forest surrounding Guwahati city.

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Keyword: Human- Wildlife debate, Joint Forest Management, Other Traditional Forest Dwellers, FRA2006

INTRODUCTION

The livelihood of 100-250 people are directly or indirectly intertwined with forests in India where the people stays in close proximity with the forests.[2]These people derive their basic amenities like fuelwood, timber for domestic purposes, medicines and the everyday necessities of life.[3] The question of ownership, management, control, use and distribution of resources all began with the governance of forest.However, the advent of the Britishers shattered the common property resource with taxation. The resources which were commonly used by the indigenous people for their subsistence activities earlier became a subject of state interest during colonial period. The forests were perceived as sacred abode of deities fulfilling the diverse need of food and shelter for the people was altered by the commercial exploitation of forest by the Britishers. The introduction of the whole series of actsand policies curtailed the customary rights of the local communities through the restrictions and regulations. 'Jungles' got transformed into 'forest' during this period with the beginning of the process of reservation. The former indicated untamed wilderness and nature while the latter means the imposition of rules and regulations on nature.[4]The period from 1867 to 1927 marked a drastic phase of colonial rule for the legal control of the forest resources. With these stringent acts and policies the traditional rights of the local communities decimalized thus ascended the governments control over the forest resources.[5]

Colonial Imperialism and Forest's in India

The whole gamut of introduction of acts and policies began with the first draft of the Forest Act of 1865[6] which culminated the total states

[2]Sarachchandra Lele, 'Rethinking Forest Governance: Towards a Perspective beyond JFM, the Godavarman case and FRA'(2011),96

[3] Madhav Gadgil and Ramachandra Guha, *The Use and Abuse of Nature*(2000/2010), 148

[4] Arupjyoti Saikia, *Forest and Ecological History of Assam*(2011)2

[5]ibid p135

[6]Ramachandra Guha, *Forestry in British and Post-British India: A Historical Analysis* (Nov. 5-12,1983)1940-47

control over the forest resources where vast pacts of forests land was brought under imperial rule for 'scientific management' and 'timber extraction'.[7] India's jungles were started to be used as spots of sports hunting, timber extraction for the construction of railway tracks and cleared the lands for cultivation of crops. The lands which belonged to the local communities for whom the conservation of forest was equally important along with the subsistence as their livelihood is dependent on it. The Indian Forest Act of 1878 consolidated and categorised the areas having forest covers and wildlife habitation into three categories i) Reserve Forest ii) Protected Forest and iii) Village Forest. [8]The Indian Forest Act 1927 held the main objective of securing exclusive state control over forests to meet the demand of the timber for the construction of railways tracks and sleeping berths of trains. These lands were untitled and belonged to the local forest dwelling communities. With the introduction of these Acts state monopolized its regulations of use and appropriate restrictions to substitute and extinguish the customary rights. Felling of trees, removal of forest products, fishing, gazing of cattle's was punishable in the reserve forest. The local communities were allowed to collect the minor forest product and non timber forest product from the protected and village forest.[9] All these acts marked a phase of colonial struggle for legal control over the forest resources in India.

Effects of Imperialism in the Land of Assam: In Assam valley there was abundance of alluvial and rich fertile soil which facilitated surplus- yielding wet rice cultivation. This necessitated reclamation of agricultural land from the wasteland and the forest by the rule of semi-feudal Ahom system. The Ahom state under the corvee

[7]cf (n 3) 135

[8] The imperial rule to impose the state monopoly over the forest classified it into three categories Reserve forest is the land consisting of valuable trees where the state have full degree of control and protection, Protected forest consisted of the single species trees which need to be protected yet the movement of the communities are allowed to collect the minor forest products and non timber forest products, lastly Village forest includes those lands where from the people could take minor forest products, non timber forest products and can allow their cattle for gazing. This land can mainly be referred as the common property resource where the control of the state is comparatively less then RF and PF yet no rights or claims over the land are given to the people. Kalyanakrishnan Sivaramakrishnan, 'Colonialism and Forestry in India: Imagining the Past in Present Politics',(Jan, 1995)3-40

[9]ibid

labour (paik system)[10] provided agricultural lands to the peasants along with that they could supplement their subsistence product from the forest and wasteland as Commons.[11]The colonial rule demonstrated a drastic change in the landscape of Assam valley in the early and mid nineteenth century. It was during this period, with the introduction of tea plantation in Assam the 'jungles' and 'forests' got transformed into tea garden by the state annexure where large quantity of village commons and community forest land came under state's control. Under the Bengal Forest Act 1865[12] forest of Assam got classified into: Reserve Forest and Open or Protected Forest. The Assam Forest Regulation of 1891[13] provided more space for commercial exploitation of forest.

Another category of forest known as Unclassed State Forest (USF's) [14]was created by the colonial rulers which paved the path of settling of marginal peasants in the forest areas and they were allowed to practice agriculture therein in exchange of their labour for collecting timber and doing other activities to the colonial forest department. All these brought a threat to the Assamese peasant communities and also to the forest dwelling communities of Assam. However though in Assam the settlement of people are not seen directly within the forest but rather they stay in close proximity of the forest and are dependent on forest for collection of minor forest products, rivulets and grazing of cattle's.[15]

Forest Acts and The Beginning of Conservation Process

The same colonial legacy of forest management continued during the post colonial time. The forest department continued to exercise more and more power to manage forest for the economic and ecological reasons. The consciousness was spread that only forest official experts can manage and conserve the forest whereas the forest dwellers are

[10] A type corvee labour system in the Ahom semi- feudal economy where the adult male were obliged to render militant service to the state in return of which they are provided with cultivable land. Chandan Kumar Sharma and Indrani Sarma, 'Issues of Conservation and livelihood in a Forest Village of Assam'(2014)47-68

[11]Amalendu Guha, *Medieval and Early –colonial Assam : Society, Polity and Economy*(1991)3-34

[12]cf (n 5) 1942

[13]cf (n 9) 52

[14]cf (n 3)70

[15]Arupjyoti Saikia, 'Why Ignore History to Stall the Forest Rights Act 2006?'(2011)102

destroyers of the forest.[16] The new acts and policies were designed to meet the need of the state. Forest became a subject of national interest where the needs of the indigenous forest dwellers are subservient to the needs of the state. The first forest policy of independent India National Forest Policy of 1952[17] invariably failed to recognize the customary traditional rights of the forest dwelling communities. Further with the creation of the protected areas for conservation process lacked the seriousness of the dependence of the communities on the forest for their livelihood. This torn debate between the Human- centric and the Park-centric approach.[18]

The Indian Forest Policy of 1927 and the Forest Policy of 1988formed the basic institutional framework for forest governance yet failed to provide a clear definition of the term 'forest'. The term forest became ambiguous due to its subjectivity which facilitated the alteration of forest to non forest boundary and use.[19] Over- exploitation of the forest for commercial interest by the forest department and private institution along with the constant increase in the number of people depending on forest for their subsistence in the absence of alternative means of livelihood further depleted forests cover.[20]

Even after thirty years of Independence India could not assure the status of the forest dwelling communities. The stringent exclusionary policies pushed the people further away from the forest which comprised a part of their daily lifesubduing the voices of the local communities.[21]After the return of then Prime Minister Indira Gandhi from the Stockholm Conference on Human Environment 1972 the conservation of forest and environmental protection emerged as a national priority. Forest found place in the Indian constitution reflected in the Directive Principles of State policy. The National Wildlife Policy

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[16]Indra Munshi, *The Adivasi Question: Issues of Land, Forest and Livelihood* (2012)293-298
[17]cf (n 9) 2
[18]cf(n 15) 296
[19]Smriti Das, 'The Strange Valuation of Forests in India',(2010)16
[20]cf (n 15) 296-97
[21]Ramachandra Guha, 'How Much Should a Person Consume?: Thinking through the Environment' (2006)140

for India 1970 was formulated to reflect the growing awareness about the environmental degradation much of which was subsequently included in The Wildlife Protection Act 1972[22] followed the same pattern with more severe punishments. The burden of proof was further put on the communities referring them as 'encroachers'.[23] Forest turned to be sites of conflict between the people and the forest department from the time they were declared as protected area. The states monopoly control over the resources without recognizing the rights of the communities ignited the conflict. Activities like poaching and smuggling increased in the protected areas. Lack of access to resources and alienation from their land has resulted hostility of the communities towards the forest department.[24] Further there always existed tussle between the Forest and the Revenue department.

Critical Analysis and Conflicts

The process of conservation in India has drawn a long standing debate about the impact of human populations inhabiting the protected areas.The park-centric approach believes that forests should be protected as 'isolated entity'[25] without the people. On the other hand the human-centric approach argues that people must be considered integral part of the conservation process. The aims to create 'people-free zones' in and around the protected areas considering communities as outsiders of the ecosystem. In India forest and people are 'fluid entities'[26] where it is considerably difficult to create people free zone as communities inhabited in close proximity with forest.The implication of 'Western' conservation approach to the developing countries have adversely effected the livelihood needs of the local communities.[27]

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[22]cf (n 5)1943

[23]Archana Prasad, ' Environment, Development and Society in Contemporary India: An Introduction', (2008)58-61

[24]Ashish Kothari, ' Keepers of Forests: Foresters or Forest Dwellers?' (2003)1-2

[25]cf (n 9)48-50

[26] Krishna B Ghimire and Michel P Pimbert, 'Social change and Conservation: Environmental Politics and Impacts of National Parks and Protected Area', (2006)13

[27] Richard P Tucker, 'A Forest History of India', (2012)168

Historicising Land,peasant and Forest in Assam

The states of Assam by 1947 have experienced major depletion in the forest cover not only by expanding crop production and commercial timber extraction but also due to the introduction of tea plantation in the world market.[28] With the increase of the demand for tea in the global market it exerted a pressure in the forest land as huge upsurge of migrants from Jharkhand and Chotanagpur could be witnessed bringing a threat to the assamese peasant community. Howeverthe Britishers were seen adopting plans for the extraction of the forest produce.[29]

The two major events of 1897 and 1950 earthquake have drastically affected the geographical nature of the state. The 1950 earthquake massively decreased land available for cultivation. Historically also the region have witnessed tremendous pressure on the cultivable land as the combined pressure of several issues like the beginning of the tae and jute cultivation since 1838 along with the factors of flood and erosion. These two factors have resulted effective loss of the livelihood compelling the peasants to forcefully assert claims over state owned forest lands.[30]

Forest Dwellers Movement in Assam

The state through Wildlife Protection Act 1972[31] and Forest Conservation Act of 1980 etc continued to assert their authority over the forest land restricting the daily sustenance activities of the people like grazing, shifting cultivation, collection of firewood and Non- Timber Forest Products. [32]Restriction along with the degradation of the forest land exerted livelihood crisis upon the forest dwelling communities as

[28]cf (n 3) 157

[29]Hiren Gohain, 'Big Dmas, Big Floods: On Predatory Development', (2008) Economic & Political Weekly, Vol.43 Issue No.30

[30]Vasavi Kiro, Roma, Jarjum Ete, Arupjyoti Saikia and Ashish Kothari. 2010. "MOEF/MOTA committee on FRA: Implementations of FRA in Assam: report of field visit"(11th/14th July)9

[31]cf (n 5) 1943

[32]cf (n 3) 309

their access to the common property resource have affected their well-being. The other opportunities of livelihood are almost non- existent for these forest dwelling communities. [33]Altogether it produced a huge upsurge on the forest dwelling people which resulted in the growth of the forest dwellers movement in Assam. The movement have grown from Tengani- in Golaghat district since 2002. This politically mobilized movement demanded permanent tenural security of land to the forest dwellers which they have reclaimed couple of decades before.[34]

Status of Scheduled Tribes and Other Traditional Forest Dwellers in Assam

Drawing from the major literary works of the historians and anthropologist the spatial distribution of social structure of the tribal's and non tribals is comparatively complex in the context of Assam as compared to the rest of India. The socio- cultural isolation of the tribal's and non tribal's are rare and to differentiate the basic economic and social practices are barely difficult. In Assam a social homogeneous fabric is being formed between the tribal's and the non tribal's more specifically in the facet of land relations.[35]

Participatory Methods of Forest Governance

As argued by many conservationists the co-existed of the communities and the wildlife could exert a better sustainable forest management rather than the exclusionary model.[36] The period from 1980's to 1990's has witnessed drastic changes in the governance of forest. Further the Social Forestry 1976 introduced the scheme for plantation of quick species in all available private and common land outside the forest areas to ensure environmental protection. The process further widened the gap between the landlords and marginalized rural communities.[37] The conservation process followed the Top down Approach which was not people- friendly. The state neglected the fact that forest and

[33]N.S..Jodha, 'Common Property Resources and Rural Poor in Dry Regions of India' (1990) pp1169-1181
[34]Akhil Gogoi. 'Natun Bon Niti: Pratyasha aru Hatasha'2001
[35]Chandan Kumar Sharma, 'Tribal Land Alienation: Government's Role', (2002)4791-4795
[36]cf (n 30) 11
[37] Manshi Asher and Nidhi Agarwal, Recognizing the Historical Injustice: Campaign for Forest Right Act, (2007)13

communities in India were "Fluid Entities" [38] which resulted in resistance in the form of environmental movement for instance the Chipko Movement. The shift from exploiting the forest to conserving the forest left little space for the communities who were dependent on forest for their bone-fide livelihood. The people are more likely to follow the forest management regulation if these regulations take into consideration their need and requirements. Community Forestry can be used in two distinct ways: one by the policies and forms of forest management which have involvement of local communities and other by the management of forest by communities for their own use. This would ensure at least a significant degree of autonomy to the communities in the decision making process.[39]

Joint Forest Management

The decentralized process of forest management gave rise to Joint Forest Management (JFM) 1990 in India. It attempted to collaboration and significant contribution of the local communities towards forest conservation. JFM involved an agreement between the forest department and the local communities in which the communities receive some access to forest resources and income in exchange of carry out some forest management tasks like plantation and protection[40]. The main objective of the introduction of JFM was to help resolve the long standing conflict between the forest department and forest users.[41] Despite the attempts made by the government JFM failed to emerge as a people friendly model of conservation. The rights held under JFM were devoid of statute which allowed the state to unilaterally alter the benefit sharing mechanisms.[42] While community rights specifically involves "handover" certain use rights to communities found in case of Nepal. In India JFM was implemented in different way which actually increased the concentration of power in the hands of the state.[43]

[38]cf (n 24) 2

[39]Raymond J Fisher, 'Devolution or Persistence of State Control', (2010) 10

[40] Local dwellers were given the duty of protecting the valuable trees and timber from felling and illegal smuggling

[41] Prakash Kashwan, ' The Politics of rights-based approaches in conservation', (2013)613-626

[42]ibid 618

[43]cf (n 24) 121

Scheduled Tribes and Other Traditional Forest Dwellers (Recognisation of the Forest Rights) Act 2006

The historical injustice continued upon the indigenous communities even after participatory forest management models were adopted. This exclusionary model of conservation through the creation of people free zone has resulted in the creation of The Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 briefly referred to as FRA. The Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act came with the main focus that the lack of access to and control over natural resources was the root cause of affecting livelihood and identity of the forest dwelling communities. FRA came as a landmark legislation to undo the historical injustice which was done to the forest dwellers from time immemorial.[44]

FRA recognises and vests forest rights to the tribal's and other traditional forest dwellers who have resided in the forest but whose rights could not be recorded. By securing tenural rights and access to the forest resources the main aim of FRA is :

- To ensure livelihood and food security to the forest dependent communities
- Provide legal recognition to community conservation initiatives strengthening traditional conservation practices
- Protect their traditional knowledge and intellectual property relating to biodiversity
- Empower communities to protect conserve and manage forest resources in turn protect their customary rights.
- Establish empowered institutions at the community level for conservation and management of natural resources, thereby strengthening the governance at grassroot level.

[44]Kalpavriksha and Vasundhara, 'Ministry of Tribal Affairs GOI and United Nations Development Program,Community Forest Rights under FRA'2012

Unlike other forest policies that resulted in providing forest patches to households after being privatised FRA neither provide clearing of the forest nor privatization. It recognizes rights of forest people to the land under subsistence cultivation but classified in government records as "forest" the notion forest, forest resources and forest dwelling communities was clearly stated in the legislation:

- Forest dwelling Scheduled Tribes means the members and community of the scheduled tribes who primarily resided in the forest for 1 generation (25 years) and is dependent on forest and forest land for bona fide livelihood.
- Other Traditional Forest Dwellers means any member and community who has for at least last 3 generations prior to 13 December 2005 primarily reside in the forest and is dependent on forest and forest land for bona fide livelihood.
- Forest land means land of any description falling within any forest area including unclassified forests, un-demarcated forest, existing or deemed forest, reserve forest, protected forest, parks and sanctuaries.
- Minor forest produce include non timber forest produce i.e. bamboo, brushwood, stumps, cane, tussar, honey, wax, tendu patta, medicinal plants and herbs

FRA acted as a response to the long sustained struggle by the forest dwelling communities for justice and restoration of traditional rights over forests.[45]The implementation of FRA is seen as savior of forest dwelling communities which is hailed as a historic Endeavour to undo the wrong committed against them by providing rights to land and resources within the forest.[46]

Role of Gram Sabha

Gram Sabha operated as the authoritarian agency which determine the nature and extent of the individual and community forest rights in some cases both to the forest dwelling ST and OTFD. The Gram

[45]cf (n 2) 55
[46]cf (n 24) 138

Sabha shall be conveyed by the Gram Panchayat and in the first meeting it shall select of the Forest Right Committee not less than ten and not exceeding fifteen of which one third of the members should be women. The FRC[47] shall decide a chairperson and a secretary and intimidate it to the Sub-Divisional Level Committee. If a member of FRC possess individual forest rights then the member shall not participate in the verification proceedings when his claim is considered. The FRC shall not reopen the forest rights recognized or the process of verification of the claims before FRA came into force.

Short comings and Problems of FRA

Undoubtedly FRA was a ground breaking legislation to assure the rights and privileges of the forest dwelling communities yet it failed to match with the existing ground realities. The definition of OTFD turned out to be defective as in some part of India these dwellers are not settled agriculturalist but gatherers who live in close proximity of the forest[48] in Assam for instance the forest dwellers were mostly OTFD and have migrated to forests due to land alienation caused by flood and erosion. The burden of proof turned to be a problem for these dwellers. Moreover, lack of proper documentation has also affected their status as forest dwelling individuals or communities.[49]Further most of states have failed to train the communities about this complex piece of legislation. The State Level Monitoring Committees of FRA are not functional in most of the states the meetings between district-level committees; sub-divisional level committees and the gram sabha are not held properly because of which they lack intimidation. Moreover some villagers are unaware of the provisions of their claims to community forest rights, in many cases these claims have been i) left pending ii) partially granted iii) illegally rejected iv) granted much smaller area then being used v) CRF titles issued in the name of Gram Panchayat or JFMC but not Gram Sabha. In the context of Assam the

[47] Forest Right Communities were formed comprising of people from the local communities which had women participation as well to check the communal and individual titles.

[48]cf (n 2) 96

[49]cf (n 35) 4793

government have apparently prioritized the forest villagers and ST to give land rights in according to their claims. But in case of OTFD there was complete lack of entertainment towards their claims only in some exceptional areas with strong political interest.[50]

CONCLUSION

The transformation of forest lands from being commons to resource mobilising entities have left the forest dwellers in the state of dilemma. From the failure of policies and acts it could be said that it must amalgamate the issues of land question, livelihood needs and forest conservation. From the review of the literature one distinctive point can be asserted that the root cause of all social and ecological problems is the state-centered and top-down approach, which adversely affects the livelihood security of the people living in close dependence on forest. The conservation policies were always with the exclusionary outlook downplaying local communities' traditional belief and practices and more specifically their livelihood need.

The Forest Policy of 1988 set an apprehensive attempt to participatory forest management, with a notion to decentralize decision making in the hands of the local communities; to meet their livelihood needs. However, JFM never gave such autonomy and coverage that it was expected to give rather such control of the foresters highlighted the atrocities of forest department towards inclusionary policy of forest management. The prospects of country's democratic forest governance were tried to be addressed by the FRA 2006. Forest department and traditional conservationist opposed to this enactment as they believed that giving rights to the forest dwelling communities would place them in an irrelevant position. The act also could not be said as a successful one due to the complexities faced by the communities in understanding the act and the disinterest of the governing bodies for the proper implementation of the act. The act was being sideline both by the central as well as the state government.

[50]cf (n 30)

The lack of alternative sources of income among the forest dwellers is the factor responsible for the attitudes and the rising problems of the conservation method. It calls for hands on conservation strategies which would entail evolving innovative practices of alternative livelihood for forest dwellers. This will motivate the later to conserve the forest for self interest.[51] The contemporary realities demand for incorporating the local historical specificities into policy perspective. Drawing from above discussion imperative traditional exclusionist model will not exercise profoundly rather people-friendly inclusionary policies will fit the demand of the contemporary times.

[51] Mahesh Rangarajan, 'Environmental Issues in India: A Reader', Delhi : Parson/ Longman,(2007)12

STANDARD FORM CONTRACTS: A STEP FORWARD OR A STEP BACKWARD

Neeti Nihal[1]

Abstract

The drastic shift of contracting from traditional form of contract to standard form of contract has stimulated debates amongst various scholars regarding the implication of such contracts in the society.To arrive at a conclusion, scholars have listed down the advantages and disadvantages of such contracts and weighed them against each other. The researcher aims to reflect the same in the article.However, irrespective of the issues arising from standard form contracts, its ubiquitous nature and permanency as a means of conducting transaction remains a fact, therefore removal of standard form at this stage is not a feasible solution due to the economic realities that exist in the world. Therefore, the researcher concentrates on providing remedies within standard form contract without really challenging its existence as a means of transaction. Another aspect which the researcher aims to take into account and attempts to highlights in the paper is the unwilling behaviour of the non-drafters to read the terms provided in these contracts to which they are a party to and the implications of the same, which usually results in the drafting of unconscionable contracts by the drafters. Under the solutions, the researcher mentions and briefly discusses the re-enactment of Consumer Protection Act, 2019 in India which is the first legislative step taken to resolve issues of standard form contract. The researcher appreciates the step taken by the legislature for addressingthe issues of unfair contracts among seller and consumers but at the same time, encourages and suggest the legislators to not just restrict its purview to consumer contracts and list down reasons as justification for the same. Further, the researcher provides for solutions for problems arising due to standard form contract and in the course divides her paper into traditional remedies provided by scholars and modern-day solutions.

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Keywords: contract, standard, people, read, form

INTRODUCTION

The edifice of traditional law of contract is based on bargaining of terms between two or more parties and entering into a mutually negotiated contract, wherein both the parties are familiar with all the terms present in the contract and have moreover negotiated for these terms to suit their conditions.[2]However, this mutually negotiated approach of contracts has drastically changed into a form of contract known as Standard Form Contracts.[3]The evolution to standard form contract is simultaneous with and reflects the economic realities of the society. [4]There remains a long-drawn fissure between the economist and traditional contract law scholars regarding the implication of Standard Form Contracts in the society. Irrespective of the continuity of this friction, one thing that has been gradually established is that Standard Form Contract have evidently become a quotidian feature of contracting and ardently guaranteesa permanency in their existence.[5]As this form of contract permeates into our daily lives of contracting, from buying something as simple as a parking ticket to capacitating heavy financial transactions such as entering into insurance contracts or services contracts such as employment contracts.[6]To understand the factum of debate regarding Standard Form Contracts, it is essential to discern the meaning of sameas it conflicts and changes the sanctity of the traditional process of contracting.Standard Form Contract are contracts solely drafted by one party due to their inordinate bargaining power and imposed upon the weaker party on a "take it or leave it" basis, restricting them to bargainonly onterms primarily related to the price and quantity of the good and services offered.[7]These contracts cause

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[2] Michael I Meyerson, 'The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts' (1993) 47 U Miami L Rev 1263

[3] George Gluck, 'Standard Form Contracts: The Contract Theory Reconsidered' (1979) 28 Int'l & Comp LQ 72

[4] ibid 73

[5] ibid 74

[6] Robert A Hillman and Jeffrey J Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 NYU L Rev 429 (hereinafter Jeffrey JRachlinski)

[7] Florencia Marotta-Wurgler,'What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements' (2007) 4 J. Empirical Legal Stud. 677

attrition to the powers of the readers as they make thenon-drafters void of their negotiating powers which is an essential element for entering into a fair contract and the same as been recognized by the courts itself.[8]

The law of contract sets an affirmative duty on both the parties to read the contract, but this principle is no longer adhered to in the present form of contract, primarily by the buyers as the sellers, themselves draft the terms in the contract.[9] An empirical study that attempts to examine the percentage of informed readers in Online End-User License Agreements states that there exist only 0.2 percent informed readers in such contracts.[10] The ignoramus yet justified behaviour of readers towards the terms present in the standard form contracts other than specific terms further aggravates the problem allowing the drafting party to take undue advantage of the readers by drafting clauses primarily in their favour.[11] In an empirical research conducted by scholars with the objective of discerning thechanges in terms of contract from the year 2003 to 2013 by taking End-User Licensing Agreement as a sample, they arrived at a conclusion that in year 2013, 25 out of 32 terms have become relatively more seller friendly terms showing a huge downfall in comparison to 2003 where there existed almost equalrange of pro seller and buyer terms, although the pro-seller terms have always surpassed pro-buyer terms in number.[12] It is although important to understand that not every pro-seller term is arbitrary, unconscionable and unreasonable in nature. [13]The researcher in this paper advocates for the existence of terms that allocate contractual risk efficiently set up by drafters.The fact that these contracts exist in immensity is undisputed but the stand of the Indian courts and primarily legislature regarding these standard form contracts and enforceability of the alleged unconscionable, arbitrary and unreasonable terms was not very well defined, up until recently.[14] The

[8] Jeffrey J Rachlinski (n 3) 454
[9] Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, 'Does Anyone Read the Fine Print?Consumer Attention to Standard-Form Contracts' (2014) 43 J. Legal Stud. 1
[10] ibid 3
[11]Jeffrey J Rachlinski (n 3) 457
[12] Florencia Marotta-Wurgler and Robert Taylor, 'Set in Stone: Change and Innovation in Consumer Standard-Form Contracts' (2013) 88 NYU L Rev 240
[13] Jeffrey J. Rachlinski(n 3)448
[14] Robert A. Hillman, 'Consumer Internet Standard Form Contracts in India: A Proposal' (2017) 29 NAT'L L. SCH. INDIA REV. 70

position of this ambiguity has changed after the recent enactment of Consumer Protection Act, 2019 which will be discussed in furtherance of the paper. Therefore, the researcher has divided the paper in 4 parts, the first part discusses the advantages of such contracts, the second provides for reasons failure in non-drafter to read these contracts and third provides for the implication of the same. Fourth, aims to highlight the solutions from various scholars and provide for the researcher's preferable solution to the issues arising from such contracts taking into account the position of Judiciary regarding such contracts.

Advantages of SFC

The ubiquitous nature and diversification of standard form contracts that are no longer just restricted to consumer relations but also include other form contracts such as employment contractsand business to business contracts, contracts by multinational companies to their employees or independent contractors insinuate that the standard form contracts have great relevance in the contemporary world which establishes their permanency.[15]Such high prevalence of standard form contracts suggests that there are some advantages that must be gained fromit due to which so many companies are adopting it in their daily form of transactions.[16] Argued and debated by many scholars, mainly economist are some listed advantages of standard form contracts.

First and foremost, is the reduction in transaction cost in the economy for both the parties as they it reduces negotiation cost that would occur every time they enter into a transaction on every term and the same is not allowed in standard form due to absence of bargaining power by one party.[17] Paradigm on the forms of reduction of transaction include reduction of drafting period as the same set of terms and conditions are provided to all non-drafters and reduction in agency cost as standardization of contractual terms limits the discretionary opportunities of the agencies to provide terms that suit their best

[15] Jeffrey J Rachlinski (n 3) 437

[16]W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 Harv L Rev 529

[17] Richard L Hasen, 'Efficiency under Informational Asymmetry: The Effect of Framing on Legal Rules' (1990) 38 UCLA L Rev 391

interest[18]. Further, with the continuing uniformity in the terms of the contract in similar fields of commercial and non-commercial transactions, the readers are gradually more likely to be aware of such terms and their implication owing to their reoccurrence in every contract they transact from the same company or similar commodity. Standard Form Contracts although are known to be stringent with changes in respect to addressing personal grievances or demands of the opposite contracting party but they are dynamic in nature as they change in accordance with the societal, economic conditions prevailing at the given time.[19]Moreover terms are added and deleted in consonance with judicial approval or rejection of the same. [20] Hence reducingthe cost of litigation for the drafters and non-draftersas the terms present in the contract have withstood judicial scrutiny.[21] The uniformity of terms in a standard form contract are helpful to the non-drafters in the sense that in a normal contract before negotiating each termthe parties need to understand the meaning and the implication of the term and moreover use it to their best advantage in the contract, which one, can be very time consuming because the non-drafters are usually people who are not as experienced as the drafters in this form of transaction and two, the consumers may need to hire a lawyer to ensure their best gain for the smallest of their transaction which can be very exorbitant and it would make more sense to some non-drafters to employ a lawyer when a dispute has arisen and not in every other transaction they become a party to.[22]The firms although have the highest benefit from such contracts, another added benefit is that instead of hiring a lawyer to advise them in every transaction, they can hire a lawyer to draft one contract covering all the rights, duties of parties, contingent situations and the role of parties in those situations, liabilities of both the parties etc, which again is very pocket friendly for them, although it is indispensable for them to always have a legal advisor.

[18]R. Patterson 'Standardization of Standard-Form Contracts: Competition and Contract Implications' (2010) 52 Wm. &Maryl.Rev. 327
[19] George Gluck (n 2) 73
[20] Jeffrey J. Rachlinski(n 3) 439-440
[21] Marcel Kahan and Michael Klausner 'Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases' (1996) 74 Wash U L Q 347
[22] George Gluck (n 2) 1237

Another essential benefit of standard form contract is the efficient allocation of contractual risk essentially by the drafters who are inordinately experienced in their field of business than the non-drafters.[23] In case of consumer-seller contracts, efficient allocation of risk provided in standard form contract helps minimize the cost of the goods or services offered and in employment contracts helps increase the salary of the employee.[24]Suppose in case of a warranty contract, efficient allocation of risk for any warranty provider would be restricting their warranty to product defects only and placing the risk related to poor maintenance to the consumers. This would help solve economic problems such as adverse selection andmoral hazard.[25] The efficient allocation of risk promotes uniformity in the terms among competitors of firms practising similar trade or business. This implies how even if some firms want to provide for consumer-friendly terms due to the competition that exist in these firms, they are compelled not to provide thembecausenon-drafters usually tend to not read the provisions given in their contracts, so the possibility of them distinguishing between contracts that provide for terms relatively more beneficial for the non-drafters to contracts that are excessively pro-drafter is very minute.[26] Therefore, they restrict to using terms that is uniformly used by all their competitors.[27]Furthermore, the allocation of risk by the drafter helps mitigate the cost of goods and services offered and if such efficient allocation of contractual risk terms are rejected by the courts, then the inefficiency of this restriction will be reflected on the price.[28] For example, in employment contract when the employer is not allowed to add a non-compete clauses against their potential employees then the employer will be compelled to reduce the salary of its employees. This is because as a rational employer, would not being willing to take the risk of his employee learning and getting trained by the facilities

[23] Jeffrey J. Rachlinski (n 3) 438
[24] ibid 440-441
[25]Alan Schwartz and Louis L Wilde, 'Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests' (1983) 69 Va L Rev 1387
[26] Yannis Bakos (n 8) 22
[27]ibid 6
[28] Jeffrey J. Rachlinski (n 3) 440-441

employed by his company, only to see him use these improvements to help his competitive rivals due to the non-inclusion of a non-compete clause and further aggravate the situation by providing his employee with a higher salary. Thereby, non-inclusion of non-compete clause will have a direct effect on the employee's salary.

Why People Tend Not to Read Standard Form Contracts

Parties imposed with the terms provided in standard form contract have a tendency to not read the terms, their lack of knowledge regarding the terms in the contract they have signed for is one of the primary issue that causes problems in standard form contract.[29] Therefore, it is important to understand the reason of their failure to read such contracts.

It is very prominent in the contemporary world that people equate speed with efficiency as they are always in a hurry and tent *to* not read the boilerplate terms, which is one of the reasons why there is such an immense growth in e-commerce which will soon substitute the traditional form of marketing as e-commerce provides speed and less effort because everything is one click away.[30] Therefore,when they are confronted with long, legalese boilerplate terms amid their contract they tend to be ignorant towards it as it comes on their way of speedy transaction. [31] The drafters further do not make the readers duty to read easy by employing methods such as using capital letters in the entire form in order to hide the important terms in the middle of the forms, or uselight and small fonts to cause difficulty in the reading power of the consumer.[32] Furthermore, the non-drafters burry their duty to read with a rather justified mentality, that their reading of the contract will not be of much help for them as the agent they are contracting with has no or very little scope of bargaining on the terms provided in the standard form contract and even in e-commerce there exist usually no medium or agent for negotiation of terms, so the consumers in the literal

[29] Jeffrey J.Rachlinski(n 3) 440-441
[30] Michael I Meyerson (n 1) 1270
[31] Melvin Aron Eisenberg, 'Text Anxiety' (1986) 59 S Cal L Rev 305
[32] Jeffrey J Rachlinski(n 3) 446

sense are faced the with the option of 'take or leave it'.[33] Moreover the readers through the means of bounded rationality focus primarily on the terms that they think are most beneficial to them such as price and quantity of the product or serviceand discard the other terms as contingencies that unlikely to occur.[34] Therefore, they associate the cost of reading these terms to be very high on the basis that the chances of non-performance of the contract by either of the parties is inordinately low.[35]The non-drafters have also developed an understanding that due to the competition that exist, drafters practising the same business will tend to have similar or uniform terms, hence searching for contracts with terms that are relatively beneficial to them also appears to be impractical and inefficacious.[36] The non-drafters sign these standard form contracts on basis of a couple of notions that may or not be true. They believe that the boilerplate terms employed by the drafters are mere customs and nothing to do with the arbitrariness of the drafters placing all the terms in their favour. According to them, the drafters will not employ terms that are heavily arbitrary and unreasonable owing to the fact that the reputation of their company is at stake.[37]

As their last resort, they convince themselves to believe that if arbitrary, unreasonable and one-sided terms are present, the courts will strike them off or declare the entire contract void, whatever they deem fit depending upon the facts and circumstances of each case and the discretion of the courts. [38] Social factors also exist that cause the non-drafters to not read the terms of their agreement.[39] These social factors may differ from case to case. It is a fact in the contemporary world that people are always in a hurry, therefore not reading a contract may not only seem useless to them but they may also fear that 'they could appear as confrontational'.[40] They believe that if they sit and go

[33]ibid 468
[34] Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 U Chi L Rev 1203
[35] Melvin Aron Eisenberg (n 30) 242
[36] W David Slawson (n 15) 548-549
[37] Jeffrey J. Rachlinski (n 3) 441-443
[38] Daniel T Ostas, 'Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner' (1998) 36 Am Bus LJ 193
[39] Jeffrey J. Rachlinski(n 3)447
[40] ibid 448

through each and every term in the contract, it may signal to the businessmen that they do not trust them and usually the agents strategically allow the non-drafters to have their say in the terms that are relevant to them or terms that every bounded rational non-drafter would be attracted so as to gain trust of the non-drafters, so that they forego reading other terms in the contract, portraying them to be irrelevant.[41] Thereby creating a situation where it becomes socially awkward for the non-drafters to read the contract. [42] The social awkwardness is not just restricted in relation to the agents of the businessmen or the businessmen themselves but also when it comes to other non-drafters waiting in the line for the same transaction and are getting delayed as one of the non-drafter is reading the terms of the contract. For example, while parking a car in the mall, persons driving the car are provided with a receipt or on the display board, the terms and conditions are provided. For a person driving the car to stop and read these terms, while others wait in line makes it difficult and awkward for the informed non-drafters to read the contract. The cognitive abilities of the non-drafters also entice them against reading the terms provided in their contract as they enter into agreements without having full knowledge of all the factors of the contract. They read enough tosatisfy themselves with knowledge they think is sufficient to enter into the transaction.[43]

Disadvantages of Standard Form Contract

As the disadvantages caused due to standard form contracts in consumer contracts have been addressed in the Consumer Protection Act and has been widely discussed by various scholars, the researcher aims to point out issues arising in employment or other form of contracts where standard form contracts are also imminently present, however due to the nature of standard form contracts there will be an overlap in discussion between the non-consumer contracts and contracts.[44]Mandatory arbitration clause is one of the most reoccurring

[41] ibid
[42] ibid
[43] ibid 450-454
[44] Russell Korobkin (n 33) 1203

terms in employment contracts.[45] It is typically imposed on the employee by employers who are usually the potential corporate defendants in the arbitration proceedings.[46] An arbitration clause compels parties to opt solely for arbitration as a means of remedy and for resolution of dispute between the contracting parties, even if one of the parties to the dispute would prefer litigation as a means of resolution and justice.[47] In simple terms, it does not allow the parties to resolve the dispute by employing any other alternative other than mandatory arbitration.[48]Further, court enforcing the validity of such clauses, encourages employers to provide more of such clauses.[49]Enforcing mandatory arbitration terms allows the corporate defendants to escape the scrutiny of courts by merely providing for an arbitration clause in their employment contracts which has become relatively more convenientsince these employment contracts are primarily standard form contracts which implies that they are non-negotiable.[50] Mandatory Arbitration clauses have been debated to be disadvantageous to the employees as it allows the defendants to reduce their overall liability, when disputes are resolved in arbitration as compared to in litigation.[51]

Another unconscionable term in standard employment contract is termination of employment and notice for termination of employment.[52] In India, the courts have addressed this issue and have struck down unconscionable terms relating to termination of employment. *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*[53]was the case that set precedence for this approach. The facts of this case so persist that the plaintiff's employment was terminated by the employer(defendant) under Rule 9 of the Article of

[45] Michael I Meyerson (n 1) 1264
[46] David S. Schwartz, 'Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration' (1997) 33 Wis. L. Rev. 33
[47] R Warkentine, 'Beyond Unconscionability: The Case for Using Knowing Assent as the Basis for AnalyzingUnbargained-for Terms in Standard Form Contracts' (2008) 31 Seattle U L Rev 46
[48]Christopher R Drahozal, 'Unfair Arbitration Clauses' (2001) 2001 U Ill L Rev 695
[49] John J A Burke, 'Contract as Commodity: A Nonfiction Approach' (2000) 24 Seton Hall Legis J 285
[50] Edith R Warkentine (n 46) 518
[51] David S Schwartz, 'If You Love Arbitration, Set It Free: How Mandatory Undermines Arbitration' (2007) 8 Nev LJ 400
[52] Edith R Warkentine(n 46) 536
[53]*Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* AIR 1986 SC 1571

Association of the Company which provides for termination of permanent employee on the ground that his services were no longer in the interest of the company, thereby allowing removal of permanent employees, without assigning any cause for the same. Following the given facts, the court raised two issues in this case and adjudged the same. The issue most relevant to readers is the second issue which posed two sub questions, first was whether an unconscionable contract of employment could be held void under the ambit of Section 23 of the Indian Contract Act, 1872 which allows for contracts to be held void if opposed to public policy. Second question was whether a contract of employment containing unconscionable terms entered with a government company would be held violative of Article 14 of the Constitution, if the government company is adjudged to be a State under Article 12 of the Constitution. The Court held that a Govt company comes under the ambit of State as provided under Article 12 of the Constitution. Further, the court discussed the position taken by other countries with regard to unconscionable terms, and it arrived at the conclusion that the courts of USA and England were empowered to strike down terms that were unconscionable subject to the condition that the contract was formed between parties of unequal footing with references to their bargaining power and the case which propounded this principle in common law was *John lee & Son (Grantham) Ltd. v. RailwayExecutive*[54], where Judge Lord Denning stated that although common law allows the existence freedom of contract it allows the same till the point that such freedom is not abused and through this statement he highlighted the vigilant feature of common law. The courts however realised the difficulty in listing down an exhaustive list consisting of situations where there would exist unequal bargaining power between parties to the contract, hence made the same subjective to the facts and circumstances of each case. Following which the courts in case *Central Inland*[55]empowered courts to refute enforcement of contracts that are unconscionable in nature or strike down clauses that are unreasonable and unfair. However, the application was restricted

[54]*John lee & Son (Grantham) Ltd. v. Railway Executive*1949 (2) All. E.R. 581, 584
[55] Central Inland case (n 52)

to where the parties on the lower end who had no other alternative to obtain goods or services or means of livelihood other than by complying with the provisions imposed by the stronger party.[56]The court allowed such clauses or contracts to be rejected only on the grounds of Article 14 and Section 23 of the Indian Contract Act. The court further held that Rule 9 of the AOA providing for termination of employment of permanent employees was arbitrary and discriminatory in natureas it does not provide for any opportunity of the hearing the employees whose employment is being terminateThe bench, in the process also discarded Rule 37 which allowed the Company to terminate services of an employee at any given time without providing for any notice if in case the employee is found guilty of any of the acts mentioned in the Article of Association of the Company. The court held that Rule 37 was violative of principles of Natural Justice as it prohibited the employees opportunity to be heard and hence was also violative of Article 14 of the Constitution. Such clauses are also regarded to do against the public interest and policy as it leads to a creation of insecurity in the minds of people upon whom it applies.However, the courts have only restricted their scrutiny of standard form contracts set by the State authorities or instrumentalities that come under the ambit of Article 12 of the Indian Constitution. Thereby, allowing private parties to provide for unconscionable terms regarding termination and notice of termination of employment. The same position as be reaffirmed in the case of *Balmer Lawrie and Co. Ltd. and Ors. v ParthaSarathi Sen Roy and Ors*.[57]Further clauses such as, selection of forum for filing of complaints is another exploitative misuse of these contracts, as drafters set forums that are convenient for them, not taking in account the convenience of parties with whom they contract, thereby primarily providing for forums outside the local or residential limits of the employee.[58]

[56]*Indian Oil Corporation Ltd. v Nilofer Siddiqui and Ors*2016 (115) ALR 512
[57]*Balmer Lawrie and Co. Ltd. and Ors. v ParthaSarathi Sen Roy and Ors* (2013) 4 CompLJ 51 (SC)
[58] Edith R Warkentine (n 46)522

Possible Preventive Solutions to Mitigating the Damage Caused by Standard Form Contract.

The first half of the paper has provided in brief the emergence of standard form contracts, discussed their advantages and disadvantages and weighed them against each other. The researcher has observed and has reached the conclusion that though standard form contracts provide for several benefits as a stimulus to the growing demand for speedy transaction, it creates a higher scope for exploitationagainst the weaker bargaining parties.[59] Up until recently, India had no specific legal remedy against the injustice meted out to the non-drafters owing to their inability to read these complex long boilerplate terms. After long contemplation, in the year, 2019, theConsumer Protection Act was re-enacted, which for the first time provided remedy to the consumers against unfair contracts drafted by seller. The act prescribes an unfair contract to be a contract that significantly alters the rights of consumers wherein it requires the consumer to provide for immoderate security deposits as a condition precedent for performance of contractual obligations by the sellers or imposition of heavy penalties on consumer due to breach of contract wherein the penalties imposed on consumers is inordinate to the loss incurred to the parties whose contract has been breached by the consumer[60].

Further, it labels an unfair contract to be contract that provides for terms which decline acceptance of early repayment of debts but on non-payment lead to imposition of penalties and contracts that allow parties, mainly the sellers to revoke or terminate the contract without providing for any reasonable cause for the same.[61] In totality, section 2(46) of the Consumer Protection Act 2019, classifies any consumer-seller contract as an unfair contract if terms in the contract impose conditions, charge or obligation on the consumers that are unreasonable in nature. Therefore, covering features of standard form contracts without mentioning them as standard form contracts but as unfair

[59] ibid, 514-517

[60]Consumer Protection Act 2019, s 2(46)

[61] CPA 2019, s2(46)

contracts. Therefore, such a step is appraised owing to the growing relevance of standard form contracts and the issues it brings along however due to its recent enactment, the efficiency of these sections addressing the problems against standard form contracts are yet be determined owing to the lack of cases filed and adjudicated upon. This is necessary because several other countries addressing the issues of standard form contract have faced heavy criticism regarding their lack of efficiency.[62]Moreover by providing for instances and examples of methods and ways in which standard form contracts are used to exploit people in fields other than consumer contracts in the above section, the researcher urges the legislators to make provisionsfor regulation of standard form contracts in the Indian Contract Act, 1872 itself as there is a very dire need to safeguard the parties that have a weaker bargaining power in contracts especially in a welfare state like India, where the state aims at protecting the weaker sections of the society. As these parties may be imposed with terms and conditions, that are unfair and unreasonableand therefore detrimental in nature. It is further placed that since the Parliament by the addition and acceptance of the term 'Unfair Contract' under the Consumer Protection Act, realises the need to protect the consumers who are recognised to be the weaker bargaining parties with respect to the sellers, they should further add provisions to the Indian Contract Act, 1872 for protection of weaker parties in these standard form contracts which provide for clauses that are unreasonable and unfair in nature to the parties it is imposed upon.

In pursuance of the same the author provides for solution discussed and debated by scholars to improve the problems that exist in Standard Form Contracts and further provides for modern day solutions to the developing Standard Form Contracts that have permeated in traditional face to face contracts as well as online transaction. In the end, the researcher humbly provides for the preferred solution of the researcher herselfto the issues arising from such contracts.

[62]Eric A Zacks, 'The Restatement (Second) of Contracts Sec. 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts' (2016) 7 Wm & Mary Bus L Rev 733

Friedrich Kessler was one of the first scholars in America to realise the issues regarding standard form contracts and introduced people to the concept of Contracts of Adhesion.[63]According to him, these contracts are drafted by parties that have inordinate bargaining power in relation toother contracting party, who have the bare option to either "accept or refuse" the contract provided to them.[64] He did not challenge the contract on the grounds of parties assent to be bound by the terms but questioned the enforcement of the onerous terms in the contract by the courts.[65] Sir Kessler suggested that the courts should refuse enforcementof onerous terms when the bargaining power of the parties is unbalanced to such an extent that the "voluntary" nature of assent itself comes into question.[66] Another famous scholar, Karl Llewellyn known for his concept of 'Blanket Assent, aimed to provide a solution to the unconscionable terms in standard form.[67] His concept of Blanket Assent isregarded to be the best understood rejection to the traditional approach of contract and manifestation of assent.[68]He states that parties primarily concentrate on terms associated with price or quality or income, and although they usually sign a contract on the basis of theseterms, they are aware that their exist other terms which they usually don't read but are bound by their implication once they have assented to the agreement.[69] He further argues that the parties signing these agreements should be understood to have agreed to all the terms they reasonably would have expected to be included in thecontract, thereby implying the exclusion in implementation of unreasonable and unexpected terms by the courts, as it heavily burdens the parties signing to the contract by stating that such terms could not reasonably be expected in the contract.[70]Therefore, in his theory parties are bound by all terms that they have assented to subject to the fact that a reasonable man would expect them.[71]

[63] Friedrich Kessler, 'Contracts of Adhesion—Some Thoughts about Freedom of Contract' (1943) 43 Colum L Rev 629
[64] Edith R Warkentine(n 46) 486
[65] ibid 486
[66] ibid
[67] ibid 488
[68]ibid489
[69] ibid 489
[70] ibid
[71] ibid

This theory is in consonance with Robert Keeton's Reasonable Expectation concept, the application of which was specific to theinsurance contracts.[72]In this theory, he advocates the enforcement of those terms that a non-drafter having ordinary intellect would have reasonably expected in their contracts, in case a court is in a dilemma regarding enforcement of an onerous term.[73] Karl and Keeton's theory however is highly subjective and factual as there exist no set golden rule to determine what reasonable expectation of every party would be.

Professor Burke provided for a potential solution to standard form contract on the basis of the theory of contract as a sale of promises propounded by David Slawson.[74]Professor Burke states that standard form contracts should be enforced as proposed by Arthur Leff who states that goods include contract terms and purchase of former amounts to purchase of latter.[75] However, Burke states that only certain terms should be enforced by following legal norms, through this he advocates legislative approach to resolve issues of knowing assentby placing responsibility on the legislature to determine or restrict certain terms to be provided or not provided in different fields of standard form contract, particularly or generally. [76]

The problem of standard form contracts is pertinent till date which has called upon solutions and discussion from various scholars and authorities, allowing the courts to promote implementation of some and discard others. However, with the evolution of internet and online transaction providing browse-wrap and click-wrap agreementshas led to exacerbation of the problem.[77] This is because the scope of negotiations in online agreements is close to nil with regard to anything, owing to the fact that these contracts unlike traditional standard form contracts do not allow any communication with a live agent, they usually work on the basis of a blockchain mechanism which prohibits any scope

[72] Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions (1970) 83 Harv. L. Rev. 961.
[73] Edith R Warkentine (n 46) 496-498
[74] ibid 493
[75] ibid 493-494
[76] ibid
[77] Robert A. Hillman(n 13) 72

of negotiation or inquiry.[78] Online transactions however have been argued to bring to the table more advantages than disadvantages, this can be concluded by its growth in worldmaking India also a party to such cost saving and speedy transaction via the internet. [79] The fact that they have advantages cannot be taken as an excuse of overlooking their scope or potential scope of exploitation against the parties with less or no bargaining power. Modern day standard form contracts propound for modern day solution to the issues arising from such contracts.

Solutions such as providing a cooling offperiod or a buffer period before the parties are locked into the contract, this approach aims to allow the partiesa certain fixed time period to read, comprehend and understand theterms in their contract properly and rescind the contract if they are unsatisfied with the same.[80]Cooling off period is in consonance with the concept of Rolling Contractsapproach which states that contracts are formed overtime and payment of transaction should not necessarily imply the end of a contract as there have been several instances wherein the party receives the terms and conditions of the contract after payment and in such cases the party at such an end must be given an opportunity to reject the contract, however their retention without an explicit rejection would amount to acceptance.[81]

However, both the concepts have been criticised to not provide an amicable balance between the drafters and the non-drafters as it is biased to the convenience of the non-drafters and costly for the drafters. Another solution can be the government stepping in and mandating inclusion of certain protective terms in the contract.[82] An example of the same could be seen in labour employment contracts that are governed by various acts and policies and mandate certain terms such hours of work or payment of overtime wages or minimum wages to be given to a set of employees, however such contracts suspend the entire

[78] Jeffrey J Rachlinski,(n 3) 468
[79]Robert A. Hillman (n 13) 71
[80] ibid 75
[81] Edith R Warkentine (n 46) 500-503
[82] Robert A. Hillman (n 13) 75-76

scope of freedom to contract.[83] Moreover, the feasibility of doing so comes into question on the basis that such contracts are no longer just restricted to consumer-seller contracts but have permeated its way into many other forms of contracts, therefore all the aspects need to be taken into account while providing for certain protective clauses but the ambit of this is so wide, it almost makes it impossible for the Government to take into account all the aspects.[84]Couple of similar approaches clubbed together would be mandating the drafting parties to highlight or to further enhance the approach of mere highlighting to compelling the parties toprovide for "I agree" bracket next to all contentious terms which forces the non-draftersto actually read the terms and on basis of that arrive to a decision after weighing in the cost of these contentious terms with the benefits of entering into such agreements.[85] The barricades of these solutions are the subjectivity of contentious terms varying from one drafter to another and one non-drafter to another.[86]Furthermore, the arguments placed against mandatorily clicking to "I agree" in very contentious term, hampers the speed efficiency in these contracts, which thereby discard one of them primary benefits of standard form contracts.[87]

Finally, one of the most preferred modern day solutions to standard form contracts and the most advocated by the researcher is enabling the establishment of Public or Private Rating Services that have the task of evaluating terms providedin the drafting parties contracts and on basis of that provide for its review and ratings on the agreement.[88] These can be posted on the internet to be viewed by the non-drafters as a guideline in understanding which drafting party should they chose for contracting of similar services if there exist more than one service provider[89].If the operation of such watchdogs is successful, they will hamper the reputation of drafters drafting one-

[83] Minimum Wages Act 1948
[84] Jeffrey J Rachlinski(n 3)437
[85] Robert A. Hillman(n 13) 76-77
[86]ibid 77
[87]ibid 77
[88]ibid 77
[89] ibid 77

sided unfair and unconscionable contracts and thereby provoke companies with incentive to provide for non-drafter friendly terms as their reputation remains at stake. Furthermore, it will reduce the readers from the burden of reading each and every term by just reading a review of the agreement. This use of a watchdog as a solution arising due to standard form contracts is also beneficial to the drafting parties as it allows them to have their freedom in contract without imposing upon them government mandated restrictions.

The Rating Service could be financed fromstate fund, however the state itself should not have much of a control over the distribution and revocation of such funds. The reason for such a provision would be to ensure independency. If it is not financed and is a private company, the drafting companies can influence their judgements by alluring them with financial incentives and because they are not backed by any fixed income it might become easier to sway them and therefore discard their whole purpose. This is because the concept of watchdog in itself is relatively new and like every business venture it involves risk, owing to this and the fact that this concept is a probable solution to the weaker bargaining parties it should be advocated and financed by the government itself in order to ensure welfare to the society. However, it is not possible for the government to finance each and every Rating Service because of the eminence of standard form contract in almost all our day to day transaction.[90] Therefore, the government should narrow its selection of funding to certain Rating Services providing ratings for sectors that have an impact on the non-drafting parties lives such as insurance contracts or certain employment contracts. The rest of the Rating Services can also exist for other fields however they will not run on State fund but on their own funds. The researcher aims more at providing for a probable solution against private parties imposing unfair terms through standard form contract than the government companies imposing contentious terms as the Court have successfully regulated the same on several constitutional grounds.[91]

[90] Jeffrey J RachlinskiJ (n 3) 437
[91] Central Inland case (n 52)

A relativelyenhanced solution to this could be enabling a mechanism wherein the drafting parties create a review section on their websites which allow these Rating Services to provide for their input on their website itself, thereby reducing the search cost of the reading parties in two ways, one they do not have to go through the contract to find contentious terms nor do they have to visit these private rating services sites to find the questionable terms. This particular provision is similar to consumers providing their inputs and reviews regarding a product, app or service on the website of the app of the product and service itself, which enables other potential buyers to make a more informed decision regarding their purchase. Such reviews have a direct impact on the drafting parties' reputation, which forces them to moderate and balance the terms in interest of both the parties. [92]

However, this solution also comes with its set of restrictions and flaws. First, its feasibility itself needs to be questioned, in the sense that standard form contracts are pertinent in our everyday transaction now, therefore providing for a Rating Service reviewing each and every agreement drafted by several drafting parties in various fields is not feasible.[93] Therefore, such a solution can primarily be restricted to online transactions, where the scope of providing for reviews is relatively higher.More so, solution is primarily directed to large corporate bodies because not every transaction entered between parties on individual capacity can be reviewed. The reviews provided by the Rating Services are again subjective to their interpretation of what constitutes as contentious or unconscionable term. Irrespective of same, the researcher regards this as a solution that brings a balanced solutions as one it allows and understands the need for existence of such contracts, it allows the drafters their freedom to contract but also help non-drafters in making informed decisions and also increase the number of informed userso that they can ensure that the drafters are conscious while drafting their terms as their reputation is at stake.[94]

[92] Jeffrey J Rachlinski (n 3)441

[93]ibid 437

[94]ibid441

THE STATUS OF ADOPTION IN ISLAMIC LAW: A CRITICAL ANALYSIS OF THE LAW AND PRECEDENTS

Pemmaraju Lakshmi Sravanti[1]

Abstract

International conventions such as the Convention on the Rights of the Child have encouragedthe State Parties to give primacy to the best interests of the child. These conventions haveplaced importance on the familial relations of the child to ensure full development. The DraftDeclaration, 1984, addressing foster placement and adoption of children has encouraged theMember States to create efficient institutions to protect the rights of children. One suchinstitution is adoption. This institution has undergone a transition in its fundamental ideasandnow provides a system to place children within familial arenas again. India, a signatorytoboth the documents, provides for the personal laws to largely govern the civil law, the law ofadoption being no exception.The Mahomedan Law, however, does not acknowledge adoption, but provides for a mode ofguardianship as the Kafalah system. While there are legislations addressing adoption andguardianship, there are no laws governing this system in India. The laws address it by thecommunity, which distorts the recognition and the status of children among the religions.This paper seeks to analyse the status of an adopted child in Islamic jurisprudence, withreference to available laws and precedents. This paper seeks to question and answer if theexisting laws and practices are in the "best interests of the child" as opposed to a uniform lawfor all religious communities.

Keywords: Adopted Child, Kafalah System, Islam, Best interests of the child

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INTRODUCTION

The popular belief is that adopting one child won't have a significant impact on the world, but has a world-altering effect on the child. Adoption, in its initial stages, was a fiction weaved by the law to protect and further the interests of a childless person; resulting in incorporation of such process into the realm of private law. There has been a significant change in the approach of the law from parent-oriented to child-oriented systems.

Adoption is a practice where the child acquires new kinship after severing the ties with the natural kin.[2] This entitles the adopted child with rights and responsibilities as the original (natural) members of the family. "*Adoption is a legal procedure which permanently terminates the legal relationship between the child and his or her biological parents and initiates a new parent-child relationship*".[3]Providing the child with a family is a highly complex process as it needs to be ensured that the child is able to adjust with the new family, or would be liable to cancel the adoption before it is made final.[4]

The Islamic Personal Law does not recognise, nor does it allow adoption. Yet provides alternatives (Kafalah system) as a means of alternate child care. There has been a continuous debate if this mode of care is favouring the interests of the child. This paper describes the international framework, the details regarding adoption in India, its purpose and objects. Further it analyses the principle governing adoption, which then is evaluated, dealing with Islamic law; customs and opinion of judiciary regarding this particular area of law. The need and use of an Uniform Civil Code has also been brought within the discourse of the paper.

[2]Adoption in Muslim Law, Ali Naqvi Islamic Studies, (1980) 19 <https://www.jstor.org/stable/20847150>accessed 5 January 2020

[3] 'Legal Rights of Children in the United States of America' in Anna Mamalakis Pappas (ed),*Law and the Status of Child*(2) 701

[4] Guidelines for Adoption, Central Adoption Resource Authority, India, 2017

International Framework

The international community had recognised the need for a consensus regarding the approach to be adopted by the Member States to foster efficient institutions and goals of adoption. The fundamental test for any adoption law is the United Nations Convention on the Rights of Child (UNCRC). The convention reiterates the inherent dignity and worth of persons, particularly children.[5] The convention is widely framed to address adoption, allowing for the States to formulate laws to meet the international set standards. It envisages adoption as a means of alternative child care;[6] where the child enjoys safeguards and the interest of the child is the primary objective.

The human rights of children, with focus on the adopted ones, are well-recognised and accepted. The preamble of the UNCRC envisages that a child should be in a familial environment to facilitate full and harmonious development. Emphasising the importance of the childhood of a human being, Universal Declaration of Human Rights (UDHR), 1948, proclaims that childhood is entitled to special care and assistance.[7]

In its modern form, adoption is in many countries the creation of legislation in the nineteenth century and after. In addition, its character varies greatly. *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*and UNCRC provide a general framework on the goals that are to be met by the domestic laws. This has resulted in a widespread range of practices. Some demand the consent of the parents or of the guardian of the adopted person or of a public authority. Some prohibit the adoption of persons belonging to the opposite sex, unless the adoption is made by spouses. In some countries adoption is a simple private contract; in others it must be formally approved by a public

[5]United Nations Convention on the Rights of the Child (adopted 20 November 1989) entered into force 2 September 1990, 1577 U.N.T.S. 3 (1989)
[6]ibid art 21
[7]ibid art 25

authority; in still other countries the approval by the public authority involves an exercise of creative discretion. The rights of succession vary greatly, ranging from the enjoyment of full rights of succession in the adopted family on an equal footing with legitimate children to exclusion from any such rights coupled with the retention of rights of succession in the natural family. Finally, adoption is revocable in some countries, while in others it is not allowed.

Adoption in India

India is a multicultural, multilingual, and multireligious country, which has determined the different factors and complexities effecting all the complexities that affect adoption policy and practice throughout the country.

In India, adoption of children by Hindu adults is governed by the Hindu Adoption and Maintenance Act, 1956. This legislation is enacted to provide the maintenance and all the rights, privileges and responsibilities that are attached to the relationship of the adopted children similar to biological child.The Guardians and Wards Act, 1890, which mostly governs Islamic and Christian matters of childcare, lays down that while appointing the guardian of a minor the court has to keep in mind the welfare of the minor.[8] For the same, the court shall consider factors, such as, age and sex of the child.

The Constitution of India[9] directs the government to make special provisions through legislation programme and approaches to ensure that the tender age of children is not abused and that even those living under extremely difficult circumstances are given facilities to develop in a healthy manner withfreedom and dignity. To fulfil this principle, the government has formulated National Policy on Children, enacted Juvenile Justice Act, 2015. This 2015 legislation is a secular law, which can override the personal law[10](Hindu), and evidently the Islamic law(after the *Shabnam Hashmi*[11] judgement).

[8] Section 17, Guardians and Wards Act, Act No.8, Acts of Parliament, 1890 (India)
[9] Article 39, Constitution of India
[10] *In re Adoption of Payal* 2010(1) Bom CR 434
[11] *Shabnam Hashmi v Union of India* AIR 2014 SC 1281

The Apex Court has noted that a balance had to be struck between attachments and sentiments of the parties towards the minor children and welfare of the minors, which was the paramount consideration for the Court[12]. A custody order passed, therefore, can never be final in nature. On multiple occasions, the Supreme Court has observed that with the change in the circumstances, the wards can seek for alteration in the order of custody proceedings.[13] While applying the principle of res judicata in the matter of custody of the minor, the courts adopted a view that it had to be established that the previous arrangement was not in the welfare of the child; before challenging the order.[14]

Adoption is not a panacea for the multiple problems that cause children to be orphaned or abandoned. It, however, is a vital practice that promotes permanency and well-being for the children. The primary purpose of adoption is to provide secure and stable adoptive families for children; which enables them to grow, develop, and realise their potential.[15]The "rules of thumb" – parental fitness and the best interests of the child[16]are the black letter law of adoption cases.

The adoption laws characterise the following objectives, made clear by the policies and judgements - to get old-age protection by the adopted child; to continue the family name legacy; to secure the family property; and for the solemnisation of last rites. These concepts have evolved to welfare of the child-oriented objectives that are- to provide a home; to assist full growth and potential of the child. With India's laws being family centric, where the aims are to retain and uphold the institution of family, adoption seeks to fulfil the void of both childless parents and children seeking a family.

[12]*R.V. Srinath Prasad v Nandamuri Jayakrishna & Ors* AIR 2001 SC 1056

[13]*Vikram Vir Vohra v Shalini Bhalla* AIR 2010 SC 1675

[14]*Dhanwanti Joshi v Madhav Unde* (1998) 1 SCC 112

[15]'Aims and Objectives Of Aberdeenshire Council Adoption Service'<https://www.aberdeenshire.gov.uk/media/3783/adoptionserviceaimsamdobjectives.pdf>accessed 5 January 2020

[16] Henry H. Jr. Foster, 'Adoption and Child Custody: Best Interests of the Child' (1972) 22 Buff. L. Rev. 1 <https://heinonline.org/HOL/P?h=hein.journals/buflr22&i=17>accessed 23 December 2019

Welfare of the Child Principle

The traditional notion since the ancient times is that the father was considered the sole guardian of the person and property of the child. The authority of the father was considered absolute, with which even the courts refused to interfere. This had resulted in development of mechanisms to dismantle the patriarchal notions- the courts staked the *parens patriae* jurisdiction to supersede the natural guardianship of the father, and award custody based on what promoted the welfare of the child.[17] This has led to the recognition of the equal rights of the mother; and put the claims of the mother and the father in a custody dispute on an equal footing and provided that welfare of the infant shall be the "first and paramount consideration".

The criteria of welfare of the child is generally flexible, adaptable and often reflects the contemporary attitudes regarding the family within the society. "Best interests of the child" has often been the least detrimental option available for the child.[18]The Supreme Court has said that the welfare of a child is not to be measured merely by money or physical comfort, but the word welfare must be taken in its widest sense that the tie of affection cannot be disregarded.[19]

The Committee on the Rights of the Child has provided additional guidance regarding the best interest standard in its General Comment 14.[20]The Committee stated that it is "*useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests*."[21] The committee has gone ahead and has prescribed the factors that could be taken into consideration-

[17]*In re, O'Hara*, (1990) 2 IR 232

[18]Joseph Goldstein, Anna Freud and Albert J. Solnit, 'Beyond the Best Interests of the Child' University of Chicago Press<https://www.jstor.org/stable/30015156>accessed 23 December 2019

[19]*Nil Ratan Kundu v Abhijit Kundu* AIR 2009 SC (Supp) 732

[20]CRC 'General Comment 13' The right of the child to freedom from all forms of violence, 18 April 2011, UN Document CRC/C/GC/13

[21] CRC 'General Comment 14' on the right of the child to have his or her best interests taken as a primary consideration 29 May 2013, CRC /C/GC/14

i) the child's views; the child's identity(such as sex, sexual orientation, national origin, religionand beliefs, cultural identity, and personality);

ii) preservation of the family environment and maintainingrelations (including, where appropriate, extended familyor community);

iii) the care, protection and safety of thechild; any situation of vulnerability (disability, minoritystatus, homelessness, victim of abuse, etc.);

iv) and thechild's right to health and right to education.[22]

"Best interests of the child", a guide to determine matters of adoption is one step towards a possibility of uniformity in adoption laws. India, being a signatory to the *Declaration on Social and Legal Principles relating to Protections and Welfare of Children with Special Reference to Foster Care and Adoption Nationally and Internationally*[23], is yet to formulate a full legislation dealing with adoption.

The primary issue that arises with the 2015 Act can be identified in the title of the statute itself. With the primary focus is providing rehabilitation and reformation for the juvenile delinquents.[24] The intention of the 2015 Act with respect to the status of the adopted child is to be equal to that of a biological child; entitled to the same rights and privileges[25].

Adoption has been considered to be a fact of Article 21, which means that the Juvenile Justice Act, 2000 incorporates the legislative recognition of adoption as a means to subserve the welfare of orphaned, abandoned and surrendered children[26], the statute has not adequately addressed adoption. However the same was not approved by the

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[22]ibid

[23] UNGA,*Declaration on Social and Legal Principles relating to Protections and Welfare of Children with Special Reference to Foster Care and Adoption Nationally and Internationally* (3 December 1986) Arts.3,4,15

[24] The Juvenile Justice (Care and Protection of children) Act, Act No.2, Acts of Parliament, 2015 (India)

[25]§63, Juvenile Justice (Care And Protection Of Children) Act, 2000

[26]*Re Adoption of Payal* 2010(1) Bom CR434.

Supreme Court in *Shabnam Hashmi vUnion of India*[27] wherein the Court stated that now is not an appropriate time for the 'right to adopt' and 'right to be adopted' to be declared as a fundamental right or that it comes within the preview of Article 21 of the Constitution.

Islamic Law

Before the advent of Islam, in the period of *jahiliyya*, adoption was prevalent to create a permanent parent-child relationship between persons who were not biologically related to each other. This was mainly done to strengthen the workforce of the tribe and to safeguard the lineage.[28]However, the actions of the Prophet resulted in confusion. He married his adopted son (Zayd)'s former wife, who was also the Prophet's cousin.[29] It is argued that since adoption was prohibited and had no effect on either of the parties, the legality of the marriage cannot be questioned. So hence the law developed a view that "adopted children" could no longer take the name of their adoptive parents, nor do they have any mutual rights of inheritance[30].

The holy book held a view that adopting another was merely a saying of the mouth, for the absence of knowledge of the father of the adopted child, would make the child brother in faith.[31]The tie between parents and child exist when the child was born to a lawfully married couple. Such ties cannot be established verbally or via contracts. Further, it is unacceptable to severe the relationship with the biological parents. Despite this stance, the holy book has provided for the charitable upbringing of orphans, for Allah is their ultimate caregiver.[32]

[27] AIR 2014 SC 1281

[28]Andrea Büchler, 'Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirate'(2018) 6 Electronic Journal of Islamic and Middle Eastern Law<https://www.ius.uzh.ch/dam/jcr:19853fff-ca30-49c07eedd8d891/FosteringzLaw.pdf>accessed 5 January 2020

[29]ibid

[30]ibid

[31] SuraAhzab, XXXIII, verse 4-5

[32] See Quran (93:6)

Adoption has been practiced as a custom by many classes of Muslims in the parts of Punjab[33], Sindh[34] and Kashmir[35]. But with the introduction of Application of J&K Muslim Personal Law (Shariat)

Application Act 2007, abrogated the custom by allowing the application of the Shariat Act.[36]

This personal law professes the "Kafalah" (sponsorship or guardianship) system, where the minor is provided for by the "adoptive parents" (not in its truest sense), yet remains a descendant of his natural parents.The minor is not given the right and privileges of family name and inheritance in the new family. Preserving the family name and origin when possible, as well as the rights of inheritance is of particular importance in IslamThis method has been provided for and recognised by the UNCRC as alternative modes for caring the child. This practice has been recognised by several Islamic countries where the kafalah parents have the responsibility to look after the child, by catering to the physical and psychological needs, as well as proper education.[37] Their laws stipulate that the kafalah parents are to look after the interests of the child as they would for the biological child.[38]However, the girl child is provided for and maintained until marriage or she is able to finance her own livelihood.[39] This is complemented by allowing the parents to bequeath maximum of one-third of their property to an unrelated person[40], in this case, the non-biological child under their care.

The argument that the ethnic, cultural, religious and linguistic background[41] had been made concrete in UNCRC. This has been the basis for the Islamic groups in India to demand that this system of

[33]*Khair Ali Shah v Imam Shah* AIR 1936 Lah 80

[34]*Usman v Asat* AIR 1925 Sind 207

[35]*Yaqoob Laway & Ors. v Gulla & Anr.* 2005(3) JKJ 122

[36]*Ahad Sheikh vMurad Sheikh & Ors* 2012(4) JKJ 860 HC

[37]cf(n 27)

[38] Moroccan Kafalah Law, art 2, 22

[39]cf(n 27)

[40] UAE Federal Law on Personal Status, art 243

[41]United Nations Convention on the Rights of the Child (adopted 20 November 1989) entered into force 2 September 1990, 1577 U.N.T.S. 3 (1989) art 20

adoption be taken into consideration before declaring a muslim child available for adoption under the Juvenile Justice Act.

It is a prevalent belief among the followers of Islam that the sponsors of a child deprived of parental care should act as the child's parents, but can never sever the familial relations with the biological parents. The Islamic Sharia encourages Muslims to take up sponsorship to provide care for children in need. This has been backed up by the notion that every child has a right to preserve identity which includes family relations.[42]

The Muslims in India are governed by the Guardians and Wards Act of 1890. The Act recognises only guardian-ward relationship. The primary issue that arises from such a recognition is that the child remains a ward, and not an adopted child; thereby never attaining the status of a natural child. Once the ward turns 21, they lose the status of a ward, which means that they have no maintainable rights inheritance as a natural child does. But the Apex Court has provided relief to Muslims, enabling them to adopt under the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006.[43] This is a secular legislation which had been enacted to meet the international obligations of ensuring the welfare of children. This would mean that a Muslim may choose to be governed by the personal law and not adopt, or be governed by the secular act and adopt a child. This stance has been reiterated via the Juvenile Justice (Care and Protection of Children) 2015.

Custom and Stance of the Judiciary

There can never be an analogy between the notions of adoption in Roman law and recognition of parentage in Mohammedean Law[44]; for the former law aimed at acquiring rights of control where as such control cannot be exercised in Islam. While the courts have rejected the notion

[42]ibid art 8
[43]Shabnam Hashmi v Union of India AIR 2014 SC 1281.
[44]Muhammad Allahdad Khan v Muhammad Ismail Khan (1888) ILR 10 All 289

of adoption within the Muslim community, they have chosen not to provide a welfare interpretation as dependent as well.[45]

Undoubtedly, the Muslim Law in its pure form governed of Shariat or Hidaya does not recognize the principle of adoption.In India, the custom of adoption[46] is prevalent in certain classes of Mohammedeans subject to Muslims Personal Law (Shariat) Application Act, 1937. The custom of adoption would prevail over the general stance of Muslim law is proved. The courts have identified that while adoption was not normally recognised, but could be made possible by virtue of custom; placing the burden of proof on the person alleging the custom.[47] Such custom must exist from time immemorial and should be continuous in nature, and the personal law can be superseded by it.

The custom of appointment of heir among Muslim agricultural tribes of Kashmir is not connected with religion and is purely a secular arrangement. This custom is practised by a sonless owner of land in order to nominate his heir.[48]An appointed son is a substitute of the appointer in the village community. The appointed son among Muslims in Kashmir was designated as *Pisarparwarda*[49] in a decision of Dogra Maharaja Pratap Singh. In one case[50], the argument that arose was that such a child was an appointed child, not an adopted one. Thus, appointed son was called *Pisarparwarda* (literally meaning "reared son" or "brought-up son") instead of Pisannutbanay, that is,adopted son. This practice was upheld on the constitutional basis that the legislature is competent to modify the law in spite of Article 25, and the non-recognition of adoption in Islamic Law[51].

The Board, in *Din Mohammad v Karim Bibi*[52], observed that the custom must be specifically pleaded for it to be a modification of

[45]*Smt. Mehtab v State Of Rajasthan* 2001 (91) FLR 501
[46] Muslims Personal Law (Shariat) Application Act1937,s 2
[47]*Zatiun Begum vSecretary Forests And Ors.* 3 (2005) ACC 877
[48]*Inder v Mukhtar*, A.I.R. 1945 Lah. 17
[49]Altaf Ahangar, 'A Critical Appraisal of Heit Appointment Among Muslims In Kashmir' (1989) 31 Indian Law Institute<https://www.jstor.org/stable/43951250>accessed 28 December 2019
[50]ibid
[51]*Khatiji v Abdul Raz* A.I.R. 1977 J.&K
[52] 3 J&K LR 122 (Board)

the personal law. The personal law can only be superseded to that extent to which a custom is pleaded and established by evidence. The custom, if proved and in derogation to the personal law, must be strictly construed. In another instance[53], the Board held that a custom derogating the personal law can be concretely established by way of decrees, judgements and documents in favour of the existence, and not merely on word of mouth or oral evidence.

However, if a person proves that he has been adopted under a custom, he cannot inherit the property for he does not become the heir to the adoptive parents. This is because the Quran specifically deals with heirs, and an adopted son has no place in inheritance. A pisar parwada (adopted son) can only be entitled to inherit if a gift deed (valid under Transfer of Property Act and Registration Act) had been executed by the adoptive father.[54]

Countries such as Egypt and Morocco, in spite of the provisions of the Sharia permit Muslims to adopt, on grounds that the verses of Quran are to be interpreted in light of the changing society and its demands.[55] While many view this as a gradual withdrawal from tenets of the religion, it can be argued that such interpretation is essential for the true realisation of Allah.The conflict that arises from India ratifying both UNCRC and Hague Convention on intercountry adoption, is that the latter does not recognise kafalah as a means of child care explicitly.

Adoption and Fulfilling Article 44

The Adoption of Children Bill of 1972, tabled in the Rajya Sabha, contained an interesting provision empowering Muslims to adopt. This was however opposed by orthodox Muslims, and thereby required an express prohibition in the bill introduced in 1980.[56] The primary issue that arises is the requirement of such opposition. The bill merely

[52] 3 J&K LR 122 (Board)

[53] *Mirza Bahadur Ali v Ch. Sundar Das* 4 J& K LR 144

[54] *Yaqoob Laway v Gulla* 2005 (3) JKJ 122

[55] Usang M. Assim and Julia Sloth-Nielsen, 'Islamic *Kafalah* as an alternative care option for children deprived of a family environment' (2014) 14(2) Afr. Hum. Rights Law J. <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962014000200003#back112>

[56] Adoption of Children Bill1972

enabled a Muslim to adopt, meaning that it was not mandatory or compulsory in nature. Thus, a Muslim who chooses to adopt should be given the freedom to. The aim of the bill is laudable, for it sought to remove the existing differences between Hindus and the other communities. This would have been an attempt to realise the Constitution makers' goals envisaging for a Uniform Civil Code[57].

It is pertinent to note that a uniform law would not violate the freedom of religion[58] guaranteed under the Constitution. It merely provides a platform for those who are currently disabled from adopting by their personal laws to make a choice for adoption. A person is free to choose whether or not to adopt, and follow the traditional dictates of his personal law. While an individual's personal beliefs and faiths are to honoured, yet cannot be exercised on the operation of a secular and enabling legislation.[59] This is supported by the construction of the guidelines which do not indicate any differentiation between the religions to determine who can be parents.

The primary issue that arises in the absence of a uniform law on adoption, is the possibility of varied application of The Hague Convention due to the conflict with the personal law, especially the Hindu law. The Convention envisages a law with a uniform application in the Member States.[60]

Analysis

Legal systems are now formulating the polices to meet the international standards of childcare. One such policy required is a deviation, or a welfare interpretation of the personal laws. Asking the courts to do so would not be a novice act, for the court has often promulgated decisions based on the ever-changing dynamics of the society, which often are construed as a departure from the personal

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[57]Constitution of India 1950, art 44

[58]ibid art 25

[59]*Shabnam Hashmi v Union of India* AIR 2014 SC 1281

[60] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption1993

laws.[61]No prohibition under the name of religion can considered legitimate if it is discriminatory in nature.

While the existing system meets three criteria laid down by the Committee, it however, does not meet the requirement of preserving family environment and relations. The system does not allow for the child to carry the name of the adoptive parents, nor can be equated to the level of a natural chid- which acts as a detriment to the interests of the child. Looking to the adoption laws of England, the adoptive parents have a legal obligation to inform the child about the origins, but can give their name to the child. This meets the first two criteria as the child isn't being entirely deprived of his/her identity; yet establishing and providing a base for new familial relations.

The laws on adoption indicate a sense of permanence as to the relation between the parents and the adopted child. This is not restricted by factors such as attaining majority of the child, or upon the marriage of the female child. In a country like India, where the laws are family-centric, what seems to be the most surprising is that it allows for the system of kafalah and guardian-ward relationships- both of which indicate that the primary purpose is to ensure a decent life, not regarding the emotional relationships or legitimising such relationships.

While the personal law emphasises on the importance to know the parentage of the child, but international documents were of the view that it was not so important if it was contrary to the interests of the child.[62]The law of Guardians and Wards governs the Islamic law on accommodating interests of a parent-less minor. An interesting, yet disturbing feature is that this law has provided detailed rules to enable proper handling of the minor's property but does not effectively address rules regarding guardianship of a minor's person.

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[61]*Mohd. Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945: *Shayara Bano v. Union of India*(2017) 9 SCC 1

[62] UNGA, *Declaration on Social and Legal Principles relating to Protections and Welfare of Children with Special Reference to Foster Care and Adoption Nationally and Internationally* (3 December 1986) art9

Conclusion

In the absence of formalised customary rules regulating the institution, has created a conflict between the practice and the script. The courts, have not shied away from deviating from the scripts in pronouncing welfare decisions, hence, arises a need for a revaluation of the stance taken on adoption. The absence of statutory law governing heir appointment has aided the perpetuation of these sordid situations. Adoptions should be made possible under the aegis of a uniform code governing all religions and sects. Extensive cultural diversity is the truth of India, but absolute heterogeneity in laws is also not desirable. Uniformity very rightly leads to a constricted scope for arbitrariness and equal protection of law to all the subjects irrespective of the diverse backgrounds they come from.In a heterogeneous society like ours, it is imminent to compare the laws governing particular sects to determine the true purpose of the law and validate its legitimacy. A uniform law recognising adoption in all religions, does exactly that- validate. Any opposition in this regard by would be absolutely uncalled for, unjustified and unreasonable as the enactment is not going to impose the legal fiction of adoption on an unwilling Muslim.

ELECTRONIC AGENTS, LEGAL PERSONALITY: CONSIDERATIONS IN THE FUTURE OF CONTRACTS

Drishya B. Shetty, K. Mythiraye[1]

Abstract

The use of electronic means of communication has grown tremendously with new innovations and the rapidly growing digital environment. Albert Einstein in his book 'Cosmic Religion And Other Opinions And Aphorisms' which was first published in 1931, famously quoted, "Imagination is more important than knowledge. For knowledge is limited, whereas imagination embraces the entire world, stimulating progress, giving birth to evolution."It has been nearly 87 years since he penned these words and the world has truly embraced this idea considering the giant leap that mankind has taken in the development of technology. There was a time when it would take days, or perhaps months to send messages from one country to another. Now in a matter of seconds we can send emails to anyone in any part of the world. We have the world at our feet, and it is only a mouse click away, the advent of the internet in the 1970's[2] has changed the dynamics of business, communication and social interactions. Electronic agents, working with Artificial Intelligence (AI) have been developed to handle the formation and performance of contracts, almost replacing the need for human intervention. While the law has to an extent, caught up with the pace of changing technology, there is yet, the need for legislators and policy makers to take a futuristic view when developing rules and regulations. While, the role of electronic agents have been recognized in the formation of contracts, what about the role of AI, in self-driving contracts ? Through this paper, the authors will attempt to provide a syntactical analysis to induce deliberations on matters relating to electronic agents and its relation withsmart contracts and the use of AI not only for formation but also performance ofself-driving contract which is the present and future of technology. Considering the legal issues and consequences of such contracts, the need for a legal framework becomes essential and the same has been addressed and deliberated.

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[2] Barry M. Leiner, 'Brief History of the Internet' (*Internet Society, 1997*) <https://www.internetsociety.org/internet/history-internet/brief-history-internet/> accessed 3 May 2019

Keywords:Smart contracts, Artificial intelligence, Self-driving contracts

Introduction

Technology has taken over our lives, almost every interaction that an individual has with another will have the involvement of technology in it. It is interesting to also understand and analyse what exists behind this technology, how it works and what are the implications it has on us. Another subject that is ubiquitous in human interaction is the law. The law acts as the guide which determines how we carry out our actions and therefore it is important to study the inter-relationship of law with technology. Two rapidly evolving subjects.

This paper will analyse the role of technology, more specifically developments of electronic agents in the formation and possibly even to include execution of contracts. This paper is also an attempt to analyse the validity of the newly developing electronic agents under contractual law in relation to self-deriving contracts using Artificial Intelligence ("AI") and smart contracts in the digital environment.

The authors will discuss the concept of electronic agents in the formation of contracts in the first part of the paper. The role they play, the legal recognition of electronic agents as well as contracts entered into by electronic agents under various International and National legislations and laws. It will further rely on the law of agency to induce the thought of electronic agents to perform even the execution part of the contract and even has the ability to act automatically. It will also shed light on the concept of – computers as agents and the definition and recognition of electronic agents under the United States ("US") legal regime. The paper will also highlight the advancement of technology in relation to contracts by analysing and discussing the concept of 'smart contracts'. The authors will discuss the legal validity of the same and the role of electronic agents to even include smart contracts as one of themand such smart contracts can also play the role of execution of the contract. Finally the paper will delve more into the future of contracts and technology. It will introduce the concept of

self-driving contracts. This is the most futuristic form artificial intelligence in contract formation and execution. Since the development of this technology is still in its chrysalis, there is limited data available on the same. In this part of the paper, the authors have relied and carried out an in depth analysis of the paper titled 'Self-driving Contracts' written by Anthony J Cassey and Anthony Nibblett in 2017, published in the Journal of Corporation Law.[3] The authors will further look into role of electronic agents in self-driving contracts by looking into the concept of legal personality. The final part of the paper, will draw conclusions on the research and carried out in the preceding sections and the authors will determine whether, the change in technology and the enhanced role that artificial intelligence and smart contracts plays in the formation and execution of contracts calls for a change in the law relating to electronic contracts as well ?

Electronic Agents

The use of electronic agents in formation of contract was recognized internationally from the "UN convention on the Use of Electronic Communications in International Contracts 2005" ("the Convention") wherein the makers of the Convention approached the concept of contracting through electronic agents from a negative perspective. That is, the makers communicated the idea by expressing that an agreement is not discredited basically as a result of the utilization of automated systems. This methodology is communicated in Article 12 of the Convention expressed as follows: *'An agreement shaped by the collaboration of a automated message systems and an individual, or by the interactions of automated systems, will not be denied legitimacy or enforceability on the sole ground that no common individual assessed or interceded in every one of the individual activities did by the automated message systems or the concluded agreement'.*

Electronic agents have also been popularly referred to as software agents, mobile agents or even intelligent agents. With growing technology, electronic agents have become advanced, perhaps to even

[3]Anthony J Casey and Anthony Niblett, 'Self-Driving Contracts' (2017) 43 J Corp L 1. [Casey & Niblett]

include AI used in self-derived contracts, smart contracts and so on for formation of contracts through electronic means. It plays a significant role in e-commerce transactions all around the world. In India, after the introduction of the Information Technology Act, 2000 ("IT Act"), the use of electronic agents for formation of contracts has been legally binding between the contracting parties derived from the wide language of Section 11(c) of the IT Act, which provides that *an electronic record shall be attributed to the originator by an information system programmed by or on behalf of the originator to operate automatically*. Article 13(2) of UNCITRAL Model Law on E-commerce, refers to the situation where the message was sent by a person who had the authority to action behalf of the originator, and the issue of actual or ostensible authority is left to domestic law.[4] This is clearly seen from the Indian provision itself. Even otherwise, in the matters of contract formation, the objective test of agreement is adopted.

The arguments that computers cannot have the intent to contract are defeated, by the simple logic that a person ultimately programs the computer, and the intent can be recognized by that person using the computer as a tool.[5]An attitude adopted towards the legal status of an electronic agent is should be that of a progressive method that allows limited liability to be attributed towards electronic agents executing a contract on behalf of the parties.

Revisiting Computers as agents

Though the concept of electronic agent existed for a few decades, its advancement is inevitable. It is irrational to foresee that with time, agent technology will be sufficiently high-tech to carry out human functions without human oversight or intervention.[6]

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[4]UNCITRAL Model Law on E-commerce Guide to Enactment, [1998], 83-92, 46-48

[5] Apar Gupta & Akshay Sapre, *Commentary on Information Technology Act*, (2nd edn, Lexis Nexis, 2016)

[6]Ian R. Kerr, 'Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act', (ULCC,1999) <https://www.ulcc.ca/en/annual-meetings/359-1999-winnipeg-mb/civil-section-documents/362-providing-for-autonomous-electronic-devices-in-the-electronic-commerce-act-1999?showall=1&limitstart> accessed May 1 2019

According to Fischer, the comparison seems obvious: '*When computers are given the capacity to communicate with each other based upon preprogrammed instructions, and when they possess the physical capability to execute agreements on shipments of goods without any human awareness or input into the agreements beyond the original programming of the computer's instructions, these computers serve the same function as similarly instructed human agents of a party and thus should be treated under the law identically to those human agents'*.[7] This can be applied to the current scenario where the issue of consent given by electronic agent is resolved by attributing it to the originator of the data message.

Even, Wooldridge and Jennings[8] define an electronic agent as, '*a hardware or software-based computer system that enjoys the following properties: autonomy (capacity to act without the direct intervention of humans or others), the capacity to interact with agents or humans, the capacity to perceive their external environment and to respond to changes that are coming from it, and the capacity to exhibit goal-directed behavior by taking the initiative*.' Hence applying the rudimentary of agency, the characteristics exhibited by these electronic agents is not to function as per the instructions given by its originator but also could proactively and autonomously make decisions while transacting through the contract.[9] Even the experts then, foresaw the fact that electronic agents could develop to not only form contracts but carry out the performance in the near future.[10] Constructively way back in the 20th century[11], this was not assumed to be a wrong claim that electronic agents can become more functional in the future.

[7] John P. Fisher, 'Computers as Agents: A Proposed Approach to Revised U.C.C. Article 2', (1997) 72 IND. L. J. 545, 570

[8] Wooldridge & Jennings, *Intelligent Agents: Theory and Practice*, (Knowledge Engineering Review, Vol. 10 No. 2, Cambridge University Press, June 1995)

[9]ibid

[10] Maes et al., 'Agents that Buy and Sell: Transforming Commerce as We Know It', (1999) 42(3) Communications of the ACM 81-91

[11] ibid

Wider Definition of "electronic agent" adopted by US Legislators

The Uniform Electronic Transactions Act, 1999 ("UETA") expressly recognizes that an electronic agent may operate autonomously, and contemplates contracts formed through the interaction of electronic agents and those formed by the interaction of electronic agents and individuals.[12] The Act defines an electronic agent as "*a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual."*[13]The drafters appreciated, however, the experts'[14] conviction that the technology likely will evolve so that at some point electronic agents will "act autonomously, and not just automatically."[15]

The concept of electronic agents performing transactions in relation to the contract is not new[16] and the contemplation of such experts has given window for the special developments such as smart contracts and Artificial Intelligence to be included under the ambit of electronic agents. It is to be taken into consideration that bringing such technology under the umbrella of electronic agents can be beneficial to make them enforceable under the laws of the land.

Smart Contracts

Smart contracts are a set of promises in digital form[17] the performance of which is done through protocols. Smart contracts are self-executing in nature and are in the form of immutable code written on private block chains as distributed ledgers of the parties of the smart contract.[18]These block chains can store safe, versatile, and non-repudiable information in a straightforward way.[19] To put it shortly, Smart Contracts are instruments coded to consequently execute when

[12] Uniform Electronic Transaction Act1999, s 14

[13] ibid s 2 (6)

[14] Tom Allen & Robin Widdison, 'Can Computers Make Contracts' (1996) 9 Harv. J.L. & Tech. 25, 26

[15] ibid

[16]ibid

[17]Nick Szabo, 'Smart Contracts: Building Blocks for Digital Markets', (1996) <http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html> accessed 22 April 2019

[18] Jeremy Sklaroff, *Smart Contracts and the Cost of Inflexibity*, (2017) 116 University of Pennsylvania L.R. 263, 269

[19]Arvind Narayanan et al, *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction* (Princeton University Press 2016)

certain standards are met.[20] The first blockchain to empower the creation and deployment of high-tech smart contracts was the Ethereum blockchain.[21] Utilizing Ethereum, anybody can compose, store, and execute little computer programs through a blockchain-based system.[22] These computer programs are executed by different participants on the Ethereum system and consequently have the ability to work autonomously and free of the control of any individual participant.[23]

Legality of smart contracts

Smart contracts could be binding on the parties if the computer software used in creation of such contracts can also be attributed to the originator that is the parties to the contract.[24] Thus, there is meeting of minds between the parties which could be inferred from the actions of the computer acting on behalf of the parties. The fact that the smart contract has been entered into between party for the execution of the existing contract is very much indicative of presence of legal intention between parties.

The principle of 'comity of contracts' is based on *pacta sunt servanda,* i.e. it is the duty of parties to be bound by the legal obligations arising out of agreement. This principle is laid down in clear and unequivocal terms in Article 1.3 of the Principles of International Commercial Contract ("PICC"). It essentially means that by entering into a contract, the parties declare their 'intention to be bound'[25] and agree to being bound to the contract. The Official Comment[26] on 'definiteness of an offer' under Art 2.2 states that some essential terms such as precise description of goods or services may be left undetermined in the contract, but what is *sine qua non* is that the

[20]William Mougayar, '9 Myths Surrounding Blockchain Smart Contracts', (*Coindesk*, 23 March 2016) <https://www.coindesk.com/smart-contract-myths-blockchain/>accessed 10 April 2019
[21]Massimo Bartoletti and Livio Pompianu, 'An Empirical Analysis of Smart Contracts: Platforms, Applications and Design Patterns' (*arXiv: Cryptography and Security* 2017) https://arxiv.org/pdf/1703.06322.pdf> accessed 10 April 2019
[22]Vitalik Buterin. 'Ethereum Whitepaper'. (2013) <https://github.com/ethereum/wiki/wiki/White-Paper>accessed14 April 2019
[23]ibid
[24] Max Raskin, 'The Law And Legality Of Smart Contracts' (2017) 1 GLTR 305
[25] UNIDROIT Principles of International Commercial Contracts, 2016, Art. 2.1.1 and 2.2.2
[26] ibid Off Cmt 1 to art. 2.2, p. 37

intention to be bound by the contract is sufficiently provided. Furthermore, in the automatic process of electronic contracting, parties would be bound by the automatically generated result, even if they were temporarily unaware of that result.[27] Further, Article 8 of the UNCITRAL Model Law on E-Commerce, 1996 ("MLEC') states that a data message will be given the same effect as that of writing if it satisfies the requirements of reliability, traceability and inalterability.[28]

The general consensus with regard to affixing signatures on a contract is to signify that both parties are willing to be bound by it. The function of a signature is two-fold, to *authenticate* a document and also to demonstrate the signer's *approval* of the contents of said document.[29]

Furthermore, it is even observed that "*courts are influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it.*"[30] Art.2.1.1 of the PICC binds such parties to a contract whereby parties *agree to adopt a system* capable of generating self-executing electronic actions without former personal intervention of each party.[31] Here, the standard of proof laid down is that mere agreement to adopt a self-executing system binds the Parties.

India in particular, these contracts could be deemed enforceable under the Indian Contract Act, 1872 which provides for the essentials of valid enforceable contracts. These include offer, acceptance, consideration, and consensus of the parties. All the essentials of a valid contract under the Indian law is met if the consideration and object is not lawful or contrary to the law. The block chain can also be programmed in such a way that the payment is mechanized as to the

[27]*Software Solutions Partners Ltd, R (on the application of) v. HM Customs & Excise*, 971 EWHC [2007]

[28] UNCITRAL Model Law on E-Commerce, 1996, Explanatory note by UNCITRAL Secretariat p. 35, para 49

[29]Ewan McKendrick & Roy Goode, *Goode on Commercial Law* (4th ednEwan McKendrick 2010)

[30]Joseph Chitty, Chitty on Contract- General Principles(H.G. Beale, Sweet & Maxwell (32nd edn., 2015)168

[31] R Nimmer, 'The Legal Landscape of E-Commerce: Redefining Contract Law in an Information Era', (2007) 23 JCL 1, 24-28

needs of the specific smart contract. The non-performance and non-payment of contract can also be put into check.[32]

With the enactment of the IT Act, 2000 which is inspired from UNCITRAL Model law on E-commerce, contracts or records are to be validated or authenticated by using electronic signatures.[33] Under section 35 of the IT Act, a digital signature can be obtained only from a government designated certifying authority. This would be the first point of concern for a smart contract, since to validate a smart contract it is the block chain technology that generates the hash-key to be used as an individual identifier and authenticator. This means that, in order for the smart contract is legally recognized, the government should be made party to the contract which all the more gives certain legality to it. However, the appeal of smart contracts will be lost. Hence, Additionally, the Indian Evidence Act, 1872 allows digital records to be admitted as evidence[34] only when it is authenticated and in consonance with the IT Act. However, what is to be noted is that there is still no clarity as to its enforcement in India.[35]

Nonetheless, it has unquestionable potential to reduce time and effort and make contracting process very secure unlike contracts which will leave an audit trail.[36]

Smart contracts as electronic agents

What needs to be understood that whether the smart contract is a derivative of the existing contract which may or may not be formed through electronic agents. The authors are only attempting to portray the possibility that an agent has the capacity to carry/perform/ act autonomously on behalf of the party in relation to the contract after the initial authorization has been permitted.

[32] Kashish Khatter, 'Everything you need to know about Smart Contracts', (*iPleaders*, 2 June 2018) <https://blog.ipleaders.in/smart-contracts-2/>accessed 30th April 2019

[33] The Information Technology Act 2000, s 5

[34] Indian Evidence Act 1872, s 65 B

[35] Dalmia, Siddharth, 'Are smart contracts enforceable under Indian law?' (*ResearchGate*, 2018)<https://www.researchgate.net/publication/324756904_Are_smart_contracts_enforceable_under_Indian_law>, accessed on 17 April 2019

[36] Anirudha Bhatnagar, 'India: Smart Contract In The Indian Crucible', (*Mondaq*, June 2018) <http://www.mondaq.com/india/x/711102/fin+tech/Smart+Contract+In+The+Indian+Crucible> accessed 29th April 2019

It is true that smart contracts are automated programs that transfer digital assets within the block-chain upon certain triggering conditions.[37] The analysis of smart contracts as electronic agents falls in two folds, *firstly*, smart contracts are akin to that of electronic agents and *secondly*, electronic records can include block chain.

Firstly, smart contracts are akin to that of an "electronic agent" however, acting through the application of block chain technology. This contract could be legally binding as it can fit neatly into the IT Act definition of an "electronic agent" which is implied under Section 11(3) of the Act read with Section 10A and Section 5 of the Act.[38] Comprehensively, smart contracts can be reasonably accommodated and construed as a contract formed expressed in electronic form[39] by an information system programmed by or on behalf of the originator to operate automatically[40] and is authenticated and verified through a digital signature.[41]

The point of concern is to the use of electronic signature. This is because the signature under a smart contract fulfills the requirements under the wide interpretation of "electronic signatures"[42] however is circumvented by the fact that it is to be issued by the central government.

The authors urge thatthe above deliberations are based upon the observations of many experts[43], keeping in mind the fact that electronic agents are to be given the legal personality and can also function for enforceability or performance of the contract.

Secondly, electronic record means "*data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche.*"[44] What can

[37] David Morris, 'Bitcoin Is Not Just Digital Currency. It's Napster for Finance'. (*Fortune,* 21 January 2014), <http://fortune.com/2014/01/21/bitcoin-is-notjust-digital-currency-its-napster-for-finance/> accessed 29 April, 2019

[38]Dylan Yaga et al., 'Draft NISTIR 8202:, Blockchain Technology Overview', (*NIST,*24 January 2018), <https://csrc.nist.gov/CSRC/media/Publications/nistir/8202/draft/documents/nistir8202-draft.pdf> accessed 10 May 2019.

[39] The Information Technology Act 2000, s 10 A

[40]ibids 11 (3)

[41]ibids 5

[42]ibids 3 A &s 5

[43]cf(n 7)

[44] The Information Technology Act 2000, s 2(t)

be inferred is to the fact that a block chain can be used, in part, as a book keeping system and which is produced, sent, corresponded, received, and saved via electronic means.[45] Further, the closest analogy to a block chain could be "database" included as computer resource[46] under the IT Act. This computer resource is used in transmission of electronic record and is validly recognized under the law.[47] Hence, we can say IT Act, facially encompass Smart Contracts, but its flexibility may result in ambiguity for legislators and parties to the contract. This uncertainty however needs to be addressed so as to move forward with feasible cross-border transactions.

- Possible Solutions to existing problem
- For one, the authors suggest by providing a legal definition for "electronic agents", keeping in mind and appreciating the advancement of technology[48] so as to even include smart contracts with in its ambit. It is about time to realise that an electronic agent can also perform contracts on behalf of the parties binding both the parties. It would be preferable if the definition was akin to that of UETA of US.

Further, in relation to the digital signature that is prescribed by the central government, the problem is when these contracts that create their own signature as opposed to those given by the central government. This is thus, not recognised by the law. This could, however be battled only by making government, a party to such contract or that a new law is made to that effect so that all such digital signatures created through the technology is kept in check and within the law.

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[45] Priyanka Desai, Freeman Lewin, and Benjamin L Van Adrichem, 'Smart Contracts & Legal Enforceability', Cardozo Blockchain Project, (October, 2018),<https://cardozo.yu.edu/sites/default/files/Smart%20Contracts%20Paper%20-%20Final_0.pdf> accessed 12 May 2019

[46]cf (n 39) s 2 (k)

[47]ibids 13

[48] M. Hulicki, 'The Legal Framework and Challenges of Smart Contract Applications,' *(International Conference on Artificial Intelligence and Law*,2017)<http://www.cs.bath.ac.uk/smartlaw2017/papers/SmartLaw2017_paper_3.pdf> accessed 15 May 2019

Self-Driving Contracts

The preceding section of this paper explored the area of smart contracts and smart contracts as electronic agents. As discussed, smart contracts are self-executing contracts which through the use block chain technology, canperform all the essential conditions that lead to the execution of a contract.[49]With the passage of time, smart contracts have taken over the business and commercial domain as the preferred means of contracting as it reduces the scope of human error and increases performance and time efficiency. Smart contracts use the block chain technology to perform its functions under the contract as per the instructions or code fed by the principal.[50] The difference between a smart contract and self-driving contract is essential to for identifying electronic agent.

Distinction between smart contracts and self-driving contracts

The advancement of technology has now given rise to a new form of smart contracts known as self-driving contracts. Unlike smart contracts, where electronic agents decide every aspect of formation and performance of a contract,self-driving contracts allow for individuals to participate in the contract formation as they lay down the broad contours of the contract while artificial intelligence is used to lay down the specifics or details under the contract.[51] Smart contracts differ from self-driving contracts, in the manner in which they operate. A smart contract contains artificial intelligence that allows for enforcement of the contract without the intervention of a third party. It is also capable of determine the specific terms of the contract based on which the transactions between the parties would operate.[52] For example, in a trade agreement between two nations, where a contract is entered into, to sell and purchase goods, ideally a bank tenders a letter of credit. However, if a smart contract is in place, it replaces the need for a bank

[49] Albert Choi and George Triantis, 'Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions' (2010) 119 Yale L J 848
[50] Tsui S Ng, 'Blockchain and beyond: Smart Contracts' (2017) 2017 Bus L Today 1
[51]V Gerard Comizio, 'Virtual Currencies: Growing Regulatory Framework and Challenges in the Emerging Fintech Ecosystem' (2017) 21 NC Banking Inst 131
[52] Casey & Niblett, cf (n 4) 43

or escrow agent to carry out the function of extending a guarantee. The artificial intelligence present in the contract would determine if the conditions are met to extend such a letter of credit and no judicial enforcement would be required.[53]

This is where a self-driving contracts differ from smart contracts. Here, the contract consists of AI capable of creating the contract in the first place, supplanted by learning algorithms that can amend the contract based on contingencies that may arise.[54] Thus, these contracts would require third party or judicial enforcement.

This can be better explained by drawing an analogy with self-driven cars. The driver is in control of the car with respect to matters such as, the directions and destination that he wishes to use and reach respectively. However, the technology inbuilt in the car determines various other specific functions such as, the speed of the car or the traffic congestions on a particular route and will therefore suggest the driver to use a different path.

Self-driving contracts operate on 3 main plains – first, the parties agree amongst themselves and lay down the broad objectives of the contract; secondly, artificial intelligence translate these broad objectives into specific directions which forms the content of the contract and lastly, these terms that the AI set out are based on the information that it gathers after the parties enter into the intial agreement.[55]

Though the concept of self-driving contracts may seem to be an idea brought into action only in the future, we are already having primary forms of these contracts in effect today, as seen in – self-pricing contracts[56] or contracts made in the insurance sector.[57]Artificial intelligence here predicts the prices at which a commodity will be placed at in future and accordingly informs the parties to a contract to adapt their business strategies and act accordingly.

[53]Joshua A T Fairfield, 'Smart Contracts, Bitcoin Bots, and Consumer Protection' (2014) 71 Wash & Lee L Rev Online 35
[54]Lauren Henry Scholz, 'Algorithmic Contracts' (2017) 20 Stan Tech L Rev 128
[55]Anthony J Casey and Anthony Niblett, 'The Death of Rules and Standards' (2017) 92 Ind LJ 1401
[56] Francisco Beneke, 'Artificial Intelligence and Collusion' (2019) 50 ILJ Int. Rev. IP & Comp. Law 109
[57] Dennis Kessler, 'How Artificial Intelligence will impact the (re)insurance industry' (*SCOR*, March 2018) <https://www.scor.com/sites/default/files/focus_scor-artificial_intelligence.pdf>accessed 1 May 2019

Technology behind self-driving contracts

Usually in the formation of a contract, the parties undertake the following steps –

1- gathering information to enter into the contract
2- out the possible contingencies that may arise once the contract is entered into
3- leaving gaps for contingencies that cannot be predicted.[58]

There are a number of steps involved in performing the contract as well, such as –

1- verifying the information received through contract
2- cost of undertaking various actions under the contract
3- cost of being unable to undertake certain actions under the contract due to lack of competence or capacity to do so
4- cost of re-negotiation and litigation costs in case of a breach in performance.[59]

Therefore, it is seen that the key for successful contract formation is for the parties to have complete information. It is only when the parties are fully aware of the present conditions and the possible future scenarios will they be able to draft clear and precise contractual terms that are best suited for each parties interest.[60] However, it is perhaps obvious that such an ideal situation cannot be achieved as it not possible for a human mind to calculate and predict every possible future contingency and plan an appropriate recourse in case such a contingency arises. This is the reason why most contracts are incomplete as parties to the contract acknowledge their inability to comprehend all possible future scenarios.[61] Thus they either have to draft their contracts with the information they have at hand and burden the costs of contingencies they did not predict or predicted but did not

[58]Christoph Glatt, 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 Int'l JL & Info Tech 34
[59]Emily M Weitzenboeck, 'Electronic Agents and the Formation of Contracts' (2001) 9 Int'l JL & Info Tech 204
[60]Martin Hogg, 'Contract Formation in the Electronic Age' (2009) 13 Edinburgh L Rev 121
[61] Casey & Niblett, cf (n 3) 47

have the time and resource to adapt themselves to it or leave the decision making when the contract fails due to lack of information during contract formation to a judge or any other person with the power to adjudicate.[62]

Thus, there exists a tradeoff – either the parties invest on collecting information or burden the costs of re-negotiation and adjudication.

This is where self-driving contracts provide a solution. By using self-driving contracts the trade-off between cost of information collection and adjudication no longer exists as the burden of both will be shifted on the artificial intelligence technology employed during the formation of the contract.[63] The technology used here is called a micro-directive. This technology possess AI that is capable of transforming the broad objectives of the contract into specific terms[64]. The onus then rests on the parties to execute the contract as per the terms that the micro-directive formulates[65]. Based on the manner in which the contract is performed, the AI or the algorithm is capable of developing further terms to allow for the contractual obligations to be fulfilled. Thus, the AI can negate any ambiguities that may arise during a transaction by developing specific terms in the contract catering to the manner in which the parties execute the same[66]. Hence, the micro-directive possess qualities of a standard, wherein it acts in tandem with the broad ex-ante objectives et between the parties, as well as that of a rule, where it is capable of foreseeing the manner in which contractual transactions will progress based on past action.[67]

Self-driving contracts will primarily use three types of technologies – predictive technologies, monitoring technologies and communicative technologies.[68] An example can best explain how these

[62]ibid 47
[63]Casey & Niblett, cf (n 3) 21
[64]Anthony J Casey and Anthony Niblett, 'The Death of Rules and Standards' (2017) 92 Ind LJ 1401
[65]Timothy D Robinson, 'A Normative Evaluation of Algorithmic Law' (2017) 23 Auckland U L Rev 293
[66]Adam I Muchmore, 'Uncertainty, Complexity, and Regulatory Design' (2016) 53 Hous L Rev 1321
[67]ibid 1415
[68] Casey & Niblett, cf (n 3) 23

technologies work hand in hand to give the parties to the contract the best possible result. A contract is formulated to cater to a potential situation X, predictive technology will determine the possible contingencies that may take place in situation X, the best plan and recourse. Say the best outcome in scenario X is Y. Monitoring technologies will determine whether scenario X has occurred in the first place for the party to the contract to carry on with offered result Y. If yes, then communicative technology will inform the parties about the same and the course of action will be charted accordingly.

The authors will now analyze each of these technologies individually and the costs that they help mitigate –

a) Predictive technologies – in today's world where technology helps us predict future actions in various commercial and social setups so that individuals can be better prepared to face them, predictive technologies are the need of the hour. These technologies not only help predict future contingencies but also provide individuals with methods to tackle them. Technology has a major role to play in the area as unlike a human mind it is capable of analyzing large amounts of data at the same time and therefore provide the best solution. These technologies consists of algorithms that can assimilate data it receives and give appropriate answers based on past transactions.[69] This type of technology helps reduce drafting costs. Drafting costs consists of – thinking cost, writing costs and negotiation costs.[70]All of these can be mitigated using predictive technologies.[71]

b) Communication Technologies – once the data is assimilated by the predictive technology there arises the need to communicate the same to the parties to the contract. However, the role of communicative technologies is not merely limited to this. The predictive technology has the capability to analyze and interpret vast amounts of data, cater to every possible contingency and provide the recourse for the same.

[69] Donald Michie and Rory Johnston, *The Creative Computer: Machine Intelligence And Human Knowledge* (Penguin Books 1985)
[70]Gordon E. Moore, 'Cramming More Components Onto Integrated Circuits' (1965) 38 ELECTRONICS 114, 114
[71]ibid 116

The, communication technology thereafter, helps identify the main principle or rule behind the data that has been collected by the predictive technology. This rule is communicated to the parties and is later put down in words of the contract. Hence making it easier for the parties to perform the contract as they will be able to comprehend the principle upon which it was framed. This technology is extremely beneficial in reducing performance costs in contingent contracts.

c) Monitoring technology – once data has been analyzed and communicated to the parties the only remaining task is to monitor the compliance of the parties with the rules of the contract. This is where monitoring technologies play a role. These technologies will first analyze whether a particular contingency predicted by the predictive technology has arisen in the first place that requires the parties to take a particular mode of action that has been suggested by AI.[72] Thus the first action would be to monitor the contingency. Next, the technology will analyze whether the actions of the parties are in compliance with the contract. Therefore, the second action is to monitor the actions of the parties. It can provide an instantaneous update to the parties in case a particular player in the contract defaults or commits a breach. Therefore, monitoring technologies have the ability to process in detail every action of the individual. This raises a privacy concern[73] which for the purpose of this article is beyond its scope. Thus, monitoring technologies help reduce enforcement costs as it can immediately update a party when they do not act in accordance to the contract to change their actions accordingly.[74]

Electronic agents and self-driving contracts

As stated earlier, self-driving contracts are distinct from smart contracts as they vary with respect to the extent of use of artificial intelligence. In case of self-driving contracts, artificial intelligence acts

[72]Scott R Peppet, 'Regulating the Internet of Things: First Steps toward Managing Discrimination, Privacy, Security and Consent' (2014) 93 Tex L Rev 85

[73] Thomas B Kearns, 'Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns ' (1999) 7 Wm & Mary Bill Rts J 975

[74]Oliver E Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) 22 JL & Econ 233

as a judge in deciding the best probable course of action in a given scenario and suggests the same to the parties to a contract. Now coming to the role of electronic agents under self-driving contracts. As was discussed in the preceding sections of this paper, electronic agents are those entities that are used during the formation of the contract.[75] However, we have also suggested that it is time to include desired execution of a contract as a function of the electronic agent in relation to the contract. The author will now elaborate on the technology behind self-driving contracts, in order to determine the role, liability and personality that can be conferred to these contracts.

The legal personality of artificial intelligence

Currently, no legal system recognizes artificial intelligence as a 'person' under the law.[76]A slight change in this status quo has been observed when the Hong Kong based robot, Sophia, was offered Saudi Arabian citizenship.[77]The European Commission's Expert Group on Liability and New Technologies – New Technologies Formation ("NTF") on 27th November, 2019, published itsReport on Liability for Artificial Intelligence and Other Emerging Technologies, wherein they restated that granting personhood to artificial intelligence for the purpose of establishing liability would be a futile exercise.[78] The Report suggested that, liability shouldbe continued to be attributed to natural persons only. However, this event has not witnessed any change in the law as such. As a matter of fact, the Restatement (Third) of Agency states categorically that:

To be capable of acting as a principal or an agent, it is necessary to be a person, which in this respect requires capacity to be the holder of legal rights and the object of legal duties. Accordingly, it is not possible for an inanimate object or a nonhuman animal to be a principal

[75]Anthony J Jr Bellia, 'Contracting with Electronic Agents' (2001) 50 Emory L J 1047

[76]Huzefa Tavawalla, 'Can artificial intelligence be given legal rights and duties?' (*Lexology*, 19 June 2018) <https://www.lexology.com/library/detail.aspx?g=15937d6a-5421-487b-bf60-82a34cb79d79> accessed 3 May 2019

[77] Reporter, 'Sophia The Robot Gets A Saudi Arabian Citizenship', *The Economic Times*, (6 November 2017)

[78] John Swinson, 'AI & Legal Personality' (*Lexology*, January 2020) <https://www.lexology.com/library/detail.aspx?g=1d63dddb-05e8-4982-9cde-e3b4cfbbe83e> accessed 23 July 2020.

or an agent under the common-law definition of agency. However, an animal or an inanimate object may serve as a person's instrumentality in a manner that may be legally consequential for the person.[79]

Thus, while the United Nations Convention on the Use of Electronic Communications in Electronic Contracts, 2005 (UNCUECIC)[80], the Uniform Electronic Transaction Act, 1999 (UETA)[81], the Uniform Computer Transaction Act, 1999 (UCITA)[82]and other national and international legislations have recognized and enforced contracts entered using electronic agents without human intervention, the problem of conferring personality to such technology still persists.

If personality is not provided to artificial intelligence, then the following problems arise. Firstly, applying the traditional principles of contract law, every contract must consist of a minimum two parties, that is, buyer-seller, offeror-acceptor etc. However, consider a contract entered between an individual, X and an artificial intelligence system, Y. If personality is not accorded to the AI, then who is X transacting with? the essentials of a valid contract will not be met. Thus, there exists an ambiguity in specifying the contracting parties.[83]

Secondly, though these agents are termed as 'intelligent' agents, there are instances, where AI has acted in a manner contrary to the objectives of the principal or have incorrectly analysed the data fed to it.[84] We must acknowledge that any computer program or software is liable to be attacked by virus or other such harming entities thus making the system not work as they are intended to and give rise toerrors. In such cases, since AI has no legal personality, who shall be held liable?

James Raymond Davis, in his paper has highlighted a lacuna in the Uniform Commercial Code, 2003[85] under section 2B which states

[79] Restatement (Third) Of Agency 2006, s 1.04
[80] United Nations Convention on the Use of Electronic Communications in Electronic Contracts, art 12, 2005.
[81] Uniform Electronic Transaction Act 1999, s 14
[82] Uniform Computer Transaction Act 1999, s 107
[83]Waleed Al-Majid, 'Electronic Agents and Legal Personality: Time to Treat Them as Human Beings' (*BILETA*, 17 April 2007) <www.Electronic%20 Agents %20 and %20 Legal %20 Personality %20-%20 Time %20 to %20 Treat %20 Them %20 as %20 Human % 20 Beings.pdf> accessed 4 May 2019
[84]ibid 4

that "contract terms do not include terms provided by the individual in a manner to which the agent could not react". He points out that this gives rise to an issue where, if the software agent or AI comes across any term in the contract it cannot comprehend, then it simply ignores the same. This leads to nullification of the contractual terms. In the present circumstances where, AI has no legal personality, who will be liable for such acts? James opines, that the AI must have the capability of informing the principal whether it can comprehend the terms or not. So that the principal can take up appropriate measures.[86]

Thirdly, with regard to self-driving contracts, there arises a peculiar issue of lack of mutual assent.[87] Here, the AI has the power to determine future contingencies and future courses of action, however these actions taken by the AI are not under the control of either parties to the contract.[88] In the situation where neither party approved a particular course of action, who would face liability ?[89] Since vicarious liability of artificial intelligence is not recognised, the principal would not be held liable for the acts of the AI.[90]

Therefore, broadly the issues with not conferring legal personality to AI can be categorized under two heads –

i) the lack of knowledge and communication between the parties

ii) liability of the AI or parties to the contract.

Probable solutions to the existing problem

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[85] Uniform Commercial Code 2003, s 2B-20

[86]James Raymond Davis, 'On Self-Enforcing Contracts, the Right to Hack, and Willfully Ignorant Agents' (1998) 13 Berkeley Tech LJ 1145

[87]Povilas Kamantauskas, 'Formation of Click-Wrap and Browse-Wrap Contracts' (2015) 12 Teises Apzvalga L Rev 51

[88]Gunther Teubner and Frankfurt am Main, 'Digital Personhood? The Status of Autonomous Software Agents in Private Law' (Frankfurt Ancilla, 2018) <https://www.jura.uni-frankfurt.de/71719886/Digital-PersonhoodENGancilla2018.pdf>accessed 4 May 2019

[89]Robert E Scott and George G Triantis, 'Embedded Options in the Case against Compensation in Contract Law' (2004) 104 Colum L Rev 1428

[90]Anthony J Jr Bellia, 'Contracting with Electronic Agents' (2001) 50 Emory L J 1047

After analyzing the above issues of the lack of legal personality of electronic agents, the authors put forth the following probable solutions.

a) Objective theory of contract – when certain actions usually expressed through words that are promised to be undertaken by an individual or a party, is given the force of law, it is said to constitute a contract.[91] What is imperative here is that there is a manifestation of the parties intention to agree to conduct themselves in a particular manner.[92] Whether, a party to the contract has not provided a subjective assent is irrelevant and what matters is that, the parties had reason to believe that the opposite party intends to follow through with the contract.[93] Hence, it is the objective of the party that is taken into consideration. Now, in relation to self-driving contracts, the electronic agent is responsible for developing the specific terms of the contract, and thus this constitutes the "manifestation of the intention to agree". Whether the parties subsequently state that they did not agree to a particular term that the electronic agent developed would be irrelevant since the broad ex-ante objectives have already been laid down by the parties.[94]

b) Unilateral offer doctrine – this doctrine states that the offeror making a unilateral offer will mention in the offer, the terms of the contract and the method of compliance.[95] Parties interested in participating in the contract will either comply with such terms which amounts to performance of the contract or intimate the offeror of such acceptance and then carry out the contract.[96]

In case of use of artificial intelligence, the technology or program can be used merely to intimate the offeree of the offer and communicate the acceptance to the offeror.[97] Therefore, there will be two separate technologies used, one carrying out the function of communication and

[91]*Hotchkiss v National City Bank*, 200 F. 287, 290-91 (S.D.N.Y. 1911)
[92]ibid
[93]ibid
[94]Michael L Rustad and Elif Kavusturan, 'A Commercial Law for Software Contracting' (2019) 76 Wash & Lee L Rev 775
[95]Sharon Christensen, 'Formation of Contracts by Email - Is It Just the Same as the Post' (2001) 1 Queensland U Tech L & Just J 2
[96]David A Einhorn, 'Shrink-Wrap Licenses: The Debate Continues' (1998) 38 IDEA 383
[97]Samir Chopra and Laurence White, 'Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis' (2009) 2009 U Ill JL Tech & Pol'y 363

the other the performance of the contract. This thereby will satisfy the condition of *consensus as idem* and intention of the parties to contract.[98]

c) Legal personality to artificial agents – the most advantageous solution to the above problems is for the law to offer legal personality to electronic agents. This would solve the problem of liability, knowledge and intention as was mentioned earlier.[99] Following are the advantages of providing legal personality –

i) it reassures the principals of the contracting parties of a reliable recourse in case of breach of contract[100]

ii) it reduces the burden on the principal in monitoring every action of the electronic agent

iii) where the agent acts beyond its authority, the opposite party has a valid claim to sue the agent.

Whether the personality of a human agent or corporation must be provided to the electronic agent depends upon the nature of functions carried out by the agent.[101]

However, with regard to providing legal personality to artificial intelligence, it would simply mean that the person who has created such a program or technology, or the one who has purchased such technology for their use would be the ones made liable for any mistake or breach on part of the AI.[102]

Conclusion

Law, so as to give electronic agents a legal identity, should initially perceive a deliberate state to them. We are coming across situations where the internet has developed a personality and conducted actions without either instruction or interreference of humans. Thus, the law

[98]ibid

[99]Woodrow Barfield, 'Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars' (2006) 39 Akron L Rev 649

[100]D W McLauchlan, 'Contract Formation, Contract Interpretation, and Subsequent Conduct' (2006) 25 U Queensland LJ 77

[101]Mindaugas Naucius, 'Should Fully Autonomous Artificial Intelligence Systems Be Granted Legal Capacity' (2018) 17 Teises Apzvalga L Rev 113

[102]Timothy D Robinson, 'A Normative Evaluation of Algorithmic Law' (2017) 23 Auckland U L Rev 293

should acknowledge that actions of AI is not merely a consequence of an object or source code but recognize them as a deliberate and intentional action carried out by AI. It only by providing such recognition that the law will be able to comprehensively accommodate the concept of AI in the contractual legal framework, which will not only benefit the parties but the electronic agent as well. On the off chance that they are given a deliberate state, contracts framed through them would be regarded shaped between purchasers (clients) and selling operators. Dealers who useelectronic agents will then later be ascribed the agreements' lawful impacts.

THE RULE OF INTERPRETATION OF INTERNATIONAL TREATIES IN INDIAN COURTS

Ananyo Mitra[1]

Abstract

Over several years, the usual court practises in most democratic countries have reflected a sheer avoidance of the application of the International treaties. Indian Judicial System, however, has been an ardent apostle of the classics of international law. The major issue of counter-majoritarian conflict that most countries have been battling with has been avoided in India by its strict adherence to Dualism. Wherever the Indian National laws have fallen short of rendering an appropriate justice to the issue at hand, International treaties and norms has come to the rescue of the judges who have applied and interpreted international treaties to complement the present Indian laws.

Keywords: Treaties, Interpretation, domestic laws, applicability, international law

Introduction

A treaty[2] can be described as an international agreement concluded between states and governed by international law.[3] International law requires the parties to a treaty to fulfil in good faith the obligations assumed by them under the agreement.[4] Entering into international treaties and agreements is one of the attributes of State sovereignty.[5] Though International law requires

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[2] The Vienna Convention on the Law of Treaties 1969, art 2(1)a

[3] Jessup, *Modern Law of Nations* (1948), 131; Kelsen, *Principles of International Law* (1952) 317

[4] Oppenheim, *International Law* (1966) 877

[5] The principle of sovereign equality as embodied in the UN Charter is the cornerstone of the international relations between the States. See Articles 2(1) and 2(2) of the UN Charter; see also R. P. Anand, „Sovereignty of States in International Law, in: R.P. Anand, *Confrontation or Cooperation: International Law and the Developing Countries* (1987)

a State to perform its international obligations undertaken by it by ratifying international treaties, but it does not govern the process of incorporating international law into municipal law. In fact, the States follow different processes of incorporating international law into their domestic legal system, depending on their constitutional provisions in this respect. Thus, the process of implementation and interpretation of international law and treaties at national level varies in different countries. The divergent State practices pertaining to incorporation of international law into municipal law have been explained by two schools of law – monist and dualist. India follows the dualist theory for the implementation of international law at domestic level[6], which has been discussed in this article. The Indian judiciary has interpreted India's obligations under international law into the constitutional provisions relating to implementation of international law in pronouncing its decision in a case concerning issues of international law. This article critically examines the powers and competence of the government of India in respect of ratification and implementation of international law in India and how the provisions of the Indian Constitution, "the law of the land", facilitates interpretation and use of treaties. Through judicial activism the Indian courts have played an active role in accomplishing India's international obligations under International treaties, specifically in the field of human rights, criminal law and environmental law. The article provides an overview and analysis of landmark case laws decided by the judiciary in implementing India's international obligations under international treaties.

Relationship between Municipal Law and International Law

The relationship of international law and the domestic laws of a country is very complex and intricate. The two systems are usually understood as separate legal system of rules and principles.[7] It is to be noted that international treaties are the products of the negotiations between the

[6] *Jolly Jorge v Bank of Cochin*, [1980] AIR SC 470

[7] Hilary Charlesworth and others, eds., The *Fluid State: International Law and National Legal Systems* (Sydney, Australia: The Federation Press, 2005)

States and are administered by international law.[8] They are one of the most essential sources of international law.

Divergent State Practice of Incorporation

Although international law entails a State to conduct its international obligations, domestic legal systems of different countries differ in respect of execution of international law at national level. Therefore, the process used by a State to carry out its international obligations varies from legislative, executive and/or judicial measures. States also keep an eye on different practices in incorporating treaties within its internal legal structure, so that the provisions can be implemented by State authorities.

It is imperative to state that, international law automatically becomes a part of national law or municipal law in some countries. As soon as a State has ratified or acceded to an international agreement, that international law becomes the national law.[9] Under such systems, treaties are generally deemed to be self-executing treaties.

While in some countries, international law does not by default become part of the national law of the ratifying State. International law in these countries is not self-executing, which means, it does not have the force of law without the passage of auxiliary domestic national legislation. If one examines the constitutional texts, especially those of the developing countries, which are usually keen on accentuating their sovereignty, the finding is that most of the States do not gives primacy to international law over their municipal law.[10]

Schools of Law: Monism v. Dualism: A Traditional Dichotomy

Monism and dualism both schools of thought in essence assume that international law and municipal law can operate in a common field.[11]

[8] The Vienna Convention on the Law of Treaties defines the term „treaty for the purposes of the Convention to mean a written international agreement between States governed by international law, see art 2(1). The Vienna Convention on the Law of Treaties United Nations, 1969, *UN Treaty Series*, vol. 1155, 331

[9] Dr. Sunil Kumar Agarwal, Implementation of International Law in India: Role of Judiciary < http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf > accessed 10 November, 2019

[10] Antonio Cassese, *Modern Constitutions and International Law*, 192

This gives rise to the traditional controversy[12] of supremacy of international law vis-à-vis municipal laws.

Monism stresses that the whole legal system is one unified branch of which international law is a part and neither municipal law nor international law is above or separates from the system.[13]

Kelsen argues that this is because international law is a higher law from which the state derives its authority and thus its ability to make municipal law and state:

"Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense. It is the basic norm of the international legal order which is the ultimate reason of validity of the national legal orders too."[14]

In Kelsen's view, the ultimate source of the validity of all law derived from a basic rule "Grundnorm" of international law. His theory led to the conclusion that all the rules of international law were supreme over municipal law, that a municipal law in loggerheads with international law was inevitably null and void and that rules of international law were directly applicable in the domestic sphere of states.[15]

On the other hand, dualism emphasises that the essential dissimilarity between international law and municipal law is consisted primarily in the fact that the two systems regulate different subject matter.[16] Further, it holds the view that international law is a law between sovereign states; municipal law applies within a state and

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[11] Ian Brownlie, *Principles of Public International Law* (Seventh Edition, 2008) 31-32

[12] Fitzmaurice considers that the debate between monism and dualism is 'unreal, artificial and strictly beside the point' for there can be no controversy as there is no common field in which the two legal systems both simultaneously have their spheres of activities. G. Fitzmaurice, *The General Principles of International Law considered from the Standpoint of the Rule of Law, (1957-II)* 92

[13] Nishant Kumar Singh, The Indian Constitution and Customary International Law: Problems and Perspectives, The Student Advocate (2000)

[14] Kelson,*General Theory of Law and the State* (Cambridge University Press, 1945) 367-368

[15] Tim Hiller, *Sourcebook on Public International Law* (Cavendish Publishing Ltd, London) 35

[16] I.A. Shearer, *Starke's International Law* (1994) 64

regulates the relations of its citizen with each other. When there is a clash between international law and municipal law the dualist would presuppose that a municipal court would apply municipal law. Oppenhiem[17] aptly maintains that the difference between the two schools of thought lies in the difference in perception, firstly on the sources of international and domestic law; secondly with regard to the relationship regulated by the international law and thirdly with respect to the substance of the two laws.

However, it is submitted that doctrines establishing the supremacy of the international law are antithetical to the legal corollaries of the existence of sovereign States, and reduces municipal law to the pensioner of international law.[18] It is universally agreed that within the international sphere, international law should have precedence over municipal law and that even outside the sphere, international law should also exercise some influence on municipal law. However any attempt to ensure the unconditional superiority of international law will conflict with claims of Constitutional supremacy. There exists no safeguard against the likelihood that a valid rule of international law may nonetheless violate the Constitution of the concerned State.

The relationship between international law and municipal law should be viewed as one of cooperation and symbiosis. As such, international law should recognise doctrines and concepts created by municipal law. The practical implications of this argument arise when considering the admissibility of municipal courts' decisions in the International Court of Justice (ICJ). In the *Brazilian Loans* case[19], the Permanent Court of International Justice (the predecessor to the ICJ) decided that due regard must be paid to the decisions of municipal courts as they provide jurisprudential guidance on the effect of the particular domestic law in the municipal sphere. Although, in accordance with the Court's jurisdiction, international law is

[17] Lauterpacht H., *Oppenhiem's international Law* (1955) 37-39

[18] Brownlie (n 10) 32

[19] *France v Brazil*, PCIJ, Ser A, No.21 [1929] 124

primarily applied, it will nevertheless be logical to assume that parties will rely on provisions of municipal law as part of their arguments. As such, they must present said laws in the form of evidence before the court.

As part of the continuous evolution of international law, the ICJ must recognise concepts created by municipal law which historically have had effect on international relations. Thus, where legal issues arise concerning a matter which is not covered by international law, reference will be made to the relevant rules in municipal law[20]. In such cases the court cannot blatantly disregard municipal law as there are no relevant provisions of international law which can be applied.

Implementation of International Treaties in India: Constitutional Provisions

Formation of Treaties: Executive Powers to enter into International Agreements

The Constitution of India provides in Article 73 is that 'the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws', and under Article 53 the executive power of the Union is "vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution". Under Article 246 (1) exclusive power is vested in Parliament to make laws with respect to any of the matters enumerated in List I of Schedule VII.

Entry 14 of List I of Schedule VII provides: Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

Since the making of a treaty is an executive act as distinct from a legislative act,[21] the President of India (in whom Article 53 of the Constitution vests all the executive powers of the union) enjoys the power to enter into treaties with foreign states,[22] in the absence of any

[20] *Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain)* (Second Phase) ICJ Rep 1970, para 38
[21] *Union of India v Manmull Jain*, [1954] A.I.R.Cal. 615
[22] ibid

law made by Parliament. The treaty making power of the President extends to any matters with respect to which the Parliament has power to make laws.[23] That does not mean that President is vested with absolute power free from every constraint. The power is subject to certain express and limitations. Article 53 expressly provides that the power vested in the President "shall be exercised by him... in accordance with this Constitution". The Constitution itself requires that the power of the President must be exercised in the manner contemplated by and subject to the limitations imposed by it.[24]

The executive power of the Government of India extends to matters with regard to which Parliament can make laws. The executive power of the Union extends also to the exercise of such rights, authority and authority as exercisable by the Government of India by virtue of a treaty or agreement (Article 73(1) (b)) of the Constitution of India).

However, executive power of government of India to enter into international treaties does not mean that international law, ipso facto, is enforceable upon ratification. This is because Indian constitution follows the "dualistic" doctrine with respect to international law.[25] Therefore, international treaties do not automatically form part of national law. They must be incorporated into the legal system by a legislation made by the Parliament.[26]

Implementation of Treaties

The matter, however, does not end with the conclusion of a treaty: legislation may be and is often required to give effect to its terms.[27] Therefore, it is important to note the distinction between the formation and the performance of the obligations imposed by a treaty. In the United Kingdom, there well-established rule that making of a treaty is an executive act, while the performance of its obligation requires legislative action, if it entails alteration of the existing domestic

[23] Constitution of India 1950, art 53, 73
[24] In re Berubari Union and Exchange of Enclaves, [1960]A.I.R S.C. 845 at 857
[25] *Jolly Jeorge v Bank of Cochin* [1980] AIR SC 470
[26] *Jolly Jeorge v Bank of Cochin* AIR 1980 SC 470; *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey* [1984]AIR SC 667
[27] *Manmull Jain Case* (n 20)

law,[28] affects the private rights, requires taxation, or involves actions which are not within the ordinary scope of the discretionary powers of the executive.[29]

A treaty may be implemented by exercise of executive power. However, where implementation of a treaty requires legislation, the parliament has exclusive powers to enact a statute or legislation under Article 253 of the Indian Constitution. The Article 253 empowers the Parliament to make any law, for the whole or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Conferment of this power on the Parliament is evidently in line with the power conferred upon it by Entries 13 and 14 of List I under the Seventh Schedule. Article 253 makes it amply clear that this power is available to Parliament, notwithstanding, the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule.

Where the Constitution does not require action to be taken only by enacting a legislation or there is no existing law to restrict the executive power of the Union (or the state, as the case may be),[30] the government would not only be free to take such action by executive order or to lay down a policy for making of such executive orders, but also to change such orders or the policy itself, as often as the government requires.

Implementation of International Obligations

The basic provision of the constitution of India, by virtue of which international law becomes implementable through municipal laws of India is Article 51(c). Article 51(c) of the Constitution enjoins the State

[28] *Attorney General of Canada v Attorney General of Ontario*, [1937] A.l.R. P.C. 82 at 86

[29] V.A. Vallet, When do British (including Canadian) Treaties need Legislation ?, Canadian Bar Review (1953) 385

[30] It is to be noted India is a federal State with a national government and a government of each constituent state. Although the structure of India is federal in a general way, yet there are certain aspects that are unique to federalism as practiced in India. The Indian government follows a strong central bias. Some of the special features of India are as follows: Single citizenship, unified Constitution, No state has the right to secede. India has a quasi-federal system of government with the legislative and executive powers divided between Union and States.

"to endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another."

It is pertinent to mention that Article 51 enshrines one of the fundamental principles of State policy (DPSP), embodied in Part IV of the Constitution. The directive principles, according to Article 37, are not enforceable through the court of law, nevertheless they are fundamental in the governance of the country and there is a non-obligatory duty on the part of the State to apply these principles in making of laws. Thus, the Article 51 and the international law per se are not justiciable in the realm of Indian municipal law.

However, the non-justiciability of Article 51 does not preclude government from striving to achieve the objectives of the international treaty, which has been ratified by it, in good faith through executive or legislative actions. Further, judiciary, though not as empowered to make legislations, is free to interpret India's obligations under international law into the municipal laws of the country in pronouncing its decision in a case concerning issues of international law. Relying upon the Article 51, Chief Justice Sikri in *Kesavananda Bharati v State of Kerala*[31], observed as under:

"It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all an intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

An examination of the decisions and practice of courts in India is, thus, imperative to understand the implementation of international law in India.

Indian Judiciary and International Law

In India at the top of the judicial system is the Supreme Court of India which exercises jurisdiction in different forms, namely, writ jurisdiction, appellate, original, advisory and that conferred under several statutes.

[31] (1973) Supp. SCR 1

At the next level are the High Courts in the various states. While most states have their own High Courts, some states have common High Courts. The High Courts also exercise writ jurisdiction, regular appellate jurisdiction as well as the power of supervision over all the Courts and Tribunals located in their respective States. The third tier is that of the subordinate judiciary at the district-level, which in turn consists of many levels of judges (both on the civil and criminal sides) whose jurisdiction is based on territorial and pecuniary limits. In addition to the subordinate judiciary there are specialized courts and tribunals at the district and state levels to hear and decide matters relating to direct and indirect taxes, labour disputes, service disputes in state agencies, family disputes, motor accident claims as well as consumer complaints to name a few.

The Supreme Court and the High Courts are the courts of records are the custodian of the Constitution have an extremely important responsibility in this regard. Articles 129 and 215 recognize the existence of such power in the Supreme Court and the High Courts as they exercise inter alia the sovereign judicial power. The Supreme Court and the High Courts also have writ jurisdictions under Article 32 and 226 of the Indian Constitution, respectively. Thus, they are empowered to provide remedy in the form of writs in case of violation of fundamental rights guaranteed under chapter III of the Constitution of India.[32]

Wherever necessary, Indian courts can look into International Conventions as an external aid for construction of a national legislation.[33] The Supreme Court in *Vishaka v State of Rajasthan*,[34] took recourse to International Convention for the purpose of construction of domestic law. The Court observed:

"In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions

[32] D.D. Basu, *Introduction to the Constitution of India* (22nd edn., EBC 2011)
[33] *P.N. Krishanlal v Govt. of Kerala*, [1995] Sup. (2) SCC 187
[34] [1997]AIR SC 3011

and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee."[35]

Obligations arising under international agreements or treaties are not, by their own force, binding in Indian domestic law. Appropriate legislative or executive action has to be taken for bringing them into force. Although not self-executing under Indian law, implementation of a treaty does not require fresh legislative or executive action if existing administrative regulations or statutory or constitutional provisions permit the implementation of the treaty in question. The Indian courts may construe, in this context, statutory or constitutional provisions that pre-exist a treaty obligation in order to render them consistent with such a treaty obligation.

Application of Treaties

Some landmark judgments passed by the Supreme Court and the High Courts of India by applying and interpreting international treaties have been discussed below.

The Kerala High Court in *Xavier v Canara Bank Ltd.*[36], deserve to be mentioned here. The issue was whether provisions of International Covenants/Treaties to which India is a party become part of the corpus juris of India and as a result giving an aggrieved individual a right to remedial action before the municipal court. The question arose on whether Article 11 of the I.C.C.P.R. 1966, viz., that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation, has become part of the Municipal Law of this Country consequently conferring right to remedial action at the instance of an

[35] ibid, para 7

[36] 1969 Ker L T 927

aggrieved individual of this Country. In dealing with this question, the Court observed;

"...The remedy for breaches of International Law in general is not be found in the law courts of the State because International Law per se or *proprio vigore* has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. I agree that the Declaration of Human Right merely sets a common standard of achievement for all peoples and all nations but cannot create binding set of rules. Member States may seek, through appropriate agencies, to initiate action when these basic rights are violated, but individual citizens cannot complain about their breach in the municipal courts even if the country concerning has adopted the covenants and ratified the Optional Protocol. The individual cannot come to court but may complain to the Human Rights Committee, which in turn, will set in motion other procedures. In short, the basic human rights, enshrined in the International Covenants above referred to may at best inform judicial institutions and inspire legislative action within member – States but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority..."

In the case of *Verhoeven, Marie-Emmanuelle v Union of India and Ors*.[37] the petitioner is a French National. She was intercepted in Uttar Pradesh by virtue of a Red Corner Notice that was issued against her by the Interpol. The request was made by the Domestic Republic of Chile for the offence of conspiracy to commit a crime and terrorist attack by the petitioner. She was provisionally arrested based on an order given on 24.02.2015 by the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi under Section 34-B of the Extradition Act, 1962. The Union of India accepted the request of extradition by the Republic of Chile and the Ministry of Foreign Affairs started an inquiry as to the extraditability on the grounds of offence committed. This resulted in the continuous detention of the prisoner and the same has been put to a challenge. While the discussion turned to as to on what

[37] Arising out of Special Leave Petition (Crl.) No.8931/2015

basis the Republic Of Chile had asked for extradition, facts showed that "*the principles of International Law derived from the Multilateral Conventions and Bi-lateral Treaties on Extradition including the Extradition Treaty between the Republic of Chile and the United Kingdom of Great Britain and Ireland signed at Santiago on 26.01.1897 which has been in force for both countries*" was considered to be the basis of the same. However, the order given by the Supreme Court of Chile also mentioned that since there is no extradition treaty between the two countries, therefore the Public International Law rules must be followed. The embassy on the other hand had followed the Extradition Treaty that previously existed between Republic of Chile and the United Kingdom of Great Britain and Ireland. The Ministry Of External Affairs passed an order, stating that the Treaty of 1897 that had previously existed would still be operative between Chile and India and therefore requested Patiala House Court, New Delhi under Section 5 of the Extradition Act, 1962 to inquire into the extradition request. The Supreme Court then referred to the case of *State of Madras v C.G. Menon*[38], where it concluded that since India gained its independence, the aforesaid treaty would not be applicable in India. Keeping in mind the same, the Extradition Act, 1962 has been formulated. Court also made reference to Section 37 which explicitly mentions that the previous treaty/acts stand repealed. The Court made further references to the Extradition Act which mentioned the procedure that is to be followed in case there is no treaty or arrangement in force between two countries. By virtue of Section 34-B, the Court ruled that the detention was not irregular. Mention was made of the contradictory orders given by the Supreme Court of Chile and their Embassy. Since their Criminal Procedure shows that the order of Extradition is a judicial order, a conflict with the decision of Supreme Court cannot sustain. It was further contended that Section 3 of the Act states that those who are not treaty states can arrange an Extradition procedure in case the Indian Government issues a notification. A further absence of the same solidifies the ground that there can be no arrest or extradition.

[38] AIR 1954 SC 517

Opposition relied on the notice issued by the ministry on 28.04.2015 directing the provisions of the Extradition Act applicable to the Republic of Chile by setting out in full the Extradition Treaty dated 26.01.1897.

Contentions raised also "*relied upon Clause 4 of the Schedule to the Indian Independence (International Arrangements) Order, 1947 which was issued in exercise of the powers conferred upon the Governor General by Section 9 of the Indian Independence Act, 1947. The agreement set out in the Schedule to the above said Order of 1947 regarding the devolution of International rights and obligations upon the Dominions of India and Pakistan from 15th day of August, 1947 shows that the rights and obligations under all International Agreements to which India is a party immediately before the Appointed Day will devolve upon the Dominion of India and upon the Dominion of Pakistan and will, if necessary, be apportioned between the two Dominions.*"

The Court also made reference to the case of *Rosiline George v Union of India and Others*[39] where similar matters have been dealt with. The court observed that there is "*...no rule of Public International Law under which the existing treaty obligations of a State automatically lapse on there being an external change of sovereignty over its territory and that India after achieving Independence specifically agreed to honour its obligations under the International Agreements, it was held that grant of independence in the year 1947 and thereafter the status of Sovereign Republic could not have put an end to the treaties entered into by the British Government prior to August 15, 1947 on behalf of India*".

The court subsequently made reference to Public International Law and Maxims like *aut punire, aut dedere* which form the very basis and customs of Public International Law. The court then delved into the concept of treaty succession where it mentioned the general practises that are enumerated in the Vienna Convention such as the "pick- and- choose", "Clean Slate doctrine" amongst others. The Court

[39] 1994 SCC (2) 80

was of the opinion that there are plenty of evidences which show that India chose to accept unequivocally the international obligations arising out of the 1931 treaty (in the case of *Rosaline George* the extradition treaty was concluded in 1931) and has reproduced an International Arrangements Order wherein India agreed to honour all the international agreements entered into before August 15, 1947 and agreed to fulfil the rights and obligations arising from the said agreements. The Court subsequently concluded that the Republic of Chile never accepted the treaty aforementioned to be in force. Therefore the Union of India, unilaterally cannot enforce the same. The Court also intercepted the issuance of Red Corner Notice. According to the Court, they do not constitute the character of an arrest warrant as it is individually concerned. But they have de facto gained the character of an arrest warrant where the country is required to issue warrants immediately upon receipt of such a notice. Therefore the Red Corner Notice was considered to not be illegal. However, the Court concluded that the provisional arrest was without any jurisdiction and the petition was disposed.

In another landmark case of *Jolly George Varghese and Another v The Bank of Cochin*[40], the Court first attempted to deal with the emerging linkages between domestic law and human rights by reconciling Article 11 of the International Covenant on Civil and Political Rights (ICCPR) with Contractual provisions under municipal law to protect human rights of a the civil debtor whose personal liberty was at stake due to judicial process under Section 51 (Proviso) and Order 21, Rule 37, Civil Procedure Code.

In *Additional District Magistrate, Jabalpur v Shivakant Shukla*[41], the Supreme Court amplified the scope of Article 21 (right to life) of the Indian Constitution by referring to Articles 862 and 963 of the Universal Declaration of Human Rights (UDHR). A survey of Indian jurisprudence, thus, indicates the active role being played by the higher judiciary in the implementation of India's international obligations.

[40][1980] AIR SC 470
[41] [1976]AIR SC 1207

In the case of *Commissioner Of Customs, Bangalore v G M Exports and Ors.*[42], the main issue that the Hon'ble Court had to deal with were whether domestic law prevails, where India is not a signatory to an international treaty and there happens to be a conflict between domestic and international law. Whether an international treaty is a legitimate aid to construction of provisions of such a statute which has been passed in pursuance of the said treaty. Whether a narrow literal construction of such a statute is preferred which is made in furtherance of an international treaty to which India is a signatory. Whether the statutory language should be construed in the same sense as that of the treaty in a situation where India is a signatory nation to an international treaty and the said statute is made to enforce treaty obligation. These issues arose with respect to the anti-dumping laws that are operative in India. The aforementioned laws have been brought into force keeping in view the WTO Agreements and the GATT Regulations to which India is a signatory. Based on the same, India developed its own legislation. The difficulty arose with respect to the levy of anti-dumping duty which was imposed by the Central Government. The same has been challenged as because the time period when it was imposed is said to be the 'gap period' during which the provisional duty had terminated. A perusal of the anti-dumping rules showed that the rules were with respect to the commencement of the date of the anti-dumping duty. The Court concluded that the Anti-dumping rules did not introduce a retrospective anti-dumping duty but rather intended to uphold the Clause 10.2 of the WTO Agreement. The Court held that when India becomes a signatory to a treaty and thereafter adopts a statute on its behest, there should be a purposive interpretation of the same rather than a narrow literal interpretation. The statute should be interpreted such that the precedents intend to carry out the treaty obligations and not be opposed to it. The Court pointed out that the same is reflected in our Constitution as well where Article 51C of the Constitution states that there should be fostering of respect for international treaties and obligations. These are part of Directive Principles and Policies of our Nation and therefore must be given effect to. There are rules which are framed in interest of

[42] [2015] (324)ELT209(S.C.)

International Trade. The court also referred to various other Indian and Foreign judgements in determining this issue and elaborated that domestic law will prevail over international law only in respect of those treaties to which India is not a signatory. Where India is a signatory to a particular treaty, it must be kept in mind that the subsequent legislation has been drafted to do away with the vagueness or obscurity that might have existed in the treaty.

In the case of *Regional Deputy Director v Zavaray S. Poonawala and Ors.*[43], the Respondent wanted to import to India a leopard that he had killed in Zambia as a trophy. As per the norms of Wild Life (Protection) Act, 1972 and also under the Convention of International Trade on Endangered Species of Wild Fauna and Flora (CITES) a leopard is a protected and prohibited species. Internationally it is recognised as an endangered species. Under the CITES permission was refused. The main contention that was raised was that since the authorities in question had given permission for the import, CITES had no locus whatsoever to restrict the same. When the respondent had first applied for the permission to Regional Deputy Director, Wild Life Protection (WLP), the same was cancelled as he was yet to obtain clearance and certificate from Director General Foreign Trade (DGFT) and CITES. He received a license from DGFT wherein a clause read that the same would not be valid unless CITES approved it. CITES thereafter wrote a letter detailing that those species which are mentioned under Appendix I should be strictly regulated in terms of import/export/trade as trophies. Based on such a letter the DGFT issued a show-cause notice to the Respondent for the confiscation of the aforesaid trophy. The Defence taken was that the authority to confiscate the same was the Chief Wildlife Warden under the Wild Life (Protection) Act, 1972, who on the other hand had authorised the said import. The Respondent thereafter challenged the authority of CITES by filing a writ petition under Article 226. The Hon'ble Court came to the conclusion that the permissions received by the respondent were both subject to the approval of CITES and therefore conditional. As far as

[43] [2015] 7 SCC 347

CITES is concerned, there has been no conveyance of any permission in any manner. The Court further concluded that India is a signatory to the CITES, signed at London. The spirit of this Convention is not only to regulate International Trade but also to regulate the International Environment standards and balance. As India is a signatory to the same, it becomes obligatory to follow the objective of this convention. The High Court while initially upholding the Respondent's claim had missed out on the importance of upholding the Environmental and scientific objective of this convention. Keeping in mind this view, the Supreme Court disposed off the appeal.

In the case of *Dilip K. Basu v State of West Bengal & Ors.*[44], the Court lamenting on the growing incidence of torture and deaths in police custody expressed its concern that despite having several international conventions, declarations and protocols on Human Rights such unfortunate violation of the same is commonplace. The Court described 'custodial torture' as *"a naked violation of human dignity and degradation that destroys self-esteem of the victim and does not even spare his personality. Custodial torture observed the Court is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backwards."* The Court expressed its anguish over the failure of the states to establish a proper human rights enforcement mechanism and went on to reiterate the history of development of human rights in international sphere as to how the International Bill of Rights became binding on the covenant parties, United Nations (UN) General Assembly's adoption of the Universal Declaration of Human Rights in December, 1948. The Court also made reference of how the lack of enforcement mechanism resulted in the non-binding nature of such a potent right. The Court thereafter went on to recount the two most important covenants implemented on the international platform: in December, 1965 two covenant for the observance of human rights i.e. the covenant on Civil and Political Rights, and the covenant on Economic, Social and Cultural Rights were adopted. The Court pointed out India's obligation to implement them

[44] [2015] 8 SCC 744

after ratifying the same. The Protection of Human Rights Ordinance, 1993 on 28th September, 1993 promulgated by the President of India to provide for the Constitution of a National Human Rights Commission, State Human Rights Commissions in the States and Human Rights Courts for better protection of human rights and for matters connected therewith was an initiative on that behest. Therefore it is paramount that India should uphold human rights. Referring to such laws, the Hon'ble Court directed that states as well as the centre is obligated to look over the proper functioning of the Human Rights commissions. It also proposed for installation of CCTV cameras in police stations wherever feasible. Suggestions were also made for appointment of female constables amongst many other recommendations.

In the Supreme Court case, *Supreme Court Women Lawyers Association (SCWLA) v Union of India and Anr.*[45] the Petitioner, Supreme Court Women Lawyers Association (SCWLA), being immensely sensitively ignited by the atrocious, inconceivable and brutal sexual offences where certain psychologically and possibly psychographically perverted culprits have not even spared 28 days old baby girl and also in other incidents have monstrously behaved with other young girls who come under two to ten years of age as if they are totally trivial commodities, had invoked the jurisdiction of the Apex Court under Article 32 of the Constitution of India for considering imposition of "chemical castration" as an additional punishment for such child abusers.

At the very outset, we must make it clear that the courts neither create offences nor do they introduce or legislate punishments. It is the duty of the Legislature. The principle laid down in *Vishaka's* case is quite different, for in the said case, the Court relied on the International Convention, namely, "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), especially provisions addressing violence and equality in employment and further referred to the concept of gender equality including protection from sexual harassment and right to work with dignity and on that basis came to

[45] [2016] AIR SC 358

hold that in the absence of enacted law to provide for effective enforcement of the basic human right of gender equality and guarantee against the sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms can be laid down in exercise of the power under Article 32 of the Constitution, and such guidelines should be treated as law declared under Article 141 of the Constitution. The following passage from the said authority makes the position clear:

"The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

Conclusion

Law is a dynamic process and through harmony, mutual collaboration and peace we can achieve a better world. This certainly calls for respect of the international jus cogens norms and opinio juris. Treaties must not be disregarded and the spirit with which the various international covenants and conventions came into existence should be upheld in every circumstances. The Indian judiciary has progressed with time and society and has not remained static as has been shown in this article. Indian judges have referred to international law which delivering their judgements, which has helped India to gain a robust recognition in the international community. A time may come when international law and national law will perfectly reconcile and the dream of effective global law and world institutions shall be fulfilled.

DECONSTRUCTING THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE IN JADHAV CASE (INDIA v PAKISTAN)

Atul Alexander[1]

Abstract

The recent decision of the International Court of Justice(hereinafter referred to as the 'ICJ' or the court),[2] in the Jadhav Case, has created intense ripples amongst the scholars as to the various dimensions of consular access in International Law. Through this paper, the author attempts to provide a detailed descriptive analysis of the entire Judgement, notwithstanding the provisional measure rendered by the ICJ. The case comment attempts to provide a balanced perspective on the decision of ICJ in the Jadhav case. The author has apportioned the study in three parts, in the first section the author provides a brief background and Provisional Measure rendered by the court, in the second portion the author discusses in detail the argument placed by India and Pakistan in the Merits and the observations of the ICJ of the same. In the final segment, the author provides the prospects and implications of the Judgment. The author has purely confined his study to the Judgement; the work does not explore into the declaration or dissenting opinion.

Keywords:International Court of Justice, Jadhav Case, Provisional Measure, Consular Access, Declaration.

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[2]Siddharth Varadarajan'Beyond the Hurrahs, Eight Takeaways from the ICJ Ruling on Kulbhushan Jadhav'(18 July 2019) *The Wire*<https://thewire.in/diplomacy/eight-takeaways-from-the-icj-ruling-on-kulbhushan-jadhav> accessed 4 December 2019

Background and Provisional Measure

On May 8th 2017, India instituted a proceeding at the ICJ against Pakistan in reaction to the death sentence to Mr.Khulbhushan Jadhav for engaging in espionage.[3] India alleged that Jadhav was abducted from Iran, where he was engaging in business. Further, consular access to Jadhav was not provided by Pakistan, which was in brazen defiance of Article 36 of Vienna Convention on Consular Relations (hereinafter referred to as 'VCCR')[4] and elementary principles of human rights. India's plea in the ICJ was two-fold i.e. to annul the decision of the military court in Pakistan and release Mr Khulbhushan Jadhavwith immediate effect.

The arguments placed by India is firstly based on the Jurisdictional front,i.e.Article 36(1) of the ICJ Statute and Article 1 of Optional Protocol to Vienna Convention on Consular Relations.[5] The defence taken by Pakistan on the Jurisdictional was that it is the 2008 Bilateral Agreement that would govern the issues on consular access and not the ICJ. Secondly, India stresses on the provision of International Covenant on Civil and Political Rights(hereinafter referred to as 'ICCPR') which was flagrantly violated by Pakistan,i.e. Article 14 concerning the fair trial.[6]The ICJ did not deliberate the contentions on ICCPR as it fell outside the scope of VCCR[7] since VCCR is essentially a self-contained regime. Based on these central arguments the ICJ issued a provisional measure unanimously in favour of India. The provisional measure mandated Pakistan not to aggravate the situation.

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[3]*India v Pakistan* (2017): *Request for the Indication of Provisional Measures/: Order of 18 May 2017* (International Court of Justice 2017)

[4]Mark J Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul'(1997) 18 (4) Michigan Journal of International Law

[5]Reema Omer, 'Beyond "Winners" and "Losers": Understanding the International Court of Justice's Judgment in the Jadhav Case'(*Opinio Juris,*31 July 2019) <http://opiniojuris.org/2019/07/31/beyond-winners-and-losers-understanding-the-international-court-of-justices-judgment-in-the-jadhav-case/> accessed 4 January 2020

[6]'United Nations Treaty Collection' <https://treaties.un.org/pages/View Details.aspx?src=TREATY & mtdsg_no=III-6 & chapter=3> accessed 4 January 2020

[7]cf (n 3)

Subsequent to the Provisional measure, both India and Pakistan respectively filed their memorial and counter-memorial. India's memorial underscored several key aspects these included the interpretation of the term 'without delay' in Article 36(1)(b) of VCCR, under which Pakistan had an obligation to grand consular access to India within a reasonable period, however, India did not dwell much further as to the extent and scope of the term 'reasonable period', further reliance on Article 14 of ICCPR by India to augment the proposition of 'minimum standards' is notable. Moreover, India questions the trial by the military court of Pakistan which it views as aflagrant violation of the principle of fair trial. The other fundamental plea on which the whole debate revolved was on the Jurisprudence of Article 36 concerning the exception under the said provision. The literal interpretation[8]of Article 36 of VCCR would undoubtedly indicate the fact that the provision comes without any exception as India put it, Pakistan maintained that there exists an exception to Article 36,i.e. In case of espionage there could be exception craved out in Article 36.

Regarding the submission on the 2008 bilateral agreement, India's position is apparent in the sense that any subsequent practice between parties under Article 73(1) of VCCR[9] does not curtail or trim the provisions of VCCR but it is meant to enhance the same. For all the above breaches India claims restitution relying on Article 31 of the ILC Draft Articles on State Responsibility for the Internationally Wrongful Act,2001.[10] Pakistan disputes all the claims raised by India in its counter-memorial, by alleging that India's sought to engineer 'Urgency' to justify provisional measures, India's evasion on the question of passport, India's unwillingness to address legitimate request for mutual legal assistance. In response India filed its rejoinder, in which India's plea was that Pakistan had treated Jadhav as a pawn in its endeavour to wage a propaganda war against India, Pakistan failure to comply with

[8]Isabelle Van Damme, 'Article 31 of VCLT and 'Textualism''(*Opinio Juris*,2 March 2009) <http://opiniojuris.org/2009/03/02/6904/> accessed 4 January 2020

[9]Article 73(1) of VCCR States: 'The provisions of the present Convention shall not affect other international agreements in force as between States Parties to them.'

[10] Agreement on consular access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India. Islamabad, 21 May 2008

the Mutual Legal Assistance Treaty (MLAT) because of its continuoussponsoring of terrorist act, India also interestingly compares the judicial system of Pakistan to that of India by referring to the case of Ajmal Kasab[11], wherein India argues due process was followed in case of Ajmal Kasab[12] ibid, unlike Mr Jadhav. The rejoinder filed by Pakistan harped on the repeated rhetoric of accusing India of misrepresentation, invectives and irrelevant diversions quoting from Article VI of the 2008 bilateral agreement Pakistan claimed that the matter requires bilateral settlement. To put it short, the core claims were on, a) Article 36 VCCR, b) 2008 Bilateral Agreement, c) Fair Trial under Article 14 of ICCPR. Much of the deliberation at the merits phase surrounded on these fundamental provisions.

Deconstructing the Judgment

In the merits phase India was represented by scholars, senior counsels and diplomats,[13] the relief sought by India was the a) Suspension of the death sentence, b) Restitution in integrum c) Release of Jadhav forthwith. Pakistan's counterclaim, in essence, was the rejection of the claims raised by India.According to India Mr Jadhav was kidnapped from Iran where he was carrying on business activities and subsequently tried under section 59 of Pakistan Army Act, 1952 and section 3 of the Official Secrets Act, 1923.[14] First, the ICJ had to decide on the admissibility, at this stage the three objections raised by Pakistan were a) Under Article II and III of the optional protocolto VCCR other means of settlement of dispute should be resorted,[15] b) The existence of constitutional right to Jadhav for clemency petition within 150 days provides an adequate remedy. India's position in the admissibility stage is that Article II and III are not preconditioned to exhaust before approaching the ICJ, the ICJ referred to its previous jurisprudence of Tehran Hostage Case[16] to substantiate the argument that Article II and

[11] *Md.Ajmal Md.Amir Kasab @Abu v State Of Maharashtra* (2011) CRIMINAL APPEAL NOS.1899-1900, Supreme Court of India
[12] ibid
[13] *India v Pakistan* (17 July 2019), International Court of Justice
[14] ibid 25
[15] ibid
[16] ibid 47

III provides only substantive recourse to the court. After the arguments on the admissibility, the ICJ dwelled into the contention of 'Abuse of Rights' as alleged by Pakistan. Pakistan claims were fundamentally on the failure of India to engage in the investigation process; the ICJ was of the view that India need not cooperate as there was an absence of mutual legal assistance treaty between the parties. Thirdly, Pakistan described the unlawful conduct of India's antecedent as vitiating its right of approaching the ICJi.e., by the doctrine of clean hands; however, the court viewed this contention as not preventing Pakistan from fulfilling their obligation under International Law. On the issue of consular access, the long-drawn view of Pakistan has been that there is an exception in Article 36 of VCCR in espionage; moreover, it forms part of customary international law. Therefore the examination of the court was, in essence, was on the jurisprudence of Article 36, both India and Pakistan relied on the Travaux Preparatoires moreover both the parties are party to the Vienna Convention on Law of Treaties, 1969 (hereinafter referred to as 'VCLT'), although Pakistan has not ratified the VCLT it is bound by the customary character of VCLT.

On the one hand, India's interpretation of Article 36 of VCCR was squarely on 'literal interpretation'vis-à-vis the preamble of VCCR which articulate the importance of developing friendly relations amongst the nations. Taking recourse to the travauxpreparatoires to support its stance that no exception is carved out in Article 36 VCCR, on the other hand, Pakistan laid emphasis on the fact that there indeed exist exception in Article 36,i.e.in espionage by relying on the preamble of VCCR, i.e.matters not covered under the existing provision would be regulated by customary international law.

Another criticalside to Pakistan's assertion was the reliance on the 2008 bilateral agreement, the assumption was the said agreement ousted the Jurisdiction of the ICJ, but India's interpretation is progressive in a sense that there is nothing in the agreement to suggest a contradiction from Article 36 of VCCR. The ICJ relied on the preamble to put the facts right, i.e. the same agreement in the preamble talks about the humane treatment of the nationals on either side of the country.

Conclusion and Prospects

The disappointing part of the entire Judgment is paragraph 146[17]See Paragraph 146 in the Jadhav Judgment states: The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan. The implication is that Pakistan has to decide the subsequent fate of Mr.Jadhav, wherein the ICJ had missed a golden opportunity to assert its superiority for the first time post the Lockerbie Case. The court decided to follow the usual recourse of interpreting its own jurisprudence,i.e.relying on its previous Judgement in the LaGrande[18] and Avena case.[19] In my view, the ICJ could have asserted itself as a Court of Justice. Paragraph 146 of the decision puts the bowl in Pakistan's domain to decide on the future course of action. The mere 'review and reconsideration' phrase from the erstwhile decisions of the Court points to the fact that firstly although Pakistan could grand consular access that will necessarily not imply the fact that the decision would be annulled. At the end of the day, it's the Pakistani dispensationthat could ultimately decide the fate of Mr. Khulbhushan Jadhav.

While not downplaying the contribution of the ICJ, it can be said the ICJ has undertaken a neutral and passive stance towards the entire dispute; this is palpable as the ICJ is based on the consent of the State.In the long history of the ICJ, this is another opportunity missed to amplify the literature of consular access in the context of human right. After, upholding and acknowledging the argument of India at every level, the ICJ should have decided on the restitution in integrum put forth by India, which unfortunately was not decided upon.

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[18]cf (n 13) para 105

[19]Bimal N Patel, *'Avena and Other Mexican Nationals (Mexico v. United States of America)'* in Bimal Patel (ed), *The World Court Reference Guide and Case-Law Digest* (Brill 2014) <http://booksandjournals.brillonline.com/content/books/b9789004261891_041> accessed 4 January 2020

India for its part could consider invoking the revisional jurisdiction of the ICJ to ensure the content and quality of the Judgement, but it cannot discuss the facts not discussed in the original Judgement. The history of revisional jurisdiction suggests that rarely does the ICJ go beyond its original judgement; a classic example for this is the Avena Case.[20] The entire debate here is whether the ICJ could overpower Article 61 of the ICJ Statute.[21] Therefore, ever if India invokes the revisional Jurisdiction, the outcome looks bleak as evinced through previous decisions of the ICJ.

Pakistan, on the other hand, could respect the decision of the ICJ and restart the whole diplomatic and enquiry process notwithstanding granting consular access to Mr.Jadhav, which it did on September 3rd 2019. Finally, the author is of the firm opinion that the existing geopolitical environment will determine the closure or non-closure to the whole dispute.

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[201]ibid

[21] Article 61 reads as: 1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence. 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground. 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision. 4. The application for revision must be made at latest within six months of the discovery of the new fact. 5. No application for revision may be made after the lapse of ten years from the date of the judgment.

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