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National Language, Linguistic Politics and New Education Policy 2019: Issues and Concerns in The 21st Century India

Dr. Prem Chand*

Abstract

The endurance of 'Indian Constitutional Democracy' is a possibility because of its strength in 'Unity in Diversity'. And, this unity in diversity is achieved by leaving certain intractable issues, such as, 'Language' by Constituent Assembly while drafting the 'Constitution of India' for the future governments to decide. In this way, not only consensus on the drafting of the Constitution was gained, but it also helped in gaining the unity in diversity. But this doesn't mean that linguistic politics came to an end, in fact, even in 2020, after seventy years of a successful Indian Democracy, language issues still impact the senses of the citizens, with an equal zeal. In this article, an attempt is being made firstly to examine the linguistic issues in context of India and then secondly, debates in the Constituent Assembly over the language issues have been discussed so as to understand the background of linguistic politics. Thirdly, the post-constitutional events have been discussed in order to understand the sensitivity of language issues in the present times, fourthly, the draft of National Education Policy, 2019 in relation to language policy has been analysed to understand as to how the present government is addressing the prevailing language issues? Fifthly, the language issues in context of present global transnationalism has been discussed so as to understand the nuances of language politics in a global context.

Introduction

We are aware of the fact that it is the language which provides strong basis to the nationalist movements all across the globe, especially, 'linguistic homogenous population' works towards building a strong and a unified nation which positively affects the political stability of a state. The problem is aggravated when the sizable minority population of the nation speaks different languages, as it poses a serious threat to the nationalist movement of the nation¹. Linguistic issues need to be

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1 Goldie Shabad and Richard Gunther, "Language, Nationalism, and Political Conflict in Spain", 14 CP 443-447 (1982).

tackled on time with perseverance, or else, many a times, they lead to political violence. India is also not an exception to this, and we had therefore seen, both during the Constituent Assembly debates and later in linguistic movements, the heat generated around linguistic issues. According to Robert D King, the founding fathers had spent too much political energies on language controversies². It is therefore, essential to address linguistic issues in the present times. India had achieved freedom at midnight in 1947, but is hitherto following administrative and institutional lineages of the colonial period. India has English as its official language only for administrative purposes and which is also India's colonial legacy. English was introduced in India for the sake of convenience, but later due to linguistic politics of India, it has been left as the integral thread, binding India. Language was one of those intractable issues, which like Citizenship, was left for the future generations to decide and tackle. Linguistic questions proved to be a 'veritable minefield'³ for the political leadership as it involved complexities, with no approximate answer, either. At the time of Independence of India, it was essential to build, a strong and unified nation, and for which it was essential to have a common religion and also cultural practices along with one language of India. But, because India is a diverse country, it could not afford to have one official language, which would be placed superior to other languages in hierarchy of languages. And, therefore, instead of settling this issue of national language, the matter was deferred. Though, it is understandably clear that, one national language is psychologically considered as paramount (symbolically) to unite the big mass of land along with its citizens.

Role played by Language in developing a Nation

Language is the first point of interaction amongst human beings and therefore, every group of people and community develop their own set of languages as means of communication. The language also provides a sense of 'commonness' and 'identity' to a particular group or community and therefore, after gaining independence, the first major obstacle before the Constitution-makers was to check the status of languages in context of the Constitution, keeping in mind, the other broader objectives and goals of building a strong and robust India. It is therefore, essential to understand the status of different languages in reference to the Indian Constitution. The importance of languages can be understood in the light of the recent developments which took place in Indian political arena – recommendations by Parliamentary Committee on Official Language's (PCOL) regarding the significant push to Hindi language in the official discourse was accepted by the President of India on 17th April 2017. Not only this, 110 out of 117 recommendations given by the Committee of Parliament on Official Languages (CPOL) were put for recommendations before the President by the Home Ministry's Department of Official Language (DoOL). Interestingly, later it was clarified by the government that it is not mandatory for the State to follow so. We also heard of the three-language policy, where along with English language, two more languages, namely, Hindi and one Mother tongue were to be applicable in India to provide 'oneness' as a theme of India. It has been recommended by the Committee that,

2 Robert D. King, *Nehru and the Language Politics of India*. (Oxford University Press, New York, 1st edn, 1998).

3 Gyanesh Kudaisya, *A Republic in the Making: India in the 1950's* 136 (Oxford University Press, New York, 1st edn, 2017).

- (i) Minimum knowledge of Hindi is essential for securing the government job.
- (ii) The students should have the option to write examinations in Hindi language.
- (iii) The governments while promoting their activities through either print media or electronic media, should use Hindi as a script, more.
- (iv) The cabinet ministers are required to deliver their speeches in Hindi, to the maximum possible extent.
- (v) Railway Ministry should use technology to assimilate Devanagri Script into their computers and other systems so that the Railway tickets comprise of information in Hindi also.
- (vi) The non-speaking States should also include Hindi announcements as mandatory at Railway Stations.

The above-referred recommendations show that the Central Government is eager to promote Hindi language and therefore, the States, especially, Southern States of India, take it in a way as if the same affects the space of their languages, which they generally relate with their culture and tradition. Next, the simultaneous development alongside mainstream politics is the promotion of regional languages by the State Governments.

Draft National Education Policy 2019

Education is the backbone of a nation, as it helps the citizens in overall grooming. National Education Policy (NEP) because affects the education system of India, is essential to examine its impact in regard to linguistic issues. At two levels, the language issues are addressed in the NEP. Firstly, while discussing curriculum and pedagogy in school education, the reference is made at point 4.5 towards imparting education to the students in the 'local language/mother tongue' and the importance of multilingualism in India and the power of language in delivering education⁴. And, secondly, while discussing any other issues, promotion of Indian languages was discussed at length at point 22.

Promoting Local Languages

The draft discusses in detail, the importance of mother tongue and the local language, as it is very helpful in quickly understanding non-trivial concepts. In fact, when the students receive lectures in the languages not known to them or are difficult for them to understand, they start lagging behind in grasping the subject themes. And, therefore, the NEP recognises the importance of the local/ mother language in the early education of the students. In fact, it also promotes tribal languages also due to similar advantages. Though, there are various challenges to the promotion of the aforesaid policy such as, (i) lack of good books in the vernacular languages, (ii) lack of translation of good quality foreign languages books in vernacular languages, etc. Despite thereof, one cannot ignore the importance of the local and mother tongues in the overall development of the child. There is also promotion to bilingual approach wherever, there is difficulty for the students with the primary medium of instruction.

4 Draft National Education Policy 2019, Constituted by Ministry of Human Resource Development, Government of India, at p. 79.

Promoting three Language Formula

The language is understood as one of the most powerful tools to unite any nation. Interestingly, the NEP also promotes for the continuation of three language formula⁵ along with the recruitment of language teachers in the schools. It is essential to know that for a diverse country like India, it is essential to promote multilingualistic policy, as it helps in building much necessary feeling of brotherhood and development of an integrated India. And, in India, multilingualism is the necessity. But, unfortunately, despite such a rich linguistic resource of India, due to promotion of colonial legacy i.e. English, by the schools, the local languages had not seen progress like English in India. NEP is planning to teach science bilingually atleast till eighth standard or before so that, by the time students will reach up to tenth standard, they would be proficient in science in both English and vernacular languages.

NEP 2019 also discusses promotion and growth of Indian languages at length. And towards the fulfilment of the above objective, the NEP firstly, promotes specially the languages in the eighth schedule. Secondly, it promotes multifarious courses on the promotion of the regional and tribal languages. Thirdly, in Higher Educational Institute (HEIs) it was expected to recruit, atleast three Indian languages' faculties in addition to the local language faculty. Fourthly, research on Indian languages is also promoted. Fifthly, HEIs are expected to promote classical languages. Sixthly, the mandate is given to the Commission for Scientific and Technical Terminology (CSTT) to develop vocabulary not only in physical sciences but in other disciplines also. The NEP also provides on the one hand, flexibility in the three language formula and on the other, promotes foreign languages such as, Spanish, German, Chinese, French, Japanese, etc., but, foreign language would be categorised as an elective course, meaning thereby that it would not replace any of the three languages.⁶ In this way, the government is planning to implement the policy of multilingualism, which will positively affect the growth of languages of India. In fact, there is a lack of exposure of languages of India and therefore, NEP also promotes modern and classical languages of India to the students. And, towards this end, NEP promotes different courses on languages of India. Towards this end, NEP is suggesting to throughout incorporate relevant excerpts from the great Indian literature into the whole curriculum.⁷ NEP especially discusses the importance and relevance of Sanskrit language as not only a 'great repository of knowledge' but also a contributor in the development of various other Indian languages. It also popularises Indian languages by introducing two year relevant course on Classic Indian Languages⁸.

The above steps, which looksimple, firstly, require huge amount of financial planning along with a strong political will because India being a developing nation, already has various other socio-economic priorities at their disposal. Secondly, the promotion of Sanskrit language in

5 The three-language formula was first introduced in the National Policy on Education (NPE), 1968 and later followed by the NPE of 1986, 1992 and 2005.

6 *Supra* note 4 at p. 386.

7 *Supra* note 4 at p. 86.

8 *Supra* note 4 at p. 87.

particular, will certainly erupt the decades old controversy of which language is classic and which language is superior in hierarchy. Thirdly, the introduction of foreign language as an elective course, would certainly require serious consideration, as in that case, the student, will find end up reading many languages than core subjects. Fourthly, there are no measures have been discussed regarding dis-continuation of English as an official language, meaning thereby, the colonial legacy of English would be carried forward atleast for the time being. Fifthly, keeping in mind the number of languages spoken in India, it would be very difficult to translate scientific books into Indian languages, due to financial cost and technical difficulties.

Promotion of Indian/ Regional Languages by the States

Another development which affects language politics is the recent promotion of regional or mother tongue language by the States, specifically non-Hindi speaking States, such as, Karnataka, Andhra Pradesh, etc. Both these developments, at national and regional levels, define where we are heading to, in linguistic politics. The preference given by the Government to one language over the other would certainly invite trouble due to the uniqueness of Indian Politics. Regional politics, particularly of Southern States of India revolves around languages and we are already aware of the fact that due to our education policy, the States are using regional languages or mother tongue languages as the means of the dispensation of education. For instance, Tamil Nadu is using 'Tamil' and Kerala is using 'Malayalam' language as a medium for dispensing education in their respective States. In fact, in Andhra Pradesh after the crafting out of new state out of Andhra Pradesh, 'Telangana', the State started working on the need to promote 'Telugu' language, on the recommendation of Telugu Language Development Committee (TLDC). In fact, towards the furtherance of the goal, the Andhra Government has institutionalised the publication and translation work in Telugu language and has also started working for creating own indigenous words for loan words from other languages such as English. This can be seen as a progressive step from the point of retaining the cultural and traditional traits of the particular geographical area which are united by a regional language. In light of the above developments, it becomes essential to locate the status of languages in the Constitution of India.

Historical developments and debates in reference to the Constitution and the Languages

Historically, India has been known for its pluralistic traditions and multicultural values along with multilingualism, and therefore India is famous for its 'linguistic diversity management', which is unique in many ways. India is organised in States, on the basis of language which is spoken in majority in that territory and it is therefore, termed as one of the most 'successful experiments of institutional engineering' in the Indian history.⁹ Constitution makers were aware of the fact that the language would certainly provide the much necessary unity to the development of the concept of 'India' and it was, therefore, essential for them to locate some threshold of balance amongst the

9 Niraja Gopal Jayal, *Representing India: Ethnic Diversity and Governance of Public Institutions* 47 (New York, Palgrave Macmillan, United Nations Research Institute for Social Development, New York, 1st edn., 2006).

languages. But, they were also aware of the importance played by language in forming culture and affecting politics and therefore, had opted for the political and constitutional route to settle linguistic issues for the sake of the unity of India.¹⁰

Linguistic Contentions before the Constituent Assembly

There were various linguistic issues debated in the Constituent Assembly (CA) because of their importance. The questions such as, what would be the national and official language of India?, what would be the status of regional and local languages of India?, whether, one of the Indian languages would prevail over the others or the status of one language would be lifted to the heights then others, etc. affected the debates of CA. The status of English language was a big question to be addressed by the CA. The political leadership is of the opinion that it is essential to replace English with some regional or local language as national language. English, till now was not only be termed as the common language of India, but it also turns out to be connecting language of India. The whole India was united via, English language. But, due to complex linguistic structure of India, it becomes very difficult to choose one vernacular language over the other as national language. In 1946, Rules Committee and later in August 1949, Fundamental Rights Sub-Committee of the CA agreed to have 'Hindustani' written either in Persian or *Devanagari* script as the National Language of India. Whereas, Minoo Masani and Hansa Mehta, the two members of the CA, suggested to have Roman script also for writing 'Hindustani' language. There are other members also who suggested the same. Frank Anthony and Dr. P. Subbaroyan¹¹ were one of them. The discussion on national language, most of the times, generated heated discussions within the House, especially by the group of linguistic extremists¹² and it was also affecting the stability of India as a nation. The two groups, one from the southern states and one from the northern and central states were leading the arguments on national language of India. Pro-Hindi group was further divided into pro-Hindustani group, led by Jawaharlal Nehru and Mahatma Gandhi, who were promoting 'Hindustani' as a national language and, P D Tandon and Seth Govind Das, Sampumanand, Ravi Shankar Shukla, and K. M. Munshi who were promoting 'Hindi' as the national language of India. The anti-Hindi lobby, which was promoting English as the official language of India, were comprised of T. T. Krishnamachari, G. Durgabai, T. A. Ramalingam Chettiar, N. G. Ranga, N. Gopalaswamy Ayyangar and S. V. Krishnamurthy Rao.¹³ Pro-Hindi supporters were of the opinion that Hindi is superior to other languages and therefore, they want English to be replaced by Hindi, for all purposes. They are of the opinion that in the long run, multilingual languages would affect the unity of India and the continuation of English is incompatible with the idea of an independent nation.¹⁴

10 Papia Sengupta, *Language as Identity in Colonial India: Policies and Politics*, (Palgrave Macmillan, 1st edn, 2018).

11 Former Chief Minister of Madras.

12 Linguistic extremists are those persons who assertively fight for the cause of their language. In CA, linguistic extremists such as, Purushottam Das Tandon and Seth Govind Das from Hindi Camp forcefully argued for Hindi as a national language.

13 Lakhan Gusain, "The Effectiveness of Establishing Hindi as a National Language", 13 GJIA 43-45 (2012).

14 *Supra* note 3 at p. 138

Jawaharlal Nehru was of the view that English should be retained for the time being as it is not only, the official language but also is providing link between the northern and southern states and by slowly and cautiously, its replacement can be done. Mahatma Gandhi came up with five points test for calling any language as national language of India.

- (1) It should be easy to learn for government officials.
- (2) It should be capable of serving as a medium of religious, economic, and political intercourse throughout India.
- (3) It should be the speech of the majority of the inhabitants of India.
- (4) It should be easy to learn for the whole of the country, and
- (5) In choosing this language, considerations of temporary or passing interests should not count.”¹⁵

The debate has taken a turn when sixty-one Muslim figures of high eminence consisting of Dr. Zakir Hussain and Fakhruddin Ali Ahmad had submitted a memorandum demanding national language to be of widest currency and it should derive its vocabulary from the language of the people. It is essential to know that, before the partition of India, there was a widespread popularity of Hindustani as a language and it can be considered for being called as national language. But, partition has changed everything. Now, the brunt of partition was faced by Urdu language and later by Hindustani language.¹⁶ In August, 1949, the debate on linguistic issues ran for mammoth six weeks. For worse, some of the members had taken the debate beyond and P D Tandon in one of his statements outside CA said that any opposition of Hindi along with Devnagari script is about following the anti-national appeasement. He was of the opinion that Hindi has the ability to tackle difficulties of the language along with Sanskrit. 74/74 tie happened on 26th August 1949 when the house went for polls on language. And, the Hindi lobby won this poll, because one of its members, through voice vote, favoured Hindi language. But, Nehru decisively refused to accept this poll result on the ground that this much narrow margin must not be considered in the discussion of such an important subject, i.e., language.

Later, K M Munshi and N. Gopalaswamy Ayyangar were able to find a formula and therefore, the formula is known by duo names, Munshi-Ayyangar formula¹⁷ and the same was put to test. This time voting led to 77/77 tie¹⁸. The main terms of the compromise are as follows:

- (i) Official Language of the nation would be Hindi in Devanagari Script along with Roman International numerals.
- (ii) For next 15 years, English would be used and later it would be replaced by Hindi language

15 Jyotirindra Das Gupta, *Language Conflict and National Development*, 109-110 (Oxford University Press, New York, 1st edn, 1970).

16 Granville Austin, *The Indian Constitution, Cornerstone of a Nation*, 277 (Oxford University Press, New York, 1st edn., 1972). According to K Santhanam, Partition had killed Hindustani language.

17 Munshi-Ayyangar formula did not provide for a national language, Hindi. Rather, it used the term ‘official language of the Union’ and it further provided that language would be Hindi written in Deva Nagari Script.

18 Chair abstained.

- (iii) Parliament has the right to indefinitely extend this period of 15 years.
- (iv) Duty of the Union to promote Hindi
- (v) Provincial governments are free to choose one language from 14 languages listed in the eighth schedule.

Though, there were certain technical issues with the Hindi language, such as, it lacked scientific vocabulary, involves 48 letters along with 10 vowel sounds, creates numerous combinations which makes this language, very difficult to adapt and learn. Time to time, linguistic issues have been crippled in the Indian democratic scene and later it subsides automatically. Nehru's linguistic policy according to Gyanesh Kudaisya rests upon two important premises, (i) Operation muddle, and (ii) operation Scuttle.¹⁹ Nehru had deferred the language issues for the suitable time in future to work upon.

Constitution and Linguistic Politics

The politics of language is always considered as one of the most crucial aspects of multicultural democracies. Essentially, people want to secure their language, because they directly relate it with their culture, tradition and other religious practices and therefore, it is very difficult to give weightage to one language over the other. India is also not an exception to it and therefore, to avoid linguistic ambiguities, during the Constituent Assembly debates itself, the President appointed Linguistic Provinces Commission (LPC), which was popularly known as Dar Commission²⁰. The Commission submitted its adverse report on forming new States on the ground of language within six months of its formation.²¹

a. Linguistic Justice can be traced in Article 344 (1)²² of the Constitution of India, which casts duty on the Commission to make recommendations to the President, regarding progressive use of the Hindi language for the official purposes of the Union and Hindi should also be used for all or any of the purposes mentioned in Article 348. It further recommended to use Hindi language to form numerals to be used for (specified) purposes of the Union and Hindi should be used as the official language of the Union in communications between the Union and a State or between one State and another.²³ In 1955, Official Languages Commission (OLC) was appointed, within two years of appointment of States Reorganisation Committee (SRC) in 1953, on whose recomm-

19 *Supra* note 4 at p. 144.

20 Dar Commission was appointed on 17th June 1948 with the purpose to check the feasibility of creating linguistic provinces, Andhra, Kerala, Karnataka, and Maharashtra with S K Dar as its Chairman and Pannalal and J N Lal as its members. The purpose was also to assess other financial, administrative and economic consequences of creating new states on the basis of language.

21 Sudha Pai (ed.), *Constitutional and Democratic Institutions in India: A Critical Analysis*, 451-474 (Orient BlackSwan, India, 2020).

22 Article 344 (1) of the Constitution of India 1950: Commission and Committee of Parliament on official language (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the English Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

23 Article 344 (2) (a) and (c) of Constitution of India 1950.

endation, fourteen new States were carved out of the Indian Union and it submitted its report, the next year itself in 1956. Both, SRC and OLC had largely covered the issue of language and identity of a nation and its constituents, people. The above reports were vehemently criticised by many political and constitutional scientists along with linguists, such as, Suniti Kumar Chatterji, according to whom, it is not conducive to do far-reaching changes in the linguistic structures of the States, especially, when they are situated outside the orbit of Hindi-belt, as it would definitely affect the already prevalent abnormal psyche of the people (non-Hindi speaking belt). The report of the Commission was also criticised by P. Subbarayan, according to whom, the Commission was completely insensitive towards the non-Hindi speaking States and moreover, their responses to the linguistic policy were also not recorded judiciously. They further alleged that no parliamentary debates were held on this issue.

b. G B Pant, who was heading the 30-member Committee had submitted a report on the status of languages in 1959. Later, it was followed by a Presidential Order in 1960 recommending scientific development of Hindi. Jawaharlal Nehru was keen to develop 'emotion integration' of India for which it was essential to develop 'sense of a nation'. Towards this goal, later, Emotional Integration Committee 1961(EIC) was constituted headed by Dr. Sampurnanand, which recommended the important role played by education in promoting emotion integration of India. The EIG recommended three-language formula (TLF) for the establishment of inter and intra boards, zonal councils and even, in youth hostels, etc. Later, the politics of language took various turns, crucial out of which, was the establishment of The Sanskrit Commission, 1956. In fact, the National Education Commission of 1964-68 had taken a liberal stand and recommended that by the end of middle school, the students would be well versed with the three languages, one regional and two main languages, Hindi and English. In Chief Ministers Conference of 1961, various measures were discussed amongst Ministers to integrate India. The Committee of Parliament on Official Language (DPOL) was established in 1976 to review the progress of use of Hindi language for official purposes. The Committee consisted of 30 members. Constitutional drafters only provided for the goal, using Hindi as official languages, whereas there was no mechanism provided to complete that goal²⁴.

c. There are various constitutional safeguards provided for the protection of the languages spoken by different people. Article 350²⁵ of the Constitution of India guarantees the right of the people to use any language they understand while making representations for the redressal of their grievances. It is considered as one of the most essential rights, as it also conveys that language would not provide any impediment in making representations, especially at the time of seeking redressal of grievances. In this way, Article 350 also secures the rights of an individual regarding, his or her choice of language.

24 Article 343 of the Constitution of India: (1) The official language of the Union shall be Hindi in Devanagari script. The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

25 Article 350 of the Constitution of India: Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

Mother Tongue versus Language of Official Use

The child's first language is – the mother tongue. And, therefore, every other language is secondary to him. And, it is due to this reason, that the people always follow their Mother tongue, as it is the most comfortable language. The Constitution was amended in 1956 and Article 350A was added to direct States to provide instructions to the students belonging to linguistic minorities till primary level in their mother tongue.²⁶ Similarly, the Constitution has also provided provision for the appointment of Special Officer for linguistic minorities, who shall be appointed by the President,²⁷ and who would investigate all the matters regarding the safeguarding of the linguistic minorities.

Conclusion

In the contemporary times, the 'global transnationalism' has affected the linguistic milieu of the traditional nationalist politics and has led to a paradigm shift in global linguistic politics. In the global context, the international migration of the people either for the search of a dignified life or to have bare minimum conditions to live, is creating altogether new socio-economic platform, where language is no more affecting the traditional politics. The settling down of these new migrated persons has affected the politics of language. The growth of multinational corporations and establishment of their branch offices in the developing countries like India, to provide back office support to them, has further affected the inter-state and intra-state migration of workers which has further influenced the language politics of the State. This global and regional movement of people has further diversified the society in the developing nations like India, and therefore it is essential to adopt a linguistic policy which can take care of such socio-economic changes. It is necessary to be always aware of the fact that India is a pluralistic society and multicultural democracy prevails in India. Further, India is a classic example of Unity in Diversity and therefore, it is necessary to protect the diverse cultural and traditional practices followed by different people. Language is one such delicate area which affects the personal identity of an individual. An individual identifies oneself with language and culture and therefore, the Constitution of India also provides for the provisions to not only safeguard the mother tongue but also to protect the linguistic minorities. Only the future can ascertain as to whether draft NEP 2019 is a step in a right direction or not, but, it must always be remembered that north-south linguistic debate will remain for the time being and therefore, any priority to one language over the other would certainly affect the fine fabric of multilingual democracy of India. National language, which otherwise is a symbolic act needs kind attention or else it can create political chaos which may affect the delicate linguistic fabric of India.

26 Article 350A of the Constitution of India: It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

27 Article 350B of the Constitution of India: (1) There shall be a Special Officer for linguistic minorities to be appointed by the President (2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the president may direct, and the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.

Sexual Orientation, Gender Identity and State Homophobia in Africa: An Examination of the Human Rights of LGBT People

Dr. Ernest Ogwashi Ugbejeh*

Dr. Agama Ferdinand Onwe**

Abstract

The challenge of lesbian, gay, bisexual or transgender (LGBT) human rights, is a global one. In Africa, most States have laws criminalising homosexuality, although LGBT people's rights fall within the ambit of international human rights. Issues concerning sexual orientation, gender identity and, the entire topics on LGBT are controversial and contentious ones worldwide. This is especially so in the African continent which till date is still a hotbed of homophobia. In essence, however, topics on LGBT fall within the purview of the present international human rights. This came as a result of painstaking efforts by proponent States which pushed hard at the United Nations General Assembly for equal recognition and protection of LGBT people's rights as human rights. On the contrary, most African States still have a different orientation and view concerning LGBT people's rights, the practices which are still largely regarded as a taboo in several parts of Africa. Against this backdrop, this paper set to discuss succinctly, the struggles, strategies and development, the legal frameworks for the protection of the rights of the LGBT people, LGBT human rights in Africa. In examining the human right status of LGBT people in Africa in relation to the prevalent State homophobia, the paper found that there is a good link to the cultural peculiarities, religion, systemic and family values in the region. On the consideration of natural order, common sense, scientific report and, even positive law, the paper argued on the propriety of the claim that LGBT people's rights are tantamount to human rights. Thereafter, it concluded with useful recommendations.

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Introduction

Human rights are indivisible and inalienable rights to which people are entitled. Relevant Articles of the Universal Declaration of Human Rights (UDHR) address respectively, the rights to equality; freedom from discrimination; life, liberty, and personal security; freedom from torture and degrading treatment; recognition as a person before the law; equality before the law as well as the rights to marry and have a family¹. However, people around the world face violence, inequality, and various forms of persecution based on their sexual orientation and gender identity. Homosexuality is criminalised in many countries of the world including Africa where LGBT people are denied their claim to the full set of human rights on the basis of their sexual orientation and identity. Deeply-entrenched homophobic attitude, often go with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, thereby exposing LGBT people of all ages and in all regions of the world to gross violations of their human rights. The struggle to decriminalise homosexuality, protect and preserve the human rights of LGBT people is therefore global, particularly in Africa continent. Proponent States² and LGBT rights organisations³ had however, by adopting the kind of elite political lobbying, pushed hard for the decriminalisation of homosexuality. The painstaking efforts and struggle by adherents towards ensuring the inclusion and recognition of LGBT rights as human rights is an indication of how awful and unwelcome the concept initially was, even globally.

It is a common knowledge that presently in Africa, State homophobia is still prevalent. LGBT rights have no legal recognition or protection in a larger part of Africa and as a result, the LGBT persons are often harassed, stigmatised or even prosecuted in the region. Even in advanced States, homosexuality and other LGBT practices were unaccepted in recent years, before the struggles and gritty contestations that led to the decriminalisation and development of homosexuality in the West⁴. LGBT people were victims of homophobic violence across Europe while facing

1 Universal Declaration of Human Rights (UDHR), G. A. Res. 217 A (III), UN GAOR, Res. 71 UN Dec./810 (1948). Arts. 1, 2, 3, 5, 6, 7 and 16.

2 Brazil for instance presented prohibiting discrimination on the basis of sexual orientation to the United Nations Commission on Human Rights in April 2003; In December 2006, Norway presented a joint statement on human rights violations based on sexual orientation and gender identity at the Commission on Human Rights on behalf of 54 states; Also, Argentina in 2008 presented a joint statement at the UN General Assembly supporting LGBT people's rights; In June 2011, South Africa presented a resolution at the United Nations Human Rights Council where they urged the United Nations High Commissioner for Human Rights to draft a report documenting discriminatory laws and practices as well as acts of violence against individuals on ground of their sexual orientation and gender identity; Most recently in 2014, Brazil, Chile, Columbia and Uruguay jointly presented another resolution at the United Nations Human Rights Council on human rights, sexual orientation and gender identity which garnered an increasing support from member States.

3 These are civil rights, health, and community organisations formed to further the civil and human rights and health of sexual minorities and to better the lot of LGBT community. Examples are Stonewall Equality Limited, an LGBT rights charity based in the United Kingdom, formed in 1989; Out Rage! which was also a British LGBT rights group espousing that LGBT people have equal rights with heterosexual people, therefore homophobia should stop; Bash Back. A United States-based LGBT political advocacy groups and Queer Nation. Also, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) and ARC International.

4 During the regime of Adolf Hitler and the National Socialist German Worker's Party, gay men and lesbians were among the targeted groups in Germany by Nazis and were ultimately Holocaust victims. See 'Persecution of Homosexuals in the Third Reich' United States Holocaust Memorial Museum.

crimination and exclusion in all spheres of life⁵. They did not enjoy the same rights and protections available to heterosexuals as they faced discrimination, pressured to hide their sexual orientation and endured harassment in the hand of anti-LGBT society⁶. Sexual behaviour commonly referred to as sodomy was considered a capital offence in a greater number of European States and homosexual persons had been executed across Europe⁷.

Although, the issue of LGBT human rights remains a matter of global divide, presently, unlike the African continent, LGBT human rights are recognized and legally protected in a good number of European States⁸. One of the several challenges facing Africa is the need to integrate various racial and ethnic groups into functioning nation-states. The LGBT people (the sexual minorities) within Africa today, by their existence, have a stake in this project of nationhood and are forming a distinct group struggling for equal rights, recognition and freedom within the African States. Unfortunately, African society is espousing counter-trend to such struggle even as most African governments explicitly enact laws criminalising homosexuality. There is strong resistance to same-sex marriage in Africa. Africans view LGBT as a western concept inimical to their culture and so, they widely reject the concept. Issues of homosexuality and LGBT human rights are considered as an imposition from the west which does not constitute a priority issue in most African States. In most African societies, sex education is still a matter of private affairs, as Africans are more conservative in relation to sex issues. Also, the value system and family value of African society encourage repressive and the homophobic dispositions within the continent.

Given the above, this work endeavoured to address the question of “why Africa is homophobic”. In this endeavour, the paper undertakes clarification of relevant concepts, examines LGBT human rights status; the historic issues underpinning the development of LGBT human right, the international and African legal frameworks on the LGBT human rights -breakthrough and backlashes; the struggle in Africa, and why Africa is homophobic.

Conceptual Clarifications

Sexual Orientation

Sexual orientation mean that “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.⁹ It refers to the sex of those to whom one is sexually and romantically attracted.¹⁰ Categories of sexual orientation include attraction to

5 J.Takacs, Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender (LGBT) People in Europe 6 (ILGA-Europe – IGLYO, Brussels, 2006).

6 *Id.*

7 C. Louis, Homosexuality and Civilisation 1-2 (Harvard University Press, Cambridge, 2003).

8 14 out of the 25 countries that have legalised same-sex marriage globally are situate in Europe with Malta, Belgium and Norway at the top “Country Ranking”: See Country Ranking 2017, available at: <https://rainbow-europe.org> (Last visited August 1, 2020).

9 Alcides Barrichello, Andréa Leite Rodrigues, *et.al.*, “Minority Stress: Does Sexual Orientation Really Matter” 21 Revista Gestão e Planejamento, Salvador 201-217 (2020), available at: <http://www.revistas.unifacs.br/index.php/rgb>

10 The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients, adopted by the APA Council of Representatives, February 18-20, 2011, available at: <http://www.apa.org/pi/lgbt/resources/guidelines.aspx> (Last visited on August 21, 2020).

members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). The above definitions notwithstanding, research has suggested that "sexual orientation does not always appear in such definable categories and instead occurs on a continuum".¹¹

Gender Identity

Gender identity is used to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, such as the personal sense of the body¹² and other expressions of gender, including dress, speech and mannerisms.¹³ Therefore, it means "one's sense of oneself as male, female, or transgender".¹⁴

State Homophobia

Homophobia is a term used to encompass a range of negative attitudes and feelings toward homosexuality or people who are identified or perceived as being LGBT.¹⁵ It is State homophobia when the negative attitude and feelings are by the State. State homophobia is often used interchangeably with State-sponsored homophobia.

LGBT

LGBT an acronym used to cover lesbian, gay, bisexual, and transgender. In order words, these initials stand for lesbian, gay, bisexual, and transgender and has been in use since the 1990s. It is the replacement of the initial LGB, used in reference to the LGBT community at the beginning to the mid-late 1980s. Over the years, LGBT has grown beyond only four letters to accommodate other sexual and gender minority such as those who question their sexual identity by addition of "Q" queer as far back as 1996 and latterly the initial was expanded by the addition of "IA", that is, LGBTQIA covering lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual or allied.¹⁶ "T" stands for "intersex" and the "A" for "asexual" and/or "allied". Thus, there are seven components of LGBTQIA and they are defined below.

11 American Psychological Association Dictionary of Psychology (2nd ed. 2015), available at: <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (Last visited August 20, 2020).

12 This may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means.

13 AlcidesBarrichello, Andréa Leite Rodrigues, *et.al.* (n 9).

14 American Psychological Association, 2006. When one's gender identity and biological sex are not congruent, the individual may be identified as transsexual or as another transgender category.

15 Adams Maurianne, Bell Lee Anne et.al., *Teaching for Diversity and Social Justice* 198-199 (Routledge, 2007); M. Renzetti Claire and L. EdlesonJeffre, *Encyclopedia of Interpersonal Violence* 338(SAGE Publications, 2008);Schuiling Kerri Durnell and Francis E. Likis, *Women's Gynecologic Health* 187-188 (Jones and Bartlett Publishers, 2011).

16 The University of California, Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual Resource Center, 2017, San Francisco, available at: <https://lgbtqia.ucdavis.edu> (Last visited April 10, 2020); Bill Daley, "Why LGBT Initialism Keeps Growing" The Chicago Tribune, June 12,2017. Available at: <https://www.chicagotribune.com/lifestyles/sc-lgbtqia-letters-meaning-family-0606-20170602-story.html>accessed (Last visited June 5, 2020).

Lesbian: This is a term used to describe “a woman whose primary sexual and affectional orientation is toward people of the same gender”.¹⁷ A woman that has sexual affection toward another woman is a lesbian.

Gay: A gay is a homosexual person. That is “a sexual and affectional orientation toward people of the same gender”.¹⁸

Bisexual: A person whose primary sexual and affectional orientation is toward people of the same and other genders, or towards people regardless of their gender.¹⁹

Transgender: It is an adjectival word general used as an umbrella term and often abbreviated to “trans.” which “describes a wide range of identities and experiences of people whose gender identity and/or expression differs from conventional expectations based on their assigned sex at birth”. Other definition include “someone whose determination of their sex and/or gender is not validated by dominant societal expectations; someone whose behaviour or expression does not “match” their assigned sex according to society; a gender outside of the man/woman binary; and having no gender or multiple genders”.²⁰

Queer or Questioning: Historically, queer has been used as an epithet against people whose gender, gender expression and/or sexuality do not conform to dominant expectations of LGBT.

Intersex: This term covers people or individuals born with any of several variations in sex characteristics including chromosomes, gonads, sex hormones, or genitals that “do not fit the typical definitions for male or female bodies”.²¹ It is also an adjective used to describe the experience of naturally primary or secondary sex characteristics that do not fit neatly into society’s definitions of male or female. Over 20 variations of intersex have been identified as falling under this term. Where such characteristic is identified at birth, it is usually mutilated in infancy and early childhood by doctors to make the individual’s sex characteristics conform to society’s idea of what normal bodies should look like. Intersex people are relatively common, although society’s denial of their existence has allowed very little room for intersex issues to be discussed publicly. Hermaphrodite is an outdated and inaccurate term that has been used to describe intersex people in the past.

Asexual or Allied: Asexual orientation generally is characterised by not feeling sexual attraction or a desire for partnered sexuality. Asexuality is distinct from celibacy, which is the deliberate

17 The University of California, Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual Resource Center, 2017 available at: <https://lgbtqia.ucdavis.edu> (Last visited April 10, 2020).

18 *Id.*

19 *Id.*

20 *Id.*

21 United Nations Office of the High Commission, “End violence and harmful medical practices on intersex children and adults, UN and regional experts urge” available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E> (last visited April 20, 2020); Jennifer Beale, Intersex: variations in sex characteristics, available at <https://www.ogmagazine.org.au/20/4-20/intersex-variations-in-sex-characteristics/> (Last visited August 2, 2020).

abstention from sexual activity. Some asexual people do have sex. There are many diverse ways of being asexual.²²

The use of LGBT in this paper covers and connotes LGBTQIA. LGBT is a topical issue under human right law.

Human Rights

Human rights are norms that are meant to protect all people everywhere from severe political, legal, and social abuses.²³ These rights include right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, freedom from discrimination, the right to education, Freedom of expression, assembly and association, etc. These rights are vital for human existence.

Historical Issues and Development of LGBT Human Rights

Historically, LGBT dates back to the first documented cases of same-sex love and sexuality of ancient civilisations, involving the history of LGBT persons and cultures around the world. However, cases of LGBT waned drastically due to centuries of persecution resulting in prejudice, suppression, shame and secrecy. Some LGBT persons in ancient days were recorded as having relations with others of their gender exclusively or together with people of the opposite gender. Others were recorded as having relations only with the same sex. However, history has it that there were instances of same-sex love and sexuality within almost all ancient civilizations. Also, people who are third gender or intersex have been recorded in almost all cultures across human history²⁴. The existence of intersex was known to many ancient and pre-modern cultures. However, whether or not they were socially tolerated or accepted by any particular culture should be a different ballgame.

In ancient American society, for instance, homosexuality was an unseen, secret and taboo concept. During the era, homosexuality was within the domain of the term “sodomy” which comprised of all forms of nonproductive sexuality²⁵. Although homosexual existed in the United States, between the 18th and 19th centuries, they were seriously discriminated against by society. Although by 1920s, homosexuals were socially accepted in the United States; during 1930s the State became so conservative again making life harsh for homosexuals²⁶. Laws were passed against LGBT persons which were declared to be a mental illness and LGBT persons would hide for fear of ridicule and imprisonment as police conducted operations to arrest them²⁷. Though

22 UC Davis, LGBTQIA Resource Center Glossary, available at: <https://lgbtqia.ucdavis.edu/educated/glossary> (Last visited January 10, 2020).

23 E. N. Zalta, “Human Rights” Stanford Encyclopedia of Philosophy First published Fri Feb 7, 2003; substantive revision Apr 11, 2019.

24 D. Siculus, Library of History, Book IV (Harvard University Press, Cambridge, 1935).

25 N. C. Edsall, Toward Stonewall, Homosexuality and the society in the Modern Western World 69-84 (University of Virginia Press, Virginia, 2003).

26 W. N. Eskridge, “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos and Citizenships” 25 Hofstra Law Rev. (1961-1981).

27 *Id.*

several demonstrations and campaigns²⁸ had occurred before 1969, asking for equal rights for LGBT persons, the general belief is that the Stonewall Riots of 1969²⁹ are groundbreaking and starting point for the modern LGBT human rights movement. During the 1970s and 1980s, the United States witnessed overwhelming decriminalisation of homosexuality except in 14 States that had not repealed the existing laws. However, with the United State Supreme Court decision in the case of *Lawrence v. Texas*³⁰ those States were forced to repeal their sodomy laws. The Court in that landmark case struck down the sodomy law in Texas by implication, invalidated anti-sodomy laws in 13 other States making homosexual activity legal in every U.S. state and territory. The Court, with a five-justice majority, overturned its previous ruling on the same issue in the 1986 case of *Bowers v. Hardwick*³¹ where it upheld a challenged to a Georgia statute and did not find a constitutional protection of sexual privacy.

In the renaissance period of European history, it is recorded that there was intense oppression of homosexual relationships, especially by the Roman Catholic Church. Although homosexual activity was believed to be legal in most of ancient Europe, it later criminalised and incurred death penalty in most European states³². Research shows that in France, during this period, first-offending sodomites lost their testicles, second offenders lost their penis, and third offenders were burned, while women caught in homosexual activity would be mutilated and executed³³. Surprisingly, France became the first West European State to decriminalise homosexuality between consenting adults as far back as 1791,³⁴ a great while before the modern campaign against anti-LGBT legislations.

In Africa, particularly in South Africa, research revealed that Basotho women in Lesotho engaged in long term erotic relationships known as *motsoalle* which relationships were socially sanctioned³⁵. Studies also show that in Northern Congo male Azande warriors engaged in boy wives practice as they routinely took boy-wives in the age bracket of twelve and twenty years. These boy-wives supported their older husbands in household work/tasks and participated in intercrural sex with them³⁶. However, the practice died in the wake of the colonisation of Africa by Europeans. In ancient Egypt, there were no clear records of homosexuality. Except that Khnumhotep and Niankhkhnum, the ancient Egyptian royal servants and manicurists in the palace

28 The May 1959 LGBT persons' clash with Police at Cooper Do-nuts during protest against Police harassments; the September 1964 protest at New York against the US's Military treatment of gay people by activist Randy Wicker's group; the 1965 Francisco protest, etc.

29 Also described as Stonewall uprising or Stonewall rebellion were a series of spontaneous and violent protests by members of the LGBT community against a police raid at the Stonewall Inn, in Greenwich Village, New York.

30 (2003) 539, U.S. 558.

31 (1986) 478, U.S. 186.

32 J. Boswell, *Christianity, Social Tolerance and Homosexuality* 293 (University of Chicago Press, Chicago, 1980).

33 F. R. Byrne, *Homophobia: A History* (Metropolitan Books, New York 2000).

34 G. Scott, *The Elastic Closet: History of Homosexuality in France, 1942-Present* (Palgrave Macmillan, 2009)

35 M. Stephen and R. Will, *Boy Wives and Female Husbands: Studies of African Homosexualities* (St Martin's Press, New York, 1998).

36 E. E. Evas-Pitchard, "Sexual Invasion among the Azande" 72(6) *American Anthropologist*, New Series, 72(6), 1428-1434 (1970).

of King Niuserre during the Fifth Dynasty of Egyptian Pharaohs were speculated to be gays because they were buried together and are represented as embracing themselves nose-to-nose in their shared tomb³⁷. So it is unclear what exact view ancient Egyptians fostered as touching homosexuality. In early modern Egypt however, homosexuality is known to exist particularly in Siwa Oasis where male homosexuals were accepted in the ancient time. This was encouraged probably by the practice in the ancient time where unmarried men and adolescents boys were sent to live and work together outside the town of *Shali* and prevented for many years from any access to available women. It was recorded that virtually all normal Siwan men and boys practisesodomy especially boy between twelve and eighteen years of age³⁸. In pre-colonial East Africa however, there have been records of male priests whose traditional religious roles make them appear and dress like women. Such a religious leadership role known as *mugawe* existed among the *Meru* people and *Kikuyu* people of Kenya and compelled them to wear women's clothes and hairstyle³⁹.

In Nigeria, it has been argued that gay sex existed in Nigeria even before contact with the Arab and Western culture and particularly in Igbo land where a woman who had no son at the death of her husband is allowed culturally to marry another woman for procreation purposes.⁴⁰ However, to have children, both the "woman-husband" and "woman-wife" will consent to allow a man (usually married) from the same village or neighbouring town to sleep with the woman wife. The children born by the woman-wife bear the family name of the woman-husband, not that of the man responsible for the pregnancy. This practice remains to date. The essence of the practice is largely for procreation contrary to the claim of the LGBT. Outside this, there have been no convincing indications that ancient Nigerians practiced or permitted homo sexuality⁴¹. One can even argue that in reading about the ancient homosexual practices whether within or outside Africa, these had been seen and treated by the larger society as a sheer deviation from nature.

LGBT Rights in International Human Rights

International human rights are those rights and freedom that are considered fundamental to all men as agreed upon by governments from around the world and adopted by the United Nations based on the principles of dignity, equality and mutual respect. These are universal rights and are protected by international human rights law. The rights came about through the Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations General Assembly on

37 T. A. Dowson, "Archaeologists, Feminists, and Queers: sexual politics in the construction of the past" in P. L. Geller, M.K. Stockett(eds), *Feminist Anthropology: Past, Present, and Future* 89-102 (University of Pennsylvania Press, 2006).

38 C. Walter, *Notes on the People of Siwa* 43 (George Banta Publishing Co., Menasha, Wisconsin, USA 1936).

39 R Needham, *Right and Left: Essays on Dual Symbol Classification*, (University of Chicago Press, Cambridge, 1973).

40 Igwe Leo, "Tradition of same gender marriage in Igboland, Nigeria" available at: <https://www.blackagendareport.com/content/tradition-same-gender-marriage-igboland-nigeria> (Last visited June 6, 2020).

41 I read the work of a Nigerian Gay Activist, BisiAlimi where he argued that homosexuality is well rooted in the core of Nigerian society and identity but did not find reason(s) to believe with him that LGBT is part of Nigerians' culture and identity whether in the old or modern time. See Legit "Homosexuality Is Well Rooted In the Core of Nigerian Society and Identity - BisiAlimi Writes" available at: <https://www.legit.ng/54704.html> (Last visited August 22, 2020).

December 1948.⁴² It set out, for the first time, fundamental human rights to be universally protected. The earlier effort at drumming for the protection of LGTB people's right at the international level was in 1951 when the International Congress for Sexual Equality sent a telegram to the U.N. demanding equal rights for homosexual minorities.⁴³ But since its creation in 1945, the United Nations had not held any discussion nor made pronouncements regarding LGBT rights until September 1995 when sexual orientation formed a topic of debate in the negotiation on the draft of the 1995 Beijing Platform for Action at the 4th World Conference on Women⁴⁴. That was the first time governments publicly made their positions known as for or against the inclusion and recognition of sexual orientation as part of human rights, particularly women's rights to control their sexuality.

It was June 2011, for the first time, the United Nations Human Rights Council adopted a wide-ranging resolution on human rights, sexual orientation and gender identity. In the Resolution,⁴⁵ the Council expressed "grave concern" at violence and discrimination against individuals based on their sexual orientation and gender identity, and commissioned a study to ascertain the scope and extent of these violations across all the regions of the world and proffer practical measures needed to address them.⁴⁶ The report of the study was submitted in December 2011. From 2003 to 2016, there were a series of representations and joint statements by proponent States in support of the application of human rights to all persons regardless of their sexual orientation or identity⁴⁷.

In 2016 in particular, the United Nations Human Rights Council passed a resolution to appoint an independent expert to investigate the causes of violence and discrimination against individuals based on their gender identity and sexual orientation, and discuss with concerned governments about how to protect those people. This step had been interpreted as an overt expression of LGBT rights as human rights by the Office of the United Nations High Commissioner

42 GA Res 217 A.

43 Leila J Rupp, and Santa Barbara, "Transnational Homophile Organizing: The International Committee for Sexual Equality" 125th Annual Meeting of American Historical Association conference (January 2011). *See also* Committee on Conference (COC) *Report of the First International Congress for Sexual Equality* (1951), 2.19.038, box 158.

44 Shelagh Day, "Women's Sexual Autonomy: Universality, Sexual Rights and Sexual Orientation at the Beijing Conference" 16(3) Canadian Women's Studies / Les Cahiers de la Femme(1996); F. Girard, "United Nations: Negotiation Sexual Rights and Sexual Orientation at the UN" in Richard Parker, Rosalind Petchesky and Robert Sember (Eds.), *Sex Politics: From the Frontlines* 311-358 (2004) available at: <http://www.sxpolitics.org/frontlines/book/index.php> (Last visited February 12, 2020).

45 A/HRC/17/19, 2011.

46 United Nations for LGTB Equality, "International Human Rights Law and Sexual Orientation & Gender" Identity <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> last visited: August 21, 2020.

47 In 2003, Brazil presented a resolution to the United Nations Commission on Human Rights prohibiting discrimination on the basis of sexual orientation; in December 2006, Norway presented a joint statement on human rights violations based on sexual orientation and gender equality at the Commission on Human Rights and later after two years on December 2008, Argentina made similar representation at the UN General Assembly and on June 2011, South Africa led a representation where urged the United Nations High Commissioner for Human Rights to draft a report documenting discriminatory laws, practices and acts of violence against people based on their sexual orientation and gender identity.

for Human Rights⁴⁸. Meanwhile, in 1994 in the landmark case of *Toonen v. Australia*⁴⁹, the United Nations Human Rights Committee in its decision declared that laws criminalising same-sex relations between consenting adults violate international human rights. In this case, there was a human right complaint brought before the United Nations Human Rights Committee by Tasmanian resident Nicholas Toonen where he contended that the Tasmanian laws criminalising homosexuality between adult males in private were a violation of his right to privacy under Article 17 of International Covenant on Civil and Political Rights (ICCPR). The Committee held that sexual orientation was included in the anti-discrimination provisions as a protected status under the International Covenant on Civil and Political Rights, a decision which resulted in the repeal of Australia's last sodomy law⁵⁰.

The former UN Secretary-General Ban Ki-Moon as touching LGBT people's human rights had been quoted as saying:

"Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the United Nations Charter and the Universal Declaration of Human Rights to protect the rights of everyone, everywhere"⁵¹.

From the above cases of recognition and inclusion by the UN agents and member States, one may be tempted to assert that LGBT rights fall within the purview of the present international human rights, although, there is global divide concerning the exact LGBT rights status. Even though much has been written about LGBT people's rights, but much remains undone. The historical examination of the efforts to include LGBT within human rights law is not only a necessary component in the story of LGBT rights but also a prerequisite for current debates about the status of these rights in human rights law. The debate and controversy over the LGBT rights are very much alive today; issues ranging from decriminalising LGBT relationships to guaranteeing marriage equality and privacy right *vis a vis* the societal norms, religious beliefs, natural law, scientific proofs and common sense. Thus, globally and particularly in Africa, people are harassed, persecuted, detained and imprisoned solely because of their homosexuality or gender identity.

The international recognition and protection of LGBT human rights notwithstanding, as of March 2019, 70 UN Member States (35%) criminalised consensual same-sex sexual acts, 68 of them have laws that explicitly criminalised consensual same-sex sexual acts and 2 more

48 M. Carol, "U.N. Council Creates Watchdog for LGBT rights" The Washington Post, June 30, 2016.

49 Communication No. 488/1992, U.N. Doc. CCPR/C (1994).

50 Castan Centre for Human Rights Law, "When All Else Fails: The Practicalities of Seeking Protection of Human Rights under International Treaties" Monash University (2003) available at: <https://www.monash.edu/law/research/centres/castancentre/our-areas-of-work/international-law/events> (Last visited December 12, 2019).

51 UN Secretary-General Ban Ki-Moon statement to the Human Rights Council, March 7, 2012.

criminalised such acts de facto.⁵² Other jurisdictions which are not the UN Member States that criminalised such acts are Gaza, the Cook Islands and certain provinces in Indonesia.⁵³

International Human Right Legal Framework on Protection of LGBT Persons

The international human rights laws are anchored on core principles such as equality and human dignity which are central to the protection of LGBT persons. The relevant international human right laws are examined below.

- i. The 1948 Universal Declaration of Human Rights. Its preamble provides for the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’ as the ‘foundation of freedom, justice and peace in the world’.
- ii. The principle of non-discrimination is embodied in the Charter of the United Nations; the Universal Declaration of Human Rights; and all the core human rights treaties.⁵⁴ The list of grounds for discrimination in these instruments is not exhaustive by the use of “other status”.
24
- iii. The principle of non-discrimination on the ground of sexual orientation spelt out by the Human Right Committee in *Toonen’s case* was adopted and reflected in the general comments by the Committee on Economic, Social and Cultural Rights (CESCR);⁵⁵ the Committee on the Rights of the Child (CRC);⁵⁶ the Committee Against Torture (CAT);⁵⁷ and the Committee on the Elimination of Discrimination against Women (CEDAW)⁵⁸ and explicitly included the prohibited grounds of sexual orientation and gender identity in the implementation and interpretation of the treaty they are respectively tasked to monitor.

52 “De facto” means that even though there are no explicit provisions criminalising consensual same-sex sexual acts in force, other legal provisions are used as the legal basis to prosecute and convict people for such acts. See International Lesbian, Gay, Bisexual, Trans and Intersex Association: Lucas Ramon Mendos, State-Sponsored Homophobia 2019 (Geneva, ILGA, March 2019) 15.

53 *Id.*

54 Universal Declaration of Human Rights (Art 1); International Covenant on Civil and Political Rights (Art 26); International Covenant on Economic, Social and Cultural Rights (Art 2); Convention on the Elimination of all Forms of Discrimination against Women (Art 1); International Convention on the Elimination of all Forms of Racial Discrimination (Art 1.1); Convention on the Rights of the Child (Art 2); and Convention on the Rights of Persons with Disabilities (Art 2).

55 CESCR, “General Comment n 22: Right to sexual and reproductive health” Art 12, para 9 UN Doc E/C.12/GC/22 (2016). CESCR, “General Comment n 20: Non-discrimination in economic, social and cultural Rights” Art 2, para 32 UN Doc E/C.12/GC/20 (2009). CESCR, “General Comment n 19: Right to Social Security” Art 9, para 29 UN Doc E/C.12/GC/19, (2008). CESCR, “General Comment n 15: Right to Water” Arts 11 and 12 para 13 UN Doc, E/C.12/2002/11 (2002). CESCR, “General Comment n 14: Right to the highest attainable standard of health” Art 12 Para 18” UN Doc E/C.12/2000/4(2000). CESCR, “General Comment n 18: Right to Work” Art 6 Para 12 UN Doc E/C.12/GC/18(2006).

56 CRC, “General Comment n 13: Right of the child to freedom from all forms of violence” para 72 UN doc CRC/C/GC/13, (2011). CRC, “General Comment n 4: Adolescent health and development in the context of the Convention on the Rights of the Child” (2003). UN Doc CRC/GC/2003/4. CRC, “General Comment n 3: HIV/AIDS and the rights of the child” UN Doc CRC/GC/2003/1 (2003).

57 CAT, “General Comment n 3” Art 14 para 8 UN Doc CAT/C/GC/3 (2012).

58 CEDAW, “General Recommendation n 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women” para 18 UN Doc CEDAW/C/GC/28 (2010). CEDAW. “General recommendation n 27 on older women and protection of their human rights” para 13 UN Doc CEDAW/C/2010/47/GC.1, (2010).

- iv. Yogyakarta Principles: This is an important human rights instrument which set of principles that apply international human rights law standards to issues that affect LGBTI people. The focus of Yogyakarta Principles is to identify specific rights and the related duties and obligations required of States under international human rights laws to ensure that LGBTI people can exercise and enjoy those rights. The major limitation is that unlike treaties, it is not binding on States. The principle is akin to “the teachings of the most highly qualified publicists of the various nations”.⁵⁹

Africa’s Regional Legal Framework on Protection of LGBT Persons

The relevant Africa legal framework includes the African Charter, the Maputo Protocol, the African Youth Charter, and the Common African Position (CAP). Underlying these treaties, policies and instruments are the core values of equality, non-discrimination, and respect for human dignity for all persons and citizens of the region. Each is examined below.

- i. *The African Charter on Human and Peoples’ Rights*: This Charter adopted in 1981 had been ratified by all African countries except Sudan. It provides that “[E]very individual shall be entitled to the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind”.⁶⁰ It prohibits discrimination on the basis of “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”⁶¹ and notes that “[E]very individual shall be equal before the law [and] ... shall be entitled to equal protection of the law”.⁶² Also, the charter provides that “every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”. These rights apply to LGBTB people and their rights are inherently covered by the provisions of this Charter.

At the 55th Ordinary Session, the African Commission via “Resolution 275”, offered its strongest condemnation of acts of violence, discrimination and other human rights violations against persons based on social orientation and regarded such acts as violating state obligations under the Charter. Thus, in *Attorney General of Botswana v. Thuto Rammoge and 19 others*,⁶³ the Court of Appeal of Botswana in 2016 ruled that:

“Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”⁶⁴

Furthermore, the LGBT people’s right to freedom of association under Article 10 and other international treaties were upheld by the court. Also in a related development, the High

59 See Article 38(1) Statute of the International Court of Justice.

60 Article 2.

61 See Article 2 of the Charter.

62 Articles 3(1) and (2).

63 Civil Appeal No. CACGB-128-14 C.F.R. Botswana: Ministry of Justice, 2016.

64 *Id.*

Court in Botswana *inter alia*, referencing the African Charter, struck down the provisions of sections 164, 165 and 167 of the country's penal code which criminalise gay sex.⁶⁵

In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the African Commission affirmed that the “aim of this principle of non-discrimination is to ensure equality of treatment for individuals irrespective of their nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”⁶⁶

- ii. *The Maputo Protocols*: It was adopted at the 2nd Ordinary Session of the Assembly of the African Union (AU) in July 2003 and the goal is to “ensure that the rights of women are promoted, realized and protected ... to enable them to enjoy fully all their human rights, guarantees non-discrimination, equitable gender inclusion, and respect for human dignity for all women in Africa. It provides for the elimination of all forms of discrimination against women irrespective of their sexual orientation, and requests states to “support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women”; guarantees right to dignity; rights to life, integrity and security of all women and girls.⁶⁷ The Revised Maputo Plan of Action, 2015 provides additional impetus and vision for the inclusion of marginalised groups in Africa, including LGBT persons.
- iii. *The Common African Position (CAP)*: CAP was launched in March 2014 as the Post-2015 Development Agenda as a critical regional policy instrument. It addresses LGBT inclusion in Africa by prioritising structural transformation for inclusive and people-centred development in Africa. It commits member-states to “fight against all forms of discrimination”;⁶⁸ focuses on diversity and the urgent need to fight discrimination,⁶⁹ and obligates governments in the region to drive inclusive growth that reduces inequality for all.⁷⁰ The CAP has the potential to facilitate actions and efforts to ensure the inclusiveness of young LGBT citizens of the region in the development planning, efforts and processes in Africa.⁷¹
- iv. *The African Youth Charter*: The African Youth Charter was endorsed by the AU in July 2006 as a key regional enforceable legal instrument. The Charter firmly guarantees enjoyment of rights to all youths, irrespective of colour, sex and “other status”. Thus, African member-state signatories of the Charter have no basis or grounds to discriminate against LGBT youth or criminalise their activities and lifestyles as LGBT persons. It commits member-states to ensure that no youth suffers discrimination based on their status, activities, opinions or beliefs,⁷² and guarantees all young people, irrespective gender identity, the

65 High Court of Botswana. *Letsweletse Motshidiemang v. Attorney General*. Case No: MAHGB-000591-16. Botswana: Ministry of Justice, 2019.

66 See “245/02: Zimbabwe Human Rights NGO Forum v. Zimbabwe” https://www.achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf (Last visited August 21 2020).

67 Articles 2, 3 and 4.

68 Paragraph 66.

69 Paragraph 93.

70 Paragraph 21.

71 Paragraph 17(iv) of the Revised Plan of Action.

72 Article 2(2).

right to full participation in all spheres of society.⁷³ Member states by this affirm and subscribe to the protection of the social, economic, health and other rights of the region's youth irrespective of their sexual orientation. The Charter safeguards the wellbeing and participation of young people in Africa.

- v. The AU's Agenda 2063 and the African Charter on Democracy, Elections and Governance are other critical regional legal and policy instruments relevant in addressing LGBT exclusion in Africa through their universal language, inclusive focus, and non-discrimination stance, and firm support for the protection of marginalised groups and peoples, particularly LGBT peoples.

LGBT Human Rights in Africa

Africa has recently become a centre of attention to the international community especially the Western World, regarding the human rights position of LGBT persons within the region. The existing legal instruments notwithstanding, except South Africa and Cape Verde, LGBT rights in Africa are very limited when compared to other regions of the world. A report from the International Gay and Lesbian Association during 2015 revealed that out of the 54 African States as recognized by the United Nations, 34 out-rightly outlaw homosexuality⁷⁴. The Human Rights Watch, however, states that in another two countries, to wit Benin and the Central African Republic, do not outlaw homosexuality, but have specific laws which apply differently to heterosexual and homosexual persons⁷⁵. Others criminalised homosexuality *de facto*. The African Commission on Human and Peoples' Rights reports that in 33 Africa States adult same-sex acts are illegal, 24 States criminalize lesbian acts, and many other countries have recently passed laws that restrict and punish groups that work on sexual orientation and gender identity issues.⁷⁶

In Central African Countries issues related to sexual orientation and gender identity have not seen much progress. Homosexuality continues to be perceived as taboo and contrary to African values. For instance, Cameroon revised its criminal code in 2016, but the provisions criminalising and penalizing same-sex relationships were not amended.⁷⁷ In the Central African Republic Article, 85 of the Criminal Code criminalises "acts against nature committed in public" and defines them as "attacks on public morals". Also, Article 272 Chad Criminal Code condemns those who commit "acts against nature" with persons under the age of 21 years. In 2016, a bill to criminalize same-sex with 20 years imprisonment failed.

73 Article 11.

74 A Carroll, International Lesbian, Gay, Bisexual, Trans and Intersex association, State Sponsored Homophobia 2016: A world survey of Sexual orientation laws: criminalisation, protection and recognition (Geneva: ILGA 2016).

75 F Louise, "How many African States Outlaw Same-Sex Relations? (At Least 34) available at: <https://africacheck.org/reports/same-sex-relations-illegal-in-34-african-states-likely-35/> (Last visited February 2, 2019).

76 Wendy Isaac, "African Commission Tackles Sexual Orientation, Gender Identity" <https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity> (Last visited August 21 2020).

77 International Lesbian, Gay, Bisexual, Trans and Intersex Association: Lucas Ramon Mendos, State-Sponsored Homophobia 2019 (Geneva; ILGA, March 2019).

In West Africa, Apart from Cape Verde having anti-discrimination protection for LGBT, there is an absence of political will to protect LGBT right and decriminalise same-sex marriage. Gambia, Guinea, Liberia, Mauritania, Nigeria, Senegal, Sierra Leone, and Togo have express criminalisation of same-sex marriage. The report is the same for the East Africa States. Angola has made some progress by decriminalising same-sex acts between consenting adults.⁷⁸ In June 2018, the Ministry of Justice and Human Rights of Angola granted legal recognition to the first LGBTI association in the State.⁷⁹ The issue is whether the ministry possesses such power to confer and grant legal recognition to LGBTI association. The revised Penal Code was approved on January 23, 2019, and was a significant shift from criminalisation to the protection of the LGBT rights in Angola. The new Penal Code establishes the crime of threatening to perpetrate a crime against someone, which could affect their “sexual self-determination”,⁸⁰ and criminalises acts of discrimination based on sexual orientation with regard to the provision of goods and services, employment and obstructing economic activities.⁸¹

Since 2011, there have been concerted campaigns by Western countries aimed at cajoling African States into decriminalising homosexuality. Part of the strategy was to limit or prohibit general budget support to countries that criminalise or restrict the human rights of LGBT persons⁸². This threat has not by any means abated the cases of violation against the alleged human rights of LGBT peoples in Africa, some of which are State-sponsored⁸³. African States refused to be influenced by the threat but in some cases have even drafted laws to increase sanctions against LGBT people⁸⁴. African leaders view LGBT as a product of the Western culture and un-African although some⁸⁵ have espoused the idea that LGBT had been, after all, part of African identity. This disposition in Africa makes life difficult for LGBT people in the region. The deeply-embedded prejudices often lead to overt discrimination against them in schools, hospitals, and the labour market and they are mistreated and disowned by their own families, often singled out for physical attack – beaten, sexually assaulted, tortured and in extreme cases killed.

Among African leaders who had been vehemently opposing LGBT rights is Robert Mugabe, the former Zimbabwe President. On August 1, 1995, President Mugabe while reacting to a stall erected by the Organisation Gays and Lesbians of Zimbabwe (GALZ) at Zimbabwe’s annual International Book Fair in Harare established in 1990 to facilitate communication within LGBT community, was reported as saying:

78 This was as a result of the Presidential Order No. 124/12, 27 November 2004. The revision of the Penal Code commenced in 2004 following this order and a new penal code was enacted in 2019.

79 *Supra* note 53 at p 97

80 Article 172(1).

81 Article 241.

82 BBC, “Cameron Threat to Dock Some UK Aid to Anti-Gay Nations”, BBC News, 30 October 2011.<<https://www.bbc.com/news/uk-15511081>> (Last visited on February 9, 2019).

83 BBC, “Ghana Refuses to Grant Gays Rights Despite Aid Threat”, BBC News, November 2 2011.

84 BBC, “Uganda Fury at David Cameron aid Threat Over Rights” BBC News, October 31 2011.

85 B Animi, “Homosexuality is Well Rooted in the Core Nigerian Society and Identity” available at: <https://www.legit.ng> › Local news (Last visited February 9, 2019).

I find it extremely outrageous and repugnant to my human conscience that such immoral and repulsive organizations, like those of homosexuals, who offend both against the law of nature and the cultural norms espoused by our society, should have any advocates in our midst and elsewhere in the world. Two weeks later during the country's annual independence celebration, Mugabe proclaimed: It degrades human dignity. It's unnatural, and there is no question ever of allowing these people to behave worse than dogs and pigs. If dogs and pigs do not do it, why must human beings? We have our own culture, and we must re-dedicate ourselves to our traditional values that make us human beings. ... What we are being persuaded to accept is sub-animal behaviour and we will never allow it here. If you see people parading themselves as Lesbians and Gays, arrest them and hand them over to the police!⁸⁶

In the same 1995 by September, Zimbabwe's parliament introduced legislation banning homosexual acts⁸⁷ and in 1997, a court in Harare found Canaan Banana, Mugabe's predecessor and the first President of Zimbabwe, guilty of 11 counts of sodomy and indecent assault⁸⁸.

In a like tone, the former Gambia President, Yahya Jammeh led the call for legislation that would set laws against homosexuals that would be "stricter than those in Iran", declaring that he would cut off the head of any gay or lesbian person discovered in his country⁸⁹. Jammeh disparagingly referred to homosexuals as vermin and declared war against them as against malaria-causing mosquitoes. To tarnish their image the more Jammeh concluded that LGBT can only mean leprosy, gonorrhoea, bacteria and tuberculosis which according to him are detrimental to human existence⁹⁰.

In Northern Nigeria, Southern Somalia, Sudan, and Mauritania, homosexuality is a capital offence punishable by death⁹¹. In Nigeria, just like many other African countries where State homophobia prevails, LGBT people are in the pang of legal and social attacks. The Nigerian legal system does not allow or recognise LGBT rights and so LGBT people enjoy no legal protection against discrimination, prejudice, violence and harassment. In addition to criminalising homosexuality, Nigeria has enacted separate legislation which makes it an offence for heterosexual family members, allies and friends of LGBT people to be supportive. The law provides that, a heterosexual ally "who administers, witnesses, abets or aids" any form of gender non-conforming and homosexual activity could receive a 10-year jail sentence. For instance, the Same-Sex Marriage (Prohibition) Act 2014⁹² stipulates that:

86 LGBT Rights in Zimbabwe at the Wayback Machine. BBC News-Africa May 6, 2006.

87 M. Epprecht, Hungochani: The History of a Dissident Sexuality in South Africa (McGill-Queen's University Press, 2004).

88 D. G. McNeil, "Zimbabwe's Ex-President Convicted of Sodomy" November 1998, available at: <https://www.nytimes.com/1998/11/.../zimbabwe-s-ex-president-convicted-of-sodomy.html>, (Last visited on February 10, 2019).

89 A. Gibba, "President Jammeh Gives Ultimatum for Homosexuals to Leave, available at: thepoint.gm/africa/gambia (Last visited February 10, 2019).

90 Reuter News "Gambia's Jammeh calls gays 'vermin', says to fight like mosquitoes" September 27, 2013.

91 A Carroll, (note 41).

92 The government of President Goodluck Jonathan on January 7 2014 signed the Same Sex Marriage (Prohibition) Act into law. The Act was passed by the Nigerian Parliament in 2013 and nicknamed the "Jail the Gays" law. Under the law, those found guilty of homosexuality are liable to 10 ten years imprisonment including those found guilty of registration, participation, membership or support for gay clubs, societies, and organisations.

A person or group of persons, who administers, witnesses, abets or aids the solemnisation of same-sex marriage or civil union or supports the registration, operation and or sustenance of gay clubs, societies or organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment⁹³.

Also, anyone convicted of entering into a same-sex marriage contract or civil union faces up to 14 years imprisonment. Already, the criminal and penal codes outlawed sexual acts between members of the same sex, in the Northern and Southern parts of Nigeria respectively⁹⁴. However, the *Same-Sex Marriage (Prohibition) Act* has gone further to criminalize lesbian, gay, bisexual, and transgender (LGBT) persons based on sexual orientation and gender identity. Anyone that enters into a same-sex marriage contract or civil union upon conviction faces up to 14 years imprisonment. The new law triggered and amplified homophobia in Nigeria putting the rights of LGBT people at worse stake in a country where lynching and mob justice are common.

On January 16, 2014, an artisan, one Mubarak Ibrahim was tried and found guilty of sodomy/homosexuality by a Sharia court in the State and was made to receive 20 whiplashes in Bauchi State of Nigeria.⁹⁵ He was ordered to lie on a bench, and an official whipped his back in front of a packed courtroom. Mubarak admitted that he had committed an act of sodomy seven years earlier. Upon this admission, Judge Nuhu Mohammed decided not to condemn him to stoning under Islamic Law because according to him, the crime had been committed many years before, and the culprit had shown “great remorse”. In addition to the 20 publicly-imposed lashes, Ibrahim was fined the sum of N5.000 (\$30). Ibrahim was part of the group of 11 men arrested by police after Christmas for belonging to a gay club.

Also, March 6, 2014, four men were lashed in public in the city of Bauchi for having had homosexual relationships.⁹⁶ The men, aged between 20 and 22, were sentenced to 15 strokes of whip and to choose between a fine equivalent to \$ 120 or imprisonment for a year. The four were forced to stand face down on the court floor to be lashed. Although homosexuality was never widely welcome in Nigeria, the new law only made already bad situations worse for LGBT people in Nigeria. LGBT people would hide their sexual identity and those who do not will face constant danger. Some are disowned and banished by their family⁹⁷. While the majority of Nigerians

93 Same-Sex Marriage (Prohibition) Act, 2013.Sec. 5 (3).

94 Section 217 of the Criminal Code provides that “Any male person who, whether in public or private, commits any act of gross indecency with another male

person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for three years”. For Penal Code, Section 284 provides that “Whoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine”.

95 BBC News, “Mubarak Ibrahim, Convicted of Sodomy in Nigeria, lashed 20 Times” available at: <https://www.bbc.ca/news/world/mubarak-ibrahim-convicted-of-sodomy-in-nigeria-lashed-20-times-1.2499873> (Last visited August 21, 2020).

96 BBC News, “Nigeria gays: 20 lashes for homosexual offences” March 6, 2014. Available at: <https://www.bbc.com/news/world-africa-26469501> (Last visited May 10, 2019).

97 This was the case of 28-year old Kenyan gay right activist, JijiBarowho described how he suffered physical attacks, arbitrary arrests and being disowned by his family as a result of his sexual orientation.

applaud the anti-gay law,⁹⁸ the same has been widely condemned particularly by Western governments and human rights organizations. However, Nigerian authorities have roundly refused to acknowledge the attack, while holding the argument that homosexuality is against African cultures and religious beliefs.

For instance, Gulak had advised that the US, member-states of the European Union and their allies should respect the cultural sensibilities and sovereignty of Nigerians and other African countries. According to Gulak “the hostile reactions of Europeans and the United States to the signing into law, was disrespect to the people of Nigeria especially the majority of the population that is against same-sex relations”⁹⁹. He further argued that:

What the anti-gay law has tried to achieve is to protect and promote family values as we know it from the start. We accept that the Europeans have reached the height of their civilization; we are yet to see how marriages between persons of the same sex will accelerate our own socio-economic and technological advancement of our people. We value the bilateral and multilateral relationships between Nigeria and its international partners and we believe that no unnecessary pressure will be brought to bear on us to accept what our people consider to be abhorrent. We are yet to see how same-sex practice will reduce inequality, reduce the grinding poverty facing our people. Same-sex rights and privileges will not generate employment, enhance health care, improved education and technological growth. We know that those who are into this practice are in the minority. The US and EU should respect the sensibilities of those in the majority who abhor the practice of same-sex relations. Our lawmakers deliberated carefully on the bill before passing it and sending it to the president for his assent. We cannot dictate to Europeans on what bills they choose to make. They have been passing legislation to regulate the migration of Africans into their countries without complaints from any other country. Some states in America have legalised the use of marijuana for medical purposes. Ordinarily, we should see that as a welcome development since we have people who grow the weed here, but for the sake of the health of our people, we cannot say what is good for America or Europeans must be good for us¹⁰⁰.

Therefore, the struggle for the protection of the right of LGBT people in Africa continues and the adamant anti-same-sex marriage position of most African States is unequivocal and crystal clear.

Struggle for and Development of LGBT People’s Rights in Africa

The struggle for the right of equality for the LGBT people in Africa is an on-going phenomenon. Apart from few States in Africa, such as South Africa, Angola and Cape Verde and Botswana, State-sponsored homophobia persists. Homophobic prejudices in Africa are

98 The Telegram, “Nigeria passes law banning homosexuality” available at: <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html> (Last visited August 22, 2019).

99 Vanguard Newspaper, “What Nobody Will Tell You About Lesbianism, Sodomy!” Vanguard Newspaper, January 24, 2014, available at: <https://www.vanguardngr.com/2014/01/nobody-will-tell-lesbianism-sodomy/> (Last visited August 22, 2019).

100 *Id.*

often embedded in tradition, religion and culture beliefs. Also, political and religious utterances in condemnation of homosexuality engender homophobia in Africa. Non-normative sexual orientations and gender identities are dismissed on the account that they are Western doctrines and un-African.

The struggle and development for the equal rights of LGBT people in Africa are still hampered by a myriad of factors, some already indicated above. These include the absence of legal protection against discrimination, lack of public acceptance, prejudices and in extreme cases, formal criminalisation of LGBT activities resulting in abuse, arrest, detention and prosecution. The hard struggle for equal rights of LGBT people seems to be a common phenomenon in the African continent even where there are policies that tend to recognise these rights. For instance, in South Africa which is commonly regarded as a haven for LGBT persons, there has been this realization of a stark contrast between the written policies and the reality in the State.¹⁰¹ This is still so and things are still hard for LGBT persons in South Africa despite the decision in the landmark case of *Minister of Home Affairs and Anor v. Fourie and Anor*¹⁰² in which a lesbian couple fought hard to claim their rights and the court unanimously decided in their favour. The Constitutional Court of South Africa in the above case ruled unanimously based on section 9 of the Constitution, that same-sex couples have a constitutional right to marry.¹⁰³

It should be noted that the decision did not in any way make it a mandate for the solemnisation of same-sex relationship by any person or body charged with the responsibility to wed intending couple assuming that person or body has a different orientation based on religion, conscience or belief. Thus, the Civil Union Act which came into force soon after the ruling “allows civil servants to refuse to solemnise civil unions if they object to same-sex relationships on the grounds of their “conscience, religion or belief.” This situation still presents a very real obstacle to LGBT people in South Africa particularly same-sex couples who want to marry.

Why Africa is Homophobic

Despite condemnations, threats and other forms of influence by the western powers, LGBT people and international organizations, African States and the majority of their people have not changed their stance against homosexuality. As earlier observed in this work, homophobia is not associated with Africa alone but a global phenomenon. While the West has become tolerant and many cases legalised and decriminalised homosexuality, Africa is still staunchly homophobic. Five African states laws presently carry the death penalty for homosexual acts, in all or part of their territories and total, 38 countries in Africa criminalise homosexual behaviour, many of them through sodomy laws dating back to colonial periods¹⁰⁴. Cameroon is notoriously aggressive in its pursuit of homosexuals. Human Rights Watch reported in 2013 that the authorities in the State

101 World Economic Forum. “South Africa still Hasn’t Won LGBTQ Equality...” available at: <https://www.weforum.org/agenda/2018/11/south-africa-road-to-lgbtq-equality/> (Last visited June 5, 2019).

102 ZACC 19, available at: <http://www.saflii.org.za/za/cases/ZACC/2005/19.html> (Last visited March 12, 2019).

103 See per Justice Albie Sachs.

104 R.Downie, “Revitalising The Fight Against Homophobia in Africa” (2014) Center For Strategic and International Studies 4.

charged at least 28 individuals with homosexual conduct in the preceding three years¹⁰⁵. These laws criminalising homosexuality whether implemented or not create fear and uncertainty for LGBT citizens living under them¹⁰⁶.

The question therefore is: What factors are responsible for this stern homophobic disposition by the governments and people of Africa? In a bit to explain the observed level and patterns of homophobia in Africa, this work proceeds to advance some factors which contribute to the trend. The identified factors include conservative and entrenched religious beliefs, Africa philosophy of marriage, African norms and cultural incompatibility, natural law principle, biological and scientific proofs, positive law, and objective truth and common sense. Each of these factors is examined below.

- i. *Entrenched Religious Beliefs*: Religion is one of the major factors that wield influence on and shape people's belief and disposition. Africans are not only religious but are known to be conservative in their religious beliefs. The three major religions in Africa- Christianity, Islam and African Traditional Religion (ATR) are unanimous in their stance against homosexuality. The Christian's belief is that marriage is a union of persons of opposing sex: man and woman. This is traced to creation when God instituted marriage between man and woman for companionship and procreation.¹⁰⁷

The Moslem's belief is that marriage is a union of man and woman or women. Islam allows a man to marry more than one wife. The wives must not fellow men. The Islamic law prohibits homosexuality, regarded as impure, grievous and abominable act and prescribed stoning to death as a penalty against a convict and is premised on Almighty punishment on the people of Lut (Lot)¹⁰⁸ when they neglected his call to desist from sodomy¹⁰⁹. Thus, such people were therefore marked as wrongdoers (Zalimun) by the Almighty Allah¹¹⁰. It was reported in a hadith, that not only the principal actors but also a person who allows himself to be mounted from behind shall be equally liable for the act and shall both dwell in the extreme hellfire and abide therein eternally¹¹¹.

Under the African Traditional Religion, a man is entitled to marry more than one wife; the wives must not be of the same sex. These beliefs are strongly entrenched. This a major factor against same-sex marriage in Africa.

105 Human Rights Watch, *Guilty by Association: Human Rights Violation in the Enforcement of Cameroon's Anti-Homosexuality Law* (Human Rights Watch, New York, 2013).

106 R Downie, (n 138).

107 Genesis 1:28.

108 The people of Lut were commonly known for the commission of sodomy during their own time.

109 Qur'an 7: 84: "And We rained down on them a rain (of stones). Then see what was the end of Mujrimin [criminals, polytheists and sinners]." Similarly, the Almighty Allah says: "And We sent Lot who said to his people: 'Do you commit lewdness such as no people in creation (ever) committed before you? For you practice your lusts on men in preference to women; you are indeed a people transgressing beyond bounds.'" Qur'an 11: 80-81

110 Qur'an 11: 83.

111 MullaMujahidSherif. *Al-Liwaat (Sodomy) Parts 1 and 4* (2010) available at: <http://almujtaba.com/en/index.php/home?start=240> (Last visited June 24, 2020).

- ii. *African Philosophy of Marriage and Value System:* Philosophy connotes people's viewpoint or thinking on a particular subject while value is a set standard in society regarding right and wrong. Marriage within the African context is a community affair. It is a union that goes beyond the couple involved to the families and communities. It is held sacred and of high moral value. One of the primary aims is procreation without which marriage is said to be incomplete because the goal is to recapture the lost gift of immortality.¹¹² Marriage is a union of a man and woman or women, not between man and man or men. Therefore, homosexuality is contrary to the African philosophy of marriage and value system hence the resistance.
- iii. *African Moral Context and Cultural Incompatibility:* There is a strong moral and cultural resistance to same-sex marriage in Africa because homosexual is incompatible with African culture and the people moral orientation of African society. For the fact that most African morality is based on the beneficiary values of collective family and community well-being, and homosexuality is generally seen in African Society as a challenge to their moral foundations. It reality, homosexuality is nobody's or society's culture. Rather, it is a trait that grew out of a series of decisions in response to the life development process. Therefore, the claim by Mensah that homosexual cuts across all cultures worldwide were also ridiculed and nullified by his argument that anti-gay laws were inserted into the statute books by the departing British colonialists.¹¹³ This is because, if it is cultural to the west, such anti-same-sex marriage provisions would not have been inserted into the law. In fact, before the present liberal law on same-sex marriage in western societies, homosexuality was frowned upon and criminalised in many states in the west. Furthermore, in spite of liberal laws today, there are LGTB people in the west who hide their sexuality for fear of discrimination, harassment and abuse. Apparent in the evolution of liberal law on LGBT people's right is the gradual evolution of the LGTB in the western world. It was not forced on them as it is being forced on Africans. African states should be allowed to pass the same process of accepting LGTB.
- iv. *Natural Law:* Proponents of the protection of LGBT rights, particularly the gay community have argued that homosexuality is a normal variant in the human condition. That is to say that homosexuality is normal disorder determined before birth as such is natural and normal. This accord with views of many Africans who see homosexuality as a disease or disorder that must not be allowed to infect other people. A disorder is a disorder. What is termed normal variant is a disorder. The question that readily comes to mind is: Are people born gay? Or do people choose to be gay? Some claim that homosexual orientation is biologically determined through genetics or hormones in the same way that eye or hair colour is fixed.

112 S. Gbabegesin, "Yoruba philosophy: Individuality, community, and the moral order" in E.C. Eze (ed.), *Nigerian Philosophy. An anthology* 51 (Blackwells, Oxford, 1998); Joseph Onuche, "Same Sex Marriage in Nigeria: A Philosophical Analysis" 3(12) *International Journal of Humanities and Social Science* 91 (2013).

113 K Mensah, "The Ghanaian homosexual in an evolving culture" available at: 2010.www.ghanaweb.com/GhanaHomepage/NewsArchive/artikel.php. (Last visited May 10, 2020).

This claim is used to advance the argument that because homosexuality is caused rather than chosen then it cannot be immoral; instead, it is normal and good. Regardless of where you stand on the pleasure-relational aspects of sexuality, man and woman's sexuality is inextricably associated with reproduction, and two men or two women cannot reproduce. Therefore, homosexuality is a condition that, fundamentally, is contrary to nature. Biologically, it is simply not natural or normal.

- v. *Positive Law*: As earlier stated most of African State have enactments criminalising homosexuality. All the above factors discussed above justify the enactments anti-same-sex marriage. According to Lokodo, Ethics and Integrity Minister in Uganda, while giving out reasons why State should interfere in the choices of consenting adults in private stated that "homosexuality is unnatural, abnormal and strange to our cultures,... It has no output whatsoever; it only does damage and destruction. You cannot have a right to be a sick human being. There is no right in homosexuality. It must be cured".¹¹⁴ In Africa, most laws are criminalising instead of legalising homosexuality. The positive law is largely against homosexuality, even where same-sex marriage is decriminalised; it is seldom enforced due to other constraints.
- vi. *Objective Truth and Common Sense*: The arguments for homosexuality are mainly fallacious because it cannot pass the test of objectivity and common sense. At best, homosexuality is an acquired lifestyle and a disorder, never natural or normal. It does not accord with positive human values which different societies consider important in the course of the development of man and his environment. The truth is that procreation is impossible with the union of man and man or woman and woman.

Conclusion

The paper undertook conceptual clarification; examined the historical development of the rights of LGBT people as a human right, the international and African legal frameworks on LGBT peoples' rights. The LGBT human rights situation, the struggle in Africa and the question of why Africa is homophobic were addressed. In this regard, the paper identified factors or reasons why Africa is homophobic. LGBT is largely seen in Africa as a disease/disorder and a taboo. Therefore, the question is whether there is hope for the protection of the rights of the LGBT people amidst homophobic stance by the majority in Africa. The answer to this question lies in addressing the identified factors above. But, whether these factors can be addressed remain doubtful giving the fact that the African homophobia is more of cultural resistance. In light of this, it is submitted that the rights of LGTB people should be allowed to evolve gradually in Africa without coercion from the west, any person or authority. Efforts in this direction had shown and will continue to affirm the proverbial saying that "you may force a horse to the stream but you cannot force it to drink the water from the steam".

¹¹⁴ The Guardian, "Why Africa is the Most Homophobic Continent" available at: <https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law> (Last visited January 12, 2020).

Role of the Judiciary as Protector Against Illegal Mining Through the Mechanism of Public Interest Litigation

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Abstract

India is a mineral rich country and one of the largest exporters of iron ore, bauxite, mica and other minerals, thus, the mining sector contributes nearly 2.4 percent of India's GDP. However, the indiscriminate and unplanned exploration and development in the mining sector may, and do cause irreversible deterioration of natural resources. New technologies of mining have raised apprehensions about depletion of resources in huge quantity, in great speed and thus having a disastrous effect on environment. The management of mineral resources is the responsibility of Central as well as state governments and society at large. Recently, the participation of Panchayati Raj institutions and tribal organisations have added a new dimension to mining law. The reports have suggested that illegal exploitation of mineral resources are happening systematically to the extent that socially driven people needed to take judiciary's protection from time to time in the form of Public Interest Litigation before Supreme Court which gave few landmark judgments which shaped the mining law jurisprudence.

Introduction

Mining is an essential economic activity in India, with the mining sector contributing approximately 2.4 percent to India's GDP.¹ India is one of the leading exporters in terms of bauxite, iron ore, chromite, manganese, and mica due to its strategic location, which facilitates convenient exports to other countries.² Minerals, being the primary source for energy, has been extracted in huge amount. Moreover, the extensive and unplanned exploration of minerals for development causes irreparable and irreversible damage to the natural resources of the country. The laws on mines and minerals have focused more on exploration and development for the

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1 Lexology, *Mining in India*, available at <https://www.lexology.com/library/detail.aspx?g=6e1b8cb8-f7bd-4905-9d0e-13a304d9cb4d> (Last visited on February 28, 2020).

2 India Brand Equity Foundation, *Metals & Mining Industry in India*, available at <https://www.ibef.org/industry/metals-and-mining.aspx> (Last visited on February 28, 2020).

growth of the mineral industry,³ and in the process, the environment has been adversely affected. The role of the judiciary becomes very crucial in such a situation of environmental degradation. Environmentalists and the general public have approached the apex court and high courts against illegal mining. It is interesting to note that the mechanism that helped their cause was '*Public Interest Litigation*' (PIL). The majority of development in mining law jurisprudence has come through judicial thinking of the Supreme Court and High Courts made in PILs in the past three decades. The Supreme Court has interpreted Article 21⁴ to facilitate environmental jurisprudence as well as human rights jurisprudence in India. There have been several decisions where the courts have used the principle of 'sustainable development' for protecting the mineral resources and thereby conserving the environment.

The paper shall discuss the role of PIL in the development of mining law jurisprudence and the changes that they have brought into the governance of the mining sector. The discussion shall include the role of PIL in coal block allocation, its role in mining in reserve forest, and the tribal areas separately. It shall delve into the analysis of significant landmark cases that have come up through the mechanism of PIL and thereby also discussing the role of NGOs and civil society in the whole process of using PIL as a tool to protect the environment and sometimes tradition.

Judicial Response To Environment

The Supreme Court has been playing a pivotal role in the protection of the environment, which comprises the prevention of illegal mining activities. Indian Courts' role in interpreting and incorporating new concepts in environmental law jurisprudence is exceptional in itself. Apart from being the institution for interpretation and adjudication⁵ of environmental law, the Court has also laid down new principles for the protection of the environment. The Courts have not only delved into the general question of law in the environmental law issues but also went into technical details. Often, the critics refer to the Supreme Court as '*Lords of Green Bench*'.⁶ It is not just limited to India, International legal experts have also appreciated the role of Courts regarding the evolution of new principles of environmental law, along with pioneering new methods in the environmental justice system.⁷ The keen interest and involvement of Supreme Court in environmental law jurisprudence, is also being perceived as an extension of its pro-active role in enforcing fundamental rights of citizens and upholding rule of law and constitutional principles. It is pertinent to note that Supreme Court has not just passed different orders on environment unlike other areas of law, but also has been continuously engaged in with the issues coming up related to environment.⁸ The continual engagement has brought distinctive innovative methods,⁹ many of

3 *Supra* note 1.

4 The Constitution of India, 1950, Art. 21.

5 The Constitution of India, 1950, Art. 141. Speaking constitutionally, the role of the Supreme Court as provided under Article 141 of the Constitution of India is to 'declare' the law that shall be binding on all courts in India. As such, it does not envisage interaction, much less a direct dialogue, with the executive government of the day.

6 S.S. Prakash and P.V.N. Sarma, "Environmental Protection vis-a-vis judicial Activism", S.C.J. 56 (1998).

7 G.L. Peiris, "Public Interest Litigation in the Indian Subcontinent: current Dimension", 40(1) ICLQ. 66 (1991).

8 Editorial, "The architect of an omnibus forest protection case", The Hindu, July 05, 2016.

9 M.K. Ramesh, "Environmental Justice: Courts and Beyond", 3 INDIAN JOURNAL OF ENVIRONMENTAL LAW 1 (2002).

them are novel and also beyond the traditional approach of judiciary in terms of legal understanding.¹⁰ The innovative methods include taking *suo moto* action against the ones who pollute, widening the scope of Constitutional provisions, accepting petitions by affected parties on behalf of inanimate objects, applying International principles of Environment law to domestic issues and appointment of expert committee for inputs and monitoring the implementation at the ground level.¹¹ These pioneering new methods can further be understood as substantive innovations and procedural innovations.¹² Substantive innovations bring out something new like the decisions where court creates, accepts or rejects and defines any governance structure or policies.¹³ The substantive innovations can be said to be used in decisions where there was expansion of fundamental rights, formation of new institutions and environmental protection through continuing mandamus.¹⁴ Procedural innovations in contrast to substantial innovations are judicial innovations where courts have widened the scope of existing procedures to bring in environmental protection.¹⁵ The procedural innovations have taken place in the way of promoting environmental petitions by people affected by pollution or petitions in the name of inanimate objects, appointment of expert committees, visits to affected places and appointment of *amicus curiae* to help out pollution and environment victims to represent them.¹⁶

Relaxation of the Rule of Locus Standi- Paving the Way to Public Interest Litigation Against Mining Activities

The mineral resources are non-renewable in nature and are present in a very limited amount. There is an ecological balance that has been present and due to reckless exploitation of the resources, that balance is lost which is affecting the other facets of environment. The massive scale at which unlawful mining has been happening has caused a dent in the environment, more so in the Forest areas.¹⁷ The impact of degradation of environment and losing the ecological balance are not just limited to just environment, their impact on human race is not quite unsettling. Hence, the protection and conservation of environment is more important in these days than ever. The importance has been realized by many environmentalists and people who have knocked the doors of courts through the mechanism of 'Public Interest Litigation' to protect the environment.

The Courts have actively by their judicial interpretation of the legislation and constitutional provisions to further the protection of environment and control the pollution. While doing that, the courts have also evolved new principles and borrowed International principles which has

10 Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the impossible", 37 THE AMERICAN JOURNAL OF COMPARATIVE LAW 3 (1989).

11 Geetanjoy Sahu, "Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence", 4/1 LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL (2008).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 Arun Kumar, "Environmental Justice in India", 7 SSC JOURNAL 3 (2002).

helped in the process of strengthening environmental jurisprudence in India.¹⁸ An important departure from traditional process of standing by way of procedural innovation with the introduction of the concept of 'Public Interest Litigation'.¹⁹ Until the early 1970s, the litigation was meant mostly as a mechanism for the redressal of individual aggrieved private party who was affected or their legal heirs. The path-breaking change happened in 1980s with the advent of 'Public Interest Litigation' due to the efforts by Justice P.N. Bhagwati and Justice V R Krishna Iyer.²⁰ Later, the scope and ambit of PILs expanded in late 1980s. Earlier, there was no provision in the Indian legal framework to allow a person to reach court if that person is not directly affected by environmental issues.²¹ In other words, the real hurdle in the growth of environmental law jurisprudence was the traditional legal concept of *Locus standi*. The limitation of the application of locus standi principle is that if any third party who has not been directly affected wants to approach any Appellate court, the petition was not maintainable.²² However, this threshold of direct injury has been relaxed in cases of PILs where any member of public can approach the court who have adequate interest for greater interest of community.²³ Hence, PILs have been a great tool as the affected parties of environment degradation or pollution are dispersed public.²⁴

Several landmark and famous environmental law cases have come up as PILs, starting from the year, 1983, the lime stone quarry case from Dehradun, after that cases famous by their nicknames: Ganga Pollution, Oleum gas leak, Delhi Vehicular Pollution, Tehri dam, Coastal Management case, Patancheru Industrial Pollution and T.N Godavarman case.²⁵ It is pertinent to mention that these cases have been brought up by environmental activists and Non-Governmental Organizations (NGOs) in the best interests of community and public at large.²⁶ It is important to also see the statistics on the environmental law cases filed from 1980-2000 that the total 104 environmental law cases were filed before Supreme Court, out of those, 28 were filed by NGOs and 54 were filed by individuals who were not affected directly by the actions mentioned in the petition.²⁷ The statistics suggest that PILs have been proven to have provided enough opportunities to third parties to represent environment or affected people those who can't do that. PILs is also

18 Arun Kumar, "Environmental Justice in India", 7 SSC JOURNAL 3 (2002).

19 See UpendraBaxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India* in THE ROLE OF THE COURT IN PLURAL SOCIETIES (1987) (Indian scholars prefer the term 'Social Action Litigation' to 'Public Interest Litigation' as the tool

has been basically used for protecting basic rights of communities and individuals and for positive impacts in social living of people as compared to United States of America where the term was first coined.)

20 Zachary Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations", 19 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 2 (9) (2012), available at <http://www.repository.law.indiana.edu/ijgls/vol19/iss2/9> (Last visited on February 28, 2020).

21 Armin Rosencranz et. al, "How Effective are environmental PILs", available at www.downtoearth.org.in/blog/how-effective-are-environmental-pils-34403 (Last visited on February 28, 2020).

22 HOLLADAY, *supra* note 20.

23 *Id.*

24 ROSENCRAZ, *supra* note 21.

25 *Id.*

26 *Id.*

27 Geetanjoy Sahu, "Public Interest Environmental Litigations in India: Contributions and Complications", 69 IPSA. 4 (Oct.-Dec., 2008).

playing an essential role in facilitating the representation of inanimate objects who cannot represent themselves in the court but is very important to raise their concern to save the environment.²⁸ It has been done by various NGOs and environmentalists and courts have asked the Polluter to pay for the damage that they have caused to the environment for restoration.²⁹ The Supreme Court have tried maintaining balance in cases of environmental matters where environment and development were in conflicts.³⁰ The court held that the leasee who had the lease to do mining activities have to pay a price to safeguard the environment, and thus, court tried maintaining balance between mining and development and ecology.³¹

Ecological Balance and Mining

Mining as an activity that creates a dent on ecological balance, because of the nature of activity. The minerals are extracted and along with that the soil, sand and ores are also displaced, which damages the balance that was needed for proper ecology. The first and one of the most landmark case in the mining law jurisprudence and which required to strike a balance between ecological balance in one hand and industrial and economic development in the process of limestone quarrying in the other is *Rural litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh ('Doon Valley Case')*.³² The incident that led the case was dangerous and reckless quarrying of limestone in the Mussoorie Hill Range of the Himalayas. As a mining practice, the miners (leasee³³) following the traditional mining process blasted the hilly area covering area of thousands of acres with dynamite for extracting limestones. However, they dug too deep into the hills which disturbed the balance of the ecological sensitive area which is illegal per se and had caused cave-ins and slumping.³⁴ The vegetation of that area was also lost due to the illegal mining and that led to landslides which killed villagers, loss of their property like homes, agricultural land and cattle.³⁵ The loss was not only caused to individuals but the ecological balance of the valley was adversely affected. The whole hydrological system of the valley took a toll; the valley which had ample water supplies was suffering with draught like situation. With natural springs withered, shortage of water supply, additionally river channels were clogged due to the presence of mining waste and severe floods also occurred in the valley during the monsoon season.³⁶ The government of Uttar Pradesh failed to fulfill their duty to regulate the mining activities in the state. Since in 1961, the mining activities were prohibited by state minister of mines but even then because of lobbying and corruption many miners got mining leases for 20 years. Then, after 20 years, in 1982, their renewal of leases were stopped but Allahabad High Court granted injunction to allow

28 Geetanjoy Sahu, "Public Interest Environmental Litigations in India: Contributions and Complications", 69 IPSA. 4 (Oct.-Dec., 2008).

29 *Id.*

30 AIR 1985 SC 652.

31 *Id.*

32 AIR 1985 SC 652.

33 *Id.* (this suggests that quarrying did not start as illegal activity, the permission to extract limestone from the Mussoorie Hill region was given to the miners).

34 *Id.*

35 *Id.*

36 *Id.*

miners to continue mining in the valley. Then, in 1983, Rural Litigation and Entitlement Kendra sent a letter to Supreme Court complaining against degradation of environment which was considered to be a writ petition under Article 32 of the Constitution of India.³⁷ Article 32 is there to provide mechanism by which PILs can be accepted in the court of law.³⁸ The Supreme Court observed that Dehradun valley needed to be saved from the unplanned, reckless and uncontrolled limestone quarrying which had put the valley in danger.³⁹ The beautiful valley has been stripped off its vegetative cover due to the mining activities. Hence, the court went on and appointed two expert committees, first, *Bhargava Committee* in the year 1985 for assessing the mines. On the recommendation of the *Bhargava Committee*, the court repudiated mining leases to dangerous mines. Another committee was *Bandyopadhyay Committee*, which the court empowered with power to deliberate on plans submitted by miners and to address the complaints of the people affected by mining activities. After the review of *Bandyopadhyay Committee* report, the Supreme Court decided to put a stop on all the mining activities in the valley in order to protect the environment and revive the ecology of the place and ordered in that effect for reforestation. However, the court did allow limited mining which the court felt that are needed in order to protect economic development of the country.⁴⁰ Hence, the Court tried creating a balance, also by using the International principle of sustainable development in Indian Environmental law jurisprudence.⁴¹ Another landmark case in mining law jurisprudence was brought by way Public Interest Litigation, *M.C Mehta v Union of India*⁴². This case came as a writ petition under Article 32 of the Constitution of India to the Haryana Pollution Control Board against the mining operators for the heavy extraction which was causing air, water and noise pollution and thus, disturbing environment.⁴³ The question that came up to Supreme Court to decide was whether the mining activities should be stopped within 5 kilometers radius of *Surajkund* and *Badkhal Lake*, which are tourist spots in Haryana.⁴⁴ The Supreme Court relied on the reports of National Environmental Engineering Research Institute, to understand that building the reservoirs would affect the rivers and the water.⁴⁵ The apex court held that it is every citizens' duty to preserve environment and maintain the ecological balance not just government under the provisions of Article 51 A (g) of the Constitution of India.⁴⁶ The Court accepted "*The Precautionary Principle*" within the constitutional framework of India under Articles 21, 47, 48A and 51 A (g).⁴⁷ The principle envisages that it is the duty of states to protect the environment, it must protect the

37 *Id.*

38 Kilaparti Ramakrishna, "The Emergence of Environmental law in Developing Countries: A Case Study in India", 12 *ECOLOGY L.Q.* 907 (1984-1985).

39 *Supra* note 30.

40 AIR 1985 SC 652.

41 *Id.*

42 1996 AIR 1997.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

wildlife and forests.⁴⁸ This principle also provides that states must prevent any action that would cause environmental degradation.⁴⁹ The principle suggests that the action should not just be taken after the degradation has happened but envisages pre-emptive action. Also, the citizens also have the duty under the constitutional framework of India to protect natural environment including wildlife, water bodies like rivers, lakes, and springs etc., forests.⁵⁰

The approach of Supreme Court in Doon Valley case was followed by Himachal High Court in the case of *Kinkri Devi v State of Himachal Pradesh*,⁵¹ where also the blasting rocks process of mining had affected the ecology and disturbed the environment of surrounding areas. In this case, it was observed that the places where ecology is sensitive, the environment laws are rigid not only for the purpose of regulating the use of land but also to overall protecting the environment for the future generation like wild-life and water bodies.⁵²

Mining in Tribal Areas and PILs

Illegal mining is prevalent in India and its concentration is mostly in few mineral-rich states, some of these areas even fall under Fifth and Sixth Schedule of the Constitution of India; (Odisha, Chhattisgarh, Jharkhand, Andhra Pradesh etc.).⁵³ These activities have attracted judicial attention and scrutiny.⁵⁴ The jurisprudence on various aspects of mining; in relation to economic development, forests and environment etc. have grown significantly over past three decades.⁵⁵ The landmark case of *Samantha v State of Andhra Pradesh*⁵⁶ came to Supreme Court as an appeal against the inconsistent law that had been laid down by Andhra Pradesh High Court (Division Bench). Here, the state government had granted licenses for mining in tribal areas to non-tribal people and so, these grant of licenses were challenged under the Regulation and Mining Act, 1957 and the issue was whether the license was in violation of the Environmental Protection Act, 1986 or the Forest (Conservation) Act, 1980.⁵⁷ The Supreme Court accepted that the mining activities that are happening in the forest was affecting the forest and was detrimental to its growth, but it also said that the mining activities were also very important for the industry. The court decided that the only resolution of this dilemma is to frame provisions that regulate these mining activities and through these provisions the regeneration of the forests should be made a priority.⁵⁸ The Court in this case as recognized the rights of tribal people on the forests that are present in the tribal area. The Court held that mining activities in areas under Schedule V should

48 *Supra* note 42.

49 *Id.*

50 *Id.*

51 AIR 1988 HP 4.

52 AIR 1988 HP 4. Jd.

53 Editorial, "Of mines, minerals and tribal rights" *The Hindu*, August 04, 2016.

54 *Id.*

55 Arpita Bisht et al., "Ecological Distribution Conflicts over mineral extraction in India: An overview", 4 *THE EXTRACTIVE IND. & Soc.* 548-563 (2017).

56 AIR 1997 SC 3297.

57 *Id.*

58 *Id.*

not be permitted without the participation of local tribal people. The Schedule V also bars any transfer of tribal land to non-tribal and the court held that in this regard that any transfer, lease or sale shall be illegal if made to non-tribal.⁵⁹ It also observed that there is an obligation on government that there has to be regulation which protects rights of tribal people on their property, their property cannot be exploited by any entity which is not state-owned or are supported by any tribal enterprise.⁶⁰ It further held that 20 percent of the net profits earned from the mining in the tribal area should be held in reserve in permanent fund for the purpose of establishment and maintenance of facilities like hospitals, schools, communication and transport facilities and also, the instructions have been given to the state governments to form co-operative societies comprising of Scheduled Tribes to carry out any mining activity.⁶¹ The Court also criticized the Ministry of Mines for the proposal of Constitutional amendment which would have bypassed the decision of the court.⁶²

In *Lafarge UmiumPrivate Ltd. v. Union of India*⁶³ case, the issue was whether Lafarge, a French mining giant got their mining license and environmental clearances through misrepresentation in East Khasi hill of Meghalaya. The amount of pollution caused by the mining was hazardous in amount. The Supreme Court had to weigh rights of indigenous people and preservation of forests in one hand and interests of corporate in the other, so, the court held that we also have to give importance to economic development and along with that if some basic steps are taken to ensure that concept of inter-generational equity is not violated.⁶⁴

In *Samaj Parivartana Samudaya. v. State of Karnataka & Ors* case,⁶⁵ Supreme Court followed recommendations of Central Empowerment Committee to stop all illegal mining activities in the Bellary- Chitradurga –Tumkur area of the state of Karnataka.⁶⁶ In this case, court also decided that the mining waste dumps would come under the definition of mining operations under Mines and Minerals (Development and Regulation) Act and hence, use of forest area to dump the waste would be in contravention of Forest Conservation Act, 1980.⁶⁷

In another case of *Orissa Mining Corporation Ltd. V Ministry of Environment & Forest*,⁶⁸ Court understood the rights of indigenous people living in the tribal area where mining lease was granted to Vedanta Group.⁶⁹ Under this order, SC directed to form Gram Sabhas and it's their vote that would decide whether mining should happen in their local area or not. The Gram Sabha rejected the mining operations to happen in their area.

59 *Supra* note 56.

60 *Samantha v State of Andhra Pradesh*, AIR 1997 SC 3297.

61 *Id.*

62 MINISTRY OF MINES, "Note for Committee of Secretaries Regarding Amendment of the Fifth Schedule to the Constitution of India in the Light of the Samatha Judgment", No. 16/48/97-M.VI (July 2000).

63 (2011) 7 SCC 338.

64 *Id.*

65 AIR 2013 SC 3217.

66 *Id.*

67 *Id.*

68 6 SCR 881 (2013).

69 *Id.*

The famous *Goa Foundation v Union of India & Ors* case,⁷⁰ is a battle being fought by Goa Foundation against illegal mining in Goa since 1992. The PIL came as a writ petition under Article 32 of the Constitution of India and it was based on M.B Shah Commission Report.⁷¹ The Commission was established to assess the mining activities in Goa. Goa has been one of the most lucrative business for miners since Portuguese.⁷² The Supreme Court completely banned the mining activities and all activities related to it even transport of ores and minerals. It has also instructed CEC to go through M.B Shah Committee report and make appropriate recommendations. The Court took into account public health, irreversible damage and effect of mining to the areas where it was happening. The Court said that state cannot neglect the natural resources and that they have to give importance to regulations and constitutional framework while disposing the natural resources.

In recent case of *Common Cause v Union of India*,⁷³ the Supreme Court ordered that hundred percent of unlawfully extracted minerals of iron and manganese etc. in the area of Mayurbhanj, Keonjhar etc., their value would be extracted/recovered from miners. However, the CEC report suggested only recovery of about 30 percent of the value and court rejected this calculation and used statutory method of calculation of penalty under Section 21(5) of Mines and Minerals Regulation Act which allows recovery of full amount.⁷⁴ In this case, some 102 mining leases in Orissa did not have requisite environmental clearances under Forest Act. The Court also observed that National Mining Policy 2008 should be reviewed and revised to make mining regulations more efficacious and tailor-made as per the requirements of all the stakeholders.⁷⁵

Many mining activities happen in forest areas to which tribal people's lives are intricately connected. Since, as per fifth schedule the tribal land are non-transferrable, the cost of land is low and their compensation if the land is used for any project is also very low.⁷⁶

Mining in Forest Areas and PILs

The first case where judiciary laid down standards for conservation and protection of forests was one of the most unique case, *T.N Godavarman Thirumulpad v. Union of India. (Godavarman)*⁷⁷ Prior to Godavarman case, cases related to mining in forest areas had come up. In *Bihar v Banshi Ram Mody*,⁷⁸ the Supreme Court permitted the renewal of license for mining (License is granted for a specific period by the Central Government, after its expiration, renewal is required) without any prior approval after the Forest Conservation Act, 1980. So, the Supreme Court overruled this case in *Monitoring Committee v. Mussori Dehradun*

70 WP (C) No. 435 of 2012.

71 *Id.*

72 *Id.*

73 (2017) 9 SCC 499.

74 *Id.*

75 *Id.*

76 HINDU, *supra* note 53.

77 (CIVIL) NO. 202 OF 1995.

78 AIR 1985 SC 814.

Development Authority.⁷⁹ In *Ambika Quarry Works v. State of Gujarat*,⁸⁰ Supreme Court laid down that renewal of license for mining in the forest areas is completely prohibited.⁸¹ Another earlier landmark case *Lal Sharma v The Secretary to the Government, Forest Department*,⁸² and the Court did not approve the operation of mining, but observed that since mining lease was given prior to enactment of the Forest (Conservation) Act, 1980, so the act would not apply to this mining lease. This approach has not been overruled, which suggest that there is strict scrutiny over mining activities.⁸³ In *Godavarman* case, court interpreted the word ‘forest’ and also clarified the objective of Forest (Conservation) Act, 1980. The Court emphasized on the need to protect the environment and created a high threshold as per section 2 of the Act, there has to be strict regulation over the industrial activities like mining.⁸⁴ The court interpreted the term “forest land” under Section 2 to not just include dictionary meaning of forest but also include any land which has been considered forest in Government records regardless of the ownership of the land.⁸⁵ The mining activities are non-forest purpose activities and hence, they cannot be undertaken without prior approval of Central Government and have to be done under the supervision of respective state governments.⁸⁶ One of the rules provided by this case was need of a committee to assess the effects of these mining activities.⁸⁷ T. N Godavarman case is also important because it is in nature of continuing mandamus and changed the environmental law jurisprudence, Court is regularly giving orders for environmental protection.⁸⁸

In another *MC Mehta v Union of India case*⁸⁹ (“*Aravalli Hills case*”), Supreme Court relied on the reports of National Environment Research Institute, Groundwater Board and Environmental Protection Central Agency. The Aravalli hills is an ancient mountain chain, with very old geological formations with different flora and fauna, dense forests. However, due to deforestation and mining activities, the ecology has been disrupted. Hence, considering reports and the ecology Supreme Court directed the Government of Haryana to stop all the mining activities happening within 5 kms of Delhi-Haryana border, but mining activity in question did not come under that. Then, Supreme Court put blanket ban on mining activities in Aravalli amidst huge opposition from miners. The Court’s approach was to protect the environment.⁹⁰ Later, with the opposition, the court modified the order to only prohibit those mining activities which

79 AIR 1996 SC 154.

80 AIR 1987 SC 1073.

81 *Id.*

82 AIR 1987 Raj 129.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 Downtoearth, “I was surprised at the sweep of the judgment”, available at <https://www.downtoearth.org.in/interviews/i-was-surprised-at-the-sweep-of-the-judgment-15034> (Last visited on February 28, 2020).

89 AIR 2004 SC 4016.

90 *Id.*

was in contravention of The Environment Protection Act, 1986 and Forest Conservation Act, 1980.⁹¹

Coal Block Allocation and PILs

Coal is the most abundant and one of the most important mineral required for energy generation for example one thermal power plant needs approx. 9000 tonnes of coal per day for the production which is equivalent of one entire train load.⁹² In India, the coal blocks have been allocated through auctions by the government. In the year 2012, India saw one its biggest political scam under the UPA-II Government popularly known as 'Coal Block Allocation Scam'.⁹³ The Government allocated coal block to public and private sector entities in a convoluted manner without transparency which was supposed to be done in a competitive bidding process.⁹⁴ The Comptroller and Auditor General published a report which revealed that Government had abused its power in the allocation of coal block and the matter went to the apex court.⁹⁵ The malpractices of the Government helped the entities to get the blocks at a lot less price than in a competitive bidding process. The profit was also estimated in the CAG report as to be whopping approximate \$160 billion earned by the winning entities.⁹⁶ Advocate Manohar Lal Sharma and Common Cause filed writ petitions against the allocation. In the petition filed by Manohar Lal Sharma, Supreme Court quashed 214 coal block allocation done by the government.⁹⁷ The Court held that the Government did not have the authority to allocate the coal blocks without properly following the process of law. Although Article 73⁹⁸ gives power to Central Government to frame enactments in the areas where it has authority to make rule, but it cannot extend its authority while doing that. In an area where statute already exists the Government cannot give/implement executive enactments, because that is beyond government's power.⁹⁹ In *M.L Sharma v. Principal Secretary*¹⁰⁰, the question was raised on the method of coal allocation during the liberalization around 1993. The method that was used that time included invitation of application and then, the application was used to be processed by a screening committee.¹⁰¹ Basically, there was no auction system. The Supreme Court rejected this process of allocation, not for the reason that no auction was conducted as the Government proved that the method used was proportional and bona fide in the context of liberalization. The Supreme Court held the allocations to be illegal because there were no set of guidelines for deciding the merit of the application which is against

91 *Supra* note 89.

92 R.A Hinrichs and M.Kleinbach, "Electricity: Circuits + Superconductors" in *ENERGY: ITS USE AND THE ENVIRONMENT* (4th ed., 2006).

93 WSJ Staff, "Transcript: Prime Minister Manmohan Singh Counters 'Coalgate' Allegations - India Real Time - WSJ", available at <https://blogs.wsj.com/indiarealtime/2012/08/27/transcript-prime-minister-singh-counters-coalgate-allegations/> (Last visited on February 28, 2020).

94 *Id.*

95 COMPTROLLER AND AUDITOR GENERAL OF INDIA, Draft Performance Audit, Allocation of Coal Blocks and Augmentation of Coal Production by Coal India Limited, available at https://www.sourcewatch.org/images/4/40/Draft_CAG_report_Pt_1.pdf, (Last visited on February 28, 2020)..

96 *Id.*

97 *Id.*

98 The Constitution of India, 1950, Art.73.

99 CAG, *supra* note 95.

100 W.P. (CrI) 120 of 2012.

101 *Id.*

the constitutional provision under Article 14.¹⁰² The allocations done by the Screening Committee can be termed as illegal and arbitrary.¹⁰³ The reasons given were as follows; firstly, there was no comparison of merits made by the committee between different applicants to choose the best applicant. Secondly, there was no uniform system to evaluate applications coming from different sources. Thirdly, there was no publication of advertisement before the application process started which did not give everyone a chance to apply.¹⁰⁴ The Court called the approach to be “casual and ad hoc”.¹⁰⁵ Hence, the order suggests that any procedure that government frames for the allocation, need not be an auction has to fulfill the criteria of procedural fairness and bona-fide. The Court repudiated Government and said the allocation of natural resources belonging to the country cannot be distributed / allocated in a manner as they are few individuals’ property.¹⁰⁶ It also pointed out “*Committee has never been consistent, it has not been transparent, there is no proper application of mind, it has acted on no material in many cases, relevant factors have seldom been its guiding factors, there was no transparency and guidelines have seldom guided it.*”¹⁰⁷

The outcome of the Coal Block Allocation scam was a change in the Coal Block Allocation Regime with the Parliament promulgating and passing the Coal Mines (Special Provisions) Bill, 2015. The objectives of the law were to allocate coal blocks as well as allocation of title, interest and ownership control over the land and mine to successful bidders and to ensure continuation of coal production.¹⁰⁸

Conclusion

From the above discussion, it can be understood that mining is an essential economy activity for a country especially a mineral rich country like India for its development. However, just like sides of a coin, mining also has another side which is the hazards that it entails. It causes extreme damage to environment, destruction of ecological balance, excessive air, water, land and noise pollution. Courts have realized that while environmental protection is very important, activities like mining cannot be banned completely, because it brings resources for electricity, raw materials for many industries, generates employment all of which are required for human sustainability. Courts have tried to maintain a balance and promote sustainable development as have been discussed from Doon Valley case to Common Cause case and the most unique and magnum opus of mining law, T.N Godavarman case. Godavarman case changed how mining and environmental law work in this country. And, apex Court became guardian of environment, also being called Green Bench. The most interesting point to note that all these landmark cases which changed and made the mining law jurisprudence in India have come through Public Interest Litigation filed by NGOs and members of general public who were somehow affected by the cause or wanted to help the community or protect the environment.

¹⁰² *Supra* note 101

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ W.P. (Crl) 120 of 2012.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Press Information Bureau, Parliament Passes the Coal Mines (Special Provisions) Bill, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=117513> (Last visited on February 28, 2020).

Facets of Federalism in the Indian Taxation Regime

Arun D. Raj*

Abstract

India has been an epitome of democracy and federalism before the entire world for quite some time now. Unlike other federations, there are some unique features to India, especially with regard to the fiscal federal aspects. Even though, the Indian federal setup is considered as quasi federal, when it comes to the matters of taxation, the federal system assumes its full colours. In this article we are trying to have a summary of various features and peculiar aspects about the Indian Fiscal Federalism, including the provisions in the Indian Constitution which deals with revenue sharing and the changes that the introduction of GST, which is by far the most expansive revamp of Indian indirect taxation regime, has brought about from the view point of the federalism concept.

Introduction

Article 1 of the Indian Constitution describes India as ‘a Union of States’. The drafting committee was clear about why they want these specific words in the opening Article itself. They wanted to make it obvious that India is a federation which is an imperishable unit and not born out of any sort of agreements among the states. However, the term ‘federalism’ has not been explicitly mentioned anywhere in the Constitution. The term ‘federation’ originated from the Latin word ‘foedus’ which means ‘league.’ In the present scenario, federation means a political entity formed by a group of partially self-governing states with a centralized governing system. There are different types of federalism existing in different federations around the world such as the centralized federalism, competitive federalism, confrontational federalism and cooperative federalism. As we know, India is not a perfect federation as the unitary feature plays its part at certain junctures. The story of Indian federalism is unique and it has passed through various types of federalism during different periods. Now it is the age of competitive federalism with a pinch of cooperation as well. When we consider the federal nature of the Indian government, Article

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245¹, 246² and 246A³ of the Indian Constitution assumes much significance. This provisions clearly demarcates the spheres wherein the central government and the various state governments can exercise their law-making powers by way of 3 lists namely the Union List, State list and Concurrent list.⁴ The residual powers along with the concurrent list have always been a shadow over the federal nature of governance in India. Understandably, the residual powers and the axiomatic upper hand of central laws in the concurrent list has considerably tilted the balance in favour of the centre and thereby diminishing the federal character. There was a school of thought on removing concurrent list to strengthen the federal character of the Indian Constitution. In the last two decades, we have also seen the emergence of the concept of ‘competitive’ and ‘cooperative’ federalism as a by-product of the changing economic scenario in India.

The federal nature of Indian public finance can be traced back to the British era and even though there existed a unitary form of government during that period, some of the financial functions were funnelled down to the provinces as well. Since then, the fiscal federalism aspect has undergone considerable remoulding to reach the present stage where there is specific division of powers regarding taxation as well as responsibilities on public expenditure among the Union government, state governments and local authorities⁵. Fiscal federalism helps the governmental system to bring cost efficiency along with specificity and adequacy in the matter of public welfare services to all nook and corners of the nation in line with the societal requirements which considerably vary with each location and social structure⁶.

1 Article 245 – Extent of laws made by Parliament and by the Legislatures of States.

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
 (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.

2 Article 246 – Subject matter of laws made by Parliament and by the Legislatures of States.

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List).
 (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List).
 (3) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

3 Article 246A – Special provision with respect to goods and services tax —

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
 (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation — The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

4 The Constitution of India, 7th Schedule.

5 M. Govinda Rao and Nirvikar Singh, *The Political Economy of India's Fiscal Federal System and Its Reform* (Publius, Oxford University Press, 2007).

6 Montek S Ahluwalia, “Economic Performance of States in Post-Reforms Period”, *Economic and Political Weekly* May 6, 2000.

The evolution of Indian federalism after Independence has quite a bit of twists and turns based on the attitude of the government in power and their policies. The first 15 years soon after the independence was a period of centralized federalism where the centre and most of the states were ruled by a stable single-party government with sufficient majority. This period was a time of new hope and the beginning of building a strong nation. Due to the kind of governments at the states along with the peculiar scenario prevalent in the nation, the entire nation depended upon the central government for everything, though the states were given enough space to make their own decisions. Since the centre was in the driving seat, the disparity in revenue and the resultant fiscal imbalance was not affecting the governance at all. The second phase in the evolution of Indian federalism was that of confrontational federalism and this was the period where regional parties came to power in most of the states and they started confronting the centre for more revenue and lesser responsibilities. This phase was followed by a brief stint of cooperative federalism and this was mostly because of the representation of regional parties in the central government. This has brought about a sense of mutual understanding and helping between the centre and the states for the common good of the nation. Then came the late 90s where the fiscal policies in India were drastically influenced by the developmental wave and this brought in the concept of competitive federalism. In this epoch, there was a sense of competition among the centre and the states. It was during this period we witnessed various states worked on their strengths and started exploring new areas for revenue generation with the ultimate aim of better performance and a hike in welfare activities (Substantiate this). The present stage of federalism is one which is an intelligent mixture of competitiveness along with cooperation.

Taxation and Federalism

Fiscal federalism is a significant area in the all-round development of the nation and the Indian constitution has a rather extensive approach to this aspect. This includes provisions for revenue as well as expenditure. Fiscal federalism in its true sense indicates the application of the principle of federalism to the financial relations between the centre and the states. To be more specific, fiscal federalism aims at a framework wherein a clear demarcation of the financial responsibilities and powers which needs to be centralized and decentralized are pointed out. Through this, the central government will be assigned with the matters which influence the whole nation and those matters which have an only regional impact are assigned to the states. A balanced fiscal equation is indeed the success mantra for any sturdy federation and that the allocation of available financial resources between the centre and the state should not end up in a fiscal imbalance⁷. However, in the case of most of the federations, the flawless fiscal balance is a myth and the expenditure of the states tends to exceed their revenue generation capabilities. Indian federation also is not an exception and this aspect has been a matter of heated debate over the years⁸.

7 Saurav Bhaumik, Financial Federalism in India. SSRN Electronic Journal. 10.2139/ssrn.1998298 (2012).

8 Raghendra Jha, "Indirect Tax Reform and Fiscal Federalism in India", ASARC Working Paper 2013/09, Australian National University (2013).

The Constitution of India embodies specific provisions which demarcate the taxing powers of centre and states. Along with this, the Constitution also specifies how the taxes collected needs to be appropriated. When it comes to legislative powers in taxation matters, the federal nature, as well as the separation of powers, is more stable. The major reason is that the role of concurrent list⁹ in taxation subjects is close to a nullity. Legislative powers based on GST is provided in Article 246A and all the other taxing powers are clearly listed out in the union and state list in the 7th schedule to the Constitution of India. Therefore, after the introduction of GST, the legislative powers based on taxation is governed by Article 246A and 7th schedule. There is absolutely no overlapping of taxing powers and no sharing of legislative sphere concerning taxation between the centre and the states. There was a bit of confusion in the initial period after the introduction of GST as to why it was not listed in the concurrent list instead of going in with a lengthy Constitutional amendment process. It's a fact that GST is common to both centre and states in the general sense, but the unique model of GST adopted by India is a four-tier system wherein there are 4 different GST laws applicable in different scenarios. Central GST or CGST levied by the centre, State GST or SGST levied by states, Union Territory GST or UTGST levied by union territories and the integrated GST or IGST which is only applicable to inter-state transactions. For intra-state transactions, again it is dual-mode wherein CGST and SGST/UTGST is applied and the total tax rate is divided equally. This means that, even though the entire GST laws are interconnected, each of these laws is exclusive for a specific entity and the other should not have a chance to encroach upon the sphere of another. This sort of a framework cannot be practical if such legislative power is kept within the ambit of 7th Schedule and the only way out was to take it out and add it as a separate provision. As a result, prior to the introduction of GST, when we discuss about the separation of powers or federal nature of the Indian constitution, mentioning about Article 246 and the 7th schedule was enough, but now Article 246A should also be added along with it to make that conclusive.

Revenue Sharing and Fiscal Balance

It's an accepted fact that financial independence between the federal government and the constituent units through clear demarcation of powers and revenue generation avenues is the foundation for a strong fiscal federalism. But, when it comes to successful operation of a federal government system, adequacy of revenue is also a major factor along with financial independence¹⁰. The lion share of revenue of the nation comes from taxes. Out of this tax revenue, irrespective of the source and the level at which it is collected, a part will go to the states. The states have an added advantage of receiving grants from the Centre in addition to their share from the tax collected. Sharing of the revenue is an important part of fiscal federalism and there are specific criteria to determine the amount which should be given to each state. There are express provisions in the Indian Constitution which talks about how the tax collected needs to be shared among the centre and the states which are as follows:

9 The Constitution of India, 7th Schedule – List 3.

10 Mukesh Anand & Amaresh Bagchi & Tapas K. Sen. "Fiscal Discipline at the State Level: Perverse Incentives and Paths to Reform", Working Paper, National Institute of Public Finance and Policy New Delhi, Jan 2002.

1. Duties levied by the Union but collected and appropriated by the States.¹¹

This provision deals with the collection and appropriation of stamp duty which is a matter in the Union list. It specifies that the duty levied by the centre shall be collected by the union government if it is levied in a union territory and by the respective state government if it is levied in a state. The amount of stamp duty collected by the state government will not form part of the consolidated fund of India and will be assigned to such states.

2. Taxes levied and collected by the Union but assigned to the States¹²

This provision deals with the taxes on consignment of goods or sale / purchase of goods in the course of inter-state trade or commerce which is levied and collected by the Union government. Such taxes will be assigned to the states involved in the transaction and distributed in the manner decided by the Parliament. This provision is not applicable in case of GST.

3. Levy and collection of GST in course of inter-State trade or commerce¹³

This provision instructs to distribute the integrated GST which is levied and collected by the Union Government on interstate sale transactions in the manner decided by Parliament by law under the recommendation of the GST Council.

4. Taxes levied and distributed between Union and States¹⁴

Under this provision, all the taxes and duties levied and collected by the Central Government, except stamp duty, tax on interstate sale, IGST, surcharge and cess shall be distributed between the Union and States in the manner prescribed by the President in recommendation with the Finance Commission.

In *T.M. Kannianv. Income-Tax Officer, Pondicherry*¹⁵ it was clarified by the Supreme Court that the income tax amount collected from a union territory need not be distributed to states under Article 270.

5. Surcharge¹⁶

This provision gives power to the Union Government to impose surcharge on any tax or duty and such amount collected by the Union will form part of the Consolidated Fund of India and need not be distributed to any states. The question of whether surcharge falls under the purview of union powers was answered by the Supreme Court in its decision on *CIT vs K. Srinivasan*¹⁷.

11 The Constitution of India, Article 268 - This provision was amended by the Constitution (One Hundred and First Amendment) Act, 2016 (w.e.f 16-09-2016) to omit the duties of excise on medicinal and toilet preparations from its ambit.

12 The Constitution of India, Article 269.

13 The Constitution of India, Article 269A.

14 The Constitution of India, Article 270.

15 1968 AIR 637, 1968 SCR (2) 103.

16 The Constitution of India, Article 271.

17 83 ITR 346 (SC).

As discussed earlier, apart from the share of taxes received from the Union Government, states are also entitled to certain amounts as grants from the Union. The provisions for such grants under the Constitution are as follows:

1. Grants in lieu of export duty on jute and jute products¹⁸

This is a special provision which was added in the Constitution to support the jute exporting states in India like the states of Assam, Bihar, Odisha and West Bengal. This amount is provided as grant-in-aid by the central government in lieu of the export duty imposed on those states. The amount will be prescribed by the President under the recommendation of the Finance Commission.

2. Grants from the Union to certain States¹⁹:

This provision empowers the Union government to provide financial assistance to those states which are in need. This amount which is charged on the Consolidated Fund of India will be decided by the Government and such amounts could be different for different states based on the requirement. The Union Government can also provide assistance to states under this provision for its developmental schemes and for the purpose of promoting the welfare of the Scheduled Caste/Tribes.

The finance Commission is a Constitutional body which has a prominent role in keeping the fiscal balance of the nation. It is the institution which has the duty and power to make recommendations regarding the distribution of tax revenue and the amount to be disbursed to different states as grant-in-aid. The President of India and the Union Government is supposed to make the decision as to the financial matters of the country based on the advise and recommendations of the Finance Commission. Another institution which had a notable role in maintaining the fiscal balance of the country was the Planning Commission which was recently replaced by the NitiAyog. The newly formed NitiAyog is considered to be a better alternative than the Planning Commission as there is representation of the states and the Union territories in it. This aspect can have far reaching and positive effects on the decisions in the long run. These are factors contributing to build a strong federal framework and the NitiAyog is an idle epitome for cooperative federalism in India.

GST and Federalism

The introduction of GST as a measure to revamp the indirect taxation regime in India has been so far the most extensive change that happened in the history of taxation in India. The idea of 'One Nation, One Tax' has proved to be really beneficial for the economic growth of the nation by almost completely wiping out disparities in indirect taxation structure which was prevalent in India. This taxation reform was aimed at bringing transparency, simplicity and efficiency to the indirect taxation system of the country. With around three years in the GST regime, it's so evident that it has done well to the federal fiscal setup in India. The GST regime has also been successful

18 The Constitution of India, Article 273.

19 The Constitution of India, Article 275.

in bringing a coordination among the diverse states and it is only through such coordinated focus, the fiscal policies of nation can be implemented fruitfully in its true nature and sense.

In the last few decades, India is on the track of drastic development in all spheres through calculated planning and cooperation between the centre and federal units. We have realized that cooperative federalism is the route for us and every move and every policy decision is focused on bringing in the same concept for a positive outcome. This is the era where the federation and its units has seized to compete among themselves for power and resources, and have started to cooperate with each other through various initiatives and instrumentalities for the common good and ultimately for the development of the nation. Taxation was one of the areas where the separation of powers was complete and there were no common grounds for the federation and units. The respective areas of tax legislation for the centre and the states were clearly demarcated through Article 246 and the 7th Schedule of the Constitution of India. Now, the introduction of GST has brought about a drastic change in the equation. The Constitution (One Hundred and First Amendment) Act, 2016 has introduced the concept of cooperative federalism in the taxation regime of the nation through GST and added Article 246A²⁰ and Article 279A.²¹ GST has proved to be the perfect harmonizing factor in the indirect taxation sphere which has started reaping robust results in the economic sector of the nation. Tax harmonization is a process through which adjustments are made to the tax laws in different jurisdictions inside the nation to bring it to a common ground. This process is the most effective path to remove unfavourable tax distortions which curtail the developmental leap of any nation. Removing such negative aspects from the market will bring about the much-needed stability and development to the economy. It can also contribute to effective allocation and use of available resources.

The Indian version of GST is a unique dual tier setup with separate GST law for the centre and states over and above the integrated GST law for the interstate transactions. This has specifically demarcated respective areas of power for the states and the union. The concept of cooperative federalism was brought by the introduction of the GST Council which has the representation of the union and all the states without giving any sort of preferences for parties in it. GST Council comprises of the Union Finance Minister, Union Minister of State for Finance and all Finance Ministers of the States or such representatives decided by the state governments concerned. The voting power in the Council is also divided in such a way that 2/3rd is allotted to the states and 1/3rd is with the Centre which reflects the accommodative feature of cooperative federalism.

Conclusion

Unity in diversity has always been the nature of our nation and the scenario is no different in the matter of taxation as well. Almost every character of federalism is present in the taxation regime of India with the latest addition of cooperative federalism through the introduction of

20 The Constitution of India, Article 246A - Special provision with respect to goods and services tax.

21 The Constitution of India, Article 279A - Goods and Services Tax Council.

GST. The new chapter of federalism in India is all set to bring in economic integration which is the only route to a prosperous India. But, one may find it perplexing that even though a lot of thought and effort is being put into bringing that aspect of unity, we still have provisions like Article 302²² and Article 304(b)²³ in our Constitution which act as an obstacle for these moves. We can hope that the Parliament will understand and realize the possible threat that these provisions pose to the economic integration of the nation and take positive steps to neutralize such possibilities before it is too late.



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- 22 Article 302. Power of Parliament to impose restrictions on trade, commerce and intercourse. — Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.
- 23 Article 304. Restrictions on trade, commerce and intercourse among States. — Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—
- a) impose on goods imported from other States 1[or the Union territories] any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
 - b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest: Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Indian Supreme Court's Interpretative Experiments: The Status of Compensatory Benefits & Lapse of Eminent Domain Acquisitions

Jaideep Singh Lalli*

Abstract

The enactment of India's Land Acquisition Act, 2013 engendered a troublesome interpretative imbroglio for section 24 of the Act which deals with the validity of eminent domain acquisitions initiated under the previous Act of 1894. Since interpretative questions related to the section govern not just the survival of past acquisitions but also the character of compensatory benefits that landowning stakeholders are entitled to, the Indian Supreme Court has been experimenting with answers to these questions since 2014, and that has only produced a concatenation of contradictory judgments. The paper dissects the concerned questions, including the Court's 2020 experiment in answering them to conclude that the current legal position is rife with inconsistencies.

Introduction

Ever since the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act¹ (hereinafter referred to as 'RFCTRA' or '2013 Act' or 'new Act') came into effect on Jan. 1, 2014, the thorny embrace of interpretative dissension at the Apex Court has engulfed section 24 of the said Act. The 2013 Act supplants the colonial era Act that regulated land acquisition in India previously, i.e., the Land Acquisition Act, 1894 ('1894 Act'). Lauded for introducing novel provisions dealing with social impact assessment, recognizing non-owners as affected persons, mode of acquisition necessitating consent of the displaced and resettlement entitlements², the RFCTRA has overhauled the process of determining the compensation that stakeholders are entitled to where the government decides to acquire land as a matter of eminent domain. Considering the deficiencies in the previous compensation regime in calculating the market value, the 2013 Act sought to rectify past framework by providing a

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1 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 Act 30 of 2013).

2 *Id.*,

scientific method for arriving at a specific market value for the land, then multiplying the value amount with a set multiplier and then adding an increased solatium to the compensation amount.³

Understood against that backdrop, Section 24 of the 2013 Act governs a domain of substantial significance for the nature of relief that a stakeholder would be entitled to. It concerns the validity of land acquisition proceedings initiated under the previous 1894 Act. As a *non-obstante* clause, the section stipulates that: (a) where an award under section 11 of the 1894 Act has not been made, then the provisions of the 2013 Act would apply for the determination of compensation⁴; (b) where the 'section 11 award' has been made, then the proceedings would continue to be regulated by the 1894 Act⁵; (c) where the 'section 11 award' was made five years or more prior to the commencement of the 2013 Act, the proceedings would lapse on the fulfilment of these conditions - 'physical possession' of the land has not been taken in such a case 'or' the compensation has not been 'paid'.⁶ The section also has a proviso which says that in case the 'section 11 award' has been made but the compensation for a majority of the land holdings has not been 'deposited in the account of the beneficiaries', then all beneficiaries mentioned in the acquisition notification issued under the 1894 Act would be entitled to compensation under the 2013 Act.

The content of section 24 envisages retrospective application to the extent that it deals with the status of land acquisition proceedings initiated under the previous Act. Since it is pivotal in ascertaining stakeholder entitlements, the Apex Court of India has run into vexed questions of its interpretation many times; from issues of terminological interpretation in deciding whether to construe 'or' conjunctively or disjunctively, examining the meaning of words like 'paid', 'possession', etc., to general matters of the provision's scope dealing with contentions like - whether the proviso is to be read only as a proviso to section 24(2) or as a proviso for the general scheme of 24(1)(b), what the extent of retrospectivity under the section in relation to the General Clauses Act⁷ is, and other similar disputations.

The most recent of these run-ins led to the whole gamut of questions apropos of section 24's true purport being referred to a Constitution Bench of the Supreme Court of India for final adjudication (for now at least), taking into account the fact that the legal milieu was of differing opinions amongst SC panels of coordinate strength. Albeit, one might be tempted to find relief in the facet that the questions have been determined with finality in 2020, yet, it doesn't take more than a few hours of reading a judgment of about three-hundred pages to realize that the possibility of injustice still looms large. To fully understand the implications of the Supreme Court's judgment,

3 Compare Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, ss. 26-30, with Land Acquisition Act, 1894 (Act 1 of 1894), ss. 12, 15, 23, 24; See generally Priyanshu Gupta, "Determination of Market Value for Land Acquisition", *Manupatra*, June 5, 2020, available at <http://docs.manupatra.in/newsline/articles/Upload/42A8A66F-AAA2-48BF-BC7C-F33D34C59A52.pdf> (last visited on July 14, 2020).

4 *Supra* note 1, s. 24(1)(a).

5 *Id.*, s. 24(1)(b).

6 *Id.*, s. 24(2).

7 See General Clauses Act, 1897 (Act 10 of 1897), s. 6.

knowledge of the past legal position is indispensable. Part I of the paper identifies the interpretative complications and contextualizes them by providing a statutory background. It also discusses the legal exposition of interpretative experiments in precedent prior to the judgment of 2020. Part II probes the *ratio decidendi* of the 2020 judgment and highlights the gaps in the Court's reasoning. Part III proffers the opinion of the author on what the desirable ruling could have been and it examines the logical potency of arguments advanced by other scholars on the legal affair. The article then concludes with the hope of future review of the 2020 judgment, for which this paper could become an important guiding force.

Walking With 'Justitia': The Past of Statutory Change & Conflicting Precedent

It is incontrovertible that the virtues of justice that the Roman goddess 'Justitia' (the blindfolded Lady Justice we see today in some court rooms) came to represent over the ages made it almost suicidal for any Roman ruler to distance his rule from the canons of justice.⁸ The situation doesn't seem any different in the present times. One of the primary reasons why the Parliament came to enact the 2013 Act was because the rapacious character of 1894 Act's provisions had caused undeniable hardships. Containing that injustice being the fundamental actuation of the legislative exercise, not just the Parliament but also the judiciary weighed in to advance interpretations that best suited the desired objectives of Section 24. Tracing these developments is much like walking alongside 'Justitia' in that it is recognized that both the legislature and the judiciary are saddled with the constitutional responsibility of promoting a just order.

Statutory Context: What is the confusion all about?

A crucial element of section 24(2), 2013 Act is the word 'paid'. Payment of compensation for proceedings initiated under the 1894 Act would naturally have to be regulated by that Act. Hence, it would be instructive to refer to Section 31 of the 1894 Act which deals with payment of compensation. It states that once the 'section 11 award' has been made, the Collector has to tender the compensation to those who are entitled and it has to be paid to them.⁹ However, in case – (a) persons don't consent to receive it; or, (b) there is no person competent to alienate the land; or, (c) there is some dispute as to the title to receive compensation; or, (d) there is some dispute as to the apportionment of compensation - the Collector "shall" deposit the compensation amount with the Reference Court.¹⁰ One of the provisos of section 31 allows the acceptance of the compensation amount under protest as to its sufficiency.

If the amount is deposited with the Court as a result of any of the contingencies described above, landowners can subsequently seek the investment of that amount in an interest-bearing account of Government securities under sections 32 and 33, 1894 Act. It must also be noted that

8 W. Köhler, "Justitia", *Treccani*, June 5, 2020, available at [http://www.treccani.it/enciclopedia/iustitia_\(Enciclopedia-dell'-Arte-Antica\)/](http://www.treccani.it/enciclopedia/iustitia_(Enciclopedia-dell'-Arte-Antica)/) (last visited on July 14, 2020).

9 Land Acquisition Act, 1894 (Act 1 of 1894), s. 31(1).

10 *Id.*, s. 31(2) ('Reference Court' is a Court to which a reference under § 18 of the 1894 Act would be submitted for the determination of objections to an award, whether they are related to the measurement of land, compensation amount, the person to whom it is payable or its apportionment).

in case the compensation amount is not ‘paid’ or in the event of the contingencies, not ‘deposited’ in the Court on or before the possession of the land is taken, the amount starts to carry with it an interest of nine percent p.a. from the time of taking possession till the compensation is paid or deposited in Court.¹¹ This amount increases to fifteen percent p.a. where the compensation amount remains unpaid/un-deposited for more than a year since the possession was taken.¹²

One of the first interpretative issues that surfaced concerning section 24, 2013 Act was the meaning of ‘paid’ in case any of the contingencies contemplated by section 31(2), 1894 Act arise; what would qualify as sufficient discharge of the obligation to ‘pay’ u/s 24 in case the person refuses to take the payment or there is no person competent to alienate the land or in case of the other contingencies so mentioned?

The Apex Court’s position before 2016

In 2014, a three-judge bench of the Supreme Court in *Pune Municipal Corporation v. Harakchand Misirimal Solanki*¹³ discussed the question presented above. The bare bones of the matter were that the ‘section 11 award’ had been made more than five years prior to the commencement of the RFCTRA and the compensation amount had neither been paid nor been deposited with the Reference Court, instead, it had been deposited in the government treasury when the land owners did not show up to receive it. The full bench unanimously held that ‘paid’ meant tendering the amount and then actually paying it to the landowners. But where the last step isn’t possible owing to any of the specified contingencies, the obligation under section 24 to ‘pay’ the compensation for avoiding the lapsing of the proceedings would not end at mere ‘tendering’ of the amount. The Court said that the procedure of depositing the amount in the event of contingencies prescribed under section 31, 1894 Act could not be ignored. Thus, depositing the amount in government treasury was held not to be proper compliance with the obligation to ‘pay’ under section 24. The Court declared the acquisition proceedings to have lapsed as a result. Since the Court rendered this judgment in 2014, it has been followed as precedent in at least 999 cases.¹⁴

Notably, a division bench of the Apex Court followed the 2014 ruling in 2015, in *Sree Balaji Nagar Residential Assn v. State of Tamil Nadu*¹⁵. The factual matrix in this case was different as this time, physical possession of the acquired land had not been taken in respect of a ‘section 11 award’ passed more than five years before the commencement of the 2013 Act. The State proselytised the idea that the computation of the ‘five years or more period’ had to exclude the period during which the acquisition proceedings remained stayed due to interim orders (stay/injunction) granted by any court. The acceptance of this argument would’ve saved the proceedings

11 Land Acquisition Act, 1894 s. 34.

12 *Id.*, s. 34, proviso.

13 (2014) 3 SCC 183.

14 Apurva Vishwanath, “SC land acquisition case: Ruling that got overturned was precedent in 999 cases”, *The Indian Express*, Mar. 7, 2020, available at <https://indianexpress.com/article/india/supreme-court-land-acquisition-case-ruling-6303159/> (last visited on July 14, 2020).

15 (2015) 3 SCC 353.

from lapsing under section 24. The Court however, rebuffed the contention and held that the proceedings had lapsed. Relying on the *Pune Municipal Corporation* case, the Court clarified that proceedings were to lapse if either of the two conditions existed with respect to awards passed five years or more prior to the 2013 Act's commencement: physical possession of the land had not been taken or compensation had not been paid. With that, the Court said that bearing in mind sections 19 and 69 of the 2013 Act, where the Parliament had specifically provided for exclusion of periods during which proceedings remain stayed on account of Court orders, the Court could not read a similar exclusionary clause into the scheme of section 24. The reasoning for this proposition was that the legislature translated its intention of excluding such periods in express terms where it wanted to do so; the fact that it did not do the same in section 24 had to mean that the legislative intent was not to exclude such a period.

2016 & After: Tracing SC's Intramural Wrangle

In 2016, a division bench of the Supreme Court doubted the decision in *Sree Balaji Nagar* case on the issue of excluding the period during which acquisition proceedings remained stayed on account of court orders while computing the 'five years or more' limit under section 24.¹⁶ The bench was particularly concerned about the application of the maxim '*actus curiae neminem gravabit*' in favour of excluding the said period. Considering that the bench was of coordinate strength, the questions were referred to be decided by a larger bench.

Then in 2017, through a judgment authored by Justice Arun Mishra in *Indore Development Authority v. Shailendra*¹⁷ ('IDA case I'), another division bench of the Apex Court referred the matter of section 24's interpretation to a larger bench. The judgment pointed out that the *Pune Municipal Corporation* and *Sree Balaji Nagar* cases did not consider several matters; for instance, the effect of precedent indicated that the consequence of not depositing the compensation amount in the Court could only extend to accruing of interest and not lapse of proceedings in the framework of the 1894 Act¹⁸, had not been evaluated while construing the meaning of 'paid' in Section 24, 2013 Act.

This tale of conflicting opinions reached its crescendo when in *Indore Development Authority v. Shailendra*¹⁹ ('IDA case II'), a three-judge bench of the Court declared (by a 2:1 majority) the ruling in the *Pune Municipal Corporation* case to be *per incuriam*. The majority *inter alia*, held that: (i) the obligation of payment of compensation under section 24 is complete as soon the amount is tendered, irrespective of its acceptance or rejection, and the manner of depositing the amount is immaterial for the purpose of the section; (ii) where possession of the land has been taken, section 24 cannot be invoked to divest the Government of the acquired property since possession vests absolute title of the land in the Government as per section 16,

16 *Yogesh Neema v. State of Madhya Pradesh*, (2016) 6 SCC 387.

17 (2018) 1 SCC 733.

18 *See Hissar Improvement Trust v. Rukmani Devi*, 1990 Supp SCC 806, 5–6; *Kishan Das v. State of Uttar Pradesh*, (1995) 6 SCC 240, 4.

19 2018 SCC OnLine SC 100.

1894 Act;²⁰ (iii) taking possession of the land by drawing a *panchnama* was a legitimate mode of assuming physical possession for the purpose of section 24, 2013 Act.

Owing to conflicting interpretations advanced by benches of coordinate strength, several orders recommending the issue to be decided by a larger bench and the need of final determination, a five-judge bench was constituted in March 2018 to decide issues pertaining to the interpretation of section 24 and the validity of the earlier decisions to that effect.²¹ After the retirement of Dipak Misra, C.J., the succeeding Chief Justice reconstituted the bench; this time, comprising Justice Arun Mishra, Justice Indira Banerjee, Justice Vineet Saran, Justice M.R. Shah and Justice Ravindra Bhat. Before the hearing could begin, one of the parties moved a request for the recusal of Justice Arun Mishra since he had already delivered his opinion on the matter by authoring the judgments in IDA Cases I and II. Rejecting the said request on Oct. 23, 2019, the five-judge bench proceeded to hear the matter.²²

Section 24 In 2020: Dissecting the Prolix Judgment

On March 6, 2020, the five-judge bench rendered its judgment in *Indore Development Authority v. Manoharlal*²³ ('2020 judgment'). On a perusal of all the previous pronouncements on the interpretation of section 24, the Court adjudicated the following key issues: (i) whether the word "or" in section 24(2), 2013 Act is to be construed as 'and'? (ii) what meaning is to be attributed to the phrase "compensation has not been paid" in section 24(2)? (iii) what meaning is to be ascribed to the term "physical possession" in section 24(2)? (iv) whether the proviso to section 24(2) is to be construed instead to be the proviso of section 24(1)(b)? (v) whether the period during which acquisition proceedings remain stayed due to court orders is to be excluded while determining the 'five years or more' limit under section 24(2)?

Arguments on all these questions were submitted on behalf of the Union, the States, acquiring bodies and development authorities on one side, and the land owners on the other. The Court's decision seems to have accepted the position of the State on all the questions.

The Or/And Selection: Bordering on Usurpation of the Legislative Function?

To a layman, even the possibility of any scope of interpreting a clearly stated "or" (indicating a disjunctive relation between the two conditions in sub-section 2 of section 24) as 'and' (which would denote a conjunctive relation between the two conditions in the sub-section) might seem absurd, because it is not like the legislature forgot English halfway through the drafting of the Act. However, supplanting the literal meaning for one that would more suitably foster the purpose of

20 This implies that in every case under section 24 where compensation is not paid, the proceedings will not lapse unless the possession has also not been taken, which in effect means that the "or" in the section is being read as 'and/nor'.

21 For other cases recommending the issue to a larger bench, *State of Haryana v. G.D. Goenka Tourism Corporation Limited*, (2018) 3 SCC 585, 9–10; *Indore Development Authority v. Shyam Verma*, 2018 SCC OnLine SC 3324, 3–4; *State of Haryana v. Maharana Pratap Charitable Trust*, Civil Appeal No. 4835/2015 (order dated Feb. 22, 2018).

22 *Indore Development Authority v. Manoharlal*, 2019 SCC OnLine SC 1392, 52–53 (this was the judgment in response to the recusal motion).

23 2020 SCC OnLine SC 316 (authored by Justice Arun Mishra alone).

the legislation is common for the Apex Court or at least, that's what the bench suggests in its 2020 judgment.

On the issue of according either a conjunctive or a disjunctive interpretation to “or”, the Court held that “or” had to be comprehended as ‘and’ or ‘nor’. This means that as per section 24(2), a lapse of proceedings would take effect only when neither possession has been taken nor compensation has been paid.²⁴ Fulfilment of one of the two conditions, therefore, would not result in lapse. The Court gave four reasons for adopting this view. Firstly, it relied on various judgments (both national and foreign) to buttress the claim that assigning a conjunctive meaning to “or” where it connects two or more negative conditions is permissible and in fact desirable where a disjunctive meaning results in repugnancy or absurdity.²⁵ Secondly, the Court said that the design of the 1894 Act does not countenance divestment of acquired land once the Government takes possession.²⁶ On basis of that asseveration, the Court said that if “or” was given a disjunctive meaning, then it would have the consequence of divesting the Government of land it has taken possession of in cases where it did not pay the compensation; which would in turn militate against the scheme of the 1894 Act as it does not allow for such a course of action. In furtherance of the same analysis, the Court said that the fact that the 2013 Act did not have a specific provision divesting the Government's title to land that it had already taken possession of only fortified the claim that section 24 was not supposed to be interpreted to apply in cases where the government had taken possession, even though it might have slacked in paying compensation.²⁷ Strangely so, the Court even asserted that divesting in such circumstances could not have been said to be intended by the legislature. Thirdly, the Court insisted that 2013 Act's legislative history showed that “or” in section 24(2) was always intended to be taken as ‘and/nor’.

The Court based this proclamation on clause 18 of the ‘Statement of Objects and Reasons’ of the 2013 Act and an excerpt from a Lok Sabha debate on the Act, dated Aug. 29, 2013.²⁸ Fourthly, the Court said that if a disjunctive interpretation is given to “or”, then an anomaly would result in a situation where an acquisition is declared to be lapsed for failure of taking physical possession even though compensation has been paid. Amusingly, the Court stated that such an anomaly springs out of the absence of a provision for refund of the compensation in such a case.²⁹ Essentially, what Justice Mishra meant to say was that since the Act does not explicitly

24 *Id.*, at p 363.3.

25 See *Ranchhodas Atmaram v. The Union of India*, AIR 1961 SC 935, 13–15; *Patel Chunibhai Dajibha v. Narayanrao K. Jambekar*, AIR 1965 SC 1457, 19; *Punjab Produce and Trading Co. Ltd. v. C.I.T., West Bengal, Calcutta*, (1971) 2 SCC 540, 8; *State of Punjab v. Ex-Constable Ram Singh*, (1992) 4 SCC 54; *Prof. Yashpal v. State of Chhattisgarh*, (2005) 5 SCC 420; *Brown & Co. v. Harrison*, (1927) All ER Rep 195, 203–04 (CA); *Steam Navigation Co. Ltd. v. Department of Trade and Industry*, 1974 (1) WLR 505 (UK).

26 See *Supra* note 9, ss. 16, 48(1); See also, *The Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust*, 1957 SCR 1, 19; *Chandragauda Ramgonda Patil v. State of Maharashtra*, (1996) 6 SCC 405, 2; *C. Padma v. Deputy Secretary*, (1997) 2 SCC 627, 4–6; *Northern Indian Glass Industries v. Jaswant Singh*, (2003) 1 SCC 335, 9; *Leelawanti v. State of Haryana*, (2012) 1 SCC 66, 19.

27 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 148.

28 *Id.*, at p 120, 164.

29 *Id.*, at p 132.

provide for refund in such a setting, unjust enrichment for the landowner would be the likely aftermath as in the absence of an explicit provision, the State would not be able to recover the compensation amount that has already been paid.³⁰

It is most respectfully submitted that taken together, all these arguments fall short of a cogent justification for the adoption of a conjunctive interpretation of “or”. Most judgments that the Court relied on to propose the first argument acknowledged that “or” stood for disjunctive interpretation, and a departure from it could only be made in exceptional cases of absurdity. At best, this argument establishes nothing more than the legal permissibility of imputing a conjunctive meaning to “or” in exceptional cases. It does not perform the function of rationalising the sanctioning of that meaning in the context of section 24. That is where the second argument comes into the picture.

The second argument is inherently flawed in that it operates in isolation of the fact that merely because the 1894 Act does not envisage divesting of governmental title after possession has been taken does not mean that legislative latitude in incorporating a provision to that effect in the new 2013 Act is extirpated. The decision on whether the new Act has in fact provided for such divestment after lapsing of proceedings therefore, cannot be based on whether the 1894 Act contemplated that ramification. The Court’s line of thought sets in a sinister regress, for the same logic can be employed to nullify almost all the novel provisions of the 2013 Act that the 1894 Act had no mention of. Moreover, stressing on the perceived absence of a specific provision providing for divestment in factual matrices where the government has taken possession appears ludicrous in light of the Apex Court’s decision in *VKNM Vocational Higher Secondary School v. State of Kerala*³¹. In that judgment, the Apex Court categorically laid down that subsequent enactments can take away vested rights if its provisions stipulate it expressly or by ‘necessary intendment’.³² It is obvious that a section that provides for lapse of proceedings where compensation has not been paid (even though land might have come to be vested with the Government by taking possession) necessarily intends divestment as a consequence; if not divestment, what else would be the concomitant corollary of lapse?

The acme of the Court’s aberrance is that it relies on the absence of the ‘compensation requirement’ in the ‘Statement of Objects and Reasons’ to conclude that the Act never intended it to be a material determinant for lapse of proceedings. The appropriate question to ask in response is, since when did a ‘Statement of Objects and Reasons’ have to provide an elaborate recapitulation of every provision contained in the text of the Act itself? The statement can certainly be summoned to aid the enquiry of discerning legislative intent, but the five-judge bench seems to be treading on an unseemly path. It has been held time and again that the statement of objects and reasons accompanying an enactment can only be used for the limited purpose of understanding the background and antecedent state of affairs of the Act and not to control the meaning or

30 *Supra* note 27.

31 (2016) 4 SCC 216.

32 *Id.*, at p 21.

determine the effect of substantive provisions in the legislation.³³ The Apex Court has even gone to the extent of holding that the objects and reasons of a statute cannot be examined where the words used in the substantive provisions are clear and unambiguous.³⁴

To support its decision, the Court also seems to be reading too much into the speech of the concerned Minister regarding section 24. In connection to this, it would be germane to recall Chief Justice Sikri's remarks on the exercise; in *Kesavananda Bharati v. State of Kerala*³⁵, Sikri C.J. said "speeches made by members of a legislature in the course of debates relating to the enactment of a statute cannot be used as aids for interpreting any of provisions of the statute". Although, the position has slightly changed since then, but cutting down the generality of the terms of the enactment by referring to ministerial speeches is still impermissible.³⁶ Yet, one might say that choosing to anchor one's conception of the meaning of a provision to ministerial speeches and statements of objects & reasons is largely a capricious choice that some judge may resort to and others might not. For that reason, a more constructive rebuttal of the bench's perception of section 24's legislative history would have to disinter the past of the provision.

In its original form, section 24 provided for lapse of acquisition proceedings initiated under the 1894 Act solely if possession of the land had not been taken.³⁷ The final provision, however, added another circumstance which could result in lapse (viz., non-payment of compensation) by separating the two conditions with "or" and not 'and'. It is unclear why despite being aware of the said fact the five-judge bench came to interpret "or" conjunctively.³⁸ To a detractor's eye, this can be reckoned a menacing usurpation of the legislative function. A study disclosed that out of all the cases filed under section 24 of the 2013 Act between 2014-16, only about 2% were matters where compensation had been paid but possession had not been taken, whereas 83% cases entailed possession being taken by the Government without paying compensation.³⁹ If the legislature intended 'non-payment of compensation' to be immaterial unless coupled with failure to take possession, it would have simply mentioned only possession as the determinant to be considered for lapse of proceedings. Conjunctive interpretation in this way, relegates the 'compensation condition' to redundancy.

Furthermore, Justice Mishra's fourth argument ignores restitution jurisprudence. The term "restitution" connotes *inter alia*, the return of a specific thing to the party that is rightfully entitled to it.⁴⁰ The Supreme Court has held that civil courts have the inherent power of employing the

33 *Aswini Kumar v. Arabinda Bose*, AIR 1952 SC 369, 56; *Vajravelu v. Special Deputy Collector*, AIR 1965 SC 1017, 10; *A.C. Sharma v. Delhi Admn.*, AIR 1973 SC 913, 12; *Narain Khamman v. Parduman Kumar*, AIR 1985 SC 4, 12; *Kumar Jagdish Chandra Sinha v. Eileen K. Patricia*, AIR 1995 SC 515, 13.

34 *S.S. Bola v. B.D. Sardana*, (1997) 8 SCC 522, 74.

35 AIR 1973 SC 1461, 179.

36 *State of West Bengal v. Union of India*, AIR 1963 SC 1241, 12; *P.V. Narasimha Rao v. State*, AIR 1998 SC 2120.

37 Land Acquisition, Rehabilitation and Resettlement Bill (Bill No.77 of 2011), s. 24(2).

38 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 161.

39 Namita Wahi, *et al.*, Land Acquisition in India: A Review of Supreme Court Cases from 1950 to 2016p.no. 38 (Centre for Policy Research, 2017).

40 Bryan A. Garner, *Black's Law Dictionary* 1315 (West Group, 7th edn.).

restitution principle to order the return of benefits accrued by a litigant which he/she is no longer entitled to.⁴¹ In the past the Court has even made it unambiguous that the principle of restitution is a bulwark against unjust enrichment and needs to be applied to do complete justice where such enrichment features.⁴² With that legal exposition, an express provision for return of the paid compensation amount is not necessary because restitution of that amount is inherent in the notion of lapse. If the proceedings have lapsed, there is not a scintilla of doubt that compensation given in pursuance of the connected acquisition will have to be returned.

Nevertheless, there is one reason why the Court's decision might seem suitable after all. The Court faintly alludes towards the argument that if "or" is regarded as a disjunctive conjunction, then it would engender divesting the title or interest of third-parties to whom the land has been conveyed by the Government after taking possession, merely because the Government failed to deposit the compensation amount.⁴³ This could produce drawbacks of staggering proportions in scenarios where these third-parties are allottees of governmental housing schemes or of public projects like building roads, offices etc. Disastrous outcomes could also ensue for the development that would've already been made in such projects if the acquisition of the land they were built on were to lapse. When this concern is factored into the choice between a disjunctive or a conjunctive interpretation of "or", the issue is no more about what the legislature actually intended; the question's horizon widens to encompass canons of equity and the exigency of balancing the competing interests of third parties in public projects and of the land owners.⁴⁴ Viewed from this vantage point, the statistics of the 2017 CPR Report speak in favour of the Court's decision in the sense that the possibility of irreparable harm to third parties and public projects already under development, existed in 83% cases filed before the Apex Court. Although, this argument does not bloom fully in the judgment, yet its exposition has sufficient detail to exonerate the five-judge bench of the charge of putting out a deficient *ratio decidendi*.

Pas De Trois of 'Paid', 'Tender' & 'Deposit'

The bench held that in its considered opinion, the obligation under section 24(2) to pay compensation for avoiding lapse is fulfilled as soon as the Collector 'tenders' the compensation amount to the person who is entitled; no further requirement necessitating the amount's deposit in a certain manner is to be imputed where payment is not possible.⁴⁵ In case the acceptance of tendered amount is hindered by any of the contingencies provided in section 31(2), 1894 Act, the amount has to be 'deposited' with the Reference Court. But, according to the Court, such 'deposit' doesn't denote 'payment' to the landowners/persons entitled because it doesn't involve actual payment to them *per se*.⁴⁶ It is merely a statutory specification on what is to be done in

41 *South Eastern Coalfields Ltd. v. State of M.P.*, (2003) 8 SCC 648, 26–28; *A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam*, (2012) 6 SCC 430, 12.

42 *State of Gujarat v. Essar Oil Ltd.*, (2012) 3 SCC 522, 61–62.

43 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 123, 148.

44 *Id.*, at p 26.

45 *Id.*, at p 206.

46 *Id.*, at p 203.

cases where the landowner refuses to accept the amount for instance. The bench also points out that failure of complying with the said mode only triggers accrual of interest as per section 34, 1894 Act, and that lapse of proceedings has never been visualised as the result of non-compliance in any other provision in either the 1894 or the 2013 Act.⁴⁷ The Court further reasons that the word 'deposit' has been used in the proviso of section 24(2), where non-deposit of compensation in the accounts of beneficiaries in respect of a majority of landholdings entitles all beneficiaries to compensation under the 2013 Act. On that observation, the Court states that since the legislature has used two different words in section 24(2) ('paid' and 'deposit'), they ought to be interpreted differently as a matter of principle⁴⁸, and that 'paid' cannot be held to embrace 'deposit' within its realm.

That chain of reasoning doesn't seem convincing because in the same way, even mere 'tendering' of the amount does not involve the completion of the 'payment' transaction, and if the Court's logic is followed, the sequitur of this statement would be that the word 'tender' is also insufficient to define the content of the obligation to 'pay'. Furthermore, the Court's emphasis on the fact that neither the 1894 Act nor the 2013 Act (for proceedings initiated under it) ever envisaged lapse as the consequence of depositing the amount otherwise than in Court, is farcical in light of the idea that just because no other provision in these enactments contemplates 'lapse' on that ground for proceedings initiated under their distinct spheres doesn't mean that section 24, 2013 Act could not stipulate that requirement to determine whether proceedings initiated under the 1894 Act deserve to survive.

Even the Court's insistence on giving different meanings to 'paid' in section 24(2) and 'deposit' in the proviso of that section lacks merit. This is because 'deposit' in the proviso is used in the specific context of it being deposited in the 'account of the beneficiaries', whereas the imbroglio of the obligation to 'pay' is regarding a scenario where the amount is tendered, refused and then statutorily directed to be deposited with the 'Reference Court'. Of course, 'payment' in general may involve 'deposit' of the amount with the person; that general overlap between the two terms cannot be glossed over by citing legal principles that might have little application here. It is submitted that even if the word 'paid' is said to include the obligation to 'deposit' the amount with the Court, it would still not cross the threshold of the general overlap between the two terms because a simple reading of the proviso suggests that it is a provision intended to benefit the landowners by entitling them to the scheme of higher compensation under 2013 Act. It seems to bestow this legislative largess irrespective of whether the deposit was not made due to governmental indolence or the landowner's own refusal since it does not expressly or by necessary implication, exclude those landowners who refused the payment. To this proposition, the five-

47 *Supra* note 43 at p 208.

48 The Court relied on various authorities to substantiate this rule, *See* Justice G.P. Singh, *Principles of Statutory Interpretation* 395 (LexisNexis, 14th edn.); *Commissioner of Income Tax v. East West Import and Export Pvt. Ltd.*, (1989) 1 SCC 760, 7; *B.R. Enterprises v. State of U.P.*, (1999) 9 SCC 700, 70; *Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd.*, (2003) 4 SCC 305, 20; *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana*, (2003) 5 SCC 622, 43.

judge bench has a moral objection in that it feels that section 24 is a 'penal provision' that seeks to reprimand the government for its inaction; with that characterisation of the provision, the Court feels that a person who refused to receive the compensation amount cannot now wield section 24 or its proviso as a weapon to win benefits in this battle of penalisation.⁴⁹

That haughty disdain for those who refuse compensation offers does not behove a court that is tasked with interpreting a welfare legislation like the RFCTRA. The Court's objection is egregiously outlandish for two reasons. Firstly, the RFCTRA is a welfare legislation aimed at rectifying past wrongs, and needs to be interpreted that way. One of these wrongs is indicated by the empirical verity that out of 445 Supreme Court cases between 1950-2016 dealing with compensation under the 1894 Act, 88% saw an increase in the compensation amount;⁵⁰ this reveals that the cause of refusal to accept compensation offers is not landowners' satanic acquisitiveness for which they need to be punished (as the Court would like to believe), instead, it is governmental niggardliness in granting fair compensation. Extending the blessing of the 2013 Act's compensation framework under section 24's proviso to landowners who reject the compensation offer logically flows from that fact. Secondly, it's not like when such landowners were rejecting the offers they had any nefarious prescience of the fact that a future legislation would grant them a better compensation package. They cannot therefore, be thought as guilty of wicked misuse if they ask the Court to compute their compensation under the 2013 Act's regime.

Notwithstanding that the argument of 'landowners trying to misuse section 24' does not work in the context of the proviso to section 24 to receive compensation under the 2013 Act, it does still have some bearing on the decision to declare a proceeding as lapsed merely because the amount was deposited in the government treasury and not the Court. It is well settled that an instance of non-conformity with the prescribed procedure would not vitiate the process in its entirety until it causes actual prejudice.⁵¹ The distinction between 'imperative' and 'directory' provisions⁵² or 'essential' and 'supportive'/'secondary' provisions⁵³ is of immense value in that connection. Non-compliance with imperative or essential provisions has the effect of decimating the legality of the exercise, but, disobedience of directory or supportive provisions does not affect the legitimacy of the act.⁵⁴ Now, non-compliance with Section 31(2)'s direction of depositing the compensation amount with the Reference Court in the event of the listed contingencies does affect one's rights to require the amount's investment in government securities (as explicated earlier in Part 1.1.) under sections 32 and 33; however, no actual quantitative prejudice is caused since failure to deposit the amount with the Court sets in the accrual of interest under section

49 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 112, 200, 223.

50 *Wahi*, *supra* note 39, at 24.

51 *Jankinath Sarangi v. State of Orissa*, (1969) 3 SCC 392, 5; *Sunil Kumar Banerjee v. State of West Bengal*, (1980) 3 SCC 304; *State of Andhra Pradesh v. Thakkidiram Reddy*, (1998) 6 SCC 554, 9–10.

52 See, *Howard v. Secretary of State for the Environment*, (1975) QB 235, 242–43 (UK); *Sharif-Ud-Din v. Abdul Gani Lone*, AIR 1980 SC 303, 9.

53 *Belvedere Court Management Ltd. v. Frogmore Developments Ltd.*, (1996) 3 WLR 1008, 1032 (UK).

54 *Ram Deen Maurya v. State of Uttar Pradesh*, (2009) 6 SCC 735, 43, 53.

34 to compensate for the loss (if any). In fact, the interest rate under section 34 (9% and 15%) is higher than any government security scheme provides.⁵⁵

A compelling argument for consequential qualitative prejudice could be made by contending that: (i) non-compliance cocks a snook at the requirement's object of insisting on the deposit of the amount with a neutral & independent authority and in an account not within the government's control to counterbalance the power asymmetry in eminent domain; (ii) non-compliance in cases where the amount is deposited in government treasury instead of the Court based on executive standing orders are of questionable legality since these orders are in contra-distinction to the procedure prescribed by the Act. Nonetheless, these arguments don't validate the radical reprisal of declaring the proceedings to have lapsed merely because they were deposited in a government treasury and not the Court considering that the act does not cause any material prejudice and that lapsing risks enormous third-party cost. Speculation of instances where government officials might be corrupt or harbour a vendetta is far-fetched. Hence, for section 24's obligation of 'payment' to avoid lapse, the material aspect should be the compensation amount's tendering & its acceptance and in the event of any of the contingencies, the continued availability of the option of access/acceptance by its apposite deposit (not necessarily with a Court).

How 'Physical' Must the 'Possession' be?

The five-judge bench held that the condition under section 24(2) of taking "physical possession" to avoid lapse only necessitates the taking of possession by the Government by drawing up a memorandum or *panchnama* to that effect.⁵⁶ To justify keeping the threshold so low, the Court draws on its assertion that once the land vests in the Government after possession has been taken under section 16, 1894 Act, the Government enjoys absolute title over it; taking that reasoning further, the bench states that any interruptions to denude the Government of possession on the actual spot after it has taken possession by drawing a memorandum, is just trespass.⁵⁷ The bench also wrote that the Government cannot be expected to start residing or cultivating the land, or even to sentinel the area with police to indicate "physical possession".⁵⁸ In order to supplement that, the Court also asseverated that 'possession' is not to be confused with 'occupation', and that one could legally have possession of a piece of land without occupying it for a considerable period of time.⁵⁹

The problem with that argument is that the side opposing the Court's narrative does not hanker for the area to be cordoned off for the Government to start a tribe. The determinative factor is the distinction between *de jure* possession and 'physical possession'.⁶⁰ The former

55 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 207 (the Court took judicial notice of this fact in this paragraph).

56 *Id.*, at p 271, 363.7.

57 *Id.*, at p 244.

58 *Id.*, at p 245.

59 *S.M. Yaqub v. T.N. Basu*, AIR 1949 Pat 146: ILR (1948) 27 Pat 1027, 1067; *Hamid Sheikh v. Nazir Dar*, 1963 SCC OnLine J&K 44.

60 *Seksaria Cotton Mills v. State of Bombay*, 1953 SCR 825, 21–22; *Superintendent v. Anil Kumar*, (1979) 4 SCC 274, 11–16; Lancelot Hall, *Possessory Liens in English Law* 2 (Palala Press, 2016); Frederick Pollock & R.S. Wright, *An Essay on Possession in the Common Law* 119 (Clarendon Press, 1888).

denotes only the right of possession (acquired by drawing a memorandum or *panchnama*), and this right metamorphoses into real manifestation only when physical possession is taken. It has been recognised that one might have legal/constructive/*de jure* possession without having actual physical possession, and that often, *de facto* possession does not attract the law's protection, yet a party's *de jure* possession cannot be equated to *de facto*/physical possession merely because that party has the lawful right to effect physical possession.⁶¹ As the antithesis to the five-judge bench's understanding of possession, the Supreme Court has in the past, gone to the extent of holding that possession is tantamount to effective physical control or occupation; and that often but inaccurately so possession is understood as a synonym for the mere right to possess.⁶² Addressing an argument similar to what the five-judge bench proffered, the Court in the past has also clarified that a party having the mere right to possess cannot benefit if actual physical possession is held by a "trespasser".⁶³

In fact, the Apex Court has also resorted to the *modus operandi* of appointing commissioners to determine 'possession on the spot' in certain cases based on the same analysis of the discrete concepts of *de jure* and physical possession.⁶⁴ Against years of precedent following this school of thought for understanding possession, the five-judge bench only has a Patna High Court judgment⁶⁵ on occupation versus possession and exiguous discussion of the implications of past precedent for interpreting "physical possession".

Bearing in mind the contrast of *de jure* and physical possession, it can safely be said that the legislative intent behind qualifying the word 'possession' by prefixing it with 'physical' was certainly to describe a state of affairs at a threshold higher than mere drawing up of a memorandum to appropriate the right to possess. In the context of a land acquisition project accordingly, "physical possession" must denote the translation of a *panchnama* into evident and demonstrable control or utilisation of the land for a public purpose (except in cases where the land is acquired specifically to be kept vacant, e.g., preventing people from settling in places susceptible to nuclear radiation). The fact that the legislature simply uses the term "possession" and not "physical possession" where it wants to refer to a lower threshold only reinforces the vigour of this conclusion.⁶⁶

Additionally, ruling for the consequence of lapse in proceedings where such "physical possession" is not taken by the Government when the award was passed five years or more prior to the commencement of the 2013 Act, would be prudent as in such a scenario the balance between the competing considerations of third parties & public projects on one side and landowners & dependent stakeholders on the other, would tilt in favour of the latter. That is

61 *B. Gangadhar v. Rajalingam*, (1995) 5 SCC 238, 5–6; 35 *Halsbury's Laws of England* 732 1211 (Butterworths, 14th edn.)

62 *Guruchand Singh v. Kamla Singh*, (1976) 2 SCC 152, 21–24.

63 *Id.*

64 *Narmada Bachao Andolan v. State of M.P.*, (2011) 7 SCC 639 (although the five-judge bench in *Indore Development Authority v. Manohar Lal*, 2020, held this decision to be improper).

65 *S.M. Yaqub v. T.N. Basu*, AIR 1949 Pat 146.

66 See *Supra* note 1, ss. 21, 28, 30, 38, 40, 41, 69, 72, 78, 80, 82, 91.

because where significant ground-level development has not begun, the magnitude of loss for third parties & public projects would pale in comparison to the disadvantage suffered by the landowners due to years of continued deprivation of compensation and lawful access to their land.⁶⁷ Public interest is an essential ingredient of public purpose⁶⁸ and where a piece of land that was acquired for public purpose has not translated into significant physical possession for more than five years, no public interest is served by keeping the acquisition alive to the detriment of disenfranchised landowners. The platitudinous argument of absolute vesting of title with no divestment has already been discussed previously (in Part 2.1.). It appears from this scrutiny that the Court's decision on the issue of interpreting the obligation under section 24(2) to take "physical possession" is not only inherently fallacious, but also inconsistent with precedent & with the Court's own yardsticks of balancing competing policy interests.

Proviso of Section 24(2): The Semantic Limits of Punctuation

Section 24(1)(b), 2013 Act stipulates that where 'section 11 award' has been made, the acquisition proceedings would continue to be governed by the 1894 Act. Section 24(2) is a section that provides for lapse of acquisition proceedings initiated under the 1894 Act on the fulfilment of its conditions only in a specific class of cases where the 'section 11 award' was made five or more years prior to 2013 Act's commencement (i.e., awards prior to Jan. 1, 2009 since the 2013 Act commenced on Jan. 1, 2014). It is evident that section 24(2) is an exception to section 24(1)(b) in that it applies a different rule to a sub-set of cases, the larger set of which is regulated by section 24(1)(b). Section 24(1)(b) ends with a fullstop (.), but 24(2) ends with a colon (:), and entails a proviso after it. The proviso states that where the award has been made but the compensation for a majority of the land holdings has not been 'deposited in the account of the beneficiaries', then all beneficiaries mentioned in the acquisition notification issued under the 1894 Act would be entitled to compensation under the 2013 Act.

The landowners argued for the proviso's application to be expanded to encompass all cases where an award has been made, and not just those cases where the award was made prior to Jan. 1, 2009, which in effect, is a demand to regard the proviso as a caveat for section 24(1)(b) and not merely for section 24(2).⁶⁹ The basis of this call is that if the legislature wanted the proviso's operation to be limited to section 24(2), it would not have omitted any reference to the effect of the proviso on lapsing provisions or the five year limit in section 24(2).

On this issue, the Court held that the legislative intent was crystal clear in terms of its usage of punctuation to affiliate the proviso only to section 24(2) and that there was no need to disturb that framework by attempting to fit a square peg in a round hole.⁷⁰ The Court relied on several

67 Now that "or" is legitimately interpreted as 'and/nor', lapse would result only when both the conditions are present, so a scenario where the possibility of lapse due to failure in taking physical possession can be entertained will necessarily also have to be one where compensation has not been paid.

68 *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd.*, (2007) 8 SCC 705, 59.

69 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 89 (the Court has summarized the landowners' argument in this para).

70 *Id.*, 363.6.

judgments to hold that referring to punctuation was permissible to illuminate the meaning of a substantive provision.⁷¹ In that regard, it would be germane to mention that the Apex Court interpreted section 27 of the Drugs and Cosmetics Act, 1940 with punctuation as the mainstay of analysis in *Mohammad Shabbir v. State of Maharashtra*⁷². It followed the same trend in *M.K. Salpekar v. Sunil Kumar Shamsunder Chaudhari*⁷³ where it emphasized on the effect of a comma in discerning the meaning of section 13(3)(v) of the Central Provinces and Berar Letting of Houses and Rent Control Order.

Understood in the background of the bench's decision on other issues, section 24(2)'s proviso blossoms in situations where physical possession has been taken but compensation has not been deposited in the accounts of the beneficiaries; since in such cases the proceedings cannot lapse now that "or" is interpreted as 'and/nor', the proviso would grant the requisite compensatory relief. The Court's decision as to legislative intent on this issue is reasonable as 'full stops' are taken to extinguish scope for the sentence to be amplified or explained; where semantic amplification is the intentment, a 'colon' is used.⁷⁴

Pride & Prejudice: Exclusion of the Stay Order Period

The Supreme Court of India in its 2020 judgment decided to interpret section 24(2) as excluding the period during which acquisition proceedings remained stayed on account of court orders while computing the 'five year or more' limit for application of the section's lapse provisions.⁷⁵ The Court viewed its decision through the prism of what in its opinion are section 24's objectives. Justice Arun Mishra writes that section 24(2), 2013 Act provides for lapse of proceedings initiated under the 1894 Act when all its conditions for invocation are met; the object is to provide for lapse only in cases where there is default by authorities to acquire land and 'tender' compensation, and not otherwise. Building on this, Justice Mishra writes that certainly therefore, one could not interpret section 24 to provide for lapse where delay is caused by court orders.⁷⁶ To strengthen his argument, the Hon'ble Justice also invoked the maxim '*actus curiae neminem gravabit*' (no party should suffer prejudice due to the acts of the Court) to say that if the said period is not excluded from section 24(2)'s five year computation process, it would result in a gross infraction of the precepts of equity as the delay produced by Court's interim orders would become a reason for the lapse of acquisition proceedings.⁷⁷

71 *Houston v. Burns*, (1910) AC 337, 348 (UK); *Hanlon v. Law Society*, (1981) AC 124, 197 (UK); *Marshall v. Cottingham*, (1981) 3 All ER 8, 12 (UK); *Dingmar v. Dingmar* 2007 (2) All ER 382 (UK); *Kennedy v. Information Commissioner*, (2012) 1 WLR 3524 (UK); *Taylor v. Caribou*, 102 Me. 401, 67 A.2 (1907); *Aswini Kumar v. Arabinda Bose*, AIR 1952 SC 369, 77; *Jamshed Guzdar v. State of Maharashtra*, 2005 (2) SCC 591, 42, 68; *Falcon Tyres Ltd. v. State of Karnataka*, (2006) 6 SCC 530; *State of Gujarat v. Reliance Industries Ltd.*, (2017) 16 SCC 28.

72 AIR 1979 SC 564.

73 AIR 1988 SC 1841.

74 Vepa P. Sarathi, *Interpretation of Statutes* 497 (Eastern Book Co., 5th edn., 2010).

75 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 363.8.

76 *Id.*, at p 282.

77 The Court placed reliance on, *A.R. Antulay v. R.S.Nayak*, 1988 Supp (1) SCR. 01, 102; *Mohammed Gazi v. State of M.P.*, (2000) 4 SCC 342, 7; *Karnataka Rare Earth v. Senior Geologist, Department of Mines & Geology*, (2004) 2 SCC 783, 10; *Amarjeet Singh v. Devi Ratan*, (2010) 1 SCC 417, 17-18.

Justice Mishra also summoned the maxims '*lex non cogit ad impossibilia*' and '*nemo tenetur ad impossibilia*' to say that the government could not be expected to take possession while it was stayed by the Court as the law could not obligate someone to perform an act, the lawful performance of which is impossible.⁷⁸ For that reason, a party that could not perform a task by circumstances beyond its control should be allowed to do that task at the earliest opportunity after the circumstances that hindered performance subside⁷⁹ and in the instant case, an aggregate period of five years of legislative tolerance is provided. The period during which the proceedings were stayed on account of court orders in the opinion of the judge therefore, must be excluded for a just operation of section 24, as the Court was saddled with the responsibility of accounting for delays and settling equities when it vacates an order of stay.⁸⁰ Abhorrently, Justice Mishra went to the extreme lengths of saying that such period should be excluded because interim orders may even be secured by producing forged documents, and that in such cases, delay and the resultant lapse would occasion grave injustice.⁸¹

It is submitted that none of these vacuous reasons makes a compelling case for the exclusion of the concerned period for computation under section 24(2). Firstly, at the drafting stage of the 2013 Act, attempts had been made to add a clause excluding the 'subsistence of stay order period' from the 'five year' computation, but the suggestion was categorically rejected by the Department of Land Reforms.⁸² Also, as explained earlier (in Part 1.2.), where the legislature wanted to permit this exclusion, it made an express provision (like in sections 19 & 69, 2013 Act) to that effect; the fact that it did not do the same in section 24's case is testament to the proposition that the legislative intent is inimical to reading in of such an exclusionary clause. Secondly, envisaging section 24(2) with a myopic perspective by limiting its contours to phrases like 'penalisation of governmental inaction' and 'punishing governmental default' ignores the aspect that the content of legislative intent can be broader than the actuating spark of the provision; that it can include the legislature's exhortation of construing section 24 to omit an exclusionary clause so that its assessment of taking 'five years' as a sufficient span for taking necessary action without excluding the stay order period is not diluted. As long as that is recognised, the Court must refrain from legislating for the inclusion of a clause that was consciously left out.⁸³ Plunging into the domain of policy making is beyond the domain of the judiciary.⁸⁴ The Supreme Court has held

78 The Court placed reliance on, *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving Mills Ltd.*, (2002) 5 SCC 54, 30.

79 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 315-17; See *Hossein Ally v. Donzelle*, ILR (1880) 5 Cal 906; *Sambasiva Chari v. Ramasami Reddi*, I.L.R. (1899) 22 Mad 179; *In re Presidential Poll*, (1974) 2 SCC 33; *HUDA v. Dr. Babeswar Kanhar*, (2005) 1 SCC 191; *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530.

80 See *G.T.C. Industries Ltd. v. Union of India*, (1998) 3 SCC 376.

81 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 298; See *V. Chandrasekaran v. Administrative Officer*, (2012) 12 SCC 133.

82 *Id.*, at p 280 (the Court has noted this in this para while summarizing the landowners' arguments).

83 See *G. Narayanswami v. G. Pannerselvam*, (1972) 3 SCC 717; *Commissioner of Sales Tax v. Parson Tools & Plants*, (1975) 4 SCC 22; *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

84 *Census Commissioner v. R. Krishnamurthy*, (2015) 2 SCC 796, 25.

that “legislative *casus omissus* cannot be supplied by the judicial interpretative process”.⁸⁵ Surprisingly, Justice Mishra emphatically refused to apply this principle in the 2020 judgment by waffling about how the English language is ambiguous⁸⁶ and how in the bench’s opinion, the legislative intent was never to omit the exclusionary clause (despite the fact that the legislative body unequivocally rejected the idea of having it).⁸⁷

Thirdly, although largely based on *prima facie* considerations, courts grant interim orders after evaluating merit in the challenge to the acquisition proceedings, and in such cases, the burden on the one seeking the order is higher. With the reality of power asymmetry in eminent domain cases, it is already cumbersome to establish arbitrariness on the part of Government agencies. In such a milieu, if the Government is rewarded for arbitrariness by enhancing the net period for which they can keep up the same behaviour by excluding the stay order period, it would only nurture the view that forgetfulness and lethargy are virtues.⁸⁸

It is absolutely grotesque that the Court cited its own ineffectiveness in judging interim order motions to transgress the boundaries of separation of powers for effecting judicial legislation by interpreting the exclusionary clause within section 24’s scheme. Pride in judicial independence seems to be transmuting into judicial overreach and inundation of portents of prejudice appear to be doing an unsatisfactory job at disguising it as justice. As the 2020 judgment shows, judges always have at their disposal the basin of spin doctored judgments taken out of context to wash their hands of interpretative repugnancy.

Entering the Detractor’s Retreat: What Would Justitia Say?

Juxtaposing views critical of the judgment with the opinions that the Court harbours is the fulcrum of academic scrutiny of the judiciary. The critic might argue that shortcomings in Justice Mishra’s reasoning in the 2020 judgment would only augment unfair adjudication of eminent domain cases and Justitia would frown upon injustice of course (she typifies justice & rule of law after all). But, the credence of that scholarly prognosis is still an open question which needs to be examined. In addition to that, an alternative perspective on what the judgment could have been if it was guided by arguments presented in this paper, would be of considerable assistance if the Supreme Court ever decided to review its decision. However, even that endeavour would first require the identification of issues that the judgment missed out.

85 *Padma Sundara Rao v. State of Tamil Nadu*, (2002) 3 SCC 533, 14.

86 *Seaford Court Estates Ltd. v. Asher*, (1949) 2 KB 481 (UK) (Justice Mishra cited this case to make the sweeping assertion that the *casus omissus* principle isn’t applicable everywhere, without reasoning why it has not application in the case before it).

87 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 309.

88 *See Neeraj Kumar Sainy v. State of U.P.*, (2017) 14 SCC 136.

Scrutinising the 2020 Judgment's Critical Reception: How Rational are the Commentators?

Critics have jumped on the bandwagon of taking offence at the Court's supplanting of "or" for 'and/nor' in section 24.⁸⁹ The commentators scowl at the notion that because of Justice Mishra's judgment, proof of the fulfilment of only one of the two conditions under section 24 would no more be sufficient for lapse of acquisition proceedings and claim that this guts the 2013 Act of its glorious content and its beneficial provisions.⁹⁰ Their analyses effuse contempt for the Court even daring to assign a conjunctive interpretation to "or". Their objection is not as much to the reason the Court provides for its decision, as it is to the Court changing the operation of the perceived legislative scheme. This overestimation of the effect of lingual pedantry on policy interpretation is a poor proxy to evaluate the merit of the Supreme Court judgment because: (i) legal language permits the degree of semantic flexibility that this judgment involves⁹¹; and (ii) trifling matters of grammatical exactitude cannot hold a candle to stakeholder assessments that reveal gargantuan loss if the status quo of disjunctive interpretation is countenanced.

Interestingly, it has been argued that the position laid down by the *Pune Municipal Corporation* case was more desirable as compared to the one laid down by Justice Mishra in the 2020 judgment.⁹² In favour of that claim, it is asserted that the operation of the decision in *Pune Municipal Corporation* case would've benefited landowner claimants in 83% of the cases filed under section 24⁹³ where the Government took possession without paying the compensation amount.⁹⁴ In that respect, while some critics remain adamant at prophesying a statutory apocalypse for the 2013 Act after the 2020 judgment since delay in paying compensation alone cannot now lead to lapse⁹⁵, others assume that the judgment deprives landowners in such cases of compensatory benefits under the 2013 Act.⁹⁶

It is submitted that the legal position in the *Pune Municipal Corporation* case was grossly absurd in that it made deposit of the compensation amount in the Court (and not in the Government treasury or anywhere else) a prerequisite to avoid lapse without ruminating over potential loss as

89 Aadil Singh Boparai, "A case of judicial law making", *The Indian Express*, Mar. 31, 2020, available at <https://indianexpress.com/article/opinion/land-acquisition-act-supreme-court-order-6435301/> (last visited on July 14, 2020); Aditya Thyagarajan, "Lapsing of land acquisition proceedings — Supreme Court Larger Bench answers reference", Lakshmikumaran & Sridharan attorneys, June 16, 2020, available at <https://www.lakshmisri.com/insights/articles/lapsing-of-land-acquisition-proceedings-supreme-court-larger-bench-answers-reference/> (last visited on July 14, 2020).

90 *Id.*

91 See Justice G.P. Singh, *Supra* note 48; *State of Bombay v. R.M.D. Chamarbaugwala*, 1957 (1) SCR 874; *Ishwar Singh Bindra v. State of U.P.*, 1969 (1) SCR 219; *Joint Director of Mines Safety v. Tandur and Nayandgi Stone Quarries*, (1987) 3 SCC 308; *Samee Khan v. Bindu Khan*, (1998) 7 SCC 59; *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*, (2018) 1 SCC 353.

92 Dhruva Gandhi & Shubham Jain, "Section 24 of 2013 Land Acquisition Act: A Series of Misplaced Interpretations", *Live Law*, Mar. 22, 2020, available at <https://www.livelaw.in/columns/section-24-of-2013-land-acquisition-act-a-series-of-misplaced-interpretations-154185?infinite-scroll=1> (last visited on July 14, 2020).

93 Wahi, *Supra* note 39.

94 Dhruva Gandhi, *Supra* note 92.

95 *Id.*

96 Aadil Singh Boparai, *Supra* note 89.

regards balancing the competing rights of third party allottees, public projects and landowners (which loomed large in the cited 83% cases where courts would have declared the acquisition to have lapsed if the *Pune Municipal Corporation* ruling was followed). Furthermore, the *Pune Municipal Corporation* case reflects a high-handed strict constructionist outlook where it does not factor in the idea that depositing the money somewhere other than a Court does not cause material prejudice as per the 1894 Act's provisions (refer Part 2.1.) and also that a less radical alternative of extending compensatory benefits under the new Act better serves the equalising purpose.

Although the 2020 judgment does not provide the whole gamut of fresh benefits under the 2013 Act that landowners would have received if the proceedings lapsed and a new acquisition was initiated under that Act, it would be delusional to surmise that it robs the landowners of their entitlement to receive compensation under the 2013 Act where the amount hasn't been deposited in their accounts for five or more years prior to the 2013 Act's commencement. The judgment clarifies that in scenarios where possession of the land has been taken but the compensation has not been paid, the landowners would be entitled to compensation under the 2013 Act under section 24(2)'s proviso.⁹⁷

It is unfortunate that even when critics analyse Justice Mishra's decision of according a conjunctive meaning to "or", they leave out his 'stakeholder assessment argument' in order to question other easy to critique reasons in the judgment (like his idea of viewing section 24 as a penal provision or his invocation of interpretative generalisations).⁹⁸ Nonetheless, the possibility of it being an innocent error in missing that argument while reading a three-hundred nineteen page judgment cannot be gainsaid. In light of Part II's elucidation of the broad spectrum of issues that the 2020 judgment deals with, it can be concluded that legal scholars have only engaged with the judgment in limited spheres.

Identifying Gaps: What did the Court Miss Out?

Even though the five-judge bench in its 2020 judgment addresses all major questions referred to it, yet its comprehensive approach still leaves crucial matters in nebulous incertitude.

- (a) *Operation of Proviso When Compensation Is Refused:* The Court has clarified in the 2020 judgment that the proviso's benefit of compensation under the 2013 Act would extend even in cases of a single owner with a single plot of land, the possession of which has been taken but the compensation for which has not been deposited in owner's account.⁹⁹ This means that the proviso isn't exclusively reserved for cases where acquisition is in respect of more than one plot or more than one landowner. The nature of the proviso's operation is also certain where possession has been taken but compensation has not been deposited. But, the Court's remarks against landowners who refuse to accept

97 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 120, 132, 243, 286, 293.

98 Dhruva Gandhi, *Supra* note 92.

99 *Indore Development Authority v. Manoharlal*, 2020 SCC OnLine SC 316, 187.

compensation¹⁰⁰ renders the scope of the proviso's benefit in cases of such land owners uncertain; State counsels may use these remarks to advance the proposition that since the deposit of the amount was prevented by the landowners' acts, they must not now be entitled to recourse under section 24(2)'s proviso. Reasons for why such landowners must not be deprived of benefits under the proviso have been enumerated earlier (refer Part 2.2.). Clarity on this front is a pressing exigency as it affects the only safeguard these landowners have left, now that the proceedings would not lapse.

- (b) *Judgment's Prospective Application*: Traditionally, a new interpretation of the law that overrules past position is deemed effective both prospectively (for future transactions) and retrospectively (for past ones).¹⁰¹ As against this view, the U.S. Supreme Court developed the doctrine of 'prospective overruling' so that the new exposition of the law applies only to future transactions or those that are pending, and not transactions that have attained finality prior to the new pronouncement.¹⁰² In the event the Court decides to apply this doctrine to the new interpretation of the law, past transactions and vested rights remain unaffected. This doctrine has become a fundamental part of Indian jurisprudence, especially in the area of statutory interpretation.¹⁰³ It has been observed before (refer Part 1.2.) that the *Pune Municipal Corporation* case was followed as precedent in almost 999 cases;¹⁰⁴ in that background, a rational argument can be made for the application of the doctrine of prospective overruling with respect to the new interpretation of section 24 that the 2020 judgment lays down. Retrospective overruling for cases under section 24, 2013 Act would reopen past acquisitions causing boundless administrative inconvenience, disturbing vested rights and bring about hardship of biblical proportions, all of which have been accepted as valid reasons to occasion the doctrine of prospective overruling's enforcement.¹⁰⁵ The ultimate power of deciding on a balance of relevant considerations whether a decision overruling a previous principle should be applied retroactively or not is with the Supreme Court and the lack of any mention of the doctrine of prospective overruling in the 2020 judgment might be suggestive of the Court's decision on that question; but, there is nothing to indicate whether the Court even thought about this issue, and even if it did, the Court has not provided any reason for why its 2020 judgment should be applied retroactively. On

100 *Id.*, at p 112, 200, 223.

101 M.P. Jain, *Indian Constitutional Law* 1698 (Lexis Nexis, 8th edn., 2018).

102 *Linkletter v. Walker*, 381 US 618, 629 (1965).

103 See *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643; *Indra Sawhney v. Union of India*, AIR 1993 SC 477; *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201; *Githa Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149, 1155; *Kailash Chand Sharma v. State of Rajasthan*, (2002) 6 SCC 562; *Orissa Cement Ltd. v. State of Orissa*, AIR 1991 SC 1676, 1717; For cases specifically dealing with new interpretations of statutory provisions without any constitutional considerations, See, *Raymond Ltd. v. State of M.P. Electricity Board*, AIR 2001 SC 238; *Union of India v. Mohd. Ramzan Khan*, AIR 1991 SC 474.

104 Apurva Vishwanath, *Supra* note 14.

105 See *Great Northern Rly. v. Sunburst Oil & Ref. Company*, 287 US 358 (1932); *Chicot County Drainage District v. Baxter State Bank*, 308 US 371 (1940); *Griffin v. Illinois*, 351 US 12 (1956); *Wolf v. Colorado*, 338 US 25 (1949); *Jenkins v. Delaware*, 395 US 213 (1969); *Williams v. United States*, 401 US 646 (1971); *Hill v. California*, 401 US 797 (1971).

reading the judgment, one cannot be certain of the Court's intention of permitting a retrospective operation, and as long as the judgment remains eclipsed by this uncertainty, injustice is the likely result since this would set in motion yet another difference of opinion amongst judges of various high courts about what the Supreme Court desired, leading the justice system into a dreary abyss.

What the Court Could Have Held: Proffering an Alternative Stance

With every aspect of the judgment scrutinised, it would be prophylactic to enunciate the components of a decision that could have served the legislative intent and secure stakeholder interest in a more advantageous manner.

Firstly, "or" having a conjunctive meaning, the obligation under section 24(2) to 'pay' the compensation to avoid lapse of proceedings must not end at mere tender of the amount. In the event of any contingencies (e.g., refusal to accept the amount), the obligation must require the government to deposit the amount such that continued availability of the option of accepting/collecting the amount is assured to the landowner. This strikes the right cord with the legislative intent of the 1894 Act in that it is not overly pedantic as it does not require the deposit to be done only in the Court and not excessively relaxed in that the obligation does not end merely after the amount is tendered.

Secondly, the proviso being regarded as section 24(2)'s part and not as a general proviso for section 24(1)(b), it should be interpreted to bestow on the beneficiary the benefit of compensation under the new Act irrespective of whether the amount remained un-deposited in the account of the beneficiary for reason of governmental inertia or the beneficiary's own refusal. Thirdly, "physical possession" under section 24(2) must denote the translation of *de jure* possession into evident and demonstrable control or utilisation of the land for a public purpose (except in cases where the land is acquired specifically to be kept vacant, e.g., preventing people from settling in places susceptible to nuclear radiation etc.).

Fourthly, the period during which proceedings remain stayed on account of Court orders must not be held to be excluded from the computation of compliance with the five years' bright line rule in section 24(2) (for substantiative reasoning, refer Part 2.5.). Lastly, the doctrine of prospective overruling must be applied to the effect that cases that have achieved finality are only reopened or disturbed if the result of such exercise would not in the opinion of the constitutional courts cause considerable harm to the public interest. That determination will have to be made on embracing the facts and circumstances of every case separately, because a general proscription against the application of the new interpretation might as well cause prejudice in cases where the benefit of its enforcement would outweigh the suffering.

Conclusion

The Indian Supreme Court's experiments with the law on lapse of acquisitions in eminent domain cases have revealed a bizarre obsession of Supreme Court judges with viewing

interpretative questions as a binary choice; “paid” would either mean deposit with a Court or it would only entail tendering the amount. Without attempting a reconciliation, never the twain shall meet. In relation to that, it must be recognised that such interpretative impropriety in construing statutes has real time implications, more so when the constitutional right to property is involved. The concatenation of judgments interpreting the scheme of section 24 prove the same point in that the stakes are tremendously high for all interested parties and as shown in the paper, the adoption of any particular view on the concerned legal questions descends into direct effects either for the civic life of third party allottees or the nation’s development or for the land-losing groups. The responsibility of maintaining intellectual vigilance is even more pronounced in such settings; any form of parochialism naturally has no place, and that’s why judges have a duty not to make moral generalisations on whether a landowner who refuses to accept compensation should be allowed benefits under subsequent statutes without taking into account the ground-realities of statistical unfairness in compensation amounts offered by the government (a verity to which the Supreme Court concedes by implication when it orders an increase in the amount offered in 88% of such cases¹⁰⁶). Recent decisions of the Indian Supreme Court like *Common Cause v. Union of India*¹⁰⁷, *Navtej Singh Johar v. Union of India*¹⁰⁸, *Joseph Shine v. Union of India*¹⁰⁹ and myriad others convey Indian judiciary’s resolve for promoting progressive change and agnising the shortfalls of its past opinions. Pledging faith in the judiciary, it is hoped that the Court reviews its 2020 decision to more suitably harmonise antagonistic interests in eminent domain matters.



106 Wahi, *supra* note 39, at 24.

107 (2018) 5 SCC 1 (allowing passive euthanasia despite years of precedent to the contrary).

108 (2018) 10 SCC 1 (decriminalizing homosexual intercourse & rectifying its past prejudice against the LGBT population of the nation by overruling its prior judgment in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1).

109 (2019) 3 SCC 39 (decriminalizing adultery & overruling previous judgments on the issue: *Sowmithri Vishnu v. Union of India*, 1985 Supp. SCC 137; *Revathi v. Union of India*, (1988) 2 SCC 72).

A View of Feminism and Pornography Through the Lens of Jurisprudence

Samhitha Sharath Reddy* & P. Vasishtan**

Abstract

This paper would deal with the jurisprudential question regarding pornography and the modernday viewpoint of feminism. Within this paper, the researcher tries to analyse the competing claims in support of and against pornography from a feminist perspective. The researcher first starts with a narrative of the two viewpoints existing on pornography. The researcher then analyses the Kantian perspective in support of banning pornography whilst analyzing the counter claims put forth by sex positivist feminists. While the researcher understands the Kantian problems of objectification, he however, agrees with the sex positivist feminists owing to the arguments of the non-unique harms and freedom of speech and expression.

Introduction

In order to understand the view of feminism on pornography we need to first understand what is pornography and then one can go towards an analysis of the feminist viewpoint on pornography. Pornography can have a variety of definitions each with its own positive and negative.¹² In order to study the feminist perspective on the same we need an understanding of the definition given to pornography under this ambit. Feminists such as Andrea Dworkin and Mackinnon defined pornography as anything graphic sexually explicit subordination of women through pictures or words which also includes any and every act which puts women in a position of servility and reduces them to body parts.³ At the outset, the researcher would lay down the structure of the paper. The paper will be divided into two parts. The first part will focus on a narrative of the two viewpoints feminism has on pornography and the second part will contain a critical appraisal of the arguments advanced. Under this the researcher shall be dealing with the objectification argument and the free consent aspect along with a cost benefit analysis of

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1 Michael C. Rea, "What Is Pornography" 123 (2001).

2 One definition is that Pornography is anything that reduces women to body parts. Another definition is that pornography is sale of sex for profit while others also maintain that pornography is nothing but obscenity.

3 Francis Biddle, Pornography, Civil Rights and Speech in Feminism Unmodified, p.146 (Harvard University Press, 2001).

pornography, all of which will be elucidated in this paper. The two perspectives with respect to pornography in feminism are the anti-pornography feminists and the sex positivist feminist, while the former focuses on a ban on pornography the latter makes no such claim.

Anti-pornography Feminism

Today, most people in the world generally hold the belief that pornography is nothing but harmless entertainment and a mechanism to release stress. However, feminists believe to the contrary. As already mentioned above, feminism views pornography as an institution which leads to exploitation and oppression of women.⁴ From this we can gather that it is not the sexual content in itself that is abhorred by feminists but the consequential result of it which is reflected in society. Generally there are three types of harms associated with working in the pornography industry.

One, is the treatment of the people in the industry themselves who are often shown in demeaning circumstances and are many a times, gagged, beaten up, made to do painful things and pretend as if they are enjoying it.⁵ Two and the more severe impact is that on society. Flowing from the phrase ‘Monkey see, monkey do’ much of the acts shown in pornography are replicated in real life, leading to dire consequences.⁶ Pornography “sexualizes rape, battery, sexual harassment, prostitution and child sexual abuse, it thereby celebrates, promotes, authorizes and legitimizes them.”⁷ Third and this is one of the major arguments used by the anti-pornography feminist, is that there is a complete lack of free consent on part of the women who are actors in pornographic films and all those who act in such films are either physically or economically coerced to do the same. This point will further be elucidated in the latter half of this paper.⁸

Many feminists such as Andrea Dworkin and Catherine Mackinnon belong to this school of thought. Mackinnon holds the view that pornography reinforces the patriarchal setup of society and accentuates the existing gender inequality.⁹ Pornography which is more female oriented than male¹⁰, shows women being subservient to man and therefore shows women to be on a lower pedestal in society as compared to man.¹¹ Much the same sentiment is echoed in the writings of Dworkin as well. Dworkin maintains that pornography portrays an image in which a woman is subservient to man and that is used as a tool by the society to define a woman’s place and role in society.¹²

4 Francis Biddle, *Supra* note 3 at p. 147.

5 Lovelace, L., M. Mcgrady, Helen E. Longino, *Pornography, Oppression and Freedom: A Closer Look: Women On Pornography*, 278 (Citadel Press, 2nded., 1980).

6 Laurie Shrage, *Feminist Perspectives on Sex Markets* (Stanford Edition of Philosophy, Winter ed. 2012) available at: <http://plato.stanford.edu/archives/win2012/entries/feminist-sex-markets/> (last visited on July 29, 2017).

7 *Supra* note 3 at 171, 172.

8 Catharine Mackinnon, *Only Words* 20 (1993).

9 Biddle, *supra* note 3 at 172. Mackinnon’s other idea that Pornography is essentially rape has been dealt later on in this paper as the consent argument or lack thereof has been dealt later on.

10 This is to say that men are generally the target audience of the pornographic industry and therefore have more female actors to serve the demand of the majority heterosexual male population of the world.

11 *Supra* note 8 at p. 140.

12 Andrea Dworkin, *Pornography: Men Possessing Women* (Penguin Books Ltd., 1989)

This brings to the researcher's second point of objectification of women. In order to discuss objectification it is essential that one refers to Kant as he is the father of modern day anti-pornography feminism. Much of Andrea Dworkin's and Mackinnon's work is based on the Kantian view on sexuality and objectification.¹³ Kant was a firm believer in monogamous marriage and held that if anyone indulges in sexual activity outside marriage then that leads to objectification as then the person is just using the other for his/her sexual appetite and treats the other as a thing which can be used and then cast away.¹⁴ Further, Kant holds that the act of using a person only to satiate one's sexual desires outside the bonds of marriage makes them lose their humanity and that reducing them to an object solely made for the purpose of sexual gratification.¹⁵

It is exactly this sentiment which is proposed by feminists as an ill effect of pornography on society. Pornography by portraying women as subordinate to man, subservient to his needs and only as an object of sexual gratification, creates a sentiment in society that men and women are unequal and that the latter occupies a lower position in society. Not only pornography but media today, does the same and that can be noticed in all the item numbers actresses do in Kollywood today. Songs such as '*En Peru Meenakumari*'¹⁶ '*EnChella Peru Apple*'¹⁷ '*Jilla Vittu Jilla Vandha*',¹⁸ '*Kalasala Kalasala*'¹⁹ are just a few examples which portray women as objects for sexual gratification.

It is this sub human treatment and objectification of women which reinforces the patriarchal setup of society and it is for these reasons that anti-pornography feminists feel that pornography should be banned. It is not the sexual act in itself but the under currents which point towards male domination, female mistreatment and subjugation and objectification²⁰ which is antithetical to women's civil right to freedom of speech and expression.²¹

None of this however stands ground if one can prove that the woman consented to it. And this is the main bone of contention between the sex positivist and the anti-pornography feminists which will be analysed later in the paper. Anti-pornography feminists believe that women are forced into this and that there is no concept of consent. According to them even if consent is present it is coerced and not free in nature.²² "Money is the medium of force and provides the cover of consent."²³

13 Evangelia Papadaki (Lina), Feminist Perspectives on Objectification (Stanford Edition of Philosophy, Winter Edition, 2012) available at: <http://plato.stanford.edu/archives/win2012/entries/feminism-objectification> (last visited on July 22, 2017).

14 Immanuel Kant, Lectures On Ethics, 163 (Louis Infield, trans., Harper & Row Pub., 1963).

15 *Id.* at 163, 164.

16 Prabhu Deva, Pokkiri, AVM Pictures (2007).

17 Bijesh Shakthi, Kandasamy, KT Kunjumon (2009).

18 Sasikumar, Eesan, Michael T Rayappan (2010).

19 Dharani, Ostehe, JSK Film Corporation (2011).

20 Wendy McElroy, A Feminist Defence Of Pornography, 17, Free Enquiry Magazine, available at [http://jlampl.net/A % 20 Feminist % 20 Defense % 20 of % 20 Pornography.pdf](http://jlampl.net/A%20Feminist%20Defense%20of%20Pornography.pdf) (last visited on July 24, 2017).

21 *Supra* note 3 at p. 148.

22 *Supra* note 12 at p. 20.

23 Catharine Mackinnon, Only Words, 28 (1993).

Pornography much like prostitution is not a matter of choice but a matter of compulsion. Recently, an advertisement was made by stop the traffik.org which also echoed that every year many women are shown the dreams of being rich and successful and then forced into prostitution.²⁴ This further substantiates the proposition that consent in such areas is never ‘free’ but is simply coerced, physical or economic.²⁵ This finally ties into the argument given by Mackinnon as to how pornography is essentially rape. The reason of her saying so is that for women doing porn it’s always some or the other form of coercion, visible or invisible, and that essentially obviates the existence of consent. This in turn ties into the definition of rape as rape is also nothing but sexual intercourse with a woman without her consent. This is one of the most important arguments put forth by Mackinnon as it goes to the extreme of saying that all pornography is essentially a crime and the evidence of this can also be seen in her work in drafting the *Minneapolis Ordinance* which aimed at criminalizing pornography.²⁶

Sex Positivist Feminism

The antithetical view to the anti-pornography feminism is provided by the sex positivist feminism. Sex positivist feminism defends women’s right to choice. They contend that as long as consent is present there should be no problem with women participating in pornography.²⁷ Quite to the contrary to the view maintained by the anti-pornography feminists, sex positivist feminists hold that pornography provides women with an avenue for “solitary enlightenment,” provides for “a panoramic view of the world’s sexual possibilities, and is equivalent to free speech in the sexual realm.”²⁸

Ann Ferguson, a libertarian feminist argues that one should “repudiate any theoretical analyses, legal restrictions, or moral judgments that stigmatize sexual minorities and thus restrict the freedom of all.”²⁹ She further goes on to point that “sexual freedom requires oppositional practices, that is, transgressing socially respectable categories of sexuality and refusing to draw the line on what counts as politically correct sexuality.”³⁰ Therefore in light of this we can see that according to the Sex Positivist Feminist having a sexual desire, a rape fantasy or anything that goes against the traditional or conventional rules of the society is not only not wrong, but is also essential as that is a woman’s true expression of her freedom which cannot and should not be restricted.

Sex positivists feel that pornography is a boon rather than a bane. Pornography for them is like a therapy, a safe sexual outlet and something that prevents people from going out and

24 Dancers Star In Hard Hitting Anti Trafficking Ad, <http://www.youtube.com/watch?v=e9YU-6WXGdQ> (last visited on 27 July, 2017).

25 *Supra* note 12 at p. 20.

26 *Id* at p. 21.

27 *supra* note 14 at p. 156.

28 *Id* at p. 155.

29 Ann Ferguson, Sex War: The Debate Between the Radical and Libertarian Feminists, available at: http://www.kmu.edu.tw/~gigs/enrollment/doc/The_Feminist_Sexuality_Debates.pdf (last visited on July 26, 2017).

30 *Id*.

committing some heinous wrong out of sheer desperation.³¹ Lastly, and most impertinently, as already mentioned above, pro-sex feminists contend that by restricting pornography one is restricting their freedom of speech and expression and that the law needs to legitimize pornography as it is only then that women who are in the pornography industry will be brought into the mainstream and will not be shunned away by society.³²

Critical Analysis

In light of the arguments put forth by both the schools of thought we can see that there are the following broad themes of arguments. One, whether pornography leads to objectification or not? Two, whether there exists a possibility of free consent and if yes, then whether consent absolves pornography from any kind of wrong? And finally three, whether the consequential harms as stated by anti-pornography feminists exist or not and if they do then whether the costs outweigh the benefits put forth by the sex-positivist feminists.

Coming to the first question of whether pornography leads to objectification or not. As mentioned earlier we see that for Kant, Dworkin and Mackinnon the premise behind 'objectification' was that it is something wrong and degrading to women. The researcher cannot accept this contention as we can see that finding objectification to be degrading is something that is highly subjective in nature.³³ The 21st Century western world as portrayed in movies, stresses on the easy going, "no strings attached" conceptions of sexual relations which even though might be exaggerated, shows that people today generally accept that kind of behavior. What might be degrading for one might not be degrading for another. Similarly, anti-pornography feminism completely dismisses the concept of right to choice of a woman. If a woman likes being objectified, likes being treated as object, given that, that is her choice, then there should not be any problem.

This brings us to the next point of debate which is the alleged existence and nonexistence of free consent. Consent as a whole is something that has not been explained properly by either side. One tends to agree with the anti-pornography feminists on this point. It is a well-documented fact that most women enter into this profession either by physical or by economic coercion.³⁴ However, there are multiple points of rebuttal to this statement. One, that physical coercion or economic coercion is not something that is unique to pornography. Many jobs such as manual scavenging in India, working as labour in a waste disposal plant, or simply working in a McDonald's after or during college is done because of economic coercion. Two, physical coercion is already governed under different laws and therefore that is not a harm that has to be considered in this debate.

However, the bigger harm such a blanket assertion causes is that now all those women who by choice go in this profession cannot do so, lest they be branded as victims or delinquents.

31 *Supra* note 12 at p. 20.

32 *Id* at p. 20.

33 *Id* at p. 20.

34 *Supra* note 7 at p. 20.

This is antithetical to the feminist cause as the end result is nothing but women being submissive to the society and women being prevented from voicing their opinions and their choice in their own life.

This does not mean that The researcher is completely oblivious of the human trafficking and the coercion that happens in the pornography industry. However, drowning out the voice of a free consenting minority for the sake of an allegedly coerced majority is not a solution to this problem. The solution to that is a better system of checks, better implementation of the law against physical coercion, better unemployment benefits to counter economic coercion.

Conclusion

So, the Anti-pornography feminists contend that a major side effect of pornography is that people start doing the same things in real life, start gagging, raping, hurting women in real life. if we are to accept this reasoning then following the same logic one should also ban movies which show murder, war and any and every other thing that is considered wrong by society. Yet we don't ban action movies, books on war, scientific study on weapons, technology, development etc. Also, we already have laws against any kind of physical abuse such as rape or harm to one's body etc. and therefore in light of this the anti-pornography contention does not stand any ground.

In conclusion, one can see that provided that we have a better system of checks and balances to prevent harms against women, pornography should not be banned and that banning pornography (the anti-pornography feminist thought) will lead to inhibiting the right of freedom of expression, right to choice which is antithetical to the feminist cause in the first place.



Answering the Awkward Question: A Case for Legitimizing and Recognizing the Practice of Lobbying in India

Tathagat Sharma* & Abhishek Srivastava**

Abstract

“Scandalization and corruption are two fundamental issues on which Indian Politics has always managed to cause an uproar. With the advent of the post-liberalization era, and arrival of the multi-national crowd, the Indian Politics and bureaucracy saw gratifications of different kind being offered for a favourable policy or law, something which it hadn't seen on such a scale. However, the presence of several socialist era laws, which saw private gains and motives as antisocial, ensured that the acceptance or even acknowledgement of favours for even the most legitimate of purpose was always brushed under the carpet, lest it cause an upheaval, more often than not, it did cause upheaval, be it the Nira Radia Tape Leaks, the Walmart expenditure on market access, or Air Asia investments on opening up of Aviation sector. What people fail to recognize is the legitimate purpose with which these steps were taken, for them to be masqueraded as instances of corruption on the ground that such steps were socially not acceptable, and sometimes stood on Wrong Moral footing. Any inquiry into the legal consideration of these act is avoided, because Lobbying as a profession is still unrecognized and unregulated in India, even though it has been existent for centuries. Its high time India start answering these awkward questions, since we aren't living in an isolated bubble, globalization has affected us for good, maybe it is time India starts acknowledging that we need to imbibe not only the Global lifestyle but the Globalized worldview alongside the jurisprudence associated with a developed economy. And do away with the conservative ideals on corruption and bribery, and start adopting principles that accommodate progressive ideas such as Lobbying”

Introduction: Addressing the Debate of Lobbying V. Corruption

“Information is the currency of Democracy”- Thomas Jefferson

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Broadly speaking ‘Lobbying’ is the act of influencing the decisions of the government or public policy through legally sanctioned methods. It is usually carried out by individuals and organizations on behalf of specific groups, or interested individuals. At times to influence legislators’ vote(s) to meet the specific interests of clientele.¹ Interestingly, the literal or etymological origin of the word ‘Lobbying’ can be attributed to the gathering of representatives in ‘lobbies’ of the senate in between the sessions, wherein they could interact with the general populace and solicit their views and advice over various policies.² A more general and encompassing definition of lobbying would include decision makers in general, which may include policy makers, politicians, international organizations, companies, as well as tribal leaders and clergies, and any other stakeholder who can advance the objectives of a target group.³ Colloquially, Lobbying is often equated with Bribery and seen as a major source of corruption within the elite circles of bureaucrats and politicians, by the layman.⁴ Even though, Lobbying, Bribery, and for that matter corruption share the same basic goal, that is to achieve favorable actions and affect government policies and/or bureaucratic decisions.⁵ Lobbying has existed in almost every system of governance since time immemorial, from courting nobles for a grant of land or requesting a tax deduction, to trading secrets with politicians for a plum posting, the broad spectrum of activities that lobbying include within its ambit makes it difficult to define, and yet more difficult to detect. However, what differentiates Lobbying from corruption, or bribery is its legal authority, a broad consensus has emerged in developed economies regarding the basic ingredients of lobbying and in turn the chief differences between its non-legal counterparts.

These chief ingredients of Lobbying include, but are not limited to the mentioned characteristics, the key to understand lobbying is its tangible nature, for what would have been considered lobbying in one jurisdiction may fall under the ambit of corruption in another, there are a lot of grey areas in between, in a jurisdiction such as India that thin line between Advocacy and Lobbying is even harder to define since both take place over a matter of one simple conversation with a legislator, or any ancillary person of interest.⁶ These broad defining characteristics include⁷:

1. Lobbying is an exceedingly ambiguous phenomenon that can take many forms, including personal meeting with bureaucrats and politicians, engaging in public protests, influencing

1 Black’s Law Dictionary 1022 (9th ed. 2009).

2 Origin of the word ‘Lobbyist’, <http://www.watermandc.com/origin-of-lobbyist.html> (last visited March 20, 2020).

3 Guidelines on Lobby and Advocacy, ICCO Utrecht (June 2010) www.icco.nl (last visited July 1, 2020).

4 Daniel Weiser, “Why Lobbying is Legal and Important in the US”, Investopedia, <https://www.investopedia.com/articles/investing/043015/why-lobbying-legal-and-important-us.asp> (last visited July 1, 2020).

5 Anthony J. Nownes, “Lobbying: The Preconditions of an anti-corruption promise”, U4 Issue, Chr. Michelsen Institute 6 (2017).

6 Editorial Note, “Formalizing Lobbying: A Necessity in a democratic setup” 10 NUJS Law Review 1 (2017).

7 “Transparency and Integrity in Lobbying” OECD (2013) <https://www.oecd.org/gov/ethics/Lobbying-Brochure.pdf> (last visited July 1, 2020).

the policy via a crowd campaign, contributing to the funds of political parties/campaigns, if it is allowed⁸ etc.

2. The target audience for lobbying activities needn't necessarily be only bureaucrats and politicians, it can include within its ambit the personal/administrative staff of politicians and bureaucrats, advisors to government, post holders of political parties not associated with governance per se, and in some cases even include judges.
3. Lobbying can be directed towards any form of government decision, or policy planning, including matters of environmental concern, educational policy, taxation questions, government spending on a particular sector, award of tenders for goods and services, and in extreme cases towards decisions of appointment to public offices.
4. Lobbying is conducted on behalf of a wide variety of clientele that can include, business firms, trade associations, professional organizations representing lawyers, doctors, teachers, public sector employees and other government employees, public spirited organizations⁹, charitable organizations, even religious institutions.
5. The extent and legitimacy of lobbying is different in different jurisdiction, however one common agreement is over their existence in all the countries, whether explicit or implicit, regulated or unregulated.

As can be seen by the very nature of lobbying and its multiple definitions, it becomes very stiff to differentiate between Lobbying and Corruption, since both share the same goal, both employ the same tactics, and more importantly both are directed towards a common target audience. A simpler outlook would suggest that both lobbying and corruption entails providing resources to policy makers to influence their decisions, the differentiating factor being the nature of those resources, for lobbying these resources are not targeted towards providing a direct gain to the representative, whereas in case of corruption those resources are specifically targeted towards providing personal gains to the representatives.¹⁰ Therefore, providing advice on a legislation, depositing resources into a party corpus (or party fund), or contributing towards the campaign of a candidate in exchange of a donation receipt, even trading information except for trade secrets, would fall within the ambit of Lobbying, whereas paying a politician or bureaucrat towards their personal capital for personal gains would amount to corruption, as the same involves a 'breach of trust' on behalf of the electorates in case of a politician, and a 'breach of contract' towards the contract of employment in case of a bureaucrat.¹¹

8 For example, in India, the Concept of Electoral Bonds is quite novel in its approach towards contributions to political parties. Preceding the concept of Electoral Bonds, contributions to election campaigns, and party funds by individuals and organization was excluded from the ambit of RTI Act, making it one of the most feasible and legal method towards influencing the decision of policymakers.

9 Organizations acting on behalf of public or citizens at large in the general interest of people or a particular community, for example, for Ganga rejuvenation, Tehri Dam Relocation, Sardar Sarovar Protests, for rehabilitation of refugees etc.

10 Francesco Giovannoni, "Lobbying versus Corruption" 12 CESifo DICE Report (2011).

11 The Federal Regulation of Lobbying Act, 1946 (USA).

Understand it this way: Mr. A is the HOD (Head of Department) of Commerce at a prestigious college. Mr. B is one of the many acquaintances of Mr. A via his wife, since both Ms. A and Ms. B are part of a common social circle. Mr. B wants to get his daughter admitted to the Commerce degree program at Mr. A's college. However, the merit usually goes high and the daughter hasn't been able to attain the percentage cutoff. Mr. B knows of this, and also holds the knowledge that the College follows a 5% management quota based on the recommendation of the concerned departments' HODs. As usually happens, Mr. B and his wife start dropping by Mr. A's home for casual chit-chats on weekends, occasionally enquire about their health, sharing the usual Sweetmeat on Festivals, inviting them to their house for birthday parties, and other ancillary events. As the admission season approaches, Mr. B over one of these many chit-chat sessions, drops a hint to Mr. A and Ms. A regarding his daughter and her admission, and casually asks Mr. A if he would be able to do anything about it, and Mr. A being the close acquaintance of Mr. B, as he now has become accepts the idea, and assures him not to worry. Consequently, the daughter is admitted to the desired program. This right there was the simplest form of Lobbying that many of us have encountered in some form. The method is harmless, and perfectly legal.

The same methods when adopted at considerable level yield bigger results. For instance: Ms. C works for an Environment advocacy firm, usually rubbing shoulders with the who's who of Delhi, Ms. C has advised the Ministry of Environment on multiple issues in the past. A highway is proposed between Delhi- Jodhpur, after due feasibility assessment the reports indicate that the highway might affect a major Wetland in the area, the wetland is the means of livelihood of thousands of people in its vicinity, they approach Ms. C's firm, Ms. C owing to her contacts in the Ministry of Environment is able to get a one on one conversation with the concerned Incharge of the highway project, wherein she is able to persuade him to divert the project through a different land route, albeit with a subtle hint of a mass protest in case such a diversion doesn't happen. The Incharge is happy to agree with her, saving himself from unnecessary trouble. This is an example of Lobbying in the higher corridors of power. This would get ugly in case direct monetary considerations are involved or favors are traded, making it seem like a quid pro quo kind of deal, which would essentially make it bribery.¹²

Having said that, the chief objective and emphasis of any legislation or policy with regard to lobbying should be/is to define the constituent elements of lobbying, and to identify the characteristics of a lobbyist. The first objective is quite generic and shares a common purpose across jurisdictions, and has adequately been explained. Towards the second constituent, of who a lobbyist is, the answer is marred with ambiguity and is the key to the success of any legislation aiming for the legitimization of lobbying. While a lot of countries like the US, Canada, Poland, Lithuania, Australia identify 'lobbyists' as professionals being paid by a client¹³. On the

12 JK Jain, "Lobbying in India: The Good, the Bad and the Ugly" Karvyonline Stock Broking, <https://www.karvyonline.com/blogs/equity/lobbying-in-india—the-good-bad-and-the-ugly> (last visited July 1, 2020).

13 *Supra* note 11, Defines 'Lobbyists' as persons who receive or solicit contributions to influence policies and/or legislations via direct communication with the Policymakers/Legislators.

other hand, Taiwan doesn't have the 'professional service' requirement and includes within its definition anyone lobbying to influence any policy or legislation, be it on behalf of a client (i.e. on a paid duty) or on their own behalf.¹⁴ This essentially means that a person lobbying for a community without any consideration involved, or groups that lobby without the aid/services of a professional lobbyist would be excluded from the ambit or jurisdiction of Lobbying laws in countries like US, Australia etc. this exempts them from any liability arising out of their acts, be it punitive as well as taxation.

Most countries which have legitimized the practice of lobbying, have setup authorities for the registration of Lobbyists and Lobbying organizations/firms, similar to the Medical Profession, and the profession of Advocacy. These authorities are charged with framing a model code for the conduct of lobbying activities. Anyone found in violation of this code may face varying degree of measures against themselves, including revocation of licenses at best¹⁵, and prison sentences at worst¹⁶. The firms and individual lobbyists in turn are required to disclose certain amount of information about their clientele, and their methods of lobbying.

Need To Regulate: A General Viewpoint of Regulation

The practice of lobbying is important in the contemporary perspective as it works as a tool for the average citizens to voice their opinions, wants, and thus help in the process of policy making. Lobbying provides the means to represent the different interest groups of the people. Therefore, it is called an inherent part of participatory democracy. But just like any other practice, lobbying is also not free from prejudice. The practice has resulted into a number of scandals and as a result the term "Lobbying" is often viewed in a negative light. In fact, in the United Kingdom, lobbying practices have been referred to as public relations or political consultancy.

Therefore, regulating the practice of lobbying becomes an important task of the government. Without proper rules and regulations on lobbying, the practice, which aims to serve the interests of the common citizens, can be misused by the corporations and organizations into fulfilling their wants and needs. Almost all the countries, with certain practice of lobbying, have enacted laws to legitimize and regulate the practice. United States of America enacted the Lobbying Disclosure Act in 1995, United Kingdom enacted the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act in 2009 and Australia enacted the Lobbying Code of Conduct in 2009 to regulate the practice in their specific states.

These regulations do not stand as obstacles before the people to exercise their right nor do they aim to harass the people who try to misuse it. They just tend to address the concerns of the democratic institutions. These regulations should follow five rules¹⁷:

14 Kaushiki Sanya & Harsimran Kalra, "A Case for Democratizing Lobbying in India" Oxford Indian Policy Blog (2013) <https://policyblog.oxfordindiasociety.org.uk/2013/05/28/a-case-for-democratising-lobbying-in-india/> (last visited July 11, 2020).

15 Examples being Australia and Slovenia, in Lithuania on repeated offenses.

16 Examples being USA and Canada.

17 Vincent R. Johnson, "Regulating Lobbyists: Law, Ethics and Public Policy" Cornell J.L. Pub. Pol'y, 13 (2006).

- **All people have fair opportunity to be heard by the government:** This rule aims at maintaining a level-playing field for all the citizens irrespective of any factor. The regulations applied on the practice should be such that they do not favour any particular individual or corporation. Lobbying is a paid activity; therefore, the regulations must be such that they do not favour the side which pumps in more money into lobbying to support its cause. Therefore, in most of the states the lobbyist is required to be registered with the government and a register is maintained.
- **Government enjoys people's support:** This rule implies the government to impose such regulations which won people's confidence and support. While deciding the regulations, the government must ensure that they are fair not only in operation but also in appearance.¹⁸ The regulations must be such that they should restrict practices that create an appearance of impropriety, such as business transactions between legislators and lobbyists, the presence of lobbyists on the floor of the House or Senate, or service by a lobbyist as the treasurer for a legislator's re-election campaign.¹⁹
- **Decisions based on reliable information:** This rule implores the government to base their decisions on sound and accurate information. Lobbying involves the representation of several interest groups. Some of these groups have a complex idea and without proper information the government may take futile actions. As a lot of government decisions depend upon lobbying therefore, regulations for accurate dissemination of information must be made. Thus, disclosure agreements became a boon for the officials who can scrutinize the petitioners with its help.
- **People should be aware about the ways in which government functions:** The objective of this rule is that accurate information is made public to the people. So that the people can know and understand the ways in which policy is made by the government. By making information public, the government can check corruption practices of the officials and also see that no unfair dealing takes place between the officials and the lobbyists. This rule aims at providing supervision on the officials, with the information made public it can deter and check foul lobbying practices.
- **Public business improves with community support:** The objective of this rule is that, the regulation should not impede lobbyists and their clients from contributing to the effective resolution of public issues.²⁰ Because the American public is often reluctant to provide funding for the staffing and expertise needed by legislative bodies, administrative agencies, and other organs of government,²¹ official decision makers frequently operate with minimal support. Indeed, "congressional staffs rarely have the resources to gather their own data

18 Lobbying Disclosure Act of 1995, 2 U.S.C.A. § 1601(3).

19 *Supra.* note 17 at 15.

20 *Supra.* note 17 at 16.

21 Vincent R. Johnson, "Liberating Progress and the Free Market from the Specter of Tort Liability" 83 Nw. U.L. Rev. 1026 (1989).

and examples.”²² Lobbyists who provide clear arguments and accurate information to public servants can play an important role in closing the gap between needs and resources.²³ Consequently, the rules governing lobbyists should not impede those practices that assist the government in doing its work.²⁴

Regulations and transparency in lobbying is not always a good thing, but without these lobbying can be grossly misused by individuals, corporations and organizations to fulfil their own needs. Therefore, to have an efficient system of lobbying certain rules and regulations ought to be implied on this practice. But the regulations should not be too strict and stringent that they discourage the citizens from advocating their interests before the government, and therefore, the five rules are followed for formulating the regulations which gives enough space for efficient practicing of lobbying without being misused.

Analysing Best Practices of Lobbying From Around the World

Lobbying is often considered as a form of legal bribery or extortion by a number of critics.²⁵ But, the practice of lobbying is widely performed in a number of developed states and alleged superpowers. In fact, lobbying has been given legality in several states, by incorporating the practice in their constitutions. In some of the states, where lobbying has been accepted as a legal practice, it has emerged as an industry and as a viable career option. As a result, the no of lobbyists in Washington is considered to be little over 12,000.²⁶ Analyst James A. Thurber estimated the actual number of working lobbyists close to 100,000 and that the Industry brings in \$9 billion annually.²⁷

Some of places where lobbying is practiced legally are:

United States of America: Lobbying in U.S.A is considered to be the practice by which an individual or an organisation can influence the policy makers of the country, advocating the need of a specific legislature in certain specific public interest cause. This can mean, any act done to influence a political position and is often taken in a loose sense. Therefore, a person writing a letter to a government official, advising on a matter which requires political action can also be considered as an act of lobbying. However, lobbying is generally considered to be a paid activity in which the work of a lobbyist is mainly to represent his client's specific interest and influence the policy makers in either supporting or opposing a legislature with regards to that interest.

22 CQ Press(ed.), Congressional Quarterly's Guide to Congress 697-698 (CQ Press, Washington D.C, 5th ed, 2000).

23 David Epstein & Sharyn O'Halloran, "A Theory of Strategic Oversight: Congress, Lobbyists and the Bureaucracy" J.L. Econ & Org. 227, 227(1995).

24 *Supra.* note 17 at 17.

25 Mike Masnick, "Is Lobbying Closer to Bribery...or Extortion?"Techdirt (Apr. 10th,2012, 7:07 AM) <https://www.techdirt.com/articles/20120406/18051618415/is-lobbying-closer-to-bribery-extortion.shtml> (last visited May 21, 2020).

26 Brad Plumer, "Corporate Lobbying is a very exclusive club" The Washington Post (Nov. 8th, 2011) https://www.washingtonpost.com/blogs/ezra-klein/post/corporate-lobbying-is-a-very-exclusive-club/2011/11/08/gIQAPLln0M_blog.html (last visited June 10, 2020).

27 Lee Fang, "Where Have All The Lobbyists Gone?" The Nation (Feb. 19th, 2014) <https://www.thenation.com/article/archive/shadow-lobbying-complex/> (last visited June 10, 2020).

Lobbying as a right in the U.S.A has been protected by the 1st amendment, 1791 of the constitution. The amendment deals with the freedom of speech, and lobbying as right is protected under it. Though lobbying is not specifically mentioned in the constitution. Nevertheless, the right “to petition the government for a redress of grievances” can be understood in modern times as indirect translation to lobbying. Moreover, the Lobbying Disclosure Act of 1955 has, as a rule of law, given legality to political lobbying. The act sets out to define a lobbyist and his works along with the different rules and regulations which he has to abide by. One of the major features of this act is the registration of lobbyists with the government. With this act, U.S.A acknowledged the practice of lobbying and gave it a public acceptance.

By publicly registering lobbying, it acts to check the undue influences in policy making. It also ensures active participation of the people in the policy making and other administrative activities. Thus, lobbying helps in the participation of people in policy making and becomes an inherent part of participatory democracy.

United Kingdom: Lobbying in U.K as defined by the now-defunct U.K Public Affairs Council is, in a professional capacity, attempting to influence, or advising those who wish to influence, the UK Government, Parliament, the devolved legislatures or administrations, regional or local government or other public bodies on any matter within their competence.²⁸ The practice of lobbying is similar to what practiced in the U.S.A, where lobbyists influence the government policies through advocacy in favour of certain specific interest groups. However, the term lobbying is not used as frequently in UK as in US, the terms “public affairs”, “public relations”, “political consultancy” and “corporate affairs” are generally used, due to the negative publicity of “lobbying” after the famous cash-for-questions affair scandal of 1990.

The measures of granting a legal status to lobbying in UK started in 2009, when the House of Commons Public Administration Select Committee published its report, “Lobbying: access and influence in Whitehall”. The report suggested the parliament that, lobbying was a legitimate and important part of policy making in the democratic process and it has been followed throughout the history of UK. The committee wanted a stature to be enacted in order to register lobbying activities to bring great transparency to the dealings between Whitehall decision makers and outside interests.²⁹ However, the appeal was rejected by the parliament and it was only after the Transparency International UK published its report on the practice of corruption was prevalent in several political institutions that the parliament considered the proposal for a registered activity of lobbying in the country.

With this effect, the parliament enacted the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act to register consultant lobbyists. Section 1 of

28 LOBBYING (Aug. 26th, 2012) https://www.cipr.co.uk/CIPR/Our_work/Policy/Lobbying.aspx?WebsiteKey=0379ffac-bc76-433c-9a94-56a04331bf64 (last visited June 10, 2020).

29 "PASC calls for a register of lobbying activity" Internet archive Wayback machine (Jan. 5th, 2009) https://web.archive.org/web/20090202090306/http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/pasc0809pn6.cfm (last visited June 10, 2020).

the Act made it compulsory for the lobbyists to register with the government and prohibited those who did not compile. The other sections of the act gave steps to prepare the register of the lobbyists.

Australia: The Australian Policy Handbook begins by noting that public policy is made by not by politicians and public servants alone, but also by ‘the tens of thousands of women and men who petition parliaments and ministers, who join interest groups, comment through the media or represent unions, corporations and community movements.’³⁰

The practice of commercial lobbying is practiced extensively in Australia i.e, paid lobbyists influencing the political officials into advocating a legislature corresponding to their cause of the specific interest groups.

Registration of lobbyists and its regulation had been a major concern for the Australian government. The scheme to regulate lobbying was first devised in 1983 when the Labour administration instituted an executive order establishing a lobbying registration scheme.³¹ However, in 1996 on account of the scheme being ineffective it was rescinded.

With increasing instances of corruption scandals in 2000s, the need for registered and regulated lobbying practises was needed.³² As a result the Contact with Lobbyists Code was enacted to register the lobbyists and subsequently in 2009 Lobbying Code of Conduct was released. With these two enactments, it was aimed to ensure that the lobbyists were registered publically and that they work in adherence to high standards of probity and transparency.

European Union: Lobbying in EU is often officially referred to as European Interest Representation. Lobbying, as defined by the European Commission in 2007, is all the activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions.³³ Lobbying as practiced in EU is different from that practised at a national level in the countries like US, UK or Australia. Interest representatives involved in EU are transnational and they directly affect the work of EU institutes, whereas, the national interest representative is generally confined within the respective state and influence the policy making process of the state.

Alman Matten in 1989, took the first step towards specialized regulation of Lobbying in European Union. But the major measures were taken by the Treaty of Lisbon in 2009, which provided a legal framework for interest representations in the EU. Article 11 of the Treaty of European Union, held that interest representations are prescribed by law and thus binding on the EU institutions. Article 11 of TEU held that:

30 Ian Ward, “Lobbying as a public affair. PR and Politics in Australia” ANZCA09. 1039, 1040 (Jul. 2009).

31 Daren Halpin & John Warhust, “Commercial Lobbying in Australia: Exploring the Australian Lobby Register” AJPA, 2 (2015).

32 *Id.* at 31

33 Green Paper: European Transparency Initiative (May. 3rd, 2006) https://europa.eu/documents/comm/green_papers/pdf/com2006_194_en.pdf (last visited May 21, 2020).

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.³⁴

The following provisions of the TEU gave legal sanctity to the practice of lobbying in EU and advocated the participation of its member-citizens in policy making and legislative process of the EU.

A Balanced Presentation of Merits and Demerits

The debate on the practice of lobbying has been long drawn through the course of history. The practice which is now legal in a number of countries is still considered as a political bribery in others. As any complex system has a list of pros and cons, similarly, lobbying also has some advantages and disadvantages to it.

Demerits

1. **Controversial Image:** One of the major factors in the negative publicity of lobbying practice is the various political scandals which are associated with it. The image of lobbyists has been painted in negative colour over the years and they have been described as a “hired gun” without principles and positions.³⁵ As most of the work in lobbying is not done in public and is usually discreet and private, done “behind the doors”, a number of instances of corruption and foul play has been seen such as: Abramoff's³⁶; dubious father-son exchange-of-favors ties³⁷; and the case of Newt Gingrich.³⁸

34 Consolidated Version of The Treaty of European Union (May 9th, 2008). <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF> (last visited March 15, 2020).

35 "The Ethics of Lobbying: Organized Interest, Political Power, and the Common Good" 1 (Woodstock Theological Centre, 2002).

36 Ronald J. Herbenar & Bryson B. Morgan, "Lobbying in America" XV (2009).

37 John Sullivan, Fredric N. Tulskey & Kristen McQueary, "Public Officials found helping Clients of Family" The New York Times (Jan. 7th, 2012) <https://www.nytimes.com/2012/01/08/us/illinois-public-officials-aid-lobbying-clients-of-family.html?partner=rss&emc=rss> (last visited May 25, 2020).

38 Nia-Mallika Henderson, "Newt Gingrich insists he did 'no lobbying of any kind' while working for Freddie Mac" The Washington Post (Dec. 15th, 2011) https://www.washingtonpost.com/blogs/election-2012/post/newt-gingrich-insists-he-did-no-lobbying-of-any-kind-while-working-for-freddie-mac/2011/12/15/gIQArow3wO_blog.html (last visited May 21, 2020).

2. **Easy way to stall all Legislative Bills:** Lobbyists, with their techniques and methods can create a temporary stall in the legislative process. By lobbying for a mirror issue and getting it overhyped in the public which results in an enormous support from the people, they can influence the policy makers in leaving behind the important matters and getting involved in the minor issue. The lobbyists can be drawn into battles, the legislatures to determine issues such as the composition over school lunches³⁹ or how much an ATM fee should be⁴⁰, more serious issues such as deficit reduction or global warming or social security are neglected.⁴¹ It leads to legislative inertia.⁴²
3. **Corporation over individual:** Lobbying is basically a paid activity of influencing the policy makers in favour of a specific interest group. Therefore, in battles between the corporations and individual, money becomes an important factor. Corporations can easily influence the policy makers by spending enormous amounts of money. Therefore, lobbying sometimes tends to support the corporations and organizations than the individual. In this instance of example of US is particularly important, A group supported by the United States Department of Agriculture proposed healthier lunches as a way to combat childhood obesity by limiting the number of potatoes served, limiting salty foods, and adding more fresh vegetables, but this group was countered by a strong food lobby backed by Coca-Cola, Del Monte, and makers of frozen pizza.⁴³ The food lobbyists succeeded in blocking the proposed reforms, even writing rules suggesting that the tomato paste on a pizza qualified as a vegetable.⁴⁴ From this instance it can be made clear that lobbying suits to corporations more than individuals as in this case, business affair won over health affair due to lobbying.
4. **Interferes in Government works:** With annual revenue of \$9 billion, lobbying is an industry and as this industry goes on expanding with huge amount of money being used in lobbying activities, there can be significant interference and undue influence in government works. There can be instances where even if there is community highly critical legislation being passed, if the lobbyists are for that legislation, the government may act on their behalf instead of looking out for the best interests of society.⁴⁵ The National Rifle Association is an excellent example of this disadvantage. Although majority of people in the US want some type of meaningful gun control legislation to come out of Congress, the impact of the

39 KJ Dell'Antonia, "Lobbying Against the Too-Healthy School Lunch" Slate (Nov. 3rd, 2011, 4:45 PM) <https://slate.com/human-interest/2011/11/congress-wants-the-agriculture-department-to-rethink-its-healthy-school-lunch-proposal-it-s-just-too-good.html> (last visited May 21, 2020).

40 Tamara Keith, "Bankers, Retailers in Lobbying Race Over Debit Fees" npr (May 10th, 2011, 12:01 AM) <https://www.npr.org/2011/05/10/136147726/banks-retailers-in-lobbying-race-over-debit-fees> (last visited June 20, 2020).

41 Paul Harris, "America is better than this: paralysis at the top leaves voters desperate for change" The Guardian (Nov. 20th, 2011, 12:18 AM) <https://www.theguardian.com/world/2011/nov/20/paralysis-in-us-politics-extremism> (last visited June 11, 2020).

42 Tom Ashbrook, "Lawrence Lessig on Money, Corruption and Politics" wbur (Jan. 2nd, 2012) <https://www.wbur.org/onpoint/2012/01/02/lawrence-lessig-on-money-corruption-and-politics> (last visited June 20, 2020).

43 *Supra.* note 39

44 *Supra.* note 41

45 *Infra* note 46

NRA⁴⁶ on American policy through the ILA is profound. They spend millions each year to counter the arguments through their lobbying efforts as a way to maintain the status quo.⁴⁷

Merits

1. Interest group creates community: Lobbying activity creates a community of like-minded people. It connects people so that their voices can reach the policy makers. Lobbying takes the quote, “United we stand, divided we fall” quite seriously, as it tends to form a coalition of people having same nuances and enables them to influence the policy makers in favour of their interests. It ensures that all the individuals are represented by means of their special interests.⁴⁸
2. Checks Extremism: Lobbying adds “built-in delays” and permits and encourages opposing lobbies to battle.⁴⁹ In the battling, possibly damaging decrees and incorrect decisions are stymied by seemingly unhelpful delays and waits.⁵⁰ Interest groups involved in the process of lobbying acts as a check and balance of the government for the average citizens. It tends to ensure that the government doesn’t misuse its power and acts as a reminder to them to act on certain important events. It checks that the government doesn’t neglect the needs and interests of the minority with respect to their commitments in the worldly affairs.
3. Educates government: Lobbyists can educate the policy makers on the topics which need immediate action but are not well known. Lobbyists can gain huge amount of knowledge in a particular topic and can help the policy makers in understanding the complex issues. They can provide their assistance by helping the makers in drafting or implementing the policies with regards to that issue. With the knowledge that they possess, they can help Congress oversee numerous federal agencies which often regulate complex industries and issue highly detailed and specific rulings.⁵¹ Accordingly, it is difficult for Congress to keep track of what these agencies do.⁵² It has been argued that lobbyists can help Congress monitor this activity by possibly raising “red flags” about proposed administrative rulings.⁵³
4. Enables people participation in policy making: Lobbying advocates people’s interest by influencing the policy makers. Therefore, it enables people participation in policy making. By means of lobbying, people become aware of the policies proposed in the parliament and passed by the parliament. It also acts as a tool for people to voice their wants. Thus, Lobbying is said to be an inherent part of participatory democracy.

46 Natalie Regoli, “Huge Advantages and Disadvantages of Interest Groups” ConnectUs (Mar. 18th, 2019) <https://connectusfund.org/16-huge-advantages-and-disadvantages-of-interest-groups> (last visited June 20, 2020).

47 *Id.* at 46

48 Donald E. Dekiffer, *The Citizen’s Guide to Lobbying in Congress* 46 (Chicago Review Press, Chicago, 2007).

49 *Id.* at 48

50 *Id.* at 49

51 David Epstein & Sharyn O’Halloran, “A Theory of Strategic Oversight: Congress, Lobbyists and the Bureacracy” *J.L. Econ & Org.* 227, 227-255 (1995).

52 *Id.* at 51

53 *Id.* at 52

Need of Lobbying in India- Striking A Balance Between Moral, Practical and Legal Considerations

“Lobbying has become a term of reproach, as if it were improper to push a particular belief. This has happened because of paid lobbyists whose opinions are for hire and the fear that decision makers, whether politicians or officials, are susceptible to their charms and wiles. This has tarred entirely proper lobbying with the same brush”- Jacob Ress Mogg.

While we talk about the need of lobbying in India, it is imperative to mention that under this header a discussion on the need of a lobbying ‘legislation’ would be undertaken and not the general profession of lobbying which has its share of proponents across the political spectrum, both in favour and against. And more importantly because Lobbying as a profession has been existent and accepted across the political circles of India for as long as law making has existed on the subcontinent. However, none has ever bothered to formalize or regulate the profession in a way other profession are dealt with. The reason can be attributed to a lack of political will, and the taboo of ‘selective policy making’ being associated with lobbying by the general populace, to put it mildly ‘Politicians across party lines are willing to accept the advantages that lobbying offers, in terms of information, expertise, or exchange of other kinds, however, what they are unwilling to accept is the fact that they accept lobbying’.

As on the day, Lobbying is neither legal nor illegal in India, even though technically the legal considerations are decided based upon the definition of Lobbying in a domestic jurisdiction. In India, a lack of such legislation forces lobbying to exist in a grey area between Advocacy, Activism and Manipulation.⁵⁴

One of the most concrete effort to formalize the Lobbying Sector in India was undertaken by BJD Member of Parliament from Orissa, Mr. K.N. Singh Deowhen he introduced ‘The Disclosure of Lobbying Activities Bill, 2013’ as a Private Member Bill, even though the bill lapsed during the 2013 session, and was reintroduced during 2015, the ‘Lobbying Bill’ hasn’t been ‘lobbied for’ properly and consequently hasn’t garnered a Lobby in its support, evident by a lack of discussion or debate on the topic in the Parliament.

A country as big and diverse as India, with so many inherent interests in every single policy and decision of the government is bound to fall back upon a system of informed citizens and subject experts whose word is taken on its face value, these ‘Subject experts’ are already an existing network of informal lobbying sector which impacts the decision of the government. On the compass of morality many consider this immoral, giving an undue advantage to one section over the other, however, something that is immoral needn’t be illegal as well.

Legalizing and regulating the practice of lobbying will, for once, lift the veil of secrecy that the entire industry operates under.⁵⁵ As has been showcased by western models, money is, anyway

54 Sudipto Dey & Nivedita Mookerji, “Air Asia Case: Lobbying continues to exist in a Grey Zone” Business Standard (Jun. 10th, 2018).

55 Debabrata Das, “Lobbying: Legalise it, my lords” Fortune India (Jun. 2nd, 2018) <https://www.fortuneindia.com/opinion/lobbying-legalise-it-my-lords/102079> (last visited June 16, 2020).

spent by companies on lobbying activities, the recent cases of Air Asia using lobbyists to influence the Aviation regulations in India via lobbyists⁵⁶, Walmart spending close to Rs. 135 Crores for lobbying related to ‘enhanced market access’ for investment in India⁵⁷ and the infamous case of Nira Radia tapes⁵⁸ are some of the few instances that came to light, while a major number goes unnoticed. Lobbying is one of the most common allegation across the Charge Sheets and FIRs filed by Central Bureau of Investigation and other agencies in cases of corporate offense.⁵⁹ CBI has gone so far as to issue a list of ‘Undesirable Contract Men’ (hereinafter as UCM), a secret list of people operating within the corridors of Ministries in Delhi including Defense, Power, Home, Telecom, Coal, Finance, Shipping etc. These UCMs are the ‘persona non grata’ for power corridors of Delhi, wherein any communication or interaction with these people can put policymakers in trouble, as on date the list remains confidential even after repeated attempts in the Parliament to make it Public.⁶⁰

Multiple experts have agreed that a regulatory authority for Lobbying in India would be the best bet towards curbing corruption and political scandalization of business deals, providing the requisite credentials to Lobbyists. It would be beneficial for the lobbyists as well as for ‘the flow of information’ in a democracy, wherein transparency would be introduced for the people to examine the cause- effect relationship that Lobbyists share with a legislation or policy. This way, the lobbyists would be required to disclose their clientele, the expanses incurred and fees received. As a verification requirement, even the ministries, departments, government institutes/firms can also be required to release a yearly report on the contacts they might have had with any lobbyist.

Transparency International has gone on to suggest a Code of Conduct for Lobbyists and Government officials, clearly chalking: what is allowed and what isn’t. In a country like India where a lack of law in this respect hasn’t been able to curb the influencing practices, but nonetheless pushed the officials and lobbyists alike to use the ambiguities in the existing laws, such a code would invariably define things and thus force the actors to act within the confines of law.⁶¹ This way the stigmatization of corruption with any Lobbying activity can also be dissociated, considering the low level of education that India suffers from, it is not unsurprising that majority of populace isn’t aware of what their politicians’ stand on with regard to specific policies, and whenever the media outlets ‘scandalize’ any influencing activity it is termed as bribery or corruption, let’s not divulge into the question of selective reporting, without understanding the legal considerations and whether the requisites of corruption have been fulfilled, a decision or policy is termed as a ‘scam’, India has had multiple experiences in this respect. To curb these two, often

56 Sudipto Dey & Nivedita Mookerji, *Supra* note 54.

57 *Supra* note 12; Walmart had disclosed the expanses as per the Lobbying Disclosure Act, 1995 in the US, the amount was paid in to American Lobbying Firms, however since the expanses were meant to lobby in the Indian Market, it can reasonably be concluded that the amount was invariably spent in the Indian Market.

58 BS Arun, “Radia Tapes: Scandal in the media” The Deccan Herald Nov. 27th, 2010 <https://www.deccanherald.com/content/116306/radia-tapes-scandal-media.html> (last visited March 21, 2020).

59 *Supra* note 54.

60 *Id.* at 59

61 *Supra* note 5

self-destructive phenomenon, regulating lobbying is an effective solution. This would enable ‘We, the people of India’ to check the veracity of political actions taken by our representatives, by looking at what they are being lobbied for, what they are accepting, and who is lobbying them. Further this would avoid the unnecessary efforts that Investigating agencies have to put for collection of facts and evidences, since regulation would automatically make these available in public domain.

One of the most concrete effort to formalize the Lobbying Sector in India was undertaken by BJD Member of Parliament from Orissa, Mr. K.N. Singh Deo when he introduced ‘The Disclosure of Lobbying Activities Bill, 2013’ as a Private Member Bill, even though the bill lapsed during the 2013 session, and was reintroduced during 2015, the ‘Lobbying Bill’ hasn’t been ‘lobbied for’ properly and consequently hasn’t garnered a Lobby in its support, evident by a lack of discussion or debate on the topic in the Parliament.

The Disclosure of Lobbying Activities Bill, 2013⁶² wasn’t an ideal legislation, in fact it was in direct conflict with some of the established laws, thereby creating a pool of confusing definitions and ideologies. The very definition of lobbying activities was too radical to consider, it defined lobbying as, ‘an act of communication with payment to a public servant with the aim of influencing government decisions with regard to its policy⁶³, a bill or amendment⁶⁴, award of grants⁶⁵, decision of public servant with respect to transfer of assets⁶⁶, and nomination or promotion to public offices⁶⁷. The definition of ‘payment’⁶⁸ was wide enough to include any kind of gratification, even the minutest, which would otherwise have passed as simple acts of compassion or camaraderie including something as simple as cost of meals, this definition made payment a double edged sword because, the intentional element is missing, and the public servant may not even realize that he is receiving payment in exchange for something. Wherein the definition of public servant

62 The Disclosure of Lobbying Activities Bill, Bill no. 208 of 2015 (India).

63 The Disclosure of Lobbying Activities Bill(2015)(India): Sec 2 (f) (ii): formulation, modification, implementation or termination of any Government policy or programme.

64 The Disclosure of Lobbying Activities Bill(2015) (India): Sec. 2 (f) (i): introduction, passing or defeat of a Bill or any amendment thereto in either House of Parliament or legislature of a State.

65 The Disclosure of Lobbying Activities Bill(2015) (India): Sec. 2 (f) (iii): awarding of a grant, loan, licence, contract, permit or allocation of funds to an individual or an organisation.

66 The Disclosure of Lobbying Activities Bill(2015) (India): Sec. 2 (f) (iv): decision of a public servant to transfer an asset, business or institution that currently produces goods and services for the public, to a private person or to a privately-owned organisation.

67 The Disclosure of Lobbying Activities Bill(2015) (India): Sec. 2 (f) (v): nomination or promotion of any person for a position in public office; but does not include a communication that is—

- a.) made by a person or a media organisation with the aim of disseminating news or providing information to the public.
- b.) made in a speech, article, editorial or any other publication or through radio, television or any medium of communication that is accessible by or available to the public;
- c.) testimony given before a committee constituted by the Government.
- d.) made in response to a request for tender.
- e.) made in response to a published Government notice or circular, soliciting communication from the public on matters connected with Government legislation, policies and programmes.

68 The Disclosure of Lobbying Activities Bill (2015) (India): Sec. 2 (h): “Payment” means contributions made in cash or kind and includes cost of meals, retreat, vacation, meeting, conference, travel or support for election campaign and offering gifts in the course of lobbying activity.

was to be the same as provided under Prevention of Corruption Act, 1988.⁶⁹ In essence, this bill argued for the regulation of such activities which include providing payment to public servants, thus legitimizing them, which would have been disastrous, in a way would have legalized bribery in India. Surprisingly, what the bill failed to address was the concern that such activities, which the bill was directed towards were already prohibited under the Prevention of Corruption (Amendment) Act, 2015 as well as Prevention of Corruption Act, 1988⁷⁰, the bill was silent over the questions of specific exemptions or any overriding power.

Section 7 read with Section 8, Section 9, Section 10, and Section 11 of POC Act, 1988 explicitly prohibits a government servant from: a.) accepting any gratification (other than legally paid remuneration) for conduct of his official duties⁷¹, b.) any person from taking any gratification by corrupt or illegal means to influence a public servant⁷² including favour or disfavour to any person, c.) anyone from taking gratification for exerting personal influence with a public servant⁷³, d.) abetment of offenses under Section 8 and 9⁷⁴, and e.) from accepting any valuable thing without consideration in relation to any proceeding or transaction that the public servant is an interested party to, prohibition is extended even if the thing is accepted on behalf of someone

69 The Disclosure of Lobbying Activities Bill(2015) (India): Sec. 2 (i): “Public Servant” shall have the same meaning as assigned to it in the Prevention of Corruption Act, 1988.

70 Hereinafter as POC Act.

71 Prevention of Corruption Act(1988) (India),Sec. 7: Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than 1[three years] but which may extend to 2[seven years] and shall also be liable to fine.

72 Prevention of Corruption Act(1988) (India), Sec. 8: Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than 1[three years] but which may extend to 2[seven years] and shall also be liable to fine.

73 Prevention of Corruption Act(1988) (India), Sec. 9: Whoever accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant whether named or otherwise to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than 1[three years] but which may extend to 2[seven years] and shall also be liable to fine.

74 Prevention of Corruption Act(1988) (India), Sec. 10: Whoever, being a public servant, in respect of whom either of the offences defined in section 8 or section 9 is committed, abets the offence, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

else⁷⁵, consequently punishments ranging from Six Months to Seven years have been prescribed in relation to the aforementioned offenses. Further to consolidate the law, the Foreign Contribution (Regulation) Act was enacted in the year 2010, the primary aim was to limit foreign contributions in all their forms, not only within the bureaucracy but within political spheres as well. Sec. 3 of the act specifically prohibits contributions to: electoral candidates, people associated with newspapers, judges, government servants, MLAs (MLCs wherever applicable), MPs, political parties and their office bearers, organizations holding political nature, companies engaged in TV and Radio broadcasting, and organization broadcasting through electronic mode.⁷⁶

The aforementioned provisions make it extremely difficult to legislate a law on lobbying in India, they explicitly deny the flow of foreign capital in the country, which is the primary means by which foreign corporations seek to lobby in India, even if the Lobbying fee is paid outside India, as had happened in the case of Walmart, the inducement of a contract to influence public servants is illegal under the POC Act, 1988, both of these combined make it a rigid combination, and the language is as clear, thus making it difficult to draw multiple interpretations. Any law seeking to legitimize lobbying in India has to strike a balance with these laws, and that can only happen if these laws are amended accordingly or the 'Lobbying Law' has an overriding power over these legislations.

Presenting Model form of Lobbying (If Ever) To be Implemented in India

Globally, Lobbying has had a slow pace of adaptation with only five countries having adapted the regulation of Lobbying between 1940s to 2000s. However, since the advent of the 21st century a number of countries, having realized the importance of regulation as against non-recognition, have progressively adopted such laws as to cater to the needs of this particular

75 Prevention of Corruption Act(1988) (India), Sec. 11: Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

76 The Foreign Contribution (Regulation) Act (2010) (India), Sec. 3(1): No foreign contribution shall be accepted by any-

- a.) candidate for election;
- b.) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- c.) Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government;
- d.) member of any Legislature;
- e.) political party or office-bearer thereof;
- f.) organization of a political nature as may be specified under sub-section (1) of section 5 by the Central Government;
- g.) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000(21 of 2000) or any other mode of mass communication.
- h.) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).

profession. India, for once, has multiple models to look upon, and as has been the Indian tendency, borrow the best from around the world and shape them according to the Indian needs.

The Disclosure of Lobbying Activities Bill, 2015 was a welcome step that largely imbibed the Lobbying Disclosure Act from the US in terms of its recommendations for submission of half yearly reports⁷⁷. Whereas, US follows strict regulatory mechanism with respect to lobbying it doesn't have an independent authority regulating lobbying, the authority and reporting office for lobbyists' remain the Secretary of Senate and Clerk of House of Representatives.⁷⁸ The requirement to setup a Lobbying regulatory authority⁷⁹ alongside the functions of that authority in terms of giving recommendations to the Government with respect to the profession⁸⁰, maintaining a register of Lobbyists⁸¹, verifying the accuracy of information⁸², conducting investigation in case of suspicion of lobbying activities without registration⁸³ amongst other things, are novel and can be effective under the Indian Context. The Loose resemblance to the EU 'Draft Joint Agreement of the Commission and the European Parliament on a Transparency Register' is apparent, however EU itself hasn't been able to deliver a consensus on the issue and the same remains self-regulatory to a large extent, even so the Indian attempt was much concrete with imposition of penalties⁸⁴ and strict compliance requirements, even if the said penalty was pecuniary in nature, that aspect can always be improved to make it criminal as well as pecuniary.

As an addition to the structure of the provided Bill, taking a cue from the UK System, the legislature can put forward a self-regulatory mechanism⁸⁵, much on the lines of the State Bar Councils, having to frame their own code of conduct with strict membership requirements, and qualifications, with an additional requirement to abide by the Code of Conducts as and in whatever manner be prescribed the Parliament or State Legislature, just like the British Associations including Association of Professional Political Consultants, Chartered Institute of Public Relations etc. are

77 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 7 (1): Every registrant shall prepare and submit to the Authority a half-yearly report giving a true and full account of its lobbying activities during that period.

78 Ionut Tanase, "Lobbying regulation and ethics: current issues and future prospects" *Journal of Media Research*, 57 (2014).

79 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 3 (1): The Central Government shall, within three months of the coming into force of this Act, constitute an Authority to be known as the Lobbyists Registration Authority to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

80 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 9 (a): give such recommendations to the Central Government with regard to the implementation of this Act and framing of rules and norms for registration and submission of reports as it may consider necessary.

81 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 9 (b): maintain a Register of Lobbyists containing such particulars as may be prescribed;

82 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 9 (c): maintain and verify the accuracy of the information contained in the reports submitted by lobbyists in such manner as it may deem fit;

83 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 9 (g): conduct an investigation, if it has reasons to believe that any person or an organization is engaged or was at any time engaged in lobbying activities without being registered as a lobbyist in the Register of Lobbyists;

84 The Disclosure of Lobbying Activities Bill (2015) (India), Sec. 10 (1): Any person or organization who engages in lobbying activity without registration with the Authority shall be guilty of committing an offence under this Act and shall be punished with a fine which may extend to fifty lakh rupees.

85 The mechanism in UK is self-regulatory without any legislative requirement. For the Indian context, the author suggests the requirement of a self-regulatory mechanism as a legislative requirement.

required to abide by the Ministerial Code as well as the Nolan Committee codes on Standards in Public Life.⁸⁶

One major improvement that the existing bill requires is the modification in definition of ‘Gratification’, with a more concentrated thrust towards accommodating the ‘Mental Element’ or Mens Rea while quantifying a crime, and not just the act of reception of something. As was done in the US through the Honest Leadership and Open Government Act, 2007 by adding that requisite knowledge that a gift, travel, payment of receipt is likely to influence, or is a step towards influencing the public servant, gifts accompanied with such knowledge are prohibited and punishable. Another improvement that has already been mentioned is the requirement for an overriding provision in the Bill with respect to Prevention of Corruption Act and Foreign Contribution (Regulation) Act, or an amendment in these acts to exclude from their ambit the Disclosure of Lobbying Bill/Act. And a requirement of both pecuniary and criminal penalty is imperative to ensure that the authority and the bill is adhered to, as has been noted by several experiences, a pecuniary penalty on its own isn’t sufficient to ensure compliance.

Conclusion and Suggestions

“To widen the market and to narrow the competition, is always the interest of the dealers. (...) The proposal of any new law or regulation of commerce which comes from this order ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. *It comes from an order of men whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.*”- Adam Smith, an inquiry into the Nature and Causes of Wealth of Nations

To assume that a mere regulation would streamline the process and end the misery associated with corruption and bribery would be a foolhardy idea, a utopia. And given the Indian ability of ‘jugaad’ a penchant for finding loopholes in laws, and molding them to our advantage, it is highly unlikely that a regulation in this respect would help the country curb corruption in Political corridors to a significant extent, however, what it would surely do is arousing an accountability measure for people who are genuinely interested in the profession, who are good with their persuasion skills and are only hesitating due to a lack of regulation mechanism, people who would want to voice the opinions of interest groups from a broad spectrum of ideologies and help the system of governance in satisfying the needs of Indian in the most efficient way using the subject expertise that comes along with any specialized subject. Further this small step, in the long run, would attract foreign capital investment in India in the form of Foreign Exchange used for lobbying purposes within Indian Borders, or on Indian Public Servants/Politicians. The existence of an intrinsic network of lobbying has already been talked about in the paper, this unregulated sector operating on large cash sums doesn’t provide any benefit to the exchequers, regulation would

86 *Supra* note 78

step up this dimension by introducing tax liabilities on lobbying activities, which would in turn be used for more constructive purposes. Further, an accepted form of lobbying also involves raising cash donations for specific purposes, legitimization would help trigger the speed of development in hitherto unexplored areas of Social Service.

All the USPs of lobbying apart, the government while deciding its policy and drafting a law has to ensure that 'Lobbying' doesn't become a privileged right for select few, it should be open to everyone in a representative democracy. The governing principle for such law should be 'equal access to policymakers' for all the competing groups. 'Equal access and benefits for everyone' should become the ultimate test for success and failure of such an exercise.



Disruptive or Innovative - Artificial Intelligence in Justice Delivery System

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Abstract

Artificial Intelligence has been making rapid inroads into the legal sphere. This article examines the meaning and evolution of Artificial Intelligence and how Artificial Intelligence and other technological advances have come around to change the practice dynamics of the legal profession. The development of Artificial Intelligence and its injection in the sphere of justice dispensation mechanism has received adequate support and encouragement from both the Judiciary and the Executives. The Article also seeks to examine how lawyering will be drastically altered in the times to come with the regular use of Artificial Intelligence tools and emphasises the need for guidelines to ensure that proper checks and balances are in place to ensure that this important tool remains a supplement to the present justice dispensation mechanism and does not turn disruptive.

Introduction

Technology cannot be restricted within the confines of a pigeon hole. It is ever pervading, permeating and penetrating. Ever since American Computer Scientist John Mc Carthy (acknowledged as co-founding¹ father) adopted the terms 'Artificial Intelligence' in a Dartmouth Conference in 1956, its flourish and use has extended and expanded exponentially from a machine (Ferranti Mark I) which used an algorithm to successfully master the game 'Checkers' - to being a part of the daily life of almost every human being in some way or the other, knowingly or unknowingly.

It would definitely be wrong to say that the technological march in the domain of Artificial Intelligence has remained in the side-lines in so far as the legal realm is concerned. It is true that the growth and development of Artificial Intelligence in the legal domain has been in dribs and drabs but it has been progressive, so much so that today, there exists a fear and a concern

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1 Along with Marvin Minsky, Claude Shannon and Nathan Rochester.

amongst a school of jurists of the advent of 'predictive justice', an era where the system of dispensation of justice would be 'justice for robots by robots'.

The journey of evolvement of Artificial Intelligence in the legal sphere, would however and surely gain a lot of propulsion and impulsion in the post Covid-19 era. Artificial Intelligence has the potential and capability to drastically change the legal landscape more so in a country like India where the entire judicial system is crippled by delay and backlog primarily due to lack of infrastructure, judge-population ratio, hastily and imperfectly drafted legislation, litigation friendly clients and encouraging lawyers, easy adjournments, delay in judicial appointments, long arguments etc. It is therefore imperative that before active initiation and introduction of Artificial Intelligence in the Indian Legal system, guidelines and regulations are put in place so that Artificial Intelligence does not turn into a Frankenstein's monster.

The need for guidelines and regulations are required to be ushered in on immediate basis as in the post Covid-19 era there will be an added temptation and impulse to use all available tools to increase efficiency of the judicial system and lower costs of litigants irrespective of long term consequences of such use. It is only once such infrastructure is put in place and its efficacy tested that it would be safe for the institutions of the judicial system to start using the tools that Artificial Intelligence provides.

A substantial bit of interaction and discussion amongst the legal fraternity today is optimisation of the use of technology for dispensing justice and providing access to justice, and at the forefront of such discussion is the use of Artificial Intelligence. There is however a bit of unease in every of this discussion - there is optimism and excitement but yet in private everyone would allay a feeling of fear and insecurity with the adoption of Artificial Intelligence.

Meaning and Scope of Artificial Intelligence

Intelligence concerns with the ability to solve a set of circumstances with general mental capacity and further learn from the various situations which are put forth to a person. Intelligence is analogous and linked with the human brain. However, with the evolution in technology this intelligent human brain itself has created a machine with 'superintelligence' (an imaginary agent that has been coded to have intelligence far surpassing that of the most brilliant, gifted and analytical human minds) capabilities - something that has now come to be known as 'machine intelligence'.

The human brain is not as complex as it looks like as it can be anticipated easily, since it follows similar patterns which can be easily gauged. Humans used technology to analyse human behaviour and then trained it perform human skills. The way it actually works is actually quite complex, but simply put, huge amount of data is stored in machines and based on that these machines understands, perceives and learns the human activity. In other words, Artificial Intelligence is nothing but just mathematical equations, algorithms which based on the data stored performs a particular given task. Artificial Intelligence has pervaded into the lives of most citizens of the world in some way or the other - whether it is through the use of Search Engines, Voice Assistants, Maps etc. or through the zillions of tools used in everyday life.

Digitalisation of Research in Legal Profession

Today, the legal arena has become increasingly reliant on online databases and search engine rather than going through the tedious task of searching in a library. Even lawyers, who are more acquainted and used to the traditional means of acquiring information, have been compelled to adopt such databases for their increased efficiency and accuracy. In fact, history shows how the legal profession has accepted and evolved with every changing shift in technology since past few centuries and has gracefully accepted its benefits in the facets of law and legal process.

The dynamics of legal research started changing with the evolution of printing press. This led to massive production of legal material. The development of transportation ensured that this material began to be circulated. Publication of important judicial precedent also began. The spanner now was organising such massive publications. This led to the need for development of a case organisation system which could help legal professionals to bifurcate the primary and secondary legal material. John B. West, a law books salesman (founder of West Publishing Co. and backbone behind the idea of citing, reporting and organising case laws) in the year 1876, based on the need of lawyers and judges for an accurate reporting of court order/judgement, launched an inaugural news sheet publication, known as the ‘Syllabi’, which reported the Minnesota Supreme Court Rulings. Within a span of six months there was an astounding demand for the reports initiated by West and his company not only in Minnesota but in the neighbouring states as well for the reports. West then launched two key innovations which metamorphosed and acted as a catalyst what we see as the tools of present day legal research. The first was National Report System (NRS) which began the foremost nationwide reporting of US judicial decisions and the second was the Key Number System which introduced the scheme of indexing and a systematic division of cases into topics and sub topics. In the year 1897, West launched its 1st Volume of Digest which included all federal and state cases from 1685 to 1896.

By the 1950’s, the volume of legal literature and precedents became humongous and it became humanly impossible to find good law or relevant case laws from the unwieldy legal material even with the help of digest. This ushered in legal practitioners started finding solutions with the help of computers. The great development in the field of computing has now enabled case laws to be converted into machine readable versions. Demand and excitement has also infused investments to incorporate computer sciences in the legal filed. These endeavours led to the development of various computer generated tools one of which was - the Lexis or now LexisNexis developed by Mead Data Centre in the year 1973.

West’s print-based reporter system was “the only comprehensive system that enabled a legal researcher to locate opinions relating to specific points of law”² however, Lexis entirely changed the process and landscape of legal research. It launched a new road map to the world by providing online access to judicial precedents as well as a program which could research

2 The History and Future of AI, available at: <https://www.bluejlegal.com/ca/blog/tax-foresight-fromdustytomestopixels>. (last visited at July 13, 2020).

keywords from the precedents. West, after two years of coming of the Lexis launched his search engine known as the Westlaw. The era of digitalisation in the legal profession had thus began.

The changes brought about by the likes of Lexis and Westlaw also ushered in the beginning of Artificial Intelligence being explored for being used in the justice dispensation mechanism and legal research - with the hope of reducing the burden of the lawyers, providing access to justice and uphold rule of law. The new 'mantra' now was - smart work - hard work.

Evolution of Artificial Intelligence in Legal Domain

Several pathbreaking initiatives in the last two decades has today put Artificial Intelligence at a platform from where it growth can only spiral. The first serious Artificial Intelligence tool was what came to be called the "Lex Machine", developed in the year 2006, by the experts of Stanford University's Computer Science Department and Law School, a project for making intellectual property transparent. Then in 2011, 'Kira Systems', was found by Canada's University of Waterloo, for contract review to augment the efforts of lawyers. In the year 2014, Professor Daniel Martin Katz, who was a professor at Michigan State University Law School and his fellow colleagues created an algorithm to predict the decisions of US Supreme Court case and they were successful in attaining a 70% accuracy in the cases from 1953-2013. Then in 2016, 'Ross' the first Artificial Intelligence lawyer in the history, was introduced. The 'Ross' could communicate in human language with other lawyers and was able to even deal with certain bankruptcy matters and also offer access to a comprehensive body of case laws from the United States Supreme Court, Circuit Courts of Appeals, District Courts etc. In United Kingdom, 'DoNotPay', a robot lawyer created with the assist of Artificial Intelligence, is known to prepare legal documents. The SAP supported software hosted in IBM cloud namely, 'Fulcrum', is also noteworthy for delivering superb legal services. 'Neota Logic' is another Artificial Intelligence engine with user-friendly and power authoring tool. 'Nextlaw Labs' curates, pilots and adapts technology and processes to proactively predict client needs and address real-world challenges.³

The tools of Artificial Intelligence has already started helping people seeking its aid. An United States company Wevorce, uses Artificial Intelligence to try predict, how a divorce will progress in Court and then provides services to their clients based on that prediction. COMPAS (herein after referred Correctional Offender Management Profiling for Alternative Sanctions), again, is a data assessment tool which is used in criminal case to anticipate whether bail shall be granted or not based on evaluation of 137 questions and then calculates the risk from the scale of 1-10 using the algorithms. There are many other such tools now available today.

Although most of the blossoming of Artificial Intelligence has circled around the United States, it is not as though its impact is confined within the bounds of United States but has in fact spread far and wide and has travelled beyond. In Australia - Artificial Intelligence 'Ailira' (herein after referred on Artificially Intelligent Legal Information Research Assistant) is providing tax and estates law services along with affordable access to legal services by those who need it the most

3 Nextlaw Labs, Let's Talk. available at: <http://www.nextlawlabs.com/#about-nextlaw-labs>, (last visited on July 13, 2020).

and another tool christened ‘Smarter Drafter’ can do legal drafting in moments and is already being used in more than 150 law firms across Australia.⁴ In Japan, ‘Legal Force’ and ‘Robolaw.asia’ are the Artificial Intelligence platforms to streamline the review work of routine contracts and to enhance academic research and judicial practice of law.

Support of Executive and Judiciary in the ascent of Artificial Intelligence

Globally, the role of Artificial Intelligence in the legal profession also got encouraging support from the judiciary. In March 2019 in the United Kingdom⁵, the Lord Chief Justice, Lord Burnett of Maldon of England and Wales has set up an Artificial Intelligence advisory body to offer guidance to the Chief Justice and to the senior Judiciary on the likely impact of developments in Artificial Intelligence on the Judiciary and the court system and to ensure that judges are sufficiently trained on Artificial Intelligence and its impact⁶.

The Chief Justice of Malaysia, Tan Sri Richard Malanjum extolled the virtues of AI during the opening of Malaysia’s Legal Year 2019 in January when he said judges in Malaysia will soon introduce AI to help decide on punishments for convicted criminals. He revealed that the government of Malaysia was exploring a data-driven feature called “data sentencing” which helps judges achieve consistency when sentencing different offenders for the same crime⁷.

Similarly, the Chief Justice of Singapore, Sundaresh Menon noted that AI, data analytics and quantum computing have started to make machine-assisted court adjudication a reality though he warned that it raised several issues. Like the use of AI within a justice system gives rise to a unique set of ethical concerns, including those relating to credibility, transparency and accountability⁸.

The European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe⁹, has adopted the first European text setting out ethical principles relating to the use of AI in judicial systems. The charter provides a framework of principles that can guide policy makers, legislators and justice professionals when they grapple with the rapid development of Artificial Intelligence in national judicial processes¹⁰.

4 Artificial Intelligence, Ailira. available at: <https://www.cio.com.au/article/656281/artificial-intelligence-putting-junior-lawyers-jobs-risk/>, (last visited on July 13, 2020).

5 Bringing the Modern World to Judiciary. available at: <https://www.iptechblog.com/2019/03/new-artificial-intelligence-advisory-body-in-england-and-wales-bringing-the-modern-world-to-the-judiciary/>, (last visited on July 13, 2020).

6 Lord Chief Justice sets up advisory group on Artificial Intelligence. Available at: <https://www.judiciary.uk/announcements/lord-chief-justice-sets-up-advisory-group-on-artificial-intelligence/>, (last visited on July 13, 2020).

7 Artificial Intelligence for sentencing, virtual hearings, holograms in tomorrow’s court. Available at: <https://www.malaymail.com/news/malaysia/2019/01/11/cj-artificial-intelligence-for-sentencing-virtual-hearings-holograms-in-tom/1711625>, (last visited on July 13, 2020).

8 <https://theasianpost.com/article/ai-and-big-data-legal-profession> (last visited on July 13, 2020).

9 About the European Commission for efficiency of Justice. available at: <https://www.coe.int/en/web/cepej/about-cepej>, (last visited on July 13, 2020).

10 CEPEJ European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment. Available at: <https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment>, (last visited on July 13, 2020).

Further, Estonia has already paved way for artificial intelligence and is beginning to use Artificial Intelligence to make Small Court Claims Judgments. In 2019, the ‘Kratt’ report was released by a group of multidisciplinary experts headed by the Chief Information Officer of Estonia’s government, which provided an outline on which the legal framework for Artificial Intelligence technology would be based.¹¹ If the government moves, completely forward with the report, then a huge aspect of the legal functions would be covered by AI within a set framework. In May 2019, the government of Estonia signed the Organization for Economic Co-operation and Development’s (OECD’s) Principles on Artificial Intelligence, which reflected the principles of human-centric and ethical AI development embodied in the EU approach and recommended by the OECD in their Recommendation of the Council on Artificial Intelligence¹².

The India Story and its tryst with Artificial Intelligence

In India, Artificial Intelligence and its use in the legal arena, has still a long way to go. The process of digitisation has begun with a lot of earnest and with Covid 19, these initiatives have been fast tracked.

The first and the foremost national initiatives towards regularising Artificial Intelligence was the Report of the Artificial Intelligence Task Force, 2017¹³, with a view to “embed Artificial Intelligence in our Economic, Political and Legal thought processes so that there is systemic capability to support the goal of India becoming one of the leaders of Artificial Intelligence rich economies”.¹⁴ The task force prepared a sectoral analysis, but it failed to appreciate the social, economic, technical and legal issues which were attached to getting the Artificial Intelligence into force. Data privacy and protection were issues that the task force could not answer. Task force also ignored the constitutional guarantee provided to freedom of speech and expression as a fundamental right.

It was therefore decided that the government think-tank NITI Aayog “would lead the national programme on AI and that “the government is set to support startups and centres of excellence with respect to AI training and research activities”.¹⁵ NITI Aayog was tasked with formulating a National Strategy Plan for Artificial Intelligence “in consultation with Ministries and Departments concerned, academia and private sector”.¹⁶ On June 4, 2018, NITI Aayog published

11 Grigoryan, A. (2019). Estonia: Government Issues Artificial Intelligence Report | Global Legal Monitor. [online] Library of Congress. Available at: <https://www.loc.gov/law/foreign-news/article/estonia-government-issues-artificial-intelligence-report/> (last visited on December 9, 2019).

12 OECD, Recommendations of the Council on Artificial Intelligence, <https://www.oecd.org/going-digital/ai/principles/>, (last visited on May, 25, 2020).

13 Artificial Intelligence Task Force. Available at, <http://www.aitf.org.in/>, (last visited on July 13, 2020).

14 *Id.*

15 Why we need to have regulation and legislation on AI and quick, The Indian Express. (July 31, 2018). Available at: <http://indianexpress.com/article/technology/opinion-technology/why-we-need-to-have-regulation-and-legislation-on-artificial-intelligence-quick-5151401/>. (last visited at July 13, 2020).

16 Press Release, Ministry of Commerce and Industry, Commerce and Industry Minister Sets Up Task Force on Artificial Intelligence for Economic Transformation (Aug. 25, 2017). Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=170231>, archived at <https://perma.cc/M5EA-8X9H>; Homepage, ARTIFICIAL INTELLIGENCE TASK FORCE, <https://www.aitf.org.in/> (last visited Dec. 11, 2018).

a discussion paper on a National Strategy on Artificial Intelligence.¹⁷ The discussion paper however unfortunately, did not consider the issues relating to application of Artificial Intelligence in the field of law.

The “Srikrishna Committee” (a committee constituted by the Government of India) which was headed by Justice B. N. Srikrishna and the said report defined and validated a roadmap for privacy in India. The Srikrishna Report was followed with one of the major decisions made by the Supreme Court to protect Right to Freedom of speech and expression and right to privacy was when the Apex Court struck down section 66A of the Information Technology Act, 2000 in the case of *Shreya Singhal Vs. Union of India*¹⁸ and criminalising the wrongful acts done via internet.

Further the development of Artificial Intelligence in India received a huge impetus with the Supreme Court of India judgment in the case of *K.S Puttaswamy*.¹⁹ In the said landmark judgement it was held that Right to Privacy is a fundamental right. The judgement observed that informational privacy is a very important component of right to privacy. Further there are various dangers to privacy, as with the growth of technology the risk with it also increases. The Supreme Court also exhorted the Government that there was an immediate need to ensure and put into place a robust regime for data protection and also suggested that such a regime should include a careful and sensitive balance between individual interests and legitimate concerns of the state.

Recently, an official of the Ministry of Electronics and IT (Meity), said, “When we are talking about whether we are ready to get into this whole artificial intelligence (AI) journey, I think we are ready and we are looking at it and going there in stages. I think the first stage is where the Supreme Court has said that privacy is a fundamental right (and) that should be kept in mind”.²⁰ It is therefore clear that the view that issues concerning privacy was roadblock to the development was cleared by the Supreme Court of India in this landmark and path breaking judgement.

The Srikrishna Report in the year 2018 formulated a draft on Personal Data Protection Bill 2018, it is pertinent to mention here that although there are schemes and policies developed by the Indian government, yet the implementation button is yet to be pressed. The Personal Data Protection Act was drafted has not been passed till date and still it is under process.

The judiciary in India has been a very vocal proponent and adherent of Artificial Intelligence and its use in the legal arena.

17 Niti Aayog, Discussion Paper: National Strategy for Artificial Intelligence (June 2018) ITI AAYOG, DISCUSSION. Available at: http://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf. (last visited at July 13, 2020).

18 *Shreya Singhal Union of India* (2013) 12 SCC 73.

19 *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*, (2017) 10 SCC 1.

20 Press Trust, India. (2019). SC ruling on privacy first step to make India ready for artificial intelligence: Meity official. [online] Business-standard.com. Available at: https://www.business-standard.com/article/pti-stories/sc-ruling-on-privacy-first-step-to-make-india-ready-for-artificial-intelligence-meity-official-119050101042_1.html (last visited on December 9, 2019).

Recently, the current Chief Justice of India, Justice SA Bobde²¹ remarked, on the Constitution Day, that the Supreme Court has proposed to introduce the system of Artificial Intelligence which would aid in the delivery of administration of justice. Justice Bobde stated “We propose to introduce, if possible, a system of artificial intelligence. There are many things which we need to look at before we introduce. We do not want to give the impression that this is ever going to substitute the judge”.²² Again, on December 3, 2019, while celebrating Lawyers of India Day, commemorating the 150th Birth Anniversary of Mahatma Gandhi and 60 years of the Bar Association of India, Justice Ravindra Bhat²³ asserted that in view of the impending use of Artificial Intelligence in justice dispensation modern lawyers should adapt themselves to the rising technological changes, learn and update their skills, he went on to add that “technology is not capable of human skills including the ability to make convincing arguments”. He said: “Lawyers have an onerous and multi-dimensional task to fulfil. He was of the view that Artificial Intelligence is not capable of replacing the Lawyers and in the context stated that: “Technology is not capable of human skills including the ability to make convincing arguments,” he said while speaking at an event here to facilitate senior lawyers here. Changing technology has resulted in the way entities conduct businesses, said Justice Bhat as he listed paperless environment, e-filing, and the introduction of mobile apps. Lawyers have a tripartite agreement with public, court and client,” adding that lawyers are expected to have the ability to detect problems, draft, and negotiate.²⁴ This signifies the receptiveness of the judiciary to incorporate Artificial Intelligence within the judicial system. Yet, it also highlights the reluctance of the judiciary to perceive Artificial Intelligence as a replacement to humans.

The Courts in India, has tasted first-hand the use of technology as an aid to dispensation of justice in view of the pandemic. The shift from public hearings to virtual hearing has seen teething issues but has definitely allowed access to justice is testing times. But this cannot become the norm, not just yet. Due to the same Justice DY Chandrachud²⁵ in a webinar on ‘Future of Virtual Courts and Access to Justice in India’ by Nyaya Forum stated that *“What I perceive for the future is a healthy mix between the use of technology for court hearings in areas where we believe technology is well suited; but we must necessarily have open court hearings also, which constitutes the spine of the system. The essential nature of justice is essential, access of public to public court room, must be preserved in video-conferencing”*.²⁶

21 Justice Sharad Arvind Bobde, 47th Chief Justice of India..

22 The Times of India (2019). SC proposes to introduce system of artificial intelligence, says CJI. [online] Available at: <https://timesofindia.indiatimes.com/india/sc-proposes-to-introduce-system-of-artificial-intelligence-says-cji/articleshow/72245567.cms> (last visited on December 9, 2019).

23 Justice Shripathi Ravindra Bhat, Supreme Court Judge.

24 ANI (2019). AI cannot replace lawyers as innovator in near future, says Justice Ravindra Bhat - ET Government. Economic Times [online] available at: <https://government.economictimesindiatimes.com/news/digital-india/ai-cannot-replace-lawyers-as-innovator-in-near-future-says-justice-ravindra-bhat/72367822> (last visited on December 9, 2019).

25 Justice Dhananjaya Y. Chandrachud, a Supreme Court Judge.

26 Virtual Courts Cannot Fully Replace Open Court Hearings; Technology Can Make Justice System More Efficient & Accessible : Justice Chandrachud. available at: <https://www.livelaw.in/top-stories/virtual-courts-cannot-fully-replace-open-court-hearings-technology-can-make-justice-system-more-efficient-accessible-justice-chandrachud-157260>, (last visited on July 13, 2020).

The virtual hearings and the various processes involved towards it are at best first steps - a lot is likely to be seen and experienced in the near future. As, Justice Bobde, has stated - the introduction of Artificial Intelligence in the justice dispensation mechanism is merely a matter of time.

Impact of Artificial Intelligence in the future of Legal Profession

The question as to how Artificial Intelligence will, in time, impact the legal profession and its practitioners has not only been a matter of intense debate but also one of scepticism, suspicion and incredulity. There seems to be the fear of the unknown. Whether Artificial Intelligence will substitute the lawyers or would it only be for facilitating the work of a lawyer. What would the pace of Artificial Intelligence be upon being introduced. How would the practice of law evolve.

It seems improbable that Artificial Intelligence will replace human lawyers any time soon. It is after all, human intelligence that gives inputs to Artificial Intelligence in order to make it susceptible to functioning like humans. However, it is definitely going to modify the traditional norms of operation in the legal profession. The transition from conventional means to Artificial Intelligence is inevitable and is bound to occur soon, with Artificial Intelligence already taking over conversations even in a country like India, where even the concept of digitisation is relatively new.

The real threat that Artificial Intelligence possesses is against paralegals, legal researchers and entry level lawyers engaged in work. It is this category of work, that is expected to be replaced by Artificial Intelligence within the coming decade. Today, for law firms and independent lawyers reliance on paralegals and legal researchers, entails expenses and spending longer hours on tasks. The entry of Artificial Intelligence, will facilitate these very firms and independent lawyers to be well-resourced to complete a task within minutes which would otherwise take hours for a human to complete and this at only a fraction of the expense. Artificial Intelligence, unlike humans, does not have characteristics of getting tired, needing food or rest and is capable of producing more successful results. With the Artificial Intelligence coming into daily practice - tasks such as due diligence, contract drafting and reviewing, research might be taken up by Artificial Intelligence in the near future.

Experts seem to be of the opinion that entry level lawyers are to be more affected than the ones already well-established in the profession. According a report by McKinsey Global Institute²⁷, only 5 percent of jobs can be fully automated and for lawyers, 23 percent of the job can be done by Artificial Intelligence. Which means that though technology will affect some aspects of legal work, the higher paid legal experts are unlikely to be affected when it comes to work involving high cognitive demands²⁸.

27 McKinsey Global Institute AI, Automation and The Future of Work: Ten Things to Solve For, June 2018. available at: https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Future%20of%20Organizations/AI%20automation%20and%20the%20future%20of%20work%20Ten%20things%20to%20solve%20for/MGI-Briefing-Note-AI-automation-and-the-future-of-work_June2018.pdf (last visited on December 9, 2019).

28 Manyika, J., Chui, M., Miremadi, M. and Bughin, J. (2017). Harnessing automation for a future that works. [online] McKinsey & Company. Available at: <https://www.mckinsey.com/featured-insights/digital-disruption/harnessing-automation-for-a-future-that-works> (last visited on December 9, 2019).

What would be taken up by Artificial Intelligence and how much, is what the debate is all about. Mr. Steve Lohr, writing for the New York Times, aptly points out that though there are expectations being placed on the Silicon Valley for Artificial Intelligence to take over the legal field, the reality behind such scenes shows something else. He cites the example of Kira systems and writes: “When Alexander Hudek, a computer scientist whose résumé includes heavyweight research like working on the human genome project, turned to automating the review of legal contracts in 2011, he figured that he would tweak standard algorithms and that it would be a four-month job. Instead, it took two and a half years to refine the software so it could readily identify concepts such as noncompete contract clauses and change-of-control, said Mr. Hudek, chief technology officer of Kira Systems. The Kira program sharply winnows the number of documents read by people, but human scrutiny is still required.”²⁹

It would be therefore be interesting to see how technology in the form of Artificial Intelligence starts its play in the domain of law. It is still early to say anything conclusively but what can be safely said is what the judges of the Supreme Court have been saying time and again - Artificial Intelligence cannot be a replacement or substitute of lawyers and will always be a tool to supplement the human mind. But there will be an impact - that is something that is inevitable. Gottfried Wilhelm Von Leibniz (1646-1716), the co-inventor of calculus, a moralist and also, a lawyer by profession had once said: “For it is unworthy of excellent men to lose hours like slaves in the labour of calculation which would safely be relegated to anyone else if machines were used”.³⁰ Today his words, resonate as regards the Artificial Intelligence. The effect of Artificial Intelligence is bound to trickle down and will no doubt seek to engulf every inch of the legal arena owing to its increased efficiency and lower costs. There is therefore bound to be turf war - as Artificial Intelligence will challenge the traditional workings of the legal field and that is where the challenge lies.

Suggestions

Adaption and adjustment with the Artificial Intelligence is a complex terrain, it is pre-eminent, integral and crucial that there must be full-fledged regulations and strong policies for the usage of Artificial Intelligence, keeping in mind the burgeoning industry of Artificial Intelligence. Further the government must formulate regulations and policies, keeping in view the regional influence of each and every country.

The pace of development of the policy must be quick, rapid and swift. Due to the Covid-19 situation there has been an acute shift from the physical appearances to getting everything virtual done or if we may say ‘no contact performances’. Therefore, while drafting the policies of Artificial Intelligence the legislatures should keep in mind all the aspects relating to Artificial Intelligence be it - ethical, security, legal, technical or a philosophical.

29 Lohr, S. (2017). A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet. The New York Times. [online] Available at: <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html> (last visited on December 9, 2019).

30 Dartmouth. (2019). Calculus on Demand. [online] Available at: https://math.dartmouth.edu/~m3cod/Leibniz_Wheel_Big.htm (last visited on December 9, 2019).

The introduction of Artificial Intelligence should gradual and like that of a baby - starting with crawls and walks and only once people are accustomed to it and there is a demand for more of it, Artificial Intelligence should be allowed to run. Therefore, the innovation of Artificial Intelligence was to go hand in hand with human brain and as a support system to human kind. The fluent working of Artificial Intelligence will begin when the legislative makers will create strong policies to protect the people to use Artificial Intelligence without any fear of any security related issues or any problem confronted by them during the usage of the Artificial Intelligence. Further, for a full fledge working of the Artificial Intelligence the legislative makers shall keep in mind that there has to be a perfect blend of human and robotic mind.

There have been various reports, bills etc passed in accord to the Artificial Intelligence however, till date there is not even a single self-powering legislation which suffice the motive of protection of people from the effects of Artificial Intelligence.

However, according to the ABA Model Rules of Professional Conduct³¹, stated that: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” Therefore, there is dire need to get into place a well programmed legislation to support and suffice the functioning of the Artificial Intelligence in our daily lives.

Conclusion

Use of technology should not be disruptive but innovative to aid and assist. There is no doubt that Artificial Intelligence or technology cannot replicate the human mind. Lawyers need independent professional judgment, a higher-order cognitive skill involving critical thinking and creativity. A skill that, we today think, Artificial Intelligence will not be able to achieve.

Tom Giradi, a renowned civil litigator and the real-life inspiration for the lawyer in the movie, Erin Brockovich befittingly says, “It may even be considered legal malpractice not to use AI one day. He goes on to add that: “It would be analogous to a lawyer in the late twentieth century still doing everything by hand when this person could use a computer”.³² Hence, in a world that is constantly evolving due to technology, keeping Artificial Intelligence out of the legal profession would be a mistake, under the guise of protectionism. The challenges would have to be met and steps taken to ensure that the turf that Artificial Intelligence would seek for itself is limited. Limited to that of a facilitative tool. It is thus imperative that detailed guidelines with

31 Available at: Text of Model Rules of Professional Conduct [https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html%20\(emphasis%20added\)](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html%20(emphasis%20added)), (last visited on August 18, 2020).

32 *Supra* note 21, at p. 9.

regard to its development and use is put in place to ensure that essential decision making is in the hands of humans and not in mathematical models, whose adequacies and biases are not controlled - to ensure the use of Artificial Intelligence constructively for efficiency, transparency and objectivity in the justice delivery system - help to do whatever we do today - better.



IS THAT CLAPPING ENOUGH...?

Priya R*

Abstract

The whole world has become a standstill...covid-19 stretching its arms and causing more and more catastrophe to human race. The battlefield is all set with health care providers as the real warriors, serving and saving others. Among them, nurses provide the face-to-face, hand-in-hand care to the victims of the pandemic. They indulge in greater risks, losing their lives for keeping the patient safe and healthy. Called as 'angels of mercy', nurses are blessed with the magical touch to heal pains and sufferings. As the backbone of the healthcare services, they are regarded as the 'care-givers' of the whole community. But the miserable fact in India is that they lack legal recognition and protection as "health care professionals". They are labeled as "labourers or workmen" and hence deprived of their right to professional status and dignity. The paper attempts to critically analyse the existing legislative framework dealing with the rights of nurses. Furthermore, the paper calls for an urgent action to recognize, regulate and rejuvenate nursing profession in India.

Introduction

At last, time has come; we clapped, honoring them for their selfless service. We praised and saluted them for their priceless care. But still, is that enough? Don't they deserve more? Nurses as "Voice to lead-Nursing the World to Health" is the motto adopted by the International Council of Nurses (ICN) for this year's nurses day celebrations¹. The call for advancing the role of nurses as practitioners and leaders of policy making related to health is been highlighted by ICN.

The term "Nursing" has always been used as a synonym for the word "care". As a universal service, nursing shares the common goal, "the best interest of the patient". When doctor's cures the disease, nurse's cares the patient to reach his best self. The nearness they keep with common man distinguishes them from other healthcare providers. The World Health Organisation regards

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1 International Council of Nurses, available at: <https://www.icn.ch/what-we-do/campaigns/international-nurses-day> (last visited on May 27, 2020).

“Nurses as the “lynchpin of health teams”, playing a crucial role in “health promotion, disease prevention, treatment and care”². They execute a wide range of clinical and non-clinical functions necessary for the delivery of healthcare³. In India, nurses play a major role in ‘Public Healthcare Level’ which is provided exclusively by the State through Health Centres; and ‘Hospital Level’, where both the State and private entities forms part. The Statistics released by the Indian Nursing Council shows that there are around, 8, 85,383 Auxiliary Nurse Midwives (ANM), 21, 29,820 Registered Nurses, Registered Midwives (RN&RM) and 56,644 Lady Health Visitors (LHV) in the Country⁴. However, studies reveal shortage of trained and skilled nurses in India. According to the Official Statistics available with the Ministry of Health and Family Welfare, Government of India, India stands at the 75th rank amongst around 133 developing countries with regard to the number of nurses in the country⁵. The Nurse patient ratio in the Country is 1.7 nurses per 1000 population⁶. The World Health Organization too points out that need of an additional 2.4 million nurses in India to achieve government’s aim of nurse-patient ratio of one nurse per 200 populations⁷.

Increasing tendency of migration among nurses in India is the major reason for this shortage. Better Social status and chances for professional advancements are the main factors that push nurses to work overseas. As per the report published by WHO titled as “Migration of Nursing and Midwifery Workforce in the State of Kerala, 2017”, “Nurses trained in India form a significant portion of internationally educated nurses working overseas”. It is also pointed out that “over 30% of nurses who studied in Kerala work in the United Kingdom or the United States of America, with 15% in Australia and 12% in the Middle East”. Countries such as Australia, Bahrain, Canada, Kuwait, Saudi Arabia, the United Arab Emirates and the United Kingdom were reported to be the major areas of destination for nurses.

Though, concerns about nurses are debated nationwide, still the question of recognition as ‘professional practitioners of healthcare’ remains unsolved. Neither the Central nor the State legislative framework in India defines nursing in terms of a professional sphere of action. Though, forms the largest sector of healthcare, they are still “invisible” and unrecognized.

Nurses as Nourishers of Health

The term ‘nurse’ is derived from the Latin term *nutricius*, which means nourishing⁸. Various interpretations of nursing ranging from doctor’s assistants to professionals, having well knowledge

2 World Health Organisation, available at: http://www10.who.int/hrh/news/2019/celebrating_nurses/en/ (last visited on March 4, 2020).

3 Rosamma Jose, Leadership for nurses in India: A futuristic perspective, Express Health Care, available at: <http://www.expressbpd.com/healthcare/life-healthcare/leadership-for-nurses-in-india-a-futuristic-perspective/389253/> (last visited on December 5, 2019).

4 Indian Nursing Council, available at: <http://www.indiannursingcouncil.org/> (last visited on March 3, 2020).

5 Government of India, Ministry of Health and Family Welfare, available at <http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=10983&lsno=17> (last visited on March 10, 2020).

6 *Id.*

7 Bulletin of the World Health Organisation, available at <https://www.who.int/bulletin/volumes/88/5/10-020510/en/> (last visited May 8, 2019).

8 Online Etymology Dictionary, available at: <https://www.etymonline.com/word/nurse> (last visited on May 20, 2020).

and expertise in healthcare can be found. In a simplest sense, nursing can be defined as a process of wholesome nourishment of the patient⁹. An interpretation of nursing as a profession interlinked with medicine is given by the Merriam-Webster Collegiate Dictionary. It defines nurse as “a licensed healthcare professional who practices independently or is supervised by a physician, surgeon, or dentist and who is skilled in promoting and maintaining health¹⁰”.

Virginia Henderson¹¹, the first lady of nursing, regards nursing as a method of entering into the situation of another so as to understand the other person’s desires. She quotes, “A nurse is to get inside the skin of each of her patients in order to know what he needs”¹². Her definition explains nurses as “assistants to individuals especially the sick in performing the activities which she or he can do at normal times”¹³.

No discussion on nursing is complete without mentioning the contributions made by Florence Nightingale, the founder of modern nursing. Her dedicated services during the Crimean war (to nurse those wounded soldiers) will remain inscribed in golden letters. She explains the basic duty of a nurse as ‘to aid patients to become agents for their health care management’¹⁴. She used the word ‘nurse’ for ‘want of a better’¹⁵. To her, nursing comprises of the complete caring of the patient’, the surroundings which he or she lives is also vital. Fresh air, light, warmth, cleanliness, quiet and a balanced diet are factors that nurses have to consider while providing nursing care. She observes:

*Nursing has been limited to signify little more than the administration of medicines and the application of poultices. It ought to signify the proper use of fresh air, light, warmth, cleanliness, quiet, and the proper selection and administration of diet-all at the least expense of vital power to the patient*¹⁶.

An elaborately discussion on the role of the nurses is provided by the International Council of Nurses. First of all, it defines the term Nurse as “a person who has completed a program of basic, generalized nursing education and is authorized by the appropriate regulatory authority to practice nursing in his/her country.”¹⁷ Further, the definition explains nursing as “an autonomous and collaborative care of individuals of all ages, families, groups and communities, sick or well and in all settings”¹⁸. Activities like “promotion of health, prevention of illness, advocacy,

9 Sr.Nancy, Stephanie’s *Principles and Practice of Nursing*, 22 (N.R Brother, Indore, 5th edn. 2002).

10 Merriam-Webster Dictionary, 18 (Merriam-Webster, USA, 11th edn. 2004).

11 Virginia Henderson (1897-1966) was a nurse, theorist and author. She is known as “The Nightingale of Modern Nursing”, and “The 20th century Florence Nightingale”, available at <https://nurseslabs.com/virginia-henderson/> (last visited on April 8, 2019).

12 Virginia Henderson, *Basic Principles of Nursing Care*, 75 (International Council of Nurses, 5th edn., 1997).

13 *Id.*

14 Florence Nightingale, *Notes on Nursing: What it is and What it is not*, 8 (D. Appleton Company, New York, 5th edn., 1860).

15 *Id.*

16 *Id.*

17 International Council of Nurses, available at <http://www.icn.ch/who-we-are/icn-definition-of-nursing/> (last visited on February 10, 2019).

18 *Id.*

endorsement of safe environment, research, participation in shaping health policy, in patient and health systems management and education” are included as part of nurse’s function¹⁹. Factors such as closeness, patient-centered care, shared decision making, collaboration (with doctor’s, patient’s, co-workers), open discussions (with the patient and his family), and strict adherence to professional values offers a unique identity to nurses. Thus in a broader sense, nursing can be defined as a process of nourishment, whereby a dignified (healthy) life can be achieved.

Nurses as professional practitioners

The World Health Organisation identifies, Nurses are part of a “Health Care Team which comprise of professionals such as medical practitioners, physical and occupational therapists, social workers, pharmacists, spiritual counselors, as well as family members, who are involved in providing coordinated and comprehensive care”²⁰. The International Standard Classification of Occupations (ISCO-08) issued by International Labour Organisation, has classified “Nursing Professionals” as Health Professionals.²¹ “Different category of nurses like the clinical nurse consultant, District nurse, Nurse anaesthetist, Nurse educator, Nurse practitioner, Operating theatre nurse, Professional nurse, Public health nurse and Specialist nurse are included in this category²². The nature of work performed by nurses in relation to the tasks mentioned in the definition is considered to be the basis of this classification. It explains the role of nurses as

Nursing Professionals provide treatment, support and care services to the people who are in need of ageing, injury, illness or other physical or mental impairment, or potential risks to health. They assume responsibility for the planning and management of the care of patients, including the supervision of other health care workers, working\ autonomously or in teams with medical doctors and others in the practical application of preventive and curative measures²³

Compared to India, the titles and functions of nurses are different in other parts of the world. In USA, nurses were classified into categories such as Certified Nursing Assistant who perform functions such as bathing the patient, taking vital signs, dispensing prescribed medications, applying bandages²⁴; Licensed Practical Nurse who administer injections, perform therapeutic massage, prepare patients for surgical procedures and maintain medical records²⁵; Registered Nurse who assist in nursing diagnosis²⁶; Advanced Registered Nurse Practitioners who diagnosis

19 *Id.*

20 The World Health Report 2006, available at https://www.who.int/whr/2006/06_chap1_en.pdf (last visited on March 18, 2020).

21 International Standard Classification of Occupations ISCO-08, available at https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_172572.pdf (last visited on March 2, 2020).

22 *Id.*

23 *Id.*

24 Felix Tarcomnico, available at https://www.huffpost.com/entry/how-to-become-a-certified_b_3720475- (last visited on March 25, 2020).

25 Rebecca Le Boeuf, Infographic, available at <https://www.snhu.edu/about-us/newsroom/2018/05/types-of-nurses-infographic> (last visited on March 12, 2020).

26 *Id.*

patients, manage treatments, order tests and prescribe medications;²⁷ and Nurse Practitioners who can examine patients, prescribe and administer medications²⁸. A similar role of nurses to USA can be found in United Kingdom, where nurses were classified as registered nurses, Licensed Practices nurses, Certified Nursing Assistant and Advanced Registered Nurse Practitioner. Functions extending from bathing the patient to prescribing medications are allotted to each of them.

Different from India, a wider scope of practice is granted to nurses by the legislative framework of countries such as USA, UK, Canada and South Africa. Most of the States in USA have enacted the Nurse Practitioner Act. Usually, under this legislation's, three kinds of practice are allowed to Nurse Practitioners such as the full practice; the reduced practice and the restricted practice²⁹. In full practice, nurses are allowed to "evaluate patients; diagnose order and interpret diagnostic tests and initiate and manage treatments"³⁰. "Prescription of medications and controlled substances/drugs under the exclusive licensure authority of the state board of nursing" are also allowed to be performed by them³¹. In reduced practice, the advanced nurse practitioners are allowed to practice in collaboration with a physician. They are allowed to "evaluate patients, interpret diagnostic tests, initiate treatments and to prescribe medications and controlled drugs under the exclusive licensure authority of the state board of nursing"³². Restricted Practice is the third kind of practice allowed by State laws and regulations. In this, "State practice and licensure laws restrict the ability of Nurse Practitioners to engage in at least one element of Nurse Practitioner practice"³³. It requires "career-long supervision, delegation or team management by another health provider in order for the Nurse Practitioner to provide patient care"³⁴. It requires supervision of the nurse practitioner by a Physician and Surgeon under a collaborative effort.

In United Kingdom, the Nursing and Midwifery Order 2001 framed under the Health Act 1999 deals with the regulation of nurse's³⁵. Similar to India, aspects such as functions of the Nursing and Midwifery Council, registration, fitness to practice processes and educational

27 Rebecca Le Boeuf *Supra* note 25.

28 *Id.*

29 American Association of Nurse Practitioners, available at: <https://www.aanp.org/advocacy/state/state-practice-environment> (last visited on January 12, 2020).

30 *Id.*

31 How does Nurse Practitioner Authority Vary By State , available at <https://www.nursepractitionerschools.com/faq/how-does-np-practice-authority-vary-by-state/> (last visited on April 22, 2020) Nurse Practitioner Act and regulations enacted by the States such as Alaska, Arizona, Colorado , Connecticut, District of Columbia, Hawaii, Idaho, Iowa, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, Vermont, Washington and Wyoming follows full practice.

32 Legislation on Nurse Practitioner Act and regulations enacted by States such as Alabama, Arkansas, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Utah, Virginia, West Virginia and Wisconsin follows the practice of reduced practice.

33 *supra* note FN 31

34 States such as California, Florida, Georgia, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee and Texas follows the restricted practice.

35 The Nursing and Midwifery Order 2001, available at <https://www.nmc.org.uk/about-us/governance/our-legal-framework/> The Order covers a series of orders made by the Privy Council and Rules made by the Nursing and Midwifery Council (last visited on February 12, 2020).

standards and training are covered by this Order. The function of the council to protect the public from unethical standards and conduct by professional can be stated as one of the major distinguishable provision which ensures accountability on the part of nurses. Besides this, the Medicinal Products: Prescription by Nurses etc, Act 1992 deals with the right of the nurses to prescribe drugs³⁶. Persons such as Community practitioner nurse prescribers³⁷, Nurse independent prescribers³⁸ and Nurse Independent/Supplementary prescribers³⁹ are allowed to prescribe medicines which are categorized as “Controlled drugs”⁴⁰.

Another noteworthy feature of inclusion of nurses with the framework of ‘healthcare professional’s’ can be found in the legislative framework of Canada and South Africa. Nursing Act, 2005 in South Africa defines “professional nurse” as a “person who is qualified and competent to independently practice nursing comprehensive nursing in the manner and the level prescribed and who is capable of assuming responsibility and accountability for such practice”⁴¹. A detailed descriptions of the activities that are to be performed by “registered nurses” and “enrolled nurses” are provided in the Act⁴². Thus, the legislation promotes clarity as to the functions and responsibilities which are expected from each category of nurse’s. The authority enjoyed by registered nurses (who are in the employment of health services of the State) to perform certain acts in cases where the services of a medical practitioner or pharmacist are not available is another important feature of the Act⁴³.

Another legislation which clearly provides an independent status to nurses is the Nursing Act, 1991 prevailing in Canada. Nurses are included within the purview of the list titled as “Self Governing Health Professions”⁴⁴. Rights including prescription, dispensation, selling and compounding of drugs are guaranteed to nurses who are registered under the Act⁴⁵. Compared

36 Sec.58 of the Medicinal Products: Prescription by Nurses etc, Act 1992, available at [http://www.legislation.gov.uk/ukpga/1992/28/introductionPrescription only drugs etc.: authorisation of registered nurses, midwives and health visitors](http://www.legislation.gov.uk/ukpga/1992/28/introductionPrescription%20only%20drugs%20etc%3A%20authorisation%20of%20registered%20nurses%2C%20midwives%20and%20health%20visitors) (last visited on January 3, 2020).

37 Standards for prescribing programmes, available at <https://www.nmc.org.uk/globalassets/sitedocuments/standards-of-proficiency/prescribing/programme-standards-prescribing.pdf>. (last visited on March 5, 2020).

38 Amendment of the National Health Service (Charges for Drugs and Appliances) (Wales) Regulations 2001; available at <http://www.legislation.gov.uk/wsi/2003/2624/regulation/4/made> (last visited on April 4, 2020).

39 *Id.*

40 Misuse of Drugs Regulations 2001, Nurse Independent prescribers is permitted to prescribe any Schedule 2, 3, 4 or 5 Controlled Drugs, available at <http://www.legislation.gov.uk/uksi/2001/3998/contents/made> (last visited on January 2, 2020).

41 Nursing Act, 2005, South Africa, s.20, available at <https://www.sanc.co.za/pdf/Nursing%20Act%202005.PDF> (last visited on May 12, 2020).

42 South African Nursing Council, Regulations Relating to the Scope of Practice of Persons Who are Registered or Enrolled under the Nursing Act, 1978, available at <https://www.sanc.co.za/regulat/Reg-scp.htm> (last visited on March 5, 2020).

43 *id.* Sec 38 A of the Amendment Act, No 71 of 1981 (South Africa, 1981) available at <https://www.sanc.co.za/pdf/Nursing%20Act%201978.pdf>, (last visited on January 15, 2020) They are allowed to perform activities such as (i) physical examination of any patient; (ii) the diagnosing of any physical defect, illness or deficiency in any patient; (iii) the keeping of prescribed medicines; (iv) the supply, administering or prescribing of medicines; and (v); the promotion of family planning.

44 Regulated Health Professions Act, 1991, Sch.1, Ontario, available at [https://www.ontario.ca/laws/statute/91r18/v38Schedule 1](https://www.ontario.ca/laws/statute/91r18/v38Schedule%201) (last visited on March 5, 2020).

45 Nursing Act, 1991, Nursing Regulation 275, Part II, Rule 17, Ontario, available at <https://www.ontario.ca/laws/statute/91n32> (last visited on May 2, 2020).

to India, the provincial nursing council in Canada provides enhanced representations to nurses. The inclusion of fourteen (elected by) from among members who are registered nurses and seven (elected by) from among members who are practical nurses⁴⁶, comprising a total of twenty one members itself reflects their well representation on the council.

Thus, in short, India can adopt all those provisions which deal with the rights as well as responsibilities of nurses. The importance of public safety and health as included in the legislation of United Kingdom as well as the inclusion of more representatives from the nursing community in the Nursing Council by the legislation of Canada is a welcome step. The clearly defined activities which each category of nurses are entrusted with along the right which they enjoy during the absence of medical practitioner as mentioned by the legislative framework in South Africa is an acceptable suggestion which can be adopted to Indian legislative framework.

Indian Nurses: Labourers or Workmen

It is a miserable fact that in India, nurses do enjoy any special rights as 'health care professionals'. It is also imperative to note that in India, there is lack of clarity as to the inclusion of nurses as 'health care professionals'. The Central law, title as the Indian Nursing Council Act, 1947 and the state legislations dealing with the registration of nurses in India does not deal with rights of nurses⁴⁷. The constitution of Nursing Council at the Central and the State level to regulate the standard of practice and educational qualification of nurses is the major aim of both legislations. In fact, both the legislations, failed to deal with the "duties and responsibilities of nurses"⁴⁸.

Though, every state in India has legislation pertaining to nursing, none of them goes beyond registration and lacks clarity as to the rights of nurses. All the state laws define nurses with the framework of their educational qualifications. Different categories of nurses such as Midwives, Health Visitors, Auxiliary Nurse-Midwives, Female Health Worker, Lady Health Visitors and Dias are included without properly defining "the boundaries of their practice"⁴⁹. The constitution of nursing council is yet another issue. Majority of the state nursing council is dominated by medical professionals without much representation from nursing professionals⁵⁰. The grounds for taking disciplinary actions against nurses are another concern which needs uniformity between state laws, "When some states incorporate breach of law, professional incompetence, defect in character etc as grounds, others include professional misconduct, conviction for moral turpitude or non-bailable offence as grounds"⁵¹. Mechanism for monitoring the implementation of the rights of nurses as well as the observation of ethical standards in clinical practice is other area which needs to be addressed by the legislations. Beyond this, a need is felt to have a central legislation

46 Nursing Act, 1991 Sec. 9 (1).

47 P M Bakshi, "Nurses and the Law", 36 JILI 286 (1994).

48 *Id.*

49 Priya R, "Women as Healthcare providers : Evaluation of Socio-economic concerns in Nursing profession", International Law Seminar Proceedings on "Realisation of Human Rights of Women: Changing Dimensions Challenges and Recourse", National University for Advanced Legal Studies, Vol.II,p.672, January (2020).

50 *Id.*

51 *Supra* note 47.

in this subject. Though, the topics of “public health, sanitation, hospitals and dispensaries” fall under the State List (entry 6); the inclusion of inclusion of topics such as “legal, medical and other professionals” within the Concurrent List, (entry 28) provides a ray of hope for a central legislation⁵².

However, the inclusion of ‘hospitals’ within the definition of ‘industry’ by the Bangalore Water Supply Case,⁵³ impliedly keeps them within the definition of ‘workmen’ under the Industrial Disputes Act, 1947⁵⁴. As a labour class, they are entitled to all the benefits guaranteed by the labour laws such as the amicable settlement of Industrial disputes⁵⁵; Wages⁵⁶ including minimum wages⁵⁷; maternity benefits⁵⁸; eight hours of work⁵⁹; payments such as provident fund⁶⁰, gratuity,⁶¹ Bonus⁶²; and compensation of occupational injury and accidents⁶³. But in the practical sense, they are curtailed all this rights and benefits. This is evident from the reports of the committees which were appointed to study the issues of nursing profession in India⁶⁴.

The increasing rate of petitions filed by nursing associations also highlight the major issues relating to the working conditions of nurses such as health risks, overtime working hours, sexual harassments at workplace and non-payment of minimum wages. *Trained Nurses Association of India v. Union of India & Ors*⁶⁵ is an important case in which the Supreme Court has entertained a writ petition filed by the Trained Nurses Association of India, ventilating the grievances on the working conditions of nurses in private hospitals. The petition sought for issuing guidelines for improving the working conditions of nurses in hospitals. In 2016, Prof. Jagdish Prasad Committee was constituted as per the order of the court in this judgment. The committee recommended payment of minimum wages to nurses as per hospital-bed ratio and application of same working conditions to nurses working in government and private sector⁶⁶. The need for framing legislations or guidelines by States for implementation of minimum wages by the private hospitals is also high

52 Priya R *Supra* note 49 at 288.

53 *Bangalore Water Supply v. A. Rajappa* (A.I.R 1978 S.C 548).

54 The Industrial Disputes Act, 1947, s.2 (s).

55 The Industrial Disputes Act, 1947 s.3 deals with Authorities under the Act such as the Works Committee, Conciliation Officers, Board of Conciliation, Courts of Enquiry, Labour Courts, Tribunals and National Tribunals.

56 The Payment of Wages Act, 1936, s.3 (1) & 5.

57 The Minimum Wages Act, 1948, s.12 & s.14 (1).

58 The Maternity Benefit Act, 1961, s.5.

59 Kerala Shops and Commercial Establishment Act, 1968, s.4.

60 Employees Provident Fund and Miscellaneous Provisions Act, 1952, s.1 (1).

61 Payment of Gratuity Act, 1972, s.4 (1).

62 Payment of Bonus Act, 1965, s.8.

63 Employees Compensation Act, 1923, s.3(1).

64 The Bhore Committee Report ((1946); The Shetty Committee Report (1954); The Mudaliar Committee Report (1962); The Kartar Singh Committee (1973); the Shrivastava Committee (1975); High Power Committee (1987); the Sarojini Varadappan Committee (1990) & Prof. Jagdish Prasad Committee (2006). Besides this, the Balaraman Committee report (2012) and the Veerakumar Committee report (2013) deals with the issues of nurses who were employed in private hospitals in the State of Kerala.

65 Decided on 29 January, 2016, available at: <https://indiankanoon.org/doc/189389715/> (last visited on March 10, 2020).

66 Recommendations of the committee, available at [https://www.tnaionline.org/cms/gall_content/2016/10/2016_10\\$file08_Oct_2016-094519157.pdf](https://www.tnaionline.org/cms/gall_content/2016/10/2016_10$file08_Oct_2016-094519157.pdf) (last visited on July 24, 2020).

lightened. In *Association of Healthcare Providers (India) v. Government of NCT, Delhi*⁶⁷, the Delhi High Court again reiterated the mandatory compliance of the payment of minimum wages by all private hospitals as per the recommendations of Prof. Jagdish Prasad Committee.

*Seenath Beevi vs. State of Kerala*⁶⁸ is another decision wherein, the Kerala High Court directed the hospital authorities to introduce three shift systems; wherein the staff nurses were compelled to work for 14 hours a day for 6 days consecutively. The court also upheld the continuing system as illegal and unconstitutional. The court observed as

*The nature and quality of service with which we are concerned here, is not one to be performed mechanically but with full application of mind. It is a matter concerning public health and those in distress. Hence such a service has to be done with compassion and confidence in contradistinction to the indifferent service rendered by a person with tired and irritated mind. Deficiency in service in this kind of work is tantamount to disservice, because what is dealt with is human life. No person running a hospital would be justified in providing deficient service and no responsible Government can turn a Nelson's eye to the harm caused to or injury suffered by its own employees and its own citizens*⁶⁹.

Jerryl Banait vs. Union of India (UOI) and Ors⁷⁰, is another recent case relating to the protection of healthcare workers who serves the COVID-19 patients. Based on the petition filed by the United Nurses Association requesting immediate directions to formulate a comprehensive policy for the welfare and safety of the healthcare workers who are serving COVID-19 patients, the Supreme Court once again reminded the State and the Police Administration to provide necessary security to Doctors and medical staff when they visit places where patients who have been diagnosed corona virus positive or who have been quarantined are housed. It also directed the State take necessary actions against those persons who obstruct and commit any offence in respect to performance of duties by Doctors, medical staff and other Government Officials deputed to contain COVID-19.

As most of the nurses are females, right to Protection against Sexual harassments at Workplace can be regarded as another significant right related to safe working conditions. The shocking incident that happened to Late Ms. Aruna Ramchandra Shanbaug⁷¹ can be cited as the

67 Decided on 24th July, 2019, available at <https://indiankanoon.org/doc/152416598/>, (last visited on December 28, 2019).

68 2003 (3) KLT 788- In this case, the Petitioner, a Head Nurse working in the Taluk Head Quarters Hospital, Thirrooragadi in the Health Services Department of the State has approached this Court with the grievance that she is required to do continuous duty for 14 hours at a stretch for 6 days consecutively.

69 *Id.* Para 20.

70 Decided on 8 April, 2020, available at <https://indiankanoon.org/doc/147127045/> (last visited on April 22, 2020).

71 Aruna Ramchandra Shanbaug v. Union of India, (1994) 3 SCC 394, Aruna Ramchandra Shanbaug was a nurse in the King Edwards Memorial Hospital in Mumbai. In November 1973, she was assaulted by ward boy, Sohanlal Bhartha Valmiki, of the same hospital. He strangled Shanbaug with a dog chain around her neck. The attack cut off oxygen supply from her brain leaving her blind, deaf, paralyzed and in a vegetative state for the next 42 years. From the day of the assault till the day she died on May 18, 2015, Aruna could only survive on mashed food. She could not move her hands or legs could not talk or perform the basic functions of a human being.

most horrifying incident which a nurse can ever undergo at workplace. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is another important legislation which provides protection to nurses against workplace harassments⁷². The Act deals with the constitution of Internal Complaints Committee for redressal of complaints of sexual harassment at workplace⁷³. Even if the non-implement of these rights is an area of concern, still the question is: Is this treatment under labour legislations enough? Don't they deserve special/exclusive rights for the service they render to humanity?

Right, Recognition, & Regulation

The three R's such as –Rights, Recognition and Regulation is the need of the hour. The recognition of nursing as a distinct profession with unique features, ensuring the rights of nurses and fixing proper standards of practice through regulation are the urgent requirements. Recognition of nurses as 'health care professional's' is still in an infancy stage in India. A uniform legislation which recognizes nurses role as 'health care professionals' shall be enacted. The legislation must guarantee the right of nurses to practice their profession. Although the Supreme Court of India has recently upheld the right of nurses to practice their occupation throughout the territory of India, still it does not expand their rights.⁷⁴ All the rights related to professional practice such as right to occupational safety and health; right to freedom from workplace harassments and violence; right to form associations or unions; right to refuse orders (physician's as well as) relating to unethical practice; right to enhance professional knowledge and skill through training and other related mechanism; right to get represented in policy decisions relating to healthcare; right to take decisions during the time of emergencies; right to disclose unethical practice at workplace (including unethical orders by physicians); shall be included within it. A balanced approach must be maintained with regard to the rights as well as the obligations of the nurses, and then only nursing will meet its major objective of ensuring 'quality health care'.

Conclusion

Time and again, the recurrent attacks by viruses, in the form as Nipah and Covid-19, have unveiled the truth - Nurses are the real wheels by which the healthcare system moves. Now, it's time to have a re-look and re-fresh ourselves. The Mother-Earth taught us to remain home silently cherishing the realities of life. Covid-19 stretching its arms -Better stays safe home praying and praising life's blessings. Meanwhile, the mind whispers, "Hey! Nothing to worry about, the warriors are ever-ready... dressed up in their PPE kits, to confront and serve us till their last breath".



72 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

73 *Id.*, s.4.

74 *Private Nursing Schools and Colleges Management v. The Indian Nursing Council &Ors*, Decided On January 22, 2019; available at: MANU/SC/0402/2019 (last visited on January 20, 2020).

Dynamic Injunctions: An End to the Whack-a-mole Effect

Akshit Bhardwaj* & Ambika Dilwali**

Abstract

The virtual world of the internet has become a platform for connecting and disseminating information across borders. However, it has become a breeding ground for piracy and security related issues as some websites are created solely for distribution of unauthorised content.

With the progress in the mechanics of piracy, cases of copyright infringement are on the rise. At the same time, the existing remedies of takedown orders and website blocking are proving to be ineffective. Putting an end to these loopholes, India's first dynamic injunction was issued to combat the ever-increasing threat of digital piracy. The authors examine the potency of this novel injunction in light of the antecedent remedies as well as its efficacy in putting an end to hydra-headed websites. Further, this article discusses the adoption of Cinematograph (Amendment) Bill, 2019, and its impact on user liability.

Introduction

The copyright law is a right of exclusion, thus prohibiting others from making certain unauthorised uses of (a) original literary, dramatic, musical and artistic works; (b) sound recordings, films and broadcasts.¹ Digital technology has made possible unimaginable innovation in creating and publicising works, but it has also led to increased fears of copyright piracy.²

The quick and easy approach of copying and exchanging copyrighted materials digitally across jurisdictional boundaries threatens the copyright owners to protect their works. Online piracy endangers the growth of the entertainment industry and has a significant impact on its revenues. The stakeholders in this industry are losing an enormous amount due to illegal streaming and downloading of their content without any payment.³ In 2019, the Indian entertainment industry crossed Rs. 100 billion with a Compound Annual Growth Rate (CAGR) of 11.6%,⁴ Over the

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1. Justin Pila, "An Intentional View of the Copyright Work" 71 *MLR* 540-42 (2008).

2. Stephen McJohn, *Examples & Explanations for Copyright* 287- 88 (Wolters Kluwer, New York, 5th edn., 2018).

3. The True Damages of Online Piracy? It's Hard to Measure, available at: <http://www.innovationfiles.org/the-true-damages-of-online-piracy-its-hard-to-measure/> (last visited on April 29, 2020).

4. Indian Media and Entertainment Industry Report, available at: <https://www.ibef.org/industry/entertainment-presentation> (last visited on May 1, 2020).

period of 2019-24, it is expected to grow at a compound annual growth rate of 13.5% and is set to cross around Rs. 3, 07,000 crores by 2024.⁵ According to a recent study by MUSO, 14,000 major piracy websites receive 57.8 billion visits and 74% of such visits are on streaming sites.⁶

It is a meticulous task to protect the rights online in comparison to the offline world where customs and police officials frequently seize physical items such as CDs, pen-drives, and DVDs containing unauthorised copies of cinematograph work.⁷ Furthermore, the film industry is particularly vulnerable to piracy because of high film production costs and on the contrary low costs are involved in producing counterfeit copies promoting the distribution of pirated content.⁸ Piracy has transitioned from file-sharing websites to streaming sites in recent years.

To curb this menace, a website blocking injunction is ordered against websites that make available copyrighted material without authorisation of copyrightowners. It is issued upon the failure of website operators to comply with the takedown notice. However, such injunctions haven't been effective as there are other ways of accessing the blocked content.

With the ever-evolving copyright infringement remedies, the courts have recently propounded a mechanism wherein the main injunction extends to the mirror websites without having to approach the court again, this came to be known as a dynamic injunction issued by the Delhi High Court in the case of *UTV Software Communication Ltd. v. 1337x.to*.⁹

Following the parameters laid down in the *UTV Software Communications* case, the courts have been issuing dynamic injunctions to prohibit websites from using mirror or redirect websites to re-host the previously blocked infringing content. The challenge faced by owners of copyrighted cinematograph works is that of increasing unauthorised reproduction, publication and distribution, the aim of awarding an injunction having such vast implications is to safeguard plaintiffs against future infringements.¹⁰ In the recent case of *Star India Pvt. Ltd. v. Movies trunk.com & Ors.*¹¹ the nature of the defendant's websites fell within the ambit of rogue websites indulging in disseminating the cinematograph film 'Mission Mangal' without authorisation. The court taking into account the non-compliance of summons issued a dynamic injunction. Correspondingly, in *Disney Enterprises Inc. & Ors. v. RLSBB. unblocked. lta & Ors.*¹² on non-adherence of takedown notice for removal of unauthorised publication of multiple cinematograph films, a blocking injunction which extended to other redirect websites was granted.

5 *Supra* note 64

6 Streaming Sites Dominate Movie and TV-Show Piracy, available at: <https://torrentfreak.com/streaming-sites-dominate-movie-and-tv-show-piracy-160727/> (last visited on May 1, 2020).

7 How Website Blocking Is Curbing Digital Piracy Without "Breaking the Internet", available at: <http://www2.itif.org/2016-website-blocking.pdf> (last visited on May 14, 2020).

8 See Arul George Scaria, *Piracy In The Indian Film Industry Copyright and Cultural Consonance* 19 (Cambridge University Press, New York, 2014).

9 *UTV Software Communications v. 1337X.to and others*, 2019 (78) PTC 375 (Del) ["UTV Software Communications"].

10 *Warner Bros Entertainment Inc. v. Http://MP4moviez.io & Ors.*, CS(COMM) 399/2019.

11 CS(COMM) 408/2019.

12 CS(COMM) 594/2019.

Legal Framework: Combatting Digital Piracy

Giving effect to *ubi jus ibi remedium*, the courts are constantly propounding methods to deal with increasing infringement due to advancements in technology. Every case of infringement requires a tailored remedy and no straightjacket injunction can be blindly issued, there have been a variety of remedies ranging from a simple takedown order to a *john doe* order.

Provisions under The Copyright Act, 1957

The Indian Copyright Act, 1957 bestows a bundle of rights upon the owner of a work which inter alia includes a cinematograph film.¹³ By virtue of Section 14 of the Copyright Act, 1957 the copyright owner has the exclusive right to communicate a cinematograph film to the general public. Section 51 states that when a person without the consent of the copyright owner does anything the exclusive right of which was conferred upon the owner would constitute infringement. When a pirated audio-visual film is released online, it is deemed to be without the consent of the owner, thus constituting infringement.

Section 65A punishes any person who intentionally disregards an effective technological measure implemented to protect rights granted under the Act. It protects the copyrighted material against illegal and unauthorised access, and prohibits digital infringement.¹⁴ However, exceptional circumstances allow for circumvention by third parties, provided they possess relevant information.¹⁵ Furthermore, Section 65B punishes any act committed to remove or alter any rights management information and prohibits its dissemination.

Additionally, Section 52A makes it compulsory to publish information regarding sound and video recordings, including details of the owner of the work and the person who records it. Simultaneously, Section 68A punishes any act in contravention of Section 52A with imprisonment up-to three years along with a fine. Section 52A serves the objective to safeguard the interest of public and copyright holders of cinematograph films and sound recordings while preventing the piracy of such work.¹⁶

India has incorporated provisions of Digital Rights Management (DRM)¹⁷ to bring the domestic law in conformity with WIPO Performances and Phonograms Treaty (WPPT), 1996, and WIPO Copyright Treaty (WCT), 1996.¹⁸ DRM is used by digital content owners as a layer of protection to limit the consumer's use of a certain product. It is encoded with a specific electronic code that safeguards the rights of the owner. Thus, prohibiting any alteration or removal in the digital copies of the work containing the information of the management of rights.¹⁹

13 The Copyright Act, 1957 (Act 14 of 1957), s. 2(y).

14 Technological Protection Measures, available at: <https://www.bananaip.com/ip-news-center/technological-protection-measures-under-the-copyright-amendment-act-2012/> (last visited on May 12, 2020).

15 The Copyright (Amendment) Act, 2012 (Act 27 of 2012), s. 65A cl. 2.

16 *State of Andhra Pradesh v. Nagoti Venkararamane*, (1996) 6 SCC 409.

17 The Copyright (Amendment) Act, 2012 (Act 27 of 2012), ss. 65A, 65B.

18 Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, available at: https://www.prindia.org/sites/default/files/bill_files/SCR_Copyright_Bill_2010.pdf (last visited on 2 May, 2020).

19 A.G. Scaria, "Does India need Digital Rights Management Provisions or Better Digital Business Management Strategies" 17 *JIPR* 465-66 (2012).

However, Section 52 provides the Doctrine of Fair Dealing which enunciates that a copy of literary work used with the intention to criticize or review a particular work or any other piece of work shall not constitute copyright infringement. The High Court of Delhi in *Wiley Eastern Ltd. and Ors. v. Indian Institute of Management*²⁰ propounded that Section 52 serves the purpose of protecting the freedom of expression enshrined under Article 19(1) of the Indian Constitution. The court further opined that Section 52 does not intend to negatively suggest what infringement is. Therefore, the content owners of copyright need to respect Fair Dealing and hence, the same shall not be restricted by applying DRM.

Remedies Preceding Dynamic Injunctions

To keep pace with the evolving nature of infringements, courts from time to time have devised diverse remedies. In *Mirabai Films Pvt. Ltd v. Siti Cable Network and others*²¹, the court upheld the peremptory action restraining the respondent, being a cable operator, and an internet provider from telecasting pirated copies of films. The reason for granting a temporary injunction vested in the fact that the respondent was a habitual offender. Furthermore, the evolution of “John Doe” orders in *Taj Television v. Rajan Mandal*²² assisted in fixing the liability of unknown defendants committing infringement in India. Subsequently, ‘Quia-Timet’ (i.e. timely action due to apprehension of infringement) and ‘John Doe’ orders are being issued over time as a necessity to curb digital infringements.

A complainant can also serve a ‘takedown’ notice to the host or Internet Service Provider (ISP) for removal of the copyrighted content that has been posted without his permission. However, the challenge of taking down a URL or a complete website still persists before the courts. In 2011, the High Court of Delhi while granting a John Doe order to prevent piracy, directed the plaintiff to send a list of file-sharing websites to ISPs in order to prevent them from indulging in piracy.²³ Subsequently, ISPs failed to monitor specific pages as URLs resulting in complete blocking of websites causing the removal of legitimate content. Although, due to misuse of this approach, the Madras High Court while what was initially a broad order converted it into a narrow and specific order by directing the copyright owners to inform the ISPs within 48 hours to block specific infringing URLs and not the entire website.²⁴ This resulted in the shifting of the onus to identify the URLs and websites from the ISPs to the copyright owners.

Interestingly, due to the growing threat of rogue websites, the courts started considering the scope of blocking entire websites. The Bombay High Court propounded that the complainant seeking an order to block the entire website due to infringing content hosted by it must establish that a comprehensive audit has been concluded to determine the necessity for such an order.²⁵

20 61 (1996) DLT 281.

21 2003 (26) PTC 473 Del.

22 (2003) FSR 2.

23 *Reliance Big Entertainment v. Jyoti Cable Network*, CS (OS) No. 1724 of 2011.

24 *M/s R K Productions Pvt Ltd v. BSNL & Ors*, CS (OS) No. 208 of 2012.

25 *Eros International Media Limited and Ors. v. Bharat Sanchar Nigam Limited and Ors*, CS 620/2016.

Furthermore, the Delhi High Court by recalling its previous order and restoring the observations of the single judge enunciated that rogue websites hide behind the veil of anonymity making it necessary to block them in their entirety as blocking a URL would not serve the purpose due to an array of URLs, thus making it a massive task for the ISPs to monitor and block.²⁶

Shift In Liability Of Intermediaries

Section 79²⁷ of the Information Technology Act, 2000 shifted the obligation of an intermediary over third-party content posted on their website giving them a safe harbour in cases where they had no actual knowledge of such infringement. However, this exculpation from liability of third-party information consists of certain exceptions incorporated under Section 79(2) & Section 79(3). Additionally, to make laws stringent and effective and for the intermediaries to exercise this immunity, it has to remove the information used to commit unlawful acts within 36 hours of receiving an official complaint.²⁸ Furthermore, Section 52(1) (c) of the Copyright Act, 1957 elucidates that for the purpose of providing electronic links, access or integration, the transitory or incidental storage of a work or performance is not explicitly prohibited by the right owner under the protection of fair use of the copyright. Nonetheless, the proviso of the section states that if the person responsible for storing the copy has received a written notice from the copyright owner alleging an infringement, such person shall refrain from allowing access to the public for a period of 21 days or until he receives an order from the court.

Significantly, if no order is received before the expiry of 21 days, he may continue to provide access to such work. The issue of intermediary liability and safe harbour has been finally settled by the Supreme Court by interpreting Section 79(3) and enunciating that an intermediary should disable access or remove certain content only after receiving actual knowledge about a court order directing for such action.²⁹ Moreover, The Copyright Rules, 2013 granted discretion to the intermediaries to remove the access to the work upon receiving a complaint from the copyright owner.³⁰ Additionally, the Delhi High Court reiterated that the decision of the intermediary to remove certain content must be backed by actual knowledge and not on mere apprehension.³¹

Dynamic Injunctions: A Step Ahead

In common practice, courts across the globe order internet service providers (ISPs) to block access to websites engaged in illegal activities such as those facilitating cybercrime, child pornography, or terrorism, however, when it comes to addressing the issue of digital piracy, certain countries are reluctant to order website blocking for the websites engaged in distributing

26 *Department of Telecommunication and Ministry of Electronics (DEITY) v. Star India Pvt. Ltd*, 2016 SCC OnLine Del 4160. [“DEITY”]

27 The Information Technology (Amendment) Act, 2008 (Act 10 of 2009).

28 Information Technology (Intermediary Guidelines) Rules, 2011.

29 *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

30 The Conundrum of Intermediary Liability, available at: <https://www.mondaq.com/india/trademark/921920/the-conundrum-of-intermediary-liability-in-the-last-decade> (last visited on 5 May, 2020).

31 *My Space Inc. v. Super Cassettes Industries*, 2017 (69) PTC 1.

illegal copies of movies, music, and other copyright protected works.³² There exist three factors that make copyright enforcement tedious- the prevalence of physical piracy, servers located outside India that host pirated content, and lack of proper implementation of civil and physical remedies.³³

In the absence of any criteria being laid down by the Supreme Court of India for blocking websites as a whole vis-a-vis specific infringing pages, it remains a matter which is decided individually by every court. In the past, courts adopted a practice of blocking which was limited to either specific pages or websites in their entirety. These measures were extremely fruitless as the pirate could easily migrate to a new page or a website without violating the injunction order and by the time the applicant approaches the court for the second time to block a new website or page, a substantial amount of loss is already borne by him.³⁴

India's first dynamic injunction³⁵ was granted in *UTV Software Communications* case, inspired by the judgment delivered in *Disney Enterprises, Inc. & Others v. MI Ltd & Others*³⁶ by the High Court of Republic of Singapore to curb the threat of hydra-headed rogue websites indulging in online piracy. Unlike the order of dynamic injunctions issued by the Singapore High Court under Section 193 DDA of the Singapore Copyright Act, the Delhi High Court by virtue of Section 151 of the Code of Civil Procedure, 1908 granted a dynamic injunction with the aim of providing ease of convenience to the copyright owners to directly approach the Joint Registrar of the court to extend an injunction previously granted against a website to another "mirror/ redirect/ alphanumeric website" with the same infringing material of an already blocked website.

Rogue and Hydra Headed Websites

According to Webster's Dictionary, "Hydra-headed" refer to having multiple centres or branches.³⁷ The issue of hydra-headed website pertains to resurfacing of a blocked website consisting of similar content under a different domain name. Thus, these rogue websites give rise to multiple alphanumeric sites even after getting blocked due to changes made by the operator in the form of a digit or a letter giving it a whack-a-mole effect.³⁸ Furthermore, these networks operate as hydra-headed websites to expand their reach.

The Delhi High Court has enunciated that websites which are majorly involved in distributing and permitting the uploading of unauthorised, infringing content or providing access to third-party to a searchable database i.e. '*flagrantly infringing online locations (FIOL)*' are considered as rogue websites.³⁹ Additionally, the Copyright Act of Singapore states that a FIOL is an online

32 *Supra* note 7 at 1.

33 Arpan Banerjee, "Copyright Challenges of Online Copyright Enforcement in India", in Kung-Chung Liu, Uday S. Racherla (eds.), *Innovation, Economic Development, and Intellectual Property in India and China* 175-77 (Springer Open, 2019).

34 *Sagarika Music Pvt. Ltd. & Ors v. Dishnet Wireless Ltd. & Ors*, CS 23 of 2012.

35 *UTV Software Communications*, *supra* note 9.

36 [2018] SGHC 206.

37 Hydra-headed, available at: <https://www.merriam-webster.com/dictionary/hydra-headed> (last visited on 10 May, 2020).

38 *UTV Software Communication*, *supra* note 9.

39 *Id.*

location which is used to flagrantly commit or facilitate infringement of copyright and is identified under Section 193DDA.⁴⁰ Additionally, the Act states that the High Court while determining a FIOI shall address and consider appropriate grounds laid down under Section 193DDA (2) of the Singapore Copyright Act. These ascertain the primary purpose and means to use such online repositories, demonstration of disregard by the website towards copyright and court orders issued domestically or internationally, and the measures taken by it to circumvent procedures adopted by agencies to disable its access. The Delhi High Court in addition to what has been laid down by the Copyright Act of Singapore has further determined certain factors such as whether the details of the registrants of the website are undisclosed and there is no information to trace the owner or the users accessing it, and perhaps the actions of website post receiving 'take down' notices and other complaints.⁴¹

A rogue website works on the notion of bypassing technical controls or orders from courts and offers convenient and unrestricted access to pirated films/shows in violation of their copyright and masks users' data.⁴² Meanwhile, the advertisement programs that generate revenue function on an obscure network with no source to examine its credentials.⁴³ These websites host, stream, broadcast, and disseminate content to the public that is pirated resulting in copyright infringement.⁴⁴ Also, behind the veil are the makers of these websites who exploit movie rights by broadcasting endless films on the internet to raise fast money and evade royalties and fees.⁴⁵

Modus Operandi Devised by the Court

The court in the *UTV Software Communications* case granted a main injunction to block the principle website and a subsequent injunction, being the dynamic injunction to block the alphanumeric websites. The plaintiff is not obligated to return to the court for a blocking order with respect to every IP address of the infringing URLs which had been previously determined by the court. Dynamic injunctions ensure that plaintiffs do not suffer on account of owners and operators of FIOIs changing the primary domain to escape liability under website blocking. At the same time, ease of convenience is provided to the defendants by not needing to return to the court for responding to another case.⁴⁶ It requires the defendants to block additional domain names, URLs, and IP addresses which give ingress to the websites blocked by the previously granted injunction. At the same time, the Court is freed from the burden of constantly monitoring and adjudicating the issue involving mirror websites hosting identical content.

Dynamic injunctions can be construed as blocking new means of access to the same websites containing infringing content rather than blocking new websites that were not included in the

40 The Copyright Act, 1987 (Singapore), s. 193A.

41 *UTV Software Communications*, *supra* note 9.

42 *Id.*

43 *Disney Enterprises Inc. v. M1 Ltd.*, [2018] SGHC 206.

44 *Supra* note 26.

45 Dr. B.L Wadehra, *Law Relating to Intellectual Property* 303 (Universal-Lexis Nexis, India, 5th edn., 2018).

46 *Supra* note 43.

previous order.⁴⁷ The mechanism is quite convenient, the plaintiff is required to file an application for impleadment via Order I Rule 10 of Code of Civil Procedure, 1908 accompanied with an affidavit affirming that the newly impleaded website is a mirror website with sufficient supporting evidence. Upon satisfaction of the Joint Registrar that the impugned website is a redirect website of the enjoined rogue website(s) and merely provides access to the same infringing content, a direction is issued to ISPs to disable access in India to such websites.⁴⁸ To keep the Registrar's power in check, any party being aggrieved by the direction passed can file an appeal to the Judge in Chambers.⁴⁹

Homogeneous Treatment of Internet Infringer

The court construed an infringer on the internet to be well within bounds of receiving similar treatment given to an infringer in the physical world. The reason cited by the court was simple, the majority of modern digital piracy websites operate as a multibillion-dollar international business⁵⁰ earning money via advertising or providing subscriptions for premium access to content without advertising.

However, according to the approach adopted by internet exceptionalists such as the Electronic Frontier Foundation believe that the internet is a unique highway and should not be subjected to rules applicable to the offline spaces.⁵¹ Internet shall be about individual freedom and not collective responsibility even if it comes at the cost of online piracy. Rejecting the views of exceptionalist school of thought the court remarked that if such a philosophy is followed all infringers shall move to the e-world and claim immunity from being prosecuted.

Non-Contravention of Free Internet Principles

Website blocking is not contrary to the ethos of a free and open internet, even copyright minimalists support the removal or limitation to access of certain materials which facilitate piracy, terrorism, and pornography.⁵² The government should draw appropriate lines between unsupervised internet freedom and unlimited censorship authority to restrict access to content that isn't illegal. It shall be kept in mind that new technologies are underway to copy and promulgate digital content without the copyright owner's assent.

Defenders of free internet might contest that website blocking is unfair to average citizens and a number of other alternatives such as a "notice and takedown" incorporated in The Digital Millennium Copyright Act of 1998 (DMCA) shall be initiated as made effective in the Napster

47 *Cartier International AG and others v. British Sky Broadcasting Ltd and others*, [2017] 1 All ER 700.

48 Delhi High Court (Original Side) Rules, 2018, Rule 6.

49 Delhi High Court (Original Side) Rules, 2018, Rule 5.

50 The Pirate Bay Makes \$4 Million a Year on Illegal P2P File-Sharing, "says Prosecutor", available at: <https://techcrunch.com/2008/01/31/the-pirate-bay-makes-4-million-a-year-on-illegal-p2p-file-sharing-says-prosecutor/> (last visited on 15 May, 2020).

51 A Declaration of the Interdependence of Cyberspace, available at: <https://www.computerworld.com/article/2494710/a-declaration-of-the-interdependence-of-cyberspace.html> (last visited on 15 May, 2020).

52 *Supra* note 7, at 17.

and Grokster cases.⁵³ Earlier, illegal copying was a strenuous and mechanical process, however in recent times, innumerable websites providing identical pirated content are just a click away and for curbing them, a dynamic injunction blocking all these redirect websites is essential.

Reliance on the Qualitative, not Quantitative Infringement Test

After determining whether the website is rogue or not, the courts seek to ascertain the tests applicable to establish infringement in such cases. In common parlance, the courts examine whether the primary purpose of and effect of the website is to facilitate infringement as opposed to examining purely the quality of infringing content on the website.⁵⁴

In 2016, the Bombay High Court propounded a three-step verification process to be followed while dealing with website blocking orders.⁵⁵ It is ought to be shown by the plaintiff that the entire website contains only illicit and infringing material with no other legitimate content whatsoever. However, the website exhibited certain non-infringing materials leading to the formulation of the test.

- a. A verification and assessment conducted by an external agency of the web links and URLs that are infringing, accompanied by a letter in writing.
- b. A second level of verification by the deponent of the Affidavit along with Plaintiff's counsel.
- c. The affidavit to be on oath.

However, a qualitative test shall be adopted by the court providing a lower threshold for the plaintiff to prove infringement. In the case of rogue websites, a stringent approach shall be followed to block websites as identification of each URL (Uniform Resource Locator) would become a tedious task whereas these rogue websites can change them within seconds.⁵⁶

The relevant question in copyright infringement is whether the segment constituted a substantial portion of the plaintiff's work, not whether it constituted a substantial portion of the defendant's work. The value of a work may be substantially diminished even when only a portion of it is copied, if the part that is copied is of great qualitative importance to the work as a whole.⁵⁷

It is an accepted position that no plagiarist can excuse the wrong by showing how much of his work he did not pirate.⁵⁸ The fact that a substantial portion of the infringing work was copied verbatim is corroboration of the qualitative value of the copied material, both to the creator and to the plagiarist who gains from marketing someone else's copyrighted expression.⁵⁹

53 See David Corwin, "Contributory Copyright Liability in Napster versus Grokster: A Distinction Without a Difference" 24 *Loy. L.A. Ent. L. Rev.* 613-16 (2004).

54 UTV Software Communications, *Supra* note 9.

55 *Eros International Media Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors.*, Notice of Motion (L) No. 2315 of 2016 in Suit No. 751 of 2016.

56 *Supra* note 26.

57 *Jarvis v. A & M Records*, 827 F. Supp., 282 (D.N.J. 1993).

58 *Sheldon v. Metro Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

59 *Harper & Row, Publishers, Inc., Et Al. v. Nation Enterprises Et Al.*, 471 U.S. 539 (1985).

For the test to declare a website to be rogue, it is required to contain only illicit or infringing material, then each and every rogue website would add a small percentage of legitimate non infringing material and contend that it is not to be declared an infringing website.

Proportionality Principle Conundrum

A fair balance shall be struck while deciding between the fundamental right of trade and freedom of expression and the right to intellectual property.⁶⁰ A stabilising act is required between freedom of speech and expression and privatised censorship. If an intermediary is mandated to differentiate and identify infringing content from non-infringing one, it could have a dampening effect on free speech. In order to refrain from contempt action, the intermediary would discard all material of such kind including the ones that remotely resemble that of the content owner. Such kind of unwarranted censorship would impinge upon the ethos of free speech regimes.⁶¹

The roots of the proportionality test lie in the heart of the moral and theoretical principle of “reward for one’s work.”⁶² According to Robert Merges,⁶³ the test evolves from the Lockean theory that measures the efforts invested by the author on one hand and the corresponding reward on the other.

Blocking is antithetical to preservation of a ‘free and open’ internet, it doesn’t imply that every website should gain free access. In *Cartier International AG v. British Sky Broadcasting Limited*,⁶⁴ Justice Arnold was of the view that alternative measures of taking action against the operators, notice of takedown by the hosts, payment freezing, domain name seizure or de-indexing would not be a solution to digital piracy. Consequently, websites blocking in the case of rogue websites shall be the most viable option when measured on the scale of proportionality and necessity. Similarly, the court refused to grant a dynamic injunction as it entailed blocking unnecessary domain names, URLs, or IP addresses without proper judicial scrutiny.⁶⁵

In the European Union, it was a customary practice of courts to consider the rights of copyright holders while issuing blocking injunctions.⁶⁶ The European Court of Justice addressed proportionality of an injunction and held that it would be considered just and proper only when strictly targeted so as to strike a balance between preventing third party infringements and protecting freedom of information.⁶⁷ The traditional notion that an injunction can only be proportionate if it leads to a complete cessation of infringements cannot be accepted as an ‘*absolute effectiveness*’ standard and cannot be justified because an injunction against one site cannot prevent infringing content being made available elsewhere. At the same time, the recent trend points towards favouring

60 UTV Software Communications, *supra* note 9.

61 *Myspace Inc. v. Super Cassettes Industries Ltd.*, 236 (2017) DLT 478.

62 See Robert Merges, “*Justifying Intellectual Property*” 317-325 (Harvard University Press, Cambridge, 2011).

63 See *Id.* at 150, 160.

64 [2014] EWHC 3354.

65 *Roadshow Films v. Telestra Corporation*, [2016] FCA103.

66 *Twentieth Century Fox Film Corp v. Newzbin Ltd*, 608 (EWHC (Ch)); *Twentieth Century Fox Film Corp v. British Telecommunications* [2011] EWHC 1981 (ch).

67 *UPC Telekabel v. Constantin Film*, Case C-314/12.

the fundamental right of freedom of expression of other stakeholders as a foundation of pillars of democracy.⁶⁸ It is acknowledged in the EU Charter of Fundamental Rights⁶⁹ that the Right to Intellectual Property is not absolutely inviolable and protected.⁷⁰ Thus, under the European Union Law, a blocking injunction shall be granted only if it is effective, proportionate, and dissuasive in cases where it creates barriers to legitimate trade.⁷¹

In India, courts have the power to order a pre-publication or pre-broadcasting injunction, provided that the two-prong test of necessity and proportionality is satisfied.⁷² Website blocking has transpired to be the most cost effective, victorious, and proportionate means to curb online piracy. An order of blocking shall only be passed once the court is satisfied that the measure is necessary and proportionate. The ‘necessary’ requirement fulfils the aim of being essential while the ‘proportionality’ requirement restricts the order from having an excessive effect.

Cinematograph (Amendment) Bill, 2019: A Way Forward

India has been struggling to tackle the issue of peer-to-peer movie downloads as the existing laws are not sufficient to deal with the modern mechanism of piracy. Furthermore, the proliferation of content in the media industry has been a major factor leading to infringement.⁷³ By virtue of The Cinematograph (Amendment) Bill, the government seeks to include penal provisions for unauthorised cam-cording and duplication of films leading to piracy.⁷⁴ It proposes to punish any person with an imprisonment upto 3 years or with a fine upto Rs. 10 lakhs or both, who knowingly transmits or attempts to transmit or abet the making of such transmission of a copy of film without the written authorization of the author.⁷⁵ Moreover, the recent amendment intends to include the definition of piracy and penal provision under Section 7 of the original Act that deals with the conditions of exhibition and watching of films and the penalties in case of violation.⁷⁶ The Bill does not seek to provide compensation to the producer or the copyright owner, albeit these stringent provisions will directly act as a deterrent against offline piracy occurring through mobile phones and cameras as the recorded content will ultimately finds its way to the web.

However, the bill suffers from irregularities such as the non-formation of an expert agency that can monitor pirated sites and carry out investigations to mitigate infringement. An expert agency is necessary to curb piracy as the local police that investigates the crime lack technical

68 *Castells v. Spain*, (1992) 14 EHRR 445.

69 The European Union Charter of Fundamental Rights 2012, Art. 17.

70 *Scarlet extended v. Sabam*, C-70/10.

71 *L'Oréal SA Ltd. v. eBay International AG*, C-324/09.

72 *Dr. Shashi Tharoor v. Arnab Goswami and Anr.*, 246 (2018) DLT 279.

73 Tackling Film Piracy & Copyright infringement, available at: https://pib.gov.in/Press_Release_Detail.aspx?PRID=1562975 (last visited on 20 May, 2020).

74 Press Trust of India, “Government introduces bill in Rajya Sabha to amend Cinematograph Act; jail term, fine for film piracy”, *The Hindu*, February 12, 2019, available at: <https://www.thehindu.com/news/national/government-introduces-bill-in-rajya-sabha-to-amend-cinematograph-act-jail-term-fine-for-film-piracy/article26249683.ece> (last visited on 1 June, 2020).

75 India: The Cinematograph Amendment Bill, 2019, available at: <https://www.mondaq.com/india/broadcasting-film-tv-radio/784368/the-cinematograph-amendment-bill-2019> (last visited on 1 June, 2020).

76 *Id.*

knowledge and resources. Furthermore, the cyber-cell division of the police that has expertise in dealing with cyber-crime is overburdened with pending cases⁷⁷ failing to protect the copyrighted content on the internet. A special agency can further assist the courts and the government by submitting their reports and findings leading to better decision making. The Bill further lacks provisions that can harmonise the functioning of different agencies that are dealing with offline and online infringement. Perhaps, the implementation of this Bill in India will solely depend upon the conduct of government agencies and other stakeholders that are committed to the cause of limiting piracy in India.

Government Initiatives

The Government has also taken note of substantial threat of piracy and has drafted various structural as well as policy initiatives to combat infringement. Due to the evolving nature of technology, efforts have been made to monitor the farsighted approach of violators and to strengthen the enforcement of Intellectual Property Laws.

National Intellectual Property Rights Policy, 2016

The Government introduced the policy to provide a secure and dynamic system of Intellectual property laws in India. The main objective of this policy is to build a strong and competent legal framework to balance the interests of rights holders with the interest of the public and to strengthen the enforcement and adjudication mechanisms to combat infringement.⁷⁸ This enabled smooth coordination between different agencies and stakeholders to identify jurisdictional issues, data and facts oriented studies, the extent of IP violations, and effective mechanism to curb digital piracy.⁷⁹ Significantly, the establishment of The Cell for IPR Promotion and Management (CIPAM) under the policy has helped in promoting awareness among people about IP laws and its enforcement. It has been co-hosting campaigns with Film & Television Producers Guild of India and Viacom18 against piracy and its implications.⁸⁰ The broadcasting of ‘Say No To Piracy’ videos and animation messages in collaboration with celebrities, media houses, and theatres has been acknowledged worldwide.⁸¹

Maharashtra Cyber Digital Crime Unit (MCDCU)

MCDCU in collaboration with the U.S. Chamber of Commerce has been contributing to the creation of a systematic and comprehensive cyber-security and anti-IP theft ecosystem to protect the rights of copyright owners.⁸² MCDCU, set up in 2017 is a first of its kind initiative in South Asia, wherein it has collaborated with entertainment industry to combat piracy. Within a

77 Vijay Mohan, “Cyber Crime Net Widens”, *The Tribune*, January 05, 2020, available at: <<https://www.tribuneindia.com/news/features/cyber-crime-net-widens-21638>> (last visited on 5 June, 2020).

78 National IPR Policy, available at: <https://dipp.gov.in/policies-rules-and-acts/policies/national-ipr-policy> (last visited on 1 June, 2020).

79 See *Id.* at 74.

80 Anti-Piracy Campaign, available at: <http://cipam.gov.in/?s=anti+piracy> (last visited on 10 June, 2020).

81 *Id.*

year, it has permanently shut down over 200 top piracy websites with 160 million users.⁸³ Subsequently, the U.S. Chamber of Commerce has recognized the efforts made by MCDU and has honoured them as 2019 IP Champions in India.⁸⁴

Anti-Piracy Measures in The Draft E-Commerce Policy, 2019.

The draft policy has suggested anti-piracy reforms keeping in account the interests of consumers, investors, traders, etc. These reforms include:⁸⁵

1. To expeditiously remove or disable access to a website or any other e-platform which is making available, selling, or distributing any copyrighted content without the prior permission of the owner. For such action, a prior complaint must be received from the copyright owner.
2. Measures to be undertaken by the intermediaries to prevent online dissemination of pirated content. Furthermore, a mechanism to identify “trusted entities” and resolve their complaints as a priority.
3. Moreover, it proposes to create a body of industry stakeholders to identify “rogue websites” and post verification, including them in the “*Infringing Websites List*” (IWL). This shall allow ISPs and search engines to disable their access leading to the removal from search results. Pertinently, IWL would further help in blocking the flow of payments to such websites and its identification shall discourage advertisers not to publish their ads on these networks.

Conclusion

Dynamic injunctions are a strong foundation laid down by the Indian Courts when it comes to combat online piracy. At the same time, a blend of dynamic injunctions for blocking websites in India as directed in the *UTV Software Communications* case, if accompanied with geo-blocking orders would go a long way in dealing with the issue of piracy and resulting infringement at the global level not restricted to the local territories of a country. Additionally, courts shall promote and exercise the mechanism of ‘hot-tubbing’ in cases relating to technical jargon. This shall help in understanding the technological advancements with the help of an expert and courts can further delve into legal aspects leading to a suitable remedy and suggesting a policy that can change the dynamics of cases involving piracy and infringement.

Correspondingly, more units like MCDU must be set in metropolitan cities to oversee piracy activities and user awareness programs must be launched at rudimentary levels in

82 U.S. Chamber Recognizes Maharashtra Cyber Unit as 2019 IP Champions in India, *available at*:<https://www.usibc.com/press-release/u-s-chamber-recognizes-maharashtra-cyber-unit-as-2019-ip-champions-in-india/> last visited on 20 June, 2020).

83 Press Trust of India, “Over 200 Pirate Websites Shut Down In One Year: Govt”, *The Economic Times*, November 19, 2018), *available at*:<https://ciso.economictimes.indiatimes.com/news/over-200-pirate-websites-shut-down-in-one-year-govt/66687482> (last visited on 25 June, 2020).

84 *Id.*

85 Draft National e-Commerce Policy, *available at*:https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf (last visited on 25 June, 2020).

collaboration with organizations like CIPAM and Federation of Indian Chamber of Commerce & Industry (FICCI). A possibility of levying fine on viewers and subscribers can be delved into keeping in mind that the majority of these viewers are young adults who might lack knowledge in respect of piracy and copyright infringement. However, subsequent and repeated offenders can be identified by the ISPs making them liable under the law.

Another possible measure to reduce the burden of courts can be done by directing any blocking requests through the administrative department of the government that can be entrusted with the responsibility of conducting a preliminary investigation based upon the claims of the applicant and later approach the court for granting an order of dynamic injunctions. However, it is recommended that the parliament must introduce a *sui-generis* administration policy that can resolve the issues of the complainant in a reasonable timeframe through the government departments. Upon employment of such measures, India would be a step ahead of other countries while dealing with issues accruing from the dark net as well as the promotion of legal content that will give an impetus to the Digital India campaign.



Role of International Labour Organization in Protecting the Human Rights of Workers – An Analysis

Rohini B.L.*

Abstract

Human labour is the essence of all human activities because survival depends on human labour alone. Today greater attention is drawn towards labour standards, especially on core labour standards which are an inevitable consequence of globalisation. Labour standards are simply the rules which govern how people are treated in a working environment. They come in a variety of forms and originate at local, national and international levels. The aim of labour standards primarily is to protect the human rights of the working class. But the question is how far the International Labour Standards are being respected. The role played by International Labour Organization in this backdrop is a point of discussion. Hence this paper critically examines and brings to light how the International Labour Organization has shaped itself to safeguard the human rights of workers through its various Conventions, Declarations and mechanisms of implementation. The study establish that ILO had played a significant role in addressing the human rights of labours but there are challenges and constraints to be overcome for which recommendations has been sought out.

Introduction

Dignified life is one of the basic rights of a human being. The principles of human rights were drawn up by human beings as a way of ensuring that the dignity of every person is properly and equally respected, that is, to ensure that a human being be able to develop and use human qualities such as intelligence, talent and conscience and satisfy his or her spiritual and other needs. Dignity gives an individual a sense of value and worth, the existence of human rights demonstrates that human beings are aware of each other's worth.¹ Human rights enable us to respect each other and live with each other. In other word they are not only the rights to be requested or demanded but rights to be respected and be responsible for. The rights that apply to you also apply to others. The denial of human rights and fundamental freedoms not only is an

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1 Satya P Kannan, Human Rights and Social justice, Concept and Perception 19 (Wisdom Press, Daryaganj, NewDelhi, 1st edn. 2012).

individual and personal tragedy, but also creates conditions of social and political unrest sowing the seeds of violence and conflict within and between societies and nations.²

Human rights and Human Labour is always linked to each other. Human labour is the essence of all human activities because survival depends on human labour alone. It determines the economic, cultural and moral development of persons, of their families and of society. The rights inherent to human labour, so explicitly and universally recognized, reflect the centrality of the human being in all working relations. This centrality is essential to understand, the intrinsic value of human labour and the importance of organizing economic and social systems in a way respectful of human rights. Today greater attention is drawn towards labour standards, especially on core labour standards which are an inevitable consequence of globalisation. Labour standards are simply the rules which govern how people are treated in a working environment. They come in a variety of forms and originate at local, national and international levels. At the international level labour standards are found in International Conventions and Recommendations. International labour standards are important because they represent the international consensus on minimum best practices, whether on human rights generally or more precisely on labour matters. Furthermore, when they have been ratified by member countries they become legal obligations in national and international law, and maybe even included in national law. Thus it could be rightly assumed that the aim of labour standards primarily is to protect the human rights of the working class. But the question is how far the International Labour Standards are being respected. The role played by International Labour Organization in this backdrop is a point of discussion. Hence this paper critically examines and brings to light how the International Labour Organization has shaped itself to safeguard the human rights of workers through its various Conventions and mechanisms.

International Labour Organization (ILO)

The International Labour Organization (ILO) is the United Nations (UN) body that sets internationally recognized labour standards to protect the rights of workers globally. It has the most effective and well developed mechanisms for protecting the human rights of workers. There are currently 189 Conventions, 205 recommendations and six protocols covering a broad range of work issues.³ Areas covered by International Labour Standard include, basic human rights, occupational safety and health, wages, working time, employment policy and promotion, vocational guidance and training, specific categories of workers, training and skills development, labour administration and inspection, maternity protection and social security, indigenous and tribal people, and migrant workers.

ILO was created in 1919 bringing governments, employers and trade unions together, to work for social justice, better living and working conditions.⁴ It was established as a result of the

2 Satya P. Kannan, *Supra* note 1

3 Rules of game : An Introduction to the standards related work of the International Labour Organization (ILO, Geneva, 2019).

4 Chandra Roy and Mike Kaye, *The International Labour Organization- A handbook for Minorities & Indigenous people* 3 (Minority Rights Group, 379 Brixton Road, London, 1st edn., 2002).

industrial revolution, during the period of economic expansion in which working conditions were harsh, often inhumane and workers labored under conditions amounting to exploitation with no social or economic security. Since then there were calls for greater protection for workers.⁵

In the aftermath of the First World War, these calls gathered momentum and trade unions stressed the need for social protection, and an international institution specializing in labour issues. In April 1919, during the peace negotiations in Paris, a Labour Commission was established to look into this question and, as a result, an international organization devoted solely to labour questions was created, in October the same year the 1st International Labour Conference was held in Washington D.C and six Conventions were adopted in the Conference.⁶

Between the two World Wars (1919–39), the ILO functioned as an autonomous organization within the family of the League of Nations, the precursor to the UN. During that time it focused on maternity protection, social security, unemployment, working hours, and working conditions of women and young people.⁷ ILO survived the demise of the League of Nations and when the UN was created in 1945,⁸ it became the first specialized agency to join the UN system, with special responsibility for social and labour issues. Today, ILO has become an organization which aims for social justice and promote decent work for men and women everywhere regardless of their race, sex, gender or social origin. It pursues this aim by a combination of standard-setting, technical cooperation and sharing of information.

The founding documents of the ILO included a Charter elaborated during the Peace Treaty of Versailles based on the certain principles:⁹ These principles form the main objectives of ILO and guide its works in all fields and they are;

- a) Abolition of child labour
- b) Adequate wages
- c) Equality of treatment
- d) Equal pay
- e) Inspection systems
- f) Labour should not be seen merely as a commodity or as an article of commerce
- g) Reasonable working hours
- h) Right of association.

*“Universal and lasting peace can be achieved only if it is based on social justice.”*¹⁰

⁵ Chandra Roy and Mike Kaye, *Supra* note 4.

⁶ *Supra* note 4, at 4.

⁷ *Id.*,

⁸ Jansuz Symonds, *Human Rights International Protection, Monitoring, Enforcement* 92 (Rawat Publication, Jaipur and New Delhi, 2005).

⁹ *Supra* note 3.

¹⁰ ILO Constitution Preamble, June 28, 1919, 49 Stat. 2712.

This forms the pillar of the ILO's work and is the basis for its work on equality and non-discrimination and for poverty alleviation. During its annual conference¹¹ ILO adopted a key Declaration which expanded on the Charter of 1919¹². This Declaration reaffirms the fundamental principles on which the ILO is based and consists of four linked principles:¹³

- a) Freedom of expression and of association are essential to sustained progress
- b) Labour is not a commodity
- c) Poverty anywhere constitutes a danger to prosperity anywhere
- d) All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

The 1944 ILO Declaration of Philadelphia thus reaffirmed the fundamental ILO principles that peace must be based on social justice, that "poverty anywhere constitutes a danger to prosperity everywhere" and that the "war against want" must be carried out at both national and international levels.¹⁴

International Labour Standards (ILS)

The method by which the ILO fights for social justice is based on the adoption and supervision of International Labour Standards consisting of Conventions and Recommendation. International Labour Standards are universal reference points marking levels of achievement in economic and social development. They lay out basic principles, articulate rights and duties of employers and workers, policy objectives, outline areas of action, or provide guidance on means and procedures to be employed.¹⁵ International labour standards are designed to promote decent work for workers of all nationalities and take the legal form of either conventions or recommendations.

- a) *Conventions or Protocols*: These are legally binding international treaties that may be ratified by member States which lays down the basic principles to be applied by ratifying countries, or
- b) *Recommendations*: They are non-binding, but authoritative guidelines that do not have to be ratified and become effective upon adoption at the International Labour Conference.¹⁶

Conventions set out the minimum standards that have been subject to extensive negotiations and resulting agreement between the ILO governments, employers and workers organizations from the member states. Recommendations provide more specific guidance for national law and practice, as well as for international advocacy. Usually Recommendations accompany and

11 1944 held in Philadelphia

12 The 1944 ILO Declaration of Philadelphia

13 Chandra Roy and Mike Kaye, *The International Labour Organization- A handbook for Minorities & Indigenous people* 4 (Minority Rights Group, 379 Brixton Road, London, 1st edn. 2002).

14 *Id.*, at 4

15 International Labour Organization, *International Labour Standards: Guide for Policy Makers and Practitioners in Asia and the Pacific* 43 (International Labour Office, Bangkok 1st edn. 2007)

16 *Id.*,

supplement a Convention and can also be autonomous, i.e. not linked to any specific Convention. In today's world, the role of International Labour Standards is to provide authoritative guidance on work-related matters.¹⁷

Once a standard is adopted at the International Labour Conference, member States are required under the ILO Constitution to submit it to their legislative assemblies for information and consideration. In the case of Conventions, this means consideration with a view to give effect in national law and practice and to their ratification.

The application of International Labour Standards is most commonly done through dialogue and persistent persuasion, and procedures are in place to ensure their application. A comprehensive supervisory system helps countries to implement the Conventions that they have ratified and the Recommendations they have adopted. Through this supervisory system, the ILO helps its members to translate the standards into concrete policies and action. Standards set in numerous Conventions and Recommendations have been incorporated into the laws and practices of the vast majority of the ILO member countries.¹⁸

This paper proceeds to analyse the concept of human rights in terms of social justice.

The Concept of Fundamental Human Rights in the ILO

International Labour Organization was founded before the term '*human rights*' became current in the international world. Neither the ILO Constitution nor the other fundamental documents of the Organization uses the term human rights, the Constitution speaks instead of '*social justice*' as the basis of ILO's work. While there is no contradiction between these terms there is certainly a difference. The term human right, as used by United Nation in particular sometimes seems to express human aspirations as a struggle between individual and the state; rights that may be asserted only in the context of a legal system which recognizes them and provides a means of redress for their violation.¹⁹ The concept of social justice is wider. Certainly, many ILO conventions²⁰ lay down fundamental human rights, such as right to be free from forced labour and discrimination, the right to organize and bargain collectively and many others. These are however expressed in the ILO more often in terms of obligations of state to provide for the protection and implementation of these conditions than in terms of basis of claims by individual against the state, or rights that may be claimed from it.

There are four main fundamental human right subjects protected by the ILO, although many others are relevant to human rights. It includes freedom of association and collective bargaining, discrimination, forced labour and child labour. These subjects were given formal

17 *Supra* note 15 at 43.

18 International Labour Organization, International Labour Standards: Guide for Policy Makers and Practitioners in Asia and the Pacific 44 (International Labour Office, Bangkok, 1st edn. 2007).

19 Jansuz Symonds, Human Rights International Protection, Monitoring, Enforcement 93 (Rawat Publication, Jaipur and New Delhi, 2005).

20 ILO Conventions No 29, 87, 98, 100, 105, 111, 138 and 182

recognition first in the World Summit on Social development²¹ and in Declaration of Fundamental Principles and Rights in 1998, both on the basis of ILO Conventions and Recommendations.²²

The World Summit²³ made explicit reference to the need of all states to ratify and implement the ILO's fundamental human right conventions dealing with freedom of association and collective bargaining, discrimination, forced labour and child labour. The governing body²⁴ decided that instruments would be the target of campaign for the promotion of the fundamental human rights convention of the ILO.²⁵

Declaration of Fundamental Principles and Rights at Work, 1998

The International Labour Conference²⁶ adopted the ILO Declaration of Fundamental Principles and Rights at Work. The Declaration was adopted to reaffirm the commitment of the ILO's 175 member states to respect the ILO's core principles, which are essential for the realization of its goals and objectives so the ILO Declaration on Fundamental Principles and Rights at Work calls on all member states, to promote and realize the universal application of the four fundamental human rights²⁷ principles²⁸

The Declaration does not point out the specific conventions that are related to the four fundamental principles but ILO's Governing Body has however identified eight conventions as 'fundamental', covering subjects that are considered as fundamental principles and rights at work (International Labour Organization, 2009).²⁹ The eight core Conventions are as follows;³⁰

International Labour Organization Core/Fundamental Conventions

Category	Core Convention
1. Freedom of association and the effective recognition of the right to collective bargaining	C. No. 87 – Freedom of Association and Protection of the Right to Organize, 1948 and C. No. 98 – Right to Organize and Collective Bargaining, 1949

21 World Summit held in Copenhagen in March 1995

22 Jansuz Symonds, Human Rights International Protection, Monitoring, Enforcement 93-94 (Rawat Publication, Jaipur and New Delhi, 2005).

23 World Summit on Social development, 1995.

24 ILO governing body serves as ILOs executive Council .The Governing Body is composed of 56 members with 28 government representatives, 14 workers' representatives and 14 employers' representatives. The governing body takes decision on how to implement ILO policy.

25 *Supra* note 4, at 94.

26 The Eighty-Sixth Session of the International Labour Conference held on 18th June, 1998,

27 (1) Freedom of Association and Right to Bargain Collectively, (2) Freedom from Forced Labour, (3) Freedom from Child labour (4) Freedom from Discrimination

28 Declaration on Fundamental Principles and Rights at Work, 1998.

29 Athira Raju, "Fundamental Principles and Rights at work: A Critical Analysis of 1998 Declaration"19(2) Labour and Development 98 (2012).

30 ILO Conventions No 29, 87, 98,100,105,111,138 and 182.

2.	The elimination of all forms of forced or compulsory labour.	C. No. 29 – Forced Labour, 1930 and C. No. 105 – Abolition of Forced Labour, 1957
3.	The effective abolition of child labour.	C. No. 138 – Minimum Age, 1973; and C. No. 182 – Worst Forms of Child Labour, 1999
4.	The elimination of discrimination in respect of employment and occupation.	C. No. 100- Equal Remuneration, 1951 and C. No. 111- Discrimination in Employment and Occupation), 1958

Furthermore, like the Declaration of Philadelphia, the Declaration on Fundamental Principles and Rights at Work redefines the ILO's functions for the years to come. It obligates the member states to adhere to the four fundamental principles of labour and employment law. Moreover the fundamental principle in the Declaration resembles the rights incorporated under Universal Declaration of Human Rights (UDHR), 1948, International Covenant on Civil and Political Rights (ICCPR), 1966, and International Covenant Economic Social and Cultural Rights (ICESCR), 1966.³¹

Moreover the Declaration provides that all states, even if they have not been able to ratify the conventions which embody these principles, have an obligation arising from the very fact of membership in the organization, to respect to promote and to realize in good faith an in accordance to the Constitution, the fundamental rights which are the subjects of the eight ILO Conventions which are considered as fundamental.³²

The Declaration had received wide support from the international corporate community. The Preamble of the Declaration states that the ILO is the constitutionally mandated international organization and the competent body to set and deal with International Labour Standards.³³ Additionally, the supporters to the Declaration opinioned that the standards under the Declaration are not economic and social rights that depend on a country's level of development and ability to pay, even the poorest countries should be able to afford the core rights.³⁴

Follow-up to the Declaration, 1998

Declaration on Fundamental Principles and Rights at Work was adopted in 1998, together with a follow up. The Declaration is a promotional instrument and not binding therefore ILO did not adopt a supervisory mechanism. Under the follow up each year a country which has not ratified all the eight convention communicates a report on what it is doing to apply the principles of the declaration covered by the un-ratified Conventions- not the declaration itself, which is not

31 Athira Raju , "Fundamental Principles and Rights at work: A Critical Analysis of 1998 Declaration" 19(2) Labour and Development 98 (2012).

32 Jansuz Symonds , Human Rights International Protection, Monitoring, Enforcement 94 (Rawat Publication, Jaipur and New Delhi, 2005).

33 Athira Raju , "Fundamental Principles and Rights at work: A Critical Analysis of 1998 Declaration" 19(2) Labour and Development 101 (2012).

34 *Id.*,

obligatory. These reports give the baseline on which the countries can measure their own progress. ILO Director-General submits a global report to the tripartite International Labour Conference each June. On the basis of the discussions on this report the governing body adopts or updated action programme for the ILO to implement the rights covered by the report.³⁵

Decent Work Concept of ILO - 1999

Another outstanding initiative of ILO is the Decent Work Concept. Decent work is the key to the eradication of poverty. If women and men have access to decent work, they can share in the gains brought by increased international economic integration. According to Mr. Somavia *Decent work* implies;

Productive work in which rights are protected which generates an adequate income with adequate social protection. It also means sufficient work in the sense that all should have access to income earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers' rights and sound standards.³⁶

He further stated that one of the objectives of member countries should not only be to create jobs but to create jobs with acceptable quality. In the 1999 Report to the International Labour Conference, the ILO Director-General stated that the primary goal of the ILO is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equality, security and human rights.³⁷ The notion of decent work emphasizes four elements;

- a) Employment,
- b) Right at work,
- c) Social security and
- d) Social dialogue.

The Components of Decent Work Include:

- a) **Rights at work:** Rights at work provide the ethical and legal framework for all elements of decent work. Their aim is to ensure that work is associated with dignity, equality, freedom, adequate remuneration, social security and voice, representation and participation for all categories of workers. Rights at work form part of the broader agenda of human rights, which in turn derive from a long tradition with deep philosophic, theological and juridical roots.³⁸

35 Jansuz Symonds, Human Rights International Protection, Monitoring, Enforcement 98 (Rawat Publication, Jaipur and New Delhi, 2005).

36 ILO Director-General Juan Somavia introduced the concept of 'decent work' in 1999 shortly after assuming his position.

37 International Labour Organization, 3(1999).

38 Dhram Ghai (ed.), Decent Work: Objectives and Strategies 7 (International Labour Institute, ILO, Geneva, 2006).

- b) **Employment and work:** Employment is a vital component of decent work. Employment in the decent work paradigm refers not just to wage jobs but to work of all kinds self-employment, wage employment and work from home. It refers to full-time, part-time and casual work and to work done by women, men and children. In order to constitute decent work, certain conditions must be satisfied one among them is that there should be adequate employment opportunities for all those who seek work. Work should be remunerative either in cash or kind, so as to meet the essential needs of the worker and the family members. Moreover work should be freely chosen and there should be no discrimination against any category of workers, such as women, migrants or minorities. Workers should be protected against accidents, unhealthy and dangerous working conditions, and excessively long hours of work and also workers should have the right to form and join representative and independent associations to represent their interests and engage in collective bargaining and in discussions with employers and government authorities on work-related issues. An essential minimum of social security also forms part of decent work.³⁹
- c) **Social protection:** The objective of social protection is to provide security against a variety of contingencies and vulnerabilities. Social protection covers ill-health, maternity needs, accidents, unemployment, destitution, extreme economic fluctuations, natural disasters and civil conflicts. A sound social protection strategy should also address the needs of vulnerable groups such as orphaned or abandoned children, single mothers, female-headed households, widows, old persons in need and the disabled. The aim of social protection policies is to minimize suffering, anxiety, insecurity, and material deprivation and to promote health, confidence and a willingness to accept technical and institutional innovations for higher productivity and growth.⁴⁰
- d) **Social dialogue:** Social dialogue provides voice and representation to participants in the production process. It is a means for the workers to defend their interests, to articulate their concerns and priorities and to engage in negotiations and discussions with other actors in the production system and with the public authorities on social and economic policies. It serves to empower the weaker partners in the economy and to bring about a better balance of bargaining power in the market place. Social dialogue can thus be a vital element in a representative and participatory democracy. Many of the workers lack autonomous and representative organizations to articulate their interests and engage in collective bargaining and consultations on matters affecting their livelihood. Social dialogue in fact provides a vehicle for negotiations on rights at work such as social security, minimum wages and conditions of labour.⁴¹

39 Dharam Ghai, *Supra* note 38. at 10

40 *Id.*, at 15

41 Dharam Ghai (ed.), *Decent Work: Objectives and Strategies 7* (International Labour Institute, ILO, Geneva, 2006).

Thus on analysis of the components of *decent work* one could effortlessly conclude that employment refers to works of all kind and has both quantitative and qualitative dimensions. The notion of decent work is applicable not just to workers in the formal economy but also to “unregulated wage workers, the un-employed and home workers”. Further, it refers to both adequate opportunities and remuneration for work (in cash or kind). Decent work also embraces safety at work and healthy working conditions. The social security component of decent work is intended to protect against the risk of losing income. While the first two components of decent work refer to opportunities, remuneration, security and conditions of work, the last two emphasize the “social relations of workers”. The notion of decent work incorporates fundamental rights of workers - “All those who work have rights at work”⁴². The basic rights relate to freedom of association, non-discrimination in work, and the absence of forced labour and child labour in abusive conditions. Social dialogue refers to the right of workers to engage in discussions with employers and authorities over matters bearing on work.

Declaration on Social Justice for a Fair Globalization, 2008

In order to put the notion of Decent Work into practice the ILO made a proposal for a new Declaration on Decent Work which in turn resulted in the adoption of The Declaration on Social Justice for a Fair Globalization⁴³. It is the third major statement of principles and policies adopted by the International Labour Conference since the ILO’s Constitution in 1919. It builds on the Philadelphia Declaration of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998. The 2008 Declaration builds on the values and principles embodied in the ILO Constitution and reinforces them to meet the challenges of the 21st century.⁴⁴

The 2008 Declaration on Social Justice for a Fair Globalization recognizes the “four equally important strategic objectives” of the Decent Work Agenda: (1) promoting employment, (2) enhancing social protection, (3) promoting social dialogue, and (4) realizing rights at work. It further recognizes that these four pillars are “inseparable, interrelated and mutually supportive.” It thereby institutionalizes, and even constitutionalizes, the ILO Decent Work Agenda as its integrated global strategy to meet the universal aspiration of social justice, which includes achieving full employment and combating poverty and inequality.⁴⁵

Thus it could be rightly understood from the above discussions that ILO has developed its own decent work agenda which has taken up many of the same challenges that the organisation faced at its inception, this aims to achieve decent work by promoting social dialogue, social protection and creating employment opportunities, as well as respect for International labour standards.

42 International Labour Organization 1999(a).

43 Declaration on Social Justice for a Fair Globalization was adopted on 2008.

44 Athira Raju, “Fundamental Principles and Rights at work: A Critical Analysis of 1998 Declaration” 19(2) Labour and Development 103 (2012).

45 Gillian MacNaughton & Diane F. Frey, “Decent Work for All: A Holistic Human Rights Approach” AM.U.INT’L. L.Rev. 450 26:2 (2011).

The Supervisory and Complaint System Within the ILO

The International Labour standards (ILS) would be on papers in the absence of effective implementing machinery, hence this section proceeds to analyse the supervisory and control mechanism adopted by ILO for the same.

Regular Supervisory System

International Labour Standards are supported by a supervisory system to monitor and promote the proper implementation of Conventions ratified by Member States. Once a country has ratified an ILO Convention, it is required to report regularly on the measures it has taken for its implementation. Every three years, governments have to provide reports detailing the steps they have taken in law and practice to apply any of the eight fundamental and four governance Conventions that they have ratified. For all other Conventions, reports have to be provided every six years, except for Conventions that have been “shelved” (which are no longer supervised on a regular basis). Reports on the application of Conventions may be requested at shorter intervals. Governments are required to submit copies of their reports to employers’ and workers’ organizations. These organizations may comment on the government reports, or send comments directly to the ILO on the application of Conventions.⁴⁶

Committee of Experts on the Application of Conventions and Recommendations

ILOs regular supervisory procedures are undertaken by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) composed of 20 legal experts from around the world. The CEACR is mandated to provide a non-binding, impartial and technical evaluation of the application of ILS by examining government’s reports to the ILO on the effect given, in law and practice, to the ratified Conventions, as well as the comments of employers and workers organizations on the reports, or on the implementation of a specific Convention. When examining the application of international labour standards, the Committee of Experts makes two kinds of comments to governments: observations and direct requests. Observations contain comments on fundamental questions raised by the application of a particular Convention in a State. These observations are published in the annual report of the Committee of Experts. Direct requests relate to more technical questions or requests for further information. They are not published in the report, but are communicated directly to the governments concerned.⁴⁷

Committee on the Application of Standards

The annual report of the Committee of Experts, usually adopted in December, is published in February the following year and submitted to the International Labour Conference the following June, where it is examined by the Conference Committee on the Application of Standards. A standing committee of the Conference, the Conference Committee is made up of Government,

46 International Labour Organisation, Rules of Game: An Introduction to the standard related work of the International Labour Organisation, (ILO, Geneva, 2019).

47 International Labour Organisation, Rules of Game: An Introduction to the standard related work of the International Labour Organisation, (ILO, Geneva, 2019).

Employer and Worker delegates. It examines the report in a tripartite setting and selects from it a number of observations for discussion.⁴⁸ The governments referred to in these comments are invited to respond before the Conference Committee and to provide information on the case. In many cases, the Conference Committee draws up conclusions recommending that governments take specific steps to remedy a problem or accept ILO missions or technical assistance. The discussions and conclusions on the individual cases (normally 24 cases) examined by the Conference Committee are published in its report. Situations of special concern are highlighted in special paragraphs of its General Report.

Impact of the Regular Supervisory System

Since 1964, the Committee of Experts has kept track of the number of cases of progress in which it has noted changes in law and practice which have improved the application of a ratified Convention. To date, over 3,000 cases of progress (cases in which the Committee has expressed “satisfaction”) have been noted.⁴⁹

The reports of both the Committee of Experts and the Conference Committee are available on the Internet to millions of users. Governments and the social partners thus have an even greater incentive to solve problems in the application of standards in order to avoid critical comments by these bodies. Moreover upon request by member States, the International Labour Office provides substantial technical assistance in drafting and revising national legislation to ensure that it is in conformity with International Labour Standards. In this way, the supervisory bodies play an important role in preventing problems in the application of standards from arising in the first place.⁵⁰

Complaint System

The ILO Constitution provides for two grievance mechanisms for asserting that a Member State is not fulfilling its obligations under a particular ILO convention: the Representation procedure and the Complaints procedure.

Representations by social partners

Under Article 24 of the ILO Constitution, any organisation of employers and/or workers may make a representation to the ILO Governing Body against any member state that it deems has failed to abide by a Convention to which it is a party. A tripartite committee may be set up by the Governing Body to examine the representation and the relevant government’s response. The committee then submits a report to the Governing Body with the legal and practical aspects of the case, along with conclusions and recommendations. Where the government’s response is not

48 *Supra* note 47.

49 *Id.*

50 International Labour Organisation, Rules of Game: An Introduction to the standard related work of the International Labour Organisation, (ILO, Geneva, 2019).

considered satisfactory, the Governing Body is entitled to publish the representation and the response. It can also be treated as a complaint as envisaged by article 26 of the ILO Constitution.⁵¹

Trade Unions have resorted to the tool of complaint mechanism whenever there was a gross violation of labour standards within their States. The most recent representation to ILO against a state party is with regard to the labour standard violation by government of India. On 14th May 2020 ten Central Trade Unions in India made a representation to ILO regarding anti-labour exercise of the Government of India towards virtual nullification of most of the substantive laws in vogue in the country by the Government of India through the State Governments. It has been alleged that this exercise has been aimed at total abrogation of the provisions of not more than eight hour- working day and Right to Freedom of Association and Right to Collective Bargaining. Certain States in India are moving towards relaxing labour laws with a view to revitalize the economy from the impact of COVID-19.⁵² In response to the complaint The International Labour Organisation (ILO) has written to Prime Minister Narendra Modi asking him to ensure that the Centre and the states uphold India's international commitments on labour law.⁵³

Complaint procedure

Under article 26 of the ILO Constitution, complaints may be filed against a State not complying with a ratified convention by another member State to the same convention, a delegate to the ILO Conference or the Governing Body in its own capacity. The Governing Body may set up a commission of inquiry composed of three independent persons. The report of the Commission of Enquiry is then sent to the Government concerned, published and transmitted to the Governing Body. The Committee of Experts on the Application of Conventions and Recommendations follows up on implementation of the recommendations. The governments concerned may refer the complaint to the International Court of Justice for final decision.⁵⁴

Thirteen commissions of inquiry have been established so far. Practice reveals that there is a certain threshold to be met for a commission to be established, there must be persistent and serious violations. There is a possibility for on-site fact-finding, but there is no obligation on a targeted country to accept an on-site fact-finding commission. When a State does not abide by the recommendations of the Commission, the Governing Body can take action under article 33 of the Constitution. It may recommend to the Conference such action as it may deem wise and

51 Laurence Boisson de Chazournes, 'The ILO and International Judicial Mechanisms: A Story of Control and Trust', Available at SSRN: <http://ssrn.com/abstract=347076> (last visited on March 21 2019).

52 A M Jigeeesh, 'Trade Unions Complain to ILO against Dilution of State Labour Laws' The Hindu Business Line, May 19, 2020.

53 Please allow me to assure you that the ILO Director-General (Guy Ryder) has immediately intervened, expressing his deep concern at these recent events and appealing to the Prime Minister (Narendra Modi) to send a clear message to Central and state governments to uphold the country's international commitments and encourage engagement in effective social dialogue," letter by Karen Curtis, ILO's Chief of Freedom of Association Branch under the International Labour Standards Department, to trade unions on May 22. The letter added that the ILO will keep the central trade unions informed about "any observations or comments that may be made by the Indian authorities on the matters that you have raised."

54 Boisson de Chazournes, Laurence, 'The ILO and International Judicial Mechanisms: A Story of Control and Trust', Available at SSRN: <http://ssrn.com/abstract=347076> (last visited on March 21 2019).

expedient to secure compliance therewith. It did so once in 2000 against Myanmar because of its forced labour practice as described and qualified by a commission of enquiry.

Complaint before the Committee on Freedom of Association

The Committee on Freedom of Association was created in 1951 for the purpose of examining complaints about violations of freedom of association in application of ILO Conventions Nos 87 and 98. The complaints may be lodged by employers' and workers' organizations against an ILO member State, whether or not it has ratified the two conventions. The Committee is composed of an independent chairperson and eighteen members representing the three constituencies. All members act in their personal capacity. The Committee evaluates specific allegations regarding freedom of association principles. After receiving a response from the State concerned, the Committee formulates recommendations on how the situation could be remedied. The Governing Body adopts the report and a State must report on how it has taken into account the Committee's recommendation. All recommendations have so far been adopted by the Committee by consensus.⁵⁵

The ILO and the United Nations have created a supplementary mechanism that can receive complaints. The Fact-finding and Conciliation Commission on Freedom of Association was established in 1950 under an agreement between the two organizations. Its mandate was initially to consider whether a complaint merited asking the Member State to accept a fact-finding commission. It is a part of the special procedures at the ILO for the examination of complaints alleging violations of the freedom of association. The Economic and Social Council (ECOSOC) can receive complaints, which it may forward to this body.⁵⁶

Challenges of ILO

Though ILO had succeeded in providing a basic foundation for protecting the labour class by adopting International Labour Standards, Recommendation and Declarations, promoting them through its cannons of supervisory and effective monitoring system there still exists certain drawbacks while interacting with the diverse range of Member States. A few of them are the following;

- a) Unfair labour Practices like long working hours, unfavorable condition of work, absence of social protection, occupational health hazards are still ignored in many sectors of employment within many member States even today. This shows that the implementation of labour standards is not uniform globally.
- b) Tripartism makes ILO far more representative of civil society than any other intergovernmental organization. However most often employers and workers organizations represent the formal economy rather than the huge and growing informal economy, especially

⁵⁵ *Supra* note 54.

⁵⁶ *Id.*

in developing nations. The voices and concerns of workers in the informal sector are poorly addressed.

- c) Usually the ILO procedures are not available to individual complainants but only to a government, a trade union, an employees association or a delegate to the ILO. The NGOs usually reach to the grassroots of the working class which includes the casual labours, drivers, migrants they are more aware of their shortcomings. NGOs involvement is more significant in the complaint procedure. Lesser participation of the NGOs in the complaint procedure is a major drawback.
- d) The level of economic development plays a key role in the process of integrating international labour law into the domestic law. In particular, effective execution of labour standards depends on the institutional capacity of each State. If the State is weak, the application of both national and international labour rules can run into problems.
- e) Though ILO standards are given effect through various legislation of member States the standards may at instance be framed according to the political interest leaving room for the employers to escape from legal consequence.
- f) Lastly another challenge is with regard to the authorities of inspection at the National level. Labour inspection suffers even in the most prosperous countries from the traditional weaknesses of insufficient resources, understaffing inadequate training and lack of transportation to reach far-flung workplaces. Already in 1947 the need to remedy this situation was mentioned in ILO Convention No. 81 on labour inspection but even today this has not been effectively sought out.

Recommendations

- a) The complaint system should be made more flexible by allowing more involvement of NGOs. The workers in the informal economy have the right to represent their members in various tripartite bodies and social dialogue structures.
- b) The time taken in conducting the inquiry under the complaint mechanism should be made within short span of time practice shows that it take years to dispose of a complaint.
- c) Steps should be taken to implement the International Labour Standards uniformly in both formal and informal sectors of employment as far as possible. The jobs created in the informal sector should meet the criteria of Decent Work. There should be better coordination to implement Decent Work Programme globally. Economic growth and development should go along with decent work.
- d) Direction should be given to the State Parties to conduct labour Inspection periodically. ILO has to ensure that the member states have institutional capacity for the same.
- e) ILO has to develop meaningful standards and keep them advanced and where appropriate adapt them to changing needs, conceptions and practices. The practice of shifting towards soft law concept might tend to reduce the effect of implementation by member States.

Conclusion

Since its foundation in 1919, ILO has focused its efforts in protecting and safeguarding rights of workers, this has reflected in its reports, policy advices, training and operational activities, Conventions and Recommendations promulgated over the past 99 years. The labour standards put forth by ILO provide the legislative framework for policies relating to all four components of decent work in countries around the world. ILO's standards and assistance have a great impact on human rights of workers in member States. It also protects the dignity of workers by promoting the concept of Decent Work. Thus what emerges from the above study is the fact that ILO has been a vital International Organization in recognizing human rights of workers and torch bearer in implementing these rights under the term '*social justice*'. However there are many challenges in effective implementation of the ILO labour policies universally this could be overcome merely with better coordination cooperation and commitment from the part of the Member States in this changing global economy.



Legal Prohibition on Child Pornography in India: An Appraisal

Sukla Saha*

Abstract

Children the most sensitive, immature and vulnerable section of our society ensures largest protection as they are the future generations of a nation. And their protection seems to be unrealistic unless the children are secure and safe from any form of exploitation. Child pornography and child sexual exploitation are not unrelated. Child pornography is a hurdle to realization of human rights which destroys the right to live with dignity and safety of a child. The paper highlights the role of technology in child pornography, the pandemic which has led the spike in cases due to the increasing rate of domestic violence, cyber threat, closure of schools, frustrations, online education etc. and its repercussions on human rights of children, role of various International Covenants, Indian legislations, policies, institutional agencies, the report of Rajya Sabha ad hoc committee in the elimination of child pornography and judiciary to tackle this burning issue.

Introduction

Childhood is the most adorable stage of a person's life. Children are a significant national asset and the future of the nation relies on its children growth and development. However this cheerful and encouraging thought look flimsy and a fuss when one meets the reality of child sexual exploitation and the harsh truth of Child pornography is brought into light.¹ Child pornography is one of the worst form of sexual exploitation or child abuse faced by myriads of children each year. Advanced internet and digital technology including the application of digital web cameras, VCRs, editing technology has led the dramatic increase of child pornography market. The plights of children caused from such abuse has multifarious effect on future days. The dignity, esteem of the child is shattered with further threats on their safety as the world of cyber technology keeps evidence of the abuse for perpetuity and the victimization of the children continues causing psychological and physical harm to the victims. Further the Covid-19 outbreak across the world, has impacted all sectors of life. When the nation has been brought to stand still due to the imposed lockdown and everybody battling against the deadly virus, people has also been suffering from

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1 Mamta Rao, Law relating to Women and Children 413 (Eastern Book Company, Lucknow, 2nd edn., 2008).

mental and psychological disorders due to unemployment, frustration, closure of schools and colleges, fear of getting affected by virus, which has lead the spike the incidence of domestic violence on women and children. Sometimes even though not committed on children, they being the witness of abusive violence at homes, loneliness, home confinement, no access to outdoor games, closure of schools has generated depression among them. All this has indeed caused children to be addicted to the digital world and the online predators taking the advantage of such situation when children has to spend their day online due to e-learning education system lures them through harmful abusive contents, which has resulted many children being trapped to this black world and many fighting to protect them. Child pornography has been in existence since many years but the home confinement of children and the advanced cyber world has flamed the issue which needs to be put to an end.

Definition of Child Pornography

Child pornography is one of the illicit rapidly developed commercial online business which generates billions. It is the audio-visual object which uses children for sexual reasons and is one of the forms of commercial sexual abuse of children.

The word abuse is defined in Black's Law Dictionary as, each thing which is opposed to a good order, established by custom, for an unreasonable and improper use, physically and mentally ill-treated and deceived. The expression "child abuse" comprises a broad ambit and includes enslavement and misuse of children.² According to P. D. Mathew Child Sexual Abuse is: "Child Sexual Abuse includes implying, using, inducing or coercing any child to engage in illicit sexual conduct, it also includes the use of children in assisting with other persons to engage in explicit sex."

Child abuse involves hard labour, child battering, rigorous punishment, psychological abuse, sexual abuse, child pornography, abandonment.³

"Any visual depiction of sexually explicit conduct involving a child which includes photograph, video, digital or computer generated image indistinguishable from an actual child and an image accepted or modified but appear to depict a child" is defined as Child pornography⁴.

Child pornography is indeed a worst cyber crime which can be explained as any crime perpetrated with the help of computer and technology and can be carried out from far distance resulting hard tracking of criminals. It is committed against person, place, and government⁵. Cybercrime being a worldwide absurdity has posed serious threat to the lives of the vulnerable children.

2 *Supra* note 1 at 463.

3 Mamta Rao, Law relating to Women and Children 464 (Eastern Book Company, Lucknow, 2nd edn., 2008).

4 Section 2(1)(da), Protection of Children from Sexual Offences (Amendment) Act, 2019, available at: [https://wcd.nic.in/sites/default/files/Protection % 20 of % 20 Children % 20 From % 20 Sexual % 20 Offences % 20 % 28 Amendment % 29 % 20 Act % 2 C % 202019.pdf](https://wcd.nic.in/sites/default/files/Protection%20of%20Children%20From%20Sexual%20Offences%20%28Amendment%29%20Act%20C%20202019.pdf) (last visited July 5, 2020).

5 Dr. Nirmal Kanti Chakrabarti, Prof. Dr. Manabendra Kumar Nag, et.al. (eds), Law and Child Part –I 218 (R Cambray &Co. Pvt.ltd, Kolkata, 1st edn, 2004).

Reasons for the Growth of Child Pornography

Child pornography is carried out against the most vulnerable section of the society and there are probably primary two means by which children may be abused by child pornography such as by being barred to pornography when recorded on a film or photographed or put a wrong foot themselves and became vulnerable to this dark world of internet which are ignominious indeed. Teenagers are likely susceptible than the younger ones because they are overseen by the parents and experience unsupervised visit on their using the internet and their engagement in online conversations of friendship, love affairs, intimacy and amorous entanglement. The prospect of danger also increases when the pedophiles achieve the child's credence and organizes rendezvous or face to face meeting and the child furnishes information causing a threat of insecurity even for the family members which also acts as a pushing factor for children to step into this atrocious crime. The criminals even use fake identity to trap the immature inexperienced children in the virtual world who fails to apprehend the lechery of the predators and are easily duped by the cyber criminals.⁶ Technology, Sexual lust of Online predators, Domestic abuse, Overlooked by parents and moreover the outbreak of Covid-19 are the pushed factors that cultivate child pornography.

Advanced technology

Child pornography images are accessible virtually on Internet in diverse social networking websites, file and photo sharing websites, games and in many mobile apps. Sexual uncensored stuff prevails on the Internet.⁷ Technology and internet has changed the hidden business into one easily accessible business. Advancement of technology has left its negative impact, rendering cyber criminals or pornographers to commit further crimes, left untraced, brought into existence new online predators, and caused fresh exploitation of children.⁸ Child pornography has become troublesome with the spike of internet which has shielded the face of risks and the criminals. In our physical world parents can protect their children from the dangers and even can face the issue and in case of cyber world parents are unfamiliar with the basic technology and the serious menace caused to the safety of their children from the using of different harmful sites, which has left an advantage for predators to lure and trap the children, who left unsupervised and due to immature brains victims of dark world of internet.⁹

Covid-19 outbreak

In the light of the striking global pandemic crisis and lockdown, several measures taken by countries to fight with this deadly virus, such as lockdown, home quarantine, isolation, social

6 Asha Bajpai, Child rights in India, 251 (Oxford University Press, New Delhi, , 2nd edn,2006).

7 *Id.*

8 Jennifer L. Garcia, Child Pornography and the Technological Landscape,2016, available at: https://www.researchgate.net/publication/297518927_Child_Pornography_and_the_Technological_Landscape (last visited July, 08, 2020).

9 Child pornography a menace, available at: <https://www.legalbites.in/child-pornography-menace/#::~:~:text=Any%20depiction%20of%20a%20child,appears%20to%20be%20a%20minor> (last visited July 8, 2020).

distancing, government health protocols, closure of schools and colleges, working sectors, curfew, closing of border areas, has resulted into violation of human rights of children. Closing down of schools and lockdown for safety of the children has compelled them to be confined within the four walls of home which has resulted serious repercussions such as depressions, retarded growth, health disturbances due to prolonged stay at home, infringement of their right to liberty, deprivation from daily meals provided to children in schools as mid day meals, child trafficking, gender based violence.

The global ongoing health emergency has raised economic downturns across the country and neglected issues of mental health and abuse. But who knows who are the worst sufferers of this prevailing psychosocial distress and abuse and why, what are the consequences, in the guise of economic and health crisis what crimes are aggravated. The answer is indeed negative in all aspects, it is beyond our imagination that when there is global threat to lives and for our safety measures are taken to curb the virus, cases of child sexual exploitation and domestic child abuse has been invisible in the dark behind the shut doors.

Domestic violence against children as child abuse either from the parents or relatives or lured by the digital black porn world, has upsurge to top peak during this crisis period which is an infringement of their right against exploitation as well as right to life when such crimes are perpetrated against them. During the threat of such worldwide public health this shielded offences behind the closed doors has protected the perpetrators and the childish brains likely susceptible to violence and danger as the virus is escalating its spread.

Domestic violence and Child pornography cannot be unrelated. The latter can be determined as the impact of the former. Mental agony of parents, no access to alcohols amid lockdown, cash strapped conditions, confined stay at home, unemployment, exasperation, domestic violence at women or the mother of the child, cat and dog fight between parents, abusive relationships of parents, separated from parents, violence by relatives, attempt to sale children, unconscious transfer of exasperation and anger by parents to children has resulted the immature and sensitive children to be victimized by domestic violence causing psychosocial repercussions on children, such as lonesome feelings, anxiety, depression. Moreover on this existing violence closing down of schools, adapting e-learning process, no supervision from parents, frustrated immature brains, advanced technology, playing online games, using social network platforms to chat with friends, provocation from cyber criminals, cyber stalkers in internet lure children and they became prone to targets of diverse abusive criminal activities, cyber-trafficking, live access of online child sexual exploitation can be termed as the core reasons for the hike of child pornography or child abuse at home during this global crisis.¹⁰

10 Child pornography in India during lockdown: Are our children safe, available at: <https://www.livelaw.in/columns/child-pornography-in-india-during-the-lockdown-are-our-children-safe-158778?infinitemscroll=1> (last visited July 8, 2020).

Impact of Child Pornography

Child abuse via pornography is not an one-off event, but a continuing victimization for year after year because the abusive materials or images recorded are merchandised by the predators and they distribute it worldwide. The record of child sexual abuse are used to compel the child to engage in further sexual exploitation because when an image is on the Internet it is irreversible and its distribution and access to people extends forever which indeed creates pressing requirements for new and outrageous images leaving in peril the safety of children. And the effect inflicted upon the child such as humiliation, anxiety, sexual growth, distrust in relationships continues until doomsday indirectly leading to infringement of right to live with dignity of a child. Child pornography has manifold and long term effect on the health of the survivors such as huge psychological, emotional and physical effects even retarded sexual development. They face symptoms of post traumatic stress disorder, anxiety, trauma, sleep disorders, eating disorders etc. Sometimes the arrest of cyber criminal ends their woes but does not end the flashback of the vicious cycle which even coerce the child to commit suicide due to the prevalence of social stigma which effect the honor and prestige of family. Child pornography has been a vicious secret cyber crime which often goes unreported due to the fear created in the mind of children of loosing respect, dignity even of the family which acts as a hurdle for a child to report and sometimes also to disclose to their parents. Taking advantage of such situation a child is repeatedly victimized as the circulation of image or video goes on and the demand of more vicious image increases indirectly affecting the child to lead his life with safety and dignity.

Human Rights and Pornography

Every human being is subject to diverse laws from the “cradle to the grave”. The human right for child is an inalienable, integral and indivisible part of human rights. So elimination of child pornography is indispensable to social well being and repute of childhoods. Child rights to development rely upon eradication of child abuse. The issue of child pornography, child abuse is related to human dignity. When human dignity is not revered such vicious issues occur. The Constitution of India entails as an inevitable fundamental right and further guarantees every citizen the right to live with dignity and respect under Article 21. The Judiciary has also highlighted dignity as a significant fundamental right in diverse cases.

In *Naz Foundation v. Govt. of NCT and others*¹¹, it was stated that “The constitutional safeguard of human dignity requires us to recognize the value and esteem of all individuals as members of our society”. The concept of dignity is generally related with safe guarding the individual against exploitation and infringement of the inherent rights. It is also provided in Article 3 of the Universal Declaration of Human Rights which lay down that everybody has the right to life, liberty and security.

In *Maneka Gandhi v. Union of India*,¹² Bhagwati, J. observed: “The expression in Article 21 is of widest amplitude and it covers variety of rights which go to constitute the personal liberty

11 (2009) SCC Online Del 1762.

12 AIR 1978 SC 597.

of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19". Right to live is not only restrained to physical existence but involves within its scope and ambit the right to live with "human dignity".

International Conventions

Diverse international and national legislations have acknowledged state responsibility for protecting children and their welfare. India has ratified numerous international conventions to secure Child rights.

The United Nations Conventions on the Rights of the Child¹³:

CRC ratified in the year 1992 incorporates extensive principles for the best interest and fundamental rights of children. This is the principal instrument to curb sexual exploitation of children. Article 19 requires the State to safeguard children from all sorts of physical or mental violence, injury or abuse, disregard or negligent treatment, mistreatment or enslavement involving sexual abuse committed by parents or others responsible for the care of children.

Article 34 of the Convention provides endeavour of the State to safeguard the child from all sorts of sexual abuse and exploitation and in this context to take all pertinent national, bilateral, and multilateral strategies to curb:

- (a) The incitement or compulsion of a child to take part in any illicit sexual activity.
- (b) The abusive use of children in prostitution or other illicit sexual employment.
- (c) The exploitative use of children in pornographic conduct or other illegal sexual conduct.

Article 35 requires the State parties to take all apt national, bilateral, and multilateral strategies to forbid the abduction or the sale or traffic in children for any reason or in any form.

Article 39 obligates the State to take all pertinent measures to assist the physical and psychological recovery and reintegration of a child victim who suffered any sort of neglect, exploitation, torture or any other sort of vicious, inhuman or humiliating treatment or punishment or armed conflict.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (2000)¹⁴:

It is the primary universal treaty that deals with the dilemma of sexual exploitation of children. It acknowledges the rights of victims of such crimes and also provides principals for the safeguarding of victims in the criminal justice system. Article 1 of the Protocol lays prohibition of sale of children, child prostitution, and child pornography. Any representation of a child involved in substantial or simulated uncensored sexual conducts or any representation of the sexual organs of a child especially for sexual purposes is defined as Child Pornography under Article 2. Article

13 Convention on the Rights of the Child, 1992, available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last visited July 6, 2020).

14 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (2000), available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> (last visited July, 6, 2020).

3 of the Protocol directs the State to apply criminal or penal law for the production, dissemination, importation or exportation, offering or selling of child pornography and Article 3(1)(c) also directs the States to penalize for possessing child porn if it is for any reasons mentioned before.

Article 3 (b) of The ILO Convention No. 182 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour for the purpose of eliminating worst forms of child labour has included the use, acquiring or selling of a child for the purpose of prostitution, production of pornography or pornographic performances under the expression worst forms of child labour.

The Council of Europe Convention on Cybercrime (2001)¹⁵:

The Budapest Convention is one of the fundamental conventions that deal with child abuse. Child Pornography under Article 9 of the Convention is defined as a material that visually represents a minor to be engaged in sexually explicit activity. This Convention provides a detailed classification of child pornography on the internet and criminalize child pornography.

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)¹⁶ classifies child pornography within child abuse.

To protect the children from sexual exploitation and abuse and further protect their rights there are several other convention which are as follows:

- (a) ILO Convention No.29 on Forced Labour 1930
- (b) The Universal Declaration of Human Rights 1948
- (c) The International Covenant on Civil and Political Rights (ICCPR) 1966
- (d) The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
- (e) The SAARC Regional Convention on Combating the Crime of Trafficking in Women and Children for Prostitution

Indian Position

In India the evil practice of exploitation and abuse of children specially teen girls has been prevalent since long ago and now in this contemporary era advanced technology has given a blow into it which has caused children to be victim in the vicious porn world. Child pornography as a form of child abuse is a state of psychological, economic and sexual enslavement which a child below the age of eighteen years is subjected to. This face of child abuse is a worldwide issue and one of the blatant infringement of human rights. However in India, the extent of apprehending the issue is fairly recent, the increasing complexities of life, drastic changes brought about by

15 Council of Europe-Convention on Cyber crime (ETS no. 185), available at: https://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf (last visited July, 6, 2020).

16 CETS NO-201 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, available at: <https://rm.coe.int/1680084822> (last visited July 7, 2020).

socio-economic factors have played significant role in escalating the vulnerability of children to this form of abuse.

Legal Framework to Prohibit Child pornography in India

Indian legislations seek to enforce punitive as well as compensatory measures on production, dissemination, possession or circulation of any child pornographic content. The national provisions relating to forbidding of child pornography is incorporated under The Indian Constitution, 1950, The Information of Technology Act, 2002, The Protection of Children from Sexual Offences Act, 2012, and the Indian Penal Code. The Constitution of India which guarantees child rights as well as safety from exploitation reflects it in various legislations of India.

(a) Constitutional Provisions

The Indian Constitution provides bed rock on which its foreign policy should be formulated and its international obligations esteemed. The double safeguards of equality before law and equal protection of laws are recognized as most significant stalwart of human rights.

The Constitution of India incorporates a number of provisions for the child welfare and their protection. The provisions which secures the right of children from exploitation and their welfare are included in Part III of the Constitution as Fundamental Rights such as Article 14¹⁷, 15¹⁸, 15(3)¹⁹, 21²⁰, 21(A)²¹, 23²², 24²³ and further requires the State under Directive Principles of State Policy to secure the children from abuse under Article 39(e)²⁴ and 39(f)²⁵. The Indian Constitution authorises the legislature to enact special laws, policies and schemes for protecting child rights, their welfare and safety.

17 Article 14 explains that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”.

18 Article 15 explains “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”.

19 Article 15(3) states that “Nothing in this article shall prevent the State from making any special provision for women and children”.

20 Article 21 provides “Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law”.

21 Article 21A explains “The State shall provide free and compulsory education to all children of 6 to 14 years in such manner as the State, may by law determine.”

22 Article 23 explains “Prohibition of traffic in human beings and forced labour – (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them”.

23 Article 24 provides “Prohibition of employment of children in factories, etc -No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

24 Article 39(e) explains “the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength”.

25 Article 39(f) states “children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment”.

(b) Information Technology Act, 2002²⁶:

The Information and Technology Act, 2002 is at the core for cyber laws in India. According to the recommendation of the Standing Committee and Expert Committee of Information and Technology (Amendment) Bill inclusion of a provision specifically dealing with criminalization of child pornography, Section 67B was inserted to the Amended Act, 2008 to criminalize such offence. This section also lays down stringent punitive action for publishing, browsing or transmitting child pornography. Further also according to Section 79 of the IT Act and the Information Technology (Intermediary Guidelines) Rules 2011, furnishes that the intermediaries shall observe due attention while performing their duties and shall notify the users of computer resources to act accordingly.

The consent of a child under both legislations is immaterial as a child is reckoned as incompetent to give consent.

(c) The Protection of Children from Sexual Offences Act, 2012²⁷:

This Act was enacted to safeguard children from sexual exploitation, sexual harassment and pornography and furnishes for constituting Special Courts for trial of such offences against children and other related matters. In Indian Jurisprudence, the expression “child pornography” means and involves contents portraying sexual explicit conducts involving a child. The new amended POCSO Act, 2019²⁸ has incorporated two-fold punishments-

- (i) Punitive actions for using a child for pornographic reasons and
- (ii) Storing child pornographic materials.

Section 14 of the POCSO Act, provides that a person who is using a child for pornographic reasons shall be punished with imprisonment for not less than five years along with fine. If the act is committed subsequent to the conviction the imprisonment shall not be less than seven years. Further Section 15 of the Act, provides any person, who stores child pornographic material for commercial reasons in any sort shall be punished with imprisonment which may extend to three years or with fine or both.

(d) Indian Penal Code:

The primary goal of criminal law is not only to safeguard and conserve the principal personal rights of any person but also to safeguard public moral principles and standard welfare ideals of the state so it is obvious and duty of the state to protect the citizens against subtle attacks and provide punishment for obscene publications. The significance for safeguarding such rights can

26 The Information Technology Act, 2002, available at: <https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf> (last visited July 8, 2020).

27 The Protection of Children from Sexual Offences Act, 2012, available at: <https://wcd.nic.in/sites/default/files/POCSO%20Act%2C%202012.pdf> (last visited July, 8, 2020).

28 The Protection Of Children from Sexual offences(Amendment)Act, 2019, available at: <https://wcd.nic.in/sites/default/files/Protection%20of%20Children%20From%20Sexual%20Offences%20%28Amendment%29%20Act%2C%202019.pdf> (last visited July 8, 2020).

be perceived from the resolution passed by the International Convention for the Suppression and Circulation of, and Traffic in, obscene publications 1923.

According to Section 292, 293 and 294 of IPC, the primary objective of these provisions is to protect the public moral standards and to categorize the sale, etc of obscene literature and publications in general related to young person a cognizable offence. Section 293 provides for punitive actions for selling, distributing, circulating and exhibiting etc of any obscene objects to young person below twenty years of age. Further Section 294 deals with obscene acts and songs which is performed in any public locale and resulted into public nuisance. The offence under this section is categorized as cognizable, bailable, non-compoundable and triable by any magistrate.²⁹

Role of Institutional Agencies to combat Child pornography:

- (a) **ICPF:** Indian Child Protection Fund (ICPF) is one of the largest child protection institutions in South Asia, works with an objective to eliminate child trafficking and child rape also aims to accomplish its goal by supporting institutions with crucial funding and resources across South Asia.
- (b) **CHILDLINE:** CHILDLINE India Foundation one the nodal organization of the Union Ministry of Women and Child Development, acts as the parent institution for establishing, managing and supervising the CHILDLINE 1098 service all over the country. It works 24-hour a day, 365 days a year rendering free service and emergency phone services to the children in need of assistance or help. They respond not only to the urgent needs of children but also look after their long term care and rehabilitation facility.³⁰ The CHILDLINE service has inaugurated the CHILDLINE FAPZ (The Fight against Porn Zombies) Campaign to increase consciousness and furnish advice to young person about the menace of pornography. It uses a chain of animations for preventing increased risk of threat caused to boys and girls from pornography.³¹
- (c) **ICMEC:** The International Centre for Missing and Exploited Children, a non-profit, non-governmental institution is dedicated to make the world a “safer heaven” for all children by eliminating child sexual enslavement and abduction. Its headquarter is situated in US with regional representatives in Brazil and Singapore. Since its establishment in 1988, ICMEC has tutored 7,500 law enforcement officials from more than 115 countries, and is working with governments in more than 100 countries-
 - (i) to enforce laws to combat child pornography
 - (ii) enhanced global engagement in International Missing Children’s Day

29 Soma Sarkar, Obscenity under IPC, 2018, available at: https://lawtimesjournal.in/obsenity-under-ipc/#_ftn3 (last visited July 9, 2020).

30 ChildLine India Foundation, available at: <https://www.childlineindia.org/a/about/childline-india> (last visited July 11, 2020).

31 ChildLine FAPZ Campaign, available at: <https://www.childnet.com/blog/childline-fapz-campaign> (last visited July 11, 2020).

- (iii) and it also established a 24-member Global Missing Children's Network³².
- (d) **NCPCR:** In 2007 the National Commission for Protection of Child Rights (NCPCR) was set up with a goal to protect child rights at national level as well as to implement it at state level. It is also concerned with receiving complaints and analyzing violations against children.
- (e) **SAIEVAC:** The South Asian Initiative to End Violence against Children (SAIEVAC) is a regional task force which has been set up under the South Asia Association for Regional Cooperation (SAARC) framework concerned with the welfare of children was set up to deal with the issues of sexual abuse or enslavement of children, trafficking, child marriage etc.
- (f) **CERT:** The Computer Emergency Response Team (CERT-In) is the national organization which is accountable for issuing directions to block websites.
- (g) **The Indian Cyber Crime Coordination Centre (IC4):** This was established with an objective to collaborate with diverse organizations to forbid and minimize harm from cyber attacks. IC4 has direct ingress to the Crime and Criminal Tracking Network and Systems and the National Intelligence Grid- India's two substantial crime databases.
- (h) **National Cyber Crime Portal:** This is a tactic to promote and helps victims report any cyber crime complaints online. This portal takes into account only cyber crimes specially focused cyber crimes against women and children. The complaints are dealt by law enforcement institutions.
- (i) **Mumbai-based Aarambh:** This in cooperation with the United Kingdom-based Internet Watch Foundation (IWF) sets up a national hotline for reporting, eliminating and blocking of CSAM.
- (j) **DSCI:** Data Security Council of India (DSCI) has evolved standard operating procedures and a manual for cybercrime systematic examination. Cyber forensic laboratories are engaged to cybercrime cells for pc, network and mobile forensics to guide them about cybercrime and cyber cyber forensics. This is a structure established by NASSCOM, has carried out social consciousness to literate children and adults Internet users about cyber security and cyber crimes.
- (k) **Social Media Platforms:** Social networking and messaging platforms and search engines or browsers such as Whatsapp, Facebook, Twitter, Instagram and Google block and report vulgar, derogatory and abusive objects via filters and privacy settings and complaint method and since 2011 applying Photo DNA technology set up by Microsoft to inspect and examine every uploaded image to check the dissemination of CSAM. Search engines such as Google etc. also block the search of illicit objects and apply splash pages to alert users when they ingress illicit or dangerous content.

32 Children's Right and Internet, available at: https://www.unicef.org/csr/files/katia_dantas_final.pdf (last visited July, 11, 2020).

- (l) **Cyber forensics training lab:** This has been established by the CBI Training Academy to guide or train CBI officials in cyber forensics and investigation process.
- (m) **The National Police Academy** carries out training courses on cyber crime and forensics for IPS officers.
- (n) **CBI:** The Central Bureau of Investigation has a primary role in participation with INTERPOL for monitoring on websites disseminating child pornography. INTERPOL keeps narrated “worst of” list of such sites that can be utilized by Indian authorities.

Few other institutions which play a leading role are:

- (o) Special juvenile police unit.
- (p) Police Cybercrime Cell.
- (q) The ICT sector plays a pivotal role to suppress and respond to child online abuse and enslavement.³³

Legislative Policies In India to deal Child pornography:

- (a) **The National Plan of Action for Children:** It was set up by MWCD in the year 2005 to combat and set up pertinent measures to battle child sexual exploitation, pornography and trafficking issues. It is also concerned with the development and protection of children along with child survival and child participation.
- (b) **NPC:** The National Policy for Children (NPC), 2013 does not concern only with online menace. All schemes and policies concerned to education, ICT or cyber security are anticipated to comprise the fundamentals of the NPC and furnish children with equal opportunities for education and empowerment, while safeguarding them from threat.
- (c) **The National Policy of ICT in Schools, 2012:** This concerns about monitoring ICT to safeguard children from dangerous online risks. It acknowledges online threats and comprises laws for supervising and monitoring Internet access. The advancement of ICT systems in schools and adult education is involved in National Education Policy.
- (d) **The National Cyber Security Policy, 2013:** This deals with forbidding, investigating and prosecuting cybercrimes, involving cyber crimes committed against children. The main role of this policy is strengthens abilities of law enforcement authorities to examine cybercrimes and collect data to enable prosecution.³⁴

Government Strategies to battle Child Pornography

Recently according to the Report of the ad hoc committee of the Rajya Sabha to study the alarming issue of pornography on social media and its effect on children and society as a whole, taking cognizance of the child pornography issue has recommend a series of strategies :

33 Child Online Protection in India, available at: https://www.icmec.org/wp-content/uploads/2016/09/UNICEF-Child-Protection-Online-India-pub_doc115-1.pdf (last visited July 11, 2020).

34 *Id.*

- (a) Enhanced meaning of child pornography to be added in the proviso related to the definition of child pornography in the Acts of Protection of Children from Sexual Offences Act, 2012 with inclusion of cyber grooming provision in the Act.
- (b) Protection of minors engaged in sexting and selfies.
- (c) The Committee recommends MWCD engage in a widespread campaign through schools, society and community organizations to discourage risky online behaviour amongst children and to incorporate Social Media Guidelines in all educational institutions for promoting awareness and adherence to the guidelines.
- (d) Protection for individuals reporting Child Sexual Abuse Material (CSAM)
- (e) The committee suggests creation of national cyber crime reporting portal for reporting.
- (f) The committee suggests preparation of code of conduct and stern cohere from social media platforms to combat using of children for pornographic purpose.
- (g) The Committee suggests particularly two changes in the Information Technology Act, 2000 to tackle with the issues of Child Sexual Abusive Material such as Section 67B is to be added which provides with punitive actions for those who furnish pornography ingress to children and access, produce or transfer such abusive material. And Section 69A furnishes powers to the Central Government through its appointed authority to block and forbid all websites or intermediaries that conduct CSAM.
- (h) The Committee stresses on reporting by intermediaries about CSAM and information related to missing children to Indian law enforcement authorities both at the Central and State level and not only to foreign authorities.
- (i) The report of the committee suggests the inclusion of new section 69 C in IT Act, 2000 for the increasing powers and function of law enforcement authorities to apply cyber created and prevailing pornography for reasons of systematic examination. Further if any NGOs/activists to find the perpetrators of children want to investigate the websites should take prior approval of the nodal agency to do so. But if any misuse of the same is found stringent action must be taken against them. The Committee also suggests amending the IT (Intermediary Guidelines) Rules 2011 to incorporate after Section 12, following provisions:
 - (i) It requires Intermediaries to proactively recognize and eliminate CSAM and also to report to Indian authorities under the National Cybercrime Portal. Gateway Internet Service Providers must hold crucial accountability to detect and block such websites.
 - (ii) Intermediaries are also accountable to report to the appointed authority IP addresses, identities of those looking for child porn or CSAM keywords.
- (j) The committee further suggests that all intermediaries are under obligation to compulsorily cohere to precedents of the Sabu Mathew case (2017) and the Prajwala case (2018).

- (k) The committee recommends forbidding of deceptive domain names which generates obscene material and even authorizes to trace the distributor CSAM or sender of the message or dispensed on end-to-end encryption media
- (l) The Committee obligates apps on all devices sold in India to supervise children's ingress to pornographic material and to evolve technological solutions for actively supervising CSAM.
- (m) Recommends MHA to raise their link their with block chain companies to detect crypto currency transactions so that users are detected who buy online child pornography and also to increase collaboration with financial services enterprises to suppress online payment system through payment portals and credit cards for buying child pornography.
- (n) To proffer family-friendly filters for parental controls by ISPs. Provides ISPs to furnish Online Safety Portal for information of parents on the procedure to use family friendly filters, supervising children's access to Internet. ISPs should also lay out options for verifying age.
- (o) Endeavour social media sites and apps to issue caution against age restriction at the time of sign up and to cohere to uniform criterion system in monitoring and taking down content.
- (p) Forbidding dissemination of CSAM across common social media platforms and also discourage predatory behaviour.
- (q) To establish nodal agency as NCPCR to curb child pornography in social media and it should incorporate technology, cyber policing, and prosecution to deal with the issue.
- (r) Awareness campaign such as POCSO e-box and the National Cyber Crime Portal be established by MOWCD to curb the threat of child pornography. A central roster of cyber-volunteers can also be established to report about CSAM to the nodal agency. The newly launched Online Child Sexual Abuse and Exploitation (OSCAE) prevention and investigation initiative by the CBI can be considered as one-stop proposal to eliminate child abuse cases which rises due to crack of technical and logistical gaps.
- (s) Enhance International collaboration and liaisons with NGOs, research organizations, Academia to gather information related to frequency of using internet by children and prepare prevailing AI tools and carry research on ways to track and adopt strategies to curb child abuse.
- (t) Escalation of collecting data or all information related to child abuse cases and reporting to the NCRB. Additionally, a national Tipline Number should be set up where cases related to child abuse and pornography can be reported by interested citizens.
- (u) Ministry of Information and Broadcasting to launch nationwide campaign for sensitizing parents to identify initial symptoms of child exploitation, online threats and methods to foster online safety for children. It should be obligatory for schools to organize training of parents at least twice in a year for sensitizing them about the menace of free access to android phones and the Internet at a tender age by children.

- (v) To conduct training programmes for investigating child abuse cases.
- (w) Inclusion of new section in POCSO Model Guidelines, 2012 laying out suggestions for media professionals to report child abuse and procedure for notifying public about online safety tactics. Any contravention of such suggestions and any action taken against them should be reported by the Ministry of Information and Broadcasting. Also rendering advice to schools to tackle the dangerous consequences of child pornography, treatment of children for their online addiction.
- (x) To render alternative activities to children which can divert children from playing online games and to escalate online safety sensitization among children.
- (y) The Committee suggests that each state and union territories to set up State Commission for the Protection of Child Rights and it must comprise an e-safety commissioner. The e-safety commissioner must enforce social media and website regulations to flagging of content and its elimination as well under age warnings and other necessities.
- (z) The Committee also seeks that the Prime Minister looking after the vital issue and with a view to curb it should take up the issue to his upcoming Mann ki Baat broadcasts.³⁵

Recent facts and Figures of Child pornography

The Indian Child Protection Fund reports that in April 2020 that there is 95% spike of consumption of child pornography cases in India between 24th and 26th March. The report informs that pornography websites of the world has crucial traffic in India and specially in New Delhi during this pandemic hour and indicates high demand for child pornography content and online sexual abuse stuff which poses a serious menace to children and susceptible to online predators. Further it also reveals that keeping tabs on the online websites exhibits the escalation in search of keywords such as “child porn”, “sexy child” and “teen sex videos” which may likely upsurge in times to come.

The average demand for child pornography is 5 million per month in 100 cities on the internet during the month of December, 2019 which has now hiked more. The report further exhibits up to 200 percent spike in demand for harmful content such as children “choking”, “bleeding” and “tortured”. The report also shows that Europol, United Nations, ECPAT, children are more at risk of grooming and sexual compulsion. ICPF reports that there is “flagrant violation of the orders of the Supreme Court, and a contravention of national policy. Pornographic sites are playing hide-and-seek with Indian law and judiciary by simply changing their websites URLs”.

Recently reported during lockdown by CHILDLINE India, that the launched helpline service has obtained more than 92000 SOS calls seeking for protection from sexual abuse and

35 Report of the Ad hoc committee of the Rajya Sabha to study the alarming issue of pornography on social media and its effect on children and society as a whole, available at: https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/71/140/0_2020_2_16.pdf (last visited July 11, 2020).

exploitation of children which makes it obvious that children are more vulnerable to sexual enslavement during this lockdown period.³⁶

Judicial Intervention

The Judiciary plays a pivotal role in protecting the fundamental rights of the citizen and non-citizens. In this contemporary era Judicial Activism appeared as a significant instrument for safeguarding Child rights including safe guarding from sexual exploitation, child abuse, child trafficking etc. some case before the Judiciary for the safe guarding of child rights are based on the United Nations Convention on the Rights of the Child.³⁷

In *Prajawala v. Union of India*,³⁸ the Supreme Court took Suo Moto cognizance of a petition submitted by Prajawala, to tackle with the issue of investigation into the cases and intermediary accountability for material involving child pornography, rape and gang rape distributed on intermediary platforms such as Whatsapp. On the basis of guidelines by an Expert Committee set up for the purpose, the Supreme Court has ordered Union of India to formulate necessary regulations, Standard Operating Procedure and enforce them curb child pornography, rape and gang rape images, videos and websites in content hosting platforms and other applications. However further orders for the petition is pending.

Domestic violence against women and children is related. Violence perpetrated against women entails effect on children who witness the violence. As well as Violence against children results child abuse which cannot be overlooked because it acts as the core reason of child pornography during this pandemic hour. The spike of child pornography amidst lockdown requires proper enforcement of laws and interventions of judiciary to stop this growing issue. Proper guidelines or directions in accordance to the spike of cases will ensure child welfare and lessen threat to their safety and protect their right against exploitation. As women are the overlooked sections in the patriarchal society, their rights needs to be protected and violence needs to be eliminated same as the vulnerable sections of the society, the rights of children needs to be looked upon and role of judiciary in their protection which plays a pivotal role from the earlier times which needs to be ensured again.

Challenges

At this time period when there is a huge spike of child pornography cases, the existing laws with penal provisions to punish the online perpetrators, proves insufficient to control the rise of this issues, the reason is the administration and proper enforcement of laws such as:

- (a) Practical issues such as implementation or lack of penal actions against intermediaries and perpetrators who expedite the dissemination of child sexual abuse objects.

36 Demand for Child pornography in India spiked since Lockdown: ICPF, available at: <https://ciso.economictimes.indiatimes.com/news/demand-for-child-pornography-in-india-spiked-since-lockdown-icpf/75127959> (last visited July 11, 2020).

37 Role of Judiciary in Child Protection, available at: [http://www.dppodisha.nic.in/sites/default/files/ROLE % 20 OF % 20 JUDICIARY % 20 IN % 20 CHILD % 20PROTECTION.pdf](http://www.dppodisha.nic.in/sites/default/files/ROLE%20OF%20JUDICIARY%20IN%20CHILD%20PROTECTION.pdf) (last visited July 12, 2020).

38 Suo Motu Writ Petition (Criminal) No. 3 of 2015.

- (b) Hard to detect and recognize the perpetrators as myriads of individuals conceal their whereabouts to outwit the system to ingress the online child sexual exploitation material.
- (c) No tabs are kept on intermediaries such as ISPs and Web applications.
- (d) One of the crucial loophole is insufficient awareness about child pornography issue and pressure upon the community regarding recognizing crimes surrounding children.
- (e) No parental care upon children and vigilance upon the activities of children during using internet by parents.
- (f) Children lacking knowledge of cyber provisions or activities constituting cyber crimes such as bullying, harmful content, blackmailing, sexting etc, ease predators to lures or coerce them to the dark world of pornography.³⁹

Conclusion and Suggestions

Child pornography is a legal and a moral dilemma in the present era as it has the proclivity to annihilate the dignity, esteem and human rights of a child. The continuous dissemination or portraying of a sexual content of a child over the social network inflames the agony of child victims by retaining the wounds or injury afresh.

- (a) A worldwide global legislation for tracing, examining and prosecuting online child pornography is the need of the time.
- (b) The online predators, viewers and intermediaries should be monitored and stringent action must be enforced against them.
- (c) Stern liability must be inflicted on the ISPs such as blanket ban on VPNs and a systematic weekly or monthly accounting must be ensured to the National Cyber Crime Reporting Portal.
- (d) One of the adaptive method “Digital media literacy” should be embraced which will create awareness and bring into light of consuming child pornography and strict punitive measures under diverse legislations.
- (e) A well organized educational programme should be unfurled across various means such as television, social media, radio, internet etc.
- (f) Society should set up watchdog groups.
- (g) The Ministry of HRD and other educational agencies such as UGC, CBSE, ICSE or state boards should make it obligatory for the schools, colleges and other institutions to organize programmes for increasing consciousness on child pornography.
- (h) As unbridled access to internet by children during this crisis hours has came into light, the role of parents at home is very crucial to sensitize their children about the likelihood of danger they may face when accessing internet and evil contents such as sexual threat,

39 The Big picture: Pornography-Impact on children and society, available at: <https://www.drishtias.com/loksabha-rajyasabha-discussions/the-big-picture-pornography-impact-on-children-society> (last visited July 14, 2020).

grooming, bullying etc, monitoring the regular online browsing conduct of children, to restrict the application of webcams, and block the probable harmful websites.

- (i) As the issue of domestic violence has upsurge during this same crisis the parents must make sure to provide a pleasant and unstressed ambience in home for the sake of their sensitive tender age children.
- (j) Whenever a parent found that their child is at risk of sexual abuse through online or any incident has took place should ask for help from the authorities.
- (k) For the comprehensive change a holistic revolutionary approach should be developed in the mindset of the people and to realize the far reaching repercussions of this online dark world on our future generations.⁴⁰



40 *Id.*

Case Comment: Re Cartelisation In Industrial and Automotive Bearings

Hartej Singh Kochher*

Abstract

In the following case comment, the author culls out the reasoning of the Competition Commission of India, to bring to book certain companies involved in cartelization in the market of industrial and automotive bearings. The reasoning is examined and the impact of such a reasoning gauged. More specifically, the interpretation of the part of Section 3(1) of the Competition Act, 2002 which deals with the likelihood of an agreement resulting in appreciable adverse effect on competition, is explained. The author also details as to how the particular interpretation followed in this case, is a positive development while dealing with alleged cartel cases.

Introduction

Re: Cartelisation in Industrial and Automotive Bearings¹ was a case instituted by the Competition Commission of India (CCI), on a *suo moto* basis after receiving a leniency application under Competition Commission of India (Lesser Penalty) Regulations, 2009. A leniency petition/application can be made to the CCI, by a cartel member, to provide full and true disclosure as to the anti-competitive activities of a cartel.² This information, if deemed vital, can enable the first such applicant to seek a penalty rebate of up to hundred percent³ provided there exists continued cooperation, to weed out the reported cartel. Hence, it becomes an effective way to bring forth cartelisation and its resultant anti-competitive effects.

Facts

In the application for leniency, filed by Schaeffler India Limited, it disclosed its participation in cartelization in the domestic industrial and automotive bearings market from the year 2009 till 2014, along with Timken India Limited, National Engineering Industries Limited, SKF India Limited and Tata Steel Limited (Bearing Division).

The application detailed as to how with the increase in steel prices, which is a major raw material in the production of bearings, there was coordinated action amongst the 'cartel' members

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1 Competition Commission of India - Suo Motu Case No. 05 of 2017.

2 The Competition Act, 2002, s. 46.

3 The Competition Commission of India (Lesser Penalty) Regulations, 2009, reg. 4.

to pass on such an increase to the customers, i.e. the automotive and industrial Original Equipment Manufacturers (OEMs) and the distribution segment of the market. Such action was necessitated as the OEMs only agreed to such increases when all the suppliers demanded an increase in price. This was limited to the Indian market and the aim was to simultaneously send out the letters to the OEMs demanding an increase in prices.

Investigation and Proceedings Before the Commission

The investigation into the said allegations levelled by way of the leniency application, was carried out by the Director General (DG), the investigating arm of the CCI, against the alleged cartel members. The investigation found two instances of the meetings between the representatives of the above-mentioned companies, except Timken India Limited. In these meetings, pricing strategies were discussed in order to gain a price increase from the Industrial and Automotive OEMs and in the aftermarket. It was found that even the percentage of price increase to be sought was discussed. The DG was even able to establish communication between competitors by way of detailed call records. However, there was no proof for a coordinated price increase in the aftermarket segment.

DG in his conclusion, found that the competitors controlled nearly three-fourths of the market and shared confidential information to achieve higher prices. Even if they ultimately deviated from these agreed prices, collusion by the parties and appreciable adverse effect on competition⁴ were established (except by Timken India Limited, as no evidence was found).

Submission of the Parties

The parties accused of cartelising and their representatives, individually submitted their rebuttals to the DG report, which are, for the sake of brevity, summarized in the following points:

- i. Schaeffler India Limited stated that even an attempt to form a cartel, comes within the definition of a cartel under the Act⁵. The collective decisions could not be implemented, is not a defence.
- ii. A large chunk of the bearings in India were actually imported and the DG had overstated the market share of the companies by estimating it at around seventy-five percent.
- iii. The global giants in the bearing business could have replaced the parties as the suppliers of bearings to the domestic market.
- iv. Bearing industry is a “price-taker”, as they buy in bulk and hence can dictate prices.
- v. This was an instance of a “coercive cartel” as the OEMs themselves wanted such price increased to be done collectively rather than in an individual manner.
- vi. There was no effect in the market in the form of raised prices.
- vii. The increase in steel prices was a justifiable reason in seeking an increase in prices.
- viii. There was no price parallelism as the percentage of price increase sought and granted, the timings of the same, were different for the companies and there was no coordinated action.

4 Appreciable adverse effect on competition is the marker used by the CCI to determine whether an agreement is anti-competitive. It takes various factors into account which are given under Section 19(3) of the Competition Act, 2002

5 The Competition Act, 2002, S. 2(c).

- ix. Various other concerns regarding the DG's investigation and the evidence at hand were raised. The presence of the representatives of these companies at the meetings was also refuted.

The Order

The Commission i.e. a three-member adjudicatory panel, while analysing the DG's report and the submission of all parties, examined the instances of meetings, a trail of e-mails alluding to the decisions taken therein, call records of persons and travel details of the various company representatives to come to a conclusion that the various representatives indeed attended/participated in the said meetings. During these, consensus was reached to send letters to OEMs asking for increase in prices.

While delving into the legal provisions, the commission referred to Section 3(3) of the Competition Act, which refers to anti-competitive agreements involving cartels. It clearly states that once a cartel was established by way of evidence, appreciable adverse effect on competition was '*presumed*' and it was on the alleged cartel members to disprove the allegations.

The arguments framed by the alleged participants, that no effect on competition actually took place, which was evident from the DGs report itself, and that the buyers had significant countervailing buying power, were not tenable under law or fact. Detailing the provisions of Section 3(1) of the Competition Act, it was noted that not only are those agreements which actually cause appreciable adverse effect on competition frowned upon, but even those agreements, '*likely*' to cause appreciable adverse effect on competition, are also proscribed.

The commission, referenced a landmark decision of the Supreme Court of India in *Rajasthan Cylinders and Containers Ltd. v Union of India and Ors.*⁶ wherein it was held that the presumption of appreciable adverse effect on competition in a case involving contravention of the provisions of Sec 3(3) of the Competition Act 2002, can be rebutted by the parties taking recourse to all or any of the factors provided under Section 19(3) of the Act. They had failed to do so. They had simply stated that the price revisions actually quoted were divergent from those agreed upon. Hence, the statutory presumption of the causing of appreciable adverse effect on competition could not be rebutted. The meeting was enough to compromise independence of the parties. A cease and desist order was ultimately passed by the commission, to preclude parties from engaging in such behavior again.

Analysis

In the opinion of the author, an interesting interpretation has been given to Section 3(1) of the Competition Act. The said provision is reproduced below in verbatim:

"No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."

6 2018 (13) SCALE 493.

A plain reading of the provision, would make it obvious that what seems to be intended is a bar on agreements which *cause* appreciable adverse effect, or are *likely to cause* appreciable adverse effects, on competition in India. Thus, any agreement, when actually implemented, and results in adverse effects on competition, would be covered under Section 3(1).

The part of the provision, which deals with the *likelihood* of an agreement resulting appreciable adverse effect on competition, brings out two possible readings/interpretation:

- I. The agreement has been implemented and will likely cause appreciable adverse effect on competition in the market in the future; or,
- II. A mere agreement has taken place, which, has not been put into practice, by the agreeing parties, but, *if implemented* will cause appreciable adverse effect on competition.

In the present case, the CCI has taken the second possible/probable interpretation. An interpretation which broadens the area domain and the jurisdiction of the CCI. It provides for a pre-emptive attack on cartels, before they can implement their decisions. Even if the decisions are not being implemented, the mere coming together of competitors at a common forum, to compromise their independence, is brought to book. The meeting of competitors itself is held to be anti-competitive, whether such a meeting results in on ground changes or not.

Conclusion

Such an interpretation, strikes at the very heart of cartelisation. Due to the wide ambit of the interpretation, even a meeting of competitors, with a hint of possible collusion, can land them in hot water with the CCI. This would definitely act as a major deterrent to all the players in the market. Non acceptance of the defence that the decisions taken at the meeting were not implemented and independent price revisions took place by the companies, will prevent a precedent from being set, wherein market players can come together, and then take such a defence. In reality, it is very difficult to prove what actually transpires at such meetings, if they take place, and it is not always that a chain of e-mails may be available to substantiate the allegations. Also, in this case, there was a cooperative party which sought leniency and provided the factual matrix. This might not be possible in all cases involving cartels.

Further strengthened is by such a reading, the presumed violation by a cartel under Section 3(3) of the Competition Act. The interpretation, presumes a cartel, just because of the factum of the meeting of competitors itself, and places the alleged violator in a position in which he has to rebut the allegations of a cartel. Hence, the burden of proof shifts and this again would be a deterrent to a conceivable cartel as the regulator would not have to build a case against it once the reality of a meeting is established.

In conclusion, in the opinion of the author, a bare cease and desist order should not have been issued, instead, a monetary penalty should have also been imposed to act as a strong deterrence. Such proactive and preemptive measures to tackle cartels, will help the CCI to achieve the objective of the Competition Act, 2002 as enshrined in its Preamble – “...to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets...”

Ramanand and ORS. V. Dr. Girish Soni and Aur. Tenants Rights and Obligations

Gyanda Kakar*

Abstract

The unprecedented pandemic has led to unforeseen situations and circumstances. The preventive measure has huge implications on economies worldwide. COVID-19 and the subsequent lockdown not only has significantly influenced businesses and economies worldwide but also contractual obligations. It also has a significant impact on business ties. A significant issue emerging during these turbulent times is whether this lockdown entitles tenants to a waiver or a rental suspension. Our economy has suffered tremendous loss because thousands of unemployed people cannot afford their everyday expenses such as monthly rentals. As an immediate consequence, the landlords evict the tenants due to rent defaults. In reaction to horrific incidents during the lockdown, the government released a new circular in favour of the tenants to make rent waiver possible. Under the contractual obligations, the owner and the landlord are bound by the rental agreement. The agreement is focused largely on the agreements reached by the parties to speculate about potential events. However, a pandemic was beyond each individual's imagination while concluding a rent deal. The agreement is focused largely on the agreements reached by the parties to speculate about potential events. However, a pandemic was beyond any individual's imagination while concluding a rent deal. This case comment explores the recent Delhi High Court judgment which somewhat clarified the above subject. It will also explore the tenant's obligation in the United States of America to have a comparative approach.

Introduction

We see a phenomenal situation that has not only disrupted our financial and hierarchical expectations but has, also, profoundly affected both our relationships and social ties. In nearly all large urban areas, where vagrant workers typically converge more, the question of the non-payment of the rental by tenants to the owner is a source of dismissal and discontent.

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Humanity is under threat to escape the threats of the global pandemic. In all aspects of life, the times have dawned in a dire situation. As an immediate consequence, the landlords evict the tenants due to rent defaults. In reaction to horrific incidents during the lock-down, the government released a new circular in favour of the tenants to make rent waiver possible. Under the contractual obligations, the owner and the landlord are bound by the rental agreement. The agreement is focused largely on the agreements reached by the parties to speculate about potential events. However, a pandemic was beyond each individual's imagination while concluding a rent deal. The agreement is focused largely on the agreements reached by the parties to speculate about potential events. However, a pandemic was beyond any individual's imagination while concluding a rent deal.

Background of the Case

- a. FACTS OF THE CASE:** The tenants run a shop in Khan Market, New Delhi (tenanted premises) which was leased at INR 300 (Rupees three hundred) a month for commercial purposes, through a lease deed dated 01 February 1975. In 2008, the landlord demanded eviction under section 14(1)(e) of the Rent Control Act, 1958 under which the Senior Judge-cum-Rent Controller imposed an expulsion order on 18 March 2017. In 2008, the landlord demanded expulsion from the house. The tenants refused this eviction order, which has been discharged by order dated 18 September 2017 before the Rent Control Tribunal.

The tenants subsequently filed before the High Court a petition contesting the dismissal order, in which the High Court, by way of order of 25 September 2017, granted a provisional order and stayed on the order for eviction, subject to the payments of tenants amounting to INR 3,50,000 per month. During the lockdown period, tenants moved the request to suspend the rent following the outbreak of COVID-19. The tenants argued that all business operations, including those in which the tenants worked, had been disrupted by the lockdown.

The lockdown was pleaded to be a force majeure case outside the tenants' control and thus, the tenants demanded the monthly lease waiver or alternative partial reliefs in place of the termination, postponement or payment of a portion of the rents.

- b. A BRIEF OVERVIEW OF THE CASE:** Particularly in COVID 19 times, this decision by the High Court provides much-needed clarification on the matters concerning the obligation of lessee to pay the rent. In the present situation, the High Court has explained the function of Section 32² and 56³ of the Indian Contract Act, 1872 and Section 108(B)(e) of the Transfer of Property Act, 1882.⁴ The High Court has also set out the factors needed to determine whether the tenants have the right to any relief from rental suspension. Under section

2 Indian Contract Act, 1872 (Act No. 9 of 1872), s. 32.

3 Indian Contract Act, 1872 (Act No. 9 of 1872), s. 56.

4 Transfer of Property Act, 1882 (Act No. 11 of 1882), s. 108.

108(B)(e) of the Property Act, temporary non-use of premises due to the COVID-19 lockdown cannot be construed by a tenant to make the rent void and hence cannot escape paying rental under that provision.

c. PROVISIONS AND STATUTES

- * SECTION 108(B)(E), TRANSFER OF PROPERTY ACT, 1882.
- * SECTION 32, INDIAN CONTRACT ACT, 1872
- * SECTION 56, INDIAN CONTRACT ACT, 1872

d. ISSUES PLACED BEFORE THE COURT

- * Can tenants/leasing parties claim a rental suspension by invoking the Court's equitable jurisdiction because of the temporary non-use of the premises caused by COVID-19 Lockdown?
- * Could tenants/leases demand a rental suspension by invoking the 'Doctrine of Contract Frustration' or the 'impossibility of performance' in the absence of 'force majeure' in the contractual term?
- * Has the Supreme Court denied tenants' appeal for an exemption from rent, rendering payment of rent mandatory for tenants?

e. PETITIONER'S ARGUMENTS: The tenants' counsel submits that he has put forward this request following the interim order of 25 September 2017, the Court had ordered that the expulsion order should be enforced if any delay of payment takes place. The counsel submits that his clients are prepared to pay the monthly sum partially. Alternatively, he prays to postpone rent for a total of one month. He claims that his customers are entitled to a form of recovery because there has been no business during the lockout period.

It is requested on behalf of the Tenants, that any rebate may only be given during the lockdown period and the Tenants are otherwise able to make the monthly payments periodically.

f. RESPONDENT'S ARGUMENTS: The counsel who appeared for the Landlord submitted that the tenants had paid a poultry amount of Rs. 300/- per month since 1975. The Counsel maintained that the tenants are highly skilled businessmen who bought a neighbouring shop in the Khan market. He further argued that, as opposed to the prevalent market rate, the amount fixed by this Court, i.e. Rs. 3,50,000 per month, is rather meagre. He quotes Shop No.33 in the Khan market for which rent is approximately Rs. 22 lakhs per month for 1,456 sq. Feet land.

Therefore, the tenanted premises are claimed to be much more valuable than the amount set by this Court. The Council submits that force majeure does not apply as the case is governed by the DRC Act. He further submitted that the landlord was a tenant and required the land for his bona-fide purposes. Counsel claims that pure business interruption cannot

prevent tenants from making monthly payments since the landlord is still relying on on-premises revenue.

- g. POINT OF LAW ESTABLISHED:** The High Court dismissed the rent suspension claim of the tenant. Nevertheless, the High Court allowed a certain amount of flexibility in the rental schedule, which owing to the lockdown. Section 32 of the Contract Act only comes into effect if there is a provision for waiver or suspension of rent in the form of force majeure; Section 56 of the Contract Law does not apply to leases and other contracts of similar nature, which are executed contracts and not executory contracts;

In the absence of contracts or statutory conditions, tenancies and leases are regulated by the rules of the Property Act.

h. FACTORS TO BE CONSIDERED

- T** Nature of the property- The High Court noted that the disputed premises were located in the prime commercial area of Khan Market.

- T** Financial and social status of the parties-The High Court noted that the landowner was a dentist wishing to use the tenanted property and seeking expulsion on a bona-fide ground following Section 14(1)(e) of the Rent Control Act. The tenants were found to be running a shop in tenants' premises which, from 1975 on, they had been renting every month at a meagre amount of Rs. 300.

The amount of rent the property commands in the market-It was noted that, after the expulsion decree had been passed against the tenants, the monthly payment for Rs. 3,50,000 was fixed by the High Court itself as a condition of the continuous utilization and stay of the expulsion decree. It was also noticed that the tenants did not want to leave the property or to vacate the tenanted premises because of the lock-down, but preferred to occupy it. The Court also noted the significantly lower amount paid by the tenants in comparison with the other properties in the same place.

- T** Any contractual condition that permits non-payment or suspension of rent-As a decree of dispossession had already been introduced, the high court ruled that the tenants were unauthorized occupants. It was noted that, given the Supreme Court judgment in *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.*,⁵ the monthly payment of the rental was fixed by the high court itself. The High Court took the view that it was appropriate to assess the use and possession of these premises in a way to completely compensate the property owner as he had expropriated it to a third party. That would tilt the comfort balance to the landlord's advantage.

- T** Protection under the Government's executive orders-The High Court noted that certain groups of tenants, such as refugees, employees and students, have been covered by central

5 (2005) 1 SCC 705.

and state government. However, the High Court observed that the tenants were not covered by the orders and therefore could not seek relief based on these orders without going into the legality.

- * Any other contract condition: No contractual commitments requiring non-paid or suspension of rent were found.
- i. **PRINCIPLE OF FOUR SITUATIONS:** The court noted that there would be thousands of cases throughout the country where the question whether the lockdown entitles lenders to claim exemption from the payment of rents or to the suspension of rent. Considering the above, the court underlined four major situations which were possible.
 - * Where a lease has envisaged force majeure conditions that could result in a rental relief.
 - * Where there is no force majeure clause under the contractual obligations.
 - * Where there are no contractual obligations.
 - * Where a profit-sharing arrangement exists.

n. **OVERVIEW OF THE JUDGMENT**

* **WHAT IS A FORCE MAJEURE EVENT?**

The Court referred the definition of *force majeure* as given in the Black's Law Dictionary, wherein the court noted that *an event or effect that can be neither anticipated nor controlled*" and includes "*both acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes and wars)*".⁶

* **SECTION 32 OF THE INDIAN CONTRACT ACT, 1872**

The Court held that the grounds under which tenants /lessees or other similarly situated parties could request waiver or non-payment of rent under contracts with a force majeure clause, governed by Section 32 of the Contract Act in circumstances such as the outbreak of a pandemic; such as the present COVID-19 outbreak.

It was held that the court would review the same under Section 32 of the Contract Act in agreements containing the force majeure clause. The Court acknowledged that due to the absence of uniform implementations or definitions, a force majeure clause may be worded differently in various contracts. It was held that the basic principle was that the tenant could only claim the same if the contract contained a clause that provides for certain types of waiver or suspension of the rent.

The High Court also noted that, in compliance with Section 32 of the Contract Act, the force majeure provision may be a contingency contract that would allow the tenant to demand

6 COVID-19 and Force Majeure: What Businesses Should Know is part of Resources for Business Responding to COVID-19 from North Carolina Law Firm Ward and Smith (2020). Available at: [https://www.wardandsmith.com/articles/covid-19-and-force-majeure-what-businesses-should-know](https://www.wardandsmith.com/articles/covid-19-and-force-majeure-what-businesses-should-know#:~:text=Black's%20Law%20Dictionary%20defines%20force,riots%2C%20strikes%2C%20and%20wars.) #:~:text= Black's% 20Law% 20 Dictionary % 20defines%20force,riots%2C%20strikes%2C%20and%20wars. (last visited July 15, 2020).

invalidation of the contract and the surrender of the premises. The High Court has however explained that rent would be payable if the tenant wished the premises to be maintained and no provision gives the tenant a relief.

❖ **RELIANCE PLACED ON**

The High Court relied on the *Energy Watchdog v. CERC & Ors.*,⁷ the judgment of the Supreme Court of India, where it has been held that in the case of an expedited or conditional term relating to a force majeure situation, the same is controlled by Section 32 of the Contract Act. Besides, Section 56 of the Contract Act, which deals with the difficulty of fulfilment, was determined by the Supreme Court in situations where force majeure event happens outside the contract.

❖ **SECTION 56 OF THE INDIAN CONTRACT ACT, 1872**

The High Court held that Section 56 of the Contract Act should not be applied to a rental agreement or other similarly situated contracts involving executed and non-executory contract. In the absence of a force majeure clause or relief provision, the High Court held that a tenant may attempt, as laid down in Section 56 of the Contract Act, to invoke the doctrine of frustration of contract or the impossibility of performance. Nevertheless, in the light of the agreed legal situation, the High Court found that this invocation was not valid.

Section 56 was held not to apply to cases where a completed transfer takes place. In this context, the Supreme Court established a rule stating that a lease should be a completed conveyance and that Section 56 of the contract law should, therefore, not be used for a waiver, a suspension or a derogation from payment of the rental.

❖ **RELIANCE PLACED ON**

The ruling of the Apex court, *Raja Dhruv Dev Chand v. Raja Harmohinder Singh & Anr.*⁸ was cited by the learned High Court Judge. In the apex court case, the rental charged by the tenant who leased some land in Punjab which could not be used due to partition during 1947. The Supreme Court found that Section 56 of the Contract Act, which provides for a substantive rule relating to the frustration of a contract, was not applicable to lease agreements following review of the statute concerning unreasonable performance by the different jurisdictions. The Supreme Court distinguished between a “completed conveyance” and an “executory contract.”

❖ The Supreme Court’s view was further reiterated in *T Lakshmipathi. and Ors v. P. Nithyananda Reddy and Ors*⁹ and *M/S. Alopi Parshad & Sons, Ltd. v. The Union of India*.¹⁰

7 (2017) 14 SCC 80.

8 AIR 1968 SC 1024.

9 Appeal (civil) 4526 of 1999.

10 1960 AIR 588.

- * The High Court relied further on the decision of a division bench of the High Court in the case of *Hotel Leela Venture Ltd v. Airports Authority of India*,¹¹ wherein the High Court's Divisional Bench held that wherein a lessee obtains possession from the lessor is an executed contract. Since the payment of the rent is in a periodical payment of the contract, it was considered the agreed rent must be paid and not simply discharged because one party finds it difficult. For that reason, nobody can withdraw from a contract.

- * **SECTION 108(B)(E) OF TRANSFER OF PROPERTY ACT**

In the absence of contracts or of contractual conditions, the High Court noted that tenancies and leases would be governed by the conditions of the TPA. Section 108(B)(e) and Section 108(B)(l) of the Act respectively set out the concept of force majeure, the rights and obligations of a leaseholder. In compliance with those rules, in the event of any provision of Section 108(B)(e) that makes property substantially or permanently unfit to be used for the purposes for which it was leased, that shall lead the lease to be unfit, if such provision is invoked at the option of the lessee. Following that provision, in the case of any provision set down in Section 108(B)(e) as fire, storm or flooding or the violence of an army or mass or any other irresistible force, that makes the property unfit for rental to serve substantially and permanently, the lease shall, at the option of the lessee be void.

- * **RELIANCE PLACE ON**

- i. The Supreme Court ruled that the temporary non-use of the leased premises by the tenant due to any circumstances would not enable a tenant to invoke Section 108 of the Property Act. A referral was again made to the decision of *Raja Dhruv* case.¹²
- ii. The emphasis was put on the decision in *Shaha Ratansi and Sons v. Kumbhar Sons Hotel Pvt*,¹³ wherein, the Supreme Court has made clear that Section 108(B)(e) of the Property Act is not read in cases relating to the lease agreement because it is presumed that only the superstructure is rented out and that rental is, in effect, also a rental of the site, when a building/structure is leased out. Since the tenured property was demolished and lost, the tenancy could not be determined.
- iii. In *Sangeeta Batra v. M/s VND Foods Ors*,¹⁴ the above-mentioned Supreme Court opinion was reaffirmed where the High Court stated that the rental premises, designated as a restaurant, had not been sealed as the tenants did not choose to avoid the lease. It was held that the obligation in Section 108(B)(l) cannot be avoided unless the renter avoids the lease.
- iv. Given the established legal position, the High Court held that, because of the force majeure clause, the permanent property must be destroyed for a lessee to seek

11 O.M.P. 1206/2012

12 *Supra* note at 8.

13 (2003) 5 SCC 150.

14 (2015) 3 DLT (Cri) 422.

protection under Section 108(B)(e) of the TPA. The conclusion was that Section 108(B)(e) of the TPA cannot be invoked until the destruction of the property occurs. The High Court found that the temporary non-use of a building by lockdown, recorded as a consequence of COVID-19 outbreak, cannot be construed as making the lease void according to Section 108(B)(e) of the Transfer of Property Act and that a tenant cannot prevent rental payments.

- o. OTHER CONTRACTS:** The High court held that the landlord/lessee may be entitled to seek waiver/suspension in respect of the contracts where there is a profit-sharing agreement or agreement for monthly payment based on sales turnover, under the provision. It had been noted that these situations were solely subject to the terms of the contract itself and that the tenant was not obligated to make maintenance payments and that no benefit and sales were made. In such cases, the High Court was of the view that the right of the lessor does not depend on force majeure events, but rather on the outcome of the force majeure event, where there were no sales or profits.

p. PRECEDENTS IN THE SAME AREA:

- * In the case of *Gurdarshan Singh v. Bishan Singh*,¹⁵ the Punjab and Haryana High Court held that a contract of lease can be avoided at the option of the lessee (depends on the volition of the party concerned) *as per the occurrence of events mentioned under Section 108(e) of TPA*. The doctrine of frustration can be applied to leases, and the principle under Section 65 of the Indian Contract Act would be applied accordingly.
- * In the case of *Court of Wards Dada Siba Estate v. Raja Dharan Dev Chand*,¹⁶ the Punjab and Haryana High Court held that Section 56 of the Contract Act embodies a positive rule concerning the doctrine of frustration. A contract of lease can be avoided on the happening of an event as per the terms of the contract either express or implied. However, it does not amount to discharge of contract as per provisions of Section 32 of the Contract Act. Also, contract of lease can be avoided as under Section 108(e) of TPA on the happening of events as stated under the section, but it is different from the discharge of contract by the doctrine of frustration.
- * In the case of *Gandavalla Muniswamy v. Marugn Muniramaiah*,¹⁷ the Andhra Pradesh High court held that as per Section 108(e) of TPA, a lease is not determined on the destruction or irresistible force of events of the property leased, it is the choice of the lessee to treat the lease void or not. However, the lessee must give up possession of the property to consider the lease as void. The rental obligations will continue to arise as long as the possession of the property is not surrendered.

15 Civil Appeal 44 of 1953.

16 Civil Appeal 143 of 1952.

17 AIR 1965 AP 167.

- ✱ In the decision of *Aranya Hospitality Management Services Pvt. Ltd. v. K. M. Dhoundiyal & Ors*,¹⁸ the Delhi High Court held that under circumstances wherein the tenant cannot use the property for the purpose for which it was leased, the tenant would have no right to continue enjoying the property and seek suspension of rent at the same time.
- ✱ In the case of *Kshitish Chandra Mondal v. Shiba Rani Debi And Ors*,¹⁹ the Calcutta High Court held that the tenant was entitled to occupy the shed as such. On its destruction even if it had been held that the tenant was entitled to continue to occupy the land, if he agreed to pay the rent, no right existed under the arrangement between the parties to authorise the tenant to raise a structure of his own, thus change altogether the character and nature of the tenancy. Specific Subject Matter, assumed by the parties to exist or to continue in existence is accidentally destroyed the promise made in the contract is accidentally discharged.
- ✱ In the case of *George J. Ovungal v. Peter*,²⁰ the Kerala High Court held that even after the destruction of the superstructure of the shop room the tenant is entitled to continue in possession of the land upon which the superstructure of the shop room stood before its destruction; as part of the property demised subject to all the rights and liabilities as a tenant, since the landlord-tenant relationship between the plaintiff and defendant continues to exist. The tenant may be bound to pay the rent under the lease. He may be entitled to exercise an option to give up tenancy under S. 108(e) of the TPA. So also, it may be open to the landlord to claim rent to exercise any other right as landlord of the property including a right to terminate the lease regarding the part of the demised property even now remaining, namely, the land which formed the floor of the shop room.”
- ✱ In the case of *Commissioner, Kadayanallur Panchayat Union & Anr v. A Puthuran Padayachi*,²¹ the Madurai bench of the Madras High Court held that no disputing fact that the basis of the contract itself was destroyed and therefore the contract in the strict sense of the word “became impossible of performance”, if we were to apply Section 108 (e) alone then the lease expires as per the wish of the lessee.
- ✱ In the case of *Shankar Prasad and Ors. v. State of M.P. and Ors*,²² the High Court of Madhya Pradesh held that the obligation to pay rent by the lessee did not cease, even though the godown leased out was destroyed by a fire, as the lessee had not sent a notice under Section 108(B)(e) of the TPA to the lessor.

18 2017(3)ArbLR345 (Delhi).

19 AIR 1950 Cal 441

20 AIR 1991 Ker. 55.

21 2007 I. L. W 597.

22 AIR 1965 MP 153.

- q. OPINION:** Since the COVID-19 outbreak, people around the world are struggling to seek termination or exemption from rent with their landlords. Tenants face considerable difficulties in paying rent due to the loss of business and jobs. The government of Singapore allows property owners to be lenient to tenants who cannot make rental orders by offering a property tax remission. Numerous government bodies like Maharashtra, Karnataka and Delhi have also worked to protect the rights of the tenants in India.

In the event of leased property, the approval of the suspension/waiver of rent depends upon the terms of the agreement between the parties. If no contract exists, the relevant provisions of the TPA shall apply and the terms of it shall be fulfilled. Only if a lease is required to be invalidated and the TPA does not envisage suspending rentals in such a case, then the applicable provisions of the TPA useful. When no statute, administrative or contractual requirements are reasonable, protective and effective, parties may try to invoke the equitable jurisdiction of the Court, but numerous factors, including those taken to account, must satisfy various factors taken into account by the Delhi High Court.

This decision of the High Court in Delhi is appropriate as it clarifies a burning problem in the world. Tenants/lessees should be advised to review their contracts and to see if they have the right to seek waiver or suspension upon rental payment. If not, negotiations with the landlord are likely instead of approaching the courts to produce relatively desirable results.

It would be appropriate to consider comparative hardship. A multinational corporation that calls on 'force majeure' to avoid the payment of rent of an individual's property, who relies on rent for survival, would cause the owner considerable difficulty as the otherwise affects the lenders equally. While this is not a legal statement, the parties should be encouraged to find a mutual solution such that problems in times of difficulty are avoided. While the force majeure clause can seek cover, it may be unreasonable to do so.

The financial damage caused by the spread of the coronavirus has prompted private parties and supporters to review the fine print for 'future proof' contracts. The unseen hand of 'force majeure' influences all contractual responsibilities. The effect of the virus on rentals, of course, would depend on the Court's final decisions.

- r. POSITION IN THE UNITED STATES OF AMERICA:** While COVID-19 continues to propagate and claim lives, numerous national, federal, state and local institutions have, among other things, responded to social separation and business closures by unprecedented interventions. At least 11 states have imposed limits on citizens' travel from their places of residence, including California, Illinois, Michigan, New York, Ohio and Oregon. In several cases, these policy forced non-essential businesses to close their doors partly or entirely to the public. In several other cases, companies had declared voluntary closures before government-ordered closures either to prevent the disease from spreading or because the demand for goods and services was halted. Such companies included Apple, Starbucks, Nike, several large departmental stores and a large number of other major retailers, together

with office buildings (including PepsiCo and Netflix).²³ Few commercial lease documents foresee a pandemic, such as COVID-19. In other words, standard commercial leases have different clauses, likely in the case of such a pandemic. This Article discusses COVID-19's possible effect on the relationships between landlords and tenants, especially the obligation of tenants to continue to pay their rentals, whether they be voluntary or required, during operational suspensions.

While it is true that many states and local governments have stopped all eviction and several courts are closed, the issue of rent between landlords and tenants remains a central problem. The criteria to start working in these areas are as follows:

Payment obligations are generally based on the specific language of the rental, but responses may not be as clear as a rental owner may assume. The leases (e.g., force majeure, severability, separate agreements) sometimes relay to a portion of the 'Miscellaneous' lease may take centre stage.

- * **FORCE MAJEURE** A typical provision for greater force excuses the failure of the parties concerned to comply with the lease obligations for uncontrolled events. This clause may specifically be referred to as "force majeure" but is often found in a section like "unable to perform" or "Unforeseen delay," without any reference to the word "force majeure." While these provisions seldom apply specifically to "virus" or "pandemic," they also apply to provisions that could theoretically apply such as "God's act," the order or regulation of the government, labour shortages or supplies or something "beyond the reach of the party."
- * **QUIET ENJOYMENT AND INTERFERENCE** – Quiet enjoyment is generally either suggested in law or expressly specified in a lease. Quiet enjoyment does not apply to a relaxed quiet environment, as its name implies. Instead, the term quiet does not, according to Black's Law Dictionary, means that no noise is there. In this situation, it implies that an operation has no external intervention. An operation is carried out without the intervention of another or superior party." Where a contract expressly specifies that a tenant has the right to a quiet and peaceful enjoyment without any intrusion from the landowner. As a typical rental language granting tenant freedom of quiet enjoyment does not excuse a tenant of having to pay rent, or otherwise comply with their rental obligation, since it would be difficult to assert the ownership liability for the closure COVID-19. In reality, if it is not the owner, but rather a third party who interferes with the tenant's right to use property peacefully, the cause of action at this stage is no longer a quiet enjoyment action but instead a cause for infringement or nuisance. The challenge for a tenant is that no punishment for violation or molestation is feasible as government authorities will likely be protected by governmental immunity. Finally, lease parties trying to understand if they have a right to a deprivation of their rights to silent enjoyment due to the COVID-19 outbreak should concentrate their

23 *The COVID-19 Pandemic's Impact on US lease Obligations* | Lexology (2020). Available at: <https://www.lexology.com/library/detail.aspx?g=a5af48fd-93ba-4946-923f-be7088a02272> (last visited July 15, 2020).

inquiry on whether the lease language renders the landlord liable for such deprivation even though the landlord does not cause the deprivation.

- * **CONDEMNATION:** Many rentals include a government entity's conviction or takeovers. Such clauses also use a narrowly structured language to apply only when any or more of the property is "acquired" or "condemned." However, other rentals use more broadly, such as that, where government 'law' or 'regulation' restricts the right of a tenant to 'use' his land, the condemnation applies. Even when such specific language exists, tenants are facing various obstacles in successfully arguing, under a COVID-19 closure, that the government has violated their rights to use the land.

* **RENTAL REQUIREMENTS THAT LANDOWNERS SHOULD FOCUS ON:**

- Rental requirements without deduction or reimbursement;
- Provisions allowing tenants to shut down their building without any rent cuts in an emergency;
- Force Majeure clauses which decide the applicability of monetary obligations;
- Service agreements and the impact on the percentage rental in the retail environment;
- Provision defining the freedom of the lease pact claims that the tenant's obligation to pay rent is independent of the tenant's obligation to hold their property open;

* **RENTAL REQUIREMENTS THAT TENANTS SHOULD FOCUS ON:**

- Abatement and other rights if the property owner's services have been denied access or ceased;
- Force Majeure clauses that do not establish currency bonds;
- Provisions guaranteeing the right of the tenant to access or use the premises;
- Condemnation/casualty clauses when drawn up as a result of regulatory action to lead to a lack of access or use;
- Co-tenancy standards in the retail sector, allowing shopping centres to maintain a certain standard or other shops in operation (failure to do so and other privileges to residents);
- Quiet Enjoyment Rights, and
- Leasing protection for tenants-identification and financial means of the corporate tenant.

s. CONCLUSION

- * The High Court dismissed the rent suspension claim of the tenant. Nevertheless, the High Court allowed a certain amount of flexibility in the rental schedule, which owing to the lockdown. Section 32 of the Contract Act only comes into effect if there is a provision for waiver or suspension of rent in the form of force majeure;

- * Section 56 of the Contract Law does not apply to leases and other contracts of similar nature, which are executed contracts and not executory contracts;
- * In the absence of contracts or statutory conditions, tenancies and leases are regulated by the rules of the Property Act.

Particularly in COVID-19 times, this decision by the High Court provides much-needed clarification on the matters concerning the obligation of lessee to pay rent. In the present situation, the High Court has explained the function of Section 32 and 56 and Section 108(B)(e) of the Property Act. The High Court has also set out the factors needed to determine whether the tenants have the right to any relief from rental suspension. Under Section 108(B)(e) of the TPA, temporary non-use of premises due to the COVID-19 lockdown cannot be construed by a tenant to make the rent void and hence cannot escape paying rental under that provision. This High Court ruling shows that it is not a tenant's natural right to request a waiver of the property owner's rent or suspension. While this decision is first of all consistent with the many decisions which may be issued by courts in this connection, it certainly sets the criterion for considering waiver claims or rent suspensions.



BOOK REVIEW

Media Laws in India : A Brief Observation

Meenu M. Nair*

Media is the medium instrument storing or communicating information. In India the media and entertainment industry comprises of television, print, films, radio, music, animation, gaming, advertising etc. Media is called as fourth estate, and it is the fourth limb of a democratic country, legislature, executive and judiciary being the other three. It is the watch dog of public affairs. Freedom of the media is an integral part of the freedom of expression and which is guaranteed by our Indian constitution as a fundamental right. It is obligated to work within the framework of legal principles. Media law can encompass different types of media including broadcast television, internet and print media and it also intersects with other types of law such as corporate law, intellectual property law etc.

The book begins with the types of media industry existing in the country. The traditional media encompasses of television, radio, newspaper and magazines while the modern media include online advertising, online streaming and social media. For understanding the regulations and control of media, the author firstly looked into the history of media laws, and mentioned about ancient laws which existed to control media throughout the world and its impact on Indian law. Media has a very powerful influence on society and it is regulated and controlled by various legislations enacted from time to time. Media freedom is the root of liberty. Freedom of print and television channels make India one of the most liberal countries in the world.

Media law is said to be completed, only when it is connected with other laws which are dealing with different areas. For this purpose, the author made an detailed analysis of laws applicable for information, broadcasting, films, intellectual property laws specifically the copyright act and connected these laws with media, and also mentioned about the Telegraph Act and the Wireless Telegraphy Act applicable to media. And also describes about various authorities created under these legislations for regulating the media industry. The Ministry of Information and Broadcasting is the apex body for formulation and administration of the rules and regulations and laws relating to information. The important case laws relating to the media is specifically depicted in this book by the author.

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Thus it is clear that this book speaks about the freedom of the press and the freedom of mass media and also the control and regulations applicable to them. The right of freedom of expression guaranteed by the constitution must be in accordance with reasonable restrictions. There must be a balance between the freedom of the media and the extent to which the freedom is applied. Media law continues to change and grow. Media lawyers are the part of the development in the legal niche. This book will be obviously helpful to find out the actual need and demand for media law in India.



BOOKREVIEW

Copyright and Collective Authorship: Locating the Authors of Collaborative Work

(Daniela Simone, Cambridge University Press, 2019)

Adv. Sreelekshmi N.*

This book is on collective authorship of copyright in collaborative works. Authorship is the cornerstone of copyright law. Generally, under copyright law, the creator of the original expression in a work is the author of the copyright and the owner of the copyright unless any contrary agreement is provided. This book was written by the author mainly to solve the question of determination of authorship of a collaborative work in this generation of technological advancement as the advances in digital and communication technology have made it easier than ever before for people to work together. This book specifies certain forms of collaborative works such as open source software, citizen science, films, books advertising, 3D printer product designs etc. to make it clear that large-scale collaboration is becoming increasingly widespread and is now a prominent feature of the economic and cultural landscape.

In today's information economy, intellectual property law has a prime importance. It provides the major directives for governing the allocation of property rights in a broad array of intellectual products. In this milieu, the question of how to determine the authorship and first ownership of copyright in works created by a group of people requires vital attention. Copyright law does not provide a coherent or consistent answer to this question and therefore the author states that this is the first book to engage with the problem of determining the authorship of works of collective authorship from a copyright law point of view.

In order to provide a solid foundation for the argument, the book begins with a doctrinal and theoretical analysis of the concepts of authorship and joint authorship in UK copyright law and the provisions of the joint authorship test in the Copyright Designs and Patent Act.

This book primarily focuses upon the interpretation of the joint authorship test in UK copyright law. It offers a comprehensive analysis of concept of authorship and in particular, joint authorship of copyright in a work. This analysis provides that a recalibration of copyright law is necessary; proposing an inclusive and contextual approach to joint authorship. In addressing the

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question of how copyright law ought to determine the authorship of collaborative work, the book primarily follows an inductive approach. Four cases studies, which broadly represent the phenomenon of collective authorship, are also discussed in detail.

The modest aim of the discussions in this book is to take us a step further down the path to define the copyright law's concept of authorship. The author argues that there are appropriate tools to determine the authorship of works of collective authorship.

Adopting the interdisciplinary inductive method, this book suggest show the joint authorship test ought to be applied to yield a suitable mechanism for determining the authorship of collective authorship works. It also suggests five broad themes which elucidate the role of copyright law in regulating collective authorship. This book also underlines the important role which copyright law serves as a touchstone for good authorship standards.

Thus it can be affirmed that this work reveals with clarity the core characteristics of collective authorship and elucidate copyright law's role in regulating highly collaborative work. Large-scale collaboration or collective authorship creates unique challenges as well as opportunities and in this particular book the author is concerned with the challenges that collective authorship pose to copyright law. This book takes a broad, interdisciplinary approach, to point out the issues related to collaborative authorship from different perspectives and in a variety of contexts. The fruits of this analysis will be beneficial to scholars and practitioners in other jurisdictions facing similar issues.



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