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Role of the Theories of Medical Ethics in Evolution of Rights of Patients

Dr. Gigi P.V.*

Abstract

From the date of creation of the Hippocratic Oath ethics has played an important role. By dealing with the beginning, and end process of human life, medicine and medical law are rendered ineluctably ethical in nature. Law is connected to medical law and medical ethics. Morality is something explicitly incorporated into legal doctrine and it is always related to the ethical controversial issues raised by the medical care system. Medical law is inseparable from medical ethics. We will not be able to understand medical law without understanding the ethical tensions in play. The main theories of Medical Ethics are Moral relativism, Moral objectivism, Utilitarianism, Right based theories, virtual ethics and compromise position. Ethics has always been a central concern of medicine. The reason may be that much of medicine is about issues of life and death. The Hippocratic Oath and its successors have expressed a fundamental medical duty to pursue patient's best medical interests, to avoid harming or exploiting them, and to maintain their confidence.

Introduction

Although in the past, it was acceptable for doctors to base their decisions on conscience, intuition, received wisdom, and codes of practice, changes in the nature of the doctor-patient relationship and in the accountability of doctors have demanded a more formal and explicit approach to medical ethics.[1] Doctors are increasingly required to explain and justify their decisions to patients, other health care workers, the media, regulators, and the courts, and to each other. In order to do so they need skills in ethical reasoning combined with an understanding of the law and knowledge of professional guidance. Ethics and law thus have a symbiotic relationship as expressed in this quote by Somerset Maugham[2]: 'conscience is the guardian in the individual of the rules which the community has evolved for its own preservation'.

Ethics has always been a central concern of medicine. The reason may be that much of medicine is about issues of life and death. For example, abortion, infertility treatment, the threat

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1 Medical Ethics Today *The* BMA's Handbook of Ethics and Law 1 (BMJ Books, London,2nd edition, 2004).

2 W. Somerset Maugham, *The Moon and Sixpence* 80 (Grossett & Dunlap Publishers, New York,1st edn., 1919).

to life through negligent treatment, or insufficiency of health resources, the treatment of the terminally ill and so on. The Hippocratic Oath and its successors have expressed a fundamental medical duty to pursue patients' best medical interests, to avoid harming or exploiting them, and to maintain their confidence. Today we may add to that Hippocratic objective the moral qualifications that we should pursue it in a way that respects people's deliberated choices for themselves and that is just or fair to others whether in the context of distribution of scarce resources, respect for people's rights, or respect for morally acceptable laws.[3] Most of these issues are not new, and doctors have been responding to ethical challenges for centuries.

Medical Ethics

Ethics is the branch of philosophy which deals with moral aspects of human behavior.[4] Ethics deals with the theories and principles of values and the basic perceptions and justifications of values, whereas morals include the customs, and normative behavior of people or societies.[5] Thus ethics in the context of medicine concerns itself with the moral principles that underlie the doctor's obligation to the sick and to society.[6] Medical ethics broadly speaking refers to the medical oaths and codes that prescribe a physician's character, motives and duties which are expected to produce a right conduct and thus guide the members of the medical profession in their dealings with one another, their patients and to society. It portrays the ideal physician devoted to his duties *vis a vis* the welfare of the patient, and the advancement of the medical profession and medical knowledge. Though, it enjoins the physician to show compassion on the patient, it also recognizes and understand the limits of a physician's curative powers.[7] This concept is entrenched in the Hippocratic injunction which states 'strive to help, but above all, do no harm'.

Medical ethics is primarily a field of applied ethics; the study of moral values and judgment as they apply to medicine. Medical ethics encompasses its practical application in clinical setting as well as work on its history, philosophy, theology and sociology. According to British Medical Association medical ethics is the application of ethical reasoning to medical decision-making.[8] Also, medical ethics is a system of moral principles that apply values and judgments to the practice of medicine.[9] But, the question is whether someone can provide an ethically correct answer to morally controversial issues? For example, how can one decide whether an embryo has a right to life? Or whether the withdrawal of life support from an incompetent patient is ethically right? Hence, Jonathan Herring[10] notes 'it is not for the medical ethicists to provide the right answer but to assist in clear thinking: to set out arguments which are logically coherent and

3 Gillon R., "Patients in the persistent vegetative state: a response to Dr Andrews", 306 BMJ 1602 (1993), pp.1602-

4 Avraham Steinberg, Medical Ethics: available at :http://www. jewishvirtuallibrary.org/jsource/Judaism/MedicalEthics.pdf. (last viewed on 14th Dec 2018)

5 *Id.*

6 Chew Chin Hin, "Medical Ethics and Doctor-Patient Relationship", 34 SMA News 6 (2002).

7 Johnson AR, Siegler M, Winslade WJ, Clinical Ethics: Cases in Medical Ethics, (Oxford University Press, New York, 2nd edn., 2001).

8 *Supra* note 1 at p. 3.

9 Medical Ethics, available at: http://en.wikipedia.org/wiki/Medical_ethics. (last visited on Dec 14th, 2018).

10 Jonathan Herring, Medical Law and Ethics 18 (Oxford University Press, New York, 3rd edn., 2010).

consistent with the facts, and to point out logical or philosophical flaws in the arguments of others'.

Traditionally, medical ethics has focused primarily on the doctor-patient relationship and on the virtues possessed by a good doctor.[11] It has also been very much concerned with relations between colleagues within the profession.[12] The heart of the doctor-patient relationship is that a physician has privilege to touch and even invade the body of another and as a consequence exercises control to a greater or lesser extent over that person, thereby invading his physical integrity.[13] It is good if the likely effect is the cure or amelioration of the patient's condition, and if it is done with the real consent and co-operation of the patient. However, in so far as it can be ascertained, it must be done in the patient's best medical interests. If there is no real consent, or if the treatment is unsuitable or negligently carried out, then it could be regarded as a violation of the patient's physical integrity. Until the middle of the twentieth century, paternalism was the norm and medical ethics was less concerned with respect for patients' autonomy and with justice. The clinical interests of individual patients were the doctor's overriding ethical concern. However, more recently the relationship has changed. As Lord Steyn in *Chester* v *Afshar*[14] declared: 'in medical law paternalism no longer rules'.

Hence, bioethics is one branch of practical or applied ethics, which is one branch of ethics, which in turn is one branch of philosophy.

Bioethics emerged in the1960s out of various public concerns. Three factors contributed to this. Firstly, the doctor-patient relationship changed from the paternalistic model to one in which patient autonomy in decision-making is recognized. Secondly, with the introduction of new medical technologies such as assisted reproduction, gene therapy, and life support, doctors were faced with new choices and dilemmas. Finally, the commercialization of medicine and the introduction of managed care and health insurance raised questions about whether the patient's best interest continues to guide doctors in their practice. The origin of modern international bioethics however, has been traced to the brutal abuse of human lives in the Holocaust.[15]

Theories on Medical Ethics

Teleological Theory

Teleology comes from the Greek word *telos* (goal) and *logos* (theory). Consequentialism is another name given to this class of theories. Under this theory, every human action has an outcome, and righteousness of a course of action is to be judged by its consequences.[16] A

11 Helga Kuhse, Peter Singer, "What is Bioethics? A Historical Introduction" in Helga Kuhse and Peter Singer (eds), A Companion to Bioethics 10. (Blackwell: Oxford, 2nd edn., 1998).

12 *Id.*

13 Kennedy I, Treat me Right: Essays in Medical Law and Ethics 387 (Clarendon Press, Oxford 1991).

14 [2004] UKHL 41, para 16.

15 Aurora Plomer, The Law and Ethics of Medical Research International Bioethics and Human Rights 1 (Cavendish Publishing, London, 2nd edn., 2005)

16 Marc Stauch, Kay Wheat, John Tingle, Sourcebook on Medical Law 7 (Cavendish Publishing, London,2nd edn., 2002)

consequentialist philosophy holds that the rightness or wrongness of an action is determined solely by reference to the 'goodness' or 'badness' of the consequences of that action.[17] For example, a consequentialist may weigh up the benefits of telling truth with disadvantages of not telling the truth.[18] For example, to a patient, a doctor may inform the true state of his health, including the consequences of side-effects of medicines on his body in future, assuming that by not disclosing the true facts he may lose the patient's trust and confidence. Such a disclosure may even frighten patients deterring him from undergoing treatment. In choosing between these two alternatives a consequentialist has to choose one which has the best overall consequences.[19] Hence, Consequentialism is based on deciding which result will produce the most 'good'. The problem with consequentialist theory is in deciding what is good?

Utilitarianism is considered as a class of consequentialist theory of whom Jeremy Bentham was one of the earliest exponents.[20] To Bentham, man was at the mercy of the 'pleasures' and it was therefore preferable to be 'a contented pig' than 'unhappy human'.[21] John Stuart Mill, by contrast, argued that cultural, intellectual, and spiritual pleasures are of greater value than the physical plea-sures in the eyes of a competent judge.[22] Mill viewed the maximization of some form of eudemonic happiness as the source of the good.[23] As Marc Stauch et al[24] argued 'though, John Stuart Mill referred to the maximizing of pleasure and described utilitarianism as the 'happiness' theory, he was aware that this might be interpreted as pandering to selfish and perhaps, base, tastes'. Mill[25] therefore, distinguished between different kinds of pleasure:

> *utilitarian writers in general have placed the superiority of mental over bodily pleasures chiefly in the greater permanency, safety, uncostliness, etc, of the former… that is, in their circumstantial advantages rather than in their intrinsic nature. It is quite compatible with the principle of utility to recognize the fact that some kinds of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone.*

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17 Michael Robertson, Garry Walter, "A Critical Reflection on Utilitarianism as the Basis for Psychiatric Ethics", 2 JEMH 1 (2007).

18 *Id.*

19 Jonathan Herring, Medical Law and Ethics 13 (Oxford University Press, New York, 3rd edn., 2010).

20 Emily Jackson, Medical Law, Text, Cases and M*aterials*, 10 (Oxford University Press, New York, 2nd edn., 2010), Utilitarianism emerged as a secular alternative to Christian ethics in the late 18th and early 19th centuries. J S Mill is identified with this theory although Jeremy Bentham was one of the earliest exponents of utilitarian theory.

21 Michael Robertson, Garry Walter, *supra* note 17.

22 Mill, J, Utilitarianism, Liberty, Representative Government (JM Dent and Sons, London 1968).

23 Michael Robertson, Garry Walter, *supra* note 17.

24 Marc Stauch, Kay Wheat, John Tingle, Sourcebook on Medical Law 8 (Cavendish Publishing Limited, London, 3rd edn., 2002),

25 Mill JS, Utilitarianism 15 (Routledge London 1863).

This theory in general states that rightness of a decision is judged by deciding whether it produces, more pleasure than pain.[26] The greatest good for the greatest number is the primary ethical principle of this theory.[27] This theory stresses upon human welfare, as wellbeing of each human being is what matters to the society at large.[28] Whenever there is a conflict between an individual decision and society at large, or duties of professionals, one can find an easy answer by relying on the utilitarian principle. In healthcare, utilitarian thinking would stipulate that whenever there is a choice between different but equally efficacious methods of treatment, patients' benefits should be maximized and the costs and risks minimized.[29] Any other approach would be regarded as an unethical practice.

In utilitarianism all human actions are to be morally assessed in terms of their production of maximal non-moral value.[30] But how are we to determine what value could and should be produced in any given circumstance? Utilitarian's agree that ultimately we ought to look to the production of what is *intrinsically* valuable rather than *extrinsically* valuable.[31] The intrinsic value of something is said to be the value that the thing has 'in itself', or 'in its own right'.[32] It is a value in life that we wish to possess and enjoy just for its own sake and not for something else which it produces. If one is asked what is good about being healthy and he says 'being healthy is just a good way to be', then he is indicating that he takes health to be non-derivatively good in a way that is intrinsically valuable. Apart from health, examples of intrinsic goods include: life, consciousness and activity, pleasures and satisfaction, happiness, beatitude, contentment, understanding, wisdom, beauty, love, friendship, freedom, peace, esteem, etc.[33] Intrinsic value is crucial to a variety of moral judgments. In consequentialism, whether an action is morally right or wrong has to do with whether its consequences are intrinsically better than those of any other action one can perform under the circumstances. Since what one is morally responsible for doing is some function of the rightness or wrongness of what one does, then intrinsic value is also relevant to judgments about responsibility. Intrinsic value is also pertinent to judgments about moral justice insofar as it is good that justice is done and bad that justice is denied, in ways that are intimately tied to intrinsic value.[34] Judgments about moral virtue and vice also turn on questions of intrinsic value, inasmuch as virtues are good, and vices bad, again in ways that appear closely connected to such value. For example, undergoing or performing an abortion may not be considered by anyone to be intrinsically good, but many people would occasionally consider it extrinsically valuable as a means to another end, such as the restoration of an ill woman to a state of health. From the utilitarian point of view, this is not what is desired. What we really ought to seek are experiences

26 David C Thomasma (ed.), Theories of Medical Ethics: The Philosophical Structure 28 (TMM Publications, Borden Institute, Washington, 2004).

27 *Id*.

28 Shaun D Pattinson, Medical Law and Ethics 32 (Sweet& Maxwell Publication, London, 5th edn., 2006)

29 Peter Mack,"Utilitarian Ethics in Healthcare", 12 INT J COMPUT COMMUN, 68 *(*2004).

30 *Id*.

31 World Medical Association (WMA) available at :http://www wma.net/b3htm (last visited on September 12, 2018).

32 *Id*.

33 *Id*.

34 *Id*.

and conditions in life that are intrinsically good in themselves without reference to their further consequences or extrinsic value.

In making ethical judgments utilitarians may ask which act will most increase the sum of human happiness. A utilitarian is least concerned of whether an act is right or wrong morally.[35] For example, a utilitarian will allow a patient to die peacefully rather than continuing with a painful life. In *Re C*[36] the patient sought a declaration from the court that his foot would not be amputated without his consent, arguing forcefully that he would rather die with two feet than live with one. The court found that, although the prisoner was suffering from schizophrenia, there was nothing to suggest that he did not understand the nature, purpose and effects of treatment; he had understood, and, with full knowledge that death might result from refusing amputation, had clearly made his choice. The court upheld the prisoner's right to refuse treatment and granted an injunction. A utilitarian is interested in the consequences of an action, rather than whether it is intrinsically right or wrong.

Faced with the objection that utilitarianism rides roughshod over widely accepted moral norms and requires endless utility evaluation, another version of utilitarianism known as 'rule utilitarianism' has been developed.[37] It provides a partial solution to some of the defects of utilitarian moral reasoning. A 'rule utilitarian' is least bothered about maximizing the welfare, but rather will focus on which action will lead to best consequences.[38] In other words, rule consequentialism will ask 'which general rules will promote the best consequences in the long term, assuming that everyone accepts and complies with them?[39] For example, it is said that doctors shall keep confidential information given to them by patients. Even though there may be individual cases where it would produce a better outcome to make that information public, the rule of medical confidentiality produces generally good outcomes, in enabling people to be frank with their medical advisers. Therefore, a strict utilitarian would approach the matter case-by-case as to whether the matter may be revealed or not. But, a rule utilitarian will impose a duty on doctors to respect their patients' confidentiality, since this rule will tend to maximize welfare. A utilitarian is interested in the aggregate of wellbeing, not any particular individual's welfare. Accordingly, Utilitarianism is a collection of moral theories holding that one is morally required to seek the best possible balance of utility or disutility.

More recently, preference utilitarianism has come to the fore.[40] Preference utilitarianism requires maximizing the subjective preferences or choices of persons.[41] This form of utilitarianism

35 *Supra* note 31.

36 *Re C (Adult: Refusal of medical treatment)* [1994] 1 All ER 819.

37 Jonathan Herring, *supra* note 19

38 Emily Jackson, Medical Law, Text, Cases and Materials 11 (Oxford University Press, New York, 2nd edn., 2010)

39 Glannon, W, Biomedical Ethics, 10(Oxford University Press, New York, 1st edn., 2005).

40 Shaun D Pattinson, Medical Law and Ethics, 6 (Sweet & Maxwell, UK, 3rd edn., 2011). It is associated with R.M.Hare, Peter Singer and Richard Brandt.

41 *Id*.

is most commonly associated with Australian philosopher, Peter Singer. His take on the greatest happiness principle focuses on the impact an action will have on the preferences of those directly affected.[42] Singer recognizes that different people have different preferences and it is best to act in the best of those concerned.[43] In achieving the greatest happiness, Singer argues that we should act in a way that satisfies people's preferences in other words, what people prefer or would most like to happen.[44] As Singer[45] notes:

> *Suppose I then begin to think ethically, to the extent of recognizing that my own interests cannot count for more, simply because they are my own, than the interests of others. In place of my own interests, I now have to take account of the interests of all those affected by my decision. This requires me to weigh up all these interests and adopt the course of action most likely to maximize the interests of those affected. Thus I must choose the course of action which has the best consequences, on balance, for all affected.*

However, preference utilitarianism fails to deal with the problem of people's unacceptable preferences. For example, Singer's preference utilitarianism is important in considering the practical ethical issues which arise with Voluntary Euthanasia. If doing the right thing is acting in accordance with the individual's preference then keeping someone alive when they would prefer to die is clearly wrong. Preference Utilitarianism, like other forms of utilitarianism is still consequentialist and relative. It looks to achieve an outcome that satisfies the preferences of those directly affected and therefore the right action will depend on the circumstances and the preferences of those involved.

There have been a number of criticisms of utili-tarianism as a moral philosophy. According to Michael Robertson[46], the negative features of utilitarianism based moral choices are that they involve assessments of preferences which may be biased or flawed; may require abandonment of emotional or filial bonds; potentially involve alienation from moral agency; may involve the active disadvantage or harm of individuals; and, are based on a political and moral philosophy that is arguably anachronistic. With respect to medicine and healthcare delivery, utilitarianism is particularly appealing as it often helps in resolving conflicts between individual and public duties of professionals.[47] But, consequentialism appears to place little weight on the right of autonomy, and would permit a doctor to carry out treatment on a patient without their consent if the overall consequences of the treatment were beneficial.[48]

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42 Singer P, Practical Ethics, 12 (Cambridge University Press, Cambridge, 1st edn., 1979)

43 *Id.*

44 *Id.*

45 *Id.* See also Beauchamp,Tom L, et. al., Principles of Biomedical Ethics 268 (Oxford University Press, Oxford,2001)

46 Michael Robertson, Garry Walter, *supra* note 17.

47 *Id.* p.28

48 On the other hand, deontology, by regarding as irrelevant the consequences of actions, ignores the importance medical practice inevitably places on the consequences of alternative forms of medical treatment.

Deontological Theory

The term deontology comes from the Greek word *deon* which means duty.[49] Deontological theory underlines the importance of one's duties and obligations. The exponent of this theory is Immanuel Kant.[50] The theory holds that certain kinds of actions are good, not because of the consequences they produce, but because they are good and right in themselves.[51] Deontological theories of medical ethics encompass both religious and non-religious theories. As Gillon[52] notes:

> "*The great religions typically justify their deontological theories on one or both of two grounds. The first is that God has commanded the people He has created to obey his moral laws and it is their moral duty to obey the creator. The second is that the laws of nature include moral laws that bind everyone, including God.*"

Currently, neither of the religious perspectives commands a great deal of support from the medical profession. The most important non-religious, deontological theory was developed by Immanuel Kant. Kant believed that a theory of morality had to be constructed without reference to God's existence. This was a necessary outcome of the rational nature of human beings. Kant then went on and used ethical arguments to establish that rational beings recognized themselves to be bound by the 'supreme moral law'. Referring to Kant's theory, Gillon[53] stated:

> "*This supreme moral law stemmed from the fact that rational agents (or persons) intrinsically possessed an absolute moral value ..., which rendered them members of what he called the kingdom of 'ends in themselves'. Not only did all rational agents recognize themselves as ends in themselves but, in so far as they were rational, they also recognized all other rational agents to be ends in themselves, who should be respected as such.*"

With regard to a person knowing what his or her duty is in a particular situation, Kant says that as human beings are rational creatures they ought to behave in a rational way, i.e. every person ought to behave as if his or her conduct were to become a universal law.[54] This means that every action must be judged in the light of how it would appear if it were to be a universal code of behavior.[55] According to this theory one must always tell truth not because that makes people happy or gives them pleasure, but because we have a duty to speak truth. Telling lies, even if expedient, could not be accepted as moral under any circumstances because if lying was to be regarded as a universal law to which people ought to conform, morality would be impossible.

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49 Herring, Medical Law and Ethics 14 (Oxford University Press, New York, 3rd edn., 2010).

50 Haris John, The value of life introduction to Medical Ethics 343 (Routledge Publication, London,4th edn., 1995)

51 *Id.*

52 Raanan Gillon, Philosophical Medical Ethics 18 (John Wiley & Sons, Chichester 2003).

53 *Id.*

54 Friedrich Heubel, Nikola Biller- Andorno, "The Contribution of Kantian Moral theory to Contemporary Medical Ethics: A Critical Analysis", 8 Med Health Care Philos. 7 (2005).

55 *Id.*

Take for example, in *Hatcher* v *Black*[56]; a BBC broadcaster went to a physician suffering from a toxic thyroid gland for which an operation was recommended. She asked if it posed any risks to her voice and was reassured. However, as a result of damage to a nerve during the operation she could no longer speak properly. The court went on to hold that the doctor had been reasonable not to warn the patient, given that 'he had done what a wise and good doctor so placed would do'. Lord Denning stated:

> *What should the doctor tell his patient? Mr Tuckwell admitted that on the evening before the operation he told the plaintiff that there was no risk to her voice, when he knew that there was some slight risk, but that he did it for her own good because it was of vital importance that she should not worry. In short he told a lie, but he did it because he thought in the circumstances, it was justifiable.*

This attitude is derived from the teachings of Hippocrates[57], nearly 2500 years ago which stated:

> ". . . *perform your medical duties calmly and adroitly, concealing most things from the patient while you are attending to him. Give necessary orders with cheerfulness and sincerity turning his attention away from what is being done to him; sometimes reprove sharply and sometimes comfort with solicitude and attention revealing nothing of the patient's future or present condition for many patients through this course have taken a turn for the worse.*"

But, a deontologist would reject the claim of therapeutic privilege or the euphemism for lying as laid down in *Hatcher* v *Black*[58]. Accordingly, for a deontologist the moral action of a doctor in responding to a patient's questioning would be that stated by Lord Bridge in *Sidaway* v *Bethlem Royal Hospital Governors*[59] where his Lordship said that when questioned by an autonomous patient: '… the doctor's duty must … be to answer both truthfully and as fully as the questioner requires'.

According to Kant no one should be treated merely as a means to an end.[60] Hence, deontologists will never justify the atrocities carried out by Nazi doctors on non-consenting people in the name of scientific research and advancement. Where a person is treated as an end in himself, there is a requirement to respect that person's values.[61] The key to deontological

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56 (1954) Times, 2 July QBD, cited in Bea Teuten, David Taylor, "Don't worry my good man - you won't understand our medical talk": consent to treatment today, 85 Br J Ophthalmol 894 (2013).

57 See generally, The Oath of Hippocrates, available at: http://classics.mit.edu/Hippocrates/hippooath.html (last visited on June 16, 2017)

58 (1954) Times,2 July QBD. cited in Bea Teuten, David Taylor, "Don't worry my good man - you won't understand our medical talk": consent to treatment today, 85 *Br J* Ophthalmol 894 (2013).

59 [1985] 1 All ER 643, 661.

60 Kant I, Robert Paul Wolff, Foundations of the Metaphysics of Morals 47 (Indianapolis, Bobbs-Merrill, 1969).

61 For example, involving people in a risky medical experiment without their knowledge deprives them of their ability to make a rational choice about participation and uses them as a means to some other end. The fact that the knowledge gained from the research might benefit thousands of other people is not relevant.

theory is the principle that one cannot justify breach of a deontological principle just by referring to the consequences.[62] Therefore, according to deontologists it is not permissible to kill an innocent person, even if by referring to the consequences. Hence, the centre piece of this theory is the notion of 'personhood'.[63] According to Kant, no decision can be imposed on others against their will, or without their consent. Kant wanted to preserve ethics in an age of rising science by establishing more objective standards for moral conduct, independent of consequences.[64] In effect he wanted ethics to be more scientific and rational.[65] Deontologists often place much weight on duties. They emphasize that the duties parents owe to their children, or physicians to their patients, are overlooked in utilitarian approaches.[66] While making a decision about children, one may take into account the duties one owes to them and not just the consequences for all children.[67] If three people are in danger in a fire, parents are expected to rescue their own child first; even if that means the other two are likely to perish.[68] As Beauchamp and Walters[69] commented on deontological theories as follows:

> *"Deontologists argue that moral standards exist independently of utilitarian ends and that the moral life should not be conceived in terms of means and ends…An act or rule is right, in the view of a deontologist, in so far as it satisfies the demands of some overriding principles of obligation.*
>
> *Deontologists urge us to consider that actions are morally wrong not because of their consequences but because the action type-the class of which the actions are instances-involves a moral violation. Because of the wide diversity in these theories it is hard to find the unity, but the following two conditions are close to the heart of deontological theories. First, the justification of principles and actions is not entirely by appeal to the consequences of adopting the principles or performing the actions. Second, some principles must be followed or actions performed irrespective of the consequences. Thus, there are not only justificatory grounds of obligation that are independent of the production of good consequences, but these grounds are at least sometimes sufficient to defeat the consequences no matter what the consequences are."*

The difficulties facing deontologists particularly relate to how we define the most important obligation. Where two moral people profoundly disagree about what rights or obligations require, it is difficult to resolve the debate. Some of the weaknesses of a strict Kantian perspective are the absence of any guidelines for dealing with the inevitable conflicts between duties and the lack of

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62 Jonathan herring, Medical law and ethics, 15(Oxford University Press, 3rd edn., 2010).
63 *Id*.
64 Jonathan herring, Medical law and ethics, 14(Oxford University Press, 3rd edn., 2010).
65 *Id*.
66 Beauchamp, TL, Walters, L,Contemporary Issues in Bioethics, 19(Wadsworth Publishing, California, 1982).
67 *Id*.
68 Medical Ethics available at:A http:/www.biomedicalcentral.com/bm (last visited on October 10, 2018).
69 Beauchamp, TL, Walters,L, Contemporary Issues in Bioethics,19 (Wadsworth Publishing, California 1982).

recognition that emotion and intuition can play a constructive role in ethical decisions.[70] For example, an absolute duty to tell a patient the truth might cause a patient harm in certain circumstances; therefore the duty to always tell the truth conflicts with the duty to avoid needless harm or injury. Kant's theory is a monist theory i.e. it relies or purports to rely on a single moral principle.[71] This gives rise to a major criticism that it does not deal with cases where there is a conflict of duties. So in a situation where truthfully answering a patient's questions would conflict with a doctor's positive duty to prevent harm to that patient (beneficence) an impossible situation arises: the doctor cannot tell the patient the truth and claim that he has done all he can to prevent the patient worrying – which may be necessary for the success of an operation, as in *Hatcher* v *Black*[72] , yet according to the Kantian position he should do both. This logical problem that can arise if a theory is both pluralist and absolutist and if its principles conflict is summed up by Gillon[73] who says:

> *"Suppose, for example, I accept the principles that I should never harm others and that I should never deceive others; if both principles are absolute and I am faced with a situation where somebody would be harmed if I did not deceive him I am logically incapable of acting rightly."*

It has been said that Kant's absolute (i.e. unqualified) assertion that, for example, we should never tell lies is unnecessarily restrictive: that moral rules are to be interpreted as generalizations not as categorical propositions to which there are no exceptions.[74] The obligation to tell the truth, for example, only need be adhered to provided that no other overriding factors are present, or provided that all other conditions are equal.[75] So, if a doctor acting from a sense of duty believes that lying to a patient is, ultimately in the patient's best interests then to tell the truth becomes subordinated to the doctor's duty to act in the patient's best interests (beneficence) and *Hatcher* v *Black*[76]may be regarded as 'good law'.

The Kantian concept of autonomy demands too much of patients. The highly rationalistic, individualistic Kantian account appears to assume that all patients are autonomous.[77] However, very few patients could be regarded as autonomous.[78] Majority of the patients are dependent or

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70 Kantian Ethics, *Ethics at a Glance*, Regis University, available at:http://rhchp.regis.edu/HCE/EthicsAtAGlance/KantianEthics/KantianEthics.pdf (last visited on August 25, 2018).

71 *Id*.

72 (1954) Times,2 July QBD. cited in Bea Teuten, David Taylor, "Don't worry my good man—you won't understand our medical talk": consent to treatment today, 85 *Br J* Ophthalmol 894 (2013).

73 Raanan Gillon, Philosophical Medical Ethics 18 (John Wiley & Sons, Chichester 2003).

74 Bea Teuten, David Taylor, "Don't worry my good man—you won't understand our medical talk": consent to treatment today, 85 *Br J* Ophthalmol 894 (2013), p.897.

75 *Id*.

76 (1954) Times, 2 July QBD. cited in Bea Teuten, David Taylor, "Don't worry my good man—you won't understand our medical talk": consent to treatment today, 85 *Br J* Ophthalmol 894 (2013).

77 Barbara Secker, "The Appearance of Kant's Deontology in Contemporary Kantianism: Concept of Patient Autonomy in Bioethics", 24 J. Med. Philos. 43 - 52 (1999).

78 *Id*.

interdependent, and their decision-making capacity is not always based on reason.[79] However, the deontological theory is seen as an important response to consequentialism. This theory also fits in well with many current concepts of human rights, though Kant placed more emphasis on obligations than on rights.

Virtue Theory

A virtue is 'a trait of character, manifested in habitual action that it is good for a person to have'.[80] According to this approach, if a person has a good character he will behave ethically as a matter of course.[81] Virtue ethics began with the ancient Greek philosophers Socrates, Plato, and Aristotle.[82] It discusses merits of virtue and its importance in living a good human life.[83] According to virtue ethicists, the virtues are those character traits that are necessary for human flourishing: these will be things like honesty, compassion, kindness, justice, and courage.[84] They searched for the elements that made a person good but in so doing they did not look at how a person acted but at what sort of character he had.[85] Virtue theory argues that all human beings have an inborn nature that prompts him to do good but needs proper guidance and training as habits are formed by one's parental and societal training, and also professional or other standards suitable to one's life choices and roles in society.[86] It suggested that a good person who behaves well must develop virtues, which, through habitual use, become part of that person's character. It is difficult to decide exactly what good virtues are. Every social group has a different measure of the balance of virtue in the socially complex mix of personal and community shaping. In one society, eating moderately may be a virtue, for instance, today's society urges everyone to stay in shape, whereas another might stress the pleasures of sampling foods to the point of illness or compulsion. However, certain core virtues are always necessary for any decent society. Physicians need additional virtues, such as humility, compassion, integrity and respect for good science.[87]

Virtue Ethics model takes into account the context and consequences, without reducing ethics to simple matters of promoting pleasure, avoiding pain, or doing one's duty.[88] A virtue ethicist would maintain that people should always try to do the right thing for the right reason.[89]Virtue

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79 Singer Peter, Practical Ethics 111 (Cambridge University Press, Cambridge, 5th edn., 2003)

80 Rachels J., The Elements of Moral Philosophy 178 (McGraw-Hill International, London 1999).

81 Pat Kurtz, Ronald L. Burr, "Ethics and Health", in Karen Saucier Lundy, Sharyn Janes, Community Health Nursing Caring for the Public's Health, 251., (Jones and Bartlett Publishers,2nd edn., 2009).

82 Gardiner P, "A virtue ethics approach to moral dilemmas in medicine", *29* J Med Ethics 297 (2003).

83 David C Thomasma 2004, 'Theories of Medical Ethics: The Philosophical Structure' in Pelegrino, Edmund D, Anthony E. Hartle, Edmund G. Howe , Military Medical Ethics 31 (TMM Publications, Borden Institute, Washington, 2013). Virtues, are defined as 'good operative habits that intensify the potentialities of human nature from its emotions to its intellect and will toward good actions'

84 Emily Jackson, Medical Law, Text, Cases and Materials, p.14(Oxford University Press, New York, 2nd edn., 2010).

85 *Id*.

86 David C Thomasma *Supra* note 83

87 Pence GE, Ethical Options in Medicine 49 - 50 (Medical Economics Company, Oradell, NJ 1980).

88 *Id*.

89 Emily Jackson, Medical Law, Text, Cases and Materials 13 (Oxford University Press, New York 2nd edn., 2010).

ethics rejects the idea that patient autonomy is absolute.[90] For example, if a patient wants to opt for euthanasia to end his life, it is not enough that the patient simply argues that death is good for him instead of undergoing medical treatment. Instead, he may prove that his life lacks the most basic human goods.[91]

Virtue theory combines the strength of both teleological and utilitarian theories. For example, Virtue theorists might argue that euthanasia, although performed out of compassion, is morally wrong because it involves killing, itself an evil act. Alternatively, a virtue theorist might argue that providing uncompensated care for the poor is a good human act, even if done for illicit motives such as personal pride, because the act has a quality of goodness independent of the agent. Its basic principle was articulated by Aquinas as; one should 'do good and avoid evil'.[92]

Because of perceived limitations of both teleological and deontological theories, virtue theory has recently received renewed interest within medical ethics.[93] The carrying out of virtues not only requires public consensus about right and good conduct, it also demands a metaphysical agreement about what counts as the good.[94] This will require a conceptual link with duties, rules, consequences, and moral psychology, in which the virtue of prudence plays a special role.[95]

Principlism

Beauchamp and Childress[96] recognized the difficulties of attaining agreement on the most fundamental roots of ethics, on the nature of the good, on the ultimate sources of morality, on the limits and validity of moral knowledge, or even on which theory should predominate. To bypass these problems, they opted for *prima facie* principles, that is, principles that should always be respected unless some strong countervailing reason exists that would justify overruling them. Accordingly they formulated four basic principles derived from moral philosophy- autonomy, beneficence, non-maleficence and justice as a framework for ethical conduct in solving the modern ethical problems in medicine and the biological sciences. Modern medicine has to deal with the ethics of abortion, euthanasia, treating the young rather than the old when there is not enough medical care to go around, *in vitro* fertilization, manipulating genes to bring about a better human being or to remove the genes that cause diseases, helping people conceive children, withdrawing life support at the end of life, discussing whether food and water given through tubes can also be withdrawn so a person can die, the limits of a person's freedom to make decisions in a community

90 Emily Jackson, *Supra* note 89.

91 Philippa Foot, "Euthanasia", 6 Philos. Public. Aff. 85 - 89 (1977).

92 St. Thomas Aquinas, *Summa Theologica*, Fairweather AM, trans. Philadelphia, Pa: Westminster Press; 1954. Quoted in David C Thomasma 2004, 'Theories of Medical Ethics: The Philosophical Structure' in Pelegrino, Edmund D, Anthony E. Hartle, Edmund G. Howe , Military Medical Ethics 32 (TMM Publications, Borden Institute, Washington, 2004).

93 Rebecca L. Walker,"Virtue ethics and medicine", 17 Medical Ethics 1, (2010), p.6.

94 David C Thomasma, *Supra* note 83.

95 *Id.*

96 See generally, Beauchamp TL, Childress JF, Principles of Biomedical Ethics, (Oxford University Press, New York., 4th edn., 1994).

etc. The four principles formulated by Tom Beauchamp and James Childress provide a simple, accessible, and culturally neutral approach to thinking about these complex ethical issues in health care. They are prima facie based on four moral commitments - respect for autonomy, beneficence, non-maleficence, and justice; plus concern for their scope of application. It offers a common, basic moral analytical framework and a common, basic moral language. Although they do not provide ordered rules, these principles can help doctors and other health care workers to make decisions when reflecting on moral issues that arise at work. The four principles plus the scope of approach claims that whatever one's personal philosophy, politics, religion, moral theory, or life stance, it will not be difficult in committing ourselves to four prima facie moral principles plus a reflective concern about their scope of application. Moreover, these four principles, plus attention to their scope of application, encompass most of the moral issues that arise in health care.[97]

A. Autonomy

Literally autonomy is self-governance or self-determination.[98] In other words it means 'right to act on one's own judgment about matters affecting one's life, without interference by others'.[99] According to Devereux[100] 'understanding autonomy is crucial to understanding the realm of health care decision making'. Underpinning this doctrine is a respect for an individual patient's autonomy. It means that patients must be treated with respect, be properly informed, be listened to, give their consent voluntarily and without coercion, and have their confidentiality fully respected. The legal principle of respect for self-determination is applied to questions concerning the physician's responsibility because patients and physicians are unequal in their possession of information and their power to control the circumstances under which they meet. Legal rights are a way of limiting the physician's power and of protecting the patient from unwarranted intrusions such as surgery without consent, public disclosure of information contained in hospital records etc.[101] The choices one has to make within the healthcare context often touches upon the fundamentals of life: refusal of life saving treatment, reproduction, a life free of pain, end of life decisions etc. Therefore, our identity as a person is closely linked to the integrity of our bodies. As Dworkin[102] notes, 'one's body is irreplaceable and inescapable… In addition because my body is me, failure to respect my wishes concerning my body is a particularly insulting denial of autonomy'. The importance of bodily inviolability is entrenched in by Justice Cardozo in *Schloendorff* v *New York Hospital*[103] in 1914 with his statement:

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97 Gillon, R, "Medical Ethics : four principles plus attention to scope", 309 BMJ 184 (1994).

98 Though, originally applied by the ancient Greeks to city-states, philosophers extended the concept to people from the eighteenth century onwards. Individualism has, of course, origins in the humanism of the Renaissance, the rationality of the Enlightenment and the struggle for personal and political freedom out of which our Western democracies sprang. See generally, G M Stirrat, R Gill, "Autonomy in medical ethics after O'Neill", 31 *J* Med Ethics 127 - 129 (2005).

99 Bewley S, Ward RH (eds.), Ethics in Obstetrics & Gynaecology 3 (RCOG Press, London 1994).

100 Devereux JA, Australian Medical Law, 3 (Cavendish Publishing, London, 3rd edn., 2007) .

101 Beauchamp, TL & McCullough, Medical Ethics 42 (Prentice Hall, Englewood Cliffs 1984).

102 Dworkin G, The Theory and Practice of Autonomy ,113(Cambridge University Press, Cambridge, 2nd edn., 1988).

103 (1914) 105 NE 92.

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault.

In common law, judicial statements makes it very clear that every competent adult patient has the *right to refuse* medical treatment, even if his or her reasons are bizarre, irrational, or non-existent, and even if refusal of treatment will result in death.[104]

There are growing indications that a number of bioethicists are becoming less comfortable with this individualism.[105] In healthcare, medical ethics should always be set in the context of relationships and community. If patient's individualistic autonomy is to be the sole criterion for decision making, the patient–doctor relationship is reduced to that of client and technician. Moreover, there has been a change in the interpretation of the term 'autonomy'. Mill laid the foundation for this theory when he proposed the principle of autonomy, on the one hand, and the principle of utility, on the other. According to Mill[106] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. One cannot be compelled to do or forbear some act simply because in the opinion of others it will be better for him to do so, make him happier and would be wise, or even right. O'Neill[107] believes that autonomy has now become too individualistic. She reminds us that John Stuart Mill hardly ever uses the word, 'autonomy' and when he does so; it refers to States rather than individuals. Mill did not refer to the idea of autonomy directly. He gave emphasis on liberty and according to him each person must be allowed to make free choices provided it does not cause harm to others.[108] Therefore, Mill's version of 'autonomy', 'sees individuals not merely as choosing to implement whatever desires they happen to have at a given moment, but as taking charge of those desires, as reflecting on and selecting among them in distinctive ways'.[109] Similarly 'Kantian autonomy is manifested in a life in which duties are met, in which there is a respect for others and their rights'.[110] Thus in Kant's account of moral autonomy 'there can be no possibility or freedom for any one individual if that person acts without reference to all other moral agents'.[111] According to Jennings[112], Kant and others established that 'morality requires a person to assume responsibility for his or her choices, actions and decisions and to act on the basis of informed reason and autonomously held principled commitments. Others in turn must respect the moral agency and reasonable commitments of the person in this sense'. For example, the most ardent proponent of the principle of autonomy would accept that it would be wrong to deny someone medical treatment

104 See, Airedale NHS Trust v Bland [1993] AC 789; *Re T (Adult: Refusal of Treatment)* [1993] Fam 95.

105 Tauber AI, "Sick autonomy", 46 Perspect Biol Med 484 (2003), p.487.

106 Mill, JS, *On Liberty*, 68 (Penguin, Harmondsworth, 1982).

107 O'Neill O., Autonomy and Trust in Bioethics, 5–83. (Cambridge University Press, Cambridge,2nd edn., 2002).

108 Mill JS, *Supra* note 106 at p 13.

109 O'Neill O, Autonomy and Trust in Bioethics, , 5–83(Cambridge University Press, Cambridge,2nd edn., 2002).

110 *Id.*

111 Campbell AV, Health as Liberation 14 (The Pilgrim Press, Cleveland 1995).

112 Jennings B, "Good-bye to all that—autonomy", 13 *J Clin Ethics* 67 (2002), p.69.

because they were incapable of consenting. Similarly in the case of children and adults lacking capacity, the treatment given without their consent cannot be termed as contrary to the principle of autonomy. The doctor's justify such treatment by using the term beneficence.

B. Beneficence

The principle of beneficence refers to a moral obligation to act for the benefit of others.[113] This principle dates from the time of the Hippocratic Oath in which the physicians swore, "I will follow that system of regimen which according to my ability and judgement I consider for the benefit of my patients…." According to this principle, the needs and wishes of the patient are the physicians' pre-eminent concern. The physician is meant to relieve suffering, produce beneficial outcomes wherever possible, and enhance patient's quality of life. The source of this additional moral obligation of beneficence taken on by doctors is presumably a certain feeling of benevolence, good will, or sympathy towards the sick.

This principle is apparent in circumstances where the patient lacks competence to make his or her own treatment decisions.[114] In *NHS Trust* v *A (A Child)*[115], the NHS Trust sought a declaration for carrying out a bone marrow transplant on a seven month old child suffering from haemophagocytic lymphohistiocytosis. As there was a chance of child dying during transplant, the parents objected to the treatment. Holman J accepted that the procedure has associated risks but given that a transplant may lead the child to live a full and happy life, the wishes of the parents should be over ridden as judgment must be based on medical evidence and reason.

The principle of beneficence justifies paternalistic decision-making.[116] As mentioned when we discussed the principle of autonomy, the patient is the one who has the right to decide what treatment doctors should provide and the medical professional should respect that choice. So it may be noted that the role of the doctor is to recommend the best treatment, but it can only be given where the patient consents. Non-consensual treatment may amount to degrading treatment but will not do so if it is therapeutically necessary. This principle was established in the 1992 case of *Herczegfalvy* v *Austria*[117], which involved the forced-feeding and restraint of a mental patient. The European Court of Human Rights held that this treatment did not amount to degrading treatment in violation of Article 3 and declared the general rule that 'a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading'.[118] The court emphasized, however, that it must 'satisfy itself that the medical necessity has been convincingly shown to exist'.[119] This reflects the straightforward idea that in deciding what treatment to give a patient, the medical professional should judge as to which will benefit the patient most.

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113 Beauchamp TL, Childress JF, Principles of Biomedical Ethics 166 (Oxford University Press, Oxford, 5th edn., 2001),

114 Elizabeth Wicks, Human Rights and Healthcare 91 (Hart Publishing, Oregon, 5th edn., 2007).

115 [2007] EWHCA 1696 (Fam).

116 Elizabeth Wicks, Human Rights and Healthcare 92 (Hart Publishing, Oregon, 5th edn., 2007).

117 (1992) Series A, No 244.

118 *Id.* para 82.

119 *Id*.

C. Non-Maleficence

The principle of non-maleficence refers to the duty to refrain from causing harm. It underlies the medical maxim *Primum non nocere*: 'First, do no harm'.[120] The principle supports a number of more specific moral rules like do not kill, do not cause pain or suffering, do not incapacitate, do not cause offense and do not deprive others of the goods of life.[121] It demands more from the healthcare professional: not merely refraining from causing harm but rather taking positive steps to promote the welfare of the patient.[122] Like Beneficence this principle too can be traced from the time of Hippocratic Oath which states:

> *I will follow that system of regimen, which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel.*

Physicians' obligation not to harm is reflected in various codes and declarations of medical ethics. In the declaration of Geneva, and as amended in Sydney in 1968, physicians were expected and indeed mandated to:

> *... maintain the utmost respect for human life from the time of conception; even under threat, ... not [to] use medical knowledge contrary to the laws of humanity.*
>
> *While the International Code of Medical Ethics states that:*
>
> *A doctor must always bear in mind the obligation of preserving life.*

The duty and obligations of physicians to their patients remain unequivocally that of beneficence and non-maleficene. Harm is justifiable if there is a just, lawful excuse or reason for the act or omission. In real life situations physicians do inflict harm on patients but generally for the purpose of achieving some kind of good. According to Beauchamp and Childress[123], a harm we inflictas a surgical wound may be negligible or trivial yet necessary to prevent a major harm such as death. The importance of this principle is that it urges against harming one patient to help another.[124] In *McFall* v *Shimp*[125], McFall needed a bone marrow transplant to improve his chances of survival from a serious medical condition. McFall's cousin, Shimp, was found to be compatible for donation. Shimp, having initially indicated that he would be willing to donate bone marrow, changed his mind and decided against it. McFall sought an order that Shimp had to donate. The court refused and held that it would be wrong to harm Shimp by taking the bone marrow without his consent, even though it would be done for a good motive. The decision could

120 Beauchamp TL, Childress JF, Principles of Biomedical Ethics 113 (Oxford University Press, Oxford, 5th edn.,2001).
121 *Id.* p.117.
122 Beauchamp TL., Childress JF, *Supra* note 120 at p. 165.
123 *Id.* p.122. (Oxford: Oxford University Press, 5th edn., 1989)
124 Jonathan Herring, Medical Law and Ethics 26 (Oxford University Press, New York,3rd edition, 2010).
125 10 Pa D & C 3d 90 (1978).

be seen as support for the principle of non-malfeasance. Where the patient consents to the treatment and the doctor provides it, the non-malfeasance principle may not be infringed.

In *Re Y*[126] a 36 year old woman was suffering from non-Hodgkins lymphoma. Her condition was rapidly deteriorating and a bone marrow transplant represented the best hope of saving her life. Her sister, aged 25, was regarded as likely to be the best match for her, but she was mentally and physically disabled and incapable of giving consent. The older sister sought a declaration from the court to permit testing her younger sister and, if the results showed a match, to permit taking bone marrow from her for a transplant. The declaration for testing was granted. The court held that the donation of bone marrow would be a benefit to Y because if the sister died, that would affect Y's mother's state of mind, and she played a major role in the care of Y. It shows how creative reasoning can find a benefit in treatment which might appear to cause only harm. However, the principle of non-maleficence requires that the physician be alert to circumstances in which treatment stops being beneficent and starts constituting malfeasance. Moreover, a strict application of this principle is not practical as medicine often involves doing harm.

D. Justice

Justice is often regarded as being synonymous with fairness and can be summarized as the moral obligation to act on the basis of fair settlement between competing claims. According to Aristotle, justice meant equal shares for all.[127] The formal principle of justice or equality attributed to Aristotle is, that equals should be treated equally and unequal's unequally in proportion to the relevant inequalities.[128] The term justice, therefore, means 'freedom from unfair discrimination'. If autonomy dictates that the patient's interests is always foremost and what is best for the patient should be first in the physician's mind, the principle of justice dictates that the physician must have concern for the fair distribution of the system's resources and for ensuring that they are not distributed in a way that depends on inappropriate discrimination.[129]

Some argue that medical ethics should have no concern with justice in the sense of fair adjudication between competing claims. As role of physician is to follow the Hippocratic principle which is doing the best they can for each patient. The idea that doctors can somehow legitimately evade any need to concern themselves with justice is hardly tenable given that in the course of their practice they are often confronted with conflicting claims on their resources, even from their own patients. For example, the doctor who stays in theatre to finish a long and difficult surgery and consequently misses an outpatient clinic is probably relying implicitly or explicitly on some sort of theory of justice whereby he can fairly decide to override his obligation to his outpatients in favour of his obligation to the patient on the table.[130] Similarly, The Declaration of Tokyo's absolute prohibition of medical involvement in torture affirms a concept of justice based on rights

126 *Re Y (*Mental patient: bone marrow donation*)* 35 BMLR 111.

127 Gillon, Raanan, "Justice and medical ethics" 291 British Medical Journal 201 (1985).

128 *Id.*

129 Sandy Sanbar, et. al. (eds.), Legal Medicine, 227 (Mosby, Elsevier, Philadelphia, 6th edn, 2001).

130 Gillon, Raanan, *Supra* note 127.

that forbids certain things to be done to other people even if doing them may be of great social benefit. So the idea that justice is a moral issue that doctors can properly ignore is clearly mistaken.

According to Gillon, in health care ethics, justice can be subdivided into three categories: fair distribution of scarce resources, respect for people's rights and respect for morally acceptable laws.[131] This means that patients are entitled to be treated fairly and equally by health professionals. As resources are limited the physicians concern should be for fair distribution of the system's resources and for ensuring that they are not distributed in a way that depends on inappropriate discrimination. In the context of distributing scarce medical resources they take the view that the proper role of doctors is the Hippocratic one of doing the best they can for each patient.[132]

All professional practitioners understand that their practice must be as free as possible from inappropriate discrimination and bias, and certainly all are aware of the inappropriateness of discrimination based on race, religion, national origin, gender, sexual orientation, or political opinion.[133] However, there is considerable literature to suggest that the practice of medicine, perhaps without intention, has contained a good deal of bias on some, if not all those grounds, in particular on the basis of age, race, and gender.[134] In the name of the justice principle, bioethics requires each practitioner to search his or her practice and all practice protocols in which he or she is involved for the subtle influence of prejudice and discrimination and to eliminate it whenever and wherever possible.[135]

The four principles framed by Beauchamp and Childress has the advantage of compatibility with deontological and consequentialist theories, and even with some aspects of virtue theory.[136] These principles have been applied widely to the resolution of ethical dilemmas by medical ethicists, and especially by health professionals. These principles are implemented in the International Code of Medical Ethics and Indian National Medical Commission Act.

Medical Ethics is considered as one-sided; as it dwells on the ethical obligations of doctors to the exclusion of those of patients. These are just guidelines that are imposed upon the professionals to ensure that their peers and also patients follow appropriate standards of moral decency. Medical ethics, through the ages, has not left contemporary society with a model that can be seen to be effective.[137] Even now the Hippocratic Oath is still considered as an inspiration for the doctors and the benevolent paternalism mentioned in it is accepted and respected by the physicians. But, there are many instances which prove the fact that in the modern day of consumerism, it is difficult to believe and accept the fact that every doctor will treat his patient with benevolence and with good conscience. After all, the courts would be unlikely to make an order which requires

131 Gillon, Raanan, Philosophical Medical Ethics 86 (John Wiley & Sons, Chichester 2003).
132 *Id.* p 201.
133 *Supra* note 129 at p 228.
134 *Id.*
135 *Id.*
136 David C Thomasma, *Supra* note 83 at p 36.
137 Jose Miola, Medical Ethics and Medical Law A Symbiotic Relationship 31 (Hart Publishing, Oregon,5th edn., 2007).

a health care professional to act in a way which is unethical. However, no one can deny the fact that the basis of ethical codes include: respect for autonomy, beneficence, non maleficence and justice, among others.[138]

Medicine is an ethical profession and a doctor is deeply confronted with complex and sensitive medical issues coupled with the increasing public demand in decision-making process in the modern day advanced technological era. Moreover, healthcare professionals have to balance the needs of the individual patient against the needs of all their patients. Therefore, there is every possibility of a doctor discovering division, opposition, bitterness and confusion among the patients. Medical decisions were regarded as clinical matters best reached by the experts and anyone seeking to challenge a doctor's decision in the court faced an uphill struggle.[139] Doctors too, it appears, seem grateful that courts are willing to resolve cases of ethical complexity. The law sets down minimally acceptable standards, while ethical approaches may include deciding what would be the ideal way for a person to behave.

International Code of Medical Ethics by World Medical Association

International code of medical ethics is a code based on declaration of Geneva and the main goal is to establish the ethical principles of the physicians worldwide. It specifies doctor's duties in the profession, to his patients and to his colleagues. This code insists for the respect of local and national codes of ethics. It also commanded that the doctors not allowed to be influenced by personal profit or unfair discrimination. The practices like self advertisement except such as it expressly authorized by the national code of medical ethics, collaboration in which the doctor does not have professional independence, receiving any money in connection with services rendered to a patient other than a proper professional fee even with the knowledge of the patient, any act or advice which could weaken physical or mental resistance of a human being may be used only in his interest.[140]

Indian Medical Commission Act 2019

In 2019 Government of India enacted Indian Medical Commission Act. This legislation has given more importance to the implementation principles of medical ethics. The majour powers and functions of Ethical and Medical Registration Boards constituted under this law are specified, such as regulation of professional conduct and promotion of medical ethics in accordance with the regulation made under this Act. It is also provided that ethics and Medical Registration Board should ensure specific compliance of the code of professional and ethical conduct through the

138 Though balancing patients' autonomy and best interests may be difficult at times, it is interesting to note that the ethical models of the physician-patient relationship all presume that the physician's role is patient-focused. See, e.g., T. L. Beauchamp and J. F. Childress, Principles of Biomedical Ethics, 312-319 (Oxford University Press, New York, 5th edn., 2001).

139 Jonathan Herring, *Supra* note 124 at p.2.

140 International Code of Medical Ethics, World Medical Association Bulletin available at:http://www.crip.org/library/ethics/intelcode/(last visited on Dec 10, 2018)

State Medical Council. State Medical Council has the power to take disciplinary actions in respect of professional or ethical misconduct by medical practitioners under respective state Acts.[141]

Judicial Decisions

There are number of cases in which the Indian Supreme Court applied various theories of medical ethics. In Paramanand Katara v Union of India and others,[142] court held that it is the part of professional ethics to start treating the patient as soon as he is brought before the doctor for medical attention in as much as it is the paramount obligation of the doctor. In X v Hospital Z[143] court found that disclosure of information would not be violative of either rule of confidentiality or the appellant's right to privacy. In Spring Meadows Hospital v Harjot Ahluwalia[144] court held that the function of medical ethics is to ensure that the superiority of the doctor is not abused in any manner. In Indian Medical Association v V.P Shantha and others[145] court found that the code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under the attribute and compensation has a high priority. In P.B Desai v State of Maharashtra and others[146] court observed that due to the very nature of the medical profession, the degree of responsibility on the practitioner is higher than that of another. The ethical duty to treat on the part of the doctors is clearly covered by the service provider. In Dr.Prabha Arti v State of U.P and others[147] court held that in case of urgent need of operation, and such conduct like non response amount to negligence as per Hospital Service Rule 10(i) also against medical ethics. So many cases were decided by the court based on medical ethics for protecting the rights of patients.

Conclusion

Advancement of medicine and technology has created new challenges in the medical field. Problem relating to infertility treatment, artificial nutrition and hydration, treatment of patients in coma are some of the controversial issue in this regard. In the new world of medical technology formal and informal regulations by professionals and institutions are necessary. So the theories of medical ethics have some significant role for protecting the rights of patients. Hence these theories should be deeply incorporated through the powerful legislations for protecting the rights of patients. Medical law and medical ethics are closely connected. The code of medical ethics is for upholding medical ethics of doctors. The prime object of the medical profession is to render service to humanity. The professionals are supposed to act in accordance its ideals. He must be keep noble in character and should be modest, sober, patient, and prompt to do his whole duty without

141 Section 27 of National Medical Commission Act 2019
142 AIR 1989 SC211
143 (1998) 8 296
144 AIR 1998 SC1801
145 AIR 1996 SC 55
146 (2013) 15 SCC 481
147 Civil Appeal no 8317 2002

anxiety, with propriety in his profession and in all the action of life. Physician should be available to their patients and colleagues and also for the benefit of their professional attainments. The physician should practice methods of healing founded on scientific basis and should not associate professionally with anyone who violates this principle. The honourable ideals of the medical profession imply the responsibilities of the physician which extend not only to individuals but also to society.

◆◆

Democracy as a Constitutional value - Relevance in the present Indian Scenario

Dr. Naseema P.K*

Abstract

Defined as 'a form of Government to maintain a better society to provide the maximum amount of liberty for individual consistent with the attainment of order and security within the State,' the word democracy stands as one of the most debated ideals in the contemporary India. Formed out of two Greek words 'demos' and 'Kartos',[1] meaning the people and the power respectively, it vests sovereigntywith the people. Unfortunately in practice there are many deviations from this very basic principle of democracy and it reminds us the revolutionary ideas of Dr.Ambedkar making it more significant today as his focus was always on peoplein terms of equality and liberty. Putting forth a broader perspective than the generally perceived idea of political liberty, equality and fraternity, it was focused on the social and economic dimensions of democracy and forcefully argued that it is impossible for political democracy to succeed if social and economic democracy is not achieved. This paper analyses how it was made a basic feature of constitution of India as different from the conventional concepts of democracy and identifies the threat and challenges of democracy in the present society.

Introduction

It is true to say that the concept of social justice has the purpose of removing inequalities and making equal opportunities available to every citizens in all the fields whether social, economic and political. The concept of social justice changes when the society advances. Social justice has high relevance in the Indian circumstances where our society is fragmented on the basis of castes, sub-castes and communities. The discriminations and inequalities existing in society due to these reasons challenge Indian democracy too. A just socio-economic order is a necessity for every nation to progress. For reaching this goal, democracy was understood as an effective means.

It was thought as a tool for social justice in the Indian society which was divided into castes and communities posing themselves as barriers of exclusiveness to Indian democracy. The study

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1 Kshirsagar Ramchandra Kamaji, Political Thought of Dr. Babasaheb Ambedkar 53 (Intellectual publishing house, New Delhi, 1992).

seeks an answer to the question that whether this constitutional tool was successful after its 70 years of working and to check whether democracy envisaged by our constitution was used as an instrument of bringing about change peacefully. In short, it's a venture to re-read the democratic concept embedded in the constitution for a better realization of social and economicempowerments of society.

Democracy and its value system

While the parliamentary democracy is based on liberalism, the true democracy implies both liberty and equality. The much discussed constitutional morality too necessitates that the minority must be confident in the hands of the majority.[2] This analysis becomes very important in the Indian context.Democracy presupposes an open democratic form of society where isolation and exclusiveness will not go hand in hand. In a democratic society it must be remembered that a positive outlook and mindset respecting other members in the society and a treatment of equality towards their fellows will be seen practiced by its members. Keeping this in mind, the contemporary issues in Indian society like honor killing, burning issues like citizenship, minority rights, and repeated incidents of atrocities against SC/ST people *etc*., raises the eyebrows about the working of democracy here. The widening gap between the haves and have-nots puts doubts regarding the socio-economic justice that democratic rule promised the people of India. Taking the words of Dr. Ambedkar, "democracy is not a form of government, but a form of social organization."[3] And in that sense it did not reach up to its goals yet. As stated in *Union of India and Ors v. Major S.P. Sharma and Ors*[4]' even a government or any other authority cannot have a right to do whatever it prefers in a democracy governed by rule of lawand if it is so the recent incidents like Hyderabad rape accused persons were shot down by the police, Unnao rape victim was burnt *etc*., cannot happen in a country where true democracy prevails. Corruption is another challenge before Indian Democracy in today's era. Misuse of public offices for personal gain goes against the basic tenets of Indian Democracy. It is regrettable to see the pathetic corruption that endangers the very existence of constitutional governance. It also threatens the very foundation of Indian democracy and rule of law.

Wide inequalities is the most dangerous aspect of our democracy that when elections come the political parties promise rice, wheat and other essential things on cheaper rates which are the basic needs of people that should have been fulfilled earlier and in fact the political parties are using the poverty of people. Takingeffective steps to drive away glaring inequalities in the society to make oppressed or suppressed class of people feel that this nation belongs to them as well, is the a tool for national integration too.

Successful functioning of democracy necessitates an ideal society so that it can convey the changes in one area to another area of the society. Unfortunately, even afterseven decades of

2 *Supra* note 1 at 60.

3. Shyam Chand, *Dr* Ambedkar on Democracy, available at: http://www.mainstreamweekly.net/article467.html. (last visited on Feb. 14. 2016).

4 (2014) 6 SCC 351.

independence, Indian society as well as political democracy has been unable to generate the ideal conditions essential for the smooth functioning of democracy as per the expectations of the Constitution makers. Hence, intellectual discussions in the form of seminars of this nature is a contribution to the growth of democracy. A proper observance of rule of law and implementation of constitutional principles is the only solution to address this challenge.Democracy means much more than democratic government. It can be considered as an attitude of respect and admiration for one's fellow humans and an instrument for social transformation and human progress. Indian democracy is confronting new challenges like religion based movements, terrorist groups, economic inequality, the rise of militarism, the ongoing citizenship amendment issue *etc.,* Though democracy is against the hereditary system of ruling, leaders of many political parties have been sticking to the seats and are taking their sons, wives and other relatives. Moreover, the trend of criminal MPs occupying the seats is increasing. Money becomes the prime player in the politics and it is degrading our democracy.At the same time new areas boosting democratic spirit are also developing like the right to information, the panchayati raj amendments, modern communication technology, transnational cooperation, representation of women in politics *etc.*As opined by the father of our great constitution, 'generating public conscience' which can be defined as that quality of a person which becomes agitated at every wrong without being bothered about the identity of the sufferer is the solution to retain the true spirit of democracy.[5]

Social justice- An imperative of Democracy

The concept of social justice changes from time to time. It has its own new patterns and new dimensions. As per the Utilitarian theory, social justice is one of the dimensions of justice that stands for brotherhood that can create and lead to such human social conditions where free and fair development of all human beings will be ensured.[6] While social justice is people oriented, legal justice is controlled and conferred by law.[7] In the opinion of Dr. Ambedkar the basis of social justice is rooted on equality, liberty and fraternity of every one. The inevitable goal of social justice is making all kinds of inequalities of caste, race, sex, power, position*etc.*, be vanished and all may enjoy their rights equally. Social justice has high relevance in Indian context as mentioned above and democracy was perceived as a tool to reach social justice which is an application of the concept of distributive justice. Indian Constitution is one of the most beautiful examples of embodying social justice in it. Democracy is a sort of social engineering which was weaved into the heart of the Constitution of India. It is actually like a renaissance in the realm of social justice using a tool of trinity of, 'the preamble, the fundamental rights and the directive principles of state policies' and it is to be emphasized that this 'trinity' is the soul of the commitments to the social revolution.[8]

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5 Dr. Sandesh M.Wagh,Ambedkar's thoughts on Democracy, available at:, srj.org/UploadedData/3318.pdf.(last visited on Dec. 31.2016).

6 Nazeer. H. Khan, B.R. Ambedkar on Federalism, Ethnicity and Gender Justice 151 (Deep &Deep Pub. New Delhi, 1996).

7 Krishna Iyer B.R. Ambedkar Centenary, Social Justice and the Undone Vast Justice 141 (B.R Pub. Delhi, 1991)

8 Mohamed Shabbir, Ambedkar on Law, Constitution and Social Justice 131 (Rawat Pub, Jaipur, 2005).

The idea of democracy in Indian Constitution is much broader perspective than the generally perceived idea of political liberty, equality and fraternity.[9] It emphasized the social and economic dimensions of democracy and forcefully argued that political democracy cannot succeed where there is no social and economic democracy. Here it is "a form and a method of Government whereby revolutionary changes in the economic and social life of the people are brought about without bloodshed.".[10] The difference from Marxism that advocates bloodshed against State and the peaceful means of democracy for stable and permanent. State can be seen here. [11] In other words "democracy is a mode of associated living."[12] The four premises on which Political democracy rests on are below.[13]

1) The individual is an end in himself.
2) The individual has certain inalienable rights which must be guaranteed to him by the Constitution.
3) The individual shall not be required to relinquish any of his constitutional rights as a price of any privilege.
4) The state shall not delegate power to private persons to govern others.

It shows that the democratic concept herein stressed for equality and to drive away glaring inequalities in the society and it does not tolerate caste system as it lacks public spirit and does not accommodate the public opinion.[14] It also believes that without equality of treatment in administration progress of the society cannot be ensured and the administration must understand that they are men in power who have to show undivided allegiance to the best interest of the country.[15] It is visible today that in spite of a strong constitutional guarantee before law and in administration, political parties are playing religion and caste role everywhere.

Isolation and exclusiveness will not go hand in hand with democracy. Democracy cannot work without social organization free from rigid social barriers."[16] Democracy is inconsistent with; anything that result in the distinction between the privileged and the unprivileged. The coexistence of all three democracies (political, social and economic) is imperative to achieve the goals of equality and fraternity as enshrined in our Constitution in Preamble.[17]

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9 Ashok Kumar,"Dr. Ambedkar's Thoughts on Democracy and Its Relevance In Existing Indian Scenario"2 Indian Streams Research Journal 4 (2012).

10 Kshirsagar Ramchandra Kamaji, *Supra* note 1 at 54.

11 ThoratSukhdeo, Ambedkar in Retrospect; Essays on Economics, Politics and Society 8 (Indian Institute of Dalit studies, New Delhi, 2007).

12 Jatava D.R, Political Philosophy of B.R. Ambedkar 77 (National publishing House, New Delhi, 2001).

13 Kshirsagar Ramchandra Kamaji *Supra* note 1 at 55.

14 Dr. Shashi, S. S, Ambedkar and Social Justice, Volume1 162 (Publications Division, Ministry of Information and Broadcasting Government of India, New India, 1992).

15 Bhagwan Das (ed), Thus spoke Ambedkar -1 (Bheem Patrika, 1977).

16 Bhagwan Das (ed), Thus Spoke Ambedkar Vol.II, (Buddhist Publishing House, 1969).

17 Vikrant SopanYadav,"Dr. B. R. Ambedkar's views on Democracy and Indian Constitution: An Analytical Appraisal*"2* Int. J. Appl. Research. 308-310 (2106).

Democracy in India vs. Constitutional Goals

The nature of Indian Constitution is first and foremost that of a social document.[18] The preamble of Indian Constitution recognizes India as a Democratic nation endeavoring to secure to the citizens of India, Justice, liberty, equality and Fraternity. In *KihotoHollohan v. Zachillhu*[19] it was held that Democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy.Democratic State is an unavoidable ingredient under this.The word ' State' has been defined in the same manner, in both Parts III and IV. It indicates that the founding fathers of the Constitution wanted unity and integrity of nation, democratic society *etc*., as our nation's ideals and they planned to achieve them through a socio-economic revolution pursued with a democratic spirit using constitutional,democratic institutions.[20] In *Union of India and Ors v. Major S.P. Sharma and Ors*[21] it was observed that,no one can claim an unlimited authority to do something on the basis of one' whims and fancies in a democratic set up.

Successful functioning of democracy necessitates an ideal State and society. Unfortunately, even after the six decade of independence, the Indian society as well as political democracy has been unable to generate the ideal conditions essential for the smooth functioning of democracy. Corruption is one of the biggest challenges before the Indian Democracy in today's era. Misuse of public offices for personal gain goes against the basic tenets of Indian Democracy. It cannot be said that Indian democracy has travelled smoothly and the larger part of Indian population has not enjoyed the fruits of it. Proper implementation and observance of rule of law in tune with the spirit of the Constitution is the best remedy to resolve this. Dr. Ambedkar's idea of democracy was intimately connected to his ideal of a 'good society.'[22] In his opinion democracy was both the end and the means of this ideal. Democracy meant much more to him than democratic government, instead essentially an attitude of respect and reverence towards fellowmen and an instrument for social transformation and human progress. The old warning that we may come across a life of contradictions of equality in politics while inequality prevails in social and economic life seems to appear to be true in the current social scenario that we witness. Political democracy though survived is not in a good condition. Indian democracy is confronting new challenges, like Hindutva movement, Terrorist groups, economic inequality, the rise of militarism *etc.* At the same time new areas boosting democratic spirit is also developing like the right to information, the

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18 Granville Austin, Indian Constitution- The Cornerstone of A Nation 50 (Oxford University Press, New Delhi, 2007).

19 (1992) Supp (2) SCC.

20 *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789.

21 (2014) 6 SCC 351.

22 Jean Drèze, Dr.Ambedkar and the Future of Indian Democracy,available at: http://econdse.org/wpcontent/uploads/2012/09/ JD-Ambedkar-and-future-of-democracy2005.pdf 23 11 2017.(last visited on Jan.2, 2020).

panchayati raj amendments, modern communication technology, transnational cooperation, representation of women in politics *etc.* If the Directive Principles of the Constitution[23] are implemented and revived, hopefully the democracy can be regained in its full spirit and in this regard concepts of Dr.Ambedkar will contribute much.

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23 Constitution of India, Articles-36-51.

Online Digital Piracy of Indian Bollywood Movies: New Issues and Challenges

Dr. Gurujit Singh*& Prabhdeep Kaur Malhotra**

Abstract

The introduction of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the year 1995 lead to the enactment of enforcement procedures to address the issue of infringement of Intellectual Property Rights (IPRs). To adopt a higher standard of protection against the increasing menace of Online Piracy, many countries engaged in bilateral agreements to create anti-circumvention laws. Various Treaties and laws to overcome the challenges and threats due to Online Piracy came into being. The Indian Copyright Act, 1957 provides different kinds of enforcement mechanisms in the form of civil and criminal remedies. When it comes to the Indian scenario, it can be rightfully said that the digital era has brought both opportunities and challenges to the entertainment industry in general and Bollywood industry in particular. With the rapid growth of internet, access to Bollywood movies is possible even hours before the content is officially aired in the country through legitimate means. Online Digital Piracy is one of the major threats, the Bollywood film industry is facing. It causes revenue losses not only to the content production sector, but also results in losses to the economy of a country. The rapid growth of Piracy in the digital platforms, thereby causing massive loss to the film industries has resulted in increasing number of litigations. Piracy of Bollywood movies is rampant internationally, and not just India. Past judicial experience shows that apart from the existing enforcement mechanisms, remedies can be provided in other forms outside the purview of Copyright Act, as the enforcement mechanisms as laid down in the statute may not necessarily work on the internet. The online digital piracy has posed a big question mark on the present enforcement mechanisms present under the Copyright Act. The efficacy and

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effectiveness of these mechanisms have been challenged in the court of law on multiple occasions. The objective of this Paper is to explore various issues dealing with the enforcement of Copyright while addressing the problem of Online Digital Piracy of Indian Bollywood movies. The Paper seeks to address the role of judiciary while making a critical assessment of the changes brought under the Copyright Act in the digital lead paradigm. The Article concludes with the suggestions and recommendations for the better enforcement of IPRs in India as well as globally.

Introduction

The Indian film industry is the largest in the world in terms of number of films produced every year in more than twenty languages. It is dominated by Bollywood, the Hindi film industry, contributing 43% of the revenue, whereas the regional and international films contribute 50% and 7% respectively.[1] Exhibition of Indian films in more than ninety countries has resulted in the emergence of Indian cinema as the global enterprise. Increasing participation in the international film festivals has contributed to effective branding and promotion of Indian films in the international market.[2]

Due to ease of communication, a person sitting in the remotest corner of the country can watch movies and enjoy live performances with one single click. The computer-aided communication technologies have created a new dimension communication process by making it more speedy, economical and informative.[3] It proves that internet is home to copyrighted content such as movies, music files, videos etc. What makes internet quintessential is that there is no requirement of prior permission from the author and no obligation to pay for any services whatsoever availed.[4]It is, therefore, true to say that penetration of internet and the digitization of information products has deeply modified the interaction between copyright holders, technology companies and consumers. Thereby, posing challenges for the economic analysis of digital products.[5]

To reduce the impact of digital Piracy, various strategies have been adopted nationally as well as internationally. The most powerful treaty prior to the introduction of TRIPS Agreement was Berne Convention. However, it was largely insufficient in the realm of Piracy.[6] The existing international conventions, namely the Berne Convention and the Universal Copyright Convention only provided a loose framework for the protection of Intellectual Property Rights. Thus, developed countries pushed for the development of single multilateral convention as against the scattered

1 Deloitte, "Indywood: The Indian Film Industry" 9 *DELOITTE* (2016).

2 Erum Hafeez & Asmat Ara, "History and Evolution of Indian Film Industry", 7 JHSS61 (2016).

3 Ministry of Human Resource and Development, Government of India, "A Study of Copyright Piracy in India"7 MHRD (1999).

4 Nikita Hemmige, "Piracy in the Internet Age", 18 JIPR 457 (2013).

5 Paul Belleflamme Martin Peitz, "Digital Piracy: Theory,"1 CESifo (2010).

6 JeanMarie LoVoi, "Competing Interests: Anti-Piracy Efforts Triumph Under TRIPS But New Copying Technology Undermines the Success,"25 BJIL 454 (1999).

bilateral treaties.[7] The Piracy crisis prompted the inclusion of Article 14 for the protection of Performers, Producer of Phonograms (Sound Recordings) and Broadcasting Organisations. With respect to pirated goods, TRIPs established a strict framework by which member countries of WTO should amend their own copyright laws.[8]

Part I of the Paper gives the introductory background. It begins with an overview of Indian film industry and Piracy of Bollywood movies. International agreements dealing with the aspect of Piracy are also introduced. Part II of the Paper defines the term "Piracy"in the digital context. It gives a brief insight of traditional and modern forms of broadcast and piracy of movies thereof. Legislations dealing with the issue of Piracy are also discussed in this Part.

The Copyright (Amendment) Act, 1957 which introduced Digital Rights Management has been discussed along with the obligations under International Agreements and Treaties. It also differentiates between content management and rights management. This Part of the Paper concludes with critical analysis of 2012 Amendment and its implementation to stop online digital piracy.

Part III of the Paper gives a detailed overview of enforcement mechanisms prevailing under the Indian Copyright Act, 1957 to deal with the issue of Piracy. It gives an analysis of civil, criminal and administrative remedies to deal with the infringement of copyright under the Act, TRIPS Agreement, Berne Convention etc. Judicial endeavour to curb Piracy has been discussed with reference to "John Doe" orders passed by the Courts. This Part discusses in detail the efficacy and effectiveness of the existing enforcement provisions and ex-parte interim injunctions and sufficiency of the same in digital lead paradigm where Piracy is rampant.

Part IV of the Paper deals with the newly emerging challenges to protecting copyright in the digital platforms. It begins with the application of doctrine of exhaustion in the digital context. It continues to highlight the difference between the concept of exhaustion and Digital Rights Management. Part V of the Paper concludes with Suggestions and recommendations.

Online Digital Piracy: Meaning and Scope

According to the Oxford Dictionary, "Piracy" refers to the act of illegal copying and distribution of the protected content such as songs, movies, books, software etc. In broader terms, piracy means the infringement of Copyright Act. Due to rapid advancement of technology, people are becoming more dependent on all forms of existing media for entertainment as well as informational purposes. The ease of accessibility enables the widespread distribution of such content leading to violation of the rights of copyright mechanism serving an opportunity to the other party and hence, failure of enforcement mechanism. The bad effects of technology are Piracy and Plagiarism, whereas, on the other hand the good effect scan be described as the availability of various techniques to detect these misconducts.[9]

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7 Jean Marie LoVoi, *Supra* note 6 *at* 457.

8 *Supra* note 6 at 463.

9 Iblina Begum, H.K. Sharma, "Piracy: A Threat to Academicians and Publishers"23 JIPR 1 (2018).

In this context, Digital Piracy means and includes the distribution of non-physical objects i.e., digital files on the internet without the authorisation of the rights holder. Various tools and circumvention measures have been developed from time to time to curb piracy. But the present violations ensure that the existing copyright regime has failed to address these issues. Digital piracy offers the consumers a convenient and economical method to access the desired content, thereby fulfilling a demand that is not properly addressed by the traditional forms of distribution. Advances in the computer technology enables the digital piracy. It is different from other forms of piracy which are mainly based on production/ distribution of the physical copies of original goods for commercial purposes.[10]

Piracy is one of the key issues pestering the Indian film industry with large revenue being lost annually.[11]India has a long-drawn history of Piracy which is often considered as one of the major challenges to its growth. The main reasons why Piracy is rampant in India is high ticket prices and cheap internet connectivity. It makes India one of the top five countries in peer-to - peer downloading. Indian's also make up the largest or second-largest group of people visiting major bit-torrent sites like Mininova, Torrentz and The Pirate Bay. The release of films in other countries prior to India is another reason.[12]

As per the Report of Irdeto Global Consumer Piracy Threat, 2018, India is among the top five countries for peer-to peer (P2P) downloads with over 965 million P2P downloads between January 2017 and May 2018. The Report states "with the proliferation of high-speed broadband services, live streaming piracy has become increasingly popular, with pirates developing professional looking linking sites that provide links to a series of illegal content streams, allowing viewers to bypass right holders."[13] An analysis of P2P trends confirms the continuing importance of the torrent network in distributing pirated content online.[14]

Piracy of Movies in India: Traditional versus Modern forms of Broadcast

To understand the context of Piracy in detail it is important to figure out the differences between traditional and modern forms of broadcast. The territorial nature of the traditional broadcast targeting the local audience makes it a "push" based service involving one-way communication from cable service providers. On the other hand, the modern form of broadcast involves the global outreach transcending the boundaries of nations making it a "pull" based service involving end to end connection between content providers and consumers.

The nature of push services in terms of technology and limited availability of the content defines the traditional viewing as "Broadcast" whereas, the pull services enabling the consumers to view the content without any limitation on the content defines the modern form of viewing as

10 Hervas-Drane, A. and Evenou, M., "Business Models Responses to Digital Piracy"*61 CMR* 33 (2019).

11 *supra* note 1 at 9.

12 Lata Jha, "How the govt is cracking down on film piracy",*available at:* https://www.livemint.com/industry/media/how-the-govt-is-cracking-down-on-film-piracy-1550130158629.html (visited on Nov. 25, 2019).

13 IRDETO, "Irdeto Global Consumer Piracy Threat" 8*IRDETO* (2018).

14 IRDETO, "The Piracy Landscape: Has Web Video Replaced Peer-to-Peer", 5*IRDETO* (2018).

"Narrowcast". In the case of later, the consumers can view the content repeatedly due to absence of centralised content publisher, but, in the case of former, there is a limitation on the viewing of content due to its limited dissemination.

In case of "Broadcast" only the approved content gets telecasted because there is an obligation on the part of service providers to pay license fees to the Government and support content that has commercial value. In case of "Narrowcast" there is no limitation on the distribution of content because the content providers have unlimited freedom to distribute and monetize their content. Under Broadcast, Cable Piracy refers to the unauthorised transmission of films through cable network. Authorisation from the right holder is required to show a film in a cable network. But many times, new releases are shown through cables without authorisation which tantamount to Piracy.[15]

Indian entertainment and live streaming platforms are the most downloaded applications globally. Netflix, Hotstar, MX Player, Jio TV, Sony-Liv, Zee5 are among the top downloaded entertainment applications worldwide.[16] The limitations of the online Indian market begins with the subscription issues by the over-the-top platforms (OTTs) which leads to less viewership through legitimate means and hence, Piracy happens. The linear models like movies, OTT shows find themselves available on torrent or other pirated websites within hours of its launch.[17]

There are a lot of paid streaming services to choose from, like Netflix, Amazon Prime, etc. Most people would opt for one or two services at the most. However, the company is always looking to draw people to their platform. They purchase the exclusive content that is not available anywhere. But most people instead prefer to go and torrent movies or TV shows that appear on their services not subscribed by them because they are not willing to pay for the one.[18]

Types of Piracy

Types of Piracy depends on the nature of protected material stolen unlawfully through illegitimate means. For instance, in case of sound recordings, piracy can happen in three ways i.e., copying of songs from different cassettes and then putting in one single cassette, counterfeiting (copying to a packaged look with the same label, logos etc.) and bootlegging (unauthorised recording of performance by artists).[19] Book Piracy happens through unauthorised printing/ selling/ translation, large scale photocopying etc.[20]

Internet / Online Piracy is a growing trend which can be understood in numerous ways. It happens in different forms such as downloadable media formats used by the pirates to illegally

15 *Supra* note 3 at 14.

16 Megha Mandavia,"Indian apps including Hotstar, MXPlayer are the most downloaded applications globally", *Economic Times,* June 26, 2019.

17 *Supra* note 12.

18 Gwyn D'Mello,"Online Piracy Has Doubled In Two Years, As Every Video Streaming Website Starts Charging Money",*India Times,* Oct. 04, 2018.

19 *Supra* note 3 at 12.

20 *Supra* note 9 at 264.

offer and distribute motion pictures to other internet users; hard goods piracy which refers to the illegal sale, distribution, trading of copies of motion pictures in any format; streaming copyright content without express authorisation of the copyright holder; circumvention of content protection devices put on films, videos, discs to secure the copyright content etc.[21]

Legislations to control Piracy in India

The Constitution of India, 1950 vests the legislative competence on copyright matters with the Parliament of India. Different regional film industries in India have been successful in compelling many State Legislatures to legislate about copyright through various paths. Several anti-piracy legislations have been enacted at State level to deal with the issue of Piracy including allowing for the preventive detention of suspected infringers.[22]

Part IV of the Constitution of India, 1950 reflects the public interest element of the copyright law. Article 38[23] directs the state to secure a social order for the promotion of welfare of the people by securing and protecting social order in which justice, social, economic, and political shall inform all the institutions of national life. Article 39 of the Constitution mandates the State to distribute the material resources of the community to sub serve the common good,[24] against the concentration of wealth to the common detriment.[25] Additionally, Fundamental Duties of the citizens of India are enshrined under Part IV-A of the Constitution. It says that every citizen of India has the duty to develop the scientific temper, humanism and the spirit of inquiry and reform and to strive towards excellence in all the spheres of individual and collective activity.[26]

The Copyright Act, 1957

The Indian Copyright Act, 1957 protects all type of music, songs, literary and artistic works. The Act is applicable throughout India, and protects the movies made abroad. The Copyright (Amendment) Act, 2012 added DRM provisions for the circumvention of technological measures and protection of rights management information. The new provisions also provided the criminal remedies in addition to the civil remedies already provided under the Copyright Law. The DRM provisions are described in the later part of this chapter.

National Intellectual Property Rights Policy, 2016

Objective 1 of the Policy is aimed at creating awareness of the economic, social and cultural benefits of IPRs. Objective 3 of the Policy called for suitable amendments in The Cinematographs Act, 1952 for the inclusion of penal provisions for illegal duplication of films. Under Objective 6 of the Policy, which deals with Enforcement and Adjudication, measures

21 Hedi Nasheri, "Addressing Global Scope of Intellectual Property Law"18 USDJ (2005).

22 Arul George Scaria, "Online Piracy of Indian Movies: Is the Film Industry Firing at the Wrong Target"*21 MSILR* 658 (2013).

23 The Constitution of India, 1950, Art. 38.

24 The Constitution of India. Art. 39, cl. (b)

25 *Id.*Art. 39, cl. (c).

26 *Id.* Art. Art. 51A, cl. (h) & (j).

have been laid down to check counterfeiting and piracy to be identified and undertaken. Regular IPR workshops / colloquia for judges would facilitate effective adjudication of IPR disputes. It includes reinforcement of Public awareness with regard to legal and enforcement mechanisms, including technology based measures, to combat offline and online piracy. To strengthen the enforcement mechanisms for the better protection of IP rights, objective 6.8.1 states "Enhanced coordination between the various agencies and providing direction and guidance on strengthening enforcement measures; coordinating with and sharing of intelligence and best practices at the national and international level; studying the extent of IP violations in various sectors; examining the implications of jurisdictional difficulties among enforcement authorities; and introducing appropriate technology based solutions for curbing digital piracy".

Information Technology Act, 2000

Section 79 of the Information Technology Act, 2000 fixes the liability on Internet Service Providers. This provision exempts the service provider in a few cases and states that the network provider cannot be held liable for transmission of information by the third party.[27] Section 43(b) of the Information Technology Act, 2000 states that if any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium shall be penalised and liable to pay damages by way of compensation to the aggrieved person. The enforcement mechanisms are discussed in Part III of this Paper.

The Cinematograph (Amendment) Bill, 2019

The Cinematograph Act, 1952 deals with the provisions for the certification of cinematograph films for exhibitions and for regulating exhibitions by means of cinematographs. The Amendment Bill proposed by the Ministry of Information and Broadcasting aims to tackle film piracy by instituting penal provisions for unauthorised camcording[28] and duplication of films by making it a legal offence[29] and punishing the offender with a three-year jail term and fine of Rs. 10 lakhs.[30] To tackle the menace of camcording and piracy, the Ministry of I & B piloted this matter before the Union Cabinet which was in demand for by the film industry from a long time. The Bill was introduced in Rajya Sabha on 12th February 2019. The Bill prohibits a person from using a recording device to make a copy or transmit a film, without written authorisation from the producer of the film.

Draft E-Commerce Policy, 2019

Under this Policy, a body of industry stakeholders will be created to identify "rogue websites". Rogue websites are those which predominantly host pirated content. After verification, these

27 *Supra* note 4 at 461.

28 The Information Technology Act, 2000, s. 6AA.

29 *Id.*, s. 7.

30 *Supra* note 12.

rogue websites shall be included in the "Infringing Websites List" (IWL), which provides: (i) internet service providers (ISPs) shall remove or disable access to the websites identified in the IWL within set time-lines, (ii) payment gateways shall not permit flow of payments to or from such rogue websites, (iii) search engines shall take necessary steps to remove websites identified in the IWL in their search results, and (iv) advertisers or advertising agencies shall not host any advertisements on the websites identified in the IWL.

National Cybercrime Reporting Portal

The Ministry of Home Affairs (Government of India) has launched the national cybercrime reporting portal (https://cybercrime.gov.in) where the citizens can lodge complaints on cybercrimes. The complaints have been divided into two categories: (i) women and child related, and (ii) other cyber complaints. Online piracy complaints can be filed under the second heading.

Digital Rights Management

Digital Rights Management refers to the technology that is used for the identification of the user. The main purpose of DRM is to control, access, usage, distribution to protect the interest of copyright holders in the digital environment.[31] The digital media distribution system comprises of four major elements. They are the Creator, i.e. the legal owner of the content, the Producer, i.e. the maker of the digital content product, the Distributor, i.e. the one who promotes and sells the digital content product to customers and the Consumer, who is the client for digital content that consumes the product and pays user fees. Some of these actors, may be in some cases embody one single entity. For instance, the first two entities in some implementations are often referred to as content provider.[32]

Major components of a typical DRM system comprise of content delivery, security, and content protection, meta data, rights object and usage rights and license generation.[33]

i. Content delivery may be of two types i.e. online, offline. Online content delivery comprises of the delivery of content from content server through download or streaming. Offline distribution consists of distributing packaged content on a portable media such as CD or DVD.

ii. Security and Content Protection: To ensure legitimate and proper use of content, DRM allows the content to be unencrypted and to be freely distributed. There are various schemes used to protect the content from unauthorised use. For example, use of an algorithm and a key is provided to the legitimate customers to recover the original information, digital signatures are used for the authentication of content providers and content consumers, digital watermarking to embed information about content creator, content producer, conditions of use into the content etc.

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31 N S Harinarayana, C S Somu & M V Sunil, "Digital Rights Management in Digital Libraries: An Introduction to Technology, Effects and the Available Open Source Tools"CALIBER 456 (2009).

32 Abouzar Abbaspour Ghomi & Alireza Azimi, "Digital Rights Management" NCMT, 3 (2014).

33 S.R. Subramanya & Byung K. Yi, *Digital Rights Management, IEEE POTENTIALS* 33 (2006).

iii. Metadata: It refers to the information about the content such as content type, content ID, encryption details, and information about the rights. Meta data is categorised as content-descriptive metadata and content-dependant metadata. Metadata is used for locating the content and management of content usage.

iv. Rights object and usage rights: A rights objects specifies the permitted ways the associated content can be used by the consumer or device. Usage rights means the expiration date, starting date, counted playback, device types, media operations etc.

v. License Generation: It contains the rights object, i.e., the terms and conditions related to the usage of the content. It also contains a key in case the content is protected.

Content Management v. Rights Management

Content management refers to the activities conducted by a device or a human being in relation to items of content. It includes creation, manipulation, fixation, storing, transferring, performing, rendering, or disposing off the content. Content management is used to describe these activities whether they occur in the digital environment. Rights management refers to all the activities that are conducted in relation to rights governing the content management activity in respect of an item of content. These rights come into existence due to legislation or contract or combination of the two.[34]

In the digital environment, the content management process and digital management process must remain synchronised even though they can work independently. There can be no content management activity without rights management activity. The content activities which happen beyond the reach of rights management process in traditional world is not possible in the digital environment.[35]

DRM under International Instruments

The digital rights management provisions do not come under the obligations of WTO-TRIPS Agreement. The TRIPS+ regime addresses the concerns of international community to emerging digital challenges. The World Intellectual Property Organisation (WIPO) bought two internet treaties in the year 1996. They are the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT). WCT and WPPT provide protection measures and techniques to copyright owner and performers to protect their material/ work from illegal downloading and unfair use. WCT and WPPT provide protection measures and techniques to copyright owner and performers to protect their work from illegal downloading and unfair use. These two internet treaties make it clear that Article 9 of the Berne Convention, which deals with the Right of Reproduction shall be applicable *mutatis mutandis* for the protection of reproduction rights in the digital environment.

34 Nic Garnett, *Automated Rights Management Systems and Copyright Limitations and Exceptions, WIPO* 13 (2006).
35 *Id.* at p 15.

Obligations concerning Technological measures

Article 11 of WCT and Article 18 of WPPT obligate the contracting parties to take 'adequate' legal measures and 'effective' legal remedies against the circumvention of 'effective' technological measures used by the right holders. Article 11 of the WCT states that the Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights. Article 18 of the WPPT deals with the similar provision.

Obligations concerning Rights Management Information

Article 12 of the WCT and Article 19 of the WPPT obligate the contracting parties to take 'adequate' and 'effective' legal remedies against unauthorised tempering of rights management information and certain dealings with works or copies of works with the knowledge that the electronic rights management information in those works have been tempered without authority.

Other Instruments

Article 27 of the Universal Declaration of Human Rights (UDHR), 1948 recognises the concept of public interest against the rights of copyright owner. Article 19 of UDHR provides, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' These rights are also manifested in the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant for Economic, Social and Political Rights (ICESCR).[36]

Enforcement Mechanisms in India

There are three types of remedies a person can get for copyright infringement in India. These are civil remedies, criminal remedies, and administrative remedies. Civil remedies are covered under Section 55 of the Copyright Act, 1957,criminal remedies under Sections 63 to 70 of the Act and Administrative remedies are provided under Section 53 of the Act.

Civil Remedies

The civil remedies are divided into two categories namely preventive civil remedies and compensatory remedies. Preventive civil remedies are most popular among the remedies. These are used prior to the occurring of actual act of infringement before the damage ensues. These are divided into four types:

i. Interlocutory Injunctions: The Indian Courts rely on three pronged tests for the grant of interlocutory injunction[37] in cases involving copyright infringement. These requirements are Prima Facie case, balance of convenience, irreparable injury.

36 Megha Nagpal, "Copyright Protection through Digital Rights Management in India: A Non-Essential Imposition", 22 JIPR 226 (2017).

37 The Code of Civil Procedure, 1908, O. 39, r. 1&2.

ii. Mareva Injunctions: These type of injunctions[38] are granted when the Court believes that the defendant is trying to delay the execution of decree being passed against him.

iii. Anton Pillar Orders: An Anton Pillar Order[39] has three elements namely an injunction restraining the defendant from dealing in the infringing goods; an order that plaintiff's lawyer be permitted to enter the premises of defendant's and take the goods in their safe custody; and an order that defendant be directed to disclose the names and addresses of suppliers and customers and to file an affidavit giving this information.

iv. Norwich Pharmacal Order: These are the orders by which information can be discovered from the third parties.

Compensatory civil remedies can be sought under Section 55 and 58 of the Copyright Act, 1957. These are divided into three parts namely:

i. Account for Profits: It entitles the owner to seek a sum of money equivalent to the profit made through unlawful conduct.

ii. Damages as a compensatory remedy: It enable the owner to seek the damages he suffered due to the infringement.

iii. Damages for conversion: These damages are accessed according to the value of the article. The remedies of damages for infringement of copyright and for conversion are cumulative and not alternative.

Civil Remedies under TRIPS Agreement

The TRIPS Agreement lays down comprehensive provisions for the enforcement of intellectual property rights. It provides civil, criminal, and administrative remedies for the infringement of intellectual property rights. The Agreement obligates the member countries to adopt procedures for the enforcement of intellectual property rights which should be fair and equitable. Also, the procedures should not be complicated or costly or entail unreasonable time limits or unwarranted delays. The procedures shall not impose overly burdensome requirements concerning mandatory personal appearances.[40] The Agreement provides remedies in the form of injunctions[41], provisional measures[42] and damages[43].

Administrative Remedy

Administrative remedies are provided under the Indian Copyright Act, 1957 under Section 53. The remedy available to the copyright owner under section 53 is complementary and

38 *Id.* O. 38, r. 5.

39 Anton Piller KG v. Manufacturing Processes Limited, [1975] EWCA Civ 12.

40 Sumedh Kumar Sethi, "Remedies For Infringement Of Copyright In India: The Adequacy Or Inadequacy Thereof", 3 JSLR126 (2017).

41 Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994, Art. 44.

42 *Id.* Art. 50

43 J.H. Reichman, "Enforcing the Enforcement Procedures of TRIPS Agreement"37 VJIL 341 (1997).

supplementary to the civil remedy available under section 55 for the infringement of copyright. It is to be noted that the remedy under section 53 is *quasi-judicial* in nature and an appeal can be made to the copyright board against the order of Registrar under Section 72 of the Act.

The procedural remedy provided under the Berne Convention deals with the seizure of infringing copies including seizure by custom authorities under Article 16. Article 16 of the Berne Convention finds mention under the TRIPS Agreement. The TRIPS Agreement provides that Member States shall comply with Article 1 to 21 and Appendix of the Berne Convention. "Special Requirements related to Borders Measures" are contained under Section 4 of the TRIPS Agreement. The position is in conformity with Article 6 of the Agreement which deals with the issue of 'exhaustion'.

The WCT provides that Member States shall comply with Articles 1 to 21 and Appendix of the Berne Convention. Article 16 of the Berne Convention thus, finds place in the WCT. Article 14(2) WCT and 23(2) WPPT oblige the State Parties to provide effective enforcement procedures in their national laws against any act of infringement of rights as provided in those treaties. The laws shall also provide expeditious remedies to prevent infringements. The remedies include civil, administrative, and criminal remedies.

Criminal Remedies

Knowledge or mens rea is an essential ingredient of the offence. Criminal remedies are more effective than civil remedies because these can be disposed of quickly. Criminal proceedings directly strike at the honour and status of the infringer, as a result of which he prefers out of court settlement to save his prestige. Article 61 of the TRIPS Agreement states that members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. Chapter XIII, Sections 63 to 70 deal with the offences relating to copyright.

Section	Offence	Punishment
63	Infringement of copyright in the work or any other right conferred by the Copyright Act, 1957.	Six months to three years. Fifty thousand to two lakh rupees.
63A	Enhanced penalty on second and subsequent conviction	One year to three years.One lakh to two lakh rupees
63B	Knowing use of infringing copy of computer programme to be an offence	Seven days to three years. Fifty lakh to two lakh rupees.
64	Power of police to seize infringing copies	
65	Possession of plates for purpose of making infringing copies	Two years and fine

65A	Circumvention of technological measure	Two years and fine
65B	Removal/ alteration of rights management information	Two years and fine
66	Disposal of infringing copies or plates for purpose of making infringing copies	
67	Penalty for making false entries in register, etc., for producing or tendering false entries	One year or fine or both
68	Making false statements for the purpose of deceiving or influencing any authority or officer	One year or fine or both
68A	Contravention of section 52A	Three years and fine
69	Offences by Companies	-
70	Cognizance of offences	-
71	Appeals against certain orders of Magistrate	-
72	Appeals against orders of Registrar of Copyrights and Appellate Board	-
73	Procedure for appeals	-

John Doe orders

In order to protect the intellectual property rights against certain unknown person when such person can be a threat to a given work and cannot be traced due to hidden identity, john doe is used as a legal remedial course of action.[44] John Doe Order is granted under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 which refers to Court's powers to grant temporary injunction read with section 151 of the Code. John Doe or *Ashok Thakur Orders* are passed by High Courts/ Trial Courts in favour of the right holders. These injunctions are used to enforce the provisions of Sections 65A and 65B of the Act. John Doe Orders passed by various Courts are discussed hereunder:

Tej Television Limited v Rajan Mandal

The Plaintiff in this case[45] launched 24-hour exclusive sports channel "Ten Sports". It was stated to have rights to some of the major sporting events and exclusive rights to broadcast the World Cup Football in 2002 which commenced in Japan-Korea. In this case, the Delhi High Court for the first time passed an ex-parte interim order allowing the plaintiff to search and seize equipment and devices of unknown defendants. The Court noted that due to the unique nature of

44 Nikieta Aggarwal, "What are John Doe Orders and in which situations they are granted", *available at:* https://blog.ipleaders.in/john-doe-orders/ (last visited on Jan 04, 2020).

45 [2003] F.S.R 22.

cable piracy, it is impossible to enforce such rights. Finding out specific cable operators would lead to enormous loss of revenue to the plaintiff. Thus, the Court while exercising its powers under section 151 of the CPC, passed the John Doe order which is internationally recognised principle in other foreign jurisdictions. This case provided the recognition to John Doe orders in India. After this order, the other Courts used the similar premises to protect the rights of the creator of the intellectual property.

ESPN Software India Pvt. Ltd. v Tudu Enterprise

In this case,[46] the plaintiff was sole and exclusive distributor of three paid channels namely ESPN, Star Sports and Star Cricket channels having obtained the exclusive license from ESPN Star Sports for all ICC events till the year 2015. The defendants used the transmitted channels of plaintiff and showed events to their subscribers and thereby, damaging the rights of plaintiff under the Copyright Act, 1957, the Cable Network (Regulation) Act, 1995. It was alleged that the unauthorized cable transmission of the plaintiff's channel shall result in irreparable loss and damage to the plaintiff including subscription loss as well as advertisement revenues in addition. It would encourage other cable operators who have currently procured licenses from the plaintiff and possessed valid licenses to also transmit unauthorized signals without making necessary payments. The Delhi High Court restrained the defendant's from distributing, telecasting and broadcasting/ rebroadcasting or communicating in any other manner to the viewing public/subscribers either by means of wireless diffusion or by wire or in any other manner the ICC Cricket World Cup,2011 being telecasted on the STAR Cricket, ESPN and Star Sports channels or infringing the copyright/ re-broadcast right of the plaintiff by downloading any other channels not registered under the downlinking guidelines.

Reliance Big Entertainment v Multivision Network (Singham Case)

In this case, the Plaintiff/ Producer of the film apprehended that the movie 'Singham' will be copied and DVDs/ CDs will be prepared and distributed in the market and will also be shown in the TV by the cable operators causing huge financial losses to the Plaintiff. The major contention was that copying and distributing the film on CDs/DVDs/Blue-ray discs/VCD etc. by such unscrupulous persons was noticed in respect of new releases in the recent past. It was found that 'John Doe' practice may have to be resorted which is well recognized not only in United States of America, Canada, England, and Australia but also in India. The Delhi High Court restrained defendants and other persons from communicating/ making available the movie 'Singham' in any manner without proper license from the plaintiff which would infringe the plaintiff's copyright in the said cinematograph film Singham through different mediums.

UTV Software Communications Limited v Home Cable Network Ltd. (7 Khoon Maaf & Thank You)

In this case,[47] the plaintiff invoked the inherent power of Delhi High Court in this case under Section 151 of the CPC restraining the defendant's from infringing the copyright under

46 MANU/DE/1061/2011.

Sections 14(1) and 16 of the Copyright Act, 1957 for its movie '7 Khoon maaf' and 'Thank You'. The Plaintiff placed reliance on the internationally adopted practice obtaining in USA, Canada, UK, Australia, and other jurisdictions as well as the obligation of India under the TRIPS agreement to effectively enforce IPR rights of parties. The Court granted an interim injunction called 'john doe' order under Order 39 Rule 1 and Rule 3 of CPC, 1908 and restrained the defendants from telecasting the pirated version of the films '7 Khoon Maaf' and 'Thank You'.

Reliance Big Entertainment v Jyoti Cable Network (Bodyguard)

In this case,[48] The Reliance Entertainment obtained John Doe order from Delhi High Court for the film "Bodyguard" starring Salman Khan. In this case, a suit was filed against unknown persons to protect their rights in the movie 'Bodyguard' with an apprehension that these persons would display the movie on the internet in an unauthorised manner. Twenty defendants, whose names and identity were unknown to the plaintiff, were named as Ashok Kumar. The Court passed order against unidentified persons restraining them from indulging in such act and asked the police to assist the film production companies to curb piracy without any norms or guidelines.

Balaji Motion Pictures Limited Case (A Flying Jatt)

The producer of the movie moved Madras High Court for a John Doe Order against known and unknown persons who may illegally host the contents of its copyrighted film A Flying Jatt. In this case, The Court directed the Internet Service Providers to block such sites within a period of 24 hours of receipt of information on infringement from the film producer. The Court also restrained cable operators and unknown persons from camcording/ recording and making copies of the film before or after its release.

Balaji Motion Pictures v BSNL(Great Grand Masti)

In this case,[49] Plaintiff appeared before the Court to grant a John Doe order for the blocking of approximately 800 websites containing pirated copies of the movie 'Great Grand Masti'. The Bombay High Court restrained the intermediaries and cable/DTH operators from making any broadcast of this film without a specific written authorisation from the Plaintiffs. The Court had also set out the protocol for the execution of John Doe orders against the ISPs, wherein the plaintiffs were directed to serve a public notice stating the brief of the case and order passed by the Court to the defendants. It was held that the objective is to provide "sufficient service" to the defendants allowing them a period of four days to apply against the grant of injunction. Similarly, in the case of Yash Raj Films v. BSNL, Sultan, the Bombay High Court was confronted with a prayer by the Plaintiff for the grant of interim injunction to block the websites containing illicit download links of the movie 'Sultan'. The Court adopted the same approach followed in Great Grand Masti Case.

47 Order dated 04.04.2011 passed in C.S.(O.S.) No. 821 of 2011.

48 CS(OS) 1724/2011.

49 2016 (4) Bom CR 485.

Eros International v BSNL(Dishoom)

The Bombay High Court, in this case,[50] denied John Doe order in the matter of Bollywood movie 'Dishoom' to block URLs that allowed illegal download of the movie on various unauthorised web links. The Court instructed the copyright holders to verify and authenticate the allegedly illicit links prior to requesting their blocking. It was held that for the enforcement of Order 39, Rule 1 of the Code of Civil Procedure, the Plaintiff is required to submit all the material before the Court.

UTV Software Communication Ltd. v. 1337X.TO (Mission Mangal)

In this Case,[51] the Delhi High Court passed a landmark judgment against film piracy by issuing dynamic injunction against rogue websites. The major issue was concerning the distribution of movie "Mission Mangal" by making the copies available to the public for viewing/ downloading. The Court found that the right holders need not go through the time consuming process of a judicial order for issuing blocking orders to Internet Service Providers (ISPs). The Court allowed the plaintiff's to approach the Joint Registrar of Delhi High Court to extend an injunction order already granted against the website to another similar "mirror/ redirect/ alphanumeric" website containing the same content as of the already blocked website. The Court also directed the Department of Telecommunications and the Ministry of Electronics and Information Technology to issue a notification calling upon internet and telecom service providers to block access to the rogue websites which the Plaintiff notified as illegally transmitting or broadcasting the cinematograph film "Mission Mangal".

Warner Bros. Entertainment Inc. v. http://www2.series9.

In this Case,[52] plaintiff, a US based entertainment Company filed a suit to block online streaming websites namely tamil rockers, eztv, katmovies, limetorrents, skymovies, MP4movies and online watch movies for allegedly streaming and distributing video content produced by production houses including Warner Bros, Universal, and Netflix. The Delhi High Court ordered the Internet Service Providers (ISPs) to block user access to the URLs and IP addresses of these websites. It also ordered the Department of Telecommunications (DoT) and MeitY to suspend the domain name registrations (DNR) of these streaming websites.

This is not the end of the story. There are huge number of websites on the internet that are readily available for downloading free movies. These include Filmywap, Todaypk, Bolly4u, Tamilrockers, MovieRulz, WorldFree4u, 9xMovies, Movie Rush etc. Most of the websites have been banned by the Government of India but they remain online by changing domain name extension on a routine basis which can be addressed via proxy sites leading users to the website. These websites hurt the revenue of the movie industry as the creators of the content do not get compensated for since the users of these websites do not visit theatres to watch movies that are

50 C.S. No.620 of 2016.

51 2019(78) PTC 375(Del).

52 CS(COMM) 400/2019.

available on these websites. As per the information available in public domain, there is a list of movies that were pirated in the year 2019 which includes Arjun Patiala, Judgmental Hai Kya, Super 30, Article 15, Kabir Singh, Bharat, De De Pyaar De, Kalank, Kesari, Gully Boy, Ek Ladki to Dekha to Esa Laga, Manikarnika, Uri, The Accidental Prime Minister etc.

Recently, Irfan Khan's movie **Angrezi Medium**, which is a sequel to 2017 film Hindi Medium was leaked by online by Tamilrockers. Despite the existing laws on Piracy, the violators leaked the content hours before it was released. Even after blocking the URLs, which could also be accessed through proxy servers, a high definition quality was made available. Similarly, the notorious Piracy website targeted Anurag Kashyap's film **Choked: Paisa Bolta Hai** produced by Netflix in collaboration with the production house Good Bad Films. The movie had fallen prey to online piracy of content by Khatrimaza, an illegal website which does piracy of digital content by uploading content on its illegal website without any copyrights. It is known to have pirated several movies in the past too. These websites encourage illegal online piracy. It is evident that such websites make it easier for people to watch movies illegally on a website rather than viewing it on the platform in which it was released or made available.

Exhaustion and Digital Piracy: Newly Emerging Challenges

The Doctrine of Exhaustion is as old as the copyright itself. It implies the termination of exclusive economic rights of the IP holder once the protected goods are brought in the market for the first time. It means, after receiving royalty from the first genuine sale through legitimate channels, he cannot control any subsequent transaction related to the same set of goods. This doctrine aims to make a balance between the public interest and private interest which is the very object of the IP rights. In contrast, the purpose of Digital Rights Management is to prevent the wrongdoer from circumventing the technological measures enabled by the owner. If he acts in violation, he shall be made punishable to the extent prescribed under the Act.

Various concepts as defined under the Copyright law are interrelated to each other and cannot be studied in isolation. The interrelationship between exhaustion and DRM implies that they both run parallel to each other but never intersect. It signifies that exhaustion is applicable in theories, but when it comes to its applicability in digital arena, it is restricted by the 2012 provisions enabling the copyright holder to invoke the provisions as mentioned under the Act.In this background, significant drawbacks of the Copyright Amendment Act 2012 in the light of exhaustion can be highlighted as under:

Narrow Scope

The amendment seeks to bring the existing law at par with the technological advancements. However, the same fails to bring in certain important aspects which are significant in the emerging copyright world especially exhaustion in the digital context. The amendment does not appreciate the significance of exhaustion which has no boundaries under the Copyright law. It is, therefore, difficult to understand the difference between exhaustion and the DRM provisions in the digital

world wherein the former puts a bar on the economic rights of the copyright holder and the latter enables him to stop the wrong doer from re-distributing the protected work.

The Right of Reproduction

The exclusive economic rights of the copyright holder are mainly the right of reproduction, distribution, adaptation, translation, communication of work to the public etc. The Right of reproduction can be described as the most significant as compared to other economic rights because most of the copyright infringements happen when the reproduction of protected work takes place through illegitimate means. For the purposes of exhaustion, the present law does not describe the scope and extent of 'reproduction' in the online digital world when the protected work in transferred online. The "medium" of transfer for the purpose of defining what reproduction is, in varied forms is conveniently forgotten in the changes brought under the Act.

Exhaustion of Rights

The traditional copyright law differentiates between economic and moral rights of a copyright owner and provides a set of rights separately falling under these two categories. The period of protection provided for economic rights is sixty years after the lifetime and moral rights can be enjoyed for an indefinite period without any bar to number of years. The intention of the legislature while categorising these rights under separate heads clarifies that the purpose is to limit its application to the physical forms of transfer. Economic rights get exhausted at one point of time whereas there is no exhaustion of moral rights under the copyright regime. The difference between 'physical' work and a 'digital' work for the purposes of exhaustion of rights can hardly be found in the existing law which is significant for the purposes of first sale doctrine because of inherent differences between the two.

Conclusion

The Bollywood movies are, without any doubt popular across worldwide. However, the overseas revenue constitute only 8% of the industry's turnover because the pirated version of sizeable volume of Bollywood content is consumed overseas.[53] As per the data available on The Hindu in Article titled "Bollywood's biggest piracy khiladis", the top 10 Hindi movies downloaded and shared in P2P networks between 1/1/2018-6/30/2018 are:

Rank	Hindi movie	No. of file sharers	Days in report
1	Padmaavat	7,355,459	157
2	Tiger Zinda Hai	6,326,500	181
3	Sonu Ke Titu Ki Sweety	5,265,881	128
4	Baaghi 2	5,234,496	93

53 Namrata Joshi, *Bollywood's Biggest Piracy Khiladis available at:* https://www.thehindu.com/entertainment/movies/bollywoods-biggest-piracy-khiladis/article24333045.ece, (last visited on Jan 05, 2020).

5	Padman	4,603,001	142
6	Raid	4,560,410	107
7	Hate Story IV	3,493,936	115
8	Pari	3,096,031	120
9	Fukrey Returns	3,044,965	181
10	Aiyaary	2,968,818	136

The Indian Bollywood industry and the concerned stakeholders feel that strict provisions are a necessary step in this regard. On the other hand, it is quite often felt that anti-piracy measures should be aimed to prevent abuse of rights in cinematographic films on a commercially exploitable scale. The recent judgment of Delhi High Court in the case of UTV Software Communication Ltd. *(Supra)* is a great step towards blocking of websites hosting pirated material by easing the enforcement procedures for copyright holders. The implementation of this decision will be seen in the future involving similar matters or when the concrete policies are formed to deal with such matters. It cannot be denied that most of the people are aware of Piracy and justify the same in the name of free use. Further developments in the future on anti-piracy and making the content easily available to the people may lead to less violations.

Collaboration from across various parts of the society is required at this stage. The recent example is the formation of Maharashtra Cyber Digital Crime Unit (MCDCU) which is a collaboration of cyber police and industry players like the Motion Picture Association of America, Indian Motion Pictures Producers' Association, the Producers Guild, and the Indian Music Industry (IMA). It is a pilot project which was started in August 2017, as a collaborative and strategic model by Star India and Viacom 18 to establish proactive mechanisms to suspend infringing websites. It was launched by the Cyber Cell of Maharashtra Police following directions from the Home Department. MCDCU has been set up to protect the entertainment industry from the menace of piracy. It is a first kind of initiative in South Asia where the industry and Government have been working together to protect Intellectual Property.MCDCU has been leading the way in the fight against piracy with the skilful execution of serious actions against piracy, resulting in the permanent shut down of over 200 top piracy websites with 172 million hits monthly. This effort has been praised by WIPO, and MCDCU has been emerging as one of the strongest units across the world. The US Chamber of Commerce recently honoured MCDCU with the 2019 Global Intellectual Property Champion Award.

Establishment of 'neutral IP Ombudsman' as suggested by Late Prof. Shamnaad Basheer could also play a vital role in curbing Piracy. The proposed third party agency or neutral Ombudsman or Neutral Verification Agency and Ombudsman (NVAO) would not only verify the illicitness of web links, but also act as an ombudsman of sorts to resolve disputes that arise in the context of John Doe orders. This idea was endorsed by Bombay High Court in *Dishoom Case*

Piracy is illegal, it is a crime to make copies of original work and selling it online for commercial purposes. Piracy is risky because the pirated internet versions are likely to be infected with serious computer viruses which can damage user's computer system.[54] Government can play a vital role in discouraging piracy by reducing the Tax on movies watched in Cinema Halls. Ministry of Information and Broadcasting (MIB) and Ministry of Electronics and Information Technology (MeiTY) can curb Piracy of Bollywood movies by enacting laws, rules and regulations to be followed in the online medium, blocking access to sites. Internet Service Providers should also be directed to disable access to the pirated websites as per the existing laws.

The Department for Promotion of Industry and Internal Trade is vested with the power to deal with maximum laws of IP. It is high time; India must enact a separate legislation to curb online piracy in lines with the foreign laws such as STOP Online Piracy Act in the United States and The Piracy Act in the United Kingdom. These legislations restrict access to sites that host pirated content. Further, the giant digital industries should also be encouraged to build a self-regulatory regime to curb the menace of Piracy with a view to protecting online curated content.

The idea of viewing Piracy needs to be changed. The viewers of pirated material should be treated as no more but no less than the criminals of piracy. By reducing the burden on Courts by creating bodies/ cyber cells/ tribunals/ dispute resolution mechanisms for tackling piracy related disputes in a timely manner is the need of the hour. A big section of India's population cannot afford the subscription of video streaming platforms or they simply want to watch free content using internet connectivity with illegitimate means.

There are ample number of issues with the existing copyright infringement laws in India. Due to rapid growth of technology, it has become challenging to enforce these laws. The judicial endeavour in the form of john doe orders and framing guidelines from time to time has proved that it has been taking appropriate measures to curb the growing menace of piracy. But there is a need to reduce online digital piracy by creating awareness amongst people, framing new policies along with precautions. The precautions may include; removing only the pirated material instead of blocking the website in its entirety. Instead of providing a temporary cure to this problem, there is a need to change the mind-set of people viewing the pirated content which is supposed to be the root-cause of this problem. The growing challenges have shown that the existing legal framework is inadequate to deal with the online digital piracy. Implementation of new policies, better awareness amongst masses and creation of new bodies or cells could help the growing menace of online infringement of copyright.

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54 *Supra* note 9 at 226.

Women Can Make Change for a Better World: Understanding Commission on Status of Women United Nations from the Experience Earned from the Conference CSW63

Dr. Khumtiya Debbarma*

Abstract

This paper writes about the experience of the author from the conference Commission on Status of Women (CSW)63 in United Nations (UN) Head Quarter New York in the year 2019. Women from across the world came to UN Head Quarter New York to participate in CSW63to learn, share and raise issues concerning women. This conference had set holistic guidelines for the Nations across the world to be followed by the respective governments so that women in any country would be empowered. Thesite events and work of CSW has been a great platform for promoting the cause of women. This paper discusses about the work of CSW of UN and site events attended by the author herself. Meeting with the expert persons of CEDAW on issues of women, displacement and indigenous women has been shared in the paper. The guidelines and advice given by the experts of CEDAW has been explained in the paper. To make this paper elaborative and precise the methodology used has been observational, participatory which involve both primary and secondary source of data.

Introduction

The Commission on Status of Women (CSW), United Nations (UN) was set to create aplatformso that women across the globe can participate and network. The author had an opportunity and experience of attending CSW63 in UN, New York. The Asia Indigenous Women Network (AIWN) which is a network of indigenous women's organisation across Asia working for the common cause of indigenous women had supported the author to attend the CSW63 meeting. AIWN has its secretariat office at Tebtebba which is an international center for policy research for indigenous peoples in Philippines. The author having a grass root understanding on the conditions of indigenous women in her state of Tripura and the same has been documented in research paper on the topic social condition of indigenous women of Tripura.[1] The conference

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1 KhumtiyaDebbarma, Many Faces of Indigenous Women in India (Narrative of Struggles and Victory) (Unpublished book,Tebtebba, Philippines, 2019).

has been a great opportunity to share about the social and economic condition of indigenous women in the state of Tripura, India and to learn the same from other parts of the country.

The side events of CSW63 which is a side meetings of different organisations like Non Government Organisation (NGO), Researchers and Academic Institutions related to number of issues on women has been conducted within and outside the UN buildings. Organisations in CSW meeting organised the side events to raise the issues on women for its awareness, advocacy, alliance with institute, governments, NGO, etc. The author had a privilege to attend few of the side events like FIMI.[2] The discussion of the side event also would be discussed in this paper.

The Convention on Elimination of all Forms of Discrimination against Women is a Convention to advocate for the rights of women. It has been described as the United Nations' landmark treaty in the struggle for women's rights.[3] It has helped advance women's rights worldwide. It can be a powerful tool to promote gender equality, true acceptance and actual implementation of the rights and protections contained in CEDAW.[4] There are many article provided in the Convention like women living in the village under Article 14, equality in Article 3, *etc*. To make the article come to its proper implementations an expert to interpret each article is made and appointed. The Chairperson of the CEDAW, Vice Chair and many other experts are appointed to see to its interpretation, implementation, documentations, advocacy, *etc.*

The Vice Chair of CEDAW, Banda Rana from Nepal who has been unanimously elected during the 72nd CEDAW session in Geneva on February 18, 2019, who is also an expert in Article 5 of CEDAW and her meeting with the indigenous women group has been discussed in the paper. Her explanations and advice on CEDAW has been much helpful for organizations in advocacy.

The paper highlights about Indigenous Women Forum of North East India (IWFNEI) which is a forum of indigenous women's organisation's network in North East India advocating for the rights of indigenous women. The Borok Women Forum (BWF) is also discussed in the paper as it is an indigenous women organisation working on the issues of indigenous women in the state of Tripura, India.

The methodology used for this paper is both primary and secondary data. Primary data relates about the experience of the author during the conference on CSW63. Along with the discussion on various points in the paper like for example side events of CSW63, CEDAW's expert sharing, *etc*, suggestions are also made at the end of the paper. In the secondary data I have included information from the literatures related to conference CSW of UN.

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2 It is a network of indigenous women leaders from Asia, Africa and the Americas.

3 Marsha A. Freeman, ChristaineChinkin, Beate Rudolf (eds.),The UN convention on the elimination of all forms of discrimination against women: A commentary(Oxford University Press, New York, 2012).

4 Linda M. Keller, "The convention on the elimination of discrimination against women: Evolution and (Non) implementation worldwide"T. Jefferson L. Rev. 27, 35, (2004).

Commission on the Status of Women Sixty-Third Session (CSW63)

The Commission on the Status of Women Sixty-Third Sessionwas held in United Nations Head Quarter, New York from 11th to 22nd, March, 2019. The main theme of the CSW63 is "Social protection systems, access to public services and sustainable infrastructure for gender equality and the empowerment of women and girls" CSW is dedicated fully for the promotions of gender equality and empowering women across the world. The commission was established by ECOSOC resolution 11(II) of 21 June 1946 with a mandate to prepare recommendation on promoting women's right in political, economic, civil, social, and educational fields. It has the responsibility of monitoring, reviewing and appraising progress achieved.

The United Nations entities, representatives of Member states and non-governmental organisation in consultative status with ECOSOC gather very year at the UN Headquarters in New York for the Commission's gathering. It is usually held for ten days in Marchand it provides an opportunity to review progress towards gender equality and the empowerment of women. It also provides opportunities for policy makers, researcher, advocates and activists to network and strategize, mobilize and plan new initiative and actions to further the cause of gender equality and women's empowerment.

Side Events in CSW63

CSW63 has been for ten days and it has included a ministerial segment with round tables and other high-level interactive dialogues, a general discussion, as well as interactive and expert panel discussions. Many side events were organized by stakeholders to draw the attention to critical aspects of work on gender equality.

Side events[5] had taken place during the CSW63 session both within and the outside UN buildings. The entire side events are related to safety, welfare and promotion of women in particular. The author had attended a few of the side events where ever possible in a short time of four days of the session though CSW is for two weeks. The author would only discuss on the side event of FIMI because this has been the issue of the author's advocacy on the rights of indigenous women in particular.

Side Event of International Indigenous Women's Forum (FIMI)

FIMI is a network of indigenous women leaders from Asia, Africa and the Americas. Its main mission is to bring indigenous women leaders and human right activists from across the world to build capacity, to coordinate agendas, and to develop leadership roles. FIMI encouraged indigenous women in decision making process and its participation at the international level, with the assurance to be consistent and serious inclusion of indigenous women perspectives in all discussion regarding human rights at all level.

During the sides event CSW63 of FIMI many issues were discussed by the members of FIMI such as its achievements, struggle and future work of FIMI. The discussion on Asia was

5 United Nation Women, available at: http://www.unwomen.org/en/csw/csw63-2019 (last visited on May 25, 2020).

shared by Ellen[6] from the Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education), Philippines. She has firstly shared the good news about two human rights activist who has been falsely accused in their country by the state.

Joan Carling who is a human right activist and environmentalist along with Victoria Tauli-Corpuz who is the UN Special Rapporteur on indigenous peoples had been falsely accused as doingterrorist activities against the government in Philippines. This accusation was made clearly in retaliation for their invaluable work defending the human rights of indigenous people worldwide. After much struggle and fight against this fault accusation both of them has been proved innocent by the court of Philippines.

Ellen also related about Asia indigenous women network (AIWN), where a number of organisation in Asia are part of the network for the common advocacy of indigenous women across Asia. Marginalised in development process and exclusion from decision making process are some of the common problems in Asia's indigenous women. In India she related about the citizenship's amendment bill and how it would severely affect indigenous peoples in India. Bina Laxmi[7] from Manipur Women Gun Survivors Network said that the bill is completely unconstitutional and against the principle of indigenous peoples in India. Many people in India had been detained and arrested especially youths and leaders for protesting against citizenship's amendment bill.[8]

Discussion with expert Person on Convention on Eliminations of Discrimination against Women (CEDAW)

Convention on Eliminations of Discrimination against Women is a Convention stating the basic and principal rights of women. CEDAW has 23 independent experts on women rights monitoring on elimination of discrimination against women. During UN CEDAW session each member states who are party to the treaty has the responsibility to submit the report on how the Convention has been implemented in their respective countries. The report of each member state is considered during the session of the committee, and recommendations are made in the form of the concluding observations.[9]

Bandana Rana[10] (BD) who hail from Nepal is Vice chair of CEDAW with charming personality, understanding, excellent orator and most importantly passionate about her work. Meeting her was indeed a good learning experience. In the side event of CEDAW BD has spoken about various issues relating to women. She has spoken about the Beijing Declaration on

6 Human Rights Defenders from Philippines.

7 From Manipur Women Gun Survivors Network.

8 Samiya Latief, "What is citizenship law and why people are protesting against it" Times of India, December 17, 2019. Bikash Singh, "ET Bureau, Protests in Northeast against Citizenship Amendment Bill" The Economic Times, November 19, 2019. Debraj Deb, "Tripura: 200 detained for CAA protest, warn of strike if no outreach from Centre" The Indian Express, January 7, 2020.

9 Convention on Eliminations ofDiscrimination against Women, available at: www.un.org/womenwatch/daw/cedaw (Last visited on May 29, 2020).

10 Women activist and human rights defender.

the rights of women, states accountability to submit the report on the situation of women in respective countries who had ratified CEDAW conventions. She also shared her personal story as a youth. As a young Journalist she thought her role was just to report and publishes it. But with time she had realised that one can also intervene, speak out, stands for justice and even much beyond that.

Pre meeting with expert Person on Convention on Eliminations of Discrimination against Women (CEDAW)

The meeting with the CEDAW Vice Chair was arranged by Elina Horo[11] and Senele[12]. Both of them are social activist and advocates for the rights of indigenous people. They were thoughtful and wanted our indigenous women team to have an interaction with CEDAW expert Bandana Rana. We were thirteen indigenous women hailing from India, Nepal, Philippines, Thailand, Bangladesh, Myanmar and Denmark.

In the discussion women of India had decided and agreed to take up only one issue for the submission of CEDAW report 2020 that is *"Displacement of Indigenous Peoples and its affect on indigenous women in India"*. We had our preparation and issues discussed on displacement and indigenous women among ourselves before CEDAW expert[13] whocame for meeting. In order to represent our issues in time and interact with BD, Senela and Elina have helped us to coordinate and organized us. The countries' representative indigenous women interacting with BD were from India, Nepal, Philippines, Thailand, Bangladesh, Myanmar and Denmark

Displacement and effect on Indigenous women in North East India

The displacement and effect on indigenous women in North East India has been shared by the author herself[14]. It was an opportunity to highlight the issues of indigenous peoples, especially indigenous women and displacement. In a very short time brief highlight on the issue of displacement and indigenous peoples in North East states' of India has been made.

Firstly, the issue of displacement in relation to indigenous peoples especially women has been the presentation with the state of Arunachal Pradesh where more than hundreds of hydroelectric dams would be constructed. Many hydroelectric dams had already been constructed in the state of Arunachal Pradesh. These dams had submerged many indigenous villages and displaced a number of indigenous peoples living in the village. The victims of displacements receive just a mere compensations and quite a lot of families did not receive any compensation. It was observed that indigenous women, children and aged people have been the most vulnerable in the process of such displacements cause by hydroelectricity dams in Arunachal Pradesh.

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11 Who a social activist and advocate for the rights of indigenous people from India, Executive Member on Indigenous Women Rights, Asia Indigenous Peoples Pact (AIPP), Thailand.

12 Senior Advisor to International Working Group on Indigenous Affairs (IWGIA), Denmark.

13 Vice Chair Bandana Rana.

14 Khumtiya Debbarma.

Secondly, in the state of Manipur the displacement of indigenous peoples due to development projects were just irreparable. It was observed that the state of Manipur without free, prior and informed consent from the indigenous peoples had been taking their land for development projects. One of the examples of such displacement is the construction of Mapithel Dam reservoir where many indigenous peoples have lost their lives. It was also estimated as of 2018, 16 people had been drowned in the reservoir besides being displaced and villages being submerged under water.

Thirdly, in Mizoram, the state suffers from climate change especially during monsoon period. In this season there are severe landslides leading to fall of hills and collapse of houses. This severely affected people by making them homeless and loss of human lives. Urgentmeasures and steps is needed by the state of Mizoram to face any type of climate change disasters.

Fourthly, in the state of Sikkim climate change and constructions of hydroelectricity dams has been a major social problem. This constructed hydroelectricity dams had been submerging villages under the water. The people living in the village were also displaced with hardly any compensation to rebuild themselves.

Lastly, the displacement of indigenous peoples in the state of Tripura was discussed. Displacement due to development projects has been serious issues of concern as indigenous peoples hold their land as per their customary land holdings. The indigenous peoples were denied of compensations as per the laws because they do not have the modern legal title to their land. The Dumbur hydroelectricity dam which is built by the state of Tripura had displaced more than 70,000 indigenous peoples. These indigenous peoples were denied of any compensation because they could not produce modern legal title over their ancestral land. They had to rehabilitate themselves on the hilltop. They started practicing Jhum[15] cultivation on the hill top for rice grains and vegetables. This Jhum cultivation requires burning of bushes on the targeted hills for farming. Due to this burning done for cultivation the displaced indigenous peoples were held responsible for environmental degradations. Some of these displaced indigenous peoples had to move to neighboring states like Mizoram and Assam for their self settlement along with their families. Many of the displaced people who went to shelter in Mizoram had returned back to their own state Tripura and are now at present internally displaced. Neither the state of Tripura nor Mizoram acknowledge them as their state's persons. They had been violated of their citizenship's rights as Indians by being denied voter identity cards by both the sates.

Expert Person's sharing on Convention on Elimination and Discrimination against Women

The CEDAW expert Bandana Rana has been sharing her views on indigenous peoples in relation to CEDAW freely. Many of the important things in CEDAW were shared by her and most importantly on how to submit CEDAW report by organisations on rights of women and its violation.

15 Shifting cultivations.

As submitting of a CEDAW report requires great skills and research. One needs to beaware of all requirements needed for submitting the report. One of the important tips of the report is that it should not be a long report and it should be concise. Report should only highlight important points with less explanation. Detailed explanation is required to be kept as a reference or as an annexure at the end of the report.

In the UN as the CEDAW official staffs had filled with muchin formation of the world. Hence, official staffs of CEDAW have less time to go into details of the report that is submitted by the organisations and people. To ensure CEDAW staffs at the UN to read the report and to take immediate steps on issues submitted, and the report needs to be brief and short as possible. The report should contain an article number and name at the very beginning. The article name and number highlighted is said to be the main title of the detail report.

BD who is an expert on CEDAW had explained that she is expertise in Article 5 of CEDAW and also expert on situation of women in conflict area. Incase indigenous women plans to submit report on this article 5 of CEDAW she ensures her help and even she can extent for references on other experts of CEDAW.

BD also shared about the concluding report by CEDAW. This concluding report is made at the end by the CEDAW office. One can see if their issue has been incorporated and highlighted in the report for their respective states to take actions. A recommendation by the office is always sent to the states to improve the situations and justice in their respective countries.

BD has also pointed out her observation that indigenous peoples lack proper coordination among themselves when it comes to advocacy and presentation of their rights. In asserting the rights of indigenous peoples one needs to have good coordination among them at first.

She hadadviced that for the good presentation of report in the UN during the CEDAW report one need to choose a person who can highlight the issues of indigenous peoples in a clear and brief way. In the UN the time given for civil societies is only for five minutes. This five minutes time requires clarity and brief presentation. If a person is good in presentation that person should be given the chance to present. The presentation is not a matter of chances but about clarity and briefness of the issues.

Few questions asked to the expert person of CEDAW

The author was keen to know about how CEDAW responses to indigenous peoples in asserting their rights? Few questions were asked to the CEDAW expert. The questions were, do CEDAW intervene to the displacements of indigenous peoples caused by development projects across the globe, for example in North East India? Second question was when there are big human rights violations against the indigenous peoples specially against indigenous women do CEDAW intervene immediately on such injustice after receiving the report from the indigenous' organisations?

The answer given by BD was that CEDAW usually do not interfere in the small and petty local issues of the states. CEDAW only intervene on matter which is of bigger issues concerning

humanity and attract attention of the whole world.When there is a crime concerning mass humanity in any nations the CEDAW office directs the nation where such violation has occurred to send a report of the violations and demands additional report within six months and further report when ever required. Report sent by the nation is the detail statement of the incident of violations along with steps and measures taken by the nation it help improve the situation of justice on the said violations. One of the examples quoted by BD is the Rohingya displacement in Myanmar where CEDAW had directly intervened in the matter and directed the authority of the country to send a report immediately and additional report was also asked regarding the situation of improvement of the people violated.

Conclusion

CSW63 is a session of the UN made towards attainment of global gender equality and empowering women. The main theme of the session has been for social protection of the system, access to public services and sustainable infrastructure for gender equality and the empowerment of women and girls. The session concluded well with its agreed outcome with the priority theme. The outcome of the document aims to accelerate implementation and dissemination to the public so as to encourage follow-up actions towards women empowerment and equality.

The side events of CSW63 were enriching with updated information on the issues of women across the world. At the end of every side events few minutes were always given for interactive discussion. During this interactive discussion women activist always made a point so that their issues get highlighted and asked for more clarity of the issues presented by the presenters in the side events. The side events observed by the author on indigenous peoples FIMI sets up a point for indigenous peoples to be recognised as an ethnic identity.

Meeting with CEDAW expert Chairperson has been worth learning. The detailed explanation on how to submit and present CEDAW report was done in a very short time. Many questions were also raised relating to gender equality and vulnerability of women during displacement due to development projects. The expert understood the questions asked by indigenous women and answered in a simple way. One very important advice she has given to indigenous women is that one need to be visible in the UN and a good coordination is required to raise the voice of indigenous peoples.

UN CSW is a good platform in raising the voice of women across the globe. There should be more awareness regarding CSW for the improvement of women especially among grassroots communities. Women from all sections, communities and especially grassroots should be encouraged to attend the meetings of CSW. More research on village women and indigenous women should be taken up. Holistic research would help create good policies for the states to empower village women.

Asian Indigenous Women network is a network of indigenous women across Asia in advocating the rights of indigenous women. TEBBTEBA is a research institute in Philippines and where AIWN has its secretariat in Philippines. The author is grateful to AIWN and TEBBTEBA for an opportunity given to attend the CSW63. AIWN and TEBBTEBA had supported and taken care of logistic and technical matters for the author.

Copyright in Cinematography and Rationale of Royalties in Music Industry

Neelesh Shukla*

Abstract

The fundamental problem with the Indian Copyright Law is not that it is flawed but that it is not always followed. The 2012 Amendment Act's good intentions are not debatable. It covers a range of issues relating to the film and music industry, and clearly intends to alleviate the condition of "non-powerful" individuals working in the industry. Whether it will achieve this aim without there first being a deluge of litigation to interpret the provisions of the 2012 Amendment Act is an open question. The attempt through this paper is to analyze the provisions related to the ownership and assignment of copyright regarding a cinema tograph film and in the context of changing mode of communi cation technologies. It also discusses as to how it tackled the problems emerged in ownership, assignment and license of copyright, the adequacy of these provisions in effectively protecting the rights of the author and performer & tries to balance the rights of owner of copyright vis-à-vis public interest and also the role of judiciary in effectively protecting these rights. Under the practice which was prevalent before the 2012 amendments, the music composer and the lyricists were not given any royalties which accrued owing to subsequent use of that particular work. Once the producer and lyricist/ composer entered into the contract, they were paid just the contractual amount and the profits were enjoyed only by the producers. This article focuses primarily on how the improvements made in relation to licensing and assignment of work are relevant for the Cinematography producers on one hand and the lyricists & music composers on the other. Also explained is the rationale behind division of royalties between the Producer, lyricist and musical composer.

Introduction

Before copyright protection is granted, the first thing to be considered is the ingenuity of the work. This means that the work should have an author and certain level of creativity. Though,

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the registration of copyright is not necessary, nevertheless the creator of any work will be considered to be the first author. According to Sec. 17 of Indian Copyright Act, the author is considered to be the first owner of the copyright work.[1]

The Bern Convention does not define the term "author" but it implies that the person or creator of any work should always be the author of the work.[2] On the other hand, the Indian Copyright Act defines the term "author" in respect of different works but it has a lot of ambiguities.[3]" This area of law becomes quite complicated in the context of improving technologies related to recording and broadcasting, especially when the work is done in the course of employment of the author."

Every time a new technology emerges, different modes of communication arise simultaneously and the exploitation of the copyright by way of assignment and licensing may add monetary benefits to the copyright owner and the provisions of licensing and assignment come into picture. The amendments to the Copyright Act have taken care of such provisions but the role of judicial interpretations cannot be neglected for effectively protecting the rights of the authors.[4]

The paper attempts to analyze the provisions of assignment and ownership of rights relating to cinematography film. The paper also discusses the adequacy of these provisions relating to assignment and licensing in effectively protecting the rights of the author and performer. Also, it tries to create a balance between the rights of the owner of copyright *vis-à-vis* public interest. In the last section, a brief analysis has been made as to the rationale behind fixing the rate of royalties by various music and cinematographic societies.

Assignment of Copyright and Licensing: Meaning

"Copyright Assignment" and "Licensing of copyright" are two different types of contracts which are involved in the exploitation of a copyrighted work by a third party. Licensing is a '*contract of authorization*' to use a work by a third party, without which the usage would be considered to be an infringement. Licensing usually involves the authorization for usage of some of the original work, and not complete duplicity. On the other hand the assignment is considered to be the disposal of the whole copyrighted work.[5]

Coming to the difference between both, in the cases of assignment, the assigner usually transfers the ownership of the work to the assignee but in case of licensing, the specific interest, not the ownership, in the copyrighted work is transferred. Also, a licensing agreement does not confer any substantial right on the licensee or against the licensor; but in case of "exclusive

1 Section 17, Indian Copyright Act (1957).

2 N. C. Suhl, "Moral Rights Protection In The United States Under The Berne Convention: A Fictional Work" 12 Fordham Intell. Prop. Media & Ent. LJ 1203 (2001).

3 Julian Rodriguez Pardo, Copyright and Multimedia 120 (Springer, Netherlands, 4th ed., 2010).

4 Ishita Chatterjee, Copyright Law 144 (Central Law Publishing,Prayagraj, 3rd ed., 2019).

5 Robert W. Gomulkiewicz, Xuan-Thao Nguyen, Danielle M. Conway, Licensing Intellectual Property: Law and Application 96 (Aspen Publishers 4th ed. 2018).

licensing agreement", the licensee has substantial rights against the licensor under which he could even sue the licensor.[6] And according to Section 30 of the Indian Copyright Act, if the licensee in any '*future work*' dies before the work comes into existence, his legal representative shall be considered to be entitled to such work.[7]

Unless the assignor joins the assignee as a party in the infringing suit, the assignee can't take any action against the infringement of copyright by any third party.[8] But any purchaser who has purchased a copy of work in good faith and for the value of the owner's interest , without notice to the licensee, will remain unaffected. The assignee however would have the right to sue the assignor if the former does not protect his right or interest in the property. Usually, the licensee has some right to make changes in the work so far as his license expressly states. But, a failure to make payment in the royalties will give licensor a right to revoke the license.

After the assignment contract, both the assignor and the assignee will be treated as the owners of their respective rights.[9] The owner of the copyright has the option of either transferring the whole copyright or to transfer rights partially. And in case the owner chooses the latter, i.e. partial assignment, then the assignee will have the copyright over the work assigned and the remaining part will be held by the assignor.[10]

Mode of Assignment

It is the prerequisite that the assignment contract be in written form, along with the signature of both the parties (or their authorized agents). The contract needs to specify the particular work, the rights that are being transferred, the time duration for which the assignment is being done, the territorial extent of such assignment, the rate of royalty which has to be paid by the assignee and at what interval(s) it has to be paid to the author. In case the period for assignment is not mentioned in the contract, it will presumably exist for a period of 5 years. Also**,** the territorial extent should be limited to India only. If the assignee does not start exercising this right within one year from the date of grant, it shall be deemed to have lapsed unless the contrary is stated in the assignment contract.[11]

Assignment of Future Rights in Copyright works

The owner of the work has the right to transfer the copyright either wholly or partially that subsists in any existing or future work.[12] But if it is the case of assignment of any work which does

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6 Jacques de Werra, "Can Exclusive Licensees Sue For Infringement Of Licensed IP Rights: A Case Study Confirming The Need To Create Global IP Licensing Rules" 30 Harv. JL & Tech. 189 (2016).

7 J. S. Nair, "Who Is The Author From Among Them All? - Film Authorship In India" 28 Cochin University Law Review, 119 (2004).

8 ShyamkrishnaBalganesh, "Copyright Infringement Markets" 113 Colum. L. Rev. 2277 (2013).

9 Mira Teresa SundaraRajan, Copyright and Creative Freedom: A Study of Post-Socialist Law Reform 48 (Routledge, 1st ed., 2014).

10 Shemaroo Entertainment Ltd *v.* Amrit Sharma and Ors,2012(52)PTC325(Del).

11 V. G. Sitapati, "Conferring Moral Rights On Actors: Copyright Act And Manisha Koirala Case" 38 (14) Economic and Political Review (EPR) 1361 (2003).

12 Indian Performing Right Society *v.* Aditya Pandey &Ors., 2012 (50) PTC 460 (Del).

not exist, then the assignment will come into effect only when the said work comes into existence. When new rights are granted by the legislature on existing works due to technological development, a problem arises regarding the ownership of the new rights, i.e. whether the assignor, who already assigned all the existing rights on the work, or the assignee is the owner of the future rights.[13]"

Assignment and Licensing of Rights of A Cinematographic Film

In general terms the "first owner" of any work is considered to be the "author" of the work with respect to his creation.[14] However, there are certain circumstances where the first author will not be considered the author of the work. In the 2012 Amendments to the Copyright Act, the legislature has not touched upon the definition of the producer of the cinematographic film.[15] But the legislature has made a big change by adding a *proviso*[16] to Section 18 which talks about Assignment of Copyright.

This amendment to Section 18 is in stark contrast to the practices which were prevalent before 2012 amendments as per which the writers and the lyricists of the work were not given any royalties which accrued owing to subsequent use of that particular sound recording or musical work. Once the producer and artist entered into the contract, they were paid just the contractual amount and the profits were enjoyed only by the producers. This practice was based on the decision given in the landmark case of the "Indian Performing Rights Society Ltd v Eastern India Motion Pictures Association"(IPRS case)[17].

In the aforementioned matter, the Copyright Board initially held that;

> "*…composers of lyrics and music retained copyright in their musical works incorporated in sound tracks of cinematograph films and could collect fees, royalties and charges in respect of those films*".[18]

However, the decision of the Copyright Board was set aside by the High Court after the Appeal. The High Court has interpreted Sec. 17 clause (b) and (c) when read with Sec. 14 clause 4 of the Copyright Act and held that,

> *"once the music composer or lyricist has entered into a contract with the producer, the producer will become the first owner of the work and will retain the copyright as such. Providing the right to the composure or lyricist even after the transfer of the rights will defeat the very purpose of Sec. 13 and 17 and hence no copyright subsist with the composure or lyricist uncles the contrary is mentioned in the contract."*

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13 Sindhura Chakravarty, "Importance of Assignment Agreements Under Intellectual Property Laws In India" 14 JIPR 522 (2009).

14 Section 2 (uu) of the Copyright Act, 1957.

15 PaskalKamina, Film Copyright in European Union, 215 (Cambridge University Press 2nd ed., 2016).

16 "Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence."

17 Performing Rights Society Ltd *v.* Eastern India Motion Pictures Association, 1977 SCR (3) 206.

18 *Id.*

This approach of the High Court was supported by Christopher Newman and he stated;

"Once the author of a lyrical or musical work transfers his rights in the work to a producer for the Cinematograph film then later he cannot claim the infringement of his rights. Moreover, the owner of the cinematographic film, namely, the producer cannot be wrongfully said to appropriate anything which belongs to the composer of the lyric or musical work."[19]

The Calcutta High Court in case of Eastern Motion Pictures[20] also held;

"that a producer of a cinematograph film will be considered as the first owner of the work created by a composer of music or a lyricist, if there was certain consideration or reward given by the producer to such creator."

The amendment to the Act aims to protect the economic interest of the creator of such work in music or other works by incorporating appropriate changes through c*lause* (2) (d) of the 2012 Amendment Act. Other provisions which were amended for the economic benefit to the authors and composers are the additions of sub-sections (8), (9)[21] and (10)[22] under Section 19 of the Act. And these new provisions of the Act will remain effective irrespective of the fact whether the composer or lyricist were paid any consideration at the time of contract or not.

Also, the *proviso* inserted under Sec. 18 (1) protects those authors who are in a highly vulnerable state. They might not have any other option but to waive their rights to receive royalties for the work they have created. Additionally, if any work created by composeror lyricist is used in the 'sound recording' but has not being incorporated into 'cinematographic film', then the author of these works would be covered under Copyright Act which prohibits them from both, either waiving or assigning their right to receive royalties for the creativity.[23]

Copyright, like other IP Rights, is a negative right which protects any author who has put some hard work into bringing any original creation. The author can exclude all others from using the work without the proper authorization and if any usage is done to the contrary, the author will have the right against the said infringement. Also, this right is not only limited to being an economic right but also extends to moral rights. In contemporary scenario, due to rapid change in technology there are various incidents of piracy of the copyrighted works**,** which are unfortunately increasing day by day. Hence the Copyright Act should not be limited to the Indian jurisdictions only but should also be extended to foreign jurisdictions.[24]

Copyright law not only protects the economic rights of an author but it extends to even protecting the reputation and personality of an author against all kinds of mutilations, modifications

19 Newman Christopher M, "An Exclusive License Is Not An Assignment: Disentangling Divisibility And Transferability Of Ownership In Copyright" 74(1) Louisiana Law Review 115 (2013).

20 Eastern Motion Pictures *v.* Performing Rights Society, AIR 1978 Cal 477.

21 Section 19 (9) of the Copyright Act, 1957.

22 Section 19 (10) of the Copyright Act, 1957.

23 Section 34 and 35 of the Copyright Act, 1957.

24 Indian Performing Right Society *v.* Mr. Viswanathan &Anr., CS (OS) No. 2423/2007, Delhi High Court (2012).

or distortions of their work. Judiciary has played an important role in interpreting these rights so that the implementation can be proper in its real sense. In spite of providing so many rights on the paper, there is a long way to go to protect these authors against the unauthorized infringement of their work available on the internet.[25]

Present Position Post 2012 Amendments

The 2012 amendments not only brought in an extension of rights of the performers and the broadcasting organizations but also the removal of prevailing practice of unequal treatment that was being meted out to the lyricists and the music composers for their work which was incorporated in cinematographic films. Under the prevailing practices, the lyricists and the music composers used to assign all the rights of their particular work to the producer for a lump-sum amount.[27] This meant that the music composers and the lyricists were not having any right to royalty, even if their work was being utilized in mediums other than cinematography films.[27]

As could be seen, the amendments were not so much fruitful for the cinematographic film producers and various other music companies of India who used to buy the complete music rights from the authors;[28] and due to this a large number of writ petitions were filed before the Delhi High Court challenging the constitutional validity of the Amendment Act.[29] Not only the producers, a large number of composers and lyricists were also not very much pleased with the amendments, despite the fact that the amendment seemed to favor them.[30] But the problem of songwriters and the composers were very much different from that of the producers of films. The writers and composers of the regional language fraternity were not in favour of *clause 1* of Section 33 which requires them to transact licensing business only through a copyright society.

Their primary ground for challenging the amendment was that it restricted their right to license their work and forced them to join a copyright society. This, because of limited popularity of *regional language music*, harmed their commercial interests as those writers and composers would have no say in determining the distribution scheme of the royalties collected by the Copyright Society.[31]

Rationale Behind Sharing of Royalties in Music Industry

Royalty in the music industry

When it comes to royalties for songs, the industry works in a complicated manner. Every time any song is played on any medium, there are basically two types of royalties that arise; one

25 Radio Today Broadcasting Ltd. v. Indian Performing Rights Society, 2007 (34) PTC 174 Cal.

26 Zeenia Nagpal, and Achintya Kumar Singh, "Javed Akhtar-IPRS Royalty Dispute Case: The Dilemma of Mandatory Royalty Sharing" 2(2) Journal of Intellectual Property Rights Law 32 (2020).

27 *Supra* note 19 at page 110.

28 *Super Cassettes Industries* v. *Union of India,* 2015 (64) PTC 127 (Del).

29 *Bharat Anand* v. *Union of India,* W.P. (C) - 2321/2013.

30 *Devender Dev* v. *Union of India,* W.P. (C) - 2959/2013.

31 N. K. Sasan, "Rights Of The Author: Possible Extensions Under Copyright Law In India" 2(2) International Journal of Innovation and Applied Studies 112 (2013).

for the sound recording and another for the underlying works which are called performing rights.[32] In the case of Indian industry, the former goes directly to the music company or the producer as the case may be, but the latter one is intended for the lyricist and the composer. Problems arise when this latter part does not reach the desired person due to a contractual agreement between the producer and the composer, lyricist, etc.

The Indian Performing Rights Society (IPRS), and like music societies, whose job is of collecting the royalties on behalf of the publisher, producer and composers; and then distributing them after deducting administrative costs, never played their roles properly.[33] The primary reason for that is that since 1982, various film industrialists became members of the IPRS and dominated the same. They signed a memorandum of understanding (MoU) with the IPRS which states that they would share the royalty with lyricists and music composers on a 50:50 basis. But, these film producers used to enter into an agreement with the lyricists, composers, etc and made them sign away their rights.

Soon music companies took over the IPRS and told producers that they would buy music from them only if they made lyricists and composers sign away all their (royalty) rights in perpetuity and unconditionally. Since a film without music is unimaginable in the Indian industry, producers agreed to it. That is how composers and lyricists began to sign on the dotted line to survive in the industry. According to Mr. Javed Akhtar, "If any lyricist or music director refused to give away his royalty rights in perpetuity and unconditionally, he would be ostracized by them".[34]

How Royalties are shared

"There is no such authenticated proper system for the distribution of royalties, but usually there are two mechanisms followed, named "logged on" and "unlogged" mechanisms. Logged on system includes television and radio where a song is played with the names of the film, its composers and lyricists. Unlogged systems include songs played at live performances/ concerts/ ringtones, and in restaurants and other public places. The IPRS decide the royalty on the basis of the logged on system, which means that wherever a song in this system is played, it generates royalty. Out of this, the society takes 15 per cent (as administrative cost) and distributes the remaining amount. 50 percent of remaining amount goes to the producer and the remaining 50 percent is distributed to the authors or composers based upon their contribution.[35] The popularity of a song is decided on the basis of its visibility on the television and the number of times it plays on the radio. On the basis of the logged on system, it is decided as to how much it would have been played under the unlogged system."

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32 Simon Frith and Marshall Lee, Music and Copyright 113 (Edinburgh University Press, Edinburgh, 2nd ed., 2004).

33 Elyria Kemp, Chinna Natesan, Aberdeen Leila Borders, and Steven W. Kopp "Paying the piper: Performing rights organizations and their role in the retail function"18(6) Journal of Retailing and Consumer Services 492 (2011).

34 Editorial, "A Different Tune" The Hindu 13 July 2012 (available at https://frontline. thehindu.com/the-nation/article30166552.ece). (Last modified July 13,2012)

35 IPRS Distribution Rules / Scheme and Methods, available at https://www.iprs.org/wp-content/uploads/IPRS-Distribution-Rules1.pdf (last visited June 9, 2020).

Why share Royalties ?

At the time of 2012 amendment, the primary issue between the producer of film and the composer with the lyricist was in regards to the sharing of royalties for the music used in the cinematography film."Film music rights are bundle of copyrights which include synchronization right, performing rights, mechanical reproduction right and sound recording right."

I would like to cite the report submitted by Parliamentary Standing Committee[36] in 2010 and according to them; "independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of Supreme Court judgment in Indian Performing Rights Society vs. Eastern India Motion Pictures Association (AIR 1977 SC 1443) which held that film producer is the first owner of the copyright and authors and music composers do not have separate right. The Committee, however, observed that in the footnote of this very judgement, Justice Krishna Aiyar also advised as follows:"

> *"the authors and music composers who are left in the cold in the penumbral area of policy should be given justice by recognizing their rights when their works are used commercially separately from cinema-tograph film and the legislature should do something to help them".*

It was found that the composers and the lyricists were paid a lump-sum amount for the creation of their work but were not paid any kind of royalties for the further use of the same work. The Committee also pointed out that "promoting new talent is the hallmark of the film industry which gives incentives to producers as well". Hence the changes were brought under Section 18 of the Copyright Act to protect the interest of the lyricists and the composers so that in the event of exploitation of their work by restricting assignments in unforeseen new mediums. Henceforth, author of works in films will have right to receive royalties from the utilization of such work in any other form except to the legal heirs or to a copyright society and any other contract to the contrary shall be void.

Conclusion

It is indeed true that the 2012 Amendment bill was enacted to bring some structural changes in the Copyright Act of India. But, there are certain texts in the amendment which remain unclear even after thorough interpretations and analysis. Also, a lot of times the end effect of the amendment has initiated various debates. If the Copyright Act is intended to be used for a contractual relationship between the film and music industry, then the regulations should have been drafted with clear demarcation and certainty.

Instead of creating relatively clear-cut provisions which would benefit the authors of underlying works, the 2012 Amendment Act appears, in places, to create an extremely ambiguous

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36 227th Report by the Department- Related Parliamentary Standing Committee on Human Resource Development on the Copyright (Amendment) Bill, 2010, Rajya Sabha Secretariat, New Delhi, November 2010 (available at http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf last visited).

and confusing situation which is most likely to benefit those who focus on interpreting the law, and not those to whom the law would apply. Furthermore, no effective remedy has been advanced to tackle the problems arising out of the retrospective operation of the amendments and the copyrights already assigned to producers. It is logistically difficult to alter all payments already made based on existing agreements.

There also exists ambiguity with respect to the recipient of payments to be made by third parties such as music companies and whether such payment is to be made directly to authors or it is to be done by the producers. The 2012 amendment Act is well-intentioned and that is not debatable. It covers a range of issues relating to the film and music industry, and clearly intends to alleviate the condition of "non-powerful" individuals working in the industry by strengthening their position. Whether it will achieve this aim, without first being a deluge of litigation to interpret the provisions of the 2012 amendment Act, is an open question.

Coming to the question of the rationale behind such rate of distribution of royalties by the Performing Societies between the Producer/Publisher (50%), Writer/Lyricist (25%) and Composer (25%), there is no such rule which talks about the same. No legislation or regulation binds the Performer Societies to share the revenue in such a manner. The only reason for such distribution is the peer societies around the world have a similar system. Since the other performing societies around the world have an analogous kind of distribution system, hence we have adopted this system of royalty distribution in Indian Performing Rights Society.

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Environmental Hazard And Upholding Human Rights of Elderly People

Kaustav Choudhoury*

Abstract

Demographic transition is evident not only in global context but also in Indian context. Population Census of 2011 reveals that there are nearly 104 million elderly persons in India aged 60 years or above. Among them 53 million are females and 51 million are males. This article is an attempt to analyse the impact of environmental hazard posed towards elderly people and their vulnerability towards environmental pollution, as elder people are at more risk towards environmental pollution and they suffer from specific environmental pollution diseases. The research methodology adopted in this paper is purely doctrinal in approach based only on secondary sources. The world community is advocating for United Nation Convention for Upholding Human Rights of Elder Person, and, several international conventions and agreement has already been accomplished in the aspect of environmental pollution and climate change. In Indian context also, not only several policies and an Act has been enacted to uphold the rights of elderly person, but also several steps have been taken towards environmental pollution and its resultant hazard. Thus it is an attempt to analyse that were these steps sufficient to uphold stability and sustainability of human civilisation and what more steps could be undertaken towards it. The role of judiciary in upholding human rights of the elderly with reference to environmental hazard is also to be analysed.

Introduction

> *"Human Rights violations lead to Environmental Degradation and that Environmental Degradation leads to Human Rights violations"*

-Preamble of Draft Declaration Principles on Human right and Environment.

The term "*Elderly People*" or "*Old People*" can be interpreted in several aspects, such as, chronological which is based on birth date; or biological which is related to human ability; or psychological which is related to psycho-emotional functioning; or social age as related to social

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role[1], and this paper focuses only on the chronological aspect of Aging. Mere 8 percent of its population was recorded 60 years and above in 2011 Census and it is expected that this will increase to 12.5 percent and to 20 percent by 2026 and 2050 respectively. Population Census reveals that in 2011 there are nearly 104 million elderly persons (aged 60 years or above); 53 million females and 51 million males. Report released by the United Nations Population Fund and Help Age Indiasuggests that the number of elderly persons is expected to grow to 173 million by 2026. The focus moreover now a day has shifted to Healthy Aging and not treating the Elderly from Charity Perspective but as a Right based and particularly Human right based. The issue of upholding Human Rights of the Elderly People and upholding Environmental Protection is inextricably intertwined as upholding Human Rights of the Elderly cannot be done without effective and efficient Environmental Protection, as it is one of the basics aspects of theirs Human Rights. Similarly, upholding Environmental Protection results in upholding the Human Rights of all and in particular Elderly People. The term "*Gerontology*" is derived from two Greek word "*geron*" which refers to "old man" and "*logia*" which refers to "study of". It was coined by *LlyaLlyich Mechnikov* in 1903 and broadly it studies the social, cultural, psychological, cognitive, and biological aspects of aging.[2] The term "*Environmental Gerontology*" which emerged in 1930 as a branch of it, and it specialises to seek an understanding and interventions to optimise the relationship between aging person and their physical and social environment. And, thus there is a close relationship between natural environment and healthy aging[3]. Environmental Gerontology Activist's advocates for Human Rights based approach to upheld Healthy Aging.

Vulnerability of Elderly People Towards Environmental Pollution Diseases and Environmental Hazards

The Environmental Pollution Disease is broadly classified into Air Pollution Disease, Water pollution Disease, Land/Soil Pollution Disease, Food Pollution Disease and Noise Pollution Disease[4]. The Health Hazards are also divided into Physical, Biological, Chemical and Radiological[5]. The Elderly People are vulnerable to all and especially Air Pollution and it results in immediate Health Hazards such as Cardiovascular and Respiratory illness, including asthma, bronchitis, emphysema and possible cancer resultant in shortened life span and thus face severe human rights violations. They are also vulnerable to skin disease, vision related disease, hearing impairments by Noise Pollution, renal system diseases, and immunity system diseases[6]. In Indian

1 Report On Aging, Older Person And 2030 Agenda For Sustainable Development By Help Age International 21.

2 Confluence of Geriatrics around the Globe, available at "Gerontology/Geriatrics Definitions".https://en.wiki pedia.org /wiki/Gerontology#cite_note-1(Last visited on 12 November 2019).

3 *Id*.

4 Environmental Pollution diseases and its Classification, available at https://www.environmentalpollutioncent ers.org/ (Last visited on 17.05.2019 at 7:36 pm).

5 Canada's Action Plan to protect Human health from environment containments, available at https://www .canada.ca/ en/health-canada/corporate/about-health-canada/accountability-performance-financial-reporting /evaluation-reports/ evaluation-action-plan-protect-human-health-environmental-contaminants-2008-2009-2012-2013.html#a2.1 (Last visited on 17 November 2019).

6 National Centre for Biotechnology Information Report on Human Health and Environment, available at https:// www.ncbi.nlm.nih.gov/books/n/nap1293/ (Last visited on 17 November 2019).

Context, of all the total deaths in India in 207-18, 1.24 million deaths which is similar to 12.5 percent of total mortality rate is attributed to Air Pollution and in this context Disability Adjusted Life Year (DALY) denotes potential sum of years lost due to premature mortality and due to disability years of productive life lost. In the aspect of natural disaster or situations of armed conflicts also, the Elderly people are also most vulnerable as it is evident from the incidence of Myanmar(2008), and Darfur(2005).

Human Right of Elderly to Safe and Healthy Environment: International Perspective

The United Nations Stockholm Declaration on the Human Environment (1972) and particularly Principle 1 laid the foundation stone of Human Right to Environment and later it was followed by Rio Declaration 1992. But this specific right is neither mentioned in Universal Declaration of Human Rights or in the International Pacts on Economic, Social and Cultural Rights, or in the European Convention on Human Rights. Moreover, regrettably the Stockholm Conference rejected proposals for a Universal Declaration on the Protection and Betterment of the Environment, which would have served as a counterpart to the Universal Declaration of Human Rights, and thus give Human Right to Environment a strong base. Thus, the Collective Right of Human Rights of Elderly to a healthy environment was not answered and the vacuum of law was essential to be filled up. The only instrument that directly links the Human Rights of the Elderly with Environment Pollution is "Aging, Older Person and 2030 Agenda for Sustainable Development**".** It sets out the Universal Plan of Action to achieve Sustainable Development and Human Rights of all people in a balanced manner. Its object is to ensure Sustainable Development Goal (SDG) with focus on the vulnerable section of society[7]. It answers the question as to why ageing and older person matters for development, deviating from the core issue of their Human Rights and analysing the issue from Sustainable Development Goal (SDG) perspective. It lays down that Economic Development as the first reason as the contribution of Aging Population towards be cannot be neglected.

Human Right of Elderly to Safe and Healthy Environment: Indian Perspective

The Environment (Protection) Act, 1986 defines environment as "environment includes water, air and land and the interrelationship which exists among and between air, water and land and human beings, other living creatures, plants, micro-organism and property". Though the Fundamental Rights provisions are inferred by virtue of articles 14, 19 and 21 the Directive Principles of State Policy gives a concrete mechanism. Article 47 provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. Article 48 -A of the constitution says that "the state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 51-A (g), says that "It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures."[8]

7 Aboderin I. and J. Beard 2015. "Older people's health in sub-Saharan Africa." Lancet, 385(9968): 9-11

8 Article 51-(A) (g) of The Constitution of India.

In B. Bharucha Vs Excise commissioner, Ajmer[9] observed that, if there is clash between environmental protection and right to freedom of trade and occupation, the courts have to balance environmental interests with the fundamental rights to carry on any occupations. In M.C. Mehta vs. Union of India[10] the Supreme Court treated the right to live in pollution free environment as a part of fundamental right to life under Article 21 of the Constitution. In Vellore Citizens Welfare Forum vs. Union of India[11], the Court observed that "the Precautionary Principle" and "the Polluter Pays Principle" are essential features of "Sustainable Development."

Thus in the Indian Constitution also, though the Fundamental Rights along with Directive Principles of State Policy and Fundamental Duties attempts to provide rights to safe environment, but the Human Rights Perspective of the Elderly has not been touched upon and it still remains an emerging aspect where a lot needs to be done. Similarly, Indian Judiciary also in several instances lived up to the spirits of upholding Human Rights to Environment, but several more steps to be needed in the perspective of Human Rights of the Elderly towards Safe Environment and curbing Environmental Pollution and in this way both the aspects could be upheld.

Stubble Burning as Environmental Hazard in Indian Context

The term "*Stubble Burning*" refers to intentionally setting fire to the Straw Stubble that remains after grains have been harvested. It was widespread earlier but its adverse implication on environment and health is a challenge for contemporary society. In Indian Context, it is the major source of Air Pollution[12]. It results in formation of Toxic cloud that is visible even from Space[13] and thus this is a major source of concern for Environmentalist and since it affects the health of all people, especially the Vulnerable Section of the Society, it is a violation of their Human Rights also. The Elderly people are most vulnerable to it and the associated Health Hazards and Environmental Diseases affect them most severely.

The National Policy for Management of Crop Residue 2014 lays down the adverse effect of Stubble Burning as loss of nutrients followed by Impact on Soil Proportion and Emission of Green House gases and other gases. The objectives laid down for it are that control of burning and diversified use of burning crop residue, capacity building and awareness of its ill effect and formulating and implementation of suitable laws and legislations.

Legal Framework Relating to Stubble Burning

The Subject of Agriculture falls under State List of Seventh Schedule of the Constitution of India and thus prima facie the concerned State Government is the sole repository to curb this menace. The State Government can also appoint or authorise any Agency to prevent or ban the practice of stubble burning as the case may be. Moreover, the Ministry of Environment, Forest and Climate Change (MoEF&CC) can also issue an Advisory to concerned State Government and Union Territory to curb the menace of Stubble burning.

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9 (1954, SC 220)

10 *MC Metha* v. *Union of India* AIR 1987 SC 1086.

11 *Vellore Citizen Forum* v *Union of India* (1996) 5 SCC 647.

12 The Issue of unchecked crop burning in India, available at , "Farmers' Unchecked Crop Burning Fuels India's Air Pollution", (Last visited on 9 November 2019).

13 NASA Report on Air Pollution in India from Earth Observatory, available at "Stubble Burning in Northern India", (Last visited on 9 November 2019).

In the case of Captsarabjit Singh vs. State of Punjab[14] filed in Punjab and Haryana High Court the adverse impact of residue crop burning was highlighted and it resulted in enactment of National Policy for Management of Crop Residue 2014 by the Ministry of Agriculture, Government of India. It was followed by several directions to State Government of Northern India especially Punjab and Haryana as according to research by Indian Institute of Science Education and Research (IISER) Stubble burning in Punjab and Haryana are enhancing concentrations of toxic gases like benzene and toluene. Moreover the cancer risk would be even higher for farmers and villagers closest to the fields, the study said, adding that mitigating crop fires could reduce these risks[15], the NGT went on to the extent of commenting that the issue of Stubble Burning is not only limited to Northern India, but its menace could be seen in the whole Geographic feature of Indian Sub-Continent. The Elderly People due to it are vulnerable to Air Pollution and it results in immediate Health Hazards such as Cardiovascular and Respiratory illness, including asthma, bronchitis, emphysema and possible cancer resultant in shortened life span and thus faces severe Human Rights violations. In the case of Vikrant kumartongad vs Union of India and others[16], the Supreme Court asked the government in exasperation, as these mere directions and shifting of the matter from NGT to Supreme Court and back to it, was futile and directed to give subsidy to farmer so that it can be stopped, but the issue is still rampant as it is a state subject and none of the parties is ready to bear the financial overburden.

Judicial Precedents

In Indian context, the Supreme Court and other High Courts are trying its bits to balance between Development and Environment and resulting in upholding Human Rights of all and especially the vulnerable, but several measures are yet to be taken. Some landmark decisions with paraphrasing of it intended to be interpreted to uphold Human Rights of the Elderly and sustaining Environment are cited for effective and efficient analysis:

In the case of Arjun Gopal vs. Union of India[17] a ban was imposed of crackers in NCR area as it amounted to air pollution during diwali. Similarly, In Bayer India Ltd vs. State of Maharashtra[18], the Supreme Court held that: "Nothing can be more fundamental than the issue of public safety and right to life and where these are infringed upon, the courts will have to act in a general interest of the citizen and not the Government and public bodies."In the case of Boban Joseph vs. Manikantan[19], the Supreme Court to protect the interest of local neighbouring public, the use of mechanical device to mine sand was permitted with restrictions. In Chilka Lake case[20], it was held that the traditional method of fishing compared to modern method amounted to violation of Article 21 on the ground of deleterious environmental impact of blue revolution. In Calcutta Wasteland Case[21], the Supreme Court upholded environmental degradation as a social

14 Writ petition no. 10138 of 2006 (judgement came in 2012).
15 The Issue of Stubble Burning in Punjab and Haryana, available at https://www.insightsonindia .com/2018/10/04/ insights-into-editorial-up-in-the-air-on-stubble-burning/ (Last visited on 17 November .2019).
16 NGT 118 of 2013 decided in 2015.
17 Case no. 891,895, 899 of 2016 and 213 of 2017.
18 AIR 1995 Bom 290, 1994 (4) BomCR 309, (1995) 97 BOMLR 957.
19 W.A. No. 2749 of 2009,W.A. No. 295 of 2010 &W.P.C. No. 16007 of 2010.
20 AIR 1956 Ori 20.
21 AIR 1976 Cal 389.

problem and that the state must discharge its social duty under Ramsar convention. In Ganga-Pollution Tanneries *Case*[22], the court further held that: *"We are conscious that closure of tanneries may bring unemployed, loss of revenue, but life, health and ecology have greater importance to the people."* In the case of *koolwal vs. State of Rajasthan*[23], the Supreme Court held that: *"In this case a direct nexus with human health and injury has not been demonstrated at all. The fundamental duty enshrined under Article 51A (g) extends not only to citizens but to instrumentality of State*". In the case of *Law of Society of India vs. Fertilizers and Chemicals Travancore limited*[24], the Supreme Court held that *"A state of perpetual anxiety and fear of examination of life is not an environment adequate for the health and well being of human race. It is the plain and clear negation of most basic human right guaranteed under Article 21."* In the case of *Virender Gaur vs. State of Haryana*[25], the Supreme Court held that the term "environment" is of broad spectrum which brings within its ambit hygienic atmosphere and ecological balance. The Human right to decent environment was recognised in *Ratlam municipality Case*[26], Justice Krishna Iyer held that: *"There is an urgent need to focus on ordinary man and a radical change in the hierarchy of values served by civil procedure*[27]*. The municipality should come to terms of paramount principle of governance by improving public health provisions."*

Suggestions, Recommendations and Conclusion:

The Human Rights of the Elderly to Pollution free Environment is one of the emerging areas of Collective Human rights where much work has not been done and it demands focus to address the issue. The Human Rights of the Elderly to Pollution free Environment is the need of the hour and the vacuum of law without any not only express provision towards it but also lack of Judicial Precedents depicts the plight of the situation. The issue of stubble burning is rampant and is a gross violation of Human Rights of the Elderly in particular and in this issue also the legal framework or Judicial Precedents depicts that the issue is not managed effectively and efficiently. Thus it is suggested that Heavily Concentrated Industrial Zone and the farming areas must be at least at a minimum safer distance so that the Elderly People Human rights are not violated. Moreover, the Office Space where Senior Citizens are involved in work it is suggested that a minimum safer distance is maintained. Specific Health Policy for Elderly People in relation to Pollution free Environment must be constructed with specified duties and responsibilities fixed on each stakeholder so that none can escape the sword of Law. Thus these demands combined efforts from all the stakeholders viz national, regional and international and in this way Sustainability and Stability of Elderly People and Environment could be achieved.

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22 1988 AIR 1115, 1988 SCR (2) 530.

23 AIR 1988 Raj 2, 1987 (1) WLN 134.

24 AIR 1994 Ker 308.

25 CASE NO.:Appeal (civil) 9151 of 1994.

26 1980 AIR 1622, 1981 SCR (1) 97.

27 Municipal Corporation *Ratlam* v. *Vardhichand* (1980) AIR SCC 1622.

E- Pharmacy And Issues In India Vis-A-Vis Existing Provisions

Rohan Samar* and Subham Saurabh**

Abstract

Recently, A petition was presented to the Delhi High Court which has claimed that the Ministry of Health, Central Drugs Standard Control Organisation and an expert committee appointed by the drug consultative committee have determined that the online sale of medicines was in contravention of the provisions of the Laws. Still per day in India lakhs of drugs are being sold on the Internet, and some of the drugs contain narcotic and psychotropic substance and some can cause antibiotic-resistant bacteria which is a threat not only to the patient but also to the humanity at large. Regulatory authorities find it problematic to control, monitor and track sell of drugs through the internet as there is want of clear-cut rules and laws in India for regulating e-pharmacies. Although the model is promising great opportunity for the business, it has some drawbacks also and many legal issues in its way of success.

Introduction

The adage quotes, which say that with great power comes great responsibility, in the modern-day world, would apply to e-commerce platforms, which have penetrated all forms of global trade, commerce, and businesses.[1] The commitment of e-commerce business in being available on a worldwide stages to traders, exports, conventional artists, homeworkers and so forth, alongside the recognition for the formation of huge infrastructural offices, for example, distribution centers, transportation, and so on, as also work for a great many individuals, is all around recognized. Nonetheless, some protections should be followed to guarantee that current organizations and trades are not antagonistically affected by the development of e-commerce business, without essential checks set up.

In the year 2019, India's drug regulatoryauthority has requested all states &union territories to forbid the selling of medications by e-pharmacy companies online. According to the order of

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1 *Amway India Enterprises Pvt. Ltd.* v. *1Mg Technologies Pvt. Ltd.* & Anr., 2019 (79) PTC 425 (Del); Manu/DE/2146/2019.

the Delhi High Court, an official spokesperson of the authority said in the court while answering public interest litigation in December 2018 that they have requested to put restriction at the selling of unlicensed and unlawful online selling of medications till the parliament drafts a new law or rules to manage online medical stores. The Drugs Controller General of India, has thus, requested all drug controllers in states & union territories to take 'necessary action' to implement the Delhi High Court's order.[2]

Ongoing illegal sale of medicines on e-pharmacy platforms was leading to the drug abuse, drug epidemic and misutilization of habit-forming and addictive medicines. Such addictive drugs/ medicines have a narcotic and psychotropic effect and these drugs are capable to cause antibiotic resistance bacteria /viruses which is a menace to humanity at large. The key concern is the rampant sale of medicines on the internet. At current there seems no instrument to regulate the selling of prescriptions on the internet, thus putting the wellbeing and lives of individuals at a high hazard and influences their entitlement under article 21 of the Constitution, right of safety and healthy life. Additionally, the Ministry of Health, Central Drugs Standard Control Organization and a specialist expert committee selected by the medication consultative council have reported that the online selling of prescriptions is in the negation of the arrangements of the current laws concerning such. Still per day in India, thousands of medicines and drugs are sold on the internet.

Background of E-Pharmacy

According to the reports presented by the government, the Indian pharmaceutical market is measured at around Rs 85,000 crore per annum, which according to the authorities grows at around 15-20% per year. India is also in the list of topmost six worldwidedrugs/medicine manufacturers in the world. Medication from Indiais exported to more than 150 countries. Alone India supplants 40 to 70 percent of the World Health Organization (WHO) request for vaccine-like Diphtheria-Pertussis-Tetanus and Bacille Calmette-Guérin and 90% of the measles vaccine.[3]

The development of e-commerce in our country fundamentally unlocked a ground to sell and produce a large portion of the items to satisfy worldwide demand. E-pharmacies are going to become the backbone of this country and it is creating a big demand in nowadays situation like Covid-19 pandemic. An e-drug store is an online-based vendor of prescription medicines, and the term incorporates both legal and illegal pharmacies. The selling of medicines apart from the general retail drug store isn't new but it has quite recently flourished in this Internet age. Perhaps, since most of the people are not cognizantwith what is an online medical store or absence of fundamental necessities, for example, the Internet, a large section of the population is not purchasing medicines online especially in small towns. However, things are changingrapidly with the introduction of smartphones, united with private sectors and government initiatives, the internet can triumph

2 "Central Drugs Regulator Asks States, UTs to Stop Online Sale of Medicines", Economics Times, Dec. 04, 2019 At 1.

3 Cresenta Shakila Motha, "Pharmaceutical industry - Studious or spurious? - An Indian context", 6 Res J Pharm Biol Chem Sci 53 (2015).

pretty much every niche and corner of this nation. Innovations and technologies in the coming days will attain the Indian government objective of health care.[4]

E-drug store or online selling of medicines, help the patients and the consumers get their medicines delivered at their doorsteps without leaving their home. As the patients suffering from incessant or chronic diseases depend on the medicines for the rest of his life, the retailers sometimes due to shortage of medicines neglect to fulfil the interests of the patient, which makes the patient run starting with one medical store then onto the next. In that scenario, e-drug stores and companies go about as a better available alternative to the patients and the consumers which makes the medicines readily available.[5] The selling of drugs and medicines in India is regulated by the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules, 1945. The Drugs and Cosmetics Act makes no difference between the selling of merchandise online and through retail stores. Likewise, The Pharmacy Practice Regulations, 2015, additionally does not define "e-pharmacy".

Statement of Research Problem

The evolution of online drug stores seems to be a sensible progression of medicine and technology. However, there is a need to have an in-depth examination of its working and possible medico-legal issues that may prop-up. Where the consumers have shifted from 'offline' to an 'online' mode of markets, the pre-pilgrim laws in India misses the mark to deal with the recent development of the e-drug store concept in India. While the e-commerce business falls under the purview of the Information Technology Act, 2000, the legislation governing the sale of drugs in India falls inside the ambit of the Drugs and Cosmetics Act, 1940, The Drugs and Cosmetic Rules, 1945, The Pharmacist Act 1948, The Indian Medical Act, 1956.

Paradoxically, despite the system that severalwell-known companies are threatening about the fears of virtual prescription medicine sales, it just might be that pharmaceutical companies might be further a "blessing than a curse" when it comes to fulfilling the open demand for value drugs.[6] Since India has no devoted online e-pharmacy laws till thisdate however it is supposed that if this is appropriatelycontrolled, the e-pharmacy store business will be a benefit to the Indian Economy and public at large.

With per day advancement in technology and science, we can see a rampant development in e-commerce shopping. However, selling of drugs and medicines on these e-commerce platformsare not allowed since the current laws requires that the sale to should be taken through a licensed store, the selling is to be affected by a drug specialist, and sale is to be effected based on a prescription. But as usual, many companies as per trend finds loopholes in the laws and once they discover problems in the law they sell drugs and medicines over the Internet, therefore this is an urgent need forthe law relating to Internet-based sales of medicines and the government

4 R. Alamelu, "Online pharma retail is a promising/unpromising avenue: an Indian context"9 AJPCR26-29 (2016).

5 V.S Ligade, "Legislation limbo on e-pharmacies in India", 117 Cur Sci, 1406 (2019).

6 Priyanka Sahay, 'Will online pharmacies work in India, and are they even legal?', Livemint, Jan. 14 2016, available athttps://www.livemint.com/Companies/EGTOILRRNF0T3J4OfUg9SN/Will-online-pharmacies-work-in-India-and-are-they-even-lega.html (last visited on Dec. 17 2019).

anyhow needs to bring a law to manage deceitful elements while guaranteeing that the new medium of sales is available to all customers.[7]

Research Methodology

This is an analytic descriptive study conducted using the library method to address the question raised in this paper. The major part of the research was done via help from virtual resources like SCC Online, Jstor and Lexis Nexis, etc. Law journals were found particularly helpful. After this, a more specific approach was undertaken. As a matter of priority, most of the recent judgments were perused although this is a new concept in the country therefore an authority on the subject is considerably less.

Research Question

Following are the principal questions for this paper

(1) Whether selling of medicines/drugs online is legal?

(2) What are the laws which govern E-Pharmacy in India?

The Approach of Indian Law Towards E- Pharmacy

As mentioned above e-commerce in India and more specifically e-pharmacy business falls under the domain of the Information Technology Act, 2000, the legislation governing the sale of drugs in India comes within the ambit of the Drugs and Cosmetics Act, 1940, The Drugs and Cosmetic Rules, 1945, The Pharmacist Act 1948 and The Indian Medical Act, 1956[8]. Followings are the legal issue with the online selling of medicines:

a. Selling Prescription Medicine to Patient Without Doctor's Prescription

There are scheduled drugs which are needed to be supplied on the prescription of specialized practitioners such as a paediatrician, gynaecologist, psychiatrists, nephrologists, etc. are supplied either directly or through non-qualified practitioners. It was noticed in some cases by food and drug administration report, Maharashtra**,** drugs were sold on changed prescriptions which were not uploaded by consumers.[9]

There are some of the drugs which contain substances specified in schedule H, schedule X and Schedule H1 of the Drug and Cosmetics Rules, 1945. These drugs can be sold by a licensee only upon the prescription of a registered medical practitioner as per rule given in 65(9)[10]. Then Rule 65 (10)[11] and Regulation 2 (j) of the Pharmacy Practice Regulation[12] requires that the prescription shall be in written form and be signed by the person giving it in his usual signature.

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7 A. Nagaraj, "Counterfeit medicines sale on online pharmacies in India", 3 J Res Pharm Prac145-146 (2014).

8 P.V Patel and B.K. Ashok, "E-pharmacies Regulation in India: Bringing New Dimensions to Pharma Sector", 5 Phar Reg Aff (2016).

9 Food & Drug Administration Report, Available at http://fda.maharashtra.gov.in/guidexlnmanf.pdf (last visited on Feb. 25, 2020).

10 Rule 65(9) (a) Pharmacy Practice Regulation,2015.

11 Rule 65(10) Pharmacy Practice Regulation,2015.

However, companies are selling prescription medicines on the internet based on the scanned prescription taken by the consumer and uploaded on the application at the time of placing of order. From a scanned copy of the prescription, the registered pharmacist cannot determine whether the prescription is genuine or not. Moreover, multiple photographs of the same prescription can be uploaded on different websites or applications, and in this manner, a consumer can obtain more than the prescribed amount of medicines.

Further, *Rule 65 (11)*[13] reads that:

> "The person dispensing a prescription containing a drug specified in Schedule H and Schedule H1 and Schedule X shall comply with the requirements such in addition to other requirements of these rules requirements".

A conjoint reading of the said rules implies that prescription drugs can be supplied only against an original prescription. The requirement of not supplying more than the total number of medicines mentioned in the prescription and stamping the prescription after medicines are dispensed would become an empty formality and not serve any purpose if the medicines are supplied on scanned copies or photocopies of the prescription. Otherwise, the patient will make many copies of the same prescription and order medicines multiple times using each copy.

Here again, the problem is that there is no mechanism in online-pharmacies to check the veracity of these prescriptions, it not only encourages the drug addicts to continue his addiction but also encourages the youth of this country to exploit themselves as the younger generation are more prone to the drug addiction.

Under the Pharmacy Practice Regulations, 2015 a prescription in the form of electronic direction is also recognized as long as it complies with the requirements of Drugs and Cosmetics Act, 1940 and its Rules framed thereunder. The Regulations do not define an electronic prescription, however, the Electronic Health Record Standards, 2016 explains that electronic prescription must be such that.

> "the logical data model includes data elements to satisfy the requirement of the format for Medical Prescription as specified by the Pharmacy Council of India. The printed prescription will need to be in the PCX prescribed format whenever and medical prescription meant for drug dispensing is prepared. For e-Prescription, implementers must ensure that the electronic version is digitally signed by a registered medical practitioner, and its non-repudiation is ensured all time. The pharmacist shall be able to print a copy of the e-prescription in the required format along with other relevant digital authentication details."

It is to be taken into notice thata scanned document of a valid prescription that is being used by the Online Pharmacies for dispensing medicines is not of electronic prescription as

12 Regulation 2 (j) of the Pharmacy Practice Regulation,2015.

13 Rule 65(11) Pharmacy Practice Regulation,2015.

explained hereinabove. A scanned document of a prescription is neither an electronic record nor a digitally signed document as defined in the Information Technology Act, 2000 and therefore it has no authenticity. Moreover, an electronic prescription has to fulfil with the requirements of the Drugs and Cosmetics Act and the other allied laws such as the Regulation 7 of the Pharmacy Practice Regulations, 2015[14] mandates that a registered pharmacist has to follow the provisions of these statutes in the discharge of its functions.

b. Selling Medicines Without A Drug Retail License

Section 18 of the Drugs and Cosmetics Act, 1940[15] forbids any person from manufacturing for sale or distribution, selling, stocking, exhibiting, offering to sell, or selling any drug without holding a license under the Act for the said purpose. The license for selling drugs is issued under Rule 61 read Form 20, 20A, 20B, 21, 21A, 21B and 20G and reads as under:

> "I ******* is hereby licensed to sell, stock or exhibit or offer for sale or distribute by retail drugs other than those specified in schedule *** of the Drugs and Cosmetics Rules, 1945, and to operate a pharmacy on the premises situated at **** subject to the conditions specified below and to the provisions of the Drugs and Cosmetics Act, 1940 and the Rules thereunder."

Presently, the Drug and Cosmetic Act and Rules do not permit the selling of medicines on the Internet. In the current drug regulatory framework licenses are fastened to a particular physical store from where the sale is proposed to take place and/or where the drugs and medicines are proposed to be stored. In the case of the online sale of medicines, it is not possible to guarantee that the drugs are being delivered from a licensed premise speciality since the online pharmacies are delivering medicines by courier or speed post all over India. Moreover, a license is required not just for selling medicines on the internet but also tor exhibiting or offering of sale of medicines on internet e-pharmacies are selling medicines without a license which is an offence punishable under Section 27 of the Drug and Cosmetic Act.

c. Misleading Patients into Parting with Confidential Medical Record

As already mentioned above the online pharmacies do not hold a valid retail or wholesale license under the Drugs and Cosmetics Rules, 1945. However, they used the words and description such as "pharmacy", "chemist" and "druggist" on the internet and their advertisements. The online pharmacies should not be permitted to advertise just as chemists are not allowed to advertise as perRule 67S of Drug & Cosmetic Rules[16] and Regulation 12.1 of the Pharmacy Practice Regulations, 2015.[17] By using such descriptions, the websites are misleading the consumers to believe that they are authorized to sell medicines. So, using such descriptions can only be displayed by a drug license holder who is employing the services of a registered pharmacist for dispensing

14 Regulation 7 of the Pharmacy Practice Regulations, 2015.
15 Section 18 of the Drugs and Cosmetics Act, 1940.
16 Rule 67S of Drug & Cosmetic Rules,1945.
17 Regulation 12.1 of the Pharmacy Practice Regulations, 2015.

medicines. The use of these descriptions by any other person is barred under Rule 65 (15) of the Drugs and Cosmetics Rules, 1945[18] as well as Section 48 of the Pharmacy Act, 1948.[19]

The display of such descriptions on the internet lures potential patients to place an order of the medicines online by uploading their prescriptions on the websites of these online pharmacies. In some cases, where the customers are not able to provide the prescriptions these online pharmacies also volunteer to provide their in-house doctor for counselling to smooth the trade of their business of selling medicines online. The Pharmacist and Doctors are bound to maintain the confidentiality of the patient at all times. There is no such regulation when it comes to prescriptions uploaded in these online-pharmacies. In this regards the provisions Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002[20] is important which is the governing code of conduct for doctors and pharmacists. Which says that the doctor or practitioner will not disclose the secrets of his patent that have been learned in the exercise of treatment.

Then, The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, [2011Rule 3(1)(v)] recognize medical records and history as a piece of sensitive information and the disclosure of the same is only allowed with the preceding permission of the provider of the information.

Also, now it is apparent as the Report of Sub-Committee constituted by the Drugs Consultative Committee[21] to examine the issue of regulating the sale of drugs over the internet under the Drugs and Cosmetics Rules 1945 in Chapter 6 has identified the confidentiality of data as a potential risk. It reads as thus:

> "Confidentiality of data – Intentionally or unintentionally some may leak the patient information. Personal records of a regular buyer could be leaked and this would lead to violation of the right to privacy of a person. This could also lead to a risk of receiving repeated emails and phone calls falsely promoting follow up medications."

d. Unsupervised Storage and Transportation of Drugs

Rule 64 of Drug & Cosmetic Rules, 1945[22] provides that license to sell medicines will be granted inter alia only if the authority is satisfied that the locationsfor storage of drugs are adequate, and accommodation is taken care for conserving the properties of medicine or drug and the person in charge is competent to control and administer the selling, distribution, and preservation of those medicines and drugs. Then the Schedule N of the Drug & Cosmetic Rules lists out the minimum equipment required for the effectual running of the pharmacy.

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18 Rule 65 (15) of the Drugs and Cosmetics Rules, 1945.

19 Section 48 of the Pharmacy Act, 1948.

20 Para 7.14 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

21 Central Drugs Standard Control Organization, Available at https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/common_download.jsp?num_id_pk=NDk5. (last visited on Dec. 20, 2019).

22 Rule 64 of Drug & Cosmetic Rules,1945.

Also, it is to be taken into consideration that *Rule 65 (16)*[23] requires a licensee to maintain an inspection book that the Drug Inspector can inspect from time to time. This mechanism is rendered ineffective since online pharmacies are stocking and selling medicine without having to comply with the above-mentioned conditions as they do not have a drug license. There is no mechanism to ensure that medicines stocked or handled by the online pharmacies are stored in controlled conditions to maintain efficacy. Drug sale and implementation of the license conditions are regulated by State Licensing Authorities. In case of the supply of spurious, misbranded or expired medicines, the concerned State Level Licensing Authority can regulate the supply of medicines within the State.[24] However, vigilance is not possible if such medicines are being sold by online pharmacies because the State law enforcement agency would not have jurisdiction over the online pharmacy delivering medicines from another State through speed post or courier, etc.

Even for sale of medicines by an itinerant vendor or distribution of medicines by motor vehicle a license is mandatory under *Rule 62A, and 62C and 62D*, respectively. However, the online pharmacies are dispatching medicines through ordinary courier services or EMS who do not have any expertise in handling medicines and it constitutes a violation of the Rules. Products that need to be stored under certain temperature control should also not be sold by e-pharmacies because it will be impossible for them to maintain the right temperature over long distances. As e-pharmacy will be selling all over the country they won't be able to observe state-specific rules.

e. Violation of Medical Code of Conduct

Even if the online pharmacies voluntarily agree to provide a doctor service through telephonic conversation there is no option for the consumers to verify whether the doctor on phone is a registered doctor or just a fake company staff suggesting medicines which would cause grave harm to the health of the consumers. Moreover, instead of the Doctor prescribing medicines to the patient upon examination, here the patient dictates the medicines he requires and the doctor is reduced to a stamping authority for issuing the prescription.

As per Regulation 1.4.1 of the Medical Council of India Professional Conduct, Etiquette and Ethics Regulations, 2002[25] every physician has to display their registration number accorded by the State Medical Council/Medical Council of India in his clinic and all his prescriptions. However, in a case where, unlike a patient going to the clinic of a doctor where he can see the registration number is displayed, in a telephonic consultation, the patient has no such recourse at the time of consultation. Therefore, doctors are only using the online pharmacies to procure patients which are specifically restricted under Regulation 7.19 of the Professional Conduct, Etiquette and Ethics Regulations. 2002,[26] which says that:'A Physician shall not use touts or agents for procuring patients.'

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23 Rule 65(16) of Drug & Cosmetic Rules, 1945.

24 S. Dutta, "E-Pharmacyin India: Issues and Challenges", 3 AIJJS24- 29 (2017).

25 Regulation 1.4.1 of the Medical Council of India Professional Conduct, Etiquette and Ethics Regulations, 2002.

26 Regulation 7.19 of the Professional Conduct, Etiquette and Ethics Regulations. 2002.

These doctors are also not charging the patients for the medical advice and issuing of prescriptions. They are being paid by the pharmaceutical companies or by the online pharmacies to prescribe medicines. This goes against the ethics of the medical profession as the doctors are taking commission/rebate for prescribing medicines to their patients. This is strictly barred under Regulation 12.2 of the Pharmacy Practice Regulations, 2015[27], which reads asA registered pharmacist shall not aid or abet or commit any of the following acts which shall be construed as unethical.

It can be further observed that this type of practice can encourage the abuse of Schedule H or Schedule X or Schedule H1 drugs as the caller on the telephone may frame his problems in such a manner where the doctor is bound to prescribe these drugs.

The Hon'ble High Court of Bombay in Deepa Sanjeev Pawaskar & Anr v. State of Maharashtra[28] was seized with an issue as to whether the prescription without diagnosis would amount to culpable negligence. The Court while disallowing the Anticipatory bail filed by the Applicants held as thus:

> "The time has come for weeding out careless and negligent persons in the medical profession. Segregation of reckless and negligent doctors in the profession will go a great way in restoring the honour and prestige of a large number of doctors and hospitals who are devoted to the profession. Recklessness and negligence are a tricky road to travel. There is gross negligence from the point of a standard of care. Prescription without diagnosis would amount to culpable negligence. This issue is decided in the affirmative."

f. Medicines Dispensed Without Supervision of Pharmacist and Counselling

In shopping online medicines, the prescriptions are worded in the technical medical language which a layman may not be able to comprehend, and thus for proper interpretation and dispensation, a qualified pharmacist is a must. The Pharmacy Act, 1948 was enacted to control the profession of pharmacy and to prohibit every person except the registered pharmacist from dispensing medicines to a patient. Rule 65 (2) of the Drugs and Cosmetics Rules, 1945[29], andRule 9.1 of the Pharmacy Practice Regulations, 2015[30] require that prescription medicines should be distributed only by or underneath the individual supervision of a registered pharmacologist. Then Section 42(1) of Pharmacy Act, 1948[31] makes it punishable for every person except the registered pharmacist to distribute medicine on the medicament of a medical practitioner.

Rule 9.1 (h)[32] of the said Regulations provides that the medicines should be physically handed over by a registered pharmacist to the sufferer or the patient's caretaker. It reads

27 Regulation 12.2 of the Pharmacy Practice Regulations, 2015.
28 Deepa Sanjeev Pawaskar & Anr v. the State of Maharashtra, (2018) SCC OnLine Bom 1841.
29 Rule 65 (2) of the Drugs and Cosmetics Rules, 1945.
30 Rule 9.1 of the Pharmacy Practice Regulations, 2015.
31 Section 42(1) of Pharmacy Act, 1948.
32 Rule 9.1(h) of the Pharmacy Practice Regulations, 2015.

as:supplyof the drug product to a patient is completed in such a way as to warrant two things: firstly, the registered pharmacologist hands over the drug to the patient. and suitable information on drugs is given to the patient.

A conjoint reading of the aforesaid provisions requires that a registered pharmacist has to personally dispense prescription and to deliver any drug product personally in the hand of the patient or the patient's caretaker. However, the virtual pharmacies are functioning in absolute disobedience with the aforesaid described mechanism. The Drugs and Cosmetics Rules, 1945, and the Pharmacy Regulations of 2015 mandates that only a registered pharmacist under his supervision will hand over the medicine to the patient. Whereas admittedly online pharmacies are delivering the medicines to the patients through courier or transporters.

Proper healthcare of patients requires a trilateral interaction between the patient, doctor, and pharmacistas per Regulation 5.3 of the Medical Council of India Ethics Regulation, 2002.[33] The role of a pharmacist is not limited to physical delivery and dispensing of drugs to the patient, rather a pharmacist is also required to assess the prescription and for rational drug use and shall counsel the patient to enhance or optimize the drug therapy. These guidelines are provided under Rule 9 of Pharmacy Regulations, 2015.[34]

It is common for patients to not understand the contents of prescription and therefore a registered pharmacist is needed to explain the dosage and timing to the patients in the language comprehensible to them. At times the pharmacist is required to make separate sachets for each medicine when the patients are unable to follow. The pharmacist would also counsel the patient in respect of possible side effects, compatibility with other medicines, etc. However, in online pharmacies, persons having no knowledge or education of drugs are dispensing the medicines who cannot guide the patients appropriately. This system is going to affect the health of patients.

g. Misuse of The Word 'Market Place' to Evade Law

The online pharmacies are trying to evade the restrictions and regulations in Drug Laws by stating that they do not operate on inventory models and that they are in fact "e-marketplaces." Even if e-pharmacy operate on a marketplace model it has to comply with the Drugs and Cosmetics Act, 1940, and the followingRules and thereforehas to obtain a license thereunder. The purpose is that the Lawcontrols not only the "manufacture and/or sale of drugs", but it likewisecontrols the "exhibition, offers for sale and distribution" of medicines. So, e-pharmacy operating on a marketplace model engrosses in "exhibit for sale" and/or "distribution" of drugs and hence is required to be registered underneath the Drugs and Cosmetics Act, 1940.

Without prejudice to the aforesaid, it can be seen that the online pharmacies are not a market place platform however they are the actual seller because:

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33 Regulation 5.3 of Medical Council of India Ethics Regulation, 2002.

34 Rule 9 of Pharmacy Regulations, 2015.

(i) They come within the definition of a seller as well-defined under section 2(13) the Sale of Goods Act. 1930[35]and/or possess the document of title of the goods as per Section 2(4) of the Sale of Goods Act.[36]

(ii) The websites thought their agents deliver the goods to patients.

(iii) The sale consideration is exchanged between the website and the purchaser.

(iv) The websites represent themselves are the seller to the customers etc.

(v) Assuming without admitting that some websites are merely delivery agency, under Section 2(9) of the Sale of Goods Act[37] they would classify as mercantile agents who are also deemed to be sellers in law.

(vi) In a market place, the sellers and customers have a direct interface whereas on the websites of e-pharmacy the seller or the ostensible seller is the website itself. It cannot be identified if anyone else through the website is selling the goods, meaning thereby that the website is not a real market place and it is itself the seller.

Therefore, as it is seen in the case of South Chemist Distributors Association v. Union of India &Ors.[38]pursuing a bar on the trade of drugs on the internet, the Hon'ble Court order issued a notice. Thus, it is seen that the Ventures who are selling the medicine online are said to be completely illegaland a ban was imposed on selling until Union government frames law for it.

h. From the Perspective of New Consumer Law

The Consumer Protection Act, 2019 (the Act) is the beginning of a new era of consumer rights in line with the latest consumer preferences. In the old act, the e-commerce sites had 'intermediaries' protection which has been changed under the new act and thus incorporated the e-commerce sites as an intermediary. The Act now offers a new explanation which says that when any person buys anything or rents or takes any services which consist of 'online payment through electronic means…' it will bring the e-commerce site within the purview of the Act. Under this new Act, the Indian government has tried to make new rules to stop the unfair trade practices in the e-commerce cyberspace from totally consumer protection perspectives.

According to the new definitions introduced in the Consumer Protection Rules now, the e-commerce sites and markets along with the online aggregators may come under the purview of the consumer law. The definition of 'electronic service provider' says that 'a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any online market place or online auction sites'[39]. Hence for online pharmaceutical aggregators, this is going to raise serious concern in understanding the new

35 Section 2(13) the Sale of Goods Act, 1930.

36 Section 2(4) of the Sale of Goods Act, 1930.

37 Section 2(9) of the Sale of Goods Act, 1930.

38 South Chemist Distributors Association v. Union of India &Ors,2018 SCC OnLine Del 12928: (2019) 256 DLT 100 (DB).

39 Section 2(e) of Consumer Protection (e-commerce) Rule, 2019.

Act for the digital business and is one further step by the government in the direction of tech-regulation adding a plus-point in favour of customers.

Issues in E-Pharmacy

There is no uncertainty that with the advancement of technology in India led to the development of e-commerce radically now people in the remotest village in India can place an order over his smartphone while sitting in one corner of the country. Looking from this perspective the concept of e-pharmacy looks very convenient and easy, however as already discussed in the above piece of the paper it surely has certain threats related to violation of laws and rules involved with it. The selling on drugs online faces some serious issues and challenges which are discussed below:

Sale of Drugs in the Different States: Rules related to transportation of medicines starting with one state of India then onto the next arenot perfect. Eachstate has a Drug Department which permits license for definite medicines to be traded inside a state. There is a likelihood that, certain medicines substantial in one state probably won't have a license in a different state. Henceforth, there is equivocalness concerning the delivery of medicines starting with one state then onto the next.[40] Suppose, 'A' who is a resident of Himachal Pradesh places an order for 'X' medicine through an e-drug store website. The medicine is shipped from the State of Rajasthan and is delivered to the consumer. However, it comes to the notice that medicine 'X' is certifiably not a licensed drug in the State of Rajasthan thereby damaging the rules as provided under 'The Drug and Cosmetic Act'. As the e-commerce business in India is operated freely starting with one State then onto the next, it will be very hard for one to keep a close screen on the source from where drugs are delivered to the consumers.

Taking Money Before Delivery: There is vagueness in Indian law about whether a drug store is permitted to yield money before the supply of medicines or not. Definite sections of the law command, money to be collected from the customer just after medicines are genuinely handed over to the customer. The different payment alternatives provided by the e-drug store websites, for example, Credit/Debit payment, payment through mobile wallets, etc. on putting in a request will surely advance questions of disobeying the Rules as provided.[41]

Selling Scheduled Drugs: At present, the Drug and Cosmetic Act doesn't permit the sale of Schedule H medicines devoid of a doctor's prescription. Also, in our country, even OTC pharma items can be traded solitary by licensed retailers. The Drug and Cosmetic Act 1940, and the Drug and Cosmetic Act Rules 1945 have guiding principles on the trade of Schedule H and Schedule X drugs. These can be traded distinctly on prescription, and there are definite rules, containing for labelling and barcoding. Numerous laws in India administer dealing with food, health, cosmetics, drugs, medicines, and nutraceuticals in India. Online sale and purchase of prescribed drugs and medicines in India are mutuallyadministered by these and other laws.

40 S. Dutta, "E-Pharmacyin India: Issues and Challenges", 3AIJJS 24- 29 (2017).

41 V.S Ligade, "Legislation limbo on e-pharmacies in India", 117 Cur Sci1407 (2019).

Single Prescription: A single prescription can be used for multiple deliveries of drugs through different e-pharmacy websites. A proper regulatory framework is the need of the hour to deal with this complicated issue as this may raise the percentage of drug abuse in India.

Intermediaries: One of the contentions raised in the recently filed petition to the Supreme Court is that some of the online companies have taken the route of appealing to be only delivery service providers also known as aggregator sites. This means they come underneath the class of intermediaries as per the Information Technology Act 2000. It may be assumed that Sections 4 and 5 of the Information Technology Act, 2000 in conjunction with Rule 65 of the Drugs and Cosmetic Rule, 1945 mollify the legality if the prescriptions are handwritten and electronically sent.[42]

Selling Drugs to Minor: Another important issue that needs proper regulation is the selling of drugs to minors. It will be very difficult to trace the authenticity of the prescription when it is uploaded on the websites for the online purchase of the drug.

Conclusion

This era is definitely about digitalization and online commerce, different organizations are hoping to put resources into such endeavours which give simple availability and a huge buyer base, and India is a source for opportunists and is in the process to become rank one for making ventures, beating China and the USA. And in light of these above analyses of the laws, it looks difficult for the online medication companies to invest in this industry unless the legislation enacts a specific new law regulating the virtual selling of drugs. Failing to such can also lead to drug abuse and drug-resistant disease which can even lead to the drug epidemic.

Thus, after considering all arrangements, working off an e-Pharmacy is a tricky incline with the current arrangement of laws, however, one necessity to make additional preparatory strides, yet might neglect to do as such as something or the other may be in the logical inconsistency of the laws and the intervention of the specialists to decipher the equivalent.From the above discussion, it can be concluded that the operation of e-pharmacy websites and the selling of online drugs in India is not illegal. It comes well within the purview of the Drugs and Cosmetics Act and Drugs and Cosmetics Rules. The only cause of concern for the online pharmacies is to abide by the law on the subject.

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42 'The legality of selling medicines online in India', Ipleaders, Sept. 30, 2015, available at http://blog.ipleaders.in/legality-of-selling-medicines-online-in-india/ (last visited on Jun. 28, 2020).

International Investment Treaties and National Sovereignty

Priyanshi Sarin*

Abstract

International investment law protects foreign investments from state action by virtue of International Investment agreements. [1]International Investment Agreements are treaties signed at the bilateral, regional or multilateral level by two or more countries to protect investments made by one country's investors in the other country.[2] II As allow individual investors to bring proceedings against host states if the latter's conduct is not consistent with the IIA.[3] These treaties allow multinational corporations or individual investors to recover from countries when their investment expectations decrease due to domestic regulatory and legal changes.[4] It is pertinent to note that despite of these treaties, there persists a power struggle between foreign Investorsexpectations and host countries desire to regulate without exposure to liability.[5] This power struggle gives rise to debate with respect to the merits and harms of these investment arbitral provisions particularly wherein arbitral award goes against public interest regulation. In the hope to protect the investor, the host states bear the brunt of heavy economic implications. This article delves into the nature of disputes surrounding around international investment agreements specifically pertaining to court intervention by the host state. The author deduces with reasons that court intervention is a pre-requisite for national sovereignty.

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1 AikateriniTiti, "The Right to Regulate in International Investment Law", 10 SIIL. 19-21 (2014).

2 See Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" 24 Int'l Law 655 (1990).

3 A. Newcombe &L. Paradell, Law and Practice of Investment Treaties (The Hague: Kluwer, 2009); A.F. Lowenfeld, International Economic Law, 467 - 591 (Oxford: Oxford University Press, 2nd ed. 2008) C. McLachlan et al, International Investment Arbitration - Substantive Principles (Oxford: Oxford University Press, 2007); R. Dolzer & C. Schreuer, Principles of International Investment Law (Oxford: Oxford UniversityPress, 2008) [Dolzer and Schreuer(2008)]; R. Dolzer & M. Stevens, Bilateral Investment Treaties (The Hague: Kluwer, 1995); M. Sornarajah, The International Law on Foreign Investment, 3d ed (Cambridge: Cambridge University Press, 2nd ed. 2010). Somarajah, PT. Muchlinski *et al, eds,* The Oxford Handbook of International Investment Law (Oxford: Oxford University Press, 2008); J. Salacuse, The Law ofInvestment Treaties (Oxford: Oxford University Press, 2010).

4 Chiara Coppotelli, "Investor- State Adjudication Mechanism Negotiations in the YITIP: An Unpopular Endeavor into the Potential Politicization of Dispute Settlement", 39 FORDHAM INT'L L.J. 1355, 1357-58 (2016).

5 David Dayen, "The Big Problem With the Trans-Pacific Partnership's Super Court That We're Not Talking About, HUFFINGTON" Post (Aug. 29, 2016), https://perma.cc/AZ6A-X5L7. (last visited)

International Investment Treaty

Investment treaty-based disputes between foreign investors and the host state are a result of an allegation by the investor stating that the host state has breached the treaty provisions, resulting in impairment of the benefits enjoyed by the foreign investor from her investment and thus should be compensated. The question however is where to pursue the issue, while domestic courts often issue anti-arbitration injunctions in commercial arbitrations the same practice cannot be executed for investment arbitration since by consenting to arbitrate under the Convention on the Settlement of Investment Disputes between States and Nationals of Other.[6] Investors "have lost their right to seek relief another forum, national or international, and are restricted to pursuing their claim through ICSID.[7]By providing for international arbitration under the BIT regime, the host State binds itself, under threat of being exposed to the other State's claim for breach of an international obligation and to accept the arbitration mechanism chosen by the investor out of the various alternative methods provided by the BIT.[8] The chosen method will apply to the settlement of disputes arising out of or relating to the investment contract or the investment authorization granted by the State's foreign investment authority or of an alleged breach of contractual obligations entered into with regard to an investment which the State has accepted to guarantee under the BIT.[9] The reason for these treaties has a strong historical backing.

In the regime prior to growth of Investment treaties, investor disputes were resolved either by domestic courts or by the investor's home country, which would negotiate the matter on behalf of the investor with the host state.[10] Bilateral Investment treaties developed after World War II by countries to protect the investments of their nationals in other countries. The number of BITs grew exponentially during the 1990s, following recommendations by the U.N. and the proliferation of neoliberalism as part of a global strategy to increase investment in developing countries. Arbitration offered protection for investors who were skeptical about the reliability of property rights in developing countries. Countries signed many BITs before the growth of the robust investor-state industry that exists today, and may not have been aware of the liability risk they had opened themselves up to for some time. The transition from state-state negotiation to state-investor arbitration shifted power away from states and toward investors and arbitrators.[11] The tussle has gained utmost importance due to rise in disputes over the years and secondly also in light of the 2020 Budget and government schemes which have been focusing on Foreign Direct Investment as a boarding pass for increasing GDP and thereby entering into more and more

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6 Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159

7 Christoph H. Schreuer et al., The ICSID Convention: A Commentary 35 (2nd ed., 2009)

8 Piero Bernardini, "Investment Protection under Bilateral Investment Treaties and Investment Contracts", 2 J. World Investment 235 (2001).

9 This is the case of BITs concluded by Germany. Other BITs prescribe that each party has to "observe any obligation it may have entered into with regard to investments"; U.S.A.-Argentina BIT of 14 November 1991, Article II 2(c).

10 Stephan W. Schill, "Enhancing International Investment Law's Iegitimacy: Conceptual And Methodological Foundations of aNew Public Law Approach", 52 VA.J. INT'LL. 57, 62 (2011)

11 Anna T. Katselas, "Voice, and LoyalyIn Investment Treaty Arbitration", 93 NEB. L. REV. 313, 315(2014).

Investment treaties[12]. An arbitral award issued against the host state's sovereign regulatory function has the potential of affecting the population of the host state adversely.[13] Thereby, it is imperative that India should ensure that its domestic legal regime addresses the questions related to enforcement of ITA awards, so as to fulfil her IIA obligations and comply with the principle of pacta sunt servanda.[14]

'Court Intervention': A Hurdle In Enforcement Of Arbitral Awards?

The basic premise behind introducing Investment treaties is to replace court intervention with effective arbitration. These treaties as mentioned above incorporate a clause for "arbitration" and is backed by the New York Convention which provides for the recognition of all foreign arbitral awards provided they meet certain basic minimum standards (such as the award being in writing, and not contrary to public policy.[15] The key term here is "public policy" which if deviated from can have catastrophic repercussions for the host state.

For instance, in there has been widespread criticism of the arbitral tribunals interpretations, the lack of transparency/accountability, pro-investor bias, and lost state sovereignty- leading to what some scholars have called the "public law challenge."[16] The U.N. Conference on Trade and Development's (UNCTAD) World Investment Report criticized inconsistent readings of key provisions in international investment agreements and poor treaty interpretation.[17] In addition to the fact that there is no binding precedent to provide clarity in international investment law, the tribunals continue to generate inconsistent interpretations of the same standards of investment protection and differing conclusions as to state liability in relation to cases with identical or similar fact situations. [18] Incoherent decisions make it difficult for both states and investors to conform their behaviour to international law. This has been thought to also reduce the amount of public welfare regulation overall. Proceedings are largely confidential, making it difficult to establish a line of precedent to guide behaviour and unlike most national courts, there is no legislative balance of power. Thus, the exclusion of the State courts jurisdiction in favour of arbitration has now raised a certain number of problems.

Non-Exhaustion of The Local Courts Remedy: Implications On The Host State

In a prominent arbitration proceeding, Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Limited,

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12 "The Treat Shopping Practice: Corporate Structuring And Restructuring To Gain Access To Investment Treaties And Arbitration", 11 HASTINGS Bus. L.J. 225, 247 (2015).

13 Rudolf Dolzer&MargreteStevens, Bilateral Investment Treaties (1995); Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", Recueil Des Cours 265, 265-75, 299 (1997).

14 Vienna Convention On The Law Of Treaties, 27 January 1980, 1155 UNTS 331, 8 ILM 679.

15 Mark Beeley, "Arbitration In The Dubai International Financial Centre: A Promising Law, But Will It Travel Well?" 12 INT. ARB. L. R. 1 (2009)

16 Stephan W. Schill, "The Public Law Challenge: Killing Or Rethinking InternationaiInvestment Law"?COLUM. FDI PERSP. No. 58, Jan. 30, 2012.

17 U.N. Conference On Trade And Development (UNCTAD), World Investment Report- Reforming International Investment Governance 145, U.N. Doc. UNCTAD/WIR/2015 (June 24,2015).

18 *Id*.

Maharashtra State Electricity Board and the State of Maharashtra ,[19] the Indian respondents had questioned the jurisdiction of the International Court of Arbitration of the International Chamber of Commerce ("ICC Court") and the Arbitral Tribunal. In this dispute the U.S. companies sought to collect on their political risk insurance, arguing that the Indian governments and courts had taken away the arbitration remedy provided in the relevant contracts, however the payment for the same was declined and thereafter the companies instituted arbitration proceedings under the auspices of the American Arbitration Association. The panel found that the Board, the government of Maharashtra, and the government of India each violated the relevant agreements for political reasons and without any legal justification. The panel also found that the Board, the Maharashtra State Regulatory Commission, and the Indian courts had enjoined and otherwise taken away the claimants' international arbitration remedies in violation of established principles of international law and in disregard of India's commitments under the New York Convention and theIndian Arbitration Act. As a result, the panel ordered OPIC to pay the companies. Thereafter, the U.S. government instituted arbitration proceedings against the government of India for claims to which OPIC was subrogated under the U.S. investment guaranty agreement with India. The International Chamber of Commerce (ICC) case resulted in a decision against India in April 2005.[20] The biggest concern which arose out of this was the impact on Indian economy, even when India was backed by its own law in entertaining the dispute in the domestic court. Section 48(2)(b) in Part II of the Indian Arbitration Act (which talks of enforcement of awards made under the New York Convention) states that a foreign arbitral award can be denied enforcement if such enforcement would be contrary to public policy of India.Additionally, the Indian Model IIA provides a third exception which states that 'nothing in this agreement precludes the host contracting party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.[21] In Union of India v. Vodafone Group Plc United Kingdom &Anr [22] also,it was clarified that it cannot be said as an absolute proposition of law that the moment there is an investment treaty arbitration between a private investor and the State, National Courts are divested of their jurisdiction. This issue comes within the purview of public policy because if India was asked to pay damages to the foreign investor for adopting a regulatory measure that it considered important for pursuing its interests.The arbitral award, by reaching the conclusion that a particular regulatory measure is illegal, dissuaded the implementation of the concerned regulatory measure to achieve a particular national interest and also because the arbitral award requires diversion of the taxpayer's money and thus national wealth in the form of damages towards the foreign investor. The author feels that a complete ouster of domestic courts goes against the public law perspective which requires horizontal equality between the two states, not the investor and a state. The state should be able to exercise authority over its own affairs," in

19 ICC Case No. 12913/MS

20 Ronald J. Bettauer, "India and International Arbitration: The Dabhol Experience", 41 Geo. Wash. Int'l L. Rev. 381 (2009).

21 Article 12 (2) Of Indian Model Iia. All The 21 Indian IiasSurveyed Provide For This Type Of Exception.

22 CS (OS) 383/2017

pursuit of "democracy, equal treatment, separation of powers, legal certainty and predictability, or in other words, the rule of law.[23]

Host Country Rights

The author in no way implies that each ITA award under international jurisdiction would be set aside for being against the interests of India or any other host country. It is merely suggested that there is a possibility that Indian courts have more sensitivity and knowledge of the country's public policy and would take a decision which is balanced and fair to both the parties. There could be cases where Indian courts, afterexamining a particular issue, deduces that enforcement of ITAaward is not against the 'interests of India' based on the facts before it.[24] In situations where the conduct of the Indian state in dealing with the foreign investor, although aimed at fulfilling a national interest, has been arbitrary and unfair, the court can decide that given the questionable conduct of the Indian government, the award is not against the 'interests of India' and thus does not violate its 'public policy'.[25] There could be situations where the regulatory measure adopted by India, in the guise of fulfilling some national interest, in reality was aimed at achieving some ulterior motive like harming the foreigninvestor for political reasons. In such situations as well, it is possible that the Indian courts will not accept the plea of an ITA award being against 'interests of India' and thus will not set aside the award for 'public policy' reasons.[26]

Most importantly, it cannot be assumed that the national courts of that State are not independent and impartial even if a State acts as a party to an arbitration.[27] At the end, India is still a developing nation and there are strong disincentives for a court to favour its own State as investors may allege that there is a denial of justice which, if successfully claimed, would deter potential investments. For instance, China, had a series of Bilateral Investment Treaties that offered substantive investment protections, while some BITs did not offer foreign investors any forum to resolve their disputes,[28] China often permitted Chinese courts to resolve investment disputes. Specifically, although there was a narrow exception permitting arbitration for the valuation of an expropriation claim, China required that all other substantive claims be resolved before national courts.[29] Reliance on national court systems and limited access to arbitration has not stopped investors from making substantial investments in China.[30] This suggests that irrespective

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23 Schill, *Supra* note 2, at 67

24 Stephan W. Schill, "The Public Law Challenge: Killing or Rethinking International Investment Law"?, COLUM. FDI PERSP. No. 58, Jan. 30, 2012.

25 Alison Giest, "Interpreting Public Interest Provisions in International Investment Treaties", 18 Chi. J. Int'l L. 321 (2017).

26 *Id*

27 Gus Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law, inInternational Investment Law And Comparative Public Law" 628, 654 (Stephan W. Schill ed.,2010).

28 Agreement on the Mutual Protection of Investments between the Government of the Kingdomof Sweden and the People's Republic of China, July 1, 1979, arts. 6-7, available at http://www.unctad.org (last visited on May 10, 2020)

29 *Id*.

30 Ted G. Telford & Heather A. Ures, "The Role of Incentives on Foreign Direct Investment", 23Loy. L.A. INT'L & COMP. L. REV. 605, 612 (2001).

of the procedural rights in investment treaties, there are some markets where investors are keen to gain a place or a foothold in a developing market.

Judicial Interference in Limit should be Permitted for India's Economic Sovereignty.

The author believes that Investment treaty arbitration and national courts have a symbiotic relationship. Arbitration does not occur in a vacuum, and the existence of investment treaty arbitration does not eliminate the need to encourage the development of a court system where rights are adjudicated in an impartial, fair, and predictable manner.

It is recommended to adhere to the principles of rule of law in national courts, by fostering this general adherence to the rule of law, investors would presumably feel more comfortable resolving their treaty claims before national courts.[31]This is because there persists various points where the integrity of local courts can impact the efficacy of the dispute resolution process.[32] While a court's role tends to be limited in ICSID arbitration proceedings, national courts have a role to play in enforcing ICSID arbitration awards, example they might evaluate challenges relating to an arbitrator's impartiality and independence' or determine whether arbitrators awarded damages in a procedurally improper manner.[33]

Secondly, not only the commercial or economic implications are burdensome but also the fact that this transfer of governance matters, including human rights, from states to supra-state bodies results in a blurring of the line between municipal and international governance issues.[34] In addition to resulting in a necessary relinquishment of sovereignty on the part of states, has other significant human rights implications. It limits the leeway and discretion available to states to react to their respective special human rights or environmental needs.[35] Traditionally, courts have been the dominant instrument of human rights enforcement, in the Indian scenario specifically the Supreme Court. However, globalization has influenced this traditional enforcement mechanism. For example, although the realization of both globalization and human rights demands state intervention, there is no consensus on when and to what extent states should intervene.[36] It is true that Countries endeavour to attract foreign investment so as to fill the gap between resources mobilised and the resources needed to achieve growth and development targets.[37] It plays an important role in complementing developmental processes at the national level by enhancing export competitiveness in creating employment opportunities and providing opportunities to local

31 Susan D. Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law", 19 Pac. McGeorge Global Bus. & Dev. L.J. 337 (2006).

32 Susan L. Karamanian, "The Road to the Tribunal and Beyond:International Commercial Arbitration and United States Courts", 34 GEO. WASH. INT'L L. REV. 17 (2002).

33 William W. Park, "Illusion and Reality In International Forum Selection", 30 Tex. Int'l L.J. 135 (1995).

34 Alex Y. Seita, "Globalization and The Convergence Of Values", 30 Cornell Int'l L.J. 429 (1997).

35 Alfred C. Aman, Jr., "Privatization, Prisons, Democracy, And Human Rights: The Need To Extend The Province Of Administrative Law", 12 IND. J. GLOBAL LEG. STUD. 511, 521 (2005).

36 Surya Deva, "Corporate Code Of Conduct Bill 2000: Overcoming Hurdles In Enforcing Human Rights Obligations Against Overseas Corporate Hands Of Local Corporations", 8 Newcastle L. Rev. 87, 109 (2004).

37 Todaro and Smith (2000), 711, Perkins Et Al, 526-533.

labour to develop new skills. Nonetheless, foreign projects can be against fundamental rights of civilians and thereby in case of breach of such judicial interference becomes a ray of hope for the suffering population. The involvement of MNCs in human rights violations[38] and generating environmental hazards is well documented.[39] Corporations undoubtedly produce wealth, but they also produce risks,both to humans and to the ecosystem.

The UN Guiding Principles Reporting Framework explains:

> "The actions of business enterprises can affect people's enjoyment of their human rights either positively or negatively. Indeed, experience shows that enterprises can and do infringe human rights where they are not paying sufficient attention to this risk.Enterprises can affect the human rights of their employees and contract workers, their customers, workers in their supply chains, communities around their operations and end users of their products or services."

Thereby, it is imperative that national courts are permitted jurisdiction in such matters since without it the population of the host state would be devoid of a forum to enforce their rights. The Indian judiciary, by and large, has been active and vigilant in safeguarding human rights, more so since the late 1970s. In fact, well before the adoption of NEP, the Supreme Court foresaw the unfolding of the impacts of liberalization and privatization on fundamental rights.[40] At a more general level, the judiciary is aware of the effects of globalization on the Constitution and constitutionalism. The judiciary perceives itself as an organ with a key role to play in the emerging scenario and it argues for an economic interpretation of the Constitution.[41] In most cases, the judiciary has not disappointed the victims of human rights violations or the human rights activists. Moreover, the Supreme Court has also tried to establish a balance between the need for development and the protection of human rights.[42]

Conclusion

The author believes that all the International Investment arbitrations should balance the competing claims and concerns of the capital exporting country and the host country. In order to achieve a balance, an International Investment Agreement should offer ample protection to investments, as well as ensure transparency about the regulatory procedures and provide certainty

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38 Surya Deva, "Human Rights Realization In An Era Of Globalization: The Indian Experience", 12 Buff. Hum. Rts. L. Rev. 93 (2006).

39 Jack Doyle, "Trespass Against Us: Dow Chemical & The Toxic Century" (2004); Joshua P. Eaton, "The NigerianTragedy, Environmental Regulation Of Transnational Corporations, And The Human Right To A Healthy Environment", 15 B. U. Int'l L.J. 261 (1997).

40 *M. C. Mehta* v. *Union of India,* A.I.R 1987 S.C. 1086.

41 *State of Punjab* v. *Devans Modem Brewaries Ltd.,* (2003) 4 L.R.I. 647, 320- 47.

42 *Vellore Citizens Welfare Forum* v. *Union of India,* A.I.R. 1996 S.C. 2715; *Narmada BachaoAndolan* v. *Union of India,* [2000] 4 L.R.I. 696; *AP Pollution Control Board-I* v. *Prof. M V Nayudu,* (2001) 2 S.C.C. 62; *Goa Foundation, Goa* v. *Diksha Holdings (P) Ltd.,* A.I.R. 2001 S.C. 184.

about the regulatory policies of the host state. Arbitration stakeholders shall not be perceived as detached from any links with the national systems of law and their specifics and it is important to balance the policy goals. Secondly, for the host country, an IIA should allow sufficient policy space needed to optimise the benefits from foreign investments. A reaffirmation towards balancing the twin objectives of investor protection and safeguarding policy space of the host country may appear in the preamble of the IIA.

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Lockdown & Demonetisation: Gauging Snowballing of Adversities From Marxian Lens

Shubham Gupta* & Shrey Lodha**

Abstract

Demonetisation and Lockdown during Covid-19 are two seminal events that have had brought to the fore the discussion for effective governance. Reflections of jurisprudence have been put to use to highlight the hardshipsthat had to be faced by the common populace which ensued in the aftermath of the measures taken to implement the former and control the latter. These measures have been analyzed from the lens of the well-known philosopher, Karl Marx. For purposes of smooth navigation, the paper has been divided into two waves,i.e. 'demonetisation' and 'lockdown during Covid-19', which are indeed two distinct sections of this paper. In pursuance of the same, the paper begins by highlighting the cause and effect of both the predicaments in India. Further, Marxist theories of class struggle, class polarization, and alienation are the yardsticks on which the authors have examined both the waves. In conclusion, it has been affirmed that 'demonetisation' and 'lockdown during Covid-19' have been synecdoche of the denseness of policy-makers, incapability of policy-enforcers, and adversities of policy-beneficiaries. Moreover, both the events had left the people of India and in certain cases beyond India with a feeling of shock and awe.

Introduction

November 8, 2016, the day of a revolutionary and bold initiative, as has been claimed by the Modi-led government, when the visionary legislators announced the policy of demonetisation which enforced the introduction of new currency notes of Rs. 500 and Rs. 2,000. This introduction was followed by a simultaneous exclusion of erstwhile Rs. 500 and Rs. 1,000 notes of the Mahatma Gandhi series in circulation, aimed towards rendering these notes redundant and unacceptable as legal tender in the Indian market.[1] In addition to such scraping off of the old Rs. 500 and Rs. 1,000 notes, the policy of demonetisation made possession and use of such old

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1 Withdrawal of Legal Tender Character of existing 500/- and 1000/- Bank Notes, India, available at:http://egazette.nic.in/(S(2eqxkdbspff2yk1snry3r3qy))/SearchNotificationDate.aspx (last visited on February 27, 2020).

currency notes illegal after the passing of Specified Bank Notes (Cessation of Liabilities) Bill, 2017, on 27th February 2017 for which legal actions could be initiated.[2]

It was explicit from multifarious notifications released by government departments, and speeches by the cabinet and government officials in the public forum that introduction of demonetisation was seminal (a) to bring to arrest networks involved in terror financing; (b) to empower the taxpayers who had put their mandate in the present government; (c) to bring to periphery Auri sacra fames involved in the black economy, and (d) to promote the use of digital and cashless economy.

Here, the terminology 'black economy' has been used as it is more appropriate in comparison to the terminology of black money as money in the crudest sense is independent of the manner of its appropriation and whereas the activity which one involves himself/herself into to receive such money attracts attribution of blackness or whiteness, depending upon the legality of the activity by which such money is appropriated.

The other event of this decade which has had an extraordinary impact on the global economy including India has been Covid-19. The exponential increase in the number of cases, escalating fatalities,the psychological fear that has enthralled the consumers and producers, has had postponed everything and compelledthem to live in the digital cave. All of this is incurably evident.

The pandemic forced the government to imposea national-wide lockdown in the country to '*flatten the curve*'of the virus. The lockdown, a decision faring well under Article 19(5) of the Indian Constitution, mandated the people in India to stay in the confines of their home, had ceased most of the business activity, and imposed certain ancillary obligations for safety from the virus. The International Monetary Fund is afraid that this pandemic can shrink the global economy by 3% which is going to be the steepest downfall since 1930's great depression.[3]

There are certain similarities between both the events being that (a) both were made known to people only a few hours before implementation; (b) both led to an increase in unemployment rates and a decrease in the per capita income of the country; (c)both paralysed the producers'/ employers'capability in paying their workers the due amount, partially or wholly; and (d) economic strenuousness on unemployed people, daily wage earners, salaried individuals and small & medium scale companies. These similarities in addition to other hardships shall suppose to be the fulcrum of examination throughout this paper.

Therefore, the present paper attempts to identify the following:

a. How demonetisation became a catalyst in intensifying class struggle?
b. Whether such class struggle impregnate class polarization?
c. How demonetisation alienated the workers from their work?

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2 The Specified Bank Notes (Cessation of Liabilities) Act 2017, India, s. 7, available at: https://rbidocs.rbi.org.in/rdocs/content/pdfs/SBNACT200417.pdf(last visited on July 14, 2020).

3 International Monetary Fund, "Chapter 1: Global Prospects and Policies" available at: https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020 (last visited on July 11, 2020).

d. Analysis of 'lockdown during Covid-19' from the lens of Karl Marx, as per the aforementioned pointers.

The present topic has been based upon, completely and totally, secondary data apropos demonetisation and literature available on the theories of Karl Marx. The authors have attempted to commensurate the facets of demonetisation with the theories of Karl Marx to highlight necessary and existing irrationality in the approach of the government while implementing the policy of demonetisation. Further, the authors have attempted to commensurate the most generally accepted discussion on the theories of Karl Marx in the present paper for contributing towards the development of jurisprudence over this subject-matter.

First Wave of Surprise - Demonetisation

Class Struggle

It has been explicit in the attempt of the ruling government that the intent of implementing the policy of demonetisation was to primarily attack and cripple the black economy which amounts to anything between the range of 20%-75% of our total Gross Domestic Product (herein after referred to as GDP) as estimated by private as well as public agencies like Ambit Capital Research,[4] World Bank and National Institute of Public Finance and Policy.[5] However, such intention of the ruling government has failed to pass the muster of its anticipation.

The policy of demonetisation, in the opinion of the government, would bring to the periphery the honest law-abiding and tax-paying citizens to exchange the then unacceptable denomination of notes as legal tender and would deter the bourgeoisieinvolved in the black economyto surface for exchanging the demonetised notes within the deadline so prescribed; thus, rendering the stack of money appropriated through involvement in black economy extinct.

Emphasis has been intended on the bourgeois class involved in black economy as it would be futile to not acknowledge that the persons, natural or juristic, involved in the black economy would *prima facie* fall under the class of bourgeoisie as the proletariats find it difficult to even meet their requirements of subsistence; thus, *ipso facto* dismissing their involvement in the black economy.

The foregoing argument advanced by the ruling government has been criticised in a two-fold manner i.e. based on**(i)** relativity; and **(ii)** jugaad.

Relativity

The amount of notes, relative to the size of the economy, that the black economy holds is significantly less than the then demonetised notes in circulation. For instance, the government estimated that around Rs. 3.5 lakh crore of monetary valueor around 2%-3% of the money of

4 PTI, "India's black economy shrinking, pegged at 20% of GDP: Report"Indian Express, available at:https://indianexpress.com/article/business/economy/ambit-capital-black-economy-shrinking-pegged-at-20-per-cent-of-gdp-2835783/ (last visited on February 27, 2020).

5 Jayati Ghosh, C. P. Chandrashekhar,et. al., "Demonetisation Decoded: A Critique to India's Currency Experiment2" Routledge, Oxfordshire & New York(2017).

the total GDP involved in the black economy would be extinguished from Rs. 15.41 lakh crore demonetised currency which is merely a pinprick as far as the extant monetary value involved in black economy is concerned. However, what was furnished was contrary to the envisioned tenets of demonetisation, as merely Rs. 10,720 croresof the total demonetised value or 0.7% of the total demonetised currency didn't reach the entrance of the banking infrastructure[6].

Jugaad

Apropos the data provided in the foregoing, it is explicit that only a pinprick of the actual black economy was flushed out of the Indian economic structure, and therefore it is imperative to pay heed to the idea of *jugaad* which has been put to use by the bourgeois involved in black economy to circumvent the perceived deadlock incorporated by the ruling government inthe policy of demonetisation to the detriment of such bourgeois class.

The quantum of demonetised notes received by the banks, during the prescribed period for exchange, was estimated to be 99.3% of the total demonetised notes; thus, rendering merely 0.7% of the total notes demonetised outside the ambit of the white economy[7]. However, the presumption of the fact that this 0.7% of un-exchanged demonetised notes is a microcosm of the black economy, intended to be flushed out, is nothing but a fallacious inference of a diabolical policy.

It is more than likely to presume that this left-out 0.7% belongs to all the classes of the society including the intermediate class and the proletariat class, who either due to poor connectivity to banking infrastructure or due to their physical absence during the prescribed deadline of 50 days might have been unable to exchange the demonetised notes. Besides, it is imperative to note that a short span of 50 days wouldn't be enough to replenish the circulation of Rs. 500 notes, rather a minimum of 6 months would have been required to replenish the same;[8] thus, completely ignoring the unparalleled distress caused to those who either don't have bank accounts or who are daily-wage earners not willing to involve themselves into a process-ridden exchangeof demonetised notes.

In the backdrop of the criticisms and the hardships faced by the public at large, it becomes pertinent to ponder upon the fact whether such an abrupt move by the government uplifted the economic situation purported to be infected with black economy or has worsened the class struggle, i.e. primarily between the bourgeois class like the persons carrying out activities of money laundering, tax evasion and terror funding which form the participants of the black economy

6 PTI, "99.30% of demonetised money back in the system, says RBI report" Economic Times,available at:https://economictimes.indiatimes.com/news/economy/finance/after-almost-two-years-of-counting-rbi-says-99-3-of-demonetised-notes-returned/articleshow/65589904.cms?from=mdr (last visited on February 27, 2020).

7 *Id*.

8 PTI, "Currency press capacity: It may take 6 months, not just 50 days to replenish Rs 500 notes"India Today, available at:https://www.indiatoday.in/india/story/demonetisation-currency-press-capacity-six-months-needed-to-replenish-rs-500-notes-352498-2016-11-17 (last visited on February 27, 2020).

on one hand and intermediate and proletariat class like working-class salaried people, rural people, people involved in petty businesses like peasantry, farmers, etc.

To ascertain this question, reference to the theory of class struggle, propounded by Marx, highlights that continuous and consistent exploitation of the proletariat class, synonymous to the working class or the labour class which exclusively contributes the labour-power in the capitalistic mode of production, by the bourgeoisie which invests the capital for production has been repetitive and forms an essential element of such class conflict.

Commensuration of such capital with the labour-power furnished by the proletariat class leads to the generation of surplus value solely enjoyed by the bourgeoisie. Therefore, the class struggle primarily revolves around the aspect of ownership of private property which can either be the capital, land, or labour-power. Class struggle is therefore between the haves and the have nots or put simply, between the oppressors and the oppressed.

Here, it is to be noted that the currency notes which semantically form part of the terminology 'money', are considered to be the private property, which Marx defines as a tangible value generated by the labour-power, ability of people to produce something upon dedicating a certain period of their time, over which the private individuals possess control concerning the ownership over the tangible value generated, notwithstanding this, and also upon the means of production for generating or producing such tangible value.

Moreover, by such ownership by private individuals vests in them the power of excluding others from the enjoyment of the private property. Since, in today's modern economy, money alike other private property has the facet of being controlled by private individuals and is then, by such controlled ownership kept in isolation from general masses is thus, also categorised as private property.

Upon perusal of literature available on Marx's aforementioned theories, it can be inferred in a nutshell that Marx conjured the society as a hierarchy of classes and, these classes interacted with each other at various levels like that of production, manufacturing, dissemination of services, etc., for the functioning of this society[9].

However, it is significant to note that a class, according to Marx, in the hierarchy of the classes in a society is characterised by the ownership of private property and such ownership of private property determines a class's exploitative nature, flowing in descending order in the hierarchy.[10] Therefore, in this hierarchy of classes, according to Marx, the 'bourgeoisie' is the one who owns the means of production and assumes maximum ownership of the total wealth or income generated in the society, and the 'proletariat' is the one which, metaphorically, manages to see a dollar after accumulating a pile of pennies only after using its labour-power.

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9 Bertell Ollman, "Marx's Use of 'Class'" 73 Am. Jn. of Socio. 573 (1968).

10 George G. Brenkert, "Freedom and Private Property in Marx" 8 Phil. & Pub. Aff. 122 (1979).

In the present implications of the policy of demonetisation, class conflict is manifested from the fact that unjustified hardships were faced by the intermediate and the proletariat class who were subjected to unnecessary hurdles ranging from standing in queues for long hours, consequential loss of life, consequential loss in yearning to objectify one's labour-power for self-actualization and other such distresses of the sort only in anticipation to extinct the resulting minuscule currency notes forming part of the black economy.

The element of surprise and instilling shock and awe apropos the bourgeois class involved in the black economy was far less than what was experienced by the proletariat class. Such shock and awe, prima facie, leads to the formation of idiosyncrasies contrary to the tenements of democracy, which intends to formulate policies to benefit the public at large, amongst the proletariat class of the society; thus, strengthening the gap between the classes.

Criticisms to demonetisation based on relativity and *jugaad* further paint the canvas of class struggle within the minds of the proletariat class by signalling that the oppressors, howsoever exploitative in nature and manner can, by ownership of private property, circumvent the framework of a policy like demonetisation and the proletariat class despite earning through legal means but due to deprivation of ownership of the private property - here ownership of private property refers to access to bank accounts, access to professional services to implement jugaad, etc., is devoid of the benefits, howsoever not realised in full and still in arrears by the capital, by the act of the third party being the state.

Therefore, it is safe to exclaim in the words of Marx that the previous attempts of demonetisation in 1946 and 1978 were tragedy and the move of demonetisation by the 2014 ruling government is a farce.

Class Polarization

Another pillar of the move of demonetisation affected by the BJP-led government was its emphasis to shift the paradigm from a cash-intensive economy to a cashless economy. This pillar was rather an aim to interfere with the maintenance and disposal of asset preference according to the wishes of the government. The underpinning argument for such a shift was that the transactions would be transparently and efficiently recorded in a cash-less economy wherein transactions would be carried out either through internet banking facilities or via a credit card or a debit card.

However, the government of the day and its flamboyant-supporting-urban economists turned a blind eye to the practical problems attached to such a shift. The problems like that related to internet and bank connectivity, digital literacy and digital unpreparedness which were amounted to another shock and awe for the public at large, who was completely shadowed by the strategy, according to behavioural economics, of nudging whereby the government had made it difficult for choosing cash economy as an alternative to thecash-less economy. Moreover, the attempt by the government to thrust down upon the throats of the people its envisioned goal of attainment of thecash-less economy within such a short notice and within such a period is an act of complete futility in overhauling the economic structure of the country.

Even if the argument of the government is taken on the face value that cash-less economy would facilitate transparency and accountability, the government cloaks the vulnerability of disruption of livelihood of many small businesses and informally organised sectors. For instance, a township having one thousand scattered vendors who are carrying out the business of providing recharge plans formobile internet, mobile talk-time,and television set-top box by dealing in cash would lose their livelihood as a result of a shift from a cash economy to the cash-less economy as such a shift would concentrate the business of such recharging in the hands of a few large capitalist groups like Paytm, Google Pay, Phone Pe and others of the sort which would eliminate the need of physical presence and that of intermediaries even if these vendors accept cash-less means of payment.

Also, cash-less transactions come with a cost on the transaction, i.e. in an event that an individual intends to advance a certain amount concerning purchasing of any product or service, he/she might have to bear the additional cost on such transaction, as the banks facilitating such transactions are the body corporate to maximise their profit and wouldn't involve themselves in providing an altruistic intermediary channel. Such cost on transaction incurred by an individual, especially, by the individual belonging to a proletariat class, leads to ethical questioning of the move of demonetisation, compelling a shift to thecash-less economy, as his generated monetary value upon provision of labour-power to the exploitative capital is prejudiced far more than what a bourgeois class is subjected to. Rather than uplifting the condition of the proletariat class the government further formulates a policy to their detriment.

Furthermore, a theory put forwarded by Kenneth Rogoff, in his book, "The Curse of Cash: How Large-Denomination Bills Aid Crime and Tax Evasion and Constrain Monetary Policy", claims that negative interest rates could be leviedby the banks in the event of a shift to the cash-less economy,meaning thereby that the banks would, contrarily to the general floor interest rate of at least 0%, charge a certain rate of interest or a certain sum on the total value of the amount deposited in the bank by an individual for the mere act of such deposit's maintenance by it. Such negative rates would act as detrimental to the benefit of the proletariat class which ipso facto is continuously and consistently exploited at all fronts.

In light of the aforementioned drawbacks of a cash-less economy which has been thrust upon by a sledgehammer attack of demonetisation, the proletariat class which is devoid of the infrastructural necessities like bank accounts and connectivity to a bank or internet or as a matter of fact has, in many circumstances, no access to a handset device for enabling cash-less economy, disabled due to digital illiteracy and their purchasing power to afford internet data plans, facing encumbrance apropos transfer of cash-less income from e-wallets to bank accounts and in requirement of smaller denomination notes for change, then, the existing classes between the bourgeois and proletariat shall keep on getting concentrated at the extreme ends wherein only a few like those belonging to the technologically-advanced companies, corporate houses and other capitalist persons will be extremely well-off whereas a large proportion of people restrained due to smorgasbord of such hindrances will have to face pauperisation.

Alienation of Workers

Based on the discussions under 'class struggle' and 'class polarization', it is put forward that such ramifications faced by the public at large, specifically, the working class people, falling under the proletariat class, lead to their alienation in a multi-faceted way. For instance, a person specialised in making mud pots is forced or not allowed to work in the field of his specialisation and has to work in coal mines for the living is an alienation of the worker from the agency of his attribute, i.e. the said person experiences a disconnection and deprivation of control over his actions.

The theory of alienation by Marx incorporates this disconnection and deprivation of control over one's actionswhile performing an unwilling activity to cater to one's necessity of subsistence due to lack of or no ownership of private property.[11] Effect of demonetisation and transition to the cash-less economy, and as a consequence, dawned unemployment uponthe informal sector's workers because their interest shifted from their daily activities to that of conversion of money. Karl Marx points out four forms of alienation which thewage earners or workers face, namely:

a. Alienation from their product.
b. Alienation from the process of production.
c. Alienation from co-workers.
d. Alienation from oneself.[12]

Many families having no access to the cash-less form of the economy like debit cards, credit cards, internet banking, etc., and due to shortage of cash, were not well-positioned to settle their medical dues and thus, had to surrender to the will of the goddess of death, Nephthys. Farmers were stuck between hell and high water when they realised that neither could their produce be sold nor could they invest to produce, thus, amplifying their obstacles to settle their loans and meet their necessity of subsistence.[13]

Due to the acute and obtuse policy of demonetisation, the proletariat class was alienated in all of the four forms. Besides, due to sudden creation of a vacuum of cash in the markets, transactions came to a standstill, and in consequence, the workers or wage earners who lack ownership of any private property experienced delayed payments, no payments or deferred payments. It is emphasised that these delayed, deferred, or no payments impeded the proletariatclass in meeting with their basic requirements of food and maintenance in addition to their alienation in various forms.

The Index of Industrial Production (IIP) series for December-March 2016-2017 period was recorded the lowest in comparison to the last five years' manufacturing growth during the

11 Armando, "Marx's Conception of Alienation" Medium:Demoskratia, available at:https://demoskratia.org/marxs-conception-of-alienation-7e9d47b78220 (last visited on February 27, 2020).

12 Antony Flew (ed.), A Dictionary of Philosophy 10 (St. Martin's Press, New York, 1984).

13 Government of Kerala, "Report of Committee to Study the Impact of Demonetisation on the State Economy of Kerala", available at:http://www.macroscan.org/dem/dec16/pdf/Impact_Demonetisation.pdf (last visited on February 27, 2020).

same period.[14] It is imperative to look at the IIP record because the proletariat class is largely involved in the production of goods and services, and such a sharp decline in the manufacturing growth significantly affects the employment of the proletariat class involved in the organised sector.

Furthermore, the proletariat class, especially those involved in the informal sector, contributes around 40% to the Indian economy and around 75% of the labour force in India, thus, an attempt to dissolve the informal sector would not only hit the employment of a large mass;[15] but, this leads to alienation from their work, product and themselves as they have to alienate themselves from their product and process of production and they alienate their desire to produce from themselves.

To these four, what is being witnessed all around the country after demonetisation and the push towards a cashless economy, raises concerns towards the evolution of the fifth form of alienation: that of a wage earner from their income received and held as tangible currency, the value of which is unfettered to the number of physical transactions, unlike online transactions which could involve transaction cost. The labour being socially, economically, and educationally backward was obstructed to use its money freely because ofthe imposition of the policy of demonetisation and the inhibitions towards the use of cash-less economy, thereby, alienating it from its income.

Second Wave of Surprise – Covid-19

Class Struggle & Class Polarization

The pandemic situation installed by the novel coronavirus, Covid-19, has dawned upon the people the need for a level playing field. This field shall be one where everything is relevant in a parallel manner and not a hierarchical one, for the reason that comparative importance would do more harm than good. Mother Nature ticked the option of chaos in the form of this virus for returning normalcy in the peace which was otherwise blemished.

Covid-19 having its origin in China,[16] howsoever controversial,[17] has introduced a new lens and definition of destruction, in terms of life, livelihood, infrastructure, and belief. However, one thing which thenovel virus could not destroy, or even modify, is the archaic reality of class struggleconsequentially leading to class polarization. In dealing with this novel virus, lack of foresight

14 Manas Chakravarty, "New IIP series shows severe impact of demonetisation on manufacturing sector" Livemint, available at: https://www.livemint.com/Money/oYE902Pvtv5ltCWe9P2WcI/New-IIP-series-shows-severe-impact-of-demonetisation-on-manu.html (last visited on February 27, 2020).

15 VP Nandakumar, "The flip side to a formalised economy" Business Line, available at:https://www.thehindubusinessline.com/opinion/the-flip-side-to-a-formalised-economy/article10037468.ece# (last visited on February 27, 2020).

16 Jeffrey Gettleman, Kai Schultz, "Modi Orders 3-Week Total Lockdown for All 1.3 Billion Indians" New York Times, available at: https://www.nytimes.com/2020/03/24/world/asia/india-coronavirus-lockdown.html (last visited on July 11, 2020).

17 Editorial, "The origin of covid-19 - The pieces of the puzzle of covid-19's origin are coming to light" The Economist, available at: https://www.economist.com/science-and-technology/2020/05/02/the-pieces-of-the-puzzle-of-covid-19s-origin-are-coming-to-light (last visited on July 11, 2020).

of post-lockdown consequences, the disparity in availability and accessibility of resources, and inefficiency in catering to hardships as a welfare state have been the reasons for increased and vehemently acknowledged class struggle amongst and by the masses.

'Lockdown during Covid-19' is an inverted equation of class struggle concerning the variables involved in the latter. The former attempts to aloof the haves from have nots, and the latter is the result of the exploitation of haves over have nots. The Indian authorities had imposed a four-phased lockdown[18] for stymieing the spread of the virus having the international guidelines[19] as well as the scenario in mind.

According to Karl Marx, class struggle is the result of consistent exploitation of have nots by haves which ultimately leads to a mass revolt for individual rights and societal duties. The same, exploitation as well as mass revolts, could be witnessed by the latest developments within the country.

Article 47 of the Indian Constitution mentions that it is upon the state to fulfil its primary duty to improve the levels of nutrition, the standard of living and health for the benefit of its citizens. However, the implementation and relaxation of lockdown by the government authorities suggests the contrary. An untimely implementation of lockdown instilled shock and awe amongst the masses, especially the proletariat class who sell their labour in places which are far from their homeland, thereby, arresting them in a situation where there is no assurance of food and shelter.[20] Despite the promises of the government in catering to the requirements and basic sustenance needs of every person, especially the proletariat class, residing in the Indian subcontinent, it miserably failed in keeping up with its promises.[21] This incapability of the government was the stepping stone in igniting the class conflict between the masses.

Meanwhile, the haves had started to return to their homelands by accessibility to information pre-lockdown, the have nots (daily wage earners) kept on selling their labour to sustain until lockdown. Being reminisce and worrisome of their family members, the have notsresorted to the

18 Annexure to Ministry of Home Affairs Order No. 40-3/2020-D, available at: https://www.mohfw.gov.in/pdf/Annexure_MHA.pdf (last visited on July 11, 2020); Ministry of Home Affairs Order No. 40-3/2020-DM-I(A), available at: https://www.mha.gov.in/sites/default/files/PR_MHA Order Dt 14042020 forextending the Lockdown Periodtill 03052020_14042020.pdf (last visited on July 11, 2020); Extension of Lockdown for a further period of Two Weeks with effect from May 4, 2020, India, available at: https://www.mha.gov.in/sites/default/files/press %20 release.pdf (last visited on July 11, 2020); Ministry of Home Affairs Order No. 40-3/2020-DM-I(A), available at: https://www.mha.gov.in/sites/default/files/MHAOrderextension_1752020_0.pdf (last visited on July 11, 2020).

19 "COVID-19: Lockdown across India, in line with WHO guidance" UN News, available at: https://news.un.org/en/story/2020/03/1060132 (last visited on July 11, 2020).

20 "India: COVID-19 Lockdown Puts Poor at Risk" Human Rights Watch, available at: https://www.hrw.org/news/2020/03/27/india-covid-19-lockdown-puts-poor-risk (last visited on July 11, 2020); VijaytaLalwani, "Coronavirus: 'Why has Modi done this?' Rajasthan workers walk back home from Gujarat" Scroll.in, available at: https://scroll.in/article/957245/coronavirus-after-lockdown-migrant-workers-take-a-long-walk-home-from-gujarat-to-rajasthan (last visited on July 11, 2020); Sukanya Shantha, "'Stay Home': Coronavirus Shows How the Government Has Failed Homeless Persons" The Wire, available at: https://thewire.in/rights/homless-persons-coronavirus-mumbai (last visited on July 11, 2020).

21 Sukanya Shantha, "'Stay Home': Coronavirus Shows How the Government Has Failed Homeless Persons" The Wire, available at: https://thewire.in/rights/homless-persons-coronavirus-mumbai (last visited on July 11, 2020)

only available means of transport, the 11 number bus i.e. their legs. [22] Cruising on their legs with luggage on their head and children on their backs, the daily wage earners didn't mind the compelling situation only to meet their families.[23] The never-ending journey was covered by them when the bourgeois was sipping wine with cheese inside their glass walls. This laid down the second step of class conflict.

In anticipation of government aid, many daily wage earners lost their lives due to hunger and heat-stroke.[24] Amidst all this, the guidelines issued by the Ministry of Home Affairs for nipping in the bud the spread of coronavirus were being flouted by these have nots for which they had to face the brunt of administration.[25] Upon acknowledging the helplessness of these people, the government tried to solace them by a slew of other promises assuring them their return.[26] However, the same was at the expense of these daily wage earners[27] and the subsequent dilution in the credibility of these promises[28] was the watershed moment for the have nots and thus, a series of agitation had begun.[29]

Further, most recently it has been highlighted that Remdisivir which has been endorsed as a coronavirus-killer drug by the Indian Council for Medical Research (hereinafter ICMR) is expensive[30] and unproven drug to tackle coronavirus. However, the ICMR has stressed its

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22 Omar Rashid, Jatin Anand, Ajeet Mahale, "India coronavirus lockdown | Migrant workers and their long march to uncertainty" The Hindu, available at: https://www.thehindu.com/news/national/india-coronavirus-lockdown-migrant-workers-and-their-long-march-to-uncertainty/article31251952.ece (last visited on July 11, 2020).

23 Omar Rashid, Jatin Anand, Ajeet Mahale, "India coronavirus lockdown | Migrant workers and their long march to uncertainty" The Hindu, available at: https://www.thehindu.com/news/national/india-coronavirus-lockdown-migrant-workers-and-their-long-march-to-uncertainty/article31251952.ece (last visited on July 11, 2020).

24 Kabir Agarwal, "Hunger Can Kill Us Before the Virus': Migrant Workers on the March During Lockdown" The Wire, available at: https://thewire.in/labour/coronavirus-lockdown-migrant-workers-walking-home (last visited on July 11, 2020).

25 ShorboriPurkayasth, "Police Brutality: Citizens, Delivery Agents Harassed Amid Lockdown" The Quint, available at: https://www.thequint.com/news/india/police-harassing-citizens-delivery-agents-amid-covid-19-lockdown? (last visited on July 11, 2020); Rohan Venkatramkrishnan, "The Indian Police must understand that coronavirus cannot be beaten with a lathi" Scroll.in, available at: https://scroll.in/article/957269/the-indian-police-need-to-understand-that-coronavirus-cannot-be-beaten-with-a-lathi (last visited on July 11, 2020); The Wire Staff, "West Bengal: Man Who Was Buying Milk Dies Hours After Police Thrash Him" The Wire, available at: https://thewire.in/rights/west-bengal-police-curfew-man-thrashed-dies (last visited on July 11, 2020).

26 PTI, "Centre asks states to operate more special trains for migrant workers" Economic Times, available at: https://economictimes.indiatimes.com/news/politics-and-nation/centre-asks-states-to-operate-more-special-trains-for-migrant-workers/articleshow/75823743.cms?from=mdr (last visited on July 11, 2020).

27 The Wire Analysis, "Fact Check: No, the Centre Isn't Paying for Migrant Workers' Train Journeys Home" The Wire, available at: https://thewire.in/government/indian-railways-migrant-workers-fare (last visited on July 11, 2020).

28 Yogendra Yadav, "Don't blame Covid or financial package. Politics is holding India's migrant workers hostage" The Print, available at: https://theprint.in/opinion/politics-holding-india-migrant-workers-hostage/415524/ (last visited on July 11, 2020).

29 PTI, "Lockdown: Across Gujarat, Migrant Workers Agitate for Passage Home" The Wire, available at: https://thewire.in/labour/lockdown-surat-gujarat-migrant-workers (last visited on July 11, 2020); Shruti Jain, "Beaten For Looking for Food,' Jaipur's Muslim Migrant Workers Agitate to Go Home" The Wire, available at: https://thewire.in/communalism/jaipur-muslim-migrant-workers (last visited on July 11, 2020).

30 Sohini Das, "Hetero to launch remdesivir at Rs 5,000-6,000/dose, Cipla to follow suit" Busiess Standard, available at: https://www.business-standard.com/article/companies/hetero-gets-nod-for-remdesivir-covid-drug-may-be-priced-at-rs-5000-dose-120062100649_1.html (last visited on July 11, 2020).

usage over Ivermectin despite the former's cost-intensive inefficacy[31] in dealing with the problem and the latter's cost-effective efficacy[32] in solving the problem. This reflects the exploitative trait of the institutions to make profits even during a pandemic, thereby, exacerbating the troubles in accessing the resources.

In light of the foregoing, the proletariat is entrenched in a situation where there is hell in the form of lockdown and there is high water in form of the exploitative nature of the haves be it the government, the businesses or the common bourgeois.

Alienation

Alienation is imprudence of the society and the individual of each society. Marx's theory of Alienation is provided in the "Economic and Philosophical Manuscripts of 1844" and "The German Ideology of 1846". In these manuscripts, Marx has defined human Alienation as the third element of Alienation. In a country like India, no one is aware of what other people of the society are going through in their life. Besides, the country is facing a new alienation of lockdown. Many people in the country work in the informal sector and comparatively earn less for their survival, migrant workers being one amongst them who sell their labourdaily to ensure their basic subsistence requirements.

Notwithstanding theprecautionary benefits of the imposition of lockdown for fighting Covid-19, itsimplementation by the government compels concerns to be raised. The fact that it is a collective decision makes it impossible to take into consideration, and further, cater to the unique need of all the strata of people. The decision of a nation-wide lockdown, coupled with the existing poverty, further ignited the hardships of the marginalised class.

The discussion in the foregoing articulates the fact that an abrupt implementation of lockdown has caused social alienation amongst the masses. Due to such abruptness and destitution in gauging of consequences,themigrant labourers were forced to vacate the factories and their residences. The cab drivers are having their vehicle but cannot drive as there is no one to avail of their services. The landlords who depend on rent for their living are facing a lot of problems. Some of the landlords are not asking for rents and allowing the tenants to live on credit. The problem is will the tenants be able to pay these hefty credits of rents later as these people have been handicapped, for lockdown, to earn, thereby, not being able to meet their daily subsistence requirements.

"Lockdown-Alienation" is one of the major issues which need immediate attention from the government. The situation could be better if the government takes some pragmatic approach,

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31 ANI, "Government still not satisfied with the efficacy of antiviral drugs Remdesivir, Favipiravir in fighting Covid-19" Economic Times, available at: https://health.economictimes.indiatimes.com/news/diagnostics/government-still-not-satisfied-with-the-efficacy-of-antiviral-drugs-remdesivir-favipiravir-in-fighting-covid-19/75757161 (last visited on July 11, 2020).

32 PTI, "Coronavirus treatment: Bangladesh doctors claim to have found drug combinations to treat COVID-19" Times of India, available at: https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/coronavirus-treatment-bangladesh-doctors-claim-to-have-found-drug-combinations-to-treat-covid-19/articleshow/75807543.cms (last visited on July 11, 2020).

as the workers have been alienated from their work and their place. The government should take some easy steps to avoid these crises, they can compel the factory owners do not remove the labourers from their factory and site residence. The government should provide these people with basic survival needs. The differentiation and categorisation is the need of the hour so to de-alienate these people and to provide them with mental satisfaction. The government should take care that the workers are not alienated with their self. Although the government cannot fulfil the self-realisation needs of these people in these times of crisis yet the bare minimum needs of protection from the alienation of place and work should be taken care of.

Recommendation and Conclusion

In light of the foregoing discussions vis-à-vis 'demonetisation' and 'lockdown during Covid-19' from the Marxist perspective, it is imperative to take note of the fact that why did the government, upon lifting the veil of apparent reasoning, in reality, implemented the said policies of demonetisation and lockdown. It is inferred upon perusal of literature on demonetisation ad Covid-19 that the government's act of implementingsuch policies at such a magnanimous magnitude without gauging the consequences and being prepared is reminiscent with that of fascism.

According to Umberto Eco, there are 14 characteristics of fascism and one of which is that fascism believes in action for own sake, for it believes that thinking is symptomatic of a certain kind of state of emasculation, thus, it is important to act. When such perception is adopted that action informed by thought is a symptom of weakness, then, it follows that action to be a sign of weakness must be a strong action and shall be one which must be on a large scale which instils shock and awe within the public at large. In the present case, demonetisation of 86% of the currency notes and imposition of lockdown within a short span of few hours indicates that it instilled shock and awe within the public at large without any sound economic rationale. The actual objective of the government, or rather the neo-liberal government, was to destroy the informal sector for benefit of large, formal capitalist sector by withdrawing the state support from that particular sector.

Furthermore, a proletariat revolution which, according to Marx, should have been a consequence of such policies, for the abolition of private property, has been absent due to the perceived essence of the tenets of democracy. In a democracy, the ruling government aims to uplift the situation or conditions of the people at large, but demonetisation and lockdown to the contrary were perceived as a bold move of the ruling government which distressed public at large and such distress was consistently being justified for the Indian democracy has reined in the hands of the leader who has the audacity to take bold steps, without having any reservations about a possible negative effect on his vote bank in the upcoming elections, for the betterment of future at the cost of distress in the present.

To ameliorate the adverse impacts of the *have nots* and bridge the gap between the *haves* and *have nots*, Marx can be referred to again. The underlying principles on which Marx had formulated the theory of class struggle were that (a) labour serves as the driving force which

gives the life of these workers meaning; and (b) pooling of resources in production, manufacturing, distribution and other life involvements. Adherence to these principles would ensure political, economical, socio-cultural, technological, environmental, and legal equivalency amongst the *haves* and *have nots*. Therefore, any government shall strive towards increasing employment and installing equanimity in accessibility to resources are the only tools that would ensure that such events do not adversely impact the *have nots* multi-fold times in contrast to the *haves* and rather would equip the *have nots* to appropriately tackle such diabolical times.

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Reconstructing The Doctrine of Command Responsibility: A Journey from SUN-TZU to ICC

Sharvin Vats* & Garima Singh**

Abstract

The doctrine of command responsibility states that, if military commanders refuse to successfully dissuade, combat, or execute war crimes of their subordinates, the commander may be tried for the crimes of his subordinates. In the ad hoc tribunals for ICTY and for Rwanda (ICTR), this concept was developed and perfected through numerous case laws. Thus, these judgements deserve a central spot in this article. Separate sections are dedicated to its Constituent Elements to elucidate and improve understanding of the distinct facets of the doctrine. This article attempts to explain the defence of superior order in criminal law. A defence that was widely relied upon after the Second World War during the Nuremberg and Tokyo Trials also found its place in the 1860 Indian Penal Code. The implementation of this defence, however, has been a source of contention throughout, to be illustrated in this paper.

Introduction

Military members occupy positions imbued with dignity and carry high degrees of public interest and immense accountability[1]. Whilst high-ranking officials are usually installed far from the fields of war, the command responsibility doctrine means that only those without war torn hands are responsible for the humanitarian violations they direct, enforce or inspire. However, in some cases, the leaders play a more active role in the commission of war crimes. Allowing unregulated soldiers actions in time of battle poses a major risk of humanitarian abuses.

Commanders of the military have effective control over their subordinates. A superior may order a subordinate to carry out physical workout to the point of extreme exhaustion as a part of corrective training. Faced with heavy resistance, a commander could order a subordinate to attack a fortified enemy position during battle. The subordinate usually does not have a choice, in any case, except to follow his orders as a matter of superior obligation. The price for such

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1 Timothy Wu & Yong-Sung King, "Criminal Liability for the Actions of Subordinates - The Doctrine of Command Responsibility and its Analogues in United States Law", 38 Harv. Int'l L. J. 272, (1997).

authority is what many calls as command burden. Commanders are required to complete and delegate a mission while at the same time being entrusted with the lives, preparation, supplies, instruction, health, and general well-being of their subordinates[2].

The power held by the military leaders placed them in the strongest position to escape nominal war crimes. Among these reasons, and because of the peculiar existence of military leadership, members may be technically liable among failure to comply under such situations. The doctrine of command responsibility for superior omissions comprises of three distinct elements under modern understanding: an instructive relationship with a subordinate; mens rea; and a failure to prevent or punish misconduct[3]. Definitions of these components vary, and have evolved over time, between foreign and domestic legal codes.

Since the wake of World War II, the concept of command responsibility has been accepted within the military of the United States. The theory has entered the field of criminal law only relatively recently since World War II. This has been identified as an effective and valuable method for investigating and trailing scheme fraud masterminds, and figures heavily in international criminal tribunals case law. This was first applied by American military jurists to belligerent military leaders during the trials of Tokyo and Nuremberg. The United States Army in 1956, upon the publication of its manual on ground warfare rules, incorporated command responsibility into its own military ethics[4]. With the inclusion of command responsibility into the manual, the U.S. Army developed the doctrine to direct future commanders.

Unfolding of the Doctrine

Although it was not until the mid-nineteenth century that universal codification of war laws took place, because in ancient times other civilizations had traditional rules of war. One early instance is of Sun-Tzu, a two-thousand-year-old Chinese text which recounts arrangement for violent military warfare[5]. Though this book devotes much of its text to military strategy, some passages symbolize modern war laws:

> "So, in chariot battles when chariots are captured, the ten-chariot unit commander will reward the first to capture them and will switch their battle standards and flags; their chariots are mixed with ours and driven; their soldiers are treated kindly when given care."[6]

Similarly, from 700 to 450 B.C., Greek soldiers had unwritten customary rules of conduct[7]. Among such rules was the recognition of the non-combatant status of religious sites, a tradition

2 U.S. Department of Army, Field Manual (12 October 2006).

3 Beth Van Schaack, "Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia", 36 U.C. Davis L. Rev. 1213-1218 (2003).

4 U.S. Department of Army, Field Manual (18 July 1956).

5 J.H. Huang, Sun-Tzu: Art of War-The New Translation 22-23 (HarperPB, 1stedn., 1993).

6 *Id.* at 5.

7 Michael Howard, George J. Andreopoulos, et. al. (eds.), In The Laws Of War: Constraints On Warfare In The Western World 12-13 (Yale University Press, 1994).

that continues to persist in the modern era: improper warfare against other individuals and in certain locations, the inviolability of holy places and individuals under the protection of gods should be upheld, particularly heralds and suppliers.

The civilizations of China and Greece provide have limited evidence on the traditional laws of war prevalent in ancient societies. Nonetheless, laws of war existed primarily as domestic policies, military actions, and religious principles, even until the mid-nineteenth century. With the St. Petersburg Declaration, signed in 1868, the first sign of an international negotiation started to emerge[8]. Nevertheless, the content of the resolution includes a prohibition on all types of weapons, the declaration is currently renowned for its comments that illustrate contemporary fears regarding the nature of highly advanced warfare.

Thirty years later, the Russian government and Czar Nicholas II called for a world meeting in The Hague to debate disarmament. The meeting in Hague was called for war avoidance but the main problem for Russia was the Western developments in arms and warfare. The conference thus consisted of two bodies: the first that addressed the prohibition of such arms, and the second that focused on the codification of war rules.

While officially considered a disarmament debacle, the Hague Conference of 1899 introduced the first attempt for codification of international laws of war. The Hague Convention on the Law and Customs of War on Land of 1899, and the Maritime Military Convention are the first examples of military laws codified in the context of an international treaty. The use of the multilateral categorization as the keystone for international law principles and treaties began with the 1907 Second Hague Peace Conference[9]. This conference incorporated thirteen conventions, ten of which were regarding war regulations. Convention IV in Hague explicitly concerned with ground warfare. The second meeting in Hague, the treaties it drafted, accounted a ground for military instruction on the rules of war.

The Nuremberg Experiment

The next pivotal development in the history of international war laws transpired at the end of WWII[10]. The United States consulted Great Britain and its allies in 1944 to decide how to negotiate with the suspected war criminals. The outcome became the first International Military Tribunal, now known as the Nuremberg Trials, to try war crimes. Nonetheless, the trials in Nuremberg are so famous that many mistakenly consider those trials as the foundation of modern war laws. Rather, the tribunal had the duty of embracing the laws of that era, both the traditional unwritten rules of warfare and codified treaties such as the Hague Conventions, and using them to the distinctive task of sentencing Third Reich criminals. The four delegations consisting of - the United States, France, Great Britain, and the Soviet Union - promulgated the tribunal's London Charter, named after the place, it was adopted in. Article Six of the Charter recorded the offences

8 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868.

9 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907.

10 Telford Taylor, The Anatomy of The Nuremberg Trials (Bloomsbury, 1993).

under the jurisdiction of the tribunal and categorized these offences into three crucial types: Crimes Against Peace, War Crimes and Crimes Against Humanity[11].

Rather than the concept of war crimes by the London Charter, it was the genuine sentencing of the Nazi war criminals which establish paramount precedents in the formation of war laws. The real outcome of the Nuremberg trials, in other words, was not to express war crimes, rather expanding them to convicted defendants.

World War II Aftermath

The mass killings during World War II resulted in public attention of war crimes, mainly those of a humanitarian sort. The outcome was an expansion in the codification of rules and customs of warfare.[12] "Within these codifications, two of the most famous were the 1949 Geneva Conventions." These four conventions were disseminated by the Red Cross International Committee and passed and adopted by leaders from most countries across the globe. In total, they provide a rigid structure from which war rules of the twentieth century developed and evolved.

Only a few short years after the conclusion of World War II, the Geneva Conventions were signed. Nevertheless, the ensuing decades saw the emergence of new forms of warfare involving military operations and internal, or non-international, wars. In the late 1970's, the Red Cross International Committee attempted to resolve these developments by convening a new conference in Geneva that finally created two supplementary protocols to the Geneva Conventions. Protocol I reflected fears about the protection of the atmosphere in post-Vietnam by including an article banning the use of weapons that could harm the natural environment and prevent environmental degradation as a means of repression.[13]

This extensive review of the history of war laws was largely limited to addressing the codification process. The practices of warfare were often highly affected by forces entirely different from the formal peace process. These examples are the media's role in putting crimes into the world spotlight, and the subsequent influence of global outrage. The treaties and agreements also offer clear evidence of the changing concepts of warfare over time.

Historical Development

The commencements of the doctrine of command responsibility can be traced far back as the Sun-Tzu time. The primary focus during that time was on the Commander 's obligation to lead and control soldiers under his direct command. In that way, the responsibility of a commander may derive not only from an improper order but also from failure to adequately direct or monitor his troops by enabling them to perform unlawful actions.

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11 The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis,1945, art. 6.

12 Timothy L. H. McCormack, "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law", 60 Alb. L. Rev. 681-721 (1997).

13 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, art. 44.

The creation of war legislation in the United States shows how the concept of command responsibility slowly took form over the last two hundred years. For example, the American Articles of War were implemented only a few months after the signing of America's Declaration of Independence.[14] In their provisions, the Articles mandated military officers to keep their forces in "good order," and that officers who refused to discipline their soldiers' crimes could be disciplined for the offenses committed themselves.

The first legal acceptance of the concept of command-responsibility took place in the 1907 Hague Convention IV. The convention deals with ground warfare and partially describes legitimate warriors as being commanded by a superior in charge. Perhaps importantly, the convention's provisions keep belligerent nations responsible for the actions of their military forces.[15] This duty foreshadows the modem idea that State heads are kept responsible under the concept of command responsibility. Nevertheless, following the 1907 Hague Conventions, World War I declined to see any significant war crimes convictions of military officers over actions that broke the rules of war.

Post-World War II Expansion

The US and its allies tried to keep many high-ranking German and Japanese officers responsible for a series of crimes committed by their troops at the end of the Second World War. Nevertheless, there was no clear evidence in many of these cases that those members directed or knowingly engaged in the violations. Consequently, the Allies required an implied responsibility theory — one that criminalizes members for failure to exert power. During World War II, thousands of convicted Axis war criminals were prosecuted before international tribunals, numerous national judicial commissions, and domestic judges. General Tomoyuki Yamashita - former chief of the Japanese army in the Philippines - was among those investigated by U.S. military tribunal. General Yamashita 's forces have certainly perpetrated major crimes in the Philippines with hundreds of thousands of people being abused and murdered[16]. Yamashita was subsequently charged with:

> *"unlawfully disregarding and failing to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes".*[17]

Given a lack of evidence that Yamashita had ordered or otherwise learned about such crimes, a military tribunal accused him under the principle of command responsibility. Though Yamashita helped to lay the foundation for command responsibility, in the post-war period the doctrine suffered from two major problems. Firstly, Yamashita (along with other prosecutions for war crimes) left some questions unanswered. The scope of a commander's obligation, what

14 The American Articles of War, 1776, sec. IX.

15 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 3.

16 Bruce D. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now", 149 Mil. L. Rev. 293 (1995).

17 Drazan Djukic and Niccolo Pons, The Companion to International Humanitarian Law 246 (Brill, 2018).

actions a commander must take to perform his duties, the correct degree of mens rea, and the position of causation, was not specified. In fact, general recognition of the theory was absent immediately after the battle.

The international community has codified command responsibility in many arrangements over the last fifty years to resolve those issues. The doctrine was set out in Protocol I to the Geneva Convention (Protocol I), the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the Rome Statue of International Criminal Court.

The international community has focused on the first two unanswered questions in Yamashita over last five decades: the scope of a commander's job, and how to assess his actions. Originally, officers were essentially expected to "repress grave breaches" of the war rules. The required degree of commitment needed by the Commander to perform his obligation has been clearly defined by international law. He needs to take the "appropriate and fair steps" either to deter or to prosecute a crime.

There is no consensus on Yamashita's remaining two questions: the correct degree of mens rea and the acceptable position of causation in command responsibility. As for mens rea, most believe that it is unproductive to allow a leader to have direct evidence of a crime. Every international law and convention provide for the obligation of mens rea without knowledge. Though international law and convention defines mens rea without knowledge as a condition, but none of these provisions agree on a common standard. Likewise, the stance on causation remains unsettled. On the other hand, Protocol I and the Rome Statute allows the offence of a subordinate to be the result of the absence of its commander. ICTY and ICTR laws on the other hand entirely lack a causal review. Jurists and academics are still yet to come up with a generally agreed definition.

What is Command Responsibility?

The doctrine of command or superior responsibility specifies that unless its superiors commit foreign offences, a superior - a military or civilian leader - can be found criminally accountable. The doctrine was part of customary legal law and was adopted into the laws of the international criminal tribunals and the International Criminal Court's (ICC) Rome Statute. The superior incurs criminal liability for failure to deter (or repress) illegal actions that his superiors have committed.[18] Consequently, order liability means a crime of omission. In Celibici case, the International Criminal Tribunal for the former Yugoslavia (ICTY) held strongly that command responsibility does not denote strict liability. Criminal law developed on the thought of a free human agency, which signifies that the accused has the ability to act in consideration with the norm that is legally and morally prudent, and that he realizes he will be considered responsible whenever he defy that norm. The command responsibility theory consist of three integral elements, representing,

18 Harmen van der Wilt, Command Responsibility, available at: https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0088.xml (last visited on June 30, 2020).

respectively, authority and organization ('effective command and control'), mens rea ('he knew or should have known'), and the error that causes criminal liability.

The command-responsibility doctrine has a mixed pedigree. The theory was initially grounded in military tradition and international humanitarian law, which acted as an ethical code of conduct to be practiced by fighting commanders. It effectively expressed the concept that a collateral obligation to follow carefully the jus in bello would counterbalance the right to engage in warfare, against the backdrop of the notion that war is an extremely risky affair in which things can quickly go astray. Combat unleashes overwhelming powers, endowing the characters with a "right to destroy," which can be misused if inadequately tested and result in frequent trouble. The onus for controlling these powers falls severely on the shoulders of the military commanders, who may be held answerable should they fail to fulfil this main objective. This equilibrium of rights and duties emerged from The Hague Conventions on the Laws and Customs of War, which specified that the rank of "lawful combatant" would be in question to the condition that the armies be subordinated to "responsible order" and must carry out their operations in obedience with the laws and customs of war. Under this way commanders' roles have been labelled as a quid pro quo for the right to take part under military war.

"Command or superior responsibility" is often misunderstood. First, it is not a kind of legal requirement that a command officer may be held criminally liable for crimes committed by his subordinates regardless of his methods and his knowledge of such crimes may be. Nor is it a form of complicity for which the superior is made criminally responsible for whatever type of help he has offered to the offenders involved.[19] To apply this principle, the occurrence of one or more crimes assigned to a second in command is a prerequisite. Furthermore, according to traditional international law, the following situations have been included as being part of the doctrine of command responsibility:

(i) There should be an instructive relationship between the accused and ones who perpetrated the said crimes at the time of the execution of the crime.

(ii) the commander's knowledge that his second in commands have, or are about to, commit, a culpable part in the occurrence of a crime; and

(iii) the commander failed to take the essential and prudent steps to avert or punish those offences.

In general, this concept may refer to military officers (at any point of the military structure), government officials (irrespective of the nature of their rank, involving heads of state or ministers), or paramilitary leaders. While the essentials of the doctrine are the same as a matter of law under conventional international law (even though not essentially at the evidential level), notwithstanding of the nature of the power exercised by the superior, the ICC Statute elucidates some differences among military and non-military commanders.

19 Guenael Mettraux, The Doctrine of Superior/Command Responsibility, available at: https://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility (last visited on July 01,2020).

Command Responsibility under Domestic Law

India

In India, in Section 76 of the Indian Penal Code, 1860 the protection of superior orders finds shelter. According to the clause, there is a cover under this provision for any act performed under the orders of superior authorities. The subordinate officer shall not be protected from responsibility by any unlawful order of the superior authority[20]. The IPC does not recognize a soldier 's absolute duty to blind loyalty to his superior authority. If he demonstrates that the orders were lawful and binding on him or the conditions made him believe in good conscience, he was obliged by statute to follow it, he would not be absolved of guilt[21]. The concept of command responsibility has also been accepted in Indian jurisprudence, as accepted in International Law[22]. We will delve into the available case laws to understand the jurisprudence surrounding this defence in India.

In the case of Chaman Lal v Emperor, there was proof of the non-admissibility of the appeal of superior orders as a legitimate criminal defence[23]. The facts of the case implicated the prison warders beating the prisoners gravely, which led to the death of two of the prisoners. Chaman Lal had been convicted and sentenced by the District Magistrate along with other prison officials. Such sentences were upheld by Lahore High Court. Sawan Ram, the head warder, raised a defence under the commands of his superior official, Chaman Lal, that he had been acting. The Court did not acknowledge this defence, stating that they all knew they were embroiled in an unlawful act and therefore there is no question of good faith, mistake of law or error of fact. The Court concluded that they must have known that ruthlessly beating up the prisoners was unlawful because they had been prison officials for quite some time.

In the case of Charan Das Narain Singh v The State[24], the accused, Charan Singh, argued at the East Punjab High Court, after firing the weapon, it was done under the superior officer, Harnam Singh's command. The Court found the superior 's decision was totally unjustified and indisputably unconstitutional. Therefore, there was no duty on the offender to obey such an order. Yes, it was his responsibility to ignore that unreasonable and unconstitutional command.

Subsequently, in West Bengal v Shew Mangal Singh & Others Government, the respondents were found guilty and sentenced by the trial court to life imprisonment on charges of murder, read with joint liability[25]. They were discharged by the Calcutta High Court, arguing conditions were such that the respondents were compelled to follow their superior officer's lawful orders. Upon appeal to the Supreme Court , the Court ruled that because the order was permissible and, thus,

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20 *Haji Mahamoodkhan Dulathan* v. *Emperor,* AIR 1942 Sind 106.

21 K I Vibhute, P S A Pillai's Criminal Law 75 (Lexisnexis, 13th edn., 2017).

22 Viplav Kumar Choudhry, "Defence of Superior's Order and Command Responsibility under the Criminal Laws in India", 60 IJPA (2014).

23 *Chaman Lal* v. *Emperor,* AIR 1940 Lah 210.

24 *Charan Das Narain Singh* v. *The State,* AIR 1950 East Punjab 321.

25 *State of West Bengal* v. *Shew Mangal Singh,* AIR 1981 SC 1917.

lawful, there should be no supplementary question as to whether the respondents, acting in compliance with that order, believed or did not believe the order was lawful. The Court also held that such a question is crucial if the superior officer's order does not conform with the statute, and the respondent pleads superior order as defence.

The Supreme Court in another landmark case of R.S. Nayak v. A. R. Antulay held:[26]

> "the superior's direction is no defence in respect of criminal acts, as every officer is bound to act according to law and is not entitled to protection of a superior's direction as a defence in the matter of commission of a crime."

Accordingly, the case laws discussed indicate that the status of the defence of superior's orders is in conformity with the theory that has been recognized worldwide. There is a general position of defence inadmissibility, unless it can qualify the various strict conditions that have evolved through the judgments.

Across the Globe

There is a common misconception that at the Nuremberg Trials this defence was first presented and litigated. Contrary to this assumption, Roman thinkers such as Saint Augustine and Hugo Grotius may trace the origins of this defence. From the very origin of it, there were contradictory stances around the defence.[27]

In 1474, a German governor, Peter von Hagenbach, attempted in the name of Duke Charles to perpetrate a reign of terror and introduced the argument that soldiers owe their leaders absolute loyalty, which was refused and beheaded. In 1660, in the case of Axtell, the claim of superior defence was dismissed with the court stating that if the superior was indeed a traitor, all those who followed him would be regarded as traitors and their conduct would be viewed as traitorous.

Until 1945, the 'ought to know' doctrine shaped the commonly accepted interpretation of the defence of superior authorities, which was in keeping with the defence understanding as explained above[28]. When the order was such that it's unlawfulness must have been apparent ab initio, then there would be no recourse even if relief can be mitigated. The definition and implication of this theory can be taken from early 19th century legal cases existing around it.

In 1816, the defendant was sentenced in the case of R v Thomas, although the jury made a mitigating argument that he should be acquitted, as this was strictly a case of an unconstitutional superior order as that of an abstruse order which was misinterpreted[29]. The defendant was convicted in R v Smith (1900) in pleading for this defence[30]. It stated:

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26 *R.S. Nayak* v. *A.R. Antulay,* 1986 SCR (2) 621.

27 Aubrey M. Daniel III, "The Defence of Superior Orders", 7 U. Rich. L. Rev. 477 (1973).

28 Hilaire McCoubrey, "From Nuremberg to Rome: Restoring the Defence of Superior Orders", 50 Int'l & Comp. L. Q.386 (2001).

29 *R* v. *Thomas,* (1816) 4 M&S, 41.

30 *R* v. *Smith,* (1900) 17 SC 561.

> "If a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they are unlawful, the private soldier would be protected by the orders of his superior office."

The 'desire to learn' theory can be seen in many jurisdictions, such as in the USA, in the Riggs v State cases (1866) and in the Commonwealth ex rel. Shortall Wadsworth v. Although, in the cases of Dover Castle and Llandovery Castle, the German Reichsgericht took up the most important cases based on this defence since the First World War. The defendant was granted the defence of this defence in the Dover Castle case as the knowledge provided to him by his subordinates was incorrect and if it had not been so, the defendant's actions would have been legitimate. In the case of Llandovery Castle, it was held that the defendant's acts of massacring shipwrecked captives were so clearly illegitimate that a remedy could not be offered and, thus, they were sentenced. Thus, the two cases defined detailed definitions of the 'to learn' theory used till World War II and the Nuremberg Trials.

The end of World War II put the Allies face to face with an unprecedented situation, both in terms of the size of exposed mayhems and the extent of the Axis Powers' defeat. The great war criminals were prosecuted in Nuremberg and Tokyo before the International Military Tribunals, and the lesser offenders were charged before the Allied Tribunals[31]. Such hearings expressly led to the advance of international criminal law. The pre-1945 doctrine 'ought to know' was side-lined and the defence was rejected to be accepted by the tribunals and, therefore, the defendants who made this plea were convicted of the crimes with which they were charged. In the Peleus case, which was like the Llandovery Castle case, all subordinates were guilty of the crime, along with the commanding officer, and serious sentences were given[32].

The rules of the Rome Statute of the International Criminal Court (ICC) account for this Nuremberg doctrine of superior orders. It phrased purely and held back the 'ought to know' doctrine. The Rome Statute (1998) returned the defence status to its original pre-1945 interpretation, without in any way corresponding with what took place at the Nuremberg and Tokyo Trials, thus freeing the defence from its 50-year interpretations.

Since the Nuremberg Trials there are three famous cases in which the defence of superior orders has been argued. Eichmann[33], Calley[34] and Lyndie England are such events. In all three cases, the accused had sought to use the defence but ultimately turned to other defences. The defence was dismissed by the court in Eichmann. Calley was unable to provide evidence of the existence of the order allegedly handed down by his superior, who was acquitted at his trial himself. The defence team gave up on pleading for superior order defence in England's trail. The doctrine of command responsibility remains static.

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31 A.V.P. Rogers, "War Crimes Trials under the Royal Warrant: British Practice 1945-1949", 39 Int'l & Comp. L.Q. 780(1990).

32 United Nations War Crimes Commission, "Law Reports of Trails of War Criminals" (1947).

33 Attorney General of the Government of Israel v. Adolf Eichmann, Criminal Case No. 40/1961.

34 *United States* v. *William L.* Calley Jr., 22 U.S.C.M.A. 534/26.875.

Command Responsibility under International Law

International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY), based in The Hague, was established by the UN Security Council. The jurisdiction of this ad hoc court encompasses four categories of crimes: serious violations of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity[35]. Its charter also confers jurisdiction on the tribunal to prosecute superiors who fail to punish or prevent such abuses. The governing statute for ICTY dictates that a standard for superior liability is known or had reason to know, and often generally mirrors Additional Protocol I, Article 86[36].

The court defined the principle of command obligation in the ICTY legislation as being in accordance with that of Additional Protocol I and customary international law[37]. Jurisprudence has demonstrated superiors' concern for preventing potential offences. Where a superior knew or had cause to suspect that a subordinate was going to commit a war crime but refused to deter the action, by instead firing the subordinate, the superior cannot rectify the mistake. These situations, discussed below, examine the degree to which this duty is to be avoided. Actual information may be derived from the circumstantial facts within ICTY holdings.

In the case of Celebici (Prosecutor v. Delalic), ICTY strongly outlined the principle of command responsibility under the justification for understanding the system[38]. The chamber of appeals clarified that general information in the possession of a commander - provided to that person or otherwise available - which would notify the superior of possible unlawful acts by subordinates, is sufficient to satisfy the requirement. The court dismissed a duty of strict liability to discover standard of misconduct for superiors. To put it another way, some information must trigger the duty of a commander to stop possible future wrongdoing.

In addition to citing the factors listed on Additional Protocol I in the ICRC commentary, the tribunal of appeals recognized information which may trigger a duty to prevent. The trial chamber also acknowledged a "probable" causal link between a commander's inability to prosecute past offenses and possible offenses commission. In case of Celebici, the ICTY chambers opened the door to finding superior responsibility where prior unresolved misdeeds of subordinates are sufficient to notify the commander of the risks of future crimes, thus triggering a duty to prevent them.

The chamber of appeals in Prosecutor v. Krnojelac expanded the likelihood of criminal responsibility for the order[39]. Whether knowledge of prior unpunished inmate mistreatment was

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35 Statute of the International Criminal Tribunal for the former Yugoslavia, 1993, art. 1-5.

36 *Id.,* art. 7(3).

37 *Prosecutor* v. *Zdravko Mucic aka "Pavo", HazimDelic, EsadLandzo aka "Zenga", ZejnilDelalic* (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998.

38 *Id.* at 37.

39 *Prosecutor* v. *Milorad Krnojelac* (Appeal Judgement), IT-97-25-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 September 2003.

sufficiently alarming information to put Milorad Krnojelac on notice of a future risk of subordinate torture and a correlating duty to prevent it was at issue. Torture, as interpreted by ICTY, requires a demonstration of the imposition of severe pain or suffering to obtain information or a confession, or to punish, intimidate or coerce the victim or another person, or to differentiate against the victim or another person[40]. The chamber of appeals for Krnojelac dismissed a systematic approach to the reason for knowing standard about the subsequently committed greater offence. Instead, the court reiterated its orthodox position that Krnojelac had to possess sufficient information, even of a general nature, about the risk of torture being committed by his subordinates. In the facts of the case, the chamber of appeals considered this information: the warden understood that persons were being held simply because they were non-Serb and was aware of the deplorable conditions of custody. Awareness of mistreatment and racist conduct was adequate to inform Krnojelac of abuse and to hold him legally responsible for failing to avoid abuse. In brief, Krnojelac had cause to think about the potential incidence of torture and refused to avoid it. Many ad hoc tribunals have likewise adopted the justification for understanding and the related duty to prohibit jurisprudence established in the ICTY cases.

International Criminal Tribunal for Rwanda

The Hutu majority in Rwanda killed between 800,000 and 1,000,000 Tutsis and moderate Hutus during a nearly one-hundred-day period in 1994, in the middle of the Rwandan Civil War[41]. The International Criminal Tribunal for Rwanda (ICTR) was created by the UN to prosecute the Rwandan government and the military officials accountable for such severe war crimes. Its extend is restricted to actions committed in Rwanda or by Rwandan nationals in adjoining states since 1994 and includes three categories of crimes: genocide, crimes against humanity and violations of Article 3 specific to the 1949 Geneva Conventions and Additional Protocol II, which controls non-international armed conflicts[42]. The authority also relates to omission errors by representatives where subordinates execute one of the crimes stated, under a principle of command responsibility. After its inception in 1995 the court has convicted 93 people. Like ICTY, ICTR uses an established or had cause to learn Command Responsibility model. The case law represents a strong willingness to recognize past unaddressed wrongdoing in an analysis-prevention role.

The tribunal considered the scope of that duty in Prosecutor v. Nahimana. Ferdinand Nahimana was co-founder of the Mille Collines radio station Radio Television Libre[43]. At the ICTR, he was put on trial merely based on superior responsibility, based on the incitement of

40 *Prosecutor* v. *Dragoljub Kunarac, Radomir Kavoc and Zoran Vukovic* (Appeal Judgement), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY)12 June 2002.

41 United Nations, The Genocide, available at:https://archive.org/details/perma_cc_64GM-R8LD (last visited on July 04, 2020).

42 ICTR in Brief, U.N. International Criminal Tribunal for Rwanda, available at: https://perma.cc/VMU4-BQNP (last visited on July 04, 2020).

43 *Prosecutor* v. *Ferdinand Nahimana,* Jean-Bosco Barayagwiza, Hassan Ngeze (Appeal Judgment), ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007.

violence against Tutsis by the radio station. The telecasts "engaged in ethnic stereotyping in a way that promoted contempt and hatred for the Tutsi population" and proposed physical force, according to the trial judgment. According to facts, a government office had told Nahimana that his station had been broadcasting messages that promoted ethnic hate and contained fake propaganda. These factors led to the court of appeals claiming that Nahimana had reason to suspect at least that radio broadcasters are likely to incite serious crimes against that group. He was compromised in his duty to prevent potential wrongdoing and was found to be criminally liable. In this case, ICTR pursued similar ICTY rulings in seeking awareness of past unpunished wrongs which gave rise to potential alert, escalating crimes. Many tribunals formulated the common theory of command obligation in similar ways.

Special Court for Sierra Leone

The Sierra Leone civil war raged from 1991 through 2002[44]. At the instigation of Liberian President Charles Taylor, Rebel groups within Sierra Leone were supported by Liberian Special Forces and attempted to overthrow the Sierra Leone government. Such gangs forcefully recruited thousands of child soldiers and massacred hundreds of thousands of people, in addition to many more being murdered and maimed[45]. The U.N. In 2000, the Special Court for Sierra Leone (SCSL) was created to prosecute war crimes linked to those cases. The court was a modified tribunal in Sierra Leone which was managed jointly by the government of that region. It indicted a total of 13 people and complied with its U.N. Mandate to close shortly thereafter in 2013.

Like ICTY and ICTR, SCSL also used a known standard for command responsibility. As formulated in ICTY jurisprudence, the SCSL tribunal used guidance on the standard of command responsibility in customary law. In a case questioning the criminal liability of a commander whose soldiers committed widespread forced marriage, the SCSL chamber of appeals symbolised an interesting detail between the criminal misconduct committed by subordinates and similar crimes committed by other soldiers in the same geographic area:

It was evident that the RUF (Revolutionary United Front) fighters in whole of Sierra Leone and dominantly in Kono District were responsible for the offence of forced marriage. The crime committed was so pervasive and obvious that Kallon was aware of the risk that RUF members, including Kissi Town, would commit similar crimes against whom he exerted effective control in Kono District.

The superiors maintained civil responsibility against Kallon for failure to deter potential offenses, relying on the awareness that the wrongdoing was widespread to local soldiers. Here the court relied on the wider organizational context and existing standards to conclude a specific category of soldiers' possible behaviour. It is possible for a commander to have cause to suspect that a crime is going to be committed by subordinates, at least under this jurisprudence, purely on

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44 The Special Court for Sierra Leone: Its History and Jurisprudence, Special Court For Sierra Leone available at:https://perma.cc/3H7X-5DSQ (last visited on 04 July, 2020).

45 Human Rights Watch, "We'll Kill You If You Cry" Sexual Violence in the Sierra Leone Conflict" (2003).

the grounds that these forms of war crimes are so common in combat. In other words, a large-scale collapse of the rule of law, which includes some humanitarian violations, was enough notice to trigger a duty to prevent it. The Kallon decision seems to be an extension of the structure for command responsibility as discussed in the ad hoc tribunal opinion.

International Criminal Court

Other domestic and international tribunals have not uniformly adopted the command responsibility of Additional Protocol I. An example of one such venue is the International Criminal Tribunal (ICC). The ICC, which was established by treaty, has authority to prosecute all war crimes as they are described, including blatant violations of the Geneva Conventions, genocide, and crimes against humanity[46]. The ICC is a last resort court, which is usually used in situations where existing state justice systems malfunction or are not sufficient.

The Rome Statute defines a unique mens rea of command obligation. A military officer or person behaving successfully as a military commander shall be criminally responsible for offences committed by forces under the jurisdiction of the court[47].

The ICC standard varies in several important ways from the customary law and Additional Protocol I standard used by the ad hoc tribunals. First, the Rome Statute includes a causal nexus between the negligence of a commander and the resulting crime of war. Customary law, as defined by ad hoc tribunals, does not allow this kind of causal relation[48]. The necessity for cause can pose a problem in determining responsibility for having allowed wrongdoing of a superior to go unchecked. By statute wording, the court would have to be satisfied that a penalty available to the Superior would have been sufficient to prevent future crimes.

More specifically, the terminology that the ad hoc tribunals would have understood is much more general than the ordinary legal practice. The disparity in definition was intended to ensure a greater degree of transparency than is provided under customary international law by the Statute drafters. Nevertheless, the contours of this level are yet to be thoroughly investigated by the ICC. In the case of Bemba, the court was poised to make the first substantive pronouncement in the Rome Law on the principle of command obligation.

The president of the Congo Liberation Movement, Bemba who also served as commander-in - chief of the "Armée de Libération du Congo"[49]. His troops obligated tremendous atrocities in the Central African Republic against the civilian population including massive pillaging, rape, and murder. However, when the court considered that Bemba had clear evidence of war crimes committed by subordinates, it was needless to discuss the norm which should have been established.

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46 The Rome Statute of the International Criminal Court, 1998, art. 5.

47 *Id.,* Art. 28(a).

48 *Prosecutor* v. *Tihomir Blaskic* (Appeal Judgement), IT-95-14-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 July 2004.

49 *Prosecutor* v. *Bemba,* Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, 110 AJIL 526, 530 (2017).

A Balanced Synthesis

This paper has already talked about the different approaches to this defence of superior's order. There is an approach in which soldiers are assumed to follow only lawful commands, and the fact that a soldier has broken the law under her superior 's command will never serve as a shield, which is considered the absolute strategy to liability. This approach contains some inherent flaws which are not in the scope of this paper to explore them. It is sufficient to say that this method should not be completely abandoned but should not be extended beyond appropriate boundaries and put on in all cases.

Another approach is the conditional liability approach. Obedience to unlawful orders under this approach should function as a defence, but only under specific circumstances. This is subdivided further into two approaches: 'factual approach to conditional liability' and 'normative approach to conditional liability.' According to the provisional plan, this protection can only be given to a complainant if the person has no idea of the order's unlawfulness and unconsciousness would be rational. The latter approach implies that a accused should be granted defence of superior orders only when the he admits that the order is unconstitutional, but if the order is highly unethical then the accused should disobey the order and the defence should not be granted to him.

Justice Wills made a rather vague argument in the Keighly v Bell trial. Then, he made a self-contradictory early remark[50]. The declaration started with a supporting claim to still provide obedient soldiers with a defence. Midway into the decision, the language changes and, in effect, the decision is an acknowledgement of an alternative to total liability. Then the judge completely changes his position and states that a conditional liability approach is supported by the law. Therefore, we realize that the attempt to unite the two positions is not something that is in nature contemporary. This was done over the years, including during the 19th century.

The approach of the middle path seems to be a viable approach to the two contradictory positions in which it must be understood that such a defence should not be regulated on the basis of a one-rule-fits-all premise. Each of the two camps cites precedents that support their views, while blatantly overlooking the precedent that supports the opposition camps' stance. Which results in legal confusion and ambiguity on a wide scale.

The British Military Law Manuals, which were written in the early 20th century, show a division apparent. The norms set out in these manuals appear to support the conditional liability view. But the other pieces that investigate war crimes provide an absolute defence. Then then there is a third kind of argument saying that the rule is vague as to when and to what degree a protection should be given to loyal soldiers.

It can be said that the middle road approach, which includes all practicable solutions to the protection of superior orders and offers specific criteria related to the problems that arise, has

50 *Keighly* v. *Bell,* (1866) 4 F. & F. 763.

been applied and should be extended for the orders issued to the defendant by the superior officer in order to do justice to both the defendant and the victim.

Conclusion

Customary international humanitarian law, as viewed by ad hoc tribunals, provides an efficient accountability framework for superiors who fail to heed red flags that incompetent subordinates will continue to participate in criminal misconduct and potentially escalate their unlawful conduct. The system may be used to apply responsibility to officers who neglect actions that appear to abuse or dehumanize civilians or captives, while this activity would not be subject to an obligation of retribution in itself. Regardless of the severe deterioration of public order and discipline, international tribunals are increasingly reluctant to criminally prosecute subordinates who disregard the degrading conditions within units. The history of prosecution in the international arena is split into three phases: pre-1945, where the defendant's strategy was contractual liability; the defendant's concept of total liability developed in the Nuremberg and Tokyo Trials and proceeded thereafter; and eventually, the introduction of the concept of contractual liability with the implementation of the Rome Statute.

In India, the jurisprudence surrounding this defence has been in line with international laws, and thus the general trend of defence inadmissibility has been followed, which is evident in the case laws. The courts have placed stringent requirements that must be fulfilled to argue the case successfully.

The Nuremberg and the Tokyo trials are filled with inherent dispute hence, following the absolute liability approach to this defence does not appear to be a sensible alternative. The intricacy of the nuances of law makes it unreasonable to expect the soldiers to have absolute knowledge of the legality of the orders of her superior. And there is a desperate need for a solution that considers the real innocence of the current complicated rules. There is also a need to reduce the vulnerable condition in which the soldiers consider themselves when there is a general pattern of this defence's inadmissibility.

Therefore, the middle path approach is a feasible solution to this defence's diametrically opposite position, where one does not attempt to use one-rule-fits-all policy. In appropriate circumstances, both the total liability approach and the conditional liability approach should be applied, and the judges must seek to strike a compromise between the two approaches.

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The *Dolus Specialis* And The Rohingya Crisis

Viyyash Kumar G.V.[*] & Akaash D.[**]

Abstract

War crimes and Genocide, the blend of it, is neither a usual phenomenon nor a recurrent one. The main aim of this paper is to examine the ongoing genocide of the Rohingya in Myanmar. Thus, it provides a vivid insight upon its history, alleged war crimes, and inhumanity against the Rohingya in all shades of black and grey. We relied on secondary data and began our study by conducting an extensive literature review. The authors examined and analyzed International Statues, newspapers, articles, e-books and Human rights reports. This legal analysis highlights the ill-fate of the Rohingya. The said statement is further affirmed by the Genocide Convention 1948. The issue pertaining to the jurisdiction is examined. The pathetic state of our humanity is realized also. The efforts pooled in by various nations should act as an igniting factor for an initiation in this direction. The Rohingya crisis demands a global effort.

Introduction

The Rohingya are an ethnic community, mostly comprised of Muslims, who have lived for a considerable period in the dominant part of Buddhist Myanmar. Certainly, there are about 1.1 million Rohingya in the Southeast Asian nation[1]. Ruaingga, the language they speak, a dialect that is distinctive across Myanmar[2]. Rohingya are indigenous to Rakhine State otherwise called Arakan in Myanmar. They settled there since the fifteenth century, collectively they fall under the Muslim Indo-Aryans, a blend of pre-colonial and colonial immigration[3]. However, according to Myanmar government, they are unlawful migrants of Rakhine following the Burmese independence and Bangladesh freedom war. Over the years, the people of Rohingya have become casualties of a sorted out massacre and are one of the world's most abused minorities. Since the 1970s, vital crackdowns on the Rohingya in Rakhine State have induced thousands to escape to Neighbouring

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1 Pavin Chachavalpongpun, "Rohingya refugee crisis shames Southeast Asia", May 21, 2015, *The Japan Times available at* https://www.japantimes.co.jp/opinion/2015/05/21/commentary/world-commentary/rohingya-refugee-crisis-shames-southeast-asia/ (Last visited on July 20, 2020).

2 Azeem Ibrahim., *The Rohingyas: Inside Myanmar's Hidden Genocide*, (24-25)(Oxford University Press, London, 2016:3,11).

3 Zeeshan Khan, "Myanmar's Murderous Methods", September 13, 2017, *DhakaTribune available at* https://www.dhakatribune.com/opinion/op-ed/2017/09/13/myanmars-murderous-methods (Last visited on July 20, 2020).

States: Bangladesh, Malaysia, Thailand, and other Southeast Asian nations[4]. During such crackdowns, displaced people have regularly revealed assault, torment, illegal conflagration, and murder by Myanmar security powers. To achieve the above aim, this paper examines the history and origin of the Muslim-Buddhist tension. 'King Dragon Operation' is highlighted to project the exodus of Rohingya Muslims. The special law for a particular subject is focused to enumerate the stance of protected class. The narration of the series of war crimes, human rights violation, and censorship evidently proves and concludes the actus reus of genocide. The stateless state of protected class is stated with reference to the refugee convention. The question of jurisdiction to handle the case was resolved by the application of Genocide Convention, 1948, in the International Court of Justice whereas the question of jurisdiction for investigation was resolved by the application of Rome Statue in the International Criminal Court. The paper concludes by deeply debating the humanity in today's world.

History of Rakhine

Arakan

Arakan, a prominent coastal region in Southeast Asia, encompassed by Arakan Mountains and paving an entry through oceans to this region as the only entry point. Today, this tiny coastal region is widely known as "Rakhine" in Myanmar. There are noted seven chapters in the history of Rakhine. First was the independent reign of Dhanyawadi. Secondly, the rule of Waithali, Lemro, Mruak[5], Occupation of Burmese from 1784 to 1826, Era of British from the period 1826 to 1948 and the period of sovereignty from 1948[6]. On 31st December 1784, the Burmese Konbaung Dynasty showcased its triumph over the kingdom of Arakanese. In 1826, after the first Anglo-Burmese war[7], the Arakan was overpowered by the British as war reparations. After the annexation of Burma by the British, it was entailed to be a part of the Crown Colony of British Burma. In 1937, British Burma was separated from British India. Post-1948, Rakhine was established to be a segment of independent Burma[8].

Intrusion of Muslims

In the early era of Bagan [AD 652-660], the Muslim merchants from Arab marked their place in ports of Thaton and Martaban. They sailed to and fro Madagascar to China, having Burma as their passage. In the 9th Century, before the reign of the king Anawrahta of Bagan, the first Burmese empire in 1055 AD, the Muslims placed their feet in Burma's Ayeyarwady River delta, Tanintharyi coast and Rakhine. Uncertainty revolved during the arrival of Muslims in Burma, Arakan, and Maungdaw. The Arabs, Persians, Chinese and European merchants of the 9th century documented the propagation and settlements of Islam community. Intermarriage amongst

4 Andrew Chatzky, "The Rohingya Crisis", January 23, 2020, *Council on Foreign Relations available at* https://www.cfr.org/backgrounder/rohingya-crisis (Last visited on July 20, 2020).

5 William J., History of Mrauk U, (Lexington Books , Amherst, MD, 2013).

6 Bollee, W. & Aung, M, "A History of Burma", Journal of The Economic and Social History of The OrientVol.12 (1969).

7 Seekins, Donald M., Historical Dictionary of Burma (Myanmar)(Scarecrow Press, Lanham, 2006).

8 Michael W. Charney, A History of Modern Burma(Cambridge University Press, Cambridge, 2009).

the Burmese ethnic group and the Muslims of early settlements, led to the Burmese Muslim community[9]. Initially, the Muslims took up the shape of traders, military personnel, prisoners of war, refugees, and victims of slavery. Gradually, they managed to attain the status of a Royal advisor, Royal Administrator, Mayor, and authoritative positions[10].

Muslim-Buddhist tension

Amongst the Rohingya Muslim and the Rakhine Buddhist, there arose a religious and social difference, these differences lead to a large rift between the Muslim and Buddhist communities[11]. In World War II, Rakhine Buddhists formed an alliance with Japanese and Rohingya Muslims formed an alliance with the British. Rohingya Muslims promised the British a Muslim state as a consideration. Inter-communal conflicts between the Buddhists and the Arakan Muslims were aggravated by this war amongst them[12]. Muslims flew to the Muslim dominant regions from those regions controlled by the Japanese and the Buddhist; many of them were killed amid the process. This led to a counter-attack from the Muslims by driving away and attacking the Buddhists in the Southern Arakan, a "Reverse ethnic cleansing" was performed by the Muslims[13].

The Exodus of Rohingya Muslims

Coup D'état

In 1962, military rule was established in Burma, setting aside the Nation's constitution and democratic governance, by the Burmese General Ne Win and paved the way to coup d'état in Burma. In the midst of 1948 to 1962, Burma relished its democratic parliamentary governance. Nevertheless, it was greatly affected due to widespread tensions and internal conflicts. Political tensions, ethnic conflicts accompanied by constitutional disputes heavily weakened the power of control by the Burmese government. Under the General's rule, Ne Win indoctrinated the "Burmese way to socialism". Incorporation of extreme principles from Marxism, Nationalism, and Buddhism structured this particular system[14].

'King Dragon' Operation

The operation 'King Dragon' was led by the Tatmadaw who are the armed forces of Burma and immigration officials of North Burma, under the leadership of General Ne Win for a

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9 Spiro, Melford &Yegar, Moshe, "The Muslims of Burma: A Study of a Minority Group",The Journal of Asian Studies Vol.33 (1974).

10 *Id.*

11 Ibrahim, Azeem, "War of Words: What's in the Name 'Rohingya?", 16 June 2016 *Yale Online, Yale University*, *available at* https://yaleglobal.yale.edu/content/war-words-whats-name-rohingya (Last visited on May 22, 2020).

12 Dan Sullivan, "Aung San Suu Kyi's Ultimate Test", Harvard International Review, Harvard University, 22 September 2017 available at https://www.refugeesinternational.org/reports/2017/4/14/harvard-international-review-aung-san-suu-kyis-ultimate-test (Last visited on May 22, 2020).

13 Yegar, Moshe, Between Integration and Secession: The Muslim Communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar (35–33) (Lexington Books, Lanham, 2002).

14 Foxtel's History channel network, "BURMA COUP D'ETAT", *available at* https://www.historychannel.com.au/articles/burma-coup-detat/ (Last visited on May 22, 2020).

period of three months from February 1978[15]. The primary purpose of this operation aimed at "scrutinizing each individual living in the state, designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally". This campaign paved the way for many inhuman offenses, destruction of mosques, rape, widespread killings, and religious persecution. Nearly, 200,000 Rohingya Muslims are claimed to be driven away to Bangladesh amid this operation[16].

The Exodus

In the 1970s, post-colonial period, the initial traces of mass exodus of Rohingya Muslims were witnessed from the East Pakistan, presently a part of Bangladesh. The Rohingya Muslim persecution began after this colonial period. The coined term "Rohingya" gathered its widespread popularity in the nineteen-nineties, straightway after "The Second Exodus" in the pre-90s[17], 400,000 Rohingya Muslims have driven away from Bangladesh to Rakhine. In 1982, the Rohingya Muslims were denied citizenship and they were prosecuted as unlawful immigrants from Bangladesh. After this event, they remained to be the victims of persecution by the Nationalist Buddhists and the Myanmar Government[18].

The Dolus Specialis

The process of determining the genocidal intent requires three essentials;

i. The commission of acts of violence
ii. committed upon the protected class of people
iii. Actus reus of genocide

The Geneva Convention 1949 forbids the commission of those acts constituting genocide as well as participating in any conspiracy for the commission of genocide, inducing to commit genocide, complicity and attempt to commit genocide[19]. In the instant case, all three essentials seem to be met.

The Protected Class

Article 2 of Convention on the Prevention and Punishment of the Crime of Genocide 1948, deciphers the term 'Genocide' to be those violent acts against racial, ethnic, or religious

15 Michael F. Martin, "Burma's Brutal Campaign Against the Rohingya", September 26, 2017, Committee on Foreign Affairs Subcommittee on Asia and the Pacific U.S. House of Representatives available at https://docs.house.gov/meetings/FA/FA05/20170927/106434/HHRG-115-FA05-Wstate-MartinM-20170927.pdf (Last visited on July 20, 2020).

16 *Id.*

17 Maaz Hussain, "Rohingya Refugees Seek to Return Home to Myanmar", November 30, 2016,*Voa News Serviceavailable at* https://www.voanews.com/east-asia-pacific/rohingya-refugees-seek-return-home-myanmar (Last visited on May 22, 2020).

18 The Guardian News Service,"Myanmar seeking ethnic cleansing, says UN official as Rohingya flee persecution", November 24, 2016, *available at*https://www.theguardian.com/world/2016/nov/24/rohingya-flee-to-bangladesh-to-escape-myanmar-military-strikes (Last visited on May 22, 2020).

19 International Court of Justice Report," Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide", Advisory Opinion of 18 May 1951, *available at* https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf (Last visited on May 22, 2020).

groups. Majority of Rohingya belong to the Muslim religion. Recurrent incidents of abuse, discrimination, and over all human rights violation by the Buddhists to the Rohingya conclude the boiling tension between Muslims and Buddhists in Myanmar. The anti-Muslim attitude of the Buddhists determines the Rohingya (Muslim minority) segregation primarily based on religion. The Rohingya, possess distinct dialect therefore; they can also be construed as an ethnic community. Thereby, the Rohingya community is determined to be a protected group under the Genocide Convention 1948

Genocide

The Genocide was of two-chapters. One originated in October 2016 and decreased its pace in January 2017. The second chapter began in August 2017 and decreased its intensity from January 2020. These two events created havoc to over a million Rohingya Muslims and those Rohingya were driven away to various neighboring countries, larger movements where to Bangladesh, India, Malaysia, Thailand, and various other parts in Southeast Asia[20]. The year 2017 marked the largest wave of movement from Myanmar leading to the gigantic human exodus ever occurred in Asia, after the Vietnam War[21]. The Armed forces of Myanmar and police officials initiated a mammoth crackdown on the Rohingya Muslims[22]. The Military officials were claimed to be accused by United Nations, International Criminal Court officials, and various human rights agencies for extrajudicial killings, ethnic cleansing, genocide, gang rapes, arson, devastating schools, and infanticides[23]. The United Nations submitted a report stating nearly 700,000 Rohingya people were forced to fly out of Rakhine State, until September 2018[24].

Actus Reus of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide 1948, categorizes majorly these five acts; willful killing; causing mental injury and serious bodily damages of individuals of a particular group; Intentionally posing threats hampering their living conditions and to vandalize in them physically; restricting birth within community; conscription and other forms of in humanitarian acts leading to slow death of the protected class.

ICJ's application of Genocide convention in this subject matter:

> *Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such*

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20 Hema Letchamanana, "Myanmar's Rohingya Refugees in Malaysia: Education and the Way Forward", Journal of International and Comparative Education Vol.2.2 (2013).

21 Todd Pitman, "Myanmar attacks, sea voyage rob young father of everything", October 28, 2017, AP News Service, available at https://apnews.com/8972bde7517d4e7aba770fb124a40726 (Last visited on May 22, 2020).

22 Md. Mahmud, "A Conflict Profile On The Rohingya Conflict in Myanmar", Journal Of Social Science Research, Vol. 14, 3313-3324 (2019)

23 Aljazeera News Service, Government dismisses claims of abuse against Rohingya, August 6, 2017, available at https://www.aljazeera.com/news/2017/08/government-dismisses-claims-abuse-rohingya-170806095548889.html (Last visited on May 22, 2020).

24 The Office Of The High Commissioner For Human Rights [OHCHR], Mission to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, Report of the independent international fact-finding mission on Myanmar A/HRC/42/CRP.5 (September 9-27, 2019).

policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if affected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the placement.[25]

The Acts can either constitute 'serious bodily or mental harm' or 'conditions of life calculated to destroy the group'[26]. The intention to displace is distinct from the intention to destroy as per the indictment of ICJ in the 2007 Genocide judgment.[27]

War Crimes

War crimes are in the nature of murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape, conscription, persecution, deliberate killing, arson, and accessing anti-personnel landmines. Liability can lucidly be discerned by construing these heinous acts under Article 7 of the Rome Statute. These heinous events are constantly reported by Non Governmental Organizations, Human Rights organizations, and numerous independent sources[28]. The Burma proxy armies, one of the non-state armed groups in Burma also did not lose its path from committing grave crimes of torture, extra-judicial killings, and systematic use of sexual violence, forced labor, conscription, and many waves of abuse[29]. Yet, these non-state groups' gravity of offenses was low compared to the Burmese Army. In addition to the above, the government troops devised counter-insurgency strategies that are targeted at the civilians to demobilize their aid for armed oppositions. Amnesty International, Physicians for Human Rights, Human Rights Watch, and IHRC declared these strategic models as war crimes and offenses against humanity[30].

Human Rights Violation

In the period between January and November 2018, it was recorded that upto 14,500 Rohingya civilians flew to Bangladesh, to break free from the ongoing violence and persecution in Myanmar, adding to the one million marks of those who fled in 2017. Making a dire habitat for Rohingya ranging from 500,000-600,000 to continue their livelihood in Rakhine State[31]. Apart from those reports in 2018 claimed by the refugees for abuses by security forces, torture, arson, extortion, restriction to access health care, and food, it was also reported that women and minor girls were abducted at various checkpoints en route to Bangladesh. Adding to that, it was also

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25 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 43 2007.

26 *Id*.

27 *Id*.

28 Burma Link, War Crimes and Crimes Against Humanity, August 24, 2017, available at https://www.burmalink.org/background/burma/international-crimes-and-impunity/war-crimes-and-crimes-against-humanity/ (Last visited on July 20, 2020)

29 *Id*.

30 *Id*.

31 Human Rights Watch [HRW], Myanmar Events of 2018, January 10, 2018, available athttps://www.hrw.org/world-report/2019/country-chapters/myanmar-burma (Last visited on July 20, 2020).

reported that officials threaten Rohingya thereby inducing them to cross the Bangladesh-Myanmar border which is widely known as "no man's land"[32]; they do so to get them stuck in the border and subjecting them to sexual harassment, Approximately 4,500 Rohingya were subjected to harassments. The Authorities barred The United Nations and International Organizations from reaching out for aid in those regions controlled by ethnic armed groups. Local organizations were also denied access to those regions controlled by the government to dispense humanitarian support, they were also threatened to be arrested under the Unlawful Association Act. The uprising of tensions pertaining to sexual violence with traumatized women and minor girls remained victims of sexual abuse. Officials lured women to China with fictitious promises, turning their economic desperation to their benefit and sold them as "brides"[33]. The government utterly failed to forbid the prevalent trafficking and delivering justice to those victims.

The International Criminal Tribunal in the Rwanda case ruled that rape and any forms of sexual offences can be considered as the acts of genocide[34]. Abhorrent strategies were employed for implementing ethnic cleansing in the Rohingya community. Measures like prevention of birth within the targeted community and impregnation of women in the targeted community by raping them with bloodlines unrelated to their community were inhumanely used.

Censorship

The diction of vague and broad phrases and utilization of words in the laws established by the Myanmar government to arrest and deprive an individual's liberty to embody the expression 'peace' were frequent. In 2018, the government arrested and restricted journalists to unarchive conflicted regions. The United Nations reported on the abuses laid to the journalists[35] and nearly became unfeasible for the reporters to perform their duty evading fear or mala-fide interest. During this period, the arrest under criminal defamation under section 66(d) of the Telecommunications Act 2013 increased its pace gigantically. Over sixty percent of the total accused was journalists and reporters, acquittal remained never as an option for the government. An activist from the Ayeyarwady region, who was a human rights defender, was awarded three months of imprisonment under section 66(d) of the Act for broadcasting a video against military officials and the authorities continued to interpret and bend section 8(f) of the Privacy Law, 2017 to indict critics for criticizing the actions of the government[36].

Lex Specialis

Statelessness

The Stateless Convention 1954 throws light on determining who is stateless. The established legal definition for the coined term "stateless" is someone who is "not recognized as a national by

32 See generally Rohingya Crisis News, "News & Information on the World's Largest "Ethnic Cleansing" Humanitarian Crisis", and January 4, 2019, available at http://home.iwichita.com/rh1/info/rohingya/5/5d.htm (Last visited on May 22, 2020).

33 *Id.* at p 27.

34 The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), September 2, 1998, *available at* https://www.refworld.org/cases,ICTR,40278fbb4.html (Last visited on May 22, 2020).

35 *Id.* at p 27.

36 *Id.* at p 19.

any state under the operation of its law"[37]. Those are individuals considered to be neither as citizens nor nationals by any state. The significant protection of stateless people is derived from The 1954 Conventions relating to the Status of Stateless Persons and The Convention on the Reduction of Statelessness 1961. One of the major drawbacks pertaining to these conventions is the deficiency in execution. Certainly, seven countries are only parties to The Convention on the Reduction of Statelessness and eighty-nine countries to The Convention on Stateless Persons. This miniature count is the troublesome part to attain the purpose of these conventions. Previously, the United Nations circumscribed the "interconnectedness" between the refugees and the stateless. Yet, the drafters chose to devise separate conventions and treaties for the refugees and the stateless. The stateless can also seek protection under the 1951 Convention on the Status of Refugees and the 1947 protocol. This Convention elucidates that a refugee is the one who owns to well-established fear or threat of being persecuted for the factors, of religion, race, nationality, association to a social community, or political sectarian divisions outside the purview of the country which the individual is national and incompetent to seek protections from that country or the country is unwilling to lay protection, or who is not a national and distance themselves from the country of their former "habitual residence". The term "habitual residence" entails the Rohingya to claim the refugee status under this convention.

Habitual Residence

The correlation between the stateless individuals and the state that certainly respects the relationship of the citizen and the individual's state is understood as "habitual residence". The courts have often been "purposive" and "flexible" in determining what constitutes a habitual resident and engage in factual inquiries.

Refugee Convention

Any member of the Rohingya community as asylum can claim for any requirement under the refugee definition by claiming that Myanmar is their habitual residence. The 1951 Refugee Convention and its 1967 protocol, they may be a widespread relief and protection for the refugees. Despite having treaties made specifically for the stateless individuals, seeking asylum under this convention and its 1967 protocol seemed to be a more feasible means for relief. Over 60 years, the worldwide protection for the refugees was a guarantee, yet, the stateless remain lackluster.

There are 145 states participated within the Refugee Convention and 146 to the protocol from this we will see that there has been special importance given to the Refugee protection. Some states like Bangladesh took part within the treaties but even without the affirmative treaty obligation, they tried hard to host Refugees.

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37 See The Convention Relating To The Status Of Stateless Persons, 1954, art. 1.

International Court of Justice

The Gambia v. Myanmar[38]

On 11th November 2019, the Gambia in the registry of the court lodged an application instituting proceedings for the alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and indicating provisional measures pursuant to Article 41 of The Statute Of The International Court Of Justice and Articles 73, 74 and 75 of the Court rules, on an aim to preserve the rights.

Jurisdiction

The Court noted that the Myanmar and Gambia are parties to the Genocide Convention and either of them did not hold any reservations under Article IX of the Convention. Article IX of the Genocide Convention states:

> *"Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".*

The Court finds that the jurisdiction can be established under Article IX of the Convention if there is an existence of a dispute pertaining to the application, fulfillment, and interpretation of the Genocide Convention. The Gambia claims that Myanmar military and security forces are liable for merciless killings, rape, torture, beatings, cruel treatment, and sexual violence, restricted access to food, shelter, and basic needs of life. The Court has affirmed by considering these elements that it is adequate to establish that there is a dispute.

The Application of Genocide Convention, 1948

The Court spotted that, in compliance with Article 1 of the Genocide Convention, all those states who are parties to the Convention, are duty-bound to punish and to prevent genocide or other pertaining crimes. Article II of the Genocide Convention elucidates that:

> *"genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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38 Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Republic of the Gambia* v. *Republic of the Union of Myanmar.)*, Application instituting proceedings and request for provisional measures, I.C.J. (pending), November 11, 2019, available at https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf (Last visited on May 22, 2020).

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

Furthermore, Article III of the Convention prohibits and penalizes conspiracy to enact genocide, direct and public inducement to perform genocide, attempt to genocide and complicity to the crime. In the instant case, the Court spotted that, in Myanmar, at the hearings, referring to the mission in 2017, "clearance operations" executed in Rakhine, stated that

> *"it cannot be ruled out that disproportionate force was used by members of the Defense Services in some cases in disregard of international humanitarian law, or that they did not distinguish clearly enough between [Arakan Rohingya Salvation Army] fighters and civilians".*

The Court specifically noted, that in the resolution 73/264 adopted on 22 December 2018 by the United Nations General Assembly, expressed

> *"grave concern at the findings of the independent international fact-finding mission on Myanmar that there [was] sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation to the situation in Rakhine State",*

Also, the General Assembly condemned

> *"all violations and abuses of human rights in Myanmar as set out in the report of the fact-finding mission, including the widespread, systematic and gross human rights violations and abuses committed in Rakhine State".*

Conclusively, the fact-finding mission stated that there are reasonable grounds to believe the presence of genocidal intentions. And the Court iterated that the Gambia can make Myanmar comply with its duties under this Convention to punish and prevent these acts as under Article II and Article III of the Genocide Convention.[39]

Interim Order

The Court reasons that the conditions required by its Statute for it to show temporary measures are met, and that it is vital, pending its official choice, for the Court to show certain measures so as to secure the rights asserted by The Gambia. Further, the Court is of the view that Myanmar must take powerful measures to forestall the obliteration and guarantee the conservation of any proof identified with claims of acts inside the extent of Article II of the Genocide Convention.[40]

International Criminal Court

The Rohingya and Human rights groups documented a criminal claim in Argentina, asserting that the administration and military of Myanmar, including State Counselor Aung San Suu Kyi,

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39 *Supra* note 38.

40 *Id.* at 13.

have perpetrated acts of genocide and inhumane treatment lead against the ethnic Rohingya minority[41]. They claim that those alleged war crimes and offences gravely violated majorly Article 7(1)(a), (b), (e), (h); 8(2)(a)(i),(iii), (iv), (v) and 8(2)(b)(i), (xxvi) of the Rome Statute. Thereby, invoking the Fourth Geneva Convention 1949, asserting that Article 32, 53, and 147 to be violated with regards to Article 8(2) of the Rome Statute.

RationeTemporis

According to Article 11 of the Rome Statute, the Court ruled that it may exercise its jurisdiction over those crimes committed after the enforcement of the Rome Statute or, wherein a state is a party to the statute. The Pre-Trial Chamber noted that Bangladesh had ratified this statute on 23rd March 2010. Hence, complying with Article 126(2) of the Rome Statute, the statute was enforced from 1st June 2010. Thereby, the Court asserted its jurisdiction rationetemporis upon these alleged crimes.

Complementarity

Pursuant to Article 17(1)(a)(b) of the Rome Statute, it provides that

> *"the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute*"

The Pre- Trial Chamber considered the Prosecutor's submission pertaining to the issue of complementarity, upon the request laid before the International Criminal Court. The Pre- Trial Chamber ascertained that any potential future case is admissible and it is unnecessary to assess the issue of complementarity.

Sanction to Investigation

The Pre-trial Chamber authorized the Prosecutor's request to probe alleged war crimes and other violations. Since there are past claims of these offenses being committed before 9th October 2016, the Chamber authorized to investigate these alleged violations from the 1st June 2010, the enforcement date of Rome statute in Bangladesh.[42]

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41 Jurist News Service, "AungSan Suu Kyi named in criminal complaint of genocide against Myanmar's Rohingya", November 15, 2019, *available at* https://www.jurist.org/news/2019/11/aung-san-suu-kyi-named-in-criminal-complaint-of-genocide-against-myanmars-rohingya/ (Last visited on May 22, 2020).

42 Situation In The People's Republic Of Bangladesh/Republic Of The Union Of Myanmar (*Bangladesh* v. *Myanmar.*), November 14, 2019, ICC-01/19, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF (Last visited on May 22, 2020).

Conclusion

Rohingya refugee crisis is one of the longest refugee crises after the World War II. It is also the reason for it to gather wide-spread international concern. Decades of systematic discrimination, targeted violence, sexual abuses, and statelessness impacting more than a million Rohingya people seemed to decrease its pace. Amid the ongoing process of rendering justice to Rohingya, many international and local humanitarian organizations are lending their hands. The UNHCR, UNICEF, Oxfam[43], Human Rights Watch and the government of various countries, are ringing the bells of humanity. Notably, the Association of Southeast Asian Nations play a vital role in resolving this ongoing crisis from forbidding any attempt of war crimes to providing humanitarian assistance. The burden lay to resolve this crisis must not be selective, it demands global efforts.The Rohingya stand as a trademark example for being an excessively persecuted minority. The Burmese Military Government has repeatedly disrespected human rights. They were never in parallel with humanity. Despite the existence of International Conventions and Protocols, millions were and are tormented. It is 21st century and we are not under the rule of Gaius Julius Caligula, the third Roman emperor to unwontedly resist the happenings. The question of jurisdiction at the International Court is itself disheartening when the situation demands immediate action. Humanity is not just an act of compassion. It is the weapon to keep a permanent period against all cruelties like the Rohingya Crisis.

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43 Sarah Olk,"HumanitarianOrganizations Help Rohingya Refugees in Bangladesh (Borgen Magazine)", July 13, 2018, Center for Global Development, available at https://www.cgdev.org/article/humanitarian-organizations-help-rohingya-refugees-bangladesh-borgen-magazine (Last visited on May 22, 2020).

War Crimes And The Rome Statute - An Analysis of The Indian Perspective

Rounak Doshi*

Abstract

After the end of the Second World War, the victorious allied powers recognized the need to establish norms that could prevent the repeat of what came to be known as war crimes. 'War Crime' can be defined as any activity carried out during the conduct of a war that violates the already recognized international humanitarian law. It includes crimes like the intentional killing of civilians or prisoners, destruction of civilian property and taking hostages. Recognizing the need for an effective body that could bring the perpetrators of war crimes to justice, the idea of an international criminal court was routed. Finally, in 1998, the International Criminal Court (ICC) was established. Since 1998 the membership the ICC has arisen. Recently, however, several states have pulled out from the membership of the ICC. It poses some pressing questions regarding the ability of the ICC to fulfill its objectives.

This research work analyses the fate of the alleged perpetrators of war crimes in the world from the prism of the ICC. Further, the work looks at India's relationship with the ICC and devises the prospects for India to become a state party of this international justice forum.

Introduction

The existence of rules or norms being followed in war dates back to time immemorial. In the context of India, the earliest known existence of rules being followed in war is found in the yuddh between Pandanvas and Koravas i.e. Mahabharata.[1] During the war of Mahabharata, rules like - not attacking chariots with horsemen, not assaulting someone in distress, not waging an attack against someone who is not trying to kill him/her, were followed and any warrior violating these rules was made subject to punishment.[2]

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1 AniditaBasu, Mahabharata, Ancient History Encyclopedia, available at: https://www.ancient.eu/Mahabharata (last visited on November 5, 2019).

2 *Id.*

War is generally defined as a state of armed conflict between different countries or between different groups within a country.[3] Though no statute defining the term 'War' exists, but according to Justice Hays of the United States Court of Appeals in the 1974 case, Pan American World Air v. Aetna.[4]

> "War refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character"

This definition of War given by Justice Hays is very apt but the concept of War Crimes also applies to internal conflicts as well.

The concept of war crimes owes the reason for its existence to the concept of the Laws of War. Laws of War aim at mitigating the severity of war by protecting the combatants & non-combatants from unnecessary suffering, by ensuring that certain universally recognized fundamental human rights are not violated, by facilitating the earliest restoration of peace.[5] An article published in the newspaper The Tacoma Times[6] in the year 1904 outlined the basic principles of the law of war, it provided:

- Military Necessity: An attack must be intended only to defeat the enemy; it must be an attack on a legitimate military objective.
- Distinction: Combatants and Civilians must be distinguished in a war.
- Proportionality: When making harm to civilians is a necessity, then it must be proportional to the military advantage.
- Humanity: Basic human rights must be preserved and respected.
- Honor: It demands a certain amount of mutual respect and fairness between the adversaries.

These above-mentioned pointers reflect the five basic principles that govern the legitimacy of the use of force in an armed conflict. These principles are also mentioned in the rules specified in the database of Customary International Humanitarian Law by International Committee of the Red Cross.[7]

The notion of War Crimes owes the reason for its existence to International Humanitarian Law, International Criminal Law and Customary International law. War Crime refers to the violation of laws of war which leads to the rise of individual criminal responsibility;[8] it also includes the failures to adhere to norms of procedure and rules of battle.[9] The rules of war, also known as the Law of Armed Conflict, license combatants to participate in the battle. War Crimes occur when some pointless injury or superfluous attack is dispensed upon an adversary.[10]

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3 Christopher Greenwood, The Concept of War in International Law 283,306 (Cambridge University Press, 1987).

4 Pan American World Air v. Aetna, 368 F.Supp. 1098 S.D.N.Y. (1973).

5 War and International Humanitarian Law, International Committee of the Red Cross, available at: https://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm (last visited on November 13, 2019).

6 A few points of International Law Governing Modern Warfare The Tacoma Times, Feb. 24 (1904).

7 ICRC Database on Customary International Humanitarian Law, Vol I.

8 David M. Crowe, War Crimes, Genocide, and Justice: A Global History (2013).

9 *Id*.

10 Gerry Simpson, Law, War and Crime: War Crimes, Trials and the Reinvention of International Law (2007).

According to the United Nations Office on Genocide Prevention and the Responsibility to protect,[11]

> "War crimes are those violations of international humanitarian law (treaty or customary law), in the context of an armed conflict, that incurs individual criminal responsibility under international law"

According to UNHRC,[12]

> "War crimes refer to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis"

According to Rules specified in ICRC's database on Customary Humanitarian Law,[13]

> "The serious violations of international humanitarian law constitute war crimes"

The expression War Crime has not been defined in the Rome Statute but Article 8 of the Rome Statute categorizes war crimes as follows:[14]

- Violation of Geneva Conventions 1949
- Breach of the laws and customs applicable in international armed conflict
- Breach of Article 3 common to the four 1949 Geneva Conventions
- Breach of the laws and customs applicable in armed conflict not of an international character.

By looking at all the above-mentioned definitions, we can conclude that a "war crime is any act, or omission; committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law".

International Humanitarian Law defines the conduct of belligerent nations and individuals engaged in an armed conflict. It is outlined to balance humanitarian concerns and military necessity and to make the armed conflicts subject to the rule of law by limiting their catastrophic effect and alleviating human suffering.[15]

There are certain basic rules of warfare that are outlined under International Humanitarian Law:[16]

- In all circumstances, complete protection shall be provided to the people who are hors de combat (outside of combat) or who are not taking part in antagonism in the situation of armed conflict.

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11 War Crimes, United Nations Office on Genocide Prevention and the Responsibility to Protect, https;//www.un.o rg/en/genocideprevention/war-crimes.shtml (last visited on November 29, 2019).

12 Info Note 2, Human Rights Violation on Democratic Republic of Congo 1993-2003, UN Mapping Report, UNHRC.

13 ICRC Database on Customary International Humanitarian Law, Rule 156.

14 Rome Statute of the International Criminal Court, Art. 8 (2002), 2187 U.N.T.S. 90.

15 Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (2nd ed. 2006).

16 *Id*.

- The emblem of the Red Cross, Red Crescent and Red Crystal shall be respected as a symbol of peace. All the injured or hurt people must be provided medical aid and must be protected by the party to the conflict which has them in its power.
- Captured persons must not be made a subject to the acts of violence and reprisals.
- No one shall be subjected to torture or cruel, inhumane and degrading behavior.
- Parties to a conflict shall at all times distinguish between combatants and non-combatants.
- Attacks by any of the parties in an armed conflict shall be directed solely against legitimate military targets.

International Humanitarian Law has explicitly mentioned only one institution i.e. International Committee of the Red Cross as a governing authority.[17] ICRC emerged from 4 Geneva Conventions of 1949. The mission of ICRC is that it is an impartial, neutral, and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.[18]

Historical Background

The actuality of War Crimes is antediluvian. The existence of a systemized body of war crimes dates back to more than 150 years ago. There is no single document or statute that covers a complete list of all the war crimes. War Crime is a concept of evolution, it has evolved and additions have been made to the list of War Crimes with the happening of different events over time. Rules, codes and statutes governing the law of war have grown with the development of international law. The aftermath of events like World War I, World War II, American Civil War and Napoleonic War lead to an urgent requirement of laws which would govern the acts of the combatants during a war. There were instances where the belligerents of the winning side physically and mentally harassed the civilians and the soldiers of the defeated side. Powerful combatants exploited the civilians of the acquired territory by treating them as their slaves. Even in some instances, the fundamental human rights of people were also violated. After the end of World War I, there were instances in some regions of Austria, where civilian men were either killed or were asked to work as slaves and civilian women were brutally assaulted and raped by the soldiers of Allied Forces.[19]

These above-mentioned instances made it necessary for the international committee to work upon humanitarian law. But as it is already mentioned that the concept of humanitarian law and war crime developed over time, so some major evolvements in the humanitarian law are as follows:

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17 Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, Art. 9 (1949), 75 U.N.T.S. 31.

18 The ICRC's Mandate and Mission, International Committee of the Red Cross, https://www.icrc.org/en/mandate-and-mission (last visited on January 8, 2020).

19 War Crime, British Broadcasting Corporation, http://www.bbc.co.uk/ethics/war/overview/crimes_1.shtml. (Last visited on January 5, 2020).

Lieber Code (1863)

This code has been recognized as the first-ever contrived attempt to systemize the laws of armed conflicts. It was signed by the American President Abraham Lincoln during the American Civil War; it directed the behaviour and conduct of soldiers during wartime.[20] Martial Law, Military Jurisdiction and the treatment of spies, deserters & prisoners of war were the main sections that it was concerned with.[21] Though Lieber code was not an international treaty, nevertheless it facilitated in the evolvement of international treaties based on laws of conflict.

Hague Conventions (1899 & 1907)

These are a series of international treaties on rules of war. They are among the first formal declarationson war crimes in the body of international law.[22]

Both the conferences involved negotiations concerning disarmament, laws of war and war crimes. Conventions on Law and Customs of War on Land, rights and duties of persons involved in a war, protection of Prisoners of War from exploitation were adopted.[23] These conferences were attended by the delegates from the USA, Brazil, UK, Russia, Uruguay, France, etc. The Geneva Protocol, which was not a part of the original conventions, is considered as an addition to the Hague Conventions. Geneva Protocol came into force in the year 1925 and focuses on permanently banning the use of Biological & Chemical Warfare. This protocol was further augmented into the Biological Weapons Convention[24] and Chemical Weapons Convention.[25]India is also a party to the convention, according to the convention of 1899, since 1950.

Nuremberg Principles (1947)

These principles are a set of guidelines for determining what constitutes a War Crime. There are 7 principles given in this. These were created by the International Law Commission of the United Nations. They evolved due to the happening of the Nuremberg Trials.[26] Nuremberg Trials were a series of military tribunals held after World War II by the Allied Forces under the principles of International Law or Law of War. These trials are known for giving punishment to Nazi leaders who participated in the Holocaust and other war crimes.

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20 Jenny Gesley, The "Lieber Code" – the First Modern Codification of the Laws of War (April 24, 2018), https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/(Last visited on January 5, 2020).

21 Lieber Code (1863).

22 James Brown Scott , The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signature, Ratification and Adhesions of the Various Powers and Texts of Reservations (1915).

23 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Treaties, States Parties and Commentaries, available at:https://ihl-databases.icrc.org/ihl/Intro/195 (last visited on December 5, 2019).

24 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972), 1015 U.N.T.S. 163.

25 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993).

26 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950).

Geneva Conventions (1949)

These conventions are considered to be the most imperative statements in the development of war crimes. These are the rules that apply only in times of armed conflict and seek to protect people who are not or are no longer taking part in hostilities.[27] Geneva Conventions were the first to majorly focus on the rights of sick and wounded soldiers on a battlefield.[28] It owes the reason for its emergence to Mr. Henry Dunant,[29] recipient of the 1st ever Nobel Peace Prize in 1901,[30] who felt the need for these conventions after visiting the wounded soldiers of the Battle of Solferino. There are 4 Geneva Conventions that have been signed at the international level. All the four conventions have given due importance to the condition of wounded soldiers, civilians and health workers during wartime.

- 1st Geneva Convention (1864) was for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. It was signed by the representatives of 12 states. It was the first codified international treaty that covered the sick and wounded soldiers on the battlefield.[31] This convention allows an impartial humanitarian organization to provide protection and relief to wounded soldiers.[32] It mandates that wounded and sick soldiers who are out of the battle should be humanely treated.[33] It also provides that wounded and sick soldiers should be collected, cared for and protected.[34] It further states that parties to the conflict should record the identity of the dead and wounded, and transmit his/her information to the adversary.[35]
- **2nd Geneva Convention (1907)** was for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. It adapts the motive of the 1st Geneva Protocol to combat at Sea. Articles 12 and 18 of the convention require all parties to protect and care for the wounded, sick and shipwrecked.[36] It impedes the warships from capturing hospital ship's staff.[37]Moreover, it also protect religious and medical personnel serving on a combat ship.[38] Article 22 of the convention prevents the use of hospital ships for military purposes.[39]

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27 ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2016).

28 *Id*.

29 Paola Gaeta & Andrew Clapham, The 1949 Geneva Conventions: A Commentary (2015).

30 All Noble Prizes, The Noble Prize, available at: https://www.nobelprize.org/prizes/lists/all-nobel-prizes (last visited on November 23, 2019).

31 ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2016).

32 *Id*.

33 *Id*.

34 *Id*.

35 *Id*.

36 *Id*.

37 *Id*.

38 *Id*.

39 *Id*.

- **3rd Geneva Convention (1929)** was relative to the Treatment of Prisoners of War. It defines the rights available to the prisoners of war (hereinafter POW). It focuses on humanitarian protections provided to POW. It was signed by 196 parties. It provides a definition of POW which makes the articulation of this convention much easier.[40] Article 5 provides for the protection of POW from the time of their capture until their repatriation.[41] It also provides that POW isthe responsibility of the State which has captured them.[42] Article 13 to 16 provides for the humane treatment of POW.[43]
- **4th Geneva Convention (1949)** was relative to the Protection of Civilian Persons in Time of War. It was the first convention to deal with humanitarian protections for civilians in a war zone. The emergence of this convention shows the evolution of the law of war as now some light has been thrown on the protection of civilians as well. Some provisions for the protection of civilians were already there in 1899 and 1907 Hague Conventions. It also has 196 signatories. It states that protection must be provided to non-combatants even in the case of the conflicts not of an international character.[44]Part III of the Convention specifically provides for Status and Treatment of Protected Persons.

In the year 1993, UNSC adopted a report from Secretary-General which concluded that Geneva Conventions are a part of Customary International Law,[45] which makes the provisions of the convention to be binding even upon the non-signatories as well.[46] Indian is a signatory of all the Geneva Conventions. In addition to these conventions, 3 additional amendment protocols were also adopted:

- **Protocol I (1977)** relating to the Protection of Victims of International Armed Conflicts. It made the armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes to be considered as international conflicts. It is ratified by 174 countries so far, India is not a signatory to the protocol.
- **Protocol II (1977)** relating to the Protection of Victims of Non-International Armed Conflicts. This protocol has provided some certain international law that aims to protect victims of internal armed conflicts taking place within the borders of a single country. It has 169 signatories. India is not a signatory to this protocol as well. This protocol made it clear that Humanitarian Principles must be applied to everyone regardless of the nationality of the combatant.
- **Protocol III (2005)** relating to the Adoption of an Additional Distinctive Emblem. This protocol leads to the adoption of the sign of Red Crystal as a symbol of peace during the

40 Geneva Convention relative to the treatment of Prisoners of War, Art. 4 (1949), 75 U.N.T.S. 135.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 Theodor Meron, The Geneva Conventions as Customary Law, C.U.P. 348,370 (1987).
46 Judge Christopher Greenwood, Sources of International Law: An Introduction (2008).

times of war. Red Crystal was adopted because many countries believed that Red Cross & Rec Crescent symbols reflected a religious character. These symbols are used for two purposes - Protective Use (Medical and religious personnel may mark themselves to show a sign of their humanitarian mission and protected status under the Geneva Conventions) and Indicative Use (Members of the movement may wear the emblems at any time as an indication of their membership). India is not a signatory to this protocol as well.

The grave breach of the provisions of the above-mentioned treaties is considered as War Crime. It includes wilful killing, torture, causation of great suffering, not providing a fair judicial trial, taking of hostages, unlawful deportation, etc. When the United Nations Security Council (hereinafter UNSC) asserts its authority and jurisdiction from the UN Charter to apply universal jurisdiction, the principle of universal jurisdiction applies to the implementation of actions against grave breaches.[47]

Over some time, science has developed which has led to a very fast evolution of artificial intelligence and autonomous weapon system. The growth of international treaties as compared to the growth of the weapon system is very slow which makes the present treaties on international humanitarian law to be less efficient. Thus there is a need to develop the law of armed conflicts with the development of technology.

Forums Dealing With War Crimes

Since 1950, multiple attempts have been made to establish international forums to deal with War Crimes. 1st ever attempt to establish an international permanent criminal tribunal with jurisdiction on war crimes was made in 1948 through the Convention on the Prevention and Punishment of the Crime of Genocide.[48] It was an unsuccessful attempt as there were a lot of delays due to ambiguities in the definition of War Crimes and Crimes of Aggression. Nevertheless, multiple forums have been established at the international level to deal with War Crimes. Some of the forums are mentioned below:

- International Criminal Tribunal for the former Yugoslavia (ICTY) was established in the year 1993 by UNSC. It was established for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia during Yugoslav Wars. The tribunal was an ad hoc court located in The Hague, Netherlands. It was later dissolved in the year 2017.
- International Criminal Tribunal for Rwanda (ICTR) was established in 1994 by UNSC to judge people responsible for the Rwandan genocide and other serious violation of international laws in Rwanda during its internal armed conflict. In was located in Arusha, Tanzania. This tribunal didn't have explicit jurisdiction over war crimes but it had jurisdiction over crimes against humanity which impliedly included war crimes as well.[49] It was later dissolved in the year 2015.

47 Resolution adopted by General Assembly in 69th Session, GA/L/3481 (2014).

48 Convention on the Prevention and Punishment of the Crime of Genocide, Art. 6 (1951), 78 U.N.T.S. 277.

49 Statute of the International Criminal Tribunal for Rwanda,Audiovisual Library of International Law, S/RES/*955 (1994).*

- Ad-Hoc Court for East Timor was institutionalized by the United Nations Transitional Administration in East Timor (UNTAET) in the year 2000. It dealt with cases related to War Crimes, Genocide, Murder, Torture, Sexual Offences and Crimes against Humanity committed in East Timor during 1999.
- International Criminal Court (ICC) is an international tribunal that has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, War Crimes and crime of aggression.[50] The majority of cases dealt by it since its inception are related to War Crimes. It deals with only those crimes that took place after its establishment.[51] It is the most imperative forum of trial for War Crimes at present. It was established in 2002 through the Rome Statute and is located at Hague, Netherlands. Further analysis of ICC's work would be done in the latter part of the paper.
- Special Court for Sierra Leone (SCSL) was established by the UN's approval in 2004 to try those responsible for the crimes committed during the civil war. It was headquartered at Freetown. It came under the authority of the Secretary-General of the United Nations and government of Sierra Leone. SCSL escorted in a new generation of international tribunals. It was considered to be a more influential forum than its counterparts. It was later dissolved in the year 2013.
- Special Tribunal for Cambodia was established in 1997 but started functioning in 2003. It dealt with the individuals who blatantly violated international humanitarian law or who committed war crimes and genocide during the Khmer Rouge Regime in Cambodia. It is still functional and operates in Phnom Penh, Cambodia.
- Special Tribunal for Lebanon was institutionalized in 2009 through an agreement between Lebanon Government and the United Nations. It is headquartered at Leidschendam, Netherlands. It deals with the cases of War crimes, terrorism and crimes against humanity.

Rome Statute

Rome Statute is a multilateral treaty which is the founding and governing document of the International Criminal Court (hereinafter ICC). The statute was adopted at a conference in Rome in the year 1998 and came into force on 1st July 2002. As of March 2020, 123 countries have ratified the treaty and there are additional 31 countries which have only signed the treaty but have not ratified it.[52]

Rome Statute was drafted because the international committee realized the need for an institutionalized international forum that could deal with gross violations of International Humanitarian Law. Rome Statute provides the authority and authenticity to ICC.[53] Article 1 of the Rome Statute provides:

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50 Rome Statute of the International Criminal Court, Part 2 (2002), 2187 U.N.T.S. 90.

51 Rome Statute of the International Criminal Court, Art. 11(1) (2002), 2187 U.N.T.S. 90.

52 The States Parties to the Rome Statute, International Court of Justice, https://asp.icc-cpi.int/en_menus/asp/states%20 parties/pages/the%20 states %20 parties %20to%20the%20rome%20statute.aspx(last visited on January 24, 2020).

53 Rome Statute of the International Criminal Court, Art. 1 (2002), 2187 U.N.T.S. 90.

"An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."[54]

The statute concerns itself with 4 primary divisions of crime – Genocide, Crimes against Humanity, Crimes of Aggression and War Crimes. Our research is solely based on War Crimes, thus a proper analysis of War Crimes given under the Rome Statute has to be made.

Article 8 of the statute provides specifications about the War Crime. Though no certain definition of War Crime has been provided in the Article but it specifically mentions 56 crimes that fall under the category of War Crimes.[55] War Crimes include both – crimes committed during a war and crimes committed during an internal armed conflict.

ICC gets the authority of Jurisdiction from the Rome Statute only. ICC's Jurisdiction can be classified into three heads:

- Subject Matter Jurisdiction – It refers that individuals can be prosecuted only for crimes that are listed in the Statute. Article 5 of the Statute enlists the crimes which are defined in later articles; Article 6 defines Genocide, Article 7 defines Crimes against Humanity, Article 8 defines War Crimes, and Article 8bis[56] defines Crimes of Aggression. Besides, offences against the administration of justice are defined in Article 70 which is a fifth category of crime for which individuals can be prosecuted.
- Territorial Jurisdiction – It refers to the region-wise jurisdiction of ICC. In this case, ICC has jurisdiction only if the crimes took place on the territory of a State Party;[57] if they were committed by a citizen of a State Party; if the crimes were referred to the Prosecutor by the UN Security Council.[58]
- Temporal Jurisdiction - It refers to the time period over which the Court can exercise its powers. Retroactive Jurisdictional power is not provided to the court. Individuals can only be prosecuted for crimes that took place on or after 1 July 2002.[59] If a state becomes a party to the statute after 1 July 2002, then the Court cannot exercise jurisdiction before the membership date.[60]

Multiple countries did not ratify or sign the Rome Statute. A country that has not ratified the treaty does not fall under the jurisdiction of ICC. ICC can prosecute any individual[61] who is a

54 *Id*.
55 Rome Statute of the International Criminal Court, Art. 8 (2002), 2187 U.N.T.S. 90.
56 Resolution RC/Res.6 (2010).
57 Rome Statute of the International Criminal Court, Art. 4 (2002), 2187 U.N.T.S. 90.
58 Rome Statute of the International Criminal Court, Art. 13 (2002), 2187 U.N.T.S. 90.
59 Rome Statute of the International Criminal Court, Art. 11(1) (2002), 2187 U.N.T.S. 90.
60 Rome Statute of the International Criminal Court, Art. 11(2) (2002), 2187 U.N.T.S. 90.
61 Rome Statute of the International Criminal Court, Art. 25 (2002), 2187 U.N.T.S. 90.

citizen of a state party to the Rome Statute; the only limitation is that it cannot prosecute individuals whose age is below 18.[62] Even citizens of non-member states can also be prosecuted if the UNSC commands ICC to do so. There are major countries like the USA, Israel, China, Russia and India which are not a party to the treaty. Different reasoning has been given by different countries, some of which are mentioned below.

- **The United States of America** did not ratify the treaty because it realized the absence of jury trials; the USA made that hearsay evidence is allowed; and allegations of no right to a speedy trial. The USA likewise felt that rule needed reasonable shields against political control, has clearing authority without responsibility to the U.N. Security Council, and damages national power by guaranteeing ward over the nationals and military work force of non-party states in certain conditions. The Heritage Foundation, an American think tank claimed:

  > "United States participation in the ICC treaty regime would also be unconstitutional because it would allow the trial of American citizens for crimes committed on American soil, which are otherwise entirely within the judicial power of the United States. The Supreme Court has long held that only the courts of the United States, as established under the Constitution, can try such offenses"[63]

It was also mentioned by Stephen Rapp, the former Ambassador for Global Criminal Justice that

> "Americans believe that they know how to help others better than the international community. If Americans would ever join an organization such as the ICC, their identity would be threatened because the United States would have to go by rules and laws alien to them"

In 2018, at the United Nations General Assembly, US President Donald Trump spoke about the USA's relationship with ICC. He specified that

> "As far as America is concerned, the ICC has no jurisdiction, no legitimacy and no authority. The ICC claims universal jurisdiction over the citizens of every country, violating all the principles of justice, fairness and due process. We will never surrender America's sovereignty to an unelected, unaccountable global bureaucracy. America is governed by Americans; we reject the ideology of globalism and embrace the doctrine of patriotism"

- **China** did not ratify the treaty since it was hesitant to make a universal body that could supplant or abrogate the national criminal purview. China was additionally worried about the ICC's jurisdiction over the crime of aggression, which is naturally connected to the job of the United Nations Security Council in discovering whether an act of aggression has

62 Rome Statute of the International Criminal Court, Art. 26 (2002), 2187 U.N.T.S. 90.

63 Lee A. Casey and David B. Rivkin, Jr., The ICC vs. The American People, The Heritage Foundation, available at: https://www.heritage.org/report/the-international-criminal-court-vs-the-american-people (last visited on February 10, 2020).

been committed by a state. Other Chinese concerns with respect to the ICC fixated on the most proficient method to characterize these core crimes under the Court's jurisdiction. China has worries about the transparency of the ICC to political impact since any investigator can choose to begin an examination. They are likewise against the way that the court has the ability to judge whether a state is capable or ready to indict its nationals.

- **Russia** never ratified the treaty but it had signed the treaty in the beginning. It completely detached itself from ICC in 2016 when it withdrew its intention to become a member of ICC. Russia was accused of war crimes during their military intervention in Syria and this triggered their decision to no longer be part of the court. Russia accused the ICC of being 'one-sided and inefficient'. Even their Minister of Foreign Affairs, Sergey Lavrov, explained that

  "The court did not live up to the hopes associated with it and did not become truly independent"

- **Israel** also never ratified the treaty. Reason being that there have been diplomatic problems between Israel and Palestine. Israel never considered Palestine to be a sovereign. When it came tothe application of Humanitarian Law in Palestine, ICC intervened which triggered Israel. Israel accused that ICC has been impartial in resolving the issue between Israel and Palestine. It is violating the sovereignty of Israel. Thus Israel decided not to become a party to the Rome Statute.

India and ICC

India has constantly upheld universal participation for the development and codification of international criminal law and ought to have been required to be a characteristic supporter of such worldwide collaboration to smother and discourage terrible wrongdoings and heinous crimes of international concern through the ICC. In this case, India not exclusively didn't endorse the treaty yet additionally decided to keep away from the vote on the Statutes and has been a quiet spectator in the Conferences of Parties and other ICC gatherings since 1998. According to Indian Jurists, an excess of enthusiasm by pedants made the Rome Statute of the ICC a deeply flawed instrument.

During the conference for Rome Statute in 1998, India ardently argued against the form that the ICC was taking under the proposed Statutes. While every country was putting its proposal before the conference, India proposed to include the use of nuclear weapons as an ICC crime through a procedural no action resolution[64], but the Rome Conference evaded the vote on this Indian proposal.

Indian delegates and jurists have regularly mentioned India's reasoning behind not ratifying the treaty. Major objections that India has are as follows:

64 A no-action motion is a procedure that prevents member states at the UN from even debating a particular resolution and the resolution is passed impliedly.

- Rome Statute made ICC subordinate to the UNSC, and thus in effect to its permanent members, by providing it the power to refer cases to the ICC and the power to block ICC proceedings. India alleged that excessive power has been given to UNSC to bind non-states parties to the ICC.
- This also violates the fundamental principle established in the Vienna Convention on Law of Treaties that no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted.
- The leader of the Indian Delegation to Rome Conference, Mr. Dilip Lahiri has stated

  "ICC has blurred the legal distinction between normative customary law and treaty obligations, particularly in respect of the definitions of crimes against humanity and their applicability to internal conflicts, placing countries in a position of being forced to acquiesce through the Rome Statutes to provisions of international treaties they have not yet accepted"
- India also alleged that the Rome Statute inappropriately vested wide competence and powers in the hands of an individual prosecutor by giving him/her the power to initiate investigations and trigger the jurisdiction of the ICC.
- India strenuously opposed the Rome Statute's refusal of India's proposal to designate the use of nuclear weapons and terrorism among crimes within the purview of the ICC.
- Also, India was against the exclusion of an "opt-out"[65] option from the Rome Statute.
- In India, the fact that in Doda (Kashmir) and in other border regions militant forces regularly engage Indian army troops, and the size of the armed forces deployed on both sides, suggests that international humanitarian law shall apply in the valley. Moreover, in the North-Eastern states where AFSPA is applicable, it has been observed that violations of international humanitarian law lead to plenty of human life every decade. In such cases, application of Article 3 common to the four Geneva Conventions which provides international law and standards governing the conduct of parties in an internal armed conflict. India has not accepted Common Article 3 of the Geneva Conventions which relate to war crimes during conflicts not of an international character, the reason being that India has a lot of internal conflicts in the Northern part of its territory and it does not want to an international body to intervene in that. If India ratifies the treaty, ICC could intervene in that matter which would cause trouble to the nation and could lead to India's condemnation at the international platform. So, India was dreadful that ICC might use its jurisdiction in the internal matters of India which are long untouched especially in the matters of Jammu & Kashmir and North-eastern states affected by the Imposition of Armed force (special powers) act, 1958 (AFSPA).

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65 Opt-out provision refers to a clause that allows the countries to reject the unacceptable terms of a resolution within a permitted time frame by keeping the other terms intact.

- In J&K, the North East and prior Punjab, sympathizers and front associations of the extremists, both in India and abroad, have made a decent attempt in the past to acquire pressure on India through global for a with charges of human rights misuses and infringement. They can be relied upon to attempt to exploit the ICC Statutes to campaign the ICC prosecutor to dispatch examinations against Indian pioneers and commandants.

India's stand at present is not to become a signatory of Rome Statute. But Indian delegates must take the option of becoming a member into cognizance. There are multiple advantages to India if it joins this international forum. Some of the advantages and reasons are listed below:

- After the conclusion of the Review Conference of the Rome Statutes in Kampala, Uganda in June 2010, an 'opt-out' provision has been added, permitting State Parties to be exempted from the exercise of jurisdiction by the Court concerning the new crime of aggression.
- ICC's jurisdiction is founded on the principle of complementarity, with absolute priority on the exercise of national jurisdiction. The principles of complementarity gives that the ICC can't take up a case on the off chance that it is as of now being examined by the concerned State except if the State is plainly reluctant or unfit to do the examination or arraignment. So as long as Indian diplomatic and legal machinery is alert, ICC cannot intervene in Indian matters thus it prevents the ICC from breaching India's sovereignty without its permission. Also, it makes direct ICC prosecution of Indian officials virtually impossible to conceive.
- Although the ICC Prosecutor has been given exceptional forces to utilize his jurisdiction over the member states yet India's choice to stay as a non-signatory doesn't imply that Indian nationals can altogether get away from the ICC's compass. The UN Security Council has been given the authority under the ICC Statutes to bring non-members of ICC under its jurisdiction. Hence, avoiding the ICC, in this way, doesn't forestall indictment by the ICC.

In spite of the fact that before joining the ICC, some lawful issues should be settled; ICC's resolutions are not steady with India's situation on other universal lawful instruments. India needs to reevaluate its situation on Common Article 3 of the Geneva Conventions and crimes against humanity in the course of domestic conflicts. Having become Party to so many UN human rights conventions, it is hardly proper that India ought to state exemption for the commission of the most grievous wrongdoings comprehensible throughout fighting domestic insurgencies.

Conclusion and Suggestions

In light of the analysis of all the reasons, authorities and stipulations mentioned above, it can be concluded that India must become a signatory to ICC or must actively participate in ICC's conferences so that it could at least influence the evolution of the ICC in the course of such discussions.

The ICC is there to remain as an undeniably central organization in the universal legal architecture to battle gigantic human rights infringement which could influence harmony and security. Avoiding ICC for an uncertain period will barely improve India's ethical notoriety and worldwide profile with its general record on the human rights issue.

India's tactic of not joining the ICC so that the international organization does not intervene in its matters is futile as UNSC could still make the ICC exercise its jurisdiction over India. Also, India's reasoning behind avoiding the intervention of ICC in its Kashmir issue shows the failure of Indian Democracy in controlling the situation of Kashmir Valley from past 70 years. India should refrain itself from hiding its lack of success in Kashmir Valley. There is a need for some international organization to interfere and stop the serious violations of human rights in Kashmir and restore the peace in the Valley. Ratifying the treaty would reflect bravery and honesty on the part of Indian Government towards promoting the principles of Humanitarian Law.

ICC's jurisdiction over India under the United Nations Security Council referral procedure would be hypothetically conceivable whether India joins the ICC, yet exceptionally far-fetched by and by. India should quickly guarantee substantive and viable support in ICC deliberative and arranging bodies which it is qualified for go to as an observer.

Also, if India joins ICC then it will be beneficial for it as it could then propose changes in the Rome Statute as a member state which would be a more influential and powerful tactic. Even for the problem of the UNSC as being the depository, India can appeal with the world majority to lessen the powers given in the hands of the UNSC and its permanent members. India can also appeal for the inclusion of Terrorism and the use of nuclear weapons in the ICC's purview. It would be beneficial from the aspect of availability of Human Rights in India and thus overall an advantageous step for India to join ICC.

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Joseph Shine Vs Union Of India- A Comment

Devisree GS*

Abstract

Case filed under article 32 of the Constitution of India challenging the validity of Section 497 IPC which makes "adultery "a criminal offence- Whether Section 497 IPC suffers from manifest arbitrariness and is violative of Article 14 of the Indian Constitution -Whether Section 497 violates Article 15(1) of the Constitution by enforcing gender stereotypes?-Whether the offence of adultery is violative of Article 21 of the Constitution? Held that Section 497 IPC lacks determining principle to criminalize consensual sexual activity and is manifestly arbitrary - woman as chattel for the purposes of article 15 discriminates against women on grounds of sex only, and therefore violates Article 15 (1) of the Constitution - The true purpose of affirmative action is to uplift woman and empower them in socio- economic spheres - held that there cannot be a community exposition of masculine dominance. Criminal law must be in consonance wit constitutional morality. Overruled the decisions in Sowmithri Vishnu v. Union of India (1985 Suppl.SCC 137), and V. Revathi v. Union of India and Ors. (1988) 2 SCC 72.[1]

Judges

CJ Dipak Misra delivered the leading judgment for himself and A.M Khanwilar J.Wile RF Nariman , Dr DY Chandrachud and Indu Malhotra ,JJ .,each delivered separate concurring opinions.

Genesis of the Case

The writ petition was filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC which makes "adultery "a criminal offence, and prescribes a punishment of imprisonment up to five years and fine. The Petitioner also challenged Section 198 (2) of the Code of Criminal Procedure.

On 05-01-2018, when the matter was called for hearing. The three Judge Bench after taking note of the authorities in Yusuf Abdul Aziz v.State of Bombay (AIR 1954 SC 321), Sowmitri

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1 Date of Decision – 27-08-2019

Vishnu v Union of India and another (1985 Suppl.SCC 137), V. Revathi v. Union of India and Others (1988)2 SCC 358 and W. Kalyani v. State through Inspector of Police and another (2012) 1 SCC 358 and while appreciating the submission advanced by the learned counsel for the petitioner felt the necessity to have a re look at the constitutionality of the provision., that Bench of the Supreme Court noted as under:-

"Prima facie on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence, but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is a conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman where the emphasis is laid on the connivance or the consent of the husband. This tantamount to subordination of a woman where the Constitution confers equal status. A time has come when the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice"

That is how the matter came before the 5 judge Bench of the Supreme Court.

Issues

I. Whether Section 497 IPC suffers from manifest arbitrariness and is violative of Article 14 of the Indian Constitution.

II. Whether Section 497 violates Article 15(1) of the Constitution by enforcing gender stereotypes?

III. Whether the offence of adultery is violative of Article 21 of the Constitution?

Law Points

Section 497 of the I.P.C is placed under Chapter XX of "Offences Relating to Marriage". In order to constitute the offence of adultery under Section 497 IPC, the following must be established:

I. Sexual intercourse between a married woman and a man who is not her husband.

II. The man who has sexual intercourse with the married man know or has reason to believe that she is the wife of another man;

III. Such sexual intercourse must take place with her consent, i.e., it must not amount to rape.

IV. Sexual intercourse with the married woman must take place without the consent of connivance of her husband

Petitioner's Contentions

1. The Petitioner urged that the operation of Section 497 is a denial of equality to women in marriage; the provision is manifestly arbitrary and amounts to violation of the constitutional guarantee of substantive equality. It was further submitted that Section 497offends the Article 14 requirement of equal treatment before law and discriminates on the basis of marital status. Further the consent of the woman is irrelevant to the offence.
2. The Petitioners contended that Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination. Further, it was argued that Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15 of the Constitution.
3. The Petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage. The Petitioners placed reliance on the judgment of K.S. Puttaswami v Union of India where in the Court held that the right to make decisions on vital matters concerning one's life are inviolable aspects of human personality.
4. The petitioner contended that whether or not the law permitted a husband to prosecute his disloyal wife, a wife cannot be lawfully disabled from prosecuting her disloyal husband. Section 198(2) Cr.P.C. operates as a fetter on the wife in prosecuting her adulterous husband.
5. The Petitioners have contended that Section 497 of the I.P.C. is violative of the fundamental right to privacy under Article 21, since the choice of a partner with whom she could be intimate, falls squarely within the area of autonomy over a person's sexuality It was submitted that each individual has an unfettered right (whether married or not; whether man or woman) to engage in sexual intercourse outside his or her marital relationship.

Respondents Contentions

1. Respondent submitted that adultery must be retained as a criminal offence in the I.P.C. Counsel for the respondent argued on the fact that adultery has the effect of breaking up the family which is the fundamental unit in society.
2. Respondent contended adultery is undoubtedly morally abhorrent in marriage , and no less an offence than the offences of battery, or assault By deterring individuals from engaging in conduct which is potentially harmful to a marital relationship, Section 497 is protecting the institution of marriage, and promoting social well being
3. The Respondents submitted that an act which outrages the morality of society and harms its members ought to be punished as a crime. Therefore adultery falls squarely within this definition.
4. The learned Counsels for respondents further submitted that adultery is not an act that merely affects just two people; it has an impact on the aggrieved spouse, children, as well

as society Any affront to the marital bond is an affront to the society at large. The act of adultery affects the matrimonial rights of the spouse, and causes substantial mental injury. Adultery is essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society.

5. It was argued on behalf of the Union of India that Section 497 is valid on the ground of affirmative action All discrimination in favour of women is saved by Article 15(3), and hence was exempted from punishment. Further, an under inclusive is not necessarily discriminatory. The contention that Section 497 does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional.

6. It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21 An outsider who violates and inures these rights must be deterred and punished in accordance with criminal law.

7. It was finally suggested that if the Court finds any part of this Section is violative of the Constitutional provisions, the Court should read down that part in so far as it is violative of the Constitution but retain the provision.

Answers to the Issues:

Issue 1 - Violation of Article 14

1. Court held that Section 497 IPC lacks determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 denies substantive equality, as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 thereby violates Article 14 of the Constitution.

2. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness. As Section 497 of the I.P.C., makes two classifications:

i) The first classification is based on who has the right to prosecute: It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery. Conversely, a married woman who is the wife of the adulterous man has the right to prosecute either her husband, or his paramour.

ii) The second classification is based on who can be prosecuted. Also, it is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an “abettor” to the offence.

The aforesaid classifications were based on the historical context in 1860 when the IPC was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or "property" of their husbands. Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a theft of his property, for which he could proceed to prosecute the offender. Court held that the said classification is no longer relevant or valid, and cannot withstand the test of Article 14, therefore ex facie discriminatory against women and hence is liable to be struck down on this ground alone. (Shayara Bano v. Union of India and Ors.(2017) 9 SCC 1 wherein it was held that legislation can be struck down on the ground of manifest arbitrariness)

Issue 2 – Violation of Article 15

1. Court held that on a reading Section 497 IPC, it is demonstrable that women are treated as subordinate to men in as much as it lays down that when there is connivance or consent of the man, there is no offence. The provision treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted. In treating a woman as chattel for the purposes of this provision, it is clear that such provision discriminates against women on grounds of sex only, and therefore violates Article 15 (1) of the Constitution
2. While dealing with the same issue Court made reference to Section 198, Cr.P.C. Court observed that Section 198 is blatantly discriminatory provision, as it is the husband alone or somebody on his behalf file a complaint against another man for the offence o adultery. Consequently, Section 198 was declared constitutionally infirm.
3. Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15 (3) of the Constitution. The true purpose of affirmative action is to uplift woman and empower them in socio- economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as beneficial legislation.
4. The purpose of Article 15(3) is to further socioeconomic equality of women It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences. A section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

Issue 3 – Violation of Article 21:

1. To address the issue of the dignity of a woman, in the context of autonomy, desire, choice and identity ,Court referred to the recent larger Bench decision in K.S.Puttaswamy and another v. Union of India and others which, wherein immense stress was laid on the dignity of an individual.

2. The Court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. Court held that there cannot be any curtailment of the same. It further held that Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes creating a dent in the individual dignity of women. As Section 497 IPC lays emphasis on the element of connivance or consent of the husband which effectively tantamount to subordination of women to her husband. Court held that on this ground Section 497 offends Article 21 of the Constitution. Court observed that the provision treats a married woman as a property of the husband. Court clarified that there cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. Further, while dealing with the issue Court held that there cannot be a community exposition of masculine dominance.

Decision of the Court

The 5-Judge Constitution Bench has held section 497 IPC and Section 198 CrPC to be unconstitutional and violative of Articles 14, 15 (1) and 21 of the Constitution.. Criminal law must be in consonance wit constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Court held that being antithetical to the constitutional guarantees of liberty, dignity and equality. Section 497 does not pass constitutional muster.

1) Section 497 is based on gender stereotypes about the role of women and violates the non – discrimination principle embodied in Article 15 of the Constitution

2) In treating a woman as chattel for the purposes of this provision, it is clear that such provision discriminates against women on grounds of sex only, Section 497 is discriminatory and therefore, violative of Article 14.

3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and

4) Section 198, CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 was held to be constitutionally infirm. Court added that Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. will also be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

5) Further, the Court overruled the decisions in Sowmithri Vishnu v. Union of India (1985 Suppl.SCC 137), and V. Revathi v. Union of India and Ors. (1988) 2 SCC 72.

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Super Cassettes Industries Ltd. V. Myspace Inc. And Ors. Case Analysis And Commentary

Samhitha Sharath Reddy* and P. Vasishtan**

Abstract

The question of an intermediary hosting an infringing copy of a work, when the uploader becomes anonymous, throws a grey area in the Indian Cyber Law Regime when there were no such infringements in the past. This is where the Supercassettes v. MySpace[1] was pronounced. In this instant case, the issue of secondary infringement has been discussed in the context of the liability of internet service providers and the Court interpreted Section 51[2] of the Copyright Act, 1957 to include not only entertainment but also other spaces on the internet within the purview of the Act. We will thus, analyse the entire case, in detail, in the classic IRAC format.

Introduction and Brief Facts

We will analyse only the 2011 Judgement majorly; however, it has been overturned, it was the Judgement that discussed on the frameworks of Copyright Law and how it was interpreted. The 2016 Divisional Bench Judgement discussed more into the need for harmoniously reading Sections 79[3]& 81[4] of the IT Act, 2000 along with Section 51 of the Copyright Act, 1957.

Myspace's website users posted copyrighted songs in the public domain, owned by Supercassettes. Thus, Supercassettes filed an infringement suit against the website owner where they contended that they had no moderation over the content that is uploaded and thus sought safe harbouring.

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1 *Super Cassettes Industries Ltd. V. Myspace Inc.*, (1978) 4 SCC 118; (2003) 27 PTC 457 (Bom); (2011) 49 PTC 49 (Del).

2 When copyright infringed.—Copyright in a work shall be deemed to be infringed under various undermentioned provisions. In this case, the relevant provisions under Section 51(a)(ii).

3 The exemption of liability for intermediaries under certain instances. An intermediary shall not be liable for any third-party information or data made available by it or hosted by it.

4 The power to have an overriding effect on other Acts. In this case, it was the effect on the Copyright Act, 1957.

This is one of the first cases in India that dealt with the overlap of provisions of both the IT Act, 2000 and the Copyright Act, 1957. As Super Cassettes, a Company that licenses several cinema songs and sells through cassettes and CDs filed an infringement suit against MySpace, who claimed innocence over the content posted by its user on their website, that infringed Supercassettes' rights. The final verdict was given by the Divisional Bench of the Delhi HC overturning its earlier Single Judge Bench that held MySpace Inc. responsible.

Issue

i. Does the requisite of hosting infringing content in one's website despite knowing about it, suffice to attract Section 51(a)(ii) of Copyright Act, 1957, and its consequent liability for an Intermediary?

ii. Does safe harbouring principle come as a safeguard to the intermediaries who in a real sense do not hold any vested authority or control to moderate any content hosted in their website before a notice of infringement is served by the Copyright Holder?

RULE

Section 13 of the Copyright Act, 1957 lists out the criteria in the instances where any form of copyright exists and not.

Section 14 of the Act, defines the rights of the copyright owner. What would amount to infringement has been given under section 51 of this Act.

Section 51(a)(i)[5] lays down that a copyright in a work shall be considered to be infringed when the intermediary does any act without a license given by the owner of the Copyright.

Section 51(a)(ii) lays down that when an intermediary provides for profit any place to be used for communicating to the public, such communication can be regarded as an infringement unless such person is unaware and does not hold any reasonablereasons to believe that such communication to the public would lead to infringements under the Copyright Act.

The Prima Facie Case Test was first discussed in *Super Cassette Industries Ltd. v. Nirulas Corner House*[6] that checks whether the first instance of an infringing content being published in a public medium. If yes, then it amounts to conveying to the public concept.

Balance of Convenience Test is used to support a Plaintiff who is aggrieved by the infringement and in case of doubts, the question of benefit was to award to the benefit, in a suit of an injunction.[7]

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5 This proviso also states that - "if he does any act in contravention of the conditions given in the license which was so granted to him or contravenes any condition imposed on him by any competent authority, where the exclusive *right* to do such an act vests exclusively with the owner of the copyright under this Act."

6 Super Cassettes Industries Ltd. vs. Nirulas Corner House., MANU/DE/2843/2011.

7 One of the first cases to iterate this Test in a Copyright Injunction Suit — Australasian Performing Right Association v. *Jain,* (1990) 18 IPR 663.

Irreparable Damage Test is used to determine whether the damage to the Plaintiff has been irreversible, and in such cases, the cause for a claimed injunction may be concentrated more.[8]

Section 79 of the IT Act offerssafe harbouring to any intermediaries in instances where the intermediary liability would not arise in the first place.[9]

Section 81 allowed any overriding effect on other Acts to provide a meaningful outcome when any provisions of the IT Act came into the purview of definition or question.

Application/Analysis

Supercassettes being the owner of the copyright in the works enumerated in the plaint, successfully made out the prima facie case - Plaintiff was also been able to establish prima facie that the acts of the Defendants are infringing in nature as the same are permitting the webspace or place on the internet for profit - Prima facie case thus was in favour of Supercassettes.

Regarding the Balance of convenience lied again in favour of the Supercassettes as My Space Inc. would be less inconvenienced if they were directed not to infringe the Supercassettes' works.

Supercassettes was dependent upon their works for royalties, reaping fruits of their copyright for further investments etc., Super cassettes would be more benefitted if their works allowed to be continued to be exploited for profit without their permission.

Section 13 and 14 of the Copyright Act had given the powers to Supercassettes, being the official license holder of such songs in question, while MySpace Inc. being a mere intermediary who did not even have the power to control or modify the content beyond a level. These powers allowed Supercassettes to have an upper hand, while Supercassettes' songs were being infringed.

Referring to Section 51(a)(i), the HC held that it was healthy to presume that My Space Inc. had total knowledge of what was being posted in their hosting website, or at least, become the first point of contact when a suit of infringement is raised on content that was allegedly posted on the website.

Since tangible evidence of communication to the public existed while reading it along with Section 52(a)(i), when Supercassettes informed My Space Inc. about their copyrighted content, My Space Inc. not only became aware of the mode of infringement but also the rights of Supercassettes over the impugned content.

Since the first instance had been marked by Supercassettes, the Court on this ground, subsequently ordered that Supercassettes must furnishthe list of all the songs or the copyrighted content per se, that was or could be available in MySpace's website, which was prayed to be taken down within a week of the receipt of such list from Supercassettes.

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8 *Dalpat Kumar and Anr.* v. *Prahlad Singh,* AIR 1993 SC 276. — This case also laid down these 3-fold test herein the apex court has stated that for the purposes of grant of temporary injunction.

9 *Google India Private Ltd* vs M/S. Visakha Industries, 2019 SCC OnLine SC 1587.

Also, amidst this judgement, the High Court did acknowledge that the wordings of Section 51(a)(i) was vague in nature, and the term 'any place' was given the meaning of 'web sphere' for time being, to protect the interests of Supercassettes as it was a suit of an injunction.[10]

The Hon'ble Court examinedvarious laws from England thatruled that any authorisation would necessitatesanctioning or having it approved. Despite theDefendants in this caseheld in control of some degree of affirmative control over the contentthat was uploaded,it was nevertheless held this would not mean authorization or sanctioning of approval, which is the standard of the common law. The Court finally ruled despite

Further, the Court held that MySpace Inc. cannot take the aid of Section 79 of the IT Act because the IT Act and the Copyright Act operate in different fields and only the Copyright Act would apply to the case at hand, because of the lack of compelling evidence to connect both these Acts.

However, since MySpace Inc. had played advertisements in the sections of the website where the infringing copies of Supercassettes' content were streamed or posted, this pecuniary reason gave the HC the edge to determine along with the point that a fast action of remedy was required as this was an injunction case, the Court weighed both monetary benefits MySpace Inc. gained and the already vaguelyworded Section 52(a)(i), the Court pronounced the judgement favouring Supercassettes.

In the subsequent second appeal of the case, the Coram comprised of Dr Justice Ravindra Bhat and Justice Deepa Sharma, who revisited the decision of Justice Manmohan Singh. In the Second Appeal, the substantial question of law was, however, the infringement had been acknowledged, the immunity for MySpace Inc. from being solely responsible for this fiasco, and becoming a liability to pay the damages claimed, was questioned.

The Court held that "*A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it*"[11]

The Divisional Bench revisited the exposition of the law on Section 51 of the Copyright Act alongside Sections 79 and 81 of the IT Act and set aside the Single Bench decision on the reason that the standard of awareness necessitated by Section 51 was not of simple suspicion or general awareness but definitive awareness and thus finally resolved the confusion between Sections 79 and 81 of the IT Act by saying that both have to be harmoniously construed.

"The difficulty in interpretation arises because Section 79 of the IT Act contains non-obstante to the effect that the provisions of the IT Act would override any law whereas Section

10 *Id.*

11 *K. Mohammed Ubaidullah* v. *Hajee C. Abdul Wahab*, 2000 (6) SCC 402.

81 lays down that the provisions of the Copyright Act would not in any way be curtailed by the IT Act."[12]

Applying this present case to today's context will reveal the significance of an intermediary company's role in bridging between the copyright holder and an uploader who would upload copyrighted content without due permissions into the intermediary's website. This case laid the foundation of immunity and safe harbouring sought by the intermediaries against the copyright holders, who by virtue of the vested copyrights, have an upper hand already. In protecting the rights of these intermediaries, the balance of the exclusive rights of the copyright holder should also not be compromised.

The principle was again held in the likes of Shreya Singhal[13] where the pertinence of the case lies in its pronouncement date that was between the two appeals of the Supercassettes v. MySpace case. Shreya Singhal case demarcated the lines for an intermediary and laid down specific requisites to identify the elements on the satisfaction of which, would immune MySpace.

Thus, in such cases, an ideal balance between usability of such websites as well as safeguarding the copyright owners shall be fostering the procedure of taking down of online content at the notice of the copyright holder. The onus of vigilance over monitoring the copyrighted content posted online shall vest with the copyright holder.

This process should be further assisted by employing various online tools that constantly monitor any copyrighted content's similar or same upload anywhere on the public domain. Famous corporations like YouTube, Facebook, Instagram etc., employ these vigilant algorithms programmed into their services that it instantly identifies any copyrightable content uploaded in their respective domains, where an instant notice is shown to such uploader to confirm that they have the required permissions and copyright to upload the content.

The onus now shifts on the uploader once they have agreed to this notice shown by the intermediary, as failure to uphold the same or malicious signing of the contract, would attract an infringement suit if the copyright holders deny any such copyright being granted to that uploader. This process thus ensures all the parties to the online transaction of copyrighted content are safeguarded and the principles of copyright are also upheld without commotion.

Conclusion

This Judgement turned more heads pan India and Copyright Law Field Professionals as the overlap of Sections 79 and 81 from the Information Technology Act, 2000 would have encroached on this standalone decision if read harmoniously with Section 51(a)(ii) of the Copyright Act, 1957.

12 Saba, "Sections 79 & 81 of IT Act and Section 51 of Copyright Act have to be harmoniously construed", available at https://www.scconline.com/blog/post/2017/01/21/sections-79-81-of-it-act-and-section-51-of-copyright-act-have-to-be-harmoniously-construed/ (last visited 28.07.2020).

13 *Shreya Singhal* v. *Union of India,* AIR 2015 SC 1523.

Thus, after harmoniously reading all the provisions from the two Acts, the Divisional Bench of the Delhi HC overturned the 2011 Single Bench Judgement and held that however there was a case of infringement, and principal damage on Supercassettes, MySpace Inc. would not be held liable, in the fronts of Safe Harboring, as the evidence submitted, did not satisfy the question of 'prior knowledge of infringement' on the part of MySpace Inc., and thus, the Decision was held in favour of MySpace Inc.

This new decision proved to be a big relief for various intermediaries who were at the risk of being in this position because of the fact their scope of controlling the content in real life was much limited due to issues from technological limitation to it being a modest source of income.

For 4 years since the case was pronounced, there had not been any other case that had challenged the likelihood of such a substantive issue of law, albeit, the technology that the common men use has increased and usage of internet has multiple folds increased due to the advent of low-cost internet packs. This has completely changed the approach of people as well as the copyright holders to harness the change in their benefit.

To adapt to the change while not compromising on their economic interests, the copyright holders or producers of cinematograph films and music entered into agreements with several music streaming services like Amazon Music, Spotify, Gaana. These agreements will ensure the producers are regularly credited their royalties, by the music streaming platforms that earn through the paid subscriptions from the customers and running advertisements.

Thus, in the 2020's parlance, in the rise of the internet era, this Supercassettes v. MySpace case may look insignificant due to its obsolete issues, nevertheless, it would still hold the credit of setting the precedent to clear the void that existed around Section 51 of the Copyright Act and subsequently, shadowed to all the present-day copyright protections, in any electronic form, whatsoever. As much as the online copyright laws are intact, the roots will always lead to this case.

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BOOK REVIEW

THE CASES THAT INDIA FORGOT

Zorah Susan Abraham*

Dr.Chintan Chandrachud who is an associate of Quinn Emanuel Urquhart & Sullivan LLP has written the book 'The Cases that India Forgot' in 2019. In this book he has made a narrative of ten different cases which have been categorised into different parts such as- politics, gender, religion and national security. All but one of these cases have been decided by the Hon'ble Supreme Court with the exception of the judgment in State of Bombay v. Narasu Appa Mali, which had been delivered by the Bombay High Court.

The objective of the author is not just to write in lucid writing about the cases that are 'not in public memory but should be'. It is to bring an account of each of the ten cases mentioned in the book by explaining the social scenario in which they have taken place. As the author himself states, the book includes circumstances in which courts have misused their responsibility as a guardian of rights and also seeks to dispel the common myth in the common man's mind that courts have a final say on all questions in the cases.

The writer has not kept in mind any particular basis while choosing the cases as each one would have their own reasons while choosing ten cases in India's legal history that should not be forgotten. But this is not to be seen as a blot on the book, taking into account the fact that each case is written effectively and after reading each of the case, the reader is made to ponder upon certain relevant questions which have never crept in our minds before, ranging from why Nani Palkivala did not attack on the deletion of the right to property in the Minerva Mills Case but rather challenged the amendments made by the Indira Gandhi government, or why the media does not give coverage to all issues equally while deliberately forgetting some, or why women are still ostracized and prejudged although they are ones who are abused and victimized.

The book, in many chapters, reflects the comments and the controversies that the judges had to face and the aftermath of the judgment on the society. It provides an outlook as to how each case leads to many a discussion, in the executive branch of the government especially. Many a time the judgments result in a tug of war between the executive and the judicial wings of the government resulting in many cases being 'overturned by the legislature' by way of further amendments to the Constitution.

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Certain prominent cases which have to be borne in our minds always due to the nature of questions dealt by them, are discussed through this book such as Kartar Singh case and Minerva Mills case. However, these cases have often been overshadowed by the landmark judgments of ADM Jabalpur and Kesavanandha Bharati respectively which dealt with similar issues. Many of us are aware of the judgment of each of the ten cases mentioned but not many of us are well-versed or conversant with the social setting of the judgment and much less, the aftermath of these judgments. The author has made a successful and honest effort to firstly, include the perspectives of both sides of the story in each of the cases and secondly, to bring a thorough understanding of the judgements and the repercussions of the judgments, both of which are to be highly commended as most books do not offer such a version. This is of utmost importance to any legal scholar as any case is to be studied not only by going through the judgment alone but also by having a proper outlook of the societal setting and backdrop in which the case had evolved. The book covers a multitude of dimensions in each cases and discusses instances wherein the case could be solved at the very instance in which the issue has crept upon such as the Keshav Singh case.

Through its pages, the book echoes the indispensable shades of the Indian society such as religion and gender. The author has done justice to this while choosing cases dealing with such issues too. The book deals with how one category of law i.e., the uncodified personal law, still remains above the Constitution, and how caste and religion still play a role in the electoral system in India. There is a narrative of how the Tukaram case helped in establishing women's groups and how it stirred up previously isolated women's groups to form collective protests, a previously unparalleled outcome by any former case. Finally, an important outcome of the case was that disclosing any identity of a rape victim without her consent would be deemed to be a criminal offence from then onwards. It discusses the prejudices and the stigma associated with a rape victim or a women challenging an abuse and that the Victorian concept of modesty still rules the letter of law.

One is reminded how the Hon'ble Supreme Court court courageously declared SalwaJudum as unconstitutional while simultaneously carefully looking into the socio-economic conditions of Chattisgarh as the reason for the rift in the region. However, sadly, in this case also, the state found a way of deviating the decision or going against the substantive decision by establishing a Chhattisgarh Auxiliary Armed Police Force although formally complying with the judgment. This again reflects the tussle between the two branches of the government. The author has through the case mentioned how the media often throws light into certain cases while remaining much silent on these issues. After a satisfactory reading of the book, any legal scholar would be brought back to square one, that is, all our quest ends in the proper understanding of constitutionalism and the basic structure doctrine, or better said, each constitutional law scholar is made to realise that he or she is following 'a pilgrim's progress to the shrine of the basic structure of the constitution' as through each of these cases, one is reminded of the rule of law principle. Although in many accounts in this book, the courts do not seem to be the proper guardian of the fundamental rights. But nevertheless, as the author himself states in the preface, there already is a huge volume of work which provides the affirmative and the prospect in this book is to tell a case as formerly untold.

BOOK REVIEW

Robot Rules: Regulating Artificial Intelligence
Jacob Turner, Palgrave Macmillan, 2019

Surya. K.R*

This book deals with the uniqueness of Artificial Intelligence(AI) and its legal and ethical problems. AI is a vintage technology which has been in discussion since the early ages of digital computing. In the present times, artificial intelligence is part of our daily life in a way that we cannot avoid it entirely yet we are not able to comprehend its consequences.

One of the biggest questions in the coming years would be how humanity should live alongside AI. The regulation is likely to influence how technology develops. Unlike any predecessors, the uniqueness of AI emerges from its ability to take decisions independently and unpredictably. Focusing on the three issues of responsibility, rights and ethics, the author analyses what happens when machines are being self-reliant, making choices independent of the human creators.

The author has approached the subject with much versatility. Beginning from the origin of the concept, the author puts forward his own views about the subject in a lucid manner. The approach is such that anyone who reads the book gets a multifaceted idea about the subject. Starting from the origin of the concept to the legal and ethical issues involved, the author also addresses the current trends by different Governments in AI regulation. It observes the issues that occur while attempting to build regulations and rules on this novel technology and puts forward principles to consider when creating the rules. This work is an attempt to highlight the multifaceted issues, bringing them all together in one place so that the new institutions and regulators will know what they are facing when writing the rules for robots.

In the words of the author, 'artificial intelligence is the ability of a non-natural entity to make choices by an evaluative process' and Robots are the physical entity or system which uses AI. This definition not meant for applying at any context, but for the sole purpose of regulation.The readers get acquainted with the unique features of AI before moving into the challenging legal concepts.

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The author is not agreeing with the view that the established legal framework is sufficient to regulate AI and he goes on to explain why AI presents a unique difficulty for legal regulation unlike the existing technologies. The readers get some interesting examples of how creating a separate cyber law was compared with having a separate law for horses in the earlier time. Explained in a well thought out manner, the reader can see how different areas of law relate to different features of AI. The author is explaining the fundamental legal concepts along with the classic examples which make this well timed, thought provoking work even more appealing to the layman. The Monkey selfie case is sited to show the jurisprudential difficulties in protecting the intellectual property of animals or other entities without legal personality. The AI might create subject matter protected by patent or make an innovative design for furniture. The present Intellectual property rules which protect the creations and innovations by human creators are manifestly unsuitable for the creations by AI. If AI can generate content in spoken or written form the law regarding free speech and hate speech need modifications to govern the instance.

The author further goes on to examine the traditional concept of rights and duties and how the same can be placed in the context of AI. The discussion would take us through the need to address the morality of 'Rights of AI'. When we are travelling towards a time where AI and robots become more integrated to our societies and display the same capabilities as other protected creatures, the author puts forth the question why should we continue to deny the rights to robots. The author also quotes the examples of humanoid robots getting citizenship and residential status to discuss the possibility of granting legal personality to AI. Even if separate legal personality for AI is accepted in theory there remains ambiguity as to how it should be structured. The author further suggests a global regulator for AI who would be capable of resolving the related issues. In his opinion having a universal law is more ideal than having separate laws by different nations. While regulating AI, there is a need of rules for the creators and creations. AI systems should be better understood and catalogued when created and modified, if the attempt to design effective norms become successful.

A concluding chapter would have added more glory to the work as this work is otherwise presented in an organised manner and achieves what it sets out to do to a certain extent. The author points out that it is not writing the rules but only provides a blueprint for future institutions and regulations. Some questions might be left unanswered, that could be considered as a space for the reader to think. This work may not be the epitome of all questions regarding legal issues concerning AI but it certainly is a guiding light which would give direction to the journey of understanding the nuances of AI.

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