Vol. VII 2019-20

DELHI LAW REVIEW

STUDENT EDITION

ISSN 0973-00IX

FACULTY OF LAW
UNIVERSITY OF DELHI

DELHI LAW REVIEW
STUDENT EDITION

Volume VII 2019-20

Mode of Citation : Vol. VII SDLR <page number> (2020)

ISSN : 0973-00IX

Published by

Faculty of Law

Chhatra Marg

University of Delhi

Delhi – 110007

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All enquiries regarding the journal should be addressed to:

Editor-in-Chief

Delhi Law Review (Student Edition)

Faculty of Law, Chhatra Marg

University of Delhi, Delhi – 110007

Email ID : student.delhilawreview@gmail.com

Website : http://lawfaculty.du.ac.in

Introductory Note

Hon'ble Mr. Justice S. Ravindra Bhat
Judge, Supreme Court of India

It is my pleasure and honor to have been invited to author an introduction to this Student Edition of the Delhi Law Review. The world order is in the crux of change this year, and the COVID-19 pandemic has upended all spheres of our lives. Its impacts have been especially pervasive for courts, legal practitioners, law makers, and students of the law. The manner in which lawyers practice their art is in the throes of transformation. Now more than ever, legal scholarship has a key role to play in making sense of the changes, providing critical analyses of law and policy, and envisioning a kinder, more equal world.

As a student of the law at Campus Law Centre, Delhi University, my peers and I were lucky to have been taught by some of the foremost legal scholars of the time. This ensured robust and at times, intense debates as part of our learning process. This academic atmosphere at Delhi University has fostered an enormous number of successful legal practitioners as well as judges at various High Courts and the Supreme Court of India today. This only goes to show that legal practice and scholarship/ academia are deeply intertwined, and each must be constantly informed by the other. Critical insights provided through academic scholarship are valuable to law makers, as well as practicing lawyers and judges in interpreting and applying the law.

In my experience as a lawyer and later as a judge, I have found academic writing to have a great impact on the quality of arguments as well as the lucidity of legal reasoning. What the law lacks on account of its rigidity, academic writing can provide, through envisioning and drawing attention to the possibilities that a particular law or a particular judicial interpretation may have failed to take into account.

There is a large corpus of legal scholarship today, far more extensive than it was during my time as a law student. However, research papers and articles in law journals continue to remain structured along similar lines, with a focus on analyses of case law or legislation. There is much to be gained from expanding our horizons, and seeking out for publication in law journals, scholarly work that takes the form of empirical legal analysis, interdisciplinary approaches to the study of law, writing on legal pedagogy, as well as promoting diversity in authors. Co-authoring between law students and students of other disciplines could be beneficial for papers and articles analyzing the impact of a law on the ground, for example. This is especially relevant in areas such as intellectual property laws where scientific opinions are relevant, and in gender laws, where the lived experiences of persons across the spectrum of gender and sexuality are crucial to understand while evaluating the law. I sincerely hope that the future of legal scholarship makes space for

such diversity, and transforms along with the changing times to make academia more inclusive.

This edition covers a wide range of legal scholarship, in areas as diverse as the law on constitutional amendments, free speech, marriage rights, intellectual property, contracts, insolvency and bankruptcy, and international law. I note with pleasure that each of the articles presents a layered analysis of the issues involved, and pushes the frontiers of legal scholarship by provoking thought. Questions of policy, where relevant, have been seamlessly interwoven with sharp legal analysis. It is heartening to see young lawyers and law students producing academic work of such great quality. I am certain that such a commitment to academic rigour and an earnest desire to adhere to constitutional values can only bode well for the future of our democracy.

I commend the editorial board and the authors for putting together an excellent journal despite all odds. I am informed that the COVID-19 pandemic, issues with remote connectivity, access to libraries, as well as the storms in the Bay of Bengal created several roadblocks. This edition is a labour of love, and a symbol of resilience in these times. I wish the authors, the editorial team, and the journal the very best!

Justice S. Ravindra Bhat

New Delhi, August 2020

FROM THE EDITOR'S DESK

It is with great delight that I introduce the 7th Edition of the Delhi Law Review (Student Edition). This journal is the sole student-run law journal of the University of Delhi, and has made some great strides since its recent revival, the last edition being received most positively by the legal community. It was very encouraging for us to have received more than double the number of submissions for the present edition than we did for the last, with a greater diversity in terms of subject-matter and author profiles.

From the time when the call for papers for this edition was sent out till the deadline for submission – incidentally the Ides of March, the import of which is significant only with the benefit of hindsight – we were in what is now known as the 'Pre-COVID World'. Our schedules were prepared, the future was charted out, and COVID-19 suddenly struck. Everyone was taken by surprise, and the systems that society created for itself were violently disrupted. Once the lockdown was announced, everything came to a standstill. However, the Editorial Board owed a responsibility to the authors, and we set-out to make good on the daunting task of preparing a journal in the backdrop of the COVID-19 crisis.

This edition is a testimony to the human spirit that perseveres in the face of adversity. It is to the complete credit of the authors that every deadline was met without any compromise on the quality of submissions. While issues with displacement from centres of study, lack of access to libraries, internet connectivity, and fighting off a general sense of despair affected all, even the storms over Bengal and Odisha impacted some of our authors. While these challenges had the potential of setting back the review process significantly, they did not. For this, I cannot thank each of the authors enough for their efforts and complete commitment to their work.

I am happy to report that Editorial Board also rose up to the occasion, adapting to the situation quickly and delivering on their timely commitment to the authors. The editors were separated geographically since the lockdown was announced in March 2020, and have not met physically even once throughout the preparation of the journal. The selection, induction and training for new members of the Board (11 of the 15-member Board) as well as all the editorial work was carried out completely virtually. While this was first time that such an exercise has been carried out by us, it seems likely that such necessary adaptation will be the *modus operandi* for the foreseeable future.

This journal's spirited revival has been made possible chiefly due to the steadfast support of our faculty advisor, Dr. L. Pushpa Kumar. His guidance throughout the process as well as his encouraging approach of granting us decisional autonomy were instrumental in producing this journal. The contribution of our previous Editor-in-Chief, Mr. Harsh Bedi, has been seminal in this revival.

We have carried forward our rich tradition of presenting a collection of thought-provoking articles across domains of law, the present edition carrying seventeen articles on varied issues pertaining to constitutional, civil, commercial, criminal and international law. An honest endeavour has been made to select critical writings on major societal issues through our double-blind peer review process.

As this journal goes to publication, the world seems to emerge out of lockdowns and quarantines, to start afresh. In a similar vein, we have taken the opportunity to create a fresh new look for the SDLR – from its cover page to formatting styles – with the goal of improving readability and giving our journal a distinctive style in the academic community.

I owe my deepest gratitude to our distinguished and cherished alumnus, Hon'ble Mr. Justice S. Ravindra Bhat, for providing us with an introductory note for this edition of our journal. The Editorial Board is very encouraged by his kind words, and aspires to further his vision of legal scholarship in India. I hope that this edition makes a small but definite contribution towards that goal.

Ribhav Pande
Editor-in-Chief
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LONG ARTICLES

SHORT ARTICLES

CENSORSHIP AND ITS EFFECT ON THE PORTRAYAL OF WOMEN IN CINEMA

Mrudula Dixit[*]

The paper analyses the various aspects of the depiction of women in Media. It uses Laura Mulvey's psycho-analysis of Visual Portrayal of Feminism in Media as the foundation for Indian Cinema and Women. The researcher further studies censorship of women and curtailment of women-centric thoughts in cinema. It analyses the overreach of the film certification board and their constricted idea of women's morality. Reliance for the same is placed on various committee reports as well as a few judicial decisions. The powers of CBFC in accordance with the Film Certification Guidelines is also considered. The analysis of the paper is divided into three parts (i) Excessive powers of CBFC and its impact on the depiction of women, (ii) the lack of legislation to protect women against indecent representation in audio-visual medium and (iii) Misplaced representation of women through an online medium.

I. INTRODUCTION

India, as a nation, has been historically praised for its vibrant culture, literature, sculptors and arts which are a subject of great discussion, debate and thesis even in the modern era. However, post-Independence, India has largely witnessed a depravity of creative freedom due to stringent censorship laws which disproportionately affect women's representation.[1] The term censorship is usually attributed with a negative connotation because it can have a daunting effect on the freedom of speech and expression guaranteed by the Constitution of India by virtue of Article 19(1)(a).[2] Moreover, the depiction of females in mainstream cinema, television, advertisements and books has been archaic, dismal and derogatory. To say the least, the spirit of censorship is misplaced, targeting such works of art and film which dare question the haphazard reality of our time. The portrayal of women in media is chiefly influenced by the censorship laws which are fuelled by fierce protection of conservative ideals and mores; one such being the subordination of women in society and

* The author is a fifth-year B.A. LL.B. (Hons.) student at the Symbiosis Law School, Pune.

[1] Uday Bhatia, "100 years of Film Censorship in India" *Livemint*, July 14, 2018, *available at*: https://www.livemint.com/Leisure/j8SzkGgRoXofpxn57F8nZP/100-years-of-film-censorship-in-India.html (last visited on May 22, 2020).

[2] The Constitution of India, art. 19 cl. (1)(a).

their subjugation in conventional films and serials. This has hampered progressive ideologies shared through theatre or film and encouraged filmmakers and producers to embrace women's passivity and male dominance. Mainstream Bollywood cinema is one of the biggest social tools to influence the mindset of millions of young as well as adult viewers across the country. The portrayal of women in such films thus has a direct causality to the way women are treated in society and it often reinforces the position held by women as second-class citizens in India. Studies have also noted that Bollywood pop-culture has a glaring and apparent relation to sexual harassment and violence against women.[3] Though the courts have taken cognizance of the lacunae existing in the current laws which govern the cinema industry in India, little has been done to fill those voids.

In this paper, the researcher attempts to navigate the reader through multiple layers of Feminism (or the lack thereof) in Media. Part II of the Paper will consider Feminist Media Analysis as a helpful tool to correct the misrepresentation of women in film. The legislation concerning certification for cinema, i.e. the Cinematograph Act, 1952 will be briefly discussed in Part III. The jurisprudence evolved by Courts and Tribunals will be analysed in Part IV. Part V, the crux of the Paper, will extensively analyse the current scenario, namely with respect to (i) The Power of CBFC and its impact on women's autonomy in film, (ii) Lack of Statutes to cover misrepresentation of women in audio-visual medium; and (iii) 'Online' Cinema and misplaced social reform. Part VI will conclude. Overall, this paper seeks to draw a nexus between the censorship as envisaged under the Cinematograph Act, 1952 and its impact on the depiction of women in cinema.

II. FEMINIST MEDIA ANALYSIS

A. Common Themes in Cinema:

One of the common critiques which often find its place in discussions is how the law has failed to take cognizance of the repetitive and not so subtle deprivation of women in media. Films today are 'gendered' and are caught in a patriarchal order which carry the following traits:

i) Women are predominantly portrayed as an object of the 'male gaze', subject to the criticism and pleasure of men.[4]
ii) Violence against women is used as a mean to showcase the chivalry and strength of the male counterparts, thus vastly trivializing the issue.[5]

[3] Ishan Mehandru, "Picture abhi Patriarchy hai; Studying Bollywood's sexism problem" *The Print*, Oct. 13, 2018, *available at*: https://theprint.in/opinion/picture-abhi-patriarchy-hai-studying-bollywoods-sexism-disease/133324/ (last visited on May 22, 2020).

[4] Liesbet Van Zoonen, *Feminist Media Studies* 87 (Sage Publications, United Kingdom, 1994).

[5] Karen Boyle, *Media and Violence: Gendering the Debates* (Sage Publications, London, 2005).

iii) Women are given subordinate and/or stereotypical roles centring around home and family. All adventurous expeditions are reserved for men.[6]

iv) If not the above, women in film are often objectified and illustrated as commodities through 'item songs' or other such provocative scenes.[7]

To better understand the above propositions, it is imperative to analyse Laura Mulvey's article titled 'Visual Pleasure and Narrative Cinema', published in 1975.[8] Laura Mulvey is a British feminist film theorist and she is currently a professor of film and media studies at Birkbeck, University of London. Her article is a psychoanalytic study used to demonstrate the way in which the unconscious of the patriarchal society has structured film form. According to her, women, because of their lack of a penis, signify a threat of castration. The 'male look' in the cinematic universe circles around this fact but never actually acknowledges it. It is argued by Mulvey that men in films use two different methods to tackle the unpleasure embodied by women:[9]

i) To overcome the castration anxiety, women are portrayed as a mysterious and curious object, which the men seek to investigate or demystify. This is counterbalanced by the devaluation, punishment or saving of the guilty object (women).

ii) This fear is completely disavowed and the 'dangerous' entity (women) is converted into a fetish object. The represented figure is turned into a fetish so that is reassuring rather than unsafe in the eyes of men. It builds up the physical beauty of the object, transforming it into something satisfying in itself.[10]

B. Psycho-analysis of Gendered Cinema:

Of the two points mentioned above, the first point is reinforced by sadism – the pleasure derived from punishing or forgiving the object guilty of imposing the fear of castration and the second is backed by an erotic instinct focused on the look alone. Thus, in cinema, in the words of Mulvey: 'The determining male gaze projects its fantasy onto the female figure which is then styled accordingly.'[11] Females are thus the 'bearer of the look' while their male counterparts are the 'maker of the look'.

The narrative structure of media, ruling ideology and physical form make it impossible for the male figure to bear the burden of sexual objectification in film. A mere role reversal in gender would not produce the effect as desired. Mary Ann Doane, a film and media critic has explained this simply by stating that a male striptease or a male gigolo is itself

[6] Julie Wood (ed.), *Gendered Lives: Communication, Gender, and Culture* 231-244 (Wadsworth Publishing, 1994).
[7] Vidya Jain and Rashmi Jain (eds.), *Women, Media and Violence* 89 (Rawat Books, 2016).
[8] Laura Mulvey, "Visual Pleasure and Narrative Cinema" 16 *SCREEN* 6 (1975).
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*

an anomaly or aberration to the general rule and the acknowledgement of the same further strengthens the dominant system of aligning the sexual difference with a subject/object dichotomy.[12] Thus, what counts in the film is what the heroine provokes and not what she signifies.[13]

Women are often the object of lust in media. The classic example of this is the existence of 'Bond' girls. Tall blondes or brunettes with an eye for style and clothing have lined the James Bond cinematography since its inception. This has been recognised by the characters in the movie too. In *Goldeneye (1995)*, Bond's boss was an authoritative woman, 'M' who straight out told him: 'You are a sexist misogynistic dinosaur, a relic from the Cold War.'[14] In later films, the protagonist was also made aware that his behaviour could qualify as sexual harassment.[15] Though female characters in the film are cloaked with the same credentials and intellect as the main hero, fancy job titles don't fool anyone.[16] They nevertheless have been used as objects to whip up desires in Bond movies.

Such depictions not only strengthen the voyeuristic 'male spectatorship' but also instil a misplaced ideal of manliness in the audience. Similarly, the most debated aspect of Indian Television and Movies is the infamous use of 'item songs' used to garner the attention of a predominantly male audience for commercial purposes. It is a chauvinist ploy used by accentuating a women's breasts, legs and hips so that men perceive her as an object for their entertainment and subject to their scrutiny. The body is thus used as a perfect product inviting a direct gaze from the male spectator.[17]

Additionally, violence against women has been used in cinema to establish male dominance and reduce women to powerless victims in need of help. Brian De Palma, a famous film-maker, quoted that women in peril work better in the suspense genre while Alfred Hitchcock, another director of crime drama, went one step further and commented: 'I have always believed in following the advice of the playwright Sardou. He said, "torture the women!", the trouble today is that we don't torture the women enough.'[18]

In India, such films are expurgated or euphemised. The guidelines set by the State and enforced by CBFC condemn scenes which show pointless or avoidable scenes of violence, cruelty and horror, scenes of violence primarily intended to provide entertainment and

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[12] *Supra* note 4 at 91.

[13] *Supra* note 8.

[14] Eon Productions, United Artists, *Golden Eye*, 1995. Also, see Donald Clarke, "James Bond has always been a misogynist dinosaur. Now he has to change" *Irish Times*, Feb. 2, 2018, *available at*: https://www.irishtimes.com/culture/film/james-bond-has-always-been-a-misogynist-dinosaur-now-he-has-to-change-1.3375210 (last visited on May 22, 2020).

[15] David Gauntlett, *Media, Gender and Identity: An Introduction* 53 (Routledge, UK, 2nd edn., 2008).

[16] Matthew Hammet Knot, "Heroines of Cinema: Can you be a Bond Girl and good feminist?" *Indie Wire*, Nov. 1, 2012, *available at*: www.indiewire.com/2012/11/heroines-of-cinema-can-you-be-a-bond-girl-and-a-good-feminist-43757/ (last visited on Dec. 19, 2019).

[17] *Supra* note 5 at 127.

[18] *Id.* at 128.

such scenes may have the effect of desensitising or de-humanizing people.[19] However, in India this problem is not limited to just physical or explicit violence, but rather, it is euphemised through 'romantic comedies' which reinforce the problematic notion of 'chasing a girl'.[20] Swati Tandon, a film producer, recently quoted that Bollywood has 'confused romance with eve-teasing' and that is extremely dangerous because of the impact it may have on young minds.[21] For instance, in the popular Hindi film *Kuch Kuch Hota Hai*, a typical college-based eve-teasing is used as a means to increase the sexual appeal of the heroine Tina.

A study conducted in 2002 noted that Bollywood movies in the 1990s depicted sexual harassment as 'fun, enjoyable and a normal expression of romantic love.'[22] In a study conducted of 30 Bollywood Films, among the total number of films displaying sexual relations, 74% translated into sexual harassment.[23] A United Nations-sponsored study piloted by a leading California-based journalism school has shown that Indian films topped the chart in a sexualized portrayal of women onscreen.[24] Interestingly, the issue of romanticising sexual harassment is so deep-rooted that a court in Tasmania acquitted a man accused of stalking based on his defence that Bollywood films taught him that relentlessly pursuing women is the only way to woo them![25]

C. The Bechdel Test

To explain it simply, the Bechdel-Wallace Test is a measure of representation of women in fiction. It states that a work of fiction, including films, should have two or more female characters, preferably named who should talk to each other about something other than a man.[26] Even though this seems like an easy enough task, it often does not withstand the test due to the inherent lack of women protagonists in the films.[27]

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[19] Films Certification Guidelines, 1991, guideline 2 (iv).

[20] Shivam Gupta, "Bollywood's relentless tryst with objectification and rape culture" *The Breakthrough Voice*, Dec. 5, 2018, *available at*: https://inbreakthrough.org/bollywood-relentless-rape-culture/ (last visited on May 21, 2020).

[21] Shafik Mandhavi, Vibhav Gautam, "Does Bollywood have a woman problem" *Al Jazeera*, Mar. 26, 2018, *available at*: https://www.aljazeera.com/indepth/features/bollywood-woman-problem-180325060304877.html (last visited on May 21, 2020).

[22] Srividya Ramasubramanian and Mary Beth Oliver, "Portrayals of Sexual Violence in Popular Hindi Films" 48 *Sex Roles* 327.

[23] *Supra* note 3.

[24] FMF Resources, "Effects of Feminism in Indian Cinema" *Filmmaker Fans*, May 31, 2018, *available at*: http://filmmakersfans.com/effects-of-feminism-in-indian-cinema/ (last visited on Jan. 4, 2020).

[25] Jonathan Pearlman, "Australian Man accused of stalking escapes conviction by blaming Bollywood" *The Telegraph*, Jan. 29, 2015, *available at*: https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11377511/Australian-man-accused-of-stalking-escapes-conviction-after-blaming-Bollywood.html (last visited on May 23, 2020).

[26] Andrew T. Jacobs, Melissa J. Gillis, *Introduction to Women's and Gender Studies* 42 (Oxford University Press, 2nd edn., 2019).

[27] Anna Waletzko, "Why the Bechdel Test sometimes fails Feminism" *HuffPost*, Dec. 6, 2017, *available at*: https://www.huffpost.com/entry/why-the-bechdel-test-fails-feminism_b_7139510 (last visited on May 21, 2020).

It still remains a common trope in Bollywood to centre the women character(s) around a broader storyline of men's aspirations. Apart from stereotypically male-oriented Bollywood mainstream cinema, even the quotably 'progressive' female films managed to fail the Bechdel Test in India. Take for instance, *Veere Di Wedding*, a film produced, co-directed by women and starring 4 women as protagonists. Even though the women characters were named, throughout the duration of the film, they failed to talk about anything but relationships and men, thus not fulfilling the Bechdel criteria. Next, even in the case of *Pad Man*, a movie qualified by a 'male saviour' for menstruation, the Bechdel Test was not satisfied. The movie failed to portray any sort of interaction between two women, even on the topic of menstruation![28]

Perhaps, we can compare the thresholds of the Bechdel Test with an interesting study conducted in 2017. This study involved more than 4000 Bollywood films, trailers, movie plots and posters from 1970 and highlighted the clear disparity in gender representation.[29] It stated that men are usually awarded stellar professions, but women are limited as 'daughter of', 'wife of' some dominant male character or given the role of a teacher or secretary.[30] Men have more lines (almost double) compared to women and they are described with more favourable adjectives.[31]

To contrast this, films which *do pass* the Bechdel test like 2019 films *Misson Mangal*, *Saand Ki Aankh* or *Manikarnika*[32] feature women who don't limit their conversations to men but rather, talk about their careers, goals, education, their day to day problems or even food! Even though the Bechdel Test threshold is low, Bollywood films have time and again failed at even the simplest form of representation.

It cannot be denied that the Bechdel Test suffers from certain infirmities. Sometimes, a woman's conversation about something other than a man serves the narrative arc of men and sometimes a woman's conversation about men can be feminist. For instance, a film which involves two women talking about being sexually harassed by men at work will *fail* the Bechdel Test but a film where two characters briefly talk about clothes or shoes but the entire storyline revolves around a man, will *pass* the Bechdel test.[33] In such cases, the Bechdel test can be complemented with other such tests. For instance, the Sphinx test

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[28] Vitamin Stree, "*The Bollywood Bechdel Test - The 2018 Edition" YouTube*, Feb. 6, 2019, *available at:* https://www.youtube.com/watch?v=wgnaKYID6bE (last visited Dec. 23, 2019).

[29] Nishtha Madaan, Sameep Mehta, *et.al.*, "Analysing Gender Stereotyping in Bollywood Movies" *Association for the Advancement of Artificial Intelligence,* 2018, *available at*: https://arxiv.org/pdf/1710.04117.pdf (last visited on May 23, 2020).

[30] Sahil Rizwan, "10 Eye-Opening Revelations About Sexism In Bollywood From A Study Of Over 4,000 Films" *Buzzfeed*, Oct. 25, 2017, *available at*: https://www.buzzfeed.com/sahilrizwan/trope-tripe?utm_term=.lnrYe6ZKJ4#.un5EvLl8KO (last visited on May 22, 2020).

[31] *Ibid.*

[32] Vitamin Stree, *"The Bollywood Bechdel Test – The 2019 Edition" YouTube,* Jan. 28, 2020, *available at*: https://www.youtube.com/watch?v=U34g2-sARIU (last visited on May 22, 2020).

[33] Samantha Ellis, "Why the Bechdel test does not always work" *The Guardian*, Aug. 20, 2016, *available at*: https://www.theguardian.com/lifeandstyle/womens-blog/2016/aug/20/why-the-bechdel-test-doesnt-always-work (last visited on May 22, 2020).

asks playwrights and directors to consider whether the woman is the 'centre stage'. Whether the woman is active rather than merely reactive to a male character? And does she have her own character arc which is compelling and complex?[34] The Mako Mori test is another good criterion. This test developed as a criticism to the Bechdel test and came up with an additional feature.[35] Mako Mori test states that the female character should have an independent plot arc and the development of her character should not depend on that of a man in the film. She should be able to make autonomous decisions about her goals, whatever they may be.[36] For instance, films like *Raazi* (featuring Alia Bhatt) may fail the Bechdel Test but they do have a strong female lead pursuing her own independent and 'unconventional' role. The inclusion and appraisal of such criteria are of great relevance for Indian cinema.[37]

D. The Madonna-Whore Complex

The Madonna-Whore complex, also known as the virgin-whore complex was proposed by the famed psychologist, Sigmund Freud.[38] Simply put, this complex is set to embody the dichotomy of women's identity in the eyes of men. When a woman is 'pure', 'virtuous' and rather subservient to the man, she is considered worthy of care but does not arouse any sexual desire in the man. On the other hand, a woman who enjoys her own sexuality and maybe even uses it, is considered fit for sexual liberation by the man but not for love or care.[39] Hence, according to Freud, a man cannot reconcile the two aspects of women into one, that is to say, women who are virtuous can never embody sexual affinity.[40] Likewise, a woman who understands her sexual desires can never be a care-giver or fit for a lasting relationship.[41]

This dichotomy has translated into film and cinema.[42] Women are either 'virgins' or 'whores', but not both at once. Any form of literature which says otherwise, is a deviation from the normal set by a patriarchal society. For instance, the depiction of item songs in

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[34] *Ibid.*

[35] Krystal Paraboo, "The Bechdel Test and the Mako Mori test" *Women in Film and Television Vancouver*, Jan. 28, 2014, *available at*: https://wiftv.ca/2014/01/28/the-bechdel-mako-mori-test/ (last visited on May 21, 2020).

[36] *Ibid.*

[37] "Bollywood better watch out – Hindi Cinema and the Bechdel Test" *The Logical Indian*, May 11, 2019, *available at*: https://thelogicalindian.com/awareness/bollywood-hindi-cinema-bechdel-test/ (last visited on Dec. 22, 2019).

[38] Helen Singer Kaplan, "Intimacy disorders and sexual panic states" 14 *Journal of Sex and Marital Therapy* 1 (1988).

[39] Uwe Hartmann, "Sigmund Freud and His Impact on Our Understanding of Male Sexual Dysfunction" 6 *The Journal of Sexual Medicine* 8, 2332 (2009).

[40] Richard Tuch, "Murder on the Mind: Tyrannical Power and Other Points along the Perverse Spectrum" 91 *The International Journal of Psychoanalysis* 141 (2010).

[41] Whitney Greer, *The Madonna*, *The Whore*, *The Myth*: *Deconstructing the Madonna/Whore Dichotomy in The Scarlet Letter*, *The Awakening*, *and the Virgin Suicides* (2016) (Unpublished thesis, University of Mississippi).

[42] *Ibid.*

film is an ode to the 'whore' identity of a woman while the girlfriend, wife or potential love interest embodies the Madonna identity.[43]

III. THE CINEMATOGRAPH ACT, 1952

It is essential to look at the only legislation in India which has the unfettered power to review films and cinematic literature in our country. There is no other special legislation which deals with audio-visual works. The Central Board of Film Certification (**'CBFC'**) is a body formed under the Cinematograph Act of 1952 (**'Act'**). The State through this agency assumes the powers of a '*parens patriae'* and acts as the guardian and promoter of general welfare.[44] In its past sixty years of existence, CBFC has refused certification or censored cinema on grounds varying from excessive violence, crudity, indecency and morality. Under the Act, certain guidelines are issued[45] which prevent the release of a film offending human sensibilities by vulgarity, depravity and obscenity,[46] by degrading or denigrating women in any manner[47] or by broadcasting scenes of sexual violence not germane to the theme of the film.[48] The object of the Act reads as: 'An Act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs.'[49] Part II of the Act lists down an exhaustive procedure for 'Certification of Films for Public Exhibition'.

Interestingly, in 1968, the G.D. Khosla Enquiry Committee on film censorship was appointed by the Government for reviewing the current statutes and their relevance.[50] It recommended the formation of an independent and autonomous Board of film censors who would act on the censorship code that it drew up for itself rather than follow guidelines given by the Government.[51] The Central Board of Film Certification has the monopoly to decide upon the content of films but the Act which confers the power on CBFC suffers from ambiguity. As the Khosla Report states, 'The Act is clumsy and ill-structured' and must adopt a wider ambit when it comes to showcasing women in regressive roles.[52] However, the suggestions tendered by the committee were never

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[43] Shoaib Daniyal, "From Tawaif to Item Girl" *Motherland*, July, 2014, *available at*: http://www.motherlandmagazine.com/item/from-tawaif-to-item-girl/ (last visited on 22nd May, 2020).

[44] The Constitution of India, art. 38.

[45] The Cinematograph Act, 1952 (Act 37 of 1952), s. 5 (B)(2).

[46] Guidelines for Certification of Films for Public Exhibition, 1991, guideline 2 (vii).

[47] *Id.,* guideline 2 (ix).

[48] *Id.,* guideline 2 (x).

[49] *Supra* note 45, Statement of objects and reasons.

[50] "Khosla Committee Report" *Media Classification*, *available at*: https://www.mediaclassification.org/timeline-event/khosla-committee-report-film-india/ (last visited on May 22, 2020).

[51] Madhavi Goradia Divan, *Facets of Media Law* 278 (Eastern Book Company, Delhi, 2nd edn., 2013).

[52] *Ibid.*

executed.[53] Moreover, the main objectives of CBFC include the duty to safeguard 'sensitivity of standards and value of society.'[54] This in itself is difficult to reconcile with another responsibility of the Board, (already noted above), particularly, ensuring that scenes 'denigrating or degrading women' are not shown and that human susceptibilities are not offended by 'obscenity and vulgarity'. Value of society, in a patriarchal construct, is judged according to the mindset of men. Now, harmonizing this 'value' with the concept of obscenity and denigration of women is often prejudiced by the male gaze. This leads to an unbreakable cycle of events – value depends on the suppression of vulgarity but vulgarity depends upon the portrayal of women in a degrading manner – this degrading manner is then judged according to a primarily male construct.[55]

IV. JURISPRUDENCE

The subordination of women in films and television is evident and apparent. In India, television soap operas misrepresent or at times, exaggerate the role of females. A prominent image of Indian womanhood which has dominated the Indian ideology and created an indelible impact on the mindset of many is that of 'glorious motherhood'. Feminine perfection is defined by the very high standards of idealistic motherhood. Most themes revolve around a strong, unmistakable and explicit sense of right and wrong and they are mostly painted black and white. Women tending to the family and household, bowing to the needs of their husbands and in-laws are shown in the light of approval. On the other hand, women who pursue active careers and break out of the traditional family roles are depicted as evil and manipulative.[56] With respect to this, the researcher has considered the following case studies:

A. The Controversy of Lipstick under my Burkha

Censorship intricately affects the working of this 'male gaze' and this imperfect method of film regulation has failed to take into cognizance the reasons and social aspects of the problem. For example, in April 2017, CBFC refused to certify the Hindi drama, *Lipstick under my Burkha* on various grounds based on the guidelines issued as a corollary to the main statute.[57] The film revolves around the lives of four women all engaged in 'unladylike' behaviour. What is unique about the film is that the Female characters are the central activity while the men carry out supporting roles. Alankrita Srivastava, the director, has

[53] *Id.* at 279.

[54] Guidelines for Certification of Films for Public Exhibition, 1991.

[55] STA, "The Cinematograph Act of India" *Mondaq*, July 22, 2019, *available at*: http://www.mondaq.com/india/x/827892/broadcasting+film+television+radio/The+Cinematograph+Act+Of+India (last visited on Jan. 21, 2020).

[56] *Supra* note 7 at 92-93.

[57] Michael Safi, "Lipstick under my Burkha's release hailed as a victory for Indian women" *The Guardian,* July 23, 2017, *available at*: www.theguardian.com/world/2017/jul/23/lipstick-uner-my-burkha-release-hailed-as-victory-for-indian-women (last visited on Jan. 2, 2020).

tried to emphasize on the 'female gaze' by subjecting men in the film to women's active voyeurism. By attempting to make women the 'maker of the look', *Lipstick under my Burkha* has transcended the male chauvinist boundaries of cinema. CBFC however, failed to recognise its potential and dismissed it on possible 'morality' grounds. It reasoned that the story was 'lady lady-oriented, their fantasy above life' and also contained continuous sexual scenes, abusive language.[58] Subsequently, in accordance to the procedure laid down under the Cinematograph Act, 1952, the decision of the Executive Committee of CBFC was challenged before the Film Certification Appellate Board (FCAT) and the movie cleared with an 'A' (Adult) Certificate.[59]

Lipstick under my Burkha switched the 'male gaze' to female. It attributed 'masculine' themes to female characters without any constraints. It did not shy away from showing a 'phone affair' of an older woman with a younger man or from depicting a girl from an orthodox Islamic family engage in 'whimsical' acts often reserved solely for men. Moreover, it recognized the sexual and occupational desires of females thereby shattering the traditional norms set by society and executed in mainstream media. When evaluated in the light of the Madonna-Whore complex, this film merged the two seemingly 'contrast' identities of women into a realistic character. Probably, this is what chagrined CBFC when the film came before it for approval. They could not fathom how a grandmother and family woman could engage so freely in sexual relations, something which many think is only reserved for the 'whore' persona.

B. Is Pati Actually 'Parmeshwar'?

Motion Pictures are far more impactful than any other form of artistic expression. This brings cinema under the strict scrutiny of the state. The censorship or certification of the film based on the depiction of women in the film is a very sensitive topic and has invited protests, appeals to FCAT and writ petitions to the High Courts. In 1988, *Pati Parmeshwar*, a movie directed by Madan Joshi and produced by R.K Nayyar was denied certification by CBFC.[60] The movie is centred around the life of a wife who was ready to sacrifice her own desires & wants for the whims & wishes of her husband. By the powers granted to the Board under Section 5B (2) of the Cinematograph Act, 1952, certain guidelines were issued by the Central Government.[61] Guideline 2(iv-a) prohibited the exhibition of films which contained visuals or words depicting women in 'ignoble servility

[58] *Sudhirbhan Mishra* v. *Central Board of Film Certification*, Mumbai (2017) F. No. 2/4/2017-FCAT, para 3.

[59] *Ibid.*

[60] Salil Tripathi, "Bombay HC ruling on 'Pati Parmeshwar' sparks a debate on censorship" *India Today*, Aug. 15, 1988, *available at*: www.indiatoday.in/magazine/society-the-arts/story/19880815-bombay-hc-ruling-on-screening-of-pati-parmeshwar-sparks-a-debate-on-censorship-797600-1988-08-15 (last visited on Jan. 16, 2020).

[61] Guidelines for Certification of Films for Public Exhibition, 1978.

to man' or glorified such servility as a praiseworthy quality in women.[62] It caused a huge ripple in the industry after the producer stated that marriage is an institution in which the wife must make sacrifices and further said that the 'Indian Culture' was on trial.

This denial of certification was challenged by way of a writ petition in the Bombay High Court.[63] The Single Judge cleared the film with a UA certificate as the ban was 'unsustainable in the eyes of law'.[64] On appeal, it was subsequently referred to a division bench but there was a difference of opinion with respect to the issues presented.[65] Justice Lentin adjudged that guideline 2 (iv-a) is valid and not vague.[66] The manner in which the wife's servility is depicted and glorified in the film is not in accordance with the standard of decency, as commonly understood and recognised. Put positively, it is indecent to the point of repugnancy. The wife's servility is glorified when she takes her husband to a 'mistress'.[67] However, in a dissenting judgment, Justice Agarwal found that guideline 2 (iv-a) transgresses the limits of powers conferred by the Central Government and thus is *ultra vires* the Act. He held it to be invalid and vague and capable of being misused. As for the movie, he ruled that the wife did not depict ignoble servility but was rather committed to the marriage, is shown to be courageous, brave and makes sacrifices for her husband to save him.[68]

The case was finally referred to a third judge who reviewed the contentions by both the parties and decided that though the impugned guideline is *intra vires* and valid.[69] The character of the wife as depicted in the film *'Pati Parmeshwar'* is one of faith, dedication and endurance and not of servility. She is not servile, but on the contrary, she is 'committed to her marriage and goes all out to save her marriage.'[70] There is no element of compulsion, fear or force by someone else to dub the conduct as one of servility. He also remarked that the role of the *'patni'* was consistent with the traditions of the Hindu society to which she belonged.[71] *'Pati Parmeshwar'* can be literally translated into English to mean that a 'husband is a god' and must customarily, be treated as such.[72]

This case highlights the impermeable misogynistic ideals of our nation which have seeped in to allow the accumulation of regressive thought. Such films, through time, have been reinforced in Indian cinema as they appeal to a larger audience and further a

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[62] *Id.,* Guideline 2(iv-a).
[63] *Union of India & Ors* v. *Film Federation of India & Anr.*, (1989) 3 BomCR 77.
[64] *Ibid.*
[65] *Ibid.*
[66] *Id.* at para 6.
[67] *Ibid.*
[68] *Id.* at para 7.
[69] *Ibid.*
[70] *Id. at* paras 7 and 44.
[71] *Id.* at para. 44 (Shah J).
[72] Bhavna Tripathi, "Pati Parmeshwar Hai?" *Speaking Tree*, Feb. 22, 2012, *available at*: www.speakingtree.in/blog/pati-parmeshwar-hai (last visited on Jan. 3, 2020).

continued notion of women's submission. Indecency should not be confined to mere 'sexual obscenity' and what should be considered is whether the film is patently offensive because it is opposed to contemporary set standards of propriety.[73] This film is also a good representation of the Madonna-Whore complex. The husband is 'attracted' sexually to a prostitute but relies on his wife for emotional support and well-being. It strengthens the dichotomy that a man dislikes a woman who is sexually autonomous but still attracted physically to her. On the other hand, a conventional submissive woman to heeds the wishes of the man is nothing but a caretaker and too 'pure' for sexual attraction. Moreover, this film is not the only one in this problematic genre. Films like *Pati, Patni aur Woh*, *Biwi ho toh aisi* represent the same skewed ideology; women are caretakers of men, designed to right their wrongs and guide them onto the right path. However, once a woman assumes this role, she loses her sexuality and instead the man is indeed attracted to only those women who embody all vices. Such films are disappointing not because they fail the Bechdel test, but also because they showcase the ground reality of numerous Indian households of today.

C. Bandit Queen Case

In *Bobby Art International* v. *Om Pal Singh Hoon (Bandit Queen Case),*[74] a petition was filed which objected the release of the film, *Bandit Queen*. It was argued that the film was 'abhorrent and unconscionable and a slur on the womanhood of India' as it depicted the female protagonist using curse words. A frontal nudity scene of the lead actress in a scene was also challenged as 'obscene'. The Supreme Court, however, refused the petitioner's contention and held that the frontal nudity scene was not indecent within Article 19(2) and Section 5-B of the Cinematograph Act as the object of the scene was not to arouse prurient feelings but revulsion for the offenders.[75] *Bandit Queen* tells the story of Phoolan Devi who was stripped naked and robbed off her every shred of dignity and the nudity scene merely reinforces the sympathy for the victim and disgust for the perpetrators.[76]

This film is a good example of women in an unconventional role of a criminal. It depicts leadership and steadfastness by a woman in cinema, something which was lacking before. Though crime is not condoned, this film is a deviation from reserving 'bad' actions for men. Moreover, looking at it from the perspective of the Bechdel, Sphinx and Mako Mori test, *Bandit Queen* supported the character arc of a woman pursuing her own goals, however questionable. As Deone and Mulvey have pointed out in their respective works, women's identity has been continually stolen and used to achieve the ends of men in

[73] *Supra* note 63.
[74] (1996) 4 SCC 1.
[75] *Ibid.*
[76] *Id.* at paras. 27-28.

media. It is a challenge to break free from the traditional film form.[77] *Bandit Queen* attempts to do just that, and, succeeds.

V. Analysis

A. Women's representation in cinema through CBFC's lens.

Before studying the actual extent of powers which are vested with CBFC, it is imperative to note that the same will be approached through a feminist perspective, as is the spirit of this paper. The Board of Certification, needless to say, has been under fire for rampant censorship on a skewed sense of 'morality'. One example: CBFC denied (or rather, indefinitely delayed) the certification for '*Love, Simon*', a film about a homosexual relationship of a teenage boy and his own growing up struggles.[78] The Board claimed that the Indian audience does not have an interest in films about homosexuality.[79] However, the highly contentious film, *Kabir Singh*, promptly received an 'A' certification from the Board.[80] *Kabir Singh*, goes a step further from the romanticised eve-teasing in Bollywood Cinema. It furthers the idea that violence in a romantic relationship is a form of affection.[81] To make matters worse, *Arjun Reddy*, the original film based on which *Kabir Singh* was made, encompassed several problematic statements about how an 'ideal' Indian woman should act. CBFC member, Vaani Tripathi, remarked in her personal capacity that *Kabir Singh* was misogynistic and violent.[82] However, despite her personal views, the film passed through certification with cuts on cuss words and drug use scenes.

It is interesting to note that LGTBQ+ cinema is often attributed to positive deviation from toxic traits of a heteronormative society. Homosexual tropes often transcend beyond portraying women as 'a threat' or a 'fetish object' (as remarked by Mulvey). They have a positive, inclusive and empowering effect on society and encourage individuals to look past the 'strong, chauvinistic male', 'helpless, subservient female' cliché. Bollywood cinema, has again, failed on this front. LGBTQIA+ individuals, especially men, are often stereotyped as feminine and over-dramatic. They are fashioned in a manner which makes

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[77] *Supra* note 8.

[78] Tejaswi Subramainan, "Love, Simon' and the audience problem" *Qrius*, June 18, 2019, *available at*: https://qrius.com/love-simon-and-the-audience-problem/ (last visited on Jan. 3, 2020).

[79] *Ibid.*

[80] HT Correspondent, "Shahid Kapoor's Kabir Singh gets an A certificate, CBFC suggests change in a drug snorting scene" *Hindustan Times*, June 19, 2019, *available at*: https://www.hindustantimes.com/bollywood/shahid-kapoor-s-kabir-singh-gets-an-a-certificate-cbfc-suggests-change-in-a-drug-snorting-scene/story-QNz1enUuyl9ocZPxUfvW8L.html (last visited on Jan. 4, 2020).

[81] Sindhuri Nandhakumar, "What is wrong with Kabir Singh" *The Hindu*, July 9, 2019, *available at*: https://www.thehindu.com/thread/arts-culture-society/whats-wrong-with-kabir-singh/article28330643.ece (last visited on May 23, 2020).

[82] FP Staff, "Kabir Singh: CBFC member Vani Tripathi Tikoo criticises Shahid Kapoor's film, calls it 'terribly misogynistic'" *Firstpost*, June 26, 2019, *available at*: https://www.firstpost.com/entertainment/kabir-singh-cbfc-member-vani-tripathi-tikoo-criticises-shahid-kapoors-film-calls-it-terribly-misogynstic-6882301.html (last visited on May 24, 2020).

them unappealing to the audience. Men view this as a deviation or even a slur on their ideals of masculinity which ultimately leads to ridicule and lack of sensitivity in real situations.

Though the Supreme Court has upheld pre-censorship of cinema,[83] it has been hesitant to granting the exclusive right to do so to CBFC. In *Children's Film Society* v. *CBFC,*[84] when the defendant failed to grant a 'U' Certificate to a children's film, *Chidiakhana* and suggested several changes, the Bombay High Court was quick to assert that 'the Board has no authority to censor what one wants to watch and see.'[85] Another petition filed by the director Amol Palekar to the Supreme Court questions the powers of CBFC as well as Ministry of Information and Broadcasting to pre-censor content,[86] however, the same has not been decided as of now.

The reason for preventing CBFC from censoring content and preventing releases remains simple. The Board, with 25 individuals (mostly male) should have no authority to stifle new ideas and expurgate content from cinema. With its ancient interpretation of 'decency and morality' which has been largely influenced by a patriarchal society, the Board cannot be said to reflect the spirit of the nation nor does it safeguard creativity and innovation. And to top it off, women receive the disappointing end. Films like *Fire*, *Gulabi Aaina* etc. which actually touch upon subjects of marginalised communities, like transsexuals and LGBTQ+ have been 'banned' in India.

Consider the Madonna-Whore complex discussed above. The body which is armed with the power to censor films itself suffers from bias due to their own two pronged and contrast views on the 'correct' identity of a woman. CBFC considers itself the protector of women's morality by fashioning every woman into a Madonna. However, when it comes to representation of 'whores' in common cinema, CBFC is reluctant, as such women do not, according to them, conform to the notion of a pure woman, but rather one with innumerable vices. In *Felix M.A.* v. *Gangadharan P.V.,*[87] the Kerala High Court had observed that 'obscenity lies in the eyes of the beholder'. Similarly, it has been asserted by the Supreme Court that popular morality must be distinguished from constitutional morality.[88] Perhaps, the Board should consider the jurisprudence surrounding morality before it exercises its disputed right to censor.

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[83] *K.A Abbas* v. *Union of India*, AIR 1971 SC 481.

[84] W.P (Civil) No. 6965 of 2019.

[85] PTI, "Bombay HC blasts CBFC for not issuing universal certificate to kids film" *India Today*, July 6, 2019, *available at*: https://www.indiatoday.in/movies/bollywood/story/bombay-hc-blasts-cbfc-for-not-issuing-universal-certificate-to-kids-film-1563301-2019-07-06 (last visited on Jan. 4, 2020).

[86] *Amol Palekar* v. *Union of India*, W.P (Civil) No. 187 of 2017.

[87] *Felix M.A.* v. *Gangadharan P.V.*, (2018) (3) KLT 404.

[88] *Naz Foundation* v. *Govt. of NCT of Delhi*, 160 (2009) DLT 277.

In 2018, a private member Bill was introduced in the Lok Sabha which aimed at curtailing the power of CBFC to censor films.[89] Though the Bill lapsed, it was an important rendition of the suggestions meted out by the Shyam Benegal Committee Report.[90] According to Shashi Tharoor, the Bill sought to remove the pre-censorship powers of CBFC, restrict the ability of the Government to censor films, respect artistic freedom and lastly, retract the power of the Government to overrule the decisions of CBFC.[91] So how do the powers of CBFC affect the holistic representation of women in media? Firstly, many critics of the Board have stated that disallowing human representations of affection actually encourages the 'derogatory' representation of women in Film. Vijay Anand, the Chairman of CBFC in 2002 had reiterated the above during his short 10-month position. He stated: 'Why do you think we have so much vulgarity, songs, dances, pelvic thrusts, bathtub fantasies and dream sequences? Because you won't allow a simple kiss.'[92] Secondly, if not for CBFC, the representation of women in film will no longer be boxed by the opinions of the Board. Though it necessarily does not mean the dissemination of quality content which respects women's agency, it is a step forward which, at the least ensures that such content will be allowed and not rejected at the threshold itself. Thirdly, as an extension of the first two points, limiting the Board's powers will serve as an impetus to Independent (indie) producers, directors and actors to create more quality content on social issues, including women welfare.

B. Lack of Legislations for misrepresentation of women in audio-visual form.

The Indecent Representation of Women (Prohibition) Act, 1986[93] is one of the few statutes in our country which address the issue of obscenity specially directed towards women. However, the parent Act is wound tightly and is limited only to print media like fliers, posters and magazines. To widen the breadth of this Act, Indecent Representation of Women (Prohibition) Amendment Bill, 2012 was introduced in the Rajya Sabha. It seeks to broaden the scope of the law to cover the audio-visual media and content in electronic form, prescribing stringent penalties which would act as a deterrent to violation

[89] The Cinematograph (Amendment) Bill, 2018.

[90] "Shyam Benegal Committee submits its report on Cinematograph Act/Rules to Shri Jaitley" *Press Information Bureau*, Apr. 26, 2016, *available at*: https://pib.gov.in/newsite/PrintRelease.aspx?relid=142288 (last visited on Jan. 5, 2020).

[91] FP Staff, "Shashi Tharoor introduces Cinematograph (Amendment) Bill seeking to remove outdated provisions" *Firstpost*, Aug. 7, 2018, *available at*: https://www.firstpost.com/entertainment/shashi-tharoor-introduces-cinematograph-amendment-bill-seeking-to-remove-outdated-provisions-4907161.html (last visited on Jan. 5, 2020).

[92] Someswar Bhowmik, "From Coercion to Power Relations: Film Censorship in Post-Colonial India" 38 (30) *Economic and Political Weekly* 3148 (2003).

[93] The Indecent Representation of Women (Prohibition) Act, 1986.

of the law.[94] The Standing Committee agreed that many contemporary films depict women in an indecent way and TV serials portray women in a regressive manner. But the Bill should not encroach upon the powers exclusively vested in the CBFC and thus films cannot be brought under the Act. However, the Committee recommended that the Ministry may consult with the Central Board for Film Certification and the Ministry of Information and Broadcasting to bring the provisions under the Cinematograph Act in consonance with this Bill. It suggested that the Board needs to review its guidelines and make them more objective and realistic.[95]

Again, reiterating what was mentioned above, an 'objective' and 'realistic' set of guidelines is difficult, if not impossible, to achieve. The ideology surrounding cinema is caught in a circle of patriarchy where the framers of the guidelines and its enforcers have a conservative outlook. As can be seen from the *Pati Parmeshwar* case[96] mentioned above, the judiciary is also hesitant to break free from the traditional notions of marriage or vouch for women's autonomy. Hence, it becomes clear that except for the provisions of the Information Technology Act,[97] there is no specific legislation which comes to aid for misrepresentation of women.

C. Online cinema and social reform.

The next step of the Analysis studies the contemporary aspects of women in Cinema, namely through the representation of Women in 'online' cinema. Online content broadcasters like Netflix India, Prime Video and Hotstar hold a unique position in the Indian cinema and series scenario. They offer a wide variety of creative, innovative content ranging from limited series, feature films and short films. As online content providers give access to non-linear TV, they are excluded from the scrutiny of CBFC. The Indian populace is thus exposed to a range of feminist media, from *Carol* (which features a lesbian relationship in the 1950s New York), *Queer Eye* (a reality TV show hosted by five gay men) to animated feature films with strong female leads like *Mulan* and *Moana*.

Moreover, all these platforms release 'originals' which often support unconventional cinema. A common example is Netflix's *Lust Stories*, featuring Radhika Apte, which shifted the clichéd trope of 'polygamy' and 'infidelity' through the lesser-known perspective of a woman. Amazon Prime Video also released its series *Four More Shots Please*, through which the audience witnessed the lives of 'modern' women dealing with 'traditional' problems. However, a major issue identified with respect to some or most of this online content,

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[94] Department-Related Parliamentary Standing Committee on Human Resource Development, "The Indecent Representation of Women (Prohibition) Amendment Bill, 2012" 258 (Sep. 24, 2013).

[95] *Id.,* cl. 4.4.

[96] *Supra* note 62.

[97] Sections 67, 67A and 67B of the Information Technology Act, 2000 prescribe punishment for showing obscene material, transmitting or publishing a sexually explicit act and showing children performing a sexually explicit act respectively.

especially those curated for an Indian audience, is the *lack of intersectional feminism*. *Lust Stories*, *Four More Shots Please* as well as the YouTube series, *Trip*, propounds a narrow, if not a privileged view of feminism. Though it passes substantially all checkpoints of a 'Feminist' Media, it limits itself to problems of economically well-off, educated and urban women. What it does, in essence, is limit the impact of feminism on other marginalised groups like Dalit and Tribal women, queer and Trans-genders and women with disabilities.

The depiction of women in cinema, as a 'revolt' against the traditional approach, is thus restricted to women engaging in vices which only men previously enjoyed. Because of this, for the contemporary Indian online media, a 'feminist film' means portraying women smoking, drinking or delving in adultery. Though these acts are not disputed on grounds of gender, they do not address the issue of patriarchy in cinema. Thus, unfortunately, there still remains a dearth of film literature which tackles the concerns of marginalised women.

VI. Conclusion

Communication through the visual medium has always been regarded as more impactful and powerful than any other form. This is because of the instant appeal of films, their versatility, realism (often surrealism) and its coordination of visual and aural senses. They can stir up emotions more deeply than any other creation of art.[98] Mulvey uses the same theory to propound her notion of a 'patriarchal cinema'. She says: 'The mass of mainstream cinema portrays a hermetically sealed world which unwinds magically, indifferent to the presence of the audience, producing from them a sense of separation and playing on their voyeuristic fantasy. Additionally, the extreme contrast between the darkness in the auditorium and the brilliance of shifting patterns of light and shade on the screen helps to promote the illusion of prurient separation.' This unchallenged mainstream film coded the erotic into the language of the dominant patriarchal order.[99] This, coupled with consistent and unswerving portrayal of woman as the subordinate, has helped wield a hard-set notion of gender roles in the society. According to Mary Ann Doane, cinematic images of women have been so consistently oppressive and repressive that the very idea of feminist filmmaking practice seems as an abnormality or even impossibility.

The simple gesture of directing a camera towards a woman has become equivalent to a terrorist act.[100] This can be confirmed by the recent attacks on films glorifying female protagonists like *Lipstick Under My Burkha*, *Pink* and *Gulaab Gang* which attempted to hoist women outside their traditional roles and surpass their passive identities. It goes on to

[98] *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780. Also, see AIR 1971 SC 481 (Hidayatullah CJ); *S. Rangarajan* v. *P. Jagjivan Ram*, (1989) SCR (2) 204.
[99] *Supra* note 8 at 835-836.
[100] *Supra* note 4 at 127.

show that a mere gender reversal is considered to be a grave anomaly worthy of a boycott. Moreover, any attempt at disturbing the dichotomy of the Madonna-Whore complex receives severe backlash.

The portrayal of women in media will always be responsive to social change and hence steps should be taken to secure a more liberal outlook towards cinema by adopting the following recommendations:

i) The State, through its Film Agency, should sponsor contemporary women-oriented films for universal public viewing. Films like *Nil Battey Sannata* which focus on education of girls without any male protagonists should be actively broadcasted at Prime hours on all mainstream government film channels. As already stated above, independent films which support feminism in media should be put in public fora by online broadcasters like Netflix, Amazon Prime and Hotstar.

ii) A separate budget for training courses on 'contemporary feminist media studies' should be set aside for upcoming film-makers and FTII (Film and Television Institute of India) students.

iii) Perhaps, for the purposes for certification, the Board or TV agencies should incorporate a Bechdel Test for fictional films. This has been done by four cinemas in Sweden as well as a few Scandinavian TV channels in Sweden. This move was hailed by the Swedish Film Institute.[101] Likewise, the 'Mako Mori Test'[102] which checks whether a female character has a narrative arc merely to support a man's story should also be applied.

iv) As has been mentioned above, the Cinematograph (Amendment) Bill, 2018 which limits the power of the Board and also restricts arbitrary intervention by the Government should be reintroduced in both Houses of the Parliament.

v) Historical dramas centring around female protagonists should be encouraged. Films on female warriors like Rani Laxmi Bai, Begum Hazrat Mahal and Uda Devi should be encouraged. Similarly, the contemporary women like Savitribai Phule, Sarojini Naidu, Hansa Mehta and Durgabai Deshmukh should be given preference in media. Likewise, biographies featuring women in science should be developed.

The only way to fight ignorance is through fruitful knowledge and the only way to counter misogyny is to enunciate a more equal and fair media. On one hand, schools preach the

[101] AP in Stockholm, "Swedish Cinemas take aim at gender bias with Bechdel Test Rating" *The Guardian* Nov. 6, 2013, *available at*: https://www.theguardian.com/world/2013/nov/06/swedish-cinemas-bechdel-test-films-gender-bias (last visited on Jan. 12, 2020).

[102] Aja Romano, "The Mako-Mori Test: 'Pacific Rim' inspires a Bedchel Test alternative" *Daily Dot*, Mar. 2, 2020, *available at*: https://www.dailydot.com/parsec/fandom/mako-mori-test-bechdel-pacific-rim/ (last visited on May 21, 2020).

necessity of gender equality to children and on the other, they are exposed to a more appealing, more vivid form of entertainment which indoctrinates the exact opposite principle of gender inequality in their brains. A fair portrayal of women in media will have a positive domino effect of equal and healthy representation of all minorities including the LGBTQ+ community, differently-abled as well as Dalits and tribal communities.

INVOCATION OF SCRUTINY TEST IN DELEGATED LEGISLATION AND ORDINANCE: A RELOOK AT THE DOCTRINE OF PRESUMPTION OF CONSTITUTIONALITY

Vijay K. Tyagi & Bhanu Partap Singh Sambyal[*]

The principle of presumption of constitutionality in favour of an enactment, constitutional amendment, ordinances and secondary legislations is an established principle. This presumption is based on some grounds which are mainly backed upon legitimacy of action of legislature. In this article, the authors have discussed the basis of the principle and why the principle should not be applicable on challenges to constitutional validity of ordinances promulgated by President and Governors, as the case may be; secondary legislations made by the executive and pre-constitutional laws. The paper also focusses on the three levels of scrutiny tests applied in the United States of America and their associated means and ends. Further, how these tests can be applied in the context of India has also been analysed. The main argument of this paper is that secondary legislations should not be given the defence of presumption of constitutionality and must be put to strict scrutiny test. Similarly, ordinances and pre-constitutional laws must also be not given this defence and must be put to varying levels of scrutiny tests. The authors are also of the view that strict scrutiny is not an alien standard of law to Indian jurisprudence and is only a rational inclusion to the subsisting requirements formulated by the Supreme Court of India for determining the constitutionality of laws.

I. INTRODUCTION

A. Background

In some situations, a presumption in favour of a particular fact can be made even without the aid of proof or evidence to that effect. Such a presumption causes the burden of proof

[*] The first author is an LL.M. Candidate at the Indian Law Institute, New Delhi and an ex-LAMP Fellow. The second author is an LL.M. Candidate at the Indian Law Institute, New Delhi. The authors would like to thank Dr. Anurag Deep, Associate Professor, Indian Law Institute for his valuable suggestions and guidance.

to shift from one party to the other. Presumptions are of two kinds – rebuttable presumption and conclusive presumption. In case of a rebuttable presumption, the opposite party can present evidence to the contrary and rebut it. A rebuttable presumption is thus, assumed true until proven otherwise. On the other hand, a conclusive presumption is irrebuttable, i.e., it cannot be refuted or disproved in any case. Thus, it can be concluded that as a rule of evidence, presumption is linked to the burden of proof. It was a device used in the ancient Jewish law code of the Talmud, and in ancient Roman law.[1]

Presumption in favour of constitutionality is a self-imposed restriction on the power of judicial review. Under that premise, courts supply any imaginable evidence required to satisfy constitutional requirements that have been established by the judiciary.[2] The justification fixed for presumption is that the legislature intentionally drafts laws that are in compliance with the constitutional mandate. It is made on the grounds that the constitutional feasibility or validity of a law is determined by a coordinate branch of the legislature before it is enacted and that the legislature never aims to draft a law that is *ultra vires* to the Constitution. Hence, it can also be concluded that the principle of presumption of constitutionality is based on the principle of separation of powers.[3]

B. Development

The presumption of constitutionality is a legal principle established by the courts in order to deal with cases which question the constitutionality of statutes. The genesis of this principle can be attributed to a case involving the validity of a state statute under the contract.[4] It was subsequently enumerated as a principle in the case of *O'Gorman & Young* v. *Hartford Fire Insurance*,[5] in which Brandeis J. wrote, 'the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.'

An important principle of the exercise of power of judicial review is that it must be used sparingly. The power to declare a statute unconstitutional is exceptional and must be exercised only when it is 'unavoidable'. Thus, courts have imposed limits on that power. One such restriction is the presumption of constitutionality. Due to this assumption, the courts presume facts that satisfy the judicially established constitutionality tests. For example, when examining a law challenged for being irrational, the presumption of

[1] Douglas Walton, *Burden of Proof, Presumption and Argumentation* 3 (Cambridge University Press, New York, 2014).
[2] F. Andrew Hessick, "Rethinking the Presumption of Constitutionality" 85 *Notre Dame L. Rev*. 1447 (2010).
[3] *Ibid.*
[4] *Fletcher* v. *Peck*, 10 U.S. 6 Cranch 87 128 [1810].
[5] 282 U.S. 251 [1931].

constitutionality principle requires the court to presume facts which determine the law's reasonableness.[6]

The doctrine of presumption of constitutionality has arisen, or rather originated, as a necessary evil in order:

a) to prevent a collision between the judiciary and the legislature in relation to any legislation being challenged;

b) to reflecting the idea that the various organs of the State are equal; and

c) to reject frivolous objections to legislation made without any legal support or any serious challenge to the constitutionality of the law.

II. DOCTRINE OF PRESUMPTION OF CONSTITUTIONALITY

Unlike most presumptions, presumption of constitutionality is not a rule of evidence. It does not deal with proof of fact because the question of constitutionality of a statute is essentially a question of law and not of fact. It is not a rule of construction either because where a question of constitutionality is raised, rule dictates that the court will construe the statute liberally in order to save it from constitutional infirmities. It is basically a tool to allocate and increase the burden of legal persuasion, requiring the party challenging the constitutionality to convince the court 'beyond reasonable doubt' that the statute in question is *ultra vires* to the constitution. The principle entails that a legislation will be upheld as long as any rational basis for its enactment can be imagined, and unless it violates a fundamental right.[7]

The principle of presumption of constitutionality first set foot in the American jurisprudence as discussed above. The US Supreme Court in numerous cases, for instance *Warmpler* v. *Lecompte*,[8] has upheld the principle and stated that he who is attacking the statute must, in both pleadings and proof, present in detail the factual basis of his attack. However, before one can call it a uniform rule we must consider the case of *Interstate Transit, Inc.* v. *Lindsey*.[9] The case was regarding interstate taxation to which Supreme Court granted injunction saying:

> As such a charge direct burden on interstate commerce, the tax cannot be sustained appears affirmatively, in some way, that it is levied only as compensation for the use of the highways or to defray the expense of motor traffic. This may be

[6] *Supra* note 2 at 1448.
[7] *United States* v. *Carolene Products*, 304 U.S. 144 (1937).
[8] 282 U.S. 172 (1930).
[9] 283 U.S. 183, 186, 51 Sup. Ct. 380, 381 (1931).

> indicated by the nature of the imposition . . . or by the express allocation of the proceeds of the tax purposes. . . . Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways, or is discriminatory. The mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.

This case, though on the peculiar facts, made a departure from the presumption of constitutionality which was and has been followed for the cases that challenged the constitutional validity of a law . It needs to be noted that the above mentioned case is not the sole exception to a rather well established principle. The U.S. Supreme Court in *Smith* v. *Cahoon*[10] carved out another exception by not giving the presumption of constitutionality to a rather badly worded statute and upholding the plaintiff's contention that the statute was discriminatory and arbitrary. Thus, it can be said that the protection of the principle can only be allowed in the cases where the statute is clear and within the power of legislature. Now, since the nature of principle itself is 'presumptive' any reliance on the facts of the case, as stated, will make the entire principle a nullity.

Further, it needs to be noted that the obiter of *O'Gorman & Young*,[11] the very case establishing the principle, claimed that the presumption of constitutionality would prevail in the absence of any factual basis that would overturn the statute. It can be deduced that the court never intended the use of this principle once some facts unfavourable to the enactment were known. The authors have further developed this argument under the chapter relating to change in societal conditions.

Soon after the decision in *O'Gorman & Young*,[12] the Supreme Court of United States of America refused to accept the principle of presumption of constitutionality in *Near* v. *Minnesota*[13] which was against a law restricting freedom of the press implicitly. The cleavage drawn by the subsequent judgements of *O'Gorman & Young*[14] and *Near*[15] is perhaps a distinction made in the cases effecting property rights and civil rights. The Supreme Court in *Schneider* v. *Irvington*,[16] *Young* v. *California*,[17] and *Nichols et.al.* v. *Massachusetts*[18] lend an authoritative substance to the reasoning that there is no presumption of

[10] 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1930).
[11] *Supra* note 5.
[12] *Ibid.*
[13] 283 U. S. 697 (1931).
[14] *Supra* note 5.
[15] *Supra* note 13.
[16] 308 U.S. 147 (1939).
[17] 3 Cal. App. (2d) 62, 85 P. (2d) 231 (1938).
[18] 60 Sup. Ct. 146 (1939).

constitutionality when the legislation, statute or ordinance goes against the civil liberty as distinguished from economic liability.[19]

The above discussion clearly establishes doubts about the principle of presumption of constitutionality, especially in cases where civil liberties (comparable to fundamental rights) are in question. While the principle is losing its sheen in its birthplace, let us discuss the cases where the Supreme Court of India has examined the principle.

In *Charanjit Lal Chowdhuri* v. *Union of India*,[20] the apex court discussed the applicability of doctrine in India and stated:

> ...It is an accepted doctrine of the American Courts and which seems to me to be well founded on principle, that the presumption is favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a transgression of constitutional principles.[21]

The Supreme Court in *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*,[22] further established that there is always a presumption in favour of constitutionality of a law. The burden to prove otherwise lies on the one who challenges the *vires* of the law. There is a presumption that the legislature correctly appreciates the needs of the people. The laws so enacted by the legislature are meant to remedy problems faced by the people identified on the basis of years of experience. It is also presumed that in case a law makes any discrimination, it does so on the basis of valid justifiable grounds. The court also observed that in order to sustain the presumption in favour of constitutionality, the courts must take into consideration matters of common knowledge, matters of common report and the history of the times. The court may also assume existence of a state of facts which can be conceived to be present at the time when the impugned law was enacted. The presumption of constitutionality cannot be extended to always holding that there must be some reason – undisclosed or unknown – that justifies a discriminatory legislation. A reasonable basis for the classification based on law or surrounding circumstances must be brought before the court in order to justify the discrimination.

The motion for leave to introduce the bill in Lok Sabha can be opposed on two grounds. First, that the Bill initiates legislation outside the competence of the house, secondly, that the provisions of the Bill are violative of Part-III of the Constitution of India.[23] Thus, while a Bill is introduced in the Parliament, it does undergo a very well laid

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[19] "Constitutional Law. Presumption of Constitutionality Not Applicable to Statutes Dealing with Civil Liberties" 40 *Columbia Law Review* 531 (1940).

[20] AIR 1951 SC 41.

[21] *Id.* at para. 67.

[22] AIR 1958 SC 538.

[23] Rules of Procedure and Conduct of Business in Lok Sabha, rule 72.

structure of scrutiny and thus, the presumption of constitutionality is invoked when such a Bill, once it has become a legislation is challenged before the court of law. Such safeguard is accorded mainly because the court presumes that the Constitution has granted plenary powers to legislature. In Australia, Murphy J. has argued for a presumption of constitutionality of legislation as 'an attribute of the respect which the judiciary, the unelected branch of government, accords to the acts of the elected representatives of the people.'[24] Thus, the presumption is based on the judiciary's recognition of law as constitutional which is duly determined by the legislative branch before enacting it. The presumption also gives effect to the principle of separation of powers by preserving the integrity of legislative function and shielding the legislature's domain from judicial encroachment.

In recent cases, the rules as to presumption of constitutionality have been summarized by Supreme Court of India as follows:

(a) there always exists a presumption in favour of the constitutionality of the statute and the burden lies upon the individual who challenges it to prove that the constitutional principles have been clearly violated;

(b) it shall be presumed that the legislature recognizes and appreciates correctly the need of its own citizens, that its laws are aimed at experiential problems and that its discrimination is founded on appropriate grounds;

(c) in order to maintain the presumption of constitutionality, the court must consider matters of common knowledge, matters of common record, the history of the times, and may presume any state of truth that may exist at the time of the statute.[25]

The authors respectfully disagree with these three validations and critique the principle of presumption of constitutionality on the following grounds:

i. Judicial deference to the legislature to merely respect separation of powers affects the judicial independence which subsequently affects the power of judicial review.

ii. There is lack of clarity in the applicability of the doctrine to ordinances and delegated legislations.

iii. The lack of clarity in the doctrine's application to pre-constitutional laws.

iv. The doctrine fails to give due regard to the change in the societal conditions in the country.

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[24] *Attorney-General (WA)* v. *Australian National Airlines Commission* (1976) 138 CLR 492, 528. Also, see Henry Burmester, "The Presumption of Constitutionality" 13 *Federal Law Review* 283 (1983).

[25] Durga Das Basu, II *Commentary on the Constitution of India* 186 (Lexis Nexis, Gurugram, 9th edn., 2014).

The main focus of this paper would however lie upon principle of presumption of constitutionality and its inter-relation with subordinate legislations, ordinances and pre-constitutional laws.

III. EFFECT ON POWER OF JUDICIAL REVIEW

The primary justification behind the presumption of constitutionality doctrine is the notion of judicial deference to the legislature. The courts completely rely on the opinion of the legislature which largely limits the autonomous exercise of the judicial power to interpret the laws which subsequently affects the power of judicial review.

The significance of judicial review can be better comprehended with the aid of the apex court decision of *Minerva Mills Ltd.* v. *Union of India*,[26] where Y.V. Chandrachud C.J. stated:

> The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution.[27]

In *L. Chandra Kumar* v. *Union of India*,[28] the Supreme Court speaking through A.M. Ahmadi C.J. laid down that:

> We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.[29]

Simply put, according to the doctrine, the judiciary opts to cast trust on legislature's determination of the constitutional validity of a statue instead of judging it on its own. The power of judicial review is a vital component of the Constitution without which the rule of law would only be reduced to an illusion and an unachievable promise.[30] The

[26] (1980) 3 SCC 625.
[27] *Id.* at para. 87.
[28] (1997) 3 SCC 261.
[29] *Id.* at para. 78.
[30] *Ibid.*

judiciary must exercise its power of judicial review independently while deciding cases of constitutional validity and not be influenced by opinion of the legislature.

Thus, it is essential that while interpreting laws, the courts must keep in mind the necessity for deference to the legislature, however, they must not hold the same as a premise for judging laws. The judiciary must exercise its powers conferred upon it by the constitution itself to the fullest extent.

IV. LACK OF REGARD TO CHANGING SOCIETAL CONDITIONS

As discussed in the beginning, the obiter of *O'Gorman & Young*[31] itself makes it clear that the presumption is to be taken into account when there is absence of material to suggest arbitrariness of the statute, from which it can be easily deduced that if there exist any condition unfavourable to the statute, the presumption should not be applied.

With changes in social circumstances, it is necessary to make and modify laws where there is a strong need to do so in order to keep up with the prevailing conditions. Unless the legislature takes upon itself to accomplish this duty, the same duty is manifested upon the judiciary to construe the laws by following an approach that safeguards their constitutional rights. While interpreting the laws, the judiciary has to take into account shifting societal norms and changing requirements of the people. Further, the judiciary must ensure that while interpreting colonial laws which were made in adherence with the societal norms that existed at the time they were enacted, changes in domestic as well as international aspects of the society must be taken into account.

The Supreme Court in the case of *Charan Lal Sahu* v. *Union of India*,[32] stated: 'In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into.' It was further observed in the case of *John Vallamattom* v. *Union of India*,[33] that:

> The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time.....the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.

However, this has not been followed in all cases. For instance, in the case of *Suresh Kumar Koushal* v. *Naz Foundation*,[34] the Supreme Court overruled the earlier decision of Delhi

[31] *Supra* note 5.
[32] (1990) 1 SCC 613, at para. 13.
[33] (2003) 6 SCC 611.
[34] (2014) 1 SCC 1.

High Court which had decriminalized homosexual acts. In the earlier decision of *Naz Foundation* v. *Government of NCT of Delhi*,[35] it was contended that the Indian society is vibrant, diverse and democratic. The Court while discussing the changing needs of society, held that functioning of modern democratic society should ensure freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. However, the Supreme Court did not accept that argument and deferred the matter to the legislature. Thus, the authors are of the view that while upholding the principle of presumption of constitutionality and giving deference to the legislature, the judiciary has fallen off track. It has overlooked the need to inspect the law in the light of the public needs of today, by adhering to the social standards that existed at the time of its enactment.

V. PRESUMPTION OF CONSTITUTIONALITY IN CASE OF ORDINANCE AND SECONDARY LEGISLATION

Though the Constitution of India does not warrant a strict separation of powers and employs a system of checks and balances, the powers given to each pillar of the state is clearly enumerated and in no scenario whatsoever can the legislature part with its power to make laws in favour of the executive and if it does so, legislation is void and unconstitutional. It is an instance of implied limitation.[36]

A. Secondary Legislations

Having established the essentiality of law-making function bestowed upon the legislature, there exists a concept of secondary or subordinate legislation in almost all working democracies of the world. Subordinate legislation is nevertheless secondary law made by the executive branch with the equivalent legal force within the boundaries set by the legislature. The term 'constitutionality of administrative rule-making' refers to the legitimate limits of any country's constitution under which the legislature can validly assign rule-making power to other administrative agencies.[37] The powers to render subordinate legislation are typically assigned or delegated to specialist officials, often called delegated legislation for this purpose. Secondary legislation is rendered mainly in the form of legislative instruments and regulations and its main function is to complement, implement, support and execute primary legislation.

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[35] 2009 (160) DLT 277.

[36] *Supra* note 25 at 14.

[37] I.P. Massey, *Administrative Law* 97 (Eastern Book Company, Lucknow, 7th edn., 2008).

Having said that, the subordinate or delegated legislation, though carrying the same weight and authority, remain subordinate as enabling provision flows from an Act of the legislature and not the *Grundnorm* i.e. the Constitution itself. Now, since the delegated legislation is made by the executive, the question arises, whether the concept of safeguarding the presumption of constitutionality based on the premise that the legislature will only make laws in accordance with the constitutional principles could be made applicable to subordinate laws. In any modern-day democracy, the executive's job, essentially, is confined to implementation of laws and it is for this convenience of implementation that the concept of delegated or subordinate legislation was evolved in the first place. Hence, we can safely state that the power granted for administrative convenience cannot have the same force or carry the same legitimacy as law made by the a duly elected legislature.

The authors exhibit an apparent scepticism for the law made by the executive due to lack of mandate and legitimacy. Is the apex court also doubtful? In *State of T.N.* v. *P. Krishnamurthy*,[38] the Supreme Court held that in addition to the conditions upon which an ordinary legislation can be opposed as stated above, a subordinate legislation can be challenged on additional grounds. The Court held:

> There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:
>
> (a) Lack of legislative competence to make the subordinate legislation.
>
> (b) Violation of fundamental rights guaranteed under the Constitution of India.
>
> (c) Violation of any provision of the Constitution of India.
>
> (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
>
> (e) Repugnancy to the laws of the land, that is, any enactment.
>
> (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).[39]

These parameters of judicial review of subordinate legislation were reiterated by the Supreme Court in *Cellular Operators Assn. of India* v. *TRAI*.[40] It is thus an accepted fact that a subordinate legislation can be questioned on the ground of infringement of

[38] (2006) 4 SCC 517.
[39] *Id.* at paras. 15 and 16.
[40] (2016) 7 SCC 703.

fundamental rights guaranteed under the Constitution of India and in such a situation the presumption of constitutionality would not be accorded. The authors suggest that in such cases, there is a need of strict inspection of such legislation. To understand the concept of scrutiny, it becomes pertinent to look into the American jurisprudence from where this concept has evolved.

1. Strict scrutiny test

Under the American constitutional law, the origin of strict scrutiny has generally been traced to the judicial response to the problems of a formal constitutional interpretation. For instance, the Equal Protection Clause, where the statute establishes a suspicious class of individuals, either by race or gender, the U.S. Supreme Court has developed the strict scrutiny requirement to determine the constitutionality of the legislation.[41] The term 'strict scrutiny' signifies a test wherein statutes will be pronounced unconstitutional unless they are 'necessary' or 'narrowly tailored' to serve a 'compelling governmental interest'.[42] Thus, to survive the strict scrutiny requirement, the laws' ends must be compelling and narrowly tailored. The strict scrutiny test was once considered an impermeable standard and once it is made applicable to any legislation, the same would be on dead on sight.[43]

The jurisprudence of strict scrutiny could be traced to the case of *Korematsu* v. *United States*,[44] wherein the Court extended strict scrutiny to a suspect class and the legislation prevailed. The legislation survived in *Korematsu* because of the U.S. Government's concern during World War II that Japanese-Americans living on the West Coast would be possible informants or traitors. Although, *Korematsu* is no longer good law, it was the first case to demonstrate how racial legislation can survive the strict scrutiny standard.[45] Thus, judicial review allows constitutional courts to check any primary legislation for its adherence to fundamental rights.[46] In the celebrated 'footnote four' case of *United States* v. *Carolene Products Company*,[47] Stone J., described the rights mentioned under the Bill of Rights as vital to the function of political process and the right of 'discreet and insular minorities' to be free from discrimination and not trigger 'exacting judicial scrutiny'.[48]

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[41] Todd J. Desimone, "Justice O'Connor's View of Equality and the Strict Scrutiny Standard: Strict Scrutiny is Not Necessarily Fatal in Fact" 13 *National Italian American Bar Association Law Journal* 73 (2005).

[42] Richard H. Jr. Fallon, "Strict Judicial Scrutiny" 54 *UCLA Law Review* 1273 (2007). Also, see *Johnson* v. California, 543 U.S. 499, 505 (2005); *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995).

[43] Jaideep Venkatesan, "Fatal in Fact? Federal Courts' Application of Strict Scrutiny to Racial Preferences in Public Education, 6 *Texas Forum on Civil Liberties & Civil Rights* 173 (2001).

[44] 323 U.S. 214 (1944).

[45] *Supra* note 38 at 76.

[46] Chintan Chandrachud, "Declarations of Unconstitutionality in India and the U.K.: Comparing the Space for Political Response" 43 *Georgia Journal of International and Comparative Law* 311 (2015).

[47] 304 U.S. 144 (1938).

[48] *Id.* at 152.

A strict scrutiny approach thereby holds values for societies recognising the special significance of rights.[49] Thus, if rights are of paramount importance, their infringement warrants a higher standard of review. In the Indian scenario, the courts' standard of review is constrained and is mostly guided by the constitutional provisions. Thus, it has been argued by many that a blanket importation of the doctrine would be indefensible for the Indian context. This is supplemented by the fact that Article 14 of the Indian Constitution provides: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' However, it is pertinent to note herein that the framers of our Constitution, did not just end at Article 14 and progressed while providing context to the ideal of equality under Articles 15 to 18 of the Constitution. Thus, 'equal protection of the laws' under Article 14 must be informed and guided by Articles 15 and 16 in particular. The task before the court is thus to figure out whether the reasons behind a legislation are permissible under the Constitution or not.[50] It is pertinent to note herein that this argument of a full-fledged embrace of the strict scrutiny doctrine may hold very good with respect to primary legislations. However, the fear of lack of a heightened standard of review in cases of secondary legislations would only result in the under protection of rights and thus, needs high level of consideration.

Strict oversight for many types of laws has been introduced in the United States, ranging from race-based regulations to free speech to cases of freedom of association. Article 13(2) of the Indian Constitution forbids the state from implementing any legislation repealing or abbreviating the privileges granted by Part III of the Constitution. This is the same protection which has been provided in relation to the Bill of Rights. The authors suggest that the fundamental rights must always remain fundamental, and rigorous inspection ensures they do. Strict scrutiny is very much in harmony with the Indian constitutional jurisprudence and it is only logical that heightened level of judicial scrutiny would only add value to the prevailing standards.

A subordinate legislation which deals with fundamental rights thus needs strict scrutiny. The authors are of the opinion that in cases of subordinate legislations, the protection of the presumption of constitutionality should not be granted and the same should be subjected to strict inspection. Strict inspection in this implies that the government is put to test where the usual presumption of constitutionality is reversed and the laws under scrutiny must fulfil both the requirements (endings) and the appropriate

[49] Moiz Tundawala, "Invocation of Strict Scrutiny in India: Why the Opposition?" 3 *NUJS Law Review* 479 (2010).
[50] *Id.* at 478.

(implies) prongs of investigation to stand.[51] For example, a weak review paired with presumption of constitutionality safeguard in case of a subordinate legislation would only dampen the constitutional principles as these legislations do not have a constitutional backing. Thus, on the basis of the above discussion it can be concluded that if any 'presumptive' principle is subjected to rigorous judicial scrutiny based on merits, the entire object of the principle is null. The authors hence submit that the courts should not allow raising the presumption in favour of secondary legislations when challenged on grounds of violation of fundamental rights enshrined in the Constitution.

B. Ordinances

The ordinance making power is a rather extraordinary power granted to the executive to wield the law-making power of the legislature in circumstances when the duly elected legislature is not able to perform its function. The power is granted to meet the emergency legislative need of the state and is in no way to usurp or circumvent the powers duly granted to the legislature under the law of the land.

Likewise, under Article 123(1) of the Constitution, the President of India shall have the authority to make ordinances.[52] The legislation states that if the President is satisfied at any time, except when both houses of Parliament are in session, that circumstances exist which make it appropriate for him to take immediate action, he can promulgate an ordinance. The ordinance so promulgated will have the same force as has been enacted by the Parliament of India. It should be noted that the ordinance making power does not flow from an act of legislature but from the Constitution itself and therefore carries the same force as the law made by the duly elected legislature.[53]

Similar powers, with some additional limitations, are bestowed, under Article 213(1), upon the Governor of a state which allows him to promulgate ordinance at any time,

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[51] Jennifer L. Greenblatt, "Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers are Created Equal" 10 *Florida Coastal Law Review* 433 (2009).

[52] The Constitution of India, 1950, art. 123. Power of President to promulgate Ordinances during recess of Parliament. -

(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance-

> (a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions.

[53] Shubhankar Dam, *Presidential Legislation in India: The Law and Practices of Ordinances* 4 (Cambridge University Press, New Delhi, 2014).

except when the legislative assembly of a state is in session, or where there is a legislative council in a state, except when both houses of the legislature are in session.[54]

The Supreme Court in *A.K. Roy* v. *Union of India*,[55] with regard to whether an ordinance under Article 123 or 213 have the same force and effect as the law stated:

> The heading of Chapter III of Part V is "Legislative Powers of the President". Clause (2) of Article 123 provides that an ordinance promulgated under Article 123 'shall have the same force and effect as an Act of Parliament'. The only obligation on the Government is to lay the ordinance before both Houses of Parliament and the only distinction which the Constitution makes between a law made by the Parliament and an ordinance issued by the President is that whereas the life of a law made by the Parliament would depend upon the terms of that law, an ordinance, by reason of sub-clause (a) of clause (2), ceases to operate at the expiration of six weeks from the reassembly of Parliament, unless resolutions disapproving it are passed by both Houses before the expiration of that period.
>
> ...Therefore, whether the legislation is Parliamentary or Presidential, that is to say, whether it is a law made by the Parliament or an ordinance issued by the President, the limitation on the power is that the fundamental rights conferred by Part III cannot be taken away or abridged in the exercise of that power. An ordinance, like a law made by the Parliament, is void to the extent of the contravention of that limitation.

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[54] The Constitution of India, 1950, art. 213. Power of Governor to promulgate Ordinances during recess of Legislature–

(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if-

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor, but every such Ordinance-

(a) shall be laid before the legislative Assembly of the State, or where there is a Legislative Council in the State, before both the House, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

[55] (1982) 1 SCC 271, five-judge Constitution bench by 4:1 majority. A.C. Gupta J. dissented on the question whether "ordinance" is law under article 21 of the Constitution.

> The exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President is emphasised by yet another provision of the Constitution. Article 367 which supplies a clue to the "interpretation" of the Constitution provides by clause (2) that:
>
> "Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the legislature of a State, shall be construed as including a reference to an ordinance made by the President or, to an ordinance made by a Governor, as the case may be."[56]

From this discussion it is clear, if there was ever any doubt about the true situation, that in fact the Constitution makes no difference between a statute made by the legislature and an ordinance promulgated by the President. Both are equally the results of the exercise of political authority derived from Constitution, and henceforth, both are similarly subject to the limits imposed on that authority by the Constitution.

However, the ordinances, unlike the legislation can be subjected to initial scrutiny as to want of exercising the emergency power bestowed upon the executive. The Supreme Court in *Krishna Kumar Singh* v. *State of Bihar*,[57] held that the authority to impose an ordinance does not entail an unlimited right, but it is conditioned on the assurance that circumstances subsist, rendering it appropriate to take urgent action and the court is free to examine it. The court has thus rightly exercised the power to scrutinize the nature of existing conditions which necessitate the promulgation of an ordinance. The court, by making the power 'conditional' has assumed power to check the immediate need of the promulgation on circumstances so presented. Again, as stated above, the initial scrutiny by the court into the circumstances undermines the purpose and dilutes the effect of any presumption of constitutionality in favour of the ordinance so promulgated. However, the whole exercise behind promulgation of an ordinance is initiated and completed by the executive branch. Here, the executive branch is involved in enacting a law which has to be ratified within six weeks from the date on which the Parliament or the state legislature reassembles. So, we have a law which has been enacted by the executive that comes into force even without sanction of the legislature during the time when the Parliament or state assembly, as the case may be, are not in session.

Although admitting that ordinances could be misused, Constitution drafters assumed that they would ultimately be either be subject to parliamentary debate or cease to exist. This as per them would be an important check on the executive's power. However, this might not always be the case though. There are instances wherein if an ordinance is not

[56] *Id.* at paras. 12-14.
[57] (2017) 3 SCC 1.

ratified by the legislature within the said period of six weeks from the date on which the Parliament or the state legislature assembles, it is re-promulgated after the session ends and continues to operate thereafter, until the legislature reassembles.[58] Thus, we can say that the power to make ordinances in certain cases has been abused to subvert the democratic process. The authors believe that although ordinances stand at a higher footing than subordinate legislation as they derive their rule making power from the Constitution, the grounds on the basis of which presumption of constitutionality is raised in favour of an enactment are absent in the case of an ordinance as well.

1. Intermediate scrutiny test

The authors suggest that an intermediate level of scrutiny should be applied to such ordinances. The burden of intermediate scrutiny is slightly lower than rigid scrutiny. In the case of intermediate oversight, the government must bring forward a particular interest (end) and show that the legislation has at least a reasonable relationship to that interest (means).[59] Such a scrutiny is essential as there may be instances where an ordinance creates outcomes that are manifestly irreversible, despite public interest demanding its reversing.[60] In our parliamentary system, all Bills go through a detailed scrutiny process. This scrutiny process is multi-tiered which includes opportunities to oppose the introduction of a Bill, reference to a Parliamentary Committee, invitation of views from government and other experts, and extensive debate on the floor. This is nothing but the constitutional mandate which every legislation has to undergo. As discussed above, the Constitution does not provide unrestricted power to issue an ordinance, but it is conditional on the guarantee that conditions exist, making it necessary to take urgent action and the court is free to review it. They cannot be used as a weapon for overthrowing a democratic process. However, ordinances bypass this whole procedure and, on the very grounds, cannot be accorded the presumption of constitutionality.

VI. PRESUMPTION OF CONSTITUTIONALITY IN CASE OF PRE-CONSTITUTION LAWS

The theory of presumption of constitutionality works under the premise that the government does not wish to pass legislations that contradict the constitutional requirements. This assumption may not be justifiable as it tampers with the independence

[58] The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was promulgated on Sept. 19, 2018. It was then re-promulgated and replaced by The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 on Jan. 12, 2019 and again re-promulgated on Feb. 21, 2019 as The Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019.

[59] *Supra* note 51 at 434.

[60] Suhrith Parthasarathy, "Rolling back Ordinance Raj" *The Hindu*, Jan. 27, 2017 (last visited on Mar. 5, 2020).

of the judiciary. At the same time, it is also understandable for the judiciary to have a self-imposed restraint on the exercise of its wide-ranging powers. However, the fact that the presumption is raised even in favour of pre-constitutional laws seems absurd because at that time, no constitutional barriers, as they stand today, existed.

In *State of West Bengal* v. *Anwar Ali Sarkar*[61] even in his minority dissenting opinion, P. Sastri C.J. while concurring with the majority, recognized that the pre-constitutional nature of a law mattered. He stated:

> The important distinction is that in Romesh Thapar case [1950 SCR 594], the impugned enactment, having been passed before the commencement of the Constitution, did contemplate the use to which it was actually put, but such use was outside the permissible constitutional restrictions on the freedom of speech, that is to say, the Act was not condemned on the ground of the possibility of its being abused but on the ground that even the contemplated and authorised use was outside the limits of constitutionally permissible restrictions.[62]

In *Anuj Garg* v. *Hotel Association of India*,[63] while addressing the statutory validity of Section 30 of the Punjab Excise Act, 1914, the Supreme Court held that the legislation passed, before the Constitution was adopted, was subject to challenge on the touchstone of Articles 14, 15 and 19 of the Indian Constitution. The court held:

> The Act is a pre-constitutional legislation. Although it is saved in terms of article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also in international arena, such a law can also be declared invalid.[64]

In *NDMC* v. *State of Punjab*,[65] A.M. Ahmadi C.J., noted that the concept of the presumption of constitutionality is not universal and does not extend to a pre-constitutional statute such as the Municipal Statute of Punjab, 1911. The court observed:

> The Act is a pre-constitutional enactment. The basis of this doctrine is the assumed intention of the legislators not to transgress constitutional boundaries. It is difficult to appreciate how that intention can be assumed when, at the time that

[61] AIR 1952 SC 75.
[62] *Id.* at para. 16.
[63] (2008) 3 SCC 1.
[64] *Id.* at para. 7.
[65] (1997) 7 SCC 339.

> the law was passed, there was no such barrier and the limitation was brought in by a Constitution long after the enactment of the law.[66]

In *Naz Foundation* v. *Government of NCT of Delhi*,[67] the Delhi High Court relied on the *Anuj Garg*[68] case and held that the presumption of constitutionality cannot be raised in favour of a colonial legislation. However, the High Court of Delhi decision in which Section 377[69] was read down, was overruled in *Suresh Kumar Koushal* v. *Naz Foundation*[70] by the Supreme Court of India. It held that:

> Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. There is nothing to suggest that this principle would not apply to pre-Constitutional laws which have been adopted by the Parliament and used with or without amendment. If no amendment is made to a particular law it may represent a decision that the Legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law. In light of this, both pre and post Constitutional laws are manifestations of the will of the people of India through the Parliament and are presumed to be constitutional.[71]

In *Navtej Singh Johar* v. *Union of India*,[72] R.F. Nariman J. clarified the position regarding the presumption in favour of constitutionality of a pre-constitution legislation as:

> The presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is aware of its limitations in enacting laws — it can only enact laws which do not fall within List II of Schedule VII to the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It

[66] *Id*. at para. 119.
[67] *Supra* note 35.
[68] *Supra* note 63.
[69] The Indian Penal Code, 1860 (Act 45 of 1860), s. 377.
[70] *Supra* note 34.
[71] *Id.* at para. 28.
[72] (2018) 10 SCC.

> is therefore clear that no such presumption attaches to a pre-constitutional statute like the Penal Code.[73]

The doctrine of presumption of constitutionality ought not to be applied to laws enacted prior to the commencement of the Constitution or colonial legislation in the same manner as it is applied to those enacted after the commencement of the Constitution and if applied strictly would only result in absurdity. This is because the constitutional principles, which form the touchstone of the legitimacy of a law today, did not exist in the colonial times and thus, it cannot be automatically presumed that colonial legislation would conform to those principles.

VII. CONCLUSION

People are becoming increasingly aware of their rights and this has resulted in an increase in the importance of an effective justice delivery system. Any major legislation and administrative decision thus need to be scrutinized. The enforcement of the presumption of constitutionality theory deprives the judiciary of its position and experience, as it functions on the premise that the government would operate within constitutional boundaries. This has a strong effect on the power of judicial review.

The application of the doctrine to pre-constitutional laws does not take into account the evolving social circumstances and has had significant consequences, particularly for minority interests. They are left at the hands of the lawmakers, an awkward majority and the court's policies. Therefore, applying the strict scrutiny test and extending the reach of judicial review when implementing this doctrine can re-establish and further reinforce trust in the justice delivery system.

The presumption of constitutionality in case of secondary legislation cannot be raised because the basic premise on which the doctrine stands and is applied in favour of an enactment is absent. A secondary legislation dealing with fundamental rights must be subjected to the strict scrutiny test and in order to stand the test of constitutionality, it must meet both - the ends and the means prongs of review. Similarly, ordinance being an executive action doesn't go through the scrutiny of the legislature before it is promulgated and thus, it cannot enjoy a similar protection as a legislative enactment by application of the doctrine of presumption of constitutionality. An ordinance must be subjected to intermediate scrutiny where the government must show that it was necessary for it to be promulgated to serve an important interest and that such ordinance bears a substantial nexus to that interest.

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[73] *Id.* at para. 361.

The courts must adhere to the judgment of the legislature, to whatever degree it is necessary, and exercise self-restraint; however, this deference must always be limited in order to ensure that the judiciary exercises its powers independently while interpreting the law in question.

THE CONSTITUTIONAL VALIDITY OF THE 103RD AMENDMENT

Sumeysh Srivastava[*]

This paper examines the validity of the 103rd Amendment of the Constitution of India, which provides for 10% quota in certain public services based on an economic criterion. The research looks at different elements of the issue, mainly the judicial and constitutional journey of reservations in India, the jurisprudence of using economic criteria for reservations, and also looks at how social justice has been defined within the Indian Constitutional Scheme. The paper looks to the Constituent Assembly Debates to understand the basic constitutional framework of different issues including the issue of 'Formal' vs. 'Substantive' equality with reference to the constitutional framework as well as judicial decisions. Judicial decisions are also used to explore and understand the position of the judiciary on the issues discussed in the paper, and an attempt has been made to chronicle the journey of the court in reaching these positions. Judicial decisions supporting both sides of the argument have been analyzed. Political narrative has been sparingly used to give context to certain information. The paper has attempted to suggest a solution by indicating at the appropriateness of certain definitions used in the Right to Education legislation, specifically with reference to criteria related to 'weaker sections'. The research does admit that it is difficult to predict how the court may adjudicate on this issue, but highlights that whatever the decision, it has the potential to alter the jurisprudence around the issues of reservations, equality, basic structure and social justice in India.

I. INTRODUCTION

The 103rd Constitutional Amendment was passed by the Union Government in January 2019.[1] It seeks to extend reservation benefits to citizens belonging to the economically weaker sections, independent of any other factors. The reason given for this amendment is that people from economically weaker sections of society are excluded from entry into

* The author is a Senior Resident Fellow at the Vidhi Centre for Legal Policy in New Delhi.

[1] "President of India gives assent to The Constitution (One Hundred and Third Amendment) Act, 2019" *Press Information Bureau*, Jan. 12, 2019, *available at*: https://pib.gov.in/PressReleasePage.aspx?PRID=1559755 (last visited on Sept. 5, 2019).

public employment and institutes of higher education.[2] A basic causal relationship has been established between economic capacity and the ability to further educational and economic interests.[3] The amendment allows the State to make reservations in public employment, as well as in educational institutes, for 'economically weaker sections'. The phrase 'economically weaker sections' is defined as those that may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.[4] It is important to understand the political background behind this legislation. We have seen intense agitations by different communities in different parts of India asking for reservations.[5] The differentiator in these agitations is that these are being done by communities which don't really fall under the definition of backward, as given in the original draft of the Constitution.[6] The definition of backwardness, reaffirmed by the Mandal Commission,[7] focuses on social and educational backwardness, caused by structured historical discrimination.[8]

However, the current agitations have been carried out by dominant, land owning communities who have traditionally enjoyed the benefits from the operation of the caste system.[9] This is in contrast to reservation agitations done in the past in both pre and post independent India, which were carried out by communities who had low or negligible representation in indicators such as land ownership and representation in government services.[10] They seemed to be driven by rural distress, lack of jobs and opportunities for entrepreneurial development, and development policies which has led to large scale exclusions.[11]

One solution for these issues is long-term policy and structural reform.[12] However, that will take time and from past experience, is difficult to implement. Reservation, on the other hand is immediate, and a remedy which appears to gives instant benefits for the community demanding it. It's interesting to note that there is a contrast between

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[2] The Constitution (One hundred and Third amendment) Act, 2019, Statement of Objects and Reasons.

[3] *Ibid.*

[4] *Id.,* s.2.

[5] Internet Desk, "Jat quota protests: What is it all about?" *The Hindu*, Sept. 23, 2017, *available at*: https://www.thehindu.com/specials/jat-quota-protests-what-is-it-all-about/article14091994.ece1 (last visited on Apr. 12, 2019).

[6] Sharmendra Chaudhry, "Caste and the Upliftment of Backwards in India", Oct. 5 2010, *available at*: https://ssrn.com/abstract=1703363 (last visited on June 18, 2020).

[7] Government of India, "Report of the Backward Classes Commission First Part" (1980).

[8] *Supra* note 6.

[9] Suhas Palshikar, "The New Reservation" *The Indian Express*, Aug. 1 2018, *available at*: https://indianexpress.com/article/opinion/columns/maratha-resevation-protest-maharashtra-patidar-quota-stir-5285330/ (last visited on June 17, 2020).

[10] R. Krishnakumar, "A history of reservation" *Frontline*, Aug. 27, 2004, *available at*: https://frontline.thehindu.com/social-issues/article30224191.ece (last visited on June 18, 2020).

[11] *Supra* note 9.

[12] S. Mahendra Dev, "Poverty and inequality after reforms" *Livemint*, July 26, 2016, *available at*: https://www.livemint.com/Opinion/Mr2DS2Qv4ika8zEuScxN1L/Poverty-and-inequality-after-reforms.html (last visited on June 20, 2010).

reservation demands in the past and the ones happening currently.[13] Originally, the discourse around reservation was seen as a response to inequalities in Indian society created by the operation of the caste system. It was intended to provide access to the socio-political space to communities that have been historically excluded and underrepresented.[14] While the policy seeks to address exclusion and inequalities which existed during the time of India's independence and continue till today, it must be acknowledged that historical factors have had an influence in how this is implemented. It was never intended as an anti-poverty or employment generation measure.[15] There have been separate initiatives for that. There have been arguments made that even within these schemes, backward communities have been excluded.[16] Hence, the argument for reservations reflects that in a situation where structural and multidimensional discrimination against certain castes exists, poverty alleviation and employment generation measures may not help to close the gap which exists because of this discrimination.[17] Reservations are a limited intervention, of what should ideally be more holistic socio-cultural initiative. They are important because they provide members of disadvantaged communities a voice in decision making; by placing them in high level public jobs and allowing them access to quality education opportunities.

It has been proposed that community-based reservations are based on two main 'theoretical narratives'.[18] One narrative proposes that the main goal of forming human societies is to reach a stage where group identity within the society becomes immaterial.[19] However, that stage can be reached only by continuing to use group identity as the main indicator for programmes designed to alleviate present inequality which has been caused by historical injustice.[20] This approach keeps the individual at the center, and group-based action is just seen as the most efficient method to improve the lot of the individual. The other narrative sees the group as the more important unit, and different forms of affirmative action are viewed as tools to achieve parity between groups, not individuals.[21]

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[13] Suhas Palishkar, "One more Quota" *The Indian Express*, July 10, 2019, *available at*: https://indianexpress.com/article/opinion/columns/obc-reservation-maratha-quota-sc-ninth-schedule-indra-sawhney-mandal-5822927/ (last visited on June 19, 2020).

[14] Constituent Assembly Debates (Vol. VIII) on May 25, 1949, *available at*: http://loksabhaph.nic.in/writereaddata/cadebatefiles/C25051949.html (last visited on June 21, 2020).

[15] E.W. Osborne, "Culture, Development, and Government: Reservations in India" 49(3) *Economic Development and Cultural Change* 664 (2001).

[16] Ananthakrishnan G, "Affluent in OBC, SC/ST not letting quota benefits trickle down, review lists: Bench" *The Indian Express*, Apr. 23, 2020, *available at*: https://indianexpress.com/article/india/affluent-in-obc-sc-st-not-letting-quota-benefits-trickle-down-review-lists-bench-6374908/ (last visited on June 17, 2020).

[17] *Supra* note 15 at 675.

[18] Gautam Bhatia, "Reservations, Equality and the Constitution – X: Untidy Endnotes" *Indian Constitutional Law and Philosophy Blog*, Apr. 9, 2014, *available at*: https://indconlawphil.wordpress.com/2014/04/09/reservations-equality-and-the-constitution-x-untidy-endnotes/ (last visited on July 23, 2019).

[19] *Id.* at para. 5.

[20] *Ibid.*

[21] *Ibid.*

In *Ashoka Kumar Thakur* v. *Union of India,*[22] the two narratives clashed, and the court unequivocally affirmed that the Indian Constitution was designed towards bringing about a casteless society.[23] This is reflected in the creamy layer doctrine.[24] The doctrine ensures that people belonging to identified beneficiary groups, but not having the required educational, economic and social backwardness indicators, do not benefit from reservations. Importantly, this also underscores that these indicators are used to confirm backwardness in the first place. Essentially, what this means is that for reservations, caste itself is not a determining criterion, but must be supported by indicators of backwardness. Hence, we can deduce that ultimate group equality is not the goal of our Constitution.[25]

However, economic criteria as a ground for reservation is not a new narrative. It can be found in the Constituent Assembly Debates ('CAD') as well. Mahavir Tyagi, a prominent freedom fighter, and later parliamentarian argued that minorities should be categorized on economic criteria, based on 'jobs' that do not earn enough to make a living. He stated:

> I do not believe in the minority on community basis, but minorities must exist on economic basis, on political basis and on an ideological basis and those minorities must have protection. I would suggest that in the place of the Scheduled Caste, the landless laborers, cobblers or those persons who do similar jobs and who do not get enough to live, should be given special reservations ... Let cobblers, washer men and similar other classes send their representatives through reservations because they are the ones who do not really get any representation. [26]

It is important to point out that the argument made by Tyagi differs from the structure of reservations given in the 103rd Amendment. Tyagi is talking about economic disadvantage due to occupational structures and labour divisions, while the current amendment looks purely at indicators based on wealth, income and land.[27]

A review of the issue of economic criteria in the CAD shows that Tyagi's view was not the predominant view while discussing the issue of reservations.[28] A perusal of the text of the CAD can confirm this. Hemchandra Khandekar, a Dalit member of the Constituent Assembly, opined that:

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[22] (2008) 6 SCC 1.

[23] *Supra* note 18.

[24]Pavan Srinivas, "Affirmative Action and the Marginalized Population: A Study on the Creamy Layer and its Relevance Today" 5 *Christ University Law Journal* 47-52 (2016).

[25] *Supra* note 18 at para. 6.

[26]Malavika Prasad, "From the constituent assembly to the Indra Sawhney case, tracing the debate on economic reservations" *The Caravan*, Mar. 28, 2019, *available at*: https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates (last visited on June 13, 2019).

[27] Ministry of Personnel, Public Grievances & Pensions, "Office Memorandum No. 36039/1/2019", Jan. 31, 2019, *available at:* https://dopt.gov.in/sites/default/files/ewsf28fT.PDF (last visited on June 21, 2020).

[28] *Supra* note 26.

> The condition of the scheduled castes has been explained by many friends who made their speeches in the House. The condition is so deplorable that though the candidates of the scheduled castes apply for certain Government posts, they are not selected for the posts because the people who select the candidates do not belong to that community or that section. I can give so many instances about this because I have got the experience from all provinces of the country that the scheduled caste people though they are well qualified do not get opportunity and fair treatment in the services.[29]

This signifies that while someone from a backward caste may have the economic resources to be able to acquire the qualifications required to apply for government posts, he may still be denied the opportunity to be selected solely because of belonging to a specific caste, and Khandekar here has specifically linked this to the lack of representation of backward classes in government services. Similarly, P. Kakkan, who was a freedom fighter and a part of the post-independence Tamil Nadu government, states that:

> The poor *Harijan* candidates hitherto did not get proper appointments in Government services. The higher officers selected only their own people, but not the *Harijans*. Sir, even in the matter of promotions, we did not get justice. The Government can expect necessary qualifications or personality from the *Harijans*, but not merit.[30]

This reinforces the point earlier made by Khandekar. An analysis of the debates around Article 16(4) clarifies that backward classes were not considered in terms of economic categories but were seen as historical social groups created due to the operation of the caste system.[31]

The 1st Constitutional Amendment,[32] which gave the state the power to make 'special provisions for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes and the Scheduled Tribes', was also 'criticized by some for reliance on social and educational—and not economic—criteria to determine backwardness'.[33] In response to the criticism, Nehru had said that the social disadvantage to be remedied was a result of cumulative factors including economic considerations, to specifically list 'economic' disadvantage would 'not make it a kind of cumulative thing but would say that a person who is lacking in any of these things should be helped'. In these discussions, there is clarity that only constitutive disadvantage, meaning disadvantage accruing due to the function of various factors such as social, educational and economic

[29] Constituent Assembly Debates (Vol. VII), on Nov. 30, 1948 *available at*: http://164.100.47.194/Loksabha/Debates/cadebatefiles/C30111948.html (last visited on June 11, 2020).
[30] *Ibid.*
[31] Parmanand Singh, "Reservations, Reality and the Constitution: Current crisis in India" 11 *Cochin University Law Review* 292-294 (1987).
[32] The Constitution (First) Amendment Act, 1951.
[33] *Supra* note 28.

backwardness was being looked at by the Constitution.[34] This is in contrast to the approach taken by the 103rd Amendment, which looks only at the lack of educational and employment opportunities, caused due to economic backwardness.[35]

The 103rd Amendment takes forward the demand for quotas on the basis of economic criteria, but it doesn't really follow the narrative given in the discussions of the CAD above. It doesn't really reflect a demand for social justice or reparation of historical injustice. It can be more accurately described as a demand for a share in power for those left out of it.

In order to better understand this, it is important to understand how the concept of social justice has been situated in the Indian Constitutional System.

II. MEANING OF SOCIAL JUSTICE IN THE INDIAN LEGAL SYSTEM

The question of reservations is immersed in issues of equality, merit and social justice. The Constitution of India is a unique document. It can be said that the creation of such a document is *sui generis*. Because, as Granville Austin has stated, no other Constitution in the world 'has provided so much impetus toward changing and rebuilding society for the common good'.[36] A similar point, about the transformative nature of the Constitution, has been made recently by Gautam Bhatia.[37] There are several distinguishing attributes which make it stand apart from the Constitutions of the world.[38] It not only provides a frame for governance, but also a structure for social, economic and political transformation.

The conceptualization of social justice emerged out of a process of progression of 'social norms, order, law and moral values'. 'It focused upon just action and created space for intervention in the society by enforcing rules and regulations based on the principles of social equality.'[39] The modern idea of social justice is different from other traditional ideas of justice and has entered political discourse with the rise of modern nation states, pre-supposing the existence of institutions or agencies which are capable of directing the institutional changes required to create social justice.[40] Being a multidimensional concept, social justice has been viewed by scholars of law, philosophy and political science

[34] *Id.* at para. 13.

[35] *Supra* note 2.

[36] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966).

[37] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India, 1st edn., 2019).

[38] Rajeev Dhavan, "A miracle work in progress" *The Hindu Business Line*, Jan. 26, 2018, *available at*: https://www.thehindubusinessline.com/blink/cover/a-miracle-work-in-progress/article10051346.ece (last visited on June 17, 2020).

[39] R.H, Raghavendra, "Dr B.R. Ambedkar's Ideas on Social Justice in Indian Society" 8 *Contemporary Voice of Dalit* 24-26 (2016).

[40] David Miller, *Principles of Social Justice 4-6* (Harvard University Press, 1999).

differently. The term is quite comprehensive. Social justice is a bundle of rights; it is the balancing wheel between the haves and have-nots. It has a great social value in providing for a stable society and securing the unity of the country. Justice has many connotations which includes natural justice or distributive justice. Social justice is basically a term that provides sustenance to the rule of law. It has a wider connotation in the sense that it includes economic justice also. It aims at removing all kinds of inequalities and affording equal opportunities to all citizens in social as well as economic affairs.[41] Thus, the aim of social justice is to 'remove all kinds of inequalities based upon caste, race, sex, power, position and wealth'[42] and to bring about a balance between social rights and social controls.

One can see this narrative coming through in the discussions comprising the CAD. Biswanath Das, a lawyer and former CM of Odisha while talking about distribution of finances to states, hoped that this will lead to social justice and a minimum standard of living for all the Citizens of India.[43] He also pointed out that the exercise of Constitution drafting was not just to create an administrative structure for governance, but also to ensure social justice and social security for the people of India. Similarly, Sardar Hukum Singh pointed out that the underlying idea is to uplift the backward section of the community so that they may be able to make equal contribution to national activities.[44] S. Radhakrishnan stated that: 'I hope that our trusted leaders who are now running this Government will carry out all those obligations put down in our Draft Constitution and will not allow it to be said that we have delayed social justice and so denied social justice.'[45]

By accepting the right to equality as an essential element of justice, the Constitution prohibits unequal behavior on the grounds of religion, race, caste, sex.[46] But the Constitution accepts that strict compliance of formal equality will lead to inequality.[47] Disparate treatment is coterminous with equality of treatment. Without extending such differential treatment which is preferential in relation to the non-disadvantaged there is no level playing field. It can be argued that by incorporating the system of special provision for backward classes of society, it is an attempt to make the principle of equality more effective.[48]

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[41] *Supra* note 39.

[42] *Ibid.*

[43] IX, *Constituent Assembly Debates*, 113.

[44] *Id.* at 122.

[45] *Id.* at 123.

[46] Dr. Puneet Pathak, "Social Justice under Indian Constitution" 2 *International Journal of Legal Developments and Allied Issues* 39 (2016).

[47] Catharine A. MacKinnon, "Sex equality under the Constitution of India: Problems, prospects, and "personal laws"" 4 *International Journal of Constitutional Law* 187 (2006).

[48] Raj Kumar Gupta, "Justice: Unequal but Separate" 2 *Journal of the Indian Law Institute* 77-85 (1969).

While the Constitution was being framed, there was a peculiar balancing issue that the framers had to face.[49] This was the conflict between what it means to provide equality in the letter of the law and to create equality in the lived realities of people. The first would mean prohibition of any schemes based on caste, religion, language, region or any other community marker, the latter conceded that certain groups had been unfavorably treated and were now marginalized. It was important to enact measures which would eliminate or scale down inequalities, pushing towards a social structure which is 'equality in fact'. So, while 'equality in law' is established, and it promises equal treatment to all citizens, irrespective of social groups, it also has to review if individuals or groups are being treated equally under the established social norms and structures. Thus, to secure the advancement of Dalits, Tribals and other 'socially and economically backward classes', it was ensured that constitutional provisions safeguard the rights of these communities and protect their interests through preferential policies.

It would not be wrong to say that this represents a discord between the two principles of equality, equality in law and equality in fact and the provisions of the Indian Constitution reflect that. To ensure the former, the Constitution ensures fundamental rights such as the guarantee to all citizens of equality before law (Article 14);[50] the prohibition of discrimination on grounds of religion, race, sex, caste or place of birth (Article 15);[51] and the assurance of equality of opportunity in matters of public employment (Article 16).[52] To ensure the provision of 'equality in fact', the Constitution needed to depart from the principle of formal equality and institute the principle of compensatory discrimination for groups who were otherwise subjected to social and economic discrimination.[53] Thus, we have Article 46, a 'Directive Principle of State Policy', which states that 'The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.'[54] The implementation of this article has mainly been in the form of preferences in public sector jobs, educational institutions, in the electoral sphere, as well as special provisions in various development expenditures.[55] This is also the article which has inspired the 103rd Constitutional Amendment.[56]

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[49] H. S. Saksena, *Safeguards for Scheduled Castes and Tribes*: *Founding Fathers' Views*: *An Exploration of the Constituent Assembly Debates* (Uppal Publishing House, 1981).

[50] The Constitution of India, art. 14.

[51] *Id.,* art. 15.

[52] *Id.,* art. 16.

[53] *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310.

[54] *Supra* note 50, art. 46.

[55] C. Basavaraju, "Reservation under the Constitution of India: Issues and Perspectives" 51 *Journal of the Indian Law Institute* 267-272 (2009).

[56] *Supra* note 2.

In order to understand how the judiciary has looked to balance between equality in fact and equality in law, it is important to review how the court has interpreted the provision for reservations and the justification for the same.

III. TRACING THE HISTORY OF CASES ON RESERVATION WITH SPECIFIC REFERENCE TO NON-ECONOMIC CRITERIA

A. Initial Considerations of Caste as a Criterion for Reservations and Imposing an Upper Limit on Quantum of Reservations

For the purpose of our current discussion, it would be appropriate to start by looking at two cases. These are *State of Madras* v. *Srimathi Champakam Dorairajan* ('*Champakam Dorairajan* case')[57] and *Venkatraman* v. *State of Madras*.[58] Here, the Supreme Court ('SC') held that any legal intervention which grants reservations on the basis of caste goes against the Constitution. Subsequently, the First Constitutional Amendment Act, 1951 inserted clause (4) in Article 15, which states that: 'Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'[59] Interestingly, the First Constitutional Amendment was passed on 18 June 1951,[60] while the first general elections were held in October 1951, so this amendment was introduced by the same people who drafted the Constitution. The next issue which came up, was that of having an upper limit for reservations. In the case of *M.R. Balaji* v. *State of Mysore ('Balaji* case'),[61] where the state had reserved 68% seats in engineering and medical colleges, the court held that reservation of 68% is inconsistent with Article 15 (4) and gave a broad opinion that any special provision for reservations should be less than 50%.[62] Further, in *T. Devadasan* v. *Union of India,*[63] the Government of India introduced the carry forward rule, which provided for carrying forward of unfulfilled quota to the next two years. This was invalidated based on the *Balaji* case, because the total reservation for a specific year was coming up to 64%. Moreover, in *State of Kerala* v. *N.M Thomas* ('*N.M Thomas* case'),[64] due to an exemption given to Scheduled Caste and Scheduled Tribe candidates from passing a departmental test for promotion, in a particular year, around

[57] (1951) AIR SC 226.
[58] (1966) SCR (2) 229.
[59] *Supra* note 54, art. 15, cl. 4.
[60] *Supra* note 32.
[61] (1962) SCR Supl. (1) 439.
[62] *Id.* at para. 135.
[63] AIR 1964 SC 179.
[64] *Supra* note 53.

68% of the posts had gone to candidates belonging to these categories. The court held that the state could make reservations to any extent in order to provide representation to backward communities in higher education as well as public employment. Finally, in the *Mandal Commission case,*[65] the SC clarified that barring any extraordinary circumstances, reservation should not exceed 50%. This was further expanded by the SC through its order passed in 2010, which allowed states to exceed the 50% limit for reservation, provided they had solid scientific data to justify the increase.[66] For instance, a legislation was passed in Maharashtra to provide 16% reservation to the Maratha community.[67] While the Bombay High Court held that the quantum of reservation was not justifiable, the provision for reservation itself was upheld.[68] The State depended on the data provided by the Gaikwad Commission, which showed (a) Gradual deterioration in educational and social backwardness of Marathas; (b)Deterioration in income as well as the desperation of families to survive; (c) Substantial backlog in services under the State; (d) Increase in the number of suicides as a result of form indebtedness and shift to manual labour; (e) Inability to raise the standard of living as a result of adverse conditions.[69] Another issue, from the wide bouquet of issues related to reservation was about determining socially and educationally backward classes, since Article 15(4) does not define backward classes, and various indicators have been applied by the SC and multiple commissions, without reaching a consensus.[70]

B. Looking at Appropriateness of Using Caste as a Sole Criterion for Reservations

In an overview of the judicial history of affirmative action in the India Law Journal,[71] Rashmin Khandekar and Sunny Shah point out that in the *Balaji* case, it was acknowledged that caste may be a pertinent element in the process of determining backward class, but it can't be the sole or foremost criterion for the same.[72] Since the order of reservation in the case was based only on caste, and no other elements, it was declared bad law.[73] In another case, *Janki Prasad Parimoo* v. *State of Jammu and Kashmir,*[74] it was held that

[65] *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477.

[66] *Voice Council* v. *State of Tamil Nadu*, (2010) 15 SCC 403.

[67] Maharashtra State Reservation (of seats for admission in educational institutions in the State and for appointments in the public services and posts under the State) for Socially and Educationally Backward Classes (SEBC) Act, 2018 (Maharashtra Act 62 of 2018).

[68] (2019) 4 Bom CR 481.

[69] *Id.* at para. 16.

[70] Nirupama Pillai, "Who Are the Other Backward Classes?" 19 *Student Bar Review* 31–49 (2007).

[71] Rashmin Khandekar and Sunny Shah, "The History, Rationale and Critical Analysis of Reservations under the Constitution of India" *India Law Journal*, *available at*: https://www.indialawjournal.org/archives/volume3/issue_2/article_by_rushminsunny.html (last visited on Apr. 12, 2019).

[72] *Id.* at para. 12.

[73] *Ibid.*

[74] (1973) SCR (3) 236.

economic destitution, by itself can't be used as a determinant of backwardness, because with this definition, a major component of the Indian population would be covered and the objective of providing reservations for historical social injustice would be defeated. In *Chitralekha* v. *State of Mysore,*[75] an order saying that a family whose income was less than Rs. 1,200 per year and followed such occupation as agriculture, petty business, inferior services, crafts, etc. would be treated as backward, was declared valid though caste as a criterion was totally ignored for the purpose.[76] It was held that identification of backward classes on the basis of occupation-cum-income, without reference to caste is not bad and would not offend Article 15(4).[77]

In *P. Ranjedran* v. *State of Madras,*[78] while the court reaffirmed that 'caste' cannot be the sole criterion, it also conceded that caste itself represents a specific class of citizens and if the class itself is socially and educationally backward, reservation can be made in their favor.[79] Carrying forward this interpretation, in *S.V. Balaram* v. *State of Andhra Pradesh,*[80] a list of backward class based solely on caste with material proving that those castes were socially and educationally backward, was held to be valid.[81] 'This material supporting the argument is an important factor, because in *State of Andhra Pradesh* v. *P. Sagar,*[82] a list of backward class based solely on caste without any material showing that the entire caste is backward, was quashed as violative of Article 15(4).[83] Interestingly, especially for this paper:

> In *K.S. Jayasree* v. *State of Kerala,*[84] a person belonging to the backward class but family income exceeding Rs. 10000, was denied the benefit of reservation as it was held that caste could not be treated as the sole or dominant test for the purpose and poverty too had to be taken into account.[85]

It was held that neither poverty nor caste can be the sole factor for determining backwardness. Caste and poverty had to be operational in association, to be applicable aspects for determining backwardness.

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[75] (1964) SCR (6) 368.
[76] *Supra* note 71 at para. 12.
[77] *Ibid.*
[78] (1968) SCR (2) 786, para. 7.
[79] *Supra* note 71 at para. 13.
[80] (1972) SCR (3) 247.
[81] *Supra* note 71 at para. 14.
[82] (1968) SCR (3) 565.
[83] *Supra* note 79.
[84] (1977) SCR (1) 194.
[85] *Supra* note 79.

C. Recognizing the Importance of Caste in Defining Backwardness and Demands for Representation

An important statement which reflected the intent and design behind the scheme for reservations based on caste was made by Justice O Chinappa Reddy in *K.C. Vasanth Kumar* v. *State of Karnataka*.[86] He stated:

> Ours is a country of great economic, social and cultural diversity. Often, we take great pride in the country's cultural diversity. While cultural diversity adds to the splendor of India, the others add to our sorrow and shame. The social and economic disparities are indeed despairingly vast. The Scheduled Castes, the Scheduled Tribes and the other socially and educationally backward classes, all of whom have been compendiously described as 'the weaker sections of the people' have long journeys to make society. They need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right and not of philanthropy. They ask for parity, and not charity. The days of Dronacharya and Ekalavya are over. They claim their constitutional right to equality of status and of opportunity and economic and social justice. Several bridges have to be erected so that they may cross the Rubicon. Professional education and employment under the State are thought to be two such bridges. Hence the special provision for advancement and for reservation under Arts. 15(4) and 16(4) of the Constitution.

Further, in *Jagdish Negi* v. *State of Uttar Pradesh,*[87] the court clarified that no one grouping can be perpetually categorized as socially and educationally backward and the state is permitted to review the position at regular intervals.[88] In *Indra Sawhney* v. *Union of India,* ('*Indra Sawhney* case')[89] it was observed that the provisions for reservation have to function on a yearly basis and cannot be carried on for perpetuity. It also held that Article 15(4) does not mean percentage of reservation should be in proportion to the percentage of population of the backward classes to the total population and it was left to the State's prudence to keep reservations at a manageable level by considering all genuine claims and pertinent factors.[90]

> In *Ashoka Kumar Thakur* v. *Union of India*,[91] Justice Balakrishnan, CJ, did not lay down any new principle for determination of backward classes, but followed the principle as was laid down in earlier judgments. The question dealt was whether the list formulated by the National Commission for the Backward Classes and the

[86] (1985) SCR Supl. (1) 352, para. 33.
[87] (1997) AIR SC 3505, para. 9.
[88] *Supra* note 81.
[89] *Supra* note 65.
[90] *Id.* at 466.
[91] *Supra* note 22.

> State Commission of Backward Classes has considered all relevant factors and criteria apart from caste for determination of backwardness.[92]

On the basis of the above discussion and other judicial developments in India's constitutional history, one can see that the judiciary has had an evolving outlook when it comes to the question of reservations.[93] Initially, in the judgments from the *Champakam Dorairajan* case to the *N.M. Thomas* case, it can be seen that the judges have affirmed that the 'conception of equality given in the Constitution does not take into account factors like caste, race, sex, religion etc. in the distributive justice component of the constitution.'[94] Articles 16(4) and – after the *Champakam Dorairajan* case, 15(4) – were constitutionally mandated exceptions to the rule and, as such, were to be construed narrowly, being departures from the norm. This is reflected in the *Balaji* case, where a 50% cap on reservations was imposed.[95]

The Court deviated from this position, starting with the *N.M. Thomas* case.[96] In this case, the 'court acknowledged the importance of taking caste alignment into consideration to achieve "equality in fact".'[97] It recognized that these groups have historically suffered from sustained and structural discrimination. In holding that Article 16(4) is not an exception to, but a facet of Article 16(1), the Court effectively held that '16(1) itself – and thus, the equality code as a whole –is beholden to this position.'[98]

However, post the *Indra Sawhney* case, the situation has become slightly Daedalean, with the court looking to find a middle ground between 'equality in law' and 'equality in fact', as defined in the Stanford Encyclopedia of Philosophy.[99] Even the *N.M. Thomas* case sees the court pointing out how reservations can't happen at the cost of administrative efficiency.[100] Now, the court's position is that both Article 16(1), which characterizes 'formal equality' and Article 16(4), which characterizes 'substantive equality' are independent assurances of equality which have to be balanced. So, Article 16(4) was no longer an exception to Article 16(1), but neither was Article 16(1) just a more abstract way of expressing Article 16(4) – rather, both constituted different elements of equality, as envisaged by the Constitution.[101]

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[92] *Supra* note 81.

[93] *Supra* note 18.

[94] *Id.* at para. 1.

[95] *Ibid.*

[96] *Supra* note 53.

[97] *Id.* at 96.

[98] Mahendra P. Singh, "Are Articles 15(4) and 16(4) Fundamental Right?" *EBC India,* 1994, *available at*: http://www.ebc-india.com/lawyer/articles/94v3a2.htm (last visited on Aug. 12, 2018).

[99] Gosepath, Stefan, "Equality", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2011) *available at*: https://plato.stanford.edu/archives/spr2011/entries/equality/ (last visited on Mar. 14 2019).

[100] *Supra* note 53 at para. 11.

[101] *Supra* note 18 at para. 3.

An important consequence of the court looking to maintain a balance with the two visions of equality, in an attempt to reconcile them, rather than letting them remain in conflict is the effect it has had on legislation. Parliament has been given more freedom in amending the Constitution, as well as constructing different schemes of reservations, which have been validated by the amendments.[102] One can see this in action with the addition of Articles 16(4A), 16(4B)[103] and 15(5).[104] Another important aspect of some of these amendments has been that they have helped to surmount unfavorable court decisions.[105] For example, in terms of Other Backward Class ('OBC') reservations, the Parliament has given constitutional legitimacy to the carry-forward rule, the catch-up rule and educational reservations for OBCs.[106] One can argue that nudged by the courts, parliament is moving towards empowering identified groups, thus moving away from the idea of individual formal equality. As discussed earlier, post the *Indra Sawhney* case, the Court has confirmed that the Constitution is committed to both visions.

IV. LOOKING AT ECONOMIC STATUS AS CRITERIA FOR RESERVATION

The author has briefly discussed above how the question for economic status as criteria for reservation was debated when the Constitution was being drafted. Now it is imperative to look at how the courts have dealt with it. The question of the relevance of economic criteria to determine 'socially and educationally backward classes' is one which Indian courts have investigated oftentimes. The first instance of this is perhaps the case of *Kumari Jayasree* v. *State of Kerala*.[107] Here, the SC looked at a decree that only those applicants belonging to the Ezhava class who were members of families whose aggregate annual income was below Rs. 10,000 would be entitled to admission to the seats reserved for students belonging to the socially and educationally backward Ezvaha class. This was done through an order of the Kerala government. The petitioner was denied admission since she wasn't qualifying through the income criteria, and this gave birth to the petition. It's important to note that the provision here seeks to create a class within caste, and not a class independent of caste. Getting back to the case, the petitioner argued that exclusion

[102] *Id.* at para. 5.

[103] Arpita Sarkar, "Judicial Review of Reservation in Promotion: A Fading Promise of Equality in Services Guaranteed by the Indian Constitution" 11 *NUJS Law Review* 11 (2018).

[104] Sujit Choudhry, Madhav Khosla, *et. al.* (eds.), *The Oxford Handbook of the Indian Constitution* 998, 1257 (OUP 2016).

[105]Faizan Mustafa, "Questions of Promotions" *The Hindu*, June 9, 2018, *available at*: https://www.thehindu.com/opinion/op-ed/questions-of-promotion/article24116633.ece (last visited on June 28, 2020).

[106] *Supra* note 104 at 1001-1009.

[107] (1976) AIR SC 2381.

of the creamy layer based on income level was invalid and that income could not be the criteria of admission to determine the benefit under Article 15(4).

This argument was invalidated by the SC. The Court unimpeachably declared that classification as per economic criteria was valid,[108] and highlighted economic backwardness as the starting point on the journey to social and educational backwardness. Importantly, it also noted that both caste and economic criteria will be individually invalid as a factor for classification, however, applying them in conjunction would grant them validity, if they are operating together.[109] As the law marched on, the proposition that economic criteria alone could not be the sole criterion to determine backwardness was established in *Janki Prasad* v. *State of Jammu and Kashmir*.[110] The Court observed that the majority of India's population was poor, with poverty being more acute and absolute in rural areas.[111] Keeping this in mind, reservations only on the basis of economic situation would lead to a capricious situation. This was because even amongst communities which were well up on the social ladder in terms of social, cultural and political advancement, there were people who were living in poverty. It is proposed that the Court may have been concerned that these individuals would get a disproportionate benefit from reservations due to the social capital they had accrued as a result of belonging to dominant communities. This point was reiterated by the Indian courts and emphasis was laid on the fact that a number of factors including caste, occupation as well as poverty need to be taken into account. In *Miss Laila Chacko* v. *State of Kerala,*[112] it was claimed that since income alone was the primary means of granting reservation, it should be applied across all communities. The High Court rejected this argument as the reservation was provided not solely on income but also taking into account the above mentioned factors.[113]

A radical departure from this narrative[114] can be seen in *K.C. Vasanth Kumar* v. *State of Karnataka*.[115] In this judgment, Justice Desai took a seminal view that economic condition can be the only criteria for determining social backwardness. He asserted that economic criteria were more accurate, scientific and measurable criteria to determine socially and educationally backward classes, as compared to caste. This contention is also unique because it places economic criteria as the primary consideration. Justice Desai, in fact saw the usage of economic criteria for reservations as a tool for the annihilation of the caste

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[108] *Id.* at 22.

[109] *Ibid.*

[110] (1973) 1 SCC 420.

[111] *Id.* at para. 24.

[112] (1967) AIR Ker 124.

[113] *Id.* at 6.

[114] K. Ashok Vardhan Shetty, "Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny?" *The Hindu Centre, Mar. 6,* 2019, *available at*: https://www.thehinducentre.com/the-arena/article26436402.ece (last visited on Aug. 11, 2019).

[115] *Supra* note 86.

system.[116] In the same case, Justice Reddy gave great importance to the economic criteria as well. Analyzing 'backwardness' using Max Weber's theory,[117] he observed that from the angle of class, status and power, poverty was one of the prime cause of problems.[118] The researcher would respectfully contend that this is a flawed analysis, since Weber's theory is focused on class, not caste, which are clearly established as separate concepts.[119] However, Justice Reddy differed from Justice Desai, wherein he did not neglect caste as a criterion for deciding backwardness. His position has some similarities to the position generally taken by the court on this issue, where it has been acknowledged that more than one factor needs to be taken into consideration while discussing backwardness. Poverty, caste, occupation and habitation were considered by him to be the primary factors that ought to be considered in order to classify a class as backward.[120]

Following this, High Courts have declared a system of reservation for economically backward classes of citizens as unconstitutional.[121] However, broadly one can see that with respect to the usage of economic criteria, the position of the law is similar to that of caste as a criterion for reservation. It can be one of the criteria to determine backwardness, but not the only one. This was clarified in the *Indra Sawhney* case.[122] Here, reservation of 10% of the posts in favor of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations', was held to not be under the umbrella of Article 16(4), and hence averse to Article 16(1). In this case, Justice Sawant expressed the same concern which has been earlier pointed out in *Janki Prasad* v. *State of Jammu and Kashmir*,[123] that if economic condition was the sole criterion, majority of the seats would be taken by sections of the poor that are social and educationally advanced.

However, this should not be seen as a comment on the value of economic criteria as a consideration for determining backwardness. As considered in *Rajesh Aggarwal* v. *Maharishi Dayanand University*,[124] the means test is a valid test and when a challenge was made to a classification based on social, educational and economic backwardness, it was quashed on the ground that the additional requirement of economic backwardness only

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[116] *Ibid*.

[117]Kim, Sung Ho, "Max Weber", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2017) *available at*: https://plato.stanford.edu/archives/win2017/entries/weber/. (last visited on July 8, 2019).

[118] *Supra* note 86 at 39.

[119] Nirmal Kumar Bose, "Class and Caste" 17 *Economic and Political Weekly* 1337-1339 (1965).

[120] *Ibid.*

[121] *Asha D. Bhatt* v. *Director of Primary Education and Ors.* (2003) AIR Guj 197; *Dayaram Khemkaran Verma* v. *State of Gujarat and Ors.* 2016 SCC OnLine Guj 1821, para. 28; *Tanmoy Nath* v. *State of Tripura*, 2014 (3) GLT 35 para. 75.

[122] *Supra* note 65 at 115.

[123] *Supra* note 83.

[124] AIR 1985 P&H 206.

restricted the Article 15(4) exception to a smaller class within the socially and educationally backward class and the state had the discretion to do so.[125]

After the VP Singh Government had announced the implementation of the Mandal Commission report, it issued an office memorandum for 27% OBC reservation.[126] This memorandum was amended by the P.V. Narasimha Rao Government to reserve 10% seats in Central Government jobs for 'other economically backward sections of the people who are not covered by any of the existing schemes of reservation'. The language used makes it clear that this reservation was available only for those who were not already covered by reservation provisions, mainly the economically backward sections amongst upper castes. This is similar to the language of the 103rd Amendment, which also seeks to provide reservations to economically backward sections amongst those not covered by current provisions for reservation. Criteria for determining these other sections were to be issued separately, according to the memorandum. The memorandum was challenged in writ petitions before the SC in the period between 1990 and 1991, which led to the judgment in the *Indra Sawhney* case, discussed above. The court affirmed that social backwardness leads to educational and economic backwardness,[127] as the Mandal Commission had found. Accordingly, the SC struck down the 10% reservation for 'economically backward sections,' for being incompatible with the Constitution.

It is important to understand that economic criteria for reservations has already been successfully legislated in the law relating to the right to education. The provisions of the Right to Education Act, 2009 ('RTE Act') provide for 25% reservation in both government and private schools for children from economically disadvantaged families living in the vicinity.[128] However, a closer reading of this provision reveals that the 'weaker section or disadvantaged group' in the RTE Act is quite different from 'economically weaker sections' ('EWS') in the 103rd Amendment. In fact, it could be contended that the definition given under the RTE Act is the broad and comprehensive definition which currently exists in India's legal system with reference to defining the weaker sections of society. It defines disadvantaged group as 'Scheduled Caste, Scheduled Tribe, socially and educationally backward class or group having disadvantage owing to social, cultural, economic, geographical, linguistic, gender or such other fact as may be specified by appropriate Government.'[129] However, there is a separate category classified as 'Weaker section' mentioned in the law. 'Weaker section' is defined as 'a child belonging to such

[125] *Ibid.*

[126] Ministry of Personnel, Public Grievances & Pensions, "Reservation for Other Backward Classes in Civil Posts and Services under the Government of India", No. 36012/22/93-Estt. (SCT), Sept. 8, 1993, *available at*: http://www.bcmbcmw.tn.gov.in/obc/download.pdf (last visited on June 28, 2020).

[127] *Supra* note 65 at 85.

[128] The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

[129] *Id.,* s. 2(d).

parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government.'[130]

Evidently, the RTE Act creates two different categories:[131] 'disadvantaged groups' and 'weaker sections', with the latter referring to an individual who is below a certain income threshold, with no reference to caste, religion or any other social indicator. More importantly, different state governments are allowed to fix various cut off figures for this. This is an important distinction from the 103rd Amendment because it allows varying conditions existing in different states to be accounted for. In any case, no state has a cut-off close to the Rs. 8 Lakh suggested for the new quotas.[132]

The RTE Act consolidates two very different principles of group and individual entitlement as applicable to two different categories of beneficiaries within the same law.[133] An argument could be made that this is what the government is seeking to do with the 103rd Amendment, creating two different groupings of beneficiaries within the same reservation system.

V. CONCLUSION

It will be intriguing to see how the SC deals with the issue of EWS quota. The Amendment was challenged in *Youth for Equality* v. *Union of India*,[134] and the SC has currently reserved its order in the case. The amendment does not specify whether the quota will be horizontal or vertical. The distinction between both was clarified in the *Indra Sawhney* case:

> A horizontal reservation is a "minimum guarantee", which only binds when there are not enough EWS applicants who receive a position on the basis of their merit score alone; if so, the bottom-ranked general category selections are knocked out by the top-ranked unselected EWS candidates. This application will not really make any difference to the prevailing situation since a majority of applicants would be expected to qualify under the EWS quota. A vertical reservation, on the other hand, is an "over and beyond" reservation. This means that if an applicant obtains a position on the basis of his or her merit score without the benefit of the reservation, it does not reduce the number of reserved positions.[135]

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[130] *Id.,* s.2(e).

[131] Partha Chatterjee, "The 10% Reservation Is a Cynical Fraud on the Constitution" *The Wire*, Jan. 18, 2019, *available at*: https://thewire.in/government/the-10-reservation-is-a-cynical-fraud-on-the-constitution (last visited on Aug. 16, 2019).

[132] *Supra* note 27.

[133] *Ibid.*

[134] WP (C) 73/2019.

[135] Parag A. Pathak & Tayfun Sönmez, "Implementation issues in 10% reservation" *The Hindu*, May 15, 2019, *available at*:
https://www.thehindu.com/opinion/op-ed/implementation-issues-in-10-reservation/article27130396.ece (last visited on Aug. 15, 2019).

Some states have been applying this quota horizontally. It will be useful to clarify this issue.

As discussed earlier, the only preceding reference point of the EWS quota is the memorandum issued by the P.V. Narasimha Rao Government. Of course, there is a wide difference in terms of issuing authority for both, while the earlier provision was issued by the executive, the current provision follows a constitutional amendment which allows the government to do what was struck down in the *Indra Sawhney* case. It's important to note that after the *Kesavananda Bharati* case,[136] constitutional amendments can only be struck down if they violate the basic structure. However, since the basic structure doctrine has never been clarified in detail, we can't be sure about how the Court will apply it here or if the Court considers any aspect of the judgment in the *Indra Sawhney* case to be part of the basic structure.

As studied earlier in this article, a reasonably coherent doctrine of cumulative rights of communities that have been the victims of historical, as well as continuing discrimination is now entrenched within the Constitution of India. The judiciary, through various decisions has endorsed the conception that reservations in spheres of public influence, like jobs and education are valid for communities that have suffered from social discrimination, as long as it does not exceed 50%, though, as mentioned earlier, the SC has diluted this provision and has allowed reservations to exceed 50% in case it can be convinced of a scientific, data backed argument for the same.[137]

The main issue with the 103rd Amendment is that it is looking to insert an idea of formal equality within a constitutional provision, which has already been confirmed to be designed to provide collective benefits to groups.

One of the most important consequences of the EWS quota is that the 50% limit levied by the courts will be explicitly breached by a constitutional provision. This will give strength to the demand for quotas by socially forward castes, like Jats, Patidars and Marathas, encouraging their claim to community reservation purely on economic grounds.

A very significant consequence of breaching the 50% limit, on the grounds of economic criteria will be that it changes the whole structural narrative based on which reservations in India have been based. The foundation for reservation will no longer be providing social justice to a minority group which has experienced structural historic discrimination, as was initially envisaged by Dr. Ambedkar. Instead, reservation becomes a policy tool to ameliorate the economic destitution of a major component of the population. In fact, the principle of individual entitlement could then be wielded to altogether dismantle caste reservation and institute a universal rule of individual

[136] *Kesavananda Bharati* v. *State of Kerala*, (1973) AIR SC 1461.
[137] *Supra* note 66.

verification of economic status.[138] This could be the beginning of a move away from group entitlements, and could take us back to the 1950s era of looking at equality. It will definitely be a fascinating progression for a student of law and social policy to track. It would also confirm that we are now moving to a stage of constitutional jurisprudence where the Parliament is explicitly going against the original intention of the drafters of the Constitution. Although reservations were originally intended to make reparation for centuries of oppression, but with the 103rd Amendment, we are looking at a scenario where reservations may be used to benefit the oppressors, whose original actions the policy was intended to redress.

As examined throughout the article, there is precedent, as well as persuasive legal and constitutional arguments which would act against reservation based on economic criteria. The fact that this is being done by a constitutional amendment makes it slightly more interesting. This is because the only way to strike it down is to hold it as being violative of basic structure. But what is the basic structure? Some elements have been recognized over the years, like judicial review, secularism, writ jurisdiction of the courts, federalism and some others. However, the doctrine's evolution has not been advanced enough for it to be defined explicitly in terms of a structure, constituent elements and extent. If economic reservation can be shown to be incorporated as a part of equality, as understood in our Constitution, it will be difficult to strike it down only on the basis that it is a deviation from how equality and social justice has been defined in the Constitution till now. If it is struck down on this basis, then it would show that the concept of looking at group entitlements for defining social justice and equality is now included as a part of the basic structure of the Constitution.

The reason it's difficult to make a prediction on how the Court will view the amendment is that the doctrine of basic structure has always been articulated by the SC as a dynamic concept. This is even more pronounced when one looks at this with reference to reservations. The definition of the basic elements of equality have always been slightly ambiguous throughout the court's intervention, as it has sought to find space for differing narratives. The apex court has always delineated the definition based on the needs of both, the society as well as the body politic. This Amendment and the judicial response to it has the potential to substantially alter the jurisprudence around affirmative action, social justice and equality in India.

[138] *Ibid.*

DUTY TO RESPECT THE NATIONAL FLAG AND THE NATIONAL ANTHEM VERSUS USING THEM AS SYMBOLS OF PROTEST

Merrin Muhammed Ashraf[*]

The national flag and the national anthem occupy a special seat of honour in every country and are ubiquitously used by people to express love and respect for their country. However, there have also been many instances of citizens using national symbols to protest government actions and policies, sometimes even by physically desecrating them. Article 51A(a) of the Indian Constitution places a Fundamental Duty on its citizens to respect the National Flag and the National Anthem. At the same time, Article 19(1)(a) guarantees to every citizen the fundamental right to free speech and expression. The question then arises whether protests using national symbols are a form of protected speech under the Constitution, and if yes, whether Article 51A (a) can place restriction on the same. Drawing from the US case laws, the article argues for recognizing protests using national flag and anthem as symbolic speech protected under Article 19(1)(a). The article further argues that the only restrictions that should be placed on such symbolic speech are those that are enumerated in Article 19(2). Fundamental duties cannot create additional grounds of restriction. Finally, the article calls for placing more emphasis on fostering respect for the ideals and values that our national symbols stand for instead of compelling obeisance to the symbols per se.

I. INTRODUCTION

Every nation holds dear certain symbols that embody the values, ideals, and aspirations that it stands for and believes in by condensing 'the history, knowledge and memories associated with one's nation.'[1] These symbols may be a building or structure which has historical and political significance or a piece of clothing with distinct colours and pattern, called the flag, or it may even be a song which stirs the patriotic feeling in the hearts of people, often called the national anthem. History shows us that national symbols have

* The author is a fourth-year B.A. LL.B. (Hons.) student at the National University of Advanced Legal Studies, Kochi.

[1] David A. Butz, "National Symbols as Agents of Psychological and Social Change" 30 (5) *Political Psychology* 779, 780 (2009).

been a great unifying force and have helped to instill patriotism and a sense of pride in their countrymen. For instance, the Great Wall of China built during the Qin dynasty, when the country was unified, represents a symbol of unity for the people of China.[2] The National Flag of South Africa, which features a side-wise 'V' that flows into a single horizontal band, is seen as a crucial symbol for the movement toward unity in a country that was torn by racial divide for so long.[3] The tricolor flag of India became a symbol of resistance to colonialism during the independence movement.[4] Among all these symbols, the national flag and the national anthem occupy a special seat of honour in every country and are ubiquitously used by people to express love and respect for their country. Countries have enacted laws to preserve the integrity of these symbols and to prevent any form of disrespect towards them.

However, throughout the course of history, one can find many instances when national flag and anthem have been used to express not pride in one's nation but displeasure at the nation's failure to live up to the ideals that they stand for. In 2016, when San Francisco 49ers quarterback, Colin Kaepernick, refused to stand during the playing of the national anthem at a football match as a protest against the discriminatory treatment meted out to African-Americans and other minorities,[5] it kick-started a fierce public debate about whether his action was anti-national and unpatriotic or whether it was a legitimate expression of criticism against the government's actions. In India, the recent protests against the Citizenship Amendment Act (CAA) saw the protestors waving the national flag, singing the national anthem and reading out the Preamble of the Constitution in public to register their opposition to the government's move.[6] By invoking national symbols in their protest, the protestors were trying to resist the attempt by the ruling regime to characterize them as anti-nationals.[7] By placing the anti-CAA protests as a background, this article seeks to examine the debate that followed the Colin Kaepernick incident in the United States (US) in an Indian setting i.e. whether protests using national symbols would qualify as a protected form of speech under Article 19(1)(a) of the

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[2] "The Importance of National Symbols to National Identity", *available at*: https://edwardscbhs.webs.com/National%20symbols%20are%20very%20important%20to%20national%20identity.pdf (last visited on May 20, 2020).

[3] "The National Flag" *South African History Online, available at*: https://www.sahistory.org.za/article/national-flag (last visited on May 20, 2020).

[4] Srirupa Roy, "A Symbol of Freedom: The Indian Flag and the Transformations of Nationalism, 1906-2002" 65(3) *The Journal of Asian Studies*, 495, 508 (2006).

[5] "Colin Kaepernick Protests Anthem over Treatment of Minorities" *ESPN.com News Services,* Aug. 27, 2016, *available at*: https://theundefeated.com/features/colin-kaepernick-protests-anthem-over-treatment-of-minorities/ (last visited on Jan. 25, 2020).

[6] Sushant Singh, "With a flag, song and book: Reclaiming national symbols is an act of political genius and imagination" *The Indian Express,* Jan. 24, 2020, *available at*: https://indianexpress.com/article/opinion/columns/shaheen-bagh-caa-protests-nrc-muslims-national-anthem-with-a-flag-song-and-book-6232185/ (last visited on May 20, 2020).

[7] Prerna Singh, "In India, protesters are singing the national anthem and waving the flag. Here's why that matters" *The Washington Post*, Jan. 20, 2020, *available at*: https://www.washingtonpost.com/politics/2020/01/20/india-protesters-are-singing-national-anthem-waving-flag-heres-why-that-matters/ (last visited on May 20, 2020).

Constitution. In India, this debate would be further fueled by the existence of Fundamental Duty in the Constitution to respect the National Flag and National Anthem.[8]

It all then boils down to the following questions: Whether the use of national symbols as a sign of protest is protected by the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. If yes, would its excision be in conflict with the fundamental duty to respect national symbols? In case of a possible conflict between the two, which should prevail – fundamental right or fundamental duty? It is these questions that the author seeks to address in this article.

II. USING NATIONAL FLAG AND NATIONAL ANTHEM AS SYMBOLS OF PROTEST - A CASE FOR PROTECTION OF SYMBOLIC SPEECH

From a very long time, national symbols, especially the national flag, have been used by citizens to register their protest against government actions. Flag protest in US against the Vietnam War in the 1960s involved the radical act of burning the national flag.[9] Several such instances of disrespect shown to and even desecration of national symbols by the citizens can be cited from the recent past, with Colin Kaepernick refusing to stand up during the singing of national anthem being one. The flag of China was trampled upon and thrown into the river by the Hong Kong protestors during a pro-democracy campaign against the Chinese Government.[10]

In India, even before the anti-CAA protests, national symbols have been used by people to express their disapprobation of government actions. In 2016, protests demanding the release of Kanhaiya Kumar, a student union leader arrested on charge of sedition, saw the waving of national flag by the demonstrators.[11] In September 12, a political cartoonist Aseem Trivedi was booked for sedition as well as under Section 2 of the Prevention of Insults to National Honour Act, 1971 upon a complaint that his cartoon mocked the Constitution and the national emblem.[12] Trivedi's cartoon, that highlighted

[8] The Constitution of India, art. 51A (a).

[9] Jonathan Jones, "Blaze of Glory: the grand tradition of burning the American flag" *The Guardian,* Nov. 30, 2016, *available at*: https://www.theguardian.com/world/2016/nov/30/blaze-of-glory-the-grand-tradition-of-burning-the-american-flag (last visited on Mar. 5, 2020).

[10] "Hong Kong protests: China flag desecrated as fresh unrest erupts" *BBC*, Sept. 22, 2019, *available at*: https://www.bbc.com/news/world-asia-china-49787134 (last visited on Jan. 25, 2020).

[11] "Stifling Dissent, The Criminalization of Peaceful Expression in India" *Human Rights Watch,* May 24, 2016, *available at*: https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india (last visited on May 22, 2020).

[12] "India: Drop Sedition Charges Against Cartoonist" *Human Rights Watch,* Oct. 12, 2012, *available at*: https://www.hrw.org/news/2012/10/12/india-drop-sedition-charges-against-cartoonist.

the issue of political corruption, portrayed the national emblem with blood-thirsty wolves instead of lions along with the words 'Corruption alone triumphs'.[13]

While protests using national symbols have many a time resulted in those taking part being booked under flag desecration statutes and other allied laws and being called unpatriotic and anti-nationalists,[14] they justify their use of national symbols as being in exercise of their freedom of speech and expression. Therefore, the question examined in this section is whether the constitutionally guaranteed freedom of speech and expression extends to using national flag and national anthem as a means to communicate disapprobation or disapproval of the State actions.

The US had been confronted and dealt with this question long ago. This is least surprising, given that the country has witnessed several instances of contemptuous treatment of national symbols during protests. In response to these incidents, several US states enacted flag desecration statutes to punish those who resort to physical acts of flag desecration.[15] Many a times, the US courts have been called upon to judge the constitutionality of these statutes on the touchstone of First Amendment free speech right.

One of the earliest cases in this regard is *Street* v. *New York,*[16] wherein the defendant was convicted under a New York statute for burning the American flag and uttering contemptuous words about the flag as protest against the shooting of a civil rights leader. The court set aside the conviction and observed that the First Amendment: 'encompasses the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.'[17] However, it is important to note that even though the case involved flag burning, the court limited its focus to the statute's proscription of 'words' that bring the national flag to contempt. This was despite the statute penalizing even 'conduct' that has the same effect. Therefore, in the *Street case,* the US courts missed an early opportunity to deliberate upon First Amendment protection to 'conduct' like burning of the Flag.

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[13] *Ibid.*

[14] *Ibid.* Also, see Albert M. Rosenblatt, "Flag Desecration Statute: History and Analysis" (1972) 2 *Washington University Law Review* 193, 193-194 (1972); Sum Lok-kei, "Chinese state media condemns Hong Kong protesters who desecrate national flag, calling it blasphemy" *South China Moring Post*, Sept. 23, 2019 *available at*: https://www.scmp.com/news/hong-kong/politics/article/3029946/chinese-state-media-condemns-hong-kong-protesters-who (last visited on May 20, 2020);

[15] "State Flag Protection Laws" *Freedom Forum Institute, available at*: https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/flag-burning-overview/state-flag-protection-laws/ (last visited on May 20, 2020).
California, Arizona, Delaware, Illinois, Maryland, New York, Texas, Washington are examples of US states that enacted legal provisions penalizing acts like mutilating, defacing, burning or trampling upon the U.S. flag or respective state flag. A number of US States adopted the Uniform Flag Law that was approved in 1917 by the National Conference of Commissioners on Uniform State Laws.

[16] 394 U.S. 576, 578-79 (1969).

[17] *Id.* at 593.

It was in the leading case of *United States* v. *O'Brien,*[18] that the US Supreme Court for the first time acknowledged that First Amendment protects not only pure speech but also certain forms of conduct which has a communicative impact. This case concerned burning of a draft card in protest against the Vietnam War. The court termed conduct such as this to be a 'symbolic speech'[19] and held that it was entitled to First Amendment protection.[20] Later, in *Spence* v. *Washington,*[21] the court was concerned with the conduct of the defendant that involved attaching peace symbol to either side of the flag using tapes and then hanging the flag upside down from his apartment window in protest against Cambodia invasion and killings at the State University. He was convicted under a Washington statute which prohibited alteration and disfigurement of the Flag. The court ruled that the defendant's conduct amounted to symbolic speech entitled to First Amendment Protection as he intended to communicate a particular message by his act and the circumstances in which the act was done was such that those who viewed the act will understand the message.

The discourse on symbolic speech perhaps reached its zenith when the US Supreme Court in *Texas* v. *Johnson*[22] held that the act of burning the national flag amounted to a symbolic speech and was protected under the First Amendment. The court struck down a Texas legislation which penalized burning, mutilating or otherwise desecrating the national flag. The Court observed that the Texas statute went against the First amendment principle 'that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'[23]

From the above discussion, it can be seen that instead of being pinned down by vague ideals of patriotism and nationalism, the US courts have taken a very liberal approach towards protests using national symbols. Turning to the position in India regarding the issue, it can be seen that Article 19(1)(a) of our Constitution guarantees right to freedom of speech and expression.[24] This right is not limited to the content of speech but also to the mode of expression. In *Romesh Thapper* v. *State of Madras,*[25] the Supreme Court of India quoted with approval the observation of the US Supreme Court in *Lovell* v. *City of Griffin*[26] that freedom of speech includes expression of one's ideas through any communicable medium or visible representation such as gesture, signs and the like. Even though the Indian courts have not expressly used the term 'symbolic speech' to denote such conduct, there is no doubt that they extend the protection of Article 19(1)(a) to even non-verbal

[18] 391 U.S. 367 (1968).
[19] *Id.* at 376.
[20] *Ibid.*
[21] 418 US 405 (1974).
[22] 491 U.S. 397 (1989).
[23] *Id.* at 2544.
[24] *Supra* note 8, art. 19(1)(a).
[25] AIR 1950 SC 124.
[26] 303 U.S. 444 (1938).

speech, like actions or conduct that communicate an idea to the viewers. In *Kameshwar Prasad* v. *State of Bihar,*[27] the Supreme Court held that demonstrations, which are a 'visible manifestation of the feelings or sentiments of an individual or a group', are a form of speech under Article 19(1)(a). The following observation of the Court assumes importance in this context:

> Demonstration is a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech.[28]

The court also observed that a peaceful and orderly demonstration wherein the members merely wear some badge to draw attention to their grievances is eligible for protection under Article 19(1)(a).[29] By analogy then, protest marches using national flags also seem to deserve the same protection prima facie.

The Supreme Court in fact got an opportunity to deliberate upon the use of national flag vis-à-vis freedom of speech in *Union of India* v. *Naveen Jindal*.[30] This case concerned the petitioner's claim of right to hoist the national flag on top of his commercial establishment which was denied by authorities on the ground that it would be in violation of the Flag Code.[31] However, the Supreme Court held that Flag code is not a law within the meaning of Article 13, and it could not therefore limit a citizen's freedom under Article 19(1)(a) to fly the national flag. The court reasoned that flying the national flag is 'an expression and manifestation of [a citizen's] allegiance and feelings and sentiments of pride for the nation'[32] and is a protected form of speech under Article 19(1)(a). However, the court was quick to add that freedom to use the national flag to express one's sentiments exists only as long as the 'expression is confined to nationalism, patriotism and love for motherland'[33] and is in compliance with the provisions of the Emblems and Names (Prevention of Improper Use) Act 1950[34] and the Prevention of Insults to National Honour Act 1971[35] (hereinafter referred to as National Honour Act).[36]

This brings us to a crucial question –can 'nationalism', 'patriotism' and 'love for the motherland' be valid restrictions on the right to use national flag under Article 19(1)(a)?

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[27] AIR 1962 SC 1166.
[28] *Id.* at para 15.
[29] *Ibid.*
[30] AIR 2004 SC 1559.
[31] Flag Code of India, 2002, *available at*:
https://www.mca.gov.in/Ministry/pdf/FlagCodeIndia14_16082018.pdf (last visited on May 23, 2020).
[32] *Supra* note 30, at para 88.
[33] *Id.* at para 75.
[34] The Emblems and Names (Prevention of Improper Use) Act, 1950 (Act 12 of 1950).
[35] The Prevention of Insults to National Honour Act, 1971 (Act 69 of 1971).
[36] *Supra* note 30, at para 88.

The grounds on which the Constitution permits restriction to be placed on this freedom are those enumerated in Article 19(2) viz., sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.[37] The Supreme Court in *Sakal Newspapers* v. *Union of India*[38] observed that 'the only restrictions which may be imposed on the rights of an individual under Art. 19(1)(a) are those which cl. (2) of Art. 19 permits and *no other*.' Therefore, by listing out additional grounds for restriction like 'nationalism', 'patriotism' and 'respect for motherland', the Court went beyond the permissible limits.

It is to be noted that the Court in *Naveen Jindal case*[39] was concerned simply with the right to fly the national flag; it did not specifically engage with citizens' right to use the national flag to protest against the state actions. In the absence of any other dictum of the Supreme court in this regard, it becomes necessary to examine how far the freedom of a citizen to use national flag or national anthem for protests can be restricted within the four corners of Article 19(2). The possible grounds on which restriction may be claimed to be placed on the use of national flag or national anthem for protest under Article 19(2) are 'sovereignty and integrity of India', 'security of state' and 'public order'. However, courts have over the years evolved stricter standards for restricting speech on these grounds.

The consistent stand of the courts has been that these grounds can be invoked not for mere criticism of the government[40] but only if the speech incite violence and disorder[41] or lead to aggravated forms of public disorder like rebellion, waging war against the State, insurrection[42] or encourages the commission of violent crimes and disturb the public peace, safety and tranquility. Peaceful protest marches involving waving of national flags or singing of national anthem are unlikely to lead to any of the above consequences and hence could qualify as protected acts of speech under Article 19(a). This also seems to be the inference from the observation of the Supreme Court in *Kameshwar Prasad case*.[43]

However, whether the Indian courts would take the same view in case of aggressive protests involving physical defilement of national symbols like burning of the national flag is unclear given the lack of any direct case law on this point. In fact, the National Honors Act of India penalizes burning and other kinds of mutilation of the national flag.[44] The

[37] *Supra* note 8, art. 19(2).
[38] AIR 1962 SC 305.
[39] *Supra* note 30.
[40] *Niharendra* v. *Emperor*, AIR 1942 FC 22; *Raj Bahadur Gond* v. *State of Hyderabad*, AIR 953 Hyd 277.
[41] *Kedar Nath* v. *State of Bihar*, AIR 1962 SC 955.
[42] *Supra* note 25.
[43] See, *Supra* note 29.
[44] *Supra* note 35, s.2.

question is, would such a legislation amount to a reasonable restriction on the citizens' right to use national flag on the touchstone of Article 19(2).

As mentioned earlier in the article, in the US, flag-burning was accorded the status of protected speech under First Amendment in *Texas* v. *Johnson*.[45] In this case, the US Supreme Court was concerned with the validity of a Texas statute which penalized individuals for mutilating, defacing, damaging or otherwise physically mistreating the national flag 'in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.'[46] After ruling that burning of national flag in protest against government actions is a symbolic speech due to its communicative impact,[47] the court went on to outlaw the Texas statute. According to the court, since the Texas Law penalized flag desecration only when the same was done in public and on the basis of the public reaction to it, the statute was a direct attempt at suppression of expression by curbing the communicative impact of the alleged conduct.[48] Therefore, the restriction imposed by the impugned statute was clearly content-based.[49] Had the law penalized flag desecration in all circumstances irrespective of the setting in which it was done, it would have passed the strict First Amendment scrutiny.[50]

In India too, the Supreme Court has taken the position that any government action which has the direct and inevitable result of suppression of free speech would not pass the test of constitutionality.[51] As the Court in *Bennett Coleman & Co.* v. *Union of India*[52] observed:

> ....if it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action, it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action.[53]

Thus, even if the statute's objective is to preserve the integrity of the national flag, if it has as its direct effect suppression of free speech, then the statute is liable to be struck down. Like the Texas statute, the National Honour Act of India also penalizes mutilation, defilement and burning of national flag only in public view. What then would prevent the Indian courts from striking down the Act like the US Supreme Court did? One reason could be that while in the US, free speech right is absolute and unfettered at least in

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[45] *Supra* note 22.
[46] Texas Penal Code, 1973, s.42.09.
[47] *Supra* note 22, at 402—406.
[48] *Supra* note 22, at 410-422.
[49] *Ibid.*
[50] *Ibid.*
[51] *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578.
[52] AIR 1973 SC 106.
[53] *Id.* at para. 39.

letter,[54] Indian Constitution permits reasonable restrictions to be imposed on the right and grounds like interest of sovereignty and integrity, security of state and public order may be invoked by the courts to justify prohibition of extreme forms of disrespect to the flag, like its mutilation and burning, or to any national symbol.

In fact, in *Naveen Jindal case,*[55] the court disapproved the stand taken by the US Supreme Court that flag burning is a protected form of speech and observed that the same cannot be allowed in India as it would amount to disrespect to the flag. But perhaps the more appropriate explanation was given by the Rajasthan High Court in *Surendra Khandelwal* v. *State of Rajasthan.*[56] Though the High Court noted with approval, the judgment in *Texas* v. *Johnson,*[57] it observed that the maturity level and social condition of our country may not allow for acceptance of such a stand. This case involved criminal proceeding against a person under Section 3 and 5 of Emblems and Name (Prevention of Improper Use) Act, 1950 and Section 2 of Prevention of Insult to National Honour Act, 1971 for printing the map of India on the back of notebooks without showing the area of Kashmir and Lakshadweep.

Another possible explanation for the difference in the stand of US and Indian courts could be the existence of the fundamental duty to respect the flag and the anthem in the Indian constitution. An examination of this fundamental duty and whether it can act as a restriction on fundamental rights is undertaken in the succeeding sections.

III. FUNDAMENTAL DUTY TO RESPECT NATIONAL FLAG AND ANTHEM – PSEUDO PATRIOTISM OR CONSTITUTIONAL PATRIOTISM?

The Constitution of India confers on its citizens certain fundamental rights and at the same time requires them to fulfill certain duties. Though the enforcement of fundamental rights is not made subject to the fulfillment of the fundamental duties, the latter were inserted to serve as a reminder to the citizens to observe certain 'basic norms of democratic conduct and democratic behavior'.[58]

The Chapter on fundamental duties consisting of just one article, Article 51A, enumerates twelve fundamental duties, the first of which is the duty of every Indian citizen to abide by the Constitution and respect its ideals and institutions, the National

[54] The United States Constitution, art. I.
[55] *Supra* note 30.
[56] Criminal Misc (Pet.) No. 3006/2018.
[57] *Supra* note 22.
[58] J.N.Pandey, *Constitutional Law of India* 474 (Central Law Agency, Allahabad, 54th edn., 2017).

Flag and National Anthem.[59] Western countries like the United States and Britain have not laid down duties for its citizens in the Constitution, let alone the duty to respect national symbols.

Fundamental duties are per se unenforceable unless they are made enforceable by way of legislative intervention i.e. Parliament can, by law, impose penalties for the failure to fulfill these duties. The National Honour Act, which was already in force when Article 51A was introduced, makes the fundamental duty enshrined in clause (a) of the Article legally enforceable. The Act penalizes individuals for showing disrespect to the National Flag and National Anthem. Section 2 of the Act[60] makes it an offence for an individual to burn, defile, deface, disfigure, destroy or trample upon or otherwise shows disrespect or contempt to the National Flag in a public place within public view. The same is punishable with imprisonment and/or fine. The section lists a number of conducts that would amount to disrespect to the national flag such as using the flag as a drapery, using it as a piece of costume below the waist, allowing the flag to trail on floor etc. Further, Section 3 of the Act[61] makes it an offence to intentionally prevent or cause disturbance during the singing of national anthem.

The attempt by the government to instill respect for the National Flag does not stop with the above-mentioned statute. The government went on to issue a Flag Code[62] which prescribes the manner in which National Flag has to be handled. We see that unlike in the western countries like US, Italy, Canada, Australia etc. where respect to National Flag and Anthem are socially inculcated by way of upbringing and education,[63] in India the respect is elicited through threats of punishment. This creates an aura of sacredness and inviolability around the national symbols. This, in turn, will have the effect of distancing these symbols from the people whose country the symbols represents.[64]

The Parliament is not alone in its attempts to elicit feelings of patriotism and respect for the national symbol. The judiciary is no stranger to this game. In 2016, the Supreme

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[59] *Supra* note 8, art. 51-A (i).

[60] *Supra* note 35, s.2.

[61] *Id.,* s.3.

[62] *Supra* note 31.

[63] "Stand for the national anthem? Here's how other countries treat the issue" *Scroll.in,* No. 30, 2015, *available at*: https://scroll.in/article/772669/stand-for-the-national-anthem-heres-how-other-countries-treat-the-issue (last visited on May 20, 2020). Also, see Edith Noriega, "Sing, stand, hand on heart: Not all national anthems play out the same" *GlobalSport Matters,* Jul. 3, 2018, *available at*: https://globalsportmatters.com/culture/2018/07/03/sing-stand-hand-on-heart-not-all-national-anthems-play-out-the-same/ (last visited on May 20, 2020); Nitin Mahajan, "Sunday Interview: Respect for National Anthem is Natural" *Deccan Chronicle,* Dec. 4, 2016, *available at*: https://www.deccanchronicle.com/opinion/op-ed/041216/sunday-interview-respect-for-the-national-anthem-is-natural.html (last visited on 20 May, 2020); " Gabriella Elgenius, "Expressions of Nationhood: National Symbols and Ceremonies in Contemporary Europe" (2005) *available at*: https://core.ac.uk/download/pdf/16390523.pdf (last visited on May 20, 2020).

[64] Suhas Palshikar, "Citizens into Subjects" *The Indian Express*, Dec. 2, 2016, *available at*: https://indianexpress.com/article/opinion/columns/national-anthem-in-theatres-national-flag-supreme-court-4405858/ (last visited on May 20, 2020).

Court in *Shyam Narayan Chouksey* v. *Union of India*[65] passed an order directing all movie theatres to play the national anthem before the start of each movie.[66] The Order also required the viewers to stand up while the anthem is played as a sign of respect.[67] This Order was severely criticized for promoting aggressive nationalism and forced patriotism.[68] The court justified the necessity of this Order on the need to uphold 'constitutional patriotism'.[69]

The implementation of the Order caused difficulty and inconvenience for the people who go to the theatres to watch movie for entertainment and not to prove their patriotism. Individuals were arrested for refusing to stand up when the anthem was played.[70] Most disturbing was the incident when a wheel-chair bound disabled person was abused for his failure to show respect by standing up when the anthem was played in the theatre.[71] Finally, in 2017, the Supreme Court passed another Order in the same writ petition clarifying that it is not mandatory for the movie theatres to play the national anthem.[72] Though the harm done by the 2016 interim order of the court has been reversed, the order and the reasoning of the court, especially the point about culturing 'constitutional patriotism' needs further examination.

While making the interim order in 2016, the court observed that:

> The citizens of the country must realize that they live in a nation and are duty bound to show respect to National Anthem which is the symbol of the Constitutional Patriotism and inherent national quality.[73]

The court used terms like 'constitutional patriotism', 'national quality' without elaborating upon the meaning and import of these terms. The concept of constitutional patriotism was propounded by Jurgen Habermas, a distinguished legal and political philosopher.[74]

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[65] (2017) 1 SCC 421.

[66] *Id.* at para. 3.

[67] *Ibid.*

[68] Harsh Mander, "SC Order on National Anthem in Cinema Halls Mirrors Aggressive Hyper Nationalism" *Hindustan Times,* Dec. 2, 2016, *available at*: https://www.hindustantimes.com/opinion/sc-order-on-national-anthem-in-cinema-halls-mirrors-aggressive-hyper-nationalism/story-vL1QM3xibtppLQW7c08tGI.html (last visited on May 20, 2020). Also, see Namit Saxena, "The Court Commands Subjects to become Constitutional Patriots; Advent of Judgocracy?" *LiveLaw*, Dec. 1, 2016, *available at*: https://www.livelaw.in/court-commands-subjects-become-constitutional-patriots-advent-judgocracy/ (last visited on May 20, 2020).

[69] *Supra* note 65, para. 6.

[70] "20 Arrested in 48 hours for Failing to Stand for Anthem in Cinemas" *NDTV*, Dec. 5, 2016, *available at*: https://www.ndtv.com/india-news/20-arrested-in-48-hours-for-failing-to-stand-for-anthem-in-cinemas-1637378 (last visited on Jan. 25, 2020).

[71] "Disabled man abused for not standing up during national anthem" *Times of India,* Oct. 2, 2017, *available at*: https://timesofindia.indiatimes.com/india/disabled-abused-for-not-standing-up-during-national-anthem/articleshow/60906067.cms (last visited on Jan. 25, 2020).

[72] *Shyam Narayan Chouksey* v. *Union of India*, (2018) 2 SCC 574.

[73] *Supra* note 65, para. 6.

[74] Jan-Werner Müller, "On the Origins of Constitutional Patriotism" 5 *Contemporary Political Theory* 278 (2006).

According to him, 'the law, as embedded in the Constitution needs to be recognized as intrinsically right'.[75] Patriotism, according to him, is not value-based norms of loyalty, national solidarity, unity or cohesion that is characterized by membership to a nation.[76] This is the popular narrative of patriotism.[77] The crux of Haberman's conception of patriotism is allegiance to the values embodied in the Constitution of a nation as a means to create a national identity that transcends religious, cultural and linguistic differences.[78] Thus, constitutional patriotism stands in contradiction to populist and aggressive nationalism which is based on values other than those embedded in the Constitution.

The 2016 interim order of Supreme Court, passed ostensibly to uphold the principle of constitutional patriotism, in fact has the result of furthering aggressive nationalism, the exact opposite of what constitutional patriotism stands for. The manner in which the Supreme Court decided to make citizens respect the National Anthem does not find validity in Article 51A (a) or in any other provision of the Constitution.[79] While Article 51A (a) requires the citizen to respect the Constitution, national flag and national anthem, it gives no guidance as to what constitutes 'respect'.

Section 3 of the National Honour Act, which was enacted to enforce the fundamental duty under Article 51A (a), penalizes a person for insulting the national anthem only when he intentionally prevents the singing of anthem or cause disturbance during such singing.[80] In fact, there is nothing in the National Honors Act which justifies making the playing of national anthem mandatory in a particular place, at a particular time. A combined reading of Article 51A(a) and S. 3 of the Act indicate that the duty to respect the national anthem as envisaged in the Constitution is a negative duty not to disrespect and not a positive duty to respect the national anthem.

It is submitted that if constitutional patriotism is what the Supreme Court wants to instill in the citizens, it is not the National Flag or the text of the national anthem per se that the citizens must be made to respect. Rather it is the ideals that the flag and the anthem represent that need to be respected and adhered to by the citizens. These ideals are what we fought for and what our Constitution reflects – ideals of equality, liberty, secularism, social, political and economic justice etc. Therefore, the court's reliance on the principle of constitutional patriotism to justify its Order is based on an erroneous understanding of the principle.

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[75] Andrew Vincent, "Patriotism and Human Rights: An Argument for Unpatriotic Patriotism" 13 (4) *The J. of Ethics* 347, 355 (2009).

[76] Editorial note, "The Supreme Court's National Anthem Mandate: A Misunderstanding of Habermasian Constitutional Patriotism" 10 *NUJS Law Review* (2017).

[77] *Ibid.*

[78] *Ibid.*

[79] *Ibid.*

[80] *Supra* note 35, s.3.

IV. FUNDAMENTAL DUTY TO RESPECT THE NATIONAL FLAG AND ANTHEM VIS-À-VIS FREEDOM OF SPEECH AND EXPRESSION – RESOLVING THE CONFLICT

Fundamental duties, by themselves, are non-enforceable. However, they can be made enforceable through legislative measures. When it is done so, can it operate to restrict the full enjoyment of a fundamental right? This is the dilemma that we face when national flags and anthem are used as symbols of protest. While on one hand we have a statute which penalizes individuals for showing disrespect to national flag and anthem, on the other hand the Constitution guarantees us the freedom to express our views and opinions through any means whatsoever. As enumerated earlier in the article, there have been many occasions in India when national flag was used as a symbol of protest and dissent. Would such expressions of protest be against our fundamental duty to respect the national symbols? Should fundamental duties be given such primacy over fundamental rights that the former imposes restrictions on the latter, which Part III of the Constitution does not envisage imposing in the first place?

An examination of various judicial decisions by the Supreme Court on the inter-relationship between fundamental rights and fundamental duties reveals that the favoured stand of the court has been to strike a balance between the two.[81] While Fundamental duties have been used by the court to judge the reasonability of restriction imposed on fundamental rights,[82] they cannot be used to create new grounds for restricting the rights. This means that a law or action that seeks to enforce fundamental duties must do so without restricting fundamental rights on grounds other than those permitted by Part III of the Constitution. The justification that the object behind a law or action is enforcement of fundamental duty will be considered only to examine the reasonability of restriction on a fundamental right; the duty itself cannot be a ground of restriction.

Now let us consider the judicial decisions that specifically examine the fundamental duty to respect the national symbols in the context of free speech. The first of such cases is *Bijoe Emmanuel* v. *State of Kerala,*[83] wherein the court upheld the right to remain silent without joining the singing of the national anthem as a fundamental right under Article 19(1)(a). The court noted that this action is not in violation of the National Honour Act or the fundamental duty under Article 51A (a) as not joining the singing of national anthem

[81] *Javed* v. *State of Haryana*, AIR 2003 SC 3057.
[82] *State of Gujarat* v. *Mirazpur Moti Kureshi Kassab Jamat*, AIR 2006 SC 212.
[83] 1987 AIR SC 748.

does not amount to disrespect. Here court expanded the ambit of freedom of speech to save the impugned act from being called in question as being against the fundamental duty.

Contrast this with the interim order in *Shyam Narayan Chouksey case,*[84] in which the Supreme Court sought to forcefully enforce respect to the national anthem by mandating the movie theatres to play the anthem before each film and requiring the movie-goers to stand up during the same. Here, the court imposed restriction on the liberty of individuals in order to give effect to the fundamental duty mentioned in Article 51A (a). It is to be noted that Article 51A (a) itself does not prescribe any particular manner in which citizens should pay their respect to the anthem and definitely does not require them to prove their love for the anthem in a movie theatre. Therefore, this is a clear instance of the judiciary outstepping its limit and donning an activist role to instill patriotism in citizens, which is clearly uncalled for.

Even when the Court passed a subsequent Order revoking the impugned interim order, it ironically cited the *Bijoe Emmanual case*[85] to emphasis the need to respect the national anthem by standing up. It observed that though the court in *Bijoe Emmanuel* sustained the right of the petitioner to not join the singing of national anthem, yet it observed that a person who stands up respectfully when the National Anthem is sung shows proper respect. It is submitted that this is an erroneous understanding of the ruling of the *Bijoe Emmanuel case*. The court in that case only observed that the petitioner, in the respective facts and circumstances, showed sufficient respect to the national flag by standing up. This should not be construed to mean that not standing up when the national anthem is played amounts to disrespect in all cases.

As already mentioned, neither Article 51A (a) nor the National Honour Act require standing up when the National Anthem is sung. It is also pertinent to note that even though the Ministry of Home Affairs issued an Order in 2018 requiring that 'whenever the anthem is played, the audience shall stand to attention', no penalty or punishment is prescribed for the non-compliance of the same.[86] Therefore, if a person in protest against an issue refuses to stand up during the singing of the national anthem, currently there is no law in India that makes his/her act illegal. Further, in *Naveen Jindal case,*[87] even though the court upheld the right to fly the national flag as a fundamental right under Article 19(1)(a), as mentioned earlier, it made the right subject to many restrictions outside the ambit of Article 19(2). These additional restrictions on the right to freedom of speech were imposed by the court with the supposed aim of striking a balance between the right and

[84] *Supra* note 65.
[85] *Supra* note 83.
[86] Order relating to the National Anthem of India, *available at*: https://www.mha.gov.in/sites/default/files/NationalAnthem%28E%29_2.pdf (last visited on May 20, 2020).
[87] *Supra* note 30.

the fundamental duty under Article 51A (a). However, the ultimate effect has been to give primacy to fundamental duty over fundamental right. Thus, the dictum in *Bijoe Emmanual case* and that of *Naveen Jindal case* seem to move in opposite directions.

Protest marches involving the use of national flag and national anthem are not necessarily anti-national or unpatriotic. In most cases, the protestors use the flag and the anthem to urge the government to conform to the ideals that they stand for. Though the court is most likely to accept peaceful uses of national flag, as we saw earlier, the legislature and the courts in India are reluctant to give the same level of protection to physical desecration of flag by burning or disfiguring. By penalizing physical desecration of flag, it seems that the legislature is more concerned with physical integrity of the flag rather than disrespect or contempt shown to the ideals and values represented by these symbols. If the legislature's aim was the former, then its mutilation or burning should have been prohibited in all circumstances and not just when it is done in public view.

Even if the state wants to prohibit flag burning in public, it should first prove that such prohibition is warranted by any of the grounds mentioned in Article 19(2) such as interest of sovereignty and integrity of India, security of the state or public order. Even then, the prohibition must not be a blanket one. It cannot be presumed that burning of national flag in all cases will endanger the above interests. Therefore, prohibition should be imposed on an objective analysis of facts and circumstances. Otherwise it would amount to giving primacy to fundamental duty at the cost of citizen's fundamental rights and liberties.

V. CONCLUSION

In these times when patriotism is equated to allegiance and subservience to the government at power, using national symbols to protest against the state's actions is considered as an affront to the government itself. The national symbols like the national flag and anthem derive their position of respect from the ideals and values that our nation stands for and which form the basis of the Constitution. Therefore, the measure of patriotism of a person must be judged by his adherence to constitutional principles and not by the outward expression of obeisance. This is the teaching of the doctrine of 'constitutional patriotism'. Though the Supreme Court took note of the concept of constitutional patriotism, it used the principle to enforce allegiance and respect to the national symbols disassociated from the ideals that they represent. If the citizens are forced to sacrifice their fundamental rights and liberties that our Constitution guarantees in order to prove patriotism and love for the nation, it becomes pseudo-patriotism which serves no purpose. In order to inculcate real patriotism in citizens, the best way for the government is to strengthen and further the values and ideals that our Constitution embodies, especially the freedom of speech and expression.

ARTIFICIAL INTELLIGENCE, PATENTS AND THE MODERN HEALTHCARE IN INDIA

Mohit Kar and Shreya Sahoo[*]

India is entrenched with a large disparity in healthcare distribution and there exists a glaring scarcity of healthcare experts and infrastructure, which provides a huge scope for sustainable, scalable, and innovative healthcare technology to alleviate the condition of the medical industry. According to the World Health Organization, around 2.3 million doctors will be required by 2030 in India, in order to comply with its recommended standard of a doctor-patient ratio of 1:1000 and nurse-patient ratio of 1:483. With a gradual rise in the new varieties of communicable and non-communicable diseases, advanced digital technology based on Artificial Intelligence ('AI') can be employed for prognosis, diagnostic decision-making, and treatment. However, the Indian Patent Act poses a challenge to the patentability of such diagnostic and prognostic methods by regarding them as 'methods to treat diseases' or 'computer programs per se' that are precluded from the ambit of patentable inventions. The possible statutory limitations have been explained by the Delhi High Court to make way for patent eligibility of inventions which manifest a technical advancement. The present article elaborately discusses the scenario of major international jurisdictions like Australia, the European Union, Japan, and regarding the patentability of AI in healthcare. Further, the authors have emphasized the need of legislative clarity in India to ensure the patentability of AI-based technologies.

I. INTRODUCTION

India is the second-most populous country in the world with the exact numbers going up to 1.353 billion.[1] The presence of such a huge swathe of individuals provides many unique and ubiquitous challenges to any administration which includes affordable healthcare. India ranks as one of the world's highest in terms of children with stunted growth.[2] The 2020 Global Nutrition Report states that almost 37.9% of Indian children under the age

* The first author is a third-year B.A. LL.B. (Hons.) student at the Maharashtra National Law University, Aurangabad. The second author is a third-year B.A. LL.B. (Hons.) student at the National Law University, Odisha.

[1] Population, total-India, The World Bank Data, *available at*:
https://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN (last visited on Mar. 09, 2020).

[2] Development Initiatives, "Global Health Nutrition Report, 2020" (May 2020).

of 5 are stunted.[3] In a survey by the Lancet on Health Access and Quality (HAQ) Index, India was ranked at 145th position out of the 195 countries that were analyzed.[4] The latest health index released by the government think tank NITI Aayog in association with the World Bank and the Ministry of Health and Family Welfare reports that several states like Uttar Pradesh, Bihar, Odisha, and Madhya Pradesh have been the worst performers in terms of decreasing mortality rates, and improving immunization coverages.[5] Despite jumping a position in the latest Human Development Index Ranking by the United Nations Development Programme, India lies at a lowly position of 129th out of the 189 countries that were counted.[6] India was also placed at the 47th place in the latest Global Health Security Index, which reported that India was lagging behind in immunization and access to healthcare.[7] This is a clear reflection of the poor healthcare services present in the country. Providing accessible healthcare to the masses has turned out to be one of the major issues faced by the Government. There are 5A's that can be attached to this problem of healthcare: 1) lack of Awareness, 2) lack of Access, 3) Absence of manpower, 4) Affordability, and 5) Accountability.[8] The governments of the past and the present have always made removal of these 5A's and improving healthcare a big part of their goal and election manifesto with the implementation of various policies and schemes. Some of the most notable schemes have been Ayushman Bharat,[9] National Health Mission,[10] and Rashtriya Swasthya Bima Yojana.[11] Recently, the Government of India introduced the Ayushman Bharat scheme and it has already faced several problems within a year of its implementation. There have been allegations that it lacks a proper mechanism to check corruption. Several states have also alleged that the procedural rates proposed by the scheme were non-viable.[12] In light of the same, the healthcare sector in India needs a revamp.

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[3] *Ibid.*

[4] GBD 2016 Healthcare Access and Quality Collaborators, "Measuring performance on the Healthcare Access and Quality Index for 195 countries and territories and selected subnational locations: a systematic analysis from the Global Burden of Disease Study 2016" 391 *The Lancet* (2018).

[5] NITI Aayog, The World Bank and Ministry of Health and Family Welfare, "Health Index, 2019" (June 2019).

[6] United Nations Development Programme, *Human Development Report 2019* (December 2019).

[7] Nuclear Threat Initiative and John Hopkins University Center for Health Security, "Global Health Security Index 2019" (October 2019).

[8] Arvind Kasthuri, "Challenges to Healthcare in India - The Five A's" 43(3) *Indian J Community Med.* (2018).

[9] National Health Authority, "Ayushman Bharat PM-JAY", *available at*: https://pmjay.gov.in/about/pmjay (last visited on May 30, 2020).

[10] Ministry of Health & Family Welfare, "National Health Mission", *available at*: https://nhm.gov.in/ (last visited on May 30, 2020).

[11] Government of India, "Report: Initiatives of Ministry of Labour& Employment During Last One Year" (Ministry of Labour & Employment, 2008), *available at*: https://pib.gov.in/newsite/erelcontent.aspx?relid=39058 (last visited on Mar. 10, 2020).

[12] Maitri Porecha, "A year on, Ayushman Bharat faces multiple challenges ahead" *The Hindu Business Line*, Sep. 24, 2019, *available at*: https://www.thehindubusinessline.com/economy/a-year-on-ayushman-bharat-faces-multiple-challenges-ahead/article29497106.ece (last visited on Mar. 10, 2020).

The rapid advances in technology in recent years have been termed as 'The Fourth Industrial Revolution'.[13] The Fourth Industrial Revolution promises to bring about and improve technologies like Artificial Intelligence, Robotics, the Internet of Things, autonomous vehicles, 3-D printing, biotechnology, nanotechnology, materials sciences, energy storage, and quantum mechanics.[14] With AI being a crucial part of the Fourth Industrial revolution, it has seen a rise in various sectors. With regard to healthcare, AI is being used to process huge patient-related datasets, the evolution of genome-editing methods, etc.[15] The World Intellectual Property Organization ('WIPO') defines Artificial Intelligence as a discipline of computer science that purports to develop machines and systems which would carry out tasks usually considered to require human intelligence.[16] Ms. Debjani Ghosh, President, National Association of Software and Services Companies ('NASSCOM') has stated that

> The future of healthcare is shaping up in front of our eyes mainly through digital technologies, such as the Internet of things, artificial intelligence, VR/AR, 3D-printing, robotics or nanotechnology. In medicine and healthcare, digital technology can help transform unsustainable healthcare systems into sustainable ones, equalize the relationship between medical professionals and patients, provide cheaper, faster and more effective solutions for diseases.[17]

Due to a lack of specialized radiographers and facilities, the mortality rate amongst the Indian women who are diagnosed with breast cancer is alarmingly high. Adding to the woe of the Indian population is the high cost of screening which renders the early detection process of breast cancer unaffordable. AI-run cancer screening software,[18] that uses machine intelligence over the traditional diagnostic method of thermographic imaging has resulted in comparatively economical, easy to control and mobile solution to identify breast cancer, thereby resulting in higher survival rate.[19] Further, an AI-based screening system is making it easier for women belonging to all the age groups to undertake regular screening as it is free from radiation, non-contact, and painless. Another fatal disease in India is tuberculosis whose cases are mainly found in the underserved rural pockets of

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[13] Klaus Schwab, "The Fourth Industrial Revolution: what it means, how to respond" *World Economic Forum*, Jan. 14, 2016, *available at*: https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (last visited on May 29, 2020).

[14] *Ibid.*

[15] *Ibid.*

[16] WIPO, "Artificial Intelligence and Intellectual Property", *available at*: https://www.wipo.int/about-ip/en/artificial_intelligence/ (last visited on Mar. 10, 2020).

[17] "NASSCOM CoE-IoT Announces a Strategic Partnership with GE Healthcare" *NASSCOM*, Apr. 30, 2019, *available at*: https://www.nasscom.in/sites/default/files/media_pdf/CoE-IoT-announces-a-strategic-partnership-with-GE-helthcare.pdf (last visited on Mar. 10, 2020).

[18] Sumit Chakraberty, "This startup uses AI to detect breast cancer from the cloud" *Techniasia*, Apr. 24, 2017, *available at*: https://www.techinasia.com/startup-patented-ai-tech-breast-cancer-screening (last visited on May 30, 2020).

[19]PricewaterhouseCoopers Private Limited, "Reimagining the Possible in the Indian Healthcare Ecosystem with Emerging Technologies" PricewaterhouseCoopers Private Limited (August 2018).

India making identification and treatment tough. In this regard, an initiative has been taken by a hospital based in Delhi-NCR in collaboration with the Haryana government, which uses an AI to process digital chest x-ray inputs of patients that are collected by a van travelling from village to village.[20] This is a promising development towards the elimination of tuberculosis in India. Further, cancer treatment is something that varies from case to case, and therefore a doctor has to determine the most suitable treatment plan. In India, this intensive process becomes cumbersome due to the limited strength of specialists. However, a leading hospital chain in India has decided to use an AI-based system that can produce a thorough report, drawing the most appropriate treatment plan options for a cancer patient based on the medical history and cancer diagnosis.[21] Additionally, some of the other shortcomings that exist in the Indian healthcare ecosystem are healthcare infrastructure, time spent by the majority of physicians while consulting patients regarding common diagnosis, time, and efforts consumption of the patients in travel and queuing up to consult a doctor, etc.[22] This issue may be catered by AI's preliminary symptom-based diagnosis which will assist doctors to focus their attention on cases that require immediate care.[23] Another common complication which is growing at an alarming rate is diabetic retinopathy which leads to blindness. The number of ophthalmologists practicing worldwide is disproportionately inadequate in comparison to the millions of patients.[24] Machine learning solutions are being developed which would enable a primary care physician to provide an accurate screening service and commence treatment.[25] The COVID-19 pandemic has also stretched the healthcare facilities in India. But it has taught the nation the importance of swift detection, testing and data analysis. With developed AI systems, the nation would be in a much better position to handle such pandemics in the future where a large number of testing and data analysis could become a need of the hour. This view was recently reiterated by Telecom and Information Technology Minister Ravi Shankar Prasad in a global conference on AI.[26]

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[20] *Ibid.*

[21] IBM News Room, "Apollo Hospitals Adopts IBM Watson for Oncology and IBM Watson for Genomics to Help Physicians Make Data-Driven Cancer Care Decision" *IBM*, May 22, 2018, *available at*: https://newsroom.ibm.com/2018-05-22-Apollo-Hospitals-Adopts-IBM-Watson-for-Oncology-and-IBM-Watson-for-Genomics-to-Help-Physicians-Make-Data-Driven-Cancer-Care-Decisions-1 (last visited on May 29, 2020).

[22] *Supra* note 19.

[23] Government of India, "Report of The Artificial Intelligence Task Force" (Ministry of Commerce and Industry, 2018).

[24] *Id*. at 15.

[25] Srikanta Kumar Padhy and Brijesh Takkar, "Artificial Intelligence in Diabetic Retinopathy: A natural Step to Future" 67 *Indian Journal of Ophthalmology* 1009 (2019).

[26] TNN, "How we can use AI in fight against Covid-19" *Times of India*, May 26, 2020, *available at*: https://timesofindia.indiatimes.com/business/india-business/how-we-can-use-ai-in-fight-against-covid-19/articleshow/75988582.cms (last visited on May 31, 2020).

A strategic partnership has been drawn between NASSCOM and GE Healthcare to invent digital healthcare solutions.[27] Incorporation of AI in the health care system of India has been observed as a key technological factor towards bringing improvements in the efficacy, cost, reach, and quality of health care and is being supported by stakeholders like FICCI.[28] Further, according to the ASSOCHAM, artificial intelligence has the ability of 'supporting systems to identify genetic risks from large-scale genomic studies, predicting safety and efficacy of newly launched drugs, providing decision support for medical assessments and prescriptions and tailoring drug administration to the individual patient.'[29]

A recent report released by the WIPO, 'Technology Trends 2019', has witnessed a humongous growth in the AI-related inventions.[30] What is more remarkable is India's position on becoming the tenth contender across the world for submitting AI-related patent applications and fourth for publications.[31] The report found that 'while it does not appear among the top offices for patent filing, India ranks third in fuzzy logic and fourth in machine learning scientific publications.'[32] Therefore, it is necessary that India bridges this gap between patent filings and research. Besides, Nirmala Sitharaman, the Finance Minister of India, while announcing the Budget 2020 has emphasized the impact of technology in cementing India's presence as a key player in AI technology.[33] The Government has planned to initiate a policy to build data center parks across India which comes as indicative to foster the tech advancements. Additionally, the current regime is looking forward to eliminating tuberculosis by 2025 by integrating artificial intelligence and machine learning in the Ayushman Bharat scheme.[34]

The growth of AI is certainly enlivening but it would need strong patent protection to incentivize the inventors allocating their time and resources on it. The Patent Law in India necessitates that for a patent to be granted, it has to be an 'invention'.[35] Further, the invention has to be novel, possess an inventive step, and must have industrial application.[36]

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[27] *Ibid.*

[28] FICCI & EY, "Re-engineering Indian Health Care" (Sep. 2016), *available at*: http://ficci.in/PressRelease/2506/ficci_Press_Release_Reengineering_Indian_Health%20care_Final_LR.pdf (last visited on Mar. 10, 2020).

[29] ASSOCHAM-PwC, "Artificial Intelligence and Robotics – 2017, Leveraging artificial intelligence and robotics for sustainable growth" (2017).

[30] WIPO, "WIPO Technology Trends 2019 - Artificial Intelligence" (2019), *available at*: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf (last visited on Mar. 10, 2020).

[31] *Ibid.*

[32] *Ibid.*

[33] Government of India, *Budget Speech 2020-2021*, (Ministry of Finance, 2020), *available at*: https://www.indiabudget.gov.in/doc/Budget_Speech.pdf (last visited on Mar. 10, 2020).

[34] Sreeraman Thiagarajan , "Budget 2020: India takes a leap of faith; makes a move towards adopting AI, ML, and tech" *Financial Express*, Feb. 2, 2020, *available at*: https://www.financialexpress.com/brandwagon/budget-2020-india-takes-a-leap-of-faith-makes-a-move-towards-adopting-ai-ml-and-tech/1852525/ (last visited on Mar. 10, 2020).

[35] The Patents Act, 1970 (Act 39 of 1970), s. 2(1)(m).

[36] *Id.*, s. 2(1)(j).

AI inventions which are formulated by ideas mixed with technology and algorithms can certainly pass the 'novelty' test. The inventive step requirement can also be overcome on the basis of the claims made in the patent application. As discussed above, the AI inventions have a plethora of applications in various industries including that of healthcare, so the industrial application test can also be overcome. But the main challenge for the patenting of AI lies in Section 3(k) and Section 3(i) of the Patent Act, 1970, which have been elaborately discussed by the authors in later part of the article.

After the introductory part, the second part of the article will seek to shed light on the integration of AI such as in machine learning and robotics in the healthcare ecosystem and the resultant transformation of healthcare because of it. The third part of the article will deal with the drawbacks of trade secret protection of AI inventions and the need for patenting. In the fourth part, the article will deal with the international standard and experience of patent protection extended to the AI and the health industry in the jurisdictions of Australia, the European Union ('EU'), and Japan. The fifth part of the article will analyze the advent of AI in India, the essential requirements for a patent claim, and challenges faced specifically due to Sections 3(k) and 3(i) of the Patents Act, 1970. The last part contains the conclusory remarks of the authors.

II. EMERGENCE OF ARTIFICIAL INTELLIGENCE IN HEALTHCARE

AI is a modern-day technological innovation that is starting to enter the field of healthcare. AI primarily consists of seven levels: (i) Reactive Machines (oldest form of AI with a very limited capability), (ii) Limited Memory (they have the capability to learn from events and history), (iii) Theory of Mind (the capacity of AI to learn from actions, thoughts, and beliefs), (iv) Self-Aware (an AI machine that can behave as a human), (v) Artificial Narrow Intelligence (the capacity of a machine to perform a particular task in an efficient manner), (vi) Artificial General Intelligence (the capacity of a machine to perform multiple tasks on the same level as human beings), and (vii) Artificial Super Intelligence (the capacity of a machine to perform tasks that is ahead of the human intellect).[37]

Currently, the AI in general and in the healthcare sector exists at the first level which is at the narrow intelligence stage.[38] The complexity of data and various detection techniques in providing efficient healthcare has made the use of AI more and more prevalent. The most significant aspect of AI at present is the manipulation of a computer

[37] Naveen Joshi, "7 Types of Artificial Intelligence" *Forbes*, Jun. 19, 2019, *available at*: https://www.forbes.com/sites/cognitiveworld/2019/06/19/7-types-of-artificial-intelligence/#53e971e6233e (last visited on May 25, 2020).

[38] *Ibid.*

or a computer-controlled robotic device to perform tasks which require a great deal of intellectual process.[39] The advanced technology used by AI makes it essential in healthcare where it could analyse complex medical data and provide accurate results. AI in healthcare is of two distinct types, these are machine learning and robotics. The details of each of these varieties are described below.

A. Machine learning

Machine learning ('ML') can be defined to be an execution of AI wherein the computer program looks at a fixed set of data, figures out a pattern based on the data given to it and makes a prediction of future events based out of that particular data.[40] ML is also known to be the science that is used to invent computers that improve automatically as they gain experience.[41] In the 21st century, access to fast internet and the capacity of various computing machines to store large amounts of data has given impetus to the growth of ML. ML is being applied to a variety of fields, wherever researchers see potential and it has given quite remarkable results.[42] Healthcare innovators are also leveraging the use of Artificial Neural Networks ('ANN'), a technique of ML to facilitate treatment at a lower cost.[43]

ML's application in healthcare has been brought to the world at large by Google.[44] Google has been using the potentialities of ML to help detect breast cancer. Findings by Google from these experiments have been quite reassuring with results showing that the predictive analysis used by ML has an accuracy rate of 89 percent.[45] The percentage achieved by ML is better than a normal pathologist which stands at 73 percent.[46] Pathologists usually face a huge problem in making an accurate prediction due to massive amounts of information that is presented before them. ML is proving to be a beneficial and reliable solution to those problems. Researchers at Stanford University recently made

[39] Bernard Marr, "The Key Definitions Of Artificial Intelligence (AI) That Explain Its Importance" *Forbes*, Feb. 14, 2018, *available at*: https://www.forbes.com/sites/bernardmarr/2018/02/14/the-key-definitions-of-artificial-intelligence-ai-that-explain-its-importance/#7e469f294f5d (last visited on Mar. 10, 2020).

[40] Dr. Manjiri Bakre, "5 ways Machine Learning is Redefining Healthcare" *Entrepreneur India*, Oct. 31, 2019, *available at*: https://www.entrepreneur.com/article/341626 (last visited on Mar. 10, 2020).

[41] Mitchell, T. M, "Machine learning" 45(37) *Burr Ridge, IL: McGraw Hill* (1997).

[42] Kislay Keshari, "Top 10 Applications of Machine Learning: Machine Learning Applications in Daily Life" *edureka!*, July 22, 2019, *available at*: https://www.edureka.co/blog/machine-learning-applications/ (last visited on Mar. 10, 2020).

[43] Nida Shahid, Tim Rappon, et. al., "Applications of Artificial Neural Networks in Health Care Organizational Decision-Making: A Scoping Review"14(2) *PLoS One* (Feb., 2019).

[44] CB Insights, "How Google Plans To Use AI To Reinvent The $3 Trillion US Healthcare Industry" (April 2018).

[45] Lisa M. Kreiger, "Google Computers Trained to Detect Cancer" *The Mercury News*, Mar. 3, 2017, *available at*: https://www.mercurynews.com/2017/03/03/google-computers-trained-to-detect-cancer/ (last visited on Mar. 10, 2020).

[46] Martin Stumpe and Lily Peng, "Assisting Pathologists in Detecting Cancer with Deep Learning" *Google AI Blog*, Mar. 3, 2017, *available at*: https://ai.googleblog.com/2017/03/assisting-pathologists-in-detecting.html (last visited on Mar. 3, 2017).

use of deep learning algorithms which is a part of ML to recognize skin cancer.[47] Borrowing the algorithm from Google, the researchers set out to make accurate detection of early-stage skin cancer which has a high survival rate of 95 percent. This can be considered as path-breaking, considering early detection could save a lot of lives. The team at Stanford also aims to bring the technology onto smartphones which could make its reach more widespread.[48] As discussed earlier, it is also worthy to mention that IBM's Watson has shown its potentialities in the application of ML in healthcare.[49] IBM Watson Health is leading in the way of oncology by developing a diverse range of AI-based solutions to aid oncologists.[50]

Startups around the world are taking heed of ML, with a UK-based start-up Feebris using ML to make accurate detection of complicated respiratory ailments.[51] Feebris is also being used by health workers in India to cater to the needs of children under 5.[52] Swiss firm SOPHiA's efforts to analyze complex genomic data using AI which can help diagnose cancer have also been noteworthy. This has helped it in completing a funding round of $77 million after it completed genomic data analysis in around 850 hospitals & 300,000 patients.[53] ML is proving to be the next big thing in terms of diagnosis and accurate analysis of data that can lead to early detection and could help improve healthcare.

B. Robotics

The notion of robots being present in the field of healthcare has been in existence for a considerable period of time and over the years there have been some significant advancements in the use of robots in healthcare. The earliest instance of robotic surgery can be traced back to the year 1985. In 1985, the PUMA 200 with its needle replacement surgery proved that robots performing surgery were no longer a dream.[54] Followed by the revolutionary step taken by the PUMA Robot, the Da Vinci Robotic Surgical System

[47] Taylor Kubota, "Deep learning algorithm does as well as dermatologists in identifying skin cancer" *Stanford News*, Jan. 25, 2017, *available at*: https://news.stanford.edu/2017/01/25/artificial-intelligence-used-identify-skin-cancer/ (last visited on Mar. 10, 2020).

[48] *Ibid*.

[49] *Supra* note 21.

[50] IBM, "IBM Watson Health in Oncology", (2019), *available at*:

https://www.ibm.com/downloads/cas/0ZRYPWL9 (last visited on Mar. 10, 2020).

[51] Nicholas Fearn, "How This Startup Is Applying Machine Learning To Disease Diagnosis" *Forbes*, June 13, 2019, *available at*: https://www.forbes.com/sites/nicholasfearn/2019/06/13/how-this-startup-is-applying-machine-learning-to-disease-diagnosis/#62f2654e772b (last visited on Mar. 10, 2020).

[52] Kathryn Reilly, "British AI liberates precision diagnosis" *MedTech ENGINE*, Jan. 11, 2019, *available at*: https://medtechengine.com/article/british-ai-liberates-precision-diagnosis/ (last visited on Mar. 11, 2020).

[53] Clara Rodríguez Fernández, "Swiss Firm Raises €67M to Take Genomics AI to Hospitals" *LABIOTECH.eu*, Jan. 7, 2019, *available at*: https://www.labiotech.eu/medical/sophia-genetics-fundraising-ai-hospitals/ (last visited on Mar. 10, 2020).

[54] Jay Shah, Arpita Vyas et. al., "The History of Robotics in Surgical Specialties" 1(1) *Am J Robot Surg.* (June 2014).

('RSS') was the first robot approved by the U.S. Food and Drug Administration ('FDA').[55] The Da Vinci RSS used to perform general laparoscopic surgery and reflux disease surgery.[56]

In a breakthrough in 2016, a robotic surgery was performed by an AI-powered smart robot to stitch up a pig's intestine completely on its own.[57] The more appalling fact about the operation was that the robot performed the surgery in a more precise manner than the human doctors. In what could prove to be a game-changer for the field of robotics, the Stanford University back in 2016 announced that it had made the first synthetic artificial skin.[58] Subsequently, scientists in Spain created the first artificial skin with the use of 3D-print technology.[59] More recently in 2019, a team at the Technical University of Munich announced that they had made a sensitive synthetic skin which could bring it close to the sense of feel that humans have.[60] This can be considered as a huge stride forward in creating human-like robots.

We have grown up in an age of superheroes like Iron Man, but robots have more medical uses than superhero ones. Orthoses or Exoskeletons are now being used by medical experts and scientists to help permanently paralyzed people walk and do simple activities.[61] These robots are also proving to be helpful in the rehabilitation process of some serious spinal or brain injuries as they help to heal the muscles better. On a similar note, BUDDY, a companion bot won the CES Innovation of the Year award for 2018.[62] Companion bots are those robots 'who' act as a caretaker, especially for uses in old age homes or sick wards to tend after the elderly or the sick people and their needs.[63]

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[55] Food and Drug Administration, "FDA Approves New Robotic Surgery Device" *ScienceDaily*, July 17, 2000, *available at*: https://www.sciencedaily.com/releases/2000/07/000717072719.htm (last visited on Mar. 10, 2020).

[56] *Ibid.*

[57] James Vincent, "A robot surgeon has passed a major milestone – sewing up pig guts" *The Verge*, May 4, 2016, *available at*: https://www.theverge.com/2016/5/4/11591024/robot-surgery-autonomous-smart-tissue-star-system (last visited on Mar. 10, 2020).

[58] Matthew Griffin, "Researchers have created synthetic artificial skin" *Fanatical Futurist*, Sep. 27, 2016, *available at*: https://www.fanaticalfuturist.com/2016/09/researchers-have-created-artificial-skin/ (last visited on May 26, 2020).

[59] Matthew Griffin, "Scientists have 3d printed functioning artificial human skin" *Fanatical Futurist* , Mar. 2, 2017, *available at*: https://www.fanaticalfuturist.com/2017/03/scientists-have-3d-printed-functioning-artificial-human-skin/ (last visited on May 26, 2020).

[60] Technical University of Munich (TUM), "Biologically-inspired skin improves robots' sensory abilities" *ScienceDaily*, Oct. 10, 2019, *available at*: https://www.fanaticalfuturist.com/2017/03/scientists-have-3d-printed-functioning-artificial-human-skin/ (last visited on May 27, 2020).

[61] Shariq Khan, "GenElek's robotic exoskeleton allows paralyzed, old aged people to walk" *ET Online*, Dec. 26, 2019, *available at*: https://economictimes.indiatimes.com/small-biz/startups/features/geneleks-robotic-exoskeleton-allows-paralyzed-old-aged-people-to-walk/articleshow/72974671.cms?from=mdr (last visited on Mar. 10, 2020).

[62] "Buddy Named Ces 2018 Best Of Innovation Awards Honoree" *Blue Frog Robotics*, *available at*: https://buddytherobot.com/en/news/buddy-named-ces-2018-best-innovation-awards-honoree/ (last visited on Mar. 10, 2020).

[63] Matt Simon, "Companion Robots Are Here. Just Don't Fall in Love With Them" *Wired*, Feb. 8, 2017, *available at*: https://www.wired.com/story/companion-robots-are-here/ (last visited on Mar. 10, 2020).

Companion bots have proved to be very useful due to the lack of manpower in the old age homes and patient care.

III. QUESTIONS OVER PROTECTION: PATENTING A MUST?

Acknowledging the rapid innovations in ML and Robotics and their use for surgery and other health-related facets, it can be concluded that there has been a noteworthy rise of AI in healthcare. Simultaneously, legal regulation of these research-oriented AI inventions and algorithms is of the highest importance. But, the rapid advances in technology have left the legal regime lagging behind in terms of proper regulation.[64] The advancement of AI has left the intellectual property regime most befuddled with regard to its regulation. The copyright concerns around authorship over AI-generated works have led to a lot of academic debate.[65]

Similarly, patent law which has strict rules with regard to the 'subject-matter' of patentability has faced questions over its scope in AI.[66] At the heart of the patent regime lies the need for incentivizing innovations that result in rapid advancements in the field of science by granting exclusive rights to patented innovations. But, granting exclusive rights especially in the field of healthcare can be detrimental to the accessibility of those health-related facilities to the public. Thus, the Central Government with the collective voice of the stakeholders needs to focus on updating the intellectual property regime to bring it uptodate with the AI, keeping in mind the issues regarding accessibility. Normally, corporates involved in the AI-sector take the help of trade secrets to protect their own unique algorithms vis-à-vis other intellectual property rights. Trade Secrets are the usual resort owing to the ease of taking benefits out of it..

A. Trade secrets and protection of AI innovations

There is an inherent lack of legislative clarity on the legal protection that can be provided to AI worldwide. Thus, the current technological products need ample intellectual property protection to be sustainable and lucrative enough for companies to invest in them and their Research & Development ('R&D'). A key reason behind the rise of AI has

[64] A. Atabekov, O. Yastrebov, "Legal Status of Artificial Intelligence Across Countries: Legislation on the Move" XXI *Eur. Res. Studies Jour*. (2018).

[65] Shlomit Yanisky-Ravid, "Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era – The Human-Like Authors are already here-A New Model" *Mich. St. L. Rev.* 659 (2017); Kalin Hristov, "Artificial Intelligence and the Copyright Dilemma" 57(3) *IDEA: The IP Law Review* 431-453 (2017); Jan Zibner, "Artificial Intelligence: A Creative Player in the Game of Copyright" 10(1) *EJLT* (2019).

[66] Vaishali Singh, "Mounting Artificial Intelligence: Where are we on the timeline?" *SCCOnline Blog*, June 7, 2018, *available at*: https://www.scconline.com/blog/post/2018/06/07/mounting-artificial-intelligence-where-are-we-on-the-timeline/ (last visited on May 29, 2020).

been the advanced algorithms that powers it.[67] As discussed above, AI algorithms have the capacity to scan through massive amounts of data and give accurate results. As AI draws near to gaining more and more humanoid characteristics, the algorithms will get more complex and will assume an even important position in the business strategy of an AI firm.[68] In such a scenario, trade secrets have come into the limelight owing to the relatable ease with which one can take recourse to it.

Firms generally take the resort of trade secrets when the subject matter is not novel enough to be patentable.[69] AI-driven innovations are on the same pedestal, as the coding and mechanical techniques are quite similar to the ones in the market with the only variety being the functionality. Trade secrets are also viable due to their low cost, with the money being mostly spent on non-disclosure agreements. The recent United States case involving Uber showed us the importance of trade secrets in the contemporary marketplace.[70] The dispute arose when Google's sister company Waymo alleged that one of its former employees illegally took various technical documents which were essential to its driverless AI cars.[71] The much-publicized lawsuit ended off in a quiet manner as both the parties settled with Uber giving Waymo a 0.34% stake in its business.[72] It can be argued that Uber got off on a lighter note, but the case highlighted the value of trade secrets to startups and technology-driven firms. An augmented reality startup named as Meta involved in the production of Virtual Reality ('VR') headsets, recently sued its former employee Zhangyi Zhong over trade secrets theft.[73] The suit was filed right after Zhong had left Meta to start his own company to produce VR headsets. Given the cheap nature with which a company can invoke trade secret protection, many AI-driven startups like Meta and Waymo are resorting to it. Trade secret laws are slowly but surely catching up to this, especially in the United States. Taking heed to the prodigious levels of trade secret theft in the US, the Congress passed the Defend Trade Secrets Act ('DTSA') in 2016.[74] This has aligned trade secrets on similar lines with other Intellectual Property ('IP') rights in the United States.

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[67] Jessica M. Myers, "Artificial Intelligence and Trade Secrets" *ABA*, Feb. 19, 2019, *available at*: https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/january-february/artificial-intelligence-trade-secrets-webinar/ (last visited on May 26, 2020).

[68] *Ibid*.

[69] Pratibha Ahirwar, "What To Choose Between Trade Secrets And Patents" *Mondaq*, Feb. 21, 2019, *available at*: https://www.mondaq.com/india/Intellectual-Property/783558/What-To-Choose-Between-Trade-Secrets-And-Patents (last visited on Mar. 10, 2020).

[70] *Waymo LLC* v. *Uber Technologies*, *Inc.*, No. 17-2235 (Fed. Cir. 2017).

[71] Sam Levin, "Google's self-driving car group tries to block Uber from using allegedly stolen tech" *The Guardian*, Mar. 10, 2017, *available at*: https://www.theguardian.com/technology/2017/mar/10/uber-google-self-driving-car-technology-waymo-lawsuit (last visited on Mar. 10, 2020).

[72] "Uber's Waymo Settlement: Why the Road Isn't clear yet" *Knowledge@Wharton*, Feb. 13, 2018, *available at*: https://knowledge.wharton.upenn.edu/article/uber-waymo-settlement/ (last visited on Mar. 10, 2020).

[73] Adi Robertson, "Augmented reality company Meta sues former employee for stealing its tech" *The Verge*, June 9, 2019, *available at*: https://www.theverge.com/2017/6/9/15772800/meta-ar-dreamworld-dreamglass-trade-secret-lawsuit (last visited on Mar. 10, 2020).

[74] The Defend Trade Secrets Act of 2016, 130 STAT. 376.

B. The Legislative Lacuna in Trade Secrets vis-à-vis Necessity of Patents in India

The growing importance of trade secrets worldwide has been shown by the recent laws passed in the USA to regulate it.[75] Trade secrets cost relatively less to enforce and administer when compared to patenting. Trade secrets are also preferable if the algorithm in the AI invention does not facilitate easy reverse engineering. When a firm or an inventor applies for a patent application for the said AI invention, the details of the invention becomes public,[76] thus creating possibilities for the reverse engineering of the algorithms present in the invention. Although the patent law strictly prohibits reverse engineering,[77] it would require the firm to spend significant amounts of money in initiating civil suits against the infringers. In such scenarios, where the algorithms do not facilitate easy engineering it would be preferable for the firm to use trade secrets.

India lacks a legislation for trade secrets. This has forced the courts in India to grant injunctions to protect trade secrets through various other acts such as the Copyright Act, contract law, and the Information Technology Act.[78] But the case law clarity on trade secrets is at a dismal position in India when compared to other common law countries.[79] In the absence of a specific law and judicial clarity, protecting trade secrets has been a huge hassle for corporates in India. Further, it is pertinent to note that trade secrets have other pitfalls when they are compared to patents. The major drawback with trade secrets is that if the secret gets out then it can be used by anyone and it cannot be protected like patented products. If it gets leaked, then the trade secret can also be patented by a third party. Lastly, trade secrets are also difficult to enforce because the onus lies on the plaintiff to prove that the secret was leaked unlawfully.[80] In the healthcare sector, AI startups would need legislative support in order to enforce their rights to continue improving the checkup facilities and R&D. Considering the abovementioned issues, for now patent protection is the best option for AI-oriented healthcare companies. Patents grant exclusive rights to the right owners.[81] The exclusive rights in India can extend up to 20 years.[82] This is a significant period of time for health-oriented companies to get their due compensation for the expenses incurred during R&D.

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[75] *Ibid*.

[76] Frequently Asked Questions: Patents *WIPO*, *available at*: https://www.wipo.int/patents/en/faq_patents.html (last visited on May 30, 2020).

[77] James Pooley, "The Art of Reverse Engineering" *IpWatchdog,* Dec. 4, 2017, *available at*: https://www.ipwatchdog.com/2017/12/04/art-reverse-engineering/id=90439/ (last visited on May 31, 2020).

[78] Prashant Reddy T., "The 'Other IP Right': Is It Time to Codify the Indian Law on Protection of Confidential Information?" 5(1) *J. Nat. Law Uni. Del.* 1-21 (2018).

[79] *Ibid*.

[80] *Supra* note 70.

[81] *Supra* note 35, s. 48.

[82] *Id.*, s. 53.

IV. INTERNATIONAL PATENT SCENARIO ON AI-HEALTHCARE

Conglomerate giants like Apple, Google, and Microsoft have filed more than 300 patent applications pertaining to healthcare, between 2013 and 2017.[83] Verily Life Sciences is a research organization of Alphabet Inc. which collaborates with healthcare institutions. The aim of this association is to build analytic tools such as wearables and identify indicators to detect diseases such as Diabetes and Parkinson's disease.[84] Companies which traditionally did not deal in the healthcare sector are increasingly filing patent applications indicating a progressive field of opportunities that a tech-based healthcare industry holds. Furthermore, the patent laws followed in certain developed jurisdictions are accommodative of AI integrated with algorithms to supplement a doctor. Hereunder is an elaborate discussion of the patent laws followed in Australia, the EU, Japan.

A. Australia

The eligibility for patenting of technological innovations has been explained in the cases of *Commissioner of Patents* v. *RPL Central Pty Ltd,*[85] and *Research Affiliates, LLC* v. *Commissioner of Patents,*[86] by the Australian Federal Court. The Court observed that a mathematical algorithm can be conferred patent rights when it is capable of being programmed in a computer and applied in a manner to deliver a material outcome which will improve the operations of the computer. Therefore, we can infer that a mere algorithmic or software invention cannot qualify for a patent; nevertheless, the invention has to impart something additional to a generic computer operation. The Full Federal Court of Australia in the *Research Affiliates* case, rejected a computerized investment index from the purview of patentable items on the grounds that it was a 'scheme merely implemented in a computer but not directed to the improvement of what might broadly be called computer technology.'[87]

In another judgement by the Federal Court of Australia in the case of *Rokt Pte Ltd* v. *Commissioner of Patents*,[88] a patent titled 'A Digital Advertising System and Method', which is a computer-implemented invention, was declared patentable subject matter as it

[83] Alia Paavola, "Google's parent Alphabet, Microsoft and Apple have filed 300+ healthcare patents: 5 things to know" *Becker's Health IT*, Mar. 13, 2018, *available at*: https://www.beckershospitalreview.com/healthcare-information-technology/google-s-parent-alphabet-microsoft-and-apple-have-filed-300-healthcare-patents-5-things-to-know.html (last visited on Mar. 13, 2020).

[84] Howard Read, "Artificial intelligence and machine learning in healthcare" *Appleyard Lees*, Dec. 13, 2019, *available at*: https://www.appleyardlees.com/artificial-intelligence-and-machine-learning-in-healthcare/ (last visited on Mar. 13, 2020).

[85] [2015] FCAFC 177.

[86] [2014] FCAFC 150.

[87] *Ibid.*

[88] [2018] FCA 1988.

demonstrated technological innovation. The judges while assessing the patentability of the impugned method considered the invention as a whole rather than examining the discrete elements of the invention. Another important aspect that was taken into consideration was, whether the invention provided a 'technical solution' to a 'technical problem' and if the computer is integral for the running of the method and not just a mere intermediary tool for its execution. This judgment has certainly paved the way for software innovators and shed clarity as to how a computer-related invention is to be assessed for patentability.

Following the *Rokt* decision,[89] in another case of *Encompass Corporation Pty Ltd* v. *InfoTrack Pty Ltd*,[90] a Full Federal Court held that a computer-related invention cannot be said to be a patentable matter if it simply displays information and implements generic computer functionality.

It is surprising that the Australian courts have not yet dealt with claims directed towards diagnostic methods. Nevertheless, in the *Myriad* case the High Court of Australia laid down the following as its observation, 'It is not disputed that a process or method of detecting the Increased likelihood of certain kinds of malignancy ... may be patentable subject matter as a process.'[91]

In Australia, patenting an AI is validated only when the inventor provides a full and comprehensive disclosure about the development it will render, such as a new medical treatment, therapy, or pharmaceutical.[92] Patents concerning medical therapies, methods for treatment, or surgery, or diagnostic tests are also allowed in Australia.[93]

B. The European Union

The European Patent Office ('EPO') witnessed a surge in the filing of patent applications by a considerable number of techcompanies that have not been connected with the healthcare sector. Several companies such as Microsoft Technology Licensing LLC, Samsung Electronics Co. Ltd., Nestec S.A., Verily Life Sciences LLC, etc. have been granted patents recently by the EPO.[94]

The European Patent Convention by virtue of Article 52(2) enumerates a number of subjects that cannot be covered under the purview of inventions by the European Patent

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[89] *Ibid.*

[90] [2019] FCAFC 161.

[91] *D'Arcy* v. *Myriad Genetics Inc*, [2015] HCA 35.

[92] Dr. Renee White, "Medical AI: Can Patent Law Keep Up With The Trajectory Of Innovation?" *Watermark*, Apr. 30, 2019, *available at*: https://www.watermark.com.au/medical-ai-can-patent-law-keep-up-with-the-trajectory-of-innovation/ (last visited on Mar. 13, 2020).

[93] Gestalt, "Artificial Intelligence Patents for healthcare" *Gestalt*, *available at*: https://www.gestalt.law/insights/artificial-intelligence-patents-for-healthcare (last visited on May 29, 2020).

[94] *Supra* note 84.

Office.[95] Two such parameters are mathematical methods and programs for computers, which are inextricably associated with AI. However, Article 52(3) states that applications pertinent to these parameters are only ruled out 'to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.'[96] Furthermore, computer programs, as well as mathematical methods are patentable, provided 'they contribute to the technical character of an invention, i.e. contribute to producing a technical effect that serves a technical purpose.'[97] Several judgments such as *VICOM*,[98] *Koch and Sterzel*,[99] and *SHOEL*,[100] have propounded the same principle of determination of the technical character of a method while assessing the patentability of a computer-related invention. Basically the EPO while assessing the patentable character of a subject matter, checks for an involvement of a 'technical teaching', which is purported to be an instruction for a skilled person about how to resolve a technical problem implementing a technical means.[101] In 2019, the EPO published its Guidelines for Examination which lists a number of technical purposes that may be catered to by a computer program or a mathematical method such as 'providing a medical diagnosis by an automated system processing physiological measurements'.[102]

A reinforcement learning agent called the 'Artificial Intelligence Clinician' has been developed which can draw implicit knowledge from the data of a patient in order to identify sepsis and further analyze the available treatment options.[103] Lowest mortality rates were recorded amongst those patients who followed the recommendations provided by the algorithm.[104] The automatic processing of the data of the patient and the output of the algorithm can be deemed as 'physiological measurements' thereby saving the algorithm from exclusion enumerated in Article 52.[105]

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[95] European Patent Convention, art. 52(2).

[96] *Id.*, art. 52(3).

[97] T 1510/10 Official Journal of the EPO [2013].

[98] T 208/84 Official Journal of the EPO [1987] 14.

[99] T 26/86 Official Journal of the EPO [1988] 19.

[100] T 769/92 Official Journal of the EPO [1995] 525.

[101] T 0154/04 Official Journal of the EPO [2006].

[102] European Patent Office, "Guidelines for Examination in the European Patent Office" (Nov. 2019), *available at*: http://documents.epo.org/projects/babylon/eponet.nsf/0/8654640290C2DBE7C12584A4004D2D9A/$File/epo_guidelines_for_examination_2019_hyperlinked_en.pdf (last visited on Mar. 13, 2020).

[103] Komorowski, L.A. Celi, Omar Badawi and Anthony Gordon, "The Artificial Intelligence Clinician learns optimal treatment strategies for sepsis in intensive care" 24 *Nat Med* (2018).

[104] *Ibid.*

[105] Venner Shipley, "Are Applications of AI to Healthcare Patentable" *Mondaq*, May 15, 2019, *available at*: https://www.mondaq.com/uk/patent/805414/are-applications-of-ai-to-healthcare-patentable (last visited on May 29, 2020).

Further, Articles 52(4) and 53(c) categorically exclude 'methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body' from the subject matter that is patentable. [106]

Nevertheless, a unique interpretation of these provisions could overcome the exclusion posed by them. In a decision rendered by the Enlarged Board of Appeal, the patentability criterion for diagnostic methods for humans and animals, and in particular the interpretation of the concept of 'diagnostic methods' in pertinence to the exclusion laid down in Article 52(4) was sought.[107] The judgment laid down that

> if ... some or all of the method steps of a technical nature ... are carried out by a device without implying any interaction with the human or animal body, for instance by using a specific software program, these steps may not be considered to satisfy the criterion "practised on the human or animal body", because their performance does not necessitate the presence of the latter.[108]

The decision indicates that any technical step of the diagnostic method executed by software would be ineligible for patenting if it interacts with the body.[109]

In another judgment, the Examining Division was faced with the issue of whether a heart monitor that examined electrocardiographic signals to conduct a diagnosis of arrhythmia was patentable or not. [110] The diagnosis procedure involved the collection of signal data, storage, and comparison to stored values. The ruling found that the diagnostic procedure was 'being performed by a computer, they are not performed on the human or animal body' implying that the invention may be affixed to the body for analysis, but it is not being 'performed on the body'.[111]

Furthermore, the EPO Guidelines explain that for a claim to be excluded under Article 53 certain features have to be satisfied and those are:[112]

i. Examination phase that relates to the collection of data,
ii. Comparison phase that relates to conducting a comparison with respect to the standard finding,
iii. Reaching an important variation by virtue of the comparison and thereby noting a symptom,

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[106] *Supra* note 95, art. 53.
[107] G 0001/04 Official Journal of the EPO [2006].
[108] *Ibid.*
[109] Kilburn & Strode LLP, "AI Diagnostics & Digital Healthcare" *Lexology*, Apr. 22, 2020, *available at*: https://www.lexology.com/library/detail.aspx?g=e05cdaeb-0743-4116-ad81-e281dc0ba18b (last visited May 29, 2020).
[110] T 0598/07 Official Journal of the EPO [2010].
[111] *Ibid.*
[112] *Ibid.*

iv. Conclusion phase that relates to ascribing the variation to a particular clinical source, i.e. diagnosis.

In case, any one or more of the abovementioned criteria is not satisfied, then the method shall not be deemed as a diagnostic method under Article 53(c). It must be considered to be a simple method of data processing or data acquisition that could be employed for diagnosis purposes and is therefore patentable.[113] A number of patents have been granted by the EPO's Technical Boards of Appeal following the guidelines which include – method of imaging an artery of a patient by employing magnetic resonance imaging,[114] method of assessing ear temperature,[115] and a method of examining regional alterations in oxygen uptake from the lungs.[116] Hence, we can infer that careful drafting can be useful in avoiding the exclusion stated in Article 53(c).

C. Japan

Japan is going through an AI boom, which has been the resultant effect of the Japanese government's incentives and promotion of the use of AI across industries. This has led important industries such as agriculture to the use of AI. Three Japanese firms namely Yanmar, Kubota, and Iseki have started robot-tractor projects for the agriculture sector.[117] The Japanese Patent Office is not far off as it has made a comprehensive plan to process the applications related to patents, trademarks, and designs with the help of AI. It aims to use the technology of AI to scan through numerous patent applications at a rapid pace to ensure that there are no similar applications prior to the ones being filed.[118] It is estimated that 850 out of 890 tasks carried out in Japan's Patent Office can be carried out by the AI.[119] Simultaneously, Japan is taking initiatives to inculcate AI into its healthcare. Given the rising healthcare expenditure, Japan has a proposition to build 10 AI-based hospitals by 2022 with an investment amounting to over $100 million dollars.[120]

On scrutinizing the Japanese Patent Law, it can be argued that it is well suited to grant protection to AI-based medical inventions. It defines invention as 'the highly skilled

[113] James Varley, "Are applications of AI to healthcare patentable?" *Venner Shipley*, Mar. 21, 2019, *available at*:
https://www.vennershipley.co.uk/resources/news/2019/03/21/are-applications-of-ai-to-healthcare-patentable (last visited on May 29, 2020).

[114] T 663/02 Official Journal of the EPO [2011].

[115] T 1555/06 Official Journal of the EPO [2009].

[116] T 990/03 Official Journal of the EPO [2006].

[117] Leo Lewis, "Japan in race to build driverless tractor" *Financial Times*, Aug. 21, 2017, *available at*: https://www.ft.com/content/8fbf30fe-7e65-11e7-9108-edda0bcbc928 (last visited on Mar. 14, 2020).

[118] Nikkei staff writers, "Japan looks to AI to simplify patent screening" *Nikkei Asian Review*, Apr. 24, 2017, *available at*: https://asia.nikkei.com/Economy/Japan-looks-to-AI-to-simplify-patent-screening (last visited on Mar. 15, 2020).

[119] *Ibid*.

[120] Nikkei staff writers, "Japan plans 10 'AI hospitals' to ease doctor shortages" *Nikkei Asian Review*, Aug. 9, 2018, *available at*: https://asia.nikkei.com/Politics/Japan-plans-10-AI-hospitals-to-ease-doctor-shortages (last visited on Mar. 15, 2020).

advanced creation of technical ideas utilizing the laws of nature'.[121] For a patent claim to be successful in Japan, an 'invention' must be a 'creation' of a 'technical idea' and should make application of the 'laws of nature'. Further, it can be said that a law of nature such as the law of gravity or energy conservation laws cannot be ascribed as an 'invention' because it does not utilize a law of nature itself.[122] Additionally, it is inevitable that intellectual activities, business methods, mathematical methods, and games, etc. do not use the 'laws of nature' and therefore cannot be regarded as 'inventions'.[123] Essentially, the provision confers patent rights to such inventions which incorporate all the aforementioned requirements to identify an issue, thereafter utilize the technical means as a solution and finally ascertain whether the means implemented for the solution of such issue was efficacious.[124]

A relevant decision in this regard was passed in the *Shade Analysing Technologies* v. *Japanese Patent Office*,[125] wherein a patent application entitled 'Interactive Dental Network' was initially refused patent rights by the Japanese Patent Office and subsequently passed on for appeal to the Intellectual Property High Court. The claim referred to the 'means for determining the relevant dental prosthesis', and the 'means for setting up a treatment plan with criteria as to shape for fitting the dental prosthesis'. The reasoning behind declining the patent was that the 'means' alluded to in the claim pertains to intellectual activities required by the dentist for deciding and drafting a treatment plan. The fact that the amended claim demonstrated a computer-based dental system that could integrate an interactive dental process to determine or draw up a decision, did not espouse the patent claim as it would still require a dentist's intellectual activity and hence could not be considered a creation of a technical idea utilizing the laws of nature. However, the Intellectual Property High Court deferred and observed that an invention would not be contrary to Article 2(1),[126] simply because it includes or pertains to some intellectual activity and the essence of the invention assists an intellectual activity or imparts technical means for substituting an intellectual activity. The reasoning applied by the Intellectual Property High Court in the current case is indicative that a claim which includes partially unpatentable subject matter on account of the incorporation of the 'laws of nature' as such or 'human rules' as such must be examined as a whole.

Another important provision is Article 29(1) of the Japanese Patent Act which requires that an invention ought to be industrially applicable.[127] Due to political and humanity

[121] The Japan Patent Act (Act No. 121 of April 13, 1959), art. 2(1).
[122] Christopher Heath and Atushiro Furuta (eds.), *Japanese Patent Law: Cases and Comments* (Kluwer Law International B.V., The Netherlands, 2019).
[123] *Ibid.*
[124] *Ibid.*
[125] Case No. 10369 (Gyo-Ke) of 2007.
[126] *Supra* note 121, art. 2(1).
[127] *Supra* note 121, art. 29(1).

perspectives, the medical industry has been left out of the purview of the meaning of 'industry' occurring in Article 29(1).[128] Earlier a claim reciting a human body or a part thereof as an attribute used to be accounted as an industrially inapplicable diagnostic method.[129] However, with the progress of healthcare technology, Japan took note of the importance of protecting the medical inventions. The Examination Guidelines, 2009, laid down the procedure to assess medical inventions. The procedure includes the standard of whether the patent claim comprises of a step of making a judgment, for healthcare purposes, on (a) physical or mental condition of a human body, or (b) proposes for a treatment, surgery, or prescription relying on the aforementioned.[130] A medical invention will be patentable if the invention does not need a judgment step to be conducted by a doctor or other medical professional even if the patent claim expresses the human body as one of its attributes. A medical device is rendered patentable as it is a product and hence is not considered a 'method of surgery, therapy, or diagnosis of humans' except where it integrates a step of judgment for medical reasons.[131] Further, a medical device is also a patentable subject-matter if it integrates a method for the collection of various types of data regarding the human body by assessing the functions and structures of the organs in the human body.[132]

V. PATENTING OF AI-HEALTHCARE IN INDIA

It is notable to mark that at a stage where AI still remains an exploratory field for certain industries, the Indian healthcare industry has adopted the AI technology quite early. A number of healthcare institutions have installed AI-based healthcare management and in addition to that, have partnered with start-ups which focus on AI-related technology. IBM's 'Watson for Oncology' is being used by the Manipal Hospitals for personalised cancer therapy.[133] Paras Hospital in Delhi, Columbia Asia in Bangalore, and Star Hospital in Ahmedabad have collaborated with Cardiotrack which is an AI-based start-up.[134] Devices have been employed that can analyse a patient's electrocardiogram ('ECG') data to diagnose any possible cardiac disorder by applying AI-based algorithms and a medically

[128] Lisa Mueller (ed.), *Global Patent Protection and Enforcement of In Vitro Diagnostic Inventions* (Kluwer Law International B.V., The Netherlands, 2019).

[129] *Ibid*.

[130] Japan Patent Office, "Examination Guidelines for Patent and Utility Model in Japan" (October 2015), *available at*: https://www.jpo.go.jp/e/system/laws/rule/guideline/patent/tukujitu_kijun/index.html (last visited on May 29, 2020).

[131] *Id*. at 10.

[132] *Id*. at 11.

[133] *Supra* note 23.

[134] Dr. Deepa Kachroo Tiku and Dr. Pallavi Singh, "AI based health innovation in India – a legal perspective" *BioSpectrum*, June 6, 2019, *available at*: https://www.biospectrumindia.com/features/69/13830/ai-based-health-innovation-in-india-a-legal-perspective.html (last visited on May 29, 2020).

organized database of 500,000 ECG scans.[135] Personalised health solutions are now possible and being delivered by start-ups like Healthi and Inito that use predictive analytics, ML, and personalisation algorithms.[136]

Predictive analytics is a discipline of advanced analytics that utilizes artificial intelligence, data mining,[137] modeling, and statistics,[138] in predicting impending activities or events that lead to decision-making well in advance. The predictive analytics technique empowers the healthcare sector to face diseases at their nascent stage,[139] thereby enhancing the recovery rate. Every year India witnesses around 1 million new cases of cancer, a number that will possibly rise at an unabated rate given the lifestyle changes of the ever-increasing population.[140] Currently, there are barely 2,000 pathologists dealing in oncology, out of which only 500 are expert oncopathologists.[141] The huge gap in providing essential healthcare can be bridged by ML solutions and thereby focusing on aiding a general pathologist in producing quality diagnosis.[142] A 'Digital Pathology' programme is underway by NITI Aayog to establish a national repository of curated and annotated pathology images.[143]

Essentially the above discussion is to indicate the importance of grant of patent protection to AI-related inventions, to help catalyze for novel and superior developments in the medical ecosystem of India which would otherwise be difficult for human ingenuity to attain. For a product or process to be patentable, it needs to comply with the requirements of Section 2(1)(i) of the Patents Act, which provides for novelty, involvement of an inventive step, and industrial applicability.[144] It is the inventive step demonstrated by an invention which possesses the capability to solve some technical problem, thereby imparting itself with a technical solution/character/feature that renders the invention patentable.[145]

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[135] *Ibid.*

[136] *Ibid.*

[137] Basma Boukenze, Hajar Mousannif *et. al.*, *Predictive Analytics in Healthcare System Using Data Mining Techniques*, The Fourth International Conference on Database and Data Mining, Held on (Dubai, April 2016).

[138] Predictive analytics in healthcare, *Deloitte*, July 19, 2019, *available at*:
https://www2.deloitte.com/us/en/insights/topics/analytics/predictive-analytics-health-care-value-risks.html (last visited on May 29, 2020).

[139] *Ibid.*

[140] Government of India, "National Strategy For Artificial Intelligence #AIFORALL" (NITI Aayog, 2018), *available at*:
https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf (last visited on Mar. 12, 2020).

[141] *Id.* at 28.

[142] *Id.* at 29.

[143] *Ibid.*

[144] *Supra* note 35, s. 2(1)(i).

[145] Dr. S. Z. Amani, Computer Programme – Does It Warrant Patenting: A Case Study of India *Manupatra* 19 (2016).

Section 3(k) of the Patents Act, puts a bar on the patentability of 'computer programs per se'.[146] Innovation in the domain of AI is imperatively 'computer-based'. Nonetheless, in the contemporary world where the majority of the inventions are computer-based subjecting such inventions to patent restrictions would be regressive. It is implicit from the words 'per se' that a genuine invention based on computer programs shall not be denied patent rights under the Patents Act.[147]. In the landmark case of *Ferrid Allani* v. *Union of India*,[148] the Delhi High Court was faced with the question of whether a 'method and device for accessing information sources and services on the web' is eligible for patenting. The patent was refused by the Patent Office due to the objections based on the provisions laid down under Section 3(k) of the Patents Act. A similar rejection was reiterated by the Patent Office after a single-judge bench of the Delhi High Court was approached by the petitioners. Thereafter, an appeal made by the petitioner in Intellectual Property Appellate Board was also in vain as it found the patent application did not disclose any technical advancement or technical effect.[149]

However, the petitioner in the current petition claimed that the device was not mere software and required a specific procedure for its performance on a computer. Thus, the patent specification reveals a technical effect and a technical advancement. Further, reliance was placed on the Draft Guidelines for Examination of Computer Related Inventions, 2013.[150] The guidelines comprise of provisions of the patentability of inventions related to computers. Further, it lays down the approach to be resorted to by the examiners while inspecting patent applications and the jurisprudence involved in the grant or rejection of the patents in this discipline.[151] The definition for technical effect and technical advancement as laid down by the guidelines is a 'solution to a technical problem, which the invention taken as a whole, tends to overcome',[152] and 'as contribution to the state of art in any field of technology'.[153] Some examples of technical effect are improved user interface, more efficient database search strategy, higher speed, better control of the robotic arm, improved reception or communication of radio signal, reduced hard-disk access time, etc. Additionally, it must be noted that all technical advancements come conjoined with the technical effects; however, vice-versa may not be true. Furthermore, as presented by the petitioners that an invention which lets the user more

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[146] *Supra* note 35, s. 3(k).

[147] Parliament of India, "Joint Committee on The Patents (Second Amendment) Bill, 1999" (Dec. 2001).

[148] 2019 SCC OnLine Del 11867.

[149] *Ibid.*

[150] Office of the Controller General of Patents, Designs and Trademarks, "Guidelines for Examination of Computer Related Inventions" (June 2013), *available at*:
http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_36_1_2-draft-Guidelines-cris-28june2013.pdf (last visited on Mar. 12, 2020).

[151] *Ibid.*

[152] *Id.* at 10.

[153] *Ibid.*

efficacious database search strategies, higher speed or more economical application of memory, etc. would comprise a 'technical effect'.[154]

In light of the aforementioned arguments, the Delhi High Court observed that an invention based on a computer program is patentable, if it manifests a technical contribution or a technical effect. It further ruled that the impugned patent application be re-examined in consonance with legal precedents which have provided for the interpretation of Section 3(k) of the Patents Act,[155] the Guidelines that have been issued in relation to Computer Related Inventions and other aids like the legislative material. Furthermore, it is important while assessing the patentability of a claim that falls in the excluded category enlisted in Section 3(k) that the focus is on the underlying substance of the invention.[156]

Further challenges arise for patents related to medical inventions as enumerated by the provision in Section 3(i) of the Patents Act, that forbids the patentability of 'any process for the medicinal, surgical, curative, prophylactic diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products'.[157] Even Japan, which has attained impeccable standards in AI devices, follows a similar provision, yet the Japanese Guidelines have construed the provision in a manner which will not impede the growth of the invention of medical devices.[158] A similar approach can be made by Indian counterparts and deem a medical device as a product. Therefore, a medical device would not be covered within the purview of Section 3(i) of the Patents Act, and hence will be patentable, except for the cases where its operation involves a judgment step for medical purposes.

VI. CONCLUSION

The fourth revolution prompted the infusion of technical innovations like ML, predictive analytics, AI-based learning algorithms, etc. into healthcare in order to assist medical professionals across the globe in early detection of diseases and patient-specific decision-making. This will broadly help a country like India where the medical staff is woefully understaffed by providing proactive measures to physicians with accurate observation, diagnosis, conclusion, and treatment plan. This will subsequently help physicians to devote their attention towards critical care cases that require immediate care. Further, AI-based medical inventions may supplement the average lab facilities, ameliorate the shoddy

[154] *Supra* note 150 at 10.
[155] *Supra* note 146.
[156] *Ibid.*
[157] *Supra* note 35, s. 3(i).
[158] *Supra* note 130 at 10-11.

healthcare access in remote areas of India and also make healthcare solutions more affordable.

As the AIs set to permeate the Indian healthcare sector, there is a glaring necessity of a stronger patent protection to foster and protect innovations in medical inventions that are AI-based. AI can pass the novelty, inventive step, and industrial application stage of a patent application. But it might face issues at the stage of Section 3(k). The recent *Ferrid Allani* ruling which provided guidance related to correct interpretation of Section 3(k) of the Patents Act has paved the way for AI inventors and investors. However, Section 3(i) of the Act still remains an apparent barrier towards India's transformation to an AI-based healthcare ecosystem. In regard to this, the Government may draft guidelines enunciating a standard for patentability of medical inventions. The guidelines could adopt a similar approach as of Japanese jurisprudence which strikes a good balance between the two needs, 'humanity' and 'industrial development'.

MEMOIR OF TERRITORIALISM: THE CONUNDRUM SURROUNDING GIBBS AND THE TAKEAWAYS FOR INDIAN INSOLVENCY REGIME

Saurabh Tiwari and Kanay Pisal[*]

The past few decades have witnessed a significant spurt in trade and business activities across the globe. With the countries becoming more liberal and open in their outlook, the figures are destined to multiply. However, with increasing consumerism and the dissolving domestic boundaries of trade and operations, even the business entities are growing and expanding tremendously in terms of the financial power that they hold. In the light of the same, the authors have tried to view the probable ramifications that might ensue in case a spell of financial difficulty surrounds these humongous entities. Thus, in order to deal with such situations in the future as well as present, we need to have a more cohesive and uniform Cross Border Insolvency regime. Gradually, the United Nations Commission on International Trade Law Model Law had emerged as a beacon of hope, but certain territorial concepts like that of 'Gibbs' have frustrated its very essence. Learning from the same, the authors extensively discuss the arguments that the proponents and opponents of Gibbs raise and try to juxtapose them against the practical situations that various developed jurisdictions have recently faced. The paper also discusses how various countries have moved from the 'territorial' approach to the more mature 'modified universalism' and analyses the international influences in this regard. In 2020, when several jurisdictions across the world including India are legislating their own versions of Model Law, it becomes increasingly pertinent to discuss the rule Gibbs that is bound to stand in the countries' march towards a well-knit, interconnected and uniform insolvency regime. The paper mentions certain difficult scenarios that emerged after the 'developed' jurisdictions had already enacted their domestic version of Model Law and believes that countries like India must take cues and learn from it. The paper concludes with a suggestion to the drafting committee for India's domestic adoption of the Model Law and proposes a stern stand against Gibbs unlike what exists in other jurisdictions.

* The authors are fourth-year B.A. LL.B. (Hons.) students at the Dr. Ram Manohar Lohiya National Law University, Lucknow.

I. INTRODUCTION

In the 21st century, with the change in economic scenario, and with businesses moving beyond the domestic boundaries, there prevails an insatiable desire for wider trade and business spawning across jurisdictions. In the quest for accomplishing these desires originate cross border operations of these corporate behemoths which enjoy international clientele, unparalleled assets and developed infrastructure across jurisdictions. Their operations aren't constricted within a single sovereign.

As a matter of fact, past few years have witnessed a significant spurt in international trade. The world trade in goods that saw a humongous rise from about US $ 10 trillion to about US $ 18.5 trillion in 11 years (by 2015) epitomizes the stated point.[1] In such a changing economic scenario, where businesses are increasingly without borders and hold mammoth economic power, any spell of financial weakness on these big entities can have miserable consequences across multiple jurisdictions.

Owing to the same possibility, there prevails a greater need for integration, connection and convergence among the legal systems involving the insolvency laws. The same is quintessential in order to ensure the greatest good for all in case of any unfortunate and tumultuous event involving failure of these corporate entities that hold enormous economic power.[2]

Whenever these giant entities (with operations stretching across various jurisdictions) go insolvent, individual insolvency proceedings have to be initiated in these multiple jurisdictions where these entities functioned. This process as well as its consequences are unnecessary for both, the domestic creditors, as well as the corporation. Separate and multiple insolvency proceedings can be burdensome, for they mean separate proceedings in separate jurisdictions with not just separate set of substantive laws, but also varied procedures and different insolvency administrators. This is exemplified by the fall of Lehman Brothers in 2008 which triggered more than 75 proceedings across a multitude of jurisdictions including Singapore, UK, USA, Switzerland and others.[3]

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[1] United Nations Conference on Trade and Development, *Key Statistics and Trends in International Trade*, UNCTAD/DITC/TAB/2015/1 (2015), *available at*: https://unctad.org/en/PublicationsLibrary/ditctab2015d1_en.pdf (last visited on May 21, 2020).

[2] Kannan Ramesh, *Cross-Border Insolvencies: A New Paradigm,* International Association of Insolvency Regulators' 2016 Annual Conference and General Meeting, Held on (Singapore, Sept. 6, 2016), *available at*: https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_Ramesh%20JC_delivered.pdf (last visited on May 19, 2020).

[3] Alvarez & Marshall, "Lehman Brothers Holdings Inc: International Protocol Proposal" 11 Feb. 2009, *available at*: https://www.investireoggi.it/forums/attachments/international_protocol_proposal_2-10-09-pdf.5709/ (last visited on June 21, 2020).

In all such scenarios of financial distress and upheaval, a system of 'universal' or 'single' proceeding facilitates a mechanism for orderly collection and realization of assets for distribution,[4] while also optimizing the returns that the entire class of stakeholders get.[5]

In most of these cases where the entity is closely integrated economically, any event of financial distress is bound to have a 'domino' effect upon the others. In such a situation of tumult and distress, a unified proceeding for insolvency or restructuring might still provide some strength to the remaining value of enterprise. Contrary to this, individual discrete insolvency proceedings mean more parallel proceedings, thereby augmenting the inconsistency and causing deviation from the objective of coordinated resolution.[6] As a result of these separate proceedings, consequently, even the assets are bound to be disposed of in a piecemeal fashion, thus increasing the likelihood of forum shopping. The most important landmark draft, guideline or legislation to achieve the said objective was the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Cross Border Insolvency.[7] The eventual passing of the Model law in 1997 can also be viewed in juxtaposition with, and as the aftermath of the deep financial crisis of 1990s and the great recession.

II. MOVING TOWARDS GREATER ACCEPTABILITY FOR CROSS BORDER INSOLVENCY REGIME

A. Recommendation from International Organisations

By the 1990s, several reputed international organizations became increasingly concerned about the absence of a uniform and a predictable insolvency mechanism. For instance, the World Bank published some principles and guidelines for effective insolvency mechanism and creditor rights systems.[8] The aforementioned principles and guidelines were to be a collection of international 'best practice' ways and methods for creditor rights systems[9] and insolvency in general.

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[4] Roy Goode, *Principles of Corporate Insolvency Law* 8 (Sweet & Maxwell, 4th edn., 2011).

[5] *Larsen Oil and Gas Pte Ltd.* v. *Petroprod Ltd.*, [2011] 3 S.L.R. 414.

[6] Irit Mevorach, "Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge" 9 *Brooklyn Journal of Corporate, Financial & Commercial Law* 235 (2014).

[7] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation* (Jan. 2014), *available at*: https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf (last visited on June 10, 2020).

[8] World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (Apr. 2001), *available at*: https://www.iiiglobal.org/sites/default/files/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20Creditor%20Right%20Systems_0.pdf (last visited on May 19, 2020).

[9] *Ibid.*

In addition to the Principles and Guidelines published by the World Bank, even the International Monetary Fund published Orderly and Effective Insolvency Procedures ('OEIP') which acknowledged the importance of strengthening the trans-border marketplace by fostering the creation of a predictable international insolvency mechanism that shall in turn be beneficial for both the debtors as well as creditors.[10]

Even the UNCITRAL began contemplating the probable idea of preparing a draft Model Law on international insolvency. Infact, the UNCITRAL even established the 'Working Group' on insolvency inspite of facing substantial opposition from certain countries. This Working Group with its members, drafted the text of the Model Law which culminated into the finalized version by May 30, 1997.

B. Approach Taken by Countries Themselves

With time, several countries have started being more acceptable towards international aspects of insolvency. In 1978, the surge in the international insolvencies prompted the United States to enact 'Section 304' in the U.S. Bankruptcy Code. This section would allow the USA courts to suitably recognize the foreign representatives and foreign proceedings[11] while using enough discretion to determine if the local creditors are to be shielded from or subjected to the laws and proceedings of the foreign court.[12] United Kingdom too, has Section 426 of the Insolvency Act,[13] a part of which has sought inspiration from the Cork Report's extra - territorial aspects of International Law.[14]

While most of the nations gradually looked up to the UNCITRAL Model Law as a promising future for Cross Border Insolvency cases, a similar tool was the EU Insolvency Regulation. The same is different from the Model Law in the way that the latter is binding on the EU Member states and permits a lesser degree of deviance[15]

Certain other jurisdictions like France have the monist hierarchy of French laws where International Law shall supersede the other domestic laws.[16] However, it is not evident that how far was the cooperation extended during pendency of proceedings. Therefore, even after the UNCITRAL Model Law was passed, to what an extent would it be adopted

[10] International Monetary Fund, *Orderly and Effective Insolvency Procedures* (1999), *available at*: http://www.imf.org/external/pubs/ft/orderly/index.htm#foreword (last visited on July 25, 2019).

[11] Lesley Salafia, "Cross-Border Insolvency Law in the United States & Its Application to Multinational Corporate Groups" 21 *Connecticut Journal of Int'l Law* 297-98 (2006).

[12] 11 U.S. Bankruptcy Code, s. 304, repealed in 2005 and replaced with Chapter 15, titled 'Ancillary and Other Cross-Border Cases'.

[13] The United Kingdom Insolvency Act, 1986, s. 426.

[14] Dept. of Trade, "Insolvency Law and Practice: Report of the Review Committee" paras. 1902-1913 (1982) [Cmnd. 8558].

[15] LoPucki, "Universalism Unravels" 79(1) *American Bankruptcy Law Journal* 166 (2005).

[16] Paul J. Omar, "The Internationalisation of Insolvency Law: An Anglo French Comparison" *International Insolvency Institute*, *available at*: https://www.iiiglobal.org/sites/default/files/internationalizationofinsolvencylawanglofrenchcomparisons.pdf (last visited on May 21, 2020).

in spirit; or that even after its adoption, would it be always applied without thwarting its essence, are the questions that still remain.

How has a country viewed the aforementioned international guidelines or to what extent do they presently follow the spirit of Model Law can be determined from three approaches that different countries follow: Territorialism, Universalism and Modified Universalism.

III. TRINITY OF ARCHAIC TERRITORIALISM, UNIVERSALISM, AND THE HYBRIDMODIFIED-UNIVERSALISM

Cross Border Insolvency is basically a patchwork of national laws that have been standardized in the best manner possible. The UNCITRAL Model Law is a minimalistic small step towards achieving greater uniformity, cohesion and cooperation among different insolvency regimes. In fact, the judicial pronouncements even before the enactment of the Model Law manifest the importance of avoiding inconsistent judgments.[17] Even at that time it was suggested that the basic approach should be of judicial support and cooperation which can collectively be called 'judicial comity'.[18]

Unfortunately, today, the pace at which the Model Law is being adopted[19] is self-illustrative of the inherent difficulties that stand in the way of achieving a more inclusive and intertwined insolvency regime. In the quest for achieving greater cooperation between insolvency laws, there are two major theories that need to be discussed: territorialism and universalism.

'Territorialism' is pivoted upon the concept that separate insolvency proceedings should be initiated in separate jurisdictions where either the creditors are situated, debt was taken from or where the assets of the debtor are located.[20] As a distant opposite, 'Universalism' believes that one size fits all and discards the domestic apprehensions of the states by making use of a single forum.[21]

The approach of Territorialism is advantageous for the local creditors as this concept maintains their entitlement over the local assets of the debtor in that specific jurisdiction. Despite the International Bar Association, the World Bank and the International

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[17] *Maxwell Case Maxwell Communication Corporation plc* v. *Société Generale*, 93 F. 3d. 1036 (2nd Cir. 1996).

[18] Peter Millett, "Cross-Border Insolvency: The Judicial Approach" 6 *International Insolvency Review* 99, 103 (1997).

[19] "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" *United Nations Commission on International Trade Law, available at*: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited on July 25, 2019).

[20] Richard Sheldon QC (ed.), *Cross-Border Insolvency,* (Bloomsbury Professional, 4th edn., 2015).

[21] Daoning Zhan, *Insolvency Law and Multinational Groups: Theories, Recommendations and Suggestions for Business Failures* (Routledge, 2019).

Monetary Fund suggesting a unified insolvency mechanism, quite a lot of governments have abstained from adopting such a regime owing to the looming fear of unfair treatment of the local creditors.[22] However, since local insolvency laws are still evolving and there isn't a mechanism of all-out transparency, there is rising relevance of a hybrid version of 'modified universalism'.[23] This approach maintains an appropriate poise while juxtaposing the contradictory concepts of territorialism and universalism and that is why the same has gained popularity in recent years.

Today, drifting from the traditional approach of territorialism and striding in the direction of universalism through the hybrid version of modified universalism must be swiftly undertaken considering the rapidly evolving domestic insolvency regimes. This approach can facilitate cooperation among all the associated countries that are seeking to distribute the debtor's estate (assets). Here, all those jurisdictions where the debtor has its assets would apply the procedural and substantive law of that specific country which would host the main insolvency proceeding[24] unless the said act connotes a major violation of the domestic public policy or of the domestic laws. These domestic laws don't exist in isolation and are knitted to interact with complex range of other domestic laws as well.[25] Ensuring greater congruence and convergence in these multiple domestic insolvency proceedings is desirable and shall prevent forum shopping while providing greater certainty. The same has also been the *raison d'etre* of effective insolvency regimes.

It is for this reason that the approach of modified universalism came into play. The said approach posits that while being consistent with public policy, justice and domestic considerations, the judicial approach that is adopted should also be in line with the universal spirit of cooperation and must actively aid the country of 'principle liquidation'.[26]

In the attempts of emboldening the idea of cooperation and communication between the courts, certain jurisdictions like Singapore have mooted for and are even working for building an institutional framework of judges from major financial centres across the world and the same would be called the Judicial Insolvency Network or JIN.[27] Upon such guidelines coming in place, the assistance between the participating courts would be made easier and the same shall also facilitate judges across jurisdictions to share their

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[22] Roland Lechner, "Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings" 19 *Arizona Journal of International & Comparative Law* 1006 (2002).

[23] *Rubin* v. *Eurofinance S.A.* [2013] 1 AC 236; *In re Maxwell Communication Corporation* 170 BR 800; Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law*, para. 10025 (Wolters Kluwer, 4th edn., 2015).

[24] Evelyn H. Biery, Jaosn L. Boland & John D. Cornwell, "A Look at Transnational Insolvencies & Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act Of 2005"47 *Boston College Law Review*, 23-24 (2005).

[25] Ian F. Fletcher, *Insolvency in Private International Law* 5 (Oxford University Press, 2nd edn., 2005).

[26] *In re HIH Casualty and General Insurance* [2008] 1 W.L.R. 852.

[27] "JIN Guidelines" *Judicial Insolvency Network*, *available at*: http://www.jin-global.org/jin-guidelines.html (last visited on July 26, 2019).

experiences and problems while dealing with cases of Cross Border Insolvency and suggest ideas for reform. However, even today a major impediment that stands in the way of achieving greater cooperation and a more unified system of proceedings is the Rule of Gibbs in place.

IV. LOOKING INTO THE GIBBS RULE

Over the years of dealing with multi jurisdictional cases of insolvency, a greater understanding and inter-connectedness has developed across various jurisdictions. A number of enactments and guidelines that have been issued in the meanwhile have chiseled the approach for a greater cooperation in an even better away. The guidelines applicable for court to court communications have been published by the American Law Institute in 2001[28] and 2012, by the UNCITRAL and the European Communication and Cooperation Guidelines for CBI (that had been adopted by INSOL Europe in 2008).[29] But whatever that may be, it is equally relevant to see that Gibbs is not violated.

A. Gibbs Rule - the Concept

With the passing years, there has been wider academic acceptability for universal and unitary proceedings. But, at the same time where there are more and more nations adopting their local versions of UNCITRAL Model Law, some advanced jurisdictions like England continue to retain certain archaic laws that stand at strict loggerheads with the universal and accommodative approach of Model Law. Gibbs being a valid law[30] operates as one such impediment. Gibbs rule is an archaic manifestation of the outdated philosophy of territorialism bunkered within the common law[31] which says that discharge of any debt or liability under the bankruptcy law of a foreign jurisdiction is a discharge therefrom in England, if, and only if, it is a discharge under the proper law of the contract.[32]

The said rule laid in 'Gibbs' has been often shunned and levied with criticism by both, judiciary and academia, as it cleaves with territorialism and must be discarded following the thrust of the present-day idea of modified universalism.

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[28] Bob Wessels, "A Global Approach to Cross Border Insolvency Cases in a Globalising World", *Eleven International Publishing* (2013), *available at*:
https://www.elevenjournals.com/tijdschrift/doqu/2013/1/DQ_2013_002_001_003 (last visited on July 26, 2019).

[29] Bob Wessels, "European Communication and Cooperation Guidelines for Cross-Border Insolvency" (2007) 4 (4) Abi Committee News.

[30] *Bakhshiyeva* v. *Sberbank of Russia*, [2018] E.W.C.A. Civ. 2802.

[31] Kannan Ramesh, "The Gibbs Principle: A tether on the feet of good forum shopping" 29 *Singapore Academy of Law Journal* 42 (2017).

[32] Lord Collins of Mapesbury, Adrian Briggs, *et.al.* (eds.), *Dicey*, *Morris & Collins on the Conflict of Laws* (Sweet and Maxwell, 15th edn., 2012).

B. Is Gibbs Relevant Even Today?

Quite interestingly, even if the English courts criticize 'Gibbs,' they are bound by it due to its precedential value. It is a judgment by the English Court of Appeals and has been upheld even recently.[33] Over time, since Gibbs has emerged as an impediment in the collective proceedings, variety of academicians have given a range of reasons to distance from the territorial idea that the same is based on. However, even if it sounds unnecessarily idealistic, Gibbs is a glaring reality that the English courts are unable to distance themselves from.[34] Even if the English courts consider it to be a bad law, they are nevertheless bound by it[35] and the same has been placed on a higher pedestal than the domestic adoption of Model Law.[36]

C. Arguments Favoring Gibbs

The proponents of Gibbs rule argue that the parties opt for the English law as the proper law of the contract because the English courts have aided in developing the global standards of impartiality and have exemplified equality, uniformity, rationality, independence, and fairness.[37] The English courts enjoy the goodwill and trust of people around the world and have had a jurisprudential badge of reliability to flaunt. With nearly half of the world taking cue for their domestic laws from the jurisprudence developed in the English courts, the reliance of the parties on the English law is not much of a surprise.

Another argument being the existence of other national laws in their nascent stages and there existing a number of economies lacking a transparent legal system and predictability due to the lack of precedents in their national courts. The rule of Gibbs provides the creditors a trusted, predictable and much more stable legal system for the protection of their rights, consequently bolsters investments, and takes away the 'domestic law insecurity' of the investors.

The fact that the rule of Gibbs is still a good law and has been kept at a higher pedestal compared to the Model Law[38] is factored into the contract price. The reliability on Gibbs gives the creditors certainty and hence the borrowers get cheaper credit. The arguments may be extended logically to assert that if Gibbs is overturned then the same shall lead to decrease in the investment and increase in the cost.

It is a common scenario that when met with financial difficulties, the debtors try to shift their Center of Main Interest ('COMI') to the safe havens and cause detriment to

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[33] *Supra* note 26.
[34] *Re OJSC International Bank of Azerbaijan*, [2018] E.W.C.A. Civ. 2802.
[35] *Global Distressed Alpha Fund 1 Ltd. Partnership* v. *PT Bakrie Investindo*, [2011] E.W.H.C. 256 (Comm).
[36] *Bakhshiyeva* v. *Sberbank of Russia*, [2018] EWHC 59 (Ch).
[37] Geoffrey Marshall, "Due Process in England" 18 *American Society for Political & Legal Philosophy* 69-89 (1977).
[38] *Supra* note 36.

the creditors. These safe havens provide benefits to creditors such as the reduction in the requirement of the voting majority (for e.g., from special majority to a simple majority) and cram down provisions, thus muffling the voice of the creditors and taking away the right unilaterally, under the garb of insolvency.[39] The very fact that the location of the COMI has a deep effect on the nature of insolvency proceedings, a shift made by the debtor to a more debtor friendly nation provides the debtor with a humongous power to not only crush the parties' expectations that seep in at the time of signing the contracts but also use provisions such as cram down to harm the interest of the creditors. Cram downs occurs when a plan of reorganization proposed in relation to a debtor is implemented, even though an entire class of creditors votes against the plan.[40] Gibbs provides protection and certainty to the legal regime in carrying out the contract and the discharge of debts against the pernicious attempts of bad forum shopping. Additionally, the discharge of English law governed debts would be carried out in the protection of the English courts and would protect the rights of both creditor and debtor.

It is argued that the Model Law is purely procedural in nature and should not be used as a tool to alter or strip off the substantive rights and protection bestowed upon the creditors by the Gibbs law. Moreover, it is the parties' expectation that governs the law,[41] and the creditors while providing debts under English law had reasonable expectation of the discharge taking place under the same law. Furthermore, the legal situation in English law is such that the courts do provide maximum possible assistance to the foreign representative and is guided by the mandate provided in Article 21 (2) of the UNCITRAL Model Law.

The last argument in favour of Gibbs is consequence based and can be understood with the help of a fictitious scenario which is more than common in the real world. Suppose, a voluntary restructuring plan was proposed and approved for Debtor A, in country XYZ. As per the law of XYZ once the plan is approved by a majority of creditors, the same becomes binding on all creditors. However, the debts included English law governed debts and a creditor C who had an English law governed debt had neither participated nor submitted to the jurisdiction of the courts of XYZ, and now C wishes to proceed in the English courts for the proper discharge of the debts. The argument follows the logical premise that since the courts in England are nevertheless bound by the rule of Gibbs they would be bound to give C a platform and right to bring actions against A and would defeat the purpose of a unified single proceeding. Furthermore, looking at it from the viewpoint

[39] International Monetary Fund, "Orderly and Effective Insolvency Procedures", *available at*: https://www.imf.org/external/pubs/ft/orderly/index.htm (last visited on May 22, 2020).

[40] "Cram Down", *Thomson Reuters, available at*: https://uk.practicallaw.thomsonreuters.com/9-384-7322?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (last visited on May 22, 2020).

[41] *Canada S. Ry. Co.* v. *Gebhard*, 109 U.S. 527 (1883).

of the debtor, if the so called centralized proceedings seeking discharge of English law debts are concluded and the assets are used to discharge and restructure the debts, then in such a scenario, the debtor would be stripped off its assets and the liability under the English law would still remain. Thus, adherence to the rule of Gibbs becomes quintessential.

D. Criticism of Gibbs

Gibbs has been criticized globally and is considered as an archaic law rooted deeply into the conception of territoriality. The criticism is on various footings.

1. Mischaracterizations of discharge of debt as a contractual matter

On examining the Gibbs decision of the Court of Appeal, it can be said that the same was based on reasoning that where the parties had consented to the English law as the law governing the contract, they had never agreed to be bound by the French insolvency law. In the judgment Lord Esher posed a rhetoric that: 'Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?'[42] The rationale for such reasoning is based on the mischaracterization of the discharge of debt as a contractual matter, rather than an insolvency and bankruptcy issue and hence the focus of the Court was upon the choice of the parties rather than the policy decisions underpinning an insolvency issue.

Furthermore, it is important to properly understand the nature of discharge under bankruptcy law. When a debt is discharged in bankruptcy, it is so done not because some parties have agreed to do so, rather it is because of the policy reasons underpinning a bankruptcy discharge. The bankruptcy court decides the contractual matter i.e. the rights and liabilities of the parties privy to a contract, it also works to safeguard the interest of the general body of creditors, and the general community within which the debtor operates. It is also relevant to note that the bankruptcy courts not only decide the matters between the creditor and debtor but also the disputes amongst the creditors. Hence, even going by the proper law of contract governing the discharge, Gibbs rule provides no answer to the lacunae created from the lack of any such contract between the creditors inter-se. Academic criticism has addressed this logical fallacy of Gibbs rule and has commented that: 'the post insolvency treatment of the claimant's pre insolvency entitlements cannot be the exclusive matter of party autonomy.'[43]

2. Expectation created by the rule of Gibbs

Gibbs rule provides that when parties choose English law as the law governing the contract, the parties have a legitimate expectation that the discharge of their debts shall

[42] *Antony Gibbs Sons* v. *LA.Societe Industrielle et Commercialle Des Metaux*, 25 Q.B.D. 399.
[43] Look Chan Ho, *Crossborder Insolvency: Principle and Practice* para. 4-098 (Sweet and Maxwell, 2016).

be governed by English law. This reasoning does more damage than justification to the Gibbs rule. What this argument explains at most is that some farsighted parties might construct a possibility that the proper law of contract would not only govern the performance and construction of the contract but also the potential discharge. But why does this logic restrict itself to only one situation. It is also possible that the same farsighted parties might recognize other potentially competing bases for the discharge of their claims, the other center of operation and nerve center of the debtor, a more efficient scheme of legal position of some nation which provides time and cost-effective resolution. The dual standards of the expectation created by the rule of the Gibbs has been addressed by Ian Fletcher, and he has proposed a reformulation in Gibbs wherein:

> ... if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.[44]

Thus 'Choice of law' in a contract should not dictate the application of law governing discharge as both are mutually exclusive in nature[45] and operate independently.

3. Against comity and reciprocity

Comity between courts may be understood as a discretionary act of deference by national courts, to not exercise jurisdiction in a case properly adjudicated in foreign states.[46] International comity mandates judicial recognition of foreign insolvency. Extending comity to foreign courts and staying the proceedings in favour of that proceeding enables the assets of the debtor to be distributed and managed in an equitable and orderly manner rather than a haphazard arrangement which requires more time and money.[47] Thus, adherence to Gibbs even on being assured of the procedural righteousness in the foreign jurisdiction and subsequent insistence on the discharge of English law debts only under the proper law of contract leads to multiplicity of proceedings and destroys the idea of a single unified proceedings.

International law when faced with the problem of lack of an international sovereign places heavy reliance on the concept of reciprocity between nations. The dual standards of the English courts and English law with respect to reciprocity can be understood by reference to the observation of Pollock CB in *Armani* v. *Castrique*: 'A foreign certificate of

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[44] Ian Fletcher, *Insolvency in Private International Law*, para. 2.129 (Oxford University Press, 2nd edn., 2005).
[45] *Supra* note 43 at paras. 4.096-4.107.
[46] *In re Ionica PLC*, 241 B.R. 829 (Bankr. S.D.N.Y. 1999).
[47] *Cunard Steamship Co. Ltd.* v. *Salen Referee Services*, 773 F.2d 452 p.no. 457-458 (2nd division).

discharge is no answer to a demand in our Courts; but an English certificate is surely a discharge as against all the world in the English courts...'[48] Talking about the Model Law, various nations such as South Africa, Mexico, the British Virgin Islands, Romania and Mauritius have all legislated on the basis of reciprocity.[49] Furthermore the English courts do not recognize the discharge of a debt outside the proper law of contract but in the same breath expect that a discharge made under their laws should be considered a valid discharge universally. This 'selective universality' in view of the authors does more harm to the regime of international law as a whole.

4. Hampers good forum shopping

Forum shopping is the transfer of disputes from one country to another to obtain a more favorable legal position 50 and is permitted when it attempts to promote the economic survival of the debtor on bona-fide grounds.[51] But the Gibbs rule takes away this maneuvering capability from the debtor. For e.g., in case your debts are English law governed debts then even if the joined interest of the creditors and the debtor is fulfilled by shifting the COMI to XYZ legal regime and increase the chances of survival of the company as well as the satisfaction of the debts, yet one would not be able to utilize the benefits of good forum shopping due to the blanket cover of Gibbs on any kind of forum shopping. The question which comes up here is that why would a good forum shopping become a bad forum shopping just because the law of debt is not the law of the forum?

5. Anachronism of Gibbs

Today when the world is moving towards a unified single proceeding under the modified universalist approach, the insistence of the English courts on the archaic law of Gibbs which has lost its relevance in the current times and has been discarded by civilized jurisprudence such as that of Singapore[52] and USA[53] requires introspection. Also, the fact that the bankrupt remains liable in England to perform his contract, but he will have been deprived of his assets,[54] and this has been described by Ian Fletcher as an 'unjust position'.

6. Destroys the notion of equality of creditors

In insolvency proceedings, there is a limited slice of a pie that is not big enough to repay all creditors in full. The rule of Gibbs provides the creditors having English law governed

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[48] (1844) 153 E.R. 185, 186.

[49] Mohan S. Chandra, "Cross border Insolvency Problems: Is the UNCITRAL Model Law the answer?" 21 *International Insolvency Review* 199-223 (2012).

[50] Miguel Virgos and Etienne Schmit, "Report on the Convention on Insolvency Proceedings" EU Council Doc 6500/96 (1996), para. 7.

[51] *Supra* note 31 at para. 49.

[52] *Pacific Andes Resources Development Ltd. and other matters*, [2016] S.G.H.C. 210.

[53] *In Re Agrokor, DD* No 18-12104 (Bankr S.D.N.Y. 2018).

[54] *Supra* note 32 at paras. 31-097.

debts to breach this equality amongst the same class of creditors and allows such creditors to recover a greater percentage of claims than the creditors being governed by the so called single unified proceeding, consequently destroying the basic tenet of equality of distribution.[55] Limited assets are to be distributed equitably in a particular class of creditors and if the creditors are governed by a single unified proceeding, the chances of them getting a better outcome and the chances of survival of the debtor are both higher, when compared to haphazard and piecemeal distribution.

V. ANALYSIS OF INDIAN CROSS-BORDER INSOLVENCY REGIME: LESSONS FROM ABROAD

Since the opening up of its economic boundaries in 1991, India has grown as a key economic power in the world and presently is the fastest growing economy as per the OECD Economic Growth Outlook.[56] With more foreign investment coming into the country and Indian Corporate Giants spreading their limbs globally there is a need of a well-equipped cross border insolvency regime. This section would first provide an appraisal of the existing legal regime in India for dealing with cross border insolvency, its deficiencies and the need for adopting a more comprehensive and robust mechanism. Further the authors would do some globetrotting and provide a possible roadmap to counter the Gibbs rule and would suggest what approach should be taken by the Indian Parliament.

A. Current Legal Framework

1. Insolvency and Bankruptcy Code

Sections 234 and 235 of the Insolvency and Bankruptcy Code[57] ('the Code'), constitute the mechanical framework for dealing with cross border insolvency in India. Section 234 of the Code provides the Central government the power to enter into bilateral agreements with other countries to resolve situations of cross border insolvency. Once a bilateral agreement is reached between India and the foreign state, Section 235 of the Code provides the adjudicating authority, the power to issue letter of request to the courts of the other country. The arrangement provided under these two sections, applies both in cases where Indian proceedings require assistance and recognition in a foreign jurisdiction and vice versa.

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[55] *Id.* at 51.

[56] "India to remain fastest growing Economy, widen lead against China: OECD" *Business Today*, May 29, 2019, *available at*: https://www.businesstoday.in/current/economy-politics/india-to-remain-fastest-growing-economy-oecd/story/351765.html (last visited on May 19, 2020).

[57] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016).

2. Code of Civil Procedure

Indian laws recognize the principle of comity, and the Code of Civil Procedure, 1908 ('the CPC') very well embodies the principle of comity in Section 44A of the CPC. It provides the Indian Courts with the power to enforce foreign orders passed by the courts of 'reciprocating territory'. A reciprocating territory is one which has been declared to be so by the Indian Government by publication in the official gazette.[58] It is also important to discuss the limitations that Section 44A is subject to. Section 13 of the CPC provides the scenarios in which a foreign order is not to be enforced by the Indian courts. These include, the lack of jurisdiction of foreign court, non consideration of the merits of the case by the foreign court, basing judgment on incorrect view of international law or a refusal to recognize the law of India in case such law is applicable, against public policy, fraud, etc. Section 14 of the CPC further provides a presumption in favor of the foreign judgment. However, the existing mechanism is not free from flaws and some of the deficiencies in the existing system are provided hereinafter. These deficiencies further highlight the need for adoption of UNCITRAL Model Law by the Indian regime-

- The problem with mechanism provided in Sections 234 and 235 of the Code is that the signing of a bilateral treaty amongst the nations requires a long and time consuming process of negotiations between the States and more importantly there is a lack of uniformity as India may have 'ABC' arrangement with country A, while 'DEF' arrangement with Country B. Thus, such a scenario creates uncertainty for both foreign investors and the domestic courts who will have to decipher and adjudicate new agreements in every new claim.
- Furthermore, with the increasing size of international corporations, the national boundaries are merely markings on the map. Thus, a scenario may arise where there is a need to invoke more than one bilateral agreement and due to the differently negotiated agreements, there may be difficulty in harmoniously construing the outcome of each separate agreement and there may be a violation of the principle of 'equality of creditors'. Consequently, the share of a creditor may be dependent on how well its home nation has negotiated the bilateral agreement with India. Also, in such a scenario the multiple bilateral agreements may create procedural and legal complexities and add to the monetary and administrative burden.
- In a situation where the assets of the Indian debtor are located in a jurisdiction with which India has not executed any bilateral agreement

[58] Code of Civil Procedure, 1973 (Act 5 of 1908), s.44A, Explanation 1.

under Section 234, there would be no guidance on remedies available to the Indian Insolvency Professional in order to take action and garner evidence of the assets of the debtor.

- The Indian law, as it exists today, provides only for the recognition of foreign judgments. Neither the CPC nor any other law deals with the recognition of foreign proceedings. To elaborate, Section 2(6) of the CPC defines 'foreign judgment' as the judgment of a foreign court. This definition is restrictive. The mechanism for the enforcement of foreign judgments in India has been criticized rightly to be not broad enough to include all insolvency orders,[59] such as orders relating to reorganization process, interim and administrative orders, etc.

From the above analysis, it is evident that there is a need for a more robust and efficient regime to satisfy the growing aspirations of India and deal with cross-border insolvencies effectively. India has recognized this lacuna and thus has started making efforts to look into the suitability of the adoption of the Model Law and the same is evident in the call for suggestions on draft chapter on cross border insolvency from the stakeholders[60] and Report of Insolvency Law Committee on Cross Border Insolvency October, 2018.[61] However, these reports and discussions have not touched upon the issue of Gibbs rule and its implications upon the Indian milieu. Consequently, there is a need to take cue from the approach of developed jurisdictions like Singapore and the USA, as the process of learning by imbibing each other's experiences and discussing collaborative solutions will undoubtedly arm insolvency regulators with the bandwidth to confront and address the new paradigm. The important aspects about the approaches of the aforementioned developed insolvency regimes are explained through the following landmark cases:

Pacific Andes Resources Development Ltd and other matters ('*Pacific Andes*'):[62]This case involved an application for restructuring[63] of among others a company incorporated in Bermuda, which was listed in Singapore and carried out business activities there. The Pacific group was facing difficulties and there were restructuring proceedings underway in Peru and the USA. The application in Singapore was an attempt by Pacific Andes Resources Development Ltd ('PARD') and the subsidiaries to buy some time to complete the pending restructuring. A scheme of arrangement was proposed before the court in

[59] "Report of Advisory group on Bankruptcy Laws" (2001), *available at*: https://indiacorplaw.in/wp-content/uploads/2016/06/20811.pdf (last visited on July 26, 2019).

[60] Government of India, Ministry of Corporate Affairs, "Overview of Cross Border Insolvency Framework for Corporate Debtors under the Insolvency and Bankruptcy Code, 2016", June 20, 2018, *available at*: http://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf (last visited on June 29, 2020).

[61] Government of India, "Report of Insolvency Law Committee on Cross Border Insolvency" (Ministry of Corporate Affairs, October 2018).

[62] *Supra* note 52.

[63] The Singapore Companies Act, 1967, s. 210 (10).

Singapore and moratoria on proceedings by its creditors in relation to this scheme was sought. The application was opposed on the ground that the debt owed by the applicant to the banks was governed by Hong Kong law and not Singaporean law, thus any discharge of Hong Kong law governed debt under any law other than the law governing the contract will not be recognized in Hong Kong on the basis of the Gibbs rule. The Court took notice of the criticism of Gibbs rule by authors and academicians across the globe like Philip Smart,[64] Professor Fletcher[65] and Look Chan Ho,[66] which offers a compelling critique of the principle in Gibbs from the perspectives of the common law, policy and Model Law, and chose not to extend comity to English rule of Gibbs. Further the Court observed that: 'the reformulation of the principle in Gibbs is an important and timely step in the global insolvency landscape as it may otherwise prove to be an impediment to good forum shopping.'[67] The Court thus granted the moratorium against proceedings brought or to be brought in Singapore against PARD by its creditors.

In Re Agrokor,[68] applicants which were subject to an extraordinary administration proceeding in Croatian Court filed a Chapter 15 application. The debt included 1.66 billion EUR English law Governed Debt and 625 million EUR New York Law governed debt. On approval of the arrangement plan, the US Bankruptcy Court, Southern New York issued a written opinion granting Agrokor complete Chapter 15 recognition. The opinion provided an analysis of the Gibbs rule and hence is significant in the current study. The Court had to decide whether in exercise of comity, the Croatian Court approved settlement agreement which included modification of English law debts, should be recognized and enforced within the territory of the USA and whether it is appropriate for the US court to extend comity to courts of one nation (Croatian courts) while denying comity to the courts of England whose law was also the law governing the contract? The Court took note of the abidance of English courts to the rule of Gibbs and the fact that Gibbs still remains good law in England. The Court further agreed with the reformulation of Gibbs rule in *Pacific Andes*[69] that 'Gibbs rule should be attributed with the expectation of parties that their claims might be discharged in proceedings in a jurisdiction where the debtor has an established connection based on residence or ties of business.'[70] The Court also took note of academic criticism about how Gibbs mischaracterized the insolvency issue as a contractual matter, and how the Gibbs rule destroys the notion of equality of creditors. The Court in line with international comity observed that once a party declares

[64] Philip St. J. Smart, *Cross-Border Insolvency*, 259-60 (Butterworths, 2nd edn., 1998).
[65] *Supra* note 44 at para. 2.127.
[66] *Supra* note 43.
[67] *Supra* note 52.
[68] *Supra* note 53.
[69] *Supra* note 52.
[70] *Supra* note 52 at para. 48.

bankruptcy in a foreign state and a foreign court asserts jurisdiction over the distribution of assets, the USA courts may defer to the foreign bankruptcy proceeding on international comity grounds and the USA courts should not leave to another court (here the High Court in London) the decision whether USA courts should extend recognition and enforcement to the foreign proceedings.

VI. CONCLUSION

Over the past few years, with business becoming trans-borders and with the corresponding surge in the cross-border cases of insolvency, quite a lot of jurisdictions have vouched for greater convergence and uniformity in the form of their domestically adopted versions of the Model Law. Presently, about 51 jurisdictions have already adopted the legislation based on Model Law. India too, seems to have fallen in line and the recommendations of the Report of Insolvency Law Committee on cross border insolvency exemplifies the pressing need to bring a law in place. In such times where the best efforts are being concentrated in order to enact an efficient legislation by involving the potential stakeholders, the practical experience from other jurisdictions reflects a glaring reality of certain important aspects that have usually remained out of sight of the drafters. The mischievous 'Rule of Gibbs' which is in place, remains as one such potential hurdle for India's prospective burgeoning Cross Border Insolvency regime even before the same comes into existence. In the present times where we aspire to lock horns and emulate the already developed jurisdictions, we must actively discuss and deliberate on the probable ramifications that the colonial 'rule' can have on our sought-to-be liberalized and universal insolvency regime. In view of the same, the authors suggest that the Indian regime can prepare itself in light of Gibbs in two probable ways. Firstly, by insertion of a clause in the legislated Model Law establishing our allegiance for 'modified universalism' over any other 'territorial' approach as long as the same does not violate our domestic 'public policy'. Secondly, by pre-discussing the validity, application and consequences of the Gibbs rule and viewing the same in the light of the academic criticism, jurisprudence of the developed countries and the practical situations that have emerged so far.

Moreover, while going forward with legislating our own law on the matter, the drafters should necessarily delve into what transpired during the legislative debates that took place while drafting the original UNCITRAL Model Law, what was the legislative intent being several provisions and terms and what led to the present version of the Law becoming what it is today. Lastly, it must be ensured that the undesired phenomenon of Gibbs doesn't get pushed before the domestic courts as a matter of last resort. Rather, greater preparedness should be sought while tackling the menace and concomitantly convergence of judicial philosophies, academic insights and substantive laws should be sought.

INDO-CHINA WEATHER TUSSLE: LEGAL PRINCIPLES RELATED TO WEATHER MODIFICATION

Purvi Nema[*]

With revolutionary development in colloid chemistry, meteorology, and electronics, there has been a significant rise in human intervention in altering weather conditions in the last few decades. The effect of weather modification is two-fold: firstly, it has benefitted in increasing or decreasing precipitation, snow or hail as and when required and secondly, the local weather modification activities may also have ill impact on the weather of the neighbouring countries. Weather knows no political or territorial boundaries. The effect of modification can be trans-national, intentionally or unintentionally. Weather is therefore an important tool-cum-weapon in the hands of the countries. In recent times, China is all set to establish its largest ever weather modification project to increase precipitation on the Tibetan plateau where sources of a number of rivers, including Brahmaputra River that flows through north-eastern states in India, lie. The said project is criticised by scientists and environmentalists who argue that this project may have severe consequences in the adjoining areas and may also have trans-national effect. The object of this paper is to analyse the applicable treaties and conventions in case of cross-boundary damage caused due to environmental modification activities and various legal principles applicable in dispute between the countries resulting from trans-boundary damage due to weather modification activities.

I. INTRODUCTION

'As science investigates the natural environment, it also modifies it, and that modification may have incalculable consequences for evil as well as for good'.[1] Man's desire to control everything around him dates back to ancient times- first in the form of spells and rituals, and in modern times in the form of science and technology. One such desire is his quest to control and modify weather. Since the last century, various countries had invented

* The author is a fourth-year B.A. LL.B. (Hons.) student at the National University of Study and Research in Law, Ranchi.

[1] John F. Kennedy, *Address at the Anniversary Convocation of the National Academy of Sciences*, Oct. 23, 1963, *available at*: https://www.presidency.ucsb.edu/documents/address-the-anniversary-convocation-the-national-academy-sciences (last visited on May 22, 2020).

weather modification techniques to avoid catastrophes and to ease their day to day lives. The term 'weather modification' can be defined as any activity performed with the intention of altering the weather that produces artificial changes in the composition, behaviour, or dynamics of the atmosphere.[2]

Weather modification technology goes back to its discovery in the 1940's, where precipitation was induced from super-cooled clouds by seeding them with dry ice,[3] which in present times is replaced with silver iodide. Of various weather modification activities, the most common is rainmaking which is optimally induced by cloud seeding or 'orographic' seeding that may cause as much as ten to twenty percent increase in precipitation.[4] Another is fog dispersion which usually is done by seeding the fog with dry ice or by attacking it with propane forced through expansion nozzles.[5] Third is hail suppression which nowadays is done by a seeding of hail storms with silver iodide.[6] Seeding with silver iodide has also been used in experiments in lightning suppression.[7] There are on-going developments in hurricane modification.

The Weather Modification Organization reported that hitherto China has the largest investment in both operational programs and weather modification research programs. Every province in China, except one, has an active weather modification program. After China, USA, Thailand and India have the largest investment in operational weather modification programs. India is investing in a major multi-year program weather modification research conducted by the Indian Institute of Tropical Meteorology in Pune, India.[8] However, the World Meteorological Organization (WMO) recommends against the use of weather modification in response to climate change, while only one-fourth of the world's nations currently engage in active weather modification.[9]

Meteorological disasters in China account for over 70% of its natural damage, including severe drought, flood, hailstorms and fog. It has motivated the rapid development of weather modification activities in terms of rain enhancement and hail

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[2] M.A. Rabie & M.M. Loubser, "Legal Aspects of Weather Modification" 23(2) *The Comparative and International Law Journal of Southern Africa* 177-218 (1990). Also, see A.G. McKenzie "Weather Modification: A Review of the Science and the Law" 6 *Environmental Law* 387 (1975).

[3] B. Mason, "Clouds, Rain & Rainmaking" 18(9) *Weather* 96-111 (1963).

[4] Roberts, "The State of the Art in Weather Making", in H. Taubenfeld (ed.), 1 *Weather Modification and the Law* 4 (1968).

[5] Wycoff, "Evaluation of the State of the Art", in W.R.D. Sewell (ed.), *Human Dimensions of Weather Modification* 27, 31(1966).

[6] *Supra* note 4 at 7.

[7] Taylor, "Weather Modification for Agriculture and Forestry", in H. Taubenfeld (ed.), 1 *Weather Modification and the Law* 56 (1968).

[8] Roelof T. Bruintjes, World Meteorological Organization Commission for Atmospheric Sciences, 6th Joint Science Committee of the World Weather Research Programme, Geneva, Switzerland, "Report From Expert Team on Weather Modification Research for 2012/2013" (July, 2013).

[9] Shiuh-Shen Chien, Dong-Li Hong *et.al.*, "Ideological and Volume Politics Behind Cloud Water Resource Governance – Weather Modification in China" 85 *Geoforum* 225-233 (2017).

suppression in China.[10] It has been one of the most active countries to conduct operational weather-modification programs in the world, using multiple advanced seeding tools in weather modification activities, such as aircraft, ground-based rockets, artillery and generators.[11]

In recent developments, China is pouring in more than 20 million dollars into its largest weather modification project named as 'Sky River' aimed at making heavy rain in its usually arid north-western region i.e. Tibetan plateau.[12] The plateau feeds many rivers including the Tsangpo River that originates from China's Tibet and flows into Arunachal Pradesh, where it is called Siang, and then Assam, where it becomes the Brahmaputra. The Brahmaputra River regularly floods, causing major damage and loss of life and property, especially in the north-eastern states of India.[13] It is proposed that the Sky River project would have significant trans-boundary implications on weather patterns and the vast scale of the project is unprecedented.[14] This could have far-reaching consequences for local weather patterns which could harm the fragile Chinese environment and also that of its neighbouring countries.[15]

The foundation of the Sky River project lies on Tibetan plateau and since the plateau shares ecological frontier with India, climatic change in the ecosystem would have severe ramifications in the Indian subcontinent. The author in this paper aims to discuss, *firstly*, the conventions and treaties that are related to weather modification and *secondly*, various legal principles that are applicable in case of trans-boundary damage caused due to weather modification activities.

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[10] GUO Xueliang, FU Danhong, *et.al.*, "Advances in Cloud Physics and Weather Modification in China" 32(2) *Advances in Atmospheric Sciences* 230-249 (2015).

[11] *Ibid.*

[12] Maryam Qarehgozlou, "Will cloud seeding cause a blast of moisture in drought-stricken areas?" *Tehran Times*, Dec. 8, 2018, *available at*: https://www.tehrantimes.com/news/430394/Will-cloud-seeding-cause-a-blast-of-moisture-in-drought-stricken (last visited on May 21, 2020). Also, see Kevin Lui, "China Is Splashing $168 Million to Make It Rain" *Fortune*, Jan. 24, 2017, *available at*: https://fortune.com/2017/01/24/china-government-artificial-rain-program (last visited on May 21, 2020).

[13] Aparna Roy, "Weather War': A latest addition to the Sino-India conundrum?" *Observer Research Foundation*, Aug. 22, 2018, *available at*: https://www.orfonline.org/expert-speak/43534-weather-war-a-latest-addition-to-the-sino-india-conundrum (last visited on May 21, 2020).

[14] "China's Plan to Seed Himalayan Clouds is Geoengineering-Unintentional or Otherwise" *ETC Group*, November 08, 2018, *available at*: https://www.etcgroup.org/content/chinas-plan-engineer-himalayan-clouds-geoengineering-unintentional-or-otherwise (last visited on May 21, 2020).

[15] Andrew Thomson, "China Bets on Cloud Seeding to Boost Rainfall in Tibet and Xinjiang" *Future Directions Internationals*, May 23, 2018, *available at*: http://www.futuredirections.org.au/publication/china-bets-cloud-seeding-boost-rainfall-tibet-xinjiang/ (last visited on May 21, 2020).

II. WEATHER MODIFICATION ACTIVITIES CARRIED OUT BY CHINA

The first cloud seeding experiment in China was conducted in 1958.[16] Since then, it has actively pursued ground observations, scientific experiments and basic research work for weather modification. China passed the Meteorological Law in 2000, which required the China Meteorological Administration to organize, coordinate and guide weather modification activities, including operations, demonstrations and research nationwide. In 2002, the Regulations on the administration of weather modification was passed which is the first national law of China to regulate weather modification activities.[17]

A decade ago, China hosted the 2008 Olympic Games and the government ensured that there is no rain over the stadium during opening ceremonies. The Beijing Weather Modification Office actively tracked the region's weather and proceeded to use aircrafts and artillery to fire a barrage of 1,110 cutting-edge military rockets into its evening clouds with cloud-seeding agents. In doing so, the Chinese were successful in stopping rain from occurring over the Olympic Games, though some distant areas of the city received heavy rain.[18]

Again, in 2009, Beijing Weather Modification Office deputed 18 aircraft and 48 fog-dispersal vehicles in days leading up to the National Day Parade to prevent any unwanted rainfall from interfering with the event.[19] In 2012, more than two thousand county-level administrations use artillery and rocket launchers for rain enhancement, hail suppression and fog dispersal, and all except the Shanghai provincial-level administration carried out weather modification using 37 airplanes equipped with silver iodide, dry ice and liquid nitrogen generators.[20]

China made headlines again in 2018 with news regarding its largest ever scientific project in the Tibetan Plateau region.[21] China is installing tens of thousands of furnace like fuel-burning chambers high up on the Tibetan mountains that are designed to emit

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[16] C.S. Cheng, "Experiment of rain enhancement in China" 30 *Acta Meteorologica Sinica* 286–290 (1959).

[17] *Supra* note at 9.

[18] M.W. Pontin, "Weather Engineering in China" *MIT Technology Review* (2009), *available at*: https://www.technologyreview.com/s/409794/weather-engineering-in-china/ (last visited on May 21, 2020). Also, see Scott Knowles & Mark Skidmore, "A Primer on Weather and Climate Intervention for Economists" *CESifo Working Paper No. 7586 Category 10*: *Energy and Climate Economics*, Munich Society for the Promotion of Economic Research (Apr. 2019), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374578 (last visited on May 21, 2020).

[19] J. Watts, "China's Largest Cloud Seeding Assault Aims to Stop Rain on the National Parade" *The Guardian*, Sept. 23, 2009, *available at*: https://www.theguardian.com/environment/2009/sep/23/china-cloud-seeding (last visited on May 21, 2020). Also, see Scott Knowles & Mark Skidmore, "A primer on Weather and Climate Intervention for Economists" *CESifo Working Paper No. 7586 Category 10*: *Energy and Climate Economics*, Munich Society for the Promotion of Economic Research (Apr. 2019), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374578 (last visited on May 21, 2020).

[20] *Supra* note 9.

[21] J. Watts, *supra* note 19,.

cloud-seeding particles into the air. They will burn solid fuel to produce silver iodide, a cloud-seeding agent, at selected locations across the Tibetan plateau to produce rainfall over a total area of about 1.6 million square kilometres (620,000 square miles).[22]

The Sky River Project is being developed by the state-owned China Aerospace Science and Technology Corporation which is a major space and defense contractor.[23] These Chambers will burn solid fuel to release particles of silver iodide, a cloud-seeding agent into the atmosphere. The chambers are situated on steep mountain ridges facing monsoons from South Asia. As the monsoon hits the mountain, it will produce an upward draft and sweep the particles into the clouds. These particles will act as a nucleus and water vapour will collect around them forming ice particles which will then fall as rain or snow.[24]

These chambers have capacity to increase rainfall in the region by up to 10 billion cubic metres a year. The Tibetan plateau acts like a canal for the Yangtze, Mekong, and Yellow, Salween and Brahmaputra which flow through China, India, Nepal, Laos, Myanmar and several other countries and where an increase in rainfall would increase water levels of many tributaries.[25] Further, Janos Pasztor, the executive director of the Carnegie Climate Governance Initiative, which seeks to create effective governance for climate engineering technologies commented that 'if weather modification in Tibet were done long enough, it will have an impact on the climate and not just the weather'.[26]

India has repeatedly raised the issue that China is not sharing data and information regarding its activities in the Tibetan Plateau and argued that these activities, mainly dam constructions, have affected the North-eastern states like Assam and Arunachal Pradesh. Therefore, this new Sky River project could further heighten geopolitical tensions between China and its southern neighbours.[27]

Himan Biswa Sarma, the State Finance Minister of Assam released a statement which said that Assam and Arunachal Pradesh are already suffering due to China's interference with natural ecosystem especially in the plateau of Tibet. Sarma added**:**

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[22] Stephen Chen, "China needs more water. So it's building a rain-making network three times the size of Spain" *South China Morning Post*, Mar. 26, 2018, *available at*: https://www.scmp.com/news/china/society/article/2138866/china-needs-more-water-so-its-building-rain-making-network-three (last visited on May 21, 2020).

[23] Brian Wang, "Geoengineering will happen, China Controlling Rain across Tibet" *Next Big Future*, Oct. 14, 2018, *available at*: https://www.nextbigfuture.com/2018/10/geoengineering-will-happen-china-controlling-rain-across-tibet.html (last visited on May 21, 2020).

[24] *Supra* note 15.

[25] Trevor Nace, "China is Launching Weather-Control Machines across an Area the size of Alaska" *Forbes*, Mar. 11, 2018, *available at*: https://www.forbes.com/sites/trevornace/2018/05/10/china-is-launching-a-massive-weather-control-machine-the-size-of-alaska/#7933ea0b6315 (last visited on May 21, 2020).

[26] Olivia Solon, "Rain dancing 2.0: should humans be using tech to control the weather?" *The Guardian*, Aug. 26, 2018, *available at*: https://www.theguardian.com/environment/2018/aug/26/rain-dancing-20-should-humans-be-using-tech-to-control-the-weather (last visited on May 21, 2020).

[27] Dhanasree Jayaram, "China's Geoengineering Build-Up poses Geopolitical and Security Risks" *Climate Diplomacy*, Dec. 05, 2019, *available at*: https://www.climate-diplomacy.org/news/china%E2%80%99s-geoengineering-build-poses-geopolitical-and-security-risks (last visited on May 21, 2020).

> Now, reports of this new system have come as a shocker. China is already giving us so much trouble and we are witnessing floods every year. If this new system is introduced, there will surely be huge ramifications. I will request the MHA to look into the matter and coordinate with Chinese authorities. The Centre should ask China not to interfere with the natural ecosystem in the Tibetan plateau.[28]

The method, however scientific, creates a legal issue. The major issue raised herein is if irreparable damage is caused to life and property in India due to weather modification activities of China, irrespective of its intention and despite any negotiations on paper, what is the legal recourse available to India against China or to any other victim state against another state indulged in weather modification activities causing damage?

III. WEATHER AS A POTENTIAL WEAPON

Weather can prove to be a valuable addition to military arsenal of any country. It has been predicted that rainmaking capability would have major strategic value for a nation which can weaken another nation by subjecting it to years of drought as a continued seeding over a stretch of dry land might remove sufficient moisture to prevent rain over a distance of up to a thousand miles downward.[29] The other conceivable uses of storm modification include utilization of hail as an anti-crop and anti-personnel weapon, lightning concentrations to cause forest fires,[30] and affect missiles and warheads,[31] and controlled hurricanes to induce terror and destroy property and lives.[32]

For instance, after the end of World War II, the U.S. Army and General Electric collaborated on the development of weather weapons that included techniques for thinning cloud cover to allow for aircraft to take-off and land in poor weather conditions.[33] The U.S. Army used weather modification technology during the Vietnam War to prolong the monsoon season in an attempt to soften road surfaces, causing landslides along roadways, and wash out river crossings in the territory held by enemy.[34]

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[28] TNN, "China's Weather Modification System raises Alarm in Assam" *The Times of India*, Mar. 29, 2018, *available at*: https://timesofindia.indiatimes.com/city/guwahati/chinas-weather-modification-system-raises-alarm-in-assam/articleshow/63527223.cms (last visited on May 22, 2020). Also, see Khusboo Thakur, "Alert For Assam, China's Weather Modification System Has Triggered Fears Of More Devastating Flood" *Dailyhunt*, Mar. 29, 2018, *available at*: https://m.dailyhunt.in/news/india/english/defence+lover-epaper-defence/alert+for+assam+china+s+weather+modification+system+has+triggered+fears+of+more+devastating+flood-newsid-84610885 (last visited on May 22, 2020).

[29] MacDonald, "How to Wreck the Environment", in N. Calder (ed.), *Unless Peace Comes* 187 (1968).

[30] D. Halacy, *The Weather Changers*, 103-117 (1968).

[31] O'Neill, "Current and Future Weather Modification Programs of the Department of Defense", in H. Taubenfeld (ed.), 1 *Weather Modification and the Law* 42 (1968).

[32] *Supra* note 29.

[33] J.M. Nielsen, "The Other Cold War: the United States and Greenland's Ice Sheet Environment, 1948–1966" 38(1) *Journal of Historical Geography* 69-80 (2012).

[34] K.C. Harper, "Climate Control: United States Weather Modification in the Cold War and Beyond" 32(1) *Endeavour* 20-26 (2008).

It would be unrealistic to seek its control except in terms of overall arms control and disarmament negotiations, and it would be equally naive, if such major capabilities exist, to expect all states to selflessly forego the possibility of becoming much greater or wealthier or more independent at the expense of another state.[35] It is feared that weather may be used as an extensive weapon by China in the near future owing to its relations with India. In the wake of the increasing number of national programs in the weather modification area, the intervention of an international body seems essential if harmonization is to be achieved.[36]

For instance, the ability to disperse fog would be extremely valuable in connection with air strikes and reconnaissance missions.[37] Furthermore, continued seeding over a stretch of dry land might remove sufficient moisture to prevent rain over a distance of up to a thousand miles downward.[38] Other conceivable uses of storm modification include utilization of hail as an anti-crop and anti-personnel weapon, lightning concentrations to cause forest fires[39] and affect missiles and warheads,[40] and controlled hurricanes to induce terror and destroy property and lives.[41]

With growing concerns over destruction that can be caused by weather used as weaponry, US and USSR drafted a Convention which was approved by the UN through its Resolution 31/72. Later, it became the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques or Convention on Environmental Modification, 1978 (hereinafter referred as ENMOD). As of now 78 state parties have ratified the treaty including India and China in 1978 and 2005 respectively.

The primary operative provision of ENMOD states that 'each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.'[42]

To be held liable under this provision, a state's action must fulfil three requirements. The action must be:

(a) military or hostile

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[35] Schachter, "Scientific Advances and International Law Making" 55 *California Law Review* 423 (1967).

[36] *Supra* note 35 at 425.

[37] Charles M. Hassett, "Weather Modification and Control: International Organizational Prospects" 7 *Texas International Law Journal* 89, 92 (1971).

[38] *Supra* note 29.

[39] *Supra* note 5 at 159.

[40] *Supra* note 5 at 39.

[41] *Supra* note 29.

[42] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. 1, U.N.T.S. 1108, (Dec. 10, 1976).

(b) employ an environmental modification technique having widespread, long-lasting or severe effects

(c) cause destruction, damage or injury.

Therefore, what is prohibited is the military or any other hostile use of environmental modification techniques and not its possession or development. Any state party to this Convention which has reasons to believe that any other state party has breached or acting in breach of obligations of the provisions may lodge a complaint including all relevant information and possible evidence with the Security Council of the United Nations.[43]

The treaty text however, clarifies that with regard to peaceful uses of environmental modification techniques, the state parties can undertake to facilitate and shall have the right to participate in the fullest possible exchange of scientific and technological information.[44] The treaty is focused on prohibition of damage or destruction caused by military or any other hostile use of environmental modification techniques and does not deal with law that would govern the situation where environmental modification techniques are used to fetch non-military purposes but yet cause damage and destruction in another state.

Two renowned British scientists at Beijing Normal University, who lead China's national geo-engineering research, Chen Ying and John Moore, commented that unlike past localised small scale cloud seeding, the Sky River project could be considered a form of large-scale geo-engineering that effects the alteration of natural systems to fight climate change.[45] Geo-engineering refers to large-scale schemes for intervention in the earth's oceans, soils and atmosphere with the aim of reducing the effects of climate change, usually temporarily.[46]

Research into geo-engineering is at a very early stage, with no guarantee of success.[47] The Oxford Principles are a set of initial guiding principles for the governance of geo-engineering proposed by the researchers at the Oxford University. One of the principles states that 'there should be complete disclosure of research plans and open publication of results in order to facilitate better understanding of the risks and to reassure the public as to the integrity of the process. It is essential that the results of all research, including negative results, be made publicly available'.

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[43] *Id.*, art. 5(3).

[44] *Supra* note 42.

[45] Oxford Geo-engineering Programme, *available at*: http://www.geoengineering.ox.ac.uk/www.geoengineering.ox.ac.uk/oxford-principles/principles/ (last visited on May 22, 2020).

[46] Geoengineering Monitor, *available at*: http://www.geoengineeringmonitor.org/what-is-geoengineering/ (last visited on May 22, 2020).

[47] *Ibid.*

However, these principles are yet to be adopted as international law. The only existing international law guideline for geo-engineering experimentation is established under the UN Conference for Biological Diversity**.** Article 3 of the Convention permits small scale scientific research, subject to a thorough prior assessment of the potential impacts on the environment.[48] China is party to this Convention and should abide by the guideline.

IV. STATE RESPONSIBILITY FOR ENVIRONMENTAL DAMAGE

States have sovereign right to exploit their own resources pursuant to their environmental and developmental policies. It is their responsibility to ensure that activities within their jurisdiction or control do not cause damage to environment of other states or areas beyond the limits of national jurisdiction.[49] States are liable in case they breach any treaty obligation or customary international law. The concept of territorial sovereignty is altered when it comes to actions within national territory that may affect neighbouring states. The duty imposed by customary law upon states is not to act as to injure the rights of any other state.[50]

Article 14 of the Convention on Biological Diversity provides that environmental impact assessments are now required by general international law, especially in respect of environmentally harmful activities which may have trans-boundary consequences, in order to meet a state's obligation to ensure that activities within its jurisdiction and control 'respect the environment of other states or of areas beyond national control'.[51] But this Convention does not lay down substantive law specific to trans-boundary harm.

Furthermore, in Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities, it is stated that the state shall take all appropriate measures to prevent significant trans-boundary harm or at any event to minimize the risk thereof.[52]Any dispute concerning application of the present articles shall be settled by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.[53] However, this is part of 'soft law' and therefore non-binding in nature.

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[48] Wil C. G. Burns & Andrew L. Strauss (eds.), *Climate Change Geoengineering*: *Philosophical Perspectives*, *Legal Issues*, *and Governance Frameworks* 188 **(**Cambridge University Press, 2013).

[49] The Rio Declaration on Environment and Development, Principle 2, June 14, 1992; Declaration of the United Nations Conference on the Human Environment, Principle 21 (Stockholm Declaration, 1972)

[50] Malcolm N Shaw, *International Law* 760 (Cambridge University Press, 5th edn., 2003).

[51] Convention on Biological Diversity, 1992, art. 14.

[52] UN General Assembly, *Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities*, art. 3, General Assembly Resolution 62/68, (Nov. 30, 2001).

[53] *Id*., art. 19.

In International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, every state entails the international responsibility and will have to face legal consequence for its act or omission**,** which is attributable to the state under international law and constitutes a breach of an international obligation of the state.[54] Where the responsibility of state is established, an obligation arises first to discontinue the wrongful conduct, second to offer guarantees of non-repetition, and third to make full-reparation of the injury caused.[55]

In absence of remedies that are specifically adapted to environmental damage caused by weather modification techniques, either in Draft Articles on Responsibility of States for Internationally Wrongful Acts or in Draft Articles on Prevention of Trans-boundary Harm from Hazardous Activities, the remedies available for breach of environmental obligations can be determined by general principles of international law. It is advocated that the legal experts and advocates of international environmental law discuss and frame the purposive creation of norms and procedures to regulate the future instead of vouching for the classical method of creating international law through claims, negotiations and customs which are too slow and sometimes ineffective.

As per the principle of *ubi jus ibi remedium,* there exists remedy wherever there is a right. From where does the right of a state originate against any other state? It originates from the principle of national sovereignty. There are certain principles of international law that are relevant to law of weather modification.

Firstly, the International law gives a state the right to maintain its national territory free of external interference by other states and their nationals and to control acts and persons on the national territory,[56] and to protect the lives, property and interests of its nationals when threatened from any quarter.[57]

Secondly, states can now claim the airspace above the national territory and waters and seem certain to assert rights of 'ownership' or of control in the clouds and other weather phenomenon in national airspace.[58]

Thirdly, international law also imposes duties on a state not to allow knowingly its territory to be used for acts contrary to the rights of other states.[59]

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[54] UN General Assembly, *Responsibility of States for Internationally Wrongful Acts*, General Assembly Resolution 56/83, (Dec. 12, 2001).

[55] *Id*., art. 30.

[56] W. Bishop, *International Law* 626-743 (2nd edn., 1962).

[57] A. Rosenthal, H. Koair, *et.al.*, *Catastrophic Accidents in Government Programs* 34-38 (1963).

[58] Rita F. Taubenfeld & Howard J. Taubenfeld, "Abstract of the International Implications of Weather Modification Activities" 1 *Office of External Research*, *Department of State* (June 1968).

[59] *Corfu Channel*, *United Kingdom* v. *Albania*, (Judgment) [1949] ICJ Rep 244.

It can be concluded that general international law imposes limitations upon actions that one state may take which would cause injury in the territory of another state.[60] Where there has been an injury to a state because of a violation of international law, there is a resulting obligation of the offending state to make reparation in an appropriate manner.[61]

V. LEGAL PRINCIPLES APPLICABLE IN CASE OF TRANS-BOUNDARY DAMAGE DUE TO WEATHER MODIFICATION

In the technologically advanced international system, especially in perspective of weather modification, it is essential to emphasize that 'there must be basic recognition of interest which the whole international society has in observance of its law.'[62] The field of weather modification is comparatively new and developing and there are no international disputes that would settle the law. Private law adds to the scientific character and legal justice in international law.[63] Even the general principles of international law referred in Article 38 of ICJ includes, though not limited to, the principles of private law administered in national Courts where these are applicable to principles of international relations.[64]

A. Private law cases related to Weather Modification

Owing to the fact that U.S. is the oldest and most active State in using weather modification techniques, there has been numerous cases in US Courts that provide some useful insights into the concept of law relating to weather modification that suggest the right of a state, for itself and its citizens, to claim compensation for damage arising out of activities conducted in another state.[65]

In *Samples* v. *Irving P Krick*,[66] dispute arose out of cloud seeding operation sponsored by the city of Oklohoma in 1953 in its North Canadian River water shed. The plaintiff filed a suit of negligence of defendant that led to sudden cloudburst and floods coincident with the defendant's cloud seeding operation. Neither of the parties raised the issue of efficacy of cloud seeding and the case of plaintiff failed due to lack of evidence. The court decided that 'it is unreasonable to expect a jury to decide whether cloud seeder was

[60] UN General Assembly-International Law Commission, *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, Doc. A/GN.4/1/Rev. l, (Feb. 10, 1949).

[61] *Factory at Chorzow* (*Germany* v. *Poland*), [1927] P.C.I.J. (ser. A) No. 9.

[62] Phillip C. Jessup, *Modern Law of Nations*, 2 (New York, 1948).

[63] H. Lauterpacht, *Private Law Sources and Analogies of International Law* 6-7 (London, 1927).

[64] J.L. Brierly, *The Law of Nations* 62 (London, 1963).

[65] *Supra* note 56 at 626-743. Also, see Lay & Taubenfeld, "Liability and Space Activities: Causes, Objectives and Parties" 6 *Virginia Journal of International Law* 252 (1966).

[66] Civil Nos. 6212, 6223, 6224 W.D. Okla. (1954).

negligent or careful in particular weather situations. A legal standard has not yet been established.'

In similar case of *Adams* v. *State of California*,[67] the court did not hold weather modifier responsible for floods caused by weather modification as the plaintiff could not bring adequate evidence. In *Auvil Ochard Co. Inc. et.al.* v.*Weather Modification Inc. et.al.*,[68] the court could not arrive at a firm decision of cause-effect relationship that cloud seeding had not brought exceptional rainfall which caused the floods, yet it passed a temporary order banning hail suppression.

In *Slutsky* v. *City of New York*,[69] city of New York defended its seeding operations undertaken in drought conditions, against the plaintiff, a resort owner who claimed that the experiments would cause inundations, and that the actual or threatened rainfall would harm the resort business. The court applied a somewhat crude benefit analysis and entered upon a comparison of claimed balance of conflicting interests between a remote possibility of inconvenience of the resort and its guests with the problem of giving the 10 million inhabitants of the city of New York and surrounding areas an adequate supply of pure and wholesome water. The court observed that the apprehensions of plaintiff are speculative and opposed to general welfare and public good and so be rejected.

In *Southwest Weather Research, Inc.* v. *Duncan,*[70] the court shifted the burden of proof on defendant to prove that the seeding operations for hail suppression did not reduce precipitation and concluded that there was ample evidence in expert and lay testimony that the actions of the defendants did dissipate clouds over the property of the plaintiffs, and that temporary restraint against such actions was appropriate. The Court observed:

> ... the plaintiff landowner is entitled to such precipitation as Nature deigns to bestow. We believe that the landowner is entitled to such rainfall as may come from clouds over his own property that Nature, in her caprice, may provide. It follows, therefore, that this enjoyment or entitlement to the benefits of Nature should be protected by the courts if interfered improperly and unlawfully.

Private law analogies have influenced, to a great extent, the decision making in air law and maritime law. The case between UK and USA on boundary demarcation of Alaska in 1903 was decided on the principles of prescription, rule of evidence and Roman law.[71] The UK and Brazil reached agreement on the frontiers of British Guinea based on prescription in 1904.[72] The *Slutsky case* is a classic example of public welfare versus private injury. If there

[67] 386 U.S. 282 (1967).
[68] No. 40544 (Super. Ct. Wash. 1956).
[69] 197 Misc. 730, 97 N.Y.S.zd 238 (Sup. Ct. 1950).
[70] 319 S.W.zd 940 (Tex. Civ. App. 1958) affirmed in 327 S.W.zd 417 (Tex. 1959).
[71] *Supra* note 63 at 40.
[72] *Supra* note 63 at 41.

had been any conclusive proof establishing a firm cause of action, court would probably have awarded damages. Whereas the *Duncan case* furnishes the idea of application of natural law to property rights.

The rules of equity and public good and natural law of property can also be equally applicable in international law on weather modification.[73] Various theories have served as basis for such claims, including nuisance,[74] and abuse of rights.[75] In general, the common causes of action that have been suggested in these cases, include trespass, nuisance and strict liability.

B. Trespass

The victim state can complain of trespass to goods or land or people but to maintain action under trespass, the state must complain of immediate and direct injury and not of consequential injury. Certainly, it is the specific facts of each case that will determine the directness and immediacy of the intrusion, though it would seem that in weather modification cases, the best test would be the inevitability of the entry into the plaintiff's airspace or onto his land.[76]

In the famous *Squib case*: *Scott* v. *Shepherd*,[77] the defendant threw a squib (a kind of firework) in the marketplace which was tossed by two other people and then it landed near the plaintiff injuring him. Even though the actions of defendant were not the immediate cause, the other people were not free agents in this situation and threw on the squib for their own safety and this was justifiable. The existence of intermediate actors and forces between the acts of weather modifying and the interference with or invasion of the plaintiff's person, goods or land would in most cases[78] render the trespass consequential, even if the original act was mischievous to the point of creating actual danger.[79]

For most form of weather modification activities, silver iodide particles are shot into the atmosphere, assuming that the particles are released directly or closer to the airspace or land of the other state party, then it is most likely that this entrance by the particles would amount to a trespass. Where the intrusion on the plaintiff's land or airspace is a side effect of the acts of the weather modifier, for example, where operations in one area set off a chain reaction which causes effects to the plaintiff in another region, then clearly

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[73] S. Bhatt, "Some Reflections on International Law and Relations involving weather Modification Activities" 15(2) *Journal of Indian Law Institute* 253-272 (2016).

[74] H. Lauterpacht, "Sovereignty over Submarine Areas" *British Year Book of International Law*, 376-391 (1950).

[75] Oppenhein, 1 *International Law*, 345-47 (8th edn., 1955).

[76] *Davies* v. *Bennison*, [1927] 22 Tas. L.R. 52.

[77] (1773) 2 Black. W. 892.

[78] *Ibid.*

[79] *Ibid*.

the situation would be closer to *Reynolds* v. *Clarke*,[80] where the fitting of a rainspout which channeled water onto the plaintiff's wall was held to be a consequential injury and not trespass.

Secondly, it is essential for a successful action in trespass that the Court finds the act of trespass to have been intentionally or negligently performed. In most of the weather modification activities, chemical particles are emitted either from airplanes, rockets or ground generators with the intention that these particles fall to the ground.[81] It can be argued that the entry of particles into the plaintiff's airspace, either as a result of having been intentionally directed over the land by the use of prevailing weather conditions, or machinery, or by falling with the effect of gravitational force from the higher stratum, may amount to an intrusion into a landowner's airspace especially if there is collision between the particles and the ground.[82]

It is possibly arguable from *Martin* v. *Reynolds Metals Co*.[83] that since an intrusion of energy or other intangible phenomena may be held to be a trespass, it is likely that the invasion of airspace by high winds or electrical energy in the form of lightning, caused by seeding elsewhere, as well as the more obviously physical manifestations of weather, could be actionable in trespass. Furthermore, subject to acceptance of scientific proof of causation, the deprivation of natural atmospheric benefits may also be actionable in trespass despite lack of an obvious physical manifestation since, for example, a transference of airborne moisture by wind or other meteorological force has a measurable physical cause and effect, although the physical repercussions thereof move from the plaintiff's property to somewhere else rather than the converse.[84] This understanding of causation would give considerable scope for the application of the law of trespass to weather modification activities.

C. Nuisance

In relation to weather modification, the nature of harm suffered by a prospective plaintiff is either

- loss of, or injury to, the natural state of the weather, as a grievance in itself, or
- loss or injury as the result of a change made to the natural state of the weather.[85]

For a nuisance to be a public nuisance it must seriously interfere with the health, convenience or comfort of the public generally, and must, therefore, actually affect a

[80] (1726) 1 Str. 634.
[81] *Supra* note 39 at 138.
[82] *Nicholls* v. *Ely Beet Sugar Factory*, [1931] 2 Ch. 84.
[83] 342 P. 2d 790 (1959).
[84] G.N. Heilbronn, "Some Legal Consequences of Weather Modification: An Uncertain Forecast" 6 *Monash University Law Review* 140 (1979).
[85] *Id.* at 143.

considerable number of people, or interfere with the rights which members of the community might otherwise enjoy.[86] In relation to weather modification, it is quite conceivable that climatic phenomena could be influenced so as to have an effect upon, or interfere with, the rights of a considerable number of people, for example, to cause damage to life and property or to disrupt communications and mobility generally.

A plaintiff in private nuisance must allege either

- actual damage to his property, which includes chattel, or
- unreasonable interference with the beneficial use and enjoyment of land.[87]

Even though the carrying out of weather modification operations on one's land is held to be an ordinary or natural user of land,[88] liability for nuisance will attach if the interference or damage was known or reasonably foreseeable to the defendant and could reasonably have been avoided.

The climatic effects of the modifier's activities must be of enough gravity to meet the criteria of public nuisance. Naturally, the mere creation of aesthetically unappealing climatic conditions would be unlikely to be of sufficient gravity unless the conditions become offensive.[89] It is quite conceivable that by the operation of Sky River project which is active on such a large scale, climatic phenomena will be modified or altered in a manner that will interfere with the rights of a considerable number of people on the Indian side that shares an ecological frontier with Tibetan plateau either in a manner that affects their natural use or disrupts mobility or communication in general.

Nuisance arising from the ordinary user of premises may be actionable, provided the nuisance could reasonably have been avoided by the defendant.[90] It is highly subjective whether weather modification activities of China are natural use of its land and also whether it took sufficient precautionary and preventive measures to avoid unnecessary damage in Tibetan plateau that affects so many neighbouring countries. Furthermore, the purpose of such programmes has to be looked into, whether they are experimental, commercial or other purposes like the elimination of the disastrous effects of droughts, the augmentation of snow-pack or water catchment with a view to the provision of resources for hydro-electric power or leisure activities such as snow and water skiing. In the case where self-interest is the main purpose, liability for nuisance is more likely.[91]

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[86] *A.G.* v. *Abraham & Williams Ltd*, [1949] N.Z.L.R. 461, 484; Romer L.J., A.-G. v. P.Y.A. Quarries Ltd, [1957] 2 W.L.R. 770, 780.

[87] *British Celanese Ltd* v. *Hunt* [1969] 1 W.L.R. 959.

[88] *Rylands* v. *Fletcher*, (1866) L.R. I Ex. 265; affirmed in (1868) L.R. 3 H.L. 330 (accumulation of water in a reservoir) and Simpson v. A.G. [1959] N.Z.L.R. 546 (accumulation of water in drains).

[89] *Kent* v. *Cavanagh*, [1973] 1 A.C.T.R. 43, 534.

[90] *Supra* note 88.

[91] *Penno* v. *Government of Manitoba*, [1976] 64 D.L.R. (3d) 256.

Where weather manipulation on several occasions has created or exacerbated prevailing meteorological conditions so that considerable damage results consequentially from the total of the activities, recovery may be had in nuisance.[92] Many environmentalists have raised geopolitical concerns that a sophisticated network such as the Sky River project, could be used to modify global temperatures in the future and possibly modifying weather patterns in different parts of the world, especially the neighbouring countries, potentially unbeknownst to those whose weather is being modified.[93]

D. Strict Liability

Weather modification activities may turn ultra-hazardous or dangerous in nature. Common law provides for strict and absolute liability in respect of certain dangerous activities through the application of the principle promulgated in *Rylands* v. *Fletcher*.[94] This rule cannot be invoked unless the plaintiff has suffered either property damage or personal injury.[95] Such injury may be actionable in respect of either

- the escape from the defendant's land of the possible effects of weather phenomena, excess water in most cases, onto the plaintiff's land - this is otherwise called run-off or;
- the escape of 'cloud-seeding' chemicals from the defendant's property and their reaction with atmospheric moisture resulting in the impact of weather phenomena upon the plaintiff or his land.

Apart from proving the factual causative link between the 'cloud-seeding' and the existence of excess water on the land, it is necessary to prove that the conduct of such activities by the defendant is a 'non-natural use' of land.[96] *Blackburn J.* considered that liability would attach for the 'natural consequences' of an escape 'of anything likely to do mischief'.[97] There seems to be no decided authority on whether or not the processes involved when a substance like cloud-seeding chemical, which is potentially mischievous but manifests its mischievousness by interaction with a second medium, namely atmospheric moisture, before giving effect to its mischievousness on a third medium, namely the earth, will fit within the description: 'natural consequences' of an escape.

The Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, 1993, also known as 1993 Lugano Convention on Civil Liability was signed in attempt to harmonise the general law on liability for environmental damage. This

[92] *Adams* v. *State of California*, 386 U.S. 282 (1967).
[93] *Supra* note 14.
[94] *Supra* note 88.
[95] *Benning* v. *Wong*, [1969] 122 C.L.R. 249.
[96] *Bayliss* v. *Lea*, [1962] 62 S.R. (N.S.W) 521.
[97] *Supra* note 88.

Convention, aimed at ensuring adequate compensation for damage resulting from activities dangerous to the environment, also provides for means of prevention and reinstatement. It considered that the problems of adequate compensation for emissions released in one country causing damage in another country are of an international nature.[98] But this treaty has not been widely adopted and has no impact on existing national law.[99] However, International courts rely on strict liability as a general principle of law although they apply it cautiously.[100]

Herein, India needs to establish that there is a dangerous substance, i.e. cloud seeding chemicals, the use of which by the Chinese in their territory, results in floods in the Indian territory and that the use of such chemicals on such a large extent is not a natural use. Cloud seeding on a large scale may cause undesirable, if not altogether destructive weather conditions such as flooding, storms, hail risks, etc. Some places usually do not have the infrastructure to handle heavy precipitation and these areas may get flooded quickly, causing more harm than good. Chemicals used in cloud seeding can potentially damage the environment.[101] Silver iodine may cause a condition called iodism, a type of iodine poisoning where the patient exhibits running nose, headache, skin rash, anemia, and diarrhea, among others. It has also been found to be highly toxic to fish, livestock and humans.[102]

VI. CONCLUSION: WHAT NEXT?

The purpose of this article was to highlight that weather modification has a potential area for international litigation now and in future and possible litigants could be India and China owing to cross-boundary damage that may be caused by these activities. Weather modification is a huge strength of any country, opening unique opportunities of economic and social development. Therefore, it appears that seemingly inevitable progress in the field of weather modification may lead to controversies or a more frightening weather war between states.

Every new creation and development in science or technology brings inevitable policy and legal complications and the demanding task of solving technical difficulties. This will, in time, lead to minor and possibly major international conflicts between states. If there is a minor interference in another nation's territory due to weather modification, the

[98] Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Council of Europe, 1993, European Treaty Series - No. 150.

[99] Patricia Birnie, Alan Boyle, *et.al.*, *International Law and the Environment* 220 (Oxford University Press, 3rd edn., 2008).

[100] Lord McNair in *South West Africa Case*, [*1950*] *ICJ* Rep *128*, 15.

[101] Shaista Malik, Haleema Bano, *et.al.*, "Cloud Seeding: Its Prospects and Concerns in the Modern World-A Review" 6(5) *International Journal of Pure and Applied Bioscience* 791-796 (2018).

[102] *Ibid.*

interests of the affected nation might well be safeguarded by the assurance of prompt and adequate compensation. But any major conflict might lead to weather war between states.

The general law relating to state responsibility requires that even though state exercises complete freedom on weather modification activities within national boundaries, any damage across its frontiers to another state party, irrespective whether it is intended or not, should be made good without fail. There is no such specific law governing weather modification developed as meticulously as its technology. There need to be a more comprehensive and mutual agreement between states calling for international cooperation so that responsibility of states can be preventive rather than punitive.

The probable tussle between China and India may fortunately be solved by negotiations or agreements but in case tensions rise, legal implications are better to be pondered upon well in advance. There is a need for development of uniform international law on weather modification between states to resolve any dispute caused, irrespective of intentions, and recognize their different positions and needs. The genuine world interest of increasing control over the forces of weather can effectively be pursued through good faith, scientific efforts and experiments.

THE RIGHT OF THE PEOPLE LIVING WITH HIV/AIDS TO MARRY

Karthik Rai[*]

The X v. Z judgement absolutely denied the right of marriage to the people with HIV/AIDS ('PWHAs'). In response to numerous petitions assailing the judgement, a clarificatory order was issued by the Supreme Court with an intention to partially undo the effects of the X v. Z case. Subsequently, the government's measures like the HIV Bill of 2017 have been affected, and modern techniques like premarital HIV testing have been proposed – both of these framed in the context of securing the rights of PWHAs. However, a close perusal seems to lead to the conclusion that the developments may not have any positive impact that they are purported to have. Contrarily, they seem to further contribute to denying effectively, the right of PWHAs to marry. Therefore, the argument advanced in this paper is that, though the right to marry, which was denied by the X v. Z case, was subsequently reversed by the Supreme Court, thereby statutorily guaranteeing the right of PWHAs to marry. A closer look at some of these developments evince that the right may not be guaranteed substantively.

I. INTRODUCTION

Recently, Mizoram recorded the highest prevalence rate for HIV/AIDS in India, which led to the government seeking the aid of the Church, various NGOs, and other local institutions.[1] While that is definitely a step in the right direction, the Mizoram Governor, Mr. PS Sreedharan Pillai, recently stated that this 'serious problem' had to be countered on a 'war-footing'.[2] In fact, many local leaders in Mizoram, whose opinions the Government relies on,[3] had earlier suggested publishing names of people with HIV/AIDS

[*] The author is a second-year B.A. LL.B. (Hons.) student at the National Law School of India University, Bengaluru. He can be reached at raikarthik4@gmail.com.

[1] Sentinel Digital Desk, "Mizoram Registers Highest HIV/AIDS Prevalence Rate in India" *The Sentinel Assam*, Feb. 19, 2020, *available at*: https://www.sentinelassam.com/north-east-india-news/mizoram-registers-highest-hiv-aids-prevalence-rate-in-india/ (last visited on Feb. 20, 2020).

[2] Press Trust of India, "AIDS Serious Problem, Should be Tackled on War-Footing: Mizoram Guv" *Outlook*, Feb. 17, 2020, *available at*: https://www.outlookindia.com/newsscroll/aids-serious-problem-should-be-tackled-on-warfooting/1736671 (last visited on Feb. 20, 2020).

[3] Press Trust of India, "Mizoram Tops in HIV/AIDS cases, govt taking steps to tackle" *Outlook*, Feb. 18, 2020, *available at*: https://www.outlookindia.com/newsscroll/mizoram-tops-in-hivaids-cases-govt-taking-steps-to-tackle/1737716 (last visited on May 24, 2020).

for all to see, thus, completely isolating them, restricting their mobility and suggesting harsher punishments for some acts that they do.[4] Such a vigorous outlook to solving or alleviating a problem, if adopted now, entails the possibility of increasingly aggressive attitudes towards preventing the disease's prevalence.

There could emerge, therefore, the possibility of an inordinate violation of the right of PWHAs to marry the person of their choice and with their consent. Several international agreements, like The International Covenant on Civil and Political Rights,[5] and The Universal Declaration of Human Rights,[6] uphold the right to marry as a fundamental right. These rights do not talk about any prerequisite for the couples to procreate in a marriage; it only provides the *option* of procreating.[7] A recognition of such rights entails the fact that the restrictions on the right to marry have to be non-arbitrary and must not substantially interfere with the enjoyment of the right. The incorporation of this right in essential rights-based documents indicate the high regard that the drafters of both the aforementioned documents had, towards the institution of marriage. The right to marry has, in several countries, been provided a progressive interpretation including within its ambit, the right to control one's own bodies when it comes to reproduction,[8] granting same-sex couples the right to marry,[9] and other concomitants.

These guarantees, however, seem to have been overlooked by courts of India when the PWHAs were deprived of their right to marry. This, in turn, has contributed to their increasing marginalization. In this context, the researcher, in this paper, wishes to explore the right to marry of PWHAs which was denied in the landmark case of *Mr. X* v. *Hospital Z,*[10] ('The First Case') and the subsequent developments in this field. In the first section, the case and the arguments adopted by the Court on the right to marry of the PWHAs have been stated. The next section identifies potential problems in the judgement. The third section looks at certain developments following The First Case, which seem to have provided a ray of hope to PWHAs to have their right to marry recognized. The concluding section critically analyses these ameliorative measures and their practicability.

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[4] Centre for Peace & Development, "Report of the Research Project Submitted to Mizoram State AIDS Control Society" *National AIDS Control Organisation*, 43-46 (2008) *available at*: http://naco.gov.in/sites/default/files/COMMUNITY%20NEEDS%20ASSESSMENT%20ON%20HIV-AIDS%20IN%20MIZORAM.pdf (last visited on May 17, 2020).

[5] The International Covenant on Civil and Political Rights, 1976, art. 23.

[6] The Universal Declaration of Human Rights, 1948, art. 16.

[7] "CCPR General Comment No. 19: Art. 23 - Protection of the Family, the Right to Marriage and Equality of the Spouses", UN Human Rights Committee (HRC), para 5.

[8] "Irish Abortion Referendum: Ireland Overturns Abortion Ban" *BBC*, May 26, 2018, *available at*: https://www.bbc.com/news/world-europe-44256152 (last visited on May 17, 2020).

[9] *Obergefell* v. *Hodges*, 576 U.S. 644 (2015); *Halpern* v. *Canada* (AG), [2003] O.J. No. 2268 (Canada).

[10] (1998) 8 SCC 296.

II. THE X V. Z CASE

In this case, a doctor, Mr. X ('X') donated blood for the operation of one of his patients. X had proposed marriage to a Ms. Y ('Y'), but before the marriage, the hospital in which he had donated blood informed the family of X that he was HIV positive; this led to the marriage being called off and he was cold-shouldered by the entire society. X appealed on one basic ground: that his right to privacy had been violated and that the hospital had breached its duty to maintain confidentiality as to the medical information. However, the Supreme Court, after a lengthy discussion on doctors' duty of confidentiality and its relation to privacy, moved to an issue not raised by X on appeal: it examined confidentiality from the lens of X's right to marry.[11]

The judges examined various marriage and divorce laws which gave the right to divorce on grounds of the spouse having the venereal disease(s). They adjudged that these laws implied that there was no right to marry 'even prior' to the divorce in marriage being claimed ('the divorce argument').[12] Next, the judges analysed Sections 269 and 270 of the Indian Penal Code ('IPC').[13] They concluded that since these sections criminalized negligent, unlawful and/or malignant acts likely to spread dangerous diseases, X has a 'duty' to not marry ('the criminalization argument').[14]

Under the next argument ('the Hohfeldian argument'), the Court analysed the 'right' to marry using the Hohfeldian analysis of legal relations, and stated that this right entailed a corresponding duty; however, in cases of PWHAs, it was an exception to the general rule, as both the rights and duties are vested in the same person, X, instead of the duty vesting in another person. The court declared this an aberration from the general Hohfeldian rule of a right creating a correlative duty. Therefore, the court declared that until X was cured of the venereal disease, the right to marriage would be 'suspended', and thus could not be judicially enforced.[15]

Following the Hohfeldian argument was the Court's opinion on AIDS being due to 'undisciplined sexual impulses'. Thus, the possibility of sexual intercourse with PWHAs had to be prevented.[16] All these arguments were used to support the Court's stance that there would be no right to marry for PWHAs. However, it is submitted that there are several wrongful implications that emerge in the analyses made by the Court.

[11] *Id.* at para. 30.
[12] *Id.* at paras. 32-37.
[13] The Indian Penal Code, 1860 (Act 45 of 1860), ss. 269, 270.
[14] *Supra* note 10 at para. 41.
[15] *Id.* at para. 38.
[16] *Id.* at para. 45.

III. PROBLEMS IN THE JUDGEMENT

In the divorce argument, the Court rationalised its decision on marriage rights by relying on The Hindu Marriage Act, 1955 ('HMA'), The Parsi Marriage and Divorce Act, 1936 ('PMDA'), and other legislation pertaining to marriage. Admittedly, these laws provide for divorce on grounds of venereal diseases. However, the very fact that this is mentioned as grounds for divorce – and not under the conditions that would disentitle the parties from getting legally married –implies that PWHAs have the right to marry. This in no way implies that there is no right to marry *ab initio*, which is what the judges claimed. For instance, if we look at Section 5 of the HMA,[17] or Section 3 of the PMDA,[18] which prescribe specifications for the parties to a marriage, there is no condition that health issues like HIV/AIDS are a bar on marriage. However, the court seems to have overlooked this separation of the grounds of a valid marriage, from the grounds of divorce.

Next, as far as the criminalization argument was concerned, the Court seems to have undertaken a merely superficial analysis. It was stated that if a person unlawfully, or negligently, contributes to the spreading of the disease to others, he/she would be guilty of the offences that have been proscribed by Sections 269 and 270 of the IPC. That is, the PWHA must have done an act with the knowledge that he/she by that act is 'likely' to spread a disease.[19] However, the Court's argument was premised on the assumption of malfeasance on the part of the PWHA. However, X himself didn't know of the affliction until his family members got to know of the same – as soon as his HIV positive status was known to him, he himself stepped back from the marriage.[20] In no way could X have predicted his HIV status unless he was informed about it. So, it is not clear how Section 269/270 would have applied if X had married Y.

In addition to this, the burden of proof in such offences is also difficult. Sections 269 and 270 penalize criminal offences requiring some form of *mens rea*. Section 269 penalizes

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[17] The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 5, states that for a valid Hindu marriage to be solemnized between two Hindus, the conditions that had to be satisfied are:

i. both parties did not have a spouse existing already;
ii. both parties had the necessary mental capacity to consent to the marriage;
iii. the bridegroom had completed the age of 21 years, and the bride, 18 years;
iv. the parties were not within the degrees of proscribed relationship to each other without a prevalent custom; and
v. the parties were not *sapindas* of each other.

[18] The Parsi Marriage Act, 1936 (Act 3 of 1936), s. 3, states that a valid Parsi marriage had to fulfil the following conditions:

i. the parties were not within the prohibited degrees of consanguinity or affinity;
ii. the parties had performed the marriage with the requisite Parsi ceremony of 'Ashirvad', including the presence of a priest and two other Parsi witnesses; and
iii. the bridegroom had completed the age of 21 years, and the bride, 18 years.

[19] *Supra* note 10 para 41.

[20] J. Krishnan, "The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India" 25 *Human Rights Quarterly* 810 (2003).

only 'negligent' acts and Section 270 the 'malignant' ones. It is highly improbable that the Court would criminalize HIV transmission if the person transmitting it was unaware of the same. The Madras High Court in *P. Ravikumar* v. *Malarvizhi*[21] agreed with the view that a PWHA entering into a marriage with a 'willing' partner could not be criminalized under Section 269.

Similarly, in the U.S., courts have been unwilling to criminalize acts unless a negligent or malignant intent is clearly evident. For instance, when a person knowing he has HIV, has sexual intercourse with another, it would be criminalized, but if he didn't know it, he would be acquitted.[22] Similarly, biting someone with the knowledge that such bites could transmit HIV would also entail criminal liability.[23] However, U.S. courts have highlighted the difficulty in deducing a malignant intent (required under Section 270) when a mother transmits the disease to her child – decisions to beget despite seropositivity (that is, having been tested positive for the presence of the virus in the serum) have entailed no animus to cause harm to the child.[24]

Therefore, by inference, sexual intercourse by a PWHA with a partner who does not have AIDS may also involve no intention to malignantly cause harm to the partner – the 'act' may be committed with the sole intention of conceiving a child. Additionally, it could be very difficult to establish that the individual had prior knowledge of the disease before he/she could be convicted of a crime.[25] Most couples don't undergo premarital testing for HIV/AIDS because this seems to indicate a lack of trust in each other's fidelity to the marriage commitment.[26] Therefore, there is a relative lack of awareness regarding seropositivity before sexual intercourse, and therefore, applying the IPC could have unintended consequences.

The judges seem to have made their analysis of the IPC sections applicable to all cases of PWHAs. Therefore, it would include cases where the mother, in spite of having HIV, conceives a child. However, in cases of perinatal drug abuse by pregnant mothers which has affected the baby, courts have refrained from criminalizing the mother's act.[27] This is because prosecuting women for transmitting the effects of substance abuse to their new-borns was not a viable solution – pregnant women would then, to evade the law, not seek prenatal assistance and would try and deliver children on their own.

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[21] (2011) SCC OnLine Mad 244, para. 10.

[22] *United States* v. *Johnson*, 30 M.J. 53 (C.M.A. 1990).

[23] *United States* v. *Moore*, 846 F.2d 1163 (8th Cir. 1988).

[24] R.T. Henrion, E Henrion-Géant, *et.al.*, "HIV-Infected Women's Decision to Continue or Terminate Pregnancy" 896 *Presse Med* (1991).

[25] *Brock* v. *State*, 555 So. 2d 285, 288 (1989).

[26] Robert Goodman, "In Sickness or in Health: The Right to Marry and the Case of HIV Antibody Testing" 38(1) *DePaul L. Rev*. 122 (1988).

[27] *Johnson* v. *State*, 602 So. 2d 1288 (Fla. 1992); *Collins* v. *Texas*, 890 S.W.2d 893 (Tex. App. 1994).

Therefore, if a mother transmits the HIV to her child, applying the First Case's analysis as against the U.S. courts' views, seems to lead us to the conclusion that the mother would be penalized under Section 269 or Section 270. This could, in all probability, have portentous ramifications as the U.S. courts have noted. Thus, the applicability of the IPC to cases of PWHAs could be problematic.

The Court also erred in interpreting the Hohfeldian conception of legal relations, as it seems to have used 'right' as a colloquial, all-inclusive term, thereby achieving an incorrect outcome by virtue of its 'looseness of usage'.[28] To disabuse this concept, we need to distinguish a right from a privilege. The mechanism by which this is done is by looking at the corresponding duty, as every right involves a duty as a correlative.[29]

In case of a privilege, the correlative[30] is a no-right, and the jural opposite[31] is a duty. While a right is enforceable by the person exercising it against all the other people, a privilege is something one avails oneself of, via an act of exercising liberty over the thing he/she has a claim over. If 'A' owns the land, he/she has the right that 'B' mustn't enter the land – thus, B has a corresponding duty. But A also has a privilege, which he/she may discretionally exercise, to enter his/her own land. B, therefore, has a no-right that A mustn't enter.[32]

Thus, in the Hohfeldian framework of legal relations, what the court mistook as a right to marry was actually a privilege to marry. Definitely, Y had the right in the Hohfeldian sense of the term that X shall not hide any information before she makes an informed decision to marry. This attributes to X a corresponding duty, had he known his HIV status, to provide the said information. However, X had not the right, but a privilege to marry Y. Thus, the Court had a duty to not interfere in X's right to marry. That is, the Court inhered a no-right that X shall not marry Y, under normal circumstances.

Unfortunately, the Court did not permit X to perform the duty to inform Y of his seropositivity, by holding that he had no right to marry. It seems that these two separate legal relations of rights and privileges, vesting in different people, were conflated and collapsed into one vague notion, of the right and the corresponding duty vesting in the same person. This, it is submitted, is an incorrect analysis.

Justice Madala of the South African Constitutional Court stated, in a case pertaining to PWHAs,[33] that the health-related information concerning a person comprises concerns about bodily integrity and autonomy. Not respecting the same, he stated, would imperil

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[28] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" 23(1) *Yale Law Journal* 31 (1913).

[29] *Ibid.*

[30] *Supra* note 28. Also, a jural correlative is a concept which is compatible, logically, with another concept.

[31] Jural opposites are concepts that are mutually exclusive.

[32] *Id.* at 32-35.

[33] *NM and Others* v. *Smith and Others*, 2006 (1) SA 524 (CC).

the individual autonomy in making important choices. This was endorsed by the Supreme Court in *K.S. Puttuswamy* v. *Union of India*.[34] However, the opinion expressed in The First Case regarding AIDS was that it originated due to 'undisciplined sexual impulses', and this was wholly uncalled for. The Court failed to realize that it is not only sexual activities that transmit HIV but sharing contaminated syringes/needles, injections, blood transfusions, etc., also contribute to the same,[35] apart from tattoo marks, scarification and antenatal transmission.[36] Such an outright branding of PWHAs as sexually hyperactive would only demean them and contribute to their further ostracization. Thus, the lack of respect for their medical condition might cause hesitation in the minds of PWHAs to disclose their status and make other important decisions.

One of the most morally static opinions of the Court in this judgement was how marriage was for the 'procreation of equally healthy children'.[37] This view is premised on the belief that the democratic society's interests could be maximised only if couples, irrespective of their personal freedom, contribute via procreation of healthy children, thereby preserving the country's quintessential cultural values.[38] However, this model is fallacious. The mere fact that a majority of existing marriages entail procreation does not make it the basis of marriage by reverse-reasoning.

Marriages are primarily for companionship, affection, and sharing emotions.[39] PWHAs often need someone to rely on, both emotionally and physically, and are very comfortable to do so with their partner/spouse. An account of a person whose partner died due to AIDS writes how his partner's feelings, hopes, and disappointments became 'our feelings'.[40] In *Navtej Singh Johar* v. *Union of India*, it was held how procreation would not be the only reason for marriage with the societal evolution – marriage would be a 'refuge' from the harshness of 'contemporary existence'.[41] Judgements like The First Case don't do anything to remedy the stigma prevalent in societies towards PWHAs, and neither do they help PWHAs obtain the emotional support they need, but may inadvertently abet behaviour like obtaining fake HIV negative certificates, evading necessary medical tests, etc.[42]

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[34] (2017) 10 SCC 1, para. 202.

[35] Thomas J. Hope, Douglas Richman, *et.al.* (eds.), *Encyclopedia of AIDS* 175 (Springer, 2018).

[36] Aboh O. Otokpa, Taiwo O. Lawoyin, *et.al.*, "HIV/AIDS-related Knowledge and Misconceptions among Women Attending Government-owned Antenatal Clinics in Gwagwalada Area Council of Abuja, Nigeria" 17(1) *African Journal of Reproductive Health* 115 (2013).

[37] *Supra* note 10 at para. 32.

[38] Hafen, "The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual and Social Interests" 81(3) *Mich. L. Rev.* 478 (1983).

[39] *Supra* note 26 at 121.

[40] Joseph Interrante, "To Have Without Holding: Memories of a Life with a Person With AIDS" 20(6) *Radical America* 56-57 (1987).

[41] (2018) 10 SCC 1, paras. 230-231.

[42] M. Dhalival, "Rights of Those with HIV to Marry Suspended in India" 7(14) *Reproductive Health Matters* 192 (1999).

Even otherwise, if procreation is the reason for marriage, that too cannot restrict the right of PWHAs to marry – PWHAs who are on medication, thereby having undetectable viral loads would not be transmitting the virus to their offspring or their partners, leading to reduction of the possibility of maternal-child transmission to around 0.1%.[43] Additionally, new interventions like caesarean sections/ ART (Anti-Retroviral Therapy to treat HIV infection) drugs and prophylaxis-against-pneumocystis help reduce viral loads, enabling a healthy life for infants.[44]

An additional confusion that could arise is whether PWHAs could indulge in live-in relationships. For a live-in relationship to exist, the parties should be capable of entering into a 'legal marriage'.[45] However, by virtue of this judgement, since PWHAs were declared as having no right to marry, it is certainly inferable that they would be disallowed from entering into live-in relationships as well. Also left uncertain was whether the marriage rights of couples, both of whom were afflicted with HIV, would be taken away.[46]

IV. POTENTIAL AMELIORATIONS OF THE PROBLEMS

The judgement caused a furore, which led to writ petitions and in 2003, a clarificatory judgement was delivered ('The Clarification').[47] The Clarification didn't examine the material placed by various parties to the appearance, and stated that the views of the First Case, except on X's right not having been affected by his expectation of confidentiality having been disrespected, were 'unnecessary' and 'uncalled for'. It then 'dispose(d) of' the appeal application.[48]

Additionally, the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 ('the HIV Act'), was brought into effect. Section 2 of the HIV Act defines an 'HIV-affected-person' as someone whose 'partner' has been afflicted with HIV.[49] Section 30 states that guidelines for providing 'HIV-related information' and 'education' 'before marriage' shall be issued.[50] Section 10 of the HIV Act instructs PWHAs to take all 'reasonable precautions' to prevent sexual transmission of

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[43] Bakita Kasadha, "Having a Baby When You Are Living With HIV" *Aidsmap*, Nov., 2019, *available at*: https://www.aidsmap.com/about-hiv/having-baby-when-you-are-living-hiv (last visited on Jan. 17, 2020).

[44] M.C. Kalavathy and S.K. Vijayasankar, "Disclosure of HIV Status and Human Rights: The Duties and Responsibilities of Couples, Medical Professionals, Family Members and the State" 8(15) *Reproductive Health Matters* 152 (2000).

[45] *D. Velusamy* v. *D. Patchaiammal*, (2010) 10 SCC 469.

[46] *A, C & Ors.* v. *Union of India and Ors*, (1999) Writ Petition No. 1322, Bombay High Court (Pending).

[47] *Mr. X.* v. *Hospital Z*, (2003) 1 SCC 500.

[48] *Id.* at paras. 6-7.

[49] The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017, (Act 16 of 2017), s. 2.

[50] *Id.*, s. 30.

HIV, including informing the person his status in advance.[51] This seems to indicate that the right to marry of PWHAs has been recognized, although tacitly.

With the advancement in science and technology, there seem to be better techniques available to prevent the proliferation of AIDS/HIV. One of such methods, namely premarital HIV testing, is sought to be introduced in Indian states. There seems to be no basis as such in the current HIV Act for such testing to take place, but it is not specifically restricted in the HIV Act either. Thus, it could very well be brought about in the near future.[52] Proper awareness would ensure that couples voluntarily adopt premarital testing, and thus obtain greater clarity on various things before they get into a marriage.

These include, inter alia, procreation plans, thus facilitating stable relationships.[53] Such an approach, *prima facie*, seems to recognize and further bolster the right to marry of the PWHAs. However, it is submitted that, on a closer inspection, each of these three phenomena – the Clarification, the HIV Act, and the implementation of premarital testing – is not as helpful to root out the problem as it seems.

V. THE REMEDIES: A CHIMERA?

The Clarification, by the usage of words like 'unwarranted' and 'uncalled for', in referring to The First Case, was not clear on whether The First Case was effectively being struck down as bad law. Adding to the confusion is that instead of the appeals (which led to the Clarification) being upheld, they were dismissed. The Supreme Court found it unnecessary to even peruse the material submitted by the appellants. Besides, the phraseology used by the Court in the Clarification leaves us unaware of the implications of the overturning – were the remarks applicable against every case on PWHAs' right to marry? For instance, where a case held that it would be constitutional for the state to promote Article 47 of the Constitution by ensuring the health of the general public against PWHAs, and that, pursuantly, rights like marriage and privacy of PWHAs could be overridden,[54] what are the implications? This situation, therefore, still seems nebulous in a way.[55]

Admittedly, the aforementioned sections of the HIV Act indirectly admit the right to marry of the PWHAs. However, even if the right to marry is formally guaranteed, whether the right is substantively guaranteed is the question. In India, to date, there have been repeated shortages of ART medicine – so, people who could be cured don't get

[51] *Id.*, s. 10.

[52] Shamani Joshi, "Officials in Goa Want to Make Couples Get an HIV Test Before They Marry" *Vice*, July 10, 2019, *available at*: https://www.vice.com/en_in/article/3k398b/officials-in-goa-india-want-to-make-couples-get-an-hiv-test-before-they-marry (last visited on Jan. 23, 2020).

[53] R.R Kishore, "Disclosure of HIV status and human rights: The duties and responsibilities of couples, medical professionals, family members and the state" 8(15) *Reproductive Health Matters* 162 (2000).

[54] *Smt. M. Vijaya* v. *The Chairman and Managing Director*, *Singareni Collieries Company Ltd. and Ors.* (2001) Indlaw AP 457, paras. 52 and 54.

[55] *Supra* note 20 at 815.

assistance.[56] In India, only those PWHAs whose CD4 count in blood (CD4 cells are killed by HIV; so, the lower the CD4 count, the more serious is the infection) is lesser than 250 units have been provided free treatment. The commitment that those with a CD4 count lower than 500 will be provided ART drugs seem to have not been upheld or effectively guaranteed.[57]

This leads to the issue of availability of medical assistance when the health condition of the PWHA has significantly deteriorated. In 2018, only 11 lakhs out of 21 lakh PWHAs were on ART treatment,[58] showing the considerable ineffectiveness of the AIDS programme, in reaching out to the people in real need of HIV-related treatment in India. 2010 WHO guidelines mandated a CD4 count of at least 350 for pregnant women.[59] Therefore, many pregnant women in India don't get treatment when required, leading to the birth of HIV positive children. For instance, a study was conducted in Tamil Nadu in 2014 to examine the incidences of parent to child transmission of HIV; it was found that, due to lack of governmental initiative, inter alia¸ about 80% of the women weren't able to access ART treatment.[60] Even in the post-partum stage, when continued treatment and diagnosis of the baby is important, India has an abysmal 23% of babies tested.[61] However, since Section 14(1) states that the measures for providing ART (Anti-Retroviral Therapy to treat HIV infection) drugs, and other therapy to PWHAs would extend 'as far as possible', it provides an avenue for the government to absolve itself of liability in case of failure to provide essential treatment to PWHAs.

In India, married women have generally been unable to negotiate safer sex with their husbands, owing to the unfortunate disequilibrium in power relations. A lot of men seem to view sexual intercourse as their entitlement in a marriage; thereby, there are many instances where women have had sexual relations with their husbands against their will.[62] In addition to that, most instances of sexual intercourse do not involve the use of measures, like condoms, to ensure safe sex.[63] If the child is born with HIV, there is a high

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[56] Menaka Rao and Priyanka Vora, "Loophole in HIV/AIDS Bill passed by Rajya Sabha draws criticism from patients, health experts" *Scroll*, Mar. 22, 2017, *available at*: https://scroll.in/pulse/832443/loophole-in-hiv-aids-bill-passed-by-rajya-sabha-draws-criticism-from-patients (last visited on Jan. 14, 2020).

[57] *Ibid.*

[58] "HIV Bill Passed: Concerns Over Access To Treatment Remain" *The Hindu Business Line*, Jan. 15, 2018, *available at*: https://www.thehindubusinessline.com/news/national/hiv-bill-passed-concerns-over-access-to-treatment-remain/article9631280.ece (last visited on Jan. 17, 2020).

[59] "New guidance on prevention of mother-to-child transmission of HIV and infant feeding in the context of HIV" *WHO*, July 20, 2010, *available at*: https://www.who.int/hiv/pub/mtct/PMTCTfactsheet/en/ (last visited on Feb. 1, 2020).

[60] A. Subramaniyan and Sonali Sarkar, "Status of prevention of parent to child transmission services among HIV-positive mothers from rural South India" 35(2) *Indian J. Sex. Transm. Dis* (2014), *available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4553836/#ref13 (last visited on May 16, 2020).

[61] "HIV and AIDS in India" *Avert*, Jan. 28, 2020, *available at*: https://www.avert.org/professionals/hiv-around-world/asia-pacific/india (last visited on May 17, 2020).

[62] Sapna Desai, "HIV and Domestic Violence: Intersections in the Lives of Married Women in India" 8(2) *Health and Human Rights* 145-146 (2008).

[63] *Id.* at 146.

possibility that it is the woman who is blamed for transmitting the HIV to her child, though the father may have been at fault. This is analogous to a situation where a woman is blamed for giving birth to a daughter. Consequently, allegations of infidelity could be levelled against the woman, and she is then subjected to physical, verbal, and economic abuse for the same, resulting in a definite breakdown of the marriage.[64] Therefore, until the HIV Act is implemented in spirit, making ART and other drugs available to those who genuinely need such treatment, the right to marry will not be realized in totality.

Moreover, there are provisions for an ombudsman under Chapter X who shall deliberate over violations under the Act[65] – however, the provisions are unclear on the ombudsman's tenor and, more importantly, whether he would be judicially trained. Therefore, whether the ombudsman would understand the nuances of the First Case, the problems in the Court's analyses in the case, and various developments in the HIV field post the judgement, still remains unknown.

Since the ombudsman would be appointed and paid for by the respective state governments, if a state is financially weak, it may not set up the post, and yet claim that it is implementing the Act 'as far as possible'.[66] The Delhi and Punjab Governments framed draft rules to facilitate the appointment of an ombudsman under this Act; however, there is no further update on when the ombudsman will be appointed.[67] In fact, the Punjab Government specifically designated civil surgeons from five divisions would constitute ombudsmen; however, there is no data on which surgeons were actually selected later if they were.[68] In Mumbai, even the draft rules haven't been made. Ultimately, the affected people are left with no recourse but to approach the police, which takes significant time.[69] Therefore, violations of PWHAs' rights, including the right to marry, could go unnoticed. Cumulatively, these could very well prevent the full enjoyment of the right to marry and the various appurtenant rights/duties, as a fear of the child being born with HIV may create concerns about procreation and possible criminalization for transmitting the virus to the child or the spouse.

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[64] *Id.* at 150.

[65] *Supra* note 49 at Chapter X.

[66] Amrit Dhillon, "India Takes Flawed First Step Towards Ending HIV and AIDS Prejudice" *The Guardian*, Apr. 13, 2017, *available at*: https://www.theguardian.com/global-development/2017/apr/13/india-flawed-first-step-ending-hiv-aids-prejudice (last visited on Jan. 30, 2020).

[67] Anonna Dutt, "Delhi drafts rules for appointment of officer to keep a check on discrimination against people with HIV" *Hindustan Times*, Sep. 30, 2019, *available at*: https://www.hindustantimes.com/cities/delhi-drafts-rules-for-appointment-of-officer-to-keep-a-check-on-discrimination-against-people-with-hiv/story-4iovGfpQK16az9UnCaOLeI.html (last visited on May 21, 2020).

[68] Vinod Kumar, "Punjab Drug Fight Runs Into AIDS Rise" *The Times of India*, Sep. 3, 2019, *available at*: https://timesofindia.indiatimes.com/city/chandigarh/punjab-drug-fight-runs-into-aids-rise/articleshow/70953361.cms (last visited on May 21, 2020).

[69] Rupsa Chakraborty, "Mumbai: HIV-Afflicted Suffer as State Fails to Appoint Ombudsman" *MidDay*, Aug. 26, 2019, *available at*: https://www.mid-day.com/articles/mumbai-hiv-afflicted-suffer-as-state-fails-to-appoint-ombudsman/21607161 (last visited on May 21, 2020).

As far as the mandatory premarital HIV testing is concerned, Indian states intend to, in the near future, bring about premarital testing. These tests, however, will ostracize people who are diagnosed as HIV positive.[70] Moreover, practically, it is not feasible at present, in that it is extremely costly.[71] The *Zablocki* case[72] in the U.S., which has been upheld in India,[73] propounded the direct and substantial interference test to ascertain the level of intrusion that would merit the interference being deemed illegal. If state actions qualified both criteria, its actions would be unconstitutional. If this test is applied to the pre-marital testing scenario, we find that there is a direct interference, as a 'legal obstacle' is placed before the right to marry.[74] Additionally, the heavy costs forcing people to seek marriages in other places is a substantial interference.[75]

VI. CONCLUSION

The First Case denied absolutely the right to marry for PWHAs, but the problems in the analyses were highlighted. The Clarification which seems to have 'overturned' the First Case leaves the position ambiguous. Admittedly, owing to legislations like the HIV Act and scientific advances, the right to marry for PWHAs seems available, necessarily after revealing the HIV status. However, owing to institutional incapacity and the government's lack of responsibility to provide treatment to PWHAs, it seems that the right to marry is effectively not guaranteed. Providing for marriage to PWHAs is a potentially effective way to prevent the pervasion of the HIV virus. This is because the institution of marriage is still viewed as a 'sacrament' in India. This could instil notions of sexual fidelity in the parties to the marriage. This, in all probability, will restrict exposure of people to HIV.

A widespread issue that further contributes to this malady is the lack of awareness about HIV/AIDS and it being regarded as a taboo. People in a sexual relationship must be made to understand the importance of protection/contraceptives and their role in avoiding HIV transmission. As for married and yet-to-marry couples, if marriage rights aren't guaranteed, both formally and substantively, PWHAs would never disclose their status before marrying, or may not utilize medical treatment. This will perpetuate the

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[70] Rahul Malhotra, Chetna Malhotra, "Should there be mandatory testing for HIV prior to marriage in India?" 5(3) *Indian Journal of Medical Ethics* 70-73 (2008).

[71] Schuyler Frautschi, "Understanding HIV-Specific Laws in Central America" 38(1) *International Journal of Legal Information* 64 (2010).

[72] *Zablocki* v. *Redhail*, 54 L. Ed. 2d 618 (1978).

[73] *T. Sareetha* v. *T Venkata Subbaiah*, (1983) SCC OnLine AP 90, paras. 28-29.

[74] *Supra* note 26 at 102.

[75] After the mandatory testing was initiated in Illinois, there was a 500% increase in people seeking marriage licenses in its border states, with a simultaneous reduction of the same in Illinois.

disease which the legislations and executive actions have intended to solve.[76] These things must be kept in mind to prevent a regression to the status quo.

[76] Emma Bell, Promise Mthembu, *et.al.*, "Sexual and Reproductive Health Services and HIV Testing: Perspectives and Experiences of Women and Men Living with HIV and AIDS" 15(29) *Reproductive Health Matters* 116-120 (2007).

ANALYSIS OF DETENTION CENTRES IN ASSAM AND THE MODEL OF THE DETENTION CENTRE IN DISTRICT JAIL, GOALPARA

Debargha Roy[*]

The detention centres in Assam were established more than a decade ago as a solution to the problem of illegal immigration in Assam. As a measure to ensure deterrence to future immigrants through the porous borders, protect the ethnic interests of the region and on grounds of national security, all Declared Foreign Nationals (DFNs) were detained in one of the six detention centres of Assam which were existing in jails of the state. With the passage of the Citizenship Amendment Act, 2019 and Centre's push for a Pan-India National Register of Citizens (NRC), it becomes crucial to study the policy of detention of DFNs by the State as the number is expected to increase. The paper attempts to analyse the policy of detention centres through the model of the Detention Centre in District Jail, Goalpara using relevant legal and economic analysis. The paper attempts at setting a reference point from which future discourse on the viability of any scheme taken to deal with DFNs shall take place. The paper attempts at understanding the lacunae in law relating to the DFNs using primary findings into the functioning of the detention centres. Policy outcomes of the study reveal that the policy of detention centres is not economically viable in the long run as they disconnect an individual from any form of economic activity and it leads to excess expenditure for the Government to maintain them by providing food, lodging and other amenities.

I. INTRODUCTION

The problem of illegal immigration has been a dominant issue of the north-eastern states of India. Due to the influx of immigrants from neighbouring countries, significant demographic changes have taken place over time in the region posing a threat to the culture and heritage of the indigenous people. The Assam Agitation (1979-85) was a significant political development which raised this issue of illegal immigration, which was led by the All Assam Students Union ('AASU') and All Assam Gana Sangram Parishad

* The author is a first-year B.A. LL.B. (Hons.) student at the Gujarat National Law University, Gandhinagar.

('AGSP'). The movement ended in Assam with the signing of the Assam Accord by the Central Government led by former Prime Minister Rajiv Gandhi and leaders from AASU and AGSP. Clause 5.8 of the Accord stated that: 'Foreigners who came to Assam on or after March 25, 1971, shall continue to be detected, deleted and expelled in accordance with the law. Immediate and practical steps shall be taken to expel such foreigners.'[1] Further, in the case of *Sarbananda Sonowal* v. *Union of India*,[2] *('Sarbananda Sonowal* case') the Hon'ble Supreme Court of India addressed the issue of illegal immigration as 'external aggression and internal disturbance'. Thus, the concept of detaining the Declared Foreign Nationals ('DFNs') emerged to facilitate deportation when diplomatic and legal arrangements were made with time. The term 'foreigner' has been defined in the Foreigners Act, 1946.[3] Legally, the term DFN applies to any person who was deemed to be not a citizen by a Foreigners Tribunal set up by the Foreigners Tribunal Order, 1964[4] and Foreigners Act, 1946.

II. OVERVIEW TO THE PROBLEM

The history of post-independence Assam is replete with huge population exchange and constant migration due to which regulation of the flow of people through the porous borders with the neighbouring country of Bangladesh forms a major part of the political debate. Movements of ethnic nationalism, defined by the fear of outsiders influencing the indigenous ways of life, have, from time to time, attempted to define citizenship in a land of fluid frontiers. The groundwork on determination of a foreigner in India lies in the Foreigners Tribunal Act, 1946 which sets a legal regime for the State to determine citizenship of an individual. It explicitly allows the Central Government to exercise its powers with regard to: 'Prohibiting, regulating or restricting the entry, departure, presence or continued presence of either a group of or all foreigners.'[5]

The issue of illegal immigration found its first solution on paper in the Assam Accord of 1985 under clause 5.8.[6] The issue was later addressed in detail in the *Sarbananda Sonowal* case,[7] wherein the Illegal Immigrants (Determination by Tribunals) ('IMDT') Act[8] was struck down. The Foreigners Tribunal, created under the Foreigners Act, 1946[9] substituted the Tribunals under the IMDT Act for determining the allegations of

[1] The Assam Accord, 1985, cl. 5.8.
[2] (2005) 5 SCC 665.
[3] Foreigners Act, 1946 (Act 31 of 1946).
[4] Foreigners' Tribunal Order, 1964.
[5] Supra note 3, s.3
[6] Supra note 1.
[7] Supra note 2.
[8] The Illegal Migrants (Determination by Tribunals) Act, 1983 (Act 39 of 1983).
[9] *Supra* note 3.

doubtful citizenship in Assam. In doing so, the Supreme Court reversed the burden of proof and called for the individual to prove his citizenship. In 2005, the highest court of the land, in the *Sarbananda Sonowal* case[10] held that Assam is indeed facing an 'external aggression and internal disturbance', which if unchecked, will lead to a constitutional breakdown.[11] This judgement changed the face of determination of citizenship in India. The procedure of such detection and deportation is drawn from separate legislation that deals with 'foreigners' in India called the Foreigners Act, 1946.

Contrary to the principles of customary international law, the burden of proof lies upon the individual and not the State.[12] Gradually, the Government of Assam was given the powers by the Central Government of administering the Tribunals and administration of justice in such cases.[13] Thus, the State Government began to manage the Border Police and Foreigners Tribunals with regard to detecting doubtful voters and this raised significant questions on the independence of the Tribunals and maintenance of checks and balances over the Executive.

III. BACKGROUND AND LEGALITY OF DETENTIONS CENTRES

Once a person is declared a DFN by the Foreigners Tribunal, s/he is detained in one of the six detention camps in Assam. Retd. Justice B. P. Katakey in the judgement of *State of Assam* v. *Moslem Mondal*,[14] mentioned that: 'The persons detected to be foreigners shall be taken into custody immediately and kept in detention camp(s) till they are deported from India within the aforesaid time-frame.' Today, Assam has six functional detention centres the first one being established in 2008 under the directions of the Gauhati High Court in the case of *State of Assam* v. *Moslem Mondal,*[15] in the following jail premises: District Jail, Goalpara; District Jail, Kokrajhar; Central Jail, Tezpur; Central Jail, Jorhat; Central Jail, Dibrugarh and Central Jail, Silchar. The total number of DFNs as of November 2019 is 1043.[16] The Supreme Court has allowed the release of detainees after completion of a term of three years and called upon the State to set up diplomatic arrangements to ensure fast deportation of the DFNs. [17]

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[10] *Supra* note 2.

[11] *Ibid*.

[12] *Supra* note 3, s. 9.

[13] *Id.*, s.3.

[14] (2010) 2 GLT 1.

[15] *Ibid.*

[16] Prabhash K Dutta, "NRC and story of how Assam got detention centres for foreigners" *India Today* Dec. 27, 2019, *available at*: https://www.indiatoday.in/india/story/nrc-story-how-assam-got-detention-centres-for-foreigners-1631835-2019-12-27 (last visited on June 16, 2020)

[17] *Supreme Court Legal Services Committee v. Union of India*, Writ Petition (Civil) No. 1045 of 2018.

The Report of the National Human Rights Commission ('NHRC') Mission to Assam's Detention Centres in January, 2018 revealed certain questions upon the legality of the detention centres.[18] It was found that there was no clear legal regime governing the rights and entitlements of the detainees as the jails and detention centres were treated with no distinction for practical purposes.[19] On non-availability of any relevant set of laws and regulations, the detainees were governed by the Assam Jail Manual.[20] On speaking to the higher officials of the State Government, it was found that the State Government had no option but to wait for the Central Government to determine the legal status and rights of the detainees.[21] In the course of this paper, the author tries to argue based on law and relevant findings made through the study of the Detention Centre at District Jail, Goalpara, Assam that a clear violation of Article 21 of the Indian Constitution has been committed with regard to the treatment meted out to the DFNs. The paper attempts at taking the model of District Jail, Goalpara to also study the viability of detention centres in Assam. Goalpara has been chosen for the study due to the availability of research and media reports that have facilitated the study along with convenience of the researcher to undergo field study. The author undertakes an analysis of the problems and prospects of detention centres, and the primary costs of detention centres which have an impact on DFNs. The author also goes on to note the recent developments vis-à-vis detention centres, in light of Covid-19, before concluding the paper.

IV. ANALYSIS OF THE PROBLEMS AND PROSPECTS OF DETENTION CENTRES

This section deals with factors that affect the operation of detention camps. It deals with relevant arguments put across in favour and against detention camps. At the same time, the author acknowledges that significant indirect and intangible costs are created, which are as difficult to conceptualize and measure as those created by the crime itself.[22] Thus, this section analyses the arguments made for and against the policy of detention centres to come to a conclusion on its overall viability.

[18] National Human Rights Commission, "Report on NHRC's Mission to Assam's Detention Centres from 22nd to 24th January, 2018" (January, 2018).

[19] *Ibid.*

[20] Dr. B. R. Saraf and Ashok Saraf, *Assam Jail Manual* (GLR Publishing House, Guwahati, 1987).

[21] *Supra* note 18.

[22] Ben Cifford, "Prison Crime and the Economics of Incarceration" 71 *Stanford Law Review* 71 (2019).

A. Socio - Legal Impact of Detention Centres

1. Lack of segregation of the DFNs from the convicts and undertrial prisoners

The study by Giorgia Tiscini on radicalization suggests that: 'The prison environment can facilitate radicalization through a process whereby the identity of an individual is made more fragile following the criminal act that leads to incarceration – an act that is sometimes traumatic for the perpetrator.'[23] Due to the lack of segregation between the DFNs and regular inmates, the process of radicalisation leads to penetration of criminal tendencies among the DFNs from the regular convicts. Thus, once released after their sentence period of three years, they are likely to engage in anti-social activities, keeping in mind their lower socio-economic position in society.

The report by mission on behalf of the National Human Rights Commission on detention centres from 22nd to 24th January, 2018 found that: 'The state does not make any distinction, for all practical purposes, between detention centres and jails; and thus between detainees and ordinary inmates.'[24] Thus, no clear legal regime exists that defines the rights and entitlements of the detainees.

2. Lack of proper and efficient legal aid

As the DFNs are behind the walls of prisons, they remain cut off from society to an extent that they fail to be informed about their legal matters in time. Right to free legal aid for persons in custody has been a core foundation laid by the Legal Services Authorities Act, 1987.[25] Although the District Legal Services Authorities have been in place to work on the concerned issue, the recent findings showed otherwise.[26] It was found through a jail visit by Studio Nilima that the details of the cases preferred in the higher courts are not communicated to them. They are unaware if their application has been accepted or rejected. Family members of the DFNs stop contacting them after one or two years due to the fear of getting arrested and being put in jail. Often, the legal aid counsels have to travel from far off places like Guwahati to address their clients which is not economically feasible. The inefficient system is such that 74 DFNs including two women were awaiting their release as they had completed their sentence of three years.[27] The delay in granting

[23] Giorgia Tiscini, "The process of Radicalization in the Prison Environment: From Criminal Genesis to Radical Genesis" 84 *Elsevier* 59 (2019).

[24] *Supra* note 18.

[25] The Legal Services Authorities Act, 1987 (Act 39 of 1987).

[26] Studio Nilima: Collaborative Network for Research and Capacity Building "Report of Visit to District Jail, Goalpara" (2019).

[27] *Supra* note 26.

of release due to administrative hindrances has caused frustration and anxiety among them. In the case of *Khatri II* v. *State of Bihar*, P. Bhagwati J. held that:

> Right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.[28]

The apex court also took due cognizance of the fact that while the right to free legal aid was held implicit under Article 21 of the Indian Constitution, most of the states in the country have not taken due note of this situation. Thus, the lack of proper communication of the High Court of Patna order to the inmate comes within the duty of the State as the inmate is confined within the walls of the prison. This is a violation of Article 21 of the Constitution.

3. Lack of education for children of DFNs

The children of the DFNs are often housed in the same jail as that of their parents.[29] Only children under six years of age are allowed to stay with their mothers at the Kokrajhar detention centre. Since most prisoners are parents to minor children, incarceration 'disrupts parent-child relationships, alters the networks of familial support, and places new burdens on governmental services such as schools, foster care, adoption agencies, and youth-serving organizations.'[30] Due to the same, children lost access to education and proper development in their formative years. The jail under study did not have any designated teachers as teachers were reluctant to teach in the jail as the same could make them lose respect in society, which is the case in most of the jails.[31] Thus, the children of the DFNs remain uneducated and under the influence of jail premises that causes a detrimental impact on their overall well being. Staying in touch with the other convicts raises a question of them coming under their influence. Further, the findings of the NHRC Mission suggest that: 'The legal handling of children above 6 who are declared foreigners is even more unclear and shaky.' This is especially true when both parents are foreigners and the State bears no responsibility of the child.

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[28] (1981) 2 SCR 408.

[29] *Supra* note 26.

[30] Jeremy Travis, Elizabeth Cincotta Mcbride, et.al., "Families Left Behind: The Hidden Costs of Incarceration and Reentry" *Urban Institute, Justice Policy Centre* (2005), *available at*: https://www.urban.org/sites/default/files/publication/50461/310882-Families-Left-Behind.PDF (last visited on June 16, 2020).

[31] *Supra* note 26.

In the case of *Maharishi Mahesh Yogi Vedic Vishwavidyalaya* v. *State of Madhya Pradesh*,[32] the Supreme Court read Article 26 of the Universal Declaration of Human Rights which stated that: 'Everyone has the right to education'. In the *Sarbananda Sonowal* case,[33] it was held that: 'A foreigner is entitled to the protection of Article 21 as the application of the said Article is not confined to citizens alone.' While in *State of Arunachal Pradesh* v. *Khudi Ram Chakma*,[34] it was held that the fundamental right of a foreigner is confined to Article 21 for life and liberty and does not include the right to reside and stay in this country. In the case of *Mohini Jain* v. *State of Karnataka*,[35] the Supreme Court held that the right to education is a fundamental right enshrined under Article 21 of the Indian Constitution. The Court held that: 'The right to education directly flows from the right to life.' Thus, it is understood that access to education is a tenet of life and liberty of an individual guaranteed by the Constitution. The denial of proper elementary education to the children of the DFNs forms a clear violation of Article 21.

4. Private Costs on the DFN

An important aspect that needs to be taken care of is the cost borne by the individual in this regard. What needs to be emphasised more than the social cost due to lack of productivity is the lack of freedom.[36] Loss of liberty of an inmate creates disutility.[37] It was found that members of the same DFN family were kept in different jails.[38] It was also found that: 'The loss of the bread earning member leads to reduced standard of living for the family and increase in dependence towards public welfare schemes.'[39] The NHRC Mission also found that the DFNs were denied parole even in the event of sickness and death of family members as parole was considered to be a right of the convicted prisoners, as they are Indian citizens.[40] During the field investigation, it was found that there was a case of three children who stayed with their father in District Jail, Goalpara whereas their mother was kept in District Jail, Kokrajhar.[41] Further, delay in release after completion of three years of detention caused frustration and mental agony to the individuals. Often, children of the DFNs were not sent to childrens' homes as there was the allegation of child abuse and child trafficking in these institutions.[42] The collateral costs that accrue to

[32] Civil Appeal No. 6736 of 2004.

[33] *Supra* note 2.

[34] (1994) Supp. 1 SCC 615.

[35] AIR 1992 SC 1858.

[36] Mark A. Cohen and Ted R. Miller, "The Costs and Consequences of Violent Behavior in the United States" 4 *The National Academies Press* 69-70 (1994).

[37] *Ibid.*

[38] *Supra* note 26.

[39] David P. Cavanagh and Mark A.R. Kleiman, "A Cost Benefit Analysis Prison Cell Construction and Alternative Sanctions" 69 *National Criminal Justice Reference Service* 9 (1990).

[40] *Supra* note 18.

[41] *Supra* note 26.

[42] *Supra* note 14.

the prisoners and their families is beyond computation. It has been seen through evidence that incarceration adversely affects future employment prospects,[43] exacerbates mental illness,[44] and may cause higher rates of recidivism after release.[45] The loss of liberty and full enjoyment of life due to the same is one of the biggest private costs borne by the individual.

The Mission found every time the Deputy Commissioner visited the detention centres, the detainees complained that they would not be entitled to proper legal representation. The cost incurred went to a point where 'many sell properties and take large loans so as to hire lawyers to steer them through this process.'[46] These findings show a clear violation of Article 21 of the Constitution.

With regard to mental health of the inmates, the Mission found that: 'Very many detainees seemed affected by depression, not surprisingly, given their situation. But some displayed signs of severe mental health problems.'[47] The lack of medical help in prison houses has been deemed to be against the spirit of law laid down in various precedents. Drawing from the case of *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, the Supreme Court held that: 'Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state."[48] The delay of the Government in providing timely medical treatment to a person in need of such treatment is a violation of Article 21 of the Constitution. While the Mental Health Act, 2017 is in place,[49] the implementation of the same was not found by the Mission and subsequently by the jail visit made on November 3, 2019 by Studio Nilima.[50] Section 31 (2) of the said act states that: 'The appropriate Government shall, at the minimum, train all medical officers in public healthcare establishments and all medical officers in the prisons or jails to provide basic and emergency mental healthcare.'[51]

The field data clearly establishes that the DFNs detained inside jails have failed to receive due medical attention and healthcare facilities.[52] In the case of *Common Cause* v.

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[43] Bruce Western, "The Labor Market Consequences of Incarceration" 25 *Crime and Delinquency Journal* (2001).

[44] Jamie Fellner, "A Corrections Quandary: Mental Illness and Prison Rules" 41 *Harvard Civil Rights-Civil Liberties Law Review* (2006).

[45] Michael Mueller-Smith, "The Criminal and Labor Market Impacts of Incarceration" 113 *Michigan Law Review* (2015).

[46] *Supra* note 18.

[47] *Ibid.*

[48] (1996) 4 SCC 37.

[49] The Mental Healthcare Act, 2017 (Act 10 of 2017).

[50] *Supra* note 26.

[51] *Supra* note 49, s. 31.

[52] *Supra* note 26.

Union of India,[53] health of an individual is deemed to be an integral part of the right to life. Thus, the denial of medical facilities is a violation of Article 21 of the Indian Constitution.

B. The Necessity of Detention Centres

1. Denial by Border Police of Bangladesh

Detention centres come into play when deportation has not been successful. The White Paper released by the Home & Political Department, Government of Assam mentions that in case of a deportation case, there is a flag meeting of the Border Police in India with that of its counterpart in Bangladesh.[54] It is only when the Bangladesh Border Police refuses to accept them that they turn 'stateless'. Thus, detention centres serve as a place to house the stateless persons.

2. Detection by the State for deportation and other purposes

Another reason why detention centres are deemed to be necessary is to ensure that the DFNs are readily available for deportation when diplomatic arrangements are made. Once a person is deemed a foreigner, an additional burden is laid on the state to monitor the movement of such persons. The White Paper mentioned the 'inherent difficulties' of detecting such persons 'since language, culture and living habits sometimes makes it difficult to identify the illegal migrants'.[55] In such cases, genuine citizens are also subjected to enquiry. These foreigners are often daily wage earners and frequently change their locations. There is a lack of permanent addresses that could help the authorities in detecting these foreigners, when required. Thus, the centres serve in a way to ensure that all declared foreign nationals are at one place and under scrutiny of the State.

3. Act as Deterrence for Prospective Immigrants

Due to the porous borders of the north-eastern states with neighbouring states like Bangladesh, the influx of immigrants is still taking place. Thus, stricter consequences for the same shall act as a deterrent to prospective immigrants who seek to enter India illegally to find an occupation or otherwise. The general deterrent effect is the response of prospective immigrants to the estimated costs of committing the offence of illegally entering the state. The choice of committing a crime is affected by the expected level of punishment that in turns reflects the probability of apprehension and conviction, the expected length of imprisonment and the expected harshness of the imprisonment.[56] Thus, seeing the phenomena from a law and economics perspective, we understand that a

[53] (2018) 5 SCC 1.

[54] Government of Assam, "The White Paper on the Foreigners' Issue" (Home & Political Department, 2012).

[55] *Ibid.*

[56] Roberto Galbiati and Francesco Drago, "Deterrent effect of imprisonment: Draft article for Encyclopedia of Criminology and Criminal Justice" (Springer-Verlag, 2012).

prospective immigrant shall have added costs of entering the country illegally against the gains received by his purpose of committing the offence. The detention of DFNs serves the purpose for the same.

4. Need for Detention after Detection

The need for detention after detection is done to ensure that the DFNs do not perform 'the act of vanishing'. The White Paper[57] records that:

> In most cases it was found that illegal migrants detected as foreigners by the Foreigners Tribunal under the provision of the Foreigners Act, 1946, go untraced after they are so detected. This has created hurdles in deportation of the foreigners detected by the Foreigners Tribunals. To impose restrictions in the movement of the detected foreigners and requiring them to reside in a particular place immediately after they are so detected and to ensure that such persons do not 'perform the act of vanishing', it was decided to set up detention centres to keep such foreigners till they are deported to their country of origin.[58]

5. Economics of Crimmigration

The White Paper further records that:

> Unquestionably, migratory movements benefit, at least economically (and demographically), the countries of origin and the host countries, but this phenomenon can have some negative aspects as well, such as the shaping or the reinforcement of transnational criminal networks, and social disorganisation, caused by these massive population movements in short periods of time. These immigrants have played crucial roles in the development of the economies of countries where they settle, meeting the demand for a low-cost workforce and demographic growth. This phenomenon can have some negative aspects, such as the shaping or the reinforcement of transnational criminal networks, and social disorganisation, caused by these massive population movements over short periods of time. Frequently restricted to an irregular status, some immigrants become involved in criminal activities in the hope of improving the quality of their lives, and their vulnerability makes them easy prey for criminal nets.[59]

Thus, the model of Crimmigration, which is a harmonious intermingling of criminal law and immigration law, has evolved in the legal system of India wherein the Border Police is given arbitrary powers to initiate proceedings against an individual based on the slightest of suspicion and that individual can be relieved of his burden if he proves that he is a

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[57] *Supra* note 54.

[58] *Ibid.*

[59] Maria Joao Guia, *Social Control and Justice: Crimmigration in the Age of Fear* (Eleven International Publishing, 2019).

citizen, thus putting the burden of proof on the individual. The White Paper on Foreigners' Issue released by the Government of Assam records that Border Police Personnel are deployed in all districts of Assam to deport/pushback the foreigners wherein the personnel conduct survey work in villages with the help of village heads to trace the foreigners. If the suspected persons are not able to produce requisite papers, an enquiry is initiated with the approval of the Superintendent of Police and a case is filed.[60] Keeping in mind that such suspected persons are mostly daily wage earners with no permanent residence, it is contended by such organisations, that it is impossible for them to store and preserve such documents. In a report by Amnesty International, titled 'Designed to Exclude', the report, finding the actions of the Border Police arbitrary, mentions that: 'The Border Police hands over blank inquiry reports with no grounds mentioned. It is common practice for the referral authorities to mechanically refer the cases to the Tribunal.'[61]

Thus, the trend of seeing an immigrant as a prospective criminal has been established with the concept of detaining them in the prisons ordinarily made for convicts and under-trial prisoners. This trend has evolved in India with regard to the issue of illegal immigrants through decades by the Government. In the wake of recent attempts to expand foreigners' detention across India, there will be a critical need to situate foreigners' detention within the crimmigration paradigm in future research.[62]

V. ANALYSIS OF THE PRIMARY COSTS OF DETENTION CENTRES ON DFNs

There have been three primary costs identified during the study which have been discussed in detail below: [63]

A. Overcrowding in jails

One of the biggest issues in a detention camp is overcrowding. The study[64] conducted by the Vera Institute[65] reveals several factors that tend to alter cost-per-prisoner numbers, out of which the first is overcrowding.

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[60] *Supra* note 52.

[61] Amnesty International, "Designed to Exclude" (2019) at page 17.

[62] Vandita Khanna, "COVID-19 and the Curious Case of Continued Detention of 'Foreigners' in India" *Oxford Human Rights Hub Blog*, May 13, 2020, *available at*: http://ohrh.law.ox.ac.uk/covid-19-and-the-curious-case-of-continued-detention-of-foreigners-in-india/ (last visited on May 27, 2020).

[63] *Supra* note 26.

[64] Brian Kincade, *The Economics of American Prison System USA L Blog*, (May 12, 2019), *available at*: https://smartasset.com/mortgage/the-economics-of-the-american-prison-system (last visited on June 16, 2020).

[65] Vera Institute of Justice is an independent policy think tank based in United States.

> By overcrowding prisons and allowing the inmate population to exceed the capacity of a facility, the price-per-inmate figure of that facility is driven downward at the cost of safety, reliability, and increased recidivism. States and private prisons with greater incarceration of low-level offenders will also report lower per-prisoner costs though their total cost to the taxpayer is actually greater.[66]

The Hon'ble Supreme Court in the case of *Re Inhumane Conditions of 1382 Prisons*[67] commented that: 'Fundamental rights and human rights of people, however they may be placed, cannot be ignored only because of their adverse circumstances.' While the statement was regarding the lack of proper attention given to the treatment of the convicts and under-trials, the Court took cognizance of the special case of Assam that was housing DFNs in six of its jails. Based on the primary data collected by 'Studio Nilima: Collaborative Network for Research and Capacity Building' in its visit to the District Jail, Goalpara on November 3, 2019, we see the following:[68]

Sl.No.	Category of Prisoner	Total Population		
		Male	Female	Total
1.	NSA Detenue	0	0	0
p	UA(P) Act	1	0	1
3.	Remands	109	7	116
4.	Sessions UTP	20	1	21
5.	NDPS Act	16	0	16
6.	R.I.	77	2	79
7.	S.I	2	0	2
8.	Civil Prisoner	0	0	0
9.	General Children with mother	1	1	2
10.	Declared Foreign Nationals (DFNs)	5	1	6
11.	Children with Mother/Guardian (DFN)	211	11	222
	Total Prisoners	**442**	**23**	**465**
	Registered Capacity	**355**	**15**	**370**

Image[69]

Thus, the substantial increase due to the same can be seen in the form of percentage. The percentage of overcrowding is calculated as: [(465 - 370) / 370] * 100 = 25.68%. The total number of DFNs in the jail is 228. When we subtract the number of DFNs from the total number of prisoners [465 - 228], we get a figure of 237 prisoners that are not DFNs – a number which falls within the jail's registered capacity of 370 prisoners (i.e., the capacity of the jail within which all resources can be shared equitably amongst the inmates).

[66] *Supra* note 64.
[67] (2016) 3 SCC 700.
[68] *Supra* note 26.
[69] *Ibid.*

Thus, it is clear that the inclusion of the DFNs has caused overcrowding in the jail that imposes a cost on not only the DFNs but also on the entire prison population as a further scarcity of space arises. The per unit area that each inmate enjoys drastically decreases, that impacts both the DFNs and the regular inmates. Due to the inadequate arrangements made in the jail for the DFNs such as lack of beds in the wards, shortage of blankets for winter and lack of proper sanitation facilities, the same increases the variable cost for the prison to accommodate the DFNs.[70] It was also found that the posts for two head warders and six male warders were vacant. Thus, with understaffing of jail officials; the problem has become more serious.

B. Lack of Proper Budget Allocation for Detention Centres in Prisons

Jails coming under the State List have seen no separate allocation for the DFNs over the years. The Assam Jail Manual does not have provisions for food and other amenities for DFNs and so the jail administration has to divide the provisions for convicts and under trial prisoners.[71] This is an unfair scenario for both, the DFNs and other inmates. It is important to note, however, that the cost of incarcerating the marginal prisoner is less than the cost of incarcerating the average prisoner, as only certain direct costs, such as food and clothing, increase with each additional marginal prisoner.[72] As a result, the average cost of incarceration needs to be treated as a ceiling when the economics of incarceration is under study.[73]

Given that the total Budget Report in 2018-19 stated that Rs. 12263.24 lakhs were voted from Government source[74] and the registered capacity of all jails together were 8888 (inclusive of men and women),[75] if we account for the actual cost of maintaining the DFNs in the same condition, we find that the cost of maintaining one prisoner is = Budget allotted to jails/registered capacity = 1.38 lakhs per prisoner in the State of Assam. In the jail under study, there were 74 DFNs reported on 3/11/2019. The total cost equals 102.12 lakhs per year (74 * 1.38 lakhs). Thus, an amount approximate to this figure would need to be released to the prison to properly accommodate the DFNs as per 2018-19.

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[70] *Ibid.*

[71] *Supra* note 20.

[72] Steven D. Levitt, "The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation" 111 No. 2 *The Quarterly Journal of Economics* 319-351 (1996).

[73] *Supra* note 1.

[74] Government of Assam, "Annual Financial Statement" (Department of Finance, 2019).

[75] *Supra* note 23.

C. Loss of the Economic Potential of the individual

The act of detaining an individual cuts him off from taking part in any gainful employment. There is no room for inmates to make beneficial contributions to society during the time of incarceration.[76] The act of detaining him/her for 3 years cuts him/her off from the system and the economy loses a part of its resources. Also after the release of the DFN, s/he finds it difficult to reintegrate into the economic system due to the social barriers. S/he is often denied jobs due to their record and remains unemployed or underemployed. They also may choose to get involved in illegal means of subsistence due to lack of other opportunities.

Taking the tool of Minimum wage of Assam as per the latest records, we see that an unskilled workman shall earn Rs. 257.40[77] per day i.e. 93,951 per year. Thus, the detention of the 74 persons in Goalpara jail is leading to the loss of at least Rs. 93,951 * 74 = Rs. 69,52,374 per year. Thus, the economy loses a huge amount of its resources every year due to the same.

VI. DETENTION CENTRES POST COVID-19 SCENARIO

Significant developments have taken place with the rise of the number of COVID 19 cases in India that has led to apprehensions of its spread in the prisons. A Guwahati-based NGO, Justice and Liberty Initiative, had filed a plea in the Supreme Court seeking a suo moto cognizance to decongest jails asking the authorities to consider releasing a class of inmates lodged in the jails.[78] The plea stated that:

> Detention camp is an ideal breeding ground for the virus. Stepped- up cleanings and a temporary halt to visitations at detention camps in the midst of the crisis cannot make up for the fact that ventilation behind bars is often poor, inmates sleep in close quarters and share a small number of bathrooms. It creates the ideal environment for the transmission of contagious disease. Social distancing is clearly not possible in such an environment. These camps are like ticking 'time bombs' ready to explode any time. In absence of any quarantine facility inside those camps, detenues are at great risk in the event of its outbreak.[79]

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[76] *Ibid.*

[77] Office of Labour Commissioner, Assam, Notification ACL/43/2004/8240-306 (2017), *available at*: https://complianceuncovered.com/wp-content/uploads/2018/09/Assam-DA.pdf (last visited on June 16, 2020).

[78] Suo Motu Writ Petition (Civil) No. 1 of 2020.

[79] *Id.* at para. 26.

The plea sought to extend the order passed by the apex court in the *In Re: Contagion of COVID 19 in Prisons*[80] to apply to the detention centres. As a result of which, the Court directed that the order dated 23.03.2020 shall be applicable to correctional homes, detention centres and protection homes.[81] Thus, the Court on April 13, 2020 ordered the release of all the detainees who have served for more than two years on personal bond with two sureties.[82]

VII. CONCLUSION

It was found after the study that the policy of detention centres inside prisons is not economically viable as it puts excessive economic and legal burden on the State. Firstly, the state is supposed to maintain a population that has been declared as foreigners from the budget allocated to prisons. Secondly, the act of incarceration of the DFNs for a period of three years takes away the scope of earning revenue out of their employment in the country. Thus, detaining an individual in a detention centre is not an economically viable solution for both the State and the individual.

Addressing the legal burden, the policy of detention puts moral and legal obligations on the state to ensure their legal rights are safeguarded. Major problems arise in the functionality of the detention centres as no legal regime exists that governs the rights and entitlements of the DFNs. Thus, an appropriate legislation should be introduced by the Central Government in consultation with the State Government of Assam. In the case of *Supreme Court Legal Services Committee* v. *Union of India,*[83] the highest judicial court allowed the State of Assam further time to prepare diplomatic arrangements for the larger issues on deportation of the DFNs and setting up of additional Foreigners Tribunals. The Court also allowed for release of detainees after the completion of a term of three years.

While much of the legal developments of the detention centres has taken place through the intervention by the courts, their role should be not to form policies but ensure that the policies brought by the Government are implemented and the rights of the detainees are secured.

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[80] *Ibid*.
[81] *Ibid.*
[82] *Ibid*.
[83] *Supra* note 17.

DISQUALIFICATION ON THE GROUNDS OF DEFYING PARTY WHIP – AN UNREASONABLE AND UNDEMOCRATIC RESTRICTION ON A LAWMAKER'S SPEECH

Maansi Verma[*]

Paragraph 2(1)(b) of the Tenth Schedule of the Constitution of India provides, inter-alia, that an elected representative may be disqualified for disobeying any direction of the party. While it is debatable whether or not the Tenth Schedule or the Anti-Defection Law has managed to curb the malpractice of defection, the freedom of speech of an elected representative has been made an unintended casualty. Even when the Bill, through which the Schedule was inserted in the Constitution, was being debated, concerns were raised on such a provision stifling dissent within a political party and preventing an elected representative from acting as per her conscience, which will be made subservient to a party's whip. In this essay, Paragraph 2(1)(b) of the Tenth Schedule will be revisited and arguments will be advanced to show - that its continued application leads to abdication of her duty by an MP; that if it is about maintaining party discipline, then correct remedy lies in promoting inner-party democracy; that if it is about curbing corruption, then remedy lies in criminal law and that if it's about defying the electoral mandate, then a much better remedy is to provide for right to recall to voters.

I. INTRODUCTION

In February 2018, the Rajya Sabha stood divided on the issue of amending the Motion of Thanks to the President for his address (delivered to a joint sitting of both Houses on the first day of first session of a calendar year).[1] The amendment, moved by an opposition Member of Parliament ('MP'), sought to add to the motion an expression of regret on government's failure to bring the Women's Reservation Bill. The motion could not succeed as eighty-six MPs opposed it including seven women MPs. These seven women

* The author is a lawyer and public policy researcher who writes and comments on Parliament related matters. She is also the Founder of *Maadhyam*, a civic engagement initiative.

[1] Rajya Sabha Secretariat, "Parliamentary Debates, Rajya Official Report", (Feb. 7, 2018) *available at*: http://164.100.47.5/Official_Debate_Nhindi/Floor/245/F07.02.2018.pdf (last visited on May 22, 2020).

MPs belonged to the following parties – Bhartiya Janta Party (BJP), Rashtriya Janta Dal (RJD), Janta Dal (United) (JD(U)), All India Anna Dravida Munnetra Kazhagam (AIADMK), Telugu Desam Party (TDP) – parties which are either in power, allies of parties in power, or parties which have been opposed to Women Reservation Bill. Eight other women MPs supported it, and all of them belonged to either Indian National Congress (INC) or Nationalist Congress Party (NCP), both parties in Opposition and known for their support to Women Reservation Bill.[2]

Parties are known to issue whips on eve of vote on Motion of Thanks to President's Address.[3] A whip is a notice issued by a political party to its supporters, 'warning them when important divisions are expected, telling them the hour when a vote will probably take place and requesting them to be in attendance at that time'.[4] With respect to a Motion of Thanks to President's Address, a party in power issues a whip to prevent any amendment of Motion of Thanks, and opposition parties issue a whip hoping to muster enough numbers to amend the Motion of Thanks. Whips are issued despite the fact that this Motion, and any amendment to it, are only salutary in nature, have no legislative value and don't affect the stability of the government. Assuming a whip was in place, would that explain why women MPs voted the way they voted? Is there a justifiable need to issue a whip on a Motion of Thanks to President for his address? Would a Parliamentary democracy be strengthened if the freedom of speech and expression of an MP is not restricted by a party whip? In this essay, arguments will be advanced to make a case for repeal of the specific provision of the Anti-Defection Law through which an MP can be disqualified for voting or abstaining to vote contrary to any direction issued by her political party.

II. DISQUALIFICATION ON GROUNDS OF DEFECTION – SETTING THE CONTEXT

Paragraph 2(1)(b) of Tenth Schedule of the Constitution of India provides that an MP can be disqualified for voting or abstaining to vote contrary to any direction issued by her

[2] Maansi Verma, "From BJP to SP, political parties remain fickle in their commitment to women's representation" *The Caravan*, Apr. 30, 2019, *available at*: https://caravanmagazine.in/politics/political-parties-remain-fickle-in-their-commitment-to-womens-representation (last visited on May 24, 2020).

[3] Past examples when such whips have been issued – HT Correspondent, "Congress issues whip before voting on President address, govt bucks up" *Hindustan Times*, Feb. 8, 2017, *available at*: https://www.hindustantimes.com/india-news/congress-issues-whip-before-voting-on-president-address-govt-bucks-up/story-SZHIXdjhV7ozwSFvwtfp2H.html?fromNewsdog=1&utm_source=NewsDog&utm_medium=referral (last visited on May 24, 2020). Also, see PTI, "Congress issues whip to Rajya Sabha members to be present during PM Narendra Modi's reply" *Economic Times*, Mar. 8, 2016, *available at*: https://economictimes.indiatimes.com/news/politics-and-nation/congress-issues-whip-to-rajya-sabha-members-to-be-present-during-pm-narendra-modis-reply/articleshow/51317799.cms?from=mdr (last visited on May 24, 2020).

[4] M.N. Kaul and S.L. Shakdher, *Practice and Procedure of Parliament* 158 (Published for Lok Sabha Secretariat by Metropolitan, 7th edn., 2016).

political party. The disqualification may not apply if prior permission has been taken and voting in contrary to the direction issued by the party has been condoned by the party within fifteen days of such voting. The Tenth Schedule of the Constitution of India, (to be henceforth referred to as the Anti-Defection Law for the purpose of this essay), doesn't define defection. Instead, it provides grounds for what can be construed as defection and attract disqualification. Other than the grounds mentioned above, voluntarily giving up membership of one's party and for an independent or nominated member to join a political party are also grounds for attracting disqualification.[5]

When the first attempt was made to suggest a law to curb the malaise of defection in Indian politics, through a Committee on Defections set up in 1967, the act of defection was defined and was confined to voluntary renouncement by an MP of allegiance or association with her political party.[6] This Committee was headed by then Union Home Minister Y.B. Chavan and comprised of members of all major political parties as well as some independent experts. The immediate motivation for setting up the Committee seems to be the fact that while there were 542 cases of defection between 1952 and 1967, the number shot up significantly and 438 cases of defection were recorded just within the following 12 months.[7] It has also been argued that many of these defections were not a result of 'honest changes of opinion' as many defectors were awarded ministership in governments that could come into power due to their defection.[8]

When the report of the Committee on Defections was taken up for consideration and discussion in Rajya Sabha, the distinction between leaving one's party on matters of principles and deserting one's party in lure of political gains was highlighted by several MPs.[9] This argument was extended to the act of voting by MPs as well, and eminent jurist M.C. Chagla, then an Independent member of the Rajya Sabha, argued that: 'if it is a matter of conscience, they will vote against their party and they should not be prevented except in extreme cases.' He went on to argue that political parties are too strict in issuing whips on every subject as if to test the loyalty of their members compelling them to vote on a matter with the party, even against their conscience. Chagla, who had earlier been in Congress, urged the parties to issue whips rarely, only on those gravely important matters which can be seen as votes of no confidence and even then, to let a member at least abstain, if it becomes a matter of conscience.

Almost two decades later, Parliament discussed the Constitution (Fifty Second Amendment) Bill in 1985, through which the Tenth Schedule was inserted in the

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[5] The Constitution of India, tenth sch., paras. 2(1)(a), 2(2), 2(3).

[6] Rajya Sabha Debates on August 12, 1969 on the Report of Committee of Defection, *available at*: http://164.100.47.5/Official_Debate_Nhindi/Floor/69/F12.08.1969.pdf (last visited on Mar.15, 2020)

[7] A.G. Noorani, *Constitutional Questions in India* 174 (Oxford University Press, Delhi, 7th Impression 2014).

[8] *Ibid.*

[9] *Supra* note 6.

Constitution.[10] The Bill, along with provisions already mentioned above, provided for exemption from disqualification on ground of defection if one-third members of a party had split. While participating in debate on this Bill, Rajiv Gandhi, the then Prime Minister, argued that the provision of split was made to provide for dissent.[11] As far as the act of voting was concerned, some MPs defended the provisions of the Bill by arguing that an MP gets elected on the back of the ideology and promises made by her political party to the electorate at the time of election and therefore, the occasion to differ from party rarely arises. Muralidhar Chandrakant Bhandare, Congress (I) MP argued that he could only recall some rare examples like C.D. Deshmukh resigning on the issue of linguistic states, but largely there is never conflict between 'party discipline and freedom of conscience' and instead there is conflict between 'self-interest and dictates of the party'.

With this backdrop, in this essay, the following arguments will be explored in detail – first, even though an MP gets elected on the ticket of a political party, once elected, if an MP surrenders her vote to the diktats of her party, she abdicates from her duty as a legislator; second, except in extreme cases like a vote of confidence or no-confidence, if defiance of a whip is about maintaining party discipline or of preventing corruption, then remedies must be found within the party or in criminal law; and third, given that an MP has been returned by the electorate, the only entity to whom an MP is responsible for her vote is the electorate.

III. DETAILED ARGUMENTS FOR REPEAL OF PARAGRAPH 2(1)(B) OF ANTI DEFECTION LAW

A. Abdication of Duty by a Member of Parliament

MPs derive their power to enact laws and vote on other issues of policy from the Constitution and their freedom to express themselves in exercise of these powers, through words or through their vote, is also protected by the Constitution.[12] Up until the insertion of the Tenth Schedule, the freedom of expression of an MP was only subject to provisions of the Constitution and rules of procedure of Parliament. This freedom, also construed as a privilege, is granted to MPs so that they 'may not be afraid to speak out their minds and freely express their views.'[13] The Constitution also provides, that an MP while performing her role as a legislator is bound by the oath, in which she pledges her 'true faith and

[10] The Constitution of India, (Fifty Second Amendment) Bill, introduced on Jan. 31, 1985, *available at*: http://164.100.47.5/Official_Debate_Nhindi/Floor/132/F31.01.1985.pdf (last visited on Mar. 15, 2020).

[11] Exemption from disqualification in case of split was provided in Para 3 of Tenth Schedule of Constitution, which was later repealed by Constitution (Ninety-First Amendment) Act, 2003.

[12] The Constitution of India, arts. 100(1), 105(1).

[13] *Supra* note 4 at 245.

allegiance to the Constitution of India.'[14] It therefore follows, that an MP is expected to steadfastly protect her own freedom of expression and uphold it not just against lures but even against the wishes of her own party, if it comes in the way of an effective performance of her role as a legislator.

But since the enactment of the Anti-Defection Law, this freedom or privilege of an MP has also been made subject to 'any direction' issued by her political party. While replying to the debate on the Constitution (Fifty Second Amendment) Bill, 1985, the then Minister of Law and Justice argued that through the provision of condonation by a political party in case an MP wants to vote differently, enough scope has been provided for freedom of conscience.[15] It is submitted that there can be no place in the constitutional scheme of things for a political party to have the power to either condone or not to condone the exercise by an MP of her freedom of expression. It must also be noted here that a political party, up until the enactment of the Anti-Defection Law, didn't have a Constitutional recognition, whereas the role and privilege of an MP as a legislator had been provided throughout. This was acknowledged during the debate in the Rajya Sabha in 1969 on the report of Committee of Defections also, when R.T. Parthasarthy argued that in absence of a legal basis of a political party and recognition in the Constitution of an individual right to contest elections, it would be difficult to tackle defection till the Constitution itself is amended.[16] But when the Constitution was amended in 1985, allegiance to a political party was given precedence over allegiance to the constitutional role and freedoms of an MP.

During the debate on the Constitution (Fifty Second Amendment) Bill, 1985, it was vociferously argued by many MPs that a candidate is elected on a party ticket and it is expected that she remains loyal to the party and respectful of the mandate of the people. An MP quoted British lawyer and academic Ivor Jennings, as follows: 'The successful candidate is almost invariably returned to Parliament not because of his personality, nor because of his judgment and capacity but because of his party label.....he asks his constituents to support the fundamental ideas which his party accepts.....The member of Parliament is thus returned to support a party.'[17] While this may hold true where an MP defects from her party to another, which would be a violation of the mandate, this reasoning doesn't hold for an MP voting contrary to her party. This is because, once elected, an MP is a public servant under an oath to perform her public duties, which are such in which 'the State, the public and the community at large have an interest.'[18] If her

[14] *Supra* note 12, art. 99 and the Third Schedule.
[15] *Supra* note 10.
[16] *Supra* note 6.
[17] *Supra* note 10.
[18] *P.V. Narsimha Rao* v. *State,* (1998) 4 SCC 626.

duty to cast her vote in the best public interest, as per her own judgment and conscience, doesn't coincide with her party whip, then her sense of duty to the people must prevail.

Since an MP is well aware of the ideology, principles and promises of a political party before agreeing to join that party and contesting on the symbol of that political party, it is quite possible that conflict of opinion may rarely arise. But if a conflict were to arise, a resolution which doesn't lead to either abdication of her duty as a legislator or her resignation or disqualification from Parliament seems distant. Some examples are advanced to highlight this point. In August 2019, Bhubhaneshwar Kalita, then the Chief Whip of the Congress party in the Rajya Sabha resigned from his seat in Rajya Sabha because he refused to issue a whip for all Congress MPs on the morning of 5 August 2019, when a possible bill on Article 370 was expected.[19] Irrespective of the correctness of his stand on the particular matter, the fact remains that he was faced with two choices only for standing by his judgment – a resignation or possible disqualification. In another example, Congress MP in Lok Sabha, Shashi Tharoor highlighted how even non-controversial suggestions by opposition parties for improvement of government bills are mechanically negated by MPs belonging to the party or parties in power, since a whip is in place to support government version of the Bill only.[20]

The freedom of speech of an elected legislator and its importance in a representative democracy, especially when such speech is critical of the government, is captured well in the judgment of the American case of *Julian Bond* v. *James 'Sloppy' Floyd*.[21] In this case, the Supreme Court of the United States found that the state violated the freedom of speech of Bond, an elected representative in Georgia by preventing him from taking membership of the Georgia House of Representatives for his statements in which he criticized certain policies of the Federal Government. The Court held:

> Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

Thus a law, which encourages or mandates an MP to exercise her legislative role not in pursuance of her duties to her electors but in accordance with her party allegiance cannot advance the deliberative law making function of Parliament.

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[19] India Today Web Desk, "Congress committing suicide: Congress whip in Rajya Sabha resigns to protest party's stand on Article 370" *India Today*, Aug. 5, 2019, *available at*: https://www.indiatoday.in/india/story/article-370-congress-whip-in-rajya-sabha-bhubaneswar-kalita-resigns-1577458-2019-08-05 (last visited on May 24, 2020).

[20] Shashi Tharoor, "India's crisis of representation" *Open*, Aug. 17, 2017, *available at*: https://openthemagazine.com/essay/indias-crisis-of-representation/ (last visited on May 24, 2020).

[21] 385 U.S. 116.

B. Defiance of a Whip – Internal or Criminal Matter

The concerns raised in this essay have been raised before different forums in the past. For instance, the Dinesh Goswami Committee in a 1990 report on Electoral Reforms recommended that disqualification on voting or abstaining to vote should only apply to motions on vote of confidence or no-confidence, money bills and motion on vote of thanks on President's Address.[22] The Supreme Court in its 1992 judgment, *Kihoto Hollohan* v. *Zachillhu and Others,*[23] ruled that since the objective of Tenth Schedule is to 'curb the evil or mischief of political defections motivated by the lure of office or other similar considerations', the scope of disqualification should be confined to vote of confidence or no-confidence or on a matter which is part of integral policy or program of the political party. It further observed that if a whip is issued, the consequences of defying the whip be also mentioned, especially where it would lead to disqualification.

In a similar vein, the Law Commission in its 170th Report on electoral reforms submitted in 1999, observed that when an MP contests and wins on a party ticket, she renders herself to discipline and control of the party and that if there is any difference of opinion, she must fight within the party but ultimately vote as per what is decided by the party.[24] The Commission then recommended that it might be desirable to restrict issuance of whip only when voting affects continuance of government and not on every occasion and left this to the discretion of party to be exercised internally. In 2003, the Standing Committee on Home Affairs deliberated on the Constitution (Ninety Seventh Amendment) Bill, which sought to do away with the provision of 'split' in the party as an exemption for disqualification.[25] At that time, a concern was raised that with the provision of 'split' done away with, there is no avenue of dissent left and so disqualification on voting should be reconsidered. But the Committee observed that while MPs may have freedom of speech on ordinary legislative measures, there can be no freedom to vote, to ensure stability of government. This observation, made from the perspective of a party in power, seems to be proposing an anomalous solution where an MP may be free to speak against a Bill brought by her own party, but she will still have to vote for it, or face disqualification.

The common theme running through all these observations is that there are some critical matters, directly affecting stability of government, on which it would be desirable to issue whip, even if that means getting MPs to vote with the party under the threat of disqualification. But the party always has the discretion not to issue whip or even if a whip has been issued, not to enforce any penalty in case of defiance. And practically, this does

[22] Legislative Department, Ministry of Law and Justice, Government of India, "Committee on Electoral Reforms" (May, 1990).

[23] 1992 SCR (1) 686.

[24] Law Commission of India, "170th Report on Reform of Electoral Laws" (May, 1999).

[25] Department-Related Parliamentary Standing Committee on Home Affairs, "One Hundred-Fourth Report on The Constitution (Ninety-Seventh Amendment) Bill, 2003" (Dec., 2003).

happen. For instance, in 2017, the BJP issued a warning and demanded explanations from 30 MPs who were absent from House, despite a whip, on the day of vote on a Constitution Amendment Bill considered crucial by the party, but it did not press for their disqualification.[26] In all observations mentioned above, the prerogative to issue a whip and its compliance has been linked to party discipline, to prevention of corrupt practices, and to further legislative agenda promised to electorate. But all these three objectives can be achieved in the absence of Paragraph 2(1)(b) as well, as elaborated below.

If violation of party discipline is a concern, it needs to be dealt internally by the party. A constitutionally protected privilege and a mandated duty can't be made subservient to party discipline, which is better achieved through greater inner-party democracy. It can be argued that Anti-Defection Law has limited the scope for creating inner-party democracy as parties can now invoke state enforced sanctions against dissenting MPs. The provision of prior permission and condonation in Paragraph 2(1)(b) is undemocratic, as argued before, and entirely misplaced as the Constitution must essentially protect a dissenting MP, and if it must interfere in the functioning of a political party, then it should suggest robust democratic measures to deal with dissent. In fact, the Law Commission in its 170th report dedicated an entire chapter on need for a law to ensure internal democracy in political parties taking inspiration from a German law on the same subject.[27] While pointing out that the Constitution of Germany mandates the internal organization of a political party to follow democratic principles, the Commission argued that a party 'cannot be a dictatorship internally and democratic in its functioning outside.' Removal of disqualification for defiance of party whip from the Anti-Defection Law will motivate or may force political parties to look for solutions to deal with dissent internally and create democratic structures which encourage discipline.

If aim of disqualification for defying a whip is to contain corrupt practices, then appropriate remedy needs to be found within criminal laws and it has been argued that disqualification doesn't help contain the vice of bribe for vote, it merely increases the associated costs.[28] The law, with respect to corrupt practices, as it stands owing to the much criticized five-judge ruling of the Supreme Court in *P.V. Narsimha* v. *State*, grants immunity to lawmakers by extending the privilege of freedom to vote, to even bribes accepted for the vote.[29] Constitutional Expert A.G. Noorani, quoted Chief Justice Warren Burger of the US Supreme Court in his criticism of this judgment, as follows:

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[26] Gyan Verma and Anuja, "Amit Shah reads the riot act to 30 BJP MPs who skipped Rajya Sabha" *LiveMint*, Aug. 02, 2017, *available at*: https://www.livemint.com/Politics/6Y2HvkBOgBECV6Edvg9ScM/BJPs-parliamentary-party-meeting-today-after-Rajya-Sabha-em.html (last visited on May 24, 2020).

[27] *Supra* note 24.

[28] Kartik Khanna and Dhvani Shah, "Anti-Defection Law: A Death Knell for Parliamentary Dissent" 5 *NUJS L Rev.* 103 (2012).

[29] *Supra* note 18.

'taking a bribe.....is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator.'[30] It is submitted that the judgment needs to be revisited. Some progress has been made in this direction as in March 2019, the question of immunity of lawmaker from criminal prosecution for taking bribe for vote has been referred to a larger bench of the Supreme Court.[31] It is hoped that this immunity will be rescinded and MPs misusing their privilege in exchange for gains will be criminally held liable and disqualification flowing from such liability will apply.

If the purpose of disqualification for vote is to ensure stability of government and to ensure electoral mandate is respected, the same can be achieved by invoking Paragraph 2(1)(a). On a crucial vote of confidence or no-confidence, or a matter of policy considered absolutely integral by the party, if an MP votes against a party whip, an upset party can construe the same as voluntarily giving up membership of the party and press for disqualification under Paragraph 2(1)(a) also. For instance, in the disqualification of an MLA from Goa Legislative Assembly for voting in favour of ruling party in a confidence motion, despite a whip from his party to do otherwise, the Speaker invoked both Paragraph 2(1)(a) and 2(1)(b) of the Tenth Schedule and disqualified him.[32]

Thus, it can be seen that even in the absence of specific disqualification for voting or abstaining to vote in accordance with a party whip, which puts an unreasonable restriction on exercise of freedom of speech of an MP, more democratic resolutions exist and must be resorted to.

C. Accountability of an MP to Electorate for her Vote

It is interesting to note that when Rajya Sabha was discussing the 1969 Report of the Committee on Defection, several MPs made a suggestion to amend the Constitution to provide for a Right to Recall an elected representative by the voters.[33] Thillai Villalan, a Dravida Munnetra Kazhagam (DMK) MP, advocating for this right explained its rationale thus: 'Because it is the people who have given him the right to represent themselves, to ventilate their grievances, to express their own feelings in the House. But when the person gets elected, the people are left out.'[34] Though MPs argued that the practicality of this right can be debated, but as a principle, it was widely acknowledged and was even suggested to the Committee for further study but wasn't taken up. Bhupesh Gupta, a Communist Party of India (CPI) MP, while supporting this suggestion argued that electorate must decide whether or not the MP who has defected should continue, in some

[30] A.G. Noorani, *Constitutional Questions and Citizens' Rights* (Oxford University Press, Delhi, 2005).

[31] *Soni Soren* v. *Union of India*, Crl.A.No.451 of 2019.

[32] PTI, "MLA disqualified for disobeying party whip" *Outlook India*, Aug. 9, 2005, *available at*: https://www.outlookindia.com/newswire/story/mla-disqualified-for-disobeying-party-whip/315949 (last visited on May 24, 2020).

[33] *Supra* note 6.

[34] *Ibid.*

cases they may approve of the defection and in other, they may not. When the Constitution (Fifty Second Amendment) Bill, 1985 Bill was being debated in Rajya Sabha, K. Mohanan, CPI(M) MP, had submitted an official amendment to provide that a member who has become liable to be disqualified will be disqualified on being recalled by no less than a margin of one-tenth of the electorate vote.[35] Since the Law Minster opposed it, he withdrew his amendment during vote on the Bill.

As has already been argued earlier, an MP may have won on the back of a party ticket, but once elected, she is under oath to uphold her own constitutional freedom to exercise speech while performing her public duty to the best of her own judgment. As a necessary corollary, where an MP fails to perform her duty in such a manner, she can be accountable internally to the party for violating discipline and externally to her electorate for violating their mandate. It might so happen that electorate approves of her vote even though party is upset with her for voting against the whip or where the party is happy with her for voting as per directions, the electorate is unhappy with her conduct. Although, as of now, voters in India do not enjoy the Right to Recall, people have been known to exert pressure on MPs still. For instance, the Naga Students Federation, a body representing Naga students in Nagaland, Manipur, Assam and Arunachal Pradesh, sent notices to two MPs from Nagaland – one in Rajya Sabha and one in Lok Sabha – asking them to explain why they voted in favour of the Citizenship (Amendment) Bill, 2019 without taking the public sentiment into account.[36] The Rajya Sabha MP, in order to prevent embarrassment for his party, resigned from his position of General Secretary within the party, but retained his seat in Rajya Sabha.

This is a sign of a robust democracy, where an MP ultimately is answerable to the people for the performance of her duty in the House. Even though a Right to Recall is what our Parliamentary democracy must eventually move towards, some incremental changes can be made in the functioning of Parliament which will ensure greater accountability of MPs. Currently, recorded vote (or division) is mandated only in case of Constitution Amendment Bills and most other Bills, including budgetary proposals, are passed by voice vote, with an MP having the option of demanding division in case of a dispute. It has been argued that only when there is recorded vote, do we get to know who was present during the vote and how they voted, and a recorded vote not just strengthens an MP's accountability to her electorate but also creates greater space for intra-party discussions before issuing whips.[37]

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[35] *Supra* note 10.

[36] Esha Roy, "After Naga party sends notice to MPs who voted for CAB, RS member quits party post" *Indian Express*, Dec. 25, 2019, *available at*: https://indianexpress.com/article/india/after-naga-party-sends-notice-to-mps-who-voted-for-cab-rs-member-quits-party-post-6183545/ (last visited on May 24, 2020).

[37] M.R. Madhavan, "Recording each vote" *The Hindu*, Aug. 22, 2016, *available at*: https://www.thehindu.com/opinion/op-ed/Recording-each-vote/article14582328.ece (last visited on May 24, 2020).

IV. CONCLUSION

In light of all the arguments presented above, it is submitted that disqualification on ground of defying a party whip is undemocratic, an unreasonable restriction on the exercise of freedom of speech by an MP and an unnecessary hindrance in the performance of her duty as an MP. It is a case of remedy being worse than the disease and several alternative remedies can be resorted to. To improve dialogues within the party, greater inner-party democracy needs to be encouraged thus eliminating the need to issue whips, except on rare occasions where stability of the government may be affected. Additionally, greater transparency on participation of MPs in debates through recorded votes would entail direct accountability of the MP with the electorate and may pave the way to move towards a recognized right to recall. This will also ensure that MPs have greater bargaining power with political parties thus further creating space for inner-party dialogues. Paragraph 2(1)(b) of the Tenth Schedule of the Constitution, therefore, must be repealed so that strides can be made towards reforming representative parliamentary democracy.

POST SCRIPT

Major political upheaval in Rajasthan in July 2020 brought into sharp focus the power of courts to intervene in disqualification proceedings, the role of Speaker in adjudicating disqualification petitions against elected legislators and the constitutionality of Paragraph 2(1)(a) of Tenth Schedule of the Constitution. Though all these points are not at the center of issues raised in this essay, interesting parallels can be found in the arguments advanced before the Rajasthan High Court in *Prithviraj Meena & Ors.* v. *Hon'ble Speaker, Rajasthan Legislative Assembly & Ors.*[38]

The Members of Rajasthan Legislative Assembly on whom show cause notices have been served by Rajasthan Assembly Speaker, have argued that mere expression of dissent or criticism of party's leadership cannot amount to voluntarily giving up membership of one's political party so as to attract disqualification under Paragraph 2(1)(a). They have further argued that if dissent was indeed construed as defection, then Paragraph 2(1)(a) will run afoul of the basic structure of Constitution and be in violation of fundamental right to freedom of expression. In Rajasthan High Court's consideration of these vexed questions of law, there exists an opportunity to reform Anti-Defection Law while promoting democratic ways to deal with dissent.

[38] D.B. Civil Writ Petition No. 7451/2020.

SQUARE PEG IN A ROUND HOLE – EVALUATING SMART CONTRACTS ON THE PRINCIPLES OF CONTRACT LAW

Shubham Nahata[*]

The exponential rise of Bitcoin as an alternative to fiat currency, which ensures transparency and accountability, has attracted the attention of policymakers to the technology underlying its success. Blockchain has the capability to increase interoperability in different sectors of the economy while substantially reducing costs and leakages. Blockchain coupled with Smart Contracts has the potential to offer curated outcomes for the contracting parties while making breach impossible and expensive. Although, the advent of Smart Contracts has raised questions about its validity on the principles of Traditional Contract Law. Uncertainties underlying blockchain and cryptocurrencies have also raised scepticism regarding the validity of Smart Contracts. This study decodes all myths surrounding Blockchain-based Smart Contracts and the questions concerning its legality. It starts with throwing light on the concept of Blockchain and Smart Contracts and how they are designed to offer outcomes as promised by the code. It aims to analyse Smart Contracts on the principles of Traditional Contract law and whether they can account for nuances of the same. The paper also gives a brief input on how these contracts can prove to be beneficial for the financial and banking sector of the economy and the need for a regulatory framework governing them.

I. INTRODUCTION

Smart Contracts are computer codes in the nature of conditional statements that ensure the automated execution of contractual obligations. Nick Szabo in 1996, propounded the idea of a computer code that aimed to eliminate human intervention in the contractual process and make breach expensive.[1] His work came to limelight after the

* The author is a third-year B.A. LL.B. (Hons.) student at the Hidayatullah National Law University, Raipur.

[1] Nick Szabo, "Smart Contracts: Building Blocks for Digital Markets", 1996, *available at*: https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html (last visited on Oct. 03, 2019).

incomprehensible rise in the popularity of Bitcoin in 2008. Behind its gigantic success was Blockchain that proved elemental to its development and other virtual currencies.[2]

Stakeholders around the world are evaluating the applications of Blockchain and Smart Contracts so as to increase interoperability and efficiency in different sectors of the economy. The sudden rise in the popularity of Smart Contracts directs our attention to the need for a legal framework governing these forms of contracts. The primary difference between a Smart Contract and a Contemporary Contract/Traditional Contract lies in the form of contract being entered into.

With the advent of the internet, rapid globalisation and development of e-commerce, contractual jurisprudence has seen remarkable growth. Legally binding relationships in the contemporary world are not restricted to human interaction but can also arise out of the use of information technology. Many jurisdictions around the world are adopting laws and taking measures to regulate such form of relationships. This article seeks to analyse the present need for a legal framework for Smart Contracts vis a vis Traditional Contracts.

The study has been divided into three parts. The first part deals with the meaning of Smart contracts, their peculiarities, and the framework on which they operate. The second part of the study analyses Smart Contracts on the basic principles of contract formation to ascertain whether they can be considered as contracts in real sense. The third part is a brief note on the relevance of Smart Contracts and Blockchain in the financial and banking sector of the economy.

A. Block by Block: Understanding the Blockchain

Blockchain can be referred to as a distributed ledger of transactions on a public platform that operates without the need of a central authority. It is a platform on which different participants in the ledger (nodes), authenticate the validity of every transaction carried out on the ledger through 'proof of work' mechanism.[3] It implies that before the addition of a single block in the entire chain it has been authenticated by each and every participant in the ledger.[4] One of the unique characteristics of the chain is that every new block in the chain is connected with the old block through a 'hash' which imparts certain characteristics of the preceding block in the succeeding block.[5] This in turn ensures that no single block in the chain can be mutated without transforming the entire chain.

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[2] Mark Andreseen, "What is Blockchain Technology?" *Coindesk*, Sep. 26, 2019, *available at*: https://www.coindesk.com/learn/blockchain-101/what-is-blockchain-technology (last visited on Oct. 04, 2019).
[3] *Supra* note 1.
[4] Pierluigi Cuccuru, "Beyond Bitcoin: An Early Overview on Smart Contracts" 25 *International Journal of Law & Technology* 179, 182 (2017).
[5] Satoshi Nakamoto, "Bitcoin: A Peer to Peer Electronic Cash System" *Satoshi Nakamoto Institute*, Oct. 31, 2008, *available at*: https://nakamotoinstitute.org/bitcoin/ (last visited on Nov. 13, 2019).

As such transformation requires exponential computing strength, it becomes physically impossible to effect a change in the chain.[6] One of the primary advantages of a Distributed Ledger Technology ('DLT') is also that it leads to avoidance of double-spending problem in transactions, which often occurs when the same transaction is repeated more than once without limits.[7] As every individual block in the chain is connected with the previous block through a hash function it ensures that the order of transactions is not disturbed.[8] 'Proof of work' and authentication by every individual node also ensures that the control in the ledger is not centralised but distributed amongst various participants of the ledger.

Every new block of transaction is sent further deep into the chain of transactions by new blocks which in turn makes those blocks unmodifiable and reduces the risk of external as well as internal manipulation.[9] This further implies that to undo a transaction in a DLT is a long and cumbersome process as it requires the performance of an exactly opposite transaction on the blockchain to nullify the effect of a previous transaction.[10]

B. Smart Contracts

The idea of Smart Contracts was first coined by Nick Szabo in his paper titled 'Smart Contracts: Building Blocks for Digital Markets',[11] wherein he set forth the idea of 'contracts embedded in the world' which implied that contracts can be implanted in the hardware and software in a manner that their breach can be made impossible and expensive.[12] In layman's language, Smart Contracts can be considered as those contracts which have the capability to self-execute themselves without the need of any human intervention.

Max Raskin in his work on Smart Contracts defined them as computer codes in the nature of conditional statements.[13] It implied that the contractual terms were written in 'if' and 'then' statements which were executed mechanically without any human intervention. Smart Contracts can be reduced to 'If a then b', conditional statements.[14] For example, a contract requiring the delivery of a digital asset on the payment of a specified amount of USD 100, is encoded in 'if a then b', form of binary operations.

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[6] Nishith Desai Associates, "The Blockchain: Industry Applications and Legal Perspectives" *Nishith Desai Associates*, Nov. 2018, *available at*: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Blockchain.pdf (last visited on Oct. 12, 2019).
[7] Max Raskin, "The Law and Legality of Smart Contracts" 1 *Georgetown Law Technology Review* 305, 317 (2017).
[8] *Supra* note 6.
[9] *Supra* note 4.
[10] *Supra* note 6.
[11] *Supra* note 1.
[12] *Ibid*.
[13] *Supra* note 7 at 312.
[14] Alexander Savelyev, "Contract law 2.0: 'Smart' Contracts as the Beginning of the End of Classic Contract Law" *Information & Communications Technology Law* 11 (2017).

Szabo in his work highlighted that one of the earliest examples of a Smart Contract can be vending machine dispensing Coke on the payment of the specified sum.[15] The hardware and the software of the machine were calibrated in such a form that on the insertion of a coin in the till they would act in synchronisation to execute the transaction. Smart Contracts operating on the blockchain are nothing but a more sophisticated version of that humble vending machine, coupled with the advantages of immutability and transparency offered by the blockchain.[16]

1. Smart Contracts and Blockchain

Gideon Greenspan defined a Smart Contract as 'a piece of code which is stored on a Blockchain, triggered by Blockchain transactions, and which reads and writes data in that Blockchain's database.'[17] The concept of Smart Contracts dates back to the year 1996 and after the introduction of Bitcoin and sudden increase in the popularity of Blockchain, the application of Blockchain-based Smart Contracts was delved into. Immutability and expensive breach are the characteristic features of such a form of contract.[18]

Unlike Traditional Contracts which presupposes the existence of a judicial framework to ensure enforcement, Smart Contracts through the use of Blockchain technology establishes a framework that ensures automatic enforcement without the need of any central authority.[19] Employing a DLT for the purpose of contract formation ensures transparency in the entire process.[20] Since in a distributed ledger a transaction has to be verified by each and every node of the ledger, it ensures that the changes are ratified by the participants before they are affected. This implies that no party can unilaterally change the terms of the contract without the consent of the other party.[21]

One of the other advantages of employing blockchain-based Smart Contracts is that it can lead to the formation of a Decentralised Autonomous Organisation (DAO),[22] which employs Smart Contracts that can deal with a succession of complex transactions ensuring minimal human intervention in the entire process. However, the Ethereum hack of 2016 has raised serious concerns on the operations of such DAO's and since then they have become defunct.[23]

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[15] *Supra* note 1.
[16] *Supra* note 7 at 314.
[17] G Greenspan, "Beware of the Impossible Smart Contract, Blockchain News" *Blockchain News*, Apr. 12, 2016, *available at*: https://www.the-blockchain.com/2016/04/12/beware-of-the-impossible-smart-contract/ (last visited on Oct. 02, 2019).
[18] Josh Stark, "Making Sense of Blockchain Smart Contracts" *Coindesk*, June 7, 2016, *available at*: https://www.coindesk.com/making-sense-smart-contracts (last visited on Sep. 30, 2019).
[19] Jelena Madir, "Smart Contracts: (How) Do They Fit Under Existing Legal Framework?", *SSRN*, 3 (2018).
[20] Peter Chapman, "Smart Contracts: Legal Arrangements for the Digital Age" *Clifford Chance*, Apr. 10, 2018, *available at*: https://www.cliffordchance.com/briefings/2017/06/smart_contracts_-legalagreementsforth.html (last visited on Oct. 13, 2019).
[21] *Supra* note 5.
[22] Alyssa Hertig, "What is DAO?" *Coindesk*, June 27, 2016,
available at: https://www.coindesk.com/learn/ethereum-101/what-is-ethereum (last visited on Oct. 04, 2019).
[23] David Siegel, "Understanding the DAO Hack" *Coindesk*, June 27, 2016,

Many jurisdictions around the globe have legislated for the regulation of Smart Contracts, for instance, State of Arizona has defined Smart Contracts as 'an event-driven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger.'[24]

Similarly, Belarus became the first country to define Smart Contract through a Presidential Decree as: a programme code intended for functioning in the distributed ledger for purposes of automated performance and/or execution of transactions or performance of other legal actions.[25] The Telecom Regulatory Authority of India ('TRAI') has also defined Smart Contracts under Section 2 (bk) of The Telecom Commercial Communications Customer Preference Regulations, 2018 as:

> a functionality of intelligent and programmable code which can execute pre-determined commands or business rules set to pre-check regulatory compliance without further human intervention and suitable for DLT system to create a digital agreement, with cryptographic certainty that the agreement has been honoured in the ledgers, databases or accounts of all parties to the agreement.

The key element in all the definitions is that it envisions the contracts to run on distributed ledger that ensures automated performance of all the transactions in a contract. TRAI's definition of Smart Contracts also underlines its capability to assist in regulatory compliance without the intervention of human element, thus creating a fail-safe framework.

II. SMART CONTRACTS VIS-À-VIS TRADITIONAL CONTRACTS

Nick Szabo in his paper titled 'Smart Contracts: Building Blocks of Digital Markets',[26] evaluated Smart Contracts on four essential principles of contract formation. The first of them being 'observability', which signifies the ability of the parties to contract to control and observe the performance by the other party. Second, 'verifiability', which affords the party an opportunity to prove to any adjudicating authority, whether the contract has been performed or breached. The third objective of the contractual process is 'privity', which ensures minimal interference of a third party to the contractual process unless it is mandated by the terms of the agreement. The fourth object of contract formation is 'enforceability', which is the final stage in the contractual process wherein parties fulfil their obligation through internal or external mechanisms.[27]

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available at: https://www.coindesk.com/understanding-dao-hack-journalists (last visited on Oct. 05, 2019).
[24] Arizona Revised Statues. Ann s. 44-7061(E)(2) (2017).
[25] Decree of the President of the Republic of Belarus No. 8 (Dec. 21, 2017) (unofficial translation).
[26] *Supra* note 1.
[27] *Ibid.*

A. Formation

1. Offer and Acceptance

A contract is an agreement between two or more parties to do or to forbear to do something in lieu of a consideration.[28] The above definition highlights three main aspects of contract formation; it is an agreement between two or more parties, the agreement is in regard to an act or omission and it is supplemented by a consideration. An agreement takes place pursuant to negotiations between the parties which results from an offer and acceptance. In Traditional Contracts, agreements can be oral as well as written.[29]

Section 10 of the Indian Contracts Act, 1872[30] states that a contract is said to be valid if they are made with the 'free will of the parties competent to contract, for lawful consideration and not declared void under the Act.'

Under different jurisdictions around the world, a contract is defined as an instrument that establishes, terminates and, regulates legal obligations amongst parties entering into the agreement.[31] An agreement should not always result from an overt action of the parties, but the conduct of the parties in relevant circumstances has to be construed to understand whether an agreement has taken place or not.[32]

Hence, an offer can be considered as an intimation of willingness by a party to the other to enter into a legally binding relationship. Whereas, assent to the same by the other party in the same form amounts to acceptance which leads to the conclusion of an agreement.[33] Any agreement supplanted by a lawful consideration gives rise to a contract.

When the parties to a Smart Contract encode the contract in the form of a computer code so that it can be performed mechanically by a computer programme, offer and acceptance can be construed from the conduct of the parties.[34] The assent to the agreement can be given by the parties through the use of a private key in a distributed ledger, which acts as a unique proof of their identity.[35] Under Uniform Electronic Transactions Act ('UETA') of the USA,[36] European Union Regulation 910/2014,[37] and Information Technology Act, 2000,[38] electronic signatures are recognised as a valid proof

[28] J Beatson, A Burrows, *et.al*., *Anson's Law of Contract* (Oxford University Press, 30th edn., 2016).
[29] *Ibid.*
[30] The Indian Contracts Act, 1872 (Act 9 of 1872).
[31] Civil Code of Russian Federation, art. 420 (1994).
[32] *Rees* v. *Warwick*, (1818) 2 B & Ald 113.
[33] *Brogden* v. *Metropolitan Railway Co.*, [1877] 2 App Cas 666.
[34] *Supra* note 7 at 322.
[35] *Supra* note 19 at 7.
[36] Uniform Electric Transactions Act of 1999, ss. 5, 13 (United States of America).
[37] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.
[38] The Information Technology Act, 2000 (Act 27 of 2000).

of identity. Under Section 65B of the Indian Evidence Act, 1872,[39] an information encoded in an electronic record can be considered as a valid evidence and is admissible in the Court of law.

If two parties wish to trade digital assets through the use of Smart Contract they can enter into an agreement by entering into a contract encoded in a computer language based on conditional statements in the nature of 'if a then b',[40] for example, a sale of copyright on a certain work can be effectuated digitally without the involvement of any third party and enforcement mechanism through the use of blockchain-based contract.

Contracts entered into between parties can also be in the form of click-wrap agreements, wherein the terms of the contract are set in advance and the user needs to give his assent to become a part of the contract.[41]

Unlike traditional contracts wherein the entire focus of the contractual process is on the enforcement of the contract, Smart Contracts lay greater emphasis on the process of contract formation, as the entire effort of lawyers and programmers is shifted to the process of encoding the contract in a binary code so as to carry out desired results.[42]

One of the other advantages of encoding a contract in a computer code and the emphasis on the formation aspect is that it reduces ambiguity in the formation of a contract.[43] In traditional contracts, it is generally the task of the judicial authorities to understand the intention of the parties through the terms of the agreement. However, in Smart Contracts, as the contractual terms are reduced into 'if' and 'then' statements, the code represents the true intention of parties and reduces the scope for any ambiguity.[44]

Concluding or entering into a smart contract by the parties is in itself an arrangement between the parties as regards to the manner they intend to carry out their contractual relationship. The need for applying rigid principles of offer and acceptance in Smart Contracts is done away with as the contractual process seeks to establish a process through which enforcement is ensured without any judicial interference.

2. Consideration

As discussed above, for an agreement to result into a contract it needs to be coupled with consideration in common law jurisdictions and cause in civil law jurisdictions. A valuable consideration in the eyes of law, may consist in some right or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by

[39] The Indian Evidence Act, 1872 (Act 1 of 1872).
[40] *Supra* note 14 at 11.
[41] *Ibid.*
[42] Maren K. Woebbeking, "The Impact of Smart Contracts on Traditional Concepts of Contract Law" 10(1) *JIPITEC* 106, 111 (2019).
[43] *Supra* note 7 at 325.
[44] *Supra* note 14 at 13.

the other.[45] Hence, a consideration need not be adequate, but it should have some value in the eyes of law.[46]

Consideration is an act or abstinence on part of the parties to do or to forbear to do something.[47] It forms an integral part of the contractual process and thus in a Smart Contract, such consideration can be in the form of trading an asset digitally on the ledger in lieu of a payment or any equivalent (having a value in the eyes of law).

3. Intention to Create Legal Relations:

An agreement is considered to be a contract when it is formed with the intention to create legal relations. The test of determining intention in a contractual process is an objective test, which considers the expectations of a reasonable person to be bound by legal consequences.[48] It is often contended that as Smart Contracts devoid the contracts of any human intervention, there is an absence of a positive or a negative obligation on the part of parties as the contract is entirely automated. The absence of any obligation on the part of parties can be construed as an absence of intention to enter into legal relations. But this seems to be an unfounded observation.[49]

Smart Contracts should only be considered as a means of entering into a contract. Using Smart Contracts to carry out contractual obligations is only a choice of form on the part of parties to a contract and should not have any bearing on the manner of legal relations being entered into.

Click-wrap agreements and e-commerce contracts are other examples wherein contracts are entered on a digital platform in the absence of any human element in contract formation.[50] Smart Contracts can also be evaluated on the lines of these agreements as the intention is a matter of legal consequence unaffected by form or platform on which contract is entered into.

In order to understand the contractual jurisprudence with respect to Smart Contracts, it is pertinent to keep in mind that one of the essential stages of such a contract is its formation. When parties to a contract signify their assent to enter into a contract based on the DLT framework, they are presumed to enter with requisite intention to create a definable legal relationship. The nature of the contract being entered into and the framework on which it operates should not be considered as relevant factors as long as there exists *consensus-ad-idem* with respect to the terms.

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[45] *Currie* v. *Misa*, [1857] LR 10 Ex 153, 162.
[46] *Chappell & Co. Ltd.* v. *Nestle Co Ltd.*, [1960] AC 87.
[47] Indian Contracts Act, 1872 (Act 9 of 1872), s.2.
[48] *Supra* note 28.
[49] *Supra* note 14 at 13.
[50] Sakshi Bhatnagar, "E- Contracts: What are Shrink Wrap, Click Wrap and Browse Wrap Agreements?" *IPleaders*, June 29, 2016, *available at*: https://blog.ipleaders.in/e-contracts-shrink-wrap-click-wrap-browse-wrap-agreements/ (last visited on Oct. 11, 2019).

B. Modification and Termination

Alteration of a contract after its conclusion is one of the key differences between Traditional and Smart Contracts. As Smart Contracts are encoded on a Blockchain, it becomes difficult to effect changes to the contractual terms after its conclusion.[51] Immutability of Smart Contracts can be coupled with the inability of the parties to account for subsequent impossibility and illegality.

Doctrine of Frustration forms an essential part of contractual jurisprudence,[52] it seeks to account for changes or discharge of contract in circumstances where the contract cannot be performed due to factors beyond the control and not attributable to any of the parties. Bingham LJ while highlighting important attributes of the doctrine has held that:

> The main [sic] object of the doctrine is to give effects to [sic] demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair as an expedient to escape from injustice which [sic] would result from enforcement of a contract in its literal terms after a significant change in circumstances.[53]

A contract is not merely an exposition of terms and conditions of an act or omission between the parties, but principles of good faith, equity, justice, and considerations of public policy also need to be accounted for. Traditional Contracts have fulfilled these requirements as common and civil law provides for adequate measures for the protection of a party's interest. It seeks to ensure that under the garb of party autonomy, unconscionable terms are not forced upon the weaker party.

Frustration of performance of a contract can arise due to a plethora of reasons, like change in subject matter and non-occurrence of a specified event. Subsequent illegality of the terms of the contract can render obligations arising out of the contract void in law.[54] Application of Boolean Logic in these circumstances can produce unconscionable results.[55] Smart Contracts based on blockchain are in the nature of conditional statements that are designed to produce a desired set of results. To override a block that has become a part of the chain, an opposite transaction needs to be performed, which is not the most suitable choice in most circumstances.

Hence, as pointed earlier, the immutability of the blockchain platform makes contracts inflexible, which implies that these contracts can be employed only in those

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[51] *Supra* note 14 at 15.
[52] Explained under s. 56 of the Indian Contracts Act, 1872. Also, see *Taylor* v. *Cardwell*, (1863) 3 B. & S. 826; *Krell* v. *Henry*, [1903] K.B. 740.
[53] *J Lauritzen As* v. *Wijsmuller BV*, [1990] 1 Lloyd's Rep 1, 8.
[54] Explained under s. 56 of the Indian Contracts Act, 1872. 'A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.'
[55] Boolean Logic is a form of algebra in which all computer values are reduced to true or false. Smart contracts work on this logic as they are able to verify conditions once they are put through the codes.

conditions where the possibility of further modification is minimal, and the terms of the contract are standard in nature.

As DLT seeks to establish a trustless trust by eliminating the need for any third party in the formation and performance of a contract, it diminishes the possibility to adjust performance on the basis of actual considerations.[56] However, modification of terms of contracts is not entirely ruled out in smart contracts.

Oracles are tools used to effect modifications in the contracts based on a distributed ledger.[57] When the parties to a contract exercise choice to include Oracles in the contractual framework, they intend to modify the reaction of the contract according to change in circumstances. Introduction of Oracles in the ledger accords some amount of flexibility to the party.[58] They can be considered as third-party individuals or programs that establish a secure connection with the blockchain so that it can interact beyond the ledger to effect modifications according to change in circumstances.[59]

One of the peculiar characteristics of Oracles is that they enable the parties to introduce some amount of subjective judgment in the execution of the contract. As Oracles can draw information from both individuals as well as programs, Smart Contracts become amenable to an amendment to a certain degree.

Hence, it can be considered that Smart Contracts are not entirely inflexible in nature. Although it needs to be taken into consideration that good faith, equity, and justice also form an integral part of contract jurisprudence. To decipher the relevance of these contracts in the contemporary legal framework, their efficacy needs to be weighed on different parameters.

C. Enforcement and Regulation

One of the major concerns with the implementation of Smart Contracts is their ability to accommodate contractual adjustments as prescribed by law.[60] There can exist circumstances wherein the results as expected from Smart Contracts may differ from what actually the parties had agreed on, or the contract may become void due to subsequent illegality as discussed above. As the contracts are encoded in computer code in the nature of conditional statements, the courts may not account for much difficulty in ascertaining the intention of the parties.[61] However, difficulties may arise in the enforcement of these

[56] *Supra* note 14 at 8.

[57] Oracles is a program that creates a secure connection between smart contracts and other resources. They are primarily employed in the contract so that it can take input from to facilitate performance.

[58] Cardozo Blockchain Project, "Smart Contracts and Legal Enforceability" *Cardozo Law*, Oct. 18, 2018, *available at*: https://cardozo.yu.edu/news/blockchain-project-releases-second-research-report-smart-contracts-and-legal-enforceability (last visited on Oct. 13, 2019).

[59] Grundmann and Hacker, "Ethereum & Oracles" *Ethereum Blog*, July 22, 2014, *available at*: https://blog.ethereum.org/2014/07/22/ethereum-and-oracles/ (last visited on Oct. 05, 2019).

[60] *Supra* note 14 at 11.

[61] *Supra* note 4 at 188.

contracts with respect to claims of undue influence, misrepresentation, coercion, and unconscionability of terms.

As distributed ledger eliminates the need of any third party in contract enforcement, the remedies and regulation in such form of contracts can either be *ex post* or *ex ante* in nature.[62] *Ex ante* actions are in the nature of regulations seeking to prohibit certain kinds of contracts between the parties. Whereas, *ex post* actions seek to remedy the wrong after the contract has been entered into.[63]

If the parties to a contract enter into an agreement for trading of any prohibited commodity, they are able to secure their end of the bargain but in the process damage is suffered by the society. In common law jurisdictions, *ex post* is a preferred mode of enforcement but, it may not prove effectual in regulating smart contracts.[64] A distinction here needs to be drawn between regulation of Smart Contracts and remedial actions taken in case of a breach. As a Smart Contract creates a framework which reduces the role of enforcement mechanisms of the State, it accompanies with itself, the problem of regulation of those contracts which attract civil/criminal liability under relevant State laws.[65] Smart Contracts reduce the need for *ex post* actions as one of their essential characteristics is to ensure automated enforcement of the contract without the intervention of any third party.

Ex ante actions in the case of Smart Contracts can contradict principles of party autonomy of a contractual process but given the form of contract being entered into, it becomes imperative for the State to regulate the content and nature of contract being entered into between the parties. However, at present, there exist a legal vacuum with regard to the regulatory framework for Smart Contracts. It will be interesting to observe how states develop a regulatory mechanism for blockchain-based transactions without depriving it of the advantages and the efficacy of its peculiarity.

D. Other Issues

One of the major concerns with regard to the application of Smart Contracts is the determination of jurisdiction in case of a dispute. As it is difficult to predict the actual place of performance of a contract, it becomes difficult for the courts to assign jurisdiction on such kind of contracts.[66] This also directs our attention to the need of a standard contractual framework for the use of Smart Contracts. A Standard Model for Smart Contracts can enable parties to conform with different regulatory requirements under different jurisdictions, but on the other hand, it may curtail their freedom to contract.

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[62] *Supra* note 7 at 325.
[63] *Ibid.*
[64] *Supra* note 7 at 326.
[65] *Ibid.*
[66] *Supra* note 19 at 15.

Standard terms may include a reference to dispute resolution mechanisms, choice of law governing the subject, and jurisdiction in case of a dispute.

The infamous Ethereum hack of 2016, broke all misconceptions about complete immutability of blockchain-based transactions. A decentralized autonomous organization operating on the Ethereum platform was forced to siphon off 3.6 million ethers which also raised concerns about the complete immutability of the platform.[67] Hence, a framework governing peculiar aspects of contract formation and execution is the need of the hour.

III. SMART CONTRACTS IN THE FINANCIAL WORLD

Financial institutions around the world are exploiting the possibilities for implementation of Blockchain and Smart Contracts in the banking sector. A research conducted by Capgemini Group highlighted that through the use of Blockchain and Smart Contracts, banking and insurance sector can save up to USD 3-11 billion which can translate into USD 980 savings for individual customers.[68]

Smart Contracts and Blockchain are considered to be a boon for the banking and financial sector. India's largest public sector bank, State Bank of India has recently launched 'Bankchain' for establishing a blockchain-based network between different commercial banks throughout the country.[69] Major financial institutions in India are a part of this network that seeks to utilise blockchain for banking purposes.

Blockchain-based Smart Contracts can be employed by banking and financial institutions to monitor fraud and non-performing assets as well. As Smart Contracts ensure a stricter performance of contractual obligations, it reduces the leeway available to the parties to opt out of the performance. Automated performance of contracts can reduce the intervention of human elements in the industry which can generate more objectivity and certainty.[70] One such example of these contracts to enforce such obligations can be found in 'Starter Interrupters' installed in cars. Starter Interrupters are used to arrest a car engine in case of a default in the payment of instalments.[71]

Working group on Fintech and Digital Banking in its report underlined possible use cases of a blockchain network in inter-banking communications.[72] It underlined the fact

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[67] *Supra* note 23.
[68] Capgemini Consulting, "Smart Contracts in Financial Services" *Capgemini*, 2017, *available at*: https://www.capgemini.com/consulting-de/wp-content/uploads/sites/32/2017/08/smart_contracts_paper_long_0.pdf (last visited on Oct. 13, 2019).
[69] Economic times, "SBI to use Blockchain for Smart Contracts and KYC by next month" *Economic Times*, Nov. 20, 2017, *available at*: https://economictimes.indiatimes.com/industry/banking/finance/banking/sbi-to-use-blockchain-for-smart-contracts-and-kyc-by-next-month/articleshow/61715860.cms?from=mdr (last visited on Oct. 20, 2019).
[70] *Supra* note 19 at 8.
[71] *Supra* note 7 at 329.
[72] Reserve Bank of India, "Report of the Working Group on Fintech and Digital Banking" 19 (Nov., 2017).

that the use of blockchain among banking sector institutions can help in proper asset management and can lead to new avenues for cross-selling.

As Smart Contracts are based on binary conditions of performance; hence, the possibility of a breach is diminished to a large extent in possible use cases. Since data circulated on the distributed ledger is verified by each and every participating node, it increases the verifiability of transactions and reduces the possibility of any fraud. A single platform available to banks to check and verify the creditworthiness of different borrowers can lead to more prudent lending decisions in the long run.

Moreover, the use of Smart Contracts and Blockchain can also increase the operational efficiency of these institutions as clearing and other mechanical functions can be done through the use of automated computer codes.[73] Similarly, stock trading through blockchain can also facilitate a more efficient transfer of securities. Clearing and settlement function carried on a DLT platform not only increases authenticity, but it can also help in increasing the efficiency of the trading operations.

Many jurisdictions around the world are keen on examining possibilities of exploitation of Blockchain technology in different sectors of the economy.[74] The Institute for Development and Research in Banking Technology in India recently released a white paper, discussing possible applications of Blockchain in the banking and finance sector.[75] The use of Smart Contracts and Blockchain can open new avenues for improved governance and direct transfer of benefits in the society.

In the landmark case of *Internet & Mobile Association of India* v. *Reserve Bank of India,*[76] the Supreme Court gave much-needed relief to the crypto market in India by removing the ban imposed on its trading by the Reserve Bank. This judgment can be seen as a positive step towards the development of the blockchain platform in the sub-continent. Regulatory Sandboxes governing and monitoring different aspects of contract formation and execution is an effective way to develop regulatory structure surrounding Smart Contracts.

IV. CONCLUSION

Classifying Smart Contracts as 'pre-emptive self- help',[77] or irregular form of contracts can be considered as a too simplistic approach devoid of critical analysation of advantages it offers. Evaluating Smart Contracts on the parameters of Traditional Contracts bring to

[73] *Supra* note 5.
[74] Delloite Insights, "Delloite's 2019 Global Blockchain Survey" *Delloite*, 2019, *available at*: https://www2.deloitte.com/content/dam/Deloitte/se/Documents/risk/DI_2019-global-blockchain-survey.pdf (last visited on Oct. 25, 2019).
[75] Institute for Development and Research in Banking Technology, *White Paper on Applications of Blockchain Technology to Banking and Financial Sector in India* (IDRBT, Jan., 2017).
[76] Writ Petition (Civil) No. 528 of 2018.
[77] *Supra* note 7 at 333.

light the fact that they can also be included within the definition of the term 'contract'. It would be an overstatement to say that Smart Contracts can accommodate for all possible use cases of Traditional Contracts. However, industry-specific usage of this form of contract can offer a large number of benefits, provided they are supplemented by a robust regulatory framework that seeks to facilitate its development rather than curtail its opportunities.

Smart Contracts may not account for nuances of Traditional Contract law, but their use and validity cannot be completely disregarded. Possibilities for exploring different use cases of Smart Contracts should be delved into, as it has the capability to increase governance and reduce government.

CONSIDERATION AND REGISTERED WRITING IN THE INDIAN CONTRACT ACT

Yoshihide Higa[*]

Section 25(1) of the Indian Contract Act provides for an exception to the requirement of consideration by requiring the registered writing. Although it is a basic subject of contract law, the interpretation of some elemental requirements under it has been unsettled. In fact, since the decision of the Calcutta High Court in Lalit Mohun Dutta v. *Basudeb Dutta, even the consensus on the necessity of registration has been lost, which can result in a grave uncertainty of law. To resolve the problem, this article attempts to examine the validity of the interpretation proposed by the precedent, the importance of which the existing literature has failed to acknowledge sufficiently, by scrutinizing the legislative history. It observes that the doctrine of consideration under the Act experienced a transition through the complicated legislation process, which resulted in the strict requirement of consideration on the contrary to the intention of the original drafters. Thus, this article argues that the inclination of the Calcutta High Court to broaden the strictly limited exception of Section 25(1) can be appreciated to some extent, though it overlooks the fact that registration requirement was introduced, as an alternative to contract under seal, to secure the deliberation of the promisor.*

I. INTRODUCTION

This article examines the legislation history of the Indian Contract Act, especially focusing on a specific provision, Section 25(1), which provides for an exception to the requirement of consideration by requiring the formality of registered writing. Although nearly 150 years have passed since the legislation and the doctrine of consideration is a basic subject of contract law, even the interpretation of some elemental requirements under Section 25(1), such as 'natural love and affection' and 'near relation,' has not been settled.[1] The most serious problem, which this article takes up, is that the consensus on the necessity of registration itself has been lost. Although the necessity of registration

* The author is a Ph.D. Candidate at the Faculty of Law, University of Delhi. He would like to thank his supervisor, Dr. Gunjan Gupta, for her valuable guidance.

[1] Priyanka Sham Bhat, "Contracts Arising from Love and Affection" *Academike,* Jan. 16, 2015, *available at*: https://www.lawctopus.com/academike/contracts-arising-from-love-and-affection (last visited on Mar. 14, 2020).

seems to have been undoubted for around a century since the enactment of the Contract Act, the wording of the provisions has left the ambiguity, which led the Calcutta High Court in *Lalit Mohun Dutta* v. *Basudeb Dutta*[2] to deny the necessity of registration in certain cases. The existing textbooks and commentaries have generally failed to appreciate the meaning and the importance of the decision, which can cause a grave uncertainty of law. By reviewing the legislation process and the original purpose of the provisions, this study attempts to find a clue to dispel the uncertain state of law. More specifically, it argues that, given the strictly limited exception to the requirement of consideration under the Act as a result of a hasty and complicated legislation process, the inclination of the Calcutta High Court to broaden the exception is not without reason.

This article also aims to reveal some implicit features of Indian contract law. It is well known that the English law was embodied in the Indian Contract Act in the codification project during the nineteenth century.[3] The Act, however, underwent a more complicated process of legislation than a mere transformation of case law into statute, which has made it theoretically inconsistent. Recent studies have revealed that the Indian Contract Bill included some substantial reforms to the existing rules regarding consideration.[4] However, some measures prepared by the original drafters to reform the existing rules were revised in the legislation process by those who assumed a different view. Considering peculiarity of Indian society in those days, the latter objected to contract law based on laissez-faire principle.

This article observes the transition, the doctrine of consideration had experienced in the legislation history more comprehensively than preceding works by referring to historical sources. Initially, the legislation process was partly described by those who engaged in the legislation work themselves.[5] In the twentieth century, some studies began to narrate the procedure partially relying on the historical sources,[6] and especially descriptions given by Frederick Pollock and George Claus Rankin have been relied on by later works.[7] Atul Chandra Patra's work is also important because it revealed details of

[2] AIR 1976 Cal 430.

[3] For codification in British India, see C. Ilbert, "Indian Codification" 5 *L. Q. Rev.* 347 (1889).

[4] Shivprasad Swaminathan, "Eclipsed by Orthodoxy: The Vanishing Point of Consideration and the Forgotten Ingenuity of the Indian Contract Act 1872" 12 *Asian Journal of Comparative Law* 141 (2017). Also, see Shivprasad Swaminathan, "The Great Indian Privity Trick: Hundred Years of Misunderstanding Nineteenth Century English Contract Law" 16 *Oxford University Commonwealth Law Journal* 160 (2016).

[5] J.F. Stephen, "Codification in India and England" 12 *Fortnightly Review* 644 (1872); Also, see W. Stokes (ed.), I *The Anglo-Indian Codes* 534 (Clarendon Press, Oxford, 1887).

[6] B.K. Acharyya, *Codification in British India* 237-41 (S.K. Banerji & Sons, Calcutta, 1914). Also, see R.N. Gooderson, "English Contract Problems in Indian Code and Case Law" 16 *Cambridge Law Journal* 67, 67-68 (1958); F.B. Tyabji, *The Indian Contract Act* lxix-lxxi (Thacker, Spink & Co., Calcutta, 1919).

[7] Preface to F. Pollock and D.F. Mulla, *The Indian Contract Act* (Sweet & Maxwell, London, 1905). Also, see G.C. Rankin, *Background to Indian Law* 88-110 (Cambridge University Press, 1946); M.P. Jain, "The Law of Contract Before the Codification" 14 (Special Issue) *J.I.L.I.* 178, 199-202 (1972); M.C. Setalvad, *The Role of English Law in India* 32 (Magnes Press, Jerusalem, 1966); M.C. Setalvad, *The Common Law in India* 70-72 (Stevens & Sons Limited, London, 1960).

discussions made at the Legislative Council of the Governor General which passed the Contract Bill.[8] Further, Warren Swain recently examined the history of enactment in the context of the English legal history and highlighted some aspects which had been overlooked.[9] Although these studies have, to a great extent, made it possible to get a general account of the legislative history of the Act, they are still inadequate as far as the doctrine of consideration is concerned. The Indian Contract Act changed its nature through the legislation process due to a transformation which the doctrine of consideration experienced. Although Swain has already mentioned this transformation, he has, due to inadequate materials, overlooked how it took place in the Legislative Council and how important the process is. Even Patra, who focused on the debates in the Council, totally missed the subject of consideration.

II. REQUIREMENT OF REGISTRATION: A WANT OF CONSENSUS

The problem about the requirement of registration is derived from ambiguity in the wording of provisions of Section 25(1), which can admit two ways of interpretation. The first one, which seems to be more consistent with *Illustration* (b) attached to it, requires written agreements made without consideration to be registered *following the procedure* 'under the law for the time being in force for the registration of documents,' namely the Registration Act. So, every agreement without consideration has to be registered to get contractual force unless it satisfies Sections 25(2) and 25(3). The second way, on the other hand, demands registration *in the case of documents for which registration is compulsory* 'under the law for the time being in force for the registration of documents.' According to this interpretation, a gift agreement of moveable property, for example, can be enforceable even without registration, for registration is optional under Registration Act.[10]

It seems that, since the Contract Act was enacted, the second way of interpretation was unknown for a long time. Pollock, who is the author of the most authoritative commentary of the Act, assumed the indiscriminate application of the requirement when he wrote that '[t]he Act does not allow any form alone to dispense with consideration, but only writing and registration coupled with the motive of natural love and affection between nearly related parties.'[11] Even in 1960s, Patra also explained as follows, without distinguishing compulsory registration from optional:

[8] A.C. Patra, "Historical Background of the Indian Contract Act, 1872" 4 *J.I.L.I.* 373, 393-99 (1962).
[9] W. Swain, *The Law of Contract 1670-1870* 260-73 (Cambridge University Press, 2015).
[10] The Indian Registration Act, 1908 (Act 16 of 1908), s. 18.
[11] Frederick Pollock and Dinshah Fardunji Mulla, *Indian Contract and Specific Relief Acts* 198 (Sweet & Maxwell, London, 6th edn., 1931).

> Under Section 25(1), an agreement without consideration will be valid only when it is (*i*) made on account of natural love and affection, (*ii*) between parties standing in a near relation to each other, and is (*iii*) expressed in writing and registered. For Section 25(1), all these three requirements are essential. The presence of only one or two of them will not suffice.[12]

In *Lalit Mohun Dutta* v. *Basudeb Dutta*,[13] however, Calcutta High Court adopted the second way of interpretation to deny the necessity of registration in the case of a written agreement to pay certain amount of money in consideration of regard for the promisee.[14] In this case, defendants failed to provide their father, the plaintiff, with the monthly payment of Rs. 50/- even though each of them had promised to pay it by executing two written agreements. Although they had not been registered, the High Court approved their enforceability, holding that the Registration Act had 'no provision for registration of an agreement simpliciter... the agreements simpliciter... are not required to be registered under the law for the time being in force for registration of such agreements but even so such documents are enforceable in law.' The Court did not accept the contention for defendants that the provision of Section 25(1) would be a 'superfluity.'[15]

How should this judgment be understood? There seems to be no authority of the Supreme Court on this point. Although few textbooks, like that of Akhileshwar Pathak, attach importance to *Lalit Mohun Dutta* v. *Basudeb Dutta*,[16] most of the existing textbooks or commentaries do not answer this issue sufficiently. Usually, they only mention the case without any explanation, or even fail to mention it.[17] Without the settlement of law on the requirement of registration, the certainty and predictability can be undermined. This article aims to contribute to eliminate the uncertainty and argues that the decision can be appreciated by examining the legislative history of the Contract Act, where the Act has become a statute which even requires consideration more strictly than English law on the contrary to the intention of the drafters who proposed several novel measures for the reform of consideration as is shown below.

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[12] A.C. Patra, I *The Indian Contract Act 1872* 520-21 (Asia Publishing House, Bombay, 1966).

[13] AIR 1976 Cal 430.

[14] It seems that, by 1959, the High Court had already showed an indication of inclining to restrict the requirement of registration. *Provat Kumar Mitter* v. *Commissioner of Income Tax, West Bengal*, (1959) 37 ITR 91.

[15] *Lalit Mohun Dutta* v. *Basudeb Dutta,* AIR 1976 Cal 430, 432.

[16] Akhileshwar Pathak, *Contract Law* 136-37 (Oxford University Press, 2011).

[17] Nilima Bhadbhade (ed.), IX *Halsbury's Laws of India* 65 n. 1 (2nd edn., 2015). Also, see Frederick Pollock and Dinshah Fardunji Mulla, *The Indian Contract Act 1872* at 593 (Lexis Nexis, Gurgaon, 15th edn., 2018).

III. LEGISLATION OF THE INDIAN CONTRACT ACT

Frederick Pollock, who was one of the most eminent contract writers in the nineteenth century, rightly characterized the Contract Act and its legislative process by stating that 'not only the work of different hands, but work done from quite different points of view, has been pieced together with an incongruous effect.'[18] Contrary to the expectation of the Indian Law Commissioners, who prepared the original draft of the Act in London, the legislation process was delayed due to a controversy with the legislature in India. Even after the resignation of the Commissioners, the Contract Bill experienced some drastic changes. The proposals for these modifications of provisions regarding general principles of contract were made immediately before the bill was passed in the Legislative Council despite the fact that their proposers, James Fitzjames Stephen and George Campbell, had directly conflicting views on the ideal contract law for India as is shown below.

A. Indian Law Commission and the Original Draft

Although the original draft prepared by the 3rd Indian Law Commission was generally based on the English law in those days, it also contained several reformative measures. Especially, for the purpose of this study, it is important that it proposed some novel provisions to reform the doctrine of consideration reflecting the Will Theory. Here, these measures are observed in turn in view of the general history of the legislation of the Contract Act.

1. Law commission and the second report

The 3rd Indian Law Commission was appointed in 1861 in London to prepare 'a Body of Substantive Law' including contract law.[19] The original members of the Commission were John Romilly, Master of Rolls, who headed the body; William Erle, Chief Justice of the Common Pleas; Edward Ryan, a former Chief Justice of Bengal; Robert Lowe, later Chancellor of the Exchequer; James Shaw Willes, Judge of the Common Pleas; and John M. Macleod, a former civil servant in India. William Macpherson, who had published a treatise on contract law applicable to the territories called 'mofussil' in British India,[20] and Neil Benjamin Edmonstone were also appointed respectively as secretary and assistant secretary to the Commission. When the Commissioners presented their second report,

[18] F. Pollock and D.F. Mulla, *Supra* note 7 at iv.

[19] Indian Law Commission, "First Report of Her Majesty's Commissioners Appointed to Prepare a Body of Substantive Law for India, & c." 3 (1864).

[20] William Macpherson, *Outlines of the Law of Contracts* (R.C. Lepage and Co., London, 2nd edn., 1864).

which contained the original draft, William Erle had already resigned and John Henderson had replaced him.[21]

The second report, dated on 28th July 1866, begins with the following statement on the necessity of Contract Act:

> We, Your Majesty's Commissioners appointed to prepare a body of substantive law for India, have, since we made our First Report, applied ourselves principally to the subject of contract, which affords the most frequent occasion for litigation in all parts of that country, and on which we are satisfied that a law can be framed applicable to the whole population. The need of such law is manifest on a view of the existing state of things; which, in general terms, may be described by saying that, within the limits of the Presidency towns, the decision of suits of this nature is practically governed by the law of England, and that everywhere else the judge is to a great extent without the guidance of any positive law beyond the rule that his decision shall be such as he deems to be in accordance with 'justice, equity, and good conscience.[22]

Here, the apprehension of the Commissioners is expressed about the existing laws of contract in British India in those days, and their belief in the introduction of uniform law of contract is clear. The remaining part of the report comments on important points where departure from English law was proposed, including some rules regarding the doctrine of consideration.

2. Rejection of contract under seal and *First Exception* to Section 10

The definition of consideration was given under *Explanation* 3 of Section 10 of the original draft:

> *Explanation* 3.—A good consideration must be something which at the desire of the person entering into the engagement another person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing.[23]

The present definition under Section 2 (d) of the Contract Act is generally based on this provision, except that it is ambiguous whether Commissioners initially intended to modify the common law principle that consideration must move from the promisee.[24] The most characteristic feature is that it, using the perfect tense, explicitly modifies the principle

[21] On his death, Henderson was replaced by Robert Lush.

[22] Indian Law Commission, "Second Report" reprinted in *Copies of Papers Showing the Present Position of the Question of a Contract Law for India; and, of All Reports of the Indian Law Commissioners on the Subject of Contracts* 3 (1868).

[23] *Id*. at 9.

[24] Rankin, *supra* note 7 at 103-04.

that past consideration is no consideration.[25] Commissioners did not intend to abolish the doctrine of consideration, but their inclination to alter and loosen it can be perceived.

Furthermore, the original draft also proposed novel exceptions to the doctrine. It tried to introduce two general exceptions to it. What is important is that the first one was proposed as an alternative to contract under seal. The second report says:

> We have considered whether it would be expedient to render binding in law promises made without consideration. By the English law, such promises are held to be binding only when expressed in writings under seal. We have not recognised any distinction between writings under seal and writings not under seal, but we think that in order to give validity to promises made without consideration, it ought to appear that they were made with due deliberation. In order to attain this object, we propose that such promises shall be binding only when they are given in writing, and are registered with the permission of the promisor, according to the provisions of the law for the time being in force for the registration of assurances.[26]

Under English law, contract under seal can be used as a general exception to the doctrine of consideration. Commissioners, however, rejected the 'distinction between writings under seal and writings not under seal,' which was peculiar to English law and had not been followed in mofussil,[27] and recommended an alternative scheme, namely registered instruments. Thus, the *First Exception* attached to Section 10 of the original draft provided as follows:

> 10. In order to the validity of an engagement by contract, there must be a lawful object and a good consideration.
>
> First Exception.—A person who makes a promise, whether upon good consideration or not, is bound to perform it if the promise be expressed in writing and duly registered according to the provisions of the law for the time being in force for the registration of assurances, unless the promise is unlawful or is based on an unlawful consideration.[28]

3. Section 62: promissory estoppel

The second exception to the doctrine of consideration was provided for in Section 62 of the original draft as follows:

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[25] Jack Beatson, Andrew Burrow, *et.al.* (eds.), *Anson's Law of Contract* 95-97 (Oxford University Press, 29th edn., 2010).

[26] *Supra* note 19 at 4.

[27] Imperial Legislative Council, VI *Abstract of the Proceedings of the Council of the Governor-General of India: 1867* 379 (1868).

[28] *Supra* note 22 at 8-9.

> 62. If one person makes a deliberate statement as to his own future conduct to another, with the intent that it should be acted upon, and the other acts upon the faith of assurance, the person who made the statement must make it good.
>
> Illustration.
>
> A. holding a decree against B., and knowing that B. is desirous to be married to C., assures the father of C. that he will never enforce the execution of the decree against B. C.'s father, relying on this assurance, permits the marriage to take place. A. is not entitled to enforce the execution of the decree.[29]

Under English law, promissory estoppel was introduced in 1947 by Denning J. in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*,[30] to give contractual force to a promise made without consideration. He distinguished the precedent of the House of Lords in *Jorden* v. *Money*,[31] which had restricted 'estoppel by representation' to the representation of existing or past fact and excluded that of future conduct, namely promise or assurance. It is interesting that much earlier than *High Trees Case*, Section 62 of the original draft proposed to directly alter the rule of *Jorden* v. *Money*. The *Illustration* attached to Section 62 is generally based on the facts of *Jorden* v. *Money*, and their conclusions are divergent, which makes clear the intention of Commissioners to make a departure from English Law.[32] In the *Illustration*, estoppel works as a defense. Although it is unclear whether Commissioners intended to go so far as to allow promissory estoppel to create a cause of action, the wording of the Section does not necessarily exclude that option.

The reformative attitude of Commissioners toward the doctrine of consideration can also be seen in other parts.[33] They could attempt experiments more freely than in the domestic context. It should also be noted that the draft was prepared in 'an age of reform'[34] in common law, which encouraged theorization of law. The Indian Law Commission itself was a product of Benthamism led by Lord Macaulay.[35] Warren Swain notes that the second report of the Commission was influenced by Will Theory, which under the influence of civil law theorists explained the ground of the binding force of contract from meeting of minds of the parties, not from consideration or other formalities.[36]

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[29] *Id.* at 20.

[30] [1947] KB 130.

[31] [1854] 5 HLC 185, p.no. 214-15.

[32] Michael Lobban, "Contract Law" XII *The Oxford History of the Laws of England* 295, 307 n. 53 (Oxford University Press, 2010).

[33] For example, Section 32 of the original draft, which became the present Section 63, abolished the principle of *Pinnel's Case*.

[34] *Supra* note 32 at 306.

[35] B. Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles" in W.C. Chan, Barry Wright, *et.al.* (eds.), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* 19 (Ashgate Publishing Ltd., 2011).

[36] *Supra* note 9 at 264-66. See also D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* 227, 235 (Oxford University Press, 1999).

The second report of the Commissioners, including the original draft, was sent to the Governor General of India through the Secretary of State for India. It was modified into the form of a bill, and published with the statement of objects and reasons in August 1867.[37] Henry Maine, the Law Member of the Governor General's Council from November 1862 to October 1869, was in charge of this work. The bill was generally identical to the original draft except some verbal alterations.[38] It was submitted to the Legislative Council on 6th December in 1867 and a select committee was appointed to examine it.[39] By the spring of 1870, the select committee presented a report, which was transmitted to London.[40] During the period some provisions in the bill triggered controversy between lawmakers in India and Commissioners in London, which caused the delay and the resignation of the Commissioners to protest against it.[41] After the dissolution, the Secretary of State in his letter dated 23rd February 1871 allowed the Government of India to take their own course with the contract bill as long as it would be enacted at an early date.[42] But his desire for the early enactment was frustrated as will be seen below.

B. Conflict of Conceptions between Stephen and Campbell

Despite the substantial delegation to the Government of India, the legislation work was not brought to an end immediately. Rather the course of events after this is important for this study. The Government of India, being on the point to leave for the summer capital, Simla, replied to the Secretary of State that they would resume the work on their return to Calcutta.[43] Further James Fitzjames Stephen, who had replaced Maine as the Law Member from the end of 1869, moved on 24th February 1871 that the bill should be recommitted, and his motion was accepted.[44] Although he explained that further alteration would be made 'not so much as in substance, as in arrangement and definition,'[45] his proposal included massive amendments. The new bill prepared by the select committee presided by Stephen, and the discussion and amendments made at the Legislative Council regarding the bill, determined the nature of the Contract Act. Swain describes as if Stephen caused the reduction of the impact of reform of consideration

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[37] *Supra* note 22 at 51.

[38] Exceptionally as an only substantial change, provisions regarding specific performance and injunction were deleted. This amendment caused a controversy between Maine and the Commissioners. *Supra* note 22 at 91-101.

[39] *Supra* note 27 at 375. Considerable time throughout 1868 was devoted to receiving opinions from the Local Governments. Imperial Legislative Council, "X Abstract of the Proceedings of the Council of the Governor-General of India: 1871" 80 (1872).

[40] James F. Stephen, "Minute on Recasting of the Earlier Parts of the Indian Contract Bill (*29th October, 1871*)" in Anon. (ed.), *Minutes and Notes by the Hon'ble Sir James Fitzjames Stephen* 148, 148 (1906).

[41] *Supra* note 3 at 351-52.

[42] Legislative Despatch to India. No. 11, dated 23rd February 1871 in XIV *Selections From Despatches Addressed to the Several Governments in India, by the Secretary of State in Council: 1871* 130 (1872).

[43] *Supra* note 40 at 148.

[44] *Supra* note 39 at 79-80.

[45] *Id.* at 80.

proposed in the original draft.[46] This article, however, rather emphasizes the role of George Campbell at the Legislative Council.

1. Stephen's Bill

On 29th October in 1871 Stephen in the resumed committee proposed to recast the beginning parts of the contract bill consisting of Sections 1 to 61 relating to general principles of contract law, and replace them with 78 Sections drawn by himself. He argued that they appeared 'to be arranged in a very obscure and confused manner' and this problem 'attracted the attention of the Committee long ago; but whilst the Indian Law Commission was in existence there was a difficulty in altering their work to any considerable extent.'[47] The new bill prepared by the select committee based on Stephen's proposal was presented to the Legislative Council on 12th March in 1872.[48] On 9th April, he moved that the bill be taken into consideration.[49] It finally passed after some alterations at the Council on the same day.[50]

Stephen's bill retained the influence of Will Theory. One outstanding example is Section 10 of the bill, which resulted in the same Section of the Contract Act. The bill arranged requirements for a contract around the concept of 'free consent' providing that '[a]ll agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.'[51] Further, contrary to Swain's view, Stephen seems to have been in favor of the reform of consideration proposed by the Commissioners. Firstly, he preserved provisions for exceptions to the requirement of consideration. Section 25(1) of the bill provided that an agreement made without consideration is void unless 'it is expressed in writing and registered under the law for the time being in force for the registration of assurances.'[52] This provision is based on the *First Exception* to Section 10 of the original draft, which had been proposed as an alternative to contract under seal. Secondly, Stephen even advanced the reform. The definition clauses in Section 2 of the Contract Act were introduced by him.[53] Here, he clearly confirmed the intention to modify and broaden the definition of consideration to include, as a valid consideration, something moving from 'any other person' than the promisee.[54] It ought to be mentioned, however, that no provision can be found in Stephen's bill which is identical to Section 62 of the original

[46] *Supra* note 9 at 269.
[47] *Supra* note 40 at 149.
[48] Imperial Legislative Council, XI *Abstract of the Proceedings of the Council of the Governor-General of India: 1872* 119 (1873).
[49] *Id.* at 321.
[50] *Id.* at 384.
[51] *Gazette of India, Extraordinary* 12, Mar. 28, 1872.
[52] *Id.* at 14.
[53] *Supra* note 40 at 149-50.
[54] *Supra* note 51 at 11.

draft, which provided for promissory estoppel. He does not give any explanation about the omission.

2. Campbell's motion for amendment, part 1

Stephen's Bill was taken into consideration on his motion at the Legislative Council. The discussion is very important because George Campbell, who was a member as Lieutenant Governor of the Bengal Province,[55] brought several motions which challenged the basic conception of the Stephen's Bill. He examined the provisions more from the perspective of the Indian society, to which they would be applied, than from that of theoretical reform of the English law. Here, especially, two groups of proposals are important.

The first one was on estimation of the loss suffered by a party because of the breach of contract. Campbell moved that certain provisions, which are underlined by the author below, should be inserted into Section 73 as follows:

> 73. When a contract has been broken, and has not been discharged, the party who suffers by such breach is entitled to receive from the party, who has broken the contract, *reasonable* compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.
>
> *When the consideration for the agreement was, at the time it was made, very inadequate, below the market-price, or such as would not have induced a prudent and independent man to make the agreement, the circumstance may be taken into consideration in determining what compensation for breach of the contract is reasonable.*[56] [emphasis supplied]

As in the case of the present one, Section 73 of the bill was clearly based on the famous English precedent *Hadley* v. *Baxendale*.[57] In addition to the test of normal or special damage, Campbell tried to authorize the courts to reduce the amount of damages to the extent that they would consider reasonable considering the adequacy of consideration. Generally, under the English law the courts are not allowed to judge the adequacy of consideration with limited exceptions. Campbell proposed, as a general rule of contract, to allow judges to exercise discretion to assess the bargain in order to protect debtors from unfair terms of contract. This motion was rejected. Stephen in his dissenting opinion emphasized that Campbell's measure would disturb 'liberty of contract'[58] of the parties. He argued that the estimation of damages should be made arithmetically in principle, whereas Campbell claimed that the damages 'should be "reasonable" rather than

[55] The Indian Councils Act, 1861 (24 & 25 Vict., c. 67), s. 9.

[56] *Supra* note 51 at 20. Also, see *supra* note 48 at 375-76. To be accurate, the clause was contained in Section 74 in the bill printed in the Gazette.

[57] [1854] 9 Exch 341.

[58] *Supra* note 48 at 377.

"arithmetical."'[59] Stephen thought it was dangerous to allow courts to exercise too much discretion as to the adequacy of consideration.[60] Furthermore, Stephen moved that *Explanation 2* and two *Illustrations* should be inserted into Section 25 to confirm an English principle that an 'agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate.'[61] He argued that a restricted exception, which was simultaneously proposed by him based on an English equitable rule, that 'the inadequacy of consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given,'[62] would be rational and better than Campbell's proposals.

3. Campbell's motion for amendment, part 2

Secondly, Campbell also moved that Section 25(1), and *Illustration* (b) attached to it, should be removed from the bill.[63] He expressed his apprehension that it would cause a fraudulent transaction, i.e. a person might be induced to make a promise in a registered instrument without receiving any consideration. Campbell had originally 'thought that no consideration was very much the same as a totally inadequate consideration.' However, 'it was always the practice of the Native lender to say the borrower— "You must register the bond before you get the money," and after the bond had been registered, he might say— "Now you have registered the bond, you shall not have a farthing of the money."'[64] Although Stephen stated that such transactions would amount to fraud, Campbell argued that the burden of proof was on the victim and that was difference between 'no consideration' and 'inadequate consideration.' The amendment was accepted.[65]

Instead of the deleted clause, a new Subsection 1 was inserted on Stephen's motion following a suggestion of another member to hold family affection to be a sufficient consideration in certain cases.[66] The new subsection provides that an agreement made without consideration is void, unless 'it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other.'[67] A new *Illustration* (b) was also inserted. Thus, this amendment considerably narrowed the scope of the exception to the doctrine of consideration. It changed what had originally been a general exception as an alternative to contract under seal into a strictly limited

[59] *Id.* at 375.
[60] *Id.* at 363.
[61] *Id.* at 384.
[62] *Id.* at 362.
[63] *Id.* at 373.
[64] *Ibid.*
[65] *Id.* at 374.
[66] *Ibid.*
[67] *Ibid.*

exception which can only be relied on in cases of specific kind of agreement. Surprisingly, this significant amendment took place on the very last day of the legislation process.

4. Analysis

It took only about five months for the Stephen's bill to be passed at the Legislative Council from the time when he presented the totally rewritten clauses at the resumed select committee on 29th October in 1871. Before that, the original draft was discussed for nearly five years. During this hasty process, the contract bill saw a few significant amendments by blending conflicting views represented by Stephen and Campbell.

Stephen's view was not so far away from that of Indian Law Commissioners. He was generally in favor of the reform of consideration. In fact, he confirmed the extension of the definition of consideration in Section 2(d). The influence of Will Theory can also be found in Section 10 and *Explanation* 2 of Section 25. He defended the liberty of contract against Campbell's proposal to authorize judges to intervene in the bargain of the parties considering the adequacy of consideration. Campbell, on the other hand, did not think that the prerequisite for freedom of contract had existed in India in those days. He described the nature of Stephen's Bill as 'the proposition that whatever a man had promised that he must perform.'[68] Such a proposition could be, he proceeded, 'equitable' only on the premise that all men and women were equal in terms of their intelligence and prudence so that no one was in a position to exploit the innocence or improvidence of another.[69] It was inappropriate to introduce the proposition into the society without these conditions. He rather emphasized an advantage of the law of 'justice, equity, and good conscience,' which Law Commissioners intended to replace by the Contract Act.[70] Campbell tried to make requirements for a valid contract stricter, and expand the remedy to release debtors from contract obligations, for reasons peculiar to India.

For the purpose of this study on the requirement of registered writing, however, it should also be emphasized that, despite the conflict between Stephen and Campbell, there seems to be a tacit consensus among them that only a written agreement could not be a sufficient formality to give contractual force to an agreement made without consideration. Originally, requirement of registration was proposed, as an alternative to contract under seal in English law, to confirm that agreements had been concluded with due deliberation. Although Campbell objected to the measure, that was because he thought even registration was insufficient in the Indian society to secure deliberation.

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[68] *Id.* at 347.
[69] *Ibid.*
[70] *Id.* at 333.

IV. CONCLUSION

So far, this article has observed the legislative history of the Contract Act to look for a clue to dispel uncertainty of law regarding Section 25(1) caused by the case of *Lalit Mohun Dutta* v. *Basudeb Dutta*. The codification of contract law was attempted under the influence of Benthamism in the nineteenth century, when English law itself experienced theoretical transformation. The original draft prepared by the Indian Law Commissioners assumed an aspect that it was an experiment of doctrinal reform in the English law. The draft, influenced by Will Theory, also proposed some significant alterations to the doctrine of consideration including general exceptions to the requirement of consideration by the registration of instruments.

However, the Act became quite different from what the Commissioners had intended to enact after the legislation process which Pollock described as '[n]ot only the work of different hands, but work done from quite different points of view.'[71] Especially, George Campbell was more cautious about introducing a concept of contract law based on laissez-faire principle into India and emphasized peculiarity of India in those days, where contract parties could not be supposed to stand on equal positions. While the Commissioners tended to underrate the discretion of judges under the law of 'justice, equity, and good conscience,' he expected the courts to intervene in an unfair bargain by considering the adequacy of consideration. Thus, the directly conflicting conceptions of contract law had to be reconciled in the legislation work. However, the Act was hastily enacted without achieving the reconciliation. Consequently, the Act became, on the contrary to the intention of the drafters, a statute which even required consideration more strictly than English law, for it lost every general exception to the requirement of consideration such as promissory estoppel, and registered instruments as well as contract under seal.

Given this strict requirement of consideration, the inclination of the Calcutta High Court, represented by *Lalit Mohun Dutta* v. *Basudeb Dutta*, to restrict the requirement of registration might be appreciated. But if, as this article has shown, the requirement of registration was adopted as a substitution for contract under seal to make sure that the agreement without consideration was made with due deliberation, it is difficult to agree with the idea of making every written agreement, registration of which is optional under the Registration Act, exempt from registration and making it enforceable as a contract. Even if the precedent of the High Court should be followed, other requirements like 'natural love and affection' should be strictly construed to mitigate the effect. What is most important, however, is to settle this issue in any way as early as possible through legislation or decision of the Supreme Court to secure the predictability.

[71] Pollock and Mulla, *supra* note 7 at iv.

OPPRESSION AND MISMANAGEMENT DISPUTES: VIABLE FOR ARBITRATION?

Soumyaa Sharma and Nilesh Sharma[*]

This article seeks to examine the current position with regard to the legal issue of arbitrability of disputes pertaining to the oppression and mismanagement of a company in India. The exclusive jurisdiction to adjudicate upon disputes relating to oppression of member(s) of a company is given in Sections 241 and 242 of the Companies Act, 2013, and strictly speaking vests in the National Company Law Tribunal. However, complexity in such cases of oppression and mismanagement arises on the question of reference of these disputes to arbitration under Section 8 and/or Section 45 of the Arbitration and Conciliation Act, 1996. With rising trends, especially with interests of parties to resolve the matter through arbitration and an obligation on part of judicial authorities to refer such disputes in case of a pre-existing arbitration agreement and/or clause between the parties, it becomes rather a vital question to determine the issue of 'arbitrability' of such oppression and mismanagement disputes. The article confines the issue of 'arbitrability' of such disputes to determining the powers that an arbitral tribunal holds with respect to, majorly, the subject matter of disputes referred and in granting remedial reliefs as enlisted under Section 241 of the Companies Act, 2013, to the oppressed. An attempt is made to bring out determinations of national fora on the aspect of arbitrability of oppression and mismanagement disputes and to further reflect on the similarities and differences on the standings of other common law jurisdictions such as that of Courts of Singapore and United Kingdom as compared to India on the present matter.

I. INTRODUCTION

The terms 'oppression' and 'mismanagement' are not explicitly defined under the Companies Act, 2013[1] ('the Companies Act'): however, the Supreme Court of India in

* The authors are final-year LL.B. students at Campus Law Centre, Faculty of Law, University of Delhi.

[1] The Companies Act, 2013 (Act 18 of 2013).

Shanti Prasad Jain v. *Kalinga Tubes Limited* [2] relying on the decisions of English Courts[3] interpreted the term 'oppression' to broadly encompass all actions on part of the majority shareholders being harsh in nature and/or prejudicial to the interests of the minority shareholders in the company. A first-hand remedy with the oppressed minority is to move the National Company Law Tribunal ('NCLT') by filing an application under Section 241 and claim relief under Section 242 of the Companies Act[4] (*pari materia* to Sections 397, 398 & 402 of the Companies Act, 1956[5]). These sections have instilled a wide scope of powers within the NCLT to grant reliefs, which range from being ordinary in nature, i.e. reliefs with regard to rights *in personam* – creating regulations and restrictions on the conduct of the business or granting monetary sanctions, to extraordinary reliefs, i.e. reliefs with regard to right *in rem* - such as an order to initiate winding-up or insolvency proceedings of the company. Importantly, no provision of the Companies Act expressly bars the resolution of such disputes through arbitration. Additionally, provisions of the Arbitration and Conciliation Act, 1996[6] ('the Act'), especially Sections 8 and 45[7] of the Act read with those under the company law, prima facie create no express bar; in fact, these sections insist for a reference to arbitration if parties have a prior arbitration agreement between them.

The complexity arises in a scenario where an arbitration agreement exists among the parties, but the appropriate relief awarded by the arbitral tribunal in such a case of oppression and mismanagement encroaches upon the powers extensively operating within the adjudicatory domain of judicial authorities such as the NCLT. Hence in oppression and mismanagement disputes, the nature of subject matter along with relief and other incidental issues raise a legal argument that even if a prior arbitration clause and/or agreement exists between the parties, such cases are still not fit for reference to arbitration. On the issue of 'arbitrability' of any dispute, the Hon'ble Supreme Court in *Booz Allen and Hamilton Inc* v. *SBI Home Finance Ltd.,*[8] discussed: 'Three facets of arbitrability: first, whether the disputes can be adjudicated by an arbitral proceeding; secondly, whether the disputes are covered by the arbitration agreement; and thirdly, whether the disputes are submitted for arbitration.'

The above discussion on the issue of arbitrability of oppression and mismanagement claims is a topic of conflict and this paper shall strive to elaborate on this legal aspect of arbitrability; and in support, conclude by providing opinions of other common law jurisdictions, such as that of the Courts of United Kingdom and Singapore. The discussion

[2] AIR 1965 SC 1535, paras. 16-20.

[3] *George Meyer* v. *Scottish Co-operative Wholesale Society Limited*, [1954] SC 381; *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*, [1958] 3 All E.R. 56.

[4] *Supra* note 1, ss.241, 242.

[5] The Companies Act, 1956 (Act 62 of 1956), ss.397, 398, 402.

[6] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

[7] *Id.*, ss.8, 45.

[8] (2011) 5 SCC 532, para. 21.

with regard to the opinion of common law countries strictly revolves around the laws of the United Kingdom and Singapore. These jurisdictions have been chosen not solely because of the shared language, legal and geographic proximity, but also because London is widely considered the most preferred seat for international arbitrations, while Singapore has strongly emerged as a go-to foreign seat for arbitrations. Pertinently, the Singapore International Arbitration Centre (SIAC) report released in 2017, names India as the largest non-Singaporean contributor to its stockpile of cases for the past decade.[9]

II. STATUTORY LAW IN INDIA

The legal complexity with arbitrability of oppression and mismanagement disputes assumes that an arbitration clause or agreement subsists and it necessarily enshrines that parties shall resort to arbitration in case of a dispute. On the existence of such an arrangement between the parties, an application is made under Sections 8 and 45 of the Act before judicial authorities for reference of the dispute for arbitration, which raises the question before the Court and/or NCLT as to whether such an oppression and mismanagement claim is arbitrable or not.

A. Understanding Sections 8 & 45 of the Arbitration and Conciliation Act, 1996

Sections 8 and 45 of the Act govern domestic-seated and foreign-seated arbitrations respectively. The courts and judicial authorities are required under Sections 8 and 45 of the Act respectively to refer the parties to arbitration, but only if the subject matter of the dispute is covered under the arbitration agreement and/or a clause between the parties. Section 8 of the Act relates to domestic arbitration in case of the existence of an arbitration agreement, whereas Section 45 of the Act specifically relates to international commercial arbitration disputes under the New York Convention Awards.[10]

A noteworthy distinction between the above mentioned Sections is that clause (1) of Section 8 of the Act creates an obligation to refer, by the use of the word 'shall'.[11] It does not leave much discretion with courts in the matter of reference to arbitration,[12] whereas Section 45 of the Act[13] grants judicial authorities limited power to refuse reference to

[9] School of International Arbitration, Queen Mary University of London, "International Arbitration Survey: The Evolution of International Arbitration" (2018), *available at*: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf (last visited on June 14, 2020).

[10] *Kotak Mahindra Bank Ltd* v. *Sundaram Brake Linings Ltd*, (2008) 4 CTC 1, para. 14.

[11] *Supra* note 6, s. 8(1)- A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

[12] *P Anand Gajapathi Raju* v. *PVG Raju*, (2000) 4 SCC 539.

[13] Supra note 6, s. 45- A judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person

arbitration if it 'finds' that the arbitration agreement is 'null and void, inoperative or incapable of being performed'.[14]

Based on the above discussion and restricting ourselves to Indian-seated arbitrations, it is clear that the strict statutory interpretation of the use of the word 'shall' under Section 8 of the Act lays an obligation on the judicial authority to refer the dispute for arbitration on an application by either party, provided that the dispute is a subject matter covered under the arbitration agreement and/or a clause in the private contractual agreement between the parties.

B. Section 16 of the Act and Doctrine of 'Kompetenze-Kompetenze'

At this stage, it is pertinent to address the issue of whether arbitral tribunals are themselves competent to decide on the question of their own jurisdiction in oppression and mismanagement disputes. To this extent, a mention of Section 16 of the Act on the aspect of arbitrability of oppression and mismanagement disputes is noteworthy.[15] Section 16 encompasses the doctrine of 'Kompetenze – Kompetenze', which translates to a tribunal being itself competent to decide its competency. Section 16 clearly empowers the arbitral tribunal to rule on the issue of competence of jurisdiction and subject matter with regard to the arbitration agreement on an application filed by the parties, and requires no interference and/or objections of judicial courts. As per Chitty on Contract:

> Such a power (often referred to as the principle of 'Kompetenz-Kompetenz') has been generally recognized by English Law before the 1996 Act. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Any such ruling may be challenged by any arbitral process of appeal or review.[16]

C. Interpretation by Courts of the Statutory Provisions

A bare reading of various provisions of the Act gives the impression that an arbitral tribunal can rule on its own competence and that judicial courts are bound to refer the matter to arbitral tribunal in case the subject matter is a part of an arbitration agreement. However, judicial precedents have laid down otherwise. It is a settled law as per *SBP and Co.* v. *Patel Engineering Co.*[17] and also reiterated by the Supreme Court of India in the recent

claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[14] *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, AIR 2005 SC 3766.

[15] *Supra* note 6, s.16.

[16] H.G. Beale (ed.), *Chitty on Contracts* 802 (Sweet & Maxwell, London, 1999).

[17] (2005) 8 SCC 618.

judgement of *State of West Bengal* v. *Sarkar & Sarkar*,[18] that the arbitral tribunal does not have exclusive jurisdiction under Section 16 of the Act to decide on the existence and the validity of the arbitration agreement. The same can also be decided by the concerned fora under Sections 8, 9 and 11 of the Act. 'Where the jurisdictional issues are decided under section 11 or section 8, it is not open to the arbitral tribunal to ignore the said decisions given by the judicial authority or the Chief Justice and the tribunal is bound by it.'[19]

III. VIEW OF INDIAN COURTS ON ARBITRABILITY OF OPPRESSION AND MISMANAGEMENT DISPUTES

As a general practice, not all disputes are arbitrable. Majorly, all disputes affecting civil rights and disputes which are commercial in nature may be referred for arbitration, either contractual or non-contractual, unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication.[20] To ascertain the arbitrability of the disputes concerning oppression and mismanagement, Indian courts have meticulously analysed the issue of arbitrability of oppression and mismanagement disputes on different parameters such as nature of the right, bifurcation of subject matter, jurisdiction and power of the NCLT, under Sections 241-242 of the Companies Act.[21] The courts have viewed the issue from the standpoint of the class of right, jurisdiction and power instilled by the Legislature within the NCLT. They concluded that oppression and mismanagement disputes are not arbitrable for want of jurisdiction, powers of the arbitrator to enforce the members right and to provide appropriate relief.

A. Nature of Right

The action under Sections 241 and 242 of the Companies Act has some flavour of action *in rem* in it.[22] Adjudication of certain categories of proceedings is reserved by the Legislature exclusively for courts and tribunal as a matter of public policy. Also, there are categories of cases that though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora like arbitral tribunals. The general principle is that disputes involving action *in rem* are non-arbitrable, as it is a right exercisable against the world at large, as contrasted from a right *in personam*, which is an interest protected solely against specific individuals. The courts can refuse to refer the parties to arbitration of a matter involving a right *in rem*,

[18] (2018) 12 SCC 736.

[19] G.K. Kwatra, *Arbitration and Contract Law in Saarc Countries* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2008).

[20] *Supra* note 8 at para. 35.

[21] *Supra* note 1, ss. 241, 242.

[22] *Rakesh Kumar Malhotra* v. *Rajinder Kumar Malhotra*, (2015) 2 Comp LJ 288 (Bom).

even though the parties might have agreed upon arbitration as the forum for settlement of such disputes.[23]

There is no straitjacket formula to apply to oppression and mismanagement disputes by the adjudicating authority. The nature and type of relief is majorly dependent on facts and circumstance of each case. In oppression and mismanagement disputes, different reliefs are granted to enforce rights of the party(s) and most of such rights are doused in the colour of right *in rem*. Such rights can be exercised against the rights which are to be enforced against the world, and should not be based on the order of private fora like the arbitral tribunals.

B. Bifurcation of Subject Matter of Dispute

As the Arbitration and Conciliation Act, 1996 does not provide for any specific provision on bifurcation of the subject matter or cause of action of the suit, the Hon'ble Supreme Court of India in its landmark judgement in *Sukanya Holdings (P) Ltd* v. *Jayesh H. Pandya,*[24] has explicitly barred the judicial authorities under Section 8 and Section 45 of the Act from bifurcating the subject matter of the suit into parts. This has been categorically held for the reason that allowing a bifurcation would lead to an entirely new procedure not contemplated under the Act. Therefore, NCLT while deciding under Sections 8 and 45 of the Act cannot bifurcate the subject matter of oppression and mismanagement petition into the arbitrable and non-arbitrable part.

C. Jurisdiction and Powers of the NCLT and Arbitrator

1. Jurisdiction

The general principle is that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal, as a matter of public policy, such a dispute would then not be capable of resolution by arbitration.[25] Section 430 of the Companies Act bars the jurisdiction of civil courts to adjudicate in respect of any matter for which the NCLT and National Company Law Appellant Tribunal ('NCLAT') are empowered under the Act.[26] Hence, oppression and mismanagement petitions under Sections 241 and 242 of the Companies Act can only be adjudicated by the NCLT. On the other hand, under Sections 8 and 45 of the Act, judicial authorities in India are under an obligation to refer the parties to arbitration, if the subject matter of the dispute is covered by the arbitration agreement.[27]

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[23] *Supra* note 8 at paras. 35-38.
[24] (2003) 5 SCC 531.
[25] *A. Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386.
[26] *Supra* note 1, s. 430.
[27] *Supra* note 12.

The question of whether oppression and mismanagement petitions should be referred to arbitration if the parties have ousted the jurisdiction of the NCLT by arbitration agreement/clause has been investigated by various courts of the land. Courts have been inclined to conclude that a petition alleging acts of oppression and mismanagement should be probed only by the NCLT and that it would not fall within the jurisdiction of an arbitral tribunal if the relief to the dispute claimed by the party is not within the powers of arbitral tribunal.[28] Furthermore, the shareholders of a company have a right to file a petition of oppression and mismanagement under the Companies Act, provided that certain thresholds are satisfied, and this right is a statutory right which cannot be ousted by a provision in the articles of association of the company.[29]

Even if the parties might have agreed upon arbitration as the forum for settlement of such disputes, the jurisdiction of arbitral tribunals is excluded by necessary implication, the reason being that a dispute regarding oppression and mismanagement is non-arbitrable and one of its essential remedy is winding up of a company.[30] The Companies Act instils the power of winding up of a company within the NCLT and no agreement between the parties could grant such jurisdiction to an arbitrator to order winding up of a company.[31]

It is pertinent to mention that the NCLAT in its recent judgement of *Dhananjay Mishra* v. *Dynatron Services Private Limited Mumbai & Ors.,*[32] has held that a dispute such as non-appointment of Directors is specifically dealt under the Companies Act and falls within the domain of the NCLT to consider grant of relief under Section 242 of the Companies Act, and rendered such a dispute as non-arbitrable. Nevertheless, it cannot be disputed as a broad proposition that a dispute arising out of a breach of contractual obligations referable to the Memorandum of Understanding ('MOU') or otherwise would be arbitrable. The NCLT, which is ceased of a company petition under Sections 241-244 read with Section 246 of the Companies Act, would be bound to refer the parties to arbitration of the matter brought before it in accordance with the arbitration agreement, provided that the arbitrator is competent or empowered to decide such a dispute.[33]

Oppression and mismanagement petitions should not become a path to avoid an arbitration forum when a private arbitration agreement exists, in the form of a contract or MOU, between the parties to this effect. Judicial authorities should be vigilant and sceptical that the petitions are not any in manner camouflaged by the petitioner to dress up an arbitrable dispute arising from a contract into an oppression and mismanagement

[28] *Supra* note 23 at para. 20; *Manavendra Chitnis and Another* v. *Leela Chitnis Studios P. Ltd.* (1985) 58 CompCas 113 Bom, para. 16; *Avigo PE Investments Limited* v. *Telcpro Engineers Limited,* (2016) Indlaw CLB 9, para. 24.

[29] *Surendra Kumar Dhawan & Anr.* v. *R. Vir.*, (1977) 47 Comp Cas 276 (Delhi HC), para. 6.

[30] *Supra* note 23 at paras. 21-23.

[31] *Haryana telecom* v. *Sterlite Industries (India) Ltd.,* (1999) 5 SCC 688, para. 5.

[32] *Dhananjay Mishra* v. *Dynatron Services Private Limited Mumbai & Ors.*, (2019) Indlaw NCLAT 54, para. 8.

[33] *Supra* note 1, s. 246.

dispute so that adjudication by an arbitration forum is dodged and pressure of adjudication in public fora like the NCLT can be asserted on opposite party so that ulterior motives can be achieved by the petitioner.

2. Powers of NCLT

The Legislature has empowered the NCLT with the widest amplitude of powers, vide Section 242 of the Companies Act, to pass appropriate orders to bring an end to the matter complained and where the NCLT is of the opinion that a company's affairs have been or are being conducted in a manner prejudicial to the public interest or oppressive to any member(s). Section 242(2) (a) to (m) enumerates various powers which are not only limited to managerial functions but also to non-managerial functions, like removal or appointment of a director, recovery of undue gains made by any managing director, manager or director.[34] An examination of the aforesaid Section clearly brings out two aspects- first, the very wide nature of the power conferred on the court; and second, the object sought to be achieved by the exercise of such power.[35] The only limitation that could be impliedly read into the exercise of these powers would be that there should be a nexus between the order passed thereunder and the object sought to be achieved by these sections. Beyond this limitation, it is difficult to read any other restriction or limitation on the exercise of the court's power.[36] Hence, it would be entirely useless to direct the dispute of oppression and mismanagement to some arbitrator to be appointed by the parties.[37] Such an arbitrator would not have appropriate power to give reliefs, such as an order for winding up of the company to the parties, and bring an end to the dispute. 'The appointment of such an arbitrator would be a complete waste of time as he would be unable to pass any orders at all in the case.'[38]

D. Reference of Dispute

The arbitral tribunals are in principle capable to adjudicate commercial disputes, either contractual or non-contractual, unless the jurisdiction of an arbitral tribunal is excluded by the parties either expressly or by necessary implication. Judicial authorities shall, on receiving an application under Section 8 of the Act by a party to an arbitration agreement, refer the parties to arbitration.

Section 8 of the Act provides that the judicial authority before whom an action is brought in a matter will refer the parties to arbitration in the said matter in accordance with the arbitration agreement. However, what can be referred to the arbitrator is only

[34] *Supra* note 1, s. 242 (2)(i).
[35] *Supra* note 18 at para. 113.
[36] *Supra* note 22 at para. 53.
[37] *Id.* at para. 83. See also, *O.P. Gupta* v. *Sfflv General Finance (P) Ltd.*, 12 (1976) DLT 49, para. 5.
[38] *Ibid.*

that dispute or matter which the arbitrator is competent or empowered to decide.[39] Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement and/or clause, the court where the civil suit is pending will refuse an application under Section 8 of the Act if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.[40]

IV. FOREIGN COURTS ON ARBITRABILITY OF OPPRESSION AND MISMANAGEMENT DISPUTES

Issues of arbitrability of disputes on the subject matter of oppression and mismanagement seem to have a varied opinion in the courts of the United Kingdom and Singapore. These jurisdictions are a well-known choice among Indian parties to carry out their foreign-seated arbitrations. Therefore, a review of arbitrability of oppression and mismanagement disputes in these two jurisdictions is noteworthy to this effect.

A. Status-quo in the United Kingdom on the issue of arbitrability

Similar to the NCLT in India, courts in the United Kingdom under the United Kingdom Companies Act, 2006 have the right to pass any orders as they deem fit in cases of oppression and mismanagement (referred to as 'unfairly prejudicial to interests' in the United Kingdom)[41] by the majority shareholders.[42] On comparing the arbitration legislations of the two countries, it can be observed that there are no express categories of disputes classified as arbitrable or non-arbitrable. Hence, judicial trends become crucial to decide the status-quo of this legal issue of arbitrability with regard to oppression and mismanagement cases.

To this effect, the situation in the United Kingdom is made amply clear by Mustill and Boyd in The Law and Practice of Commercial Arbitration in England, who have observed as follows:

> In practice, therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt, for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. Also, the types of remedies which the arbitrator can award are limited by considerations of

[39] *Supra* note 31 at paras. 47-49.
[40] *Supra* note 23.
[41] The Companies Act, 2006 (The United Kingdom), s.994.
[42] *Id.*, s.996.

> public policy and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order.[43]

Next, importance should be placed on the case of *Fulham Football Club (1987) Ltd.* v. *Richards,*[44] where the issue of whether 'unfair prejudice' claims (or oppression and mismanagement disputes) are capable of settlement by arbitration came up for consideration before the United Kingdom High Court of Justice ('the U.K. Court'). A petition under Section 994 of the United Kingdom Companies Act, 2006 was presented on the ground that the Chairman of the Football Association Premier League ('FAPL') had conducted its affairs in a manner prejudicial to the interests of the petitioner.[45] The U.K. Court in this case had considered two issues to our relevance: (1) Whether relief arising from an oppression and mismanagement dispute would affect third parties rights and should not be arbitrable; and (2) Whether the very nature of such claim devolving public interest should not be resolved by a private arrangement among few parties.

On the first issue, the U.K. Court held that nature of FAPL was such that the relief sought would impact only the aggrieved parties, who were also party to the agreement. Therefore, the U.K. Court felt that the nature of relief cannot be the sole basis for upholding all claims of unfair prejudice as non-arbitrable and so in the present case, relief could be granted by an arbitrator without impacting any third-party rights. On the second issue, the U.K. Court held that the scope of the unfair prejudice claim had been consciously given a life independent of that of the relief of winding up on just and equitable grounds.[46]

Thus, judicial precedents of English Courts on the issue of arbitrability have not devised any clear mechanism as to placing all oppression and mismanagement cases in the category of arbitrable or non-arbitrable. It is not at a far striking distance from the approach adopted by Indian fora in its several decisions.

B. Singapore Courts on Arbitrability of Oppression and Mismanagement Disputes

In the landmark case of *Silica Investors Ltd.,*[47] the High Court of Singapore was approached by Silica Investors Ltd. (Plaintiff) alleging the conduct of the defendants as being

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[43] Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd edn., 1989).

[44] *Fulham Football Club (1987) Ltd.* v. *Richards,* (2011) 2 WLR 1055.

[45] *Id.* at paras. 1057-58.

[46] *Id.* at paras. 58, 61.

[47] *Silica Investors Ltd.* v. *Tomolugen Holdings Ltd.*, (2014) 3 SLR 815.

prejudicial to their interests and oppressive. The High Court was faced with the legal issue of whether a stay on court proceedings should be granted due to subsistence of an arbitration clause in the shareholders' agreement (importantly, a few defendants in the instant case were not a party to such agreement).[48] The High Court of Singapore, in this case, decided not to stay the proceedings on two grounds: (1) not all defendants were party to the agreement containing the arbitration clause; and (2) the plaintiff had pleaded for remedies like winding-up of the company, which were beyond the powers of an arbitrator to exercise. Interestingly, on appeal[49] to the Singapore Court of Appeal, the High Court's decision was overturned. It was stated that the dispute is arbitrable and that arbitrability has a 'reasonably solid core', but that the 'outer limits of its sphere are less clear'.[50] The Court of Appeal relied on the decision of *Fulham Football Club (1987) Ltd.* v. *Richards,*[51] which had made a distinction between arbitrability of subject matter and jurisdictional limitations of the arbitrator to grant relief and held that the arbitrator itself could decide on the issue of granting relief and is duty-bound to grant relief which it has jurisdiction to grant. As a result, the Court of Appeal stayed the part of the claim covered by the arbitration agreement between the parties, and the Court seemed to retain jurisdiction over matters not covered in the arbitration agreement (bifurcation of claims or stages).

It is important to note how Singapore's law allows for bifurcation of claims, unlike India's (as seen in case of *Sukanya Holdings (P) Ltd* v. *Jayesh H. Pandya)*.[52] Further in India, unlike Singaporean Law, no appeal lies in the matters of referral to arbitration under Sections 8 or 45 of the Act with regard to the limited grounds of appeal laid down in Section 37 of the Act.[53]

V. CONCLUSION

Arbitrability of oppression and mismanagement cases is a highly debatable issue for both national and international fora of justice. With no real backing of the statutory law on the topic as to what subject matters are arbitrable or not, the disputes can be deduced only qua the decided case laws of the land.

India's position on this issue can be inferred as arbitral tribunals being private fora are not adequately empowered to give appropriate reliefs to the parties in all the types of the disputes; that being said, reference to arbitration of oppression and mismanagement disputes can be made by the judicial authorities, such as the NCLT, considering the nature

[48] *Ibid.*
[49] *Tomolugen Holdings Ltd. and Anr.* v. *Silica Investors Ltd.,* (2015) SGCA 57.
[50] *Id.* at para. 71.
[51] *Supra* note 44.
[52] *Supra* note 24.
[53] *Supra* note 6, s. 37.

of dispute and relief prayed by the parties. Judicial authorities on being satisfied on the point that an arbitral tribunal is legally competent and empowered to decide and grant the relief prayed, should refer the disputes to arbitration on pre-existence of arbitration agreement/clause. Furthermore, the competence and jurisdiction of the arbitral tribunal can be determined by an arbitral tribunal itself under the doctrine of 'Kompetenze-Kompetenze' (but notably, the power is not an exclusive one and same lies with judicial authorities) as discussed above in this paper.

On comparing the international trends on this issue, it is important to note that there are slight differences between the approaches of the Singapore and the English Courts in comparison to the Indian Courts. The jurisprudence of the Singapore and the English Courts allow bifurcation of claims unlike Indian precedents, which negate bifurcation as categorically held in *Sukanya Holdings (P) Ltd* v. *Jayesh H. Pandya*.[54] In India, no appeal under Section 37 of the Act lies in the matters of referral to arbitration under Section 8 or 45 of the Act.[55]

In conclusion, it can be deduced that in India, *prima facie* an obligation on part of judicial authorities exist to refer disputes under arbitration if a private contract (arbitration agreement and/or clause) exists between the parties.[56] Prior to a reference to arbitration, a careful thought on the competence of an arbitral tribunal with regard to relief and/or nature of dispute based on a *prima facie* assessment of the facts of the case and reliefs prayed becomes a concern for the judicial authorities. Additionally, vigilance is required on part of the judicial authorities to carefully adjudge the petitions alleging oppression and mismanagement for not being in any manner camouflaged with the intention to avoid an arbitration forum, especially when a private contractual agreement already exists between the parties to this effect.

[54] *Supra* note 24.
[55] *Supra* note 6, s.37.
[56] *Supra* note 6, ss.8, 45.

COPYRIGHT GIANTS: ANTICOMPETITIVE PRACTICES OF COPYRIGHT SOCIETIES

Vaishnavi Sabhapathi and Pooja Vikram[*]

India amended the Copyright Act in 1994 and replaced the performing rights societies by copyright societies. The important function of the said societies is to bridge the gap between the copyright holders and users of the work protected by copyright. As per Section 33 of the said Act, there can be only one copyright society for one class of work which left sufficient room for monopolizing the market of copyright management. The societies, which were hitherto acting with a non-profit motive, have now become a high profit business entity because of the collective administration of copyrights through anticompetitive practices such as excessive pricing licensing, refusal to deal etc. This has created a ripple effect in two equations: firstly, towards the copyright holders and secondly, towards the users of the copyrighted work. However, these practices of copyright societies have never come under scrutiny of competition laws. This research paper analyses the above anticompetitive practices of the copyright societies through the lens of competition law in India, juxtaposed with European Union case laws. The paper deals firstly, with the interplay between copyright and competition laws, and secondly, with the 'abuse of dominant position' of copyright societies towards the users of copyrighted works and towards the copyright holders. Finally, the paper concludes by suggesting the necessary measures required to regulate anticompetitive practices of copyright societies.

I. INTRODUCTION

Until 1994, there was no provision in the Copyright Act for the collective administration of copyright. Realizing the importance of the collective administration of copyright, the Parliament amended the Copyright Act by inserting Section 33 in the Act. According to the said section, copyright societies are collective administration societies which can be formed by owners and authors. Some of the function of these societies are issuing the license, collecting fees, distributing royalties etc., thereby building the bridge between copyright holders and copyright users. The said section mandates that there can be one

* The authors are fifth-year B.A. LLB (Hons.) students at the Alliance School of Law, Alliance University, Bangalore.

copyright society for one class of work which will have the authority to issue or grant licenses in cases of cinematographic film and sound recordings. Since absolute power is vested in the copyright society, they have been able to attain a monopoly position in the market of copyright management. In 2012, an amendment was passed and Section 33A was inserted in the Copyright Act, which mandated copyright societies to publish tariff schemes. Further, it gave the right to any person aggrieved by an unreasonable or inconsistent tariff scheme to approach the Copyright Board.

The structure of copyright societies in India has per se resulted in their natural monopoly status. The societies have begun to discriminate against their members and users of copyrighted works by engaging in practices such as charging exorbitant fees, unreasonable licensing conditions and refusing to grant membership. This has resulted in anticompetitive practices in the copyrights management market as they attract the provision of abuse of dominance under section 4 of the Competition Act.[1] However, no such case has been investigated by the Competition Commission of India ('CCI') yet. In this paper, the researchers are specifically dealing with the issues of copyright societies in India; however, a reference has been made to the European Competition Commission ('ECC') in deciding the abuse by copyright management societies in their jurisdiction since the ECC has dealt with the above issues in a more coherent manner when compared to other jurisdictions.

II. INTERPLAY BETWEEN COPYRIGHT LAW AND COMPETITION LAW

Under the copyright law of India, owners of the copyright are conferred with restricted monopolistic powers restraining third persons from using the copyrighted works.[2] Even though all countries have different rights, their aim is to protect the copyright holders and allow them to gain benefits for their intellectual investment. Thus, the copyright holders exploit their rights in the form of exclusive deals, excessive pricing, etc.[3] On the other hand, competition law is aimed at preventing anticompetitive practices in the market.[4] In many circumstances, copyright confers market power through exclusivity which may lead to restriction of production, supra-competitive prices and what economists call a 'deadweight loss'.[5]

[1] The Competition Act, 2002 (Act 12 of 2003), s. 4.

[2] The Copyright Act, 1957 (Act 14 of 1957).

[3] Antonio Capobianco, "Licensing of IP Rights and Competition Law" *Organisation for Economic Co-operation and Development 131st meeting of the Competition Committee*, Apr. 29, 2019, *available at:* https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf. (last visited on Jan. 6, 2020).

[4] Viswanath Pingali, "Competition Law in India: Perspectives" 41 *Vikalpa: The Journal for Decision Makers IIM Ahmedabad SAGE* 168-193 (2016).

[5] Christopher R. Leslie, "Patent Tying, Price Discrimination, and Innovation" 77 *Antitrust Law Journal* 811 (2011).

At first glance, it may appear that both laws contradict each other; however, their final objective is to achieve dynamic efficiency in the market.[6] Different practices by copyright holders such as exclusive licensing agreements, refusal to deal and other such agreements are amenable to scrutiny of the Competition Act under Section 19(3)[7] and Section 3(3).[8] Also, as Section 33 of the Copyright Act gives monopoly power to copyright societies, they will come under scrutiny of Section 4 of the Competition Act in case they abuse their dominant position. Thus, it is clear that the law of competition will intervene in copyright matters to preserve competition in the market.

One of the earliest case which specifically dealt with the role of competition law in copyright management sector was the *Magills Case* and it was the first case in which a practice related to copyright was sanctioned in terms of abuse of dominant position.[9] The case was concerned with the refusal to deal by Radio Telefis Eireann ('RTE'), which was the operator of three Irish television stations. The RTE had acquired a dominant position in the market because of the existence of copyright for their program schedules. The European Court of Justice had ruled that copyright protection is not absolute and is subject to scrutiny of competition rules under Articles 81 and 82 of the Treaty of Functioning of European Union, 1957 ('TFEU').[10]

A. Mandate of Copyright Societies in India

In India, the concept of Collective Management Organisation ('CMO') emerged after the 1995 Copyright Amendment, in the name of Copyright Societies.[11] They were mainly formed to assist the copyright holders and the users of the copyrighted work, as it was impractical to keep a track on all the users of the copyrighted work. The definition of a copyright society is mentioned under subsection (3) of Section 33 of the Act. According to subsection (1) of Section 33, the issuing and granting of license in respect of all works in which copyright subsists shall be carried out by a registered society under the Act. There should be at least seven members to form a copyright society.[12] These societies shall be registered by the Central Government of India keeping in view the rights of the owners, authors and the public. The Copyright Act allows for the establishment of only one society for one class of work and a minimum registration period of five years.[13] Sections 33 to 36A

[6] Nikolaos E. Zevgolis, "The Interaction Between Intellectual Property Law And Competition Law In The EU: Necessity Of Convergent Interpretation With The Principles Established By The Relevant Case Law", in Ashish Bharadwaj, Vishwas Devaiah *et. al.* (eds.), *Multi-Dimensional Approaches Towards New Technology* 25 (Springer, 2018).

[7] The Competition Act, 2002 (Act 12 of 2002), s. 19(3).

[8] *Id.,* s. 3(3).

[9] *Radio Telefis Eireann (RTE) & Independent Television Publications Ltd. (ITP)* v. *Commission,* 1995 E.C. R I-743.

[10] Treaty on the Functioning of the European Union, 1957, arts. 81, 82.

[11] *Supra* note 2, s. 33.

[12] The Copyright Rules 2013, Rule no. 44(1).

[13] *Supra* note 2, s. 33(3A).

of the Copyright Act deal with the functions of these societies, which include issuing the license of copyrighted work as an agent on behalf of the copyright holders, monitoring the use of the work and collecting fees, distributing royalties to their members and entering into reciprocal agreements with foreign copyright societies.[14] Also, according to the 2012 Amendment Act, copyright societies are mandated to publish their tariff scheme on their website.[15]

Presently in India, there are three copyright societies, namely the Indian Performing Rights Society ('IPRS'),[16] the Phonographic Performance Limited ('PPL')[17] and the Indian Singers Right Association ('ISRA'),[18] for collective administration of copyrights in musical works. The IPRS is a representative body of artists including music owners, composers, publishers of music and lyricists. The main objective of the body is to collect royalties which are due to the artists, if their work is used anywhere else. The process of licensing with the IPRS is that whenever events are to take place, the society approaches the organizers beforehand to inform the latter about the licensing requirements to play the song of the artists who are registered with them.[19] The PPL licenses its copyrighted sound recordings to consumers to publicly perform the songs and for radio broadcast, and collects the fee for its member music labels and distributes the proceeds accordingly.[20] The ISRA administers & controls the exploitation/utilisation of the singer's performances & collects royalties on the singer's economic rights and then distributes the royalties so received.[21]

III. ABUSE OF DOMINANT POSITION OF COPYRIGHT SOCIETIES TOWARDS THE USERS

Section 2(h) of the Competition Act defines 'enterprise', which includes person or department of government that is engaged in activities like storage, supply, distribution, etc.[22] Section 33(3) of the Copyright Act mandates copyright societies to get registered by

[14] *Supra* note 2, ss. 33, 34, 35, 36, 36A.
[15] *Supra* note 2, s. 33A.
[16] Home page, Indian Performing Rights Society, *available at*: https://www.iprs.org (last visited on January 28, 2020).
[17] Home page, Phonographic Performance Limited, *available at*: https://www.pplindia.org/ (last visited on January 28, 2020).
[18] Home page, Indian Singers Right Association, *available at*: http://isracopyright.com/ (last visited on January 28, 2020).
[19] Javed Akhtar, "Chairman Message" *Indian Performing Rights Society*, *available at*: https://www.iprs.org/chairman-message/ (last visited on January 28, 2020).
[20] Madan Thakur, "About Us" *Phonographic Performance Limited*, *available at*: https://www.pplindia.org/aboutPPL (last visited on January 28, 2020).
[21] *Supra* note 18.
[22] *Supra* note 7, s. 2(h).

the Central Government.[23] The existing societies – the IPRS,[24] the PPL[25] and the ISRA[26] - are registered as per the said provisions. Further, copyright societies fall under the preview of Section 2(l) of the Competition Act which defines 'person', as they are an association of persons or a body of individuals incorporated in India or outside India. Therefore, copyright societies are enterprises. As already discussed, copyright societies have a dominant position in the copyright management market because of their legal framework;[27] the next question which arises is whether copyright societies have been abusing their dominant position.

Section 4 prohibits any enterprise from abusing its dominant position. The term 'dominant position' has been defined in the Act as 'a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour'.[28]

A. Exorbitant Fee Collected by Copyright Societies

The dominant position of the said copyright societies is in granting licenses for different categories of work and demanding high rate of royalties.[29] The royalties charged by them are not fixed and they vary according to the negotiations that take place between the users and the copyright societies.[30] Once the royalties are collected from the users, there is no transparency in distributing them to the copyright holders.[31]

A study conducted by the Centre for Internet and Society found that a common user is unable to know the exact tariff rates and has no option, except to pay the fees or royalties demanded by the society.[32] The study pointed out that, despite the mandate to publish the tariff rates,[33] the PPL failed to report the mandated tariff rates, its annual revenue report and its royalty distribution policy.[34]

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[23] Supra note 2, s. 33(3).

[24] *Supra* note 16.

[25] *Supra* note 17.

[26] *Supra* note 18.

[27] *Supra* note 13.

[28] *Id.*, s. 4.

[29] Meera Srinvas, "Caught between the Music and Royalty Claims" *The Hindu*, Sept. 29, 2016, *available at*: https://www.thehindu.com/news/cities/chennai/caught-between-music-and-royalty-claims/article3859670.ece (last visited on Jan. 30, 2020).

[30] *Ibid.*

[31] *Supra* note 15.

[32] Maggie Huang, Arpita Sengupta, *et. al.*, "Comparative Transparency Review of Collective Management Organisations in India, United Kingdom and the United States" *Centre for Internet and Society*, July 31, 2015, *available at*: https://cis-india.org/a2k/blogs/comparative-transparency-review-of-collective-management-organisations-in-india-uk-usa. (last visited on Jan. 30, 2020).

[33] *Ibid.*

[34] *Ibid.*

In December 2004, at the general public's suggestion, the Indian Railways attempted to play Rabindra Sangeet in Rajdhani Express and Duronto Express trains for a soothing experience for the passengers. But the IPRS approached the Indian Railways asking an exorbitant royalty payment of rupees 16 lakhs per year. Even after heated deliberations, it was a hefty price tag. The zonal railway officer approached the Railway Ministry, to take up the matter and come out with the solution but the regional manager of the IPRS was stern in his decision and was quoted as saying: 'We have asked from the railways what we demand from other organizations like Air India. They all pay us as the (sic) approved tariff. Even Commonwealth Games paid us copyright amount.'[35]

In the case of *Music Broadcast Pvt. Ltd.* v. *Phonographic Performance Ltd.*,[36] the Copyright Board took into consideration factors such as the status of the user, justification of the rates demanded by the PPL, comparison of the rates demanded by the PPL with that of the IPRS, terms of the licencing agreement, to determine the reasonability of the license fee demanded.

In the above circumstances, the behaviour of copyright societies is questionable because in spite of a mandatory requirement to publish tariff reports and annual reports, they have not discharged their duties transparently and effectively. Also, even after deliberations, the IPRS has been charging high royalty rates on a work (Rabindra Sangeet) which is in the public domain.[37] This can be pointed out as an abuse of dominant position under Section 4(2)(a)(i) of the Competition Act.[38] In *HT Media Ltd.* v. *Super Cassettes Industries Ltd*,[39] the CCI held that 'if a dominant entity imposes an unreasonable and discriminatory prices while licensing their content it will amount to abuse of dominant position under section 4(2)(a)(i) of the Competition Act.'[40]

B. Treatment of Abuse of Dominant Position in the European Union

A similar situation was raised in the European Union in the case *of Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība (AKKA/LAA)* v. *Konkurences padome,*[41] wherein AKKA/LAA, a collective management organisation handling copyright for musical works, was the only entity authorised in Latvia to issue, for consideration,

[35] Avishek G Dastidar, "Railways bid to make journeys musical hits royalty hurdle" *Indian Express*, Dec. 15, 2014, *available at*: https://indianexpress.com/article/cities/kolkata/railways-bid-to-make-journeys-musical-hits-royalty-hurdle-2/ (last visited on Jan. 30, 2020).

[36] 2010 (44) PTC 107 (CB).

[37] Swaraj Paul Barooah, "IPRS, Indian Railways, & Rabindra sangeet (!)" *CTR ON SpicyIP*, Jan. 3, 2015, *available at*: http://spicyip.com/2015/01/guest-post-iprs-indian-railways-rabindrasangeet.html (last visited on Jan. 30, 2020).

[38] *Supra* note 7, s. 4(2)(a)(i).

[39] Competition Commission of India, Case No. 40 of 2011.

[40] *Supra* note 38.

[41] (Case C-177/16) 1 OJ C 200, 6.6.2016.

licences for the public performance of musical works in respect of which it managed the copyright. The dispute was regarding the rates as the rates applied in Latvia were higher than those applied in Estonia and, in most cases, higher than those charged in Lithuania. The European Court of Justice held that copyright management organisations that hold a monopoly and charge unfair prices fall within the meaning of Article 102 of the TFEU. The principle used by the European Commission was to compare the rates charged by the CMO, with those applicable in neighbouring member states. The difference between the rates indicated that the CMO had abused its dominant position. Also, in the case of *Tournier* v. *National Provincial and Union Bank of England* ('Tournier case'),[42] where a complaint was filed against Société des Auteurs, Compositeurs et Éditeurs de Musique ('SACEM'), a French collecting society for charging unreasonable fees and forcing users to take blanket licensing, the European Union held it to be abusing its dominant position under Article 86 of European Economic Community. Referring to the Tournier case and *François Lucazeau and Others* v. *Société des auteurs, compositeurs et éditeurs de musique (Sacem) and Others* ('Lucazeau case'), the European Commission, held that CMOs have to increase transparency with regard to the payment charged to the users of phonograms. The Commission further said, for better efficiency of each society, there should be transparency in pricing which would give a better understanding of their management cost to users as well as to the members of the CMOs.[43]

C. Unreasonable Terms in License Agreement

Copyright societies have been imposing unreasonable conditions on users while granting licenses for the use of work, which has led to anticompetitive practices.[44] In 2013, agents of the copyright societies threatened small business owners, live event owners, resort owners and some wedding planners, demanding high royalty for the music being played. Often, the latter end up paying this unreasonable fee. Also, the societies pressure the users into signing a blanket license on an annual basis, irrespective of their needs.[45]

In the case of *Event and Entertainment Management Association (EEMA)* v. *Union of India*,[46] the petitioner approached Delhi High Court for the issue of a writ of *mandamus* directing the Union of India, to hold a detailed investigation of copyright societies, for the alleged violation of Section 33 of Indian Copyright Act, as they were issuing the licenses on unreasonable terms. The Delhi High Court granted the injunction and also

[42] [1924] 1 KB 461.

[43] ECR 1989 2811.

[44] Prashnat Reddy, "Music labels across India complain against PPL's anti-competitive behaviour" *SpicyIP*, Dec. 29, 2011, *available at*: https://spicyip.com/2011/12/music-labels-across-india-complain.html (last visited on Jan. 30, 2020).

[45] TNN, "IPRS, PPL claims over royalty under cloud" *Times of India*, Sept. 10, 2015, *available at*: https://timesofindia.indiatimes.com/city/goa/IPRS-PPL-claims-over-royalty-under-cloud/articleshow/48891750.cms (last visited on Jan. 30, 2020).

[46] W.P. (C) 12076/2016.

directed the copyright societies to provide their process of issuance of license and obtaining royalties. A similar situation was raised in the case of *South Indian Music Companies* v. *Union of India,*[47] and the same principle was reiterated by the Madras High Court.

In the above cases, the Courts have discussed in detail the unreasonable claim of royalty and it is clear that the copyright societies are in a practice of claiming licenses on unreasonable terms by threatening users. Some users might not use the copyrighted works for a period of one year, but they are forced to pay for the long term, if they want a license.[48] The main objective of competition law is to protect the interests of the consumer.[49] Since copyright societies are abusing the dominant position through unreasonable terms and the users who are the consumers in this case have no other recourse but to approach the society for licensing, the Competition Commission must consider such practices subject to scrutiny under Section 4(2)(a)(1) of the Competition Act.

A similar situation was raised in the European Union in the Tournier case,[50] where the users, instead of blanket licensing, demanded it for only a part of the repertoire and the SACEM refused. The Court ruled that the refusal by the CMO amounted to imposing unfair trading conditions prohibited under Article 101 of the TEFU.[51] Also, to further prohibit anticompetitive practices and control the abuses of the copyright societies, the European Commission recommended certain guidelines to protect the interests of the users, such as reasonable conditions for grant of license, transparency in the pricing policies, and reasonableness of the tariffs.

IV. THE ABUSE OF POWER OF COPYRIGHT SOCIETIES AGAINST COPYRIGHT HOLDERS

Copyright holders enter into an agreement with copyright societies to seek benefit of the collective administration – their rights will be protected and applied more effectively and efficiently. This ability of the copyright society leads to better representation and wider opportunities to get remuneration for the copyright holders. In the execution of the above functions, copyright societies abuse their power in situations such as membership conditions, selection of members, differences in remuneration, etc. which attracts the provisions of competition law.

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[47] W.P.No.6604 of 2015.
[48] *Supra* note 39.
[49] *Supra* note 7, preamble.
[50] *Supra* note 42.
[51] *Supra* note 10, art. 101.

A. Refusal to Grant Membership & Unreasonable Terms in Membership

As per an investigation conducted by a journalist from Soundbox Magazine, South Indian Music Companies Association ('SIMCA'), a music association setup in 1996, was facing problems in the South India music industry. SIMCA's membership was being denied by the PPL on frivolous grounds. The PPL defended their action on the ground that the petitioner had failed to fulfil the basic condition for the position of associate member. The eligibility criterion put forward by the society was that for the fifty music albums count, only film music was recognized. However, in the PPL's registration certificate there was no distinction made between film and non-film music.[52] According to the Articles of Association of the PPL, an associate member is defined as:

> An Owner of Sound Recording Copyright or Owner of Reproduction of Recording rights and Musical & Literary Works, who has registered with the company, at least one work in his/its name, and as recorded in the Register of Works maintained, and any person who holds right of administration of copyrights for and on behalf of and at behest of the Copyright Owner, shall only be admitted as an Associate Member of the company.[53]

Also, according to Article 7 of the Articles of Association, the eligibility for membership is any individual, firm, association, institution or a body corporate incorporated under any law or regulation for the time being in force and who are the owners of sound recording works in India and abroad, and have a place of business in India shall be eligible to become members of the Company.[54] But while considering the membership application, the PPL did not obey these provisions, which could be seen in the SIMCA Case.[55]

Further, copyright holders are forced to make an exclusive agreement in favour of the copyright societies for licensing of their rights.[56] To have membership with the copyright societies, they are forced to sell or license all their bundle of rights, even though they want to retain some.[57] This practice limits the choice of the copyright holder in choosing the most appropriate administration of their copyrighted work.

These practices of copyright societies amount to abuse of dominant position because the CCI in the case of *Ashutosh Bharadwaj* v. *DLF Ltd* has affirmed the allegation of abuse

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[52] *Supra* note 44.

[53] Phonographic Performance Limited (PPL), Article of Association, 2016, art. 3

[54] Phonographic Performance Limited (PPL), Article of Association, 2016, art.7.

[55] *Supra* note 47.

[56] Prashant Reddy T., "The Background Score to the Copyright (Amendment) Act" 5 *National University of Juridical Science Law Review* 479 (2012).

[57] Neil Averrit and Robert Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Laws" 65 *Antitrust Law Journal* 713 (1997).

of domination by the opposite party in imposing terms and conditions.[58] The CCI analysing the flat purchase agreement between the informant and the opposite party noted that the agreement causes injury which is related to unfairness in the nature of the practice itself. The CCI therefore held that the said agreement was unfair under Section 4(2)(a)(i) on the reasoning that the terms of the agreement were heavily loaded in favour of the opposite party and were made non-negotiable.[59]

B. Decisions of the European Competition Commission on Unreasonable Terms of Membership

In *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* v. *Commission of the European Communities* case, the copyright society through its membership condition put a restriction on the freedom of choosing partial or whole assignment rights, which the European Commission held to be an abuse of dominant position by the copyright society, through unreasonable conditions that went against not only the provisions in the Articles of Association but also under Article 102 of the TFEU. The Commission made a specific ruling in this case on the obligation set by the copyright societies on the copyright holders to assign an exclusively broad category of rights on their worldwide works that would include present and future rights, to constitute abuse of dominance.[60] Also, the same was affirmed by the Commission in the case of *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs* v. *SV SABAM and NV Fonior*, wherein it ruled that a compulsory assignment of all copyrights without drawing a distinction between present and future rights amounts to exploitation and unfair conditions in terms of membership.[61] One of the most recent decisions of the European Commission was in the case of *Banghalter and Homem Christo* v. *SACEM* ('Daft Punk decision'). In this case, Daft Punk, a music label alleged that SACEM, which is a copyright society, refused to grant membership to the members of Daft Punk on unreasonable terms and conditions. The Commission held that the act of SACEM to acquire all the rights of Daft Punk when they intended to administer certain rights individually infringed Article 102 of TFEU. The Commission ordered SACEM to alter their membership rules and made individual management possible.[62]

[58] CCI, Case No. 01 of 2014.

[59] *Id.* at para. 5.

[60] Commission Decision 71/224/EEC of 2 June 1971 relating to a proceeding under article 86 of the EEC Treaty (IV/26 760 - GEMA), O.J. L. 134/15 (June 20, 1971).

[61] C-127/73.

[62] COMP/C2/37.219.

V. SUGGESTIONS & CONCLUSION

A. Suggestions to Tackle Anticompetitive Practices of Copyright Societies

Some of the suggestions to curtail the anticompetitive practices of copyright societies are: firstly, there is a need for strict enforcement of Section 33A of the Copyright Act, since copyright societies have failed to publish the tariff schemes. Also, in this arena, there arises a need that the Competition Commission, Intellectual Property Appellate Board & Copyright Board together should play an active role in the enforcement of the above provisions. Secondly, a rule of transparency should be adopted by the copyright societies in terms of their administrative functions. The copyright societies must be transparent in providing the details of license fees collected, the administration charged and royalty paid to the copyright holder. Such fee collected from the user should be justifiable under principles of proportionality[63] and indispensability.[64] Thirdly, to tackle the issue of the anticompetitive practice of refusal of membership, copyright societies must be mandated to publish all their agreement deeds with present members in the public domain, so that to whomever membership is refused, can make a note on present membership agreements. This would further prevent cartelization. Fourthly, adopting the 'follow the dollar' model,[65] which would simply mean that each right holder would receive the exact share of the CMO's distribution pool that usage data has determined. In India, copyright societies can maintain data pools which will keep a track on the usage of the copyrighted works and helps the users and copyright holders evaluate the quality and standard of the work. Fifthly, copyright holders and users must be given the independent right to choose their assignment right instead of compelling them to accept exclusive agreement and buy a bundle of rights. Further, there is a need to create awareness about the working and functioning of copyright societies, so that their statutory monopoly right may be controlled. Also, this will ensure that a balance is struck between artistic and financial concerns. Lastly, the CCI should conduct a *suo motu* investigation on the abuse of natural monopoly by copyright societies and come out with a broad set of guidelines and regulations that should be followed by copyright societies similar to that of Communication on the Management of Copyright and Related Rights in the Internal Market.[66]

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[63] *Remia* v. *Commission,* [1985] ECR 2545.

[64] *Supra* note 46.

[65] Daniel Gervais, *Collective Management of Copyright and Related Rights* (3rd edn., 2015).

[66] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *The Management of Copyright and Related Rights in the Internal Market* (COM/2004/0261), *available at*:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0261:FIN:EN:PDF (last visited on Jan. 30, 2020).

B. Conclusion

The need for copyright societies in the present time is inevitable in the licensing market especially for copyright users and holders. This is the only medium which helps exploit copyrighted works in an efficient manner. At the same time, due to statutory conditions, copyright societies have a dominant position in the respective markets. Such a dominant position gives scope for the rise of anticompetitive practices. Copyright societies while giving membership, charging fees, granting the rights can indulge in exclusionary practices or may tend to behave like a cartel. Therefore, there is a necessity for the application of competition law to protect both copyright holders and users. In applying competition laws and rules, there lies a challenge for the Competition Commission to consider and respect the importance of copyright societies and balance the interest of economies and the rights of these societies. The Competition Commission can *suo motu* conduct investigation and also receive complaints from the users or holders of copyright to regulate the particular sectors if the sector-specific regulations are not adequately followed. Competition law therefore works like a seismograph for the existence of effective sector-specific regulation to fill in the necessary gaps. Therefore, copyright societies should be controlled by competition law along with other sector-specific regulations. As the saying goes: 'power corrupts; absolute power corrupts absolutely', likewise the powers of copyright societies must be subjected to certain restrictions to prevent them from frustrating competition.

THE NATIONAL MEDICAL COMMISSION ACT AND THE VICE OF OVER-CENTRALISATION

Parth Maniktala[*]

The National Medical Commission Act, 2019 was introduced to remedy the many faults of the existing Medical Council of India, which was accused of corruption, fraudulent practices, and general incompetence in the administration of the medical education system. However, the new regulatory framework under the National Medical Commission Act, 2019 paves way for greater inequities by conferring excessive unchecked powers on the Central Government. Many of the concerns raised by the medical fraternity and even the Parliamentary Standing Committee were overlooked in the enactment of this Act. This paper shall offer a critique of several crucial aspects of the Act—the process of appointment to the Commission, the subservient nature of the various 'Autonomous' Boards constituted under the Act, the effacement of states' role in the medical regulatory framework, and the encroachment of judicial functions by the executive. It is argued that the new medical regulatory framework undermines crucial constitutional tenets of democracy, federalism, and separation of powers.

I. INTRODUCTION

The now lapsed National Medical Commission Bill, 2017 was infamously described as a 'remedy worse than the disease'.[1] Subsequently , the National Commission Bill, 2019 ('the Bill' or 'NMC Bill, 2019') which was passed by both Houses of the Parliament, received Presidential assent on August 8, 2019.[2] While Union Health Minister Harsh Vardhan hailed the Bill as 'historic',[3] the medical fraternity registered continuous protests against

* The author is a second-year LL.B. student at Campus Law Centre, Faculty of Law, University of Delhi.

[1] Joyeeta Chakravorty and Ralph Alex Arakal, "A remedy worse than the disease" *The Asian Age*, Jan. 4, 2018, *available at*: https://www.asianage.com/byline/joyeeta-chakravorty-and-ralph-alex-arakal (last visited on May 21, 2020).

[2] "President Ram Nath Kovind signs NMC Bill into a law; NMC to be constituted within six months" *The Economic Times*, Aug. 9, 2019, *available at*: https://economictimes.indiatimes.com/news/politics-and-nation/president-ram-nath-kovind-signs-nmc-bill-into-a-law-nmc-to-be-constituted-within-six-months/articleshow/70591981.cms (last visited on May 21, 2020).

[3] "Harsh Vardhan hails Medical Commission Bill as historic" *Business Standard*, Aug. 1, 2019, *available at:* https://www.business-standard.com/article/news-ani/harsh-vardhan-hails-medical-commission-bill-as-historic-119080101710_1.html (last visited on May 21, 2020).

the passing of the Bill.[4] In fact, National President of the Indian Medical Association, the largest body of doctors and students in the country, Dr. Santanu Sen went to the extent of saying: 'The NMC is the worst bill ever introduced in the medical education system... The proposed bill is anti-people, anti-poor, anti-students, anti-democratic and draconian in nature.'[5]

Through the course of this paper, the author shall argue that the National Medical Commission Act, 2019[6] ('the Act' or 'NMC Act') suffers from the vice of over-centralisation. By vesting too much authority in the Union Government, the Act appears to violate cherished ideals of democracy, federalism, and separation of powers. It must be mentioned that these ideals have repeatedly been held to be a part of the 'Basic Structure' of the Indian Constitution,[7] and therefore any departure from their application must be subject to stringent tests of constitutionality.

One must note that the medical fraternity has raised other pertinent objections to the Act. For instance, Section 32 of the Act provides for the licensing of 3.5 lakh non-medical persons or 'Community Health Providers' to practise modern medicine.[8] This provision, it is argued, will legitimise quackery and reduce the quality of healthcare in the country.[9] The Union Government, however, has sought to dispel these doubts by enhancing the punishment for quackery.[10] Concerns have also been raised over the National Exit Test ('NEXT'), which will serve as a common final year undergraduate medical examination, for granting a license to practice medicine as medical practitioners, and for enrolment in the State Register or the National Register.[11] It is contended that such a test would dumb down the rigorous process of assessing the student's competency, both in medical theory and clinical methods.[12] However, in this paper, the author shall not focus on these

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[4] "Doctors, students protest against NMC Bill" *The Hindu*, July 29, 2019, *available at*: https://www.thehindu.com/news/national/doctors-students-protest-against-nmc-bill/article28745240.ece (last visited on May 21, 2020).

[5] *Ibid.*

[6] The National Medical Commission Act, 2019 (Act 30 of 2019).

[7] *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461; *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299.

[8] Neetu Chandra Sharma, "Why is the medical fraternity opposing the National Medical Commission Bill?" *Live Mint*, Aug. 1, 2019, *available at*: https://www.livemint.com/news/india/why-is-medical-fraternity-opposing-the-national-medical-commission-bill-2019-1564638843794.html (last visited on May 21, 2020).

[9] T.K. Rajalakshmi, "The National Medical Commission Act: Travesty of Reform" *Frontline*, Sept. 27, 2019, *available at*: https://frontline.thehindu.com/the-nation/education/article29390676.ece (last visited on May 21, 2020).

[10] "NMC Act: Punishment for quackery enhanced up to 1 year imprisonment and fine of Rs 5 lakh, says Harsh Vardhan" *Business Standard*, Aug. 9, 2019, *available at*:

https://www.business-standard.com/multimedia/video-gallery/general/nmc-act-punishment-for-quackery-enhanced-upto-1-year-imprisonment-and-fine-of-rs-5-lakh-says-harsh-vardhan-88899.htm (last visited on May 21, 2020).

[11] *Supra* note 6, s. 15(1).

[12] Vikas Bajpai, "National Medical Commission Act: A Cure Worse than the Malady" *Economic and Political Weekly*, Feb. 29, 2020, *available at*: https://www.epw.in/journal/2020/9/commentary/national-medical-commission-act.html (last visited on May 21, 2020).

contentions; rather, a structural critique of the Act shall be offered to argue that it is anatomically designed to grant excessive powers to the Central Government and that such powers are subject to misuse and arbitrary exercise.

II. BACKGROUND

The controversy at hand relates to the establishment of an overarching framework to regulate medical education and practice in India. The Medical Council of India ('MCI') was established in 1934, under the Indian Medical Council Act, 1933 ('IMC Act, 1933'), with the purpose of establishing uniform minimum standards of higher qualifications in medicine and recognition of medical qualifications in India and abroad.[13] Subsequently in 1956, Independent India enacted the Indian Medical Council Act, 1956 ('IMC Act, 1956') to repeal the original IMC Act, 1933, and reconstituted the MCI.[14] While the IMC Act, 1956 provided a solid foundation for the growth of medical education in the early decades, it could not keep pace with time. 'Various bottlenecks crept into the system with serious detrimental effects on medical education and, by implication, delivery of quality health services.'[15] The deteriorating standard of medical education and research in India, an acute shortage of health care providers, especially in rural areas, and frequent allegations of fraudulent practices, corruption, and nepotism in the medical education system led to an increasing criticism of the functioning of the MCI.[16]

Recognising the challenges of a failing medical regulatory system, the Government of India undertook several measures to reform the MCI. The first effort in this direction was the promulgation of the Indian Medical Council (Amendment) Ordinance, 2010.[17] As per Section 3A of this Ordinance, the MCI would be superseded for a period of one year, and in the interim, a Board of Governors ('BoG') would take over the functions of the MCI. This Ordinance was replaced by the Indian Medical Council (Amendment) Act, 2010[18] in September 2010. This Amendment Act required the MCI to be reconstituted within three years from the date of supersession, i.e. by May 14, 2013. The Government, by amending the Act in 2011 and 2012, twice extended the terms of the BoG by one year at a time.[19] In the following months, the Government made multiple attempts to pass bills to

[13] Parliamentary Standing Committee on Health and Family Welfare, "109th Report on The National Medical Commission Bill, 2017" (March, 2018).

[14] *Ibid.*

[15] NITI Aayog, "A Preliminary Report of the Committee on the Reform of the Indian Medical Council Act, 1956" (August, 2016).

[16] *Supra* note 13.

[17] The Indian Medical Council (Amendment) Ordinance, 2010 (No.2 of 2010).

[18] The Indian Medical Council (Amendment) Act, 2010 (Act 32 of 2010).

[19] *Supra* note 13.

amend the IMC Act, 1956 but these could not be taken up for consideration. In the meantime, the tenure of the BoG kept getting extended through ordinances.

On July 7, 2014, the Ministry of Health and Family Welfare constituted an Expert Committee led by (late) Prof. Ranjit Roy Chaudhury to study the existing IMC Act, 1956, and suggest recommendations to make the MCI modern and suited to the prevailing conditions.[20] This committee recommended structurally reconfiguring the MCI's functions, and suggested the formation of a National Medical Commission through a new Act.[21] The recommendations of the Prof. Ranjit Roy Chaudhury Committee were echoed by the NITI Aayog Committee and the 92nd Report of Standing Committee on Health and Family Welfare:

> The situation has gone far beyond the point where incremental tweaking of the existing system or piecemeal approach can give the contemplated dividends. That is why the Committee is convinced that the MCI cannot be remedied according to the existing provisions of the Indian Medical Council Act, 1956 which is certainly outdated. If we try to amend or modify the existing Act, ten years down the line we will still be grappling with the same problems that we are facing today.[22]

Hence, there was broad consensus that the MCI was beyond repair, and the best way forward was to reconstitute an apex medical body from scratch. Pursuant to this, the NITI Aayog Committee finalized the draft National Medical Commission Bill that would replace the MCI with the proposed National Medical Commission. The National Medical Commission Bill, 2017 was introduced in the Lok Sabha on December 29, 2017, and was subsequently referred to the Parliamentary Standing Committee on January 4, 2018 for a detailed examination and report.[23] The 2017 Bill lapsed with the dissolution of the 16th Lok Sabha.[24] The NMC Bill, 2019 was introduced in the Lok Sabha by Union Health Minister Harsh Vardhan on July 22, 2019.[25] Within 10 days, the Bill had been passed by both Houses of the Parliament.

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[20] *Ibid.*

[21] Nivedita Rao, "Explained: The National Medical Commission Bill, 2017" *PRS Blog*, Jan. 2, 2018, *available at*: https://www.prsindia.org/theprsblog/explained-national-medical-commission-bill-2017 (last visited on Mar. 3, 2020).

[22] Parliamentary Standing Committee on Health and Family Welfare, "92nd Report on The Functioning of the Medical Council of India" (March, 2016).

[23] *Supra* note 13.

[24] Gayatri Mann, "Understanding the National Medical Commission Bill, 2019" *PRS Blog*, July 29, 2019, *available at*: https://www.prsindia.org/content/understanding-national-medical-commission-bill-2019 (last visited on Mar. 3, 2020).

[25] National Medical Commission Bill, 2019 (Bill No. 185 of 2019).

III. STRUCTURE OF THE NATIONAL MEDICAL COMMISSION ACT

Under the NMC Act, there is a *prima facie* division of power between three bodies: the Search Committee, the Medical Advisory Council, and the National Medical Commission ('NMC'). However, these three bodies are not coequals. The NMC continues to serve as the overarching regulatory body, whereas the functions of the other two bodies appear to be auxiliary in nature. The following are brief descriptions of the functions of the three bodies:

- National Medical Commission: The NMC is a body corporate with perpetual succession.[26] Section 10 of the NMC Act lays down the overall functions of the NMC. The Commission is required to lay down policies to maintain high standards in medical education. Further, it is required to regulate medical institutions, medical researches and medical professionals. As a corollary of these duties, the NMC has been empowered to lay down policies and codes to ensure the observance of professional ethics in the medical profession, ensure co-ordination among the Autonomous Boards, and develop a road map for meeting the requirements of the country's healthcare infrastructure.[27] As observed, the powers of the NMC are expansive and comprehensive. The Act sets it up as the apex medical body of the country.
- Medical Advisory Council: Section 11 of the NMC Act provides that the 'Central Government shall constitute an advisory body to be known as the Medical Advisory Council.' As the name suggests, this body is meant to perform an advisory function, and is designed to be the 'primary platform through which the States and Union territories may put forth their views and concerns before the [National Medical] Commission.'[28]
- Search Committee: The Search Committee, as established by Section 5 of the NMC Act, is to recommend persons who shall then be appointed by the Central Government to various posts in the Commission. This, it shall do by recommending a panel of at least three names for every vacancy referred to it.[29] The intention behind having a separate committee to

[26] *Supra* note 6, s. 3(2).

[27] Ashwin Sapra, Kartik Jainet, *et.al.*, "The National Medical Commission Act, 2019. A look : Part 1" *India Corporate Law (A Cyril Amarchand Mangaldas Blog)*, Sept. 9, 2019, *available at*: https://corporate.cyrilamarchandblogs.com/2019/09/national-medical-commission-act-2019-part-1/(last visited on Mar. 3, 2020).

[28] *Supra* note 6, s. 12(1).

[29] *Id.*, s. 5(3).

> decide the members of the NMC is to ensure that a 'revolving door' is not created.[30]

Furthermore, under the umbrella of the NMC, four 'Autonomous' Boards have been set up to deal with different aspects of medical education and practice. The Under-Graduate Medical Education Board ('UGMEB'), to oversee all aspects of medical education at the undergraduate level;[31] the Post-Graduate Medical Education Board ('PGMEB'), to offer oversight of medical education at the postgraduate level;[32] the Medical Assessment and Rating Board ('MARB'), to determine the process of assessment and rating of medical educational institutions as per the standards laid down by the UGMEB and PGMEB;[33] and the Ethics and Medical Registration Board ('EMRB'), to maintain a National Register of all licensed medical practitioners, and also to regulate professional conduct and medical ethics.[34]

At first glance, the NMC Act seems to have neatly compartmentalised the manifold aspects of the medical regulatory framework into separate, mutually independent organs. And yet, as the author shall argue, this entire framework is undercut by over-centralisation, which hinders the autonomy of these bodies and makes them under-representative of the voices of various concerned stakeholders.

IV. THE APPOINTMENT PROCESS

The now defunct MCI was a mostly elected body.[35] In 2007-08, 71% of the members in the committee were elected. These represented universities and doctors registered across the country.[36] However, considering that the MCI was saddled with allegations of corruption and incompetence, many suggested replacing the 'election-based' model of the MCI. In fact, the NITI Aayog Committee explicitly rejected the MCI process, suggesting that it is based on 'a flawed principle whereby the regulated elect the regulators'.[37] 'It creates an *ab -initio* conflict of interest and therefore this system must be discarded in favour of one based on search and selection'.[38]

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[30] *Supra* note 15.

[31] *Supra* note 6, s. 24(1).

[32] *Id.*, s. 25(1).

[33] *Id.*, s. 26(1)(a).

[34] *Id.*, s. 27(1).

[35] "Functioning of Medical Council of India" *PRS India*, *available at*: https://prsindia.org/report-summaries/functioning-medical-council-india (last visited on Mar. 4, 2020).

[36] Rohit, "Issues related to MCI - how to regulate medical colleges and doctors?" *PRS Blog*, Aug. 17, 2010, *available at*: https://www.prsindia.org/theprsblog/issues-related-mci-how-regulate-medical-colleges-and-doctors (last visited on Mar. 4, 2020).

[37] *Supra* note 15.

[38] *Ibid.*

Admittedly, a system wherein a majority of the regulatory body is elected creates apparent conflicts of interest. But as opposed to adopting a model that balances democratic requirements (through elections) and meritocratic appointments (through a transparent selection process), the NMC Act establishes an entirely bureaucratic system of appointments, wherein the Central Government gets a predominant voice in the constitution of the Commission (and its allied bodies).

The NMC consists of thirty-three members (a Chairperson, ten *ex officio* members, and twenty-two part-time members).[39] Section 5 of the NMC Act provides that the Chairperson, certain part-time members (in terms of Section 4(4)(a) of the NMC Act), and the Secretary of the NMC (in terms of Section 8 of the NMC Act) shall be appointed by the Central Government on the recommendation of the Search Committee.[40]

The primary concern here is that the Search Committee itself is almost entirely appointed by the Central Government. The Search Committee consists of seven members (two of whom are Central Government servants) and the remaining five are nominees of the Central Government.[41] Therefore, considerable doubts arise over the independence and neutrality of the Search Committee itself. And since the Search Committee is directly responsible for selecting key functionaries of the NMC (including the Chairperson), the scepticism regarding the independence of the Search Committee creeps into apprehensions over the impartiality of the NMC members appointed by such Committee.

In contrast, the Selection Committee constituted to appoint members of the Competition Commission of India ('CCI') comprises, among other members, the Chief Justice of India or her nominee.[42] The Chairman and other directors of the National Bank for Agriculture and Rural Development ('NABARD') are appointed by the Central Government in consultation with the Reserve Bank of India ('RBI').[43] Both the CCI and the NABARD are regulatory bodies, but the appointment process of their members is relatively more consultative and representative than that of the NMC.

Notably, several other members of the NMC are *ex officio* Government servants whose appointing as well as disciplinary authority is the Central Government.[44] This raises concerns over their autonomy as well.

The Indian political arena has seen an increased apprehension over the Central Government's control in appointing key functionaries in various constitutional and statutory bodies. The RBI has proposed that instead of the Central Government

[39] *Supra* note 6, s. 4(1).

[40] *Supra* note 27.

[41] *Supra* note 6, s. 5(1).

[42] The Competition Act, 2002 (Act 12 of 2003), s. 9(1)(a).

[43] The National Bank for Agriculture and Rural Development Act, 1981 (Act 61 of 1981), s. 6(2).

[44] "IMA Released Reply to FAQ of NMC Bill" *Medical Reporter Today*, Feb. 9, 2018, *available at*: https://medicalreportertoday.com/ima-released-reply-to-faq-of-nmc-bill/ (last visited on Mar. 4, 2020).

appointing Governors and Deputy Governors, they should be appointed by a collegium of experts comprising former RBI Governors, other prominent central bankers, and economists.[45]

The Law Commission in its 255th Report examined at length the appointment process of the members of the Election Commission of India ('ECI'). It was recommended that 'the appointment of Election Commissioners becomes a consultative process,' with the selection committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha, and the Chief Justice of India. Such a procedure was deemed 'imperative' to shield the Election Commissioners 'from executive interference'.[46]

Several factors underlie the need to keep our statutory and regulatory agencies free from the control of the political executive. First, political appointments undermine the principle of meritocracy. The political executive may be motivated by extraneous concerns, and may consequently appoint individuals not best suited for the position. Second, such appointments create a culture of reciprocity, where the appointees are more likely to comply with the wishes of the political executive, as opposed to making independent assessments of the best policies to pursue.[47] Further, pursuing partisan political interests harms the effectiveness and efficiency of regulatory agencies.[48]

Having an independent NMC is crucial to enable impartial decision-making for the betterment of medical education, healthcare infrastructure, and the profession of medicine. But the fact that the Central Government exercises considerable powers over the constitution of the NMC suggests that the Commission will lack requisite autonomy to take decisions free of the influence of the political executive. This may give rise to nepotism and the promotion of lackey culture that had infested the MCI.[49] But most significantly, this may hinder the growth of India's medical ecosystem.

At this stage, we must revisit the stipulation laid down by the NITI Aayog Committee: 'Regulators of highest standards of professional integrity and excellence must be appointed through an independent and a transparent selection process by a broad based Search cum Selection Committee.'[50]

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[45] Gayatri Nayak, "RBI union moots a Collegium of experts to appoint governors and deputy governors to ensure central bank autonomy and independence" *The Economic Times*, June 25, 2019, *available at*: https://economictimes.indiatimes.com/news/economy/policy/rbi-union-moots-collegium-to-select-governorsdeputy-governors/articleshow/69946007.cms?from=mdr (last visited on May 21, 2020).

[46] Law Commission of India, "255th Report on Electoral Reforms" (March, 2015).

[47] Bertram H. Raven, "The Bases of Power and the Power/Interaction Model of Interpersonal Influence" 8 *Analyses of Social Issues and Public Policy* 1 (2008).

[48] John Hudak and Grace Wallack, "Political appointees as barriers to government efficiency and effectiveness: A case study of inspectors general" *Brookings Centre for Effective Public Management* (2016), *available at*: https://www.brookings.edu/wp-content/uploads/2016/07/oig.pdf (last visited on May 21, 2020).

[49] Shah Alam Khan, "National Medical Council Act offers little change, brings in a host of new problems" *Indian Express,* Aug. 23, 2019, *available at*: https://indianexpress.com/article/opinion/columns/bad-prescription-national-medical-commission-bill-5918348/ (last visited on May 21, 2020)

[50] *Supra* note 15.

As discussed above, the criterion of 'independence' seems unsatisfied, given that the Search Committee consists entirely of Central Government affiliates. Furthermore, there is nothing in the text of the NMC Act which indicates that the selection process is 'transparent'. The procedure as detailed by the Act is as follows: the Central Government shall, within one month from the date of occurrence of any vacancy, make a reference to the Search Committee for filling up of the vacancy.[51] The Search Committee shall, consequently, recommend a panel of at least three names for filling up the said vacancy— having satisfied itself that such persons do not have any financial or other interests which are likely to prejudice their functions on the Commission.[52] *Prima facie*, there are no external checks on this process and no procedure has been laid down to make the Search Committee accountable for its recommendations. Furthermore, the NMC Act gives the Central Government (unchecked) discretion with respect to whom to appoint from the recommended panel.[53]

This process can be contrasted with the appointment process in the higher judiciary— the collegium system— which despite being heavily opaque,[54] still requires all consultations between the concerned parties (that is, all the Judges consulted) to be in writing and be a part of the official record. In the *Second Judges* Case, a nine-judge bench of the Supreme Court had opined: 'Expression of opinion in writing is an in-built check on exercise of the power, and ensures due circumspection.'[55]

It is submitted that, at the very least, similar provisions must be added to Section 5 of the NMC Act to ensure greater transparency in the process of selection of NMC members. All consultations among members of the Search Committee should be in writing. Furthermore, the Search Committee must submit in writing its reasons for recommending any name to fill up the vacancy that has arisen. The Central Government should also be required to record in writing its reasons for appointing such persons as it chooses to appoint from the panel of names recommended by the Search Committee. The reasons for such appointment should be published on the website of the Commission.

More importantly, the NMC should consist of more democratically elected members. We must note that the Board of Governors, that was constituted in supersession of the MCI in 2010 and continued to function till 2013, was an entirely nominated regulatory body. However, this model was not successful, and therefore the MCI had to be reconstituted in November 2013.[56] Thus, past precedent shows that a pre-dominantly

[51] *Supra* note 6, s. 5(2).

[52] *Id.*, ss. 5(3), 5(4).

[53] *Id.*, s. 5(1).

[54] PTI, "Collegium system of judges appointment opaque: Justice Chelameswar" *The Economic Times*, Oct. 16, 2015, *available at*: https://economictimes.indiatimes.com/news/politics-and-nation/collegium-system-of-judges-appointment-opaque-justice-chelameswar/articleshow/49419256.cms (last visited on May 21, 2020).

[55] *Supreme Court Advocates-on-Record Association* v. *Union of India*, (1993) 4 SCC 441.

[56] *Supra* note 13.

nominated/appointed regulatory body is not the ideal solution. On the other hand, we have examples of regulatory bodies that have a judicious balance of appointed and elected members. Councils like the Dental Council of India, Nursing Council of India, Homeopathy Council of India, etc. consist of various committees that have members from their general body, as well as members nominated by the Central Government, thus achieving a balanced representation and providing less scope for any favouritism or personal approach.[57]

In the current framework, the Central Government exercises disproportionate influence in the constitution of the NMC. Further, there are no statutory safeguards to make the appointment process transparent and accountable. It is submitted that the NMC Act is rightly criticised for being undemocratic.

V. THE (NOT SO) AUTONOMOUS BOARDS

The Act purports to set up four 'Autonomous' Boards, to address different functions such as medical education and qualifying examinations, medical ethics and practice, and accreditation of medical colleges.[58] These functions are crucial to the overall medical regulatory framework of the country. It is therefore safe to suggest that the independent functioning of these Boards is crucial to ensure effective fulfilment of their mandate and prevent undue political interference or pressure. However, contrary to their nomenclature, in their functioning these Boards are hardly 'autonomous'.

Section 16(1) of the NMC Act posits that these Boards shall function 'under the overall supervision of the [National Medical] Commission.' As demonstrated above, the independence of the NMC itself is uncertain. Sub-clause (2) provides that the Boards shall operate 'subject to the regulations made by the Commission.' As per Section 23(1) of the Act, the 'President of each Autonomous Board shall have such administrative and financial powers *as may be delegated* to it by the Commission' [emphasis supplied]. Therefore, *prima facie,* the Boards are subservient to the directions and regulations of the NMC.

The appointments to the Autonomous Boards are subject to the same criticisms that are levelled against appointments to the NMC. As per Section 18 of the NMC Act: 'The Central Government shall appoint the President and Members of the Autonomous Boards... on the recommendations made by the Search Committee.' As argued above, the Search Committee itself consists of Central Government appointees and affiliates. Furthermore, Section 56(2)(k) of the NMC Act grants influential power to the Central Government to make rules regulating the salary, allowances, and other terms and conditions of service of the President and members of the Autonomous Boards. The

[57] *Supra* note 44.
[58] *Supra* note 15.

Central Government has also been vested with the power to determine the allowances payable to the part-time members of the Boards.[59]

With the finances and functioning of the Boards being under the control of the NMC and the Central Government, serious misgivings arise about the degree of 'autonomy' exercised by the Autonomous Boards. The Boards have been described as 'mere extensions of the NMC, with the NMC even exercising appellate jurisdiction with respect to their decisions'.[60]

Most perniciously, both the NMC and the Autonomous Boards are bound by the directions issued by the Central Government on questions of policy.[61] The Central Government has the final authority to decide whether or not 'a question is one of policy'.[62] The Act, therefore, vests unchecked authority in the Central Government to dictate the functioning of both the NMC and the Autonomous Boards.

The Parliamentary Standing Committee in its report on the NMC Bill, 2017 had made pertinent recommendations to make the Autonomous Boards more accountable and non-partisan. The Committee had recommended that one member in each of the Autonomous Boards should be an elected member. It had also recommended that the President of the EMRB should be a retired judge of a High Court, so as to maintain impartiality in the regulation of professional medical conduct.[63] However, neither of these recommendations was adopted in the final NMC Act.

It is, therefore, submitted that the Autonomous Boards are likely to be bodies entirely subservient to the whims and diktats of the Central Government, and their ability to make independent decisions to meaningfully fulfil the functions assigned to them remains suspect.

VI. SIDELINING THE STATES

The Constitution envisages a pivotal role for the states in the healthcare structure of the country.

Entry 25 of the Concurrent List includes 'medical education'.[64] Entry 26 confers legislative power with respect to the medical profession.[65] As per Article 246(2) of the Constitution, the Parliament and State Legislatures are both competent to legislate on

[59] Ashwin Sapra, Jashaswi Ghosh, *et.al.*, "The National Medical Commission Act, 2019. A Look: Part 2" *India Corporate Law (A Cyril Amarchand Mangaldas Blog)*, Dec. 16, 2019, *available at*: https://corporate.cyrilamarchandblogs.com/2019/12/national-medical-commission-act-2019-2/ (last visited on Mar. 11, 2020).

[60] *Ibid.*

[61] *Supra* note 6, s. 45(1).

[62] *Id.*, s. 45(2).

[63] *Supra* note 13.

[64] The Constitution of India, seventh sch., list III, entry 25.

[65] *Id.*, entry 26.

subjects enlisted in the Concurrent List. Furthermore, 'public health and sanitation' is an exclusive entry in the State List.[66] This scheme of distribution of legislative powers posits that states have a crucial role to play in the overall medical and health-services framework.

Admittedly, Article 254(1) of the Constitution provides that in the event of a conflict between a Union and a State law, the former shall prevail over the latter. However, cooperative federalism is a long recognised judicial principle that requires the Union and the states to work in harmony towards achieving larger goals of good governance and overall development. As M.P. Jain argues: 'All governments have to appreciate the essential point that they are not independent but interdependent, that they should act not at cross-purposes but in union for the maximisation of the common good.'[67]

The Supreme Court, in the case of *Government of NCT of Delhi* v. *Union of India,*[68] endorsed a cooperative federal architecture for achieving coordination between the Union and the states. The Court observed that the Union and the state governments 'should express their readiness to achieve the common objective and work together for achieving it'.[69] It further held that 'both the Centre and the States must work within their spheres and not think of any encroachment. But in the context of exercise of authority within their spheres, there should be perception of mature statesmanship so that the constitutionally bestowed responsibilities are shared by them.'[70]

The Supreme Court has, therefore, extolled the value of the Union cooperating with the states towards achieving common aims as the true ethos of federalism. And yet, the NMC Act seems to dilute this very cooperation by making the states entirely unessential in the medical regulatory framework.

Section 11 of the NMC Act requires the Central Government to 'constitute an advisory body to be known as the Medical Advisory Council' ('MAC'). The MAC is to serve as the primary platform through which the states and union territories put forth their views and concerns before the NMC.[71] At first glance, the Act seems to provide a sufficient outlet to the states to provide their inputs and guide the functioning of the NMC. However, the MAC is tokenistic at best and redundant at worst. Crucially, none of the decisions of the MAC are binding on the NMC. The Act, in fact, does not even require the NMC to provide any reasons for ignoring or rejecting the decisions or recommendations of the MAC. The NMC is in no manner accountable to the MAC.

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[66] *Id.*, seventh sch., list II, entry 6.

[67] M.P. Jain, "Some Aspects of Indian Federalism", *available at*: https://www.zaoerv.de/28_1968/28_1968_2_a_301_364.pdf (last visited on May 19, 2020).

[68] (2018) 8 SCC 501.

[69] *Id.* at para. 119.

[70] *Ibid.*

[71] *Supra* note 6, s. 12(1).

Further, it is unclear if the composition of the MAC provides meaningful representation to the states. One major concern is that every member of the NMC will be an *ex officio* member of the MAC.[72] This undermines the MAC's ability to hold the NMC accountable, since a significant portion of MAC members would themselves belong to the NMC. This also presents the risk of the Advisory Council becoming an echo chamber of the NMC itself. In essence, having all members of the NMC on the advisory board defeats the purpose of having a separate Advisory Council.[73]

Additionally, the states have no representation in the four Autonomous Boards. This implies that the states will not have any role to play in policy issues relating to medical education planning, curriculum and course design, as well as approval of new medical institutes in the states. With respect to their participation in the NMC, the states would be represented in an '*ex officio* manner' through the Vice Chancellors of health universities of the state. As such, the discretion of the states to have their nominees is taken away.[74]

One of the major criticisms of the Act is that it is 'anti-poor'.[75] This criticism stems from Section 10(1)(i) of the Act which allows the NMC to regulate the fees for fifty percent of the seats in private medical institutions. This provision is in contrast with the current set-up wherein states have the autonomy to regulate fees for eighty-five percent of the seats in private colleges.[76] By reducing the number of seats for which fees can be regulated, the NMC Act paves way for further privatisation of medical education in the country. This will have the necessary effect of making medical education more inaccessible for the economically vulnerable sections of the country. Not only does this provision deny poor students access to quality medical education, it further forces doctors to practise in expensive hospitals and private clinics, so as to pay back their hefty educational loans.

Several regional parties, including allies of the Bharatiya Janata Party (BJP) such as the ruling Biju Janata Dal (BJD) of Odisha and the All India Anna Dravida Munnetra Kazhagam (AIADMK) have objected to the effacement of states' autonomy to regulate the fees for seats in private medical institutions.[77] The Government of Odisha in their submissions before the Parliamentary Standing Committee recommended an alternative framework for fee regulation under the NMC Act. It was suggested that 'the fee for 85% of the seats must be regulated by the States and the fee for remaining 15% can be decided

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[72] *Id.*, s. 11(2)(b).

[73] Shamika Ravi, Dhruv Gupta, *et.al.*, "Restructuring the Medical Council of India" *Brookings India Report*, *available at*: https://www.brookings.edu/wp-content/uploads/2017/08/mci-impact-series-paper.pdf (last visited on May 21, 2020).

[74] *Supra* note 44.

[75] PTI, "NMC Bill in present form is anti-poor: Indian Medical Association to Parliamentary panel" *The New Indian Express*, Jan. 25, 2018, *available at:* https://www.newindianexpress.com/nation/2018/jan/25/nmc-bill-in-present-form-is-anti-poor-indian-medical-association-to-parliamentary-panel-1762936.html (last visited on May 21, 2020).

[76] *Supra* note 9.

[77] *Ibid.*

by a body authorized by the UGC.'[78] The Parliamentary Standing Committee itself noted that, in status quo, separate State Acts provide a well-defined process to regulate the fees charged by the private medical colleges. The Committee recommended that 'the existing fee regulatory mechanism for private medical colleges by the States to protect their rights to regulate fees, should not be diluted.'[79] However, the given recommendations were not adopted in the final NMC Act.

The powers of the states are further effaced through Section 46 of the NMC Act, which constitutes a severe attack on the ethos of federalism. This provision lays down that 'The Central Government may give such directions, as it may deem necessary, to a State Government for carrying out all or any of the provisions of this Act and the State Government shall comply with such directions.' It is submitted that this provision is too broad as it does not prescribe any appropriate conditions under which the Central Government can issue such binding directions. Further, it does not provide any discretion to the state governments to assess whether or not such directions are appropriate; they are simply constrained to comply. In the landmark judgment of *S.R. Bommai* v. *Union of India*, Reddy J. had observed: 'The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis–à–vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers.'[80] It is submitted that contrary to the mandate of this judgment and the constitutional tenet of federalism, the NMC Act reduces states to 'mere appendages of the Centre' by conferring broad and unrestricted powers on the Central Government to ride roughshod over the states.

Similarly, draconian powers are conferred by Section 55 of the Act, which allows the Central Government to supersede the NMC (in which case all the members of the Commission shall have to vacate their offices, and all powers of the Commission shall be exercised by persons appointed by the Central Government), if the Commission persistently refuses to comply with any direction issued by the Central Government under the Act. It is submitted that such powers are disproportionate and liable to abuse. As such, this would render the NMC an instrument of pushing the political and economic agenda of the government of the day in the field of health, rather than primarily being an instrument for ensuring the highest standards in medical practice, ethics and morality.[81]

[78] *Supra* note 13.
[79] *Ibid.*
[80] (1994) 3 SCC 1.
[81] *Supra* note 13.

VII. SEPARATION OF POWERS

Article 50 of the Indian Constitution embodies 'separation of judiciary from executive' as a Directive Principle of State Policy.[82] In *State of U.P.* v. *Jeet S. Bisht,* the Supreme Court noted: 'It is true that there is no rigid separation of powers under our Constitution but there is broad separation of powers, and it not proper for one organ of the State to encroach into the domain of others.'[83] Generally speaking then, there is a constitutional and judicial basis to suggest that different organs of the State must perform separate functions, and it is inappropriate for any organ to appropriate the functions meant to be performed by another.

In this context, certain provisions of the NMC Act seem to disturb this careful balance of separation of powers, by vesting judicial authority in the executive. There are several provisions of the Act that refer to either the NMC or the Central Government as an appellate authority. As per Section 35 of the Act, any university or medical institution that seeks recognition for their medical qualification must apply to the UGMEB or the PGMEB, as the case may be. If the requisite Board does not grant recognition to a medical qualification, the university or the medical institution can file an appeal before the NMC.[84] Further, if the NMC decides not to grant recognition, or fails to adjudicate on the appeal within a period of two months, then the university or the medical institution concerned can prefer a second appeal to the Central Government.[85] Even Section 9(6) of the Act lays down that persons aggrieved by the decisions of the NMC can prefer an appeal to the Central Government.[86]

The NMC Act therefore presents a clear violation of longstanding principles of separation of powers by allowing non-judicial bodies to perform adjudicatory functions. This problem becomes especially pernicious with respect to disputes relating to ethics and misconduct in medical practice, which certainly require judicial expertise. It is unclear why the NMC Act seeks to contravene established principles of judicial review. However, it is submitted that consistent with past precedent laid down by the Supreme Court, the judiciary would still have the powers to review adjudicatory decisions taken by the NMC or the Central Government under this Act. The Supreme Court has construed Paragraph 6(1) of the Tenth Schedule to the Constitution—which sought to impart finality to the decision of the Speaker/Chairman with respect to the disqualification of a member of a House on the ground of defection—to mean that the finality '[did] not detract from or abrogate judicial review of the decision under Articles 136, 226, and 227 of the Constitution

[82] The Constitution of India, art. 50.
[83] (2007) 6 SCC 586.
[84] *Supra* note 6, s. 35(5).
[85] *Id.*, s. 35(7).
[86] *Id.*, s. 9(6). Also, see The National Medical Commission Act, 2019, ss. 22(3), 28(6), 36(3).

insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned'.[87]

The current framework under the NMC Act is also inconsistent with international best practices. In the UK, the General Medical Council ('GMC') serves as the regulator for medical education and practice. When the GMC receives complaints with respect to ethical misconduct on behalf of medical practitioners, it is required to conduct an initial documentary investigation in the matter, following which it forwards the complaint to the Tribunal. This Tribunal is a judicial body independent of the GMC. The final disciplinary action is decided by the Tribunal.[88] In Norway, the Appellate Board for Health Personnel is an independent body consisting of three members of the legal profession, three members with a background as health professionals, and one lay representative.[89] Therefore, it can be observed that other countries have adopted a framework wherein the adjudicatory process is independent of the overall medical regulatory body. This is crucial to ensure fairness and impartiality in the adjudication process.

Even the Parliamentary Standing Committee was cognisant of the harms of vesting judicial functions in the Central Government. The Committee explicitly noted that 'giving the appellate jurisdiction to the Central Government does not fit into the constitutional provision for separation of powers'.[90] The Committee, therefore, recommended the constitution of a Medical Appellate Tribunal—comprising a Chairperson, who would be a sitting or retired Judge of the Supreme Court or a Chief Justice of a High Court, and two other members—to have appellate jurisdiction over the decisions taken by the Commission.[91] This provision, again, did not find a place in the final text of the NMC Act.

The Act, as it currently stands, significantly undermines the constitutional ethos of separation of powers by enabling the executive to encroach upon judicial functions. It is submitted that provisions of the Act, which stipulate such a framework, should be struck down as unconstitutional.

VIII. Conclusion

The NMC Act, indisputably brings about a fundamental shift in the medical regulatory framework of India. However, this shift occasions grave constitutional concerns. Through this paper, the author has argued that the NMC Act patently gives too much authority to the Central Government, and in doing so, undermines essential constitutional values.

[87] *Kihoto Hollohan* v. *Zachillhu*, AIR 1993 SC 412.
[88] *Supra* note 24.
[89] The Norway Health Personnel Act, 1999, s. 69.
[90] *Supra* note 13.
[91] *Ibid.*

The Act marks a shift from the elected MCI to the nominated NMC. While the MCI model, which was predominantly electoral, gave rise to fraudulent practices and corruption, the NMC framework creates an overtly bureaucratic body, with most of its members being appointed by the Central Government through a non-transparent process. The NMC fails to have a representative character, insofar as it lacks a judicious mix of elected and nominated members. The remedy lies in amending the Act to include more democratic representation, and to introduce stricter checks and balances in the appointment process.

Despite 'public health' being a state legislative matter, the NMC Act makes the states almost irrelevant in the medical and health-services framework. States are represented in the NMC only in an '*ex officio* manner' through the Vice Chancellors of health universities of the states. Further, the states have no representation in the four Autonomous Boards. The MAC, which is meant to enable the states to put forth their views and concerns before the NMC, is by design powerless. Moreover, all directions issued by the Central Government bind the state governments. The Act, essentially, subverts the spirit of cooperative federalism.

The NMC Act also contravenes the well-established principle of separation of powers, by vesting judicial authority in the executive. The same falls foul of our constitutional mandate, and is inconsistent with international best practices. It is recommended that a separate provision for a Medical Appellate Tribunal be incorporated in the Act, so as to separate the regulatory and adjudicatory functions of the NMC.

In passing the NMC Bill, the Parliament did not pay heed to the recommendations made by medical practitioners, policy-makers, and even the Parliamentary Standing Committee. The Bill was passed amidst staunch opposition from crucial stakeholders. It is now for the judiciary to subject the provisions of the NMC Act to the test of long-standing constitutional ethos, so as to prevent the apex medical regulatory body from falling prey to the impulses of the political executive.

EXAMINING THE LEGAL CONTOURS AND FALLOUTS OF THE DNA TECHNOLOGY (USE AND APPLICATION) REGULATION BILL, 2019

Ananaya Agrawal[*]

As India's first legislation on DNA profiling, the DNA Technology (Use and Application) Regulation Bill, 2019 attempts to resolve several missing gaps in the escalating use of DNA technology in India's governance and legal framework. The DNA Bill envisions applications ranging from establishing the identity of the people associated with crimes such as the accused, the witnesses, and the victims to resolving cases of missing persons, civil disputes over parentage and immigration, and quite broadly, in any other area the state may choose to apply such obtrusive technology. In its bid to be a comprehensive, 'go-to' legislation on DNA profiling, the Bill stretches itself thin and misses the key aspects that it was meant to tap. Despite being touted as a statute to enable efficient use of DNA technology in criminal law investigation, there appears a prima facie clash in the Bill's endeavours, in so far as it also makes provisions for the application of the technology in broader civil law issues that are closely related to the identity of a person. Further, the Bill legislates on data collection, profiling, and use without acknowledging the existing jurisprudence and legislations that form India's position on issues such as citizens' privacy, individual autonomy, and data ownership. Thus, the Bill has ruinous potential to upheave the balance between citizen's rights vis-à-vis the state. This article shall examine the legality of the Bill along the contours of the dichotomy between considerations for criminal and civil law, a rights-based privacy jurisprudence, and power relations between the state and citizens in the Indian democracy.

I. INTRODUCTION

Deoxyribonucleic Acid ('DNA') is an individual's genetic 'code' containing all the biological information needed for building and sustaining the body. Human beings share

* The author is a second-year B.A. LL.B. (Hons.) student at the National Law University, Delhi.

99.9% of their DNA but witness more than 3 million variations for the remaining 0.1%.[1] Each individual's DNA, except for identical twins, is unique thereby making it a useful biotechnology for governance and judicial procedures relating to the identification of individuals. Though DNA evidence has been used by India's legal system since 1989,[2] the most prominent example being Section 53A in the Code of Criminal Procedure, 1973 ('CrPC'), a legislation on profiling and storing DNA samples for future use has been absent as compared to other forensic technology such as blood samples and biometrics.

Cognizant of advances in DNA technology and its growing use[3] around the world, governments in India have been formulating a draft legislation ever since the Department of Biotechnology ('DBT') first posited the idea in 2003. The DBT established a DNA Profiling Advisory Committee, tasked with developing the 'Human DNA Profiling Bill' between 2007 and 2012.[4] In 2013, an Expert Committee was constituted to deliberate on issues of privacy and individual autonomy.[5] The draft Bill was revised and referred to the Law Commission of India which suggested enacting the legislation after making certain recommendations.[6] The Bill, in its present form, has been pending in the Parliament since 2017 and is under the scrutiny of a Parliamentary Standing Committee constituted in October 2019.[7]

The DNA Technology (Use and Application) Regulation Bill ('the Bill'), 2019 seeks to leverage DNA technology in the criminal justice system by creating 'DNA Data Banks'[8] at national and state levels to establish the identity of the accused, suspects, under-trials, witnesses and victims involved in crimes.[9] The Bill also provides for employing DNA to identify unidentified deceased persons, missing persons and resolving civil disputes over parentage, immigration, organ transplantation etc.[10] The DNA profiles collected for an

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[1] GNN, "Genome Variations" *Genome News Network*, Jan. 15, 2013, *available at*: http://www.genomenewsnetwork.org/resources/whats_a_genome/Chp4_1.shtml (last visited on May 24, 2020).

[2] Dr. M.W. Pandit and Dr. Lalji Singh, "DNA Testing, Evidence Act and Expert Witness" 99 *Indian Police Journal* (2000). Also, see Mohd. Hasan Zaidi and Yashpal Singh, *DNA Tests in Criminal Investigation, Trial and Paternity Disputes*, 36 (2006).

[3] M. Wallace, A.R. Jackson, *et.al.*, "Forensic DNA Databases: Ethical and Legal Standards: A Global Review" 4(3) *Egyptian Journal of Forensic Sciences* 60 (2014).

[4] Elonnai Hickok, "The DNA Profiling Bill 2007 and Privacy" *Centre for Internet and Society*, Apr. 25, 2011, *available at*: https://cis-india.org/internet-governance/blog/privacy/dna-profiling-bill (last visited on May 24, 2020).

[5] Vasudevan Mukunth, "Modi Wants the DNA Profiling Bill Passed Right Away. Here's Why It Shouldn't Be" *TheWire*, June 26, 2015, *available at*: https://thewire.in/health/modi-wants-the-dna-profiling-bill-passed-right-away-heres-why-it-shouldnt-be (last visited on May 24, 2020).

[6] Law Commission of India, 27[ist] Report on Human DNA Profiling- A Draft Bill for the Use and Regulation of DNA-Based Technology 42-44 (July, 2017).

[7] The DNA Technology (Use and Application) Regulation Bill, 2019, *available at*: https://www.prsindia.org/billtrack/dna-technology-use-and-application-regulation-bill-2019 (last visited on May 24, 2020).

[8] DNA Technology (Use and Application) Regulation Bill, 2019, cl. 25.

[9] See long title of the DNA Technology (Use and Application) Regulation Bill, 2019.

[10] *Id.*, Sch. Part B, C.

investigation or dispute will be listed in separate indexes for missing persons,[11] offenders,[12] suspects or undertrials[13] and unknown deceased persons.[14] The Bill's broad objective is to create an institutional mechanism that will employ DNA analysis to identify individuals for the administration of justice in various domains of criminal and civil law. Through regulation, it also seeks to prevent misuse and harm to individuals and society.[15]

At the outset, it is pertinent to make a strict differentiation between justifications for using DNA technology for criminal and civil law purposes. Criminal investigation curtails an individual's privacy rights to a greater degree and enforces harsher regulation of the accused's liberties than civil law typically does. At the same time, the former also imposes a higher burden of proof i.e. 'beyond reasonable doubt' instead of 'preponderance of probabilities'.[16]

Further, the objectives of a profiling database are materially different from existing criminal legislations on the use of DNA technology such as the CrPC and Indian Evidence Act, 1872. The nature of profiling DNA inevitably shifts the mantle of power in the hands of the state by providing more permanent access to citizens' genetic data. It also raises questions on the reliability of DNA evidence, the capability of the system to efficiently exploit the technology, and the problems of creating a population of suspects in a restorative criminal justice model.

Lastly, an individual's DNA is an identifier so intrinsic to their physical existence and activity, and so the Bill naturally raises concerns related to privacy and human rights by providing for a scheme of categorising genetic data of populations into indexes relating to the crime scene, offenders, suspects, missing persons etc.[17] Studies have posited that DNA profiling systems need to be evaluated in consideration of the individuals included in the database, consent for the taking and specific use of samples, degree of connection of the subject with the crime, extent of information revealed from the analysis, and duration of storing the data.[18]

This paper aims to study the Bill through four prongs: first, it will compare the provisions relating to civil law with that of criminal law to analyse whether the Bill has adequately delineated the standard of rights, ethics, and state responsibility to be applied for population groups involved with the two divergent fields of law. Next, it will consider

[11] *Id.*, cl. 2(xvi).

[12] *Id.*, cl. 2(xviii).

[13] *Id.*, cl. 2(xxv).

[14] *Id.*, cl. 2(xxvi).

[15] *Id.*, Statement of Objects and Reasons.

[16] Government of India, Justice V.S. Malimath Committee on Reforms of Criminal Justice System, Report Volume I (Ministry of Home Affairs, 2003).

[17] *Supra* note 9, cl. 2(iv),(xvi),(xviii) for details of each index.

[18] Margarita Guillén, María Victoria Lareu *et.al.*, "Ethical-legal problems of DNA databases in criminal investigation" 26 *Journal of Medical Ethics* 267 (2000).

the impact of the envisioned profiling system on criminal justice administration in light of the equality of treatment, fallacies in forensic science, and rehabilitation. Then, it will evaluate the extent of the Bill's integration with established principles of privacy law in India, and highlight key fallouts, especially considering the Justice A.P. Shah Committee report,[19] the *Puttaswamy*[20] judgement, and the Personal Data Protection Bill, 2019. Lastly, it will discuss the Bill's surveillance model using Bentham's Panopticon, and Foucault's notion of power and knowledge.

II. CONTRADICTORY APPROACH OF THE BILL: PLACING CIVIL LAW IN PERIL

Primarily, there appears to be a serious clash in what the Bill endeavours to achieve. It legislates on the use of advanced DNA technology for criminal investigation as well as wishes to provide a mechanism for using the technology to determine broader civil law issues relating to the identity of a person. In its attempt to encompass all kinds of individual identification through genetic testing, the Bill creates four kinds of cases: purely criminal cases for offences in the IPC falling under Part A of the Bill's Schedule; offences under special law under Part B, relating to the moral fabric of society, such as domestic abuse and immoral trafficking; purely civil cases like parentage and organ transplantation under Part C; and cases of missing or unidentified dead persons under Part D, which could fall under either civil or criminal law.

The approach is contradictory insofar as the Bill treats matters relating to criminal law on a par with those of civil law. By doing so, it ignores the difference in rights and ethics afforded to individuals in both areas.[21] What may be a reasonable and proportionate reduction of an individual's fundamental rights in the domain of criminal law, may not be regarded so in disputes of civil law.[22]

Further, the objectives of the legislature behind criminal and civil legislation, especially on the regulation of DNA technology, do not come from the same standpoint. Civil legislation will focus more on applying DNA technology for resolving citizen's disputes and promoting access to justice. It will also have stronger safeguards against intrusion by state and attempt to secure public trust. On the other hand, criminal legislation will seek to make the investigation more 'scientific' so that not only can a case be fast-tracked to

[19] Government of India, Justice A.P. Shah Group of Experts on Privacy, Report of the Group of Experts on Privacy (Planning Commission, 2012).

[20] *Justice K. S. Puttaswamy (Retd.)* v. *Union of India*, (2017) 10 SCC 1.

[21] Robin Williams and Wienroth, "Social and Ethical Aspects of Forensic Genetics: A Critical Review" 29(2) *Forensic Science Review* 156 (2017).

[22] *Id.* at 148.

justice, but also 'risky' populations such as repeat offenders can be mapped on a database for crime control and social order.[23]

This inherent conflict is *prima facie* revealed from the Act's 'definitions' clause itself, wherein Clause 2(2) states that any word left undefined shall have its meaning as assigned under the trifecta of Indian Criminal Law, namely, the Indian Penal Code, 1860 ('IPC'), the Code of Criminal Procedure, 1973 ('CrPC') and the Indian Evidence Act, 1872.

Moreover, the four parts of the Bill's Schedule have not been delineated clearly. Part B dealing with offences under special laws has considerable overlapping with issues of civil law under Part C. For instance, the Transplantation of Human Organs Act, 1994[24] and the Surrogacy Regulation Bill, 2019[25] are placed in Part C despite stipulating criminal punishments similar to or more severe than those under the Motor Vehicles Act, 1988[26] or the Protection of Civil Rights Act, 1955.[27] Since special laws seek to repair and protect the moral fabric of society, a more intelligible delimitation is needed. The provisions of the special law itself should be separated into dichotomous categories of civil and criminal disputes. The Bill's approach of lumping all disputes relating to a certain issue like surrogacy or organ transplantation is incongruous.

Further, the procedure for obtaining DNA samples in civil law cases is completely missing from the Bill. This creates ambiguity on the standard of consent,[28] the system of appeals, and the process for retention or removal of genetic records.[29] Pertinently, Indian courts are more sympathetic towards the use of DNA in civil law cases where the ethical ramifications of testing are severe. In a series of paternity dispute cases, the Supreme Court has not only held that blood sampling for DNA testing of paternity cannot be forced upon an unwilling subject,[30] but also that the courts should take into account the consequences of such testing on the child's and mother's wellbeing, that the husband has a high burden of proof if he attempts to refute the presumption of legitimacy made under Section 112 of the Indian Evidence Act,[31] and that a direction for such testing must be avoided by the court as far as possible so that the child's legitimacy in society is not put in peril.[32]

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[23] Carole McCartney, "Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach" 12 *Critical Criminology* 157 (2004).

[24] The Transplantation of Human Organs Act, 1994 (Act 42 of 1994), s.18-22.

[25] The Surrogacy Regulation Bill, 2019, s.36-42.

[26] The Motor Vehicles Act, 1988 (Act 59 of 1988), s.177-200.

[27] The Protection of Civil Rights Act, 1955 (Act 22 of 1955), s.3-7A.

[28] See DNA Technology (Use and Application) Regulation Bill, 2019, cls.21,22,23 for standard of consent relating to criminal cases and missing persons.

[29] *Id.*, cl. 31 for retention and removal of records relating to criminal cases and missing persons.

[30] *Goutam Kundu* v. *State of West Bengal*, AIR 1993 SC 2295.

[31] *Kanti Devi* v. *Poshi Ram*, AIR 2001 SC 2226.

[32] *Nandlal Basudev Badwaik* v. *Lata Nandlal Badwaik*, AIR 2014 SC 932.

In *Bhabhani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women,*[33] the Supreme Court held that where a child's paternity is in question before the court, using DNA technology becomes a delicate issue due to which courts need to do a 'balancing of interests' regarding an individual's right to privacy and the prejudicial impact on an innocent child. Ordering a DNA test should not be 'routine' or as a 'matter of course' but rather it is to be employed only when it fulfils the test of eminent need. This test is satisfied when the material of record establishes a strong *prima facie* case suggesting an 'eminent need' for directing a DNA test.[34] Even in doing so, the courts should consider the pros and cons of such a test.[35] Similarly, a prior case, *Sharda* v. *Dharampal,*[36] held that matrimonial courts can order DNA tests only after a strong *prima facie* case is made out and the applicant has placed sufficient material before the court; the same is not to be a mechanical process.

Where the pre-existing jurisprudence on ethics of using DNA technology in Indian civil law places such high premium over consent, wellbeing and relative sensitivity of the citizens involved on both sides, incorporating civil issues within the legislative framework is a precarious move that threatens these pre-existing safeguards. The present DNA Bill is devoid of considerations such as the 'test of eminent need', 'balancing of interests', and family members' wellbeing. Further, it leaves these protections for citizens open to challenge due to ambiguous provisions of a more recent special law fully regulating the use of DNA technology.

Lastly, the Bill fails to specifically punish illegally obtaining and/or testing DNA samples.[37] Even if a penalty was to be read into its residuary punishment clause, Clause 50, in the absence of any indication to the contrary, it appears that the punishments for breach in civil cases and criminal cases would be the same even though the nature of the offence may be different in both cases. For instance, the breach in criminal cases may involve additional charges of obstructing the criminal justice machinery, destruction of evidence, aiding a criminal and so on, whereas a breach in a civil case could include tortious wrongs, like negligence, as well as criminal offences, such as theft. Here too, the Bill does not differentiate between the nature of offences in terms of the ramifications of a breach of data.

The glaring lack of delimitation in the treatment of civil and criminal cases not only militates against the legality of the Bill, but also violates ethics of forensic science for justice administration.

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[33] AIR 2010 SC 2851.
[34] *Narayan Dutt Tiwari* v. *Rohit Shekhar & Another*, (2012) 12 SCC 554.
[35] *Supra* note 33.
[36] (2003) 4 SCC 493.
[37] *Supra* note 4.

III. Tracing Fault-lines in Criminal Justice Administration: Investigation, Trial and Rehabilitation

As per *Surendra Kolli* v. *State of U.P.,*[38] biometric evidence such as DNA samples are admissible evidence under Section 27 of the Indian Evidence Act, 1872. Similarly, Section 53A of CrPC stipulates collecting DNA samples from the accused of rape crimes for purposes of DNA profiling. Hence, the use of DNA technology for criminal investigation is not a new feature of this Bill. Rather the objective of the Bill is a kind of bio-surveillance which will promote genetic identification of individuals as potential suspects as well as the elimination of the innocent during an investigation. Further, such genetic identifiers will be categorised and stored in a searchable database for future investigations.[39]

Here, bio-surveillance is the profiling and identification of individuals enabled by developments in molecular biology technologies that permit the 'isolation and analysis' of the unique components in human DNA.[40] Like other tools of reconstructive identification,[41] DNA profiling aims not towards correcting the behaviour of criminals but by demarcating them from the general population and managing their actions through 'assured detection'.[42] This is because the value of profiling DNA from individuals onto a database is that it will help solve future crimes or unresolved cases (where the same criminal has committed different crimes).[43] There is also the idea that 'career criminals' will be deterred from reoffending after being released as they would know that chances of detection have increased.[44]

Hence, a result of the DNA database will be creating a 'society of suspects'[45] as by retaining someone's genetic information in the offenders' and suspects' indexes, is to treat them as a potential suspect for future crimes.[46] Pertinently, this aspect of the Bill leads to the erosion of individualised suspicion[47] and a 'decline of innocence'[48] as now categories

[38] (2011) 4 SCC 80.

[39] Robin Williams and Paul Johnson, "Circuits of Surveillance" 2(1) *Surveillance & Society* 3 (2004).

[40] *Id.* at 2.

[41] *Id.* at 4.

[42] *Supra* note 39. Also, see David Lyon, "Bentham's Panopticon: From Moral Architecture to Electronic Surveillance" 98(3) *Queen's Quarterly* (1991).

[43] Forensic Genetic Policy Initiative, *Establishing Best Practice for Forensic DNA Databases* 8 (Sept., 2017).

[44] Hudson, "DNA Profiling" *New Law Journal* 127 (1997).

[45] Carole McCartney, "Forensic DNA Sampling and the England and Wales National DNA Database: A Skeptical Approach" 12 *Critical Criminology* 172 (2004).

[46] *Supra* note 43.

[47] Gary Marx, "What's New about the New surveillance?" 1(1) *Surveillance and Society* 17 (2002).

[48] Richard Ericson and Kevin Haggarty, *Policing the Risk Society* (Oxford University Press, Oxford, 1997).

of citizens have been created. These citizens are presumed guilty until the evidence proves otherwise.[49]

The creation of a DNA database is a form of 'scientification' of investigation[50] which takes an expansionary approach towards the police's powers to collect, retain and use genetic samples. Although the utilitarian crime control model is justified on the grounds of bringing efficiency to the investigation, this efficiency is elusive and difficult to reach.[51]

Further, the Bill does not envision safeguards for voluntary consent unlike under Section 164 of the CrPC which requires the Magistrate to ensure free and voluntary confession by accused.[52] Rather, the principle of consent is placed at such a low pedestal that the investigating authority need not obtain voluntary consent for the sampling of DNA and the same can be overridden by an order of the Magistrate under Clause 21(2) for the accused, Clause 22(2) for children and people of unsound mind, and Clause 23(2) for victims, witnesses, and relatives of missing or unidentified deceased persons. Such overriding of individual consent for the collection and use of sensitive personal information is not only harmful to the accused's fair trial rights but also injures interests of victims and witnesses as stakeholders in the criminal justice system. The same is contrary to established jurisprudence and statutory principles in Indian criminal law which place a premium on protecting the accused's rights[53] as well as fostering a considerate and secure environment for the victim.[54]

When it comes to crimes punishable with more than seven years of imprisonment, the individual's consent is not even sought. This differentiation based on the term of punishment has been criticised as the crimes with higher punishment may not see the greatest recidivism. Moreover, cataloguing offenders of serious crimes is not the best when it comes to building a reliable DNA database.[55] It may be alternatively argued that consent is denied for serious crimes because of their deleterious impact on society and the need to ensure quick justice, however the same denies the arrested persons a fair presumption of innocence at the pre-trial stage. Further, it offers scope for mischief since police

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[49] *Ibid.*

[50] Richard V. Ericson and Clifford D. Shearing, "The Scientification of Police Work" in Gernot Böhme and Nico Stehr (eds.), *The Knowledge Society — The Growing Impact of Scientific Knowledge on Social Relations* 129 (Reidel Publishing Company, Dordrecht,1986).

[51] *Supra* note 21 at 148.

[52] *Sanatan* v. *State*, AIR 1953 Orissa 149. Also, see *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569; *Sarwan Singh Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *State of Maharashtra* v. *Damu*, AIR 2000 SC 1691; *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600.

[53] *Sakiri Vasu* v. *State of UP*, (2008) 2 SCC 409; *DK Basu* v. *State of West Bengal*, 1997 1 SCC 416; *Joginder Kumar* v. *State of UP*, AIR 1994 SC 1349.

[54] Bharat Chugh, "Role of a Magistrate in Investigation Process" *Bharat Chugh - Insights On Law, Life And Literature*, Feb. 14, 2017, *available at*: https://bharatchugh.in/2017/02/14/role-of-a-magistrate-in-a-criminal-investigation/ for the judiciary's role in protecting interests of victims and witnesses, especially those falling into vulnerable categories such as children and victims of sexual assault and trauma.

[55] *Supra* note 18 at 269.

authorities may resort to framing more serious charges in the pre-trial stage to escape the consent requirement.

Herein, there is little scope for the Magistrate to act as a supervisory authority and prevent police abuse since the entire process will then place before any judicial authority even takes cognizance of the case. Clause 34(a), DNA Technology (Use and Application) Regulation Bill, 2019 provides that the DNA samples and profiles will be available to law enforcement authorities for identification of persons and investigation of criminal cases. Therefore, both the lack of individual consent required for offences punishable with imprisonment of seven years or more, as well as the permission to collect and employ sensitive genetic data at any stage of the trial, work in tandem to militate against established safeguards in the criminal justice administration system. To rectify these defects, the Bill must clearly specify at what stage the investigating authority is allowed to collect DNA samples, and require the Magistrate to grant permission only when the investigating officer has established the need for collecting such samples.

Lastly, the Bill denies stakeholder of a criminal investigation i.e. the guilty, the victims and the witnesses the 'right to be forgotten' by not providing for automatic deletion of their profile after conviction. Rather, information under the crime scene index will be retained as per Clause 31(1). Removal of information of suspects and undertrials, under Clause 31(2) and (3), is subject to the DNA Director's assent to the individual's request. By denying the right to remove DNA information for convicts after completion of their sentence or as a penitentiary benefit,[56] the Bill also discourages rehabilitative justice.

IV. COMPARING THE BILL WITH EXISTING AUTHORITY ON PRIVACY LAW

In the nine-judge bench decision of *Justice K. S. Puttaswamy (Retd.)* v. *Union Of India*,[57] the right to privacy was affirmed as a foundational value of the Constitution, a fundamental right enforceable under Part III of the Constitution. In doing so, the court overturned prior cases of *M.P. Sharma* v. *Satish Chandra*[58] and *Kharak Singh* v. *State of Uttar Pradesh*,[59] and affirmed longstanding jurisprudence subsequent to these cases that have held privacy to be a fundamental right.[60]

The judgment laid down three facets of individual privacy, namely, privacy over personal information, privacy of the physical body, and privacy over 'fundamental personal

[56] *Ibid*.

[57] *Supra* note 20.

[58] 1954 AIR 300.

[59] 1963 AIR 1295.

[60] *Supra* note 20 at 369. Part H of Justice D.Y. Chandrachud's judgment which adumbrates and analyses these precedents.

choices'.[61] This article will discuss privacy over personal information or data privacy, and privacy of the physical body in the following sub-sections of Part IV, whereas privacy over fundamental choices will be studied with a discussion on surveillance by the state in Part-V.

A. Right to Data and Informational Privacy

At the outset, it is critical to keep in mind that DNA or genetic data is a form of 'sensitive personal data'[62] and hence the threshold of its protection against misuse[63] and inviolability of citizens' consent[64] is heightened in comparison to other forms of personal data.

1. Violation of Justice AP Shah Committee Report's Principles

A Group of Experts on Privacy under the chairmanship of Justice A P Shah was constituted in 2011 to study privacy laws of various countries and make recommendations for a draft bill on privacy in India.[65] The Committee submitted its report in 2012 and recommended the adoption of nine national privacy principles in any legislation or government scheme that accumulates and uses citizens' personal data in India.[66] These principles have been derived from various statutes on privacy from around the world and been modified to suit Indian conditions. Apart from general global acceptance, the 'privacy principles' have been referenced as the bedrock of any privacy law in India.[67]

a) Notice: The person or organization collecting information must give a comprehensible notice to all individuals before taking their information including details such as nature of the information collected, its purpose and use, security safeguards against misuse etc.
b) Choice and Consent: The data collector must take an individual's consent only after giving notice of their informational practices. Further, the individual must have a choice to revoke consent any time after it was granted.
c) Collection Limitation: The data collector shall only collect such information as is necessary for the purposes of such collection. These purposes must be notified to the individual and information must be collected only after obtaining the individual's consent.

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[61] *Supra* note 20 at 598.

[62] Personal Data Protection Bill, 2019, s. 3(35)(viii).

[63] Section 87(2)(ob) of the Information Technology Act, 2000 (Act 21 of 2000) provides that the Central Government shall make rules for special security practices and procedures of sensitive personal data or information under section 43A of the Information Technology Act, 2000.

[64] *Id.*, s.11(3).

[65] Jatin Gandhi, "Srikrishna committee report on data protection and privacy by May-end" *Hindustan Times*, Mar. 27, 2018, *available at*: https://www.hindustantimes.com/india-news/srikrishna-committee-report-on-data-protection-and-privacy-by-may-end/story-KYTHD6DxcgkA9VwtZ24OrN.html (last visited on July 12, 2020).

[66] *Supra* note 19.

[67] *Supra* note 20 at 634.

d) Purpose Limitation: The data collector shall take and use the information only for the purposes stated in the notice. Any change in purpose must be notified to the individual.
e) Access and Correction: The individual shall have the right to access the information stored by the data collector, to obtain a copy of such information and to seek correction, amendment or deletion of inaccurate information.
f) Disclosure of Information: The data collector shall not disclose information to third parties without providing notice and obtaining informed consent of the individual. Further, the data collector shall not publish or make public the individual's private information.
g) Security: The data collector is responsible for reasonably securing the information collected by them or in their custody against loss, unauthorized access or disclosure, processing, tampering or manipulating and destruction.
h) Openness: The data collectors must be transparent and open about their policies, procedures and practices in a manner that is accessible and intelligible to all persons.
i) Accountability: The data collectors should be held accountable for complying with the safeguards set by the privacy principles by taking measures inclusive of training and education, external and internal audits and complying with general or specific orders of regulatory bodies such as the Privacy Commissioner.

The DNA Bill misses out compliance with these principles on multiple counts. Firstly, the Bill has an expansive ambit and the state may choose to apply it in any area, other than those mentioned, as well.[68] Clause 34 of the Bill allows the use of DNA information at any stage of a criminal trial, for any kind of civil matter ranging from immigration to establishing parentage, and even for proceedings beyond the formal legal system which can mean extending its application to methods of Alternate Dispute Resolution such as arbitration, mediation, conciliation and the like.

Additionally, the Schedule that lists matters for DNA testing is not only open to amendments through Clause 56 but is also vaguely framed. For instance, Part C of the Schedule enumerates broad civil issues for which the DNA sampling and testing may be used without outlining specifics: 'Issues relating to immigration or emigration', 'Issues relating to pedigree', 'Issues relating to the establishment of individual identity' etc. By this, the Bill violates two principles, that of purpose limitation and consent. It violates the principle of purpose limitation because once the change in purpose takes place, all prior information collected and stored becomes amenable to use despite the information donor not agreeing to such purpose.

[68] *Supra* note 9, cls. 34(f), 58(2)(k), 59(2)(v).

Secondly, the Bill makes no provision whatsoever for providing a comprehensive notice to the individuals. This will impact their ability to give informed consent under Clause 11(1). Further, the Bill turns the table by allowing a Magistrate's order to override the principle of consent for all groups of people regardless of their age and roles in the investigation (i.e. whether the person is an accused, victim, witness or relative of missing person).[69] Additionally, once consent is taken, revocation is not the discretion of the individual, although the right to revoke consent is part of the principle of choice. Rather, they may only send a written request for removing their DNA data from the database, and its acceptance or rejection rests with the National DNA Bank under Clause 31(3).

Crucially, the principles of collection and purpose limitation are doubly violated when the principles of notice and choice are disregarded. Even though the choice principle states that law can mandate providing information,[70] it also provides that the same does not negate the safeguards laid down by other principles (here, these being the principles of informed consent, choice, notice, collection limitation, and purpose limitation).

Moreover, there is no provision for access to and/or correction of the information collected. Access is limited only to where the accused wishes to use the DNA testing to establish their innocence under Clause 34(d) and is hardly a safeguard for the vast majority of individuals remaining. The Bill is also silent on the access to DNA profiles of missing or deceased persons. This creates an issue for relatives and descendants who have no control over data collected from their family members and cannot file a request for removal of the profile. In a caste endogamous society like India,[71] such denial of access is akin to denying consent and control for use of parts of one's own genetic data.

2. Comparison with the Personal Data Protection Bill, 2019

Although the Personal Data Protection Bill, 2019 (hereinafter 'PDP Bill') is itself up for scrutiny and discussion in the Parliament, it is essential to examine the DNA Technology Bill within the framework of the former which has a wider and more general ambit of establishing standards for personal data privacy.[72] Further, the Expert Committee chaired by Justice A.P. Shah extensively highlighted missing and contradictory provisions in the 2007 draft of the DNA Technology Bill[73] while simultaneously holding that the Privacy Bill, that is under wraps, should harmonise and override privacy concerns of the DNA

[69] *Id.*, cls. 21(2), 22(2).

[70] *Supra* note 19 at 23.

[71] Paul Woodbury, "Dealing with Endogamy, Part I: Exploring Amounts of Shared DNA" *Legacy Tree Genealogists Blog,* Oct. 13, 2016, *available at*: https://www.legacytree.com/blog/dealing-endogamy-part-exploring-amounts-shared-dna (last visited on May 24, 2020).

[72] See long title of the Personal Data Protection Bill, 2019.

[73] *Supra* 19 at 31-36.

Technology Bill.[74] Hence any implementation of the DNA Technology Bill will necessarily have to comply with the provisions set out in the PDP Bill.

On comparing the two Bills, the PDP Bill resolves issues relating to lack of notice by providing a list of conditions for which the data recipient i.e. the state shall be required to notify the data providers.[75] These include the nature of the data collected, the purpose and basis of processing, specified period of retaining the data, right to withdraw consent, right to file complaints to the authority and procedure for grievance redressal among others.

Secondly, it resolves the issue of consent by providing that personal data can be processed only upon explicit consent[76] and that such processing should be 'reasonable and fair' to the privacy of the individual. This requirement of reasonability under Section 5(a) will be pertinent while testing the DNA Bill under Part III of the Constitution.

Thirdly, the PDP Bill broadens the scope of accountability of the data collector (which would be the DNA Regulatory Board and the DNA Banks) by not only requiring compliance[77] with obligations postulated by the PDP Bill but also requiring the data collector to demonstrate[78] such compliance. The principles of collection and purpose limitation have also been incorporated through Sections 5 and 6 of the PDP Bill alongside Section 9 which limits the storage of personal data only if it is reasonably necessary for satisfying its purpose.

Further, the PDP Bill addresses the issue of choice by giving the individual the right to revoke consent under Section 7(1)(d) and the choice to separately consent to use of different categories of sensitive personal data under Section 11(3)(c).

Through Section 17, the Bill also gives the individual the right of confirming whether the data fiduciary is processing their data and if so, information on the category of the data being processed. The same section also grants the right of access to any personal data of the individual that may be stored with various data fiduciaries.

Lastly, Section 27 requires a data fiduciary to conduct an impact assessment on data protection before processing and profiling sensitive data like genetic information on a large scale. The impact assessment is to include a detailed description of the processing operation and its purpose,[79] assessment of the potential harms to the individual,[80] and measures to mitigate or minimise the same.[81] While the DNA Bill does not have any

[74] *Supra* 19 at 69.
[75] *Supra* note 72, s. 7.
[76] *Id.*, s. 11(3).
[77] *Id.*, s. 10.
[78] *Id.*, s. 28(1)(a).
[79] *Id.*, s. 27(3)(a).
[80] *Id.*, s. 27(3)(b).
[81] *Id.*, s. 27(3)(c).

process for impact assessment, the DNA Board and Data Banks would be required to undertake the same under the PDP Bill.

Therefore, the PDP Bill rectifies the fallouts of the DNA Bill to some extent. However, at the same time, Section 36 makes an exception for data processing for criminal investigations, enforcing of a legal right, and performing of judicial functions, and a vast majority of the safeguards from Chapter II to VII have been lifted.[82] These include stipulations on the rights of persons as data principals, obligations of data fiduciaries, transparency, and restrictions on transfer. Hence, whether these protections apply to individuals under the DNA Bill remains to be seen.

B. Right to Bodily Privacy

A discussion of privacy over genetic material should not confine itself to data or informational privacy, and should also consider issues of human dignity by considering bodily integrity. While the former protects information, the latter protects the person itself.[83] Even the *Puttaswamy* judgement identified the importance of bodily privacy as it affirmed individual autonomy over their body,[84] and the right to 'freedom from unwanted stimuli'.[85] The judgment also affirmed the right to dignity as part of Article 21 of the Constitution of India. Hence, DNA collection and profiling techniques should treat individuals as ends in themselves and not a means to an end.[86]

Bodily privacy will be violated if DNA samples are forcefully extracted from the individual's body. Hence, consent of the individual must be placed at a premium and should always be sought. Where consent is not granted, but taking the sample is necessary, the manner of collection should be the least intrusive one. Many jurisdictions make a distinction between 'intimate' samples, such as blood, semen or vaginal swabs, and 'non-intimate' samples, like mouth swabs, scrapping of fingernails, and pulling hair other than pubic hair. While non-intimate samples can be taken without consent and by technical staff other than medical professionals, intimate samples should only be taken by a medical professional, with the consent of the individual, and when such sample has the potential to provide a piece of important evidence.[87]

Many scholars argue this classification should be refined as 'internal' and 'external' body samples as the criminal investigation process will cross internal or external

[82] *Id.*, s. 36(a),(b),(c).

[83] Neil Gerlach, "From Bodily Integrity to Genetic Surveillance. The Impacts of DNA Identification in Criminal Justice" in Sean Hier and Joshua Greenberg (eds.), *Surveillance — Power, Problems, and Politics* 135 (UBC Press, Vancouver, 2009).

[84] *Supra* note 20 at 498.

[85] *Id.* at 371.

[86] *Supra* note 21 at 153.

[87] *Supra* note 43 at 17.

boundaries of the individual's body.[88] Hence, even buccal or mouth swabs would then become intimate, internal body samples. Clause 23(3) of the DNA Bill makes a detailed distinction between intimate and non-intimate body samples; it only applies the same to provide that medical practitioners shall collect intimate samples, and technical staff shall collect non-intimate samples under the supervision of a medical practitioner.[89] Therefore, the Bill misses an opportunity to apply this distinction to the crucial aspect of consent by the individual.

Lastly, while the Bill incorporates special considerations[90] for samples taken from women under Clauses 23(3)(b) and (d), it fails to extend this consideration to members of the LGBTQ+ community. The recognition of gender identity as interlinked with bodily integrity[91] must be extended to transgenders and other members of the community who disproportionately face breaches of their privacy and bodily integrity due to inadequate laws that fail to grant them gender recognition and protection.[92] Otherwise, the Bill violates the *Puttaswamy* judgement which holds gender and sexual orientation as essential to the right to privacy.[93]

V. SHIFTING TOWARDS A STATE-DOMINATED POWER STRUCTURE

Although genetic profiling is a recent development, it is a part of longer and more historical attempts by the state to exercise social control through reconstructive surveillance or surveillance that allows it to recreate and reconstruct individual behaviour through inference.[94] A DNA database thus forms a crucial archive that 'automatically' detects an individual and closes gaps by linking an action or place to the individual. Such surveillance is retrospective, as the individual is not being watched at the time of commission, but is later identified with certainty.[95] Once the database is created, all individuals who have been indexed will be subject to permanent 'bio-visibility'.[96] Unlike

[88] Imra van der Ploeg, *The Machine-readable Body: Essays on Biometrics and the Informatization of the Body* (Shaker Publishing, Maastricht, 2005).

[89] *Supra* note 9, cl.23(2)(a),(b).

[90] *Id.*, cls.23(3)(b)(iv),(v),(vi) and 23(3)(c)(vi),(vii),(viii).

[91] Human Rights Council, *Report of the Special Rapporteur on the Right to Privacy*, A/HRC/40/63 (Feb. 27, 2019) 6, para 34.

[92] See Eastern European for LGBT+ Equality, "Input to Inform the Independent experts report addressed to the HRC on data collection and management" (2018), *available at*: https://www.ohchr.org/Documents/Issues/SexualOrientation/Data/EasternEuropeanCoalitionLGBT.pdf (last visited on May 24, 2020).

[93] *Supra* note 20 at 422 and 499. See further *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1.

[94] *Supra* note 39 at 4.

[95] *Id.* at 6, 7, 10.

[96] *Id.* at 8.

iris scans or face recognition, DNA is left behind by persons thereby allowing for geotagging or tracking even in private places without cameras.

This constant surveillance by the state portends a 'function creep' where the technological apparatus expands beyond its intended function and infringes rights of the citizens.[97] Many scholars have compared it to Jeremy Bentham's 'Panopticon'[98] that was later revisited by Michel Foucault in *Discipline and Punish*.[99] A Panopticon is a model of 'asymmetrical surveillance' where the individual is an 'object of information' and never a 'subject of communication'. Simply put, panoptic surveillance places individuals under constant watch where they know they are being observed by omnipresent, visible yet unverifiable 'watchers'. Individuals cannot verify if they are being observed at a particular point of time, and as a result, individuals begin to self-regulate their behaviour. Therefore, the individuals become the principle of their own subjugation,[100] even in the smallest details of life.[101]

As a result, there is a shift in the balance of power between the state and the citizens. Foucault understood 'knowledge' as power,[102] saying that power and knowledge move in a circular process constantly reinforcing each other. The more the state observes, the more knowledge it accumulates. Individuals, who are aware of this knowledge but do not control it, internalise self-regulation and thereby, increase the power of the state to regulate citizens' behaviour.[103]

This constant surveillance enabled by DNA profiling has the disastrous potential to create a 'chilling effect' on people's exercise of their civil rights such as the freedom of movement, speech, association, assembly and peaceful protest.[104] Since the Bill does not stipulate a cut-off on the seriousness of the individual's crime, routine arrests of petty violators such as those jumping traffic signals, littering, or violating parking rules, will cause them to be profiled and placed under continuous bio-surveillance.

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[97] Richard Fox, "Someone to watch over us: Back to the Panopticon?" 1(3) *Criminal Justice* 261 (2001). Also, see GeneWatch PR, "Statement on One Show DNA case" *GeneWatch UK*, Jan. 12, 2011, *available at*: http://www.genewatch.org/article.shtml?als[cid]=492860&als[itemid]=567376 (last visited on May 24, 2020).

[98] Miran Božovič (ed.), *The Panoptic Writings* (Verso, London, 1995).

[99] Michel Foucault, *Surveiller et punir*: *Naissance de la prison* (Gallimard, Paris, 1975). Also, see Michel Foucault, *Discipline and Punish*: *The Birth of the Prison* (Vintage Books, New York, 1979).

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

[103] Moya K. Mason, "Foucault and His Panopticon" *Moya K. Mason Research Website*, *available at*: http://www.moyak.com/papers/michel-foucault-power.html (last visited on May 24, 2020).

[104] See further Richard Fox, "Someone to watch over us: Back to the Panopticon?" 1(3) *Criminal Justice* 261 (2001).

Further, human DNA can reveal other information relating to personal identity such as an individual's ancestry, colour, ethnicity etc.[105] Already, police bias causes disadvantaged groups, such as racial, religious, caste and gender minorities, refugees, and the poor to be arrested more frequently and rather disproportionately. As a result, several vulnerable groups may be termed as 'risky' populations since DNA profiling of a single family member indirectly includes close relatives into the database due to the sharing of DNA.[106] They would be treated as general suspects of crimes under investigation and subject to public vilification by the remaining population. Further, they would face genetic discrimination in their daily lives by restricted access to jobs, visas, insurance policies, asylum, medical aid, pre-trial rights etc.[107] Therefore, DNA profiling creates a veiled pathway to reinforce and aggravate institutional biases and social stigmatization. It allows them to spill into the social and moral fabric of a liberal democracy thereby disrupting social inclusion and cohesion.[108]

VI. CONCLUSION

As Yuthas and Dillard have argued:

> Unanticipated uses and side effects of innovations can never be fully foreseen or controlled, and technologies we use today can have serious consequences for individuals separated from us by great expanses of time and space. Although the risks can never be eliminated, we must own up to their possibility and make serious attempts to anticipate and control them.[109]

The DNA Technology Bill is an instance of 'technosolutionism' i.e. solving long term and complex structural problems of society through scientific (and often reductionist) methods.[110] However, these scientific and technological solutions are not always objective. Rather, they are very much subject to the biases of those who develop them.[111] One should be sceptical of 'scientification'[112] of investigation and surveillance that legalises several

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[105] Gabrielle Samuel and Barbara Prainsack, "Forensic DNA Phenotyping in Europe: Views "On the Ground" From Those Who Have a Professional Stake in the technology" 38(2) *New Genetics and Society* (2019).

[106] GeneWatch UK "DNA databases and human rights" (Jan., 2011), *available at*: http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/infopack_fin.pdf (last visited on May 24, 2020).

[107] *Ibid*. See further Irma van de Pleog, "The Illegal Body: Eurodac and The Politics of Biometric Identification" 1 *Ethics and Information Technology* 296 (1999).

[108] *Supra* note 21 at 156.

[109] Kristi Yuthas and Jesse Dillard, "Ethical Development of Advanced Technology: A Postmodern Stakeholder Approach" 19 *Journal of Business Ethics* 49 (1999).

[110] E. Morozov, *To Save Everything, Click Here: Technology, Solutionism, And The Urge To Fix Problems That Don't Exist* (2013).

[111] J. Angwin, J. Larson, *et.al.*, "Machine Bias" *ProPublica* (2016), *available at*: https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (last visited on May 24, 2020).

[112] *Supra* note 50.

state excesses. In times where the Indian State is collecting biometric profiles of its citizens[113] and creating a national citizen registry,[114] the dangers of the DNA Technology Bill should be well-recognized and its implementation should be treated with caution.

A large portion of distress over the Bill's chilling impact comes from the non-demarcation of the Bill's application in civil and criminal law. Therefore, the first step should be separating the Bill's civil and criminal law provisions and engendering a dichotomous approach to protecting the privacy of genetic information. Further, while using DNA profiling in criminal investigation, a trusted chain collecting and analysing samples should be in place. The Indian police are not adequately equipped for handling sensitive DNA samples[115] and therefore, serious capability building must be done before the Bill is introduced.

Further, courts must not presume infallibility of analytics from DNA profiling. Often the relevant data is not easily decipherable.[116] Additionally, the risk of false matches and errors will increase as the database expands.[117] Since India has a large population, such risks will be exacerbated by testing partial DNA samples[118] and hence, the courts should strictly avoid relying on the same. To prevent gross injustice and maintain the efficiency of the database, a more liberal approach towards removal should be adopted.

The debate on privacy law expands into areas such as patients' rights,[119] gendered rights over bodily autonomy,[120] and the right to protest.[121] Despite the relating to privacy principles in the Bill, its impact also depends largely on its rules and regulations which are yet to be framed by the Central Government. To some extent, its inconsistencies will also

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[113] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act 18 of 2016).

[114] India Today Staff, "What is NRC: All you need to know about National Register of Citizens" *India Today,* Dec. 18, 2019, *available at:* https://www.indiatoday.in/india/story/what-is-nrc-all-you-need-to-know-about-national-register-of-citizens-1629195-2019-12-18 (last visited on May 24, 2020).

[115] The Wire Staff, "Four Reasons Why India's Controversial DNA Bill Should Be Sent to a Standing Committee" *The Wire*, July 25, 2018, *available at*: https://thewire.in/government/dna-profiling-bill-parliament (last visited on May 24, 2020).

[116] Robin Williams and Jason Weetman, "Enacting forensics in homicide investigations" 23 *Policing and Society* 376 (2013).

[117] H.M. Wallace, A.R. Jackson, *et.al.*, "Forensic DNA Databases: Ethical and Legal Standards: A Global Review" 4(3) *Egyptian Journal of Forensic Sciences* 2 (2014).

[118] Naomi Elster, "How Forensic DNA Evidence Can Lead to Wrongful Convictions" *JSTOR Daily*, Dec. 6, 2017, *available at*: https://daily.jstor.org/forensic-dna-evidence-can-lead-wrongful-convictions/ (last visited on May 24, 2020).

[119] Chang May Choon, "Coronavirus: Giving out patient details - a case of serving public good or invasion of privacy?" *The Straits Times*, Mar. 12, 2020, *available at*: https://www.straitstimes.com/asia/east-asia/coronavirus-giving-out-patient-details-a-case-of-serving-public-good-or-invasion-of (last visited on May 24, 2020). Also, see Sundeep Sahay and Arunima Mukherjee, "Where Is All Our Health Data Going?" 55(1) *Economic and Political Weekly* (2020).

[120] Arijeet Ghosh and Nitika Khaitan, "A Womb of One's Own: Privacy and Reproductive Rights" *EPW Engage* Oct. 31, 2020, *available at*: https://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights (last visited on May 24, 2020).

[121] NH Webdesk, "Put up banners with names of bank defaulters, if naming and shaming is allowed" *National Herald*, Mar. 12, 2020, *available at*: https://www.nationalheraldindia.com/india/put-up-banners-with-names-of-bank-defaulters-if-naming-and-shaming-is-allowed (last visited on May 24, 2020).

be resolved by the PDP Bill and the *Puttaswamy* judgment that will form the bedrock of privacy in the days to come.

Ultimately, the Constitution of India envisions the State as a trustee of its citizens' wellbeing and their fundamental rights. It is the state's responsibility to balance individuals' rights, civil liberties, and the ethical risks of DNA profiling, against its resourcefulness in reaching objectives of public interest such as crime control and social order. Such decisions by the state will be tested on the cornerstone principles of equality, dignity, liberty, and physical integrity laid down in the Constitution of India.

INSOLVENCY AND BANKRUPTCY AMENDMENT 2020: ADIEU TO HOMEBUYERS' RIGHTS?

Palak Kumar and Himanshu Dixit[*]

Post-June 2018, homebuyers have been accorded the status of financial creditors; however, the Insolvency and Bankruptcy (Amendment) Act, 2020 adds a new proviso to Section 7 which impacts the rights of the homebuyers so categorised. The amendment, inter alia, creates an additional battle for homebuyers, which needs to be fought before they can bring a claim against the builder for not finishing the project within the stipulated time. The paper, in part I traces the development of the status of homebuyers as financial creditors, analyses the reasoning adopted by the Hon'ble Supreme Court in recognising homebuyers as financial creditors and discusses the 2020 Amendment which requires a minimum threshold limit to be met by the homebuyers before they can initiate a corporate insolvency resolution process against the developer. In part II, the authors endeavour to critically examine the validity of the Amendment on the anvil of Articles 14 and 21 of the Indian Constitution, citing various judicial pronouncements on the same. In part III of the paper, the authors consider the practical difficulties involved in meeting the minimum threshold requirement and how the retrospective application of the amendment would have a chilling effect on insolvency litigation. The paper ends with concluding remarks and the way forward.

I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ('IBC, 2016') is an economic legislation, which was brought in 'for the resolution of the stressed corporate debtor, maximization of value of assets of the corporate debtor and protection of interest of all the stakeholders'.[1] Amongst the various stakeholders involved in the insolvency process, creditors occupy a prominent position especially with regard to deciding the future of corporate debtors. The IBC, 2016 classifies creditors into two broad categories – Financial Creditors and

* The first author is a third-year B.A. LL.B. (Hons.) student at the National Law Institute University, Bhopal and an editor at the NLIU Journal of Business Laws. The second author is a third-year B.A. LL.B. (Hons.) student at the National Law Institute University, Bhopal and an empanelled legal columnist at the Naidunia Jagran Group.

[1] *Swiss Ribbons Pvt. Ltd.* v. *Union of India*, (2019) 4 SCC 17.

Operational Creditors. Financial creditors are those who provide financial assistance to the corporate debtor in consideration for the time value of money,[2] while operational creditors provide goods and services to the corporate debtor.[3] The IBC, 2016 under Section 7 provides certain exclusive rights to the financial creditors by giving them the authority to initiate Corporate Insolvency Resolution Process ('CIRP') without serving a demand notice to the corporate debtor. However, the insolvency framework in India cannot be said to be free from criticism as the term financial creditor fails to define its contours in a very articulate manner. In fact, since the introduction of the IBC, 2016 there have been myriad debates on the status of homebuyers as financial creditors.

II. TRACING THE DEVELOPMENT OF STATUS OF HOMEBUYERS AS FINANCIAL CREDITORS

A plain reading of Sections 5(7) and 5(8) of the IBC, 2016 suggests that the homebuyers were initially not classified under any class of creditors. The issue was raised for the first time, before the National Company Law Tribunal ('NCLT') in the case of *Nikhil Mehta & Sons (HUF)* v. *AMR Infrastructure Ltd* ('Nikhil Mehta case').[4] The question before the NCLT was: 'Whether the appellants who reached the agreement/Memorandum of Understanding with the respondent for the purchase of a residential flat come within the meaning of "Financial Creditor" as defined under the provision of sub-section (5) of Section 7 of the IBC, 2016.' The NCLT held that Memorandum of Understanding between the parties for sale/purchase of a property is a mere agreement for sale and it does not partake the character of a financial debt merely because of a breach of 'assured amount'. The NCLT also held that these transactions do not involve any consideration for the time value of money, and hence quashed the claim of the petitioners. The matter was appealed before the National Company Law Appellate Tribunal ('NCLAT'),[5] which held that the transaction of purchase of a property does have a commercial effect of borrowing, thereby holding the appellants as financial creditors. Since the Nikhil Mehta case,[6] there has been a catena of cases,[7] which has questioned the status quo of homebuyers as financial creditors.

To remove this ambiguity, an amendment dated June 6, 2018 ('2018 Amendment') inserted an explanation to Section 5(8) of the IBC, 2016.[8] The explanation provided that

[2] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 5(7).
[3] *Id.*, s. 5(20).
[4] *CA No. 811(PB)/2018* in *(IB)-02(PB)/2017.*
[5] *Nikhil Mehta & Sons (HUF)* v. *AMR Infrastructure Ltd*, Company Appeal (AT) (Insolvency) No. 07 of 2017.
[6] *Supra* note 4.
[7] *Chitra Sharma.* v. *Union of India*, W.P. (C) 744 of 2017; *Pawan Dubey* v. *M/s J. B. K Developers Private Limited*, Civil Appeal No. 11197 of 2017.
[8] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), s. 3(ii).

'any amount raised from allottees under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.'[9] As per the 2018 Amendment, the amount received by the builder from the homebuyer will be treated as a 'financial debt'. Consequently, the homebuyers shall be eligible to file an insolvency application under Section 7 of the IBC, 2016 in case the builder fails to deliver the possession of the unit/flat/property within the stipulated period or fails to refund the amount paid by the homebuyer at the time of booking. The 2018 Amendment prompted much hue and cry, with real estate builders challenging its constitutionality on various grounds.

This controversial issue was finally put to rest by the Hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited* v. *Union of India* ('Pioneer Case'), which upheld the status of home buyers as financial creditors.[10] The apex court held that the sale of a real estate property by a seller to a homebuyer would have the legal effect of a commercial borrowing, as both parties would get a commercial advantage – the homebuyer would get a flat/apartment while the seller would make a profit from the sale of such property.[11] The Court also observed that the amount received from the sale of real estate property would be subsumed within the definition of 'financial debt' defined under Section 5(8)(f) of the IBC, 2016.[12] The Court reached these conclusions by relying on the recommendations made by the Insolvency Law Committee Report,[13] and emphasized that the amount raised from homebuyers contributes significantly in financing the construction of flats/apartments. Subsequently, on December 28, 2019, the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 ('Ordinance') was introduced by the Ministry of Law and Justice.[14] The Ordinance, *inter alia*, prescribed a minimum threshold, which the homebuyers needed to fulfil before they could file an application for the initiation of CIRP against the defaulting builder. The Ordinance was statutorily imbibed in the Insolvency and Bankruptcy Code (Amendment) Act, 2020 ('2020 Amendment'), which by virtue of Section 3 added a proviso to Section 7 of the IBC, 2016. The proviso provides that an application for initiating CIRP by financial creditors who are real estate allottees can be filed 'by not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less'.[15]

Additionally, the 2020 Amendment provides for retrospective application, which implies that the applications filed before the tribunal but not yet admitted also need to

[9] *Ibid.*
[10] (2019) 8 SCC 416.
[11] *Ibid.*
[12] *Supra* note 2, s. 5(8)(f).
[13] Government of India, "Report of the Insolvency Law Committee" (Ministry of Corporate Affairs, March, 2018).
[14] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (No. 16 of 2019).
[15] *Supra* note 2, proviso to s.7.

comply with the minimum threshold requirement.[16] Thus, the 2020 Amendment poses new challenges for homebuyers, which they need to overcome before raising any claim against a real estate developer. The Ordinance through which the amendment was introduced has already been challenged in the case of *Manish Kumar* v. *Union of India*.[17] However, while the matter is still pending before the apex court, the 2020 Amendment has been implemented.

III. Constitutionality of the 2020 Amendment

It is a fundamental principle of law that a particular enactment can be challenged on the following grounds: i) It is violative of fundamental rights enshrined under Part III of the Constitution of India; ii) It is *ultra vires* the Constitution; iii) It is in contravention of mandatory provisions of the Constitution.[18] The authors in the following part have argued that the 2020 Amendment is violative of Articles 14 and 21 of the Constitution of India. The authors have attempted to justify as to: i) how the amendment fails to comply with the test of 'intelligible differentia' and 'reasonable nexus'; ii) how it has the effect of creating a 'class within a class' thereby creating a hurdle for homebuyers in initiating CIRP; and iii) how it is violative of the right to life under Article 21 of the Constitution of India.

A. Under Article 14 (Intelligible Differentia & Reasonable Nexus)

Article 14 of the Constitution of India provides for equality before the law and equal protection of laws.[19] The principle behind Article 14 is that every person within the territory of India must be subjected to similar treatment under the same set of circumstances.[20] It provides that people who are similarly circumstanced must be treated similarly in terms of liabilities imposed and privileges granted.[21] This brings in the idea of classification. Article 14 does not guarantee that the same law shall apply to all persons. It provides that varying needs of separate people often require separate treatment.[22] If the legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well-defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other people.[23]

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[16] *Ibid.*
[17] WP(C) No. 26 of 2020 (SC).
[18] *Namita Sharma* v. *Union of India*, (2013) 1 SCC 745.
[19] The Constitution of India, art. 14.
[20] *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75.
[21] *Id.* at 14.
[22] *Chiranjit Lal Chowdhuri* v. *The Union of India and Others*, 1951 AIR 41.
[23] *State of Bombay* v. *F.N Balsara*, 1951 AIR 318.

It is safe to say that Article 14 does not prohibit class legislation founded on well-grounded reasons. Das, J. in the case of *Lachman Das Kewal Ram* v. *State of Bombay* held that two conditions must be satisfied to pass the test of permissible classification: a) the classification must be based on intelligible differentia between the people so grouped and the people left out, and b) there must be a rational nexus between the classification and the object sought to be achieved.[24]

The 2020 Amendment, which has annexed an additional requirement on the homebuyers to collate a specified number of people before initiating the insolvency proceeding against the realtors, does not seem to be based on a reasonable differentia. The Hon'ble Supreme Court in the Pioneer Case[25] has already recognised homebuyers as financial creditors. The IBC, 2016 defines only two types of creditors (financial and operational creditors) and once homebuyers have been accorded the status of financial creditors, imposing any other requirement to a subcategory of a particular category manifests an arbitrary move. The Hon'ble Supreme Court in *Shayara Bano* v.*Union of India* held that 'manifest arbitrariness, therefore must be something done by the legislature capriciously, irrationally and/or without adequate determining principle.'[26] The legislation has the effect of treating two people of the same category unequally. That is to say, a financial creditor on default of one crore rupees (as on March 2020)[27] can initiate a CIRP against the corporate debtor but a homebuyer, who is also a financial creditor cannot initiate an insolvency process against the flat developer unless the threshold requirements are fulfilled.[28] It is evident therefore, that the classification is not only arbitrary, but is also not based on intelligible differentia.

Furthermore, the IBC, 2016 is an economic legislation with one of its objectives being the protection of the interests of all stakeholders, but the Amendment bars an individual homebuyer from approaching the NCLT in case of any default by the developer, thereby hampering the interest of the innocent homebuyer. Thus, the legislation miserably falls short of the objective it seeks to achieve. The legislation by imposing a minimum threshold requirement creates a class within the already existing class and puts the homebuyer in an uncertain position where he is dependent on other homebuyers to bring a claim against the builder. This creation of a class within a class is manifestly arbitrary

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[24] 1952 AIR 235.

[25] *Supra* note 10 at 3.

[26] (2017) 9 SCC 1.

[27] Notification by Ministry of Corporate Affairs [S.O. 1205 (E)], *available at*: https://www.ibbi.gov.in/uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf (last visited on June 10, 2020).

[28] Jatin Rajput, "Homebuyers & IBC (Amendment) Act, 2020: Four Years, Two Amendments And Journey still Continues" *IBC Laws,* May 6, 2020, *available at*: https://ibclaw.in/homebuyers-ibc-amendment-act-2020-four-years-two-amendments-and-journey-still-continues-advocate-jatin-rajput/ (last visited on Mar. 15, 2020).

and violative of Article 14, as held in the case of *State of U.P.* v. *Committee of Management, Mata Tapeshwari Saraswathi Vidya Mandir*.[29]

Now, supporters of the 2020 Amendment are of the view that the move would be beneficial in curbing vexatious and frivolous litigation. A strong criticism to this would be that the legislature, in order to curb the clog in the system and get rid of frivolous matters, cannot put the interest of stakeholders having genuine grievances at stake. It must be remembered that, 'the IBC, 2016 is a beneficial legislation which can be triggered to put the corporate debtor on its feet in the interest of unsecured creditors like allottees.'[30]

Additionally, one can also argue that the operational creditors who are placed much below the financial creditors in the waterfall-mechanism,[31] do not have to meet any threshold limit before they can bring any claim against the debtors as opposed to the homebuyers who necessarily have to ensure that a minimum of 100 homebuyers or 10% of the total homebuyers file for bankruptcy against the real estate developer. It is a violation of the principle of equality (under Article 14) that any operational creditor having an outstanding amount of more than one crore rupees[32] in default can drag the builder to court,[33] but a homebuyer (who is now a financial creditor) cannot avail of such recourse. A group of homebuyers which is usually large in number gets routinely defrauded by the builder and denying them the chance to file an application results in denial of a level playing field to a much more deserving set of stakeholders.

Besides, as the government has not provided any relief to homebuyers from the repayment of bank loans, if the builder fails to deliver, this becomes another hurdle for them. Thus, it can be said that homebuyers today face a dual problem, i.e. denial of home delivery in the prescribed time and no respite from the payment of dues to their lending banks, failing which they will be regarded as defaulters.

B. Under Article 21 (Right to Shelter is a Facet of Right to Life)

The crux of Article 21 of the Constitution of India is that the phrase 'Right to Life' does not mean a mere animal existence, but includes the right to lead a decent standard of life.[34] Article 21 which talks about the right to life and personal liberty includes within its ambit the right to food, clothing and reasonable accommodation.[35] The Hon'ble Supreme Court has time and again, held that having a home is a part of the right to life.[36] The three-judge

[29] (2010) 1 SCC 639.
[30] *Supra* note 10.
[31] *Supra* note 2, s. 53.
[32] Supra note 27.
[33] Supra note 31, s. 9.
[34] *Munn* v. *Illinois*, 94 U.S. 113 (1877).
[35] *Olga Tellis* v. *Bombay Municipal Corporation*, 1985 SCC (3) 545.
[36] *M/s Shantistar builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520.

bench of the apex court in the case of *Chameli* v. *State of UP* observed that the right to shelter includes within its ambit variety of aspects such as 'adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities' and an individual must be given all the possible opportunities to achieve this objective.[37]

For any family, a home is a basic yearning, which takes years of hard work and finances before it is built. The legislature by imposing the threshold has only added more obstacles before a homebuyer can achieve his dream of owning a house. Thus, denying homebuyers their right to approach the NCLT denies them, in effect, their fundamental right to shelter.

IV. PRACTICAL DIFFICULTIES IN THE 2020 AMENDMENT

A. Difficulty in Meeting the Minimum Threshold Limit

The minimum threshold limit for invoking Section 7 of the IBC, 2016 seems to be cumbersome and almost impossible to achieve. This is because it is impracticable for any homebuyer to have a consolidated list of other homebuyers of the same class, as the details of other homebuyers are not available in public domain. For any aggrieved homebuyer, it will be an uphill task to identify ninety-nine other aggrieved people so as to be able to file an application against the debtor. This will only add to his misery and aggravate his troubles since he needs to find the requisite number of people before filing an application against the developer.

While addressing a similar issue, the highest judicial court on August 31, 2017 upheld the findings of the tribunal in the case of *Innoventive Industries Limited* v. *ICICI Bank Limited* wherein the NCLT and the NCLAT held that financial creditors need not necessarily get the consent of the Joint-Lenders Forum to initiate insolvency proceedings.[38]

Also, there may be instances where some homebuyers are themselves at fault or have entered into a cash compromise with the real estate developer and in such a scenario, it is uncertain whether the claim of other genuine and bona fide homebuyers be entertained, or fail on account of the fault of some homebuyers. Ultimately, any homebuyer who fails to comply with the requisite threshold will be disentitled from filing a CIRP, thereby leaving him at the mercy of the Committee of Creditors.

[37] (1996) 2 SCC 549.
[38] Civil Appeal Nos. 8337-8338 of 2017.

Those who have embraced the change in law brought in by the 2020 Amendment claim that the homebuyers have other remedies under the Real Estate Regulation Act, 2016 ('RERA, 2016')[39] and the Consumer Protection Act, 2019 ('Consumer Act, 2019').[40] It is relevant to note that once an application for a CIRP has been accepted by the NCLT without a homebuyer's representation, he is left with no other recourse due to the imposition of moratorium under Section 14 of the IBC, 2016. Once the moratorium is imposed, it bars the initiation of any legal proceedings against the debtor except criminal proceedings.[41] Hence, the homebuyers are left in a lurch, at the mercy of the Committee of Creditors.

If one looks at other beneficial legislations like the Consumer Act, 2019 and the Right to Information Act, 2005,[42] it will be observed that the government, instead of curbing the number of cases, has encouraged the filing of cases by decreasing the court fees to zero in consumer cases having valuation up to rupees 5 lakhs.[43] Therefore, a similar approach should also be adopted under the IBC, 2016 to protect homebuyers because by imposing a threshold requirement, the legislature has 'turned an individual action into a class action'.[44] It has ignored the ticket size of the investment of a homebuyer and has reduced him to a mere number rather than a creditor.

B. Retrospective Effect of the 2020 Amendment

Moving on to the retrospective application of the 2020 Amendment, it is a settled position of law that unlike criminal law, liability can operate retrospectively in civil matters.[45] However, the Supreme Court, in the case of *Securities and Exchange Board of India* v. *Classic Credit*,[46] observed that an amendment cannot have a retrospective application if the claim/substantive right has been filed by the plaintiff. Further, in the case of *Young* v. *Adams*,[47] the Lordships of the Judicial Committee had clearly held that the retrospective operation of a statute should not intend to extinguish the rights and interests of people, which have already been vested. Therefore, the 2020 Amendment seems quite contradictory to the scheme and spirit of the doctrine of retrospective legislation.

The 2020 Amendment, in so far as it stays the application for CIRP for non-fulfilment of the threshold limit is not justified as the claim has already been filed by the homebuyers

[39] The Real Estate (Regulation and Development) Act, 2016 (Act 16 of 2016).

[40] The Consumer Protection Act, 2019 (Act 35 of 2019).

[41] *Tayal Cotton (P.) Ltd.* v. *State of Maharashtra*, Criminal WP 1437 OF 2017.

[42] The Right to Information Act, 2005 (Act 22 of 2005).

[43] The Consumer Protection (Twenty Second Amendment) Rules, 2018.

[44] Sobhana K. Nair, "Insolvency and Bankruptcy bill discriminates against homebuyers: MPs" *The Hindu*, Mar. 4, 2020, *available at*: https://www.thehindu.com/news/national/ibc-bill-discriminates-against-homebuyers/article30983639.ece (last visited on Mar. 20, 2020).

[45] *Pareed Lubba Muhammed Lubba* v. *K.K. Neelambaran*, AIR 1967 Ker 155.

[46] (2018) 13 SCC 1.

[47] (1898) A.C. 469.

and the matter has been admitted for further adjudication. In *Hitendra Vishnu Thakur* v. *State of Maharashtra*,[48] the apex court had discussed the scope of an amending Act and its retrospective operation:

> (i) Law relating to forum and limitation is procedural in nature, whereas law relating to the right of action and right of appeal even though remedial is substantive in nature.
>
> (ii) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
>
> (iii) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in Operation unless otherwise provided, either expressly or by necessary implication.[49]

From the reasoning given above, it is clear that any statute, which creates new duties in respect of transactions already completed, should not have retrospective application. When the 2020 Amendment applies retrospectively, applications for CIRP, which have already been admitted, are stayed *pro tempore* until the homebuyers meet the threshold requirement. In case the homebuyer fails to meet the threshold limit, the application is dismissed. Now, the only remedy available to any homebuyer will be to institute criminal proceedings against the builder, since civil remedies under the RERA, 2016 and the Consumer Act, 2019 would be barred due to the operation of moratorium.[50] Thus, the 2020 Amendment, which imposes retrospective application as per the proviso to Section 7 seems to be legally sound but, if one looks at its practical applicability, would entail that all cases where the CIRP has been initiated, become infructuous, thereby jeopardising the interest of thousands of homebuyers.

V. CONCLUSION

From the above analysis, the authors are of the view that any legislation, brought by the legislature needs to be well thought out, keeping in mind the practical impossibilities and the implications, that such move is likely to have. The legislature may justify the impugned legislation as a measure to curb vexatious and frivolous litigation, but in its attempt to do so, it has failed to take into account the interest of bona fide homebuyers whose hard-earned money is locked up. No remedy is available to them unless they comply with the highly unattainable requirements of the proviso to Section 7. While introducing the 2020 Amendment, the legislature has failed to take cognizance of the fact that homebuyers have

[48] (1994) 4 SCC 602.
[49] *Id.,* at para 26.
[50] *Canara Bank* v. *Deccan Chronicle Holdings Limited*, Company Appeal (AT) (Insolvency) No. 147 of 2017.

already been recognized as financial creditors and requiring them to comply with any additional requirement before claiming a remedy against the real estate developer, will only lead to distortion of the equality code. As discussed through the course of this paper, the amendment is manifestly tilted in favour of the builders, thereby hampering the homebuyer's interest. In conclusion, it can be said that the entire scheme of the amendment has turned against the homebuyers, who are victimised, most exposed to the financial mismanagement of the builders and are now being deprived of their fundamental right to seek a remedy.

VI. THE WAY FORWARD

In light of the above discussion, following are suggestions, which the authors would like to propose with respect to the 2020 Amendment:

a) *Displaying the transactions of builders:* The legislature should contemplate enacting a legislation, which ensures that the details of the homebuyers for a real estate project are made public, easily available on a public website. It is observed that arranging 100 homebuyers is almost impossible for individual homebuyers, running from pillar to post to get either their flat or a refund of the project value from the builders. With this change, data will be available regarding the details of the project allottees and the homebuyer will get to know about others to meet the 10% threshold.

b) *Reducing the threshold limit:* The fixed threshold limit to invoke the CIRP proceedings can be brought down from 100 to 10 persons in number or any other lower limit as the government may deem fit. This can be done in those cases where some buyers are themselves at fault or have entered into a compromise with the builder. In such cases, allowing an aggrieved homebuyer to initiate the CIRP without meeting the threshold requirement should be justified.

c) *Clarity in the ladder of payment:* The legislature should also endeavour to clarify whether homebuyers classify as 'secured' or 'unsecured' creditors in the waterfall mechanism at the time of the disbursement of payment to all the stakeholders. This will enable them to weigh their claims at the very outset of filing the CIRP application.

d) *Insertion of a waiver clause:* A provision in line with Section 244 of the Companies Act, 2013 may also be inserted in the IBC, 2016 which would empower the NCLT to grant an exemption from meeting the threshold requirement, based on the facts and circumstances of the case.

Faculty Of Law
University Of Delhi
Delhi – 110007