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Editorial

Introduction

In today's world, where the demand for legal education is on the rise, it has become increasingly crucial to establish a platform where teachers, scholars, and practitioners can exchange ideas and contribute to the advancement of legal knowledge. Quality legal research and standard publications constitute one of the important mandates of a leading law school like NALSAR University of Law.

The articles published in NALSAR Law Review (NLR) are peer-reviewed and represent the latest thinking on various legal topics. This helps to keep the legal community up-to-date with the latest developments in the field and facilitates the exchange of ideas and knowledge. NLR serves as a vital mechanism for the dissemination of legal knowledge and intellectual discourse. The contributions of young and aspiring legal professionals to these debates, through the publication of their research and analysis, help to ensure the continued advancement and evolution of the legal profession. NALSAR University Law is committed to promoting contemporary legal education and research. It recognizes the pivotal role that law journals play in advancing legal scholarship. We are committed to providing the resources and support necessary to maintain the high standards of the NLR.

As the NLR Editorial Board, it is our duty to ensure that NALSAR law Review remains at the forefront of legal discourse, reflecting the latest developments and trends in the field of Legal education and legal thought.

Author Contributions

The Eighth Volume of the University's flagship Journal titled "NALSAR Law Review" is being published on the eve of *Nineteenth Annual Convocation*, 2023. This gives us great pleasure to present our scholarship in this issue of NLR.

The re-launch issue contains diverse topics that will keep the reader engaged. Breadth of the scholarship is far reaching. The research articles in this issue are well researched and have definite recommendations. There are articles on law and technology, Criminal

Law, Competition Law, Matrimonial Obligations, Land Laws, Banking and Defence Laws, Space Law and more.

Contributors are well established in their area of scholarship. This issue has articles written on very significant topics such as *Viewing Indian Mobile Phone Market through the Lens of Standard Essential Patents – Time to Move Beyond Ex-Parte Injunctive Relief?* by Prof. VK Unni, IIM Calcutta; *Jurisprudence of the Oppressed: Literature and the Judicial Imagination,* by Prof. Mukesh Srivastava, National Law Institute University, Bhopal; *Maintenance Obligations in Matrimonial Disputes: A Critical Appraisal* by Dr. Aruna B Venkat*; Academic Social Responsibility (ASR): NALSAR's Grassroots Initiatives Showing the Way Forward*, by Prof. V. Balakista Reddy, NALSAR University of Law; *Mapping Institutionalized Legal Aid Framework in India – Challenges and Way Forward,* by Prof. K. Vidyullatha Reddy, Registrar, NALSAR University of Law and many more.

We hope readers would find the present issue interesting and thought provoking. We hope our readers will enjoy reading the Review as much as we did putting it together for you.

Editorial Committee

VIEWING INDIAN MOBILE PHONE MARKET THROUGH THE LENS OF STANDARD ESSENTIAL PATENTS – TIME TO MOVE BEYOND EX-PARTE INJUNCTIVE RELIEF?

V.K. Unni[*]

Abstract

The role played by technology standards in our modern-day society is very high. Technology industry has to implement standards because of the complexity of products. Since many systems have to work seamlessly in a single product there could be issues pertaining to interoperability. Standard Setting Organisations (SSO) have been set up with the intention of tackling the interoperability problem and it is the SSOs which will determine the standards that entities need to comply with while making their products. Standard Essential Patents (SEPs) are patents which are essential to work or implement a particular industry standard. SSOs while managing SEPs are duty bound to enforce an IPR policy which mandates its members to license their SEPs under Fair, Reasonable and Non-discriminatory (FRAND) terms. However, the lack of uniformity regarding interpretation of FRAND Terms across various jurisdictions has resulted in a flurry of costly litigation around the globe. India has also witnessed a sudden surge in SEP litigations, with around ten lawsuits being filed in High Courts in the recent years, involving some prominent companies like Ericsson, Xiaomi, Micromax etc. This paper examines the approach taken by the Indian judiciary and Competition Commission of India regarding SEP litigation in the field of mobile/smartphones along with the court's interpretation regarding the significance of SEPs and FRAND commitments.

Key words: Interoperability, Standard Setting Organisations (SSO), Standard Essential Patents (SEPs), Fair, Reasonable and Non-discriminatory (FRAND)

[*] Professor, IIM Calcutta.

Introduction

During the past few years India has witnessed astonishing growth with respect to the number of mobile phone subscribers. According to the Internet and Mobile Association of India (IAMAI) report the number of mobile internet users had gone up from 173 million users in December 2014, to 450 million users by June 2017.[1] Since more than fifty per cent of India's population uses mobile phone as the sole access point to the Internet, the device also doubles up as the access point to knowledge. Thus, today's mobile phone, plays a lead role in bringing a gamut of solutions which can revolutionize socio-economic system, develop sectors like agriculture, small scale industries etc and also connect every Indian to various financial inclusion programs launched by the government. The phenomenal success of mobile devices has resulted in the development of newer wireless system and standards for various kinds of telecommunication dealing with data and voice.

The role played by technology standards in the modern-day society is very high, even though many of us are not fully aware of their impact.[2] These Standards enable us to work without any hindrance when our mobile phones and tablet computers connect to Wi-Fi over different hot spots. Interoperability standards have played a lead role in ensuring that many important innovations quickly reach the marketplace and the same holds true in the case of complex communications networks and sophisticated mobile computing devices that have defined the modern age. Standards used in the field of hardware like USB make sure that our flash drives work on different devices that follow a common drumbeat laid down by standard setting organizations (SSOs). Standards promote competition amongst products that are compliant with a particular standard which in turn forces companies to innovate more which eventually results in lot of benefits to consumers. Standard Essential Patents (SEPs) are patents which are essential to work or implement a particular industry standard and this means that in order to make a standard compliant mobile device those manufacturers will have to utilise technologies that are covered by one or more SEPs. The last few years have witnessed a large number of legal disputes in the field of SEPs and India also plays a major role with regard to SEP jurisprudence

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1 http://www.iamai.in/research/reports_details/4860

2 Jorge L. Contreras, *Implementing Procedural Safeguards for the Development of Bioinformatics Interoperability Standards*, 39 N. Ky. L. Rev. 87, 87 (2012).

with various High Courts and Competition Commission of India dealing with the same.

Introduction to SSOs and SEPs

Complexity of products drives the technology industry towards standardisation. The main reason for this is the interdependence of different systems which have to work together in commonly used devices like smart phones, tablet, laptops etc. Since many systems need to work together in a single product this also creates an interoperability problem.[3] Standard Setting Organisations (SSO) have been set up with the precise aim of tackling the interoperability problem and it is the SSOs which will determine the standards that entities need to comply with while making their products. These SSOs generally may be a consortium of universities, private companies, vendors, and government agencies. To cite an example the Telecommunications Industry Association is an association of companies providing communications and information technology products and services that will formulate standards for performance testing and compatibility.[4] At the time of standardization, companies who are members of the SSOs are required to disclose patents or patent applications that could be used in the industry standard.[5] Thereafter SSOs will proceed to set up standards to ensure that companies will have discussions and thereafter standardize the use of crucial technologies.[6] If a patent is implemented in the standard, that patent is known as a SEP. According to Judge Posner *"once a patent becomes essential to a standard, the patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy."*[7]

One of the most important benefits that standardisation will bring to an SEP owner is the market power which will in turn enable it to demand excessive royalties (which can be many multiples of the value of

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3 Edith Ramirez, Commissioner, Fed. Trade Comm'n, P*repared Statement of the Fed. Trade Comm'n, Before the U. S. Comm. on the Judiciary Concerning Oversight of the Impact on Competition of Exclusion Order to Enforce Standard-Essential Patent*s 4 (July 11, 2012), available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf [hereinafter FTC Oversight] (discussing the "inoperability problem").

4 Details at https://tiaonline.org/about/

5 Jamie Lee, *An Un(frand)ly Game: Preventing Patent Hold-Up by Improving Standardization*, 10 J. Bus. & Tech. L. 375, 379 (2015).

6 FTC supra note 3, 2.

7 Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

their patented technology) from those entities who want to implement the technologies protected by these SEPs. Along with the advantages mentioned above, for standardisation there is also the risk of "hold ups". The power of a holder of a patent forming part of a standard to demand more than the value of its patented technology and to attempt to capture the value of the standard itself is referred to as patent "hold-up".[8]On many occasions complex technological products may implement numerous standards each of which may be covered by hundreds of patents. The aggregation of royalty demands by multiple patent holders might result in exorbitant costs on standards-compliant products. This situation is generally termed as royalty stacking.[9]

SSOs mandate SEP owners to agree to license their patents on FRAND (Fair Reasonable and Non-Discriminatory) terms to SSO members, and sometimes, to outside implementers.[10] Technology implementers like Samsung, Apple etc must get permission from all SEP owners by making cash payment, recurring royalties, or cross-licensing if they want to use the relevant standard. The FRAND commitment aims to facilitate widespread adoption of the technology by protecting implementers against hold-ups by SEP owners after the adoption of a particular standard by the concerned industry.[11] If a technology implementer wants to use a particular standard the SEP owner should negotiate a fair and reasonable rate and if the implementer does not agree to pay that rate, the SEP owner can file a patent infringement suit and ask for damages. The main objective of FRAND licenses is to prevent patent hold-up and royalty stacking. It is the FRAND licensing mechanism which helps the SEP users to negotiate and pay a royalty to a patent owner who has agreed to be reasonable and fair to the SSO when the patent was classified an SEP.[12] Theoretically FRAND licensing should offer the same or similar terms to all users or licensees on a given patent and is meant to minimize or prevent licensing abuses and post-

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8 *Microsoft Corp. v. Motorola, Inc.,* C10-1823JLR, 2013 WL 2111217, at 10 (W.D. Wash. 2013)

9 Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2049 (2007).

10 Damien Geradin, *Moving Away from High-Level Theories: A Market-Driven Analysis of FRAND*, 59 Antitrust Bull. 327, 354 (2014)

11 Daryl Lim, *Standard Essential Patents, Trolls, and the Smartphone Wars: Triangulating the End Game*, 119 Penn St. L. Rev. 1, 10 (2014).

12 Janice M. Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 BERKELEY TECH. L.J. 623, 624 (2002).

standardization hold-ups by the patent owner, like refusing to license the patent or setting exorbitant royalty rates.[13]

Patent Competition Interface

Even though it might appear to be anticompetitive to allow interested industry members and competitors to develop new technology together, on a philosophical plane patent laws and competition laws are complementary in nature as both are intended to encourage innovation and competition. Across the globe patent law tries to reflect the balance between the need to encourage innovation and the avoidance of monopolies (which stifle competition) by stipulating a term of the patent which is generally twenty years from the date of filing. Competition law also recognises the important role played by Intellectual Property Rights (IPR) /patent system by exempting agreements on restraining IPR infringement from the ambit of anti-competitive agreements. The economic benefits that accrue as a result of standardization outweigh the risks of collusion and price-fixing as long as the discussions on new standards are driven by a purely technical perspective.

It is widely accepted that systematic implementation of innovative ideas results in the availability of better goods and services, which, in turn, benefit consumers. Needless to mention the economic growth of a country is very much dependent on the culture of innovation and creativity prevailing there. Governments across the globe devise various policy measures to nurture a congenial environment for innovation. Despite the positive aspects of patents, there have been instances where patent holders have indulged in abusive practices. Most such practices relate to issuance of licences which cause prejudice to an existing trade or industry, licences providing for exclusive grant-back, coercive package licensing, etc. In such situations, competition law has a major role to play as it is premised on preventing artificially-created entry barriers. Interface of IP/patent and competition law can be seen when there is a disparity between the exclusivity rights granted by IP law and anti-competitive practices that the competition law tries to deal with. India is witnessing disputes that raise policy questions regarding the interface between IP law and competition law.

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[13] Srividhya Ragavan et. al. *Frand v. Compulsory Licensing: The Lesser of the Two Evils,* 14 Duke L. & Tech. Rev. 83,90 (2015).

SEP Litigation in India

India being a British colony had its patent law for more than 160 years which was a replica of the then British law. After the country got its independence in 1947 various governmental initiatives were undertaken and finally a new patent law was passed by the Indian Parliament in 1970 called the Indian Patents Act.[14] During the 1990's India joined the World Trade Organisation and as a result the country had to make some changes to its patent law which eventually was completed by 2005 in three phases. In India during the last five years there have been numerous disputes in the high technology wireless sector concerning SEPs. Most of them were filed by the Swedish Telecom company Ericsson. Apart from high-end mobile phones/smartphones there are some SEP cases pertaining to DVD systems where Philips had filed cases against Indian companies to enforce its SEP.[15]

This write-up will examine the landmark cases on SEPs that were decided by the High Courts and Competition Commission of India (CCI)

Case 1: *Ericsson v Mercury Electronics/ Micromax* (March 2013, Delhi High Court) [16]

The main suit was filed by Ericsson against Mercury Electronics and Micromax Informatics Limited (hereinafter Micromax) praying for permanent injunction to stop the Micromax from manufacturing, importing, selling, offering for sale, advertising products which included telephone instruments, mobile handsets, tablets etc and any future devices that contained Adaptive Multi-Rate AMR, 3G and EDGE technology/devices/apparatus as patented by Ericsson in the suit patents so as to result in infringement of the said suit patents. Ericsson also prayed for a decree of damages of Rs. 100 crores against Micromax and a direction to Micromax to render sales accounts for the years 2008-2012for the mobile devices that included handsets, tablets etc.that incorporated Ericsson's patented technology. Ericsson further sought

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14 "The Patents Act, 1970, Act No. 39, Parliament, 1970 (India) (hereinafter the IPA), full text athttp://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_31_1_patent-act-1970-11march2015.pdf".

15 *Koninklijke Philips Electronics N.V. vs. Rajesh Bansal And Ors.,* available at https://indiankanoon.org/doc/156062069/

16 *TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) Vs MERCURY ELECTRONICS & ANR.* CS (OS) No. 442 of 2013, decision available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=46519&yr=2013

delivery up of infringing components/elements etc. from Mercury and Micromax.[17]

The single bench of the Delhi High Court opined that Ericsson had made out a prima facie case in its favour and balance of convenience was also entirely in its favour. Further, irreparable harm would be caused to Ericsson if the interim injunction order as prayed for was not granted. Accordingly, the Custom Authorities were directed that as and when any consignment was imported by Micromax intimation thereof had to be given to the Ericsson and objections, if any, of Ericsson should be decided under Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 till further orders. Court also designated its officer as the local commissioner to visit Micromax's premises to inspect and collect documents indicating import and sales of various alleged infringing mobile devices (handsets, tablets etc.) and other alleged infringing components for the last three financial years.[18] In this case the court had granted an ex-parte interim injunction without even hearing the contentions of Micromax and it also authorised a court appointed commissioner to seize documents from Micromax's office with respect to the sales and import of the mobile phones which are the subject matter of the present litigation.

This decision was appealed by Micromax before a Division Bench of the Delhi High Court but it was dismissed by the Division Bench during the very first hearing. Thereafter Micromax and Ericsson approached the single bench informing the judge that they had entered into an interim arrangement pending final disposal of the lawsuit.[19]

Ericsson v Mercury Electronics (February 2018 Delhi High Court)

Ericsson and Micromax informed the High Court that during the pendency of the present proceedings, they entered into a Global Patent License Agreement dated 26thJanuary, 2018 and in light of its execution, the parties had put an amicable end to their disputes. Parties also agreed to withdraw all their pending disputes between them including the present suit, counter-claims, contempt petitions as well as applications.

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17 *Id.*

18 *Id.*

19 Court was informed of this settlement on 19th March 2013.

The Court permitted Ericsson to withdraw the present suit along with pending applications as well as contempt petitions in pursuance to the Global Patent License Agreement dated 26thJanuary, 2018.[20]

Case 2: *Ericsson v Intex (Delhi High Court March 2015)*

The plaintiff Ericsson filed the present suit for permanent injunction restraining infringement of rights in eight patents registered in India along with damages/rendition of accounts and delivery up etc. According to admitted facts the plaintiff, M/s Ericsson was a company incorporated under the laws of Sweden which was founded in Sweden.[21]

The patents which were relevant to this suit belonged to three technologies in the field of telecommunications pertaining inter alia to 2G and 3G devices (mobile handsets, tablets etc), details of which are referred below

1. Adaptive Multi-Rate (AMR) speech codec - a feature that conserves use of bandwidth and enhances speech quality; (AMR)

2. Features in 3G phones - Multi service handling by a Single Mobile Station & A mobile radio for use in a mobile radio communication system; (3G)

3. Enhanced Data Rates for GSM Evolution (EDGE) - A transceiving unit for block automatic retransmission request; (EDGE)

The abovementioned patents were SEPs in the field of telecommunication and were mandatorily required and used for the implementation of the concerned technologies including 2G and 3G technologies. Ericsson in the light of the FRAND commitment made by it to various SSOs including European Telecommunication Standards Institute (ETSI), fairly offered a license for its entire portfolio of patents including the suit patents which were essential for 2G and 3G technologies to the defendant Intex. However, despite being put to notice since December 2008, Intex had failed to obtain licenses from Ericsson for its SEPs including the suit patents. Ericsson contended that from

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[20] *TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) Vs MERCURY ELECTRONICS & ANR.* I.A.Nos.1698/2018 & 1623/2018

[21] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) VsIntex Technologies India Ltd., http://164.100.69.66/jupload/dhc/MAN/judgement/16-03-2015/MAN13032015S10452014.pdf

2008 onwards till the filing of the present suit, though Intexhad always averred and in fact continued to state that it was willing to discuss and enter into a FRAND license with Ericsson however the same was not reflected in the conduct of Intex. In spite of repeated requests made by Ericsson, Intex had failed to constructively negotiate a license agreement with Ericsson (the SEP owner) and despite admitting that Ericsson was the owner of SEPs which were necessarily employed and used by Intex in various telecommunication devices like handsets, tablets, dongles etc. that were being sold by it under the Intex brand, no feasible offer had been made by Intex.[22]

Court noted that if a patent covered a particular component/ element/ device/ method etc corresponding to a technical specification or a technology that forms a part of a standard, the patent was regarded as an essential patent for such standard. An essential patent could be said to be a patent that corresponded to an industry standard. The same standard was mutually agreed by various service providers, equipment manufacturers etc to be mandatorily implemented for a particular technology. This was meant to ensure that complete compatibility was achieved. It was impossible to claim compatibility with a technology as defined by the concerned standards without actually infringing the specific patent. So as to avoid a situation whereby standards could not be effectively implemented due to existence of such patents - patentees of such essential patents had broadly committed to FRAND (Fair, Reasonable and Non-discriminatory) licensing. FRAND was a balance between ensuring the availability of an open, global standard to a new entrant and incentivizing development of that standard by rewarding those who contributed to the standard with their research and development skills. Ericsson also supported FRAND licensing and had over 100 global license agreements with vendors in the telecom industry. To support its case that the patents in question pertaining to AMR, EDGE and 3G technologies were essential patents and they corresponded to the standards issued by ETSI related to the aforesaid 2G and 3G technologies, Ericsson demonstrated that the Department of Telecommunications, India had recognized ETSI standards as approved standards for GSM, WCDMA/ UMTS network and equipment providers and as a consequence the same were required to be complied with by various device importers, manufacturers, sellers etc. While Intex had its

[22] *Id.* paras 7-8.

discussions with Ericsson, it also filed proceedings against the Ericsson before the Competition Commission of India (CCI) for abuse of dominance and filed petitions for revocation of patents in the Intellectual Property Appellate Board. [23]

Intex contended that the essentiality of the patents which were being challenged had not been proven and that there were numerous serious challenges against the same for violations of various provisions of the Patents Act. Intex's argument revolved around the issue pertaining to validity of the patents which had to be proven before any action for infringement. It further contended that it had not been proved that its devices contained the patents owned by Ericsson and questioned the accuracy of Ericsson's in-house testing and its expert.[24]

The Court however rejected the arguments of Intex with respect to the allegation that Ericsson had not proved the essentiality of its patents. Court noted that in view of explanation given by Ericsson coupled with the conduct of the Intex for the last five years, an inference could easily be drawn in favour of Ericsson that the suit patents were prima facie valid and there was no credible defence raised by Intex who was guilty of infringement of patents. The suit patents were SEPs even as per the admissions of Intex who had been corresponding with the Ericsson for many years. Court also noted the contention made by Intex before the Competition Commission of India (CCI) as an admission on part of Intex with respect to the essentiality of patents owned by Ericsson.[25]

The Court opined that Intex had prima facie acted in bad faith during the negotiations with plaintiff, and it had even approached various fora and had made contrary statements in order to get monetary benefit. Court observed that the balance of convenience lied in favour of Ericsson and against Intex. With regard irreparable loss and injury, the Court noted that if a FRAND agreement was not signed by Intex or royalty was not paid, it would have impact on other 100 licensors who were well known companies in the world who were paying the royalty. Finally, the Court directed Intex to pay Ericsson 50% of the total royalty

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23 *Id.* see generally paras 13-15.
24 *Id*. paras 41-42.
25 *Id*. para 28.

amount, as per total selling price of the device from the date of filing the case.[26]

Case 3: *Ericsson v Best IT World (iBall)* [27] (September 2015, Delhi High Court)

Ericsson filed the suit for permanent injunction restraining infringement of patents, damages, rendition of accounts, delivery up etc. against iBall. The patents in question covered three technologies in the field of telecommunications pertaining inter alia to 2G, EDGE and 3G devices (mobile handsets, tablets, dongles etc.), details of which are as under:- (a) Adaptive Multi-Rate (AMR) speech codec – a feature that conserves use of bandwidth and enhances speech quality; (AMR) (b) Features in 3G phones - Multi service handling by a Single Mobile Station & A mobile radio for use in a mobile radio communication system; (3G) (c) Enhanced Data Rates for GSM Evolution (EDGE) - A transceiving unit for block automatic retransmission request; (EDGE).[28]

The contention of Ericsson was that the said patents had corresponding registered patents in several countries of the world and these technologies were essential for mobile devices (handsets, tablets, dongles etc.) to interoperate with network equipment, as per the standards prescribed by international standardization bodies that had been adopted and implemented in India by the Department of Telecommunications (DoT). Ericsson had also produced copies of its declarations to ETSI along with claim charts mapping the said patents to concerned technical specifications of relevant standards. Prior to the suit, iBall filed a complaint before the CCI alleging that Ericsson which owned the SEPs had abused its dominant position.

Subsequently CCI passed an order directing its Director General to start investigation against the Ericsson and the said order of the CCI was challenged by Ericsson vide writ petition filed before the Delhi High Court on the ground that CCI's order passed was arbitrary in nature and without jurisdiction. The Delhi High Court allowed the Director General (DG) of the CCI to call for information from Ericsson but directed that

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[26] *Id.* para 160

[27] *TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. M/S BEST IT WORLD (INDIA) PRIVATE LIMITED* full text at http://164.100.69.66/jupload/dhc/MAN/judgement/03-09-2015/MAN02092015S25012015.pdf

[28] *Id.* paras 6-7

no final report be submitted by the DG and no final orders be passed by the CCI in the said case.[29]

iBall admitted that there were meetings and exchange of communications between the parties from 2011 till 2015 however in spite of many reminders from time to time, Ericsson had failed to provide relevant details to iBall so that it could be aware about the legal rights of Ericsson. iBall argued that it was the obligation of Ericsson to provide all the necessary details which till the day had not been provided by Ericsson. iBall further contended that unless it was satisfied about the legal rights of Ericsson it could not be blamed that iBall was unwilling to have the FRAND license. Ericsson refuted the arguments of iBall and stated that iBall was provided with all the relevant details. Court after hearing both the parties came to the prima facie view that the plea of iBall that it was not aware about the rights claimed by Ericsson had no force in the light of the averments made in the plaint and documents filed by Ericsson. Court thus held that iBall was aware about the claim of Ericsson's portfolio of SEPs related to GSM, GPRS, WCDMA technology for which there was no substitute and which were necessarily used by telecommunication devices claiming to be GSM, GPRS, WCDMA etc.

Finally, the Court held that Ericsson had made out a prima facie case in its favour and balance of convenience also lied in its favour. If the interim direction/ order was not granted, the plaintiff would suffer irreparable loss and injury because of the reason that the defendant would keep on marketing the mobile devices without the FRAND agreement and without paying any royalty. Based on these findings the Court restrained iBall its agents/affiliates from importing of mobiles, handsets, devices, tablets etc.[30] Thus Ericsson won the case against iBalland an interim injunction granted by the Court against iBall restraining the company and its agents/affiliates from importing of mobiles, handsets, devices, tablets etc containing the technologies covered by SEPs owned by Ericsson.

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29 *Id*. para 9.

30 *Id.* paras 26-28.

Case 4: *Ericsson v Lava*[31] *(June 2016, Delhi High Court)*

Ericsson had filed the present suit for permanent injunction against Lava seeking to restrain violation and infringement of its rights in its eight patents. These patents covered three technologies in the field of telecommunications pertaining inter alia to 2G, EDGE and 3G devices (mobile handsets, tablets, dongles etc.), details of which were as under:-

(a) Adaptive Multi-Rate (AMR) speech codec – a feature that conserves use of bandwidth and enhances speech quality; (AMR)

(b) Features in 3G phones - Multi service handling by a Single Mobile Station & A mobile radio for use in a mobile radio communication system; (3G)

(c) Enhanced Data Rates for GSM Evolution (EDGE) - A transceiving unit for block automatic retransmission request; (EDGE)

Ericsson argued that the said patents had corresponding registered patents in several countries of the world and these technologies were essential for mobile devices like handsets, tablets, dongles etc.to interoperate with network equipment, as per the standards prescribed by international standardization bodies that had been adopted and implemented in India by the Department of Telecommunications (DoT). Ericsson claimed ownership of extensive portfolio of SEPs vis-à-vis GSM, GPRS, WCDMA etc. When a patent was essential for a particular standard, all manufacturers of devices or equipment which were 2G, EDGE or 3G compliant were supposed to use the said technology belonging to Ericsson's patents because it was impossible to claim compatibility with a technology without using those SEPs. This meant that there was no other option but to obtain a license from Ericsson and in absence thereof, it would be considered as infringement of the SEPs.[32]

Ericsson argued that Lava was guilty of infringement, as their phones were compliant with specified ETSI Standards. According to Ericsson, Lava's devices used the same AMR technology in 3G and 2G

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[31] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. Lava International full text http://164.100.69.66/jupload/dhc/MAN/judgement/13-06-2016/MAN10062016IA57682015.pdf

[32] *Id*. para 8.

and possessed EDGE capabilities and thus, it was alleged that all these devices were infringing Ericsson's SEPs. Ericsson also stated that it was obligated to offer a license to SEPs on FRAND terms and had sought to negotiate with Lava but the latter had refused to take license on FRAND Terms.[33]

Lava contended that Ericsson had not furnished the correct technical specifications however the Court dismissed this contention because of the material placed on record by Ericsson. The Court held that Ericsson had sufficiently built a prima facie case to demonstrate the essentiality of patents, by setting out the relevant standards, mapping said standards with claims. The Court noted that Lava was aware about the existence of Ericsson's SEPs since 2011 and was also aware about the fact that the plaintiff owned an extensive portfolio of SEPs relating to GSM. GPRS, WCDMA technology for which there was no substitute and which were necessarily used by telecommunication devices claiming to be GSM, GPRS, WCDMA etc. Lava was also aware about third party proceedings instituted by Ericsson in India on the basis of the suit patents and the orders passed therein. Lava had the full knowledge about the fact that Ericsson had executed various global patent license agreements related to its SEPs with a large number of parties. In spite of this Lava had been consistently delaying execution of a license agreement with Ericsson and in such a case, advance notice of existence of a patent and its infringement ought to go in favour of Ericsson. Court further opined that Lava who had notice of the patents should not get the benefit of the loss of time. Moreover, the fact that Lava was aware of the Ericsson's patents but had not challenged their validity and hence admitted the same, should be a factor in favour of grant of injunction.[34]

Court also dismissed Lava's arguments that Ericsson had wrongly claimed that its patents were not algorithms at all and were in fact product patents, and, therefore, not within the bar of Section 3(k) of the Patents Act. Court held that the bar of Section 3(k) did not apply when a patent involving modern day technology algorithms were employed in order to perform certain calculations or selections which were thereafter utilized by various hardware components or elements to produce/improve a technology and create a practical effect or result in a physical realization. As per the Court each of the inventions claimed in

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33 *Id*. para 9.

34 *Id.* paras 98-100.

the suit patent were not mere theoretical or abstract algorithms or mere mathematical or mental methods or even computer programmes per se as was being alleged by Lava. [35]

Court held that once it appeared that there had been a prima facie infringement of a patent and no credible defence was established by the defendant, injunction had to follow even in cases of SEPs. If any party deliberately avoided to enter into license agreement on flimsy grounds, the injunction order had to be passed. Court noted that the approach of Lava was very negative and prima facie the company was adopting a hide and seek policy. Court was of the opinion that Ericsson had made out a strong prima facie case in its favour and against Lava and the balance of convenience also lied in favour of the plaintiff and against Lava. Court observed that in case the interim order was not passed or Lava was not ready to enter into FRAND agreement with Ericsson the other licensees would also take the same stand which was being taken by Lava. The Court passed an injunction order against Lava and directed the company to deposit Rs. 50000/ with the Prime Minister's National Relief Fund.[36]

Case 5: *Ericsson v Xiaomi (December 2014, Delhi High Court)*

Ericsson filed a suit against Xiaomi for injunction, restraining infringement of rights in eight patents, rendition of accounts, delivery up, etc. According to Ericsson they owned eight patents covering three technologies in the field of telecommunication relating to 2G and 3G devices. Ericsson had previously invited Xiaomi to obtain the requisite licenses for SEPs owned by Ericsson. Instead of obtaining the license Xiaomi launched its infringing devices in India during July 2014. The Court after hearing Ericsson passed an *ex parte* order that injuncted Xiaomi from selling, advertising, manufacturing or importing devices that infringed the SEPs mentioned by Ericsson in the suit. The Court also directed the customs officials to prevent the imports under the IPR Rules, 2007 and also appointed local commissioners to visit the offices of Xiaomi in order to ensure the compliance of these orders.[37]

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35 *Id.*

36 *Id.* para 114

37 *TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. Xiaomi Technology and others* CS(OS) 3775/2014, Order dated 08.12.2014 of Delhi High Court

Thereafter Xiaomi appealed against the order of the single bench before the Division Bench of the Delhi High Court and the Division Bench allowed Xiaomi to sell its devices in India, with certain riders. These riders mandated that Xiaomi could only sell devices that carried chips imported from Qualcomm Inc., a licensee of Ericsson and that Xiaomi was to deposit Rs. 100 for every device sold in India.[38]

Subsequently in 2016 Xiaomi approached the Delhi High Court with the allegation that Ericsson had suppressed certain facts regarding the existence and contents of a Multi-Product License Agreement dated 01.10.2011 entered into between Ericsson and Qualcomm Incorporated. Under the said Agreement, the Ericsson had granted a license in respect of some of its patents, at least patents pertaining to CDMA (3G), applications to Qualcomm which vested in them the right to make, use, sell. and import mobile device chipsets and devices incorporating chipsets. The benefits of the said license accrued to purchasers and customers, of Qualcomm chipsets. Xiaomi argued that implementation of Qualcomm chipsets for CDMA (3G) applications was a licensed use of Ericsson's relevant patents and could not be said to be an infringement of such patents. The Court held that because of the prior licensing and applicability of the said license to some of Xiaomi's mobile devices (including the device allegedly subjected by the Plaintiff to testing and infringement analysis), Ericsson had entirely failed to demonstrate or establish a prima facie case in its favour. Based on this the injunction order against Xiaomi had been vacated in part.[39]

Case 6: *Vringo v. Xu Dejon/ZTE*

Vringo proceeded against ZTE for infringement of its SEP. The Delhi High Court granted an ex parte interim injunction which restrained ZTE from making, importing, selling, using or advertising the infringing products.[40]According to the Court, Vringo had made out a prima facie case showing that Xu Dejon /ZTE were violating and infringing the SEP of Vringo. Court also appointed local Commissioners who were directed

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38 News on vacating of injunction available at https://www.livemint.com/Companies/BP69vGrbfM2JGWTt593dqO/Delhi-HC-allows-Xiaomi-to-sell-in-India-till-8-January-subje.html

39 *TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. Xiaomi Technology and othershttp*://164.100.69.66/jupload/dhc/VKR/judgement/23-04-2016/VKR22042016S377522014.pdf para 24 VII

40 http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=221627&yr=2013

to visit the premises of ZTE and prepare an inventory of all the infringing products/ goods i.e., handsets, tablets, dongles, infrastructure equipment, semi-assembled products, brochures, technical specifications, template offer letters etc. Subsequently the injunction was vacated on the condition that ZTE would pay Rs. 5 crores and filed an affidavit disclosing the details of CDMA devices sold along with the revenue accrued.[41]

Case 7: *Vringo v Indiamart Intermesh and others*

Vrngo filed patent infringement suit against ZTE and its subsidiaries for infringement of its SEPs.[42]According to Vringo its research and development efforts resulted in filing over 25 patent applications on technologies pertaining to internet search and search advertising, handsets and telecommunications infrastructure and wireless communications. In the present case Vringo was alleging infringement of patent No.IN 200572 which dealt with a method and a device for making a handover decision in a mobile communication system. It was alleged by Vringo that, ZTE and its associates were infringing its suit patent by manufacturing, importing, selling, offering for sale infrastructure equipment including base station controller.

ZTE strongly refuted the allegations levelled by Vringo and contended that the technology used by them was different from the technology owned by Vringo. ZTE further argued that Vrngo was guilty of concealment off act. Vringo had stated that the cause of action accrued to them in December 2012, when the notice of cease and desist was given to them, while the fact of the matter was that the predecessor-in-interest of Vringo was aware of the fact that ZTE and its associates were using a technology allegedly developed by them right from 2002 not only in India but in different countries and yet, Nokia Telecommunication (who was the predecessor-in-interest of Vringo) had not taken any action against ZTE. Therefore, action for infringement which has been initiated by Vringo against ZTE was hit by latches and delay and was also barred by limitation.[43]In such a situation, it was contended that Vringo would not suffer an irreparable loss in case the ad

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41 https://spicyip.com/wp-content/uploads/2013/12/Vringo-ZTE-Order.pdf

42 *Vringo Infrastructure Inc. and Anr v. Indiamart Intermesh Ltd. and Ors.,* I.A. No.2112/2014 in C.S. (OS) No.314/2014 (High Court of New Delhi), http://164.100.69.66/jupload/dhc/VKS/judgement/07-08-2014/VKS05082014S3142014.pdf

43 *Id*. para 11.

interim injunction was not granted, instead ZTE would suffer an irreparable loss inasmuch as it would have to stop its commercial activity with regard to the sale of the base station controller.

After hearing both the parties Court held that Vringo had not been able to establish a prima facie case about the patent of Vringo being infringed by ZTE from the evidence which had been produced. Court wanted more evidence to decide the issue. Court also observed that the balance of convenience was not in favour of Vringo because the assignor/original patentee, namely, Nokia Telecommunication as well as the licensee to whom the patented technology had been given to be commercially exploited by Vringo did not complain about the use of the technology by ZTE either prior to the assignment or even after the grant of license. Court further held that Vringo would not suffer an irreparable loss in case injunction granted stood vacated because the interest of the Vringo could be sufficiently protected even if there was no injunction.[44] Based on the above-mentioned reasons the Court vacated he *ex-parte* injunction.

SEP Disputes before the CCI

The Competition Act 2002 (hereinafter CA 2002) provides for the setting up of a market regulator called Competition Commission of India (CCI).[45] CCI consists of a chairperson and not less than two and not more than six other members to be appointed by the Government of India (GoI). CA 2002 deals with three thematic clusters a) anti-competitive agreements, b) abuse of dominant position c) regulation of combinations. There is a Director General (DG) appointed for the purposes of assisting CCI to conduct inquiry into contravention of any of the provisions of CA 2002 and DG is appointed by the GoI.

In order to enforce their SEPs, companies like Ericsson and Vringo had filed patent infringement suits in High Courts particularly the Delhi High Court. Companies who were defending the lawsuits were mainly technology implementers like Micromax, Intex Lava, iBall, Xiaomi, ZTE etc. Apart from defending the cases filed in the High Court some of these companies proceeded against the SEP owners under the

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44 *Id.* para 42.

45 https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

relevant provisions of the CA 2002 dealing with abuse of dominant position.

Section 4 of CA 2002 deals with abuse of dominant position and the said section prohibits any enterprise or group from abusing its dominant position in a direct or indirect manner. Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or(ii) affect its competitors or consumers or the relevant market in its favour.[46] Abuse of dominant position happens if any enterprise or a group imposes unfair or discriminatory

i) condition in purchase or sale of goods or service; or
ii) price in purchase or sale (including predatory price) of goods or service.
iii) limits or restricts— production of goods or provision of services or market therefor; or technical or scientific development relating to goods or services to the prejudice of consumers;
iv) indulges in practice or practices resulting in denial of market access
v) concludes contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
vi) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

According to CA 2002, predatory price means the sale of goods or provision of services, at a price which is below the cost ofproduction of the goods or provision of services, with a view to reduce competition or eliminate the competitors.[47]

Micromax and Ericsson Case

Micromax filed information against Ericsson before CCI, wherein it was alleged that Ericsson was demanding unfair, discriminatory and exorbitant royalty for its patents regarding GSM technology. The royalty demanded by Ericsson was excessive when compared to royalties charged by other patentees for patents similar or

[46] Explanation to Section 4 of CA 2002.
[47] *Id*.

comparable to the patents held by Ericsson.[48]Micromax submitted before the CCI that Ericsson abused its dominant position by imposing exorbitant royalty rates for SEPs, as it was well aware that there was no alternate technology available and Ericsson was the sole licensor for the SEPs of globally acceptable technology standards. Furthermore, Micromax argued that royalty rates imposed by Ericsson were not product based i.e. royalty was not being charged on the basis of cost of the product licensed but was being charged on the basis of value of the phone in which product of Ericsson was incorporated and Micromax had to pay a per centage of cost of the phone as royalty. [49]Ericsson in its defence argued that Micromax had taken different stands before the Commission and Delhi High Court and the latter had started making payments of the royalty as per the interim arrangement recorded by the Delhi High court. According to Ericsson the present dispute was of commercial and civil nature and CCI should not assume the role of a price setter or concern itself with excessive prices ad pointed out that seeking of injunction from court did not constitute abuse of dominance.[50]

CCI noted that Ericsson's SEPs were in the field of 2G, 3G and 4G patents used for GSM smart phones, tablets etc. and thus the relevant product market would be the SEP(s) in GSM compliant mobile communication devices in India. Based on the details submitted by Micromax, CCI made a prima facie view that Ericsson was dominant in the relevant market of GSM and CDMA in India and held large number of GSM and CDMA patents. Ericsson had 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. Since Ericsson held the SEPs and there was no other alternate technology in the market, it enjoyed complete dominance over its present and prospective licensees in the relevant product market. Thus the CCI ruled that Ericsson was dominant in the relevant product market.[51]

CCI further observed that the royalty rates being charged by Ericsson had no linkage to patented product and it seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of

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48 Micromax Informatics (Informant) and Telefonaktiebolaget LM Ericsson (Opposite Party) full text at http://cci.gov.in/sites/default/files/502013_0.pdf

49 *Id*. para 8.

50 *Id*. para 9.

51 *Id.* para 16.

product of user for its patents. Refusal by Ericsson to share commercial terms of FRAND licences with licensees similarly placed to Micromax strengthened the accusations of Micromax regarding discriminatory commercial terms imposed by Ericsson. CCI further noted that Micromax had every right to raise issues regarding abuse of dominant position before CCI as Section 62 of CA 2002 made it clear that provisions of Competition Act were in addition to and not in derogation of other existing laws. Based on the above-mentioned analysis CCI opined that it was a fit case for through investigation by the Director General of CCI into the allegations made by Micromax.[52]

Intex and Ericsson Case

Intex Technologies also approached the CCI against Ericsson on more or less similar grounds.[53]Intex alleged that Ericsson, by way of its term sheet for Global Patent License Agreement (GPLA) demanded exorbitant royalty rates and unfair terms for licensing its patents to Intex. Ericsson also made it clear that the jurisdiction and governing law for the GPLA would only be Sweden. Even though Ericsson had publicly claimed that it offered a broadly uniform rate to all similarly placed potential licensees Ericsson refused to share the commercial terms and royalty payments on the grounds of Non-Disclosure Agreements (NDAs) and Intex alleged that this was strongly suggestive of the fact that different royalty rates/commercial terms were being offered to the potential licensees belonging to the same category. Intex pointed out that above said conduct of Ericsson would raise the threat of royalty stacking and patent hold up issues.

CCI while hearing the matter noted that FRAND licences were primarily intended to prevent patent hold-up and royalty stacking. It further noted that Ericsson had declared to ETSI that it had patents over 2G, 3G and EDGE Technology and these patents were SEPs and it was required to offer and conclude licences with patent seekers on FRAND Terms. Since Ericsson held the SEPs CCI ruled that Ericsson was dominant in the relevant product market. CCI further held that the information concerning royalty rates made it clear that the practices adopted by Ericsson were discriminatory as well as contrary to FRAND

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52 *Id*. para 19.

53 Intex Technologies (Informant) and Telefonaktiebolaget LM Ericsson (Opposite Party), 762013_0.pdf (cci.gov.in)

terms and the royalty rates being charged by Ericsson had no linkage to patented product, contrary to what was expected from a SEP owner.[54] Ericson's unwillingness to share commercial terms of FRAND licences with licensees similarly placed to Intex strengthened the allegations of Intex with respect to the discriminatory commercial terms imposed by Ericsson. CCI thus opined that the present case be clubbed with the case of Micromax that was currently being investigated by the Director General of CCI.

Ericsson v. CCI (Delhi High Court)

The orders of the CCI passed in both cases resulted in an investigation by its DG against Ericsson. This investigation was challenged by Ericsson before the Delhi Court, through a writ petition under Article 226 of the Indian Constitution[55]Ericsson argued that the impugned orders passed by the CCI were without jurisdiction as it lacked the authority to commence any proceeding in relation to a claim of royalty by a patent owner and any issue regarding a claim for royalty would fall within the scope of the Patents Act, 1970 (hereinafter PA 1970) and could not be a subject matter of investigation under the CA 2002. Ericsson further submitted that the abuse of dominance and anti-competitive behaviour as alleged by Micromax and Intex related solely to the royalty sought by Ericsson for use of its patented technology and this issue was outside the jurisdiction of CCI as the PA 1970 provided an adequate mechanism to address all such issues.[56]

CCI in its defence submitted that the impugned orders could not be subjected to judicial review under Article 226 of the Constitution of India as the said orders did not amount to a final expression of opinion on merit. CCI countered the arguments that it did not have the jurisdiction to investigate issues regarding payment of royalty in respect of patents registered under PA 1970 by submitting that the provisions of CA 2002 were in addition to and not in derogation of any other law. CCI contended that it was not concerned with any other aspect regarding

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54 *Id*. para 17.

55 TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) vs. Competition Commission of India and another., W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014,full text at https://indiankanoon.org/doc/164770226/

56 *Id.* paras 32-34

grant or exercise of any right pertaining to a patent except to ensure the compliance with Sections 3 and 4 of CA 2002. [57]

The Court noted that there was no irreconcilable repugnancy or conflict between CA 2002 and PA 1970 and in the absence of any such conflict between the two laws the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of patents cannot be excluded.[58]Court observed that seeking injunctive reliefs by an SEP holder in certain circumstances might amount to abuse of its dominant position because the risk of suffering injunctions would in certain circumstances, clearly exert undue pressure on an implementer and thus, place him in a disadvantageous bargaining position vis-a-vis an SEP holder. A patent holder had a statutory right to file a suit for infringement and the Competition Act was not concerned with rights of a person or an enterprise but the exercise of such rights. The position of a proprietor of an SEP could not be equated with a proprietor of a patent which was not essential to an industry standard. While in the former case, a non-infringing patent was not available to a dealer/manufacturer; in the latter case, the dealer/manufacturer might have other non-infringing options.[59]As Ericsson was the owner of SEPs it was not open to Ericsson to contend that its conduct in respect of those SEPs could not be made subject matter of enquiry by CCI on the ground that SEPs had been denied by Micromax and Intex. Finally, the Court held that CCI's Director General can continue its enquiry against Ericsson with regard to the information filed by Micromax and Intext dealing with abuse of dominant position.

Analysis

This paper has tried to cover most of the important litigations pertaining to SEPs in India. As is evident from the cases which have been discussed, SEP owners in the field of mobile/smartphones have been very active to protect their rights. To that extent companies like Ericsson which owns a large number of SEPs have tried the legal route by filing numerous patent infringement suits against many smartphone makers from India and abroad.

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57 *Id*. para 38.
58 *Id*. para 174.
59 *Id*. para 199.

In most of these cases, the SEP owner was able to get appropriate remedies either in the form of injunction or interim arrangements. In many of these cases courts have granted ex-parte injunctions. Ex parte injunction is something where an injunction can be given instantaneously where even the opposite party is not even given a notice. [60] However, the Supreme Court has held that an ex parte injunction could be granted only under exceptional circumstances.[61] According to the Supreme Court the factors which should weigh with the court in the grant of ex parte injunction are-

(a) whether irreparable or serious mischief will ensue to the plaintiff;
(b) whether the refusal of *ex parte* injunction would involve greater injustice than the grant of it would involve;
(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant *ex parte* injunction;
(e) the court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application.
(f) even if granted, the *ex parte* injunction would be for a limited period of time.
(g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court.

But in many of the SEP cases discussed earlier, ex-parte injunctions had been given as a matter of right and this has adversely affected the rights of the defendant/mobile phone manufacturer as they were not even given a chance to explain their position regarding the allegation of infringement raised by the SEP owner. Furthermore, in some instances SEP holders were found guilty of concealing crucial information regarding patent licensing and in some cases the injunction granted to the SEP owner was vacated in part as a result of such abusive practices

The smartphone companies who were being targeted by SEP owners tried to use the provisions under competition law to defend their

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60 Order 39 (1) and (2) Civil Procedure Code 1908
61 *Morgan Stanley Mutual Fund v. Kartick Das,* details at https://indiankanoon.org/doc/1120137/

position. Thus, they approached the CCI to carry out an investigation regarding SEPs abusing their dominant position by charging exorbitant royalty rates. CCI found merit in their allegation and directed its Director General to investigate which was challenged by Ericsson in the Delhi High Court. However, the High Court categorially held that CCI had power to order investigation against SEP owners regarding abuse of dominant position.

The SEP owners have used patent law to repeatedly file infringement suits against various smartphone companies and this has resulted in many companies eventually closing down or drastically losing its market share. Micromax had a market share of about 22% in the quarter 4 of 2014. However, by the corresponding quarter of 2016 its market share dipped to 5%.[62] Even though this might not be entirely due to SEP litigation, it is evident that many of the Indian mobile phone manufacturers who did not have adequate financial resources were not able to take the license offered by companies like Ericsson because of the exorbitant royalty rates demanded by the SEP owners.

SEP litigation is an attempt to demarcate the extent of public rights and is closely connected with public interest. Whenever a SEP implementer like a mobile/smartphone manufacturer is forced to pay exorbitant charges to the SEP owner it has serious implications on public interest because these higher costs will be eventually passed on to end consumers. These costs could be in the nature of higher royalties and even payment for expired patents which could also be made part of the patent license.

The limited objective of this project is to trace the manner in which technology standards are being created and managed, with special reference to the FRAND licensing commitments of patent owners. After analysing the cases decided by the High Court and CCI it becomes pretty clear that the SEP owners have been abusing the system and their commitments under FRAND licensing and this has resulted in a higher number of disputes and uncertainty in the market which in turn will have cascading impact on the availability of mobile phones at affordable prices. The practice of quick injunctive relief for SEP owners should be re-considered at the earliest.

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62 https://candytech.in/smartphone-market-share-india/

EVIDENTIARY VALUE OF DNA PROFILING IN PATERNITY DISPUTES IN INDIA – AN ASSESSMENT

Dr. KVK Santhy[*]

Abstract

In cases involving child custody, issues pertaining to child support, adultery-related divorces, and succession, paternity of children have been argued extensively in Indian courts. Blood grouping, the ABO blood type test, and the DNA test are just a few examples of the scientific and technological advancements that have been put to use in these kinds of paternity lawsuits. Global courts have accepted science's argument that it can provide irrefutable proof of paternity. The default use of such criteria (first instance application) in resolving such conflicts has been contested by law as an institution. There are two main lines of thought that lead to these conclusions. The first concern was the individual's right to privacy, which would be infringed upon if they were to submit to these tests without their will. The second concern is that the first implementation of such assessments might have a lasting impact on the child's best interests. Instead of pursuing preferred justice for a litigant, the legal system has always sought equity for all litigants as the fundamental legal principle. By limiting the conditions of its use and providing a chance to examine its claim of providing conclusiveness, judicial supervision and control in evaluating the context, value, and validity of employing the DNA test in such scenarios highlights how technology is socially constructed.

Key words: DNA Profiling, Paternity, Constitution, Personal Laws, Criminal Liability

Introduction

DNA technology has many uses, but none is more significant than paternity testing. It helps resolve not just paternity problems but also those involving matrimonial issues, property, child support, child

[*] Associate Professor, NALSAR University of Law

exchanges, surrogate motherhood, and other related issues. To the best of our knowledge, DNA controls the transmission of all traits, both observable and invisible. It determines physical characteristics like as height and behavioural traits. It may be extracted from almost any biological material, including blood, saliva, hair, bone, sperm, skin, even a single nail. Scientists use DNA testing as a tool to aid in identifying people from their unique genetic patterns. When this phenomenon is used to determine parentage, it is referred to as a "paternity test. "Every individual is unique because they have a unique genetic code that no one else shares. Both parents contribute equally to a child's genetic makeup. Therefore, if a child, a mother, and a father all provide DNA samples, it is simple to prove paternity or identify the biological parents. Identical twins are the one and only possible exception to this rule. Only identical twins, who share an identical genetic blueprint, are known to be an exception to this rule. A scientific case may be made from this discrepancy that one twin is the biological father of the other twin's kid. Still, this has never been experienced or reported before, and is only a footnote in most paternity test case study contexts. Also, mitochondrial DNA, which is passed directly from mother to child without being shuffled, is found in humans and is very useful for determining paternity. Thus, it would be far simpler to prove a link using mitochondrial genome comparison than nuclear genome comparison. However, such testing is only useful for determining whether or not two people have a common ancestor via the maternal line. Testing of the Y chromosome, the "father's chromosome," is a very reliable method for determining paternity.

Establishing the proof of Paternity

Paternity is defined as fatherhood or relationships via the father. There are a variety of definitions for the term "parent" in various statutes. According to certain definitions, a parent is either the man or woman who gave birth to a child legally. According to Section 13 of the General Clauses Act, 1897, “parents" must always refer to a male parent and never to a female parent[1].

Parental testing refers to the use of genetic fingerprinting to detect whether a parent and child link exists, whereas a paternity test

[1] General Clauses Act, 1897. § 13, No. 10, Acts of Parliament, 1897 (India)

determines if a man is the biological father of a person and a maternity test does the same for a woman. The phrase "paternity proceedings" refers to any legal action taken by a court to establish the paternity of a child who was born outside of a marriage. DNA identification, blood typing, and tissue type are all reliable methods that may be used to conduct parental, paternal, and maternal testing. There are two ways of looking at family law: the natural and the instrumentalism. From a more organic perspective, marriage is a sacrament and the joining of one man and one woman is essential to the established order of things, but it also comes with the obvious issue of illegitimacy. Illegitimate refers to a birth that occurs outside of the traditional marriage relationship. It might be to a single mother (consensual or forced). It's also possible for a married woman whose spouse is not the biological father of her child. In the past, those who had children outside of marriage were looked down upon, but according to Section 16[2]of the Hindu Marriage Act,1955, all children are now regarded legally legitimate even if their parents are not.

In the absence of a parent or legal guardian, every kid is considered "*Parents Patria*" and is thus the responsibility of the state. The legislature has made several child-friendly measures as part of this effort. The goal of the legislation was to ensure that children born inside and outside of marriage were treated the same and that custody and other child-related decisions were based on what was in the child's best interests. Goldstein and his colleagues advocated that the Court should always choose the option that does the least harm to the kid, and this is one of the concepts they emphasized[3]. At all times when a decision must be made on the nation's youth, the principle of *Parens Patria* is

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[2] Hindu Marriage Act, 1955, § 16, No. 25, Acts of Parliament, 1955 (India) Section 16 - Legitimacy of children of void and a voidable marriages :
1. Notwithstanding that marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or nor a decree of nullity is granted in respect of that marriage under this Act and whether or nor the marriage is held to be void otherwise than on petition under this Act.
2. Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity,
3. Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents

[3] In *Semitra v. Bikram Chaudhary*, it was held that even an illegitimate child was entitled for maintenance.

honoured[4]. In another instance, the wife and kid in a bigamous marriage were also granted protection by the Hon'ble Supreme Court[5].

Legal provisions for establishing Paternity in India

Where and why does the necessity arise to establish paternity when there are already laws in place that protect children's best interests? Questions that appear straightforward at first glance may often lead to knotty issues in practice. In cases when a male has to establish paternity, seek custody, alimony, or inheritance, or to establish paternity, a DNA test may be necessary. DNA profiling is now the most accurate way to establish paternity. Paternity may also be established with the use of statutes and legal documents. Sec 112 of the, Indian Evidence Act, 1872 (IEA)deals with Proof of legitimacy beyond a reasonable doubt when a child is born inside a marriage[6].Section 112 of IEA not only talks about the legitimacy of a born child, but also proves that the child isn't legitimate if the husband can show that he and his wife haven't had any contact for a long time. Therefore, the provision loses its force since it actually provides the parties with a means of escape. However, the legislative endeavour to prevent a kid from being bastardized has been fair. On the other hand, at the present day, it seems to be an outmoded rule. In 1872, while this inaccessibility criterion was being evaluated, the Indian Evidence Act was passed. Forensic use of DNA testing began in earnest after its development in 1986. Science has progressed to new heights, and now not only law enforcement organizations but even criminals use scientific methods in their investigations. For this reason, giving up on access requirements altogether would be the least scientific option. Even more so when the child's outcome is same whether access is proven or denied or a DNA test is performed. The cases of *Goutam Kundas and Kanti Devi v Poshhiram*[7] may be cited as examples where the court refused to order blood grouping or a DNA test since doing so might cause a kid to be ostracized as a "bastard" in society.

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4 *Kanchan Bedi and Anr. v Shri Gurpreet Singh Bedi*, AIR 2003 Delhi 446.

5 *Bakula Bai v. Ganga Ram & Anothers*, 1988 (1) SCC 537.

6 The fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had not access to each other at any time when he could have been begotten

7 AIR 1993 SC 2295

The Rule of Evidence based on Section 112 of IEA is based on the Latin proverb "*Paterest Quemnuptiaedemmonstrant*," which literally translates to "He is father whom the marriage implies." Its foundations are the Mansfield Rule[8] and the English Rule[9].However, when the mother's paternity is in question, Section 112 does not apply. If a party can prove that a kid was born during the subsistence of the marriage or within 280 days after the dissolution of the marriage and the mother was still unmarried, then it is convincing proof that the child is of that father under Section 112 of the IEA. According to the said section, if a party can prove that a child was born during the life of a marriage or within 280 days after its dissolution—provided that the mother has not remarried—then the child is conclusively proven to be the biological child of the man named as the father.

However, the disputed parent has the right to challenge paternity under this section if he or she can prove that they never had any contact with the mother of the child throughout the time the kid was pregnant or was born[10]. By virtue of the presumption of innocence norm, the onus of proof rests squarely on the shoulders of the person making the affirmative declaration. To counter this, Section 112 of IEA places the onus of proof on the party disputing the existence of a fact. Section 112 IEA creates a rebuttable presumption that may be challenged by evidence that is more persuasive than the balance of probability alone[11]. The question is whether, as in criminal situations, this evidence must be beyond any reasonable doubt, or if it may be shown just via a majority of the probabilities, as in civil proceedings.

The Honourable Supreme Court provided a response to this query in the *Kanti Devi* Case[12], declaring that the burden of proof must be shared by the two parties in order to guarantee that the plaintiff spouse was not a potential source of the child's conception. Given that the assumption would label the child as a bastard and the woman as unchaste, courts typically take their time in delivering rulings against it.

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8 Mansfield Rule states that if a child is conceived while the marriage is subsisting, the husband is presumed to be the father.

9 The English rule states that the child born in the wedlock should be treated as the child of the man who was then the husband of the mother.

10 *Smt. Ningamama & Another v. Chikkaiah & Another*, AIR 2000 Kant 50, AIR 2000 Kant 50.

11 *Goutam Kundu v. State of W.B.*, AIR 1993 SC 2295.

12 AIR 2001 SC 2226.

The conditions for non-access, however, do not apply in the current situation. There may be a case where women is unchaste, having sexual intercourse with many persons within 280 days after dissolution. If a child is born to such woman, the child would be presumed to be that of the husband and it would be highly unfair to put economic burden upon such husband.

As DNA profiling techniques have the ability to conclusively determine the legitimacy or illegitimacy of a disputed child, so, it must be applied without any vacillation. The Courts should not be the mere spectators of what is happening but must make every endeavour to ascertain the truth. There should be no obstacle to determining paternity using DNA profiling .There should be no impediment to determining paternity using DNA profiling if maintenance can be awarded to the child whether he is legitimate or illegitimate under Section 125 of the Criminal Procedure Code, 1973 (Cr. P.C.)[13]A child born to a married couple is automatically recognized as their legitimate child if the child is born during the subsistence of their marriage, even if husband is not the biological father of the child. The conclusiveness could be challenged, however, if it could be demonstrated that the persons in question were unable to communicate with one another. In a number of cases, impotence has been cited as evidence of lack of access; nevertheless, court opinions on this issue have been divided.

In *Krishnayya v Mahipathi*[14], the Privy Council was doubtful if on an issue of legitimacy, evidence of impotency could be admitted. However, comparative analysis with the position in other countries like U.S. and English Law shows that the other countries do permit impotency to be proved. Several Indian marriage laws see impotence as a legitimate excuse for not getting married. The Supreme Court has recognized male impotence as a legitimate reason for divorce on many occasions. And it's not only the husband who might suffer from impotence; the woman can, too. If impotency can be considered as a ground of divorce, then it would be prejudicial for not considering it while deciding the question of legitimacy or illegitimacy of the child. Other grounds those could be pleaded are un-chastity of women, Vasectomy operation and respondent's (husbands) illness. Section 112 of

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13 Code of Criminal Procedure, 1973, § 125, No. 27, Acts of Parliament, 1974 (India). Order for maintenance of wives, children and parents

14 40 CWN 12 (PC).

IEA does not allow premature birth to overcome the presumption[15]. Thus, section 112 of IEA needs to be amended in order to keep up with new scientific discoveries.

Scientific Techniques used in determining Paternity –A Brief Note

Paternity analysis can now-a-days be conducted with certainty with the aid of scientific techniques. The most common method for identifying a person's blood type is called ABO typing. The antigens required for this to happen are encoded in the ABO locus on human chromosome 9. In the ABO system, the A and B alleles are both dominant whereas the O allele is recessive. This means that a person with ABO blood type O has two copies of the O gene. Type O blood is carried by those who have two O alleles, whereas type A blood is carried by those who have either two A alleles or one A and one O allele. Having type B blood similarly indicates the presence of either two B alleles or one B allele and one O allele, just as having type O blood indicates the presence of two O alleles. Some people have blood type AB, which means that they have inherited both the A and the B alleles[16]. In cases where paternity is contested, ABO blood type may be used to exclude a man as a possible father. Since, he will always pass on the A or B gene, a man with blood type AB cannot father a child with blood type O. Despite their usefulness in this context, ABO blood types cannot be used to establish paternity. This factored towards the lag in blood-adoption typing's by the legal system. In 1943, Joan Barry made headlines when she publicly declared that Charlie Chaplin was the father of her child. After conclusive DNA testing showed that Chaplin was not Barry's biological father, he was nonetheless forced to pay child support to Barry[17]. As a direct result of the events surrounding *Barry v Chaplin*, new laws were passed that marked the beginning of a new era in forensics.

Blood-typing has been used for quite some time to establish paternity and for forensic reasons, and it has been enhanced with the

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15 In *Ponnammal v. Andi Aryan*, AIR 1934 PC 49; the child was born after 8 months from marriage. Husband raised a plea that for one month immediately after the marriage, he was incapacitated from doing sexual intercourse due to some operation, but Court turning down his plea held that 7 months' time was sufficient and termed the child to be legitimate as parties had full access to each other.

16 Mike Redmayne, *The DNA Database: Civil Liberty and Evidentiary Issues*, 1998 Cri. L.R. 437.

17 Ian W. Evett, et.al, *DNA Profiling: A Discussion of Issues Relating to the Reporting of Very Small Match Probabilities*, 2000 Cri. L.R. 341.

introduction of other blood antigens, such as those associated with the MN and Rh systems. The fact is, however, that such blood groupings were only around 40% accurate in ruling out a man as a child's father[18]. Human Leukocyte Antigen (HLA) testing was developed in the 1970s, providing a means by which women could reliably exclude males as potential fathers (with an accuracy rate of 80%). HLA genes contribute to exchanging antigens with T cells. The HLA system is very varied, with over 3,200 different alleles found thus far. Although the HLA system's tens of millions of genotypes are useful for identity and paternity testing, the system's multitude of alleles poses challenges for cell and organ transplantation.

However, DNA profiling has superiority over the traditional Blood testing techniques as it has the potential to go beyond exclusion to positive identification of biological father. It may be noted that except in case of identical mono-zygotic twins, DNA for each person is unique[19].Sir Alec Jeffery's DNA profiling method was created in 1984, and by 1988[20] it was being used in paternity testing. DNA paternity testing is quite easy in all other respects as well. A sample is obtained from the presumed father, mother, and offspring. The DNA is extracted from the samples, so taken, and then cut at specific sites into fragments by the means of restriction enzymes. These fragments are then placed into a gel matrix where electric current is passed which moves the fragments across the surface of the gel revealing markers on the gel surface. These markers are then exposed to a probe that has been labeled with known DNA markers. These probes can only bind to a certain region of a person's DNA, hence they can only be used to study that region. Inspecting the DNA binding sites of the probes might help establish paternity. The profiling processes are identical to those used in comparing victim and suspect samples. After that, the bands are paired up with their mothers. The zygote is the result of the union of the father's sperm and the mother's egg during conception (a fertilized egg). Each

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18 K.F. Kelly, et.al., *Methods and Applications of DNA Fingerprinting: A Guide for the Non-Scientist*, 1987 Cri. L.R. 105.

19 In a unique case of the kind, on June 3rd 2011, a man claimed himself to be biological father of Mara Thoner Samuel Wanjiru and moved to High Court for stopping his son's burial to allow him to conduct a paternity test. He was Mr. Eligah Chebon who wanted to extract samples from Wanjuru's body for a DNA analysis who wanted to prove that he was his biological father. The Court certified the application to be urgent and issued notice of motion. Available at www.nahon.co.ke/news (last visited on June 5, 2011).

20 John M. Butler, *Forensic DNA Typing: Biology, Technology, and Geneticsof STR Markers* 253 (2d ed. 2005).

parent contributes half of the zygote's DNA, yet the resulting organism has two full sets of genes. Zygotes reproduce and split into embryos, which grow into new-borns and then adults. All the cells that make up the body at any one time carry the same amount of DNA—half from each parent. DNA includes instructions for making proteins, but the vast majority of it is useless "junk DNA" with an unclear purpose. Humans may be identified using this otherwise useless DNA. Predictable inheritance patterns are observed at certain sites (called loci) in the junk DNA, which may be used to infer ancestry. In these spots, DNA scientists may find the unique markers that allow them to identify a person. Short fragments of DNA that appear in highly variable repeat patterns across people are utilized as markers in a standard DNA paternity test; these markers are known as Short Tandem Repeats (STRs).

Every individual has two sets of these markers in their DNA, one set from each parent. The length and occasionally the order of markers at a given DNA site might vary from person to person within a community, depending on which markers were passed down from which parents. Each person's genetic profile is made up of a different set of marker sizes and combinations of those sizes. A pair's DNA profiles are compared to discover whether there is strong evidence of shared ancestry. The correlation on 16 markers between the kid and the tested male allows us to form a judgment as to whether or not the guy is a biological father, and the partial findings are suggestive of a match on a smaller subset of markers[21]. A paternity Index (PI) is a statistical measure of how strong a match at a given marker indicates paternity, and it is awarded to each marker in scientific studies. When the PIs from each market are multiplied together, the resulting Combined Paternity Index (CPI) shows the relative likelihood that a given man is the biological father of the tested kid, relative to the chance that the child was fathered by a random guy of the same race. After the CPI is calculated, a paternity probability is generated that indicates the likely closeness of the purported father to the kid. The results of other types of DNA testing for determining familial ties, such as those for establishing grand parentage or sibling-ship, are quite comparable to those of paternity tests. Oftentimes, an alternative statistic, such as the sibling-ship index, is provided instead of the combined paternity index. In addition, whole genomes should be

[21] Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*34 WAKE FOREST L. REV. 767, 768 (1999).

disregarded in favour of certain marker alleles during paternity testing. Analysing the whole genome would be costly and time-consuming, and it wouldn't even guarantee better findings. DNA profiling is extremely sensitive, automated, and superior to the other conventional ways of detecting paternity since it can be conducted even on smaller and degraded DNA samples with better speed and good accuracy.

Procedure followed in DNA Testing for Determining Paternity

For a paternity test, one requires a sample of a Child and that of the alleged father in case of paternity and child and that of mother in case of maternity testing. Sample of the mother may not be a strict requirement; however, presence of sample may further strengthen the results. Nevertheless, it shall be required in cases of disputed maternity and surrogate mothers. A situation may arise when the alleged father is not present or refuses to give his sample. In such a case, the paternity test can still be performed. The sample can be collected from the relatives. This is known as Relationship Analysis[22]. This technique is frequently used by people who want to decipher about their biological father, particularly when that person refuses to undergo the said test. The genetic code may tell which characteristics will be handed down through the generations. Since the Y chromosome is unique to males, a technique known as Y-STR Analysis may be used to positively identify male perpetrators of rape and other sexually motivated crimes. Paternity may be determined by examining the DNA of any male relative since the Y chromosome is passed on unaltered through male generations. Any male relative, such as a grandfather, brother, or male offspring, may provide a DNA sample.

Paternity testing may be done at any time, not only after the baby is born. It is now feasible to do tests on both pregnant women and their new-borns. It can also be done when the child is in the womb of the mother. However, in such a case, sample is not the blood but the Amniotic fluid. This process is painful and is likely to cause repercussion. It can harm the unborn child and also lead to abortion. It also involves various ethical and moral questions, so, it is least recommended. Generally, for all types of testing through DNA, A little

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22 D. H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 430 (2003).

prick in the arm would do the needful. It is just like any other test which is performed by taking the blood sample. However, if it seems to be painful to some, then DNA profiling can even be done by using saliva taken through a mouth-swab Paternity tests may be "curiosity paternity tests" or "legal paternity tests". In the former category, the option is with the person who has performed the test either to disclose or not to disclose it to someone else. In the latter case, both the parties, lawyers and judge would be curious to know the result. In such cases, the expert who will conduct the paternity test may also learn other confidential facts about the person. So, the companies with the good reputation and accreditation should be chosen for comparison / parental testing. There is no evidence that DNA paternity tests are unreliable. The collection of contaminated or otherwise modified samples, for example, or the erroneous labelling of samples, may lead to errors, as can purposeful interventions. As a result, only doctors who are properly trained and equipped to do so should request DNA samples. Taking samples at different stages of the process, recording the data, and cross-referencing the findings are all crucial. A lab worker who isn't paying close enough attention might potentially affix the wrong Bar code to a material. Another potential danger posed by computers is the accidental deletion or modification of data. It is advised that samples be divided into two to conduct tests on each half separately as a safeguard against such results. However, there may be occasions when DNA profiling doesn't yield results i.e. it is neither a match or non-match. This is called a inconclusive paternity test. It may be because of number of reasons including a tainted DNA sample or presence of a twin brother who is not a mono- zygotic twin or contamination.

Apart, from establishing paternity, parental testing has varied applications. It can establish living relationship in cases of domestic violence, relieve respondent of financial burden in cases under 125 CrPC; helpful in inheritance claims; in cases of adoption, birth through donor conception, or separated in a divorce custody battle. Also, certain children may be inquisitive about their biological parents or father. Certain countries have laws to protect the anonymity of donors; however, at some places, offspring's have rights over information regarding their biological parents. Siblings can also wish to get the paternity tested, if, they want to know that they share common father or not. Even twins cannot be assumed that they share the same father, since it is possible for a woman to release two eggs during ovulation which

can then get fertilized by two different men. Only exception is in-case of mono-zygotic identical twins.

Relevance of DNA Testing for Paternity in Matrimonial Disputes

Maintenance procedures under Section 125 of CrPC or Section 24 of the Hindu Adoption and Maintenance Act, 1956 are common venues in which problems of challenged paternity emerge. Section 125 procedures are brief in nature and should be moved quickly since they are benign provisions written for welfare. They have been enacted to benefit the destitute wives, neglected children and neglected parents. Similarly, this is the intent of Section 24 of the Hindu Adoption and Maintenance Act. In *Bakulabai& Another v Gangaram & Another*[23], the Hon'ble Supreme Court held that maintenance proceedings under Section 125 of Criminal Procedure Code and those under Section 24 of the Hindu Adoption and Maintenance Act are welfare measures and those should not be stultified on technicalities. Nothing in Section 125 will be construed to limit, restrict, or otherwise impair the rights of any person who is the victim of homelessness, regardless of gender. Since the proceedings under Section 125 of Cr.P.C, are summary in nature, it has already been ruled that the estranged wife's claim for maintenance for herself and the child cannot be dismissed merely because the court has yet to rule on the complicated matter of whether or not DNA testing is necessary to resolve the charge of illegitimacy[24].

Moreover, DNA test would be of no consequence till respondent is not able to rebut the presumption under Section 112 of IEA, by proving non-access. Also, DNA test should not be used as a tool to impede the proceedings under Section 125 of CrPC when the husband has a remedy under Civil procedure code to challenge paternity.

The Court can take an adverse opinion if the respondent refuses to take a DNA test after the Court has ordered one. Respondent won't be able to contest paternity if the application for a DNA test has been made on his behalf and is approved, but he refuses to submit himself for the test[25].In view of these discrepancies and inadequacies in Law, as well as recent scientific advancements in the field of genetics, the Law

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23 1988 (1) SCC 537.
24 *Amarjit Kaur v. Harbajan Singh &Anothers*, 2003 (1) AWC 344 (SC).
25 *Dwarika Prasad Satpathy v. Bidut Prana Dixit*, (1999) (8) JT SC 329

Commission of India has proposed modifying Section 112 of IEA in its 185th report[26]. DNA paternity testing on both twins is required in situations when the paternity of the twins is in question. However, if one is unsure of whether twins are fraternal or identical, a Twin Zygosity test must be done. Identical twins would have the exact copy of DNA as that of the father. Twin paternity testing poses special difficulties that call for extra care.

Evidentiary value of DNA Profiling Technique in Paternity Disputes – Probative or Conclusive

In India, the statutory provisions were deficient that could confer powers upon the court for directing a person to give his blood sample. But with passage of time, it was realized that advanced scientific techniques could be not only useful in combating the crime but also be helpful for judicial processes. So, Section 53-A was inserted in the Cr.PC[27]. However, post amendment, critics raised voice that the said amendment was violative of Article 21[28] and Article 20(3)[29] of the Indian Constitution however, it is now well settled that the Courts can pass such orders and any direction of a blood test or DNA test would not infringe Art 21 and Article 20(3) of the Constitution. The prime duty of the Court is to discover the Truth and if in that process, the law has to extend its wings and give liberal and widest interpretation to the provision of inherent powers, it can do so. Moreover, no right is an absolute right and thus a party could be directed to take DNA or Blood Test for paternity disputes however, he cannot be compelled to do so in-case of refusal. If in case such direction has been given by the Court and the person refuses to undergo a DNA test, the Court would be at liberty to draw adverse inference against that person. Till date, Section 112 of IEA is not amended. A conclusive presumption of legitimacy is in favour of the child. In such a case, husband will not be allowed to rebut this presumption through DNA testing. For the obvious reason that

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26 Law Commission of India, 185th Report, 2004 Cr. L.J. 143, Journal Section.

27 Code of Criminal Procedure, 1973, § 53-A, No. 27, Acts of Parliament, 1974 (India).Examination of person accused of rape by medical practitioner.

28 Article 21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

29 Article 20. Protection in respect of conviction for offences.—
(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
(2) No person shall be prosecuted and punished for the same offence more than once.
(3) No person accused of any offence shall be compelled to be a witness against himself.

safeguarding children is in the public interest, and also because legislators did not want children to be harmed because their parents were too slothful to intervene[30]. Furthermore, throughout the time the child may have been conceived, the husband should be denied access. If the disputed party seeks to oppose the presumption by arguing that it only applies to a fraction of the total responsibility, this cannot be allowed. The disputed party may use more than just DNA profiling to counter the strong inference. Section 112 of IEA is his only option for challenging the evidence. It's important to keep in mind that the Section 112 method only works in one way. The contending party would first show non access and then may resort to DNA profiling for further substantiating his claim. But it cannot be allowed that contending party resorts to DNA profiling for proving non access[31].

Conclusion

Science's most impressive quality is how it adheres to the same, universally accepted principles in every one of its endeavours. There's no denying that several branches of science have a powerful grip on the minds of their audiences. Evidence based on scientific studies and discoveries has become more reliable in recent years, and it is increasingly used as the foundation for criminal convictions. It's no surprise that many individuals have challenged the validity of scientific evidence presented in court. The goal of this study was to provide laypeople with no training in biochemistry or molecular biology a firm grounding in the underlying concepts that underpin genetic testing for paternity. One cannot overstate the importance of DNA testing in the judicial and forensic sectors. To illustrate, since human skin contains DNA, even a casual contact may leave behind a wealth of cells that can be used for DNA typing. There is a clear trail of DNA on the cutlass that may lead police to the killer who brandished it. Every person on Earth has a one-of-a-kind genetic code. Both parents contribute equally to a child's genetic makeup. Consequently, if a kid, a mother, and a father all provide DNA samples, it is simple to prove paternity or identify the biological parents. Identical twins provide the one possible exception to this rule. Only in the instance of identical twins, in which both individuals have a copy of the same genome, does this appear to constitute a violation of the general scientific norm. This discrepancy

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30 *Kanti Devi v Peshi Ram*, AIR 2001 SC 2226.

31 *Tushar Roy v Smt. Sukla Roy*, 1993, Cri LJ 1659 (Cal.).

might be used to prove, scientifically, that one twin fathered the other's kid. However, this has never happened or been mentioned in any recorded instances, and hence it is often treated as an afterthought in paternity test case studies.

In cases where the evidence is collected by the third party, for e.g., the investigating officer or a forensic expert, the chances of manipulation and corruption increases. However, it may not be in the case where the parties want to get DNA profiling done for their own satisfaction or where the samples are sent through the orders of the court especially the paternity matters and the matrimonial issues. This is sans doubt that if the sample has been collected correctly, DNA profiling would give exact results. So, its application in the paternity matters and the matrimonial disputes should not be questioned or disputed. However, it is surprising that where on one hand the science has revolutionized, we are still struck up with the old traditional and obsolete methods of determining parenthood and legitimacy. If the respondent urges in an application that he has not fathered the child, there should be no necessity for him at all to first prove “non-access”. At the most, if his claim is found to be false, he can be burdened heavily for it. Moreover, the legislation itself breaches the object with this non-access theory, and then why not resort to shorter and infallible methods of determining truth.

RING FENCING THE LEADER: NEED FOR IDENTIFICATION IN CARTEL ENFORCEMENT

Dr. Sudhanshu Kumar & Alok Verma[*]

Abstract

Competition has been considered an essential component of the market leading to productive, allocative, and dynamic efficiency. A free-flowing healthy market tends to create opportunities for businesses to grow. It is important therefore that competition is preserved by prohibiting anti-competitive practices. Cartelization is the most pernicious violation of competition law and is treated as a 'fraud' on the market. Cartel deterrence forms the fulcrum of antitrust enforcement which in turn is dependent on effective penalization. The Indian Competition Act, 2002 (hereinafter, ICA) envisages special provisions to deal with cartels. A collective exercise to disrupt the fair market practice is curtailed by the competition regulator. The Competition Commission of India (hereinafter, CCI) has also developed a leniency scheme to incentivize cartel disclosure. It is argued that provisions of ICA and anti-cartel enforcement of CCI fall short in terms of effectively penalizing cartels because of the non-identification of the active role of cartel leaders ('ring leader'). Lack of identification of 'instigators', influencers, or coercers within the internal organization of a cartel, in the quantification of penalty or grant of immunity/leniency leads to an anomaly where the ringleader despite being the mind behind the anti-competitive practice walks free. This article examines the position of a 'ringleader' in a cartel and suggests measures in designing remedies for violations of competition laws that forbid cartels. A course correction is a real necessity to create democratic market economies and punish the mind behind the cartel.

Key words: Competition, Cartel, Ringleader, CCI, investigation, Market, Economy

[*] Sudhanshu Kumar is an Assistant Professor, NALSAR University of Law; Alok Verma. Research Scholar (Ph.D) at Buchmann Faculty of Law, Tel Aviv University.

Introduction

"*Competitors are our friends, customers the enemy*" is a major highlight of the movie "The Informant" based on the prosecution of Lysine-Cartel in the USA.[1] These lines summed up the business philosophy of Michael Andreas, son of the chairman of Archer Daniels Midland Co. (ADM), USA who was prosecuted by the Department of Justice for anti-trust cartelization.[2]Over the years, anti-cartel enforcement has developed as the focal point for the majority of anti-trust regulators.[3]

Competition laws across jurisdictions are enacted to protect the interest of the market and allow stakeholders to reap the benefit of a free and fair market.[4] It acts as 'invisible hands' to push the best interest of participants and consumers.[5] It has been seen that the urge to pervert competition causes greater harm as compared to the gain of a single enterprise.[6] Any practice to charge 'supra competitive' prices or control of production has a far-reaching effect on consumers, market players, and the economy. Therefore, the objective of competition policies is to keep market participants away from the temptation of collusion. Where under a restructuring and collaborative process, the firms are subject to high public scrutiny and have to play by the rule.[7] As such requires little policy correction and discovery. In contra, anti-competitive arrangements escape legal scrutiny due to their very nature of secrecy until detected actively by the regulators.[8] Therefore, competition enforcement to achieve efficiency and effectiveness needs to follow strict deterrents for the perpetrators. The current form of legislation across the globe with effective remedies clubbed with sanctions suffice

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1 Phrase used by Michael Andreas, son of Chairman of Archer Daniels Midland Co. (ADM), USA (the Lysine Cartel case).

2 J.M. Connor, *Our Customers Are Our Enemies: The Lysine Cartel of 1992-1995*, 18(1) Review of Industrial Organization (Feb 2001).

3 Recommendation of the Council concerning Effective Action against Hard Core Cartels, OECD legal instruments (2019), https://www.oecd.org/competition/recommendationconcerningeffectiveactionagainsthardcorecartels.htm

4 There are more than 120 jurisdictions in the world today which have a statutory law on competition. See, Richard Whish & David Bailey, Competition Law, Oxford University Press 8th ed., (2015).1-5

5 Adam Smith, 'AN Inquiry into the nature and causes of the wealth of nations', (1776) ECONLIB BOOKS Feb 5 2018.

6 Chu, C.Y.C and N. Jiang, 'Are Fines more Efficient than Imprisonment?', *Journal of Public Economics*, 51, 1993, 391–413.

7 See: Competition Act, 2002. S.5

8 Bryant, P.G. and E.W. Eckart, 'Price Fixing: The Probability of Getting Caught', *The Review of Economics and Statistics*, 73, 1991, 531–36.

to restrict the evils of anti-competitive practices of the corporation.[9] Strict penalization and amnesty scheme forms the fulcrum of anti-cartel enforcement. Competition regulators of most advanced jurisdictions rely heavily on leniency applications to counter cartelization. The success of leniency schemes depends both on the fear of sanctions and the incentivization to open up. Both of them require a deep examination of the internal organization of a cartel. Wrongly targeted incentivization may be counter-productive.

Many times, the laws have fallen short of being effective against the actual mind(s) behind the wrongdoing. Lack of identification of 'instigators', influencers, or coercers within the internal organization of a cartel, in the quantification of penalty or grant of immunity/leniency leads to an anomaly where the ringleader despite being the mind behind the anti-competitive practice walks free. Present sanctions are merely remedial to undo the vice of practice and the burden is shared collectively.[10]The private individuals who may be at the top of the pyramid or the one who devises the strategy of foul play have not been dealt with effectively. The results are unsettling as in several cases these offenders are tempted to collude again.

A governance system to effectively deal with cases of individuals or lead firms who violate cartel laws requires social and political consensus. Indian coemption law regime seems to lack such consensus. An ongoing debate amongst academics and practitioners alike has gained momentum over the years seeking strong deterrents for lead enterprises and individuals.[11]Indian competition law, although inspired by antitrust legislations in countries like the US and the UK/EU, is not quite in *pari materia* with these jurisdictions. In the present article, the authors have argued that the provisions of ICA and anti-cartel enforcement of CCI fall short in terms of effectively penalizing cartels because of the non-identification of the active role of cartel leaders ('ringleader'). In a time when the Indian legislatures are rethinking the tenets of competition law, it is important to evaluate and assess the experience of the CCI in dealing with cartel cases. Any reform to the current regime has to be in light of

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9 Friedman, D., 'Why not Hang Them All: The Virtues of Inefficient Punishments', *Journal of Political Economy*, 107, 1999, 259–69.

10 Andreoni, J., 'Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?', *The RAND Journal of Economics*, 22, 1991, 385–95.

11 Joshua, J.M., 'Competition Law Enforcement Criminalization, Cartels, Leniency and Class Actions: A Look into the Future', *Competition Law Insight*, 2004.

previous experiences and challenges to the effective enforcement of anti-cartel laws.

The present work capitalizes on this debate and explores legal scholarship to suggest an effective antitrust regime for the lead firms and individuals. This article is majorly divided into three parts. The first part of the paper brings out a normative understanding of cartels and 'ring leaders. The second part highlights the gap in the present applicable regime and cases of Indian jurisdiction with relevant references to select jurisdictions. In conclusion, we suggest some corrective actions, to bring the Indian competition regime to par with the global standard of anti-competitive deterrence.

Normative Foundations

Cartels and cartelization

Historically, the term "Cartel" originates from the Latin term *'carta'* meaning paper or letter. Alternatively, the term *'carta'* was used to signify political and military compromises between nations to exchange information on the prisoner and like. Later, during the 19th century, this term assumed its usage in a business transaction for the arrangement of trade-related information. The modern usage of the term cartel has a negative connotation and is used to refer to an agreement using the anti-competitive practice of restrain and manipulation for the mutual gain of uniting enterprises. Simply speaking, a cartel is "*an arrangement between competing firms designed to limit or eliminate competition between them, to increase prices and profits of the participating companies and without producing any objective countervailing benefits".*[12]

While 'cartelization' in itself may be considered by some as a business strategy where the supposed competitors join hands to create a favourable environment for themselves to maximize their profits,[13] most jurisdictions see cartels as highly unethical and anti-competitive[14]

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12 John S. Lee, STRATEGIES TO ACHIEVE A BINDING INTERNATIONAL AGREEMENT ON REGULATING CARTELS: OVERCOMING DOHA STANDSTILL, Springer (2016), pg. 17.

13 R.F. Hahn, S. Sabou, R. Toader, & C. Rădulescu, Worldwide *Competition Strategies Between Ethical and Unethical Practices*, 12(1) Review of Management & Economic Engineering (2013).

14 Joe Harrington, *Some Thoughts on Why Certain Markets are More Susceptible to Collusion*, OECD Global Forum on Competition – "Serial Offenders", U. of Penn. – Wharton (October 2015)

because of their proven adverse effects on the market. Legal scholarship has concentrated on the external manifestations of a cartel in terms of all the harmful effects on the competition in the relevant market. Similarly, the efficiency of regulatory action has been seen through the lens of the quantum of penalty imposed on cartels. There has been little focus, especially in developing countries to examine the internal organization of a cartel, its decision-making, and internal sanctioning mechanism. In other words, the factors that lead to cartel stability thereby increasing its duration have received lesser attention. This gap in the identification and differentiation of the internal organizational structure of the cartel has also affected the overall anti-cartel enforcement. It is argued that the identification of different levels of participation of the firms in the cartel decision-making can help in creating a better sanctioning mechanism. Identifiable factors to decode internal organization in turn will also improve the cartel detection rate of the competition authority.

The organizational arrangement of cartel

The organizational arrangement of a cartel can be scrutinized based on internal decision-making within the cartel. Constituent members of the cartel are not always of the same size or capacity and they do not have similar positions in the market. Therefore, it is logical that decision-making may not always be democratic. Some scholars[15] have chosen to classify cartels as – centralized and decentralized. While collective decision-making is the hallmark of decentralized cartels, there is a strong hierarchy of decision-making in centralized cartels. There is also the presence of one or more 'leader(s)' and an identified communication network. In contrast, 'mutuality' pervades a decentralized or bureaucratic cartel, involving multilateral arrangements and is affected through group meetings. Such cartels generally require a third-party monitor to oversee the functions and to ensure that the collective decision is followed by all necessitating exchange of relevant information at some level. Engagement of third-party monitoring reduces the risk of detection as there is no record keeping at the individual firm. The platform of a trade association and federation of business activities becomes a perfect conduit for the exchange of information. However,

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www.oecd.org/competition/globalforum/ Harrington_OECD_10%2015.pdf (last accessed on Dec. 10, 2022).

15 W.E. Baker & R.R. Faulkner, *The Social organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, 59(6) American Sociological Review, 837-859 (1993).

such cartels have also proven to be less stable due to a lack of trust in fellow cartelists and the absence of strong internal deterrents. On the other hand, in a centralised cartel concentrated force and the presence of a ring leader provides strong stability. Followed by a strong internal sanctioning mechanism where there is credible economic fear, defections are less visible in centralised cartels and the cartel may survive for a longer duration of time.

Cartel 'ring' leaders

If under certain jurisdictions, cartel leaders cannot avoid fines and in others, they can, further clarification of the concept becomes essential. The concept of the ringleader of a cartel can be broken down into three forms – 'originator' (the entity that takes the effort to establish the cartel and gets it going through its connection with other market participants); 'instigator' (entity which advances the objectives of the cartel through its decision making, monitoring and coordination) and 'coercer' (the entity which pressurizes other business entities to join the cartel). One can be called a leader if to advance the objectives of the cartel was the first to voluntarily implement the cartel arrangement or takes active steps to sustain the cartel. Therefore, even without coercion, an undertaking can still be called a cartel leader.

Many jurisdictions, to create a higher level of deterrence treat the cartel ring leaders differently from other cartel participants. It is understood that in most cartels, one entity or group of an individual tends to take up the role of coordination and management of the entire scheme. They can act as initiators, instigators, and even coercers in specific circumstances. Therefore, in a market with players of different sizes, cartel ring leaders succeed in coercion or force the smaller players to join the cartel or impose ostracization. Many cartels would not start or operate or break quickly but these ring leaders and their strong role in a stabilising cartel cannot be ignored. Based on the theoretical ideologies of different schools the sanction scheme of different cartels varies. Jurisdictions across the world differ on the stand to give differential treatment to ring leaders vis-à-vis penalty and leniency. While some countries prescribe a higher penalty for ring leaders when compared to other cartel participants, countries like China or India have no stricter or deferential treatment of ring leaders.

Differential treatment of cartel leaders – Penalization and leniency

Leadership is often taken as an aggravating factor in the calculation of the fine. The EU Guidelines prescribe a higher penalty for leaders ("undertaking with a significant driving force"[16]) and instigators[17] (one who persuades or encourages other business entities to establish or join a cartel) of the cartel.[18] Further, in many cases, the benefit of leniency or amnesty is not extended to them. The US 'Guidelines of corporate leniency' of 1993 include all these forms in its provision for exclusion from the leniency regime.[19]As per the U.S. guidelines, a ringleader is only eligible for amnesty if he "*did not coerce another party to participate in the illegal activity and was not the leader in or originator of the activity"*[20].As Klawiter[21] puts it,

> *... from a trial strategy perspective, if the cooperating witnesses testify that they instigated or threatened others to participate but their corporation was given a complete pass by the Division, it would make cross-examination of the cooperating witnesses an enjoyable task for defence counsel. Such situations would make the Division's case against any other defendant very difficult, if not impossible, to try successfully.*

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16 See, Case T-15/02, *BASF v. Commission*, Judgment of the Court of First Instance (Fourth Chamber), 15 March 2006 II – 516; Case T-410/03 *Hoechst v Commission,* [2008] ECR II-881. A leader undertakes specific liability for the operation of cartel, coordinates the operation of cartel from within the cartel and sees to the implementation of the cartel. See, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission,* [2003] ECR II-2597. The entity which plays a central role in the operation of the cartel by organizing meetings or coordinates exchange of information or undertakes the responsibility of other members or formulates proposals for course of action can be designated as a leader. See, [1983] ECR 3369, 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission*; Commission decision of 30 October 2002, Nintendo/Video Games, (2003) O.J. L 253/33; *Graphite Electrodes*, (2002) O.J. L100/1).

17 Not all founding members can be categorized as instigators. Instigators are only those undertakings that have taken the initiative "for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so." Since, instigation is concerned with the establishment or enlargement of a cartel, it is possible that several undertakings might simultaneously play a role of instigator within the same cartel. See, Case T-343/06, *Shell Petroleum & Others v Commission,* [2012] ECR II-000 para. 155.

18 See, Para 28, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, (2006/C 210/02), Official Journal of the European Union, EU (2006) (May 2020) https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29.

19 Para A(6), Corporate Leniency Policy, 1993, Department of Justice (May 2020), https://www.justice.gov/atr/corporate-leniency-policy.

20 Id.

21 Klawiter, D.C., 'Corporate Leniency in the Age of International Cartels: The American Experience', *Antitrust* (summer), 2000, 13-17 at 13.

However, the US anti-cartel enforcement can be differentiated based on criminal sanctions for cartelization. Courts may not look favourably on evidence provided by an individual, which might appear to have been bought in return for granting immunity from prosecution.[22] It has been pointed out that in the US, the threat of criminal sanctions plays a significant role in encouraging corporate leniency applications.[23] In jurisdictions therefore which do not envisage criminal sanctions, leniency applications have to be incentivized. For instance, leniency provisions of the European Union (EU) allow ring leaders to make applications for a reduction in penalty.[24] While the 1996 Commission notice acted as a barrier to immunity from fines for cartel ring leaders, the 2002 and 2006 Commission notices only bans immunity in case the undertaking coerced other undertakings to either join or stay in the cartel. These undertakings can still apply for a reduction in fines if they fulfil the relevant criteria. The Commission notice does not prevent other forms of ring leaders from applying for immunity. Therefore, if an undertaking was instrumental in establishing the cartel (instigator) or coordinated the cartel in its operation or played a determining role in its operation (leader), it would still be eligible for immunity if it has not coerced other undertakings into the cartel.

It is not always necessary that the competition policies differentiate between 'instigators' and 'leaders' and cartels are broadly characterized either with a "ringleader" or without a "ringleader". The important aspect is the consequence of such characterization in terms of the imposition of fines, grant of immunity, or even reduction in penalties.

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22 Hammond, A. and R. Penrose, *Proposed Criminalisation of Cartels in the UK,* Office of Fair Trading, London, 2001.

23 Bloom, M., 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy', *Competition Policy International,* 1(1), 2005.

24 The 1996 Commission Notice excluded entities who *"compelled another enterprise to take part in the cartel" and which "acted as an instigator or played a determining role in the illegal activity"* [See, Para B(e), *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases*, *Official Journal C 207 , 18/07/1996 P. 0004 – 0006,* EUROPEAN COMMISSION *(May 2020)* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31996Y0718%2801%29].The 2002 Commission Notice in para A11(c) retained the exclusion for undertakings that took "*steps to coerce other undertakings to participate in the infringement."* However, as per section B, entities would be eligible for reduction of any fine if the undertaking provides *"the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession…"*[See, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, *Official Journal C 045 , 19/02/2002 P. 0003 – 0005,* EUROPEAN COMMISSION *(May 2020),* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002XC0219(02)]. Similarly, the 2006 Commission Notice excluded all undertakings from grant of immunity from fines if the undertaking "took steps to coerce other undertakings to join the cartel or to remain in it". However, such undertakings would "still qualify for a reduction of fines if it fulfills the relevant requirements and meets all the conditions therefore."

The exclusion of ring leaders from the leniency scheme is expected to affect the very formation, and if formed, the operation of the cartel. No one would like to take the risk of being categorized as the ringleader and facing the possibility of higher fines and no leniency. On a different footing, it would be problematic when a ringleader who established and ran the cartel and who also has the best pieces of evidence to prove the cartel then also applies for leniency and gets immunity while others who were participants at the instance of the leader are penalized. The exclusion of ring leaders from leniency comes from this idea.[25] There is however a counter to this. The presence of an anti-cartel enforcement regime that differentiates between ring leaders and others affects the internal organization of the cartel. If the cartel members know beforehand that certain undertaking(s) will not be eligible for immunity from fines, trust in these entities by others increases, thus increasing the stability of the cartel as there are minimal chances of self-reporting. Ring leaders can provide the best possible evidence to prove cartels. If the ring leaders and other cartel members have the same rights, there is the possibility that non-leaders might feel the risk of the ring leader defecting.

Scholars like *Aubert, Rey,* and *Kovacic* (2006), *Spagnolo* (2006), and *Leslie* (2006) argue in favour of extending leniency to ring leaders as that would cause distrust within the cartel thus destabilizing it.[26] Leniency, as is argued would incentivize ring leaders to report since if in case anyone else defects and reports, they would be penalized at a higher rate.

In a non-differentiated regime, ring leaders are likely to get more penalties thereby reducing the likelihood of establishing or operating the cartel in the first place. Undertakings would not like to take leadership roles for fear of high fines, thus impacting the creation and also the sustenance of the cartel. Identification of a ringleader is also tricky and may not be that simple in many cases. A differentiated regime that

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25 N. Zingales, *European and American Leniency Programs: Two Models Towards Convergence?* 5(1) The Competition Law Review, 5-60 (2008).

26 See, C. Aubert, P. Rey, and W.E. Kovacic, *The Impact of Leniency and Whistle blowing Programs on Cartels,* 24 International Journal of Industrial Organization, 1241–1266 (2006); C.R. Leslie, Antitrust Amnesty, Game Theory, and Cartel Stability, 31 The Journal of Corporation Law, 453–488 (2006); G. Spagnolo, *Leniency and Whistleblowers in Antitrust*, CEPR Discussion Paper No. 5794 (2004) (May 2020) https://econpapers.repec.org/paper/cprceprdp/5794.htm.

excludes ring leaders may deter undertakings from reporting if their identity as ring leaders is unclear.

Treatment of cartel 'ringleaders' under the Indian Competition Law

The issue of an organized cartels in various markets has been one of the major concerns for all competition regulators. Due to its detrimental impact, it has been referred to as "supreme evil" or "cancer to the market".[27] Academics and regulators univocally agree that cartels are supposed to be dealt with iron hands.[28] Anti-competition law has to be applied rigorously and effectively and competition matters need to be expedited to create a deterrent for cartels. In line with this objective India replaced the Monopolies and Restrictive Trade Practices Act of 1969, with the Competition Act, of 2002 (hereinafter, ICA). The enactment was a response to the changing economic environment of the country. Despite functional and administrative difficulties, the Indian competition law has grown by leaps and bounds in the last decade. The Competition Commission of India (hereinafter, CCI), a chief regulator has imposed unheard penalties casting strict impact on entities indulging in anti-competitive behavior. Under the scheme of ICA, an arrangement for leniency is prescribed to impose lesser penalties on the cartel member whose information leads to the discovery of material information.[29] However, the metric adopted by the CCI seemed to oscillate between a "good value addition" and a "significant value addition". Also, due to unclear standards of discovery and stringent penalties, the scheme seems to have lost its charm. A major challenge to the leniency provision under ICA or the CCI (Lesser penalty) Regulation of 2009 is the lack of any guidance as to the "nature and level of detail of the evidence that is required" to form a clear opinion on the functional aspect of the ringleader.

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27 Kumar, Sudhanshu. *Regulating Cartels in India: Effectiveness of Competition Law*. Taylor & Francis, 2022.

28 David Evans and Jorge Padilla, Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach, 72 University of Chicago Law Review 73–75 (2005). Also see: *The Objectives of Competition Law and Policy*, OECD Global Forum on Competition CCNM/GF/COMP (2003) 3, p. 9.

29 Competition Act, 2002. S. 46 read with the Competition Commission of India (Lesser Penalty) Regulations 2009, Available at: https://www.cci.gov.in/sites/default/files/regulation_pdf/regu_lesser.pdf

Leadership role as an aggravating factor

CCI does not have a penalty guideline yet that accounts for different factors including 'cartel leadership' to quantify fines for cartel members. A harmonious reading of the statute signifies that there are no limitations over the CCI or investigative agencies to take into account cartel leadership as an 'aggravating factor' to impose the highest level of penalties prescribed under section 27 of the Competition Act, 2002 to cast a deterrent. However, the CCI in the last twelve years has rarely considered 'leadership' as a relevant factor to impose or enhance penalties on the person whose mind is behind such illegality. While the idea of leadership has been marked as an aggravating circumstance across jurisdictions, there is a general lethargy in the identification of leaders in cartel cases. This may be also due to the lack of an identification framework and a clear understating of the role of a leader in a cartel.[30]

Examination of decided cartel cases in India illustrates that there has been little or no attempt by the CCI to identify ring leaders. This phenomenon is common for both types of cases in India viz. one where the trade association act as the central leader and another where either trade association is absent or is present only as a conduit for cartel activity. It has been empirically illustrated that the identification of a ringleader which leads to higher penalties for such actors proves to be a strong deterrent. The CCI has taken an easier route by sidestepping the requirement to collect evidence against one or more central actors.

The laxity and shortcomings are reflected in the number of cases prosecuted so far. The CCI has so far attempted to identify such leaders in only a handful of cases. This necessarily implies that since there is no major attempt to identify ring leaders, nothing would stop an enterprise to establish a cartel or coarse others to do so. In the present context, even if detected, the cartel ring leaders would not be treated any differentially to other participants who might have entered due to the very coercion of the ring leader(s). Even in these cases, while the evidence suggests that the cartel has key or central figures, there is no sign of any increased

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[30] Eva van Leur, *Characteristics of Cartel Ringleaders: An Analysis of EU Commission Decisions*, Research in Business and Economics - MaRBLe Research Papers (2013) (June 2020) https://openjournals.maastrichtuniversity.nl/Marble/article/view/187.

penalty or strong prohibition. The CCI's approach of 'one shoe fits all' is very different and somewhat weak comparing other jurisdictions.

N.V RAMANA, J., in the case of Excel Crop identified leadership as one of the key factors in quantifying penalty. The Apex Court observed:

> "*8. After such initial determination of relevant turnover, the commission may consider appropriate percentage (of penalty), as the case may be, by taking into consideration nature, gravity, the extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, the profit derived from the contravention, etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty…..*"

In advanced jurisdictions across the globe, regulators have geared up to identify ring leaders to either not extend to them any benefit of leniency or to impose higher penalties. When there is no threat of identification as the leader, the general trust within the cartel increases increasing the overall life of the cartel. Also, uniform penalty measures on the cartel are self-defeating to the idea of strong deterrence and proportionate penalization. In return, it would act as a catalyst for the ring leaders to repeat the offence and stronghold over the cartel.

The leadership role is one of the most common aggravating factors taken into account for the imposition of a fine in many jurisdictions.[31] The European Commission Guidelines of 2006 or the sentencing Guidelines of the US for instance, lists 'leadership' as an aggravating circumstance. The CCI has not taken an effort to identify ring leaders so far. It is undisputed that the identification of a ringleader

[31] Geradin, D. and Henry, D., 2005. The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments. European Competition Journal, 1(2), pp.401-473.

in a cartel may help in fixing increased penalties amongst various cartel members. It shall also set the tone for regulatory measures and Commission's willingness to single out instigators and coordinators and deal with them in a sterner fashion. CCI's reluctance in attributing leadership in cartel cases may also be because of the trend of cases it sees. In India, a high percentage of cases are cantered on trade associations and the final penalty is imposed only on the association or its executive members. Considering, that membership of trade associations is comprised of business undertakings, it would have been worthwhile to identify the leader firm behind the decision-making of the association. Non-identification of ring leaders fails to create 'specific deterrence' for individual undertakings.

In *Uniglobe*[32], the CCI identified three trade associations among six as taking the lead role and having a high degree of involvement. The role of leadership was disregarded while imposing a penalty. On the contrary, it acted as a mitigating factor for the other three associations which were left without any penalty. The three leader associations were slapped with a penalty of one lakh each, something which was neither based on their turnover nor annual receipts. In contrast, the CCI has imposed lesser penalties on account of enterprises not in a position to influence and dictate the terms of the anti-competitive agreement or due to having insignificant market shares in the relevant market in contrast with other competitors.[33]

Similarly, in *Nagrik Chetna Manch*[34], while the managing director of one of the firms admitted to having established and operationalized the cartel of bid rigging, the CCI made no distinction in imposing a penalty, either at the individual or at the undertaking level.[35] A uniform penalty at the rate of 10% of average turnover and income was calculated for six firms and five individuals including the ringleader. Contrary to the idea of stricter punishment, the Commission also granted leniency of a 25% reduction in penalty for the ringleader without considering his role as leader. Also, in *Cartel in industrial and*

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32 *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India &Ors.,* Case No. 3/2009, decided on 4/10/2011 (CCI).

33 *In re: Anti-competitive conduct in the Dry-Cell Batteries Market in India* [Suo Moto Case No. 2 of 2017 and Suo Moto Case No. 3 of 2017

34 *Nagrik Chetna Manch v. Fortified Security Solutions & Others*, Case No. 50 of 2015, decided on 1/5/18 (CCI).

35 See also, *Nagrik Chetna Manch v. SAAR IT Resources Private Limited &Ors.,* Case No. 12/2017, decided on 9/8/2019 (CCI).

automotive bearings,[36] despite a leniency application being made by Schaeffler India implicating itself in cartel activity, CCI did not impose any penalty due to lack of evidence.

Similarly, in the *Dry Cell batteries*[37]case, even though the CCI marked that Panasonic played a key role in the cartel and was in a position "to influence and dictate the terms" of the anti-competitive agreement to Godrej, it was granted a 100% reduction in penalty in lieu of the leniency application. Non-appreciation of the fact of Panasonic played a ringleader role has made the outcome of the case a bit unfair.

In the absence of penalty guidelines in India, there is no structural mechanism available to the CCI to take these factors into account while imposing sanctions. The Competition Law Review Committee ("CLRC") lamented the lack of penalty guidelines in India and saw it as one of the reasons for the disproportionate penalties that have been imposed by the CCI. India does not also have a settlement or plea-bargaining mechanism for cartel cases. While a settlement mechanism is mostly seen as a procedural efficiency-enhancing tool and not as a detection tool like leniency, the experience in many countries shows that settlement structures can facilitate early inside information and cooperation. Indian legislature is planning to introduce a "leniency plus" program to encourage settlement and an additional reduction in penalty for whistle-blowers.[38] It aims to provide speedy detection and faster market correction. However, the nonexistence of any provision for reporting and identification of the ring leaders would bring no different result for the competition law regime in India.

Leadership as a factor in leniency applications

The CCI, similar to some of the European countries follows a non-discrimination approach when it comes to cartel leaders. Section 46 of ICA supplemented by CCI (Lesser Penalty) Regulations, 2009 is based on providing 'vital information' and it does not differentiate between leaders and participants.[39] The CCI has to date not cleared its

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36 In Re: Cartel in industrial and automotive bearings (*Suo Moto Case No. 05 of 2017*)

37 *In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India*, Suo Motu Case No. 03/2017, decided on 15/1/2019 (CCI).

38 Gireesh Chandra Prasad, 'The why and how of changing our competition law' (Mint, December, 2022)

39 As per reg. 4 of the Lesser Penalty Regulations, an applicant may be granted benefit of reduction in penalty of up to one hundred percent, if the applicant is first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a *prima facie* opinion regarding the existence of

position on ringleaders. Given the divergent views of jurisdictions like the US and EU on issues of immunity and reduction of penalty, clarification from the CCI is essential. The CCI, if it has continued with the non-differentiated approach, then has to consider the role of cartel instigators, coordinators, and coercers in terms of grant of leniency.

Conclusion

Anti-cartel enforcement is premised on the seriousness of sanctions and the success of the leniency regime. Considerations of fairness may require refusing to grant leniency to a firm that was the cartel ringleader or that coerced other firms to enter it. However, the treatment of leaders within leniency/amnesty programs is not uniform across jurisdictions. While full immunity is available to cartel leaders under European Commission Leniency Notice unless the entity was a cartel coercer, many countries[40] deny full immunity to enterprises that acted as instigators and played a determining role in cartel activity. The CCI must clarify its position concerning the treatment of cartel leaders vis-à-vis leniency and induct it as an aggravating factor within the penalty guidelines. A comprehensive penalty guideline will bring much-needed transparency and consistency to the decision-making process of CCI. Further, the regulator must develop an identification framework to detect cartel ringleaders.

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a cartel. Similarly, the applicant marked as second in the priority status may be granted reduction of monetary penalty of up to fifty percent and the applicant(s) marked third in the order of priority may be granted reduction of penalty of up to thirty percent.

[40] In Ireland and Germany, the applicant must not have played 'a decisive role' in the cartel. In Sweden, immunity is not available for a company that played a leading role in the cartel; however, if two or more companies shared the role of ringleader, each of them may qualify for immunity. UK has adopted the 'coercion' test for leniency. [In the previous OFT guidelines, the *Competition Act 1998 Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* ('1998 OFT Guidelines'), para. 3.4(c) provided that the applicant must not have compelled another undertaking to participate in the cartel and must not have acted as the instigator or played the leading role in the cartel. See, B(e) of the *Commission Notice on the non-imposition or reduction of fines in cartel cases*, OJ 1996 C207 of 18.07.1996]. Germany, post 2021 has also adopted a similar approach to that of UK. [Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings, 2021]; Singapore does not allow cartel leaders (be it instigator or coercer) to claim immunity.

UNCEASING CRISIS IN INSOLVENCY AND BANKRUPTCY CODE: ISSUES AND WAY FORWARD

Dr. Vipan Kumar[*]

Abstract

The present article aims at evaluating the journey of the Insolvency and Bankruptcy Code, 2016 (the Code) so far and analysing the issues that have arisen, either settled or still open. The Code has been amended for several times in a short span of 6 years and there are a series of amendments that are expected in near future. All these amendments were helpful in settling various issues and challenges that were faced by the stakeholders in the functioning of the Code. However, despite the series of amendments, it is difficult to conclude that the crisis existing or originating in the journey of the Code has been settled. There are a series of amendments proposed by the Central Government that shall attempt to address some of the issues that are still open. Even the proposed amendments are not enough to overcome all challenges faced by the stakeholders. Thus, the author has made a humble attempt to highlight this perspective of the subject.

Key Words: Corporate Insolvency, Insolvency and Bankruptcy Code, Amendments in IBC, Insolvency Professionals

Introduction

The Insolvency and Bankruptcy Code (the Code) is a law that was enacted in 2016 to consolidate and amend laws relating to insolvency and bankruptcy in India[1]. The Code provides a time-bound process for resolving insolvency and bankruptcy cases and aims to maximise the value of assets of the debtor and minimise delays. It applies to both companies[2] and individuals[3], and is intended to create a

[*] Faculty, Hidayatullah National Law University, Raipur

1 Act No. 31 of 2016 published in official gazette on 28 May 2016.

2 Insolvency and Bankruptcy Code, 2016, part II.

3 *Id.* part III.

transparent, efficient and market-driven system for the resolution of insolvency and bankruptcy cases. The Code has been widely recognized for its effectiveness in addressing the issues of bad debt and non-performing assets in the Indian economy[4].

However, like any law, it is not without its drawbacks. Some of the main criticisms of the Code include:

I. Time-consuming process: The process of resolving insolvency and bankruptcy under the Code can be time-consuming and has been criticized for delays in the resolution process.
II. Lack of expertise among resolution professionals: The Code relies on the appointment of resolution professionals to manage the resolution process, but there have been concerns about the lack of expertise and experience among these professionals.
III. Limited participation of operational creditors: Operational creditors, such as suppliers and employees, have been criticized for having limited participation in the resolution process under the Code.
IV. Limited scope for out of court settlement: The Code is designed as a court-based process, and there is limited scope for out-of-court settlement.
V. The eligibility criteria for resolution applicants are seen as too restrictive, as they exclude some potential buyers and investors.
VI. The Code has been criticized for not providing enough protection to the smaller creditors and employees in the resolution process.

It's worth noting that many of its criticisms have been addressed by amendments that have been discussed in the second part of this article. Now, the question arises: Whether the series of amendments to the Code are successful in putting an end to the crisis in the Code? The present article seeks to find an answer to this question. While finding the answer, the third part of this article deals with the issues and challenges faced by the Code. The last part is conclusion.

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[4] Anil Kumar Popli, *Insolvency and Bankruptcy Code - In Depth Knowledge*, 70 TAXMANN.COM 407, 407 (2016). Also see: Hetal Chitroda & Jaya Singhania, *The Insolvency and Bankruptcy Code 2016: A Brief Snapshot*, 71 TAXMANN.COM 364, 364 (2016); Nidhi Parmar, *Bankruptcy Code - An Umbrella for All*, 35 CPT 138, 138 (2016); and Neeraj Parmar, *Insolvency Resolution Process under Bankruptcy Code, A Game Changer*, 38 CPT 154, 154 (2017).

Amendments to the Code

The Insolvency and Bankruptcy Code of India has been amended several times since its original enactment in 2016. The first amendment to the Code was passed in 2018[5], which introduced several changes to the original law, including changes to the eligibility criteria for resolution applicants[6], and changes to the rules for voting by creditors[7].

The Second Amendment to the Code was passed in the same year 2018[8], which made several key changes to the original Insolvency and Bankruptcy Code of 2016, inter alia, including real estate allottees under a real estate project as a financial creditor[9]; reducing the percentage of voting required for passing of resolutions by Committee of Creditors from seventy-five to sixty-six percent[10]; allowing withdrawal of application for insolvency resolution by the adjudicating authority[11]; and excluding related parties of corporate debtor from any representation in committee of creditors[12]. It also added a provision to exclude applicability of the Code to micro, small and medium enterprises[13]. Overall, the amendment aimed to provide more clarity and transparency in the resolution process.

The third amendment to the Code was passed in 2019[14] that made several key changes to the Insolvency and Bankruptcy Code of 2016, inter alia, completion of corporate insolvency resolution process within three hundred and thirty days from the insolvency commencement date[15]; expanding the scope of resolution plan to include restructuring by way of mergers, amalgamation and demerger[16]; protection of payment of debt of operational creditor[17]; bindingness of resolution plan on Central Government, State Governments or Local Authority to whom debts are

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5 Insolvency and Bankruptcy Code (Amendment) Act, 2018. Also see: Corrigendum - The Insolvency and Bankruptcy Code (Amendment) Act, 2017.
6 *Supra* note 2, § 29A.
7 *Id.*§ 30(4).
8 Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.
9 *Supra* note 2, Explanation to § 5(8)(f).
10 *Id*. §§ 12, 22, 27 and 33.
11 *Id*. § 12A.
12 *Id.* § 21.
13 *Id*. § 240A.
14 The Insolvency and Bankruptcy Code (Amendment) Act, 2019.
15 *Supra* note 2, § 12.
16 *Id.* § 5(26).
17 *Id.*§ 30(2)(b).

owed[18]. Overall, the amendment aimed to provide more clarity and transparency in the resolution process and to provide for a time bound completion of corporate insolvency resolution process.

The fourth amendment to the Code was passed in 2020[19] that made several key changes to the Insolvency and Bankruptcy Code of 2016, inter alia, threshold limits for filing corporate insolvency resolution application by financial creditors who are allottees under real estate project[20]; entitlement of specified corporate debtor to initiate corporate insolvency resolution process against another corporate debtor[21]; appointment of interim resolution professional on the insolvency commencement date[22]; and ceasing of liability of a corporate debtor for offences committed prior to the commencement of corporate insolvency resolution process[23].

The fifth amendment to the Code was passed in 2020[24] that made two changes to the Insolvency and Bankruptcy Code of 2016: (1) suspension of corporate insolvency process due to COVID effect[25] and (2) prohibition on filing of application against fraudulent or wrongful trading in respect of default against which corporate insolvency resolution process has been suspended[26]. Overall, the amendment aimed at suspending the corporate insolvency resolution process and provide relief to corporate debtors affected by the COVID-19 pandemic.

The sixth amendment to the Code was passed in 2021[27] that mainly focused on the pre-packaged insolvency resolution process. The amendment added chapter III-A and made various changes in the code to support the pre-packaged insolvency resolution process.

After the series of amendments discussed above, it appears that the crisis of the Insolvency and Bankruptcy Code, 2016 might have come to an end. However, there are many issues that still remain unresolved and there are many stories that are yet to be unfolded.

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18 *Id.*§ 31.
19 The Insolvency and Bankruptcy Code (Amendment) Act, 2020.
20 *Supra* note 2, Proviso to § 7(1).
21 *Id.* 11.
22 *Id*. § 16.
23 *Id*. § 32A.
24 The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020.
25 *Supra* note 2,§ 10A.
26 *Id.*§ 66(3).
27 The Insolvency and Bankruptcy Code (Amendment) Act, 2021.

Issues and Challenges Faced by the Code

As highlighted above, certain issues that are still open and remain unresolved are discussed under the following heads.

Real Estate Allottees as Financial Creditors

The Second Amendment to the Insolvency and Bankruptcy Code granted the status of financial creditor to the real estate allottees and later on, their right was restricted by subsequent amendments. Whatever changes might have taken place in this arena, they do not seem to be sufficiently redressing the woes of real estate allottees. The real estate allottees file an insolvency petition under section 7 of the Code against the corporate debtor who is unable to complete the project. They are left in a state of uncertainty about the fate of their investments, as they may lose their entire investment if the corporate debtor is liquidated. Thus, it is proposed to have a reverse insolvency under IBC[28]. The reverse insolvency can attempt to address the concerns of both the corporate debtor and the real state allottees through external lenders. The external lender is proposed to provide services to both the parties. Service to real estate allottees refers to facility to refund claimed amount, and service to corporate debtor refers to providing interim finance for completing the project. The proposed three-party approach between the real estate allottees, corporate debtors and lenders shall be beneficial to all.

Taxation Issues Under the Code

The grey areas in taxation law require urgent attention of the Central Government to stimulate more resolutions under the Code for insolvent companies. Waiver of liability by creditors of a company undergoing corporate insolvency resolution process may result in taxation under income from other sources. This causes unnecessary hardship to the corporate debtor receiving a waiver from liability under the resolution plan.

The law relating to tax demand or tax claims that have been finalised by the income tax department shall be dealt as per the resolution plan. However, ambiguity remains for the tax proceedings that

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[28] Anjali Mukati, *Reverse Insolvency Under the IBC: The Creation of A Sui Generis Regime*, 147 TAXMANN.COM 95, 95 (2023).

are still open. It is pertinent to note that seller in a resolution plan is also bound to take no objection certificate from tax authorities.

Further, it has often been proposed that certain issues relating to taxation of allotment of shares at less than fair valuation of shares, applicability of GAAR provisions, and deductibility of CIRP costs should also be addressed at the earliest[29].

Test for Initiating Corporate Insolvency Resolution Process

There are various tests recognised under the corporate law jurisprudence to initiate insolvency proceedings. The Insolvency and Bankruptcy Code, 2016 recognises a cash test for initiating insolvency proceedings, i.e. inability to pay debts. However, it is considered that the cash test falls short of painting a true financial picture of an entity and a combination test may be more appropriate[30]. Thus, the cash flow insolvency test may be amended to include factors such as contingent and prospective current assets and current liabilities and overall financial position of an entity. Reliance may also be placed on the decisions rendered by Supreme Court in: (1) *Sun Electric Power Pte Ltd*. v. *RCMA Asia Pte Ltd.*[31], and (2) *Vidarbha Industries Power Ltd.* v. *Axis Bank*[32] cases.

Recent Changes Proposed by the Central Government

The Ministry of Corporate Affairs is also apprised of certain key issues in the present Code. It is quite evident from the consultation paper floated by the Ministry and certain news items appearing in the media regarding proposed changes to the Code[33]. The proposed changes, inter alia, are as follows:

a. Introduction of E-Platform for better case management system, automated process to file applications with the Adjudication

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29 Subham Kumar and R. Sarath Karthick, *Income Tax Quandaries in the IBC – Budget 2023 Expectations*, 146 TAXMANN.COM 507, 507 (2023).

30 Nipun Singhvi, Pranjul Chopra and Kartik Agarwal, *Cash Flow Test under the Indian Insolvency Regime: Is it Bearing the desired Result?*, 56 CPT 32, 32 (2022).

31 (2021) SGCA 60.

32 233 Company Cases 544.

33 https:// economictimes.indiatimes.com /news /economy /policy /govt -proposes -slew -of -changes -to -insolvency -law /article show /97094004.cms; https:// www.caclubindia.com /articles /proposed -amendments -in -ibc -in -year -2023 -48188 .asp #: ~: text= The %20amendments %20vide %20Insolvency %20 and, of% 20Parliament% 20early %20next %20year. [Last accessed: 5 February 2023]

Authorities, delivery of notices, enabling interaction of Insolvency Professionals (IPs) with stakeholders, etc.

b. The application under section 7 of the Code must be admitted by the adjudicating authority if the default is established. This change is proposed to override the interpretation given by the Supreme Court that the adjudicating authority has a discretion to admit the application even if the default has been established, as the word used in section 7 is 'may'.
c. The corporate debtor won't be able to suggest an Interim Resolution Professional (IRP). Thus, the IRP shall be appointed by the Adjudicating Authority on the recommendation of the IBBI.
d. Relaxing the requirements for Pre-Packaged Insolvency Resolution Process by lowering and omitting certain conditions.
e. Inclusion and regulation of separate class of professionals by IBBI for providing valuation services.
f. Revision in voting thresholds of Committee of Creditors to two-third of the members present and voting with at least 51% of the total voting share. This change will address the issue of absenteeism.

Apart from the mentioned changes, there are a series of other amendments proposed by the Ministry of Corporate Affairs that are aimed to provide more efficient and effective system of Corporate Insolvency Resolution Process.

Conclusion

From the above discussion, it can be concluded that the crisis in Insolvency and Bankruptcy Code, 2016 is not yet over. The code can be considered as a dynamic law which is adapting to the ground realities and Indian economy. Thus, the process relating to corporate insolvency is still evolving and testing the challenges faced by different stakeholders. The law is in its Beta Stage, and it's a well beginning than having no comprehensive law at all.

THIRD PARTY PARTICIPATIONAT THE WTO: DEVELOPING COUNTRY PERSPECTIVE

Jyoti Sharma[*]

Abstract

Since its inception, the WTO membership has grown to 164 countries, and around two-thirds of them constitute developing countries. They play a crucial and active role in the WTO and are resultantly becoming more important in the global economy. Unlike the old GATT system, the WTO dispute settlement system, as part of the present neoliberal international order, was established with the objective of creating a level playing field for developing countries. It was set up with the promise that the size and relative power of the country were not to be factors when settling disputes. This hope for an egalitarian system, however, coincided with the increase in the number of developing countries that participated in disputes indirectly (as third parties) rather than being the main party. Studies show that developing members of the WTO fail to participate in the dispute system in an equal capacity with the developed countries because of several capacity and political constraints. Participation in disputes is crucial for the existence of the rule of law in the system. The lack of participation by developing countries in the system reflects power asymmetry in the rules of the WTO Dispute Settlement Understanding that favour stronger economies. Third party rights act as a tool for developing countries to help them overcome their constraints, thereby ensuring greater participation in a cost-effective manner.

Key words: Third Party Rights, WTO Dispute Settlement System, Dispute Settlement Understanding, Neoliberalism

Introduction

Third party rights are the rights accessible to the member(s) in a dispute presented before the World Trade Organization (WTO) dispute

[*] Research Scholar, NALSAR University of Law, Hyderabad.

settlement system. The bearer of such rights is called a 'third party[1]' who enjoys special legal rights to participate and who is a member other than the complainant or respondent who has a *substantial interest*[2] in the subject matter of the dispute and who is willing to comment on the factual assertions or legal claims presented by the parties involved in the dispute. It is a means available to countries other than litigants for entering the room during dispute proceedings of the WTO. These rights are crucial for developing country members' participation in the WTO dispute resolution process. Developing countries account for two-third of the total members in the WTO and by far have made maximum use of such rights in the WTO disputes, including India, which participated as a third party in 176 cases[3] *i.e.* more than one-fourth of the total number of disputes since the existence of the WTO dispute settlement.[4] When compared with developed economies, developing countries appear to have relied more on these rights for the protection of their trade interest involved in the dispute.[5] There have been instances where some of the developing countries have participated only as a third party and not in any other capacity to the dispute.[6] Studies show that developing economies abstain from participating in the system of WTO dispute settlement in equal capacity with their developed counterparts because of inconsistent DSU[7] rules that favour stronger economies, thereby reflecting asymmetric power.[8]

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1 Under the WTO agreement and covered agreements, including the rules on the dispute settlement system (including third party rights) is limited to WTO Members. The right to access is not available, under the WTO, to individuals or international organizations, whether governmental or non-governmental.

2 Scope of such rights is governed by the text of Dispute Settlement Understanding (DSU) of the WTO under Article 4.11 and Article 10.2.

3 Disputes by Member, WTO, weblink: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed January 20, 2023).

4 *Id.* India is one of the most active users of the WTO dispute settlement system and hence, is viewed in a different capacity when compared with other developing countries with weaker economies in academia.

5 It is, however, important to note that there is a significant disparity among developing countries' use of WTO dispute system. There are only a few developing countries like China, India, Brazil, Argentina, and Mexico that have frequently been participating in the dispute settlement system as compared to other developing members.

6 *supra* note3, 30% of the developing countries have participated in the WTO disputes only in the capacity of third party.

7 The Dispute Settlement Understanding (DSU) is officially known for rules and procedures governing the settlement of disputes, and establishes rules and procedures that manage various disputes arising under the covered agreements of the Final Act of the Uruguay Round.

8 David Evans & Gregory C. Shaffer, Introduction, 7 DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE, (Gregory C. Shaffer & Ricardo Melendez-Ortiz ed., 2010); Md. Tanzimuddin Khan, *WTO Dispute Settlement system: Whither the Developing Countries?*, WTO DISPUTE SETTLEMENT SYSTEM AND DEVELOPING COUNTRIES: A NEOREALIST CRITIQUE (2004); Faisal A.S.A., Alibashar, & A.F. M. Maniruzzaman, *Reforming the WTO Dispute*

The way in which international organisations like WTO aim at equality among sovereigns with the objective of creating a competitive field for developing countries elevates the question of participation. In other words, equality can only be achieved when all countries are privy to the WTO proceedings, including the dispute settlement mechanism. Participation in the WTO dispute settlement is significant in addressing various challenges faced by developing countries by reason of various capacity and political constraints, including their smaller economy, narrower trading profile, and lack of retaliatory power, etc. In this context, third party rights act as a tool to overcome these constraints, especially the capacity constraint[9], through the experience of participating in the dispute in a cost-effective manner.

However, the nature of such rights present in the WTO DSU text is often questioned as being very restrictive and unclear. Also, the foundation of such rights is not clearly indicated in the DSU. The interpretation of the scope of such rights is, therefore, left in the hands of the WTO panels and the Appellate Body. The paper analyses the significance of third-party rights from the perspective of developing countries.

The question of participation in the WTO – a theoretical framework

The neorealist tradition of international relations[10] assumes that WTO is a state-centric regime controlled by stronger economies, especially the United States, and its rules on the dispute settlement mechanism are a reflection of such power asymmetry and the interests of the powerful states.[11]To put it another way, the formal legal equality credited to nations at the WTO camouflages the hidden inequality in its mechanisms. The rights of full membership are not accessible to all the

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Settlement System: A Rethink of the Third Party Right of Access to Panel and Appeal process from Developing Countries Perspectives, JWITLL 311.

9 *Id.,* at 7*Shaffer (2010*).Developing countries, while participating in the WTO dispute system, suffer from various capacity constraints like litigation costs, lack of resources, untrained lawyers and officials, etc.

10 Neorealists accept international regimes as an alliance for mobilizing international cooperation and the continuous existence of international regimes. This approach relies on "hegemonic stability theory" (HST), which reflects the understanding that states are status maximisers and concerned with relative gains. Hegemonic stability theory contends that an open, liberal economic order requires a single hegemonic or dominant power. An international system without a leader is seen as unstable and potentially dangerous.

11 Alibashar & Maniruzzaman, supra note. 8 at 313.

nations in the WTO, especially developing and least developing countries.

To illustrate further, most of the significant negotiations are conducted in small group meetings of developed states (often called as "Green Room" meetings). When this core group has gained consensus, the remainder of the organization's members are subsequently included. A small group of governments are able to set the agenda for and control the negotiations thanks to this informal institutional structure. This elite group's informal membership is chosen by the members themselves or the director-general. These nations, which are seen as the major actors and have the most influence over the negotiations, make up the WTO's inner circle of power.[12]

Similar positivist epistemology and ontological presumptions about global regimes are shared by the neoliberals[13]. However, the neoliberals' exclusivity stems from their presumption that international frameworks can assure interstate cooperation. It sees new powers assimilating seamlessly into the liberal international system that the West created. Given the current level of global economic interdependence, it indicates that new powers will defend the status quo based on the premise that all countries have an interest in sustaining and participating in the system. The old and new powers will consequently cooperate to manage the global economic infrastructure in order to maintain an open, liberal international economic system.

However, it is clear from the WTO that the United States(US) and other traditional powers like the European Union(EU) continue to hold a dominant position in the international system while emerging powers like developing nations have yet to make a significant impact or take the initiative and set the agenda for international economic governance.[14] A very compelling argument in favour of the dominant western neo liberalism is made by the unequal involvement of developing nations in the WTO dispute system. Some significant deficiencies of developing nations that existed during the General Agreement on Tariffs and Trade (GATT) years at its various levels could

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12 Khan, supra note 8 at 39.

13 Neoliberals exemplify the case of the growing global economic integration occurring through the increased movement of goods, services, and capital across borders, propelled by free market ideology and policies, championing open and competitive markets, freed from the fetters of the state.

14 Salvatore Babones, *American Hegemony is here to Stay*, NATIONAL INTEREST (June 11, 2015).

not be eliminated by the reforms and transformation of the dispute settlement system into a legalist model. This can be explained by the fact that developed nations like the US and EC had a major effect on the development of WTO dispute settlement systems. Only those concerns that allowed the US and EC to use relational power against one another were addressed in the transformation of the diplomatically oriented dispute settlement system. The international trade regime ambiguously embraced the concerns of the developing countries for judicializing and making the system rule-oriented.

For developing nations, participation in the WTO dispute settlement mechanism is important because of various reasons. First, the contribution that participation makes to particular economic results. Second, the effects of non-participation on a nation's general social well-being. The terms of trade for the exporting country are harmed if an importing country erects an illegal trade barrier and uses its market power to force foreign products to reduce their prices in order to sell in its market. Third, the role of participation, where WTO precedent impacts how laws are interpreted, applied, and perceived over time and, as a result, how future bargaining positions will be positioned in light of these developments.[15]

Given that the idea of free trade is founded on the assumption that liberalism must be applied uniformly by all WTO members, a closer examination of the well-known "egalitarian theory"[16] that forms the basis of equality and fairness is necessary. The inclusion of special and differential provisions in the international trading system from the very beginning is based on the egalitarian approach and works to benefit the less advantaged members, i.e. the developed countries. These provisions were initiated by stronger economies in the GATT era to address issues of inequalities among member nations.[17] Analysing the consequence of the outcomes, the WTO process of decision-making process and its mechanism of dispute settlement on the development goals of

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15 Gregory Shaffer, *Developing country use of the WTO dispute settlement system: Why it matters, the barriers posed*, 169 FRONTIERS OF ECONOMICS AND GLOBALIZATION, 167–190 (2009).

16 Also known as 'Rawls theory of justice', more detail in John Rawls, *A Theory of Justice*, HAWARD UNIVERSITY PRESS(1971).

17 Frank J. Gracia, *Justifying Inequalities Through Special and Differential Treatment,*171 TRADE, INEQUALITY, AND JUSTICE: TOWARDS A LIBERAL THEORY OF JUST TRADE, International Law and Development, Vol 1, 147–192 (2003).

underdeveloped countries intensifies the need for participation. In this context rights of third-party are significant for such countries.

WTO Rules on Third Party Rights

The GATT has had procedures in effect since its inception that permit Members other than the litigants to be informed of dispute proceedings. In the WTO's DSU, third party rights are normally provided during the panel proceedings.[18] Yet, third parties do exist at an earlier stage of the dispute i.e. during consultations,[19] and are argued to have the biggest impact there.

In order to enter a dispute during consultations, a country must first show *a substantial trade interest* in the issue at hand. This is a higher bar than the *substantial interest* standard set forth in Article 10 for Members to join a dispute at the panel stage, suggesting a wish to give more latitude to parties that choose to negotiate in private. In this regard, however, the condition that follows—"in consultations being undertaken pursuant to paragraph 1 of Article XXII of GATT"—gives parties the authority to let third parties enter or deny them admission. Although this allusion to the GATT wording is a little obscure, it has significant ramifications. The ability of complainants to prevent third parties from participating in consultations is something that is frequently forgotten.

One of the most significant of third party participation during the stage of consultations is that it makes settlements less likely. This assumption has been assessed doctrinally[20] as well as confirmed empirically in a number of independent analyses, on subsets of disputes and within specific legal issue areas.[21] It is observed that consultation is

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18 Article 10, DSU: Third Parties: 1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process. 2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a 'third party') shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

19 Article 4.11, DSU: Whenever a Member other than the consulting Members considers that ithas a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, ... such Member may notify the consulting Members and the DSB ... of its desire to be joined in the consultations.

20 Krzysztof J. Pelc, *Third Party Participation at the WTO: What have we learned?,* 12 (Manfred Elsig & Joost Pauwelyn eds.), CAMBRIDGE UNIVERSITY PRESS (2017), Available at SSRN: https://ssrn.com/abstract=3532742 or http://dx.doi.org/10.2139/ssrn.3532742.

21 Busch, March L & Eric Reinhardt, *Three's a crowd: Third Parties and WTO Dispute Settlement*, WORLD POLITICS, 58: 446-477, (2006); Bown, Chad P., *Participation in WTO Dispute Settlement:*

a very important stage of dispute settlement and hence, needs to be more accessible to developing countries. The indiscriminate refusal of requests made by third party during the stage of consultations needs to be examined in the interest of developing countries. There is also a need to address specific issues relating to the finance and human resource of the weaker economies during such proceedings.

As was already mentioned, once litigation starts, the bar for joining a dispute as a third-party lowers. Members can then assert a "substantial interest" that need not be tied to a particular trade interest; rather, it only needs to be a claim to a larger systemic interest. Thus, a nation can take part in a dispute about, say, steel safeguards even if it doesn't trade in the metal but is worried about how the interpretation of the safeguards rules will affect its membership.

According to Article 10, the status of third-party gives Members the right to attend the major substantive meetings between the panel and the plaintiffs and to express their opinions to the panel orally or in writing. It has been noted that developing nations don't always manage to obtain better third-party rights during the panel process and appellate stage. When analysing several issues involving third party rights, it becomes apparent that the panel has frequently acted arbitrarily in determining the extent of such rights. Therefore, it is crucial to update the current third party rights provisions to make them stronger and more lucid.[22]

The extent of the procedural rights granted to third parties during the appeal process is left up to the Appellate Body's broad discretion. It has done so by giving third parties the status of passive observers at startling and unexpected moments. By enacting new rules that were not included in the original version of its working procedures, the AB has gone farther and violated its own procedural rules. Therefore, it is the discretion granted to the AB that has been used "inconsistently," "unpredictably," and "controversially," comparable to how the panel has used discretionary power.[23]

Complainants Interested Parties, and free Riders, WORLD BANK ECONOMIC REVIEW, 19: 287-310, (2005).

22 Alibashar & Maniruzzaman, supra note. 8 at 315.

23 Takemasa Sekine, *Enhanced Third Party Rights under the WTO Dispute Settlement System*,15 Manchester J. INT'l ECON. L. 354 (2018).

DSU gives third parties very limited rights, yet they are increasingly used in the WTO. The interpretation of the scope of such rights are left at the hands of Panel and Appellate Body. They use their discretion to enhance or restrict the scope of third party rights during the course of litigation at the cost of security and predictability of the system.

Developing Countries' participation as Third Party – Whether it is helping?

Third party rights in connection with developing countries have not been discussed much in academia. The numerical data on the participation of developing countries in the WTO disputes mentioned below reflects the trend of participation among them. The given data also justifies the significance of third-party rights towards developing countries.

Developing Countries Participation in WTO Dispute Settlement System[24]

S. No.	Member	As Complainant	As Respondent	As Third Party
1.	Antigua and Barbuda	1	0	0
2.	Argentina	21	22	66
3.	Barbados	0	0	4
4.	Belize	0	0	4
5.	Bolivia, Plurinational State of	0	0	2
6.	Brazil	34	17	164
7.	Cameroon	0	0	1
8.	Chile	10	13	48
9.	China	22	49	192
10.	Colombia	5	7	66
11.	Costa Rica	7	1	20
12.	Côte d'Ivoire	0	0	4
13.	Cuba	1	0	18
14.	Dominica	0	0	3
15.	Dominican Republic	1	8	9
16.	Ecuador	3	3	38
17.	Egypt	0	5	33
18.	El Salvador	1	0	23
19.	Fiji	0	0	3

[24] Researcher's compilation from "Disputes by Member", World Trade Organization, accessed January 20, 2022, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

20.	Ghana	0	0	1
21.	Grenada	0	0	1
22.	Guatemala	10	2	59
23.	Guyana	0	0	3
24.	Honduras	8	0	36
25.	India	24	32	177
26.	Indonesia	12	15	47
27.	Jamaica	0	0	8
28.	Kenya	0	0	3
29.	Malaysia	2	1	26
30.	Mauritius	0	0	6
31.	Mexico	25	15	112
32.	Nicaragua	1	2	18
33.	Nigeria	0	0	6
34.	Pakistan	5	4	13
35.	Panama	7	2	13
36.	Paraguay	0	0	21
37.	Peru	4	6	19
38.	Philippines	5	6	18
39.	Saint Kitts and Nevis	0	0	3
40.	Saint Lucia	0	0	3
41.	Saint Vincent and the Grenadines	0	0	1
42.	Singapore	1	0	69
43.	Sri Lanka	1	0	4
44.	Suriname	0	0	1
45.	Switzerland	5	0	34
46.	Chinese Taipei	7	0	134
47.	Tanzania	0	0	3
48.	Thailand	14	4	101
49.	Trinidad and Tobago	0	2	4
50.	Türkiye (formerly Turkey)	6	12	106
51.	Uruguay	1	1	14
52.	Venezuela, Bolivarian Republic of	3	2	31
53.	Viet Nam	5	0	37
54.	Zimbabwe	0	0	6

It is important to note that the data presented shows only the 'formal' third party participation under Article 10, i.e. during panel proceedings and does not involve third party participation during consultations, since most disputes never make it to the panel. The given data reveals the fact that developing countries mostly participate as third

party and around thirty percent of the developing countries have only participated as third party which clearly evidences the inequity and power imbalance in the multilateral trading system. Antigua and Barbuda is the only country among developing members who has never participated as third party. There is no doubt that the option to join in litigation as a third party has successfully enlarged the scope of participation to a set of countries that lack the capacity to file their own challenges. Therefore, it is assumed that third party places a significant role towards the participation of developing countries in the WTO disputes.

The study of cases like *Cotton dispute*[25], and *Sugar dispute*[26] are significant because of the involvement of developing countries from sub-Saharan Africa as third party. They had never participated in the dispute system as complainants or respondents. They participated in the dispute for the first time as third party. They are countries with issues of health and social problems. They had small volume of trade and therefore, participation in WTO disputes was beyond their imagination. In both the cases, underdeveloped countries initiated towards the development of rules and practices of WTO through participating indirectly as third party.

The *cotton dispute* appears to be a landmark case on developing countries' issues over agricultural subsidies that have been applied by their developed counterparts. The dispute involved Brazil and the US being main parties and a number of third parties[27]. Brazil received a positive ruling, as it was determined that US agriculture subsidies violated WTO regulations. The case is significant in the sense that it helped Benin and Chad, Least Developed Countries(LDCs) in Sub-Saharan Africa use rights of third party as a tool to preserve their trade related agenda concerning cotton industries against the US.[28]They

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25 United States -Subsidies on Upland Cotton, panel report, WT/DS267/R, adopted on 8 September 2004; appellate body report, WT/DS267/AB/R, adopted on 03 March 2005.

26 EC- Export Subsidies on Sugar, panel report (complaint by Thailand, Brazil and Australia), WT/DS/283/R, WT/DS/266/R, WT/DS/265/R, 15 October 2004, appellate body report, WT/DS/283/AB/R, WT/DS/266/AB/R, WT/DS/265/AB/R, adopted on 28 April 2005.

27 Third parties involved were Argentina, Australia, Canada, China, Chinese Taipei, the European Community, India, New Zealand, Pakistan, Paraguay, Venezula, Japan, Benin and Chad. The last two are LDCs which had never before used the Dispute Settlement System in any capacity.

28 They went through both the legal channel (as third party in cotton dispute) and the political channel, by putting the issue related to cotton industries involving US's inconsistent WTO rules on agriculture subsidies. This was one of the main reasons behind the failure of the Cancun ministerial conference in 2003, making their views known to the public and to decision-makers.

presented compelling evidence against the harmful effects of US cotton subsidies. West Africa through the use of WTO dispute system attained a better political position in the negotiations involving cotton subsidies as one of their crucial demands.[29]

Sugar dispute is another example where developing states made effective utilization of the DSU by participating as third party. The case involved third party arguments by fourteen African Caribbean Pacific (ACP) countries, India, China, the USA, Cuba, Canada, Columbia, Paraguay and New Zealand by making 26 members in total. The dispute set a record for the number of third parties involved in a single dispute. ACP countries involvement in the case helped them learn how to pool their resources, and to raise collective voice through single representation in the hearing.

The experiences of *Chile* and *Jamaica* offer yet another argument in support of the value of third-party rights for developing nations. A developing nation like Jamaica has never been the primary party in a dispute before the Dispute Settlement Body[30] and hence, is of the view that believes that its third-party participation has enhanced its expertise with the system. Additionally, it has improved its comprehension of the discussions and the assessment of the dispute system, which will strengthen the position of developing nations in the system.[31]Through its involvement as a third party, the Chilean representative's position evolved to include active engagement in the WTO's DSU negotiations.[32]

Conclusion

Countries participate in disputes for strategic reasons: they want to protect their trade interests from unfair accords; they want to have an impact on the jurisprudence that emerges from litigation; and they want to improve their legal ability by studying the proceedings of other countries. Countries with weaker economies suffer from various capacity and political constraints which has severe impact on their level of participation in the WTO system including the dispute settlement. Since the system of dispute settlement is what makes the WTO unique, there is

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29 Elinor Lynn Heinisch, *West Africa versus the United States on cotton subsidies: how, why and what next?*,256 JOURNAL OF MODERN AFRICAN STUDIES, 44(2):251-274, (2006).

30 *Id.* at 35.

31 Minutes of meeting, TN/DS/M/S, (27 February, 2003) at 5.

32 Minutes of meeting, TN/DS/M1, (12 June 2002) at 5.

growing disagreement over whether it creates the conditions necessary for members to contribute meaningfully to the system. Every country must have an equal chance of success regardless of its economic situation under this more formalised system, which has systemic ramifications. Analysing of the role of participation and the difficulties faced by developing countries in the DSM, third party rights is viewed as an important tool of capacity building that needs to be used regularly to ensure their participation system in a cost effective manner.

Third party involvement is obviously essential for developing and less developed countries' access to justice because both have used it (unlike primary party status, which has not been employed by a significant number of poorer countries). The rights are significant towards enabling greater participation and an effective measure of learning for weaker economies in the WTO dispute system. Developing nations are able to express their opinions by taking on the role of third parties. As a result, they can communicate their opinions to the general public at a lower cost than if they were to act as the main parties, both financially and politically. It is assumed that legal capacity is possible to be attained not only through country's wealth but also by experience.

These rights because of its exclusive implication on developing countries have raised issues relating to its restrictive presence in the rules and procedures of WTO disputes. It is often argued from the side of developing countries that nature of such rights are restricted and ambiguous. Hence, they need to be transformed to safeguard their interests appropriately within the dispute system.[33]

[33] The arguments have been drawn from the various proposals submitted by developing countries towards the enhancement of third-party rights.

JURISPRUDENCE OF THE OPPRESSED: LITERATURE AND THE JUDICIAL IMAGINATION

Mukesh Srivastava[*]

Abstract

In this article we first seek to explore the range of possible meanings associated with the intellectual discipline of Law and Literature. In so doing, we contend with scholars such as Maratha Nussbaum's universalist position on "poet as Judge" through readings of Premchand's story Kafan and Mahasweta Devi's Daupdi. Further attention is focused on some relatively recent judgments of the Indian Supreme Court where literary references might become a metaphorical instrument in the reasoning of the court, and in the framing of judicial narratives, so as to create a new space of thinking and narrating justice against the dominant frameworks of the State and accompanying social structure of power. In short, the effort is directed towards understanding how a jurisprudence of the oppressed might benefit from critical insights derived from reading literary writings.

Key words: Narrativity, Subject position, Judicious spectator, Judicial Neutrality, Critical Legal Imagination

Introduction

Jurisprudence trembles ... uncertainly on the margins of many subjects[1] *H.L.A. Hart*

Only Poets are fully equipped to embody the norms of judgment that will hold these (American) states together as a nation. Their presidents shall not be their common referees so much as their poets shall.[2] *Walt Whitman*

[*] Professor, National Law Institute University, Bhopal.

[1] H.L.A. Hart, *Essays in Jurisprudence and Philosophy,* (Oxford, 1983), 49.

[2] Walt Whitman, 'By Blue Ontario Shores' in Leaves *of Grass* (Norton, 1973) Lines133, at347.

Since the publication of James Boyd White's, *The Legal Imagination* in 1973, there has been, in the Western academy, a somewhat systematic attempt to not only retrieve the study of law from nearly all-pervasive legal formalism, but also to trace and restore the humanist origins of law as a discipline of thought. What such an enterprise endeavours to demonstrate is to reveal, first, the formation of rhetoricity of the language of law, and secondly, much like literary studies, the literary tropes, or metaphorical imagination, which is actively at play in legal discourse.

The initiative of "Law and Literature" as an interdisciplinary field of study, particularly in the sense in which Roland Barthes describes interdisciplinary activity—as a non-peaceful operation—is of relatively recent origin.[3] It can be said to have four basic elements. First, there is the study of Law that has a direct bearing on the production and circulation of literature, or simply called *the law of literature.* Second, there is the study of literary tropes, or in a more simplified version, literary properties of legal texts. This would imply studying *law as literature.*[4] Third, we have a study of the *styles*, or modes or *methods of interpretation of* legal and literary texts which is generally referred to as legal and literary hermeneutics. Finally, we have a study of the *representation* of law and legal processes in literature, called *law in literature.* A minimal description of at least two of these categories is now in order before we set out to discuss the concerns of literary and judicial imagination in the later sections of this article.

Law as Literature: This genre pays close attention to all the linguistic devices, literary tropes as well as narrative techniques as they are deployed in the formation of legal discourse in general, and judicial narratives in particular. So special attention to the language of judicial opinions may reveal how, for instance, contradictions are concealed or

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3 Roland Barthes, 'From Work to Text' in *Image, Music, Text* (Fontana classics, 1986). For Barthes, interdisciplinary work does not merely imply juxtapositions of already established intellectual disciplines to produce new information. It is rather a violent operation in the sense that the stability and solidarity of old disciplines are broken, and their boundaries dissolved, so as to produce 'a new object of investigation'.

4 Sanford Levinson, 'Law as Literature' in Sanford Levinson and Steven Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* (Chicago, 1991). Also see Kieran Dolin (ed), *Law and Literature* (Cambridge, Critical Concept Series2018); Paul Raffield and Gary Watt (eds), *Shakespeare and the Law* (First Indian Reprint, Mohan Law House Publishing 2010).

glossed over by the use of irony or transferred epithets as metaphors. Similarly, in building up narrative logic in a judgment, one may use the trope of synecdoche, consciously or unconsciously, as a special kind of linguistic metaphor, to reach consistency and logical cohesion in the argument.[5] This tendency towards a very subtle and close attention to language may well bring in that blurring of the academic disciplines that may lead to general reconfigurations of genres where law or literature will disappear as textuality.[6]

Legal and Literary Hermeneutics: The practitioners of comparative legal and literary hermeneutics tend to ask two fundamental questions: one, what can the commentators and interpreters of constitution and statutory law and interpreters of novel or any other form of literary discourse learn from each other? Second, can we create a better understanding of how judges develop case law if we study how certain literary forms, say dramaturgy, are developed by their practitioners?

There are no easy or direct answers to these two questions, yet various responses to these questions may suggest that the connections between the two and learning that happens is connotative rather than denotative. It is often a qualitative leap of understanding and insight that defies rule-bound, empirical or quantitative methods of learning. As the mathematician, Alfred Whitehead put it once:

> *When you know all about the sun, and all about the moon, and all about the rotation of the earth, you may still miss the radiance of the sun set.*[7]

Indeed, it is "the radiance of the sun set" which is sought to be grasped by a holistic awareness of literature, or the fine arts generally, and that awareness can rub off into a contemplative mode of adjudication. However, no matter how we choose to respond to the above two questions in the field of comparative hermeneutics, what is obvious beyond any doubt is that while ambiguity, irony, contradiction

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5 Hayden White, *Tropics of Discourse* (Oxford, 1986); W.C. Dimock, *Residues of Justice: Literature, Law, Philosophy* (Berkeley, 1996); Stanley Fish, 'Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty and Ronald Dworkin' in *There's No Such Thing as Free Speech … and It's a Good Thing Too* (Oxford, 1994) 220.

6 Jacques Derrida, *On the Margins of Philosophy* (Chicago ,1976) 60-76. This position on textuality is severely criticized by Richard Posner in his classic, *Law and Literature*, Universal Law Publishing (First Indian Reprint ,2011) 39-50.

7 Whitehead, quoted in Fritj of Capra, *The Tao of Physics* (Flamingo 1975) 43.

and paradox are the delight of literary interpretation and criticism, it may often be the "enemy" of legal analysis. Sophisticated analysts of legal discourse may be well aware nonetheless that the very nature of language, including legal language, is such that the operations of tropes and symbolism are unavoidable. Therefore, instead of trying to hunt down ambiguity, irony and symbolic in general from their argumentation and methods of analysis, they may take recourse to pragmatics or other criteria of evaluation or judgment in a given situation, rather than on the premise of truth of a legal proposition.[8]

In sum it may be said that law and literature as a field of study, or even as a movement, as some have described it, may be unified less by an overarching theory or some 'unshakeable' shared fundamental principles, than by a shared *stance*, or *aesthetic attitude.* That would imply a shared sense that contemplation of the relationship between law and literature is an *intrinsically* fruitful and energizing pursuit, regardless of how the frontiers of that relationship are drawn and re-drawn, depending on the context from which we as readers and critics examine that relationship.

This article is divided into two sections. The first section considers in some detail the proposition that the experience of intense and engaging literary reading may contribute to the activity of judging in a legal situation. *Here we attempt to offer a critique of Maratha Nussbaum's position on the poet–as—judge as a universal and neutral subject and argue that the insights drawn from literary readings of Premchand and Mahasweta Devi may also contribute to locate the subject position of the judge as a pragmatic, contextualized humanist cultural critic.*

The second section considers how literary passages, literary quotations, lyrics, poems, songs and aphoristic statements from different sources find entry in the judicial narratives to enhance the quality of reasoning in judgments. Here we mainly consider two most celebrated judgments of the Indian Supreme Court in recent years: first, relating to the plight of tribals living in the forests of *Bastar* region; and second, about the enforcement of the rights of the gay while reading down section 377 of the Indian Penal Code.

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[8] Stanley Fish, 'Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty and Ronald Dworkin' in *There's No Such Thing as Free Speech … and It's a Good Thing Too* (Oxford, 1994) 224.

The literary artist as a catalyst in the judicial process

Walt Whitman's celebrated and oft-quoted figure of the phantom—which emerged suddenly on the blue Ontario shore where Whitman stood musing over the fate of America—may be taken as the initiator of a new kind of reflection on *how deep and engaging literary reading might influence judicial mind.*:

> *Of these States the poet is the equable man,*
> *Not in him but off from him things are grotesque, eccentric, fail of their full returns, ...*
> *He bestows on every object or quality its fit proportion, neither more nor less,*
> *He is the arbiter of the diverse, he is the key,*
> *He is the equalizer of his age and land, ...*
> *The years straying toward infidelity he withholds by his steady faith,*
> *He is no arguer, he is judgment, (Nature accepts him absolutely,)*
> *He judges not as the judge judges but as the sun falling*
> *Round a helpless thing, ...*
> *He sees eternity in men and women, he does not see men and women as dreams or dots.*[9]

Maratha Nussbaum makes the point that the key to understanding this esoteric poem is contained in the line in which the poet sees eternity in men and women, he does not see men and women as dreams or dots. Here the contrast is between "an abstract pseudo-mathematical vision of human beings and a richly human and concrete vision that does justice to the complexity of human lives."[10] This is also the way to read the contrast between being an "arguer" and being "judgment": the poet does not merely present abstract formal considerations but presents equitable judgments, judgments that fit the historical and human complexities of the particular case.

This, however, the Phantom now goes on to point out, *is not the way of most current judges: thus, the poet does not judge "as the judge judges. "*The method of the poet involves direct perception and insight

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[9] Walt Whitman, 'By Blue Ontario Shores' in Leaves *of Grass* (Norton, 1973) Lines 137-138,140-142,146-148at 347-348.

[10] Martha C. Nussbaum, 'Poets as Judges: Judicial Rhetoric and the Literary Imagination' (1995) *The University of Chicago Law Review*, 1478.

that does not omit or neglect the minute and the dark, hidden recesses of one's being, glossed over by operating principles of contingency or pragmatism. We can best get an idea of what his method *is* like, the Phantom suggests, by thinking of *the way sunlight falls around a "helpless thing."*

This complex image suggests enormous detail and particularity. When the Sun falls around a thing, it illuminates every curve, every nook; nothing remains hidden, nothing unperceived. This intimacy is emphasized by the unusual location, "falls around," instead of "falls upon." So too the poet's judgment falls around all the complexities of a concrete case, perceiving all that is there and disclosing it to our view."[11] In particular, the Sun illuminates the situation of the helpless, which is usually shrouded in darkness. But "this intimacy is also stern and rather pitiless: by comparing judgment to sunlight rather than gentle shade, Whitman indicates that the poet's commitment to fairness does not yield to bias or favour; his confrontation with the particular, while intimate, is unswerving."[12] There is an ideal of 'judicial neutrality' here in Nussbaum's phraseology, but it is neutrality linked not with *quasi-scientific abstractness but with rich historical concreteness.*

While Nussbaum defends the claim to 'judicial neutrality' through the act of poetic reflection involving concrete and particular historical details, she also insists, at the same time, that "*technical legal reasoning, knowledge of law, and the constraints of precedent play a central role in good judging and supply constraints within which the imagination must work."*[13] Whitman, according to her, "neglects the institutional constraints" on the judge's role, treating him as free to follow his own fancy. But she further argues that, properly constrained, the imaginative characteristics of a literary artist—and her attentive reader—can often supplement the other aspects of judicial reasoning in a valuable way.

Extending this argument further to the experience of reading realist fiction of nineteenth century England, particularly *Hard Times* by Charles Dickens, and the fiction of Richard Wright, *Native Son*, which is set in the twentieth century downtown Chicago, Nussbaum posits the

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11 Ibid 1479.
12 Ibid 1480.
13 Ibid 1486.

concept of a *'judicious spectator'* as the judge, who is also the ideal reader of the novel. In this argument, the very structure of the realist novel creates the position of an ideal reader, who watches in a calm, detached manner, but with candid sympathy and an eye for details, the vicissitudes, anxieties, conflicts and sufferings of various characters, and in so doing understands with historical specificity, and concrete details, the predicament of those characters. This experience of literary reading, and the sympathetic insights gained from it, can be analogously applied to the task of a judge as judicious spectator, who—rather than being immersed in her own narrow personal emotions of pity, fear and anxieties—experiences these emotions nonetheless from afar. Therefore, the *judge as ideal reader* of realist fiction is moved to intervene in the best possible manner, using all her imaginative resources to overcome the technical constraints of precedents and legal reasoning to the extent possible, and wherever necessary, so as to try and reach the position of Whitman's Phantom where "sunlight *falls around a helpless thing"!*

Maratha Nussbaum's argument is powerful and persuasive indeed, and this is precisely why this must be subjected to critical scrutiny. First of all, it is pertinent to ask: Who is the ideal reader-as-judge of the realist fiction? Is it possible to arrive at the position of the ideal reader by an act of good will or noble intention? Secondly, what is the nature of correspondence between realist fiction and reality? Does realist fiction create a literary form of its own that can be historicized and located in the political economies of a culture where it is born, or else, does realist fiction simply 'reflect' what is universal reality? Thirdly, what are the specific articulations of technical constraints as precedents and legal argumentations with holistic judging? Does the act of judging creatively, with insights drawn from literary experience, simply subsume the former, or is there a more circuitous way of arriving at holistic judging by offering imaginative interpretations of both precedents and legal reasoning?

Let us take the first question in some detail. The second and third questions, though very significant in themselves, would fall outside the scope of consideration for this article. This author would argue that the position of the ideal reader as *judicious spectator* is highly problematic because it presumes the reader–as–judge to be in a state of mental *transcendence* while reading the novel. What are the historical, cultural,

racial, gender and geographical co-ordinates of the reader?[14] Is the mind of the reader not already conditioned at the time of reading, and will that conditioning not influence the mind, or rather shape the subject position of the reader-as-judge? Taking the spirit of Nussbaum's Universalist position forward, it is perhaps possible to say, however, that the ideal reader may be in a position to de-condition oneself with intensely engaging active self- awareness. That would have to imply that one fully understands the formation of one's linguistic, cultural and social 'self" and is willing to dissolve it completely in order to achieve a transcendental and Universalist position of *neutrality* in the act of judgment. This position of the ideal reader-as-judge is implicitly metaphysical and is more consistent with the mystical and intuitive dimensions of humanist poetic perception. The German philosopher Eckhart Tolle, and the Indian philosopher J. Krishnamurti in particular have emphasized the method of intense self-observation to the point of complete cessation of "the self" as a necessary precursor for the arrival of insight and an altogether novel and original mode of perception of reality.[15]

Being mindful of the difficulties involved in the arguments relating to "judicial neutrality" and in finding the location of an Archimedean vantage point from which to judge, it is still possible to summon all the force in one's command to adjudicate, not by concealing the location of one's subject position, but by acknowledging it fully, and yet circumventing it, when necessary, in order to achieve equality, justice and fairness.[16]

Mahasweta Devi situates her story *Daupdi* (mistranslated sometimes as Draupdi) against the Naxalite movement (1967-71), the Bangladesh Liberation War (1971) of West Bengal and the ancient

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[14] Modern literary theory, especially in relation to the formation of colonial and post-colonial experience, has devoted full attention to the formation of different subject positions in various domains: of the empire, nationalism, religion and similar other institutions mediated by complex and subtle relations of power. One of the earliest and most influential essays to study subject positions is Michel Foucault, 'Subject and Power', 32:3 *Critical Inquiry* (1982), 28.

[15] This metaphysical dimension of perception is not explicitly stated or argued by Martha Nussbaum, but it is rather implicit in her assumptions which together constitute the figure of the 'judicious spectator'. For the method of 'direct perception' without a 'seer' an old classic would be J. Krishnamurti, *Freedom from the Known* (Mary Lutyens ed, K.F.I. Publications, 1969). Also see Eckhart Tolle*, A New Earth* (Penguin, 2005).

[16] Dipesh Chakrabarty makes a somewhat related point, though in a very different context, to argue for a move away from the universalization of European knowledge production and re-situating it in the specific location where it began. See Dipesh Chakrabarty, *Provincialising Europe: Post Colonial Thought and Historical Difference* (Princeton, 2000).

Hindu epic of *Mahabharata*, engaging with the complex politics of the making and un-making of Bengali identity in the larger context of narrating a strident Indian nationhood. The tribal uprising against wealthy landlords caused the fury of the government which led to *Operation Bakuli* that killed several tribal rebels operating in the countryside and deep forests.

Daupdi is a story about Dopdi Mehjen, a woman who belongs to the *Santhal* tribe of West Bengal.[17] She is an exceptionally courageous, bold and skillful woman who, with her husband, Dhulna, murders a wealthy landlord named Surja Sahu. Surja Sahu refuses the use of common village well to the villagers and being in league with the police and the *sarpanch*, he scares away the villagers who have no other source of water in the village. Dopdi, in her indomitable spirit, refuses to suffer the humiliation thrust upon her, and so we find the ultimate nemesis of Surja Sahu as he is eliminated.

The story opens with the running away of Dopdi in the forests. She knows the intricate details of the forest like the back of her hand, unlike the forces of the Indian army who baulk at every step in dense forests. Had it not been the work of traitors from her own tribal group, Dopdi would never have been captured. But that was not to be! Eventually she is captured by the officer *Senanayak* who instructs other functionaries to 'make' her and extract information about the rebel uprising.

Ironically, the same officers who brutally violated her body insist that she covers up and puts her clothes on after going through multiple rounds of violent rape. But Dopdi rips off her clothes and walks towards Senanayak, *"...naked. Thigh and pubic hair matted with dry blood. Two breasts. Two wounds"*. (p.44) Senanayak is shocked by her defiance as she stands before him *"with her hand on her hip"* as *"the object of [his] search"* and exclaims, *"There isn't a man here that I should be ashamed."*(p.45)

The main point of the story is to demonstrate how Dopdi refuses to occupy the subject position of the mythical heroine *Draupadi* in the *Mahabharata* and transforms the powerlessness of her physicality into a

[17] Mahasweta Devi, Gayatri Chakravorty Spivak (tr) 'Daupadi', in *Breast Stories* (Seagull, 2010). All references are made to this edition.

very powerful tool of resistance against brutal male power. Unlike the case of *Draupadi* in the *Mahabharata,* there is no divine intervention here. Instead, we have *an ironic inversion of the theme of divine grace* but Dopdi is not ashamed! She snatches her agency from the jaws of defeat as she breaks the codes of honour and shame of a gendered civil society, and therefore, for the first time *"Senanayak is terribly afraid of an unarmed target!"*

This story, though published originally in Bengali in 1978, and first translated into English by Gayatri Chakravorty Spivak in 1982, is at once contemporary with our times. It evokes strong memories of *operation green hunt* conducted in Chhattisgarh, Bastar district, where a large number of tribes fighting for the survival of their limited forest resources, were brutally murdered by the State forces.

Before we proceed to discuss the implications of this powerful story for the *framing of judicial narratives* in the next section, and the place of tribal rebellion effected by a *santhal woman* in the face of nationalist appropriation of tribal consciousness, let us continue with a brief reading of Premchand's short story *Kafan* in order to problematize and re-situate the subject–position of the ideal reader involving "judicial neutrality" in the stance of literary artist- as- judge.

Premchand's short story *Kafan*, published shortly before his death in 1936, is broadly considered to be one of the most powerful story written in the twentieth century India, if not *the most* powerful.[18] Situated in the rural north India of the 1930s, this story poignantly captures not only extreme poverty of the farmers but also emphatically demonstrates the prevalent phenomenon of extreme hunger that shapes the individualized consciousness of landless labouring classes, leading to the cruel treatment of the central woman character, *Budhiya,* who is the most oppressed in the structure of hierarchy of the village society.

Set in a typical village of the state of Uttar Pradesh (UP), the milieu of Premchand's best works on a dark, chilly winter night, it is the story of a father, *Ghisu*, and his son*, Madhav*, who sit at the door of their hut roasting potatoes stolen from a neighbour's field. Budhiya, Madhav's young wife is inside groaning in childbirth. Neither man responds to her

[18] David Rubin (ed, tr), *The World of Premchand: Selected Short Stories* (Oxford, 1993). All references in the text are made to this edition.

moans. In fact, Madhav is annoyed. His father urges him to take a look in on the girl, but he asks, "If she's going to die why doesn't she die now? What can I do by looking?" Lazy, dishonest, cunning, and, one might say, totally de-humanized, *Ghisu* and *Madhav* are members of the *Chamar* caste, the poorest and lowest in India's highly structured social hierarchy. Budhiya, Madhav's young wife, was an exceptionally kind-hearted woman:

> "Since this woman had come, she had laid the foundations of civilization in the family. Grinding grain, cutting grass, she arranged for a couple of pounds of flour, and kept filling the stomachs of those two shameless ones. After she came, they both grew even more lazy …" (p.38).
>
> *It was the same woman, the wife and daughter-in-law of two men busy with eating potatoes, who lay moaning in childbirth, yet neither of them, responds. Madhav is afraid that if he went inside to look, his father, Ghisu would gobble up most of the potatoes.*

This is indeed a vivid description of that society where hunger and food seemed to have become the dominant values, over and above everything else. Pushed down to the bare minimum and below the level of subsistence by a ruthless system of landowning called *Zamindari—an invention of the scheming of the British empire in India in partnership with the Indian feudal lords*—the Indian peasant was absolutely ruined by paying off exorbitant revenue to the British via the figure of the *Zamindar*, the feudal lord. Hence, the extreme poverty and hunger of the peasant and the landless labour as well, despite a "back breaking labour" in the field day in and out. The haunting pictures of *these landless labouring classes* have once again, in our own times of the pandemic-induced lockdown, returned to full consciousness before the public view, in moving television images of the hungry, exhausted and economically ruined, migrant workers with their small children, walking several hundreds of kilometres on foot, back to their native villages! The reader-as–judge cannot fail to notice here the similarity and in a sense continuity between the colonial and the nationalist project.[19]

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[19] Chastened by open criticism from former members of the higher judiciary, as well as many senior lawyers and jurists, the Supreme Court sought to redeem its stature by issuing a series of directions to the government. As part of its efforts, it made all State governments file comprehensive

The next morning, Madhav goes into the hut and finds his wife dead, the baby having died inside the womb. Both men go about the village beating their chests and wailing "according to the old tradition." They receive consolation from the other villagers, and, to get money for the shroud and firewood needed to cremate the dead woman, they go the village's major landowner and beg. Though the landowner knows them to be cheats, he reluctantly throws them a few rupees. They then make the rounds, collecting money for the cremation from other people, and they end up with five rupees in addition to other gifts of grain and wood.

Ghisu and Madhav decide that they have enough wood, but since no one will see the corpse when it is taken from the hut at night, they have second thoughts about purchasing a shroud. Moreover, they ask why they should spend money on something that is going to be burned anyway. Wandering through the market, the two find themselves "by some divine inspiration or other" in front of the village liquor store. They order a bottle and some food. As they drink and eat "in the lordly manner of tigers enjoying their kill in the jungle," which is the second allusion to their animal-like behaviour, they gradually sink into drunkenness. They initially have qualms about not purchasing a shroud:

> *"What a bad custom it is that someone who didn't even get a rag to cover her body when she was alive, needs a new shroud when she is dead".* (p.41) *But they rationalize their decision with praises for the dead woman: "Even dying she got us fine things to eat and drink."*(p.42).

This story is very different from the main corpus of Premchand's fiction where the possibilities of individual or collective redemption, however bleak, are not completely lost. The poet-as-judge is called upon to discover the contours of this dystopic vision by moving out of the text.

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affidavits on the action they had taken to facilitate the return of the workers, provide them with immediate relief and the arrangements made for food and water for them during train journeys. It further asked the States to spell out their plans for registering all the workers, their skills, their areas of employment and the different welfare and employment schemes meant for them. Several problems remain, not the least of them being the lapses on the part of the authorities across the country in dealing with the crisis. The inadequacy of facilities for registering and identifying those who wished to travel and the paucity of timely information and effective communication relating to the movement of trains and their destinations were other issues. Overall the current crisis facing the migrant labour in India caused due to sudden lockdown lays bare the structural continuity in the conditions of existence of labouring classes and farmers from colonial era to modern nationalism. See Yogendra Yadav, "Do not blame Covid, or Financial package: Politics is holding India's migrant workers hostage" *The Print*, (6May 2020).

Further, the judge while reflecting on the *historical specificities* that serve to extinguish even a semblance of a morally uplifting action, cannot so easily, and readily, pronounce a judgment on *Ghisu* and *Madhav*. It is the *literary mode* of reflection which transcends the moral binaries of the legal codes and enables the poet-as-judge to create a structure of adjudication where the dynamics of complexities of life interact with 'the reasonable man' in unpredictable ways. A critical consideration of such dynamics may strain such a judge against the precedence of a settled code and break away from the 'realism' and 'objective reality' of an already determined moral universe.

Whatever happened to *Budhiya,* the central woman character in this story? Unlike Daupadi, in Mahasweta Devi, whose deafening rebellion punctured the smooth prose of the police administration, *Budhiya* remains a truly gendered subaltern figure who cannot speak at all. Nor can a voice be extracted from her through a mediated male or female voice. She remains a 'twice removed' subaltern figure whose inability to speak, within the scope of the narrative, will provide yet another occasion for the poet-as-judge to reflect creatively. Such a mode of literary reflection is not an exercise in merely 'filling' the silence by judicial speech, but rather an act of judicial *introspection.* Surely, Premchand, the great writer of fiction, did not or could not envisage the possibilities of a gender resistance in the larger narrative of making a nation, in ways which are possible today, but nonetheless, that does not diminish the power of his vision, or the significance of clinical description of village India under the British Empire. More than the authorial intent and craft, it's the responsibility of critical reader to flag these silences of the text.

The tragic vision of India emerging from both the writers considered above compels the reader, and the figure of *'judicious spectator'* to reflect on the phenomenon of why the downtrodden, the exploited, the deprived and marginalized people, *may not play according to the rules of the game*. Moreover, in some specific cases, not only *by breaking the law of the land explicitly*, but also by *breaking the codes of honour and shame*, and in the case of *Ghisu* and *Madhav*, by losing the very core of their humanity, these characters bring in sharp relief the underbelly of the 'mission' of British empire in India, and indeed the legal and pedagogic project of nationalism till date. The *implications for the poet-as-judge cannot be overemphasized.* The informed and sensitive

judge will find it hard to speak from an Archimedean vantage point of truth and morality, rules and abstract principles of justice. And so, instead of speaking, or better, narrating his judgment from *an apriori universal subject position*, the judge might decide to break the given codes, and offer *interpretations* that are consistent with a more radical understanding of 'constitutional morality.'[20] In so doing, the judicial imagination, drawing creatively from the literary experience, would *create* or *invent* a *provisional subject position of adjudication* rather than take recourse on abstract principles of equality, truth and justice.

Literature in the Judicial Narratives

To live outside the law, you must be honest. Bob Dylan, *Absolutely Sweet Marie* (Columbia Records, 1966)

"A Heart of Darkness" in *Nandini Sundar and Ors. v State of Chhattisgarh*

The Supreme Court showed a remarkable literary sensibility by drawing insights from reading of Joseph Conrad's classic novel *The Heart of Darkness* and applying it to the above case. The Court drew a parallel between the gross exploitation of native Africans and their forest resources by the Colonial power structure in the guise of development and the situation prevailing in the forests of Bastar and Dantewada in Chattisgarh where a large number of local tribals had to be sacrificed and their resources plundered all of which was justified by the State to legitimize the larger narrative of development. It was a landmark judgment delving into the minute details of how the State Government created special police officers (S.O.P.) from the local tribal population and used them against the other tribals to fight the armed insurgency that has for a long time tormented the state of Chhattisgarh.[21] The judgment quotes Joseph Conrad's *Heart of Darkness* to provide context to how the state was functioning in Chhattisgarh:

> *"As we heard the instant matter before us we could not but help be reminded of the novella, Heart of Darkness by Joseph*

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[20] The notion of 'Constitutional Morality' was revitalized by the Delhi High Court when it de-criminalized homosexuality involving two consenting adults by reading down Sec. 377 of the Indian Penal Code, 1860. *Naz Foundation v.Govt. of NCT of Delhi& Others* [160 (2009) DLT 277].

[21] AIR 2011 SC 2839.

> *Conrad who perceived darkness on three levels: Firstly, it operated on the level of the darkness of the forest which was seen as a representation of a struggle for life and sublime. Secondly, the darkness that resides in each human being when a supreme and unaccounted force is vested and rationalized by a twisted view of the world which is seen by the individual as feasible and inevitable and the capability of each individual to then descend into such darkness. Lastly, the darkness which is a result of colonization and exploitation of resources. …"* [22]

The novel is set in the backdrop of colonization of Africa and the large-scale ivory trade in Congo where imperial powers were directly involved in the exploitation of forest resources. The Court related the novel to the present-day scenario of Chhattisgarh by using the words *"The Horror! The Horror!",* which were the very same words used by the main protagonist Kim at the conclusion of the novel.

This case shows how the setting and premise of a novel can contextualize the writing of a judgment. The theme of 'representation' made otherwise so complex in the parlance of theory of colonial discourse is presented here at its simplest to help a reader gauge the deep-rooted issues of plundering of forest resources and exploitation prevalent in tribal society, which are hard to otherwise explain in a prosaic narrativization of a legal judgment. It is in this limited sense that one may discover in the judgment the turn towards the localized subject position of poet-as-judge drawing a parallel from literary images situated in a different context.

Literature of Self Identity: *Navtej Singh Johar and Others v. UOI*

The judgement was pronounced by a Constitution bench headed by the then Chief Justice of India Dipak Misra and Justices Rohinton Fali Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra.[23]

The major issue before the Court was to test the constitutional validity of Section 377 of the IPC which categorized consensual sexual intercourse between same sex people as an "unnatural offence" and

[22] Ibid para iii.
[23] Writ Petition (Criminal) No.76 of 2016.

"against the order of nature." It prescribed a punishment of 10 years imprisonment. The provision of this section is a relic of the Victorian England, but not quite so, if we carefully examine the resistance against reading down such a law in India even today.

This landmark judgment of the Supreme Court decriminalizing Section 377 in India comprised of *numerous references to literature* pertaining to the identity of an individual. Three judges in their very different styles of writing and, even in their mode of legal reasoning, drew support from literary classics in arguing that what is generally unacceptable to social morality, *need not be unacceptable* to the larger vision of Constitutional morality. The guiding principles of our Constitution thus seek to protect unique individual expression and behaviour as against the normative patterns of social behaviour. The opening paragraph of the judgment written by Justice Deepak Mishra contained quotes from Goethe *"I am what I am, so take me as I am",* Arthur Schopenhauer "No *one can escape from their individuality"* and William Shakespeare *"That which we call a rose by any other name would smell as sweet."*[24]These quotes seek to illustrate the significance of the essential core of unique individuality in one's life.

The judgment observed further that the irreplaceability of an 'identity' is the respect that a person gives to oneself and the *denial of self-expression* is as severe as inviting death. Judge Nariman quoted Alfred Douglas where he described the love that exists between same sex couples as "The *love that dare not speak its name*" in his poem *Two loves*. Douglas was the lover of Oscar Wilde and the reference to Lord Douglas becomes important in the context of the judgment as Oscar Wilde faced three trials with charges of homosexuality, which was a crime at that time in England. Literary and Cultural critics have pointed out how the prejudices against homosexuality became deep rooted in the social mores of Victorian society, which in turn were shaped both by a new model of Calvinist Christianity, and the claim of racial purity, and racial superiority, advanced by the British in consolidating the British Empire.[25]

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[24] Ibid Para ii.

[25] Ashis Nandy, *The Intimate Enemy: Loss and Recovery of the Self in Colonialism* (Oxford, 1983). See especially his discussion of Rudyard Kipling, Oscar Wilde and Aurobindo, 65-75.

Justice Chandrachud quoted the lyrics of *Leonard Cohen's* song *Democracy* to state that democracy is coming *"from the ashes of the gay"* to convey that the trials of same-sex couples have not gone waste and that *democracy would beckon from the ashes of gay.*[26]

"Democracy
It's coming through a hole in the air,
It's coming from the feel
that this isn't exactly real,
or it's real, but it isn't exactly there.
From the wars against disorder,
from the sirens night and day,
from the fires of the homeless,
from the ashes of the gay:
Democracy is coming"

Justice Nariman refers to the *Fundamental Rights as the "North Star" in the "universe of Constitutionalism"*, *in a reference to the play Julius Caesar* by William Shakespeare: [27]

"I could be well moved, if I were as you;
If I could pray to move, prayers would move me:
But I am constant as the Northern Star,
Of whose true-fixed and resting quality
There is no fellow in the firmament"

Finally, a reference is made by Chandrachud to the poem *Through Love's Great Power* written by Indian novelist and poet Vikram Seth: [28]

"Through love's great power to be made whole
In mind and body, heart and soul –
Through freedom to find joy, or be
By dint of joy itself set free
In love and in companion hood:
This is the true and natural good.
To undo justice, and to seek
To quash the rights that guard the weak –

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26 Supra footnote no. 23, para vi.
27 Ibid, para ix.
28 Ibid, para viii.

To sneer at love, and wrench apart
The bonds of body, mind and heart
With specious reason and no rhyme:
This is the true unnatural crime."

The poem illustrates what exactly is to be considered *an unnatural crime,* rather than criminalizing the nature of love. The true crime is to ostracize the cultural minority and impose unjust laws on such minority thereby completely removing any notion of justice in a democratic society.

Conclusion

In this article we tried to show how developing literary sensibility and imagination can contribute to not only the quality of writing a judgment, but also to deepen one's understanding of principles of justice governing life as a whole. As the figure of Walt Whitman's phantom appearing on the beach had prophesized, it is the poet-as-judge who may be able to shed light—even as the Sun does—and remove completely the darkness around a helpless thing.[29] However, as we noted through the readings of the fiction of Mahasweta Devi and Premchand, the figure of the poet-as-judge does not emerge from a universal and neutral subject position, based on abstract principles of Truth, Morality and Justice. Indeed, such a judge may break these codes, while listening intently to 'the small voice of history' arising from literary spaces and sunken voices of marginalized tribes and communities which are not obliged to play according to the rules of the game.[30]

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[29] Walt Whitman, 'By Blue Ontario Shores' in Leaves *of Grass* (Norton, 1973) Lines133, at347.

[30] What Ranjit Guha argues for in the domain of creating a new historiography, turning away from the colonialist and nationalist founding assumptions, could be applied equally well, with further qualifications, to the narrative and intellectual discipline of Indian Jurisprudence. The subterranean "micro" narratives of history are often best manifested in the genre of literature where the compulsion to produce empirically verifiable "objective" reality does not operate. See Ranjit Guha, Subaltern Studies, vol. 1 (Oxford, 1983) vi-xii.

MAINTENANCE OBLIGATIONS IN MATRIMONIAL DISPUTES: A CRITICAL APPRAISAL

Dr. Aruna B Venkat[*]

Abstract

Maintenance obligation is an ancient Hindu customary practice pertaining to spousal and child support. In the event of marital separation, divorce or death of the husband, the wife and children were provided with "maintenance". Reforms in the Hindu personal laws resulted in the enactment of several social welfare legislations such as Hindu Marriage Act,1955 and Hindu Adoptions and Maintenance Act, 1956, the Protection of Woman from Domestic Violence Act 2005, the Prohibition of Child Marriages Act 2006, the Sexual Harassment of Women at Workplace Act 2013 etc.,

These laws also have derived their inspiration and validity from Article 15 read with Article 39 of the Constitution of India. All these enactments contain provisions providing maintenance for the wife and children which have been given liberal, purposive interpretation by the courts to ensure justice and fairness to them. Since India ratified CEDAW in 1993, several important legislations have been passed by the parliament. Wife and children must not be left to be at the mercy of the Courts and the husband.

The article strongly recommends equal division of matrimonial assets. The article makes a strong case for women to have equal stakes in the proceeds from those properties towards which they have made contributions during the subsistence of their marriage. The author suggests that wife services must be quantified.

Key words: Maintenance Obligation, CEDAW, Equal Share, Matrimonial Assets, Wife Services.

[*] Associate Professor, NALSAR University of Law

Introduction

The idea of maintenance obligation[1]is as old as Hindu civilization. It had its roots in the ancient Hindu customary practice pertaining to marriage, children, their position and status in the then Indian society. It was in the ancient Hindu societal traditional practice that women enjoyed a very high position in the society and were treated with respect and kindness. In the event of marital separation, divorce or death of the husband, the wife and children were provided with "maintenance". The then Hindu society was more kind to all dependents like aged and infirm mothers, fathers and also grandparents and its adult members were expected to take care of them. The idea of "duty to maintain" the wife was the original Hindu thought from which the modern theory of maintenance obligation of the husband towards his distressed wife had emerged and evolved. During the time of "Manu" this was recognised and codified as the law of "Manu". The idea of maintenance obligation can also be traced to the Babylonian code of Hammurabi according to which a divorced man was obligated to return the dowry and give his divorced wife custody of any children from the marriage and grant her an allowance to sustain her and children until they were grown.[2] The same idea had inspired the modern Indian society to effect reforms in the Hindu personal laws, resulting in the enactment of several social welfare legislations such as Hindu Marriage Act,1955 and Hindu Adoptions and Maintenance Act, 1956 etc.[3]

These laws also have derived their inspiration and validity from Article 15[4] read with Article 39[5] of the Constitution of India which not only provides the necessary constitutional empathy for these laws but also envisages a "positive role for fostering change towards

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1 This paper deals with maintenance obligations under HMA 1955, SMA 1954, HAMA 1956, Section !25 CrPC 1973, DV Act 2005.

2 Hammurabi's Code of Laws Translated by L. W. King, Exploring Ancient Worlds, at http://eawc.evansville.edu/anthology/hammurabi.htm.

3 G. Venkatesh Rao, *Law of Maintenance Obligation,* in (ed) Non-Resident Indian and Private International Law, ISIL, HOPE INDIA, 2008.

4 Article 15(3) of the Indian Constitution declares: "Nothing in this article shall prevent the State from making any special provision for women and children."

5 Article 39 of the Indian Constitution declares: The State shall, in particular, direct its policy towards securing— (a) that the citizens, men and women equally, have the right to an adequate means of livelihood ….
(d) that there is equal pay for equal work for both men and women …."

empowerment of women". Also, Article 14[6] and 21[7] of the Indian Constitution, which guarantees gender equality and a right to a life of dignity to all persons respectively, and which includes the minimum needs of food, clothing shelter, health and education[8], have inspired and supported the enactment of these above-mentioned social welfare legislations. Similarly, Article 15 (3) reinforced by Article 39 of the Constitution of India, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time. Justice Krishna Iyer held that the object of maintenance laws is:[9]"This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance."

All these enactments contain provisions providing maintenance for the wife and children which have been given liberal, purposive interpretation by the courts to ensure justice and fairness to them. As held by the Supreme Court, these legislative provisions "are not petrified print but vibrant words with social function to fulfil".[10]

India, on 9th July 1993, ratified the United Nations convention on elimination of all forms of discrimination against women (CEDAW). Since its ratification, several important legislations such as the Protection of Woman from Domestic Violence Act 2005, the Prohibition of Child Marriages Act 2006, the Sexual Harassment of Women at Workplace Act 2013 etc., have been passed by the parliament, as automatic incorporation of Article 16 of CEDAW[11] into domestic law is not

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6 Article 14 states: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

7 Article 21 stipulates: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

8 *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746 and *Mohini Jain v State of Karnataka* AIR 1992 SC 1858.

9 See, *Captain Ramesh Chander Kaushal v Mrs. Veena Kaushal and others* AIR 1978 SC 1807.

10 Ibid.

11 The Convention on the Elimination of All Forms of Discrimination against Women or CEDAW is an international human rights treaty, which requires countries to eliminate discrimination against women in all areas and promotes equal rights of men and women. The Convention, adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a

possible. Treaties are first approved by the parliaments and only then specific legislative measures are taken to reflect the principles and content of treaties in the domestic law. This is known as the "dualist approach" because it involves a two-tier process of treaty ratification and actual legislative reform.

A Brief Account of Legislative Framework Pertaining to Maintenance Claims

Five enactments which refer to maintenance claims are: The Special Marriage Act of 1954; the Hindu Marriage Act 1955; the Hindu Adoption and Maintenance Act 1956; section 125 CrPC 1973 and The Protection of Women from Domestic Violence Act 2005.

All these laws are social welfare legislations intended to provide maintenance support to estranged Hindu women who do not have independent source of income sufficient to support her family and to pursue the pending litigation.

While the Hindu Marriage Act provides maintenance support to both spouses, the other laws provide support only for women. All of them provide independent and distinct reliefs and enable the distressed wives to initiate successive maintenance proceedings. The Special Marriage Act and Criminal Procedure Code are secular in nature and provide relief to all distressed women irrespective of their religion provided they fulfil the conditions laid down therein.

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preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

Article 16 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; 7 (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Special Marriage Act 1954 (SMA) is a secular legislation applicable to all persons who solemnised their marriages in India according to its prescriptions. Section 36 provides that a wife is entitled to claim interim maintenance if she does not have sufficient independent income to support her and to meet legal expenses. The maintenance may be granted on a weekly or monthly basis during the pendency of matrimonial proceedings. The Court would determine the quantum of maintenance depending on the income of the husband and award such amount as may seem reasonable. The maintenance is given on an application made by the wife to the District Court which has to be disposed of within a period of 60 days from the date of notice served on husband. Section 37 of the Act provides, among other things, for grant of permanent alimony as a consolidated amount payable by the husband to the wife towards her maintenance for life. It is given at the time of passing of the decree of divorce or subsequent there to which is done on an application made by the wife to that effect. If the divorced wife is remarried or not leading a chaste life, the maintenance order may be varied, modified, or rescinded at the instance of the husband. This can be affected in such a manner as may seem just to the Court.

The Hindu Marriage Act 1955 (HMA) provides for the rights, liabilities and obligations arising from a marriage between two Hindus. Section 24 of the Act provides for maintenance pendant lite, where the Court may direct the respondent to pay for the expenses of the proceedings and also pay such monthly amount as is considered to be reasonable having regard to the income of both parties. An application has to be made to the Family Court by the aggrieved Party which has to be disposed of within 60 days from the date of service on the respondent. Section 25 provides for grant of permanent alimony. All the factors that are applicable under section 24 of the act are applicable under this provision. Also, all the factors that are applicable under section 37 of SMA are applicable under this provision. The maintenance order may be modified, varied or rescinded, in the case of wife, if she is remarried or living an unchaste life and in the case of the husband, if he has sexual intercourse with any woman outside wedlock. This provision also provides lifelong maintenance for the wife.

The Hindu Adoption and Maintenance Act, 1956 (HAMA) is the special law relating to adoptions and maintenance among Hindus during the subsistence of the marriage. Section 18 provides maintenance to the

wife from husband during her lifetime. She is also entitled to make a claim for separate maintenance for reasons mentioned therein. This provision read with section 23 of the Act provides the factors required to be considered for deciding the quantum of maintenance. However, the right to claim separate residence and maintenance would not be available if the wife has been unchaste or has converted to another religion. It may be appreciated that while the right under section 18 of this Act is available during subsistence of the marriage, without any matrimonial proceedings pending between the spouses, the right under section 25 of HMA is available only after divorce.

Section 125 of Criminal Procedure Code, 1973 (CrPC), provides maintenance for wife, children and parents in a summary proceeding. The object and purpose of this provision is to provide immediate relief to an applicant. For making an application under this provision, two conditions need to be satisfied. One is that the husband has sufficient means, and the other is that there has been neglect to maintain the wife on the part of the husband. This provision was amended to introduce the facility of providing interim maintenance to the wife. After the amendment, the application for grant of interim maintenance must be disposed of within 60 days from the date of service of notice on the respondent.

Protection of Women from Domestic Violence Act 2005 (DVA)- This Act seeks to give relief to an aggrieved women who is victim of domestic violence. The expression "aggrieved person" (i.e., Woman) has been defined as a woman who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence. "Domestic relationship" has been defined as a relationship between two persons who live or have at any point of time lived together in a "shared household", when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. The words "domestic violence" have been defined as physical abuse, verbal abuse, emotional abuse and economic abuse. The Act provides that an aggrieved woman cannot be evicted or excluded from a "shared household" or any part of it by the respondent save in accordance with the procedure established by law. Section 20 of the Act provides for monetary relief. It says that the "magistrate may direct the responded to pay monetary relief to meet the expenses incurred and

losses suffered by the aggrieved person as a result of domestic violence". The provision states that the maintenance granted under this provision is in addition to an order of maintenance awarded under any other law. It also states that the "monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed".[12] Maintenance granted under this provision may be an appropriate lump sum payment or monthly payment, as the nature and circumstances of the case may require. Section 26 of the Act says, inter alia, that the relief provided under this provision may be sought in addition to, and along with any other relief that the aggrieved person may seek in a suit or legal proceeding before a civil or criminal Court. This provision also imposes an obligation on the aggrieved wife to inform the magistrate of the grant of any relief that has been obtained by her in any proceeding other than the proceeding under this Act. Lastly, section 36 of the Act stipulates that this Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

The Object and Purpose of the Laws dealing with Maintenance Obligations.

The main purpose and object of the maintenance provisions of these welfare legislations, as intended by the legislature, has been to provide legal framework to enable dependent wives and children to claim financial support so as to prevent them from falling into destitution and vagrancy[13]. Their object is not to penalise or punish the husbands for their past neglect and misconduct[14] which has led either to their judicial separation or divorce. The special feature of each of these enactments is that each of these laws provide an independent and distinct remedy for wives who are separated from the family either by a degree of judicial separation or divorce, as the case may be, and the aggrieved wives can claim maintenance by filing successive maintenance applications under each of these laws[15]. Because of this statutory facility, the concerned

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12 *Shome Nikhil Danani v Tanya Banon Danani* 2019 SCC On Line Del 8016

13 *Bhagwan Dutt v Kamla Devi* (1975) 2 SCC 386; *Chaturbhuj v Sitabai* (2008) 2 SCC 353.

14 *Nagendrappa Natikar v Neelamma* (2014) 14 SCC 452 and *Sundeep Choudhary v Radha Choudhary* (1997) 11 SCC 286.

15 In *Rohtash Singh v Ramendri* (2003) 3SCC 180, the Supreme Court, while considering the maintenance obligation of the husband towards his wife, observed: "A woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in section 125(4) CrPC. In another capacity, namely, as a divorced woman, she is again entitled to claim maintenance from the person of whom she was once the wife. If she cannot maintain

Courts, in the past, had to encounter difficulties in the enforcement of maintenance orders in those situations where there were overlapping jurisdictions and the resultant conflicting judicial decisions of these Courts.

Justice Indu Malhotra in the case of *Rajnesh v Neha*[16]has adverted her attention to this issue. In addition, Her Lordship also addressed other issues which are integral to the grant of maintenance by the Courts which are: i) payment of interim or pendant lite maintenance or alimony. ii) criteria for determining quantum of maintenance, iii) the date from which the maintenance is to be awarded and iv) enforcement of the maintenance orders. The learned judge thought it necessary and appropriate to frame and issue a set of guidelines to ensure that there is uniformity and consistency in deciding maintenance issues.

Overlapping Jurisdictions and Conflicting Judicial Decisions

The Supreme Court realised that simultaneous operation of these laws, under which maintenance claims could be filed, would lead to multiplicity of conflicting orders which would, in turn, have the inevitable effect of overlapping jurisdictions of different Courts. The court observed that this process of overlapping jurisdictions and conflicting judicial orders required to be streamlined, so that the respondent-husband was not obligated to comply with the successive maintenance order passed under different enactments. The Apex Court effected an extensive survey and analysis of the past precedential judgments as well as the various High Court orders in the light of the relevant provisions of various enactments, where the Courts delivered conflicting judgments on various issues pertaining to maintenance claims. For example, a Hindu wife may claim maintenance, first under section 125 of CrPC and subsequently under section 24 for interim maintenance under HMA or under section 25 off HMA for permanent alimony. Similarly, a woman may first file an application for maintenance under section 125 CrPC and subsequently under the Protection of Women from Domestic Violence Act 2005. Again, a Hindu woman may first claim maintenance under Hindu Marriage Act, 1955 and subsequently under Hindu Adoption and Maintenance Act 1956, or

herself or remain unmarried the man who was once a husband continues to be under a statutory duty and obligation to provide maintenance to her."

16 (2021) 2 SCC 324

under Special Marriage Act 1954. Likewise, one can have any number of combinations. In similar contextual situations in the past, there arose the question whether or not the amount of maintenance awarded in the first proceeding ought to have been taken into account and given set-off and adjustment from the amount of maintenance awarded in the subsequent proceedings.

On this question, different benches of the Supreme Court and different High Courts had given conflicting judgments. For instance, Madhya Pradesh High Court in *Ashok Singh Pal v Manjulata*[17] and *Mohan Swaroop Chauhan v Mohini*[18] was of the view that the question as to whether or not adjustment ought to be granted was a matter of judicial discretion to be exercised by the Court. The Court held that there was nothing to suggest as a thumb rule which laid as a mandatory requirement that adjustment or deduction of maintenance amount awarded in the first proceeding must be set-off from the amount awarded in the subsequent proceeding. Similarly, the Calcutta High Court in *Sujit Adhikari v Tulika Adhikari*[19] and *Chandramohan Das v Tapati Das*[20] held that adjustment was not a mandatory rule that the quantum of maintenance determined by the Court under HMA was required to be added to the amount of maintenance under section 125 of CrPC.

On the other hand, the Bombay High Court in *Vishal v Aparna*[21] and the Delhi High Court in *Tanushree v AS Murthy*[22] opined that when there were two parallel proceedings, one earlier and the other later, adjustment or set-off must be made applicable. This was also the view taken by the Supreme Court in *Sudeep Choudhary v Radha Choudhary*[23].

In *Rajnesh v Neha*[24], Justice Indu Malhotra made a specific reference, with approval, rightly so, to the view taken by the Bombay High Court, because the idea of providing maintenance for the wife was to prevent her from falling into destitution and vagrancy and not to punish the husband for his past misconduct.

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17 AIR 2008 MP 139.
18 (2016) 2 MPLJ 179
19 (2017) SCC online Cal. 15484
20 (2015) SCC online Cal. 9554.
21 (2018) SCC online Bom 1207.
22 (2018) SCC online Del 7074.
23 (1997) 11 SCC 286.
24 See supra foot note no. 16.

It may be appreciated that while the Supreme Court allowed adjustment or set-off to take place in those cases, where there were prior maintenance proceedings under section 125 CrPC and subsequent proceedings under the other laws such as HMA and HAMA etc, it was not in favour of allowing the same in the converse cases.

This was made clear by the Supreme Court in *Rakesh Malhotra v Krishna Malhotra*[25]. The Court held that a wife who "initially prefers an application under section 125 CrPC to secure maintenance in order to sustain herself …. would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a competent court under the Act (HMA) or similar such enactments, but the reverse cannot be the accepted norm".

It is submitted that if the main object of providing maintenance to the wife is to prevent her from falling into destitution and vagrancy and that its main purpose was not to punish or penalised husband for his past neglect, there is no reason why such a facility is not allowed in the reverse process. The fact that the proceeding under section 125 CrPC is summary in nature cannot be the ground to penalise the husband.

In *Nagendrappa Natikar v Neelima*[26], the Supreme Court held that initiation of maintenance proceeding under section 125 CrPC, after signing a consent letter indicating that no further proceedings would be initiated subsequently in any other law, was no bar to a subsequent proceeding at HAMA. The Court opined that the proceeding under section 125 CrPC was summary in nature and was intended to provide a speedy remedy to the wife. The Court took the view that any order passed under section 125 CrPC by compromise or otherwise would not foreclose the remedy under HAMA.

In *XXX v YYY*[27], the Kerala High Court said the law is well settled that an agreement by which a wife waives her right of maintenance under Section 125 of CrPC is an agreement against public policy and the same is void *ab initio* and not enforceable.

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25 (2020) SCC online SC 239.
26 (2014) 14 SCC 452.
27 2023 LiveLaw (Ker) 60 order dated 2-2-2023.

To prevent the aggrieved wives from making maintenance claims under different enactments and to ensure uniformity in respect of these claims, the learning Judge in *Rajnesh v Neha* case, thought it necessary to issue the following direction which was meant to be followed by all claimants. To quote Her Lordship:

"To overcome the issue of overlapping jurisdictions and to avoid conflicting orders being passed in different proceedings, we direct that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding and the orders passed therein, so that the High Court would take into consideration the maintenance already awarded in the previous proceedings and grants an adjustment or set-off of the amount. If the order passed in the previous proceeding requires any modification or variation, the party would be required to approach the concerned Court in the previous proceeding".

Procedure to be followed for Awarding Interim or Pendant Lite Maintenance

An aggrieved wife can claim interim maintenance as well as permanent maintenance or alimony from the husband. The object of pendant lite maintenance is to enable the wife to sustain herself and her family and to meet litigation expenses. It has been provided that interim maintenance proceeding should be disposed of within 60 days from the date of service of notice on the contesting spouse. In spite of this mandatory requirement, there has been inordinate delays in the disposal of interim maintenance application. The law requires the party claiming interim maintenance to file concise application for that purpose. The claimant as well as the respondent are required to submit affidavits of disclosure of their income /earnings and other property details which is mandatory. On the basis of these and the limited arguments before the Court, it makes an assessment of approximate amount to be awarded as interim maintenance.

The Supreme Court, taking assistance from National Legal Services Authority, consolidated all the aspects pertaining to the affidavit of disclosure of assets and liabilities and framed a model format[28] whose

[28] The Court framed three kinds of format of Affidavits, applicable to three different categories of deponents which are called Enclosure I, Encloser II and Enclosure III.

submission, in the interim maintenance proceedings under all enactments providing interim maintenance, is now mandatory.

For framing the model format and for issuing the guidelines, the Supreme Court sought to exercise its extraordinary constitutional powers given under Articles 136[29] and 142[30] of the Constitution of India. Some of the directions issued with respect to the above aspects were:[31]

"(b) The applicant making the claim for maintenance will be required to file a concise application accompanied with the Affidavit of Disclosure of Assets.

(c) The respondent must submit the reply along with the Affidavit of Disclosure within a maximum period of four weeks. The Courts may not grant more than two opportunities for submission of the Affidavit of Disclosure of Assets and Liabilities to the respondent.

If the respondent delays in filing the reply with the Affidavit, and seeks more than two adjournments for this purpose, the Court may consider exercising the power to strike off the defence of the respondent if the conduct is found to be wilful and contumacious in delaying the proceedings.

On the failure to file the Affidavit within the prescribed time, the Family Court may proceed to decide the application for maintenance on basis of the Affidavit filed by the applicant and the pleadings on record.

(d) The above format may be modified by the concerned Court if the exigencies of a case require the same. It would be left to the judicial discretion of the concerned Court, to issue necessary directions in this regard.

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(j) The concerned Family Court / District Court / Magistrate's Court must make an endeavour to decide the I.A. for Interim Maintenance by a reasoned order, within a period of four to six months

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29 Article 136 (1) says: "Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.…"

30 Article 142 declares as follows: — "(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order3 prescribe. (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

31 See supra foot note no. 16.

at the latest, after the Affidavits of Disclosure have been filed before the Court.

(k) A professional Marriage Counsellor must be made available in every Family Court."

Permanent Alimony

The Court held that parties may lead oral and documentary evidence with respect to income, expenditure, standard of living, etc. before the concerned Court, for fixing the permanent alimony payable to the spouse.

In those cases, where marriages do not last for a reasonable length of time, it may not be a equitable solution to direct the contesting spouse to pay permanent alimony to the applicant for the rest of her life. The duration of the marriage would be a relevant factor to be taken into consideration for determining the permanent alimony to be paid.

In those case, where the custody of child is with the wife, provision for grant of reasonable expenses for the marriage of children must be made at the time of determining permanent alimony. The expenses would be determined by considering the financial position of the husband and the customs of the family and also investments created by any spouse / grandparents in favour of the children. This would also be taken into consideration while deciding the final child support.

Criteria for Determining Quantum of Maintenance

In this case, the Supreme Court, referring to some past precedents, held that since the idea of maintenance was to prevent the wife from falling into destitution and vagrancy and not to punish the husband for his past faults, there could not be a fixed formula for determination of its amount.

According to the Court's view, it should neither be too high nor too low, it should be "reasonable and realistic", the only conditions precedent being that dependent wife and children should have no independent income for her family support and that its amount should not be insufficient to live "with reasonable comfort".

The Court opined that the determination of the amount of maintenance would depend upon factual situations and that the Court would mould it based on various factors some of which were "the status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.[32] …. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications"[33].

It may be noted that the legislative framework, dealing with maintenance claims, also provide statutory guidance to the Courts for the determination of the Quantum of maintenance.[34]

As regards the maintenance of minor children, the Court held as follows:[35] "The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extra-curricular / coaching classes, and not an overly extravagant amount which may be claimed. Education expenses of the children must be normally borne by the father. If the wife is working and earning

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32 See Part B (III) of the judgement of the Court in *Rajnesh v Neha* (2021) 2 SCC 324.
33 Ibid.
34 See, section 37 SMA, section 23 HAMA, section 20 DV Act.
35 See Part B (III-d) of the judgement of the Court in *Rajnesh v Neha* (2021) 2 SCC 324.

sufficiently, the expenses may be shared proportionately between the parties."[36]

If any of the family members were suffering from serious disability or ill health, requiring recurrent expenditure that was held to be taken into consideration for deciding the amount of maintenance.

The Date from which Maintenance to be awarded

On the issue of the date from which maintenance is to be awarded, while there are no provisions in HMA and DVA, Section 125 CrPC provides that maintenance may be awarded either from the date of the order or from the date of the application. Because of this legislative uncertainty, there had been difference of judicial opinion among various High Courts regarding this issue.

However, there had been a unanimous agreement among the Courts to the effect that they had judicial discretion in this regard. There was more than one judicial view on this issue. While the Orissa[37], Madhya Pradesh[38], Allahabad[39] and Delhi[40] High Courts took the view that maintenance orders should be made effective from the date of application, the Allahabad[41] and Madhya Pradesh[42] High courts were of the opinion that the general rule was that the maintenance order was effective from the date of order and that if the maintenance order was to be made effective from the date of application, which was an exception, special reason must be recorded. A third view was expressed be Kerala[43], Calcutta[44] and Orisha[45] High Courts which was to the effect that the maintenance order should be made operative from the date of service of summons on the respondent. Orissa High Court also expressed a fourth view to the effect that the maintenance order be made operative from the

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36 Ibid.

37 *Susmita Mohanty v Rabindra Nath Sahu* 1996 (1) OLR 361; *Kumar Nayak v Urmila Jena* (2010) 93 AIC 726 (Ori) and *KanhuCharan Jena v Smt. Nirmala Jena* 2001 CriLJ 879.

38 *Krishna Jain v Dharam Raj Jain* 1993 (2) MPJR 63.

39 *Ganga Prasad Srivatsava v Additional District Judge, Gonda and Ors*2019 (6) ADJ 850.

40 *Lavlesh Shukla v Rukmani*Crl. Rev.P. 851/2019.

41 *Bina Devi v State of UP* (2010) 69 ACC 19.

42 *Amit Verma v Sangeeta Verma* CRR no. 3542/2019 dated 08/01/2020.

43 *S. Radhakumari v KMK Nair* AIR 1983 Ker 139.

44 *Samir Benerjee v Sujata Banerjee* 70 CWN 633.

45 *Gouri Das v Pradyumna Kumar Das* 1986 (11) OLR 44.

date of appearance in the court of the respondent in those cases where the wife was not working.[46]

Setting at rest the judicial dichotomy, the Supreme Court approved the view that the maintenance order must be given effect from the date of application. Justice Indu Malhotra referred to the Court's previous decisions where the court held that "the right to claim maintenance under all enactments must date back to the date of filing the application."** It further held "enormous delay in disposal of proceedings justifies the award of maintenance from the date of application …. The delay in adjudication was not only against human rights but also against basic embodiment of dignity of an individual."[47] The Court also opined that "purposive interpretation needs to be given to the provisions of section 125 CrPC. …. The purpose is to achieve 'social justice' which is the constitutional vision enshrined in the Preamble of the Constitution of India."[48]

Endorsing the views expressed by the Supreme Court in its previous decisions, the learned Judge held:[49] "Even though a judicial discretion is conferred upon the Court to grant maintenance either from the date of application or from the date of the order in section 125(2) CrPC, it would be appropriate to grant maintenance from the date of application in all cases. …. We find that there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interest of justice and fair play that maintenance is awarded from the date of the application. …. The rationale of granting maintenance from the date of application finds its roots in the object of enacting maintenance legislations, so as to enable the wife to overcome the financial crunch which occurs on separation from the husband. …. In order to prevent a dependant from being reduced to destitution, it is necessary that maintenance is awarded from the date on which the application for maintenance is filed before the concerned Court."

Finally, Justice Indu Malhotra issued the following direction which is as under:[50] "It has therefore become necessary to issue

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46 Ibid.
47 *Bhuwan Mohan Singh v Meena* (2015) 6 SCC 353.
48 *Badshah v Urmila Badshah Godse* (2014) 1 SCC 188.
49 See Part B (IV): Discussion and Directions of the Judgement in *Rajnesh v Neha* (2021) 2 SCC 324.
50 Ibid.

directions to bring about uniformity and consistency in the Orders passed by all Courts, by directing that maintenance be awarded from the date on which the application was made before the concerned Court. The right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remain pending is not within the control of the applicant."

Enforcement of Orders of Maintenance

Enforcement of maintenance orders is the last stage of maintenance proceedings which is crucial from the point of view of the applicant as delays in their execution would defeat the very object of these social welfare legislations. The orders of maintenance "may be enforced like a decree of a civil court, through the provisions which are available for enforcing a money decree, including civil detention, attachment of property, etc. as provided by various provisions of the CPC … ."

The Court finally directed that "an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act 1955; Section 20(6) of the DV Act; and Section 128 of CrPC, as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 read with Order XXI."[51]

The Supreme Court and various High Courts have held that where the spouse who is directed to pay the maintenance and litigation expenses, the legal consequences for its non- payment are that the defence of the said spouse is liable to be struck off.[52]

An Appraisal

As already mentioned, Articles 15(3), 21 and 39 of the Indian Constitution have inspired and enjoined Indian Parliament to enact several social welfare legislations to provide maintenance for distressed and estranged women.[53]Some of these laws are: the Special Marriage

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[51] See Part B (V): Discussion Enforcement of Orders of Maintenance of the Judgement of the Court in *Rajnesh v Neha* (2021) 2 SCC 324.

[52] *Kaushalya v Mukesh Jain* Criminal Appeal nos. 1129-1130/2019 decided vide Judgement dated 24-07-2019, *Bani v Prakash Singh* AIR 1996 P&H 175, *Mahinder Verma v Sapna* MANU/PH/3684/2014.

[53] See, supra footnote. no 11.

Act, the Hindu Marriage Act, the Hindu Adoption and Maintenance Act, Criminal Procedure Code. All these enactments, except the Hindu Marriage Act are women centric in the sense that they provide maintenance only for women.

The Hindu Marriage Act is gender neutral as it provides maintenance support for both men and women.

The Special Marriage Act and Criminal Procedure Code are secular in nature and provide maintenance for women irrespective of their religion. All these enactments provide independent and distinct relief under them. The aggrieved wives can file successive applications for maintenance under them. Initiation of maintenance proceedings under one law is no bar for the initiation of similar proceedings under any other law, the only condition precedent being that the applicant or complainant seeking relief should not have independent source of income sufficient to maintain herself and her children and to meet the litigation expenses.

In the context of filing successive maintenance applications by the aggrieved wife under different enactments, there arose the issue as to whether or not the amount of maintenance obtains in a previous proceeding should be taken into consideration while deciding the amount of maintenance in the subsequent proceeding. This needs to be examined in the light of statutory guidelines if there are any. The Supreme Court has taken the view that the amount of maintenance obtained in a previous proceeding should be adjusted or set-off against the amount granted in a subsequent proceeding. The Court also took the view that if an aggrieved wife first initiated maintenance proceeding under any law other than section 125 CrPC and a subsequent proceeding under the latter, adjustment and set-off could not be made applicable.

In this context, there are two issues which need our attention. One is the issue of applicability of adjustment or set-off. The DV Act in section 20(1)(d) makes it clear that the "maintenance award to the aggrieved wife under DV Act is an addition do an order of maintenance provided under section 125 CrPC". In those situations where section 125 CrPC and section 20(1)(d) DV Act are involved in the sense that there is a prior proceeding under the former and a subsequent proceeding under the latter, can the Supreme Court exercise its judicial discretion to apply

the principle of adjustment or set-off? If the Court exercises its judicial discretion, would that not be violative of the above statutory guidelines provided in section 20(1)(d) DV Act? Again, in the context of successive applications under different enactments, the Court has directed the applicant to disclose to the court the maintenance order passed in the previous proceedings in a subsequent case. This is understandable. But the problem would arise when there are maintenance applications file simultaneously resulting in parallel maintenance proceeding. How to solve this problem? Because the Court took the view that the mere fact that two proceedings were initiated by the applicant would not imply that one would have to be adjourned *sine die*. These questions required appropriate answers.

Another issue which needs to be considered is about the date of the order. Regarding this aspect, the Supreme Court has issued the direction that the *pendant lite* maintenance order would become effective from the date of application. But this direction does not solve the financial vows of the aggrieved wife. The Court has given a maximum period of six months for the disposal of the interim maintenance application which may not be followed in practice. However, even assuming that the maintenance application is disposed of within six month which is a long time, who will support her in the *inter regnum*? This problem needs to be addressed. The only solution to this problem is to demand the respondent to deposit in the Court a certain fixed amount which could take care of her financial need till her application for interim maintenance is disposed of. In order to do "complete justice" to the aggrieved wife, Supreme Court, in exercise of its powers under Article 142 of the Constitution of India, can issue such a direction.

As regards the issue of lifelong maintenance to be awarded to the aggrieved wife, Supreme Court also felt that "it may be inequitable to direct contesting spouse to pay permanent alimony to the applicant for the rest of its life. The duration of the marriage would be a relevant factor to be taken into consideration for determining the permanent alimony to be paid". While this is the feeling of the Court, there is statutory commitment and support to the idea of lifelong maintenance support to the wife. This is evident from section 37 HAMA and section 24 HMA. Section 37 SMA prescribes that on maintenance application by the wife the Court may "order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the

husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life". Section 25 HMA contains similar prescription.[54] The question is that in the face of these statutory commitments, will it be possible to ignore, or do away with, the facility of lifelong maintenance support to the wife?

These are all questions which need viable answers. It is submitted that the only viable and effective alternative is to bring in a special law, codifying various existing maintenance provisions in different enactments with appropriate amendments. This would bring in certainty into the law by providing definite statutory guidelines. This would not only prevent the possibility of initiation of successive maintenance proceedings but also prevent and avoid overlapping jurisdictions and the consequent conflicting judicial decisions.

If special legislation, as suggested above, is not possible and feasible, the idea of lifelong maintenance for the wife should be dispensed with as it has no place in the contemporary Indian society where there is demand for gender equality and where there is progressive empowerment of women almost in all field of human activity.

It is suggested[55] that we can visualize two situations where the estranged wife would need permanent alimony. One situation is where she is uneducated, unskilled and would not be able to support herself immediately after divorce etc. In other words, she would be a person who cannot have an existence of her own and have no place to go to or stay. In such circumstances, the divorced wife would need to be rehabilitated. In this situation, permanent alimony would be helpful to tide over the man made misfortune for the divorced wife and which becomes a necessity. This kind of alimony may be called rehabilitated assistance which can be one-time lump sum payment to the wife.

The other situation is where aggrieved wife who is well educated with necessary skills to acquire a job or who has a potential to acquire a good job. Such a wife may be granted what is called a settlement support

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54 Section 25 HMA 1955 states as under: — "Any court exercising jurisdiction under this Act may …. on application made …. by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant …. such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant ….".

55 Aruna B Venkat, *Alimony: Till death do Us Apart*, Oriental Journal of Law and Social Science, Vol XI, Issue 11, Oct 2017, pg 62-70, ISSN 0973-748.

which would be one-time settlement amount paid as alimony. While deciding the amount, the Court may take into consideration various factors such as the status of the parties, reasonable need of the wife and dependent children, whether the applicant has any independent source of income, whether the income is sufficient to enable to maintain the same standard of living as she was accustomed in her matrimonial home, etc. The Court would also need to take into account certain factors from the side of the husband such as the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance and other dependent family members, liabilities if any etc.

A third possible solution is also mooted here. Article 15(3) of the Constitution of India empowers the state to pass laws that put both men and women at par with each other in terms of rights and opportunities available to them in society. In spite of an enabling provision, we do not have laws that provide for an equitable distribution of the matrimonial assets such as their savings, their sharing and their division of labour at the time of the dissolution of their matrimonial relationship. It is time that law makers in India look at the possibility of "equitable distribution of matrimonial assets". Wife and children must not be left to be at the mercy of the Courts and the husband. Many foreign Jurisdictions follow equal division of assets. This approach will allow women to own properties or have equal stakes on the proceeds from those properties towards which they have made contributions during their marriage. Here 'contributions towards properties' must mean and also take into account 'the wife services' which are the care giving services and house work which are predominantly done by women of the house.

In *Kirti v Oriental Insurance Company Ltd* (2021)[56], Chief Justice NV Ramana opined "taking into account the gendered nature of work… the fixing of notional income of a homemaker assumes special significance. It becomes a recognition of the work, labour and sacrifices of homemaker and reflection of changing attitudes. It is also in furtherance of our Nation's International Law obligations and our constitutional vision of social equality and ensuring dignity to all."

To determine a woman's share in marital assets, greater emphasis is generally placed on financial contributions that she has made to the

[56] (2021) 2 SCC 166.

asset building and completely disregard other non-monetary contributions, such as raising children, caring for elderly relatives and discharging household duties. In fact, 'wife services' enable the husband to earn an income and increase his assets, disregarding the unpaid contributions made by the wife in and outside of the household. "Non-recognition of unpaid care work, which is primarily done by women, is a structural barrier to women's human rights in the family and contributes to women's poverty.'[57]

Therefore, there must be at the time of divorce, equal distribution of all the properties acquired by the parties after the marriage. This equitable distribution of assets will reduce the financial and emotional distress of the parties and children at the time of divorce and thereafter. And also, the law as well as judicial decisions provided for payment of maintenance from the date of application, however, there is no statutory timeline for award or maintenance or disposal of petition. The matters relating to marriage, maintenance, custody impacts severely on the health and wellbeing of family and therefore, the author recommends for inclusion of statutory time limit for ensuring timely disposal of cases.

Conclusion

In conclusion the following points maybe reiterated:

Firstly, the Court ruling that in situations where there were successive maintenance applications, the principle of adjustment or set-off would be made applicable has no statutory support. On the contrary, statutory support and commitment is to grant additional maintenance claims. Therefore, unless the existing statutory support is changed by suitable amendment, it is doubtful whether the Court can apply adjustment or set-off principle.

Secondly, in order to do complete justice to the wife, the Court, in exercise of its Constitutional power under Article 142 of the Indian Constitution, can mandatorily require responded to deposit in the Court certain fixed amount to be made available to the aggrieved wife to meet her urgent needs.

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[57] Action Aid, *Making Care Visible, Women's Unpaid Care Work in Nepal, Nigeria, Uganda and Kenya*, pp. 4, 6, (Johannesburg, 2013).

Thirdly, if initiation of maintenance proceedings first under section 125 CrPC is no bar to a subsequent proceeding under either HMA, SMA or HAMA, there is no justification for not applying the same principle in the reverse process. The reason that the proceeding under section 125 CrPC is summary in nature cannot be a sound reason.

Fourthly, the present provision providing for lifelong maintenance support to the aggrieved wife should be dispensed with by effecting suitable legislative changes. In its place, the principle of rehabilitative assistance or settlement support, as the case may be, may be awarded depending upon social, educational and economic status of the wife.

Fifthly, to solve the problems of successive maintenance applications, overlapping jurisdictions and the consequent conflicting judicial decisions and the lifelong support as permanent alimony to the wife, the only effective and viable alternative is to bring in a special law by withdrawing the existing maintenance provisions from different enactments and codifying them into a single and comprehensive code. This will bring in the most needed clarity and certainty to the law pertaining to maintenance obligations in the country.

And last but not the least, the possibility of equitable distribution of matrimonial assets must be made possible on the date of filing of the divorce application, so that wife and children need not live in penury till interim maintenance orders or permanent alimony orders are passed by the Courts.

MEDIATION IN CRIMINAL MATTERS - HOW FAR POSSIBLE?

Dr. Shruti Goyal[*]

Abstract

Mediation is a facilitative process in which disputing parties engage with an impartial third party to assist in negotiating a fair and acceptable settlement. Mediation has been used in civil matters, family disputes, business matters from quite some time. Section 89 of the Code of Civil Procedure, 1908 gives statutory recognition to enable courts to refer the matters to alternate dispute redressal. However, the use of mediation in criminal matters is a relatively new concept. At first blush, it would seem improbable that criminal trials can be referred to mediation and therefore, inter se settlement without involvement of the state.[1] *There are no express provisions in the Code of Criminal Procedure, 1973 to refer the parties to alternate dispute resolution through mediation. Therefore, the question which needs to be answered is whether the Criminal court has the power to refer the case to mediation for dispute resolution? Further, can the court refer all types of criminal cases to mediation for settlement or are there any limitations imposed? The author in this article has endeavoured to answer these questions together with the guidelines given by Court for mediation in criminal matters.*

Key Words: Mediation in criminal cases, Compoundable offences, Process of Mediation

Introduction

Mediation is a voluntary, party centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialised communication and

[*] The author is Associate Professor of Law at Rajiv Gandhi National University of Law, Punjab and is Qualified Solicitor (Non-practising) for the Law Society of England and Wales.

[1] Rajiv Dutta, Future of mediation in criminal jurisprudence in India, International Bar Association. Available at https://www.ibanet.org/Article/Detail.aspx?ArticleUid=DD042CC3-5F68-4AA8-A39A-C81B7AF3589E

negotiation techniques.[2] Mediation in being used in civil matters but use of mediation in criminal matters is a relatively new concept. The author in this paper shall be discussing the cases in which mediation can be resorted to in criminal matters, the limitations of the criminal court to allow mediation as a mode of settlement of criminal disputes and the advantages of using mediation as a tool to settle criminal cases.

Mediation

Mediation is a facilitative process in which the disputing parties engage with an impartial third party to assist in negotiating a fair and acceptable settlement.[3] It is a way to resolve conflicts amicably by means of a trained third party, as the mediator. It is an alternative to the traditional state-run courts.

Mediation as a method of dispute resolution is not new and has evolved through long standing traditions which was being used by villages and tribes in India for a long time. The roots of mediation have been traced back to texts such as "*Kautilya's Arthashastra*" as well as the Panchayati Raj system. The references to Lord Krishna's mediation between *Kauravas* and *Pandavas* during the Mahabharata are legendary.[4]

Mediation has emerged as a science now.[5] In India, many States have trained mediators including legal professionals. In addition to it, mediation centres are also run by the Judiciary.

Types of mediation

Mediation is of two types: one is court referred mediation and the other is private mediation. In court referred mediation, mediation may start on a Court referral whereby the Court refers the parties in a pending case, with their consent, to mediation. Mediation may also be initiated by the parties privately where the parties reach the mediation centre or the mediator even without the referral order of the Court. This is also

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2 Mediation Training Manual for Awareness Programme, Mediation and Conciliation Project Committee, Supreme Court of India, p.6. Available at https://main.sci.gov.in/pdf/mediation/Mediation%20Training%20Manual%20for%20Awareness%20Programme.pdf.

3 Henry J Brown Et al, ADR Principles and Practice127 (Sweet and Maxwell 1997).

4 *Dayawati v. Yogesh Kumar Gosain*, (2017) 243 DLT 117

5 238 Report, Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions 9 (Law Commission of India 2011).

referred to as 'pre litigation mediation' where the parties try to solve their dispute before filing a case to explore the possibility of dispute resolution without court intervention.[6]

Mediation can manifest directly, in which all parties are present, or indirectly, a situation supposing that the third-party mediator will discuss separately with each party and will transmit the intentions and requirements to each other to help them to establish an agreement.[7]

Civil matters vis-a-vis criminal matters

Mediation has been used in civil matters, family disputes, business matters, commercial disputes from quite some time. It has evolved as one of the effective tools of alternative dispute resolution (ADR) mechanism. Section 89 of the Code of Civil Procedure, 1908 gives statutory recognition to alternative dispute resolution mechanisms.[8] Under this section, the Civil court is empowered to refer the matters to alternate dispute resolution.

In fact, in *Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd.*,[9] the question before the Court was whether the Court can under section 89 refer the parties to ADR "without the consent of the parties". The Supreme Court held that "where it appears to the Court that there exists elements of a settlement" the Civil court shall

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6 Mediation Training Manual for Awareness Programme, Mediation and Conciliation Project Committee, Supreme Court of India, p. 18. Available at https://main.sci.gov.in/pdf/mediation/Mediation%20Training%20Manual%20for%20Awareness%20Programme.pdf.

7 Luminita Dragne, Brief Considerations Regarding Mediation in Criminal matters, Challenges of the Knowledge Society, 3 (1988), https://core.ac.uk/download/pdf/26936733.pdf

8 Code of Civil Procedure, 1908, § 89, Acts of Parliament, 1908 (India). It reads as - Settlement of disputes outside the Court - (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for- (a) arbitration; (b) conciliation (c) judicial settlement including settlement through Lok Adalat; or (d) mediation. (2) Where a dispute had been referred- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act. (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat; (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

9 Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24

invariably refer cases to the ADR process. The court however carved out categories of cases which are normally considered to be not suitable for the ADR process having regard to their nature. Amongst others, the two categories pointed out were (i) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc. (ii) Cases involving prosecution for criminal offences.

Though mediation is used in civil matters and has gained general acceptance, however, the use of mediation in criminal matters is a relatively new concept. At first blush, it would seem improbable that criminal trials can be referred to mediation and be settled without involvement of the state.[10] There are no express provisions in the Code of Criminal Procedure, 1973 to refer the parties to alternate dispute resolution mechanisms.

Therefore, the question which needs to be answered is whether the Criminal court has the power to refer the case to mediation for dispute resolution? Further, can the court refer all types of criminal cases to mediation for settlement or are there any limitations imposed?

Advantages of mediation in criminal matters

At the onset, let us examine the advantages of using mediation in criminal matters. In criminal law, mediation is part of the broader concept of restorative justice. The main purpose of restorative justice is to balance the concerns of the victim and the community with the need to reintegrate the offender into society.[11] The various advantages of using mediation in criminal matters are:

- Reducing the backlog of cases- Indian Courts are reeling under the pressure of backlog of cases. As on 31-12-2019 a total of 2.31 crores of criminal cases were pending in different courts of the country.[12] Mediation can be used for unclogging the Courts where settlement is arrived between the parties with the help of a trained mediator.

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[10] Rajiv Dutta, Future of mediation in Criminal Jurisprudence in India, International Bar Association (Apr. 24, 2021, 8:00 AM), https://www.ibanet.org/Article/Detail.aspx?ArticleUid=DD042CC3-5F68-4AA8-A39A-C81B7AF3589E

[11] United Nations Economic and Social Council, Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, 2002, http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf

[12] Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881, 2021 SCC Online SC 325

- Victim's participation-- Victims of crime are the forgotten people in the criminal justice system. The victim's role has been moved to the periphery where the centre stage is occupied by the accused and the prosecution. It was in 2008 that the term "victim" was first defined in the Code of Criminal Procedure.[13] The settlement of dispute through mediation gives victims a more participative role. Otherwise, in an adversarial criminal justice system the victim is just viewed as a witness to crime.
- Compensation to the victim- A victim who suffers crime wants justice. A question that arises is whether the victim only wants the accused to be put behind bars or does the victim want compensation in certain cases because of the wrong committed against him. In today's world, victims are increasingly looking for something substantial that will punish the accused and compensate the victim. The retributive justice has started losing its relevance as newer theories which focus on rehabilitation are picking pace. Mediation can help in compensating the victim for the loss.
- Satisfaction to the victim - In mediation, the victims can express completely and blame directly the offender which is not possible in Court of law. In cases where mediation is used in sexual assault cases, this manifestation can restore the balance of forces between the accused and the victim and can help in restoring the emotional balance of the victim if the mediation is successful.[14] The victim gets an opportunity to present their uncensored side of story beyond issues strictly of interest for the criminal trial.[15] Such a ventilation of feelings allows for a healing of wounds which is not possible in adjudication.[16]

Mediation process has participatory and consensual character. The mediator encourages the parties to negotiate and reach at an amicable settlement. Thus, apart from the hoped impact on caseload and delay, mediation presumably has a number of favourable effects on the parties to the dispute and on the legal system as a whole.

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13 Code of Criminal Procedure, 1973, § 2(wa), Acts of Parliament, 1973 (India). It reads as "Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.

14 Alina, *Perception of Civil Society on Mediation in Criminal Matters*, 92 Procedia- Social and Behavorial Sciences 364, 366 (2013).

15 Id. at 367.

16 Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me. L. Rev. 237 (1981).

Use of Mediation in Criminal Matters

As discussed earlier, there are no provisions in the Code of Criminal Procedure for reference of matters to alternative dispute resolution mechanisms. The provisions of Section 89 of the Code of Civil Procedure which provides for alternative dispute resolution does not apply to criminal matters. Therefore, in order to understand the applicability of using mediation in criminal matters, the offences can be divided into two categories:

- Compoundable offences
- Non-compoundable offences

Compoundable offences

Compounding in the context of criminal law means forbearance from the prosecution as a result of an amicable settlement between the parties.[17] The expression 'compounding' means arranging, coming to terms; condoning for money; arranging with the creditor to his satisfaction. This concept is primarily based upon mutuality between the parties.[18]The victim is prepared to condone the offensive conduct of the accused because he has received some pecuniary/non-pecuniary benefit or the attitude between the victim and the accused has changed towards each other. Thus, there is a compromise between the parties and the dispute is resolved.

The provisions regarding compounding are contained in Section 320 of the Code of Criminal Procedure, 1973. This section catalogues offences of the Indian Penal Code, 1860 which can be compounded. These offences are mentioned in the form of tables. Table 1 enlists those offences which can be compounded without the permission of the Court whereas Table 2 enlists those offences which can be compounded only with the permission of the Court. The offence can only be compounded by the persons specified in Column 3 of the Tables and such person is the person directly aggrieved in the sense that she/he is the victim of the crime.[19] Where the offence is compoundable, the abetment or attempt of such offence is also compoundable.[20] In case the person competent to

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17 237 Report, Compounding of (IPC) Offences 638 (Law Commission of India 2011).

18 *Abasaheb Yadav Honmane and Ashwini Abasaheb Honmane v State of Maharashtra,* 2008 (2) Mh Lj 856

19 Code of Criminal Procedure, 1973, § 320 (1) &(2), Acts of Parliament, 1973 (India).

20 Code of Criminal Procedure, 1973, § 320 (3), Acts of Parliament, 1973 (India).

compound is under the age of eighteen years or is an idiot or lunatic, any person competent to contract on his behalf may with the permission of the Court compound the offence.[21] Where the person who would otherwise be competent to compound is dead, his legal representatives may with the consent of the court compound the offence.[22] As a result of composition of the offence under Section 320, the accused stands acquitted of the offence of which he/she is charged.[23]

The policy of the Legislature adopted in this section is that in case of certain minor offences where the interests of the public are not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains.[24] Thus, in compoundable offences the matter is resolved between the parties by entering into a settlement or compromise. Therefore, even though there are no statutory provisions in criminal law to refer the accused and complainant to Alternative Dispute Resolution, Section 320 permits settlement of dispute between parties without stipulating the process by which it may be reached. Thus, offences which are compoundable can be settled between the parties themselves or through mediation.

Non compoundable offences

As far as compoundable offences are concerned, Section 320 of the Code of Criminal Procedure allows the parties to compound it. It is pertinent to note that section 320 lists around 66 offences only. The Code specifically provides that no offence shall be compounded except as provided in the Section.[25] The Supreme Court in the case of *Surendra Nath Mohanty v State of Orissa*,[26] made it clear that Section 320 of the Code contains a complete scheme for compounding of offences and therefore no offence other than those specified in section 320 can be compounded.

Therefore, the question which arises is whether non-compoundable cases can be settled through mediation? Before answering this question, it is necessary to understand the mediation procedure.

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21 Code of Criminal Procedure, 1973, § 320 (4), Acts of Parliament, 1973 (India).
22 Code of Criminal Procedure, 1973, § 320 (4)(b), Acts of Parliament, 1973 (India).
23 Code of Criminal Procedure, 1973, § 320 (8), Acts of Parliament, 1973 (India).
24 *Biswabahan Das v. Gopen Chandra Hazarika and Others*, AIR 1967 SC 895
25 Code of Criminal Procedure, 1973, § 320 (9), Acts of Parliament, 1973 (India).
26 *Surendra Nath Mohanty v. State of Orissa*, AIR 1999 SC 2181

Procedure of Mediation

The process of mediation commences when the Court orders the referring parties to explore the possibility of arriving at a settlement through mediation process. The Court references for mediation are made on joint request of the parties or with the consent of the parties. The Courts are referring cases to mediation cells both in civil and criminal matters. In civil cases where the settlement is arrived at between the parties, terms of such settlement are finalized and signed by the parties. In criminal matters, if the settlement is reached through mediation, a clause is incorporated by which the parties agree to approach the High Court for taking the settlement on record and for quashing the criminal proceedings wherever required. Thus, in criminal matters once the parties arrive at a settlement through mediation, the matter is brought before the High Court with the prayer under Section 482 of the Code of Criminal Procedure for quashing of pending criminal proceedings. It is important to note that though the settlement has arrived between the parties, the matter with regard to quashing of criminal proceedings rests entirely with the power of the High Court under section 482 of the Code of Criminal Procedure, 1973. In non-compoundable offences, the success of entire mediation proceedings in criminal matters depends whether the High Court quashes the criminal proceeding or not.

Quashing of Criminal Proceedings under section 482 of CrPC

Under section 482 of the Code of Criminal Procedure, 1973 the High Court has inherent powers to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The High Court in exercise of such powers may quash/ refuse to quash any criminal proceedings.

The Supreme Court of India in various judgments has elaborately discussed and laid down principles/guidelines which may be kept in mind by the High Court while exercising its power under section 482 for quashing the criminal proceedings in cases involving non compoundable offences where amicable settlement has been reached between the contesting parties.

In *Gian Singh v State of Punjab*.[27] the Supreme Court held that the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In *Gian Singh v State of Punjab,*[28] *Nikhil Merchant v CBI*[29]*,* B.*S. Joshi v State of Haryana*[30] *and Manoj Sharma v State*, [31] the Court enumerated certain offences which can be compounded. It held that offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed.

In Parbatbhai Aahir v State of Gujarat,[32] the Supreme Court summarised the broad principles where non-compoundable offences can be compounded and subsequently criminal proceedings be quashed. These principles are:

- Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which are inherent in the High Court;
- The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the

[27] *Gian Singh v. State of Punjab*, (2012) 10 SCC 303
[28] Id
[29] *Nikhil Merchant v. CBI*, (2008) 9 SCC 677
[30] *B.S. Joshi v. State of Haryana*, (2003) 4 SCC 675
[31] *Manoj Sharma v. State,* (2008) 16 SCC 1
[32] *Parbatbhai Aahir v. State of Gujarat*, AIR 2017 SC 4843

purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash Under Section 482 is attracted even if the offence is non-compoundable.

- In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;
- While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;
- The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;
- In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;
- As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;
- Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;
- In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

- There is yet an exception to the principle set out in propositions (8) and (9) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

To sum up, the non-compoundable offences where the Court can quash proceedings under section 482 thereby allowing an occasion for the parties to reach at a settlement are:

- Offences which are not serious in nature;
- offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions; [However, if the offence has implications which lie beyond the domain of private disputants then it is not to be compounded]
- offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute;
- Offences where there is compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice. {However, if the offence is heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity or is a financial offence having implications beyond private disputants, then it is not to be compounded]

Compounding vis-a-vis mediation

There are some differences in compounding of offence and mediation. Compounding of offence is given statutory recognition under Section 320 of the Code of Criminal Procedure. Mediation as a procedure for alternate dispute resolution is not statutorily recognised by express provisions of the Code. In compounding, the compromise may be reached between the parties themselves whereas in mediation, mediator facilitates the negotiations between the parties. Compounding is allowed only for offences mentioned in the tables attached to Section

320 of the Code whereas mediation in India is allowed even for non-compoundable offences where criminal proceedings can be quashed under Section 482 of the Code.

Instances of mediation in criminal matters

The abovementioned discussion clarifies that mediation can be restored to in compoundable cases and in certain situations in non compoundable cases also. The author in this part shall discuss the cases where mediation has been used by the Courts for settlement of cases.

Cruelty by husband and his relatives

Section 498A of the Indian Penal Code, 1860 provides punishment for the offence of cruelty by husband and his relatives. It provides that whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine. This section was introduced in 1983 in the Penal Code to combat the evil of dowry and cruelty in the Indian societal set up so that the woman can live with dignity in her matrimonial home.[33] The Courts are flooded with complaints regarding matrimonial discord and allied provisions. According to the data records of the National Crime Record Bureau, cruelty by husband and his relatives constituted31.8% of the total crime committed against women.[34] It is pertinent to note that the offence under section 498A is not compoundable under the Code of Criminal Procedure.[35]

Many times a complaint under section 498A is filed in the heat of the situation. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted out. At times the parties later on reconcile or decide to part ways amicably. The Supreme Court has advocated the use of mediation as a tool to settle matrimonial disputes.

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33 *Krishan Lal vs. Union of India* 1994 Cri LJ 3472

34 Crime in India 2021, p xii, (National Crime Records Bureau, 2021).

35 Section 498A is compoundable in the State of Andhra Pradesh.

In *Jitendra Raghuvanshi v Babita Raghuvanshi*,[36] the Supreme Court held that it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly when the same are on considerable increase.

In *K. Srinivas Rao v D.A. Deepa*,[37]the Supreme Court held that though offence punishable under Section 498-A IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. The Court recognised "mediation" as an effective method of alternative dispute resolution in matrimonial matters. The Court clarified that the objective is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A IPC, but to locate cases where the matrimonial dispute can be nipped in the bud in an equitable manner.

Though, the Courts have been allowing compromise in cases of matrimonial disputes but this move is criticised on the grounds that firstly, persons who harass their wives should not be allowed to escape the clutches of law and secondly, woman especially the uneducated woman may be coerced to arrive at some compromise.

During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. If, however, they choose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will also reduce the burden on the courts which will be in the larger public interest. In order to meet the criticism levelled against compromise in matrimonial cases, the mediator must ensure that the mediation exercise does not lead to the erring spouse using the mediation process to get out of clutches of the law. In addition to it, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Thus, there are safeguards to ensure that the process is not abused.

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36 *Jitendra Raghuvanshi v. Babita Raghuvanshi*, (2013) 4 SCC 58

37 *K Srinivas Rao v. D.A. Deepa,* (2013) 5 SCC 226

Cheque Bounce Cases

Cheques are used as a bill of exchange under the Negotiable Instruments Act, 1881 and are accepted in lieu of money. If the cheque is returned by the bank unpaid for the reason of insufficiency of funds in the account of the drawer, then it is said to have been dishonoured. Section 138 of the Negotiable Instruments Act prescribes criminal penalty if the cheque is dishonoured. The punishment that can be imposed is imprisonment for a term which may extend to two years or fine which may extend to twice the amount of the cheque or both. It is important to note that offence under section 138 is compoundable.[38]

Though cases under section 138 are compoundable, but the reality is that compounding is adopted as a last resort by the unscrupulous drawer of the cheque who keeps case lingering for years. This puts unnecessary strain on the judicial system and increases the number of cases pending under the Negotiable Instruments Act. As on 31-12-2019 a total of 2.31 crores of criminal cases were pending in different courts of the country. Out of this 2.31 crores of cases, 35.16 lakh pertained to section 138 which constitutes around 20% of all the criminal cases.[39] In *Damodar S. Prabhu v Sayed Babalal,*[40] the Supreme Court has also issued guidelines for imposing costs on parties who unduly delay compounding of the offence of dishonor of cheques.

Keeping in mind the gargantuan pendency of cases under section 138, the Courts have advocated the use of mediation as a tool for settlement of cases. In *Dayawati v Yogesh Kumar Gosain*,[41] the High Court of Delhi discussed at length the legality of referring cases under section 138 to mediation and whether there is necessity for framing Mediation Rules for criminal cases. The Court in this case held that there is no bar on referring a case under section 138 to mediation. On the question of framing separate Mediation Rules for criminal matters, the Court held that as far as Delhi is concerned the Mediation Rules that apply to civil proceedings[42] would apply to criminal proceedings also.

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38 Negotiable Instruments Act, 1881, § 147, Acts of Parliament, 1881 (India).

39 *Re: Expeditious Trial of Cases* under Section 138 of N.I. Act 1881, 2021 SCC Online SC 325.

40 *Damodar S. Prabhu v. Sayed Babalal*, AIR 2010 SC 1907.

41 *Dayawati v. Yogesh Kumar Gosain,* (2017) 243 DLT 117.

42 The High Court of Delhi has framed Mediation and Conciliation Rules, 2004 in exercise of powers under Code of Civil Procedure, 1908.

Recently, the Supreme Court through a five judge bench in the case of *Re: Expeditious Trial of Cases under Section 138 of N.I. Act 1881*,[43] recommended in order to expeditiously dispose off cases of cheque bouncing, all the cases pending under section 138 in Appellate Court shall be settled by mediation.

In addition to the above-mentioned cases, mediation can be used in cases which are not of serious nature or the cases which have predominantly civil flavour.

Judicial Guidelines for Mediation in Criminal matters

In *Yashpal Chaudharani v State (NCT of Delhi)*,[44]there were five criminal cases before the Court. The four of them were related to credit card fraud and the fifth was a case of obscene calls and IT offences. The mediation authorities registered a settlement between the parties. The High Court of Delhi denounced the manner in which the case was dealt with by the lower court and the mediation authorities. The Court laid guidelines for the criminal courts and mediation authorities to be followed in such cases. The Guidelines are:

- Scrutiny by Court before making reference to mediation - The court while considering reference of the parties to a criminal case to the mediation must before even ascertaining as to whether elements of settlement exist first examine, by preliminary scrutiny, the permissibility in law for the criminal action to be brought to an end either because the offence involved is compoundable or because the High Court would have no inhibition to quash it, bearing in mind the broad principles that govern the exercise of jurisdiction under Section 482 CrPC.
- Scrutiny by mediator before commencing mediation - The mediator (before commencing mediation) must undertake preliminary scrutiny of the facts of the criminal case and satisfy himself as to the possibility of assisting the parties to such a settlement as would be acceptable to the court, bearing in mind the law governing the compounding of the offences or exercise of power of the High Court under Section 482 CrPC. For this, an institutional mechanism has to be created in the mediation centers

43 *Re: Expeditious Trial of Cases under Section 138* of N.I. Act 1881, 2021 SCC Online SC 325.
44 *Yashpal Chaudharani v. State* (NCT of Delhi), 2019 SCC Online Del 8179

so that there is consistency and uniformity in approach. The scrutiny in above nature would also need to be undertaken, as the mediation process continues, should any such criminal case, as mentioned above, be brought on the table by the parties (for being included in the settlement), as it takes it beyond the case initially referred.

- Vetting - The system of vetting, at the conclusion of the mediation process, needs to be institutionalised so that before a settlement *vis-a-vis* a criminal case is formally executed by the parties, satisfaction is reached that the criminal charge involved is one which is either compoundable or one respecting which there would be no inhibition felt by the High Court in exercise of its inherent power under Section 482 CrPC, bearing in mind the relevant jurisprudence.

Scope of Mediation in India

In India, as highlighted by the case of *Yashpal Chaudharani,*[45] mediation is encouraged only in cases which are compoundable or cases where the High Court can quash the criminal proceedings under Section 482. The question is should the scope of mediation for settling disputes in criminal cases shall be limited to this only or should it be allowed to expand its horizons?

It is pertinent to note that listing of offences as compoundable is something unique to the Indian Criminal law.[46] Section 320 enlists around 66 offences only which are compoundable. There is a constant demand to make certain other offences compoundable. For example, in the case of *Ramgopal v State of M.P.*,[47] the Supreme Court observed offence of causing grievous hurt with dangerous weapons punishable under section 326 of the Indian Penal Code can be made compoundable as such a step would not only relieve the Court of the burden of deciding cases in which the aggrieved parties have themselves arrived at a settlement, but may also encourage the process of reconciliation between them. In *Gopal Das v. State of M.P.*,[48] in view of the fact that section 326 is non compoundable, but having regards to long lapse of time and

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45 *Yashpal Chaudharani v. State* (NCT of Delhi), 2019 SCC Online Del 8179.
46 237 Report, Compounding of (IPC) Offences, (Law Commission of India 2011).
47 *Ramgopal v. State of M.P.* (2010) 7 SCALE 711.
48 *Gopal Das v. State of M.P.,* (2011) 12 SCALE 625.

settlement between the parties, the Court reduced the sentence to the period already undergone in imprisonment. Thus, offences which are not serious and does not effect the society at large may be allowed to be settled through mediation.

It may be pointed out that in certain countries like USA, mediation has been used even for settling the offences involving serious charges like sexual assault, etc.[49] There is a point of controversy. If we allow heinous offences to be settled through mediation then though the cases will arrive at conclusion at a faster pace but at the same time, there are chances that the parties may be coerced to enter into an agreement for settlement.

The Supreme Court of has categorically held in serious cases such as rape, dacoity etc., the case. cannot be settled through compromise. In *State of Madhya Pradesh v Madan Lal*,[50] the Supreme Court held that in a case of rape or attempt to rape, there cannot be a compromise or settlement between the parties. The reason for this is that these offences are considered very heinous offences where the perpetrator cannot be let off on account of settlement arrived at with the victim.

It is argued that cases where parties have entered into compromise on their own, the chances of conviction become very rare. In fact, in such cases where the parties are ready to compromise, mediation should be offered. It must be understood that mediation is intended to complacent and not replace the judicial process. Mediators are trained professionals and possess specific qualifications.[51] The mediators can play a pivotal role in ensuring that any of the party is not coerced to enter into an unbalanced compromise. Mediator is a trained mind who is unbiased and can facilitate the process of negotiation. Time has come when more criminal cases are referred to mediation so that the Courts which are reeling under the pressure of backlog of cases can heave a sigh of relief.

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49 *Jack Hanna, Mediation in Criminal Matters*, 15 Disp. Resol. MAG. 4 (2008).
50 *State of Madhya Pradesh v. Madan Lal*, (2015) 7 SCC 681
51 Mediation Training Manual for Awareness Programmes 38 (Supreme Court of India).

Conclusion

To sum up, litigating in courts in India is a time-consuming and expensive exercise, and justice usually eludes both parties to an action.[52] Mediation is a technique whereby a private and confidential environment is ensured where the parties are not overwhelmed by the burden of formality of a court of law, and the result always satisfies both parties, as opposed to the trial in court where there is a winning party and a losing one whose claims have been dismissed. Mediation is widely used in civil matters. The use of mediation in criminal proceedings can help the courts in removing congestion and also enhance the participation of the victim in criminal justice process. It shall facilitate access to justice by providing an effective alternative dispute resolution mechanism.

[52] 246 Report, Amendments to the Arbitration and Conciliation Act 8 (Law Commission of India 2014).

INDIA MOVING TOWARDS GREY REGIME OF ILLIBERAL DEMOCRACY: A MYTH OR REALITY

Dr. Garima Pal[*]

Abstract

The term illiberal democracy is a contradiction. Modern democracies are by definition liberal and you cannot have true democracy until you follow the principles of liberalism. Illiberal democracy is basically just a synonym for 'autocracy' which aims at almost unlimited executive, populist attacks, the stoking of ethic claims and attacks on democratic norms and institutions. In the present era, there has been a clear retreat from globalism in embrace of nationalism in few parts of the world. The current period in India represents, in some ways, a reversal from decades of generally sound and healthy democratic institutions.

Currently, India is located somewhere in a dictabland a kind of regime, where illiberalism is on a rise due to constant attempts of converting India into a Hindu majoritarian state. The paper focuses on two areas where this illiberalism and erosion of democracy, has occurred in India: the first is the suppression of civil liberties, suppression of all forms of dissent, exemplified by assaults on free speech, the media, and social media; the second is the prejudice and hostility directed towards religious minorities which is consistent with this notion of Hindu nationalism. In some ways, the constitution and fundamental principles of India have been reversed but it can be argued that Indian democracy is much more resilient and provides constitutional mechanisms and protection against populist attacks and the rising illiberalism.

Key words: Illiberalism, Populism, Authoritarian**,** Politics of Fear

[*] Dr. Garima Pal, Assistant Professor, Maharashtra National Law University, Mumbai

Introduction

> *"Suppose the elections are free and fair and those elected are racists, fascists, separatists. Since no one can know everything, and most people know almost nothing, rationality consists of outsourcing knowledge to institutions that specialize in creating and sharing it, primarily academia, public and private research units, and the press. That trust is a precious resource which should not be squandered."*
>
> *-Steven Pinker*

Illiberal Democracy on a Rise

The term 'illiberal democracy' is a form of government in which, despite the elections being held, citizens are unable to learn or know about the actions of those in actual power due to lack of civil freedoms; as a result, it does not represent an open society. Constitutional restraints on their authority may be disregarded or circumvented by the leaders of illiberal democracy.[1] They frequently disregard the opinions of the minority, which is what gives democracy its illiberal nature. In such kind of democracy, elections are frequently rigged or manipulated, serving to support and reinforce the incumbent rather than to select the nation's leaders and policies.[2]

Fareed Zakaria used the phrase "illiberal democracy" in a frequently referenced 1997 article in the magazine Foreign Affairs.[3] According to Zakaria, there are more and more illiberal democracies rising in the world, and these democracies are gradually restricting the liberties of the people they claim to serve. According to Zakaria, electoral democracy and civil rights (such as freedom of speech and religion) coexist in the West.[4] However, the two ideas are diverging globally. According to him, a democracy devoid of constitutional liberalism breeds centralized governments, the diminution of liberty, racial rivalry, conflict, and war.

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1 Yascha Mounk, *The People Vs. Democracy - Why Our Freedom Is In Danger And How To Save It,* HARVARD UNIVERSITY PRESS (2018).

2 Heino Nyyssönen & Jussi Metsälä, *Liberal Democracy and its Current Illiberal Critique: The Emperor's New Clothes?*, TAYLOR & FRANCIS ONLINE (Sept 24,2020), https://doi.org/10.1080/09668136.2020.1815654

3 Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFFAIRS (1997), https://www.foreignaffairs.com/world/rise-illiberal-democracy

4 *Id.*

Authoritarian nations as well as the consolidated liberal democracies can both give rise to illiberal democracies. Although Zakaria originally used the terms "illiberal democracy" and "pseudo-autocracies" interchangeably in his essay, they are now also used to refer to nations that may be experiencing a *democratic backslide.*

As long as regular elections are held, illiberal democratic administrations may believe they have the authority to behave in whatever way they want. Opposition is very challenging when freedoms like freedom of speech and freedom of assembly are unavailable. The ruling class may consolidate influence between local and central government branches (exhibiting no separation of powers). The government frequently has influence over the media, which is very pro-regime.[5] Non-governmental organizations may be subjected to stringent rules or maybe outrightly banned. The regime may retaliate against its detractors with violence, incarceration, red tape, or economic pressure. According to Zakaria, constitutional liberalism can bring democracy, but not the other way around.

Illiberal democracies can range from being openly dictatorships to nearly being liberal democracies. There may be governments that have regular, free, fair, and competitive elections to fill the major positions of power in the country but do not qualify as 'Free' in Freedom House's yearly evaluations. Such governments may be considered illiberal democracies.[6] An *article by Rocha Menocal, Fritz, and Rakner(2008)* analyzed some of the traits that illiberal democracies have in common as well as how they emerged.[7] Menocal, Fritz, and Rakner attempted to compare hybrid regimes with illiberal democracies.[8] The authors argued that hybrid regimes with illiberal ideals emerged as a result of the 'democratic optimism' existing in the 1990s, which followed the fall of the Soviet Union. The failure of democracy to consolidate has sparked the emergence of hybrid regimes with 'illiberal ideals.'

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5 Ashutosh Varshney, *Narendra Modi's illiberal drift threatens Indian democracy*, FINANCIAL TIMES (2017). https://www.ft.com/content/0015a59e-80e2-11e7-94e2-c5b903247afd

6 Diamond, Larry &Morlino Leonardo, *Assessing The Quality Of Democracy* 61 JOHNS HOPKINS UNIVERSITY PRESS (2005).

7 Alina Rocha Menocal, Verena Fritz & Lise Rakner (2008) *Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries*, SOUTH AFRICAN JOURNAL OF INTERNATIONAL AFFAIRS, (Feb 13th ,2010) 10.1080/10220460802217934

8 *Id.*

Populism and Illiberal Democracy-

Populism is a major strand in the emergence of illiberal democracies in modernized world. The trend of today's populist leaders, particularly in Western states to advance illiberal principles is seen in their exclusion of immigrants and overtly xenophobic statements. Despite its poor connotations, populism is democratic in nature since it provides the people with a voice and adheres closely to the principle of majority rule. The authors claim that liberal values and democracy are internally incompatible, which causes difficulty within the liberal democracies. Liberal values offer the protection of minorities while democracy promises majoritarian authority.

Furthermore, it is claimed that populism is a by product of democracy; nonetheless, populist leaders typically attempt to undermine liberalism itself. The authors attempt to prove that populism's emergence is weakening liberal norms since populism fundamentally rejects plurality and minority protection. Under the leadership of former President Donald Trump, the Republican Party in the United States has come under fire in recent years for allegedly becoming more and more illiberal.[9] According to a study by the V-Dem Institute, Donald Trump's leadership has significantly increased the Republican Party's illiberalism and populism over the past ten years.[10] Some have viewed Trump's populist leadership style as a potential threat to liberal democracy, as well as his disregard for long time traditional democratic partners and praise for other "strongman rulers" like Putin.

Narendra Modi, the prime minister of India, is one of many powerful "populist" leaders who have emerged globally amid the neoliberal crisis and whose support stems in part from their promises to impose authoritarian policies in order to restore growth to their countries' economies. The Indian case demonstrates how populism may negatively impact civil society and fundamental rights like the right to freedom of religion. When populism is taken to its furthest extreme, it poses a danger to liberal democracy.

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9 Brian Beutler, *Sorry, Conservatives, Trump's Illiberalism Is on You*., THE NEW REPUBLIC (Dec 7th,2016). https://newrepublic.com/article/139200/sorry-conservatives-trumps-illiberalism-you

10 The Economist, *The Republican Party has lurched towards populism and illiberalism*, THE ECONOMIST (2020). https://www.economist.com/graphic-detail/2020/10/31/the-republican-party-has-lurched-towards-populism-and-illiberalism

The Future of Freedom: Majoritarian Illiberal Democracy in India

India's liberal and secular democracy is now firmly under the control of Hindutva-populism as a result of the political parties (India's extreme right-wing party) huge victories in the 2014 and 2019 parliamentary elections. Liberal democracy in India is in danger due to the certain anti-secular bodies, majoritarian agenda. If the party follows through with its plan, India will likely continue to be an electoral democracy, but its claim to be a liberal democracy, a nation with open discourse, strong institutions for checks and balances, and reliable safeguards for rights and freedoms would vanish into obscurity.

The US-based think tank Freedom House[11] has recently published its annual assessment, which ranks nations according to how well they uphold democratic ideals like access to government institutions, freedom of expression, religion, and opinion. In this year's report India, which had previously been regarded as a free country, had been dropped to 111th place out of 162 nations and was tagged as only *'partly free.'* The Varieties of Democracy (V-Dem) Institute[12], Sweden went one step further and termed India as an "electoral autocracy." India is presently in this gray zone of hybrid regimes. Journalists are exposed to myriad types of physical assault, including police violence, ambushes by political activists, and lethal retaliation by criminal gangs or corrupt local authorities, the report stated, calling India "*one of the world's most dangerous countries for the media*."[13]

Looking at historical perspective it can be asserted that India actually gambled on liberal democracy in 1947, at the end of British colonial authority. India was poor, illiterate and it had high levels of racial diversity and minimal degrees of industrialization. International rankings may be disregarded, however historical trends should be noted. The British colonial government banned newspapers and detained people who opposed unfair legislation before independennce. Civilian protests were put down by police, who frequently used force. Currently, India's

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11 *Countries and Territories*, FREEDOM HOUSE (2022), https://freedomhouse.org/countries/freedom-world/scores

12 *V-Dem Institute*, DEMOCRACY REPORT (2022). https://vdem.net/media/publications/dr_2022.pdf.

13 Anisha Dutta, *Centre rejects findings of World Press Freedom Index that ranked India at 150 among 180 countries*, THE INDIAN EXPRESS (July 21st,2022), https://indianexpress.com/article/india/india-news-india/centre-rejects-world-press-freedom-index-ranked-india-150-among-180-countries-8044191/

rank is 142 out of 180 countries on the World Press Freedom Index,[14] down two positions.[15] So, in some ways, India's establishment of democratic institutions at the time of its creation and the adoption of a more inclusive and secular constitution fly in the face of the majority of prevalent political science theories that would have expected a less democratic outcome for India. But despite these challenges, it can be said that India has always maintained democratic institutions, with the exception of a few brief years during the 1970s. Therefore, the current period in India represents, in some ways, a reversal from decades of generally sound democratic institutions.

In India, two areas where this illiberalism and erosion of democracy, has occurred are: the first is the suppression of civil liberties, a suppression of all forms of dissent, exemplified by assaults on free speech, the media, and social media; and the second is the prejudice and hostility directed towards religious minorities especially Muslims which is consistent with this notion of Hindu nationalism. There is an undermining of the Constitution which marks a reversal of India's founding ideals and constitution.

It is a paradox that on the one hand elections are being conducted, about how free and fair they are we might argue on that, but on the other hand, we are choosing these politicians that we can call "right leaning, populist, or exclusionary nationalists."

The failing democratic system in India is an issue that is now being discussed internationally. Recently over 100 of the best minds from around the world came together at the Financial Times festival of ideas in 2020 to address important global challenges. During the event, India was referred to as the largest 'illiberal democracy' in the world, and it was said that Narendra Modi was *'Orbanizing India'* by equating him to Viktor Orban, the illiberal right-wing prime minister of Hungary.

In some ways, as we tried to understand the rise of these illiberal, right-leaning, populist, and exclusionary nationalist regimes, we should look at

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14 World Press Freedom Index, Reporters without Borders (2022), https://rsf.org/en/index?year

15 G Sampath, *India's position on the World Press Freedom Index*, THEHINDU (May 5th ,2022), https://www.thehindu.com/news/national/indias-position-on-the-world-press-freedom-index/article65382354.ece#:~:text=THE%20GIST-,India%27s%20ranking%20in%20the%202022%20World%20Press%20Freedom%20Index%20has,%2Dcultural%20context%2C%20and%20safety.

the Bharatiya Janata Party (BJP), which for the first time in many years has complete control over both houses of parliament. Leading to give it a kind of muscle that has allowed it to do and enact certain things through elected institutions in a way that a much more robust political opposition had prevented doing in the past. An example of this can be the abrogation of Article 370 of the Constitution[16] through an ordinance. To a certain extent, the rise of authoritarian regimes also represents a total collapse of the alternative parties. This is not to suggest that there is no opposition to them; rather, the source of that opposition in the Indian context is much richer from civil society and not so much in a manner from alternative political parties. So, a lack of strong opposition also promotes illiberal activities.

The chief minister of Uttar Pradesh and member of the BJP, Yogi Adityanath, declared secularism to be "the biggest threat to India's tradition of garnering recognition on the global stage"[17] a few days after the Freedom House report was published. Jawaharlal Nehru, India's first prime minister, created a pluralist and secular Indian nation. In his mind, India would be a country with citizenship laws that would institutionalise diversity in unity and institutions that would uphold democracy. But sadly, under Modi's administration, Nehru's plan suffered a severe setback when the contentious Citizenship Amendment Act (CAA), which made religion the foundation of citizenship in clear violation of the Constitution, was passed in December 2019.

In a diverse nation like India, institutional autonomy is also in danger. The media has developed into a key instrument in the hands of political administration, and parties zealots utilize it to further promote their Hindu nationalist agenda. 18 Canadian academics were recently interviewed by CBC News, and they opined that Hindu nationalist supporters had threatened or harassed them.[18] The Australia-India Institute at Melbourne University also recently saw a group of academics

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16 INDIA CONST. art. 370.

17 Express News Service, *CM: Secularism biggest threat to India's tradition on global stage*, THE INDIAN EXPRESS (March 7th, 2021), https://indianexpress.com/article/cities/lucknow/cm-secularism-biggest-threat-to-indias-tradition-on-global-stage-7217637/

18 Katie Swyers & Judy Trinh, *Hate speech and death threats: Canadian academics harassed after criticizing Hindu nationalism in India*, CBC (2022), https://www.cbc.ca/news/canada/academics-harassed-criticism-india-politics-1.6402486

leave, claiming concerns for academic freedom and accusations of influence from the Indian High Commission.[19]

The fanaticism of the government is spreading to regional regions as well. The University Grants Commission (UGC) and the All India Council for Technical Education (AICTE) cautioned Indian students and Indian citizens living abroad against pursuing higher education in Pakistan on April 23, 2022.[20]

'Opposition' not 'Sedition'-

In India, it becomes a national treachery to oppose the regime, its ideology, and its agenda. Criticizing the government, its acts, and its policies essentially makes you a traitor to the country. This leads to a disturbing association between disapproval of a political party's objective and sedition where mere disapproval can be tagged as sedition. There has been a crackdown on free speech, social media, and the press. Due to the number of journalist killings in broad daylight, India has been called one of the world's most dangerous places to work as a journalist.

Sedition-related accusations are frequently levelled against academics and civil society organizations. Naturally, this illustrates how vehemently the regime opposes any dissent pertaining to the same. Another illustration of how brazen the government is in stifling dissenting voices is provided by Disha Ravi, a young environmental activist who joined farmers in a manual protest against government policies. In a sedition case, activist Disha Ravi was granted bail by the Delhi court on February 23. The Delhi High Court ruled that citizens could not be imprisoned "*just because they choose to disagree with the governmental policy."*[21]

The core qualities of India as a free democracy are quickly deteriorating. Instances of democratic reversal are not new to the nation. However, the present government is dismantling the basic foundation of India as a free democratic country in its pursuit of Hindu

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19 Gargee Chakravarty, *In Australia, debate continues about claims Indian High Commission interfered in academic institute*, SCROLL.IN (April 17th, 2022), https://scroll.in/article/1021985/in-australia-debate-continues-about-claims-indian-high-commission-interfered-in-academic-institute

20 ANI, *UGC, AICTE caution students against pursuing higher education in Pakistan*, THEPRINT (April 23rd, 2022), https://theprint.in/india/ugc-aicte-caution-students-against-pursuing-higher-education-in-pakistan/927564/

21 State v. Disha A. Ravi, SCC OnLine Dis Crt (Del) 3.

majoritarianism. India is making worrying advancements on its path to an authoritarian democracy. The nation has utterly failed to give the religious minority the assurance that they live in a sovereign nation.

Conclusion

Democracy is a fashionable component of modernity. Therefore, issues that lie within a democracy will probably be the main issues with governance in the twenty-first century. Being covered in the cloak of legitimacy makes them more challenging to manage. The leaders in an illiberal democracy are also elected and popular. The fact that illiberal democracies are moderately democratic gives them strength and legitimacy. The greatest threat that an illiberal democracy poses, is that it can harm its own citizens, this will undermine liberal democracy as a whole and cloud democratic government.

This would not be an unusual occurrence. Every wave of democracy has experienced setbacks when the system was deemed insufficient and ambitious leaders and restless masses sought new alternatives. The most beneficial thing the international community can do right now, in the face of the spreading of illiberalism around the world, is to support the progressive growth of constitutional liberalism around the world, rather than looking for new locations to democratize and have elections. Without constitutional liberalism, democracy is not only insufficient but also hazardous, leading to the dilution of freedoms, the abuse of power, racial tensions, and even war.

THE NEED FOR REGULATORY FRAMEWORK FOR FAMILIAL DNA SEARCHING – A PRIVACY PERSPECTIVE

Abhishek Sharma Padmanabhan[*]
Prof. (Dr.) Sapna S[♣]

Abstract

Familial DNA searching, a recent development of DNA technology has proven to be an effective technique in law enforcement. A forensic DNA profile not only discloses genomic information about the person whose "genetic fingerprint is on file, but also about his or her near relatives. The compelled collection of DNA from criminals poses serious privacy and civil liberties problems due to the long-term retention of genetic makeup and all of the personal information it contains. Additional privacy concerns that arise from familial searches include the possibility of lifelong surveillance, the possible surreptitious acquisition of DNA just because one is connected to someone in the national database, and the family itself, in which it may be shown that some members are not genetically related or are linked in ways that people are not aware of Familial Searching calls for higher weighting of privacy than is typically the case and the technique can only be ethically justified if steps are made to ensure that the technology is both significant and that challenges to privacy and fair trial are mitigated. We therefore provide an approach for describing and balancing the relative importance of the diverse interests involved, and we suggest a comprehensive regulatory framework to enhance the value and effectiveness of Familial Searching while still securing privacy concerns.

Key words: Forensic Justice, DNA Fingerprinting, Privacy, Constitution, Familial Searching

[*] Assistant Professor of Law, School of Law, CHRIST (Deemed to be University); sharmapabhishek@gmail.com

[♣] Professor of Law and HOD, School of Law, CHRIST (Deemed to be University); sapna.s@christuniversity.in

Introduction

DNA Evidence has been used by law enforcement as a potent tool for over twenty years, and its use in familial searches is a relatively new development. Governments quickly began mandating the collecting of DNA samples from different categories of offenders after DNA evidence was ruled admissible in court. One step in the direction of DNA technology is the broader use of familial searching[1]-. Close relatives will share genetic information because of the high degree of genetic similarity between them. Since this is the case, a forensic DNA profile "reveals considerable genetic information not only about the person whose 'genetic fingerprint' is on file, but also about his or her near relatives[2]. This technique is used in familial searching to infer a relationship between a suspect and his/her relative whose DNA is similar to but not an exact match with a sample recovered from a crime scene[3]. Searching for long-lost relatives online may be exciting, but it also raises important ethical questions about the scope of DNA databases and genetic testing[4].With the long-term preservation of genetic material and the quantity of personal information it carries, the mandatory collection of DNA from accused poses a variety of difficulties connected to privacy and civil rights[5]. Concerns about violating the presumption of innocence under the law are heightened by efforts to gather DNA from detainees. These are not the only concerns that come up when someone looks at their familial searching; they can also find out that they are not related to some of their relatives genetically or that they are connected to others in ways they never would have guessed[6]. Due to the relationship to someone in the national database, even innocent family members run the possibility of being tracked for the rest of their lives and, in certain circumstances, having their DNA covertly gathered.[7] The ever-expanding uses of DNA databases will always outweigh the security

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1 Tania Simoncelli, *Dangerous Excur-sions: The Case Against Expanding Forensic DNA Databases to Innocent Persons*, 34 J.L.MED. & ETHICS 390, 392 (2006)

2 Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding theScopeofLawEnforcementDNADataBanks*,67 BROOK.L.REV.127,127(2001)

3 Sonia M. Suter, *Whose Genes Are These Anyway? Familial Conflicts over Access to Genetic Information*, 91 MICH. L. REV. 1854, 1855–56 (1993).

4 Alice A. Noble, *DNA Fingerprinting & Civil Liberties*, 34 J.L. MED. & ETHICS 149,150(2006)

5 Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34J.L.MED.&ETHICS165,165 (2006).

6 Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*34 WAKE FOREST L. REV. 767, 768 (1999)

7 Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 250 (2006)

consequentialist approach. It' is conceivable that the more immediate and strong benefit of solving just one more crime, finding just one more guilty rapist, and respecting the rights of just one more victim will outweigh our general concerns about the privacy interests of convicted persons and their families[8]. There may be unanticipated benefits to wider use of DNA Fingerprinting, but we must stay committed to these limits and not let ourselves get distracted by them. The benefits of familial searching may be increased and privacy can be better protected with the implementation of certain regulatory frameworks.

Evolution of DNA Finger Printing and expansion of DNA Databases

DNA Fingerprinting Technique is used to identify a person based on their unique genetic makeup, and they were first identified by an Englishman named Alec Jeffreys. He was able to solve the rape and murder of two English children in 1985 with the use of DNA fingerprinting by apprehending a man whose DNA matched that found at the crime site. Each individual will have their in cells 23 sets of chromosomes, and each set contains DNA, or genetic information. Every person's chromosomes are made up of two sets, one from each parent[9]. Unique genetic profiles may be derived through the analysis of highly polymorphic areas, which are often, found in non-coding sequences and do not include information about individual genes[10]. Relationships between people may be determined via genetic testing by comparing the DNA sequences of two samples. DNA fingerprinting was used to buttress cases by showing that crime scene evidence matched suspects' DNA profiles. When there were initially no obvious suspects, DNA fingerprinting was quickly utilized "to simplify suspicion less identification" of the potential givers of the DNA samples. Law enforcement need a sizable database of profiles, ideally from criminals whose crimes involved DNA evidence, so that they could compare them to DNA profiles from crime scene samples in order to get such cold hits[11]. In response to this increase, DNA databases were created,

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8 Robin Williams & Paul Johnson, *Inclusiveness, Effectiveness and Intrusiveness: Is-sues in the Developing Uses of DNA Profiling in Support of Criminal Investigations*, 34 J.L.MED. & ETHICS 234, 234 (2006).

9 JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICSOF STR MARKERS 253 (2d ed. 2005)

10 DNA Initiative, Advancing Criminal Justice Through DNATechnology,http://www.dna.gov/dna-databases/codis[hereinafterCODIS](lastvisitedJan 2 5 ,2023)

11 Aaron P. Stevens, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 922 (2001)

considerably enhancing the capacity of law enforcement to identify and capture people guilty for sexual and violent crimes.

For the purposes of DNA databases, "qualifying offences" are defined differently by legislation in each country. It includes DNA profiles from those who have been convicted of crimes, charged in an indictment or information, had missing human remains recovered near them, and had "samples voluntarily supplied by family of missing victims." Almost from the inception of DNA databases, the Governments have been in the forefront of initiatives to increase DNA Finger printing's widespread use. Sexual offenders were the first to be subject to regulations demanding the collection of DNA samples from criminals because they are "especially likely to leave DNA evidence at the crime site" and engage in the same illegal conduct repeatedly. After then, everything moved forward at a much faster clip. The DNA database now stores mandatory genetic profiles for all convicts, not only "certain sex offenders and certain violent criminals." Due to "mission creep,"[12] the progressive expansion of database pools, many countries' databases now contain nonviolent criminals, misdemeanour offenders, juvenile offenders, and even arrestees[13].

Familial DNA Searching – Potential source for Privacy Violations

Familial DNA searching (Familial Searching)is a method of investigating a crime by looking for potential perpetrators among a person's own blood relations using internet DNA databases. Due to the hereditary nature of DNA, we share the vast majority of our ancestry with our direct blood relatives; this is exploited via a technique called "familial searching," which makes effective use of today's high-powered computers. Police may try to obtain a suspect's DNA indirectly by analysing DNA from his family members if he refuses to voluntarily provide a DNA sample, if there are no full or partial matches between the DNA found at the crime scene and the suspect's DNA in the DNA database, and if there is not enough evidence to obtain a court order[14]. Even though it's not certain to work, law enforcement agencies often use familial searching when other methods of investigation have proven

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12 Editorial, *Mission Creep in DNA Data Banks*, CHRISTIAN SCI. MONITOR, Apr. 23, 2008, at 8

13 Erica Haimes, *Social and Ethical Issues in the Use of Familial Searching in Forensic Investigations*, 34 J.L. MED. & ETHICS 263, 264 (2006)

14 Kimberly Wah, *A New Investigative Lead: Familial Searching as an Effective Crime-FightingTool*, 29 WHITTIER L.REV.909,918 (2008).

futile. In order to learn who, the suspect's family members are, police often have to interrogate him or her. Since they are "crucial to both the reception and supply of information, from and to the police," suspects and suspects under arrest take on the role of "pivot" in the chain of events after their arrest. The pivot person may worry about being shunned or demoted within the family on top of whatever shame or responsibility he may feel for unwittingly exposing family members to law enforcement monitoring.

Familial Searching poses a greater privacy risk since it may unearth details about the "informant" that go beyond his DNA fingerprint. It's possible that the relatives of the offenders are unaware of his or her conviction, and even more probable that they have no idea that the arrested person even exists. Although a conviction is considered public information, it may be kept uninformed from certain relatives; nonetheless, any attempts to get in touch with relatives after finding a partial match might reveal this information. These worries are especially important for those who have been arrested. Even if the person arrested is found to be innocent, disclosing their arrest to loved ones who had no reason to know about it can cast a permanent shadow over them. The government may use data that is saved indefinitely for purposes other than criminal investigations. It is also worrisome since rules for the mining of such data are so often lacking, which exposes people to this danger. Suspects who have not yet been convicted raise even greater concerns regarding the collecting of samples from them since they have not yet given up any informational privacy or liberty rights[15]. Finally, the publication of information about the pivot person's conviction and/or arrest creates privacy problems since it may reveal secrets or change the identity of the partial match.

Using this approach raises a variety of privacy concerns. Some of these concerns relate to the broader topic of DNA databanks, the storing of genetic samples from individuals, and the accompanying debate over the constitutionality and privacy consequences of such procedures. Finally, there are privacy and civil rights concerns with searching one's own

[15] Kevin Lothridge & Robin Wilson Jones, *Principles of Forensic DNA for Officers of the Court: An Interactive, Computer-Based Training Tool for Attorneys and Judges*, 54DRAKE L. REV. 671, 672 (2006).

family members[16].There are three areas where familial searching raises privacy issues:

1. The individual who provided the DNA sample for the database (the genetic informant or pivot person), whose DNA matches evidence from the crime scene, prompting further investigation of the family members of the suspect(s).
2. Family members whom police may interview and attempt to collect evidence from, and
3. The full family unit.

These issues all point to the need for caution before rushing into searches for familial searching. These considerations raise the possibility that, if familial searching are to be conducted at all, precautions should be taken to reduce the risk to individuals' right to privacy. DNA Fingerprinting and familial searching pose a number of privacy and civil liberties issues, although they are not inherently more serious or dangerous than other types of police surveillance or searches[17]. Collateral damage may also occur when law enforcement agencies conduct investigations and discover sensitive personal information about a suspect or the suspect's relatives in the course of their inquiry. The protection of one's personal information is also designated as a Fundamental Right (Right to Privacy)[18]. When deciding whether and when a familial searching is warranted, the first thing to think about is the potential dangers associated with it.

Violation of Privacy Interests of Genetic Informants

Anyone who's DNA partly matches the sample taken from the crime site and leads police to relative's ' homes might have their privacy violated in a number of ways. Some individuals' right to privacy might be jeopardized by efforts to create obligatory DNA data banks, the effects of which would be exacerbated by familial searches. The privacy concerns of criminals whose DNA is unwillingly taken and processed have been a topic of discussion in courts and commentaries since DNA data banks were first developed. Despite claims that DNA data banking restrictions breach the Privacy Protections, and consequential

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16 Robert W. Schumacher II, Note, *Expanding New York's DNA Database: The Future of Law Enforcement*, 26 FORDHAMURB. L.J. 1635, 1645 (1999)

17 Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153, 153 (2006).

18 Richard Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974)

constitutional limitation on unreasonable searches and seizures, the courts have supported all of these policies[19]. Considering solely the immediate damage or intrusion, courts often decide that the acquisition of DNA samples is itself a modest privacy intrusion that is offset by the state's interest in pursuing potential leads. The collecting of the DNA Sample is the most intrusive part of this technique. Many courts assume that minor privacy rights are at issue due to the relative simplicity and non-intrusiveness of the treatment. The sample analysis is just identifying, like fingerprints or an image, as the courts and other observers have pointed out. They determine that the DNA profiles do not expose sensitive information such as behavioural traits or a propensity for developing a particular disease. Given this, they conclude that DNA Fingerprinting is unlikely to compromise people's privacy, especially if they have low privacy concerns to begin with. The complete scope of privacy concerns is not taken into account by the majority of the courts in their analysis because of a narrow focus on the particular and immediate intrusions of obtaining and characterising the DNA sample. The collecting of a biological sample and the preservation of a sample containing genetic information both constitute privacy breaches, yet the courts seldom address or downplay these concerns. DNA samples include a plethora of personal information, including susceptibility to specific illnesses, behaviours, physical and mental features, parentage, and genetic relatedness to others, which is not available from standard fingerprints[20]. Not only does our DNA serve as a unique identifier, but "it is essential and basic to our make-up," making it very sensitive. The influence it plays in shaping our "temperament, health, talents, and physical appearance" is significant, though not universal.

Since much (though not all) of our DNA is "integral to the self," we do have a strong private interest in protecting it. Maintaining privacy is crucial for maintaining the "essence of the personality" and for fostering personal growth. Furthermore, the absence of a national standard regulating sample retention adds to concerns that private information contained within the samples might be mined "for malevolent, retributive, or repressive reasons" for lengthy periods of

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[19] D. H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 430 (2003)

[20] Jacqueline K. S. Lew, *The Next Step in DNA Databank Expansion? The Constitutionality of DNA Sampling of Former Arrestees*, 57 HASTINGS L.J. 199, 210 (2005)

time, if not forever[21]. To ensure the reliability of past DNA testing, however, law enforcement organizations insist on storing samples. They further argue that, when newer and more accurate technologies for DNA identification become available, older samples will need to be reanalysed. For this reason, numerous courts have concluded that it is legal to obtain DNA samples in the first place, and that it is also legal to preserve these samples permanently. Regardless of the validity of the aforementioned reasons, this method needs caution owing to the grave threat it presents to individual privacy and civil rights[22].

It is unknown how far law enforcement is allowed to use the obtained samples. When rules specify just a small set of permissible uses, none of which include medical or other inquisitive objectives, it seems logical to presume that any additional in-depth DNA analysis is prohibited. Many statutes restrict the use of such samples to "undefined law enforcement purposes," while others do not. Law enforcement officials believe that analysing the preserved samples will help them construct a DNA forensic profile based on the individual's known susceptibilities to disease, physical characteristics, and behavioural patterns. When investigating a crime, law enforcement often uses the findings of a physical search, which reveal the presence of illegal goods, as evidence[23]. However, a DNA search's findings may be used to prosecute crimes unrelated to the one that led to the sample's collection. Further, although there is always a chance that law enforcement may (in) advertently unearth private information irrelevant to the crime under investigation or the scope of the search warrant, this risk frequently evaporates after the search has been completed. Keeping DNA samples after a search has been completed, on the other hand, opens the door to the potential that authorities would use them in ways outside the scope of the original inquiry. Also, even if these restrictions were made more explicit via law, it is not obvious how well we could tell whether the government and other participants really adhered to them[24]. As a result, threats to individuals' right to privacy will remain even as the scope of government expands into every aspect of citizens' life.

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21 Jessica D. Gabel, *Probably Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3, 15(Winter 2010)

22 David H. Kayeetal., *Is a DNA Identification Data base in Your Future?*, CRIM.JUST., Fall 2001, at 4.

23 Duncan Car-ling, Note, *Less Privacy Please, We're British: Investigating Crime with DNA in the U. K. and the U.S.*, 31 HASTINGS INT'L & COMP. L. REV. 487, 495 (2008)

24 Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 33 J.L. MED. & ETHICS 279, 282–84 (2005)

Violation of Privacy Interests of Arrestees.

The capacity to identify criminals and the potential to dissuade crime are two of the main arguments in favour of DNA databanks for convicted offenders, both of which are also cited to justify collecting DNA from arrestees. They also cite the administrative benefit of keeping "an unmistakable record of exactly who has been apprehended." Some have even argued that arrestees have less of a right to privacy when their arrest is based on probable cause, since "identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other crimes in the past, present, and future[25]." These arguments have influenced lawmakers in several countries to pass legislation requiring the taking of DNA samples from those who have been arrested. Many people have pointed out that these laws do, in fact, go "beyond constitutional bounds." While, others believe that these techniques amplify the privacy intrusions imposed by DNA Fingerprinting, regardless of constitutional concerns, since suspects should be deemed innocent and hence should not have diminished private rights. The process of collecting DNA from those who have been arrested places them in a purgatory of sorts, where their genetic profile can be used against them and their family members[26].DNA Fingerprinting requires the gathering of biological samples rather than conventional fingerprints, which raises concerns about "probing into an individual's private life," especially considering the wealth of medical information that can be gleaned from such samples. Concerns regarding DNA Fingerprinting are exacerbated by the fact that most governments keep DNA samples for long periods of time and provide little safeguards against the very invasive mining of this data for personal information vital to privacy and personhood rights. Some are concerned that the government will be able to obtain sensitive information beyond the scope of a preliminary investigation. DNA profiles and samples are not automatically expunged under most jurisdictions' rules. If the accusations against an individual are dropped, only a minority of Laws that require DNA collection from arrestees demand the erasure of the DNA profile. Non-convicted arrestees have the right under many laws to have their DNA profiles erased from the

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25 Daniel J. Grimm, Note, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 COLUM. L. REV. 1164, 1170 (2007).

26 David R. Paoletti et al., *Assessing the Implications for Close Relatives in the Event of Similar but Non-matching DNA Profiles*, 46 JURIMETRICS J. 161, 162 (2006).

database, although the process may be lengthy and complicated[27]. Under some laws, the exonerated arrestee or offender is the one who must request expungement, and only one law mandates that the exonerated arrestee or offender be informed of their entitlement to expungement. In accordance with the statutes, therefore, even though exonerated arrestees are aware of their right to have this information deleted, they still face the onerous prospect of doing so, and in certain jurisdictions, they have no option but to have this information removed at all, posing serious privacy concerns[28].

Violation of Privacy Interests of Relatives

The innocent relatives subjected to law enforcement surveillance through familial searches may elicit more sympathy from the public and the courts than the convicted offenders whose privacy and liberties are invaded by DNA databases and familial searches[29]. However, many people have pointed out that the "in- formant's" relatives become suspects without any documented infraction, just because of genetic relatedness. To put it another way, family searches may help law enforcement discover "guilt by kinship."[30] Simply said, "familial searching successfully raises police scrutiny and interest in persons based on their relative's prior involvement in the criminal justice system." It may be unsettling enough that a DNA match might lead authorities to the homes of a suspect's relatives, who would then be questioned about their ancestry and whereabouts at the time of the alleged crime. It's possible that the police may ask friends, neighbours, and coworkers embarrassing questions that will damage the relative's image. Nothing, however, compels police enforcement to notify the relative's friends, neighbours, and coworkers that the relative is innocent after the suspicion is lifted from their name. Living under suspicion "has the ability to damage a career, shatter a marriage, or ruin a life," regardless of how long it lasts or whether or not it is eventually dispelled. The police will likely request an intrusive blood sample or cheek swab

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27 Ellen Nakashima, *DNA Tool to Solve Crimes Can Entangle Suspects' Kin*, WASH. POST, Apr. 21,2008

28 R.E. Gaensslen, *Should Biological Evidence or DNA Be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively-Stipulated Conditions*, 34 J.L. MED. & ETHICS 375, 376 (2006).

29 Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 371 (2003).

30 Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Under- standing of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 773–74 (2004).

for DNA analysis[31]. Ultimately, the full benefit of family searches cannot be realized without analysing the genetic samples of people connected to the partial match. Taken together, these actions might make a relative feel like a suspect or person of interest, which can be unsettling and intrusive. This kind of investigation is annoying at best. The worst case scenario is that the relative's right to privacy is invaded since they are subjected to "lifetime [of] genetic surveillance."

In addition, questions from presumed relatives might put relatives on the spot and make them feel pressurized. If police have reason to think a suspect's family has a genetic connection to the offender, they may try to coerce the suspect's relatives into providing DNA samples, but they likely would not be able to do so without a court order. It's possible that no one in the family is aware of their right to refuse, or of the potential repercussions of submitting a sample to the police. Finally, some individuals may believe that refusing to cooperate with authorities is evidence of guilt and will result in heightened scrutiny. In this situation, requests for samples to prove one's innocence have the potential to be coercive in the same way that dragnet searches may. A person may be arrested if they refuse to cooperate with law enforcement. Although questioning family members and requesting DNA samples is probably not a violation of constitutional rights, it does raise serious policy issues and ethical considerations that law enforcement and society failed to account for in the early days of DNA Fingerprinting[32]. The possibility that law enforcement would get a relative's DNA from abandoned material rather than by directly interviewing family members or making requests for DNA is one of the most serious violations of privacy and civil rights[33]. It is uncertain if such "surreptitious sampling" violates the Right to Privacy restriction against unreasonable searches and seizures. There is a greater threat to privacy when DNA samples are kept indefinitely, whether they were collected via legitimate covert searches (if the Right to Privacy authorizes it) or were willingly provided.. Exonerated individuals have the legal right to have their sample files and other relevant records destroyed in some states, as previously mentioned. To destroy samples, the sample owner usually

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31 Sheri A. Alpert, *Protecting Medical Privacy: Challenges in the Age of Genetic Information*, 59 J. SOC.ISSUES 301, 302 (2003).

32 ROBIN WILLIAMS & PAUL JOHNSON, GENETIC POLICING: THE USE OF DNA IN CRIMINAL INVESTIGATION 72 (2008).

33 Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 876–77.

needs to take some initiative, which is unfortunate. It's possible that many people either don't know they have this privilege or don't have the resources to use it. Nobody who has had their DNA discreetly collected is likely to know that they were sampled or that a record of their DNA even exists[34]. A person's cooperation with law enforcement does not absolve them of responsibility for the destruction of samples if they are innocent of any crime or are ignorant that their DNA was ever acquired and processed. People's right to privacy and freedom persists long after they have been exonerated, making this a serious problem. The relatives who are investigated due to incomplete matches are also at danger of having their identities stolen in the same manner that the pivot person is. Depending on the nature of the connection, a relative's privacy may be jeopardized in the same manner as a partial match's. One or more members of the social family, including the pivot person, may discover that they are not related to each other biologically. All the identification and privacy problems mentioned in connection with the partial match are even more serious since the relatives have not been convicted and do not have any diminished expectations of privacy[35]. Despite our concerns about the effects of lying and secrecy on individuals and families, searching for answers within one's own family might lead to potentially embarrassing disclosures in the most invasive kind of criminal monitoring. In light of these factors, it's reasonable to worry that the relatives of the partial match will have their privacy and civil liberties violated throughout the search.

Violation of Privacy Interests of Family Unit

When it comes to privacy, we make sure to keep things separate on a personal level for each member of the family while also respecting the needs of the family as a whole. In this view, protecting the privacy of a family means protecting the privacy of the family as a whole, not just the privacy of the individuals whose information is used to make choices about the family's well-being[36]. The stress and turmoil that may be caused by an inquiry into a family member is a threat to family unity, especially in families who are already vulnerable owing to a criminal

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34 Jules Epstein, *"Genetic Surveillance" –The Bogeyman Response to Familial DNA Investigations*, 2009 U. ILL. J.L. TECH. & POL'Y141, 165.

35 David H. Kaye, *The Science of DNA Identification: From the Laboratory to the Courtroom (and Beyond)*, 8 MINN. J.L. SCI. & TECH. 409, 425 (2007).

36 Richard Warner, *Surveillance and the Self: Privacy, Identity, and Technology*, 54 DEPAUL L. REV. 847, 856–58 (2005).

conviction within the family. It's possible that some households have struggled financially in the past because of things like legal fees, theft, or the loss of a breadwinner. There's a chance their family may be shunned[37]. The conviction may generate distress within the family, including feelings of loss, betrayal, and abandonment for other family members. In certain cases, the convicted offender may have even victimized family members. Having additional relatives of a convicted criminal investigated might exacerbate emotions of betrayal and distrust within the family. In addition, it might permanently cast doubt on the rest of the family's trustworthiness[38]. These interventions are a direct result of the offender's family member's conviction and may contribute to or worsen existing family problems. If Familial searching yield several partial matches, it's possible that many families may be subjected to unnecessary scrutiny and injury. The suspect is almost certainly a member of one of the families. The other families, even if they are completely innocent, will have to endure the intrusive investigations and all that follows after. Any police investigation, not just ones involving home invasions, may strain family relationships[39]. The unintended consequences of police surveillance on families may be diverse and unsettling.

Balancing the conflicting interests of Familial DNA Searching and Privacy Protection

Research shows that persons who have been convicted of a crime, those who are under arrest, and relatives all have legitimate privacy and civil rights concerns when it comes to Familial Searching. Since it aids law enforcement in solving situations that would otherwise be very difficult to solve, familial searching supports a number of vital public interests. For the sake of public safety, it is important that criminals who have committed more serious offenses be taken off the streets.. Due to the prevalence of DNA databases, some criminals may think twice before performing violent acts just in case their DNA is linked to a suspect. Some persons may be less likely to commit crimes if they are aware that a conviction or arrest may lead to police monitoring of their family members via familial searching. Finally, to the degree that

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37 Dan Markeletal., *Criminal Justice and the Challenges of Family Ties*, 2007 U.ILL.L.REV.1147,1153.

38 Lina Alexandra Hogan, Note, *Fourth Amendment — Guilt by Relation: If Your Brother is Convicted of a Crime, You Too May Do Time*, 30 W. NEW ENG. L. REV. 543 (2008).

39 Frederick R. Bieber et al., *Finding Criminals Through DNA of Their Relatives,* 312SCIENCE 1315, 1316 (2006).

Familial Searching helps us identify actual criminals, it can help set wrongfully condemned people free. As could be expected, the police have a strong opinion in favour of using DNA profiles and, more specifically, Familial Searching to find criminals. Supporters of Familial Searching often appeal to a constrained kind of consequentialism that finds justification in any action that contributes to the common good of peace and security, while giving less weight to more nebulous principles like privacy. The advantages of this method are obvious and undeniable, and as a result, it will continue to lobby in support of expanding DNA forensics' usage[40]. Getting violent offenders off the streets, bringing closure and solace to victims and their loved ones, and restoring faith in the legitimacy of the judicial system are all tangible and tangible benefits to society as a whole. These advantages may be "quantified in financial terms" as well. When it comes to DNA fingerprinting, on the other hand, the dangers are more theoretical. Concerns about privacy invasions, dangers to civil rights, and the fair trial are less appealing because of their lack of concreteness.

It is simply difficult to put a number on the costs of privacy violations or the advantages of maintaining privacy, particularly when weighed against the advantages of apprehending and prosecuting a killer. Even if we might have a hazy idea of the value of privacy, this interpretation of consequentialism predicts that the balance will nearly always go heavily in favor of extending the use of DNA fingerprinting technologies and familial searches. An alternate method of analyzing familial searches, focuses primarily on principles of fairness, civil liberties, and privacy. Such a strategy promotes substantial limitations on the usage of DNA databases. The collection of samples from detained individuals whose privacy interests have not been diminished, as well as family searches, which jeopardize the privacy rights of numerous individuals and the family as a whole, would certainly be argued against. The security consequentialist viewpoint devalues individual rights to autonomy, freedom, and fair treatment. In an evaluation that prioritizes observable, quantifiable outcomes, these abstract qualities are meaningless. Instead, a focus on privacy devalues other, equally important social goods like public safety, victim rights, and justice for the wrongfully accused.

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[40] Troy Duster, *Selective Arrests, an Ever-Expanding DNA Forensic Database, and the Specter of an Early-Twenty-First-Century Equivalent of Phrenology*, *in* DNA AND THECRIMINAL JUSTICE SYSTEM 315, 328 (David Lazer ed.,2004).

Balanced Regulatory Model for Regulation of Familial DNA Searching and Protection of Privacy

There is a need to circumvent the deadlock caused where DNA technology supporters disregard privacy advocates' concerns and privacy advocates oppose any extensions of DNA Fingerprinting. Instead of simply weighing opposing values and naming a victor, there is a need to recognize the continued importance of the prevailing values and the responsibility they continue to place on our actions and arguments. We need to undertake an analysis that reveals "the greatest balance" of good over evil. This sort of research often yields reasonable findings when deciding whether or not to do DNA family searches. Since the prima facie obligations to increase public safety, respect victims' rights, and clear their names are not absolute, it is difficult to draw the conclusion that this approach mandates the conduct of family searches without restriction. They conflict with the obvious responsibilities to safeguard personal freedoms and fair trial. Like privacy, civil rights, and fair trial, familial searching is not an absolute duty, thus it would be wrong to argue that it is immoral on those grounds alone. Our proposed solution consists of determining which prima facie responsibilities should take priority over competing prima facie obligations and then taking whatever action is required to rectify the moral residues of the outweighed prima facie responsibilities. Assuming there are instances in which the public's safety is more important than an individual's right to privacy, the hazards to individuals' privacy are minimal. Policymakers may be better equipped to "establish the optimal standard" for the use of this technology if they are not constrained by the need to resolve every possible instance and disagreement. According to this theory, higher weight must be assigned to the "transcendent value" of privacy while conducting a Privacy analysis of DNA technologies, taking into account not only the harm done to the defendant in the case at hand, but also the danger posed to him and others in the future[41]. The proportional weight of the competing prima facie responsibilities should be taken into account when deciding whether or not DNA Fingerprinting and family searches are permitted, and if so, under what circumstances. Our strong prima facie commitments to defend privacy, civil rights, and secure fair trial need restrictions on DNA technology in general and familial searching in particular to guarantee the technology has a reasonable

[41] Dorothy C. Wertz, *Society and the Not-So-New Genetics: What Are We Afraid Of? Some Future Predictions from a Social Scientist*, 13 J. CONTEMP. HEALTH L. & POL'Y 299,314(1997).

possibility of success. Without these protections, we risk just reaping the periphery advantages of technological progress while putting at risk certain fundamental principles. Many factors, including the precision of DNA technology as a whole, the nature of the crimes we hope to solve with it, the likelihood that a partial match indicates that the sample came from the offender's relative, and the availability of sufficient resources, personnel, and oversight in crime labs, all contribute to the positive social impact of familial searching[42].

During a familial searching, several persons may be investigated, putting them at risk of continuous, long-term hazards to their privacy and civil rights, even if they are later found to have no relation to the crime. A minimal threshold can be established before detecting the partial match and initiating familial investigations by evaluating the quality of the DNA evidence showing that the pivot and perpetrator of the crime are related. False positives may be reduced by the use of current and future technologies that increase the speed of familial searching[43]. These advancements may make familial searching for criminals and relatives ones less invasive and reduce the amplification of privacy violations that often follow them. The accuracy with which various matching algorithms may make such family detections is an area that requires further study. Technology exists now that can tell us whether or not a DNA match between a suspect and a crime scene is coincidental or represents a biological link between the two. For this reason, it is not appropriate for investigators to inquire about relatives unless there is a strong basis for suspecting a familial relationship. For this strategy to be shown generally beneficial and for strategies to be discovered to optimize its potential, much empirical effort is needed. There has to be more extensive testing of DNA testing and familial searching to demonstrate their value. For the sake of allowing less invasive familial searching, simpler technology solutions may ultimately be better[44]. To reveal the identity of a partial match, police would have to show that they had pursued all other possible avenues of investigation first, and the law may mandate further testing to rule out any possibility of a false lead resulting from a partial match. The last scene should include the "genetic

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42 Sonia M. Suter, *Whose Genes Are These Anyway? Familial Conflicts over Access to Genetic Information*, 91 MICH. L. REV. 1854, 1855–56 (1993).

43 Tania Simoncelli, *Dangerous Excur-sions: The Case Against Expanding Forensic DNA Databases to Innocent Persons*, 34 J.L.MED. & ETHICS 390, 392 (2006).

44 Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 VAND. L. REV.965, 975–79 (2004).

sample of a relative-suspect" and the revelation of the partial match's identification. Investigators should also be required to evaluate voluntarily collected samples within an acceptable time frame so that exclusions may be quickly formed to lessen the possibility of suspicion among the studied family members. Such procedures would reduce the intrusive features of probing family members to some level. It will also encourage worried family members to help law enforcement by providing information and/or samples. People's right to privacy is seriously threatened by the prospect of police conducting non-consensual searches of people's homes to get DNA samples from persons who are presumed to be innocent. The fact that such information may be stored indefinitely and used to any purpose increases the danger. Overreach on the side of law enforcement may jeopardize their efforts to protect "the privacy and dignity of our people" if, for example, they secretly collected DNA samples from suspects to find partial matches or conduct indirect testing of a suspect via a family member. However, even if the family (or the arrestee) is exonerated in connection with the crime that led to the collection of DNA, the sample and profile may be held forever, posing a danger to the privacy and civil rights of the families of partial matches. DNA data, profiles, and samples should be deleted for anybody who is found to be innocent of the crime for which they were collected, whether they were first arrested and subsequently cleared or found via a family search and later shown to be innocent[45].

Conclusion

The risks to people's privacy, civil rights, and fair trial posed by familial searching may not be eliminated entirely, but they may be considerably reduced if the proposed protections are implemented. Many of these steps have the potential to increase the efficiency of this technology, allowing it to better carry out its duty of detecting and prosecuting wrongdoers, preserving victims' rights, and exonerating the innocent. Finding contentment amidst conflicting commitments is a losing game. Finding common ground on how to strike this delicate balancing act in relation to familial searching, and other forms of DNA technologies that serve the public good, but also undermine long-held beliefs and traditions, will remain tough in a society as politically and

[45] Harish Agarwal, *It's All Relative: DNA Fingerprinting Identifies Family Members—For Better and for Worse*, BERKELEYSCI. REV., Fall 2006, at12, *available at* http://sciencereview.berkeley.edu/articles/issue11/briefs_3.pdf.

philosophically varied as ours. Since much is at risk, it is imperative that the state establish the legality of this technological progress. To be legitimate in this sense, not only do public authority and openness need to be present, but so must a thoughtful, deliberate evaluation of the different values at play. Familial searching has been growing fast in many countries, unchecked by the relevant governmental agencies. Trust in law enforcement is threatened by practices like DNA Fingerprinting and nationwide familial searches. The public's support for DNA Fingerprinting as a whole might decline if they perceive law enforcement is abusing technology intended for a specific purpose in ways that infringe the privacy rights of innocent persons. It is more important to include the public and have them help us build a consensus on what that middle ground should be than to attempt to locate the ideal middle ground between our competing prima facie commitments to defend privacy, justice, public safety, victims' rights, etc. In a democratic society, where people "exercise ultimate political and coercive authority over one another in making laws," disagreements on values like justice and privacy must be settled using "the goals and principles embodied by society's sense of political justice." A voice of public reason is especially important in cases when individuals' right to privacy and equality may be at danger, as is often the case in familial searching.

MATERIAL INFORMATION IN DEATH-SENTENCING HEARINGS: NEED FOR LIMITED CODIFICATION

Sridip S. Nambiar[*]

Abstract

Gaps in death penalty administration in India have been identified in numerous scholarly works. Most of them highlight flaws in sentencing hearings. It has been established through several research projects that little or no information is placed before a judge to determine the circumstances relating to the accused person. The Supreme Court of India has in multiple instances intervened by creating guidelines (for example, by holding that the burden was on the state to disprove the probability of reform of an accused person). However, such piecemeal measures do note ensure clarity or uniformity. It is thus important to deliberate on the linkages between objectives of punishment, impact on victims and criminal law. Against this background, this article reframes an oft-repeated question ('do we need a sentencing policy?') as 'do we need to codify a judge's duty to elicit material information on the accused person?' and 'do we need to define 'material information'?' It is argued that sentencing hearings should be delinked from trial-based hearings through codification, guidelines should be framed to identify 'material information' and narrative tools should be allowed when admitting such information.

Keywords: Criminal Law Reform, Death Penalty, Individualization, Mental Health, Prisoner Rights, Sentencing Policy, Mitigating Circumstances.

Introduction

Project 39A's latest report on death penalty shows how trial courts are sentencing accused persons to death without properly

[*] Asst. Professor, NMIMS School of Law, Hyderabad. The author can be contacted at sridipnambiar@gmail.com

considering the mitigating circumstances.[1] The Supreme Court of India in Manoj v. State of Madhya Pradesh[2] recognized this deficiency and held that the burden was on the state to disprove the probability of reform of an accused person. This had to be done by analyzing the background and conduct of the accused person. It went on to hold that even failure to discharge this burden should be considered a mitigating circumstance. This was further discussed in *In Re Framing Guidelines*[3], where the core issue was whether a trial court ought to sentence a person to death on the same day on which the judgment (on conviction) was made. Adjournment to another day would enhance the effectiveness of a sentencing hearing, which is a statutory right.[4] The question, though, has been referred to a larger bench. Against this background, this article reframes an oft-repeated question ('do we need a sentencing policy?') as 'do we need to codify a judge's duty to elicit material information on the accused person?' and 'do we need to define 'material information'?'

I argue that sentencing hearings should be delinked from trial-based hearings and the former should be scheduled within a reasonable time after the end of the latter. Secondly, the judge should take a proactive role in sentencing hearings by requiring all stakeholders (prosecution, convicted person and victim) to provide material information on the accused person. However, codifying and defining 'material information' may not be feasible considering the uniqueness of criminal cases. It is even more beneficial if detailed guidelines which indicate the range and scope of material information are framed. I suggest that in contrast to an adversarial approach (which is used in trial), facilitation of individualized narratives of the accused person might help a judge in reaching an appropriate decision. Decisions based on engaging, informative stories (from all perspectives) will help in not only deciding the punishment but also building documentation for potential pre-release decisions.

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1 National Law University, Delhi, *Death Penalty in India – Annual Statistics Report 2022*, https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/63d751d50c727c6df54df62d/1675055923918/Annual+Statistics+2022.pdf (1 Feb, 9 PM).

2 Criminal Appeal No. 248 of 2015.

3 In *Re Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, Suo Motu* Writ Petition Crl. No. 1 of 2022.

4 Section 235(2), Cr.PC.

Delinking of Sentencing Hearing

Trial-based hearings are adversarial in nature. Finding of guilt is based on an objective appreciation of admissible evidence. The trial process links facts, evidence, and the relevant provisions of substantive law. Sentencing hearings, especially in capital punishment cases in India, are different from the trial process and so they require a different treatment. Firstly, as mentioned earlier, the accused person must be heard on the question of sentence. The content of this hearing is not specified in the legislation. As argued elsewhere, it is important to consider the views of not only the convicted person, but also that of the victim (through victim impact statements[5]). It is also important to consider the views of the state, through prosecution.

Secondly, there are only broad guidelines for the judge. A judge ought to start with a negative question – why a person should not be sentenced to life imprisonment.[6] The Supreme Court has provided guidelines to assist a judge faced with this question. The guidelines broadly state that circumstances relating to a case must be categorized into two: aggravating (pro-death penalty) and mitigating (pro-life imprisonment).[7] The judge is then required to balance these circumstances and decide on the punishment. Supreme Court of India has accepted the arbitrary nature of sentencing in the post-*Bachan Singh* era.[8] Circumstances relating to the convicted persons were either not placed on record or were insufficient to reach a decision.

Policy and codification on sentencing are thus important because of three reasons. Firstly, the guidelines were created by the Supreme Court to counter the unconstitutionality of death penalty. Compliance with the guidelines is a condition for constitutionality. The much touted 'rarest of rare' test purported to overcome the vagaries of unguided discretion. However, it has been convincingly argued that the theoretical

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5 Adrija Ghosh, *Unravelling the Question of Victim Impact Statement at Sentencing*, https://p39ablog.com/2022/03/unravelling-the-question-of-victim-impact-statements-at-sentencing/ (1st Feb, 2023, 9 AM).

6 Section 354(3), Cr.PC provides that special reasons are to be recorded why the alternative of life imprisonment should not be chosen.

7 *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1983 1 SCR 145.

8 *Sangeet v. State of Haryana*, Criminal Appeal Nos. 490-491 OF 2011

gaps in *Bachan Singh* are also problematic.[9] Secondly, the current system has been proved to be counter-productive.[10] As mandatory death penalty has been held to be unconstitutional[11], life imprisonment is the norm. However, the Supreme Court found that administration of life imprisonment was subject to state government policies, which are not uniform or consistently applied. This meant that a person who nearly 'missed' the death penalty threshold as per the 'rarest of rare' test could be out of prison within fourteen or twenty years. In this scenario, instead of re-examining the 'rarest of rare' test itself, the Supreme Court created a 'new' punishment in the form of 'life imprisonment which will not be subject to premature release'.[12] Thirdly, the test has been applied wrongly. There were instances where circumstances relating to the convicted person was not considered at all.[13] The Supreme Court had to intervene to hold those judgments as per incuriam.[14]

Thus, sentencing hearing must include the views of the convicted person, victim and the state. The judge should be duty-bound to collate and compile information obtained through the process. Judicial accountability will ensure closer scrutiny of death penalty decisions.

Material Information and Storytelling

Criminal policy on death penalty in our country is essentially judiciary-driven. Practically, this causes inefficiency, as 'guidelines' are not by design exhaustive and are frequently applied inconsistently. Judicial 'guidelines' are part of judgments and so are mostly limited to the case at hand. It is thus easy to ignore the guidelines by distinguishing the facts. However, each criminal case is considered unique. Therefore, codification of material information will not yield better results.

It is therefore necessary to create a broad set of guidelines on what amounts to material information. The Supreme Court has identified some aggravating circumstances (cruelty involved in the crime, pre-

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9 Anup Surendranath, Neetika Vishwanath & Preeti Pratishruti Dash, *The enduring gaps and errors in capital sentencing in India*, 32 NAT'L L. SCH. INDIA REV. 46 (2020).

10 Anup Surendranath & Maulshree Pathak, *Legislative Expansion and Judicial Confusion: Uncertain Trajectories of the Death Penalty in India*, 11 INTERNATIONAL JOURNAL FOR CRIME, JUSTICE AND SOCIAL DEMOCRACY 67 (2022).

11 *Mithu v. State of Punjab*, 1983 AIR 473, 1983 SCR (2) 690.

12 *Swamy Shraddananda v. State of Karnataka*, Criminal Appeal NO.454 OF 2006.

13 *Ravji v. State of Rajasthan*, (1996) 2 SCC 175.

14 *Santosh kumar Bariyar v. State of Maharashtra*, Criminal Appeal No. 1478 of 2005.

meditated acts, age of the victim etc.). These circumstances will already be part of record during the trial. What is more important from a sentencing perspective is mitigating circumstances. Some of the circumstances that have been identified by Supreme Court are: extreme mental or emotional disturbance, age of the accused, socio-economic background, crime was committed under the duress of another person etc.[15] But what is important is the broad category in which these circumstances have been placed: the probability that the accused would not continue to be a threat to society and that of reform and rehabilitation of the convicted person. The state is required to place evidence on the same, according to Supreme Court. This is a task which requires assessment of psychological factors and conduct of the convicted person.

It is essential to provide an independent psychiatrist for analyzing the reasons for committing the offence and to 'predict' potential threat to society. It is unclear how the latter can be achieved, but one method would be to consider the testimonies of prison officials on conduct of the person post-detention. When considering the 'potential threat' factor, the victim impact statement is also relevant.

The sentencing hearing needs to be documented and all the parties should be able to provide detailed 'stories' of why they believe a certain outcome should be preferred. In 'Punished: Stories of Death Row Prisoners in India', Jahnavi Mishra attempts such a portrayal.[16] As Anup Surendranath observes in the foreword to the book, "The stories in this volume are written with the hope to make readers understand the people we want to kill." The issue here is not whether death penalty should be abolished, but to examine the process by which we administer capital punishment. But the current practice of giving very little time for sentencing hearing would not be able to accommodate this plan. This is why a uniform plan should be imagined for effectively executing sentencing hearings.

Conclusion

Individualization of punishment is highly desirable in capital punishment cases. As more and more countries move towards abolition,

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15 *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1983 1 SCR 145.

16 Jahnavi Mishra, *The Punished: Stories of Death-row Prisoners in India*, (2021).

it is important that those countries which retain it achieve rational standards for administering it. In India, based on the efforts of several academicians and the apex court itself, it has been substantially established that death penalty administration has huge gaps to be filled. This should be seen as an opportunity to re-examine our approaches to punishment. Only a rehabilitation-centric punishment strategy can accommodate a detailed sentencing hearing.

The core argument made in this piece is that there should be (enhanced) statutory recognition of pre-sentencing hearing with the additional mandate for a judge to proactively collate material information. It is obvious that collection of material information is dependent on operationalization of other factors: conduct assessment in prison, independent psychiatric evaluation and legal recognition for victim impact statements. It is thus proposed that a new section 235A may be inserted to indicate the duty of the concerned magistrate to adjourn the sentencing hearing to a reasonable date and two, to collect and compile information relating to circumstances of the crime and criminal. Future research should establish the scope, content and range of 'material information'.

ROLE OF LAND RECORDS IN RESOLVING LAND DISPUTES

Dr. G. Mallikarjun[*]

Abstract

Land is of an enormous economic, social, and symbolic significance in India. Land ownership is broadly determined by access to a land title, a document that establishes ownership. Having a clear land title protects the rights of the titleholder against other claims to the property. Maintenance of land records and the availability of land information is one of the most important issues of land governance today. There is a need for an efficient system of land records. New forms of land information systems are being introduced all over the world. The aim of land governance and administration is to ensure secured 'titles' to boost investments in land.

The Digital India Land Records Modernization Scheme has certainly helped in modernizing the land records in India. Moving away from the presumptive title system and adopting the conclusive title system by some states is laudable. Several issues are still persistent when implementing the scheme. Most important requirement is to improve the system of maintaining and updating the land records at every level of land governance. There is also a need to push for the inclusion of various communities, tribes, and villages that have been excluded from the current regime and make the system more accessible.

Key Words: *Land Administration, Land Records, Title Holder and Digitalization of Land Data.*

Introduction

In India, land is of an enormous economic, social, and symbolic significance. The way in which access to land can be obtained and its ownership documented would affect the livelihood and existence of the

[*] Assistant Professor, NALSAR University of Law, Hyderabad.

large majority of the poor, especially in rural and tribal areas. It will also determine the extent to which increasingly scarce natural resources are managed. Land ownership is broadly determined by access to a land title, a document that states such ownership. Having a clear land title protects the rights of the titleholder against other claims to the property. In India, land ownership is determined through various records such as registered sale deeds, property tax documents, and government survey records. Maintenance of land records and the availability of easily accessible land information is one of the most important issues faced by the governance today. "Land Records" itself is a generic expression and can include records such as the register of lands, Records of Rights (RoRs), tenancy and crop inspection register, mutation register, register on disputed cases etc.[1] Thus, there is a need for an efficient system of land records that is indispensable for the land governance. There has been growing pressure on land information, administrative units and systems not only in India, but in many other countries all over the world. New forms of land information systems are being introduced all over the world that deal with the needs and desires of both individual landowners and commercial owners. The aim of land governance and administration[2] is to ensure secured 'titles' to land, which in turn encourages the investment on land and development.

Land Records: Historical Background

India has a rich history of diverse customary practices with regard to land records. There were different land tenure systems in different historical periods, as the form of institutions regulating and administrating the same changed through the different historical contexts. The text of Kautilya's Arthashastra, though did not discuss the maintenance of land records, mentioned recording of the possessory rights of the cultivator and other ancillary rights of the owner.[3] Eventually, efforts for an organized system for preparing and maintaining land records can be traced back to the Mughal times, and to

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1 MEIT Y LAND RECORDS, https://www.meity.gov.in/content/land-records, it can also include geological information regarding the shape, size, soil type of the land; and economic information related to irrigation and crops. (last visited Feb. 5, 2023).

2 Land Administration is the term adopted by the UN Economic Commission for Europe to describe the processes of recording and disseminating information about the ownership, value and use of land and its associated resources.

3 Gaurika Chugh, *Land record reforms: A key element forgotten,* DECCAN HERALD, (last accessed Feb. 5, 2023).

the North Indian emperor, Sher Shah Suri (1540-1545 A.D.).[4] All the subsequent efforts largely remained revisions of the principal structure established by Sher Shah Suri. Later, Akbar introduced the Mansabdari system for the collection of land revenue. He was aided by his trusted officers like Raja Todarmal and Muzaffar Khan who effected a major change in the system of revenue collection.[5] There were initiatives taken by all of the subsequent rulers from the Mauryans to the Vijayanagara rulers. The Marathas of Karnataka appointed state officers like *Kulkarni* (*Shanbhog*), *Deshpande, Deshmukh*, etc to oversee revenue accounts.[6]

The British more are less continued the revenue administrative system and land recording from the Mughal. However, they imposed their own customs and laws relating to land and introduced three main systems of land revenue and recording. The Zamindari system introduced through the Permanent settlement act of 1793, the Ryotwari system introduced by Thomas Munroe in Madras Presidency and the Mahalwari system introduced between 1840 and 1850.[7] It is important to note that under each of these systems there were variations in the way they were implemented in each of the presidencies. Coming to the popular ryotwari system, the only general record that was required was a detailed register of every field with the name of the khatedar or the registered occupant and admitted co-sharers as may be recorded.[8] The system of village accounts and land records depended to a great extent on the efficiency of the village patwaris.[9]

Post-independence bureaucracy has carried forward many of these trends and traditions, though there have also been drastic deviations from such patterns in the last six decades. Due to the same reason, land records have not been given much importance in India for a considerable amount of time. Land divisions and mutations are frequently not recorded. The land may continue in the name of a deceased person in some instances. It can be said that there are no records for many years. The First Five Year Plan (1951)[10] and the Seventh Five Year Plan emphasized the significance of keeping land

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4 *Ibid.*
5 P. ROBB, PEASANTS, POLITICAL ECONOMY, AND LAW 91 (Oxford University Press, 2007).
6 P. T. SPIELMAN, POLITICS AND ADMINISTRATION OF LAND USE CONTROL 81 (Lexington: Lexington University Press, 1974).
7 P. ROBB, PEASANTS, POLITICAL ECONOMY, AND LAW 98 (Oxford University Press, 2007).
8 B. POWELL, THE LAND SYSTEMS OF BRITISH INDIA 354-355 (Low Price Publications, 1990).
9 *Id.* at 385.
10 *Ibid.*

records up to date. It was mentioned in the subsequent Seventh Year Plans, highlighting the necessity of accurate land records for agricultural credit. However, there was little improvement in the land records. A "one man committee" led by D.C. Wadhwa was established in 1987 to investigate the status of land rights records. Wadhwa published a study in 1989 titled as "Guaranteeing Title to Land" after studying the land records of various states and becoming convinced that the only solution was for the state to issue definitive titles to the public. Wadhwa emphasized the helplessness of millions of small illiterate farmers in the country, whose only evidence of title was the entry in a record of rights by the state governments. These farmers had no way to fight various kinds of fraud, forgery, or other forms of cheating in land transactions. He argued that conclusive titles provided by the state would greatly assist these farmers and assist the state in achieving its goal of public welfare.

Land Disputes: The Need for Proper Land Records to Resolve

Land records itself is a generic expression and could include records like the Record of Rights, Pahani/Adangal, Record on Government Land and Crop Inspection Register, etc. Land records are the evidence of ownership and are typically associated with formal land administration systems. Incomplete, out-of-date or contested land records can pose a threat to tenure secured land rights.[11] The responsibility of maintaining land records is always with revenue authorities and they do not coordinate with other departments such as Registration and Survey departments. In Telangana and Andhra Pradesh, where there is a considerable amount of land without clear title, there is evidence that providing a clear patta or deed certificate can significantly increase land values, by many folds. At the same time a clearly defined land right would increase the probability of a plot of land being rented out, thereby providing indirect benefits to the poor.[12]

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[11] UN HABITAT, LAND AND CONFLICT- A HANDBOOK FOR HUMANITARIANS,https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/LAND%20AND%20CONFLICT%20-%20A%20Handbook%20for%20Humanitiarians.docx).

[12] WORLD BANK REPORT, INDIA: LAND POLICIES FOR GROWTH AND POVERTY REDUCTION; K Balagopal, *Land Unrest in Andhra Pradesh-III: Illegal Acquisition in Tribal Areas*, ECONOMIC AND POLITICAL WEEKLY 42, 40 (2007): 4029–34M http://www.jstor.org/stable/40276643.

Therefore, developing countries are focusing on land registrations in their endeavour to become developed countries. It is useful for the decision makers to understand clearly the extent and nature of benefits which can reasonably be expected from land registration, since they must allocate their scarce resources across different uses based on their expected benefits.[13] The most problematic aspect of maintaining land records for any government has been the difficulty in updating them from time to time to ensure that they represent ground realities of land ownership and possessory right over land. Maps depicting land parcels (cadastral maps[14]) are required to be updated periodically through the process of survey and settlement operations. In December 1988, the Conference of Revenue Secretaries of States identified the poor state of land records and recommended immediate action[15] as land records have proved to be extremely important to prove land ownership in the court of law. The failure to resolve land disputes in a given situation due to unavailability or un-updated land records will increase land litigation cases.[16]

In furtherance of this, many noted jurists have observed that a magnitude of the cases related to land disputes arise because of the improper keeping of land records. The governments around the world including the US and the EU have strong land record maintaining systems. This helps in reducing the burden of cases piling up in the Civil Courts every day. Thus, it is imperative on the government to maintain the land records in a proper way which would reflect actual ground realities of land. The age-old method of registers in village offices is still prevalent however, computerization of the records is slowly taking over in a few states. A typical land record dispute evolves when there has been a long line of transfers and it is not accounted for in the village record, not out of wilful neglect but lack of knowledge. This keeps on continuing till the time somebody tries to take advantage and bribes the record keeper to enter his name as a new title holder. Therefore, now the

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13 Gershon Feder and Akhikiko Nishio, *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, LAND USE POLICY, 15, 1, pp.25-43, 1999.

14 Cadastral map is a map showing the boundaries and ownership of land parcels. Some cadastral maps show additional details, such as survey district names, unique identifying numbers for parcels, Certificate of Title numbers, positions of existing structures, section and/or lot numbers and their respective areas, adjoining and adjacent street names, selected boundary dimensions and references to prior maps.

15 D. K. Bhalla & K. Rai, *Computerization of Land records in India* accessed athttp://pib.nic.in/feature/feyr2000/ffeb2000/f140220001.html (last visited on November 13, 2022).

16 *Ibid.*

simple solution to all of this is to keep the records updated and to keep them in a docketed format for everyone to peruse.

Maintenance of Land Records in India and the Issues and Concerns

India is facing several issues in maintaining and updating land records. It may be due to the influence of the erstwhile system of zamindari, which was then adopted or integrated into the Indian system by the British, and the same legacy is continued even after the independence. The primary issue would be data collection methods (with various flaws) employed for collecting land ownership data with an improper and unscientific land survey and resurvey.

Optional Registrations

There are certain land-related transactions for which registration is not mandatory. For example, according to Sec. 18[17] of the Registration Act, leasing of any property which has a tenure of less than 11 months, rights vested in property by the court order/decree and certain other transactions are exempt from registration (in the sense that it is not mandatory). This provision often leads to land disputes because multiple parties then claim the title to the same parcel of land by taking advantage of this exemption and also, since the registration is not mandatory in certain cases mentioned above, it is very difficult for the court to decide and determine the rights over the land in dispute relating the title over the land. In this connection, various Government Committees[18] like the Committee on Financial Sector Reforms (FSRC) in 2009[19] have recommended various changes that push towards mandatory registration, reducing the cost that is required for registration so that it eases out the process of registration particularly for the poor. Though, these changes have been suggested, they have not been codified into any law either by the State Legislatures or by the Parliament.

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17 The Registration Act, 1908, § 18.

18 The Standing Committee on Finance (2015) was constituted to examine the Benami Transactions Prohibition (Amendment) Bill, 2015 and the Committee on State Agrarian Relations (2009) emphasised the need to update land records and streamline the land administration and also suggested adopting the Land Title Guarantee system for India, with the introduction of technology such as GIS, GPS and use of satellite imagery to update land records and maintenance of land records. Further, these committees emphasised the importance of the linkage of Aadhaar and PAN numbers of all the parties involved in purchasing a property.

19 "A Hundred Small Steps- Report of the Committee on Financial Sector Reforms", Planning Commission, Government of India, 2009, http://planningcommission.nic.in/reports/genrep/rep_fr/cfsr_all.pdf.

Complex Registration Process

In India, there are three different departments which oversee three different aspects of land details: First, there is the registration department, which looks after the registration of various land transactions and the sale of stamps in order to pay stamp duty; Second: there is the Survey department, which handles the creation and updating of maps which provide the information about the boundaries and natures of various immovable properties and lastly the Revenue department, which looks after the revenue aspect of land and keeps records relating to revenue receipts on the land. The problem arises when it comes to updating information about various properties, due to a lack of coordination and outdated mechanism, data that gets updated in one department and may not get updated in another. This as such may lead to serious inconsistencies, which inevitably lead to both additional costs and delays. However, there are various solutions possible for this, one of these is to have an identification number for all properties which shall be the linking factor that links the three different departments which in turn, would then be linked to an online portal for gaining access to such information.

Presumptive Land Titles

India has been following the system of Registration of 'Deeds' only and not the registration of 'title'. It is merely a record of an isolated transaction and there is no inquiry regarding the title of the transferor to ensure conclusive title to the transferee.

There are two main kinds of land registration prevailing in the world;

1. Registration of deeds- documents recorded in the land registry are the evidence of title. It does not affect the actual vesting of the property but merely determines its priority by referring to the date of registration.[20] It is merely a record of an isolated transaction.[21] There is no inquiry regarding the eligibility of the parties to carry out the transaction or its validity.

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[20] Kevin Nettle, *Titles v Deeds: Institutional and Legal Challenges- International Experience and Implications for the Indian Continent*, WORLD BANK, *available at* http://www.siteresources.worldbank.org/INTINDIA/.../Kevin-Nettle_paper.doc, (last visited on 18th October, 2022).

[21] *Ibid*.

2. Registration of title- this registration is the primary evidence. Under this system, the record-of-rights in land is up-to-date and shows the ground position correctly because of the compulsory mutation.[22]

In India the responsibility of checking the validity of the title of the seller falls solely on the buyer of the property and the government has no responsibility with respect to the same, it means, India is following system of deed registration (registration of transaction) not the registration of title. This is surely problematic because maintaining accurate records should be the responsibility of the government in the presumptive title system. Whereas, in title guarantee system[23], a government will issue title deed to the land which will be a conclusive proof of the ownership of the land in question by adopting Curtain Principle (means the record of title is nothing but a true depiction of the ownership status and it should mirror the ground reality). Thus, the shift from Presumptive titling to that of Conclusive titles is imperative. The government before shifting to the Conclusive titles, should focus on the process of digitalization of land records with proper cadastral survey in the context and backdrop surrounding land rights issues in India.

Slow on Computerization of land records:

In 1990, the government of India introduced the Computerization of Land Records (CoLR)[24] scheme with an intention to introduce a robust land records system for India with the help Geographical Information System (GIS)[25]. The main objective of this scheme is that landowners should get computerized copies of Records of Rights (ROR's) at a reasonable price and within a reasonable time. The other

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22 D.C. Wadhwa, *Guaranteeing Title to Land*, JSTOR, http://www.jstor.org/stable/4412872, (last visited on 18th October, 2022).

23 The basic principles of a conclusive title system are:
1. The 'mirror' principle**,** which states that at any given moment, the land records should mirror the ground reality- It will be done by the computerization of land records.
2. The 'curtain' principl**e,** which means that the record of title is a true depiction of the ownership status- records that have been generated by the survey/re-surveys will then be assessed to determine the correct title of every unit of land holding.
3. The 'indemnity' principle- Title insurance**,** which refers to the fact that the title is guaranteed for its correctness and the party concerned is indemnified against any loss arising because of inaccuracy in this regard.

24 The central government sponsored the Computerization of Land Records (CoLR) scheme in the year 1988, to tackle the recurrent problems thrown up by the inadequate land records system.

25 GIS is a system of hardware and software used for storage, retrieval, mapping, and analysis of geographic data. Practitioners also regard the total GIS as including the operating personnel and the data that go into the system.

objectives of the scheme is to create a database of records facilitating the issuing of the copies of records, minimize the possibility of land records being manipulated, and create an effective land management information system.[26] Experience with computerization suggests to have a robust innovative solutions to achieve a number of remaining challenges in the area of spatial data and policy regarding registration fees and integration of systems.[27] However, the success of it can only be measured from whether: (i) The records are electronically updated when ownership changes due to sale or inheritance; (ii) It has contributed to reduction in lower level corruption; (iii) It has reduced workload for revenue officials, as well as delays for landowners; (iv) The flow of institutional finance has improved; (v) It has contributed to the reduction of disputes, and (vi) Changes in records are reflected in the village map.[28]

Adopting Conclusive Title for India: The Initiatives

It is predicted that by 2050, India would top the list of the most land scarce countries (per capita).[29] It is said that the situation would deteriorate to such an extent that other population dense countries like China and Brazil would have 4 and 20 times the land, respectively, than that of India would have (per capita)[30]. In this context, it is apparent that the land rights are a resource which will keep getting more scarce as time goes by and as a consequence, better land management is the only the solution. Therefore, it is pertinent to note that clear land rights would not only give people a sense of security over the land that they own, but also form the cornerstone for other spheres like commerce, business, agriculture, etc. Improper land rights also make it difficult for the government to identify the recipients of the various schemes that it launches.[31] One can recognize, rather understand, the extent of the problems simply by looking at the pending cases in revenue and civil courts relating to land disputes. This benefits not just in ending land

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26 M.L.S. HARYA & R.K. PUNIA, LAND REFORMS IN INDIA89 (Bangalore: Ajanta Publishers1989).

27 K. Deininger, *Strategy for Improving Land Administration in India,* WORLD BANK, at http://siteresources.worldbank.org/EXTARD/Resources/Note33.pdf (last visited on December 15, 2022).

28 *Ibid.*

29 Shilpa Bhala, *Digitisation of Land Records,* IJS, 6, 2, (2017).

30 *Ibid.*

31 Ila Patnaik, *India's Woeful Land Records Will Have Trouble Identifying Farmers Eligible For Rs 500/Month*, THE PRINT, https://theprint.in/opinion/indias-woeful-land-records-will-have-trouble-identifying-a-farmer-eligible-for-rs-500-month/188360/ (last accessed on Feb. 4, 2023).

disputes, it also enables to have more complex contracts involving urban land and the agriculture land.

The Government of India adopted the presumptive titles system instead of Torrens system due to influence of the existing British System. The adoption of this system has proved to be ineffective in providing conclusive title over the immovable property, as the system itself encountered with various problems.[32] Incomplete records led to a lot of inaccuracies for farmers, and the titles that were given under the Registration Act, 1908 led to a lot of incorrect titles with no real redressal mechanism or indemnification for damages caused due to the implementation of this system. However, in 2008, the Government of India had changed its approach, it moved away from the presumptive title and started following the Torrens System of land recording. The differentiating factor under this new system was that a title to land would not be conferred unless there is conclusive proof of the ownership over the piece of property or land. There are four key cornerstones to this system: [1] Unification of all land record agencies and keep the handling of land records under a single agency; [2] Mirror Principle: the idea that the records of the properties must mirror the situation on the ground i.e., ground realities are to be reflected; [3] A grievance redressal system and an indemnification system to provide for losses occurring due to inaccuracies of the implementation of the system; [4] The land title being conclusive proof of ownership, essentially once a title of land is obtained, the land disputes will drastically be reduced.

Despite the initiative of the Digital India Land Records Modernization Program (DILRMP) to computerize land records, land governance of India never explicitly endorsed the adoption of conclusive titling system for India. However, a Model Land Titling Bill was drafted by the Government in 2010 and 2011, respectively. The purpose of these Bills was to encourage States to move towards establishing conclusive titles. However, these Bills needed more clarity regarding the transition from the existing system to the new system and the roles of authorities and officers. In addition, it should have discussed how insufficient land records could be corrected to reflect the actual situation. As to the 2010

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[32] *Land Records and Titles in India*, PRS INDIA, https://prsindia.org/policy/analytical-reports/land-records-and-titles-india (last accessed on Feb. 4, 2023).

Bill[33], it aimed to encourage the States to introduce 'Torrens System' in land registration system. However, the Bill did not clarify the means for the transition from the existing system to the new system and the roles of authorities and officers. So, the government came up with Land Titling Bill, 2011. This Bill also lacked the clarity regarding the transition from the existing system to the new system. In addition, it did not discuss how insufficient land records could be corrected to reflect the actual situation.

In the meantime, the Central Government in the 2016 sponsored the Digital India Land Records Modernization Scheme with an aim of creating the centralized management system for any information pertaining to land across states with the added aim of allowing states to modify this system to allow for region specific peculiarities or needs. The major objective of this scheme is to update the existing land records before going to digitalize these land records and to provide easy access with a minimum cost. It attempted to do so through a three-pronged approach. Firstly, it would conduct new surveys and re-surveys; secondly, it would digitize all land records and lastly, it reflects the new transaction through the computerize registrations with up-to-date record that can keep up with changes occurred on the rights over the property. This system would then link property records to Aadhaar Cards and Digital Mapping services to ensure that the land records mirror the situation on the ground. This centralization should also alleviate concerns of people having to approach different state governments in order to get relevant information.[34] However, there are issues with DILRMP:

a) Customary Practices: While there may not be an inherent problem with the scheme per se, within India, there are several small communities, tribes, and villages that generally transfer their land according to the local customs and traditions which they follow (like white paper transaction (Sada Binama), instead of following process prescribed by the law. It is said that only about 20% of the villages in

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[33] The Department of Land Resources in the Ministry of Rural Development developed the Land Titling Bill 2010 to establish a system of conclusive, electronically recorded titles. However, to rectify the anomaly in the Land Titling Bill 2010, the central government drafted the Model Titling Bill 2011 as the revised version and released it on June 23, 2011.

[34] Sandip Chowdhury, *Without Addressing Legacy Issues, Can Digitising Land Records in India Be a Game Changer?*, THE WIRE, https://thewire.in/rights/land-digitisation-ulpin-land-records-legacy-digital-india (last accessed on Feb. 4, 2023).

India have been effectively implementing the digitization system.[35] Thus, the scheme should have envisioned a way to include these lands during the re-surveying process that it undertook. This is due to the fact that it may lead to land disputes over the land where a proper legal title as recognized by the government is absent.[36]

b) Inconsistencies and discrepancies with the data: There are a lot of issues with respect to accuracy of the data after digitization such as Bhoomi project[37] of Karnataka and the problems with Dharani portal of Telangana.[38]

c) Lack of Unification: While this scheme does provide for it, there has been a distinct lack of centralization of the three departments (Registration, Revenue and Survey departments) and no coordination. This results in the problems like delays and additional costs, which have not been resolved and the citizens continue to face these issues.

d) Lack of authentic certification: The documents that are obtained online through the web portals do not have the status of authentic certified copies and also people still prefer going for the hard copies from the various departments, which has essentially rendered the entire online system redundant. In effect digital documents obtained online are only used for personal purposes.

e) Inadequate staff and Infrastructure: This is the main issue that is being faced by many departments while implementing most of beneficial schemes or programs in India and these programs of digitalization of the records are not an exception. There is quite a bit of shortage with respect

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35 Prachee Mishra, Roopal Suhag, *Modernizing Land Records in India*, THE MINT, https://www.livemint.com/Opinion/YZ7goB2ERdl3VZQJTdWc9L/Modernizing-land-records-in-India.html. (last accessed on Feb. 4, 2023).

36 Neil Sorensen, *The Digitization of Land Records: A Panacea for Land Conflicts?,* LAND PORTAL, https://landportal.org/node/99940. (last accessed on Feb. 4, 2023).

37 The Bhoomi project was intended to manage and deliver land records through an online portal in Karnataka. It was the first state government to implement the Computerization of Land Records scheme in 2000. Under the project, all the manual Records of Rights (RoR), Tenancy, and Crops (RTCs), which prevailed at the time of data entry, were digitized. These records are made available to the citizen through kiosk centres, which will facilitate banks and other financial institutions to use such material for inquiry into the ownership rights of the land owner. (See Revenue Department, Government of Karnataka; Success stories on National Land Records Modernization Program, Ministry of Rural Development; PRS.)

38 *Implementation of DILRMP in Rajasthan*, NATIONAL INSTITUTE OF PUBLIC FINANCE AND POLICY, https://macrofinance.nipfp.org.in/PDF/DILRMP.pdf, (last accessed on Feb. 4, 2023).

to various infrastructure facilities like mapping equipment, insufficiently trained surveyors and insufficient servers for collecting the data, etc.

Legislative Initiatives in India on Establishing Conclusive Land Titling:

Though many of the state legislatures are slow in adopting Land Titling Bill, 2011, Rajasthan, Maharashtra, Telangana and Andhra Pradesh took some steps toward enactment of Conclusive Land Titling system[39]. The major benefit of the land titling system is commendable and will ensure the conclusive title to the owner of the property.[40]

As a crusader, the state of Rajasthan enacted the Urban Land (Certification of Titles) Act 2016. The Act called for the appointment of an officer (civil servant) to decide who owned urban land. If there were no unpaid tax dues or disputes on the land in question, the officer could issue a title certificate to the applicant. The applicant will be compensated by the state in the event that a flaw in the title over the land is discovered later. But the Act is still not enough because it does not address an important issue like, the nature of the land not being recorded in the titling certificate and further it is only applicable to urban land. In addition, there is a clause that allows the certificate to be revoked if it was issued in error. This indicates that the certificate is not indefensible, and buyers may still need to investigate the title of the seller and the nature of the land.

In 2019, State of Maharashtra approved a draft of the Maharashtra Land Titling Bill intended to create and update land records, with the establishment of a Land Titling Authority. It proposed a system in which all land-related information including encumbrances

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39 *Ibid*.

40 Under this system, the property owners will have a sense of ownership security due to the following reasons:

1. Financial institutions will be able to cross check the status of the property before granting the mortgage.
2. The problem of multiple wills and fraudulent transactions will be avoided.
3. It will be easier to control stamp duty and property tax evasion.
4. A unique identification number will be assigned to the property. In case of a dispute, the status of the land can be ascertained on the internet using the number since all the transactions are to be recorded.
5. The party concerned is indemnified against any loss arising because of inaccuracy under indemnity' principle (Title insurance)
6. The data and the conclusive titles would help in the development process such as land acquisition, rehabilitation and resettlement, land use planning.

and litigation would be accessible from a single location. However, even after the Bill is passed, it will still take at least three years to update all land records, and the pilot program will begin in a small area.

The Andhra Pradesh Legislative Assembly has approved the Land Titling Bill 2022 passed on 21/09/2022. The Act is intended to determine land boundaries and resolve ownership rights of owners, if any. This Bill, was shaped to make it possible to set up, manage, and control a "title registration" system for real estate as well as other related issues. Another object of the Bill is to prepare a list of all immovable properties region wise after conducting a cadastral survey.

The State of Telangana enacted the Telangana Rights in Land and Pattadar Pass Books Act, 2020 to consolidate the state laws governing the record of rights pertaining to the agricultural land[41]. This Act is made with respect to Agricultural Lands with certain major objectives such as to maintain 'record of rights' in electronic form, automatic acquisition of rights, immediately after transfer of property, increase transparency in Revenue Administration, evolve good practices to end corruption and to ensure hassle free revenue administration in the public interest. The revolutionary reforms introduced in the Act will eliminate issues that the owners of agricultural land and others face, such as the need for pattadar passbooks and title deeds to conduct business on agricultural land and obtain loans from banks, the modification of their lands following a transfer and the physical production of pass books and title deeds to obtain loans. Further, This New Act will provide maintenance of records of rights in electronic form and validate them, enable agricultural landholders to obtain electronic Pattadar Passbook-Cum-Title Deed through establishment of Dharani portal[42], such as automatic acquisition of rights immediately after the transfer of property.

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41 Transactions relating to agricultural properties such as sale, transfer or people who acquire rights over land through succession, survivorship, inheritance can register through Dharani Portal. The Tahsildar will enter register the records and would issue a new 'pattadar passbook cum title deed' duly updated. The pattadar passbook–cum-Title deed will have the same evidentiary value with regard to the title for the purpose of creation of equitable mortgage under the provisions of the Transfer of Property Act, 1882 as a document registered in accordance with the provisions of the Registration Act, 1908. Farmers can secure loans easily by inspecting the Record of Rights electronically.

42 "Dharani Portal" is a website where registration of land can be done in a single window method without knocking doors of many departments. Initially Dharani Portal was supposed to be used for registering both agricultural and non-agricultural lands. The first Law which was enacted in this direction is "The Telangana Agricultural Land (Conversion for Non-Agricultural purposes) (Amendment) Act, 2020". It is believed that this Legislation will aim to bring in more transparency and accountability in the registration of non-agricultural land and will enable the Government to maintain land/ revenue records in a digital form.

Conclusion

Given all the propositions and arguments identified above, the Digital India Land Records Modernization Scheme has certainly done its part in modernizing the land records in India. specifically, moving away from the presumptive title system and adopting the conclusive title system by some states is laudable. However, while the vision is admirable, several issues are still persistent when implementing the scheme (Digitalization of Land Records to adopt Conclusive Titles), as has been highlighted in the paper[43]. The major issue is that many state governments have not given a serious thought to implementing the conclusive title system in their respective states due to lack of political will.

In terms of potential reforms, the first step that must be undertaken is to improve the system of maintaining and updating the land records at every level of land governance (village to state level). This is due to the simple reasoning that if the records are not good enough, then on some level, it defeats the entire purpose of keeping them. Eventually, the various types of land disputes, like the question of ownership right over the land will be at stake, and land disputes will be increased due to non-updating the land records at each level. The second step would be to push for the inclusion of various communities, tribes, and villages that have been excluded from the current regime and make the system more accessible to those people either by integrating more vernacular languages or by sending out government agents to these areas when the surveying process is to be undertaken. There is also a need to provide easy access to digital land records (online) at the village level. Thus, it is suggested that the Village Revenue Officer be authorized to issue certified copies of the land records with accuracy instead of directing the landowner to approach the survey and registration departments. This makes it much simpler and enables even common people to ascertain their rights over the land without any hassle.

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[43] Guest, *India needs Digitized Land Records and Online Property Registration – Here's why*, FINANCIAL EXPRESS, https://www.financialexpress.com/money/india-needs-digitized-land-records-and-online-property-registration-heres-why/2134454/ (last accessed on Feb. 4, 2023).

MAPPING INSTITUTIONALIZED LEGAL AID FRAMEWORK IN INDIA – CHALLENGES AND WAY FORWARD

Prof. (Dr.) K. Vidyullatha Reddy [*]
Pardhu Pinnamsetty[♣]

Abstract

A legitimacy crisis faced by the judicial system in the aftermath of the emergency period led to a series of proactive steps by the supreme court to extend more expansive protection to the democratic rights of the people of the nation. After the Public Interest Litigation mechanism, Legal aid system was the next big step towards the goal. However, even after 35 years since the legal aid program received a statutory mandate, the goal remains largely elusive. After all, regardless of whatever laws are enacted for the benefit of the poor and disadvantaged, they simply remain as meaningless and inanimate words, so long as the people, for whom the laws are intended, are incapable of enforcing them. The reach of any State support depends on the on-ground working of the system. Despite many checks and balances, the system struggles to generate motivation and conviction among its workforces. This paper looks at legal aid clinics established to support the legal aid system in place and tries to identify some of the shortcomings in the way they function and how these shortcomings can be addressed.

Key Words: *Democratic Rights, Public Interest Litigation, Legal Aid Clinics, Legal Aid System*

Introduction

Legal aid broadly refers to the provision of legal services to individuals and groups who are unable to access them. The preamble of the Indian constitution aims to secure for the people of India justice – social, economic and political. The Article 38 and 39A of the Indian Constitution are more specifically notable in this regard; Article 38(1)

[*] Professor of Law and Registrar, NALSAR University of Law, Hyderabad.
[♣] Assistant Professor of Sociology, NALSAR University of Law, Hyderabad

states that the State shall promote the welfare of the people by securing and protecting the social order including justice. Article 39A of the Constitution states that the State shall, in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen. It was held by the Supreme Court[1] that if any accused is not able to afford legal services, then he has a right to free legal aid at the cost of the State. The Constitutional mandate led to the enactment of the Legal Services Authority Act of 1987 which provided the statutory framework for the legal aid program in India. Through this mechanism, various schemes and programs to provide legal aid to marginalized and disadvantaged groups, such as women, children, and members of scheduled castes and tribes were implemented. A broad range of institutions that provide free legal services through a network of legal aid clinics, legal aid boards, and legal services societies were established in India. The Bar Council of India also mandates all legal education institutions to establish and run a legal aid clinic under the supervision of a senior teacher[2]. While most of the institutionalized legal aid primarily came up in furtherance of the provisions of the Legal Services Authorities Act and Bar Council of India Rules, there are few other organizations (like Non-Governmental Organizations (NGO's), Trusts, and societies etc.) that are also carrying forward the spirit of legal aid through their own designed programs. This paper strives to briefly analyze the institutional legal aid frame work of legal educational institutions their scope of operations and the usual challenges faced by them.

Statutory Legal Aid Framework

The Legal Services Authority Act of 1987, established a system of legal aid to ensure that justice is accessible to all the poor and marginalized sections of the society. The Act provides for the constitution of various authorities to carry forward its mandate. The National Legal Services Authority (NALSA) at the national level, the State Legal Services Authorities (SLSAs) at the state level and the District Legal Services Authorities (DLSAs) at the district level are primarily responsible to carry out legal aid activities in India. These Authorities are under the administrative control and supervision of the Supreme Court, High Court and District Court respectively. There are also legal aid committees at

1 *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98

2 Bar Council of India Rules on standards of Legal Education and Recognition of Degrees, 2008

the Supreme Court (SCLSC), High court(HCLSC), District Court and Taluka level (TLSCs) that take care of administration at their respective levels. NALSA, on the other hand, is responsible for formulating policies and schemes for the provision of legal aid, as well as coordinating the work of SLSAs and other legal aid organizations. It also provides financial assistance to SLSAs and other legal aid organizations. SLSAs are responsible for implementing legal aid schemes and programs in their respective states. They are also responsible for the management and supervision of legal aid clinics, legal aid boards, and legal services societies, which provide legal aid services to the public.

There are many hurdles to ensuring access to justice for all. Merely providing legal counseling and representation does not address the problems holistically. Hence, NALSA works to reduce barriers to access not just by providing free litigation aid but also by providing monetary support in the form of bearing the expenses involved in litigation like court fees, procuring and printing documents and other ancillary expenses arising from the litigation[3]. In addition, issues like trafficking, abuse faced by children in many forms need rehabilitation and redressal in a holistic way which is also provided by legal aid committees. They provide economic and social pathways for the survivors to achieve complete rehabilitation. Besides complete aid, NALSA also aims to raise awareness about free legal aid programs and schemes among the intended beneficiaries. Legal aid clinics in law schools and universities tie up with SLSA's and DLSAs and contribute to various activities mentioned above. One initiative of the legal services authority under the Act namely Lok Adalat which focuses on alternate dispute resolution, conciliation and mediation to resolve the disputes more amicably gained prominence in recent decades The extensive use of these ~~aspects~~ modes of dispute resolution can be witnessed by the numerous Lok Adalats conducted every year by the Courts. It was estimated that more than 8 crore cases pending before various courts in India got resolved through Lok Adalats[4].

In India, access to legal aid is limited and varies greatly from State to State. According to a report by the National Legal Services

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[3] Panel of advocates are appointed by the legal services authorities to help the litigants. These advocates take up cases freely for the clients who cannot afford to engage a lawyer and in turn they are compensated by the legal services authority.

[4] Motor accident claims, land acquisition matters and compoundable offences etc. are largely settled in Lok Adalats besides many others.

Authority (NALSA), only about 10% of the population has access to legal aid services. Throughout the country there are only 672 DSLAs and 2282 TLSCs.[5] The suggested norm is that one legal aid clinic has to serve not more than six villages.[6] In March 2020, there were 14,159 legal aid clinics for 597,617 villages that is on an average of one clinic for every 42 villages.[7] The report also states that there is a shortage of legal aid lawyers, with only about one lawyer for every 50,000 people. Working to redress the shortages, in addition to NALSA and SLSAs, there are also several non-governmental organizations (NGOs) and charitable institutions that provide legal aid services in India. One such institution is the legal aid clinics that work through law universities and colleges across India.

Legal Aid Clinics in Universities/ Law Schools

National Legal Services Authority (Legal Services Clinics in Universities, Law Colleges and other Institutions) Scheme, 2013 provides the scope and ambit of the legal aid clinics operating under the legal educational institutions. The Bar Council of India mandated all law colleges and universities in India to establish and run legal services centers or clinics as a step towards ensuring effective access to justice[8]. Section 4(k) of the Legal Services Authorities Act, 1987 mandates NALSA to institute programs for clinical legal education and promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions.

These clinics aim to provide effective legal services to the poor and marginalized people, and in the process, inculcate an attitude among young professionals to work for the upliftment of the masses. The students gain hands on experience while engaging themselves in the legal aid work. The legal aid clinics of the universities in addition to providing legal aid and furthering the cause of social justice also helps in providing an opportunity for students to learn while doing. In furtherance of that objective, legal aid clinics engage in various kinds of activity that are all aimed at helping the masses and improving access to justice. They provide client counseling and offer various kinds of assistance to those

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5 Annual Report 2021-22 (2021), https://nalsa.gov.in/library/annual-reports/annual-report-2020-2021.

6 Section 3, NALSA (Legal Services Clinics) Regulations, 2011

7 India Justice Report 2020: Ranking States on Police, Judiciary, Prisons, and Legal Aid (2021),https://www.tatatrusts.org/insights/survey-reports/india-justice-report (last visited Feb 4, 2023)

8 Supra note 4

who face economic and social hurdles in accessing the legal system. Besides counseling and other forms of litigation-related help, the university clinics organize legal workshops and awareness programs among marginalized communities. They carry out the necessary research, through empirical field work, to identify and plug the gaps in the justice delivery system.

With the object of equitable access to justice, establishing and operating a legal services clinic in law schools was made a mandate under the Bar Council of India Rules of Legal Education, 2008. Legal aid clinics take up various sorts of activities from providing legal counselling to raising awareness among intended beneficiaries to organizing camps and providing assistance in implementing various schemes of NALSA that aim at increasing access among the marginalized sections of society like prisoners, women facing domestic harassment, labor in the unorganized sector, gender and sexual minorities.

NALSA has taken several steps to provide speedy and cost-effective justice through free legal aid services. Department of Justice, Government of India launched a new Scheme on Access to Justice namely "Designing Innovative Solutions for Holistic Access to Justice" (DISHA) for the FY 2021-2026.NALSA has also launched Legal Services Mobile App for Android and IOS version on 8th August, 2021 and on 09th November, 2021 respectively which will facilitate functions like seeking legal assistance, legal advice and for redressal of other grievances through Mobile App, tracking applications submitted for legal aid & advice and other grievances, sending reminders , and victims of crime applying for victim compensation through the Mobile App. It would also facilitate applications for pre-institution mediation in commercial matters or a for mediation[9].

Broadly the work of legal aid clinics could be categorized into the following:

a) Providing and improving free legal services to underprivileged communities: Legal aid clinics in law schools have been working to

[9] "NALSA has taken several steps to provide speedy and cost-effective justice through free legal aid services" available at https://pib.gov.in/PressReleseDetail.aspx?PRID=1884149 (last accessed on 14th Feb 2023)

provide free legal services to marginalized communities, including women, children, and Dalits. They have been helping these communities access justice by helping them get legal representation in court, counseling, and other legal services, often collaborating with the legal service mechanism put in place by NALSA and SLSA. To that effect, they provide research and drafting/filing assistance to panel lawyers working with legal aid committees. Students working with the clinics also conduct field visits to prisons, residential localities with vulnerable sections of society, mental health camps, schools, etc. For example, the Legal aid clinic set up in NALSAR that started in 2009 began its activities with the final year students visiting the nearby Shameerpet village of the Rangareddy district to examine the problems faced by the villagers. Of the 46 households surveyed, the members of the clinic identified 5 problems of which 3 were strictly legal in nature. Speaking to municipal authorities, they helped with issues relating to land settlement, access to drinking water, non-receipt of pensions for the old and disabled, etc. In the process, they also managed to raise awareness about government schemes and other benefits they can seek from municipal bodies. Another such example of legal aid clinics involved with legal counselling is the Sabarmati Jail Project conducted by the clinic at the Institute of Law, Nirma University. Since 2011, the project saw 292 under-trial needy persons get counselling and ensured 588 persons get an advocate through Legal Service Authority. A similar well-known project is run at the West Bengal National University of Juridical Sciences, Kolkata in the name of *Shadhinota* (meaning 'freedom') wherein students aided the Commonwealth Human Rights Initiative (CHRI) via research and fieldwork for the goal of increased access to justice for inmates. NALSAR in association with an NGO named Landesa set up a legal aid clinic within the premises of the District court in Warangal to help poor people with land issues. These programs are an example of many such programs run through legal aid clinics in law colleges and universities in the country.

b) Raising awareness about legal rights and social issues: Legal aid clinics have been successful in raising awareness about legal rights and responsibilities among the general public. Legal aid clinics conduct legal literacy programs and workshops in rural areas, where people are often unaware of their legal rights and the process of accessing justice. At the NALSAR legal aid clinic, the 2005-2010 batch coordinated with the Teach India Program to run a program at the local school in Shameerpet.

Additionally, they also prepared a reading module on ”Introduction to Land Laws” for the students of law at Kakatiya University and Adarsha College in Warangal, Telangana. The NALSAR students also prepared a draft report on laws relating to the conservation of trees for an NGO working on environmental protection[10]. Another batch of students also organized sanitation awareness camps and litter-picking drives in and around Shameerpet with the aim of spreading awareness of sanitary hygiene, public health and environment protection. Almost all law schools run legal literacy programs of the kind discussed above. Now with extensive use of technology, these programs are conducted with more ease as the resource person's physical non-availability does not hinder it anymore. Collaboration across legal institutions through sharing of recorded programs, printed materials and posters etc. is making many strides toward the goal of improving awareness among common people.

c) Advocating for policy change: Legal aid clinics have been successful in advocating for policy change in areas such as women's rights, child labor, and human rights. Advocacy and carrying out field surveys to examine the socio-economic conditions of target groups and providing research to push for governmental action are also thrust areas for legal aid clinics. Many such clinics have conducted research and provide legal support to organizations, and NGOs working in these areas, leading to the introduction of new laws and policies that benefit marginalized communities. The NALSAR clinic with the help of the batch of 2010-2015 organized the 12th International Consumer Law Conference in association with the International Association of Consumer Law. The theme of the conference was Consumer Law – Globalization, Poverty and Development. The conference addressed the link between consumer law and globalization, with a special emphasis on the growing need to address poverty and development issues in the context of consumer law. Legal aid clinics have also been pushing to encourage socially conscious lawyers and to that effect successfully conducted Rajeev Gandhi Advocate Training Programme in 2017, a 45-day intensive training program to select lawyers. Another remarkable project taken up was at the National Police Academy where the members through a workshop involving lectures, skits and discussions, pushed for gender-sensitive policing. Many passionate and meaningful discussions took place around the issues of “moral shaming of victims”, child marriages, custodial

[10] Council for Green Revolution (CGR) an NGO working in Hyderabad on the conservation of trees and environment protection.

violence, etc. Aiming for a change in the way government deals with the "problem" of the homeless, the NUJS legal aid cell filed a PIL to present before the Calcutta High Court for challenging provisions of the Bengal Vagrancy Act, 1943. NALSAR legal aid clinic moved by the plight of farmers committing suicide prepared a report on the problems faced by poor farmers with microfinance institutions which furthered the State Government to enact a law in this regard[11].The above is only a miniscule example of the nature of activities taken up by the legal aid clinics of the law schools.

Challenges faced by the Legal Aid clinics in India

a) Lack of funding and support: Legal aid clinics in law schools often face shortage of funding, which limits their ability to provide effective legal services and training to law students. This can result in a lack of resources, such as office space, equipment, and legal materials, which are essential for the functioning of the clinic. This shortage in funding is a problem plaguing SLSAs and DLSAs across the country. As per the 2018 Commonwealth Human Rights Initiative study including 29 states and seven Union Territories, per capita spending on legal aid in India is Rs 0.75, one of the lowest in the world. In 2019-'20, as per India Justice Report[12], per capita spending on legal aid in India was Rs 1.05. Consequently, the funding and support that legal aid clinics receive from SLSAs and DLSAs are very less or none. In the study conducted by Shailendra K. Gupta and David Tushaus in 2011 surveying around 30 legal aid clinics across 14 states in India, it was found that less than 10% have received any state funding.

In addition to funding, state machinery should be ready to work with legal aid clinics and allow them to assist them in meaningful ways. However, DLSAs rarely keep a check on the workings of legal aid clinics as mandated according to the regulations of 2011. In turn, they are sometimes non-cooperative in providing them assistance by making panel lawyers available or giving access to other State institutions. Members of legal aid clinics are often having to face hostile authorities at places like prisons and municipal offices who insist on keeping them under surveillance while they are speaking to complainants. In the end,

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11 The Andhra Pradesh Micro Finance Institutions (Regulation of Money Lending) Act, 2011.

12 India Justice Report 2020: Ranking States on Police, Judiciary, Prisons, and Legal Aid (2021), https://www.tatatrusts.org/insights/survey-reports/india-justice-report (last visited Feb 4, 2023)

there is no system of incentives to motivate law students to work for the clinics in a committed fashion. Many experts suggest introducing a system of granting credits for the work done by law students as a part of clinical education.

b) Limited staff and resources: Legal aid clinics in law schools often have limited staff and resources, which can make it difficult for them to provide effective legal services to marginalized communities. While LSCs are student-driven, the guidance of experts is necessary to avoid making the activity perfunctory. In the study surveying around 30 law universities and colleges in India, it was found that clinics in nearly 3/4th of those institutes worked with three or fewer faculty members.[13] Without experience, the students will be unable to earn the confidence of those who they want to help. While the regulations necessitate legal services to have a dedicated office and work station with internet and other infrastructural facilities, the legal aid clinics in law schools often receive limited support from the government, which can limit their ability to provide effective legal services to marginalized communities.

c) Formalism and lack of collaboration: The lack of leadership and effective organization will lead to half-hearted and piecemeal efforts; legal aid work will be reduced to a formal requirement that is to be done away with least effort possible. Organizing disparate lectures or seminars once every semester will not lead to anything worthwhile. Providing legal aid is a long arduous process that needs planning, commitment and effort. If the activity of legal aid clinics is tied to the constraints of the academic calendar, measures need to be taken to overcome those limitations. Operating on the basis of the academic calendar will only allow students to engage with legal aid in a superficial way. Effective leadership from the professors or management, on the other hand, will unleash the potential of legal aid clinics to the fullest. Legal aid clinics could, for example, work in collaboration with other organizations, such as non-profit organizations and community-based organizations, which can enhance their ability to reach marginalized communities and provide effective legal services. Recently, under the aegis of the Department of Justice, a new *Nyaya Bandhu* project was launched to connect legal aid programs across the country using digital platforms. This also entails establishing pro-bono clubs in universities that runs parallel to the legal

[13] David W. Tushaus, Shailendra Kr. Gupta & Sumit Kapoor, "India Legal Aid Clinics: Creating Service Learning Research Projects to Study Social Justice," 2 Asian J. Legal Educ. 100–118 (2015).

aid clinics established under the Regulations of 2011. Collaborating horizontally and vertically within and outside the legal system is the key for the successful running of these clinics.

Lack of practical training for law students: Legal aid clinics in law schools often face a lack of practical training for law students, which can limit their ability to gain hands-on experience in legal work. This can result in a lack of practical skills and knowledge, which can make it difficult for law students to transition into the legal profession. Even professors without much practical knowledge will be helpless in certain aspects. So, it is important to involve practitioners in legal aid clinics and courses so that both coursework and legal aid work are done in an effective and meaningful way.

Conclusion

A study by the Commonwealth Human Rights Initiative found that India has one legal aid lawyer per 18,609 population or five legal aid lawyers per 1,00,000 population.[14] The annual report by NALSA in 2022 shows that there are approximately 50,000 panel lawyers across the district and high court legal service organizations.[15] While the problem of budget cuts remains, as of 2019–20, unlike a year ago, all states have contributed towards legal services expenditure, while others have increased their share. The increased willingness to contribute more towards legal aid suggests a mounting recognition of the value of this service. In seven states, this share has moved to upwards of 80 percent (India Justice Report, 2020). The question of budget cuts to legal aid involves debates on whether legal aid is an effective tool in the hands of the oppressed or if it is an alibi for the capitalist state that only works as a safety valve for rising discontentment against injustices written into the logic of the system. Speaking of the string of judicial activism that eventually gave rise to the legal aid institution, particularly in the case of Kamla, a woman who was being bartered on the streets of Delhi, an observation made by the supreme court:

> *"Kamla entered the middle-class consciousness and got a journalist handsome money and the Supreme Court a radical*

[14] Jeet Sing Mann, "*Plight of Legal Aid Counsels at the District Courts of India*," EPW Engage (2022), https://www.epw.in/engage/article/plight-legal-aid-counsels-district-courts-india (last visited Feb 4, 2023).

[15] Annual Report 2021-22 (2021), https://nalsa.gov.in/library/annual-reports/annual-report-2020-2021.

> *image before she was stolen off the streets. The middle class will discover other Kamla's not merely for their titillation but so that we can use them and their continued oppression to refurbish our hitherto bankrupt images or to enhance our sense of moral rectitude"*[16].

However, even the most critical of them do not question the impact that could be achieved with the effective working of organizations operating at the grassroots level — the kind of activities they undertake, the frequency of such activities, the quality of the services rendered, the percentage of the student population that participates in these activities and the frequency of interaction with the community outside the college, especially the marginalized community, are the details that loom large over the efficacy of the institution despite problems like fund cuts and non-cooperation from the state machinery. Previous studies have shown that many legal aid clinics operate only formally to satisfy bar council requirements.[17] Law Universities, with effective and committed leadership, can play a big role in plugging the shortages and short-comings of Legal service committees run under SLSAs and DLSAs. There are many internal, organizational problems that Legal aid institutions face like corruption, maladministration, etc. The lack of a mechanism to check the quality of lawyers and legal aid offered strikes as a death blow to the program, making the institution lose credibility and confidence among the people. Legal aid clinics through their outreach programs can bring people back to the courts making them aware of the redressal mechanisms put in place by the state. Legal aid clinics, with proper leadership, can adopt new and innovative means to tackle the problems related to access to justice. By collaborating with other legal service institutions, the clinics can contribute to their capacity building by organizing training programs for panel lawyers, paralegal volunteers and providing assistance in adopting new digital technologies in their outreach program.

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16 Rajeev Dhavan, *Managing Legal Activism: Reflections on India's Legal Aid Program*, 15 Anglo-Am. L. Rev. 283–295 (1986).

17 "*Access to Justice for Marginalized People: A Study of Law School Based Legal Aid Clinics"* (2011), https://www.undp.org/india/publications/study-law-school-based-legal-services-clinics-0 (last visited Feb 4, 2023).

LIVE STREAMING OF COURT CASES – A QUEST FOR ENSURING TRANSPARENCY IN JUSTICE DELIVERY SYSTEM

Dr. P Sree Sudha[*]

"Publicity is the very soul of justice. It keeps the judge, while trying, under trial."

- Jeremy Bentham

Abstract

Open courts effectively foster public confidence by allowing litigants and members of the public to view courtroom proceedings and ensure that the judges apply the law in a fair and impartial manner. The impact of open courts in our country is diminished by the fact that a large segment of the society rarely has an opportunity to attend court proceedings. This is due to constraints like poverty, illiteracy, distance, cost and lack of awareness about court proceedings. Litigants depend on information provided by lawyers about what has transpired during the course of hearings. Others, who may not be personally involved in a litigation, depend on the information provided about judicial decisions in the media. Live streaming of courtroom proceedings is an extension of the principle of open courts. Live streaming of court proceedings, in one sense, with the use of technology is to "virtually" expand the courtroom area beyond the physical four walls of the courtrooms. Advancement in technology and increased internet penetration has facilitated transmission of live video feed to devices like computers, tabs and mobiles. The article will examine the privacy concern related to live broadcasting of Supreme Court of India and controversy centered on various High Court's Live Streaming of Cases.

Key words: Live Streaming, Court proceedings, Judiciary, Privacy, Democracy.

[*] Professor, DSNLU, Vizag.

Introduction

The important characteristic of justice as delivered by courts is that the proceedings occur in public and are presided over by a judge who is completely independent of the parties and of the executive government. The independence of the judiciary is inextricably connected to the openness of the courts. Jeremy Bentham was no admirer of the common law, but he did see great value in the openness of courts. He said: "Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial"[1] Bentham believed that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. Most importantly he believed it was the most effective of all possible safeguards from the abuse of power."[2] The rationales for courts being open were recognized from the earliest times. First, it inspired public confidence in the justice system. If the public could hear the evidence themselves, watch the proceedings and then hear the decision and the reasons for it, they could form their own judgment as to whether the system was operating fairly and delivering just outcomes. Second, it encouraged those working in the system, including the lawyers and the judges to meet the high standards that the public would expect of them. Third, it ensured acceptance of the courts as the fair and appropriate way to resolve disputes and to mete out justice to wrongdoers. This dampened down any desire for recourse to vigilante justice or mob rule. Fourth, it demonstrated to the public the operation of the rule of law. It was practical proof that everyone is subject to the same laws and the same procedures, regardless of their rank or wealth. Fifth, it served to educate the public about the law and how it operated.[3] To imbue greater transparency, inclusivity, and foster access to justice Government of

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1 4 WORKS OF JEREMY BENTHAM316-317 (J Bowdler ed., 1843)

2 J BENTHAM, RATIONALE OF JUDICIAL EVIDENCE524 (1827) – "Without publicity, all other checks are insufficient: in comparison with publicity all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks."

3 In 1936 the Privy Council had to consider the issue in the case of *McPherson v McPherson*1998 ME 141, 712 A. 2d 1043 - an appeal from the Supreme Court of Alberta. In that case the first instance judge had made orders dissolving a marriage whilst sitting in the Judge's Law Library. Entry to the library was gained through a double swing door that opened off a public corridor. The door, whilst unlocked had a brass plate with the word 'Private' in black letters written on it. The word Private was enough to deny the proceedings one of the essential qualities of a judicial trial. The Privy Council stated: "Publicity is the authentic hallmark of judicial as distinct from administrative procedure…The court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none"

India has initiated live streaming of Constitutional Bench Proceedings in India from 2022.

This article is divided into five parts, first part deals rationale behind live streaming of court proceedings in India for realizing Right to Know, part two will present Indian Judiciaries role for guaranteeing live streaming of court proceedings in India by delivering a path breaking Judgments of *Swapnil Srivastava* and *Indira Jai Singh* Cases etc., part three will throw some light on Concerns on live streaming of court proceedings, part four presents a critical analysis of Model Rules for Live-Streaming and Recording of Court Proceedings and finally ends with conclusion.

Live Streaming of Court Proceedings in India – A Path Breaking Moment for Realizing Right to Know

Live streaming of court proceedings indubitably has the potential of throwing up an option to the public to witness live court proceedings and thus provide them with a more direct sense of what has transpired which they otherwise could not due to logistical issues and infrastructural restrictions of courts. Thus, technological solutions can be a tool to facilitate actualization of the right of access to justice bestowed on all and the litigants in particular by providing them virtual entry in the court precincts and more particularly in court rooms. In the process, a large segment of persons, be it entrants in the legal profession, journalists, civil society activists, academicians or students of law will be able to view live proceedings in propria persona on real time basis. Live streaming of court proceedings is feasible due to the advent of technology and has been adopted in other jurisdictions across the world. Such a technology 'virtually' expands the court room area beyond the physical four walls of the court rooms.[4] Technology is evolving with increasing swiftness whereas the law and the courts are evolving at a much more measured pace.

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[4] High Court of Gujarat, while hearing a petition seeking public access to Virtual Court hearings observed, "the right to know and receive information is one of the facets of Article 19(1)(a) of the Constitution and for which reason, the public is entitled to witness the Court proceedings involving the issue having an impact on the public at large or a section of the public, as the case may be." The Bench observed: "To observe the requirement of an open Court proceedings, the members of the public should be allowed to view the Court hearings conducted through the video conferencing, except the proceedings ordered for the reasons recorded in writing to be conducted in-camera."

Open justice was important for three reasons:

First, it assisted in the search for truth and played an important role in informing and educating the public. Second, it enhanced accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done. The tradition of open justice had its origins in England before the Norman Conquest, when freemen in the community participated in the public dispensing of justice.[5] The tradition had spread out from England, particularly to those parts of the world which had adopted and retained the common law heritage, but was also observed and respected in civil law societies. Open court system of judicial administration entails court proceedings to be open to public and media at large. Such proceedings are common feature US, Canada and Australia.[6] Open court system is found to be a necessary condition for a fair trial, which is a fundamental principle of rule of law. As regards the pronouncement of judgments by the Supreme Court, there is an express stipulation in Article 145(4) of the Constitution that such pronouncements shall be made in open Court. Indeed, no such express provision is found in the Constitution regarding "open Court hearing" before the Supreme Court, but that can be traced to provisions such as Section 327[7] of the Code of Criminal Procedure, 1973 (Cr. P. C) and Section 153-B of the Code of Civil Procedure, 1908 (CPC).[8]

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5 David M Paciocco, *When Open Courts Meet Closed Government* 29 SUPREME COURT L. REV. 385, 389–90 (2005).

6 Adam R. Pah et. al., *How to build more open Justice System* 369 SCIENCE 134 (2020)

7 Criminal Procedure Code (1973) § 327 "Court to be open.- (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them; Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. (2) Notwithstanding anything contained in sub-section (1), the inquiry into the trail of rape or an offence under section 376, section 376-A, section 376-B, section 376-C [section 376-D or section 376-E of the Indian Penal Code (45 of 1860)] shall be conducted in camera; Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court; [Provided further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate.] (3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court:] [Provided that the ban on printing or publication of trail proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties.]"

8 Civil Procedure Code (1908) § 153-B "Place of trial to be deemed to be open Court.- The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them: Provided that the presiding Judge may, if he thinks fit, order at any state of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court."

The impact of open courts in our country is diminished by the fact that a large segment of the society rarely has no opportunity to attend court proceedings. The constraints behind open court proceedings in India are like poverty, illiteracy, distance, cost and lack of awareness about court proceedings, most of the time litigants depend on information provided by lawyers about what has transpired during the course of hearings. Legal scholars indicate that the principle of open justice encompasses several aspects that are central to the fair administration of justice and the rule of law. It has both procedural and substantive dimensions, which are equally important.[9] Live streaming is a two-edged blade even though its objective is to improve accountability and openness.[10] Whenever court is broadcast live or recorded sessions circulate on social media, they frequently provide non-contextual information, especially when involving issues that have a significant political or social impact.

The Indian judiciary has incorporated Information and Communication Technology (ICT) under the aegis of the e-Courts Integrated Mission Mode Project (e-Courts Project). This has been a part of the National e-Governance Plan (NeGP) which has been implemented in all High Courts and the District Courts of India. It was based on the 'National Policy and Action Plan for Implementation of Information and Communication Technology' prepared by the e-Committee of the Supreme Court of India in 2005. Advancement in technology and increased internet penetration has facilitated transmission of live or pre-recorded video feed to devices like computers, tabs and mobiles. Live-webcast or streaming of court proceedings in real time can be implemented through available technological solutions.[11] For improving transparency and greater access to the justice system Supreme Court e-committee has initiated Live-webcast or streaming of court proceedings in India for connecting geographically dispersed audiences across the nation.[12]

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9 Cunliffe Emma, *Open Justice: Concepts and Judicial Approaches* 40 FED. L. REV. 385 (2012)

10 Draught of Code for the Organization of the Judicial Establishment codified the principle of open justice as: "Article XVIII- Judicial proceedings, from the first step to the last inclusive, shall, in all cases but the secret ones herein specified, be carried out with the utmost degree of publicity possible."

11 E-Committee Supreme Court of India "Model Rules for Live Streaming and Recording of Court Proceedings" Available at: https://ecommitteesci.gov.in/document/model-rules-for-live-streaming-and-recording-of-court-proceedings/ (last visited Jan 15, 2023).

12 Krishan Das Raj Gopal, *Live Streaming Court Proceedings Crucial for Dissemination of Information: CJI*, THE HINDU (July 17, 2021) https://www.thehindu.com/news/national/live-streaming-court-proceedings-crucial-for-dissemination-of-information-cji/article35386356.ece, visited on 15-1-2023.

Whereas Gujarat High Court, Jharkhand High Court, Karnataka High Court, Madhya Pradesh High Court, Orissa High Court, Patna High Court have started live streaming of their Court Proceedings.

Court proceedings excluded from live streaming are:

- Matrimonial matters, sensitive matters including sexual assault.
- Proceedings to POSCO cases happen under the camera so that identity of the child is not revealed.[13]
- Matters involving Medical Termination of Pregnancy.
- the presiding judge of each courtroom shall have the discretion to disallow live-streaming for specific cases where, in his/her opinion, publicity would prejudice the interests of justice. This may be intimated by the presiding judge in advance or live-streaming may be suspended as and when a matter is being heard; and

Where objections are filed by a litigant against live-streaming of a case on grounds of privacy, confidentiality, or the administration of justice, the final authority on live-streaming the case shall lie with the presiding judge.

Indian Judiciary on Live Streaming of Court Proceedings – A Critical Analysis

The Hon'ble Supreme Court of India on 26.09.2018 through the Writ Petition (Civil) No. 1232 of 2017 allowed the "Live streaming of Supreme Court case proceedings on constitutionally significant, nationally important topics that affect the general public or a significant number of people".[14] A citizen of India has the right to freedom of speech and expression under Article 19(1)(a) of the Indian Constitution. It is now widely accepted that one aspect of Article 19 (1) (a) of the Indian Constitution is the right to know and receive information. On the other side, the Article 21 grants an individual the right to privacy. There is a fundamental connection between Articles 19 and 21, which together uphold the honour of "Live Streaming of Supreme Court's Proceedings.' The 103rd report from a parliamentary standing committee on "Functioning of Virtual Courts / Court Proceedings by Video

[13] Model Rules for Live Streaming and Recording of Court Proceedings, Rule No. 5.2 - 'Matters registered under or involving the Protection of Children from Sexual Offences Act, 2012 (POCSO) and under the Juvenile Justice (Care and Protection of Children) Act, 2015.'

[14] (2018) 10 SCC 639.

Conferencing" was then presented in September 2020.[15] However, the Hon'ble Apex court while considering the issue of whether court proceedings should be streamed or not opined that live streaming of court proceedings, Justice D.Y Chandrachud in his separate cornering opinion "The finest disinfectant is sunlight. By extending the idea of open courts, live-streaming will guarantee that the interface between a court proceeding and virtual reality will result in the largest possible dissemination of information, adding openness and accountability to the judicial process."[16] The opinion of Justice D.Y Chandrachud should not be just read in the light of court proceedings. Rather, it can be even applied to live streaming of classroom as well as parliament proceedings. However, the idea of live streaming opens pandora's box. It is a slippery slope. The privacy problem is the main difficulty associated with live broadcasting. The Supreme Court in *Puttaswamy Case*[17] observed that "privacy is a natural right, which inheres in every human being by birth".[18] Further, the right to privacy has been violated by the live stream plan.

The stream will include sensitive personal information about them, such as their voice recordings, behavioural data, and information about their communications. Therefore, it appears unlikely that live streaming will be successful in achieving its intended goal, whether it is in the classroom or the courtroom, unless and until the government is able to handle the issue of privacy. Second, there is the consent matter.[19] Considering a class of 100 pupils or a courtroom with 80 cases, the confusing question is whether individual consent will be necessary or

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15 Available at: https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/125/103_2020_9_16.pdf, (last visited Jan 12, 2023) According to the Report, live streaming plays a crucial role in "promoting openness and transparency, which would strengthen public confidence in the judicial system."

16 *Swapnil Tripathi v. Supreme Court of India*, (2018) 10 SCC 639.

17 ((2017) 10 SCC 1).

18 *Justice K.S. Puttu Swami & others v. Union of India*, (2017) 10 SCC 1.

19 Media coverage under Rule 18c(a) and (b) of the Texas Rules of Civil Procedure is permitted only on written order of the court. A request for an order shall be made on the form included in these rules. The following procedure shall be followed, except in extraordinary circumstances and only if there is a finding by the court that good cause justifies a different procedure: (i) the request should be filed with the district clerk or county clerk, depending upon the court in which the proceeding is pending, with a copy delivered to the court, court administrator, all counsel of record and, where possible, all parties not represented by attorneys, and (ii) such request shall be made in time to afford the attorneys and parties sufficient time to confer, to contact their witnesses and to be fully heard by the court on the questions of whether media coverage should be allowed and, if so, what conditions, if any, should be imposed on such coverage. Whether or not consent of the parties or witnesses is obtained, the court may in its discretion deny, limit or terminate media coverage.

not, and if a party declines, would the authorities cease live broadcasting after a single consent withdrawal.[20]

Concerns with Respect to Live streaming

Many people have expressed concerns over live screaming's ramifications in light of its advantages and the celebration of legal activists. Judges and attorneys may unconsciously change their behavior in a sensationalistic age. For fear of negative feedback on social media, judges might hesitate from asking or making controversial statements. On the other hand, attorneys may decide to appeal to the crowd and persuade the general public rather than the judges. Additionally, there has been a tendency recently to place more weight on each judge's unique oral observation than on the entirety of the judgment's reasoning or dicta.[21]

(i) Contempt of court: There are already video snippets of Indian judicial sessions with dramatic titles and little information on YouTube and other social media platforms, such as "High Court super angry on army officer."[22] Thus, such kind of clipping sends a wrong kind of message to the public at large.[23]

(ii) Misinformation and sensationalism: There are worries that the public may become misinformed as a result of irresponsible or motivated content use. Social media's introduction transformed every individual into a potential journalist. According to a study, judges operate like politicians when given free television time, acting to increase their own publicity. There are signs that portions of the legal system that were formerly in the public domain are already vulnerable to sensationalism

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[20] Press Information Bureau, Live Streaming of Court Proceedings (Mar 25, 2022) available at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1809626, (last visited Jan 24, 2023- The e-Committee of the Supreme Court has set up a Committee to draw up Standard Operating Procedure (SOP) for Live Streaming. Additionally, under the guidance of e-Committee, Supreme Court of India, a sub-committee was constituted for framing Model Rules for Live Streaming. The said rules have been forwarded to Computer Committee of High Courts for the feedback and suggestions.

[21] Yash Agarwal, *Challenges in Setting up virtual and Online Courts in India*, THE LEAFLET (Oct. 23, 2022), https://theleaflet.in/challenges-in-setting-up-virtual-and-online-courts-in-india/(last visited Jan 23, 2023)

[22] Apurva Viswanath, *Live Streaming of Supreme Court Proceedings: The Rationale and the Concerns*, THE INDIAN EXPRESS (Feb. 4, 2023) https://indianexpress.com/article/explained/live-streaming-of-sc-proceedings-the-rationale-and-the-concerns-8164955/ (last visited Jan 23, 2023)

[23] *CJI Expresses Concern at Circulation of Clips Taken out of Context says Sanctity of Institution must be Maintained*, LIVE LAW (Nov. 25, 2022) https://www.livelaw.in/top-stories/live-streaming-cji-expresses-concern-at-circulation-of-clips-taken-out-of-context-says-sanctity-of-institution-must-be-maintained-215030, (last visited Jan. 21, 2023).

and misinformation. Some high courts have made their archived live-streamed video content available, including those in Gujarat, Karnataka, and Patna. They are witnessing films of their procedures that have been edited together strewn around YouTube with headlines like "Young lady lawyer's confidence in court!" Will she triumph? When the wife went to the High Court, the angry avatar of justice revealed the husband's secret. Additionally, there are propaganda videos that are circulated through WhatsApp that use a brief excerpt from a query or observation made by a court or attorney and typically demonize the expert. The majority of these videos[24] avoid accountability by being anonymous. Any practicing advocate would agree that a court argument is a whole procedure that must be viewed as a whole, rather than through individual questions or comments made during this process. Judges and lawyers may self-censor during live-streamed proceedings if elements of the proceedings can be shared in brief, false summaries on social media. This will have the unintended consequence of sanitizing the oral processes and inhibiting real courtroom participation.[25]

(iii) Decency of questions: Judges may ask or say anything during proceedings that might be viewed as controversial. Oral observations by the court are becoming more common, and they are replacing reasoned judgment and consequential orders. However, oral observations are not binding on parties. This, is evident from the Nupur Sharma case, wherein, a bench comprising of J Surya Kant and J Pardivalla made certain observation in the case, which attracted huge social media criticism.[26] Furthermore, despite the fact that none of the statements made in open court made it into the final ruling issued by the bench, judges were compelled to withdraw them due to the massive online campaign.

(iv) Credibility of the Institution might be at risk: Live streaming has the potential to have two subconscious effects on judges if it is introduced

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[24] *Delhi High Court Restraints Circulation of Sexually Explicit Video of Judicial Officer*, THE WIRE, (Dec 1, 202) https://thewire.in/law/delhi-hc-restrains-circulation-of-sexually-explicit-video-of-judicial-officer, (last visited on Jan 21, 2023)

[25] Staff Writer,*The consequences of oversharing on Social Networks.* REPUTATION DEFENDER (Sep. 26, 2011) https://www.reputationdefender.com/blog/social-media/consequences-oversharing-social-networks, (Jan. 21, 2023)

[26] Nalini Sharma, *Three Instances when Judges were Forced to Withdraw their Remarks made in Court*,INDIA TODAY (Jul 5, 2022) https://www.indiatoday.in/india/story/three-instances-when-judges-were-forced-to-withdraw-their-remarksmade-in-court-1970661-2022-07-05(last visited on Jan. 21, 2023)

without protections. First, judges are not permitted to raise issues or make statements during proceedings that might be viewed negatively. Second, there is a trend toward replacing reasoned judgment and consequential orders with the court's spoken opinions, which are not binding on parties. This trend may be accentuated by live streaming, when the reporting emphasizes the oral proceedings rather than the decision. Similar to this, attorneys who are conscious of their new audience could decide to show off and appeal to the crowd, particularly in a case they anticipate losing. Consequently, live broadcasting has the capacity to both amplify and inhibit desirable discourse in a courtroom.

(v) Copyright Over Live-Stream Videos Of Hearings- Recently, a petition has been filed in the Supreme Court of India seeking to "Direct for a special agreement with You Tube for safeguarding the copyright over live streaming and archived judicial proceedings"[27] as per the directions in judgment of *Swapnil Tripathi vs. Supreme Court of India*.[28] Delhi High Court HC said that it has been provided that any unauthorized usage of live streaming will be punishable under the Indian Copyright Act, 1957 and contempt of court along with other laws. However, the same could be used for disseminating news and for training, academic and educational purposes.[29]

(vi) Using Supreme Court clips for Commercial gains- The possibility that anyone may exploit the recordings and broadcast for commercial gain is one of the concerns in the minds of the legal community. Due to this, the Supreme Court recently gave notice in a petition in which the same problem was raised. Supreme Court effort to overcome to challenges. The Draft Model Rules for Live-Streaming and Recording of Court Proceedings were published by the Supreme Court's e-Committee on May 28, 2021, and the public was invited to comment on the proposal

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27 Padmakshi Sharma, *Supreme Court Issues Notice on Plea to Retain Court's Copyright Over Live-Stream Videos of Hearings, Prevent Commercial Use of Footages*,LIVE LAW (Oct. 17, 2022) http://www.livelaw.in.elibrarydsnlu.remotexs.in/top-stories/supremecourt-issues-notice-on-plea-to-retain-courts-copyright-over-live-stream-videos-of-hearings-prevent-commercialuse-of-footages-211896. (last visited on Jan. 21 2023)

28 (2018) 10 SCC 639

29 Kriti Kumar,*Live Streaming and Recording of Court Proceedings Rules of the Delhi High Court*, *2022*, SSC ONLINE (Jan 24, 2023) https://www.scconline.com/blog/post/2023/01/24/high-court-of-delhi-notified-live-streaming-and-recording-of-court-proceedings-rules-of-the-high-court-of-delhi-2022-legal-update-legal-research-legal-news/ (last visited Jan. 21, 2023,) HC noted, "To imbue greater transparency, inclusivity, and foster access to justice, it is expedient to set up infrastructure and framework to enable live streaming and recording of proceedings."

until June 30, 2021.[30] This is a significant step toward increasing judicial process transparency and will make the higher judiciary much more accessible to the general public. The guidelines specify at the outset certain cases are prohibited from being live streamed, Questions left unanswered by the committee. Overall, this is a really positive development, and the student author wholeheartedly endorses the decision to stream court hearings live. This will increase accountability and openness, encourage public confidence in the systems that administer justice, and significantly raise the general public's level of legal literacy. It demonstrates the e-dedication Committee's to working to strengthen the judiciary as a whole. Any such action, though, must appropriately strike a balance between privacy and the general good. Although we are aware that the Live-Streaming Rules have made a clear and thoughtful endeavour to achieve such a balance, the student claims that minor adjustments are still needed to better this balance.

A Critical Analysis of Draft Live-Streaming Rules

In order to control the live streaming of court proceedings, the Supreme Court later drafted the "Model Rules for Live-Streaming and Recording of Court Proceedings" in June 2021.[31] Live streaming was prohibited by these guidelines in cases involving divorce, sexual assault, and gender-based violence. Legal activists and practitioners have underlined time and time again how watching court proceedings live will boost the public's interaction with the judicial system.[32] As and when the decisions are made, professionals, law students, and journalists will have the chance to analyse the intricacies of the arguments and rulings. Additionally, it is asserted that as the general public is the major stakeholder and the Supreme Court also deliberates on matters of national importance, much like India's Parliament, which is live streamed, they should have access to the proceedings in real time. The Historic Day after four Years the Supreme Court of India started streaming live court hearings from September 2022. The National Informatics Centre's YouTube page hosted a live webcast of the three Constitution benches, which received about 800,000 views. The Hon.

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30 Sharma, *supra* note 27

31 E-Committee Supreme Court of India Draft Model Rules for Live Streaming and Recordings of Court Proceedings, for details see: ecommitteesci.gov.in, visited on 24-1-2023

32 According to Senior Advocate Indira Jaising, "There is no substitute for first-hand knowledge, especially in the era of what has come to be known as fake news and hence, there is urgent need for real-time information."

Justice UU Lalit, Chief Justice of India, presided over a meeting where the decision to stream the proceedings in real time was unanimously adopted.[33] The live streaming capability is now restricted to Constitution benches' hearings. These benches, which consist of five or more judges, make decisions on important legal issues concerning the interpretation of the Indian Constitution. Following section will present gaps in the Model Rules on Live-Streaming of Court Proceedings.

(i) No provision to secure personal data: For the sole purpose of the Court and any potential appellate stages, video recordings of the proceedings will still be made in circumstances where they are not live webcast. But no regulations regarding the security and privacy of such recordings have been offered. This is especially concerning because it pertains to delicate cases where keeping secrecy is crucial, such those involving sexual offences and gender-based violence. It's also important to note that India does not yet have a legislative framework for data protection.[34] The Draft Live-Streaming Rules do make it clear that in criminal cases, dummy names, face masking, pixilation, and/or electronic voice distortion will be used to preserve the testimony of victims and witnesses in the recordings. When a Court is unable to find such methods to protect the anonymity of victims and witnesses, there is no advice. In these situations, the Rules should make it clear that the Court must not record court proceedings if the victim's or witnesses' identities cannot be secured by the employment of such safeguards. The recordings are likely to contain sensitive personal information because they pertain to individual plaintiffs' judicial proceedings, including criminal prosecutions. In fact, even a person's participation in a criminal trial may be considered sensitive information. The Rules are very specific about what kinds of material must be screened from public streaming, but they are less explicit about what kinds of information can even be screened from recording. Since Rule 7.4 mandates that all recordings be kept for at least six months, it's important to understand how this information will be protected. This is especially concerning because India lacks a data protection regime.

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[33] C Raj Kumar, *Live Streaming Supreme Court Proceedings: A Step Closer to a Stronger Democracy*, THE INDIAN EXPRESS (Oct. 4, 2022) https://indianexpress.com/article/opinion/columns/livestreaming-supreme-court-proceedings-a-step-closer-to-astronger-democracy-8188265, visited on 24-1-2023

[34] *Live and Let Live: The Supreme Court Releases Draft Rules for Live Streaming of Court Proceedings* https://internetfreedom.in/live-and-let-live-the-supreme-court-releases-draft-rules-for-live-streaming-of-courtproceedings-2/. (last visited Jan. 21, 2023).

(ii) Tighten the language to avoid arbitrariness: It is necessary to tighten and clarify Rule 3.2, which asks the DCR to make sure that nothing "uncivil or inappropriate" is streamed in public. Technical specialists cannot make moral judgments about what is proper and what is impolite. The standards for this may be much more clearly stated in the Rules. [35]

(iii) Tighter protections for victims/witnesses: There is no direction on how the Dedicated Control Room(DCR)[36] should proceed in situations where the anonymity of victims and witnesses cannot be protected in the recordings via fake names, face-masking, pixilation, and/or electronic distortion of voice due to technological issues or logistical problems. It should be made clear that the proceedings will be put on hold until these problems are fixed. Otherwise, technical workers might record without the necessary safeguards.

(iv) Timelines in streaming: Subject to limitations contained in these rules, the live stream shall commence as soon as the bench assembles and instructs the court staff to start the proceedings and shall end when the bench signals its conclusion for the day.[37] Additionally, Rule 8.3 i.e. streaming delay requirement does not specify any criteria or goals that would be served by the delay. Although the delay may be necessary to ensure that no unlawful content is transmitted, it is possible for this capability to be abused in the absence of clear instructions on how it should be used.

(v) Extensive efforts required to put rules in practice: Finally, because all district and sessions courts in rural India must comply with the Live-Streaming Rules; extra care must be taken to maintain and update the electronic infrastructure while implementing the Rules. For each courtroom in each courthouse in each municipal court in India, a full team of technical experts will be needed. This will necessitate a significant hiring and training effort that is essential to the implementation of the Live-Streaming Rules.

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35 *Striking the balance between privacy and public interest in judicial proceedings: Our comments to the Supreme Court's Draft Live Streaming Rules*INTERNET FREEDOM FOUNDATION (July 21, 2022) https://internetfreedom.in/striking-the-balance-between-privacy-and-publicinterest-in-judicial-proceedings-our-comments-to-the-supreme-courts-draft-live-streaming-rules(last visited Jan. 21, 2023)

36 Rule 3 of Model Rules for Live Streaming and Recording of Court Proceedings talks about Requisitioning and Positioning of Human Resources.

37 Rule 8.3 of Model Rules for Live Streaming and Recording of Court Proceedings talks about Relay of Court Proceedings

(vi) Greater protection for personal information is required: General data protection precautions are outlined in Rule 8.1 of the Draft Rules, which also states that "any one of the masking techniques, as given under Rule 6.8, may be utilized." However, Rule 6.8 is absent from the Draft Rules (the sub-parts of Rule 6 are Rules 6.1-6.5). Rule 8.1 should beclear about the circumstances in which the masking techniques in Rule 5.8 are not accessible due to technical or logistical issues in order to prevent the control room from operating without the masking techniques.

Conclusion

From the above discussion it was felt that live streaming of Court proceedings has the potential of throwing up an option to the public to witness live court proceedings which they otherwise could not have due to logistical issues and infrastructural restrictions of Courts; and would also provide them with a more direct sense of what has transpired. Thus, technological solutions can be a tool to facilitate actualization of the right of access to Justice bestowed on all and the litigants in particular, to provide them virtual entry in the Court precincts and more particularly in Court rooms. In the process, a large segment of persons, be it entrants in the legal profession, journalists, civil society activists, academicians or students of law will be able to view live proceedings in *propria persona* on real time basis. Justice Rewati Mohite Dere[38] ruled that "certainly the public has a right to know what is happening in this case". The decision taken in *Swapnil Tripathi*[39] and *Indira Jai singh's Case*[40] is one of the most path breaking judgment ever delivered in the annals of the Supreme Court and will be always remembered in the time to come. It will not just promote more transparency but also enable common man to get well acquainted with how justice is delivered in the top court. So far as Indian judicial system is concerned it can be fairly concluded that to an extent it has followed the principle of open justice to make the system transparent

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38 In the order passed by Revati Mohite Dere, J. addressed two criminal petitions filed challenging the jurisdiction of the City Civil and Sessions Court for passing an impugned order dated 29.11.17, in Session Cases Nos. 177of 2013, 178 of 2014, 577 of 2013 and 312 of 2014, banning the print, electronic and social media from publishing/posting or reporting any of the court proceedings.

39 (2018) 10 SCC 639.

40 *Indira Jai Singh vs. Secretary General of Supreme Court & Ors* (2018) has *inter alia* observed that : (i) It is important to reemphasise the significance of live streaming as an extension of principle of open justice and open Courts; (ii) The process of live streaming should be subjected to carefully structured guidelines;(iii) Initially, a pilot project may be conducted for about three months by live streaming only cases of national and constitutional importance which can be expanded in due course with availability of infrastructure.

and accountable. [41]The strength of the judiciary is its open court system as everyone is free to watch what transpires in court. Such a system forecloses any possibility of hanky-panky or foul play. However, in India, the concept of open justice seems to be undergoing a silent burial as the courts are increasingly getting inaccessible. Besides, there is an increasing tendency to ban the reporting of court proceedings in sensitive cases.[42]

The Chief Justice of Canada, the Rt Hon Beverley McLachlin P.C that "The law belongs to the people. The principle of open justice is the cornerstone for ensuring that law fulfils this role, and does not become a tool for arbitrary power. Open justice exists in order to ensure that decisions in court are served properly and effectively. Exceptions to the rule of open justice represent those instances in which a completely open court would have undermined the purpose of the hearing. Nevertheless, when an application is made for a private hearing, the reasons for allowing it must be justified by the Court. This enables the confidentiality of information to be maintained, while ensuring that such exceptions are properly justified." Without any proper guidelines and any data protection law, live-streaming though may be intended to do welfare. However, it may not be able to achieve its intended objective and may lead to infringement of privacy. [43]Therefore, it is important to ensure that the state takes an active step for closing this vacuum and bring in laws to safeguard the interest of its citizen.[44]

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41 *Indira Jai Singh vs. Secretary General of Supreme Court & Ors* (2018) has inter alia observed that : (i) It is important to reemphasise the significance of live streaming as an extension of principle of open justice and open Courts; (ii) The process of live streaming should be subjected to carefully structured guidelines;(iii) Initially, a pilot project may be conducted for about three months by live streaming only cases of national and constitutional importance which can be expanded in due course with availability of infrastructure.

42 Delhi court has restrained the media from reporting on the FIR filed against Justice I.M. Quddusi, a former Odisha high court judge, who is an accused in the medical admissions bribery case. The court has said that the constitutional right of free speech does not "confer a right" to defame persons and harm their reputation by "false and unsubstantiated allegations". It is baffling that the court has termed the allegations "false and unsubstantiated" before the trial.

43 Saeed Khan on "Gujarat High Court Bar Complains to Chief Justice about Violation of Live Streaming Rules," The Bar association has brought to CJ's notice that many cases involving personal disputes and offences against women and children, which are not meant for live-streaming, are also live-streamed. This is in violation of fundamental rights including Right to Privacy and Right to be Forgotten of lawyers, litigants and their relatives.
Available at: https://timesofindia.indiatimes.com/city/ahmedabad/gujarat-hc-bar-complains-to-chief-justice-about-violation-of-live-streaming-rules/articleshow/92731936.cms, (last visited Jan. 12, 2023).

44 Siddarth R. Gupta &Utkarsh Sharma, *Live Streaming in Courts: Accessible and Affordable and Accountable Judiciary*, SSC ONLINEhttps://www.scconline.com/blog/post/2021/06/23/live-streaming-n-courts-accessible-affordable-and-accountable-judiciary-part-2/ (last visited on Jan. 12, 2023).

CURIOUS CASE OF DEFENCE PROCUREMENT IN INDIA : STRIVING TOWARDS DEFENCE INDIGENIZATION

Ms. Anita Singh[*]

Abstract

The peninsular structure of India also places it strategically close to the sea lane stretching between Suez Canal to Persian Gulf to the Straits of Malacca which is the prime area through which the oil from the Gulf region transpires. This is an area which has attracted super power rivalries in the past and continues to be a region of heightened activity by extra regional navies on account of current global security concerns. Having due regards to the strategic location of India and the fact that it is critically located on the most crucial routes i.e. the Silk Route and Oil Route of the Gulf region, it is of paramount importance for the nation to establish, train and periodically review the functioning of its armed forces, both internal and external, in order to safeguard its security interests. Its unique geographical and topographical diversity has made India face numerous challenges especially in the terms of maintaining security for which high-end defence equipment and well-trained armed forces are required.

The author through this article ventures in this sketchy domain of Defence Procurement Laws. The focus of the author is to dwell upon this gap between the policy on paper and the practice on field and the impact of this difference on the government and private sector entities who wish to invest in the defence sector.

Key words: Defence Law, Defence Procurement Procedure, Defence Production Policy, Security Studies

[*] Ms. Anita Singh is an Assistant Professor (Law) at Hidayatullah National Law University, Raipur and a Doctoral Scholar at NALSAR University of Law, Hyderabad

Introduction

The maintenance of the security and stability and the law and order in a country is the ultimate responsibility of the government of that country. The geographical location of India is strategically placed especially in the context of security maintenance in the so-called Eastern region and the Indian Ocean region[1]. Its unique geographical and topographical diversity has made India face numerous challenges especially in the terms of maintaining security, especially in recent times, for which high-end defense equipment and well-trained armed forces are required[2]. Accordingly, it is extremely critical for a nation to equip its armed forces with advanced and contemporary technology and modern warfare equipment which will supplement and prepare the armed forces to face any kind of planned or unplanned external or internal threats to the national security of the country. India's functioning of armed forces and its preparedness to face war-like situations in unprecedented times like these depend substantively on the resources available with the country's armed forces at their disposal. A well-equipped and well-trained armed force is a key factor in determining the extent of the military strength of a nation[3].

Traditionally there are primarily two means to equip one's resources or to build one's resources. Firstly, to procure the requisite resources from original producers or vendors placed beyond the territorial jurisdictions of the country. Many countries including India are heavily dependent upon imports through the mode of outright purchase or licensed production to meet these requirements[4]. The second route is to produce or manufacture the same content within the boundaries of the countries using the resources available with the country. Indigenization of production capabilities in this context refers to the latter scenario.

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1 The Maps of India, Latitude and longitude finder, Lat Long of Indian states Maps of India (2013), https://www.mapsofindia.com/lat_long/ (last visited Dec 13, 2022).

2 LAXMAN KUMAR BEHERA, INDIAN DEFENCE INDUSTRY: AN AGENDA FOR MAKING IN INDIA MANOHAR PARRIKAR INSTITUTE FOR DEFENCE STUDIES AND ANALYSIS (2016), https://idsa.in/system/files/book/book_indian-defence-industry_0.pdf (last visited 2022).

3 Ashley J. Tellis et al., MEASURING NATIONAL POWER IN THE POST INDUSTRIAL AGE RAND Corporation (2000), https://www.rand.org/pubs/monograph_reports/MR1110.html (last visited Feb 16, 2023).

4 Stockholm International Peace Research Institute, SIPRI arms transfers database SIPRI ARMS TRANSFER DATABASE: AN INDEPENDENT RESOURCE ON GLOBAL SECURITY (2022), https://www.sipri.org/databases/armstransfers (last visited Feb 16, 2023).

Indigenization as the term suggests refers to the process of making either manufacturing or producing a product, good, service, or technology with the assistance of locally available resources which would be compatible in the local context[5]. Indigenization as a term is susceptible to multiple interpretations depending upon the context in which it is used as there is no single or standard or uniform definition of the term. Indigenization is susceptible to numerous perspectives and interpretations. To say the least, it refers to the process of or rather the art of designing, developing, and manufacturing or producing an item or product or technology or service with the assistance of resources available domestically and which will suit the requirements of the local public at large and consequently meet the welfare objectives of the government[6]. The fundamental premise remains to design, develop and manufacture something with the assistance of resources, natural, human, or otherwise, which are available domestically within the jurisdiction of a country.

In the context of the defense sector, the term *indigenization* refers to the process of developing self-reliance and achieving self-sufficiency in the production or manufacture of items with the help of the raw materials available or indigenously produced in the country and to avoid importation of the same[7].The development of indigenous defense production capabilities is one of the developmental goals of a country and this goal has a stronger relevance and influence as far as the defense sector of the country and more particularly its indigenous production capabilities are concerned. Indigenization of the defense sector caters to the larger objective of the country to become self-reliant in meeting the requirements of the armed forces and the defense sector of the country[8]. Achievement of Self-Sufficiency and becoming self-reliant to meet the critical needs of a nation is one of the crucial objectives and underlying driving forces behind the policy initiatives of a country. Self-reliance refers to the idea of being self-sufficient in ensuring that the basic requirements of key infrastructural sectors are met through the resources

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5 Oxford English Dictionary, DISCOVER THE STORY OF ENGLISH MORE THAN 600,000 WORDS, OVER A THOUSAND YEARS HOME: OXFORD ENGLISH DICTIONARY (2004), https://www.oed.com/start;jsessionid=538A3B06147A7678C15913DBDDEF590C?showLogin=false (last visited Apr 9, 2022).

6 Merriam Webster Dictionary, INDIGENIZE DEFINITION & MEANING MERRIAM-WEBSTER (2015), https://www.merriam-webster.com/dictionary/indigenize (last visited Feb 16, 2023).

7 Hence through the use of the phrase '*indigenous production capabilities*' signify this process.

8 Dalip Bhardwaj, 'MAKE IN INDIA' IN DEFENCE SECTOR: A DISTANT DREAM ORF (2018), https://www.orfonline.org/expert-speak/make-in-india-defence-sector-distant-dream/ (last visited Feb 16, 2023).

available at the disposal of a state and that these needs are not met from procurement of resources available outside the domain of a country[9]. This remains one of the most crucial parameters on which the military strength of a country is determined[10].

India's focus on its security also deserves attention for the fact that in view of the contemporary developments in the role of the country as an emerging economic power especially in Asia, it has also become the central point of the South Asian region. The continuing presence of terrorist and fundamentalist forces in its neighbourhood has prompted India to maintain a high level of defence vigilance and preparedness to face any challenge to its security[11].

In the context of this background in the last one decade one of the key focusses of the country is on strengthening the defence capabilities of its armed forces. One of the focus areas of the government in this regard, is to equip the armed forces with the latest technologies and equipments. Every year substantial portion of the budget is allocated for this purpose. On a policy level as well, attempts have been made to strengthen the defence capabilities of the country and to make the country self-sufficient in ensuring defence capabilities. This is evident by the very essence of the Make-in-India policy. However, what is interesting to note that despite having the intention and policy framework in place, India continues to procure heavily from foreign vendors both government and non-governmental. Hence, this paper focuses upon the gap created by the fact that despite numerous attempts made by the government at a policy level to develop self-sufficiency in the defence sector, India till date is heavily reliant of foreign procurements.

Defence Base of India

General Nature of the Indian Defence Industrial Base in India

Indian Defence Industrial base at present comprises of a compilation of numerous small-scale research and development and

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9 Ministry of Defence, SELF-RELIANCE IN DEFENCE MANUFACTURING PRESS INFORMATION BUREAU (2022), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1795540 (last visited Feb 16, 2023).

10 Http://blogs2.law.columbia.edu, LOG IN ' BLOGS2@CLS - WordPress, http://www2.law.columbia.edu/course_00S_L9436_001/North%20Korea%20materials/4a.htm#:~:text=Implementing%20the%20principle%20of%20self,defense%20of%20one's%20own%20country (Accessed: December 13, 2022). (last visited Feb 16, 2023).

11 MOD, Annual Report - 2018 - 2019 13–56 (2018).

assemblage actors coupled with a group of private small-scale assemblage parts producing / manufacturing units. To be specific, as per the official disclosures, India has a vast industrial base which includes approximately fifty-two research laboratories[12] established directly under the domain of the Defence Research and Development Organization (DRDO), nine Defence Public Sector Undertakings[13], and thirty-nine-odd Ordnance Factories[14]. All these sectors are established and run under the aegis of the Ministry of Defence, Government of India. The functions of this seemingly vast operational sector are further supplemented by a small and medium scale private sector which primarily engages in production and / or manufacturing of assemblage units or spare parts which are further installed into the defence equipments that are procured from other parts of the world. However, having due regards to the extensive nature of imports or procurements it has been often criticized that the existing industrial base is not equipped to meet the advanced requirements of the internal and external security forces of the country. This can be easily deduced from the Annual Reports of the Defence Ministry of the past one decade which categorically shows and blatantly boasts of equipping the defence and security sector of the country with state-of-the-art defence equipments that have been procured from outside.

The defence base of India was primarily developed to support equipments and technologies that we procure from outside. Consequently, India engaged extensively in procurement of equipments and technologies for the armed forces from governmental and non-governmental vendors established abroad. Substantial chunk of the budget allotted to the defence sector was set aside for such procurement.

Contribution of the Britishers in developing the Defence Industrial Base in India

For the purposes of understanding the discussion around indigenization, we need to digress a bit and discuss the background of

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12 Supra Note 3

13 FAQs pertaining to offset banking can the vendor apply for banking. - , MINISTRY OF DEFENCE, GOVERNMENT OF INDIA (2016), https://www.ddpmod.gov.in/sites/default/files/FAQ%2007042017(1).pdf (last visited Feb 16, 2023).

14 MINISTRY OF DEFENCE, DIRECTORATE OF ORDNANCE (COORDINATION AND SERVICES): GOVERNMENT OF INDIA HOME | DIRECTORATE OF ORDNANCE (COORDINATION AND SERVICES) | Government of India (2016), https://ofbindia.gov.in/index.php?wh=ourunits#F.pdf (last visited Feb 16, 2023).

the defence industrial base in India and the consequent need for indigenization and evaluate the effectiveness of our existing policy framework in this regard.

The erstwhile colonial power has a huge role to play with respect to the development of the production and manufacturing aspects of the Indian Defence sector. The British government had realized that while the main equipments and defence technology can be procured from the home country, the necessary supplements, some of which were perishable, needed to be produced within the country. For this purpose, a small-scale supplementary parts base was established in India. For instance, the Dhirendra Committee Report specifically talks about the base for gunpowder which is a perishable item and was required in large quantities as it was also the time when the march for freedom struggle had started, and violence was one of the key methods to suppress the erupting struggle[15]. Hence this prompted the colonial government to set up small mills within the fortifications at Bombay (now Mumbai), Madras (now Chennai) and Calcutta (now Kolkata) to make gunpowder. In addition to gunpowder mills, smithy and carpentry yards were established to make gun carriage. The Fort William complex was augmented by a brass gun foundry and thereafter a full-fledged production factory at nearby Cossipore (Kashipur). This factory was subsequently recognized as the first Ordnance Factory. This factory also subsequently ventured into manufacturing of shell rifles by extending its premises. Subsequently many ordnance factories were established in India whose sole purpose was to supplement the usage of the defence equipments with the help of locally produced items of what can be termed as quartermaster stores. Needless to point out this methodology was widely adopted and popularized for its cost-effective approach. But in the long run, especially after the departure of the British power, this methodology proved to be extremely detrimental for the Indian defence sector. India always lacked the requisite technology to manufacture / produce state-of-the-art defence equipments and solely relied on the importation of the same with the only support of repair and maintenance provided to the equipments indigenously.

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[15] MOD, HOME | MINISTRY OF DEFENCE REPORT OF THE EXPERTS COMMITTEE, MINISTRY OF DEFENCE. (2015), https://www.mod.gov.in/sites/default/files/Reportddp.pdf (last visited Feb 16, 2023).

India – the Spender!

The significance of the defence sector is India can be seen not only from an operational perspective but also from the perspective of the annual financial allocation to this sector. India has the fourth largest armed forces in the world and its annual defence budget is about 1.90% of its GDP[16]. If we look at the pattern of budget allocation for the defence sector from the year 2000 to 2010, the scope of the monetary allocation for the defence sector has nearly become three times[17] i.e. from Rs. Fifty-eight thousand five hundred and eighty-seven to Rs One Lakh forty-one thousand seven hundred and eighty-one[18]. This amount increased by more than seventy percent by the time we reached the year 2015[19]. For the year 2017-2018, a sum of Rs. Two Lakh seventy-four thousand one hundred and fourteen has been earmarked[20].

However, on the other hand it is also pertinent to note that in proportion to the humongous financial allocation was a large military expenditure as well. Till date India remains one of the top ten military spenders in the entire world after U.S.A., China, Russia, Saudi Arabia, France and UK and it moved up to the fourth largest military spending nations in the world[21]. The major concern for us in a scenario like this is not the quantum of military spending but the dependency of our armed forces on imports despite the implementation of idealistic yet robust policies for indigenous development of the defence sector. Most of its military spending goes into importing equipments from foreign vendors (whether governmental or non-governmental) and this pattern has bestowed upon India the title of the largest defence equipment importer across the world. India has the third largest armed forces in the world. Significantly, during 2011 to 2016, India has remained the world's

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16 Price Waterhouse Coopers, AEROSPACE AND DEFENCE SERVICES - PWC INDIA - CONSULTING | ESG DECODING THE INDIAN AEROSPACE AND DEFENCE SECTOR DOMESTIC AND FOREIGN INVESTMENTS AND OFFSET OBLIGATIONS (2017), https://www.pwc.in/assets/pdfs/industries/aerospace-and-defence-services.pdf (last visited Feb 16, 2023).

17 *PRS LEGISLATIVE RESEARCH, DEMAND FOR GRANTS 2018-19 ANALYSIS: DEFENCE PRS LEGISLATIVE RESEARCH (2023), https://www.prsindia.org/parliamenttrack/budgets/demand-grants-2018-19-analysis-defence (last visited Feb 16, 2023).*

18 LAXMAN KUMAR BEHERA, INDIA'S DEFENCE BUDGET 2019-20 INDIA'S DEFENCE BUDGET 2019-20 | MANOHAR PARRIKAR INSTITUTE FOR DEFENCE STUDIES AND ANALYSES (2016), https://idsa.in/issuebrief/indias-defence-budget-2019-20-lkbehera-080719 (last visited Feb 16, 2023).

19 *Ibid*

20 *Id*

21 Deloitte, 2023 AEROSPACE AND DEFENSE INDUSTRY OUTLOOK DELOITTE UNITED STATES (2022), https://www2.deloitte.com/us/en/pages/manufacturing/articles/aerospace-and-defense-industry-outlook.html (last visited Feb 16, 2023).

largest importer of major weapons, with 14% share in the global import of arms[22].

Acquisition in Defence Sector: A Precursor

Procurement of technology in the defence sector encompasses the entire gamut of defence requirements ranging from aeronautics and naval systems to delivery systems and the protection of the strategic systems. The trajectory of India's defence sector has reflected largely those requirements which were vital and central to India's national security. The subject area of defence procurement aims at strengthening national security. Defence procurement in India covers sensitive procurement alone (i.e., for military purpose alone). It seeks to be prepared for unforeseen contingencies such as war. Each country thus aims to collect more and more weaponry (or military equipment through defence procurement) to be in a strong position if war were to arise. As a result, each country tends to have national laws and regulations on defence procurement.

Defence Acquisition Procedure is a result of numerous revisions and is currently, sixth in line of series which attempts to foster indigenization in the Indian defence sector.

The Preamble to the DAP 2020 begins by differentiating the operational aspects of defence procurement from the more generic practices of public or civil procurement and that there are numerous aspects which are peculiar to the practice of defence procurement including the provision of supplier constraints, technological complexity, foreign suppliers, high cost, foreign exchange implications and geo-political ramifications. DAP 2020 needs to strike a balance with the fundamental principles of procurement including the principle of transparency, certainty or predictability and the most important principle of public accountability and the need to maintain confidentiality and protect the sensitive and classified nature of information involved in the process of defence procurement. Hence adopting a separate policy framework governing the procurement practices of defence related equipment is necessary.

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[22] SIPRI, SIPRI YEARBOOK 2016 SUMMARY (ENGLISH) SIPRI YEARBOOK 2016 ON ARMAMENTS, DISARMAMENTS AND INTERNATIONAL SECURITY (2016), https://www.sipri.org/sites/default/files/YB16-Summary-ENG.pdf (last visited Feb 16, 2023).

The DAP 2020 in its next paragraph recognizing the long-standing dream of the Indian defence sector to build its indigenous capabilities and attainment of the goal of self-reliance in the design, development, and manufacturing in defence sector and consequently to align the procurement procedure with the dream of '*Make-in-India*' emphasizes that the defence procurement practices should imbibe these goals. Consequently, the DAP 2020 attempts to streamline procedural framework governing Defence Procurement with a particular emphasis on strengthening the procedure for contract management and monitoring for *Prototype Development Contract* under the '*Make Category of Procurement*'.

DAP 2020 ultimately aims to achieve Self-Reliance in defence manufacturing and towards this end, it attempts to simplify and expedite the procedural framework for defence procurement. A simple, streamlined, and expeditious procurement process would ultimately lead towards ensuring that defence procurement, as a policy tool, acts as a catalyst towards bringing the much needed, financial and technological and R&D boost to the defence industrial sector which would ultimately lead to this phenomenon.

The procurement category of '*Make*' has also been procedurally revised to facilitate participation of more stakeholders in development of the defence industrial base of the country. In this regard, particular emphasis has been made on the role of Medium and Small-Scale enterprises (MSMEs) and the preamble considers this as one of the defining features of DAP 2020. Simplification of procedural framework of the said category includes significant steps towards reducing the permissible timeframes of the procurement activities at the same time enhancing predictability for the concerned stakeholders.

The Defence Procurement Procedure laid down in DAP 2020 was the first procurement procedure where the drafters have included a Preamble entailing the vision of the draftsmen. The Preamble as explained above realizes the defence procurements needs to be treated both substantially as well as procedurally separately from the public procurement. Given the sensitive nature of information involved with respect to the procurements, the vendors and the route of procurement and implementation of the offsets, it is pertinent that the policy should

provide a reasonable flexibility to the executors of the policy in order to meet the requirements of the armed forces expeditiously.

Defence Procurement Procedure typically follows a two-stage bidding process as has been laid down under the Defence Procurement Procedures i.e. the technical and the financial bid. The initial phases of defence procurement involve a stage of 'Request for Qualification' or 'Expression of Interest' wherein a set of eligible and capable suppliers who are willing to bid are shortlisted. The next phase is known as the 'Request for Proposal' phase wherein the financial evaluation of the prospective bidders is conducted. These phases lead to shortlisting of the first set of prospective suppliers who then present a proposal for technical bidding. The prospective bidders who are successful in the technical bids are then evaluated on the basis of their financial bid and subsequently for final selection. As happens in every procurement process the lowest bidder which meets all the specifications and requirement of the procurement is usually selected. Barring this process, many at times defence procurement contracts are entered between two or more Governments as well, wherein there is no standard requirement to follow such a process and equipment and / or technology can be transferred on mutually agreed provisions.

On the procedural front, defence procurement is essentially regulated by a series of policy framework. The most important policy framework in this entire series is the Defence Procurement Procedure, which was recently revised in 2016, which essentially lays down the policy framework for procurement of defence equipments including defence technology in India. The next in line of importance is the Defence Offset Policy which essentially incentivizes the proposal for investment in the Indian Defence sector. Essentially, the prospective bidders apart from agreeing to supply defence equipment, if their bid gets selected, has to further invest in an Indian company or establishment whether public or private for the purposes of enhancing the defence capabilities of the nation. Barring the Defence Procurement Procedure which categorically provides for capital acquisitions, a Defence Procurement Manual also exists which covers revenue procurements. Besides these two standard procedural policy frameworks, defence organizations established under the aegis of the government i.e. the Defence Research and Development Organization (DRDO), Defence

Public Sector Undertaking (DPSU) and Ordnance Factories have a separate procurement procedure to follow.

Indigenization v. Procurement – The Procedural Debate

Simply put, indigenization essentially refers to the capability to manufacture a product or supply a service independently within a country instead of relying on foreign manufacturers or suppliers. Country had set the dream of achieving self-reliance in the defence sector for itself a long time ago. Way back in 1992, a self-reliance committee under the chairmanship of Dr A.P.J. Abdul Kalam, the then Scientific Advisor to the Defence Minster, had visualized that self-reliance index-measured in terms of percentage share of domestic procurement in total procurement expenditure would progressively increase from then 30 per cent to 70 per cent by 2005[23]. The target has not been achieved even today. What is even more bewildering is not only the poor level of self-reliance but also the lack of concrete evidence in the public domain to measure its progress, leading to wide variation in estimates put by various groups[24].

The category of 'Make' was introduced for the first time in 2006 in the Defence Procurement Policy for the purpose to ensure Indigenous Research, Design, Development and Production of capabilities sought by the Armed Forces in prescribed timeframe while optimally utilizing the potential of the Indian Industry" as "it would also achieve self-reliance in Defence Equipment"[25]. The underlying objective is to make Indian Defence sector self-sufficient in Defence Production[26].

The Defence Procurement Policy of 2020 takes this objective further and entails a preferential treatment to equipment and technology that will be designed, developed and manufactured indigenously. Therefore, whenever the required arms, ammunition & equipment are

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23 Laxman Kumar Behera, ESTIMATING SELF-RELIANCE IN INDIA'S DEFENCE PRODUCTION ESTIMATING SELF-RELIANCE IN INDIA'S DEFENCE PRODUCTION (2012), https://idsa.in/event/EstimatingSelfRelianceinIndiasDefenceProduction (last visited Feb 16, 2023).

24 *Ibid*

25 Ministry of Defence. (2016 29). Chapter III, Paragraph 5, Defence Procurement Procedure 2016. Retrieved 15, 209AD, from https://mod.gov.in/sites/default/files/dppm.pdf_0.pdf.

26 Objective of DPP 2011, Paragraph 3: *to achieve substantive self-reliance in the design, development and production of equipment/ weapon systems/ platforms required for defence in as early a time frame as possible; to create conditions conductive for the private industry to take an active role in this endeavour; to enhance potential of SMEs in indigenization and to broaden the defence R&D base of the country.*

possible to be made by Indian Industry within the time lines required by the Services, the procurement will be made from indigenous sources."[27]

The DAP 2020 also talks about having a hierarchical structure in different categories of procurement i.e.

CATEGORIES OF CAPITAL ACQUISITIONS (CLASSIFIED ON THE BASIS OF PRIORITY)			
S No	**Nature of Procurement Category**	**OEM / Vendor Registration**	**Extent of IC**
1.	**Buy (Indian IDDM** - Indigenous, Design, Development and Manufacturing)	Indian	50 % of cost of base contract price
2.	**Buy Indian** • IDDM – Not mandatory	Indian	60 % of cost of base contract price
3.	**Buy and Make (Indian)** • Stage 01 – Fully Formed (FF) Equipment Acquisition - TOT of critical technologies • Stage 02 – Indigenous Production in phased manner	Indian vendor who has tied-up with foreign OEM	50 % of cost of 'Make' portion of contract
4.	**Buy (Global Manufacturing in India)** • Stage 01 - Outright purchase of Equipment & manufacturing technology from foreign OEM under TOT for critical technologies • Stage 02 – Indigenous Manufacture of end-user product (wholly or partially) + MRO facility	Foreign OEM – can be contracted through their Indian subsidiary (JV or PA)	50 % of cost of base contract price
5.	**Buy (Global)** • Outright purchase of Equipment • Procedure can be adopted for IGA • Offsets applicable where value of procurement contracts is ₹ 2000 crores or more.	Foreign or Indian Vendor competing in global market	If Indian Vendor – IC of cost of base contract price

Looking at the policy framework highlights the efforts to encourage the domestic industry by incentivizing and giving a preference to them in order of selection of vendors with the larger objective of reducing dependency on imports. But the more we dwell upon the policy framework, the more we realize that it is encouraging imports which undertake to invest in the domestic sector. While this brings in the much needed financial and technical support to the domestic market, but the

[27] Ministry of Defence. (2016 29). Chapter 1, Paragraph 20a Defence Procurement Procedure 2016. Retrieved 15, 209AD, from https://mod.gov.in/sites/default/files/dppm.pdf_0.pdf.

corresponding result seems minimal. As a matter of practice, the rate at which the government is importing defence technology and equipments from outside is increasing every year. On the other hand, the discussion on the modes and mechanisms of investments in domestic sector seems like a never-ending process. Consequently, the domestic defence sector is still limited to producing spare parts and assemblage units. Hence even though the DPP and even the Make-in-India scheme focusses on indigenous production of defence equipments, it is barely percolating into practice. In fact, it is inviting foreign manufacturers to set up manufacturing bases in India. This is all the more detrimental because despite having the manufacturing unit in India, the domestic operators like DPSUs barely have any rights over the final product. The operators are given instructions as to how to operate the technology, manufacture product. The OEMs maintain complete control over the number of units manufactured and any alteration in the nature of product. Even the repair and maintenance work are managed by the OEMs. The same is reflected on the official website of Make-in-India which aims towards inviting foreign investments in defence sector. But the general tenor of its content shows that the aim is to attract global companies to undertake the manufacture of their products in India.

The role of the foreign vendors or the private sector entities or when they are establishing their manufacturing units in India are also not clear. Foreign vendors and investors will certainly not invest financially and technologically in collaboration with an Indian entity only to become a minority stakeholder in the deal. If they retain majority stakes, then they come in the final two or the least preferred category. Whether they are willing to give up their stakes just to take advantage of the first two categories is a question that will be decided on a case-by-case basis. There are advantages of a foreign vendor with limited control or ownership in defence production to be classified in the first two categories. Numerous exemption and direct absorption of the end product is an immense advantage. However, to avail the benefits under this scheme, is it possible to give up direct ownership and control. Or is there any means through which this control can be indirectly exercised. The Policy framework is also silent about the role of Indian industry and foreign companies/governments[28].

[28] Amit Cowish, MAKING 'MAKE-IN-INDIA' MOVE IN DEFENCE PRODUCTION MANOHAR PARRIKAR INSTITUTE FOR DEFENCE STUDIES AND ANALYSES | (2015), https://idsa.in/ (last visited Feb 16, 2023).

Self-sufficiency/reliance has been the primary reason for developing a vast defence industrial base (DIB), which now comprises 52 defence laboratories and establishments under DRDO; and 9 defence public sector undertakings and 39 ordnance factories under the Department of Defence Production of MoD. While the focus of the policy framework is towards achieving self-sufficiency in the defence sector it has been observed that this dream barely is reflected in practice. India's defence imports rises every year and from the perspective of indigenization, this trend has been heavily criticized. One of the chief reasons for the same is that it takes us away from the goal of self-sufficiency in defence manufacturing. Moreover, what the country procures is not the top-notch but in fact quite commonly available to which the counter technologies also exist. This argument is in line with the fact that no nation will be ready to part with its critical technology for the purposes of maintaining an edge over their competitive counterparts.

In order to cater to this and consequently with the purpose of enhancing the self-reliance index various policy measures have been adopted in the past two decades. One of the methods to do this was to infuse finances into the defence sector for the purposes of strengthening the indigenous defence manufacture and production. The first attempt towards this was made in 2001 when the Indian government liberalized the defence industry by allowing 100 per cent participation by the Indian private sector and foreign direct investment up to 26 per cent. The government has also created opportunities for domestic enterprises to participate in defence contracts through the successive revision of its defence procurement procedures (DPP). The big move in this regard was to revise the offset policy in 2005 and the same has been under continuous review and revision and has been modified at least six to seven times till date. The DPP has also created categories such as 'Make' and 'Buy and Make (Indian)' which give exclusive rights to Indian companies to participate in arms contracts. Recently, the MoD has articulated the first ever defence production policy and joint venture guidelines to facilitate more indigenous production.

Besides, there is a small but growing number of companies in the private sector. The DIB is responsible for design, development, production and upgradation of various types of arms primarily for the Indian armed forces. However, India is probably the only country which

despite having a vast DIB still imports majority of its armaments, including several low-tech items (including military transport vehicles).

The present government is enacting policies with a view to enhance indigenization in the Indian defence sector which has been one of the long-cherished dream of the government. Achieving self-reliance in the sphere of defence production and manufacturing categorically articulated in the Defence procurement policies which not only encouraged steps taken for ensuring indigenization but also entrusted the Defence Minister with the responsibility to review the annual progress made in this regard[29].

The concrete discussion for ensuring indigenization of the defence sector and in particular achieving self-reliance in defence production and manufacturing started doing the rounds with the constitution of the Dhirendra Committee[30]. The Dhirendra Committee report which essentially proposed for indigenization of the Indian Defence Sector extensively traces the reason behind the existing state of the defence industrial base in India. But what the country under the British rule and subsequently focused on manufacturing were support and assemblage units. The reminiscence of this approach can be felt even now. Our current defence procurement and production policies are framed with the noble idea of indigenizing our defence requirements including producing warfare weapons and technologies locally[31]. The present acquisition process is directed towards procurement of high-end weaponry systems and technologies to strengthen its military prowess at the same time ensuring that in-house research and production of weapons, equipment and technologies capabilities also develop. While substantive efforts can be seen for achieving the former aim, the precedent and practice towards the latter aim paints a contrary picture. Even after 71 years of independence, the Defence Public Sector Undertakings (DPSUs) and Ordnance Factories (OFs) have not made a substantial change in the nature and variety of the production. Despite having a lucrative Offset Policy, India continues to procure weapons and

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29 DPIIT, DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE DEPARTMENT OF PROMOTION OF INDUSTRY AND INTERNAL TRADE (2010), https://dpiit.gov.in/sites/default/files/chap001_0_0.pdf (last visited Feb 16, 2023).

30 Supra Note 7

31 Department of Defence (no date) Defence Procurement Procedure 2020 DAP (Preamble) | Department Of Defence. Available at: https://www.mod.gov.in/dod/defence-procurement-procedure-dap (Accessed: December 13, 2022).

military technology from abroad and constantly requires their service staff for any repair and maintenance work with respect to that technology.

Despite entering into a series of technology transfer agreements, the so-called technology transfer has not taken place in its truest sense. Technology transfer happens with immense instructions from the original manufacturing country / company including opting for mandatory repair and maintenance services from the original manufacturer and the role of the Defence base of India is again reduced to production of spare parts for the use of the said technologies. Ordinance Factories and Defence Public Sector Undertakings have not been able to absorb fully, the technologies after executing Transfer of technology; forget the ability to further enhance them. Thus, we are still dependent on foreign countries for many critical assemblies and sub-assemblies, defeating the very purpose of Transfer of Technology[32].

Conclusion

International procurement in the defence sector is always a preferred approach. Defence procurement is essentially the process through which the government acquires equipment, technology and weaponry for the armed forces. Despite the fact that the India's defence imports rises every year, nevertheless, there has been a lot of criticism against this trend. It has been widely criticized as under numerous circumstances what we have ended up procuring was not the top-notch technology. That kind of defence technology is quite common and counter technologies also exists. This argument is in line with the fact that no nation will be ready to part with its critical technology for the purposes of maintaining an edge over their competitive counterparts.

In order to cater to this and consequently with the purpose of enhancing the self-reliance index various policy measures have been adopted in the past two decades. Starting from the Defence Procurement Procedure Policy, the Offset Policy and the extremely famous Make-in-India policy, self-reliance and indigenization has been the key focus of the policies in defence sector. Nonetheless, despite the policy

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[32] IDR, INDIGENISATION IN DEFENCE : A STEP IN THE RIGHT DIRECTION INDIAN DEFENCE REVIEW (2017), http://www.indiandefencereview.com/indigenisation-in-defence-a-step-in-the-right-direction/ (last visited Feb 16, 2023).

framework, India continues to procure from foreign vendors and its defence imports is on the rise.

As the Defence sector of India strides towards the 'Make in India' regime, restructuring of the Defence Procurement Policies (DPP) becomes the utmost important task of the Ministry and the related Departments. To achieve the pedestal of self- reliance after being one of the biggest procurers in the world, the indigenization policies of India related to acquiring of technology are demanded to be stringent and capable of ad hoc applicability.[33]

Technology obviously plays an important role in the development process of any country. Hence, technology sharing and transfer at the international level assumes importance from the viewpoint of technology suppliers and those who need technology. While completely shunning down the option of technology transfer and defence procurement would be catastrophic at the moment, nonetheless, attempts should be made to move from policy level to practice. Not only should the technology be transferred but the recipient country should also have access to the technical know-how. The focus of the defence sector should be to build up a capability which would be in tandem with the overall requirements.

[33] Dinesh C Srivastava, MAKE IN INDIA: CHALLENGES BEFORE DEFENCE MANUFACTURING INDIAN DEFENCE REVIEW (2015), http://www.indiandefencereview.com/news/make-in-india-challenges-before-defence-manufacturing (last visited Feb 16, 2023).

INDIA'S MARITIME AWAKENING – NEED FOR URGENT REFORMS IN SHIPPING LAWS

Akash Kumar[*]

Abstract

The importance of the maritime domain for India's for the development of trade and commerce, security, stability and sustainable development needs no emphasis. With its two strategically located island territories, 7500 kilometres of coastline, 13 major and more than 200 non-major ports, India is blessed with a favourable and pivotal position in the Indian ocean. A robust maritime infrastructure, science and technology and a sound legal system have to come together to supervise the flow of carriage of goods via the sea route to ensure safety, protection and proper maintenance of trading ships, regulate the registration, carrier liability, safe navigation, collision, pollution, insurance etc. This research focuses on the need to bring urgent reforms in the maritime laws in the country to respond to the growing investments, infrastructure and to equip itself to the various challenges in this sector. The maritime laws in India requires urgent attention to address the issues of lack of certainty, procedural delays, ambiguity, jurisdictional issues and most importantly adhering to the inter terminal conventions and international best practices surrounding it. These laws play a crucial role in the augmentation and realisation of true potential of the Indian maritime sector. The author in this research focuses on some of the most important maritime legislations which have been revised recently or are in the various stages of development.

Key words: Indian Ports Bill, Admiralty Act, maritime laws, shipping laws, urgent reforms.

Introduction

The shipping industry has been at the forefront of the world economy and has been the most preferred means for transporting goods

[*] Akash Kumar, Assistant Professor, National Law University Odisha, NLUO

and people across the globe. In India shipping industry accounts for more than 90 percent of country's international cargo volume and speaking globally, it is a means for more than 80 percent of global merchandise trade. However, even after being blessed with advantages like 7500 kms of coastline, fifth largest economy in the world, strategic location on the world map[1], the global share of country in shipping sector has been far below potential. The government of India through its Ministry of Ports, Shipping and Waterways (hereinafter as 'the Ministry') has in the past five years highlighted that it is keenly working on positioning Indian maritime sector at par with international standards by attracting domestic as well as international investments. This is evidenced by some of the flagship government programs like the 'Sagarmala Project' which has already undertaken an ambitious national initiative aimed at bringing about a radical change in India's logistics sector performance, by unlocking the full potential of India's coastline and waterways.[2] The aim is to work on four pillars for port led development namely port modernisation, port connectivity, port-led industrialisation, and coastal community development[3]. At the same time, the Ministry has already identified this objective of 'propelling India to the forefront of global maritime sector' in their ten years blueprint 'Maritime India Vision 2030'.[4] The author however in this research intends to highlight the challenges faced by shipping laws in the country in responding to the massive maritime infrastructure growth. The technology driven growth, investments and infrastructure need to be supplemented by having laws that are clear, predictable, devoid of uncertainty as to the extent of various obligations and most importantly, adhering to the International Conventions and best practices around the world. Uniformity of laws, decisions, obligations is more than desirable in maritime laws because of the great importance of maritime transportations[5].

While port and shipping logistics and infrastructure, ship building, securing country's maritime neighbourhood and sustainable use of maritime resources promote blue economy, the legal responses to various challenges faced in the shipping industry have been undermined

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1 Ministry of Ports, Shipping and Waterways Government of India, *Maritime India Vision 2030*, https://sagarmala.gov.in/sites/default/files/MIV%202030%20Report.pdf (last visited Feb 4, 2023).

2 Ministry of Ports, Shipping and Waterways, *About SagarMala*, http://sagarmala.gov.in/about-sagarmala/background (last visited Feb 2, 2023).

3 *Id.*

4 *supra* note 1.

5 A. N. Yiannopoulos, *The Unification of Private Maritime Law by International Conventions*, 30 LAW AND CONTEMPORARY PROBLEMS 370 (1965).

recently. While focusing on the need for urgent reforms in some key maritime legislations, the author also wants to highlight some of the remarkable welcome changes in the recent shipping laws which have been enacted, or are in the various stages of finalisation. These include Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, Major Port Authorities Act 2021, the Marine Aids to Navigation Act 2021, Recycling of Ships Act 2019, the Inland Vessel Act 2021, and proposals are already underway for replacing older laws like Indian Ports Act 1908, Merchant Shipping Act 1958 and enacting newer laws like Anti Maritime Piracy laws.

Admiralty Jurisdiction - The most awaited and notable change to the admiralty jurisdiction came in 2017 with the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, which replaced various archaic British laws. This Act is seen as an attempt to modernize Indian admiralty law and align it with the two Arrest Conventions, one in 1952 and the other one in 1999.The idea of both the conventions is to provide for actions that can be taken while arresting of a ship (in rem) in nature. It is pertinent to mention here that in the absence of legislative action, the Courts in India had to step in to fill some of the gaps by judicial intervention, most importantly by reading into Indian admiralty jurisprudence and the two Arrest Conventions respectively[6]. Until the enactment of this Act the admiralty law in India used to be governed by the Admiralty Court Act, 1840, the Admiralty Court Act, 1861, read with the Colonial Courts of Admiralty Act, 1890, the Colonial Courts of Admiralty (India) Act, 1891 and the provisions of the Letters Patent, 1865. These Acts have been now been repealed by the Admiralty Act, 2017 which seeks to consolidate the existing laws relating to admiralty jurisdiction, maritime claims, maritime lien, arrest of ships, admiralty proceedings and other related matters[7].

In getting rid of the much-outdated laws and aligning it with the International Convention relating to the Arrest of Sea-Going Ships 1952, International Convention on Arrest of Ships, 1999 and the International Convention on Maritime Liens and Mortgages 1993, it is worth noting

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6 *M. V. Elizabeth & Ors. Vs. Harwan Investment Trading P. Ltd.,* Supp (2) SCC 433 (1993); Liverpool and London S.P & I Associations Ltd. v. M. V. Sea Success I, 9 SCC 512 (2004). The Supreme Court interpreted the application of the two arrest conventions of two Arrest Conventions of1952 and 1999 in these cases.

7 Jennifer Maria Dsilva, *Recent Developments of Admirality Law in India*, 6 SUPREMO AMICUS 155 (2018).

that the present Act makes a significant departure from these international conventions. For example, the arrest of ships under the Act is now possible even in the execution of a judgment, ship owned by an entity which was at the relevant time the time/voyage charterer of another ship can be arrested; a vessel under demise charter can be arrested for a claim against the demise charterer of another vessel, if the demise charterers are the same. Looking at the Arrest Conventions and the Admiralty Act side by side it is seen that a lot of new claims as maritime claims have been added with regard to which a ship can be arrested like "port or harbour dues, canal, dock or light tolls, waterway charges and such like; particular average claims; claims by master or crew or their heirs/ dependents for wages, cost of repatriation or social insurance contributions; insurance premiums, mutual insurance calls" etc. under the definition of 'maritime Claims'.[8]

The Act lacks a provision for the release of a ship upon furnishing of security, nor is there any provision for re-arrest/multiple arrests of ships; ship arrest pending arbitrations is also not clarified[9]. It was only clarified by the High Court of Bombay in 2019 relying on the common law principles and held that "arrest of a ship as security is allowed and valid even in the cases of an ongoing arbitration proceeding in a foreign seat, provided that all the conditions of Admiralty Act, 2017 are to be met with"[10]. Therefore, it can be said that the new law has missed an opportunity to align the domestic law regarding admiralty issues with international Conventions, thereby leading to a lack of clarity and uncertainty to participants in shipping industry. It would be interesting to see that how newer admiralty courts with no experience of admiralty jurisdiction, deal with these issues, but nevertheless should make pragmatic and progressive interpretations keeping in mind the convention provisions, international best practices and the other classical sources of admiralty law[11].

Merchant Shipping Act 1958 - The principal Act dealing with most of the maritime and shipping issues in India is the Merchant Shipping Act 1958 (MSA). It provides legislative framework for issues like

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8 Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, S 4

9 Dsilva, *supra* note 7.

10 *Altus Uber v Siem Offshore Rederi AS*, MANU/MH/1960/2019.

11 Rahul Rajpurohit, *Indian Admiralty Act 2017- Interpretation and effect*, SHIPPING AND FREIGHT RESOURCE (2022), https://www.shippingandfreightresource.com/indian-admiralty-act-2017-interpretation-and-effect/ (last visited Feb 9, 2023).

registration of vessels, seafarers qualifications, employment, safety, wages, collision, pollution, pollution rules, salvage, towage, wreck removal, limitation of liability, passenger claims etc. This Act needs an urgent revision to bring our laws in conformity with international conventions of International Maritime Organisation on various issues. It may be noted here that an attempt to revise the Act was made in 2016 by the introduction of the Merchant Shipping Bill, 2016 on December 16, 2016. But after that, it was referred to the Parliamentary Standing Committee, and the Committee in its 249th report in 2017 observed that "the Bill was drafted in a hasty manner leading to several loopholes, and possibility of multiple interpretations".[12] The committee further recommended a revision of all the different clauses to remove ambiguity leading to different interpretations and creating loopholes.

The Ministry of Ports, Shipping and Waterways in 2020 again issued the Draft Merchant Shipping Bill, 2020 for public consultation. It was clarified that the newer Bill was drafted, 'with the primary aim of promoting the growth of the Indian shipping industry by incorporating the best practices adopted by other advanced countries like the U.S., Japan, U.K., Singapore and Australia.'[13] Aimed at repealing and replacing the Merchant Shipping Act, 1958 and the Coasting Vessels Act, 1838, the bill promised to have updated the provisions regarding application of several IMO Conventions/protocols, to which India is a party. Provisions were also incorporated to ensure the safety and security of vessels, safety of life at sea, prevent marine pollution, provide for maritime liabilities and compensations among others.[14] Currently, the Central Government in exercise of powers conferred by section 218A read with section 457 of the Merchant Shipping Act, 1958, continues to issue new rules for different matters covered by old Act pending revision of the same.[15]

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12 PARLIAMENTARY STANDING COMMITTEE, *The Merchant Shipping Bill, 2016*, (2017), https://prsindia.org/files/bills_acts/bills_parliament/2016/SCR-%20Merchant%20Shipping%20Bill,%202016_0.pdf (last visited Feb 2, 2023).

13 Ministry of Ports, Shipping and waterways issues Draft Merchant Shipping Bill, 2020 for Public Consultation, https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1676050 (last visited Feb 9, 2023).

14 *Id.*

15 Ministry of Ports, Shipping and Waterways, Government of India, *Merchant Shipping Rules*, https://www.dgshipping.gov.in/Content/MerchantShippingRules.aspx (last visited Feb 10, 2023).The Ministry of Ports and Shipping and Waterways issued the Merchant Shipping (Maritime Labour) Amendment Rules, 2021 to amend the Merchant Shipping (Maritime Labour) Rules, 2016, issued the Merchant Shipping (Maritime Labour) Amendment Rules, 2021 and Merchant Shipping (Recruitment and Placement of Seafarers) Amendment Rules, 2022.

Revision for this Act is needed keeping in mind the compliance with all the existing international maritime conventions that India is a party to, for promoting ease of doing business, and the use of digital technology in registration and certifications of vessels, record keeping, payments etc. There is a need to include bareboat cum demise charter provisions in the Act to increase vessel registration and hence opportunities for international trade, an increase in India's tonnage as an eligibility criterion for the ownership of vessels is also needed to have a wider eligibility for vessel registration. Clear provisions need to be included for adjudication and predictability of claims arising out of disputes involving collision, finding degree of fault of each vessel. As of now, issues like collisions, salvage and wrecks are decided by the Merchant Shipping (Prevention of Collisions at Sea) Regulations 1975 which provide little guidance to the courts for apportionment of liability between two vessels involved in a collision in accordance with the degree of fault.

Under the same Act, the laws regulating shipwrecks is laid down in Part XIII of the MSA and in the Indian Ports Act 1908. The term 'wreck' includes 'a vessel abandoned without hope or intention of recovery'. India is working to give effect to the Nairobi International Convention on the Removal of Wrecks 2007, but as of now there is no law to deal with the removal of shipwrecks in the exclusive economic zones of India.

As noted above, the proposed Bill deals with a vast majority of maritime issues and give effect to the most important of IMO Conventions namely the International Convention for the Safety of Life at Sea (SOLAS), International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW), International Convention for the Prevention of Pollution from Ships (MARPOL) and Maritime Labour Convention (MLC). The revision of the same is therefore crucial to have increased opportunities of investment, certification, employment, and qualification standards etc. leading to an even stronger maritime presence in the world.

Indian Carriage of Goods by Sea Act, 1925 (the Indian COGSA) - Another important issue in maritime trade is of carrier liability in maritime contracts. The Hague Rules were included in the Schedule of Indian Carriage of Goods by Sea Act, 1925, India updated the COGSA

in 1993 and added a few Hague-Visby Rules clauses.[16] These rules do not, however, have legal standing in India by themselves as they have not been ratified by India, but parts of it has been adopted under the schedule to Indian COGSA. The applicability of Indian COGSA is limited to outward cargo, which refers to the carrying of goods through ships from Indian to foreign ports or within ports in the Indian territory. It is not applicable to inward cargo *i.e*., ships transporting goods from foreign ports to Indian ports[17]. The Indian Supreme Court had to decide in Shipping Corporation of India Ltd v. Bharat Earth Movers Ltd[18] whether the Indian COGSA or the Japanese Carriage of Goods by Sea Act, 1992 (Japanese COGSA) was applicable in a case involving goods transported from Japan to India. The Court decided to apply the Japanese COGSA instead of the Indian COGSA since it did not apply to inbound goods.

The Hague Rules were enacted way back in 1924 and hence, never took technology into consideration. However, with the evolution of technology, Hague Rules of 1924 along with amendments in different years afterwards have become outdated in regulating the modern shipping industry[19]. In this context, it is crucial for India to initiate the adoption of international conventions and meet the expectations of modern technology used in shipping nowadays, in order to comply with international trade standards. With the progress of time, the Hague rules have become so obsolete that countries like Canada, Spain, and the USA have become hesitant in trading with India at international levels as these rules are controversially and subjectively considered outdated, by the leading major maritime countries. Also, by using these older rules, cargo owners in India do not have the same rights as in other countries who have adopted the newer conventions. Currently, 26 countries have signed the Rotterdam rules including the United States, which is a big trading partner of India. Looking at the current developments and international response to the rules on carrier liability, India must start working towards adoption of the Rotterdam rules.

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16 Ins. by Act 28 of 1993, s. 31 and the Schedule (w.e.f. 16-10-1992).

17 Shipping Corp of India Ltd v Bharat Earth Movers Ltd, AIR 2008 SC 728 728 (2007).

18 *Id.*

19 Indira Carr & Peter Stone, *The Hamburg Rules and the Rotterdam Rules*, *in* INTERNATIONAL TRADE LAW 276 (6 ed. 2017), https://www.taylorfrancis.com/books/9781134846115/chapters/10.4324/9781315543970-12 (last visited Feb 11, 2023).

Regulation and management of non-major ports–With regard to the management of non-major ports, the government recently published the fourth revised draft of the Indian Ports Bill which seeks to replace the older Indian Ports Act 1908. The previous versions of the bill had faced very strong opposition from coastal states which had raised an alarm regarding concentration of strong powers in the hands of the central government resulting in the violation of federal structure of governance.[20]

The most controversial parts of the proposed Bill are chapters II and III providing for the Maritime State Development Council (MSDC) which still have been kept in the latest 2022 version of Bill but with some modifications. This body was created in 1997 by an executive order to serve as an advisory body for the development of major ports, it however met only 17 times in 24 years.[21] In the above said chapters, the bill proposes to make it a permanent body with its staff, offices, accounts, audit and is empowered with a wide-ranging power for existing and new ports. One of the most important objectives assigned to MSDC is to develop a National Plan for the development of maritime sector that is beneficial for both States and Centre[22].

In the most recent draft, the Ministry tried to create a balance where State governments have some say in the management of non-major ports. The National plan is made recommendatory instead of mandatory in the earlier 2021 draft version, another important change is regarding the functions of MSDC, which are to be discharged in consultation with the Central Government and State Governments.

Concerns have also been raised by the different state authorities and scholars alike about several penal provisions under the proposed bill for ordinary administrative lapses on the part of port authorities, officials and other persons. Under the Indian Ports Bill 2022, it is provided that "if any non-major port or port official fails to comply with directions of the State Maritime Board under Section 21, fine which may extend to ten

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20 Avani Chokashi, *Indian Ports Bill 2022 : Towards Privatization*, https://www.aicctu.org/workers-resistance/v1/workers-resistance-october-2022/indian-ports-bill-2022-towards-privatization (last visited Feb 10, 2023).

21 K. Ashok Vardhan Shetty, *A Draft Bill that Cuts Maritime States Adrift*, (2021), https://www.thehinducentre.com/the-arena/current-issues/article36247293.ece (last visited Feb 10, 2023).

22 Indian Ports Bill, 2022, S. 10(1)(b)

thousand rupees, and one thousand rupees per day for the continuing offence in case of port official; and a fine which may extend to two lakh rupees, and twenty thousand rupees per day for the continuing offence in case of a port".[23] The Bill seeks to criminalise ordinary administrative lapses and creates a new overly regulated regime which is likely to hamper the development of non-major ports leading to adverse consequences on port traffic and economy.[24] Alarms have also been raised that the proposed newest draft seeks to bring in anti-federal features in the Indian ports regulation, at a time when worldwide countries are opting for port regulation in a manner which is decentralisation, deregulation, corporatisation and encourages private sector participation.[25] The proposed Bill has therefore raised many issues which need to be addressed immediately by having a dialogue with different stakeholders and setting things up in a way it is being done in most successful economies with less centralisation and self-regulation.[26] The current India Ports Act 1908, needs a complete overhaul and it is very important to have pre-legislative consultations with all the stakeholders. While the Ministry should be commended to have hold four rounds of consultations with State governments and other stakeholders on this issue, it is noticed that the improvements in the draft from first version to four this just cosmetic and have not been able to iron out differences between Centre and different maritime States.[27]

Regulation and management of major ports - For the administration of thirteen major ports in India, the government revised and repealed the older Major Port Trusts Act 1963 with Major Port Authorities Act 2021. The Act came with an intention to revamp the working of Tariff Authority for Major Ports (TAMP) under the old Act and work towards decentralization of power, paving way for the formation of a Board of Major Port Authority for each major port. Some important developments in this new Act are revision of the role of older TAMP. The newer 'Board' is empowered to enter into contracts in its own legal capacity and to fix Scale of rates for assets and services available at Major Port[28],

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23 Indian Ports Bill, 2022, S. 68.
24 Shetty, *supra* note 21.
25 Alifya Vora & Swadha Sharma, *Indian Ports Bill, 2021- Critical Analysis of the Good and the Bad*, (2022), https://ijpiel.com/index.php/2022/01/10/indian-ports-bill-2021-critical-analysis-of-the-good-and-the-bad/ (last visited Feb 10, 2023).
26 Shetty, *supra* note 21.
27 *Id.*
28 Major Port Authorities Act 2021.

power to raise loans and issue securities[29]. The Act also sets up an Adjudicatory Board to be constituted by the central government to carry out residual functions of the erstwhile TAMP.[30]

According to the Ministry of Ports, Shipping and Waterways, the Major Ports Trust Act of 1963 was deemed to be restrictive, with major ports "finding it difficult to operate in a highly competitive environment and respond to market challenges"[31].The act is a welcome step in operationalizing government locations that have been kept idle or have been inactive due to years of underinvestment or bureaucratic dominance. Further, in terms of decentralizing decision-making power and operational flexibility, the act gives more freedom to the Major Ports to compete with private players to operate at their optimum capacity and generate profit. Under the MMPA, 2021, all the powers and functions of TAMP as provided under the erstwhile Major Port Authorities Act 1963 stands transferred to the Adjudicatory Board except that of tariff setting.[32] Therefore, in order to fill this void, the government issued the Tariff Guidelines, 2021 for future public-private partnership. These Guidelines remarkably allow the concessionaires themselves to set tariffs as per market conditions.[33]

One of the major issue faced by these concessionaires in the earlier regime was regarding non-uniformity in storage charges as well as other tariffs which led to the absence of a level playing field for all the terminal operators. The 2021 Guidelines will enable a level playing field at Major Ports allowing competitive pricing hence benefiting both users as well as terminal operators.

Furthermore, for the execution of aforesaid new policies, the Ministry of Port, Shipping and Waterways also introduced Model Concession Agreement, 2021 (hereinafter referred to as 'the Model Agreement'). Article 8 of the Model Agreement envisages that the "Concessionaire shall fix Tariff based on market conditions and on such other conditions, if any, as may be notified and made applicable by a competent authority, under the provisions of the MPA Act."Therefore, under the new Act the government intends to act merely as a facilitator

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29 *Id.* S 33.
30 *Id.* S 54.
31 Vora and Sharma, *supra* note 25.
32 Major Port Authorities Act, 2021, S 58(1) and S33(2),
33 Para 2, Tariff Guidelines, 2021 for the future PPP Concessionaires.

for the creation of basic infrastructure, acquiring lands and leave the operation part of major ports to the private sector to respond quickly to market needs. This approach can be seen as quite opposed to the one adopted for operation and management of non-major ports in the country through Indian Ports Bill 2022. The new Act however also provides that "fixation of the scale of rates should not be inconsistent with the directions and rules made by the central government".[34] This seems to create a confusion and leaves a considerable space for the government to interfere with the tariffs thereby running the risk of getting entire Act reverting back to the status quo.

Cargo Claims - In terms of cargo claims, India is yet to have an equivalent of the English Carriage of Goods by Sea Act, 1992, but rather follows a colonial legislation – the Indian Bills of Lading Act, 1856.[35] The Madras High Court in MT Titan Vision v. 3F Industries Ltd[36] and the Gujarat High Court in MG Forest Pte Ltd v. MV Project Workship,[37] in their interpretation of Section 1 of the Act, held that "only a named 'consignee' or 'endorsee' would have the right in India to initiate a cargo claim against the carrier under the bill of lading contract".[38]The Indian Bills of Lading Act, 1856 is an old British-era law that does not define the scope and application of the Act and is based on the UK's Bills of Lading Act, 1855 which now itself has been repealed by the Act of 1992. The above-mentioned jurisprudence on the Act shows that it is applicable on the international carriage of goods by sea too but in a very limited manner expressed above in conjunction with Indian Carriage of Goods by Sea Act, 1925.[39] It can therefore be expected that the consignee assumes responsibility only in terms of the carriage and delivery of goods and is not liable for the consequences of, for example shipment of dangerous cargo. Needless to say, that laws regarding cargo claims and bill of lading in India need to be updated with clear definitions, application and scope and such old acts repealed, to avoid courts interventions.

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34 Major Port Authorities Act 2021, *supra* note 28. 27(1)(f).

35 Amitava Majumdar & Tripti Sharma, *Commercial overview of the shipping industry*, THE SHIPPING LAW REVIEW: INDIA (2022), https://thelawreviews.co.uk/title/the-shipping-law-review/india (last visited Feb 9, 2023).

36 (2014) 2 MLJ 154.

37 Misc Civil Application No. 187 of 2003 in Admiralty Suit No. 14 of 2003.

38 Amitava Majumdar and Tripti Sharma, *supra* note 35.

39 *Id.*

Management of vessel traffic services and navigation - India also repealed an outdated Lighthouse Act 1927 by enacting the Marine Aids to Navigation Act, 2021 and thereby, implemented the Convention on the International Organization for Marine Aids to Navigation 2021 it ratified in December 2021. This is a very welcome move as aids to navigation and vessel traffic services have long been regulated by the state-of-the-art technologies and marine navigation devices via radars and satellites and the provisions of the old Lighthouse Act were just obsolete. The Act provides for appropriate statutory framework for aid to navigation, central advisory committee, management of general, vessel traffic, training and certification, and maintenance of heritage lighthouse. This Act also deals with a much-awaited provision for marking of wrecks in general waters for the identification pf sunken and stranded vessels for safe and efficient navigation[40]. Development of the existing lighthouses as heritage sites and their use for education, tourism etc. to contribute to the economy of coastal regions is also provided[41].

Conclusion

India has in the recent past made substantial reforms in maritime and commercial laws and has made several changes to reflect the IMO Convention principles on maritime pollution and safety of law at the sea, arrest of ship, maritime lien, carrier liability, commercial arbitration and many more. It has also taken proactive steps in making its maritime presence felt in the world with the revision of Major Ports and Indian Ports Act. All the above-mentioned laws are in different stages of development with some needing urgent revision. Notwithstanding these developments, to attract foreign investment, quick resolution of disputes and increasing India's share in maritime shipping, it is needed that newer laws are not ambiguous and should not hesitate in adopting internationalConventions. Before such benefits are realised, it remains to be seen how different stakeholders react to the current legislative framework regulating the shipping industry.

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40 Chapter IX, Marine Aids to navigation Act 2021

41 *Id*, Chapter X

REFORMS IN SPACE SECTOR IN INDIA

P. Jogi Naidu[*]

Abstract

A significant achievement of the 20th century is human being's ability to go out of the planet earth keeping aside the obstacle of gravitational force and reaching to the outer space to have a complete view of the earth. The growth of the space activities for the world identified with the launch of the Sputnik in the year 1957. The Indian Space journey started with the launching of small sounding rockets from Thumba Equatorial Rocket Launching Station (TERLS) in 1963. The architect-visionary of the Indian Space Programme was Vikram A. Sarabhai. India is a party to all the important space treaties, which form the entire gamut of international space law. The global space economy is currently valued at about 360 billion dollars. Presently India's share in this sector at about to a mere 2% despite being its presence has been felt prominently in this sector for the last few decades. The relevant companies, which have been part of this growth, are such as Space X, Blue Origin, Virgin Galactic, Arianespace etc., have brought revolution in the private space sector. The Antrix Corporation (Commercial arm of the ISRO) expects the space industry in India might grow up to $50 billion by 2024 in case the appropriate policies made and implemented. The Indian space sector under the ISRO enjoys immense political support with the government allocating budget amount every year for the development of space activities. To facilitate private sector participation, the government has created the Indian National Space Promotion and Authorization Centre (In-SPACe), as a single window, independent, nodal agency.

Key words: Space, ISRO, Antrix, In-SPACe, FDI.

[*] Assistant Professor, Damodaram Sanjivayya National Law University, Visakhapatnam

Introduction

A significant achievement of the 20th century is the ability of the human being to go out of the planet earth keeping aside the obstacle of gravitational force and reaching to the outer space to have a complete view of the earth. This phenomenal achievement to reach the outer space by the human being is due to the result of consistent efforts by not one generation but by different generations of aspirations. Although some space scientists formed an abstract idea of a remote possibility of reaching to the outer space few decades before it became actual reality. The ideas became real only with the successful launch by the then great United States of Soviet Russia named as Sputnik-1 on October 4, 1957[1]. After about four years from such a great adventure of the Sputnik-1, the first ever man, who could enter the space was Yuri Gagarin on dated April 12, 1961. Inspired from the above incidents the human being has enhanced their achievements by dreaming it to land on the moon and it happened through Neil Armstrong and Edwin Aldrin on July 16, 1969. These achievements really helped the man to dream of solving the pertinent problems related to the earth on various aspects from the outer space. Many issues which could not be solved for many decades could be resolved with this newly acquired skill and more advanced technical expertise learnt in outer space[2]. The developed expertise space technology has made us to imagining of a new vision of our planet earth is termed as a global village and almost erased the man drawn territorial boundaries. The benefits of this exorbitant space technology have really started becoming relevant in India's efforts to be part of the steady growth of the sector in Indian territorial places.

In the beginning the Indian Space Programme was part of the Department of atomic energy (DAE). It was separated in 1972 with the establishment of Space Commission and Department of Space (DoS). These two important departments to develop the space activities were monitored by the Indian Space Research Organization (ISRO). The Indian Space journey started with the launching of small sounding rockets from Thumba Equatorial Rocket Launching Station (TERLS) in 1963. However, the significant renowned incident happened on April 19, 1975, when India's first scientific satellite "Aryabhata" was launched

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1 G.I.Petrov (Ed.,) *Conquest of Outer Space in the USSR*, 1973.

2 V.A.Sarabhai, P.D.Bhavsar, E.V.Chitnis and P.R.Pisharoty, *The Applications of Space Technology to Development* (United Nations, 1973).

and it was named after the great Indian mathematician and astronomer of the classical age and this satellite was launched from the former Soviet Union cosmodrome at Bikanur. Further, when India launched Satellite Launch Vehicle-3 (SLV-3) in July India came close to realizing its dream of achieving indigenous satellite launch capability. Taking cues and confidence from those achievements Inida started successfully experimented with Polar Satellite Launch Vehicle (PSLV), Geo Synchronous Launch Vehicle (GSLV).

Opinion of the Great Indian Scientist on Space

International contribution played an important role in the Indian Space Programme. The architect-visionary of the Indian Space Programme, Vikram A. Sarabhai, in his words stated, "There are some who question the relevance of space activities in a developing nation. To us, there is no ambiguity of purpose. We do not have the fantasy of competing with the economically advanced nations in the exploration of the moon or the planets or manned spaceflight. But we are convinced that if we are to play a meaningful role nationally, and the community of nations, we must be second to none in the application of advanced technologies to the real problems of man and society, which we find in our country. And we should note that the application of sophisticated technologies and methods of analysis to our problems is not be confused with embarking on grandiose scheme, whose primary impact is for show rather than for progress measured in hard economic and social terms[3]."

Position of India about the International Instruments

India is a party to all the important space treaties, which form the entire gamut of international space law, such as, the Outer Space Treaty (OST) of 1967, the Rescue of Astronauts Agreement of 1968, the Liability Convention of 1972, the Registration Convention of 1975, and the Moon Agreement of 1979. It has been witnessed that India considerably actively participating in various international platforms such as the UN COPUOS, the International Council of Scientific Unions (ICSU), International Astronautical Federation (IAF) etc., in shaping global space law and policy.

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[3] Vikram A. Sarabhai, "The Value of Space Activities for Developing Countries", in *Sarabhai on Space – A Selection of Writings and Speeches* (ISRO Publication, Bangalore, 1979)

Self-reliance and national development are the cornerstones of the Indian space programme. In achieving these goals, the space programme is totally oriented towards peaceful purposes. The contribution of space technology and its applications in different areas of the national economy are substantial.

Now, applications of innovative space technology are already reached to every corner of the world. All developed countries keep their outer space programmes as significant components as part of their industrial growth and ability to compete in international markets[4]. With the advancement of outer space activities by various space faring nations, the need of legal framework felt by the United Nations hence established the United Nations Committee on Peaceful uses of Outer Space (UN COPUS) on. As this could not meet all the requisites other related agencies have produced a substantial corpus of international space law to draw the benefits for the humankind from the outer space.

Present Position of the Space Economy

The global space economy is currently valued at about 360 billion dollars. And it projected to grow exponentially in the coming years. Presently India's share in this sector at about to a mere 2% despite being its presence has been felt prominently in this sector for the last few decades. Undisputedly for the last decades, the presence of private sector increasingly playing an important role in other space faring nations as part of the global space economy. The relevant companies which have been part of this growth are such as Space X, Blue Origin, Virgin Galactic, Arianespace etc., have brought revolution in the private space sector. These companies have exemplified in demonstrating to the world that not only in reducing the expenditure but also the turnaround time of launching the space objects in their respective specific tasks.

The United States of America was the first in enacting national space legislation in confirmation with international treaties like the Outer Space Treaty, the Registration Convention, and the Liability Convention.[5] It also enacted Commercial Communication Satellite Act enabling the United States to take part in the operation of the Intelsat, and international organization dedicated to ensuring the availability of

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4 N.M.Matte (Ed.,), *Space Activities and Emerging International Law (Montreal, 1984)*

5 National Aeronautics and Space Act, 1958

the electromagnetic spectrum globally without discrimination[6]. Further legislations like the Commercial Space Launch Competitiveness Act, 2015, the American Space Commerce Free Enterprise Bill, 2017 (Not an Act yet) were formulated to regulate the right of the United States citizens to explore the outer space and exploit it. Therefore, through these initiatives, it opened up a path for exploration of the outer space for future generations as well.

Journey of Indian Space Sector Growth

India launched its first satellite Aryabhata in 1975 from that initiative it has not looked back. It continues to play an active role in the space sector having launched more than 100 domestic and more than 300 foreign country satellites for about 33 countries. The Antrix Corporation (Commercial arm of the ISRO) expects the space industry in India might grow up to $50 billion by 2024 in case the appropriate policies made and implemented. To achieve the same, the Indian government in the year 2021 established the Indian Space Association (ISpA) to make it accessible the Indian Space Industry to private sectors and start-ups. Also, as a part of COVID-19 relief package, the government announced to open the India's space sector to private players as well while focusing on introducing new opportunities of satellite manufacturing, communications technology, entrepreneurship and so on.

India's Space Sector and Need for Reforms

India has been working on its space sector and taking initiatives by following the guidelines of the Russia and the United States of America. The most outshining achievement of ISRO till date is putting an orbiter around Mars on its very first attempt in 2014 elevating India's position to have a place and part of the league of space powers of the world. Till date, no other country could achieve such an achievement with respect to the Mars is concerned. The mission achieved by the India is phenomenal and made it with very less expensive is the significant part.

India has been a member of the Asia-Pacific Regional Space Agency (APRSAF) since 1993 to discuss issues of space cooperation in the Asia-Pacific Region. Apart from it, India is a party to all major

[6] Open-Market Reorganization for the Betterment of International Telecommunications Act (2000).

international treaties, which are overseen by the United Nations Committee on Peaceful Uses of Outer Space (UN COPUS). The Constitution of India also enable India to adhere to the international agreements under Article 253 and also through Article 51A it calls for striving for excellence "in all spheres of collective activity that the nation constantly raises to high levels of endeavour and achievement"[7].

Space exploration began in October 1957. During the last 65 years, the space sector has contributed to transform the global society as it used to be a dream for the yester years scientists and the other interested population. The launched satellites provide global network of communication connecting people and family's world over, which was quite visible during the COVID-19 pandemic. These space objects also bring people connected with each other with cheaper cost and made the people to enter into various activities on daily basis despite being not able to go to their workplaces. Education is being imparted through outer space particularly when attending the physical classes were disrupted due lockdowns by various countries and cities to avoid the spread of the contagious disease. Remote sensing of resource has added new aspects of ideas and dimensions to economic of nations. It is pertinent to note that the planning of towns, cities have been helped by the space. The world has been witnessing the phenomenal development with respect to innovation and development of technology in general and in the space sector as well.

Space Sector in the ISRO vis-à-vis to the Private Enterprises

Whereas, in India the private players in the industry have been limited only to the extent of being made as vendors or suppliers to the government's proposed projects of the space programmes designed by the government owned ISRO (Indian Space Research Organization). This is the high time the space sector in India needs to promote private sector activity in all the high technology areas to realize the potential of India's youth and they be made as part of the growth of this sector to their full extent possible. The idea of this development to make private entities within this sector to make a mark as independent entrepreneurs who can achieve the end-to-end space activities on their own determined goals. These enthusiastic entrepreneurs exhibiting their interest not only

7 The Constitution of India, Art 51A cl., j.

in space activities and services but also in different applications on their own. These private players only legitimate demand is to create a conducive environment to realize their full potential by drawing a necessary requisite policy.

Lack of Legislation in India

The Outer Space Treaty, 1967 mandates to all the space faring nations to make the enforcement of its provisions. By adhering to the same there were many big and small countries have enacted their requisite laws. However, despite being India has been very active in the space related activities continues to lack a national legislation regulating the exploration and/or experiments and not exploitations carried out in the outer space. Previously, the space activities were taken up by the ISRO as regulating body which is under the complete control of government of India, however, with recent developments and higher technology, the private enterprises are also taking part in the space activities leading to exploitation[8].

Considering the activities initiated and done by the Indian Space sector that India is emerging as a serious player in the International Commercial Space Market. The pertinent issues of space market, authorization, agreements and dispute resolution mechanism needs to be regulated and codified. Even as per the Article VI of the Outer Space Treaty, 1967 the states have to incur responsibility for the damage caused by governmental and non-governmental bodies in the outer space and pushing India to be more vigilant and agreeing for liability- sharing. As a result, many countries have liability-sharing agreements along with insurance coverage schemes in their national space enactments ensuring the risk carried by private parties.[9]

Moreover, with the probability of space tourism becoming a fascination for the future generations due to the role played by private players like Richard Branson and Jeff Bezos, like the Space X, states need to be vigilant and develop a framework for regulation of the space activities as human lives are involved here. Hence, India also needs a legislation on regulation of space activities to enable proper commercialization and

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8 G.S.Sachdeva, *Space Legislation: Random Reflections in* FUNDAMENTALS OF NATIONAL SPACE LAWS (Sandeepa Bhat, Shouvik Kumar Guha, 2022)

9 Sandeepa Bhat, *National Space Law for India – A Reality Check, id at 97*

private space investments and requires changes in domestic law like contract, stamp duty, copy right, patent and so to bring space related issues within it.

Need for Reforms

The Indian space sector under the ISRO enjoys immense political support with the government allocating budget amount every year for the development of space activities. Although, the Indian space economy is valued at $7 billion which is making it about 2% of the global space economy[10]. However, despite the status of the India's role in the space sector, there have been many irregularities noticed requiring immediate attention.

Conflict of interest

The department of Space is directly under the control of the office of the Prime minister of India. This office controls the activities of the ISRO directly showing government's dual role as regulator and commercial executor throttling the participation of private enterprises to reduce the competition and protecting its commercial viability. Although, the Foreign Direct Investments are allowed in this sector, the government through the Department of Space and ISRO would be controlling them. On one hand the government would be competitor and on the other hand regulator and hence it would be proven that it has got stuck in the issue of conflict of interest.

National Security Concerns

Citing reasons for national security with respect to technology sharing, launch systems and satellites capabilities, the Indian government has been reluctant to include private players in the Indian market[11].

Therefore, considering the impact of private players like SpaceX, Blue Origin, Virgin Galactic and Arianespace in the global space economy over the last two decades across the globe. The Indian government recently had proposed initiatives to open the space market for private

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[10] ASG Analysis: Reforms, Opportunities, and India's Space Sector, https://www.albrightstonebridge.com/files/ASG%Analysis%20-%20India%27s%20Space%20Sector.pdf

[11] *Id.,*

individuals as well prior to which their role was limited only to being vendors or suppliers to government's space programme[12].

Reforms Undertaken by India

The Prime minister of India made an announcement on June 24, 2020, in regard to the proposed reforms to be brought in the space sector by harnessing private sector participation in its entire space activities. With a view to enhance India's technology and make it industrially robust based on Atmanirbhar Bharat scheme, it had proposed to facilitate private sector participation through encouraging policies. The following are the proposals for reforms to be undertaken to develop the Indian space market.

Establishment of Indian Space Association (ISPa)

This association was established to promote and help the private players to carry out independent space activities, facilitate technology development of ISRO to be used by them and provide regulatory and policy inputs to the private players in order to support their start-ups, Medium and Small Sector Enterprises (MSMEs) and Acdemia[13]

Setting up of IN-SPACe

To facilitate private sector participation, the government has created the Indian National Space Promotion and Authorization Centre (In-SPACe), as a single window, independent, nodal agency. Its main mandate is to promote and enhance the role of private industry players in the space sector through hand holding, support, and by providing them with a level playing field for all the stakeholders. It will also authorize the use of ISRO facilities by private companies for their enhancement of technology and other infrastructure facilities, development of Indian satellite systems, and launch of rockets/vehicles developed by the private sector. These developments can be taken completely by the private sector or on public private partnership model to achieve the goals of India.

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12 *Unlocking the Space Sector,* ISRO, https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/sep/Space%20reforms%20booklet.pdf

13 *Overview-the Indian Space Sector*, IBEF (*17*Nov, 2021) https://www.ibef.org/blogs/major-reforms-transforming-indian-space-sector.

Commercialization and Privatization of Space

A Memorandum of Understanding (MoU) was signed between the Department of Space and New Space India Limited that will enable identification of requisite technologies developed by ISRO and transfer them to public and private sector organizations. The proposed transfer of technology is to be done for the platforms like Polar Satellite Launch Vehicle (PSLV) and Small Satellite Launch Vehicle (SSLV) in the near future[14].

Further, the role of IN-SPACe is to authorize the use of ISRO facilities by the private companies, helping them to launch rockets, develop satellite systems in the country. ISRO has to identify the needs and demands of private enterprises and help them achieving it using India's resource mechanisms including educational institutions and research institutions[15]. However, the demand for many space-based activities is on rise making ISRO alone inadequate for achieving the country's target of achieving 9% of international space market global economy by 2030.

Example is NewSpace, also established in India (Team Indus, Bellatrix, Satsure and Aerospace) is a phenomenon of entrepreneurs developing products and services based on space using private funding in their initial developments. These private companies are technologically driven and completely focusing on innovations to make it sustainable in the space market. They consist of nascent start-ups providing funding through their own means and getting minimal support from ISRO[16]. With the United States being the lead of the revolution, it is predicted that it will kick-start within the next 10 years across the globe[17]. NewSpace has attracted successful global entrepreneurs to fund them for their ventures in exploring the space and it was successful while traditional enterprises were struggling with the costs of assets and developing rockets at a cheaper price having greater launch cadence.

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14 ISRO, *supra* note 12.

15 Lakshay Beniwal, *A New Space Policy: Critical for the Development of the Space Sector in India,* 4 INT'L J.L.MGMT & HUMAN, 1813 (2021).

16 Ranjan Kaul, *Recent Space Reforms in India: Perspectives of Policy and Law,* 44 J Space L. 450 (2020).

17 Narayan Prasad, *Traditional Space and New Space Industry in India: Current Outlook and Perspectives for the future,* SPACE INDIA 2.0 (Rajeswari Pillai, Narayan Prasad, 2017)

Therefore, the implementation of policies of the government to encourage them is to be seen[18].

Revising the FDI Policy to Open Investment Opportunities for the Foreign Companies

The chairman of ISRO had affirmed that the government of India had announced a revised Foreign Direct Investment (FDI) policy for the space sector that would enable the foreign companies to make invest huge money in the Indian space sector. With the establishment of IN-SPACe acting as bridge between the government entity ISRO and the other interesting private enterprises, facilities of space-based activities is expected to be done. At present, the FDI investments are to be cleared by the government but the revised policy is to be expected to clear through automatic single window mode of clearance of permissions as part of ease of doing business.

Increasing Participation of Private Enterprises in the Indian Space Sector

The proposed steps include the increase in the participation of private enterprises in the Indian Space Sector by enabling ease of doing business through single window clearance system with predictable timelines. This mechanism can enhance the confidence of the investors and they do not need to wait endlessly for their permissions to start their desired projects. By making the Indian resources available for the private players, the government of India wants to set-up a business-friendly mechanism in the country like transfer of technologies, providing facilities of tracking and telemetry, launch-pads and laboratories of ISRO so that the private space industry climbs up in playing an important role in development of the Indian Space Sector.

Public Sector to Focus on Research and Development Work

The intention of the government of India through the words of the Prime Minister of India that to develop the learning facilities to enable youngsters and youth to learn basics of space technology and carry out research activities in the space law. The public sector laboratories would focus on research and development of technology

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[18] *Id*

while the commercial enterprises have to engage in manufacturing activities[19]. Further, the ISRO was given a major role pushing for overall development and research including space exploration, innovation and human space flight in the nearest possible time.

Impact of the Reforms in Space Sector in India

The proposed reforms by the government of India through the Hon'ble Prime Minister of India have been welcomed by the industries, start-ups and the academia in the space sector and the new IN-SPACe mechanism. Presently, more than 40 start-ups, MSMEs and industries who are associated with the space sector have already been received for immediate future consideration by IN-SPACe showing the excellent response from the interested stake holders and the general public who have been observing the developments in the sector for the good of future generations.

In addition to it, many interested Indian based start-ups initiatives owning to the reforms have been able to raise venture capital for their planned projects to utilize the opportunity to explore the possibilities in making their business in this coveted sector. This shows the rising confidence amongst the investors in the vibrant Indian space sector and the expected impact of this deregulation, as brought about by the reforms. To make it real on part of the government of India the applications have been sought for transfer of technology for the Polar Satellite Launch Vehicle (PSLV) and Small Satellite Launch Vehicle (SSLV), which has generated great interest from the interested private sector organizations to be part of the initiative offered by the nation. The reforms enabled to enter the Non-Disclosure agreements and other Memorandum of Understandings (MOUs) for transfer of technologies have been signed between ISRO centers and several private sector enterprises for transfer of technologies and development and development of the exploration activities[20].

In consideration of the reforms initiated by the government of India, it was announced that there are six space technology incubational centers are now started functioning at various places such as Agartala, Trichy, Jalandhar, Rourkela, Nagpur, and Bhopal. Even, on February 28,

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19 *Id*

20 ISRO, *supra* note 8

2021, the NewSpace India Limited conducted its first ever-commercial launch wherein this launch facilitated to put 19 satellites into orbit on the PSLV-C51 launch vehicle, including 4 satellites through IN-SPACe[21].

Therefore, the overwhelming response from the interested private industries and public is a positive sign for the proper establishment of a systematic regulatory mechanism. The deregulation of geospatial/space-map making in India was thus enabled through establishment of IN-SPACe and Non-Government Private Enterprises (NGPEs) making it a historic cherished decision by the government of India[22].

Suggestions

The following are the suggestions for the development of the Indian Space Sector to new heights:

1. The role and activities of private enterprises in India has to be regulated as with the new reforms, they are bound to enter the market and explore the resources to the fullest possibilities. Hence, it is a high time that the government of India shall initiate to enact a legislation on space law is required for laying a proper reliable process and procedure in the country.
2. The created resources must be divided between NSIL and ISRO to ensure that the private players would be able to get their fair and non-discriminatory access to resources and infrastructure, preventing any kind of monopoly or market dominance.
3. As India is a party to the liability convention, the entry of private enterprises in the country would make India liable for their shortcomings as well, mandating the country to put in place appropriate policies for systematic development.
4. India must work on its space policy to develop space insurance to mitigate risk and protect against financial losses[23]; again, requiring a proper framework including the legal aspects.
5. There is a need for cluster mapping and comprehensive study of competitiveness in India to enable managers, policymakers of abroad as well to take advantage of the opportunities opened in India to deliver high reliable technology, services and products.

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21 *Id*

22 *Dr. Jitendra announces historic decision to deregulate space map-making in India*, DAILY EXCELSIOR, https://www.dailyexcelsior.com/dr-jitendra-announces-historic-decision-to-regulate-space-map-making -in-india-2/

23 Lakshya*supra* note 15

6. Target oriented policies should be formulated for an achievable economic development threshold along with recognizing the need for international coordination.
7. Robust mechanism for structured commercial activities to assist new stakeholders and involve them in proper governance of space activities has to be considered.
8. India's space industry must strike a balance between competitiveness and sustainability for security, stability of the country.
9. The growth of Indian space industry can also be recorded by having a space directory of companies, capabilities etc., are accessible to anyone in the international markets to promote ease of doing business[24].
10. The Indian space industry must take part with ISRO in space conferences across the globe like the International Astronautical Congress in order to promote the space activities of the Nation.

Conclusion

The Indian space sector contributes although only 2% to the global space economy as on date, but thus making this sector in India is one of the dynamic and growing sector. The reforms proposed by the government of India in the year 2020 as part of *Atma Nirbhar Bharat* announcement had given very positive response from the various relevant stakeholders in specific private enterprises who have been waiting to become part of the growth of the industry by investing their money and technological advancement skills. It aimed at involving the private players to enter into the Indian space market for better utilization of resources and development of the Indian space sector. Therefore, the implementation of these reforms is to be seen at a wide scale and it is suggested that proper policies and legal framework are formulated for better results and recognition across the world. India shall be able to achieve the growth by 2024 at the United Stated $ 50 billion, further, it must achieve 9% of the global market share by 2030.

[24] Narayan, *Supra* note 17

NALSAR'S ACADEMIC SOCIAL RESPONSIBILITY (ASR): A GRASSROOTS APPROACH

Prof. (Dr.) V. Balakista Reddy[*]

"Universities must go back to their original understanding of a community of scholars in the initial sense, to educate and create knowledge at the use of society."

-Prof. Ruben Cabral

Abstract

NALSAR University of Law was established with the goal of revolutionizing legal education and producing socially conscious lawyers. Over the past 25 years, the university has upheld its values of social responsibility, striving to raise legal awareness in society and promoting social and economic justice. The concept of Academic Social Responsibility (ASR) recognizes the obligation of universities to utilize their resources and expertise to serve the greater good and make a positive impact on society. The Centre for Tribal and Land Rights (CTLR) at NALSAR has played a key role in fulfilling its constitutional mandate and academic social responsibility through various legal aid initiatives, resulting in legal aid for over a million rural poor and also increased legal awareness among them. NALSAR's Community-driven Land Records Updation program was successful in resolving land disputes and updating land records in eight villages.

Key Words: *Academic Social Responsibility (ASR), Legal Aid Initiatives, Legal Awareness, Updation Program*

Introduction

Through this article, the author intends to provide a comprehensive explanation of the direction and efforts made by NALSAR in general, and more specifically through the Centre for Tribal

[*] Prof. (Dr.) V.Balakista Reddy, Professor of International Law; Director, Centre for Aerospace and Defence Laws (CADL) and the Centre for Tribal and Land Rights (CTLR), NALSAR University of Law, Hyderabad.

and Land Rights (CTLR), towards incorporating the concept of academic social responsibility into legal education. Additionally, the author cites the example of Corporate Social Responsibility (CSR)[1], which started as a voluntary initiative but later became mandatory under the Companies Act, 2013. The author advocates that, before academic institutions are legally obligated to fulfil their social responsibility duties, these institutions and academicians should take the initiative to undertake such activities voluntarily.

NALSAR University of Law was established by the Act 34 of 1998[2] with the goal of revolutionizing legal education and producing lawyers who are not only technically proficient but also socially conscious. Over the past 25 years, the university has consistently upheld its values of social responsibility, imparting them to its administration, faculty, and students. The central mission of NALSAR is to cultivate a new generation of lawyers who are capable, competent, compassionate, and are equipped to meet the challenges of the modern world while also serving their communities.

In addition, NALSAR strives to raise legal awareness among the general public, promote social and economic justice, and share legal knowledge through lectures, seminars, symposia, and workshops. The fundamental objective of legal education in India is to uphold the principles of the constitution and to promote a legal system that works to eliminate poverty, reduce inequalities, and ensure justice for all in the social, economic, and political realms. NALSAR aims to achieve these through its concept of *'Academic Social Responsibility'*.[3] The concept of ASR stems from the understanding that universities play a critical role in shaping society and addressing its problems. They are not only centres of learning and knowledge generation, but are also crucial players in the development of their surrounding communities and the world at large. NALSAR recognizes the obligation that universities must utilize their resources, expertise, and influence to serve the greater good and make a positive impact on society.

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1 Section 135, Companies Act, 2013.

2 The National Academy of Legal Studies and Research University Act, 1998. (Act No. 34 of 1998).

3 Academic Social Responsibility can be interpreted as a concept that broadens the scope of academic institutions' educational missions that aim at actively contributing to society through teaching, research, service, and collaboration. The principles and procedures for training socially responsible and globally engaged leaders are discussed by M. Tavanti in the book, *Responsible Management Education in Practice: The Principles and Processes for Educating Socially Responsible and World Engaged Leaders* (Chapter 31).

In today's rapidly evolving world, the challenges facing society are becoming increasingly complex and require multidisciplinary solutions. The National Education Policy (NEP), 2020[4] has introduced a transformative approach to higher education in the country, providing universities with a unique opportunity to bring together diverse perspectives and skills to tackle these challenges and generate meaningful solutions. The Committee on Implementation of Legal Aid Schemes (CILAS)[5] has emphasized the need for law students to participate in providing free legal aid to the poor. It has also pointed out that through community engagement, law students can gain a better understanding of the legal needs of the people and become more effective lawyers.

Teaching, research, and all other activities at NALSAR are geared towards developing a socially conscious body of faculty and students through ongoing engagement with the society. NALSAR is upholds the noble goal of imparting 'Legal Education' as 'Justice Education.' It trains students to become socially responsible lawyers who will act as catalysts for the efficient administration of justice, ensuring that the ideals of 'Justice for All' and 'Equal Access to Justice' become a reality and not just a pipe dream.

Legal Aid to the Poor: A Constitutional Mandate

Article 39A of the Constitution of India states that "*the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities*." Further, the Supreme Court of India on several occasions held that legal aid is a fundamental right, and it is a *sine qua non* for justice[6]. In fulfillment of the constitutional mandate, the Government of India enacted the Legal Services

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4 The National Education Policy, 2020, is the third in the series of National Education Policies (1968 and 1986 modified in 1992) in India and is the first education policy of the 21st century. NEP 2020 covers the broader spectrum of school education from pre-primary to senior secondary. More details available at:https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf.

5 The committee headed by Justice Bhagwati, was set up by the Union Government to formulate uniform schemes for free legal aid to the poor in the year 1980. More details are available at: http://nalsa.gov.in.

6 *Khatri II Vs. State of Bihar*, (1981) 1SCC; 1981 SCC (Cri) 228; 1981 Cri. LJ 470, *Hussainara Khatton & Ors. Vs. Home Secretary, State of Bihar* (1980) 1SCC98.

Authorities Act of 1987[7], which came into force in 1995. Legal Services Authorities were constituted at the Taluqa / Mandal, District, State, and National levels to provide free legal services to the poor and the needy.

The Poor in India are not able to secure their rights over land and other livelihood resources due to the lack of legal awareness, absence of legal aid, inadequate time given to dispute resolution by the revenue officials, lack of clarity regarding the role in case of most revenue officers, weak legal help in the resolution of the cases, and so on. A poor litigant cannot argue his own case for the lack of articulation and excessive formalism relied upon by the courts and lack of access to land records. "*The poor get little or no help as they go from one court to another, as the existing legal aid framework is weak. By the time a case reaches the apex courts, the average age of a case is 15-20 years…Through all this time, the poor are forced to engage lawyers, which costs them thousands of rupees forcing them into a debt trap*" observed the Land Committee appointed by the government of Andhra Pradesh.[8]

In fulfilling the constitutional mandate and as its academic social responsibility, NALSAR in the last two decades, has undertaken several legal aid initiatives which are replicated by various government and non-government institutions. These initiatives have helped more than a million rural poor in getting legal aid and many more becoming aware of their rights and legal provisions. The Centre for Tribal and land Rights (CTLR) at NALSAR has played a key role in these initiatives through its collaboration with the Legal Services Authorities, the State Government and other stakeholders.

Centre for Tribal and Land Rights (CTLR): A Trend Setter in Legal Research& Training

NALSAR University has taken a major step towards fostering advanced learning and scholarly research by establishing 20 specialized research centers. These centers encompass a wide range of subjects, including corporate and consumer affairs, environmental preservation,

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7 The Legal Services Authorities Act, 1987, Act No. 39 of 1987, available at: https://www.indiacode.nic.in/bitstream/123456789/1925/1/198739.pdf.

8 Land Committee Report. Submitted to the Government of Andhra Pradesh (2006).Available at: https://vdocuments.net/download/koneru-rangarao-committee-on-land-issues-of-the-poor.html

protection of intellectual property rights, governance of deep seabed resources, and regulation of outer space activities.

The primary objectives of these research centers are to produce high-quality scholarly publications, provide policy recommendations, and publish newsletters related to their respective areas of focus. Additionally, the university regularly hosts guest lectures and discussions which are aimed at raising awareness about these important issues. Through these research centers, NALSAR also has the opportunity to participate in funded research projects from national and international agencies, as well as from the Central and State Governments.

The Centre for Tribal and Land Rights (CTLR) is particularly focused on social outreach programs. This center strives to create a positive impact on society by addressing the critical issues facing tribal and land rights and working towards finding solutions that benefit all parties involved. This center is a testament to NALSAR's commitment to being a leader in research and making a positive impact on society. CTLR has carried out a number of initiatives, such as assisting the governments of Telangana, Andhra Pradesh, and the Government of India in enacting pro-poor land laws; trained about 1,000 paralegals who assisted in resolving more than one million poor people's land problems; provided training to various stakeholders working on land (revenue, forest, and tribal welfare officials); launched several initiatives to promote legal literacy; and provided technical assistance to the poor. CTLR's advocacy efforts have helped in getting the needed amendments in the record of rights act pertaining to regularization of the un-registered purchases of agricultural lands by the small and marginal farmers. About two million farmers were given the opportunity to apply for *pattas* to the land they were cultivating…thanks to this one effort alone!

Through two booklets, district-level training programs, and extensive media awareness campaigns, NALSAR has educated the farmers and the revenue officers on the above-mentioned new law. About seven lakh farmers were able to obtain land rights. Teaching the law is one thing; assisting students in participating in the creation and application of the law is quite another. The latter provides a fantastic opportunity for students to see the law in action while simultaneously assisting the neighborhood. This is the unique model of imparting legal

education which NALSAR has created through CTLR while helping millions of fellow citizens.

Review of Land Laws - A First of its Kind

There are about two hundred laws and rules including amendments in the undivided state of Andhra Pradesh pertaining to Telangana. The Andhra Pradesh Reorganization Act, 2014 mandates adoptions and modifications of all the laws made before the Telangana State came into existence within a period of two years. Section 101 of the Act states that "For the purpose of facilitating the application in relation to the State of Andhra Pradesh or the State of Telangana of any law made before the appointed day, the appropriate Government may, before the expiration of two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority"[9]. The State Government of Telangana requested CTLR, NALSAR, to review the land laws of Telangana and suggest the necessary changes or enactment of new laws.[10]

NALSAR gathered a group of legal experts to investigate the current land laws in force in the State of Telangana. The team examined, assessed, and revised the laws using a holistic approach. Land laws have been examined from a number of perspectives, including stakeholders, and the prevailing economic, social, political, administrative, and legal conditions. At NALSAR, more than a dozen conversations with various stakeholders, including farmers, members of tribal communities, women, civil society organizations, revenue officials, attorneys, and elected officials, were held to seek feedback on the necessary legal modifications. The group reviewed reports from other key land committees as well as documents from the Nizam era.

Additionally, to get a local perspective, NALSAR organized stakeholder consultations at the district level in each of the 10 districts in conjunction with the district government. The meetings were organized at the district administrative centers with the intention of debating and

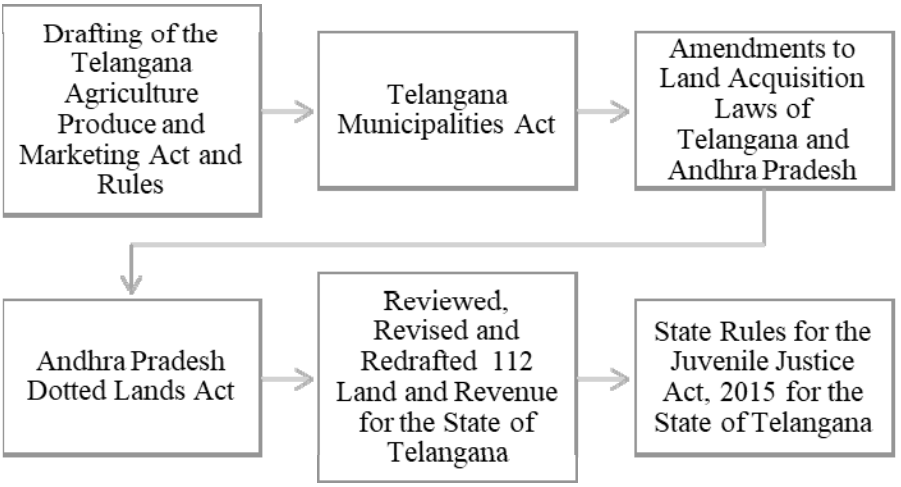
9 The Andhra Pradesh Reorganization Act, 2014, Section 101.
10 Government Order Number 470; dated 01-10-2015.

comprehending the diverse viewpoints and objectives of the public as well as collecting feedback on necessary changes to existing laws. A wide range of interested parties and experts from the Revenue department, farmers organizations, civil society organizations, women's federations, academia, and other interest groups participated and contributed to the consultations.

CTLR has developed a comprehensive report based on consultations, a desk study, and multiple internal discussions with specific recommendations for each statute. CTLR has recommended that some laws should be repealed and others amended. It has pushed for the replacement of all existing land-related legislation with a single comprehensive law. A sample land Act was also produced. Other suggestions made by CTLR include community-driven land record updates, re-surveys, use of new technologies for record maintenance, restarting of the paralegal program, establishment of a land academy to improve land administration, and establishment of district and state level land tribunals for swift resolution of land disputes. It is perhaps for the first time that an academic institution has got the opportunity to participate in such a thorough analysis of the law. This has provided a fantastic opportunity for teachers and students to learn the law by taking part in its construction, and CTLR has served as a superb platform for bridging the gap between the academia and the real world.

As it has maintained its work as a law-making organization, several governments periodically asked NALSAR'S CTLR for aid in analyzing and creating laws and other legal documents. The nation's model tenancy law is being developed by the expert committee on tenancy at NITI Aayog with technical support from CTLR. The Center also organized two state-level consultations in Telangana and AP to provide a forum for discussing the necessary modifications to the state's agricultural tenancy laws in light of the implementation of the Land Licensed Cultivators Act, 2011, and the NITI Aayog's Model Agricultural Land Leasing Act.[11]

[11] For more information, see: *The Land Newsletter*, CTLR, NALSAR, (July 2017).



Their Land, Their Rights: Community-Driven Land Record Updation Pilot

Accurate and up-to-date land records and clear land titles are critical for the effective use of property and economic growth. Unfortunately, outdated land records, unclear or undocumented land titles, and incomplete information lead to land disputes which hinder progress and development. Regrettably, most existing land records are outdated and often do not reflect the true state of affairs.

This often results in the omission of *pattadar* and farmer identities in important documents. The consequences of such outdated land records are significant, with many property owners facing immense difficulties. As a result, a large portion of landowners lack secure rights to their properties and are unable to access benefits such as crop loans, insurance, and input subsidies that are available to them as farmers.

To address the challenges posed by outdated land records and ambiguous land titles, the Government of India has launched the Digital India Land Records Modernization Programme (DILRMP)[12]. This program aims to modernize the management of land records, reduce the number of land disputes, increase transparency in the land records

[12] *Best Practices in Digital India Land Records Modernization Programme (DILRMP)*, Department of land Resources, Ministry of Rural Development, Government of India, available at: https://dolr.gov.in/en/programme-schemes/dilrmp/digital-india-land-record-modernization-programme.

maintenance system, and ultimately guarantee conclusive titles to immovable properties in the country.

In Telangana, the state government is taking steps to update and digitize land records, as well as undertake a re-survey. However, the lack of community involvement in these efforts has led to poor implementation and farmers are losing their rights over their land. It is essential that community participation be emphasized to ensure the success of these initiatives and to safeguard the rights of farmers.

The Community-driven Land Records Updation pilot initiated by the CTLR is aimed at addressing the challenges faced by farmers due to outdated and unreliable land records. This pilot project has been implemented in eight villages and seeks to involve the community in the process of updating land records. Three village youth have been selected as Community Resource Persons and have undergone training on land records maintenance.

These Community Resource Persons visited every household in the pilot villages to collect information on the details of the landowner and any related land problems. They also gathered information from important land records such as 1B, pahani, setwar, khasrapahani, village map, tippan, assignment register, inam register, and government land register. In addition, they visited every parcel of land in the pilot villages to collect information from the cultivators and neighboring farmers and prepared a rough sketch of the land parcel.

The data collected from the household survey, land records, and field verification was then correlated and analysed to identify any discrepancies in the land records. The Community Resource Persons also prepared a list of land problems and the entries in the land records that needed to be updated. This initiative not only helps in updating the land records but also empowers the community to take ownership of their land records and maintain them accurately.

The Community Resource Persons also played a crucial role in raising awareness among the farmers and landowners about their rights and the importance of having updated and accurate land records. Through regular interactions and discussions, they educated the community about the benefits of having updated land records, such as

improved access to government benefits, reduced chances of land disputes, and better land management practices.

The Community-driven Land Records Updation pilot has received positive feedback from the villagers and has been successful in updating the land records and resolving land problems in the pilot villages. This approach has been effective in involving the community in the updation of land records and in ensuring that the updated records accurately reflect the actual situation on the ground. The success of this pilot project has encouraged the government to consider replicating this model in other villages across the state.

The successful outcome of the Community-driven Land Records Updation pilot in eight villages, where all the land problems were resolved, and land records were updated, inspired the Telangana Government to launch the Land Records Updation Programme (LRUP) across the state. In addition, the Government of India recommended this program to other states as part of the Digital India Land Records Modernization Programme. As a result of this initiative, approximately a hundred tribal families from a remote tribal village received *pattas* for their land for the first time, as well as crop loans. The NALSAR logo featured on the land records kit given to these families and on the wall of the village office, showcasing NALSAR's efforts beyond the justice city as part of the ASR initiative, to help poor tribal families living miles away.

Land Rights Legal Aid Clinic at the Court Premises - A Unique Experiment

The University has implemented a unique approach to clinical legal education by setting it in real-world settings, allowing students to apply what they have learned. This has been especially emphasized in Legal Aid, where students provide legal support in various areas of law across Andhra Pradesh and Telangana. In collaboration with the State Legal Services Authority, NALSAR's CTLR established a ground breaking Land Rights Clinic at the Warangal District Court. The purpose of this clinic was to provide a platform for the Legal Services Authorities to offer legal aid on land-related issues. Over the course of its operation, the clinic has provided legal advice to over a thousand individuals and helped resolve their land problems.

Additionally, the clinic has organized legal literacy programs in thirty villages and trained approximately 4,000 people on land matters. This included paralegal volunteers, SHG women, Anganwadi workers, students, police officers, revenue officers, advocates, media personnel, and members of civil society organizations. The clinic served as a one-stop service centre for the marginalized, poor, and tribal individuals with land-related legal issues. This clinic has served as a model for setting up similar clinics in other parts of the state and country.

The NALSAR University's Land Clinic provides legal aid on land matters and encourages students to gain hands-on experience in resolving land cases by opting for the two courses—Land Laws Course and Land Clinic course. Despite the Legal Services Authorities Act being in place for over two decades, the Land Committee recognized a lack of legal aid for the poor suffering with land problems. The Land Clinic serves as a model for Legal Services Authorities to provide free legal services to the poor on land matters through the involvement of law students.

Training the Para Legals - A Million Poor Benefited

Inspired by NALSAR's legal aid programs, the State Government in the combined Andhra Pradesh State launched a paralegal program to resolve the land problems of the poor. The Paralegal Program was part of a large state rural livelihoods program called Indira Kranthi Patham (IKP), implemented by the Society of Elimination of Rural Poverty (SERP), which is part of the state government's Rural Development Department.[13] To provide free legal aid to the poor, SERP recruited 500 rural youth as paralegals to work with women in self-help groups (SHGs). These paralegals were initially tasked with securing the land rights of the rural poor by: (1) identifying the land issues of the poor at the village level; and (2) facilitating the resolution of those issues through legal analysis, case investigation, land surveys and coordination with the Revenue Department (responsible for land administration in Andhra Pradesh).

[13] Society for Elimination of Rural Poverty [SERP] (2002). Operational Manual: *Increasing the Rural Poor's Access and Rights to Rural Land*. Hyderabad: Department of PR; Rural Development, Government of Andhra Pradesh.

NALSAR provided a ten-day paralegal certification course in capacity building. About 50 young attorneys were selected and trained by NALSAR to supervise the paralegals in each district and tribal region. The main duties of the paralegals include identifying and listing land issues in villages, gathering factual data and documentation, preparing reports and petitions, and assisting claimants and court officials in resolving land issues. Paralegals also support Revenue Department staff in holding village meetings.

So far, the paralegal program has helped about a million rural households in poverty. It has received positive feedback from various committees and has been recommended for nationwide implementation with necessary modifications for local situations. The Andhra Pradesh Land Committee supports the program's expansion throughout the state to aid in resolving disputes, assist with legal action, and improve data collection. The Indian government has encouraged all states to adopt NALSAR's successful paralegal model to assist the underprivileged. NALSAR's program not only trains future lawyers, but also creates a network of barefoot lawyers who provide legal services to the communities. NALSAR has not only produced socially conscious lawyers but also fulfilled its academic social responsibility.

NALSAR Brought Courts to Villages

NALSAR students adopted four villages in the Warangal district with the highest number of pending cases. They visited the villages to advise the parties in civil and criminal court cases, gathered information, spoke with village elders, and collected petitions on community issues. In collaboration with the District Judiciary, NALSAR established Village Courts where students represented the underprivileged and helped resolve approximately 100 pending civil, criminal, and other conflicts. The university also established legal aid clinics in nearby villages to assist locals with resolving their issues.

NALSAR students, with the help of the state government's revenue and rural departments, established Grama Revenue Adalats (Village Revenue Courts) in multiple districts and effectively resolved numerous land issues. The success of this project led the state government to issue an order for the creation of a Village Revenue Court

in every village. Over 20 lakh cases were heard, and thousands were resolved through these village courts.

Training and Policy Advocacy Initiatives for stakeholders working on land

To improve law enforcement and enhance the learning experience of law students, NALSAR and the Centre for The Study of Law and Governance (CTLR) have organized workshops and training sessions to expand legal education to those who put it into practice. Key revenue and legal authorities have participated, along with revenue officers, tribal welfare officers, forest officers, police officers, and other stakeholders received training from NALSAR. Additionally, NALSAR organized training for civil society, media professionals, and professors of land law. District consultations on land administration were also held in collaboration with the district collectorates. These efforts support the university's mission of ASR as well as increase student awareness.

NALSAR has played a significant role in driving change by organizing over a dozen events focused on diverse land issues. The impact of these events, including workshops, meetings, and conferences, has been felt by farmers and the rural poor. The paralegal conference organized by NALSAR resulted in the expansion of the paralegal program throughout the state. Additionally, NALSAR's workshops on land leasing led to the adoption of a new tenancy law in Andhra Pradesh.[14]

The training program aimed to improve legal skills, including handling legal disputes, conducting legal research, providing legal advisory services, drafting legal documents, and understanding the court system in India. It also aimed to enhance communication skills in English, professional ethics, and understanding the consequences of ethical breaches in the profession.

Millions of poor people still lack secure access to land. The lack of basic knowledge and skills among revenue officers to interpret and enforce land laws is a major challenge. NALSAR organized training programs for revenue officers, including Deputy Tahsildars and

[14] V. Balakista Reddy, *CTLR Land Initiatives A Journey of Two Decades*, NALSAR University of Law, (December 2021).

Tahsildars, to improve their understanding of land laws, land records, and revenue court powers and jurisdiction, as well as improve their skills in legal drafting, judgement/order writing, and presenting land rights, records and evidentiary value in court. The programs also discussed the challenges in resolving land disputes and possible solutions.

The growth of case load and issues with managing land records and complex laws have made land dispute adjudication difficult and slow. The high volume of cases in courts is due to the poor land administration, leading to a paralyzed land management system. The undivided Andhra Pradesh's Land Committee reported this problem. Numerous civil and high court cases are also related to land disputes which otherwise should have been handled by the Revenue Authorities. To address this, the High Court of Andhra Pradesh noted the lack of knowledge among the revenue officers and ordered the government to provide training.

CTLR at NALSAR also organized training programs for Forest Officers, including FROs, DRFOs, FSOs, FBOs, and ABOs in the Telangana State. The aim was to improve knowledge of land and forest laws, court procedures, and protection of forests and forest rights. The programs focused on proper implementation of forest laws to safeguard forests, flora and fauna, address boundary disputes, improve evidence collection, and reduce illegal encroachments leading to forest land reduction.

Conclusion

NALSAR is a premier law school with a commitment to creating a socially responsible legal community which contributes to the positive development of the society. It is dedicated to producing lawyers who are not only legally competent but also socially aware—a goal that is achieved through its projects and initiatives that are academically challenging and beneficial to society.

As an institute of global legal excellence, NALSAR faces the challenge of staying ahead in the face of globalization. The law school has the responsibility of maintaining its position as a centre of excellence in legal education—a distinction it achieved in its first ten years by creating legally competent attorneys who are socially relevant. With the

emergence of new challenges posed by globalization and the WTO/GATS, there is a growing demand for skilled legal professionals who can effectively function in the new legal order. NALSAR remains committed to meeting this demand.

NALSAR aims to establish a legal fraternity that supports society while being socially responsible. At NALSAR, the idea of giving back to society is instilled in the young minds of future lawyers, in the form of 'social responsibility.' This training results in the creation of lawyers who place a high importance on becoming helping hands to society. To achieve this, it is imperative for academic institutions in the country to incorporate 'academic social responsibility' as part of their reforms.

Every academic institution in the country must now embrace the ethical responsibility of incorporating "Academic Social Responsibility" into their ongoing reforms. NALSAR is at the vanguard of this initiative and is taking the lead role in promoting this important principle.

Book Review

*Noor Ameena**

RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS
Edited by Hilal Ahmad, R. K. Mishra &, K. N. Jehangir

Rethinking Muslim Personal Law: Issues, Debates and Reforms is a timely intervention in the ever-replenishing debates on Muslim Personal Law and Uniform Civil Code within the Indian public sphere. The edited book is a compilation of nine articles, seven of which were presented in a seminar titled 'Making Sense of Muslim Personal Law in Post-Independent India, jointly organized by Institute of Public Education, Centre for Study of Developing Societies and Indian Council for Social Science Research in September 2019. The most important contribution of this work is that it gives a new direction to the debates on Uniform Civil Code (UCC) and Muslim Personal Law (MPL) Reforms which often comes to a dead end with the rhetoric of uniform laws for all versus sacrosanct personal laws. Laying down within the broader framework of legal pluralism, these articles call for a nuanced approach in dealing with this over-debated question. The authors do not shy away from asking complicated questions or taking political positions. The ultimate object of this work is not to find an easy answer for a question that has become definitive of India's self itself, but involves a call for retrospection and collective action for future well-being, for the state, government as well as the community.

Ever since independence, Muslim Personal Law and Uniform Civil Code were conceived as opposites; the political parties, media, and the courts in India have time and again reinforced this binary understanding of UCC and MPL. The first thing to do to create a genuine discussion on this topic is to step out of this binary to understand that UCC is not just a Muslim issue as it is broadly portrayed to be. It lays down the rich diversity of customary practices and personal law operated, and continues to operate in India, protected by Constitution, state and central statutes, dispelling the common myths of a uniform Hindu Code or a Uniform Civil Code in Goa, among others[1].M.R.

* Research Scholar, Integrated LLM PhD, NALSAR University of Law, Hyderabad.

1 Irfan Engineer, *Gender Equality Should Guide the Process of Reforming Family Laws and Not National Integration*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 151 (2022); M.R. Shamshad, *Of Statutes and Scriptures: Diversity, Democracy,*

Shamshad outlines the hypocrisy of the Indian courts and the contribution of Indian courts in setting out Islamophobic narratives feeding into the political imbroglio. He argues that 'essential religious practices' test employed by the Supreme Court is bound to go, and that the courts should not be in the business of dissecting what is essential or non-essential to a religion, which are matters of faith and are best left to the believers. Contrasting religious or denominational morality with constitutional morality, he proposes that the positions of religion would have logics and rationale beyond the equality principles emerging from constitutional morality. Referring to Law Commission of India report and findings of Pew Research Surveys, the author argues that for a Muslim women, her religious identity, which includes personal laws, is as important to her as her other cultural or linguistic identities, and hence it would be unfair to disallow her sense of morality under the freedom of religion, even if it is at variance with mainstream morality concepts. While there is credence in these arguments, the major fault line in this line of argument is that it creates a sense of denial in relation to the question of the need for personal law reforms. It does not take into account the several works in the domain of Islamic feminism that provide varied understanding of religion and personal laws; there is neither an acknowledgment of the sense of injustice among at least a section of Muslim community nor a genuine interest for reforms of Islamic laws in select areas. Misbah Rashid's *'Challenging the Hegemonic Discourse: All India Muslim Personal Women Personal Law Board and Gender Justice'* offers a counter to this by tracing the efforts of All India Muslim Women Personal Law Board (AIMWPLB) in offering nuanced interpretations of Muslim Personal Law which is at variance with the positions taken by All India Muslim Personal Law Board (AIMPLB)[2].

Hilal Ahmad's work on *Politics of Shariat in Post-colonial India* argues that Shariat in its operation in every soil is a historical construct. The puritan Shariat is a relatively modern interpretative tradition; the continuity of Muslim personal law as a whole from the Mughal era through the colonial and post-colonial era is also far from true. Looking

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Personal Laws and Courts, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 15 (2022).

2 Misbah Rasheed, *Challenging the Hegemonic Discourse: All India Muslim Women Personal Law Board and Gender Justice*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 135 (2022).

at the Persian and Sanskrit literary universe and their interactions with the political system in Mughal India, historians have argued that, ''what seems to be operating are two models of cosmopolitan culture which, while certainly in dialogue with religious systems, embraced a far wider spectrum of culture than religion alone'[3]. The Islamic reform movements in the 19th century and the emerging popularity of translations of Quran gave rise to the distinction between ideal Islam based on Shariat and the customary practices intertwined in the practice of Muslims. This eventually led to the demand for Shariat Application Act, 1937 resulting in overthrowing of customary practices prevalent among Indian Muslims in favour of Shariat. Hence the Shariat as we see and practice today are historically evolved by human intervention, and the perceived sacredness of the same is questionable. Going through the debates on Shariat in post-colonial India, Ahmad argues that the development of Shariat in the post-colonial world is built on state/ government distinction. Ahmad postulates a new way of looking, and understanding Shariat debates in South Asia, poses more questions than answers[4].

The articles also lay down the plurality of views within and among Muslims which makes consensus among Muslims themselves on key issues nearly impossible. The voices for Muslim Personal law reforms have risen time and again from within the community, and partly the blame also falls on the Muslim community and its leadership including religious leadership in not heeding to these voices. The community also has lost *ulemas*who could creatively engage with the state to come up with solutions to the concerns within personal law[5]. The articles condemn the Indian *ulemas*and bodies like AIMPLB for holding on to the conservative interpretation of Muslim personal law to the detriment of women. The internal dialogues should start within the different sects and leadership of the community, lest one would witness the top down reforms at the instance of the state or judiciary where the members of the community would have little or no say[6]. In an insightful work, Nazeema Parveen elucidates how over-submissive media

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3 RICHARD MAXWELL EATON & PHILLIP B. WAGONER, POWER, MEMORY, ARCHITECTURE: CONTESTED SITES ON INDIA'S DECCAN PLATEAU, 1300-1600 (2014).

4 Hilal Ahmed, *Politics of Sharia*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 120 (2022).

5 Furqan Ahmad, *Muslim Personal Law Reform and Human Rights*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 73 (2022).

6 Maidul Islam, *Triple Talaq Bill and Reforming the Muslim Personal Law in India*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 117 (2022).

manufacture discourse for political consumption propelling the images of recalcitrant Muslim men and hapless Muslim women and the ruling party as saviour; and in this process the real voice of Muslim women gets submerged[7].

Werner Menski & Kalindi Kokal put forth a 'flying kite' methodology in dealing with questions in the intersections of law and religion. Legal pluralism refers to a situation where behaviour occurs in response to more than one legal order in the same space at the same time[8]. The foundational understanding of legal pluralism is that state is not the sole source of law. In any jurisdiction, one could see a co-existence of four different types of laws: a) natural laws (religious and traditional ethics/ values, b) societal norms (includes customs), c) state laws (statutes, court rulings), and d) new natural laws (international human rights). Different stakeholders say a lawmaker, a judge or an individual navigating through these legal orders has to balance the kite carefully; like a flow of wind may affect the stability of the kite, the response to these legal orders are also conditional on time and space. A legally conscious individual carefully opts between these legal orders or a mix of these in a manner best suit them. Leaning to one legal order or establishing the superiority of one legal order over the other, disrupts the balance of the kite and the kite will eventually fall. For example, to come up with a state imposed uniform civil code or to completely leave it to supremacy of religious laws both are counterproductive. The answer lies somewhere in the middle, in a careful balancing act, 'a kite flying balance' as Menski & Kokal proposes. In a nutshell, that is the future the authors envisage: *a kite flying balance*.

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7 Nazeema Parveen, *Muslim Personal Law and Triple Talaq: Claims, Counter Claims and the Media Discourse*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 89 (2022).

8 Werner Mensky & Kalindi Kokal, *Muslim Personal Law from a Cross-National and Comparative Perspective*, *in* RETHINKING MUSLIM PERSONAL LAW: ISSUES, DEBATES AND REFORMS , 42 (2022).

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Prof. (Dr.) Srikrishna Deva Rao

for subscription enquiries write to:
The Registrar
NALSAR University of Law
Justice City, Shameerpet,
Medchal-Malkajgiri District,
Hyderabad - 500 078, Telangana. India
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