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Articles

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Book Review of Socio-Legal Research: Theory and Methodology

NATIONAL LAW UNIVERSITY, ASSAM

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MESSAGE FROM THE EDITOR-IN-CHIEF

The National Law University Assam Law Review (NLUALR) is a mirror to the quality research orientation of students of NLUJA, Assam. The University represents India with talented students from all over the country, pursuing studies in divergent disciplines and honing inter-disciplinary approach towards pertinent national issues. As diligent students, acquiring and disseminating knowledge in different shades of life, the contributors to NLUALR are serving the great cause of social aspiration to accomplish the right to know more and to update information regarding socio-legal problems and their solutions. This fifth volume of the journal covers a wide range of research areas containing adequate and relevant data, appropriate analysis, thought provoking ideas and new insights along with deep vision of socially desired pursuit of justice.

Articles, case and legislative comments published in this issue contain contributions from students, researchers and academicians. The current issue encompasses writings on contemporary and multidisciplinary facets pertaining to the diverse areas of Arbitration, International Laws, Intellectual Property Rights, Personal Laws, Environmental laws etc. The NLUALR is the result of untiring and relentless efforts of the Editorial Board consisting of talented students devoting their precious time, without impairing the high pursuit of learning and study, under the guidance of the Faculty Advisory Board. The students involved in publication of this Review deserve special congratulations for their meritorious work. As the Editor-in-Chief of NLUALR, I wish all the success to this issue and hand over it to readers to read, evaluate, comment and encourage the budding scholars to work with new zeal for social service and community welfare through constructive, creative and innovative suggestions to solve social-legal problems and eradicate social evils.

Prof. (Dr.) V. K. Ahuja
Vice-Chancellor, NLUJA, Assam
Editor-in-Chief, NLUA Law Review

MESSAGE FROM THE FACULTY EDITORIAL BOARD

The National Law University and Judicial Academy, Assam proudly presents this issue of the NLUA Law Review, our student run peer reviewed journal. It is one of the flagship journals of our university that provides an avenue for the publication of valuable research by the esteemed legal fraternity. This journal comprises a myriad of quality research from across disciplines.

Research, *inter alia*, should aim at contributing to the enhancing the standard of our society and that of its resident individuals. This journal endeavours to house deliberation on topics of law and other multidisciplinary fields ultimately leading to invaluable addition to legal scholarship and policy formulation. The current issue of this journal is an assortment of well researched and thought-provoking pieces covering various relevant facets of contemporary law. The need to research upon diversified areas of law has been recognised and realised through publication of varied legal issues relevant to Constitutional Law, Criminal Law, Environmental Law, Family Law, Human Rights Law, Intellectual Property Rights, Law of Contract, and Public International Law in the present issue of the journal.

At this juncture, we would humbly acknowledge the guidance and support of our Editor-in-Chief and Vice-Chancellor, whose support has been invaluable in bringing forth this issue. We heartily appreciate the work of the Editorial Board for their commitment and dedication towards the publication of this issue. We extend our thanks to the esteemed authors for their valuable contributions to our journal and hope to enjoy their support and contributions in the future. We hope our readers find the articles informative and interesting and we sincerely wish all our readers happy reading and learning experience.

Faculty Editorial Board

NLUA Law Review

EDITORIAL

In 2021, the National Law University Assam Law Review (NLUALR), a peer-reviewed publication native to NLUJA, Assam, celebrated six years of glorious existence. In these extraordinary times, this modest milestone serves as a motivation and a source of delight for all of us. As students of Humanities, we are taught that what it means to be human is defined by our legacy. Thus, tracing back our legacy, it was in the year 2015 when the foundation stone for NLUALR was established. The foundation stone was built on the principles of collecting, processing, and disseminating tenets of legal academia for the benefit of the global legal community—students, academics, practitioners, and anybody who finds a glimmer of hope in free and bias-free expression. The Law Review has strived for excellence in terms of the research we present to our community over the years, as envisioned by Professor (Dr.) Gurjit Singh and implemented by Professor (Dr.) Vijendra Kumar, remaining both inclusive and restrictive at the same time, the former for ideas from all walks of life in the firm belief that each idea has the power to fundamentally change the world, and the latter for academic excellence. Now, under the auspices of our Hon'ble Vice-Chancellor of NLUJA, Professor (Dr.) V. K. Ahuja, the Editorial Board of this publication, has gone to great lengths to continue the legacy of the luminous past - with a helping hand at every stage.

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

Priyanka Anand, in her article titled "DECIPHERING INDIA'S TRYST WITH INVESTOR STATE ARBITRATION: INSIGHTS FROM CAIRN ENERGY PLC & CAIRN UPHOLDINGS LIMITED V THE REPUBLIC OF INDIA", has talked about the persisting conundrum of tax disputes and ISDS and attempts to analyse the interaction of Investor State Dispute Settlement (ISDS) and Taxation in light of the Cairn Energy Plc case. The author has discussed the Cairn Energy Case in length to see how the tribunal has answered questions in relation to its jurisdictions on tax related dispute, and to look at the way forward and see how the countries could keep taxation measures outside the jurisdiction of ISDS.

Atul Alexander and **Maya Venkiteswaran**, in their article titled "CALLAMARD REPORT ON THE MURDER OF JAMAL KHASHOGGI: HAS THE CAR LEFT THE GARAGE?", seek to enquire into the facts and the legal aspects that surround the killing of renowned Saudi Journalist Jamal Khashoggi. The article presents the steps taken by the United States, Turkey and Saudi Arabia to comply with the Callamard Report published by the Special Rapporteur. The article highlights how the state of Saudi Arabia has completely failed at fulfilling the recommendations of the report and how in doing so, they have denied justice to Khashoggi.

Neha Bhandari and **Manmeet Kaur**, in their article titled "MENSTRUAL HYGIENE ENSHROUDED IN TORPOR OF OBLIVIOUSNESS VIS-À-VIS A FACET OF RIGHT TO LIFE FOR SYRIAN REFUGEES", enquire into the menstrual hygiene measures in the context of the right to life and its importance as a facet of right to health. The authors have traced the historical aspect of the topic under study as well as the international legal principles as well as organisations involved. The author has touched upon the relevant legal principles and provided an interesting study on South Korea.

Divya Dhupar and **Lianne D'Souza**, in their article titled "A COMPARATIVE ANALYSIS OF THE REGULATORY FRAMEWORK GOVERNING SOLAR WASTE MANAGEMENT IN INDIA, UNITED STATES OF AMERICA AND THE EUROPEAN UNION", analyse the existing legal and regulatory framework prevailing in India, relating to solar waste management. In doing so, they draw a parallel to the legal and regulatory frameworks in the United States of America and the European Union concerning solar waste management. Through this comparative approach, the authors map the loopholes in the present framework and also put forth suggestions for the same. A poor solar waste management strategy will not allow India's solar energy sector to truly reach its potential. When India is seeking to shape the world's acceptance of solar energy by leading initiatives as the International Solar Alliance, a well-planned regulatory framework on how to deal with decommissioned solar energy tools, it would definitely help India's cause.

Gaurav Chaliya and **Vivek Krishnani**, in their article titled "FOUR CIRCLES INSTEAD OF SEVEN: ASSESSING THE VALIDITY OF AN ANAND KARAJ

BETWEEN TWO HINDUS" argue for the validity of Anand Karaj marriage between two Hindus, which Indian Courts have otherwise objected to in various rulings. The authors argue for placing more emphasis on the intention of the parties and also examine the validity of an Anand Karaj marriage for two Hindus from various lens, which, to quote the author's themselves, makes the argument indeed more 'compelling'.

Kanika Aggarwal, in her article titled "THE TWO PRINTS MATCH'- A STATEMENT HAVING DIFFERENT MEANINGS FOR SCIENCE AND LAW" seeks to analyse whether the appreciation of fingerprint evidence in the courts in India is in consonance with the contemporary scientific knowledge. The author puts forth a very detailed account of the manner in which Indian courts have appreciated fingerprint evidence and also puts forth the fundamentals of fingerprint identification. Substantial discrepancies between legal interpretations of latent fingerprint comparison evidence and scientific understanding and expectation have been aptly demonstrated and the author also puts in certain recommendations which in her words, would connect the unconnected worlds of scientific enquiry and law.

Sanchit Sharma, in his article titled "THE LINE OF 'CONTROL': A SOCIO-LEGAL EXAMINATION INTO THE COMBAT EXCLUSION POLICY OF WOMEN IN INDIA", examines the arbitrary policy of excluding women from combat, keeping in view the recent developments of women in the armed forces and the progressive jurisprudence put forth by the Honourable Supreme Court over the years. The author criticises this policy by trying to draw a nexus between the sociological and legal literature available and challenges the classical assumptions which provide ground for the exclusion of women from combat.

Diptimoni Boruah, in her article "THE CONUNDRUM OF INHERITANCE RIGHTS AND WOMEN EMPOWERMENT IN INDIA: A SOCIO-LEGAL PERSPECTIVE", attempts to highlight the impounding necessity of property ownership for women. She extensively talks about how women despite having rights on article, have been denied to exercise such rights to property and succession on a ground level. This article traces the roots of inequalities in inheritance and succession

among various secular and customary laws. The author has necessitated how property ownership among women can empower them for their sustainable future.

Shivam Tripathi, in his article titled "TAXATION OF WORKS CONTRACT: A PERSISTENT CONUNDRUM" delve into the impact of Hundredth and One Constitutional Amendment, 2016 on the issue of taxability of works contract. The article attempts to present certain pertinent issues prevalent in the imposition of tax on a work contract under the GST regime and list out probable suggestions in order to plug existing loopholes.

Chiradeep Basak, in his article titled "PROTECTION OF CHILD FROM CYBER BULLYING: A COMPARATIVE LEGAL ANALYSIS", analyses the menace of Cyber bullying in today's era and how Cyber Bullying has posed a prominent challenge in today's highly dependent virtual scenario. The author has brilliantly accentuated his points with the help of pictorial and graphical representation. The article even makes a comparative legal analysis between the cyber laws of the USA and India to highlight similarities and dissimilarities between them and how we can take a cue from other nations and improve cyber security regimes in India.

Vidhatri Mysore and **Saumya Adhana**, in their article titled "A NEW WORLD CRISIS - WHO GETS THE VACCINE?", have tried to analyse the role of Intellectual Property Rights amidst the pandemic, the TRIPS Agreement and its significance, the waiver proposed by India and South Africa as well as the reasons for the shortage of vaccines. This article aims to critically analyse how the IPR laws have been an impediment to access to the COVID-19 vaccines and how we can come up as a global community to suggest and implement possible solutions and get rid of old flaw-filled existing systems to curb the same.

Shradhanjali Sarma, in her article "DATA PROTECTION AUTHORITY: IN SEARCH OF AN INDEPENDENT REGULATOR" discusses the nuances of The Personal Data Protection Bill, 2019, that had introduced the Data Protection Authority as the "independent" regulator for the protection of personal data of citizens. In her article, she discusses the role of the fourth branch of the Government and the extent of its independence. The journey of the Data Protection Authority in India is also

traced and whether the current structure is a success in terms of an effective regulatory data protection regime in India is judged.

In the article titled "ARTIFICIAL INTELLIGENCE AND PATENT LAW: DISCOURSE OVER DISCLOSURE," **Abhinav Srivastava** attempts to elaborate the discourse over Artificial Intelligence (AI) and Patent Law. The article argues that the nature of AI has the plausibility of being a stumbling block to the fulfilment of prerequisites of patent law and, therefore might put barriers on the basic essence of patent law. The article seeks to analyse the mechanism of AI and its issue over transparency in light of the doctrine of disclosure under the umbrella of patent laws of the US and India.

Neha Aneja, in her article titled "CHILD MARRIAGE IN INDIA: A SOCIO LEGAL ANALYSIS" examines the institution of child marriage and analyses the associated challenges the Indian legal system faces vis-à-vis the prohibition of Child Marriage. The author also highlights how a legislative mess exists with regards to dealing with Child Marriage and suggests what legislative as well as attitudinal changes need to be made in the Indian legal and societal framework.

Shivani Chouhan, in her article titled "INTIMATE PARTNER VIOLENCE AND LEGAL FRAMEWORKS: A COMPARATIVE STUDY OF INDIA AND JAPAN" attempts to study the cross-disciplinary exploration of the menace of Intimate Partner Violence, presenting it in the context-specific to India and Japan and the legal mechanisms that address these concerns. The article emphasises the necessity of looking for the long-term solutions addressing the root cause behind the violence against women rather than slapping on band-aids and quick fixes.

Abhishek Chakravarty, in his article titled "A LEGAL STUDY OF SACRED GROVES IN INDIA AND ITS BIOLOGICAL IMPORTANCE WITH SPECIAL REFERENCE TO MAWPHLANG SACRED GROVE MEGHALAYA", addresses the legal regime surrounding sacred groves; he tries to make the readers understand the biological importance of these forests. In the further course of his article, he talks about municipal and customary laws in Meghalaya, which provide recognition and protection to sacred groves with special reference to the field study of the Mawphlang

sacred grove, and he elucidates the framework of Carbon Trading and how the REDD+ initiative is helping protect and restore community forests.

The case of *Vidya Drolia v Durga Trading Corporation* has settled a host of issues in the arbitrability of fraud saga by clearing the deck for arbitrability of tenancy disputes under the Transfer of Property Act, 1882. **Animesh Bordoloi** and **Hitoishi Sarkar**, in their case comment "CLOSING THE LID ON ARBITRABILITY OF FRAUD: ANALYSING THE INDIAN SUPREME COURT'S RULING IN VIDYA DROLIA" attempts to provide a detailed descriptive analysis of the most recent decision by the Supreme Court while also analysing the implications of the ruling and identifying the missed opportunities on areas where there was a significant need to bring clarity on the position of law.

Tathagat Sharma in his case comment on "THE APPEALS CHAMBER'S JUDGMENT IN SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN" examines the Appeal's Chamber's judgement in overturning the judgement of the Pre-Trial Chamber to allow the prosecutor to commence the investigation into the alleged crimes under Rome Statute of ICC in Islamic Republic of Afghanistan. The author highlights why the Appeals Chamber's judgement is in consonance with the aims and values of the Rome Statute. At a time when the International Criminal Court is having to struggle for staying relevant and gain more acceptance from nation states, the Appeals Chamber's Judgement helps the ICC's cause in many direct and other implied ways.

Farah Hayat, in her legislative comment titled "ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019: A LAW THAT RAISES MORE QUESTIONS THAN IT ANSWERS" examines the Muslim Women (Protection of Rights on Marriage) Act passed in 2019 prohibiting divorce by way of *Triple Talaq* or *Talaq-e-Biddat*. The author has attempted to provide a brief analysis of the issue of triple-talaq and how the aforementioned legislation has paved the way for the protection of the rights of married Muslim women.

MK Bhandari, in his book review of the book by the title, "SOCIO-LEGAL RESEARCH: THEORY AND METHODOLOGY", by P.P Mitra [Thomson Reuters

South Asia Private Limited, 2021], delves into the role of the book in exploring the various nuances of the research methodology and sociolegal research in particular. The author traces the chapter wise contents of the book and appreciates the book for highlighting the future of socio-legal research.

We would like to thank the offices of the Vice-Chancellor and the Registrar of National Law University and Judicial Academy, Assam, for their unwavering support throughout the publication of this edition of the Law Review. A special mention of our gratitude towards our staff members at the University must be made for all of their assistance towards us during this time. We would also like to express our gratitude towards our contributors for their patience and cooperation with our editorial team. This pandemic has unveiled the limitations of the structures that have allowed us to thrive as a society; it has made it apparent that we must do better, which is why all the help we have received at this time has been invaluable, and we are grateful for it.

Note: The views of the authors in their respective articles do not necessarily represent the views of the Editors.

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DECIPHERING INDIA'S TRYST WITH INVESTOR STATE ARBITRATION: INSIGHTS FROM *CAIRN ENERGY PLC & CAIRN UK HOLDINGS LIMITED v GOVERNMENT OF INDIA*

Priyanka Anand[1]

ABSTRACT

India has been an economically attractive destination, but the infamous 2012 'retrospective amendment' to the Indian taxation law has rendered significant distasteful mark on its reputation and investor confidence. This amendment has led to a series of multiple international investment disputes and when fiscal measures entwine arbitration, unnecessary conundrum follows. The 2012 amendment incited three significant investment treaty arbitration cases against India, namely Vodafone, Cairn Energy Plc and Vedanta Resources Plc. The year 2020 saw two of the three cases (Vodafone case and Cairn case) decided against India which ultimately led the Indian government in wilful defiance of the arbitral orders. The present paper tries to analyse the interaction of ISDS and Taxation in light of the Cairn Energy Plc case. The paper is divided into three parts: Part I is dedicated to analyse ISDS and taxation at a conceptual level and to see what is the relationship between ISDS & taxation. Part II of the paper discusses the Cairn Energy case, the award and the post-award developments. I analyse the reasoning of the tribunal and see how the tribunal has answered questions in relation to its jurisdiction on tax related dispute, which the states generally argue is outside the jurisdictional scope of ISDS because it is a matter of sovereign power of the states. The last part of the paper attempts to look at the way ahead, i.e., how the countries could keep taxation measures outside the jurisdiction of ISDS.

Keywords: *Investor State Dispute Settlement, Bilateral Investment Treaties, Taxation, Expropriation, Tax Carve Out.*

[1] Assistant Professor of Law, National Law University, Odisha.

INTRODUCTION

With the escalation of International Trade and Investment transactions, the potential for conflict between tax jurisdictions has increased and it has become imperative and inevitable to reform international taxation policies, in both law and practice. Tax policies have outgrown the boundary of individual states and there has been a phenomenal rise in the number of tax issues that are governed by international agreements – treaties between states which provide for eliminating international double taxation, promoting exchange of information and cooperation among tax administrations and thereby encouraging both international investment and global economic growth.

India has been able to establish itself as a country with substantial economic attractiveness, yet the infamous 2012 'retrospective amendment' to the Indian taxation law brought about by the government as a move to nullify the effect of the *Vodafone* judgement[2] of the Indian Supreme Court has rendered portentous foreboding mark on this reputation. This amendment has received heavy criticism over the years, and is one of the reasons for the foreign investors' hesitation in bringing more money to India. However, today, when this amendment has led to a series of multiple international investment disputes, there is hardly a murmur, even when the Indian government is willingly defying the arbitral orders against the amendment. It is still an enigma as to why the Indian government that vanities itself on its egress from the past in all other fields of social and political life, is so resolute to defend this retrospective tax dispute which preludes its tenure and has only brought continued litigation[3]. This notorious retrospective taxation by India in 2012 incited three significant investment treaty arbitration cases against India, namely: (i) *Vodafone International Holdings BV v The Republic of India (Vodafone case)*[4]; (ii) *Cairn*

[2] *Vodafone International Holdings B V v Union of India & Anr,* [2012] 1 SCR 573**.**

[3] 'Cairn's belligerence puts Indian government in a quandary' (*Money Control*, 18 May 2021) <https://www.moneycontrol.com/news/opinion/cairns-belligerence-puts-indian-government-in-a-quandary-6905731.html> accessed 21 May, 2021.

[4] *Vodafone International Holdings BV v* Government of *India* [I], PCA Case No. 2016-35 (Dutch BIT Claim) - The ISDS tribunal consisting of L.Y. Fortier, R. Oreamuno Blanco and F. Berman gave an award in support of VIHBV, for violation of the FET standard of the India – Dutch BIT. The tribunal ordered India to compensate legal costs of approx. INR 850 million to Vodafone. The entire award is not published in public domain. <https://images.assettype.com/barandbench/2020-09/c2062072-6807-4c92-8979-f16b440e70fe/VODAFONE_PCA_Decision.pdf > accessed 1 May 2021.

Energy Plc and Cairn UK Holdings Limited v The Republic of India (Cairn case)[5]; and (iii) *Vedanta Resources Plc v The Republic of India (Vedanta case)*[6]. In the year 2020, two of the three cases (Vodafone case and Cairn case) have been decided against the Indian government and in favour of the foreign investors. In December 2020, Cairn Energy Plc & Cairn UK Holdings Ltd. (collectively 'Cairn Energy') won the arbitral award that held the levy of taxes using the infamous 2012 'retroactive amendment' to Indian Income Tax law unfair on the company and the International arbitral tribunal asked the Indian government to return $ 1.2 billion plus cost and interest. It was decided by the investment tribunal that India had broken its obligation under the 1994 India-UK Bilateral Investment Treaty (India-UK BIT) and under international law.

This paper endeavours to do a comprehensive study of the interaction between Investor State Dispute Settlement (ISDs) and Taxation in light of the one of the most high-profile tax litigations, *Cairn Energy Plc and Cairn UK Holdings Limited (Cairn Energy) v The Republic of India*. The paper is divided into three parts: Part I is dedicated to analyse ISDS and taxation at a Conceptual level and to see what is the relationship between ISDS & taxation. In Part II of the paper, I discuss the conspicuous *Cairn Energy case,* the award of tribunal and the present status of the case.

This case is important not just from point of view of India's tryst with investor state arbitration but also from the point of view of taxation measures. The reasoning of the tribunal is an important ruling which shall be carefully looked at by all the countries who wish to adopt taxation measures in future. The last part of the paper shall be dedicated to study how countries can keep their taxation measures outside the ambit of ISDS because that is indeed one thing that has come out prominently of this case as a lesson. Here, I shall particularly talk about the Indian model BIT which has come out in 2016 which provides a template with a *'tax carve out'*. '*Tax carve outs'* fix the scope of the tribunal's jurisdiction, and limits bounds the substantive obligations that are pertinent to a state's taxation measures.

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[5] *Cairn Energy PLC and Cairn UK Holdings Limited* (CUHL) *v.* Government of *India,* PCA *Case* No. 2016-*7.*
[6] *Vedanta Resources Plc v India,* PCA *Case* No. 2016-05 (UK BIT claim).

REDRESSING THE CONUNDRUM OF TAX DISPUTES AND ISDS

The Continuing Dilemma of Taxation vis-à-vis States' Police Power

Taxation has long been considered as among the last bastion of Westphalian sovereignty[7]. However, an important question that needs to be addressed in context of the ever-increasing tax related disputes with respect to foreign investments in a country is whether tax is related to a states' 'police power'[8]? Why is it important? According to the so-called police powers doctrine, any action taken by a state which is within the state's police powers and results in loss of property cannot be considered as an indirect expropriation and the state would not be required to compensate.

Preliminarily, taxation does not cause any apprehension with respect to the regulatory autonomy, but in terms of international taxation, we need to see if taxation can be considered to be within a country's state police powers and why is this important? To answer this question, when we look at the history of International Investment law and history of State Responsibility for international conduct or international regulations, we see that taxation has always played an important aspect. So if we look at customary international law for example, which tells us about the police power doctrine in international law – which states that whenever any country adopts any regulatory measure which is bona fide, in good faith, and in order to address an important public objective, this regulatory measure is a non-compensable taking – which means the state need not compensate the foreign investor for such regulatory measure – of course such regulatory measure needs to be bona fide and in good faith and is to address a public interest objective and should follow due process. Now, this police powers doctrine which has been part of customary international law, has been recognised by several arbitral tribunals across the globe but it leaves one question open – the question is '*is there a list or taxonomy of state's police powers?*' Well scholars have still struggled to come to a conclusion that whether there is indeed

[7] Dr. Julien Chaisse, 'The treatment of (National) Taxes in Tax & Non-Tax (International) Agreements', presentation at the 6th Meeting of the Asia-Pacific Foreign Direct Investment (FDI) Network <https://www.unescap.org/sites/default/files/5.%20Julien%20Chaisse_Tax.pdf> accessed 1 May 2021.

[8] 'The police powers doctrine provides that a State possesses an inherent right to regulate in protection of the public interest and does not act wrongfully when, pursuant to this power, it enacts *bona fide*, non-discriminatory and proportionate regulations in accordance with due process'. *See* Ms. Alice Osman, 'Police Power Doctrine' (*Jus Mundi,* 26 May 2021) <https://jusmundi.com/en/document/wiki/en-police-powers-doctrine> accessed 28 May 2021.

any such list or list of activities that can be classified as an example of states police powers, but there is some indication to suggest that even if this list is uncertain, there is one set of states measures, on which there appears to be consensus that they fall within states police powers and these are taxation measures.

Let's take some examples from international law to prove this point. The protection to investors against indirect expropriation by States' is a general sight in numerous international instruments. But most of them have no specific provision on the treatment of the non-compensable regulatory measures, except few such as the European Convention on Human Rights and Fundamental Freedoms[9], the US-Free Trade Agreements[10] and the model US BIT 2012[11], Model Canada BIT, 2004[12] and Model India BIT 2016[13]. Noteworthy is that commentaries were later added to the OECD Draft Convention on the Protection of Foreign Property[14] and the draft OECD Multilateral Agreement on Investment[15] because the original drafts were silent on the non-compensable regulatory measures. Similarly, the text of the Third Restatement of Foreign Relations of the United States which is an authority on the American stance on International law and diplomacy and the role of international law in American jurisprudence also is an important work restating the same doctrine. The 1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens recognises a number of categories on which this non- compensable taking can take place & taxation happens to be one such category along with others such as maintenance of public order and normal operation of laws of the states etc.[16]

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[9] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, enforced 3 September 1953) 213 U.N.T.S. 222; Protocol 1, Article 1.

[10] US has free trade agreements with around 20 countries Article 11.7. talks about expropriation and compensation as in US-Australia FTA < https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf> accessed 17 May 2021.

[11] U.S. Model Bilateral Investment Treaty (2012) art 6 <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 21 May 2021.

[12] Canada Model Bilateral Investment Treaty (2004) art 13 < https://investmentpolicy.unctad.org/internationalinvestmentagreements/treatyfiles/2820/download> accessed 21 May 2021

[13] India's Model Bilateral Investment Treaty Text 2016 <https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf> accessed 17 May 2021.

[14] OECD Draft Convention on the Protection of Foreign Property (1968) *The International Lawyer* 2(2), 331-353 <http://www.jstor.org/stable/40704497> accessed 17 May 2021.

[15] OECD Draft Multilateral Agreement on Investment (1998) <https://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf > accessed 21 May 2021.

[16] Harvard Draft Convention on International Responsibility of States for Injuries to Aliens 1961, art 10(5) (*Yearbook of International Law Commission, 1969,* Vol II, 19-26) <https://legal.un.org/ilc/documentation/english/a_cn4_217.pdf> accessed 28 April 2021.

Scholars have also reiterated similar claims, such as *Ian Brownlei*, for example, stated that "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation" Thus, he claims that if foreign assets are subjected to certain state measures, provided the conditions are satisfied as said earlier (in good faith & bonafide etc), this would not amount to taking and he also includes taxation within the ambit of such measures[17]. On the same lines, *Sornarajah*[18] in his treatise on international law on foreign Investment has stated that unprejudiced measures[19] associated to anti-competitive, consumer protection, securities, environmental protection, land planning are all non-compensable takings because they are imperative for the effective working of the state. Likewise, if we look at the work of *Andrew Newcombe*[20], he also recognises that there are certain broad categories of states police powers and any action of these police powers justifies this action of non-compensation where there is deprivation of investment, and he lists three categories of this police powers – 1. Public Order 2. Protection of human health & environment & 3. Taxation. Thus, from the above discussion, it is safe to say that taxation has been recognised as an integral aspect of states police powers. Now, the next question that arises next is how has ISDs tribunals dealt with such issues?

Unravelling the Role of Arbitrability in Tax-Related Investment Disputes

Investor-state dispute settlement (ISDs) is a mechanism by which the private investors can charge sovereign nations for inequitable practices. ISDs is a tool of public international law imbibed in a numerous bilateral investment treaties and even few international trade treaties, like the United States-Mexico-Canada Agreement. ISDS is probably the most important aspect of the BIT today because it empowers the private investors to challenge the sovereign actions of the states before the International

[17] Ian Brownlie, *Public International Law* (6th Edn, Oxford University Press 2003) 509.
[18] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 1994) 283.
[19] Rudolf Dolzer and Margarate Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) 98.
[20]Andrew Paul Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 (1) ICSID Review-Foreign Investment Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=789706> accessed 27 May 2021.

Arbitration Tribunals. In all the investment trade agreements that have the ISDs system, any corporation from a signatory state who invests in another signatory state can challenge the new laws or regulations which would adversely affect its anticipated profits and investment potentiality, and ask for compensation by a binding arbitration tribunal. These companies could seek compensations amounting to millions or billions of US dollars. However, this mechanism only works one way, that is allows only the foreign corporations to indict states, not the other way around.[21]

Under ISDs mechanism, the investor is empowered to challenge any sovereign action of the state, but the question that arises is, can the investor also challenge Taxation measures? The answer to this question is yes. There is nothing in the investment treaties or large number of investment treaties that have been signed to suggest that taxation measures are outside the ambit of BIT. So, it means that if a state has exercised any regulatory measure on taxation, and if it has any adverse impact on a foreign investor, then this foreign investor is very much within her right to challenge this regulatory measure as a breach of one of the provisions of BIT.

So, when I talked about taxation being recognised as part of the police powers, this is useful only when we talk about expropriation claims because states police powers become important only when we talk about expropriation. So, if a foreign investor alleges that any taxation measure has resulted in expropriation of foreign investment, the state can always argue that it falls as a part of its police powers and therefore even if it has led to substantial deprivation, it would not amount to expropriation. Now whether the tribunal would accept this argument or not, it is a very difficult question to answer.

One of the fundamental and significant problems that we have with the ISDS mechanism or system is that this system is scattered and is all over the place. There is no one institutional framework which administers the ISDS mechanism. So, if we compare this with the international trade law, there you at least have one institution such as the World Trade Organisation (WTO) which has an institutional framework which looks into these issues and is governed by only one treaty which is there to

[21] 'FAQs about ISDS' (*ISDS Platform)* <http://isds.bilaterals.org/the-basics> accessed 29 April 2021.

interpret for dispute settlement[22]. In the ISDS mechanism, since the substantive law is scattered across 3000 odd investment treaties and since we have so many arbitral institutions which have their own set of principles and norms to be governed with, for example, if a case goes before an ICSID arbitration the ICSID convention also comes into picture and it's not only the investment treaty. So as a result, what happens is, since you have the substantive law scattered across different investment treaties it often becomes difficult to lay down one clear principle that will be accepted and adopted across different arbitral tribunals. So, while there are some arbitral tribunals that have recognised the police power doctrine, for example *Methanex v USA*[23]; *Saluka v. Czech Republic*[24] but then we also have some arbitral tribunals that have given greater attention to other aspects in determining expropriation and not just Police powers. So for example, some arbitral tribunals have held that it is the effect of the regulatory measure on the foreign investor that is extremely important in determining whether expropriation has taken place and therefore if it translates into context of taxation it would mean that if a sovereign tax measure has a very severe or detrimental effect on the foreign investor resulting into substantial deprivation of the investment, then arguably the tribunal would find such taxation measure as amounting to expropriation. So, on the one hand, we have the taxation measures being recognised as states police powers and if this test is used by the arbitral tribunals, then taxation measures will not constitute expropriation.

On the other hand, we also have another test which quite a few arbitration tribunals have followed, this test is of *substantial deprivation of foreign investment*, and within this test if a tax measure results into substantial deprivation of foreign investment, it would result in expropriation. So, there is an inconsistency and lack of coherence when it comes to ISDS tribunals dealing with such issues and any investment lawyer would say that you would have to live with this incoherence, with respect to investment law and ISDS mechanism. Let us discuss some examples of few cases which have dealt with taxation measure where this inconsistency or incoherence clearly comes out.

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[22] Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
[23] *Methanex Corporation v United States of America* (2005) 44 ILM 1345.
[24] *Saluka Investments BV v Czech Republic* ICGJ 368 (PCA 2006).

The famous case of *Link trading v Moldova*[25] where a set of fiscal measures by the state were challenged by the investor as expropriation. The tribunal said that fiscal measures only become expropriator when they are found to be an abusive taking. So, they laid emphasis on an abusive taking. Now what they meant by abusive taking? The tribunal ruled that an abuse is established when it can be shown that the state has acted unfairly or inequitably towards the investment; or when it had approved measures, which were arbitrary or discriminatory, in the manner of the implementation of such measures or when these state action encroach upon the commitment of the state in the investment treaty. So, there are two points which are important here: *Firstly*, the arbitral tribunal did not say that the taxation measures are outside the purview of ISDS. This is the first very important aspect that comes out of the present award. *Secondly*, the tribunal recognised the fact that fiscal measures can be expropriatory. So, basically, they ruled out any argument that fiscal measures cannot be held to be expropriatory. But what they ruled was that for fiscal measures which basically means taxation measures, to be expropriatory, what they need is that it has to be an abusive taking, which has to involve an unfair or inequitable treatment towards the investment. So, in other words the tribunal did recognise that fiscal measures or taxation measures can lead to expropriation if it leads to abusive taking.

Another case, which also recognise the same principle is *Encana v Ecuador*[26]. In this case, the tribunal recognised that if a tax law is extraordinary or punitive in amount, then it would give rise to an indirect expropriation.[27] On the other hand, on the same line, there is another tribunal decision known as *Burlington v Ecuador*[28] wherein the tribunal observed that confiscatory taxation constitutes an expropriation without compensations and so is unlawful. Thus, the point that comes out of this discussion is that in none of these cases did the ISDS tribunals say that taxation matters were outside the purview of the BIT's and ISDS mechanism. They also recognised the fact that the taxation measures could lead to expropriation provided they are extraordinary punitive and lead to an abusive taking.

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[25] *Link-Trading Joint Stock Company v Department for Customs Control of the Republic of Moldova* IIC 154 (2002).
[26] *EnCana Corporation v Republic of Ecuador* LCIA Case No. UN3481.
[27] William Park, 'Tax and Arbitration' (2020) 36 (157) Arbitration International <https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1980&context=facultyscholarship> accessed 21 April 2021.
[28] *Burlington v Ecuador* ICSID Case No ARB/08/5.

Thus, to summarise the first part of paper, it is safe to say that while within customary international law there is a strong argument to make that taxation is part of states' police powers, and therefore taxation measures should not constitute expropriation, but the manner in which tribunals have held, especially on taxation, is that taxation measures can lead to expropriation and can be held to be illegal vis-à-vis countries BIT obligations.

There are many cases where countries have approached ISDS on matters of taxation, not only for expropriation but also on grounds of violation of fair & equitable treatment and National Treatment. In most cases, the tribunals have found that these measures, even if not found violating the expropriation measures, they have violated the fair & equitable treatment and National Treatment principles, and that the taxation measures were arbitrary, discriminatory and were imposed without following due process. In fact, this was the reason why *the Cairn Energy tribunal* as well, found India's taxation measures to be violative of the BIT as these tax measures violated the fair and equitable treatment provision of the India -UK BIT. So, the idea in this first part of the paper was to set the tone in terms of ISDS and Taxation, to provide with larger over-arching framework under which these issues have been dealt with.

ANALYSING INDIA'S CHEQUERED HISTORY WITH INVESTOR- STATE ARBITRATION IN LIGHT OF THE *CAIRN ENERGY* ARBITRAL AWARD

In this second part of the paper, I shall take up the relevant *Cairn Energy* case as a case study to look at the issue of taxation and how foreign investors continue to find relief from sovereign retrospective taxation powers of states under international law. This part shall delve in to understand the transaction, the retrospective taxation measure of India, the reported portion of the arbitral award and the subsequent measures adopted by India in defiance of the award. The award granted in both Vodafone and Cairn Energy case is not fully available to grant us the benefit of reviewing it, however, these awards are an obstinate admonition of the limits placed by international law upon the State's sovereign rights of taxation. This is an arbitral Award that was issued against India in December 2020 where the arbitral tribunal held that the imposition of taxes retrospectively was a violation of India's Fair &

Equitable Treatment (FET) obligation under the India-UK Bilateral Investment treaty. The tribunal ordered India to return 1.2 billion dollars that India had collected from *Cairn energy*. This case has attracted attention across the world for several reasons, most importantly for the following questions –

- *Whether the taxation matters fall within the scope of BIT?* and
- *Whether the amendment of the tax laws retroactively could lead to an internationally wrongful act?*

Setting the Stage - The infamous 2012 Amendment to India's Income Tax Act 1961

The starting point of this dispute was in 2012 when India amended its tax laws retroactively. This amendment was done by the Indian government to overturn the Indian Supreme Court's decision favouring the *Vodafone* Tax battle with the Indian government. What was this amendment and what did it do? The amendment inserted two explanatory provisions to section 9 (1)(i) of the Income Tax Act 1961, India's primer tax legislation which is germane for this case and important for this discussion[29]. The first explanation clarified the meaning of the term 'through', stating that:

For the removal of doubts, it is hereby clarified that the expression 'through' shall mean and include and shall be deemed to have always meant and included 'by means of', 'in accordance of' or 'by reason of'.

The second explanation clarified that:

An asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

The 2012 tax amendment included a clarification to the word "transfer" and expanded the scope by stating that the word would 'include and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or

[29] Income Tax Act 1961, Section 9(1)(i) provides:
The following incomes shall be deemed to accrue or arise in India: —
(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights had been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India'[30]. This amendment made taxation retrospectively applicable to what are known as indirect transfers, that is to say the transfer of a share of a company incorporated abroad by a non-resident outside India if those shares would directly or indirectly derive its value substantially from assets located in India. So even if it's an offshore transaction, there is a value to be gained from this offshore transaction if the assets are based in India and indirectly capital gains tax needs to be paid.

This amendment has since been heavily criticized. I don't question this amendment *per se* as the Parliament of India is competent to amend its laws in its own wisdom, but what is problematic is that the amendment was made retroactive in nature and stated that it was the intent of the Parliament right from 1961. Now this basically meant that the case India lost in the Supreme Court of India against *Vodafone,* this amendment basically overruled the Supreme Court decision. So, this was like government acting as a bad loser, that is we can't lose the game and if we do lose, we change the rules of the game by using our power in the parliament. Further, another aspect t be noted here is that it was undertaken by a government which was basically not as powerful as some other governments right now are, who enjoy full majority.

Post 2012, because of this retroactive amendment, many corporate restructurings that took place of MNC's through indirect transfers caught the governments attention and one such case was this of Cairn Energy. There was a separate case that the *Vodafone* had brought against Government of India which was also decided in 2020 against India, but I am not going into that case. The arbitral award is not available in the public domain and so the reasoning of the ISDS tribunal is not known and so I am refraining to comment on the same.

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[30] Kshama A. Loya, Moazzam Khan & Vyapak Desai, 'Cairn v. India - Investment Treaty Arbitration' (Nishith Desai & Associates, 28 December 2020) <https://www.nishithdesai.com/information/news-storage/news-details/article/cairn-v-india-investment-treaty-arbitration.html >accessed 15 April 2021.

Facts of the Cairn Energy dispute

I am focusing on the case of Cairn Energy, the second most significant indirect transfer which caught the government attention post to 2012 amendment. The case started in the wake of an internal corporate restructuring that Cairn Energy had carried out through a series of transactions that were carried out from 1996 to 2006. From 1996 to 2006, Cairn Energy had acquired many interests in India's oil and gas sector which were held through many subsidiaries that were incorporated abroad. The important players in the transaction are Cairn India Holdings Limited ("CIHL") incorporated in Jersey in August, 2006, a wholly owned subsidiary of Cairn UK Holdings Limited ("CUHL"), the holding company incorporated in the United Kingdom in June, 2006 and Cairn India Limited ("CIL") incorporated in India, another wholly owned subsidiary of CUHL in August 2006. Under a share exchange agreement between CUHL and CIHL, the former transferred shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL, that were engaged in the oil and gas sector in India.

In 2006, Cairn Energy decided to consolidate all such subsidiaries into one entity in India. In October 2006, CUHL sold shares of CIHL to CIL in an internal reorganization of the corporation. The issued share capital of CIHL was transferred to CIL through subscription and share purchase agreement for which the consideration was paid by cash and in form of shares of CIL. Later, CIL divested 30.5% of its shareholding by way of an Initial Public Offering in India in December 2006. Accordingly, CUHL was in receipt of approx INR 6101 Crore (Approx. USD 931 Million) because of this divestment of 30% of its holding in the subsidiaries.[31] Thus, finally Cairn India Limited (CIL) acquired Cairn India Holdings Limited (CIHL) from Cairn UK Holdings Limited (CUHL). So CIL acquired CIHL from CUHL. Now it was this acquisition that is of CIL acquiring CIHL which included the capital gains realisation by CUHL that became the focus of India's taxation measures. After this acquisition, there were a series of divestment made by CUHL. From October 2009,

[31] Ishaan Vyas & Meyyappan Nagappan, 'Retrospective Capital Gains Tax on Indirect Transfers: The Ghost of The Vodafone Case Revisits Cairn (UK)' (*Nishith Desai & Associates,* 20 March 2017) <http://nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/retrospective-capital-gains-tax-on-indirect-transfers-the-ghost-of-the-vodafone-case-revisits-cairn.html?no_cache=1&cHash=ffbad1885eefd774e7b23420d1b06493> accessed 19 April 2021.

CUHL sold 2.3 % of CIL's issued share capital to Petronas and CUHL also sold part of CIL's issued share capital to Vedanta. All this happened between 2006 to 2012.[32]

Cairn obviously had thought that they had done this corporate restructuring smartly with the advice of the best taxation lawyers' and would not be required to pay any capital gains tax to the Indian state. But the Indian state out-smarted them and armed with the 2012 amendment, in the year 2014, the Indian tax authorities launched their investigation into Cairn Energies restructuring by initiating re-assessment proceedings under section 147 & 148 of IT Act, 1961. In the year 2016, the income tax authorities sent a notice of approximately 4.4 billion dollars to CUHL. This tax notice landed up before the income tax appellate Tribunal and the ITAT obviously upheld this tax demand by the tax authorities that was imposed on Cairn Energy, although it didn't uphold the interest. In line with this Income Tax appellate Tribunal decision, the income tax authorities sent several notices to CUHL demanding money to be paid to India[33]. CUHL moved before the Delhi High Court in appeal against the ITAT order in August 2017 against the ITAT's order imposing capital gains tax. The Indian revenue department filed a cross-appeal in October 2017 against the ITAT's denial of the interest demand.[34] During the pendency of these proceedings, on March 10 2015, *Cairn Energy* started international arbitration proceedings as per the India-UK BIT challenging the abovementioned measures espoused by the Indian government and wanted restitution of the assets and cost that were apprehended by the Indian revenue department, in and since January 2014.[35] Basically, the income tax department had seized CUHL's assets in India and its shares (in Vedanta Limited) of approx. value of US $1 billion during the pendency of these arbitration proceedings and forbade it from selling it. Further, the Indian revenue department also parted with a part of these shares, the proceeds of which amounted to approx. US$ 216 million, in order to recover some portion of the impending tax demand made by it. CUHL did not pay up the tax and what the government finally did was forced the sale of CUHL's share in CIL, which by November 2018 amounted to 98.2 percent of CUHL's holding in CIL.

[32] 'Updates on Cairn's assets in India' (*Cairn News*, 9 July 2018) https://www.cairnenergy.com/news-media/news/2018/update-on-cairn-s-assets-in-india/#Tabundefined=1 accessed 15 April 2021.
[33] ibid.
[34] Vyas and Nagappan (n 31).
[35] 'Updates on Cairn's assets in India' (*Cairn News*, 9 July 2018) https://www.cairnenergy.com/news-media/news/2018/update-on-cairn-s-assets-in-india/#Tabundefined=1 accessed 15 April 2021.

Cairn wanted restitution of its position that it may have enjoyed itself in 2014, had the Indian government not taken such resolute measures in violation of the Treaty.[36]

Thus, from the brief statement of facts we can understand that there was an internal corporate restructuring of the companies owned by Cairn Energy and although all of the transactions took place offshore, but since the assets were based in India, it garnered the attention of the Indian tax authorities. The understanding of the Income Tax law at the point in time of the transaction was that such transactions are not taxable in India. However, it was this understanding that was corrected by the infamous 2012 Income Tax Act amendment applied retroactively.

The Case before the Tribunal

To briefly summarise the arguments and the arbitral Tribunal decision, when the case went before the ISDS Tribunal, one of the arguments that India made to defend its taxation measures was that taxation measures are not arbitrable as a matter of public policy as well as under the municipal laws of India or Netherlands (why Netherlands? because Hague was the seat of arbitration here). But the tribunal rejected this argument. The Tribunal held that countries agreement to arbitrate is given in the BIT and therefore this agreement to arbitrate is governed by international law. To support this conclusion, the tribunal referred to Article 3 of the International Law Commission Articles of State Responsibility (the ILC articles)[37]. Article 3 states that "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law". So, the tribunal said that it is a settled principle of international law that countries cannot negate their international law obligations by relying on domestic laws. Thus, whether the tax that was imposed by India was consistent with India's domestic laws is irrelevant while determining the legality of India's conduct as far as international law is concerned. Therefore, the tribunal said that countries cannot argue that the subject matters falling within the scope of BIT are not arbitrable under the treaty since they are not arbitrable under the domestic laws. Hence, even if taxation matters are not arbitrable as the domestic law,

[36] ibid.
[37] Draft Articles on Responsibility of States for Internationally Wrongful Acts (International Law Commission, November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1 <https://www.refworld.org/docid/3ddb8f804.html> accessed 30 May 2021.

hypothetically, that doesn't change the fact they can still be arbitrable under the investment treaty before the ISDS.

Another interesting argument that India made in defending its 2012 amendment to the Income Tax Act was that the amendment that was carried out by India was constitutional as per the Indian Constitution. The Tribunal again held that the Indian domestic legal framework is relevant from the point of view of establishing whether the investor has complied with the domestic law requirement. However, compliance with domestic legal framework does not mean that the substantive protection that the investor enjoys under the BIT are restricted to those given under the domestic law, which means that if a country invokes domestic law, then the only thing that the ISDS tribunal has to see is whether the investor has made his investment in a manner consistent with domestic law. But whether the investment enjoys the protection, that is something which has to be addressed by referring to the investment treaty or the International Law standards. And to support this conclusion, the Tribunal again referred to the ILC articles and the Tribunal said that if the States' conduct is lawful under the domestic law, it does not mean that it is also lawful under the international law. It was argued by India that *Cairn* did not challenge the amendment as unconstitutional before the Indian courts and the amendment is a constitutional act and absolutely legal as per the domestic law. However, the tribunal rejected the argument and held that it had no bearing on determining the liability of the country under international law. I personally accede to this argument, as it is a settled principle that we cannot talk about the legality of a domestic law within international law as the basis, when you are accused of violating the international law. Thus, it is but obvious that these arguments that India made in its defence of the 2012 amendment were rejected by the tribunal. The tribunal basically held that the 2012 Amendment that India carried out, it substantially changed the scope of or operation of section 9(1)(i) of the Income Tax Act.

The tribunal had made it very clear that they did not question the sovereign right to tax and thus it was not a taxation dispute in that sense. But they said that it can be inferred that the sovereign right to tax should be exercised in a manner that it is consistent with the international law. Hence, the tribunal concurred that this retroactive application of the law without any specific justification was created a tax

burden on the transaction that were not taxable at a time that it was carried on in 2006. When this transaction was carried out it was not taxable and to prove this point the tribunal referred to several commentaries, several decisions, legal positions in tax law and came to the conclusion that this was not taxable and of course the Supreme Court itself attested this point in the *Vodafone* case that these transactions were not taxable. Hence, by making these transactions taxable on the retroactive basis, the tribunal said that India has robbed *Cairn Energy* the ability to plan its activities keeping in mind the legal consequences of its conduct and disproportionately undermines, what the tribunal calls at the as the 'principle of legal certainty'. The tribunal stated that this 'principle of legal certainty' is one of the core elements of the fair and equitable treatment provision (FET) and therefore by undermining this principle, India's retroactive tax amendment violates India's obligation under the FET provision of investment treaty.

I wish to emphasize on this point again that the tribunal was very clear in saying that this is not a tax dispute. The tribunal made the distinction between a 'tax dispute' and 'tax related investment dispute' very clear. The tribunal classified this case as a 'tax related investment dispute'. As per the tribunal, a 'tax dispute' is a row related to the taxability of a specific transaction and on the other hand in a 'tax related investment dispute', the question that the tribunal has to answer is whether the host state has violated its substantive protection standards given in the BIT by exercising its authority in the field of taxation. In other words, the question before the tribunal was whether the manner in which India taxed the 2006 transaction, including the application of the 2012 amendment, did it fall short of the substantive standard that were laid down in BIT, and the tribunal came to the conclusion that this action did fall short of the substantive standards laid down in the BIT because they violated the FET obligation[38].

Developments Post the 2020 Arbitral Award

An ISDs award is binding on the parties to the dispute, but the award is never the end to a dispute because of two reasons; *firstly,* as the award could be challenged at the seat of arbitration and *secondly,* that the host state could challenge the enforcement

[38] *Waste Management, Inc. v United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3.

of the award in its jurisdiction or any other jurisdiction where the investor tries to enforce this award. After the December award, we see similar course of action followed by the Indian government.

The September 2020 *Vodafone* award and the December 2020 *Cairn Energy* award made India lose around 4.2 billion dollars to these private investors. India's principal defence in both these cases was that tax disputes were not protected by the Bilateral Investment Treaties, which both companies were claiming under. However, India appears to have taken the awards in its stride, filing appeals against both awards and is repeating the same arguments there. It's an elementary fact that when you challenge these ISDS awards, you can do so on very limited grounds such as procedural irregularities on jurisdictional matters. However, India is repeating the same argument that taxation matters are outside the purview of ISDS tribunal because they are outside the scope of the application of the BIT. Thus, India's argument is that the case matter brought about by *Cairn energy* is outside the subject matter scope of tribunal. In my view, this argument would not succeed at Hague, because the *Cairn Energy* tribunal itself dealt with the same argument and ruled that taxation matters are very much within the purview of the ISDS. Further, even if you look carefully at the UK -India BIT under which this dispute arose, taxation measures are given as an exception only for MFN and National Treatment[39], which means that if an investor brings up a claim of MFN or NT violation against the state for taxation measures, we know that the tribunal would not have jurisdiction because it is listed as an exception. But taxation related sovereign measures could still be tested on the touchstone of other substantive standards such as the FET provision, which is exactly what the tribunal did in the present case.

Thus, I don't think that India's challenge is going to succeed, but of course it is good tactic to try to buy time and to do other things in between so as to settle or mitigate the loss that may arise to Indian government because of the dispute.

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[39] Agreement for the Promotion and Protection of Investments (Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India) (adopted on 14 March 1994, enforced on 6 January 1995) UKTS 27 (1995), Cm 2797, Article 4(3): <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1613/download> accessed 23 April 2021.

The developments that we see post the December 2020 award, Cairn had initiated enforcement proceedings in courts of US, UK, France, Netherlands, Quebec and Singapore of the award[40]. In its stride of vigorous defence against the award, the Indian Finance Ministry, in first week of May issued a guidance to state-run banks to withdraw funds from their nostro accounts[41].

This legal battle between India and Cairn Energy is intensifying between the two parties and the Indian government is willing to defend its sovereign right of taxation with full vigour. However, *Cairn* had reached out to the Indian government with renewed offers to settle the dispute[42], though with dim prospects of success. However, the government is unlikely to accede to the proposal, arguing that it would mean accepting the verdict, against which it has appealed.

CAUTIOUS OPTIMISM IS THE WAY OUT FROM THE TUSSLE BETWEEN STATE SOVEREIGNTY AND FOREIGN INVESTOR PROTECTION

In this part of the paper, I try and analyse the fact, that if the countries are so sensitive about the taxation measures being their sovereign right, then what may be the way to keep these taxation measures outside the purview of the ISDS tribunal? I personally would not advocate to keep taxation measures outside the scope of the ISDS tribunal because taxation measures are an important element of state sovereign power and if the state abuses its sovereign power, then the state should be held accountable although they are very much within their right to exercise their sovereign power.

India, as a reaction to the claims and legal disputes such as with *Vodafone, Cairn, Vedanta etc.* which went for international arbitration under the ISDS, came out

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[40] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force on 7 June 1959) 330 U.N.T.S.

[41] 'India asks state-run banks to withdraw funds from foreign currency accounts abroad over Cairn dispute' *Business Today* (e-paper, 7 May 2021) <https://www.businesstoday.in/current/economy-politics/india-asks-state-run-banks-to-withdraw-funds-from-foreign-currency-accounts-abroad-over-cairn-dispute/story/438500.html> accessed 23 May 2021.

[42] Dilasha Seth, 'Arbitration case: Cairn Energy offers to invest $1.2 bn if India relents' *Business Today* (e-paper, 12 April 2021) <https://www.business-standard.com/article/companies/arbitration-case-cairn-energy-offers-to-invest-1-2-bn-if-india-relents-121041200028_1.html> accessed 19 May 2021; Dilasha Seth, 'Govt files appeal against $1.2-billion Cairn arbitration verdict' *Business Standard* (e-paper, 23 March 2021) <https://www.business-standard.com/article/companies/india-appeals-against-cairn-arbitration-order-seek-stay-on-1-2-bn-award-121032301272_1> accessed 19 May 2021.

with its Model BIT (MBIT) in 2016 with a 'tax carve out'. 'Tax carve outs' are provisions in International Investment Agreements that partially exclude the applicability of substantive obligations to taxation measures.[43] 'Tax carve outs' did not appear in IIAs from the very beginning and have evolved over time. The first BIT between Germany and Pakistan did not contain any exception for taxation[44].

Article 2.42 of Model BIT also has included a 'Tax carve out' which states that –

> This treaty shall not apply to - any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be nonjusticiable and it shall not be open to any arbitration tribunal to review such decision.[45]

Thus, India has basically tried to carve out taxation from the scope of ISDS Tribunal. It has also reflected in some of the investment treaties that India has signed post the 2016 Model BIT and I presume that this would be the trend in the future, at least as far as India's investment treaty practice is concerned, where taxation measure shall be kept completely outside the purview of the ISDS tribunal. Now, if you have a language of this nature, then in the dispute of the kind that *Cairn Energy* brought, India can rely on this provision and say that the ISDs Tribunal does not have any jurisdiction. But in the absence of a carve out of this nature, it is obvious that it would be difficult to convince the ISDs Tribunal lacks jurisdiction. The Tribunal would have jurisdiction over all sovereign regulatory measures of the state, unless and until such sovereign regulatory measures have been carved out of the BIT.

Thus, the way forward, in order to keep taxation measures outside the purview of ISDs is to include 'Tax carve outs' in International Investment Agreements so as to avert overlay with the tax treaties. 'Tax carve outs' sets out the limits of the tribunal's

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[43] Rav Singh, 'Tax Disputes in Investor-State Arbitration' (Master's thesis, University of Cambridge 2020) 89 <https://doi.org/10.17863/CAM.48579> accessed 17 April 2021.
[44] See Treaty for the Promotion and Protection of Investments (Germany-Pakistan) (adopted 25 November 1959, entered into force 28 November 1962) 457 U.N.T.S. 24.
[45] OECD Draft Convention on the Protection of Foreign Property (1968) *The International Lawyer 2*(2), 331-353 <http://www.jstor.org/stable/40704497> accessed 17 May 2021.

jurisdiction, and sets a perimeter to the substantive obligations that are applicable to a state's taxation measures. Not only does the 'Tax carve outs' constrict the jurisdiction of investor-state tribunals, these also concede to the states, an extensive periphery to endorse and implement tax measures. The 'Tax carve outs' generally eliminate the application of the non-discrimination standard on the state's taxation measures.

CONCLUSION

The recent awards in the cases of *Vodafone* and *Cairn* cases have reiterated the limits put forth by international law upon States' sovereign rights of taxation. The primary rationale for protecting treaty obligations, as against other sovereign powers, is that treaties are also sovereign promises by State to guard the foreign investment in their territory. This juxtaposes the sovereign powers demarcated under domestic laws against sovereign obligations under international law. The question that needs to be addressed is whether the latter transcends the former? The answer still remains in a flux.

The interplay of ISDS and taxation measures are still within the clouds of obscurity, yet the *Cairn Energy* award and the *Vodafone* award, both of these tribunals have given an impetus towards arbitral tribunals looking at taxation measures. I believe that the tribunals should look at tax related investment disputes closely and examine whether they violate the countries BIT standards? However, when I say this, I do not mean that the tribunal should not show due deference to the state's taxation measures. The tribunals should recognise the sovereign right of the countries to tax, but this right has to be exercised in a manner that is consistent with the international law.

India should understand that the outright defiance of the arbitral award, would substantially diminish the confidence of international investors. As a notable economically attractive nation, India is in a status to bargain a better compromise for gratifying the arbitral award, such as accepting Cairn's offer of reinvestment of arbitral award in India. However, this recalcitrance could be more catastrophic than the monetary loss including the national humiliation.

CALLAMARD REPORT ON THE MURDER OF JAMAL KHASHOGGI: HAS THE CAR LEFT THE GARAGE?

Atul Alexander[1] and Maya Venkiteswaran[2]

ABSTRACT

In 2016 Jamal Khashoggi a renowned Saudi journalist working with Washington post had visited the Saudi Consulate to get divorce papers and what we know now to have been a premediated attack, was never seen again. The aim of this paper is to understand the facts and the legal aspects that surround the Jamal Khashoggi killing. In the aftermath of the gruesome and cold-blooded assassination of Jamal Khashoggi, the special rapporteur on extrajudicial, summary or arbitrary executions published a report with recommendations (Callamard report), following a six-months investigation. This paper seeks to looks into the steps taken by the US, Turkey, and Saudi Arabia to comply with the report. An analysis of the Callamard report and various reports drew the conclusion that the US and Turkey have fulfilled the recommendations to a great extent. In contrast, Saudi Arabia has taken minimal steps to do the same and thus only fulfilled two to three recommendations.

Keywords: *Jamal Khashoggi, Agnes Callamard, Saudi Arabia, Turkey, United Nations*

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INTRODUCTION

The United Nations Special Rapporteur Agnes Callamard conducted a detailed investigation on the murder of Jamal Khashoggi (hereinafter "*Khashoggi*"). Khashoggi was murdered in the territory of Turkey at the Saudi Arabian Consulate in October of 2018.[3] Khashoggi was a journalist from Saudi Arabia who was an adviser to the Government of Saudi Arabia. But in 2017, due to a falling out with the Government of Saudi Arabia, he went into a self-imposed exile and lived in the United States of America (hereinafter "*US*").[4] In the US, Khashoggi worked as a journalist at the Washington Post (hereinafter "*WP*") and criticized the Government of Saudi Arabia and especially the Crown Prince, Mohammed Bin Salman (hereinafter "MSB").[5] In September of 2017, Khashoggi wrote an article where he mentioned that he was afraid for his life as he had criticized MSB.[6]

Agnes Callamard (hereinafter "*Callamard*") was the first to conduct an independent investigation on Khashoggi's killing and, through the investigation, concluded that the killing was state-sponsored.[7] Callamard was the United Nations (hereinafter "*UN*") Special Rapporteur who took it upon herself to get to the bottom of Khashoggi's extrajudicial killing. Callamard has also worked on many other cases, such as the murder of Daphne Caruana Galizia and the hacking of Jeff Bezos' phone.[8] Callamard is a French Human Rights expert who has worked as an independent expert on extrajudicial killings for the UN in many cases, including killing Khashoggi.[9] Her investigation into the murder of Khashoggi brought to light the sounds of struggle and rustle of plastic sheets heard from the Consulate when Khashoggi was within the premises.[10] She also brought to light the last words said by Khashoggi.[11] She mentions the person he was and how he was lured into the Consulate on the pretext of obtaining

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[3] 'Jamal Khashoggi: All You Need to Know about Saudi Journalist's Death' *BBC* (24 February 2021) <https://www.bbc.com/news/world-europe-45812399>, accessed 11 March 2021.
[4] ibid.
[5] ibid.
[6] ibid.
[7] S. Kirchgaessner, 'Agnes Callamard: unflinching UN official Taking on Saudi Crown Prince' *The Guardian* (24 January 2020) <https://www.theguardian.com/world/2020/jan/24/agnes-callamard-unflinching-un-official-taking-on-saudi-crown-prince> accessed 11 March 2021.
[8] ibid.
[9] ibid.
[10] ibid.
[11] ibid.

a certificate for eligibility to be married.[12] She also notes that "he was only armed with his pen, his kindness, his politeness, and was forced to face Saudi thugs and other security personnel, who strangled him and dismembered his body."[13]

In this paper we shall first look into the various facts that have come to light about the attack on Khashoggi. Subsequently, we shall analyse the legal aspects mentioned in the Callamard report. In the final section, we shall look into the various steps taken by the governments of the three states involved and also look into whether the recommendations of the Callamard report have been fulfilled.

BACKGROUND

Khashoggi had contacted the Saudi Arabian Embassy in Washington for a certificate that stated he was eligible to be married.[14] He was then asked to collect the same from the Embassy of Saudi Arabia in Turkey. To obtain the same, he visited the Saudi Consulate on 28th September unannounced to obtain the certificate.[15] He had also visited the marriage bureau in Turkey to confirm if he could marry without the certificate. He was informed that it was necessary to have the certification in order to get married.[16]

Khashoggi knew he would have to submit his devices to the security staff while entering the Consulate. He left his phone with his fiancée as he did not want to submit the phone to the security staff.[17] He was treated well inside the Consulate and left within forty-five minutes and had a very happy disposition when he came out. He was instructed to visit again on 2nd October to get the certificate.[18] Within a few hours, the information had been relayed to Riyadh that Khashoggi would be returning on 2nd October.[19] In a phone call, the consular general of Saudi in Turkey was heard saying

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[12] A. Callamard, 'Will There Ever Be Accountability for Murder of Jamal Khashoggi' *Aljazeera* (2 October 2020) <https://www.aljazeera.com/opinions/2020/10/2/will-there-ever-be-accountability-for-murder-of-jamal-khashoggi> accessed 11 March 2021.
[13] ibid.
[14] UNHRC 'Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi' (2019) A/HRC/41/CRP/1 [73] (UNHRC Report).
[15] ibid.
[16] ibid.
[17] J. Corbin, 'The Secret Tapes of Jamal Khashoggi's Murder' *BBC* (30 September 2019) <https://www.bbc.com/news/world-middle-east-49826905> accessed 11 March 2021.
[18] ibid.
[19] ibid.

that the person he was having a conversation with informed him that a special mission, which was top secret, required him to send two security personnel for training to Saudi Arabia.[20] There was another call with one of the security personnel, where he was asked whether Khashoggi would return to the Consulate on 2nd October, and he responded in the affirmative.[21] There were also two instances where the Consulate officials conducted a thorough search for any bugs that may be present.[22]

A team of nine members arrived in a private chartered plane from Riyadh on 2nd October holding diplomatic passports, and some had arrived a few days prior as well.[23] As each of the individuals held a diplomatic passport, their bags were not checked by the airport security in Istanbul.[24] Further, evidence collected through witness testimony shows that the Consular General asked all the "non – Saudi staff not to report on 2nd October or leave before noon."[25] The staff who worked at the Consular General's residence were also briefed not to leave the premises as an engineer was supposed to arrive to conduct repair work.[26]

On the morning of 2nd October, ten Saudi team members went to the Consulate while five others went to the Consular General's residence.[27] Khashoggi entered the consulate, and his fiancée was waiting in the car for him. He had also instructed her that if he did not come out within a few hours, she was to call an adviser to Turkish President Recep Tayyip Erdogan.[28] Khashoggi entered the Consulate and was greeted by a person he recognised. They did have a conversation about how there was a team to take him back to Saudi Arabia, to which he responded that there was no case against him and that he has a driver waiting for him outside.[29] There was also an instance of an argument heard in the recordings recovered later by Turkish intelligence. An analysis of the recordings recovered helped Turkey's intelligence officers conclude that Khashoggi was given a sedative and then suffocated using a plastic sheet.[30] This was

[20] UNHRC Report 80.
[21] ibid.
[22] ibid.
[23] ibid.
[24] ibid.
[25] ibid.
[26] ibid.
[27] ibid.
[28] ibid.
[29] UNHRC Report 94.
[30] ibid.

followed by more sounds of plastic rustling in the recordings, which the Turkish intelligence concluded was from the Saudi team dismembering Khashoggi's body.[31] There was also a top Saudi doctor, who had expertise in forensics, to dispose of the body.[32]

Later two vehicles, one of which was a consular van, left the Consulate and arrived at the Consular Generals residence.[33] Three men were seen carrying plastic trash bags and a suitcase in the CCTV footage while entering the Consular General's residence.[34] Later that day, the three members who had visited the Consular General's Residence left the premises in a consular car without the bags with which they had entered.[35] They then went to the airport, where a private chartered plane took six members to Cairo. The same flight then flew to Riyadh the next morning, but whether the Saudi team members were on it is unknown.[36] The second group of team members took another flight that was privately chartered to Dubai, and the flight left for Riyadh on the evening of 3rd October.[37] By the time the second group arrived at the airport, the Istanbul police had alerted airport security of a kidnapping that might have taken place. Before permitting the Turkish authorities to enter, a crew was seen entering the Consulate and conducting commercial cleaning.[38]

ANALYSIS OF THE AGNES CALLAMARD REPORT

This section aims to look into the various legal aspects Callamard has put forth in her report regarding the duties incumbent on the States. As Khashoggi was present in Turkey at the time of the incident, the act was committed by Saudi Arabia, and Khashoggi was a resident of the US. Thus, all three States have duties that are incumbent on them.

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[31] ibid.
[32] D. Kirkpatrick & C. Gall, 'Audio Offers Gruesome Details of Jamal Khashoggi Killing, Turkish Official Says' *The New York Times* (17 October 2018) <https://www.nytimes.com/2018/10/17/world/europe/turkey-saudi-khashoggi-dismember.html> accessed 11 March 2021.
[33] UNHRC Report 97.
[34] ibid.
[35] ibid.
[36] ibid.
[37] ibid.
[38] ibid.

Prior to the Attack

Part IV of the report deals with the responsibilities of the State prior to the attack. This includes the duty to warn and the responsibility to protect. There is an intricate requirement of a balance to be struck between the duty to warn and imposing unrealistic onus on States in such cases.[39] The first question we shall look into is whether the US and Turkey could have reasonably foreseen the threat to Khashoggi's life. There has been a threat from Saudi Arabia to all those who speak against the government and their actions. Khashoggi was one such person who wrote many critiques about MSB.[40] Further, his falling out with the government and the self-imposed exile furthers this stance.[41] But merely an existence of a threat, as widely applicable, is not enough to fulfil the criteria.

The US intelligence agency had intercepted a call, a year before the incident, between MSB and another top official of the Saudi government, where MSB clearly states that he would shoot Khashoggi if he did not return and put an end to his criticism of the government.[42] There was another call that was intercepted a few days before as well. However, unfortunately, the US intelligence agency had not transcribed this data until after Khashoggi has been murdered.[43] There were conversations that had been intercepted by the US that there was something vexatious being planned against Khashoggi, which the US intelligence agency had informed the White House as he was a resident of the US.[44]

The duty to warn is not limited to citizens, and in this case, Khashoggi was a resident of the US. Thus, they did have a duty to warn him if they had "credible"

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[39] M. Milanovic, 'The Murder of Jamal Khashoggi: Immunities Inviolability and the Human Right to Life- Part II: Before the Attack' (*EJIL: Talk!* 16 April 2019) <https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-ii-before-the-attack/> accessed 13 March 2021.

[40] 'Jamal Khashoggi: All You Need to Know about Saudi Journalist's Death' *BBC* (24 February 2021) <https://www.bbc.com/news/world-europe-45812399> accessed 11 March 2021, 2

[41] ibid.

[42] M. Milanovic, n (40). <https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-ii-before-the-attack/> accessed 13 March 2021.

[43] ibid.

[44] J. Schindler, 'NSA: White House Knew Jamal Khashoggi Was In Danger. Why Didn't They Protect Him?' *The Observer* (10 October 2018) <https://observer.com/2018/10/nsa-source-white-house-knew-jamal-khashoggi-danger/> accessed 13 March 2021.

knowledge of such threats to his life.[45] Further, if he were merely arrested, this duty would not be incumbent.[46] Thus, knowing whether the intention was to capture or whether there was an actual threat to his life should have been deduced by the US intelligence agency through conversations intercepted. Further, the US also has a National Security Act. It clearly states that if the information is acquired against any "person or group of persons,"[47] the State and the intelligence agencies shall have a duty to warn.[48] Further, under the definition of 'Duty to Warn,' both US and non-US persons are included.[49]

On the other hand, after the attack, Turkey has revealed recordings of the last moments of Khashoggi from inside the Consulate.[50] Thus it can be assumed that this means was available even before the murder, and therefore they would have some credible information on the threat to Khashoggi's life.[51] Further, the fact that a 15 member team landed in Istanbul carrying diplomatic passports, the CCTV being disabled for that day, and the staff asked not to come to work on 2nd October clearly shows that there had been planning which the Turkish authorities could have been suspicious about.[52]

It is not relevant to look into where the threat arose; thus, the extraterritoriality aspect does not come into play as per Human Rights Law.[53] Two obligations arise – negative, where a state must not cause harm to the life of any person, which has an extraterritorial application; and positive, where a state shall have a duty to protect and warn, but this requires a nexus.[54] The Human Rights Committee has furthered this view by stating that a State shall be obligated to ensure that the right to life is enjoyed

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[45] S. Harris, 'Crown prince sought to lure Khashoggi back to Saudi Arabia and detain him, U.S. intercepts show' *The Washington Post* (10 October 2018) <https://www.washingtonpost.com/world/national-security/crown-prince-sought-to-lure-khashoggi-back-to-saudi-arabia-and-detain-him-us-intercepts-show/2018/10/10/57bd7948-cc9a-11e8-920f-dd52e1ae4570_story.html> accessed 13 March 2021.
[46] ibid.
[47] National Security Act 1947 (Intelligence Community Directive 191).
[48] ibid.
[49] ibid.
[50] UNHRC Report 92.
[51] M. Milanovic, n (40) <https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-ii-before-the-attack/> accessed 13 March 2021.
[52] ibid.
[53] CESCR 'General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (2016) E/C.12/60/R.1 [33].
[54] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP, 2011) 18,19.

by all those within its territory and its jurisdiction.[55]

The main question with the extraterritorial application of Human Rights Treaties is whether a person has rights against State action when they are not within that State's territory.[56] In the case of Jamal Khashoggi, he was a resident of the US. He was within the territory of Turkey when the State of Saudi Arabia attacked him. Would Saudi Arabia then be obligated to protect his Human Rights? Further, would he be able to sue Saudi Arabia under Human Right Treaties like the European Convention of Human Rights?

Philosophically Human Rights are universal and thus it should not make a difference whether a person is within a territory of a state or outside it.[57] Human Rights should be applicable regardless of the person geographical location. But this does not stand true in Law as this depends on how various Human Right Treaties have been framed and applied.[58]

Most Human Rights Treaties that cover civil and political rights have a separate clause that define the jurisdictional scope of the treaty. For example, Article 2 Para 1 of the International Covenant on Civil and Political Rights states that, States that are parties shall respect and ensure the Human Rights of individuals within their territory and subject to their jurisdiction.[59] The convention against torture stipulates that State parties have the duty to prevent torture or inhumane treatment in any territory under their jurisdiction.[60]

The concept of jurisdiction of a State has been looked at either spatially or personally. Spatially means the effective overall control over a particular area by a State. Personally, on the other hand, means the authority or control over an individual that is exercised by a State.[61]

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[55] UNHRC 'General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018) CCPR/C/GC/36 [63].
[56] Marko Milanovic, n (55).
[57] ibid.
[58] ibid.
[59] ibid.
[60] ibid.
[61] ibid.

When one looks at the spatial understanding of jurisdiction of a State, the case of *Loizidou v Turkey*[62] in the European court of Human Rights comes to mind. Ms. Loizidou was a woman who owned territory in the northern part of Cyprus. When Turkey invaded Cyprus and set up the Turkish State of Northern Cyprus, Ms. Loizidou could not access her property and wanted her right to own territory, under Article 1 protocol 1 of the European Convention, to be upheld.[63] Ms. Loizidou decided to sue Turkey. She did so as the State of Northern Cyprus was not at fault and the Puppet State set up by Turkey was not a member of the European Convention.[64] The court, in its judgement, said that as Turkey controls the northern part of the State through its military and a local administration, Turkey was in control.[65] Thus, they are obligated to ensure the protection of Human Rights of the people in that territory.[66]
But the issue seen with adopting this approach, is that it is very restrictive. We see that there are many ways in which a State can violate your Human Rights without actually controlling the territory. Examples include air-strikes and assassinations, where the State may not be in control of the territory but can still cause death and can thus violate human rights.[67]

In the case of *Bankovic v Belgium*[68], we see the limitations of spatial understanding of jurisdiction of a State. It was concerned with an airstrike conducted by NATO in Serbia where NATO bombed a TV Station in the city-center of Belgrade.[69] The families of the people who were there during the bombing felt that as many of these NATO States were party to the European Human Rights Convention, they had violated the right to life of the people who were present during the bombing.[70] The court never reached the merit stage as it said that the case was not admissible.[71] This was because the people were not within the jurisdiction of these NATO States. The court stated that by conducting an airstrike, the State is not actually in control of the area.[72] Thus, the people are not within their jurisdiction. The appellants argued that

[62] *Loizidou v Turkey* App no 40/1993/435/514 (ECHR, 23 February 1995).
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] Milanovic, n (3).
[68] *Banković and Others. v Belgium* App no. 52207/99 (ECHR, 19 December 2001).
[69] ibid.
[70] ibid.
[71] ibid.
[72] ibid.

the intervening State does not have to guarantee all the Human Rights (like Right to Education), but merely that the Right to Life should be guaranteed.[73] The court in its judgement decided that the convention does not cater for such a division of rights into categories. Thus, in essence, the court said that either all of the Convention applies or none of it. [74]

The Human Rights Committee, in the case of *Lopez Borgos v Uruguay*[75] was seen to have adopted the personal approach to jurisdiction of a State. This case involved Uruguay agents going into the territory of Argentina and kidnapping a resident there.[76] They then brought him back to Uruguay. The Human Rights Committee said that as Uruguay exercised control over them, the ICCPR would follow the agents when they entered Argentina.[77] The Committee said that it would be unacceptable to interpret Article 2 of the ICCPR in such a manner, so as to allow a State, to carry out violations of Human Rights of an individual in another State, when they would not be able to do the same in their own State lawfully.[78]

Soon after, the European Court of Human Rights followed by applying another interpretation of jurisdiction, as authoritarian control over individuals. This approach was a modification of the personal approach and was seen in the case of *Al-Skeini v UK*[79]. This case dealt with the killing of 6 people by British troops in Basra in southern Iraq.[80] The European Court of Human Rights said that all these six people were under the jurisdiction of Britain vis-a-vis the personal concept of Jurisdiction.[81] The European Court said that killing people allows a form of authoritative control over the person.[82] Thus, the person will be within the jurisdiction of the sending state. The court in *Al-Skeini's* case partially overruled the *Bankovic v Belgium* case and it expressly said that an individual will have only those rights which are applicable to their situation as per the Personal Concept of Jurisdiction.[83] This allows for a division

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[73] ibid.
[74] ibid.
[75] UNHRC 'Sergio Euben Lopez Burgos v Uruguay' U.N. Doc. Supp. No. 40 (A/36/40) (1981).
[76] ibid.
[77] ibid.
[78] ibid.
[79] *Case of Al-Skeini and Others v The United Kingdom* Application no. 55721/07 (ECHR, 7 July 2011).
[80] ibid.
[81] ibid.
[82] ibid.
[83] Milanovic, n (1).

of rights under the European Convention of Human Rights. This meant that a State representative, whether the military or any other, was bound not to violate the Right to Life of any person. The State, on the other hand, is also not obligated to ensure rights like the Right to Education.

At the Time of the Attack

Under this section, we shall look into the various obligations the States have to prevent the attack during the time of the attack. Here we shall focus on Saudi Arabia's obligation not to use force and Turkey's obligation to protect Khashoggi's life.

Saudi Arabia violated its obligation under the Arab Charter and customary International Human Rights Law (hereinafter "*IHRL*") when the 15-member team murdered Khashoggi within the Consulate premises.[84] we deduce this as, firstly, Saudi Arabia had an obligation not to cause hurt to or murder Khashoggi under the right to life. This does not have any territorial limits, as we have established in the previous part.[85] Further, as Khashoggi was within the Consulate premises when the attack took place, he was within Saudi Arabia's territory. Thus, the violation of the Arab Charter and the right to life is clear.[86]

The position regarding the violation by Saudi Arabia is unequivocal, but the clarity reduces when we look at Turkey's obligations. Here there is an intricate balance that needs to be reached between the obligation of Turkey not to enter the Consulate as per the Vienna Convention on Consular Relations (hereinafter "*VCCR*") and the obligation of Turkey to protect the life of Khashoggi. It is evident through many news reports and the report of Callamard that Turkey had recordings of the happenings inside the Consulate.[87] If Turkey knew about the happenings inside the Consulate while they were happening, the mere warning would not fulfil Turkey's positive

[84] M. Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life – Part III: During the Attack' *EJIL:Talk!* (17 April 2019) <https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-iii-during-the-attack/> accessed 13 March 2021, 2-3.
[85] M. Milanovic, n (40).
<https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-ii-before-the-attack/> accessed 13 March 2021, 18-19.
[86] M. Milanovic, n (55), 2-3.
[87] UNHRC Report 93.

obligation.[88] In such a case, Turkey would be required to forcefully enter and prevent the attack to fulfill the obligations under IHRL.

On the other hand, VCCR prevented the Turkish authorities from entering without the Consular General's permission.[89] There have been arguments that show that there is a difference between Article 31 of VCCR and Article 22(1) of the Vienna Convention on Diplomatic Relations (hereinafter "*VCDR*"). In the Teheran Hostage case, the court said that in a case where the diplomatic agent is caught while committing the act, the receiving State can avoid the commission of a crime by making a brief arrest. Then the threshold may be lowered for inviolability and immunities in such a case.[90] The inviolability of a diplomatic premise is absolute, but in cases of emergencies, there may be an exception made. But Khashoggi was attacked in a Consulate that has a lower threshold of inviolability.

Further, Article 31(2) of VCCR clearly states that an exception may be made in cases of a fire or other disasters that require immediate intervention.[91] Thus, we now have to look into what a disaster can encompass. It is clear that disaster is not limited to natural disasters because if the sending State members were being attacked, the receiving State would intervene.[92] Further, there was an urgent need for intervention in this case, and there was no other way to save his life. Thus, if the Turkish authorities had entered, they would not have violated Article 31 of VCCR.[93]

AFTERMATH

In this section, we will look into the current developments in the case and draw a connection to the recommendations in the Callamard report.

Turkey

The Turkish authorities conducted a search of the Consulate on 15th October. This was

[88] M. Milanovic, n (55) 3.
[89] Vienna Convention on Consular Relations (adopted on 24 April 1963, entered in force 19 March 1967) 596 UNTS 261, Art. 31.
[90] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)* (Advisory Opinion) [1980] ICJ Rep p.3 [86].
[91] Vienna Convention on Consular Relations (adopted on 24 April 1963, entered in force 19 March 1967) 596 UNTS 261, Art. 31(2).
[92] M. Milanovic, n (55), 5.
[93] Responsibility of States for Internationally Wrongful Acts 2001, Article 24(1).

only possible after the court issued a warrant, and a meeting was then conducted with the Saudi officials.[94] They did not find much. They also conducted a test that showed drops that followed one another in a curved line.[95] On the following day, they requested to search the Consular General's residence but were obstructed throughout by Saudi officials.[96] The Turkish authorities also requested to search the well and allow fire-fighters to enter the premises to help with the investigation. Still, a response was not received for the former request, and the latter was denied.[97]

The day the search of the cars was to be done, an investigator present said that the Saudi officials did not help ease the process but instead showed resistance.[98] The Turkish authorities have conducted a further investigation where witness testimonies were collected, including all the Turkish staff members of the Consulate and the Consular General's residence.[99] Within the witness testimonies collected, one was of a local technician, who said that there was an 'air of panic' within the Consulate and that he was asked to light up the oven (tandoor) before he left.[100] He also said that there were many meat skewers and a barbecue set up near the oven (tandoor).[101] Further, in his testimony, he stated a change in the colour of the marble as though it had been cleaned with chemicals.[102]

Once the court issued arrest warrants for 15 members of the team and three additional persons who assisted them, the public prosecutor requested Saudi Arabi to extradite the 18 persons for whom an arrest warrant was issued, he received no response.[103] Later that month, Saudi Arabia's ambassador to Germany declared that 18 persons were suspects as per their investigation. Further, Saudi Arabia is not going to take this matter lying down, and that they would do their best to ensure Khashoggi

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[94] UNHRC Report 135.
[95] ibid.
[96] ibid.
[97] ibid.
[98] ibid.
[99] P. Keddie, 'Jamal Khashoggi killing: Turkey's trial of Saudi suspects resumes' *Aljazeera* (23 November 2020) <https://www.aljazeera.com/news/2020/11/23/khashoggi-killing-turkeys-trial-of-saudi-suspects-resumes> accessed 16 March 2021.
[100]'Khashoggi trial: Consulate worker was told to 'light up the oven' *Aljazeera* (3 July, 2020) <https://www.aljazeera.com/news/2020/7/3/khashoggi-trial-consulate-worker-was-told-to-light-up-the-oven> accessed 16 March 2021.
[101] ibid.
[102] ibid.
[103] UNHRC Report 167.

gets justice.[104]

US

Soon after the attack on Khashoggi, '22 senators invoked the Global Magnitsky Human Rights Accountability Act.'[105] This required the Government at that time, the Trump administration, to look into who the persons responsible were and provide a report of the same to Congress by 8th February 2019.[106] Trump ignored this and allegedly crossed the 'legal boundaries' to withhold the information collected by the Central Intelligence Agency (hereinafter "*CIA*") from Congress to protect MSB.[107]

The Biden administration came in and began working on declassifying the information collected by the CIA.[108] The CIA has drawn an inference that as MSB is the de facto ruler of the Kingdom and oversees each detail, the attack was ordered by MSB.[109] Earlier this year, the present Government declassified the reports and shared the information collected by the CIA.[110] The four-page report released shows a clear link between MSB and the murder of Khashoggi.[111] However, the US stopped there, and they did not issue any sanctions, financial or otherwise, on the future ruler of Saudi Arabia.[112] The report also concluded that it was a premeditated attack but stated that they could not determine how long this had been in the making.[113]

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[104] ibid.
[105] Editorial Board 'Opinion: Trump defies Congress — to shield MBS from accountability on Jamal Khashoggi' *The Washington Post* (21 August 2020) <https://www.washingtonpost.com/opinions/global-opinions/trump-defies-congress--to-shield-mbs-from-accountability-on-jamal-khashoggi/2020/08/21/4cc19034-e3da-11ea-b69b-64f7b0477ed4_story.html> accessed 17 March 2021.
[106] ibid.
[107] ibid.
[108] S. Kirchgaessner, 'Biden administration 'to declassify report' into Khashoggi murder' *The Guardian* (19 January 2021) <https://www.theguardian.com/world/2021/jan/19/biden-administration-to-declassify-report-into-khashoggi> accessed 17 March 2021.
[109] S. Harris, G. Miller, J. Dawsey, 'CIA concludes Saudi crown prince ordered Jamal Khashoggi's assassination *The Washington Post* (16 November 2018) <https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html> accessed 17 March 2021.
[110] S. Kirchgaessner, 'US finds Saudi crown prince approved Khashoggi murder but does not sanction him' *The Guardian* (26 February 2021) <https://www.theguardian.com/world/2021/feb/26/jamal-khashoggi-mohammed-bin-salman-us-report?CMP=Share_AndroidApp_Other> accessed 17 March 2021.
[111] ibid.
[112] ibid.
[113] ibid.

Khashoggi's fiancé has filed a lawsuit against MSB and 20 other Saudi persons in the district court of Columbia.[114] This has been filed under Torture Victim Protection Act and the Alien Tort Statute, and as per the statutes, US courts have jurisdiction on the matter even though the attack was outside the territory of the US.[115]

Saudi Arabia

Saudi Arabia has admitted that Khashoggi was killed inside the Consulate but has not taken responsibility for it.[116] The Saudi Government has claimed that Khashoggi died during a fistfight that resulted from Khashoggi refusing to return to Saudi Arabia.[117] MSB has denied any involvement but made a statement that as a Saudi Arabian leader, he took full responsibility as the attack was perpetrated by officials working for the government.[118] Saudi Arabia's government has provided compensation to Salah Khashoggi, Khashoggi's son, for the attack on his father.[119]

The 21 men, allegedly involved in the 'rogue mission', were arrested pursuant to the trial conducted by Saudi Arabia. The prosecutor was to seek the death penalty for five of the members.[120] The prosecutor also mentioned how the team leader decided to change the plan from returning the victim to Saudi Arabia to ending his life if the negotiations failed.[121] The trial was conducted in Saudi Arabia, but there was no transparency as the State did not permit those who attended to report about the

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[114] V. Nereim, 'Saudi Crown Prince Faces U.S. Lawsuit for Khashoggi Killing' *Bloomberg* (20 October 2020) <https://www.bloomberg.com/news/articles/2020-10-20/u-s-lawsuit-filed-against-saudi-prince-for-khashoggi-killing> accessed 19 March 2021.

[115] ibid.

[116] K. Sullivan, L. Morris, T. El-Ghobashy, 'Saudi Arabia fires 5 top officials, arrests 18 Saudis, saying Khashoggi was killed in fight at consulate' *The Washington Post* (19 October 2018) <https://www.washingtonpost.com/news/world/wp/2018/10/19/saudi-government-acknowledges-journalist-jamal-khashaoggi-died-while-in-that-countrys-consulate-in-istanbul/> accessed 18 March 2021.

[117] ibid.

[118] F. Gardner, 'Jamal Khashoggi: Saudis sentence five to death for journalist's murder' *BBC* (23 December 2019) <https://www.bbc.com/news/world-middle-east-50890633> accessed 18 March 2021.

[119] A. Callamard 'Complete mockery: Saudi Arabia condemned over Khashoggi ruling' *Aljazeera* (8 September 2020) <https://www.aljazeera.com/news/2020/9/8/complete-mockery-saudi-arabia-condemned-over-khashoggi-ruling> accessed 18 March 2021.

[120]'Public Prosecution: Investigation Results Briefing' *Saudi Press Agency* (15 November 2018) <https://www.spa.gov.sa/viewstory.php?lang=en&newsid=1841715> accessed 18 March 2021;
D. Kirkpatrick & C. Gall, 'Audio Offers Gruesome Details of Jamal Khashoggi Killing, Turkish Official Says' *The New York Times* (17 October 2018) <https://www.nytimes.com/2018/10/17/world/europe/turkey-saudi-khashoggi-dismember.html> accessed 11 March 2021.

[121] ibid.

same.[122] Further, when the judgment was delivered, no public or media personnel were allowed to participate.[123] Eight persons were charged with prison sentences varying from seven to twenty years.[124] Two persons who were senior intelligence officers and right-hand men of MSB were exonerated through the prosecutor's many statements that they played a crucial role in Khashoggi's attack.[125] Further, as mentioned above, the persons who claimed to have the leaders of this 'rogue mission' were not found guilty.[126]

The trial conducted was within closed doors, and due to the lack of transparency, there are still many questions that Saudi Arabia fails to answer. They would have attained the information that could answer many of these questions, like the whereabouts of Khashoggi's body.[127] As per the law, families have a right to commute the sentence in Saudi Arabia. Khashoggi's family friend claims that the family was under pressure from MSB and the Government to exonerate the senior officials.[128]

The international pressure on Saudi Arabia to release information regarding the murder of Khashoggi is mounting. This pressure increased when Saudi Arabia rejected the Callamard report.[129] The ambassador to Denmark made a statement on behalf of 29 States which pressed Saudi Arabia for justice for Khashoggi.[130] On behalf of many European States, the German ambassador urged Saudi Arabia for transparency and answers to many unanswered questions.[131]

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[122] K. Fahim, 'Saudi Arabia hands down 'final' rulings in Jamal Khashoggi murder, sentencing 8 to prison terms' *The Washington Post* (7 September 2020) <https://www.washingtonpost.com/world/saudi-arabia-sentences-8-defendants-in-jamal-khashoggi-murder/2020/09/07/26656b4e-f114-11ea-8025-5d3489768ac8_story.html> accessed 18 March 2021.
[123] ibid.
[124] ibid.
[125] Aljazeera, 120.
[126] Aljazeera, 120.
[127] Aljazeera, 120.
[128] Aljazeera, 120.
[129] 'Saudi Arabia rebuffs U.N. expert's report on Khashoggi murder' *Reuters* (19 June 2019) <https://www.reuters.com/article/us-saudi-khashoggi-un-reaction-idUSKCN1TK1YR> accessed 18 March 2021.
[130] 'Saudi Arabia rebuked at UN over Jamal Khashoggi killing, abuses' *Aljazeera* (15 September 2020) <https://www.aljazeera.com/news/2020/9/15/saudi-arabia-rebuked-at-un-over-jamal-khashoggi-killing-abuses> accessed 18 March 2021.
[131] ibid.

Recommendations of the Callamard Report

The first recommendation requires Turkey to seek a follow-up investigation from the UN and provide assistance.[132] Turkey has not taken any steps in this regard post the Callamard report.[133] The second recommendation asked Turkey to release all the information collected and conduct a public investigation into the murder of Khashoggi.[134] Through various newspapers and other such sources, we have details of many of the witness statements, evidence collected, and the prosecutor's statements and the courts in this regard. Thus, we can conclude that the information has been made public, and an investigation had been conducted. There has also been a petition that has been signed by many of the citizens to change the name of the street on which the Saudi Consulate is present to "Jamal Khashoggi Way."[135] Thus as per the third recommendation,[136] steps have been taken to change the street's name, but there is still a long way to go before it is implemented in its entirety. After the Coup in 2016, many journalists had been imprisoned, and the number reached a high of 160.[137] But as per the recent reports, the number has reduced drastically. In 2020 there were about 37 journalists imprisoned.[138] The fourth recommendation states that all journalists should be freed and all necessary steps should be taken to enforce the recommendations provided in the report "on freedom of expression, torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group of Enforced Disappearances."[139] This recommendation has been implemented to an extent but not in its entirety. The final recommendation requests Turkey to respond to

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[132] UNHRC Report,485.
[133] J. Bukuru, 'Turkey Should Seek Follow-Up Inquiry on Khashoggi Killing' *Human Rights Watch* (27 June 2019) <https://www.hrw.org/news/2019/06/27/turkey-should-seek-follow-inquiry-khashoggi-killing> accessed 18 March 2021.
[134] UNHRC Report, 493.
[135] J. Walsh, 'A petition to change the street name where the Saudi Embassy in Washington is located to 'Jamal Khashoggi Way' already has a heap of signatures' *Business Insider* (1 November, 2018) <https://www.businessinsider.in/a-petition-to-change-the-street-name-where-the-saudi-embassy-in-washington-is-located-to-jamal-khashoggi-way-already-has-a-heap-of-signatures/articleshow/66455808.cms> accessed 18 March 2021.
[136] UNHRC Report [490].
[137] 'More than 120 journalists still jailed in Turkey: International Press Institute' *Reuters* (19 November 2019) <https://www.reuters.com/article/us-turkey-security-media-idUSKBN1XT26T> accessed 18 March 2021.
[138] 'Turkey/ Europe & Central Asia', *Committee to protect journalists* <https://cpj.org/europe/turkey/> accessed 18 March 2021; E. Beuser, 'China, Turkey, Saudi Arabia, Egypt are world's worst jailers of journalists' *Committee to protect journalists* (11 December 2019) <https://cpj.org/reports/2019/12/journalists-jailed-china-turkey-saudi-arabia-egypt/> accessed 18 March 2021.
[139] UNHRC Report 491.

the resolution passed by the United Nations Educational, Scientific and Cultural Organization (hereinafter "*UNESCO*") to the steps taken in response to the murder of Khashoggi.[140] In the report published by the Director-General, it is clear that Turkey has responded to the request and provided the information.[141]

The recommendations for the US are first to conduct an inquiry into the murder and file a criminal prosecution within the US.[142] The inquiry had been conducted, and there already exists a lawsuit against MSB and 20 others.[143] This recommendation has been fulfilled to a certain extent as the lawsuit is of a civil nature and has not been filed by the government, but the inquiry has been conducted. The second part of this recommendation is to release information under the Global Magnitsky Human Rights Accountability Act and determine whether MSB was responsible.[144] As stated above, this has been fulfilled recently by the Biden Administration.[145] Thus this point too has been fulfilled. The second recommendation requires the US Congress to hold hearings and pressure Saudi Arabia to release information they collected. Congress wants accountability and has been putting pressure on the US government to take action.[146] Thus we conclude that this point has not been fulfilled, and there is still a long way ahead. The final recommendation for the US is to declassify information collected by the CIA.[147] This has been fulfilled by the Biden administration recently.[148]

The first recommendation for Saudi Arabia is to apologize to the family, provide

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[140] ibid.
[141] IPDC, 'Director-General Report on the Safety of Journalists and the Danger of Impunity' (25-26 November 2020) 32nd Session CI-20/COUNCIL.32/4. (IPDC) <https://unesdoc.unesco.org/ark:/48223/pf0000374700> accessed 18 March 2021, 16
[142] UNHRC Report 493.
[143] V. Nereim, 'Saudi Crown Prince Faces U.S. Lawsuit for Khashoggi Killing' *Bloomberg* (20 October 2020) <https://www.bloomberg.com/news/articles/2020-10-20/u-s-lawsuit-filed-against-saudi-prince-for-khashoggi-killing> accessed 19 March 2021.
[144] UNHRC Report 493.
[145] Kirchgaessner, n (109).
[146] Editorial Board, 'Opinion: Congress wants accountability for Khashoggi. Trump breaks the law to stop them' (Washington Post, 8 March, 2020) <https://www.washingtonpost.com/opinions/global-opinions/congress-wants-accountability-for-khashoggi-trump-breaks-the-law-to-stop-them/2020/03/08/38369b5c-5f17-11ea-b29b-9db42f7803a7_story.html> accessed 18 March 2021.
[147] UNHRC Report 493.
[148] S. Harris, G. Miller, J. Dawsey, 'CIA concludes Saudi crown prince ordered Jamal Khashoggi's assassination' *The Washington Post* (16 November 2018) <https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html> accessed 17 March 2021.

state-based compensation, and take responsibility for the attack.[149] This has been fulfilled, as shown in the previous parts of this section. The second and third recommendation requires Saudi Arabia to apologize to Turkey and the US, respectively, for Khashoggi's attack.[150] This has not been done to the extent of my knowledge. The fourth recommendation requires Saudi Arabia to release all journalists imprisoned.[151] The number of journalists imprisoned has been rising steadily, and the government has taken no steps to fulfil this recommendation.[152] The fifth recommendation requires Saudi Arabia to take steps towards investigating which actors and institutions made the attack possible and release the information to the public.[153] There may have been an investigation as a part of the trial where the information may have come to light, but the same has not been made public, and thus this recommendation has not been fulfilled.[154] The next recommendation requires Saudi Arabia to release information to UNESCO.[155] This recommendation has been fulfilled as per the report published by the Director-General.[156] The last recommendation requires Saudi Arabia to ratify "International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty."[157] Saudi Arabia has not taken any steps to ratify the same and thus, has not fulfilled this recommendation.[158]

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[149] UNHRC Report 480.
[150] ibid.
[151] ibid.
[152] E. Beuser, 'China, Turkey, Saudi Arabia, Egypt are world's worst jailers of journalists' *Committee to protect journalists* (11 December 2019) <https://cpj.org/reports/2019/12/journalists-jailed-china-turkey-saudi-arabia-egypt/> accessed 18 March 2021.
[153] UNHRC Report,484.
[154] Aljazeera, n (120).
[155] UNHRC Report 486.
[156] IPDC 16.
[157] UNHRC Report 487.
[158] University of Minnesota, Human Rights Library, Ratification of International Human Rights Treaties- Saudi Kingdom <http://hrlibrary.umn.edu/research/ratification-saudikingdom.html> accessed 18 March 2021.

CONCLUSION

It is clear that Saudi Arabia has not taken any significant steps to fulfil the Callamard report's recommendation. There is also a visible lack of transparency, and there exists much contradiction in Saudi Arabia's statements with other reports that have come to light. This has caused a significant hindrance in providing justice to Khashoggi. Despite the international pressure mounting, Saudi Arabia has failed on all fronts to fulfil its obligation to Khashoggi and the international community. On the other hand, Turkey has taken steps to provide justice by conducting a thorough investigation and ensuring transparency throughout. But their efforts have come to a standstill due to the lack of cooperation from Saudi Arabia. Initially the US did not take any steps to render justice for Khashoggi, but since the Biden administration came into power, we see steps have been taken. There is still more that the US can do but it may be a long time before we actually see any such steps being taken.

There is evidently a bigger story in this case that could be traced back to senior Saudi officials, including the Crown Prince and the King. This has been shown through many means, including the Callamard report and the information declassified by the US. But merely drawing such a conclusion is not enough. The need of the hour is to hold the Kingdom responsible and impose strict punishment on the perpetrators of such a heinous crime regardless of who it may be.

MENSTRUAL HYGIENE ENSHROUDED IN TORPOR OF OBLIVIOUSNESS VIS-A-VIS A FACET OF RIGHT TO LIFE FOR SYRIAN REFUGEES

Neha Bhandari[1] and Manmeet Kaur[2]

ABSTRACT

Human Rights has been the central subject matter of contemplation over decades with respect to "Right to life" symbolic to the worth of the sun in the universe. In spite of the tremendous efforts on the part of global organizations and the governments of the respective states, the breach of the natural right has been pigeonholed as the by-product of the crystallization of structure of the state in the dynamic modern political fabrications – the most manifested episode is the "Syria Crisis". The paper attempts to explore the aspects of the menstrual hygiene as a facet of Right to life. The fundamental question of pondering: Is Menstrual Hygiene an obligation of the State to be extended to all women as a facet of right to life or does this facet only knock the door of Proletariat women in the society? The paper is a catalyst for the framework, policies and standards and scope of the right to menstrual hygiene of the refugee women in Syria. The researchers attempt to explore the evident gap which has amplified in the implementation of the rights due to the associated factors and distinctive prominence on the right of the women refugees to the necessity which is buried under the torpor of obliviousness. The researchers will trace the gaps and links that are present today, linking the stumbling block in the recognition of the pivotal right from the past disdains and the need for evolution. The paper will elucidate the legal prospects, the contentions of jurists, international prospects, jurisprudential facet and authors' acute analysis. To support the research, the paper will include a comparative study for finding a reasonable solution to the problem and bringing notable changes in the despotisms of women.

Keywords: Right to Life, Menstrual Hygiene Management, Syrian Refugees, Women, Syrian Crisis.

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INTRODUCTION

Is menstruation in point of fact envisioned as a taboo? Is Menstrual Hygiene still a notion which is propagated by the bourgeoisies' locus to the knowledge? The answer to the questions proposed is assertive which puts nimble on the despotism of menstruators in general and Syrian Refugees, in particular. The autocracy of menstruators is envisaged in three folds, predominantly, the gender identity they are disguised in; secondly, the onus of being statelessness and lastly, the unidentified but indispensable needs which are buried under the elevated massifs of delusions, witlessness and so called "taboos".

The United Nations have said that Menstrual Hygiene is a subject cardinal to the gender equality, public health, and human rights issues.[3] But the question which fades the strife of the global organization is, what is the reason of obliviousness of masses when 52 percentage of the female population[4] (26 percentage of the total population) is in reproductive age? The life of menstruators is bifurcated into five periods: infancy, puberty, maturity, menopause, and senility[5] but these are not stringent divisions and are subject to changes respective to various associated factors and variants. It has been estimated that 50 percentage of the female population is experiencing normal menstruation with normal discomfort and others experience the torments.[6] But the conjoint socket is the absence of the Menstrual Hygiene amenities in all the situations.

There is need of sentience because lack of information is thwarting the menstruators from relishing the quality of life, the articulation is necessary to preserve the self-esteem and dignity of the menstruators.[7] The encounter is to be addressed as a social issue by all the stakeholders' i.e., state, individuals and society. There is a need for amendment in the believes and norms attached to menstruation and eradicate the privileged approachability surrounding the menstrual absorbents

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[3] Abigail Durkin, 'Note, and Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle against Reproductive Justice' (2017) 18 Geo. J. Gender & L. 159-61.

[4] Sarah House, Thérèse Mahon and Sue Cavill, *Menstrual Hygiene Matters: A Resource For Improving Menstrual Hygiene Around The World* (Taylor & Francis, Ltd. 2013) 257.

[5] Marion Craig Potter, 'The Hygiene of Menstruation' (1910) 10 The American Journal of Nursing 382.

[6] ibid.

[7] Ministry of Drinking Water and Sanitation, 'Menstrual Hygiene Management National Guidelines' (Government of India). <http://www.ccras.nic.in/sites/default/files/Notices/16042018_Menstrual_Hygiene_Management.pdf > accessed 24 April 2021.

(sanitary napkins, tampons, cloth etc.), soaps, water, disposal bins, mechanism of safe disposal of the used material and the mentality of accepting the natural biological process with poise. The paucity of these Menstrual Hygiene products coerces the under-privileged menstruating population to utilize the alternatives for the preventing the staining on the clothes like bunches of toilet papers – it means they make themselves susceptible to even shoddier situation i.e., serious health hazards.

But the question of conundrum is why menstruators expose themselves to such shoddier situations? Is this the unfamiliarity about the situation and Right to Life or underestimation of the "worth of life" of the menstruators in the difficult and susceptible situations like refugee camps in specific? The authors have here contemplated on the term "worth of life" in context to the Right to Life with dignity and something beyond mere animal existence, as it has been pronounced in the case of *Munn v Illinois*[8] with the due reference to the 13th and 14th Amendment of the US Constitution. The notions of the society may be, on certain subjects like menstruation and menstruators, being deeply offensive to individual dignity and human rights.[9] But it can neither be subject of subordination to the observations of morality of the society nor intolerance of society operate as a marauding morality[10] to biologically significant and natural process of menstruation. Right to Life is like a tree which has various other rights hanging on it like fruits like Right to Health, Right to Privacy, Right against Untouchability, Right to Clean Environment, Right to Personal Liberty, etcetera.

Over the last duration of 15 years, there has been contribution by the global organizations for the enunciation of the Menstrual Hygiene Management (MHM) for the population post and pre displacement. But what is MHM; it is the mechanism which has been initiated at the global level to accommodate the needs of the adolescents and other menstruators during menses to ensure the shield to limbs of the right of life and personal liberty. This definition has not been propounded by the global institutions as it is multi facet subject but by the basic indulgence of the

[8] *Munn v Illinois*, 24 L Ed77: 94 US 113 (1877).
[9] *Indian Young Lawyer Association & Ors. v State of Kerala & Ors.*, 2018 SCC OnLine SC 1690.
[10] ibid.

authors. It is centered primarily on saving the human lives and secondarily on improving the quality of life inclusive of the facilities like private latrines, easy access to clean water, culturally apposite sanitary material, and disposal mechanism for the sustenance of the refugees[11] as it all goes along with the Right to Life with dignity. Identical is the situation of the Syrian Refugees, crumbling underneath the weight of the collapsing system and society. They have shared toilet facilities with other families and men, which lacks privacy and disposal facilities. The disposal of the used sanitary material in the household is again pilloried – for instance, hefty gap in the bamboo walls sanctioning conspicuousness and absence of locks on the doors. This stemmed in many girls and women experiencing anxiety regarding the potential for "peeping toms" or intruders while using these facilities.[12] Another cumbersome issue is the diversity in the Syrian Refugee population itself – which makes further categorization with due reference to the cultural and traditional believes and preferences on the subject – some proportion of the population is unaware of the menstruation but population in Lebanon were more likely to report having some basic knowledge but with some attached futile superstitions and myths.[13]

EVOLUTION OF MENSTURAL HYGIENE

The well-being of menstruators' family and the menstruator has a positive correlation with menstruators' menstrual health, but too often the mind sets, customs and institutional prejudices prevent menstruators from getting the menstrual health care they require, and it continues to be amongst the most challenging development issue today.[14] For most of human history, menstruation has been associated with taboo and stigma.[15] Menstruators throughout the world lacked the means to absorb their menstrual blood. They were required to change their clothes often and were usually separated or forced to stay inside.

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[11] Marni Sommer, 'Menstrual hygiene management in humanitarian emergencies: Gaps and recommendations' [2012] 31 Waterlines 83.

[12] Schmitt, M.L., Clatworthy D., Ratnayake, R et.al, 'Understanding the menstrual hygiene management challenges facing displaced girls and women: findings from qualitative assessments in Myanmar and Lebanon.' (2017) 11 Conflict and Health.

[13] ibid.

[14] Niraj Gera, 'Menstrual Hygiene: A Challenging Development Issue' (*Down to Earth*, 1 September 2019) <https://www.downtoearth.org.in/blog/health/menstrual-hygiene-a-challenging-development-issue-66973> accessed25 April 2021.

[15] Jennifer Kotler, 'A short history of modern menstrual products' (*Hello Clue*, 21 November 2018), <https://helloclue.com/articles/culture/a-short-history-of-modern-menstrual-products> accessed 25April 2021.

In Ancient Egypt, it was recorded that menstruators used soft papyrus to create devices similar to tampons whereas menstruators in Japan made paper tampons, which they had to change over twelve times in a day.[16] Menstruators in other parts of the world used wool, roots, grass, or sticks.[17] In Medieval times, menstruators put rags between the legs to absorb their menstrual blood which was washed and dried for reuse. This gave rise to the term 'on the rag'. Further, menstruators were considered unclean during menstruation, which gave rise to a glut of myths. Men believed that menstruation was necessary to prevent the unclean blood from contaminating the clean blood, that period blood carried diseases and was 'poisonous'. Another common belief in the medieval times was that menstruators during menstruation were susceptible to systematic shocks and other diseases.

These beliefs persisted until the middle 20th century. The timeline from before the Victorian Era to the 20th century was filled with misinformation and incorrect notions about menstruation. Menstruators were so ashamed on menstruation that they hid it from their own counter-parts, and it was so rarely discussed that menstruators did not have enough understanding of their cycle to explain it.[18]The 1800's manifested the inception of sanitary pad industry. Companies sold sanitary pads which were reusable and some disposable. During the World War I, a significant discovery was made where; French nurses observed that cellulose, a material used for bandaging soldier's wounds was more absorbent than ordinary cloth diapers.[19] Sanitary bloomers were invented around the 1920's followed by the invention of the first belt-less sanitary napkins by Stayfree with an adhesive at the bottom which would easily stick to the underwear. Before 1985, the word "period" (to mean menstruation) had never been uttered on American television,[20] but the Stayfree product met immediate success and was reproduced by other brands. The 60's and the 70's witnessed a change of attitude among menstruators, and they

[16] 'Periods in History: Feminine Hygiene Products' Effect on Women Throughout History' <https://www.arcgis.com/apps/Cascade/index.html?appid=65aa54dce98349b68be0bc535ab47aa9> accessed 25 April 2021.
[17] ibid.
[18] ibid.
[19] ibid.
[20] Kotler (n 15).

began to embrace the comfort of tampons which was especially prevalent among young menstruators.

A change in the mind set of menstruators (specifically women) in the 21st century can also be felt, with women being more open about their rights and the necessity to talk about menstruation and its aspect, but how far have we come from the ancient times is still debatable. The aura of comfort to talk about menstruation openly had been only achieved by one specific gender in the category of menstruators that is women (not absolutely), which has paved the path to the unnecessary gap among the marginalized menstruating community itself. The evolution of menstrual hygiene products is a double-edged sword because though the creation of more user-friendly products has improved menstruators' freedom and the ability to obtain work and education, the taxation and industrialization of menstrual hygiene products is used as a vehicle to impose financial limitations on women.[21]

Syrian Refugees dread menstruation every month as they perceive it as a financial, physical, and mental threat. More than 860,000 people live under siege across war-ravaged Syria, facing shortages of food, water, and other vital goods, but menstruators in besieged areas face the additional challenge of struggling each month with limited access to menstrual hygiene products as well as clean water, leading to sometimes serious gynecological complications caused by poor hygiene.[22] The menstrual hygiene products are too expensive for besieged women to afford and reusing pads has led to fungal infections, kidney pains, and vaginal and urinary tract problems.[23]

A basic part of life for menstruators, menstruation has been a neglected challenge for an estimated 30 million menstruators displaced due to worldwide conflicts and disasters.[24] The horror stories of menstruation among the Syrian Refugees raises alarming concerns and questions, as to how conveniently it has been

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[21] ibid.
[22] 'Syrian Women under siege face new threat: Their periods' (*Independent*, 31 October 2016), <https://www.independent.co.uk/news/world/middle-east/syrian-women-under-siege-developing-infections-their-periods-without-tampons-or-clean-water-a7388476.html> accessed 26 April 2021.
[23] ibid.
[24] Ronnie Cohen, 'Refugees lack menstrual supplies and private, safe toilets' (*Reuters*, 6 November 2017) <https://www.reuters.com/article/us-health-refugees-menstruation-idUSKBN1D629P> accessed 26 April 2021.

overlooked. The lack of supplies, safe and private toilets, inadequate knowledge on menstruation practices and preferences have led menstruators in general to suffer during their menstrual cycles in the refugee camps.

JURISPRUDENTIAL FAÇADES OF MHM PROGRAMMES CIRCUMSCRIBING SYRIAN REFUGEES

'A woman's health is her capital.'

- Harriet Beecher Stowe[25]

What if the capital of health is running down and abating? The population of Syrian Refugees is abstruse and is scattered in diverse countries either legally or illegally. For instance, in Jordan, of the registered female population from Syria (though gargantuan strata of the population is unregistered), one fourth of the population is from menstruating age[26] – but as illustrated in the following chapter, Jordan is neither a ratifying country to the 1951 Refugee Convention nor there has been any execution of the municipal refugee programmes to discourse the basic inevitabilities and quandary of forlorn.

The yearning to cling to the conception that menstruation is filthy, sordid and tainted highlights the utilitarian ideology attached to menses and women for the persistence of toting value to the products in the market which will be proportional to the benchmark of the "women empowerment" in the market. Feminist have contended that locus of women has been subjugated for meeting the yardstick of the profits. The biological process has been attached to the bifurcated but superstitious vision of "remedying"[27] the wrong is foundational access of the corporate world to the potential markets with the social debt of uplifting the marginalized gender. This may lead to assertive effect of humanizing menses and improving the Menstrual

[25] American abolitionist and author.

[26] IPSOS Group SA, 'Unpacking gendered realities in displacement: the status of Syrian refugee women in Jordan' (2018) UN Women <https://jordan.unwomen.org/en/digital-library/publications/2018/gendered-realities-in-displacement-jordanreport#:~:text=IPSOS%20Group%20SAUnpacking%20gendered%20realities%20in%20displacement%3A%20the%20status%20of%20Syrian%20refugee%and%20physical%20isolation%20in%20Jordan> accessed 26 April 2021.

[27] Kuntala Lahiri-Dutt, 'Medicalising menstruation: a feminist critique of the political economy of menstrual hygiene management in South Asia' (*ResearchGate*) <https://www.researchgate.net/publication/272123828_Medicalising_menstruation_a_feminist_critique_of_the_political_economy_of_menstrual_hygiene_management_in_South_Asia> accessed 26 April 2021.

Hygiene but the negative whoopla is subtle publicity of the product to found the basis in potential market. This understanding is due to categorization or objectification of the body of the women, either by men or women herself, as the reproduction and sexual gratification machine leading to a metaphoric understanding of menstruation as indicating a 'diseased factory' or 'machine in disrepair'.[28]

The problem which has been contemplated here, according to the authors, is the paucity of the literature on the menstruation in general and scholarly work on the lives of Syrian Refugees crumbled under the mounds of statelessness, patriarchy and poverty. The cleft stick of the Syrian Refugees has an attached defect of statelessness and obliviousness which exfoliate the fact that in times of absence of the basic vintage needs (food, shelter and clothing) there is no chamber for the peculiar inevitabilities of the menstruators.

The authors have analyzed that menstruation and myths has been narrowed to "the womanhood" but for the presence of the fact that menstruation is not the biological experience of women only. "Women as menstruator" is the all-encompassing category but not all women menstruate and all who menstruate are not women. But it would be doltish of authors to question the gratification of the menstrual desideratum of queers when the recognized class of genders (women) is pugnacious for endurance.

There has been jesting in gender roles of the menstruators in Syrian Refugee Camps because of the surfeit of the reasons like – divorce, abandonment or widow. The majority of the menstruating population is still perplexing in the household responsibilities but programmes, like "Cash for Work" by the (UN Women) which provide waged work to the menstruating(female) population, are actually resolving the stereotypes and engaging menstruators (women) to earn their livelihood. The momentous outcome is the safe space to discover the self-esteem and identity.[29] But here the colossal conundrum is that there is no augmentation in lives of

[28] ibid.
[29] Yumna Asaf, 'Syrian Women and the Refugee Crisis: Surviving the Conflict, Building Peace, and Taking New Gender Roles' (*ResearchGate*) <https://www.researchgate.net/publication/319948838_Syrian_Women_and_the_Refugee_Crisis_Surviving_the_Conflict_Building_Peace_and_Taking_New_Gender_Roles> accessed 27 April 2021.

menstruators and Menstrual Hygiene. This has assertive narration on the domestic lives of the menstruators along with the economic aspects[30] but the Menstrual Hygiene is not the subject of contemplation because the earnings are barely enough to cater the necessities of the family. The Menstrual Hygiene is still a prerogative which is comprehended by the menstruators from the bourgeoisie. This disseminates to the requisite of "menstrual equity".[31] Authors have contemplated the term (keeping in sight the work of Bridget J. Crawford) as the need to marginalize the stigma attached to the biological process experienced by half of the population globally, there is need to bring the harmonious gratification of the needs of so called "underprivileged – Proletariats" and simultaneously, unbewildering the nexus of menstruation and womanhood.

Menstrual Injustices have been at pinnacle, is also called as "matrix of domination".[32] This has been amalgamated with "Structural Intersectionality"[33] which has been discoursed by the authors in the subject matter of the paper (but the specific terminology has been adopted from the framework of Margaret E. Johnson[34]). It is manifestation of combination of techniques of the subservience and clampdown of class of people experiencing the layers of dominance like point of intersection of patriarchy, white supremacy, transphobia, classism, and ableism. There is need of the discourse to manage the bleeding, pain and use of the menstrual products with due reference to the environment and eco-system. Menstrual Consciousness is pressing pre-eminence for securing the lives with dignity of menstruators.

INTERNATIONAL POSITION ON MENSTRUAL HYGIENE

For the past ten years, Syria has remained the world's largest refugee crisis. Taking a glance at the Menstrual Hygiene of Syrian Refugees, imagine having a period

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[30] ibid.

[31] Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld & Emily Gold Waldman, 'The Ground on Which We All Stand: A Conversation about Menstrual Equity Law and Activism' [2019] 26 MICH. J. GENDER & L. 341.

[32] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and The Politics of Empowerment* (2nd edn, Taylor & Francis 2000) 18.

[33]Margaret E. Johnson, 'Menstrual Justice' (*UC Davis Law Review*, 2019) <https://lawreview.law.ucdavis.edu/issues/53/1/articles/files/53-1_Johnson.pdf > accessed 27 April 2021.

[34] Margaret E. Johnson. Professor of Law, Co-Director, Center on Applied Feminism, Director, Bronfein Family Law Clinic, University of Baltimore School of Law.

amidst fleeing political violence or a natural disaster with inadequate sanitary products and private sanitation facilities. The vast majority – approximately 5.5 million refugees – have found refuge in neighboring countries, primarily in Turkey, Lebanon, Jordan, Iraq and Egypt, where Turkey alone hosts the largest population - 3.6 million,[35] out of which more than one million girls and women (no statistical data available on the queer community) between the ages of 12 and 59 are in need of access to Menstrual Hygiene.[36] This means that 29 percent of more than four million Syrian Refugees are in need of access to Menstrual Hygiene (excluding queer community).[37]

Refugee camps provide people with basic necessities such as shelter, food and clean water, however, many personal items are not provided, which can make hygiene difficult to maintain and Menstrual Hygiene more than often disregarded.[38] Approximately 92 percent of the refugees who have fled to neighboring countries live in rural and urban settings, with only roughly five percent living in refugee camps, however, living outside refugee camps does not necessarily mean success or stability, with more than 70 percent of Syrian Refugees living in poverty, with limited access to basic services, education or job opportunities and few prospects of returning home.[39]

The 1951 Refugee Convention is one of the seminal texts of the post-World War II international human rights regime and was signed in recognition of the dangers to human beings of being rendered homeless and stateless through persecution.[40] It consolidated the previous international instruments on refugees and provided a comprehensive codification on the rights of refugees at an international level and the maintenance of basic minimum standards for refugee treatment.

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[35] 'Syria Refugee Crisis Explained' (*USA for UNHCR*, 5 February 2021) <https://www.unrefugees.org/news/syria-refugee-crisis-explained/> accessed 28 April 2021.
[36] Katherine Hanifen, 'Improving Menstrual Hygiene for Refugees' (*Borgen Project,* 28 August, 2019) <https://borgenproject.org/menstrual-hygiene-for-refugees/> accessed 28 April 2021.
[37] ibid.
[38] 'Maintaining Menstrual Health in Refugee Camps' (*Relief Web*, 9 February 2016) <https://reliefweb.int/report/jordan/maintaining-menstrual-health-refugee-camps> accessed 28 April 2021.
[39] ibid.
[40] Sela Benhabib, 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights' (*Springer Link*, 28 July 2020) <https://link.springer.com/content/pdf/10.1007/s42439-020-00022-1.pdf> accessed 28 April 2021.

The scope of the 1951 Convention, however, was limited to persons who fled from their country of origin and were refugees due to events in Europe before 1st of January 1951, eliminating the refugees from the refugee crisis in the 1950s and the 1960s. Therefore, it was considered desirable that all refugees falling under the definition of 'refugee' in the 1951 Convention should be given equal treatment irrespective of the dateline, which leads to the emanation of the Protocol Relating to the Status of Refugees, 1967. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol form the foundations of the international refugee system; provided the legal foundation of refugee assistance and the basic statute guiding the work of the UN Refugee Agency (UNHCR).[41]

State responsibility starts with addressing root causes of forced displacement, strengthening the rule of law, and providing citizens with security, justice, and equal opportunities to break the cycles of violence.[42] The rights of the refugees have been clearly laid down in the 1951 Convention, but the fundamental question remains as to its implementation in the Contracting as well as the Non-contracting States to the Convention. As mentioned previously, Egypt, Turkey, Lebanon, Jordan, and Iraq host most of the Syrian Refugees. Out of these countries, Iraq, Lebanon, and Jordan are not signatories to the 1951 Convention or the 1967 Protocol.

The reasons for not being party to the Convention or its Protocol are varied but the fact of not being a party affects, for example, the ability of UNHCR to work with and within that State and importantly, the legal requirement upon that State to comply with the international humanitarian standards, however, the actual actions of States in relation to key aspects of protection of refugees are not directly correlated with whether they have signed or ratified either Convention or Protocol [43]

[41] 'Non-Signatory States and the International Refugee Regime' (*FM Review*) <https://www.fmreview.org/non-signatories> accessed 29 April 2021.
[42] 'A Guide to International Refugee Protection and Building State Asylum Systems' (*UNHCR*, 2017) <https://www.unhcr.org/3d4aba564.pdf> accessed 29 April 2021.
[43] ibid.

RIGHT TO HEALTH: A DIMENSION OF RIGHT TO LIFE

Every human being has the inherent Right to Life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[44] The Right to Health constitutes as a facet of the multi-dimensional Right to Life. The 1946 Constitution of the World Health Organization (WHO), preamble defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[45] The 1948 Universal Declaration of Human Rights also mentioned health as part of the right to an adequate standard of living under Article 25 and was again recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural Rights.[46]

The Right to Health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.[47] It is relevant to all States as every State has ratified at least one international human rights treaty that recognizes the Right to Health.[48]

Human Rights are interdependent, indivisible, and interrelated, which means that violating the Right to Health may often impair the enjoyment of other human rights, such as the Right to Education or Work, and fundamental freedoms. This leads us to question, whether Right to Health as a facet of Right to Life is an achievable reality or a mere fallen dream for the Syrian Refugees?

Non-discrimination and equality being fundamental human rights principles and critical components of Right to Health have been incorporated in the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women which requires the

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[44] International Covenant on Civil and Political Rights, Article 6 (1).
[45] 'Right to Health' (OHCHR) <https://www.ohchr.org/documents/publications/factsheet31.pdf> accessed 29 April 2021.
[46] ibid.
[47] Committee on Economic, Social and Cultural Rights, General Committee No. 2014, ¶11.
[48]'Human Rights and Health' (*Who*, 29 December 2017) <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> accessed 29 April 2021.

elimination of discrimination against women in health care and guarantees equal access for women and men to health-care services.[49]With half the battle won, much is required for its proper implementation, especially during a humanitarian crisis.

CONTRIBUTION OF INTERNATIONAL ORGANIZATIONS

While literature on Menstrual Hygiene Management (MHM) has evolved over the years to include the setting of humanitarian crisis, it still has gaps in addressing holistic approach to MHM which takes cultural and religious differences, such that of Islamic and Arabic Menstrual Hygienic practices into consideration.[50] Menstrual Hygiene has also been substantially neglected by the WASH sector and is not *pari passu* with the sexual and reproductive health.

Before an organization prepares to aid a refugee camp with amenities, certain pre-requisites are required to be considered which align with the 'usual practices' of the refugee community being aided. The typical response to MHM in refugee camps is the distribution of reusable/disposable sanitary pads to households, disregarding other aspects, such that of non-culturally appropriate and inadequate hygienic items, inadequate WASH facilities, lack of financial means and difficulty accessing water points.[51] Governments and humanitarian agencies within the *cluster approach* are thus required to regularly adapt their assisting tools and programs to be more context and culturally specific for refugee needs.[52]

The UNFPA addressed the MHM needs in the humanitarian field in the year 2000. This led to the innovation of dignity kits to encourage female comfort, dignity, and mobility specifically, targeting the management of menstruation and their distribution. The UNFPA provided 464,000 dignity kits in the year 2013-2015 to men as well as women. The creation of "safe spaces" for women and girls has greatly

[49] ibid.
[50] Sarah Hasan Al-Shurbji, 'Pain beyond Period: Understanding Menstrual Hygiene Management Challenges Muslim Refugee Women in Za'atari Camp Perspective' (*University of Birmingham,* 2018) <https://menstrualhygieneday.org/wp-content/uploads/2018/04/Pain-Beyond-Period_Sarah-Shurbji.pdf> accessed 29 April 2021.
[51] ibid.
[52] ibid.

contributed to the protection and empowerment of women and girls affected by the Syrian crisis.[53]

The basis of UNICEF's involvement in facilitating access to menstrual materials is the assessment of preferences of women and girls. In a humanitarian crisis, UNICEF may be involved in procuring menstrual materials and providing them to affected populations, in other cases, it may play a market facilitation role to expand access to the type, quality, or affordability of products available for distribution (such as through a government-financed education programme) or purchase.[54] UNICEF further partners with Organizations of Persons with Disabilities (DPOs) for tailored support to girls and women with disabilities. In 2018, UNICEF and Plus Public Foundation partnered to produce education materials on Menstrual Hygiene, school safety and child rights in alternative formats for children with visual and hearing disabilities and represented an important first step towards more inclusive programming.[55]

Transgender people face additional barriers to WASH facilities and services, particularly toilets.[56] A 2012 report highlighted the harassment, exclusion and abuse that transgender people face while using the public toilets. Transgender men who access the men's toilets have limited infrastructure and services for Menstrual Hygiene which are usually available in women's toilets. UNICEF has provided certain tips to include non-binary people in MHM programmes such as, to include non-binary individuals in programme design and delivery, and consult with non-binary individuals to develop desirable and safe options for MHM and avoiding exposure to vulnerability and further stigmatization by implementing the necessary services.

UNHCR's Water, Sanitation and Hygiene (WASH) programming aims to create a healthier environment for the refugees and host communities during

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[53] 'Women and Girls in the Syria Crisis: UNFPA Response' (*UNFPA*, 2015) <https://www.unfpa.org/sites/default/files/resource-pdf/UNFPA-FACTSANDFIGURES-5%5B4%5D.pdf> accessed 29 April 2021.
[54] UNICEF, 'Guidance on Menstrual Health and Hygiene' (March 2019) 71.
[55] ibid.
[56] ibid.

emergencies, stabilized and protracted situations.[57] During an emergency, UNHCR's WASH initiatives ensure immediate survival, dignity and the prevention of disease outbreaks and in alignment with the Sustainable Development Goals (SDGs), UNHCR provides WASH capacity building, guidance, infrastructure upgrades, support for operation and maintenance, and funding to support the host communities.[58]

MENSTURAL HYGIENE ENSHROUND IN TORPOR OF OBLIVIOUSNESS: AN ACUTE ANALYSIS

The authors have employed the term "torpor of obliviousness" in the title of the article to focus on the reason of neglecting the mainstream momentous concern of "Menstrual Hygiene" of the menstruators in general and Syrian Refugees in specific. The "facet of Right to Life" phrase in the title highlights the paltry value attached to the lives of the menstruator by making them guests at the thresholds of the health hazards which they are not aware of themselves because of the slumber of obliviousness. The question of equal treatment has been raised by the authors with reference to the subject of menstruation and Menstrual Hygiene irrespective of the gender and sexes. But the dilemma raised is pre-mature because the notion of women as menstruators is yet not acceptable and question of Menstrual Hygiene of other menstruators is nugatory.

Human Rights of the Menstruators

The subject of human rights is like a deep ocean full of treasures, but it can be preserved either by nature or humans. The nature is here symbolic of International Laws and Humans are symbolic of the Municipal Laws. The nature will kneel down if humans pollute the environment, therefore, there is need of the Municipal Law for the better implementation of the rights enshrined in the International Law. The question of quandary which has traversed the minds of the authors is what will be situation of the stateless individuals? These individuals are refugees or permanently displaced persons, so what is the source of the rights for them as they are not the subjects of any Municipal Law and there is no constitutional set up which shields

[57] 'Institutional Survey on Menstrual Health Management' (*UNHCR*, 2019) <https://wash.unhcr.org/download/institutional-survey-on-menstrual-hygienemanagement/#_ga=2.88326811.1423720467.1619754528-545393144.1619275922> accessed 30 April 2021.
[58] ibid.

their rights. The other interpretation can by the way of Social Contract Theory which illustrates that these are the inherent (or natural) rights of the refugee menstruators for which state is not the essentially required as a shield.

The Right to Life is home of right to personal liberty, the term "personal liberty" must be unfolded in the copious sense and not restrictively. It is used in compendious fashion which includes plethora of other rights which make up liberties.[59] It includes innumerable aspects which are impossible to enumerate exhaustively.[60] For instance, Right to Privacy is essential ingredient of it which the Syrian Refugee menstruators are deprived of because of the lack of adequate facilities of toilets, disposing of the menstrual waste, washing clothes etcetera. The stigma attached to menses has brought into notice the Right against Exclusion. This has been introduced to bring on equal footing and giving power to vulnerable menstruators to accomplish collective good of the excluded menstruating community and to establish the destinies crumbled under the feudal social order.[61] It being the facet to Right to Life has not been explicitly mentioned in the International law which can be categorized as the "gap" and "bridge" simultaneously because there is no possible definition of the term "exclusion" and had it been defined in the International Law, it would have restricted the implementation of the right.

Therefore, it highlights that the drafting and implementation or in specific the International Law is shallow, it ignores more facets of human rights than it safeguards both in contemplation and implementation. This comes up as dainty International Politics which is undermining the absolute "worth of life" of the menstruators. There is need of the social and political reforms along with learning the lessons from the states with the best Menstrual Hygiene policies.

EFFECTIVE IMPLEMENTATION OF MHM: A LESSON FROM SOUTH KOREA

The international organizations have been working tirelessly towards the implementation and optimum utilization of MHM in extremely morbid conditions,

[59] VN Shukla, *Constitution of India* (13th edn, Eastern Book Company 2017).
[60] PK Tripathi, Spotlights on Constitutional Interpretations (NM Tripathy 1972) 166.
[61] Rajeev Bhargava, *Politics and Ethics of the Indian Constitution* (Oxford University Press 2008) 15.

supporting refugees and host communities alike. However, there have been situations posing certain lacunae in its administration. While the High Commissioner's five commitments to Refugee Women includes the provision of sanitary materials to all women and girls of concern, the available data shows that this commitment has been fulfilled only in one third of the operations worldwide.[62]

The authors believe that South Korea can be taken as a reference country in this context, to aid the international institutions in overcoming these lacunae and contribute to ease the implementation of MHM for the Syrian Refugees. South Korea has valuable lessons to share with the rest of the world with regards to Menstrual Health Management, due to the advanced economy, healthcare, and education.[63] It is also one of the few countries with a history of menstrual leave policy as part of its Labour Standards Act. Some recommendations and suggestions are:

- Menstrual Education is paramount in proliferating awareness amongst the masses. South Korea provides for menstrual education for grades 5-6. This is a steppingstone for the young minds to quench their menstrual queries through formal education and can also be implemented among the Syrian Refugees. With regards to the situation within the host communities, formal education should be made available in every refugee camp for generating higher health literacy levels, in turn busting myths and taboos which have existed since time immemorial.
- The lack of research in health literacy level amongst menstruators is an alarming concern which only adds on to the existing stigmas and taboos related to menstruation and period pain management as menstruators are ashamed and embarrassed to talk about these issues which may further delay medical facilities when necessary. This sphere is required to be worked on a global level and concerns menstruators from every facet of life.
- The Syrian Refugees alike the South Korean menstruators are provided with disposable and reusable sanitary napkins. However, these products have the highest environmental impact, both in terms of waste generated, resource

[62] Wudalew Meselu Tesfaye, 'Menstrual Hygiene Management in Refugee Camps. A Qualitative Assessment using Focus Group Discussions' (*Grin*, 2015) <https://www.grin.com/document/366971> accessed 30 April 2021.
[63] Vilayphone Choulamany, 'Menstrual Health Management: A South Korean Case Study' (*Asia Foundation*, 2018) <http://asiafoundation.or.kr/annual-report/annual-report-2017/documents/MHM-A-South-Korean-Case-Study.docx> accessed 30 April 2021.

used, and chemicals released in the environment.[64] South Korea may become the first country to encourage its menstruating population to use reusable products, although this would be a rather far-fetched dream for Syrian Refugees, but not impossible. If the international institutions partner with private institutions in providing easy and safe reusable products for menstruators it would prove as a marvellous win in the implementation of MHM, for the environment as well as the menstruators. To combat the taboos and stigmas, however, would be a concern in encouraging reusable products.

[64] ibid.

A COMPARATIVE ANALYSIS OF THE REGULATORY FRAMEWORK GOVERNING SOLAR WASTE MANAGEMENT IN INDIA, UNITED STATES OF AMERICA AND THE EUROPEAN UNION

Divya Dhupar[1] and Lianne D'Souza[2]

ABSTRACT

The transition to clean sources of energy has gained the attention of many, if not all countries across the globe. As the transition to low carbon sources of energy gains momentum, there has been a boom in use of renewables and technologies associated with these sources of energy. The use of solar energy especially has witnessed an exponential rise. But with such accelerated growth, the issues associated with it have not been considered by existing laws and policy in India. Like all energy projects, solar panels will also eventually reach the end of their life cycles. It is at this stage that decommissioning and waste management programs play an important role. Similarly, solar panels and their batteries will also need to be decommissioned and the waste produced from such life cycles will need to be managed. In light of these issues, this article analyzes the existing legal and regulatory framework prevailing in India, relating to solar waste management. The article delves into the adequacy of the Indian regulatory framework to address the solar waste management problem efficiently and sustainably. In doing so, the article also draws a parallel to the legal and regulatory frameworks in the United States of America and the European Union. Through a comparative approach with the aforementioned countries, this paper maps the loopholes in the present framework. By examining the waste management strategies in other countries, possible solutions and lessons can be learnt with respect to better application of such strategies in India. In conclusion, this paper will put forth suggestions which will better assist India in managing solar panel waste from its booming solar industry.

Keywords: Solar Energy, Waste Management, European Union, United States of America, India.

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INTRODUCTION

As countries across the world grapple with pressing issues such as global warming and energy security, renewable sources of energy have emerged to be a promising avenue in resolving these issues. Solar power, in particular, has proved to be an effective and sustainable avenue in furthering a low-carbon transition. In India, solar energy has gained traction at a staggering pace. Especially in the context of generating clean energy, solar energy has worked wonders for the Indian economy. This being stated, the rapid resort to solar power has revealed a dark side to it.

The stark yet critical reality of solar energy is that while it is an environmentally sound source of power, it comes with a tremendous waste management problem. Regardless of the technology utilized, the truth remains that all solar panels will have an end-of-life cycle. This implies that at some point in time, solar panels will have to be decommissioned and be reduced to waste. It is in this after-life stage that solar energy creates a negative externality. Owing to the trails of hazardous waste they leave behind solar panels and their constituent components can wreak havoc for human health. Furthermore, the waste generated from decommissioned solar panels and the constituent photovoltaic ('PV') modules can leave devastating and lasting impacts on the environment, if not treated effectively. Considering the continuing expansion of solar power, the decommissioning of solar panels will also intensify the pressures of the existing waste problem in the country. It is in this context that strategies for PV modules and solar panel waste management become a matter of primordial importance, particularly if these strategies are backed by a legal framework.

A well-defined legal and regulatory framework is key to institutionalizing a clear system for the handling and management of solar panel waste. It will spell out the key stakeholders, their roles and responsibilities and the liability mechanism. At present, the legal and regulatory framework for waste management in India is comprehensive, ranging from solid waste management to plastic waste management. However, there is no specific law pertaining to the handling of waste generated by decommissioned or defunct solar panels. At this juncture, it becomes pertinent to examine whether the existing range of laws are adequate to deal with this problem. Further, as the United States of America and European Union have undertaken comprehensive legislative

measures to address this problem, a study of legislative attempts by these countries would be relevant to the examination of the Indian regulatory framework.

BACKGROUND TO THE SOLAR WASTE PROBLEM IN INDIA

Overview of the Solar Power Industry

The solar energy market in India has been an extremely lucrative one, having witnessed exponential growth over the past few years. As in 2021, the total estimated installed capacity of solar power in India is 98.69 Giga Watt (GW),[3] which has placed India in the fifth position globally in solar power deployment.[4] This accelerating growth of solar power has been stimulated by a number of key factors.

The first driver has been in the wake of India's gradual transition to a decarbonized and green economy. As India seeks to reduce its dependence on hydrocarbons, the renewable sector – particularly solar and wind - has scaled up by leaps and bounds. Secondly, solar energy serves as a more predictable source of power generation among the renewable sources. Renewables, quite distinguishingly, pose the risk of intermittency. This implies that the sun will not always shine or the wind will not always blow, making these options unreliable to an extent and subject to a plethora of environmental factors such as wind speed, intensity of sunshine, cloudiness etc. However, owing to India's geographical position and suitable solar climatology, the issue of intermittency *vis-à-vis* solar energy does not largely arise as a majority of the country's landmass is bestowed with three hundred sunny days in a year.[5] Thirdly, solar energy offers a remedy to the issue of energy security. With load shedding frequently being adopted by multiple states,[6] thereby being unable to meet the basic criteria of continuous supply of energy at a sustained price point, India faces the

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[3] Standing Committee on Energy, *Action Plan for Achievement of 175-Gigawatt Renewable Energy Target* (LS 2020-2021, 17) paras.

[4] 'Solar Energy, Grid Connected' (*Ministry of New and Renewable Energy*) <https://mnre.gov.in/solar/solar-ongrid> accessed 20 September 2021.

[5] Chris Lo, 'Solar Power: India lets the Sunshine in' (*Power Technology*, 20 December 2011) <https://www.power-technology.com/features/featuresolar-power-india-lets-the-sunshine-in/> accessed 10 August 2021.

[6] Subhomoy Bhattacharjee, 'Lights Out? More Load Shedding on the Cards, Suggests Power Supply Report' *Business Standard,* (New Delhi, 5 December 2018) <https://www.business-standard.com/article/economy-policy/ligmayhts-out-more-load-shedding-on-the-cards-suggests-power-supply-report-118120500043_1.html> accessed 12 August 2021.

looming crisis of energy poverty.[7] In this context, solar energy has emerged to be a game changer by effectively meeting the energy demands of the rising population[8]. Fourthly, the introduction of various schemes and incentives has given impetus to the growth of the solar sector. Apart from the National Solar Mission[9], aimed to install 100MW of grid-connected solar panel systems, the government has rolled out various measures to boost the solar power sector. For example, under the Grid Connected Solar Rooftop Programme, the central government offered to support the residential sector and Distribution Companies ('DISCOMS') with central finance assistance in proportion to the percentage of rooftop solar capacity installed by the beneficiaries.[10]

This Programme was envisioned with the objective of achieving a cumulative capacity of 40,000 MW from rooftop solar projects by the year 2022. More recently, the Central Government also rolled out a mammoth production-linked incentive scheme to enhance India's manufacturing capabilities under the *Atmanirbhar Bharat Abhiyan*. Titled the 'National Programme on High Efficiency Solar PV Modules', the Programme is designed to boost manufacturing capacity of GigaWatt scale in High Efficiency Solar PV modules with the aim of increasing exports and reducing imports of solar cells and panels.[11] Finally, the growth of the Indian solar industry is linked to the achievement of India's ambitious targets under the Paris Climate Accord of 2015.[12] As pledged under its Nationally Determined Contributions,[13] India aims to combat climate change by reaching the ambitious target of 100GW of solar powered energy by

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[7] IRENA and IEA-PVPS, *End-of-Life Management Solar Photovoltaic Panels* (2016) <https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_IEAPVPS_End-of-Life_Solar_PV_Panels_2016.pdf> accessed 10 August 2021.

[8] International Energy Agency, *India Energy Outlook 2021* (2021) <https://iea.blob.core.windows.net/assets/1de6d91e-e23f-4e02-b1fb51fdd6283b22/India_Energy_Outlook_2021.pdf> accessed 27 September 2021.

[9] Niti Aayog, 'Sixth Five Year Plan 1980-1985' <https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/index5.html> accessed 8 August 2021.

[10] Ministry of New and Renewable Energy, 'Grid Connected Rooftop Solar Programme' (8 March 2019), <https://mnre.gov.in/img/documents/uploads/c48d969074544005bfffofcd6b236e9a.pdf> accessed 28 August 2021.

[11] Ministry of New and Renewable Energy, 'Production Linked Incentive Scheme 'National Programme on High Efficiency Solar PV Modules' (28 April 2021) <https://mnre.gov.in/img/documents/uploads/file_f-1619672166750.pdf> accessed 28 August 2021.

[12] UNFCCC on Climate Mitigation, Adaptation and Finance (adopted April 22,2016, entered into force November 4, 2016).

[13] Deepak Dwivedi and Poonam Khatri, 'India is on a Solar Mission' (*Fair* Observer, 23 February 2021) <https://www.fairobserver.com/region/central_south_asia/deepak-dwivedi-poonam-khatri-national-solar-mission-india-renewable-energy-solar-power-news-41991/> accessed 10 September 2021.

2030. As such, the solar sector plays a pivotal role in enabling India to navigate its way through the global climate change jigsaw.

The Mounting Solar Waste Problem

The impetus for solar energy backed by technological advancement and favourable financial incentives has undoubtedly triggered a wave of solar installations across the board. However, the growing concern associated with the *en masse* installation of solar panels is the corresponding volume of waste that will be generated when these panels reach the end of their life cycles. The average operational life span of a solar panel – subject to mid-life failures caused by damage or destruction - is 25 to 30 years[14]. This implies that after a finite period of time, the bulk of solar panels installed at a given time period will turn obsolete. In India, this problem of unmanaged ageing solar panels is a hazard in the making given the accelerating rate at which the solar sector is expanding. In 2019, the volume of PV waste in the country was estimated to increase by around 200, 000 tonnes by the year 2030 and 18 lakh tonnes by the year 2050.[15] Such augmenting numbers spell nothing but peril, as there are significant consequences for the environment – including plant, animal and human health.

The first and most distressing issue resulting from improperly managed solar panels is that of leaching. As solar panels are by and large dumped in landfills, the dangers of soil contamination caused by toxic elements are clearly evident. Furthermore, given the presence of hazardous substances such as antimony, glass, cadmium, aluminum, copper, chromium and other heavy metals in solar panels,[16] the possibility of leaching toxic chemicals entering the food stream is significantly high. Secondly, improper management of solar panels can have a high environmental foot-print if they are disposed of in an environmentally malignant manner. For example,

[14] Sajjad Mahmoudi and others, 'End-of-life Photovoltaic Modules: A Systematic Quantitative Literature Review' (2019) 146 Resources, Conservation and Recycling < https://doi.org/10.1016/j.resconrec.2019.03.018> accessed 15 September 2021.
[15] Bridge to India, *Managing India's PV Module Waste* (2019) <https://bridgetoindia.com/backend/wp-content/uploads/2019/04/BRIDGE-TO-INDIA-Managing-Indias-Solar-PV-Waste-1.pdf> accessed 15 September 2021.
[16] Hari Bhakta Sharma and others, 'Evaluation of Heavy Metal Leaching under Simulated Disposal Conditions and Formulation of Strategies for Handling Solar Panel Waste' (2021) 780 Science of The Total Environment <https://doi.org/10.1016/j.scitotenv.2021.146645> accessed 20 September 2021.

studies have indicated that incineration of plastic components present in solar panels[17] and disposal of PV modules in landfills have a higher environment footprint when compared to other alternative methods[18]. Furthermore, over-dumping in landfills may impose undue pressure on the carrying capacity of the land, thereby accelerating the rate of land degradation. This demonstrates that solar energy, despite its inert advantages, can pose significant risks if the waste generated by solar panels and other components are not handled efficiently at the end of their life-cycles.

REGULATORY FRAMEWORK IN THE UNITED STATES

The United States of America ('US') has been one among the larger consumers of solar energy in the world. As in 2020, the solar energy industry grew by 43% and is estimated to grow by a higher margin.[19] Likewise, it is faced with a mounting solar panel waste problem that only continues to grow, given the current state of consumption patterns. This rampant rise in production paints a dreary picture for the PV waste as the US is estimated to generate close to 10 million tonnes of PV waste by the year 2050.[20]

At present, there is no dedicated national law or policy for the management and disposal of solar panel waste in the US. The decommissioning of PV waste is regulated under the framework of the Federal Resource Conservation and Recovery Act, 1976, which broadly provides a national system for control of hazardous and non-hazardous solid waste. By its composition solar panel waste can be categorised as 'hazardous waste'[21]. If the components of the solar panels exhibit predefined characteristics such as ignitability, toxicity, corrosivity and reactivity, the material can be categorised as hazardous waste.[22] However, owing to the drawbacks of the Act and the scope of exclusivity, in many cases, solar panel waste may not be regulated under the Act.

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[17] Cynthia E L Latunussa and others, 'Life Cycle Assessment of an Innovative Recycling Process for Crystalline Silicon Photovoltaic Panels' (2016) 156 Sola Energy Materials and Solar Cells <https://doi.org/10.1016/j.solmat.2016.03.020> accessed 20 September 2021.

[18] Zhao Huang B and others, 'Environmental Influence Assessment of China's Multi-Crystalline Silicon (Multi-Si) Photovoltaic Modules Considering Recycling Process' (2017) 143 Solar Energy <http://dx.doi.org/10.1016/j.solener.2016.12.038.> accessed 20 September 2021.

[19] 'U.S. Solar Market Insight 2020 Year-in-Review Report' (*Solar Energy Industries Association*, 14 September 2021) <https://www.seia.org/us-solar-market-insight> accessed 15 September 2021.

[20] IRENA and IEA-PVPS, *End-of-Life Management Solar Photovoltaic Panels* (2016) <https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_IEAPVPS_End-of-Life_Solar_PV_Panels_2016.pdf> accessed 24 August, 2021.

[21] Federal Resource Conservation Act 1976, 42 U.S.C.A sec 6901.

[22] ibid.

Furthermore, under the mandate of this Act, all industrial entities are required to comply with regarding the disposal of hazardous materials in the manner specified thereunder. However, there is no provision for disposal of waste at the residential level. In this absence, used solar panels from the residential consumers end up in landfills. Another issue with solar panel waste management at the federal level is the absence of adequate recycling mechanisms. There is no law currently at the federal level that governs the same. The circular concept of repair, reuse and recycle in the context of PV waste management is still in the nascent stage. However, a few initiatives have been taken up by the private sector to ensure effective end-of-life management of solar panels and solar PV cells. For example, the Solar Energy Industries Association has introduced the National Solar PV Recycling Programme to develop cost-effective and environment-friendly solutions for the collection and recycling processes for the solar industry.[23] Though these initiatives are laudable, they are largely influenced by the volition of few interested groups, and do not cater to a country-wide problem.

Although there are visible gaps in the federal regulatory framework, the States in the US have taken some positive strides in the endeavour towards safe handling of solar panel waste. At the state level, the State of Washington was the first to take legislative steps in resolving the impending solar waste problem. In 2017, the State passed the Engrossed Substitute Senate Bill which *inter alia* includes provisions that promote the recycling of solar panels in a convenient, safe and environmentally sound way.[24] The Act, under Chapter 70.355 specifically outlines the Photovoltaic Module Stewardship and Takeback Program whereby the manufacturers of PV modules are duty bound to finance the takeback and recycling of solar panels. Under the Act, every manufacturer[25] of PV Modules is required to prepare and submit a stewardship plan to the department by the later of July 1, 2022, or within thirty days of its first sale of a photovoltaic module in or into the state.[26] This plan must *inter alia* include the funding mechanism to finance the costs of collection, management, and recycling of photovoltaic modules and residuals sold in or into the state; a description of how the program will minimize the release of hazardous substances into the environment and

[23] 'SEIA National PV Recycling Programme' (*Solar Energy Industries Association*) <https://www.seia.org/initiatives/seia-national-pv-recycling-program> accessed 10 August 2021
[24] Engrossed Substitute Senate Bill (ESSB) 5939 (2017), cl 12
[25] Title 70 Revised Code of Washington, sec 70A.510, sec 2 (e) (2017)
[26] ibid sec 5

maximize the recovery of other components; the performance goals in terms of recycling and recovery of materials; and the manner in which requisite information will be disseminated to concerned stakeholders to achieve the objective of the Act.[27] Interestingly, failure to participate in the stewardship plan is accompanied with deterring consequences. If the manufacturer fails to comply with the provisions of sub-section 5, the department may impose a hefty penalty of a maximum of 10,000 dollars for every sale that takes place without a plan. Further, to ensure all commercial transactions by the defaulting manufacturer are put to halt, every distributor, retailer, or installer in connection with such manufacturer is issued a written warning stating that they may no longer sell or install a photovoltaic module if a stewardship plan for that brand has not been submitted by the manufacturer and approved by the department within thirty days of the notice.[28]

Recently, the State of California adopted the Photovoltaic Modules – Universal Waste Management Regulations 2020, with the aim of facilitating the reuse and recycling of solar panels. As California records the highest number of PV installations in the country[29], these Regulations have a positive impact on the management of solar panel waste. The first of its kind in any state in the US, these Regulations categorise photovoltaic modules as 'universal waste' which are subject to an alternate set of management standards in lieu of the regulation of hazardous waste. Under the mandate of the Regulations, a universal waste handler is prohibited from disposing, diluting or treating waste categorised as universal waste subject to certain exceptions where such waste may be disposed of at a destination facility.[30] Furthermore, with specific reference to the disposal of PV modules, the Regulations specify that PV modules ought to be managed in a manner that prevents breakage and release of any constituent of a PV module to the environment.[31] In the event the PV module is accidentally or unintentionally broken, the concerned universal waste handler shall immediately clean up and place the PV modules and their constituents in a compatible

[27] ibid.
[28] ibid.
[29] Wood Mackenzie and the Solar Energy Industries Association, *State Solar PV Installation Ranking, 2020* (2020) <https://www.seia.org/research-resources/solar-market-insight-report-2020-year-review> accessed 8 September 2021 - The State of California logged a total solar installation of 3,904 MW.
[30] Photovoltaic modules (PV modules) – Universal Waste Management Regulations 2020, sec 66273.31, 22 U.S.C. 66260.10.
[31] ibid sec 66273.33.6.

and structurally sound container.[32] The Regulations also make provisions for appropriate labelling,[33] tracking and shipment[34] and quantitative restrictions on the transport of PV modules for recycling or otherwise.[35] By providing a step-by-step requirement of handling of solar panel waste, these Regulations have been said to embody an ideal cradle-to-grave approach in addressing this concerning category of waste.

REGULATORY FRAMEWORK IN THE EUROPEAN UNION

The European Union's Waste Electrical and Electronic Equipment ('WEEE)' Directive, 2014[36] is the primary law that governs the handling and treatment of solar panel waste in the region. These Directives have three core themes namely: establishing liability in the manufacturer/producer, the responsibility for collection, recycling and recovery of materials, treatment methods to prevent leaching of chemicals into the environment and lastly ensuring consumer consciousness regarding effective waste management.[37]

Further the Directives established Extended Producer Responsibility ('EPR') "an environmental policy approach in which a producer's responsibility for a product is extended to the post-consumer stage of a product's life cycle."[38] "The Member States must respect the minimum requirements imposed by the European Directive. However, each Member State can resort to "gold-plating", a term to characterise the process where an EU directive is given additional powers when being transposed into the national laws of member states."[39] Apart from the WEEE Directives the Directive on Hazardous Waste[40] also have a bearing on solar waste management. The Directive effectively set maximum limits on certain toxic substances that can be used in

[32] ibid.
[33] ibid.
[34] ibid.
[35] ibid.
[36] Directive 2012/19/EU August (2012).
[37] Bridge to India, *Managing India's PV Module Waste* (2019) <https://bridgetoindia.com/backend/wp-content/uploads/2019/04/BRIDGE-TO-INDIA-Managing-Indias-Solar-PV-Waste-1.pdf> accessed 8 September 2021.
[38] OECD, 'Extended Producer Responsibility: A Guidance Manual for Governments' (20 March 2001) <https://www.oecd-ilibrary.org/environment/extended-producer-responsibility_9789264189867-en> accessed 8 September 2021.
[39] EU-India Technical Cooperation Energy Project, 'PV Waste Management in India: Comparative Analysis of State of Play & Recommendations', (*Solar Power Europe*, March 25 2021) < https://www.solarpowereurope.org/wp-content/uploads/2020/02/SolarPower-Europe_India-Solar-Investment-Opportunities.pdf >, accessed 7 September 2021.
[40] Directive 2008/98/EC, 19 November (2008).

Electrical and Electronic Equipment ('EEE') waste. Secondly, this Directive encourages the promotion of the reuse and/or repair of appropriate discarded products or of their components.[41] The Waste Framework Directive also introduces the "polluter pays principle"[42] and the "Extended Producer Responsibility (EPR).[43] It incorporates provisions on hazardous waste and waste oils and includes two new recycling and recovery targets to be achieved by 2020: 50% preparing for re-use and recycling of certain waste materials from households and other origins like households, and 70% preparing for reuse, recycling and other recovery of construction and demolition waste. This Directive requires as well that Member States adopt waste management plans and waste prevention programmes."[44]

But the drawback of this directive is that PV modules have been "permanently excluded from the scope of this directive"[45] thus limiting the scope for regulating the treatment or disposal of various components of solar panels.

Another significant regulation that has played an instrumental role in tackling the mounting solar waste problem at the source is the REACH Directive.[46] The Directive sets limitations of the quantum of chemicals imported and used in the manufacturing by producers. Further, this Directive mandates that certain "substances of very high concern (SVHC)[47] cannot be used unless the company/importer/manufacturer in question has received prior consent from the European Chemical agency. In terms of PV modules producers must demonstrate how they will mitigate risk associated by using such chemicals in manufacturing solar modules.

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[41] ibid.
[42] ibid.
[43] ibid.
[44] EU-India Technical Cooperation Energy Project, 'PV Waste Management in India: Comparative Analysis of State of Play & Recommendations', (*Solar Power Europe*, March 25 2021) < https://www.solarpowereurope.org/wp-content/uploads/2020/02/SolarPower-Europe_India-Solar-Investment-Opportunities.pdf>, accessed 20 September 2021.
[45] EU-India Technical Cooperation Energy Project, 'PV Waste Management in India: Comparative Analysis of State of Play & Recommendations', (*Solar Power Europe,* March 25 2021) < https://www.solarpowereurope.org/wp-content/uploads/2020/02/SolarPower-Europe_India-Solar-Investment-Opportunities.pdf>, accessed May 7 2021.
[46] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December (2006) concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).
[47] EU-India Technical Cooperation Energy Project, 'PV Waste Management in India: Comparative Analysis of State of Play & Recommendations', (*Solar Power Europe,* March 25 2021) < https://www.solarpowereurope.org/wp-content/uploads/2020/02/SolarPower-Europe_India-Solar-Investment-Opportunities.pdf>, accessed 20 September 2021.

While the REACH Directive caters to the 'cradle' stage, the Landfill Directives address the 'grave' aspect. The Landfill Directive[48] has the sole objective of reducing the waste and negative impacts of such waste from polluting the environment and harming human health. This Directive identifies three classes of landfills: landfills for hazardous waste, non-hazardous waste and inert waste.[49] "Most of the EU Member States have introduced a landfill ban for untreated waste (including PV modules), separately collected waste such as the products covered by EPR-regulations (such as PV modules)."[50]

The Battery Directive[51] creates a framework for developing better battery technology and ensuring that decommissioned batteries are collected separately, recycled, and disposed of safely to prevent battery leaching into the environment. This directive creates a better market for batteries especially for PV modules. Lastly, there is added EPR on producers, manufacturers, and accumulators[52] of batteries to effectively manage waste.

An overview of the EU Regulatory framework demonstrates that there is a comprehensive system to address the rising problem of solar waste. Though the entire regulatory framework is scattered and spread across a number of directives, the regulations form a coherent whole, thereby efficiently catering to the issue at hand.

REGULATORY FRAMEWORK IN INDIA

At present, there is no dedicated law in India for the management of solar panel waste. The waste generated from various components of solar panels are to an extent regulated under E- Waste (Management and Handling) Rules, 2016 ('E-Waste Rules,

[48] Directive 1999/31/EC, 26 April (1999).
[49] ibid.
[50] EU-India Technical Cooperation Energy Project, 'PV Waste Management in India: Comparative Analysis of State of Play & Recommendations', (*Solar Power Europe,* March 25 2021) < https://www.solarpowereurope.org/wp-content/uploads/2020/02/SolarPower-Europe_India-Solar-Investment-Opportunities.pdf>, accessed 20 September 2021.
[51]Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC (Text with EEA relevance) OJ L 266, 26.9.2006, p. 1–14.
[52] EU-India Technical Cooperation Energy Project, 'PV Waste Management in India: Comparative Analysis of State of Play & Recommendations', (*Solar Power Europe*, March 25 2021) < https://www.solarpowereurope.org/wp-content/uploads/2020/02/SolarPower-Europe_India-Solar-Investment-Opportunities.pdf>, accessed 7 September 2021.

2016'). The E-Waste Rules and subsequent amendments[53] have the objective of reducing the quantity of e-waste and ensuring proper disposal standards have been adopted by parties involved in such activities. Interestingly, PV modules and their inverters are not included within the scope of the definition of E-waste[54], despite these technologies containing hazardous substances which are known to have adverse impacts on human health and the environment. The scope of these rules extends to:
(i) information technology and telecommunication equipment; and
(ii) consumer electrical and electronics. Neither PV modules nor inverters are listed among the identified Electrical and Electronic Equipment categories.[55]

A striking and laudable feature of the E-waste Rules is that it establishes rules based on the EPR (Extended Producer's Responsibility)[56]. The scope of these rules extends to, "allow producers to use several instruments to ensure compliance: i) PROs, ii) e-waste exchanges, and iii) deposit refund scheme where consumers pay a deposit that is withheld until they return the product for disposal. Producers are also tasked with creating awareness about recycling options and ensuring consumers do not dispose of their e-waste as normal waste by marking the products with a "crossed-out bin symbol."[57] Nevertheless, the bottom line remains that solar panels are not expressly covered within the scope of the E-waste Rules. Interestingly, although the text of the Rules do not mandate obligations *vis-à-vis* solar panels, the Ministry of New and Renewable Energy, set out the Rooftop Solar Panel Guidelines[58] that require manufacturers of decommissioned solar panels to collect and dispose of E-waste in a manner that has been mandated under the E-waste Rules. This is a positive step forward towards bridging the glaring gap in the statutory framework.

In terms of handling of waste generated from expired batteries used in solar panels, the legal framework is still found lacking. The Battery Rules[59] currently are

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53 E-Waste (Management) Amendment Rules 2018.
54 ibid.
55 ibid.
56 E-Waste (Management) Amendment Rules 2018.
57 Bridge to India, 'Managing India's Solar Panel PV Waste', (*Bridge to India*, 16 April 2019) <https://bridgetoindia.com/backend/wp-content/uploads/2019/04/BRIDGE-TO-INDIA-Managing-Indias-Solar-PV-Waste-1.pdf> accessed 28 August 2021.
58Ministry of New and Renewable Energy, GOI, Grid Connected Rooftop, (*MNRE*, 20 August 2019) <https://mnre.gov.in/img/documents/uploads/7ccd3b4b3bb94a51af516e2ee4fdede3.pdf> accessed 29 August 2021.
59 Batteries (Management and Handling) Rules 2011.

only applicable to lead-acid batteries in India. The Ministry of New and Renewable Energy published the Draft Battery Waste Management Rules,2020[60]. The new rules will effectively cover all types of batteries, including lithium-ion batteries used in the PV modules. The scope of these rules will extend to all persons in the supply chain from manufacturer to those involved in the collection and disposal of these batteries.[61] These rules set limits to the concentration of heavy metals which are used in the manufacture of these batteries.[62] Further, to ensure safety, batteries containing heavy metals are required to have symbols depicting the same. These are the responsibilities placed on the manufacturers.[63] Similar provisions have been discussed in depth in the REACH directive.[64] The Ministry of New and Renewable Energy under chapter III of the Rules[65] has extended the scope of the rules to manufacturers and collectors of waste. Lastly, the EPR mandates that producers/manufactures are registered with the Central Pollution Control Board to be able to sustainably dispose of solar panel waste and ensure recycling of certain parts are carried out.[66] Moreover, the Hazardous Waste Rules[67] set a limit on the concentration of certain toxic substances that can be used in the manufacturing of PV panels and batteries. These rules are in line with the provisions of the Basel Convention[68].

It is pertinent to note that solar panel and battery waste have been excluded from the ambit of the Solid Waste Management Rules[69]. Emulating the EU Waste Directive[70], solar panel waste should be considered as 'solid waste' under the Solid Waste Management Rules.

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[60] Battery Waste Management Rules 2020 (Draft Rules).
[61] ibid.
[62] ibid.
[63] ibid.
[64] Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396 30.12.2006, p. 1.
[65] Batteries (Management and Handling) Rules 2011.
[66] Battery Waste Management Rules, 2020 (Draft Rules).
[67] Hazardous And Other Wastes (Management and Transboundary Movement) Rules, 2015.
[68] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989 28 I.L.M. 657 (1989).
[69] Solid Waste Management Rules 2016.
[70] Directive 2008/98/EC November (2008).

Furthermore, Under the EU WEEE directive[71], there are two models which exist for waste management. They are the business-to-business model and the business to consumer model.[72] Under the business to consumers mode, a variety of options exists from collection and recycling costs being borne by the producer to joint and several liability for waste collection and recycling.[73] These models are advantageous because end consumers will also be involved in the waste management process rather than shirking the sole responsibility to the producer/manufacturer. Consumers should be able to effectively separate their e-waste from other private and household waste for collection. By understanding proper waste segregation, consumers can contribute to larger amounts of e-waste especially PV waste being recycled.

The Landfill Directive[74] in the EU stated that untreated PV waste cannot be dumped into landfills and certain EU members have a blanket ban on dumping such waste into landfills.[75] India has no regulations regarding this issue. As per the E-Waste Management Rules[76] it remains unclear whether PV waste can be dumped into landfills, and if the answer is in the affirmative, the existence of a mandate on the quantum and treatment of such waste being dumped into landfills if obscure.
Lastly, the Ministry of Environment, Forest and Climate Change vide a notification proposed an amendment to the Plastic Waste Management Rules, 2016.[77] The draft rules under rule 3 have incorporated the following clauses (iii) (vb)- Thermoset Plastic and (vc)-Thermoplastic under the definition of Plastic waste. This bears relevance because the aforementioned have ubiquitous utility in solar panels as high-density polyethylene plastics. As these are a form of thermo and thermoset plastics,[78] there are very rigid and are processed at a very high level of heat. By including the aforementioned into the amendment rules, the onus of responsibility cast upon waste

[71] Directive 2012/19/EU.
[72] Bridge to India, 'Managing India's Solar Panel PV Waste', (*Bridge to India*, 16 April 2019) <https://bridgetoindia.com/backend/wp-content/uploads/2019/04/BRIDGE-TO-INDIA-Managing-Indias-Solar-PV-Waste-1.pdf> accessed 20 September 2021
[73] ibid.
[74] Council Directive 1999/31/EC of 26 April (1999) on the landfill of waste.
[75] WEEE Directive.
[76] E- waste (Management and Handling) Rules, 2018.
[77] Plastic Waste Management Rules 2021.
[78] Aklilu T. Habtewold et al. 'Solar Assisted Pyrolysis System for High-Density Polyethylene Plastic Waste to Fuel Conversion', (2020), 8 (3) 455-473, < https://doi.org/10.3934/energy.2020.3.455> accessed 28 September 2021.

generators[79] and producers, importers and brand owners[80] has been augmented. Thus, it can be rightly inferred that, since the draft rules have included these types to HDPE plastics within their scope and definition, the responsibility to segregate and manage such plastic waste extends to solar panels as well.

On the judicial front, there have been a few interventions that address the gap in the legislative framework. For example, in the case of *Niharika v Union of India,*[81] the National Green Tribunal ('NGT') was confronted with the issue of antimony – a potent carcinogen – in solar panels. In this regard, the NGT directed the Ministry of Environment, Forest and Climate Change to prepare a policy and issue appropriate guidelines with regard to the uses, manufacture and import of antimony coated solar modules.

SUGGESTIONS & CONCLUSION

Experiences from the recent past demonstrate that in the absence of a cogent and clear policy or regulatory framework for the handling and management of solar panels, India faces the risk of disastrous consequences from solar panel waste. Clearly, India is lagging behind other large consumers in formulating suitable and necessary legal provisions in handling the mounting solar waste in the country. As the bulk of solar panels produced are still well within their functional lifespan, the problem is not critical yet. This being stated, one cannot ignore the countdown to a major waste crisis, when all such solar panels reach the end-of-life stage.

Drawing from the experiences of the EU and the US – be their success stories or failures, solar panel waste management requires a clear-cut legal framework that preferably addresses the issue through a cradle-to-grave approach. As solar waste is neither defined in a specific framework nor exclusively included within the existing web of regulations, solar panel waste needs to be covered either under the E-waste Rules or the legislature should undertake introducing law and policy to tackle such waste and incidental pollution.

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[79] Plastic Waste Management Rules 2016, rule 8.
[80] Plastic Waste Management Rules 2016, rule 9.
[81] *Niharika v Union of India* Original Application No 473/2017 [NGT – 27.02.2019].

The lack of legislation and policy framework does not create an obligation on developers to effectively manage this type of waste. Because of the absence of any specific mandate, decommissioned and damaged PV modules and batteries are treated and stored on site till there is a certain amount of waste generated.[82] Once this occurs the panels are treated to rid of toxic and hazardous chemicals. Treated panels are recycled and then disposed of. The portion of the frame is sold in the market, the cables etc are recycled as per the requirements under the e-waste regulations and glass waste is disposed as per India's waste management rules.

The legal framework must incorporate manufacturer's liability to compel recycling of waste solar panels by manufacturers. Taking cue from the Stewardship Programme of the State of Washington and the 2008 EU Hazardous Waste Directives, the Indian framework should also incorporate an EPR model whereby manufacturers or producers bear the responsibility for takeback and recycling. Incorporating an EPR model will invite a circular economy in waste management and will streamline the effective management of solar panels from source till the end-of-life cycle. This would ensure recycling of PV modules form the residentials sector as well as large utility solar parks.

Recycling is key to the waste management problem. PV panels pose the advantage of having a 'double green' benefit through recycling.[83] Just as the E-Waste Management Rules, 2011 incorporate a circular economy model through extended producers' responsibility, solar panel waste management should also follow suit to allow for directing the waste back into the material flow. The findings by the IRENA highlight that close to 90% of all major components of solar panels are recoverable and subject to reuse.[84] Especially in the context of precious metals such as silver, aluminium, indium, gallium, and tellurium, they have a high value for recycling. Till date, there is no scheme for recycling of solar panels in India. However, to a large extent, those components which can be categorised as E-Waste are regulated by the E-Waste Management Rules. Solar panels are made up of valuable materials that can

[82] ibid.
[83] Kari Larsen, End-of-Life PV: Then What? Recycling Solar PV NEWABLEENERGYFOCUS.COM (Aug. 3, 2009).
[84] IRENA, 'End -of- Life Management Solar Photovoltaic Panels' (*IRENA 2016 AND IEA-PVPS*, 12 June 2016, page 82) < https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2016/IRENA_IEAPVPS_End-of-Life_Solar_PV_Panels_2016.pdf>, accessed 10 August 2021.

mostly be recaptured, and the method of recycling will also have a substantial contribution to the recovery rates.[85]

While waste management is a priority when it comes to decommissioned solar panels, it is important to stimulate innovative technologies to improve the efficiency of solar panels and increase the longevity of their life spans. It is pertinent to note that commercial solar panels at present are said to convert only 15% of solar energy into electricity. Thus, this raises the key issue of innovation to increase the efficiency of solar panels. This can be achieved by incentivising and mandating an upgrade in existing solar panel and battery technology. Further, innovation should also be incentivised in recycling methods to improve the recovery rate of materials from recycled solar panels and the quality of reclaimed materials.[86]

The energy transition presents an opportunity for transitioning to an inclusive, just, and environmentally sound economy for all. At the forefront of this transition, is the application and use of solar energy. This does not mean that such sources of energy do not present without qualms. As discussed, decommissioned solar panels need an effective and robust framework for effective waste management. By incentivising better solar panel and battery technology and a dedicated recycling framework, solar energy can truly achieve its unbridled potential.

[85] Keiichi Komoto & Jin-Seok Lee, Int'l Energy Agency, 'End-Of-Life Management of Photovoltaic Panels: Trends In Pvmodule Recycling Technologies', (2018) IEA 46.
[86] Meghan McElligott, 'A Framework for Responsible Solar Panel Waste Management in the United States, Oil and Gas, Natural Resources, and Energy Journal', (2020) 5 ONEJ 485.

FOUR CIRCLES INSTEAD OF SEVEN: ASSESSING THE VALIDITY OF AN ANAND KARAJ BETWEEN TWO HINDUS

Gaurav Chaliya[1] and Vivek Krishnani[2]

ABSTRACT

In this article, the authors express their views on the validity of a peculiar kind of marriage which is performed by two people professing the Hindu religion. In such a marriage, viz. Anand Karaj, the rites and rituals recognized by the Sikh religion are observed in a Gurudwara. While such marriages are well received by some Hindus, the Indian judiciary has objected to their legal validity in numerous cases. In fact, at times, courts have disregarded these marriages, despite clear intention of the parties to enter into a marital union. For doing so, courts have emphasized on the significance of performance of ceremonies like Saptapadi, which are not performed in an Anand Karaj. Admittedly, this approach finds support in the non-contractual nature of marriage, as identified under Hindu Law. This article, nonetheless, presents an argument in favour of the validity of such marriages by relying on an analysis of not only the text but also the spirit of relevant laws, besides certain practicalities which make the argument even more compelling.

Keywords: *Anand Karaj, Presumption, Marriage, Saptapadi, Solemnisation*

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INTRODUCTION: ANAND KARAJ BETWEEN TWO HINDUS

Admittedly, the ceremonies with regard to marriage have to be observed as per the requirements of personal laws.[3] This is important for the fulfilment of the condition of solemnization of marriage which is a *sine qua non* for any marriage to be valid in the eyes of law. In fact, the Hindu Marriage Act, 1955 (hereinafter "**HMA**"), in this respect, places an obligation upon two Hindus to perform the ceremonies of marriage in conformity with their customary rites.[4] Where such customary rites provide for *Saptapadi*, this ceremony is crucial for the marriage to be "complete and binding", as can be understood from Section 7 of the HMA.[5]

In this light, the authors wish to highlight that a peculiar kind of marriage has gained traction in the Indian scenario. In such marriages, two non-Sikhs (Hindus) marry in a *Gurudwara* observing the Sikh style of marrying, *viz. Anand Karaj*. This is done, despite clear instructions to most of the *Gurudwaras* to not perform any ceremonies of marriage, unless both, the groom and the bride, are Sikhs.[6] It may also be noted that a marriage performed in this manner would actually come within the purview of Anand Marriage Act, 1909 (hereinafter "**Anand Act**"). That being said, before assessing the validity of such marriages, an insight into the positions of Sikhs and Hindus is necessary.

Briefly Understanding the Position of Hindus and Sikhs

While the HMA applies to Hindus, the Act covers within its ambit Sikhs as well.[7] In this regard, Section 2(3) provides that the term "*Hindu*", for the purpose of interpretation of the provisions of the Act, shall be construed to include "*a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies*".[8] A reading of this provision makes it clear that the Sikhs are to be treated as

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[3] Kusum & Prof. Poonam Pradhan Saxena, *Family Law* (Vol. 1 Ch. 1, Lexis Nexis 2020) (hereinafter "Prof. Saxena").
[4] The Hindu Marriage Act 1955, s 7(1).
[5] ibid.
[6] Yudhvir Rana, 'Sikh, non-Sikh can't tie knot at London Gurdwara' (*The Times of India* July 29, 2015) <https://timesofindia.indiatimes.com/city/chandigarh/Sikh-non-Sikh-cant-tie-knot-at-London-gurdwara/articleshow/48259499.cms> accessed April 2, 2020; S M A Kazmi, 'Doon Sikh body bans inter-faith marriages in Gurdwaras' (*Indian Express* May 15, 2007) < http://archive.indianexpress.com/news/doon-sikh-body-bans-interfaith-marriages-in-gurdwaras/31025/> accessed April 2, 2020.
[7] Hindu Marriage Act (n 4) s 2(1) (b).
[8] Hindu Marriage Act (n 4) s 2(3).

a "*class different from Hindus*".[9] Relying on this proposition, the Punjab and Haryana High Court, in *Ravinder Kumar v Kamal Kanta*, observed that "*Sikh religion which permits the Anand Karaj form of marriage is treated by the Act (HMA) as distinct from the Hindu religion*".[10] The Court also pointed out that regard has to be had to the tenets of each religion as the validity of marriage would depend upon the ceremonies being performed and whether these ceremonies have been sanctioned by the religion.[11]

With this backdrop, the upcoming segments touch upon the legality of an Anand Marriage between two Hindus, who are not professing the Sikh religion.

Position of such Marriages under the Anand Marriage Act, 1909

The Law Commission of India, in its report no. 270, has stated with regards to the Anand Act that it "*was enacted in order to allow for registration of marriages among Sikhs….it was amended in 2012 to again include the registration of marriages of Sikh couples who chose to opt out of the Hindu Marriage Act, 1955.*"[12] This depicts that the Anand Act aims at providing validating those marriages which do not conform to the requirements laid down under the HMA.

Although the Anand Act validates those marriages which do not comply with the requirements of the HMA, the Act explicitly restricts its scope by stating that the Act does not apply to "*any marriage between persons not professing the Sikh religion*".[13] Likewise, the expression "*Sikh couples*", which finds place in the Law Commission Report, suggests that non-Sikh parties cannot rely on the Anand Act for so validating their marriage. Accordingly, a marriage between two Hindus, who are not Sikhs, would not be recognised under the Anand Act.

Position of such Marriages under Hindu Law

Given the non-recognition of such marriages under the Anand Act, the legal rights that arise between parties might get seriously jeopardised, despite proper observance

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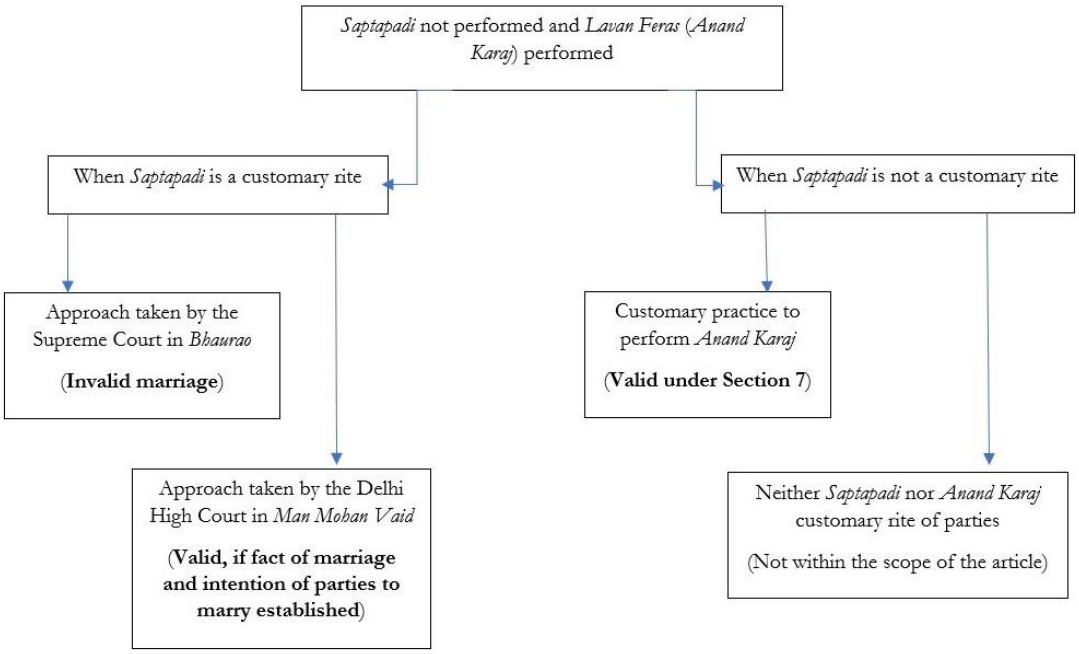
[9] *Shakuntala v Nikanath* 1973 Mah. L.J. 310.
[10] *Ravinder Kumar v Kamal Kanta* 1976 SCC OnLine P&H 48.
[11] ibid.
[12] Law Commission of India, *Compulsory Registration of Marriages*, Report No. 270, 11 (July, 2017).
[13] The Anand Marriage Act 1909, s 3.

of the Sikh rites and rituals. This leads the authors to a significant question, which has been differently answered by the Indian Judiciary in various cases:
Whether an Anand Marriage, in a Gurudwara, between two Hindus, who are not Sikhs, can, under any circumstance, be considered as legally valid?

To answer this question, and some others that naturally follow, the authors would, in this Article, discuss various case laws which touch upon this aspect. In doing so, more importantly, the position of such marriages under the Hindu Law has been considered by the authors in this Article. This quest for a valid marriage, under the Hindu Law, can be depicted as follows:



This article, in essence, explains the foregoing depiction in some detail. In the immediately upcoming part, the significance of solemnisation of marriage has been highlighted and the essential nature ceremony of *Saptapadi* has been analysed to determine its substitutability. This is followed by a discussion of the issue from a non-textual lens, wherein facts of certain cases have been presented for a more pragmatic approach to the issue. Subsequently, a conclusion has been provided.

SOLEMNISATION OF MARRIAGE AND THE CEREMONY OF SAPTAPADI

Solemnisation, in its simplest form, means "*to enter marriage publicly before witnesses in contrast to a clandestine*".[14] Accordingly, the Madras High Court has, in *M. Sowndarya v The Bar Council of Tamil Nadu*,[15] observed that a marriage performed in secrecy, particularly in an advocate's chamber, would not amount to solemnisation of marriage. Consequently, certain formal obligations required under the relevant personal law, including non-secrecy, have to be fulfilled to effectuate the marriage as legally valid.

Solemnisation and Non-Contractual Nature of Marriage under Hindu Law

Before codification of the HMA, a marriage between two Hindus was said to be solemnised by following customary or *Shastric* rituals and in case of non-compliance with these essential rituals, the marriage was not recognised as a valid marriage.[16] The importance of the sacramental element of the solemnisation can be seen by its codification under Sections 7 and 7A of the HMA.[17]

Under the HMA, the solemnisation of marriage impliedly means to celebrate a marriage with proper ceremony and with due form.[18] As per the Supreme Court's judgment in *Bhaurao*,[19] the word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in the due form'. For this, reliance was placed on the Shorter Oxford Dictionary. Subsequently, it was held, in no ambiguous terms, that "*merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom*".[20]

In fact, under Hindu law, particularly, ceremonies become all the more important as marriage is viewed as an "*indissoluble union of flesh with flesh and*

[14] Solemnisation, Black's Law Dictionary <https://blacks_law.enacademic.com/41063/solemnisation> accessed 21 April 2020.
[15] *M. Sowndarya v The Bar Council of Tamil Nadu* 2016 SCC OnLine Mad 30195.
[16] *Dr. A.N. Mukerji v State* AIR 1969 All 489.
[17] Hindu Marriage Act (n 4) ss 7-7A.
[18] *Bhaurao Shankar v State of Maharashtra* AIR 1965 SC 1564.
[19] ibid.
[20] ibid.

bone with bone" and not a contract.[21] The authors opine that because the marriage is not seen as a contract, the importance of the intention of the parties in favour of married gets slightly diluted. In this regard, it has also been argued that an intention to live together as husband and wife does not give birth to a valid marriage, if proper ceremonies have not been performed.[22] This understanding raises serious concerns for a marriage which has been performed in the Sikh style by two Hindus who are not covered under the Anand Act.

The conflict is essentially between non-performance of due ceremonies on the one hand and intention of the parties to be married on the other. In fact, the rest of the article elaborately addresses this conflict to come to a conclusion as to the fate of the peculiar kind of marriage which forms the nucleus of this discussion. That being said, in the upcoming segment, the essential nature of *Saptapadi* is analysed.

Does Non-Performance of Saptapadi, in all Cases, Invalidate Marriage?

Is the ceremony of *Saptapadi* so essential that its non-performance can, in itself, render the kind of marriage envisaged in this article as invalid? While this has been the position of the Indian judiciary in numerous cases, some judgments have indirectly questioned the "essential" nature of these ceremonies by upholding the validity of marriages that did not comprise them. Accordingly, the authors' answer to the question is in the negative.

Difference between Essential and Non-Essential Obligations on the Basis of Consequences of their Non-Performance

In an English case,[23] the consent of the father of the husband, who was a minor, was not obtained and consequently, the marriage was challenged. Therein, the Court observed that the requirement of consent, as enumerated under Section 16 of Marriage Act of 1823,[24] was only directory in nature. Consequently, the marriage, which was performed in absence of such a directory obligation, would not be

[21] *Tikait v Basant* ILR 28 Cal. 758.
[22]Ambransh Bhandari, Marriages under Hindu Marriage Act, *B&B Associates LLP* (January 06, 2020) <https://bnblegal.com/article/marriages-underhindumarriageact/#:~:text=The%20provision%20under%20Section%207of%20either%20of%20the%20parties.&text=Mere%20intention%20to%20live%20together,does%20not%20amount%20to%20marriage> accessed April 15, 2020.
[23] *R v The Inhabitants of Birmingham* (1828) 108 E.R. 954.
[24] The Marriage Act 1823, s 16.

considered as invalid. In the same vein, Justice Ormrod had noted, in *Collett v Collett*,[25] that the "*general tendency has been to preserve marriages where the ceremonial aspects were in order rather than to invalidate them for failure to comply with the statutory provisions leading up to the ceremony*." In doing so, the Court placed reliance on *Plummer v Plummer*,[26] wherein the Court ignored non-compliance with a procedural formality to uphold the validity of marriage.

In the same vein, in *S.W.G v H.M.K*,[27] a Kenyan Court held that "*where a marriage does not comply with the relevant formalities laid down by the Marriage Act or under customary law, it may be rescued by presumption of marriage by cohabitation*." For this, the Court placed reliance on previous case laws[28] and *Section 119* of the *Evidence Act*[29]. Likewise, a Tanzanian Court in *Sakola v Elia*, refused to hold a marriage to be invalid for non-payment of bride price.[30] It was observed that factors like cohabitation were much more important considerations than non-performance of directory obligations.

It may be noted that each personal law provides for different ceremonies for solemnisation of marriage and also attaches a different amount of significance to the form of marriage. Accordingly, the afore-discussed cases cannot be made applicable to the debate of validity of Anand Marriage between two non-Sikhs. However, the authors have undertaken the foregoing discussion for the limited purpose of explaining the difference between essential and non-essential ceremonies, as the heading points out as well. Having equipped the readers with an understanding of the difference between the two, the authors assess the nature of Saptapadi in the upcoming segments.

Is Saptapadi Essential when it is not a part of the Customary Rites of Parties?

The Indian Supreme Court has, in numerous instances, discussed the essential nature of *Saptapadi* and the legal implications of its non-performance in a marriage,

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[25] *Collett v Collett* (1967) 3 WLR 280.
[26] *Plummer v Plummer* (1917) P. 163, C.A.
[27] *S.W.G v H.M.K* (2015) KLR.
[28] *Njoki v Mutheru* (1985) KLR 487; *Hortensiah Wanjiku Yawe v The Public Trustee,* Civil Appeal No. 13 of 1976.
[29] The Evidence Act, Cap 80, Laws of Kenya, s 119.
[30] *Sakala v Elia* (1971) H.C.D. n. 257.

where it was a part of the customary rites of the parties. For instance, in *Laxmi Devi v Satya Naravan and Ors.* (Hereinafter "**Laxmi Devi**"),[31] the Court had categorically stated that both *Homa* and *Saptapadi* are essential rites, which have to be followed for a valid marriage according to the "*law governing the parties*". In the absence of performance of *Saptapadi* in that case, the factum of the marriage was not found out by the court. In a different case,[32] the Court clarified that *Saptapadi* would be essential only in case it is admitted by the parties that as per the form of marriage applicable to them *Saptapadi* was an essential ceremony. Likewise, in *Chandrabhagbai Ganpati v S.N. Kanwar*,[33] the Court had observed that performance of *Saptapadi* is not an absolute requirement for solemnisation of a marriage, in case other customary practices of the parties have been duly followed. Admittedly, the non-performance of *Saptapadi* is not fatal for a marriage, particularly, where custom and applicable law prevailing among the parties provides for different ceremonies. Nonetheless, as gleaned from the foregoing cases and a reading of Section 7, observance of "customary rites" of either party is a condition precedent for constituting a valid marriage, even if *Saptapadi* is not a part of the same.

Is Saptapadi Essential when it is a part of the Customary Rites of Parties?

The problem analysed in this article pertains to a peculiar scenario, where customary rites of both the parties demand *Saptapadi* and the same is still not performed. As previously stated, it has been laid down in *Laxmi Devi* that *Saptapadi* is an essential rite, where it is a part of the customary rites of the parties. However, contrary opinions have been expressed in some other cases. First, regard must be had to the judgment of the Supreme Court in *S.P.S. Balasubramanyam v Suruttayan*.[34] Therein, it was held that presumption under Section 112 of the Evidence Act[35] would be available when a man and woman were living under the same roof and cohabiting for a number of years and they would be presumed to be husband and wife. It was also observed that the non-performance of *Saptapadi* would not, in itself, make the marriage legally invalid.

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[31] *Laxmi Devi v Satya Naravan & Ors* (1994) 5 SCC 545.
[32] *S. Nagalingam v Sivagami* 2001 Supp (2) SCR 454.
[33] *Chandrabhagbai Ganpati v S.N. Kanwar* 2008 MLR 21 (Bom.).
[34] *S.P.S. Balasubramanyam v Suruttayan* AIR 1994 SC 133.
[35] The Indian Evidence Act 1872, s 112.

Specifically, with regard to *Anand Karaj* between two Hindus not professing Sikhism, it has been noted by the Delhi High Court, in *Man Mohan Vaid v Meena Kumari* (hereinafter "**Man Mohan Vaid**"),[36] that mandating *Saptapadi* could not have been the intention of the legislature. To make this claim, the Court highlighted that "*if the Legislators thought that a marriage in absence of appropriate ceremonies was void or voidable then there could have been a provision either in Section 11 or Section 12*[37] *to make the marriage void or voidable with specific reference to ceremonies mentioned in Section 7 of the Act also*."[38] This was also regarded as a "*definite omission*".[39]

Resonating with the Court's observations, the authors assert that the performance of *Saptapadi* is not mandatory and its non-performance cannot, in itself, invalidate marriages, even if it is a part of the customary rites of the parties.

Can Anand Karaj, in any Circumstance, be a valid substitute for Saptapadi?

The HMA refers to *saptapadi* as "*the taking of seven steps by the bridegroom and the bride jointly before the sacred fire*".[40] In this regard, the Calcutta High Court has observed that two essential ceremonies to the validity of a marriage are invocation before the sacred fire and taking of seven steps and that "*the absence of these essential ceremonies invalidates the marriage*".[41] However, these ceremonies are not performed in an *Anand Karaj*, which mainly consists of the recitation of the holy *Granth Sahib* and "*Lavan Ferey*" (four steps around the holy book).[42]

In the Delhi High Court decision, which has been discussed in the foregoing segment, it was specifically found that "*As regards the alleged non-performance of* saptapadi*, it shall be presumed in the circumstances in the shape of* lavan feras". This suggests that the latter can be considered to be a valid substitute of the other, particularly when *Saptapadi* is not mandatory, as previously pointed out.

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[36] *Man Mohan Vaid v Meena Kumari*, 2003 SCC OnLine Del 496.
[37] Hindu Marriage Act (n 4) ss 11-12.
[38] *Man Mohan Vaid* (n 36) at ¶ 35.
[39] ibid.
[40] Hindu Marriage Act (n 4) s 7(2).
[41] *Mousumi Chakraborty v Subrata Guha Roy* II (1991) DMC 74 (DB).
[42] *Ravinder Kumar v Kamal Kanta* 1976 SCC OnLine P&H 48.

A PRACTICAL OUTLOOK ON THE ISSUE

While the previous segment presented a legalistic argument made by the authors in favour of the validity of the kind of marriage being discussed, this segment provides a more practical approach towards the issue.

Generally, such marriages have come to the notice of the Courts in cases which have either pertained to criminal suits and appeals for offences like cruelty, dowry, bigamy, etc or for rights of children resulting from such marriages. The Supreme Court had, in a case[43] concerning an offence under Section 494 of the Indian Penal Code,[44] held that the proof of solemnization of second marriage, in accordance with "*essential religious rites*" applicable to the parties, is a must for a conviction for bigamy. Mere admission by accused that he had contracted second marriage was not considered to be sufficient for this purpose. *Per contra*, the authors opine that in such cases, it becomes important to give a purposive interpretation and uphold the validity of a marriage for granting the necessary remedy. The Roman doctrine of *factum valet* could be applied to achieve this end.

Doctrine of 'Factum Valet'

In India, the doctrine of *factum valet* is said to be first propounded by *Dayabhaga* School of thought in Hindu Law.[45] The term '*factum valet*' translates to "what should not be done, yet, having been done, it shall be valid".[46] In her treatise, Prof. Poonam Pradhan Saxena has noted that Hindu Law conforms to this idea as well.[47] In the same vein, the Bombay High has observed, in *Santosh Kumari Lalchand Mehra v Chimanlal Munilal Kapur*, that the doctrine can be used to "cure the defects in solemnisation".[48]

Similar understanding has been reflected in numerous decisions that emphasize on the "factum of marriage", which leads courts to the assumption of

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[43] *Smt. Priya Bala Ghosh v Suresh Chandra Ghosh,* AIR 1971 SC 1153.
[44] The Indian Penal Code 1860, s 494.
[45] Zahur, M., 'The Hindu marriage system in Bangladesh: Addressing Discrimination' [2014] 40(4) Commonwealth Law Bulletin, 608.
[46] Prof. Saxena (n 3) at Ch. 10, 11.
[47] ibid.
[48] *Santosh Kumari Lalchand Mehra v Chimanlal Munilal Kapur* AIR 1950 Bom 307.

performance of essential ceremonies required to perform of a valid marriage.[49] Particularly, in *Veerappa v Michael*,[50] the Supreme Court highlighted that once the fact of the celebration of marriage is proved the Court shall presume everything necessary to validate the marriage including the performance of essential ceremonies. Going by this understanding, in case of an *Anand Karaj* between two non-Sikhs, the marriage should enjoy the status of a valid marriage as this does involve some sort of celebration.

To buttress this claim, the authors would bring the readers' attention to another relevant factor, i.e., the intention of the parties at the time marriage, which has been discussed in some detail in the upcoming segment.

Intention of the Parties

To begin with, we may look at the observation of the Odisha High Court in *Namita Patnaik alias Mohanty v Dilip Kumar*,[51] wherein the Court stated as follows: "*if the parties perform a kind of marriage and accept it to be a valid marriage and to add to it, in consonance with the said marriage, live as husband and wife together and consummate the marriage, both of them are estopped at a later date from taking the plea that the marriage was not in proper form*." The Court's opinion suggests that the intention of the parties is also pertinent in such cases because if the parties, at the time of marrying, intended to legally have each other as husband and wife, then the defects in solemnisation can be ignored. The fact of living together and consummating the marriage conspicuously established such an intention on the part of the husband and wife.

Consistent with this line of argument, a similar inference can be drawn from the case of *Man Mohan Vaid*[52]. In that case, the Delhi High Court attached crucial weight to the fact that the appellant's "*own maternal uncles and aunts would not have been present at the Gurudwara at that time and that too against the wishes of the father of the appellant*" if the appellant had been drugged at the time of marriage. Additionally, seeing the photographs and the cohabitation of the appellant

[49] *Lopez v Lopez*, 1885 2nd 12 Cal. 706 (FB); *Veerappa v Michael,* AIR 1963 SC 98; *Mauji Lal v Chandrabati*, (1911) 2nd 38 Cal. 700.
[50] *Veerappa v Michael* AIR 1963 SC 98.
[51] *Namita Patnaik alias Mohanty v Dilip Kumar* I (2002) DMC 248.
[52] Man Mohan Vaid (n 36).

and the respondent in the house of their maternal uncle (emphasis supplied), the Court held that there was an "*admission of marriage*" on the part of the appellant, who challenged the validity of the marriage.[53] A conjunctive consideration of all the above shows that the true intention of the party, which was challenging the validity of the marriage, was considered to be of great relevance by the Court.

A reflection of such an approach can also be found in the case of *Dhannulal v Ganeshram*[54], where the Indian Supreme Court did not construe the law textually, to grant a meaningful remedy. In that case, Chhatrapati and Phoolbasa Bai were living together and the latter was alleged to be a mistress and not the legally-wedded wife.[55] The Court had observed that, since the relationship between Chhatrapti and Phoolbasa Bai are recognised by all persons concerned, there is a strong presumption in favour of the validity of marriage and legitimacy of the child.

In doing so, the Court made a reference to the decision in *A. Dinohamy v W.L. Balahamy* (hereinafter "**A. Dinohamy**"), wherein it was held that if a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.[56] In that case, it was also noted that "*the husband during his life recognised, by affectionate provisions, his wife and children*".[57] Accordingly, the Court indicated towards the fact that the deceased father would also have intended that the child should inherit his property. In sum, the Courts have, sub-consciously or deliberately, taken into account the intention of the parties, at the time of marrying, for ascertaining whether the defects in solemnisation could be ignored.

In such cases, it is of great significance to go beyond the law and appreciate the circumstances that have prevailed in the relationship. It is imperative to not delve into the intricacies of the text of the law or those of the form of marriage. This idea is consistent with the idea of presumption in favour of marriage and doctrine of *factum valet*, which have been discussed previously.

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[53] ibid.
[54] *Dhannulal v Ganeshram* (2015) 12 SCC 301.
[55] ibid.
[56] *A. Dinohamy v W.L. Balahamy* AIR 1927 PC 185.
[57] ibid.

Towards the end, it may be reminded that the opinion of the Supreme Court in the *Bhaurao* case and that of the Calcutta High Court in the *Mousumi Chakraborty* case, discussed previously, does not concur with the authors' understanding expressed in the preceding paragraph. Particularly, the Apex Court's views do not, in any event, allow the conclusion reached by the Delhi High Court in the *Man Mohan Vaid* case. However, in light of the non-essential nature of the ceremony of *Saptapadi*, the applicability of the doctrine of *factum valet* and the true intention of the parties, the authors, with due respect, favour the understanding of the lower Court, *viz*. the Delhi High Court.

CONCLUSION

"*Marriage enjoys law's favour*", as Prof. Poonam Pradhan Saxena writes in her treatise.[58] Consequently, in case of doubt, there has to be a presumption of the validity of the marriage. It should be difficult to rebut this presumption when the relationship between the parties concerned has been very much like that of any legally-wedded husband and wife. This amounts to saying that factors like continued co-habitation, the consummation of marriage, public perception, celebration of marriage among relatives and the public in general[59] become extremely relevant. These factors establish the intention of the parties to legally marry each other.

An important aspect, which this article deals with, is the conflict between the need to perform ceremonies of marriage in a proper form and the intention of the parties to enter into a marriage, regardless of the form prescribed under the applicable personal laws. Particularly, under Hindu Law, due to the non-contractual nature of marriage, intention might get under-emphasized if proper ceremonies have not been performed. However, giving undue importance to the "form" in which the marriage was performed would automatically mean not giving due weightage to the substance of the relationship. This would, in almost all cases, have an unfair outcome for the disputed wife or even those children whose legitimacy is being adjudicated upon. It is highly likely that women might face grave problems in a relationship which is so overlooked by the law. Equally, not passing on the property to children

[58] Prof. Saxena (n 2) 12.
[59] *S. Balakrishnan Pandiyan v Superintendent of Police* (2014) 5 LW 207.

born out such relationships might well be against the will of the father, as observed in the case of *A. Dinohamy*.

In light of the practicalities that have been presented above, it is prudent to legally recognise an *Anand Karaj* performed between two Hindus, even if it is assumed that this has the impact of slightly deviating from the sacramental nature of marriage, by attaching more significance to the intention of the parties.

‘THE TWO PRINTS MATCH’- A STATEMENT HAVING DIFFERENT MEANINGS FOR SCIENCE AND LAW

Kanika Aggarwal[1]

ABSTRACT

‘The two prints match’ is frequently presented as testimony in court when it comes to fingerprint evidence. Such assertions have been shown to be scientifically untenable. Nonetheless, for a variety of reasons, this conventional method of providing fingerprint identification reports has remained in use. The judicial system and judges are completely unmindful of the genuine probative value of a fingerprint expert’s report. Numerous instances of erroneous fingerprint identification and seminal studies by authoritative organisations are the reasons why fingerprint identification has received widespread adverse attention in recent years. This is a cause for great worry, more so, as fingerprinting is often erroneously referred to as “exact science” in judicial contexts. This article is meant to analyse whether the appreciation of fingerprint evidence in the court in India is in consonance with the contemporary scientific knowledge. The first section of the paper presents a discussion of the fundamentals of fingerprint identification. This is followed by a series of divulging scientific revelations regarding fingerprint identification that serve as the foundation for this article. Following that, an analysis of the judgments rendered by the Indian courts is provided. The last section of the article contains some conclusions and recommendations. The paper demonstrates substantial discrepancies between legal interpretations of latent fingerprint comparison evidence and scientific understanding and expectations.

Keywords: *Fingerprint identification, reliability, probative value, subjective, contextual bias*

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INTRODUCTION

Richard Feynman, a Nobel laureate physicist, coined the term 'cargo cult science' to refer to pseudo sciences such as voodoo, old beliefs, black magic, witch doctors, mind reading, and astrology, among others.[2] Richard pleaded for complete scientific honesty, which he defined as 'attempting to provide all the facts necessary to assist others in judging the worth of your contribution; not just the information that points in one way'.[3] The appeal holds water even today with respect to fingerprint identification as a forensic technique.

Fingerprint identification, also known as Dactyloscopy, is one of the most commonly utilised forensic identification methods. Skin surface has friction ridges that are meant to facilitate gripping.[4] Fingerprints are left on a surface as a result of deposition of oil when it comes in contact with friction ridges.[5] The technique involves using these prints for identifying the person to whom they belong. For instance, fingerprint found on a weapon may be used to identify the person who the more generic name for the technique is Friction Ridge Analysis which refers to the examination of ridges on the volar surface of the hands and feet, specifically fingerprint, palm, and sole prints.[6] It is not limited to fingerprints i.e., the friction skin at the distal end of the fingers and thumbs. The designs on the fingers are more complex facilitating clearer categorisation and individualisation. Any reference to 'fingerprint evidence' is intended to include the more general phrase presently in use i.e., friction ridge impression evidence. The uniqueness, permanence, inimitability and transferability of fingerprints make them highly useful for legal purposed.[7] Though, numerous instances of erroneous fingerprint identifications[8] and seminal studies by authoritative organisations are the reasons why fingerprint identification has received widespread adverse attention in recent years. The most notorious case in this regard is the case of Brandon Mayfield. He was erroneously arrested for the 2004 explosion in

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[2] RP Feynman, 'Cargo Cult Science' (1974) 37(7) Engineering and Science 10.
[3] ibid.
[4] A Campbell, 'The Fingerprint Inquiry Report' (2011) 43 Edinburgh, Scotland: Aps Group Scotland 790.
[5] *US v Mitchell*, 365 F.3d 215 (3d Cir. 2004).
[6] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) (hereinafter referred to as NAS report).
[7] Kavita Manchanda, 'Forensic Science' (*Scribd*, 28 April 2017) <https://www.scribd.com/document/346690304/Forensic-Science> accessed 15 June 2021.
[8] *Commonwealth v Cowans*, 756 N.E.2d 622 (Mass. App. Ct. 2001).

Madrid based solely on latent fingerprint analysis.[9] One of the examiners at FBI had determined that there was 100% certainly in the fingerprint match.[10] This was later found to be an erroneous fingerprint comparison.[11] The Spanish authorities found the match to be clearly negative.[12] Whereas, three official from FBI and one private examiner had claimed that it was match.[13] The following are the print used in the case:

Latent print

Mayfield's print

Daoud's print (actual perpetrator)

Taking inspiration from the recent studies in United Kingdom[14] and Australia[15] that map the usage and appreciation of fingerprint evidence in courts in respective countries, this study has been designed to analyse 'whether the appreciation of fingerprint evidence in the court in India is in consonance; with the contemporary scientific knowledge?'

METHOD EMPLOYED

The ACE-V method is used to analyse the prints left by the skin. Analysis, Comparison, Evaluation, and Verification - is what ACE-V stands for.[16] ACE-V is an abbreviation, not a technique. It is just a description of what anybody would do when analysing a

[9] Stacey RB, 'Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case' (2005) 7(1) Forensic Science Communications.
[10] Application for Material Witness Order and Warrant Regarding Witness: Brandon Bieri Mayfield, In re Federal Grand Jury Proceedings 03-01, 337 F. Supp. 2d 1218 (D. Or. 2004) (No. 04-MC-9071).
[11] Emma, 'Forensics Under the Microscope: Unproven Techniques Sway Courts, Erode Justice' *Psychology and Crime News* (24 October 2004) <http://crimepsychblog.com/?p=153.s> accessed 28 September 2021.
[12] Sandy L Zabell, 'Fingerprint Evidence' (2005) 13 J.L. & Pol'y 143.
[13] ibid.
[14] Gary Edmond, Emma Cunliffe and David Hamer, 'Fingerprint Comparison and Adversarialism: The Scientific and Historical Evidence' (2020) 83.6 The Modern Law Review 1287.
[15] Gary Edmond, 'Latent Science: A History of Challenges to Fingerprint Evidence in Australia' (2019) 38 U. Queensland L.J. 301.
[16] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) 137.

latent and a potential source print.[17] It is a procedure that gives a sequence of steps to be followed by an examiner.[18] The first stage in fingerprint analysis is determining if the available ridge information is adequate for assessment on both a qualitative and quantitative level. Thereafter, the examiner compares the two prints. The next stage is to determine if the concordance between the latent and chance prints is large enough and of sufficient quality to enable a conclusion. Finally, another independent examiner confirms the finding.[19] A fingerprint examination can lead to four possible conclusions:[20]

1. Valueless – the quality of prints is too poor to be evaluated.
2. Match – the two prints came from the same source.
3. Excluded – the two prints have not come from same source.
4. Inconclusive – no conclusion can be drawn by comparing the two prints.

Whatever the conclusion of an expert report, it shall be accompanied by reasoning in support. Simply presenting an expert's judgement in court has little significance unless it is supported by the rationale that supports the finding.[21]

SCIENTIFIC INSIGHTS

Science is subject to evolution. New scientific information accumulates and supplants previously held scientific truths. If this were not the case, we would still believe that homosexuality is a mental illness, as the American Psychiatric Association categorised it until the 1970s.[22]

The first reported fingerprint case, *People v Jennings*[23] was decided in 1911, and the technique soon became finely established in legal precedent.[24] The identification of criminals through fingerprints was the first important break-through in the scientific investigation of crime. Fingerprinting has been in usage forensically for almost a century. The time when it was introduced in legal system, forensic science was in its infancy. Consequently, this technique was subjected to

[17] Zabell (n 12).
[18] Campbell (n 4) 633.
[19] Andre A. Moenssens, 'Fingerprint Identification: A Valid, Reliable Forensic Science' (2003) 18 CRIM. Just. 30.
[20] Stevenage, S.V. and Pitfield, C., 'Fact or Fiction: Examination of the Transparency, Reliability and Sufficiency of the ACE-V Method of Fingerprint Analysis' (2016) 267 Forensic Science Intl. 145.
[21] *Ramesh Chandra Agrawal v Regency Hospital Ltd. and Ors.*, MANU/SC/1641/2009.
[22] CK Faisal, 'On the Margins with Full Equality Still out of Reach' *The Hindu* (Delhi, 28 June 2021) 6
[23] 252 Ill. 534, 96 N.E. 1077 (1911).
[24] PC Giannelli, 'Daubert Challenges to Fingerprints' [2006] Faculty Publications 155.

very little judicial scrutiny. It was readily accepted in courts.[25] Infact till the 1950s, scant scientific research was done on fingerprint identification. As the research into fingerprint identification techniques began and various studies were conducted, it was found that there is a vast difference in the manner in which forensic science is being understood/presented in the courts and the manner in which the world of forensics actually works. Emerging scientific research by peak scientific bodies provide a standard (or benchmark) that enables us to evaluate both the latent fingerprint evidence and the legal responses. It gives us an opportunity to reflect on performance and awareness (or ignorance) our legal system.

It is not disputed that friction ridge patterns are unique to each person and remain the same in one's lifetime. The uniqueness and permanence of friction ridge details is accepted as being beyond scientific doubt. The ridge features remain unchanged even though a total cell replacement of the hand occurs approximately every month.[26] However, uniqueness does not imply that prints from two distinct individuals will always be enough dissimilar to be distinguished as originating from the same source, or that two impressions produced by the same finger will always be sufficiently similar to be identified as coming from the same source.[27] Impressions left by one finger may vary because of exogenous factors such as pressure applied, degree of contact between the finger and the surface etc.[28] Latent prints show only a portion of the actual pattern and may be distorted, smudged, etc. They are generally less clear. For these reasons, these prints are an inevitable source of error. as they generally 'contain less clarity, less content, and less undistorted information than a fingerprint taken under controlled conditions, and much, much less detail compared to the actual patterns of ridges and grooves of a finger'.[29]

The lack of research in the field of fingerprinting as a discipline became widely publicised in 2009, when the US National Research Council published a landmark

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[25] Simon A Cole, 'Suspect Identities: A History of Fingerprinting and Criminal Identification' [2009] Harvard University Press.
[26] Andre A. Moenssens, 'Fingerprint Identification: A Valid, Reliable Forensic Science' (2003) 18 CRIM. Just. 30, 32.
[27] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) 144.
[28] ibid.
[29] Haber, Lyn and Ralph Norman Haber, 'Error Rates for Human Latent Fingerprint Examiners, In Automatic Fingerprint Recognition Systems' [2004] Springer NY 339.

report on forensic sciences, the NAS report.[30] The report made a categorical statement that 'the law's greatest dilemma in its heavy reliance on forensic evidence, however, concerns the question of whether – and to what extent- there is science in any given forensic science discipline'.[31] The report points out that as the accuracy and reliability of friction ridge studies are unknown, assertions that these fingerprint reports have 0% error rates are scientifically implausible.[32] ACE-V provides a foundation for friction ridge analysis. This framework, however, is insufficiently precise to qualify as a proven technique for this kind of study. ACE-V does not protect against bias; it is too wide to provide repeatability and transparency; and it does not ensure that two analysts using it would get identical findings[33]. As a consequence, just following the ACE-V stages does not guarantee that the technique would lead to generating reliable findings.[34]

Again, while examining this issue in 2016, the President's Council of Advisors on Science and Technology (PCAST)[35] in the US found that only two properly designed studies of latent fingerprint analysis had been conducted. Both these studies found the rate of false matches (known as "false positives") to be very high: 1 in 18 and 1 in 30. The reports together raised a demand for accurate and reliable forensics. These problems inherent in the fingerprint comparison task has led researchers, the press, and the legal system to challenge the assertions that fingerprint technique is an exact science and of a zero-error rate.[36] The American Association for the Advancement of Science (AAAS) has questioned the scientific validity of fingerprint analysis. 'We have concluded that latent print examiners should avoid claiming that they can associate a latent print with a single source and

[30] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009).
[31] ibid.
[32] ibid.
[33] ibid.
[34] ibid.
[35] Report to the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods*, 1 (Sep, 2016).
[36] Haber, Lyn and Ralph Norman Haber, 'Error Rates for Human Latent Fingerprint Examiners, In Automatic Fingerprint Recognition Systems' [2004] Springer NY 339.

should particularly avoid claiming or implying that they can do so infallibly, with 100% accuracy'. [37]

Forensic examiners have long proclaimed high levels of certainty that latent prints, based on their analysis, originated from an identified person, statements that multiple reports have called 'scientifically indefensible'.[38]

The AAAS report says:
'There is no basis for estimating the number of individuals who might be the source of a particular latent print. Hence, a latent print examiner has no sound scientific basis for concluding that the pool of possible sources is probably limited to a single person than for concluding it is certainly limited to a single person'.[39]

The ability of any examiner to 'individualise' without the potential for any error at the claimed level of one person in the whole of human history is not scientifically validated.[40] One may counter argue that 100% certainty is not a precondition for the admissibility of expert evidence.[41] Yet, inappropriateness of claiming 100% accuracy without scientific basis is what caused commotion in forensic and scientific community. Undoubtedly, uncertainties are understandable given the very nature of science. The problem lies with the unsupportable claims and assertions about the accurateness of the technique to 100%. The judges ought to be provided with a truthful presentation of the evidence, including its strengths and weaknesses, so that they are able to determine the weight of the evidence appropriately.[42] Only testimony establishing the findings real limits is admissible as evidence.[43] Lawyers and judges must guarantee that only scientifically valid arguments are used in court and that the importance of fingerprint evidence is not overstated.

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[37] Anne Q Hoy, 'Fingerprint Source Identity Lacks Scientific Basis for Legal Certainty' (*AAAS*, 14 September 2017) <https://www.aaas.org/news/fingerprint-source-identity-lacks-scientific-basis-legal-certainty>.
[38] ibid.
[39] ibid.
[40] Campbell (n 4) 683.
[41] Campbell (n 4) 685.
[42] Campbell (n 4) 630.
[43] Zabell (n 12) 179.

To be clear, the scientific reviews were not entirely critical. Latent fingerprint comparison is recognised as a valuable subjective procedure that has the potential to assist with identification. However, latent fingerprint examiners have improperly claimed higher degree of reliability than they should have done. Fingerprint evidence continues to be systematically overstated. This has resulted in the courts being deprived of truthful information about evidence. This is a legacy of the historical commitment to categorical identification and the failure of the community of fingerprint examiners to engage with statistics.[44]

WHETHER SUBJECTIVITY NEGATES RELIABILITY?

A fingerprint examiners conclusion regarding individualisation of a latent print involves a series of subjective decisions.[45] In fact, at every single step in the ACE-V process has an element of subjectivity which can be called human factor.[46] The method and the expert undertaking the method are closely linked and one cannot be separated from the other.[47] This 'human factor' may have a perilous impact on forensic results.[48] As seen earlier, in a fingerprint examination human eye is the primary instrument of analysis, the court, making it vulnerable to human errors.[49] It is largely based on human interpretation.[50] In a study by Dror, it was found that the examination is so subjective that examiners differ from their previously recorded findings when asked to examine again in a different context.[51] Each examiner makes assessment of the prints based on his view of the quality and quantity of the features. Consequently, the outcome of verification by different examiners varies.[52] An

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[44] C Champod and J Vuille, 'Scientific Evidence in Europe--Admissibility, Evaluation and Equality of Arms, (2011) 9(1) International Commentary on Evidence

[45] Campbell (n 4) 50.

[46] Taylor, K Melissa, David H Kaye and others, 'Latent Print Examination and Human Factors: Improving the Practice Through a Systems Approach' (*NIST*, 17 February 2012) < https://www.nist.gov/publications/latent-print-examination-and-human-factors-improving-practice-through-systems-approach> accessed 29 September 2021.

[47] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) 143.

[48] Gary Edmond, 'Latent Science: A History of Challenges to Fingerprint Evidence in Australia' (2019) 38 U. Queensland LJ 301, 317.

[49] 'Forensic Evidence Largely Not Supported by Sound Science – Now What' (*The Conversation*. 7 December 2016) <https://theconversation.com/forensic-evidence-largely-not-supported-by-sound-science-now-what-67413> accessed 10 June 2021.

[50] supra.

[51] IE Dror and D Charlton, 'Why Experts Make Errors' (2006) 56(4) J of Forensic Identification 600.

[52] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) 139.

examiner based on his intuition decides how much do the prints match. This remains problematic as there is no justification for a judgment he makes.[53]

Proficiency tests provide us with insight into error rates associated with fingerprint analysis.[54] A proficiency test was designed, assembled and reviewed by IAI (International Association for Identification), in 1995 and administered by Collaborative Testing Service (CTS).[55] In the study, 156 examiners were provided with seven latent-prints and print of all ten fingers of four suspects. Shockingly, only 68 examiners could correctly identify all seven latent prints. And, a total of 48 errors in identification were found. The reaction of forensic community to this result ranged from shock to disbelief.[56]

CONTEXTUAL BIAS

Even, ubiquitous risks from cognitive bias and error are not appropriately managed or disclosed. Contextual bias occurs when 'the forensic scientist uses other evidence to believe that the specific evidence being analysed is related to a particular reference sample(s)' and when the contextual information prompts a biased selection or weighting of the features in the samples.[57] Contextual information can produce confirmation bias. It can influence people acting in good faith and attempting to be fair interpreters of the evidence.

Other pieces of evidence, such as background of the accused and the prosecutor's theory of the case, are not needed for examination and does not get documented in the reports. Such information has been referred to as 'domain-irrelevant information' by Gary Edmond.[58] Having knowledge of the prior

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[53] Zabell (n 12) 156.
[54] ibid.
[55] David Grieve, 'Possession of Truth' (1996) 46 J. Forensic Identification 521 523.
[56] ibid.
[57] Taylor, K Melissa, David H Kaye and others, 'Latent Print Examination and Human Factors: Improving the Practice Through a Systems Approach' (*NIST*, 17 February 2012) < https://www.nist.gov/publications/latent-print-examination-and-human-factors-improving-practice-through-systems-approach> accessed 29 September 2021.
[58] Edmond, G., Tangen, J.M., Searston, R.A. and others, 'Contextual Bias and Cross-contamination in the Forensic Sciences: The Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals' (2015) 14(1) Law, Probability and Risk 1.

assessment influences the verifier's examinations irrespective of how hard the verifier tries to be objective.[59]

An examiner shall not be exposed to case related information that is irrelevant and that may influence the examiner's ability to reach an objective conclusion.[60] The perception that a fingerprint examiners report can be significantly swayed by extraneous information has gained ground and has been conceded to be a real phenomenon. Contextual influences have been shown to have corrosive influence on the experts reports by several prominent studies. Dror (2005)[61] in the first of its kind study analysed the effect of extraneous information on the functioning of forensic science. The experiment undertaken in the study showed that 'fingerprint identification decisions of experts are vulnerable to irrelevant and misleading contextual influences'.[62] The study involved taking fingerprints that have previously been examined and assessed by latent print experts to make positive identification of suspects. The very same prints were presented, to the same experts, but gave a context that suggested that they were a no-match, and hence the suspects could not be identified. Within this new context, most of the fingerprint experts made different judgements, thus contradicting their own previous identification decisions. How the questions are posed before expert and how the data is provided to him can cause biasness in his findings.

CASE REVIEW

This part of the study consists of review of judicial decisions to provide an account of how the legal community is making use of fingerprint identification technique as evidence in the courts. The purpose of the case review is to evaluate the efficiency of legal safeguards/mechanisms that are intended to protect the credibility/integrity of our judicial system.

[59] ibid.
[60] Gary Edmond, 'The Science of Miscarriages of Justice' (2014) 37 U.N.S.W.L.J. 376.
[61] Itiel E Dror, David Charlton and Ailsa E Peron, 'Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications' (2006) 156 Forensic Science Intl 74.
[62] ibid.

Methodology

The study involved a review of judgments of the District Courts in Delhi from January, 2016 to December, 2020. The database for the study is the judgments available on the website named indiankanoon.com. Indiankanoon.org is a website that provides access to Indian legal judgments. It also provides a state of art "search functionality" over these documents.[63] The research used 'expert' as the search word to filter the cases wherein expert evidence was used. Thereafter, the cases were divided based on the forensic technique involved. The author found around 200 cases that involved the use of fingerprint evidence. Out of these 200, many cases did not have a detailed discussion on the fingerprint evidence. In some cases, the prints were found to be unworthy of comparison. Eventually, only 61 cases were studied in detail. The focus was to analyse reports and readily accessible case to capture the manner in which fingerprint evidences were being dealt with.

Disclaimer

It is conceivable that some judgements are not published on indiankanoon.com and therefore, are not evaluated. Additionally, it is likely that other scientifically informed objections were presented in the trial courts but went unrecorded for a variety of reasons. The decisions examined reflect existing legal methods and judicial attitudes towards fingerprinting a forensic technique. This case study approach has a few drawbacks. Nonetheless, this is very suggestive and instructive in terms of gaining an understanding of the fingerprint technique's actual use in the courts. The relevant excerpts from the decisions that were analysed have been categorised keeping in view the purpose of the study.

The following excerpts from the judgments that show the use of the expression of certitude in forensic reports -

….chance print mark Q4 was found identical with the right ring finger impression of Sagar (testimony of SI)[64]

[63] 'Service Description' (*Indian Kanoon*) <https://api.indiankanoon.org/terms/> accessed 29 September 2021.

[64] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/51244846/> accessed 29 September 2021.

PW18 testified that he had examined the chance prints mark Q1 and Q2 and found chance print mark Q1 was identical with right thumb impressions mark S1 on finger prints slips of Shahabuddin son of Bundu Khan.[65]

Chance prints mark Q2 and Q7 were found identical with specimen right ring and right middle finger impression respectively of accused Amit Rathi.(fingerprint expert from the finger print bureau)[66]

After comparison, he found that chance print marked Q1 was identical with the specimen left palm portion slip of accused Sameer.[67]

PW18 is Sh. Narender Singh Finger Print Expert, who deposed that he examined the chance print and found that chance print Q1 & Q2 & Q5 & Q6 are identical with right ring and right middle finger of specimen impressions slip of accused Monu.[68]

expert opinion of chance print Q1 and Q2 developed by Distt. Mobile Crime Team with the specimen finger / palm impression slips of co- accused namely Shahid Ali and same were found identical.[69]

FSL report which clearly established that the chance print i.e., Q1 and Q2 were identical with the fingerprint of accused person.[70]

the said finger prints were found to be identical with the left thumb impressions of accused Mehboob Hasan,[71]

the chance print marked Q1 was found identical with accused's right thumb impression marked S1 on the finger impression slip of the accused.[72]

He further deposed that chance print Q1 was found identical with specimen right index finger impression mark S1 of finger print slip of suspect Mani Shankar S/o. Nageshwar.[73]

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[65] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/189125556/> accessed 29 September 2021.
[66] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/118685271/ accessed 29 September 2021.
[67] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/62185511/> accessed 29 September 2021.
[68] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/78259493/> accessed 29 September 2021.
[69] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/79316276/> accessed 29 September 2021.
[70] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/188785898/> accessed 29 September 2021.
[71] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/24744904/> accessed 29 September 2021.
[72] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/32518948/> accessed 29 September 2021.
[73] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/122066277/> accessed 29 September 2021.

The author identified a few judgements in which the language is more epistemologically modest, i.e., rather than expressing the conclusion of the inference, the comparison process is described in terms of a 'match' or 'identification' etc.

From the car also finger prints were lifted which tallied with the finger print of Sagar.[74]

The chance fingerprints lifted from the looted truck were compared with the specimen prints of the accused persons and as per report of the FSL, the same matched with that of Laxman @ Sonu.[75]

It has been rightly concluded by the trial court that the fingerprint of one finger of accused Parvesh i.e. the appellant has been matched with the chance prints taken from the Innova car ...[76]

The following excerpt demonstrates the assumption that fingerprint identification is a failsafe method of establishing an accused's identity.

Ld. APP submitted that this circumstance of finding the finger prints point towards the guilt of the accused.[77]

The finger prints matched with the finger prints of Amit Rathi. There is no explanation coming on record as to how the finger prints of Amit Rathi reached the bottles which were found inside the car.[78]*(judge)*

After comparison, he found that chance print marked Q1 was identical with the specimen left palm portion of accused Sameer. His report in this regard is Ex.PW31/E. Reliance in this regard can be placed upon a judgment of the Hon'ble Delhi High Court which is reported as Bhagwan Mahalik & Ors. v State (NCT of Delhi)[79] dated 29.11.2012 *wherein it was held that in the absence of infirmity in comparison, the matching of the finger prints of the accused with the finger prints*

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74 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/51244846/> accessed 29 September 2021.
75 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/77528161/> accessed 29 September 2021.
76 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/75519628/> accessed 29 September 2021.
77 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/51244846/> accessed 29 September 2021.
78 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/118685271/> accessed 29 September 2021.
79 Crl. A. No. 326 of 2011.

collected from the scene of crime is a vital incriminating circumstance against the accused to prove his presence in the house at the time of occurrence. In a case reported as Munna Kumar Upadhyaya alias Munna Upadhyaya v State of Andhra Pradesh[80] *it was held that the finger print evidence is reliable evidence. In another case, which is reported as B.A. Umesh v Registrar General, High Court of Karnataka, it was held that matching of finger print on the almirah of the house shows the presence of accused in the house. Therefore, the presence of accused Sameer at the time of incident in the house of the deceased is proved.*[81]

Some of the judgments are expressing a firm faith in the identification capability of the fingerprint technique by calling it '*Exact Science*' -
The law is well settled that evidence given by finger print expert need not necessarily be corroborated but the court must satisfied itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence.[82]

In the following three judgments, the court raised suspicion over relying solely on fingerprint evidence.
The matching of finger prints of accused Shahid Ali with the water bottle found in the car of accused Anil Puri is not sufficient to hold that he was involved in the murder of deceased Rajesh Saini with accused Anil Puri..[83]
In view of the settled law, I am of the considered opinion that merely on the basis of the report Ex PW3/A, a finding of conviction cannot be returned in the present case and accused deserves the benefit of doubt in the absence of any other incriminating evidence against him.[84]

The following are examples of situations when procedural objections were made.

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[80] AIR 2012 SC 2470.
[81] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/62185511/> accessed 29 September 2021.
[82] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/180389461/> accessed 29 September 2021.
[83] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/79316276/> accessed 29 September 2021.
[84] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/4952992/> accessed 29 September 2021.

It is also important to note here that the specimen finger prints of accused were taken but those were not taken with the permission or in the presence of Magistrate and that also creates doubt about the procedure… That also creates doubt regarding the truthfulness of all these facts.[85]

Even otherwise, the finger prints on the charge slip were taken by the police during their police custody, without any permission from the court and hence, cannot be relied upon.[86]

From the testimony of HC Amit Kumar (PW-9) and ASI Jai Singh (PW-6), it is evident that the chance prints were not lifted from the spot in any scientific manner. It is not specified in what manner or through which method, the chance prints were lifted. There is no seizure memo of any cup from the scene of crime upon which chance print was found Moreover, Inspector Dinesh Kumar (PW-24) failed to depose in categorical terms where and when the finger prints impressions of the accused were obtained which raises doubts if the sample finger prints sent for comparison, in fact, belonged to the accused…. Hence, inadmissible and not reliance can be placed on it.[87]

The chance prints were not connected with him and I.O. has created a false evidence against him…..it was argued that the genuineness of document Ex.PW31/D (Specimen chance print of accused Sameer) is doubtful. It was argued that Ex.PW31/D is a fabricated document and does not belong to the accused Sameer. [88]

…the same was in an unsealed condition and therefore in view of the above the tampering of the same cannot be ruled out. The prosecution failed to explain as to why the exhibits were sent in unsealed condition specially when the offence pertains to forgery.[89]

Since the property was not produced nor was other cogent evidence produced to establish the location of these chance prints, it is difficult for the court to understand

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[85] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/51244846/> accessed 29 September 2021.
[86] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/189125556/> accessed 29 September 2021.
[87] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/86952220/> accessed 29 September 2021.
[88] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/62185511/> accessed 29 September 2021.
[89] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/24810999/> accessed 29 September 2021.

how the left index finger print of the accused Sanjay and the left index finger print of the accused lalit were found on the jewellery boxes. [90]
…the prosecution also failed to establish when the finger prints of the accused were obtained, when the same were sent to the Finger Prints Bureau for comparison or who had taken the samples to the Finger Prints Bureau.[91]
the manner of lifting chance prints is doubtful.[92]
the chance prints were not sealed properly. (Defence objection)[93]

The following are the only few instances in which epistemic objection was raised.
…the expert has made markings on the disputed thumb impressions regarding the slant of ridges. However, no such slant is visible in the photographs Ex. D1, Ex. D2 and Ex. D7, as the finger prints are totally smudged in said areas. Further, as per said expert, the basic pattern of disputed thumb impression is "elliptical whorl" pattern whereas the basic pattern of the admitted impression is "double loop pattern and therefore said impression cannot be of same person. However, the other expert examined by the complainant i.e. CW 4 had stated that basic pattern in the disputed gift deed is "Central pocket loop" in one impression and "circular whorl" in another."[94]

…however, from naked eye examination of the said chance prints, one can easily come to the conclusion that there are no characteristics which are visible to make any comparison as there are apparent superimposition and such superimposition lead to crossing of ridges and the said cross ridges would mean that the characteristics are not visible for any comparison. It is submitted that the pattern as found in the chance prints are extremely unclear for any examination and even if all efforts are put in, one would observe cross cutting of ridges due to

[90] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/188785898/> accessed 29 September 2021.
[91] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/32518948/> accessed 29 September 2021.
[92] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/10772774/> accessed 29 September 2021.
[93] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/180389461/> accessed 29 September 2021.
[94] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/45824139/> accessed 29 September 2021.

superimposition and highlighted area by the prosecution shows entirely different pattern.[95]

PW36 had not followed the practice and standard to be followed vis avis conclusion drawn with regard to bifurcation, ridge ending, short ridesare contrary to his anal ysis, that report not reliable.[96]

In this report, the result of the examination has been mentioned. However, there is no explanation as to on what basis and what manner the Finger Print Analyst/expert has reached this conclusion.[97]

Certain instances show a court's propensity for relying on cross examination to safeguard the public from excessive or untruthful expert testimony. In this way, judges' own responsibility as gatekeepers of expert evidence is ignored.

Testimony of PW-3 regarding lifting of chance prints from the scene of occurrence has also not been dented as the accused, despite opportunity, failed to cross-examine him. Expert evidence of PW-5 regarding matching of fingerprints and chanceprints has also remained un-contradicted and the accused failed to create any suspicion regarding the methodology adopted and the veracity of the report.[98]

His cross examination did not bring out anything which could make this witness untrustworthy.[99]

The expertise and experience of the finger print expert has not been challenged in the cross-examination; the finger prints are of good quality and are clear. No sound reasons exist to disbelieve the reports of this witness.[100]

Inferences

This short but significant research demonstrates that judges express their conclusions and implications of latent fingerprint evidence unreservedly. We found just a few occasions in the many judgements studied where the epistemic grounds of the

[95] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/24744904/> accessed 29 September 2021.
[96] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/122777044/> accessed 29 September 2021.
[97] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/198983537/> accessed 29 September 2021.
[98] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/165812106/> accessed 29 September 2021.
[99] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/149275000/> accessed 29 September 2021.
[100] 'Delhi District Court' (*Indian Kanoon*) <https://indiankanoon.org/doc/180389461/> accessed 29 September 2021.

inference to identification were addressed or where the view was needed to be qualified in a scientifically 'defensible' way. However, none of the court decisions we found address the limitations and real risk of error inherent in the fingerprint comparison process, or how these limitations and risks should be communicated. The possibility of an actual error does not seem to have been raised as a reason for concern. Second, the study shows how legal actors have focused exclusively on adjectival law, investigative procedure, and, more recently, human rights and privacy, without ever interacting meaningfully with the validity, reliability, and resulting perspectives on fingerprint comparison methods.

The courts, attorneys, and experts should be fully aware that in relation to fingerprint identification certainty is unattainable, human error is possible, and subjectivity is unavoidable.[101] Fingerprint reports that indicate high degree of certitude should trigger warning bells. It is utterly important to recognise the limitations of fingerprint evidence due to its subjective character and to acknowledge that it is not flawless.[102] The methodology ie ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results.[103]

The analysis shows that the courtroom actors have shown a disregard for scientific warnings, opting instead to follow conventional beliefs in the name of legal precedents. Judges' Achilles heel is their reluctance to go into areas that are beyond their own expertise. Unqualified court trust in expert evidence mirrors the broader unwillingness of certain forensic scientists to admit their method's frailties and limits.[104] Cross questioning and counter evidence did not encourage or permit lawyers to uncover, analyse, or express epistemological issues about latent fingerprint

[101] Forensic Evidence Largely Not Supported by Sound Science – Now What' (*The Conversation*. 7 December 2016) <https://theconversation.com/forensic-evidence-largely-not-supported-by-sound-science-now-what 67413> accessed 10 June 2021.
[102] Campbell (n 4) 684.
[103] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) 142.
[104] Edmond, G., Tangen, J.M., Searston, R.A. and others, 'Contextual Bias and Cross-Contamination in the Forensic Sciences: The Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals' (2015) 14(1) Law, Probability and Risk 125.

evidence. Nor have they put the judges in a position to evaluate the expert testimony rationally or scientifically.[105] Absence of legal engagement with reliability, error, and scientific research suggests that adversarial processes have failed to obtain scientifically reliable expert testimony and that legal professionals struggle with foundational scientific understanding. Our research demonstrates that despite scientific cautions that such an approach is 'indefensible,' fingerprint evidence is routinely equated with categorical confirmation of identification.

The gap in the legal system exemplifies how unconnected the worlds of scientific inquiry and law are. The underlying reality is that forensic evidence is not always interpreted in light of scientific research to evaluate its reliability. This is a serious issue that necessitates a complete overhaul of the evidentiary system governing expert testimony. Just as science advances and evolves with time, the legal system shall do the same.[106]

[105] Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 136 (National Academies Press, 2009) 18.
[106] AA Moenssens and SB Meagher, *Fingerprint Sourcebook* (201 1) ch 13.

THE LINE OF 'CONTROL': A SOCIO-LEGAL EXAMINATION OF THE COMBAT EXCLUSION POLICY OF WOMEN IN INDIA

Sanchit Sharma[1]

ABSTRACT

Amidst the ever-prolonging conflict between the rights of women in the armed forces versus myriad societal constructs, the Union Government on September 8, 2021, informed the Honorable Supreme Court of India (SC) that women shall be inducted into the armed forces through the National Defense Academy. While equality tallied a win on this front, there is another and more significant (legal) aspect that has existed (and overlooked) for years and calls for our immediate attention to be examined: the exclusion of women in combat. Against this background, the Honourable Supreme Court has mentioned that they are—at least presently—not dealing with the issue of induction into fields in which women are not in existence. Ergo, this Article, keeping in view the recent developments of women in the armed forces, coupled with the progressive jurisprudence put forth by the Honourable Supreme Court over the years, endeavours to examine this discourse by way of academic scrutiny. This is accomplished by briefly deliberating upon both, sociological and legal aspects behind this discourse; upon which a nexus is drawn between the two sources of literature to conclusively bring to fore the manifestly arbitrary policy dictating the exclusion of women in combat while also stressing upon the dire need for re-assessment, bearing in mind the tenets of our Constitution and constitutional jurisprudence around equality and state policy.

Keywords: *Combat Exclusion Law, Constitution of India, Equality, Army, Policy*

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INTRODUCTION

A quick recollection of any (and all) great battlefields in history depicts how women have played a monumental role in the international war effort. Be it in the roles of nurses during the American civil war[2] or as soldiers of Rani of Jhansi regiment in India[3]; history is rich and replete with instances where the participation and contribution of women on the battlefield was deemed to have been of immense value. But despite their best endeavours (and equally competent efforts), the entry of women in the armed forces has always remained to have a chequered history[4], and in all likelihood would remain so, since there appears to be—as also acknowledged by the Honourable Supreme Court of India—what we may term as a strong interplay between the rights of women in the armed forces, and various national security considerations (as avowed by the Union Government) in stark contrast to their rights.[5] Pertinent to note here is that this discourse germinates from two contrasting schools of thought where one, for a liberal and egalitarian agenda, such as that of Israel[6], calls for equality on all fronts in the armed forces, while the other (traditional) school opposes it strongly; and for this reason, there is a disputatious tussle of these two opposing forces in every discourse related to the role of women in the armed forces.

But in all the contentious subjects concerning the role of women, one discourse stands a class apart, and appears to be, without an iota of doubt, the most contentious of all, i.e., the exclusion of women in combat roles. This discourse not only sprouts from the previously mentioned counterbalance of rights, but also sharply intensifies the fervour (and debate) between equality and national security considerations; and for that reason, it wouldn't perhaps be an exaggeration to call it the last front in the battle of equality for women in the armed forces.

Renowned Canadian clinical psychologist Jordan Peterson contends that a functional social institution (in the context of this Article, judiciary, legislature and the

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[2] Maureen Murdoch, 'Women and War What Physicians Should Know' (2006) 21(3) J Gen Intern Med <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1513175/> accessed 25 September 2021.

[3] Tobias Rettig, 'Recruiting the all-female Rani of Jhansi Regiment: Subhas Chandra Bose and Dr Lakshmi Swaminadhan' 2013 21(4) SEA.

[4] *The Secretary, Ministry of Defence v Babita Puniya*, (2011) SCC OnLine SC 87; Clyde WILCOX, 'Race, Gender, and Support for Women in the Military' (1992) 73(2) Soc. Sci. Q. 310.

[5] ibid.

[6] Orna Sasson-Levy and Sarit Amram-Katz, 'Gender Integration in Israeli Officer Training: De-gendering and Re-gendering the Military' (2007) 33(1) UCP 105.

armed forces) can utilise the creative, liberal types to determine how old and outdated might be replaced with something new and more valuable.[7] Reading this contention with the Honorable Supreme Court's recent NDA judgement, which, incidentally, serves as an eloquent testament of evolving constitutional jurisprudence in the realm of equality, offers us with an incredible opportunity to gingerly scrutinise the current combat exclusion policy of India. Ergo, this article attempts to explore this contentious discourse from an egalitarian standpoint and briefly examines the current position of women in combat in the Indian context.

This scrutiny is accomplished by discerning the sociological roots behind this discourse, and thereafter analysing the Law in question; consequently, the Article is divided in two parts: the first part of the Article examines various classical assumptions the *hoi polloi* (and the policymakers) hold against women soldiers from a sociological standpoint; upon which, an attempt is made to challenge (and possibly debunk) the existing canonical assumption about the purported limits of women in the armed forces, and more specifically, in combat; the second part of the Article seeks to establish a *nexus* between the sociological and legal literature. It examines and analyses Articles 33 and 14 and Directive Principles of State Policy (DPSP's) and Fundamental Duties enshrined in the Indian Constitution against the background of contentions raised in part one of the Article—to categorically conclude how, on the basis of purported limits, the exclusion policy against women serving in combat is *prima facie* discriminatory, arbitrary, and patently absurd.

PART ONE: SOCIOLOGICAL ASPECTS

Classic Assumptions & Policy Decisions

"*The state controlling a woman would mean denying her full autonomy and full equality.*"
— Ruth Bader Ginsburg

This section of the Article firstly addresses the canonical assumptions the *hoi polloi* has against women in the armed forces; and upon establishing that, in the second part,

[7] Jordan Peterson, *Beyond Order* (Penguin Random House UK, 2021) 34.

it demonstrates how these assumptions lead to irresolute policy decisions which are prejudiced and discriminatory; and thereafter, it briefly examines the effect of such policy decisions on the role of women in the armed forces.

Classical Assumptions

If one reckons combat, one is often visited with gruesome imagery of war, where men, for their Nation, fight with gallantry and die in valour. But not once does the representation of women fit in this imagery. This, however, does not (and should not) come as a shocking revelation of mind, as the *nexus* between the armed forces and masculinity is a rather enduring one.[8] The armed forces are essentially perceived as a male dominant establishment[9], where combat roles—if not all positions—are perceived limited to the expertise of men.[10] And in this male-dominant profession, not only are the toils of women met with satire and scrutiny, but the reservation and resentment which surfaces against women can hardly be camouflaged.[11] The perception of women in the armed forces, therefore, is abysmal, to say the least; for instance, General Lewis Hershey coarsely said, "There is no question but that women could do a lot of the things in the military services. So could men in wheelchairs. But you couldn't except the services to want a whole company of people in wheelchairs."[12] Or more gravely, from within our own Nation, an army officer from Haryana pontificated: "*Admiyon jaisi auraute? kis ko chaihiyen hain?*" (Who wants manly women?)[13] Needless to say here is that these two illustrations are undeniably on the end of the spectrum of non-acceptance, as the public perception for women in the armed forces (and that of armed forces itself) has changed tremendously over the years[14], but these perceptions, nevertheless, bring to fore the presence (and long due

[8] Rachel Reit, 'The Relationship between the Military's Masculine Culture and Service Members' Help-Seeking Behaviors' (Master's Theses, Marquette University 2017); Maya Lahav, 'Is the Military a Masculinised Expression of Society?' (E-International Relations, 10 March, 2020) <https://www.e-ir.info/pdf/82158> accessed 21 September 2021; Deepanjali Bakshi, *In the Line of Fire: Women in the Indian Armed Forces*, (WISCOMP 2006) 21; Brandon T. Locke, 'The Military-Masculinity Complex: Hegemonic Masculinity and The United States Armed Forces' (Master's Theses, University of Nebraska-Lincoln 2013); Maya Eichler, 'Militarized Masculinities in International Relations' (2014) 21(1) BJWA 81; Jennie Ruby, 'Women in Combat Roles: Is That the Question?' (2005) 35(11/12) Off Our Backs 36

[9] Nancy Goldman, 'The Changing Role of Women in the Armed Forces' (1973) 74 Am. 892; Nancy Goldman, 'The Utilization of Women in the Military' (1973) 406 Ann Am Acad Pol Soc Sci. 107, 108.

[10] Prem Chowdry, 'Women in the Army' (2010) 45 EPW 18, 18-19.

[11] ibid.

[12] Nancy Goldman, 'The Changing Role of Women in the Armed Forces' (1973) 74 Am. 895.

[13] Chowdry (n 10).

[14] Jani P. Vaara, PhD, Jarmo Viskari, FDF, Heikki Kyröläinen, PhD, Matti Santtila, PhD, 'Perceptions and Attitudes of Female Soldiers Toward Physical Performance and Fitness Standards in Soldiers' (2016) 181(10) Military Medicine <https://academic.oup.com/milmed/article/181/10/1218/4159714>

acknowledgement) of a conflict—a conflict which is deeply rooted in the societal implications of our Nation, and thwarts any and every attempt made towards equality and acceptance for both genders—not only in the armed forces, but in every other possible context.

The origin of these assumptions against the purported limit of women (in general, but especially in the armed forces) occurs at a sociological level and appears to be a quintessential illustration of discrimination against the two genders. Pertinent for us to note here is that his discrimination is largely and monumentally based on a gender stereotype wherein the role of a man, on account of being associated with masculine virtues imparted by the society (rather than those biologically given)[15], such as strength, toughness, courage, aggression, is associated with war and rampage[16]; whereas on the flip side, the role of a woman is only confined to having a submissive, a sort of inferior living compared to men, and therefore, limited to a kitchen.[17] In General Westmoreland's words, "No man with gumption wants a woman to fight his Nation's battles. I do not believe the American public wants to see a woman… do a man's job, and that is to fight."[18]

The origin behind this stereotype essentially rests on the notion that the strong protect the weak[19], and therefore, since women are considered weak—which is largely due to societal implications of affixing feminine characteristics such as humanity, charity, emotions etc., to the female gender—they are not considered fit to fight. We see this perception *entrenched generally* in the society (as evident from the combat exclusion policy) and so *deeply entrenched* in radical Islamic groups that, in the fight against ISIS, there came a time when ISIS fighters feared being killed by hands of

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accessed 22 September 2021; Megan H. MacKenzie, 'Let Women Fight: Ending the U.S. Military's Female Combat Ban' (2012) 91(6) Foreign Affairs 32; Clyde WILCOX, 'Race, Gender, and Support for Women in the Military' (1992) 73(2) Soc. Sci. Q. 310, 314-320; Cynthia Dunbar, 'Toward a Gender-Blind Military: A Comparative Look at Women in Combat' (1992) 15(1) <https://www.jstor.org/stable/42760368> accessed 23 September 2021; Heather Wilson, 'Women in Combat' (1993) 32 The National Interest 75.

[15] Maya Eichler, 'Militarized Masculinities in International Relations' (2014) 21(1) BJWA 90.

[16] ibid.

[17] Wangchuk Lama and Salvin Paul, 'Women Empowerment in the Indian Armed Forces' in Walter Leal Filho et al. (eds), *Gender Equality* (Springer 2020).

[18] Judith Wagner DeCew, 'The Combat Exclusion and the Role of Women in the Military' (1995) 10(1) Hypatia 56, 63.

[19] Maya Lahav, 'Is the Military a Masculinised Expression of Society?' (E-International Relations, 10 March, 2020) <https://www.e-ir.info/pdf/82158> accessed 21 September 2021.

women combatants[20], as according to their manifesto, women's role was that of wives and mothers and women fighting was anathema to the groups' preferred social order.[21]

To divert from the contention for one moment here, we could see this to be the case—the blatant assumption of women being the weaker sex—in hostage situations where women, children, and elderly are asked to be released on account of being perceived as belonging from weaker sex and age, in that order.

So keeping in mind the deeply entrenched stereotypes, when a woman steps into this profession, which is reinforced with a rich history of brotherhood, which is further based on historical, cultural, political, and social associations, she challenges the very foundation of the armed forces (and to that extent, the very social fabric of every Nation) because they—and those in it—choose to see themselves (and be seen) in a certain way[22] , i.e., an organisation consisting of a group of men, who, for the record, represent the epitome of masculinity, capable of waging war and defending their Nation. Chowdry puts it rather succinctly when he observes that the fear emanates from the perceived threat posed to the existing structure of the gender, on which lies the equilibrium of the patriarchal society[23], and this fear, along with the pre-existing notions on the capabilities of women, the Article asserts, manifests itself into subsequent policy decisions.

Policy Decisions

It is said that the military is a critical site for research on gender integration because it is not just another patriarchal institution; but rather, it is the institution most closely identified with the State, its ideologies, and its policies.[24] In this regard, Justice Chandrachud has philosophically yet accurately observed that Law and society are

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[20] Geoff Earle, 'ISIS fighters terrified of being killed by female troops' (New York Post, 19 Sep, 2014) <https://nypost.com/2014/09/19/isis-fighters-terrified-of-being-killed-by-female-troops/> accessed 21 September 2021.

[21] Reed M Wood and Jakana L Thomas, 'Women on the frontline: Rebel group ideology and women's participations in violent rebellion' (2017) 54(1) J. Peace Res. 31, 35.

[22] Victoria Basham, in 'Gender and Militaries: The importance of military masculinities for the conduct of state sanctioned violence' in S. Sharoni, J. Welland and L. Steiner (eds) *Handbook on Gender and War* (Edward Elgar Publishing 2016).

[23] Prem Chowdry, 'Women in the Army' (2010) 45 EPW 18; Victoria Basham, in 'Gender and Militaries: The importance of military masculinities for the conduct of state sanctioned violence' in S. Sharoni, J. Welland and L. Steiner (eds) *Handbook on Gender and War* (Edward Elgar Publishing 2016).

[24] Sasson-Levy and Amram-Katz (n 6) 109.

intrinsically connected, and oppressive social values often find expression in legal structures.[25] Observation made by Justice Chandrachud quite accurately (and clearly) appears to be the case in the combat exclusion policy of India because, despite the fact that the union government has accepted permanent commissioning of women officers in the Army, it is still hesitant in inducting women in combat roles[26], and thereby, India has a formal combat exclusion policy for women[27], which is, based on the abovementioned societal implications, and legally speaking (as we would see further), an explicit testament to a policy based on discrimination. For instance, the union government notes that women are not employed on duties that are hazardous in nature because of the inherent risks involved[28], and often seek the point of national security.[29] Meaning thereby, the union government not only presupposes that woman cannot partake in perilous missions but also arrogates on the dissuasive submission that including women in combat missions would become a national security matter.

In response to these mistaken beliefs, the Honourable Supreme Court, in its landmark judgements like *Union of India v Lt Cdr Annie Nagaraja*[30] and *The Secretary, Ministry of Defence v Babita Puniya*[31] has time and again reiterated how the policies framed by the union government are based on false constructs, as the discrimination against women were justified only on the basis of stereotypes of physical and psychological capabilities.[32] These broad generalisations, therefore, accurately, yet regrettably bring to fore the beliefs and assumptions about gender roles in policy decisions.[33]

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[25] *Joseph Shine v Union of India* (2019) 3 SCC 39.
[26] Pradeep Gupta and Akansha Sharma, 'Representation of Women in Indian Armed Forces' (2021) 647 Academia Letters. 3, 1-6.
[27] Bakshi (n 8).
[28] *The Secretary, Ministry of Defence v Babita Puniya*, (2011) SCC OnLine SC 87.
[29] Mehal Jain, 'Why Is Co-Education A Problem?': Supreme Court Frowns On Army's Policy To Bar Women From NDA [Full Court Room Exchange], Live Law (Live Law, 18 Aug, 2021) <https://www.livelaw.in/top-stories/supreme-court-women-nda-exams-army-policy-gender-discriminatory179804?infinitescroll=1https://www.livelaw.in/top-stories/supreme-court-women-nda-exams-army-policy-gender-discriminatory-179804?infinitescroll=1> accessed 25 September 2021.
[30] *Union of India v Lt Cdr Annie Nagaraja* (2015) SCC OnLine SC 1862.
[31] *The Secretary, Ministry of Defence v Babita Puniya*, (2011) SCC OnLine SC 87.
[32] ibid.
[33] Gautam Bhatia, 'Gender Equality in the Armed Forces' (Indian Constitutional Law and Philosophy, March. 20, 2020), <https://indconlawphil.wordpress.com/2020/03/20/gender-equality-in-the-armed-forces/> accessed 22 September 2021.

In fact, Justice Chandrachud, in another case, had prolifically observed that the union government's submission that it is a great challenge for the women to meet the hazards of service owing to their pregnancy, motherhood, and domestic obligations is a strong stereotype which assumes that domestic obligations rest solely on women.[34] Furthermore, in the matter related to the admission of women in the NDA, Justice Kaul stated that "policy decision" to bar women from admission is based on gender discrimination.[35] Further still, a perusal of international case laws rendered the same result when; for instance, in Owens v. Brow[36] Judge John Sirica, on the question of whether an absolute ban on the assignment of female personnel to sea duty, except in certain ships, violated the equal protection guarantee of the Fifth Amendment, noted that bar against assigning females to shipboard duty was premised on the notion that duty at sea is part of an essentially masculine tradition.[37]

Moreover, in addition to an irresolute policy of social assumptions, this stereotype is exacerbated when the State, through its actions, further perpetuates these gender roles. Hence, a policy, *prima facie,* may appear to benefit women but instead reinforce a stereotype.[38] This could be seen when women are allowed in the armed forces, but they are not allowed in combat roles, thereby perpetuating (and building) the traditional assumption that women are the weaker sex and only men ought to fight wars.

In a beautifully drafted judgement, which brought out the horrors of society, Justice Deepak Mishra observed how women are treated as fragile, feeble, dependent and subordinate to men.[39] He also noted how such horrors continue to exist irrespective of the developments we have made as a nation. Although this contention

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[34] *The Secretary, Ministry of Defence v Babita Puniya*, (2011) SCC OnLine SC 87.
[35] Express New Service, 'Supreme Court lets women sit for NDA exam, says policy based on gender bias', (The Indian Express, 19 Augsut, 2021) <https://indianexpress.com/article/india/sc-interim-order-women-nda-exam-army-gender-discrimination-7459561/> accessed 22 September 2021.
[36] *Owens v Brow* 455 F Supp. 291 [D.D.C. 1978].
[37] Judith Wagner DeCew, 'The Combat Exclusion and the Role of Women in the Military' (1995) 10(1) Hypatia 56, 63.
[38] Unnati Ghia and Dhruva Gandhi, The Anti-Stereotyping Principle: A Conundrum in Comparative Constitutional Law, (IACL-AIDC Blog, 5 May , 2020) <https://blog-iacl-aidc.org/2020-posts/2020/5/5/the-anti-stereotyping-principle-a-conundrum-in-comparative-constitutional-law>; *Joseph Shine v Union of India* (2019) 3 SCC 39; *Anuj Garg v Hotel Assn. of India* (2008) 3 SCC.
[39] *Charu Khurana v Union of India*, (2015) 1 SCC 192; *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125.

was put forth in respect to the *hoi polloi*, it is equally relevant, in consonance of the aforesaid observations, in the case of armed forces too.

The policy, therefore, quite explicitly reeks of discrimination based on societal constructs and consequently affects the role women play in the armed forces.

Role of Women

Can women be as aggressive as men in combat? The question that comes to mind is one asked by Henry Higgins in My Fair Lady: Why can't a woman be more like a man? Well, the answer is, no doubt, that she can. But the real question is, do we really want her to be?[40]

Riding on the boat of discriminatory policies, while sailing in the sea of assumptions, women officers in India, even after over three decades of their inclusion in the armed forces, on account of policy, still serve as a support instrument. Though an occasional bright comet of female leadership has streaked through the war skies every now and then, the most common perception of women's involvement in warfare, through the ages, has been in support roles only[41] From the factories of Germany to the radio rooms of Great Britain; from the wetlands of China to the publicised cockpits of Soviet Russia, history is replete with instances where women have been utilised as combat support units[42], and most of these army contingents were also either downsized or abolished altogether.[43] The position, in today's decade, is no different in India.

Challenging Classical Assumptions

"This type of fight gives us the opportunity of becoming revolutionaries, the highest level of human species, and it also permits us to graduate as men."[44]

[40] Jennie Ruby, 'Women in Combat Roles: Is That the Question?' (2005) 35(11/12) <https://www.jstor.org/stable/
20838522> accessed 27 September, 2021 38
[41] Bakshi (n 8) 29.
[42] Nancy Goldman, 'The Changing Role of Women in the Armed Forces' (1973) 74 Am. 900
[43] Bakshi (n 8) 32; Jessica Darden Trisko, *Assessing the Significance of Women in Combat Roles*, (2015) 70 IJ. 461, 454-462
[44] Nancy Goldman, 'The Changing Role of Women in the Armed Forces' (1973) 74 Am. 900

This section of part one attempts to challenge (and possibly debunk) the assumptions we have observed about women in the armed forces insofar by employing the use of various illustrations.

Historical & Contemporary Evidence

"*I have learned that soldiers are individuals. I have known women who were good soldiers and bad. I have known men I wanted to sell to the enemy because I was determined not to let them get me killed. I have known some outstanding male soldiers as well.*"[45]

The arguments against women in combat could not be wholeheartedly accepted, as history (and the present) dictate largely otherwise. The argument, from the side of the armed forces, essentially rests on the point where the armed forces feel the need of protecting their identity and recruiting male soldiers to fulfil the long-standing beliefs of recruiting men in combat roles for developing militarised masculinity[46], and maintain the military's institutional identity as a masculine domain in which real men are prepared to fight.[47] And this goal of masculinity is achieved by constantly warding off threats to it[48], such as femininity, or more specifically, female soldiers in combat missions.

It is to be seen that when the discrimination is based solely on the context of gender (and not on the components of training or education), then one cannot help but recall how the advance of the Soviet Red Army in Ukraine in 1944 prompted the integration of women from medical support roles to combat rules[49], or how women in Soviet Russia received 91 Hero of Soviet Union Medals for the highest award for military valour for heroism in combat.[50] More so, in the present context, it would be worthwhile for us to take note of women combatants in disputed countries like El

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[45] Bakshi (n 8) 24.
[46] Victoria Basham, in 'Gender and Militaries: The importance of military masculinities for the conduct of state sanctioned violence' in S. Sharoni, J. Welland and L. Steiner (eds) Handbook on Gender and War (Edward Elgar Publishing 2016) 12-13.
[47] ibid 18; Megan H. MacKenzie, 'Let Women Fight: Ending the U.S. Military's Female Combat Ban' (2012) 91(6) Foreign Affairs 32, 39; George H. Quester, 'Women in Combat' (1977) 1(4) International Security 80, 87.
[48] Bakshi (n 8) 7.
[49] Jessica Darden Trisko, *Assessing the Significance of Women in Combat Roles*, (2015) 70 IJ. 451.
[50] Bakshi (n 8) 29.

Salvador, Colombia, Eritrea, Guatemala, Nicaragua, Sierra Leone, Sri Lanka, Uganda.[51] Not to mention, in the middle east, during the ISIL uprising, it was estimated that one-third of the Kurds currently fighting against ISIL were female.[52]

In furtherance of this argument, it would be worth mentioning that Indian women soldiers have fought off Taliban[53], Naxals[54], have commanded transport convoys in militant prone areas[55], are assigned the same duties as that of the male officers[56], are trained at par with the male officers, and have countless laurels at both national[57] and the international stage.[58] In fact, in the United Nations, it has been observed that "women peacekeepers broaden the range of skills and capacities among all categories of personnel, enhance the operational effectiveness of all tasks, and improve the mission's image, accessibility, and credibility vis-à-vis the local population.[59] Based on these incontrovertible illustrations, it is rather explicit that exclusion of women on the basis of gender falls short for lacking convincing certitude, as women have continually portrayed the bold and brazen spirit to fight, and therefore, largely challenge the conventional view.

On the basis of these illustrations, the Army (and the government), it seems, has turned a blind eye even to entertain the possibility that women can endure, suffer,

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[51] Jessica Darden Trisko, *Assessing the Significance of Women in Combat Roles*, (2015) 70 IJ. 454; Sara Dissanayake, 'Women in the Tamil Tigers: Path to Liberation or Pawn in a Game?' (2017) 9(8) CTTA 1.
[52] Jessica Darden Trisko, *Assessing the Significance of Women in Combat Roles*, (2015) 70 IJ. 454; Reed M Wood & Jakana L Thomas, 'Women on the frontline: Rebel Group Ideology and Women's Participations in Violent Rebellion' (2017) 54(1) J. Peace Res. 31.
[53] PTI, 'SC notes Women Army Officers' achievements like fighting Taliban, UN Peace Operation' (Business Standard,17 February, 2020), <https://www.business-standard.com/article/pti-stories/sc-notes-women-army-officers-achievements-like-fighting-taliban-un-peace-operation-120021701382_1.html>.
[54] Shantanu Nandan Sharma, Meet the Women Commandos fighting Naxals in the jungles of Bastar, (The Economic Times, 4 March, 2018) <https://economictimes.indiatimes.com/news/defence/meet-the-women-commandos-fighting-naxals-in-the-jungles-ofbastar/articleshow/63150699.cms?utm_ source=contentofinterest.
&utm_medium=text&utm_campaign=cppst>; *The Secretary, Ministry of Defence v Babita Puniya* (2011) SCC OnLine SC 87.
[55] *The Secretary, Ministry of Defence v Babita Puniya* (2011) SCC OnLine SC 87.
[56] Wangchuk Lama and Salvin Paul, 'Women Empowerment in the Indian Armed Forces' in Walter Leal Filho et al. (eds), *Gender Equality* (Springer 2020) 5.
[57] Sanchari Pal, 'Marching Ahead: 13 Incredibly Brave Women in Indian Armed Forces Who Broke the Glass Ceiling' (The Better India, 24 Jan. 2017) <https://www.thebetterindia.com/83280/brave-women-soldiers-indian-armed-forces/> accessed 4 September, 2021; Ritika Sherry, '16 Brave Women from The Indian Armed Forces Who Proved There's Nothing Called A Man's Job' (ScoopWhoop, 12 Feb. 2018), <https://www.scoopwhoop.com/armed-forces-women-pioneers/> accessed 4 September, 2021
[58] ibid.
[59] Wangchuk Lama and Salvin Paul, 'Women Empowerment in the Indian Armed Forces' in Walter Leal Filho et al. (eds), *Gender Equality* (Springer 2020) 4.

and conquer the rigour of combat, and that of training, since limitations are purported and reflected upon by having a single male-centred standard for fitness.[60] For example, a long-standing popular perception is that women cannot—or rather, should not—be admitted into special forces (the elite of infantry) because the training and combat thereafter are highly demanding components—and women soldiers, due to being associated with feminine virtues, by default, are presumed to have lacking the physical capabilities; and consequently, women are not given a fair chance to try out for a special forces outfit. In this regard, it must be noted that a fair opportunity to participate has to be provided irrespective of gender, because not every soldier (men included) make it through the rigour of the armed forces, and it would indeed be a harsh (and perhaps unreasonable) generalisation that *all women*, irrespective of determination, calibre, values, and will, are not physically fit; and therefore, the idea that women should not even be allowed to train (or be in combat) in its totality is prejudiced and discriminatory and portrays, therefore, in words of Wagner, paternalistic protectionism and stereotypical views about what work women were suited for.[61]

PART TWO: THE LEGAL ANALYSIS

> "*The law sees and treats women the way men see and treat women*"
> — Catherine MacKinnon, American Law Professor, Feminist, and Writer

Article 33 of the Indian Constitution

Moving away from the sociological perspective, as we move towards the legal school of thought, we are first greeted with a provision that appears seemingly innocuous, is disputatious in nature, and is very inconspicuously placed: Article 33 of the Constitution.[62]

Article 33 of our Constitution protects policy decisions of the Union Government and imposes an inherent limitation for judicial intervention in questions

[60] Megan H. MacKenzie, 'Let Women Fight: Ending the U.S. Military's Female Combat Ban' (2012) 91(6) Foreign Affairs 32, 37.
[61] Judith Wagner DeCew, 'The Combat Exclusion and the Role of Women in the Military' (1995) 10(1) Hypatia 56.
[62] The Constitution of India 1950, art 33.

of policy related to the armed forces.[63] It confers power in the Union Government to allow the abrogation and/or restriction of fundamental rights in questions related to the armed forces[64], and such abrogation and/or restriction is notwithstanding any fundamental rights contained within Part III of the Constitution.[65] For instance, recently, Army Chief Bipin Rawat, upon being asked about the stand of the armed forces on abrogation of Section 377, answered on similar lines and commented, "Some of the rights and privileges authorised to you by the Constitution are not authorised to me [armed forces]…I [armed forces] do not have the power to form the union; you have."[66] Essentially, therefore, some fundamental rights (due to a variety of considerations) are not conferred upon the Army; meaning thereby, in context of the points raised insofar, the policy decision to allow women in combat (or not) must endure the scrutiny of said Article—and the essential question here is whether the iron-hand of Article 33 leaves any scope for the application of progressive constitutional jurisprudence or not? *In other words, can Article 33 stop women from engaging in combat?* The article answers this question in the negative.

Article 33: Why in Place to begin with?

The powers conferred to the Union Government and the restrictions imposed under Article 33 were put in place by constitutional framers to ensure the fulfilment of discipline in the armed forces[67], as the armed forces, dealing in the matters of national security, not only routinely partake in perilous missions, but also live in treacherous conditions; therefore, discipline amongst them facilitates their existence, prevents mutiny, ensures survival; but most significantly, it guarantees the continued existence of us, the citizens of this nations, because if it were not for their continued existence on borders and the frontlines, we, as a nation, could have never been able to enjoy our fundamental rights.[68] In this respect, it is popularly said that the military doesn't work on the principles of justice and liberalism[69], and working along these lines when policy

[63] *Union of India v P K Chaudhary*, 9 Civil Appeal No 3208 of 2015; *Lt. Col. Prithi Pal Singh Bedi v Union of India*, (1982) 3 SCC 140; *Mohammed Zubair v Union of India*, (2017) 2 SCC 115.
[64] *Union of India v LD Balam Singh* (2002) 9 SCC 73.
[65] *Achudan v Union of India* (1976) 1 SCWR 80.
[66] Hindustan Times, 'YouTube, 'No gay sex in Army', says Army Chief Bipin Rawat', (January 10 2019) <https://www.youtube.com/watch?v=jTbN9kQsZDw> accessed 26 September 2021.
[67] *R Viswan v Union of India* (1983) 3 SCC 401.
[68] *Lt. Col. Prithi Pal Bedi v Union of India* 1982 AIR 1413.
[69] Pradeep Gupta & Akansha Sharma, 'Representation of Women in Indian Armed Forces' (2021) 647 Academia Letters. 4, 1-6.

framers argue that women serving in combat roles may become a national security matter, the contention forwarded, at least *prima facie*, seems cogent and applicable, as looking through the lens of national security, any contention in favour of national security, which may derogate the existence of our Nation, should be struck down with an iron-hand. But for this submission, it is to be noted that when such submission is largely based on conjecture and surmises, discrimination and prejudice, has no merit and lives meagrely to continue a long-standing tradition, the abjuration of rights in any manner becomes (and not to stretch my assertion here) a national security matter itself.

Article 33: The Scope of Restrictions

The constitution-makers, taking a liberal stand and in all their wisdom, attempted at every twist and turn to draft a constitution that delivered fundamental rights without unnecessary abrogation, or at least minimum abrogation. Article 33, this paper argues, is a testament to that contention. Therefore, when drafting Article 33, they were obviously anxious that no more restrictions—or rather, no additional than those necessarily required for suitable functioning—should be placed on the fundamental rights of the members of the Armed Forces.[70] For this reason, it has been held by the SC, time and again, that the power conferred in the Union Government to apply restrictions under Article 33 could not be done through a rigid statutory formula[71], meaning thereby, the restrictions in question must only be "necessary" to the extent for allowing the Armed Forces to fulfil their goals[72], and to that effect, no unnecessary restrictions should be placed on the fundamental rights of the Armed Forces.

Upon a *prima facie* analysis of the arguments raised in this Article insofar, and against the background of arguments put forth by the Union Government in context of Article 33, what comes to fore is that the policy of exclusion is hackneyed and arbitrary. The entirety of policy, it seems, resides on the explicit and irrational understanding that since women soldiers are unable to endure the ordeals of combat, the classification (to only allow men) is, therefore, cogent. To this contention, although

[70] *R Viswan v Union of India* (1983) 3 SCC 401.
[71] ibid.
[72] Gautam Bhatia, 'Gender Equality in the Armed Forces' (Indian Constitutional Law and Philosophy, March. 20, 2020), <https://indconlawphil.wordpress.com/2020/03/20/gender-equality-in-the-armed-forces/> accessed 22 September 2021.

in a slightly different context, it would be pertinent for us to note that the constitution-makers gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders.[73]

Further, a plain reading of Article 33, coupled with the intent of constitution-makers, goes on to show that the objective purpose of Article 33 was never to exclude women (or other minorities, for that matter) from being given a fair and equal opportunity to serve; but rather, they left an imperceptible (yet powerful) apogee, beyond which abrogation of fundamental rights must be, in all relevant considerations, be deemed void. This, the paper argues, affirms the presence of a doctrine that Article 33 could not act as a concrete pillar of legal application and it has to, in the grandeur constitutional scheme—and especially in the context of our study where considerations for exclusions appear to be irrational—necessarily concede to fulfilment of fundamental rights, because on the contrary, it would violate Articles 14, 15(1), 16, and 21 of the Constitution, and in effect, would take a violent departure from the basic tenets of the Constitution.[74]

Treading on these lines allow me to also point out that the extent of restrictions imposed under Article 33 would necessarily depend upon the prevailing situations at a given point in time.[75] Speaking in these confines and looking at the military leadership, we would witness a desperate and urgent need of army officers in the Army.[76] Filling these vacancies with male officers (who are trained in combat), I assert, would not afford any advantage to the Army, and therefore, the search prospects have to be widened to take into account the female gender—or dare I proffer, the transgenders as well, because a professional army has to optimally utilise its material and human resources for effective operational preparedness.[77]

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[73] *National Legal Services Authority v Union of India* (2014) 5 SCC 438; *Anuj Garg v Hotel Assn. of India* (2008) 3 SCC 1.
[74] *Union of India v LD Balam Singh* (2002) 9 SCC 73; *Joseph Shine v Union of India* (2019) 3 SCC 39; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[75] *R Viswan v Union of India* (1983) 3 SCC 401.
[76] Rajat Pandit, 'Armed Forces continue to grapple with shortage of officers' (The Times of India, 26 June, 2021) <https://timesofindia.indiatimes.com/india/armed-forces-continue-to-grapple-with-shortage-of-officers/articleshow/84761297.cms> accessed 23 September 2021.
[77] Bakshi (n 8) 9; Sara Dissanayake, 'Women in the Tamil Tigers: Path to Liberation or Pawn in a Game?' (2017) 9(8) CTTA 1, 4.

Article 14 of the Indian Constitution

"*A gender line … helps to keep women not on a pedestal, but in a cage.*"
— Ruth Bader Ginsburg

There cannot be discrimination solely on the grounds of gender.[78] This observation made by the Honourable Supreme Court of India in *Charu Khurana v Union of India*, even though not an objective rule of Law, still provides for the necessary basis for our discussion. Since we have already established that Article 33 cannot have an iron-hand application in the process of restriction of fundamental rights, it would, therefore, mean that the application of such doctrine would pave the way for the application of, *inter alia*, Article 14 of our Constitution.

The SC in *C. Masilamani Mudaliar v Idol of Sri Swaminathaswami Swaminathaswami Thirukoil*[79] held that, "All forms of discrimination on the grounds of gender is violative of fundamental freedoms and human rights. For its meaningfulness and purpose, every woman is entitled to the elimination of obstacles and discrimination based on gender for human development." Further, champion of human rights, Justice Ruth Bader Ginsburg in the *United States v Virginia,*[80] observed: "Physical differences between men and women, however, are enduring. 'Inherent differences' between men and women, we have come to appreciate, remain a cause for celebration, but not for the denigration of the members of either sex or for artificial constraints on an individual's opportunity."

Although Article 14 is couched in absolute language, it is now settled that the protective discrimination or doctrine of classification is inherent in it[81], and the State can make reasonable (not arbitrary) classifications found on an *intelligible differentia* (difference capable of being understood) having a rational relation to the object sought to be achieved.[82] So, therefore, the rule of Law, as given under Article 14, does not prevent certain classes of persons from being subject to special rules[83], but such

[78] *Charu Khurana v Union of India* (2015) 1 SCC 192.
[79] *C. Masilamani Mudaliar v Idol of Sri Swaminathaswami Swaminathaswami Thirukoil* (1996) 8 SCC 525.
[80] *United States v Virginia* 518 US 515, 532-33 (1996).
[81] SM Mehta, *A Commentary on Indian Constitutional Law* (Deep & Deep, 1990) 60.
[82] *V.J. Ferreira v Bombay Municipality* AIR 1972 SC 845; *G.K. Krishnan v State of Tamil Nadu* AIR 1975 SC 853; *State of Karnataka v D.P. Sharma* AIR 1975 SC 594.
[83] J.N. Pandey, *Constitutional Law* (58th edn, Central Law Agency 2020).

subjection has to have merit and should not be based on arbitrary and manifestly absurd ideas. To build on this further, I will take assistance from *In Re Special Courts Bill, 1978,*[84] where the SC had the opportunity to deal with the scope of Article 14 and thirteen propositions, derived from various judgements, were set out.

In its fourth proposition, the SC noted that the principle underlying Article 14 is not that the same rule of Law should be applicable to all persons…[but] it only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.[85] Classification would thus mean segregation of classes that have a systematic relation usually found in common properties and characteristics.[86] But, and notwithstanding the power conferred in the executive, such classification should only be rational and not arbitrary, artificial, evasive, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the person groups together and not in others who are left out, but those qualities or characteristics must have a reasonable relation to the subject of the legislation.[87]

Since Article 14 necessitates the classification to have a reasonable relation to the subject of the legislation, and since the subject of every armed forces legislation is to ensure national security, the conclusion derived here is that putting women in combat roles could become a national security concern since—and to reiterate again—women cannot fight, owing to their gender and societally inflicted virtues; and therefore, cannot be taken into combat. It is said that classification is only justified when it is not palpably arbitrary[88], and I find this reasoning of exclusion (which is rooted in their reason) not only arbitrary but also incongruous, as it solely rests on the principle of discrimination on the basis of gender. In furtherance to this point, it is to be seen that the SC, speaking in terms of discriminatory acts, has made it abundantly clear that any ground of discrimination founded on a stereotypical understanding of the role of the sex will not survive constitutional scrutiny prohibited under Article 15(1) if certain characteristics grounded in stereotypes are to be associated with entire

[84] *In Re Special Courts Bill, 1978* 1978 AIR 1979 SC 478.
[85] ibid.
[86] ibid.
[87] ibid.
[88] ibid.

classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate.[89]

Further still, the court has also observed that equal laws shall have to be applied to all in the same situation, and there should be no discrimination between one person and another if regards the subject matter of the legislation their position is substantially the same.[90] Overlooking for a brief second the norms of gender discrimination, we witness how men and women in the armed forces are precisely the same and work as a common unit. They have the same training periods, the same pay grade, both have a permanent commission, both operate in perilous circumstances, and both are inducted into the armed forces through the NDA. The difference, therefore—except that of gender and attributes attached therewith—appears to be missing. To summate on this point, the Honourable Supreme Court of India has observed that when a law is not held unconstitutional earlier—or in our case, not challenged yet—it can be held so, having regard to later developments in societal norms and values, including gender equality.[91] The Law, therefore, needs re-assessment.

Final and Conclusive Considerations: DPSP's and Fundamental Duties

The promise of India as a democracy is based, as enshrined in our preamble, on the components of, *inter alia*, equality of status and opportunity[92], but under the shadow of scrutiny conducted insofar, it appears that said idea (or guarantee, rather) appears to be missing, as the prejudiced exclusion policy goes beyond the tenets of our preamble, thereby raising serious questions on the guarantee of fundamental rights and contentious state policies.

The sagacity of the Honourable Supreme Court of India is to be admired here since they have held that no law in its ultimate effect should end up perpetuating the oppression of women because personal freedom is a fundamental tenet that cannot be compromised in the name of expediency until and unless there is a compelling state

[89] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; *Andrews v Law Society of British Columbia* 1989 SCC OnLine Can SC 8.
[90] ibid.
[91] *Joseph Shine v Union of India* (2019) 3 SCC 39.
[92] The Constitution of India 1950, preamble.

purpose.[93] In this respect, the State's purpose, in the context of questions associated with the armed forces, is to continually and dedicatedly ensure the national security of our Nation, which results in the immediate and continuous existence of Indian sovereignty at the global stage. But to reiterate again, while the State's *purpose* behind such exclusion is, in fact, not wrong (at least when looked at from the national security perspective), but the reasoning leading up to such purpose (and the policies made thereunder) to secure the stated purpose is, in view of the sociological arguments proffered, lacks the convincing certitude; and therefore, in need of immediate re-assessment—and the starting point for same could be found within the DPSP's and Fundamental duties as enshrined in our Constitution, which, parenthetically, are held as two wheels of the chariot in establishing the egalitarian social order.[94]

Directive Principle of State Policy

It may be seen, yet again that the promise of India, in furtherance of our preamble, is based on a functioning modern democratic society that ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis—and while, in the course of this Article, and in respect of the exclusion policy, we may appear to have lost track of these tenets, we may still find our way back based on certain guiding principles—beginning with DPSP's.

While DPSPs are not enforceable in nature, they still throw the guiding light for courts to interpret our fundamental rights in light of them.[95] Consequently, the combat exclusion policy ought to be read (and carefully interpreted) in close consonance with the fact that DPSP's calls for the union government to minimise inequalities[96] and provide for adequate means of livelihood to men and women equally.[97] Further, Dr. B.R. Ambedkar, on the floor of the Constituent Assembly, has emphasised that the State, instead of paying a mere lip-service to the DPSP's, should make them the bastion of all executive and legislative action as when decisions are taken that are on the conformity of them, they constitute the conscience of the Constitution.[98] Therefore,

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[93] *Anuj Garg v Hotel Assn. of India* (2008) 3 SCC 1.
[94] *Ramlila Maidan Incident, In re* (2012) 2 SCC (Civ) 820; *Ashoka Smokeless Coal India (P) Ltd. v Union of India* (2007) 2 SCC 640.
[95] *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1: 4 SCEC 453; *Pramati Educational and Cultural Trust v Union of India*, (2014) 8 SCC 1.
[96] The Constitution of India 1950, art 38 (2).
[97] The Constitution of India 1950, art 39 (a).
[98] *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125. 147.

the re-assessment of the exclusion policy ought to be seen and interpreted alongside DPSP's—and the fundamental duties of citizens.

Fundamental Duties

Fundamental duties enshrined in our constitution call for every citizen to have a duty to, *inter alia*, uphold and protect the sovereignty, unity, and integrity of India[99], to defend the country and render national service when called upon,[100] and most importantly, for individuals to strive towards excellence, so the Nation rises to higher levels of endeavour and achievement.[101]

The fundamental duties enshrined under sub-clauses (c) & (d) of Article 51-A calls for citizens to protect and defend our Nation in times of crisis. The constitution drafters, again in their wisdom, forethought and egalitarian outlook, did not seek to make the aforesaid call of duty for the Nation, primarily that for men. Women soldiers—and for that matter, broadly speaking, women in the times of crisis—speaking within the confines of Article 51A, have an equal and vital responsibility in the protection of our Nation—and the combat exclusion policy has to be read (and examined) in that regard because the duty of a citizen has been extended to the collective duty of the State; meaning thereby, it becomes the duty of the State to provide for opportunities and not to curtail the opportunities.[102]

CONCLUDING REMARKS

"It is good to be a beginner, but it is a good of a different sort to be an equal among equals."[103]

Heather points out that restrictions (on the inclusion of women in military roles) are imposed by policy, and the policy is unreasonably restrictive.[104] A prompt reliving of the arguments perused in the course of this Article would dictate so to be the case.

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[99] The Constitution of India 1950, art 51A (c).
[100] The Constitution of India 1950, art 51A (d).
[101] The Constitution of India 1950, art 51A (j).
[102] *Charu Khurana v Union of India* (2015) 1 SCC 192.
[103] Jordan Peterson, *Beyond Order* (Penguin Random House UK, 2021) 21.
[104] Heather Wilson, 'Women in Combat' (1993) 32 The National Interest 75.

At this juncture, and before putting forth the final submissions, it would be pertinent for us to note that while this Article recognised, and in effect, called for a sincere re-assessment of combat exclusion policy against women, it also readily admits that the re-evaluation of policy (and its subsequent implementation) could only be realised gradually and not abruptly. This is drawn from the growing turn of events, as ever since February 9, 2012, responding to growing scrutiny, the United States Department of Defence has begun to remove restrictions on women's roles[105] and the idea of inclusion of women into expanded military roles—both nationally and internationally—is moving forward slowly, yet steadily; in fact, the Honourable Supreme Court of India, coincidentally, and with the same thought in mind, while instructing the Centre to address the issue of inducting girls in military schools, has called for small beginnings.[106]

However, notwithstanding the gradual process of change, it is to be seen and reiterated that the power to abrogate fundamental rights is exercisable by parliament alone[107], but where the State, and in this case the Army as an instrumentality of the State, differentiates between women and men, the burden falls squarely on the Army to justify such differentiation with reason[108], and in view of the analysis conducted through the course of this essay, the reason for differentiation is not very well-founded.

Furthermore, in this battle for equal roles, the judiciary has made a sincere, positive and conscious attempt to ensure the fulfilment of rights in the armed forces, but the judiciary alone would be a lone stakeholder in reform, as Justice Kaul, while hearing on the NDA matter reflected, "You must begin with some tokenism. Don't compel judicial intervention all the time!"[109] It is, therefore, clear that reform—especially in the context of combat exclusion policy—could not solely be a product of

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[105] Megan H. MacKenzie, 'Let Women Fight: Ending the U.S. Military's Female Combat Ban' (2012) 91(6) Foreign Affairs 32.
[106] Sristhi Ojha, ''Let's Make a Small Beginning': Supreme Court Directs Centre to Address the Issue of Inducting Girls in Military Schools' (Live Law, 22 September 2021) <https://www.livelaw.in/top-stories/supreme-court-directs-centre-to-address-the-issue-of-inducting-girls-in-military-schools-182199> accessed 27 September 2021.
[107] *Dalbir Singh v State of Punjab* AIR 1962 SC 1106.
[108] *The Secretary, Ministry of Defence v Babita Puniya* (2011) SCC OnLine SC 87.
[109] Mehal Jain, 'Why Is Co-Education A Problem?': Supreme Court Frowns On Army's Policy To Bar Women From NDA [Full Court Room Exchange], Live Law (Live Law, 18 Aug, 2021) <https://www.livelaw.in/top-stories/supreme-court-women-nda-exams-army-policy-gender-discriminatory-179804?infinitescroll=1https://www.livelaw.in/top-stories/supreme-court-women-nda-exams-army-policy-gender-discriminatory-179804?infinitescroll=1> accessed 25 September 2021.

judicial intervention; instead, it has to come from within the armed forces. This could only be accomplished when we remedy the societal outlook of women in combat; and thereafter, acknowledge the fact that when women are put in non-combat roles—which are deemed safe, as compared to combat roles—it reinforces the gender division,[110] and until we acknowledge and adapt to these outlooks, the future of women in combat would appear bleak at best.

Further still, the intrinsic idea here is that even though the judiciary does not ordinarily interfere with the decisions of the central government, it nevertheless expects the government (and to that extent the armed forces) to show initiative on its own on behalf[111], as at the end of the day, women have served the organisation for almost twenty-five years, and the battle is not that of combat, but that against mind-sets.[112]

To conclude finally, although the literature is replete with incredibly thought-provoking quotes and phrases on equality for women, one by Swami Vivekanand caught my attention and fits perfectly in view of our constitutional jurisprudence revolving around fundamental rights, fundamental duties, and DPSP's: 'Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind.'

[110] Prem Chowdry, 'Women in the Army' (2010) 45 EPW 18, 18-19.
[111] ibid.
[112] *The Secretary, Ministry of Defence v Babita Puniya* (2011) SCC OnLine SC 87.

THE CONUNDRUM OF INHERITANCE RIGHTS AND WOMEN EMPOWERMENT IN INDIA: A SOCIO-LEGAL PERSPECTIVE

Dr. Diptimoni Boruah[1]

ABSTRACT

Women today are actively involved in every sector and play a substantial role in decision making, policy formulation and they also undertake various other pertinent roles. Although women make up the highest number of agricultural labor force in India, very few women have rights of possession and ownership of property. They are frequently denied right to inherit property. Property ownership of women is crucial for their economic independence and empowerment. Since Indian society is based mostly on customs, legal rights need to be accompanied with the customary rights. Social inequality and restrictions place women in vulnerable situation which further compel them to face violence. The condition is much exacerbated due to economic dependency and patriarchal nature of Indian society, which has placed women in a subordinate position to that of men. Though property ownership of women is crucial for their development, in many parts of the country religious practices and social norms and customs have consistently denied women enjoyment of equal property rights with men. Though legislations have been adopted to share equal property rights by both men and women, they have failed at the grass root level. Current situation of India warrants some extra efforts to bring down inequality, violence against women, and to assure equal property rights of women in India.

Keywords: *Right to property and Inheritance, International perspective, Indian scenario*

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INTERNATIONAL RECOGNITION OF WOMEN'S LAND AND PROPERTY RIGHTS

Though women's land and property rights are crucial for their development, reality is that in many parts of the world these rights are not equally available to men and women. On the contrary such rights of women are consistently denied, violated, and remain unenforced.[2] Worldwide women are holding less than twenty percent of land ownership[3]. Even countries where laws are favorable to women's land ownership and inheritance rights, there are many other factors which pose hindrance to enjoyment of the property and inheritance rights of women. For instance, widows may lose their property in disputes with family members of their deceased spouse. Many factors including gender-based discrimination, discriminatory social norms, local customs, and general attitude of society and institutionalized practices greatly affect women's property ownership which has the effect of marginalization of women.

The Food and Agriculture Organization, has by recognizing this problem of inequality in land rights between men and women, stated that worldwide, "Gender inequalities in land rights are pervasive. Not only do women have lower access to land than men. They are often also restricted to so-called secondary land rights, meaning that they hold these rights through male family members. Women thus risk losing entitlements in case of divorce, widowhood or their husband's migration. Evidence also shows that women's land parcels are generally of smaller size and lower quality than men."[4]

Direct access to land minimizes women's risk of impoverishment and improves her economic, mental and physical well-being and the future prospects for her children. If we observe the global status of women today in terms of land rights,

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[2] Mayra Gomez and D. Hien Tran, 'Women's Land and Property Rights and the Post 2015 Development Agenda' *(*ESCR-NET Lindesay Centre for Women's Land Rights, October 2012) < https://www.escr-net.org/resources/womens-land-and-property-rights-and-post-2015-development-agenda> accessed 17September 2021.

[3] Monique Villa, 'Women own less than 20% of the world's land. It's time to give them equal property rights' (World Economic Forum, January 2017) < https://www.weforum.org/agenda/2017/01/women-own-less-than-20-of-the-worlds-land-its-time-to-give-them-equal-property-rights/> accessed 17 September 2021.

[4] United Nations Food and Agriculture Organization, 'Gender and Land Rights: Understanding Complexities, Adjusting Policies. Economic and Social Perspectives Policy Brief'<https://www.fao.org/economic/es-policybriefs/briefs-detail/en/?no_cache=1&uid=40497 >accessed 17 September 2021.

they still are minority land owners and often suffer due to discriminatory customs, laws and institutional practices that strictly restrict their ability to gain and control property. Secure and equitable land rights of women is crucial for achievement of four sustainable development goals (SDGs), including ending poverty (Goal 1), ensuring food security (Goal 2), achieving gender equality and empowering women (Goal 5), and making cities and human settlements inclusive (Goal 11). Despite the potential development in the international arena, the Millennium Development Goals (MDG) framework did not directly address women's land and property rights.

In May 2012, the Committee on World Food Security released the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security. The guidelines were assimilation to show how the issue of gender inequality was a further impediment to measures against poverty, sustainable development and socio-economic growth of the nation. Even The United Nations Conference on Sustainable Development (Rio +20) held in june, 2012 was a reiteration on the preponderance of Women's right to land and property[5]. In the Rio +20 outcome document, "The World We Want," women's land and property rights were duly emphasized. [6]

In furtherance of the aforementioned international guidelines, women's rights have been accentuated through various international legal instruments, *inter alia*, the International Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights (Article 3); the Platform for Action adopted at the 1995 Fourth World Conference on Women; the United Nations Convention on the Rights of the Child (1989); United Nations Commission on Human Rights resolution 2002/49; the Convention on the Elimination of All Forms of Discrimination Against Women (Article 2); the Universal Declaration of Human Rights (article 2).

[5] United Nation General Assembly, 'United Nations Conference on Sustainable Development, (Rio+20)-The Future we want' (27 July, 2012), A/RES/66/288 <https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E> accessed 18 September 2021.
[6] ibid.

RIGHTS OF WOMEN TO INHERITANCE AND PROPERTY UNDER THE INDIAN LAWS

India is a melting pot of diverse religious groups and individuals. However, till today the country has failed in bringing all religious groups under a common set of regulation through enactment of a uniform civil code. Therefore, each religious groups is governed by the personal laws based on their respective religions, social customs and norms. As per the ancient Hindu laws, women could enjoy a lifelong interest in ancestral property only as a widow or as a daughter in a son-less family [7]Islamic law gives only partial recognition to women's inheritance rights to land where customary law prevents women from exercising their rights over agricultural land.[8] Although the Constitution of India equally bestows succession and inheritance rights to both men and women, women's access to land is largely through inheritance. Further, inheritance is governed by customs, which vary across regions and states.

The fundamental law governing succession rights of Hindus, Sikhs, Buddhists and Jains is one set of legislation - Hindu Succession Act, 1956. The Act was enacted to unify inheritance rights of Hindus and to reduce gender inequalities in the inheritance rights of men and women. It allowed sons and daughters to enjoy equal inheritance rights. However, the legislation failed to address significant gender inequalities in succession which placed women in a disadvantageous position as compared to men.

Under 1956 legislation both sons and daughters had equal rights of inheritance to the separate property that their father accumulated during his life time.[9] However the main source of discrimination arose from joint family property, where sons by birth were entitled to their respective share, while the daughters weren't. However, considerable amounts of property, particularly in rural areas, are jointly owned, and the position of women has still remained adversely affected.

[7] Riju Mehta, 'Inheritance rights of women: How to protect them and how succession laws vary' *The Economic Times* (Jul 29, 2019, 08:30) <https://economictimes.indiatimes.com/wealth/plan/inheritance-rights-of-women-how-to-protect-them-and-how-succession-lawsvary/articleshow/70407336.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 18 September 2021.

[8] B. Agarwal, 'Social Security and Family', (Workshop on Social Security in Developing Countries, London: London School of Economics, 2013).

[9] Hindu Succession Act, 1956, s 6.

Hindu male coparcener consists of male members of Class I, II and III heirs, who by virtue of birth are entitled to a share of joint family property. Daughters were excluded from coparcenary and they were deprived off the joint family property as well.

Besides, a father could declare his separate property as part of joint family property, which would further bar the daughter's inheritance.[10] Where a male coparcener renounces his right on the coparcener property, it does not affect the son's right to property, but daughters and Class I heirs remain outside of that share of the property. Therefore, these inequalities created by the Hindu Succession Act, 1956 were further alleviated by the amending act of 2005. The Hindu Succession (Amendment) Act, 2005 expanded the space for women's land rights and changed the inheritance rights of women, especially unmarried daughters. The Act was amended to reduce various sources of inheritance inequalities between son and daughter. Section 6 of Hindu Succession Act was amended, allowing daughters of a male dying intestate, to get equal rights with sons and further abolishing the restriction pertaining to inheritance owing to their marital status.

States legislatures, under the Indian Constitution, were empowered and allowed to make amendments to the Hindu Succession Act. Kerala was the first state to amend the Act in 1976, following Andhra Pradesh in 1986, Tamil Nadu in 1989 and Maharashtra and Karnataka simultaneously in 1994. These states have given daughters a birth-right in the coparcenary and abolished the prevailing inequalities in ancestral property division. However, under these laws daughters were granted an individual share in the joint family property only if they were unmarried at the time of the amendments. This limitation was further removed by the Hindu Succession (Amendment) Act, 2005.

For decades Indian Muslim women have been fighting for their rights and gender equality in the Islamic law. Due to absence of codified Muslim personal law, there is no clarity of Muslim women's rights. The uncertainty rests on the various

[10] Riju Mehta, 'Daughter's Claim to father's Property: When she can and When she Can't' *The Economic Times (*May 14, 2019, 18:38) <https://economictimes.indiatimes.com/wealth/plan/daughters-claim-to-fathers-property-when-she-can-and-when-shecant/articleshow/69278419.cms?from=mdr> accessed 18 September 2021.

interpretations of Quran, which placed Muslim women at a much disadvantageous position. Till 1937 Muslims in India were governed by their customary laws that further worsened the situation. Post the enactment of the Shariat Act of 1937, the personal, property, succession rights of the Muslims in India was governed uniformly.

The Islamic scheme of inheritance demonstrates three features: (i) the Koran gives specific shares to certain individuals (ii) the residue goes to the agnatic heirs and failing them to uterine heirs and (iii) bequests are limited to one-third of the estate, i.e., maximum one-third share in the property can be willed away by the owner. The main principles of Muslim inheritance law which have significant bearing on the property rights of women, are: (i) the husband or wife was made an heir (ii) females and cognates were made competent to inherit (iii) parents and ascendants were given the right to inherit even when there were male descendants and (iv) as a general rule, a female was given one half the share of a male.[11]

However, where a female is equal to the male heir in relation to the deceased, the Islamic law gives her half the share of a male. For instance, if a daughter co-exists with the son, or a sister with a brother, the female gets one share and the male enjoys two shares. Inequality persists in Islamic law in terms of inheritance and succession. Most Muslim women don't know or want to claim their property. This results in them remaining as an economically and socially most depressed section in the society. In the absence of specific codified Muslim laws on property, in most disputes relating to the Muslim women's rights of property and ownership of land, it is the court which decides and fixes Muslim women's land and property rights.[12] However, '*mehr*' being an important concept of Islamic law which is directly related to Muslim women's property, gives them the right in case of dissolution of marriage to have absolute right over *mehr* property.

Christianity is the third largest religion in India and the property right of Christians in India is governed by the Indian Succession Act, 1925. This pre-independence law dealing with property succession of Christians gave preferential

[11] Aqil Ahmed, *Mohammedan Law* (Prof. I.A. Khan, 25th ed., Central Law Agency 2013) (1992) 96.
[12] *Mohd. Ahmad Khan v Shah Bano Begum* AIR 1985 SC 945; *BaiTahira v Ali Hussein* AIR 1979 SC 362.

treatment to men. It was unfair and unjust to a Christian woman when men were given superior status in access to and in owning property. The Law Commission of India Report 247 recommended amending the Act so that both the parents get equal share in the deceased son's property.[13] Irrespective of mode of acquisition a person's property is treated as self-acquired property and no one can claim it during his life time. Even a widow cannot succeed the property left intestate if a valid contract is made before her marriage that prohibits her from succeeding to a share in her husband's property.[14] Otherwise, property of the deceased devolves upon the wife and upon the family members i.e. one-half of his property shall go to the widow and two-third to be distributed among his legal heirs. In absence of children and grandchildren of the deceased and the widow who survives him, one-half of his property and another half of his property are owned by his kindred. Where no kindred, children and grandchildren are there, the entire property will be owned by the widow.

The fifth and the sixth schedule of the Indian Constitution states that, the Scheduled areas have different customary tribal laws which deal with the rights to administer the property and regulate inheritance and succession for women in the said property. The underlying issue being that there is no uniformity in these laws as there are numerous indigenous tribal communities, and every single community has different customary laws, which put the women of these communities on a lower pedestal compared to that of men.

LAND OWNERSHIP AND WOMEN EMPOWERMENT

It is needless to say that Property rights play an important role in facilitating women's economic independence which further helps in their complete empowerment. The capability to exercise property rights ensures women's economic independence and enhances their participation in various affairs of life, which ultimately results in women's empowerment. Women's status in the society can be improved only if they undertake socially visible economic activities. Land is more important than any other assets because land is a permanent source of income.

[13] Krishnadas Rajagopal, 'Property Law Unfair to Christian Women: Report', *The Hindu* (New Delhi, September 15, 2014) <https://www.thehindu.com/news/national/property-law-unfair-to-christian-women-report/article6410350.ece >accessed 19 September 2021.
[14] ibid.

Larger amount of land ownership will have the effect of enhancing the income which will translate in to their capacity to spend on food, education, healthcare, housing, etc. This shall further result in lesser risk of poverty in the family. Women with sound economic standing have a say in internal affairs of the household and also acquire substantial position in the society. Economic independence also reduces anti-women biases and promotes equality.

Women's land rights are important as a source of direct access to income. Although the importance of other employment opportunities cannot be denied, the land being a permanently tangible asset is considered as a stable security against risk of poverty, desertion, divorce and widowhood. To achieve the constitutional mandate of gender equality, it is necessary to attain social justice. Equality can only be achieved when women will reach certain a position from where they can challenge the existing power relations which place them in inferior position to that of men. In order to attain equality of sexes economic independence is crucial. Granting land ownership to women is necessary and urgent to attain economic security which results in greater respect and consideration inside and outside the house. Though land ownership is not enough for effective participation in the decision making process in the society, it may facilitate participation. Hence land ownership is a key pre-requisite for women empowerment.

CONCLUSION

In India, for centuries men have been the title holders of land. A very small fraction of women own and control property including land. Due to gender restriction and lack of financial capacity to invest in land, only a handful of women have the ability to effectively exercise these rights. Property rights have a significant role to play in women's empowerment. Yet the reality is that millions of poor women, particularly of scheduled castes and tribes may never get any land rights.[15]

[15] Bina Agarwal, 'Gender and Land Rights Revisited: Exploring new prospects via the State, Family and the Market' (2003) , 3 Journal of Agrarian Change, 184 < https://www.escr-net.org/sites/default/files/Gender_and_Land_Rights_Revisited_0.pdf> accessed 20 September 2021.

Even though the Hindu Succession Act has been amended time and again, giving sons and daughters equal rights to inherit family's land and property, and was also heralded as an important step forward for establishing gender equality in India, Indian traditions dictate that sons inherit the family property. In order to ask for her share, women have to go through many hardships and even face rejection and disappointment in the hands of the male members of their family. The root cause of this is the patriarchal mindset. Sadly half of the Indian population of men still considers it wrong for women to inherit their rightful share in their parents' land. The inbuilt stigma of immorality in women further stops them from seeking what is rightfully theirs. Today Indian women are fighting for their rights in marital and ancestral property, which is uniformly denied to them across all religious boundaries.

In order to face and overcome these stigmas and challenges women primarily need to know their rights. More importantly, they not only should know but also know how to exercise those rights. Families, communities and authorities must be supportive of such women so that they can exercise their rights without necessity of estranging their family members. There are many approaches that can be adopted to address such challenges including legal aid programs, improved training for local government officials etc., so that they can help the girls and women from the economically and socially backward communities in understanding their fundamental and basic rights. When women know and understand their rights they can raise their voice against injustice and break the cycle of extreme impoverishment and empower themselves.

TAXATION OF WORKS CONTRACT: A PERSISTENT CONUNDRUM

Shivam Tripathi[1]

ABSTRACT

To simply put, a works contract, is a contract of service which often involves an element of supplying goods towards effectuating the contract. Interestingly, in India, the scheme of allocation of taxes between centre and states has been such, that the tax levied upon the service component is attributed to the centre, while that levied upon supplying of goods is attributed to the respective state. Such allocation structure is precisely the reason why taxation of a works contract has been an issue of constant tussle between centre and states, throughout the history of independent India. Furthermore, even with the implementation of a comprehensive Good & Services Tax which was expected to put an end to the saga of interpretation of works contract, it now seems, that after four years since its implementation, the legislature might not have found the final piece to the puzzle just yet. The article therefore analyses how with the introduction of Goods and Services Tax, the entire system was turned upside down, with a view to resolve the issues existing under the previous regime. Although the present taxation regime is successful in solving several issues, there are certain loopholes which need to be taken care of. The paper thereby suggests that a probable solution to the current problems can be found in the approach adopted by the Supreme Court in few of its early judgements.

***Keywords**: Works Contract, GST, Contract of Service, Taxation Regime, Tax.*

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INTRODUCTION

The hundredth and One Constitutional Amendment, 2016[2] introduced a fresh indirect taxation regime in India and was termed, 'The Goods and Services Tax (GST)'. The introduction of GST made certain ground breaking changes to the entire indirect taxation structure of the country. Unlike its predecessors, GST is a destination based tax, wherein the incidence of tax is supply rather than manufacture. It is essentially this reason that a major chunk of issues have been resolved with the implementation of GST in India. However, as critiques often suggest 'perfection doesn't exist', GST too is no such exception to the rule, and that few areas under the present regime still tend to serve hardship to the assessee. One such component is the taxation of a works contract.

A works contract contains three elements namely, Goods, Labour and Services. Of these three elements the issue of taxability is concerned with goods and services under the contract. Under previous regimes works contract were subjected to both central and State Taxes, i.e. Service Tax and Value Added Tax (VAT). Resultantly, there was always a tussle between the Centre and States to have the bigger share of tax under their purview, ensuing in cases where the assessee had to pay a much higher value, than the actual value of the contract.[3] Another relevant issue was the application of dominant intention test on a case to case basis to determine the nature of contract, which ultimately led to inconsistencies while applying the provisions of law. However, after the implementation of GST, the entire position of law on indirect taxes has changed significantly.

Within the present taxation structure, a works contract is now classified as a composite supply of services, thereby eliminating the issue of dividing the contract into sale of goods vis-à-vis supply of services. Nonetheless, this classification under GST, has also arguably opened up a Pandora's Box when interpreting how a works contract is to be taxed. To mention one such instance at the very outset, the current regime classifies only contracts relating to immovable property as works contract which leads to certain unresolved issues. Firstly, CGST act does not define the word

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[2] The Constitution (Hundred and First Amendment) Act, 2016, No. 55 Acts of Parliament, 2016 (India)
[3] 'Works Contract under GST', (*S Khaitan & Associates*, 18th April, 2017). <http://www.cakhaitan.com/resource/Resources/image/Works_Contract_under_GST.pdf> accessed 25 March 2020.

immovable, secondly the definition of movable and immovable property in itself is very vague under certain cases.

Additionally, there have been serious concerns pointed out by writers across various forums, regarding the constitutional validity of a works contract when categorised as a supply of service which has been subsequently dealt with in detail through the course of present article.

Thus, to analyse the issue of taxability of a works contract with greater gravity, the paper is divided in three sections. While, the first section examines the structure of implementation of a works contracts under the GST regime. The second section further substantiates certain pertinent issues prevalent in the imposition of tax on a works contract under the GST regime. The concluding section finally lists out probable suggestions in order to plug existing loopholes. The overarching point that is being conveyed through the course of this submission, is that, there are certain issues under the present regime which require redressal. For instance the definition of a works contract adopted under GST, is restrictive, since it only construes immovable property to constitute a works contract. Furthermore, the law with regards to application of input tax credits for works contract are fairly ambiguous. The research, thus, is an attempt to present a comprehensive case on works contract and essentially highlight certain issues which require consideration by the legislature.

WORKS CONTRACT UNDER GST: THE BETTER & WORSE

The introduction of GST, has been a mixed bag of consequences for the taxability of works contract. Consistency, predictability and efficiency can be named as the key advantages, while restricted definition, and blocked input credits can be listed as disadvantages. In the pre-GST era works contract was considered a single indivisible contract, which would then be divided into its components by the legal fiction created under Article 366(29A)[4]. However such treatment lead to a number of confusions. On the other hand, under GST regime, the entire works contract is now considered to be composite supply of service.[5] Section 2(119), CGST Act defines a works contract.

[4] *State of Madras v Gannon Dunkerley & Co*., AIR 1958 SC 560
[5] Para 6 (a) of Schedule II to the CGST Act, 2017

Under the earlier regime, due to the legal fiction a single works contract was taxed under a combination of service tax and VAT, which resulted in having a cascading effect, thereby increasing the total cost of the contract. Whereas under GST, the rate of tax is now uniform and fixed eliminating the issue of cascading effect of taxes. However, while the introduction of GST has brought a sigh of relief for execution of works contract, there still remain a few grey areas unaddressed. For instance, the definition of works contract restricts the scope of works contract to immovable property only, therefore the place of supply of service will be the place where the immovable property is located, or intended to be located.[6] The question of place of supply of services in case where the contract is regarding construction of multiple buildings situated in different states therefore still remains unsettled.[7] Thus, it becomes imperative to unravel some of the major issues regarding taxation of works contract which have subsequently cropped up under the GST regime in order to further develop an interpretation/rule which is aimed at easing these constraints.

ISSUES UNDER WORKS CONTRACT IN THE GST REGIME

Interpretation Issues in Construction of Works Contract

Whether constitutional bifurcation of a works contract is made redundant post introduction of the Goods & Services Tax?

The transformation of works contract from a contract divided into its components to a single contract was intended to reduce the confusion created by the division of a works contract. However the transformation has now resulted in an irregularity with regards to the correct interpretation of the said contract. Initially, while GST was being implemented, a certain set of changes were introduced, however the constitutional provision creating the legal fiction[8], bifurcating a works contract into two contracts was left unchanged. This has now opened areas for debate, as to whether the legal fiction which was previously created under the constitution will supersede the provisions under CGST Act.[9] To simply put, the question which is yet to be answered and will possibly gain greater traction in years to come, is, whether the constitutional

[6] CGST Act, 2017 s. 12(3).
[7] Applicability of GST on Works Contract, [2020] 113 Taxmann.com 132 (Article).
[8] Article 366(29-A), Constitution of India.
[9] VS Datey, 'Works Contract is composite supply for rate of tax under GST' [2018] 91 taxmann.com accessed 2 November 2020.

provision bi-furcating a works contract is left redundant with the introduction of the Goods & Services Tax.

Whether GST rate should always be determined by treating works contract as a supply of service?

Before one delves deeper into this issue, what should be consistently borne in mind is that a works contract is firstly a composite supply which is treated as 'supply of service'.[10] Under GST regime, while taxing a composite supply[11], the rate of tax is dependent upon the principal supply, however for a works contract, which is also a composite supply, the supply is deemed as a supply of services under all circumstances. This in-turn leads to absurd conclusions in certain scenarios. For instance, if contract for installation and erection of an air cooling unit is classified as composite supply of service, than the tax rate applicable will be 18%, however if the contract is classified as composite supply of goods, the applicable tax rate will be 28%. Also, in cases where the works contract is for the installation and erection of agricultural or dairy machinery, the rate of tax applicable is 12%, however when classified as composite supply of service, the rate of tax will be 18%.

Furthermore, it also becomes pertinent to state that no specific reasons are made available by the legislature, as far defining works contract as a "deemed supply of service" is concerned.[12] More importantly, as has been rightly put forth by writers across various forums, that the existence of the term "composite supply" cannot simply be ignored, or in words of Justice K.D. Gupta: *"The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of statute should have effect."*[13] Additionally, reliance should also be placed upon the judgment of the apex court in case of Maruti Udyog v. Ram Lal[14] wherein it was observed that a deeming provision cannot be stretched to an extent that it leads to absurd conclusions.

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[10] Schedule II, para 6(a), CGST Act, 2017.
[11] CGST Act, 2017 s. 8(a)
[12] VS Datey, 'Works Contract is composite supply for rate of tax under GST' [2018] 91 taxmann.com accessed 2 November 2020.
[13] *J.K. Cottton Weaving and Spinning Company Ltd. v State of U.P.* (1961) 3 S.C.R. 185.
[14] *Maruti Udyog v Ram Lal* (2005) 2 SCC 638.

Thus, the overarching point that is being conveyed through the above argument is that a mere mechanical application of the provision classifying a works contract as a "deemed supply of service" under all circumstances would simply lead to absurd conclusions. Therefore, relying upon the law laid down by the apex court, any interpretation which leads to confusion, should be avoided[15] and that in cases of ambiguity in provisions of a statute the courts must adopt a purposive construction[16] and that which is beneficial to the assessee.[17] Resultantly, since treating every category of a works contract as a supply of service would lead to absurd conclusions, and would ultimately thwart the very objective of the legislature which was primarily to provide for a comprehensive indirect tax structure specifying different tax rate for different categories, therefore, arguably one of the better alternative here in such cases is to charge a works contract on the basis of the principle supply.

Works Contract as Immovable Property: An Emerging Battle

The second pertinent issue is the restricted definition of a works contract. The definition of a works contract under GST is limited to contracts relating to immovable property only. Whereas in pre-GST regime the definition of works contract included both movable and immovable property.[18] Therefore in pre-GST era, the question regarding the nature of the property, whether movable or immovable, was never relevant. However with the introduction of GST since the scope of a works contract was restricted to contain only an immovable property, there have been numerous instances, were inconsistency regarding what constitutes a movable or an immovable property has resulted irregularity. One of the primary reasons for such an inconsistency is the non-availability of the definition of an immovable property under the CGST Act itself.

To simply state, when limiting the definition of a works contract to contain only immovable property, it was also relevant to define the scope of immovable property, however the CGST Act didn't do so. Therefore, reliance now, has to be placed on other statutes and previous judgements for instance, the General Clauses Act, 1897[19] and

[15] *Rishab Chand Bhandari v National Engg*. [2009] 10 SCC 601.
[16] *State of Maharashtra v Swanstone Multiplex Cinema (P.) Ltd*. [2010] 3 taxmann.com 534 (SC).
[17] *CIT v Vegetable Products Limited* 88 ITR 192 (SC).
[18] Finance Act, 2012 s. 65b.
[19] General Clauses Act, 1897 s. 3(26).

Transfer of Property Act, 1882[20] which define immovable property, and definition under both these statutes lays down certain basic conditions for any property to be classified as an immovable property. Furthermore, extensive reliance is also placed by Authority for Advance Ruling on judgements laid down under the Customs Act, as judgements under the customs act have laid down various tests to determine the nature of the property.

Firstly, in *Triveni Engineering & Indus Ltd. v CCE*[21], which is one of the landmark judgements of the apex court on the issue, and is often employed by the Authority for Advance Ruling in GST regime when deciding what constitutes an immovable or an immovable property. The apex court here observed that for any property to be classified as immovable property two conditions must be fulfilled namely, the property must not be movable neither should it be marketable. Additionally, the Court held that the intention of the parties and the factum of annexation of the property to the earth shall also be considered while determining the nature of the property.[22] The court further applied the test of permanency[23] and held that, if the machine has to be dismantled and re-erected at a later place, it cannot be considered as a movable property as there is difference between a machine and its components.

Further in *T.T.G. Industries Ltd. v CCE, Raipur*[24] the court devised four elements to determine whether a property is immovable property or not namely, a) what is the degree of the permanency[25], b) the intention of the property should be to use the property as an immovable property[26], c) if the property is detached/removed from the earth it will cause substantial damage, d) if the property is removed identity of the property is lost.

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[20] Transfer of Property Act, 1882 s. 3.
[21] *Triveni Engineering & Indus Ltd. v CCE* (2000) 7 SCC 29 (Division bench).
[22] The judgement is arrived by relying on *Municipal Corporation of Greater Bombay v Indian Oil Corp.* 1991 Supp (2) SCC 18, *Quality Steel Tues Ltd. v CCE*, (1995) 2 SCC 372, *Mittal Engg. Works v CCE*, (1997) 1 SCC 2013 and *Sirpur Paper Mills v CCE,* (1998) 1 SCC 400.
[23] *Municipal Corporation of Greater Bombay and Others v Indian Oil Corporation*, 1991 Supp. (2) SCC 18.
[24] *T.T.G. Industries Ltd. v CCE, Raipur*, (2004) 4 SCC 751.
[25] *Municipal Corporation of Greater Bombay v Indian Oil Corp*., 1991 Supp (2) SCC 18.
[26] *Sirpur Paper Mills Ltd. v CCE*, 7 (1998) 1 SCC 400.

The above two judgements of the apex court often serve as guiding light towards determining what constitutes a movable or an immovable property. However, despite these definitions, the rulings of Authority for Advance Ruling (hereinafter referred as "AAR") which extensively rely on these judgments are at times inconsistent. Moreover every issue being decided on a case to case basis, also serves as an impediment to businesses/ individuals towards drafting their contractual agreements. The inconsistency in approach of AAR can be understood by way of its rulings for the solar industry, across various states throughout the territory of India. The common issue involved in these rulings was whether setting up of fully functional solar power generation system (hereinafter referred as "SPGS") would fall within the ambit of a works contract, or simply composite supply.[27] Interestingly, AARs across three different states have each given a different observation to this issue.

*Setting up of SPGS as a Works Contract***:** Maharashtra AAR in its rulings in *Dinesh Kumar Agarwal In re, and Fermi Solar Farms (P) ltd. In re* [28] has observed that a contract for setting up of Solar Power Generation Systems would qualify as works contract and would consequently be taxed at a rate of 18 percent. In *Fermi Solar Farms (P.) Ltd., In re* the AAR held that although solar water heating systems are taxed at 5% rate, but if they are being supplied with the services of erection and commission, the entire transaction would amount to works contract and would therefore be taxed at an 18% rate. Furthermore, similar ruling was also delivered by the AAR Rajasthan in *Tag Solar System, In re.*[29]

Setting up of SPGS as Composite Supply

The Uttarakhand AAR in its ruling in *Eapro Global Limited*, *In re* [30] ruled that entire contract for supply for various components falls within the contours of SPGS as a whole, and thus the entire supply for setting up of a Solar Power Generation System would fall within the ambit of composite supply and therefore goods would be taxable at a rate of 5 percent GST.

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[27] 'Supply of solar power generating system as a whole is a composite supply- AAR Uttarakhand' (*KPMG*, 28 September 2018) <http://www.in.kpmg.com/taxflashnews/KPMG-Flash-News-Eapro-Global-Limited-2.pdf> accessed 25 November, 2019.
[28] *Fermi Solar Farms (P.) Ltd.* In re [2018] 67 GST 599.
[29] *Tag Solar System*, In re, (2018) 97 taxmann.com 455 (AAR Raj.).
[30] *Eapro Global Limited*, In re, 2018 SCC OnLine AAR-GST 11.

Setting up of SPGS is not Composite Supply

The Karnataka AAAR however, in *Giriraj Renewables (P.) Ltd., In re*[31] where the question was whether construction of solar power plant would constitute works contract or composite supply. The AAR observed that in order to determine whether a contract is composite supply or not, the supply should be naturally bundled. In the present case, the AAAR thus accordingly ruled that as majority of the components towards construction of SPGS are supplied separately therefore they cannot be held as naturally bundled, and therefore entire contract cannot be taxed at 5%.

Similarly, inconsistent rulings were also observed in determination of the issue whether electrification and energisation of submersible pumps would constitute a works contract or not. While on one hand in *United Engineering Works, In re*[32], Karnataka AAR ruled that installation, electrification and energisation of submersible pumps doesn't constitutes a works contract. The AAR in para 10 and 12 of the ruling observed that since the applicants obligation related only to effective installation and functioning of the goods, which did not include any activity relating to building, construction, or fabrication etc. Therefore, it was accordingly concluded that as submersible pumps are not in the nature of immovable property they do not constitute a works contract.[33] However, a contrary ruling was given by AAR Rajasthan *in Kailash Chandra In re*[34], wherein one of the issues was whether commissioning and installation of solar energy based water pumping system qualifies as supply of goods or services. The AAR observed that installation and commissioning of solar energy based water pumping system is works contract of composite supply.[35]

Thus, it can be inferred from these instances, that there is no uniformity in the approach adopted by the AAR while drawing distinctions between what constitutes a movable or an immovable property. This in turn is certainly alarming for various businesses, especially the ones which have their clientele based in multiple states. However, there are two possible solutions which are suggested by way of this submission to rectify this issue:

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[31] *Giriraj Renewables (P.) Ltd.,* In re [2018] 97 taxmann.com 385 (AAR Mah.).
[32] *United Engineering Works*, In re [2019] 108 taxmann.com 104 (AAR - Karnataka).
[33] *United Engineering Works*, In re [2019] 108 taxmann.com 104 (AAR - Karnataka), [10.12].
[34] *Kailash Chandra* In re 2018 SCC OnLine Raj AAR-GST 19.
[35] *Kailash Chandra* In re 2018 SCC OnLine Raj AAR-GST 19, [12].

1. Firstly, the CGST act must be amended to include a comprehensive definition of the term immovable property, in order to eliminate the element of uncertainty.
2. Or, alternatively the definition of works contracts should not be restricted only to immovable property. Here, the previous definition of a works contract under the finance act[36] may be used a guiding principal.

Issues Regarding Availability of ITC Claims for Works Contract

GST has introduced the concept of input tax credit (ITC), the principle of ITC allows the manufacturer to claim credit for the tax already paid by him for the raw materials or any other inputs. ITC however, can only be claimed if the goods or services is intended in furtherance of business.[37]

Interestingly, under section 17(5) (c)[38] and section 17(5) (d)[39] works contract for construction[40] (except plants and machinery[41]) are barred from availing ITC benefits, unless such construction is in supply of works contract or in course of furtherance of business.[42] The provisions raises a series of doubts with regards to the availability of ITC for construction works contract, for instance what constitutes the term "On his own account", whether laying down of pipelines under a works contract, can be considered as plant or machinery, Whether "electrical and mechanical works" can be regarded as "in furtherance of business", whether construction of any civil structure to protect plant and machinery would be eligible for ITC[43], and whether construction using pre-fabricated material would be covered under the scope of

[36] Finance Act 1994 s. 65B.
[37] s 16.
[38] s 17(5)(c) reads as- "Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely: …(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service…"
[39] Section 17(5)(d) reads as- "Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely: …(d)goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business…."
[40] The term construction includes renovation, repairs, modification and re-construction, but only to the extent of capitalisation.
[41] CGST Act, 2017 s. 17(6).
[42] The act also provides with an explanation which provides what shall be included in "construction". It includes reconstruction, renovation, addition, or alteration or repairs.
[43] *Maruti Ispat and Energy (P) Ltd.* In re (2018) 99 taxmann.com 103 (AAR-AP).

ITC[44]?[45] The present submission is aimed at untangling some of these issues with regard to availment of ITC on works contracts. These have been discussed as follows:

Implications of the term "On his Own Account"

As discussed previously, section 17(5) (d) to the CGST enunciates that ITC cannot be availed against goods or services which are received by a taxable person towards construction of an immovable property "on his own account" even when they are used in furtherance of business. However, interestingly the Orissa High Court in case of *Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Service Tax*[46] (hereinafter referred as "Safari Retreats (P.) Ltd") seems to have departed from this principle. To simply begin with, the court in this case allowed ITC to be availed against inputs used for the construction of a shopping mall against GST payable on income received from rent by the tenants of the shopping mall. [47]

The court in this case held that the section 17(5) (d) was not applicable, as the petitioners were into the business of construction for rental purposes. The court held that if the provision is read in strict sense as suggested by the department it would adversely affect petitioners business, by increasing the cost of production.[48] Furthermore, the court also observed that if ITC claims are not allowed for buildings intended to be rented, it would only mean that they are treated in the same way buildings intended to be sold are treated. Such an interpretation would not only be against the basic tenets of a taxing statute, but would also be violative of Article 14[49] to the Constitution of India.[50] Here, the court while interpreting the meaning of the words "on his own account" under section 17(5)(d), held that as the petitioners carried out a business of letting out buildings, the same cannot be interpreted to mean on his own account. The court further added that, in the present case if the interpretation suggested by the department was favoured it would have led to a situation of double

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[44] *Tewari Warehousing (P) Ltd.* In re (2019) 72 GST 485 (AAR-WB).
[45] *Western Concessions (P) Ltd.* In re [2019] 106 taxmann.com 186 (AAR-Maharashtra).
[46] [2019] 105 taxmann.com 324 (Orissa).
[47] 'ITC on construction services available against tax payable on lease income from such constructed property- Orissa High Court' (*KPMG*, 21 May 2019) <http://www.in.kpmg.com/taxflashnews/KPMG-Flash-News-Safari-Retreats-Pvt-Ltd.pdf > accessed 27 July 2020.
[48] *Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Service Tax*, [2019] 105 taxmann.com 324 (Orissa) [19].
[49] Article 14, Constitution of India reads as- "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
[50] *E.P. Royappa v. State of T.N.* (1974) 4 SCC 3.

taxation. The court therefore concluded that ITC claims cannot be denied in the present case.

The judgement opens up new horizons for a number of people using immovable property to derive income.[51] It is also significant from the point of view of managements of hotels, offices, residential complexes, theatres which are getting/have got civil construction done and are using such civil structures. For instance, a similar situation could arise in respect of any rental industry wherein construction of building is complete and the building is then rented out to individual recipients for a specific period of time. In view of the current judgement ITC can be availed by such an industry in respect of raw materials used for construction of the civil structure. The judgment is indeed a step in the right the direction, however, it remains to be seen, if the apex court agrees with this view.

Safari retreats, however, doesn't seems to be the only case where there could be a possible departure to the principle of laid down in section 17(5)(d) in order to provide for an interpretation which is in favour of the assessee and in overall conformity with the very objective of the legislation i.e. preventing cascading effect of taxes. In one of the more recent petitions before the Delhi High Court of *Bamboo Hotel and Global Centre (Delhi) (P.) Ltd*.[52], where the assessee was denied input tax credit for the goods purchased in construction of an immovable property, under a works contract. The assessee has prayed before the court to declare section 17(5), CGST Act to be unconstitutional as it violates the principle of equality enshrined under article 14, Constitution of India. The High Court has issued notices to the all the respondents, and the issue remains unsettled. More importantly, one of the key takeaways from the above discussion is that the court in safari retreats case has acted as our sentinel by preserving the interests of businesses, since the decision was given by relying upon the intent of the law rather than a mechanical application of the provision contained thereunder.

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[51] 'ITC on construction services available against tax payable on lease income from such constructed property- Orissa High Court' (*KPMG*, 21 May 2019) <http://www.in.kpmg.com/taxflashnews/KPMG-Flash-News-Safari-Retreats-Pvt-Ltd.pdf > accessed 27 November 2019.
[52] *Bamboo Hotel and Global Centre (Delhi) (P.) Ltd. v Union of India* W.P.(C) 5457/2019.

Whether laying down of pipelines under a works contract, can be considered as plant or machinery?

The issue whether laying down of pipelines under a works contract, can be considered as plant or machinery within the meaning of section 17(5) (d) was brought before the AAR in *Western Concessions (P) Ltd. In re*[53] the question was whether laying down of pipelines can be classified as equipment or machinery, for the purpose of section 17(5) (c) and (d). It was held that, since in the instant case pipelines were being laid down outside the factory premises therefore the exclusion under section 17(5) (c) and (d) will be applicable and ITC could not be claimed. However, here it is also pertinent to mention here that the AAR did not carve out any rule regarding the availability of ITC for laying down pipelines within the factory premises and the issue thereby remains unanswered.

Whether "electrical and mechanical works" can be regarded as "in furtherance of business"?

To address this issue, in *Nipro India Corporation Private Limited., In re*[54] a novel approach was taken by the AAR. The Applicant in this reference was undertaking an extension of its manufacturing facility through works contract. He did not contest a claim to input tax credit on costs of civil works under the Extension Project but sought ITC in relation to certain costs which incurred for "mechanical works" and "electrical works" which he claimed fell within the ambit of "plant and machinery" and were, thus, eligible for ITC. ITC claims were allowed in the instant case on the grounds that the "mechanical and electrical work" were done in the course of furtherance of business. It was further held that "Mechanical Work" entails activities in the nature of Plumbing Works, Fire Protection Work, Air-Conditioning Works, etc, and "electrical works" entail activities in the nature of Sub-station Work, DG Set Work, and Lighting System Work. Therefore, ITC is available against costs incurred during electrical and mechanical works done on a plant or machinery, as they fall within the ambit of the term "in furtherance of business" enshrined under section 17(5) (d).

Additionally, there are some more issues faced by the works contracts. For instance, a building contractor who engages a sub-contractor towards completing a

[53] [2019] 106 taxmann.com 186 (AAR-Maharashtra).
[54] *Nipro India Corporation Private Limited.,* In re, [2018] 18 G.S.T.L. 289 (AAR-Maharashtra).

portion of the assigned work, and the sub-contractor subsequently charges GST in his invoice raised to the main contractor. ITC will be available to the main contractor, because the services rendered by the sub-contractor are in furtherance of his business. However, ITC will not be available to the company engaging main contractor, in case the company is for example an IT firm, as the same is not in course of business of the company. Furthermore, whether the below mentioned instances are to be considered as composite supply or works contract, still remains unclear:

- Plumbing activity- if upon completion, a plumbing activity becomes inseparable and cannot be severed from an immovable property.
- Installation of electric items- if after such installation these electric items have become inseparable from the immovable property.

Therefore, the overarching point that has been presented in this issue is that, one of the better alternatives to resolve doubts regarding the availability of ITC for works contract under GST, it that a detailed provision could be laid down by way of an amendment which provide for a clear distinction on the issues which are being raised time and again for instance, what constitutes the term “On his own account”, what qualifies as plant and machinery, and what activities are regarded to be in furtherance of business, since in absence of such a provision there remains certain uncertainty which would ultimately result inconsistent findings along different jurisdictions.

CONCLUSION

With the introduction of GST, taxing of works contract has been simplified to a great extent. Under the earlier regime, both centre and state were empowered to impose tax on works contract, thereby increasing the total cost of the project. The method adopted under GST, significantly helped in reducing the total cost of the project. There have been a series of studies concluding that under GST regime there has been a cost reduction of upto 6%.[55] Furthermore, the process of tax calculation in the pre-GST regime was very complex and cumbersome, because there were separate calculation for sales tax, i.e. VAT and service tax on different portions of the contract. Under the GST regime the process of calculation has now been simplified since there is single,

[55] Rajat Mohan, ‘How GST changed the face of Indian Tax system’ *Financial Express* (New Delhi, 25 March 2020) <https://www.financialexpress.com/economy/how-gst-changed-the-face-of-indian-tax-system-here-are-six-benefits-to-society/1909166/> accessed 2 April 2020.

composite calculation. However, after an analysis of GST regime for works contract, it can be safely concluded that certain new issues have arisen and an attempt has been made through this research to identify and discuss these issues at length.

Moreover, in order to solve these persistent issues under GST regime, one of the key takeaways is that firstly a works contract should be classified as a composite supply and not composite supply of services, and should thereby be taxed according to the principle supply. This will comprehensively ensure that the initial aim of legislature to dissolve multiple rate of taxes being applied to single transaction is achieved. Or alternatively, as suggested by writers across various forums, a works contract should again be bifurcated into supply of goods and supply of service specifying distinct taxation values for each, since such a bifurcation is arguably less litigation prone when compared to the present one.

PROTECTION OF CHILD FROM CYBERBULLYING: A COMPARATIVE LEGAL ANALYSIS

Chiradeep Basak[1]

"My pain may be the reason for somebody's laugh. But my laugh must never be the reason for somebody's pain."

- Sir Charlie Chaplin[2]

ABSTRACT

With the emergence of electronic modes of communication, we have derived immense benefits. However, at the same point in time, we have also encountered several anathemas. Cyberspace has its own pros and cons. This chapter entails a comparative legal evaluation of one such aspect; commonly known as 'cyberbullying'. The menace of cyberbullying has placed a prominent challenge in front of legal enforcers. Unlike the United States of America and several other nations, where they have a plethora of laws and policies; India is still widening its amplitude of cyber regulations to combat crimes in cyberspace. An interjection of laws relating to the rights of children and cyberspace has been the need of the hour. This short piece is an academic endeavour to explore the comparative legal schematics of the same.

Keywords: Cyberbullying, Rights of the Child, Information Technology Act, Austrian Penal Code, Harmful Digital Communications Act of New Zealand

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[2] Sir Charles Spencer "Charlie" Chaplin was an English comic actor, filmmaker, and composer.

INTRODUCTION

The evolving communication technologies of the modern era have not only given us an easy mechanism to connect but also brought upon us, certain perturbed issues. Nowadays children spend substantial time in ostensibly ubiquitous online social networks. This openness and connectivity have created a new virtual world in itself where they interact, communicate and share. Sometimes, such an online forum turns out to be a platform for bullying, ragging, threatening & even harassing peers. This form of the dreadful online act is commonly known as cyberbullying. Information Technology Act, 2000 does not specifically talk about cyberbullying. A sadist's brutal way of deriving ecstasy by distressing some stranded poor chap in high schools and colleges. Most of us turn quite nostalgic, thinking of our childhood days while many of us get goosebumps because of certain hard-hitting times we had in our childhood days. The problem of cyberbullying is not just in developed countries but also in several other countries worldwide. This analysis will also reflect upon a comparative legal analysis as regards cyberbullying laws.

THE DEFINITION

So, what is cyberbullying? What is the legal definition of cyberbullying and what amounts of cyberbullying? Is the terminology, universal or it varies across the globe?

These are some of the fundamental questions, which need legal scrutiny. According to Oxford Dictionary cyberbullying means: "The use of electronic communication to bully a person, typically by sending messages of an intimidating or threatening nature." This definition might not be enough to cover a wide range of modes and methods, used to bully children over cyberspace. This definition is limited because it covers the messages, sent to the victim via electronic communication. However, some of the emerging trends of bullying involve a situation where perpetrators opt to share a comment publicly; over social media (Facebook, Twitter etc.) with a malicious intention to degrade the reputation and dignity of the victim, which finally leads to horrendous results like suicides. Cyberbullying does not merely mean sending messages of intimidating nature; it may cross the boundaries and transgress into the privacy of an individual.

According to Smith (2008)[3], cyberbullying is an aggressive, intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and overtime against a victim who cannot easily defend him or herself.

According to Willard (2006)[4], cyberbullying covers the following forms:

- Flaming;
- Harassment;
- Cyberstalking;
- Denigration;
- Masquerade;
- Outing & Trickery; and
- Exclusion.

Coming to the salient features of cyberbullying, the same depends on a certain degree of technological expertise. There are certain erudite and sophisticated forms of cyberbullying now, like masquerading; where someone posts certain denigrating matter on web pages by using some other person's name. An element of invisibility is also adhered to cyberbullying because the perpetrators can go incognito and sabotage the dignity of the victim, anonymously. Unlike conventional bullying, the role of bystanders is more complicated in the case of cyberbullying. In the case of the former model, the bystanders are the one who remains physically present during the act of bullying but in the case of cyberbullying, the bystander can be:

- the one who was with the perpetrator, while he/she sends the message;
- the one who was with the victim, while he/she receives the sent message; and
- the one who visits any webpage where the post of bullying has been uploaded.

When we analyze the issue of cyberbullying from the lens of the rights of children, it becomes far complicated and problematic; because on both sides, we have children entwined; both as a violator and victims. In most cases, child cyberbullying involves school children. A significant number of youths' experience both

[3] P. K. Smith *et. al., "*Cyberbullying: its nature and impact in secondary school pupils", [2008] 49(4), 376.

[4] Willard Nancy, "Cyberbullying and Cyberthreats: Responding To the Challenge of Online Social Cruelty, Threats, and Distress. Eugene: Center for Safe and Responsible Internet Use", (2007) CBCT 18.

cyberbullying and its deleterious effects, and additional research is needed to guide nascent prevention and intervention efforts.[5] The epidemic of cyberbullying has gathered much attention up lately, in several legislative, judicial and academic forums. According to Justin W. Patchin and Sameer Hinduja,[6] cyberbullying can take numerous forms (see figure 1).

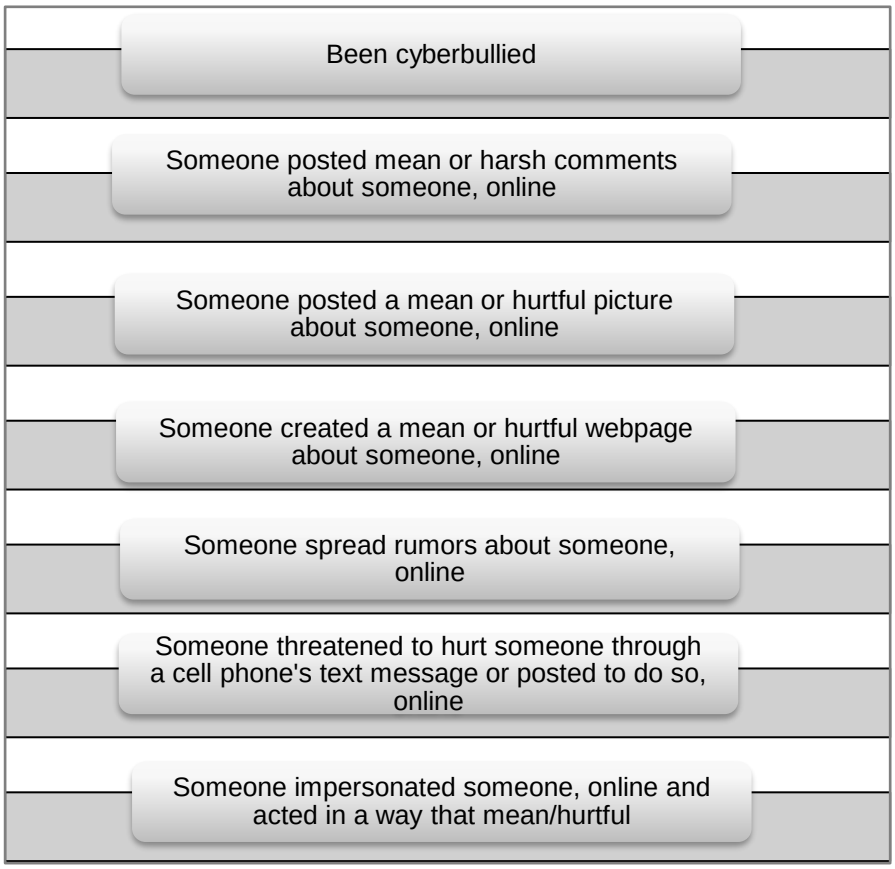

Figure 1: Forms of Cyberbullying

The authors mentioned above have undergone an exhaustive empirical study to understand the problems of cyberbullying in a better fashion. In the process of their analysis, they even came across cyberbullying based on gender, age and even race. It won't be judicious enough to put up a generalized dictum of cyberbullying because every child, culture and community is different and their perceptions about this emerging menace might vary. Sagacious and reflective thinking is necessary to understand these variables involved in cyberbullying.

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[5] Melissa K. Holt, Dorothy L. Espelag, "Cyberbullying Victimization: Associations with Other Victimization Forms and Psychological Distress" [2012] 77 Mo. L. Rev. 641

[6] Sameer Hinduja, Justin Patchin, 'Cyberbullying Research Summary Emotional and psychological consequences', (*Cyberbullying*, 2008) <http://cyberbullying.org/cyberbullying_emotional_consequences.pdf> accessed 9 August 2016

CYBERBULLYING AND THE CYBER LAW

There exist two Schools of cyberlaw: (1) technology-specific schools; and (2) technology-neutral schools. The former argues that the law should recognize only one given set of technology standard while the latter argue that law should remain neutral when it comes to giving due recognition to any technical standards. To combat several issues related to cybercrimes, countries across the globe have adopted one of these schools. The developed countries prefer technology-neutral schools while the developing countries prefer technology-specific schools. Explaining this further, *Vakul Sharma* writes:

It is important to note that both technology-specific laws and technology-neutral laws may co-exist at any given point in time. Often it is seen that the developed countries with a wider technology users' base have a multiplicity of technology platforms, whereas the developing countries with a narrow technology users' base have one common technology platform, to begin with. The reason is that in a developing country, technology is at a premium and hence the users are few, whereas in a developed country there is a large number of users and there is technology maturity and hence are a multiplicity of technology platforms.[7]

India follows tech-specific schools under the regime of the Information Technology Act, 2000. Hence, the issues related to cyberbullying will fall under its purview, while on the other hand developed countries like the United States, have certain specialized legislation to deal with the menace of cyberbullying. In the aftermath of Clementi's suicide, the State of New Jersey passed the "Anti-Bullying Bill of Rights". Several other unfortunate incidents of such kindled to the enactment of anti-bullying/cyberbullying legislation. There are several current legal initiatives taken by several other countries to combat the issues of cyberbullying. According to Microsoft's Global Youth Online Behavior Survey, India ranks third in cyberbullying.[8] *Budapest, The Regional Dimension*: European Union in the year 2001 enacted the Convention on Cybercrime in Budapest after realizing the challenges concerning

[7] ibid.

[8] 'Shame: India come third in cyber-bullying', (*Hindustan Times*, September 19, 2012), <http://www.hindustantimes.com/india-news/newdelhi/shame-india-comes-third-in-cyber-bullying/article1-932687.aspx> accessed 29 August 2021.

cybercrimes. The council of Europe recognized the profound need for hours to bring cooperation among states to combat the rapid growing crimes in the virtual world. Under Article 9 of the Convention, child pornography has received major attention in form of an inclusive list of activities that amount to offences related to child pornography. Albeit this convention misses out on cyberbullying in clear terms but it envisages other forms of cybercrimes. The additional protocol to this convention recognized the human rights linked to the cyber world. The protocol expressed concerns over the misuse/abuse of cyberspace. However, the protocol addresses the problems of xenophobia and racial discrimination in the cyber world but not cyberbullying in specific.[9]

About 40 states in the United States of America have anti-bullying laws and policies.

States having both law and policy on anti-bullying are:
Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Colombia, Florida, Georgia, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington

States having only laws are:
Arizona, Illinois, Indianan, Kansas, Minnesota, North Dakota, Tennessee and Texas

Montana is the only state with policy only but no law on bullying. Most of these laws and policies are amended to put up the issues of cyberbullying in their respective states by including electronic harassment in it. Many of the state laws proposed cyberbullying in their school policies. Some of them have supplemented criminal sanctions to cyberbullying while most of them supplemented only school sanctions.

Some of the noteworthy laws on cyberbullying in the United States are:

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[9] Article 2 (definition) "racist and xenophobic material" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

No.	Name of Legislation	State
1	Seth's Law	California
2	Bullying Prevention for School Safety and Crime Reduction Act	California
3	The End to Cyberbullying Act	Georgia
4	Safe and Supportive Minnesota Schools Act	Minnesota
5	Arkansas Code on Cyberbullying	Arkansas
6	Delaware Code on Cyberbullying	Delaware
7	The End to Cyberbullying Act	Georgia
8	Jared's Law	Idaho
9	Safe and Supportive Minnesota Schools Act	Minnesota
10	Megan Meier Cyberbullying Prevention Act	Federal

Table 1: Anti-bullying Laws and Policies across the United States of America

At the federal level, there are two important laws, named after two children Megan Meier and Tyler Clementi- Megan Meier Cyberbullying Prevention Act and Tyler Clementi Higher Education Anti-Harassment Act.

In India, the situation is far different. The Information Technology Act overlooked many critical aspects of cybercrimes. Before 2013, there were no clear enactments to prohibit cyberbullying. One of the severe critics of the Information Technology Act is that it dealt merely with e-commerce (financial crimes) and not the other aspects of criminal activities. Justice Verma Committee's contribution to amend criminal laws is remarkable in this facet. The Criminal Law (Amendment) Act of 2013 included cyberstalking as a criminal offense. This came after the unfortunate incident of Delhi in December 2012 to combat the mounting crimes against women.

According to Norton (Symantec), 52% of the children in India were victims of cybercrime, 18% had been cyberbullied and strangely, 84% of the parents didn't even

feel their child being cyberbullied.[10] In India, there is no uniform regulation in schools to address the issues of cyberbullying or even bullying in general at all.

However, the Protection of Children from Sexual Offences Act, 2012 was formulated to effectively address the grievous and odious crimes related to sexual exploitation and abuse of children. The given enactment comes heavily on both penetrative as well as non-penetrative assault. Based on the gravity of the sexual offence, this act enshrines stringent punishment for the same.

Ministry of Home Affairs has issued certain advisories concerning this statute.[11] Under this, an advisory on preventing and combating cybercrime against children (dated 4th Jan 2012) was issued. It was advised to all states and union territories to exclusively combat the crimes in the forms of cyberstalking, cyberbullying, child pornography and exposure to sexually explicit material.

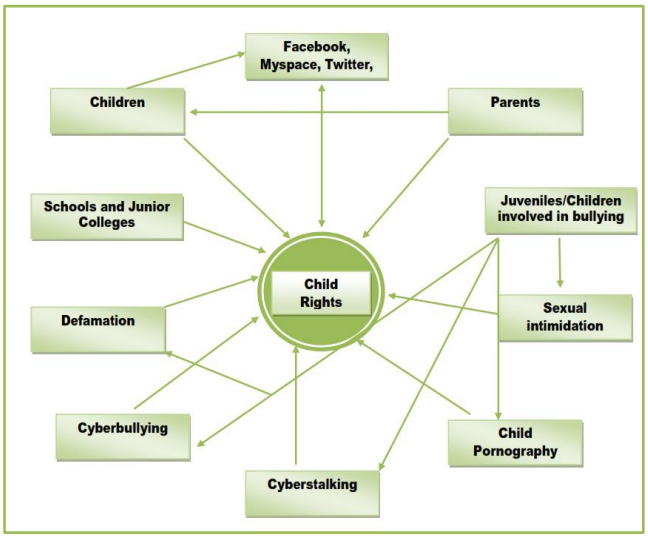

Figure 2: The dimensions of cybercrimes from the angle of child rights

From the given flowchart, it is apparent that all these platforms and stakeholders are related and connected. The shapes and forms of such crimes can vary

[10] 'Majority of children in India face cyberbullying but parents don't think so', (*Firstpost*, 16 June 2014) <http://tech.firstpost.com/news-analysis/majority-children-india-victims-cyberbullying-parents-dont-think-report-225864.html> accessed September 19 2021.

[11] 'Press Information Bureau Government of India, Ministry of Communications & Information Technology on Child Bullying on Internet' (*Press Release Bureau*, 11 July 2014) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=106467>accessed August 9 2021.

but it all surrounds one important aspect of all, i.e., rights of children. In some cases, cyberbullying offences are committed unknowingly. The age group of offenders ranges from 8 to 18. They might not even know what they are committing out of fun or sheer but ephemeral hatred towards their classmates may lead to a heinous crime. Lack of awareness and sensitivity is a major cause behind this. In *University of Kerala v Council, Principals' Colleges*, *Kerala and* Others[12], the apex court has referred to Raghavan Committee Report to bring strenuous action in schools to abate ragging and other forms of bullying. There is no doubt that we have a legal vacuum to address the issue of cyberbullying because the existing Information Technology Act, 2000 merely deals with two forms of offences, one which is obscene in nature and the other, which relates to breach of privacy. However, under section 66A of the IT Act, harassment through electronic means by sending offensive or menacing information is punishable with imprisonment for a term, which may extend to 3 years and with a fine. I propose the following approaches and leave it up to the readers to decide the plausibility of the same:

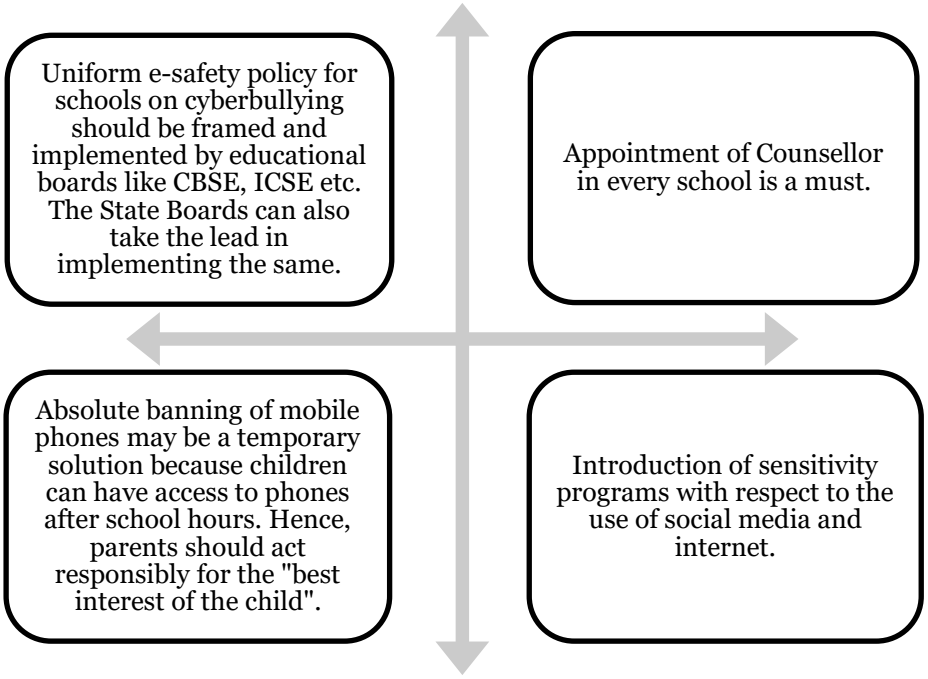

Figure 3: Probable Measures to Combat Cyberbullying

From the perspective of child rights, the principle of best interest has evolved with time. The jurisprudence of child rights has now taken a new shape to fit into the

[12] *University of Kerala v Council, Principals' Colleges, Kerala and Others*, Special Leave Petition (Civil) 24295 of 2004.

latest world of technology. International Nongovernmental organizations like ICRC (International Committee of the Red Cross) are now also looking into several emerging issues like online gaming like sniper, war games etc. which portrays violent graphics.[13] This induces hatred, brutality and insensitivity among young minds. Some other areas are like online sex games, gambling which needs a legislative look. India is a fast learner, there is no doubt about it because we have the majority of young minds, capable as well as competent for doing wonders and creating history.

The Ministry of Women and Child should ensure a better mechanism for the protection of children against these emerging crimes but as there is this old saying that charity begins at home. Similarly, the welfare criteria begin with primary and basic education from the parents. The rights of the children can only be protected if the duties of the parents are properly complied with. These duties are not merely legal or statutory but derive their essence from morality.

The CERT-In, i.e. Computer Emergency Response Team, India is authorized to block any website which exposes illegal information but this is to protect the sovereignty and integrity of India (*See* Sections 69A and 79B of IT ACT, 2000).

The Cyber Café Rules of 2011 envisages provisions to regulate the activities of minors in cybercafé only in the presence of an adult. These rules, even though looks dynamic on the exterior but is obsolete in the interior because most of the children carry smartphones with them everywhere and cybercafé remains empty. Section 67B of the IT Act again looks into child abuse through electronic mediums. The punishment prescribed under this section is 5 years and a fine, which may extend to 10lakhs rupees.

This is to note that Information Technology Act/Rules do not mandate the social networking sites to portray notice on their Webpages that children under the age of 13 are not permitted to open accounts. According to law, someone who is below 18 is minor and websites like Facebook went ahead with the US norms and made it

[13] Ben Clarke, *et.al,* 'Beyond the Call of Duty: why shouldn't video game players face the same dilemmas as real soldiers?' (2012) ICRC <https://www.icrc.org/eng/assets/files/review/2012/irrc-886-clarke-rouffaer-senechaud.pdf> accessed August 30 2021.

open for anyone who is above 13. In countries like the US, they have separate laws on cyberbullying (as referred earlier) and inappropriate content like the Children's Online Privacy Protection Act which allows a child below the age of 13 to open an account on social networking sites with the prior consent of their parents coupled with stringent guidelines to be followed but in India, there are no such norms to guide, regulate or even prohibit such practices. In the US, the Children's Internet Protection Act, 2000 also deals with the funds from the federal agency to install filtering technologies in schools and libraries. The Prosecutorial Remedies and Other Tools to Tend Exploitation of Children Today Act, 2003 regulates and checks the use of misleading domain names which are created to deceive minors.

Britain has Internet Watch Foundation, which in association with government, police administration and people has compiled a list of websites that showcases inappropriate content. Internationally, the enforcement agencies formed a task force to protect children from online abuse. The Virtual Global Task Force comprises enforcing agencies of several countries like Korea, Indonesia, Canada, Interpol, Child Exploitation & Online Protection Centre (CEOPC) in the UK. In addition to enforcement, this task force also raises awareness of the risks associated with online child abuse.

THE CONCLUDING ANALYSIS AND THE WAY FORWARD

The menace of online violence against children has escalated and attained to the abyss of epidemic proportion as with the new normal, the same is bound to further increase. The scope of online violence against children is wider than what we can imagine. With newer forms of applications available, it has become even more complex to detect and easy to commit kind of an offence. To be very specific with cyberbullying, there are certain models which may be considered; especially in the wake of this new normal mode of online classes. In this context, the Austrian model is quite elaborative. § 107(c) of the Austrian Penal Code defines cyberbullying by bringing the element of 'continuous harassment by a computer system or a telecommunication' in it.[14] The said

[14] Liat Franco & Khalid Ghanayim, 'The Criminalization of Cyberbullying Among Children and Youth', (2019).
[17] Santa CLARA J. INT'L. I.

legislation was enacted by Austria in the wake of the growing menace of cyber-crimes against children. It came into force on January 1st, 2016.

It further provides that,
'*any person who harms another person's reputation in front of a large number of people, or makes facts or images pertaining to a person's domain of intimate life available to a large number of people without said person's consent by means of a telecommunication system or computer software application and in a manner calculated to inflict serious harm on a person's way of life for a long period of time is punishable by one year's imprisonment or a fine equivalent to 720 days income and furthermore, it also highlights that if such activity leads to the suicide or attempted suicide, then the penalty will be more severe with three years' imprisonment*.'

This legislative measure, albeit appears to be a stringent move by designating online offence against child and youth as a dedicated cyberbullying offence but if the perpetrator of such cyberbullying involves a child or youth itself, then the element of stringent measures associated with this model might require an approach with a lower level of penalty. Adoption of a dedicated cyberbullying offence model like Austria's might not be fit for such instances because for the best interest of the child (be it the victim or the juvenile offender), drawing a reasonable balance is necessary because the juvenile offender if treated in equal parlance to that of a habitual offender, will ultimately vitiate the principle of the best interest of child itself. However, there cannot also be a straightjacket application because the grievousness of such online violence should be determined on a case-by-case basis. A special *mens rea* of such instance should be a crucial determining factor, before drawing any judicial conclusion in such cases where the victim as well as the violator, are both children. In this context the 'Harmful Digital Communications Act, 2015' of New Zealand is relevant. The Kiwis have also taken a dedicated cyberbullying offence model by bringing the criterion of 'serious emotional distress in the definition of cyberbullying under their national law. In the said legislation, § 22 defines cyberbullying as an independent offence and while determining the same, the following factors should be considered, which includes: the extremity of the language used; the age and characteristics of the victim; extent of digital circulation, anonymity involved; the context in which it appeared; repetition of such act etc. However, the said enactment is also silent on the age of the violator, which

brings back the previous concern of a child being not only the victim but also the perpetrator. The growing use of smartphones and the increased accessibility of the internet as a whole and social network in particular to children and youth increases the number of cyberbullying incidents and makes it difficult to estimate the effect of anti-online violence laws on the extent of such cases in such mutable circumstances. In addition, in many such matters, the courts of law found it difficult to address the conflict between freedom of expression and the criminalization of cyberbullying.[15] There is also another contention on anti-cyberbullying laws for it being ambiguous on the account of the use of nebulous language in defining online violence as an offense, the use of such defences as the freedom of expression and the fear of countersuits being filed by the bully's parents, and the case's silencing in the service of maintaining the good reputations of the school and the city which witnessed the commission of the online violence offense.

A protected social value is a basic and primary benchmark in determining the justified penalty to be applied on account of the criminal offense's commission. A phenomenon defined as a criminal offense would lead to the derivation of a basic penalty that would constitute retribution for the anti-socialness associated with guilt such that the harm inflicted on the protected social value expresses the greatest degree of anti-socialness.[16] Putting child cyberbullying in the broad spectrum of several social values amalgamated into one legislative definition (as done in several countries) will not only affect the best interest principle factor but also the principle of legal certainty and clarity, that emerges from the principle of legality, which in turn is based on the constitutional ethos of any nation in this contemporary world.

Information Technology India is continuously booming and with several reforms in the recent past (including National Education Policy), where coding has been mandated in primary schools, we can expect the future generation to be more tech-savvy and vulnerable to cyber threats. The mental health associated with cyber threats (especially cyberbullying in this context) is another branch of concern that law alone cannot address. Hence, sensitization should be the primary concern and in fact,

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[15] Sameer Hinduja & Justn Patchin, *Cyberbullying: A Review of The Legal Issues Facing Educators,* 55(2) PREVENTING SCHOOL FAILURE, 71-78 (2011).
[16] ibid.

the juridic-ethical values associated with the use of information technology should be a mandatory and integral part of the course curriculum of educational institutions.

Some nations opted for an approach that is commonly known as the 'existing criminal offense model'. Under the said approach, the nations have opted to include cyberbullying under an existing criminal offense. Germany for example has adopted an Exiting Physical Domain Offences Model, which applies to the online domain. Even, USA's state-specific laws (Missouri and Massachusetts) follows the said model with the amendment of their existing physical domain offences by including cyberbullying in the harassment and stalking offences.[17]

Although, it appears quite promising the said model is also not immune from challenges. While we apply the physical domain offences, we consider privacy, defamation, sexual harassment, intimidation in it but the ways these offences of the physical domain are dealt with might not fit into the scheme of online offences like cyberbullying. The physical domain offences do not consider the characteristics of the relevant technologies as well as the characteristics of children and youth's online behaviour.[18] Convicting a child offender for cyberbullying under this model that necessitates *mens rea* will be a terrible move as in most cases, the child involved in cyberbullying have a close nexus with the ways they are nurtured and, in many cases, by nature out of boredom. In many cases, to appear 'cool' and be 'popular' in virtual platforms, many under peer influence commit cyberbullying. However, it cannot be ruled out that in certain circumstances, as rarely appeared, the malice behind such an act developed out of a criminal mind. In this context, a different set of norms and standards is highly necessary to the violence associated with several online/video/mobile games that has proximity with a criminal thought process that might germinate gradually. Our cyberlaw (India) are quite silent about such modern gaming applications that promote violence and agony by a virtual portrayal of killings and massacres.

[17] ibid.
[18] ibid.

With several cases of brutality and heinousness against minors, a social perception has emerged that strongly supports the application of stringent penal proscriptions on delinquent juveniles. In this context, an argument also emerges that supports the inclusion of online violence and child, such as cyberbullying to be treated on equal parlance of the physical domain penal proscriptions but with a reduced element of penalty- in form of a caveat. In the matter of *Anonymous Person* v. *The State of Israel*[19], this angle was present.

In contrast to this common perception, Franco & Khalid rightly points out that,
'*The datum of children and youth which expresses a reduction in the act's anti-sociality and a reduction of guilt does not solely express a mitigating consideration in penalization but also affects the very definition of the phenomenon as criminal*'.[20]

In *Finkel v Dauber*[21], five school girls published demeaning statements against one of their classmates that she suffers from sexually transmitted diseases and had bestiality and sexual intercourse with a male prostitute. The New York court in the said matter held that this act of online publication of demeaning expressions was not denigrating and that no defamation occurred. It was the act of vulgar humour hyperbole and attempts at one-upmanship. Hence, it may be ascertained that such cases of cyberbullying, although on the face of it, appears a crime but might not be severe and string assault on the social and legal order, where adults and the element of *mens rea* are judged.

In this context, a crucial angle of the socio-cultural atmosphere is also significant. The judgement of the New York County Court might draw certain fair criticisms on the ground of values that varies from one society to another. The cultural and moral values of a society in an eastern nation might not go in consonance with such judgement, especially if that further leads to social ostracization of the victim. As the trend that has been quite commonly seen in cases of social anathema that a prosecutrix face in cases of rape. There the cultural relativism from the rights

[19] *Anonymous Person v The State of Israel* 47 ILM 768 (2008).
[20] Franco and Khalid (n 14) 41.
[21] *Finkel v Dauber* 906 N.Y.S.2d 697, Sup. Ct. Nassau County (2010).

perspective might demand stringent measures against the perpetrators. But the point of judgement comes into play, where the allegation is drawn against a child itself. If a disciplinarian society mandates such practices where nurture is the primary responsibility of parents, then culpability of such cyberbullying should also question the credibility of parenting.

Another model has been followed by certain countries like Israel, where an 'aggravating category' has been determined based on the degree of intensity, violence and seven sexualities are concerned. Nonetheless, this model has been regarded as a nebulous safety valve concept that keeps immense space for judicial interpretation and executive enforcement. In *Miller v Alabama*[22], the county court of the United States has emphasized that juveniles and their lack of maturity, negative influences, peer pressure and an underdeveloped sense of responsibility are several factors behind cyberbullying. On the other hand, this same immaturity has been used by the Court to uphold the ability of parents to commit their minor children to mental health institutions against their will[23]:

'Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments… The fact that a child may baulk at hospitalization … does not diminish the parents' authority to decide what is best for the child.''[24]

India has a long way to go to combat cyberbullying as there are certain disengagements between the practical experience of child cyberbullying and the pre-existing narratological frameworks. Combatting child cyberbullying necessitates a collaborative effort by all stakeholders (which includes law enforcement, educational institutions, parents, tutors, children). The effort should address the issue of child cyberbullying should be inclined towards preventive measures but the legal measures should also be capable to address the *post-factum* challenges. Sections 66A, 66E, 67, 67A, of the Information Technology act, 2000 along with other allied legislation

[22] *Miller v Alabama* 132 S.Ct. 2455, 2458 (2012).
[23] Andrew Gilden, 'Cyberbullying and the Innocence Narrative', 48 HARV. CR-CL L REV. 357 (2013).
[24] *Parham v JR* 442 US 584, 603-04 (1979).

(Sections 292A, 354A, 354D, 499, 509 of Indian Penal Code) aim to address the issue of cyberbullying in India but there is no special legislation that exclusively deals with child cyberbullying. India should consider adopting the 'aggravating categories' model as it is suitable in its social context. The centrality of information technology in our children's lives, especially after the onset of the 'new normal mode of online learning', signifies that we should concern ourselves with the formulation of necessary legal measures to address the issue of cyberbullying, which should be progressive.

To sum up, the following words of His Holiness, Dalai Lama would be apt: *"*Our prime purpose in life is to help others. And if you can't help them, at least don't hurt them."

A NEW WORLD CRISIS - WHO GETS THE VACCINE?

Vidyarthi Mysore[1] and Saumya Adhana[2]

ABSTRACT

"With a fast-moving pandemic, no one is safe, unless everyone is safe."
- World Health Organization[3]

Covid-19 has engulfed the entire world in its flames, taking the lives of nearly 3 million people, and affecting the lives of crores of people. It left the world economy in destitution and poses a threat to all activities across the planet as well. The only silver-lining the world witnessed was the creation of vaccines and their successful clinical trials thereafter. Through this paper, the authors try to analyze the role of Intellectual Property Rights amidst all this, the TRIPS Agreement and its significance, the waiver proposed by India and South Africa as well as the reasons for the shortage of vaccines. This paper aims to critically analyze how the self-interest of various stakeholders mitigate the solidarity of mankind in essence. This humanitarian crisis calls for a global collective approach where we try to come up with larger frameworks to cope with instead of relying on the same-old flaw-filled existing systems. This paper seeks to weed out various shortcomings of the actions that have been taken thus far by the global community as a whole, and suggest possible solutions that can enable the world from committing the same errors over again, keeping in mind that those countries, that unable to keep up with the coronavirus claiming the lives of their citizens on account of having low resources and limited capability to tackle the situation on their own. Special emphasis will be given to the IPR laws being an impediment to access to the COVID-19 vaccines and the 1995 agreement on Trade-Related Aspects of Intellectual Property Rights or TRIPS.

Keywords: *Collective Cooperation, Patent Protection, TRIPS Agreement, TRIPS waiver proposal, Transnational Companies, Pharmaceutical Companies*

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[3] Geneva WHO, 'Covax' (*World Health Organization*) <https://www.who.int/initiatives/act-accelerator/covax> accessed 3 September 2021.

BACKGROUND

December 31st, 2019 marked the first known sighting of the SARS-CoV-2 variant by the World Health Organization (WHO) China County office. A sighting then termed to be pneumonia of unknown etiology (unknown cause), grabbed hold of 44 individuals by the morning of 3rd January 2020.[4] What began as an idiopathic the disease of spontaneous origin has now turned into an outbreak affecting every nation across the planet with rapid repercussions. This deadly respiratory disease does not discriminate, affecting old as well as young, the able as well as the disabled, healthy as well as the ailing with symptoms ranging from high fever, loss of taste and smell, nasal congestion, muscle pain, respiratory difficulties, and skin rash to name a few.[5]

With over 3 million cases and 207,973 deaths across the globe, the World Health Organization (WHO) on March 11, 2020, characterized COVID-19 as a pandemic, pointing to an inter-continental lockdown.[6] This officially set charge to one of the biggest- if not the largest to date- ongoing pandemics in the long-drawn history of humankind as we know it.

SARS-CoV-2 variant, short for 'Severe Acute Respiratory Syndrome', was recently given the widely acquired term 'COVID-19' - a version derived from the Coronaviruses (Latin: corona= crown). Tyrell and Bynoe were the first on the scene to describe the Coronaviruses back in 1966 after cultivating it from patients sporting common colds back in the 1900s.[7] It was further observed that the Coronaviruses were a series of enveloped, positive single-stranded RNA (Ribonucleic Acid) viruses that have shown an increasing tendency to affect humans as well as a diverse range of animals.

Epicentered in the Hubei Province of the People's Republic of China, SARS-CoV-2 seems to have made huge strides in transitioning from affecting animals majorly to

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[4] Geneva W, *Novel Coronavirus (2019-Ncov) SITUATION REPORT - 1* (2020).

[5] 'Coronavirus' (*Who.int*, 2021) <https://www.who.int/health-topics/coronavirus#tab=tab_1> accessed 3 September 2021.

[6] Organization W, 'Coronavirus Disease 2019 (COVID-19): Situation Report, 100' (*Apps.who.int*, 2021) <https://apps.who.int/iris/handle/10665/332053> accessed 3 September 2021.

[7] Tyrrell D, and Bynoe M, 'CULTIVATION OF VIRUSES FROM A HIGH PROPORTION OF PATIENTS WITH COLDS' (1966) 287 The Lancet < https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(66)92364-6/fulltext > accessed 3 September 2021.

affecting humans on an alarmingly large scale in the Hunan seafood market in Wuhan, China.

The first few recorded cases of SARS are known to have emerged mid-November, within the year 2002 in Guangdong province of China. Following a 2003 WHO report, the primary official report stated that it affected 305 people and caused 5 deaths. Around 30% of the cases spanned the frontline health care workers who were concerned with patient care. Another 1/3rd of the early cases have been noted in food handlers/peddlers (individuals who manage, kill, and sell animal origin food, or those that prepare and serve food). The previous incidence of the SARS-CoV outbreak within the year 2002 and lasted a year, had unfolded across the world, moving twenty-four countries that enclosed Cambodia, Hong Kong, Singapore, Hanoi, Canada, and others, recording 8,437 SARS cases and 813 deaths.[8]

In December 2019, new cases reported were infected with a novel CoV (nCoV), which turned out to be the first observed cases in human beings.[9] The newly observed virus similar to SARS-CoV was named nCoV 2019 (January 2020) and later known as COVID-19 in February 2020.[10] As of February 12, 2020, a total of 43,103 instances of contamination and 1,018 deaths were recorded. Thousands of human infections were reported in China, spreading rapidly across the globe.

INTELLECTUAL PROPERTY RIGHTS AND COVID-19 VACCINES

IPR means rights granted to creators and innovators who make any artistic, technical, or scientific creation that is unique, to protect them and their product for a certain prescribed period.[11] With the coming of IP, more creators started making their products and creations because they were now protected by law, and with time,

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[8] Lee, Jong-Wha, and Warwick J. McKibbin, 'The Impact of SARS." In China: New Engine of World Growth', (2012) ANU Press < http://www.jstor.org/stable/j.ctt24h9qh.10 > accessed 1 September 2021.

[9] Lu R and others, 'Genomic Characterisation And Epidemiology Of 2019 Novel Coronavirus: Implications For Virus Origins And Receptor Binding' (2020) 395 The Lancet <https://www.thelancet.com/article/S0140-6736(20)30251-8/fulltext> accessed 2 September 2021.

[10] Li H and others, 'Coronavirus Disease 2019 (COVID-19): Current Status and Future Perspectives ' (2020) 55 International Journal of Antimicrobial Agents <https://pubmed.ncbi.nlm.nih.gov/32234466/> accessed on 1 September 2021.

[11] Singh R, *Law Relating To Intellectual Property* (1st edn, Universal Law Publishing, 2004).

economies all around the world started noticing a considerable boost. Seeing more players, the government and other institutions were also incentivized to put in better technologies for Research and Development [hereinafter referred to as R&D] and we thus saw a massive jump in the field of R&D because those who unlawfully took valuable information about a new invention, or the invention itself, could now be punished under IPR Laws.[12] The most important right that a creator now possesses is the benefit of owning the sole right to sell/fix prices, distribute, license, etc., fit to his demand which essentially gave him power over his innovation.

Intellectual property has different types inter alia, but when it comes to the study/practice of medicine, we are essentially talking about patents solely. The main idea behind patents in the vast field of medicine is the protection it offers to the innovation of a creator so that he/she is freely able to recuperate his investments while simultaneously putting an immediate halt to any attempt at imitation with or without his knowledge.

Coming to the field of medicines, when a company sets out to create a certain life-saving drug such as a vaccine, millions of dollars go into its research and development - conducting clinical trials, having different phases in those trials, etc. Finally, when the drug does pass all the tests and trials put before it, it must be launched in the international market which brings to notice the cost of producing the drugs. This entire long-drawn process of trial and error consumes a lot of time, money, and manpower. Therefore, patent protection enables and incentivizes these companies to make more advancements in their field so mankind is benefited in the end. But if the pharmaceutical companies have no assurance of recuperating their returns and earning a percentage of profits, then they would not be willing to go through all that trouble to help create these life-inducing drugs.

The patent rights in question are offered for a subtotal period of 20 years after which other pharmaceutical corporations and companies are free to undertake mass production of cheaper substitutes of the same and enter the market with profit-making in mind. The main crux of the issue revolves around the fact that on the one

[12] Bhattacharya S, Saha C, 'Intellectual Property Rights: An Overview And Implications In Pharmaceutical Industry' (2011) 2 Journal of Advanced Pharmaceutical Technology & Research <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/> accessed on 31 August 2021.

side, to advance in the field of science and technology, it is imperative to charge headfirst with the legal protection necessary that effectively monopolizes the sole ownership of the innovator.

Unfortunately, over the past couple of years as history has dictated, most (if not all) multinational pharma companies have misused this protection in some form or the other by charging exorbitant prices for the drugs/vaccines they produce. This is a troubling case scenario that poses a plot for international concern since a majority of nations across the globe cannot afford to purchase.

Eventually, big multinational pharmaceutical companies came out with their vaccines. The first one to hit the market was the Pfizer – BioNTech vaccine which began a mass vaccination drive in the UK around late in the year 2020. Slowly, more players started coming into the market across the world. What would originally take years to get the approval after multiple rounds of clinical trials, took only a few months in most cases. In some countries, approval by the boards was given before even the phase III trials could begin.[13] But despite so many regulatory overlooks, the production and rollout are strenuously slow. Companies are unable to meet the huge requirements.

This kind of proactive policy aside, we can see the reality it has opened our eyes to the blatant disregard by those countries that are better off. They have made it abundantly clear that come-what-may, they want the sole monopoly over the drugs they have created instead of being of the mind that in times such as these when millions of people are dying every passing day, immunizing every individual in the world is more important than getting sole rights for production and distribution by way of patents.

TRIPS, VACCINE NATIONALISM & SHORTAGE OF VACCINES

One of the key instruments that the paper focuses on throughout is the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1995 which

[13]Ghosh J, 'Covid-19: Vaccine Production and Distribution Has Exposed – And Intensified – Global Inequality' (*Scroll. in*, 2021) <https://scroll.in/article/992328/covid-19-vaccine-production-and-distribution-has-exposed-and-intensified-global-inequality> accessed 3 September 2021.

happens to be extremely comprehensive in terms of multilateral trades and governs the international forum as a whole. It protects IP by putting member countries under binding obligations to ensure IP rights in their countries as well as to ensure a minimum level of protection.[14]

At this juncture, it is imperative to mention the backbone of this agreement, and even the WTO itself - the infamous Uruguay Round of Negotiations that happened for a massive 7 years in total from 1986 to 1994, which shaped what is perhaps the biggest reforms concerned with the world trading system ever since the establishment of GATT post the second world war. These rounds of negotiations were so extensive they included almost every single aspect of trade and also had certain contentious deliberations on the TRIPS Agreement that are worthwhile mentioning from where we see the problem arose.

Two sides debated and deliberated in these negotiations. On one side there were the developing nations who claimed that if there was going to be a strong IP system that was stringent, then the prices of pharmaceutical drugs would take a massive toll. And citing this as one of the main bones of contentions, these countries were not as keen on IP agreements in the WTO.[15] On the other side were the developed nations such as the United States along with the transnational multi-million pharmaceutical companies who advocated for the TRIPS Agreement because they believed that a stringent multilateral agreement that would govern a strong IP system would bring in far greater rents for their corporations.[16] Eventually, the developed nations got their way by using threats in the form of trade sanctions. They also compelled the developing countries to agree to include IP in these negotiations by alluring them with agricultural and textile concessions.[17]

These IP protections might help pharmaceutical giants and other corporations likewise in getting a proper ground on which they can get their returns back. Patents can also be seen as a type of reward that is given to the creators for their product

[14] Bossche P, *The Law, And Policy of The World Trade Organization* (Cambridge University Press 2005).
[15] Gervais D, *The TRIPS Agreement* (5th edn, Sweet & Maxwell 2021).
[16] Piragibe dos Santos Tarragô, 'Negotiating for Brazil' in Watal J and Taubman A (eds), *The Making of The TRIPS Agreement* (World Trade Organisation 2015).
[17]Lestor S, Mercurio B, and Davies A, *World Trade Law: Text, Materials, And Commentary* (3rd edn, Oxford Hart 2021).

without which there may be either a lack of development or no development at all. However, despite all the positive aspects to patents, there has always been an argument post the TRIPS agreement that it thwarted the release of such life-saving drugs, vaccines, and other medical treatments to the developing countries thereby denying the people their right to access affordable medicines and healthcare.[18] But the question remains, as to what extent these transnational pharma companies' lobby should be allowed to have their way. When we see the world crumbling around us, this question becomes that much more crucial for us to answer and so does the debate about IP laws under TRIPS denying the right to access medicines. Such arguments now bear the spotlight and the surrounding questions take the center stage today, where we see the well of nations assuming the 'every-nation-for-itself' policy supported by the lobby of big pharmaceutical giants.

Vaccine developments are generally known to take a long time to become successful, often, but not limited to, 10 to 15 years, with a lot of public as well as private cooperation.[19] The oncoming surge of COVID cases, however, saw an anomaly of sorts in this trend of vaccine development. The fact that there was already research study on similar coronaviruses such as SARS and MERS, an existence of established vaccine technologies, a push in administrative logistics to induce faster clinical trials, and the recently established CEPI, helped in creating a silver lining amidst the global pandemic- vaccines were created in an extremely short time and were also approved by regulatory authorities to be put for use. Yet, we have a vaccine crisis because of the sheer fact that these vaccines and other treatments for covid-19 are all subject to patent protection under the TRIPS agreement which essentially gives them the sole right to manufacture, sell and use the vaccine for the entire period of 20 years from the day the patent was filed.[20] This patent protection is essentially what is impeding ensuring the vaccination among poorer countries or developing countries. To end the pandemic, we must universalize the vaccines so the entire population of the world gets vaccinated, however, unfortunately, there is yet

[18] Joseph S, 'Blame It on the WTO?' [2011] Oxford University Press; 'A Fair Shot for Vaccine Affordability' (*Médecins Sans Frontières Access Campaign*, 2021) <https://msfaccess.org/fair-shot-vaccine-affordability> accessed 3 September 2021.
[19] 'Vaccine Development, Testing, And Regulation - History of Vaccines' (*Historyofvaccines.org*, 2021) <https://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation> accessed 5 September 2021.
[20] TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights (15 April 1994) LT/Art 33 <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

another problem that we face today. This problem is in the form of vaccine nationalism or vaccine grab which is essentially a situation where rich countries place orders and stockpile more vaccines than required ahead of other countries to ensure their citizens are safely populated first. For example, advanced countries that made up a mere 14% of the world's population placed orders that estimated around 85% of the total production in 2021, all within a month of the regulatory approvals being given to the first 3 vaccines [Pfizer-BioNTech, Moderna, and AstraZeneca]. Some of these countries had placed orders even before the regulatory approvals were given, such as the desire of the well of nations to stockpile everything for themselves.[21]. Strictly in the sense of IPR laws, vaccine nationalism can be deemed as a subset of sorts of economic nationalism wherein it has been so structurally embedded to favor those countries that have IPS such as the United States and the European Union over those that do not.

It is the view of the authors that even if countries opt for vaccine nationalism, economically, the impact is far greater than what would be if there are equitable distributions of the vaccines. Not only do the rich nations turn a blind eye to this, but they also fail to take into account the very fact that this coronavirus mutates. In simple words, it changes and adapts, therefore, even if only a percentage of the world's population is inoculated, those from the well-off nations, it does not mean that this fight is over for them. The new strains of the virus will have an equally binding effect on them too, and all the vaccination that they would have initially received would be for naught considering that will not have any effect on the new strain. If this kind of 'vaccine nationalism' continues, there is a slim chance of survival for the developing countries and the low-income countries. To quote the WHO's chief Tedros Adhanom Ghebreyesus, "I need to be blunt: the world is on the brink of a catastrophic moral failure – and the price of this failure will be paid with lives and livelihoods in the world's poorest countries".[22]

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[21] Ghosh J, 'Vaccine Apartheid' (*Project Syndicate*, 2021) <https://www.project-syndicate.org/commentary/pfizer-vaccine-doses-claimed-by-rich-countries-weakens-covax-by-jayati-ghosh-2020-11?barrier=accesspaylog> accessed 3 September 2021.

[22] 'WHO Chief Warns Against 'Catastrophic Moral Failure' In COVID-19 Vaccine Access' (*UN News*, 2021) <https://news.un.org/en/story/2021/01/1082362> accessed 3 September 2021.

All this was happening when there was already a proper system proposed in place by the World Health Organisation. It had been clear when the first traces of the novel coronavirus were detected outside of China, that this might be more than a country-specific disease. As it started spreading, it became mighty evident that this was not going to be easy to stop and at a very nascent stage itself, global leaders came together and brainstormed for ways to ensure expedited manufacturing and distribution of vaccines processes and also had a goal to achieve equitable, affordable, and efficient distribution and allocation of vaccines, as a result of which came to their brainchild- COVAX. Launched by WHO, the European Commission, and France, its major objective is to ensure the vaccines are accessible to everyone across the world despite their wealth status on a high-risk basis.[23] COVAX was joined by almost 2/3rd of the world and this is perhaps one of the world's largest portfolios of vaccine distribution and preparation plans.[24] Scarcity and excessive demand are two of the most crucial aspects the World Health Organisation had to contemplate about and because of this they concluded that some groups have to be prioritized over others until there are sufficient doses to vaccinate everyone, as a result of which, WHO's Strategic Advisory Group of Experts on Immunization came out with 3 main priority groups, namely: "Frontline workers in health and social care settings, people over the age of 65 and people under the age of 65 who have underlying health conditions that put them at a higher risk of death".[25]

Vaccine rollout would be carried out in two main phases. The first phase would ensure that the participating countries would simultaneously be getting vaccines until they can cover 20% of their population, again, where priority groups comprising frontline workers will be given first preference.[26] In the case of low-income countries, the allocation of vaccines to ensure they inoculate 20% of the population would be highly dependent on raising funds for the COVAX facility's financing mechanism which determines the participation of these countries, called

[23] 'COVAX Explained' (*Gavi.org*, 2021) <https://www.gavi.org/vaccineswork/covax-explained> accessed 3 September 2021.
[24] ibid.
[25] 'Access And Allocation: How Will There Be Fair And Equitable Allocation Of Limited Supplies?' (*Who.int*, 2021) <https://www.who.int/news-room/feature-stories/detail/access-and-allocation-how-will-there-be-fair-and-equitable-allocation-of-limited-supplies> accessed 3 September 2021.
[26] ibid.

COVAX AMC.[27] The second phase of rollout would be prioritized based on the level of risk that any country faces. Those countries that are under a high risk of the impact of COVID-19, those with a vulnerable population, and those with a substandard healthcare infrastructure will receive vaccines at a faster pace than those countries with a lower risk.[28] Not only this, an additional 5% of the vaccines produced will be stored as a buffer stock or 'humanitarian buffer' which is essential for other vulnerable groups of people such as refugees, asylum seekers, migrants, and workers who are managing the affairs there.[29]

The most imperative point to note here is the fact that the COVAX system is so accurate and precise that they factored in the lower-income member countries as well into this, who would be getting their doses free of charge, whereas the other member countries would pay for their doses individually. When all of these systems are in place, and a very fair one at that without any discrimination or biasedness, the facility remains extremely underfunded because of two major reasons: (i) the over-hoarding and mass ordering of vaccines by the wealthier countries, and (ii) because the COVAX facility allows for their members to make their bilateral agreements and deals with the pharmaceutical companies without any requirement of the COVAX's permission.

THE TRIPS WAIVER PROPOSAL

Rampant hoarding, exorbitant prices, shortage of vaccines, patent protection which resulted in limited licensing - all of this led two countries, namely, India and South Africa, to give a joint proposal at the WTO for a temporary waiver of the IP rights on Covid-19 vaccines and drugs.[30] At a time when the world needs the solidarity of all the countries across the world, those nations that are well-off started securing all resources that could help mitigate this pandemic for their use. When we need to universalize vaccines and ensure efficient production vaccines which is why India and South-Africa gave a joint proposal at the WTO, to the TRIPS council so they

[27] Access and Allocation (n 25).
[28] ibid.
[29] ibid.
[30] 'Waiver From Certain Provisions of The Trips Agreement for The Prevention, Containment, And Treatment of Covid-19' (*Docs.wto.org*, 2021) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True> accessed 3 September 2021 (hereinafter "TRIPS Waiver Proposal").

could further submit it to the General Council- to waive certain provisions of the TRIPS Agreement which dealt with IP, to ensure 'prevention, containment or treatment of Covid-19'.[31] This proposal argued that should IP protections and rights be given, a majority of the world would have to suffer as the affordability and availability of COVID-19 vaccines would be hindered. This could lead to a drastic impact where low-income and certain other middle-income countries would have to wait for years till they could get a smidge of a chance to have access to these medicines. The world has witnessed pandemics before as well, and we saw similar patterns where life-saving medicines took a while to develop, after which the poorer countries had to wait for years to get access to vaccines by which point it was almost too late. This time around, when the pandemic is still ongoing, the global community still has a chance to ensure equitable distribution among all countries equally but it is up to us to take the step, and this step has already been proposed by the 2 nations in the form of a temporary waiver, but unless the well-off nations come on board, the Covid-19 pandemic will again have a similar tale of woe for the low-income and poor nations. Despite promises about equitable access, countries are still enforcing their bilateral agreements, by going around COVAX, to secure vaccines which are acting as an obstacle for the COVAX facility to start their distributions. Dr. Tedros Adhanom Ghebreyesus, the Director-General of WHO highlighted the importance of equitable access to vaccines and the repercussions the world would see if the richer countries and the transnational pharmaceutical companies endeavor on to continue in their profit-maximizing and bilateral-agreement-making path.[32]

In case the waiver is granted by the WTO, then the member countries will not be in a position to enforce or grant any IP-related rights with regards to the COVID-19 vaccines, diagnoses, and other medical treatments. What this means is that for all practical purposes, lifting patent protection and associated rights essentially gives the green signal for the entire blueprint of the vaccines to be shared with everyone in the world after which such an embargo as we have now would cease to exist. In doing so, any corporation that has the necessary equipment, infrastructure, and technology

[31] ibid.

[32] “More than 39 million doses of vaccine have now been administered in at least 49 higher-income countries. Just 25 doses have been given in one lowest-income countries. Not 25 million; not 25 thousand; just 25.", 'WHO Director-General's Opening Remarks At 148Th Session Of The Executive Board' (*Who. int*, 2021) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board> accessed 3 September 2021.

can go ahead and produce the vaccine and distribute them. The current shortage would eventually disappear as more of these cheaper and generic vaccines begin to come into the market. WTO member countries will stand to be protected from any claims of illegality for the measures they adopt to vaccinate their masses.

TWO SIDES TO THE WAIVER ISSUE

Legal Validity of the Waiver

The TRIPS waiver proposal has been under discussion both formally and informally since its date of inception and has also simultaneously been sponsored by other developing countries.[33] To fully understand the reason for this proposal, we must delve into the actual provisions of the TRIPS agreement and see what the provisions are and how they are interpreted in these times of crisis.

The provisions that are of significant importance include IX.3, IX.3 (b), and IX.4 of the TRIPS Agreement. These articles essentially govern exceptional circumstances, the power of the ministerial conference to grant such a waiver, and to whom the waiver proposal must be submitted.

Article IX.3 stipulates that the Ministerial Conference, which is the apex decision-making authority in the WTO, can waive an obligation that is imposed on a member country by any multilateral trade agreement or any WTO Agreement in the likelihood of an exceptional circumstance.[34] The article also provides that such a waiver proposal should be supported by a 3/4th majority, although the WTO General Council stipulates that such matters would first be tried with consensus, if no simple consensus can be reached, then it requires the support of 3/4th of the members.[35] Further, Article IX.3 (b) stipulates for the submission of the proposal of waivers related to any multilateral trade agreement. According to this, the waiver must first be submitted to Council for Trade in Goods, later to the Council for Trade in Services,

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[33] 'Members Discuss TRIPS Waiver Request, Exchange Views on IP Role Amid A Pandemic' (*Wto.org*, 2021) <https://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm> accessed 5 September 2021.

[34] Feichtner I, 'The Waiver Power of the WTO: Opening the WTO For Political Debate on The Reconciliation Of Competing Interests' (2009) 20(3) EJIL <https://academic.oup.com/ejil/article/20/3/615/402381> accessed 31 August 2021.

[35] 'DECISION-MAKING PROCEDURES UNDER ARTICLES IX AND XII OF THE WTO AGREEMENT' (*Docs.wto.org*, 1995) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/93.pdf&Open=True> accessed 5 September 2021.

and finally to the Council for TRIPS, however, considering the present waiver by India and South-Africa is about the TRIPS Agreement, the TRIPS Council has jurisdiction over it. Finally, Article IX.4 sets out the parameters in case the Ministerial Conference goes ahead with granting such waivers. They should state the 'exceptional circumstance' along with the terms and conditions that govern the waiver, the duration of the waiver, and other related specifications. In a situation where the waiver is granted for more than a year, the Ministerial Conference should meet every year to review the waiver.

Despite a provision for 'exceptional circumstances it is not defined anywhere in the agreement as to what constitutes an exceptional circumstance, but, in all essentiality, what these provisions aim to do is they sort of legalize any action taken by a member country, in times of urgency, which would otherwise be against the WTO laws[36], by waiving off certain obligations of said country. In short, Articles IX.3 and IX.4 have to be exercised with great caution because they could just as easily be used to circumvent the WTO laws[37] and obligations by a member country much like a fire escape people use to run away unnoticed. The waiver power enshrined in these articles is keeping in mind that there exist certain exigencies which a member country faces wherein it becomes extremely hard and not feasible for them to follow the WTO laws in which cases, for a temporary period, the WTO is allowed to waive those measures that are non-compliant thereby legalizing them until such exigencies remain.

The question now remains if indeed the waiver proposed by India and South Africa can be considered as an exceptional circumstance or not. It is quite evident that the COVID-19 pandemic is one of the worst we have seen in over a hundred years. Causing unprecedented destruction along its way - economic, political, social, you name it, this pandemic has changed the course of the way we think and the way we act, thus, earning the title of an ‘exceptional circumstance’. In grueling times such as these, it is imperative that the world comes together and collectively addresses this crisis because meeting stringent IP laws by way of the TRIPS agreement does not seem feasible. At this juncture, when different parts of the world have slowly

[36] Feichtner I (n 34).

[37] *EC – Bananas III, (Ecuador, Guatemala, Honduras, Mexico, United States v European Communities)* (Appellate Body Report) (WTO, 2008) WT/DS27/AB/R (p 185).

witnessed mutated forms of the initial SARS-CoV-2 variant, it becomes that much more important for the cooperation of all countries to find efficient ways to not only produce but simultaneously, ensure its distribution is equitable and also affordable. The world needs to support this waiver if we are to come out of this fight alive. We have witnessed cooperation before when a waiver was proposed in 2003 which was concerned with the Kimberley Process Certification Scheme. The WTO considered this proposal and a collective waiver was granted to all those countries participating in this scheme under Articles IX.3 and IX.4.[38]

If the WTO grants such a collective waiver, it becomes easier to produce vaccines because any country that has the resources could begin production thereby ensuring the demand for vaccines is met. It could also pave the way for faster distribution of vaccines to the Low-Income and certain Middle-Income countries that do not have the required equipment or the resources to produce this vaccine. The WTO could also just grant the waiver for a temporary period of a year and could further review it once this duration got over to check if it needs an extension or not.

Trips Flexibilities - Claimed By the Other Side

The authors shall focus on the flexibilities offered by TRIPS and shall try to analyze whether using this as a defense by those opposing the waiver proposal is valid or not in this brief.

TRIPS contains certain flexibilities that allow for the laws to be a little less stringent in case of any dire or exigent event. One of the most important of these flexibilities happens to be what is known as 'compulsory licensing'. Governed under Article 31 of the Agreement, this essentially grants a government the right to issue a license to use/produce the patent without the consent of the patent holder during the term of the patent. A study conducted for TRIPS flexibility measures, from 2001 through 2006, showed that out of 144 instances where countries went on to use these flexibilities, 100 of such instances were related to public non-commercial use/compulsory licensing to ensure generic medicines were available at affordable

[38] In 2006, the General Council extended the waiver; 'WT/L/518' (*Docs.wto.org*, 2021) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=32765&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 5 September 2021.

prices, thereby increasing production to meet the required demand.[39] Article 66.1[40] of the TRIPS agreement is yet another flexibility that is of extreme significance. This provides an extension in the transition period for LDCs for them to be able to comply with the obligations provided for by the Agreement. In the same study as above, it was found that there were a large number of member countries that adopted this flexibility of a long transition period for them to meet the standards of the TRIPS agreement and to be able to comply with them.[41]

The opposing members to the waiver proposal forget one main aspect to these flexibilities; the massiveness of the current pandemic is such that it would be highly inaccurate to conclude that just these flexibilities are enough to solve all the problems that the entire global community faces as of this day. The application of such flexibilities also differs across countries. Take an example of compulsory licensing. In the year 2012, India was relentlessly pressurized by the US government when it issued a compulsory license to produce a generic and cheaper version of Bayer's cancer drug[42], which goes on to show that even developing countries that can use such licenses to produce patented drugs, face the wrath of those developed countries from whom they got the license not to issue such licenses. The story for LDCs is completely different. Where developing countries at least have the resources to produce patented drugs should they get a compulsory license, a majority of LDCs cannot even produce such drugs.

The WTO recognized another problem with compulsory licensing under Article 31 in the 2001 Doha Declaration on TRIPS and Public Health. Sub-clause (f) under Article 31 is the main problem-causing issue because it states that a compulsory license can be granted for the sole use of the domestic market that belongs to the license-issuing country. This essentially means that such generic medicines produced under a compulsory license cannot be further exported which

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[39] 'T Hoen E and others, 'Medicine Procurement and The Use of Flexibilities in The Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016' (2018) 96 Bulletin of the World Health Organization,

[40] TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights (15 April 1994) LT/Art 66 <https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art66_oth.pdf> accessed 5 September 2021,

[41] Hoen (n 39).

[42] "'US Attacks On India's Patent Law' (*Médecins Sans Frontières Access Campaign*, 2021) <https://msfaccess.org/us-attacks-indias-patent-law> accessed 5 September 2021.

inevitably results in LDCs and those countries that cannot manufacture or are incapable of doing so, not being able to enjoy benefits under Article 31. In the Doha Declaration, WTO clearly states that "they would give till 2002 for the Council for TRIPS to come up with an expeditious solution to this problem and report it back to the General Council." In 2003, the General Council waived these obligations under Articles 31(f) and 31(h) which meant countries could now export the patented drug manufactured under compulsory licensing to those countries that lacked the resources to do so. A monumental reaffirmation of the 2003 verdict was seen by way of the 2005 Amendment to the TRIPS agreement which was enforced from 23rd January 2017[43]. The fact that a waiver followed by an amendment was required to ensure equitable distribution of drugs in cases of scarcity further cements the contentions of the authors that mere TRIPS flexibilities are not nearly enough to deal with such a devastating and catastrophic pandemic.

According to the amended TRIPS, Article 31*bis* stipulates certain conditions and procedures that are to be followed when a country that can manufacture generic medicines exports the product to a country that is not able to meet the requirements to manufacture it on its own under compulsory licensing. These procedures are extremely lengthy and time-consuming, which is the final crux of the intent behind the waiver proposed by India and South Africa. These two nations identified those factors under Article 31*bis* that were not feasible to achieve at a time when the entire world is hobbling to meet the bulk demand for Covid-19 vaccines. In this phase, all the countries across the world aim to inoculate their population against the deadly virus, therefore, following all the procedures mentioned under Article 31*bis* to export vaccines would not only cost the country who is receiving the export but it would also cost the country that is manufacturing the vaccines to slow down their exports at a time when we need the vaccines to be universalized and available to every country.

Another important flexibility that TRIPS offers is 'voluntary licensing', which is a form of license where both parties mutually agree upon the terms and

[43] TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights (15 April 1994) (as amended on 23 January 2017).

conditions.[44] An example for a voluntary license would be the recent agreement wherein Oxford-AstraZeneca's vaccine [known as Covishield in India], would be manufactured by the Indian Serum Institute, one of the world's largest vaccine producers. The downside to voluntary licensing is the fact that the ultimate decision lies with the patent-holder with regards to import/export, third-party inclusion, etc. This could be seen with the license given by AstraZeneca to the Serum Institute as well, where the former company controls the ultimate recipients, thereby massively restricting the vaccines to be distributed equitably to all countries that need them.[45]

The world is at the cusp of a disease that could turn undefeatable if not controlled. The colossal demand for vaccines and the shortage of the same have already opened our eyes and shown us the future. When there is still a small chance of saving the entire global community, just the various flexibilities offered by the TRIPS agreement are nowhere enough to meet the required vaccine doses. Until the nations put up a front of solidarity, this internal vaccine fight will continue taking the lives of the poor and destroying the LDCs in its wake.

STANCE AS OF 7 MAY 2021

Massive development in the waiver proposal came on 7th May 2021 where the US announced their approval for temporary TRIPS waiver despite having a strong inclination towards having string IP Protections, in light of the safety of the masses and those grappling with the unyielding hands of the novel coronavirus. One of the first rich countries to come on board the proposal, does not, however, mean that the IP protections will be waived off right away. Unless the members of the WTO take action, the world will have to wait whilst constantly having to look at the inequitable distribution taking place right under their noses.

THE TRIUMVIRATE ON THE ACCESS-TO-MEDICINE FRONT

It is the view of the authors that there exists a 'Triumvirate' of sorts when it comes to the production and distribution of vaccines to all - the three most powerful

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[44] Ranjan P, 'The Case for Waiving Intellectual Property Protection for Covid-19 Vaccines' (*ORF*, 2021) <https://orfonline.org/research/the-case-for-waiving-intellectual-property-protection-for-covid-19-vaccines/> accessed 5 September 2021.

[45] Thambisetty S, 'Vaccines And Patents: How Self-Interest And Artificial Scarcity Weaken Human Solidarity' (*Blogs.lse.ac.uk*, 2021) <https://blogs.lse.ac.uk/politicsandpolicy/vaccines-and-patents/> accessed 5 September 2021.

stakeholders. On the one side, we have the Multinational corporations, on the other side we have nation-states [who want to enhance their needs over others, essentially the same as vaccine nationalism] and finally, we have the various International Organizations, NGO's, Low/Poor/Middle-income countries, etc. [who want to ensure that the vaccines are delivered to the entire population of the world at affordable prices]. When the pandemic broke out, we saw that all of these three parts had one goal in mind which was to ensure expedited vaccine creation and equitable distribution of said vaccines. But over time, we saw that the only group that was left which advocated for equitable and affordable vaccine distribution was that of the NGOs, LDCs, etc. Even before the vaccines received approval from the regulatory authorities, we saw the rampant rise of vaccine nationalism which, in this triumvirate, means that nation-states started pre-ordering in bulk, vaccines from various companies, to secure their people first over the rest of the world. In this process, the multinational corporations and the big pharmaceutical companies who were in charge of producing vaccines struck bilateral trade deals with the nation-states to boost their profits. These bigwigs also started enforcing their rights to patent the drugs they produced which further resulted in the production of vaccines being severely restricted. Such pharmaceutical companies and multinational corporations have made it abundantly clear that they strongly advocate for IPR laws and they hope that they get their respective patent protections. Various international organizations and other groups who want equitable and affordable access to these vaccines have seen the harm that is being done to the people because of this deep-seated personal agenda among the two other stakeholders as well as their capitalistic goals. The foe we face today can mutate and adapt thereby becoming stronger. If this tiff among the stakeholders and their varied agenda does not come to an end, then they are one of the main threats which are acting as a barrier for us to fight this virus.

If this fight for vaccines goes on for too long, there will come a point when the virus would reach its strongest form after which, it would be next to impossible to defeat it. Vaccinating just one country is not the solution for stopping the virus from spreading, because, as long as even 10 percent of the world’s population remains not vaccinated, the chances of the virus attacking those that have been vaccinated is still a very high possibility and the second wave that India is witnessing is a proof of that.

CONCLUSION

The onslaught of the COVID-19 pandemic swept across the planet like a tidal wave of death and destruction, spreading across borders on an equal footing, leaving none unaffected, inclusive of the rich ones, the middle-income as well as the poor ones. Despite the pandemic affecting the entire population of the world, there is still an astonishing number of cases where some of the more affluent nations are given suitability preference over other developing countries in certain aspects, one of which this paper holds most crucial, i.e., the widespread production and distribution of vaccines in the face of our Covid-strewn tomorrow.

To combat COVID-19, it is imperative to scale up the vaccine production to meet the gigantic demand of vaccinating the entire world's population. But to do this, we need to change multiple facets in the current framework if we are to accommodate and successfully charge ahead with this massive task ahead of us. The TRIPS waiver is not the end of our troubles; on the contrary, it is but a step closer to achieving the goal of inoculating the masses across each corner of the earth. A collective resilient front is required; however, we also need to ensure that various medical facilities and health infrastructures are set up across those countries that do not have them, amending or relaxing existing legal frameworks to fight the virus and implement changes in the administrative force to increase the vaccine production and to get through this fight in one piece.

DATA PROTECTION AUTHORITY: IN SEARCH OF AN INDEPENDENT REGULATOR

Shradhanjali Sarma[1]

ABSTRACT

Over the past few decades, we have seen an increase in delegation to independent regulatory bodies. The traditional narrative of democracy emphasizes on the role of the three organs of the Government which includes the executive, judiciary and the legislature. In addition to these traditional bodies, the complex democratic societies of today have seen the mushrooming of independent regulators to supervise, monitor and regulate sector-specific issues. The need to establish independent bodies as experts in sectoral regulation has led to the formation of institutions knows as the 'fourth branch of the Government'. In the Indian constitutional context, fourth branch institutions such as Election Commission, Lokpal, and Central Investigation Bureau etc. are entrusted with the responsibility of protecting the constitutional values such as democracy, legality, impartiality and human rights. Due to its distinctiveness from the three branches of the Government i.e., the executive, judiciary and legislature, it is expected to be more independent in its functions and operation than the other three branches. In midst of the ongoing debate for protection of personal data of citizens in India, the need for an independent regulator was suggested in the Srikrishna Committee Report. The Personal Data Protection Bill, 2019 introduces the Data Protection Authority as the "independent" regulator for protection of personal data of citizens. However, owing to the dominance of the Central Government in the composition of the body and in the rule-making functions, the Data Protection Authority's structure has been criticised time and again. The paper broadly, intends, to explore four objectives- the role of fourth branch of the Government and the extent of its independence; trace the journey of the Data Protection Authority in India and to understand whether the current structure is a success in terms of an effective regulatory data protection regime in India or not.

Keywords: *Data Protection, Regulation, Data Protection Authority, Personal Data Protection Bill 2019, Personal Data, Saikrishna Committee Report*

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INTRODUCTION

The proposed data protection regime in India intends to protect individuals from breach of their personal data by providing for a mechanism to prevent 'harms'. Based largely on the existing global frameworks and India's privacy jurisprudence, the Personal Data Protection Bill, 2019 (PDP Bill) ensures protection of personal data of citizens by emphasizing on the 'consent and notice' principle.[2] Basing itself on the universal principles of purpose minimization, purpose specification, accuracy, transparency etc., the legislation intends to safeguard personal data of citizens from misuse and manipulation.[3]

Owing to privacy jurisprudence across the globe, a need was felt to provide for a central regulatory body to supervise the personal data of citizens and to protect it from any form of misuse. In pursuance of these objectives, the PDP Bill provides for Data Protection Authority (DPA), a regulatory body responsible for protecting and regulating personal data of citizens.[4] After the judgment in *Puttaswamy v Union of India*[5], the Srikrishna Committee was formed to provide an effective data protection framework for the country to protect the personal data of citizens. The Srikrishna Committee observed that 'consent' is the foundational principle for a data protection regime. However, practices pertaining to consent are often broken, thus necessitating the need for a body to protect the rules from being broken. With the aim of effective regulation, the Srikrishna Committee Report suggested that an independent body should be created for establishment of an effective data protection framework.[6] It was the suggestion of the Committee that led to the formation of the DPA under PDP Bill as the 'fourth branch institution' with the responsibility of being the bulwark against any kind of misuse of personal data of citizens.

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[2] Anirudh Burman, 'Will India's Proposed Data Protection Law Protect Privacy and Promote Growth?' (*Carnegie India,* 2020) <https://carnegieendowment.org/files/Burman_Data_Privacy.pdf> accessed 10 August 2021.
[3] ibid.
[4] Amar Patnaik, '*Why India's Proposed Data Protection Authority Needs Constitutional Entrenchment*' (*The Wire*, 23 July 2020) <https://thewire.in/tech/india-data-protection-authority-needs-constitutional-entrenchment> accessed 15 September, 2021.
[5] ibid.
[6] Justice B.N Srikrishna, *White Paper of the Committee of Experts on a Data Protection Framework for India* (2017).

Recently, the Government decided to work on a new draft, after 21 months of the PDP Bill being referred to the Joint Parliamentary Committee.[7] In the newly reshuffled cabinet Ms. Lekhi and four other committee members became the council of ministers, with Mr. Chaudhury as the Chairman.[8] However, there were reports that Ms. Lekhi did not circulate the report, thus leading to intense deliberations among members. After a long deliberation, it was decided that the Bill needs to be given a fresh start as another motion for a second round of deliberation was considered futile.[9] Owing to the change in the circumstances, it will be interesting to witness the manner in which the Government will initiate the process of starting the drafting process from scratch. It will be significant for the Government to consider the recommendations of the Srikrishna Committee as well as the loopholes in the 2019 Bill in order to develop a strong regulatory regime in India. In this backdrop, the paper explores the current structure of DPA under the PDP Bill and the manner in which it can be improved for developing a robust data protection framework for the country.

Development of the Data Protection Ecosystem

After the landmark judgment in *Puttaswamy v Union of India*[10], the Srikrishna Committee was constituted to provide for a framework for data protection. It was observed by the Srikrishna Committee that India does not have a separate authority for ensuring compliance with data protection obligations.[11] It was only the Information Technology Act, 2000 (IT Act) that provided for appointment of adjudication officers and for appellate mechanism for data protection. However, the same was for issues arising under the IT Act and not under any other enactments. Therefore, a need was felt to established a central regulatory body for the purpose of protection of personal data of citizens.

In the report, the Committee after analysis of different jurisdictions, suggested that an independent body should be established who shall be responsible for monitoring, enforcement, awareness generation and for standard setting.[12] The idea

[7] Special Correspondent, '*Fresh Start for Report on Data Protection Bill*' (*The Hindu*, 15 September, 2021) <https://www.thehindu.com/news/national/work-on-report-on-personal-data-protection-bill-to-start-afresh/article36482658.ece> accessed 17 September 2021.
[8] ibid.
[9] ibid.
[10] (2017) 10 SCC 1.
[11] The Hindu (n 7).
[12] ibid.

behind setting up the DPA was to establish an enforcement agency for creating a robust data protection regime and for adherence to the substantive obligations.[13] It was observed by the Srikrishna Committee that a central body will be better equipped in handling matters relating to personal data protection as it will ensure consistency in issuing guidelines and regulations.[14] Also, the Committee based it analysis on examples from across the globe, significant being that of Japan, who moved from a multi-regulatory structure to a unitary national structured.[15] Along with the benefit of consistency, single regulatory body tend to provide greater opportunities for multilateral trade, as it serves as the single point of contact for collaborations.[16]

The Committee received comments on establishment of an independent body for protection of data of individuals. In order to ensure independence, it was suggested that that there should be a fixed tenure, financial independence, disclosure of conflicts, restrictions on future employment, retiral benefits etc.[17] It was suggested that the DPA should constitute of a chairperson, technical and legal members.[18] The members and the chairperson are to be appointed by a committee comprised of members from both executive and judiciary.[19] The reason behind including a committee comprising of both executive and judiciary is significant in establishing an independent regulatory body.[20]

Based on the comments received by the Committee, it was suggested that the Board will be headed by six whole-time members and a Chairperson appointed by the Central Government.[21] The selection committee responsible for appointing the members and the chairperson shall consist of the Chief Justice or her nominee (who is a judge at the Supreme Court), Cabinet Secretary to the Government of India and a reputed expert in the field of data protection, data science, information technology, data management, cyber laws and related laws.[22]

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[13] Srikrishna (n 6).
[14] ibid.
[15] ibid.
[16] United Nations Conference on Trade and Development (UNCTAD), 'Data Protection Regulation and International Data Flows: Implications for Trade and Development' (2016) <https://unctad.org/system/files/official-document/dtlstict2016d1_en.pdf>.
[17] The Hindu (n 7).
[18] ibid.
[19] ibid.
[20] ibid.
[21] ibid.
[22] ibid.

In addition to the above, it was discussed that the members of the DPA are required to have professional experience of not less than ten years in fields such as data protection, information technology, data management, data science, cyber and internet laws and related subjects.[23] It was suggested that to ensure independence of the DPA, the members shall have a fixed term for five years and that their terms and conditions for appointment shall not be reduced to their disadvantage.[24]

The Committee laid the manner in which the DPA has to ensure compliance of the law by the data fiduciaries. The Committee suggested that the DPA should be given the power to issue directions to the data fiduciaries and processors to ascertain that they are discharging functions under law. Additionally, the DPA is to have the power to call for information from the data processors and the fiduciaries.

In order to maintain transparency and awareness, the Committee envisaged a model where the DPA could carry out certain functions. *First*, the DPA should be given the power to issue directions from time to time to data fiduciaries and data processors for discharging functions under the law. *Second*, the DPA should be entrusted with the power to call for information from the data processors and fiduciaries, of the DPA require such information to perform functions under law. *Third*, the DPA should allow stakeholders to ask questions in order to receive clarifications on the law. *Fourth*, the DPA should be allowed to issue public statements on their website regarding contraventions by data fiduciaries and processors. The intention behind providing such a power of disclosure to the DPA is to ensure that the public is aware of specific instances of contravention related to personal data. *Fifth*, The DPA should be allowed to formulate their own codes of good practice. *Sixth*, the Committee envisages a non-mandatory structure for DPA in matters of conducting inquiries/investigation. It also suggests that the DPA should be allowed to issue reprimands and warnings to data fiduciaries and processors. *Seventh*, the DPA should conduct in a manner which allows coordination with other regulators.

The suggestions of the Bill found its way into the Draft PDP Bill of 2018. On December 11, 2019, the PDP Bill was introduced in the Lok Sabha by Union Minister

[23] The Hindu (n 7).
[24] ibid.

of Electronics and Information Technology, Mr. Ravi Shankar Prasad. The Bill was considered as the keystone development in the evolution of data protection law in India. Borrowing principles from the European General Data Protection Regulation (GDPR) and the landmark *Puttuswamy* judgment, the Bill intended to fill the vacuum in the regulatory framework concerning data protection.

ISSUES AND CHALLENGES

Is the DPA Independent?

The debate surrounding the current DPA structure under the PDP is that it fails to operate as an effective 'fourth branch institution'.[25] In the Indian constitutional context, fourth branch institutions such as Election Commission, Lokpal, Central Investigation Bureau etc. are entrusted with the responsibility of protecting the constitutional values such as democracy, legality, impartiality and human rights.[26] Due to its distinctiveness from the three branches of the Government i.e. the executive, judiciary and legislature, it is expected to be more independent in its functions and operation than the other three branches. While certain global constitutional framework such as the South African Constitution provides complete independence to the fourth branch institutions, the Indian Constitution does not provide for such explicit independence. Under the Constitution, it is the Parliament that enacts laws for such fourth branch institutions, thus granting them 'implicit' independence.[27] Under the classical narrative of democracy, it is the three organs of the Government which acts as the bulwark. However, due to the complexity in the administration and governance of a state, it was necessary to establish independent institutions in the form of fourth branch institutions. With the same intention in mind, the DPA structure was formed. However, the journey of DPA is questionable, especially with its independence eroding at each stage of discussion.

The Committee Report was soon followed by the enactment of the PDP Bill, 2018 and a revised one in 2019. The 2018 edition of the Bill was almost an exact replication of the structure suggested by the Committee, wherein it included the Chief Justice of India as one of the members of the selection committee. However, the 2019 edition of

[25] Patnaik (n 4).
[26] ibid.
[27] ibid.

the Bill removed the inclusion of the judiciary in the selection committee and included only members from the Central Government, thus reducing the independence and impartiality of the body. The current framework under the PDP provides that the DPA shall be established by the Central Government. It shall consist of a Chairperson and six-whole time members, out of which one shall be a person holding qualification and experience in law.[28] The members shall be appointed by a selection committee who shall comprise of the Cabinet Secretary, who shall be the Chairperson of the committee. It shall also include the Secretary to the Government of India dealing with the Ministry of Legal Affairs and with that of the Ministry of Electronics and Information Technology (MeitY).[29] The Bill also specifies that the Chairperson and the members shall be people who shall have knowledge in areas such as information technology, data protection, data management, data science, data security, cyber and internet laws, public administration, national security or related subjects.[30] The removal of the Chairpersons and the members is placed upon the Central Government. It is believed that independence of regulatory bodies is important for formulation of better policies.[31] While there is no consensus on how independence should be measured, certain regulators are strongly insulated than others from external influences.[32] Independence exercised by regulatory bodies are two-fold. A regulatory body, first and foremost, should have the independence to take it own decisions and be a judge of their own interests.[33] Along with it, independence requires a regulatory body to take ownership of their own decisions.[34]

The DPA appointed solely by the Central Government will fail to serve as an independent regulator. It will run a severe risk of being in conflict with its purpose, especially in cases where action needs to be taken against the Government. In issues pertaining to data protection, both the Government as well as the citizens are stakeholders, but with competing interests. A regulatory authority appointed solely by

[28] PDP Bill 2019, s 42.
[29] PDP Bill 2019, s 42.
[30] ibid.
[31] Chris Hanretty & Christel Koop, 'Shall the Law Set Them Free? The Formal and Actual Independence of Regulatory Agencies' (2013) 7(2) Regulation and Governance <https://doi.org/10.1111/j.1748-5991.2012.01156.x> accessed on 14 September, 2021.
[32] Fabrizio Gilardi and Martino Maggetti, 'The Independence of Regulatory Authorities' in David Levi-Faur (eds.) in Handbook on the Politics of Regulation (*EE* 2013).
[33] ibid.
[34] ibid.

the Central Government has the tendency to bend towards the interests of the Centre rather than the citizens, thus stripping the regulatory authority from its ability to take independent decisions. Such conflicts are inevitable in breaches pertaining to health data or data concerning any social welfare programs.[35]

DPAs in most jurisdictions are independent, and have independence inscribed as the one of the significant features of data protection legislations. In European Union, the GDPR serves as the primary legislation for data protection and was the bedrock legislation based on which the Srikrishna Committee formulated the White Paper on data protection in India.

Article 51 of GDPR provides for establishment of more than one supervisory authority for data protection. The GDPR allows substantial flexibility to the Member States regarding the appointment of the members of the supervisory authority.[36] The striking feature of the provisions concerning the supervisory authority/s is that of independence. Article 52 of GDPR provides that each member of the supervisory authority shall remain free from external influence, and not take instructions from anyone. The authority, under external influence, should not engage in any activity which is incompatible with their duties.[37]

Another concerning aspect of the structure of the DPA is that of absence of independent experts.[38] For a dynamic field like data protection, it is important that the structure consist of independent experts. The absence of any independent members might create problems for regulating the field of data protection which is fast evolving. Inclusion of members only as whole-time members might make the structure inflexible and also devoid of any independence.[39] Also, the number of whole-time members which is fixed as six might lead to understaffing of the DPA.[40] Such a structure deliberately excludes itself from gaining insights from researchers,

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[35] Patnaik (n 4).
[36] GDPR, art 54.
[37] GDPR, art 52.
[38] Dvara Research, 'Comments to the Joint Parliamentary Committee (JPC) on the Personal Data Protection Bill 2019 introduced in the Lok Sabha on 11 December 2019', <https://www.dvara.com/research/wp-content/uploads/2020/03/Dvara-Research-FinalSubmission-Comments-to-the-Joint-Parliamentary-Committee-on-PDP-Bill.pdf> accessed on 11 April, 2021.
[39] ibid.
[40] ibid.

practitioners and technical experts.[41] The exclusion of independent experts from the DPA is a deviation from the structure of the other regulatory bodies in India such as TRAI, where there are at least two-part time members in addition to the whole-time members and the Chair.[42]

Under the Protection of Personal Information Act (POPI) of South Africa, an Information Regulator is established for the protection of personal information. POPI provides for a Chairperson and two-full time members. Along with two full-time members, the Act mandates the presence of two part-time members.[43] The Act states that the Information Regulator has to be impartial and perform its duties without fear, favour and prejudice.[44]

Unlike the PDP Bill, the GDPR and POPI clearly mentions that the regulators or the supervisory authority has to be independent and impartial. The explicit mention of such features guarantees confidence to the citizens.

The OECD Recommendation of the Council on Regulatory Policy and Governance emphasized on the importance of a regulator to be independent from politicians, government and regulated entities to maintain 'public confidence'.[45] An independent regulator helps in building trust in the market. Also, a decision of a regulator has significant impact and hence it is important that its impartiality is protected.[46] In 2013, the OECD came up with five-dimensional structure to create a culture of independence for the regulatory bodies. It suggested that a regulatory body should have five characteristics to ensure independence- role clarity, accountability and transparency, financial independence, independence of leadership and staff behaviour.[47]

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[41] Guest Author, 'Regulatory Governance under the PDP Bill: A Powerful Ship with an Unchecked Captain?' (*Medianama,* January 7, 2020) <https://www.medianama.com/2020/01/223-pdp-bill-2019-data-protection-authority/> accessed 14 September 2021.
[42] ibid.
[43] POPI Act, s 41.
[44] ibid.
[45] OECD, 'Creating a Culture of Independence Practical Guidance against Undue Influence' (2013) <'https: //www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf> accessed 11 April 2021.
[46] ibid.
[47] ibid.

Under role clarity, the OECD report suggested that the legislature should clearly define the functions of the regulator. Even though it is not possible to clearly define the roles, the report mentioned that the legislative process should be such that it resolves conflicts and prevents undue interventions. In the current framework, it is highly unlikely that undue interventions can be prevented in as much as there is sufficient dominance in presence of the Central Government in the regulatory structure.

Section 86 of the PDP Bill, 2019, allows the Central Government to issue instructions to the DPA if it feels necessary in the interest of national security and sovereignty. The DPA is bound by the instructions of the Central Government. It is important that regulatory bodies are kept independent from any kind of political independence in order to prevent compromise of their credibility as well as impartiality.[48] However, the instructions under Section 86 are imposed on the DPA without any prior consultation and discussion, thus eroding the independence of the DPA and by subjecting them to the power and dominance of the Central Government. The second most important determining criteria to establish DPA as a strong regulatory body for data protection is 'transparency and accountability'. As per the OECD, 2014 report, accountability keeps maintains a system of check and balance for the regulator, thus establishing its credibility in the market.[49] Within the broad contours of accountability exists 'transparency' by which the regulator is mandated to report its exercise of power and responsibilities, outcomes etc.[50] It is important for a regulator to provide a report on internal governance either to the legislature or the executive in order to maintain trust with the institution. The OECD report also suggests that the regulator should be under an obligation to publish its decisions with empirical evidence, explaining the reasons behind its decisions.[51] This will ensure transparency and will allow the citizens to be aware of the manner in which a regulatory body function in protecting their interests.

However, it is difficult to comprehend the manner in which the current structure of the DPA will allow transparency and accountability. The PDP Bill allows

[48] Dvara Research (n 38).
[49] OECD (n 45).
[50] ibid.
[51] OECD (n 45).

the Central Government to lay down the procedures for meetings from time to time. There is no provision in the Bill which allows the members of the DPA to be consulted before any code of ethics is being released by the Government, thus placing the rule-making powers entirely on the Central Government to which the DPA has to abide by. In absence of any internal accountability mechanism, it will be difficult to determine whether the regulatory body will be able to establish itself as an accountable and transparent institution for its citizens, especially in matters of data protection, which is not only fast-evolving but is also an issue of great sensitivity. The DPA, established with the intention of safeguarding personal data of individuals, holds great responsibility towards the citizens, making it important for it to be accountable and transparent. However, owing to the dominance of the executive in the entire structure of the DPA, it will be interesting to understand and witness the manner in which the authority will establish its accountability and transparency.

Nation's Interest v Citizens' Interests

The PDP Bill, when it was first released in 2018, stated that the processing of personal data by the State is exempt from most of the provisions under law, if such processing is in accordance in law and is proportionate. The 2018 Bill tried to incorporate the proportionality standard laid down in *Puttaswamy*. However, the 2019 Bill generated industry-wide concerns for widening the exemption clause in favor of the Government. Under Section 35 of the PDP Bill, 2019, The Central Government is empowered to exclude any agency of the Government from all or any provision of the Bill. The instances under such an exemption apply to are same as that of Section 5 of the Telegraph Act. Therefore, Section 35 exempts *any* agencies from transparency and accountability provisions under the PDP Bill, irrespective of whether the agencies are performing security provisions or not.

Under the 2018 Bill, all state agencies that accessed personal data for security purposes had to deploy security measures for processing of data in a fair and reasonable manner.[52] Such state agencies were to be regulated by DPA and no exemptions were provided to these agencies from any action of the DPA. However, with the 2019 Bill, the position has changed, with every agency under the Government

[52] Medianama (n 41).

being promised immunity from any action by the DPA. The Bill has also exempted the Government from the *Offence* chapter, thus providing full immunity for any breach committed by the Government which might harm the interests of citizens.

Such a provision allows the Government to process substantial personal data of citizens on the pretext of national interests. Earlier, the Bill allowed such exemption only in cases of national security. With the addition of four new grounds- sovereignty, integrity, friendly relations, and public order, the Bill expands the power of the Government to process personal data of citizens. While such grounds are legally provided for under Article 19(2) of the Constitution, no specific instances enumerated under each heading for the purposes of PDP Bill.

In *Puttaswamy*, the Court stated that the State may have an interest in placing reasonable limits on informational privacy for national security, security of State and other similar grounds.[53] The Court defined the term 'other similar grounds' to include national objectives such as sovereignty, maintenance of public order, integrity of the state, maintenance of friendly relations and prevention of incitement of the commission of offence.[54] However, these terms were not defined in the Srikrishna Committee Report. The Srikrishna Committee Report relied on *Santokh Singh vs. Delhi* Administration[55] and stated that these terms are not precise and has to be examined on case-to-case basis. In *Ram Manohar Lohia vs. State of Bihar*[56], the Court examined some of these terms. It stated that these terms have to be observed in the form of three concentric circles.[57] The largest circle will be represented by law and order and the smallest circle by security of state.[58] The circle in between these two will represent public order. The Court explained that an action which may affect law and order, may not affect public order. Similarly, an act which affects public order may not affect security of state.[59]

[53] *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.
[54] ibid.
[55] 1973 AIR 1091.
[56] 1966 AIR 740.
[57] *Dr. Ram Manohar Lohia v State of Bihar* 1966 AIR 740.
[58] ibid.
[59] ibid.

It is the presence of definitional ambiguity which provides enough powers to the Government to carry out surveillance by processing of personal data of citizens. Further, as mentioned in *Santokh Singh*, the terms have to be observed case-to-case basis. Therefore, allowing a blanket exemption to the Government does not leave any scope for the DPA to analyze such instances on case-to-case basis and instead gives the Government wide discretion to take matters in their own hands.

The structure of Section 35 of the PDP Bill robs the essence of enactment and defies the intention with which the DPA was established in the first place. There is no justification for such a blanket exemption. Infact, such a blanket exemption fails to adhere to the four-stage test in *Puttaswamy*. Allowing the Government and all agencies to process personal data on pretext of national interests, irrespective of whether these agencies are engaged in security functions, will lead to dilution of privacy rather than protecting it. The 2019 Bill has replaced the constitutional standards of 'necessary proportionate' with 'necessary and expedient', thus providing far greater discretion to the Government in matters of personal data of citizens.[60]

The DPA, once established, has to cater to the interests of the government, the private sector as well as the citizens/individuals, which is the most important section.[61] However, the Bill is structured in a manner which places the Government's interest at the pedestal rather than that of the citizens. Owing to conflict of interests and the dominance of the executive in the DPA, striking a balance might be difficult.

Also, the Bill envisions dual objectives which are- to promote protection of personal data and to promote economic growth.[62] The Preamble of the Bill states the transformative objective of balancing economic growth with informational privacy of citizens. The Preamble states that 'it is necessary to create a collective culture that fosters a free and fair digital economy, respecting the informational privacy of individuals, and ensuring empowerment, progress and innovation through digital

[60] Amber Sinha and Arindajit Basu, 'The Politics of India's Data Protection Ecosystem' (2019) 54(49) EPW <https://www.epw.in/engage/article/politics-indias-data-protection-ecosystem> accessed 14 September 2020.
[61] Trisha Jalan, '*NAMA: Data Protection Authority's Independence and Powers under the Personal Data Protection Bill*' (*Medianama*, 29 January, 2020) <https://www.medianama.com/2020/01/223-nama-data-protection-authority-powers-independence-pdp-bill/> accessed 13 September, 2020.
[62] ibid.

governance and inclusion', thus laying down the importance of balancing these two competing interests.[63] The intention behind such a Preamble is to clarify that data, which is considered popularly as the 'new oil' can be profitable to an economy only if it is used responsibly by keeping citizens' interests in mind.

It is well known that public good often create conflict, and is considered to be anti-thesis to an individual's right to privacy. However, protection of individual's personal data and the progress of an economy are two significant constitutional objectives of a free and fair digital economy.[64] While economic growth vis-à-vis data can be problematic in a case where individual's personal data is involved, it is important that the DPA finds a middle ground where it is able to promote economic growth in a privacy-centric manner.[65]

THE WAY FORWARD

For a strong data protection regime, it is important that the DPA establishes itself as an independent regulator, protected from aggrandizement from the executive and from political control. The DPA should be sufficiently independent in matters of appointment of members, conditions of service and in making rules for its functional role. As discussed above, in the 2018 edition of the Bill, following the suggestions in the Srikrishna Committee Report, a member of the judiciary i.e. the Chief Justice of the Supreme Court or her nominee was required to be a part of the selection Committee. The 2019 Bill removed the provision for a judicial-members, thus replacing it with members solely from the Central Government. In order to function as an independent, accountable and impartial regulator, it is important that the DPA consist of bipartisan representation from the legislature as well as the judiciary.[66] Instead of vesting the Central Government with the power to remove members and the Chairpersons, the Bill should incorporate a provision by which the removal procedure shall be similar to that of a judge of the Supreme Court.[67] Also to strengthen independence of the body, it is important that independent experts are appointed

[63] Personal Data Protection Bill, 2019.
[64] Amar Patnaik and Nikhil Pratap, 'For a Robust Data Protection Regime' (*Business Line*, May 13, 2020) <https://www.thehindubusinessline.com/opinion/for-a-robust-data-protection-regime/article 34551998.ece> accessed 15 September 2021.
[65] ibid.
[66] The Hindu (n 7).
[67] ibid.

apart from the six whole time members. Constraining the number of members to six whole-time members might lead to understaffing. Considering the level of expertise that the field of data protection and privacy requires, the presence of independent experts will be a necessity. Also, the Government and the DPA should engage in a consultative process to lay down the rules for its effective functions. The rule-making power should not be vested solely on the Central Government.

For an effective institutional design, the Bill should mandate submission of reports by the DPA, outlining the various investigations carried out by it along with decisions. This would ensure that the regulator is carrying out the functions in a legitimate manner and is not transgressing its powers under the Act.[68] Such a structure would also help in creating a feedback loop and would enable the regulator to understand the areas in which it needs to improve.[69]

In order to make the Bill *Puttaswamy*-compliant, it is important to include the Government under the purview of the Bill as well as the DPA. A blanket exemption of the Government and its agencies does not serve the purposes of data protection and privacy. While allowing the Government to process personal data of the citizens on the grounds of national interests is not impermissible, there should be at least a manner in which the DPA gets an opportunity to test the veracity of such 'expedient' and 'necessary' circumstances.

The Central Government is allowed to process data on the grounds such as sovereignty', 'integrity', 'state security', 'international relations', and 'public order', which are not objectively defined under the Bill. This provides the Government with tremendous leeway to process personal data of citizens, without any scrutiny and assessment of a situation. Instead of allowing a blanket exemption from the entire Bill, the Central Government should be placed under the scrutiny of the DPA for all or any decisions that the Central Government takes for non-consensual access of personal data of citizens.[70] Also, for the DPA to supervise and scrutinize the decision of the

[68] Dvara Research, 'Our Initial Comments on the Data Protection Bill, 2017', 2020 <https://www.dvara.com/blog/2020/01/17/our-initial-comments-on-the-personal-data-protection-bill-2019/> accessed 11 April 2021.
[69] ibid.
[70] Akshat Agarwal and Ors., 'The Personal Data Protection Bill 2019: Recommendations to the Joint Parliamentary Committee' (*Observer Research Foundation*, March 2020)

Central Government, it is significant to come to a conclusion regarding the terms-sovereignty', 'integrity', 'state security', 'international relations', and 'public order', which are vaguely provided for under the Bill. The Bill can borrow objective definitions from the he laid down in the Private Member Bill introduced by Shri Baijayant Pandya in 2017, wherein he provided for well-defined grounds for exemptions.[71] Observations can be drawn from the said Bill along with Intelligence Services (Powers and Regulation) Bill, wherein the term 'national security' has been clearly defined. A clear and unambiguous law would help in establishing an effective institutional design for regulation.

Certain powers of the DPA have been transferred to the Central Government in the 2019 version of the Bill. In the 2018 version of the Bill, the power to notify categories of 'sensitive personal data' was placed on the DPA.[72] However, the same has been transferred to the Central Government in the recent version of the Bill in 2019.[73] As discussed above, it is the DPA who shall consist of members well versed on areas of data protection, data security, data science, cyber laws and information technology. Owing to the expertise and knowledge, it is the DPA who should be given the power to notify the categories of sensitive personal data in as much as it is better placed to so as compared to the Central Government.[74] Therefore, the position as envisaged in the 2018 Bill should be reinstated. Also, a similar provision should be incorporated in the Bill in terms of notifying the significant data fiduciaries. The current framework allows the Central Government to notify the significant data fiduciaries. However, the DPA is better placed in terms of knowledge to carry out such tasks[75].

Also, one important feature that DPA can adopt from existing regulators is that of publication of consultation papers on matters that DPA wishes to take an important decision. This allows different stakeholders to engage and provide their opinions, thus helping the DPA to regulate matters in a balanced manner.

<https://www.orfonline.org/research/the-personal-data-protection-bill-2019-61915/> accessed 12 April 2021.

[71] The Data (Privacy and Protection) Bill, 2017 by Shri Baijayant Panda, M.P.

[72] PDP Bill 2018, s 22(2).

[73] PDP Bill 2018, s 15.

[74] Dvara Research (n 68).

[75] ibid.

In a nutshell, the DPA in order to establish itself as an effective regulatory body has to free itself from the fetters of the Central Government. The current regulatory structure not only provides excessive leeway to the Government by providing them a blanket exemption, but also vests them with excessive power vis-à-vis the operation of the DPA. Such a regulatory design will compromise on the intent with which the data protection framework was envisaged both by the judiciary as well as the Srikrishna Committee. Hence, it is important that the structure of the DPA is revamped to establish a privacy-oriented regulatory design for the country.

ARTIFICIAL INTELLIGENCE AND PATENT LAW: A DISCOURSE OVER DISCLOSURE

Abhinav Srivastava[1]

ABSTRACT

We are witnessing the era of Artificial intelligence (AI), which has the potential to change society altogether. The invasion of AI into our daily life is something which has been anticipated by scientists and researchers decades ago. The way AI processes data and acts independently without human intervention brings innumerable legal questions and lately, the discourse over AI and patent law have attracted a considerable amount of attention. Patents are basically conditioned over inventor disclosing information regarding the invention but AI's inner working is not known and hence, it is unexplainable. The nature of AI has the plausibility of being a stumbling block to the fulfilment of prerequisites of patent law. The lack of transparency and inscrutable nature of AI might put barriers on the basic essence of patent law, that is 'disclosure' (or specification) of inventions produced by the system of AI. The output one receives by AI is known but the processing is largely unknown because of its ravelling nature of black-box, and the examiner of the invention might find it difficult to scrutinise the processing. The paper will focus on AI-generated inventions, which poses challenges to the foundational requirement of patent law which is disclosure of invention. So, to anatomize the same the author has divided the paper into three portions. Firstly, the author will analyse the mechanism of AI and its issue over transparency. Secondly, the author will give a holistic view of the doctrine of the disclosure under the umbrella of patent laws of the U.S. and India. Lastly, the author will try to show the picture of an AI-generated invention and its impact on disclosure requirements.

Keywords: *Patent, Artificial Intelligence, Information Disclosure, Invention, Transparency*

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INTRODUCTION

The term 'Patent' has its origin from the Latin term '*Patere*' that means 'be open or lie open'.[2] The patent right is not only about giving exclusive rights to an inventor but also to disclose the information regarding invention to the world. It works on the Latin maxim '*quid pro quo',* which states that in return of the monopoly right for limited time over invention; inventor has to share enough information apropos invention which could be deduced into use by the others.[3] For instance, Elwood Haynes (who was the first inventor of American automobile) invented an automobile which was designed to run solely on its own power and when he got to know that George Selden already patented not only internal combustion engine but also four-wheeled vehicles on which engine would be used, and on top of that George demanded royalties from every manufacturer in America.[4] In the legal battle, George lost the case and the Court emphasised that the public gained nothing from George's invention and from the view point of public interest the patent had never been granted.[5] The conventional requirement of disclosure is pertinent to disseminate the technical knowledge of invention to others. Article 29 of TRIPS places the requirement to the applicant of the member countries to disclose the invention in clear and complete manner, along with the optional requirement of best mode to carry out the invention by a skilled person in the art.

It is beyond doubt that artificial intelligence (hereinafter AI) is touching every aspect of human life either directly or indirectly. Number of patents of AI are largest in the area of transportation, personal devices which compute interaction between human and computer, telecommunication and medical science, and the United States, Japan and China combine 78% of AI related to filing and research in the world.[6] AI impacts not only the economy of the countries but also alleviates human labour by complementing human intelligence. But the involvement of the AI system in producing inventions might cause some dissension in the patent system. U.S, U.K,

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[2] Patent, *Online Etymology Dictionary* <https://www.etymonline.com/word/patent> accessed 11 August 2021.
[3] Timothy R Holbrook, 'Possession in Patent Law' (2006) 59 SMU L Rev 123, 125.
[4] Jacob Adam Schroeder, 'Written Description: Protecting the Quid Pro Quo since 1793' (2010) 21 Fordham Intell Prop Media & Ent LJ 63, 65.
[5] Schroeder (n 4) 66.
[6] Bharti Mishra, 'The Huge Impact of AI Or Artificial Intelligence In The Economy' (*Hitechies,* 22 May 2020) <https://www.hitechies.com/impact-of-ai-artificial-intelligence-in-economy/> accessed 12 August 2021.

and European Union still have not recognised Device for Autonomous Bootstrapping of Unified Sentience/DABUS (an AI) as inventor, and the countries where it has been considered as inventor is South Africa, where patent examinations are not done substantively[7] and in Australia, where the ruling was subject to my criticisms,[8] and might be overturned in future. However, we are not going to delve into the question of whether AI could be an inventor or not because there is already a lot of discussion going on over this issue and the air is still not clear. The forthright question here, which has not been considered by many, is that would AI-generated inventions qualify the *sine qua non* of disclosure requirements? Because considering the facet of AI, that works on consumption of data to provide the end product, the processing of algorithms are widely unknown and opaque in nature,[9] which makes the system inscrutable.

So to answer that, the author will first look into the concept of AI and its mechanism. Then the author will delve into the doctrine of disclosure requirement in the light of U.S. and India's patent law, so as to delineate the stand of developed and developing countries regarding the same. Lastly, the author will give a wide view of inscrutable AI and the concept of disclosure and try to show the interplay.

AI AND ITS MECHANISM

The origin of AI could be traced back to the mid-20th century when the question "Can machines think?" was first considered by computer scientist Alan Turing in his published paper.[10] Till now, there is no exhaustive definition of the term AI and it varies from person to person. According to Oracle, AI refers to machines or systems that mimic human intelligence to carry out tasks and can improve themselves by

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[7] Anthony Trippe, 'Can AI Be an Inventor? New Legal Judgements Says Yes' (*Forbes,* 4 Aug. 2021), <https://www.forbes.com/sites/anthonytrippe/2021/08/04/can-an-ai-be-an-inventor-new-legal-judgments-say-yes/?sh=37a54dd91275> accessed 12 August 2021.

[8] Mark Summerfield, 'In Becoming the First Country to Recognise Non-Human Inventors, is Australia a Hero of Progress, or a Chump?' *(Patentology*, 01 Aug. 2021) <https://blog.patentology.com.au/2021/08/in-becoming-first-country-to-recognise.html> accessed 13 August 2021.

[9] Ashley Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 119 Colum. L. Rev 1829, 1832.

[10] 'Artificial intelligence (AI)' *The Alan Turing Institute* <https://www.turing.ac.uk/research/research-programmes/artificial-intelligence-ai> accessed 13 August 2021.

collecting information.[11] Gone are the days when computer programs used to perform tasks within the boundaries of a limited set of rules fixed by programmers. Now, AI could perform a task which is beyond human limitation. There is always an ambiguity over the term 'intelligence' because in common parlance it could relate to the intelligence of human beings only. So, what constitutes 'intelligence' artificially? John McCarthy (who coined the term AI) said that there is no specific definition of intelligence which could not depend on relating it to intelligence of human beings because in general it is not yet specified what computational process we actually want to call intelligent.[12] Thus, the definition of the term intelligence varies widely and focuses on a number of characteristics of humans which are themselves hard to define, namely, language use, the ability to abstract, self-awareness, the ability to adapt, the ability to reason and the ability to learn.[13] However, the term 'intelligence' in AI could be understood by the Turing test, which is not conclusive but it would suggest that machines have some intelligence. In this test, a person does a conversation with an AI system and if he believes that a conversation is between him and an actual person then it could be said that a machine has acquired some intelligence.[14]

As the machine advances, the autonomy of intelligence becomes a more distinct character that makes the decisions of machines free from any input from outside, otherwise the intended function of AI to learn could not be achieved.[15] The existing example would be the IBM's Watson (it is a supercomputer having combination of AI and sophisticated software used to perform task, which is 'question answering' using its cognitive capabilities)[16] which won *Jeopardy!*[17], a

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[11] 'What is AI? Learn about Artificial Intelligence' *ORACLE* <https://www.oracle.com/artificial-intelligence/what-is-ai/> accessed 13 August 2021.
[12] Mathew U Scherer, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies' (2016) 29 Harv J L & Tech 353, 360.
[13] ibid.
[14] Rex Martinez, 'Artificial Intelligence: Distinguishing between Types & Definitions' (2019) 19 Nev LJ 1015, 1024.
[15] Martinez (n 14) 1026.
[16] Ed Burns, 'IBM Watson Supercomputer' *Tech Target* (June, 2018), <https://searchenterpriseai.techtarget.com/definition/IBM-Watson-supercomputer> accessed 14 August 2021.
[17] Ian Paul, 'IBM Watson Wins Jeopardy, Humans Rally Back' (*PCWORLD,* 17 Feb. 2011), <https://www.pcworld.com/article/219900/IBM_Watson_Wins_Jeopardy_Humans_Rally_Back.html> accessed 14 August 2021.

television quiz show in America, where it outperformed the contestant Ken Jennings who holds the record of longest winning streak in the show.[18]

Machine learning (ML), the subfield of AI systems, helps to achieve the goals without human interference. The technique of ML performs tasks by analysing the data and making decisions accordingly but for better guidance the method of deep learning (subfield of ML) implements ML in which neural networks having a number of layers attempt to stimulate the functions of the human brain by consuming large amount data and producing accurate results using algorithms.[19] However, these algorithms lack transparency, which give rise to the complex nature of black box in AI systems that make it inscrutable in nature.[20]

To analyse the inner mechanism of AI, the author will dissect the following discussion in the light of transparency in AI that would give a better perspective of the complexities of the inner workings of the AI systems.

TAXONOMY OF TRANSPARENCY IN AI

In the past few years, opacity of algorithmic systems has been subject to criticism, which led to call for measures, which produce "Transparency, Accountability, and Fairness" in ML models and systems which are data driven.[21] The issue over transparency in AI based systems has been a challenge to the interest of the public. In the modern AI system, deep learning methodology obscures its system in such a way that might not be possible to achieve transparency, and even if the creator tries to explain the AI system how it works, he could not explain because of its inherent nature to change and learn automatically after consuming data.[22] So, whenever a

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[18] Matthew Wilson, "Jeopardy!': Relive Ken Jennings' Record-Breaking 74-Game Win Streak' (*OUTSIDER,* 18 Feb. 2021) <https://outsider.com/news/entertainment/jeopardy-relive-ken-jennings-record-breaking-74-game-win-streak/> accessed 14 August 2021.

[19] Brett Grossfeld, 'Deep learning vs. Machine learning: a simple way to learn the difference' (*Zendesk,* 23 January 2020) <https://www.zendesk.com/blog/machine-learning-and-deep-learning/> accessed 14 August 2021.

[20] Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31 Harv J L & Tech 889, 901.

[21] Gorwa R and Ash TG, "Democratic Transparency in the Platform Society" in Nathaniel Persily and Joshua A Tucker (eds), *Social Media and Democracy: The State of the Field, Prospects for Reform* (Cambridge University Press 2020) <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F4BC23D2109293FB4A8A6196F66D3E41/9781108835558c12_286-312.pdf/democratic_transparency_in_the_platform_society.pdf> accessed 15 August 2021

[22] Charlotte A Tschider, 'Beyond the "Black Box"' (2021) 98 Denv L Rev 683, 689.

situation arises which requires a review of processing, there is no information regarding the same and no one could typically answer that question, so it is just inputs and outputs.[23]

The way deep learning discerns its environment by adapting the algorithms to provide solutions makes the inner system of AI indecipherable because the adoption of neural networks adds thousands of hidden layers, which after many orientations provide accurate results and it obscures the logic behind the algorithms.[24] The learning method of neural networks is intuitive in nature because of which it might not be possible to reduce its knowledge in a set of instructions.[25] It is not a matter of complications of code but the system's ability to 'think' in such a way which makes it quite incomprehensive and there is no static method to examine the adaptive system because of its dynamic nature.[26] The complexities of AI predominantly challenge the concept of disclosure which creates difficulty in explaining the end product produced by it.

DOCTRINE OF DISCLOSURE IN THE PATENT SYSTEM

The institution of patent system based on the following contentions, namely (*i) contention of natural law that gives the right to the fruits to one's idea and labour, (ii) contention of reward by monopoly that gives a monopoly right to the one, so to compensate the labour of inventing, (iii) contention of monopoly for profit where government promotes progress industrially by giving greater economic returns to inventors, and (iv) contention of exchange for secrets which states that inventor could keep the secret unless given incentives for disclosure in the society's best interest,* and these contentions promote social benefits altogether.[27]

Suppose a world where there is no requirement of disclosure, what would it have looked like? The Wright brothers who invented an airplane would have secured a patent without disclosing the invention and they would only be the one to operate

[23] Jim Shook et al., 'Transparency and Fairness in Machine Learning Application' (2018) 4 TEX. A&M J. PROP. L. 443, 446.
[24] Shook (n 23) 691.
[25] Bathaee (n 20) 902-903.
[26] Carmen Cheung, 'Making Sense of the Black Box: Algorithms and Accountability' (2017) 64 Crim LQ 539, 546.
[27] Samuel Scholz, 'A Siri-ous Societal Issue: Should Autonomous Artificial Intelligence Receive Patent or Copyright Protection?' (2020) 11 Cybaris INTELL. PROP. L. REV. 8, 123-124.

airline flights without giving anyone else the right to make or use the aircraft, this scenario would decelerate the science and the advancement towards it.[28] The requirement of disclosure is essential for the following reasons, namely *(i) it make sure the inventor teaches others, so that others would be able to use such information to replicate the invention or improve the new technologies, (ii) it creates prior art, which makes it difficult for others to claim the similar variant of patented invention, and easier for examiner to identify the new technology using applicant's disclosure, (iii)it limits the scope of the claims over patent, which means an applicant could only claim patent over invention for which it was granted and not every variant of that invention, (iv) it helps drafter and reader in better understanding of the claims, and (v) it helps the applicant to write new claims of the same patent years after the original application.*[29] The disclosure of information stimulates productivity, firstly by allowing the society to freely use the information after expiration of patent and secondly, by encouraging others to improve the new technologies even during the term of patent.[30]

Disclosure of information about invention could be carried out by three complementing requirements, which are written description, enablement and best mode.[31] An inventor has to satisfy the requirement of written description by describing his invention so that a person having skill in the art (PHOSITA) could conclude that what the patentee has invented, and on the other hand the requirement of 'enablement' provides information about the invention so that others could recreate it by employing the method of 'best mode' provided by the patentee.[32] On the question, what denotes PHOSITA? It has been said that it is a patent law's hypothetical construct which is akin to tort's reasonably prudent person,[33] and its identity is crucial because through this legal concept one could evaluate the disclosure's adequacy.[34]

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[28] Jeanne C Fromer, 'Patent Disclosure' (2009) 94 Iowa L Rev 539, 541.
[29] Jason Rantanen, 'Patent Law's Disclosure Requirement' (2013) 45 Loy U Chi LJ 369, 373-375.
[30] Rantanen (n 29) 376.
[31] Aniruddha Sen, 'Clear and Complete Disclosure in Biotechnology Patent Application-A Comparison of the Laws in USA, Europe and India' (2006) 2 Hanse L Rev 91, 96.
[32] Alan Devlin, 'The Misunderstood Function of Disclosure in Patent Law' (2010) 23 Harv J L & Tech 401, 409.
[33] Sean B Seymore, 'Heightened Enablement in the Unpredictable Arts' (2008) 56 UCLA L Rev 127, 132.
[34] Seymore (n 33) 133-134.

Now to elucidate the significance of these disclosure requirements, the author has divided the further discussion into two sections and dealt with them in the light of U.S. and India's patent law.

Disclosure Function in U.S

Section 112 of U.S. Patent Act states that an inventor has to explain his invention in clear, full, concise and exact terms so as to enable PHOSITA to carry out the invention using the best mode furnished by the inventor.[35] The definition divides the disclosure requirement into three distinct requirements in which inventor has to *(i) provide written description or description requirement of invention, (ii) explain invention in clear, full, concise and exact terms as to enable PHOSITA to make and use invention, which referred as 'enablement requirement' made up of 'how to use' and 'how to make' requirements, and (iii) provide best mode to carry out invention which was contemplated by inventor at the time of filing.*[36] Here, the requirement of written description is not merely explaining how to make and use invention but has broader meaning which includes that the applicant must convey with reasonable clarity to PHOSITA that he/she is in possession of invention at the time of filing and the same is satisfied by the disclosure of descriptive means, which include structures, words, figures, formulas, diagram, etc., that completely describe the claimed invention.[37] On the other hand, enablement requirement places the subject matter of the claims in public possession and if the applicant recognized any specific technique at the time of Filing, which carries out the invention in best way, the requirement of best mode obligates to disclose to public that information as well.[38]

There is no indication in the U.S. patent act that the requirements under Section 112 will operate differently to different technologies and the same has been defined under the TRIPS which prohibit national patent laws to discriminate in any field of law.[39] However, disclosure requirement apropos *unpredictable arts* (biotechnology and chemistry) is higher than *predictable arts* inventions (electrical

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[35] 35 U.S.C. § 112 (2018)
[36] Richard L. Schwabb, 'Disclosure Requirement for U.S. Patent Application' (1978) 6 APLA Q.J 313, 314.
[37] Schroeder (n 4) 85.
[38] Bingbin Lu, 'Best Mode Disclosure for Patent Application: An International and Comparative Perspective' (2011) 16 J. INTELL. PROP. RIGHT 409, 412.
[39] John R. Allison & Lisa Larrimore, 'How Courts Adjudicate Patent Definiteness and Disclosure' (2016) 65 DUKE L.J. 609, 620.

and mechanical)[40] because they are new technological disciplines for which there is not sufficient learning to explain.[41] The issue regarding insufficient disclosure requirements of unpredictable arts by the applicants and to avoid any undue experimentation by PHOSITA, the examiner could examine the same according to the 'Wands factors',[42] which include *(i) experimentation's quality, (ii) the amount of guidance or direction presented, (iii) the absence or presence of working samples, (iv) the invention's nature, (v) the prior art's state, (vi) the reasonable skill of those in arts, (vii) the art's predictability, and (viii) the claim's breadth*.[43]

Disclosure Function in India

Section 10 of the Patent Act, 1970 set forth the disclosure requirements which provide applicants to describe invention, furnish models, sample or drawing to illustrate the invention, give complete specification including best mode, claims defining the invention's scope along with technical information.[44] Provisions of U.S. and India's patent law whether it is enablement requirement[45] or best mode requirement[46] is almost similar and found in both countries. But the implications regarding the best mode requirement are different in both jurisdictions. In the U.S., the examiner might object to the granting of patent due to non-disclosure of best mode but once the patent granted its validity could not be challenged because of the lack of best mode requirement, and in India, it would always be the ground to challenge the validity of patent.[47] Upholding the importance of disclosure function with respect to the nature of invention as in its novelty and its distinguishing character, Court in the case of *In Ram Narain Kher v. M/s Ambassador Industries*[48] emphasised that the party who is claiming patent must specify the particular feature of the said invention, which distinguished it from already known and he/she should

[40] Allison and Larrimore (n 39) 622.
[41] Brian P. O'Shaughnessy, 'The False Invention Genus: Developing a New Approach for Analyzing the Sufficiency of Patent Disclosure within the Unpredictable Arts' (1996) 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 147, 151.
[42] Sen (n 31).
[43] Denise W. DeFranco & Ashley A. Weaver, 'Written Description and Enablement: One Requirement or Two' (2005) 15 FED. CIR. B.J. 101, 102.
[44] The Patent Act, 1970, Act No. 39 of 1970 (India).
[45] Sen (n 31) 93.
[46] Lu (n 38) 409.
[47] Essenese Obhan & Divyendu Thakur, 'India: Enablement Requirement (Sufficiency Of Disclosure) For Patents' *Mondaq* (Aug. 11, 2020) <https://www.mondaq.com/india/patent/974930/enablement-requirement-sufficiency-of-disclosure-for-patents> accessed 20 August 2021.
[48] *In Ram Narain Kher v M/s Ambassador Industries* AIR 1976 Del 87.

show the improvement which constitute the invention, and in addition to this, applicant must show not only the improvement in the art but also its usefulness to the knowledge already existed. Patent information becomes more pertinent for the developing countries because it encourage their economic development,[49] so applicants should state the information clearly and distinctly about the invention and if any ambiguity arises regarding the language, the said invention would be liable to be refused.[50] In India, inventions regarding biotechnologies are not patentable unless given additional disclosure requirements regarding the same wherein it is required to deposit the samples and such biotechnologies must show industrial applications and inventive steps through invention.[51]

Since the TRIPS agreement, disclosure requirements hold the core position in patent law internationally. However, the implications are different in member countries but the motive is the same i.e., disclosure of technological information. Disclosure requirement being one of the fundamentally historical principles of patent law might also be considered as a form of social-contract theory, where society and inventor makes a contract in which the inventor has to disclose information regarding invention to society in exchange of exclusive right over invention for limited time.[52]

AI - GENERATED INVENTIONS?

Before moving further to unfold the subject matter of AI-generated inventions, it is pertinent to bring forth some figures which would delineate the emergence of AI in patent regime. The World Intellectual Property Organization's report[53] shows the prodigious figures which are rising year by year. 2,399, 20,195 and 21,011 number of applications of AI-related patents mentioning deep learning, machine learning and

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[49] Andrea Wechsler, 'Chinese, Japanese, Korean, and Indian Patent Information in Comparison: Asia's Rising Role in Technology Disclosure through the Patent System' (2009) 2 Tsinghua China L Rev 101, 112.

[50] *Press Metal Corporation Limited v Noshir Sorabji Pochkhanawalla* 1982 PTC 259 (Bom).

[51] Preeti Tyagi, 'Additional disclosure requirement for biotech invention in India' (*AsiaIP* Mar. 31, 2020) <https://www.asiaiplaw.com/section/ip-analysts/additional-disclosure-requirements-for-biotech-inventions-in-india> accessed 20 August 2021.

[52] B.N Pandey & Prabhat Kumar Saha, 'DISCLOSURE REQUIREMENT OF THE TRIPS AGREEMENT: IMPLICATIONS FOR DEVELOPING COUNTRIES' <http://www.dehradunlawreview.com/wp-content/uploads/2020/06/1-Disclosure-requirement-of-the-trips-agreement-implications-for-developing-countries.pdf> accessed 17 September 2021.

[53] *WIPO Technology Trends 2019: Artificial Intelligence*, World Intellectual Property Organization (2019), <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf>.

computer vision respectively were filed in 2016.[54] Since its inception i.e., mid 1950s, approx. 340,000 applications apropos AI-related patents have been filed worldwide by innovators and researchers.[55] These figures unveil the popularity of AI among the innovators and researchers, and are even considered as new electricity.[56] Viewing the AI epoch, one could infer that it is the appropriate option to encourage the advancement in society and the patent system too promotes the inventions of new technologies for the social benefits. But the interplay holds a different scenario here and the same calls for greater attention to its impact on traditional laws.[57] Under the current jurisprudence of patent law for eligibility, an invention would not get protection if the same has not been specifically described and viewing the nature of AI even the computer scientist who write the program would not able to explain that how and why the system of AI behaved in certain ways, which conflicts with de facto requirement of specification.[58] Suppose, AI consume and analyse vast amount of data using algorithms and produces the end product, here input could be deduced but the end product could not because the middle work i.e. 'how' and the 'modus operandi' by which that product was created is largely unknown and that very opacity of AI system is something which holds the touchstone position [if explained] in patent system which require full, clear and concise terms for specification of invention.

AI-generated inventions/inventive AI are the inventions which are solely produced by the efforts of AI,[59] and its decision making algorithms are certainly not explainable by applying intuitions of humans because of its non-transparency and complexity, which could not be comprehensible to humans.[60] The ML algorithms in AI are different from conventional software where a programmer implements fixed rules which provide output but in the case of ML systems black-box learn algorithms to discover rules and provide hidden patterns, which are non-deterministic in

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[54] *WIPO Technology Trends 2019: Artificial Intelligence*, World Intellectual Property Organization (2019), <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf>.
[55] ibid.
[56] ibid.
[57] Peter K. Yu, 'Artificial Intelligence, the Law-Machine Interface, and Fair Use Automation' (2020) 72 ALA. L. REV. 187, 189.
[58] Mizuki Hashigushi, 'The Global Artificial Intelligence Revolution Challenges Patent Eligibility Law' (2017) 13 J. Bus. & TECH. L. 1, 29-30.
[59] Patric M. Reinbold, 'Taking Artificial Intelligence Beyond the Turing Test' (2020) 2020 Wis. L. REV. 873, 877.
[60] Arti K Rai, 'Machine Learning at the Patent office: Lessons for Patents and Administrative Law' (2019) 104 IOWA L. REV. 2617, 2625.

nature.[61] This non-deterministic nature of AI or lack of transparency within it would reflect on written description, which might only be cured through higher levels of disclosure of the AI system in detail.[62] It is true that algorithms within AI could produce the results by operating statistical patterns but it does not comprehend the words which it sees.[63] Suppose, a student cheats in an exam by copying the answer key, his answer might be correct but the same could not be comprehensible by him.[64] This analogy is similar to algorithms in AI. AI's black box would make decisions and predictions as humans do but without communicating its reasons behind doing so, and it's thought processing is based on patterns which could not be perceived by humans, that means understanding the AI might be equivalent to understanding entirely different intelligent species.[65] The opaque nature of AI puts more concern over the issue that if AI-generated invention is unpredictable art then the scrutiny needs to be higher in nature. For instance, in *Genetech Inc. v. Novo Nordisk,* [66] the court struck down the protection to a protein of amino acids because specification only contains generic statements but does not describe the details like how to make the said amino acids, which does not supply aspects of invention as to enable the public to carry out it. Because of uncertainty over the protection of AI-generated inventions, patentee chose not to disclose any involvement of AI over inventions[67] or take an option of trade secrecy which gives protection to AI-generated inventions without disclosing the information regarding the same.[68] For instance, as there is no investigation regarding inventive processes, a company might name one from the department as inventor and instruct him/her the objectives behind invention and keep AI as trade secret.[69] However such activity might not comply with law and eventually calls into question the validity of patentability.[70] Even if the trade secrecy plays as a backup role [if not patented] in the situation of non-disclosure of invention; the call for disclosure requirement would still be crucial because viewing

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[61] Mehdi Poursoltani, 'Disclosing AI Inventions' (2021) 29 TEX. INTELL, PROP. L. J. 41, 54
[62] Poursoltani (n 61) 59.
[63] Samuel Scholz, 'A Siri-ous Societal Issue: Should Autonomous Artificial Intelligence Receive Patent or Copyright Protection?' (2020) 11 Cybaris INTELL. PROP. L. REV. 81, 85
[64] Id., at 85-86.
[65] Bathaee (n 20) 893.
[66] *Genetech Inc. v Novo Nordisk*, 108 F. 3d 1361 (Fed. Cir. 1997).
[67] W. Michael Schuster, 'Artificial Intelligence and Patent Ownership' (2018) 75 Wash. & LEE L. REV. 1945, 1948.
[68] Michael McLaughlin, 'Computer-Generated Inventions' (31) 101 J. PAT. & TRADEMARK OFF. Soc'y 224, 248.
[69] Francesca Mazzi, 'Patentability of AI generated Drugs' (2020) 4 EPLR 17, 22.
[70] ibid.

the difficulty in determining the reason behind the decision of AI it becomes indispensable when the information involves the matter of public health,[71] as in the case of AI-generated drugs (AI might be considered as a specific technology but AI-generated inventions are not, it might also include other aspects too e.g., AI-generated drugs).[72] Considering the drawbacks of trade secrecy, it could be inferred that trade secrecy affects the incentives for inventors as it requires cooperation to take reasonable steps for maintaining it, which could result in producing inventions that might be socially harmful by not letting those inventions enter the public domain.[73]

Lack of information disclosure in AI-generated inventions might also prove to be a stumbling block to the patent concept of PHOSITA. As discussed above, disclosure of information in patent application has twofold*, (i) it allows PHOSITA to carry out invention without any undue experimentation and (ii) it gives guidance and inspiration to other inventors to develop new inventions*. Problem arises when a PHOSITA might not be able to compare the AI-generated inventions with his/her capabilities.[74] AI-generated inventions might be based on learning from representation of data and even in rare cases, humans having extraordinary capabilities of detecting computational processes would not be able to develop AI-generated inventions.[75] Now assume, an AI-generated invention applied for patent protection, PHOSITA might not be able to distinguish by comparing with the existing technologies because of its lack of information disclosure, and as a result, PHOSITA might find fewer inventions as obvious since AI is improving at an exponential rate and it is not possible to keep pace with the existing doctrine of PHOSITA.[76] Hence, it would weaken the evaluation of invention, which would end up protecting not so deserving inventions.[77]

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[71] David W. Opderbeck, 'Artificial Intelligence in Pharmaceuticals, Biologics, and Medical Devices: Present and Future Regulatory Models' (2019) 88 FORDHAM L. REV. 553, 585-586
[72] Mazzi (n 69) 18.
[73] Tabrez Y. Ebrahim, 'Data-Centric Technologies: Patent and Copyright Doctrinal Disruption' (2019) 43 NOVA L. REV. 287, 289.
[74] Ebrahim (n 73) 309.
[75] ibid.
[76] Connor Romm, 'Putting the Person in Phosita: The Human's Obvious Role in the Artificial Intelligence Era' (2021) 62 B. C. L. REV. 1413, 1439.
[77] ibid.

Many members of the technological and legal community are concerned that AI inventiveness would fundamentally disrupt the patent system and shake the existing doctrine of patent to its core.[78] The rate at which computing power of AI is increasing, it is probable that patent application would ultimately increase, which might cause legal uncertainty that might affect the future AI applications and the value of research and development (R&D).[79] Even if a patent is granted, the risk associated with the validity of the patent has to be managed by the owner through litigation which might cost more than the benefits of having a patent.[80]

CONCLUSION

Every coin has two sides, it is not always about changing the current laws (as being proposed by many) for the progression but also considering the other side too i.e. AI because doctrines like disclosure requirements are the bases of patent system which provide technical information to benefit the society at large, so to modify the foundational requirement for AI which is considered as the fourth industrial revolution and on which scientists and researchers are still exploring the impacts of it on society, might not be the option. The blinkered view towards advancement without addressing the nature of AI is not a solution. Predictability of futuristic technologies like AI is something enigmatic and modification or any change in well-established law in the patent system for some unpredictable technology is something not worthwhile. Issues like transparency, ethics, and accountability of AI need more attentiveness because law might fall behind if these issues are not addressed. The author through this discussion tried to show the bigger picture of the present patent system which is not primed to accept the AI-generated inventions because AI is not consistent with the standardized goals of the patent system like information disclosure which are crucial for social benefits. As aptly said by Elon Musk, that AI is capable of knowing more than anyone and the improvement rate is exponential.[81] He further stated that we must learn how to prepare for potential risks of AI because in the history of civilisation, it could be the worst event.[82]

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[78] Romm (n 77) 1415.
[79] Scholz (n 63) 115.
[80] Scholz (n 63) 129.
[81] Mike Thomas, '7 Dangerous Risks of Artificial Intelligence' (*Built In,* 06 July 2021) <https://builtin.com/artificial-intelligence/risks-of-artificial-intelligence> accessed 15 September 2021.
[82] ibid.

CHILD MARRIAGE IN INDIA: A SOCIO-LEGAL ANALYSIS

Neha Aneja[1]

ABSTRACT

Child marriage is a pernicious sociocultural practice prevalent in many developing as well as developed countries. Violations of human rights are both a cause and an outcome of it. While it violates the right to whole development for both sexes, it has significantly more detrimental repercussions on the girl children involved. Although India's government has made valiant efforts to curb child marriage, it is still widespread. While India has enacted its own legislation to curtail this practice and ratified extensive international conventions, its pluralist culture makes such legislation difficult to enforce. In India, social and cultural values are more influential than state-enacted laws, resulting in a weak enforcement of legislation banning child marriages. Moreover, a legislative mess exists because of provisions of several legislations that, on one hand, provide penalties and, on the other, recognize child marriage as valid. Similarly, the judicial decisions also rely heavily on the theory of factum valet, which gives validity to child marriages based on the devout customs of Hindu religion and personal law. This paper examines the status and implications of child marriage in India through the analysis of its historical development, impact of legislations and conflicts with personal laws of different communities, and judicial response to child marriages.

Keywords: *Child Marriage, Indian Legislation, Indian Perspective, Personal Laws, Judicial Perspective*

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INTRODUCTION

Marriage is the foundation of all relationships of society and it is a way of forming a family through which the society sustains. But for a child, getting married is usually one of the awful things that can happen. Child marriage violates human rights of children and places them at the risk of violence, sexual exploitation and abuse. Although it affects both sexes equally, it is more disproportionately affecting girls since they constitute the majority of victims.[2] In case of a girl child, she faces lifelong effects beyond her adolescence, including the health consequences of getting pregnant too young and too often, marital rape, domestic violence, and economic dependence.[3] Consequently, practice of child marriage is unacceptable as it drives children in the situation which is deprived of education, employment, health safety and freedom of choice.[4] Though the issue of child marriage has lessened with the passage of time, still, it exists and menaces the lives, well-being, and future of children around the world.[5]

In accordance with the Universal Declaration on Human Rights (UDHR)[6], only men and women with legal marriages may marry. Despite the fact that the Declaration uses the word "full age," it does not specify what this age is.[7] The United Nations Convention on the Rights of the Child 1989[8] (CRC) has not also stipulated a minimum marriage age. However, Article 1 of CRC defines a “Child” as a human being under the age of 18 years.[9] So, Child marriage can be described as a marriage entered into by an individual before attaining the prescribed eligible age. At present, prodigious attention is being paid to child marriage globally and according to the emerging consensus of international human rights standards, child marriage occurs when one or both parties

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[3] Brent Stirton, ‘Q&A Child Marriage and Violation of Girls Rights’ (Human Rights Watch. 14th June, 2014) <https://www.hrw.org/news/2013/06/14/q-child-marriage-and-violations-girls-rights> accessed 30 August 2021.

[4] Biswajit Ghosh, ‘Child Marriage, Society and the Law: A Study in a Rural Context in West Bengal, India’ (2015) 25 INT'L JL POL'Y & FAM 199.

[5] Ending Child Marriage and Adolescent Empowerment (*UNICEF*, December 2016). <https://www.unicef.org/protection/child-marriage > accessed 30 August 2021.

[6] Universal Declaration of Human Rights (Dec.10, 1948, G.A. Dec. 217A, at 71, U.N. Doc. A/810 at 71) [hereinafter UDHR] <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> accessed 30 August 2021.

[7] ibid.

[8] Convention on The Rights of the Child (20 November, 1989 1577 U.N.T.S.3) [hereinafter CRC] <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 30 August 2021.

[9] Convention on The Rights of the Child (20 November, 1989 1577 U.N.T.S.3)<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 30 August 2021.

are "under the age of eighteen".[10] The Committee on the Rights of Children (CRC Committee) and Committee on Elimination of all Forms of Discrimination against Women (CEDAW Committee) in their joint recommendation (2014) clarified that child marriages are marriages where one or both spouses are under age 18 and obliged states to eliminate child marriage.[11]

This paper focuses on the reasons given by various traditional communities advocating the practice of child marriage in India and the ill effect of child marriage on a child's life. Author has analysed various enforceable legislations to curb the practice of child marriage in India and whether such laws have been efficient to put a check on this. Further, the paper examines the conflicts between secular laws relating to the prevention of child marriage and personal laws of the various communities in India and how the Indian Judiciary has tried to resolve the conflicts through various landmark judgments.

PRACTICE OF CHILD MARRIAGE IN INDIA: CAUSES AND IMPACTS

"*People in [India] take great pleasure in [child] marriage …. The little bit of a woman, the [child] bride, clad in red silk. Drums are beating and men, women and children are running in order to have a glimpse of that lovely face. From time to time, she breaks forth into little ravishing smiles. She looks like a lovely doll."*[12]

There is uncertainty about when child marriage began, and who originated this custom.[13] Under Hindu uncodified law, as per Mitakshara, marriage becomes possible after one has completed sixteen years and, according to Dayabhaga, when one has completed fifteen years.[14] Therefore, in India, child marriage is not a new phenomenon and despites child marriage prohibitions laws still it is one of the major problems.

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[10] Brent Stirton, 'Q&A Child Marriage and Violation of Girls Rights' (Human Rights Watch. 14th June, 2014) <https://www.hrw.org/news/2013/06/14/q-child-marriage-and-violations-girls-rights> accessed 30 August 2021.

[11] Joint General Recommendation/General Comment No. 31 Of the Committee on The Elimination of Discrimination Against Women and No. 18 of the Committee on The Rights of The Child on Harmful Practices <https://reliefweb.int/report/world/joint-general-recommendationgeneral-comment-no-31-committee-elimination-discrimination >accessed 30 August 2021.

[12] Jacqeline Mercier, 'Eliminating Child Marriage in India: A Backdoor Approach to Alleviating Human Rights Violations'(2006) 26(2) Boston College Third World Law Journal 377.

[13] Report of Age of Consent Committee, Government of India, (1929) 92.

[14] Alladi Kuppuswami, *Hindu Law and Usage* (14th edn. 1996) 186.

According to United Nations Children's Fund (UNICEF), "1.5 million girls under age of eighteen years get married in India, which makes it home to the largest number of child brides in the world - accounting for a third of the global total."[15] Child Marriage is a most common practice in some northern and central regions of India, especially in states such as Madhya Pradesh, Uttar Pradesh, Haryana, Jharkhand, Rajasthan and Bihar. [16] However, there is significant decline in actual practice as it prevails now, still continues to thrive by enlarge in rural areas of the country. According to National Family Health Survey in 2015-2016 (NFHS-4), 26.8% females and 20.3% males get married before attaining minimum age for marriage.[17]

India has a high prevalence of child marriage, and any attempt to address the issue must take into account the multiple factors that contribute to it.[18] Child marriage happens in various forms and for different reasons; majorly, it is driven by cultural and social traditions that encourage and facilitate gender discriminatory norms rooted in patriarchal values and ideologies, as well as, poverty and lack of education. Most often, children are married off early, especially girls, as a result of an arranged marriage and the leading cause of their marriage centres around control over her sexuality and avoiding the risk of sexual harassment, romantic involvement before marriage.[19] There is also a belief that women should reproduce early enough since their reproductive lives are shorter than men's.[20] Moreover, in many communities, sometimes a children get marry just after puberty or even before that so as young girl child brings monetary benefit to family in a form of dowry. [21] On other hand, the prevailing threat of honour killings holds the girls back from fighting the yoke of child marriage.[22] Another major factor contributing to the prevalence of child marriage is

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[15] Ending Child Marriage and Adolescent Empowerment (*UNICEF*, December 2016) <https://www.unicef.org/india/what-we-do/end-child-marriage > accessed 30 August 2021.
[16] Ghosh (n 4).
[17] National Family Health Survey (NHFS-16) <http://rchiips.org/nfhs/pdf/NFHS4/India.pdf > accessed 30 August 2021.
[18]State Strategy and Action Plan for Prevention of Child Marriage (2017, Government of Rajasthan) <https://www.girlsnotbrides.org/documents/653/SSAP-Child-Marriage.pdf> accessed 30 August 2021.
[19] Nisha Varia, 'Ending Child Marriage: Meeting the Global Development Goals Promise to Girls <https://humantraffickingsearch.org/resource/ending-child-marriage-meeting-the-global-development-goals-promise-to-girls/ >30 August 2021.
[20] Asha Abbhi, Kirthi Jaikumar, Manasa Ram Raj, Ramaya Padmanabhan, 'Child Marriages in India an Insight into Law and policy December 2013' (Final Report of the Red Elephant Foundation submitted to OHCR) 4 <https://www.ohchr.org/documents/issues/women/wrgs/forcedmarriage/ngo/theredelephantfoundation.pdf >accessed 30 August 2021.
[21] ibid.
[22] ibid.

the declining sex ratio which encourages the exchange of daughters for daughters-in-law, regardless of their age.[23]

The practice of child marriage is a possible threat to India's aim of accomplishing Sustainable Development Goal 5 by 2030,[24] which aims to achieve women empowerment and gender inequality. Child marriage violates rights of children and denies them the freedom to develop and obtain education and have a life of liberty and pride. Child marriage bereaves young girls of their potential and obstructs their social and individual development. Due to premature subjection to sexual acts and pregnancy, girls who are married at a very early age become prone to sexual and reproductive illness.[25] Young pregnant girls, during child birth, face complications and death. Girls with poor background who get married in their childhood rarely get access to health care facilities.[26] Researches also show a high rate of sickness and death among babies of mothers who are under 18 years of age.[27] Child marriage is similar to child abuse and for many young girls it means commencement of regular and unsafe sexual acts that can have grave repercussions on the health of young girls, such as infant mortality, maternal mortality, anaemia and can cause diseases like HIV/ AIDS.[28]

In some cases, many young girls who flee from their abusive child marriage end up becoming sex workers or take recourse to sexual activities for their survival.[29] Moreover, in a marriage where husband is very old than the young bride, there is a very high likelihood of such young bride getting widowed at a very primary age. This can result them in facing discrimination including loss of status and denial of property rights…etc. due to lack of education and other skills to be able to take care of themselves.[30]

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[23] ibid.
[24] Shireen J Jejeebhoy, *Ending Child Marriage in India, Drivers and Strategies* (New Delhi: UNICEF, 2019) 1.
[25] Law Commission of India, 205th Report on Proposal to Amend The Prohibition of Child Marriage Act, 2006 and Other Allied Laws (2008) 18 <https://lawcommissionofindia.nic.in/reports/report205.pdf > accessed 30th August 30, 2021
[26] ibid.
[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid.

International Legal Framework for The Prevention of Child Marriage

On December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights[31] (UDHR). Even though this document does not specifically address the issue of child marriage, it contains provisions that implicitly include the language that leaves child marriage in a notorious position. As every child is a human, their rights are naturally included in this document. There are a number of human rights instruments that specify marriage norms, such as age, consent, and equality within a marriage. Among the most relevant international human rights conventions concerning marriage issues of children are the Convention on Civil and Political Rights[32] (ICCPR); the Convention on Economic, Social and Cultural Rights[33] (ICESR), the Convention on the Elimination of All Forms of Discrimination against Women, 1979[34] (CEDAW) and the Convention on the Rights of the Child, 1989[35](CRC). One of the key requirements essential at the time of entering the marriage is "free and full consent". International Human rights treaties guarantee all individuals the right to marry with "free and full consent" of both parties. In article 23, paragraph 3, of the ICCPR, as well as in article 10, paragraph 1 of the ICESCR, this right is enshrined.

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages in its Article 1 requires that both parties must express their consent in person in front of a competent authority.[36] Article 16 of the CEDAW enjoined that a full and free consent to marry must be an essential condition for States to implement the right to marry on the basis of gender equality. Article 16, paragraph 2 of CEDAW provides that "the betrothal and the marriage of a child shall have no legal effect." Even though the CRC does not specifically prohibit child marriage, analyzing it in light of the CEDAW provides an urgent rationale to end child marriage.

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[31] UDHR (n 6).
[32] International Covenant on Civil and Political Rights (23 March 1976, 999 U.N.T.S. 171) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 30 August 2021.
[33] International Covenant on Economic, Social and Cultural Rights (3 January, 1976, 993 UN.T.S.3) <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 30 August 2021.
[34] Convention on the Elimination of All Forms of against Discrimination Women (18 December 1979, 1249 U.N.T.S.13) < https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx >accessed 30 August 2021.
[35] CRC (n 8).
[36] General Assembly [resolution 1763 A (XVII)] <https://www.ohchr.org/en/professionalinterest/pages/minimumageformarriage.aspx> accessed 30 August 2021.

In their dialogue with state parties as well as in their concluding observations, the CRC and CEDAW Committees frequently raise the topic of child marriage. As both CRC and CEDAW have emphasized, there is a need for additional legal safeguards to protect the right of all individuals to freely enter into a marriage, even in plural legal systems that combine statutory and customary laws.[37] Both committees are also concerned about the continuation of child marriage, and have recommended that the States Parties take action to prevent it.[38]

Furthermore, as one of the nodal bodies of nations, the United Nations (UN) has worked to gain consensus from member nations on protecting women and children in their local jurisdictions. In addition, UNICEF and UNFPA launched the "UNIFPA-UNICEF Global Programme to Accelerate Action to End Child Marriage" recently, which is a multicountry initiative to accelerate efforts to end child marriage.[39] In September 2015, United Nations (UN) member states adopted sustainable development Goals (SDGs) which includes elimination of child marriage as a key target by 2030 for achieving gender equality.[40] Thus, governments across the world are committed to end the child marriage. India has ratified a slew of the above-mentioned international conventions, but has reservations about its ability to prevent child marriages in light of high levels of poverty.[41] However, even when it comes to implementation of these international obligations, they are weakly enforced.

National Legal Framework for The Prevention of Child Marriage

Pre-Independence

To understand the influence of British colonial government on practice of child marriage, it must be taken into consideration that the British government did not

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[37] Preventing and Eliminating child, early and forced marriage- Report of the office of the United Nations High Commissioner for Human Rights A/HRC/26/22 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/22 > accessed on 30 August 2021.

[38] ibid.

[39]Ending Child Marriage and Adolescent Empowerment (*UNICEF*, December 2016) <https://www.unicef.org/sites/default/files/2019-04/GPECM%20Evaluability%20Assessment.PDF> accessed 30 August 2021.

[40] Transforming Our World: The 2030 Agenda for Sustainable Development (*UNGA*, 12 August, 2015) <https://www.un.org/pga/wp-content/uploads/sites/3/2015/08/120815_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf >accessed 30 August 2021.

[41] Jennifer Roest, Child Marriage and Early Child- bearing in India: Risk Factors and Policy Implications, Policy Paper 10 (*Young Lives,* September 2016) <https://www.younglives-india.org/sites/www.younglives-india.org/files/YL-PolicyPaper-10-Sep16.pdf > accessed 30 August 2021.

interfere in family laws of those it ruled. In respect to family matters such as marriage etc., the British decided to apply Hindu laws to Hindus and Muslim laws to Muslims. Though criminal and other laws were codified and made uniform, the British government applied family laws on an individual basis by embracing a plural system of family laws.[42] Consequently, Madras High Court in *Venkatacharyula v Rangacharyula*[43] which was a famous case of 19th century case upheld the validity the child marriage. In this case, a girl was married without her father's consent after the girl's mother dishonestly told the priest that her father had given consent for the marriage. The court held that Hindu marriage is a religious ceremony and if the marriage rite is duly solemnized, the marriage would be valid irrespective of the fact whether the person married is minor or of unsound mind. It can be observed from the judgment that court gave priority to the sacred nature of Hindu marriage, where marriage was free from "consent" and thereby validated the practice of child marriage. The court relied on the customary Hindu law that arose from the conventional Hinduism.

Nevertheless, the reformist movement against child marriage was inspired by British customs and thoughts. As a result of immense efforts taken by various Social reformers like Malabari, Raja Ram Mohan Rao, and Ishwar Chand Vidhya Sagar to curtail the practise of child marriage, in 1846, the Law Commission recommended the prohibition sexual intercourse with a wife less than 10 years and to make it an offence.[44] The movement against child marriage gained momentum following the notorious case of *Queen v. Haree Mohan Mythee*[45], in which an 11-year-old girl died due to the injuries she received during sexual relations with her 35-year-old husband. During 1891, the Criminal Law (Amendment) Act, 1891[46] increased the age of consent to sexual intercourse from "10 to 12 years" in order to protect female children from immature cohabitation.[47] In the late 20th century, public attention was increasingly focused on improving the physique of the nation and reducing abnormal mortality of

[42] Domenico Francavilla, '*Interacting Legal Orders and Child Marriages in India*' (2011) 19 American University Journal of Gender, Social Policy & the Law 529, 535.
[43] *Venkatacharyula v Rangacharyula* (1891) ILR Madras 316.
[44] Vandana, 'Child Marriage under Hindu Personal Law: Factum Valet or an Issue for Protection of Human Rights of Women' (2017) 1ILI Law Review 179.
[45] *Queen v Haree Mohan Mythee* 26ILR 1891 Cal 49.
[46] Act 10 of 1891.
[47] ibid.

female children.[48] During the year 1924, Hari Singh Gour introduced a bill that raised the consent age for married girls to 14 years. After this, a Committee on Age of Consent[49] was formed in order to review the Bill and examine its societal impact, which the earlier amendment had led to. It was recommended in the report of the committee (1928-29) that a law be enacted penalizing marriages under a certain age.[50] In addition, it suggested that marriages conducted in violation of such a law still remain valid.[51] As a result, in 1929, the Criminal Law (Amendment) Act raised the age of consent for married girls from 12 to 13 years. In the same year, Rai Sahib Har bilas Sarda presented a Bill that sought to restrict child marriages in Hindu communities by declaring such marriages invalid when one or both parties were under the prescribed age. The bill ultimately culminated in the Child Marriage Restraint Act of 1929[52], which is also known as the 'Sarda Act', named after the person who introduced the bill.[53] It proposed the marriage to be invalid if at the time of marriage, the age of the boy or girl was below the prescribed age as per law, nevertheless this provision was eventually done away with.[54] CMRA 1929 initially fixed the marital age at "14 years for girls and 18 years for boys" but in 1949, the age for girls was "raised to 15 years". Eventually in 1978, the marital age for girls and boys was fixed at 18 and 21 years respectively.[55] The act only imposed penalties in the form of imprisonment for up to three months and/or fine on bridegroom, his parents and those performing such marriage. In *Munshi Ram v Emperor*[56], the court while discussing the scope of CMRA 1929 observed that the act focuses at and deals with the restriction "performance of the marriage." it is not concerned either with the validity or the invalidity of the marriage. In *Moti v Ben,*[57] the court held that though a marriage would have violated CMRA 1929 but the act does not declare such marriage to be an invalid marriage. The Act only inflicts some punishment on persons who perform child marriages. The motive of the act was to dissuade people from performing child marriage and it did not stress on the status of such marriages and the rights of those married.[58] Although the

[48] Vandana (n 45) 178.
[49] ibid.
[50] ibid.
[51] ibid.
[52] Act 19 of 1929.
[53] Ghosh (n 4) 201.
[54] Francavilla (n 43) 538.
[55] Vandana (n 45) 180.
[56] *Munshi Ram v Emperor* AIR 1936 All 11.
[57] *Moti v Ben* AIR 1936 All 852.
[58] Ghosh (n 4) 201.

British tried to interfere in the custom of child marriage by introducing criminal norms aimed at limiting the ill effects of the practice of child marriage, they did not challenge the legitimacy of child marriages.[59] Further, the ineffectual and weak implementation of CMRA was itself an issue since it was also opposed by Muslim stakeholders, leading to the passage of the Muslim Personal Law Application Act of 1937, which allowed for paternal or guardian consent for Muslim marriage with no minimum age limit.

Post-Independence

On the domestic front, the government has been making efforts to improve the child's situation and to protect their rights. After independence, a growing need for more strict and stringent child marriage laws was felt due to high number of child marriages and the ineffectiveness of the Child Marriage Restraint Act 1929 (CMRA). CMRA punishments and penalties were insufficient to stop the menace. In its 1995-1996 Annual Report, the National Commission for Women recommended that the government immediately appoint "Child Marriage Preventive Officers". Afterward, the National Human Rights Commission, based on an analysis of the existing CMRA, 1929, again made recommendations in its Annual Report 2001-2002.[60] Following that, in 2006, the Prohibition of Child Marriage Act (PCMA) was passed as an adequate solution to this social ill and it repealed the CMRA. It came in to force on January 10, 2007.[61]

The fundamental rights of children are also protected in the Indian Constitution in its Preamble, Fundamental Duties, and Directive Principles. Article 45 states that the State should provide early childhood care and education to all children below the age of six. Lastly, Article 51(K) states that the parents/guardians of the children between the ages of six and fourteen should provide them with opportunities for education. Article 39 of the Constitution amended in 2014 includes the following provisions: "The State shall, in particular, direct its policy towards securing – (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." Article 21A of the Indian

[59] Francavilla (n 43) 538.
[60] National Human Rights Commission, India (Annual Report 2001-02) <https://nhrc.nic.in/annualreports/2001-2002> accessed 30 August 2021.
[61] Act No. 6 of 2007.

Constitution States that, all children between the ages of six to fourteen should be provided with free and compulsory education. In addition, The Right of Children to Free and Compulsory Education (2009) was introduced to ensure entitlement to free and compulsory education to all children within the "age group of 6-14 years".

The latest Criminal (Amendment) Act, 2013 was a gigantic step with regard to strengthening laws with regard to rape and has also risen the age of consent for sexual acts from 16 to 18 years. However, Exception 2 to Section 375, IPC continued to remain present in its earlier form. This Exception inadvertently legalised forced sexual intercourse within marriage and especially when a girl is between 15 years to 18 years it fell within the purview of child marriage. Ironically, on one hand violence against them received protection under the parasol of marriage. However, in *Independent Thought v Union of India*[62], the Apex Court has increased the age of consent for sexual intercourse within marriages to 18. Further, there is Protection of Children from Sexual Offence Act, 2012 that defines children as all persons below 18 and therefore punishes sexual intercourse below this age. The Juvenile Justice Act (Care and Protection of Children) 2015, Section 14(12), also notes that "a child who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage is vulnerable and needs care and protection".[63]

To eliminate child marriage practice, the Ministry of women and child development (MWCD), the Ministry of Health and Family Welfare (MoHFW) and the Ministry of Human Resource Development have also initiated the "Beti Bachao, Beti Padhao" scheme in 100 districts of country.[64]Some of the other policies targeting the child policies are National Population Policy 2000, National Policy for Empowerment of Women 2000 and National Youth Policy 2003. Further, the National Plan of Action for Children of 2005 also includes goals on eradicating child marriage. National Plan for Action for Children 2016 also emphasised on "public advocacy and awareness"

[62] *Independent Thought v Union of India* AIR 2017 SC 4904.
[63] State Strategy and Action Plan for Prevention of Child Marriage (2017, Government of Rajasthan) <https://www.girlsnotbrides.org/documents/653/SSAP-Child-Marriage.pdf> accessed 30th August 2021.
[64] Roest (n 4) 41.

towards sensitising the masses to the prohibition of child marriage.[65] The proposed National Strategy on child marriage reflects the commitment of the Indian Government to curb child marriage. This report provides an overall strategic vision of how the Government of India intends to eliminate child marriage. It also provides broad guidance to State and District Governments for these purposes, so they can develop interventions aimed at ending child marriage.[66]

The Prohibition of Child Marriage Act, 2006 (PCMA)

This PCMA is an improvement on the CMRA, 1929, and is a significant step forward in the fight against this serious rights violation against children. The PCMA defines "child marriage" as "a marriage to which either of the contracting parties is a child"[67] and a "child" has been defined for girls under the eighteen years and for boys under the twenty-one years.[68] The PCMA not only prohibits child marriages but also makes such marriages voidable at "the option of the contracting party who was a child at the time of the marriage".[69] The Act further states that a petition for the annulling a child marriage can be filed in a district court by the contracting party who was child at the time of marriage[70] but before the party filing the petition completes "two years of attaining majority".[71]Furthermore, in the case of "kidnapping, abduction, trafficking, or under pressure, coercion, or deceit" a child marriage can be declared void.[72] However, the status of annulment of child marriage is very weak. Especially in the case of girl children, the primary cause is that they are unaware that laws are in place in this regard. While they know that child marriage is illegal, they are unaware of the rights accorded to them under the law.

Though this Act treats such marriages as grave offences and declares void, yet the confusion is evident in other legislations as well as judicial decisions regarding

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[65] National Plan of Action for Children (2016) <https://wcd.nic.in/sites/default/files/National%20Plan%20of%20Action%202016.pdf> accessed 30 August 2021.
[66]National Strategy Document on Prevention on Child Marriage (*Ministry of Women and Child Develpopment ,* 14th Feb, 2013) <https://static.vikaspedia.in/media/files_en/social-welfare/women-and-child-development/strategy-child-marriage.pdf> accessed 30 August 2021.
[67] Prohibition of Child Marriage Act 2006, s 2(b).
[68] ibid s 2(a).
[69] ibid s 3(1).
[70] ibid.
[71] ibid s 3(3).
[72] ibid s 12.

child marriage.[73] In *Aminder Kaur v State of Punjab*[74] The Punjab and Haryana High Court declared a marriage of a 16-year-old girl, solemnized following Hindu rites, in violation of Section 12(a) of PCMA, because the girl was enticed away from the lawful guardianship of a guardian by her alleged husband.[75] Those who perform, conduct, direct, assist, promote, or allow the solemnization of a child marriage are also punishable with similar sentences.[76] Furthermore, under section 11, any parent or guardian who actively supports or negligently fails to prevent a child's marriage is liable for imprisonment and/or a fine.[77] Within the same provisions, Section 11 (2) refers to a rebuttable presumption that a child's parent or guardian negligently failed to prevent the child's marriage.[78]

All offences under this Act are cognizable and non-bailable.[79] Further, in cases of an impending child marriage, the Courts have been empowered under the Act to issue for ex parte injunctions to prevent the marriage from being conducted[80], as well as making any child marriage solemnized in violation of an injunction void[81]. A violation of such an injunction order is punishable by imprisonment for up to 2 years or a fine of up to 1 lakh rupees, or both.[82] Thus, as compared to the CRMA 1929, the punishments contemplated under the PCMA are significantly more severe. Although no woman can be punished under the Act, it is not a welcome step in every circumstance.

The PCMA requires both parties to return gifts and other valuable received on the occasion of marriage. In the case of annulment of the child marriage, the male contracting party, or his guardians if he is a minor, must pay maintenance to the female contracting party until she remarries.[83] In general, although underage marriages are treated as voidable or void in certain cases yet PCMA secures the minor wife's matrimonial rights such as right to claim maintenance and residence. Further,

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[73] Vandana (n 5) 183.
[74] CRM-M 29790 of 2009 (O&M) decided on Nov.27, 2009.
[75]Prohibition of Child Marriage Act 2006, s 9.
[76] ibid.
[77] ibid.
[78] ibid.
[79] ibid.
[80] ibid.
[81] ibid.
[82] ibid.
[83] ibid.

the legitimacy of the children born from child marriages has also been established, so that even in the case where the marriage itself is annulled, the child shall still be legitimate.[84] The Act also provides provision for the maintenance and custody of the children born to these marriages, which was not the case with the CMRA.[85] Under the Act, district courts can modify, add to or revoke any order regarding the maintenance of the female petitioner or her residence or regarding the custody and maintenance of the children.[86]

State governments are required to appoint full-time "Child Marriage Prohibition Officers" in their states under the PCMA.[87] These officers are authorized to prevent child marriage, make documented reports of violations, prosecute offenders, including the child's parents, and remove children from dangerous or potentially dangerous situations. It also empowers State Governments to frame rules for effective implementation of the Act.[88] Additionally, District magistrates have also been given special powers to prevent mass child marriages on certain days, such as Akhaya trutiya, by using appropriate measures and the minimum amount of force required.[89]

It is noteworthy that Karnataka State Government passed Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 to declare child marriages void *ab initio*.[90] It has augmented the punishments for early marriage and also added a provision stating that a police officer could take *suo moto* cognizance under the Act.[91] Hence, Karnataka became the first state in India to declare child marriage void.[92] Similarly, the Prohibition of Child Marriage (Haryana Amendment) Bill, 2020 has been passed which also declares child marriages as void ab initio.[93]

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[84] ibid s 6.
[85] ibid s 5.
[86] ibid s 7.
[87] ibid s 16(1).
[88] ibid s 19.
[89] Ibid s 13(3) & (4).
[90] Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, No. 37, Acts of Karnataka State Legislature, 2017 (India).
[91] ibid.
[92] Child Marriage and Karnataka Amendments: Re-Engaging with the Debate on Voidability *(Centre for Law and Policy Research* , July 31, 2017)<https://clpr.org.in/blog/child-marriage-and-karnataka-amendments-re-engaging-with-the-debate-on-voidability/> accessed 30 August 2021.
[93] Haryana Assembly Passes Eight Bills, (*Outlook,* Mar. 3, 2020) <https://www.outlookindia.com/newsscroll/haryana-assembly-passes-eight-bills/1751066 > accessed 30 August 2021.

Earlier, PCMA 2006 didn't apply to the state of Jammu and Kashmir. But after the abrogation of Article 370 of the Indian Constitution in August 2019, an act[94] was passed by the Indian Parliament through which PCMA 2006 along with several other acts was made applicable to the state of Jammu and Kashmir.[95] This act, along with improving the living condition of the residents of Jammu and Kashmir, will also help in reducing the rate of child marriage in the state. Interestingly, PCMA 2006 is a territorial law and is applicable, though restricted, to all Indians in a significant facet of personal law. [96] It covers every Indian despite affecting the family laws. In this backdrop, it would not be wrong to suggest that within the system of personal laws, uniformization of laws is taking place.[97] The Act departs from the previous rule of retaining the principle of distinct personal laws that were applicable based on the membership in a particular community and the principle of restricted interference in the family affair.[98]

PERSONAL LAWS

The legal order in India, which has sustained itself in the post- independence era is a set of laws in the field of family laws. The British made such laws separate for the five communities, namely Hindu (includes Sikhs, Jains and Buddhists), Parsi, Muslim, Christian and Jews. Distinct laws for each community and the attempt to ascertain application of law on the grounds of community membership is purely a British contribution to the Indian legal system. Family law in India does not vary from one state to another; application of laws is not ascertained as per the residency of an individual in India but in accordance with the religion one follows.[99] Community can be understood to be a "legal group," affiliation with which decides law applicable.[100]

Hindu Law

The Hindu Marriage Act, 1955 (HMA) is the major marriage law in India because it governs the majority of citizens who are Hindus. It lays down certain conditions for

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[94] Jammu and Kashmir Reorganisation Act, 2019, No.34, Acts of Parliament, 2019 (India).
[95] ibid.
[96] Francavilla (n 43) 542.
[97] ibid.
[98] ibid.
[99] Joan L Erdman, 'Marriage in India: Law and Custom' (1981) 5 Update on Law Related Education 22, 48.
[100] ibid.

solemnization of valid marriages among Hindus. Section 5(iii) requires that the bridegroom should have completed the age of "twenty-one years" and the bride, the age of "eighteen years" at the time of the marriage. Initially the ages prescribed for the bridegroom and the bride were "eighteen years" and "fifteen years" respectively. Until 1978, a marriage under the prescribed age could be solemnized with the consent of the guardian if the girl is in the age group of 15-18.[101] The Act stipulates certain penalties for violating this age condition such as "simple imprisonment up to 15 days or fine up to Rupees 1000 or both".[102] Nevertheless, the marriage was not void or voidable due to non-compliance with the age requirement or guardian's consent.

As part of the major reforms to the Hindu Marriage Act that took place in 1976, a new ground for divorce was added[103], allowing girls under the age of 15 to seek a divorce based on their under-age marriages. They could do this at any time during the three years following the completion of their fifteenth year of age, even if the marriage had already been consummated.[104]

Later on, with the Amendment Act in 1978, this provision has been rendered ineffective as the age for marriage was raised and a guardianship is no longer required for someone over 18 years of age. As a result, the provision requiring consent of guardian was deleted by the Amendment Act.[105] A marriage solemnized in violation of the conditions laid down by section 5 is either void or voidable depending upon the violation of specific clauses of section 5. A very strange thing about the provisions of the Act is that no particular fate is ascribed to the marriage in contravention with the age requirement of section 5(iii). Thus, child marriage is neither void nor voidable, since it does not fall under either category. There seems to be a deliberate omission on the part of the legislation to deal with the violation of this provision. However, the HMA imposes penalties for children whose marriages are solemnized which can extend to "2 years simple imprisonment or with fine which can go upto Rs.1,00,000/- or both"[106].

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[101] Hindu Marriage Act 1955 s 5(vi) was repealed by the Child Marriage Restraint (Amendment) Act 1978 (Act 2 of 1978).
[102] Hindu Marriage Act 1955, s 9.
[103] ibid s 13 (2) (iv).
[104] Government of India, Towards Equality: Report of the Committee on the Status of Women (1975)113.
[105] Hindu Marriage Act 1955, s 6.
[106] Hindu Marriage Act 1955 s 18 as amended by Amendment Act 6 of 2007.

Muslim Law

Personal laws governing Muslims are uncodified. Among Muslims, those who have attained majority and are of sound mind may enter into a marriage contract. The presumption is that a person is of majority when he or she turns 15 unless proven otherwise.[107] The marriage for minors can also be contracted, but only by their parents or guardians. Marriages entered into pre-puberty are not invalid; however, they are voidable at the option of the minor upon attaining puberty. This is called "option of puberty". According to Muslim uncodified law, both boy and girl may exercise this option as soon as possible after reaching puberty and before the consummation of marriage.[108] But under the Dissolution of Muslim Marriage Act, 1939, the option of puberty can only be exercised by the girl. If a girl is married by her guardian before the age of 15, she has the right to repudiate the marriage before attaining the age of 18, if the marriage has not been consummated.[109]

Christian Law

For Indian Christians, the Indian Christian Marriage Act of 1872 stipulates an age of marriage 13 for girls and 16 for boys. Also, when the party to the marriage was under the age of 18 years, the consent of the parents or guardian would be required.[110] In 1952, the marriage age was raised to 15 years for girls and 18 years for boys.[111] Further, in 1978, the Child Marriage Restraint (Amendment) Act amended the Christian Marriage Act of 1872. Now the age of marriage has been raised to 18 years for girls and 21 years for boys, and parental consent is no longer required.[112] However, the Act does not invalidate a marriage because of the violation of age requirements.

Parsi Law

In India, marriage among Parsis was governed by the Parsi Marriage and Divorce Act, 1865, which did not fix a specific age for marriage. However, it stipulated that person of either sex under 21 must marry only with the consent of their parents; otherwise, their marriage would be invalid. In 1936, the Act of 1865 was replaced by a new The

[107] A.A.A. Fayzee, *Outlines of Muhammadan Law* (2008) 73.
[108] Tahir Mahmood, *The Muslim Law of India* (1980) 48-54.
[109] Dissolution of Muslim Marriage Act 1939, s 2 (vii).
[110] Indian Christian Marriage Act 1872, s 60(original version).
[111] Act XLVIII of 1952 amended Indian Christian Marriage Act 1872, s 60.
[112] Mahmood (n 108) 48-54.

Parsi Marriage and Divorce, 1936, under which the marriage age remained the same.[113] This provision has been substantially amended by the Amendment Act of 1988.[114] Now, the boy's age of 21 years is retained, but for the girl, it has been lowered to 18 years. The guardian's consent requirement has also been abolished. Parsi law does not invalidate underage marriages either, like other personal laws.

The Special Marriage Act

Civil marriages are governed by the Special Marriage Act, 1954, which specifies two types of marriage. The first are those solemnized under its provisions, and the latter, those originally solemnized under personal law and later registered under it. In the case of the first type of marriage, both the girl and boy must be 18 years old and 21 years old at the time of their marriage, respectively.[115] For the latter type of civil marriage, both parties must be at least 21 years of age at the time of registration, regardless of their age at the time of original solemnization of marriage.[116] Furthermore, the consequences of violating the age requirement for each type of civil marriage are different. The court may annul a civil marriage originally solemnized under the Special Marriage Act if either party is found to be below the required age, and a decree of nullity can be issued on a petition presented by either party to the marriage.[117] When a marriage originally solemnized under personal law is subsequently registered under the 1954 Act, if either party is found to have been under 21 at the time of registration, that marriage registration under the 1954 Act would be nullified, but the marriage will still be governed by the personal law under which it was originally solemnized.[118] A marriage between an under-age couple is null and void under the Special Marriage Act, 1954, and also subject to penalties under the PCMA.

ROLE OF JUDICIARY

Due to discrepancies and contradictions between personal laws and central legislation, judicial approach on the issue of child marriage remained quite varied while some High Courts acted more pro-actively by giving judgments that would prevent these

[113] The Parsi Marriage and Divorce 1936, s 3 (c).
[114] Act No. 5 of 1988.
[115] Special Marriage Act 1954, s 4(c).
[116] ibid s 15 (d).
[117] Ibid s 24 (1).
[118] Ibid s 24 (2).

marriages from occurring. On another hand, number of courts often relied upon personal laws rather than central legislation to decide upon the validity of the child marriage. However, many times courts failed to strive a balanced approach by rely heavily on the theory of factum valet, which gives validity to child marriages based on the devout customs of Hindu religion and personal law. Yet, judiciary has played a significant role in transformation and the protection of the rights of children from this menace of child marriage.

VALIDITY OF CHILD MARRIAGE

Hindu Law

Legislative policy of retaining the validity of child marriages is also sustained by judicial decisions. In most cases, the judiciary has approved of child marriage except for a few exceptional cases. In *Appalasuramma Panchireddi Appala Suramma Alias … vs Gadela Ganapatlu*[119] When Andhra Pradesh High Court held that "The Act of Parliament was not mere to fix for the marriage i.e. 18years and 15 years for boys and girls respectively, but it wanted to make marriage void under the Act." But the same High Court in the case of *Venkatraman* realised the wrong interpretation of law previously, declared that though child marriage was an offence and punishable u/s 18 of Hindu Marriage Act, 1955, but it was not void or voidable. Thereafter, In *Lila Gupta vs Laxmi Narain & Ors*[120] the Apex Court upheld the validity of child marriage. Similarly, in *Sukram vs Smt. Mishri Bai*[121] MP High Court allowed child marriages.

In *T. Sivakumar v Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District*[122] Madras High Court held that to the extent of inconsistency, PCMA, 2006 being a secular law would have overridden effect over Hindu Marriage Act, 1955. In *Lajja Devi v State (NCT of Delhi)*[123], the Delhi High Court Full Bench observed that the PCMA does not make child marriage void per se, but merely declares it voidable. A child marriage on the one hand is considered an offence that is

[119] *Appalasuramma Panchireddi Appala Suramma Alias v Gadela Ganapatlu* AIR 1975 AP 193.
[120] *Lila Gupta v Laxmi Narain & Ors* 1978 AIR 1351.
[121] *Sukram v Smt. Mishri Bai* AIR 1979 MP 144.
[122] *T. Sivakumar v Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District* (2011) 5 CTC 689.
[123] *Lajja Devi v State (NCT of Delhi)* 2012 SCC OnLine Del 3937.

punishable by law, while on the other hand it is still considered valid, i.e., voidable until it is declared void.

In a Habeas Corpus petition[124], a division bench of Allahabad HC while upholding the validity of child marriage allowed a minor girl to live with her husband. Further, the Court laid down that even if a girl is a minor, her marriage cannot be said to be void. In *M. Janaki v. K. Vairamuthu*[125] Madras High Court also clarified that child marriages do not become null and void automatically. Later, the Supreme Court, in *Independent Thought vs. Union of India*[126], found it odd that the PCMA criminalizes child marriage and prohibits it, but it does not declare it void. Recently, in *Yogesh Kumar vs.Priya*[127] the Punjab and Haryana High Court ruled that if a girl marries before attaining the age of 18 years, she can seek a decree of divorce as long as the Hindu Marriage Act did not declare the marriage void.

Muslim Law

In *Abdul Khader v K. Pechiammal Child Marriage Prohibition Officer*[128], the Supreme Court dismissed a criminal revision filed claiming a right to practice marriage of a Muslim girl on her attaining puberty on the ground that it had legislative approval under the Sharia Act 1937. The court held that such practice was contrary to the aims of PCMA 2006, which was directed towards curbing the practice of child marriages in India. In *M. Mohamed Abbas v The Chief Secretary, Government of Tamil Nadu*,[129] a writ petition was filed to restraint the respondents from intervening, by citing the provisions of PCMA 2006, with a marriage performed under Muslim Personal law. The court while dismissing the writ petition held that provisions of PCMA 2006 are not contrary to religious freedom granted under Article 25 and 29 of the Constitution of India 1950. The Act aims to ensure education and empowerment of girls and also status on par with that of men in the society.

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[124] *Smt. Ramsati @ Shyamsati Throu Her Husband Jitendra v State of U.P. Through Prin. Secy. Home Deptt. Lko And Ors*, Habeas Corpus No. 247 of 2015.
[125] *M. Janaki v K. Vairamuthu* 2016 SCC OnLaine Mad 1409.
[126] *Independent Thought v Union of India* (2017) 10 SCC 800.
[127] FAO-855-2021 Decided on 26.08.2021.
[128] *Abdul Khader v K. Pechiammal Child Marriage Prohibition Officer*2015 SCC OnLine Mad 5212.
[129] *M. Mohamed Abbas v The Chief Secretary, Government of Tamil Nadu* AIR 2015 Mad 237.

In *Md. Idris v State of Bihar*,[130] the High Court of Patna after discussing in detail the Mohammedan law held "… under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian." In *Mrs Tahra Begum v State of Delhi & Ors*.,[131] relying on *Md. Idris v State of Bihar,* Delhi High Court observed that under Muslim personal law a Muslim girl can marry without the permission of her parents once she has attained puberty. Also, she can live with her husband even if she is under the age of eighteen years. Such marriage shall not be void but the girl would have the choice to regard such marriage voidable once she reaches the age of majority (18 years).[132]

Thus, as seen in certain cases courts have held PCMA 2006 not opposed to Muslim law and only aimed towards curbing child marriage, but as seen in *Tahra Begum* case, the court upheld the marriage of a Muslim girl who was under 18 years of age by giving preference to the personal laws. At this juncture a reference may be made to the *State of Bombay v Narasu Appa Mali*[133]case where a Division Bench comprising of Chief Justice MC Chagla and Justice Gajendragadkar while deciding the constitutional validity of Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) held:

"[A] sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

In *Seema Begaum v State of Karnataka*,[134] the High Court of Karnataka disagreed with the view taken by the Delhi High Court in *Tahra Begum's* case and held that PCMA, 2006 applies to all Indian citizens, irrespective of their religion and Muslims cannot claim immunity from the same on the ground of belonging to a particular religion. Further in *Yunusbhai Usmanbhai Shaikh vs State of Gujarat*[135], Anguished at the marriage of the Muslim teen with a man who is twelve years older

[130] *Md. Idris v State of Bihar* 1980 Crl L.J. 764.
[131] *Mrs Tahra Begum v State of Delhi & Ors* 2012 SCC OnLine Del 2714.
[132] Tahra (n 131).
[133] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.
[134] *Seema Begaum v State of Karnataka* (2015) 1 KCCR 281.
[135] *Yunusbhai Usmanbhai Shaikh v State of Gujarat* 2016 CriLJ 717.

than her, the Gujarat High Court laid down that Child marriage is explicitly prohibited by PCMA, which is a secular law. Furthermore, the Court held that as a "Special Act" as well as a subsequent legislation, the provisions of the PCMA will, to this extent, override any provisions of Muslim Personal Law, Hindu Marriage Act or for that matter any other personal law. The religion of the contracting party is irrelevant. Later, in 2017, in the judgment of *Independent Thought v Union of India*, it was opined by a judge that to the extent of inconsistency, PCMA 2006 will have overriding effect over Muslim personal laws.[136] Hence, there still remains an inconsistency regarding marriageable age for Muslims and whether PCMA would prevail over personal laws.

REGISTRATION OF MARRIAGES

There is no central law requiring compulsory marriage registration. However, registration of marriage has been made compulsory under a number of different Acts- the Christian Marriage Act of 1872, the Parsi Marriage and Divorce Act of 1936, and the Special Marriage Act of 1954 – but is optional for Hindu marriages under Hindu Marriage Act, 1955. Registration of marriage is also not compulsory under Muslim Law. Furthermore, there is no central legislation requiring compulsory registration of marriage. However, in 2006, the Supreme Court in *Seema v Ashwani Kumar*,[137] observed that registration of marriages of all citizens belonging to different religions should be made obligatory in the states where such marriages are performed. The Law Commission of India in its report suggested that existing laws directed towards curbing the practice of child marriage in India can be effectively implemented by registration of marriage.[138] The report also clarified that the purpose of recommending registration of marriages is not to obliterate the personal laws of various communities in India but to embrace the existing personal laws related to solemnization of marriage subject to the condition that such marriages should be registered in accordance with the Compulsory Registrations of Births Deaths and Marriages Registration Act or other laws existing in the state.[139] The Law Commission considered compulsory registration of marriages as an essential “reform” and suggested amendment of “Registration of Births and Deaths Act 1969” in order to incorporate in its purview the provisions for compulsory registration of marriage so that the prevailing

[136] Independent Thought (n 126).
[137] *Seema v Ashwani Kumar* (2006) 2 SCC 578.
[138] Law Commission of India, 270th Report on Compulsory Registration of Marriages (2017).
[139] ibid.

administrative system can conduct registration of marriages.[140] Thus, it is suggested that if registration of marriages is made mandatory in India by the government, it shall effectively help in curbing the practice of child marriage.

Consent given by a minor wife to her husband for sexual intercourse

PCMA 2006 requires the minimum age for marriage for girls to be 18 years and boys to be 21 years. But earlier there was an inconsistency with provision of the Indian Penal Code 1860. The offence of rape defined under section 375 of Indian Penal Code 1860 had an exception, which stated that sexual intercourse or sexual activity by a man with his own wife who was not below the age of 15 years did not amount to rape. Thus, it permitted sexual intercourse with wife between the age of 15 and 18 years. This was in distinction with other laws, which imposed a minimum age for marriage to be 18 years for girls and 21 years for boys. Hence, it could be seen that though criminal law made it a punishable offence to have a sexual intercourse with a wife below 15 years of age, but the marriage was still considered valid under PCMA 2006.[141] . In *Court on its own Motion (Lajja Devi) v State*[142], it was held that an offence of rape under section 375 of Indian Penal Code 1860 is made out when there has been consummation with a wife below the age of 15 years. There are no exceptions to it and it must be followed stringently and thoroughly. Consent in such instances is irrelevant and whether the girl is married or not also does not make any difference. The court finally held that even the personal laws applicable to the parties are also irrelevant. In furtherance of the same, the Parliament of India, in 2012 enacted the Protection of Children against Sexual Offences (POCSO) Act[143] which made sexual offence with any child under the age of 18 years[144] a punishable offence. This rule had no exception[145] and therefore, it was in contradiction with the exception 2 of the section 375 of the Indian Penal Code 1860, which permitted sexual intercourse with a wife between 15 and 18 years of age. To remove this inconsistency, it was suggested by the Law Commission of India in its 205th Report[146] that sexual intercourse with a girl below the age of 18 years, instead of

[140] ibid.
[141] ibid.
[142] *Court on its own Motion (Lajja Devi) v State* 2012 SCC OnLine Del 3937.
[143] Onkar Nath Tiwari, 'Elder Sister on Violence against Children: J. J. Act 2015 in Halfway' (2018) 9 INDIAN JL & JUST 1.
[144] Protection of Children from Sexual Offences Act 2012, s 2(d).
[145] Shraddha Chaudhary, '*Reconceptualising Rape in Law Reform*' (2017) 13 SOCIO-LEGAL REV 156, 162.
[146] Law Commission of India (n 139).

15 years of age must be considered rape under Section 375 of Indian Penal Code, 1860 and marriages under the age of 15 years must be considered void and not valid or voidable.

Thereafter, to avoid any ambiguity, the Parliament brought an amendment in POCSO Act in 2013 which stated that it shall have an overriding effect over any other law to the extent of inconsistency.[147] This made it clear and unambiguous that sexual intercourse with wife between the age of 15 and 18 years would be punishable under this act and consent, in such cases would be immaterial. In 2017, it was made further clear by the Hon'ble Supreme Court, in *Independent Thought v Union of India*, that POCSO Act 2012 will prevail over Indian Penal Code 1860 and exception 2 of section 375 of the Indian Penal Code 1860 was liable to be struck down as being unconstitutional and it shall be read as "*Exception 2 – Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape*."[148] Hence, Indian judiciary has made the law crystal clear by stating that sexual intercourse by a man with his wife, who is below 18 years of age, would amount to rape irrespective of her consent. The overriding effect of POCSO act 2012 over IPC 1860 would save the girl child from irreversible damage she may suffer due to pre-mature sexual acts or early pregnancy. This would now help in protecting women from exploitation where the consent of a girl below 18 years is taken coercively. In *Gajraj Ramabhai Hajani Through Ramabhai Pithabhai Hajani v. State of Gujarat*[149], the Gujarat High Court imposed Rs.30K costs on the parents of minors in marriage for misusing the provisions of IPC and POCSO and for ruining the childhood of minors by forcing them into marriage.

CONCLUSION

Despite the existence of a stronger law on child marriage, the practise has continued at an alarming rate. As a social evil, child marriage affects both boys and girls equally, but the impact is more severe on girls, who suffer from various irreparable losses, such as early pregnancy, sexual and reproductive illness, and other diseases. Early marriage and motherhood violate the girl's right to control her body, curtail her chances of

[147] Protection of Children from Sexual Offences Act 2012, s 42.
[148] Independent Thought (n 126).
[149] *Ramabhai Pithabhai Hajani v State of Gujara* R/CR.MA/12832/2020.

education, employment, and cause many problems for her and her progeny. Consequently, the girl child's human rights are violated at a stage of her life when they need protection the most. A child marriage creates a complex legal anomaly where the marriage so solemnized, despite being punishable by law, retains its validity in court. On one hand, there are legal provisions to curtail this menace, while on the other, the other legislative enactments and the judiciary recognize and endorse the validity of child marriage. As a result, child marriage remains illegal, punishable, and yet valid. The PCMA has definitely been a positive step, as it has replaced the previous legislation that was not effective in curbing the incidence of child marriage. Yet, its implementation in India is riven by legal contradictions on age of marriage, under-reporting of cases, voidability of child marriages, and low annulment rates for child marriages.

In order to end child marriages in India, legislative changes must be introduced to declare such unions void per se. The courts should also refrain from granting any legal relief to couples whose marriage was solemnized in violation of the required age. Another measure that could greatly contribute to eradicating child marriage is enforcing the registration of births and marriages, which should not be allowed in cases of child marriage. Further, Government needs to make people aware of the grave consequences of child marriage and raise the literacy rate, as ignorance is at the root of all social evils. In addition to legislative reforms, attitude reforms and a healthy social environment are required to end child marriage.

INTIMATE PARTNER VIOLENCE AND LEGAL FRAMEWORKS: A COMPARATIVE STUDY OF INDIA AND JAPAN

Shivani Chouhan[1]

ABSTRACT

Intimate Partner Violence is recognised as a serious medical and public health concern, as well as an egregious human rights violation of women. The present study is a cross-disciplinary exploration of the menace of Intimate Partner Violence, situating it in the context-specific to India and Japan and the legal mechanisms that address these concerns. The first section introduces the prevalence of IPV, followed by a brief analysis of models of IPV. The third section deals with the socio-cultural context of India and Japan before moving onto the legal framework addressing IPV. The last section consists of some concluding observations made by the present researcher.

Keywords: *intimate partner violence, human rights, women's rights, socio-cultural study, violence against women, gender inequality*

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INTRODUCTION

Crimes against women have come to be represented as a separate class in itself, not because those crimes are perpetrated only against women—men may also be victims of these crimes—but because women are much more at risk when it comes to these crimes. Crimes against women are not a random statistical grouping, but crimes directed specifically at women as a group, owing to their gender or their position in the socio-cultural context of the community. The perceptions of women being at risk of falling victim to this class of crimes is almost pervasive throughout, so much so that violence against women has become a subject of epidemiology across nations and worldwide. The UN, as well as nation-states, have come to recognise and survey the prevalence of violence against women as a serious health issue and have included it under their studies for healthcare policies. The United Nations defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[2]

Intimate partner violence (IPV), in particular, has emerged as an issue so viscerally prevalent across the globe—irrespective of the economic or social advancement of the country—that it is recognised as a major medical and public health problem and an egregious violation of women's human rights. The World Health Organization has defined IPV as "behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours."[3]

Despite the fact that due to the private nature of intimate relationships, the extent of IPV is hard to uncover, the emerging accounts paint a grim picture: "estimates published by WHO indicate that globally about 1 in 3 (30%) of women worldwide have been subjected to either physical and/or sexual intimate partner

[2] UNGA Res 48/104 (20 December 1993) UN Doc A/RES/58/104.
[3] L Heise and C Garcia-Moreno, 'Violence by Intimate Partners' in E. G. Krug et al. (eds), *World Report on Violence and Health* (WHO Geneva 2002).

violence or non-partner sexual violence in their lifetime."[4] Most of this violence is IPV, perpetrated majorly by men on women, although there may be cases of men being victims too. According to WHO, close to 27% of ever-partnered women in the age group of 15-49 reported having suffered some kind of physical and/or sexual violence at the hands of the intimate partner.[5]

Victims of IPV are susceptible to physical and mental health morbidities, such as unwanted pregnancies, miscarriages, sexually-transmitted diseases and depression, anxiety, trauma, PTSD etc.[6] Mental health issues are predominantly common in these victims. IPV has a severe adverse impact on the long-term physical, psychological, sexual and reproductive health of women. In some cases, it traps them in a cycle of emotional and economic degradation. Although the patterns of IPV seem to be more or less uniform worldwide, some socio-cultural factors have a specific correlation with their prevalence. Irrespective of the economic development of a country, the pervasive values of patriarchy and hierarchy have a negative effect on the treatment of women. India and Japan—both countries have a background of patriarchal social setup and resemble each other in a culture of male dominance in familial spaces. While the health sector may be the first gatekeeper and entry point for the healthcare of women suffering from IPV, there is still a policy gap when it comes to an understanding the difficult circumstances of women trapped in a cycle of violence. A prominent example of the same can be seen in the consecutive lock-downs imposed by countries across the globe during the COVID-19 pandemic outbreak—which reportedly led to a palpable increase in cases of domestic violence against women[7] who were left to no recourse as the health sector went into emergency modes to tackle the pandemic on priority basis, while all other support organisations were also put into a freeze. The present study is an attempt to explore the legal frameworks that have been developed to address the malaise of violence against women specific to the socio-cultural context of India and Japan and the interstices the policies have failed to assess.

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[4] World Health Organization, 'Violence Against Women' (*WHO* 9 March 2021) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> accessed 6 August 2021.

[5] ibid.

[6] Maya I. Raghavan, Kirti Iyengar and Rebecca M Wurtz, 'Physical Intimate Partner Violence in Northern India' (2014) 24(4) Qualitative Health Research 457.

[7] WHO (Technical Document) 'COVID-19 and Violence Against Women: What the Health Sector/System Can Do' (7 April 2020) WHO/SRH/20.04.

MODELS OF INTIMATE PARTNER VIOLENCE

There are multiple facets to Intimate Partner Violence. IPV does not manifest as a straightforward outward signification of physical battering but also works in subtler ways like mental, psychological and emotional abuse and pressure tactics, sexual violations, economic impoverishment and social isolation.

Physical abuse is the most visible type of violence in toxic intimate relationships and includes not just battering and life-threatening injuries but also abetment to self-harm and suicide. Oftentimes, physical injuries by intimate partners are dealt with in places that can be covered up and rely on the silence of the victim. However, more severe forms of physical violence like permanent disfiguration and acid attacks may also arise out of feelings of revenge and scorn towards the victim. Physical violence frequently overlaps with sexual violence against women. Sexual violence may be "any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. It includes rape, defined as the physically forced or otherwise coerced penetration of the vulva or anus with a penis, other body part or object, attempted rape, unwanted sexual touching and other non-contact forms".[8] Specific to the context of intimate relationships, sexual aggression coupled with physical battering leads to sustained health issues such as STIs and HIV with devastating consequences on the reproductive, sexual, physical and psychological health of women in particular, and children and public health in general.[9] In certain backward communities, female genital mutilation is prevalent as a form of cultural imposition of male possession of female body and honour.

Mental and emotional abuse has lesser tangible visibility and takes the form of "withholding children, food, water and medication from a mother, and shunning, belittling, isolating, and degrading her."[10] Controlling behaviour is one of the most insidious tactics of mental abuse. Mental abuse is the pressure exerted on women through various mechanisms that render them subject to objectification and

[8] World Health Organization, 'Violence Against Women' (*WHO* 9 March 2021) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> accessed 6 August 2021.
[9] Jean Chapman, 'Violence Against Women in Democratic India: Let's Talk Misogyny' (2014) 42 Social Scientist 49.
[10] ibid.

commodification and reduce their worth in terms of dowry or other gifts or material benefits. Mental and emotional abuse works in alternate cycles of affirmative, affectionate reassurance, followed by intermittent outbursts of verbal abuse and threats, which may culminate into physical or sexual violence. Other mental abuse tactics would be anonymous trolling of women and sexual abuse online, resentment and threatening of independent women who are seen as wilfully rejecting male protection and a culture of male sneering. This may manifest in several forms, such as cyberstalking, defamation and puts the victims at risk of depression, anxiety, neurosis, isolation etc.

Economic abuse by intimate partners takes the form of denial of necessities and isolation from communities that can lend help. Many theories on the relationship between IPV and the wage gap seem to suggest that lack of outside options of employment directly affects the bargaining power of women in toxic relationships. Economic deprivation by intimate partners is often coupled with social isolation as the perpetrator cuts off the options for the woman to venture and reach out for help, making her solely dependent on his providing. All these factors may be present in toxic intimate relationships in varied proportions or overlap in a way that makes it hard to identify the incidence of IPV. Various studies have posited tools for the identification of IPV through empirical studies that have been reviewed in the course of the present research. The most common and relevant models have been discussed hereinafter.

Power and Control Wheel

The Power and Control Wheel[11] was developed by the Domestic Violence Intervention Project of Duluth, Minnesota, to help victims of domestic violence identify and describe the various kinds of abuse tactics used by their partners. It was based on the numerous conversations practitioners and advocates had with battering victims and was subsequently used to assist victims in describing their plights. The Wheel outlines the various aspects of intimate partner violence that interplay so as to give the power and control in the relationship to the man.

[11] E Pence and M Paymar, *Education Groups for Men Who Batter: The Duluth Model* (Springer 1993).

Figure 1: Power and Control Wheel

The outer edge of the Wheel depicts physical and sexual violence, which are the most visible and easily recognised forms of abuse. These are also the means which hold and bind the victim in the toxic cycle of abuse. The inner rim denotes tactics the perpetrators use to establish their dominance and control over the victim. While these tactics may be present in other relationships as well, what changes in a relationship with violence is that physical and sexual violence ensure that the tactics used to play out as a form of threat to coerce the victim to do what the perpetrator wants without having to use physical violence every time. In a relationship devoid of physical and sexual violence, these tactics may cause tension and arguments but would not work as a coercive threat that ensures the victim's submission. However, in IPV, the employment of these tactics would directly lead to the central part of the Wheel, *i.e.*, the power and control over the victim. Although the perpetrator may not directly intend it, power and control in the relationship is a direct consequence of this behaviour. Regular use of abusive behaviours by the batterer, when reinforced by one or more acts of physical violence, make up a larger system of abuse. Although physical assaults may occur only once or occasionally, they instil the threat of future violent attacks and allow the abuser to take control of the woman's life and circumstances.

Although the Power and Control Wheel was developed in the context of the US, researchers have found it to be applicable to the experiences of women across the

globe, with slight modifications according to the specific cultural contexts. One study based in Japan explored the specificity of Japanese women in intimate relationships through an empirical method and modified the Wheel to better fit the socio-cultural context.

> In the original Wheel, both physical and sexual violence are placed in the Wheel's outer rim, which indicates that these two types of violence are more visible and more easily recognised than other forms of abusive and coercive acts. Sexual assault in intimate relationships in Japan remains hidden. Thus, placing sexual violence in the outer rim to imply its relative visibility compared to other forms of abusive tactics did not reflect Japanese women's experiences.[12]

Additionally, several forms of tactics did not adhere to strict boundaries as depicted in the original Wheel and intersected with one another—leading the author to acknowledge more fluid boundaries in the Wheel through dotted lines. The resultant modified Wheel appeared thus:

Figure 2: Modified Wheel

[12] Mieko Yoshihama, 'A Web in the Patriarchal Clan System: Tactics of Intimate Partners in the Japanese Sociocultural Context' (2005) 11 Violence Against Women 1236.

This modified Wheel may be applied to the Indian context as well, owing to the fact that sexual violence stays hidden in the four walls of the house due to socio-cultural setting as well as state policy. The fact that the law itself does not recognise marital rape further pushes this form of violence into the shadows of unarticulated experiences of IPV victims.

Web of Intimate Partner Violence

The aforementioned author also developed another tool for understanding IPV particular to the Japanese context based on her research through focus group methods. This tool was formulated in the form of a web wherein each control tactic represented a strand of a cobweb that effectively trapped the victim. The descriptions by the victims typified the entrapping and confining nature of the violence, and each abusive tactic would reinforce other tactics. Thus, periods of apologetic and affectionate behaviour would be used to reinforce the notion that the man was the provider without whom the woman would not survive and justify his abuse by putting the onus of avoiding confrontation on the woman. These justifications dismissed the effect of physical, sexual, mental and emotional abuse on women, making it harder for them to recognise the violence, while at the same time, isolation and financial deprivation prevented them from outside help. Thus, each strand of the web imprisoned the victim, making her escape harder even if a few strands were broken, i.e., the victim recognised the behaviour as abusive.

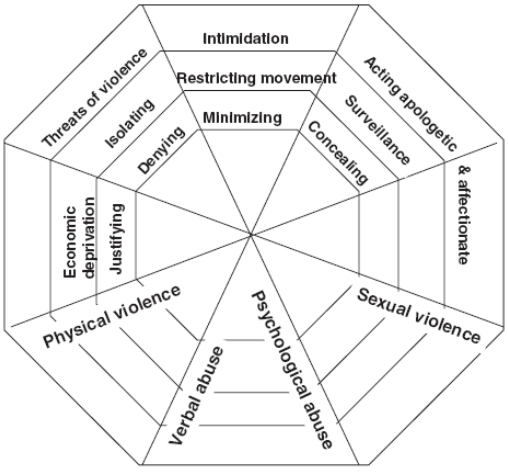

Figure 3: Intimate Partner Violence Wheel

The Coiled Spring

Various other conceptual models have been further developed in specific socio-cultural contexts. Just like the Power and Control Wheel may be used to account for experiences of IPV survivors across nations with modifications, similarly, some of these context-specific models can be modified to account for the lived experiences of women of other nationalities. The Coiled Spring developed by the Asian and Pacific Islander Institute on Domestic Violence was borne out of research on the collective experiences of women in the context of rural India (Maharashtra).[13] The local context was that women who lived in proximity to their natal family would seek refuge there when the marital home was violent.[14]

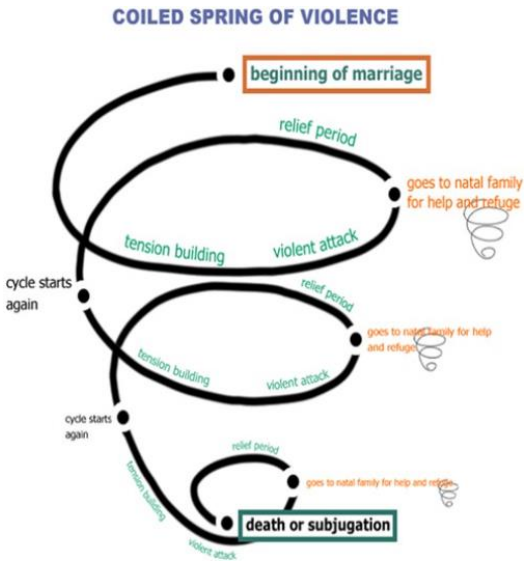

Figure 4: Coiled Spring of Violence

This model represents the cyclical violence and downward spiral in Indian households where domestic violence is prevalent. Each coil can be seen as a cycle where violence is followed by a relief period and then tension building, which again ends in violence. The violence can be of both physical and sexual nature. During the tension building period, the victim may face multiple waves of abuse such as emotional, mental, economic etc. This pattern is repeated over and over, but the relief period gets shorter with each cycle, and violent attacks become more pronounced and acute. The smaller coils on the outside of the central one represent abuse suffered at the natal home. After

[13] Masum's Health Clinics, 'Domestic Violence: A Tightly Coiled Spring' (2002) Asian and Pacific Islander Institute on Domestic Violence (APIAHF 2002).
[14] ibid.

a violent attack, the victim may go to her parental home to seek refuge and is welcomed at first. But after she returns to her marital home and the cycle of violence is repeated, the natal family becomes less and less welcoming with each instance and may also turn abusive or force her to go back to the marital home. This results in further validation and impunity to the marital household, whose abuses and violence get more and more violent, represented by the tightening of the coil. The environment of fear, humiliation and denigration becomes more and more palpable. As domestic violence becomes more frequent and severe, the downward spiral ends with either the death or subjugation of the woman. Thus, with the lack of intervention from outside, the coils tighten around the victim and leave her with no escape options. Given that this model was developed specifically in the Indian setting, the intimate relationship considered here is that of marriage. However, in applying this model outside of this context, other intimate relationships that are de facto like marriage may be represented by this model.

Lifetime Spiral of Gender Violence

The Lifetime Spiral of Gender Violence or Gender Abuse[15] is another tool developed by the Asian and Pacific Islander Institute to enumerate the gender-based violence suffered by women, not only in the context of intimate relationships but to identify the history of violence associated with them and how it impacts their future relationships. The spiral shows the violence perpetrated at every stage of life by a woman. These lived experiences further shape the way the victims handle abuse as they go through the spiral of violence growing up. While some of the abuses may be confined to one stage of the life cycle, some continue beyond it. The background of abuse also makes it easier for the future perpetrator to act with impunity and ensures silence of the victim, wherein oftentimes, a particular act may not even be recognised as violent or abusive. The Lifetime Spiral reveals patterns of victimisation by enumerating the types of violence, vulnerabilities, and harms women and girls face. It also implicitly shows the presence of different abusers located over the life course. While the acts themselves might have direct consequences, the abuse is also embedded in the environment of fear, shame, coercive control and devaluation that pervade the life cycle of women. This violence may be experienced in the context of additional oppression based on

[15] Asian and Pacific Islander Institute on Domestic Violence, 'A Lifetime Spiral of Abuse' (2002) Asian and Pacific Islander Institute on Domestic Violence (APIAHF 2002).

race, ethnicity, age, sexual orientation, gender identity, type of labour performed, level of education, class position, disability, and immigration or refugee status.[16]

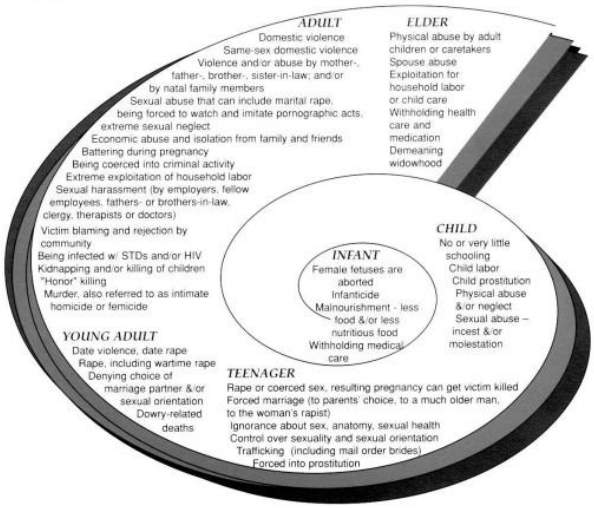

Figure 5: Lifetime Spiral of Gender Violence

SOCIO-CULTURAL CONTEXT

Comparative studies in either India or Japan are, more often than not, done with respect to one of the Western systems. Especially when it comes to India, comparative studies in legal systems, as well as socio-cultural institutions, would look at the US, UK, Canada etc. However, it is to be understood that the law or institutions of the land cannot be understood divorced from the socio-cultural setup. In this context, a comparative study between India and Japan offers a semblance of parity as both the countries seem to have quite similar socio-cultural contexts. One of the major problems faced by researchers, however, is the language barrier posed by Japanese, as well as other East Asian languages. Moreover, an acute lack of interest at the institutional as well as policy level has widened this gap further. This is not to say that the oppressive socio-cultural elements prevalent in these countries are not to aspire to change towards the more liberal framework existing in the West, but that without a cultural perspective, surgical changes in law and policy themselves prove to be ineffective. An understanding of socio-cultural context lends consideration to what tools can be used to bring changes from the bottom-up approach, especially in the

[16] Asian Pacific Institute on Gender-Based Violence, 'About Gender-Based Violence' (*Asian Pacific Institute on Gender-Based Violence Website,* 2017) <https://www.api-gbv.org/about-gbv/our-analysis/lifetime-spiral/> accessed 5 August 2021.

context of desired attitudinal changes of people—as such, learning from the experiences of nations having similar backgrounds would prove to be a more effective comparative study than a cursory glance through legal frameworks existing in certain other countries.

India and Japan both share a history of the patriarchal system and are still largely male-dominated societies. Both countries have institutions governed and represented by men, accounting for the needs, desires and lived experiences of men, with little to no perspective on the exigent problems faced by women. While both systems have endeavoured constantly to provide adequate legislative and policy safeguards to women, the lack of representation makes the matters seem less urgent, and the top-down approach alienates the women from any sort of participation as stakeholders in the governance and law-keeping process. The Inter-Parliamentary Union's data on women representation paint an abysmal picture for both nations: with India ranking 146 with 14.4% parliamentary representation and Japan ranking and even lower 164 with 9.9% parliamentary representation.[17] Consequently, the male perspective approaches women-specific issues from a patronising or protectionist approach, but seldom, if ever, from a participative and facilitative approach.

India

Intimate partner and sexual violence result from various factors "occurring at individual, family, community and wider society levels that interact with each other to increase or reduce risk (protective)."[18] These factors are associated not only with the perpetrator but also with the victim. Lower levels of education, exposure to familial violence during childhood, alcohol and drug abuse, societal norms of hyper-masculinity, male privilege, as well as marital discord, communication-gap, notions of family-honour and sexual purity, male entitlement and weak legal sanctions for sexual violence are some contributory factors.[19] While women in India may suffer from the additional oppressive burden of poverty, developed and economically advanced

[17] Inter-Parliamentary Union Parline, 'Ranking of Women in National Parliaments: Global Data on National Parliaments' (*IPU Parline Website*, June 2021) <https://data.ipu.org/women-ranking?month=6&year=2021> accessed 6 August 2021.
[18] World Health Organization, 'Violence Against Women' (*WHO* 9 March 2021) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> accessed 6 August 2021.
[19] ibid.

nations like Japan still appear to be struggling with the same problems of violence against women.

The Violence Against Women Prevalence Estimates conducted by WHO reported an estimate of 35% ever-married/partnered women to have suffered IPV at least once in their lifetime, while 18% were reported to have experienced it in the 12 months period preceding the 2018 survey.[20] On average, one in three women is believed to face some form of IPV in her lifetime. According to National Family Health Survey 4,[21] in a series of large scale, multi-round surveys conducted in India, 33% of ever-married women have experienced physical, sexual, or emotional spousal violence.

Indian society is fraught with fractures when it comes to gender perceptions. A form of a hyper-masculinised version of male attributes has been valorised over the decades while at the same time devaluing and objectifying the female for the pleasure of the male members and trivialising issues of her dignity. The problems of sexual and physical violence against women are also contextualised in terms of the honour of the family and community, a treasured possession of the male members, who may feel free to give it away as they deem fit. Conversations about the dignity of women are lost in political interstices. While the Constitution of India recognises the right to equality and freedom and liberty to all irrespective of their sex, these constitutional guarantees are left outside the threshold of the four walls of the home. For instance, in the case of *Harvinder Kaur v Harmender Singh Chaudhary*,[22] the Delhi High Court made an observation that introducing constitutional law in a matrimonial home was akin to "introducing a bull in a China shop".

Dowry and cruelty by in-laws are such common features of matrimonial households that not an eyelash is batted at the mention of it. On the other hand, conversations about penal laws enacted for the protection of women end up revolving around the apprehensions of false complaints and wrongful prosecutions. Men's fear

[20] WHO (Technical Document) 'Violence Against Women Prevalence Estimates, 2018: WHO South-East Asia Region Fact Sheet' (3 June 2021) WHO/SRH/21.10.
[21] International Institute for Population Sciences, *National Family Heath Survey-4 of 2015-16* (Ministry of Health and Family Welfare, Government of India 2017).
[22] *Harvinder Kaur v Harmender Singh Chaudhary*, AIR 1984 Delhi 66.

of being accused is always seen to be a more viscerally acute problem than the indignities and threats suffered by women in silence on a daily basis. Further, forms of victim-blaming in cases of physical as well as sexual violence is embedded into the cultural arguments that paint exclusionary pictures of women in a sub-category that do not conform to the set gender norms, termed as sexual-subalterns by a renowned feminist scholar.[23] The focus on women does not deny violence against male children and adults.[24]

[W]ithin violence against women framework, which is informed by feminist theory, the gendered dimension of violence against women are different from those of violence against men, because while men may certainly be exposed to violence as a result of their socially determined gender roles and norms, the violence they experience—or even perpetrate against other men—rarely if ever contributes to or confirms the overall subjugation of men as an entire subgroup of people.[25]

Various studies have undertaken empirical studies to trace the correlation of IPV prevalence in India to controlling behaviours[26] and drug use, gender wage-gaps[27] and misogynistic attitudes rooted in Brahmanical patriarchy.[28] However, these studies are limited in the singular aspects they examine, and the policy needs to take account of a more holistic picture of gendered divisions in India.

Japan

Japanese cultural beliefs also privilege the position of males over females. Until only very recently, the prevalence of IPV was not considered a serious social problem in Japan. The dynamics of the Japanese family system relegated domestic violence to the status of a personal matter. Although the old family system, referred to as the *Ie*

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[23] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* 51 (Glasshouse Press 2005).
[24] Jean Chapman, 'Violence Against Women in Democratic India: Let's Talk Misogyny' (2014) 42 Social Scientist 49.
[25] Sophie Read-Hamilton, 'Gender-Based Violence: A Confused and Contested Term' (2014) 60 Humanitarian Practice Network 5.
[26] Reema Mukherjee and Rajneesh Kumar Joshi, 'Controlling Behaviour and Intimate Partner Violence: A Cross-sectional Study in an Urban Area in Delhi, India' (2019) Journal of Interpersonal Violence 1-12.
[27] Anna Aizer, 'The Gender Wage Gap and Domestic Violence' (2010) 100 The American Economic Review 1847.
[28] Jean Chapman, 'Violence Against Women in Democratic India: Let's Talk Misogyny' (2014) 42 Social Scientist 49.

system, was abolished in 1945 in a post-war democratisation effort, the cultural beliefs continue to adhere to this family system based on the feudal warrior class. The *Ie* system privileged the family above all else. The firstborn son was distinguished as the future head of the family, and any other younger son had to seek his permission to set up a branch family. Daughters were meant to leave their native *Ie* upon marriage and enter the marital *Ie* not as a wife but as a *Yome*. The closest translation of *Yome* means daughter-in-law; however, she has to hold her husband's parents closer to herself than her own parents. There was a "vertical" conception of family, and the continuation of the family line was of utmost importance, which permitted having multiple wives in order to produce an heir. The absence of a male heir meant the extinction of the *Ie* and the fief had to be forfeited, leaving the family members and retainers in destitution.[29]

Domesticity is a cornerstone element of middle-class femininity in post-Second World War Japan. During the period of high economic growth in 1950-70, Japan saw the emergence of a strict gendered division of labour.[30] Men would primarily take on the role of breadwinners, while women's primary responsibilities consisted of taking care of the household and children. "As a result, paid employment became strongly associated with masculinity and motherhood with femininity."[31] Although an Equal Employment Opportunity Law (EEOL) was passed in 1985 which prohibits gender-based discrimination in the areas of recruiting, hiring, job assignment, pay, and promotion, organisations in Japan, have established gendered career tracks, which indicates that "more innocuous forms of gender discrimination continue to operate to deter women from pursuing careers."[32]

A two-tier employment track system adopted by the companies posits a "career track" and a "clerical track".[33] The former represents the employment trajectory of full-time employees, involving long work hours and frequent transfers. However, this track also provides benefits like promotions, job permanence, salary increments etc. On the other hand, the clerical track involves lesser, fixed work-hours, no transfers, but it also lacks benefits provided by the former. Theoretically, individuals can choose either of

[29] Fujiko Isono, 'The Family and Women in Japan' (1964) 12(1) The Sociological Review 39
[30] Justin Charlebois, 'The Discursive Construction of Femininities in the Accounts of Japanese Women' (2010) 12(6) Discourse Studies 699.
[31] ibid.
[32] ibid.
[33] Yoshio Sugimoto, *An Introduction to Japanese Society* (Cambridge University Press, 2003).

the tracks. However, the career track is predominantly occupied by men while the clerical track by women. The social expectation of women bearing the responsibility of domestic work and childcare make the latter a more attractive choice for women who wish to marry and raise a family as the involvement of the male members in these tasks is expected to be limited. At the same time, the expectation of primary breadwinning tasks falls on the men and deters them from choosing the clerical track. "Problematically, the passage of the EEOL has resulted in an internal division of labour where men are primarily careered professionals and women are short-term clerical employees prior to marriage."[34]

These cultural hegemonies have inculcated beliefs about marital relationships that force women to stay in IPV relationships. The beliefs that men are dominant and wives and their possessions all belong to the husbands, that the role of wives in the relationship is insignificant, and that IPV is perpetrated by women themselves due to disobedience emerged in another empirical study.[35] Women were taught to be dependent on men and that their obedience to husbands' wishes ensured happiness. As a result, women were embedded with the belief of their own inferiority vis-à-vis their husbands and were thus emotionally dependent on them. This dependence further generates anxiety and insecurity if they think about leaving due to incidents of IPV. At the same time, family attitudes towards IPV also reaffirmed these cultural notions about marital bonds. Women reported that when the wives' families became aware that the women were experiencing IPV, their families did not support their leaving. Further, the legal system also trivialised these issues. The police overlooked IPV as a personal marital quarrel and chose not to intervene, while the lawyer did not come across to be helpful in providing viable alternatives to these women.

LEGAL FRAMEWORK

Both India and Japan have developed their own specific laws in order to curb the menace of crimes against women. Although the society in both countries continues to treat IPV as a predominantly personal issue and puts the onus to avoid it on the women, the widespread prevalence and resultant push for policy intervention have

[34] Jean Chapman, 'Violence Against Women in Democratic India: Let's Talk Misogyny' (2014) 42 Social Scientist 49.
[35] Miyoko Nagae and Barbara L Dancy, 'Japanese Women's Perceptions of Intimate Partner Violence' (2010) 25(4) Journal of Interpersonal Violence 753.

compelled that States to recognise IPV as a social problem of criminal proportions and nudged them to adopt laws to safeguard women against violence by intimate partners. While the Indian legal approach has been piecemeal, spread over multiple legislations, the Japanese approach has been more surgical in the sense of neat compartmentalisation. Both the approaches have their pros and cons, as are discussed hereinafter.

India

Multiple legislations directly or indirectly cover situations that lead to intimate partner violence in the Indian context. The menace of dowry demand and violence against the wife to promote those demands was sought to be addressed by the introduction of the Dowry Prohibition Act, 1961. The Act prescribed punishments for giving and receiving dowry and demanding dowry or advertising offers of dowry. The legislation was gender-neutral in the sense that it prohibited giving or taking of dowry by either party. However, on the other hand, the legislation did allow the giving of dowry solely for the benefit of the wife or heirs. This provision made space for the specific needs of women who are subjugated and deprived in case of an abusive marital home.

At the same time, corresponding amendments were made to the Indian Penal Code in order to penalise cruelty on women for demands of dowry and otherwise. Section 498A defined cruelty in terms of grave mental as well as a physical injury or mental torture that would drive her to suicide. Harassment of the woman in order to coerce some property from her or any person related to her was also included. Additionally, Section 304B was introduced, which specifically defined circumstances that construed dowry death. Correspondingly, provisions for a presumption in case of abetment to suicide by a married woman and dowry death were added under Section 113A and 113B to bring violent partners and in-laws to justice, given that, owing to the private nature of the relationship in a marital setting, the evidence was harder to collect as most instances of IPV and DV were silently borne or brushed under the carpet by people who were meant to protect the victims.

Another legislation brought about specifically to address the issue of IPV was the Protection of Women from Domestic Violence Act, 2005. This Act covered a very wide spectrum of abuse under the definition of domestic violence, including physical

abuse, sexual abuse, verbal and emotional abuse, economic abuse as well as harassment, endangering or threat of such violence. The provisions of this Act were also cast in gender-neutral terms and could be used by men to seek protection from abuse by female partners, although the very nomenclature of the Act points to the prevalence of violence against women, for which this act was brought into force. This Act also imposed duties on police officers, magistrates, shelter homes and medical facilities to assist the aggrieved. Also, the Act provided Protection Orders against the offending persons. Provisions for monetary relief and compensation were also included. The calculated generality of this Act has made it one of the most equitable legislations as it affords protection not only to women but also to men, and at the same time, is not restricted in its scope of only marital relationships but also affords equal protection to unmarried people in intimate relationships.

Lastly, the broadening of the spectrum of sexual offences under the Indian Penal Code following the amendment of 2013 has also provided for the protection of women against IPV. Section 354, 354A, 354B, 354C, and 354D enumerate punishments for offences of sexual harassment, assault with intent to disrobe, voyeurism and stalking, respectively. Although these provisions are general, the applicability against intimate partners has made many sexually abusive behaviours penal. Further, other provisions like sections 326A and 326B penalise specific forms of grievous injury, *i.e.*, acid attacks. Given the fact that many times, these tactics are used by jilted partners seeking revenge, these penal provisions provide another layer of legal recourse. Additionally, officers who refuse to register complaints or provide medical attention to victims of these crimes are also penalised under sections 166A and 166B.

One of the biggest stumbling blocks in the Indian legal framework, however, remains in the form of an exception carved into the definition of rape under section 375, *i.e.*, marital rape. Although section 375 can be used to prosecute other intimate partners and rape shield provisions enumerated in the Indian Evidence Act bar the questioning of past sexual conduct of the victim, the prevalent norms of rape trials still play into the tropes of victim-blaming in sexual relationships. On the other hand, husbands are provided with blanket protection under the exception of section 375 to rape their wives with impunity as the law does not recognise marital rape as a form of

rape or even sexual offence. Many seminal works have been done specifically on this abominable exception, but that discourse falls outside the scope of the present discussion.

Japan

Japanese law has maintained a more focused approach in its framework to address violence against women. The Penal Code of Japan[36] enumerates sexual offences in very straightforward terms. This, however, does not mean narrowing the scope of these provisions. Article 176 enumerates the offence of "Forcible Indecency", which includes all kinds of sexual violations of the victim without consent. On the other hand, Article 177 defines rape as "forcible sexual intercourse" "through assault or intimidation." Article 178 defines the offences of quasi-forcible indecency and quasi-rape by enumerating the circumstance where there is a loss of consciousness or inability to resist. Following the amendment of 2017, "rape" has been replaced by "forced sexual intercourse" as the language of the definition has been expanded to include men as victims of rape. As such, the Japanese Penal Code has now made sexual offences gender-neutral.

In 2001, Japan introduced the Act on the Prevention of Spousal Violence and the Protection of Victims, etc.[37] This act was applicable not only to spouses but also to relationships that were a "de facto state of marriage". Hence, it addressed IPV at the level of marital as well as other intimate relationships. Although the definition of spousal violence was not as wide as that under the DV Act of India, it included physical as well as psychological violence of the same degree or threat thereof. The Act aims to protect victims by establishing a system for notification, counselling, protection and support for self-reliance following an incident of spousal violence. It focuses almost exclusively on the creation of temporary shelter programs, provision of information about existing assistance resources, and restraining orders. The Act provides for restraining orders and prohibition of contact (known as Protection Order) by the offender where it is likely that the victim may suffer serious psychological or bodily harm. This Act has also enabled reporting of cases of spousal violence by other individuals or medical practitioners who detect the existence of IPV. The Act has also

[36] Penal Code of Japan Act 1907.
[37] Act on the Prevention of Spousal Violence and the Protection of Victims 2001.

placed emphasis on Counselling and Support centres and the duties of functionaries in assisting, advising and protecting the victims.

In 2000, Japan also adopted the Anti-Stalking Control Law.[38] It has been noted that prior to the adoption of this law, of the complaints registered for stalking, 51.2% of the cases involved current or former intimate partners, and 14.4% involved a current or former spouse.[39] Growing public fear over the rise of stalking-related murders prompted the Japanese government to create a law specifically addressing stalking, as previously, it had to be prosecuted under the Penal Code, which was not designed to deal with a situation like this. "In addition to broadly prohibiting stalking, the statute also includes lying in wait, demanding a meeting, violent acts, silent phone calls and sending dirty or explicit items, animal carcasses or sexually insulting materials."[40] Under this law, police are empowered to issue warnings against stalkers, which seems to be quite effective in the Japanese context. "Of the 453 people the police issued warnings to in the six months after the law took effect, 96% ceased their stalking activities."[41] On the persistence of stalking after warning, a desist order may be issued—violation of this order results in a penalty of imprisonment or fine. Since the adoption of this law, police officers have been proactive in providing portable security buzzers as well as technical advice to the victims. An unconventional form of compensation has emerged in the form of stalking insurance, which compensates victims in cases of injuries sustained in stalker-related incidents.

CONCLUSION

Intimate partner violence is not an issue endemic to one class of countries—every country, be it developed or developing, rich or poor, reports an astounding number of IPV cases every year. The existence of a patriarchal setup may at first glance seem to suggest a higher prevalence of IPV, but the counterintuitive truth is that irrespective of societal beliefs and endorsement of patriarchy, IPV is a menace faced by all strata of society—the only difference being that recognition and reporting of IPV may be

[38] Anti-Stalking Control Law 2000.
[39] Nga B Tran, 'A Comparative Look at Anti-Stalking Legislation in the United States and Japan' (2003) 26(3) Hastings International and Comparative Law Review 445.
[40] Legal Information Institute, 'Women and Justice > Japan' (*Cornell Law School*, 2021) <https://www.law.cornell.edu/women-and-justice/location/japan#liinav> accessed 7 August 2021.
[41] Anti-Stalking Control Law 2000.

more muted in countries with patriarchal setup. The various models developed by researchers through their empirical studies of women's lived experiences across different countries, and socio-cultural systems paint ostensibly similar pictures with slight modifications. Although India and Japan may be very different in their economic and political trajectories, both countries share the same DNA of patriarchal socio-cultural setup, which devalues women and establishes norms of male dominance. While both countries have developed legal frameworks to deal with the issues of violence against women, indicating that the governance is alive to the exigent issues of women, they have mostly adopted top-down approaches of penalisation. A lack of representation and myopia towards woman-specific issues have deterred any kind of victim-centric approach from entering into the fray. So long as systems of male dominance continue to thrive, representation of women's perspectives in maladies plaguing the disempowered women will remain a pipe-dream, which fall short of addressing the specifically woman-centric issues from being systematically addressed, no matter however much protective legislation may be enacted. Unless bottoms-up solutions to everyday problems of women are seeking, the problem of violence against women will continue to plague societies across the globe. It is imperative to look for long-term solutions addressing the root cause rather than slapping on band-aids and quick fixes.

A LEGAL STUDY OF SACRED GROVES IN INDIA AND ITS BIOLOGICAL IMPORTANCE WITH SPECIAL REFERENCE TO MAWPHLANG SACRED GROVE MEGHALAYA

Abhishek Chakravarty[1]

ABSTRACT

Indigenous communities across the world have a common practice of revering forests. It is often seen that these communities try to protect, conserve, and manage small areas of forests or groves, with which they have cultural, spiritual, and religious beliefs associated. While for some, these groves are abodes of their deities, for others they are sites of cultural practice. However, with the changes in belief systems and societal structures – many of these practices around conservation of sacred groves are also fading. This has resulted in the destruction of sacred groves for timber or expansion of land for agriculture and settlement. As many of these forests store invaluable biodiversity, conservationists feel an urgent need to protect them. There is no such specific protection provided in most legislations or conventions regarding sacred groves. However, in the recent times, internationally, there is an attempt to recognise this practice, with intentions of furthering the conservation and restoration measures. Some countries have also come up with legislations to protect sacred groves in their respective territories. This paper attempts to understand the concept of sacred groves, followed by examining the international and national documents that push for its conservation and management by local communities. It also looks into the municipal and customary laws in Meghalaya, which provide recognition and protection to sacred groves. An in-depth field study of the Mawphlang sacred grove, which I had carried out a few years back, where a REDD+ initiative is helping protect and restore community forests (including sacred groves), also forms an integral part of the paper. The primary objective of this paper is to analyse the legal regime surrounding sacred groves, understand the biological importance of these forests, and suggest legal and policy measures for a sustainable conservation and management of these forests.

Keywords: *sacred groves, conservation, forest management, biodiversity, customary laws*

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INTRODUCTION

"*The forest is not merely an expression or representation of sacredness, nor a place to invoke the sacred; the forest is sacredness itself. Nature is not merely created by God; nature is God. Whoever moves within the forest can partake directly of sacredness, experience sacredness with his entire body, breath sacredness and contain it within himself, drink the sacred water as a living communion, bury his feet in sacredness, open his eyes and witness the burning beauty of sacredness.*"

- Richard Nelson

Several cultures around the world carry cultural and religious beliefs that certain areas of forests (sacred groves) have deities residing in them, these deities protect the villagers from evil and calamities, in turn villagers protect these forests and consider them sacred.[2] There's a unique legend, lore, and myth which form the integral part of any sacred grove. They are considered an inextricable link between present society and past in terms of biodiversity, culture, religious and ethnic heritage.[3] Throughout the world there are different local rules and customs followed, some of which is also encoded, for protecting these sacred forests. Sacred groves occur in many parts of India, but primarily in the Western Ghats, Central India, Northeast India, and the Himalayas where much of the country's tribal communities reside. Each of these forests is given its own unique name and status by the local communities who reside in the region. These forests represent an important long-held tradition of conserving specific land areas that have cultural and often religious, significance. In India, with its diverse culture, tradition, and landscape, it is estimated that there are over 100,000 sacred forests[4]. Today, much of these forests only remain as small fragments in the midst of human settlement or farmland. Sometimes, community members are unaware of these fragments, and with time in many places, the community's involvement in the protection and management of these forests is also declining.

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[2] Ashalata Devi Khumbongmayum and M.L. Khan, 'The Sacred Groves and Their Significance in Conserving Biodiversity: An Overview' (2008) 34(3) International Journal of Ecology and Environmental Sciences 277.

[3] ibid.

[4] Indian National Science Academy, New Delhi and Indira Gandhi Rashtriya Manav Sangrahalaya, *Cultural and Ecological Dimensions of Sacred Groves in India* (2001).

This article is an attempt to look into the legal aspects of the conservation of sacred groves with special focus on the State of Meghalaya in India's North-East. This region is a part of an international biodiversity hotspot falling in the Indo-Malayan zone, and home to several indigenous ethnic communities. Besides the cultural and religious significance of sacred forests, several studies have shown that they are pivotal in the conservation of biological diversity, including medicinal plants, within highly anthropogenic landscapes. While historically sacred groves were strictly protected, presently, they face numerous threats – pressure from timber industry and other forest products, land needs for agricultural expansion, and general changes in cultural beliefs.

The arrangements for ownership, conservation, and management of sacred forests varies regionally, making it necessary to closely study these arrangements on a case-by-case basis. Also, sacred groves in India lack any kind of legal protection from any existing statutes which makes them highly vulnerable to deforestation. With the changing social and religious values across the country, these forests now are more vulnerable to destruction. There is a need to support this traditionally continued practice of conservation, and provide for a culturally sensitive model to ensure a community-led natural resource management system. Further, legislations are also needed for better legal protection and providing a solid legal status to these rich habitats.

EXISTING LAWS AND POLICIES ON SACRED GROVES

Sacred Groves have been conserved by communities across the world since time immemorial. The reason behind this conservation effort is the spirituality associated with these sacred groves. In modern times however the spirituality of the people is on decline and people are now more concerned with their economic and material benefits. This is led to a lot of anthropogenic pressure on the sacred groves and resulted in their destruction. Although the need for legal mechanism for the conservation of sacred groves was not needed in the earlier times but now there is a grave need for such laws in order to protect these natural heritages. Across the world only a few countries have adopted such laws and in the international level there have been certain conventions in this regard, but these laws have not been well defined or implemented. In India for example, the Wild Life (Protection) Amendment Act, 2002

had introduced a new category of protected areas called the 'community reserves' but the term 'community reserve' has not been well defined. It is not clear whether sacred groves fall under the ambit of 'community reserves'. In recent times countries like Australia and Benin have adopted certain laws for the protection of sacred groves and also there are certain International Laws in this regard and these shall be explained in the subsequent paragraphs.

International

The United Nations has certain guidelines which influence land-based religious practices around the world. The 1948 Universal Declaration on Human Rights declares that freedom of religion is a fundamental human right, and its Article 18 reads:

"*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."* [5]

Most of the sacred groves are a part of people's religious beliefs and practices and for many indigenous communities these are either places of worship or abode of their deities. Therefore, Article 18 of the Universal Declaration on Human Rights indirectly speaks for the protection of these sacred groves.

A draft Declaration on the Rights of Indigenous Peoples was proposed in the year 1994 for the protection of the rights of the Indigenous people living across the globe. This extensive document saw the involvement of several indigenous leaders from across the world, working over several years, before being approved by the U.N. The original draft of the document had two important articles, which had been unchanged for more than a decade, and had a direct influence on the protection of sacred lands (including sacred groves).[6]

Article 13 stated:

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[5] Sacred Land Film Project, <http://www.sacredland.org/home/resources/tools-for-action/protection-strategies-for-sacred-sites/international-efforts-to-protect-sacred-places/> accessed 22 November 2020.

[6] ibid.

"Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected." [7]

While Article 25 stated:
"Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard." [8]

The year 2003, saw a new international movement for the protection of sacred places gain momentum. In September 2003 at the 5th World Parks Congress in South Africa, Durban Recommendations on the Cultural and Spiritual Values of Protected Areas was proposed. The need for the recognition of the cultural and spiritual values of protected areas around the world, and the full inclusion of tribal groups and their spiritual leaders in the management of sacred natural sites was the primary theme in the document.[9]

"Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites and Cultural Landscapes" was a major symposium which convened in Tokyo, Japan in 2005. Over 200 people from across the globe convened at this symposium to deliberate on the importance of safeguarding sacred natural sites and cultural landscapes to safeguard and conserve biological diversity. There was also an emphasis on the role of these sites for the spiritual and cultural well-being of indigenous communities, who must play a major role in their conservation and management. The attendees agreed on the fact that new laws and improved land

[7] Draft Declaration on the Rights of Indigenous Peoples (1994) UN Doc E/CN.4/Sub.2/1994/2/Add.1.
[8] ibid.
[9] IUCN Centre for Mediterranean Cooperation, 'Durban Recommendations on the Cultural and Spiritual Values of Protected Areas' (2007) <https://www.uicnmed.org/web2007/CDMURCIA/pdf/durban/recommendations_en.pdf> accessed 5 November 2020.

management policies are key to further the involvement of local communities in conservation of sacred natural sites.[10]

The rise of this movement for the protection of cultural sites saw the emergence of several important documents which emphasised not only on protection, but the need for laws and policies for better management of the sites with involvement of indigenous people. The symposium in Japan saw the emergence of the Tokyo Declaration, which exhorts that the UNESCO and IUCN's Draft Guidelines for the Conservation and Management of Sacred Natural Sites be put into effect, and the dissemination of the Convention on Biodiversity's Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact, sacred sites and the lands and waters traditionally occupied or used by indigenous and local communities.[11]

The following are also a few more documents which deal with the conservation of Sacred Groves at the International level:

- The Playa del Carmen Declaration on Indigenous Spirituality, Nature and Sacred Sites (April 2005)[12]
- UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage (October 2003)[13]
- The Yamato Declaration on an Integrated Approach to Safeguarding Tangible and Intangible Cultural Heritage (October 2004)[14]

Further in 2008, the IUCN and the UNESCO published a book called the "Best Practices Volume 16, Sacred Natural Sites – Guidelines for Protected Area

[10] Sacred Land Film Project, <http://www.sacredland.org/home/resources/tools-for-action/protection-strategies-for-sacred-sites/international-efforts-to-protect-sacred-places/> accessed 10 November 2020.
[11] ibid.
[12] The Playa del Carmen Declaration on Indigenous Spirituality, Nature and Sacred Sites, <http://www.sacredland.org/PDFs/Playa_del_Carmen.pdf> accessed 22 November 2020.
[13] UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage, <http://www.sacredland.org/PDFs/Intangible_Cultural_Heritage.pdf> accessed 22 November 2020.
[14] The Yamato Declaration on an Integrated Approach to Safeguarding Tangible and Intangible Cultural Heritage, <http://www.sacredland.org/PDFs/Yamato_Declaration.pdf> accessed 22 November 2020.

Managers"[15], and launched the publication at the World Conservation Congress in Barcelona, Spain. IUCN members also passed Motion 53, which emphasised on "Recognition and conservation of sacred natural sites in protected areas." As a result of all these steps taken by various international organisations, sacred site management is now an accepted category of conservation practice with internationally recognised guidelines, principles and policies, all supported by more than a dozen case studies. The guidelines are now being field tested in protected areas around the world. This has led to many countries adopting laws to protect the sacred groves across the world and has given an international recognition as well importance to these natural heritages of planet Earth.

Australia's Northern Territory Aboriginal Sacred Sites Act

One of the first legislations in the world passed in 1989 which explicitly protects sacred groves and lands of Indigenous communities living in Australia. The Aboriginal people, who are the indigenous people of Australia, inhabit much of its sparsely populated Northern and Central regions. These people are very much associated with nature. A very primitive community living mostly in forests and wastelands, they depend on the nature for much of their needs. As a result of this dependence on nature, they also worship nature. They associate their deities and the spirits of the forefathers with the natures and hence consider many sites as sacred groves and sacred sites. However, due to many economic activities in recent times there had been a lot of exploitation of their sacred sites and much of it were destroyed mostly by rapid coal mining projects. Therefore, in 1989 the Australian Government passed this act for the protection of the sacred sites of the Aboriginal people. The Northern Land Council and the Central Land Council are Aboriginal-controlled organisations that monitor this legislation, along with the use of and activities on Aboriginal lands. In recent times there have been a lot of criticisms about the loopholes present in the act and The Central Land Council report "Our Land, Our Life"[16] provides details about how the land councils operate and explains current difficulties with land rights and sacred site protection in Australia. The report

[15]Best Practices Volume 16, Sacred Natural Sites – Guidelines for Protected Area Managers, <http://www.sacredland.org/PDFs/SNS_Guidelines.pdf> accessed 22 November 2020.
[16] Our Land, Our Life, <http://catalogue.nla.gov.au/Record/1089157> accessed 1 December 2020.

states that the 1989 act "is not strong enough as Aboriginal people say it provides miners with the 'legal' means to destroy sites."[17]

Benin's Sacred Forest Protection Law, 2012

Benin is one of the first countries in Africa to enact a law for the protection of Sacred Forests. It is inhabited by various indigenous tribes like Fon, Yoruba, Dendi etc. who have a lot of spiritual connections with the forests. The Act defines Sacred Forest as "Any forest home to several gods worshipped by the local population. It can be a hunting reserve, a forest of the ancestors, a burial forest, a forest of the gods or spirits, or a forest of secret societies."[18] The Act also divides the sacred forests into categories of – Burial Forest, Forest of God or Spirits, Forest of Secret Societies and Hunting Forests.[19] Chapter III of the Act includes articles 4 and 5 which speak of the management of these forests. The forests shall be managed by the community and a committee should be formed headed by any local tribal king or the village headman. The Act also speaks of a Buffer zone near the Sacred Forests. The Act is very well documented and made with over 53 articles spread over VIII chapters. It is a national legislation and applies to the entire country. It prohibits any kind of destructive activity near the sacred forests. This law can be taken as a basis for many countries including India, where sacred forests play a vital role in the lives of the Indigenous communities but now are facing the brunt of over population, urbanisation and industrialisation.

National

Sacred groves are an integral part of the Indian society and the country has over 100,000[20] sacred groves distributed across the its length and breadth. However, there is no law in India which specifically focuses on the conservation and management of the sacred groves. India has different laws as far as environment and forest protection is concerned. The Government also protects many forests as National Parks, Wildlife Sanctuaries, and Reserved Forests and in many other

[17] ibid.
[18] Gaia Foundation, <http://www.gaiafoundation.org/sites/default/files/documents/Benin%20Sacred%20Forest%20law%20final%20English%20version%202014.pdf> accessed 12 December 2020.
[19] ibid.
[20] Malhotra, K. C., Ghokhale, Y., Chatterjee, S. and Srivastava, S., *Cultural and Ecological Dimensions of Sacred Groves in India* (INSA 2001).

categories. But Sacred Groves have not been listed as a protected area and are hence prone to many destructive activities.

The Wild Life (Protection) Amendment Act, 2002 has broadened the meaning of protected areas and included 'community reserves' as a part of it by adding section 24 A to the act. Section 24 A reads as:
"Protected area means a National Park, a sanctuary, a conservation reserve or a community reserve notified under sections 18, 35, 36A and 36C of the Act" [21]

Section 36C of the Wild Life (Protection) Act, 1972 also defines 'community reserves' but the definition is not clear if it includes sacred groves or not. Section 36 C of the Act reads as:
"The State Government may, where the community or an individual has volunteered to conserve wild life and its habitat, declare any private or community land not comprised within a National Park, sanctuary or a conservation reserve, as a community reserve, for protecting fauna, flora and traditional or cultural conservation values and practices." [22]

The section speaks of the conservation of wild life, but many of the sacred groves in India are more concerned with the protection of trees and forests than wildlife. This definition also lacks clarity, and it points towards the urgent need for a specific law for the conservation and management of sacred groves in India.

State

The Northeast Indian states are primarily inhabited by several indigenous communities. One such State is Meghalaya, where the Khasi, Garo, and Jaintias form the major demography. Many of these indigenous tribal groups have their own rules, regulations, and codes commonly referred to as customary laws. These customary laws have varied jurisdictions – from social customs to over the use of land and resources. This jurisdiction is exercised by the village council (called *Dorbar Shnong* among the Khasi people). As most of Meghalaya's lands are community owned, or owned by individuals, many of its sacred natural sites (like sacred groves) fall within

[21] Wildlife (Protection) Amendment Act 2002, s 24 A.
[22] Wildlife (Protection) Act 1972, s 36 C.

individual or community properties. This is a unique situation where forests are managed by individuals and communities, rather than the State.

There are two important local laws – United Khasi and Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958 and Garo Hills Autonomous District (Management and Control of Forests) Act 1961 under which certain forested areas can be declared as a sacred grove, if the district council perceives that the forest is revered by local communities. Since this study is primarily focused on the Khasi hills region, the former law has been analysed. As per this Act, the management and control of the sacred groves is to be undertaken by a priest or religious head (known as a *Lyngdoh* in Khasi) or other person(s), who are entrusted with the religious ceremonies for the locality or village, in accordance with the customary practices and rules framed by the Executive Committee of the concerned Autonomous District Council.[23] Section 7 of the Act –
"Prohibits felling of trees inside the sacred groves without the written sanction of the concerned Chief Forest Officer or any other officers." [24]

Section 9 of the Act states –
"No tree/trees shall be felled or removed from the Law Lyngdoh, Law Niam and Law Kyntang (Sacred groves) except for purpose connected with the religious function or ceremonies recognised and sanctioned by the Lyngdoh (priest) or other persons in accordance with section 4 (b)." [25]

In 1998, the Planning Commission set up a commission under the chairmanship of Shri S P Shukla, known as the Shukla Commission. The objective of this commission was to critically examine the gaps in the development of the infrastructure sector and the delivery of the basic minimum services in the Northeast. An important suggestion of this commission was the recommendation to set up a North East Forest Policy Committee (NEFPC). This committee was constituted by Ministry of Environment and Forests in 1998 to suggest suitable Forest Policy for the North Eastern Region within the framework of the National Forest Policy, 1988. One of the primary recommendations of the committee was the

[23] United Khasi and Jaintia Hills Autonomous District (Management and Control of Forests) Act 1958.
[24] ibid.
[25] ibid.

encouragement of forest-based livelihood opportunities which could benefit the region and the local communities.[26] This policy however does not touch upon the conservation, management, and the importance of sacred groves in the region. Apart from this, more recently, The Meghalaya State Biodiversity and Strategy Action Plan was set up which recommends several policies in regard to the biodiversity of the State and touches upon the issue of sacred groves.

CASE STUDY OF SACRED GROVES

Like most indigenous communities across the world, the Khasi tribe of Meghalaya also share a closely and inextricable relationship with the nature. An important part of their cultural tradition is the dedication of a part of the forest in their community-owned lands to their deities – which are commonly referred to as sacred groves.[27] It is a belief among the members of the community that three deities - *Ryngkew, Basa, and Labasa* reside in these forests and hence the land is dedicated to them.[28] Apart from dedicating the land to the deities, and use of the land for traditional religious practices, some of the sacred groves also serve as burial grounds. The rights and jurisdiction over these lands reside with the priest, the community or the village headman.[29] Sacred groves are spread across Meghalaya, and are known by various names – based on the local rules which regulate and control the land in which they are situated.[30] The laws dealing with these sacred groves are very strict; misuse of the area and its resources can lead to punishments in the form of heavy fines and social isolation from the community. In most of the sacred groves plucking a flower, fruit or even deadwood is not allowed, except for religious purposes with the permission of the priest. The sacred groves serve as sites for several social and cultural rituals and religious ceremonies[31]. In Khasi hills the sacred groves are of three kinds[32] –

1) *Law Lyngdoh* are the groves ruled by the priest *Lyngdoh*.
2) *Law Niam* are the places of traditional religion *Niam trai*.

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[26] The Meghalaya State Biodiversity and Strategy Action Plan, <http://megbiodiversity.nic.in/docs/pdf/MBSAP_6th_March_2017.pdf> accessed 22 December 2020.
[27] Gurdon, P.R.T., *The Khasis* (Cosmo Publications 1907).
[28] ibid.
[29] ibid.
[30] The Meghalaya State Biodiversity and Strategy Action Plan, <http://megbiodiversity.nic.in/docs/pdf/MBSAP_6th_March_2017.pdf> accessed 15 January 2021.
[31] The Meghalaya State Biodiversity and Strategy Action Plan, <http://megbiodiversity.nic.in/docs/pdf/MBSAP_6th_March_2017.pdf> accessed 25 January 2021.
[32] BK Tiwari, SK Barik, and RS Tripathi, 'Biodiversity Value, Status, and Strategies for Conservation of Sacred Groves of Meghalaya, India' (1998) 4(1) Ecosystem Health 20–32.

3) *Law Kyntang* are the groves where the area is under control of the village headman.

In the Jaintia Hills, sacred groves are known as *Khlaw U Blei* or *Khloo Blai,* and in Garo Hills it is known as *Asong Khosi.* It is seen that the strict protection (under the local customary laws) has led to conservation of several rare and endemic flora and fauna found in the region.[33] These groves also play a vital role in environmental amelioration as many of these sites form important watersheds and catchment of several rivers and streams. Even though Meghalaya has as many as 105 recorded sacred groves, the most famous ones are the Mawphlang and Mawsmai sacred groves. In the Selbalgre village of Garo Hills, community conserved gibbon reserve along with Sacred grove has also become an important gibbon conservation area.[34] Recently, Meghalaya Forest Department has listed as many as 125 sacred groves in the State including those which need to be recognised and notified.[35]

Biological Importance of Sacred Groves in Northeast India

Sacred groves are some of the last undisturbed forests outside protected areas which have been conserved by communities since time immemorial. They are the most important reservoirs of biodiversity in the region. Some groves even hold key population of a large variety of flora and fauna which have been extinct from other parts of the region.

The following are the reasons for the importance of sacred groves in the region:

- Regulation and support to the local ecosystem.
- Maintenance of sub-surface hydrology and water quality
- Conservation of soil
- Dispersal of seeds
- Regulation of local climate
- Maintenance of populations of pollinators and predators
- Harbour several species of endemic flora and fauna
- Sources of several water springs and streams

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[33] ibid.

[34] R Kaul, R Tiwari, et al., 'Canopies and Corridors- Conserving the Forests of Garo Hills with Elephants and Gibbons as Flagships' (2017) Wildlife Trust of India 167.

[35] The Meghalaya State Biodiversity and Strategy Action Plan, <http://megbiodiversity.nic.in/docs/pdf/MBSAP_6th_March_2017.pdf> accessed 7 February 2021.

- Sites for cultural practices and indigenous knowledge of communities

The sacred groves in Meghalaya also harbour relatively higher species diversity compared to other forests. In 2002, nearly 546 species of vascular plants were recorded from five sacred groves of Jaintia Hills.[36] Of these, 91 species were either rare or endangered. 60 species were endemic to North Eastern India and 26 species endemics to Meghalaya.[37]

Apart from this richness, the sacred groves are also sources of water for many towns and cities. Most of the water supplies to Shillong, Jowai and Cherrapunjee townships come from the streams and springs arising out of the sacred groves nearby.

In recent years, it has been observed that traditional knowledge and cultural practices in the State are on decline resulting in the shrinkage and degradation of many of these sacred groves. The changes in traditional way of life are attributed to be the main reason for changes in people's attitude toward these forests. Increasing population pressure, changing values and rapid economic growth are the main reasons for loss of sacred groves.[38] The cutting of trees for timber, fuelwood, NTFPs and cattle grazing has resulted in changes in plant communities and botanical organisation of several sacred groves.[39]

Carbon Trading and REDD+ Initiative

As a tribal society almost 90% of Meghalaya's forests are either owned by individuals or communities and therefore the people play a very important role in conservation of the forests. Most of the forests and groves in Meghalaya are located in the catchment areas of major rivers. The Lum Shillong – Nongkrim sacred groves, for instance, are the source of as many as eight streams that supply water to Shillong. Therefore, the conservation of forests becomes very important in the Meghalayan plateau. Further, Shillong has the highest per capita cars in India and therefore emits

[36] K Upadhaya, HN Pandey et al., 'Tree Diversity in Sacred Groves of the Jaintia Hills in Meghalaya, Northeast India' (2003) 12(3) Biodiversity and Conservation 583–597.
[37] ibid.
[38] BK Tiwari, SK Barik, and RS Tripathi, 'Biodiversity Value, Status, and Strategies for Conservation of Sacred Groves of Meghalaya, India' (1998) 4(1) Ecosystem Health 20–32.
[39] ibid.

a heavy amount of carbon dioxide (CO2) which can only be absorbed by the forests. However, forests in the Shillong plateau are dwindling over the years and are now only restricted to certain sacred groves and some inaccessible sites in the hills.

In the last few decades, the Khasi Hills have witnessed rampant deforestation, and this can be seen even from a first visit to the region. Travelling anywhere beyond Shillong, to places like Jowai, Sohra, Nongstoin or Mawphlang, one can see the destruction of hills and forests due to heavy mining and quarrying. This practice of heavy mining and quarrying is embedded in the region that neither the customary governance nor official government feats could halt. Where there is no limestone or coal, the hills are scooped up for construction material like stone chips. Adding on to mining, there is the unrestricted and wholesale clearing of forests for various purposes.

The site selected for the REDD+ project is the village of Mawphlang which is home to some of the last natural subtropical forests near Shillong known as the Mawphlang sacred grove. Initially a watershed conservation project started in the region in 2005. It is run by Community Forestry International (CFI) with a Mawphlang tribal community and covered an area of 8,379 hectares. The project tried to manage the waters of the Umiam basin and also ensure year-round availability of water.

Then In May 2011, Down to Earth reported that, "the tribal community is looking for funding from agencies like the World Bank's Forest Carbon Partnership Facility to make the watershed project a REDD pilot."[40] The village community then decided to adopt and implement the REDD project which is the first of its kind in India. The project anticipates generating 13,761 carbon credits each year, which it hopes to sell for between US$42,000 and US$80,000.[41]

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[40] Uthra Radhakrishnan, 'Soon: India's First REDD Project' (*DownToEarth*, 2011) <https://www.downtoearth.org.in/news/soon-indias-first-redd-project-33484> accessed 29 July 2020.

[41] Lang Chris, 'India's first REDD project in the East Khasi Hills: When you say that I need permission to cut my own tree, I have lost my right to my land!,' (*DownToEarth*, 2011) <https://www.redd-monitor.org/2011/11/29/indias-first-redd-project-in-the-east-khasi-hills-when-you-say-that-i-need-permission-to-cut-my-own-tree-i-have-lost-my-right-to-my-land/ accessed 25 July 2020.

The guiding document for the project – "Project Idea Note for the Umiam Sub-watershed REDD+ Project East Khasi Hills District" submitted to PLAN VIVO[42], Community Forestry International and its local partners clearly outline their primary objective of involving local communities in climate mitigation activities like protection of the remaining forest patches, conservation of species and restoration measures in degraded areas, in order to reverse deforestation and degradation trends. The protection, conservation and restoration measures include – controlling forest fires, reduction of fuelwood collection by providing alternative energy sources, keeping a check on un-regulated grazing, and management of unsustainable stone quarries.[43]

Mawphlang Sacred Grove and Interview Data

An empirical study was conducted at Mawphlang, Meghalaya in order to understand the research from a practical point of view. The target groups for the interview included the village chief, the village priest and several other villagers. However, due to the language barrier and the lack of a translator not much information could be gathered through the interviews unless when the interviewee could speak in English.

Mawphlang, a village located around 25 kms from Shillong in East Khasi hills district of Meghalaya. For the purpose of this research, the village of Mawphlang was visited and primary information was collected from the locals. The village of Mawphlang is famous for mainly two things- monoliths and sacred groves. The sacred grove at Mawphlang, called Law Lyngdoh, has a folk story connected to it. It is said that one of the Khasi clans "Iangblah", originating from Jaintia Hills had constituted this sacred grove. The sacred grove was made considerably large in area in order to provide a home for a Khasi deity or spirit called "U Basa" or "U Ryngkew". The spirit is regarded as a keeper or defender of the sacred land. The current belief in regard to this grove among the local Khasi tribals is that anyone who commits any damage in it will be throttled to death by the spirit in residence. Hence, people refrain from damaging this sacred grove.

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[42] Ghosh Soumitra, 'REDD+ in India, and India's first REDD+ project: a Critical Examination', (*Mausam*, September-October 2011) <http://www.redd-monitor.org/wp-content/uploads/2011/11/03_Mausam_Sept-2011.pdf> accessed 9 October 2020.
[43] ibid.

An interaction with an elderly in the village revealed that there are five kinds of sacred groves in the Khasi Hills namely as follows:

i. *Ki Law Lyngdoh*: These forests are under the control of the traditional religious leader (or now village councils). The public use of these forests is not permitted. People generally refrain from entering these forests.

ii. *Ki Law Kyntang*: These forests are of great sacred value for sacrificial and religious ceremonies. Many religious ceremonies among the *Seng* Khasi (followers of traditional religion) like the worship of ancestors, are performed in these forests.

iii. *Ki Law Niam*: These forests are also used for religious purposes just like the Ki Law Kyntangs.

iv. *Ki Law Adong*: These forests are very common near almost all Khasi villages and are protected for non-commercial use, e.g. water, medicinal plants etc.

v. *Ki Law Shnong*: 'Shnong' in Khasi means community. These are usually community forests and under the control of the *Dorbar Shnong* or the village council. These forests are used and harvested for timber, firewood, fruits and other household uses.

The Mawphlang sacred grove falls under the category of *Ki Law Lyngdoh* and is managed and protected by the village council. It is 75 hectares in area.

A trek into the fringes of the sacred forest along with a local guide revealed many more things about the grove. The sacred-groves which have been preserved since time immemorial, are in sharp contrast to the surrounding grasslands which cover much of the area. These groves are rimmed by a dense growth of *Castanopsis kurzii* trees which forms a protective hedge and halts the intrusion of *Pinus kasia* (Khasi pine), a species which dominates all areas outside the sacred groves. Inside the outer rim, the sacred groves are virtually Nature's Own Museum with a very high biodiversity. The heavily covered grounds have a thick cushion of humus accumulated over the centuries and are covered with moss. The trees in the sacred grove are heavily loaded with epiphytic growth of aroids, pipers, ferns, fern-allies and orchids and look like an ecosystem of their own. The humus-covered grounds

likewise harbour myriad varieties of plant life, many of which are found nowhere else and are endemic to the area.

An interaction with the Secretary of the village council of 10 villages, Mr. Tambor Lyngdoh, revealed that the village council is working for the protection of the forest. In his words he said, "In the sacred forests of *Ki Law Lyngdoh* at Mawphlang, you cannot cut any trees or branches and if you do, then illness and misfortune will befall you and soon you will be dead. That is our belief and we follow it." Mr. Lyngdoh also informed how the village council has been spearheading a movement to save the sacred groves from any kind of harm.

The village priest also translated and explained a traditional prayer which praises the sacred grove. The translation of the prayer is as follows:
"*O sacred forest, we are so proud of you and grateful to us….people come from all over—East and West of our Hills– to see you, praise you….you bless us with your colors, waterfalls, fresh … your fragrance spreads over all the Hills…..We pray to you O sacred forest….all rites and rituals are for everyone, O sacred forests…. heal all and bring peace and harmony for the whole Hima (domain) and the world"*

However, the local people also spoke of new threats emerging against the sacred groves. They revealed the following threats to the sacred groves of the area:

i. There has been recent disappearance of the traditional belief systems, which were fundamental to the concept of Sacred Groves. These systems and their rituals are now considered mere superstition by most of the new generations which usually ignore it.
ii. Sacred Groves in Mawphlang also face threats due to rapid urbanisation and developmental interventions such as roads, tourist resorts, dams and also commercial forestry. The Mawphlang dam is also located near the sacred grove and poses a threat to it. Further, Mawphlang has been receiving many tourists lately who many times pluck plants and orchids from the forests.
iii. The groves are suffering due to the 'Christianization' of the Khasis or the transformation of the primitive forms of nature worship into formal church worship and the decline of the traditional religion.

The field study at Mawphlang sacred grove clearly revealed two very contrasting results. The first is that the people still consider the sacred grove very divine and sacred. They sing hymns and prayers praising the sacred grove. Many of the people still adhere to traditional faiths and beliefs. However, there are also many rising threats that endanger the existence of this natural heritage. In recent times the attitudes and beliefs of people have changed and many merely remark the spirituality connected with the sacred groves as a mere superstition. Development has caused a lot of loss to the natural heritage. The Mawphlang dam which was constructed to generate electricity had submerged large areas of land and also disrupted the flow of the river. Mawphlang recently turning into a tourist stop has also affected the sacred grove to a large extent. The tourists often venture into the forests and damage plants and other life forms.

Now coming to the management and legal part of the topic, Mawphlang sacred grove although does not have any legislative backing or legal status enjoys more protection than even some of the National parks and Biosphere reserves of the State. The forest is managed by the local council who have been protecting it since time immemorial. This system of conservation has turned out to be very effective in protecting the sacred groves and can be adapted to form a legislature for the protection of sacred groves in India.

CONCLUSION

Across the world, there is degradation of forests and the environment. In this world of destruction of natural heritages, sacred groves remain as some of the last remaining areas of rich biodiversity. Sacred Groves enjoy the protection of human faith and beliefs and thus are still safe from the marauding hands of urbanisation, rapid economic growth and industrialisation. However, with changing values in the society, sacred groves today also face the brunt of environment destruction to fulfil the needs of human beings. Therefore, a time has come up where there is a need of legal protection to sacred groves through legislative measure in countries across the world. The International community has also realised this need and has passed and adopted various resolutions and conventions in this regard. Many countries like Australia, Canada and U.S.A have also realised the need to protect these ancient groves which harbour hundreds and thousands of endemic species and have adopted

different measures. Even least developed countries of Africa like Benin too have passed laws for the protection of the sacred groves. However, India with over 100,000 sacred groves and the rich biodiversity of those groves have failed to take stern and concrete step for the protection of these natural heritages.

India has a long-standing history of conservation of nature. Sacred groves have been conserved and protected by Indian communities since time immemorial. Their faiths, beliefs and spirituality are connected to these sacred sites and are an important part of their religion. Therefore, the only need of the hour is to give a legal status to these sacred groves and pass a suitable legislation specifically protecting the sacred groves. The various U.N. Conventions and Resolutions for protecting sacred groves, Legislations from countries like Australia, Canada, and Benin etc. along with customary laws of different tribes of India, can be referred to and adopted in the new legislation. The sacred groves in Meghalaya not only harbour a plethora of species but are also a source of water for the nearby towns and villages and also regulate the local climate. The coming up of programmes like REDD+ have further added value to these sacred groves which could now bring incentives to the communities who work to protect it.

From the study it was clear that tribes of Meghalaya had their own customary system of protection and management of sacred groves. These traditional systems of management can be modified and adopted by the Government and put into force through legal backing. A legal status to sacred groves would not only protect it from destruction but would also give sanctions to anyone who tries to violate it. Therefore, the need for a legal status to Sacred Groves in India has become necessary and steps must be taken by the State before we lose these ancient natural heritages. The suggested legislation must encompass not only conservation of sacred groves but also other areas relating to it like biodiversity conservation and management in sacred groves and also provide a way for communities to go on with carbon trading and the REDD+ programme, keeping in mind the customary laws and the aspirations of the communities. And as Theodore Roosevelt said, “A grove of giant redwoods or sequoias should be kept just as we keep a great or beautiful cathedral,” we too must take steps to protect and preserve the natural heritages called “sacred groves.”

CLOSING THE LID ON ARBITRABILITY OF FRAUD: ANALYSING THE INDIAN SUPREME COURT'S RULING IN *VIDYA DROLIA*

Animesh Bordoloi[1] and Hitoishi Sarkar[2]

ABSTRACT

The lack of clarity on 'subject matter' arbitrability has often led to a rise in volume of unscrupulous litigation. Despite several attempts to limit or even curb judicial intervention through amendment to Section 8 and 11 of the Indian Arbitration and Conciliation Act 1996, it can be argued that Supreme Court has through its judgments created two antithetical approaches – one in lines with the amendment, the other, advocating for interventions in the referral stage. This heedless approach has in all sense acted as the proverbial Achilles heel to Indian legislature's attempt at creating a pro-arbitration setup. In this context, the Supreme Court of India's decision in Vidya Drolia v. Durga Trading Corporation gains prominence.[3] In the aforementioned ruling, the court tries to create a definite test for deciding arbitrability and offers an approach akin to the legislative intent by opining that courts should follow a pragmatic approach thereby limiting judicial intervention. This piece analyses the implication of the ruling as well as identifies the missed opportunities on areas where there was a significant need to bring clarity on the position of law.

Keywords: *Arbitration and Conciliation Act 1996, Supreme Court, Litigation, Pro Arbitration*

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[3] *Vidya Drolia v Durga Trading Corporation* 2020 SCC OnLine SC 1018.

INTRODUCTION

The issue of arbitrability with respect to subject-matter and fraud have been widely discussed and diversely opined under the Indian Arbitration jurisprudence. On faced with questions relating to expanding the scope of arbitrability in cases containing elements of fraud, the Supreme Court has sometimes chosen to shrink the scope of arbitrability and on at least one occasion, grappled with the difficulties that may arise if the scope of arbitrability is expanded.

In this context, the recent *Vijay Drolia*[4] judgment is antithetical to the general approach, as the Supreme Court, cleared the deck for arbitrability of tenancy disputes under the Transfer of Property Act, 1882 ("ToPA") unless governed by a special statute. Further and more significantly, the ruling also puts to rest fraud as a defence to escape arbitration in India thereby limiting judicial interference in pre-arbitral stages.

The article is an examination of the issue presented before the Court in *Vidya Drolia*[5]. It finds that while the court approach is a welcome change keeping in mind its chequered history, a one size fits all approach can potentially create conflicts with several statutes that provide for specialised forum when looked closely with the nature of the disputes.

As a first step, the article begins with a brief synopsis of the factual matrix in *Vidya Drolia*[6] while also briefly shedding some light on the court's recent decision and the previous position of law in India with regard to arbitrability of tenancy disputes. The next part analyses the impact of this judgment on clarifying the position of arbitrability of disputes tainted by fraud. The final part argues that the court has missed significant opportunities to address concerns that are created out of its own judgment. Further, it also looks into the areas where the court could have stamped it authority to provide clarity in positioning of the law.

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[4] ibid.
[5] ibid.
[6] *Vidya Drolia v Durga Trading Corporation* 2020 SCC Online SC 1018.

VIDYA DROLIA V DURGA TRADING: THE 'TENANCY' DISPUTE

This section focusses on three components: first, it explains the facts that were presented for determining the question of arbitrability, and second, it reflects on the previous position of law. Third, it highlights the considerations that the Court had to balance in delivering its verdict on the above question.

Factual Background

In this case, a tenancy agreement was entered onto by two parties, wherein the minimum period of tenancy was limited to ten years. On completion of ten years the landlord asked for the property to be vacated and upon refusal the landlord issued a notice of arbitration to the tenant. Since the lease deed incorporated an arbitration clause, the landlord preferred a petition under Section 11 of the Arbitration and Conciliation Act, 1996[7], ("Act") before the Calcutta High Court seeking an arbitrator's appointment. The Calcutta High court rejected the petition, following which the landlord preferred an appeal before the Supreme Court. The Supreme Court, cognizant of the legal conundrum surrounding India's arbitrability of tenancy disputes, referred the matter to a larger bench.

Previous Position of Law Concerning Tenancy Disputes

Previously, the Supreme Court had in *Natraj Studios Private Limited v Navrang Studios and Anr*.[8] which concerned a dispute relating to a lease deed governed by the provisions of the Bombay Rents Act, 1947 ruled that since statutes governing rent and tenancy are welfare legislations, the disputes under the same cannot be arbitrable. Likewise, in *Himangini Enterprises v Kamaljeet Singh Ahluwalia* [9] the Court held that tenancy disputes are non-arbitrable in India. It rationalized that since the Transfer of Property Act, 1882 only cloth civil courts with jurisdiction to adjudicate such disputes, the same cannot be arbitrable in India.

[7] Arbitration and Conciliation Act 1996, s 11.
[8] *Natraj Studios Private Limited v Navrang Studios and Anr* (1981) 1 SCC 523.
[9] *Himangini Enterprises v Kamaljeet Singh Ahluwalia* (2017) 10 SCC 706.

This position was furthered in *Booz Allen Hamilton Inc. v SBI Home Finance*[10] when the Supreme Court classified eviction or tenancy matters governed by special statutes as *in rem* matters not capable of being arbitrated. Noteworthy that the aforementioned position of law was also endorsed in its subsequent decisions.

The Court's Decision

The Court overruled the ratio laid down in *Himangini Enterprises* and held that landlord-tenant disputes are arbitrable as the ToPA does not specifically forbid or foreclose arbitration. In doing so, the Court considered the element of special rights or liability entrusted by statutes as an exception while determining arbitrability. It also reiterated its own observation in *A. Ayyaswamy v A. Paramasivam* [11] on the importance of minimizing judicial intervention and tried to strike a balance with public policy. In doing so, it relooked into the case, and upheld the same on arguments that agreeing to the underlying reasoning in the case.

Further, it gave into idea that by considering arbitration where reliance is on facts, evidence, statutes, precedents similar to the judicial process and are normally presided by experts in the subject matter of the disputes as ill-equipped to deal with fraud would be akin to looking at arbitration as a process inferior to the courts. Therefore, it overruled *N. Radhakrishnan v Maestro Engineers and Others*[12] which had mandated civil courts as appropriate forums for matters of fraud over arbitration.

Thereby, the Supreme Court made allegations of fraud arbitrable, if it relates to a civil dispute, subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect of non – arbitrability. The Court also expressed that its jurisdiction under Section 8[13] and 11[14] are extremely limited and restricted. It did so, by allowing judicial intervention only in *prima facie* circumstances - where the arbitration agreement is non-existent, invalid, or the disputes are non-arbitrable. However, it also added that the nature and facet of non-arbitrability would, to some

[10] *Booz Allen Hamilton Inc. v SBI Home Finance* (2011) 5 SCC 532.
[11] *Ayyasamy v A. Paramasivam* (2016) 10 SCC 386.
[12] *N. Radhakrishnan v Maestro Engineers and Others* 2009 (13) SCALE 403.
[13] Arbitration and Conciliation Act 1996, s 8.
[14] Arbitration and Conciliation Act 1996, s 11.

extent, determine the level and nature of judicial scrutiny by using the rule of '*when in doubt, do refer*' for intervention.

Having noted the key issues of the judgment and the change in position of law with respect to arbitrability of tenancy disputes and fraud, the next part examines how this judgment could have wider significance on the arbitration jurisprudence in India.

THE DECISION AND ITS IMPLICATIONS

This part declutters two key components: first, it examines how the four-fold test introduced through the judgment amend the position of arbitrability and whether this position align with the pro-arbitration jurisdictions. Second, it explains how this approach has finally created a linear position for the judiciary that reflects the legislative intent.

Arbitrability of Tenancy Disputes

While overruling *Himangini Enterprises*, the Court rationalized that tenancy disputes under ToPA are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*. The Bench opined that it was only when mandatory laws quintessentially bar the parties from waiving or contracting out of the specified Court can non-arbitrability be established. Relying on the aforementioned rationale, the Court reasoned that since there was no bar to the arbitration of tenancy disputes under the ToPA, there existed no grounds to render such tenancy disputes as non-arbitrable. Moreover, following the same reasoning on special statutes, the Court also overruled *HDFC Bank Ltd. v. Satpal Singh Bakshi*[15], which had earlier held that DRT matters are arbitrable.

It is pertinent to note here that the Court has affirmed the position of law laid down in *Booz Allen* whereby *"eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes"* were rendered non-arbitrable. Thus, the Court, while retaining the position of law in *Booz Allen* on tenancy matters with special statutes, has amended its position with

[15] *HDFC Bank Ltd. v Satpal Singh Bakshi* [2013 (134) DRJ 566 (FB)].

regard to Landlord-tenant disputes under the ToPA by construing them as being *in rem* matters.

Interestingly, the Bench went a step further to lay down a four-fold test of subject matter arbitrability. It held that a subject matter was to be considered non-arbitrable when **(1)** the cause of action and subject matter of the dispute relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*. **(2)** the cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable; **(3)** the cause of action and subject matter of the dispute relates to an inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and **(4)** the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

In our opinion, the ruling in *Vidya Drolia* is a welcome move as it now aligns the Indian position with that of arbitration hubs such as U.K and Singapore. For instance, in the U.K., tenancy disputes are generally considered arbitrable unless they are in derogation to the provisions of the Consumer Rights Act, 2015. This has been reiterated in *Pittalis v Sherefettin* while adjudicating upon a rent review clause.[16] An identical position was also taken by the Singapore Court of Appeal in *Batshita International (Pte) Ltd v Lim Eng Hock Peter*.[17]

Implications on arbitrability of fraud

The Court disagreed with *N. Radhakrishanan* on several counts. Firstly, they delineated the public policy argument by distinguishing the concept in matters of non-arbitrability from that of Section 34(2)(b) of the Act[18]. Observing that all statutes necessarily have a public policy objective, the Court argued that even arbitrators like courts are bound to follow all the policy considerations failure to do which would lead to setting aside of the award but this is not on the grounds of non-arbitrability. Secondly, it observed that merely by accepting this argument would mean undermining and agreeing to the idea that arbitration is a flawed and

[16] *Pittalis v Sherefettin* [1986] 2 All ER 227.
[17] *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1996] SGCA 68.
[18] Arbitration and Conciliation Act 1996, s 34(2)(b).

compromised mechanism that can be forgone every-time there is an argument of public policy. The court observed that the reason of complexity is not enough to ward off arbitration. Further, it was stressed that the intent behind Section 89 of the Civil Procedure Code[19], the mandatory language of Section 8 & 11 and the purpose behind the Arbitration Act mandate that the mutually agreed arbitration clauses must be enforced.

The ruling will have significant implications because of the narrow interpretation provided to the idea of implied non-arbitrability. By reinstating the principles relating to the arbitrability of fraud stated in *Ayyasamy* and *Avitel Post*[20] it closes the lid on the 'fraud' exception to arbitrability in civil suits, thereby insinuating a pro-arbitration approach. Moreover, the restricted interpretation of public policy in context to non-arbitrability keeping in balance and respecting the specialized institution or special laws will now carve out unscrupulous attempts at running away from the agreed arbitration process, thereby ending the overt public policy hostility over the arbitration. This also brings the Indian domestic position in tandem with the international position followed by the Indian courts *in Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee*[21]. Further, it also recognises the importance of the *kompetenz - kompetenz* principle under section 16[22] by putting the onus on the tribunal to decide their jurisdiction as well as acknowledges the idea of Section 8 whereby courts must mandatorily refer parties to arbitration when there is an arbitration clause. However, this was revisited in the case of *Ayyaswamy* wherein the court helped the arbitral tribunal to keep its powers to adjudicate upon matters without court intervention. The Supreme Court held that all matters that involved legation of "serious frauds" would not be arbitrable, while those dealing with "mere allegations" of fraud were arbitrable.[23]

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[19] Civil Procedure Code 1908, s 89.
[20] *Avitel Post Studioz Limited and Others v HSBC PI Holdings (Mauritius) Limited* Civil Appeal No. 5145 of 2016.
[21] *Swiss Timing Limited v Commonwealth Games 2010 Organising Committee* (2010) 1 SCC 72
[22] Arbitration and Conciliation Act, 1996, s 16.
[23] Pranav B R and Ganesh Gopalakrishnan, 'Dealing with Arbitrability of Fraud in India – The Supreme Court's Fra(e)udian Slip?', Kluwer Arbitration Blog, November 17 2016. <http://arbitration blog.kluwerarbitration.com/dealing-with-arbitrability-fraud-in-india-the-supreme-courts-fraeudian-slip/> accessed 20 September 2021.

MISSED OPPORTUNITIES

Another interesting facet of the judgment is the classification of all insolvency or intracompany matters as *in rem* rights incapable of being arbitrated. Such generalized classification can be questioned as being inconsistent with the 'sub-ordinate rights *in personam*' approach that the Court has acknowledged in tenancy matters, which it can be argued might be the case with intra – company and insolvency proceedings as well. An alternate approach could have been to allow arbitration in cases where the other creditors' substantive rights would not be affected, which would have helped India achieve a balanced position similar to Singapore in insolvency matters. Furthermore, a similar approach could also have been taken in intracompany disputes where the substantive rights affected are limited to only the parties to the arbitration agreement. Such one-dimensional classification of insolvency matters contradicts the court's own observation in the judgment as arbitrators with expertise in the area cannot be held inferior to courts if they adhere to the special rights and obligations entrusted under the statute in scenarios were subordinate rights *in personam* have arisen.

Similarly, the Court also missed an opportunity to clarify the arbitrability of disputes below 20 lakhs for Banks and NDFCs given that these disputes do not come under DRT and allowing arbitrability for such might create two diverging views on the same class of cases. Moreover, by trying to limit judicial intervention to '*prima facie* inconclusive or extraordinary circumstances' the court opens up another Pandora's box, as there is no definite understanding of what constitutes 'prima facie' with respect to such cases either in any of the previous amendments or in its own judgments. Therefore, while the judgment endorses a pro-arbitration approach and puts the controversial position of fraud to rest, it does miss the chance to close the lid on others significant questions and rather creates a few new ones that might need a little more tweaking to be considered as settled. Looking forward, the authors are optimistic that this judgment will help counter the setbacks jolted by subsequent amendment[24] unconditional stay on enforcement of arbitral awards induced or effected with fraud as this judgment could be resorted to in deciding whether to put a stay or not.

[24] Arbitration and Conciliation (Amendment) Act 2021.

NEITHER BOW NOR BEND: CASE COMMENT ON THE APPEALS CHAMBER'S JUDGMENT IN "SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN"

Tathagat Sharma[1]

ABSTRACT

The International Criminal Court established through the Rome Statute was envisaged as an International Court in line with the International Court of Justice, to propagate Individual Criminal Responsibility, and punish individuals hiding behind the veil of state for the crimes committed in their official capacity. For long the Court has been dubbed as the Court for African States, the targeted prosecution of African State leaders and leaders from the Third world seemed to justify that claim. However, the ICC, in an attempt to strengthen its jurisdiction and legitimize its claim as the "International" Criminal Court has taken active steps in prosecuting crimes committed by different states, one of those major steps included the attempt to prosecute the crimes committed in Afghanistan by different factions, including the CIA, US Armed Forces et. The attempt was both greeted and abhorred by the scholars of international law, who saw this as an attempt to uniform applicability of International criminal law, and as an overtly uncalled adventure by ICC to extend its jurisdiction beyond limits not required by its Statute, staking its already questionable authority further, respectively. So, when the Pre- Trial Chamber rejected the request of the Prosecutor, neither were people surprised, nor were they expecting any further attempt at an already questionable pursuit. In the process, when an appeal was extended by the Prosecutor, and surprisingly accepted by the Appeals Chamber of the ICC, amidst expressly hostile behaviour of the POTUS, and US Administrative Agencies, it came as a breath of fresh air for scholars long advocating for an equitable approach to International Law. The Appeals chamber ruled upon crucial aspects of the Prosecutor's powers, and the authority of the Pre-Trial Chamber regarding questioning the vires of Prosecutor's findings and apprehensions. The case comment would look at these aspects in detail.

Keywords: *International Criminal Court, Rome Statute, Individual Criminal Responsibility, Afghanistan, USA, International Law, Appeals Chamber*

[1] Advocate, Supreme Court of India.

INTRODUCTION

"Injustice anywhere is a threat to Justice everywhere"

- Dr. Martin Luther King Jr. [2]

The International Criminal Court at the Hague is a product of a multilateral treaty known as the Rome Statute constituted to prosecute 'individuals' responsible for committing four specific crimes. The jurisdiction of the court work complimentary to national jurisdiction of prosecuting states, wherein the ICC only tries individual if the State where the crime is committed, or national state of perpetrators is either unable or unwilling to prosecute such accused. In light of the said principles of criminal law, the Prosecutor of ICC Ms Fatou Bensouda decided to proceed with preliminary investigation into the instances of crimes committed in relation to Islamic Republic of Afghanistan[3] and submitted her 200-page request pursuant to Art. 15(3)[4] of the Rome Statute in November 2017. Interestingly, the Afghanistan request was submitted along with request for proprio motu investigation in Kenya, Ivory Coast, Georgia, and Burundi, subsequent to this group of requests, the request for Situation in Bangladesh/Myanmar was also submitted. Surprisingly, barring Afghanistan all the other requests were approved by the PTC.[5] Even more surprising was the fact that the request was not answered for 420 days, more than four times the period the court had taken for any application under Art. 15 prior to that[6], thus by the time it was rejected by the PTC, scholars were not very hopeful of the outcome, and the PTC did not disappoint by rejecting the request.

Then on 5th of March 2020, the International Criminal Court (ICC) Appeals Chamber symbolically accented to the aforementioned belief of Dr Martin Luther King Jr. when it amended the decision of Pre-Trial Chamber-II under Art. 82(1)(d) read

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[2] Martin Luther King Jr., 'In a Letter from Birmingham Jail', African Studies Centre, University of Pennsylvania, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html accessed on 30 November 2021.

[3] PTC Judgement, Hayley Evans and Paras Shah, 'International Criminal Court Appeals Chamber holds hearing on Afghanistan', (*Lawfare*, 10 February 2020) <https://www.lawfareblog.com/international-criminal-court-appeals-chamber-holds-hearings-afghanistan> accessed on 30 November 2021.

[4] Rome Statute, art. 15(3).

[5] Katherine Gallagher, Nikki Reisch, 'ICC Holds Historic Hearing on US Torture and other Grave crimes in Afghanistan', Just Security (23 December 2019), at: https://www.justsecurity.org/67843/icc-holds-historic-hearing-on-u-s-torture-and-other-grave-crimes-in-afghanistan/ accessed 30 November 2021.

[6] ibid.

with Rule 158(1)[7], and unanimously authorized the Prosecutor to commence the investigation into the alleged crimes under Rome Statute of ICC in Islamic Republic of Afghanistan.[8] The Pre-Trail Chamber II had used the excuse of 'not in the interest of justice' to deny the prosecutor's request for investigation.

Afghanistan being a member state to the Rome Statute of ICC was deemed as a fit case to investigate by ICC's office of Prosecutor under Art. 15(1)[9] of the Rome Statute. However, since Afghanistan had not ratified the Kampala Agreement and had submitted its accession to Rome Statute on 10 February 2003[10] therefore the scope of investigation was restricted to 'Crimes against Humanity' and 'War crimes' committed on or after 1 May 2003, the date on which Afghanistan joined the ICC. The alleged perpetrators of the aforesaid crimes include the Taliban and its affiliated groups[11], the Afghanistan National Security Forces as well as US Armed Forces and the CIA.[12]

Based on the preliminary examination of the facts and evidence produced by the prosecutor, the Pre-Trial Chamber (hereinafter as PTC) duly recognized that there exists 'reasonable factual basis to proceed' as well as 'applicability of court's jurisdiction' in the instant case.[13] However, based on its own assessment of the situation the PTC ruled that proceeding with the investigation would not be in the 'interest of justice' as provided under Art. 15[14] read with Art. 53(1)(c)[15] of the Rome Statute.[16] The PTC considered factors such as 'non feasibility'[17] and 'inevitable failure'[18] of the investigation, while arriving at the conclusion in relation to 'interest of justice' being met. In its ruling the PTC reasoned that substantial time would have lapsed since

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[7] Rules of Procedure and Evidence, rule 158(1).
[8] Press Release, 'Afghanistan: ICC Appeals Chamber authorises the opening of an investigation', (5 March 2020) available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1516 accessed 30 November 2021.
[9] Rome Statute of International Criminal Court, art. 15(1): The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
[10] Accession Status to Rome Statute, Afghanistan, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/afghanistan.aspx accessed 30 November 2021.
[11] Alleged for War Crimes and Crimes Against Humanity; Situation in the Islamic Republic of Afghanistan, ICC Appeals Chamber, No. ICC-02/17 OA4, at 3.
[12] Solely for War Crimes.
[13] PTC Judgement, para 60.
[14] Specifically, art 15(4), Rome Statute.
[15] Rome Statute, art 53(1)(c).
[16] PTC Judgement, para 88.
[17] PTC Judgement, para 90.
[18] ibid.

the commission of offense and beginning of investigation [19](if at all an investigation was to begin). Thus, making it difficult for collection and preservation of evidence[20] amplified by the complexity and volatility of the Afghanistan[21] making it difficult to secure cooperation of relevant authorities in investigation or surrender of suspects[22]. The PTC also cited financial consequences that such an investigation would have on the already stretched resources of the court, which might consequently prove detrimental for other realistic trials by compromising their chance of success by virtue of a lack of financial and human resources if such an investigation in Afghanistan is allowed.[23]

The judgement of the PTC drew widespread criticism across the Legal academia, practitioners, as well as from counsels representing the victims. The judgement was criticized on issues like the 'scope' of Prosecutor's power to investigate[24], PTC's restrictive interpretation of territorial scope[25], and the entire 'interest of justice' argument[26]

Evidence was drawn from the Report of Senate Select Committee on Intelligence[27], to conclude the point that the US Efforts (or a lack of it) to investigate and punish the perpetrators were insufficient and unconvincing.[28]

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[19] PTC Judgement, para 92.
[20] PTC Judgement, para 93.
[21] PTC Judgement, para 94.
[22] ibid.
[23] PTC Judgement, para 95.
[24] See: Dov Jacobs, 'ICC Pre Trail Chamber rejects OTP Request to open an investigation in Afghanistan: Some Preliminary thoughts on an ultra vires decision', Spreading the Jam Blog, (12 April 2019), https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/> accessed 30 November 2021.
[25] PTC Judgement, para 55.
[26] ibid; See also Kevin Jon Heller, 'Can PTC Review the Interests of Justice?' ,OpinioJuris (12 April 2019), at: https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/ accessed 30 November 2021.
[27] 'Report of Senate Select Committee on Intelligence, Committee Study of the CIA's Detention and Interrogation program (Dec. 2014)', available at: https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf, accessed on 30 November 2021.
[28] See: David J. Scheffer, 'The ICC's probe into Atrocities in Afghanistan: What to Know', Council on Foreign Relations, (6 March 2020), at: https://www.cfr.org/article/iccs-probe-atrocities-afghanistan-what-know accessed 30 November 2021.

A BREATH OF FRESH AIR FROM THE APPEALS CHAMBER: NOT TO BEND NEITHER TO BOW

Under circumstances of constant US Pressure, repeated threats to the Prosecutor, Staff and Judges of ICC[29], the Prosecutor sought leave to appeal under Art. 82(1) of the Statute, and approached the Appeals chamber for reconsideration of the PTC Judgement. The Appeals Chambers analysed the issues in details and delivered its judgement on 5th of March 2020.

The Appeals Chamber Judgement can be divided into two headers albeit with a difference of subtility. First and explicitly, where it deals with the technical issues of reviewability of Prosecutor's discretionary powers by the PTC[30], and second and subtly with the 'Interest of Justice' argument and PTC's authority to rule over it.[31]

The Appeals Chamber in its finding on the first issue concluded that the PTC erred in its interpretation of Art. 15(4), wherein it was only required to analyse whether a 'reasonable factual basis' existed for the prosecutor to proceed with an investigation. On the first issue, the Prosecutor and the Amicus Curiae presented relatively different approaches towards interpretation of Art. 15(4).[32] The Prosecutor, for one, agreed that Art. 53(1)(c) is indispensable for the court to rule in favour of an application under Art. 15(3). Her argument was centred around a progressive reading of Art. 15(4) in consonance with Art. 15(3). However, her issue was that the manner in which the PTC considered Art. 53(1)(c) was wrong.[33]

Whereas, the victims as well as Amicus Curiae[34] argued that PTC was not authorized to address interest of justice argument at all, in facts of the present case. The argument was based upon the literal interpretation of the statute, where the PTC

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[29] US Sanctions of International Criminal Court: Q&A, at: https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court accessed 30 November 2021.
[30] Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation', OpinioJuris (10 March 2020), at: https://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation/ accessed 30 November 2021.
[31] Kevin Jon Heller, 'The Appeals Chamber got one aspect of Afghanistan Decision very wrong', OpinioJuris (9 March 2020), at: https://opiniojuris.org/2020/03/09/the-appeals-chamber-got-one-aspect-of-the-afghanistan-decision-very-wrong/ accessed 30 November 2021.
[32] Appeals Chamber Judgement, para 23.
[33] Appeals Chamber Judgement, para 21.
[34] Included: OPCV, Cross Border Victims, Victims in Afghanistan, Queen's University Belfast Human Rights Centre.

is only required to look at 'interest of justice' when it is the basis of a decision for 'not' initiating an investigation, rather than initiating it as in the present case. [35]

The Appeals chamber observed a consistent practice of PTC in previous cases wherein it has always tried to establish a nexus between Arts. 15(4) and Art. 53(1). Citing the *Situation in Republic of Kenya*[36]example wherein the court had established that PTC should follow the exact same standards that the OTP used for arriving at a decision to investigate. In that case PTC has allowed for the investigation to proceed. The same was affirmed in *Situation in Republic of Cote d Ivoire*. Thus the Appeals Chamber ruled that the PTC has erred in its interpretation of Art. 15(4).[37] The Chamber concluded that the PTC is not required to assess interest of justice, if the prosecutor is exercising her propio motu power to open an investigation.[38] The Appeals chamber further ruled that the PTC was required to only assess the allegations advanced by prosecutor and her assessment of jurisdiction and admissibility, the PTC was not required to rule on 'interest of justice' since it was not a factor submitted by the Prosecutor for assessment.[39]

Thus, rather than remanding the matter back to PTC, for sake of 'Judicial economy' the Appeals Chamber plainly amended the order of PTC and authorized the investigation.[40] The merits of the case per se were not dealt with under the present appeal, questions such as jurisdictional scope of investigation, admissibility issues including exhaustion of alternate remedy under national law as well as issues of States' bilateral obligation under Art. 98 were left unanswered, to be taken up at further stages of the trial.[41]

CONCLUSION

The Judgement of Appeals Chamber in the present case holds special significance for multiple reasons, for one it was the first time in its history that the ICC Appeals Chamber had to adjudicate upon a PTC decision pertaining to authorization of

[35] ibid.
[36] ICC-01/09.
[37] Appeals Chamber Judgement, para 25.
[38] Appeals Chamber Judgement, para 39.
[39] Appeals Chamber Judgement, para 43-44.
[40] Appeals Chamber Judgement, para 54.
[41] Appeals Chamber Judgement, para 44.

investigation. The decision was welcomed by the international community, and was deemed as the much necessary respite against the nonsensical judgement of PTC. With the judgement, the ICC has, at least symbolically, driven home the message that it would bow to none, and would impartially try anyone accused of such crimes irrespective of their global standing. The judgement was a much necessary legitimacy boost to the Status of ICC. However, for all the optimism, realistic factors including practical and political implications of the judgement cannot be ignored. Critics have also pointed that the judgement has disturbed the delicate balance of power between the Office of Prosecutor and PTC, the balance for which most of the State parties negotiated at Rome. This line of thinking was further fed the fodder by the Separate opinion of Judge Carranza, where she disagreed with the findings that Prosecutor had absolute discretion over 'interest of justice' in proprio motu investigations. The non-cooperation, even hostile, behaviour from Governments of Afghanistan, USA, and Taliban is not likely to help the cause of investigation. Added perils in path of the investigation include the termination of Visas of ICC officials to visit the USA, and the instability in Afghanistan, both of which are likely hurdles in collection of meaningful evidence for prosecution, threatening to turn the judgement and the investigation as largely symbolic gesture, or in words of PTC, giving false hopes to the victims, without results and relief on ground.[42]

[42] Ryan Vogel, 'Introductory note to the Situation in the Islamic Republic of Afghanistan', (2021) International Legal Material, Vol. 60, 30-52 (Cambridge University Press).

ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019: A LAW THAT RAISES MORE QUESTIONS THAN IT ANSWERS

Farah Hayat[1]

ABSTRACT

This legislative comment aims to examine the Muslim Women (Protection of Rights on Marriage) Act passed in 2019 (hereinafter referred to as the Act of 2019) by the Indian Parliament with the objective of protecting the rights of married Muslim women and prohibiting divorce by way of Triple Talaq or Talaq-e-Biddat. But this enactment, that was passed with the noble aim of protecting the rights of Muslim women who become victims of the unscrupulous act of instant Triple Talaq, a form of Talaq that becomes final and irrevocable instantaneously, has raised more questions than it has answered. This study will delve into the provisions of the Act and also into those pertinent questions that it has given rise to in its wake and the holes that it has failed to fill.

Keywords: *Muslim Women (Protection of Rights on Marriage) Act 2019, Triple Talaq or Talaq-e-Biddat, Shayara Bano judgment, Right to Divorce of Muslim Women, Khula*

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INTRODUCTION

The form of *Talaq* that has been provided in the Quran is known as *Talaq-ul-Sunnat* because it is based on the Prophet's tradition. Since the Quran allows breaking of the marriage tie only in the most irreconcilable situations, it stipulates that even after pronouncement of *Talaq*, it shall not become final at once and thereby leaves scope for compromise and reconciliation between the husband and wife during those three months when the spouses can still cohabit although not engage in sexual intercourse or else the effect of the pronouncement of *Talaq* shall be nullified. *Talaq-ul-Sunnat* is divided into two types. First is *Talaq-ul-Ahsan* which is considered as the best and most approved form of *Talaq* wherein the husband makes a single pronouncement of *Talaq* during the *Tuhr* period of the wife, that is, when she is not menstruating and thereafter, her *iddat* period starts which lasts for three months but *Talaq* does not become final till the time *iddat* period is going on. During this time if the spouses engage in sexual activity, then the previously pronounced Talaq is nullified, otherwise at the expiry of the three months period, the marriage is legally dissolved.

If the marriage has not been consummated, a *talaq* in the *ahsan* mode may be pronounced even if the wife is in her menstruation. Where the spouses are away from each other for a long period of time or where the wife is beyond the age of menstruation, the condition of *Tuhr* is not applicable.[2] Second approved mode of *Talaq* is called *Talaq-ul-Hasan* wherein the husband pronounces *Talaq* once every month for three consecutive months during the *Tuhr* period and at the expiry of the third month, *Talaq* becomes final and irrevocable.

But the most criticized form of *Talaq* and ironically also the most commonly practiced form of *Talaq* in India has been *Talaq-e- Biddat*. It makes *Talaq* irrevocable as soon as the word *"Talaq"* is pronounced thrice at one go, notwithstanding that whether the husband pronounced *Talaq* in a moment of impulse or anger or provocation or intoxication. The Quran does not recognize *Talaq-e- Biddat* because it's "*Talaq in a hurry*". No scope for reconciliation between the husband and wife is present.

[2] *Chand Bi v Bandesha* AIR 1960 Bom. 121.

ORIGIN OF *TALAQ-E-BIDDAT*

This form of *Talaq* has neither been provided for in the Quran nor was it recognized by the Prophet since it was not in practice during his lifetime. It was only much later, during the reign of the second Caliph, Hazrat Umar, that this form of *Talaq* was legitimized but only as an emergency measure to deal with a very peculiar situation. During the reign of Hazrat Umar, he came to know that Arab men who were conquering Syria, Egypt, Persia, etc. wanted to marry women of these places for their beauty without divorcing their respective wives back home. But these women insisted that they should first instantaneously divorce their wives by pronouncing *Talaq* thrice in one sitting and then only will they marry them. Since the Arab men knew that such instant *Talaq* is not permissible in Islam, they tricked these women by pronouncing instant *Talaq* and later on went back to their original wives. In order to curb this treacherous practice, Hazrat Umar passed a decree that even pronunciation of *Talaq* three times in a single sitting shall dissolve the marriage tie irrevocably so that it will act as a deterrent for Muslim men engaging in this unscrupulous practice. This was never meant to be made into a permanent law. But since it was an easy and convenient way of divorcing, it gained followers who started abusing this practice and the *Hanafi* scholars further acknowledged it to be a legitimate way of dissolving the marriage tie.[3]It became a common practice among Sunni Muslims belonging to the *Hanafi* school to pronounce *Talaq* thrice in a go impulsively, as no other school recognizes this form of *Talaq*.[4] Under *Hanafi* school, any Mohammedan of sound mind who has attained majority may divorce his wife whenever he likes by pronouncing *Talaq* even without any cause. A *talaq* pronounced under compulsion or fraud is also effective under *Sunni* Law[5] and even *Talaq* pronounced under the effect of intoxication is effective under *Hanafi* law which is quite ironical since consuming any intoxicating substance itself is considered sinful in Islam.

Furthermore, after the pronouncement of *Talaq*, a woman has to wait for three months (*iddat* period) for two reasons: if she has conceived a child during the marriage then this fact will be known for sure within three months. Also, it gives sufficient time

[3] Aqil Ahmad, *Mohammedan Law* (25th edn, Central Law Agency 2013) 174.
[4] I. Mulla, *Mulla on Mohammedan Law (*2nd edn, Dwivedi Law Agency 2012) 328.
[5] ibid.

to the husband to take her back if he desires reconciliation which can be done through an arbitrator. This makes it clear that *Talaq-ul-Biddat* or irrevocable divorce is not permissible.[6] Arbitrators must be appointed, one from each side who will be neutral in their approach and will work towards the reconciliation of the husband and wife and only when it is next to impossible for them to stay together, that they should seek *Talaq*. Hence, *Talaq-ul- Sunnat* is the most proper form of *Talaq* as per the word of God as it does not become irrevocable immediately and the couple has three months to see if they have a chance together.

JUDICIAL INTERVENTION ON THE ISSUE OF *TRIPLE TALAQ* AND PROVISIONS OF THE ACT OF 2019

The judiciary in India has time and again attempted to clarify the illegal and immoral nature of *Triple Talaq*. In the *Rukia Khatun* case[7] the Division Bench stated that the correct law of *Talaq*, as ordained by the Holy Quran, is: (i) that "*talaq*" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "*talaq*" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

The Full Bench of three judges of the Hon'ble Bombay High Court in *Dagdu Chhotu Pathan v Rahimbi Dagdu Pathan* [8] took all the Quranic verses on the issue of matrimony into consideration and also some of the ancient rulings and took the view that a Muslim can give *Talaq,*

1. For reasonable cause or grounds,
2. He has to follow the provision of arbitration for reconciliation, and
3. *Talaqnama,* in breach of these conditions, cannot operate as divorce.

The ruling of the Bombay High Court thus indirectly has done away with the *Triple Talaq* since it does not follow these conditions. But, this ruling can be enforced only in the State of Maharashtra. Furthermore, in the case of *Shamim Ara v State of*

[6] Asghar Ali Engineer, *The Rights of Women in Islam* (Sterling Publishers Pvt. Ltd. 2008) 152.
[7] (1981) 1 Gau LR 375.
[8] (2002) 2 Mah LJ 602.

U.P & Ors.[9]the Supreme Court made an important observation and further reiterated that the correct law of divorce as ordained by the Holy Quran is that *Talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband; if the attempt fails *Talaq* may be effected. Thus the Supreme Court had tacitly disapproved the formula of Triple *Talaq* as being applied and followed in India. However, it was only in *Shayara Bano v Union of India*[10] that *Triple Talaq* was found constitutionally infirm and struck down by the majority of 3:2. But it was only with the passage of the Act of 2019) that *Triple Talaq* was not only declared as void but also illegal,[11]and was made a criminal offence.

The Act of 2019 under section 2(c) does not define *Talaq* but only provides that it will include *talaq-e-biddat* or any other similar form of *Talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband. Further, section 3 declares *Triple Talaq* not just to be void but also illegal. Moreover, section 4 punishes any Muslim husband who pronounces *Talaq* referred to in section 3 upon his wife with imprisonment for a term which may extend to three years and shall also be liable to fine. The Act of 2019 has also secured the right to a subsistence allowance to the wife and her dependent children, to be payable by the husband[12] and entitles the Muslim woman to the custody of her minor children in the event of *Triple Talaq*.[13] The Act also makes the offence cognizable[14], non-bailable[15] and compoundable[16] at the instance of the Muslim wife.

THE QUESTIONS THE ACT OF 2019 RAISES AND THE GAPS IN THE LAW

The Act of 2019 raises two fundamental questions. First of all, since the *Shayara Bano* judgment has banned *Triple Talaq*, it means if anybody pronounces *Triple Talaq* to end the marriage there and then, such pronouncement shall be void and have no legal

[9] JT 2002 (7) SC 520.
[10] (2017) 9 SCC 1.
[11] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 3.
[12] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 5.
[13] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 6.
[14] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7 (a).
[15] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7 (c).
[16] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7 (b).

effect. At the same time, the Act of 2019 makes *Triple Talaq* and not "attempt to commit *Triple talaq*" punishable with imprisonment, which may extend to three years and fine. So, if an act is void under law, it means it has no legal effect whatsoever: an absolute nullity- the law treats it as if it had never existed or happened and something that has no legal impact, how can someone be punished for it? The law can instead be worded differently, such as declaring *Triple Talaq* as void and any attempt to give divorce using *Triple Talaq* to be illegal. This will not only be in consonance with the object of the *Shayara Bano judgment* and the Act, that is, making *Triple Talaq* a nullity, that even if it is pronounced, it will have no legal effect but also making the attempt of committing the offence of *Triple Talaq* illegal and punishable.

As per Section 101 of the Indian Evidence Act, 1872, when a person is bound to prove the existence of a fact, the burden to provide evidence for the same lies upon him. In criminal cases, the principle remains constant that the initial burden of proof lies upon the prosecution to prove beyond reasonable doubt that the accused has committed an offence, failing which the accused is entitled to be acquitted,[17] whereas in matrimonial cases, the principle of burden of proof relating to civil cases is applicable meaning thereby that burden of proof must lie on the petitioner because ordinarily the burden lies on the party which affirms a fact, not on the party which denies it.[18] So the second question is that even if the intention of the husband was to pronounce *talaq-e-biddat*, and because this is a matrimonial case giving rise to criminal liability so in such a scenario, on which party will the burden of proof lie? The Act has failed to specify this.

The Act of 2019, in its current form, has several loopholes that must be taken care of to truly achieve the objective of the Act, that is, to protect the rights of a married Muslim woman. Firstly, the Act of 2019 is completely silent on the Muslim woman's right to initiate divorce, further substantiating the popular notion that under Islam, only the husband can divorce his wife and not vice-versa. *Khula* or wife-initiated divorce is the right of a wife to divorce to escape an unsuccessful or exploitative marriage. *Khula* or Redemption literally means 'to lay down'. In law it means *"laying*

[17] *Ouseph alias Thankachan v State of Kerala* (2004) 4 SCC 446.
[18] *P. Mohandas Panicker v K.K. Dakshayani* ILR 2014 (1) Kerala 538.

down by a husband of his right and authority over his wife". It should be noted that in pre-Islamic times, there was no provision of *khula*. Muslim Law introduced it.

Khula was defined by their Lordships of the Judicial Committee in *Moonshee-Buzu-ul-Raheem v Luteefutoonissa*[19] as follows:

> *"A divorce by khula is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. It signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property. Khula in fact is thus a right of divorce purchased by the wife from her husband."*

From this definition, it follows that in the case of *khula*, there must be an offer from the wife, and the offer must be accepted with the consideration for the release by the husband. As soon as an offer for *khula* is received, it becomes an irrevocable divorce (*talaq-ul-bain*) and the wife is bound to observe *iddat*.[20] But if the husband refuses the offer for *khula*, what other resort is left with the wife, especially if none of the nine grounds are applicable in her based on which she can file for divorce under the Act of 1939.

Over time, the meaning and essential requirements of *khula* have evolved. As was cited in the recent case of *"X" and Ors. v "Y" and Ors.,*[21] according to the veteran Muslim law scholar Abul Ala Maududi:

> *"The wife's right to khula is parallel to the man's right of Talaq. Like the latter the former too is unconditional. It is indeed a mockery of the Shariat that we regard khula as something depending either on the consent of the husband or on the verdict of the Qazi. The law of Islam is not*

[19] *Moonshee-Buzu-ul-Raheem v Luteefutoonissa*, 8 M.I.A. 379.
[20] I. Mulla, *Mulla on Mohammedan Law (*2nd edn, Dwivedi Law Agency 2012) 360, 361
[21] (09.04.2021 - KERHC) : MANU/KE/1070/2021.

> *responsible for the way Muslim women are being denied their right in this respect."*[22]

In this 2021 judgment, the Kerala High Court overruled the precedent laid down in *K.C. Moyin v Nafeesa & Others*[23] which negated the right of Muslim women to invoke extra-judicial divorce in light of the Act of 1939. Therein it was held that under no circumstances, a Muslim marriage could be dissolved at the instance of the wife, except in accordance with the provisions of the Act. The Hon'ble Kerela High Court has ruled that even if the husband is not in favour of divorcing the wife, she can independently seek the dissolution of her marriage through *khula,* reinforcing her right to divorce her husband unilaterally.[24] The Court also held that in the absence of any secular law governing *khula*, it would be valid if the following conditions are satisfied:

(i) A declaration of repudiation or termination of marriage by wife.

(ii) An offer to return dower or any other material gain received by her during marital tie.

(iii) An effective attempt for reconciliation was preceded before the declaration of *khula*.[25]

There are two opinions among scholars when it comes to the husband's right to say no to *khula*.

Like Maududi, the noted Islamic scholar Tahir Mahmood, whom the High Court quoted in its verdict, maintains that:

> *"The husband cannot say no to khula. Just as in Talaq the last word is of the husband, in khula the last word is of the wife. If a wife finally opts for khula, the husband cannot compel her to continue in marriage and has to pronounce Talaq which will be irrevocable. He may ask the wife to forego her unpaid dower which otherwise becomes*

[22] Abul Ala Maududi, *Huqooq-Uz-Zaujain* (9th edn, 1964) 139.
[23] MANU/KE/0060/1973 : 1972 KLT 785.
[24] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7 (c).
[25] ibid.

> *immediately payable by the husband in the case of a talaq by the husband."*[26]

Moreover, *khula* must be "*preceded by an effective attempt of reconciliation*" otherwise such *khula* shall be "*bad in law*".[27] Hence, a law that has as one of its objectives to protect the rights of married Muslim women, must provide for her right to divorce as well, if she is unhappy in her marriage.

Secondly, the Act is also silent on the practice of *Nikah Halala* and its removal as a requirement if the same parties want to marry again. *Nikah halala* is a practice that aimed at deterring men from casually pronouncing *Talaq*, but the real sufferer in this situation is the woman who must first marry another man, their marriage must be consummated and he should then divorce the woman out of his own free will who then must undergo *iddat*, before she can remarry her previous husband.

Thirdly, although the Act specifies that the Judicial Magistrate First Class may determine the amount of subsistence maintenance to be payable to the wife and his children but the Act does not specify the time period for which the husband shall be liable to provide subsistence maintenance, especially in the scenario when after serving time in prison, he does not want to cohabit with the wife anymore. Will the wife have to wait for two years before she can file a suit for dissolution of marriage on the ground of non-payment of maintenance?

Fourthly, for a Muslim husband apostasy, *ipso facto* dissolves the marriage. Apostasy will also dissolve the marriage tie for a woman who had converted to Islam going back to her former religion, but it will not dissolve the marriage tie for a woman who was born a Muslim and converts from Islam to another religion. She will still have to prove one of the nine grounds under the Act of 1939 to get a decree of divorce from the Court. This amounts to not only discrimination based on gender, since differential treatment is being given to a Muslim woman who converts to another faith, in comparison to a Muslim man, but it's also discrimination on the basis of religion since a woman who reconverts to her former religion from Islam does not have to separately

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[26] Tahir Mahmood, *Muslim Law in India And Abroad* (2nd edn, 2012).
[27] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7 (c).

file for divorce under the Act of 1939 and the Act of reconverting will *ipso facto* dissolve her marriage.

Fifthly, there is no provision regarding whether *Triple Talaq* can be added as a ground for the woman to initiate divorce under 1939 Act or through any of the extra judicial means if the husband does not want to cohabit with his wife even after serving jail time.

Sixthly, the Act does not specify whether utterance of *Triple Talaq* in a state of intoxication will have the same legal effect as per the Act of 2019 as *Triple Talaq* pronounced in a state of sobriety. Consumption of intoxicating substances is prohibited in Islam since the person is not in the position to differentiate between right and wrong. Ironically, *Triple Talaq* under intoxication was considered valid, but after enactment of the Act of 2019, will *Triple Talaq* pronounced in an intoxicated state shall be considered void but without inviting any criminal penalty, is a question that requires clarity.

Since the Act deals with protection of rights of Muslim women on marriage, the ambit of the Act should be broadened to include provisions on these important aspects as well through appropriate amendments.

CONCLUSION AND SUGGESTIONS

It is extremely unfortunate that even though Islam as a religion intends to treat women on an equal footing with men in matters of both marriage and divorce, but self-serving jurists and theology scholars, either influenced by male domination or dictates of old traditions, have undermined the position of women in Islam in many ways, one of which is by propagating the unfair and unjust practice of *talaq-e-biddat* which puts the Muslim woman at the mercy of her husband. Practices that were against the dignity of women were in vogue during the pre-Islamic times, that is, during the *Jahiliyah* period and were vehemently discouraged by Islam.[28] But through *Qiyas*, unethical practices like *talaq-e-biddat* still propagated and spread throughout the world. The Act of 2019 has paved the way for the protection of the rights of married Muslim

[28] Asghar Ali Engineer, *The Rights of Women in Islam* (Sterling Publishers Pvt. Ltd. 2008) 150.

women, but the Act requires amendments, and nevertheless, a lot more needs to be done to alleviate the plight of Muslim women in India. Accordingly, the author has made the following suggestions:

1. The legislative intent behind enactment of the Act of 2019 has been to protect rights of Muslim women and deter Muslim men from pronouncing *Triple Talaq*. Awareness must be spread amongst the Muslim community, especially Muslim men who might think that once they will serve three years in jail, they will be free from the marriage tie, that apart from attracting criminal liability, the legal consequence of the pronouncement shall be that the *Talaq* never happened and the marriage shall continue like *Triple Talaq* was never even uttered in the first place. So even after a Muslim man charged for pronouncing *Triple Talaq* comes back after serving his time in jail, his marriage with the wife shall continue like before. Simultaneously, awareness should be spread among Muslim men and women about the permissible modes of divorce.
2. Section 3 of the Act of 2019 can be amended to declare *Triple Talaq* as void and any attempt to divorce through *Triple Talaq* to be illegal.
3. The Act can be amended to add provision regarding *Khula*.
4. The Act can be amended to add a provision with respect to burden of proof.
5. The practice of *Nikah Halala* may be banned by law.
6. *Triple Talaq* can be added as a ground for divorce under section 2 of the Dissolution of Muslim Marriages Act, 1939 if the husband refuses to cohabit with the wife after serving prison time, especially if he refuses to pay maintenance after coming out of prison so that the woman does not have to wait for two years to file for divorce.
7. Magistrate under the Act of 2019 can be ordained with the power to decide the time period for which the husband must provide subsistence allowance to the wife.
8. *Triple Talaq* uttered in the state of intoxication should not invite any criminal action and should have no legal effect.
9. The effect of apostasy should be the same for both husband and wife, that is, dissolution of the marriage tie, irrespective of the fact whether wife was a Muslim and converted to another faith or reconverted to her previous faith.

BOOK REVIEW OF SOCIO-LEGAL RESEARCH: THEORY AND METHODOLOGY (2021), P.P. MITRA, THOMSON REUTERS SOUTH ASIA PRIVATE LIMITED, 10TH FLOOR, BUILDING NUMBER 9B, DLF CYBER CITY, GURGAON-122002, INDIA, PP. XXIV + 181

Prof. (Dr.) M.K.Bhandari[1]

Research is a trained scientific investigation. Socio-legal research requires a multidisciplinary approach to analyze and interpret the law, the legal phenomenon, the relation between those two, and also their relationship with society in the widest sense. Socio-legal research has its theoretical, practical, and methodological bases in social science. The study and understanding of research methodology provide discerning research scholars with the necessary training and skills in selecting methods, material, scientific tools, and training in techniques required for the meaningful and result-oriented outcome of the chosen problem. The quality of research study is directly proportionate to the application of correct tools and techniques of research methodology. The frontiers of socio-legal research in India are expanding with breakneck speed; the training and understanding of suitable and proper methodology are very pertinent. In this grim scenario, every effort in the creation of a quality piece of writing on socio-legal research methodology is a welcome and praiseworthy initiative.

The book under review is a serious scholarly contribution in the pool of scanty literature on Research Methodology. Prof. P.P.Mitra is a versatile author with sound knowledge and understanding of the intricacies of research methodology. This book has been meticulously designed and, the author has systematically arranged the issues and themes covering a wider gamut of entire subject matter with conceptual and thematic perspective. Distributed in Twelve (12) chapters, this book has dealt with several aspects *viz*; various forms of research, identification of research problem, formulation of hypothesis, and framing of research design with conceptual clarity. Socio-legal research is now all about employing empirical methods as the

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collection, analysis, and interpretation of collected data needs trained and scientific expertise. Knowledge of technology further makes the task easier.

The introduction has given a broad view about the application of human knowledge in theology, science, and humanities and also about development in social research for betterment in human civilization and human culture. Chapter Two has described the historical development in the human thought process from the ancient period to post-modernism, including European enlightenment to logical positivism of Vienna Circle and empiricism to the critical theory of Frankfurt School. Chapter three has analyzed the basic differences between researches on natural science and social science. In this chapter, the reader gets a clear idea about the Induction method, Deduction Method, and Falsification Theory. In Chapter Four, the author has tried to classify all kinds of researches based on their application, nature, model, pattern, period, and instrumentality. Chapter five has dealt with sources and testing of hypotheses including the differences between 'Research Question' and 'Hypothesis'. Chapter Six has depicted various methods of social science research, from the Positive method to the Field study method, Case study method, Survey method etc. It has also covered the literary method in legal research, Economic methods in law, Statistical methods, Jurimetrics, Marxist legal research, Feminist legal methods, Realist legal method, and Critical legal method. Chapter Seven has elaborately explained research design about pilot studies, panel studies, trend studies, cohort studies, blind studies, double-blind studies, focus group studies, cross-sectional studies. It has distinguished the terms of research design, research methods, and research approach. Chapter eight has given detailed ideas about Sample frame, Sample size, Sample design, and differentiation between Sampling error and Sample bias. The readers will get an idea about Census, Target population, and sampling. Chapter Nine has extensively shown Interviews, Questionnaire, Observation, Participant Observation, Content Analysis, methodology, Socio-metrics, Oral History Methods, Life History Method, and other Tools and Techniques for Data Collection from samples in many socio-legal types of research. Chapter Ten is very helpful for young researchers to develop an idea about the standard format of legal writing. Chapter Eleven is the newest one and it talks about 'Research and Publication Ethics' which has been included as per the latest syllabus of UGC. It has focussed on the most debated issues like predatory journals, plagiarism, and the

Impact factor of journals (JIF). It is a most useful chapter dealing with various research metrics with different kinds of publication misconduct. In the conclusion, the author has highlighted the various aspects of the future of social science research. In this book, however, the tools and techniques of data collection have been duly explained at length, but the approach has been confined only to the theoretical perspective. It would be feasible if practical and illustrative patterns had been mentioned for effective understanding. Further, the mode and manner of interpretation of data are also missing. The author may be advised to cover this aspect in the next edition or reprint. The chapter on report writing and research and publication ethics deserves special mention as these important dimensions are necessary to maintain the integrity of any research study. Though the book classifies all types of social research based on its application, mode, pattern, and instrumentality. It has illustrated different tools and techniques for data collection in empirical study on legal, social, and anthropological issues. The author has described various legal thoughts developed on the different sociological backdrop from the Italian renaissance to the French enlightenment and from Chicago school to Frankfurt school. He narrates every method adopted by the researchers from natural school to positivist school and sociological school to critical legal school and also traces its roots in the post-modern era.

In the concluding chapter, the final observation of Prof. Mitra “that best way to learn research methods is going through research” has aptly attracted the attention of one of the well-known leading legal scholars Prof. Upendra Baxi, who has written a brilliant yet critical foreword to this monograph. This Foreword of Prof. Upendra Baxi has added scholarly weight to this book and according to Prof. Baxi, what matters the most, is the pursuit of one's chosen area, consistency, cogency, and conscientiously. These four 'C's of research constitute the necessity of research methods. Author, Prof. P.P. Mitra deserves all praise and appreciation for his sincere and scholarly efforts. This book is a welcome addition to the pool of literature on Research methodology.

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