

NATIONAL LAW SCHOOL JOURNAL

Volume 14

2018-19

- Towards Effective Reduction of Global Climate Emissions: Proposing Global Emission Trading as A More Efficient option to Regional EU Emission Trading on Reduction of Aviation Emission
- A Critical Analysis of Transaction Avoidance in Insolvencies with Special Reference to Extortionate Credit Transactions Under the Insolvency and Bankruptcy Code, 2016
- Intellectual Property Rights of Chefs and Restaurateurs in Edible Creative Culinary Creations and Their Plating
- A Modern World Fighting A Modern War: An Effort to Balance Technology and Humanity Under The Regime of International Humanitarian Law
- Co-Operatives in A Market Economy: Democratization of Economic Process
- Data Economy - Need to Safeguard the Economy by Implementing Strong Data Protection Laws
- The Role of International Law in State Building: Exploring The Nexus Between Conflict Resolution and Law
- Nudging towards Overlapping Consensus - Analyzing Libertarian Paternalism
- Unofficially Hindi
- Revisiting 'Consent' Under Indian Rape Law
- Artificial Intelligence and Legal Implications: An Overview
- Standard of Review in Set-Aside and Enforcement Proceedings Relating to Arbitral Awards in India
- Law and Sexuality: Commentary on Joseph Shine vs. Union of India and Others 2018 SC
- Merit V. Efficiency: A Paradigm Shift in Reservation Policy: A Case Comment on B. K. Pavitra and Ors. V. The Union of India and Ors. (Decided On May, 10, 2019)
- Joseph Shine V. Union of India – A Comment



National Law School of India University
Nagarbhavi, Bangalore

NATIONAL LAW SCHOOL JOURNAL

Vol. 14

2018-19

EDITORIAL BOARD

SARASU ESTHER THOMAS
CHIEF EDITOR

DR. YASHOMATI GHOSH

MR. KUMAR ABHIJEET

MODE OF CITATION
(2018-19)14 NLSJ



Published by
NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
Nagarbhavi, Bangalore

Subscription rates

National Law School Journal

Price:	India	INR 250 /-
	Abroad	US \$ 10 /£ 7

(ISSN No: 0971-491X)

©The copyright vests with the Publisher

The National Law School of India University does not necessarily subscribe to the views expressed by the authors.

Subscription, order and inquiries for all the above should be sent to

The Librarian

National Law School of India University

P.O. Nagarbhavi

Bangalore- 560 242

Fax: 080-23160534

Printed at National Printing Press, Bangalore- 95

NATIONAL LAW SCHOOL JOURNAL

Vol. 14

2018-19

CONTENTS

Editorial	v
Notes on Contributors	vii
Towards Effective Reduction of Global Climate Emissions: Proposing Global Emission Trading as A More Efficient option to Regional EU Emission Trading on Reduction of Aviation Emission <i>Dr. Murtala Ganiyu A. Murgan</i> <i>Prof. Abdul Ghafur Ahmid</i>	1
A Critical Analysis of Transaction Avoidance in Insolvencies with Special Reference to Extortionate Credit Transactions Under the Insolvency and Bankruptcy Code, 2016 <i>Varendyam Jahnawi Tiwari</i>	28
Intellectual Property Rights of Chefs and Restaurateurs in Edible Creative Culinary Creations and Their Plating <i>Ankita Vashisht</i>	54
A Modern World Fighting A Modern War: An Effort to Balance Technology and Humanity Under The Regime of International Humanitarian Law <i>Satavisha Halдар</i>	77
Co-Operatives in A Market Economy: Democratization of Economic Process <i>Aloke N Prabhu</i>	95
Data Economy - Need to Safeguard the Economy by Implementing Strong Data Protection Laws <i>Suresh Chandra Pandey</i> <i>Saurabh Pandey</i>	125

The Role of International Law in State Building: Exploring The Nexus Between Conflict Resolution and Law <i>Prof. (Dr.) Rakesh Kumar Singh</i> <i>Dr. Bhanu Pratap</i>	151
Nudging towards Overlapping Consensus - Analyzing Libertarian Paternalism <i>Abhay Singh</i>	193
Unofficially Hindi <i>Dr. Ashish Kumar Srivastava</i>	206
Revisiting ‘Consent’ Under Indian Rape Law <i>Shreya Shree</i>	219
Artificial Intelligence and Legal Implications: An Overview <i>Chemmalar S</i>	236
Standard of Review in Set-Aside and Enforcement Proceedings Relating to Arbitral Awards in India <i>Gracious Timothy Dunna</i>	252
Law and Sexuality: Commentary on Joseph Shine vs. Union of India and Others 2018 SC <i>Owais Hasan Khan</i> <i>Farheen Arif</i>	267
Merit V. Efficiency: A Paradigm Shift in Reservation Policy: A Case Comment on B. K. Pavitra and Ors. V. The Union of India and Ors. (Decided On May, 10, 2019) <i>Dr. Naseema P. K.</i>	281
Joseph Shine V. Union Of India – A Comment <i>Shweta</i> <i>Tauseef Ahmad</i>	295

EDITORIAL NOTE

The National Law School Journal (NLSJ) is the flagship journal of NLSIU and it is one of the earliest legal journals to be published in India under the leadership of the founding Director Padma Bhushan Prof. (Dr) Madhava Menon. The year 2019 was of immense significance to us since it marked the completion of 20 years of NLSJ, but on May 9, 2019 the entire legal community suffered a great loss with the passing away of Dr. Menon. Dr. Menon has been recognised as the father of modern legal education in India and by establishing the five-year integrated law degree programme by through the foundations of NLSIU. The success of this educational model is evidenced from the subsequent establishment of more than 20 National Law Schools in different parts of the country. Dr. Menon was the first chief editor of NLSJ and under his guidance the first issue of the journal was published in the year 1989. He conceptualised the necessity of publishing a law journal with the purpose of encouraging research, writing, and dissemination of knowledge. In the first editorial he highlighted the objective of NLSJ and observed – *“the idea of publishing a journal primarily to project the research and writing activities of its Faculty for the benefit of the legal community engaged the attention of every teacher in the University.”* The 2019 volume is being dedicated to Dr. Menon and his ideals and vision. The journal continues to be a sincere effort of the faculty members of NLSIU to contribute towards the development of law in a changing society. In recognition its long standing contribution to legal scholarship the journal has been included in the prestigious UGC CARE List. The Editorial Team has painstakingly selected each one of the articles keeping in view the highest standard of legal scholarship. The articles have been selected so that the readers find them useful with the core focus on contemporary legal issues having multi-disciplinary research approach and comparative legal scholarship. We would humbly request the readers to send in their suggestions and comments for the purpose of making the journal more meaningful and useful for the legal community in general and the academic world in particular.

Dr. Yashomati Ghosh
On behalf of the Editorial Team

NOTES ON CONTRIBUTORS

Abdul Ghafur Ahmid: He is a Professor of International Law, a prolific Author, and former Deputy Dean, Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.

Abhay Singh Thakur: The Author is working as an Assistant Professor at Gujarat Maritime University. He is also a research scholar at Gujarat National Law University. He possesses a Master of Law in International and Comparative Law from West Bengal National University of Juridical Sciences (WBNUJS) Kolkata. He qualified UGC-NET in July 2018. He has about six years of overall work experience, which includes more than two and a half years of teaching experience, over two and a half years of practice as an Advocate at Debt Recovery Tribunal and at Punjab and Haryana High Court and one year as a Legal Associate with Bharti Infratel Ltd. He has 5 paper publications in his name, which includes a paper publication in NALSAR Air and Space Journal and Law Journal Amity Dubai.

Aloke Prabhu: The contribution from the Author was the result of his research time spent as Post Doctoral Fellow at The Edmond J. Safra Center for Ethics at the Buchmann Faculty of Law, Tel Aviv University, Israel, during 2018-19. He holds a Doctorate from Jawaharlal Nehru University and, currently, works as a faculty of law at the O. P. Jindal Global University.

Ashish Kumar Srivastava: He is an Assistant Professor, Faculty of Law, University of Lucknow. He graduated from Law School, Banaras Hindu University, Varanasi, with a Gold Medal. He was awarded Junior Research Fellowship by the University Grants Commission. He started his academic carrier at National Law University, Jodhpur. He has ten years' experience of teaching at Under Graduate and Post Graduate Law Programmes. He has co-authored a book on Property Laws published by Lexis Nexis. He has prepared modules for EPG Pathshala Programme of Ministry of Human Resource Development on Company Law. He has authored a Book on Partnership by

Thomson Reuters and a Book on U. P. Ceiling on Land Holdings Act, 1960, by Satyam International. He has delivered lectures at HRDC, UGC Lucknow, HAL and Indian Railway Institute of Transport Management. He did his Ph.D. in Corporate Insolvency. He has several published works to his credit in reputed publications like ICPS, AIR, NLS Bangalore and National Law University, New Delhi.

Ankita Vashisht: The Author is an Advocate at the High Court of Delhi, New Delhi, India; she has qualified for Assistant Professorship and is contemplating transitioning gradually. She has an LLM (IPR) from NALSAR University of Law, Hyderabad, Telangana, India, and her BBA, LL.B (Hons.) from University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University, New Delhi, India.

The Author is grateful to Prof. V. C. Vivekanandan, Vice Chancellor, Hidayatullah National Law University, Raipur, Chhattisgarh, India, for displaying faith in her idea and helping to give it a definite shape with his excellent insight, suggestions and guidance.

Bhanu Pratap: This Author is an Assistant Professor Faculty of Law, University of Lucknow. He is Co-Author of the book titled 'Textbook on Public International Law' published by Universal Publications. His areas of specialization include International Law and Jurisprudence and Human Rights. He is a Gold Medallist (LL.M. Human Rights), Baba Saheb Bhim Rao Ambedkar University, Lucknow.

S. Chemmalar: The Author is an LL.M., MBA, and is a Faculty at Pondicherry University School of Law, where she specializes in Comparative Corporate Law, Commercial Laws, Comparative IPR and Criminology. She was Assistant Professor in SRM Institute of Science and Technology, Chennai, for two years and was a faculty at Dr. Ambedkar Government Law College, Pondicherry, for one year. She has three years of experience in working as a legal assistant with a leading NGO in Pondicherry. She is currently pursuing her doctrinal research at School of Law, SRM Institute of Science and Technology. S. Chemmalar

has published research papers in numerous peer-reviewed journals, served as panel judge in national level moot court competitions, participated in FDP/ workshops and presented her work at numerous professional conferences. Her areas of interest are maritime law, technology law and space law. She earned both her Bachelors and Masters Degrees in Law from Dr. Ambedkar Government Law College, Puducherry, affiliated to Pondicherry University, and her MBA in Human Resource Management from Pondicherry University.

Naseema P. K.: The Author's address is PKN Manzil, Mundakkottukurussi, Shornur-2, Palakkad, Kerala, 679122. She is presently working as Asst. Professor of Law in the Dept. of Law, AMU-Centre, Malappuram, Kerala. She was previously working as Asst. Professor of Law in Faculty of Law, University of Delhi. Her academic Qualifications are a Ph.D. from National University Of Advanced Legal Studies (NUALS- KOCHI) on the topic 'Divorce and Gender Justice under Muslim Law in India,' U.G.C-N.E.T in Law, LL.M, M.A English and B.Sc. physics. Her fields of interest are in Law of Torts, Jurisprudence, Law of Contract, Family Law, and Constitutional Law. She has several articles published in reputed journals and books. Some of them are titled as 'Human Trafficking in India: Concerns Regarding Socio-Legal Framework,' 'Is *talaq* uncontrolled?' - A trial towards clarifications, Unequal Access to Divorce of Muslim Woman: A Claim, Curriculum Change towards Women-Centric Jurisprudence – Need of the Time, Education, Women and Skill Development - An Introspection, History, Constitutional Framework and Evolution of Indian Tax System and Goods and Service Tax - A study, etc. She has presented papers in 11 international seminars and 17 national seminars. She had attended 4 training programmes and 4 short term courses for faculty development. She has teaching experience of 13 years, and she believes herself to be a dynamic, team spirited and performance driven professional, with intensive academic training in law, and with high proficiency in forming cohesive team environment, possessing creative problem solving skills and excellent motivating power.

Farheen Arif: Ms. Farheen Arif is the former PRT, Government of Uttar Pradesh. Her area of interest includes Education Reforms, Teaching Pedagogy and Gender Studies.

Gracious Timothy Dunna: This Author is an Independent Practitioner based in New Delhi. His primary areas of practice and interest are domestic and international arbitration and litigation, arbitration-related litigation, litigation related to contract disputes, and consensual dispute resolution.

Murtala Ganiyu A. Murugan: The Author is a B.A Hons (Hist) (ABUzaria), Master Public Adm. (ABU), LL.B Hons (Unilorin) BL. (Abuja), LLM, (Unilorin), PhD. Law, (Malaysia) and is a specialist in Aviation Environmental law. He has been a lecturer in Environmental law and Legal Methodology at the Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin, Nigeria, for many years.

Owais Hasan Khan: Dr. Owais Hasan Khan is working as Assistant Professor of Law at National Law University, Odisha. His area of research includes Personal Laws, Law & Religion, Law & Gender and SAARC Law Studies.

Rakesh Kumar Singh: He is a Former Head and Dean Faculty of Law, University of Lucknow. He is also Author of 'Textbook on Family Law' and 'Textbook on Public International Law' published by Universal Publications. His area of specialization includes Family law, Constitutional Law and International Law. He has teaching experience of more than 19 years and received the Governor's prize for excellence of research conducted in the Field of Law.

Shweta: The Author has completed LL.M from Jamia Millia Islamia, New Delhi, in 2018 and her BBA. LL.B from BPSMV, Khanpur Kalan, Sonipat in 2016. The Author has qualified JRF. The Author has also published several research papers in reputed National and International Journals. The Author, also, presented various research papers in National seminars and attended several conferences. The author has been the recipient of various awards, as well.

Shreya Shree: This Author is a Senior Research Fellow at the Centre for Constitutional Law, Policy and Governance (CLPG), National Law University Delhi. She holds a B.A. LL.B. (Hons.) Degree from National Law School of India University, Bangalore (2015), and an LL.M. Degree, with a specialisation in Constitutional and Criminal Laws from National Law University Delhi (2018). Her research interests include Reproductive Justice, Criminal Law (in particular, sexual offences), Medical Jurisprudence, and Empirical Analysis of Law. At CLPG, she is currently undertaking a field-based research study on ‘Legal Barriers to Accessing Safe and Comprehensive Abortion Care in India.’

Suresh Chandra Pandey: He is an advocate at Allahabad High Court, with over 25 years of practice in diverse areas of law, including Writ Jurisdiction, Criminal Matter, Banking Matter, and other laws. The Author has held the position of Honorary Secretary of the High Court Bar Association, Allahabad.

Saurabh Pandey: He is an Aerospace Engineer, who is presently pursuing a degree in law with specialisation in Intellectual Property law from IIT Kharagpur.

Satavisha Haldar: The Author is currently in the third year of Ph.D. research work from the West Bengal National University of Juridical Sciences, Kolkata, on the subject of International Humanitarian Law. The author’s Ph.D. thesis paper is titled, ‘The Weapon Systems of the World: A Study of the Inclusion of Artificial Intelligence in Modern Warfare.’

The Author completed her B.A.LLB. Degree from KIIT Law School, Bhubaneswar, in 2016. Thereafter, she completed her Master’s in Law (LLM.) from Amity Law School, Kolkata, with specialization in Business Laws in 2017.

The Author takes keen interest in research work and has served as a Research Assistant with Indian Council of Social Sciences Research (ICSSR).

Tauseef Ahmad: The co-Author is currently pursuing Ph.D in Law and completed LL.M and BA.LLB from Jamia Millia Islamia. The co-Author has qualified in UGC NET. He has also published several research papers in reputed

National and International Journals. He has presented more than 20 research papers in national and International seminars, and has been the recipient of various awards, as well.

Varendyam Jahnawi Tiwari: She is a faculty of law, primarily specialising in Commercial Laws, at National Law University, Jodhpur. She teaches the course on Company Law, Insolvency Law and Financial Markets and Regulatory Systems. She is at an advanced stage on her Ph.D. thesis on the topic 'Efficacy and Economics of Insolvency Law.' She holds a double masters degree in the form of LL.M. and an M.A. in Economics and is a Gold Medallist in Corporate Law in her postgraduate studies at National Law University, Jodhpur. She is also a member of the Centre for Insolvency Studies at National Law University, Jodhpur. She can be contacted at varendyam18@gmail.com.

TOWARDS EFFECTIVE REDUCTION OF GLOBAL CLIMATE EMISSIONS: PROPOSING GLOBAL EMISSION TRADING AS A MORE EFFICIENT OPTION TO REGIONAL EU EMISSION TRADING ON REDUCTION OF AVIATION EMISSION

Dr. Murtala Ganiyu A. Murgan
Prof. Abdul Ghafur Ahmid

Abstract

The need to reduce the increasing rate of aviation emission and its catastrophic consequences on human life and the environment puts global pressure on the International Civil Aviation Organization (ICAO) to adopt Emission trading as an option for reduction of aviation emission, but the inaction of ICAO on the implementation of Emission Trading for effective reduction of international civil aviation emission ushered in the EU Emission Trading System as one of the regional emission trading bodies with more commitment to effective reduction of international aviation emission. However, the EU is found to be a regional body with inherent limitations of adequate geographical coverage, while its overall contribution to global reduction of aviation emission is still found to be poor. This paper proposes Global Emission Trading as a more dependable and effective option for global reduction of aviation emission, instead of regional EU Emission Trading System. Also, Global Emission Trading will achieve involvement of all airlines in the world in the process of reduction of aviation emission. The paper adopts a doctrinal research methodology, and it is found that Global Emission Trading will bring about global uniform treatment, global coverage and better performance on reduction of aviation emission if implemented by ICAO.

Key words: *Proposing, Global Emission Trading, EU Emission Trading, Option, Reduction of aviation Emission*

1.0 INTRODUCTION

It has been observed that ICAO has some challenges in its responsibility to see to reduction of aviation emission. One of such problems is how to allocate international emissions to specific countries, and this problem involves determining whether or not emissions should be allocated to the country where the aircraft is fuelled, the country where the aircraft originates, or should it be allocated to the destination of the aircraft?¹ There is also the question of equity and fairness on emissions allocation between the developed and developing countries (Responsibility for burden sharing), as cumulative data from ICAO on aviation traffic from 1974-2009 shows several airlines from developing countries as among the highest emitters.²

Recently, it is observed that air travel accounts for 5%³ of global climate emission, and it is growing rapidly. Despite the rapid growth, aviation emissions are known to remain unregulated with serious consequences on the environment. Pressure has thus been mounted on ICAO to agree to a system for a reduction in aviation emissions, as aviation emissions must be reduced drastically to avoid serious consequences on human life and the environment. In response to this, ICAO has suggested many options including emission trading which is a market based measure guaranteeing effective reduction in aviation emission, if adopted. The above claim is justified by the fact that an

-
- 1 See Centre for Development and Environment, Policy Brief-Turbulence ahead: Market Based Measures to Reduce Aviation Emissions, Carbon Market Watch, June 2013 at 2. <[http://www.google.com.my/?gws_rd=market based=measures+to+reduce+emission](http://www.google.com.my/?gws_rd=market+based+measures+to+reduce+emission).>viewed 10/June/2015.
 - 2 See International Civil Aviation Organization, ICAO Under Pressure to Forge Deal on Aviation Emission, July 2014 at 2 Viewed 11 June, 2015.
 - 3 See Centre for Development and Environment Policy Brief n1 at 3. Also, see Eric Cordina, Aviation and Environment: "A study on Ways to Limit Environmental Harm Caused by Engine Emission and Assessment of Future Environmentally Friendly Aircraft Technologies," (LLM Thesis, London City University, 2002), 28. Also, see Beatriz Martinez Romera and Aro Van Aselti, The International Regulation of Aviation Emission: Putting Differential Treatment in to practice, (journal of Environmental Law) vol. 27, 2015, 259. <http://www.google.com.my/?_rd=ss/#q=the+international+regulation+of+aviation+emission+different+treatment+practice>viewed 6, August, 2015.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

open emission trading system has been applied successfully in the EU States by the European Union.⁴ However, despite the adoption of Open Emission Trading by the ICAO, it is observed that ICAO displays an inactive role at ensuring effective implementation of Open Emission Trading to achieve international reduction in aviation emission. It is based on ICAO's state of inaction that the EU Emission Trading system came up as a popular regional aviation emission reduction system in the aviation sector. Although the EU Emission Trading system became a widely acclaimed popular system all over Europe and the nearby states, it also suffers the problems of geographical coverage and the limitation of its content in covering major aviation emission gases, such as carbon dioxide and others, which are needed to make it more effective for global reduction of aviation emission.

The purpose of this paper, therefore, is to propose global emission trading as a more effective option for achieving global reduction of aviation emission. Global Emission Trading is a mechanism that allows all nations to utilise Emission Trading System in many sectors for the purpose of reducing aviation emission. This global emission scheme should be a universally accepted practice for reduction of aviation emission among participants and different sectors. The justification for this is that Global Emission Trading is found to be more efficient and effective, as this involves participation of all airlines in the world in the process of aviation emission reduction, rather than only regional participation. Further, the burden of passing information on the process of reduction of aviation emission will be less, as aviation polluters will personally choose and concentrate efforts on the areas where mitigation efforts are required. A major focus of study in this paper is to show that there is need to move ahead, explore other options and think beyond the use of EU regional emission trading as the only market based option, for achieving positive outcome on reduction of aviation emission. This paper,

4 See Emission Trading System, International Civil Aviation Organization <[http://www.icao.com/environmental-protection/page/emissions trading.aspx](http://www.icao.com/environmental-protection/page/emissions%20trading.aspx)>Accessed 22/June/2015. Also see Report on Voluntary Emission Trading for Aviation (VETSReport) 2007. <http://www.google.com.my/?gws_rd=ss/#-report-on-voluntaryemission+trading+for+aviation>viewed 12 /June /2015.

which explores the potentials of regional and global emission trading systems as effective measures for mitigating the burden of aviation emission, is in essence set to establish the claim that emission trading can also serve as a Market Based Instrument (MBI) for achieving reduction in aviation emission, if comprehensive burden sharing system of Kyoto Protocol could not help.

In achieving the purpose above, this paper shall discuss the meaning and types of emission trading, the regional application of EU emission trading system, as well as the effectiveness of EU Emission Trading System. Further, this paper shall propose application of global emission trading system for global reduction of aviation emission and discuss the necessary steps for achieving this. Even though this paper agrees with the fact that emission trading stands to play an important role in limiting the increase in aviation emission, it is believed that it cannot be the overall single solution, but can also serve as a complimentary measure to Kyoto Protocol and ICAO SARPs on reduction of aviation emission.

2.0 THE MEANING OF EMISSION TRADING

Emission trading system (ETS), according to the Report on Voluntary Emission Trading for Aviation (VETS Report), is explained as a system whereby a limit is officially placed or capped on the total amount of emissions to be made by a firm, company, or regulated entities. Allowances in the form of permits to emit greenhouse gases could, therefore, be bought and sold by these regulated entities to meet emission reduction objectives.⁵ Also, ICAO, in its environmental protection report, refers to an Emission Trading system as a system whereby the total amount of emission is capped and allowances in the form of permits to emit CO₂ can be bought and sold to reduce and meet emission reduction objectives.⁶ Further to the above, the online dictionary has defined emission trading as a tradable permit system in which a green house gases emitter in a firm or a country is under an obligation to limit its total air pollution.⁷ It can be understood from all the above, that emission trading is a

5 See Report On Voluntary Emission Trading for Aviation (VETS REPORT) 2007 n.4.

6 See Emission Trading system, International Civil Aviation Organization, n.7 at 6.

7 See Dictionary.com for explanation on emission trading, 5.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

cost effective market based instrument used for achieving effective reduction in aviation emission. The highest volume of emission is set at political level, while negotiable emission allowances are issued to the emitters who are left to decide, independently, whether to reduce emission and sell emission allowance, or increase emission and buy allowance. Therefore, emission trading is a market based measure which has been considered a long term cost effective measure for reducing greenhouse gas emission made by the civil aviation and other industrial sectors. Under emission trading system, the market would establish the price of the emissions certificates, while those companies and industries that are able to reduce their emissions to the required standard would sell their emission permits to other companies and industries that would rather prefer to buy permits than reduce their emissions.⁸

Emission Trading has many important benefits which include making it possible for total amount of emissions to be decided and regulated by issuing allowances in the form of permits to operators in the aviation and industrial sectors to emit pollutants. Also, it makes possible for the international body or a central organization to regulate the overall quantity of access to the shared natural air resource. Emissions trading permit is different from ordinary permit scheme in the sense that the permit can be bought and sold on the market by the firms and companies.

Despite the importance, Emission trading mechanism has been criticized by many scholars as a failed market based mechanism due to some limitations. One of such is the fact that the setting of emission limit as a means of trading, as well as the reporting system, will have to be agreed upon and implemented. Meeting the above requirement will take time and also cause serious delay on the application of emission trading system.⁹

8 See A Guide to Emission Trading, United Nations Environmental Protection Programme. (UNEP)'s booklet gives a good explanation on emission trading available at <= viewed 20/June/2015.

9 Eric Cordina, "Aviation and Environment: A study on ways to limit the Environmental harm caused by Engine Emission and an Assessment of future Environmentally friendly Aircraft Engine Technologies," (PhD thesis, London City University, 2002), 28.

Another limitation of emission trading is fact that only carbon dioxide CO₂ emission is found to be the emission majorly considered by ICAO and other relevant organizations, while other options were to determine the contribution of other greenhouse gases to emissions by measuring other emission in CO₂ equivalent. However, the problem with the above approach is that there will be difficulty in comparing the effect of various emission gases adequately.¹⁰

It has been argued that since innovation will depend on cost of buying credit from offsetting project and innovation, emission trading may not encourage adoption of new technology. This is because if a firm buys credit before and after investing in new technology, incentive to innovate will not be increased on the part of that participating firm when next emission trading is introduced.¹¹

As part of limitations of emission trading, it has also been argued that emission trading will not automatically contribute to climate change protection but will only generate costs. As against the general belief, successful airlines will have to buy emission allowances for a considerable share of their flights. The purchase of allowance attracts so much money that could be invested in other fuel efficient technologies.¹²

It has further been argued that the level of environmental effectiveness of emission trading may not reduce emission from targeted source. The reason for this is that in a cap and trade system, it is believed that an adequately designed cap will provide opportunity for limiting emission from a group of polluters to a level lower than the current. Therefore, if the cap set is too high, there will be no challenge to meet the cap, and this will have no environmental effect. Also, if the cap set is, also, too stringent, there may be no sufficient reduction

¹⁰ Ibid.

¹¹ Annie Petsonk et. al, *Market Mechanisms & Global Climate Change*, (Washington DC) [347] <<http://www.C2es.org/publicationmarkek-mechanism-global-climate-change>> viewed 6, August, 2015.

¹² See "Emissions Trading: Harsh Criticism across the entire globe, Policy Brief," Lufthansa, Aviation Group Oct 2011. <<http://www.google.com.my/?gws.rd=ss/+q=aviation+harsh+criticism>>viewed 7 August, 2015.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

in emission. So, there is need to attach appropriate stringency and flexibility to emission trading for the purpose of getting adequate environmental result.¹³

One of the limitations of emission trading is poor political acceptance of the scheme by other relevant stakeholders, including airlines and other industry actors that have influence on aviation emission reduction. The fact of this claim is reflected in current state of conflict and refusal to comply with the EU emission trading scheme by the United States of America, China and India and the eventual adoption of stop clock policy on reduction of aviation emissions by the EU.¹⁴ The above shows how political acceptability can be a problem to operation of emission trading system.

However, regardless of all the above problems of emission trading, it is observed that interest in operation of emission trading has continued to increase among countries, as other countries like Denmark and Norway have established their national emission trading scheme.¹⁵ One of the advantages of emission trading on reduction of aviation emission includes the fact that it allows compliance and flexibility,¹⁶ *rather than rigid regulatory system of convention. This is because emission trading system permits each sector or entity to make its choice of emission credit and quantity to be traded in order to meet the target limit for emission reduction. The above is observed to make emission trading system better than the regulatory system of reduction of aviation emission which suffers from lack of compliance and flexibility over allocation of emissions to member states.*¹⁷

13 Richard B. Steward, "Models for Environmental regulation: Central Planning versus Market based approaches," Vol. 547 (1992) Boston College Environmental Affairs Review, 21.

14 See Report on Voluntary Emission Trading for Aviation (Vets Report) n. 6 at 9.

15 See IATA On What You Need to Know About Emission Trading <<http://www.iata.org>>, Also, see Martins Cames & Odetta Dember Kendecel, Emission Trading in International Civil Aviation, n. 11 at 47.

16 See Report on Voluntary Emission Trading for Aviation Emission (VETS report) n 4 at 7.

17 Allen Pei Jan and Annie Peterson, "The Skies: An Airline Based system for Limiting Greenhouse Gas Emissions from International Civil Aviation," Vol. 6 No 3 (2000) at 12 *Environmental Lawyer*, 793.

Another factor is that Emission trading guarantees effective control of emission across regulated entities or specific regions where it is applied. This is because incorporating an emission trading system into an environmental policy means that some effective environmental protection would be achieved across specific entities at a lower cost.¹⁸ According to Inter governmental Panel on Climate Change (IPCC) report, emission trading regime would likely meet environmental objectives at a lower cost, because it arranges overall environmental goals and the requirements for geographical flexibility.¹⁹ This benefit is observed to make emission trading better than the regulatory system of Kyoto protocol, where emission reduction was restricted to Annex 1 countries with the exclusion of developing countries.

Also, Emission trading is found to be a more reliable way to predict environmental outcome of emission reduction. Under this system, the overall quantity of emission is fixed, while the market is allowed to determine where reduction will take place. This certainty of value in reduction of aviation emission is said to make the system more reliable than the regulatory system.²⁰

In terms of cost, Emission trading, especially the cap and trade, is found to be cost effective in reduction of aviation emission. This is because the parties are free to choose, buy and use emission credit based on their determined emission quantity at minimum time and cost. Through this, emission can be effectively controlled without the parties subjecting themselves to the delay and indecision of the regulatory system.²¹

Further, Emission trading offers incentives to parties for reduction of emission. This is made possible in the sense that the trading of permit to pollute offers incentive for low cost companies to reduce emission and sell permits to higher cost companies. By so doing, the low cost companies are able to attract some

18 Ibid.

19 See Intergovernmental Panel on Climate Change Report on Climate Change, 1990.

20 Report on Voluntary Emission Trading for Aviation (VETS), International Civil Aviation Organization, Preliminary edition, n. 4 at 10.

21 Ibid.

incentives through participation in emission trading system.²² This is observed to be a better situation compared to that under regulatory system.

Emission trading, particularly the cap and trade system, has the advantage of minimizing the burden of information on the regulators. This is based on the fact that the information needed for burden sharing is transmitted through the market for emission permit and the fact that the polluters themselves shall determine where mitigation efforts are needed. This type of advantage is said to make emission trading more popular than regulatory system.²³

Examples of Emission Trading include the European Union Emission Trading System (EU ETS), Climate Change Scheme (CCX) in US, California Cap and Trade Scheme also in US, Quebec Cap and Trade System in Canada, Australian Carbon Price Mechanism in Australia, Korean Emission Trading System (Korean ETS), the New Zealand ETS and Kazakhstan Emission Trading System.²⁴ It should be noted, however, that some of the above named emission trading are, also, referred to as regional emission trading.

3.0 REGIONAL EMISSION TRADING IN AVIATION

Regional emission trading can be explained as a trade in emissions credit among many countries and involving many sectors.²⁵ As established by Kyoto protocol, emission trading is a major mechanism for achieving reduction in aviation emission and continued concern for reduction in aviation emission has led to continued development of regional emission trading around the world. At present, the European Union Emission Trading System (EU, ETS) stands as a foremost regional emission trading system. However, it has been

22 See Guidance on the use of Emission Trading for Aviation n.14 at 5.2.

23 Allen Pei Jan and Annie Petsonk n15 at 13. Also, see Tom Titenberg, *Emission Trading principles and practices 2nded*, Resources for the future, Washington DC, 2006, 12.

24 See Nikolaus Starbatty, n.4.

25 See Christopher Bohringer Bouwe Dijkstra and Knut Einar Rosendiakl, "Sectoral and Regional Expansion of Emission Trading," (2011), Statistics Norway Research Department, 4.

established that the United States of America (USA) and Canada are other examples of countries where development of Regional Emission Trading can be found, though may not be as active as the (EU ETS). The US has the Regional Greenhouse Gas Initiative (RGGI); it was launched in 2003 as the first emission trading system for reduction of emission from power plants.²⁶ There is Western Climate Initiative established in 2007 by US and Canada. There is also Quebec's Cap and Trade System launched by Canada in 2012. Even if the number is few, still, there is no doubt in the fact that the issue of interest in regional emission has spread.²⁷

Regional Emission Trading has two potential functions. It can serve as a mitigation tool within the global sectoral target, and it can also provide an example of multitude level approach for reduction of aviation emission beyond a total reliance on the international treaty regime. It is also of valuable importance if sectoral target of international aviation emission cannot be achieved. However, Regional emission can be weaker than global emission trading because of possible carbon leakage within the sector and complexity of monitoring its activities.²⁸

3.1 THE EUROPEAN UNION EMISSION TRADING SYSTEM

The European Union Greenhouse Gas Emission Trading System (EU ETS) was launched in 2005²⁹ as the world's largest multi- country and multi- sector

26 See Brian Murray C. Murray & Heather Hosterman, "Climate Change, Cap and Trade and the Outlook for US policy," Vol. 34 (2008-2009) *Journal of International Law and Commerce*, 669.

27 See Nikolaus Starbatty, Research Paper: Emission Trading Scheme n. 12 at 5. "Australia shelves key emission trading Scheme" BBC (27, April 2010) <http://news.bbc.uk/hi/world/asia-pacific/8645767.stm> viewed 30/12/2015.

28 See Jamine D. Scheelhease & Wolfgang G. Grimme, "Emission Trading for International Aviation-An Estimate of Economic Impact on Selected European Airlines" Vol. 13 (2007) *Journal of Air Transport management*, 253.

29 See EU Emission Trading System for Aviation: Questions and Answers (BDI) http://www.google.com.my/?gws_rd=ss/#bdi+emission+trading+system+for+aviation Accessed 13/6/2015> see Cinnamon Carlarne, Climate Change policy and ocean apart, United States and European Union Climate Change Policies Compared, 14 *Pen St Environmental law Review* 435. Also, see Commission of European Community Brussel 27/9/2005.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

emission trading scheme. It covered 10,000 power stations and industrial plants in 30 countries, whose carbon emissions make up 50% of Europe's total. Emission trading scheme operates on the basis that a cap on the total emission allowed within the scheme is set. Allowances adding up to the cap are given out to countries regulated by the scheme. The companies are to report their emissions and hand in an allowance for each trip they made. The EU emission trading system is a market based assessment of climate policy designed to increase the cost efficiency of greenhouse gases. As regards the issue of allocation of EU aviation emission allowances (EUAAAs), the yard stick used for this under the EU ETS is based on the average annual emissions of aviation activities between 2004 and 2006 (base line). In 2012, the value of allowances to be distributed will be 97%, and in subsequent years until 2020, this will be 95%. Out of these allowances, individual aircraft operators will be allocated 85% free of charge based on a distribution key. 15% allowance is auctioned by EU member states.³⁰ The proceeds of emission trading accrue to member states and should be earmarked and spent for climate protection purposes. It should also be noted that each member state is at liberty to decide for itself what the proceeds shall ultimately be used for.³¹

4.0 LEGALITY OF EU EMISSION TRADING SYSTEM

As regards legality of the application of EU ETS to international aviation, an examination of relevant international agreements such as the UNFCCC, the Kyoto Protocol, the Chicago Convention, and other laws like the EU law and bilateral air service agreements has confirmed that there are no restrictions on application of EU emission trading system to aviation industry. Buttressing the above, Article 4 (2)(b)³² of the United Nations Framework Convention on

Communication 459 from the commission to the council, the European Parliament, The European economic and social Committee and the committee of regions reducing climate change impact of aviation (Sec 2051184).

30 EU Emissions Trading System for Aviation: Questions and Answers n. 40 at 3.

31 Ibid, 3.

32 See Article 4 (2)(b), United Nations Framework Convention on Climate Change (UNFCCC)1992.

Climate Change (UNFCCC) requires developed countries to adopt national policies and take corresponding measures on mitigation of climate change. This article, together with article 3(3)³³ and article 4(1)³⁴ which states that parties can act individually or jointly to implement measures to mitigate climate change caused by transport sector, have clarified the position that the EU not only has the legal right under the UNFCCC to combat climate change but is also permitted to do this jointly under the platform of EU.

As regards the Kyoto Protocol, Article 2(1) (b)³⁵ requires that developed countries shall implement further elaborate policies and measures to reduce emission of greenhouse gases in the transport sector. Article 2(2)³⁶ states that parties in Annex 1 shall pursue reduction in greenhouse gases from aviation, working through International Civil Aviation Organization (ICAO). The above confirms that there are no restrictions to introduction of emission trading into the climate change regime.

With regard to Chicago Convention 1944, Article 11³⁷ of Chicago Convention, though not strictly related to aviation emission, states that the law and regulations of contracting states shall apply to admission and departure of aircraft from the territory of contracting states without consideration for nationality. The above means that EU must treat foreign aircraft as national aircraft, and it also shows that there is no restriction to inclusion of emission trading in international aviation.

33 See Article 3 (3), UNFCCC 1992 It states that parties should take anticipate, prevent and mitigate the causes of Climate Change and mitigate its adverse consequences.

34 See Article 4 (1) UNFCCC, it stresses that States should promote development, transfer of technologies, practices and processes that are aimed at mitigating aviation emission.

35 See article 2(1), Kyoto Protocol to the UNFCCC requires developed countries to develop elaborate policies and measures for reducing greenhouse gases in the transport sector.

36 See Article 2(2) of Kyoto Protocol to UNFCCC 1997.

37 See Article 11, Chicago Convention 1944, which states that law of the contracting state being visited shall apply to any aircraft at arrival or departure from such country without consideration for nationality of the aircraft. Also, see EU Emission Trading for Aviation: Questions and Answers (BDI), n. 40 at 9. See further, Giving Wings to Emission Trading, Inclusion of Aviation Under European Emission Trading System (ETS): Design and Impacts n. at 175.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

As for the EU law, Directives 2003/87/EC³⁸ establish emission trading to tackle climate change and Directive 2008/101/EC³⁹ especially includes tackling aviation emission activities in the EU ETS. Accordingly, Directive 2008/101/EC of the European Parliament and the Council amended Directive 2003/87/EC so as to include aviation emission activities in the scheme for Greenhouse gas emission allowance trading within the EU community. The Directive was adopted on 29th November, 2008 and came into force on 30th April, 2014.⁴⁰ All the above confirm that there is no restriction on inclusion of aviation emission in emission trading. The above also provides relevant legal basis for application of EU ETS to aviation.

However, there was a controversy on whether inclusion of all flights departing from, or arriving in, the EU is compatible with international law. Non- EU ETS countries argued that emissions outside the EU airspace fall under the rules of EU ETS and conceived this as an infringement of 1944 Chicago Convention which spells out sovereignty of each country over its own airspace. This matter led to a legal action between Air Transport Association of America and Others v. Secretary of State for Energy and Climate and the Accountability of International Organization for Members Obligations in 2009.⁴¹

According to the suit, it is observed that after the European Union (EU) enacted the aviation Directive 2008/1 which extends activities of the European Union Emission Trading Scheme of Cap and Trade to the airlines in the aviation

38 See Directive 2003/87/EC on how to tackle emission trading.

39 See Directive 2008/101/ EC on how to tackle aviation emission.

40 See Airport Transport Association of America (ATA) and Others v. Secretary of State for Energy and Climate Change and the Accountability of International Organisations for Member Obligations [2011] ECR 637. Also, see Gen Plant, "Air transport Association of America and Others v. Secretary of State for Energy and Climate Change and the Accountability of International Organisations." Vol. 107 No 1 (2013) American Journal of International Law, 183 - 192. See also, text of Directive 2000/101/EC of The European Commission published in the Official Journal of European Union, 13/1/ 2009.

41 See EU Emission Trading System for Aviation (BDI) n 40 at 9, where it was explained that even before pronouncement of court decision, a report by Advocate General Juliane Kolkott also stressed the importance of neutral implementation of EU ETS with inclusion of non European countries.

sector, Three American Airlines, the Air Transport Association of America and a Canadian Airline challenged the 2008 aviation directive on the ground of its implementation in the United Kingdom (UK) and Northern Ireland. The suit, which was before the High Court of England and Wales in 2010, was brought on the ground that the alleged extra territorial imposition of EU law was made with intent to impose tax on foreign airlines that travel outside the EU airspace and which amount to infringement of international law ; principles of customary international law, the Open Skies Air service agreement between the EU and the United States, the Convention on international Air Transportation and the Kyoto Protocol formed the bases of the plaintiffs' claim.⁴²

The matter which was eventually transferred to the court of Justice of the European Union (CJEU) in July 2010 under article 267 which deals with functioning of the European Union for preliminary ruling. The report made in October 2011, by Advocate General Juliane Kolkott showed non infringement of international law and recommended that the complaint be dismissed.⁴³ Following the Report of the Advocate General that the Directive was valid, the Court of Justice of the European Union, therefore, upheld the aviation Directive in December 2011.⁴⁴ The above also goes to show that there is no legal restriction for including emission trading in aviation emission.

4.2 APPLICATION OF EU EMISSION TRADING SYSTEM IN AVIATION

Application of EU Emission Trading in aviation formally took place in 2012⁴⁵ when EU added aviation to its scheme. This applied to all 28 member states of

42 See *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change and the Accountability of International Organisations for Member Obligations*, n. 63.

43 See *Including the aviation sector in the European Union Emission Trading Scheme Report with evidence HL 21 report of session 2005-06 European Union Committee of the House of Lords* at 67 online, <> viewed 15/July/2015.

44 See *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, n. 63.

45 *Aviation Challenges to EU Cap and Trade and Way Forward to a Global Emission Trading*, at 33, <<http://www.google.com.my/?gws_rd=ssl#aviation+challenges+to+EU+cap+trade+wayforward+global+emission+trading>> viewed 16/June/2015.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

EU as well as Iceland, Norway and Liechtenstein.⁴⁶ The process of application of EU Emission trading system is that EU imposed a cap on carbon dioxide emissions for all aircraft arriving or departing from EU airport with effect from 1st January 2012. The purpose is to enable airlines to buy and sell pollution credit on EU carbon market in order to control aviation emission.⁴⁷

Meanwhile, the idea to include aviation emission in the EU ETS (Emission Trading Scheme) had been mooted by EU way back in 2005. This is based on the fact that in 2004, ICAO had agreed to a resolution to endorse voluntary emission Trading Scheme that interested member states of ICAO might propose. Also, in 2010, ICAO pledged to undertake work to develop framework for Market Based Measures (MBMS) in international aviation for consideration at ICAO 38th Assembly.⁴⁸ However, because of the fact that the pledge made by ICAO could not materialise on time, and having observed that reaching global agreement among nations for arriving at ICAO condition on reduction of aviation emission would take time to achieve, EU decided to take unilateral action by implementing EU ETS scheme in aviation. In 2008, the EU had enacted Aviation Directive 2008/1 to include aviation activities in the European Union Trading Scheme and was applying this over all the airlines passing through the EU territories. As earlier reported in a section of this chapter, the Air Transport Association of America (ATA) and a Canadian Airline were opposed to this and sued the EU ETS authority in court in 2008 alleging territorial imposition of EU Law. The matter was finally determined by the Court of Justice of European Union in 2011 which held that the EU Aviation Directive 2008/1 was lawful and validly operated.

46 See Aviation and EU ETS, What Happened in 2012 during Stop Clock? Sand bag n. 37 at 13.

47 See EU Emission Trading System for Aviation: Questions and Answers (BDI) n. 40 at 3, See, also, Including the aviation sector in the European Union Emission Trading Scheme n. 53 at 68.

48 See Aviation Challenges to EU Cap and trade n. 50 at 34. Also, note that EU member states are individually members of ICAO and not that of EU itself.

However, the court victory for EU over Aviation Directive 2008¹ invoked heated accusation of unilateralism from several countries, and this later had effects on the formal take off of EU Emission Trading scheme in 2012. A group of nations, including the US, China, Japan and Singapore, concluded that including aviation in the EU ETS in the manner wanted by the EU will result in serious market distortion and, as such, agreed to consider several counter measures such as suspending the EU's traffic right, assessing legality of EU's measures under World Trade Organization and reviewing bi-lateral agreements. Besides, the fact of the EU's decision and inclusion of non EU airlines in the EU Emission Trading System led to resistance from many countries including US, China, Japan, Russia and India.⁴⁹ President Obama of the United States even signed European Union Emission Trading Prohibition Act, allowing US secretary of transportation to issue EU prohibition order preventing all US registered aircraft from participating in the EU Emission Trading Scheme in 2011.⁵⁰ At the same time, the unilateral action of EU had the effect of driving the discussion on aviation forward.

The EU eventually took note of this, and in order to allow ICAO Assembly meeting of 2013 to take place, it temporarily suspended enforcement of arrangement on EU emission requirement for 2013. It further confined application of emission trading system rule to countries within Europe by adopting the Stop Clock Policy at the 38 ICAO Session in 2013.⁵¹

49 See Emission Trading: Harsh criticism across the entire globe, Lufthansa Group 2012 <http://www.google.com.my/?gws_rd=ssl#q=emissions+trading+:+harsh+criticism+across+the+entire+globe>viewed 20/June/2015. Also, see David Lee, Bridging the Emissions Gap<<http://www.cate.mmu.ac.uk/projects/bridging-the-aviation-Co2-emission-gap-why-emissions-tradingneeded/>. See joint statement by China and Russia (27thsept2011)[http://www.greenaironline.com/photos/china-RussiaJoint statement on EU ETS EN.pdf](http://www.greenaironline.com/photos/china-RussiaJoint+statement+on+EU+ETS+EN.pdf).

50 See Aviation Challenges into EU Cap and Trade n53, 33. Also, see Obama signs "EU emission Trading prohibition" (Nov 2012) The European Institute <http://www.europeaninstitute.org/November-2012/Obama+signs-signs-que-emission-trading-prohibition-measure-1129+html/>. See also, 26 countries join to protest EU aircraft carbon emission norms (oct2011) The Economic Times <<http://articles.economictimes.india.com/2011-10-03/news/30238352.1.emission-trading=eu-carbon-dioxide>>.

51 See Aviation and EU ETS, What happened in 2012 during Stop Clock? Sandbag n. 35 at 16.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

Based on ICAO's proposal to implement emission trading scheme in 2020, the EU further adjusted its plan on cap and trade scheme that affects international aviation. The EU adopted a scheme for greenhouse gas emission allowance trading with the EU member states. This scheme is to cover the period 2014-2020 and will only cover emission within the airspace of EU states and exempt the aviation activities that take place outside airspace of EU.⁵²

4.3 THE EFFECTIVENESS OF EU EMISSION TRADING

In terms of effective coverage of relevant gases that cause greenhouse emissions, it is observed that the EU Emission Trading System is potentially effective in controlling carbon dioxide emission, and it has a tendency to include reduction of Nitrogen Oxide from aircraft.⁵³ The EU, therefore, has effective coverage of the requirement for controlling international emission. It has been observed that carbon dioxide (CO₂) and Nitrogen Oxide (NO_x) constitute the major gases affecting aviation transportation, and the EU scheme has a wide coverage for carbon dioxide while it has the potential to contain Nitrogen Oxide too.⁵⁴ Therefore, the current EU Emission Trading System which has a scheme for carbon dioxide, and can further extend to take care of Nitrogen oxide, is found effective for containing aviation emission.

In terms of trading with other sectors, it is equally observed that the EU Emission Trading System is a scheme that covers certain sectors and some

52 EU said ICAO Assembly Resolution won't stop ETS, Transport and Environment on line <<http://www.transportenvironment.org/news/2007/10/EU-Says-icao-assembly-resolution-wont-stopETS>> viewed 15/July/2515. Also, see Turbulence Ahead: Market Based Measure to Reduce Aviation Emissions, Policy Brief June 2013, Carbon Market Watch, 2.

53 See Joyce E Pener, et. al (eds), *Aviation and Global Atmosphere: Special Report of the International Panel on Climate Change*, Cambridge University Press, Cambridge 2009, at 9.

54 A number of changes were known to be made to EU ETS by the European Commission under its phase III; other gases such as N₂O emission from nitric production, Adopic and glycolic acid production and perfluorocarbons from aluminium sector are included. See EUROPA "Questions and Answers on the Revised Emission Trading System," MEMO 1769, Brussels, 17 Dec, 2008 <<http://europa.eu/rapid/pressReleasedAction.do?reference=MEMO108/796&format=0&1>> Accessed 20/July 2015.

economic activities within the sector. As a result of the fact that the airlines have been able to effectively engage in carbon trading with other sectors, the EU ETS has acted as an effective tool for curbing greenhouse gas emission, even though similar level of mitigation as in other sectors may not directly take place in the aviation sector.⁵⁵ However, it should be known that the purpose of expanding the coverage of emission trading by including more sectors is to increase efficiency of the EU ETS scheme.⁵⁶

The allocation method is another factor that contributes to effectiveness of EU Emission Trading System. This is because the EU ETS effectively combines the two methods of grandfathering (free allocation) and auctioning (where everyone bids for purchasing) for initial allocation of emission on aviation.⁵⁷ This system is eventually seen as a good compromise. Grandfathering is preferred in the trial phase of European trading system, while auctioning favoured incumbent polluters who have existing resources at the cost of environment. Allocating allowances on grandfathering has political advantage and has been accepted by many airlines.⁵⁸ Therefore, the combination of grandfathering and auctioning system has been found to be a good step for reduction of aviation emission. Even though it has been argued that airlines may not gain many benefits, it has achieved much reduction in aviation emission.

Allowing and restricting the use of credit offset from Kyoto protocol's project based on flexible mechanism of joint implementation is one of the factors

55 The EU ETS has been recognized as an open scheme promoting global innovation. The detail about this is contained in Europa website<http://ec.europa.eu/environment/climate/emission/index_en.htm> accessed 19/7/2015.

56 Harro Van Asselt, *The EU ETS in the European Climate Policy mix: past present and future* (2009) at 56 <<http://Sen.com/abstrac=1596892>> Accessed 18/July/2015.

57 See Ulrich Steppeler & Angela Kingmaker, *EU Emission Trading Scheme and Polluter Pay Principle. Do polluters pay under Grandfathering?* *Review of Law and Economics*, vol. 4, 2008, at 565.

58 See Article 3c of directive 2008/15/EC at 28: Grandfathering is the method for initial distribution of allowances free of charge to entities in an Emission Trading Scheme as observed on the history on Emission Trading, see *Guidance on the Use of Emission Trading for Aviation* at xii.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

that contribute to effectiveness of EU emission trading system. The EU ETS provides a certain amount of credit which aircraft operators shall use for a corresponding percentage of emission which shall not be below 15% of their verified emission during the period 2013-2020.⁵⁹ This allows airlines to use credits from offsetting project with a ceiling on the quantity of such credits. This EU approach on carbon offset stands as a good guidance to airlines on the rules for allowing and restricting access to Joint Implementation (JI)⁶⁰ and Clean Development Mechanism (CDM).⁶¹ This is a departure from the old practice where member states diverge in the implementation of linking directive on Joint Implementation and Clean Development.

However, the effectiveness of EU ETS should not be taken as absolute, as it has some shortcomings. Despite the level of effectiveness of the EU ETS above, it is observed that its emission policy can only cover limited geographical area, while its contribution to reduction of global aviation emission is still known to be poor. It is said that even if EU emission trading functions continuously, it will still send wrong message for climate Change policy as the geographical limit of the system can lead to carbon leakage and increase in global warming.⁶² Further, it is observed that the greatest growth in air transport will occur in Asia, South America and Middle East which are known as the regions which EU ETS cannot cover at all. Hence, the contribution of EU ETS to reducing global

59 The EU ETS has been recognized as an open scheme promoting global innovation. The detail of this is contained in Europa website <http://ec.europa.eu/environment/climate/emission/index_en.htm>viewed 19/July/15.

60 Joint Implementation is a mechanism under Kyoto Protocol whereby a developed country can receive emission units in return for financing projects that help to reduce greenhouse gas emission in another developed country, See, Guidance on the Use of Emission Trading For Aviation, ICAO at Xiii.

61 Clean Development Mechanism is a mechanism under Kyoto Protocol whereby developed countries finance greenhouse gas reduction or removal projects in developing countries and receive credit for doing so. Such credit when applied will now be used by the developed countries in meeting their commitments on mandatory limits on their emission.

62 See The Inclusion of Aviation Emission Trading System: An Economic and Environmental Assessment. Issue NO5,(2011),ICSTD Global Platform on Climate Change, Trade and Sustainable Energy,<<http://www.ictsd.org>, at 3. Also, see EU Emission Trading System for Aviation: Questions and Answers n. 48, at 6.

emission is known to be small after all. Besides this, the EU ETS is observed to have seen the need for rapid development of a global carbon market which will exhibit uniform framework condition on reduction of aviation emission in order to avoid distortions of competition.⁶³

Therefore, having discussed the effectiveness of EU ETS emission trading on reduction of aviation emission and having observed that the weaknesses of EU ETS have led to need for adoption of global emission trading for reduction of aviation emission, the adoption of global aviation emission trading system shall now be proposed.

5.0 PROPOSING A GLOBAL EMISSION TRADING IN AVIATION

Based on the need to ensure an effective measure for achieving global reduction of aviation emission, a global emission trading system is hereby proposed. Global Emission Trading is the process where all nations will use Emission Trading System in many sectors with the aim of reducing aviation emission. This global emission scheme, which should be a universally accepted practice for reduction of aviation emission among participants and different sectors, can initially be adopted in the form of sectoral emission scheme for the aviation sector, until a comprehensive global scheme is agreed upon.⁶⁴ Towards achieving the above, a means should be established for negotiating a link between global emission scheme and the regional emission trading scheme. Under the global system, a sectoral cap or target should be agreed upon through international negotiations to be facilitated by the UNFCCC, and all other airlines should participate. It is also proposed that the International Aviation Transporters Association (IATA) should be in charge of allocation of emission allowances at the initial stage, while verification and compliance should be handled by International Civil Aviation Organization (ICAO).⁶⁵

⁶³ Ibid 7.

⁶⁴ Allen Pen Jan Sai & Annie Petsonk "Tracking the skies" n. 24

⁶⁵ Ultrich Steppler and Angela Kulingwalter n. 68 at 34.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

The reason for proposing the above is that global emission trading system has a lot of advantages over the present EU regional emission trading system if adopted. These advantages are based on the fact that a global emission trading system will bring about uniform framework, in order to avoid distortion of conditions on reduction of aviation, and this will ensure that participant states are dissuaded from avoiding compliance with the regulations.⁶⁶ Also, a global approach will bring about global solution to reduction of aviation emission which will involve participation of all airlines in the world as against the current regional participation.⁶⁷ Further, a global approach on emission trading will reduce information burden on regulators globally, since polluters themselves will determine where mitigation efforts are most effective. Importantly, a non-discriminatory cap will be introduced, and this will equally take care of the emission responsibilities of the developed and non-developed member countries. In addition, a global approach will serve as an incentive to participating members for better performance. Also, whereas it is observed that EU Emission Trading will only reduce aviation emission by a small amount because it provides an isolated solution, emission trading at global level will reduce aviation emission by a large amount and will serve as an effective instrument for climate change control.⁶⁸

However, it is equally observed that the following conditions should be met for ensuring implementation of global emission trading system in the aviation sector. These include ensuring that under emission allocation method, all parties should be allocated emission allowance through auctioning system, and not both grandfathering and auctioning.⁶⁹ This is because relying on auctioning system will ensure that revenue realised from emission trading is used for funding environmental protection scheme.

66 Emission Trading for Aviation: Questions and Answers n. 48 at 7.

67 See Proposal for Global Emission Trading Scheme (GETS) for International Bunkers (Aviation and Shipping) Tyndal Briefing note No 26, (2008), Tyndal Centre for Climate Change Research.<ec.europa.eu/clima/policies/transport/aviation/index_en.htm>viewed 7 August 2015.

68 Ibid.

69 Fedrik Carlson & Henrich Hammar "Incentive based Regulation of CO₂ emission from international aviation emission," Journal of Air Transport Management Vol. 8, (2008), at 365.

Also, there should be a recognized authority that shall be in charge of allocating emission cap. The International Aviation Transporters Association (IATA) is suggested to handle the auctioning of allowances, because the association is well equipped to manage the auctioning process with airlines.⁷⁰ IATA is proposed for this role because of its role as the most significant private international economic aviation regulator.⁷¹

Apart from the above, the International Civil Aviation Organization (ICAO) shall be responsible for technical support on monitoring and compliance on regulating of aviation emission through global emission trading system.⁷² This is because it is important to ensure that the proposed global emission trading for aviation receives verification and compliance. This process which will entail enforcement with some administrative monitoring on participant countries and companies shall be executed by ICAO.⁷³ This is to be done with the purpose of ensuring participants compliance with agreement on standards for monitoring, reporting and verification of aviation emissions. Therefore, ICAO is to play a great role on monitoring, verification and compliance. ICAO's choice for this role is because ICAO is best equipped to handle the role of verification and monitoring of aviation emissions.⁷⁴ This is also made possible because, under Article 12⁷⁵ of Chicago Convention, every ICAO member state has

70 See remark of Giovanni Bisignani at aviation and the Environment Summit IATA Press, 22nd April 2008 <www.iata.org/pressroom/speeches/2008-04-21.htm> Also, see iata: IATA blasts European Union ETS Decision (24 October, 2008), <<http://www.iata.org/pressroom/pr/2008-10-24-02htm>> viewed 20/July/2015.

71 See Article VI, IATA Article of Association. This Article regulates affairs and activities of ICAO. Also, see John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge 2000) at 455.

72 For more information on enforcement, monitoring and transaction costs of emission trading, see Nicholas Stern, *the Economics of Climate Change: The Stern Review* Cambridge University Press, 2007 at 9.

73 See Robbert N. Stavins, "Transaction cost and Tradable permit" Vol.29 (1995), *Journal of Environment, Economics and Management*, 133.

74 See Chris Hewett & June Foley, "Plane Trading, Policies for Reducing the Climate Change Effect of International Aviation" (The Institute for public Policy Research, London 2000), 6.

75 See Article 12, Chicago Convention on Rule of the Air.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

the enforcement authority over aircraft flying over or manoeuvring within its territory and over every aircraft carrying its national mark. Such member states will require aircraft operators to carry sufficient allowances for all anticipated emissions to be made by aircraft during landing and take-off operation.⁷⁶

The role of the United Nations Framework Convention on Climate Change (UNFCCC) will, however, be to ensure that sectoral overall cap in Emission Trading set by international negotiations through the UNFCCC receives proper scrutiny when decided.⁷⁷ In this case, the UNFCCC is to facilitate International negotiation on emission limit, and importantly, it should be noted that the overall cap in the Emission Trading system will be set by international negotiation through the UNFCCC led sectoral approach on aviation emission.⁷⁸ In this case, the central environmental objective of emission trading is not going to be decided by IATA and cannot be undermined by ICAO. The scrutiny of emission above the total cap through UNFCCC is important and should not be reduced for the interest of the aviation industry.⁷⁹

Apart from the above, it is also proposed that airlines should be allowed to buy credit from carbon offsetting project up to a maximum limit, while there should be option of negotiating a linking mechanism with regional schemes like the EU Emission Trading System, as this will avail airlines the opportunity

⁷⁶ Ibid.

⁷⁷ For a discussion of Compliance and Accountability System considered by the UNFCCC Parties, see Anne Petsonk & Chad Carpenter "The Key to the Success of Kyoto Protocol, Integrity Accountability and Compliance," Vol 4, (May 28,1999), Linkage Journal, at 50.

⁷⁸ The UNFCCC will be suitable to perform its proposed assigned role of facilitating International negotiations on fixing the overall sectoral cap on Aviation Emission Trading, since Article 17 of Kyoto Protocol to UNFCCC allows Parties in Annex B to engage in Emission Trading as supplemental to domestic action for the purpose of meeting emission limitation. See Akinobu Yasumoto and Mutsuyoshi Nishimura, "A proposal for Global Upstream Emission Trading System," (2009) Harvard Project on International Climate Change Agreements at 1.

⁷⁹ For relevant discussion on compliance and accountability system, see Anne Petsonk and Clark Carpenter, The Key to the Success of Kyoto Protocol; Integrity, Accountability and compliance, 1999, Linkages Journal, Vol. 4 No. 2.

to reduce their greenhouse gas emissions. Not only that, the proposed global emission trading system will also serve as a mitigation tool for incentivising the airline industry to improve on energy intensity.⁸⁰ The purpose is to contribute to global solution to limiting greenhouse gas emission. Also, the international community can agree to provide favourable take off allowances to developing countries to the level of taking care of the principle of Common but Differential Responsibilities.⁸¹ Based on the above, ICAO, the UNFCCC and the airlines will function effectively to secure effective reduction of aviation emission from the Carbon offsetting and reduction mechanism for international civil aviation in the sense that ICAO shall monitor the progress made in the implementation of Carbon Offsetting measures to be introduced for meeting aviation emission reduction targets. The UNFCCC is to pursue reduction of Greenhouse Gas Emission from the aviation sector, working through the ICAO. The UNFCCC on its own shall serve as a window or platform for addressing member states of the United Nations on the issue of keeping to the threshold and limits on international aviation emission with a view to ensuring that member states obey the guidelines on emission allocation. The airlines, as collectively represented by IATA, will in turn use the emission credit offset they purchase to eliminate their excessive emission, and, once eliminated; such an offset will be deleted from being used by another airline again. The purpose of emission credit or offset is to reduce aviation emission, and buying an offset indicates a purchase of credit that has been found to be a real measure for reducing emission. While assuring effective synergy of operation on reduction of aviation emission among ICAO, UNFCCC and the airlines, it is, however, expected that the airlines which are also member states of ICAO should ensure high level of cooperation and compliance with ICAO on emission monitoring.⁸²

80 See Allen Pen Jan Tsai and Anne Petsonk, n. 24 at 793; Also see John Braithwaite and Peter Drahos, *Global Business Regulations*, Cambridge University press, Cambridge 2000, 445.

81 See Akinobu Yasumoto and Mutsuyosh Nishimura n. 102 at 2.

82 Carbon Brief, <https://wwwCarbon.Brief.org> accessed 21/8/19.

5. CONCLUSION

This paper examines the potential of EU emission trading system as a mechanism for reduction of international aviation emissions and proposed global emission trading.

Further, the paper explains about regional emission trading scheme and uses the European Union Emission Trading System (EU ETS) as a good example of regional trading system. Legal analysis for accepting the EU Emission Trading System into international aviation emission trading is made, as well as analysis on the effectiveness of EU Emission trading System. The EU Emission trading system is found effective in terms of coverage of relevant gases that cause greenhouse gas emissions, trading in carbon with other sectors, using effective emission allocation method and restricting the use of credit offset from Kyoto protocol offset. The paper, however, observed the limitations of EU Emission Trading in the aviation sector to include the fact that its emission policy can only cover some limited geographical areas, while its contribution to global reduction of aviation emission is still found to be poor. Based on the discussions on the effectiveness of EU Emission trading system, a global emission trading system is proposed. The reason for proposing global emission trading system is based on its numerous advantages, which include the fact that global emission is stronger than regional emission trading in terms of curbing global aviation emission, the fact that global emission trading will bring about uniform framework in emission reduction in order to avoid distortion of conditions and, also, for enhancing participation of all airlines and reducing information burden on regulators. It is, however, recommended that for an effective global emission trading system to be evolved, all airlines should be allowed to buy emission credit through emission auctioning system. The International Aviation Transporters Association (IATA) should auction emission allowances, while verification and compliance with emission allocation rules should be done by ICAO.

REFERENCES

1. A Guide to Emission Trading, United Nations Environmental Protection Programme (UNEP)'s booklet gives a good explanation on emission trading available at < viewed 20/June/2015.
2. Article 3c of directive 2008/15/EC.
3. Beatriz Martinez Romera and Aro Van Aselti, The International Regulation of Aviation Emission: Putting Differential Treatment in to practice, (journal of Environmental Law) vol. 27, 2015.
4. <<http://www.google.com.my/? rd=ss/#q=the+international+regulation+of+Aviation+emission+different+treatment+practice>>viewed 6, August, 2015.
5. International Civil Aviation Organization, ICAO, Under Pressure to Forge Deal on Aviation Emission, July 2014 at 2 Viewed 11 June, 2015.
6. Centre for Development and Environment, Policy Brief-Turbulence ahead: Market Based Measures to Reduce Aviation Emissions, Carbon Market Watch, June 2013 at 2
7. <<http://www.google.com.my/?gws rd=market based=measures+to+reduce+emission.>>viewed 10/June/201.
8. Directive 2003/87/EC on how to tackle emission trading.
9. Directive 2008/101/ EC on how to tackle aviation emission. Airport Transport Association of America.
10. Directive 2000/101/EC of The European Commission published in the Official Journal of European Union, 13/1/ 2009.
11. Eric Cordina, Aviation and Environment: "A study on Ways to Limit Environmental Harm Caused by Engine Emission and Assessment of Future Environmentally Friendly Aircraft Technologies," (LLM Thesis, London City University, 2002).
12. Harro Van Asselt, The EU ETS in the European Climate Policy mix: past, present and future (2009) at 56<<http://Sen.com/abstrac=1596892>>Accessed 18/July/2015.
13. International Civil Aviation Organization, ICAO Under Pressure to Forge Deal on Aviation Emission, July 2014 at 2 Viewed 11 June, 2015.

*Towards Effective Reduction of Global Climate Emissions:
Proposing Global Emission Trading as a more Efficient Option to Regional EU
Emission Trading on Reduction of Aviation Emission*

14. Europa website <http://ec.europa.eu/enviromet/climate/emission/index_en.htm>viewed 19/July/15 Chris Hewett & June Foley, "Plane Trading, Policies for Reducing the Climate Change Effect of International Aviation (The Institute for public Policy Research, London 2000).
15. Article 12, Chicago Convention on Rule of the Air.
16. Akinobu Yasumoto and Mutsuyoshi Nishimura, "A proposal for Global Upstream Emission Trading System," (2009) Harvard Project on International Climate Change Agreements.
17. IATA and Others v. Secretary of State for Energy and Climate Change and the Accountability of International Organisations for Member Obligations [2011] ECR 637.
18. Gen Plant, "Air transport Association of America and Others v. Secretary of State for Energy and Climate Change and the Accountability of International Organisations" Vol. 107 No 1 (2013) American Journal of International Law.
19. International Civil Aviation Organization, ICAO, Under Pressure to Forge Deal on Aviation Emission, July 2014 at 2 Viewed 11 June, 2015.
20. John Braithwaite and Peter Drahos, Global Business Regulations, Cambridge University Press, Cambridge 2000.
21. Ulrich Steppeler & Angela Kingmaker, EU Emission Trading Scheme and Polluter Pay Principle: Do polluters pay under Grandfathering? Review of Law and Economics, vol. 4, 2008.
22. Article 3c of directive 2008/15/EC.

A CRITICAL ANALYSIS OF TRANSACTION AVOIDANCE IN INSOLVENCIES WITH SPECIAL REFERENCE TO EXTORTIONATE CREDIT TRANSACTIONS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Varendyam Jahnawi Tiwari*

Abstract

The Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as “IBC” or “Code”] is the extant law and an assimilated Code unifying the different legal regimes dealing with insolvencies and bankruptcies in India. The IBC is a good-piece of legislation and has recently been declared constitutionally valid in its entirety by the Apex Court in Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.¹ It is a significant effort in addressing the concerns of the creditors whose interests are adversely affected due to asymmetry of information that exists between the creditors and the corporate debtors. When an entity is financially distressed, the promoters and the directors of the company are the first to get alarmed at the situation, and not the creditors. Thus, there exists a high probability that they may alienate the assets of the company to the detriment of the creditors by reducing the liquidation estate, which is against the principle of anti-deprivation rule quite popular in England.² Hence, transaction avoidance laws are important for regulating such evasive behaviour of the debtors and restraining them from entering into transactions for a certain time prior or during the insolvency, which might adversely affect the rights of all the creditors or a few of them.

Among various forms of avoided transactions, this paper focuses on the ‘extortionate credit transactions’ and highlights that the existing provision³ faces various challenges

* The Author duly acknowledges the extensive and quintessential assistance extended by Mr. Anmol Jain in research and articulation of the paper.

1 *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 99 of 2018.

2 *Moon v. Franklin*, [1996] BPIR 196.

3 Insolvency and Bankruptcy Code, 2016, §50.

and issues related to interpretation and implementation. §50 of the IBC provides for avoiding such transactions entered into by the debtor in the two years preceding the insolvency commencement date in order to keep the asset value intact and secure the interest of all the creditors at par with the interests of the creditor involved in the said transaction. Though the term ‘extortionate credit transaction’ is not defined in the IBC, necessary indication is provided under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 [hereinafter referred to as “IBBI Regulations”]. The remedies envisaged under the IBBI Regulations are inadequate, ineffective, and too stringent in nature and create absurd legal fictions. Therefore, this paper is an attempt to holistically study the foundations of the IBC and, particularly §50, undertake a comparative study and recommend necessary changes in order to derive a flawless §50.

INTRODUCTION

The concept of insolvency is not a new concept, though it is definitely symbolic of an organized human society. With the evolution of concepts like obligation, credit, debt, property, assets, commercial trade and exchange, the concept of insolvency has gained recognition. Many a time, entities feel that they would gain from certain transaction but, eventually, due to misfortune or mismanagement, unsatisfactory outcomes appear. Consequently, there comes a time when the possibility of gain becomes an impossibility, and the entity finds itself in a sea of debts. The debtor either experiences ‘*balance-sheet insolvency*’ (also referred to as ‘*absolute insolvency*’) when his combined total outstanding liabilities exceed the current measurable value of all his assets, or ‘*cash-flow insolvency*’ when the debtor cannot maintain enough liquidity to ensure timely payment of debts. The latter form is associated with the concept of ‘*liquidity risk*’ and is often termed as ‘*liquidity-crisis*.’⁴

Timely identification and effective resolution of such situations is imperative for a better management of funds and enhanced investor confidence in an economy. Addressing the same requirements, the Insolvency and Bankruptcy Code [hereinafter referred to as “IBC” or the “Code”] was enacted to

⁴ Dennis Faber, *Commencement of Insolvency Proceedings* (Niels Vermunt, Jason Kilborn, Tomas Richter, eds. 2012).

consolidate and amend the previously scattered laws relating to the resolution of insolvencies of corporations and bankruptcies of individuals. It is an assimilated legislation, focusing on a time-bound resolution of stressed entities, followed by liquidation⁵ at the earliest with intent to maximise the creditor's return by preventing reduction in the value of assets with undue passage of time.⁶ It is a step forward from a state of unclear, inconsistent and inefficient resolution procedure prevailing under the cumulative application of multiple laws⁷ and in multiple forums.⁸

The Code is a significant effort in addressing the concerns of the creditors whose interests were adversely affected due to asymmetry of information between the creditors and the corporate debtors. When an entity is financially distressed, it is the promoters and the directors of the company who first get alarmed at the situation, and not the creditors. Thus, there exists a high probability that they may alienate the assets of the company to the detriment of creditors by reducing the liquidation estate, which is against the principle of 'anti-deprivation rule'.⁹ The rule states that no person can contract with the insolvent party through an arrangement that gives her any additional advantage from the bankruptcy estate and deprive other creditors of their due share in the assets undergoing liquidation/bankruptcy proceedings or administration.¹⁰

5 Especially in cases where the resolution is not possible owing to reasons like failure to come up with a resolution plan or if the corporate debtor contravenes the plan, etc.

6 The Insolvency and Bankruptcy Code, 2016, preamble.

7 See The Sick Industrial Companies (Special Provisions) Act, 1985; The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002; The Recovery of Debts Due to Banks and Financial Institutions Act, 1993; Companies Act, 2013.

8 Bankruptcy Law Reforms Committee, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (Nov. 2015) ¶3.3.1 cited in *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 99 of 2018, ¶6; *Madras Petrochem Ltd. and Anr. v. Board of Industrial and Financial Reconstruction and Ors.*, (2016) 4 SCC 1, ¶40; *Innoventive Industries Ltd. v. ICICI Bank and Anr.*, (2018) 1 SCC 407 ¶13; *Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Ors.*, Civil Appeal Nos. 9402-9405/2018, ¶62.

9 *Moon v. Franklin*, [1996] BPIR 196, Here, it was seen that the debtor transferred the matrimonial home into the name of spouse and a civil partner to avoid the stress and embarrassment of a forced sale.

10 *In re Jeavons, ex parte Mackay*, 8 LR CH App 643(1873).

One of the earliest application of this doctrine was evidenced in *Whitmore v. Mason*,¹¹ wherein it was clearly held that no bankrupt person shall possess any property in a manner that it shall pass on to another and not its creditors. In another significant case, *Belmont Park Investments Pty. Ltd. v. BNY Corporate Trustee Services Ltd & Anr.*,¹² while differentiating between the two basic premises of the English Insolvency Law, i.e., the “anti-deprivation rule” and “*pari-passu* distribution principle,” Lord Collins held that:

“While anti-deprivation rule is aimed at attempts to withdraw an asset on bankruptcy, thereby reducing the value of the insolvent estate to the detriment of the creditors; the pari-passu rule reflects the principle that statutory provisions for pro-rata distribution may not be excluded by a contract which gives one creditor more than its proper share.”

One of the finest instance of adoption of a similar position in the Indian jurisdiction could be §49 of the IBC which concerns undervalued transactions deliberately entered by the debtor in order to defraud the creditors by keeping the assets beyond the reach of such creditors.¹³ The rationale for inserting this

11 *Whitmore v. Mason*, (1861) 2 J & H 204.

12 *Belmont Park Investments Pty. Ltd. v. BNY Corporate Trustee Services Ltd & Anr.*, 38 UKSC [2011].

13 The Insolvency and Bankruptcy Code, 2016, §49:

“49. Transactions Defrauding Creditors.-

Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45, and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor -

- (a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or
- (b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order —
 - (i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and
 - (ii) protecting the interests of persons who are victims of such transactions:
Provided that an order under this section—
 - (a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and

provision in the Code, as provided in the Bankruptcy Law Reform Committee Report,¹⁴ is similar to the anti-deprivation rule existing in the United Kingdom.¹⁵ The Report places its reliance on §423 of the Insolvency Act, 1986 (UK), which delineates the invalidity of transactions which are entered upon to deprive the creditors of the assets of the insolvent party.

Hence, the Code is seemingly quite a veritable effort and lays down a platform for regulated reorganization and insolvency resolution of corporate persons, firms and individuals in a time bound manner for the maximization of asset value.¹⁶ At the same time, the entities must ensure that their transactions are sterling and are not meant to defraud the creditors, because if such transaction exists, then a need might arise to avoid such transactions for an effective resolution or liquidation, as the case may be.

Now, the pertinent query to resolve is *why* a corporate debtor enters into an undervalued or extortionate credit transactions? We believe that the answer lies in the underlined principles of the Indian form of insolvency resolution model.

(b) *shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.*"

14 Bankruptcy Law Reform Committee, *Interim Report of the Bankruptcy Law Reform Committee* (Feb. 2015) 98-99.

15 However, the authors argue that there are two significant differences between §49 of the Code and the anti-deprivation doctrine. *First*, §49 of the Code envisages those transactions where the *mala fide* intention (to deprive other creditors of its assets by entering into fraudulent and undervalued transactions) is on the part of the corporate debtor; whereas in the anti-deprivation doctrine, a similar *mala fide* intention has to be shown on the part of the third party. Furthermore, in cases involving violation of the anti-deprivation doctrine, the modern tendency has been to uphold the commercially justifiable contractual provisions, unless they are blatantly depriving the creditors of the assets of the insolvent party – *See Folgate London Market Ltd. v. Chaucer Insurance Plc.*, 328 EWCA Civ (2011). On the contrary, Section 49 of the Code does not allow the exception of party autonomy to prevail in the cases of such fraudulent and undervalued transactions – *See Varendyam Jahnawi Tiwari & Atyotma Gupta*, 'Developing an Interface between Treatment of Contracts and Insolvency Proceedings – A Comparative Analysis of the United States, the United Kingdom and India,' in Dr. A.K. Singh ed., *Legal Dynamics* (2018) 17.

16 The Insolvency and Bankruptcy Code, 2016, preamble.

The Indian Legislature adopted the “*creditor in control*” model for the insolvency resolution procedure, unlike the “*debtor in possession*” model prevailing in the US. The difference between the two regimes is apparent on a *prime facie* study of the United States Bankruptcy Code, 1978 [“USBC”] and the IBC. §1121 of the USBC states that *only the debtor may file a plan until after 120 days after the date of the order for relief*, which could be extended to 18 months by the Bankruptcy Court.¹⁷ In contrast, the IBC specifically excludes a corporate debtor from filing an application to initiate the corporate insolvency resolution process¹⁸ and deems her ineligible to be a resolution applicant.¹⁹

The US was not following the “debtor in possession” model since the inception of the corporate reconstruction thought, first conceived in 1938.²⁰ Prior to this, the federal laws only addressed individual bankruptcies, and insolvencies were addressed by the federal courts using their equity powers and the non-uniform separate laws of the US States.

Article 1 of the US Constitution confers upon the Congress the power to establish uniform laws on the subject of bankruptcies.²¹ A power conferred in 1787 was not utilized until the year 1800, immediately after the US was hit by depression of 1798.²² However, the law could not survive long and was repealed in 1803. It was followed by multiple enactments and repeals in the nineteenth century, 1898 witnessing the last version enacted to address the financial debacle of 1893.²³

The first attempt to revamp the US bankruptcy law in the twentieth century and to provide for corporate reconstruction took place in 1938 to address

17 The United States Bankruptcy Code, 1978, §1121(b), (d)(2)(A).

18 Insolvency and Bankruptcy Code, 2016, §11.

19 Insolvency and Bankruptcy Code, 2016, §29A.

20 The US did have a federal bankruptcy regime since long, a regime that witnesses multiple laws coming and going together with the economic cycles of recessions.

21 The Constitution of the United States, art. 1, §8.

22 Bankruptcy Act, 1800; Vincent L. Leibel Jr., ‘The Chandler Act – Its Effect Upon the Law of Bankruptcy,’ 9 Fordham L. Rev. 380 (1940).

23 The Bankruptcy Act, 1898.

the impacts of the Great Depression.²⁴ Prior to this enactment, the US was following the “creditor in control” approach,²⁵ only to register high number of matters of collusion between the debtors and financial creditors to decrease the value of assets to acquire them again from the creditors in detriment to the operational and unsecured creditors. This practice used to virtually wipe out the entire share of the latter. Therefore, the 1938 Act manifested the demands raised since 1926 to put limitations on the control of the creditor over the insolvency procedure:

*“Creditor control in bankruptcy proceedings should be limited to cases of general creditor interest, and creditor’s committees should be authorized to assist in the administration.”*²⁶

Since then, the US is following the “debtor in possession” approach in addressing insolvencies and bankruptcies. This model also presents a hidden benefit to the creditor, i.e., it induces the creditors to conduct efficient due diligence before extending credit, ensuring that reckless and bad lending is prevented.²⁷

However, as India follows the “creditor in control” model,²⁸ it allows the possibility of extortionate credit transactions for two reasons:

24 The Bankruptcy Act, 1938; For a counter opinion, See Vincent L. Leibel Jr., ‘The Chandler Act – Its Effect Upon the Law of Bankruptcy,’ 9 Fordham L. Rev. 380 (1940): *Unlike much recent legislation, the Chandler Act was not the result of any sudden pressure or desire to meet an emergency. When it was finally presented to Congress, it had behind it years of research and discussion.*

25 See Walter Chandler, ‘The Revised Bankruptcy Act of 1938’, 24(11) American Bar Association J. (1938).

26 *Ibid*; See Walter D. Coles, ‘The Solicitor General’s Bankruptcy Report and New Bankruptcy Bill,’ 18(5) American Bar Association J. (1932).

27 See Joseph Stiglitz, *Globalisation and its Discontents* (2002) 237.

28 The Insolvency and Bankruptcy Code, §29A. It is believed in the Indian jurisdiction that if the corporate debtor himself is the reason for the invocation of the Corporate Insolvency Resolution Process, s/he cannot be allowed to provide a solution to resolve it: See *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 99 of 2018, ¶63 citing Speech of the Finance Minister while moving Section 29A, Statement of Objects and Reasons, *Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Ors.*, Civil Appeal Nos. 9402-9405/2018, ¶27-29; *Chitra Sharma v. Union of India*, Writ Petition (Civil) No. 744 of 2017, ¶31-32.

1. Instead of extending credit with sufficient due diligence, the creditors might release credit following a lackadaisical approach while charging higher interest rate to secure their position when the debtor anticipates insolvency; and
2. The debtors are left with no option but to accept such credit to keep the business away from insolvency. Acceptance of credit becomes an imperative for the debtors because but for the credit, they shall lose control over their business to the Committee of Creditors and the Resolution Professional under the “creditor in control” model.

§50 of the IBC empowers the adjudicating authority to avoid such extortionate credit transactions; however, we argue that the provision faces various challenges and issues. This paper is an attempt to establish that the IBC has failed to provide an effective mechanism to deal with such transactions. It has been stated elsewhere that while dealing with the avoidance provisions, courts have failed to ascertain the underlined rationale for the existence of these provisions.²⁹ Therefore, in Part I, we shall discuss the concepts of transaction avoidance and extortionate credit transactions in detail to fill the judicial void, which shall help us to appreciate the inclusion of §50 in the IBC, as discussed in Part II. In Part III, we shall highlight the problems attached to §50 and include a comparative analysis while discussing the UK Insolvency Act, 1986. Finally, Part IV shall envisage certain recommendations to make §50 remedy more effective.

PART I: TRANSACTION AVOIDANCE AND EXTORTIONATE CREDIT TRANSACTIONS

1. Transaction Avoidance

The role of credit is indispensable in an economy. Credit dealings allow a corporation to take risks with an aim to gain higher profit. Sometimes, the risk proves to be unmerited (either due to non-controllable circumstances,

²⁹ Andrew Keay, ‘In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions,’ 18 Sydney L. Rev. 55 (1996).

deliberate guilefulness or negligence) resulting in unfulfilled obligations on part of the debtors and, therefore, credit brings with itself the perils of insolvency.

In the matters of insolvency, usually a collective procedure to administer the debtor's assets is adopted to secure a fair distribution among all creditors after the claims are collated and verified. However, it has been witnessed on multiple occasions that the debtors try to adopt evasive behaviours to reduce the assets available for insolvency procedures and administration. This is considered to be contrary to the collective interest of the creditors. Hence, the insolvency laws of most of the jurisdictions employ provisions to avoid such abusive transactions keeping in mind the principle of *anti-deprivation* and *pari-passu* distribution.

At the time of insolvency anticipation, it is natural for creditors to respond to the insufficiency of assets by demanding excess credit terms or demanding security in order to have an edge over other creditors. For instance - in England, the executory contracts survive during insolvency and is enforceable by either party even if there is administration or liquidation going on. Thus, in a supply contract, the suppliers have been found to be charging higher prices for the continued supply of goods to a receiver facing insolvency risks.³⁰

It is undisputed that such transactions qualify as extortionate, and they undermine the essence and objective of the scheme of distribution applicable in cases of insolvency – *pari passu distribution*. Hence, provisions concerning transaction avoidance become cardinal and indispensable to secure the collective interest of all the creditors. The English courts have identified this significance of transaction avoidance and held that:

*“Where the receiver is demanding increased prices from the customer in order to secure ongoing supplies and the customer has no source of supply, then the receivers are exploiting customer’s vulnerability.”*³¹

30 *In re Transtec Automotive (Campise) Ltd.*, 403 BCC (2001).

31 *In re Transtec Automotive (Campise) Ltd.*, 403 BCC (2001). However, merely asking for due payments before further supplies has been held to be valid – *See Leyland DAF Limited v. Automotive Products Plc.*, 389 BCC (1993): “*when payment is overdue for goods supplied,*

The practice of avoiding transactions is neither a new phenomenon, nor does it locate its growth in the doctrine of unconscionability. In fact, an enactment issued by Edward III in 1376 is the first recorded evidence of this practice, wherein the creditors could recall property transferred to friendly third parties in an execution.³² Emerging from the notions of insolvency, transaction avoidance has now widened its scope and the most common application is manifested in the form of nullity of unconscionable contracts.³³

Transaction avoidance provisions, in the IBC, focuses upon the undervalue transactions, preferential transactions and extortionate credit transactions. Given the vast nature of the jurisprudence on these three transactions, we have restricted the scope of this paper to extortionate credit transactions.

2. Extortionate Credit Transactions

Defining the phrase from the debtor's perspective, extortionate credit transactions are onerous transactions involving an unfairly high rate of interest or unfair credit terms (such as severe default provisions) usually entered when the debtor is in a financially vulnerable condition.³⁴ From the creditor's perspective, such transactions are perceived as an exploitation of the debtor's impuissant position to her advantage. The Black's Law Dictionary equates extortionate credit transactions with loan sharking and defines the latter as the practice of lending money at excessive and especially usurious rates and, often, using threats and extortion to enforce repayment.³⁵

then the supplier is under no obligation to continue supplies and the refusal to deliver further goods until payment has been made for the dues cannot be regarded as an abuse of dominant position under Article 86 of the Treaty of Rome." The Court of Appeal was of the opinion that asking due payments as pre-conditions is a normal and a reasonable behaviour in a competitive market.

32 50 Ed 3 c6: *Fraudulent assurances of land or goods, to deceive creditors, shall be void.*

33 Hamish Anderson, *The Framework of Corporate Insolvency Law* (2017) 174; See *Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr.*, (1986) 3 SCC 156.

34 Ashish Makhija, *Insolvency and Bankruptcy Code of India* (2018) 992.

35 Extortionate Credit Transactions or Loansharking, *Black's Law Dictionary* (9th ed. Bryan A Garner ed.) 1022; See Extortionate Credit Transactions, *Words and Phrases*, 15B W&P (Permanent ed. 2004) 394.

In the Companies Act, 2013, or in its predecessor law, the Companies Act, 1956, there was no specific provision relating to extortionate credit transactions. However, §535 of the Companies Act, 1956, and §333 of the Companies Act, 2013, envisaged provisions regarding the disclaimer of onerous obligations and assets. These provisions are worded similar to §62 of the Presidency Towns Insolvency Act, 1909.³⁶

Judicially, the England and Wales Court of Appeal have defined the term ‘extortionate’ as:

*“‘Extortionate’ like ‘harsh and unconscionable,’ signifies not merely that the terms of the bargain are stiff, or even unreasonable, but that they are so unfair as to be oppressive. This carries with it the notion of morally reprehensible conduct on the part of the creditor in taking grossly unfair advantage of the debtor’s circumstances. . . . At least, a substantial imbalance in bargaining power of which one party has taken advantage.”*³⁷

36 Presidency Towns Insolvency Act, 1909, §62:

“62. Disclaimer of onerous property.-

- (1) Where any part of the property of an insolvent consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the official assignee may, notwithstanding that he may have endeavored to sell or have taken possession of the property, or exercised any act of ownership in relation thereto, but subject always to the provisions hereinafter contained in that behalf, by writing signed by him, at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property: Provided that, where any such property has not come to the knowledge of the official assignee within one month after such adjudication as aforesaid, he may disclaim the property at any time within twelve months after he has first become aware thereof.*
- (2) The disclaimer shall operate to determine, as from the date thereof, the rights, interest and liabilities of the insolvent and his property in, or in respect of the property disclaimed, and shall also discharge the official assignee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the insolvent and his property and the official assignee from liability, affect the rights or liabilities of any other person.”*

37 *Paragon Finance Plc. v. Nash*, [2001] EWCA Civ 1466.

Such transactions, in most of the cases, are manifested when either of the parties possesses unequally higher bargaining power than its counterpart. For instance, when the entities anticipate insolvency, the prospective creditors sense a position of dominance and higher bargaining power, a position apt for exploitation of the debtors through unscrupulous transactions.³⁸ Any transaction resulting from the abuse of such dominant power shall lack true freedom of contract,³⁹ an idea highly signified under the Indian law,⁴⁰ as it ensures that economic interests of the community are secured.⁴¹

Even if it is found that the extortionate transaction was freely entered without the abuse of position, we argue that the freedom of Contract is a contextual necessity and is not an absolute requirement.⁴² The law shall not uphold such transactions for the larger public interest, because accepting extortionate credit from a particular creditor is disadvantageous to the other creditors who had extended credit at a fair interest rate.⁴³ If a party is found to be misusing such freedom against the collective interest of the other creditors by way of diminution of the asset value,⁴⁴ then the right of the creditor involving in

38 Rebecca Parry, 'Extortionate Credit Transactions (Insolvency Act 1986, Sections 244 and 343),' in *Transaction Avoidance in Insolvencies* (Rebecca Parry *et al.* eds., 3rd ed. 2018) 197.

39 *LIC of India v. Consumer Education and Research Centre*, (1995) 5 SCC 482, ¶ 32, 37.

40 Indian Contract Act, 1872, §10 specifically states that: "All agreements are contracts if they are made by the free consent of parties..." Further, §14 defines free consent as the one which is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

41 *Anson's Law of Contracts* (J. Beatson *et. al* eds., 30th ed. 2016) 4; *Chitty on Contracts* (25th ed., Vol. 1 ¶4) cited in *Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr.*, (1986) 3 SCC 156, ¶79; *See State of Kerala v. State of Tamil Nadu*, 2018 Indlaw SC 71, ¶111-114.

42 *See* G.H.L. Fridman, 'Freedom of Contract,' 2 *Ottawa L. Rev.* 1 (1967).

43 Rebecca Parry, 'Extortionate Credit Transactions (Insolvency Act 1986, Sections 244 and 343),' in *Transaction Avoidance in Insolvencies* (Rebecca Parry *et al.* eds., 3rd ed. 2018) 197.

44 *Rubin v. Eurofinance SA*, [2012] UKSC 46; Roy Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011) 521-22; *See* Report of the Review Committee, *Insolvency Law and Practice* (Cmnd 8558, June 1982, United Kingdom), ¶1200-1209; Department of Trade and Industry, *A Revised Framework for Insolvency Law* (White Paper, Cmnd 9175, 1984, United Kingdom), ¶62.

the extortionate transaction could be constrained to strike a fair balance⁴⁵ by employing the tool of transaction avoidance and setting aside such transactions. This preserves the collective nature of the insolvency proceedings.⁴⁶ If such transactions are allowed to exist, it might reduce the company's net asset value, invoke a potential of injustice and unfairness, and defraud the other creditors by breaching the principle of *pari passu* distribution, because a particular creditor might unjustly acquire more payments in returns of the loan by capitulating the vulnerability of the debtor.⁴⁷

It has been argued elsewhere that provisioning for setting aside the extortionate credit transactions might lead to rationing of credit resulting in the reduction of the availability of credit.⁴⁸ A higher interest rate is thus justified to maintain the flow of credit, because the prospective creditors would be suffering from high probability of default in repayment due to vulnerable financial position of the debtor.⁴⁹ Therefore, while respecting and providing enough space to such scepticism regarding repayment, only those transactions are labelled as extortionate which a debtor would not indulge in but for his anticipation of insolvency and imminent need for credit.⁵⁰ Moreover, it has been observed by Rebecca Parry that practical instances of extortionate credit transactions are rare in cases of companies owing to the efficient financial regulations and

45 Report of the Review Committee, *Insolvency Law and Practice* (Cmnd 8558, June 1982, United Kingdom), ¶1481-1484.

46 Department of Trade and Industry, *A Revised Framework for Insolvency Law* (White Paper, Cmnd 9175, 1984, United Kingdom), ¶62.

47 *Rubin v. Eurofinance SA*, [2010] EWCA Civ 895: *Here, the Court stated that the avoidance provisions are integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters; Angove's Pty Ltd. v. Bailey*, [2016] UKSC 47.

48 J. Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law,' 63(3) *Modern Law Review* 355 (2000).

49 Rebecca Parry, 'Extortionate Credit Transactions (Insolvency Act 1986, Sections 244 and 343),' in *Transaction Avoidance in Insolvencies* (Rebecca Parry *et al.* eds., 3rd ed. 2018) 197.

50 See Report of the Review Committee, *Insolvency Law and Practice* (Cmnd 8558, June 1982, United Kingdom), ¶1481-1484. The use of the word 'gross' in the UK law or 'exorbitant' and 'unconscionable' in the IBC ensures that the power of the creditor to decide the value for the credit extended is not controlled beyond necessity.

competitive nature of the credit market,⁵¹ and thus, such scepticism is not practically relevant.⁵²

Having elaborated upon the understanding of extortionate credit transactions and the principles underlined in the practice of avoiding such transactions, we shall reflect upon §50 of the IBC, which is with respect to this practice.

PART II: §50, INSOLVENCY AND BANKRUPTCY CODE, 2016

The IBC does not define the term ‘extortionate credit transaction,’ but provides that the liquidator or the resolution professional can apply to the adjudicating authority for the avoidance of such transactions involving the receipt of financial or operational debt⁵³ entered into within the two years preceding the insolvency commencement date.⁵⁴ The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 [hereinafter referred to as “**IBBI Regulations**”], provide necessary guidance with respect to the scope of the

51 Rebecca Parry, ‘Preferences and Other Transaction Avoidance Provisions in Insolvency’ (PhD Thesis, University of Manchester, 1997) cited in Rebecca Parry, ‘Extortionate Credit Transactions (Insolvency Act 1986, Sections 244 and 343),’ in *Transaction Avoidance in Insolvencies* (Rebecca Parry *et al.* eds., 3rd ed. 2018) 198.

52 However, when it comes to individuals and their bankruptcy anticipations, a higher number of extortionate transactions are recorded owing to the lack of individual asset holding: See D. Milman, *Personal Insolvency Law, Regulation and Policy* (2005) 111; See Berthoud & Kempson, *Credit and Debt* (1992).

53 V.S. Wahi’s, *Treatise on Insolvency & Bankruptcy Code* 465 (2018).

54 The Insolvency and Bankruptcy Code, 2016, §50:

“50. *Extortionate credit transactions.*—

(1) *Where the opposite debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional, as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.*

(2) *The Board may specify the circumstances in which a transaction which shall be covered under sub-section (1).*

Explanation – For the purpose of this section, it is clarified that any debt extended by any person providing financial services, which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.”

provision, and it states that a transaction shall be considered as an extortionate credit transaction where its terms:

- “(1) *require the corporate debtor to make exorbitant payments in respect of the credit provided; or*
- (2) *are unconscionable under the principles of law relating to contracts.*”⁵⁵

For instance, where the corporate debtor has been charged with an unfairly high rate of interest or has been subject to a severe default provision, such terms could be deemed as extortionate under §50 of the IBC.⁵⁶ On finding the transaction as extortionate, the adjudicatory authority can undertake variety of actions enlisted under §51 of the IBC,⁵⁷ wherein implications could also extend to a third party receiving any interest through the transaction. The collective reading of all the provisions shall suggest that the effect of successful proceedings under §50 does not implicate invalidity of the extortionate transactions, but merely seeks for their *modification or avoidance*.⁵⁸

PART III: PROBLEMS ATTACHED TO §50, IBC AND COMPARATIVE ANALYSIS

On a peripheral understanding of §50, it seems to be a well-drafted provision with an aim to achieve equal protection to all the creditors. However, in reality,

55 The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 11.

56 Ashish Makhija, *Insolvency and Bankruptcy Code of India* (2018) 992.

57 The Insolvency and Bankruptcy Code, 2016, §51:

“51. *Orders of Adjudicating Authority in respect of extortionate credit transactions. –*

Where the Adjudicating Authority, after examining the application made under sub-section (1) of Section 50 is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order-

- (a) *Restore position as it existed prior to such transaction;*
- (b) *Set aside the whole or part of the debt created on account of the extortionate credit transaction;*
- (c) *Modify the terms of the transaction;*
- (d) *Require any person who is, or was, a party to the transaction to repay any amount received by such person; or*
- (e) *Require any security interest that was created as a part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.”*

58 See Insolvency Act, 1986, §244 (United Kingdom).

§50 has failed to develop a separate jurisprudence relevant for the effective functioning of the IBC and has merely codified the existing contractual remedies available to invalidate an unconscionable agreement. Given the fact that §50 intends only to avoid or modify certain transactions, it is absurd to codify the existing contractual remedies, as the latter have stringent thresholds to be met.

In this part, we shall first argue that the remedies granted under Regulation 11(1) of the IBBI Regulations can be traced back to Section 23 of the Indian Contract Act, 1872, and those under Regulation 11(2) to Section 16 read with Section 19A of the Indian Contract Act, 1872, [hereinafter referred to as “**Contract Act**”] and establish that the IBC has followed stringent threshold in opposition to its purpose. This shall be followed by a discussion of the UK Insolvency Act, 1986, to provide a guided direction for amendments to the Indian law.

... Require the Corporate Debtor to make exorbitant payments in Respect of the Credit Provided ...

§23 of the Contract Act proscribes unconscionable contracts in the nature of requiring exorbitant payments in respect of the credit extended. It provides that an agreement shall be deemed as void, *inter alia*, if the court regards its consideration or object as opposed to public policy.⁵⁹ The earliest recorded case recognising this connection between §23 and unconscionable contracts is *Sheik Mahamad Ravuther v. The British India Steam Navigation Co. Ltd.*,⁶⁰ decided by the Madras High Court in 1909. In this case, the defendant company had exempted itself from any liability arising out of the negligent conduct of its servants by incorporating an exclusion clause in the contract. Though the majority upheld the exclusion clause, the dissent of Shankaran Nair, J. is significant. He dissented, noting that the exclusion clause is opposed to public policy under §23, and thus, the defendant company is liable for negligence. In a later case, the Supreme Court of India accepted this connection and held that unconscionable contracts are against the public policy.⁶¹

59 Indian Contract Act, 1872, §23; *Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr.*, (1986) 3 SCC 156, ¶91-92.

60 *Sheik Mahamad Ravuther v. The British India Steam Navigation Co. Ltd.*, ILR (1909) 32 Mad 95.

61 *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, 1986 SCR (2) 278.

Following the logical chain, transactions imposing the burden of exorbitant credit on the debtor shall be void under §23 as such transactions have been recorded as unconscionable by the courts vide multiple jurisdiction. In 2018, the California Supreme Court had noted that any interest rate beyond the pre-decided cap is unconscionable.⁶² The Indian courts have also come up with similar decisions.⁶³ The Usurious Loans Act, 1918, also envisages a similar position, and it bestows upon the jurisdictional Court to relieve the debtor of all the liability in respect of any excessive interest to be paid for the loan extended.⁶⁴

The problem in Regulation 11(1) is not substantive but procedural. While the Limitation Act grants the debtor three years period to file a suit under §23 of the Indian Contract Act or §3 of the Usurious Loans Act to set aside the unconscionable transaction,⁶⁵ the liquidator or the resolution professional can approach the adjudicating authority with regard to transactions entered into in the two previous years only. Given the fact that the remedies under the said statutes and the IBC are similar, to be accurate, it is of lesser magnitude under the IBC; it is absurd to prescribe different limitation periods to approach the similar remedies granted under different statutes. The Legislature should strive to harmonize the existing laws with the new laws, unless the diversion is imperative owing to the nature of the new law, a condition that remains unfulfilled in the case of IBC.

... Are unconscionable under the Principles of Law relating to Contracts.

The Contract Act does not envisage a specific provision dealing with unconscionability, and the courts have resorted to §16 to remedy the unconscionable contracts. §16 of the Contract Act defines undue influence, which, if proved, shall make the contract voidable at the option of the affected party under §19A. The undue influence should be such that has the effect of overpowering the volition of

62 *Eduardo De La Torre et al. v. Cashcall Inc.*, 9th Cir. No. 14-17571.

63 *See Ibney Hasan v. GukkandiLal and Ors.*, AIR 1936 All 611.

64 The Usurious Loans Act, 1918, §3.

65 The Limitation Act, 1963, Schedule, art. 19, 21 & 59.

the affected party⁶⁶ in order to obtain an unfair advantage.⁶⁷

In *Lloyd's Bank Ltd. v. Bundy*, the Court granted relief to the party affected by undue influence owing to unequal distribution of bargaining power and set aside the contract.⁶⁸ However, it has been time and again clarified by the courts that mere instance of unequal bargaining power leading to an unconscionable transaction shall not enable the party to set aside a contract, unless one can prove undue influence.⁶⁹ The Supreme Court has noted that if the parties wilfully enter into an unconscionable bargain, law cannot come to their rescue later on.⁷⁰

An illustration to the §16 clarifies this situation beyond doubt:

*“... (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.”*⁷¹

66 *Lingo Bhimrao Naik v. Dattatraya Shripad Jamadagani*, AIR 1938 Bom 97; *Raja Shiba Prasad Singh v. Tincouri Banerji*, AIR 1939 Pat 477; *P. Saraswathi Ammal v. Lakshmi Ammal*, AIR 1978 Mad 361; *Alok Kumar Aich v. Asoke Kumar Aich*, AIR 1982 Cal 599.

67 *Poosathurai v. Kappanna Chettiar*, AIR 1920 PC 65; *Sathi Sattema v. Sathi Subbi Reddy*, AIR 1963 AP 72; ; *Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd.*, [1964] 1 SCR 270; *Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib*, [1967] 1 SCR 331.

68 *Lloyd's Bank Ltd. v. Bundy*, [1975] QB 326; *See Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 3 All ER 616; *Clifford Davis Management Ltd. v. W. E. A. Records Ltd.*, [1975] 1 All ER 237.

69 *Poosathurai v. Kappanna Chettiar*, AIR 1920 PC 65; *U. Kesavulu Naidu v. Arithulai Ammal*, (1912) ILR 36 Mad 533; *See Law Commission of India, Report No. 13, Contract Act, Part II* (September 26th, 1958); *Lloyd's Bank Ltd. v. Bundy*, [1975] QB 326; *Syed Noor v. Qutubuddin*, AIR 1956 Hyd 114; *National Westminster Bank Plc. v. Morgan*, [1985] 1 All ER 821; *Chitty on Contracts* (28th Ed. Vol. 1) 457, ¶7-088.

70 *S.K. Jain v. State of Haryana*, (2009) 4 SCC 357, ¶8; *See Sundarambal Ammal v. Yogavanagurukkal*, AIR 1915 Mad 561; *Mackintosh v. Wingrove*, (1878) 4 Cal 137; *Satish Chunder Giri v. Hem Chunder Mookhopadhyaya*, (1902) 29 Cal 823; *See also Karnal Distillery Co. Ltd. v. Ladli Parsad Jaiswal*, AIR 1958 Punj. 190; *See also Raghunath Altia v. Arjuno Altia*, AIR 1973 Ori 76.

71 Indian Contract Act, 1872, Illustration (d).

Therefore, mere position of dominance is not proscribed under the contract law, but abuse of dominance is. In terms of the insolvency law, if the creditor has inserted certain unconscionable terms - not with respect to the interest rate towards exorbitant payments, as higher interest rates shall be dealt under Regulation 11(1), but any other unconscionable clause - the adjudicating authority cannot set it aside, unless undue influence is proved on part of the creditor. In simpler terms, §50 of the IBC shall be invoked only if substantial unconscionability is the resultant of a procedural unconscionability.

This position is highly problematic and against the objects of the IBC. §50 aims at securing equal position for all the creditors, and thus, *any form of substantial unconscionability* that puts a particular creditor or a group of creditors at a privileged position shall be liable to be set aside. However, by referring to the understanding of unconscionability under the contract law through Regulation 11(2), an additional element of *procedural unconscionability* has been added as a pre-condition to seek remedy under §50, a position not thought of by the Legislature, nor apt for the effective implementation of the law.

One might argue that a presumption of *undue influence or procedural unconscionability* can be created in the unconscionable transactions entered into during the last 2 years by the corporate debtor. §16 of the Indian Contract Act states that such presumption only arises when one of the parties holds a real or apparent authority over the other, stands in a fiduciary relation to the other, or makes a contract with a person whose mental capacity has been affected.⁷² However, in the case of a credit transaction, none of these conditions is fulfilled, and forming a presumption of *procedural unconscionability* shall create a legal fiction wherein such transactions shall become voidable at the option of the debtor, a position that is extremely dangerous. Therefore, it is argued that Regulation 11(2) of the IBBI Regulations fall foul of the underlined purposes of §50 and, thus, should be amended.

72 Indian Contract Act, 1872. §16(2).

The UK Insolvency Act, 1986

§244 of the Insolvency Act, 1986, is a similar provision concerning extortionate transactions in the UK, but with certain differences:

*“The court may, on the application of the office-holder, make an order with respect to the transaction if the transaction is or was extortionate and was entered into in the period of 3 years ending with the day on which the administration order was made or the company went into liquidation.”*⁷³

There is a rebuttable presumption in the favour of the debtor that the transaction with respect to which the application was filed was extortionate.⁷⁴ Noteworthy is clause 3 of §244 that defines the scope of the provision:

*“For the purposes of this section, a transaction is extortionate if, having regard to the risk accepted by the person providing the credit – (a) the terms of it are, or were, such as to require **grossly** exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit; or (b) it otherwise **grossly** contravened ordinary principles of fair dealing...”*⁷⁵

While reading the English law, one must focus on the repetitive use of the term ‘gross’ while outlining the transactions that shall be considered as extortionate. This implies that the questioned transactions must be not merely unfair, but also oppressive, reflecting an imbalance in the bargaining power and vulnerability, which was exploited by the other party.⁷⁶

73 Insolvency Act, 1986, §244(2).

74 Insolvency Act, 1986, §244(3).

75 Insolvency Act, 1986, §244(3).

76 *Paragon Finance Plc v. Nash*, [2002] 1 WLR 685 cited in Roy Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011) 597; See *White v. Davenham Trust Ltd.*, [2010] EWHC 2784 (ch); Rebecca Parry, ‘Extortionate Credit Transactions (Insolvency Act 1986, Sections 244 and 343),’ in *Transaction Avoidance in Insolvencies* (Rebecca Parry et al. eds., 3rd ed. 2018) 203; See Department of Trade and Industry, *A Revised Framework for Insolvency Law*, (White Paper, Cmnd 9175, 1984, United Kingdom), ¶62.

The determination of a transaction as extortionate is a matter of fact, and it has been left to the discretion of the courts. The courts have crystallized a test to determine the 'extortionate' nature of transactions: "*The test for 'extortionate' in commercial transactions of this kind, where the interest rates are spelled out at the outset, must be a very stringent one.*"⁷⁷ Therefore, in *Devogate v. Jarvis*,⁷⁸ the court adjusted a secured loan at 39% annual percentage rate to 30% and, in *Frestonwell v. Capon*,⁷⁹ from 42% to 21%. Whereas in *Batooneh v. Asombang*,⁸⁰ the court held that an unsecured short term loan extended at the annual interest rate of 100% was not extortionate. Similarly, when the debtor required credit on a very urgent basis, the court has held as valid higher interest rates.⁸¹ The holistic reading of the UK law shall conclude that the adjudicating authority enjoys the power to set aside an extortionate transaction if it suffers from *gross* procedural *or* substantial unconscionability. The use of the phrase '*ordinary principles of fair dealing*' grants necessary discretion in favour of the adjudicating authority.

PART IV: RECOMMENDATIONS

While considering the under-mentioned recommendations, it must be understood that the remedies envisaged under the IBC should be easy, flexible in nature and having a lower threshold to prove because their underlined intention is to merely *avoid* the extortionate credit transactions to ensure equal treatment of all the creditors unlike *invalidating* a transactions.

The present §50 calls for multi-fold modifications:

1. The Limitation Act, 1963, grants a period of three years in favour of the prospective plaintiff to file a suit in order to set aside a contract and seek remedy in matters concerning loan. The IBC has envisaged similar

77 *White v. Davenham Trust Ltd.*, [2010] EWHC 2748 (Ch).

78 *Devogate v. Jarvis*, CA, 16 November 1987, transcript Lexis Library.

79 *Frestonwell v. Capon*, Kettering County Court, 18 November 1988.

80 *Batooneh v. Asombang*, [2003] EWHC 2111 (QB).

81 *Campden Hill Ltd. v. Chakrani*, [2005] EWHC 911 (Ch.); *Ketley v. Scott*, [1981] ICR 241.

remedies, however, with a shorter limitation period. The authors argue that such a situation shall create practical absurdities. For instance, consider a situation wherein an extortionate credit transaction is entered into by the debtor on a date falling beyond the preceding two years from the insolvency commencement date, but, however, three years from the date of the transaction have not yet elapsed.

As the corporate insolvency resolution process has already commenced, the liquidator or the resolution professional shall take command of all the contracts entered into by the corporate debtor. However, they shall be unable to seek any remedy from the adjudicating authority in the form of setting aside such extortionate transaction under the IBC. At the same time, owing to the doctrine of privity of contract and absence of *locus standi*, they shall be unable to approach a civil court under §§19A or 23 of the Contract Act or §3 of the Usurious Loans Act. This legal fiction shall make the concerned extortionate transaction secured from any form of prospective judicial scrutiny, a situation that is blatantly unjust and worth reconsidering. Therefore, it is argued that the phrase ‘during the period within two years preceding the insolvency commencement date’ under §50 of the IBC should be amended to replace the term *two years* with the term *three years*.

2. Regulation 11(2) of the IBBI Regulations refers us to the understanding of unconscionability under the Contract Act, the remedy for which is highly stringent. One is required to prove both substantial and procedural unconscionability to claim relief. However, the objects and purpose of the IBC warrants only an evidence of substantial unconscionability, i.e., a consensual extortionate transaction entered into with a true freedom of contract should also be set aside in order to achieve a real equality among the creditors. To realise the said aim, *either* of the two steps could be undertaken:
 - a. *First*, Regulation 11(2) should be redrafted clarifying the requirements of the law and stating as follow:

“A transaction shall be considered as an extortionate credit transaction where its terms are such which results in fall in the debtor’s asset value and places the other creditors at a disadvantageous position, irrespective of the fact that such a transaction was entered into with no compromise in the bargaining power of the debtor while exercising true freedom of contract.”

- b. *Second*, an amendment should be made in the Contract Act in accordance with the suggestions of the Law Commission of India intending to grant discretion to the courts to deem a contract as unenforceable, based only on substantial unconscionability. In its 103rd Report, the Commission had recommended for the insertion of draft §67A in the Contract Act that would read as follow:

“(1) Where the Court, on the terms of the contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.

(2) Without prejudice to the generality of the provisions of this Section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from – (a) the liability for wilful breach of the contract, or (b) the consequence of negligence.”⁸²

The insertion of this provision shall empower the courts with the discretion to deem a contract as unconscionable and make it unenforceable merely on the basis of substantive unconscionability and ease the prospective hardship to be faced by the liquidator or the resolution professional to discharge the heavy burden of §16 of the Contract Act.

3. The language of §50 makes use of the expression “*credit transaction*,” but neither the Code, nor the IBBI Regulations provide any guidance as to what can come under the ambit of ‘*credit transactions*.’ Owing to the lack of clarity, the courts might face difficulties while answering two questions:

82 Law Commission of India, *Report No. 103, Unfair Terms in Contract* (July 28th, 1984), ¶2.6.

- a. If any seller sells goods or services at an exorbitant cost that is higher than the ordinary commercial and profit making cost prevailing in the market, does it violate §50? The authors believe that the answer would be in affirmation when the transaction is executed on credit basis, as §50 includes operational credit within its purview. However, the situation remains unclear when instant payment is made for the transaction. The authors argue that *avoiding* the transaction involving credit, but *allowing* the similar transaction when executed via cash payment shall be an unequal treatment of similar situations. We argue that two similar transactions executed via two different modes of payment – credit and cash – should be treated in same fashion; however, necessary guidance from the Legislature is lacking for the same.
- b. What shall happen in cases where the operational creditor charges penal rate of interest for delayed payments? The situation is complicated as the debtor could avoid penal rate of interest by timely payments. However, given his anticipated insolvency, he might default in payment. The default triggers penal rate of interest, resulting in conversion of a reasonable credit transaction into an exorbitant credit transaction. Necessary guidance is required from the Legislature with respect to treatment of such transactions.
4. The explanation to §50 of the Code clarifies “*that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.*” In reality, the financial services regulators usually do not provide rules relating to credit transactions. Rather, it is the Reserve Bank of India, which provides fair lending practices to be followed by the institutions.⁸³ Therefore, virtually the lenders are free to charge any interest rates according to their policies, risk perception and after classifying the borrowers into different categories. The drafting of terms and conditions of a loan agreement thus becomes

83 Reserve Bank of India, *Guidelines on Fair Practices Code for Lenders* (May 5, 2003).

the independent prerogative of a 'highly empowered' bank. It is only a subjective presumption that the financial service provider will deal fairly and necessarily comply with the law or their own policies or self-framed fair lending code.⁸⁴ Therefore, we argue that the regulators should issue a model Regulation defining the range of rate of interest that a bank would be empowered to charge depending on the conditions of market and the debtor.

CONCLUSION

IBC is a new law and is going through a phase of regular changes, modifications and updates in order to derive a flawless version. Under the head of 'Resolving Insolvency' of the Ease of Doing Business Index, India has shown a jump from the 134th spot in 2018 to 108th in 2019.⁸⁵ India has also won the Global Restructuring Review award for the most improved jurisdiction in 2018.⁸⁶ Nevertheless, a one-time enactment rarely presents itself in the best possible form, and it becomes one of the major reasons for the judiciary to take part in the lawmaking process through its interpretative tools, and it gives the final finishing to the law, too.

This paper is an attempt to holistically discuss the background of the IBC and, particularly, §50, which deals with extortionate credit transactions, and to identify the difficulties attached to the provision. A comparative study of multiple jurisdictions has helped us derive the aforementioned recommendations.

The argument made in this paper is simple. The Indian Contract Act and the Usurious Loans Act already confers the power to the party to an extortionate

84 Vinod Kothari & Shikha Bansal, *Law Relating To Insolvency And Bankruptcy Code*, 2016 (Taxmann2016).

85 World Bank, *Resolving Insolvency*, <https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency>.

86 Press Trust of India, *India wins GRR award for "most improved jurisdiction,"* INDIA TODAY (June 28, 2018), <https://www.indiatoday.in/pti-feed/story/india-wins-grr-award-for-most-improved-jurisdiction-1272634-2018-06-28>.

credit transaction to approach a court of law in order to invalidate such transactions. However, the IBC comes with a different purpose, and it intends to merely avoid such transactions in order to maintain equality in the position of all the creditors. Therefore, when the purpose of the IBC itself calls for a lower threshold remedy, it is absurd to refer to the existing provisions to seek such avoidance. Therefore, it is argued that the adjudicating authority under the IBC should be bestowed with the power to avoid such transactions based on flexible discretion applied in a bona fide manner keeping in consideration the motive of the IBC, i.e., securing the justified position of all the creditors. This shall make the §50 remedies apropos to the objectives sought and establish a reasonable nexus between the text and context of the statute.

INTELLECTUAL PROPERTY RIGHTS OF CHEFS AND RESTAURATEURS IN EDIBLE CREATIVE CULINARY CREATIONS AND THEIR PLATING

Ankita Vashisht

Abstract

Dining has just arrived on Indian soil as an activity of leisure, with recent influx of world renowned chefs and restaurateurs attracted to India as a lucrative market for their upscale restaurants, stimulating a debate among restaurant patrons on whether to give societal acceptance to edible creative culinary creations and their plating as art, just like music, photography, etc. The same has already been happening in developed countries, which have a creative edge on the avant-garde art front. This new phenomenon brings along the need that has already been felt in foreign nations to study whether the Intellectual Property regime is decked out to tackle consequent legal issues like culinary thefts, riffs and plagiarism by chefs, other restaurants, and social trends like amateur food photography by diners. Therefore, my aim is to study the Indian Intellectual Property regime to see whether it carves protection for edible creative culinary creations and their plating.

I. INTRODUCTION

Worldwide, dining is increasingly becoming a popular form of leisure and entertainment. Cooking and dining have been alluring dilettantes and the general citizenry through regular features in print media, online lifestyle blogs, social media, travel and culinary television (TV) shows, and through celebrated chefs endorsing brands on TV shows. Fine-dine and high-end restaurants are becoming the preferred choice for holding business meetings, get-togethers, and are becoming famous hangouts for the influential as well as impressionable youth. The desire of regular restaurant patrons for an upscale and exquisite dining experience has transformed eating from a mere perfunctory and primal

activity to a big and trendy business industry. The most influential generation - the youth looks at food through the lens of its smart phone before tasting the same, making the young constant '*foodstagrammers*.' This, in turn, puts pressure on chefs to constantly evolve food art. Food no longer holds mere functional value; it has been elevated as an ambitious creative zone. Chefs are constantly investing substantial amount of time and labour in creating ingenious menus, plating out signature dishes in the most innovative styles, in their pining for attention and money of restaurant patrons, social media influencers and potential diners. Dishing out an innovative plate of food has become as creative an activity as that of a musician, an artist or an author. Everyday a new restaurant is set up with an ingenious theme, exquisite menu, inspiring décor and promoted by a celebrated chef.

Just like the fashion industry, which is a highly creative zone, culinary industry is also transforming into an arena ingeniously plating out restaurant dishes applying techniques like molecular gastronomy and art, to come up with remarkably novel textures, colour combinations, structures, forms, shapes, taste, and stories on each plate they put before diners.

Since the food art phenomenon already exists in foreign nations, they have constantly felt the need to carve out space in the existing Intellectual Property ('IP') regime for protection of ingeniously plated restaurant dishes. Several cases have come before foreign courts involving culinary knock-offs and evolving newer applications of legal principles for extending IP protection to edible creative culinary creations and their plating. However, India was oblivious to this phenomenal shift in dining experience until now, when it has attracted attention from several celebrated chefs like Floyd Cardoz, Gaggan Anand, Vineet Bhatia and, recently, Italian chef Jamie Oliver as a lucrative market for opening upscale restaurants serving their signature dishes. Indian crowd has responded bright-eyed and bushy-tailed to this transformation of food from a mere functional element to a holistic experience. The appearance of upscale restaurants patronised or owned by celebrity chefs in the Indian context will bring along a competitive urge amongst these restaurants, eventually mirroring the scene in foreign lands, and will transmute into culinary thefts, knock-offs

and plagiarism. Hence, there is a need to carve out space for edible creative culinary creations and their plating in the Indian Intellectual Property regime and to equip it to be able to tackle these looming legal issues.

This article looks at how the community-norms have failed to tackle the above issue in foreign nations and the consequent need felt there to carve out space for edible culinary art and its plating in the existing IP regime; the possible ways of protecting food art and its plating under the copyright and trademark laws and the possibility of protecting the same under the design law; and, analysing the effectiveness of the Indian IP regime in this regard.

The article proceeds as follows:

Chapter I gives an insight into the social phenomenon of chefs creating edible food art with their dishes and the associated legal issue of culinary knock-offs;

Chapter II delves into the question of how culinary tradition of sharing ideas has conventionally been governed by self-imposed community-based norms, and how these norms are turning out to be insufficient in light of the changing culinary thought and attitude;

Chapter III underlines the doctrinal hurdles, especially with respect to distinctiveness and functionality, that a chef may face while claiming a trade dress in the plating of his restaurant dish, and the arguments he advances to counter these hurdles;

Chapter IV, similarly, underlines the doctrinal hurdles for copyrightability of food plating - form of expression, originality, fixation and utilitarian aspect. There are also arguments made to counter these hurdles;

Chapter V makes an attempt to carve out place for functional and ornamental food plating under the design law. This is a nascent attempt.

The article ends with a conclusion stating the need for an incrementally increasing IP protection to supplement well-functioning community norms of food plating, lest it stifles competition and creates monopolies of chefs.

The pivot issue dealt with in this article is: whether the Indian IP regime is equipped to tackle the looming rifts of edible creative culinary plating of food in restaurant dishes. This principal issue can be stratified into sub-issues: (a) whether the trade dress law provides the requisite protection to edible creative culinary creations and their plating; (b) whether the copyright law carves out space for the requisite protection to edible creative culinary creations and their plating; (c) whether the design law is the feasible area for protecting edible creative culinary creations and their plating.

II. WHY IS LEGAL PROTECTION NEEDED?

The creative culinary industry flourishes in a “low-IP equilibrium,” contrary to the general belief that there is no creativity without an incentive.¹ Social scientists, Emmanuelle Fauchart and Eric von Hippel, conducted a survey of Michelin-starred French chefs and observed that despite existing in IP’s “negative space,”² the most blatant copying of dishes is prevented through community-based norms like, (a) a chef must not copy another chef’s recipe innovation exactly; (b) if a chef reveals a recipe-related secret to another chef, that chef may not pass along the information without permission; and (c) chefs must credit developers of significant dishes as authors of those creations.³ These norms are enforced through self-imposed professional and social sanctions like refusal of access to other chefs’ secrets, and internal sense of morality and personal pride of elite chefs. These norms are remarkably well-suited for a small community of elite chefs, who share customers, cooks and investors and small geographic areas, such as a city. But, would these norms still hold bite when the community expands? Doesn’t policing become difficult when the chef creating a knock-off is placed in a different geographic location and has no incentive to refrain from copying when he knows that the creator-chef will not become aware of such copying? And, would these norms be able to police acts of large corporations solely interested in financial gains? They may not.

-
- 1 Naomi Strauss, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. Rev. 182, 184 (2012).
 - 2 Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006).
 - 3 Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 188 (2008).



Figure 1. *Gucchi* by Chef Gaggan Anand⁴

The signature main course '*Gucchi*' at Gaggan, an upscale restaurant in Bangkok, is Chef Gaggan Anand's *pièce de résistance* - a rare Kashmiri morrel mushroom paste with *Gucchi* standing tall over it and a generous sprinkling of chilli soil around it, to be eaten in one bite. This imaginative presentation is likely to give a centre stage to the idea of a forest on the earthy wooden log. Patrons and connoisseurs flock this restaurant from different parts of the world for the dining experience it gives. If knock-offs of '*Gucchi*' are easily made available at the neighbourhood Mom's and Pop's or if an MNC decides to apply the same presentation to its food or if another chef in another part of the world blatantly copies his presentation, will there remain any thrill in wanting to visit Gaggan for the exquisite dining experience? There will be a sharp drop in Chef Gaggan Anand's economic profits as well as praise for creativity. Certainly, community norms do not have the bite always. Now, if he were a musician or a writer or a sculptor, he could have invoked copyright law to protect his expressive creation; or if he were an inventor, applying molecular gastronomy, patent law or trade secret agreements would come handy; or as a restaurateur, he could trademark the logo of his restaurant, its name, décor, theme; but, what protection does he have for the artful presentation of his food?

4 NDTV Food (2019). *18 Courses Designed by Gaggan Anand, The Food God*. [image] Available at: <https://food.ndtv.com/photos/18-courses-designed-by-gaggan-anand-the-food-god-20657/slide/8> [Accessed 5 May 2019].

III. FEASIBILITY OF PROTECTING EDIBLE CREATIVE FOOD PRESENTATION UNDER TRADEMARK LAW

Recently, the Hon'ble High Court of Delhi in *South Indian Beverages v. General Mills*,⁵ while quoting the 1995 US *Qualitex Co. v. Jacobson Products Co.* Judgment,⁶ proffered that '*the law of Trade Marks serves a dual purpose: firstly, it attempts at protecting consumers, who rely on a company's trade mark for assurance that they are using a particular brand that they trust as being the producer of quality products or services; secondly, the attempt is at protecting producers from competitors seeking to derive from the former's reputation by passing off their products as the former's or by misappropriating the former's registered mark.*'⁷

A subset of this protection law is trade dress, which protects the overall image of a product functioning as the brand signifier.⁸ It protects the significantly distinguishable overall image or look of the product, like the distinct and unmistakable Coca-Cola bottle and the Jack Daniels' signature whisky bottle. Trade dress may lie either in the packaging of the product, like the colour scheme of package or the décor or the style of packaging, or the product design which is the actual distinctive-looking product in itself. This area of trademark law may serve as an avenue for protection of the creative food plating and presentation by chefs and their high-end restaurants.

It was in the landmark case of *Two Pesos, Inc. v. Taco Cabana, Inc.*⁹ in the year 1992 that the Hon'ble Supreme Court of the United States of America (U.S.A.) recognized Taco Cabana's trade dress in its Mexican-themed restaurant's thematic décor, wall colour, awnings and menu style as inherently distinctive. This watershed event resonated the idea that any symbol used in trade, which traces goods to a particular source may claim a trade mark protection,¹⁰ and

5 2015(61)PTC 231(Del).

6 514 U.S. 159 (1995).

7 2015(61)PTC 231(Del) ('*South Indian Beverages*').

8 Wal-Mart Stores vs. Samara Brothers, 529 U.S. 205, 209-10 (2000).

9 505 U.S. 763, 768 (1992).

10 Joan L. Dillon & Michael Landau, *Two Pesos v. Taco Cabana: Still More Interesting for What It Did Not Decide*, 94 Trademark Rep. 944, 945 (2004).

several judgments toed the line by holding trade dress in menu layout.¹¹ Courts have, time and again, endeavoured to limit this kind of protection by holding that product design is not inherently distinctive, like latterly, in *Colgate Palmolive Co. Ltd. v. Mr. Patel*,¹² the Hon'ble High Court of Delhi dismissed the claim of trade dress protection in the red and white colour scheme of tooth paste, made by the plaintiff company. Thus, in case of product design, it must be proved that it had acquired distinctiveness.

Not long ago, Papa John's made a claim¹³ of trade dress in its pizza crust with a distinct highly raised border and the style of placing cheese under toppings, followed by the much spoken about suit¹⁴ made by Rebecca Charles, chef-owner of Pearl Oyster Bar against Ed McFarland, previously her sous-chef and current chef and co-owner of Ed's Lobster Bar, for brazen copy of her restaurant's peculiar white marble bar, grey paint on wainscoting, chairs, bar stools with wheat straw backs, packets of oyster crackers placed on each table and the unique Caesar salad dressing. Although the two chefs reached an out of court settlement with Ed agreeing to change the décor and names of dishes, Charles' statement that appeared in an article on The New York Times that, "*My restaurant is a personal reflection of me, my experience, my family*,"[...] "*That restaurant is me...*"¹⁵ depicts contemporary entrepreneur-like approach of chefs and nonacceptance of the tradition of sharing ideas and the open source model of learning to a limited extent.

In order to get the trade dress claim accepted, a producer - in our case a chef or a restaurateur - must successfully prove fulfilment of these *sine qua non*

11 Vasquez vs. Ybarra, 150 F. Supp. 2d 1157, 1170 (D. Kan. 2001); TM Foods of Avon vs. Jimmy John's Enters., No. 05-CV-0220 (S.D. Ind. Oct. 5, 2005).

12 2005(31)PTC583(Del).

13 Papa John's Int'l v. Pizza Magia Int'l, No. 00-cv-00548-JGH (W.D. Ky. Sept. 12, 2000, terminated Jan. 23, 2007).

14 Powerful Katinka v. McFarland, No. 07-CV-6036 (S.D.N.Y. June 26, 2007), 2007 WL 2064059.

15 Pete Wells, *Chef Sues Over Intellectual Property (the Menu)*, The New York Times (Mar. 31, 2019, 09:05 PM), http://www.nytimes.com/2007/06/27/nyregion/27pearl.html?pagewanted=all&_r=0.

conditions: (i) commercial use, (ii) non-functional aspect,¹⁶ (iii) inherent or acquired distinctiveness,¹⁷ and (iv) recognisability as symbolic of, or associated with, a product or service by consumers¹⁸ in our case, generally the restaurant patrons and connoisseurs of culinary art, if we can call it that. In order to carve out a place for creative edible food presentation and plating, doctrinal hurdles clearly lie in the second and third stipulations, and I shall be delving further into these areas in the subsequent parts.

A. DISTINCTIVENESS

A consumer must be able to trace the product to its source with the help of a mark. This mark may be inherently distinct or it may acquire distinctiveness through advertisements and other market strategies.

1. Workability Of The Idea Of Food Plating As Inherently Distinctive

As discussed in the previous section, Taco Cabana's trade dress claim was accepted by the court as a form of product packaging and not product design. This has been a beacon approach and cue may be taken from Justice Scalia's concurring opinion of treating restaurant design either as (a) product packaging, (b) *tertium quid*,¹⁹ or (c) service mark.

(a) Food Plating As Product Packaging:

Under this argument, when a restaurant dish is served, food obviously is the product, and its plating and the precise presentation style may be treated as the packaging.²⁰ Just like creating packaging of products, for example, Festina waterproof watches, genome bread packaging, Hanger tea, Dettol Liquid

16 § 9(1)(b) & §9(3), The Trade Marks Act, 1999.

17 § 9(1)(a), The Trade Marks Act, 1999.

18 § 9(2)(a), The Trade Marks Act, 1999.

19 Naomi Strauss, *Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry*, 60 UCLA L. Rev. 230 (2012).

20 Lisa K. Krizman, *Trademark Protection for Restaurant Owners: Having Your Cake and Trademarking It, Too*, 99 TRADEMARK REP. 1004, 1010 (2009).

Wash green packaging, and the like,²¹ creative plating of food is also not a routine and monotonous job of merely and mechanically arranging food on plate. It involves decisions on choice of plate, colour scheme, textures, etc. An appropriate example would be Chef Massimo Bottura's Moeche and Polenta in Two Versions served at his restaurant Osteria Francescana, which must have involved some critical decisions about use of moulds, textures, form and use of plate. However, this distinction becomes hard when food also becomes the container, like in the case of Chef Gaggan Anand's Gucchi.²² We may consider the next option, if Chef Anand is unable to conceptually prove that the presentation of Gucchi qualifies as packaging.

(b) Food Plating As *Tertium Quid*

The Latin phrase '*tertium quid*' means a third thing.²³ That being so, the main product that a diner pays for is the food on plate; however, a connoisseur also pays for the décor and the ambiance, which enhance his dining experience. The argument is that in character with décor and ambiance, imaginative and ingenious plating and presentation style also enhances the dining experience and brings a thrill, and diners are willing to pay a higher price for the same. Therefore, as a corollary to the protection of décor as trade dress, plating may also qualify for protection being a *tertium quid*.

(c) Food Plating as a Service Mark

A service mark, as the term suggests, protects a particular service rendered by the producer. This argument in favour of chefs claiming service mark in their restaurant dishes can be better explained through the example of McDonald's

21 35 Brilliant Examples Of Creative Package Design, Digital Synopsis (Mar31, 2019, 09:00 PM), <http://digitalsynopsis.com/inspiration/35-creative-product-package-designs/>

22 18 Courses Designed by Gaggan Anand, *The Food God*, NDTV Food (Mar31, 2019, 09:00 PM), <http://food.ndtv.com/photos/18-courses-designed-by-gaggan-anand-the-food-god-20657/slide/8>.

23 American Heritage College Dictionary, 1401 (3rd ed. 1993) (defining *tertium quid* as "something that cannot be classified into either of two groups considered exhaustive").

service mark in its Sausage and Egg McMuffins.²⁴ According to the Federal Circuit, these two McMuffins represented the breakfast service provided by McDonald's²⁵ and, therefore, a restaurant service. In light of this progression, the presentation style may find protection as a service mark if diners can trace the chef or restaurant through that particular style of plating and presenting food, like a complementary *amuse bouche* served in all the restaurants of a renowned chef before main course may serve as a service mark, if this chef can demonstrate through advertisements, critiques, cookbooks, restaurant's or chef's website, etc., that this *amuse bouche* represents his restaurant service, and diners associate it with him or his restaurant(s). He may even claim service mark in a well-choreographed thematic menu traceable to him or his restaurant by the diners.

2. Workability Of The Idea Of Food Plating As Having Acquired Distinctiveness

This provision is better suited for well-known chefs and restaurants. If a chef can demonstrate through advertisements, critiques, cookbooks, restaurant's or chef's website, photos on social media, 'likes' on Facebook, etc., that the diners can associate a dish with that chef or restaurant, he may be able to claim secondary meaning for the plating and presentation of the dish. Say, a chef always places a blob of grape jelly on lasagne and diners have come to associate this style of plating with him. A peculiar fact to keep in mind here is that this reputation or popularity of the chef ought to be trans-border and not limited to the geographic location in question.²⁶ This principle plays an important role in case of chefs, who have developed a popularity in other jurisdictions and are now looking forward to expansion in India.

In respect of secondary meaning especially, the Likelihood-of-Confusion Test becomes more crucial. The similarity of marks needs to be analysed, not by

24 *In re McDonald's Corp.*, 818 F.2d 875 (Fed. Cir. 1987), *rev'd without opinion* 230 U.S.P.Q. 210 (T.T.A.B. 1986).

25 Lisa K. Krizman, *Trademark Protection for Restaurant Owners: Having Your Cake and Trademarking It, Too*, 99 TRADEMARK REP. 1004, 1016 (2009).

26 *N. R. Dongre v. Whirlpool Corporation*, 1996 PTC(16) 583(SC).

placing the two products side by side, but by simply considering the broad and essential features of the two products.²⁷ In respect of restaurant dishes, to analyse these broad features, some market factors may come in handy, like:

(a) Popularity of The Chef Or The Restaurant

Regular diners and restaurant patrons generally are able to associate specific plating and presentation styles with particular chefs or restaurants. When they see, say, a Greek style of presentation or extensive use of tweezers to plate food, they may associate it with Chef George Colambaris. If another chef plates in a similar manner, it may lead to confusion in the minds of diners as to whether Chef Colambaris had licensed name or style to that restaurant or whether that dish is his creation.

(b) Sophistication Of Diners²⁸

Generally, the audience for high-end restaurants and the art they create through food presentation and plating includes regular diners, restaurant patrons, food critics and connoisseurs. This veteran group is adept at distinguishing various chefs' techniques and fashion. They may be more vulnerable to be fooled to believe that a particular chef sponsors a particular restaurant, chef or dish or has licensed his style.

(c) Geographic Market²⁹

Likelihood of confusion increases if the restaurant serving the dish plated in a deceptively similar style is geographically closer to the creator-chef's restaurant.

(d) Generic Claims Are Unacceptable

In line with the ratio in *Landscape Forms, Inc. v. Columbia Cascade Co.*,³⁰ my argument does not lie in favour of attempting to protect mere concept or

27 Mumtaz Ahmad v. Pakeeza Chemicals, AIR2003All114.

28 Maker's Mark Distillery v. Diageo N. Am., 703 F. Supp. 2d 671, 695 (W.D. Ky. 2010).

29 § 21, The US Restatement (Third) Of Unfair Competition.

30 113 F.3d 373, 382 (2d Cir. 1997).

idea of plating. “*The plaintiff must precisely articulate the specific elements that comprise its distinct trade dress, so that courts can evaluate claims of infringement and fashion relief that is appropriately tailored to the distinctive combination of elements that merit protection.*”³¹ For example, Heston Blumenthal is usually associated with the idea of using liquid nitrogen to prepare quick ice-cream and the hysteria this whacky idea creates while presenting. But, he cannot restrict other chefs from applying this gastronomic idea to their preparations. However, Chef Massimo Bottura’s style of plating Moeche and Polenta in Two Versions in the style of a crab background is not generic, nor is the presentation of Chef Gaggan Anand’s version of egg bhurji.

B. FUNCTIONALITY OF FOOD ON PLATE

A product becomes functional, if its shape results from the nature of goods or is necessary for technical result or it gives a substantial value, improves quality or reduces cost of production, etc.³² This functional product does not warrant a trademark protection. One rationale for this limitation can be that patent or design law is a better area for protection of functional elements. However, this certainly does not imply that functional elements cannot be protected as trade dress. Bethink *Two Pesos case*, each element like décor of the restaurant, layout of menu, seating style has a utilitarian aspect, but hand in glove, they create a trade dress.

If we apply the Morton-Norwich test as the evaluation criterion,³³ an argument can be advanced for the protection of functional food on plate as an overall trade dress, if the chef/restaurateur can prove that the functional food elements on plate, in cahoots, create a distinctive style in the minds of diners and that there are no practical concerns, like cost reduction or quality improvement, resulting from a particular plating style. Like, the Eleventh Circuit Court

31 *Best Cellars v. Wine Made Simple*, (S.D.N.Y. 2003) at 69.

32 § 9(3), The Trade Marks Act, 1999.

33 *In re Morton-Norwich Prods.*, 671 F.2d 1332, 1336 (C.C.P.A. 1982) later formally incorporated in the Lanham Act as § 1125(a)(3).

refused trademark protection to Dippin' Dots,³⁴ because the shape of beads of ice-cream depicted application of the flash-freezing technique; the size of beads depicted creaminess; and the colour of beads depicted flavour - hence, it was functional.

Thus, if the chef/restaurateur has the genius to overcome the hurdles of distinctiveness and functionality, his claim for trade dress protection of his food plating and presentation may be a success.

IV. FEASIBILITY OF PROTECTION OF EDIBLE FOOD PRESENTATION UNDER COPYRIGHT LAW

Artists, like authors, can protect their original artistic creations under the law of copyright, which provides a defensive right to prevent others from copying their works. This kind of protection has two elements: economic rights like that of reproduction, publication, performance, broadcasting and adaptation; and moral rights to object to false attribution and to retain privacy with regard to photographs and films.³⁵ The copyright law has three basic requirements: *expression, originality and fixation*.³⁶ As I have already discussed in the previous chapters, the focus has been on the possibility of protecting recipes as copyright; but this article centres around the feasibility of protecting restaurant dishes per se as copyrightable artistic expressions. Also, food art not meant for the purpose of eating may find protection in the form of applied art like sculpture, if it fulfils the above-mentioned requirements; but can edible culinary creations and their plating be considered as '*art*' worthy of copyright protection?

A. FOOD PLATING AS A FORM OF EXPRESSION

For a chef to get copyright in his food plating and presentation, he must invariably first be able to prove that his food presentation is an expression and not a mere abstract idea unworthy of copyright protection. Chefs themselves

34 Dippin' Dots v. Frosty Bites Distribution, LLC, 369 F.3d 1197, 1200 & 1203 (11th Cir. 2004).

35 Simon Stokes, *Art and Copyright*, at 3(2nd ed. 2012).

36 The Copyright Act, 1957.

call their culinary works as art on plate, to quote Rick Tramonta, the chef-owner of TRU, here:

“When you put on a Miles Davis piece or a Santana piece, and you’re just listening to this guy riff on this guitar or riff on this horn . . . it gives you goose bumps. You’re feeling the emotions through that spirit of music. It’s just like when you get a great dish in front of you, if you’re eating in some restaurant.”³⁷

The work must be an expression and not a mere idea.³⁸ That the ‘*culinary field is highly creative and expressive*’ can be understood from the theme-based invention tests conducted for amateur cooks on the TV Show ‘*MasterChef*.’ The cooks must draw inspiration from their surrounding environment, diverse cultures, textures, colours and flavours to come up with inventive and imaginative culinary creations on plate. Art is not a static concept; it has evolved with societal interests. Just like a painting or a sculpture imbues varied elements of colour, form, texture, a plate of food, through its harmonized aroma, flavour, texture, dramatic presentation, combinations of colour, and form, can also stimulate a very pleasant gustatory experience. Dali drew a profound connection between art, metaphysics and food and called gastronomy a serious art.³⁹ Dining is a contact with reality through jaws.⁴⁰ It took the Renaissance to achieve societal acceptance of paintings as a form of art and expression. It takes time for the society to accept a particular form of expression as an art worthy of protection, as happened in the case of music, choreography and photography. The question that arises then is whether the societal acceptance of creative edible culinary creations and plating has reached that level requiring copyright protection of the same? If the answer is in affirmative, a culinary creation can at least qualify as an expression worthy of copyrightability.

37 Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?* 24 Cardozo Arts & Ent. L.J. 1121, 1134 (2007).

38 R.G Anand v. M/s. Delux Films, 1978 AIR 1613.

39 Malla Pollack, *Note, Intellectual Property Protection For The Creative Chef, Or How To Copyright A Cake: A Modest Proposal*, 12 Cardozo L. Rev. 1477, 1493(1990 - 1991).

40 Malla Pollack, *Note, Intellectual Property Protection For The Creative Chef, Or How To Copyright A Cake: A Modest Proposal*, 12 Cardozo L. Rev. 1477, 1493(1990 - 1991).

B. ORIGINALITY OF FOOD PLATING

As per Section 102 of the US Copyright Act, the work of authorship must be original, *i.e.*, it must be creative enough to require copyright protection. This test applies even to combinations of unoriginal elements. The standard is low, but not negligible, and with *the Feist judgment*,⁴¹ there has been a paradigmatic shift towards the stricter “*higher authorship*” test, which added a new dimension to the doctrine of “*sweat of the brow*.” According to this new rule, which now prevails throughout the U.S.A., instead of merely focussing on the quantity of skill and labour put in by an author into his work, the courts must judge whether the quality of skill and judgement put into the work by the author is such that it reflects the intellectual thoughtfulness and the person of the author in his work.

The Central District Court of California was faced with the question of whether a ‘*bowl-of-food*’ sculpture was original enough to call a copyright protection to it.⁴² Two rival Chinese-Vietnamese food supply companies used similar packaging for rice stick food package, *i.e.*, a photo of bowl filled with rice sticks topped with egg rolls, grilled meat and garnishes. Kimseng claimed that its employee had chosen the ‘*food*’ depicted out of a thousand possibilities, and hence, it was copyrightable. Deciding against it, the Court held that combination of common bowl with common Vietnamese food lacked originality. However, if we look at dishes like Blumenthal’s turtle soup, Chef Gaggan Anand’s Bird Nest and Chef Massimo Bottura’s Moeche and Polenta in Two Versions, we see intricate design, creative display and artistic precision. They display ‘*more than trivial degree of creative selection*’⁴³ and the arrangement of food elements does not seem trite. These food presentations seem to pass the test of originality as laid down in the U.S.A.

The issue of originality also arises in respect of innovative re-creations of classic crowd pleasers. Should these re-creations be taken as original works

41 Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).

42 Kim Seng Co. v. J&A Importers, 810 F.Supp.2d 1046, 1050 (C.D. Cal. 2011).

43 810 F.Supp.2d 1046, 1050 (C.D. Cal. 2011) (‘Kim Seng’).

of expressions? Or would doing so create a chilling effect, stifling creativity and creating monopolies over community dishes? For example, Chef Gaggan Anand's take on egg bhurji served in egg shell atop salt granules with layers of hot egg soufflé, cheese soufflé and tomato-onion masala. One solution could be to allow '*thin copyright protection*' to such innovative re-creations still leaving it open for other chefs to come up with their own derivations of classics.

Looking into the Indian law of copyright, Section 13(1)(a) of the Copyright Act, 1957, also protects '*original artistic works*,' and the test of originality seems to have come in line with the US standard of looking for creator's personality in the work with the Apex Court's decision in *Eastern Book Co. v. D.B. Modak*.⁴⁴ Thus, creative edible culinary presentations may cross this hurdle with a degree of ease as well.

C. FIXATION REQUIREMENT

A close reading of Section 101 of the US Copyright Act⁴⁵ and the definition clause of the Indian Copyright Act, 1957, tells that the intended purpose of fixation clause is to sufficiently permit the expression to be perceived, reproduced, communicated for a period of time which is more than a transitory duration, so that people do not claim copyright protection of mere ideas and utterances;⁴⁶ and, so that there is a tangible evidence of copyrighted expression. For a chef, the hurdle lies in having to prove that the aesthetic plate of food he designs by harmonising textures, colours, flavours, varied arrangements is '*fixed*' on a tangible medium. In *Kim Seng*, the Court, while deciding whether the '*bowl-of-food*' sculpture satisfied the fixation requirement, compared it with the living garden discussed in *Kelley vs. Chicago Park District*,⁴⁷ decided by the Seventh Circuit Court. Chapman Kelley's '*wildflower*' display in the

44 (2008)1SCC1 ('Eastern Book').

45 Available at <http://www.copyright.gov/title17/> (Mar.31, 2019, 09:15 PM).

46 *Falwell v. Penthouse International, Ltd.*, 521 F.Supp. 1204 (W.D. Va. 1981).

47 Leading case on copyrightability of organic works, 635 F.3d 290 (7th Cir. 2011); see also Lily Ericsson, *Creative Quandary: The State of Copyrightability for Organic Works of Art*, 23 Seton Hall J. Sports & Ent. L. 359, 361(2013).

Chicago Public Park received critical and popular acclaim and was promoted as a '*living art*.' Without his permission, defendant dramatically reduced the size of garden, reconfigured flower beds and changed some planting material. The issue was whether artistically arranged garden could be called '*fixed*,' and the Court held it not to be a stable fixation. However, the Court did annex a clarification that the work is not required to be static or fully permanent or that authors incorporating organic material in their works cannot claim copyright. On these terms, in *Kim Seng*, the Court held the perishable '*food-of-bowl*' ineligible as being not '*fixed*.'⁴⁸

Just like a '*writing in disappearing ink*' and a '*writing in frost in window pane*,' which are destined to vanish, a restaurant dish is also created for the purpose of being eaten.⁴⁹ So, this fixation test may act as a big hurdle for a chef because his culinary creations are also perishable. The judgment in *Kelley* and *Kim Seng* seems flawed in light of copyright protection granted to Jeff Koons'⁵⁰ '*Puppy*,'⁵¹ despite changing blooms on it. This latter event seems more in line with the legislative intent of requiring fixation merely for more than cursory duration. An analogy may be drawn with a choreographic work, which is protected⁵² despite fleeting movements of dancers, so long as there is a written explanation of the steps involved or a taped recording. Innovative contemporary artists are indulging in bio art, eco art or even traditional art using organic material and in light of this new phenomena, I must suggest reforms in the existing copyright regime in order to carve out space for these organic arts. If the same is done, creative culinary plating may be able to overcome the fixation hurdle and may find protection, not just as a work of sculpture, but in its own sense as a performing art creating a pleasant dining experience. It must be noted

48 Cathay Y. N. Smith, *Food Art: Protecting "Food Presentation" Under U.S. Intellectual Property Law*, 14 J. Marshall Rev. Intell. Prop. L. i10 (2014-2015).

49 Cathay Y. N. Smith, *Food Art: Protecting "Food Presentation" Under U.S. Intellectual Property Law*, 14 J. Marshall Rev. Intell. Prop. L. i10 (2014-2015).

50 *Art Rogers v. Jeff Koons*, 960 F.2d 301 *available at* <https://copyrightvisualarts.wordpress.com/2011/12/20/art-rogers-vs-jeff-koons/> (Mar. 31, 2019, 09:10 PM).

51 *Eg.*, <http://www.jeffkoons.com/artwork/puppy> (Mar. 31, 2019, 09:10 PM).

52 §2(h) &§13, The Copyright Act, 1957.

that instead of debating feasibility of recipe as a copyrightable material, it can be treated as a medium of fulfilling the fixation requirement. The work of authorship lies in the culinary creation itself. An analogy may be drawn with a dance performance or a music concert, which is also a fleeting and transient but copyrightable expression with graphical notations fulfilling the fixation requirement.⁵³

D. UTILITARIAN ASPECT OF FOOD AND PROTECTION AS AN APPLIED ART

Another hurdle that a creative plate of food may have to face is that of the doctrine of '*useful article*,' which requires separability of utilitarian and aesthetic aspects of food. The obvious function of food is to provide nutrients and caloric content. Conceptually, a plate of food must be desirable even without its functional aspect, *i.e.*, solely based on its aesthetic appeal. A judge may find it very easy to separate the two aspects, since plating does not affect the calorific content of food or its flavour. But, applying this doctrine and drawing analogy between food and useful articles brings us back to square one, *i.e.*, to the point where edible art is treated as an applied art like sculpture not meant for eating. The application of this doctrine can be dodged by simply comparing food, instead, with dance performance or a music concert. But, this would require a specially choreographed menu in order to protect a restaurant dish as a form of performance.⁵⁴ But, if the same cannot be done, chef may fail in getting copyright protection of his culinary creation and its plating.

What may be interesting would be to look into the possibility of protecting the aesthetic aspect of a creative plate of food as separate from its functional aspect under the design law, and the same is delved into under the next part.

53 Lily Ericsson, *Creative Quandary: The State of Copyrightability for Organic Works of Art*, 23 Seton Hall J. Sports & Ent. L. 359, 382 (2013).

54 Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?* 24 Cardozo Arts & Ent. L.J. 1131 (2007).

E. FOOD FOR THOUGHT

The newest cultural trend doing the rounds is *'foodstagramming,' i.e.,* amateur food photography by diners. Even before taking the first bite, we, the diners quickly take out our smart phones and take snaps of our food and within seconds, upload the same flooding social media websites like Facebook, Instagram and Twitter with mouth-watering photos of innovatively plated culinary creation, with the desire of capturing moments of our lives and sharing experiences with friends and followers.

'Foodstagramming' is a sore in the eyes of several chefs, who cite varied reasons for disliking this trend, like: it disturbs the ambience of restaurant; spoils the experience of other diners; low quality photos spoil the whole effect created by the plating; and, most importantly, it helps poachers steal presentation styles. Chefs like David Chang, chef-owner of Momofuku Ko, have even banned photography inside their restaurant.⁵⁵

Could copyrightability of creative plating of restaurant dishes help chefs prevent diners from clicking and uploading photos of their dishes? A more intriguing question would be: would chefs even wish to sue diners for taking photographs for personal use considering the risk of bad publicity and potential loss of customers? A better solution lies in this creative project called *'Foodography'*⁵⁶ taken up by Carmel Winery in collaboration with Chef Meir Adoni, one of Israel's most admired chefs, Dan Peretz, one of the most preeminent food photographers and the ceramic design artist, Adi Nissani. They are designing special plates with provision for smart phones in order to bring together the culinary world and photography. They are even conducting quick workshops for diners, in order to teach better culinary photographing. It at least solves the issue of low-quality, unappealing photographs clicked by amateur photographers-diners.

55 Helene Stepinsky, *Restaurants Turn Camera Shy*, The New York Times (Mar. 31, 2019, 09:00 PM), <http://www.nytimes.com/2013/01/23/dining/restaurants-turn-camera-shy.html>.

56 *Eg.*, <https://www.behance.net/gallery/23032317/FOODOGRAPHY-Carmel-Winery>(Mar. 31, 2019, 08:55 PM).

V. FEASIBILITY OF PROTECTION OF EDIBLE FOOD PRESENTATION UNDER DESIGN LAW

The utility of design law lies in protecting ornamental designs with practical functionality. The requirement in the U.S.A. is that the design must be ‘*new, original, ornamental*,⁵⁷ and *non-obvious*.⁵⁸ Protection is extended to the ‘*visual appearance as a whole, as well as the visual appearance it creates*.⁵⁹ Accordingly, a design patent was granted to a serving tray with shrimp, which created an impression of a clockwise turning wheel.⁶⁰ It is not just different plating arrangements, even new and ornamental shapes of food are finding protection as design patents, like various shapes of pasta⁶¹ and Rich Lord’s “*peace symbol pretzel*.”⁶²

Toeing the line, chefs may explore this area for protecting their plating and presentations, and food designs as design patents, if they can meet the ‘*new, original and ornamental*’ and ‘*non-obvious*’ standard. The test that chefs will be required to pass, in this respect, would be, as laid down in *Revision Military vs. Balboa Mfg. Co.*,⁶³ that “*in the eye of an ordinary observer, giving such attention as a [diner] would usually give, the two plating arrangements are substantially the same.*”

In India, the corresponding Act is the Designs Act, 2000, which protects ‘*the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or*

57 §171, The U.S. Patents Act (Designs).

58 §103, The U.S. Patents Act (Designs).

59 *Contessa Food Products, Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1376 (Fed. Cir. 2002).

60 282 F.3d 1370, 1376 (Fed. Cir. 2002) ‘*Contessa*.’

61 Dan Lewis, *How Kraft Uses Patents to Dominate the Mac and Cheese Wars*, Smithsonian.com (Mar. 31, 2019, 08:55 PM), <http://www.smithsonianmag.com/arts-culture/how-kraft-uses-patents-to-dominate-the-mac-and-cheese-wars-1679578/?no-ist...>

62 *Leslie Friend v. Keystone Pretzels and Laurel Hill Foods*, No. 2:2013cv01028 (W.D.Pa. July 17, 2013).

63 700 F.3d 524, 526 (Fed. Cir. 2012).

*in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.*⁶⁴ The requirements under the Indian Act are similar to those under the US Patent Act, *i.e.*, the design must be ‘*new or original, significantly distinguishable, novel.*’⁶⁵ The doctrinal hurdles lie in the phrases ‘new or original,’ ‘industrial process’ and ‘significantly distinguishable.’

An interesting section to note here is Section 15(2) of the Indian Copyright Act, 1957, which makes it obligatory to register ornamental designs reproduced more than fifty times by an industrial process under the Designs Act and not under the Copyright Act. The rationale is that functional yet ornamental designs must not be protected under the Copyright Act, which is meant to protect aesthetic expressions, not for the purpose of commercial exploitation as such, but with the aim of protecting art and culture more. A restaurant dish is prepared essentially for a commercial purpose, no matter how fancy it may appear, and for that very purpose, it goes without saying that it usually crosses the mark of fifty very easily.

The Design Act helps overcome the utilitarian aspect argument countering copyrightability of food plating. The arguments in favour of a design may be better explained through Chef Massimo Bottura’s Moeche and Polenta in Two versions.



Figure 2: Chef Massimo Bottura’s Moeche and Polenta in Two Versions⁶⁶

⁶⁴ §2(d), The Designs Act, 2000.

⁶⁵ §4, The Designs Act, 2000.

⁶⁶ NDTV Food (2019). *18 Courses Designed by Gaggan Anand, The Food God*. [image] Available at: <https://food.ndtv.com/photos/18-courses-designed-by-gaggan-anand-the-food-god-20657/slide/8> [Accessed 5 May 2019].

The above-displayed dish fulfils the requirement of being original as the idea of plating polenta and crab meat as the body of a crab is a unique idea expressed on plate by Chef Massimo. The plating is also novel as such a plating style has never before been opted for by any other chef. However, the dish is generally required to meet one or both of the requirements - novelty or originality.⁶⁷ And, it is evident that the ornamentally placed crab background, the round polenta and crab meat and the herbs above all serve a functional purpose. These days chefs employ several molecular gastronomy techniques like flash freezing, sous vide, spherification, etc. A chef's kitchen appears like an assembly line with line cooks, a sous chef and a head chef. This structure may qualify as an industrial process. In the Moeche dish also, there appears to be a use of several moulds and techniques, by the assembly line of chefs.

The Design law may serve as a more optimum area for protection of functional food presented and plated artistically, compared with the Copyright and the Trade Marks laws, in the sense that chefs will not be needed to cloak food as non-functional, if it can be proved that the chefs are employing an industrial process.

However, one point that must be noted here is that the Designs Act protects only novel designs not already disclosed to the public worldwide. In line with this requirement, chefs coming to India will have to endeavour at creating novel plating and presentation styles, which are not already known in any part of geography.

VI. CONCLUSION

The culinary industry strives on an open source model of learning through apprenticeship and the tradition of sharing of ideas, especially in the elite circle. Blatant copying in this industry, accordingly, is majorly governed by self-imposed professional and social community-based norms of chefs.

67 M/s Bright Auto Industries v. Sh. Raj Chawla, ILR 1978 (I) Delhi.

Of late, the industry has seen a shift in chefs' approach; they are building an entrepreneur-like attitude and demanding treatment of their expressions on plate as art and its exclusivity. Community norms alone are failing at protecting chefs' works; hence, there is a rising demand by chefs and restaurateurs to carve out place for their edible culinary art in the existing IP regime. This phenomenon is on the rise in India as well now with the influx of well-known chefs, restaurateurs and their high-end restaurants.

I have discussed in this article the feasibility of carving out place for creative edible culinary creations and their plating in the Copyright, Trade Marks and Designs laws of India, and I have found that it is plausible and possible to carve out such place, if we bring about some modifications as suggested in the previous chapters, in line with the growing societal acceptance of plating and presentation of restaurant dishes as crucial as, say, restaurant décor, for enhancing the dining experience and competition amongst chefs for plating more creative dishes.

A MODERN WORLD FIGHTING A MODERN WAR: AN EFFORT TO BALANCE TECHNOLOGY AND HUMANITY UNDER THE REGIME OF INTERNATIONAL HUMANITARIAN LAW

Satavisha Haldar

The art of war is of vital importance to the state.
It is a matter of life and death, a road either to safety or to ruin.
Hence, it is a subject of inquiry, which can on no account be
neglected by any of us
Today,
... and tomorrow.¹

AN INTRODUCTION TO THE EVOLUTION OF ARMED CONFLICT

Wars have been a periodic, but persistent, part of the history of the world. Over the years, scholars have deliberated that conflicts of any nature which ultimately result in warfare are exorbitantly destructive, but inevitable nonetheless. Article 2 of The Charter of the United Nations puts a restraint on the use of force against the “territorial integrity or political independence of any other state.” The provision hints at the fact that peaceful and amicable methods should be preferred in the dissolution of conflicts, instead of going into armed conflict.² However, this does not take away from the state its right of self-defense. A state can resort to force as a means of retaliation to an attack on it.³ Under this provision, self -defense is an inherent right of states which are under an armed

1 Sun Tzu, *The Art of War*, 133 (1st ed. General Press, 2018).

2 Charter of the United Nations, 2 (1945). All Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

3 UN Charter, 51 (1945).

attack. In spite of the numerous provisions surrounding it, wars cannot be justified, as it results in imminent damage and suffering to life, property and environment - damage which in most cases is immeasurable. The provisions of International Humanitarian Law come into action, specifically during an armed conflict, but hold active relevance in the legal world at all other times, also. It sets out a list of provisions, which act as a guiding tool to regulate the way in which a war is being fought, keeping in mind the interests of 'humanity.' It does not delve into the justifications or reasons for a war taking place, but acts as a body of rights and reforms to make sure that unnecessary suffering to human life can be minimized.

The 20th century witnessed the most brutal wars when there was a recorded death of 187 million, which were caused as a direct or indirect result of war.⁴ Since then, there has been a change in the scenario. The way in which wars are being fought has gone through a radical modification. This concept is dealt with under the head "Means and Methods of Warfare" under International Humanitarian Law (IHL). International Humanitarian Law or *jus in bello* is a particularly old branch of law which deals with the laws that are in force during a period of armed conflict. The inception of IHL can be primarily seen from The Battle of Solferino in 1859 and, thereafter, through the various Conventions which ultimately resulted in the codification of the laws. There are a sufficient number of laws which guide the behavior of soldiers and belligerents on a battlefield. The laws are extensively listed under the four Geneva Conventions which will be dealt with in the later part of the research work.

An idea of war instinctively puts in our minds pictures of certain basic weapons like guns, rifles, machetes, machine guns, tanks, flamethrowers and other various forms of artillery. The present scenario of an armed conflict has, however, changed substantially. It is seen how advanced methods of technology have taken over every sector and have made our lives faster, communication simpler and the world a closer place. The progress in technology has become an irreversible

4 Eric Hobswawm, *War and Peace*, THE GUARDIAN (Jan. 24, 2019, 12:16 AM), <https://www.theguardian.com/education/2002/feb/23/artsandhumanities.highereducation>.

truth,⁵ and there is no truth in denying its existence. In the world weaponry system, also, technology has made its mark unnoticeable. Armed conflicts nowadays have the potential of being fought remotely through various concepts which are the brainchild of scientific advancement. It is crucial to mention beforehand that the following research work is in no way a condemnation on the efficacy or potency of scientific progress. It is only an attempt to bring about a sense of balance between military necessity and humanity in a way which does not make armed conflict technologically regressive, but at the same time does not cause indiscriminate destruction to humanity. Henri Durant, in as early as 1986, predicted that, “On one hand, if modern states take recourse to new and frightful weapons which might seem to abridge the duration of future wars, on the other hand it is very likely that these weapons would render future battles only more and more murderous in nature.”⁶ Therefore, it seems that one of the primary motives of international humanitarian law is to provide a check on the wide range of weapons used, so as not to cause ‘*indiscriminate suffering*’⁷ to mankind. The international community has stressed intently on the concept of ‘*humanization of the war*’ which largely believes that where, on one hand, armed conflict is unfortunately inevitable, on the other hand, the only solace that might emanate from it is if sufficient and ample measures are taken to keep death and destruction of humankind to a minimum. The modern battlefield has now become a controversial playground where different states are introducing and using the latest, technologically modified weapons, almost always never conforming to the mandates of international humanitarian law. The provisions explained above have been set forth very deeply in the Geneva Conventions; however, there have been challenges and difficulties in implementing them. For instance, only very few states have adopted the means to pursue a legal review or scrutiny under Article 36 on any new weapon that is being acquired by it.

5 Anushriti Singh, *Technology Advancements: A Boon or Curse*, PC QUEST (Feb. 3, 2019, 4:00 PM), <https://www.pcquest.com/technology-advancements-boon-curse/>.

6 H. Durant, *A Memory of Solferino*, 126 (International Committee of the Red Cross, Geneva 1986).

7 Protocol Additional to the Geneva Conventions 12 August, 1949, relating to the Protection of International Armed Conflicts (Protocol1), 35 (2) (1977).

The provision does not explicitly mention or refer to any particular system to review weapons. Thus, only very few states have actually established their own review mechanism. In 2016, the ICRC introduced a Guide to the Legal Review of New Weapons, Means and Methods of Warfare.⁸ However, the guide somehow fails to provide a definitive review mechanism and only provides the mandates that States ought to follow.

Advancement in science is expeditiously making its mark in all the different studies of the world, and the weapons system is no exception. Customary International Law makes the provisions of the Geneva Convention relating to the law of weapons available to all States, irrespective of the fact of whether they come under a certain treaty or not.⁹ One of the primary reasons which attract humanitarian law regulations is the dismissal of human control over a new weapon. Artificial Intelligence in the weapons system and the concept of Autonomous Weapon System (AWS) has been trying to come up with innovations which are capable of making decisions to attack and end life without human intervention.¹⁰ Research shows that there have been situations when weapons controlled by artificial intelligence have proved to be better performers than human controlled weapons. However, researchers and scholars are extremely skeptical, with some even vehemently opposing the concept.¹¹ This is because it has been seen that, currently, there is no software capable of mechanizing qualitative decision making and taking on-the-spot, impromptu decisions.¹²

8 *Review of New Weapons*, ICRC (Jan. 29, 2019, 10:30 AM), <https://www.icrc.org/en/document/review-new-weapons>.

9 *Customary International Humanitarian Law: Questions & Answers*, ICRC (August 20, 2019, 07:15 PM), <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm>.

10 Alan L. Schuller, *At the Crossroads of Control: The Intersection of Artificial Intelligence in Automated Weapons Systems with International Humanitarian Law* Harvard National Security Journal, 391 (August 20, 2019, 07:37 PM). <https://harvardnsj.org/wp-content/uploads/sites/13/2017/02/Schuller-NSJ-Vol-8.pdf>.

11 Kelsey Piper, *Death by Algorithm: The age of Killer Robots is closer than you think*, VOX. (August 20, 2019, 07:43 PM).

12 Yu Zhou, *Decision Making is more than Quantitative Problem Solving*, Towards Data Science (August 20, 2019, 07:52 PM).

MEANS AND METHODS OF WARFARE: PROVISIONS UNDER INTERNATIONAL HUMANITARIAN LAW

The two basic principles of the law of armed conflict concerning the use of weapons are that weapons should neither cause unnecessary suffering to combatants, nor be used in a manner that will indiscriminately affect both combatants and non-combatants. These rules are now codified in Articles 35, 36 and 51(4) of the Additional Protocol 1, which says:

ARTICLE 35¹³: 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 35 is treated as customary international law in both international and non-international armed conflicts. The usage of weapons which are of a nature so as to cause 'superfluous injury or unnecessary suffering' [Article 35(2)] is considered as a war crime under Article 8 of the Rome Statute.¹⁴ The importance of this principle was further upheld in the *Nuclear weapons Advisory Opinion*:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following...it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering...states do not have unlimited freedom of choice of means in the weapons they use... In conformity with the aforementioned principles, humanitarian law, at a very early

13 Additional Protocol I, 35, (March 1, 2018, 10:04 AM) <https://ihl-databases.icrc.org/ihl/WebART/470-750044?OpenDocument>.

14 Rome Statute, 8(2) (b) (xx), (Feb. 16, 2018, 12:30 AM), https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

age, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to the combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives...these fundamental rules are to be observed by all States...because they constitute intransgressible principles of international customary law.¹⁵

There were several different theories which existed before the formation of the Additional Protocols. One of these theories, (now out of date) was elucidated by the maxim, “*kriegsraison geht vor Kriegsmanier*” - The necessities of war take precedence over the rules of war or “*Not kennt kein gebot*” – Necessity knows no law. These maxims signify that depending on the demand of the military situation at the time, the commander on a battlefield has the power to decide in every case, whether the rules shall be respected or ignored.¹⁶ Article 35 rejects both such maxims and sets forward two distinct fundamental principles of International Humanitarian Law:

- The balancing of humanity and military necessity (upholding the statement given in The St. Petersburg Declaration, 1868).
- Prohibition on causing superfluous injury and unnecessary suffering.

ARTICLE 36: In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would in some, or all, circumstances be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Thus, Article 36 of Protocol compels parties to the Protocol to reassess and review the legality of any newly developed weapon prior to its usage. Therefore,

15 Nuclear Weapons Case, paras 78-79 (1996).

16 Philippe Sands, International Law, The International Court of Justice and Nuclear Weapons 311-312 (Laurence Boisson de Chazournes ed., Cambridge University Press, 1999).

any new weapon must be judged in line with the provisions of Additional Protocol I and International Humanitarian Law and any other International Law treaty that might seem relevant.

ARTICLE 51(4): Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

THE EFFORTS OF THE INTERNATIONAL COMMUNITY IN HUMANIZING WARS: ‘MEANINGFUL HUMAN CONTROL’

On 29th June, 2017, The ICRC (International Committee of the Red Cross) and the German Permanent Mission to the United Nations hosted a panel discussion on the launch of the book, “Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law” edited by Robin Geiss, Andreas Zimmermann and Stephanie Haumer. The book almost acts as a subtle reminder that amidst the boom and glory of technology, care needs to be taken to keep our wars humane. It goes on to talk about the role of the Red Cross and The Red Crescent in regulating and controlling the controversies relating to the means and methods of warfare.¹⁷

In October 2012, ‘The Campaign to Stop Killer Robots’ was formed by a global conglomeration of around 72 NGO’s from 31 countries. Their goal is to ban fully autonomous weapons and, thereby, retain ‘meaningful’ human control over

¹⁷ *Humanizing the laws of war - The Red Cross and the development of International Humanitarian law*, ICRC (Feb. 4, 2019, 11:20 PM), <https://www.icrc.org/en/event/humanizing-laws-war-red-cross-and-development-international-humanitarian-law-0>.

the use of force.¹⁸ The term ‘Meaningful Human Control’ was primarily coined by the UK based NGO, Article 36, who work to promote public scrutiny over any new production and development of weapons.¹⁹ In 2015, it released an open letter calling for a ban on offensive autonomous weapon beyond meaningful human control. This letter was signed by around 4000 researchers on Artificial Intelligence and Robotics and 22,000 others. The United Nations Convention on Conventional Weapons has been holding annual meetings on this issue, and, in 2016, it formed a Group of Governmental Experts (GGE) to help probe further into the matter. The latest meeting was held in August 2018 to further understand and instill the meaning of ‘human element’ in lethal force and the use of emerging technologies in producing autonomous weapons.²⁰

On April 2016, there was an Expert Meeting by ICRC under the framework of UN Convention on Certain Conventional Weapons (CCW) to deliberate and consider the humanitarian, legal, and technical issues relating to autonomous weapon systems. The discussions held at this meeting revealed a determined agreement that there needs to be “meaningful, appropriate or effective human control over the weapons that are being introduced or used and that the use of force should be contained.”²¹ The discussion also set forth to determine the definition and various characteristics of Autonomous Weapon Systems. There as need to formulate a clear terminology of the term which would result in better understanding of the context. The ICRC has defined autonomous weapon system as: “Any weapon system which possesses autonomy in its critical functions. That is, a weapon system that can select (i.e., search for, or detect,

18 Id.

19 Autonomous Weapons Systems: Evaluating the Capacity for ‘meaningful human control’ in weapon review processes, Discussion paper for the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts (GGE) meeting on Lethal Autonomous Weapons Systems (LAWS) Art. 36.

20 *2018 Group of Governmental Experts on Lethal Autonomous Weapon Systems (LAWS)*, (Feb. 6, 2019, 11:30AM), [https://www.unog.ch/80256EE600585943/\(httpPages\)/7C335E71DFCB29D1C1258243003E8724?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/7C335E71DFCB29D1C1258243003E8724?OpenDocument).

21 *Views of the ICRC on autonomous weapon systems, CCW Meeting of Experts on Lethal Autonomous Weapon Systems (LAWS)*, ICRC (2016) Background Paper.

identify, track, select) and attack (i.e., use force against, neutralize, damage or destroy) targets without human intervention.²²

The definition mentioned above can be broken down and analyzed for a better understanding. In the very first instance, an autonomous weapon system is anything which has a considerable level of independence from human control in its actions. Thus, such a weapon system detects and attacks targets without any actual human (physical or remote) interference. The issue at play here is the part where human control is being lost. The weapon system is governed under international humanitarian law, a branch of law which has weapons and methods of warfare as one of its core elements. The word humanitarian explicitly contains the word 'human' inside it and can easily be understood as being a concept that deals with service to mankind. Authors and researchers believe that intentionally surrendering the human capability 'to think' and make rational decisions to machines can have disastrous effects. Lethal Autonomous Weapon Systems (LAWS) are thus proving to be criticized and controversial due to a large number of apparent reasons. 'Killer robots' is a term that has been used for weapons which are completely autonomous in their decision making and actions and have no human control.²³ Countries, organizations and experts from all around the world have been coming together to put across a ban and, subsequently, stop the production and use of these weapon systems.

On 17th October, a panel of experts was brought in by the First Committee on Disarmament and International Security to discuss on the issue titled '*Retaining Meaningful Human Control of Weapons Systems.*' The event occurred as a result of the collaboration between Human Rights' Watch's Campaign to Stop Killer Robots and the Permanent Mission of Austria to the United Nations. The Campaign Coordinators were Mary Wareham and Ambassador Thomas Hajnoczi who shared chairing duties for the panel. Ambassador Hajnoczi commenced the discussion by explaining how fully autonomous weapons if

22 *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons.* ICRC Expert Meeting, Versoix, Switzerland 7-8 (2016).

23 Campaign to Kill Killer Robots, available at <https://www.stopkillerrobots.org/learn/>.

used in warfare would lead to moral and ethical injustice, as well as create legal disarmament issues under the international framework. He has been quoted as saying, “Once they are introduced into the battlefield, it might be too late.”²⁴

There have been extensive debates on the ethical aspects of using lethal autonomous weapon systems in the last five years. To address the problems of absolute autonomy, the principle of “meaningful human control” has been introduced in the legal-political debate. An open letter signed by influential and revolutionary world figures like physicist Stephen Hawking, Apple co-founder Steve Wozniak and Tesla’s Elon Musk, along with around 1000 artificial intelligence experts and researchers on robotics, called for a ban on “offensive autonomous weapons beyond meaningful human control.”²⁵ To lay down basis and groundwork for meaningful human control, there are not only various moral considerations which need to be taken into account, but also certain ethical guidelines which can accommodate policy makers, technical designers and engineers.²⁶ Human involvement, keeping in mind the international humanitarian law provisions and sanctions, would amount to meaningful human control. Merely programming a machine and feeding it data to function as an independent weapon does not qualify as meaningful human involvement. It is very important for the international community to, therefore, form a consensus and formulate laws which are targeted towards the production, development and usage of fully autonomous weapon systems. Such a provision, however, should not be construed to mean that weapons should be manufactured without scientific and technological help or that their usage should be absolutely devoid of scientific intellect. This is where the international community has to work to curb the grey area and understand

24 *Retaining Meaningful Human Control of Weapons Systems*, United Nations Office for Disarmament Affairs (April 18, 2019, 8:45PM), <https://www.un.org/disarmament/update/retaining-meaningful-human-control-of-weapons-systems/>.

25 *Autonomous Weapons: An Open Letter from AI & Robotics Researchers*, Future of Life Institute (May 16, 2019, 11:20 PM), <https://futureoflife.org/open-letter-autonomous-weapons/>.

26 Filippo Santoni di Sio & Jeroen van den Hoven, *Meaningful Human Control over Autonomous Systems: A Philosophical Account*, *Frontiers in Robotics and AI* (May 21, 2019, 5:40PM), <https://www.frontiersin.org/articles/10.3389/frobt.2018.00015/full>.

how much innovation can be applied to a weapon so as to make it efficient but keep the human control over the weapon, so that it does not develop an autonomy of its own.

AN UNDERSTANDING OF THE CONSEQUENCES OF A WORLD RUN BY AUTOMATED WEAPONS

A detailed study of the principles and provisions of international humanitarian law would help understand as to how such a ban is legally and morally justified. The production and usage of weapons like these directly affect the human dignity and conscience. The biggest challenge of using AWS is that it runs against the principles of military necessity, proportionality or distinction. The principal of military necessity enunciates that even though it gives states the freedom to engage in armed conflict, it does not take away the duty of the states to abide by the rules of international humanitarian law. The principle literally means that the armed forces can take up measures that are deemed to be necessary for the achievement of a legitimate military goal, taking into consideration that the acts cannot be held unlawful under international humanitarian law.²⁷ Automated Weapons if used would cause more harm and casualties than necessary on the battle field. This is because these weapons would not pay heed to the notion of humanity, as they would be fully automated in nature. Similarly, the principle of proportionality says that the effects that the usage of weapons in an armed conflict have must not be “disproportionate to the military advantage sought.”²⁸ Weapons which are automated in nature lack the rationality which would let them understand the concept of proportionality. The usage of such weapons might result in adverse and extraordinary harm. Lastly, weapons which are programmed to run on artificial intelligence do not possess the understanding to differentiate between combatants and non-combatants. For example, the Israeli Harpy is an airborne military weapon

27 David Turns, Military Necessity, OXFORD BIBLIOGRAPHIES (August 20, 09:31 PM), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0008.xml>.

28 *Proportionality*, How does Law Protect in War, ICRC (August 20, 09:37 PM) <https://casebook.icrc.org/glossary/proportionality>.

that has the power to detect radar signals. When it finds a signal, it looks at its database to find out if it is friendly, and if not, it dive bombs the radar. This type of discrimination is different from the requirements of the principle of distinction because, for example, the Israeli Harpy cannot tell if the radar is on an anti-aircraft station or on the roof of a school. If it attacks the school, the amount of collateral damage would be disproportionate in nature.²⁹

Therefore, we see how usage of Autonomous Weapon Systems cause unnecessary suffering and fatalities. Most of the times the intensity of the attacks done by using these weapons are more than the degree of attack imposed on them, and finally, and most importantly, these weapons lack rationality and the power of human judgment while functioning. Thus, they cannot differentiate between combatants and non-combatants, even though they are sometimes programmed with sensory and vision systems.

Another very crucial reason to put a prohibition or to control the extent of AWS is their lack of accountability.³⁰ When a weapon which is attacking autonomously without a human controlling it, kills a civilian or a child unnecessarily, then it becomes almost impossible to make anyone liable for such action.³¹ Human-made provisions and distinctions cannot be programmed into robots and other autonomous weapons, and thus, unprecedented casualties are inevitable. A world using absolute automated weapon systems becomes extremely dangerous, as it completely goes against the basic concept of law and justice, a system which has a victim and an offender and there is a liability attached to the offender for obstruction of justice. Assigning complete independence to a machine to attack and fight wars on behalf of humans would

29 Noel E. Sharkey, *The Evitability of Autonomous Robot Warfare*, 94 International Review of the Red Cross (August 20, 2019, 09:55 PM).

30 *Elements Supporting the Prohibition of Lethal Autonomous Weapon Systems*, Working Paper of The Holy See (May 20, 2019, 12:40PM)[https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/752E16C02C9AECE4C1257F8F0040D05A/\\$file/2016_LAWSMX_CountryPaper_Holy+See.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/752E16C02C9AECE4C1257F8F0040D05A/$file/2016_LAWSMX_CountryPaper_Holy+See.pdf).

31 *Mind The Gap: the Lack of accountability for Killer Robots*, HRW (2015) <https://www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots>.

only increase human casualties and collateral damage to a huge extent, without any particular source to hold accountable for it.³²

The introduction of LAWS (Lethal Autonomous Weapon System) goes directly against the ‘Martens Clause’ which formed a part of the preamble to the Hague Convention (II) 1899, on the Laws and Customs of War on Land. The clause says that even without an explicit ban, all states must ensure that its weapons comply with “principles of humanity” and “the dictates of public conscience.” Autonomous weapons cannot adhere to any of these criteria and are in direct conflict with the laws of war.³³ This is because the laws of war, under the guidance of International Humanitarian Law are codified in a manner as to keep ‘humane’ considerations as its priority. Including autonomous weapons which lack human rationality on the battlefield would absolutely go against this priority. During a ceremony which marked the 100th anniversary of The World War I, the U.N. Secretary General, Antonio Gueterres backed the ban on LAWS. He addressed the audience and encouraged them to “imagine the consequences of an autonomous system that could, by itself, target and attack human beings.” He concluded by saying, “I call upon states to ban these weapons which are politically unacceptable and morally repugnant. He further stressed on the fact that machines which had the power and discretion to take lives without human involvement should be strictly prohibited under international law.³⁴ Scientific invention and evolution has shown humans many different facets and has made their lives easier and more efficient. However, as Professor Albert Einstein had very correctly predicted and said, “*It has become appallingly obvious that our technology has exceeded our humanity.*”

32 Rebecca Crootoof, *War Torts: Accountability for Autonomous Weapons*, 164 University of Pennsylvania Law Review 1348, 1365-1366 (2016)https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9528&context=penn_law_review.

33 *Principles needed for Autonomous Weapon Systems*, Japan Times (May 6y, 2019, 10:20AM), <https://www.japantimes.co.jp/opinion/2019/03/31/editorials/principles-needed-autonomous-lethal-weapons/#.XOY8gsgzbIU>.

34 Id.

CONCLUSIONS AND RECOMMENDATIONS

At certain times, it might be thought that the inclusion of actors (killer robots, here) who are not humans might help to reduce or, in certain cases, almost diminish the casualty rate which occurs during and after a war. It is to be carefully understood that war is a historical act that has been going along for centuries, and there is a reason why Sun Tzu had named his book, *The 'Art' of War*. The initiation of a war comes from human minds (with all its complex thinking abilities), which is something that automated machines or artificial intelligence can never do. The basic impetus behind the working of a machine is a human mind. Therefore, an act that has been started by humans in the first place, should be seen through by humans. International humanitarian law works with actors who are human beings, and the act of completely replacing human beings with machines would then not come under the scope of its provisions and protection. It is important to clearly understand that the meaningful human control asks the question: How much power can be delegated to a machine to fight a war for humans? To answer the question, it is important to understand that replacing humans with machines should not be an option. However, supplementing a machine's strength and accuracy with advanced technology is a better approach, which might help in the reduction of destruction in some way. Therefore, the act becomes progressive and not regressive, keeping in mind the fact that a war, in the first place, is hugely detrimental, but sometimes inevitable.

The creation and evolution of law and justice has been initiated from the intellect and actions of humans; till now, there has been no separate body which can understand and regulate the acts of something which is not human. Article 35(1) of Additional Protocol 1 explains very clearly that, 'In any armed conflict, the rights of the Parties to a conflict to choose methods and means of warfare is not unlimited.'³⁵ Before the introduction and usage of any weapon, this factor needs to be carefully analyzed and understood. The provision was created to hint at the fact that the effect of a weapon used during war should not be of such nature as to cause exorbitant and unnatural death and suffering. Therefore,

³⁵ Additional Protocol 1 to the Geneva Conventions of 1949, 35(1) (1977).

it is only rational and just that the international community assesses and re-assesses its decisions regarding the involvement and inclusion of concepts like automated warfare and artificial intelligence in weapons used during warfare.

This research work does not strive to criticize the worthiness of technological progress in any way. It would be immensely immature and ignorant to propose that scientific advancement is not radical and dynamic in nature. Any mere activity in today's world is performed with the help of science and technology. Research work in any stream has become much more smooth and accessible only because of the level of efficiency that scientific advancement has brought in. However, it is essential for humans to understand where to stop. Instead of creating a world which does not run on logic but on certain pre entered commands and programs, the advantages of science can be harnessed to create a better tomorrow.

The Arms control race, once put in perspective, shows that the civil society has been vehemently working to legally prohibit the autonomous weapons system under the CCW framework which works alongside the Campaign to Stop Killer Robots and is coordinated by the Human Rights Watch.³⁶ This is backed by organizations such as Amnesty International, the UK group Article 36, The International Committee for Robot Arms Control and a network of experts and practitioners in the field of robotics and artificial intelligence. The ultimate goal of these agencies is to prohibit and reduce the involvement of autonomy and the idea of artificial intelligence in weapons used in warfare. Effort is being made to reach an optimum position, keeping in mind the concept of 'meaningful human control.'

Through recapitulation of the above mentioned factors, it can be derived that meaningful human control is to be present over all weapons used during war. This position stems from the following issues:

36 *Stopping 'Killer Robots': Why now is the Time to Ban Autonomous Weapons System*, ARMS Control Association (April 18, 2019, 9:00PM), https://www.armscontrol.org/ACT/2016_10/Features/Stopping-Killer-Robots-Why-Now-Is-the-Time-to-Ban-Autonomous-Weapons-Systems.

Firstly, when seen from a moral perspective, using fully autonomous weapons is a direct violation of human rights and dignity. The decision to use force should be attempted keeping in mind respect for humanity. This decision making can only be undertaken by humans, as they possess the power of reasoning and prudential judgment. Further, they are equipped to modify their action and state of mind depending on past experiences relating to a particular event.³⁷ The third CCW Meeting of Experts on LAWS was held from 11th to 14th April 2016. The Holy See, (which is the office of the Bishop of Rome, which is the Pope) submitted a paper which stated, “Prudential judgments cannot be put into algorithms.”³⁸ The statement’s appropriateness lies in the fact it is true that advanced scientific programming and coding might help develop and provide autonomy to a weapon and teach it to attack and destroy certain targets. However, it can never acquire the continual, rational thinking process of a human mind which can assess situations, and adjust and reorganize accordingly to take a decision which can bring about optimization between achieving a target and checking unnecessary casualties/damage. Further, human beings possess empathy, which is a feeling of compassion for other humans and the surroundings. On the other hand, inanimate objects such as autonomous weapons can never be expected to understand the value of human lives, and thus, allowing such weapons to handle life and death decisions would not be justified.

Secondly, meaningful human control in weapons would signify respecting and being in compliance with the provisions of International Humanitarian Law. It is true that there is no specific law which directly talks about meaningful human control over weapons. However, for the first time during the 1899 Hague Conventions Fyodor Fyodorovich Martens introduced the Martens Clause, which says that in certain instances or cases which are not guided by any international agreement or do not come under the jurisdiction of a particular

37 *Killer Robots and the Concept of Meaningful Human Control: Memorandum to Convention on Conventional Weapons*. Human Rights Watch, (May1, 2019, 8:00AM), <https://www.hrw.org/news/2016/04/11/killer-robots-and-concept-meaningful-human-control>.

38 *Id.*

convention, civilians and combatants or any other affected person shall not find themselves devoid of any protection. Instead, they shall be guided by the principles of law of nations, law of humanity and the dictates of public reason.³⁹

Further, it has been stressed how various provisions of Additional Protocol 1 explicitly mention that the rights of using weapons during an armed conflict is not unlimited in nature. There are mandates which need to be followed. The principle of necessity and proportionality also stresses on the same issue that the usage of weapons during a situation of armed conflict must be contained and should not be exorbitant. Therefore, AWS runs in direct violation to the principles of international humanitarian law, and the introduction of meaningful human control helps in harmonizing and rationalizing the position.

Thirdly, and most importantly, comes the question of accountability. Accountability is a major component while establishing rule of law. It is important that there be a physical person who can be accused and punished for a crime committed.⁴⁰ Using autonomous weapons creates a gap in accountability, because a casualty or fatality caused by the weapon cannot be traced back to a human actor directly. This is a direct violation of the whole justice system, as there is no one to be held liable for the acts of an inanimate machine. In case of traditional weapons, it is easier to build a nexus between a crime committed and the human involved. If the concept of accountability becomes vague, then the whole justice system becomes jeopardized. Individual criminal responsibility comes into play when a combatant can be directly held liable for any crime that he commits in a situation of armed conflict.⁴¹ This consists of both *actus reus* and *mens rea*. However, in the situation of autonomous warfare, if a robot is programmed and physically put in an unstructured environment, it might act unpredictably, and, in such a case, it shall be almost impossible to attach

39 *Martens Clause, How does Law protect in War?* ICRC (March 26, 2019, 10:20AM), <https://casebook.icrc.org/glossary/martens-clause>.

40 Michael Walzer, *Arguing about War* 287 (2004); Thompson Chengeta, *Defining The Emerging on Meaningful Human Control*, 864 (March 25, 2019), <http://nyujilp.org/wp-content/uploads/2010/06/NYI303.pdf>.

41 *Id.*

criminal responsibility on anyone. Therefore, to constitute accountability, it becomes crucial that there are human players involved and the whole situation is not governed by autonomous weapons.

The concept of artificial intelligence, which is the driving force behind the different autonomous weapons and killer robots, is not a regressive concept altogether. Artificial intelligence is the brainchild of scientific advancement and has helped in bringing about positive change in a number of sectors all throughout the world. The present paper has no intention to criticize the proactive advancements of science and technology. It is limited specifically to the involvement of artificial intelligence in weapons used during warfare. A weapon should not be loaded with the burden of carrying out acts which involve decision making. This would prove to be only impossible and fatal. There are certain limits up to which a machine can act on behalf of humans, and exceeding those limits would prove to be dangerous for the human race. Human beings need to remember that spontaneous as well as general decision making can never be programmed into a machine. It is a virtue that can only be performed by a rational human being. The laws of nature have arranged the world in such a way that each organism has its own set of roles which it needs to perform. By not acceding to these laws of nature, but handing over responsibilities to machines which should have been undertaken by humans themselves, it would result in doomsday for the human race.

CO-OPERATIVES IN A MARKET ECONOMY: DEMOCRATIZATION OF ECONOMIC PROCESS

Aloke N Prabhu

INTRODUCTION

Human enterprise and social systems of organising economic activity are predominantly based either on competitive or cooperative principles. Despite the dominance of competitive principles in contemporary capitalism, historically these principles manifested in many different combinations in different contexts. This paper argues that a market enterprise could better serve the interests of society if based on a system of cooperation, rather than competition. With a system based on cooperation, I mean not only forms of organization which legally qualify as cooperatives, but also a wide array of market ventures that are inspired by the principles and philosophy of cooperation¹ based on shared values and common interests. There are drawbacks to such a system, but, as I will argue, the benefits it may bring are far-reaching, not the least thanks to its voluntary (non-coercive) and bottom-up nature which has the potential to produce positive change at the grass root level. The normative arguments it creates reflect a much more robust and shared economic system

1 A cooperative is an organization established for the purpose of purchasing and marketing the products of its members, i.e., shareholders, and/or procuring supplies for resale to the members, whose profits are distributed to the members, not on the basis of members equity investment in the cooperative, but in proportion to their patronage of it, i.e., the amount of business that each member transacts with it. Hence, cooperative can be a specific type of cooperation, recognized under the law; it can also mean a set of practices and values reflecting internal governance structure of an organization, like a group of tenants creating a housing cooperative by adopting highly participatory and democratic ways of operating. Also, see, Jonathan Michie, Joseph Blase & Carlo Brozaga (Ed) *The Oxford Handbook of Mutual, Co-Operative and Co-Owned Business* (2017).

that is egalitarian. Such changes not only enable the least advantaged members of society, but also help establish and foster democratic values.² In fact, while it may be desirable to have democratic values for capitalism to flourish, the capitalist enterprise - as best exemplified by the profit-motivated and hierarchical corporation - fails to realize democratic values within its internal organization. Schumpeter notes that the capitalist process unavoidably attacks the economic standing ground of the small producer and trader by engaging in a competitive mechanism.³ The capitalist process eventually decreases the importance of the function by which the capitalist class lives, indicating that the strength by which capitalism trumped preindustrial feudal society could impede its own progress.

As such, capitalism presents a fundamental contradiction: it relies and flourishes on democratic values, yet the very structures do not imbibe democracy, but are hierarchical and adversarial in nature where competition is the virtue. Some also argue that in order to bring true democracy to life, it is necessary to remove the poisonous fumes of capitalism that asphyxiate it. The capitalist economy has created complexity and giantism, distancing our actions from their consequences, and thus impoverishing our capacity for moral action. The separation of ownership from control⁴ also led to degradation and immoral action, which otherwise would require individuals to have both the opportunity to, and capacity for, understanding the consequences of their actions and assuming responsibility. The abstractness of the consequences of our actions when dealing within these organisations often discourages moral responsibility to the vanishing point. But these organisations do not just distance us from the consequences of our actions; rather, through this distancing, they also contribute

2 The understanding of democracy is based on the classical doctrine of democracy that is democracy as a supreme value in itself, rather than a method for the selection of leaders. This view takes democracy as a metaphysical value to be realized, reflected in the common good and by the will of the people or *volontegenerale*. Hence, in the text, the phrase democratic values are largely used, which indicates the commonly accepted notions of what life and society should be.

3 Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (1943) 140.

4 Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property* (1991).

to dis-embedding the individual from both social relationships⁵ and moral considerations. It widens the socio-political and economic divide. The premise that any economic development should increase the likelihood of transiting to a superior state, and encompass all sections of people within a community, rests on the need for state intervention where necessary and the belief that economic institutions, though predominantly have economic goals, yet are not devoid of social and political implications.⁶ Hence, the laissez faire theory that is based on the merits of free market and competition, though bringing development and economic growth, yet the ever-increasing inequality has questioned the very legitimacy of the free market principles. Hence, the failure of neo liberal economic approach world-wide has questioned the very notion of free market and unbridled competition as a virtue,⁷ and, hence, it is argued by some that a mix of market competition and state regulation is unavoidable in any complex modern economy.⁸ Under such circumstances, this paper intends to show that, in the debate between free market forces where competition is devoid of state and external regulation, cooperative as an institution takes a midway between state ownership and private ownership. It represents a collective ownership that marks a significant distinction from a vision of markets as institutionalisations of individualism and non-responsibility that can only be corrected through external intervention or left open to free market forces to correct itself through failure. More importantly, it is harmonious with the individual and institutional conflicts and would be ethical in its framework that counters the ethical dilemmas which otherwise are found in a free market institution that is focussed on utilitarian principles. It is argued that cooperatives as an institution is driven by shared values and common interests, facilitating an egalitarian system that brings about interactions that are far more meaningful and robust and that help evolve property as a building block of market and society.

5 Karl Polanyi, *The Great Transformation* (1944).

6 Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2013).

7 Thomas Piketty, *Capital* (2013).

8 Geoffrey M. Hodgson, *Conceptualizing Capitalism: Institutions, Evolution, Future* (2015).

The paper specifically charts its course through a narration of three aspects that forms the basis for the arguments raised. The first aspect focuses on the role of cooperatives that re-imagines property, and in doing so, it reflects on balancing capital and labour as two core attributes which have to be properly realigned. By recombining capital and labour as plural, dispersed and flexible in new ways, it could help generate a form of capitalism or a space within capitalism that is no longer a threat to liberal-democratic values; rather, it potentially converges with them. The second aspect traces the larger role of cooperatives as not just an enterprise creating economic well-being, but bringing about democratic values, especially among deprived and weaker sections of the society. In doing so the paper finds itself in line with the Rawlsian notion of property-owning democracy. It also enables one to address the problems of economic inequality where property tends to be distributed in a highly unequal fashion leading to conflicts of democratic values and property rights. The third aspect, the paper argues, is for a full and an equal citizenship in economic enterprise, as is the aspirational goal in cooperatives. This aspect has its foundations in the nature of cooperation, as against competitive and hierarchical nature of a capitalist firm. Cooperation aspires to greatly reduce the hierarchical, adversarial and conflictive relationships within firms, and could have an impact on social and political aspirations and values of the society, apart from economic values of human interaction.

The structure of the paper is as follows. Section one presents the case of Amul, a complex three-tier cooperative system. This allows for a close dissection of the functioning of cooperatives and contextualizes the nature of economic enterprise. It helps one to understand the causal link between an economic institution in furthering democratic values and its implications in social and political sphere, but, nevertheless, it serves as a case study, and not as an example that needs to be replicated as such. It helps to contextualise the theoretical aspects that are discussed in the further section. Section two charts the challenges to cooperatives and the characteristics that make the cooperatives distinct from other economic enterprises. Cooperatives specifically create an institutional frame where a multitude of values are assimilated in creating

property rights, and the interaction between them makes it more meaningful. Section three attempts to unravel the legal basis of cooperatives in terms of capital and labour and argues that a re-articulation of property rights reveals a relatively less explored aspect of property. This is reflected by how cooperatives may create a different and more balanced interaction between capital and labour than typically observed in capitalist enterprises. Section four argues that the cooperative fosters democratic values through its very structure, and it is thus most suited to society that is reflective of a broader and complex set of values. Section five further discusses the democratic potential of cooperatives in the context of broader debates about competition and cooperation in contemporary capitalism. The narrative hence indicates and the paper concludes by identifying a core of property as one that assimilates a broader and varied set of values with its interaction. The relations property seeks to create makes the property worthy and meaningful. Hence, property rights should not be read in isolation, and the complex relations it creates brings value only when it communicates with other similar property rights, making it a collective bargain and one of cooperation.

1. THE CASE OF AMUL

The Modern cooperative movement is historically rooted as a movement of protest or, even in some cases, as reactionary against the model of private ownership where the profit is accumulated in few hands and the power structure adds to the dependence of many on a few.⁹ The structure of cooperatives though was universal, but the context of its emergence saw various reasons in different part of the globe, leading to different kinds of cooperatives, whether it's worker, producer or any other forms of cooperatives. Nevertheless, its structure was different from the structure of a capitalist firm, where many were subjected to the command and control by few. The case of Amul in India serves as an example, and because it has been existing successfully for a long time, the socio-economic

9 M. Fulton & D. Laycock (1990) Introduction. In M. Fulton (Ed), *Cooperative Organisations and Canadian Society: Popular Institutions and The Dilemmas of Change* 13-38, (1990); Also see Avner Ben Ner, *Producer Cooperatives: Why Do They Exist in Capitalist Economies?* (Ed.) W. Powell, *The Non-Profit Sector: A Research Handbook*, 434-49 (1987).

implications were visible in the community. This has helped sociologists to study the impact of institutions like Amul on the socio-economic growth of the community and the change it has brought about. Amul had emerged as a reaction against the economic exploitation of the small milk producers by the middle men who had access to market players who could process the milk for commercial ends. The incapability of the individual producers and lack of bargaining power and logistical and economic incapability to access the wider market had left them at the mercy of the middlemen who procured the milk and took it to the larger corporations who processed the milk.

The cooperatives, which were formed in 1946 in Kaira District of the State of Gujarat in western India, over a period of time, through their sheer economic success grew into a competitor to Multinational companies which were thought to be modelled on competition and capitalist system of economic organisation. Started in 1946 under the leadership of Tribhuvandas Patel and, later, led by Dr. Varghese Kurien, the collective of cooperatives grew beyond the imagination of its founding members. Tribhuvandas Patel was highly influenced by Gandhi, and his model of self-determination or Swaraj gave leadership to the movement where a three-tier system¹⁰ of cooperatives were created to produce, process and market milk and related products. Amul, as has been popularly known and branded, emerged as the organisation of Dairy Cooperatives of Gujarat and has a distinct three tier structure, with a dairy cooperative society at the village level as the basic unit, milk union at the district level and federation at the state level. Milk producers or farmers control procurement, processing and marketing, and it is professionally managed by a management team. In doing so, it has been successful in establishing a direct link between the milk producers and consumers by eliminating the middlemen, specifically in the process of production and distribution. Elimination of middle men who controlled and dictated contracts with actual producers led to the formation of Amul, as the

10 The three-tier structure consists of a Dairy cooperative society at the village level, affiliated to a milk union at the district level which, in turn, is further federated into a milk federation at the state level. This helps in delegating the various functions and creates an internal structure whereby economies of scale are achieved.

poor dairy producer felt that his financial woes never seem to improve though the price in the market for his produce has been rising. Previously, the benefits were taken by the middlemen and didn't permeate to the actual producer. The cooperative structure helped the producers to make their own policy, shape their own development, and achieve an economy of scale to maximize the producers' income. Somjee and Gita Somjee in their work point out that the significant aspect of dairy revolution started with the people of Kaira district was that it could overcome the constraints imposed by the hierarchical nature of the traditional Indian rural society¹¹ on one hand, and the hierarchical capitalist firm on the other. It protected the employment avenues of the rural folk and economically gave them independence apart from the larger social reform it could bring.¹² Cooperatives as tool of economic development, therefore, were adapted to people's needs and values, and not vice versa. Cooperatives as a human centric institution take a holistic look at the human activity in a community, rather than dividing it into spheres that could not relate to each other. This also in some way resonates with Schumacher's message quoting J. S. Mill, "Do not break down problems into isolated components, but look at the world and see it whole."¹³

1.1 SOCIO-ECONOMIC IMPLICATIONS

One of the foremost challenges to create a cooperative venture in rural India, especially in the case of Amul, had been a conservative society based on ethnic and caste-based divisions that permeated into economic inequality. Historically, a stratified society made it difficult for the people to cooperate in matters of social and political engagements, specifically in the governance of village panchayat (local governance body), but cooperatives made cooperation possible

11 A. H. Somjee & Geeta Somjee, *Cooperative Dairying and the Profiles of Social Change in India*, 26.3 Economic Development & Cultural Change, 577, 578 (1978).

12 Schumacher advocated 'Production by the masses, instead of mass production,' as there were inherent limits to the power of central government to get things done in rural India. It was somewhat simplistic to see more funding and material aid as the obvious and only way to help the rural poor.

13 Ernst F. Schumacher, *Small is Beautiful: Economics as if People Mattered*, 25 (1973).

on the tangible economic criteria. The cold statistics and ledger bound world of milk cooperatives brought discipline when compared to panchayat where guess work, social and political considerations and spontaneity and confusion ruled the roost.¹⁴ In a cooperative, the labour is employed primarily for its use value, and the membership is motivated by purposive and solidarity incentives, in contrast to the “profit nexus” and material incentives found in the typical conventional capitalist organisation.¹⁵ The benefit of a well-run cooperative also extended to establishing cooperative banks and cooperative consumer stores as happened in Ode Village predominantly run by a deprived social group Kunbi, bringing about social justice into rural areas.¹⁶ The change was also visible in case of women who were traditionally sidelined though they were the principal participants in a milk producing rural economy. In the rural community of Khadgodhara, women acquired formal recognition and institutional expression, as they became the chairperson and members of the executive committee of the milk cooperative of the village down to the average shareholder.¹⁷ This was a significant achievement for the village where electricity has not reached. Somjee and Gita Somjee suggest that this brought not just financial independence among women, but confidence in social dealings with men and lesser inhibitions in dealing with the outer world. In many ways, it brought about value to the labour, and it was seen as a capability, a means to lead a meaningful life.

The case of Amul suggests that the establishment of institutions like cooperatives in rural India could become a catalyst among the people and could act as a bridge to participate across the social and economic divisions. The effective method of decision making, running a cooperative and the impact it generated on the day to day life of people also impacted the village panchayat, as Somjee and Gita Somjee observe. The collective decision-making capability that started

14 A. H. Somjee et. al., Supranote, 581.

15 Howard Aldrich & Robert Stern, *Resource Mobilization and the Creation of US Producer Cooperatives*, 1835, *Economic & Industrial Democracy*, 371-406 (1983).

16 A. H. Somjee et. al., Supranote, 583.

17 Id. At 585.

with cooperatives had an impact on local governance institutions and its democratisation. It furthers active citizenry and a flourishing civil society and forges a political liberal society through the possibility of interactions it seeks to create. The success of an economic enterprise also resulted in acceptance of certain rational economic priorities as economic activity based on universal principles of equal pay for equal work gained ground among gender. As these developments indicate that norms of democratic values originate from the interaction and participation that is beyond individual existence and his concerns.¹⁸ The individual became a part of the complex economic institution which forced him to broaden his horizons of thought into political, social and economic concerns, developing a larger perspective on his role and life in terms of society. Hence, the members of the cooperatives voluntarily refrained from dislodging those people from office who had proven their ability to run an economic institution like the milk cooperatives in the most efficient and business-like fashion.¹⁹ Regardless of social and ethnic divide, the cooperatives taught the people to value equality by treating all its shareholders as equals and, so, had been a great leveller. It helped break social barriers for the weaker and marginalised sections of the population. It psychologically uplifted the society and gave them an identity and purpose. All this indicates that the modelling of our existing beliefs can have surprising consequences at the level of institutional design, or at the level of complete “ideal types” of institutional schemes.

These developments suggest the ability of cooperatives to create jobs more cheaply than capitalist firms by mobilizing workers’ effort, with wage flexibility and, perhaps, even their savings.²⁰ The members were thus encouraged to

18 Jessica Gordon Nembhard, *Benefits and Impacts of Cooperatives*, 2014. This whitepaper submitted by Jessica charts the cooperatives and their impact in the United States where a similar socio-economic impact has been seen within the local community through the interactions of the members of the cooperatives. See Vanessa Bransburg, *The Center for Family Life: Tackling Poverty and Social Isolation in Brooklyn with Worker Cooperatives*, Geo: Grassroots Economic Organisation Newsletter Vol. 2, No. 8, 13-16 (2011).

19 A. H. Somjee et. al., *Supra*, 580.

20 Saul Estrin, *The Role of Producer Cooperatives in Employment Creation*, 345, *Economic Analysis & Workers Management* (1985).

invest in land and buying of cattle.²¹ This also brought about change in social status, as their bargaining power in the society increased with better means of livelihood. Efficient functioning of the cooperatives also led them to replicate the community organisation as a problem-solving method, especially in cases of extraordinary situations, like natural disaster.²² Concern for cattle health and scientific method of cattle rearing had impact on human health. It brought about health centres for the people, which were non-existent, as some felt that the cattle were better off than themselves in terms of health facilities, as people started focussing more on cattle because of their increasing economic value. Somjee and Gita Somjee also suggest that there was an increase in concerns of family planning, as the artificial insemination of cattle had an effect on the understanding and attitude that the size and health of the family is a matter of manipulation, rather than something over which one has no control. These changes, in some sense, evidenced changes in social norms and the impact it has brought about on the social and economic life of rural India where cooperatives functioned efficiently.

One of the significant features of cooperatives had been its capacity to eliminate the conflict of interest between worker and capital owner which could eliminate the problems related to asymmetries of information, opportunistic behaviour, and structural organisational inflexibilities. In contrast to capitalist firms, especially under adverse economic conditions, cooperatives tend to protect employment opportunities and income levels, which might otherwise be subject to economic conditions resulting in lay-offs and reduction in income

21 A. H. Somjee et. al., *Supra*, 588, It is seen that in 1918, 30 families of Venkars had 100 acres of land, whereas in 1974, 60 families of Venkars had 250 acres of land.

22 Christopher M. Douty, *Disasters and Charity: Some Aspects of Cooperative Economic Behaviour*, 580, A. E. REV, (1972); Amul created an Amul Relief Trust to specifically deal with the disaster relief efforts after the earthquake measuring 7.9 in Richter Scale that struck Gujarat in 2001, and which led to reconstruction of schools with cost of more than 50 Million Indian Rupees; Also, see Ahmad Saqib Masruqin et. al., *Community Empowerment Model through Cooperative for the Villages Most Severely Affected by Eruption of Merapi*, 57, I J S Sc & H 6, 1 (2016).

and salaries.²³ The studies by Ben-Ner²⁴ on worker cooperatives suggest that they are largely formed during the times of economic distress; and its superior efficiency permit worker-owned firms to survive longer than capitalist firms in declining industries. It has also helped such industries to weather more easily the cyclical **recessions**?. Hence, a possibility of seeing cooperatives as countercyclical response to economic downturns is interesting to note, though no compelling evidence to suggest this exists. Cooperatives largely are seen as a result of the initiative of collective interests. Hence, it is sensitive to the needs of the community and derives its existence from the collective will of the members of the community. The political liberties are particularly sensitive to “our social position and our place in the distribution of income and wealth.”²⁵

The collective will of the members of the cooperatives has an effect not only on the economic well-being, but also on non-economic matters. From an ecological perspective, it has been observed that external conditions are the decisive determinants of organizational change. Competition for resources could determine the course of organisations and their adaptability. Environmental constraints reflect the behaviour of existing organizational forms, and cooperatives could be more sensitive to the changing conditions than capitalist firms, as they are deeply rooted in the local conditions and, hence, community interests often result in corrective measures. In case of Amul, the members initiated a mass tree plantation drive beginning 2007, and thereafter, every year on 15th August, Independence Day, with a commitment to protect tree saplings through to full growth. They successfully planted more than 3,00,000 trees in the initial five to six-year period.²⁶ It was a result of their realisation that due to intensive agriculture and dairying, consumption of natural resources has happened at a faster pace, and there is a need to undertake corrective measure for sustained growth. This reflects Schumacher’s criticism of considering natural

23 Karl Polanyi Supra.

24 Ben Ner Supra.

25 John Rawls. *The Theory of Justice*, 328 (1971).

26 Ann Dale et. al., *Working paper of International Co-operative Alliance, Cooperatives and Sustainability: An Investigation into the relationship*, 7 (2013).

capital as not part of the economic capital.²⁷ The human tendency to overlook the vital fact that we treat as valueless everything that we have not made ourselves is also reflected in 'labour theory of value,' the fact that we value only what we laboured for, and the process of labour, hence, indicates value.

Cooperatives largely tend to allay the existential fear, a fear due to one's increasing dependence on outside forces which one does not have control over, and this is largely found in employees in a capitalistic firm. Cooperatives are indicative of the economics of permanence.²⁸ As Schumacher points out, "nothing makes economic sense unless its continuance for a long time can be projected without running into absurdities. There can be 'growth' towards a limited objective, but there cannot be unlimited generalised growth."²⁹

Stuart White notes that, "Each person is entitled to a share of the economic benefits of social cooperation, conferring equal opportunity in return for the performance of an equal handicap-weighted quantum of contributive activity."³⁰ It also means that the cooperatives and the voluntary nature of participation denote what Rawls calls as his conception of fairness which is linked to reciprocity.³¹ He notes that individuals participate only when they feel that it is fair and that they are not taken advantage of or forced to give in to claims which are not legitimate. Hence, a social cooperation fails in cooperation when there is no reciprocity.

2. CHALLENGES TO COOPERATIVES

Unlike a capitalist firm, cooperatives work on cooperation and participation. Their functioning, their success and failures present a complex picture of influences of various elements from socio-economic setting to individual and group endeavour and the purpose and the context in which it was created. A

27 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (2006).

28 J. C. Kumarappa *The Economy of Permanence*, (1957).

29 Schumacher *Supra*.

30 Stuart White, *Liberal Equality, Exploitation, and the case for an Unconditional Basic Income*, 318, *Political Studies* 45,2 (1997).

31 Samuel Freeman, John Rawls – *Collected Papers*. (Ed) 59 (1999).

well-designed research is needed to address issues related to the founding and dissolution of cooperatives and is beyond the purview of this paper. Likewise, the role of individual characteristics in the founding of a cooperative and the long-term performance, the factors which could bring workers with a history of job instability, limited human capital, little personal equity together, to form a cooperative, and whether they are influenced by the solidarity and purposive incentives with plenty of employment opportunities in the mainstream sector needs research. It would also be interesting to explore the role of network relations among different forms of cooperatives and the impact of community of cooperatives on growth.

The Cooperatives need a strong assimilation of collective interests and a leadership capacity to begin with, and the social and political divide makes the task difficult. Hence, until and unless the economic consideration doesn't outweigh the divisive forces of social and political divide, cooperatives find it difficult to flourish. This is to say the economic criteria are the bedrock of any cooperative venture. To create a collective interest and assimilate people in the beginning of the cooperative movement may not be an easy task, and it requires strong leadership, without any personal interest and stake. As in the case of Amul, the members are mostly part time workers, and they often required technical assistance. In some instances, they also may displace existing business and, hence, their contribution to job growth in local markets may be insignificant where the size of the cooperative is small. Cooperatives do not have the capacity to contribute beyond a modest income to its members, and the related studies suggest that both in urban and rural economies, there is hardly any distinction on this count.³² Over a period of time, certain principles evolved that formed the basis of any cooperative venture.

32 UdoStaber, *Worker Cooperatives and the Business Cycle: Are Cooperatives the Answer to Unemployment*, 140 A. J. ECO & SOC, 52, 2 (1993).

The Rochdale Cooperative Principles³³ which were adopted by the International Cooperative Alliance has found itself to be a time-tested set of principles, modified and used around the world according to the cooperative enterprise³⁴ and local conditions. Though, the principles seem to imbibe benefits and virtues, they can also create unwanted results. For example, the first principle of voluntary and open membership has been a contested issue, as there are certain limitations and qualifications for one to be member of the cooperative, and if the person doesn't fall into the category for which the cooperative stands, like a farmers' cooperative, no one other than a farmer with the expected qualifications can become a member.³⁵ The second principle of "one share, one member, one vote" could lead to situations where a smaller cooperative may end up having more decision-making capacity than the parent cooperative which has lesser members. The role of non-members many a time is a contested issue. The third principle of "fair investment" makes the process of accumulation of necessary capital a cumbersome and slow process. Cooperatives are to satisfy the needs of people and not as a vehicle for investors to make money; hence, it attracts less investments. Many have adopted the process of raising loans from members and non-members at reasonable interest rate as a way out. External source of fund has helped to keep the membership rates reasonable. Many jurisdictions and provincial statutes favour a limit on the interest rates on

33 Rochdale Principles provide that a true cooperative will: 1. Offer voluntary and open membership, 2. Govern by democratic member participation (one member, one share, one vote), 3. Operate by equal and fair investment by the members, 4. Remain free of intervention from governments or any other outside power (financial entities and other firms), 5. Educate its members and the community about the nature, principles, values, and benefits of the cooperative, 6. Encourage cooperation among cooperatives, and; 7. Protect the environment and contribute to the sustainable development of the community.

34 Cooperatives are generally classified as Producer co-ops, Value-Added co-ops, Supply or Distribution Co-ops, Service Co-ops, Retail/Consumer Co-ops, Workers Co-ops, Housing Co-ops and Financial Co-ops. The legal system in most countries treat each type of co-op in different ways; hence, the classification makes sense not just on the purpose of enterprise, but also on rules and its functioning.

35 Alexander S. Axworthy, *Consumer Cooperatives and the Rochdale Principles Today*, *Consumer Co-operatives and the Rochdale Principles Today*. 150, OSGOODE HALL L.J. 15.1 (1977).

investment.³⁶ The fourth principle of complete autonomy and independence has led cooperatives to be restricted in scope, fearing the loss of control due to democratic decision-making process and the threat of competition. The fifth principle of educating members has created a marketing program, whereas an effective membership must be based on values of cooperation to members and others in the community, and any failure of constant education process would lead to a breakdown of the whole system. The sixth principle of cooperation among cooperatives has been a result of coordination between individual cooperatives, rather than any state cooperation. The seventh principle which states a concern for environment and sustainable living has attracted member volunteer labour, but lack of awareness among people has found the movement wanting in cooperation from external entities. Hence, what forms the essential legal foundation for a cooperative to succeed is a question one needs to explore. The different values associated with cooperatives still seems to have some common thread when we explore the property relations that it seems to create.

3. THEORIZING COOPERATIVES

The cooperatives essentially reflect a core element of property, which I consider as co-operative in its essence as it is relational. Any understanding of property as relational presents within itself the complexity of the notion. It espouses not just values, but institutions as well.³⁷ Property becomes worthwhile when it is defined as relations.³⁸ It is the relation that creates value.³⁹ If one considers property as relations among persons with respect to things, it suggests that the underlying vehicle is contractual; that helps define relations, which in turn serve a variety of human values. Hence, property in its empirics define it as relation, and the normative sense suggests that only when we define it as relation will we have a much richer and complete experience of what that

36 Id. at 154.

37 Hanoch Dagan, *Property: Values and Institutions* (2011).

38 Stephen R. Munzer, *A Theory of Property* - Cambridge Studies in Philosophy and Law, (1990).

39 Gregory S. Alexander, *Property and Human Flourishing* (2018).

property means to us. Property hence reflects a need for cooperation between people to create relations that ultimately define property. Cooperatives, as institutions that are distributive and corrective, act as property institutions that rearrange property relations between members of the community by creating the web of relations that are dependent on each other. Such relations espouse the cooperative values, rather than competitive spirit. Property, thus, becomes richer when we understand it as an enabling factor that helps us interact with others and cooperate with others. As Hanoch Dagan points out, property also creates a structural pluralism where multiplicity of realms of social activity and corresponding legal doctrines and institutions reflect their own value foundations.⁴⁰ Sharing, community and cooperation fosters values that form the normative guideposts for law. Any individualistic pursuits become inappropriate as normative foundations when we are talking about legal institutions that are aimed at fostering collective economic well-being and social cohesion. Cooperatives that provide structural multiplicity also nurture value pluralism that is both foundational and normative.⁴¹ The pluralistic features also mean that the underlying values can be incommensurate with each other, as it would be difficult to measure it by any single common scalar metric.⁴² Any property regime that calls in communitarian and collective institutions which do not heed the cooperative values of property is necessarily focussing on a closed and narrow interpretation that creates disagreement and friction, making it as a system of conflicts. It, hence, signifies the understanding that everyone benefits from the cooperation, and it is essential to foster social cohesion, economic well-being and political harmony.

The cooperatives engage in a macro level restructuring of markets which also defines property. This restructuring largely eliminates the conflict or the widening gap between capital and labour construed as distinct classes within

40 Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1410 (2012).

41 *Id.* at 1413-15.

42 Micheal Stocker, *Abstract and Concrete Value: Plurality, Conflict, and Maximization*, In *Incommensurability, Incompatibility and Practical Reason*, (Ed) Ruth Chang (1997).

society. It takes into account the interests of a community's different layers, so that gains in prosperity from capitalist forms of economic organization are diffused widely. Cooperatives have some significant features of common property, as the assets are collectively controlled by a group, and unlike a pure contract-based resolution to any disputes, in case of cooperatives, it is seen that the legal system establishes a broad-based understanding among otherwise diverse audiences about how the rights are structured and prioritized in cases of conflict. Irrespective of a closed set of property rights being applicable, cooperatives have within it the capability to adapt according to legal systems, the specific menu of rights applicable and the content of each such right in question.⁴³ Hence, it provides for a facet of property law concerning the complex interface between public law and private law aspects, reducing the tension. In essence, they are what Gregory Alexander calls as a Janus-faced character, as it overlaps social spheres, which implicate both the public and private values as those of equality and community.⁴⁴

3.1 LABOUR, CAPITAL AND COOPERATIVES

Modern economists consider labour or work, as little more than a necessary evil.⁴⁵ Thus, labour has always found itself subservient to capital. It is largely believed that the capital owning class commands the bargaining power. Thus, the capital owners are the firm. But, being the firm has never been an attribute of capital. The accumulation of capital and social conditioning had given the capital owners the power to win the hiring conflict by hiring labour and, thus, becoming the firm. In a free market economy, firm-hood is determined by

43 *Zoroastrian Cooperative Housing Society Ltd and Anr. v. District Registrar Cooperative Societies (Urban) and Ors. Appeal* (Civil) 1551 of 2000 SCC 2005.

44 Gregory S. Alexander, *Property and Human Flourishing*, 56 (2018).

45 Schumacher points out that for an employer, labour is an item of cost and better reduced to the minimum given the opportunity to automate the process of production. For a workman, work is to make a sacrifice of one's time and comfort, and wages denote the cost of sacrifice he made. Where automation is not possible, division of labour as suggested by Smith cuts the cost. Such specialisation of work is distinct from what historically has been practised; contrary to the creativity, it denotes unskilled and non-application of human faculties.

the outcome of contest or conflict over who hires what or whom in the factor markets. If capital hires labour, then capital is the firm; if labour hires capital, then labour is the firm, and if it's a third-party hire of both labour and capital, then that third-party is the firm. That is, there is no ownership of the firm, as firm predominantly is a contractual role, and not a property right. In a market economy, the corporate capital can be hired out as labour and other factors. It is the pattern of those hiring contracts that determines who is the firm. Hence, some call it a myth based on the belief that the identity of the legal entity undertaking a given production opportunity is determined by a property right called "ownership of the firm," or in the Marxist tradition, "ownership of the means of production"; but, the fact is that the firm-hood is not determined by a property right, but is determined by the pattern of contracts between factor suppliers.⁴⁶ Hence, cooperatives in the form of conceptual reconfigured entities could create firms which balance capital and labour by creating a necessary correlation between being the firm and ownership of a corporation. Hence, a democratic ownership brings bargaining power of the capital owning class with the social power of hiring labour giving the necessary market power.

It also reflects the problem in economics on the distinction between persons and things, or can be called as the labour theory of property.⁴⁷ The understanding in law that only humans can be held responsible, and not things, and there can be no liability on tools, regardless of their productivity, emanates from the idea that people are liable for, or can benefit from, their actions. But, in economics, the services of humans and the services of things are both causally efficacious; both have a marginal productivity, in the sense that production would decrease if the

46 David P. Ellerman, *Property and Contract in Economics: The Case for Economic Democracy and Contract in Economics*, 5 (1992).

47 Alfred Marshall [1920, Chapter IV and V OF Bk. VI] speaks of certain characteristics of labour: 1. Workers may not be bought or sold; only rented or hired, 2. The seller must deliver the service himself, 3. Labour is perishable, 4. Labour-owners are often at a bargaining disadvantage, and, 5. Specialised labour requires long preparation time. Further, Prof Samuelson notes that, 'Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself; he must rent himself at a wage (1976, 52).

services were withdrawn. The contemporary economics which has understated the actions of persons in the labour theory is brought to focus in an economic system driven by cooperatives, as it values labour equally with capital. Though the natural basis for private property appropriation had been labour, the employment system in capitalist economy has been founded on denying people the right to the fruits of their labour by virtue of employment contract which cooperatives essentially restructure, being a dominant entity in the relation. Hence, some argue that capitalism revolves around the employment contract instead of “private ownership of means of production.”⁴⁸ Competition under free market forces would seek the highest profits possible, squeezing the workers with least pay. Under such circumstances, Marx opines that the separation of capital and labour and their consequent conflict resulted in far broader social consequences in terms of both the nature of politics and ideology.⁴⁹ This has impacted communities where the relocation of industries in search of cheap labour has destabilised the local community. This conflict of capital and labour has been ignored largely by the mainstream economics.⁵⁰ Cooperatives can be seen as an attempt to bring both labour services and services of land and capital at par with each other in the employment system and, in some ways, attempts to counter the inability of capitalist economics to recognize any unique and relevant characteristics of labour that become an ideological blind-spot. The fact that natural sciences take no note of responsibility, but view responsibility in terms of causality, also undermines human agency in a firm. So, under an engineering production function, there is ignorance in differentiating the actions of persons and the services of things.

Unlike capital, labour has a distinct character that it is closely associated and reflective of the individual. For an individual, it takes effort to develop a skill; there is creativity and the maturity time for the labour to engage with the market, so labour calls for time and space. Labour doesn't exist on its own. Capital,

48 David P. Ellerman *Supra*.

49 Jon D. Wisman, *Creative Destruction and Community*, In *Ethics and The Market* (2006) 31.

50 Wisman J. D. *Capital-Labour Tensions and Liberal Economic Thought*, *International Journal of Social Economics*, 19. 279 (1997).

on the other hand, stands alone and the only requirement is appropriation. It does not need validity; it traverses easily through the complexity of market; it is convertible; while labour reflects the human character. For a painter, it's his labour which is reflected in the painting, and the portrait is representative of his skills. Here, labour is valued more than the painting, and as an end product, the painting is the capital which engages with the market is a derivative form. By making labour one of the core focus in an engagement with the enterprise of cooperatives, labour is valued in cooperatives, as it is the focus of cooperatives. One cannot be a mere silent investor. But, one has to be associated with the functioning of the cooperatives in terms of employment as a workforce and a part of collective decision-making process and daily functioning. Cooperatives, thus, engage with the labour of individuals and give meaning to it by making it productive. It also in some sense signifies the importance of means over ends. Use of means and the effort to achieve ends should not be considered as a mere process, but as a reflection of human endeavour and interaction with multiple factors in a complex system. In some sense, it creates an economic democracy within a complex system of relations that is institutionalised for a specific purposes and a common goal.

4. TOWARDS ECONOMIC DEMOCRACY

In the light of the general conception of democratic governance, Thomas Christiano argues that accumulation of capital in the institutional form of company creates an obligation to comply with democratic norms or extra-legal moral norms. In case of choices between frustrating the will of the democratic majority in order to maximize its profits and complying with the democratic norms, the obligation is to pursue a policy of the latter.⁵¹ The state always depends on people to foster democratic policy in exercising their private property rights.

To the extent that capitalists are capable of undermining the pursuit of the aims of [a] democratic society, they... should be thought

51 Thomas Christiano, *The Uneasy Relationship between Democracy and Capital*, 195, Social Philosophy & Policy 27(1) (2010).

of as under duties to act in ways that do not hinder the pursuit of aims. They have a special responsibility by virtue of the power they hold, not to use it to pursue antidemocratic aims. These are not legal duties but rather moral duties that are owed to the rest of the society.⁵²

Further, Galbraith argues that for an effective functioning of an economy dominated by big organisations, there is a need to create such systems of law, regulation, supervision and ethics that foster behaviour catering to public purposes, at the same time, meeting legitimate private interests.⁵³ The significance of a cooperative is that it reflects a legal structure distinct from the capitalist firm in forging the quintessential factor of cooperation between a dispersed population in a democratic way. In democratic parlance, the collective trust reposed on the firms by giving them the privilege of trade is conditional on the violation of that very trust. Hence, cooperative as an economic entity that prompts the collective interests structurally and notionally could be seen as a ‘property owning democracy’ as is referred by Rawls.⁵⁴ This notion also helps us counter the neoliberal tradition and understanding of economic institutions. As such, Cooperatives create a more egalitarian system of redistribution of resources. The economic system of cooperatives also ensures that all members have access to capital, both human and physical. The point of this restructuring is to eliminate the conflict between capital and labour construed as distinct classes within society. It intertwines the interests of all society’s different sectors, so that gains in prosperity from economic organisation are diffused as widely as possible, with reshaping of social and associational forms. In Rawls opinion, neither *laissez faire* capitalism, nor welfare state capitalism, nor “state socialism with a command economy supervised by a one party” will satisfy

52 Id. at 207.

53 James K. Galbraith, *The End of Normal: The Greatest Crisis and The Future of Growth*(2014) 159.

54 Alan Thomas, *Republic of Equals: Predistribution and Property-Owning Democracy* (2017), where it is argued that Rawls choice of a social system can be narrowed down to a ‘Property Owning Democracy.’

his principles of justice. However, a suitably structured “property owning democracy” or “liberal socialist regime” might. As for the latter two options, “justice as fairness does not decide between these regimes.”⁵⁵ In the Rawlsian framework of justice as fairness, the aim of the branches of government is to establish a democratic regime in which land and capital are widely, though not presumably equally, held. Society is not so divided that one small sector controls the preponderance of productive resources.⁵⁶ Rawls himself envisages four branches of government, namely Allocative branch, Stabilization branch, Transfer Branch and Distributive Branch for the Government to ensure that the economy satisfies his two principles of justice. These background institutions though indicate a Keynesian liberal welfare state, giving a major role to government, but the interferences are towards securing the institutions of equal liberty in a property-owning democracy and the fair value of the rights they establish.⁵⁷

Rawls theory was not a justification of welfare state capitalism, but for a property-owning democracy. As Rawls suggests, the background institutions of property-owning democracy work to disperse the ownership of wealth and capital and, thus, prevents a small part of society from controlling the economy and, indirectly, political life as well.

To prevent a small part of society from controlling the economy and indirectly, political life as well.... Property owning democracy avoids this, not by the redistribution of income to those with less at the end of each period, so to speak, but rather by ensuring the widespread ownership of productive assets and human capital... at the beginning of each period.⁵⁸

It has to be noted that the principles that regulate the interaction with each other in case of cooperatives are public and universal. It reflects that in a

55 John Rawls, *Justice as Fairness*, 164 THE PHIL REV, 67, 2 (1958).

56 Alan Thomas Supra 161.

57 John Rawls, *Justice as Fairness: A Restatement*, 279 (2001).

58 Alan Thomas Supra 161.

well-ordered society, citizens reflexively understand their mutual interaction as regulated by a set of transparent principles that are universal in nature. As such, the members adjust their personal goals and projects to accommodate the demands of justice, and the universal principles are reflected by all in a way that is consistent with the democratic culture of society. These interactions help develop a property-owning democracy. Concomitantly, Rawls appears to consider it as “necessary” to improve the lot of the worst-off members of the society, and so considers some incentives as necessary though it generates inequality in the larger process of engaging in greater economic production. Rawls’ difference principle governs the distribution of income and wealth, positions of responsibility and power, and the social bases of self-respect and holds that the inequalities in the distribution of these goods are permissible only if they benefit the least well-off positions of society.⁵⁹ The incentives cooperatives, as property-owning democracy, provide to engage in economic activity, in that sense, appears to be the least of inequality generating method considering the fact that it benefits the worst-off members of the society even where state agencies fail to make a difference.

Cooperatives are, in this sense, a contrast to the free market firms. It in some sense reflects the idea of market democracy that John Tomasi argues for; he combines the Hayakean and Rawlsian notion of liberal values and speaks of basic rights and liberties, where the institutions are legitimate only if they consider the least well-of citizenry.⁶⁰ Tomasi’s market democracy reaffirms a thick conception of economic liberty in the sense that democratic values overarches the very economic goals that market and its institutions stand for. The pursuit of social justice necessitates a space within market and its predominant economic institution to pursue social goals that reflect democratic values.

59 Alan Thomas Supra at 20; John Rawls. 1993 *Political Liberalism*, 5-6, (1993) Rawls notes that the social and Economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and, second, they are to be to the greatest benefit of the least advantaged members of society.

60 John Tomasi, *Free Market Fairness* 2012.

It is significant to understand a deep-rooted paradigm in which a free market economy works. A free market economy considers competition as a virtue, perhaps as the most important and only virtue. Many have challenged this view, and they have put forward 'cooperation' as a replacement to attain the cherished values and to live a more meaningful life within the free market economy. The statistics suggest that there is a significant presence of cooperatives or self-governing enterprises⁶¹ in different parts of the world, both developing and developed. In the debate of competition versus cooperation, this paper argues for cooperation in multiple aspects, especially to understand the feature of cooperatives as property owning democracy.

The features which distinguish cooperatives, though, are identified by different scholars in different ways, but to isolate a single primary feature is difficult, as several features are significant.⁶² As members own the business, the ownership entails an investment. The economic and other benefits arising from the association are tied to ownership and constitute an indirect return on this investment, rather than stock dividends or interest payments. The nature of these benefits arises from lower costs for goods purchased, higher price on goods sold and patronage refunds which arise from cooperative savings. This model suggests that the benefits do not accumulate, but are distributed across the structure, depending on the transaction. It, hence, brings in a democratic formula where it has emerged as an alternate option to private or public ownership. It also provides economic accountability to community expectations for stable employment, especially in less attractive industries.

61 Robert A. Dahl, *A Preface to Economic Democracy*, 91 (1985), notes that both workers and employees are equivalent to all persons who work directly for wages or salaries in an organisation, distinctions between the two are sometimes intended. Advocates of self-managed enterprises sometimes distinguish between labour-managed and worker managed systems, but the distinctions are not uniform.

62 Terence J. Centner, *Retail Food Cooperatives: Testing the Small is Beautiful Hypothesis: Comment*, 328, A. J. AGRI ECO, 67, 2 (1985).

5. COOPERATION AND COMPETITION

Humans, especially in the early years, have survived through cooperation, by participation, sharing and interaction of information, knowledge and wealth. Their communication and interaction made them distinct and helped them adapt. With the emergence of fictional entities like firms, hardwired with the ultimate mandate of making profits, the firms dis-embedded the economic transaction from the political and social realities of the time and space. On the other hand, cooperation generated interaction and participation, apart from enhanced thinking.⁶³ The economic activity is not considered as a zero-sum game, but as a process created by interaction and cooperation.⁶⁴ It is not to argue that the competition is devoid of virtue, as is noted above. Schumpeter notes that the fall of feudalism and preindustrial age was to be attributed to competition, but it could also undermine its robust growth and existence itself. He has further argued that the “decline of competition,” whether due to monopoly, giantism or hierarchical and adversarial nature of capitalist enterprise, indicates decline of capitalism. The political consequences of concentration affect and tend to eliminate a host of small and medium sized firms, eroding its own base. It strikes at the very foundations of private property and free contracting that

63 D. W. Johnson & R. T. Johnson, *Cooperation and Competition: Theory and Research*, Chap 6 (1989).

64 Id. At 29. In their empirical and quantitative study, they compared cooperation, competition and individual effort. Some of the questions they posed were, ‘Which is the most effective and whether particular circumstances and types of activity are major deciding factors? Should cooperation, competition and individual effort vary with the type of task?’ Some of the sub category questions they posed were, ‘Could the inclusion of person of very high and very low ability in cooperative groups get in the way of optimal group process and this hinder performance? Is competition necessary for motivation? Does cooperation encourage malingering and non-participation, thus penalizing the group?’ Again, the methodological questions they raised were, ‘Could gender make a difference? Would socioeconomic class or educational level of the subjects make a difference? How might the diversity of ethnic or cultural background of subjects affect the results?’ The data indicate that cooperation will produce a higher level of productivity and achievement than will either competition or individual effort. Over 50 percent of the findings were strongly in favour of cooperation, while only 10 percent favoured either competitive or individual effort.

wears away in a nation, in which its most vital, most concrete, most meaningful types disappear from the moral horizon of the people.⁶⁵ The capitalist process, that institutionalises and standardizes the labour contract, presents restricted freedom of choice, creating impersonal masses of workmen or consumers. Hence, the capitalist process which is a truly private economic activity is pushed into the background with the institutions of property and free contracting.

The study done by Cooper and Kagel⁶⁶ indicate that disagreements among members of cooperative groups can bring about transitions to higher stages of cognitive and moral reasoning. Though there can be debates about many of these aspects in terms of its empirics and in terms of conceptual value, the fact remains that cooperation can be considered as an alternative to competition, especially with the frequent occurrence of imperfect competition under the free market principles.⁶⁷

Cooperation as an alternative to competition, also, is an attempt to refocus on humans as a complex being with a plurality of capability, interests and needs. The argument of Sen⁶⁸ and others puts across the normative claims that the freedom to achieve wellbeing is of primary moral importance, and, second, that freedom to achieve well-being is to be understood in terms of people's capabilities, that is, their real opportunities to do and be what they have reasons to value, which has been seen as a part of the theoretical framework created in

65 Joseph Schumpeter *Supra* at 141.

66 D. J. Cooper and J. H. Kagel, *Lessons learned: Generalizing Learning across Games*, Supplement to *Signaling and Adaptive Learning in an Entry Limit Pricing Game* RAND J. E. 28(4) (1997), 622-83, In their study of team and individual behaviour, they recorded and analysed to determine exactly how those interactions in a team were used to solve strategic problems. They found that the synergies in more difficult games were beating the demanding truth wins norm. The superior performance of teams was particularly striking when rules encouraging competitive behaviour were introduced. The teams tried competitive behaviour at first, but eventually rejected it in favour of the more productive cooperative solutions.

67 Beat Burgenmeier. *Socio-Economics: An Interdisciplinary Approach - Ethics, Institutions and The Markets* (1992) 16.

68 Amartya Sen. *Development as Freedom* (1999); Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, (2000).

social justice and development ethics. This suggests that, what is important is not what qualities people have, but what qualities people can develop through interaction and cooperation, and that the freedom to achieve well-being is a matter of what people are able to do and to be and, thus, the kind of life they are effectively able to lead.

The criticism of capitalism on the grounds of competition or self-interest or generation of wealth as a criterion is found to be valid not just on the individualistic level, but on the level of nations. The fact that there is an oasis of abundance among the desert of poverty, and the effect of globalisation has to an extent shown us that certain countries have failed or are highly insecure, while the few among the larger nations have seen generation of wealth and prosperity sky rocketing.⁶⁹ The sense of values has been deeply eroded, and it is indicative of the process where the end of making more money justifies the means.⁷⁰ The market has also seen indicators of growing instability and volatility. It has been observed that cooperatives evolve independently of the business cycle, that is, they survive independently of changes in general economic conditions and are the answer to the problem of unemployment.⁷¹

It is in this backdrop that one has to recognise the significance of cooperatives which have emerged as a model of firm, essentially what can be called as a free market economy. Cooperatives neither require nor call for any particular form of economic systems, as it is capable of developing in any given system where there is scope for freedom of interactions and cooperation amongst the common man in his day to day engagement with life. Hence, cooperatives have emerged in places where economic engagements otherwise are not regarded as meaningful and profitable. The cases of Grameen Bank in Bangladesh, Amul in India, Mayan Coffee Cooperatives in Mexico or the Liga de Cooperativas de Puerto Rico, etc., suggest Globalization from below. More significantly, it

69 Joseph Stiglitz. *The Price of Inequality*, (2013).

70 Id.

71 Udo Staber, *Worker Cooperatives and the Business Cycle: Are Cooperatives the Answer to Unemployment*, *The American J. Eco & Socio*, 52, 2 (1993).

suggests that cooperation is rooted in a highly democratic, participatory and group-directed process and is distinct from the collaborative attitude within a typical corporate command chain. For example, in Switzerland, one can see producers' cooperatives played an important role in early Swiss Socialism, where Joan Philipp Becker promoted a distinct social vision through cooperatives, emphasizing, like Marx, on the educational and demonstration value of cooperatives.⁷²

In self-governing enterprises like cooperatives, as the members themselves decide on the principles according to which wages, salaries, and surplus were to be distributed among members, their choice of internal distributive principles is derived from various factors, like their beliefs about fairness influenced by tradition, prevailing culture, ideology, religion and the like. It would be more reasonable that members would maintain wages and salary differentials within their firms at much lower ratios than would be in a capitalist firm. So, the inequalities in income and wealth are not reduced because the self-governing firm would be shared among all its members, but it in some sense functions similar to the democratic process in the government of the state.

6. CONCLUSION

The case of Amul and similar cooperatives has put forward a system of property rights that institutionalises cooperation as a core value of property by creation of relation that benefits both the parties. In some sense, it has a network effect, and the more interactions property creates, the better values it fosters. The primary economic value also leads to creating a culture of participatory democracy, having its effect not just in the social and political arena, but also on human personalities and behaviour. The case of Amul shows that whatever be the pitfalls, cooperatives can provide people with the means of doing profitable and intrinsically significant work, helping men and women achieve autonomy; so, they as employers or members of self-governing enterprises,

72 Jurg K. Siegenthaler. *Producers' Cooperatives in Switzerland*, 19 International Labour & Working-Class History, (1977).

work towards a meaningful life contributing to the community. This brings in not only decentralisation, but the shared democratic values of accessibility of land, of ownership of the means of production and of political and economic power.' It has brought about a more humanely satisfying life for more people, a greater measure of genuine self-governing democracy, and freedom from mass producers of consumer goods and a dominant capitalist enterprise. As Schumpeter notes, a dematerialized, defunctionalised and absentee ownership does not impress and call forth moral allegiance as the vital form of property did. It indicates an evaporation of what Schumpeter calls a material substance of property - its visible and touchable reality. Hence, cooperatives as an alternative contribute in reducing alienation and marginalisation, created community with solidarity based on work, strengthening the general good of the community and weakening the pulls of self-interest by creating a robust and meaningful idea of property. More importantly, it is a step forward in making a body of active and concerned public-spirited and better citizenry in society.

The system of cooperative enterprise, though, doesn't eliminate conflicting interests, both social and political, but it could reduce such conflicts, given the fact that members of the enterprise as citizens would be attuned to maintaining political and democratic institutions in the governance of the state and would facilitate the development of a stronger consensus on standards of fairness and shared interests. The small-scale application of cooperatives, as pointed out by Leopold Kohr, suggests that small scale operations are always less likely to be harmful to the natural environment than large scale production, simply because their individual force is small in relation to the recuperative forces of nature. This also gives ample scope to be experimental in certain ventures which otherwise would be dangerous due to the ruthless application on a vast scale of partial knowledge as has been witnessed in cases ranging from the use of fertilizers in agriculture, to technology driven systems forced upon people.

The cooperatives act is an alternative to the presumption that individuals cannot organise themselves and always need to be organized by external authorities. It could create employment in rural areas, where the migration to the urban areas

and unemployment has been a cause of worry, impoverishing village life and adding to the number of jobless slum dwellers in cities. The cooperatives to be fully developed and accepted require a theoretical corroboration that individuals can organize themselves and need not be organized by external authorities.

The assimilation of the dispersed common and shared interests determines what counts as freedom from arbitrary domination. Such freedom as non-domination is implemented by, and constitutes, the design of our very institutions. As such, the institutions, like cooperatives, not only identify genuine common interests, but also provide a broader guarantee that the forum of contestatory democracy meets an independent standard of fairness. In turn, the flourishing democracy brings a widespread dissemination of civic virtues.

The diversity of social and economic systems gives enough scope to create and assimilate systems or institutions of markets which are varied in their nature. The market provides different kinds of institutional frameworks depending on the resources, needs and capital available for people to come together. When, on the one hand, we have profit-making corporations, we also have non profit making ventures and trusts to attain the specific goals for which such institutions are best suited. In a socio-economic system where the growth of corporations making money for the few individuals have flourished, there is a growing chasm of inequality which has emerged as a disturbing phenomenon. In this context, this paper argues for strengthening the institution of cooperatives. The history of cooperatives, though, does not reveal a robust picture, but the possibility of creating a successful institution which primarily focuses on the cooperative structure of property by bringing a socio-economic revolution cannot be denied.

DATA ECONOMY - NEED TO SAFEGUARD THE ECONOMY BY IMPLEMENTING STRONG DATA PROTECTION LAWS

Suresh Chandra Pandey
Saurabh Pandey

Abstract

Data Economy is an evolving market and, collaborated with considerable advances in technology, is resulting in the generation of even more data. The never-ending quest of humanity to change the way it leads its life and the need to reform itself with the modern standards has invariably led to the creation and growth of the data economy. It has potential to change every sphere of our life and, if properly regulated, can have effects of huge magnitude if it is looked upon from the perspective of the European Union where data economy has resulted in generating growth in the economy and the creation of quality jobs.¹ The most important thing of all is that it enables an organization or an individual working across all sectors to expand, collaborate and provide adequate services to their customers by providing a platform. These are the least of the things which can be achieved from the data economy if utilised and developed in a positive way, but the competition in the market can be cut-throat, and competitive practices can even be unethical on certain occasions and can put the customer at a disadvantageous position. Since the data economy thrives upon information generated by the consumers, it is imperative that it becomes very important that for the interest of the consumers and for the promotion of the market, it is vital to strike a right balance between the free flow of information and that of informational privacy. This brings us again to the importance of having a robust data protection law to achieve the dual-factors, as mentioned above.

Keywords: Data Economy; Data Protection; Right to Privacy; Competition.

INTRODUCTION

Consumers are the axiom of any market and are pivotal for the sustained development and growth of the economy. In such a situation, it is crucial to

1 Data Economy Quality Jobs.

have the consumer protected from any harmful, deceptive, improper practices that could be employed by any individual or organizations to take any unfair or undue advantages. Healthy competition and consumer protection are the essential keys for the development of any market. For any market to be able to grow and to survive, there is a severe need to regulate the market in order to safeguard consumers' interest and, at the same time, prevent any unhealthy competition from causing any harm to the economy. This brings out imperative reasons to have a proper data protection law in place, so as to offer protection for personal data of an individual, so as to afford him the necessary protection in the form of right to privacy guaranteed by the constitution. The constitution has now been interpreted to have a natural right to privacy as a fundamental right, but merely defining a right can never safeguard it, let alone protect it, and hence it should be supplemented with well-stipulated boundaries so as to define the scope of the protection offered to provide further guidance on the area. Scope of protection raises an essential question as to how the right to informational privacy should be evaluated in the present data economy. It also raises another question concerning ownership and control that an individual can exercise over his data which is being generated and collected by various service providers to provide adequate service. Data economy works and operates with the understanding that an individual gives access to certain information intending to obtain some services. An individual who is consenting to part away with some of his information to get access to any particular service needs that the service provider is under an obligation to utilize the data only for the purpose one has given one's consent. Use of data should not go beyond what one has consented for, and specific personal and sensitive data of an individual are at risk and needs to be adequately protected to ensure uniform protection of the law and to safeguard fundamental rights. In today's time, one needs to be scintial about his rights and duties which is also the central idea of this article, so as to provide an understanding of new technologies that are emerging continuously, and their interferences with society had made the current law primitive and outdated.

In the first part of this article, we shall try to look into various aspects of the need for data protection in promoting 'data economy' as a continuous effort

to constantly transform our society to adapt to the rapid development of the information age and big data analytics. We shall see various arguments about the potential improvement of market efficiency and its capabilities to exacerbate class disparities. The idea is to empower the individual to a degree where he can use and control his data. The second part of this article shall look into “right to privacy” which has been interpreted to be part of the Indian constitution, and it may change the way data is being collected and used in the present day. Privacy inheres in every individual as a matter of natural right and is inalienable and is attached to every individual as a condition so as to enable them to exercise their freedoms. With current system of retention of personal information, it makes it necessary to prevent any non-transparent collection of small data, so as to enable the organization to identify us and segregate us based on the choices and decisions we make. We will try to look upon the issue of maintaining healthy competition in the market by providing it with the information and, at the same time, respecting individual privacy so as to ensure that personal information of an individual is secured. The third part of the paper would be setting the factual background of the data protection regime that has been set up in various countries like the United Kingdom and the European Union; whereas in the fourth part, we would be looking into what kind of data would be offered protection.

In the fifth section of this part, we shall look into the particular prohibited act and/ or any restriction on “processing of personal data” and attaching liability to ensure that the integrity and privacy of an individual and his Fundamental Rights are respected. “In order to ensure a consistent level of protection for natural persons and to prevent divergences hampering the free movement of personal data within the internal market, a Regulation is necessary to provide legal certainty and transparency for economic operators.”² This is also done to ensure that the rising criminal activities with respect to personal data of any person, which are on the rise, will find this as a way forward to curb them.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Moreover, lastly, we shall present a conclusion about the current law and its shortcomings.

1. DATA ECONOMY - REVOLUTIONIZING SOCIETY

In the present time, we are a part of a society which is nothing like what we have seen in the past, rapidly shifting towards a data-based economy with the continuous development in science and technology and, also, of artificial intelligence. All of these things combined resulted in something that we are witnessing at present, which has been known as “Information Revolution” or “Big Data Revolution.” This “Big Data Revolution” has the potential for creating enormous social changes at a pace as never before. At present, whatever we do and the decision we make is most likely getting influenced by the predictions made by analyzing or processing the data that is being collected by service providers/data fiduciaries at various points. A definition provided by Mayer-Schonberger and Cukier which sums up Big Data Analytics as “things one can do at a large scale that cannot be done at a smaller one, to extract new insights or create new forms of value, in ways that change markets, organizations, the relationship between citizens and governments, and more.”³

Now, the data industry explores the digital economy and other associated areas through which it can generate an incentive for the economy as a whole for taking upon itself a unique task of creating and innovating technologies accustomed to our choices and preferences and, also, other great things that may result out of it. Victor Mayer-Schonberger notes that, in the past 10 years, it has been argued that the technical practicalities and the economic aspect associated with retention of personal information have come to outweigh the arguments relating to deletion or erasure of any individual’s data. With an ever-increasing collection of data, the resulting analyses have the potential to exacerbate class disparities. They will undoubtedly improve the efficiency of the market, but the problem with this efficiency is that it favors people with power,

3 Victor Mayer-Schonberger, Kenneth Cukier, *Big Data: A Revolution that Will Transform how We Live, Work, and Think* (Princeton, NJ: Princeton University Press, 2011).

wealth, and the established classes. While the benefits of the data economy will accrue to nearly all spheres of society, the wealthy and better-educated people are likely in a better position to take advantage of this economy by becoming a sophisticated consumer who can take advantage of this big data culture.⁴ Omar Tene argues that the ever-pervasive collection of data should not be allowed, as it might create disparity and lead to discrimination as to the say that a poor person may subsidize luxury goods for the rich,⁵ and we might “be categorised and classified every which way, and only the highest high value of those categories will experience the best benefits that data can provide.”⁶ This is an interesting insight, as it could be seen from the past that any large scale changes bring out certain disparities among the members of the society. In Neil M. Richards, et al., paper on big data ethics, it has been argued that big data, broadly defined, is increasing the power of institutional awareness and also that makes it necessary to develop Big Data Ethics.⁷ The disparity in society may cause disruptive social changes and, it most certainly requires attention and preparedness to tackle the series of problems associated with data protection, including - first in line - the violation of one’s fundamental right of privacy and, also, on what data can be collected, let alone using it.

At the same time, to ensure that the competition in the data economy thrives and flourishes and does not get impeded and a healthy competition is maintained, the rights of the consumers should be respected at the same time. The first important question that we should address is whether the regulations should be

4 For a discussion of the “winners and losers” of big data, see Lior Strahilevitz, “Toward a Positive Theory of Privacy Law,” 126 Harvard Law Review 2021-33 (2013).

5 Omer Tene, Privacy: For the Rich or for the Poor? CONCURRING OPINIONS (July 26, 2012), <http://www.concurringopinions.com/archives/2012/07/privacy-for-the-rich-or-for-the-poor.html>

6 If we intend for our economic and legal frameworks to shift from data collection to use, it is essential to begin the conversation about what sort of uses we want to take off the table. Certain instances of price discrimination or adverse employment decisions are an easy place to start, but we ought to also focus on how data uses will impact different social classes. See Joseph W. Jerome, Buying and Selling Privacy: Big Data’s Difference Burdens and Benefits, 66 Stan. L. Rev. Online 47 (2013-2014).

7 Neil M. Richards; Jonathan H. King, Big Data Ethics, 49 Wake Forest L. Rev. 393 (2014).

aimed at what data is to be collected or the data collection methods which can be employed for the purpose? The recent case in India raised a serious question about the mass collection of data for Aadhaar, which is a unique identification number created for targeted delivery of government services and has personal as well as sensitive personal biometric data of more than over one billion persons including its citizens as well as non-citizens. There is no denying that only selected data should go into the hands of an organization which processes all this big data. The processing of the information should be based upon a certain set of clear principles which should clearly delineate as to what kind of data processing is ethical and what is not, and, also, set the limits of what a data processing organization might share with other data processing organizations. The rapid growth of the “Information Revolution,” with our participation as a society to build an effective “big metadata computer” that is now computing data, and other associated metadata about everything that we do, are being constantly studied and monitored somewhere. Big Data Analytics’ new capabilities enable various new kinds of data analyses and motivate increased data collection and the sharing of data for secondary uses.⁸ However, the collection and use of the collected data should not go beyond what one consented for and should provide any such protection which would be necessary so as to balance protection offered to individuals’ right and the interest of the economy. The idea is to empower the individual to a degree where he can use and control his data, and in the present age, with privacy as the fundamental right, one should be able to make consented decisions as to use of one’s personal data. This last aspect, we shall examine in the next section of this part.

2. RIGHT TO PRIVACY AND FREE FLOW OF INFORMATION AND A SUSTAINABLE BALANCE BETWEEN THEM.

“Privacy is a concomitant of the right of the individual to exercise control over his or her personality.”⁹ The notion that “certain rights are inalienable” is present in the “American Declaration of Independence (1776)” in the following terms:

8 Neil M. Richards; Jonathan H. King, Big Data Ethics, 49 Wake Forest L. Rev. 396,399, 401(2014).

9 Justice K. S. Puttaswamy (Retd) v. Union of India (“Puttaswamy”), MANU/SC/1044/2017 p. 25.

*Data Economy - Need to Safeguard the Economy by
Implementing Strong Data Protection Laws*

“We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness.”

Privacy inheres in every individual as a matter of natural right and is inalienable and is attached to every individual as a condition, so as to enable them to exercise their freedoms. Political, economic and social changes entail the recognition of new forms of rights, and with the evolution of law, especially such rights which are necessary to provide a degree of freedom to the citizenry are to be **protected** in the backdrop of the recent invention, and changes in the business models to meet the demand of society¹⁰. Though the contemporary account of modern conception on privacy is attributed to ‘Warren and Brandeis’ article, historical matters indicate that ‘Thomas Cooley’ coined the phrase “the right to be left alone” while discussing the scope of personal immunity¹¹. Roscoe Pound, while describing the work of Warren and Brandeis, stated that it was nothing more than an addition of a chapter in our law¹². However, another writer on the subject states that the concept of privacy is nothing new and that Warren and Brandeis did not even coin the phrase “right to privacy,” nor its common sobriquet, “the right to be left alone.”¹³ Natural rights are not bestowed by any state; rather, they inhere in every human being, and they exist equally among all individuals, irrespective of “class or strata, gender or orientation.”¹⁴ It is perfectly true that neither law, nor the state is responsible for creation of natural rights.

Roscoe Pound, in his seminal work titled ‘The Spirit of the Common Law,’ explained the meaning of natural rights as an interest which ought to be secured, and demands which may be made by humans and we think ought to

10 Samuel D. Warren; Louis D. Brandeis; The Right to Privacy; Harvard Law Review, Vol. 4, No. 5. (Dec. 15, 1890), pp. 193, 195, 205.

11 Thomas Cooley, Treatise on the Law of Torts (1888), 2nd edition.

12 Thomas Cooley, Treatise on the Law of Torts (1888), 2nd edition page 29.

13 Dorothy J. Glancy, "The Invention of the Right to Privacy," Arizona Law Review (1979) Vol. 21, No. 1, at page 1.

14 Justice K. S. Puttaswamy (Retd) v. Union of India (“Puttaswamy”), MANU/SC/1044/2017 p. 27.

be satisfied. "But, it will be fatal to all reasoned thinking which treats them as legal conceptions. For, legal rights are devices employed by law to secure any interests which are expedient to recognize, and are the work of the law, and/or, in another sense, work of the state."¹⁵ Two decades later, Pound, in his work "The Revival of Natural Law," propounded the classical natural law during the seventeenth and eighteenth centuries which had three very important postulates. One such postulate was natural rights: a guarantee of stability, enabling an individual to have certain things or be able to do certain things. The second postulate was on social compact: "a postulated contract basis of civil society," which enables and guides change in any society. The third postulate states that positive laws are: "declaratory; an ideal body of perfect precepts governing human conduct and ordering human relations."¹⁶

Development of right to privacy can be attributed to the protection offered by right to liberty under the common law, and the court in various instances found that police intrusion¹⁷ may violate one's personal liberty and rejected the notion of privacy only to give relief which is confined within the scope of protection of life and liberty. But later, the U.S. Supreme Court, in the case of "*Griswold v. Connecticut*,"¹⁸ invalidated a conviction under a statute for giving information and advice to married couples on contraceptive methods as violating the right to privacy and gave the following dictum "that specific guarantees of the bill of rights, and in the case of "*Jane Roe v. Henry Wade*"¹⁹ where the court allowed a married woman to terminate her pregnancy as part of her personal privacy. This saw a change in our law which has rejected the idea on an earlier occasions²⁰ for want of something substantive in the constitution

15 Roscoe Pound, *The Spirit of the Common Law*, Marshall Jones Company (1921), at page 92.

16 Roscoe Pound, "The Revival of Natural Law," *Notre Dame Lawyer* (1942), Vol. 27, No. 4, at page 330.

17 *Wolf v. Colorado* 338 US 25 (1949); *Kharak Singh v. State of Uttar Pradesh* (1964) 1 SCR 332.

18 381 US 479 (1965).

19 410 US 113 (1973).

20 *M. P. Sharma v. Satish Chandra*, District Magistrate, Delhi (1954) SCR 1077; *Kharak Singh v. State of Uttar Pradesh* (1964) 1 SCR 332.

which necessitates the importing of right to privacy in the Indian constitution Unlike the U.S. constitution. Based on the evolved concept of privacy from American laws and from the work Warren and Brandeis which could be seen to flow from the opinion of justice Mathew in the case of Gobind v. State of Madhya Pradesh²¹ where he explained that what should “right to privacy must encompass and protect and also found it to be implicit in the concept of ordered liberty”. Subsequent to the judgment in Gobind, smaller benches²² proceeded to follow the judgment of Gobind. So, the judgment of Rajagopal²³ gained significance as it read ‘right to privacy’ as implicit in the right to life and liberty, and this was followed by various other cases which followed it. The right to privacy has been read to be an intrinsic and inalienable right under Article 21 and has been confirmed by the recent judgment of the Supreme Court in the case of Puttaswamy²⁴.

Now, with the privacy perspective, we shall look into the questions which are raised as to how the identity of individuals can be protected in the present age of information, where data is ubiquitous, an all-encompassing presence; which, in the words of Justice D. Y. Chandrachud of Supreme Court of India, can be stated as ‘that technology act is a great enabler; and, biometrics is a unique identifier in the present age of technology. The combination of these elements creates, as it were, new genetic material. Combined together, they present unforeseen challenges for governance in a digital age for full protection of the privacy of an individual. The concern related to a particular data may seem to be inconsequential, but the aggregation of these data may provide a better picture. The aggregation has been dealt with by Daniel J. Solove in his article; individuals have very little knowledge concerning what kind of data is being collected, let alone being shared with third parties. Existing laws relating to privacy protections focus only on managing information which could lead

21 (1975) 2 SCC 148.

22 Malak Singh v. State of Punjab and Haryana (1981) 1 SCC 420; State of Maharashtra v. Madhukar Narayan Mardikar 1991) 1 SCC 57.

23 R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632.

24 Justice K. S. Puttaswamy (Retd) v. Union of India, MANU/SC/1044/2017 p. 27.

to the identification of an individual and are not enough to safeguard the “secondary uses of big data sets” which can be reverse engineered to determine past, present, and even future breaches relating to privacy, confidentiality, and identity.²⁵ Many of the personal data sets, such as search history, location history, call history, purchase history, social network connections and facial recognition, are already in the hands of organizations comprising of both state and non-state actors. This may have some serious social and legal implications in future. Non-transparent “collection of small data inputs enables big data analytics to identify,” to aggregate the information and later to segregate, based on the past choices we have made, ‘at the expense of individual identity, and empower institutions that possess big data capabilities.’²⁶ The analog phone calls we used to make have been converted to digital technologies, which have within inherent enabling and creation metadata and easier sharing, as revealed by the “NSA metadata collection programs.”²⁷

The law has always tried to protect private information which are in “intermediate states, whether through confidentiality rules, like the duties that lawyers owe to clients”; evidentiary rules; or statutory rules, like the federal laws protecting health, financial, communications, and intellectual privacies. We must, also, recognise that shared private information can remain “confidential.” Privacy law in the past few decades has been understood as a “binary notion, on-or-off state, and that once information are shared and consent is given, it can no longer be retracted. Binary notions of privacy can be particularly dangerous and can erode trust in our era of big data and metadata. Neither shared private data (nor metadata) should forfeit their ability to be protected merely because they are held in intermediate states. Understanding that shared private information can remain confidential better helps us to see how to align our expectations of privacy with the rapidly growing secondary uses of big data analytics.”

25 Daniel J. Solove, Introduction: Privacy Self-Management and the Consent Dilemma, 126 HARV. L. REV. 1880, 1881 (2013)

26 Neil M. Richards & Jonathan H. King, Three Paradoxes of Big Data, 66 STAN. L. REV. ONLINE 41, 42-43 (2013).

27 See Glenn Greenwald, US Orders Phone Firm to Hand over Data on Millions of Calls, GUARDIAN (Regional), June 6, 2013, at 1 (explaining a National Security Agency program which collects telephone records of Verizon customers).

In our big data economy and the information age, the focus should be on promoting not only a “sphere of privacy,” but also the other “rules of civility” that are essential for social cohesion and broad-based equality.²⁸ Practical challenges faced by average people are not considered; big data organization will try to push against the “efforts to promote social equality.” The lower classes are likely to feel the biggest negative impact of big data. “Historically, the poor have had very little expectation of privacy - castles and high walls were always an elite thing. Even today, however, the poor are the first to be stripped of fundamental privacy protections as has been stated by Christopher Slobogin that there is a “poverty exception” to the Fourth Amendment, suggesting that our expectations of privacy have been defined in such a manner that the less well-off are more susceptible to experience²⁹ warrantless government intrusions into their privacy and autonomy.”

3. THE AADHAAR LEGISLATION - SHOWS THE DATA PROTECTION LEGISLATION

The Government of India came with an initiative to start a Unique Identification program to make a Data Repository of its citizens and to enable millions of them to establish their identity and, also, to bring in efficiency, transparency and achieve good governance by making available certain benefits and subsidies which are funded from the consolidated fund of India to be disbursed based on this new identification program. The government has the legitimate need to identify real and genuine beneficiaries, and in the absence of a credible system of authentication, it was very challenging to identify the beneficiaries and monitor whether they received the intended benefits. The project was rolled out by the Government way back in 2009 through an administrative order, and since its inception, it saw massive enrolment. And, it was only in the year 2016 that the act was crystalized as an enactment of parliament. It was done

28 Joseph W. Jerome, Buying and Selling Privacy: Big Data's Difference Burdens and Benefits, 66 Stan. L. Rev. Online 47 (2013-2014).

29 Christopher Slobogin, The Poverty Exception to the Fourth Amendment, 55 FLA. L. REV. 391, 392, 406 (2003).

only pursuant to the need to tackle the issue of identifying the beneficiaries through the Aadhaar and providing them with various benefits, and to address the legitimate concern related to security and integrity of the data and the privacy and confidentiality concerns related to it.

The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, directed the creation of a Unique Identification Authority of India, which is the authority empowered to issue³⁰ the Aadhaar number³¹ to residents by collecting³² information such as biometric information³³ and demographic information³⁴ for the purpose of issuance of the Aadhaar number. The objective of the act is to authenticate the identity of the beneficiary by his Aadhaar number, so as to provide accurate, secure and targeted delivery of certain benefits,³⁵ subsidies³⁶ and services³⁷ directly from the consolidated fund of India. The authentication part under the act was the most contested provision before the court, with the primary assertion being that this would lead to a surveillance state and may give rise to a totalitarian state which may refuse essential services for want of an Aadhaar number. This assertion was made since the rule provided by Aadhaar (Authentication) Regulations, 2016, provided for storage and maintenance of authentication transaction

30 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 3(3).

31 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(a).

32 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 3(1).

33 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(g).

34 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(k).

35 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(f).

36 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(x).

37 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(w).

data,³⁸ which also includes metadata related to the transaction, and such 'Authentication record'³⁹ shall be stored for a period of 6 months and, then, archived for a period of five years.⁴⁰ The court, while deciding the part with respect to authentication, held that while the Aadhaar could help in serving the legitimate aim of the State seeking welfare of its people and, thus, interpreted the meaning of benefit, subsidy and services in a very narrow sense, so as to not widen the scope of Aadhaar net and **held** that such authentication should be restricted to any welfare scheme for which the funds are coming from the consolidated funds of India only, and it should not be broadened. Also, the court struck down Section 2(d) of Aadhaar Act and held that Regulation 26 of the Aadhaar (Authentication) Regulations in its current form is impermissible and requires suitable amendment to it so as to contain only transaction process metadata, and not the metabase, and held that regulation 27 of the Aadhaar (Authentication) Regulations which provides for storage of Authentication records which consist of time and locations to be invalid, as it violates right to privacy of an individual.

The Authority, i.e., UIDAI, is collecting some very private information of a person which are under the sphere of personal information and are protected by the right to privacy and, also, such information are susceptible to misuse by any unauthorised access to such depository. This has been made sure by providing for protection of information by making sure that the data so collected is kept securely and its confidentiality is maintained at all times⁴¹ also the law puts a restriction on sharing of biometric information⁴² for any person other than for generation of Aadhaar number and authentication purposes. Section 33(2) of the Aadhaar Act is concerned where the information so collected can be disclosed in the interest of national security by the joint secretary; however,

38 Aadhaar (Authentication) Regulations, 2016, see Regulation 26.

39 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 2(d).

40 Aadhaar (Authentication) Regulations, 2016, see Regulation 26.

41 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 28.

42 The Aadhaar (Targeted delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, see section 29.

the court held that “for determination of such an eventuality, an officer higher than the rank of a Joint Secretary should be given such a power. Further, in order to avoid any possible misuse, a Judicial Officer (preferably a sitting High Court Judge) should also be associated thereof, Section 33(2) of the Act in the present form is struck down with liberty to enact a suitable provision on the lines suggested above.” The Aadhaar act provides that cognizance of an offence would only be taken after a complaint is made by the authority or any officer authorised on behalf of it, and not by any individual or a victim of such offence; about this, the court held that a suitable amendment needs to be brought so as to provide for the same.

3.1 DATA PROTECTION OFFERED IN INDIA THROUGH INFORMATION TECHNOLOGY ACT, 2000.

The rise in various forms of communication systems and digital technology have created very dramatic changes in our life. It has been nothing less than a revolution, which has changed the way people transact business. It has provided an advantageous position to various businesses and has provided new areas. But, in spite of people being aware about all these advantages of the Digital technologies and how it has changed the way we create, store and transmit the data, there was a natural reluctance to continue with such use of technology because of lack of proper legal framework to support and recognise such transactions. As of now, the data protection in India is offered through a legislation which is based on the model Law on Electronics which had been adopted by the General Assembly of the United Nation in 1997. The objective of the law was to provide legal recognition to transactions carried out by electronic data interchange or by any means of electronic communication. There was the need felt to amend various laws to provide for a proper legal framework in order to create legal recognition for the transactions carried out using the digital means, so as to promote the e-commerce in the country.

The law provides protection to various kinds of information and sensitive personal data or information,⁴³ by putting an obligation on any body corporate

43 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 3.

who are possessing, dealing or handling such data to be diligent while implementing it and in maintaining reasonable security practices.⁴⁴ Failure to do so will attract compensation which needs to be paid as damages to any such person being affected by such failure.⁴⁵ The law provides for recognition of various kinds of data⁴⁶ including Biometric,⁴⁷ password⁴⁸ or personal information⁴⁹ which a private body can collect for providing any services. The law provides that the body corporate needs to have a proper policy for privacy of the data collected in a clear and easily accessible statement.⁵⁰ The law puts an obligation on the body corporate to provide the purpose for which the data is being collected and what will be the uses of such data⁵¹; also, to state the need to provide the types of data that is being collected.⁵² The law has made it compulsory that before obtaining any such data, it is imperative for the entity collecting such data to seek the consent of the data principal.⁵³

44 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

45 Information Technology Act, 2000, see section 43-A Compensation for failure to protect data.

46 Information Technology Act, 2000, see section 2 (o) Data.

47 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 2(1) (b) Biometric means the technologies that measure and analyse human body characteristics, such as 'fingerprints,' 'eye retinas and irises,' 'voice patterns,' 'facial patterns,' 'hand measurement' and 'DNA' for authentication purposes.

48 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 2(1) (h) Password.

49 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 2(1) (i).

50 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 4(1) (i).

51 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 4(1) (iii).

52 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 4(1) (ii).

53 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 5(1).

Also, the collection of sensitive personal data is barred⁵⁴ by law, unless it is for lawful purpose and is concerned directly with the activity performed by the body corporate, and the collection of same is necessary for that purpose. The person whose data is being collected should have the knowledge of the data is being collected, the purpose for which it is collected and the intended recipient of such data. Also, he should have knowledge about the agency collecting and retaining the data.⁵⁵ The law is clear that the data so collected should not be retained longer than it is necessary,⁵⁶ and it should only be utilised for the purpose for which it is collected.⁵⁷ The Body Corporate should also provide an option for any person to not provide his data. And, also, provide that the consent can be withdrawn at any point of time after the data has been collected by providing the same in writing.⁵⁸

The Information Technology law has given proper recognition to various forms of data and created various obligations on the entity collecting the data so as to safeguard the data provided by data principals. The law is very much silent as to how the collected data would be utilised or how the collected data would be processed by the collecting entity. Data protection in India has become an important concern, as it can be seen from the previous two major judgments pronounced by the Constitution bench of the Apex Court on ‘right to privacy’ and the Validity of Aadhaar Legislation, where the court has stressed on the importance of bringing in suitable data protection legislation to regulate the data economy and, also, to safeguard the interest of the consumers.

54 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 5(2).

55 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 5(3).

56 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 5(4).

57 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 5(5).

58 The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 see Rule 5(7).

4. DATA PROTECTION LEGISLATION ACROSS THE EUROPEAN UNION, UNITED KINGDOM AND THE DRAFT INDIAN DATA PROTECTION BILL

This section aims to compare various provisions of data protection laws across various jurisdictions and to develop a comparative understanding of the issues related to Data Protection and see that they are addressed and their shortcomings are discussed. At present, in India, the so-called data protection is predominantly with respect to e-commerce and e-transactions that happen on the internet. As to what was the main reason which prompted a major change in data protection laws across the European Union and the United Kingdom, we need to understand data protection laws with respect to the privacy of an individual's personal data. And, not to forget, privacy has been held to be a fundamental right under Article 21 of the Indian Constitution also, as has been encompassed in the European Charter as a fundamental right. We must also look into the reason which necessitates the requirement of a tougher data protection law, as, today, maintaining of databases is not as difficult a task as maintaining the integrity of the same. So, in the present day, the most important debate is going on about a perfect "method of data protection." It is a very big headache for the financial institutions, business houses and the governmental bodies to provide adequate protection to their databases. In the absence of any robust and stringent law relating to data protection, the miscreants are gaining expertise in this, exponentially. With the advancement in technological development, there also took place a transition in the standard of crimes. The lust for information is acting as a catalyst in the growth of cybercrime.

In this part, we shall see in the first section the scope of data protection law and as to what kind of protection is being offered in India through the Information Technology Act, 2000, and how robust is the system to address the concerns of the present data economy. Later, we shall understand our discussion of this part by looking into some of the important definitions, such as Data, Personal Data, Sensitive Personal Data and, also, what we mean by the processing of such data. Also, we shall look into the principles followed for the processing of such data and avoid any unnecessary processing of data. Also, we shall look into the authorities

and their power to make sure that the laws are being strictly adhered to - respecting one's privacy and, at the same time, promoting the data economy by securing information and processing of data following the principles of data processing.

4.1 THE SCOPE OF PROTECTION - WHAT KIND OF DATA ARE BEING OFFERED PROTECTION

In order to understand and appreciate the scope of data protection offered, we first need to understand as to what is meant by terms such as data, personal data, sensitive personal data. Also, how can these data be used to determine the level of protection offered to an individual in the current data economy so as to secure its fundamental right to privacy.

“A strong and a coherent data protection framework” is required in the country, backed by “strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across all segments of the internal market.”

i. Data

Data has been defined in “UK Data Protection Act, 1998,” for short “UK Act,” as any information which is being processed⁵⁹ by any automated equipment, or is being saved with the intention⁶⁰ to be processed at a later point of time, or is being recorded as a part of relevant filing system,⁶¹ or forming part of any records⁶² which has not been provided for by earlier meaning of data. Whereas the “Indian Personal Data Protection Bill, 2018,” for short “Indian Bill,” defines Data in an inclusive definition, “meaning representation of information, facts, concepts, opinions, or instructions in a manner suitable for communication, interpretation, or processing by humans or by automated means.”⁶³ The above definition of data from various jurisdictions is that data is nothing but any form

59 United Kingdom Data Protection Act, 1998 see section 1 Definition of Data ss. a

60 United Kingdom Data Protection Act, 1998 see section 1 Definition of Data ss. b

61 United Kingdom Data Protection Act, 1998 see section 1 Definition of Data ss. c

62 United Kingdom Data Protection Act, 1998 see section 1 Definition of Data ss. d

63 Indian Personal Data Protection Bill, 2018 see sec. 1(12)

of information which may be processed by any equipment or manually. The European Union's directive of 1995 does not define data, but instead defines personal data. So is the case for the "new UK Act."

ii. Personal Data

"Directive of 95/46/EC of the European Parliament and of the Council"⁶⁴ seeks to harmonise the "protection of fundamental rights and freedoms of natural persons" in respect of "processing activities, and to ensure the free flow of personal data between Member States" and defines "personal data" as an information related to any identified or identifiable natural person; who may also be known as "data subject" or "data principal," and can be identified directly or indirectly, is known as an identifiable person and "in particular by reference to any identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity," and the UK Act, as well as the new UK Act, follows the same principles⁶⁵ as that of European Union. In India, the definition of personal data provided by Indian bill is attributed to a natural person who can directly or indirectly become identifiable, having regard to any trait, attribute, characteristic or any other feature or combination of features, with any other information which may reveal the identity of that natural person.⁶⁶

iii. 'Sensitive Personal Data'

Sensitive personal data has been defined in Indian bill as anything which relates to, or constitutes, any of the following like "passwords, financial data, health data, official identifier, sex life, sexual orientation, biometric data, genetic data, transgender status, intersex status, caste or tribe, religious or political belief or affiliation, or any other category of data specified by the Authority under

64 Directive 95/46/EC of the European Parliament and of the Council of 24 October, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 38).

65 United Kingdom Data Protection Act, 1998 see ss. 5(2) and 5(3).

66 Indian Personal Data Protection Bill, 2018 see sec. 1(29)

section 22” of the Indian bill.⁶⁷ The same has been defined under section 2 of the UK Act, 1998.

With the basic understanding as to what constitutes data and what are personal data or sensitive personal data, we shall look into the aspect of obligations imposed on data fiduciary in relation to the processing of such data.

4.2 PROCESSING OF PERSONAL DATA

“Processing of personal data of a natural person” and protection of such processing is a fundamental right enumerated in Article 8(1) of the “Charter of Fundamental Rights of the European Union” (the ‘Charter’) and Article 16(1) of the “Treaty on the Functioning of the European Union” (“TFEU”) provides that everyone has the right to the protection of personal data concerning him or her.” Data fiduciary, while processing personal data of someone, should, whatever their nationality or place of residence, respect their freedom and fundamental rights, in particular, their right to protection of personal data.⁶⁸ Data economy is designed to serve humankind and not the other way around. So, it is indispensable to establish a clear set of principles governing the processing of personal data.

i. Obligations as to Data Fiduciary - Principles of Collection and Purpose Limitation

The obligations set out under the data protection law are very critical in ensuring that the dual objectives of limiting processing to the extent of fulfilment of the purpose of data principals, while capitalizing gain from data processing for society at large. Failure to adhere to these obligations will hold data fiduciaries accountable.⁶⁹ Article 16(2) TFEU mandates the European Parliament and

67 Indian Personal Data Protection Bill, 2018 see sec. 1(35)

68 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

69 Committee of Experts under the Chairmanship of Justice B.N. Srikrishna; A Free and Fair Digital Economy Protecting Privacy, Empowering Indians, p. 49

the Council to lay down the rules relating to the protection of natural persons with regard to the processing of personal data and the rules relating to the free movement of personal data. Srikrishna committee considered the views of various commenters on the issue of obligations attached to data fiduciary and came to the conclusion that these principles of purpose and specific limitations can't be narrowed down as it might hamper the innovation, and it can't even be kept vague and broad as to fail in providing notice and consent to its citizens.⁷⁰

The relationship between the data subject and the data controller is to be reformulated as a fiduciary relationship between the data principal and the data fiduciary.⁷¹ In a fiduciary relationship, it is essential to have clear delineation of rights and obligations, since the relationship is based upon the premise of trust and is "characterised by one party's dependence on another." There are certain essential obligations in the fiduciary relationship, which are to be followed, irrespective of the exact nature of the contractual relationship, and must uphold "trust and loyalty placed in them by the data principal." Going by this principle, all processing of personal data by data fiduciaries must be fair and reasonable.⁷² Also, there is a principle of collection and purpose limitation which will apply on all data fiduciaries, unless they have been explicitly exempted.⁷³ Processing of personal data by using big data analytics, where the purpose of the processing might not be known at the time of its collection and cannot be reasonably communicated to the data principal, can be undertaken only with explicit consent.

Data fiduciary needs to adhere to the principle of transparency from the time the data is collected to various points in the interim. Most prominently, a data fiduciary is obliged to provide data principal with notice at the time of the collection of her personal data.⁷⁴ There shall be obligations on data fiduciaries

70 *ibid* at pp. 49-50

71 Indian Personal Data Protection Bill, 2018 see Sections 3(13) and 3(14)

72 Indian Personal Data Protection Bill, 2018 see Sections 4

73 Indian Personal Data Protection Bill, 2018 see Sections 5, 6

74 Indian Personal Data Protection Bill, 2018 see Sections 8, 28

as to the quality of data and storage limitation. However, the responsibility that the personal data provided is accurate shall be ensured by the data principal.⁷⁵ There will also be a provision of personal data breach notification to the DPA and, in certain circumstances, to the data principal.⁷⁶ With large amounts of data being held by fiduciaries, the breach of personal data becomes a real possibility. A breach can have deleterious consequences for individuals. Therefore, it becomes crucial to inform data principals about such instances, so that they can shield themselves from the harmful consequences of such a breach. The Srikrishna Committee was cognisant “that a notification requirement which depends on harmful consequences to the rights of the data principals may not afford sufficient clarity to fiduciaries. The content of such notifications should, at the minimum, include the nature of personal data that has been subject to breach and the number of individuals who have been affected by the breach.”⁷⁷

Data security is another such obligation which will be applicable to data fiduciary.⁷⁸ “While the basis of a data protection law is the individual’s right to informational privacy, obligations securing data protection need to be supplemented by the implementation of security safeguards to ensure data security.” The obligation to ensure data security is thus incorporated by the guidelines prescribed by EU in GDPR, “which adopts the principles of information security requiring the integrity and confidentiality of personal data to be maintained at all times.”⁷⁹ Now, with this, we shall look into the aspects of rights given to the data principals.

ii. Rights of Data Principal - Enforcing Rights against Data Fiduciary for any Violation.

“It is essential to provide data principals with the means to enforce their rights against corresponding obligations of data fiduciaries.” These rights are

75 Indian Personal Data Protection Bill, 2018 see Sections 9, 10

76 Indian Personal Data Protection Bill, 2018 see Sections 32

77 Committee of Experts under the Chairmanship of Justice B.N. Srikrishna; A Free and Fair Digital Economy Protecting Privacy, Empowering Indians

78 Indian Personal Data Protection Bill, 2018 see Sections 31

79 Article 5(1)(f), EU GDPR

based on the principles of autonomy, self-determination, transparency, and accountability, so as to give individuals control over their data and to enable the digital economy to flourish by empowering the data principals to have a certain degree of control over their data. A robust set of Data Principal's rights will be an essential component for empowering data protection law. Also, the proposed bill has provisions for a penalty and punishment for any case arising out of violation of any rights or duties provided by it to ensure that the law is strictly adhered and complied with.

iii. Right to Access, Confirmation and Correction⁸⁰

The first such right of confirmation refers to the right of data principal to inquire about the processing of his personal data; a data principal is well within his right to ask the data fiduciary about the status of processing of his data or in what way his personal data is being processed by the data fiduciary and they are duty bound to comply to such requests in a time bound manner. Right to access refers to the right which enables the data principal to ask for his personal data from the data fiduciary which has been collected by the them. The data fiduciary needs to provide a summary of information with respect to processing of personal data that they have collected from the data principal in the course of providing any services. Right to correction is a right conferred upon the data principal which enabled them to make a request at any time to the data fiduciary seeking correction or updating any personal data that has been collected by the data fiduciary for provision of any service. It is important to maintain correct and up-to-date personal data in order to ensure the veracity of output decisions. Data principal shall have the right to correct, complete or update any inaccurate or incomplete personal data as to ensure accuracy of their personal data. This right is a natural consequence of the right to access and, where such personal data is accessed and found to be inaccurate they can be corrected. The application of this right has a broad scope covering information about the data principal that a fiduciary possesses. It applies to both input personal data , the data that the data principal provides to the data

80 Indian Personal Data Protection Bill, 2018 see Sections 24, 25

fiduciary and output personal data, the data that has been used to create a profile or reach a certain conclusion about an individual.

iv. Rights to Objection, Restriction and Portability⁸¹

The right to data portability is critical in making the digital economy seamless. This right allows data principals to obtain and transfer their personal data stored with a data fiduciary for the data principal's own uses, in a structured, commonly used and machine- readable format. Thereby, it empowers data principals by giving them greater control over their personal data. Further, the free flow of data is facilitated easing transfer from one data fiduciary to another. This in turn improves competition between fiduciaries who are engaged in the same industry and therefore, has potential to increase consumer welfare. These rights represent a particular approach to ensuring lawfulness of processing by vesting data principals with the power to hold the data fiduciary accountable is an extension of the core principle of autonomy, but autonomy is not absolute and may be curbed in favour of more efficacious achievement of the ultimate public good, for creation of a free and fair digital economy.

v. Right to be Forgotten⁸²

The right to be forgotten is the ability of an individual to “limit, delete, or correct the disclosure of any personal information” on the internet that may be “misleading, embarrassing, irrelevant, or anachronistic.” Such disclosure on internet may or may not be a consequence of unlawful processing by the data fiduciary. This right flows from the general obligation of data fiduciaries to not only process lawfully, but also in a manner that is fair and reasonable. Implicit in this formulation is the fact that the right itself is defeasible. There is no principled reason as to why the data principal's assessment of unfairness would override that of the fiduciary. In case of a direct or subsequent public disclosure of personal data, the spread of information might be complicated

81 Indian Personal Data Protection Bill, 2018 see Sections 26.

82 Indian Personal Data Protection Bill, 2018 see Sections 27.

to prevent; also, the restriction of disclosure immediately affects the right to free speech and expression. So, this right needs to be protected, based on a balancing approach with the right of free speech and expression.

Conclusion

The regulation needs to be aimed to achieve a balancing role to promote free and fair trade and to protect the rights of individuals. Also, it needs to have a framework as to the promotion and regulation of a healthy market competition and to avoid over-protection and under-protection. Information is always an essential part in the flourishing of the economy, but it raises another concern as to what level of data privatization is necessary, that is how much and what kind of personal data a private entity can retain, and what kind of activities can be done by processing of such data. It is very pertinent to ensure that there should be guidelines for data protection, as to who can collect these data and how it can be processed. And, more towards our discomfort, the collection of these and other data sets which are commonly known as big data is only accelerating with time, and its amount and variety are continually changing with time. The choices we make might lead trails as bread crumbs and are known as digital footprint. This makes it a very pressing issue before the state to come with a stringent data protection laws which are necessary to prevent any intrusion with these data which could cause any serious harm or injury to a person.

1. We have seen the data protection bill and the report of the Srikrishna Committee on data protection law. The proposed bill strikes the right balance between right to privacy and right to information in order to ensure that the rights of the citizenry are protected, and the digital economy is promoted based on the information. We have seen that data fiduciaries are subjected to a lengthy obligation which has been clearly explained. Also, the rights of individuals are taken care of by prescribing punitive action for any breach of obligation or rights of principals. However, the law is somewhat not clear as to the concept of data transfer across the cross-border, in the age of seamless flow of personal data from one country to another due to globalization and technological progress

which we have achieved in the past decades. Today, the threats that one perceives to one's privacy and data does not stem solely from the boundary of his State, but from other States and the State's use of personal data of any of its citizen for public administration and law enforcement.⁸³ Instead, threats emerge from a highly connected and technologically advanced world where a number of public and private actors participate, perhaps, even unintentionally, in creating them. This raises another issue with respect to jurisdiction, since our data protection law has jurisdictional application, but data are being transferred from one part of the world to another, seamlessly. This requires a need for uniform law throughout the world to protect the liberty and rights of individuals irrespective of their nationality or place of residence.

83 Colin J. Bennett, and Charles D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (The MIT Press, 2006).

THE ROLE OF INTERNATIONAL LAW IN STATE BUILDING: EXPLORING THE NEXUS BETWEEN CONFLICT RESOLUTION AND LAW

**Prof. (Dr.) Rakesh Kumar Singh
Dr. Bhanu Pratap**

Abstract

One of the least explored areas of International Law is the emerging trend of 'State Building.' International Law has entered its 'post-ontological' state, where the debate about its existence and legality is moot. International Law is facing certain knotty problems since the advent of globalization. International law controlled the jus ad bellum regime in a Westphalian context. As a result, The Charter of the United Nations only settled disputes which arose between states. In other words, the focus of the Charter was interstate disputes. The last decade of 20th century and the early 21st century heralded the era of Civil Wars. The Charter was primarily not designed to deal with the issues of civil war. The issue of civil war required a liberal interpretation of Article 2 Para 7 and Article 39 of the Charter. In addition to this, International Law did not have too many 'institutionalized' mechanisms to deal with the issue of civil wars. The problem became more severe with the coinage of the phrase 'Fail/Weak State.' To settle this issue, International Law sought the help of the nascent field of 'Conflict Resolution.' It is Conflict Resolution which acts as a bridge between International Law and State Building. With the advent of Responsibility to Protect (R2P), especially its third dimension, Responsibility to rebuild, it can be said that International Law is making its foray in institutionalizing State Building and Conflict Resolution. The paper is a small attempt to analyze the relationship between International Law, Conflict Management, State Building, Fail/ Weak States and Responsibility to Protect (R2P).

Section I of the paper will trace the origins of Conflict Resolution with special emphasis on Protracted Social Conflict. Section II of the paper will deal with the ontology of Fail / Weak States. Section III of the paper deals with the relationship between State Building, International Law and Responsibility to Rebuild. Section IV of the paper will give concluding observations and suggestions.

Keywords: *International Law, Conflict Management, Fail / Weak States, State Building, Responsibility to Protect.*

Section I

The challenges that were posed by the end of the 20th century and the beginning of the 21st century were different from the post World War issues. The institution of State itself was challenged. If the Charter institutionalized the Westphalian system by virtue of Article 2 Para 4, then the phenomenon of globalization, civil wars and human rights made the concept of sovereignty relative. Particular problems faced by the international society were as follows:

- (a) Chaotic civil wars.
- (b) Globalization and the vulnerability of the state as an institution.
- (c) Failure of the Oslo Peace Agreement.
- (d) The aftermath of 9 / 11 attacks.
- (e) The emergence of the concept of Fail / Weak States.¹

Ramsbotham and Woodhouse consider this a problem of ‘governance breakdown.’² According to them, any society which is deeply fractured, or having a fragile social bond with a weak governance will lapse into the cycle of recurring violence and lawlessness.³ In other words, these are the very issues which give fuel to the concept of Fail/Weak States. Conflict resolution then is a part of ‘development’ and stands for social justice and social transformation. It includes not only States but international organizations, nongovernmental organizations and individuals.⁴ Conflict resolution is of the view that short term measures like military interventions have to be accompanied by middle term and long term strategies like Peace building, State Building, Transitional Justice, Refugee Management and Local Ownership.⁵

1 Oliver Ramsbotham et al., *Contemporary Conflict Resolution* 7 (4th ed. 2016)

2 *Id.* at 8.

3 *Id.*

4 *Id.* at 9.

5 *Id.*

Conflict arises when two parties have ‘incompatible goals.’⁶ The term conflict refers to a situation where the parties are pursuing opposite goals and there is no scope for reconciliation. Galtung refers to a conflict as a triangle with contradiction, attitude and violence at its vertices.⁷ It has its origins in economic differentiation, social change, cultural formation, psychological development and political organization.⁸ According to Morton Deutsch, conflicts should be distinguished between two categories, namely, ‘destructive’ and ‘constructive’ conflict.⁹ Constructive Conflict is an essential part of human life. The field of conflict resolution emerged in an aftermath of the World Wars, and it slowly distinguished itself from the subject of international relations. The discipline of Conflict Resolution had the following characteristics:

- (1) Multi Level: The discipline embraced solution to conflict at all levels, i.e., intrapersonal, interpersonal, intergroup, international, regional and global.
- (2) Multi Disciplinary: It borrowed tools from the field of politics, international relations, strategic studies, development studies and social psychology.
- (3) Multi Cultural: It studied conflicts present in any culture by analyzing the spillover effect of an international event and focusing on the deprivation of primary goods by the government at a domestic level.
- (4) Analytical and Normative: Its approach is both systematic and value laden.
- (5) Theoretical and Practical: Conflict resolution imbibes both a theoretical and practical framework.¹⁰

Oliver Ramsbotham, in his seminal work on Contemporary Resolution, has provided a useful terminology through which Conflict Resolution can be

6 Id.

7 Id. at 10, 12.

8 Id at 9.

9 Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (1973).

10 Ramsbotham et al, *supra* note 1, at 10.

distinguished from terms like Conflict Management, Conflict Settlement and Conflict Containment. Some of the important terms used are as follows:

- (a) *Armed Conflict*: It is a species of conflict where both parties are involved in the use of force.
- (b) *Violent Conflict*: Here the violence is one sided and includes acts of Genocide and Ethnic Cleansing.
- (c) *Conflict Settlement*: A Political or a violent conflict is brought to an end by the conclusion of a treaty or an armistice, but the conflict may re-emerge.
- (d) *Conflict Containment*: It includes measures of peacekeeping and war limitation.
- (e) *Conflict Management*: It is very much similar to Conflict Resolution as far as the issue of Positive Conflict Handling is concerned, but is less comprehensive.
- (f) *Conflict Resolution*: It is more comprehensive, and it involves handling the sources of deep rooted issues, addressing them and transforming them. By transformation, it is meant that the behavior is no longer violent. The last stage of Conflict Resolution is Conflict transformation.¹¹

The discipline of Conflict Management developed in the following phases:

- (A) The First Generation (1918-1945).
- (B) Second Generation (1945-1965).
- (C) Third Generation (1965-1985).¹²

The First Generation saw the foundation of the Chair of International

Relations at University College of Wales, Aberystwyth in 1919.¹³ Mary Parker Follett advocated the process of integration, instead of domination and compromise.¹⁴ Conflict Resolution was influenced by Psychology, Politics

¹¹ Id at 34-35.

¹² Ramsbotham et al, *supra* note 1, at 39-59.

¹³ Id at 40.

¹⁴ M. P. Follett, *Dynamic Administration: The Collected Papers of Mary Parker Follett* (H. Metcalf and L. Urwick eds., 1942).

and International Studies.¹⁵ In Psychology the theories of frustration and aggression influenced the nascent discipline of Conflict Management.¹⁶ Brinton's assessment of the causes of Political Revolution gave important tools to Conflict Management.¹⁷ In International Studies, David Mitrany adopted a functionalist approach which moved beyond the 'win-lose' paradigm.¹⁸ This allowed Conflict Resolution to find a way beyond the 'zero sum' game. Holsti's seminal analysis of the peace agreements from 1648 – 1990 allowed him to give the eight requisites of peace. These were related to governance, legitimacy, assimilation, a deterrent system, conflict resolving procedure, consensus on war, procedure for peaceful change and anticipation of future issues.¹⁹

The Second Generation is dominated by the thoughts of Kenneth Boulding, Johan Galtung and John Burton. According to Kenneth Boulding, if war was an inherent outcome of State Sovereignty, then the situation can be redeemed by reforming the international organizations and research capabilities.²⁰ John Galtung gave the famous distinction between negative peace and positive peace. Negative peace is the cessation of direct violence, while Positive peace is related to structural and cultural violence.²¹ Burton was hugely influenced by systems theory and games theory. He made the distinction between 'interests' and 'needs' in Conflict Resolution. Interests were goods that could be bargained or negotiated with. Needs were non negotiable. If a Conflict arose as a deprivation of 'needs,' then the situation required special attention of the international community.²²

The Third generation was more employed with 'problem solving workshops' and came up with maxims for negotiators:

15 Ramsbotham et. al, supra note 1, at 41.

16 Doob J. Dollard et al., *Frustration and Aggression* (1939).

17 Crane Brinton, *Anatomy of A Revolution* (1938).

18 David Mitrany, *A Working Peace System: An Argument for The Functional Development of International Organization* (1943).

19 Kalevi Holsti, *Peace and War: Armed Conflicts and International Order* 336-339 (1992).

20 Ramsbotham et al supra note 1, at 46.

21 Ramsbotham et al supra note 1, at 47.

22 John Burton, *Conflict: Human Needs Theory*, 242 (1990).

- (i) Separate the people from the problem and focus shall be made on building good relationships.
- (ii) Focus on trust building exercises by listening to each other.
- (iii) More focus on interests and concern, than on demands.
- (iv) Avoidance of zero sum options to solve a conflict.
- (v) Use of objective criteria.
- (vi) Anticipation of obstacles in advance.
- (vii) Overcome the anticipated obstacles.²³

The notion of conflict changed in the last decade of the 20th century. The focus of conflict management shifted towards civil war. Holsti was of the view that wars of the late 20th century were not about foreign policy, security or status, but they were about statehood, governance and the very status of nations and communities within states.²⁴ The language now used in the field of Conflict Management was focused on terms like weak or fragile states,²⁵ internal conflicts,²⁶ new wars,²⁷ small wars,²⁸ civil wars,²⁹ ethnic conflicts,³⁰ conflict in post colonial states,³¹ 'deep rooted conflicts,'³² and 'intractable conflicts.'³³ These conflicts have been termed as 'wars of third kind,'³⁴ the other two wars

23 Ramsbotham et al supra note 1, at 55.

24 Kalevi Holsti, *The State, War, and The State of War*, 20-21 (1996).

25 *Ethnic Conflict and International Security* vii (Michael Brown ed. 1993).

26 *The International Dimensions of Internal Conflict* (Michael Brown ed. 1996).

27 *New and Old Wars: Organized Violence in A Global Era* (Mary Kaldor, Basker Vashee eds, 3rd ed. 2012).

28 Jeremy Harding, *Small Wars, Small Mercies: Journey in Africa's Disputed Nations* (1994).

29 Charles King, *International Institute for Strategic Studies, Ending Civil Wars*, Adelphi Paper 308 (1997).

30 Rodolfo Stavenhagen, *Ethnic Conflicts and The Nation State* (1996).

31 *Between Development and Destruction: An Enquiry into The Causes of Conflict in Post Colonial States* (van de Goor et al. eds., 1996).

32 Ramsbotham et al supra note 1, at 113.

33 *Id.*

34 *Id.*

being the emergence of state itself, where use of force was monopolized by it, and the second being interstate war.³⁵

Edward Azar's Theory of Protracted Social Conflict is the most extensive work present on Civil wars.³⁶ He rejects international law's artificial distinction between international and domestic.³⁷ According to Azar and Burton, 'there is really only one social environment, and its domestic face is the more compelling.'³⁸ There had been a tendency to focus more on overt conflict, but the latent and non violent conflict has been ignored.³⁹ According to the term Protracted Social Conflict, the sources of such latent conflicts lies 'within' rather than 'between' states. The new intra state conflicts are characterized by communal tension, deprivation of human needs, and failure of governance, limited resources, growing population and limited accessibility to international organization.⁴⁰ In other words, Protracted Social Conflict is connected with 'development.' According to Azar, 'Most states which experience protracted social conflict tend to be characterized by incompetent, parochial, fragile and authoritarian governments that fail to satisfy basic human needs.'⁴¹ Transnational conflict is an extension of Protracted Social Conflict which considers the impact of globalization and its spillover effects over various regions of the world. The addition that Transnational Conflict has made to protracted social conflict can be summed up in 'greed versus grievance' approach. It tends to argue with Azar's conclusions that conflicts are a consequence of the unwillingness of the state to recognize the individual and communal needs of the people.⁴² In contrast to Azar's theory, Collier and Hoeffler are of the view that civil wars are generated by rebel greed and contestation for economic resources.⁴³

35 Id.

36 Edward Azar, *The Management of Protracted Social Conflict: Theory and Cases* (1990).

37 Edward Azar & John Burton, *International Conflict Resolution: Theory and Practice* 33 (1986).

38 Id.

39 Ramsbotham et al *Supra* note 1, at 116.

40 Id. at 117.

41 Id. at 118.

42 Ramsbotham et al *supra* note 1, at 121.

43 Id.

Section II

The relative nature of sovereignty has had a cascading effect on the political-legal status of state. The Procrustean structure of a Westphalian state is no longer the only option available. The permeable membrane of this archaic structure has been broken with the advent of concepts of Sovereignty as Responsibility, Subsidiarity and Isomorphism. The traditional understanding of State as given under Article 1 of Montevideo Convention of Rights and Duties of States, 1933, has been challenged. International Law has now entered a skeptical mode where the positivist understanding and interpretation of State and Sovereignty is being questioned. In the 21st century, the ideas propounded by International Commission of State and Sovereignty (hereinafter referred as ICISS) have attracted the attention of academicians from various other branches of social sciences. International law is now a unique playground of conflict management, ethical studies, State Building and Military Science. The Rwanda and Serbian crises have raised certain critical issues regarding re-interpretation of sovereignty, intervention and collective security. Unilateral humanitarian intervention failed to gain legality in the realm of international law. The well intended notion of Humanitarian Intervention could not escape the skeptical mood of the world community.

Responsibility to Protect (hereinafter referred as R2P) has provided an inclusive culture for the discipline of International Law. The Three Dimensional approach of the doctrine has allowed the incorporation of tools from other branches of social sciences. It is a unique amalgamation of international law, diplomacy, conflict management and military science. The R2P doctrine has provided a way of reconciling the norms of human rights, sovereignty, use of force, collective self defense, failed states, state building, Chapter VI and Chapter VII & VIII of UN Charter.

The events of the last decade of the 20th century left some unanswered questions for the realm of International Law. It seemed that the subject had reached the stage of brinkmanship and was facing an existentialist crisis. The subject and its basic constituents face the following problems:

*The Role of International Law in State Building: Exploring the
Nexus between Conflict Resolution and Law*

- (1) Were the concepts of international law in need of a radical change altogether? or
- (2) The concepts themselves being adequate, were in need of a radical interpretation?

These questions arose because the well intended doctrine of humanitarian intervention had urged the legal scholars, diplomats, governments to find a legal and legitimate method to find a balance between frequent violations of humanitarian law, human rights and the traditional notion of sovereignty. The concepts of state, sovereignty, international human rights and international humanitarian law were now placed in the unique construct of a globalized world that demanded the reconciliation between the positivist International law and a neo liberal global order. At this point, international law was being interpreted through the lens of international politics, ethics and neo Kantian norms. Humanitarian Intervention had sparked a unique 'Legality – Legitimacy' debate in the realm of International Law. Humanitarian Intervention gained ascendancy among academicians, strategists, heads of state, but NATO's unilateral intervention in Serbia made things murky. NATO'S unilateral intervention in Serbia found no legal precedent in the present modern international law regime. It was against the Code of Conduct prescribed for the UN member states (Principles of UN Charter). It was an apparent violation of Art 2 (4) of UN Charter. NATO's actions were criticized by the erstwhile USSR, China and Non Aligned Movement (NAM) countries. In spite of its controversial nature, NATO played the role of a catalyst, as it allowed the international legal community to reflect upon the existing lacunae within the UN Charter. NATO's unilateral intervention should not be considered as a novel approach which refuted the legal norms, but it should be seen as a reaction against the inactivity and political squabbling of the Security Council. The unilateral intervention could not be justified on the legal grounds provided under the UN Charter. The 'implied authorization' of the previous Security Council Resolutions was one of the few devices left which allowed NATO powers to justify their action in an oblique manner. The 'Legality Legitimacy' debate provided some interesting rhetorical debate, but what was required was

a crystallized legal pedagogy which would satisfy the inherent principles of UN Charter and customary International Law. The notion of 'collective intervention' was a logical answer to the questionable practice of Humanitarian Intervention, but the institutional reluctance on the part of the permanent members of the Security Council now required the presence of a viable doctrine which would incorporate the accountable nature of human rights and humanitarian law into the Westphalian State system, as incorporated in the UN Charter. It is to be noted here that the problem which the international legal community was facing was related to an international system which had seen the rise of civil wars due to the sudden disintegration of the USSR. The problem was that of Intra State conflicts, and not Inter State Conflicts. There were doubts regarding the linguistic baggage of Humanitarian Intervention. The overbearing tone of 'Right to Intervene' made many countries uncomfortable. It was being interpreted as a grand design on the part of Western European nations to spread the notions of liberalism, democracy, human rights everywhere, which would open the gates to neo imperialism. The humanitarian intervention and its motives were interpreted with skepticism by African States and South Asian states. It was seen as a threat to the political independence and sovereignty of South Asian States. It was interpreted to be a threat to the 'political independence and territorial integrity' of the states as espoused under Art 2 (4) of UN Charter. A new approach was required to tackle the following issues:

- (1) Creating a new approach to the basic concepts of Public International Law, i.e., sovereignty and intervention.
- (2) A drastic change in the linguistic use of the term 'Right to Intervene.'
- (3) Incorporation of the elements of human rights, international humanitarian law into the Westphalian traditions of sovereignty.
- (4) Importing the elements of peacekeeping, peace operations and peacemaking into the realm of UN Charter.
- (5) Addressing the issue of refugees, women, children and internally displaced persons.
- (6) Providing an alternate to the inactivity of the Security Council.

- (7) Addressing the primary responsibility of the state towards its population.
- (8) Addressing the issue as to whether international legal community had a residual responsibility to protect the civilians of other states.
- (9) Re interpretation of the role of Security Council, General Assembly and Secretary General.

An answer to the above mentioned series of questions came through the work of the International Commission on Intervention and State Sovereignty (hereinafter referred as ICISS) which published its report called *The Responsibility to Protect* (herein after referred as R2P). Some of the core elements of its ideas were adopted unanimously at the summit of world leaders at the Millennium Summit of United Nations in 2005. The report of ICISS had some interesting observations to make, but its most important contribution was bringing a change in the linguistics of the concepts of International Law. It made a radical departure from the linguistics of 'Right to intervene' to 'Responsibility to Protect.' The shift came when the nomenclature changed from 'rights of state' to 'duties of state.' According to Jose E. Alvarez, the virtue of R2P was that it urged upon the state actors to engage in humanitarian relief by shifting the emphasis from the politically unattractive right of State interveners, to the less threatening idea of responsibility.⁴⁴ R2P avoided the aggressive and avenging nature of intervention and emphasized on 'Duties to Prevent, React and Rebuild.' According to ICISS, R2P is applied when there was 'serious and irreparable harm occurring to human beings or imminently likely to occur, which involves the large scale loss of life, actual or apprehended, with genocidal intent or not, produced by either deliberate state action or state neglect, inability to act or in a failed situation.'⁴⁵ The report also mentioned the residual responsibility of the international legal community while dealing with situations of genocide, ethnic cleansing, war crimes and crime against

44 Jose E. Alvarez, *The Schizophrenias of R2P*, 275, (Philip Alston and Euan McDonald (eds), Human Rights, Intervention and Use of Force, 2008).

45 Report of ICISS, R2P, December 2001, page XII.

humanity. Hugh Breakay has brilliantly summed up the core idea of R2P.⁴⁶ According to the author, the core of R2P has three elements:

- (a) To shift the concept of sovereignty itself.
- (b) Residual responsibility of the International Community when the state fails to protect its citizens.
- (c) To decide the manner of intervention with a special focus on principled and multilateral response consistent with international law.⁴⁷

Former Secretary General Kofi Annan felt strongly that the lack of action in situation of gross violation of human rights could threaten the legitimacy of the UN and the authority of the Security Council with its primary responsibility for the maintenance of international peace and security. Following the experience in Kosovo, he summarized his concerns and the challenges for the United Nations as follows:

“The inability of the international community in Kosovo to reconcile their two equally compelling interests – universal legitimacy and effectiveness in defense of human rights – has revealed the core challenge to the Security Council and the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand.”⁴⁸

In response to this dilemma, the Canadian government sponsored the ICISS which presented its report entitled, ‘The Responsibility to Protect’ to the Secretary General at the end of 2001. The

46 Hugh Breakey, *The Responsibility to Protection: Game change and regime change* in ‘Norms of Protection: Responsibility to Protect, Protection of Civilians and their interaction,’ 12, Angus Francis, Vesselin Popovski, Charles Sampford (eds) United Nation university Press, 2012).

47 Id.

48 Kofi Annan, Two Concepts of Sovereignty: Address to the 54th Session of the General Assembly, The Question of Intervention: Statement by The Secretary General of the United Nations, Kofi Annan, New York, 1999, page 39.

Commission was established as an independent international body and mandated to help in bridging the concepts of sovereignty, intervention, peacekeeping, peacemaking and international humanitarian law through a broader understanding of the relevant issues, and to foster a global political consensus towards action within the UN system. The commission convened five full meetings to stimulate debate and ensure that the Commission heard the broadest possible range of views during the course of its work; eleven round tables and national consultations were held in all regions of the world. The report of the commission made several important contributions to the international policy debates on human rights versus sovereignty. Most importantly, it turned the debate about a 'right to intervene' into a 'responsibility to protect.' This change of perspective intended to move the attention away from the interveners and to the potential victims needing support. Sovereignty, involved not only 'control' but 'responsibility.' The Commission borrowed from the works of Francis Deng and Bernard Kouchner, and it was pointed out that the States had the primary responsibility to protect its civilians, and if the State could not fulfill its primary responsibility, then the international community steps up to perform its residual duties.⁴⁹

It is an accepted notion that human thinking is processed in a binary form. A positive notion necessitates the existence of a negative notion. For a considerable period of time, the State has been interpreted in a positivistic notion. This positivistic notion is backed by the Historical construct of Treaty of Westphalia. State became the first subject of Public International Law and was received the legal baptism through Article 1 of The Montevideo Convention of Rights and Duties, 1933. In recent times, the notion of failed states has posed a serious challenge to the building blocks of international law. David Chandler has made an interesting observation. By using the 'unbundling' neologism of Stephen

⁴⁹ Supra note 22, page 22.

Krasner, Chandler notes that Sovereign state forms are held up, but sovereignty is being redefined. This means that the importance of the legal shell of the state is retained, while the political content of self government and autonomy meaning thereby that the notion of sovereignty has been challenged. This is done in three ways:

- (a) Treating sovereignty as a capacity.
- (b) Treating Sovereignty as a responsibility.
- (c) Radical interpretation of international legal sovereignty.⁵⁰ The radical interpretation includes new approaches to sovereignty like neo trusteeship,⁵¹ pooled sovereignty,⁵² or shared sovereignty.⁵³

Being a novel area in International law, Fail/Weak states have started to attract the attention of scholars. Following are some of the definitions related to the term:

- (1) Failed States are States which cannot and will not safeguard minimal civil conditions, i.e., peace, order, security.⁵⁴
- (2) Failed States can be defined in terms of the demise of the practical operation of governmental functions for an internationally recognized state.⁵⁵
- (3) Olson suggests that the list of failed states could be expanded if one were to include states facing serious “internal problems that threaten their continued coherence or significant internal challenges to their political order.”⁵⁶

50 David Chandler, ‘Empire in Denial: The Politics of State Building’ 33, (2006).

51 James D. Fearon and David D. Laitin, Neo Trusteeship and The Problem of Weak States, 28 (4) International Security, 5-43 ,(2004).

52 Stephen Krasner, The Case for Sovereignty, 16 (1), Journal of Democracy 69-83, (2005).

53 Stephen Krasner, Sharing Sovereignty: New Institutions for Collapsing and Failing States, 29(2), International Security, pages 85-120 (2004).

54 Robert H. Jackson, Institute of International Relations, The University of Columbia, Surrogate Sovereignty? Great Power Responsibility and Failed State, (1998).

55 Hans-Joachim Spanger, Peace Research Institute, Failed State or Failed Concept? Objections and Suggestions, (2000).

56 William J. Olson, *The New World Disorder: Governability and Development in Gray Area: Confronting New World Disorder* (Max G. Manwaring, ed., 1993).

- (4) Peters, while not actually defining a failed state as such, notes that globalization demands conformity to the practices of global leaders. In addition to the traditional indicators of failure, he notes that new predictive tools have emerged which are based in culture. These indicators are the restrictions on free flow of information, the subjugation of women, the inability to accept responsibility for individual or collective failure, the extended family or clan as the basic unit of social organization, the domination by a restrictive religion, the low valuation of education and the low prestige assigned to work.⁵⁷
- (5) Rotberg notes that states succeed or fail according to the effective delivery of crucial political goods, and strong states may be distinguished from weak states and weak states from failed or collapsed states.⁵⁸ Rotberg analysis shows that state failure is a continued process, which includes weak states, failed states and collapsed states. A failed state is one that meets a specific set of conditions and excludes states that meet some of the criteria which can then be classified as weak or failing states. A collapsed state is the most extreme form where there is complete absence of authority.⁵⁹
- (6) The concept of a failed state refers to a state that is seen as incubators for global “bads,” because they lack adequate capacity to resolve issues such as terrorism, trafficking and disease⁶⁰

The main reason behind Fail/Weak state is the inability to execute their legal capacity of sovereignty. The very reason that we are dealing with the neo logism of failed/weak state is because the very basic elements of State have been deeply fractured. The litmus test for a State's failure is its capacity of

57 Ralph Peter Seven Signs of Non-Competitive States Parametres, Us Army War College Quarterly (1998).

58 Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators*, in *State Failure And State Weakness in A Time of Terror*, (Robert I. Rotberg, ed., 2003).

59 Id.

60 L. S. Wyler, 'Weak and Failing States: Evolving Security Threats and Us Policy,' Crs Report for Congress RL34235, Washington, DC: Congressional Research Service, Library of Congress.

Sovereignty and its consequential loss. It is for this reason that sovereignty is now being interpreted as a relative concept. In a way, state failure is an inside phenomenon that is not subject to outside control.⁶¹ Robert Jackson has used the notion of quasi states to describe the process of state failure.⁶² He uses the terminology of negative and positive sovereignty. According to him, quasi states are those ex colonial states that had been internationally franchised and have the same external rights and responsibilities as all other sovereign states. This judicial statehood is derived from right of self determination. This aspect is called negative sovereignty. Positive Sovereignty means exercise of power over effective dominion, including territory and people. It is in the positive aspect of sovereignty that states exercise limited empirical statehood.⁶³ The issue of State failure has been related to the relative nature of sovereignty. The problem is best tackled if sovereignty is viewed not as a right, but as a capacity. The remedy for a state failure is located in the notion of state building.

If we were to forge a relation between international community and Fail/Weak State, it would be that of Post War Construction and Peace Building. When a conflict has ended in a Fail/Weak States, post conflict building is important. It is at this point that we must distinguish between Peace Building, Peace Making and Peace Keeping. Peace Building is an aspect of Conflict Resolution and Peace Research. Its main function is to overcome the structural and cultural violence.⁶⁴ Peacemaking, on the other hand, is an institutionalized settlement between parties which necessarily does not guarantee peace in perpetuity, as it may be a mere thaw.

61 Georg Sorensen, *Sovereignty, Security, and State Failure* (University of Aarhus, Denmark, 2001 [cited 3 March 2003]) available from http://www.ippu.edu/failed_states/2001/paperSorensen.pdf. last accessed on 3 July 2016.

R. H. Jackson, *'Quasi States: Sovereignty, International Relations and The Third World'* (Cambridge, Cambridge University Press, 1990).

62 Robert H. Jackson, *Quasi States: Sovereignty, International Relations, and the Third World* (Cambridge: Press Syndicate of the University of Cambridge, 1990).

63 Ramsbotham et al supra note 1, at page 26.

64 Ramsbotham et al supra note 1, at 237.

Peacekeeping is mere conflict containment (Measures adopted by Security Council under Chapter VI of The Charter). Peace Building is a novel area, as Peace Making and Peace keeping has been a pertinent part of Second Generation of Peacekeeping. Peace Building is synonymous with 'Post War Reconstruction' – a term specifically used by Oliver Ramsbotham in the fourth edition of his book on 'Conflict Resolution,'⁶⁵ (Ramsbotham, 239). It is said that all the major interventions of the 20th century followed the IRW formula (Intervention – Reconstruction - Withdrawal). The Peace operations from 1989-2019 can be distinguished under the following heads:

- (a) Interpositions and Monitoring Operations.
- (b) Decolonization Operations.
- (c) Democracy Restoration Operations.
- (d) Peace Support Operations.
- (e) Humanitarian Intervention Operations.
- (f) Regime Change Operations.⁶⁶

The IRW formula follows the trajectory of Intervention, Stability and Normalization. Intervention includes control of armed factions; supervision of disarmament, demobilization and rehabilitation; reconstitution of courts; oversee new constitution, election and restructuring of election; provide humanitarian relief; protection of vulnerable groups and return of refugees.⁶⁷ Stability includes adequate indigenous capacity to maintain basic order; legitimacy of the government; a stable relation between centre and federal units; better future employment opportunity; prevalence of peace and justice; protection of minority rights and an independent media.⁶⁸ Normalcy

⁶⁵ Id at 239.

⁶⁶ Id at 241-244.

⁶⁷ Ramsbotham et al supra note 1, at 251.

⁶⁸ Id at 255.

means demilitarized politics; healing of psychological wounds of the victim; development of a civil society; education and gender equality.⁶⁹ One aspect that all Conflict Resolution shall not lose sight of is the notion of 'Local Ownership.' This aspect will be considered in the next section.

Section III

State building has been referred to interventionist strategies to restore and rebuild the institutions and apparatus of the state. It is something that external authorities can engage in.⁷⁰ According to David Chandler, state building is a consequence of the humanitarian intervention of the 1990s and, at a same time, a theoretical approach to state sovereignty. State building has mellowed the overtly militaristic stance of humanitarian intervention, and now it is no longer viewed as an external coercion, but as an internal matter of administrative assistance for good governance or institutional capacity building. This is true if we reflect upon the idea of Responsibility to rebuild tool from the theoretical framework of Kantian peace model. We can visualize the stages of development of State building. In terms of Political philosophy, Kantian Peace model initiated the concept by mentioning the 'Definitive Articles.' The post Second World War phase featured rehabilitation packages, such as the Marshall plan. The last decade of the 20th century saw an overtly military intervention strategy which hampered the idea of state building. The core idea of State building has always been 'local ownership.' The previous approaches failed to recognize its importance, but the situation has changed with the introduction of Responsibility to Protect. In absence of the appreciation of the idea of local ownership, it seemed that the approach of the international community was suffering from Western ethnocentrism, where the entire world was being seen from the American / European point of view. Responsibility to Protect understood the overt military and overbearing American approach and adopted the strategy of Local Ownership for an honourable exit.

69 Id at 260.

70 Chandler *supra* note 43, at 26.

The decade of 1990s was seen as the ‘golden period’ of humanitarian intervention. It looked as if the states were losing their legal capacity. Many viewed this as a positive development.⁷¹ Post modernists drew on the work of Foucault to argue that Clausewitz’s dictum should be inverted to reveal the illegitimacy of the liberal democratic state and understand ‘politics as the continuation of war by other means.’⁷² Some were of the view that the state oriented perspective of the international community encourages post cold war conflicts like Bosnian conflicts.⁷³ The concept of ‘state building’ gained momentum in the 1990s with the advent of good governance agenda.⁷⁴ Stephen Mallaby has argued that State Building is a subset of Development.⁷⁵ Good governance stays within the agenda of development,⁷⁶ and the tools of development include tax reforms, civil service reform, infrastructure development, democratisation, conflict management, etc.⁷⁷ The notion of state building in the decade of 1990s was seen with an abundant skepticism. According to one observation, the notion of state building was less self consciously altruistic and was more focused on fulfilling the ulterior motives of the external actors, rather than focusing on the restructuring of the weak state.⁷⁸ State building has also been labeled as ‘neo imperialism’ and ‘neo patrimonialism.’⁷⁹ The interventionist tendencies suffered from certain basic defects:

71 Id at 30-33.

72 Daniele Archibugi & David Held , *Cosmopolitan Democracy: An Agenda for a New World Order* (1995).

Michel Foucault, *Society must be Defended: Lectures at The College DE France* (D. Macey trans., Penguin Publication) (2003).

73 David Campbell, *National Deconstruction: Violence, Identity and Justice in Bosnia* (1998).

74 Zoe Scott, Governance and Social Development Resource Centre, University of Birmingham, International Development Department, Literature Review on State Building,’ ‘Literature Review on State Building,’ 4, 2007.

75 Id.

76 Id.

77 Id at 5

78 Id.

79 Id.

- (a) They were overtly external and coercive in nature.
- (b) Usually governance issues were ignored.
- (c) Policies were forced on reluctant countries.
- (d) They were aimed primarily at advancing the economic or political interests at donor.⁸⁰

It was also said that international aid provision bypassed state institutions and established parallel bureaucracy.⁸¹ However, with the advent of Responsibility to Protect (hereinafter referred as R2P) the situation has changed drastically. R2P, with its Responsibility to Prevent, React, Rebuild tools added new terms like Preventive Diplomacy and Rebuilding Process. Responsibility to React and prevent tool box are nothing more than the integration of Chapter VI and VII of UN Charter. The novel aspect of R2P, however, lies in Responsibility to Rebuild. Responsibility to rebuild answers the question as to what amounts to an honourable exit. This tool lays out the blue print for the integration of a Fail / Weak State in the liberal democratic legal order by making a State more responsive and responsible. Responsibility to rebuild is arguably the first effort to institutionalize the issue of 'Local Ownership.' The issue of local ownership is what separates the new conflict management strategy of R2P from humanitarian intervention.

To start with, almost the entire literature of state buildings is largely divided on the alternative assumption about the state. Positivists, including Simon Chesterman and Zartman,⁸² consider State as the building block of International Law, while Radicalists like Brock and Ottaway are of the view that, at times, states are not worth preserving.⁸³ The next logical question is as to what type

80 Chandler supra note 43, at page 29.

81 Id, at 28.

82 Simon Chesterman, *You, The People: The United Nations, Transitional Administration and State Building*, (2004).

83 L. Brock, *Nation Building – Prelude or Belated Solution to The Failing of States? Paper presented at the Conference on Failed States IV: Structures, Cases and Policies, 10th - 14th April, Florence, Italy*, http://www.ippu.purdue.edu/failed_states/200/papers/brock.pdf last accessed on 6 May, 2019, M. Ottaway, 'Rebuilding State Institutions in Collapsed States,'

of state shall be built by the international community. It has been argued that 'liberal democratic model' is the best way forward. This model is also supported by 'Democratic Peace' hypothesis. It is at this point where Responsibility to rebuild has to be interpreted in the Kantian Perpetual Peace Model. This leads to another subset of State Building, i.e., Peace Building. Peace Building is not simply about ending violence. The achieved peace must be sustainable in nature. This means that intermediate powers must not make an immediate exit from the affected country. The intermediate powers shall ensure that rule of law, justice system, bureaucracy and democracy are entrenched in the affected State. This is where the entire Responsibility to Rebuild Toolbox comes into play. According to Paris, this new dimension of Peace building and conflict management necessitates exporting a particular vision of the state in the non western environments.⁸⁴ State building is usually seen as a post conflict situation. This 'post conflict situation' naturally demands a viable 'exit strategy.' The literature on State Building is rife with the discussion on exit strategy.⁸⁵ The debate is generally centered on the two competing ideas of 'early exit strategy' and 'lengthy exit strategy.' Some authorities have also questioned the entire basis of exit strategy by calling for a new type of state entity which is somewhere between an independent sovereign state and one that is entirely supported by international system.⁸⁶

Before proceeding with the tools of Responsibility to Rebuild and Kantian Peace Model, it is imperative to analyze some of the existing legal literature on State Building. This is being done for the critical analysis of the present literature, to support the idea that Responsibility to rebuild is arguably the first legal effort to include fail/weak states in the Global legal order.

Vol 33 no. 5, Development and Change (2002) <http://www.gsdr.org/go/displayandtype=Document&id=1378>, last accessed on 7 May, 2019.

84 R. Paris, International Peace Building and The Mission Civilsatrice, 28, Review of International Studies, 637-656, 2002.

85 B. Rubin, Peace Building and State Building for Whose Security?, 27, Third World Quarterly, 175-185, 2006.

86 B. Rubin, Peace Building and State Building for Whose Security? 27, Third World Quarterly, 175-185, 2006.

According to U. Hopp and Kloeke Leasche, development policy of State Building should be about the continuous development of an integrated society based on shared values and goals with recourse to a function statism and infrastructure.⁸⁷ External actors must respect the sovereignty of the emerging nation states. External actors must boost the integration process, and priority must be given to local ownership.

W. Zartman argues that state building should be a process that combines order, legitimacy and authority with policy, production and extraction, rather than a series of discrete steps taken one at a time.⁸⁸ Zartman also asserts that it must be done with a keen sense of indigenous orders, customs and ways of doing things, which are the strongest allies of reconstruction efforts, but can also be their undoing.

R. Rotberg outlines the following characteristics of a failing states:

- (a) Enduring Violence.
- (b) Victimization of citizens by the state.
- (c) Loss of control over peripheral territory.
- (d) Growth of criminal violence.
- (e) Flawed institutions, particularly an emphasis on the powers of the executive rather than the legislature.
- (f) Deteriorating infrastructure.
- (g) Failing provision of basic service.
- (h) Declining GDP.
- (I) Widespread corruption.

87 U. Hopp and A. Kloeke Leasche, 'External Nation Building vs. Endogenous Nation forming: A Development Policy Perspective,' *Nation Building: A Key Concept for Peaceful Conflict Transformation?* 137, 139, (J. Hippler ed., 2004).

88 William Zartman, 'Putting Things Back Together' *From Collapsed States: The Disintegration and Restoration of Legitimate Authority*, 273. (1995).

Further R. Rotberg argues that 'to fail a state is not easy. Crossing from weakness into failure takes will as well as neglect.'⁸⁹

J. Fearon and D. Laitin offer the notion of neo trusteeship. According to them, neo trusteeship is a variant of modern imperialism. It is different from classical imperialism, as state building is multi lateral and involves the nongovernmental sector. The author outlines four strategic challenges for neo trusteeship:

- (a) Recruitment: Who pays and manages the process?
- (b) Coordination
- (c) Accountability
- (d) Exit.

The article emphasizes the difficulties in the concept of an exit strategy as delusional, if that means a plan under which full control of domestic security is to be handed back to local authorities by a certain date in the near future. Exit requires a functioning state capable of providing order.⁹⁰

According to R. Paris, peace building is equivalent to State Building, as it is based on normative assumptions of liberal democracy and market economics. The article outlines four mechanisms through which peace builders promulgate liberal market democracy:

- (a) Shaping the content of peace agreement.
- (b) Provision of expert advice in the implementation of peace agreements.
- (c) Imposing social and political conditions on aid; for example, free and fair elections, respect for human rights, etc.
- (d) Performing a quasi governance function by standing in administratively for the state.⁹¹

89 R. Rotberg, 'The Failure and Collapse of Nation States: Breakdown, Prevention and Repair' in *When States Fail: Causes and Consequences*, 41, (2004).

90 Rotberg *supra* note 84, at 41.

91 R. Paris, *International Peace Building and The Mission Civilization*, 28, *Review of International Studies*, 637-656, 2002.

J. Dobbins uses the word nation building instead of state building. He presents a militaristic interventionist view of nation building. The article develops a rough hierarchy of nation building functions:

- (a) Security.
- (b) Humanitarian and relief efforts.
- (c) Governance.
- (d) Economic Stabilization.
- (e) Democratization
- (f) Development and infrastructure.⁹²

In the opinion of Simon Chesterman, M. Ignatieff and Ramesh Thakur, state building works best when a population rallies behind an enlightened leader. Local ownership is imperative – the paper uses the examples of Mozambique, Costa Rica and Singapore where State building processes were all led by strong local elites. State building therefore must be tailored to the local context, addressing local needs where possible, channeled through local hands. There can be no doubt that state building processes are slow, and domestics publics should be made aware of that fact. The paper closes by emphasizing that “states cannot be made to work from the outside. International assistance may be necessary, but it is never sufficient to establish institutions that are legitimate and sustainable. This is not an excuse for inaction, if only to minimize the humanitarian consequences of a state’s incapacity to care for its vulnerable population. Beyond that, however, international action should be seen first and foremost as facilitating local processes, providing resources and creating the space for local actors to start a conversation that will define and consolidate their polity by mediating their vision of a good life into a responsive, robust and resilient institution.”⁹³

92 James Dobbins, National Security Research Division, *Preparing for Nation Building*, xxiii, 2006.

93 S. Chesterman et al, *Making States Work: From State Failure to State Building*, ii, (2004).

Another important work that supports the cause of state building through Responsibility to Protect is the project developed by International Peace Academy titled, “Making States Work: From State Failure to State Building.”⁹⁴ When states fail, mechanisms for distributing political power remain, albeit in a more disorganized form. This makes it difficult for external actors to engage in a meaningful way. The project’s main argument is that while donors struggle to know whether they should focus on top down or bottom up approaches, “state building works best when a population rallies behind an enlightened leader.”⁹⁵ Local ownership is imperative, and the paper uses the examples of Mozambique, Costa Rica and Singapore where State building processes were all led by strong local elites. State building, therefore, must be tailored to the local context, addressing local needs, and, where possible, channeled through local hands. If local involvement early on is not possible due to conflict amongst local actors and a lack of functioning institutions, ownership should still be the ultimate goal. Regional concerns must also be taken into consideration along with an appreciation that returning Diaspora can generate political tensions as they form new political elite. It is further emphasized that states cannot be made to work from the outside. International assistance may be necessary, but it is never sufficient to establish institutions that are legitimate and sustainable. This is not an excuse for inaction, if only to minimize the humanitarian consequences of states incapacity to care for its vulnerable population. Beyond that, however, international actions should be seen first and foremost as facilitating local processes, providing resources and infrastructure, and, also, the space for local actors to start a conversation that will define and consolidate their polity by mediating their vision of a good life into responsive, robust and resilient institution.⁹⁶

The project of international peace academy has its origins in the work of International Commission on Intervention and State Sovereignty (hereinafter referred as ICISS). In its introductory chapter setting out the policy challenge,

94 Id.

95 Id at I.

96 Chesterman 88, at ii.

R2P argued that:

“... effective and legitimate states remain the best way to ensure that the benefits of internationalization of trade, investment, technology and communication will be equitably shared. Those states which can call upon strong regional alliances, internal peace and strong and independent civil society seem clearly best placed to benefit from globalization. They will also be likely to be those most respectful of human rights, and in security terms, a cohesive and peaceful international system is far more likely to be achieved through the co-operation of effective states, confident of their place in the world, than in an environment of frail, collapsed, fragmenting or generally chaotic state entities.”⁹⁷

The project of International Peace Academy in its exclusive summary makes a very special contribution. It cites that UN Charter is no longer an impediment to international engagement.⁹⁸ This project grew out of the work of ICISS when it acknowledged that state sovereignty is the bedrock principle on which the modern international system is founded. It pointed to the problem of incapacitated and criminalized states, but argued that the best solution was to strengthen and legitimize states, rather than overthrow the system of states. A world of culpable, efficient and legitimate states will help to achieve the goals of order, stability, predictability and human security.

The report considers three positions where a state is considered a failure and comes up with a fourth condition of its own:

- (a) If the state is understood as the vehicle for fulfilling a social contract, then state failure is the incapacity to deliver on basic public goods.
- (b) If the state is defined by its capacity to exercise a monopoly on the legitimate use of force in its territory, state failure occurs when authority structure breaks down.

97 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Para 1 34, December 2004.

98 International Commission on Intervention and State Sovereignty *Supra* note 92.

- (c) If the state is constituted by its legal capacity, state failure is the incapacity to exercise such powers effectively.

Rather than choosing between these Lockean, Weberian and judicial lines of thought, the report argues that such definition oriented questions are misleading and offers a fourth explanation of its own:

- (d) According to the Report, it is not generally the state that fails, it is the government leaders that fail. It is only through a more nuanced understanding of the state as a network of institutions that crises in governance may be properly understood and remedied.⁹⁹

The report further discusses two sets of actors that are important in the rebuilding of a failed state.

- (1) Local Factors.

- (2) External Actions.

- (1) Local Factors: In efforts to strengthen state capacity, it is necessary to strike a balance between the responsibilities of local and international actors that have the resources to assist with state building, economic development, conflict prevention and post conflict reconstruction. The report reserves an important caveat on this point. The report fears the over enthusiasm of the international community, but the international actors must take care not to confiscate or monopolize political responsibility, not to impede, but to facilitate the creation and consolidation of local political competence.¹⁰⁰ The state building works best when a population rallies behind an enlightened leader.

- (2) External Action: While highlighting the importance of international actors in state building, it states that a successful strategy should focus on the needs and aspirations of the people. The foreign powers should be sensitive to the peculiar needs of the ethnic population.¹⁰¹

⁹⁹ Id.

¹⁰⁰ International Commission on Intervention and State Sovereignty, *Supra* note 92, at 2.

¹⁰¹ Id., at 8.

One of the most difficult aspects of the problem is the identification of the alleged 'fail/weak' states. A large inclusion of states in this category on the pretext of poor legal infrastructure, ideological commitments or hostility toward a particular state will be a huge set back to the international legal order. This will amount to interference and not intervention. What is required are a set of parameters which will allow the international legal community to identify the states that are not able to guarantee a basic political legal infrastructure for its citizens. The norms that are to be set should not consider a singular incident of violation of human rights as an indicator that a state should be considered as Fail/Weak entity. The violations should be consistent and continuous over a considerable period of time. In addition to the violations of human rights, the coping mechanism of state shall also be considered. The existing fractured political – legal cultures are responsible for the phenomenon of Fail/Weak states. The legal reformulation of theses states is the key to conflict management. This otherwise formidable task has been simplified by the 'International Crisis Group' which publishes 'Crisis Watch' bulletin on a monthly basis. In this bulletin, the International Crisis Group has identified certain criterion on the basis of which a country is deemed to be fit for the application of R2P doctrine. According to Gareth Evans, International Crisis Group assesses situations which are actual or reasonably foreseeable and have the potential of shocking the collective consciousness of the international legal community.¹⁰² The Crisis Watch list follows the following criteria:

- (a) Whether the Country has a past history of mass atrocities? Past conflict is the most viable indicator of a future conflict. If a particular state has been susceptible to these atrocities, then it displays a lack of civic/political/legal infrastructure that would guarantee civil liberties to the citizens.
- (b) Second criterion mentions the 'persistence' of the situations that gave rise to conflicts in the first place. While assessing the elements of 'persistence,' the constitutional /legal status, political representation, elements of discrimination, economic wealth and opportunity, low economic growth, etc., should also be considered.

¹⁰² Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, 72, (2008).

*The Role of International Law in State Building: Exploring the
Nexus between Conflict Resolution and Law*

- (c) Third factor assesses the country's coping mechanisms. This point focuses on testing the institutional structures of a country that are primarily responsible for conflict resolution. These include an assessment of the political system, legal system, policy and the army infrastructure.
- (d) Fourth factor is related to the receptivity of the concerned country to external legal community. This is assessed either in a positive or a negative way. If the receptivity of the state to the external legal community is positive, then it will cooperate with the international agencies to solve the dispute. A negative response amounts to the presence of a 'closed' society that is completely impervious to the presence and pressure of international legal actor and to the human rights of its people.
- (e) The fifth element is good leadership. A good leadership shows signs of receptivity and paves the way for an open society.¹⁰³

Although, these criteria cannot be applied with utmost precision, they can provide a workable solution to the problem of fail/weak states. The five criteria point to the agenda engineered by the International Crisis Group which has given a much needed theoretical base to the problem of identification of Fail/Weak States.

If focus is laid on the relationship between state building and Fail/Weak states, then one can draw a clear demarcation between the interventionist strategies of the 1980s and 1990s and the strategies adopted by ICISS. The interventionist policies of the 1990s underestimated the importance of states for maintaining international stability.¹⁰⁴ According to David Chandler, the previous interventionist strategies suffered from the following shortcomings:

- (a) They were overtly external and coercive in nature.
- (b) International financial institutions specified detailed policies which the recipient countries had to accept.

¹⁰³ Gareth Evans, *supra* note 99, at 71-73.

¹⁰⁴ Chandler *supra* note 43, at 28.

- (c) Non Western states were more accountable to the international financial institution than to their own people.¹⁰⁵

ICISS does not allow the concept of State to recede into background by focusing solely on the notion of the intervening powers, but argues that rights of state sovereignty can co exist with the interventionist and state building strategies. The strategy of ICISS is different because it has not polarized the two competing rights, i.e., ‘right of intervention’ against ‘right of state sovereignty.’ It speaks about the concept of shared responsibilities and new partnership.¹⁰⁶ It allows an all inclusiveness where the failure of the political and legal infrastructure does not mean complete isolation from world community, but rather another door opens where the very superstructure of the fail/weak states can be metamorphosed into liberal democratic ways by the twin process of legality and legitimacy. With these different approaches, the Responsibility to Rebuild tool plays in the political-legal inclusion of Fail/Weak States.

Responsibility To Rebuild: For the first time, the international legal community has offered a tool in the realm of conflict management. It is the tool of Responsibility to Rebuild. It is the third dimension of R2P. Responsibility to Rebuild has four interrelated dimensions:

- (a) Achieving security.
- (b) Good governance.
- (c) Justice and Reconciliation.
- (d) Economic and Social Development.¹⁰⁷

The Responsibility to Rebuild Toolbox is as follows:

- (1) Political /Diplomatic Measures
 - (a) Rebuilding Governance Institutions.

¹⁰⁵ Id at 30.

¹⁰⁶ Id at 32.

¹⁰⁷ Evans *supra* note 99, at 151-173.

*The Role of International Law in State Building: Exploring the
Nexus between Conflict Resolution and Law*

- (b) Maximizing Local Ownership.
- (2) Economic / Social Measures
 - (a) Support Economic Development.
 - (b) Social Program for Sustainable Peace.
- (3) Constitutional / Legal Measures
 - (a) Rebuilding Criminal Justice.
 - (b) Managing Transitional Justice.
 - (c) Supporting traditional Justice.
 - (d) Managing Refugee Returns.
- (4) Security Sector Measures.
 - (a) Peacekeeping in Support of Nation Building.
 - (b) Disarmament, Demobilization and Re Integration.
 - (c) Security Sector Reform.¹⁰⁸

There are three more issues attached to the notion of Fail/Weak States:

- (a) Achieving Security
- (b) Achieving Good Governance.
- (c) Achieving Justice and Reconciliation.
 - (a) Achieving Security: Almost all the post Cold War peace operations are centered on the notion of “nation building.” Following functions are to be performed:
 - (i) Restoration of Good Governance.
 - (ii) Rule of Law.
 - (iii) Conditions for Economic Growth and Development.
 - (iv) Mine Clearance.
 - (v) Pursuit and Apprehension of Indicted War Criminals.

¹⁰⁸ Evans *supra* note 99, at 150.

- (vi) Disarmament, Demobilization and Re Integration.¹⁰⁹
- (b) Achieving Good Governance: According to Gareth Evans, there are two distinct dimensions of achieving good governance in the post conflict peace building. Firstly, immediate restoration of government services. Secondly, creation, recreation of a system of governance with working executive, legislative and judicial institutions that can sustain peace in the longer term.¹¹⁰

Responsibility to Rebuild and International Law: The vision of Responsibility To Rebuild is now being gradually institutionalized through International Law. The various dimensions of R2P have been applied in practice by Economic Community of West African States (hereinafter referred as ECOWAS) created in 1975. ECOWAS has worked extensively on the issue of peace building strategies, regional integration, and conflict management. According to Kwesi Aning and Samuel Atuobi, ECOWAS has made considerable progress in establishing norms and structures that are relevant for the implementation of R2P.¹¹¹ ECOWAS adopted measures that were aimed at protecting their citizens from war crimes and human rights abuses and, at the same time, rebuilding its society after crises have been averted. The protocols that have been endorsed by ECOWAS reflect the strong role that regional organizations play in a conflict situation. They are capable of not only conflict prevention, but also have a natural capacity to manage conflict as they bear a direct nexus with the conflict at hand. The growing strength of the regional organization in conflict management is reminiscent of the legal philosophy of subsidiarity. Following the ideas of ECOWAS, African Union (hereinafter referred as AU) has taken the position that it has the right to intervene in member states under 'grave circumstances.'¹¹² Following ECOWAS documents are relevant for

109 Id at 151-156.

110 Evans *supra* note 99, at 151-156.

111 Kwesi Aning and Samuel Atuobi, *The Economic Community of West African States and The Responsibility pages*, in *The Routledge Handbook of the Responsibility to Protect* 216-231 (W. Andy Knight, Frazer Egerton eds., 2014).

112 Constitutive Act of African Union art 4(h), Nov. 7, 2000, 2158 U.N.T.S. 3.

forging a relationship for forging a relationship with R2P and, consequently, Responsibility to Rebuild.

- (1) The Protocol on Non Aggression, 1978.
 - (2) The Protocol on Mutual Assistance in Defense Matters, 1981.
 - (3) The ECOWAS Declaration on Political Principles, 1991.
 - (4) The ECOWAS Revised Treaty, 1993.
 - (5) The Protocol to the Mechanism for Conflict Prevention, Management, Resolution and Peacekeeping and Security, 1999.
 - (6) The Supplementary Protocol on Democracy and Good Governance, 2001.
 - (7) The ECOWAS Conflict Prevention Framework, 2008.
- (1) The Protocol on Non Aggression, 1978: This was concluded three years after the conclusion of ECOWAS treaty of 1975. It regulated the interstate relations among member states by reducing and regulating the possibility of conflict or armed confrontation between them. Article 1 of the Protocol calls upon the member states to refrain from threat or use of force or aggression... against the territorial integrity or political independence of other member states.. Article 2 also enjoined member states to refrain from committing, encouraging or condoning acts of subversion, hostility or aggression against the territorial integrity or political independence of other member states.’

In spite of its focus on interstate conflict, the Protocol’s Pacific approach to conflict resolution had implicit value for conflict prevention, and therefore could be useful for the protection of populations who were likely to suffer should there be war among states.¹¹³

- (2) The Protocol on Mutual Assistance in Defense Matters, 1981: The primary objective of this Protocol was to establish a collective defense regime; Article 2 provided that ‘Member States declare and accept any armed threat

¹¹³ Protocol on Non Aggression art 5, ECOWAS, May, 1981.

or aggression against the entire community.’ Article 4 mentioned offering military support to member states under two circumstances (a) situations of armed conflict arising among member states (b) internal armed conflict within any member state, engineered and supported actively from outside, likely to endanger the security and peace in the entire community.

- (3) The ECOWAS Declaration on Political Principles (1991): This Declaration was important when most of the member states were making a transition from military governance to democracy. It is for the same reason that the Declaration reflected notions of Human Rights, Security and Peace.
- (4) The ECOWAS Revised Treaty (1993): According to Article 3 of ECOWAS Treaty, the objective of the organization is economic in nature. However, Article 4 of the Treaty lays down certain fundamental principles which further the economic causes of the Treaty. These include: maintenance of regional peace, stability and security through the promotion of good neighborliness; peaceful settlement of disputes among member states, active co operation between neighbours and promotion of a peaceful environment as pre requisite for economic development; recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights; and, promotions and consolidation of democratic governance in each member state as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July, 1991. These provisions provide a basis for ECOWAS to initiate conflict prevention activities on the basis of R2P.¹¹⁴ Article 58 of ECOWAS Treaty is also relevant for the conflict prevention and protection of civilians. It states that ECOWAS ‘Member states undertake to cooperate with the community in establishing and strengthening appropriate mechanisms for the timely prevention of intra State and interstate conflicts.’ The principle inscribed in Article 58 has gained importance as it is reiterated in The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution and Peacekeeping Security.

¹¹⁴ Kwesi Aning et al, *supra* note 106, at 219.

- (5) The Protocol to the Mechanism for Conflict Prevention, Management, Resolution and Peacekeeping and Security, 1999: This Protocol was framed in the background of the civil war crises in Liberia and Sierra Leone in the 1990s. The protocol talked about objectives that will allow the state parties to intervene in conflicts to alleviate the suffering of civilians. The objectives of the Protocol are as follows:
- (a) Implement relevant provisions of Article 58 of the Revised Treaty.
 - (b) Prevent, manage and resolve internal and interstate conflicts.
 - (c) Implement the relevant provisions of the Protocol on Non Aggression, Mutual Assistance in Defense.
 - (d) Strengthen cooperation in the area of conflict prevention, early warnings, peacekeeping operations, and the control of cross border crime, international terrorism and proliferation of small arms and anti personnel mines.
 - (e) Maintain and consolidate peace, security and stability within the community.
 - (f) Establish institutions and formulate policies that would allow the organization and co ordination of humanitarian relief missions.
 - (g) Promote class co operation between member states in the areas of preventive diplomacy and peacekeeping.
 - (h) Constitute and deploy a civilian and military force to maintain or restore peace within the sub region whenever need arises. To ensure that the above objectives are attained, the Protocol has established institutions, namely, The Authority of Head of State and Governments, the Executive Secretariat, The Peace and Security Council. All these organs are supported by three organs, namely The Defense and Security Commissions, The Council of Elders and the ECOWAS Ceasefire Monitoring Groups.¹¹⁵
- (6) The Supplementary Protocol on Democracy and Good Governance, 2001: It is based on the following principles:

¹¹⁵ The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security art 3 July 23 1993.

- (a) Separation of Powers.
- (b) Every accession to power must be made through free, fair and transparent elections.
- (c) Zero tolerance for power obtained or maintained by unconstitutional means.
- (d) Popular participation in decision making, strict adherence to democratic principles and de centralization of power at all levels of governance.
- (e) The armed forces must be apolitical and must be under the command of a legally constituted political authority. No serving member of the armed forces may seek to run for elective political office.¹¹⁶
- (f) The ECOWAS Conflict Prevention Framework, 2008.
- (7) The ECOWAS Conflict Prevention Framework, 2008: The purposes of this treaty are:
 - (a) Comprehensive Operational Conflict Prevention and Peace building strategy which enables the ECOWAS system and member states to draw upon human and financial resources at the regional and international levels in their efforts to transform conflict creatively.
 - (b) A guide for enhancing cohesion and synergy between relevant ECOWAS departments on conflict prevention initiatives in order to maximize outcomes and ensure a more active and operational posture on conflict prevention and sustained post conflict reconstruction from the ECOWAS system and its member states.
 - (c) A reference for developing process based on cooperation with regional and international stake holders, including the private sector, civil society, African Union, UN system, as well as development partners, on Conflict prevention and peace building around concrete interventions.¹¹⁷

116 The Supplementary Protocol on Democracy and Good Governance, ECOWAS Commission, 1999 art (a) to (e), December 21, 2001.

117 Kwesi Aning et al, *supra* note 106, at 222.

ECOWAS Conflict Prevention Network states that necessary 'supranational' powers should act in conjunction with member states, the AU and the UN to protect human security in three ways which are directly related to the doctrine of R2P:

- (a) Responsibility to Prevent, which involves actions to address the direct and root cause of intra and interstate conflict that put populations at risk.
- (b) Responsibility to React.
- (c) Responsibility to Rebuild.

To further promote the above mentioned idea, 14 initiatives have been designed:

- (1) Early warning.
- (2) Preventive diplomacy.
- (3) Democracy and political governance.
- (4) Human Rights and Rule of Law.
- (5) Media.
- (6) Natural Resource Governance.
- (7) Cross Border Initiatives.
- (8) Security Governance.
- (9) Practical Disarmament.
- (10) Women, Peace and Security.
- (11) Youth Empowerment
- (12) ECOWAS Standby Force.
- (13) Peace Education.
- (14) Humanitarian Assistance.¹¹⁸

So far, what has been considered and analyzed is relatively an unexplored area of international law. This analysis is not usually considered while discussing

¹¹⁸ Kwesi Aning et al, *supra* note 106, at 222.

the norms of *jus ad bellum* regime. The concept of state building is rarely discussed in the realm of public international, as the traditional way is to see the status of states as an actor of public international law from the prism of positivist philosophy and UN Charter. The concept of Fail/Weak states has been intertwined with the third tool of R2P, i.e., Responsibility to Rebuild. It is argued that Responsibility to Rebuild and State Building are auxiliary agencies which would make them legally responsible and responsive to the international legal community. It is pertinent to mention here that the triad of Fail/Weak States, Responsibility to Rebuild and State Building needs a theoretical base which will clarify the urgent need of reformation of international legal theory. Section IV.

The paper has made an endeavor to create a nexus between international law and Conflict management. This has been done by exploring the concepts of Fail/ Weak States, Responsibility to Rebuild and State Building. This allows a radical interpretation of International Law. It should be seen as a progressive instrument of change, as a means to serve the interests of people, rather than government. This is where the concepts of human rights and international humanitarian law step in. Fail / Weak States have gained ascension only in recent times. Fail / Weak states, State Building are constantly pushing the boundaries of International Law and are making way for the incorporation of Conflict Management in the realm of International law and 'An Agenda For Peace,' 'Brahimi Report' and 'The Prevention of Armed Conflict' indicate this trend. Security Council Resolution 1366 of August 2001 identified a key role for the Security Council in the prevention of armed conflict. A Trust Fund for Preventive Action was established, and training on conflict prevention was initiated. Within the UN system, the UNDP has been involved in post conflict prevention strategy. Various regional organizations are actively engaged in the field of conflict prevention. European Union has developed a comprehensive set of policies and policy instruments which combine human rights programme measures to prevent the spread of small arms, supporting security sector reform. The Organization for Economic Cooperation and Development (OECD) has also produced guidelines for conflict prevention. The G8 countries produced their Rome Initiative on Conflict Prevention in July 2001, concentrating on

small arms and light weapons. ASEAN Regional Forum brings twenty seven states of South East Asia to discuss common security issues. The African Union has a Conflict Prevention and Early Warning System with a Continental Early Warning System. The theoretical underpinnings of conflict management and international law are intriguing. If a nexus is forged between conflict management and international law, then international law is to be seen as an instrument of progressive change, and United Nations organization is to be seen as a Communitarian institution, a repository for genuine cosmopolitan norms, and the nature of intervention is solidarist.

One of the most profound ways to measure the failure of a State is the Fragile State Index. It has been produced by the Fund For Peace. It is an annual rating system among 178 countries that reflects the pressure they face and how it affects their fragility.¹¹⁹ It highlights the normal and overwhelming pressure which a state may face. Overwhelming pressure outweighs a state's capacity to handle it. The index tends to give an early warning to a State that, in future, it may face a conflict. The Index collects reports and information from around the world which details the social, economic and political pressure. The Index is based on Conflict Assessment System Tool developed by Fund for Peace. It collects data from three methods – content analysis, quantitative data and qualitative review.¹²⁰ The 15th edition of FSI comprises data between January 1, 2018, and December 2018. The lower a country's FSI score is, the better off it is. The Index is composed of the following variables:

(A) Cohesion indicators:

- (1) Security Apparatus.
- (2) Factionalized Elites.
- (3) Group Grievance.

(B) Economic indicators:

- (1) Economic Decline.

119 Fragile State Index Report, Annual Report 2019.

120 Id at 32.

- (2) Uneven Development.
- (3) Human Flight and Brain Drain.

(C) Political indicators:

- (1) State Legitimacy.
- (2) Public Services.
- (3) Human Rights and Rule of Law.

(D) Social Cross Cutting Indicators:

- (1) Demographic Pressures.
- (2) Refugee and IDPs.
- (3) External Intervention.¹²¹

The cohesion /security indicators include aspects like state sponsored violence; private armies; police brutality; fair election of leadership; presence of political reconciliation process; presence of separatism; hate speech; stereotyping of religion and ethnicity; religious motivated violence; oppression of groups; vigilante justice, etc.¹²²

The economic indicators include level of government debt; inflation rate; conducive business; climate for foreign direct investment; free education; housing system for poor; presence of ghettos and slums; and exodus of professionals and highly educated people.¹²³

The political indicators consider the openness of government with its citizenry; presence of corruption; peaceful transition of power; free and fair elections; monitoring of elections in a free and fair manner; access to medicines; adequate sanitation; literacy rate; freedom of movement; independent media; access to information; and fair trials, etc.¹²⁴

121 Id at 33.

122 Id at 34, 35.

123 Id at 36, 37.

124 Id at 38, 39.

Social indicator includes high orphan population; refugee issues; resources for IDPs; and forced intervention from outside.¹²⁵

According to the Annual report of 2019 of the Fragile State Index, Yemen is the worst affected country followed by Somalia, South Sudan, Syria and Congo. The most sustainable country is Finland, followed by Norway, Switzerland, Denmark, Australia, Iceland and Canada.¹²⁶ Of the 20 most worsened countries in 2019, nine of these countries were also 20 most worsened countries in 2018. Brazil, United States of America and Venezuela have been among the 20 most worsened countries for the last three surveys. Venezuela and Brazil have been placed as the most worsened countries of 2019. Venezuela was deeply affected by a turbulent 2018 election, while Brazil faces the aggressive right wing policies of Jair Bolsonaro. The marginalized minority including women, homosexuals and indigenous tribes are having a difficult time with the intolerant views of the new government. United Kingdom is the fourth most worsened country, as it has not performed well on group grievance, factionalized elites and State legitimacy. The repressive policy of President Daniel Ortega made Nicaragua the third most worsened country for 2019.¹²⁷ Ethiopia has been marked as the most improved country because of the socially inclusive policies of Prime Minister Abiy Ahmad. Former Soviet states Belarus, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan and Uzbekistan are the top 20 ranked most improved nations.¹²⁸

Thus, the notion of Fail/ Weak States is responsible for creating a space for the institutionalization of Conflict Management in International Law. It can also be said that the idea of subsidiarity is supporting the growth of conflict management in International Law, as it is the Regional Organizations - especially African Union and ECOWAS - who are readily incorporating the tools of conflict management to solve international legal issues. The paper will end by serving a caveat to the international community by asserting that forceful

125 Id at 40, 41.

126 Id at 6, 7.

127 Id at 9, 10.

128 Id at 11.

assertion and export of Western values across the world should be avoided. This will result in ethnocentrism. Any sort of State building or Conflict Management shall be done with the consent of the local, and 'local ownership' shall be the priority of all the parties involved.

NUDGING TOWARDS OVERLAPPING CONSENSUS - ANALYZING LIBERTARIAN PATERNALISM

Abhay Singh

Abstract

Libertarian Paternalism is a merger of a paternalistic approach with freedom of choice. The government makes paternalistic efforts to influence the behavior of general public in order to sway their decisions regarding availing a government policy, and at the very same time, it calls for providing a liberty to opt out. The present paper argues that Libertarian Paternalism doesn't fall within the restraints of libertarianism or paternalism, but rather it seeks to achieve "Overlapping Consensus," an idea formulated by John Rawls. In order to establish the same, the paper, firstly, points out that libertarian paternalism is a "political conception" which is an element required to achieve overlapping consensus. Libertarian Paternalism also appears to be fair; it give the impression of an operational political conception of justice. Further, the option to opt-out provides general public with the freedom to avoid undesirable policies, making it possible to achieve a willful consensus. Thus, The Libertarian Paternalists provides for maximum consensus and minimization of conflicts by employing "willful consensus" and "theoretic minimalism."

Also, the practical implementation of Libertarian Paternalism is made by the Nudge Departments in India, e.g., Niti Ayog policies. Further, the Federal and state government in the United States with the help of Nudge Units have also incorporated several nudge policies in their legislation.

Three major objections to Libertarian Paternalism addressed by Sunstein: 1st objection has been raised by John Rawls in the form of a "publicity principle"; according to him the government shall not make any rules or regulations for its citizens that cannot be publicly defended by it. 2nd objection is that in certain situations, the neutrality of the government becomes the right of the people and, in such a situation, the government shall not even provide a weak paternalistic steer. The 3rd objection comes from Edmund Burke who suggests that a major difficulty and hubris is that the government is to frame its policies on the bases of theory rather than putting faith on practices.

Keywords: Libertarian Paternalism, Nudge, Overlapping Consensus, Consensus, political, policy.

INTRODUCTION

In the world of complex policies and confusing regulation, it becomes difficult to opt for a policy which will provide the best result; a layman cannot fully understand what tax plan will provide the best return or what insurance policy could provide him the best benefits. To opt for a more adequate plan, people tend to seek the help of professionals and, even then, may not be able to get the full benefits available. In order to provide the best benefits, the government may try to influence the behavior of the people by utilizing the theory of libertarian paternalism which is also known as the 'nudge' theory. Libertarian Paternalism argues that behavioral research is a suitable method to influence the choice that people make and ensure that they pick the best policy available and, thereby, nudge them on the way to lead a better life.¹ Libertarian Paternalism is grouping paternalism with the freedom to choose.² It enables the government to influence the behavior of people, or is a way to nudge the general public towards making such decisions which the government believes are the most suited, and at the very same time, it will provide an option to opt out, i.e., to not avail the benefits of the government nudge. As argued by Richard Thaler and Cass R. Sunstein, the founders of Libertarian Paternalism, people know what is best for them, but even then they often act irrationally and opt for unsuitable policies which cause self-loss, and they end up preventing their growth and also effect the growth of other people who act rationally and opt for adequate policies. Thus, we need to nudge people by enrolling them in policies as default. By this, people could be automatically registered with this kind of registration as the

-
- 1 Till Grüne-Yanoff, 'Old wine in new casks: libertarian paternalism still violates liberal principles' (Social Choice and Welfare, Vol. 38, No. 4, April 2012) <<http://www.jstor.org/stable/41485436>> accessed 10 January 2017.
 - 2 Thomas Ploug and Soren Holm, John Brodersen, 'To nudge or not to nudge: cancer screening programmes and the limits of libertarian paternalism' (Journal of Epidemiology and Community Health (1979), Vol. 66, No. 12, December 2012) <<http://www.jstor.org/stable/43281458>> accessed 10 January 2017.

default rule. For explaining their theory, Richard Thaler and Cass R. Sunstein mentioned the voluntary organ donation system applicable in Austria, in which all the citizens are automatically registered as organ donors by the State, and the government also provides an option to unregister themselves after filing an application. With the help of this policy, Austria has 99.98% of organ donors. On the other hand, Germany with a similar financial and social character has only 12% organ donors.³ Thaler and Sunstein are Libertarian paternalists who emphasized that along with a restriction to choose, an option to opt-out of the policy shall also be there.⁴ A possibility to back out must be provided.

Libertarian Paternalists are against the paternalistic law of banning. They argue that instead of outlawing, it is better to influence the behavior of the public and direct them to act rationally.⁵ The paternalistic ideology applied by the State government in Bihar by passing a legislation banning the sale and consumption of alcohol is an adequate example of failing paternalistic policies. This legislation has not stopped the influence of alcohol in Bihar; rather, it has invited a new problem of illegal sale of liquor. Libertarian Paternalists believe that it's better to nudge people by influencing their behavior to avoid consumption of alcohol. Better laws could be made if there is a shift from paternalism to Libertarian Paternalism.⁶ Although the theory given by Sunstein and Thaler calls for moving away from paternalistic ideology, they do not advocate for moving from paternalism to Libertarianism.⁷ They seek a compromise between both

3 Cass R. Sunstein, Richard H. Thaler, 'Nudge: Improving Decisions About Health, Wealth and Happiness' (Penguin UK, 04 October 2012).

4 Richard H. Thaler, Cass R. Sunstein, 'Libertarian Paternalism Is Not an Oxymoron' (University of Chicago Public Law & Legal Theory Working Paper No. 43, May 2003) <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1184&context=public_law_and_legal_theor> accessed 10 January 2017.

5 Cass Sunstein, Professor of Jurisprudence at the University of Chicago Law School, 'Libertarian Paternalism Is Not an Oxymoron' at Princeton University, 05 October 2006, (UChannel, 29 September 2010). <https://www.youtube.com/watch?v=JNi_hNgGh7Y&t=44s> accessed 10 January 2017

6 Ibid.

7 Gregory Mitchel 'Libertarian Paternalism Is An Oxymoron' (Northwestern University Law Review Vol. 99, No. 3, 2005) <<http://bear.warrington.ufl.edu/brenner/mar3503/ArticlesLinks/libpat-oxy.pdf>> accessed 10 January 2017.

concepts; hence, they advocate for Libertarian Paternalism and, thereby, form an attempt to create John Rawls's "Overlapping Consensus."⁸

LIBERTARIAN PATERNALISM AND OVERLAPPING CONSENSUS

Libertarian paternalism provides a middle way between the two opposing extremes, i.e., a level between a totalitarian notion on the one side, and *laissez-faire* on the other. If we trailed the studies on Libertarian Paternalism and Nudge, it can be concluded that the concept is a means to attain a compromise between the two opposites, i.e., libertarianism and paternalism. By doing so, the Libertarian Paternalists have created an overlapping consensus as a middle ground.

Overlapping Consensus is a political conception which seeks to create a universally accepted legislative policy which enjoys the support of all sections of society. Such acceptance shall not be acquired in terms of *Mutatis mutandis*, which permits the use of force to bring necessary change. The element of fairness must be reflected from such policies in order to create a political concept of justice. The consensus must be reached willfully and with peace.⁹

The Nudge theory of Thaler and Sunstien fall well within the three major essentials of overlapping consensus. Thus, to fulfil the criteria, firstly, the policies having Libertarian Paternalistic approach, when taken up by the political actors at a policy framing platform, must be considered as political conception; secondly, it displays the element of fairness by ensuring that no one is forcefully enrolled in a policy which is not wanted; thereby, making it a political conception of justice¹⁰; and, thirdly, it is not the use of *Mutatis mutandis*¹¹; the

8 Anuj C. Desai, 'Libertarian Paternalism, Externalities, and the "Spirit of Liberty": How Thaler and Sunstein Are Nudging Us toward an "Overlapping Consensus"' (Wiley on behalf of the American Bar Foundation, Winter 2011) <<http://www.jstor.org/stable/23011877>> accessed 10 January 2017.

9 John Rawls, 'The Idea of an Overlapping Consensus' (Oxford Journal of Legal Studies, Volume 7, Issue 1, 1 March 1987, Pages 1–25) <<https://doi.org/10.1093/ojls/7.1.1>> accessed 03 December 2017.

10 Pierre Schlag, 'Nudge, Choice Architecture, And Libertarian Paternalism' (The Michigan Law Review Association, April 2010) <<https://www.jstor.org/stable/40645851>> accessed 14 January 2017.

11 Supra note 9.

*Nudging Towards Overlapping Consensus -
Analyzing Libertarian Paternalism*

conception which approves the application of coercive method in order to reach the desired legislation. The purpose of Libertarian Paternalism is to bring forth such policy which gathers maximum in agreeability with minimum divergence and resistance. The reason for implementing any legislative policy is the welfare of the people, and a libertarian paternalistic policy will automatically enroll the population and will also provide an option to opt out of the implementation for those who desire to escape the policy; such a process ensures effective execution without coercion and without forcing the unwilling population to be incorporated in the policy. Such a system of policy creation will result in a universally recognized notion of overlapping consensus. Through this notion every individual whosoever is a member of society has the liberty to opt out of a policy or to pick out from the available choices, if any, thereby bringing everyone to come to a consensus.¹² Thus, Libertarian Paternalists provides for maximum consensus and avoidance of friction. The notion is an exceptional and a unique way of applying social engineering theory founded by Roscoe Pound.¹³ Being unique, it can revolutionize the prevailing group polarization ideology of politics which is a negative aspect of deliberative democracy. The notion, when applied, provides a broader outlook to the legislators with consensual support.¹⁴

By considering the notion of Nudging as a constitutional theory, the rousing features for libertarian paternalism can be observed. The primary focus of nudging is not merely to attain a kind of post-partisanship; in actuality, it is to ensure such laws and rules which apprise of beliefs of diverse sections of civilization. The purpose for attaining overlapping consensus is to encourage

12 *Supra* note 10.

13 James A. Gardner, The Sociological Jurisprudence Of Roscoe Pound (Villanova Law Review Volume 7 Issue 1) <https://www2.warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law_2015-16/roscoe__pound_the_sociological_jurisprudence.pdf> accessed 14 January 2017.

14 Richard H. Pildes, 'Means And Ends In Politics And Law: An Essay In Honor Of Cass Sunstein' (Tulsa Law Review Volume 43 Issue 4 The Scholarship of Cass Sunstein, 17 September 2008) <<http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2634&context=tlr>> accessed 14 January 2017.

thirst for maintaining peace, unity and fraternity. It also shows admiration, as well as point outs and rectifies the human limitations of the legislative drafters. As peaceful implementation procedure via maximum acceptance and, also, universal recognition is the necessary element of the overlapping consensus, the same is ensured by the nudge principle. Cass Sunstein, while giving an example of implementation of nudge, contends that every individual person is aware that he should save, and managing their income and opting in adequate tax and savings plan will enable them to do so; nonetheless a layman will not be in a position to identify appropriate regulations and policies which they should opt for; thus, in a welfare state, it becomes the responsibility of the government to frame and enroll them in the best available policy, so that their savings can be maximized. Then, again, only framing policies will not ensure maximum savings; people must be brought in to a position to avail these policies. Libertarian Paternalists propose that the general public has to be automatically opted-in, and such policies should be made applicable on all, keeping in mind the best option for them. The reason for such automatic enrollment is that certain population sometimes do not avail the policy because of behavioral tendencies, and even though they want to opt in, they keep postponing and later forget. Such kind of enrollment will ensure maximum implementation. This part of the theory will bring a paternalistic approach. Libertarian Paternalists further propose that people should be given an option to reject the policy or to continue with the old policy, specifically for those who do not want to be included in the implementation, and such opt out shall be subject to filling of a form or paying a minimal fee in order to discourage opt out. Sunstein further argues that humans have a tendency of not acting up, even if they have a slight discomfort from the policy. Thus, this lazy approach that people usually take will also result in maximum implementation.¹⁵

As put by Judge Learned Hand (1960), it is the will of the people to seek the upliftment of their “spirit of liberty.” He argues that people may not be too certain regarding their being right in availing a policy and certain uncertainty

15 *Supra* note 4.

can be there, and the people could believe that political policies provide mere false hopes leading to hesitation in getting enrolled in government welfare policy. Libertarian paternalism focuses towards nudging for an improved world as viewed by the government and, simultaneously, preserve the world's humanity by recognizing that people can be irrational or wrong.¹⁶ Libertarian Paternalists in their research show how even a minor modification in the appearance of choices can have the capability to provide a better outcome for a policy and can form an overlapping consensus in the legislative system.¹⁷

PRACTICAL IMPLEMENTATION OF THE NUDGE THEORY

India

The National Institution for Transforming India, also known as NITI Aayog, is a think tank established by the government of India to frame development policies. The institution has initiated planning and implementation of effective policies with Libertarian Paternalistic approach. For instance, the government built several Public Toilets. However, the problem of public urinal was not resolved, as the toilets were not being used. Further, despite existence of Garbage bins at public places, litter was thrown here and there. In order to counter the said problem, government took assistance of policies like Swachh Bharat Yojana, which resulted in decline in such unhygienic activities. To solve such issues, it has to be looked into to find what encourages people to use public toilets and what prevents them from doing so? Lack of knowledge, disregard towards environment and laziness are the three major factors, and instead of imposing a penalty, the better way is to educate the population and create a social pressure through publicizing and creating of better policies. Thus, to solve such a problem, how can the collective consensus be reached through affecting the individual decisionmaking should be looked into? It was this question which became the reason behind Swachh Bharat Abhiyan. In order to bring in more effective nudge policies, NITI Aayog formulated an association

16 Ibid.

17 Supra note 14.

with Bill & Melinda Gates Foundation. The aim of this association is the creation of “nudge unit” which could recommend policies through which behavioral modification in the general public could be achieved and, thereby, the best possible development could be attained. Policies, like Jan Dhan Yojana, Skill India, Digital India, etc., prove that through behavioral change, better development could be achieved. To solve such critical issues, where implementing penal laws are ineffective, “Nudge Units” come into the picture.

Another example of Nudge policy can be seen in Delhi Metro, where yellow lines have been painted on the platforms through which a nudge formulates and discourages the general public to cross the area marked by the line. The line provides an indication of possible injury. Because of the present system, even though countless passengers travel through Delhi metro regularly, the number of accidents are considerably less.¹⁸

Furthermore, the distribution of mid-day meal in government schools for students serves as an effective nudge to bring in more students belonging to the economically weaker section of society who earlier considered education as a waste of time. Also, the distribution of uniforms and school resources encourages students to ensure maximum spread of education.¹⁹ Art 21A of the constitution of India provides for Free and Compulsory Education to all below the age of 14 years. The present law automatically enrolls all the children below the said age for mandatory education and, thereby, ensures maximum education spread. The said policy, however, is more paternalistic in nature, as it does not provide opt out option.

USA

The United States has implemented Libertarian Paternalism and has, thereby, achieved an overlapping consensus. The *Proposition 64* or the *Adult Use of*

18 ‘Nudging the NITI Aayog - the Behavioural Economics way’ (The Shillong Times, 28 September, 2016) <<http://www.theshillongtimes.com/2016/09/28/nudging-the-niti-aayog-the-behavioural-economics-way/>> 07 March 2017.

19 Welcome to Annamrita<<http://annamrita.org/>> 07 March 2017.

Marijuana Act 2016 legalized recreational marijuana for population above 21 years of age.²⁰ Ban on consumption of cannabis has always been a sensitive issue in the US. And, the paternalistic approach of banning marijuana caused more problems than it solved. It led to smuggling, drug trafficking, and rise in the black market crime and, as a result, has been widely condemned by a number of political thinkers. They demand for a more liberal approach.²¹ Keeping in view the present demand, State of California in 2016 took a Libertarian Paternalistic approach and passed a legislation allowing people above 21 years of age to purchase and consume marijuana for medicinal, non-medical and recreational purposes. The legislation allowed people to establish up to 6 marijuana plants; however, for the same, license has to be applied for. Through this legislation, the government maintained a paternalistic approach of ban on marijuana, and at the same time, it provided liberty to the people for consumption of marijuana. The government applied a nudge towards less consumption of marijuana, by creating the hurdle of applying for a license. The present ensured maximum implementation of legislation and a maximum acceptance of the law, thereby showing an overlapping consensus.²²

NUDGE POLICY IN AUSTRIA V. LIBERTARIAN POLICY IN GERMANY

An online experiment was conducted by Eric Johnson and Dan in year 2003 in which they asked the general public regarding their willingness to become organ donors. They divided their research sample into two clusters. One cluster was told that in order to become an organ donor, they must opt in the policy and change their default status to the status of an organ donor. The others cluster was told that they will be automatically enrolled as organ donor, and in order to opt out and come back to the default status they must fill and application.

20 Will Houston, 'Know your rights post-Prop. 64' (Eureka Times-Standard 11/07/16) <<http://www.times-standard.com/article/NJ/20161107/NEWS/161109826>> accessed 07 March 2017.

21 Patrick Radden Keefe, 'BUZZKILL Washington State discovers that it's not so easy to create a legal marijuana economy' (The New Yorker, 18 November 2013) <<http://www.newyorker.com/magazine/2013/11/18/buzzkill>> accessed 07 March 2017.

22 *Supra* note 20.

The experiment showed that people in the 1st cluster where they were not automatically enrolled participants had only 42% of organ donor. On the other hand, the 2nd cluster, where the people were automatically enrolled as organ donor, had 82% people registered as organ donors.

Similar situation occurred in two very similar countries, i.e., Germany and Austria. Germany has the libertarian policy of letting people choose from default, whether they want to be registered as organ donor; thereby, only 12% of its citizens are registered organ donors. Whereas, at the same time, Austria has a libertarian paternalistic policy of automatically enrolling people as registered organ donors and allowing them to opt out by filling an application, and the country has 99% of population as organ donors.²³

DEBATED LIMITATIONS OF LIBERTARIAN PATERNALISM

Cass Sunstein, who is one of the founders of Libertarian Paternalism, in his address at the Princeton University, pointed out three highly debated and sound limitations of Libertarian Paternalism. These limitations must be kept in mind when the framing and implementation of Libertarian Paternalism policy is being done, so that a successful policy could be made and overlapping consensus could be attained.

The First limitation that was addressed by Sunstein comes from John Rawls who has suggested that a political policy must not violate the “publicity principle.” Publicity Principle states that the government must not act in a way, or must not frame a policy for its citizens, which the government cannot publicly defend. John Rawls argues that it would be discourteous to enforce such a policy which, if revealed, would be unworkable or intolerable.²⁴ The instance of a policy violating Publicity Principle would be if the government nudges people to practice and profess a certain religion. Such a policy will be

23 Anand Damani, Why 99% of Austrians donate their organs (Behavioural Design, 11th Aug 2015) <<http://www.behaviouraldesign.com/2015/08/11/why-99-of-austrians-donate-their-organs/#sthash.ZJsLqNUB.dpbs>>

24 Supra note 5 and Supra note 4.

unworkable and intolerable. Agreeing with John Rawls, Sunstein acknowledged that if the government frames policies violating the Publicity Principle, it will face immense criticism, and such policies may result in causing public unrests. Sunstein points towards the Abu Ghraib Prison tortures incident, where the American government allowed torture and execution of prisoners. He suggests that, if the government had taken into consideration the publicity principle, it could have saved itself from a lot of public uproar.²⁵

The Second limitation to libertarian paternalism is that, in some situations, it is the right of the people that the government frames neutral policies and does not try to influence the decisions of people. In these situations, even a weak paternalistic steer could prove to be immoral and unacceptable. If the government tries to influence people's decision to vote and nudge them to vote for a certain candidate, such steer, no matter how weak, will be unacceptable and undemocratic.²⁶ Viewing the present scenario in USA, where the Republicans enjoy the majority in congress and have a Republican President, if this government tries to influence people by conveying that whoever votes for Democrats will be voting for such candidates who are ignorant towards the welfare and security of United States, even such a weak steer is intolerable when it goes in violation of right to impartiality.²⁷

The Third limitation that was addressed by Sunstein comes from Edmund Burke. The present limitation is not specifically towards libertarian paternalism, but is towards all the theoretical notions. Edmund Burke favored practical implementations and actual practice rather than relying on theories. He cited the French Revolution and rejected the revolutionary outlook. He argued that the temperament taken by the French Revolutionaries was based on theoretical notions and are unreliable when the same are compared to the practices established over time, as such practices are the result of ideas of numerous people and are based upon their tradition and practice. Therefore, in case of

25 Ibid.

26 Ibid.

27 Supra note 5.

the realistic application of a government policy, where the government has automatically nudged people in abiding with the policy, a major setback could arise which could be fatal and theoretically unforeseeable.²⁸ Consequently the objection to social engineering by Edmund Burke states that a theory works like a bomb which could explode when put into practice, and when countless people are supposed to contribute in its implementation, the results could be catastrophic. Edmund Burke's objection also specifies that it is a great problem when so much faith is put in the government, and a new policy having no foreseeable results, which the government considers is a welfare promoting policy is implemented as a default rule, and a tested and relied policy is set-aside. Such hubristic change could produce unwanted negative results.²⁹

CONCLUSION

The theory of Libertarian Paternalism, though, is a well-engineered theory for effective implementation of governmental policies while keeping intact the democratic nature of a country, and the theory also provides certain concrete advantages and ensures effective policy implementation. However, the theory doesn't come without flaws. There are certain major flaws attached with the theory which should not be ignored. The theory has to be implemented with caution. It will be wrong to implement libertarian paternalism in every situation, and sometimes it would be even wrong and immoral to use the theory as a policy framing mechanism.

Further, it is not realistic to maintain a standard limit on the level of paternalism or a standard limit on the level of libertarianism which should be implemented in all the policies. The level required for every policy is different, and the level of steer for every policy needs to be variable. Also, there is no standard rule to evaluate the conditions where the theory of libertarian paternalism will be most fruitful. Nevertheless, the theory of Libertarian Paternalism does lead toward

28 Supra note 5 and Cass R. Sunstein, 'Beyond Judicial Minimalism' (The University Of Chicago, September 2008) <<http://www.law.uchicago.edu/files/files/LE432.pdf>> accessed 14 January 2017.

29 Ibid.

*Nudging Towards Overlapping Consensus -
Analyzing Libertarian Paternalism*

a way to achieve the utopia of overlapping consensus. Through Libertarian Paternalism, the idea of overlapping consensus cannot be achieved in all situations; however, it does help in attaining the state in some and, thereby, brings us one step closer in attaining the overlapping consensus.

Through the adequate and careful use of libertarian paternalism government can bring positive and productive change in the behavior of people and, thereby, lead towards the development of society. The theory can work for their betterment and can also make policies more acceptable and welcomed by the people, which would lead towards the better implementation of policies. The theory, if properly implemented by the government, adequately satisfies the criteria required to achieve an overlapping consensus, as Libertarian Paternalism does provide a mechanism for framing political policies, keeping intact the fairness and conception of political Justice. The opt-in and opt-out mechanism provided by Libertarian Paternalism is a clear example of democratic and consensual policy making; thereby, providing effective and successful implementation of policy with no opposition. Consequently, unlike the concept of *Modus Vivendi*, where the consensus is reached in theory by any means which includes coercion, the theory of Libertarian Paternalism provides effectual universal acceptance of policy with no implementation of force or any coercive means. And, as a result, it provides such a legislative framework which is more than competent to withstand the test of time, because a peaceful acceptance will eliminate friction and cause an unhindered implementation of policies. By studying the factor involved in the practical implementation of the theory of libertarian paternalism, it can be established that the theory provides an effective start in reaching what John Rawls called the idea of overlapping consensus.

UNOFFICIALLY HINDI

Dr. Ashish Kumar Srivastava

Abstract

“India is a multicultural and multilingual country which is known for its unity in diversity. Lingual homogeneity is not possible in India; however, we see two basic classes of languages, i.e., Indo Aryan and Dravidian, which are classified as Hindi and Non-Hindi speaking peoples. Official language has been a crucial issue, as the non-Hindi speaking people were apprehensive that Hindi speaking people will have a cutting edge over them in Constitutional Governance. This scuffle resulted in compromising provisions as laid down in Indian Constitution under Article 343 to 351. Hindi was designated as Official language - not as only National language, as the regional and Hindi languages make national language. Hindi was designated as official language; however, English remained the language for Legislation and Judiciary. The problems of language for legal texts and judicial processes of the courts are very difficult, as law applies uniformly on a society which is multilingual, and this was the reason why English took a dominant position, as, initially, only English text for legal documents was held as being authoritative. But, when Hindi speaking states passed laws only in Hindi, Judiciary held them constitutional, which was a welcome step. The idea of giving Hindi a secondary treatment was that it was not well developed in fifties. But, now it is. This is the right time when Hindi speaking states must pass laws in Hindi, and courts of such states must pass judicial processes in Hindi, and, if not possible, in Hindi translation. The author in this paper shall investigate the various dimensions of official language of legislations and find out problems and make useful suggestions.”

“It is my humble but firm opinion that unless we give Hindi its national status and provincial languages their due place in the life of the people, all talk of Swaraj is useless.”

M.K. Gandhi

INTRODUCTION

India is a plural society, having an amalgam of various cultures, ethnicity, races and religions. Nationality is and was always a very crucial issue in India. The sense of nationality is borne only when people connect to form a nation having a uniform culture and geography. Indian peninsula offered a very rich and resourceful refuge to multiple ethnic and religious groups, and because of this reason, India became a home for thousands of migrants who migrated from every nook and corner of world. This plural society has multiple languages to connect and communicate. During Indian freedom movement, the issue of language arose, to which was not paid as much heed as was required. Issue of nationality could have been made stronger had there been a uniform language. In Constituent Assembly, the issue of National and official language was discussed at length and what could be achieved was a half-hearted compromise. The provisions pertaining to official language are enshrined in Article 343 to 351 and VIIIth Schedule of the Constitution of India.

HISTORICAL BACKDROP

A brainstorming session took place in Constituent Assembly on the issue of National and official language. The issue of official language was very crucial, because India has been for a very long time a colony of British Empire, and English was in a dominant and robust position in so far as working official language was concerned. In 1951, 45 percent population of India spoke Hindustani.¹ Hindi speaking people (Aryans) were claiming that status of official language must be granted to Hindi. However, South Indians (Dravidians) had their own vested interest to oppose this. No other provision, except fundamental rights, saw as much heat and energy as the discussion on official language in the constituent assembly.

There were various ideologies of difference. There was a difference of opinion about 'Hindi' and 'Hindustani.' Some puritans believed that 'Hindi' which is

1 Census of India, 1951.

sanskritised and a language of the elite must be made official language, while others believed 'Hindustani' which was a common bazaar language having words from Urdu, Sanskrit, Punjabi must be made official language. Hindiwallahs² who were hard core Hindi extremists, like Pt. Ravi Shankar Shukla, Seth Govind Das and S. L. Saksena, pleaded strongly for status of official language to be given to 'Hindi' only. However, Sardar Patel, Gandhiji, K.M. Munshi and Ayyangar favoured 'Hindustani.' However, Gandhiji wrote, *"The Hindustani should be neither Sanskritised Hindi, nor Persianised Urdu, but a happy combination of both. It should freely admit words, wherever necessary, from the different regional languages and, also, assimilate words from foreign languages, provided that they can mix well and easily with our national language."*

The South Indians were concerned that if Hindi is made official language, then Hindi speaking people will have a cutting edge over south Indians in the administration and offices. The Hindi itself was not fully developed and standardised by that time. They were also apprehensive about the fate of regional languages like Tamil, Telugu, Kannada, and Malayalam. There were other groups, like minor regional languages, which were pro and anti-Hindi agitation, like Bengali, Gujarati, Punjabi, Sindhi, Kashmiri and Pahari. India is a country of 1600 languages and dialects. South Indian agitation was led by T. T. Krishnamachari and Pattabhi Sitaramayya. This group wanted a grace period for adaptation of the people to Hindi.

Seth Govind Das, who was a puritan, spearheaded the agitation for Hindi and was opposed to use of Hindustani. Hindustani lost to Hindi by a single vote which is known as 'single vote controversy.' Dr. Ambedkar wrote, *"There was no Article which proved more controversial than Article 115, which deals with the (Hindi) question. No Article produced more opposition. No Article, more heat. After a prolonged discussion, when the question was put, the vote was 78 against 78. The tie could not be resolved. After a long time, when the question was put to the meeting once more, the result was 77 against 78 for Hindi. Hindi won its place of*

2 Austin, Granville (2011), *The Indian Constitution; Cornerstone of Nation*, New Delhi: OUP p. 266.

*national language by one vote.*³” However, Govind Das held that the controversy was false, as Kaka Bhagwant Roy, after casting his vote, went from assembly.⁴ However, Seth Govind Das, who was a Hindi extremist, said that, “*We have accepted democracy, and democracy can only function when majority opinion is honoured. If we differ on any issue, that can only be decided by votes. Whatever decision is arrived at by the majority must be accepted by the minority respectfully and without any bitterness.*”⁵

The next set of disputes was Hindi versus English and other regional languages. The ‘Madrassi’ agitators showed their concern against Hindi, as they could lose importance in Union Governance. They were sceptical that, by imposition of Hindi, *Cultural Imperialism* was being thrust upon them. English, which was the language of the conqueror, i.e., was having a dominant position in matters of Governance, was the lone language for correspondence between the Union and the States. Mr. T.T. Krishnamachari, Mrs. Durgabai Deshmukh and Pattabhi Sitaramayya were concerned about Dravidian languages and other regional languages. Mrs. Durgabai⁶ said that, “*...The people of the non-Hindi speaking areas have been made to feel that this fight, or this attitude on behalf of the Hindi-speaking areas, is a fight for effectively preventing the natural influence of other powerful languages of India on the composite culture of nation.*”

However, S. P. Mookerjee differed and pleaded for consensus on the issue. He said that, “*It is claimed by anyone that by passing an Article in Constitution of India, one language is going to be accepted by all by a process of coercion, I say, Sir, that will not be possible to achieve. Unity in diversity is India’s keynote and must be achieved by a process of understanding and consent, and for that, a proper atmosphere has to be created.*”⁷

3 Ambedkar, Dr. B.R.(1955), *Thoughts on Linguistic States* Aligarh: Anand Sahitya Sadan, p.14.

4 Austin, Granville (2011), *The Indian Constitution; Cornerstone of Nation*, New Delhi: OUP p. 300.

5 CAD IX, 32, 1325.

6 CAD IX, 34, 1426.

7 CAD IX, 32, 1328.

Amidst confusion and commotion, N. G. Ayyangar introduced Munshi-Ayyangar⁸ formula which recommended for the use of one of the languages in India as a common language for the whole of India. Yet, this could not be achieved immediately; so, English should be official language for whole of India, because Hindi is not fully developed today. The international numerals must be used, and President could order use of Devanagari numerals. On 14th September, 1949, which is now observed as 'Hindi Day,' the deadlock over the issue was resolved by certain modifications in Munshi-Ayyangar formula. The formula was that English shall be used as official language for 15 years, and after 15 years, Parliament shall decide the use of Hindi or English, and International numerals shall be used. English shall be used in Constitutional Courts, and authoritative text of all bills and Acts shall be in English. However, Parliament may legislate on use of Hindi or regional language in courts and in texts of bills, Acts and ordinances.⁹

Granville Austin writes, "*Yet, the language provisions are not just an unhappy compromise; if they have a more positive side. They show that the large majority of the Assembly believed that use of many Indian languages and of English was compatible with national unity and with the evolution of a national spirit.*"¹⁰" The dust settled after establishment of English as official language of India, which was also, by that time, established as '*lingua franca*.'

CONSTITUTIONAL PROVISIONS

Constitution of India under its Article 343 to 351 and Schedule VIII provides for 'Official Language.' Article 343(1) provides that Hindi in Devanagari script shall be official language of Union and international numerals shall be used. Hindi, along with other regional languages, is a National language.¹¹ Article

8 CAD IX, 32, 1312.

9 CAD IX. 34, 1486-1489.

10 Austin, Granville (2011), *The Indian Constitution; Cornerstone of Nation*, New Delhi: OUP, p. 307.

11 Jain, M.P. (2010), *Indian Constitutional Law*, New Delhi: LexisNexis, p. 841.

343(2) provides that English shall be used for all official purposes for a period of 15 years from the commencement of Constitution of India.

Article 344 provides for appointment of Official Language Commission after 5 years and, thereafter, at the expiry of 10 years. Article 345 authorises the State to adopt, by making a law, any regional language in use in the state, or Hindi, for its official purposes. Article 345, therefore, lays down that for the purposes of communication between two states or between union and state, English should be used, although Hindi or another regional language, if authorised, may be used.¹² Article 346 provides for inter-state communication in English, and if they agree to use Hindi, then Hindi may be used instead of English.

Article 347 provides that if a substantial popular demand is made to the President, other regional languages may be adopted by the state for official purposes. Article 348 makes provision that language of Supreme and High Courts, authoritative text of Bills, Acts, Ordinances and byelaws of Union and states shall be in English. A state legislature may authorise use of any language, other than English, for bills, Acts, Ordinances and byelaws. Governor, with the previous consent of the President, may authorise use of Hindi and other regional languages in courts. However, judgments, decrees or orders shall be in English. Article 349 provides that with previous sanction of President, and after he has taken into consideration the recommendations of Official Language Commission under Article 344 and report of Parliamentary Committee on Official Language, any bill or amendment for use of Hindi or other language in Courts and legislature may be introduced or moved in either House of Parliament.

Article 350 deals with language to be used for grievance redressal. Any aggrieved party shall be entitled to use official language of Union or state before relevant authority or officer for redressal of his grievance. Article 350A¹³ provides that state and local authority within state shall provide adequate facility for use of

¹² *Ibid* at 844.

¹³ Inserted by Constitution Amendment Act, 1956.

mother tongue as medium of instruction at primary education for linguistic minority groups, and President may make suitable order to this effect. Article 350B provides for appointment of special officer and report by him to President for the purposes of Article 350A.

Article 351 is an important Article which casts an obligation on the Union to spread and develop Hindi. It says that, *"It shall be duty of the state to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India, and to secure its enrichment by assimilating without interfering with its genius, the forms, the style and expressions used in Hindustani and in the other languages of India specified in the Eighth schedule and by drawing wherever necessary or desirable for its vocabulary, primarily, on Sanskrit and, secondarily, on other languages."* Eighth Schedule identifies different regional languages which have robust presence in states. The schedule has been amended on several occasions and currently contains 22 languages.¹⁴

LEGISLATION; COURTS AND OFFICIAL LANGUAGE

Law of the land is very important for common man because he has to abide by it. He can fully abide by it only when he understands it fully and deeply. One understands the law when it is in his mother tongue. Any imposed language which is not known to them will put them in difficulty. Natives feel alienated with those laws which are made in another language than the native language. Anglo-Saxon system, which is also followed in India, is based upon English language only. We have an integrated, hierarchical judicial system, wherein the role of judicial precedents and judicial review via appeal plays a very crucial role in justice dispensation process. Therefore, uniform language from lower to upper court becomes *sine quo non*. If we allow lower courts to use Hindi or other languages for legal proceedings and if it is appealed to constitutional courts, then it would be impossible for Judges to appreciate the proceedings at lower

14 Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu and Urdu.

courts because of difference of language. They will need a translator/interpreter. Translation is not an easy thing to do. Translation mars the spirit of text, as it has its own vices. As we know that words are skin of thoughts. Therefore, for ease of administration, Article 348 provides that, until Parliament otherwise provides, proceedings in Supreme and High Courts shall be in English language. It further provides that the Governor of the State, with previous consent of the President, may authorise the use of Hindi or other official language of the state, provided that all processes, i.e., judgments, decrees & orders of the Courts shall be in English language.

Article 348 also provides that authoritative text of all bills, amendments to bills, Acts, Ordinances, Orders, Rules, Regulations, Bye-laws at Union and State level shall be in English. Authoritative text simply means, in case of any doubt, the English version of the law shall prevail. Article 348(3) provides an exception to this rule; it says that State legislature can prescribe use of Hindi or other language for purposes of bills, acts, ordinances, etc. But, a translation of the same in English is to be published in official gazette under the authority of state Governor, and that would be authoritative text in English. It has been mentioned above that translation can create havoc and substantially mar the rights of parties at trial and review stage. Constitutional Courts are appellate courts and final interpreter to test the constitutional validity of statutes and subordinate legislations. In the matter of interpretation and construction, courts need authoritative text which can be utilised. Misery of the situation is that we don't have fine translators, and because of that, we do not have the copy of most important laws in India in Hindi and other regional language. The authoritative text of Constitution in Hindi was made by Brij Kishore Sharma and it was adopted and inserted as Article 394A in 1987 by 58th Amendment Act.

As we know, English was made as an official language for initial 15 years, and in 1965 this period was to be over. In 1955, as per Article 344, The Official Language Commission under Chairmanship of B.G. Kher was appointed,¹⁵

15 Basu, D.D. (2010) *Introduction to The Constitution of India*, New Delhi: Lexis Nexis, p. 408.

and it recommended that English could not remain official language for long, as it would be against national self-respect, and it emphasised for making Hindi official language on appointed day, i.e., 26th January, 1965. Parliamentary Committee as envisaged by Article 344 endorsed the same view.¹⁶ As the date neared, non-Hindi speaking people staged an agitation, and there were vehement and violent protests against Hindi. Pt. Nehru assured these people of continued use of English as an associate official language. In 1963, Official Language Act, 1963, was passed, which was amended in 1967. The main provision of the Act was that English shall be official language of Union in addition to Hindi for an *indefinite period*. The Act also provides for translation of Union laws in Hindi and other regional languages and its official notified version shall be authoritative text. The Act also provided a media for reconsidering the language problem at a future date by appointment of a Parliamentary Committee on official language after 26th January, 1975.¹⁷

JUDICIAL RESPONSE

Supreme Court has delivered various radical judgments on the issue of official language. In *Madhu Limaye v. Ved Murti*,¹⁸ Supreme Court asserted that the language of the Court is English. However, in *Vijay Laxmi Sadho v. Jagdish*,¹⁹ Madhya Pradesh High Court dismissed a petition being filed in Hindi on account of requirement of petition in English by High Court Rules. The Supreme Court held that the High Court could not do so, as the Rules did not constitute a substantive law but was, rather, a procedure.

If in any state there are laws made in English and other languages then in such cases the Courts have held that they can use both versions for interpretation and even use one to remove ambiguities of the other, yet in case of conflict, the

16 Jain, M.P. (2010), *Indian Constitutional Law*, New Delhi: LexisNexis, p. 848.

17 *Ibid*.

18 AIR 1971 SC 2608.

19 AIR 2001 SC 600.

English version must prevail over the other.²⁰ In the State of U. P., the official language is Hindi, and when a difference was found in Hindi and English version of language, Supreme Court held that Hindi version will prevail.²¹

In Bihar, use of Hindi has been authorised as per Article 348. An ordinance was passed and published in Hindi, and no English version was available. It was challenged that it cannot prevail, as there was no authoritative text of ordinance. However, Patna High Court²² held that, *“Under the scheme of Article 348 of the Constitution, all ordinances made in Hindi where the legislature has so authorised will be a valid piece of legislation even without its English translation, and where an English translation has been published as laid down therein, the said translation shall also be considered to be valid piece of legislation, and both can be looked into as authorised versions of the Ordinances.”* Again, in an interesting case in Bihar, English version of Ordinance was published on 22-12-75, while Hindi version was published on 05-12-75. It was contended that ordinance came into force on 22-12-75 when English version was published. This contention was rejected by Patna High Court²³ which held that if no English version is published it shall not make the ordinance ineffective. However, if both versions are available, only English version shall be an authoritative text in case of doubt.

The Supreme Court recently upheld the validity of Uttar Pradesh Government’s action of declaring Urdu as the second official language of the state. Supreme Court²⁴ held that, *“After adopting a particular language as official language, the State does not lose power to adopt any other language in use in the State as second official language. Accordingly, Section 3, which was inserted through amendment*

20 *Sagir Ahmad v. State of U.P.*, AIR 1954 All 257; *Jaswant Sugar Mills v. Presiding Officer I.T.*, AIR 1962 All 240; *Govindram Ramprasad v. Assessing Authority*, AIR 1958 MP 16; *J.K. Mills v. State of U.P.*, AIR 1961 SC 1534; *Ram Rati v. Gram Samaj*, AIR 1974 All 106, *Usha Mehta v. State of Maharashtra*, (2004) 6 SCC 264; *Nityanand Sharma v. State of Bihar*, (1996) 3 SCC 576; *Prabhat Kumar Sharma v. U.P.S.C.*, (2006) 10 SCC 587.

21 *CIT v. Associated Distributors Ltd.* (2008)7 SCC 409.

22 *Mathura Prasad Singh v. State of Bihar*, AIR 1975 Pat 295.

23 *Alok Kumar v. State of Bihar*, AIR 1976 Pat 392.

24 *U.P. Hindi Sahitya Sammelan v. State of U. P.*, AIR 2015 SC 1154.

in 1989 in the *U. P. Official Language Act of 1951, adopting Urdu as second official language of the State was not ultra vires in the Constitution.*” But, recently when State of Karnataka wanted to make ‘Kannada’ as compulsory medium of instruction for students of Class I to IV being ‘mother tongue,’ the Supreme Court,²⁵ after discussing various provisions of Article 19(1)(g), 21A, 29, 30 and 350A, held that, “Article 350A therefore cannot be interpreted to empower the State to compel a linguistic minority to choose its mother tongue only as a medium of instruction in a primary school established by it, in violation of this fundamental right under Article 30(1).” The Supreme Court recently ruled out the proposition of use of Hindi in Supreme Court on the basis of Law Commission report.²⁶

ISSUES UNRESOLVED

After long deliberations, we have seen that Britishers succeeded in making English as Official language of the Union. English was not even the language of Britain. Latin was its official language. Language is a thread which weaves the nation in a strong unit. Indian linguistic diversity was a big hurdle for one common language. According to 2011 census, approximately 41% of people speak Hindi; 1652 languages are spoken in India. There is boundless use of English in every walk of life, and one should not oppose the same as English is *Lingua franca*. However, it is matter of our national self-respect. The conundrum that is created by English language is beyond one’s imagination. English makes the business of big enterprises, DTP software, and computers very convenient, at least in India. Indians have taken no pride in their languages, and one finds it very difficult when one sees that foreigners are communicating in their native languages. All European Countries use/speak their native languages and are very romantic about the same, but we do not even take an initiative in this regard. The evolution of a language stops if it is not used. Many radical changes have

25 *State of Karnataka and others v. Associated Management of (Government Recognised - Unaided - English Medium) Primary and Secondary Schools*, (2014) 9 SCC 485.

26 The Indian Express, 15th January, 2015, Available at <<http://indianexpress.com/article/india/india-others/govt-against-hindi-as-official-language-in-higher-judiciary/>> accessed on 07-03-2018 at 17:11 P.M.

been brought into the official language provision, but a lot is still needed to be done. People take pride in speaking and using English only even if the context requires them to converse in regional languages. Whenever anybody initiates anything with regard to promotion of Hindi and other regional language, it is vehemently opposed without any sound reasons. The Supreme Court²⁷ held that, “*Article 343(3) provides merely for extension of time for use of English language after the period of 15 years. The progressive use of Hindi language is, thereby, not to be impaired. Extending the time for the use of English language does not amount to abandonment of progress in the use of Hindi as the official language of the Union.*” In Murasoli case, by a Presidential order, training in Hindi was made compulsory for the employees of Central Government which was held constitutional. Whenever Hindi is promoted by anyone, it is opposed; as in Tamil Nadu, anti-Hindi agitators were given pension, which was turned down by the Supreme Court²⁸ as it contained the vice of disintegration and fomenting fissiparous tendencies.

H. M. Seervai finds it very difficult to make Hindi or regional languages the official language for courts. He says that, “*If the unity of the judicial administration, and of the Bench and the Bar, is to be preserved, it is to be hoped that such permission will not be given... The work of the Supreme Court and the recruitment of Judges to the Supreme Court must greatly suffer, for Judges of the Supreme Court could not be recruited from High Courts where the language was different from that spoken in the Supreme Court.*”²⁹

We have seen the unprecedented growth of countries working in their native languages, and it makes to feel, as an Indian, as to why one needs to bank upon one's English knowledge only in so far as international communication is concerned. We failed to develop our software and medium of expression on electronic platforms in Hindi and regional languages, which could have

27 *Murasoli Maran v. U.O.I*, AIR 1977 SC 225.

28 *R. R. Dalvaiv. State of Tamil Nadu*, AIR 1976 SC 1559.

29 Seervai, H M (1996) *Constitutional Law of India*, N. M. Tripathi Pvt. Ltd: Bombay, p 2585.

enhanced our language. The Indian must learn the regional languages with the same passion as they have in learning French, English and German, etc. North should learn the language of South and *vice versa*. Equally, one cannot lose sight of the fact that English is *lingua franca* and language of international trade, so one shall have to learn English, also. However, one must be mindful that language cannot be imposed upon anyone. The Law Commission of India, in its 216th report in 2008, had held that introduction of Hindi as a compulsory language in the Supreme Court and the High Courts was not feasible, and added, “*no language should be thrust on any section of the people against their will, since it is likely to become counterproductive.*”³⁰

CONCLUSION

The conundrum of official language is a deep-rooted problem. The problem becomes unique due to the linguistic diversity of India. We cannot be ignorant of the fact, however, that the love for English, being the *lingua franca* and language of international trade, is compelling us to ignore our strength in Hindi and other regional language. Because, if these languages are strengthened, then, with the help of Semiotics and Semantics, better and effective construction and interpretation can be made which shall result in better and effective delivery of justice, social, economic and political to ‘We, the people of India.’

“If the English educated neglect, as they have done and even now continue, as some do, to be ignorant of their mother tongue, linguistic starvation will abide.”

M.K. Gandhi

30 216th Report of Law Commission of India, at 7.

REVISITING ‘CONSENT’ UNDER INDIAN RAPE LAW

Shreya Shree

Under the Indian Penal Code, 1860 (“IPC”), the offence of ‘rape’ criminalizes sexual intercourse by a man with a woman ‘*against her will*’ or ‘*without her consent*’.¹ It recognizes a woman’s capacity, freedom and choice to exercise her will or consent to a sexual activity.² However, in order to account for the unequal, vulnerable or coercive circumstances³ under which a woman may be compelled to consent, Section 375 of the IPC lists situations which may amount to rape even if the woman consents.⁴ Further, Section 376 (2) of the IPC read with Section 114A of the Indian Evidence Act, 1872, creates a rebuttable presumption of non-consent in certain other situations, shifting the burden to prove consent on the accused.⁵

Even though absence of consent is an integral component of ‘rape’, IPC did not define ‘consent’ in positive terms prior to the Criminal Law (Amendment) Act, 2013 (“2013 Act”).⁶ Section 90 provided that consent under *any* provision of

1 PEN. CODE, § 375(1860) (This has been the case since 1837, when the draft Penal Code was submitted by the Law Commission headed by Thomas Macaulay. For a sexual intercourse to amount to rape, proof that the act was committed “*against the will*” of the complainant or “*without her consent*” was essential. Further, in certain circumstances, consensual sexual intercourse would amount to rape. The structure of section 375 has not changed much even after the Criminal Law (Amendment) Act, 2013). See generally Elizabeth Kolsky, *The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57*, 69 (4) J. ASIAN STUD. 1093, 1098-99 (2010); Rukmini Sen, *Law Commission Reports on Rape*, 45 (44-45) ECON.&POL.WKLY., Oct. 30, 2010, at 81.

2 PSA PILLAI’S CRIMINAL LAW, 716 (K I Vibhute ed., 12th ed. 2014).

3 See generally Catherine MacKinnon, *Rape Redefined*, 10(2) HARV. L.& POL’Y REV. 431, 443-449 (2016).

4 PEN. CODE, § 375 (Thirdly to Sixthly)(1860).

5 PEN. CODE, § 376 (2)(1860) read with Indian Evidence Act, § 114A (1872).

6 RATANLAL & DHIRAJLAL, LAW OF CRIMES, Vol. 2 (C. K. Thakker ed., 2009), 2060. See also MRINAL SATISH, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*, 37 (2016).

the IPC would stand vitiated if given under a fear of injury or misconception of fact *and* the accused had knowledge or reason to believe that the consent was so given.⁷ However, since the aforesaid circumstances of ‘fear’ and ‘misconception of fact’ were already covered under section 375 of IPC⁸ (albeit in narrower terms), section 90 was of little assistance in interpreting consent.⁹

In the absence of a positive definition under IPC, the Courts relied on Punjab and Haryana High Court’s exposition of consent in *Rao Harnarain Singh v. State*.¹⁰ Thus, consent presupposed existence of “*physical power, mental power and free and serious use of them*”¹¹ and required proof of:

“voluntary participation [...] after exercise of intelligence, based on knowledge of the significance and moral quality of the act, [and] having freely exercised a choice between resistance and assent... submission of her body under influence of fear or terror is no consent.”¹²

This formulation was progressive, as it relaxed the requirement of explicit non-consent or resistance (modifying ‘*no means no*’ standard) under conditions of fear or duress.¹³

7 PEN. CODE, § 90 (1860) 1860. *See* RATANLAL AND DHIRAJLAL, *supra* note 6, at 2060. *See also* Pradeep Kumar Verma v. State of Bihar, AIR 2007 SC 3059 (holding that both these requirements ought to be “*cumulatively satisfied*”).

8 PEN. CODE, Clauses third and fourth to § 375 (1860).

9 SATISH, *supra* note 6, at 37. *See also* LAW COMMISSION OF INDIA, 42ND REPORT ON THE INDIAN PENAL CODE, (June 1971) (Discussing the applicability of the general exceptions in section 90 to section 375, the Law Commission of India in its 42nd Report mentioned that it was possible to argue that third and fourth clauses of section 375 being special provisions excluded the application of general provisions under section 90, which were then couched in much broader terms. However, it chose not to clarify this point by an amendment, as there were no difficulties felt in practice.)

10 *Rao Harnarain Singh v. State*, AIR 1958 Punj 123. *See also* *State of Himachal Pradesh v. Mango Ram*, (2000) 7 SCC 224.

11 Stroud’s Judicial Dictionary and Jowitt’s Dictionary on English Law, *in* Pradeep Kumar Verma v. State of Bihar, AIR 2007 SC 3059; *Uday v. State of Karnataka* AIR 2003 SC 1639.

12 *Rao Harnarain Singh v. State*, AIR 1958 Punj 123. *See also* *State of Himachal Pradesh v. Mango Ram*, (2000) 7 SCC 224.

13 Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L.& PHIL. 35 (1992) [hereinafter Schulhofer, *Sexual Autonomy*].

Detailed discussions on the substantive law relating to 'consent' appeared in the 84th Report of Law Commission of India, following the infamous decision in the *Mathura Rape*¹⁴ case, where the Supreme Court equated passive submission with consent. However, the Criminal Law (Amendment) Act, 1983, did not incorporate the Commission's recommendation on pre-fixing "*free and voluntary*" to consent under second clause of section 375 of IPC. Further, it restricted the rebuttable presumption of non-consent to cases of aggravated rape¹⁵ instead of extending it to all cases of rape or attempt to rape as recommended by the Commission.¹⁶ Thus, until 2013, the consent was neither defined nor its nuances recognized in IPC.¹⁷

In this backdrop, the definition of 'consent' recommended by Verma Committee¹⁸ and introduced as explanation (2) to section 375 of IPC by 2013 Act,¹⁹ has been a belated but progressive step forward.

In the first part of this essay, the author assesses the standard of consent introduced by the 2013 Act and its application by the Courts. At the time of writing this essay in Nov. 2017, the author came across only two instances where a High Court has interpreted the new definition of 'consent'.²⁰ Of these

14 Tukaram v. State of Maharashtra, AIR 1979 SC 185.

15 Indian Evidence Act, § 114A (1872).

16 LAW COMMISSION OF INDIA, 84TH REPORT ON RAPE AND ALLIED OFFENCES SOME QUESTIONS OF SUBSTANTIVE LAW, PROCEDURE AND EVIDENCE, ¶7.11 (1980) (The Commission recommended insertion of following as Section 111A to the Indian Evidence Act, 1872: "*In a prosecution for rape or attempt to commit rape, where sexual intercourse is proved and the question is whether it was without the consent of the woman, and the woman with whom rape is alleged to have been committed or attempted states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.*")

17 Sen, *supra* note 1.

18 J.S. VERMA J., LEILA SETH J., GOPAL SUBRAMANIAM, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (Jan. 23, 2013). The Committee comprising of J.S. Verma J., Leila Seth J. and Gopal Subramaniam is, hereinafter, referred to as *Verma Committee*.

19 Hereinafter, referred to as "*consent definition*."

20 This essay examines cases up to November 2017. A general search for the phrase "*unequivocal voluntary agreement*" and section 375 of IPC was conducted on Manupatra's Indian Law Legal Database for cases from the Supreme Court and High Courts where

two, *Mahmood Farooqui v. State (NCT of Delhi)*²¹ is significant due to its detailed and controversial engagement with the concept of consent.²² A special leave petition against the High Court's decision was dismissed by the Supreme Court.²³ Examining the decision in *Farooqui*, the author argues that the reforms introducing the consent definition couched in affirmative terms, without shifting the evidentiary burden of proof, were inadequate. In the second part of the essay, the author attempts to relook at the affirmative consent standard in the light of MacKinnon's recent statutory proposal for rape definition not based in consent.

I. STANDARD OF CONSENT POST 2013 ACT

Verma Committee recognized that every woman has the constitutionally guaranteed right to life, bodily integrity and sexual autonomy.²⁴ In recognition of her right to express and experience complete sexual autonomy in relationships, the 2013 Act introduced consent definition as:

Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication communicates willingness to participate in the

explanation (2) of section 375 had been cited. The search returned 20 such judgments between 2013 to 22 November, 2017, including Supreme Court's decision in *Independent Thought v. Union of India* (W.P. (Civil) 382 of 2013) regarding age of consent in context of marital rape exemption. Before the High Courts, interpretation of 'consent' of the complainant was an issue in 6 breach of promise to marry cases; however, since the Courts did not interpret the new definition, these cases have not been analysed here. Other cases either included cases of statutory rape where consent is irrelevant or the alleged act was committed prior to 2013 Act. The two instances where the High Courts interpreted the new definition of consent are *Sachin Tukaram Muneshwar v. State of Maharashtra*; and *Mahmood Farooqui v. State (NCT of Delhi)*.

- 21 *Mahmood Farooqui v. State (NCT of Delhi)*, MANU/DE/2901/2017 (High Court of Delhi). The decision is hereinafter referred to as *Farooqui*.
- 22 Seema Rao, *A Troubling Precedent for Rape Cases*, LIVE MINT (Oct. 2, 2017, 3:47 AM), <http://www.livemint.com/Opinion/aUWJYk8psY6PwbzWdrsKsI/A-troubling-precedent-for-rape-cases.html> (last visited May 31, 2019).
- 23 *Ms. X v. Mahmood Farooqui & Anr.*, SLP (Cri) No. 281 / 2018 (Jan. 19, 2018) (Supreme Court of India).
- 24 VERMA ET AL, *supra* note 18, at 430.

specific act. Provided that, a person who does not offer actual physical resistance to the act of penetration is not by reason only of that fact, to be regarded as consenting to the sexual activity.²⁵

Thus, consent is an unequivocal and voluntary agreement, which comes into existence when a woman communicates her willingness to participate in a specific sexual act, either verbally or non-verbally. The requirement of '*communication of willingness*' indicates that consent must be *given* in '*affirmative*'. Thus, as a first step, the man should obtain a woman's consent for participating in the particular sexual act.²⁶ The consent definition is particularized and contains elements of the affirmative consent standard.²⁷

While recommending the consent definition, Verma Committee referred to the consent standards recommended by United Nations²⁸ and as existing in Canada²⁹ and England & Wales, which are modeled on the affirmative consent standard, and noted that shifting the burden of proof on the accused to prove consent in rape cases was necessary to avoid secondary victimization of the complainant during the trial. It also took note of the recommendations in the 84th Law Commission Report in this regard.³⁰ However, in its final recommendations, it chose to retain the *status quo* placing the burden on the complainant to prove beyond reasonable doubt that she did not consent. Once

25 PEN. CODE, Explanation(2) to § 375 (1860).

26 Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of a Affirmative Consent Standard in Rape Law*, 58 V AND. L. REV. 1321, 1335, 1345 (2005).

27 *Id.* Discussed in Part IV of this essay.

28 VERMA ET AL, *supra* note 18, at 73. See Dep't Econ & Soc. Aff., *Handbook for Legislation on Violence Against Women*, U.N. Docs ST/ESA/329, at 26-27(2010), <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (last visited May 31, 2019) (An "*unequivocal and voluntary agreement*" is required to constitute consent. Additionally, the burden of proof is on the accused to demonstrate the steps taken to ascertain the complainant's consent.)

29 VERMA ET AL, *supra* note 18, at 74 (noting the requirement under the Canadian Law to demonstrate that he took reasonable steps to ascertain the complainant's consent to the specific sexual activity).

30 VERMA ET AL, *supra* note 18, at 307-308.

the complainant discharges the initial burden, the onus is on the accused to prove that some act on part of the complainant amounted to consent under the consent definition.³¹

Thus, even though the 2013 Act has clearly set out that ‘consent’ cannot be presumed and must be obtained in affirmative, in effect the standard still ends up creating a “*rebuttable presumption of consent*.”³² Similar to the ‘no means no’ standard,³³ the burden is not on the accused to demonstrate (or seek) consent, but on the complainant to clearly and explicitly speak up, resist and convey her refusal³⁴ and then adduce proof to that effect when she is put on trial.

This burden may be easier to discharge in cases of simple rape by a stranger, but may be extremely difficult in case of acquaintance rape, with a history of physical intimacy between the parties.³⁵ As was seen in *Farooqui*, the progressive ‘affirmative yes’ requirement then transforms into a requirement of an ‘*emphatic no*,’ which must be powerful enough to avoid the ‘no means yes’ trap.³⁶ This is especially problematic given that in 95.5% of the rape or attempt to rape cases in India, the offender is an acquaintance of the complainant.³⁷

31 Rupali Samuel, *The Acquittal in the Mahmood Farooqui Case: A Mirror to Us All*, BAR & BENCH (Sept. 30, 2017), <https://barandbench.com/acquittal-mahmood-farooqui-case/> (last visited May31, 2019).

32 David Bryden, *Redefining Rape*, 3 (2) BUFF. CRIM. L. REV. 317, 400 (2000).

33 Schulhofer, *Sexual Autonomy*, *supra* note 13. One of the criticisms of a ‘no means no’ standard is that by requiring an expression of refusal, it fails to account for passive submission or coercive pressures. However, explanation of consent takes care of this by laying down that absence of physical resistance by itself would not be treated as consent.

34 MacKinnon, *supra* note 3, at 446. See Stephen Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQU. 335, 340 (2017) [hereinafter, Schulhofer, *Reforming the Law*].

35 Little, *supra* note 25, at 1331.

36 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi). See Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1127(1996).

37 National Crime Records Bureau, *Crime in India 2015: Compendium* (2016), <http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf> (last visited May31, 2019).

II. CONFUSING CONSENT IN FAROOQUI

*Farooqui*³⁸ is one of the first decisions where a High Court was tasked with interpreting 'consent' under the new framework introduced by the 2013 Act. It was a case of acquaintance rape, where the penetrative act alleged was oral sex (section 375(d) of IPC).

The facts considered relevant by the Court related to the familiarity between the parties, the nature of their relationship which was beyond 'normal' friendship, and acceptability of physical intimacy to certain extent between them.³⁹ Though the Court acknowledged that their past sexual conduct was irrelevant for determination of consent, it remained central to its reasoning.⁴⁰

On the day of the incident, the complainant visited the accused and found him in a drunken-lachrymose state. The parties consumed alcohol in some measure and exchanged kisses. The complainant told the accused that she felt motherly affection towards him, the accused then expressed his desire to suck her, she said 'no' and gave him a push. However, fear of physical hurt ultimately led her to continue without resistance, and she even feigned orgasm. She did not communicate her fear to the accused.⁴¹ Other facts alleged by the prosecution indicating expression of non-consent⁴² and presence of physical force component were given a miss by the Court.

Despite regarding the complainant a "sterling witness,"⁴³ the Court acquitted the accused for want of proof beyond reasonable doubt of the fact that:

38 *Mahmood Farooqui v. State* (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi).

39 *Mahmood Farooqui*, at ¶ 77.

40 *Mahmood Farooqui*, at ¶ 77. Note that section 155(4) of Indian Evidence Act (1872) was omitted in 2003.

41 *Mahmood Farooqui*, at ¶ 81.

42 *Mahmood Farooqui*, at ¶ 42, 43, 47 (These include the fact that after the victim denied consent to the accused to suck her, the accused *tried to pull down her underwear and she kept pulling it up*, and thereafter, the accused *immobilized* her and forced oral sex upon her).

43 *Mahmood Farooqui*, at ¶ 96.

- first, the incident alleged by the victim took place;
- second, if it did take place, it was without victim's consent or will; or
- third, if it did take place without the victim's consent, the accused could discern / understand that the victim did not consent.⁴⁴

The verdict turned on the *third* ground. The Court considered it unnecessary to enquire into the *first* ground by delving into the timing of various events surrounding the incident, even though admissible secondary evidence was present. Further, the Court did not regard victim's non-consent as material and, instead, introduced an element of '*mens rea*' in rape.⁴⁵ It held that it was doubtful that the accused had the "*the requisite mental intent of violating the prosecutrix,*"⁴⁶ and whether the element of fear in her mind or non-consent was "*made known or communicated to*" him. This was in part the outcome of Court's misplaced reliance on section 90 of the IPC⁴⁷ for determining non-consent, which includes knowledge or reasonable belief requirement on part of the accused, when consent has been explicitly defined under section 375 of IPC.⁴⁸

Aside from this glaring misapplication of law, the Court's interpretation of '*consent*', discussed below, is illustrative of how the affirmative elements of consent definition are of little consequence in reality. As mentioned above, in

44 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi), at ¶ 101.

45 See Schulhofer, *Sexual Autonomy*, *supra* note 13, at 41. This is similar to section 273.2, Criminal Code (Canada), 1985, which provides for a limited defense of mistaken belief of consent to the accused. However, the accused is required to at least show that reasonable steps were taken by him to ascertain consent and his willful blindness or recklessness are not considered defense.

46 Mahmood Farooqui, at ¶ 92.

47 Mahmood Farooqui, at ¶79.

48 Mrinal Satish, *The Farooqui Judgment's Interpretation of Consent Ignores Decades of Rape-Law Reform and Catastrophically Affects Rape Adjudication*, THE CARAVAN (Oct. 7, 2017), <http://www.caravanmagazine.in/vantage/farooqui-judgment-consent-ignores-rape-law-reform-catastrophically-affects-adjudication> (last visited May31, 2019) (In fact, even section 90 does not place an obligation on the victim to communicate her fear or misconception to the accused. The emphasis is simply on whether the accused had knowledge or reason to believe that the victim consented under such fear or misconception).

this case an additional burden was put on the victim to make her non-consent known to the accused.

A. SUBSTITUTING LEGAL CONSENT WITH NORMAL CONSENT

Referring to the consent definition, the Court noted that consent has to be “*categorical, unequivocal, voluntary*” signifying willingness to participate in the specific sexual act.⁴⁹ It acknowledged that ‘*mere hesitation*’; ‘*reluctance*’; or a ‘*no*’ to sexual advances cannot be treated as consent. Consent has to be “*an affirmative one, in clear terms*,”⁵⁰ and is required for every sexual act, every time.⁵¹ The Court was correct so far, and in acknowledging that basis of any sexual relationship is equality and consent.⁵²

However, to answer the questions formulated by it,⁵³ the Court turned to the meaning of consent in normal parlance, stated as a voluntary and revocable agreement to engage in a sexual activity “*without being abused or exploited by coercion or threats*.” Thus, consent need not be (or is not) ‘*unequivocal*’ in normal parlance. Further, it stated that the rule that consent has to be given and cannot be assumed, does not hold good in reality where gender binary operates (men as initiators of sex, women as mute receptors).⁵⁴ Accordingly, when parties engage in an act of passion, a ‘yes’ may not always mean ‘yes,’ and ‘no’ may not always mean ‘no.’⁵⁵ Gender binaries, if strictly observed, are helpful for determining

49 *Mahmood Farooqui*, at ¶ 75-76.

50 *Mahmood Farooqui v. State (NCT of Delhi)*, MANU/DE/2901/2017 (High Court of Delhi), at ¶ 74.

51 *Mahmood Farooqui*, at ¶ 74-76.

52 *Mahmood Farooqui*, at ¶ 86.

53 *Mahmood Farooqui*, at ¶ 83 (The Court listed four points of inquiry: (i) whether or not there was consent; (ii) whether the accused mistakenly accepted the moves of the prosecutrix as consent; (iii) whether such a mistake was genuine; (iv) whether the feelings of the prosecutrix could be effectively communicated).

54 *Mahmood Farooqui*, at ¶ 85.

55 *Mahmood Farooqui*, at ¶ 85. See Schulholfer, *Sexual Autonomy*, *supra* note 13, at 41 (“Courts and commentators...[insist] that a woman’s attitude might be deeply ambivalent, that she would often say no meaning yes, and that a man could not be expected to accept verbal protests as genuine unless accompanied by loud screams...”)

consent in such cases. However, when “equality [becomes] the buzzword” and binaries are disturbed,⁵⁶ confusions arise.

B. FROM AFFIRMATIVE 'YES' TO DIFFERENT DEGREES OF 'NO'

The Court observed that both affirmative consent and ‘no means no’ standards are inadequate for ascertaining consent in rape; more so, in cases of disturbed gender binaries.⁵⁷ Therefore, as a substitute, the Court proposed its own theory of different grades of ‘no’ for such situations. The fundamental premise of this theory is that “instances of woman behaviour are not unknown that a feeble ‘no’ may mean a ‘yes.’”⁵⁸ It does not claim universal application and excludes cases where:

- the parties are strangers;
- the parties are in a prohibited relationship;
- if one of the parties is a conservative person, who has not had any exposure to the ways and systems of the world.

In these cases, ‘mere reluctance’ or a ‘feeble no’ would amount to ‘no’. However, the theory creates a presumption of consent if the parties are known to each other, are persons of letters, intellectually and academically proficient, and have had history of physical intimacy. For negating consent in such cases, an “*emphatic no*” is required.⁵⁹

The Court does not say that women lie, but it reinforces another myth that “women do not know what they want or mean what they say - at least when they say no.”⁶⁰ Farooqui undoubtedly was far away even from the ‘no means no’ standard, as express refusal of the victim was not considered ‘no.’ The Court regarded the

56 Pratiksha Baxi, *When No is Not No in Law*, THE WIRE (Sept. 29, 2017), <https://thewire.in/182578/law-no-may-not-actually-mean-no/> (last visited May 31, 2019).

57 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi), at ¶ 84-85.

58 Estrich, *supra* note 35, at 1127.

59 Mahmood Farooqui, at ¶ 78.

60 Estrich, *supra* note 35, at 1129. See MacKinnon, *supra* note 3, at 445 (“Sex has been considered rape when women said no to sex or otherwise expressed disinclination, making clear that women expressing their lack of desire for a sexual interaction has not necessarily been considered inconsistent with a finding of consent.”)

complainant's testimony which screamed of non-consent as '*sterling*,' however, was reluctant in believing it.

Further, even while hypothetically accepting that the victim did not consent, it failed to shift the onus on the accused to demonstrate that some act of the victim amounted to consent.⁶¹ The reluctance of the Court to recognize the onus on the accused to act only after obtaining affirmative consent of the complainant illustrates that consent definition couched in affirmative terms without expressly shifting the evidentiary burden on the accused remains a weak and ineffective legal reform, especially in case of acquaintance rape.⁶² For the focus of inquiry never shifts on to the accused's misconduct.⁶³

III. RETHINKING CONSENT IN RAPE

As discussed, the current standard is similar to '*no means no*' standard and remains ineffective in guarding a women's sexual autonomy in the courtroom where the Judges are influenced by erroneous stereotypes and myths about the victim, accused and rape.⁶⁴ An alternative is proposed in the affirmative consent standard ('*yes means yes*') to give equal voice to women in sex and in Court.⁶⁵

Affirmative consent standard requires the man to first enquire whether the woman is desirous of engaging in the particular sexual act, and continue only upon receiving her "*freely given consent*."⁶⁶ The consent definition incorporates this requirement.⁶⁷ A failure to seek consent would not *ipso facto* indicate absence of consent, if it can be shown that that consent was *expressed* in any other way. In order to prevent victim's trial, this standard shifts the burden

61 Samuel, *supra* note 30.

62 Schulhofer, *Sexual Autonomy*, *supra* note 13, at 42.

63 MacKinnon, *supra* note 3, at 452.

64 Little, *supra* note 25. See generally Jennifer Temkin, *And Always Keep a Hold of Nurse, For Finding Something Worse": Challenging Rape Myths in the Courtroom*, 13 (4) NEW CRIM. L. REV. 710, 714 (2010).

65 MacKinnon, *supra* note 3, at 454.

66 Little, *supra* note 25, at 1345.

67 Little, *supra* note 25, at 1345.

on the accused to prove that consent had been sought and was “*affirmatively expressed*.”⁶⁸ Therefore, it creates a “*rebuttable presumption of non-consent*.”⁶⁹

Advocates of affirmative consent standard argue that it marks a shift from differentiated gender roles to equality,⁷⁰ prevents secondary victimization by requiring the accused to demonstrate the steps taken to ascertain the complainant’s consent, provides an “*external test of consent*”; and eventually, instils rational behaviour among men and women.⁷¹

Little concedes that even with affirmative consent, in many cases, a trial may still result in a “*he said, she said*”⁷² situation; however, the difference lies in the fact that the man’s story would be the subject of scrutiny and cross-examination. The effectiveness of this standard is evident in case of aggravated rape under IPC.⁷³ Thus, affirmative consent is projected as the “*best way to legally recognize women [as] equal partners in any sexual interaction*.”⁷⁴

68 Bryden, *supra* note 32 (“*If*” actions speak more loudly than words, “then perhaps the action of failing to signify consent affirmatively speaks even more loudly than the action of failing to resist”).

69 *Id.*

70 Schulholfer, *Sexual Autonomy*, *supra* note 13, at 85.

71 Bryden, *supra* note 31 (“*What is required of a man is simply that he behaves with a civilized regard for his companion’s wishes...If she equivocates or gives no positive signal, he must wait*”).

72 Little, *supra* note 25, at 1345.

73 In *Sachin Tukaram Muneswar v. State of Maharashtra* (MANU/MH/1843/2015), the Court considered the consent definition while deciding on the anticipatory bail applications filed by various applicants charged under section 376(2) (n) of the Indian Penal Code, 1860 (aggravated rape) in cases pertaining to breach of promise to marry. Referring to the meaning of the term ‘*unequivocal*’ in Black’s Law Dictionary and Websters’ English Dictionary, the Court said that even though there was reason to believe that the complainants, being major, voluntarily agreed to the intercourse, *prima facie* it was constrained to hold that the sex was non-consensual as the *accused* could not prove that consent was ‘*unequivocal*.’ Chaudhari J. expressed his discomfort with the requirement of ‘*unequivocal consent*’ as:

“*There is no manner of doubt that the major women in these cases, with full understanding and conscience, went ahead in entering into sexual intercourses which should not constitute rape. But then, the fact remains that personal opinion or feeling of this Court has no place in law, and the will of Parliament must be held to be supreme.*”

74 Little, *supra* note 25, at 1363.

However, critics argue that, while affirmative consent standard is “*well-intentioned [and] ostensibly progressive*,” it does not work well in *all* sexual interactions.⁷⁵ In turn, it ends up fostering assumptions which are antithetical to effective reform, because it reinforces the expectation that “*yes*” *does mean yes and a [woman] who says “yes” is [always] willing*.⁷⁶ The difficulty then lies in determining when the circumstances are sufficiently constraining to invalidate ostensible consent.⁷⁷ Radical feminists call for rejection of the affirmative consent standard, as it fails to account for the social reality where under disparities of power resulting from gender inequality, a woman’s consent to sex is never really ‘free’.⁷⁸

In her recent statutory proposal on rape definition,⁷⁹ MacKinnon termed the concept of consent ‘*unequal*,’ given its failure to account for gender inequality. She makes a powerful argument that presence of consent does not necessarily make a sexual interaction equal, it simply makes it “*tolerated or less costly of alternatives, out of the control or beyond the construction of the ones who consent*.” Consent standard does not place the “*proposal-(alleged)-disposal*” relation in its wider social context to account for the historically unequal power relations. Therefore, in prevailing conditions of social inequality, consent to sex is in fact “*acquiescence to power*.”⁸⁰

Further, MacKinnon argues that despite “*creative attempts to rehabilitate [consent]*,”⁸¹ it remains a legally impractical tool which undertakes a subjective inquiry into internal psychology of a woman, focusing on “*what [she] has in her*

75 Schulholfer, *Reforming the Law*, *supra* note 33.

76 Schulholfer, *Reforming the Law*, *supra* note 33, at 336, 342 (“Rape law could not justifiably assume [women’s] ability to control [what is done to them] because under conditions of gender inequality, social constraints and pervasive disparities of power can be decisive”).

77 Schulholfer, *Sexual Autonomy*, *supra* note 13, at 42.

78 Little, *supra* note 25, at 1361. See Catherine MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 (4) *SIGNS* 635, 647 (1983).

79 MacKinnon, *supra* note 3.

80 MacKinnon, *supra* note 3, at 441.

81 MacKinnon, *supra* note 3, at 442 (MacKinnon refers to Canadian Law which includes a provision stating ‘what does not amount to consent’ under section 273.1 of Canadian Criminal Code, 1985. Further, she argues that even when defined as ‘agreement or permission’ or accompanied by terms such as ‘positive, affirmative, unequivocal’ or requiring ‘willingness,’ consent remains unequal.)

*mind or lets someone “do to” her body.”*⁸² While her proposed inequality analysis starts with the man and inquires into what he does with his power, the focus in consent analysis never shifts from the woman.⁸³ Thus, whether defined positively or negatively, “*consent is the reason the rape complainant is put on trial.*”⁸⁴

For MacKinnon, the primary issue of rape is gender inequality and *not* autonomy.⁸⁵ Rape defined in sex-equality terms focuses on unequal external circumstances, including gender, which make sex rape.⁸⁶ She argues that it is the only way social realities can be reflected in law and proposes the following definition of rape:

“a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability.”⁸⁷

Workability of Inequality Analysis in Domestic Context

MacKinnon identifies the merits of her proposal in its *humane nature* and *workability* in legal practice.⁸⁸ She draws analogies from the decision in *Prosecutor v. Akayesu*,⁸⁹ *where the international tribunal defined rape in terms of coercive circumstances, while making a case for rejection of consent standard in domestic context.*⁹⁰

82 MacKinnon, *supra* note 3, at 441.

83 MacKinnon, *supra* note 3, at 441 (“*Like one wing flapping, consent analysis focuses endlessly on [woman], what she has in her mind or lets someone do to her body.*”)

84 MacKinnon, *supra* note 3, at 441.

85 MacKinnon, *supra* note 3, at 436 (arguing that internationally rape is recognized as a crime of gender inequality; however, no domestic jurisdiction has defined rape in sex equality terms).

86 MacKinnon, *supra* note 3, at 469.

87 MacKinnon, *supra* note 3, at 474.

88 MacKinnon, *supra* note 3, at 469.

89 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (1998) (International Criminal Tribunal for Rwanda).

90 MacKinnon, *supra* note 3, at 469.

An exclusive focus on unequal circumstances is workable in international criminal law context, where rape is often committed by strangers⁹¹ and under manifestly coercive circumstances in the background of war, homicide and physical violence. However, in the domestic context, where the majority of rapes are acquaintance rapes, manifestations of inequality may be complex and elusive.⁹² Contrary to MacKinnon's argument, in seemingly equal relationships where "equality is the buzzword"⁹³ elements of coercion may not leave "forensic tracks in the real world."⁹⁴ The outcome of the trial will be contingent on the Judge's broad or restrictive interpretation of the circumstances surrounding rape, which will in turn be affected by the linguistic and cultural conventions and his stereotypical notions about rape.⁹⁵ The real challenge would be to design the definition in a way that aspirations are in fact translated into legal form.⁹⁶

Additionally, as Munro argues, while in theory an exclusive focus on unequal or coercive circumstances may prevent the victim's trial, it may result in further alienating her experience from the legal process by focusing on the macro-level disparities in power.⁹⁷ She argues that retaining consent on the other hand would permit recognition of rape as "*both a personal and systemic attack.*"⁹⁸

Remodeling Affirmative Consent

MacKinnon does consider affirmative consent standard an improvement from a sex-equality perspective, despite disagreeing that remodeling it can effectively

91 Vanessa E. Munro, *From Consent to Coercion*, 17, 21 in *RETHINKING RAPE LAW* (Clare M. Glynn and Vanessa E. Munro eds., 2010) (pointing out that in international criminal law scenario, parties are both literally and metaphorically strangers, when viewed in the light of their divergent ethnic identities).

92 *Id.*

93 Farooqui, *supra* note 21.

94 MacKinnon, *supra* note 3, at 469.

95 Stephen Schulhofer, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND FAILURE OF LAW*, 90 (1998) as cited in Victor Tardos, *Rape Without Consent*, 26(3) *OXFORD J. LEGAL STUD.* 515, 516 (2006) ("Flexibility almost inevitably results in under-enforcement and non-compliance").

96 Schulhofer, *Reforming the Law*, *supra* note 33, at 346.

97 Munro, *supra* note 89, at 26.

98 Munro, *supra* note 90, at 26.

account for unequal circumstances.⁹⁹ While it is true that consent becomes meaningless in coercive circumstances,¹⁰⁰ it is an important expression of sexual autonomy which enables persons to define boundaries of personal intimacy and deserves equal protection in its own right.¹⁰¹ Treating autonomy as a lesser concern in rape undermines the merits of the affirmative consent standard in giving women's voice equal validity in a sexual interaction and affecting social consciousness.¹⁰² Further, it is submitted that accounting for historical imbalances does not necessarily require denying recognition to sexual autonomy.¹⁰³

Both equality and autonomy should be central to any discussion on rape law reform. This is not to say that affirmative consent should be the norm in all cases irrespective of the circumstances. What must be explored is the possibility of designing a model, placing consent in context, possibly by starting with an inequality analysis of the external circumstances, followed by consent analysis.

It is important that such a model is educative in its application and enactable and, therefore, would require care in listing of coercive circumstances. As Schulholfer argues, enlisting circumstances in this manner may leave out some unequal circumstances out of the bounds of law; however, it would be helpful in setting the clear and specific boundaries of law.¹⁰⁴ While he agrees that rape law ought to account for gender-inequality, he is cautious of the fact that “*to propose at this juncture a visionary concept of mutual respect of sexuality, and a massive expansion of criminal law to enforce it, could conceivably divert attention from issues of implementation that make the real difference.*”¹⁰⁵

99 MacKinnon, *supra* note 3, at 454 (She criticizes it on the ground that it shields all situations where women consent in unequal circumstances. Further, she disregards its potential for reform by referring to the model proposed by American Law Institute for the Model Penal Code, where it attempts to contextualise consent vaguely, and rejects affirmative consent requirement).

100 MacKinnon, *supra* note 3, at 463.

101 Schulholfer, *Sexual Autonomy*, *supra* note 13, at 94.

102 Little, *supra* note 25.

103 Little, *supra* note 25, at 1362.

104 Schulholfer, *Reforming the Law*, *supra* note 33, at 346.

105 Schulholfer, *Sexual Autonomy*, *supra* note 13, at 36.

CONCLUSION

Verma Committee regarded full expression of sexual autonomy of women as integral to her right to equality.¹⁰⁶ Following its recommendations, the consent definition was incorporated in IPC; however, it remains midway in the affirmative consent standard and is ineffective in practice.

As discussed in the previous section, dismissing consent standard from rape law and treating all unequal sex as sexual assault may not entirely be desirable for both theoretical and practical reasons. As Little argues, affirmative consent standard is indeed required to treat women as equal partners in a sexual interaction, especially in an acquaintance rape scenario, like *Farooqui*, where inequalities may not be manifest.¹⁰⁷ In such cases, affirmative consent standard provides an unambiguous standard for the offense of rape.

Therefore, it is submitted that an affirmative consent standard should be adopted in full by shifting the evidentiary burden on the accused in all cases of rape. This is necessary to give effect to the changes aspired through the consent definition, that is, to reduce secondary victimisation of the complainant (as observed by Verma Committee), as well as bringing in social consciousness that a woman's permission is a minimum requirement before any sexual act, irrespective of the nature of relationship shared by the parties.

At the same time, it is important to not lose sight of MacKinnon's argument that consent standard alone cannot account for the economic, psychological and hierarchical inequalities or threats that affect women's choices in relationships. IPC reflects this consciousness, and consent analysis in rape under certain coercive circumstances, as MacKinnon notes, either places the burden on the accused to prove consent or disregards the consent question as irrelevant.¹⁰⁸ It is essential that these provisions are revisited to carefully delineate most (if not all) unequal circumstances which constrain a women's sexual choices, in a manner that is enactable, educative in implementation and progressive.¹⁰⁹

106 VERMA ET AL, *supra* note 18, at 126.

107 Schulholfer, *Reforming the Law*, *supra* note 33.

108 PEN. CODE, §§ 375, 376 (2) (1860). Indian Evidence Act, § 114A (1872).

109 Munro, *supra* note 90. See Schulholfer, *Reforming the Law*, *supra* note 33.

ARTIFICIAL INTELLIGENCE AND LEGAL IMPLICATIONS: AN OVERVIEW

Chemmalar S

Abstract

Artificial Intelligence is a transformative technology that changed every walk of our lives. Artificial Intelligence technology is unavoidable because it is omnipresent and people are more dependent on Artificial Intelligence driven technologies without knowing of its presence. The two main objectives of the study are: Why the technology should be regulated and, also, to discuss the interplay of AI technology and law. The paper discusses the legal implications involved in both development of the technology and protection of legal rights of humans interacting with technology. An attempt has been made to find a plausible solution to the problem.

A. INTRODUCTION

Artificial Intelligence (AI) is a technology that makes devices smart and allows performing actions that imitate human beings. AI is different from other emerging technologies. AI is considered as transformative technology since it transforms the living nature of humans. However, till now there is no universally accepted definition for AI. AI is omnipresent technology that has transferred our day to day lives. In fact, we are more dependent on AI driven technologies without knowing its presence. It can be found in mobiles (speech recognition system that transcribes human language through voice response), chat bots (virtual agents used for consumer service), biometric device (technology that identifies and analyzes behavioral and physical aspects of humans), text analytics (understands the structure and meaning of sentences), video games, driver assist (mapping and localization with GPS), etc. It has significant impact on both law and society.

Human AI interaction: Artificial Intelligence enabled devices may operate autonomously from humans. But, since AI is for the society, it interacts with people. These interactions will lead to both positive and negative impacts in the society. AI may have unpredictable behavior. For instance, many might have experienced the situation where GPS enabled cars show shortest route to the destination location inaccessible for regular cars. There are many such instances where humans are misled by the devices. Captcha is an anti-robot system used to confirm if the user is human or robot. It is a system that uses artificial intelligence to win over artificial intelligence. Captcha blocks robots from harvesting the email addresses, blogs or other websites that has been in use since 2000. Obviously, this reveals that AI poses significant threat to society in future.

Human-centric AI Laws: Technologies simply move fast and outpace law with no trace. Innovation is the key factor for economic development and social wellbeing. Law plays a critical role in regulating technology in order to safeguard the society. Moreover, these technologies need support to improve their changes and law should keep up with the technological development. Apart from regulating, law gives support and protection to AI technology. Technology and law are intertwined in various ways. AI has international character and so they require universal framework. At present, there is no international regulation vis-à-vis technology. However, General Data Protection Regulation is the only framework that regulates the corporations from violating the privacy rights of individuals belonging to the European Union. Taking India into account, Information Technology Act, 2000, is the only act concerning technology. The act does not have provision to address the contemporary issues relating to advent of technology. Technology related aspects, such as cybercrime, are also dealt under the IT Act, 2000, which is insufficient for the regulation. The need of the hour is consistent law that protects humans from negative impacts of AI without affecting the development of the AI technology. In simple words, the technology should be human centric.

Legal Personality of AI: Legal personality is bundle of rights and responsibilities. In general artificial personalities are not accorded with liability because they

have no personality in the eye of law. For instance, Sophia a humanoid robot invented in 2016 was given citizenship by Saudi Arabia. Since then the country received controversial comments about its legal personality.

The research paper is confined to the legal aspects of AI. At present there is no universally accepted definition for AI. The paper tries to reach definition that is appropriate for legal regulation. It explains the importance of introducing human-centric AI regulation. The paper also tries to integrate AI and Law. The paper aims to suggest potential legal problems to be faced by development of AI technology in future, if not acted on quickly. The paper tries to highlight the Intellectual Property rights with respect to AI technology and suggests the need for strong data protection framework at global level to protect the privacy rights of individuals.

B. OBJECTIVE OF THE STUDY

1. To analyse if AI should be regulated?
2. To recognize the interplay of law and AI technology.

C. METHODOLOGY

The paper uses doctrinal method, aiming to analyse how law and legal proceedings impact the field of AI in society. Qualitative approach has been adopted to reach a satisfactory conclusion and answer important questions.

D. SCOPE OF THE STUDY

Technological innovations spread faster through various channels worldwide. But, legal regime takes considerable phase to regulate a sudden technological change. A new technology starts to intrude in everyone's life before government can take any step to regulate it. This paper provides the possible challenges that could be posed by AI technology and the action to be taken in order to address the issue of technological development, particularly with AI.

E. RESEARCH QUESTIONS

1. To what extent, can the existing legal regime respond to AI technological changes worldwide?
2. How must the legal regime pre-adapt to oncoming and unexplored legal challenges?

1. INTRODUCTION

“Too many in AI today try to do what is popular and publish only successes. AI can never be a science until it publishes what fails as well as what succeeds.”

– John McCarthy (1956)

McCarthy was the American cognitive scientist who coined the word Artificial Intelligence¹ in the year 1956. The Dartmouth Summer Research Project on Artificial Intelligence² paved the avenue for development of the term AI. McCarthy, along with other participants Marvin Minsky, Oliver Selfridge, Claude Shannon, Trenchard More, Allen Newell, Herbert Simon and Ray Solomonoff, discussed various aspects of AI technology. At the conclusion of the conference, no inference was made on the general theory of the AI, but they came up with a common vision that computers can be designed to perform intelligence tasks. Even before founding the term AI, in 1935, Alan Mathison Turing discovered a computer with limitless memory that recognizes symbols. In 1951, he adopted a tuning test to test the intelligence of computers which is now called as Turing Test.

It has been nearly 65 years since McCarthy founded the term AI. Till now, there is no universally accepted definition for AI in the true sense. Traditional meaning of AI was based on goals to be achieved in developing a computer with characteristics such as natural language processing, learning, planning,

1 Hereinafter referred as AI.

2 James Moor, *The Dartmouth College Artificial Intelligence conference: The next fifty years*. *American Association for Artificial Intelligence*. 27 AI Magazine 87, 89-90(2006).

interacting, ability to manipulate and reasoning. Technology has taken a fast phase in the past two decades, whereas at the outset the computers capabilities of doing things were minimal. The Turing test which was designed to check the capabilities of Intelligence of computers is in practice even today. The test involves three subjects: a computer or non-human to be tested, a human and an intermediary or judge to identify and differentiate the computer from the human. This test is performed in a room where the identity of each person is hidden from the other. The judge is allowed to ask simple and complex questions to the participants of the test. Based on the answer provided by the participants, the judge would come to conclusion that the particular participant is a non-human. How can a judge come to the inference based on the answer provided by the participant? It works like this. For instance, the judge shoots with some simple and basic questions like, what is the answer for 10 added to 8 and then subtracted by 4. Obviously, both participants provide correct answers for this question. But, then, the judge asks complex questions like, what is the answer for 5558476545 multiplied with 985554456, and then divided by 87878. In general, computers alone are able to provide apparent answer for this question. And, if the non-human participant gives the correct answer to the question, then obviously the judge can easily identify it as computer. In such a case, the computer will not be able to pass the test and is not considered as an intelligent computer anymore. Then, how would the intelligent computer behave? If the computer is intelligent enough to manipulate the answer provided to the judge, then the computer is said to have passed the test. Obviously, it has to deliver the wrong answer. From this test, the inference can be made that the computer in order to be intelligent should possess the following capabilities: language processing, reasoning, machine learning and language representation. This test is purely theoretical and abstract in nature and not experimental.

Modern definition of AI is different from that of the traditional definition, because technological change has brought many changes and, now, the goals for creating AI is in a transformative phase. AI is now considered as transformative technology, as AI has the scope of transforming the future. AI technology has intruded in our daily activities with no overt traces, and we all have adapted to

it without the knowledge of its presence. Because of this reason, AI has become unavoidable. For instance, mobile phones with face recognition technique, finger print lock, biometric system, cars with GPS system, and even home appliances, such as washing machines, are functioning on AI technology. However, the technology used in the appliances and machines may vary in nature of technology used in it. Hence, the modern definition of AI is the technology enabled to perform tasks possessing intelligence that imitates human being. It is the study of intelligent agents that assist and imitate human behavior and intelligence. AI is set of algorithms that enable the computer to perform tasks in an intelligent way. Today's AI goals are logical programming, probabilistic reasoning, problem solving and machine learning. AI involves Computer science, mathematics, philosophy, neuroscience, and engineering disciplines.

AI still remains a challenging subject and deriving a clear definition is contentious. The technology raises issues of privacy and threat to humans if they outperform humans. At some point, the protection of rights of creator of AI technology itself is under threat. The existing law is inapplicable for the AI technology.

2. COMPONENTS OF AI: ALGORITHMS, MACHINE LEARNING AND DEEP LEARNING

Algorithms: The technology of AI revolves around algorithms. Algorithm is the technique used in computers to get the task done. This technique facilitates the computer for machine learning, i.e., to think and learn. It is an automated instruction that can be structured or unstructured, complex or simple.

Machine learning: Machine learning is the set of algorithms. It can be classified into supervised or unsupervised learning. Supervised learning is learning with the assistance of something, whereas unsupervised learning is concerned with grouping of data into one category.³ Machine learning is the study of creating

3 KISHORE AYYADEVRA, PRO MACHINE LEARNING ALGORITHMS 1-3 (1st ed. 2018).

computers which learn without programming, i.e., learning from experience. Learning is the integral part of AI.⁴ Artificial Intelligence encompasses many technical aspects, among which the key aspect is machine learning. Deep learning is part of machine learning and machine learning is part of AI.

Deep learning: Deep learning is new technology of machine learning. For instance, deep learning is the technology behind driverless car, to distinguish between human and lamppost and recognize the signs and symbols on the road. This technology requires large number of labeled data and videos. Deep learning requires considerable computing data (ability to analyze more data) and high performance Graphics Processing Unit (GPU)⁵ for more effectiveness. In deep learning, the term 'deep' refers to a hidden layer in the neural network, i.e., nearly 150 layers. Deep learning technique learns directly from the large labeled data without the help of manual feature.

3. ARTIFICIAL INTELLIGENCE CATEGORIZED

According to McCarthy, AI is divided into three categories: Strong AI, Applied AI and Cognitive stimulation. Strong AI is a machine to be designed to perform several tasks that humans cannot do. Applied AI is a programmed machine, to do certain tasks and to make it commercially viable, and Cognitive Stimulation refers to learning through experiences.

NITI Aayog, in its Publication on National Strategy for Artificial Intelligence, categorized AI in the following terms:

- a. **Weak AI vs. Strong AI:** AI is categorized as weak and strong in terms of thinking ability. Weak AI refers to simulation, i.e., programmed to do a repetitive task without perception. Weak AI function on rule based system; whereas, strong AI refers to intelligent thinking, i.e., creative and productive. Strong AI can interact with human with perception.

4 Zsolt Nagy, *Artificial Intelligence and Machine Learning Fundamentals* 7-9 (1st ed. 2018).

5 Electronic circuit designed to manipulate computer graphics and image processing.

- b. Narrow vs. General AI: AI is categorized as narrow and general on the basis of the tasks they perform. Narrow AI can only perform limited tasks for which it is programmed. For instance, Google voice search can recognize only English language. Whereas, General AI can perform any task and act like a human.
- c. Super intelligence: Super intelligence refers to AI that outperforms humans.⁶

4. ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY PROTECTION

What kind of IP protection is needed for AI? The plausible solution is to apply mixed-model approach, i.e., a combination of each type of IP protection. The three types of IP protection suitable for AI technology are copyright, patent and trade secrets. Patent can be a powerful form of IP protection, but patent is not a complete solution since it is not available for certain aspects of AI. For instance, patents do not protect source code, algorithms and certain data compilations. Thus, apart from patent protection, copy right and trade secrets should be taken into account while considering legal protection of AI.

Copyright: Copyright, which is otherwise called as author's right is the right given to the original creator of any product. The term 'original' refers to creativity and not novelty. Article 1 of the Bern Convention 1971 protects the rights of the authors in their literary and artistic works. The existing laws, almost all national laws and the international treaties protect the copyrights of humans and do not apply for non-humans. Hence, the works that result from the creativity of AI enabled machines or AI programmed computers are not recognised by present laws because non-humans are not natural persons and may not be held legally responsible in a court of law. But, the programmers and companies who develop AI are natural and legal persons, and hence accorded with legal rights and are responsible for liabilities associated with it. Bern

6 NitiAayog. *National Strategy for Artificial Intelligence* (Feb. 20, 2019, 10:21 PM)file:///C:/Users/HP/Desktop/important/NationalStrategy-for-AI-Discussion-Paper.pdf.

Convention 1971 does not explicitly define the term 'author.' However, article 3 protects the rights of the authors who are nationals and non-nationals of countries of the Union, provided the non-nationals are habitual residents of the countries of the Union. Thus, the term 'author' includes persons who are nationals of state parties and, also, includes non-nationals who belong to non-state parties. According to the convention, the works generated by computer programs are not copyrightable if the works are created by a machine without human intervention or assistance. Ironically, any creation that is not protected by copyright immediately falls under public domain from the instance of its creation. This leads to considerable disadvantage in releasing the independently generated AI creations into public domain. The companies and institutes that have funded for developing the machine and, even, individuals would have invested their money and time in creating and improving the technology. Their efforts would be in vain, if their right is not recognized or protected. The prevailing trend will undermine and discourage the innovators, developers and companies to dissuade further innovation not only relating to AI but also technology associated with AI. This, in turn, will lead to reduction in creation of artificial intelligence-generated works, and this will have an impact in numerous sectors, like health, education, pharmaceuticals and agriculture. These sectors will suffer significantly, resulting in loss of valuable research and future AI applications. According to the present legal regime, they cannot enjoy the copyright protection for the creations of machine they have designed, but at least they should be able to enjoy the financial benefits associated with it. But, how is this possible? Should the definition for author be redefined to encompass both human and non-human creators? A few argue that providing authorship to non-humans is a productive way to increase AI innovation and development, and this could protect the autonomously created works of AI machines from falling into public domain. A few argue that this solution is controversial and could lead to not only legal, but also technical, challenges. Redefining the definition of authors in order to include non-humans would undermine the current legal regime and would raise more problems than answers.

The effective solution requires two important conditions to be fulfilled for AI developers: one, protecting the legal status of a copyright holder, and, two, the need for incentives for AI developers. The first condition is assigning authorship to humans for works of innovative technology. This leads to another question: who is that human author? The person who developed the AI technology or the institution that funded the innovation? The solution for this question can be determined by ascertaining the ultimate goal of assigning copyright of AI generated works to humans and by assessing the parties' contribution to this goal.

AI generated works can be categorized into two: (1) Works generated by AI with the guidance or input of humans and (2) Independently generated AI creations.⁷ The first category may be Computer assisted work or computer generated works.⁸ Computer assisted work includes essays prepared using Microsoft word and operation of computer algorithm to digitally simulate the texture synthesis. Thus, computer assisted work will generally be authored works, since computer is merely used as a tool to produce the work. There works are not computer generated, but work resulting from the direction of human mind. The second category, independently generated AI creations, includes works that are created in total absence of or with little human interference. The computer determines the particular form of the output. For instance, weather forecasting can be considered as independently generated AI creation.

It is pertinent to note here the judgment pronounced by US court involving selfie-taking monkey.⁹ The complaint was filed by PETA, an American based animal rights organization as next friend on behalf of the monkey named Naruto, against Slater the publisher of the book in which selfie taken by the monkey was published. PETA stated that the publisher has violated the

7 Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*. 57 The I.P.L.J.,(2017).

8 Benita Lao, *How Copyright Applies to Computer Generated AI-Generated Works*, TAYLOR VINTERS VIA LLC(May. 02, 2019, 10:28 PM), <https://www.taylorvinters.com/article/how-copyright-applies-to-ai-generated-works>.

9 *Naruto, et al. v. Slater, et al.*, no. 15-CV-04324 (N.D. Cal. 28 January 2016).

copyright of the monkey Naruto by publishing and selling the photo of monkey selfie. In *Naruto v. John Slater*, the court decided on two issues; does an animal have statutory standing under copyright law and the other issue of whether an organization can assert next friend status on behalf of an animal. Court held that copyright does not authorize animals to file copyright infringement suits. And, the court barred the next friend standing for animals. The court further stated that humans have general understanding of similar interests of other humans. For the plea taken by PETA to consider the next friend stance which is similar to competent person representing the incompetent person, court asserted the material difference between humans and animals. This case clarified that works produced by a machine is a mere mechanical process that operates randomly or automatically. It also stressed that copyright law only protects “the fruits of intellectual labor that are founded in the creative powers of the mind.”

Patent: Patent is seen as the best IP right in the area of AI. A patent is an exclusive right granted by a government for an invention, which is a product or a process. Patent provides its owner right to exclude others from using his invention or product. An invention is patentable if it has three subject matters: novelty, non-obvious and industrial applicability. An invention must be novel in the sense that discovery is new and has not been claimed by anyone. The inventors should be incentivized for disclosing the AI innovations such as algorithms and other softwares.

Algorithms, machine learning and deep learning are interconnected, and AI functions behind these fundamentals. Apart from these fundamentals, AI also covers mathematical models, and these raise the questions on eligibility of mathematical models for patent protection. According to section 3(k)¹⁰ of Indian Patent Act,¹¹ algorithms and other softwares are not patentable. However, algorithms and softwares having technical characteristics are patentable. Hence, it has been challenging for the patent offices to process patent applications

10 Inventions not patentable: “a mathematical or business method or a computer programme per se or algorithms.”

11 The Patent Act, 1970, No. 39, Act of Parliament, 1970 (India).

relating to softwares and other computer related inventions, not only in India, but also across the world. Since patent law explicitly excludes the computer related inventions from obtaining patent, the patent offices worldwide issues guidelines in order to cope up with the current technological issues. Similarly, India also issued guidelines to facilitate uniform practices. This guideline seeks to clarify the doubts and exceptions created by section 3(k) of patent act with respect to patenting of computer related inventions. However, in case of conflict between the guideline and patent act, the act and rules would prevail over the guideline. And, the same is subject to the scrutiny of the court.

Reward theory of invention or incentive theory: This theory is an old theory and finds its origin in the US, and this theory is based on the presumption that inventor or author should have an incentive such as a patent or copyright to protect the invention from falling into public domain and to, also, encourage them to invent and create further. The courts should understand this cardinal principle while deciding on granting of IP rights.

Trade secret: Trade secret is concerned with the inventions that do not meet the eligibility criteria. It protects economically valuable secrets. The artificial intelligence elements like neural networks, data output and algorithms can be protected under trade secrets. Thus trade secrets and copyright provide exclusive protection for IP that cannot be achieved by patents alone.

5. GENERAL DATA PROTECTION REGULATION AND AI

AI requires large data in order to make decisions in a rational way. AI is a collective phenomenon, including algorithms, machine learning and deep learning. AI requires more input because the technology can become intelligent only if it has enough data input to learn from. The concept of deep learning is the new development in the field of AI. Deep learning is the advanced technology of machine learning; it requires large data for the technology to function. This can be illustrated with a self-driving car, wherein the technology requires large data such as human images, various sign boards, addresses, etc. From these data, the AI learns and works accordingly. Another illustration is

chatbot: a computer program to interact with humans. Initially, chatbots were used for customer services, but today chatbots softwares can be downloaded into mobiles, and these softwares enable individuals to interact with AI. There is a variety of chatbots, like chatbots for friendly conversation, chatbots for stress release, chatbots for improving the conversational skills, etc. While conversing with chatbots, the users provide their personal information to AI without knowing the fact that they are providing their personal details to a company that owns the software. Chatbots function only online and not in offline mode, and while conversing, they ask for various information including email and phone numbers. This indicates that the privacy of humans is in peril. What can be done to protect the rights of humans from non-humans? There are two main privacy related aspects of AI: machine learning (technology function with the input provided) and deep learning (learns from environment through experience). These two things form the basis for AI, and the same pose a threat to privacy rights. Both national law and international law is silent on the protection of privacy rights from being violated by corporations developing and using AI. At present, GDPR is the only regulation that protects privacy of individuals, but it does not explicitly provide for privacy violation by AI technology. GDPR strengthens the privacy rights of nationals of European Union. As a result, corporations processing the personal data will bear more responsibility and the corporations will be liable for stringent punishment for non-compliance of law.

6. INDIAN PERSPECTIVE OF DATA PROTECTION AND AI

Sir Krishna Committee was constituted by Indian government, which was headed by former Supreme Court Judge Sri Krishna, to review and make recommendation on protection of privacy rights. The Committee realized the need for a comprehensive law for data privacy issues in India and came up with the draft bill called data protection bill. This bill has been left open for public scrutiny. The bill has resemblance of GDPR. The key features of the bill are that personal data shall be processed only for clear, specific and lawful purpose, and the appointment of data protection officers is mandated for all

companies, and the Bill contains provisions for stringent punishment. Apart from the bill, the committee also recommended the amending of the existing Acts, like Information Technology Act. The committee has taken a triangular approach in the proposed data protection in which privacy of the individual is the top priority. Secondly, it imposes responsibility on the state for the protection of citizens' privacy rights. The report also ensures that trade should not be affected as the result of the above two priorities.¹²

The proposed bill identifies seven key principles. They are technology agnosticism (data protection must be flexible enough to meet the changing technology), Holistic application (applicable both to the public and private sector), Consent, Data minimization, Controller accountability (data controller accountable for processing), Structured enforcement (strong enforcement) and Deterrent penalties (adequate penalties).

The framework is intended to protect the data of a natural person and not a juristic person. Hence, corporate data or its financial information may be excluded from the proposed data protection legislation. The law shall be applicable to two bodies: (i) entities incorporated and processing data of Indian residents. (ii) Foreign entities conducting business in India and processing personal information of Indian residents. The framework defines personal data as data which reveals the identity of a person. The framework classifies the data processing into collection, use and disclosure of data. It lays down accountability as the central principle in data protection. It makes the data controller (the organization that collects and processes personal data) accountable for the data protection. The consent is one of the key features of the framework and recognizes consent as the ground for the collection and use of personal data. It also prohibits the processing of children's personal data. The paper provides for three rights: right to confirmation, right to access and right to rectification. The framework lays down two conditions for cross-border transfer: (a) allows transfer of data to countries which provide data protection, (b)

12 Nitin Bhatt, *Personal Data Protection Bill – 2018*, ERNST & YOUNG LLP (May. 11, 2019, 04:25 AM), [https://www.ey.com/Publication/vwLUAssets/ey-personal-data-protection-bill-2018/\\$File/ey-personal-data-protection-bill-2018.pdf](https://www.ey.com/Publication/vwLUAssets/ey-personal-data-protection-bill-2018/$File/ey-personal-data-protection-bill-2018.pdf).

imposes responsibility on data controller to safeguard the data. Regarding its enforceability, the framework emphasizes the importance of adjudication as an integral part of any law enforcement. It imposes penalty as the form of deterrence, and the quantum of the penalty is not specified in the framework.

7. CONCLUSION:

AI is pervasive and unavoidable. AI has changed every walk of our life drastically. AI is considered as third generation of web. AI is not to replace the humans, but to replicate our intelligence and intensify our reach. AI is used in almost all sectors. For instance, Safari Park in South Africa uses AI to spot poachers entering the reserve forest and alerts the park rangers. Safari Park is home for white rhinoceros, which is listed as near threatened species. The AI used in the park has the ability to identify and differentiate humans from animals. Once it recognizes the human breach, it notifies the control center, and it is also capable of tracking the known offenders. WT 2 Plus is the world's first AI translator, designed by China-based company Timekettle Technologies. It can translate 20 languages. The device consists of two translator earphones that can be worn by two people and allows the user to converse in any language without looking at their phone. AI with deep learning technology is even used for parking space detection in developed countries, which has been a major issue that has been faced by people. Deep learning technology, which is considered as developed version of machine learning, is being used in AI. For this purpose, AI requires large data which leaves the privacy of individuals at peril. This has to be regulated by law which at present is not up to mark.

Technology is for humans; so keeping this objective in mind the corporations, innovators and scientists should act in an ethical way while improving the technology. What has been disturbing is China's behavior of using AI face recognition technique against the minority to check and monitor their movement.¹³ This act is generally known as racial profiling and considered as

13 Paul Mozur, *China is Using A.I. to Profile a Minority*, N. Y. TIMES, April 14, 2019.

a national problem.¹⁴ The States have a responsibility to protect the rights of their citizens. India is proactive in dealing with individuals' privacy rights; this is apparent from the draft bill made for data protection which has prioritized the protection of citizen's rights over other rights. Regarding the protection of privacy rights, EU has made a tremendous effort in protecting the rights of the citizens with the enactment and implementation of GDPR. There is an urgent need not only for India, but also for the entire world to adopt versions of European rules.

As far as AI technology is concerned, the present intellectual property protection laws available for the protection of rights of inventors and programmers are not fully appropriate or partly applicable with drawbacks. The reason is computer algorithms and machine learning has become the new source of creativity. IP protection for AI generated works is necessary to prevent the products and creativity from falling into the public domain. Whereas, the existing law is not fully appropriate to meet the needs of emerging technology. Another major issue is predictable unemployment due to fast-track technology. There is a threat of loss of jobs by humans as a result of automation. This will happen at tremendous speed, so states have to take proactive measures to protect people from losing their jobs. Technology is indispensable for sophisticated living, but it plays a vital role in medical sectors, farming sectors and, even, to predict the climate. Hence, the law makers, while making laws, have to keep in mind that the new law should not curtail the technological development, and such technological development should not be at the cost of people's rights.

14 Racial Profiling. American Civil Liberties Union (May. 20, 2019, 11:20 PM), <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling>.

STANDARD OF REVIEW IN SET-ASIDE AND ENFORCEMENT PROCEEDINGS RELATING TO ARBITRAL AWARDS IN INDIA

Gracious Timothy Dunna

Abstract

The question of standard of review in cases under Sections 34 and 48 of the 1996 Act remains uncertain, and courts have not dealt with this issue with any clarity. This, in fact, concerns more with the question of “who” would have the final say over arbitral decisions: whether it is the court, or the tribunal; and whether this would depend on the issue that was decided – procedural, jurisdictional, or substantive. This piece concludes that Sections 34(2)(a) and 48(1) of the 1996 Act entail a de novo standard of review, and that Sections 34(2)(b) and 48(2) entail a limited or restrictive standard of review, which is now statutorily expressed. What it ultimately points to is a balance of powers between courts and tribunals under the scheme of the 1996 Act.

I. INTRODUCTION

The most basic question that forms the premise of this piece is: ‘Who’ should have the final say on an arbitral decision – should it be the courts, or should it be the arbitral tribunal? And, does this question depend on the issue that was decided – whether procedural, jurisdictional, or substantive?

The theme here has great relevance to address how courts should deal with challenges arising under Sections 34 and 48 of the Arbitration and Conciliation Act, 1996 (‘1996 Act’), dealing with setting aside of ‘Indian awards’¹ and refusal of enforcement of foreign awards, respectively. These provisions are

1 The phrase ‘Indian awards’ is to conveniently refer to arbitral awards that are rendered by tribunals juridically seated in India, whether international commercial arbitration or not.

nowhere close to being simple in their language, meaning, and effect. And, nor should the role of the courts, and the courts' viewing of these provisions, should be any simple;² particularly, the standard of review of each ground for set-aside or refusal of enforcement. For instance, should a court equally view a contention of breach of due process and a challenge claiming the violation of public policy of India, i.e., with high deference to the tribunal's decision, entailing no reappreciation of facts and law? Should a jurisdictional decision be considered any different from a decision on merits (i.e., on the substance), thereby deserving a treatment that is different from a decision on merits?

Arbitral decisions bear a great force to be taken lightly. In support of this mechanism, the State itself lends power to the arbitration agreement, the arbitrator, and the arbitral decisions. Arbitral awards are given *res judicata* effect, and the contours of an arbitrator's power are vast and judge-like and must not be allowed to escape any checks-and-balances that could be legitimately imposed by statute or judicial control. Hence, there is more reason why the 'who' is so fundamental, even as a matter of policy and India's jurisprudence on the law of arbitration. A judicial system needs balancing between judicial control and the independence and legitimacy of private dispute resolution methods like arbitration, but not at the expense of the rights of the parties involved.

This piece will address these intriguing, and sometimes disconcerting, questions in the Indian context vis-à-vis the 1996 Act. While the regimes for an Indian seated arbitration versus a foreign seated arbitration are quite divided, I will nevertheless discuss them together because the question of standard of review is similarly applicable, whether it be an Application under Section 34 for setting aside an award, or a challenge under Section 48 for refusing the enforcement of a foreign award.

An abridged conclusion of this piece is that Section 34(2)(a) and Section 48(1) of the 1996 Act entail a *de novo* standard of review, i.e., affording no

2 See generally, Markham Ball, The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration, 22(1) ARB. INT'L 73 (2006).

deference to jurisdictional and procedural decisions of the tribunal; and that Section 34(2)(b) and Section 48(2) entail a limited or restrictive review, i.e., affording high deference to arbitral awards deciding the merits, prohibiting any reappreciation of facts or law. As for the question of ‘who,’ the ultimate decider is, it is an authority that is shared between a court and a tribunal, depending on the nature of the issue decided. In other words, the law allocates such a specific role and power to a court and a tribunal, and it is doubtful whether there can be any re-allocation of such a specific role and power by means of an agreement between the parties, even if it were an agreement that was clear and unmistakable.

To get to this conclusion, this piece has been divided into two major segments with several sub-segments. Segment II elaborates on the internal divide within Section 34 and Section 48; that it is possible to view these provisions having categorized the various defences for challenging an Indian award or refusing the enforcement of a foreign award. These give us categories of procedural, jurisdictional, and substantive sub-provisions. Further, in Segment III, I argue the applicable standard of review for each of these categories through statutory interpretation of Section 34 and Section 48 and by considering the overall scheme of the 1996 Act. In Segment IV, I further buttress my arguments by relying on foreign national court decisions applying Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“New York Convention”). Finally, Segment V will present a few concluding remarks on the entire theme of this piece.

II. DIVIDE WITHIN SECTION 34 AND SECTION 48

Categories of Procedural, Jurisdictional, and Substantive Defenses

Section 34 and Section 48 of the 1996 Act have two significant internal divisions that put respective corresponding sub-provisions under a different light: Section 34 has clauses (2)(a) and (2)(b), each of which are different in nature; the same correspondingly applies to Section 48, which has sub-sections 48(1) and 48(2). On examining Section 34(2)(a) vis-à-vis Section 48(1)—which are

*Standard of Review in Set-Aside and Enforcement Proceedings
Relating to Arbitral Awards in India*

analogous—we may draw the understanding that these provisions specifically postulate procedural and jurisdictional defenses. In other words, they postulate exceptions relating to due process and competence of the arbitral tribunal. The following chart helps dissect these provisions more clearly:

Section 34(2)(a)	Section 48(1)	Category
34(2)(a)(i): Incapacity	Section 48(1)(a): Incapacity and invalidity of the arbitration agreement	Jurisdiction or competence
34(2)(a)(ii): Invalidity of the arbitration agreement		
34(2)(a)(iii): Notice and opportunity to present the case	Section 48(1)(b): Notice and opportunity to present the case	Due process or procedural
34(2)(a)(iv): Scope of the award	Section 48(1)(c): Scope of the award	Jurisdiction or competence
34(2)(a)(v): Composition of the tribunal or procedure not in accordance with arbitration agreement or the 1996 Act	Section 48(1)(d): Composition of the tribunal, or the procedure was not in accordance with arbitration agreement or the governing law	Due process or procedural
	Section 48(1)(e): Award not yet binding, or set-aside or suspended at the seat	A question of conflict of laws

This is radically different from the latter halves of Section 34 and Section 48 of the 1996 Act, which deal with substantive questions, i.e., issues relating to the merits of the dispute. Again, the following chart throws more light onto the essence of Section 34(2)(b) and Section 48(2):

Section 34(2)(i)	Section 48(2)	Category
34(2)(b)(i): Arbitrability	Section 48(2)(a): Arbitrability	Substantive or merits-related
34(2)(b)(ii): Public policy of India	Section 48(2)(b): Public policy of India	Substantive or merits-related (Note, however, that ‘public policy’ also has a procedural connotation)

Thus, it is quite evident that objections relating to jurisdiction and due process have been clubbed together under Section 34(2)(a) and Section 48(1), respectively; whereas the substantive challenges are put in a separate basket under Section 34(2)(b) and Section 48(2), respectively. Consequently, we must operate under the indispensable assumption that each of the defenses were specifically positioned by the legislature for a particular reason, indicative of the different norms in their application by the courts. “The legislature could have simply provided one catch-all ground; the reason why it provided different grounds was because each ground had its own purpose and domain within which it operates.”³

III. APPLICABLE STANDARD OF REVIEW

Generally, judicial review signifies a superior court’s power to review the decisions of the lower judiciary or other branches or levels of government, especially a court’s power to invalidate legislative and executive actions.⁴ Such judicial review is also available for challenging an arbitral award, rendered by an arbitrator, under the procedure laid down in the 1996 Act. What’s more, judicial review may have varying standards or degrees of review. A *de novo* review, for instance, is a court’s non-deferential review of a judicial (or quasi-judicial) decision or a government action through a review of the records plus any additional evidence the parties present.⁵ Likewise, in the context of the Code of Civil Procedure, 1908 (CPC), an appellate review entails the examination of a lower court’s decision by a higher court, which can affirm, reverse, or modify, the decision.⁶ The scope of such review under the CPC is available

3 Badrinath Srinivasan, Public Policy and Setting Aside Patently Illegal Arbitral Awards in India (March 27, 2008) (unpublished manuscript) (on file with the author).

4 *See generally*, LIMITED GOVERNMENT AND JUDICIAL REVIEW (TAGORE LAW LECTURES BY DURGA DAS BASU) (P. Ishwara Bhat ed., 2015); BLACK’S LAW DICTIONARY 924 (Bryan A. Garner ed., 2009).

5 *See* BLACK’S LAW DICTIONARY 112 (Bryan A. Garner ed., 2009) (“appeal *de novo*. An appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.”).

6 CODE CIV. PROC. § 96 (Ind.).

on questions of law and fact.⁷ In contrast, a limited review is when the court's review is restrictive in nature, giving deference to the concerned judicial (or quasi-judicial) decision or government action.⁸

In respect of the Section 34 and Section 48 of the 1996 Act, which are statutory expressions of judicial review of arbitral awards (Indian and foreign), the provisions itself do not specify the applicable standard of review, except with respect to 'public policy of India' in Sections 34(2)(b)(ii) and 48(2)(b).⁹ Concerning Sections 34(2)(b) and 48(2), a plethora of judicial precedents have also held that arbitral awards must be treated with high deference, more so in the case of foreign awards,¹⁰ specifically in relation to challenges made on the ground of breach of public policy.¹¹ Various decisions finally culminated into the Arbitration and Conciliation (Amendment) Act, 1996 (2015 Amendments), which specified in the context of 'public policy of India' that there shall be no review of merits, eliminating grounds like erroneous application of the law and restricting re-appreciation of evidence.¹² Thus, high deference is afforded to an arbitrator's determinations on merits, except where grounds for non-arbitrability and violation of public policy exist.

While this is an established position of the law in India, the issue is that some precedents may have casually muddled any difference in the standard of review

7 *Infra* note 17.

8 See BLACK'S LAW DICTIONARY 1048 (Bryan A. Garner ed., 2009) ("manifest weight of the evidence. A deferential standard of review under which a verdict will be reversed or disregarded only if another outcome is obviously correct and the verdict is clearly unsupported by the evidence.").

9 See Arbitration and Conciliation Act, No. 26, Acts of Parliament, 1996, §§ 34(2)(b)(ii) Explanations 1 and 2, 34(2A), 48(2)(b) Explanations 1 and 2 (Ind.). See also *MMTC Ltd. v. Vedanta Ltd.*, 2019 S.C.C. OnLine SC 220, ¶ 13 (Ind.).

10 See, e.g., *Shri Lal Mahal v. Progetto Grano Spa*, (2014) 2 S.C.C. 433 (Ind.) (The expansive construction accorded to the term 'public policy' cannot apply to the use of the same term 'public policy of India' in section 48(2)(b)).

11 *MMTC Ltd. v. Vedanta Ltd.*, 2019 S.C.C. OnLine SC 220, ¶¶ 11–13 (Ind.).

12 See Arbitration and Conciliation Act, No. 26, Acts of Parliament, 1996, §§ 34 and 48 (Ind.). See also, *supra* note 10.

between Sections 34(2)(a) or 48(1) and Sections 34(2)(b) or 48(2), respectively, by quoting the entire Section as is, without bifurcating its former and latter halves. Nonetheless, such precedents always seem to point at the ‘merits,’ that a court should not sit on appeal, or that it should not entail any review on the merits of the dispute. For instance, in *Shri Lal Mahal v. ProgettoGrano Spa*, the Supreme Court held that:¹³

“... Section 48 of the 1996 Act does not give an opportunity to have a ‘second look’ at the foreign award in the award - enforcement stage. The scope of inquiry under Section 48 does not permit *review of the foreign award on merits*. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.” (emphasis added)

Moreover, the language of the provisions of the 1996 Act are also indicative of a different standard of review for different grounds of challenge under both Section 34 and Section 48 of the 1996 Act. Section 34(2)(a) states that an arbitral award may be set-aside by the court if the “party making the application furnishes proof” of any one of the grounds. This is drastically different from the latter half, under Section 34(2)(b), which states that an arbitral award may be set aside if the “Court finds that” any one of the grounds is satisfied. The exact same language also features in Section 48 of the 1996 Act. Section 48(1) states that enforcement may be refused “only if that party furnishes to the Court proof” of any one of the grounds. This use of the language—requiring that “proof” be furnished—is distinct from Section 48(2) which merely states that enforcement “may be refused if the Court finds that” any one of the grounds is satisfied.

The idea that “proof” be furnished needs further exploration. But, at the least, it would be safe to conclude that this significant difference in language clearly indicates that the standard of review contemplated was different in the

13 *Shri Lal Mahal v. Progetto Grano Spa*, (2014) 2 S.C.C. 433, ¶43 (Ind.).

case of Sections 34(2)(a) or 48(1), as compared to Section 34(2)(b) or 48(2), respectively.

How do we understand the word “proof”? Black’s Law Dictionary defines the word as the “establishment or refutation of an alleged fact by evidence; the persuasive effect of evidence in the mind of a fact-finder.”¹⁴ Further, it defines “proof” as “[e]vidence that determines the judgment of a court.” In other words, Sections 34(2)(a) and 48(1) require the use of evidence and arguments to establish the grounds constituting the said provisions. And, since a party is required to furnish proof under Sections 34(2)(a) and 48(1), that necessarily involves the right of the other party to produce countervailing evidence and arguments to establish a proposition.

On what included “proof,” in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi (Emkay Global)*,¹⁵ the Supreme Court clarified the legal position that an Application for setting aside will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues under Section 34(2)(a), they may be brought to the notice of the court by way of affidavits filed by both parties. The Supreme Court also cautioned that cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth would generally emerge through a reading of the affidavits. This was keeping in mind the object of the 1996 Act and expedient conclusion of summary proceedings under Section 34.

Unfortunately, the Supreme Court in *Emkay Global* wasn’t clear about the applicable standard of review; rather, it only provided an understanding that the word “proof” included further affidavits filed by parties (external evidence) besides the records that were before the arbitral tribunal (internal evidence).¹⁶

¹⁴ BLACK’S LAW DICTIONARY 1334 (Bryan A. Garner ed., 2009).

¹⁵ (2018) 9 S.C.C. 49, ¶ 21 (Ind.).

¹⁶ See generally, REPORT OF THE HIGH-LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA 65 (2017); Arbitration and Conciliation (Amendment) Bill, No. 100 of 2018, §§ 7–8 (Ind.).

However, the point that courts would have to decide according to the parties' submission of internal and external evidence, which may include resubmission of the evidence and arguments already tested before the tribunal, is no different from a *de novo* review, or determining the correctness of a tribunal's findings on matters falling under purview of Section 34(2)(a) or Section 48(1) of the 1996 Act.

With the passing of the Arbitration and Conciliation (Amendment) Act, 2019, the parliament has now introduced the phrase "establishes on the basis of the record of the arbitral tribunal that" to substitute the phrase "furnishes proof that." Essentially, this excludes *Emkay Global* to a large extent: *Emkay Global* was specifically with respect to the phrase "furnishes proof that," suggesting that a court could go beyond the record if relevant to the determination of an issue. After the substitution, *Emkay Global* has been reduced to only the record of the tribunal, i.e., it now excludes any external material. The 2019 Amendment, however, could be a problematic restriction to parties who, for instance, would need to rely on materials not forming a part of the record if asserting a challenge on the ground of bias. It is also worth noting that the question of the applicable standard of review is quite distinct from the issue of interpretation of the grounds featuring in Section 34 and Section 48. Generally, these grounds for challenging an Indian award or refusing the enforcement of a foreign award are subject to a narrow interpretation, and this has been repeatedly held by the courts (and it is also a general principle of interpretation that exceptions should be narrowly interpreted).¹⁷ For example, viewing Sections 34(2)(a)(ii) or 48(1)(a) in the narrow sense would merely cover "validity" of the arbitration clause, but it may not cover questions pertaining to "formation" or the very existence of such arbitration clause, which would possibly require a stretch in the interpretation of Sections 34(2)(a)(ii) or 48(1)(a). Another example is the interpretation of the notion of being "unable to present his case" under Sections 34(2)(a)(iii) and 48(1)(c). A narrow interpretation would avoid a meaning like "physical" presence and include representative participation.

17 See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co.*, (2008) 155 DLT 457, 475; *Renusagar Power Co. Ltd. v. General Electric Co.*, A.I.R. 1994 S.C. 860 (Ind.).

Putting it all together in a graphical representation, the issue of interpretation of grounds lies on the horizontal axis, i.e., how wide or narrow is an exception, whereas the question of applicable standard of review lies on the vertical axis, i.e., how shallow or deep is the review of a court (or how much deference should be afforded to an arbitral award).

JURISDICTIONAL DEFENSES

Among the categories of grounds under Sections 34(2)(a) and 48(1) of the 1996 Act, there are jurisdictional defenses (or “gateway” issues) like questions relating to the validity of the agreement to arbitrate, and what issues should and can be arbitrated under the arbitration agreement (i.e., scope of the arbitration agreement).

In relation to jurisdictional questions under Sections 34(2)(a)48(1), the overall scheme of the 1996 Act evidently promotes a *de novo* review when entertaining jurisdictional questions. The argument runs in the following manner. Under Section 16, where a plea that the tribunal lacks jurisdiction is accepted, the remedy provided is an “appeal” under Section 37(2)(a),¹⁸ since such decision is not an interim award.¹⁹ The use of the term “appeal” here is important and that it is not defined under the 1996 Act. Nevertheless, it is established that the meaning and scope of “appeal” under the CPC is correctness of the findings of facts and law.²⁰ While the applicability of the provisions of CPC to court

18 *See generally*, Jain Studios Ltd. v. Maitry Exports Pvt. Ltd., (2007) 145 D.L.T. 490 (Ind.) (plea that a certain claim barred by limitation was rejected by the arbitrator, held, appeal under S. 37(2)(a) was not possible, only option open is to challenge the award under S. 34 after final adjudication upon the matter.)

19 Union of India v. East Coast Builders & Engineers Ltd., A.I.R. 1999 Del 44 (Ind.) (If the legislature had to treat an order under S. 16 to be an interim award, it would not have provided for an appeal under Section 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and the legislature would have left challenge to such order as well under Section 34 of the Act.).

20 In the context of the Code of Civil Procedure, *see* B. V. Nagesh & Anr. v. H. V. Sreenivasa Murthy, (2010) 13 S.C.C. 530 (Ind.) (“The first appeal is a valuable right, and the parties have a right to be heard both on questions of law and on facts, and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving

proceedings under Section 37 of the 1996 Act is a question that remains to be conclusively answered by the Supreme Court,²¹ the “standard of appeal” under Section 37(2)(a) in the context Sections 34(2)(a)(i), (ii), and (iv) should not have any qualms – the standard would be appellate review or *de novo* review on the correctness of the finding of facts and law.²²

Those with a contrary opinion may rely on the recent Supreme Court’s decision in *MMTC Ltd. v. Vedanta Ltd.* (MMTC) to argue that interference under Section 37 cannot travel beyond the restrictions Section 34 of the 1996 Act and that “there cannot be any independent assessment of the *merits* of the award” (emphasis added).²³ However, it must be noted that MMTC was laid down in the context of Section 34(2)(b) or “merits,” but not in the context of Section 34(2)(a). Even if we go by MMTC’s logic, the standard of review under Section 37(2)(a) would be dependent on the limitations or liberties of Section 34(2)(a), which is ultimately reasoned to be *de novo* review.

In *Sarkar and Sarkar v. State of West Bengal*, the Calcutta High Court has rightly held that the task of the court under Section 37(2)(a) (i.e., appeal from a tribunal’s order accept the plea of lack of jurisdiction) is to examine whether the ruling of the tribunal under Section 16 (accepting the lack of jurisdiction) on the existence of the arbitration agreement is factually and legally, as well as the arbitrability of the subject matter, is right or wrong in the appellate jurisdiction. It was further held that, unlike Section 34 read with Section 37, the court’s jurisdiction as a first appellate court is not a restricted one. Therefore, it is open for the court to consider all aspects of the matter; thereby, the court can examine as to whether the interpretation of an arbitration clause given by

reasons in support of the findings.”); *Santosh Hazari v. Purushottam Tiwari* (Deceased) by L.Rs., (2001) 3 S.C.C. 179 (Ind.); *Madhukar & Ors. v. Sangram & Ors.*, (2001) 4 S.C.C. 756 (Ind.)

21 See *Mahanagar Telephone Nigam Ltd. v. Applied Electronics Ltd.*, (2017) 2 S.C.C. 37 (Ind.).

22 See *Sarkar & Sarkar v. State of West Bengal*, (2007) 2 Arb. L.R. 396, 398 (Ind.), *aff’d*, (2018) 12 S.C.C. 736 (Ind.).

23 *MMTC Ltd. v. Vedanta Ltd.*, 2019 S.C.C. OnLine SC 220, ¶ 14 (Ind.).

an arbitrator is correct or not. More importantly, this decision of the Calcutta High Court has been affirmed by the Supreme Court in 2018.²⁴

Further, a jurisdictional decision accepting the plea of lack of jurisdiction is clearly treated to be different in character (as compared to an award), not subjected to a challenge regime under Section 34 of the 1996 Act but subject to an appeal under Section 37.²⁵ But where a plea that the tribunal lacks jurisdiction is not accepted, the remedy is different because the jurisdictional decision is combined with the decision on merits, i.e. the final award. In this case, the remedy for a jurisdictional challenge would lie under Sections 34(2)(a)(i), (ii), or (iv) and it cannot be that the standard here inconsistently changes; it would remain a *de novo* standard of review, i.e. to examine the correctness of findings of facts and law. The logic also boils down from nature of a tribunal's jurisdictional decision:²⁶ "It cannot be accepted that the order under S. 16 would change its nature upon two different contingencies; that is to say, where the order rejects the plea of no jurisdiction, it becomes an interim award, and where the arbitral tribunal allows the plea of no jurisdiction, it is not an interim award and only appealable. Therefore, it can easily be interpreted that in either case, it is only an interim order and not an interim award." Thus, it would be inconsistent to hold that the tribunal's decision on jurisdiction under Section 16 (an "interim order" by nature) would be subjected to set-aside standards applicable to an arbitral award on merits under Section 34(2)(b). Accordingly, the standard of review under Sections 34(2)(a)(i), (ii), and (iv) would have to be same as Section 37(2)(a) (or vice-versa, going by the decision in *MMTC*).

Further, in the context of jurisdictional decisions vis-à-vis Section 48(1)(a), the standard of review becomes clearer when considering the overall scheme of the 1996 Act reflected in Part I (as explained above). And, given that Section 34(2)(a) is exactly like Section 48(1)(a), the 1996 Act envisions courts to have

24 *State of West Bengal v. Sarkar & Sarkar*, (2018) 12 S.C.C. 736 (Ind.).

25 *Union of India v. East Coast Builders & Engineers Ltd.*, A.I.R. 1999 Del 44 (Ind.).

26 *Union of India v. East Coast Builders & Engineers Ltd.*, A.I.R. 1999 Del 44 (In d.).

final authority on jurisdictional questions, whether it's an Indian award or foreign award.

DUE PROCESS DEFENSES

In addition to jurisdictional questions, Sections 34(2)(a) and 48(1) contain various exceptions that are due process oriented, i.e., concerning fundamental procedural issues that may arise in the process of arbitration and necessitate due protection. These exceptions have a different tone (as compared to review of jurisdictional or substantive decisions), since they would majorly involve external evidence rather than internal evidence (briefly mentioned above) and directly relate to the process or the procedure followed in the entire proceedings. In such challenges relating to due process, a court's review would practically involve considering proof whether parties were treated with equality and whether each party was given a full opportunity to present his case. Given their fundamental nature (being notions of basic fairness),²⁷ these grounds have been placed under Sections 34(2)(a) and 48(1) of the 1996 Act, respectively, demanding proof (internal and external evidences) from a party seeking to set-aside an Indian award or refuse the enforcement of a foreign award.

I. INTERNATIONAL PERSPECTIVE

In the U.S., in *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.* (*China Minmetals*), a U.S. Court of Appeals held that it “must make an independent determination of the agreement’s validity [...] at least in the absence of a waiver precluding the defence.”²⁸ This was in relation to Article V(1)(a) of the New York Convention which domestically reflects in the Indian system as Section 48(1)(a) of the 1996 Act.

However, under U.S. law, the question of “who” the ultimate authority is also depends on what parties agree. This was held in *First Options of Chicago, Inc. v. Kaplan* (*First Options*): “[i]f [the parties agreed to submit arbitrability to

²⁷ See Arbitration and Conciliation Act, No. 26, Acts of Parliament, 1996, § 18 (Ind.)

²⁸ 334 F.3d 274 (3d Cir. 2003) (U.S.).

arbitration] then the court's standard for reviewing the arbitrator's decision about the matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate... That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.”²⁹ In *BG Group plc v. Republic of Argentina (BG Group)*,³⁰ the U.S. Supreme Court reiterated that the trend was to give high deference to the decision of the arbitrator concerning issues of procedural and substantive arbitrability (where there is a clear and unmistakable evidence of “delegation” or “re-allocation” of authority to the arbitrator by the parties). Note, such re-allocation would be unlikely in the Indian system reflecting the UNCITRAL Model Law on International Commercial Arbitration (Model Law) which statutorily cements the allocation of final authorities between courts and arbitral tribunals. In the 1996 Act, it would not be possible to re-allocate the powers of the court and of the tribunal via parties’ agreement, regardless of how clear and unmistakable the intention is.

Moreover, in *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs (Pakistan)*, the U.K. Supreme Court referred to *China Minmetals* and noted that Article V (1)(a) does not restrict the nature of the review to be carried out by the court asked to enforce the award.³¹ Likewise, in Germany, various courts have held that they were not bound by the arbitral tribunal’s findings on jurisdictional questions.³² Simply put, the standard of review applicable to the tribunal’s jurisdictional determinations is correctness; that is, whether the tribunal was correct in determining that it had jurisdiction.

29 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (U.S.).

30 *BG Group plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014) (U.S.).

31 [2010] U.K.S.C. 46 (Eng.).

32 *See* Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 Sch 5/99; Oberlandesgericht [OLG] Celle, Germany, 18 September 2003, 8 Sch 12/02. *See also*, Oberlandesgericht [OLG] Celle, Germany, 4 September 2003, 8 Sch 11/02, XXX Y.B. COM. ARB. 528 (2005) (although the court here did not rely on Article V(1)(a) of the New York Convention). With respect to the second limb of Article V(1)(a), *see* Oberlandesgericht [OLG] Celle, Germany, 14 December 2006, 8 Sch 14/05.

In the context of Article V(1)(c) of the New York Convention—reflecting in Section 48(1)(c) of the 1996 Act—some foreign national courts have taken the view that courts are not bound by the tribunal’s decisions with respect to the scope of the submission to arbitration.³³ In this regard, a U.S. Court of Appeals has held that it would “review *de novo* a contention that the subject matter of the arbitration lies outside the scope of a contract” (emphasis added).³⁴ This, of course, subject to the holding of the U.S. Supreme Court in *First Options* and *BG Group*, where such gateway issues are delegated to the arbitrator by the parties through a clear and unmistakable agreement. Therefore, in determining whether an award goes beyond the scope of the arbitration agreement or the terms of submission, a court would have to evaluate the relationship of the decision rendered by the arbitrator vis-à-vis the issues submitted; in doing so, the arbitrator’s mandate must not be interpreted restrictively and include everything that is closely connected to the arbitration agreement and to the question she has to decide.

IV. CONCLUSION

Ultimately, Section 34(2)(a) and Section 48(1) of the 1996 Act offer a standard of checks-and-balances to prevent any miscarriage of justice, on jurisdictional questions and where there is breach of the principles of natural justice. In this regard, in India, the ultimate authority and role has been statutorily entrusted onto courts, allowing *de novo* review of arbitral decisions on issues included within Sections 34(2)(a) and 48(1). The balance between courts and arbitral tribunals is, nevertheless, maintained by giving high deference to tribunals’ decisions on merits or substantive issues.

33 See, e.g., Debt Collection and Bankruptcy Chamber of the Court of Appeal, Switzerland, 16 September 2002, 14.2002.00042 (Switz.).

34 *Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int’l Corp.*, 820 F.2d. 1531 (9th Cir.1987) (“[S]ince we find the arbiters’ authority to reach the main decision was within the scope of the letter agreement, it follows the arbiters also had the authority to award costs and fees for obtaining the arbitral decision.”)

LAW AND SEXUALITY: COMMENTARY ON JOSEPH SHINE VS. UNION OF INDIA AND OTHERS 2018 SC

Owais Hasan Khan
Farheen Arif

Abstract

In Joseph Shine vs. Union of India, constitutional bench of Supreme Court unanimously declared section 497 of IPC, dealing with the offence of adultery, as unconstitutional. Present paper analyses the Joseph Shine judgement from the perspective of law, sexuality and gender justice. It discusses the interface between law, state and sexuality. State and its instrumentalities have traditionally been regulating sexuality of its citizenry. However, still, legal system lacks precise rules which could provide a limit to the State's regulation of sexuality of its citizenry. Present paper attempts to theorise and propose guidelines which can be considered while deciding the legitimacy or otherwise of the state regulation of sexuality.

INTRODUCTION

Supreme Court's judgement in *Joseph Shine vs. Union of India*¹ falls in the jurisprudence of reformatory constitutionalism. It reiterates the constitutional objective of gender justice, human dignity and the creation of an egalitarian society where there is absolute equality between the sexes. The judgement deeply loathes and condemns patriarchal and condescending practices in sections of Indian society, where women are treated as subordinate to men or, in worst cases, as property of the men.

Joseph Shine has also revived the debate regarding the interface between law, state and sexuality. State, through the instrumentality of the law, has traditionally

1 AIR 2018 SC 4898.

been regulating sexual behaviours of its citizenry. Such regulations and, in some cases, criminalisation of certain sexual behaviours by the State is the result of social mooring, popular morality, local culture and religious ideologies. The present legal position in India still lacks precise rules which could provide a limit to which law can regulate the sexuality of an individual. There is an urgent need to demarcate the area within which the state instrumentality should act when it comes to the sexuality of an individual, crossing which should be considered as a violation of the right to freedom, privacy and 'sexual self-determination.'

The present judgement deals with the constitutional validity of Section 497 of IPC which penalises the act of Adultery and Section 198 (2) of the CrPC which provides prosecution for offences against marriage. It defines the offence of Adultery, as "Whoever has sexual intercourse with a person who is, and whom he knows, or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case, the wife shall not be punishable as an abettor."²

Constitutional Bench of the Supreme Court, while unanimously declaring Section 497 as unconstitutional, held that it violates the principle of equality as mandated under Article 14 and right to dignity as enshrined under Article 21. The bench also held that 'adultery' does not fall in the category of crime, although it is a ground for civil action in the form of action for divorce by the other spouse to the marriage.

PART I

FACTUAL BACKDROP, ISSUES AND THE JUDGEMENT

Since independence, there have been a plethora of cases before the Supreme Court and different High Courts of India on the constitutional validity of

2 S. 497, Indian Penal Code.

Section 497 of IPC which selectively criminalises the act of adultery along with having an andocentric language construction. Most significant of cases where Section 497 was challenged were *Yusuf Abdul Aziz v. State of Bombay*,³ *Sowmithri Vishnu v. Union of India and Another*,⁴ *V. Revathi v. Union of India*,⁵ *W. Kalyani v. State through Inspector of Police and another*.⁶ In all these earlier cases, the Supreme Court refused to strike down Section 497 as unconstitutional.

The provision regarding Adultery was borrowed into Indian criminal law jurisprudence from the common law conception of criminalising adultery. However, in England itself, the act of adultery has been decriminalised. Divorce and Matrimonial Causes Act, 1857, abolished the criminal action for adultery while retaining the right of the husband to claim damages for adultery committed by the wife.⁷ Award of the damages was the manifestation of how law considered women, in general, and wife, in particular, the property of men. Due to its patriarchal and condescending ramification, even the provision of damages to the husband for the adultery of the wife was abolished by the Law Reforms (Miscellaneous Provisions) Act, 1970.⁸

The present case is a writ petition filed under Article 32 of the Indian Constitution by Mr. Joseph Shine, an Italian hotelier of Indian origin. Under the instant writ petition, constitutional validity of Section 497 was again challenged as being violative of Articles 14, 15 and 21 of Indian Constitution.

Following issues were raised before the court: First, whether Section 497 of Indian Penal Code and Section 198 of the Code of Criminal Procedure are violative of Articles 14 and 21 of the Constitution of India. Second, whether the definition of Adultery under section 497 is arbitrary, inconsistent and, therefore, cannot be treated as a crime.

3 AIR 1954 SC 321.

4 AIR 1985 SC 1618.

5 (1988) 2 SCC 72.

6 (2012) 1 SCC 358.

7 Section LIX of Divorce and Matrimonial Causes Act, 1857.

8 Section 4 of Law Reforms (Miscellaneous Provisions) Act, 1970.

DECISION AND *RATIO DECIDENDI*

The judgement in the present case was unanimously given by a constitutional bench of the Supreme Court consisting of Chief Justice Deepak Misra, Justice Khanwilkar, Justice Nariman, Justice Chandrachud and Justice Indu Malhotra.

Before pronouncing the judgement on incongruity between Section 497 IPC *vis-a-vis* mandates of Articles 14 and 21, Justice Misra and Justice Khanwilkar dwelled on the earlier pronouncements of the Supreme Court on the same issue. In the *Yusuf Abdul Aziz v. the State of Bombay*,⁹ the constitutional bench of the Supreme Court held that Section 497 is constitutionally valid, as it is saved by Article 15 (3) which authorises the State in making any special provision for women and children. Similarly, in *Sowmithri Vishnu v. Union of India*¹⁰ and *Another and V. Revathi v. Union of India*,¹¹ Court upheld the validity of Section 497 vis-a-vis Article 14 on the ground that no constitutional provision is violated merely by defining the offence of adultery so as to restrict the class of offenders to men. Justice Misra and Justice Khanwilkar decided on this issue on the basis of right to equality and the right to dignity as guaranteed under Articles 14 and 21.

Language construction of the impugned section, itself, shows inherent male chauvinism when it says, “...without the consent or the connivance of that man...” Section postulates wife as the chattel of the husband and projects her as totally subservient to the will of the husband who is the sole master over her. This postulation of the section is against the mandate of Article 14 requirement for equality and non-discrimination.

Further, the section could also not be saved by Article 15 (3), as it is inconsistent, and in one situation, it protects the women and, on the other situation, it does not protect the women. The situation in which it does not protect the women is when under Section 198 of CrPC “person aggrieved” is defined.

9 AIR 1954 SC 321.

10 AIR 1985 SC 1618.

11 (1988) 2 SCC 72.

Definition of adultery under section 497 is selective, arbitrary and inconsistent. On the one hand, the impugned section intends to promote and protect matrimonial honesty of the spouses towards each other. However, on the other hand, it does not criminalise the extramarital relationship of a married man with an unmarried woman or a widow. Similarly, the impugned section, also, does not penalise the woman who was a part of the adulterous relationship along with the man who is penalised in the same section. Here, the definition of adultery given in Black's Law Dictionary is worth noticing: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."¹²

Furthermore, the definition of the expression "person aggrieved" under section 198 of Criminal Procedure Code is also selective and arbitrary. Section 198 (2) considers the husband of the woman only as the party aggrieved. However, it does not consider the wife of the adulterer as an aggrieved person. Accordingly, the Court held that the definitions of the crime and aggrieved person under sections 497 of the Indian Penal Code and 198 of the Criminal Procedure Code are selective, arbitrary and irrational.

Another aspect decided in the case was whether adultery can be considered as a criminal offence. It was held, in this regard, that treating adultery as a crime is like the State entering into the private realm of an individual. Although the ideal situation of matrimonial alliance demands that parties are honest with each other, and dishonesty, in terms of extra-matrimonial affairs, can be considered as a ground for divorce, yet it should not be a criminal offence. Adultery cannot be treated as a crime, as it offends two facets of Article 21, that is, the dignity of the husband and wife and their right to privacy. The present judgement of the court establishes the following ratio:-

- a. Section 497 of the Indian Penal Code is inconsistent with the mandates of Articles 14 and 21 and is declared unconstitutional: The main reason for its unconstitutionality is its patriarchal narrative where women are presented

12 Black's Law Dictionary, Revised 4th Edition, St. Paul Minn. West Publishing Co., 1968, p.71.

as the chattel of the men. As Justice Misra pointed out, “On the reading of the provision, it is demonstrated that women are treated as subordinate to men, inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of the man and totally subservient to the will of the master.”¹³ Thus, the provision itself relegates the position of the women in society and buttresses the medieval patriarchal social order. Justice Nariman pointed out that what section 497 punishes is not adultery *per se*, but the “proprietary interest of the married man in his wife.”¹⁴

- b. Definition of adultery under section 497 is manifestly arbitrary and inconsistent: The definition of adultery under section 497 has been a bone of contention from a long time. The bare reading of the section showcases that it does a selective penalisation of the crime of adultery. As Justice Misra observed, “Section 497 IPC does not bring within its purview an extramarital relationship with an unmarried woman or a widow. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary, as it does not even appear to be rational”¹⁵
- c. The act of adultery cannot be treated as a crime: By analysing different aspects of the crime of adultery *per se* and adultery as defined under Section 497, the court held that adultery cannot be treated as a crime because it does not fit in the conceptualisation of crime. The act of adultery is a personal moral choice made by an individual in which the State should not interfere. The court observed, “Treating adultery as an offence, we are disposed to think, would tantamount to the State entering into a real private realm.”¹⁶ However, the act of adultery will remain a ground for divorce under relevant personal laws of the parties, without being a criminal offence.

13 Para 21, Justice Misra’s judgement in *Joseph Shine v. Union of India*.

14 Para 01, Justice Nariman’s judgement in *Joseph Shine v. Union of India*.

15 Para 23, Justice Misra’s judgement in *Joseph Shine v. Union of India*.

16 Para 49, Justice Misra’s judgement in *Joseph Shine v. Union of India*.

PART II

REFLECTIONS ON THE JUDGEMENT

The Supreme Court's decision in the *Joseph Shine v. Union of India* is another benchmark judgement in the court's endeavour for gender justice, individual dignity and equity. The judgement reiterated that the law has to be read in a dynamic fashion. The law and its interpretation should and must change with time and social development. In a similar manner, the Constitution must also be considered as organic and a living document. It has to be remembered that law can be either instrument of social reformation or the reason for 'social stagnation.' Therefore, law-making has to be taken as a very pious duty which has to be diligently performed in a just and an equitable manner.¹⁷

The Court buttressed that all historical perceptions and so-called cultural norms which degrade the position and the individuality of the women should be purged. Any kind of patriarchal monarchy of men over women cannot be tolerated. This judgement is also a manifestation of the fact that, sometimes, even law perpetuates gender stereotype and inequality. As Justice Chandrachud pointed out, "The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices."¹⁸

Another novel aspect of the judgement is that it tends not to delve into the individual morality aspect, but to decide the criminality of an act on the basis of popular morality yardstick. Accordingly, it held that adultery cannot be treated as a crime, as the act falls in the real private realm of an individual where the state should not interfere. Sexual preferences or orientations of an individual should remain as a moral question for the person concerned, where the State and the law must not take a stand in terms of criminalisation.

17 See Cary Coglianese, "Social Movements, Law, and Society: The Institutionalization of the Environmental Movement." *University of Pennsylvania Law Review*, vol. 150, no. 1, 2001, pp. 85–118; Daniel C. Kramer, "Courts, Legislature and Social Reforms: A Comparative Study" *Comparative Politics* Vol. 4, No. 2 (Jan., 1972), pp. 251-268.

18 Para 1 of the Justice Chandrachud's judgment in *Joseph Shine v. Union of India*.

LAW AND SEXUALITY

Joseph Shine judgement has also triggered a debate relating to the interface between law and sexuality. It has been witnessed that law regulates sexuality of an individual, despite the fact that decisions regarding sexuality are the most private aspect of a person's life and existence. As has been witnessed in India, the law has regulated and, in certain cases, criminalised sexual behaviours and choices of the citizenry, including matters like sexual orientation, etc.

However, a question still persists as to what is the limit to which sexuality of the individual, if at all, should be regulated by the state and its instrumentality. There are a few probable scales through which a limit can be set for the state to regulate the sexuality of its citizenry. These scales can be determined on the basis of the following tests/principles:-

a. The Harm Principle

The harm principle was propounded by J. S. Mill as part of the debate regarding liberty which an individual can exercise in a free society and reasonable restrictions which can possibly regulate one's actions.¹⁹ The harm principle proposes that all the individual's actions which do not harm someone are permitted to be freely exercised without any control, regulation or prohibition from the State or its instrumentalities and even the society.²⁰

J. S. Mill's understanding of liberty is based on an underlying belief that a free society which is not shackled with excessive state interference, cultural norms and jingoistic outlook has more chances of achieving its full potential. However,

19 J. S. Mill, "On Liberty" Fifth Edition, Longmans, Greens, Reader and Dyer, London, 1874.

20 See James Bogen and Daniel M. Farrell, "Freedom and Happiness in Mill's Defence of Liberty," *The Philosophy Quarterly*, Vol. 28, No.113, 1978, pp. 325-338; Richard Ball, "Individualism, Collectivism and Economic Development" *The Annals of the American Academy of Political and Social Science* Vol. 573, Culture and Development: International Perspectives, 2001, pp. 57-84; Nils Holtug, "The Harm Principle" *Ethical Theory and Moral Practice*, vol. 5, no. 4, 2002, pp. 357-389.

it does not mean that harm principle gives an individual complete right to do whatever s/he wants to do, including to the extent of suicide or drug abuse or giving oneself to slavery.²¹

Applying harm principle to the act of adultery would justify that harm is caused to the institution of marriage and spouse of the marital union. However, the criminalisation of adultery in the form of presenting it as a crime against society is highly inappropriate. Even though the act of adultery showcases lack of marital fidelity on the part of the adulterous individual in the form of her/his choice of not honouring the relationship, the same cannot be subject to penal consequences. Such an act will lead to the breach of marital contract, entitling the aggrieved spouse to claim a divorce.

b. Right Sexual Self Determination

The Right to choose a sexual partner, including matters like sexual orientation, are a part of rights to sexual self-determination.²² In numerous countries around the world, sexual self-determination has been recognised as a part of the right to life and dignity, including a part of the right to privacy.²³

In one of the judgments delivered by the Constitutional Court of Korea, the right of sexual self-determination has been defined as: “Self-determination is the premise of the personality’s right and the individual’s right to pursue happiness.

21 J. S. Mill, “Utilitarianism” Seventh Edition, Longmans, Green and Co., London, 1879; Jeremy Bentham, “An Introduction to the principle of morals and legislation” University of Oxford Press, 1876.

22 Right to choose sexual/emotion partner has been accepted by the Supreme Court of India as the part of Article 21 mandate in the *Puttaswamy v. Union of India* (2017), *Navtej Singh Johar v. Union of India* (2018) and *Shafin Jahan v. Ashokan K. M* (2018) and *Shakti Vahini v. Union of India* (2018).

23 For instance, debate on the construction of Article 10 and 17 of the Constitution of the Republic of Korea; *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). *Toonen* case dealt with criminalisation of homosexuality by the Tasmanian Criminal Code Ss. 122 (a) and (c) and s. 123. It was held in this case that the impugned provisions are in violation of Article 17 (right to privacy) of the International Covenant on Civil and Political Rights.

And, this includes sexual self-determination, to determine whether to have sex or not and which sexual partner to have sex with..."²⁴

Even the basis of the recent adultery judgement [2009 Hun-Ba17] of the Constitutional Court of Korea has been the right of sexual self-determination.²⁵ Declaring Article 241 (Adultery) of the Korean Criminal Act, 1953,²⁶ as violative of the Korean Constitution, the Constitutional Court of Korea observed,

The right to self-determination connotes the right to sexual self-determination, that is, the freedom to choose sexual activities and partners, implying that the Provision at Issue restricts the right to sexual self-determination of individuals. In addition, the Provision at Issue also restricts the right to privacy protected under Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain.²⁷

Even in the *Navtej Singh Johar v. Union of India* which decriminalised homosexual relations, the right of self-determination and sexual self-

24 Constitution Court of Korea, 89Hun-Ma82, Sept. 10, 1990, as quoted in Seokmin Lee, "Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery,'" Vol. 15, Journal of Korean Law, June 2016 pp. 325-353. Similar opinion regarding sexual self determination was also given in Constitutional Court of Korea, 99Hun-Ba40, Oct. 31, 2002; Constitutional Court of Korea, 2008Hun-Ba58, Nov. 26, 2009. Available at official website of Constitutional Court of South Korea-Case search- <http://english.ccourt.go.kr/cckhome/eng/decisions/casesearch/caseSearch.do> (as on 28th February 2019).

25 Constitutional Court of Korea, Adultery Case [2009 Hun-Ba17, February 26th, 2015] available at official website of Constitutional Court of South Korea-Case search-2009 Hun-Ba17 <http://english.ccourt.go.kr/cckhome/eng/decisions/casesearch/caseSearch.do> (as on 28th February 2019).

26 Korean Criminal Act, 1953, Article 241 (Adultery):

(1) *A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant.*
(2) *The crime in the preceding paragraph shall be prosecuted only upon the complaint of the victimized spouse. If the victimized spouse condones or pardons the adultery, complaint can no longer be made.*

27 Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho, Para V-A(1) of Adultery Case [2009 Hun-Ba17, February 26th, 2016].

determination were referred to strike down section 377 of IPC. Chief Justice Deepak Misra's observation in this regard is worth noticing; elaborating on self-determination, he observed,

It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such orientation or choice that reflects an individual's autonomy is innate to him/her. It is an inalienable part of his/her identity. The said identity, under the constitutional scheme, does not accept any interference as long as its expression is not against decency or morality. And, the morality that is conceived of under the Constitution is constitutional morality.²⁸

Since the new right to sexual self-determination, including the right to choose a sexual partner, on the one hand, and existing regulations on marital relations, on the other, works on the principle of sexual exclusivity²⁹ and monogamy,³⁰ applying the principle of sexual self-determination for the case of adultery brings out an inherent dichotomy. However, this incongruity is confined to the civil covenant of marriage and the breach of the covenant by the adulterous spouse. The remedy of such breach should be the civil action of divorce rather than criminalisation of the adulterous act.

c. Privacy's Pinnacle:

Sexual orientation and the sexual decision of an adult individual is the most intimate domain of private life. And, the same should not be subjected to state

28 Para 149 of Justice Deepak Misra and Justice A.N Khanwilkar's judgement in *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

29 Sexual exclusivity as an indispensable requirement of marriage has been traditionally challenged by provision of polyandry in most of the world religions and contemporarily by practices like polyamory which allows intimate relationships with more than one partner with the consent of all the partners.

30 More especially, it is a serial monogamy which is widely practiced. Serial monogamy entails having one partner by marriage at a time. Unlike strict monogamy, it does not prohibit remarriages after death or divorce.

intervention and regulation, when such exercise has been done fulfilling the criteria of ‘consenting adults.’³¹

In the case of marital ties, the marital fidelity should be left with the spouse as their private decision, and it should not be enforced by the criminal courts. Although, lack of sexual exclusivity in the marriage or adultery may be considered as an immoral act, it falls in the private domain of an individual. State and its instrumentality should not enforce morality by way of criminal prosecution. Therefore, criminal adultery is an excessive interference in the private matters of an individual and abuse of power of punishment by the State.

d. The principle of Proportionality:

Punishment of adultery also does not fit into the principle of proportionality which provides that punishment must be in proportion to the impugned act.³² In the case of adultery, what the act impacts is the sanctity of the marriage and marital fidelity with which spouses are bound to each other. In case of marital infidelity, it is an act against the institution of marriage and the proportionate action should be confined to option given to the other spouse to break the marital ties in the form of divorce.

However, criminal prosecution and incarceration are inappropriate. Criminal prosecution does not serve the purpose of saving the marriage, as the internment of the defaulting spouse will not bring back marital fidelity once the internment period is completed. Plea for the internment of the defaulting spouse is in most cases triggered by feeling of revenge and loathing for being cheated, rather than with the intention of getting back to the ‘happy married life.’

31 For the principle of ‘consenting adults,’ see *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

32 See Von Hirsch, Andrew “Proportionality in the Philosophy of Punishment.” *Crime and Justice*, vol. 16, 1992, pp. 55–98; Roozbeh (Rudy) B. Baker. “Proportionality in the Criminal Law: The Differing American versus Canadian Approaches to Punishment.” *The University of Miami Inter-American Law Review*, vol. 39, no. 3, 2008, pp. 483–502.

CONCLUSION

Joseph Shine judgement is a remarkable judgement of the Supreme Court which endeavours to re-metamorphose India into a liberal democracy which aims at gender justice and values individual liberty exercised within the ambit of a just law. It is also a reflection on over-criminalisation and abuse of State's power of punishment, particularly in cases of individual action judged on moral scales.

This judgement *inter alia* presents a framework which has to be honoured by the State and its instrumentalities while regulating sexuality of its citizenry. In *Joseph Shine*, along with *Navtej Singh Johar (2018)* and *Shafin Jahan (2018)*, Apex Court accepted sexual determination as a part of Article 21 mandate of the Constitution. It reiterates and buttresses the quest of our compassionate constitution for individual liberty, human dignity and liberalism.

On the interface between State and individual sexuality, author proposes that theoretical jurisprudential scales like JS Mill's harm principle, question of privacy, right of sexual determination as honoured in *Joseph Shine*, along with criminal law conception of proportionality should be employed. These theoretical scales can assist in judging the legitimacy and appropriateness of State action having ramification of the sexuality of an individual.

Present judgement, along with judgements like *Shafin Jahan (2018)*, *Navtej Singh Johar (2018)*, *Joseph Shine (2018)*, *Shakti Vahini (2018)*, *Shayara Bano (2017)* and *Indian Young Lawyers Association (2018)*, showcases that Apex Court has refused to be budged down under forces of so-called culture, traditions and religious beliefs which trample individual liberty, perpetuate gender inequality and suppress exercise of rights guaranteed under our compassionate constitution. These judgements reiterate that what will reign supreme is the constitutional morality, not the popular morality. Collectivism cannot be tolerated at the cost of individual action within the ambit of a just law.

The criminalisation of adultery projects state's paternalism, encroachment on individual privacy and enforcement of moral principles. State and its power of

punishment must be kept at a distance when it comes to the moral questions and cultural behavioural quotient, including matters like clothing, food/drinking habit, sexual orientation, etc. Such a decision should be left with the individual concerned, rather than providing rules from above.

In the context of feminist movement, the ratio of the present judgement falls in the third and fourth wave of feminism which focuses on the individuality of the women and targets the behavioural aspect of the society which treats females as the 'second sex,' a sex which is subordinate before marriage to her father or uncle or brother and, after marriage, subordinate to the husband.³³ In the context of matrimonial relations, Justice Misra in his prefatory note to the judgement rightly held, "it is the time to say that a husband is not the master."³⁴

33 Simone De Beauvoir, "The Second Sex," Editions Gallimard, Paris, 1949.

34 Para 1, Dipak Misra and A. M Khanwilkar JJ.'s judgement in *Joseph Shine v. Union of India*.

**MERIT V. EFFICIENCY: A PARADIGM SHIFT IN
RESERVATION POLICY: A CASE COMMENT ON B. K.
PAVITRA AND ORS. V. THE UNION OF INDIA AND ORS.
(DECIDED ON MAY, 10, 2019)**

Dr. Naseema P. K.

I. B. K. Pavitra I v. B. K. Pavitra II: Two interconnected cases leading to a new Act, and adequacy of exercises validate it.

It is not unusual that a law passed by the” competent legislature is still challenged in a court of law. But, the peculiarity here is that an Act passed by the State gets the stamp of validation from judiciary through its prompt fulfilling of the requirements in the just previous litigation of the case under discussion. This case comment is based on the latest decision of Supreme Court of India on the policy of reservation. ‘Reservation’ was always been a topic of debate and conflict, giving rise to a plethora of cases. Recently, on May 10th 2019, a bench comprising Justices U. U. Lalit and D. Y. Chandrachud upheld the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2018. This enactment aimed for providing consequential seniority from April 24, 1978, onwards to SCs and STs along with other things. Through this decision, the State of Karnataka became the first state to benefit from the Constitution bench’s ruling, which said that a state’s view on the adequacy or inadequacy of their representation in state services would not be enquired into by courts.¹The decision is highly relevant, as it is a unique exercise of judicial

¹ https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-upholds-karnataka-law-on-sc/st-promotion/articleshow/69274454.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst(accessed on May, 20, 2019).

review in post Nagaraj² world when the State government defends its legislation claiming that it has ‘done the exercise’ of collecting quantifiable data before it enacted the law. The judgment shows how a constitutional court is using the tool of judicial review of a legislation enacted by a competent legislature, and it is a seminal issue how to review a data collection exercise by a government.

The Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act 2002 (which will be referred as reservation Act, 2002) was challenged in *B K Pavitra v. Union of India*.³ Therein, a Bench consisting of Justice Adarsh Kumar Goel and Justice U. U. Lalit held Sections 3 and 4 of the Reservation Act 2002 to be *ultra vires* Articles 14 and 16 of the Constitution, as the mandate of *M. Nagaraj*⁴ decision was not followed by the State. In *M. Nagaraj*,⁵ it was held that the determination of inadequacy of representation, backwardness and the impact on overall efficiency must precede the enactment of the law, which was not done in the 2002 Act, and hence the Act was declared invalid.

After *B. K. Pavitra I*,⁶ on 22 March 2017, the Government of Karnataka constituted the Ratna Prabha Committee⁷ to submit a report on the backwardness and inadequacy of representation of SCs and STs in the State Civil Services and the impact of reservation on overall administrative efficiency in the State of Karnataka. On 5 May, 2017, the Ratna Prabha Committee submitted a report, titled as the ‘**Report on Backwardness, Inadequacy of Representation and Administrative Efficiency in Karnataka**,’ which was then submitted to the Law Commission of Karnataka on 8 June, 2017, through its Department of Personnel and Administrative Reforms of the Government of

2 (2006) 8 SCC 212.

3 (2017) 4 SCC 620.

4 (2006) 8 SCC 212.

5 *Ibid.*

6 *Supra* n. 3.

7 G.O. No. DPAR 182 SeneNi 2011 quoted at p.24 of the Judgment.

Karnataka. On the basis of the Ratna Prabha Committee report, the legislative assembly of the Government of Karnataka passed the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Bill 2017 on 17 November, 2017, and the Bill received the assent of the President on 14 June, 2018, and was published in the official Gazette on 23 June, 2018.

In the meantime, the petitioners filed contempt petitions, contending that the directions of this Court in *B. K. Pavitra I*⁸ to the State of Karnataka to review the seniority list were not complied with. The State of Karnataka filed applications for extension of time for compliance. On 20 March, 2018, the Supreme Court disposed of the petitions, rejecting the applications for extension of time for compliance with the decision in *B. K. Pavitra I*⁹ and granted one month time to take any consequential action. The State of Karnataka subsequently filed compliance affidavits before this Court stating that the exercise directed by the decision in *B. K. Pavitra I*¹⁰ had been carried out.

The main challenge in the *B. K. Pavitra-II* is regarding the validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act 2018 (hereinafter mentioned as reservation Act 2018). The enactment provides, among other things, for consequential seniority to persons belonging to the Scheduled Castes and Scheduled Tribes promoted under the reservation policy of the State of Karnataka. In the present case, the petitioners question both the process of collecting data as well as the outcome of the exercise carried out by the state for collecting quantifiable data. While *B. K. Pavitra I*,¹¹ involves an invalidation of a law on the ground that no exercise of data collection was carried out by the State, in the present case mentioned as *B. K. Pavitra II* in the judgment, challenge is regarding the validity of a law enacted after the State

8 *Supra* n. 3.

9 *Ibid.*

10 *Ibid.*

11 *Supra* n. 2.

had done the exercise dictated by the Highest court in *M. Nagaraj* case. The judgment¹² quotes from *M. Nagaraj* and elaborates that the legislative power of the state to enact such a law is preserved and the exercise of the power to legislate is conditioned by the existence of parameters compelling reasons, namely: the existence of backwardness, the inadequacy of representation and overall administrative efficiency. The parameters which must be applied where a law has been enacted to give effect to the provisions of Article 16 (4A) were considered as controlling factors for making reservations for SCs and STs.

In *B K Pavitra I*, the contention was that the law laid down by the Court in *Badappanavar, Ajit Singh II* and *Virpal Singh* is applicable despite the Constitution (Eighty-fifth Amendment) Act 2001, and Govt. of Karnataka had not complied with the tests laid down in *Nagaraj*. Moreover, no consideration was given to the issue of overall administrative efficiency. Relying on *Paneer Selvam* case,¹³ it was held that the exercise for determining inadequacy of representation, backwardness and overall efficiency is a must for exercise of power under Article 16(4-A). The State cannot be allowed to legislate on the basis of a mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs. It is not by itself enough to grant consequential seniority to promotees who are otherwise junior and, thereby, denying seniority to those who are given promotion later on account of reservation policy. Court urged that the State must place material on record that there was compelling necessity for exercise of such power.¹⁴

2. B. K. PAVITRA II - AN ANALYSIS

The following main issues were raised for the determination of the Hon'ble Supreme Court in the present case.

1. Is the Reservation Act 2018 valid?

¹² Judgment in *B. K. Pavitra II* at Para. 23.

¹³ *S. Panneer Selvam v. State of Tamil Nadu*, (2015) 10 SCC 292.

¹⁴ *Ibid* at p. 641.

2. Does it not peremptorily overrule the decision of this Court in B. K. Pavitra I without altering the basis of the decision?
3. Does the background to the enactment to the Reservation Act 2018 reveal a manifest intent to overrule the decision in B. K. Pavitra I?
4. Was the reference of the Bill by the Governor of Karnataka to the President under Article 200 of the Constitution and the subsequent events which took place constitutionally valid? In this context, could the Bill have been brought into force without the assent of the Governor?
5. Is the Reservation Act 2018 compliant with the principles enunciated in the Constitution Bench decisions in Nagaraj and Jarnail?
6. Does the report of the Ratna Prabha Committee dated 5 May, 2017, constitute an adequate and appropriate basis to support the validity of the Act and its implementation?
7. Does the Reservation Act 2018 apply in the present writ petitions (instituted by B. K. Pavitra and Shivakumar) to those departments where there is overrepresentation or in public corporations not covered by the Ratna Prabha report or the legislation?

The petitioner's argument was that this is a clear case of usurpation of judicial power, as the Reservation Act 2018 was enacted in a hurry with no purpose other than to overrule the decision in B, K, Pavitra I, and there was no compelling necessity to overrule B. K. Pavitra I except that of political necessities, and the act under challenge is substantively the same to the Reservation Act 2002 on comparison.¹⁵ Another strong contention was on the basis of violation of the separation of powers which postulates that a constitutional division between legislative and judicial functions must be respected and the legislature cannot lawfully usurp judicial power by sitting in appeal over any judicial decision by attempting to overturn it. It was also argued that the Ratna Prabha Committee report is flawed and does not establish inadequacy of representation and impact on administrative efficiency. On the other hand, the arguments of the

¹⁵ See *Supra* n.13 at Para. 40.

respondents were that while judicial review allows courts to declare a statute as unconstitutional if it transgresses constitutional limits, the courts are precluded from inquiring into the propriety or wisdom underlying the exercise of the legislative power. Seniority is not a vested or an accrued right, and hence it is open for the legislature to enact a law for dealing with it.¹⁶ The collection of data by the State must demonstrate the presence of compelling reasons. The Ratna Prabha Committee has dealt with all the three facets constituting the compelling reasons. Promotions are made on the basis of seniority-cum-merit. It was also represented on behalf of the state that only those candidates who fulfill the criteria of merit/suitability are promoted based on seniority. Since this criterion is applicable even in respect of roster promotions, the efficiency of administration is not adversely impacted. Also, on promotion, a candidate is required to serve a statutory period of officiation before being confirmed in service which is applicable to all candidates including roster point promotees which in turn ensures the efficiency of administration.¹⁷

3. OBSERVATIONS OF THE COURT

The judgement sustains the view that judicial review allows courts to declare a statute as unconstitutional if it transgresses constitutional limits, but wisdom underlying the exercise of the legislative power is incapable of being judicially evaluated. The Bench observed that the decision in *B. K. Pavitra I* did not restrain the state from carrying out the exercise of collecting quantifiable data so as to fulfill the conditionalities for the exercise of the enabling power under Article 16 (4A).

“The legislature has the plenary power to enact a law. That power extends to enacting a legislation both with prospective and retrospective effect. Where a law has been invalidated by the decision of a constitutional court, the legislature can amend the law retrospectively or enact a law which removes the cause for invalidation, and the legislature can either amend an existing law or enact a law

¹⁶ *Ibid* at p.49.

¹⁷ *Ibid* at p.52.

which removes the basis on which a declaration of invalidity was issued in the exercise of judicial review. Curative legislation is constitutionally permissible, not an encroachment on judicial power.¹⁸”

Once an opinion has been formed by the State government on the basis of the report of expert committee, it is impossible for the Court to hold that the compelling reasons that mandate the State have not been established. Even the errors in data collection will not justify the invalidation of a law which the competent legislature was within its power to enact.

“After the decision in B. K. Pavitra I, the Ratna Prabha Committee was correctly appointed to carry out the required exercise. Once that exercise has been carried out, the Court must be circumspect in exercising the power of judicial review to re-evaluate the factual material on record.¹⁹”

4. SUBSTANTIVE EQUALITY V. FORMAL EQUALITY - AN EXPOSITION

There are various forms of equality as there are many ways of comparing the circumstances of persons, like moral, political, legal, social, racial equality, etc. The two main significant forms of equality are – Formal equality and Substantive Equality (equality of opportunity and outcome). Although the concept of substantive equality is originated from formal equality, it sometimes seems contradictory to it. The formal equality is the initial idea of equality which is also called as foundational equality. Aristotle has dealt with the legal thought on equality and said “the just is the lawful and the equal, and the unjust is the unlawful and the unequal.”²⁰ The basic idea of formal equality is that all human beings possess equal rights by virtue of their common humanity; thus, they must be treated equally.²¹ The most prominent expression of formal equality

18 *Ibid* at p.80.

19 *Ibid* at para. 101.

20 Otto A. Bird, *The idea of justice*, (Fedrick A. Praeger, New York, 1968) at p.133.

21 Andrew Heywood, *Political theory - An Introduction*, (Palgrave Macmillan, London, 2015) at p.270.

is the legal equality, *i.e.*, law should treat all persons equally as individuals, without taking into account their background - social, political, economical, educational, caste, gender, race, color, etc. This is the form of equality approved and supported by all, from conservatives to socialists, and it has limitations, as it may be unable to provide real equality.

The origin of substantive equality is tracked from the formal equality.²² It is not about the equal treatment of law or treating the likes alike, but the real impact of the law.²³ Substantive equality is not concerned with the sameness and difference; rather, it considers the inequality suffered by the people. Thus, it is pointed at eradication of individual, institutional and systemic discrimination.²⁴

There are two aspects of substantive equality - equality of opportunity and equality of outcome. The idea of equality of opportunity was found in the writings of Plato who suggested that social position should be based on individual capacity, and all should be provided an equal opportunity to recognize their abilities. Thus, equality of opportunity removes the obstacles that stand in the way of personal development. By introducing special treatment or measures to prevent the discrimination faced by a disadvantaged group or class, it leads to positive discrimination, which is also described as preferential treatment or reverse discrimination.²⁵ This includes affirmative action policies taken by countries, including India.

The core of the present case is based on the constitutional content of equality.²⁶

22 *Ibid* at P.271.

23 Kapur, Ratna, Un-Veiling Equality: Disciplining the 'Other' Woman, in Anver Emon, Mark S. Ellis *et. al.* (eds.), *Islamic Law and International Human Rights Law Searching for Common Ground*, (Oxford University Press, Oxford, 2012) at p.268.

24 Lahey, Katherine, Feminist Theories of (In)Equality in S. Martin and K. Mahoney (eds), *EQUALITY AND JUDICIAL NEUTRALITY* (Carswell, Toronto, 1987). At p.70-71.

25 Goonesekere, Savitri W. E, *The Concept of Substantive Equality and Gender Justice in South Asia*, www.unwomensouthasia.org/assets/The-Concept-of-Substantive-Equality-and-Gender-Justice-in-South-Asia visited on May 8, 2019.

26 *Supra* n.13 at at P 106.

The Court opines that, for equality to be truly *effective* or *substantive*, the principle must **recognize existing inequalities in society** to overcome them.²⁷ Reservations are to be understood as not an exception to the rule of equality of opportunity, but rather as the true fulfilment of *effective and substantive* equality by accounting for the structural conditions into which people are born. It is postulated that Article 16 (1) itself sets out the principle of substantive equality, making Article 16 (4) **the enunciation of one particular facet of the rule of substantive equality set out in Article 16 (1)**.²⁸ The judgment quotes elaborately from the Constituent Assembly's understanding of Article 16 (4), to prove that reservations are to overcome existing inequalities in society. The members of the Constituent Assembly recognized that Indian society suffered from deep structural inequalities and wanted the Constitution to serve as a transformative document to overcome them. One method of overcoming these inequalities is reservations for the SCs and STs in the legislatures and State Services.

5. CONSTITUTION - A TRANSFORMATIVE INSTRUMENT TO BRING OUT 'SUBSTANTIVE EQUALITY'

The judgment views the Constitution as a transformative document.²⁹ Its transformative potential rests ultimately in its ability to breathe life and meaning into its abstract concepts. The Constitution becomes a transformative instrument by being a significant instrument to bring social change in a caste-based feudal society full of oppression of, and discrimination against, the marginalized. The constitutional jurisprudence is the realization of this transformative potential of the Constitution. It is having a close nexus to the evolution of equality away from its formal underpinnings to its substantive potential. This is not a new idea, but was present in the minds of the makers of the Constitution. The members of the Constituent Assembly recognized this, and wanted the Constitution to serve as a transformative document to overcome the inequalities in the society and found reservation as one method. This is evidenced by the many statements

²⁷ *Ibid* at P.107.

²⁸ *Ibid*.

²⁹ *Ibid* at P.111.

by members in support of reservations for minorities quoted in this judgement itself. It is quite interesting to note the comparison of Shri. Phool Singh if the reservation would not have been given: **“To ask the people from the villages to compete with those city people is asking a man on bicycle to compete with another on a motorcycle, which in itself is absurd.”**³⁰

Thus, the Constitution was intended by its draftspersons to be a significant instrument for bringing about social change. They understood that in the context of centuries of oppression and habitual submission, it would be impossible to raise their standards if the doctrine of equal opportunity was strictly enforced. Clause (4) in Article 16 was introduced because they would not get any chance if they were made to enter the open field of competition till such time when they could stand on their own legs, as opined by Justice Subba Rao.³¹ It cannot be an exception to Article 16(1), and if so the equality of opportunity visualized in Article 16(1) is a sterile one, and equality of opportunity guaranteed under Article 16 (1) means effective material equality.³² Thus, the need for proportional equality as a means of achieving justice was understood by the constituent assembly as well as the judiciary, and it means nothing but the notion that equality under the Constitution is based on the substantive idea of providing equal access to resources and opportunities. While formal equality treats everyone as equal without favouring anyone, the concept of proportional equality expects the States to take affirmative action in favor of disadvantaged sections of the society within the framework of liberal democracy.³³ In short, social justice cannot be reached without a distribution of benefits and burdens, and this will be done effectively if the Constitution is understood as a transformative document, rather than a literary work dumped with a dry formal equality theory.

30 (Volume XI) Debate on 23 August 1949.

31 T Devadasan *v.* The Union of India, AIR 1964 SC 179.

32 Justice K K Mathew in N M Thomas, (1976) 2 SCC 347.

33 Justice S H Kapadia in Nagraj, *Supra* n. 2 at page 250.

6. Merit v. Efficiency - A Myth

The most important part of the judgment is that it invokes a new theory to the reservation policy by rejecting the old notions of efficiency coupled with merit.³⁴ Generally, affirmative action programs in government services are criticized by the argument that it adversely impacts the overall competence or efficiency of government administration. Merit based approach is suggested as an alternative, and the constitutional justification for this ‘**efficiency argument**’ is centered on Article 335.³⁵ The Court rejects this argument by quoting the proviso as a realistic recognition that unless special measures are adopted for the SCs and STs, the mandate of the Constitution for the consideration of their claim to appointment will remain illusory. The proviso is read as an aid for fostering the real and substantive right to equality for the SCs and STs. It is effectuating a substantive, rather than a formal, equality. “The proviso is not a qualification to the substantive part of Article 335, but it embodies a substantive effort to realize substantive equality. The proviso also emphasizes that the need to maintain the efficiency of administration cannot be construed as a fetter on adopting these special measures designed to uplift and protect the welfare of the SCs and STs.”³⁶ The court interprets this proviso as a remedy for centuries old discrimination suffered by the SCs and STs in a feudal, caste-oriented societal structure. Rather than sticking to its literal meaning, the proviso is seen as an aid to fostering the real and substantive right to equality for the SCs and STs, by protecting the authority of the Union and the States to adopt any of the special measures to effectuate a realistic (as opposed to a formal) consideration of their claims.

34 *Supra* n.13 at P. 116

35 A. 335 runs as follows, ‘The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:
[Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.].

36 *Supra* n. 13 at P.116.

It further observes that the Constitution does not define what the framers meant by the phrase ‘efficiency of administration.’³⁷ “Article 335 cannot be construed on the basis of a stereotypical assumption that roster point promotees drawn from the SCs and STs are not efficient or that efficiency is reduced by appointing them. This is stereotypical because it masks deep rooted social prejudice. The benchmark for the efficiency of administration is not some abstract ideal measured by the performance of a qualified open category candidate.” ‘Efficiency of administration’ is a term that must be defined in an inclusive sense, where diverse segments of society find representation as a true platform where they all can find their own space

7. CONCLUSION

The Bench urges to understand the Constitution for realization of substantive equality with the recognition of the plurality and diversity of the nation. The judgment puts a caution that it is true that our benchmarks will define our outcomes, and if this benchmark of efficiency is grounded in exclusion, it will produce a pattern of governance against the marginalized. Hence, Article 335 shall liberate the concept of efficiency from a one-sided approach. Understanding of the SCs and STs as worthy participants in affairs of governance is intrinsic to an equal citizenship. Equal citizenship demands governance which is inclusive and ensures that those segments of our society which have suffered a history of oppression have a real voice in governance. Inclusion is inseparable from a well-governed society, and so the Hon’ble Judges beautifully demonstrate that there is no antithesis between the efficiency of administration and the claims of the SCs and STs to appointments.³⁸ The bench aptly cut across the argument that merit based appointments lead to efficiency, by saying that ‘administrative efficiency is an **outcome** of the actions’ taken by officials **after** they have been appointed or promoted and is not tied to the selection method itself.³⁹ Moreover, the classification of candidates beyond a particular cut-off point as considered

³⁷ *Ibid* at P.119.

³⁸ *Ibid* at P.117.

³⁹ *Ibid* at P.122.

meritorious, and others as non-meritorious, is a distorted understanding of the function that merit plays in society. The Court quotes Amartya Sen to establish this observation.⁴⁰ Reference is also made to the observation of Marc Galanter that it is well settled that existing inequalities in society can lead to a seemingly neutral system discriminating in favor of privileged candidates.⁴¹ The three broad kinds of resources necessary to produce the results in competitive exams that qualify as indicators of merit are economic resources, social and cultural resources and intrinsic ability and hard work. “The first two criteria are not the products of a candidate’s own efforts, but rather the structural conditions into which they are born. By the addition of upliftment of SCs and STs in the moral compass of merit in government appointments and promotions, the Constitution mitigates the risk that the lack of the first two criteria will perpetuate the structural inequalities existing in society.”⁴²

Thus, it is well placed that providing of reservations for SCs and the STs is not at odds with the principle of meritocracy, and merit must not be “limited to narrow and inflexible criteria such as one’s rank in a standardized exam, but rather must flow from the actions a society seeks to reward, including the promotion of equality in society.”⁴³ It is concluded by holding that the challenge to the constitutional validity of the Reservation Act 2018 is lacking in substance, and following the decision in **B. K. Pavitra I**, the State government had carried out the exercise of collating and analysing data on the compelling factors, and the Reservation Act 2018 has cured the deficiency which was noticed by **B. K. Pavitra I** and is a valid exercise of the enabling power conferred by Article 16 (4A) of the Constitution. The court observed that ‘inclusiveness’ was part of

40 Sen A, Merit and Justice, in Arrow, KJ, MERITOCRACY AND ECONOMIC INEQUALITY (Princeton University Press 2000) (Amartya Sen, Merit and Justice quoted *ibid* at p. 123.

41 Galanter M, Competing Equalities: Law and the Backward Classes in India, (Oxford University Press, New Delhi 1984), cited by Deshpande S, Inclusion versus Excellence: Caste and the framing of fair access in Indian higher education, 40:1 South African Review of Sociology 127-147, quoted at *supra* n. 13 at p. 127.

42 *Supra* n. 13 at p. 128.

43 *Ibid* at P. 121.

equality in any society.⁴⁴ The opinion of the State regarding representation of SCs and STs in the administration was a subjective satisfaction, and so, once an opinion has been formed by the state government on the basis of the report submitted by an expert committee, court cannot interfere on that. This holds true even if there were some errors in data collection, and that will not justify the invalidation of a law which the competent legislature was within its power to enact. The present case is considered by the Bench as unique in many ways.⁴⁵

This judgment is highly relevant, as it has potential to influence the discourse on reservations, and it is to be appreciated for its offering a paradigm shift to the 'merit theory' and making an understanding of reservation as a tool of proportional equality. Its lucidity and the rare understanding of what constitutes "merit" and "efficiency" in an unequal society like ours can contribute towards a different focus of reservation concept as a whole. It reminds us that, what we need is not formal equality, but substantive equality. It undoubtedly clarifies that the key goal of the substantive equality is the exclusion of the substantive inequality of the deprived group or class which may suffer by them. Substantive equality is not concerned with the sameness and difference, but the inequality suffered by the disadvantaged group. Thus, it is pointed at eradication of individual, institutional and systemic discrimination.⁴⁶ The essential quest of substantive equality is 'whether the rule or practice in question contributes to the subordination of the disadvantaged group, and whether their treatment in law contributes to their historic, systemic disadvantage.'⁴⁷ Of course, in that sense, this judgment is a move in that way. It reiterates that, 'Formal equality is attained when law treats all equal, whereas substantive equality requisites impact of those laws and practices to improve the condition of disadvantaged group.'⁴⁸

44 *Supra* n. 1.

45 *Supra* n. 13 at p. 6.

46 *Supra* n. 38.

47 *Supra* n. 37 at p. 268-269.

48 Edwards, Alice Violence against Women under International Human Rights Law, (Cambridge university press, Cambridge, 2011) at P.158.

JOSEPH SHINE V. UNION OF INDIA – A COMMENT

Shweta
Tauseef Ahmad

Abstract

Over the years, legal reforms in India have played an important role in altering the position of women in societal orderings. This is seen in various matters, like matters concerning inheritance and in protection against domestic violence. Law can act as an agent of social change as well as social stagnation. The Indian Constitution in text, as well as in interpretation, has played a significant role in the evolution of law from being an instrument of oppression to becoming one of liberation. Recently, the Supreme Court has struck down 158 year old Section 497 of the Indian Penal Code, which criminalizes adultery, as unconstitutional. The basic objective of this paper is to analyze the Joseph Shine v. UOI case and discuss impact of this case on women's liberty and society and reasons for declaring it unconstitutional. This article also identifies what are the effects on marriage in India after the striking down of Section 497 where marriage is always considered as a sacrament.

Keywords: *Constitutional law, patriarchy, gender justice, transformation, liberty, dignity, equality, property, marriage sanctity, sacrament*

Section 497 of Indian Penal Code, 1860, makes adultery a criminal offence. It is an act which is committed consensually between two adults who have strayed out of the marital bond. It is considered as an anti social and illegal act. Recently, the Indian Supreme Court has struck down 158 year old Section 497 of the Indian Penal Code, which criminalizes adultery, as unconstitutional and held that Section 497 destroyed and deprived women of dignity.

In *Joseph Shine v. Union of India*¹ case, a writ petition was filed under Article 32 of the Constitution of India for challenging the validity of Section 497, which makes “adultery” a criminal offence and prescribes a punishment of imprisonment up to 5 years and fine. The petitioner also challenged the Section 198(2) of the Code of Criminal Procedure. This matter came before Supreme Court of India.

There are 3 main issues which are involved in this case.

1. Whether section 497 IPC suffers from manifest arbitrariness and is violative of Article 14 of the Indian Constitution?
2. Whether Section 497 violates Article 15(1) of the Constitution by enforcing gender stereotypes?
3. Whether the offence of adultery is violative of Article 21 of the Constitution?

LAW POINTS

Section 497 of the IPC, 1860, is placed under Chapter XX of “Offences Relating to Marriage.” In order to constitute the offence of adultery under Section 497 IPC, the following must be established:

1. Sexual intercourse between a married woman and a man who is not her husband;
2. The man who has sexual intercourse with the married woman must know or have reason to believe that she is the wife of another man;
3. Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

ISSUE 1- VIOLATION OF ARTICLE 14

Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being

1 (2018) 2 S.C.C 189.

violative of Articles 14 and 15 of the Constitution which form the pillars against the vice of arbitrariness and discrimination. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

- i. The classification is made on the basis of an “intelligible differentia” which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and
- ii. The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

The discriminatory provisions in Section 497 have to be considered with reference to the classification made. The classification must have some rational basis, or a nexus with the object sought to be achieved.

Section 497 of the I.P.C., makes two classifications:

- i. The first classification is based on who has the right to prosecute: It is only the husband of the married woman who indulges in adultery who is considered to be an aggrieved person, given the right to prosecute for the offence of adultery. Conversely, a married woman, who is the wife of the adulterous man, has no right to prosecute either her husband or his paramour.
- ii. The second classification is based on who can be prosecuted. It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an “abettor” to the offence.

The said classification is no longer relevant or valid and cannot withstand the test of Article 14; therefore, it is *ex facie* discriminatory against women and, hence, is liable to be struck down on this ground alone.

A law which deprives women of the right to prosecute is not gender-neutral. The discrimination should also reflect on the fact that women cannot even be prosecuted for the offence. Under Section 497, the wife of the adulterous male

cannot prosecute her husband for marital infidelity. This provision is, therefore, *ex facie* discriminatory against women and violative of Article 14.

The Court held that Section 497 IPC lacks determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 denies substantive equality, as it perpetuates the subordinate status ascribed of women in marriage and society. Section 497, thereby, violates Article 14 of the Constitution.

When the parties to a marriage lose their moral commitment to the relationship, it creates a dent in the marriage, and it will depend upon the parties on how they deal with the situation. Some may exonerate and live together, and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said 'act' should be made a criminal offence, especially when, on certain occasions, it can be the cause and, in certain situations, it can be the result. If the act is treated as an offence, and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships, and any law that would make adultery a crime would have to punish, indiscriminately, both the persons whose marriages have been broken down, as well as those persons whose marriages have not. A law punishing adultery as a crime cannot make a distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness.

ISSUE 2 – VIOLATION OF ARTICLE 15

Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children to protect and uplift this class of citizens.

Section 497 is a penal provision for the offence of adultery, an act which is committed consensually between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution. The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as “beneficial legislation.”

The purpose of Article 15(3) is to further socioeconomic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences. A Section which perpetuates oppression of women is unsustainable in law and cannot take cover under the guise of protective discrimination.

ISSUE 3 - VIOLATION OF ARTICLE 21

To address the issue of the dignity of a woman, in the context of autonomy, desire, choice and identity, it is obligatory to refer to the recent larger Bench decision in *K. S. Puttaswamy and another v. Union of India and others*² which, while laying down that privacy is a facet of Article 21 of the Constitution, lays immense stress on the dignity of an individual.

The court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. Court held that there cannot be any curtailment of the same. It further held that Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes, creating a dent in the individual dignity of woman. As Section 497 IPC lays emphasis on the element of connivance or consent of the husband which is, effectively, tantamount to subordination of women to her husband, the court held that on this ground Section 497 offends Article 21 of the Constitution. The Court observed that the provision treats a married woman as a property of the husband. The court clarified that there cannot be a

² (2017) 10 SCC 1.

patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. Further, while dealing with the issue, the court held that there cannot be a community exposition of masculine dominance.

DECISION OF THE COURT

The 5 Judge Constitutional Bench has held section 497 IPC and Section 198 CrPC to be unconstitutional and violative of Articles 14, 15 (1) and 21 of Constitution. Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Court held that being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster.

- 1) Prima facie, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality, but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This is tantamount to subordination of a woman, where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, prima facie, appears to be quite archaic.

Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a

denial of substantive equality, as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

- 2) Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;
- 3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and
- 4) Section 198 CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file complaint against another man for his offence. Consequently, Section 198 was held to be constitutionally infirm. Section 198(2) of the CrPC., which contains the procedure for prosecution under Chapter XX of the I.P.C., shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

CONFRONTING PATRIARCHY

The act which constitutes the offence under Section 497 of the Penal Code is a man engaging in sexual intercourse with a woman who is the “wife of another man.” For this offence, the man who engages in sexual intercourse must have knowledge or reason to believe that the woman is married. If he engages in sexual intercourse with an unmarried woman or with a married women, but with the consent or connivance of her husband, then the offence of adultery does not come into being.

These ingredients of Section 497 lay bare several features which bear on the challenge to its validity under Article 14. If the ingredients of section 497 are established, then there is no significance to the fact as being an offence, as there is consensual sexual relationship between a man and a woman. What the legislature has constituted as a criminal offence is the act of sexual intercourse between a man and a woman who is “the wife of another man.” There is no

offence where a man who has a subsisting marital relationship engages in sexual intercourse with a single woman. Though adultery is considered to be an offence relating to marriage, the legislature did not penalize sexual intercourse between a married man and a single woman. Even though the man in such a case has a spouse, this is considered to be of no legal relevance to defining the scope of the offence. That is because the provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be 'adulterous,' by definition.

The offence of adultery would not be made out if the man to whom she is married were to consent or even to connive at the sexual relationship. For, in the eyes of law, in such a case it depends upon the man in a marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. In fact, the offence of adultery would not be established, even if the two men, i.e., the spouse of the woman and the man with whom she engages in a sexual act, were to connive. Because, the essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man.

Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. She is treated as the property of her husband; that's why no offence of adultery would be made out if there is sexual relationship outside the marriage with the consent of the husband. Thus, section 497 is founded on the notion that a woman, by entering upon marriage, loses - so to speak - her voice, autonomy and agency. It is based on patriarchal order.

Legislatures made an ostensible effort to protect the institution of marriage by enacting Section 497 of IPC. 'Ostensible' it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of, and between, spouses.

Each of them is entitled to the same liberty which is guaranteed by Part 3 of Indian Constitution, but Section 497 is based on the notion that marriage submerges the identity of the women. It is based on the understanding of marital subordination. Due to this, section 497 is inconsistent with the ethos or, we can say, foundational principles of the Constitution of India. It treats a woman as but a possession of her spouse. The essential values on which the Constitution is founded – liberty, dignity and equality – cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness. Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality.

Section 198 of CrPC re-enforces the stereotypes implicit in section 497 of IPC. Cognizance of an offence under Chapter XX of the Penal Code can be taken by a Court only upon a complaint of a person aggrieved. In the case of an offence punishable under Section 497, only the husband of the woman is deemed to be aggrieved by the offence. In any event, once the provisions of Section 497 are held to offend the fundamental rights, the procedure engrafted in Section 198 will cease to have any practical relevance.

COMMENT

The issue remains as to whether “adultery” must be treated as a penal offence subject to criminal sanctions, or as a marital wrong which is a valid ground for divorce. One view is that family being the fundamental unit in society, if the same is disrupted, it would impact stability and progress. The State, therefore, has a legitimate public interest in preserving the institution of marriage. Though adultery may be an act committed in private by two consenting adults, it is nevertheless not a victim-less crime. It violates the sanctity of marriage and the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulterer and the adulteress; it impacts the growth and well-being of the children, the family, and society in general and, therefore, must

be subject to penal consequences. It is advisable to remember what John Stuart Mill had observed: “The legal subordination of one sex to another is wrong in itself and, now, one of the chief hindrances to human improvement, and that it ought to be replaced by a system of perfect equality, admitting no power and privilege on the one side, nor disability on the other.”³

Throughout history, the State has long retained an area of regulation in the institution of marriage. The State has regulated various aspects of the institution of marriage, by determining the age when an adult can enter into marriage; it grants legal recognition to marriage; it creates rights in respect of inheritance and succession; it provides for remedies like judicial separation, alimony, restitution of conjugal rights; it regulates surrogacy, adoption, child custody, guardianship, partition, parental responsibility, guardianship and welfare of the child. These are all areas of private interest in which the State retains a legitimate interest, since these are areas which concern society and public well-being as a whole.

Adultery has the effect of not only jeopardizing the marriage between the two consenting adults, but also affects the growth and moral fibre of children. Hence, the State has a legitimate public interest in making it a criminal offence.

The contra view is that adultery is a marital wrong, which should have only civil consequences. A wrong punishable with criminal sanctions must be a public wrong against society as a whole and not merely an act committed against an individual victim.

To criminalize a certain conduct is to declare that it is a public wrong which would justify public censure, and would warrant the use of criminal sanction against such harm and wrong doing. The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the “best interest” of the individual.

3 On the Subjection of Women, Chapter 1 (John Stuart Mill, 1869).

Criminal sanction may be justified where there is a public element in the wrong, such as offences against State security and the like. These are public wrongs where the victim is not the individual, but the community as a whole. Adultery undoubtedly is a moral wrong qua the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general in order to bring it within the ambit of criminal law? The element of public censure, visiting the delinquent with penal consequences and overriding individual rights would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment. The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

In **Sowmithri Vishnu v. Union of India**,⁴ the court proceeded on the basis that the earlier decision in Yusuf Abdul Aziz⁵ had upheld Section 497 against a challenge based on Articles 14 and 15 of the Constitution. The decision in Sowmithri Vishnu dealt with the constitutional challenge by approaching the discourse on denial of equality in formal and rather narrow terms. Chandrachud, CJ, speaking for the three-judge Bench, observed that by definition, the offence of adultery can be committed only by a man and not by a woman. The court construed the plea of the petitioner as amounting to a suggestion that the definition should be recast in a manner that would make the offence gender neutral. The court responded by observing that this was a matter of legislative

4 AIR 1985 SC 1618.

5 Yusuf Abdul Aziz v. The State of Bombay and Husseinbhoj Laljee AIR 1954 SC 321.

policy and that the court could invalidate the provision only if a constitutional violation is established. The logic of the court to the effect that extending the ambit of a statutory definition is a matter which requires legislative change is unexceptionable.

In **V. Revathi v. Union of India and Ors.**,⁶ the Supreme Court, after referring to *Sowmithri Vishnu*, repelled a similar challenge to Section 198 of the CrPC, 1973. After referring to *Sowmithri Vishnu*, since Section 497 IPC and Section 198 CrPC go hand in hand and constitute a legislative packet to deal with the offence of adultery committed by an outsider, the challenge to said Section failed.

The decisions in **Sowmithri Vishnu v. U.O.I.**⁷ and **V. Revathi v. Union of India and Ors**⁸ hereby stand overruled.

CONCLUSION

Indian ethos gives paramount importance to the sanctity of marriage and the institution of marriage. In India, marriages are considered as a sacrament. This is the reason behind criminalizing adultery. But, the sanctity of marriage can be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow. Also, if the husband consents or connives at such sexual intercourse, the offence is not committed; thereby showing that there is no sanctity of marriage which is protected and preserved, but a proprietary right of a husband. Now, it is only a ground for divorce, not a crime. Decriminalization of adultery will see rising of the divorce rates and cases of marital infidelity and will critically endanger the institution of marriage. But, in a real sense, such marriages are not sacrament marriages where your spouse is not willing to live with you. It is cruelty upon the female to force her to live with the husband against her will, and there is an adverse effect upon children and family in such a wedlock. So, it is better to be separated.

6 (1988)2 SCC 72.

7 1985 Suppl. SCC 137.

8 (1988)2 SCC 72.

DISCLAIMER

The views expressed by the authors/ contributors are their own and do not in any way reflect the views of the Editor or the National Law School of India University.

The Editor and the National Law School of India University are not responsible for mistakes if any and for copyright violations of any kind.

FORM IV

Place of Publication	Bangalore
Periodicity of Publication	Annual
Printer's Name	National Printing Press
Whether Citizen of India (if foreigner, state the country of origin)	Yes
Address	580, K.R. Garden, Koramangala, Bangalore- 560 095
Publisher's name	Dr. Sudhir Krishnaswamy Vice Chancellor National Law school of India University
Whether Citizen of India?	Yes
Address	National Law School of India University Nagarbhavi, Bangalore- 560 042
Editor's name	Dr. Sarasu Esther Thomas
Whether Citizen of India (if foreigner, state the country of origin)	Yes
Address	National Law School of India University Nagarbhavi, Bangalore- 560 042
Name and address of individuals who own the newspaper and partners of shareholders holding more than one per cent of the total	National Law School of India University Nagarbhavi, Bangalore- 560 042

I, Dr. Sudhir Krishnaswamy, on behalf of National Law School of India University, Bangalore, hereby declare that the particulars given above are true to the best of my knowledge and belief.

For National Law School of India University

Sd/-

Dr. Sudhir Krishnaswamy

