e-ISSN 2582-4570

DELHI JOURNAL OF CONTEMPORARY LAW

VOLUME III

2020

LAW CENTRE-II
UNIVERSITY OF DELHI

Delhi Journal of Contemporary Law

Vol. III 2020

e-ISSN 2582-4570

EDITOR-IN-CHIEF NOTE

It is my pleasure and privilege to present Volume III year 2020 of the Delhi Journal of Contemporary Law. It carries e-ISSN Number 2582-4570. The journal is peer-reviewed e-journal with annual periodicity that ensures to make a significant contribution to explore, disseminate legal research and findings in rapidly changing scenario especially during ongoing COVID-19 pandemic. The Journal gives an ideal forum to academicians, researchers, judges, advocates, students and others to express their profound thoughts, legal analysis and information to broaden spectrum of contemporary legal issues in form of articles. The present issue is special because it epitomises the human pursuit and zeal to keep going even in adverse times when the world is reeling with COVID-19 pandemic and online working and meetings have taken over the physical meetings & working. This issue is certainly an offshoot of hard work of all its contributors and specifically the editorial team led by Prof. (Dr.) Vageshwari Deswal as its editor. I attribute this issue to the undying spirit of humanity that life never stops even in odd times.

Best Wishes

Prof. (Dr.) Mahavir Singh Kalon
Professor In-charge
Law Centre-II, Faculty of Law
University of Delhi

EDITOR'S NOTE

Law is a dynamic discipline with an ever expanding expanse of statutory provisions and authoritative judgments. A person associated with the legal field needs to constantly update oneself on the contemporary developments and keep abreast with the latest enactments or changes in old laws via legislative amendments or the judicial tool of interpretation.

The Delhi Journal of Contemporary Law is an endeavor in this direction. Every article has been carefully tested on the touchstone of its relevance in present times in addition to its evergreen appeal. We have articles relating to violence during covid, transborder data flow, rape, religious conversions, patents, copyrights, trade secrets and review of laws in the light of latest judgments impacting conditions relating to bail, right to food, probation of offenders etc.

I am thankful to our Prof. in Charge Prof. (Dr.) Mahavir Singh for his constant support and encouragement. My thanks are also due to all the contributors for their fantastic academic pieces that have added value to our journal. And lastly, I am thankful to my dedicated editorial team for deftly handling all the work ranging from selection of articles, getting them peer reviewed by senior professionals, incorporating suggested changes, editing, formatting and all other related work that goes into bringing out a law journal.

It is my privilege to present to you the third volume of Delhi Journal of Contemporary Law. Wishing you knowledgeable moments as you peruse through its contents.

Prof. (Dr.) Vageshwari Deswal
Professor, Law Centre-II,
Faculty of Law, University of Delhi.

EDITORIAL COMMITTEE MEMBERS

Dr. Monica Chaudhary, Assistant Professor, Faculty of Law, University of Delhi completed her LL.B., LL.M. and Ph.D. from Faculty of Law, University of Delhi. She has been teaching at the Faculty of Law, University of Delhi since January, 2006.

Dr.. Jupi Gogoi, is Assistant Professor of Law Centre II, Faculty of Law, University of Delhi. She has completed her LLM from Indian Law Institute with specialisation in Intellectual Property Rights and Human Rights Law. Before joining Faculty of Law, she worked as Assistant Professor in The Indian Law Institute. Her areas of interests are IPR, Human Rights and Constitutional Law.

Dr. Santosh K Upadhyay is an Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. He has six years of teaching experience. His areas of interest are Public International Law, Laws of Armed Conflicts, Jurisprudence and Administrative Law. He is a keen researcher and he has presented papers in many national and international conferences. He is also a member of the Advisory Board of RMLNLU Law Review. He regularly delivers lectures on the important topics of public international law in many Indian universities and institutes.

Dr. Ajay Sonawane, Assistant Professor, at Law Centre-II Faculty of Law, University of Delhi completed her LL.B., LL.M. from ILS Law College, Pune. He has completed his Ph.D. in Law from Department of Law, Savitribai Phule Pune University. His areas of interest are Human Rights Law, Constitutional and Administrative Law.

Mr. Amrithnath SB completed LL.M in Intellectual Property Law from King's College London and LL.M in Environmental Law from Cochin University of Science and Technology. He has around 10 years of teaching and research experience. He is currently Assistant Professor at Law Centre-II, Faculty of Law, University of Delhi.

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She is currently pursuing Ph.D. from Faculty of Law, University of Delhi, in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

DELHI JOURNAL OF CONTEMPORARY LAW VOL.III

e-ISSN 2582-4570

RIGHT TO FOOD AND FOOD SAFETY IN INDIA : CONSTITUTIONAL MANDATE AND JUDICIAL PRECEDENT

Dr. Priya Ranjan Kumar[*]

Abstract

Health is the descriptor of peoples' physical, mental and social condition and depends on access to food, adequacy of food, quality of food in terms of nutrition and safety from any kind of adulteration. Nature and quality of food a person takes determines the quality of life he/she enjoys. It is the State responsibility to ensure through legislation, policies, executive mechanism the quality of food made available for consumer's consumption, laying down food standards and regulate the economic activity from manufacturing to retailer. Though the Indian constitution in content does not recognises right to food as fundamental right but Indian Judiciary has succeeded in fulfilling international obligation towards citizen's right to food and food safety by elevating Directive Principles of State Policy to that of Fundamental rights. This paper attempted to reflect the right to food and food safety legislation in India from constitutional perspective and discuss some relevant issues with the help of judicial precedent. The paper also explains the limitation of judicial precedent in food safety and standards for consumers who happens to be an innocent less intellectual capacity to understand technicality involved in it. The paper Concentrate on food safety and standard issues relating to salt, adulterated and synthetic milk, sale of adulterated food, tobacco product, bottled drinking water, use of lactic acid in food products and Maggie noodle case. The paper is purely based on doctrinal method of research.

I. INTRODUCTION

Stipulation of health gives complete description of one`s physical, mental and social condition and its productive competency to work, live and enjoy life as a human being with dignity. Universal Declaration of Human Rights do state for everyone right to health which includes right to food, clothing, housing, health services and public services. Availability of food, access to food, adequacy of food, quality of food in terms of nutrition and safety from any kind of adulteration are the parameters which will determine the given nations citizen's life quality and socio-economic growth of nations. Jurisprudence imposes a responsibility on the Nation State and international community to undertake activities for promotion of the rights in the nature of the right to food. Roscoe Pound, the founder of sociological school also laid emphasis on the need for law to protect the social interest. The right to food is amongst one of the basic human wants. Therefore, philosophy of Roscoe Pound guides the Nation

[*] Associate Professor & Head, Department of Law, Tezpur University.

State to enact legislation on the right to food.[1] India is a signatory of a number of international treaties which cast an obligation on the Government of India to guarantee to the people of India the right to food. Indian Judiciary has succeeded in fulfilling this international obligation towards citizen's right to food and food safety by elevating Directive Principles of State Policy to that of Fundamental rights. Moreover, Judiciary has reviewed the State actions which alleged to jeopardise citizen`s right to food.

II. LEGISLATION ON RIGHT TO FOOD AND FOOD SAFETY: A BRIEF NOTE

India does not have comprehensive legislation on right to food for its citizen`s but the protection depends on numerous central and state legislations which aims to achieve constitutional goal and fulfils international obligations. Food related Legislations in India are : The Indian Penal Code- sections 272 to 276 relating to public health and safety; The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, The Food Safety and Standards Act, 2006 to consolidate -The Prevention of Food Adulteration Act, 1954, The Fruits Product Order, 1955, The Meat Food Products Order, 1973, The Vegetable Oil Products (Control) Order, 1947, The Edible Oils Packing (Regulation) Order, 1988, The Solvent Extracted Oil, De-Oiled Meal and edible Flour (Control) Order, 1967, The Milk And Milk Products Order, 1992 and any order made under The Essential Commodities Act, 1955. There were many regulations made under the Food Safety and Standards Act covering the delegated legislation permissible area of food additive, contamination & toxins in food, food for special medical purposes, specific and non-specific food, organic food, alcoholic beverages, advertising and claims, packaging, labelling, Import, laboratory and sample analysis etc. There is much state legislation too on food safety and standards.

The Food Safety and Standard Act, 2006 along with various regulations were legislated and enforced with an object to remove confusion in the minds of consumers and stake holders about multiplicity of laws. Lay down standards to regulate food additives and contaminants. It was enacted to after considering Law commission report, international laws and agreement and to fulfil international obligations. It intends to establish Food Safety and Standard

[1] FBA Freeman Michael, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th edn., 2014).

Authority of India for laying down scientific standards for food article and regulate economic activity from manufacturing to retail and ensuring quality of food for human consumption.[2]

III. RIGHT TO FOOD: CONSTITUTIONAL MANDATE AND JUDICIAL PRECEDENT

It is imperative to comprehend that Indian constitution in content does not recognises 'right to food' as a fundamental right though in context the India Judiciary has upheld right to food as fundamental right while giving liberal interpretation to article 21, 23, 39, 43, and 47 of the Indian Constitution. In the matter of protection of women from sexual harassment at workplace or protection of children, or elderly person, equal pay for equal work and at many more occasion 'Judicial Activism' has bridged legal gap, redefined and given new dimension to fundamental rights and provided social security. Law declared by the Supreme Court of India is precedent for all subordinate courts in India and its importance in establishing the right to food in India cannot be underestimated. According to Prof. A. Lakshminath, "the doctrine of *stare decisis* helps to generate judicial accountability, ensures fairness in adjudication and excludes arbitrariness and helps in maintaining stability and certainty". Through Public Interest Litigation, the doctrine of precedent has played a very creative role in realization of right to food of the hungry and malnourished population of India in absence of adequate enactments.

As the process of determination of the authority of a precedent is complex. The illiterate men who constitute the whole bulk of the starving population finds it difficult to access to the laws derived through the precedent. However, this doctrine of precedent is subject to certain lacunae. First, the unsatisfactory method of reporting makes it difficult for a food vulnerable person to know the law on right to food. Secondly, the determination of the *ratio decidendi* of the case which lay down the biding principle is a complex process. Thirdly, some conflicting decisions throw the people in dilemma as to what the law of the land is and under such circumstance people find it difficult to ascertain and enforce their rights in case of violation. Fourthly, there are various other factors which destroy the authority of precedents. Sometimes the legislature adopts a legislation which expressly or impliedly abrogates a precedent.[3] In such cases it becomes difficult for an illiterate man to rely on law laid down as

[2] *Swami Achyutanand Tirth* v. *Union of India* (2016) 9 SCC 699.
[3] The Parliament adopted the twenty-fourth amendment of the Constitution to abrogate the effect of the decision of *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643.

precedent and undertake the risk of incurring expenditure on litigation. Fifthly, precedents are sometimes reversed by a higher tribunal on appeal. Therefore, a common man is unsure about the authority of a precedent. Sixthly, confusion arises in the minds of the common man as a precedent is often overruled in subsequent cases and a new law is established. Seventhly, a precedent also does not enjoy the authority of law when it is given in ignorance of law. Therefore, the doctrine of precedent can be termed as the law for the lawyers and the highly educated section of the society. Eighthly, the precedent does not enjoy the authority of law when the decision is passed sub silentio[4]. This creates a hurdle for the illiterate man to understand the laws flowing through the precedent. Finally, the observations of the court in a judgement divorced from its context, as containing a full exposition of the law on a question when such question was not required to be answered does not operate as the authority of law[5].

IV. RIGHT TO FOOD AS A BASIC HUMAN RIGHT

Judicial construction of right to food and its relation to fundamental rights can be seen in the case of *Francis Coralie* v. *Union Territory of Delhi*,[6] wherein Court observation on meaning and nature of right to life enshrined under article 21[7] was not merely an animal existence but includes right to live with human dignity. To live or survive with human dignity it is essential that a person must have right to access adequate nutritious food, shelter and clothing.[8] The basic necessity of life of hunger is food without which there is no meaning to their life. Thus, right to food is protected under the right to life[9]. People have to eat to survive and if right to livelihood is not upgraded as fundamental right, then the easiest way to deprive a person right to life is to deprive him from access to food or means of livelihood.[10] Supreme Court has asserted the fact that "right to life guaranteed in any civilized society would take within its sweep the right to food".[11] Right to food is essential to have good health and have right to health as fundamental right[12]. Children of tender age must have an opportunity and facility to develop in a healthy manner in condition of freedom, dignity, just and human conditions of

[4] *MCD v. Gurnam Kaur*, (1989) 1 SCC 101.
[5] *Madhav Rao Jivaji Rao Scindia* v. *Union of India*, (1971) 1 SCC 85.
[6] AIR 1981 SC 746.
[7] The Constitution of India, 1950, art. 21.
[8] H.M. Seervai, *Constitutional Law of India*737 (Universal Law Publishing, LexisNexis, Vol.-I, 4th edn., 2017.
[9] Dr. J.N. Pandey, *The Constitutional Law of India*280 (Central Law Agency, 47th edn., 2010).
[10] *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545.
[11] *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520.
[12] *State of Punjab* v. *Mahinder Singh Chawla*, AIR 1997 SC 1225.

living.[13] The Supreme Court has emphasized in *Vincent* v. *Union of India*[14] that "a healthy body is the very foundation of all human activities". Canteen is required to be established in all establishment where food can be supplied to the workmen at the subsidized rates is the right to food as a basic human rights[15]. Even the Court has taken reference to article 25 of UDHR and held that 'right to life includes right to live with basic human dignity with the suitable necessities of life including food for socio-economic well being of every individual[16]. The Universal Declaration of Human Rights, International Covenant on Economic Social and Cultural Rights recognises certain basic needs for human existence and to ensure socio-economic justice which includes right to food, clothing, housing, right to education, rights to physical and mental health as integral part of right to life[17].

V. RIGHT TO FOOD AND FOOD SAFETY UNDER DIRECTIVE PRINCIPLES OF STATE POLICY (DPSP)

Articles 36 to 51 contain the Directive Principles of State Policy (DPSP), borrowed from the Irish Constitution and are non-justiciable[18] policies. DPSP are fundamental in the governance of the country and aims to establish welfare State, to promote just socio-economic order, improve the public health and thereby aids the realisation of right to food of the people. States have constitutional obligations to apply these policies in law making.[19] The court has used articles 14, 19 and 21 frequently as a means to implement the directive principles[20] and maintained that DPSP and fundamental rights are complementary and supplementary to each other[21] and both together form the conscience of the Constitution.

To improve the nation's public health is the primary constitutional obligation of the States[22] and its scope is wider in nature. Right to health includes right to food which must be nutritious in nature with which a person may lead a healthy life free from hunger. The availability of food to people must also be free from any adulteration which is not fit for

[13] *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.
[14] AIR 1987 SC 990.
[15] *Deena Nath* v. *National Fertilizers Ltd.*, (1992) 1 SCC 695.
[16] *Peerless General Finance and Investment Co. Ltd.* v. *Reserve Bank of India*, (1992) 2 SCC 343.
[17] *C.E.S.C. Ltd* v. *Subhash Chandra Bose,* (1992) 1 SCC 441.
[18] Constitution of India, art. 37 says that, the Directives shall not be enforceable in the Court of law but the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws; *Ashok Kumar Thakur v. Union of India*, (2008) 6 SCC 1
[19] B. Shiva Rao (ed.); *The Framing of India's Constitution, Select Documents* 175 (Vol-II, Universal Law Publication Co. Pvt. Ltd., New Delhi, 2010).
[20] *Unnikrishnan* v. *State of Andhra Pradesh*, (1993) 1 SCC 645.
[21] *Dalmia Cements (Bharat) Ltd.* v. *Union of India,* (2000) 123 ELT 307.
[22] Constitution of India, art. 39 (e) and 47.

human consumption. Therefore, the Government is under obligation to prohibit exploitation of innocent people by the hand of economic gainer by marketing genetically modified food grains which are harmful for human consumptions. The Supreme Court has held that "even the food distributed through the public distribution system is required to pass the litmus test and the Government should confer to the letter and spirit of this provision and it cannot distribute food grains unsuitable for human consumption".[23]

Article 47 of the Indian Constitution for improving public health confers obligation on the states to raise level of nutrition and standard of living of its people. The state is to endeavour to bring about prohibition of the consumption intoxicating drinks and drugs which are injurious to health except for medical purposes. The Allahabad High Court has issued a "writ of mandamus restraining the state from selling in open market chemically processed soya bean which was unfit for human consumption".[24] The Bombay High Court has upheld the Food Safety and Standards Act, 2006 as welfare legislation and intra virus to the Constitution[25] referring precedent in the case of *Sant Lal Bharati* v. *State of Punjab.*[26]

The court in the case of *Saikhawant Ali* v. *State of Orissa*[27] expressed that "adulterated food, which would pose adverse health risk, there was a need to confer special powers so that in emergency conditions, the legislation could be properly implemented and the culprits punished appropriately". Citing the observations of the Supreme Court in *Centre for Public Interest Litigation* v. *Union of India*[28] , the Bombay High Court indicated that "the Act was framed in order to confer protection to health and well-being of human beings".[29] It further added that "any adulterated hazardous food can be a threat to the fundamental right to life".[30] The Court was of the view that "Food Safety and Standards Act was a mechanism to implement article 47 of the Constitution of India which ensures that the State raises the level of nutrition and standard of living for the benefit of public health in India".[31]

[23] *Tapan Kumar Sadhukhan* v. *Food Corporation of India*, (1996) 6 SCC 101.
[24] *Shaibya* v. *State of U.P.*, AIR 1993 All 171 (para 8).
[25] *Ahar, Indian Hotel and Restaurant* v. *Union of India,* Writ Petition No. 477 of 2012 decided on September 16, 2015.
[26] (1988) 1 SCC 366.
[27] AIR 1955 SC 166.
[28] AIR 2014 SC 49.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.

VI. INDIAN JUDICIARY ON FOOD SAFETY AND STANDARDS ACT, 2006: SOME REFLECTIONS

The Constitution of Indian being supreme law of land, the Supreme Court of India the highest Judicial Authority of the country and is the interpreter and protector of the Constitution. It is the guardian of the fundamental rights of the people and review actions of all the wings of the States; has the power to determine the constitutionality of all laws and its decision, direction and even guidelines are laws aimed to protect public interest and human rights including right to food. Judiciary being independent, impartial, free from external influence have effective power to ensure better security for the rights of the public.

Constitutionality of Food Safety and Standards Act, 2006

The jurisdiction of the Bombay High Court was invoked through PIL with a prayer to quash the provisions of Food Safety and Standards Act, 2006 as violative of article 14, 19 and 21 of the Indian Constitution. The Bombay High Court, in the case of *Ahar, Indian Hotel and Restaurant* v. *Union of India*[32] upheld the constitutionality of the Food Safety and Standards Act, 2006 and the rules made there under and taking reference to *Sant Lal Bharti* v. *State of Punjab*[33] and *Kusum Ingots and Alloys Ltd.* v. *Union of India*[34] stated that "constitutional validity of any Act must be on the basis of certain and definite set of facts and not on apprehension and cannot be raised in abstract or in vacuum. The fact must show that implementation of the Act has violated any constitutional or legal right guaranteed". It is within the statutory capacity and discretion of the public authority with the rules of natural justice to grant licence or permit or withhold the same and impose reasonable restriction within the parameter of article 19 (1) (g) on carrying out trade or business in beef or food products which are inherently dangerous, noxious or injurious to the public interest, health and safety. Article 14 forbids class legislation but permits reasonable classification. If classification is based on intelligible differentia and such differentia must have rational relation to the object sought to achieve by the legislation.

[32] *Supra* Note 25.
[33] (1988) 1 SCC 366.
[34] (2004) 6 SCC 254.

Sale of Salt

The Food Safety Officer collected the sample of salt having brand name as "*shudh*" and sent for its testing to state food and drugs laboratory in Namkom, Ranchi through the designated officer. Upon the sample being analyzed, it was found of substandard grade with unsafe in terms of section 3(zz), (x), and (xi) of Food Safety and Standards Act, 2006. On receiving report, the designated officer sent the report to the appellant calling upon him to get the sample reanalyzed, if he wishes to do so, from the referral laboratory. The appellant did not opt for reanalyzing and thereby, the report was submitted to the Adjudicating Officer. For Selling of salt of sub-standard quality and for keeping it in unhygienic condition the Court has convicted the appellant for the offences punishable under sections 51 and 59(1) of the Food Safety and Standards Act and sentenced him to pay a fine of Rs. 3 lakhs for both the offences.[35]

In *Academy of Nutrition Improvement and ors* v. *Union of India*[36], the court said that "the terms like processing, storage, distribution, food service, catering, food ingredients which are not defined under the Act have created an ambiguity and vagueness in the implementation of the provisions of the Act".[37] The Supreme Court has observed that "where an item of food (used in the composition or preparation of human food and used as a flavouring) is in its natural form and is unadulterated and is not injurious to health, a rule cannot be made under the provisions of the Act to ban the manufacture for sale, storage or sale of such food item on the ground that such ban will ensure that the populace will use a medicated form of such food, which will benefit a section of the populace".[38] The Supreme Court has made the decision in the context of the challenge to the validity of Rule 44-I of the provisions of Food Adulteration Rules, 1955 which banned use of common iodised common salt for human consumption. The issue was whether compulsory iodization system ought to be replaced by voluntary need-based iodization system? Such replacement will give an opportunity to those who have deficiency of iodine and they can choose iodized salt. It was claimed that it is unjust and unfair to deny a person having deficiency of iodised to choose between iodized and common iodized sal and therefore, Rule 44-I was violative of articles 14 and 21 of the Constitution. The Supreme Court held that "the issue to have a universal salt iodization is much debated technical issue relating to medical science and that decisions in these matters

[35] *Manoj Verma* v. *The State of Jharkhand.,* (2015) SCC Online Jhar 2432.
[36] 2011 (8) SCC 274.
[37] *Ibid.*
[38] *Ibid,*

can only be taken by an expert".[39] The Court should not hasten on the issue where the scientist and medical experts are careful. Moreover, the court should not substitute their own views as wise, secure, sensible or appropriate relating to technicalities where question is about the public health.

Adulteration of Milk

Milk is considered as essential nutritious food for all age of human being. A PIL petition was filed based on "Executive Summary on National Survey on Milk Adulteration, 2011". The petition has stressed on the growing threat of sales of adulterated and synthetic milk in India.[40] It was alleged that milk was produced with the use of hazardous substance like Urea, detergent, refined oil, caustic soda having threat to the life and standard of human health and the government have failed to prevent and prohibit such practices. Such hazardous substances are harmful for heart, liver, kidneys and may also lead to cancer. On such a grave issue, the Court direction has provided relief to the consumer. The Court held that "the Government shall take appropriate steps to implement Food Safety and Standards Act, 2006 in a more effective manner and to inform owners of dairy, dairy operators and retailers working in the State that if chemical adulterants like pesticides, caustic soda and other chemicals were found in the milk, then stringent action shall be taken on the State Dairy Operators or retailers or all the persons involved in the same".[41] The Court has also given direction to the State Food Safety Authority to identify high risk areas and at the times of nearing festivals where such practices were paramount. The lab testing infrastructure must be also be looked into by the State Food Safety Authorities. The snap short surveys at the State as well as at the national level be undertaken by FSSAI. Awareness among the School going children be carried out so to develop skill and competency to detect common adulterants in food.

In the case of *Pradeep Kumar Gupta* v. *State of U.P.,*[42] the appellant was a petty food salesperson occupied in the business under the Act. The Food Safety Officer investigated his stall, purchased a specimen of paneer, which as per report of public analyst was found to contain fats less than the prescribed limit of 50% hence, sample was found to be sub-standard. On the basis of the report and after requisite sanction from the Designated Officer under the Act, a complaint was filed by the Food Safety Officer before the Adjudicating

[39] *Ibid*.
[40] *Supra* note 2.
[41] *Ibid.*
[42] Criminal Appeal No. 1586 of 2015.

Officer. The Adjudicating Officer after notice and hearing the appellant passed an order imposing a penalty of Rs. 5 lakhs. The appellant preferred an appeal under section 70(1) before the Food Safety Appellate Tribunal i.e., the District Judge. The F.S.A.T further passed a conditional order that the appeal be admitted subject to deposit of 50% of the penalty. In appeal the Allahabad High Court upheld the objection stating that both the adjudicating authority under the Food Act, 2006 were having only power of civil court and while imposing penalty have exceeded their authority. Therefore, the court referred the matter for determination by the bench of the High Court.

Sale of Adulterated Food

While defining the scope of the prohibition against selling of adulterated food, the Supreme Court observed in the case of *State of Orissa* v. *K.R. Rao*[43], that,

"In the absence of any provision, express or necessarily implied from the context, the courts would not be justified in holding that the prohibition was only to apply to the owner of the shop and not to the agent of the owner who sells adulterated food. The Act is a welfare legislation to prevent health hazards by consuming adulterated food. The *mens rea* is not an essential ingredient. It is a social evil and the Act prohibits commission of the offence under the Act. The essential ingredient is sold to the purchaser by the vendor. It is not material to establish the capacity of the person vis-a-vis the owner of the shop to prove his authority to sell the adulterated food exposed for sale in the shop. It is enough for the prosecution to establish that the person who sold the adulterated article of the food has sold it to the purchaser."[44]

Food article must have basic standard and the Food Authority of India is under obligation to prescribe the standard by laying down regulation on every food article.[45] Any deviation to those standards must be dealt strictly. The Apex Court plays a stringent function in reviewing the action of administrative authorities while implementing the food adulterated laws and shows no compassion to the convict for reducing and giving sentences.[46] *Khoya*, a milk product is used for preparing sweets and many other eatable food and adulterators of it has

[43] AIR 1992 SC 240; retrieved from www.indiankanoon.org/doc/1971456/; accessed on 18-04-2018 at 08:44 PM.
[44] *State of Orissa* v. *K. Rajeshwar Rao,* AIR 1992 SC 240
[45] *Vital Nutraceuticals Pvt. Ltd.* v. *Union of India,* 2014 (2) FAC 1.
[46] *Mithilesh* v. *State of NCT , Delhi* 2014 (2) FAC 37.

been given rigorous imprisonment.[47]From manufacturer to street vendor, all are duty bound to adhere with food standard laid down under FSSA to maintain food hygiene and ensure nutrition as well as public health.[48] To maintain public health, the Court emphasizes on providing proactive disclosure of food ingredient and its importance and printing it on the cover of the product[49]. The cases relating to adulterated food must be disposed off in prescribed time bound limit,[50] giving due consideration to fact of each case[51].

Though the court had stringent approach in food adulterated cases but has also depicted flexibility in catering needs and requirement of the society.[52]Even though, food adulteration recorded marginal in nature but still an act is an offence and punishable[53]. The role of the judiciary becomes more important when the laws on food safety or rules thereunder are defective or there are lacunae in procedural norms. Misappropriation of funds in food subsidy cannot be tolerated.[54] There were contradiction of opinion of High Court on delay in proceeding, delay and contradiction in laboratory report and analyst which have given benefit of doubt to accused person which resulted in acquittal[55]. For defects in laws or administrative norms or in cases of latent adulteration of food benefit of doubt is conferred on accused.[56]

Tobacco Products

The Central Legislation on Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) is a comprehensive law on tobacco product in the interest and to protect public health as a Constitutional mandate under article 47. All tobacco products are covered under it and it prohibits advertisement but regulate production, supply, distribution, trade and commerce. Consumption of tobacco in India is very high. The State of Assam enacted the Assam Health (Prohibition of Manufacturing, Advertisement, Trade, Storage, Distribution, Sale and Consumption of *Zarda*, *Gukta*, *Pan Masala*, etc. Containing Tobacco and/or

[47] *Suman Saini* v. *State of Haryana,* 2014 (2) FAC 152.
[48] *National Association of Street vendors v. South Delhi Municipal Corporation,* 2014 (2) FAC 96. See also *Banshilal* v. *State Of Rajasthan,* 2014 (2) FAC 120.
[49] *Danisco India Pvt Ltd.* v. *Union of India,* 2014(2) FAC 109.
[50] *M/s Tirupati Food and Beverages* v. *State of H.P.,* 2014 (2) FAC 125.
[51] *Hotel Ranchi Ashok* v. *State of Jharkhand,* 2014(2)FAC 157.
[52] *Muthyalakka* v. *Union of India*, 2014(1) FAC 190.
[53] *Sukhdev Singh* v. *State of Punjab,* 2014 (1) FAC 260.
[54] *Manpreet Singh* v. *Director, CBI,* 2014 (1) FAC 477.
[55] *Baljit Singh* v. *Union of India,* 2014(2) FAC 44.
[56] *Delhi Administration* v. *Sunil Kumar* 2014(1) FAC 163.

Nicotine) Act, 2013 which was challenged through PIL as unconstitutional.[57] The Gauhati High has affirmed the challenge and declared the Assam Health Act as unconstitutional as it lacks legislative competency and the Act is repugnant to COTPA. Moreover, unlike COTPA the Assam Health Act prohibited completely the entire industrial activity relating to smokeless and chewing tobacco which was otherwise permitted by the central legislation. Now the question arises is that whether the states are not having primary duty to give effect to article 47 of the Indian Constitution? Whether smoking cigarette or chewing tobacco is not injurious to health? In the case of *Godawat Pan Masala Products*[58], the Supreme Court stated that "trade or business in article of tobacco does not lead to an activity which is criminal in propensity, immoral, obnoxious, injurious to the health of general public". Moreover, the court asserted the fact that there exists plethora of legislation which regulated tobacco product and does not suggest that the parliament has ever treated it as an article *res extra commercium*. If tobacco is injurious to health, then what is wrong in completely prohibiting its manufacture, production, supply, distribution and consumption in the interest of public health?

In the case of *M/s Omkar Agency* v. *The Food Safety And Standards Authority of India* [59] wherein the commissioner of Food Safety, Patna, in exercise of power under section 30(a) of the Food Safety and Standards Act, 2006 has prohibited the manufacture, storage or sale of *Zarda*, *Pan Masala* and *Gutka* was challenged as violation to COTPA and also that schedule tobacco product is not food business within the meaning of Food Safety and Standards Act, 2006. Though, the Commissioner order was quashed and set aside as arbitrary and made beyond the scope of the power conferred by the Food Safety Act but the court do stated that "*Pan Masala* means the food generally taken as such or in conjunction with *Pan* like Betelnut, lime, coconut, *catechu*, saffron, cardamom, dry fruits, *mulethi*, *sabnermusa*, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non-prohibited flavours and regulated by the Food Safety and Standards Act, 2006. The moment tobacco is added to *Pan Masala* as occurring in Food Safety Regulation, 2011 it will take colour of *Pan Masala* under COTPA and the commission does not have power to

[57] *Dharampal Satyapal Ltd.* v.*State of Assam*, W.P (C) No. 1583/2014.
[58] *Godawat Pan Masala Products* v. *Union of India*, W.P. No. 78378-78380/2013.
[59] Civil Writ Jurisdiction Case No. 3085 of 2015, decided on May 2, 2016.

prohibit it by impugned order."[60] In *ITC Ltd.* v. *Agricultural Produce Market Committee*[61], the Constitutional bench of five judges observed that tobacco is not a food stuff.

In the case of *Ganesh Pandurang Jadhao* v. *The State of Maharashtra*,[62] the petitioner stopped by Food Safety Officer and was found carrying huge quantity of vessel of tobacco in a lorry. The officer filed a police complaint alleging that the petitioner had committed violation of a Government Notification prohibiting tobacco and thereby committed offense punishable under sections 26 and 30 of the Food Safety and Standards Act, 2006. The food safety officer further professed that the petitioner was also liable to be arraigned and penalized for offences punishable under sections-272, 273,188 and 328 of the Indian Penal Code. The police registered an offence and arrested the petitioner. Although the petitioner has got bail, but he himself asserted that registration of crime and lodging of complaint for offences are punishable under provisions of Indian Penal Code was illegal. According to them, offence punishable under section 328 of the Indian Penal Code is not made out against them. The day when the incident occurred, the prohibitory order was also in force. It is, therefore, clear that the petitioners were found to have committed violation of the prohibitory order. Section 272 and section 273 of the Indian Penal Code deals with the adulteration of food or drink intended for sale. Section 273 deals with the provisions of Sale of noxious food or drink. Both the sections deal with adulteration of article of food. However, it can be assumed that adulteration of food would mean mixing any material to food which would make the food unsafe and substandard. Masala would amount to administering poison. Therefore, *gutka* or *pan masala* are not subjected to food analysis. The commissioner on the basis of various report but not the report of analyst was of the opinion that sale of tobacco was not in public interest. Therefore, the Bombay High Court held that both *Gutka* and *Pan Masala* are befuddling, exhilarating or unhealthy drugs. It leads to oral sub-mucous fibrosis. Besides offering these items of food would not amount to intention to cause hurt. The provisions of section 328 of the Indian Penal Code to the present cases are therefore impermissible. Therefore, the action taken by the Police against petitioners under sections 372, 373,188 and 328 of the Indian Penal Code was declared to be illegal and as a result the complaints were quashed. In appeal to the Supreme Court, the charges under section 328 of IPC were quashed, and the petition was stay was granted.

[60] *Ibid.*
[61] AIR 2002 SC 852.
[62] Criminal Writ Petition No. 1027/2015 decided on October 15, 2020.

Bottled Drinking Water

Profuse of water are available on the earth but regret to say only diminutive 0.3 % is available for human consumption and rest 99.7% is found in other form in the nature. In such a backdrop and with knowledge that water form most essential requirement for human existence either to prepare food or to drink for survival, manufacturing, processing and trading in drinking water is economically profitable venture with all time consumer demand. The manufactures of bottled drinking water are required to complete registration process under the Food Safety and Standard Act, 2006 and also required to obtain Bureau of Indian Standard certificate. In the case of *Kerala Bottled Water Manufacturers Association* v. *Ministry of Health And Family Welfare*[63], a writ petition was filed by the Kerala Bottled Water Manufacturers Association seeking a few reliefs. The court held that only persons having proper registration can manufacture or produce packaged drinking water and the said product can be only sold with genuine parchment by the Bureau of Indian Standards. Moreover, the respondents shall take instant pace to enforce the said provisions of law.

Regulation 2.10.8 of Food Safety and Standards (Food Products Standards and Food Additives) Regulations of 2011 state about packaged drinking water which is other than mineral water and are water derived from the 99.7% sources available in the nature i.e., sea or underground water which are subject to further treatment to remove all harmful contaminations and make the water drinkable which was otherwise not.

Use of Lactic Acid

Lactic acid is a food additive and is used in food as an acidulant, buffering agent, neutralising agent. It is not consumed as a food by itself and may be used for technological purposes in manufacturing, processing, and preparation. The Bureau of Indian Standards has laid down use of lactic acid must be in conformity with standards and ash sulphate (salt-free basis) should not be used more than 2.5% by weight and in case of sugar boiled confectionery not more than 3 % o be weight. Whereas ash sulphate in dilute hydrochloric acid used not be more than 0.2% by weight and in sugar boiled confectionery not more than 0.4% by weight. In the case of *Parle Biscuits Private Limited* v. *Food Safety & Standard Authority of India, Ministry of Health & Family Welfare,*[64] the petitioner's shop was sealed and the raw materials and the food articles were seized by the Commissioner of Food Safety. The

[63] Writ Petition No. 31449 of 2016, decided on February 17, 2017.
[64] (2013) 2 Mah LJ 409.

petitioner prayed before the court to restrain respondent from taking any further action and quash action already taken. The petitioner manufacture confectionery products including sugar boiled confectionery and sale its product since 2004 and 2008 with trade name 'kaccha Mango Bite' and 'Mazelo' respectively. The petitioner product sample was sent for analysis and respondent claimed that it contains lactic acid which was impermissible and the sample contain more than permissible amount of colour which is against the Act, rules and regulations. It was noted that out of 48 batches of samples 39 batches of sample contained permissible limit but rest were not. The court held that the lactic acid is a permissible ingredient in sugar boiled confectionery product subject standards laid down by the Bureau of Indian Standards. It is important to note that DL lactic acid shall not be added to any food meant for children below 12 months. The court directed to return back 39 batches of product which are within permissible limit.

Maggie Noodles

Maggie noodles is the choice of all the children and people of all age as it is easy to cook and be made presentable on dining table quickly. Maggie Noodle is product of Nestle Company, a Switzerland based company having subsidiary place of business in India. The question was raised on the manufacturing process of Maggie noodle in which use of glutamic acid including monosodium glutamate (MSG) and lead was made. The Uttar Pradesh Food Safety and Drugs Administration collected the samples of Maggie noodles and found that it does contain lead in excess of maximum permissible limit of 2.4 ppm, misleading labelling information on the package reading "no added MSG and lead". The FSSA, New Delhi held liable the company and directed to withdraw it product from market. The Government filed complaint against the company and claimed Rs. 640 crore as compensation before the National Consumer Dispute Redressal Commission, New Delhi which had forwarded 16 samples of Maggie Noodles to Central Food Technological Research Institute, Mysuru as per direction of Supreme Court.[65] The Bombay High Court interpreted the show cause notice issued to the company as a ban order. At many occasion the sample of Maggie Noodles was sent to laboratory in Gorakhpur, Kolkata, Delhi, Maharashtra, Gujarat, Tamil Nadu, etc and found contain of lead and glutamic acid beyond the permissible limit. In 2015, the company called back its Maggie Noodles from the market till the clearance from the Authority to ensure consumer health safety.

[65] Order dated January 13, 2016, Civil Appeal No. 14539 of 2015 with SLP (C) No. 33251 of 2015.

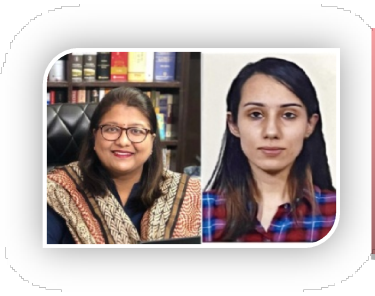
The honourable court held that all the administrative orders must pass the test of principle of natural justice and the impugned order in this case failed in test and therefore, liable to be set aside. When the company had withdrawn the product till the clearance by the authority by press release then what was the need of such order. The Court has also questioned on the laboratory institution where the samples were test on the ground of their accreditation and recognition that they were not as per the Act and regulation and therefore the court decline to rely on their reports. Mandatory procedure laid down under section 47 of the Act and Regulation were also not followed. [66] The Court has given relief to the Company on the ground of non-adherence of procedural norms by the Food Authority and Laboratory credentials but what if the alleged Maggie product have lead and MSG, can it be allowed to threat the life, safety and health of people only on the ground on non-adherence of procedural norms.

VII. CONCLUSION AND SUGGESTIONS

India judiciary equipped with feature of independence, guardian to the constitution and Fundamental Rights of individual have upgraded the Directive Principle of State Policy to fundamental right. Right to food implied under article 21 of the Indian Constitution and many judicial precedents on right to food, food safety and standards were laid down which needs to be complied subject wise highlighting stare decisis so that layman can read, understand and apply in their day-to-day life and be aware of their right. Persons who know their rights can be in a position to enforce it in case of violation. The executive machineries responsible to implement the statutory provisions of Laws on Food Safety and Standards have an onerous responsibility to the welfare of the citizens and preserve and protect their valuable rights guaranteed under the Indian Constitution. Infrastructure and skilled man power needs to be raised in Laboratories recognised for analysis of Food and related samples. The dilemma of conflict and confusing state of mind regarding recognised lab and authencity of its report must be avoided and what happened in Maggie Noodle case should not be repeated at the cost of human life, safety and health.

[66] *M/s Nestle India Limited* v. *The Food Safety and Standards Authority of India*, AIR 2015 SC 489.

e-ISSN 2582-4570



COURT OBSERVING UNCONSTITUTIONALITY IN RELIGIOUS MATTERS *VS* THE DOCTRINE OF ESSENTIAL PRACTICE

Dr. Belu Gupta[*] *Varalika Deswal*[**]

Abstract

The onset of festive season brings with it various practices which then become the ground for debate across several religious and social groups. The evolution of religious festivities and the practices that each group associates with the same in these contemporary times raises the question: what constitutes an essential practice? With different religious groups questioning one another about the same, and raising issues of social concern society waits for clarity on the subject. Who decides what religious celebration or practice is harmful to society, is it society itself? Where does one find the balance between enjoying the freedom to practice one's religion and being respectful and considering the societal impact that the same may have? In a secular democracy, the practice of judicial activism in India is one of the ways in which the judiciary gets empowered and dispenses justice. This is one of the integral features of the democracy which keeps its courts strong and helps the people, it gives the Supreme Court considerable autonomy in acting as a policy reformer while acting as the supreme adjudicating body. Like all common law systems, our Apex Court is responsible for interpreting and preserving the constitution and its ideas. However, there are matters where the court in its functioning reaches an intersection between preserving constitutionality or preserving the interests of the people. This paper will aim at exploring how the judiciary responds to matters of social justice *vis-a-vis* protection of personal laws.

I. INTRODUCTION

The Constitution of India, via Article 25 guarantees the freedom to practice, profess and propagate religion to all persons; Article 26 extends this freedom to religious denominations and groups to manage their religious affairs; but, this freedom can be regulated or restricted on the grounds of public order, morality and health.[1]We explicitly declared ourselves to be a secular nation vide the constitutional 42nd amendment in the year 1976.[2] Thus, despite having an overwhelming majority of Hindu population, India does not have any state religion. By adopting a non-patronizing approach towards any particular religion, India has ensured a neutral and impartial approach towards religious matters.

[*]Assistant Professor, Law Centre-II, Faculty of Law, University of Delhi.
[**]Legal Researcher presently pursuing her law degree from Jindal Global Law School

[1]The Constitution of India.
[2]Forty-second Amendment Act 1976.

Our Judiciary is of the belief that there lacks a demarcation between what the matters of religion are and what not. Religion isn't defined in the Constitution and cannot be given one rigid definition.[3] It is still interesting to note that in whatever scope possible, without limiting the definition of religion, the Supreme Court defines it as a matter of faith where having belief in God is not mandatory to constitute religion.[4] It is a code of ethical rules for its followers to abide by and observe ceremonies which are regarded as an integral part to it.[5] It is the matters that fall out of essentiality in a religion that are secularized and legalized.

India, being home to a multitude of religions and our socio-cultural norms has, to a great extent, been influenced and reinforced by our religious beliefs. In such a scenario, it becomes extremely difficult to segregate religious and social or cultural practices. There are several instances when these practices are not based on religious belief or faith alone and then it becomes problematic to categorize it as an essential religious practice. Objections to their continuity merit state intervention and if the contentious religious practice is exclusionary i.e. if it is discriminatory, oppressive or violative of human dignity, then the court may apply the 'anti-exclusionary principle'[6]. This principle is utilized to resolve conflicts wherein claims to autonomy in religious matters threaten the constitutional principle of equality.

Humans are mortal beings with limited knowledge and there are multitude of matters in this infinite universe which are beyond human comprehension. Religion is a matter of faith, and not everything that is believed in, is capable of being calculated with mathematical precision or provable with scientific observation. By attempting to define faith with logic, Judges are venturing into territory that is uncharted for judicial acumen and trying to indulge in judicial adventurism of sorts.

Contextualizing the 'Harm Principle'[7]with religious practices, one can safely deduce that religious practices should not be subjected to judicial circumspection unless they there is a resultant harm to someone else. Under our constitution, any religious practice that goes against the constitution can be restricted. It is perfectly justified for the judiciary to delve into

[3]*The Commissioner, Hindu Religious Endowments, Madras* v. *Shri LakshmindarTirthaSwamiyar of Shri Shirur Mutt* [1954] SCJ 335.
[4]*S.P. Mittal* v. *Union of India* [1983] SCR (1) 729.
[5]*Ibid.*
[6]The "Anti-exclusionary principle" was set forth by the Supreme Court in the *Sabarimala case*, [2018] SC 1690.
[7] The harm principle, a basic tenet of Liberalism was given by an English philosopher, John Stuart Mill who said that, people should be free to act however they wish unless their actions cause harm to somebody else.

matters concerning perceptible threats to the constitutional guarantees of equality, freedom and non-discrimination.

II. DECLARING UNCONSTITUTIONALITY

Observing the growing legitimacy and influence of the courts, scholars have started referring to the India as a *juristocracy*,[8] or even a *judicial dictatorship*,[9] in some cases.The power of the Indian Supreme Court and High Courts to declare unconstitutionality is beyond question.[10]Though courts subordinate to the High Court cannot decide upon matters questioning constitutional validity they can challenge it.[11]As a starting point in all cases an assumption of matter on hand being constitutionally valid is made.[12] And where the Court sees multiple interpretations possible, the one that complies with the constitutional mandate is the one that is adopted.[13]The Court, in cases, often leans towards the interpretation that preserves constitutional elements. The problems in interpretation begin to arise when there isn't a clarity seen with the matter and constitutional remedies. In such cases it is up to the Court to decide the level of acceptability in the issue and if there is a breach of fundamental rights there is no hesitation seen on the Court's side to declare said activity as unconstitutional.[14]

Establishing the Essential Practice Test

When it came to deciding which religious matters were entitled to constitutional protection, the *assertion test*, in which one could simply assert that the practice in question is a religious practice, was rejected by the Court.[15] Justice Mukerjea pointed out that the Court would have to assess and examine the practice 'asserted' and that the Court's view would have to be formed as a result of a far ranging inquiry into the same, which could not be practically possible and so the *essential practice test* was recommended wherein the court would see whether the practice in question exists or not and then see if it is essential to the

[8] Sanjay Ruparelia, 'A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court' (2013) 33 Helen Kellogg Institute for International Studies.
[9]Arundhati Roy, 'Scandal in the Palace', Outlook India (1 October 2007).
[10]ChintanChandrachud, 'Declarations of Unconstitutionality in India and the UK'(2015) 43 Georgia Journal of International and Comparative Law.
[11]Code of Civil Procedure 1908, section 113; Code of Criminal Procedure 1973, section 395.
[12]*State of Kerala* v. *NM Thomas* [1976] SC 490.
[13]*Sunil Batra*v.*Delhi Administration* [1978] SC 1675.
[14]*Supra*, note 10.
[15]*Supra*, note 3.

religion.[16]This judgment was satisfactory to both the traditionalists and modernists as it south to devise a way in which a balance between religious sentiments and practicality could be created.

Even so, as professor Galanter points out, how is the court to determine exactly what an essential practice is? There are various issues that are raised in this regard, such as: relying on religious leaders, the Court conducting its own inquiry, should interpretation be done in a common law way? And how that would address the social discontent that came along with it.[17]As in any case, when the constitutionality of an essential practice is judged, some societal backlash is to be expected, though the Court aims at creating a balance and benefiting all people, constitutionality does take precedence over preserving certain essential practices that may not comply with it as that is done keeping in consideration the larger good.

Justice Ganjendragadkar in the *Durgah Committee* case,[18] denied validity to "practices which, though religious, may have sprung from superstitious and unessential accretions to religion itself" adding the secular requirement of rationality in the essential practice test where now, not only does the practice need to be essential to a religious but also devoid of superstitious beliefs.[19]

The Constitution has provided the judiciary withsufficient textual justification to serve social reform and override religious practices that interfere with others constitutional rights. However, it is not possible without the cooperation of India's religious groups as the Constitution alone cannot overcome the implications that the society faces.[20]

III. CHANGES OBSERVED IN RELIGIOUS PRACTICES

Considering at some of the following judgments it can be observed that the judiciary certainly holds the power, via processes like judicial review, to alter significant parts of religious practices when they fail to comply with the Constitutional mandate.

[16]*Ibid.*
[17]Marc Galanter, 'Hinduism, Secularism and the Indian Judiciary' (1971) 21 Philosophy East and West 482-83.
[18]*Durgah Committee* v. *Hussain Ali* [1962] SC 1402.
[19]*Ibid.*
[20]Rajeev Dhavan, 'Religious Freedom in India' (1987) 35 American Journal of Comparative Law 209-254.

In the case of *Sri VenkataramanaDevaru and others* v. *The State of Mysore and others*,[21]'matters of religion' was held to be a term inclusive of practices regarded as integral to the religion and its associated ceremonies by the community.

In the case popularly known as the *Tandava Dance case*[22]the Supreme Court overruled a ruling of Calcutta High Court[23] in which the court had upheld public procession with people doing Tandav while carrying skull and trident as an essential practice of Anand Margi faith. The court held it as devoid of religious validation and also relied on the fact that it was adopted by the sect in 1966 no sooner than eleven years after the sect had been established in 1955. Thus the Court seems to have adopted a stand prohibiting religious reforms by setting a benchmark of essentiality that stems only when a practice is established on the date of establishment of that religion, a proposition that will be almost impossible to satisfy in any case. This also runs contrary to the previous stance adopted by Supreme Court ruling that"every person has a fundamental right to entertain such religious beliefs as may be approved by his judgment or conscience".[24]

In *Gramsabha of Village Battis Shirala* v. *Union of India*,[25]the capture and worship of live cobra to celebrate the festival of Naga Panchami was held as to have failed the test of essentiality because it lacked religious validation from the Dharamshastras.

In the case of *Dr. M. Ismail Faruqui*v. *Union of India,*[26] popularly known as the Ayodhya case, a five judge constitution bench of the Supreme Court held that offering Namaz in Mosque is not essential to Islam. It may be offered anywhere, even in the open. In another case,[27] the sacrifice of Cow by a Muslim on Eid was held as a non-obligatory option and thus not an essential practice.

The ambiguity also reflects in various judgments indicating the lack of clarity when it comes to interpretation of essentiality as meaning a practice that is essentially religious, or a practice

[21] [1958] SC 255.
[22]*Commissioner Of Police & Ors* v. *Acharya J. Avadhuta and anr* [2004] Civil Appeal No. 6230 of 1990.
[23]*Acharya Jagdishwaranand Avadhuta and Ors*v. *Commissioner of Police, Calcutta* [1984] SC 512.
[24]*Ratilal Panachand Gandhi* v. *The State of Bombay and Ors* [1953] Bom 242.
[25] [2014] Bom 1395.
[26][1995] SC 605A.
[27]*Mohd. Hanif Quareshi & others* v. *The State of Bihar*SC [1959] SCR 629.

that is essential to the religion. In several cases the Court has held that Hinduism is a way of life and not a religion.[28]

IV. CONCLUSION

The Court has considerable authority when it comes to interpreting the constitution. The lack of rigid boundaries in our legislations gives room to our judiciary to act as a moderator and gives it remarkable autonomy. The court does not declare what religion is or is not, its powers as an activist body are that of defining what secularism is and what it is not.

Religious beliefs are challenged as being mere philosophical convictions or cultural tenet devoid of theological or scriptural backings. It is for the courts to strike a balance between the obligatory nature of the religious practice and the constitutional justification behind the proposed restrictions. Judicial interference should be meticulously calibrated by adopting a nuanced approach that ensures proportionality between the essential practice and the proposed restriction. One needs to acknowledge the interpretational subjectivity of religious practices shaped by regional and sectional particularities before considerations of constitutionality outweigh individual freedoms.

[28] *SastriYagnapurushadji and others* v.*MuldasBhuradas Vaishya*[1959] 61 Bom 1016; *Manohar Joshi* v. *Nitin BhauraoPatil&anr*[1996] SCC (1) 169.

e-ISSN 2582-4570

NON-USE OF SOCIAL MEDIA AS A CONDITION FOR BAIL : SOME REFLECTIONS ON MUHAMMED SHIFAS V. STATE OF KERALA

Dr. Monica Chaudhary[*] *Harshita Singhal*[**]

Abstract

The Hon'ble High Court of Kerala at Ernakulam on September 17, 2020 granted bail to the accused in a case where he allegedly raped a minor and clicked her nude pictures. He allegedly continued to sexually abuse her for almost a year, under the threat of circulating her nude pictures that were in his possession, on social media. Then, he created a fake Facebook profile and uploaded the complainant's pictures on it and tried to extort money from her for deleting the pictures. That is when the case was reported to the police. The Hon'ble High Court while granting bail to the accused, imposed a condition that the accused will not use social media till the completion of the investigation or till the completion of the trial, in case the court took cognizance of the chargesheet. The Court also put the onus of informing the investigating officer about the violation of this condition on the victim. This article examines the reasonableness and the practicality of imposing such a condition for bail in light of the existing bail jurisprudence and the technical aspects of social media.

I. INTRODUCTION

The Code of Criminal Procedure, 1973 (hereinafter 'CrPC') classifies offences into bailable and non-bailable, depending on their seriousness. For bailable offences, bail is a matter of right. But for non-bailable offences, the court has the discretion to grant or deny bail pending investigation or trial. A person arrested for a non-bailable offence may apply for bail to a Magistrate's court under section 437of the CrPC. Suitable conditions may be imposed by the court while granting bail, in order to ensure that the bail is not misused to derail a fair investigation or trial. As per section 437(3) of the CrPC, while granting bail for offences punishable with imprisonment up to seven years or more, or offences against the State, human body or property under the Indian Penal Code, 1860 (hereinafter 'IPC') or for abetment of, or conspiracy or attempt to commit such offences, the Magistrate should impose conditions directing the accused to attend in accordance with the conditions of the bail bond, not commit similar offences and not influence witnesses or tamper with evidence.[1] Apart

[*]Assistant Professor, Faculty of Law, University of Delhi.
[**]Advocate, High Court of Delhi.
[1]CrPC, s. 437(3).

from these mandatory conditions, the Magistrate may impose any other conditions that he considers necessary "in the interest of justice".[2]

A person arrested for a non-bailable offence may also apply for bail to a Court of Session or High Court under section 439, CrPC. These superior courts have wider powers to grant bail and if the offence is of the nature specified in section 437(3), then, they can impose any conditions that they consider necessary for the purposes mentioned in section 437(3). They can also set aside or modify a condition imposed by a Magistrate while granting bail under section 437. If the conditions of bail are violated after release, the bail of the accused may be cancelled by the court.[3]

II. CONSIDERATIONS FOR GRANT OF BAIL

The judicial discretion to grant or deny bail in case of non-bailable offences has to be exercised based on well-settled principles and not in an arbitrary manner. Factors like the nature of accusations, nature of the evidence, punishment provided for the offence, character, behaviour, means and standing of the accused, possibility of absconding of the accused or his tampering with evidence or influencing witnesses and the larger interests of the public or State are some of the factors that are to be considered by the courts.[4]

In view of this legal position relating to bail in non-bailable offences, the conditions imposed by a single judge Bench of the Kerala High Court in a bail order in *Muhammed Shifas* v. *State of Kerala*[5]have been examined in this article.

III. *MUHAMMED SHIFAS*V. *STATE OF KERALA*

Facts

In *Muhammed Shifas*v. *State of Kerala*, the applicant was accused of the offences of rape, insulting the modesty of a woman and criminal intimidation under the IPC; the offences of aggravated penetrative sexual assault, use of a child for pornographic purposes and storage of pornographic material involving a child under the Protection of Children from Sexual

[2]*Ibid*.
[3]*Id.*, ss. 437(5), 439(2).
[4]See *State* v. *Jagjit Singh*, (1962) 3 SCR 622; *Gurcharan Singh* v. *State (UT of Delhi)*, (1978) 1 SCC 118; *Prahlad Singh Bhati* v. *National Capital Territory of Delhi*, (2001) 4 SCC 280; *State of U.P.* v. *AmarmaniTripathi*, (2005) 8 SCC 21.
[5](2020) SCC OnLine Ker 4148.

Offences Act, 2012(hereinafter 'POCSO Act') and for violation of privacy under section 66E of the Information Technology Act, 2000.

According to the prosecution's case, the accused and the victim girl were in love. The victim accepted this fact. On December 22, 2018, the accused allegedly took the girl to a resort under some pretext, forcibly raped her there and took her nude photographs. Thereafter, he allegedly threatened the victim that if she disclosed the incident to anyone, he will circulate her nude pictures on social media. Using the same threat, the accused allegedly raped the victim on about six occasions until November 2019. According to the dates mentioned in the order, the victim must have been a minor under 18 years of age during most of this period. So, her consent to any kind of sexual act would have been irrelevant.[6] It was also alleged that on July 31, 2020, the petitioner created a fake Facebook profile and posted the victim's nude photographs and demanded Rs.1 lakh from the victim for deleting them. The FIR was registered by the victim on August 14, 2020 and the accused was arrested on August 23, 2020. The accused approached the Court of Session for bail, which was denied to him on September 9, 2020. Thereafter, the accused moved the Kerala High Court which admitted his application for bail on September 17, 2020 and granted him bail the same day.

Bail order

While granting bail to the accused, the Hon'ble High Court reiterated the principle that "bail is the rule and the jail is the exception".[7] It also considered the fact that the accused was "aged only 23 years" and the victim was also a "major" by now and "admits her love affair with the petitioner"[8]who was under detention (for less than a month going by the dates mentioned in the order). Another consideration for the Court was the directions issued by the Hon'ble Supreme Court in *In Re: Contagion of COVID-19 Virus in Prisons case*[9] and by a three judge Bench of the Kerala High Court in *The Court on its own motion: Suo-moto proceedings-COVID-19-Pandemic case*[10] for minimising the number of inmates inside prisons in order to follow social distancing norms so as to avert the spread of the novel Corona virus pandemic.[11]

[6]See IPC, s.375, cl. sixthly; POCSO Act, s. 2(1) (d).
[7]*Supra* note 5, para 15.
[8]*Id*., para 8.
[9]Suo-moto Writ (Civil) No. 000001 of 2020.
[10] Writ Petition (Civil) No. 9400 of 2020 (S).
[11]*Supra* note 5, para 14.

Hon'ble Mr. Justice P.V. Kunhikrishnan, while granting bail to the accused, notes that the victim's main grievance was that the accused was circulating her nude photographs on social media. Therefore, the learned judge imposed a condition that the accused shall not use social media like Facebook,WhatsApp, Twitter, Instagram etc., till the completion of the investigation, and if the court took cognizance of the chargesheet, then, the accused should not use social media till the completion of the trial. This condition was imposed to protect the girl's privacy. According to the learned judge:

> "Heavens will not fall down if a condition is imposed in a bail order restraining the accused in a rape case in using social media, especially when it is to protect the victim girl's privacy."[12]

The investigating officer was directed to inform the victim about this condition and 'to do the needful in accordance with the law' in case the victim 'reported any violation of this condition'.[13]The High Court traced its power to impose such a condition while granting bail under section 439(1)(a), CrPCto the fact that the alleged offences were covered under section 437(3) CrPC, and therefore, it had the power to impose in the interest of justice such other conditions as it considered necessary.[14]

Analysis

The condition imposed by the Hon'ble Court sought to avoid circulation of the nude photographs of the victim on social media. However, instead of protecting the victim against the further circulation of her nude pictures by the accused, the condition focusses more on curbing the use of social media by the accused, since he had allegedly misused it.

The bail order by the Hon'ble High Court seems to ignore the fact that social media is not the only means through which the pictures can be circulated. They can be circulated through emails, storage devices and offline modes like printouts etc. too. The bail order makes no reference to the seizure of the pictures and the capturing or storage media by the police, which leaves open the possibility of their further circulation and use for intimidation of the

[12]*Id*., para 13.
[13]*Id*., para 16, direction number 6.
[14]*Id*., para 12.

victim, given the history of the case. There is no reference to the possibility that the pictures that were already put up on the Internet by the accused through the fake profile could have been accessed, stored or circulated by other users on the platform, not just in India but in any part of the world. The order does not ask the accused to disclose all his existing social media profiles, email ids etc. as a condition for bail. It is even more perplexing that the onus to report the violation of the condition regarding the accused's non-use of social media has been placed on the victim. It is difficult to fathom how will it be possible for the victim to monitor the use of social media by the accused. Is the victim expected to be on a constant vigil to check whether the accused is using social media platforms?

Apart from being inherently unfair, this requirement also reflects a lack of understanding of the nature and functioning of social media. Social media is not a monolith. Various platforms are included in 'social media'. Not all social media platforms are used by everyone. What if the victim is not using or does not want to use any or all of the social media platforms? Moreover, not all social media platforms are public by default. For example, if the accused uses WhatsApp to circulate the pictures, how will the victim know about it, unless someone knowing about such use or receiving those pictures brings it to her knowledge? Other social media platforms also allow for privacy settings where profiles may be made accessible to selected persons. Moreover, given the possibility of easily creating any number of fake profileson social media, use of social media proxies and techniques like Virtual Private Network (VPN),[15] masking of Internet Protocol (IP) address[16] etc., it is almost impossible for anyone, including the victim, to constantly monitor the use of social media by the accused. So, this condition leaves the victim vulnerable to further circulation of her photographs. Furthermore, even if the victim gets to know about posting or sharing of her photographs by the accused, due to the very nature of the Internet, the damage may already be done, as other users may have accessed and stored and circulated the photographs by then.

[15]A VPN is a service that creates a safe, encrypted online connection and can be used for online privacy and anonymity. VPNs can be used to hide a user's browser history, Internet Protocol (IP) address and geographical location, web activity or devices being used. *See*"What is VPN? How It Works, Types of VPN" *available at*: https://www.kaspersky.com/resource-center/definitions/what-is-a-vpn(last visited on December, 10, 2020).

[16]An IP address is a unique address that identifies a device on the Internet or a local network. An IP address is assigned to a device by the Internet Service Provider. *See* "What is an IP Address – Definition and Explanation" *available at*:https://www.kaspersky.com/resource-center/definitions/what-is-an-ip-address(last visited on December, 10, 2020).

While granting him bail, the Court generously considered the young age of the accused who was "only aged 23 years" and was under detention, but failed to consider the impact that the lurking threat of her nude pictures being circulated may have over the mind of the 19-year-old girl, who according to the Hon'ble Court had "also turned major".[17] It is difficult to comprehend how the compliance of the condition regarding non-use of social media can be monitored even by the State agencies, leave aside the victim.

Even looking at things from the perspective of the accused, restraining the accused from using social media altogether, till the conclusion of the investigation or the trial, which can take many years in India, maybe very harsh. In today's digital world, online forums, including social media, are being used for education, information,work, shopping and staying connected with loved ones. Online platforms including social media have become the means of survival for many people in a pandemic afflicted world. So, this kind of embargo on the accused is harsh and does not even fulfil the basic purpose for which it was ostensibly imposed by the learned Judge, which is to protect the privacy of the victim. The bail order also does not consider the future possibility of the victim asking for cancellation of bail on the ground that the accused has been sharing her photographs from someone else's social media account(s) or some fictitious account(s). Since this would amount to violation of the condition for bail, will the court conduct a roving inquiry in such a case, to decide the truthfulness or otherwise of such an allegation, in order to decide the application for cancellation?

The condition does not fulfil the basic requirement of being a condition in the 'interest of justice' nor does it relate to any of the other considerations mentioned in section 437(3). In fact, the condition that the accused will not share the victim's nude pictures on social media is implicit in the general condition imposed by the Court in terms of section 437(3). So, apart from the futility of this condition in ensuring the privacy of the victim, the complete embargo on the use of social media by the accused seems disproportionate and unnecessary from the point of view of the accused too. It also becomes punitive in nature and violates the principle of presumption of innocence in favour of the accused. It also significantly curbs his fundamental right to freedom of speech and expression, guaranteed by article 19(1) (a) of the Constitution of India, 1950. Incidentally, in a separate matter relating to charges of sedition,

[17] *Supra* note 5, para 8.

the Supreme Court did not interfere with the Allahabad High Court's order granting bail to the accused on the condition that he will not use social media, but on July 10, 2020, agreed to examine "whether prohibition on use of social media can be prescribed as a pre-condition for granting bail".[18] The order in *Muhammed Shifaz's* case has been granted on September 17, 2020, that is, during the pendency of the matter before the Supreme Court.

Another condition imposed in *MuhammedShifaz's* case is that the accused will "strictly abide by the various guidelines issued by the State Governments and Central Government to the keeping of social distancing in the wake of the COVID 19 pandemic".[19] This condition is in accordance with the general directions issued by a three-judge bench of the Kerala High Court in *The Court on its own motion: Suo-moto proceedings-COVID-19-Pandemic case*.[20] Again, it is difficult to understand how this condition is related to a fair investigation or trial. How will the compliance of this condition be ensured? It also raises the question whether it is alright for the courts to impose conditions whose compliance cannot be ensured and violations cannot be tracked. It is not clear what purpose will be served by such conditions in ensuring the presence of the accused or a fair investigation and a fair trial.

IV. INTERPRETATION OF CONDITIONS "IN THE INTERESTS OF JUSTICE"

Sections 437(3) and 439 (1) (a) of the CrPC which empower the concerned court to impose "in the interests of justice, such other conditions as it considers necessary" have been interpreted by the Supreme Court in several decisions.

In *Sumit Mehta* v. *State (NCT of Delhi)*,[21] the Supreme Court observed that the words "any condition" in the above-mentioned provisions "should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose".[22] According to the Hon'ble Court:

[18] *Sachin Choudhary* v. *The State of Uttar Pradesh*, Special Leave Petition (Criminal) No. 002720-002721 of 2020.
[19] *Supra* note 5, para 16, direction number 5.
[20] *Supra* note 10.
[21] (2013) 15 SCC 570.
[22] *Id*., at 576, para 15.

> "any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail".[23]

In *Kunal Kumar Tiwari* v. *The State of Bihar*,[24] a Division Bench of the Supreme Court recognised that the wordings of sub-clause (c) of section 437(3) "are capable of accepting broader meaning", but cautioned that:

> "such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase 'interest of justice' as used under the sub-clause (c) of section 437(3) means "good administration of justice" or "advancing the trial process" and inclusion of broader meaning should be shunned because of purposive interpretation."[25]

In *Parvez Noordin Lokhandwalla* v. *State of Maharashtra*,[26] a division bench of the Apex Court, speaking through Hon'ble Dr. Justice D.Y. Chandrachud observed that though the competent courts are empowered under these provisions to impose 'any condition' for the grant of bail, the judicial discretion "has to be guided by the need to facilitate the administration of justice, secure the presence of the accused and ensure that the liberty of the accused is not misused to impede the investigation, overawe the witnesses or obstruct the course of justice".[27]

V. CONCLUSION

Examining the bail order in *Muhammed Shifas* v. *State of Kerala* in light of the above-mentioned observations by the Hon'ble Supreme Court in various cases, the condition regarding non-use of social media by the accused does not seem to be in consonance with these observations.[28] Moreover, the unusual conditions for bail in *Muhammed Shifas* v. *State of Kerala* belie Hon'ble Mr. Justice P.V. Kunhikrishnan's own statement in the order that conditions imposed in a bail order should be "reasonable and effective in the pragmatic sense".[29] The conditions, though well intentioned, may not serve the purpose for which they are imposed. They still leave the victim vulnerable and just seem to suggest that social media

[23] *Ibid*.
[24] (2018) 16 SCC 74.
[25] *Id.*, at 78, para 9.
[26] (2020) SCC OnLine 807.
[27] *Id.*, para 14.
[28] See *supra* Part IV.
[29] *Supra* note 5, para 9.

is a tool which was misused by the accused and merely asking him not to use that tool will be sufficient safeguard against possible further abuse and intimidation of the victim, who will also be a crucial witness in the case.

With increased reporting of cases of alleged sexual exploitation or harassment of women under threat of publication/circulation of intimate pictures or videos on social media by male accused, many such regular and anticipatory bail applications are coming up before the courts. In such cases, the courts are either denying bail[30] or directing that the anticipatory bail granted by the court may be cancelled till the end of the trial, in case the accused circulates any intimate pictures on social media.[31] In some cases, the courts have granted bail and imposed the usual conditions that the accused will not tamper with evidence and he will not contact or attempt to influence the complainant or other prosecution witnesses,[32]or that he will furnish his cell phone number to the investigating officer,[33] or hand over his cell phone to the police for forensic examination.[34] In this context, the bail order *in Muhammed Shifa*v. *State of Kerala* stands out for going a step further in trying to address the concern of the victim regarding further circulation of objectionable pictures. However, the well-intentioned order in *Muhammed Shifas*v. *State of Kerala* falls short of meeting that requirement for the reasons discussed above.

The increased reporting of cases with facts similar to *Muhammed Shifas*v. *State of Kerala* calls for laying down of standard protocols in such cases, to deal with the possible misuse of technology to evade the courts' directions and to ensure that the victims do not live under the perpetual fear of their pictures or videos being leaked through some other medium, link or platform. The evolution of such a protocol requires the engagement of the legislature, the executive,technical experts and stakeholders from the social media platforms. The situation also requires proactive monitoring and use of artificial intelligence based tools for quick and

[30]See*HetalkumarHasmukhlalModi* v. *State of Maharashtra*, (2019) SCC OnLineBom 11267.
[31]See*Virendra Vilas Ramteke* v. *State of Maharashtra*, (2018) SCC OnLineBom 12863.
[32]See*SanjeevanRamchandran Nair* v. *The State of Maharashtra*, (2016) SCC OnLineBom 6414; *Harsh Kumar Trivedi* v. *The State of Maharashtra*, (2018) SCC OnLineBom 5406; *RajkumarRamdularVarma* v. *State of Maharashtra*, (2019) SCC OnLineBom 13027.
[33]See*AjayRamnareshTripathi* v. *State of Maharashtra*, (2018) SCC OnLineBom 9562; *RajkumarRamdularVarma* v. *State of Maharashtra*, (2019) SCC OnLineBom 13027.
[34]See*SanjeevanRamchandran Nair* v. *The State of Maharashtra*, (2016) SCC OnLineBom 6414; *Anil GovindRathod* v. *State of Maharashtra*, (2019) SCC OnLineBom 13021.

effective removal of the objectionable content. In this regard, The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 which *inter alia* impose liability on the intermediaries to ensure time bound removal of offensive content and The Personal Data Protection Bill, 2019 which seeks to provide for protection of personal data of individuals and proposes a regulatory mechanism for the same, are steps in the right direction for dealing with non-consensual sharing of intimate images, which generally woman and children are subjected to in the digital space. The action taken under these provisions will hopefully be considered in bail orders in future, so as to ensure that the victim is not harassed further due to grant of bail to the accused on certain conditions that contribute towards keeping the victim in a vulnerable position. There is also an urgent need for training and sensitisation of investigating officers for prompt action regarding the seizure of the offensive material and ensuring that immediate steps are taken for blocking and removal of offensive content already uploaded or shared. Such steps need to compliment the conditions imposed by the courts in cases like *Muhammed Shifas*v. *State of Kerala* in order to ensure fair treatment to the victim and the accused in the criminal justice system.

e-ISSN 2582-4570

DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE PROBATION OF OFFENDERS ACT, 1958

Debajit Kumar Sarmah[*]

Abstract

Different statutes in India have different standards of disqualification attaching to conviction. In relation to the Probation of Offenders Act, the standard of disqualification and the interpretation given by various decisions of the Supreme Court to it requires reconsideration. The necessity for the same arises out of the philosophical underpinning in which the law of probation was enacted way back in 1958. The present law is not sufficiently addressing the concerns of the young offenders below the age of 21 years though the mandate of law is to give maximum benefit to such offenders. The various Supreme Court's judgments are also not very categorical and explicit of such a concern. Whereas, the Juvenile Justice Act as amended from time to time, is a progressive legislation from that perspective. The paper elucidates different parameters to assess the present law and practice of disqualification attaching to conviction under the Probation of Offenders Act, 1958.

I. INTRODUCTION

During the 19th century the world witnessed a paradigm shift in the approach towards crime and punishment with the emergence of the Positive School of Criminology led by *Cesare Lombroso, Raffael Garofalo* and *Enrico Ferri.* The Positivists were influenced by the spirit of renaissance, applied scientific methods in the study of crime and established through empirical studies about various physiological, psychological, social and economic factors in crime causation. The entire philosophy changed from punishment fitting into the crime during the Classical School to punishment fitting into the criminal during the Positive School era. This understanding led to recognition of several non-punitive experiments grounded on individualized treatment of offenders and Probation is a classic example of such an experiment.

Considered as one of the most advanced reformative techniques of punishments, the idea of probation was for the first time developed by *John Augustus* in 1841 in the USA and was put into practice in the year 1878. The word 'Probation' has a latin origin in the word *'probatum'* meaning *'the act of proving'.* In common parlance, Probation means when a particular sentence is suspended by a court based on objective assessment of an offender and the offender is allowed to stay in community instead of prison for a particular duration of time with or without supervision under pre-determined conditions. In other words, the benefit of

[*]Assistant Professor, Tezpur University, Assam.

Probation can be given only when the guilt of an offender is established by the court, the offender is convicted and a sentence is to be imposed. The advantages of the system of Probation are twofold-it gives reformative opportunities to an offender in one hand and on the other hand, the offender personal liberties are adequately safeguarded which is not possible when someone imprisoned.

United States of America was the first country in the world to have a law on probation in 1878. In India, the Jails Committee Report of 1919-1920 (Mulla Committee), visit of UNO expert on Prison Reforms W.C. Reckless in 1951 and the All India Conference of Inspectors General of Prisons at Mumbai in 1952 were instrumental in defining the legislative history of Probation for the country. However, it must be mentioned here that the Code of Criminal Procedure, 1898 also contained a provision relating to release of offenders on Probation in section 562 of the Code and that was in fact the first statutory recognition of the idea of Probation in India.

II. SPECIFIC PROVISIONS DEALING WITH DISQUALIFICATION IN LAWS OF PROBATION

The Probation of Offenders Act, 1958has 19 sections and deals with the release of offenders on probation or after due admonition. The law is applicable throughout the territory of India. Removal of disqualification attaching to conviction is being dealt under section 12 of the Act, which provides as under:

> Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law: Provided that nothing in this section shall apply to a person who, after his release under section 4 is subsequently sentenced for the original offence.

The Code of Criminal Procedure, 1972whichalso provides for release of offenders less than twenty one years of age on probation of good conduct or after admonition in Section 360 of the Code, however, does not have similar benefit concomitant to it of the nature of removal of disqualification attaching to conviction.

III. ANALOGOUS PROVISIONS UNDER CHILDREN RELATED LAWS

Children laws in the country always have analogous provision dealing with removal of disqualifications attached to their wrong-doing. The word ‘conviction’, though being used in

some legislations, should ideally be not used in cases of children as because such terminologies are philosophically not appropriate to be used for children. Following are some of the provisions in law related with children in respect of disqualification:

Section 25 of the Children Act, 1960

Removal of disqualification attaching to conviction: Notwithstanding anything contained in any other law, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

Section 24 of the Juvenile Justice (Care and Protection of Children) Act, 2015

Removal of disqualification on the findings of an offence: (1) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

(2) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court.

Earlier JJ Act

The similar provisions were also contained in the earlier Juvenile Justices Act of 1986 and 2010 and Rules made there under. Under the Juvenile Justice (Care and Protection of Children) Act, 2010 , section 19 (1) and (2) dealt with it , whereas, section 25 of the Juvenile Justice Act, 1986 dealt with the same.

IV. DIFFERENCE BETWEEN THE PROBATION OF OFFENDERS ACT AND JUVENILE JUSTICE ACT WITH REGARD TO DISQUALIFICATION PROVISION:

The difference which can be seen between the Probation of Offenders Act and the Juvenile Justice Act is that the law requires destruction of records of conviction in cases of children

found to have committed an offence and dealt with under the provisions of the JJ Act. This is contemplated in sub-section (2) of section 24 of the JJ Act. However, similar requirement is not to be fulfilled when an offender is released under the Probation of Offenders Act. Meaning thereby, records of persons granted the benefit of Probation under the Probation of Offenders Act can be retained by the police or the court for the future. The Children Act, applicable to the Union Territories, also does not require the police, board or the court to destroy records of conviction.

V. SUPREME COURT'S INTERPRETATION OF DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE PROBATION OF OFFENDERS ACT:

In *Divisional Personnel Officer, Southern Railway and Another* v.*T.R.Chellappan,*[1] the point of law which came for consideration in this case was in relation to the meaning of 'removal of disqualification attaching to conviction' in section 12 of the Probation of Offenders Act, 1958 and whether an order of dismissal of an employee found guilty of a criminal offence under Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968 would fall within the meaning of the same. It was held in this case that disqualification under section 12 only refers to such disqualifications which are explicitly mentioned in other statutes such as holding of offices, standing for elections etc and not an automatic disqualification attached to conviction in itself. Therefore, dismissal of an employee for misconduct under service rules cannot be washed away by virtue of section 12 of Act if such an employee is released on Probation. The Court further also held that the order of release on probation is merely in substitution of the sentence to be imposed by the court.

In the case of *Shanker Das* v. *Union of India,*[2]a government employee prosecuted for breach of trust in relation to an amount of Rs.500/- was convicted by the trial court but released on probation u/s 4 of the Act. Consequently, his services were terminated by the Government on the reason of his conviction by the impugned order. The appellant challenged his dismissal from service on the ground that he was released on probation and by virtue of *Section* 12 of the Probation of Offenders Act he could not suffer any disqualification such as dismissal from service. The court held that:

> Clause (a) of the second proviso to Article 311 (2) of the Constitution confers on the Government the power to dismiss a person from service "on the ground

[1] AIR 1975 SC 2216
[2]AIR 1985 SC 772.

> of conduct which has led to his conviction on a criminal charge". But, that power, like every other power has to be exercised fairly, justly and reasonably. The Constitution does not contemplate that a Government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may, perhaps not be entitled to be heard on the question of penalty since clause(a) of the second proviso to Article 311(2) makes the provisions of that. Article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly.

On the reasons cited as above, the court finally reinstated the employee back to his service. However, the court did not agree with the appellant's contention that dismissal from service is immune by section 12 of the Act. In a way, the *Shankar Dass case*[3] also affirmed the earlier decision of *Challappan's case*.[4] In *Swarn Singh* v. *State Bank of India and Another*[5] also the rationale of Shankar Dass case decision was affirmed by the apex court.

Hari Chand v. *The Director of Education,*[6]was a case in which the appellant was convicted of an offence u/s 408 of the IPC and sentenced to undergo rigorous imprisonment for a term of two years with fine. Both the Sessions Court and the High Court upheld the conviction. Sessions court though upheld the conviction but set aside the sentence and directed that the appellant be released on Probation. By reason of the conviction, the respondent was dismissed him from service. The point of contention here before the apex court was that by virtue of section 12 of the Probation of Offenders Act, 1958 the appellant could not be dismissed from service. The apex court, however, ruled that release of a convicted employee on probation under the provisions of the Probation of Offenders Act, 1956 does not rescue from being dismissed from Government service on the basis of his conviction as provided in Article 311 of the Constitution. Where the law prescribes an offence and punishment along with disqualification thereto, section 12 would in such cases obliterate the disqualification attaching therewith the conviction, and not otherwise.

In *Trikha Ram* v. *V.K. Seth*[7], the Supreme Court gave a somewhat different interpretation to section 12 of the Act without being restrictive by merely converting an order of dismissal of

[3] *Ibid*.
[4] *Ibid.*
[5] SLP(Civil) No.7783 of 1986.
[6] Civil Appeal No. 1451 of 1987.
[7] AIR 1988 SC 285.

service to an order of removal from service so that same could help the petitioner to secure future employment in other establishment. In this case a government servant was convicted for a criminal offence but was released on probation by the court. The issue was whether such an employee could be terminated from service by virtue of the conviction or not. The court in the instant case followed the decision of the Challappan's [8]case and opined as under:

> Since it is statutorily provided that an offender who has been released on probation shall not suffer disqualification attaching to a conviction of the offence for which he has been convicted notwithstanding anything contained in any other law, instead of dismissing him from service he should have been removed from service so that the order of punishment did not operate as a bar and disqualification for future employment with the Government. Under the circumstances, the impugned order of dismissal is converted into an order of removal from service.

The important aspect of this case remains what the court said that the order of punishment in the light of section 12 of the Act should not be detrimental to the interest of the offender so far as future employment with the Government was concerned. And therefore, the appellant in the instant case, was removed from service rather than being dismissed from service.

In *Union of India* v. *Bakshi Ram*,[9] respondent Bakshi Ram in this case, a constable with the Central Reserve Police Force(CRPF), was convicted U/s 10 (n) of the CRPF Act, 1949 and was subsequently released on Probation u/s 4 of the Probation of Offenders Act by the Sessions Judge. The offence specified under the impugned Act was any act or omission which was prejudicial to good order and discipline. Bakshi Ram was dismissed from service and he contended that by virtue of section 12 of the Probation of Offenders Act he does not disqualify to continue in service as the said provision removes any disqualification attaching to conviction.

The Supreme Court, however, finally held in this case as under:

> Section 12 of the Probation of Offenders Act, 1958 only directs that the offender 'shall not suffer disqualification, if any, attaching to a conviction of

[8]*Supra* note 1.
[9]1990 SCR (1) 760.

> an offence under such law'. Such law in the context is the other law providing for disqualification on account of conviction e.g. if a law provides for disqualification of a person for being appointed in any office or for seeking election to any authority or body in view of his conviction, that disqualification by virtue of section 12 stands removed. But that is not the same thing to state that the person who has been dismissed from service in view of his conviction is entitled to reinstatement upon getting the benefit of probation of good conduct. Section 12 does not preclude the department from taking action for misconduct leading to the offence or to his conviction thereon as per law. It was not intended to exonerate the person from departmental punishment".

Another very important observation of the apex court in this case was that in release of an offender under the Probation of Offenders Act the sentence aspect only gets affected but the person's conviction does not in any way get obliterated. Any departmental proceeding is in a way is based on conduct of someone which has led to a conviction rather than sentence. Sentence is imposed based on conviction. Hence nothing can preclude any such proceeding under the existing law.

VI. COURT'S INTERPRETATION OF DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE JJ ACT

There are indeed various decisions of courts in India in regard to removal of disqualification attaching to conviction of children in conflict with law. The definition of juvenile under the existing law i.e Juvenile Justice (Care and Protection of Children) Act, 2015 is a child below the age of 18 years. The upper age limit of 18 years was also the same in the Juvenile Justice (Care and Protection of Children) Act of 2010. Mentioned below are few relevant cases in this regard:

Nadeem Khan v. *State of Rajasthan*[10]*:* This is a recent case being decided by the Rajasthan High Court. The petitioner's candidature was rejected for a post of Constable (General) by the Government on the ground that he was acquitted in a case before the Juvenile Justice Board for lack of evidence, however, the allegations against him were serious in nature. What was contended in this case was that the Government's decision was incorrect by virtue of the

[10]Civil Writ Petition No. 4321/2019.

express provisions of Section 24 of the Juvenile Justice Act of 2015. The court finally held as under:

> A perusal of the above provision reveal that the same removes the disqualification on the findings of an offence recorded against a juvenile i.e. even if a child has been convicted of an offence, he would not suffer disqualification. In the present case, even the conviction has not taken place and the petitioner has been acquitted.

The court relied on an earlier decision in *Hanuman* v. *State of Rajasthan and Others*[11] wherein it was held as below:

> "This Court is of the firm opinion that not even for a moment can the respondents deny the petitioner (4 of 5) [CW-4321/2019] appointment in the questioned recruitment process on the ground of the criminal case registered against him at an earlier point of time. Indisputably the criminal case was registered against the petitioner while he was a juvenile. Section 24 of the Juvenile Justice (Care and Protection of Children) Act, 2000 which was in force at the relevant point of time provides that a child who has committed an offence and has been dealt with under the provisions of Juvenile Justice Act shall not suffer disqualification, if any, attached to a conviction for an offence under such law. Thus even if a juvenile is held guilty after trial under the Juvenile Justice Act, the conviction would not carry any disqualification. In the case at hand, the petitioner was admittedly a juvenile when the offence was committed was tried. He was exonerated of the charge by the Juvenile Justice Board vide judgment dated 21.10.2013. Thus, mere registration of the criminal case against the petitioner while he was a juvenile cannot be construed to be a disqualification so as to disentitle him from being appointed on the post of Constable despite being selected on his own merit after facing recruitment process."

In the instant case also the court upheld the ratio of the above mentioned decision and the respondents were directed to give appointment to the petitioner.

[11]Civil Writ No.11395/2015.

In *State Petitioner* v. *Jagtar and Others*[12], one of the issues to be settled by the Delhi High court was that of the power of an appellate court to order removal of disqualification attaching to conviction. The court held that an appellate court , be it the Sessions Court or the High, is empowered under section 6(2) of the JJ Act, 2000 to order removal of disqualification attaching to conviction if the statutory mandate is being overlooked by a Juvenile Justice Board. The Delhi High Court referred to two important judgments, namely, *Ranjeet Kumar Jha* v. *State of Bihar*[13]of Patna High Court and *Chand Pasha* v. *State of Karnataka*[14] of Karnataka High Court.

VII. A CRITIQUE OF LAW RELATED WITH DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE PROBATION OF OFFENDERS ACT

i) The impugned provision in the Probation of Offenders Act does not differentiate between young offenders within the meaning of section 6 of the Act, i.e. under twenty-one years of age, with that of adult offenders.Section 6 imposes restrictions on imprisonment of offenders under twenty-one years of age and stipulates that such offenders be released either under section 3 or section 4 of the Act, unless reasons to be recorded in writing for exceptions.

ii) Judicial decisions have also not dealt with any differential criteria with regard to interpretation of disqualification attaching to conviction for young offenders of the age group of 18 years to 21 years. Barring one or two, almost all decisions cited above held that disqualification under section 12 only refers to such disqualifications which are explicitly mentioned in other statutes such as holding of offices, standing for elections etc and not an automatic disqualification attached to conviction in itself

iii) If the same interpretation to the provision is to be given for young offenders, perhaps, the same would go against the basic reformative doctrine behind the enactment of the law of probation. Probation is premised on reformation rather than on retribution of offenders.

iv) There would be many such offenders in the age group of 18 years to 21 years whose future may be adversely affected if they are removed from their workplaces

[12]Crl.A. No.979/2008.
[13](2012) Cri.L.J. 759.
[14]Criminal Appeal No.365/2010.

in the pretext of their conviction for a trivial offence. The Prison Statistics India[15] reveal that 2, 07,942 inmates, covering 43.3% of the total inmates in Indian jails, belonged to the age group of 18-30 years.

v) Many young offenders would also find it difficult to get employment opportunities if the records of their conviction, like under the JJ Act, are not destroyed, if found to have committed merciful offences of not serious in nature and subsequently released on probation. Such criminal records of offenders may preclude their chances of finding gainful employment for livelihood in future.

vi) Employment into any government job requires a mandatory police verification report and if criminal antecedents are found the person may be denied an opportunity to be employed into a government job. The cases under 21 years of age released on either under section 3 or under section 4 of the Probation of Offenders Act are important to be seen in that perspective also. The cases cited above also indicate that people are compelled to take up employment even before attaining the age of 21 years because of unsound economic condition of family.

vii) Section 6 of the PO Act would be meaningless without any differential treatment for offenders under 21 years of age who are released on probation. Because it is an established percept of Article 14 of the Constitution that like should be treated alike.

VIII. CONCLUSION

In conclusion it can be said that if both the laws *i.e.*, the Juvenile Justice Act and the Probation of Offenders Act are akin to the common philosophy of reformation of offenders, there is no reason why young offenders released on probation under the Probation of Offenders Act should not be given identical treatment like in cases of offenders who are found guilty under the Juvenile Justice Act. Pertinent to mention here that benefit of probation is never given to offenders found to have committed an offence punishable with death or life imprisonment. Meaning thereby, for less serious offences the probation may be given subject to the discretion of the courts. Looking in the same perspective, it appears to be reasonable to think of some amendment in the existing law of Probation in India in relation to disqualification provision under section 12 of the Act to accommodate the best interest of young offenders.

[15]Released by the NCRB, Ministry of Home Affairs, Govt. of India

e-ISSN 2582-4570

THE MISOGYNISTIC TROPES OF RAPE DELINEATING THE BOUNDARY OF ROMANCE IN POPULAR FICTION

Harsh Mahaseth[*]

Abstract

It is astonishing to see a civilized nation being defined by culture such as rape. Rape culture is evident in society and it is being achieved through the condoning and normalization of physical, mental and sexual torture that women are subjected to.Norms are created in society through attitudes, beliefs, customs and rituals. Rape has been embedded in our culture and hence it is seen as normal. Due to the normalization of such assault's society perceives rape as something inevitable. Rape has been accepted as a part of society. But how has this normalization occurred? The media is an influential medium through which the people form their opinions. Whether it be newspapers, novels or television channels, all of these mediums propagate one point of view. Sadly, all the mediums have a massive amount of material that trivializes and eroticizes rape. It is due to the collective tone set by the media that a synthesis between rape and culture has led to the rape culture becoming a part of our society.

I. INTRODUCTION: THE STORY OF ROMANCE REPLACING THE STORY OF RAPE

The readership of the romance genre in the fictional narrative is immense. These novels have been targeted primarily at women of all age groups. In her book, '*Reading the Romance: Women, Patriarchy, and Popular Literature,*' Janice Radway shows that the majority of readers for the romance genres consists of women.[1]The target audience internalises the notions of an ideal romance and emulates those in their real lives. Complications arise in this genre when romantic norms, as perpetuated by the genre, are replicated in cases of sexual assault and violence. Within the romantic framework, it has been seen that a woman 'no' has been interpreted to actually mean a 'yes'.The myths are premised on cultural norms that foster patriarchy in society. When such romantic notions are validated in the legal discourse, the consequences are that the patriarchal norms become the reality. Due to this internalization by the legal fraternity, it has been palatable by society.

[*]Assistant Lecturer, Jindal Global Law School, O.P. Jindal Global University, Sonipat, India.

[1]Janice Radway, *Reading the Romance: Women, Patriarchy, and Popular Literature* (The University of North Carolina Press, North Carolina, 1991).

Authors are no exception to this internalisation. Knowingly or unknowingly, they have furthered the internalisation of such norms in their novels. This has led to the conclusion that the authors' thoughts have been reinforced by patriarchy.

II. THE MISOGYNISTIC TROPES IN POPULAR FICTION

In popular fiction, the general stereotype underpinned in it is the female protagonist falling for the desired man even though he is contemptuous and hostile towards her. He makes fun of her, passes remarks and objectifies her. The female protagonist gets offended by at first but she starts to understand the troubles that he himself has been fighting since the past. She realizes that his inability to express his love for her is manifest in the frustration which he initially had against her. She readily forgives him and, in the end, they live happily ever after.[2]

The image of an 'ideal woman' has been embedded into the beliefs of the women furthering the notion that 'when a boy is being mean, he actually has a crush on you.'Radway states that the ideal heroine of a romance novel must also be innocent and naive to the ways of sexuality and remain aloof and detached in terms of attracting sexual attention while also being sexually attractive. While the female must be virginal and naive, the male is expected to have multiple sexual encounters to make his transition toward desiring the heroine more powerful. This has led to the desensitization of women when they face verbal mockery or sexual violence as they perceive these acts as 'natural male tendencies which occur during the course of romance.'[3]

"For an instant, she thought he was going to hit her and then, fearfully, realized he was going to do something very different".[4]This scene clearly shows how the female protagonist mistook a kiss for an act of sexual violence. Such a characterization of violence as love legitimises the assault on women and maintains the notion of physical and sexual violence on women as a sign of love.

[2]Abrams, D., "Harlequin Romance Tries to Adjust to Changing Times", *available at*https://publishingperspectives.com/2014/05/harlequin-romance-tries-to-adjust-to-changing-times/ (last visited on December 1, 2021).
[3]Pineau, L.,"Date Rape: A Feminist Analysis", *8*(2) *Law and Philosophy* 217–243 (198).
[4]Weston, S. (1976). *Goblin Court Harlequin Romance* (Harlequin Mills and Boons, 2005).

According to Jean-Jacques Rousseau, women are destined to resist.[5]Women are bound by societal expectations and hence they need to suppress their inner sexual desires. They have to rely on men and their interpretations of what they want. Chasteness is considered to be a significant female virtue which she cannot jeopardize to fulfil her sexual desires. A man on the other hand can freely express himself without any fear of ostracization. To further this Rousseau also suggests that:[6]

> To win this silent consent is to make use of all the violence permitted in love. To read it in the eyes, to see it in the ways in spite of the mouth's denial, that is the art of he who knows how to love. If he then completes his happiness, he is not brutal, he is decent. He does not insult chasteness; he respects it; he serves it. He leaves it the honour of still defending what it would have perhaps abandoned.

A problem with this myth of women is that they are being deprived of their autonomy. In the discourse of romance, her consent is subject to the interpretation made by the man. Her consent is contingent upon him correctly interpreting it.Further, if women are supposed to be chaste and are not to indulge in any sexual behaviour then, by implication, women who are open about their sexuality will suffer dire consequences for defying their role in society. This would sustain the prevalent rape defence of 'she was asking for it,' further perpetuation the rape culture in society.

Sexual Consent as Depicted by Popular Fiction

In a novel called *Stranger in the Night*, written by Charlotte Lamb,[7] the heroine Claire gets drunk in a party. In her drunken state, she is taken away from the party by a man. Under the belief that she is in love with the man, she agrees to leave the party with him. Upon getting sober she realizes that she was being sexually assaulted. She tries to verbally and physically protest against the sexual act; however, the man disregards all such protests and continues with the assault. It is during the course of the novel that Claire justifies the man's assault by saying:[8]

[5]C. Pateman,"Women and Consent",8(2) *Political Theory*149–168 (1980).
[6] J. Rousseau, &A. Bloom, *Politics and the Arts: Letter to M. D'Alembert on the Theatre*(Cornell University Press, Ithaca, 1968).
[7]C. Lamb, *Stranger in the Night*(Harlequin Mills & Boon, 1981).
[8]*Id.,* 112-113.

> And to do him justice, I suppose he thought I was willing, too. He thought I knew what he wanted. How was he to guess I was as thick as a plank?

In another novel called *The Fountainhead*, written by Ayn Rand, the protagonist Howard Roark violently rapes a woman named Dominique. He forces her into submission.

> She tried to tear herself away from him. The effort broke against his arms that had not felt it. Her fists beat against his shoulders, against his face…, her eyes wide, colourless, shapeless in terror. He was laughing.

Dominique tries to get away by flailing and biting and she does draw blood from Howard however he had his way with her. However, in the end, Dominique realizes that this is 'the kind of rapture she had wanted' all along. Rand has described Howard Roark as 'the noble soul par excellence…. And who triumphs completely. A man who is what he should be.' However, he also says that the relationship between Dominique and Roark, 'Were it necessary, he could rape her and feel perfectly justified.' It is needless to say that Dominique, the woman who was raped by Roark, 'worships him and loves him much more than he loves her.'[9]

The justification given by Claire in *Stranger in the Night* legitimises the assault on her. She concedes to it and believes that she had deserved it. The same is seen in *The Fountainhead* as Dominique concedes to it and legitimises the sexual assault.In both instances, we see that both blame themselves and disregards the verbal as well as physical protests that they had put up.

In the *Stranger in the Night* after Claire accepts that what happened to her was because she deserved it, she talks about this with the protagonist. However, instead of comforting her, he abuses her. He calls her names such as 'stupid bitch'[10]or 'tease'[11]and blames her for his frustration. In a fit of rage, he threatens her and tells her that he might do something that both of them will regret. Instead of calling him out on his abuse Claire confesses her love for him.

In the novel *Stranger in the Night,*we see that the author fails to acknowledge the non-consensual assault which Claire suffered from by both the stranger and the protagonist. The first sexual assault by the stranger was justified by Claire as she thought that she had brought

[9]A. Rand & L. Peikoff, L., D.Harriman (*ed.*), *The Journals of Ayn Rand* (NAL, New York, 1999).
[10]*Supra* note 8 at 112-113.
[11]*Ibid.*

it upon herself. The second sexual assault by the protagonist was justified as it occurred out of love and jealousy.

Delineating the Boundary of What Constitutes Sexual Assault

In a novel, *The Boss's Virgin*,[12]the heroine, Pippa, is engaged to the protagonist Tom. She had fallen in love with another person named Randal Harding four years ago which did not work out as he was already married. In a sudden chance encounter, both meet again. Upon seeing Harding, Pippa faints. Harding lifts her unconscious body and takes her to his hotel. Despite her constant protests like 'Let me go'[13]and 'Don't touch me.'[14]Harding ignores them and tries to engage in a sexual encounter. However, Tom appears at the right time and stops Harding from going any further. When Tom asked Pippa about whether Harding tried to rape her, she refuses and defends him. She says 'No, he didn't use force; he's devious and scheming, but never violent.'[15]She further justifies his actions, thinking:

> Randal had no need to use force. He had used her own feelings and desires against her and had a walk-over because she was too weak to defend herself. Whatever she might say to him, however fiercely she rejected him, Randal had some way of seeing past all that and realising his power over her.

This justification given by Pippa validates the actions taken by Harding as he had correctly interpreted what Pippa wanted. Hesaw through the façade put up by Pippa and had correctly interpreted her 'true desires. The novel legitimizes the attempted rape by interpreting it as romantic seduction and further justified it by showing that the woman had 'consented' to it, though she did not want to admit it.

In a subsequent encounter where both of them do have sexual intercourse, Pippa yet again refuses and says, 'No, don't! Stop that!'[16]To which Harding replies 'And you need it, too, whether you'll admit it or not.'[17]During the entire time they were having intercourse, Pippa continued to struggle and refuse. Even though she was 'trembling violently [and] her mouth

[12]C. Lamb,*The Boss's Virgin*(Harlequin Mills &Boon, 2001).
[13]*Id.*, 28.
[14]*Ibid.*
[15]*Id.*,79.
[16]*Supra* note 12 at 142–143.
[17]*Ibid.*

hot from the mere touch of his tongue'[18]and 'her treacherous mouth had parted to admit him, her body clung hotly to his.'[19]

Now such a depiction of 'romance' has delineated the boundary of what constitutes sexual assault. In the scenario given above Harding correctly interprets the refusal of Pippa as concealing her desires. He relied on his interpretation of what he thought she wanted while neglecting the verbal and physical protests made by Pippa. This situation is further exacerbated by the fact that Pippa actually wanted him to advance and she was putting up a resistant façade in front of him. Such narratives have led to the perpetuation of the flawed rape myth that a woman's 'no' actually means 'yes'.

The media has played a huge role in propagating such an idea. Novels such as John Cusack's *Say Anything*, Nicholas Sparks' *The Notebook* and the famous series *50 Shades of Grey* have shown a culture where a man or men compete in order to win the woman's affection. While in these novels the woman refuses at first, she waits for outrageous gestures before saying 'Yes'. Even if the woman wants to say 'Yes' she is repeatedly told to say 'No'. It is due to such complications that have contributed to the rape culture and replacing the story of romance with the story of rape.

In a world where 'No' no longer means 'No', there needs to be a discourse in which the present generation realises that consent cannot be implied based on perceived actions. The term 'no' meaning nothing more than 'no'.

III. THE ALTERNATIVE STORY OF RAPE: THE STORY OF ROMANCE

Fictional narratives as the ones given above have led to the perpetuation and normalization of assaults that are directed against women. Such narratives have created a supplement to the legal narrative by creating an alternative to the story of rape: the story of romance.[20] When rape is consistently depicted as romance or love in popular fiction then the entire formal legal narrative of rape is delegitimised as its very existence is negated and actively suppressed.[21]The narration is essential to establish the existence of rape.

[18]*Ibid.*
[19]*Ibid.*
[20]N. Philadelphoff-Puren, "Contextualising consent: the problem of rape and romance", 20(46) *Australian Feminist Studies* 31–42 (2005).
[21]L. A. Higgins, "Screen/Memory: Rape and Its Alibis in Last Year at Marienbad", in D. Russell (*e.d.*), *Rape in Art Cinema* 15–26 (Bloomsbury Academic, 2010).

When someone commits murder there can be defences such as acted under self-defence or mistaken belief. However, when the crime of rape is committed the entire case falls if it is proven to be consensual. The presence or absence of consent of both parties can effectively deny the commission of rape. Hence, if the perpetrator takes the defence of seduction or romance then the dimensions of the case completely change from who committed the crime to whether a crime was even committed.

Thus, if the story of rape is narrated as the story of romance then the entire formal legal crime of rape is invisibility. Such an invisibilization negatives the traumatic experience of the victim and reduces such an experience to a socially palatable reality which is condoned even by the legal system! Further, this also incentivises the perpetrators to continue doing such heinous crimes and tag it as an act done during the course of romance.

IV. PROBLEMATIC PORTRAYAL OF RAPE IN CINEMA OR MOVIES

Media outlets,*i.e.*, movies and cinema contain multiple layers of portrayals that conceal the truth about consent and what society thinks about assent. Our society is rooted in patriarchal norms. Most of the content we see on the big screen today reflects the harsh and cruel mentality set by this patriarchy. Nowadays, young men consider stalking, harassment, eve-teasing of females and other behaviours as normal and acceptable behaviours. When they see their favourite entertainers engage in similar activities and get praise from the actress, it is viewed as the successful solution for attracting women's attention and hence they apply it in real life too.

One of the most serious crimes against women of rape is also the most clearly depicted crime in Indian cinemas. Since ancient times, rape has been regarded as a power tool. For decades, the idea of establishing predominance through rape has been reflected in our cinemas. Even when the plot of the movie is not needed, the frequency of depicting rape and even assault is high.

What people cannot understand is the difference between fiction and reality. Everybody discusses how profound this rape culture is established in our society. Although we can say that the film industry may not be the biggest cause of the rape culture, it does play an important role in affecting young people. The impact of audio-visual movies is much higher in people's thoughts, especially in impressionable minds. It tends to normalise the occurrence of suchinstances. In cinema, the existence and spread of rape culture are huge, and we cannot

expect it to disappear with the wave of magic wands. However, the potential for reducing it is huge, thereby enabling society to develop towards a better future. To this end, the joint efforts of the audience, filmmakers and the media are needed.

V. THE NORMALIZATION OF RAPE MYTHS IN THE LEGAL DISCOURSE

Relationship between rape, romance fiction and the law

In the article"Contextualising consent: the problem of rape and romance",Puren Philadelphoff[22]states that conviction for sexual assault in Victoria had dropped because those juries are reluctant to convict in acquaintance rape cases where women know their attacker, due to this proving the crime becomes difficult because of the complexity of the issue of sexual consent in such situations. The complexity of consent is a matter of discussion explicitly the confluence between rape and romance. This convergence requires us to study the operation of consent not only in the context of law but also through seemingly non-legal literary genres. Such an inquiry can reveal how literature can function as a form of legal reasoning in the context of rape, which is eligible to disqualify a woman from testifying. Therefore, many writers criticize and condemn rape laws as they are placed under the framework focusing on the issue of credibility. They believe that credibility is not the jury's decision about the relative credibility of the various witnesses than as a matter of the victim's credibility in the eyes of the law. Therefore, the paradox governing rape law includes the obvious contradiction between the almost never-failed historical description of rape as one of the most serious crimes and the relatively low conviction rate for felony rape. Therefore, rape seems to be a serious but rare crime.

In the field of rape law, the most important 'context of consent' to consider is romantic discourse. Feminist scholars point out that romanticism and the specific pattern of rape legal narrative are consistent.

Thusly, romantic non-legal texts can provide literary and emotional justification as legal defences, including some enduring beliefs that women say 'no' when they say 'yes', this story continues to work. In rape trials, although there are legislative reforms aimed at eliminating this situation. In addition, the supplementary relationship obtained between

[22]*Supra* note 20.

romance and rape means that 'consent' can be deployed in both the free form of law and the romantic literary form.

In his influential essay 'Date Rape: Feminist Analysis', Lois Pineau reiterates the difference between romance and reality with 'ideological persuasiveness', 'romantic illusions' and 'false belief'. Here, romance is an unreal component that can pop out of reality. Pineau believes that the realm of fiction is the realm of fantasy, which has not been realized in the 'truth' of female erotic life. According to this view, the law 'reflecting' the rules of romantic fiction in the consent standard is wrong because it fails to reflect the new reality created by feminism.

Judicial Insensitivity and Validation of Myths and Stereotypes

Rape is a serious offence and to understand how the judiciary deals with such offences task forces were created to measure the level of gender biasedness in the Courts of New Jersey and New York. In their first report both the task forces reported the presence of judicial insensitivity towards rape. [23]

These task forces have reported cases where a Wisconsin judge he described a rape to be normal because the five-year-old victim was 'an unusually promiscuous young lady'; a Colorado judge described a sexual assault as 'an attempted seduction'; a California judge held that a working prostitute could not be considered a rape victim; a Pennsylvania judge declared a suspect not guilty of attempted rape and aggravated assault because the guy was a 'good-looking fellow' and the victim was an 'unattractive girl' and the defendant had done 'something stupid.'

The insensitivity of the judge can be seen in various other cases as well. In another case, the drunk defendant jumped into bed with the victim, raped her and then subsequently went to sleep in the same bed. The judge, in this case, states that 'I think it started without consent, but maybe they ended up enjoying themselves.'

[23]L. H. Schafran, "Documenting Gender Bias in the Courts: The Task Force Approach", 70(5) *Judicature* 280 (1987).

In a case, in Milwaukee, the judge threatened to dismiss the case of the complainant if she did not stop crying. Circuit Judge Ralph Gorenstein said, 'This is no 16-year-old schoolgirl. The woman was twice-divorced. You might say she was well-experienced in the school of life.'[24]

Due to such insensitivity, it is pertinent to educate the judges to provide them with a better understanding of the differences between vigorous cross-examinations that protects the defendant's rights and questioning that includes improper sex stereotyping and harassment of the victim.[25]

In the case of *R* v. *Seaboyer*,[26] the Supreme Court of Canada struck down a rape-shield provision as it was in violation with the right to full answer and defence provided under Section 7 and Section 11(d) of the Canadian Charter of Rights and Freedoms. In this 9-judge bench, Justice McLachlin for the majority stated that the rape-shield law was excluding relevant evidence by being unable to ask the victim about past sexual activity.

In her dissenting opinion, Justice L' Heureux-Dube gave voice to the faulty and sexist logic used by the bench. Further elucidating her point Justice L' Heureux-Dube said that the status quo surrounding rape myths have had severe consequences for sexual assault victims and maintaining sexual assault in society. She voiced out several myths and stereotypes relating to it:

i. Struggle and Force: Woman as Defender of Her Honor: This myth feeds on the stand that a woman cannot be raped against her will. If she really wants to prevent the rape then she can do it.
ii. Knowing the Defendant: The Rapist as a Stranger: There is a myth that the rapist has to be a stranger. A friend or relative cannot be a rapist.
iii. Sexual Reputation: Women are categorized into one-dimensional types. They are maternal or they are sexy. They are good or they are bad.
iv. General Character: A woman who drinks or smokes can be used to discredit her and her character and implies that she had consented to sex or had contracted to have sex for money.

[24]L. H. Schafran, "Gender Bias in the Courts: An Emerging Focus for Judicial Reform", 21 *Arizona State Law Journal* 237 (1989).
[25]*Supra* note 23.
[26]*R.* v.*Seaboyer*, [1991] 2 S.C.R. 577

v. Emotionality of Females: Females are assumed to be 'more emotional' than males. If the female is calm and not visibly upset then there is an assumption that nothing had happened and that she consented to it.

vi. Reporting Rape: Two conflicting expectations exist concerning the reporting of rape. One is that if a woman is raped, she will be too upset and ashamed to report it, and hence most of the time this crime goes unreported. The other is that if a woman is raped, she will be so upset that she will report it. Both expectations exist simultaneously.

vii. Woman as Fickle and Full of Spite: A myth exists that women are fickle and seek revenge against past lovers.

viii. The Female Under Surveillance: Is the Victim Trying to Escape Punishment? It is assumed that the female's sexual behaviour is under the surveillance of her parents or her husband. To get back into the good books she blames the rapist and shows that she had no hand in it.

ix. Disputing That Sex Occurred: There is another stereotype that females like to fabricate stories that include sexual activities.

When the perpetrators are permitted to use such myths and stereotypes to build a defence, this results in negating the fact that a sexual assault ever occurred and also impacts the position of women in society.

VI. THE VALIDATION OF 'NO' MEANS 'YES'

A problem arises when the 'rape as romance' and 'no means yes' myths are emulated in the legal discourse which leads to the institutionalization of these flawed concepts. Such flawed concepts deprive women of their autonomy and delegitimize their verbal expression. The interpretation of a woman's will by a man is given precedence over the verbal articulation of a woman.

In the case of *R* v. *Hughes*,[27] the victim and the defendant were staying together at Bluey's Horse Ranch on Magnetic Island. Over a course of time, both of them developed friendly relations and often gave each other massages. One night while on a koala trail somewhere near the Ranch both of the defendant confessed his love for the victim and his desire to have sex with her. The victim refused and said that 'she did not want that.'[28] In both the

[27] *The Queen* v. *Gary Alan Hughes*, [1998] QCA 279.
[28] *Ibid.*

testimonies given by the victim and the defendant there was an agreement that there was a verbal refusal made by the victim. While the victim in her testimony said that she consistently refused until the defendant threatened to push her off the cliff, the defendant said that though she initially refused, she later consented to it.

> Well, she never said yes. But she did respond. Well, I mean, she was thrusting with me and she was rubbing my back and kissing me and grabbing my - the back of my head.'

The defendant, in this case, ignored the verbal protest of the victim and interpreted her actions to mean that she was consenting, similar to the interpretation done by Harding in *The Boss's Virgin* and the stranger in *The Stranger in the Night*. He took it upon himself to differentiate between a genuine 'no' and a deceptive 'no' depriving the victim of her autonomy.

The legal framework has itself created space for non-verbal consent. Explanation 2 of Section 375 of the Indian Penal Code, 1860 defines consent as:

> Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

The Indian laws negate the requirement of verbal consent to a sexual encounter by envisaging non-verbal communication.

In *R* v. *Hughes*, the judge elucidated further saying that "in the circumstances here, where the complainant was a virgin, forceful intercourse was not necessarily intercourse without consent," effectively reinstating the non-consensual, violent rape as sex, premised on the romantic notions of forced seductions.

VII. REALISING THE DISTINCTION BETWEEN ENFORCED SUBMISSION AND ACTIVE CONSENT

Through extrapolation of the fictional narrative in the legal context, a distinction between enforced submission and active consent needs to be made. In fictional narratives the man enforces seduction on the woman who tries to resist the sexual encounter; however, instead of respecting the choice made by the woman, the man put a greater degree of force on her to

submit to his will.[29] The romantic discourse suggests that women want the men to be forceful against them even if they resist. Such acts of rape are normalised by the fictional narrative by justifying it as for hidden affection towards the woman.

Such a replication in the real-life would result in the violation of a woman's body and the denial of her rights. When judgements use the same line of thought as romance novels then women's oppression gets institutionalised. Judges have equated submission to mean consent as seen in the case of *Tukaram* v. *State of Maharashtra*.[30] Such an equation has reinforced the underlying assumption perpetuated by the romantic discourse of enforced submission to be justifiable.

Further, in the case of *DPP* v. *Morgan*,[31] the victim's husband had told the defendants that his wife would actually be enjoying the sexual intercourse and that she would struggle or try to resist. Acting on such a belief the defendants took the defence of mistake of fact. The defence of mistake of fact was premised on the assumption that the consent of the woman was deceptively manifested and the defendants could not rely upon her verbal articulation. Thus, when the judge accepted the defence of mistake of fact, this decision inculcated the rape myth perpetuated within the fictional narrative on the pretext of seduction and romance.

VIII. CONCLUSION

The patriarchal norms of the society have premised the romantic genre and the flawed romantic tropes present in it. The internalization of such culture further reinforces patriarchy and the subjugation of the women and their sexuality.

Women are represented by qualities which are expected from them to be developed such as beauty, powerlessness, sexiness, *etc*.; while men are represented by qualities such as dominance, strength, aggressiveness, *etc*. Women are portrayed as objects that must be able to attract a man and be subjected to their sexual impulses.

These tropes form the underlying characterisation of female characters leading to the suppression and closeting of female desires. They are necessitated by their virtues to say 'no'

[29] A. Toscano, "A Parody of Love: The Narrative Uses of Rape in Popular Romance", 2(2) *Journal of Popular Romance Studies* (2012).
[30] *Tukaram* v. *State of Maharashtra*, AIR 1979 SC 185.
[31] *DPP* v. *Morgan*, [1975] 2 WLR 913.

even when they welcome the encounter. This had led to the proliferation of the myth that a woman's 'no' actually means 'yes'.

The judges have shown insensitivity towards the issue of rape and have often required proof of a physical injury to prove the existence of a non-consensual sexual encounter, effectively implying the irrelevancy of verbal protests which still amount to consent. Such a similarity between the romantic tropes in fictional narratives and in the legal discourse has reinforced the myths and stereotypes as the reality.

The analysis in the paper does not intend to suggest that the creative freedom of writers needs to be curtailed to avoid sexual assaults on women. The problem lies when the juristic reality reflects the same line of thought as seen in the romantic discourse. There is a need to separate the romantic discourse from the legal discourse as assimilation of both legitimises the defences accepted in the cases of *R* v. *Hughes*[32] and *DPP* v. *Morgan.*[33]

[32] *Supra* note 2.
[33] *Supra* note31.

e-ISSN 2582-4570

INDIAN TRADEMARK LAW AND PUBLIC INTEREST PROVISIONS

Dr. Jupi Gogoi[*]

Abstract

Trade-mark is an important intellectual property right specially for traders and businesses. Unlike most intellectual property rights, trademark once granted is given for perpetuity subject to payment of renewal fees at periodic intervals. Trademark serves dual purpose:firstly, it helps consumers in distinguishing the goods and services of one seller from those of others and secondly, it aids the sellers to hold on to their goodwill by preventing others from using that mark. However, it also needs to be admitted that trademark law grants monopoly to the trademark owner to use a mark to the exclusion of all others. This monopoly right may at times create a conflict with the use of the mark by bona fide users. Hence to resolve this conflict, some important provisions are provided in the Act to balance the interest of the trademark owner and bona fide users of the trademark. The article will be limited to only grounds for refusal of registration of trademark when it conflicts with the legitimate use of the trademark for bona fide purpose by traders while practising their basic human rights to freedom of expression and right totrade, profession and business.

I. INTRODUCTION

Human Rights are certain inalienable rights that are inherited by human beings by virtue of being born as a human being. Human Rights over a period of time has been categorised under various generations, such as civil and political rights which is brought under the umbrella of first generation rights. The second generation rights include economic, social and political rights and the third generation rights are certain collective rights which are important to all human kind like right to clean environment, right to development and right to self-determination. A new fourth generation right is gradually developing includes rights of future generations, that is future claims of first and second generation rights and new rights, especially in relation to right to technology.[1]

Intellectual Property Rights (IPR) on the other hand, recognises the creativity of an individual.It gives rights to individuals to exploit their creations. In most IPR, for a certain

[*]Assistant Professor, Faculty of Law, University of Delhi.

1.1 [1]Jason Woodroofe, "A Fourth Generation Of Human Rights", *available at*https://Theowp.Org/A-Fourth-Generation-Of-Human-Rights/ (last visited on October 20, 2021).

amount of fixed time and subject to certain limitations,[2] the exclusive right to use and economically exploit the created work is given to the creator.

This article is limited to grounds for refusal of registration of trademark under the Trademark Act, 1999.

II. HUES OF HUMAN RIGHTS IN GROUNDS FOR REFUSAL OF REGISTRATION OF TRADEMARK

Grounds for Refusal of Registration of Trade-mark

Section 9 and 11 of the Trademark Act, 1999 provides for absolute and relative grounds for refusal of registration of trademarks respectively. When an application for trademark registration is applied for, the registrar of trademark examines if the essential criteria under section 9 are met or not. If it is not met, it will be held as an absolute ground for refusal of registration of trademark. The grounds under section 9 includes three things, firstly, the trademark has to be distinctive,[3] secondly, the trademark cannot be descriptive[4] and thirdly, the trademark cannot be generic, that is, a trademark cannot be consisted exclusively of marks or indications which have become customary in the current language or in the *bona fide* and established practices of the trade. However, in exceptional circumstances when the descriptive or generic word has become distinctive,[5] in that situation, it can be registered.[6]

The relative grounds of refusal of registration of trademark are certain disqualifications in registering a trademark on grounds that they are pre-existing trademark and due to the subsequent registration of trademark there might be confusion in the minds of the public as they would associate it with the earlier trademark[7] or at times the later trademark may take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.[8]For the purpose of this paper, we will be restricting to the absolute grounds for refusal of registration of trademark.

---

[2]Compulsory licensing is one limitation to the rights of IPR.
[3] S. 9(1)(a).
[4]*Id.*, s. 9(1)(b) states that consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;
[5]It is important to note that descriptive or generic words are not inherently distinctive, however, by long usage, if such words have acquired distinctiveness, it can be considered.
[6]*Id.*, *s*. 9(1)(c).
[7]*Id.*, *s*. 11(1)
[8] This is particularly in context of well-known trademark. *Id.*, s. 11(2).

Judicial interpretation of absolute grounds of refusal of trademark registration from a human rights angle

The human rights which can often conflict with trade-mark is the freedom of right to expression.[9] This conflict can be looked at from the angle of the applicant aggrieved if a trademark registration is denied and thus stops him from advertising (a form of expression) a product in the way he wants. The second conflict is when due to a registration of trademark in favour of one person, a wide range of other legitimate users would be deprived from doing so. It is the second conflict that is the focus of attention in this paper.

Descriptive words not to be registered

In a leading case of *M/s. Hindusthan Development Corporation Ltd.* v. *The Deputy Registrar of Trade Marks*,[10] one of the leading question was whether the word *Rasoi*which was used as a trade-mark by the appellant company for selling their product groundnut oil, has a reference to the quality and character of the product and thereby disqualified on the ground of being descriptive.While looking into the application, the Deputy Registrar of Trademark stated that the meaning of the word Rasoi is cooking. To reach this conclusion, he stated that,

> …whether a mark has reference to the character or quality of the goods, the mark must be looked at, not in its grammatical significance, but as it would represent itself to the public at large.

The provision stated that the word Rasoi should not have direct reference to the character or quality of goods. The Deputy Registrar stated that:

> the word characterhasbeendefinedinMurray's*NewEnglishDictionary*,Vol.II,PartI, to mean a feature, trait, characteristic and the word characteristic has been defined to mean a distinctive mark, trait or feature, a distinguishing or essential peculiarity or quality.One of the use of hydrogenated groundout oil is that it can be used for cooking. The way a commodity is used forms part of its character. Thus the word Rasoi would imply a direct reference to the character of the goods.

[9]Andreas Rahmatian, "Trade Marks and Human Rights" in P. Torremans, (ed.),*Intellectual Property and Human Rights*335-357(Wolters Kluwer, Alphen aan den Rijn, 2008).

[10]AIR 1955 Cal. 519.

Another question looked upon by the court in this case was since Rasoi was a common word of a particular language and hence monopoly should not be given to any particular seller or trader. The court made an important observation that words of a language are not the property of a single individual and hence no one should be allowed to monopolise it. However, the court also noted that in special circumstances, there can be an exception to this rule. The exceptional situation would be if the common word has lost its primary meaning as a result of the long usage of the word by a particular trader. In the instant case, since it was observed that the word Rasoi had not lost its primary significance, hence a trader cannot be permitted to monopolise it.

Name of place not to be allowed to be registered as a trade-mark

In a case of *The Imperial Tobacco Co. of India Ltd. v. The Registrar of Trade Marks*,[11] the applicant wanted to register the word 'Simla' for selling their cigarettes. The Deputy Registrar while looking into the application observed that:[12]

> …Simla in its only and obvious signification is a well-known geographical name and the chief town of a State and further the word Simla was inherently not adapted to distinguish the goods of any particular trader……

On the argument that the trademark became distinctive on the material date due to the high sales and large advertisements, it was stated that it will not be correct to only accept trade evidence as complete proof of acquired distinctiveness.

Coming to choosing geographical names as trade-mark, it was stated that a geographical name in its ordinary significance should not be registered. However, there can be an exception if there is an evidence of distinctiveness. The court quoted Karly's[13] treatise on trademark wherein it was stated that a word is not prohibited from registration as a trademark merely because it is a geographical name. Some geographical names can be allowed registration if it can be made sure that these names will not come to the minds of other traders of that area or on grounds of distinctiveness. In other situations, geographical names used in a

[11] AIR 1977 Cal 413.
[12] *Id.,* para 13.
[13] *Id.,*para 43.

fanciful manner can be allowed as a trademark. However, it was also noted that names of major cities should be completely prohibited from registration.

Finally, while rejecting the word 'Simla' for selling cigarettes, the court remarked thatthe fact that the applicant used an imprint of snow clad hills in the trademark indicates that they wanted to use the word Simla in its ordinaryand geographical sense. If registration of the word Simla will be given, it will definitely hamper the traders in and around the locality in future if they decide to go into the tobacco business. It cannot be denied that Simla is a prominent city, which is famous in India and abroad and hence it is neither inherently distinctive nor capable of distinguishing the goods and services of one trader from others.

Generic names not to be allowed registration

In the case of *Geep Flashlight Industries Ltd.*v. *The Registrar of Trade Marks*,[14]the appellants being unsatisfied that their trademark Janta has been refused trade-mark registration for electric torches filed an appeal. The Registrar while rejecting the application stated that the word Janta was a word of common use and hence lacks the criteria for distinctiveness. The court on appeal agreed with the Registrar and made a very important observation that, in India, the word Janta plays a very significant role and it is used in different situations. It is one of those words which should be kept open for the use by any person for a *bona fide*, trading or descriptive purpose. No one should get monopoly on such a word.

Analysis of the aforementioned provisions and judicial precedents *vis-à-vis* human rights

The human rights that are in discussion is the right to freedom of expression and right to freedom of trade, profession and business. It is important to note at this juncture that trademark and advertising are interrelated. Trademark performs the communication function, which conveys the trademark image through advertising to and between consumers.[15]In the case of *Tata Press Ltd.*v. *MTNL*,[16] the Supreme Court stated that commercial advertisements are part of freedom of speech and expression and the only limitations to it can be under article 19(2) of the Constitution of India. Article 19(2) states that in the interests of the

[14]AIR 1972 Del 179.
[15] Sebastian Deck and Richard Brunner, "Brand And Trademark: Where Marketing Meets Law", *available at: https*://www.mondaq.com/trademark/733436/brand-and-trademark-where-marketing-meets-law(last visited on October 20, 2021).
[16]1995 SCC (5) 139.

sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence, restrictions can be imposed by the state on the right to freedom of speech and expression.

Alternatively, it can also be seen that trademark registration of a particular word or logo can be a restriction to the right of freedom of expression of another trader or business who wants to use it in the course of their trade or business but are denied by the trademark registration. Hence, to balance these extreme approaches, section 9 of the Act plays an important role. On one hand, owing to the international recognition of intellectual property rights and the TRIPS Agreement, it is mandatory for all member states to have strict IPR laws including trademarks. On the other hand,it is also important to allow traders to be able to use a mark which is important for their legitimate business interests and for bona fide purposes.

Section 9(1)(b) of the Trademark Act plays a key role in this aspect. The provision states that, "the trademark which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service shall not be registered."

Imagine a situation that the word Mango is registered as a trademark by a trader for selling mangoes. It will be completely detrimental to the interests of all other mango sellers as they will be unable to use the word 'Mango' for selling Mangoes. Hence, it is for the legitimate interests of the other sellers that the mark which indicates the kind is disallowed. Another example could be that the word 'creamy' is allowed trademark registration for ice-cream. It will definitely to affect the other traders as creaminess is one of the qualities of an ice-cream.Hence any kind of descriptive word of the goods is disallowed registration of the trade mark under the said provision.Geographical origin is discouraged as every trader/manufacturer of a good in a particular place would want to put the place of origin in their goods. Allowing the geographical origin as a trademark will naturally hamper the interests of other traders.

Generic and Common words

Section 9(1)(c) of the Trademark Act states that trademarks which consist exclusively of marks or indications which have become customary in the current language or in the *bona*

fide and established practices of the trade shall not be registered. Fry L.J.'s observation in the case of *Re: Dunn*[17] is particularly important as he mentioned that though the word 'Fruit-Salt' has not been used in collocation except by the applicant Mr. Eno in the case. However, the court cannot overlook that there was an attempt by Mr. Eno "to enclose and to appropriate as private property certain little strips of the great open common of the English Language". The court held that this the court cannot allow.

Similarly, the Supreme Court in the case of *Geep Flashlight Industries Ltd.v.The Registrar of Trade Mark*[18]held that by trying to register the word Janta for electric torches, the applicant is trying to get a monopoly of the word and this instance is nothing but an attempt to enclose and to appropriate as private property certain little strips of the great open common of the Hindi Language. There are certain words which are important for all traders, they are words of everyday usage, everyday importance. Monopolising those words or attempting to register those words as trademark is going to hamper the legitimate words of all people. The Supreme Court's last observation in the said case is worth mentioning,

> Janta in India has a special significance and it is used very widely in various situations to denote or connote people or the common man and that the word 'Janta' is one of those words which should be kept open for the use of any person for a bona fide descriptive or trading purposes and that the appellant should not get monopoly right over this word.

The aforementioned are some of the leading cases in India when the courts have intervened and disallowed a particular trademark registration for the common benefit of all others who are professing a particular trade or profession. An important observation in the context to name of places being registered as trademark by Calcutta High Court in the *Imperial Tobacco* case is that,[19]

> Such monopoly rights must not be granted, otherwise wealthy applicants will divide amongst themselves all the names of important cities and towns of India to the embarrassment and prejudice of smalltraders….

[17](1888) 6 RPC 379.
[18]*Supra* note 14.
[19]*Supra* note 11.

It is true that trademark is essentially a commercial law, however, no law can be read ignoring the larger benefit of the society. If a law encourages private interest solely over public interest that has to be considered to be a bad law.

Bona fide use of trademark

Section 35 of the Trademark Act, 1999 is worth mentioning. It states that, "Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with any *bona fide* use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods or services." This provision is complementary to section 9 of the Act. Section 9 prohibits trademark applicants from using a descriptive or generic words from registration, whereas, section 35 gives a legitimate right to the people irrespective of the trademark registration to use their own name, place of nosiness, or any bonafide description of the character or quality of his goods or services in their course of trade or business.This provision particular is beneficial when a corporation is able to monopolise a descriptive or generic word as trademark by providing strong grounds of acquired distinctiveness.

Another provision that needs to be mentioned is section 11(11) of the Act which states that if a trademark is registered in good faith by revealing all material information or the trademark is acquired through use in good faith before the enactment of the legislation, then the registration will still be held valid irrespective of whether the trademark is similar to or identical with a well- known trademark. This provisionis important as otherwise all trademark that would be slightly similar to a well-known trademark will be held infringement. As is known, trademarks which comes under the category of well-known trademark are given special privilege under the Act.[20] In that scenario, this provision comes as a relief to those whose genuine trademark which are acquired through good faith or before the coming of the 1999 Act. Say, for example, H&M is a well-known trademark which came into the Indian market in recent years. Let's say they apply for a trademark in India and gets it being a reputed brand. Now they file infringement case against a small Indian company based in Baroda as they are trading under the mark 'H and M'. If it is found that the Indian company had taken this trademark in good faith as the owners were two brothers, Haribhai

[20]Well-known trademarks are protected not only against similar or identical trademarks of similar goods and services but also against similar or identical trademarks of dissimilar goods and services. See, *supra* note 3 at s. 11(2).

and Manishbhai (hence H and M) and started their trademark much before the 1999 Act came into force, they will be allowed to use and register the trademark.

Another provision is section 12 of the Act which states that in cases of honest concurrent use, the registrar may permit the registration of more than one identical or similar trademark in respect of same or similar goods and service. Some conditions or limitations can be imposed by the registrar in such cases. Cases in which a proprietor may be using a particular trademark long before the coming of the trademark act of 1999 but haven't registered it, may be given registration under this provision irrespective of the fact that there is another similar or identical trademark which was registered under the Act.

IV. CONCLUSION

In today's time and era, trademark law plays an important role in the business and goodwill of corporations. Hence, the corporations put in a lot of effort to register as well as protect their trademark. The discussions aforementioned highlights the problems underlying the trademark registration and analyses the provisions in the trademark act which counterbalances the interest of corporations and legitimate public interest. It is important to mention that in the absence of such provisions, specifically section 9, 11(11), 12 and 35 of the Trademark Act, the legitimate rights of individuals to trade, practice and profess their trade and profession will suffer a huge setback. The absolute grounds of refusal of registration of trademark under section 9 of the trademark law have since a long time helped the general public from the corporations which seek to appropriate generic, descriptive and non-distinctive common words as their trademarks. It is laudable that the courts in India also have played a prominent role in protecting public interest which would have otherwise suffered heavily in the hands of trademark registered or sought to be registered by corporations.

e-ISSN 2582-4570

THE DICHOTOMY ON CODIFICATION OF CUSTOMARY LAWS IN INDIA – AN ANALYSIS

Mercy K Khaute[*]

Abstract

In many indigenous communities, Customary law is hugely empowering as it is a form of not just a social organisation of justice which maintains and sustains traditions that dates back millennia but a way of life and sense of identity to those bound by it. The dominant narrative in socio-political terms as driven by progressive changes in Indian society has been one tending towards social inclusion of tribal populations. The manner in which this endeavour of social inclusion has panned out through codification of customary laws is the subject of discussion in this paper. In attempting to discern the position, the author examines the question on codification of tribal customs adopting cross jurisdictional study. Considering the tribal population in India, it is a common knowledge that the majority of tribes are concentrated in Central and North-East India as demonstrated by the Fifth and Sixth Schedules of the Constitution. This paper seeks to analyse the debate over the codification of customary laws- to seek whether this is the only method of providing recognition to the customary laws in the mainstream formal legal system. The article begins with an introduction to the topic touching upon the aspects of legal pluralism. Second Part is a brief discussion on Customs- its definition and dynamics. Part III of the paper contains cross jurisdictional study on customs and their codification. While part IV attempts to answer if a case for codification is ruled to recognise the customary laws, lastly the paper concludes with observations of the author.

I. INTRODUCTION

Ethnic diversity is the defining characteristic of Indian democracy. Legal developments which discount the plurality of interests involved are unlikely to be well received and may in turn invite strong oppositions. Therefore, it is essential that uniformity is not mistaken for unitary. One needs to take a liberal approach towards understanding the concept of codification through the lens of pluralism taking into considerations the history of the land and the various community practices that have developed over time ensuring at every stage that the idea of the heterogeneous fabric of the society is not disrupted. If these are not considered, the law might appear oppressive to the communities.

Customary laws are treated as rules, which all members are obliged to follow owing to their general acceptance. Over time they evolve as an intrinsic part of one's life, views and

[*]Assistant Professor, Faculty of Law, University of Delhi.

an identity especially of many indigenous communities[1]. While Blacks'sLaw Dictionary describes "laws to consist of customs which are accepted as legal necessities or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic part of a social and economic system that they are treated as if they were laws"[2]. The Indian Constitution permits certain communities the right to deal with disputes through personal and customary laws whereby the customary legal forums operate within the sanction of the state itself. Hence in this context of the tribes in India, customary laws being given both state and social sanctions has played an immensely important role in determining lives and rights of the tribesmen.

The policy of non-interference was adopted by the colonial rulers in the administration of the affairs of the hill tribes thereby permitting them to manage the affairs based on their customary laws[3]. To the rulers it was one of the fundamental task to "civilize and humanize" the hill tribes with could most significantly be achieved through the introduction of modern education[4] that was imparted by the missionaries whose movements in the region were restricted to evangelical works and social services ranging from imparting education to offering medical aid and assistance[5]. Numerous activities which focused on literacy, medical assistance and introduction of scripts through education marked the entry of the Christian missionary works in the region[6789]. Restrictions on the accessibility of the region was considered to be one of the most significant channel to protect the tribesmen from infiltration against outside communities, which continues to this day.

[1]U. Gosart, "Traditional Knowledge & Indigenous Peoples" *World Intellectual Property Organisation* 143(WIPO, 2009), *available at* :https://www.wipo.int/edocs/pubdocs/en/tk/1014/wipo_pub_1014.pdf (last visited on March 31, 2021)

[2] Henry Campbell Black, Bryan A Garner (eds), Blacks's Law Dictionary 2007 (St. Paul, MN: West Group, 2007)

[3]UdayonMisra, North-East India: Quest for Identity: a Collection of Essays on Socio-political Topics (Omsons Publications, New Delhi,1988)

[4] H. Srikanth, "British Colonialism and the Hill Tribes of Composite Assam", 79-116 Man and Society: A Journal of North East Studies 3 (2006)

[5] V. Venkata Rao, "Politics of Tensions in North-east India: Antecedents" in VerinderGrover, Pressure Groups and Politics of Influence 193-218 (Deep and Deep Publications, New Delhi, 1997)

[6]R Buongpui, Women and Legal Pluralism: A study among Hmars of Manipur 104 (2016) (Unpublished Ph.D Thesis, IIT Guwahati)

[7]Lal Dena, Christian Missions and Colonialism: A Study of Missionary Movement in North East India with particular reference to Manipur and Lushai Hills, 1894-1947 (Vendrame Institute Publications, Shillong, 1988)

[8] Rowena Robinson,"Christianity in the Context of Indian Society and Culture", in Veena Das (ed.) The Oxford India Companion to Sociology and Social Anthropology, 1 883-907 (New Delhi: Oxford University Press, 2003)

[9] John Thomas, Missionaries, Church and the Formation of Naga Political Identity 1918-1997 (2010) (unpublished Ph.d. Thesis, Jawaharlal Nehru University. Centre for Historical Studies School of Social Sciences)

Framers of the Indian Constitution acknowledged that there were certain issues pertaining to the Northeast region that needed due consideration[10]. The necessity to establish a separate political and administrative structure to suit the requirements of the region was implemented, directing the efforts of the Government towards a plethora of endeavours to address the needs of the tribal communities as part of the nation-building project[11]. The Indian Constitution grants protection of the culture, tradition and customary laws of the region[12] through various provisions and laws to the tribal communities[13]. While the amusing fact to place on record is that, except for the states of Nagaland and Mizoram; there is no codification of customary laws in the other Eastern States. Nonetheless the intrinsic values of the unwritten laws continue to play decisive and pivotal role to the tribal identity. Researches conducted by various authors reflect that the modern tribesmen prefer to redress their grievances through their customary laws in almost every part of the Northeast states[14].

II. DEFINITION, MEANING AND ROLE OF CUSTOMARY LAW

To the sociologist, the function of law is to sustain the social order by upholding the basic values and norms of the society[15]. Mathew Deflem[16] writes that laws are an institutionalised system of norms intended to establish social interactions for societal integration. Henry Maine, opined that law developed organically just as language. The legal pluralist would certainly disagree to the common perception that laws came into existence via the institution of the state, making the primary function of the state to legislate laws. To them, not all laws originate from the state[1718]. The universe of such non state laws is huge and one can easily place the customary laws that are indigenous, native and living or the local-laws way.[19]

[10] Manjushree Pathak, Crimes, Customs & Justice in Tribal India: A Teleological Study of Adis(Mittal Publication, New Delhi, 1991)
[11]Melvil Victor Pereira, Customary Law and State Formation in Northeast India: A Comparative Study of the Angami and the Garo of Meghalaya, (unpublished thesis submitted for the degree of doctor of Philosophy in Centre for Political Studies. School of Social Sciences, Jawaharlal Nehru University Delhi, 2009)
[12] The Constitution of India, article 13 29, 30, the Vth ,VIth Schedule.
[13]Ibid.
[14]Supra note at 6, 5,70 and117.
[15]Indra Deva(ed.), Sociology of Law 02 (Oxford University Press, New Delhi, 2005)
[16] Mathieu Deflem, Sociology of law: Visions of a Scholarly Tradition (Cambridge University Press, Cambridge, 2008)
[17]Eugen Ehrlich, Fundamental Principles of the Sociology of Law (Arno Press, New York, 1975)
[18] Leon ShaskolskySheleff, The Future of Tradition, Customary Law, Common Law and Legal Pluralism (RoutledgePublication,New York, 2009)
[19] M.S Vani, "Customary Law and Modern Governance of Natural Resources in India: Conflicts, Prospects for Accord and Strategies" in Gitenjendra Pradhan (ed.)Legal Pluralism and Unoffical Law in Social, Economic and

Customs and Customary laws distinguished

Customary laws enjoy legal sanctions through the general acceptance by the members of the society and any failure of compliance to these will attract sanction[20]. Generally speaking, customs are norms or rules of social conduct failure of adherence may or may not attract sanction. Customary laws do not constitute a 'single body of law' but is adaptive with inherent flexibility to the ever evolving body of norms for efficiency in governances of the tribal communities.[21]Such laws serves the dual purpose of regulating social relationship and engages social control as the breach of customary laws often culminates into a situation with serious consequences[22]. Leon Sheleff[23] notes that customary laws are not simply relics of the past but provides guidance and solutions for situations that maybe more satisfying than those offered by the State legal system. The validity of customary laws is the free will of the social acceptance of the people who chose to adhere to it[24]. The genesis of customary laws are the values, morals and traditions of the local indigenous ethnic people[25] and from the societal practices that the community concerned feels obligated to follow[26] thus enabling the younger generation to developed an holistic understanding of their culture[27].

Dynamics of Customary law

Customary laws that can be detected historically and presently accepted as authoritative are deemed to be the outcome of social conditions blended with political motivations[28]. Customary laws are endowed with the outstanding feature of being unwritten based on oral traditions[2930]. The traditions are conveyed through the modes of folktales,

---

Political Development 409-446 (The International Centre for the Study of Nature Environment and Culture, Kathmandu, 2002)

[20] T.S. Gangte, Tribal, Land, History and Culture and other Essays (Ruby Press & Co., New Delhi, 2013)

[21]Supra note 19.

[22] P.K. Bhowmick, Customary Law of Austric-Speaking Tribes (Kalpaz Publications, Delhi, 2002).

[23] Leon ShaskolskySheleff, The Future of Tradition, Customary Law, Common Law and Legal Pluralism (Routledge Publication, New York, 2009)

[24]Ahren, "Indigenous people's Culture, Customs and Traditions and Customary Law- The Saami people's Perspective"' Arizona Journal of International and Comparative Law 63-112 (2004)

[25] Ben KirombaTwinomugisha, "African Customary Law and Women's Human Rights in Uganda" inJeanmarieFenrich (eds.) The Future of African Customary Law (446-466) (Cambridge University Press, 2011)

[26] T. Bennett, Customary law in South Africa (Lansdowne, Juta (2004)

[27]Supra note at 25.

[28]MunaNdulo, "African Customary Law, Customs, and Women's Rights", 18(1)Indiana Journal of Global Legal Studies87-119 (2011).

[29]Supra note at 25.

[30]Vera N, Ngassa, "Exploring Women's Rights within the Cameroonian Legal System: Where do Customary Practices of Bride-Price Fit in?" in FonjongLotsmart (ed.) Issues in Women's Land Rights in Cameroon (Langaa research & Publishing Common Initiative Group, Cameroon, 2012).

songs, stories and epics, myths and tales and legends of the past[31]. Customary law may be referred to as a system of immemorial rules that originate and evolve with the development of human desires the focus being the common knowledge[32]. Another distinguishing feature is the easy accessibility of the customary laws as opposed to the stringent rule of law in the formal system of Legal order. The informal atmosphere with regard to the time and space for operating the procedures of dispute resolutions makes it relatable and less intimidating.[33].

With the enactment of the Indian Constitution in 1949, Article 13(1) unambiguously states the invalidity of all previous and future laws that were and are inconsistent with the Constitution.[34] The Article 13 of the Constitution defines "law" to include " allcustom or usage having in the territory of India the force of law." The Courts of India have thus recognized custom as law only if the custom fulfils the following tests,

(1) "ancient or immemorial" in origin,[35]

(2) "reasonable [[36]] in nature & continuous [37] in use," &

(3) "certain"[38]

The interpretation of the Courts in elucidating the terms "ancient or immemorial" is to emphasis that for any customs to be binding it "must derive its force from the fact that by long usage it has obtained the force of law." A custom may also "derives its validity from being reasonable at inception & present exercise." Lastly, a "certain" custom is one that is "certain in its extent & mode of operation" & invariable.[39]

Section 3(a) of Hindu Code defines 'Custom' as:

[31]Melvil Victor Pereira, Customary Law and State Formation in Northeast India: A Comparative Study of the Angami and the Garo of Meghalaya (2009) (Unpublished Ph.D Thesis, Centre for Political Studies. School of Social Sciences, Jawaharlal Nehru University Delhi,

[32] J.C. Bekker, "Seymour's Customary Law in Southern Africa, Cape Town" in Juta&Belenky, Mary Field, et. al. (eds.) in Women's Ways of Knowing: The Development of Self, Voice and Mind (Basic Books , New York, 1989)

[33] E. Harper,Customary Justice, 27 (International Development Law Organization, Rome, 2011)

[34]Available athttp://lawmin.nic.in/coi/coiason29july08.pdf (last visited on March 31, 2021)

[35]Gokulv..Parvin Kumari, 1952 AIR 231.

[36] In Produce Brokers co. v. Olympia oil & coke co. [1915] UKHL 787, the Divisional court of the King's Bench held that customs shall be adopted when they are fair and proper, that any reasonable, honest and fair minded men would willingly adopt.

[37] In case of Muhammad Hussainforki v. Syed MianSaheb(1942) 1 MLJ 564,it was held that unless there is continuity there is no custom. A custom may be abrogatory if it abrogates another custom, such other custom ceases to exist

[38] In Wilson v Willes, 1 US (1 Dall.) 351 (1788) it was held that for a custom to be recognised it must not be vague but certain and definite.

[39]B.J. Krishnan, "Customary Law", (Aug. 2000), available at http://www.india-seminar.com/2000/492/492%20b.%20j.%20krishnan.htm. (last visited on March 31, 2021)

3. Definition[40] - In this Act, unless the context otherwise requires. -

(a) the expressions, 'custom' & 'usage' signify any rule which, having been continuously & uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family[41]

"...therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right." [42]

Following the World War-I & the establishment of the League of Nations, the need for codification of international law was on high demand. In 1930, the League of Nation conducted the Hague Conference for the purpose of codification of general rules but hardly achieved any progress. Post the World War-II, the International Law Commission was established under the umbrella of the United Nations for the effective study & formulation of international jurisprudence cum laws.[43]

III. Cross Jurisdictional Study of Customary Laws - An Overview

Africa

The Constitutions of African nations have to a high degree recognised traditional and customary institutions alongside the wide acceptance of the customary laws in the courts. The law provides wide range of obligations ranging from protection and promotion of culture/traditions, [44] to a more generic right on freedom to tradition and culture [45] or a more specified right with regard to language.[46] Often, these rights or duties are strictly manned to be accordant with the constitution and fundamental human rights.[47] The Constitution of Chad is the most restrictive, allowing recognition of customary marriages and inheritances only

[40]Bhimashya&Orsv. Smt. Janabi @ Janawwa,Appeal (civil) 5689 of 2006 (Arising out of S.L.P (C) No. 26558 of 2005

[41]*Available at*https://indiankanoon.org/docfragment/285351/?formInput=custom%20define(last visited on march 31, 2021)

[42]In Re, Smt. Amina v.Unknown, AIR 1992 Bom 214.

[43]*Available at* https://en.wikipedia.org/wiki/Codification_(law)(last visited on 31 March 2021)

[44] The Constitution of the Republic of Benin 1990, art. 10; Constitution of the Federal Democratic Republic of Ethiopia 1995, art. 91(1); Constitution of Kenya 2010, art. 11; Constitution of Mozambique 1990, art. 115(1); Transitional Federal Charter for the Somali Republic 2004, arts. 1:1(3), 24(6); Constitution of the Republic of Ugands 1995, art. XXIV .

[45]Id

[46] Constitution of the Republic of Benin 1990, art. 11; Constitution of Equatorial Guinea 1991 item 4; Constitution of Kenya 2010, art. 7.

[47] Constitution of the Federal Democratic Republic of Ethiopia 1995, art. 91(1); Constitution of the Republic of The Gambia 1997, s 32; Constitution of the Republic of Ghana 1992, art. 26(2).

upon the agreement of both the parties.[48] The Namibian constitution provides for marriages under customary law [49] while Ethiopia recognises customary marriages and permits the application of customary laws in the adjudication of disputes relating to personal or family matters.[50] The preamble to the Swazi constitution upholds the necessity to fuse customary institutions with the agents of modern democratic society, alongside the traditional pillars of the monarchy[51] which functions according to Swazi law & custom.[52] The administration establishes a Council of Chiefs, to advise the King on issues pertaining to customs specially on such Bills that may alter and affect the customary authorities, cultural activities, customary courts or Swazi laws and/or custom.[53]Somalia's charter requires the participation of traditional leaders on the appointment of parliamentarians.[54] The state of Angola dictates that the local government organisations shall include traditional authorities.[55]

In the African continent, the constitutions contain provisions on customary laws that ought to be observed in the judicial courts. Some jurisdictions are enlarged to accommodate the establishments, preservations and/or permission for establishing specific customary law courts [56] while few others dictate the contours on the courts's jurisdiction in view of customary laws. One must note that numerous constitutions do contain stringent prohibition on customs that are or appears to be contrary to all or few basic rights like those on human rights, women's rights , principles of natural justice or any such other norms of customs that are deemed to be undesirable.[57]Sudan provides for an interesting association of the custom and the state laws, pronouncing that the source of nationally enacted legislation shall be customs.[58]

---

[48] Constitution of the Republic of Chad 1996, art. 162.
[49] The Constitution of the Republic of Namibia 1990, art. 12(1)(f).
[50] Constitution of the Federal Democratic Republic of Ethiopia 1995, art. 34(4),(5).
[51] The Constitution of the Kingdom of Swazil,2005, s .227(2). The Constitution of Lesotho 1993, ss .45, 46 & Constitution of the Republic of South Africa 1996, s. 143(1) maybe referred for provisions relating to the application of customary laws in relation to traditional monarchary.
[52] The Constitution of the Kingdom of Swazil, 2005 s 227.
[53]Supra note 52 at ss. 115, 251
[54] Transitional Federal Charter for the Somali Republic 2004, arts. 30, 71(5).
[55] Constitution of the Republic of Angola 2010, art. 213.
[56] Constitution of the Federal Democratic Republic of Ethiopia ,1995, art. 78(5); Constitution of the Republic of Malawi ,1994, s. 110(3); Constitution of the Federal Republic of Nigeria, 1999, ss. 265, 280; The Constitution of Sierra Leone, 1991, s. 120(4); Constitution of the Republic of South Africa, 1996, schedule 6, s. 16.
[57] Constitution of the Republic of Angola, 2010, art. 7; Constitution of the Democratic Republic of the Congo, 2005. art. 207; Constitution of the Federal Democratic Republic of Ethiopia, 1995, art. 35(4); Constitution of the Republic of Ghana, 1992, art. 26(2); Constitution on Kenya, 2010, s. 2; Constitution of the Republic of Liberia, 1986, art. 2; Constitution of the Republic of Malawi, 1994, ss. 24(2), 200; The Constitution of the Republic of Namibia, 1990, art. 66(1); The Constitution of the Republic of Rawanda, 2003, art. 201; The Interim National Constitution of the Republic of Sudan, 2005, art. 32(3); The Constitution of the Kingdom of Swazil, 2005, s. 252(2); Constitution of the Republic of Uganda, 1995, art. 2(2).
[58] The Interim National Constitution of the Republic of Sudan, 2005, arts. 5(2),(3)

Canada & Australia

Contemporary Canadian constitution broadly recognises aboriginal rights. All existing aboriginal rights pertaining to treaties including any claims and freedoms are protected.[59] Interestingly it also ensures that customary rights are not affected by any provision pertaining to official languages.[60]

While the Indigenous Australian customary law lacks uniformity across the continent and one witnesses wide variations in language groups, clans, or regions.[61] The words "law" & "lore" are used to differentiate the Indigenous and post-colonial legal systems. The word "law" is used in reference to the system of laws as was set up by the British during their rule, and the word "lore" in contradistinction to "law" refers to the Indigenous customary system that is inherent in the lives of the tribes since time immemorial. Imparted through childhood, lore spells out the rules and norms on interaction within the community. [62] In 1986 a report by the Australian Government noted the absence of any codified version of the indigenous customary lore, while it did acknowledged that the existing knowledge on Indigenous Australian traditions was adequate for codification.[63] In 1992, post-colonial law asserted that the claims through the Indigenous lore was a valid in the Mabo decision[64], which discarded the legal fiction of terra nullius. The court found that the crown held title over all land in Australia, the High Court held that customary legal rights to land would be recognised if only those legal rights had not been displaced but maintained continuously. The Australian Law Reform Commission[65] and the Law Reform Commission of Western Australia[66] have propagated the advantages in recognising customary law entailing the Aboriginal Australians. In the Northern Territory, the statutes and courts make rather obvious references to various customary lore in identifying relationships based on social expectations. [67] These have

[59] Constitution of Canada, 1982, ss. 25, 35
[60] Supra note 59 at s. 22
[61] Australian Law Reform CommissionReport 31, "The Proof of Aboriginal Customary Laws" (12 June 1986)
[62] Working with Indigenous Australians First Nations People, "The Law & the Lore"*available at* http://www.workingwithindigenousaustralians.info/content/Culture_4_The_Law_and_the_Lore.html (Last accessed on March 31 2021.
[63] Supra note 61
[64](1992) 175 CLR 1
[65] Supra note 61
[66] Law Reform Commission of Western Australia, "*Aboriginal Customary Laws (Project 94) - Discussion Paper Overview*" (2005) *Available at* https://www.wa.gov.au/sites/default/files/2021-04/LRC-Project-094-Discussion-Paper.pdf (last accessed on March 31 2021).
[67]Community Welfare Act 1983 (NT) s 69; Sentencing Amendment (Aboriginal Customary Law) Act 2004 (NT) s 4

sometimes been rather controversial,[68] by and large in cases where customary lore appears to infringe human rights.[69]

IV. A CASE FOR CODIFICATION?

Customary International Humanitarian Law refers to un-codified rules and regulations of Public International Law. International Humanitarian Laws such as Geneva Conventions are ratified by almost all the Nation States but not all treaties are ratified, ushering the importance of customary practices as the guiding principles in the absence of any proper, codified norms in treaties and conventions. The International Committee of the Red Cross (ICRC) reported the existence of 161 customary rules applicable in national and international armed conflicts. Technological advancements have reduced warfare and created globalisation of trade. Customary International Law plays the pivotal role in establishing diplomatic relations between these 'global villages'. Codification of trade norms thus appears to be the pressing needs in the global engagements. But, this does not imply that Customary Laws have lost their significance.

The Constituent part of Indian jurisprudence is customs upheld in many judgments by the courts. Customs are lucid in their expressions, enabling established local usage to develop into law which maybe often used interchangeably though customs are originally confined to local usages existing immemorially. [70]

When the court uphold the validity of a customary right in India it organically becomes customary law based on the principle of common law jurisprudence. While customary laws at the community sphere evolved out of the local traditional usages and practices, that reflect the cultural ethos and haute of livelihood of the inhabitants of the society. Custodial association is much more than community conservation of natural resources. The concept of 'custodial association' still exists wherein the natural resources are owned by the community themselves. This relationship of man-nature custodial association exemplify the 'best

[68] Walker v. New South Wales [1994] HCA 64, (1994) 182 CLR 45 (16 December 1994), High Court (Australia); Coe v Commonwealth [1993] HCA 42, High Court (Australia).

[69] Elizabeth Byrne, "High Court rejects customary law defence in sexual abuse case" The World Today (ABC Radio). 19 May 2006. *Available at* https://www.abc.net.au/worldtoday/content/2006/s1642802.htm (Last accessed on March 31 2021).

[70] Bulbul Kumari, " Distinction between Substantive and procedural law", *available at* https://www.academia.edu/39468664/UNIT_I_Distinction_between_substantial_law_and_procedural_law (Last visited on March 31, 2021)

&highest' model in community conservation. [71] Correspondingly Article 3(1) of Convention 169 (1989) of the International LabourOrganisation (ILO) [72] states that

> Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

In Australia the Mabo case [73] it was pronounced that the community title was superior to crown title over the common naturals. Similarly the Indian Constitutional 73rd & 74th Amendments were significant efforts with regard to community conservation also, paving the road for local governance largely based on customary laws.

Customs in the North Eastern States

Certain special provisions are contained in the Fifth and Sixth Schedule in the Constitution of India that permits and legitimises the existence of governance via alternate mechanisms within specific scheduled and tribal areas. These provisions are applicable to those states where the customary laws have been upheld equivocally in the north-east Indian states of Assam, Tripura, Mizoram and Meghalaya alongside notified scheduled areas in ten other Indian states namely Chattisgarh, Madhya Pradesh, Jharkhand, Gujarat, Himachal Pradesh, Rajasthan, Telangana, Andhra Pradesh, Odisha and Maharashtra.

The colonial government had brought the tribes of Assam under its regime while recognising their customary laws through the Scheduled District Act of 1874. The tribal customs were further protected by the Assam General Clauses Act 1915 by limiting the application of the Provincial Laws in the Hill areas. Similar provisions were contained in the Montague-Chelmsford Reforms 1919. The Indian Statutory (Simon) Commission, 1930 recommended the protection of tribal customary rights which was accepted by the Government of India Act in 1935 thereby dividing the hill areas into Excluded & Partially Excluded zones while stipulating that Act of the Central or Provincial Legislature will apply to the areas only if the Governor decided in furtherance of peace and good

[71] Ibid
[72] International LabourOrganisation, C 196- Indigenous and Tribal Peoples Convention, 1989 (NO.169) (5 Sep 1991). *Available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (Last visited on March 31, 2021)
[73] (1992) 175 CLR 1

governance. These provisions are the current day Sixth Schedule that includes the Naga, Khasi, &Garo Hills. Currently it applies to states of Meghalaya and the North Cachar Hills &KarbiAnglong districts in Assam. Recognition to the customary laws of Nagaland and Mizoram have also been provided through the Amendments to the Constitution to Art. 371A and 371G respectively.[74] Peculiar to the Sixth Schedule is recognition of community ownership with regard to land and forests and those without individual title belongs to the State. However, only recognition of rights fails to provide adequate protection interns of their livelihoods as the administration of the areas remain individual oriented where the office of the (village)chief is hereditary. There have been multiple instances where the chief had issues pattas[75] in the North Cachar Hills of Assam where non- tribals of the region are not permitted to own lands. [76] Instances was these have led to other states like Arunachal Pradesh, Manipur and Tripura to demand for the recognition of their customary laws under the Sixth Schedule as they were never apart of Assam[77].

V. CONCLUSION

One may notice a contradiction between the formal and informal legal systems. Tribal communities need no formal recognition of their customs by the formal system which is an external regulatory mechanism as adherence to the customs enables them maintain a balance between their communities and nature[78]. The customs are social control mechanism hence followed with respect and fear as violation of such are taken seriously by the community leaders.[79]. This is precisely because customary laws and practices are a response to their daily life with the space for flexibility to adopt to the changing needs of the tribesmen. If a society fails to progress and stagnates unable to deal with changes, the resultant factor is the rigid interpretations that emerges especially if the customs continue while the social base had disappeared. Justification for such custom are then sought by attributing it to its ancestors.

[74]JeutiBarooah, "Property and Women's Inheritance Rights in the Tribal Areas of the North East" in Walter Fernandes and Sanjay Barbora (eds.), Changing Women's Status in India: Focus on the Northeast 99-113 (North
Eastern Social Research Centre, Guwahati, 2002)
[75]Id
[76]Supra note 74 at 65-66
[77]Supra note 74
[78]RoshmiGoswami, "Shifting Sands: Negotiations, Compromises and Rights in Situations of Armed Conflict'', in Preeti Gill (ed.) The Peripheral Centre: Voices from India's Northeast 88-99 (Zubaan, New Delhi, 2010)
[79]Lucy T.V., "Women's movement in Manipur: Some Observations", in M.N. Karna (ed.) Social Movements in North-East India (Indus Publishing Company, Delhi, 1998)

Customary practices may also changes when formal codification are made which is the case in the state of Nagaland and Mizoram.

However the debate on codification of tribal customary laws have been long drawn. A growing opinion appears to supportive idea of documentation of customary laws and then recognition by the State. This will lead to double benefit of- recognition and second, flexibility as codification reduces the mobility and flexibility of the customary laws. The issue of codification is not one that can find easy summation of thoughts as to most of the Hills Tribes in the Eastern states, their customary laws is an identity and not just governing set of norms. Any threat to their customs are looked upon as a threat to their existence and culture. The idea of documentation is well supported as this will ensure that the customs and traditional laws will not die off with generations. But codification being the final step of being given a legal form within the formal legal system one is left with the fear of distorting the essence of the customary. Yet one must appreciate that without recognition, any exercise of documentation is a futile exercise. Hence, recognition is the integral process to accept the identity of not just the Tribes but of any socio political existence.

Experiences in the past have reflected that codification of tribal laws can result in the stagnation of customary laws and go against the concept of legal pluralism. For instance, there are substantial differences in the customary law of the Naga living in Manipur, Nagaland and Assam. The essence of customary laws may vanish permanently if codification is imposed bringing several different practices into a single code thereby striking off identity through diversity. Flexibility is essential for the customary laws to evolve preserve tribal identities. This requires recognition, not stagnation through codification. However, considering that despite agitation on the point over the past three decades, state like Manipur continues to be outside the Sixth Schedule depriving the constitutional protections deserved by the tribes, making it vulnerable to the onslaught of mainstream influences which can adversely impact the cultural identity.

Through this paper, an effort has been made to study the feasibility of codifying customs as it could bring several benefits including but not limited to making them more accessible to the general population and availing legal remedies in case of infringement of their tribal traditions. However, one can not overlook that any endeavour for codification of customs may open a pandora's box with the possibility of non-tribals hijacking tribal narratives by replacing them with their own interpretations of tribal cultures as in the case

when savanna individuals began authoring pieces about dalit life. Further, unlike the mainstream populations, several aspects of the tribal ways of life are intangible, codification may not be the best option and even if done may perhaps not be capable of capturing the true essence of the customary elements. Modernisation and globalisation has enabled constant interactions between the tribals and non-tribals. Yet, it is important to remember that there exists the serious need to support tribal communities in preserving their traditions and culture. Under the guise of social inclusion, it must not be at the cost of loss of identity of tribes.

e-ISSN 2582-4570

VIOLENCE AGAINST WOMEN AND THEIR MENTAL HEALTH WITH AN EMPHASIS DURING COVID-19

Samraggi Chakraborty[*]

Abstract

The pandemic Covid-19 has brought along with it lot of hardships on people. One such hardship has been the suffering of women during Covid-19. This hardship is faced by women by way of violence meted to them during the pandemic Covid-19. The mental health of women have been effected due to violence committed on them during Covid19. Violence committed against women affects her mental health and thus violates her human right. The World Health Organization (WHO) mentions that the pandemic Covid-19 by way of lockdown measure has made women more vulnerable and susceptible to violence. Violence against women is a gruesome act which devastates her. Violence against women is prevalent in our societies and is a hard reality with which we live. It is indeed shameful that even today where civilization and humanity claims itself to be developed, violence against women is very much prevalent in our society.

Keywords: Violence on women; mental health; pandemic; human rights; Covid-19

I. INTRODUCTION

WHO in its report dated March 9th, 2021 points out that globally one in three women experiences violence. Thus, it can be said that violence against women is an epidemic at the global level. It is prevalent across the globe, across the communities, across the societies, across the culture even though most of the societies are against such violence. Such violence against women results in killing, torturing or maiming her (be it economically, sexually, psychologically, physically). Violence against women shatters her individuality and is a gross violation of her human rights. Such violence effects severely her mental health apart from her physical health. Women are victims of such violence (which mostly occurs in the form of sexual or physical violence) which are meted to them by their family member, partner, acquaintance and stranger. According to United Nations International Children's Emergency Fund (UNICEF), "Moreover, when the violation takes place within the home, as is very often

[*]Assistant Professor, School of Law, Ajeenkya DY Patil University, Pune.

the case, the abuse is effectively condoned by the tacit silence and the passivity displayed by the state and the law-enforcing machinery."[1]

Violence against women has been defined by the United Nations Declaration on the Elimination of Violence against Women (1993) as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Analysis of this definition leads to the point that violence committed against women results into her subordination to men in the society and thus referring to gender based violence. This definition also includes psychological and physical harm suffered by women victims of violence.

II. VIOLENCE ON WOMEN AND THEIR MENTAL HEALTH DURING COVID-19

The pandemic Covid-19 has brought lots of hardships. Women have been subjected to domestic violence during this pandemic. Imposition of measures like lockdown made women become victim and suffer violence at the hand of their abusive partners. Worsening of economic situation in the pandemic forced the women to put up with their abusive partners and thus making them vulnerable to domestic abuse and violence. This situation has indeed made women's mental health suffer and are forced to live a life full of fear and apprehension of violence being meted to her.

According to Dr. TedrosAdhanomGhebreyesus, Director-General of WHO, "Violence against women is endemic in every country and culture, causing harm to millions of women and their families, and has been exacerbated by the COVID-19 pandemic."

According to PhumzileMlambo-Ngcuka,, UN Women Executive Director, "It's deeply disturbing that this pervasive violence by men against women not only persists unchanged, but is at its worst for young women aged 15-24 who may also be young mothers. And that was the situation before the pandemic stay-at home orders. We know that the multiple impacts of COVID-19 have triggered a "shadow pandemic" of increased reported violence of all kinds against women and girls." Reports form many countries affected by the pandemic Covid-19 (China, Italy, United Kingdom, Brazil, Germany, The United States of America

[1]Sushma Kapoor, "Domestic Violence against Women and Girls", 6 *Innocenti Digest* 2 (2000).

showed a rise in the cases of domestic violence. Same is the case with India. After the imposition of national lockdown in India, National Commission for Women (NCW) received within seven days fifty-eight complaints regarding violence faced by women. The lockdown did not only made women victims of domestic violence but also hindered their right to health facilities.

According to a news report published by Times of India dated April11th, 2020, the pandemic Covid-19 has made women suffer and has shown that the mental health of women needs to be a priority.

III. CONCEPTUALIZING MENTAL HEALTH

WHO defines mental health in its report of 1981.It says "Mental health is the capacity of the individual, the group and the environment to interact with one another in ways that promote subjective well-being, the optimal development and use of mental abilities (cognitive, affective and relational), the achievement of individual and collective goal consistent with justice and the attainment and preservation of conditions of fundamental equality."[2] In this definition, it can be seen that there is emphasis on mental health of women. The definition focusses on the following:

i. "stresses the complex web of interrelationships that determine mental health and that the factors that determine health operate on multiple levels.
ii. goes beyond the biological and the individual
iii. acknowledges the crucial role of the social context.
iv. highlights the importance of justice and equality in determining mental well being."[3] (WHO, 2000,p.11-12).

According to WHO, mental health is "…a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community."[4]Thus, it can be seen that for the wellbeing and development of women, good mental health is a prerequisite. Good

[2]Women's Mental Health An Evidence Based Review, *available at*: https://www.who.int/mental_health/publications/women_mh_evidence_review/en/ (last visited on March 28, 2021).
[3]*Ibid*.
[4]Mental health: strengthening our response, *available at* https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response#:~:text=Mental%20health%20is%20a%20state,to%20his%20or%20her%20community (last visited on March 25,2021).

mental health not only benefits the womenbut also the community. WHO says that a good mental health provides individual women with a sense of emotional well being. [5]

IV. RELATION BETWEEN GENDER AND MENTAL HEALTH

The discussion made above with regard to mental health doesnot anywhere mention about gender. However, gender has role to play in the field of mental health. Gender plays an important factor in determining the health differences between women and men.Impact of gender is there on "production of mental health at every level- the individual, the group and the environment- and is critically implicated in the differential delivery of justice and equality."[6]Gender violence plays a role in the matter of mental health. Women facing discrimination and gender inequality are often subjected to poor mental health condition. Violence face by women are mainly because of the gender inequality.

V. CONCEPTUALIZING VIOLENCE AGAINST WOMEN

There is no denial to the fact that women are subjected to violence. Such violence are meted to them by their family member, strangers, acquaintances, and partners. Many a times violence against women begins at her own family and she becomes a victim of such violence. According to UNICEF, family is that "place that imperils lives, and breeds some of the most drastic forms of violence perpetrated against women and girls."[7]Within the four corners ofa domestic household, it is usually the male who commits violence against women. Such males are the ones who are usually in the position of husbands, fathers, boyfriends, father-in-law, uncles, sons, brothers or other relatives.Women during different phases of their life are subjected to violence. For example, during pre-birth phase there may be violence in the form of sex-selective abortion. In the infancy phase, violence can be in the form of female infanticide.During girlhood, violence may be in the form of female infanticide, female genital mutilation, child pornography, child prostitution. During adolescence and adulthood, there may be dating violence, sexual harassment at workplace, incest, trafficking, abuse for dowry, marital rape. During the elderly phase, women may be forced to commit suicide or killed for economic benefits.

Violence against women mostly takes the following forms:

[5] *Supra* note 2.
[6] *Ibid*.
[7] *Supra* note 1 at 3.

i. Domestic Violence- This type of violence consists of many forms of violence that happens with the four corners of a house. Such violence consist of intimate partner violence (IPV). The aftereffects of domestic violence are manifold. It harms the mental health of women immensely.
ii. Sexual abuse committed against children and adolescents- According to UNICEF, usually a childs' right is done away with for protecting the family name and reputation as well as that of the perpetrator. Children and adolescents becomes victim of sexual violence committed against them by the people who are in a position of trust.
iii. Rape and sexual violence in intimate relationship- Women become victims of rape or sexual violence by their intimate partners. There are many countries who do not consider where rape in the form of marital rape and sexual abuse committed by intimate partners as a crime. But there are countries like USA, Germany, Russia, Finland, Austria, France, Australia have taken measures against marital rape.
iv. Forced Prostitution- This type of violence is reported quite often across the globe. According to UNICEF, "Forced prostitution or other kinds of commercial exploitation by male partners or parents is another form of violence against women and children reported worldwide."[8]

VI. CONSEQUENCE OF VIOLENCE AGAINST WOMEN

Women who are victim of violence face health issues- be it physically or psychologically. It does not matter when and how the women becomes a victim of violence. What matters the most is the consequence of such violence which has a deep impact on her life. Such consequence may range from mental health disorders, depression, eating and sleeping disorder suicidal tendency, self-harm attitude, panic attack, blood pressure problem, lower self-esteem. According to UNICEF, as a result of violence women are left in situations where she feels powerless and mentally destabilized.[9]Sometimes it may so happen that a women who is a victim of domestic violence finds no way to end the violent relation other than committing suicide.

Women who are victims of violence also becomes victim of psychological abuse. Such psychological abuse includes behavior that is intended to intimidate and persecute, and takes the forms of threats of abandonment or abuse, confinement to the home, surveillance, threats

[8]*Supra note* 1 at 6.
[9]*Supra* note 1 at 4.

to take away custody of the children, destruction of objects, isolation, verbal aggression and constant humiliation[10]

VII. CONCERN AT THE INTERNATIONAL LAW REGARDING VIOLENCE AGAINST WOMEN

Violence against women gathered attention even at the international level. In World Conference on Human Rights, 1993, it was acknowledged that womenand girls have "inalienable, integral and indivisible part of universal human right" rights. The General Assembly of United Nations adopted in 1993 the Declaration on the Elimination of Violence against Women (Declaration). This Declaration became the first instrument at the international level which dealt with violence against women. In 1994, the United Nations Special Rapporteur on Violence against Women was set up by the Commission on Human Rights for documenting how violence is committed against women and thus making accountable the governments for such prevalent violence. In the year 1995, at the 4thBeijing World Conference on Women, violence against women of any form was considered as one of the twelve strategic objectives and actions were framed that needed to be acted upon by United Nations, Governments, Non-Governmental Organizations (NGOs). The monitoring Committee of Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) adopted in 1992 General Recommendation 19. This General Recommendation 19 dealt with gender based violence and identified it as a type of discrimination that hinders a women to enjoy her freedoms and rights.

These measures highlight the efforts and concern at the international level regarding violence faced by women which actually impairs their human right.

VIII. CONCLUSION

Violence against women is prevalent across the globe. The reason for such violence cannot be singled out. There are many factors that actually contribute to such violence and women being targets and victims of violence. Cultural and societal factors also plays a role in women facing violence at the hands of men. According to the United Nations Declaration on the Elimination of Violence against Women, General Assembly Resolution, December 1993, "Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by

[10] *Id*. at 2.

men and to the prevention of the full advancement of women". The'unequal power relations' is a result of various factors. Such factors may be the societal condition, cultural condition, economic condition, concept of male superiority and domination over female etc. Religious belief and tradition have many a times approved of violence against women. Women who are not economically sound or economically independent usually becomes victim of violence. Such women donot have a way to avoid being victim at the hands of men whom they trust and are dependent upon. According to UNICEF, factors like "Excessive consumption of alcohol and other drugs has also been noted as a factor in provoking aggressive and violent male behavior towards women and children."[11]. The consequence of such violence on women affects her mental health. It is not only the women that suffers. It is the society as a whole which also becomes victim of such violence and hinders it overall growth. During the pandemic COVID-19, women have suffered fromviolence. According to Dr. TedrosAdhanomGhebreyesus, Director-General of WHO, "Violence against women is endemic in every country and culture, causing harm tomillions of women and their families, and has been exacerbated by the COVID-19pandemic." He further stated that "unlike COVID-19, violence against women cannot be stopped with a vaccine. We can only fight it with deep-rooted and sustained efforts – by governments, communities and individuals – to change harmful attitudes, improve access to opportunities and services for women and girls, and foster healthy and mutually respectful relationships." We need to gender sensitize and develop awareness regarding violence against women and how it impacts her mental health. Care and support services needs to be provided to women victims of violence and thus help them to restore their mental health and contribute as an effective human resource.

[11] *Supra* note 1 at 8.

e-ISSN 2582-4570

INTERNATIONAL HARMONIZATION OF COPYRIGHT LAWS

Abhinav Goswami[*]

Abstract

We must understand that legal diversity by itself is not the enemy. The intention behind the exercise and the extent of deviance from established practices determine the level of threat. In other words, it is not the difference in the legislative drafting style but the inherent incompatibility that we need to target. Minute changes to suit the local needs and circumstances are acceptable. But there should be no standoff between the laws. When the term harmonized is used in modern copyright literature, it does not mean that there has to be an identity of law among the countries, rather the essential task is to keep the national laws in utmost compatibility or harmony with one another. We must understand that all copyright principles do not have equal economic relevance. Rights of communication and distribution, for example, play the defining role in the economic exploitation of copyrighted work. Nonetheless, we have areas such as moral rights which hardly have any economic relevance. Here arises the dilemma. If we take the EU approach to harmonization and apply it to achieving international standardization, it will lead to divisions within the system based on the respective economic and cultural potentials of copyright principles. The other option is to make an outright rejection of the economic approach to harmonization but if we do so, we will be losing on the experience gained over a long period in the EU. So we need to more cautious in taking a stance towards the developments we have witnessed so far.

I. INTRODUCTION

Common Cultures, traditions, religions, and socio-political backgrounds have been the grounds for uniting people for ages. But with the rise of modern nation-states, the importance of these grounds has been emphasized more to claim separate existence and independence from others. The latest trend has been to make one's community more and more exclusive to restrict any alien intervention. By ignoring all-natural factors which make all human beings members of one grand family, modern political thought places special emphasis on divisive politics on lines such as ethnicity or religion.[1] Modern nations are organized on these parochial lines and it is readily justified by present-day politicians and administrators in the name of convenience.

These evolutions have had an influence on growth of the legal industry. In the initial decades of the twentieth century, a big part of the world population was under British Colonialism and hence, the legal and political structures of these colonies were dominated by British traditions. But when these colonies attained independence in the 1940s and 1950s, they

[*] Assistant Professor, Amity Law School, Amity University, Noida.

[1] J.M. Kelly, *A Short History of Western Legal Theory* pp 392-409 (OUP, Great Clarendon Street Oxford, 1992).

started designing their law around their own peculiar needs.[2] India, for example, adopted its Constitution[3] on January 26, 1950, which was far more progressive and catered to local needs than any of the previous British acts enacted for India. Further, the division of countries on economic grounds into developed, developing, and under-developed, provided additional impetus to diverse in-laws around the globe. Soon diversions from established legal principles were being made not out of any genuine need, but to satisfy the egoistic and pseudo nationalistic sentiments of the citizens.

This was not happy news for the growth of essentially international laws. One such example is copyright law. The categories of works with which the copyright law essentially deals have traditionally been circulated across national borders and the digital revolution of the late twentieth century has further pushed the exercise. In the absence of international standardization, nation-states have been enacting copyright legislation that protects the peculiar interests of their citizens.[4] The result is that the foreign authors have been facing discrimination at the hands of national laws of foreign states where their works are circulated and exploited. Therefore, there is a great need for a truly harmonized system of copyright laws, based on mutual recognition of authors' rights around the globe.

However, we must understand that legal diversity by itself is not the enemy. The intention behind the exercise and the extent of deviance from established practices determine the level of threat. In other words, it is not the difference in the legislative drafting style but the inherent incompatibility that we need to target. Minute changes to suit the local needs and circumstances are acceptable but there should be no standoff between the laws. When the term harmonized is used in modern copyright literature, it does not mean that there has to be an identity of law among the countries, rather the essential task is to keep the national laws in utmost compatibility or harmony with one another.[5]

II. THE NATURAL RIGHTS AND UTILITARIAN THEORIES OF COPYRIGHT LAW

If we are to understand the present-day codes on copyright law existing in different countries and the essential differences that exist among them, we need to go back to the history of copyright principles and how they came to be adopted in domestic laws. From the very start, there was no dispute regarding the need for copyright laws. The difference of opinion was essential regarding the justifications for it. Broadly, the opinions were divided into two theories, *i.e.*, the one based on natural rights and the other on utilitarian, which were providing their justifications for controlling the flow of copyrighted works and rewarding

[2] Elizabeth Kolsky, "The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India" 120 *The American Historical Review* 1218-1246 (2015).
[3] The Constitution of India.
[4] Ruth L. Okediji, "Reframing International Copyright Limitations and Exceptions as Development Policy" in Ruth L. Okediji, *Copyright Law in an Age of Limitations and exceptions* 429-433 (Cambridge University Press, Cambridge, 2017).
[5] Ewa Laskowska-Litak, "Between Scylla and Charybdis: a comparative look at copyright's protected subject matter and the (CJ)EU harmonization" 14 *JIPLP* 766-768 (2019).

their creators. The natural rights theory was further divided into two lines of thought, the labor theory[6] propounded by John Locke and the personality theory[7] propounded by Immanuel Kant and further elaborated by Hegel. The first claimed that as a particular work is the result of the labor of its creators, it is quite natural that it should belong to them. While the second gave more importance to the nature of the work itself and provided that when an individual takes on the task of creating a work, it becomes an essential part of his personality and must belong to him.

On the other hand, the proponents of the utilitarian theory[8] were Jeremy Bentham and John Stuart Mill. The utilitarian theory did not concern itself either with the nature of the work or with its creator. The sole determining factor was the utility of the work in the market, which made the author or creator deserving of any incentive or reward from society.

Though the aim of both the theories was to ensure economic benefits for the authors, the way they propose to do that is very different. For the natural rights theorists, the return to the authors is their reward and a prize for their artistic skills. The utilitarian theorists take the benefits occurring to the authors to be an incentive for their contribution to society. They consider it to be more of a give and take exercise where the society as a whole incentivizes the authors for their creations which are of utility for its members.

III. DROIT D' AUTEUR AND COMMON LAW TRADITIONS

The natural rights and utilitarian theories that provided different justifications for the existence of copyright laws divided the world into two blocs. On the one hand, some countries pay allegiance to the natural rights theory argues that the reason for the emergence and existence can only be deciphered by relying either on the product of labour or extension of personality principle as put forward by John Locke and Immanuel Kant respectively. These countries together are popularly referred to as *Droit d' auteur* nations because they pay more heed to the relation between the authors and their works than any economic viability of the works in the society. France, Germany, and Austria can be said to be the forerunners of this tradition. Though there are wide differences in the domestic laws of these countries, the way they generally perceive copyright laws makes them part of a common tradition. Germany for example has designed its copyright law keeping the extension of the personality argument of Kant and Hegel in mind and hence for Germany copyright is vested in the authors because their creations are nothing but a way to depict their personalities. France has been equally influenced by the labor and personality arguments for the reasons that in the initial years, the copyright laws in France were developed mainly with the help of case laws

[6] Peter Laslett (ed.), *Locke: Two Treatises of Government* 265-428 (Cambridge University Press, Cambridge, 1988).
[7] Immanuel Kant, *The Science of Right* (A & D Publishing, Cheshire, 2018).
[8] George Sher (ed.), *Utilitarianism* (Hackett Publishing, Indianapolis, 2002).

where judges got the opportunities to elaborate on the laws in bits and pieces. They used every possible argument which supported their judgments.[9]

On the other hand, countries like the UK, the USA, and Australia, which can be said to belong to the rival bloc of the common law tradition. For the countries belonging to this tradition, copyright is nothing but a way to economic prosperity for the copyright holders, and like any other activity in the market, the sole aim is profit-making.[10] How much money a particular product is going to fetch in the market is determined by its utility for the consumers in the society and hence the utilitarian principle holds good for these nations as justification for vesting of copyright in authors. The authors are vested with these rights to ensure free and fair exploitation of their works in the market as a result of which the authors individually and the entire economy in totality is benefitted. The relation between the authors and their works is that of the owner and the object of ownership and the principles depicting the work as being part of the personality of its author does not have much relevance here.

IV. THE BERNE EXPERIENCE

To generate an international consensus on copyright principles and devise a common path, the Berne Convention[11] was established in the year 1886 to establish and implement copyright principles that were acceptable to all the member countries to ensure the free flow of copyrighted works across the globe. It established three fundamental principles-

Minimum Standards Principle

The first thing that we need to take notice of under Berne, is the principle of minimum standards. It only specifies the minimum level of protection that members are bound to provide to authors and it is of no concern for the Berne Convention as to how authors' friendly approach a particular member has adopted as long as it is successful in satisfying the terms of the convention. The principle of minimum standards, therefore, ensures the availability of these basic rights to authors around the globe and at the same time providing sufficient breathing space to the peculiarity of national laws of Berne members.

The National Treatment Principle[12]

This principle is codified under article 5.1 of the convention enacted to protect the literary works(Berne), which ensures that the domestic laws of the signatory states do not discriminate between the same categories of work in providing the legal rights and remedies only based on their origin. It is not just for the protection of foreign works in member states

[9] Isabella Alexander and H. Tomás Gómez-Arostegui (eds.), *Research Handbook on the History of Copyright Law* 288-292 (Edward Elgar Publishing, Inc., Massachusetts, 2016).
[10] *Ibid.*
[11] Berne Convention for the Protection of Literary and Artistic Works, 1886, 1161 U.N.T.S. 3, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (last visited April 19, 2020).
[12] *Id.*, art. 5 para 1.

against discriminatory policies, but it also prohibits favorable treatment of foreign works against the interests of local authors. Hence, it ensures singularity or identity of law concerning the treatment of similar categories of works within member states.

Term of Protection[13]

The Berne Convention requires all members to protect copyrighted works at least till the death of the author with additional 50 years except for photographic and audio-visual works. This has been one of the biggest achievements of the convention as by providing the minimum term of protection that all members must secure to its authors, it aligned the copyright laws of the members to a great extent.

Automatic Protection[14]

The Berne Convention also established that to fall within the umbrella of copyright protection, the authors were not required to go through any formalities. The creation of work deserving of protection was a sufficient trigger for the application of the copyright laws.

Moral Rights Principles[15]

Moral Rights is another area where the efforts at Berne brought fruitful results. The provision on moral rights was not introduced in the original convention of 1886 and even 1896, 1908, and 1914 revisions failed to bring them on board because of the unfounded fears of the common law countries. However, by the time of the Rome revision held in 1928, the Berne union was able to generate consensus on making moral rights a part of the international copyright regime. The result was Article 6bis of the Berne convention which marked the first-ever acknowledgement at international level of the *doctrine of moral rights*. The contribution of Berne rests in the phenomenon that it garnered the general acceptability of moral rights principles around the globe.

The contribution of Berne towards internationalizing the copyright law can in no case be denied. However, it only established broad standards as noted above and there was a lack of specific copyright rules binding on all the members equally with no exceptions. Moreover, it did not provide for effective enforcement mechanisms. This position has partially changed with the coming of TRIPS and its dispute resolution mechanism, which can force WTO members to comply with the convention.

The European Union

The European Union presents one of the best possibilities of having a truly harmonized copyright system at least for the current member states. However, it is necessary to note that

[13] *Id*., art. 7.
[14] *Supra* note 11, art. 5 para 2.
[15] *Id*. art. 6*bis*.

the purpose of the establishment and continuance of the EU system is more economic than legal. All the activities of the EU are encircled with the goal of attaining a unified market around Europe. There is a treaty named Treaty on the Functioning of the European Union (TFEU) which in its article 114 clarifies that the sole objective of the EU is to estimate the domestic laws and regulations of the signatory countries to set up a unified internal market.[16] There may arise some temporary concerns such as removing diversity in copyright or business-related laws, but all this is only a means to an end i.e. a unified internal market. Therefore, the EU harmonization process is concerned more with the unification of the internal market than a harmonized copyright system.

Because of this market-driven outlook of the EU, not all principles or propositions of copyright law receive equal consideration. The features of copyright law which incorporate the replication or reproduction rights and transmission or communication to public rights which may threaten the uninterrupted flow of copyrighted works circulated in the market are always in priority. On the other hand, the areas which have little relevance to the economic exploitation of the work such as moral rights principles hardly garner any attention. This is the reason that the copyright laws of signatory countries still differ fundamentally on the category of rights granted and their respective scope. Great diversity can also be observed regarding the duration of these rights. This is not a very satisfying position if we are aiming for a truly harmonized system of copyright.

Now we will consider a few aspects of EU Law which have a bearing on the harmonization process-

Limited Competence of the EU

As per article 5 para 2 of the Treaty on European Union (TEU), the European Parliament and European Council (EC) do not have any vested power with them to take tasks *suo moto*, rather they are bound to act within the limits of competence specifically or impliedly conferred upon them by the treaties among member states to attain the specified objectives.[17] Hence, the EU also failed to save itself from the unfounded suspicion with which vesting of any real power in a supranational authority is seen. European Parliament like every other regional or international law-making authority, ends up being nothing more than a puppet at the hands of its member states who are always driven by their pecuniary and political interests. As a result, when we consider the facts of the EU being established only for achieving an integrated market along with its reliance on agreement among the members, we are left with much less than what we had expected.

Moreover, para 3 and 4 of article 5 of TFEU provides for two additional limitations on EU competence to make effective laws. The former requires the EU to first satisfy that the actions it wants to take are such that they cannot suitably be provided by the domestic laws of

[16] Treaty on the Functioning of the European Union, 2008, art. 114.
[17] The Treaty on European Union, 2008, art. 5 para 2.

signatory states and better results are expected of Pan-European law. However, it has no application to areas that comes under the domain of exclusive jurisdiction of the EU. On the other hand, the latter provides for a three-tier test with which all EU legislations have to be tested and it makes no difference here whether the area concerned is falling under the exclusive jurisdiction of the EU or not. It is equally applicable to all actions at the EU level. First, the action will be tested on the grounds of suitability for the objectives to be achieved. Then the question of the necessity of the action arises. Finally, if both the above tests are satisfied, the action is measured on the scale proportionality to ensure that it does not become unduly restrictive for member states.[18]

Article 118

Article 118 of TFEU brings much relief by specifically making a provision for intellectual property. It states that European Parliament and European Council shall take required steps for establishing a Pan-European intellectual property system that guarantees uniform protection in the discipline of Intellectual or intangible property throughout Union.[19] So far nine directives have come in this direction. But everything boils down to a singular fact that all policy decisions are taken at the European Parliament and EC with the single aim of achieving a truly integrated European market. Therefore, it is not the principles of creativity and rewards for the authors rather the considerations of the free flow of copyrighted products in the market that dominate the discussion.

One clear stance could be mentioned here. After detailed discussions, Green Paper on Copyright and Related Rights in the Information Society[20] was taken in the year 1995. This document aimed to look for areas where the harmonization process at the EU level should target. It suggested that areas related to replication or reproduction rights, transmission to the audience rights, digital broadcast rights, moral rights, and the applicable law principles are in immediate need of harmonization. However, the entire exercise soon fell prey to self-serving diplomacy of the member states, and by the time the Information Society directive[21] was adopted in 2001 only replication, dissemination, and transmission to the audience remained to be the areas where members were required to take legislative and legal actions to integrate the national laws.

Even though nine directives have been adopted so far covering most of the crucial areas such as computer programs,[22] rental and lending rights,[23] database[24] but as noted in the instance of

[18] *Supra* note 17, art. 5 paras. 3 and 4.
[19] *Supra* note 16, art. 118.
[20] Commission, *Green Paper on Copyright and Related Rights in the Information Society,* COM (95) 382 final (August 19, 1995).
[21] Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p.no. 10–19.

[22] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, p.no. 16–22.
[23] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental rights and lending rights and certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, p.no. 28–35.

directive available in the Information Society, each directive has been drafted in a very restrictive manner to take all members on board to reach unanimity among members on IP issues. The result has been that no directive in itself is comprehensive enough to tackle all crucial aspects of the respective target areas. The point that the author is trying to make here is that just because a directive exists covering a particular area does not necessarily mean that the law in that area has become harmonized. It is still an unfinished task that will require regular updates into these directives to achieve a truly harmonized structure of law at the EU level.

Culture vis-a-vis Common Market

Though the main theme of EU law as discussed so far has been to establish a common European market. However, it does not mean that European art and culture have no place under the scheme. The detailed memorandum to the Orphan Works,[25] the rules and regulations provide that there will be no general bar against the presence of orphan works over the worldwide web if the same is to promote the cultural and educational interests of the Union. The same directive also creates a broad exception to exclusive rights in favor of public libraries, archives, and museums which allows these institutions or organizations to replicate an orphan work and make it attainable or accessible to the general public. The aim is to ensure the availability of works to a wide population to make Europe culturally homogenized. The cultural concerns also find mention in other copyright directives such as resale rights[26] and rental rights directives[27]. Culture has a direct relation to the economy because of its influence over the consumption habits of the population, hence it becomes crucial that not only the market practices but the consumers' preferences and behavior in that market are also uniform. This has been very well understood by the EC as depicted from all the emphasis in the above-mentioned directives on the cultural integration of the union. However, these cultural considerations in the directives can only be complementary to the need for market integration and as of now, they do not have any standalone relevance.

The Exhaustion Principle

One of the most prominent rights that domestic laws of all member states recognize has been the distribution right. It is considered to be the natural right of all creators so that they can regulate and control how their works are distributed and made available in society. However, this right has great potentialities of dividing the market and can thus prove to be a real challenge for the harmonization process.

[24] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p.no. 20–28.
[25] Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM/2011/0289 final - COD 2011/0136.
[26] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p.no. 32-36.
[27] *Supra* note 23, art. 6.

In the endeavor of exploiting the copyrighted work to the best of its capabilities and to gain maximum profits, the right holders design such a strategy in which the distribution right is exercised in such a manner that it results in the division of the internal market. They adopt different pricing for different member states depending on the purchasing capacity of the population and to counter the influx of the copyrighted goods from other sources, they also pressurize their respective governments to impose limitations on parallel imports. The consequence is that the uninterrupted circulation of copyrighted works is hampered.[28] To tackle the situation, the CJEU came forward, and in *Deutsche Grammophone*,[29] the case held the exhaustion principle to be a well-established part of EU law. The court observed that once the holders of copyrights put their copyrighted works in the domestic market of any signatory state with their assent, the distribution right is exhausted then and there. There remains no further right with the author to control or manipulate the flow of work in the internal market.

The distribution right is thus protected only to the extent of its first exercise in any part of the internal market. However, to implement the exhaustion doctrine, it is necessary that the application of the dissemination right has to be either by the copyright possessor or with their assent. Moreover, the sale transaction is completely different from other types of commercial exploitation of the copyrighted works. A sale transaction is the one where the ownership rights over the copyrighted product are transferred to the buyer. This has to be clearly distinguished from the application of rental rights and public performances performed by the owner of copyrights. In such cases, there is no transfer of ownership. These acts are more like services provided to society which is repetitive and limited in duration and extent.[30] If the exhaustion principle is applied in such cases and it is held that the rights of the copyright owner will be extinguished in such cases, the very purpose of granting these rights such as the rental right will be frustrated for the reason that their essence lies in the recurring commercial exploitation of the copyrighted work.

The National Treatment Principle

To achieve singularity of law at least within the political boundaries of member states, the principle of national treatment has been recognized and made part of EU law under article 18[31] of the TFEU. It provides that "within the domain of implementation of the treaties and without prejudice to any provision constituted therein, any discrimination or unfairness based on nationality shall be forbidden." Hence, no discriminatory treatment can be meted out to authors and their works based on their country of origin. Moreover, it is not essential for the accomplishment of article 18 that the discriminatory domestic law must also amount to a limitation on trade among signatories.

[28] Peter Mezei, *Copyright Exhaustion: Law and Policy in the United States and The European Union* 26-31 (Cambridge University Press, Cambridge, 2018).
[29] Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. (1971) Case 78-70 European Court reports 1971 p.no. 00487.
[30] *Supra* note 28 at 8-10.
[31] *Supra* note 16, art .18.

All signatory nations of the union have been bound to treat foreign works at par with domestically created ones. All benefits whatever be their nature and extent have to be shared equally between them. But the question that occasionally arises is whether article 18 is only protecting the foreign works against discriminatory policies of member states or it also prohibits any preferential treatment in favor of such works? To explain the answer to this question, there is a need to understand first that the main aim of the doctrine of national treatment is to ensure the identity of laws within the domestic system of members. So whatever be the nature of discrimination, whether it is negative discrimination against the foreign works or positive discrimination in their favor, both equally violate the national treatment principle.[32]

However, we must also take notice of the fact that article 18 is a watered-down version of the national treatment principle as it provides ample opportunities for future treaties to create exceptions to it. The use of the words "without prejudice to the provisions contained therein" in article 18 depicts that it can be made subject to explicit provisions of the treaties which are prejudicial to the national treatment principle.[33]

CJEU's Contribution

Framing of regulations or adoption of directives is not the only way in which the EU is moving in the direction of a harmonized law. The Court of Justice of the European Union (CJEU) has played a noteworthy part in the evolution of a harmonized law. CJEU has been at the forefront of all efforts to integrate the laws of copyright of the signatory nation in the EU. CJEU's role has never been limited to decide individual disputes among members, its decisions have long been guiding as to the areas where codification is needed and in some cases such as *Infopaq International*,[34]it has gone further also to suggest the direction in which the law should develop. Even before the adoption of the inception of first directive in the area of copyright i.e. the Computer Program Directive,[35] the CJEU had already provided guidelines and framed rules and regulations concerning a variety of copyright issues.

However, CJEU is essentially a judicial authority with the primary role of adjudicating the disputes and it can only contribute when it has the right opportunity in the form of a case raising crucial questions. This does not mean that CJEU always sits as a passive recipient. CJEU's opinion in *EMI Electrola* v. *Patricia*[36] can be cited as a leading example where the court was very vocal about the inequities in EU law and questioned the half-hearted approach of the European Community towards harmonization specifically concerning the duration of copyrights. The court opined that it was high time that a comprehensive directive on the

[32] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) European Court Reports 2001 I-06193, Case C-184/99, para. 35-36.
[33] *Supra* note 31.
[34] *Infopaq International A/S v Danske Dagblades Forening* (2009) European Court Reports 2009 I-06569, Case C-5/08.
[35] *Supra* note 22.
[36] *EMI Electrola GmbH v Patricia I'm- und Export and others* (1989) European Court Reports 1989 -00079, Case 341/87.

duration of copyrights be brought forth, as variance in this area of law has great potentials of causing harm to the fabric of European law.[37]

Moreover, CJEU has been very well aware of the threats that uneven development of the copyright laws among member states may pose to the uninterrupted circulation of copyright works in the internal EU market. Price discrimination policies and protection against parallel imports provided within the national laws of signatory states have been at the radar of CJEU for a very long time. But in the absence of explicit directives, the CJEU is dependent on general protections provided by article 34[38] and 35[39] of the TFEU to disallow discriminatory laws and practices of the members. It is not a very handy approach for the reason that in every case the CJEU is required to predict the consequences of a particular domestic law under consideration, to see whether it will amount to an export barrier or a prohibition to parallel imports and thus impeding cross-border trade.

To improve the situation, CJEU in *Costa* v. *Enel*[40] recognized and settled the doctrine of the hegemony of EU law over domestic legislation. The court made it clear to all domestic legislators that the laws that came from the treaty can never be overruled by the domestic laws except for the cases where the treaty itself has allowed its subjugation.[41] Article 36[42] of TFEU provides for a scenario in which the domestic laws of the signatory states can impose restrictions on free trade if it is to protect industrial and commercial property. The use of the words "industrial and commercial property" has been intentional with the motive of broadening the purview of the exception so that more and more leeway is given to the domestic laws. The domestic copyright laws may also come under its purview as far as the commercial (money oriented) exploitation or misuse of the copyrighted works is concerned. This point has been clarified by the CJEU in *Musik-Vertrieb,*[43] where the court observed in the context of article 36 of Treaty Establishing the European Economic Community[44] (EEC Treaty), that it is not possible to distinguish between economic aspects of the copyrights and other industrial and commercial property rights.

V. HARMONIZING CONFLICTING INTERESTS

The biggest challenges to the harmonization process come not from the pessimist stance of member states, rather from the conflicting interests of the various shareholder intricated in the creation and consumption of copyright products. The case of authors/performers *vis-à-vis* producers/investors is worth considering. The author is the main mind behind the creation of

[37] *Id*., para. 10-13.
[38] *Supra* note 16, art. 34. It provides that all quantitative restrictions and other equivalent measures shall be prohibited between member states.
[39] *Id*., art. 35. It prohibits all quantitative and equivalent restrictions on exports between member states.
[40] *Flaminio Costa v E.N.E.L.* (1964), English special edition 1964 0058, Case 6-64.
[41] *Id*. at 594.
[42] *Supra* note 39, art. 36.
[43] *Musik-Vertrieb membran GmbH and K-tel International v GEMA- Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (1981) European Court Reports 1981 -0014, Joined cases 55/80 and 57/80.
[44] Treaty Establishing the European Economic Community, 1958, art. 36.

a work and a performer is generally the first interpreter of the work of authorship. They are the initiators of the creative process. They are the backbone of the entire copyright system. The economic returns and other benefits that are vested in the author are the rewards for their efforts and creative activity, which has, in turn, benefitted the entire society. As far as, the benefits in terms of money are concerned they are sufficiently protected in the EU by some directives such as the Rental and Lending Rights directive[45] which secures the right of remuneration to authors, performers, and creators, and the Resale Right directive[46] which ensures that the author gets a share on every successive sale of original graphic and plastic art.

However, when it comes to securing the non-economic interests of the authors and performers, the discrepancies in the European Union copyright directives come to the fore. The moral rights of the authors and performers have been specifically left out of the harmonization process as if it is possible to achieve a truly integrated EU-wide copyright system in their absence. The term of protection directive[47] and the Database directive[48] are the explicit example of this inequality of treatment of moral rights. Both of these directives have explicitly provided that moral rights fall outside of their scope.

Even if we forget for the time being the moral rights set-back and come back to the system of economic rewards to the authors and performers, there is not much to be happy about. Considering the essential economic nature of the EU copyright system and its central theme which revolves around market integration, anyone would be led to believe that it must at least be protecting the economic interests of the authors to a satisfactory level. Unfortunately, it is not so and it is essentially because of the general acceptability of the doctrine of assignment of rights. There are a few directives such as the information society directive[49] which have expressly recognized the power of assignment at the hands of the authors and performers, and in others where any such explicit rules and regulations are absent allowing the assignment, the same power has been implied with the help of the general theory of freedom of contract.

It is a misnomer to call it a power of assignment because when a particular author or performer faces the realities of the art industry, this power soon turns into an obligation on them to assign their rights to the production company or other investors as a matter of general practice. Given the unequal position of the author/performer in the market, the aspect of choice and discretion in exercising this so-called power of assignment soon fades away. Therefore, it becomes very essential that we go beyond the game of drafting style and accept the reality that these assignment clauses were created and they continue to exist only to benefit the production companies or independent investors. So in the end after discussing all the rights and benefits that EU copyright law has to offer to the authors/performers, we find

[45] *Supra* note 23, art. 5.
[46] *Supra* note 26, art. 1.
[47] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p.no. 1-5, art. 9.
[48] *Supra* note 24, preamble pt. 28.
[49] *Supra* note 21, preamble pt. 30.

that all of it essentially depends on the negotiation of the power of the respective parties involved in the contract. Except in very few cases where the author/performer is very well known, the author/performers are always at the receiving end.

Moreover, some directives also contain explicit provisions providing an additional net of protection to protect the economic interests of the investors. The database directive[50], for example, recognizes a *sui generis* or unique right to protect who has taken the initiative and risk of investing. It is essential to secure substantial investment or devotion in the creation of databases that are of utility for the entire community. There is nothing wrong with it. The sources of infusion of money in the industry must always be protected. But we must ensure that in its endeavor of protecting the interests of investors, the law does not turn into a tool at the hands of few for the exploitation of the creators of the work. Both creativity and money are important and none should have an upper hand over the other. The law needs to be more neutralized otherwise the standard form of contracts containing broad assignment clauses, renders the whole exercise of granting rights to the authors/performers and efforts for their EU-wide harmonization completely illogical.

VI. FINAL REMARKS

The EU harmonization process has a much greater potential for developing a truly universal standard for the protection of copyright principles if we compare it to the Berne regime.[51] The most powerful members of the EU such as the UK, France, and Germany, have been the heartland of many established copyright principles. However, as we witnessed in this paper, the main drivers of the harmonization process at the EU level have been the economic and cultural interests of the community. Except for article 118, copyright concerns hardly find mention in the newly established system.

We must understand that all copyright principles do not have equal economic relevance. Rights of communication and distribution, for example, play the defining role in the economic exploitation of copyrighted work. Nonetheless, we have areas such as moral rights which hardly have any economic relevance. Here, arises the dilemma. If we take the EU approach to harmonization and apply it to achieving international standardization, it will lead to divisions within the system based on the respective economic and cultural potentials of copyright principles. The other option is to make an outright rejection of the economic approach to harmonization but if we do so, we will be losing on the experience gained over a long period in the EU. So we need to more cautious in taking a stance towards the developments we have witnessed so far.

Harmonization is a long process and we need to take small steps towards our aim. Instead of providing for elaborate rules and regulations, the initial objective should be to achieve a baseline standard as was the case with Berne. Once it is achieved, we need to slowly and

[50] *Supra* note 48, preamble pt. 40-41.
[51] *Supra* note 11.

steadily push for upward harmonization. But it has to be ensured that there is no unequal treatment between the copyright principles and all are given equal impetus.

e-ISSN 2582-4570

LOCAL WORKING AND COMPUSORY LICENSE UNDER PATENT LAWS: IT'S INTERFACE WITH COMPETITION LAW

Amrita Nambiar[*]

Abstract

Balancing private intellectual property interests with that of the public is always a difficult task. A general consensus with regard to the local working requirement is that the individual's exclusivity should be subject to public interests especially in cases relating to public health. Since these local working requirements are essential to maintain the balance between monopoly rights *vis-à-vis* public interests, it is essential to develop a comprehensive understanding of the same. Accordingly, the interpretation of local working as a ground for issuing compulsory license has generated a lot of discussion amongst intellectual property stakeholders as well as various political communities. This article primarily analyses the evolutionary interpretation of the local working requirement as a ground for issuing compulsory license under the Paris Convention and the TRIPS agreement. It will also elaborate on the differing political opinion, negotiated prior to the enactment of TRIPS agreement regarding the standards of local working requirement. The analysis will focus on the issue of whether the importation of patented products would satisfy the local working requirement, particularly in light of Paris Convention, TRIPS Agreement and the Patent Act, 1970. Further, the article also tries to analyze the relationship of competition law with that of compulsory license. As per section 4 of the Competition Act 2002, refusal to license is a ground for determining an enterprise's abuse of dominance in the relevant market. Accordingly, the paper looks into the scope of issuance of compulsory license under the provisions of the Competition Act, 2002.

I. INTRODUCTION

The system of intellectual property rights works upon the utilitarian principle of facilitating the progress of science and useful arts[1]. The world has witnessed notable references to the protection of creative intellect since ancient times even in the absence of a statutory regulation[2].The right of patent is considered to be the strongest amongst all intellectual properties since patented inventions can protect the ideas themselves.[3]The literal meaning of the term patent is *open*and is derived from the term "*Letters Patent"*[4], which basically means open letters. Before patents were made the subject of legislation, they were issued by virtue

[*] Research Associate, Law (Level - II) at Competition Commission of India.

[1] E. Hettinger, "Justifying Intellectual Property" 18 (1) *Philosophy and Public affairs*31 (1989).

[2] Bruce Willis Bugbee, *The Genesis of American Patent and Copyright Law* (Public Affairs Press, 1967). The author has cited numerous cases relating to intellectual property protection. From chefs being granted year-long monopoly for creating culinary delights to false poets being disgraced for stealing the works of original authors in literary contests and how is ownership related to intellectual work when it is codified differently, intellectual property has been a reason for discourse shortly before first century itself.

[3] Henry C Mitchell, *The intellectual commons: Toward an ecology of intellectual property* 29 (Lexington Books, United States, 2005).

[4] From Latin words "*Litteraepatentes"*.

of royal and state prerogatives[5]that granted certain definite privileges, rights, ranks or titles to the holder of the document[6].The *raison d'être* for promoting and protecting inventions has more or less centered on granting incentives for working the new inventions locally[7]. Patents acted as a tool to attract foreign craftsmen to practice their art in different jurisdictions[8] and thereby promoting technology transfer by the domestic application of foreign inventions in the country granting patent.By the middle of the nineteenth century many industrialized countries had enacted legislations related to patent with the primary objective of bolstering domestic industrialization[9].Further, the development of technological infrastructure was ascertained specifically by mandating local working of the patent and in case of failure to work in the territory, by the grant of compulsory licensing. Therefore, it can be said that it is the local working requirement that enable patent granting countries to force the foreign patentees to transfer technology in foreign markets.

Under the Indian Patents Act 1970 (hereinafter the Act), compulsory license for a patented invention is issued for disjunctive conditions such as if the reasonable requirement of the public is not met, unaffordable price or if the patented invention has not been worked within the territory of India. The analysis will focus on the issue of whether the importation of patented products would satisfy the local working requirement, particularly in light of Paris Convention for the Protection of Industrial Property, 1883 (Paris Convention), TRIPS and the Act.

II. "LOCAL WORKING" DEFINED

There is no statutory definition of the term "local working" thereby making itcrucial for the government to interpret it as according to the national requirements. Local working is synonymous with national working, requiring the patentee to manufacture or apply the patented product or process, within the country that has granted the patent.[10]It may also be known as commercial working of patent in a country[11]. Historically, the development of local working mandate can be traced back to the Venetian Patent Act of 1474, which provided that a patent would be cancelled if it was not actively exploited within the country[12]. Similarly, the United Kingdom Statute of Monopolies1623, required the local working condition for retaining the patent. The US and the French statutes also saw regulations for grant of patent

[5] P. Meinhardt, *Inventions, Patents and Monopoly* 43 (Stevens & Sons Ltd., London, 1946).
[6] Paul A. David, "Intellectual Property Institutions and the Panda's Thumb: Patents, Copyright and Trade Secrets in Economic Theory and History, in M.B. Wallerstein, Mary Ellen Mogee, *et.al.*(eds.) *Global Dimensions of IPRs in Science and Technology* (National Academy Press, 1993).
[7] Ulf Anderfelt, *International Patent Legislation and Developing Countries* 3-25 (Springer, Netherlands, 1971).
[8] C. MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660-1800* 11(Cambridge University Press,1988).
[9] Michael Halewood, "Regulating Patent Holders: Local Working Requirements and Compulsory Licences at International Law" 35(2) *Osgoode Hall Law Journal* 248 - 252 (1997).

[10] G B Reddy & HarunrashidA.Kadri, "Local Working of Patents- Law and Implementation in India" 18 *Journal of Intellectual Property Rights* 15 - 20 (2013).
[11] The traditional meaning of local working is local manufacture. However, many a times it is being interpreted to include local commercial use, i.e. making available for local sale, a criterion which can be satisfied by importation of the patented invention. See, G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property,* 71 (World Intellectual Property, 1968).
[12] Supra note 8, at 9.

on foreign inventions only if the invention was worked locally[13]. A patent got actually revoked in France if the domestic inventor got the same invention patented in any other country[14]. Thus, it can be deduced that, local workingrequirementhadan effect of compelling foreign patentees to situate production facilities within the patent granting country.

Local Working under Paris Convention

The Paris Convention was the first multi-lateral treaty to standardize the regulation as well as the reciprocal treatment of intellectual propertiesat an international level. Article 5(A)(2)of the Paris Convention allows the Contracting Parties to:

> "[…] take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work [emphasis added]."

The member countries have the right to make laws relating to grant of compulsory license to check any monopoly abuse arising from the exercise of the exclusive patent rights. Under this provision, only 'failure to work' a patent has been cited as a probable abuse of patent right and has not been expressly defined. It should be noted there was nothing in the provision limiting the freedom of the states to determine what other activities may possibly be suggested to mean abuse of private right. Not only it was reasonable to clarify as to what activities would amount to 'failure to work' or 'insufficient working', but also required in order to take appropriate action for issuing compulsory license. Further, the power to grant compulsory license is subject to a number of conditions as set out in article 5(A)(4):

> "compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license [emphasis added]"

A significant time period of 4 years has been provided to determine the failure of working only after which, an action for the grant of compulsory license can be initiated. No compulsory license shall be granted in case the patentee justifies non-working due to legitimate reasons which may have caused the invention impossible to work or to work more intensively. Further, a for bearing approach on the local working mandate under article 5(A)(1)is noted whereby, a patent was not to be forfeited even if it was being imported in to the patent granting country.[15] By reading article 5(A)(1) in conjunction with article 5(A)(2), there seems to be an intelligent balance between the interests of the patentee *vis-à-vis* that of the community. However, to assess whether only local working requirement can sufficiently address the interests of the community is a nuanced task. The determination of costs and

[13] Supra note 9, at 251.
[14] WIPO, *Introduction to Intellectual Property: Theory and Practice* 19 (1997).
[15] Paris Convention for the Protection of Industrial Property, 1883, art. 5A. (1)- Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

benefits (social and economic) of local working for a community depend upon variety of factors such as the level of economic development of the patent granting country *i.e.* if it's a developed country, developing country or a least developed country, the technology sector involved to name a few. Further, in cases where importation justly satisfies community requirements, imposing local working would be limiting the interests of the patentees. With no precise description of 'failure to work' in Paris Convention, member countries were given freedom to determine its ambit and scope depending on their national requirement. The Convention also recognized the impracticability of requiring immediate working of patent in all the countries and therefore sought to strike a balance between the rights of the patent holder and that of the state[16].Further, a patent could not be revoked unless the grant of compulsory license was not sufficient to work the patent in the territory.[17] Accordingly, compulsory license became a condition precedent for revocation of patent on the grounds of non-working of a patent.

Paris Convention is seen as one of the most successful treatises, so far, primarily because it did not seek to level out the national laws of the country. It did not even establish the reciprocity principle for national treatment. Rather, it chalked out immense legislative freedom for the member countries to develop laws according to their national requirements. The only restrain was mandated in the form of compulsory equal treatment of nationals as well as foreigners. One of the other commendable features was the rule on priority period to prevent conflict between two or more inventions concerning the same subject-matter.

Local Working under TRIPS Agreement

With TRIPS, the agenda was to create a new kind of international regulatory agreement which introduces a very fine line between international obligations and the freedom of the countries to regulate their own national economies. It contains numerous references to GATT, Berne and Paris Convention. An analysis of the negotiating history of TRIPS reveals that a lot of deliberation took place on interpretation on local working in order to reach a consensus. This part is therefore discussed under two categories: 'local working negotiated before TRIPS' and 'local working under TRIPS'.

'Local working' negotiated before TRIPS

The negotiating history of TRIPS agreement reveals a lot of deliberations on interpretation and extent of local working of patents in a country. Primarily, three ideas on local working were put forward during the negotiations and the confusions were kept as "bracketed texts" for consideration during future negotiations. The Developing Countries Draft[18] contained a provision regarding the obligations of full disclosure of the invention as well as on the

[16]WIPO Publication No. 489 (E), *Intellectual Property Handbook: Policy, Law, and Use* 241-162, (2nd edn., 2004).

[17]Paris Convention for the Protection of Industrial Property, 1883, art. 5A (3)- Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

[18]The countries of Argentina, Brazil, Chile, China, Columbia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, Uruguay and Pakistan had this view. Part II, chap. II, art. 5, ¶ 2, GATT Doc. MTN.GNG/NG11/W/71 (May 14, 1990) [hereinafter Developing Countries' Draft]. It is published in Carlos M. Correa andAbdulqawi A. Yusuf, *Intellectual Property and International Trade: The Trips Agreement,* 441 (Kluwer Law International, 1998).

information regarding the foreign applications and grant to be met by the patent applicant. The developing nations never wanted local working to be an optional clause for a patentee. Local working requirement was intended to be the primary and mandatory obligation for conferral of exclusive rights as opposed to an exception to patent rule. In the context of local working of patents, the provision had a further obligation for the patent applicants *viz*:

> "to work the patented invention in the territory of the Party granting it within the time limits fixed by national legislation and subject to the sanctions provided for in chapter VI."[19]

The developing countries distinctly required the patent holders to work the patent locally within a fixed time period in return for receiving patent protection in the patent granting country. This mandate on local working requirement stayed put throughout the negotiations for developing countries. The provision specifying the obligations eventually paved its way to the TRIPS agreement as article 29[20] titled as 'Conditions on Patent Applicants'. The countries also emphasized on patent holders to not to engage in any abusive or anti-restrictive practices which might hinder technology transfer as evident from the following clause:

> "in respect of license contracts and contracts assigning patents, to refrain from engaging in abusive or anti-competitive practices adversely affecting the transfer of technology subject to the sanctions provided for in chapters VI and VII."

Clearly, for the developing countries, the primary goal of effecting technology transfer was to be met with the local working requirement in the patent granting country. Conversely, the United Stateswas completely on the other end of the spectrum with barring local working obligation on the patentees. The U.S. Draft[21]not only sought to prohibit local working requirement but also any other responsibility for the patentee in case of failure to work the patent.It further tightened the knot by totally negating the grant of compulsory license as a remedy for a patentee's failure to work the invention locally.The proposal offered very limited grounds for evoking compulsory licensing *viz.*antitrust violations and declared national emergencies;

> "Contracting parties may limit the patent owner's exclusive rights solely through compulsory licenses and only to remedy an adjudicated violation of competition laws or to address, only during its existence, a declared national emergency."

---

[19] *Id.*atch II, art. 5 (2).

[20] TRIPS Agreement, art. 29: Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.
2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

[21] Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights, Communication from the United States, art. 27, GATT Doc. MTN.GNG/NG11/W/70 (May 11, 1990) [hereinafter U.S. Draft],stating that the U.S. proposal restricted compulsory licensing to national emergencies and anti-competitive abuses; *available at* https://docs.wto.org/gattdocs/q/UR/GNGNG11/W70.PDF(last visited on Mar. 12, 2021).

In effect, the US draft suggested a relaxed mode of regulation under which a patentee's exclusivity on patents would always be free fromany kind of adverse impacts even in case of failure to locally work a patent.

Amidst these extremities, the European Countries' Draft[22] proposed a middle ground by suggesting that local working requirements should not be a patentee's obligation, but a rather permissible exception to the patent rights. Clause (4) of the proposed provision for compulsory license[23]dealt with the requirement of local working of patents. As compared to the draft by the developing nations, the EC Draft was more lenient and ideal in approach as itdidn't grant compulsory license simply for want of local working and instead permitted national laws to excuse local working in situations where it was justifiable with legitimate reasons. It also differed from the US Draft as it did not see to limit the grounds available for issuing a compulsory license and rather stipulated the conditions for such issuance.

These ideological differences received fair share of attention amongst the negotiating group. The developing and the European countries were fairly skeptical about the highly restrictive approach of the US for the grounds related to compulsory licensing[24]. Subsequently, a reconciliation of the prevailing different views was attempted with Chairman's Draft[25] as per which compulsory license was permitted in case of failure to work, dependent patents[26], and overriding public interests[27].This draft had more resemblance with the conditions stipulated under the Developing Countries' draft and the EC draft rather than the US draft. It was clearly stated that working of the patented invention in the country of grant was one of the primary obligations of a patentee. Such working was seen as an essential element of the patent system and it created balance between the interests of patent owners and that of the country undertaking to protect inventions.[28]

[22]Draft Agreement on Trade-Related Aspects of Intellectual Property, Communication from the European Communities, art. 26, GATT Doc. MTN.GNG/NG11/W/68 (Mar. 29, 1990) [hereinafter EC Draft], *available at* https://docs.wto.org/gattdocs/q/UR/GNGNG11/W68.PDF (last visited on Mar. 12, 2021).

[23]EC Draft, art. 26: Compulsory Licences- Where the law of a contracting party allows for the grant of compulsory licences, such licences shall not be granted in a manner which distorts trade, and the following provisions shall be respected……. (4) Compulsory licenses may not be issued for non-working or insufficiency of working on the territory of the granting authority if the right holder can show that the lack or insufficiency of local working is justified by the existence of legal, technical or commercial reasons.

[24]Negotiating Group on TRIPS, Meeting of Negotiating Group of 14-16 May 1990, GATT Doc. MTN.GNG/NG11/21, ¶ 13 (June 22, 1990), *available at*https://docs.wto.org/gattdocs/q/UR/GNGNG11/21.PDF (last visited on March 10, 2021).

[25]Gatt-Uruguay Round (referring to the Chairman's Report to the GNG on the Status of Work in the Negotiating Group, GATT Doc. MTN.GNG/NG11/W/76 (July 23, 1990) [hereinafter Chairman's Draft], *available at* https://docs.wto.org/gattdocs/q/UR/GNGNG11/W76.PDF (lastvisited on March 10, 2021).

[26] The patents which require the use of another patented product or process.

[27]Terence P. Stewart, *The Gatt-Uruguay Round: A Negotiating History (1986-1992)*, 2274 (Kluwer Law International, 1993)[Hereinafter Gatt-Uruguay Round].

[28]Daniel Gervais, *The Trips Agreement: Drafting, History and Analysis,* (Sweet & Maxwell Ltd, UK 2012).

In the late 1990, the TRIPS negotiating group reached to a consensus and submitted the Brussels Draft[29] which reflected the observations under the Chairman's Draft. It reflected the determination of the developing countries as they could successfully persuade other states to maintain a balance between the rights and obligations for patentees. Technological and economic development remained as a yardstick for defining the principles of intellectual property and consequently many obligations were placed upon the patentee. Even though the parties never reached upon a consensus on making local working a mandatory obligation (as it was retained in brackets), it still appeared in the Brussel text:

> PARTIES may provide that a patent owner shall have the following obligations:
>
> (a) To ensure the [working] [exploitation] of the patented invention in order to satisfy the reasonable requirements of the public. [For the purposes of the Agreement the term "working" may be deemed by PARTIES normally to mean manufacture of a patented product or industrial application of a patented process and to exclude importation.

Local working as a ground for compulsory license was independently dealt and it was stated that the authorization shall not be granted in case of failure to work, [where importation is adequate to supply the local market] or if the right holder can justify failure to work or insufficiency of working by legitimate reasons. The provision read as follows:

> Authorisation by a PARTY of such use (i.e. compulsory licensing) on grounds of failure to work or insufficiency of working of the patented product or process shall not be applied for before the expiration of a period of four years from the date of filing of the patent application or three years from the date of grant of the patent, whichever period expires last. Such authorisation shall not be granted **[**where importation is adequate to supply the local market or**]** if the right holder can justify failure to work or insufficiency of working by legitimate reasons, including legal, technical or economic reasons.

Without the bracketed text, the provision functionally resembled article 5A (4) of the Paris Convention on permitting a grace period of three-four years before issuing compulsory license. However, incorporation of the bracketed text is significant to the ground of issuing compulsory license in the sense that the failure to work a patent locally (manufacture it locally) would not trigger compulsory license if by importation, local market needs are taken care of. In effect, a substantial change in consequences was noticed from the Paris Convention in the event of failure to work. To summarize the Brussels draft, 'working' was understood as local manufacture of the patented invention and it was imposed upon the patentee as an obligation for conferring the exclusive patent rights. Yet, compulsory license may not be issued in case where importation of a patented product/process could satisfy the local market requirements. In effect, two different standards of interpretations were suggested

[29]Supra note 27 at 2275 (noting the submission of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) [hereinafter Brussels Draft].

for working/non-working of patents. Thisissue remained unsettled and in brackets as the negotiating groups failed to reach a consensus even during the following Uruguay rounds.

With pressure to conclude TRIPS agreement and no finality on issues, Arther Dunkel, the Director-General of the GATT and the Chairman of the Trade Negotiating Committee, in his paper suggested that the parties should not determine the availability of patent on the basis of whether the product is locally manufactured or imported.[30]This suggestion led to the complete elimination of the discussion with respect to local working requirement in context of granting of patent and introduced the 'non-discriminatory clause'which is now seen in TRIPS.[31]The introduction of non-discrimination clause for patented inventions failed to properly address the negotiating groups' actual issue: whether importation can be seen to satisfy local working in lieu of local manufacturing. It also failed to represent the negotiated consensus between the countries on rights and obligations of the patentee in any way. As it turned out, the arbitrated draft at the end that had nothing to do with disputed interpretation on local working and rather obliged the member countries from not discriminating between locally produced and imported patents while granting patents.A hard-hitting inference is ultimately thatthe developing countries couldn't succeed in making local manufacturing a necessary obligation for the patentee and what constitutes local working still remains a puzzle.

'Local working' under TRIPS agreement

As previously stated, as per TRIPS agreement, no member country can insist local manufacturing to confer patent rights[32].It has been argued by many countries that article 27 (1) of the TRIPS precludes any member country from making any laws mandating the local working of the patents. In order to understand the objectives of the TRIPS agreement, article 27 (1) should be read in conjunction with other provisions which not only lay down the objectives but also emphasize upon the social and economic significance of intellectual property rights. Article 7of the agreement states that promotion of technological innovation and technology transfer should be the result of protection and enforcement of intellectual property rights.[33]Such technology transfers while creating a balance of rights and obligations should be for the mutual advantage of the private interest of the patent holder and the society in a manner which is beneficial to the social and economic welfare. Article 8(1) allows member countries to take necessary measures to advance the public interest in sectors of vital

[30]*Supra* note 25at 2279.

[31]TRIPS Agreement, art. 27(1): Patentable Subject Matter- patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

[32] TRIPS Agreement,art. 27(1) Patentable Subject Matter
Subject to the provisions of paras 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (5) Subject to para 4 of art.65, para. 8 of art. 70 and para. 3 of this article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

[33] TRIPS Agreement,art. 7 Objectives: The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

importance to their socio-economic and technological development.[34]Correspondingly, article 8 (2) provides the member countries to assume measures to prevent the abuse of intellectual property rights by right holders or the resort to unreasonable practices which may restrain trade or adversely affect the international transfer of technology.[35]To balance out the exclusivity of the patent rights conferred, the agreement also provides for limited exceptions under article 30.[36]It has also been provided that these exceptions while taking account of the legitimate interests of third parties should not unreasonably conflict with a normal exploitation of the patent and unduly prejudice the legitimate interests of the patent owner.

It is clear that article 27(1) is not an independent clause. The assertion that article 27 is a general principle and hence free from the exceptions stipulated under articles 30 or 31 would be negating the legal principles of construction on the face of it.[37]Inspite of numerous debates, it is obvious that articles 7, 8 and 30 of the TRIPS guide the operation of article 27 (1) of the TRIPS. In case it had to be interpreted otherwise, the objectives of the agreement will hold no significance. The intent and the objectives have a sweeping effect over the entire provisions of the agreement. Moreover, to clear any ambiguity towards the interpretation of article 27 (1) of the TRIPS, a reference to article 2 of the TRIPS becomes imperative since it makes Paris convention a part of TRIPS and compliance to it mandatory.[38]Thus, the interpretations of articles in the Paris Convention should be used to put an end to any ambiguity that exist in TRIPS articles regarding similar issues. Accordingly, in the context of interpreting local working requirements, it is important to look into the meaning implied by the Paris Convention as well as the *travauxpreparatoires* of the TRIPS agreement as discussed previously.

III. LOCAL WORKING AND COMPULSORY LICENSING UNDER PATENT ACT, 1970

Chapter XVI of the Patent Act deals extensively with the concept of working of patents, compulsory license as well as revocation of patents. Section 83 is the guiding principle regarding the interpretation of local working requirement under the Act. The two-fold objectivesstipulated in TRIPS agreement are reinstated as it states that the patent laws should

[34] TRIPS Agreement,art. 8(1) Principles: 1.Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

[35] TRIPS Agreement, art. 8(2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

[36] TRIPS Agreement,art. 30 Exceptions to Rights Conferred: Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

[37] The rule of legal construction *lex specialis derogate legi generali* establishes that where a general legal provision conflicts with specific provision, the specific legal provision takes place. In the present context, the generality of art. 27 is over-ridden by arts. 30, 31 in any contravening scenario.

[38] TRIPS Agreement,art. 2 (1) Intellectual Property Conventions
In respect of Parts II, III and IV of this Agreement,Members shall comply with art. 1 through 12, and art. 19 of the Paris Convention (1967).

encourage invention along with securing commercial working of the patented invention within the country to the extent reasonably practicable.[39] The provision alsoemphasizes on the patent law's purpose for the promotion of technology innovation, technology transfer and prevention of abuse of patent rights which unreasonably restrain international transfer of technology.[40]It has also been categorically stated that the patent exclusivity granted to the right holders should not be limited to the importation of the patented article in the country.[41] This provision paves way for requiring the patentees to ensure local working of the patented invention within the country.

The grant of compulsory license has been dealt under section 84 as per which, a person may make an application to the Controller after expiration of 3 years from grant of patentfor the following grounds:

a) reasonable requirements of the public with respect to the patented invention have not been satisfied,
b) patented invention is not available to the public at a reasonably affordable price, or
c) patented invention is not worked in the territory of India.[42]

It is clear that not working of a patented invention within the territory is a specificground for issuing compulsory license. Clause (7) of section 84 elaborates the different circumstances as per which it shall be comprehended that the reasonable requirements of the public are not met. Amongst them, the condition having bearing with local working is the one whereby which, unless the patent has been worked in India on a commercial scale to a reasonably possible adequate extent, it shall be understood that the reasonable requirements of the public are not met.[43]Further, it is stated thatreasonable requirement of the public will also be deemed to have been not met in case commercial working of the patented invention within the territory is hindered solely by way of importation of the patented article. It is pertinent to note that importation of patented article to India has not been expressly barred and to such extent, this provision is in line with the 'non-discrimination' requirement under TRIPS. It is only when such importation results in the prevention or hindering of working of the product within India that it would be deemed that reasonable requirement of public is not met.

Section 84(6) stipulates different conditions to be considered by the Controller while examining applications for compulsory license. Amongst other things the Controller shall

[39]Patents Act, 1970, s. 83(a) General principles applicable to working of patented inventions. -Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely; -(a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay.
[40]Patents Act, 1970, s. 83(c)& (f).
[41]Patents Act, 1970, s. 83 - Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely; - (a)…..; (b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;.
[42]Patents Act, 1970, s. 84(1).
[43]Patents Act, 1970, s. 84(7)(d).

look into the nature of invention; measures taken by patentee/ licensee to make full use of the invention; applicant's ability to work the invention to the public advantage *etc*. The Controller shall also consider on merits the efforts taken by the applicant to obtain a license form the patentee on reasonable terms and conditions. However, this requirement may be done away with during contingencies such as that of national emergency, extreme urgency, public non-commercial use or establishment of anti-competitive practices by the patentee.[44]In such circumstances, an applicant will not be required to establish the efforts taken to receive a license from the patentee. Further, even after the grant of compulsory license, a patent can be revoked on the grounds of non-working,not meeting the reasonable requirements of the public or non- availability of the patented invention on a reasonably affordable price.[45]The Controller has also the power to adjourn the hearing of application for compulsory license on the ground of non-working or as per section 84(7)(d), if he is satisfied that the time elapsed after sealing of patent was by any reason insufficient to work the invention on a reasonable possible commercial extent.[46]As per section 89, the Controller shall exercise his powers while dealing with an application on compulsory license to secure the commercial working of an invention to the fullest extent which is reasonable possible. Additionally, one of the primary conditions for compulsory license under section 90 is that the person to whom such license is granted shall work the invention to the fullest extent practically possible. An understanding of all these provisions make it clear that patent law requires the patented article to penetrate into the commercial setup of the country to the extent as far as possible. Theoretically, all these provisions *in toto* depict the seriousness of the Act regarding the local working requirement of patented invention.

As regards the procedural aspect of implementing local working provisions', section 146 (1)is the enabling provision as per which the Controller can ask for information or periodical statement from the patentee or licensee (exclusive or otherwise) regarding the commercial working of the patent in India and the same has to furnished within 2 months.[47] Further, Rule 131(2) of the Patent Rules 2003 (hereinafter Rules) requires the statements under section 146(2)to be furnished within 3 months of the end of every calendar year. Rules 131(1) prescribes that the information on the commercial working should be filed under Form 27.Even though the Form deals with the critical issue of determining commercial working of a patent, the lack of clarity in the approach and ambiguities has led to serious confusions. It

[44]Patents Act, 1970, s. 84(6).
[45]Patents Act, 1970, s. 85.
[46]Patents Act, 1970, s. 86(1).
[47]Patents Act, 1970, s. 146: Power of Controller to call for information from patentees - (1) The Controller may, at any time during the continuance of the patent, by notice in writing, require a patentee or a licensee, exclusive or otherwise, to furnish to him within two months from the date of such notice or within such further time as the Controller may allow, such information or such periodical statements as to the extent to which the patented invention has been commercially worked in India as may be specified in the notice.
(2) Without prejudice to the provisions of sub-section (1), every patentee and every licensee (whether exclusive or otherwise) shall furnish in such manner and form and at such intervals (not being less than six months) as may be prescribed statements as to the extent to which the patented invention has been worked on a commercial scale in India.
(3) The Controller may publish the information received by him under sub-section (1) or sub-section (2) in such manner as may be prescribed.

was after filing of a public interest litigation[48] by Prof. Shamnad Basheer, that the Office of the Controller General of Patents, Designs & Trademarks (Controller) invited comments and conducted stakeholder meetings for procedurally overhauling Form 27. In 2019, a revised Form 27 was published by the Department for Promotion of Industry and Internal Trade (DIPP). The proposed revisions sought to address some of the existing ambiguities with respect to the details which are required to be filed in the Form 27. After a series of backlashes/scrutiny by people from all fields including academicians, Form 27 has been revised and officially notified by the Patent (Amendment) Rules 2020[49] (Amendment).

Prior to the recent notification, Form 27 mandated disclosure of the following information:

i. whether the invention has been worked;

ii. if not worked, the reasons for not working the invention, and the steps being taken to work the invention;

iii. if worked, quantum and value (in rupees) of the patented product:
   - manufactured in India,
   - imported from other countries, giving details of the countries concerned;

iv. licenses and sub-licenses granted during the year;

v. whether the public requirement has been met, at a reasonable price either partly, adequately or to the fullest extent.

As per the previous Form 27,a patentee or the patent licensee had to explain the reasons for not working of the patent along with the steps taken to make that invention work in the territory, even if the patent is not commercially worked in India. Additionally, in case of importation of patented products, country-wise information regarding the details from where it is being imported is sought in the Form. Legal sanctions have also been specified in the event of failure/refusal to file or providing false information in the form. A patentee may in such case be subject to either paying a fine extending to INR 10 lakhs or imprisonment upto six months or both.[50] The information received by the Controller under Form-27 is to be published as per section 146(3)read with Rule 131(3). The publication of such information assumes significant importance as it relates to different aspects of patent which is granted ranging from the quantum and value of the patented product, country of import, number of licensees, etc. and therefore it has been contended by the patentees that such information should remain confidential. However, this disclosure of information related to commercial working is with the purpose of keeping the Controller abreast about the commercial status of a patent within the country especially because non-working of a patent is one of the principal

[48] W.P.(C) 5590/2015, CM No. 10090/2018

[49] Ministry of Commerce & Industry, Department for Promotion of Industry and Internal Trade, G.S.R. 652(E), (19th October 2020).

[50] Patents Act, 1970, s. 122(1): Refusal or failure to supply information -If any person refuses or fails to furnish- (a) to the Central Government any information which he is required to furnish under sub-section (5) of sec. 100; (b) to the Controller any information or statement which he is required to furnish by or under s. 146, he shall be punishable with fine which may extend to [ten lakh rupees]; s. 122 (2) - If any person, being required to furnish any such information as is referred to in sub-section (1), furnishes information or statement which is false, and which he either knows or has reason to believe to be false or does not believe to be true, he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

grounds for seeking the grant of a compulsory license under patent law. The availability of such data can eventually open up opportunities for involved parties which may seek the grant of compulsory licenses on account of non-working of patents. This is especially important in the areas of public health or national emergency. However, it should be understood that a complete non-disclosure shall not encourage the mechanisms related to the grant of compulsory licensing in the event of failure of local working.

In contrast with the old form, the Amendment distinguishes between the disclosure requirements for both product and process patent. It removes the assessment required on 'quantum of patented product' and instead focuses on the value (INR) accrued from both manufacturing and importation into India. The Amendment also does away with submission of country details from where the product has been imported or the process carried out. In cases where the product is covered with multiple patents and the value accrued from a particular patent is not deducible separately, the patentee can provide combined value accrued from all the related patents. The Amendment also eliminates the requirement of showing the steps being taken by the patentee in case of failure to work. Finally, the patentee need not provide any statement on 'whether the public requirement has been met partly/adequately/to the fullest possible extent at reasonable price' which may be best assessed in a judicial proceeding rather than by the patentee himself. These alongwith few other amendments in the Form 27 indicate the serious approach of the Indian government on assessing more properly the commercial working of a patent. Even prior to this amendment of Form 27, the Controller in 2009 had issued a notification directing the disclosure of all relevant information regarding commercial working of the patent mandatory for all the patentees or patent licensees. Any failure to comply with this order attracts punitive provisions as stated under section 122. A similar notification was again issued in 2014 appealing to the patentees to comply with the directions under section 146 of the Act. It is clear that the repeated notifications by the Patent Office as well as the amendment to Form 27 emphasize the patentees to strictly comply with the procedure of submitting necessary information regarding commercial working of patent in India. Such information has a dynamic utility for determining the applications for issuing compulsory license or even for approaching the patentee for a license/assignment over the said patented article. It will also be surely relied upon during litigation process to assess whether or not a patent has been commercially worked in the country or not. For instance, in India's first ever grant of compulsory license in the decision of *Bayer* v. *Natco*[51], both the Patent Office as well as the Intellectual Property Appellate Board (IPAB) relied heavily on the information provided by the patentee (Bayer) on the commercial working of its drug- Nexavar. It was held that the product, locally failed to work because of low affordability, accessibility and availability. The Hon'ble Supreme Court went beyond the requirement of manufacturing in India and empirically determined the availability of the drug based upon its price, dose and usage per patient. It was observed that the grant of compulsory licenses due to failure to work accrued specifically because of lesser affordability considering the quantum of requirement of the drug.

[51] *Bayer Corporation* v. *NatcoPharma Ltd.*, Order No. 45/2013 (Intellectual Property Appellate Board,Chennai).

IV. LOCAL WORKING MANDATE IN FOREIGN JURISDICTIONS

The Brazilian patent law was challenged by the US as being discriminatory against the US owners of Brazilian patents whose products were imported into but not locally produced within Brazil.[52] Article 68 of Brazil's Industrial Property Law authorizes the government to grant compulsory license if the patent owner does not manufacture the product in the territory of Brazil within three years of the patent grant.[53] A plain reading of article 68 does imply violation of TRIPS agreement, yet the question to be determined was whether the law is permissible under any of the exceptions under articles 30 & 31 of the agreement. The invention on which license was granted were two anti-retro virals Efavirenz and Nelfinavir needed for treating HIV-AIDS. Brazil took a stand that either they should be allowed to grant the license or the medicines should be made available in the country at 50% discount. The case was however dropped with the claim that the United States sought to protect their intellectual property without sabotaging the measures to combat HIV-AIDS.

V. COMPETITION LAW'S NEXUS WITH COMPULSORY LICENSING

Extending the realm of competition law to intellectual property is still an area that requires major attention. As an overly simplistic view, it is understood that there is an inherent conflict between these two branches of law. While intellectual property laws such as that of patents grant exclusivity, competition law policies seek to ensure a competitive market place, conducive to the consumer's interests. The exclusivity granted to a holder of intellectual property has the potential to cause competition concerns by creating entry barriers, refusing to deal agreements and abuse of market power all of which are explicitly prohibited by competition law. This interpretation however is short-sighted as the common objective of encouraging innovation and enhancing consumer welfare runs through both these set of laws. In fact, there is plethora of academic literature recognising the complementary nexus between all sorts of intellectual properties and competition law.[54]In an economic sense, intellectual property rights may not be necessarily be monopolistic in nature as there may be similar competitive products in the market. Accordingly, the realm of competition law policies does not *per se* concern itself with prohibiting exclusivity; it only aims to prevent the misuse or the abuse arising out of such exclusivity. Therefore, these two set of laws are invariably complementary to each other.

---

[52]Chia Ling Lee, "The legality of local patent working requirements under the TRIPS agreement" 2 (1), *NTUT Journal of Intellectual Property Law & Management* 39-48 (2013).

[53]Brazil Industrial Property Law 1996, art. 68: para. 5 - A compulsory license under para. 1 may only be requested if 3 (three) yearshave elapsed since the patent was granted (emphasis supplied).

[54]Micheal A Carrier, "Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust law", (Oxford University Press, New York 2010); J Newberg and T Willard, "Antitrust and Intellectual Property: From Separate Spheres to Unified Fields" 66 *Antitrust LJ* 167 (1997); Tom and Newberg, "Antitrust and Intellectual Property: From Separate Spheres to Unified Field" 66 *Antitrust LJ* 167 (1997-98); Jacob, "Competition Authorities Support Grasshoppers: Competition Law as a Threat to Innovation" 9 *Competition Policy International* 15 (2013).

Inspite of the possible co-existence of these laws, a lot is being deliberated on the extent to which an intellectual property owner can be compelled to grant a license to third party. A generally acceptable proposition is that such an owner is entitled to determine the nature and extent of exploitation of the intellectual property and imposition of compulsory license should be limited to exceptional circumstances. Even under the TRIPS agreement, the member countries are allowed to enact legislations restricting such licensing practices of intellectual property rights that may possibly restrain trade or affect competition negatively.[55]

As already stated, in India, the provision relating to the compulsory license under the Act was first applied in the case of *Natco*v *Bayer*[56] in relation to Bayer's patented anti-cancer drug Nexavar (*sorafenib tosylate*). The Controller observed that all the three grounds of stipulated under section 84 were satisfied under this case. Accordingly, a compulsory license was granted to Natco for the manufacture and sale of Nexavar for the remaining term of the patent. With respect to the grounds (i) and (ii) of section 84, it was understood that the drug Nexavar due to its high price, was affordable to only roughly 2% of the total potential patients. However, a lot of furore was created due to this decision in the intellectual property community in respect of application of ground (iii) *i.e.* 'the patented invention is not worked in the territory of India' in the instant matter. The implication of such an interpretation by the Controller is that the patented invention must be manufactured in India to reasonable extent or that the license must be granted by the patent holder to third parties to manufacture the patented invention in India. In other words, even if solely by means of importation, a patented invention satisfies the reasonable requirements of the public at affordable price, it may still be subjected to compulsory license.

Other than the decision of *Natco v Bayer*, which was dealt categorically under the Act,the Competition Commission of India (CCI) also dealt with the issue of refusal to license intellectual property rights in the decision rendered in *MCX Stock Exchange Ltd. &Ors vs National Stock Exchange Of India*[57]and *HT Media v. Super Cassettes Industries Ltd*[58]. Even though these cases did not pertain specifically to the pharmaceutical sector, the common thread of a potential competitor's voluntary request being denied by the intellectual property right holder runs through all of these cases.

It is pertinent to note that there is no express provision regarding grant of access of intellectual property as a remedy for abuse of dominance through refusal to license, under the Competition Act 2002 (Competition Act). Having stated that, there are some provisions indicating the possibility of permitting access to intellectual property rights within the existing framework of the competition statute.As per section 4(2)(c), denial of market access by dominant enterprise may constitute abuse of dominance. Accordingly, as a general interpretation, the market access in relation to products protected under the intellectual

[55]TRIPS Agreement, art. 40.
[56]Supra note at 51.
[57] CCI, Case No. 13/2009.
[58]CCI, Case No. 40 of 2011.

property regime and its licensing may be included in this provision. Further, under the section 27 of the Competition Act, CCI has the power of inquiry into agreements or abuse of dominant position and pass orders. Accordingly, CCI can direct enterprises and person involved in abuse of dominance to discontinue and desist from such activities in the future. Further, under section 27 (g) of the Competition Act, CCI has very wide power to pass an order of any nature as it may deem fit. This can be the power which may be used by CCI to provide access to IPRs to avoid abuse of dominance in exceptional cases.

In recent cases, it has also been observed by the courts that the issuing compulsory license under the Act and preventing anticompetitive practices under the Competition Act are not entirely in exclusion of each other, and rather they have to be read in conjunction with each other. In *Telefonaktiebolaget LM Ericsson v. CCI*[59], the Delhi High Court observed that in cases where CCI has found a patentee's conduct to be anticompetitive and its decision has reached finality, the Controller can also proceed on the said basis and the patentee can be estopped from contending otherwise. However, even though there is no irreconcilable repugnancy between the two legislations, it cannot be necessarily stated that the provisions under Competition Act, explicitly guarantee access to the patented products, which otherwise fall under the purview of the Act. In other words, a remedy to address abuse of dominance may not include access to patented products. In such circumstances, it becomes imperative to establish boundaries for determining abuse of dominance by an enterprise due to refusal to license. While in such cases, where competition law comes to an aid, CCI has to tread cautiously as it may lead to different ramifications in various cases as the remedy of issuing compulsory license falls squarely under the Act.

VI. CONCLUSION

For developing countries like India, signing up international agreements for the protection of intellectual property rights is not just limited to the goal of safeguarding monopoly rights. These also provide an opportunity to maximise technology transfer. In health sector, the local firms are also encouraged to compete and improve innovations. Further, encouraging patent laws just to enable foreign companies to import in a particular jurisdiction but not use it for fostering technological development seems to fall short on the very objectives of the law. India has accordingly made use of the flexibility under the TRIPS agreement in the context of local working requirement as a ground for compulsory licensing. Both the substantive and procedural conditions on local working clearly indicate that it has been regarded as a fundamental obligation for patent holders. Even though some countries[60] diluted this concept to include importation, ensuring a patented article's local manufacture or application has significant impact on the long- term growth of the economy of the patent granting country. National working of a patented invention has the potential to hit to the socio-economic goals of the particular country such as industrial and technological development, creation of job

[59] W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014; Also see,*Koninklijke Philips Electronics v. Rajesh Bansal*(12.07.2018 – DELHC): MANU/DE/2436/2018.

[60] The countries such as Australia, Hungary, South Korea and Mexico treated importation to satisfy local working requirement.

opportunities, production of more and more competitive goods, economic sovereignty, and thereby promoting general welfare. Though importation of patented product would satisfy the local working requirement both under the TRIPS as well as the Indian Patent Act, 1970, it serves only as an exception and not as a general rule. Further, in relation to competition intervention, it should be limited to cases where the dominance of an enterprise is undisputable and no other remedy is available to harmonise the interests of the stakeholders. This is all the more important in the cases of where access to healthcare is in question. Unwarranted intrusions under the Competition Act may lead to curbing of social inequality rather than protecting and promoting a competitive economic environment which otherwise is the primary goal of the legislation.

e-ISSN 2582-4570

ANTI-CONVERSION LAWS AND MARRIAGE IN INDIA : ANALYSING THE CONSTITUTIONALITY OF THE UTTAR PRADESH PROHIBITION OF UNLAWFUL CONVERSION OF RELIGION ORDINANCE, 2020

Aayush Tripathi[*] *Shivangi Tripathi*[**]

Abstract

The Governor of Uttar Pradesh recently promulgated an Ordinance to provide a procedure for religious conversions and penalise conversions that are in contravention of the provisions thereof, which translates into a direct attack on inter-faith marriages, as marriage is stipulated as one of the unlawful ways for religious conversions. The Ordinance suffers from inherent procedural and substantive infirmities. It is a gross violation of the freedom of choice in marriage which has been categorically held to be inherent in article 21 by the apex court. It not only exemplifies an abuse of the legislative powers of the executive, but also suffers from constitutional impropriety, in so much as it violates the fundamental right to privacy, as under article 21 of the Constitution of India by the apex court, and the freedom of religion guaranteed under article 25, apart from also creating room for arbitrary action by using vague terminology and thus violating article 14. In light of the ever-increasing communal polarisation in the country, it becomes necessary to tread this path with caution and hence the authors have made an effort to lay bare the various ways in which the Ordinance is not only anti-democratic in spirit but also unconstitutional in form. The article primarily seeks to substantively and procedurally analyse the constitutionality of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 while also briefly discussing the legislative and judicial history of anti-conversion laws in the country vis-à-vis the Supreme Court's ruling in the Rev. Stanislaus judgment.

I. INTRODUCTION

"Liberty, taking the word in its concrete sense consists in the ability to choose."

-Simone Weil

India has seen the enactment and enforcement of anti-conversion laws since the pre-independence era in a bid to conserve the Hindu religious identity. Thereafter, post-independence, different states came up with their own versions of the anti-conversion laws, which are ironically referred to as the "freedom of religion laws". The latest states to join the bandwagon are the states of Uttar Pradesh, Himachal Pradesh and Madhya Pradesh.

[*] Advocate, Delhi High Court and District Courts.
[**] Advocate, Delhi High Court and District Courts.

The Uttar Pradesh Government recently came up with an anti-conversion law by way of an Ordinance called the '*Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020*' ('hereinafter The Ordinance'). The law is aimed at providing a procedure for religious conversions and at the same time, prohibiting and penalising unlawful conversions by *misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage*. Thereafter, Himachal Pradesh and Madhya Pradesh Governments followed suit. It is worth noting, that these State laws come in the wake of a failed attempt by the Central Government to come up with a national anti-conversion law owing to the intervention of the Ministry of Law and Justice which rendered a contrary advice stating that the same is purely a state subject under Schedule VII.These laws have received widespread criticism and accusations for being in contravention of rights guaranteed under Part III of the Indian Constitution.

While anti-conversion laws have been enacted many times since independence, what is peculiar now is the fact that the *marriage* has been added as a means of unlawful conversion along with misrepresentation, undue influence, coercion, allurement etc. Time and again, over the years, the Supreme Court has reiterated that the freedom of choice in marriage is an integral part of article 21 of the Constitution of India. The right to marry a person of one's own choice is a part and parcel of the right to live with dignity and the right to privacy. Every human being should have a right to manage his or her personal affairs in a way that suits them without being held accountable to any alien entity. As such, these recent state laws under consideration are as much inhumane as they are unconstitutional.

Part II of the article provides a brief history of the anti-conversion laws in the country, both legislatively and judicially. It will also briefly discuss the apex court's judgment in the *Rev. Stanislaus* judgment along with discussing the criticism it has received to better understand the arguments against the Uttar Pradesh Ordinance. This article under Part III seeks to procedurally and substantively analyse the validity and constitutionality of the Ordinance promulgatedin the state of Uttar Pradeshin light of the other anti-conversion laws in force in India, relevant judicial precedents and the concept of personal liberty, dignity and privacy, as enunciated by the apex court.

II. LEGISLATIVE AND JUDICIAL HISTORY OF ANTI-CONVERSION LAWS IN INDIA

The origin of anti-conversion laws in India can be traced back to the 1930s, when the Hindu princely states enacted such laws in an attempt to preserve the Hindu religious identity in the face of British missionaries.[1]Post-independence, a plethora of anti-conversion laws were introduced, but never enacted, due to lack of parliamentary support. Finally, Odisha and Madhya Pradesh became the first states to introduce anti-conversion laws in the 1960s, and thereafter Arunachal Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, and Uttarakhand also enacted such laws, with provisions requiring notice to the district authorities and penalising any contraventions. The corresponding law passed in the state of Gujarat went a step further and required that prior permission be sought from the District Magistrate in case of an individual wanting to convert.[2]

Odisha Freedom of Religion Act, 1967 and Madhya Pradesh Freedom of Religion Act, 1968

The Orissa Freedom of Religion Act, 1967 was brought under judicial scrutiny in 1973, wherein it was declared*ultra vires* the Constitution.[3] The High Court opined that article 25(1) of the Constitution of India guarantees the right to propagate one's religion and conversion is a part of the Christian religion.[4] The Court further held that the term *inducement* has a wide connotation and therefore cannot be said to be covered within the restriction in article 25(1). The Madhya Pradesh Freedom of Religion Act, 1968 used the term *allurement* instead of *inducement* and also defined the same in its definition clause under section 2(a). The High Court of Madhya Pradesh, however, in 1977, upheld the validity of the Act,and held that the Act established equality of religions by prohibiting involuntary conversions by objectionable activities. Later, both these state laws were brought under consideration in the apex court in the case of *Rev. Stanislaus* v. *State of Madhya Pradesh*,[5] which overturned the Orissa High Court judgmentand upheld both the laws.

[1]James Andrew Huff, "Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws" 10(2) *Rutgers J. L. & Religion* 1, 4 (2009).
[2]Gujarat Freedom of Religion Act, 2003 (Act 22 of 2003),s. 5.
[3]*Yulitha Hyde* v. *State of Orissa*AIR 1973 Ori. 116.
[4]*Ibid.*
[5]*Rev. Stanislaus* v. *State of Madhya Pradesh* AIR 1977 SC 908.

Himachal Pradesh Freedom of Religion Act, 2006

The Himachal Pradesh Freedom of Religion Act, 2006, went a step aheadof the Madhya Pradesh and Orissa Acts.[6] The Act stipulated that any person that has been converted to another religion in dereliction to its provisions shall be deemed not to have been converted,[7] and used the term *inducement* instead of *allurement* in its prohibition clause. Further, the prior notice requirement was extended to thirty days under section 4 and the amount of fine and duration of imprisonment had been raised in comparison to other state laws. The Himachal Pradesh High Court read down the Act and struck down section 4 of the Act as being *ultra vires* the Constitution.[8] The court held that the said provisions violated the right to privacy as encompassed under article 21 and further infringed article 14.

Uttarakhand Freedom of Religion Act, 2018

The Uttarakhand Freedom of Religion Act, 2018 was the first state to introduce marriage in the realm of anti-conversion laws. In a*habeas corpus* petition, the Uttarakhand High Court suggested that the Government pass an anti-conversion law on the lines of Madhya Pradesh and Himachal Pradesh.[9]Subsequently, the law enacted stipulated, *inter alia*, that "*any marriage which was done for the sole purpose of conversion by the man of one religion with the woman of another religion either by converting himself before or after marriage or by converting the woman before or after marriage may be declared null and void*".[10] However, the rationale that the court gave for suggesting the enactment was contrary to the objects and reasons of the current law under consideration. The court reasoned that such a law was required to tackle the cases where people convert to other religions only to facilitate marriage whereas the Uttar Pradesh Ordinance, among others, aims to tackle cases where marriage is used as a tool to facilitate conversion.

Supreme Court's view in *Rev. Stanislaus* and its criticism

The Supreme Court in *RatilalPanachand Gandhi* v. *State of Bombay*[11] clarified the provisions of article 25 by holding thatevery person has a fundamental right to exhibit his

[6]*Evangelical Fellowship of India* v. *State of Himachal Pradesh*, CWP No. 438 of 2011.
[7]The Himachal Pradesh Freedom of Religion Act, 2006 (Act 5 of 2006), s. 3.
[8] *Supra* note 6.
[9]ApoorvaMandhani, "Uttarakhand HC Suggests Enactment of Freedom of Religion Act to Curb "Sham Conversions" for Marriage", *Livelaw*, November 20, 2017),available athttp://www.livelaw.in/uttarakhand-hc-suggests-enactment-freedom-religion-act-curb-sham-conversions-marriage-read-order/ (last visited on January 20, 2020).
[10]Uttarakhand Freedom of Religion Act, 2018 (Act 28 of 2018),s. 6.
[11]*RatilalPanachand Gandhi* v. *State of Bombay* 1954 SCR 1035.

belief and ideas in such overt acts as sanctioned by his religion and further to propagate his religious views for edification of others[12]. Later, in *Rev. Stanislaus*, the apex court while upholding the validity of the Madhya Pradesh and Orissa freedom of religion laws opined that propagation of religion included persuasion without coercion but did not include the right to convert any person as that would impinge on the freedom of conscience guaranteed to all the citizens of the country alike.[13] The court reasoned that Article 25 guarantees freedom of religion to the followers of all the religions alike and it can be fairly enjoyed by one only while allowing all others to do the same otherwise public order will be hampered which is encompassed under reasonable restriction to the enjoyment of the freedom so guaranteed. Therefore, there can be no fundamental right to convert any person to one's own religion[14].

The decision of the apex court in the case of *Rev. Stanislaus*, however, has been at the receiving end of criticism on several counts. The judgment failed to discuss the definitions and scope of the terms *inducement* and *allurement* and refuses to include the freedom to convert within the purview of the right to propagate. It was contended that the term propagate was included in Article 25 by the Constitutional assembly, as an assurance to the Indian Christian community that they would have the right to convert. It was further pointed out that without the right to convert, propagation would by itself be covered within the purview of the freedom of speech and expression.

The Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020

The Uttar Pradesh Ordinance prohibits religious conversion for the purpose of marriage.[15] Any marriage between inter-faith couples where either the man or woman converts to another religion for the sake of marriage, the marriage shall be declared void by the Family Court.[16]The Ordinance is hit by constitutional infirmity on both, procedural as well as substantive grounds since:

- It violates the Fundamental Rights enshrined under Articles 14,19, 21 and 25 of the Constitution and,
- It was passed arbitrarily bypassing the legislative process of the Assembly, when there was no urgent need.

[12] *Ibid.*
[13] *Supra* note 5.
[14] *Ibid.*
[15] The Uttar Pradesh Prohibition of Unlawful Conversion of Religious Ordinance, 2020 (U.P. Ordinance No. 21 of 2020), s. 6.
[16] *Ibid.*

Thus, it becomes imperative to analysethe procedural and substantive irregularities of the Ordinance separately.

III. SUBSTANTIVE IRREGULARITIES

The Ordinance violates the fundamental rights to privacy, dignity, choice and the right to freedom of conscience and free profession, practice and propagation of religion, enshrined under the Constitution. Since, the legislation is manifestly arbitrary, it threatens to have catastrophic implications on inter-faith marriages and thus violates Articles 14, 19, 21 and 25 of the Indian Constitution.

Violation of Article 25 of the Constitution

The preamble equates offences such as misrepresentation, force, allurement, coercion, undue influence and fraudulent means with marriage by stating in its objective to prohibit '*unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage.*[17]

Section 2(a) of the Ordinance defines *allurement* in even broader terms than defined in the aforementioned Madhya Pradesh Act by including factors such as "*better lifestyle, divine displeasure or otherwise*."[18] The use of the term *or otherwise*in the definition of the term *allurement*in section 2(a) (iii)is vague and gives rise to the possibility of being abused by the authorities. Sub-clause (i) of the same includes *gifts* within the definition of allurement. By that logic, even gifting a religious text or a holy book to another person may amount to *allurement* under the legislation.

Section 3 of the Ordinance prohibits any person to convert or attempt to convert a person from one religion to another by using the aforementioned means. Ironically, the proviso to the same section provides that re-conversion of a person to his/her *immediate previous religion* will not be illegal even if it is caused by fraud, coercion, misrepresentation etc. The penalty for contravention of provisions under section 3 has been provided under section 5 which mandates a punishment of imprisonment for a term not less than one year and may extend up to five years along with a fine not less than twenty-five thousand rupees. Also, the proviso

[17] *Supra,* note 15.

[18] *Id.*, s. 2(a): "Allurement" means and includes offer of any temptation in the form of- (i) any gift, gratification, easy money or material benefit in cash or kind; (ii) employment, free education in reputed school run by any religious body; or (iii) better lifestyle, divine displeasure or otherwise.

provides punishment for *mass conversions.* The Ordinance defines mass conversion as an event when two or more persons get converted.[19] The punishment regarding the same gets extended to at least three years imprisonment extendable up to ten years along with a fine not less than fifty thousand rupees.

The *Rev. Stanislaus* judgment by the Supreme Court, though did uphold the validity of the M.P. and Odisha's anti-conversion laws, it did so since the primary purpose of those legislations was to prevent forcible conversions which were against public disorder. The legislations did not list inter-faith marriage as a ground of unlawful conversion and consequently not addressed by the Supreme Court. The subject matter of the legislation in question is inter-faith marriages and the Ordinance by associating inter-faith marriages with breach in public order apprehends the constitutional values of freedom of privacy and freedom to profess, practice and propagate religion and is thus arbitrary in nature.

Violation of Articles 14, 19 and 21

Sections 4, 8 and 9 of the legislation are in gross violation of the Right to Privacy of an individual and also strike upon the freedom of choice in marriage, both ingrained under article 21 of the Constitution. Further, section 4 of the Ordinance enables any person who is related by blood, marriage or adoption to the person converting to lodge a complaint. It means that the parents, siblings, cousins and adopted children of converting individuals can take objection, file complaint and hold a converting individual and his/her spouse to ransom. The section curtails the constitutional liberty provided to every adult citizen in the country to choose the person they want to marry out of their own free will and strikes directly upon the Right to Privacy and dignified life under article 21 of the Constitution.

Further, if a person wishes to convert to another religion, he/she is mandated by section 8 to give a declaration in a prescribed form to the District Magistrate or the Additional District Magistrate stating that he/she is doing so out of free consent, without any coercion, force or undue influence.[20] Post this, the converted person is supposed to tender a declaration to the District Magistrate under section 9, in which the person must furnish details such as date of birth, permanent address, current address, original religion of the person before conversion etc. within sixty days from conversion. Further, the person is supposed to appear before the

[19] *Id.*,s. 2(f).
[20] *Id.*,s. 8.

District Magistrate within 21 days from the date of sending the declaration to establish identity and confirm the contents of the declaration.[21] A failure to do so would render the conversion, illegal and void.[22]

Sections 8 and 9 not only create a double hurdle by allowing objections from the public post the conversion but also give police unfettered powers for which there can be no possible explanation apart from deterring citizens from converting out of their own free will.It is submitted that the provisions of the impugned Ordinance are not just arbitrary in nature and in violation of article 14 but in violation Right to Freedom of Expression under article 19, Right to Privacy which includes the right to freedom of choice in marriage under article 21 and Right to freedom to practice of religion under article 25.

IV. JUDICIAL PRONOUNCEMENTS

Lata Singh* v. *State of U.P.

The Supreme Court in *Lata Singh* v. *State of U.P.*[23]had held that as citizens of a country that is free and democratic, a person can marry whoever he/she likes after attaining the age of majority. The court remarked that if the parents of the boy or the girl do not approve of the marriage, the maximum they can do is cut off social relations with them but they had no right to either harass or threaten to commit acts of violence against the couple. The court also directed police authorities around the country to ensure adequate protection to couples who underwent *inter-caste* or *inter-religious* marriages from harassment and threat to violence against them.Referring to this judgment in 2014, the Supreme Court reiterated the same and held that the Right to freedom of choice in marriage is inherent under article 21 of the Constitution.[24]

Shakti Vahini*v. *Union of India

The *Shakti Vahini*[25]judgment by the Apex Courtin 2018 serves as landmark with respect to the Right of choice in marriage. It was held that the act of choosing of partners, consensually by two adults was a manifestation of their choice protected under articles 19 and 21 of the

[21]*Id.*,s. 9.
[22]*Ibid.*
[23]*Lata Singh* v. *State of Uttar Pradesh* (2006) 5 SCC 475.
[24]*Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23-1-2014 in Re* (2014) 4 SCC 786.
[25]*Shakti Vahini*v. *Union of India* (2018) 7 SCC 192.

Constitution. Emphasis was laid on twin pillars of human existence, that is, *liberty of choice* and *dignity*, both of which the court held were inextricably linked to each other as there is no dignity where there is erosion of choice.Mishra C.J. began the judgment with the statement that "*Assertion of choice is an inseggregable facet of liberty and dignity*".[26]Further, it was held that the choice of two adults to marry out of their own volition, choose their paths and consummate their relationship was a right and any infringement of such a right is a constitutional violation.

Shefin Jahan*v.*Asokan K.N.

A recent judgment of the Supreme Court in *Shefin Jahan*v.*AsokanK.N.*[27]set aside the annulment of marriage of an adult woman named *Hadiya* (original name 'Akhila Asokan') who had converted out of her own free will to marry a Muslim man named Shefin Jahan which was objected by her family. It was held by the apex court that "*the choice of a partner within or outside marriage lies within the exclusive domain of each individual*."[28] Elaborating further, the court opined that the intimacies of marriage lie within the inviolable zone of privacy and that the right to choose one's life partner is absolute and is not affected by matters of faith.The court placed matters of faith, religion and choice in marriage under individual autonomy which was held to be supreme. Finally, it was held that the right to marry a person of one's own choice was an integral part of article 21 that cannot be taken away except by the due process of law. It was further enunciated that the right to make decisions on matters intrinsic to the pursuit of happiness is central to Right to life and liberty guaranteed by the Constitution.

Priyanshi @Km. Shamren and Noor Jehan Begum

The Government of Uttar Pradesh had cited two decisions of single benches of the High Court of Allahabad, namely, *Priyanshi @Km. Shamren*v. *State of Uttar Pradesh*[29]and *Noor Jehan Begum @ Anjali Mishra* v. *State of Uttar Pradesh*[30]which held that religious conversions for the purpose of marriage are illegal and such marriages, void. However, recently, a division bench of the same High Court in *Salamat Ansari* v. *State of Uttar*

[26]*Id.,* at 1.
[27]*ShefinJahan*v.*Asokan K.N.* (2018) 16 SCC 368.
[28]*Ibid.*
[29]*Priyanshi @Km. Shamren*v. *State of Uttar Pradesh* Writ C No. 14288 of 2020.
[30]*Noor Jehan Begum @ Anjali Mishra* v. *State of Uttar Pradesh* Writ C No. 57068 of 2014.

Pradesh[31] held both the single judge decisions to be bad in law. The bench stated that the choice of an individual who has achieved the age of majority is their right and an infringement of that right shall constitute a breach of fundamental right to life and liberty of that individual.

The views expressed in the abovementioned judgment sare in consonance with its views expressed in the landmark case of *K.S. Puttaswamy*v. *Union of India*[32]where it was held that the right to make personal choices form an intrinsic part of the idea of privacy. Chandrachud J. in his concluding remarks opined that it is privacy that provides dignity to an individual and facets of life such as family, marriage, procreation and sexual orientation, all form an integral part of it. To choose a partner and to live with dignity is enshrined under article 21 of the Constitution. Thus, it is clear from the above arguments that the impugned Ordinance is arbitrary in nature and impinges the right to privacy, choice and freedom to profess and practice the religion of their choice and hence in violation of articles 14, 19, 21 and 25 of the Constitution. It is *ultra vires*the constitution and is liable to be struck down on grounds of arbitrariness.

V. PROCEDURAL IRREGULARITY

The Ordinance has been promulgated by the Governor under article 213 of the Constitution which extends the legislative power to the Executive. The power to legislate can be exercised by the Governor only when-

- the Assembly is not in session, and
- Circumstances exist which render it necessary to take immediate action.[33]

Therefore, the Governor's satisfaction as to the presence of an exigent situation and compelling circumstances is a *sine qua non* for the exercise of legislative power by the executive.

Was there an emergent need to promulgate the Ordinance?

The primary reasonprovided by the Uttar Pradesh Government for the enactment is the rise in cases of forced conversions for the purpose of marriage. There were no statistics that were provided as an evidence of compellingcircumstances. There was no concrete data found

[31]*SalamatAnsari* v. *State of Uttar Pradesh*Crl. Mis. Writ Petition No- 11367 of 2020.
[32]*K.S. Puttaswamy*v. *Union of India* (2017) 10 SCC 1.
[33]The Constitution of India, art. 213(1).

regarding forced conversions by the Special Investigation Team (SIT) appointed by the Uttar Pradesh Police to gather relevant information regarding the same as most of the inter-faith marriages turned out to be consensual in nature devoid of any force, coercion, fraud or misrepresentation.[34] The SIT found no evidence of a foreign conspiracy or an organized effort in these inter-faith marriages. Similarly, the National Investigation Agency (NIA), designated to probe if there was a larger criminal design in these marriages happening in Kerala post the *Hadiya*case[35] found no evidence to suggest that women and men were being forced to marry and convert to Islam.[36] Further, even the then Union Minister of StateG.Kishan Reddy, in a written reply in the Parliament to a question replied that no cases of forceful religious conversion have been reported by the Central Agencies.[37] Thus, it seems that there was no urgent need for the Ordinance to be promulgated by by-passing the conventional procedure of law making through the Legislature. The issue being sensitive in nature deserved to be scrutinisedby the Assembly and expert committees before being made a law as it threatens to unsettle the peace and harmony of the society.

Judicial Pronouncements

R.C. Cooper* v. *Union of India

The Supreme Court in *R.C. Cooper* v. *Union of India*[38]held that the power to promulgate Ordinances should only be used in exceptional circumstances by the executive and that it shouldn't become a method to by-pass the scrutiny of the legislature. The case dealt with the power of promulgation of Ordinance by the President under article 123 of the Constitution. However, since the powers provided under articles 123 and 213 are almost identical and contingent upon existence of *emergent circumstances*, rendering immediate action necessary by the President or the Governor, the judgment holds good for article 213 as well. The court held that exercise of Ordinance making power by the executive is strictly conditioned and the

[34]Kunika, "Constitutional Validity of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020", *Livelaw*, December 16, 2020,*available at* :https://www.livelaw.in/columns/love-jihad-constitutional-validity-unlawful-conversion-up-Government-167296?infinitescroll=1.(last visited on Jan. 26, 2020).
[35]*Supra* note 27.
[36]Rajesh Ahuja, "NIA Ends Kerala Probe, Says There's Love But No Jihad", *Hindustan Times*, October 18, 2018, *available at* https://www.hindustantimes.com/india-news/nia-ends-kerala-probe-says-there-s-love-but-no-jihad/story-wlpWR7BMNcdJHkb1MUso4J.html (last visited on Jan. 26, 2020).
[37]Meghnad Bose, "BJP InParl: No Case of Love Jihad. BJP Outside Fight Love Jihad", *The Quint,* February 10, 2020,*available at*https://www.thequint.com/news/politics/bjp-in-parliament-no-cases-of-love-jihad-bjp-outside-fight-love-jihad (last visited on Jan. 26, 2020).
[38]*R.C. Cooper* v. *Union of India* AIR 1970 SC 564.

satisfaction of the executive means firstly, existence of circumstances and secondly, the necessity to take immediate action as a result of those circumstances.[39]

D.C. Wadhwa*v. *State of Bihar

In *D.C. Wadhwa*v. *State of Bihar*,[40]the apex court held that "*the power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to serve political ends".* The case concerned the repromulgation of multiple ordinances in Bihar without them being enacted into legislations.It was opined by the Constitution Bench that, although it is contrary to democratic norms that the executive has any law-making power at all, but the power under article 213 has been provided to deal with an *emergent situation* and should thus be limited in its use.[41]It was further stated that since the Ordinance making power is an emergency power, it cannot be resorted to by the executive to take over the law making function of the Legislature when it is not is session since it would be a blatant subversion of the democratic process. Thus, it was held that a constitutional authority is not permitted to do indirectly what it cannot do directly as it would amount to colourable exercise of power and consequently a fraud on the Constitution.

Krishna Kumar Singh* v. *State of Bihar

Recently, in 2017, it was held by the Supreme Court that the power to promulgate an Ordinance is not an absolute entrustment but conditional upon two requirements that needs fulfillment. The first requirement is that state legislature shouldn't be in session and the second one being satisfaction of the Governor regarding existence of circumstances rendering immediate action a necessity. These requirements show a clear intent under the Constitution to restrict the Ordinance making power of the Governor within clearly mandated limits. Thus, it was held by the apex court:

> "The power of promulgating ordinances is not an absolute entrustment but conditional upon satisfaction that circumstances exist rendering it necessary to take immediate action."[42]

Therefore, it is clear in this case that the act of the Governor in promulgating the Ordinance under article 213, bypassing the legislative process of the Assembly is arbitrary in nature

[39]*Ibid.*
[40]*D.C. Wadhwa*v. *State of Bihar* (1978) 1 SCC 378.
[41]*Id.,*at40.
[42]*Krishna Kumar Singh* v.*State of Bihar* (2017) 3 SCC 1.

andnot meeting the standards set by the Hon'ble Supreme Court or the Constitution of Indiaand thus, is in violation of article 14 of the Constitution.

VI. CONCLUSION

Choosing to marry a certain person and changing one's religion are intimate choices that should not be put under administrative scrutiny for vague, half-baked reasons. Such matters should not be a concern of the government until and unless the commission of an offence in relation to such act is manifest. Further, there are specific limitations that can be set on religious conversions as provided under article 25 and only such limitations as stand the test of the said article can be said to be valid in this aspect.

An intervention by the Government is necessary if forced conversions are taking place at a scale endangering public order and even in that event, they should be dealt with a remedy which is proportionate and shouldn't overburden the citizens with substantive and procedural provisions that infringe their right to privacy. The apex court in *Rev Stanislaus* designated the furthest limit up to which restrictions could be placed on practice, profession and propagation of religion under article 25. Any restriction beyond that, either under the garb of freedom of religion or for prohibition of unlawful conversion, is unconstitutional. Therefore, in the light of the aforementioned legislative history, interpretation of constitutional principles and judicial precedents, the *Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020*can easily be placed on a higher stratum of privacy invasion and constitutional *ultra vires* than any of the earlier state laws on account of violation of the fundamental rights under articles 14, 19, 21 and 25.

For any secular and democratic government, the best course in respect of such personal affairs of the citizens is minimal interference. The essence of democracy is in the freedom of choice with minimum friction. There is no reason for the government to keep a tab on innocent and sincere choices of the citizens in respect of their faith or love. Such legislations not only interfere with the autonomy of the citizens but also cast a blot on the democratic credentials of the government as well as the country. Therefore, such a path shall be trodden with great caution by the government.

e-ISSN 2582-4570

MANAGING TRANSBORDER DATA FLOWS

Sudhanshu Pathania[*]

Abstract

By its very nature internet is free which allows seamless integration between everyone around the globe. This involves transferring data around at an enormous scale, this exchange of data around makes internet a truly a borderless space. As internet grew, so did the need to regulate various aspects of it. One of such aspect is 'data privacy' and various jurisdictions made rules and regulations regarding it on the basis of how they view 'privacy' as a concept. For instance, EU made laws regarding 'data privacy' around the concept of privacy as a Fundamental Right, on the other hand, the concept of data privacy in USA is very different as their privacy is looked through the lens of dignity and free market. This paper analysis how different jurisdictions try to deal with constant movement of data extra-territoriality while trying to preserve the privacy of their citizens through various approaches which are critically analyzed. This paper also points out how sovereignty of nations is being eroded as laws are not able to cope up with data mobility beyond national borders. The example of 'Schrems v. Data Protection Commissioner' is taken to drive this point home.The final part of the paper seeks a solution of the issue of jurisdiction posed by trans-border data flows by analysing the possibility of a global framework or a solution based on legal pluralism, by weighing them against each other.

I. INTRODUCTION

The world is transformed by internet, everyday internet throws a surprise at us. This is because it has united over 4 billion people on a single platform.[1] People have access to information that wasn't possible before in the history of humanity. It can be best termed as an 'information explosion' with the amount of data that has been generated. One of the best examples that give us some idea about the staggering amount of data that is generated was given in the report by titled 'Data Data Everywhere' in the Economist. Facebook has a library of over 40 billion photos and is every growing adding over 25 petabites of data to their databases that is 167 times the books in America's Library of congress.[2] This colossal amount of data has given rise to its own set of unique problems which are not minuscule by any extent of imagination andtransborder data flows is one of them.

[*] LLM Indian Law Institute. PhD Scholar, NALSAR University of Law.

[1] Internet Usage Statistics, *available at:* https://www.internetworldstats.com/stats.htm (last Modified: March 25, 2021).

[2] Data, Data Everywhere, *available at:* https://www.economist.com/special-report/2010/02/25/data-data-everywhere (lastVisited on April 3, 2021).

Personal data is the oil of 21st century, one who controls data controls economy, this becomes apparent when we see that Alphabet, Facebook, Amazon and Microsoft raked in 25 billion dollars of profit amongst themselves in 2017 alone.[3] Personal Data is the crucial raw material on which economy would run in the future. This data when processed becomes valuable to the companies who use it as per their business models but also pose serious threat to an individual's privacy. Moreover, when we take into account the fluid nature of Internet where this data crosses borders seamlessly, protecting privacy of individuals become even more cumbersome.

During the infancy of internet, there was very little transborder data flows, and whatever there was it was all point to point exchanges however, today transborder data flows have grown manifolds. There is hardly any empirical data available that shows to what extent such transborder data flows have increased however it doesn't require a genius to make an intelligent guess that the transborder data exchanges that were happening in the in 1970 is a mere fraction to what is happening today. Because, Internet shows literally no regard for the International border thereby most of the data routed today does not give regard to the sanctity to international borders we can assume that a big chunk of it would fall under transborder data flows. In 2016 Cisco published a white paper which said that global IP reach had reached 1 zettabyte.[4] To give an idea of scale, 1 extabyteis the size of 36000 year long HD video and 1 zettabyte would contain 1000 such videos.[5]

I have used 'fluid' and 'something that shows no regard for the international borders' for internet and it is because internet is structured on technological lines and not on geographical lines, in other words there is a good chance that if I send over a file win the same city, it is not an impossibility that it has been routed through a server not in that country but another country by the ISP.[6] Due to this technological complexity, the lines between transborder data

[3] The World's most Valuable resource is no longer oil, but data, *available at:* https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data (last visited on April 3,2021).
[4]VNI Global Fixed and Mobile Internet Traffic Forecasts *available at*: https://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/index.html(last visited on April 3, 2021).
[5] What is Zettabyte? By 2015 the Internet would know says Cisco *available at*: https://www.theguardian.com/technology/blog/2011/jun/29/zettabyte-data-internet-cisco (last visited on April 3, 2021).
[6] European Data Protection Supervisor, 'Cloud Computing in Europe' *available at*: https://edps.europa.eu/data-protection/our-work/publications/opinions/cloud-computing-europe_en (last visited on April 3, 2021).

transfer and data transfer within the country has blurred so much that for regulatory purposes it would be safe to assume that all data transfers are transborder data transfers.

II. TRANSBORDER DATA FLOWS: GOOD, BAD AND THE UGLY

To apply regulations on transborder data flows, we need to first define what transborder data flows are. The vice with defining transborder data flows is that each definition comes with its own set of flaws and more one tries to resolve them through each amendment, you find yourself staring at a host of new flaws. From EU directive[7] to Asia Pacific Economic Cooperation privacy framework[8] and even GDPR[9] have tried to define transborder data flows. And then there are a few like the Canadian Personal Information Protection and Electronic Documents Act (hereinafter referred as PIPDA) which does not distinguish between 'transborder data transfer' and 'data transfer' where both are considered the same.[10]

One of the reasons defining it has become such a cumbersome task is that data can cross borders not by actively being sent across borders but by being sent across individuals and not to forget transfer of data as a part of the internet structure as discussed previously(although that can excluded from the working of any regulatory mechanism through safe keeping provisions).[11] It is important to differentiate that such data transfers might happen both as a deliberate action but as a part of the process as well. Most authors are of the view that such 'mere transactions' should be kept beyond regulations however post NSA I am sceptical that even such data transfers are kept beyond surveillance states like USA and China.[12]

Along with the risks, transborder data transfers come with a bunch of benefits where the benefits seem to outweigh the risks especially when the risks are properly managed. I have

[7] EU Data Protection Directive, 1995, art 25(1).
[8] APEC Privacy framework has no clear definition of transborder data flows but instead uses various terminologies like 'cross-border information flow' and 'cross-border data transfer' interchangeably.
[9] General Data Protection Regulation, 2016. Ch. V.
[10] Guidelines for Processing personal data across borders *available at*: https://www.priv.gc.ca/en/privacy-topics/personal-information-transferred-across-borders/gl_dab_090127/ (last visited on April 3, 2021). In the explanation to the act, transfer is explained as 'use' by the organisation. By defining the transfer in terms of how and when data is used by an organisation the Canadian PIPED Act have very smartly avoided the question and ambiguity of when does data crosses the borders and when the act would be applicable.
[11] *Supra* note 6.
[12] Government Surveillance: Last Week Tonight with John Oliver *available at*: https://www.youtube.com/watch?v=XEVlyP4_11M (last visited on April 3, 2021).

categorised it under three heads, benefits under 'good', risks under bad and the evil aspects under 'ugly'.

Good: From whole society to individuals, transborder data transfers are of immense benefit. In society, the one such example is that of Arab Spring where democratic ideas like freedom of expression and equality which originally were known only to small and affluent strata of the society, were enforced through a revolution and multiple monarchs were dethroned. These 'western ideas' found place within the streets of Libya and Tunisia because of this open-ness of Internet.[13] On an individual scale the effects are not that profound but still important where individuals get access to a host of services which otherwise would have remained only to a few. Another example is that of Khan Academy, this YouTube channel by an Indian-American who teaches mathematics and other science related subjects from 8th standard to College level. Thanks to internet everyone around the world benefits from his videos.[14]

Corporate is another beneficiary of transborder data transfer because they get access to new markets which otherwise would not have been possible.

Bad: There are certain downfalls of transborder data transfers, which can be seen at the levels of Government and Corporations. It makes difficult for the government to track online frauds and tracking internet based crimes have become more difficult for the governments around the world. Corporations have also found it difficult to protect their intellectual property on the internet. A 2007 study found that IP theft cost companies billons of dollars. According to TV privacy forecast report, the loss due to online privacy would double to 51.5 billion by 2022.[15]

Ugly: If 'good' paints a rosy picture then 'ugly' paints a bleak one where an individual has no privacy and Orwellian Dystopia has come true.[16]Transfer of personal data to states without

[13]How the Arab spring engulfed the Middle East – and changed the world *available at*: https://www.theguardian.com/world/ng-interactive/2021/jan/25/how-the-arab-spring-unfolded-a-visualisation (last visited on April 3, 2021)
[14] Khan Academy, Results span Countries and Grade Levels, *available at*: https://www.khanacademy.org/about/impact (last visited on April 3, 2021).
[15] Quantifying loss due to streaming privacy, *available at*: https://cleeng.com/blog/streaming-piracy-quantify-revenue-loss#gs.44acin (last visited on April 3, 2021).
[16] Why Orewll's 1984 could be about now, *available at*: http://www.bbc.com/culture/story/20180507-why-orwells-1984-could-be-about-now (last visited on April 3, 2021).

adequate data privacy regulation jeopardizes privacy and makes individual's data susceptible to unauthorized use. There is a consistent threat of surveillance by foreign governments which further hinders free flow of data across borders as the technological companies would prefer. I must add that this is not any unfounded suspicion as post NSA revelations any email that has been routed through a server within USA could be accessed by NSA does not sound very improbable.

III. TRANSBORDER DATA: REGULATIONS

Main reason various states have enacted regulations is because in today data protection is very closely related to an individual's privacy.[17] Another reason why states enact laws to regulate transborder data flows is to preserve its 'Informational sovereignty'.[18] Informational Sovereignty at best can be understood as the ability of a country to control what happens to the data of its citizens beyond its borders. If a country lacks such ability where it is unable to control data, then its decision making capacity is said to be compromised. Many governments have expressed concerns that transborder data flows if left unregulated would impede their National Economic Sovereignty.[19]

However, while regulating transborder data flows, states try not to break the internet by hindering the free flow of data. Thereby regulations are to be made in such a manner that Internet stays fluid.

Although there is a consensus that regulating transborder data transfers is a necessary, how it is done is a totally a different manner. Different regimes have found different ways to look at regulate transborder data flows, for instance EU calls regards Data Privacy as a person's Fundamental Right.[20] Even in *Rotaruv*. *Romania*, the European court of Human Rights interpreted Art 8 of European Convention of Human Rights where a person's right to private and family life was given a wide interpretation to include data privacy as well.[21] By considering data privacyasa person's basic Fundamental Right, Transborder data transfer regulations in EU are made exceptionally strong.

[17] Cyrus Farvivar, *Habeas Data: Privacy* v. *Rise of Surveliace Tech* 35 (Melville House, UK, 2018).
[18] United Nations, "Report of Commission on Transnational Corporations of the UN Economic and Social Council", (July, 1981).
[19] John M.Edger, "Emerging Restrictions on Transborder Data Flows: Privicy, Protection or Non Tarriff Trade Barriers" 10 *Law &Pol'y Int'l Bus* 1055 (1978).
[20] *Supra* note 9, art 1.
[21] (2000) ECHR 191.

On the other hand there are many regimes like USA, where data isn't looked from the same lens as that of EU and has taken a different approach. Here, a clear influence of the capitalist economy is visible where ease of doing business is takes centre stage. In US privacy means right to be let alone and have evolved so as a protection against intrusion in one's personal space. In USA privacy is viewed from a prism of *liberty* and *free market*. These values trickle down to transborder data regulation where it looks like'less regulation is more convenience' approach is used by the US government. Such a regulationwould promote free flow of data and zealous nature of the American government to promote their business interest over privacy concerns is clear.[22]

The above two examples explain how culture is an important factor in deciding how privacy norms are followed in different jurisdictions. This also explains why there is no straight jacket formula in dealing with the issues of data privacy and transborder data as every place has its own cultural norms according to which it chooses how to implement regulations to protect data privacy.

One major aspect about transborder data regulations is how they deal with the privacy issues once data is transferred to a third countries and what laws would apply then. Two major approaches to this are geographical based approach and organisation based approach. It is also known as adequacy versus accountability approach.

Geography Based Approach is also called as *Adequacy* approach is an approach to regulate data transferred to a third country based on the legal system of that country and the protection to data that it provides. It is called the adequacy approach because this approach requires that a minimum standard of protection as per the data exporting country should be provided and only if a minimum standard of protection is provided the exporting country would allow transfer of data to a third country. There are a number of regional and national legislations which follow this approach, some of the major ones are:

[22]Tarrence Craig and Marry E Ludolf, *Privacy and Big Data* 13 (O'rille, Sabastapol, 2011).

i. EU Data Protection Directive – Art 25 of the directive asks for adequate level of protection to allow transfer of data to a third country.[23]
ii. EU's General Data Protection Regulation – This regulation replaced the Data Protection Directive in March of 2018 and follows the same adequacy principles that the directive followed. Chapter 5 of the regulation talks about 'Transfer of personal data to third countries'. GDPR adequacy requirements are more stringent than that of the directive where Art 45 states what adequacy is and what steps are required by the commission so as to ensure adequacy.[24]
iii. Council for European Protection 108 - Equivalent Protection requirement is made within the convention. While the adequate protection asks for a 'minimum protection to data', equivalent protection is different at it requires same levels of protection that is provided by the convention.[25]
iv. Andorra – A level of protection for personal data equivalent to that established by the law[26]
v. Bosnia – The Same principles of data protection as provided by law on protection of personal data.[27]

These were a few countries and regional organisations which follow the Adequacy approach with each having its own set of principles to define what adequacy is.

The supporters of this approach state that by using this approach they are encouraging countries to enact data privacy laws so that they could attract data exports from those countries and therefore are promoting the principles of privacy to countries which have not adopted them already.

I have a twofold criticism of this approach *firstly,* where a country has to decide whether another country's laws are adequate or note, such a decision is based more on political considerations than legal ones. Irish government's refusal to grant Israel the adequacy

[23] *Supra* note 7.
[24] *Supra* note 9, art. 45.
[25] Council for European Protection - 108, 1981, art.2(1).
[26] Qualified law on Personal Data Protection, 2003, art. 35
[27] Law on Protection of Personal Data, 2006, art. 8.

certificate because Israel was involved in forgoing passports of Irish nationals is an apt example of how politics influences such decisions.[28]

And *secondly,* this approach interferes with the sovereignty of a third nation by arm twisting it into enacting a legislation similar to yours which might not be right for it based on its socio-economic conditions.

Organisationally based approach or otherwise known asthe *accountability* approach. While the geographical approach puts onus on the third country to make sure that their laws are adequately equipped so as to protect personal data. On the other hand in accountability approach, onus falls on the organization or the company which exports data to a third country. As per this approach, adequate measures are to be taken by the data exporters so as to make them accountable for processing personal data in third countries. Malcom Crompton explains this approach in the following words 'This approach ensures that the original collector of personal information remains accountable for compliance with the original privacy framework that applied when and where the data was collected, regardless of the other organisations or countries to which data travels subsequently'[29]

Accountability approach just like adequacy approach asks for the parent legislation to be implemented, however in this approach implementation is directly on the company who had initially collected personal data instead of channelling it through another sovereign country by arm twisting their legislature to adopt the parent country's Data Privacy measures. Organisations implement these measure through 'due diligence' measures through contractual obligations on other organisations operating in the third countries to abide by the parent country's data privacy rules.

The major advantage that this approach has over adequacy approach is that it is easier for the parent company to implement their laws on a private company by themselves upon violation of someone's Data Privacy rather than asking a sovereign country to do so on their behalf. There is a major disadvantage to this as well, when there is a violation of data privacyprincipals in a third country it becomes difficult for the data controller of that country

[28]Ireland to block EU-Israel data hoover, *available at*: https://www.theregister.co.uk/2010/07/12/ireland_israel_passport/ (last visited on April 3, 2021).
[29] Malcom Crompton, "The Australian Dodo case: An Insight for Data protection regulation",*Boomberg Privacy and Security Law Report* 181 (2009).

to ascertain who is the parent company that had authorised such transfer outside to a third country.

IV. EXTRATERRITORIAL APPLICATION OF FUNDAMENTAL RIGHTS LAW

One of the issues that come with the transborder law is the problem of jurisdiction. EU has taken an expansionist approach to this problem. By defining data privacy as a Fundamental Right, they have laid groundwork for applying earlier Data Protection Directive and now GDPR beyond its jurisdiction. Although Europe Convention 108[30] defines jurisdiction based on territory only, yet there have been constant proposals to expand as their data privacy laws are Fundamental Rights so they should be given the same coverage as European convention of Human Rights. Many instances have come up where the European Court of Human Rights has caved into such demands by slowly expanding the jurisdiction of EU's data privacy laws beyond its borders. In one of the most prominent cases, the European Court of Human Right has extended the jurisdiction under European Convention of Human Rights outside the territories of European Union. However, the extent of it was kept limited to the instances where regulatory state had control over terror where the said violation had happened.[31] European data privacy laws, being Fundamental Rights and hence an extension of European Human Rights Law theoretically can be applied in transborder data violations as well. However, there are jurisdictional issues like the knowledge of actual place where the violation of Human Rights have been committed which is difficult to ascertain in case of transborder data violations.

In SWIFT case,[32] the Belgian Privacy commission considered the question that to what extent it could enforce compliance extraterritorially in deciding whether that could enforce Belgian Data Privacy laws in US or not. In the final order the commission finally caved in and said 'Belgian law does not apply to US and any qualification would remain purely theoretical and without effect.' SWIFT was a co-operative company which provided reliable messaging services to a number of financial institutions. It was established in Belgium and for providing reliable service it maintained databases in Belgium and in USA which were mirrors of each

[30] *Supra* note 24.
[31] *Al-Jaddav. United Kingdome*, (2011) ECHR 1092.
[32] Belgian Privacy Commission publishes decision on 'SWIFT case' *available at:*https://www.lexology.com/library/detail.aspx?g=853bdcbb-32e6-4e72-88c0-89376ec6c60b (last visited on April 4, 2021).

other. Post 9/11 USA sent subpoena to access the mirrored database which came under US jurisdiction. When SWIFT gave access to authorities the whole question of violation of EU's Data Protection Directive came into the picture and the Belgian Privacy Commissioner had to decide whether it could enforce compliance of Belgian privacy laws in USA.

One of the most important judgements in the field of transborder data flows came in the case of *Maximilian Schrems*v. *Data Protection Commissioner.*[33]In this judgement, the court invalidated the US-EU safe harbour agreement which the council had said provided adequate protection to data transfer from EU to US. This case became more significant because it came post NSA snooping revelations. The petitioner in this case had specifically filed a case after Edward Snowden had revealed details about snooping done by NSA on a massive scale on number of people around the world including US and EU citizens.[34]

On October 16th 2015, CJEU gave a judgement. While dealing with adequacy principal, judgement said that the third party needs to provide guarantee which is equivalent to that provided under EU law. In the same paragraph, the court gave the justification of the 'Equal' requirement by saying that Data privacy is a fundamental Right and thus equal requirement is reasonable.[35] This is a flawed interpretation of the EU laws, both of the directive and that of GDPR as they required only adequate protection and not equal protection.(Although when the judgement case directive was under force and GDPR replaced it later on, still even GDPR with its stern requirement does not ask for equal protection).

There are many aspects that are both intriguing and questionable of this judgement, I would stick to those parts which specifically deal with application of data protection rights to third party countries. In this relation what they said in paragraph 44 is interesting:[36]

> EU law did apply to data transfers under the Safe Harbour becausethe operation consisting in having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 2(b) of Directive 95/46.

[33] ECJ Case – C 362/14.
[34] Christopher Kurnes, "Reality and Illusion in EU Data Transfer Regulation Post Schrems", 18 *German Law Journal* 881(2017)
[35]*Supra* note 32, paragraph 73.
[36]*Supra* note 32, paragraph 44.

This for all practical purposes imposes the EU law on all third countries as the manner in which Internet works, data has to be routed through a third country. This is exactly what Anu Bradford calls the Brussells effect in which EU itself engages in unilateral regulation of the global markets and sovereignty of these countries takes a hit.[37]Adding to this new understanding of adequacy principle and EU law applying to literally everywhere data flows, DPAs are given more power under GDPR as much as stopping data flows to a third country which has the potential to break the internet and not in a way celebrity selfies do.

This is a beautiful illusion, at least to European eyes, because it envisions a world where the reach of EU data protection law extends globally; where attempts by foreign intelligence agencies to access the data of Europeans are repelled through the use of procedural mechanisms; and where DPAs police the Internet and quash attempts to misuse European data. Yes, it is nothing but illusion as everything said has little to do how internet works on ground.

V. A GLOBAL FRAMEWORK

The above stated problem is because of the fact that there is a lack of global framework where every jurisdiction is trying to achieve its own ends through ways that suit them the best. There seem to be two set of groups, one who favours free flow of data with little or no regulation and the other which is trying to look at the data privacy implications of transborder data flows. Due to this, there are considerable differences in regulations in different states and these differences as explained earlier are partly due to the cultural differences and partly because of different economic and political requirements from personal data.

Current Transborder data flow regulations as a form of legal pluralism

Current transborder data flow regulation can be best understood as a form of legal pluralism. The manner in which these regulations have come up over tie they can be best defined as legal pluralism. In absence of any true hierarchical structure and authoritative government a pluralistic approach seems appropriative. Following are some characteristics which point towards a pluralistic structure –

i. Conflicting regimes in public International Law with a clear lack of hierarchy.
ii. Differing hierarchies in Human Rights

[37]Anu Bradford, "The Brussels effect", 107 *NorthwesternUniversity Law Review* 1(2013). Whole Article 13 of the EU copyright amendment laws is another example of Brussels effect.

iii. Conflict of laws on the internet, where there is a differing and sometimes conflicting concepts of Fundamental rights.

In a pluralistic system, there is an absence of *Grundnorm*that would allow resolution of conflicts which is precisely the situation in which we find ourselves with regards transborder data flows.

Binding International Agreement as a Solution?

Most of the time the answer that comes up with regards to problems like these is a single binding international agreement which would give minimum requirement for data privacy as a basic requisite that has to be followed by everyone. It seems a simple answer to a very complex answer and while in theory it might work, but in practice it would be very difficult with such diverse requirements of each nation state with regards to data. While some countries prefer free flow of data so that their companies could mine it, there are others where data privacy is a fundamental right. More you dive deeper into the problem more you start to think that there cannot be a middle ground between the two, put cultural differences within this mix and it becomes chaos. In EU, data localization is seen as a way to protect people's personal data while in India when Sri Krishna committee report became public, privacy experts were up against arms against the government's plans to localize data as it might lead to surveillance on the citizens by the Indian government.[38]

Then there is the issue of which global institution would be able to draft such a treaty. Some international bodies like UNICITRAL and UNIDROIT do come to mind that have the expertise in the field of internet and privacy respectively but don't have the diplomatic strength to see through such a politically charged treaty.

It seems that we are falling prey to the street light effect where we have a tendency to look for answers in places where they are easiest to look at.[39]In my view pluralistic approach is the right way forward where the regulations grow with time rather than a powerful International agreement on the lines of TRIPS which in all practicality is impossible to make due to conflicting interests of all the parties involved. If we accept that the framework is fragmented

[38]Srikrishna Committee: The Good And The Not-So-Good In The Data Protection Committee's Report *available at*: https://www.bloombergquint.com/law-and-policy/srikrishna-committee-the-good-and-the-not-so-good-in-the-data-protection-committees-report (last visited on April 3, 2021).

[39] The streetlight effect is a concept that comes from an old joke where a drunk is trying to look for his keys under a streetlight not because he lost them there but because where he lost them it is dark over there.

and they try to harmonise over time it rather than to force through an International treaty we would achieve better results. This method would allow the countries to mature overtime which allows harmonisation of norms and eventually in a natural and phased manner consensus would be formed between two opposing ends of the spectrum.

This being said there are certain reforms in the current pluralistic structure that can be made to make it more robust so that flow of data is not hindered and privacy concerns of parties like EU are also addressed.

i. *Agreement with regards to data which requires extra protection*: Internet consists of all kind of data with variable importance, a person's weight is not of that sensitivity rather than his financial data. Hence, agreement between various states can be reached with regards to what can fall under 'sensitive data' and what cannot. And what level of extra protection should be provided.
ii. *Technological Measures*: Technological measures are required to be put in place to promote privacy of data transferred internationally like double encryption. On the other hand regulations need to be sensitive of technological realties, how data is transferred would always depend on the technology in place and not on what regulation is present in that jurisdiction.
iii. *Greater cooperation*:Cooperation between various nations is required to bridge the gap between them and make transborder data regulation more robust. The 'endgame' of pluralistic regime is to enable transborder data flows in a more secure manner where privacy isn't compromised upon and that can only be achieved when countries become more cooperative.

In concluding remarks, I would say that transborder data is like globalization, we can't do away with it. It is better to make peace with it and let it evolve for the benefit of everyone. There is always a natural desire to find a single straight jacket solution to our problems, but Internet is fluid and for a fluid and ever-changing problem a single top-level solution won't suffice.

V. CONCLUSION

The dependence of this data driven world is going to increase on algorithmic decision making which will make the movement of data across borders even more voluminous and as the internet is structured presently, there will be more confrontations between various data

protection regimes. It is pertinent that a minimum standard of privacy is agreed so that the interests of the states protecting privacy of their citizens and the interests of the corporations mining data are given due regards and flashpoints like the one with Ireland are avoided in the future.

e-ISSN 2582-4570

NATIONAL AND INTERNATIONAL PROTECTION OF TRADE SECRET

Anchit Verma[*]

Abstract

This research article contains an introduction to trade secret as an intellectual property, primarily focused on principles of TRIPS and relevant laws related to trade secret in USA, UK, China and Japan. The paper also Includes Trade Secret Licensing; Factors, restrictions and validity along with non-disclosure/ confidentiality agreement. So basically the effort is to draw a comparison between available measures to deal with trade secret issues in India and other countries.

I. INTRODUCTION

स्वस्तिप्रजाभ्यःपरिपालयन्तांन्यायेनमार्गेणमहींमहीशाः।

गोब्राह्मणेभ्यःशुभमस्तुनित्यं लोकाःसमस्ताःसुखिनोभवन्तु॥[1]

May the well-being of all people be protected by the powerful and mighty leaders be with law and justice. May the success be with all divinity and scholars, May all (samastāḥ) the worlds (lokāḥ) become (bhavantu) happy (sukhino).

In a general discourse, any private business data, statistics, facts, figures or any other such information which affords an organization or any sort of group or any entrepreneur an economical advantage over competitors may be considered as a trade secret. Trade secrets comprehends industrial secrets or manufacturing and commercial secrets. The unlicensed usage of such secret by a person other than the original holder is considered as an unfair exercise and an abuse of the trade secret. Reliant on the legal structure, the shield of trade secrets forms part of the universal concept of safeguard against unfair rivalry or is grounded on various provisions or cases on the security of confidential information.[2]

"A trade secret is kind of information which includes a pattern, formula, device, compilation, technique, method or process, that: (i) originates autonomous economic value, definite or potential, from not being known in general and not being willingly ascertainable by appropriate means to other individual who can obtain fiscal value from its use or disclosure and (ii) reasonable efforts made in respect to maintain secrecy."[3]

---

[*] Ph.D. Scholar, Institute of Law Jiwaji University, Gwalior

[1] Srimad Valmiki Ramayana(Part 1), p.no. 2, col. 2 (Geeta Press, Gorakhpur) (YEAR OF PUBLICATION NOT MENTIONED)

[2] The Agreement on Trade-Related Aspects of Intellectual Property Rights, World Intellectual Property Organization, India-Other member countries, art. 39 (Jan.15, 1994).

[3] Uniform Trade Secrets Act,s. 1(4), 14 U.L.A. 372 (1985 & Supp. 1989).

It is a form of IP in the form of compilation of information, commercial method, pattern, instrument, design, process, practice or formula not largely known or rationally ascertainable by others by which an industry can gain an economic benefit over competitors. Sometimes, these secrets are dealt as know-how or confidential information.[4]

This is unfortunate that instead of being world's 5th largest economy[5], UTSA[6] on April 28, 2017 in its "Special 301"[7] Report placed the Republic of India on Priority Watch List as we have insufficient and outdated legal framework on trade secret. This report is a question mark on the dream of our honourable Prime-minister that sooner we will be 5 trillion dollar economy[8], as without insurance of protection on trade secret, foreign investors are in doubt to deal with our nation.

II. NEED OF PROTECTION

Trade secret is an intellectual property (IP) required to be protected like any other type of IP but its protection is bit complex in comparison to other IPs, as to protect such type of properties their registration is mandatory and for registration disclosure of specifications is required. As far as disclosure of information is concern, in case of trade secret such information need to be confidential in a manner that it is not, usually identified among or willingly available to individuals within the loops that ordinarily deal with the kind of knowledge in question; it should have some commercial value due to its secrecy; and subject to some reasonable steps taken to insure it to be secret.[9]

When it comes to a nation like India, where contractual obligation can be imposed on a person not to reveal 'know-how'. Sometimes in the absence of express contract and express law as well court plays a vital role. In the absence of express contract honourable High Court of Delhi awarded injunction in case[10] where plaintiff shared his know-hows with defendant. Later it was discovered by the plaintiff that specifications, designs, drawings and know-how allegedly misappropriated by defendant.

---

[4] Dr. Ganesh Dubey & Anchit Verma, "Trade Secret Laws Indian Prospective"*Jai MaaSaraswatiGyandayini*50 (2019).

[5] Joe Myers, "India is now the world's 5th largest economy", *available at*:https://www.weforum.org/agenda/2020/02/india-gdp-economy-growth-uk-france/(last visited on March02, 2020)

[6]United States Trade Representative; The draft of this Report was developed through the Special 301 Subcommittee of the interagency Trade Policy Staff Committee.

[7] Executive Office of The President of The United States, *2017 Special 301 Report* (Mar. 2, 2020, 05:20 PM), *available at:*https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF

[8] Narendra Modi, *Hear what PM Modi says about making India a 5-trillion dollar economy in the next 5 years!*, YouTube (March. 2, 2020, 05:56 PM), *available at:*https://www.youtube.com/watch?v=5AxUDOcJBV8

[9]The Agreement on Trade-Related Aspects of Intellectual Property Rights, World Intellectual Property Organization, India-Other member countries, art 39 (2), Jan.15, 1994.

[10] *John Richard Brady And Ors* v. *Chemical Process Equipments P. Ltd. and Anr*, AIR 1987 Delhi 372 (India).

In another case honourable court granted an injunction and held that the idea evolved and developed by the plaintiff was the result of the effort made by the plaintiff by using his brain which results in unique production by applying material available in public domain which makes the information confidential. Thus, the court granted an injunction.[11]

So, the question remains constant that how can trade secret remains protected without being disclosed? Thus, there is a need for an appropriate mechanism to protect this sort of IP, the mechanism which can guard it on one hand and that too without being disclosed, unlike other sort of IPs.

III. METHOD OF PROTECTION

"Through good treatment or early diagnosis, it is rare to eliminated disease, but elimination of disease is surely possible through prevention."[12] Protection of Trade Secret is possible with the reasonable steps required to be taken.

Probably it is always convenient to follow rules and regulations where such guidelines are backed by some specific statute like Uniform Trade Secret Act (UTSA) which is well drafted with definition clause, Injunctive Relief, Damages, Attorney's fees, preservation of secrecy, statute of limitations, effect of other laws, uniformity of application and construction, severability and time of taking effect is mentioned.[13] In India, unlike United States, we have no specific legislation. The law in reference to trade secret is bit scattered in various clauses of numerous statutes,[14] for instance Agreement in restraint of trade, void;[15] Penalty for breach of confidentiality and privacy;[16] Punishment for disclosure of information in breach of lawful contract.[17]

In India we have no such specific law, still there are some machineries available to deal with the issue that an owner of trade-secret could not "let the cat out of the bag," and the impending licensee would not of the opinion to "buy a pig in a poke."[18]

---

[11] *Mr. Anil Gupta and Anr.* v. *Mr. Kunal Dasgupta and Ors,* 97(2002) DLT 257(India).
[12] Denis Parsons Burkitt (28 February 1911 – 23 March 1993).
[13] Uniform Trade Secrets Act, 1979.
[14] *Supra* Note 4 at 53-54.
[15] The Indian Contract Act 1872, s.27.
[16] The Information Technology Act 2000,s.72.
[17] The Information Technology Act 2000,s. 72 A.
[18] Karl F. Jorda, *Trade Secrets and Trade-Secret Licensing*, Kenneth J. Germeshausen Center for the Law of Innovation and Entrepreneurship, Franklin Pierce Law Center, U.S.A. (March 3, 2020, 06:43 AM), http://www.iphandbook.org/handbook/ch11/p05/#2

Trade Secret Licensing

Access to the knowledge of trade secret is given through the licensing of trade secret by the proprietor who is a licensor, to the party interested in information known as licensee. This license permits beneficiary an access to the information, not generally known to the public.

The licensor can in-cash his ownership on a trade secret, without being transferring his actual ownership. There are some factors required to be considered while drafting in Trade Secret License agreement, however clauses may vary but if any of these factors left out there are bright chances that the value may reduce, these factors are- license terms, qualifications and/or restrictions, maintenance of secrecy, payment terms (payment stream, royalties or lump sum payment and compensation), audit rights (inspection of records to check and balance compliance), termination (exit clause), governing Laws, survival clause (maintenance of secrecy even after termination of an agreement, notice provisions (if case of accidently discloser of trade secret), assignment clause (this is a reciprocal clause to share the information with the third party and manner of access).

Non- Disclosure/ Confidentiality Agreement

As discussed above that trade secret is such an intellectual property that to maintain its worth is an expensive task, and its responsibility lies on the actual owner but there are some simple and reasonable ways through which this IP can be protected in lesser expense that is by signing NDA. Non-Disclosure Agreement can be defined as-

Non-Disclosure Agreement is a legally binding contract, unilateral, bilateral or multilateral(NDA/ CA/ CDA/ PIA/ SA)[19] *where at least two or more parties promises not to disclose particular information, confidential material or knowledge without proper endorsement considering such know-how as a trade secret. On the disclosure of trade secret to the other party for the purpose of development, securing financial backing, marketing or evaluation such agreements are frequently used. Series of these agreements are not surety to protect trade secret itself if the three basic steps are not followed by the actual owner, given in Article 39 of TRIPS agreement.*[20]

The idea of the above definition is a union of two definitions linked in footnote eighteen, which is an attempt to define non- disclosure agreement.

[19]Non-Disclosure Agreement, Confidentiality Agreement, Confidentiality DisclosureAgreement, Proprietary Information Agreement, Secrecy Agreement.

[20]*Nolo's Plain-English Law Dictionary*. (1st ed. 2009);
Non-Disclosure Agreement (March 03, 2020, 08:52 AM),*available at:*https://en.wikipedia.org/wiki/Non-disclosure_agreement

Non-Disclosure Agreement generally contains confidential information (description of information), terms of agreement (tenure of NDA), exclusions from confidential information (contingency clause for non-applicability of agreement to the information), obligation to retain confidentiality, employee solicitation (clause to prevent the recipient from hiring employees of actual owner of trade secret for 12-24 months), Jurisdiction in case of dispute, Remedies.[21]

Non- Compete Agreement

To run any company or business, some complex business information required to be disclosed to certain individuals, they may be employees or other companies. After sharing such information there are higher probabilities that such information can be used against Owner Company by the individual information shared with them, especially when they get apart. Thus the very purpose of non-compete agreement is to prevent unfair competition.

In the statutory law of India there is a general restriction on any such agreement which puts bar on trade, so it seems that non-compete clauses are invalidated in Indian law.[22] Even in a case[23] it was ruled if there is any clash between protection of confidential information as a right of employer and earning daily bread as a right of employee, in such case employee's right always prevails.

The question arises, then what about the employer's right? How his trade secret can be protected? Well the answer is already given by honourable Supreme Court of India through its judgement in a case[24] that not-compete clauses could not be considered as constraint on trade against the employee if such clauses operating within the course of employment. It is further added that even if in a case agreement terminated due to some reason, the restriction continues till the end of 5 years.

IV. INTERNATIONAL PROTECTION ON TRADE SECRET

In this article international protection of trade secret is limited to TRIPS, USA, UK, China and Japan considering their competence and compatibility with India on the basis of region, economic stability and statutory influence.

---

[21]Susan Chai, Esq., *Free Non-Disclosure Agreement (NDA),*Legal Templates (March 5, 2020, 05:47 AM), *available at:*https://legaltemplates.net/form/non-disclosure-agreement/ ;
Richard Harroch, *The Key Elements Of Non-Disclosure Agreements*, Forbes (March 5, 2020, 06:02 AM), *available at:*https://www.forbes.com/sites/allbusiness/2016/03/10/the-key-elements-of-non-disclosure-agreements/#21bfb5cc627d

[22] The Indian Contract Act 1872,s.27.

[23]*Dessicant Rotors International Pvt. Ltd.* v. *Bappaditya Sarkar* (2009) Del. 337 (India).

[24]*Nilanjan Golokari* v. *The Century Spinning and Mfg*, (1967) 2 SCR 378 (India) .

TRIPS

This is an international agreement came into force on January 01, 1995 between 164[25] WTO member countries. Member countries shall draft minimum standard regulations to regulate intellectual properties in respective countries.[26] TRIPS agreement refers to all category of Intellectual property rights[27] but there is a specific article[28] of the agreement guaranteeing operative security against unfair competition which is also provided under Paris Convention.[29]

According to the agreement, minimum standard given to protect intellectual property as trade secret, contrary to honest practice commercial in nature till such know-how is-

i. Not readily accessible or generally known to persons within the loop that ordinarily deal with the kind of info in question.[30]
ii. Commercially valuable as it is secret.[31]
iii. Protected by lawful and reasonable steps taken by a person of ordinary prudence.[32]

Exception- Such data shall be protected by members against disclosure, except where essential to safeguard the public, or steps required to be taken for insurance against unfair commercial usage to protect data.[33]

United States

After World War II the world's economy was crumbled but there was one country which is still above all and that's the United States of America, for a long time the United States has been the dominant economy in the world.[34] To maintain their rank as world economy and as a signatory to TRIPS, US enacted an Act[35] specifically dealing with trade secret issues and created federal civil cause of action. Now the parties can resolve their respective disputes either in federal law or in state law, as almost every state of US adopted UTSA.[36]

The protection given under the act is very limited as to use and unauthorised discloser referred as misappropriation. Protection of trade secret deems to be lost if there is any failure

[25] *TRIPS Agreement* (March 06, 2020, 06:59 PM),https://en.wikipedia.org/wiki/TRIPS_Agreement
[26] Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO members, art 1 (3), Jan 1, 1995.
[27] *Ibid.* members, art. 1 (2), Jan 1, 1995.
[28] *Ibid.* art. 39, Jan 1, 1995.
[29] Paris Convention for the Protection of Industrial Property, Director General, art 10bis, July 14, 1967.
[30] Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO members, art 39 (2) (a), Jan 1, 1995.
[31] *Ibid.* art. 39 (2) (b), Jan 1, 1995.
[32] *Ibid.* art. 39 (2) (c), Jan 1, 1995.
[33] *Supra* note 32.
[34] *Top 20 Economies 2019 (Nominal GDP), available at:*YouTube (March 07, 2020, 09:51 AM), https://www.youtube.com/watch?v=S1NA_EQMSeg
[35] The Defend Trade Secrets Act (2016).
[36] The Uniform Trade Secrets Act (1979).

on part of the holderto maintain secrecy or the information discovered independently and becomes generally known. So until loss or discovery protection of trade secret continues, as there is no expiry of Trade secrets.[37]

United Kingdom

In UK confidential business information is protected by The Trade Secrets Directive[38] given through the European Union. Goal of these directives is to maximize the recovery of information which is confidential. These directives defined trade secret almost in a same way as defined and manner prescribed for protection under TRIPS agreement and test adopted under English law.[39] Remedies are also codified under the same directives through final and interim injunctions to prohibit misuse. Importance to preserve confidentiality during litigation is already acknowledged by English courts, therefore adopted some measures which are-[40]

i. Discloser of profound material to confidential club members to be limited.
ii. Hearing of litigation in privacy.
iii. Giving edited public judgments to remove references confidential in nature.

Note- Brexit[41] is an upcoming issue in near future, which may affect trade secret laws in UK. The process of Brexit started from March, 2019 and probably continues till December, 2020. This period is known as transition period, during which facilities given to the countries of European Union will continue.[42]

China

A specific law adopted at 3rd session of the Standing Committee of 8th National People's Congress on September 02, 1993 and entered into force on December 01, 1993.[43] This act is a sum of general provisions, acts of unfair competition, supervision and inspection, legal responsibility and supplementary provisions.

[37] *Trade Secret Policy,* United States Patent & Trademark Office United States Patent & Trademark Office (March 07, 2020, 07:58 AM), *available at:*https://www.uspto.gov/ip-policy/trade-secret-policy
[38] Trade Secrets Directive (2016/244/EU).
[39] Faccenda Chicken v. Fowler (1987) Ch 117. (UK).
[40] *Protecting Your Trade Secrets in the UK,* Jones Day (March 07, 2020, 10:28 AM), *available at:* https://www.jonesday.com/en/insights/2019/06/protecting-your-trade-secrets-in-the-uk
[41] Exit of Britain from European Union.
[42] BBC News Hindi, *What is Brexit and how will it impact India? (BBC Hindi),available at:*YouTube (March 07, 2020, 11:53 AM), *available at:*https://www.youtube.com/watch?v=81TOgb5sWEE
[43] The Law of the People's Republic of China Against Unfair Competition (1993).

In China's Anti-Unfair Competition Law (trade secret law) several amendments added by the National People's Congress to provide benefits to the trade secret holders on April 23, 2019 which came into effect on November 01, 2019.

Amended law shifted onus of proof, as previously party in prosecution required to prove that particular information qualifies as trade secret. Further the same has been wrongfully taken and used, which was challenging task for claimant, as the evidence to prove wrongful act is generally in possession of the party defending. After amendment a plaintiff only required to prove prima facie case of theft of trade secret and then onus shift's on defendant that they didn't taken or used trade secret owned by plaintiff.[44]

Japan

In Under principle of disclosure in a litigation maintenance of confidentiality and submission of evidence in respect to confidential information to the court of justice had been one of the key challenges in the practice of public trials.

On June 15, 1991 an explicit law[45] came into effect with measures and protection of qualified secrets which may be "technical or business information". This act was the result of resilient international call for harmonization of intellectual property laws. Prior to this law there was no statute protecting trade secret directly, although Japan do have scattered laws alike today's India protecting trade secret. In 2003 criminal sanctions added through amendment.

The act consists of general provisions, claims for injunctions and damages, acts prohibited pursuant to international agreements, miscellaneous provisions, penal provisions, special provisions on criminal proceedings, special provisions on procedures concerning seizure, procedures for preservation and international common legal assistance in implementation of judicial decision and in protection for seizure and collection.

V. CONCLUSION

In India, as far as current arrangements for the issue of trade secret concern, our courts by the means of various judicial pronouncements made it clear that the clause of 'non-compete' agreement operates after termination of the service of the employee aren't enforceable in India.[46] Right to life and liberty clause of the Constitution[47] ensures 'right to livelihood'[48]

[44]Tim Jackson, *New China Developments In Trade Secrets You Need To Know,* Rouse The Magazine (March 07, 2020, 12:27 AM), *available at:*https://www.rouse.com/magazine/news/new-china-developments-in-trade-secrets-you-need-to-know/

[45]Unfair Competition Prevention Act (1993).

[46]*Nilanjan Golokari* v. *The Century Spinning and Mfg.*, *Supra* Note 22.

[47]Constitution of India, art. 21.

[48]*Chameli Singh* v. *State of U.P*, 1995 Supp(6) SCR 827(India).

thus earning daily bread cannot be restricted by an employer. On other hand same article guaranties 'right to privacy'[49] which ensures security of confidential information, so in this case right to livelihood (employee's right) and 'right to privacy' (employer's right) are clashing.

India need specific law alike United States, United Kingdom, China, Japan and other developed and developing countries as mere agreements and scattered law are not fair enough to meet need for protection. Being a signatory to TRIPS it is mandate on India to draft and enact legislation competent enough to deal with such issues, as if we lack in drafting such laws then we will continue to be in the list of "Priority Foreign Countries" and will be judged to have inadequate IP laws which may affect our international trade and relations.

This paper is concluded as, despite of so many advancements and verdicts, law of 1872 still continues through section 27 and The Innovation Bill, 2008 never became law. Thus an amendment and enactment is required.

[49] *Justice K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1 (India).

e-ISSN 2582-4570

JURISPRUDENCE OF KARM YOG & RELEVANCE OF DUTY IN CONTEMPORARY WORLD

Seema Singh[*]

Abstract

In the Indian Constitution, the duties have found place in the form of Fundamental Duties but they are not considered as important as rights. The same thing is equally applicable across the globe including in different International Conventions and Declarations. This article reveals the importance of Karma /duty in the present day Rights Oriented Society. To prove its point, the author has taken the guidance from the preaching of Lord Krishna in Bhagvad Gita. How un-controlled desires and the gap between deserve and desire creating a restless society and how hyper expectations of individuals in this materialistic world is affecting the psyche of the society negatively, is the point of discussion. How to maintain a balance between our success and failure and between illegitimate and legitimate expectation is the core theme of discussion of this article. Law is not all about resolving conflicts but also minimizing conflicts. Most of the conflicts in the society is the result of greed or hyper expectation. This article teaches us to maintain a balance in life for the peaceful coexistence in the society. Through this article the author tries to prove that only a duty conscious society may establish peace and sustainability in the in the world.

I. INTRODUCTION

Any living being cannot live without doing any karma. Karma of an individual not only affects his own life but also the life of others. Good karma creates good result and bad karma gives bad result. No text in the entire world talks about karma and karmic consequences as elaborately as Bhagvad Gita does. Presently when the whole world and mother earth is suffering from our greedy and selfish attitude the relevance of doctrine of karma becomes much more relevant.[1]

Bhagavad Gita is one of the most practical and sound books of all time talking about the karmic presence in our life. Chapter 3 of this book exclusively talks about the importance of KarmYog. The philosophy of KarmYog enshrined in this holy text is the philosophy of Vedas, which is the reflection of philosophy of Sanatan Dharma. There are various divergent concepts thriving under the name of Sanatan Dharma. It welcomes diversity. However, there

[*]Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi.

[1]*Available at:* https://www.baps.org/Spiritual-Living/Hindu-Beliefs/Karma-and-Dharma.aspx(Last visited on January 5, 2021)

are some high level common salient concepts, about which almost all saints and leaders agree.[2]

Swami Vivekananda, a hindu monk, makes understand the philosophy of KarmYog in a very revolutionary way to the modern society. KarmYog according to Vivekananda is- "Humankind's ultimate goal is knowledge & thus it becomes the source of karma. The result of karma comes at the end can be pleasurable or painful. A person's reaction to the particular karma decides the 'Character' of that person."[3]

Usually we treat Karma, Duty and KarmYog as synonyms of each other but actually there is a significant difference among them. "Karma" is something which is assigned to us naturally as a human and social being, while "Duty" means something that is imposed. There may be a force of sanction behind 'duty' but there is no such compulsion behind 'karma'. Performing any action is not karma. Machines also perform certain actions through different mechanical processes but theiract cannot be characterized as karma. To convert an act into karma combination of three is required and i.e.-Body, Mind and Senses. Thus awareness and consciousness about effect of your action is true karma. Karma is all about your conscious choices. Elevated souls and visionaries have capacity to control their mind. Such people are calmer, more positive and more decisive in their decision making.[4]Philosophy of Karma is much broader than the philosophy of Duty. KarmYog gives psychological and spiritual expansion to duty or karma to further purify it in individual or collective interest.

II. BHAGVAD GITA AND PHILOSOPHY OF KARMA & KARMYOG

Any work has two effects, one is external and another one is internal. The external effect is the visible one or the physical results of our actions. The internal effect is that which has generated a solid impression in the mind or in sanskar. There is also a third effect which is not visible and is called the karmashaya / cosmic effect. If we do a good act with good intentions, it will come back to us at some point in time. Thus, Karma works like newton's theory of action-reaction. It is not fixed but relative to the actions you perform. Thus a negative situation can be turned into a positive one with our willful or conscious action[5] .

[2]*Available at:* https://www.esamskriti.com/e/Spirituality/Philosophy/Scriptures-of-Sanatan-Dharma-1.aspx(Last visited on January 5, 2021).
[3] Swami Vivekananda, "Karma-Yoga" https://sites.google.com/site/mandrivnyjvolhv/indu/piznishi/svami-vivekananda/swami-vivekananda-karma-yoga(Last visited on January 5, 2021).
[4]*Available at:* https://iskcondesiretree.com/page/what-is-karma(Last visited on January 10, 2021).
[5] Karma - The Law of Cause and Effect, https://www.dailypioneer.com/2020/state-editions/karma---the-law-of-cause-and-effect.html (last visited on January 15, 2021).

KarmYog teaches us that doing good should be part of our life because our today's action has capacity to mold our future. Though law of destiny precedes the law of karma but our own destiny is determined by our own past karma. According to theory of KarmYog we get what we deserve and not what we desire. A conscious karma liberates the doer while an unaware karma binds us in the bondage to our karmic consequence[6].

KarmYog is an extension of Karma which teaches us to remain free from ego, attachment and expectation of reward.KarmYog creates a balance between the results of karma, like balance of pleasure or pain, sorrow or happiness and ease or discomfort. In the present day world when everything is governed from greed, materialistic gains and expectation as a natural and social being it is very important to understand the philosophy of KarmYog. It teaches us to become more inclusive, balanced and blissful.

In this21st century, which is though more modernized and scientifically advanced, but full of cut throat competition, stress and loneliness, philosophy of KarmYog becomes more relevant. In the present materialistic world, we expect much more than our efforts and what we deserve. This gapbetween deserve and desire is cause of depression and stress. Constant reaction towards stressful situations creates a chronic threat to our life, mental peace and wellbeing. Spirituality is the only way out in such circumstances and the only way to find bliss. If we analyze our life, then we realize that non-spiritual aspects dominate our life. The spiritual aspect has capacity to evolve our life but it is least prioritized. The solution to this is to spiritualize life itself i.e., to make spirituality a part of work or every day actions. It teaches us to control our mind and desires and thus regulates our behavior from being unwarranted by the social and moral norms, which is the most pertinent problem of the present day world. There is a strong linkage between spirituality and our karma. Spirituality keeps our karma pure and enhances positivity to the surroundings in which we live and work.

KarmYog in reality is the spiritual evolution of karma. Mahabharata which includes Bhagvad Gita is a great source of understanding the consequences of our karma and teaches us about the value of good karma for an individual and for the entire universe. It teaches us to maintain a balance between our thoughts and actions and thus between our mind and karma. Most of the time we are governed from our mind. Mind creates warranted and unwarranted desires. Unwarranted desires tend us to do something which is not ethical, moral or legal. So controlling mind is the most difficult but the most desired thing. The 6th Chapter of Bhagavad Gita says that even the great warrior Arjuna had difficulty in controlling his mind.

[6]*Available at:* https://www.holy-bhagavad-gita.org/chapter/3 (last visited on January 15, 2021).

Here, Lord Krishna suggests the path of KarmYog as a solution. For those who are starting the spiritual path, work is the best form of meditation. KarmYog is meditation with eyes open, i.e., in our very interaction with others and in our actions. Once the mind is under control or has become finer, the action form of meditation becomes more effective[7].

The most popular line related with KarmYog in Bhagavad Gita is, 'KarmanyeVadhikaraste', the starting line of chapter 2 verse 47 in the holy book. Bhagavad Gita is a tool that provides guidance and solutions to human life problems and helps widen the horizons of wisdom and get the courage to live with confidence in any part of the world[8].The core philosophy of Bhagvad Gita is the philosophy of Karma, which should be understood by everyone for attaining peace and contentment.

There are several commentaries on Bhagvad Gita. According to RamanujacharyaBhagvad Gita is Bhakti Yog or Emotional Management;[9] according to Shankar it is GyanYog;[10] according to Tilak it is KarmYog[11] and according to Arvindo it is a combination of all forms of Yog and hence it is SamagraYog and according to ParamhansYoganand it is DhyanYog.[12]Bhagwad Gita talks about the ways to achieve the purpose of life. It basically contains four types of Yog,[13]*viz.,***KarmYog, GyanYog, Bhakti Yog and DhyanYog.**Its interpretation depends upon the 'Bhaav (feelings)' through which it is communicated. Basically it is a dialogue between Buddhior Intellect (Krishna) and Mann or (Mind) (Arjuna)[14].

One of the key shloka of Bhagvad Gita is-

"कर्मणयेवाधिकारस्तेमांफलेषुकदाचन।मांकर्मफलहेतुर्भूः मांतेसंङगोस्त्वकर्मणि" ।।

KarmanyeVadhikaraste, Ma phaleshoukadachana, Ma Karma PhalaHeturBhurmateySangostvaAkarmani

(Bhagwat Gita: Chapter Two verse 47)

[7]*Available at:* https://www.holy-bhagavad-gita.org/chapter/6 (last visited on January 15, 2021).
[8]*Available at:* https://www.holy-bhagavad-gita.org/chapter/2/verse/47 (last visited on January 15, 2021).
[9]*Available at:* http://www.srimatham.com/uploads/5/5/4/9/5549439/ramanuja_gita_bhashya.pdf (last visited on January 25, 2021).
[10]*Available at:* https://integralyogamagazine.org/the-jnana-yoga-of-adi-shankara/ (last visited on January 25, 2021).
[11]*Available at:* https://en.krishnakosh.org/krishna/Gita_Rahasya_-Tilak (last visited on January 25, 2021).
[12] Essays on the Gita Paperback – 27 April 2001by Sri Aurobindo (Author) (last visited on January 25, 2021).
[13]*Available at:* https://isha.sadhguru.org/yoga/new-to-yoga/types-of-yoga/(last visited on January 30, 2021).
[14]*Available at:* http://geetadharma.org/swadharma-its-position-and-direction-part-1/(last visited on January 25, 2021).

"श्रीकृष्णभगवाननेअर्जुनसेकहा: आपकोअपनेनिर्धारितकर्तव्यकापालनकरनेकाअधिकारहै, लेकिनआपकभीकर्मफलकीइच्छासेकर्ममतकरो (कर्मफलदेनेकाअधिकारसिर्फईश्वरकोहै) ।कर्मफलकीअपेक्षासेआपकभीकर्ममतकरें, नहीआपकीकभीकर्मनकरनेमेंप्रवृर्तिहो (आपकीहमेशाकर्मकरनेमेंप्रवृर्तिहो) ।।" (Bhagwat Gita: Chapter Two verse 47)

Means-

"You have a right to perform your prescribed duty, but you are not entitled to the fruits of action. Never consider yourself to be the cause of the results of your activities, and never be attached to not doing your duty. - Bhagavad Gita, Chapter II, Verse 47"

Here below is detailed meaning of this verse:[15]

i. "***karmanyevadhikaraste:*** you have a right to work only
ii. **"ma phalesukadachana:** but have no right to the fruits thereof
iii. ***"ma karma-phala-heturbhur:*** let not the fruits be the motive of doing karmas
iv. ***"matesangostvakarmani:*** let yourself not be attached to inaction.

Thus according to Bhagvad Gita -Any person cannot live in "Akarm (actionless)" state, though it can be active or passive karma. We are free to decide our Karma. They may be good or they may be bad. But Karma is unavoidable according to lord Krishna.

It is common displeasure among the majority of human beings that despite of putting our all efforts we don't get the desired results any in many other cases with less effort others get much better results. Bhagvad Gita is the only text in the world which explains the reason of this disparity.

According to Lord Krishna there are five elements deciding every Karmphal or outcome of actions-

i. ***Adhishthan***- Place where karma is performed.
ii. ***Karta*** - means the doer of the work.
iii. ***Karnam*** **-** means the instrument through which the karma is done.
iv. ***Cheshta-*** means activities like desire, thought, faith or behavior.
v. ***Daiv*** -means collected karmphal of past birth.

[15]Chapter 2: Contents of the Gita Summarized, https://asitis.com/2/47.html (last visited on January 30, 2021).

Except the fifth factor rest four are in our control. So human beings have the capacity to control 80% result of their sincere effort. Rest 20% decided on the basis of actions of **PoorvJanam** (previous birth) and that cannot be changed though it can change the outcome of 80% efforts and thus makes the outcome ultimately beyond the control of the individual doer. As 'Daiv' has capacity to change the end result in our favour or otherwise we should focus only upon doing our karma ,without thinking about the fruits of our action.

What is KarmYog?

The word 'Karma' originated from the Sanskrit root 'Kru' which means 'Work' or 'Action'. Karma consists of action we perform consciously or unconsciously and result of that action. Action is a physical act, but whether our mind and soul is aligned with the same action? Without proper alignment of these three we cannot enjoy our work nor we can feel that ultimate bliss of our action which gives a divine feeling.

"YogahKarmasuKausalam[16]" ~ Bhagavad Gita 2.50

'Yog' is an art of getting perfection (kausalam) in every work (Karmasu) of life. This perfection comes in karma with the regular practice of devoting karma to others. It keeps a person free from ego and enhances his capacity. Hence, perfection in karma is considered as yog also. According to Lord Krishna the meaning of Karm-Yog is a combination of "Karma (action)" and "Yog (Union)". 'Yog' is the combination of balance and perfection. Perfection in action should be our effort but a balanced approach towards the success and failure should be our attitude. Failure is also the fruit of our effort so it should also be happily accepted. Every karma should be according to dharma and not according to desired consequences. A karm yogi sees no difference between 'karma' and 'prayer' and remains indifferent from the outcome of the action.

Balancing or Sthitiprajyata should be our attitude in all circumstances according to Bhagvad Gita.

"KarmYog is 'path of action', one among 4 paths of Yoga in spiritual practices of Sanatan Dharma. Other 3 paths in this series are[17]-

Bhakti Yog (Path of Devotion)

JnanaYog (Path of Knowledge)

[16] *Available at:* http://bhagavadgita.org.in/Chapters/2/50 (last visited on January 25, 2021).
[17] *Available at:* https://ramakrishna.org/fouryogas.html (last visited on January 30, 2021).

Raja Yog (Path of Discipline)".

Combination of all these Yog makes the action perfect. Performing karma in such a combination eliminates violence and ego from the seeker's heart and replaces it with love, joy and compassion[18]. Karma is not a mechanical process but it is an outcome of union of thought and action. When yog is added to Karma it becomes a practice of union with one's true self through 'action'. Every action which brings awareness about your true-self and your karma is KarmYog[19]. So KarmYog is all about making us conscious decision about our action and its consequences.

III. TYPES OF KARMYOG

As I have discussed above KarmYog and Karma are not synonyms of each other. Every karma is not KarmYog but types of KarmYog suggests that in how many ways karma affects us.

Depending upon intention Karma can be categorized as follows[20].

Sakam Karma or Action with Desire

Sakam Karma means doing something with the intention of getting some personal gain. It is an attitude in which a person develops a thought of 'mine' or 'your'. "Sakam" is a sanskrit word means "desire of someone behind his actions[21]". A person who acts with Sakam Karma believes

that if he is doing something he will get result of the same in return. Sakam Karma creates egoism, hatred, jealousy in a person's heart consciously or unconsciously. It creates restlessness or disappointment when the desired expectation remains unfilled. Sakam Karma is the basic problem of today's competitive world.KarmYog is not meant for Sakam karma. Yoga frees us from the bondage of karma while Sakam karma keeps us bound in the bondage of karmafal or fruits of our action.

Nishkam Karma or Action without Desire

[18] *Available at:* https://www.hinduamerican.org/wp-content/uploads/2020/03/UNDERSTANDING-HINDUISM_1OCT2014_2018update.pdf (last visited on February 5, 2021).
[19] What Is Karma Yoga: Its Principles, Types and Importance, *available at:* https://www.fitsri.com/yoga/karma-yoga#text=Karma (last visited on February 5, 2021).
[20] What Is Karma Yoga: Its Principles, Types and Importance, *available at:* https://www.fitsri.com/yoga/karma-yoga (last visited on February 5, 2021).
[21] *Available at:* https://www.yogapedia.com/definition/8906/sakam-karma (last visited on February 5, 2021).

The meaning of "Nishkam Karma" means "action without desire" and it is just the contrast of Sakam Karma. It is the central message and prominent theme of Bhagvad Gita[22].

'Nishkam' means selfless action which breaks the bondage of karma and makes us free from the cycle of birth and death. Nishkam karma is a kind of detachment from the consequences of the action and leads someone's soul upward towards divinity. It makes someone free from all sorts of liking, disliking or attachment and purifies the conscience[23]. Nishkam karma is the path of renunciation. This type of karma is rarely seen in the present day world.

Thus, it emphasizes that if our present actions are good, they are selfless and in the interest of all that can change the ill effects of impure past karma. It decodes the biggest philosophy of Karma that our present good decisions and deeds have capacity to change our destiny and this is the core of theory of KarmYog.

Importance of KarmYog

KarmYog is an art of balancing one's act and expectations. It dedicates someone only to his rightful karma. It is a way to follow the path of spirituality. Once selfless action purifies the mind and helps in attaining the supreme state where once remains unaffected from the outcome of actions. KarmYog helps in connecting us to divine energy. It increases dutifulness towards all other living and non-living beings and develops the wisdom of equanimity. It seeks excellence in action and considers work as an offering to higher-self. Ultimately KarmYog enhances the sensibility towards oneness.It develops a clarity of thought and removes all confusion. It develops a balancing attitude even in the most difficult times. It keeps align thoughts, words and actions. It removes all sorts of duality and unify the action with soul.

Whatever you do to others that comes back to you. KarmYog insists upon 100% , part performance which in turns gives an accomplishment to the doer. Such person never expects anything in return but prefers to do a selfless work. Such karmyogi's are more gentle, soft hearted and generous persons. Benefit of others is the biggest satisfaction for such persons. A karm yogi knows the art of balancing life. It readies a person to accept the result of his efforts happily even if it is a failure. Thus it helps in attaining a calmness of mind in all circumstances and develops a positive psychology.[24]KarmYog enhances the value of humanity and gives a feeling of bliss.

[22] *Available at:* https://vivekavani.com/nishkam-karma-bhagavad-gita/(last visited on February 5, 2021).
[23] *Available at:* https://www.ananda.org/yogapedia/nishkam-karma/(last visited on February 5, 2021).
[24] How to Practice Karma Yoga, Check Principles & Benefits of Karma Yoga, *available at:* https://theyogainstitute.org/karma-yoga-practice-principles-benefits/(Last visited on February 15, 2021).

Volunteerism is one of the most significant characteristic of KarmYog. The conscience of karm yogis is so evolved that they try to provide best possible solution to everyone into trouble. They don't wait for others to help the needy but take initiative to offer help. Since a karm yogi is already aware about the consequences of his actions, his deeds remain more inclined towards the moral and emotional aspects rather than being inclined more towards worldly things. This transformations in one's life can help in making this world a much better place to live for all[25].

IV. ROLE OF BHAGVAD GITA IN CREATING A BETTER WORLD- THE ART OF GIVING

Bharat was always a duty centric society whose core fundamental was sacrifices for others. Bharat was the longest survived civilization whose knowledge system was aligned with the nature. The fundamental rule of nature is 'Art of Giving'. Every living and nonliving entity of the universe is bound by certain set of karma. The process of life is going on over this earth from time immemorable just because of this natural philosophy of karma where sun, river, earth, mountain, plants everybody is performing their allotted duty or karma. Nature believes in sharing and caring and Bharat followed this same philosophy of caring and sharing of its prosperity and knowledge.

Since industrial revolution world has seen a sharp change where power was shifted from spiritual knowledge and prosperity to mechanical knowledge and wealth. Imperialism, heavy industrialization and consumerism are the key outcome of this developmental and knowledge model. We created a competitive world where countries, communities, societies and individuals are competing others to prove their superiority. This race is not for gaining knowledge and liberating ourselves but to bind in the web of power and wealth. That's why now the psyche of the society works on the concept of materialistic gain.

In this process to prove one's superiority over others countries and civilizations have been destroyed. Natural resources are sucked by human greed. We alienated ourselves from the nature and started controlling and exploiting natural resources. Now our karmas are governed by greed and this attitude is destroying humanity and nature.

Now most of us prefer to do a karma which gives some materialistic gain in exchange. Now people rarely prefer to owe responsibility unless it is imposed. So now karma is replaced

[25] The Path of Work – Karma Yoga, *available at:* https://vedanta.org/yoga-spiritual-practice/the-path-of-work-karma-yoga(Last visited on February 15, 2021).

from duty or it is only sakam karma. This thought is creating a deep sense of attachment from the expected outcome of our action and on being unfilled creating a deep sense of annoyance and dissatisfaction. Result of this throat cut competition is very much evident. Recent Corona virus is one such example. In such self-destructive atmosphere if something can save humanity that is- purity of karma and desire free karma.

Desired Karma at personal, social, national and international level are creating a disastrous result. At personal level unfilled and over desires are resulting into crime, at social level they are causing conflicts and among the states they are creating unhealthy competition. Exploitation of developing countries by the developed countries, rising tendency of expansionism of China, destruction of environment and natural resources and breaking families are the outcome of such selfish desires or sakam karma. Crimes against humanity are rising, people are migrating and trust in society is gradually diminishing. The revenge of nature in the form of rising natural calamity and disaster is the example of such karmic consequences.

Bhagvad Gita's KarmYog is the only philosophy in the world which has capacity to guide and save the world. KarmYog teaches us to adhere with our karma without neglecting and compromising our duties and responsibilities. Bring your spirituality and balanced approach to all your actions is the jest of KarmYog[26].

V. CONCLUSION

Thus, on the basis of above discussion it is clear that KarmYog is the real solution of all present day problems as it purifies our actions and develops a deep insight about the consequences of our actions. It considers moral behavior as a mandatory duty and collective solidarity as an essentiality of life. KarmYog teaches us to focus on present karma only and not to think about Sanchit, Prarabdh or Agami karma. According to Bhagvad Gita the purity of our current action can purify our past sins.Conversation between Lord Krishna and Arjuna in Chapter 3 of Bhagvad Gita reveals the importance of KarmYog in an ordinary person's life. It removes doubt of a normal human being experienced by him in his day to day life. In Mahabharata when Arjuna was hesitating to fight against his relatives, Krishna asked him to do his karma by participating in war. He preached Arjuna the importance of Karma according to Dharma and said that Karma is the key to freedom from the cycle of death and birth (salvation).

[26]Bhagavad Gita- Chapter 2 (Part-4) SaankhyaYogah- Yoga of Knowledge (last visited on February 25, 2021).

While expressing the importance of Karma Lord Krishna says a person cannot be a monk by giving up his responsibility of Karma. Only after purification from Karma a person can lead a life of Monk[27]. Krishna says in Bhagvad Gita that karma is a quality of active soul and Trigunas (Rajas, Tamas, Sattva) are the constituents of Soul. Thus all beings are bound to act according to the combination of triguna[28].

KarmYog helps us in developing a balance among triguna and develop a culture of caring and sharing. It teaches us- do good to get good. It evolves us to accept the existence of other and to respect them. Thus, it stops us from exploiting others and mother earth and leads us towards a model which is more inclusive and sustainable.

Thus, according to Bhagvad Gita karma is the essence of the Law of Universe and everyone should work toward this realization by recognizing it as a truth. KarmYog is the process of self-actualization and liberation. A karm yogi has capacity to liberate his soul from all illusions which are the cause of sufferings. Thus, KarmYog is the path of peace and contentment which unites the doer with the divine.

In the present day world where entire humanity and mother earth facing a deep crisis due to excessive greed, exploitative tendencies and over obsession of 'rights' ,Bhagvad Gita is the only effective way to show the right path to the humanity. High level of consciousness and collective action (karma) of living beings keeps the world going. So do your duty with detachment and learn to engage your minds in contemplation[29].

Ultimately, to restore values and humanity in the society and to revive the relevance of natural law, Bhagvad Gita should be the compulsory part of everyone's life.

[27] *Available at:* https://www.holy-bhagavad-gita.org/chapter/3.4 (last visited on February 25, 2021).
[28] *Available at:* https://www.holy-bhagavad-gita.org/chapter/3.5 (last visited on February 25, 2021).
[29] Bhagavad Gita: Chapter 2, Verse 47.

e-ISSN 2582-4570

EMPIRICALLY UNVEILING THE POLICY & IMPLEMENTATION OF PRIVACY AND DATA PROTECTION LAWS IN DIGITAL INDIA

Dr.Jayanta Ghosh Dr.Ashwini Siwal***

Abstract

The up-gradation of the traditional system to the digitized system has made the life of the individual easy—this change is leading an individual to a vulnerable situation where his privacy is at stake. Organizations use individuals' data for earning billions of dollars. Multinational companies are using the user's patterns, public posts, and personal information of individuals for business purpose. Organizations are influencing the individual in such a way that they are made to think that in future, there will be no term like privacy, and the entire world is an open community. Liberty of an individual is being intruded by technological interference. Personal data protection laws are the subject matter of intense global debate, triggered by the extraordinary development of Information Technology (IT). This debate is primarily triggered by way of advancement in the technological sector interfering in terms of societal demand for regulation. The use of the Internet in the modern-day lifestyle has become indispensable, and the use of the Internet is making life easier. However, it has become a natural source to collect personal information and easily hack the servers storing the user data. Many internet users are not adequately educated on do's and don'ts of the Internet, and they became the victim. As a developing country, India doesn't have specific laws on privacy and data protection. There are several judicial pronouncements by the Apex Court that recognized the right to privacy. This research would foray to suggest the policy & implementation on privacy and data protection laws in digital India.

I. INTRODUCTION

Liberty is an expression that is valued in a dignified human life.[1] It is a natural law idea and a desire for human civilization.[2] Views are divergent as to what is essential for human life. A moral human being is one who at his capacity can think, reason, choose, and value things.[3]

*Research Fellow, Centre for Regulatory Studies, Governance and Public Policy, West Bengal National University of Juridical Sciences, India.
**Assistant Professor in IP & IT Laws, Faculty of Law, University of Delhi, India

[1]Weiss, Charles. "The Coming Technology of Knowledge Discovery: A Final Blow to Privacy Protection." *University of Illinois Journal of Law, Technology & Policy,* 253 (2004).
[2]Rawls, John. *A theory of justice*. (Harvard university press, 2009).
[3]Fried, Charles. *Modern liberty: And the limits of government*. (WW Norton & Company, 2007).

Liberty, which covers a variety of rights, raised to the status of distinct fundamental rights and other related rights.[4]

In order to endorse liberty, it is essential to preserve and protect the privacy of an individual; hence, privacy has to be treated as a right.[5] To understand privacy as a right, it is necessary to look to its origins and growth. It is also established that in history, there lies a relation of privacy and development of technology signifying the prominence of technology over privacy. In modern days, privacyhas become more prone in computerized information society.[6] From the times immemorial surveillance has set its roots. The Fifth Amendment of the Constitution of America has given the emphasis on privacy as an unreasonable search and seizure. International instruments like Magna Carta, Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC), International Convention on the Protection of All Migrant Workers and Members of Their Families, The European Convention on Human Rights and the American Convention on Human Rights all these acknowledge privacy rights.[7] To greater importance, privacy as a right has been recognized in the Universal Declaration of Human Rights (UDHR). To preserve the dignity of the human being as human rights, the UDHR has played an important role. It has inspired the constitutionalizing of privacy in many countries after the fall of imperialism. Article 12 of the UDHR focuses on the importance of privacy. It conveys that a person shall not be arbitrarily interfered with his privacy at family, home, or correspondence and not to attack upon his honour and reputation. Therefore, it can be said that that privacy requires non-encroachment of body and property by others without authorization.[8] The contents of the right to privacy have widened in the multi-dimensional sphere over a period of time viz, bodily privacy, territorial privacy, communication privacy, and information privacy (Privacy and Human Rights Survey). Amongst these mentioned privacies, communication privacy and informational privacy are two essential types of privacies that are directly related to personal information or personal data.

The sharing of personal data is subject to the will of a person. As regards human rights, there is no objection to the sharing of data or the exchange of data. In fact, it is often positively

[4]Bhattacharjee, Anandamoy M. *Equality, Liberty & Property Under the Constitution of India*. (Eastern Law House, 1997).
[5]Ibid.
[6]Viswanathan, Aparna. *Cyber Law: Indian & International Perspectives on Key Topics Including Data Security, E-commerce, Cloud Computing and Cyber Crimes*. (LexisNexis ButterworthsWadhwa, 2012).
[7]Baker, Tyler. Roe and Paris: does privacy have a principle. 26, *Stanford Law Review,* 1161 (1973).
[8]Benn, S. I. *Respect for Persons in JR Pennock& JW Chapman*, eds., (NOMOS XIII, Privacy, 1971).

crucial for the sharing of personal data to fulfil the obligation of the State to take steps to safeguard such human rights such as rights to life, and it can, in theory, be justified by reasonable considerations of public interest.[9] The exchange of personal information, however, eventually poses questions regarding human rights. In view of the welfare state claim, the policy must show that all data collection plans are both fair and proportionate and that sufficient protections are in place to ensure that personal data are not arbitrarily released unless it is rational in the circumstances.

The reason being, in this contemporary society, various activities of human beings are taking place in the virtual world and technology have become an integral part of human life. However, the goodness of technology has also brought along ill effects by endangering informational privacy in this technology-driven world where individuals, communicate, transact, and interact with others using advanced technology.[10] Here sharing of information is essential, as it is done voluntarily. Therefore, an individual should agree to face the consequences of disclosure of information. In this context, a State requires to consider that its institutional framework must focus on both aspects, i.e. privacy and data protection of an individual, (whether data is shared voluntarily or involuntarily).

II. STATEMENT OF PROBLEM

India has witnessed a rapid expansion of the use of the Internet amongst the inhabitants. At the same time, the digital divide which refers to the gap between demographics and regions that have access to information and communications technology, and those that don't or have restricted access, is also a reality in India. Information communication technology has been viewed as a solution to many ills, particularly, 'governance', as indicated in the broad vision of Digital India. The role of technology in improving governance, such as to bring transparency, more convenient access to services, etc., has been in place since the late 80s in India. Technology is used for distribution of different services/amenities by the government to the beneficiaries. This technology connects the citizen and government virtually.[11]

Virtual technology has made a distinct reflection on the human lifestyle. However, the lifestyle has also been made susceptible to individual privacy and data protection. The

[9]Bygrave, Lee A. *Data privacy law: an international perspective*, 63 (Oxford: Oxford University Press, 2014).
[10]Bygrave, Lee A. Data protection pursuant to the right to privacy in human rights treaties.6, no. 3 *International Journal of Law and Information Technology* 247-284,(1998).
[11]Bostwick, Gary L. "A taxonomy of privacy: Repose, sanctuary, and intimate decision. 64 *California LawReview* 1447,(1976).

concern of privacy and data protection becomes more pertinent because of the demographic pattern of the country where more than seventy per cent of the population lives in rural areas having inadequate/limitation of knowledge about technological interventions for claiming entitlements from the government. As the technological intervention is made compulsory for the program, sharing of information and storage of the same is *fait accompli* for individuals.

The government of India proposes Governance and Services on Demand to connect the beneficiaries with the government through the virtual world. It involves "using the Internet as a means to deliver services and information… [Which] allows users to register for government services".[12] Dempsey points out that *"privacy cannot be an afterthought in the design of information systems"* and for that matter, needs e-government implementation. Fairweather and Rogerson advise, *"e-government should also offer a good level of data protection and security".*[13]Therefore, the 'Digital India Programme' must also give preference to the privacy of an individual. Anderson points out that *"countries seeking to promote e-government must protect the privacy of the information they collect"*.[14] This imposes the responsibility upon the State to protect the collected information of the individuals. And the efforts of the government to protect individual privacy and data is in question.

III. BACKGROUND

The protection of information has been a serious concern; in this regard, international organizations has been pioneer. Protection of privacy and respect for human rights is a part of the fundamentals provided under the UDHR. As the UDHR is an outcome of the United Nations Organization (UNO), the responsibility lies in all the member states of the UNO to ensure the implementation of the UDHR and observe that all citizens are enjoying their human rights, without distinction. Amongst the list of human rights, *'personal liberty'* is one of the oldest human rights which was found in the Magna Carta as '*Libertatum'* of 1215. In this regard, the UDHR reflects that privacy is an integral part of personal liberty and in no means a separate institution. Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 16(1) & Article 42(2) (vii) of the Convention on the Rights of the Child (CRC), and the Article 14 of International Convention on the Protection of All Migrant

[12]Chaffey, D., & Ellis-Chadwick, F. *Digital marketing*. (Pearson uk.2019).
[13]Fairweather, N. B., &Rogerson, S. Towards morally defensible e-government interactions with citizens. *Journal of Information, Communication and Ethics in Society*,(2006).
[14]Agyei-Bekoe, E., Empirical Investigation of the Role of Privacy and Data Protection in the Implementation of Electronic Government in Ghana,(2013).

Workers and Members of Their Families. At the regional level, the European Convention on Human Rights (Article 8(1)) protects the right to privacy and the American Convention on Human Rights (Article 11) provides legitimacy of the right to privacy.

In India, under Article 21 'personal liberty' is mentioned as a compendious term to include all the diversity of human rights other than those covered by Article 19(1).[15] While Article 19(1) covers specific species or rights attributes, personal liberty in Article 21 takes the residue in and consists of it. Expanding the contours of rights to 'Personal Liberty' and liberty, the apex court has held that privacy is an essential ingredient of liberty and freedom; hence, it enjoys the status of a fundamental right.[16] Informational privacy relates to the protection of data of an individual. Data or Information of specialized knowledge, facts, concepts including computer printouts magnetic or optical storage media, punched cards, punched tapes, etc. all of these comes under matters of informational privacy of an individual. The Constitution of India provides for the granting by the Supreme Court and High Courts of all rights therein to enforce fundamental rights or for other purposes, under Articles 32, 226, and 227. However, the availability of the writ for the enforcement of unenumerated rights or the right that falls short of clear enunciation through a judicial pronouncement is questionable. Now, there is a need to identify the position of the right to privacy on the landscape of enforceable rights and remedial measures available against the State in cases of violation.

In relation to privacy and data protection, the Information Technology (Amendment) Act 2008, have delineated some provisions. The preamble of the Act facilitates e-commerce *"which involves the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filings of documents with the Government agencies…"* Chapter III of the Act describes the electronics governance that dealt with legal recognition, retention of an electronic record, and digital signature, which has its limited applicability to procedural aspects. It also gives the power to make rules by the Central Government in respect of digital signature. The Act has limited applicability and fails to provide any legal mechanism about the sharing of information by an individual to the government for availing services or benefits under different schemes of *'Digital India*

[15]Singh, J. S. Expanding Horizons of Human Right to Education: Perspective on Indian and International Vision. *Journal of the Indian Law Institute*, *52*(1), 34-59.(2010).
[16]Rai, S. *Legal and Regulatory Issues of Privacy and Data Protection in e-Commerce: An Analytical Study* (Doctoral dissertation),(2020).

Programme' which is based on the horizontal relationship between the subject of the right holder and the duty-holder.

Considering that technological development, privacy and data protection are having a more significant impact on this digital age. The present-day scenario demands privacy and data protection to be read as a human right perspective. In this advancement of technological information era, the right to life and dignity of an individual requires a new dimension i.e. the least-intrusive role of the State. By the launch of the Digital India initiative, the government is preparing to make India a truly digital country by providing various e-government services across the different sectors through the cloud, connectivity, the Internet of Things, etc. With the implementation of the Digital India program, the privacy and data protection of an individual becomes a prominent concern.

IV. LEGAL SYSTEM OF INDIA AND DIGITAL INDIA

In accordance with Article 19(1) and Article 21, the Constitution of India is the bulwark of "democracy" and "liberty," which guarantees 'the right to freedom' and "personal rights.' Article 21's right to life was interpreted freely, in order to mean something more than mere survival, mere existence, or animal life. It includes, therefore, all those aspects of life which make the life of one man more meaningful, complete, and worthwhile. Privacy rights are 'the right to be alone.' A citizen has the right, among other things, to preserve his or her privacy, family, marriage, procreation, maternity, care for children, and education. The Supreme Court has held that the right to privacy is essential to the preservation of freedom.[17] Even though privacy and data protection have not been explicitly mentioned in any provision, 'privacy' as a right has evolved through various judicial pronouncements. In Article 21, personal liberty covers a variety of reasons and certain rights have fundamental rights and, in accordance with Article 19, additional protection. The right to expression limits the ambit of the private sphere of individuals, and therefore, there is a question of balancing two competing powers, i.e., speech and privacy. This right to privacy encompasses the protection of individual data or information; hence, arguably, both privacy and data protection are recognized as human rights.[18]

[17] *Gobind* v. *State of Madhya Pradesh and Anr*. (1975) 2 SCC 148.
[18] Sharma, S. *Data privacy and GDPR handbook*. (John Wiley & Sons.2019).

Considering the aspects as mentioned above, the recently announced initiative of the Government of India, the *'Digital India Programme'* needs to be examined against the touchstone of the legal regime on privacy and data protection. This program has been initiated as a policy of the government as of institutional arrangement for promises of better governance, inclusive growth, job opportunities, and quality of life to the citizen of this country through the intervention of Information Communication Technology (ICT). Three broad visions have been encapsulated under this program. One of the visions is 'Governance and Services on Demand' which targets seamless integration across departments or jurisdictions, services available in real-time from online and mobile platform, all citizens'entitlementsare to be made available on the cloud, services digitally transformed for improving ease of doing business, making financial transactions electronic and cashless, leveraging Geographical Information Services (GIS) for decision support systems. The targets envisaged under the vision will have a revolutionary impact on the governance of the country. The success of the program depends upon participation from an individual, particularly from marginalized and downtrodden sections of society for whom governance matters the most. To avail the benefits targeted in the program, every intended beneficiary needs to submit personal information with the agencies/authorities designated thereof. For full-fledged participation and involvement, individuals who are parting with the information need to be assured about the protection of data and effective remedial mechanism in case of infringement of his right.

The absence of clarity on the right to privacy and data protection on the landscape of human rightsraises serious apprehension about the exercise of power by the government in relation to the collection and usage of data. Therefore, it is pertinent to examine the position of privacy and data protection in the gamut of the right to personal liberty and the right to freedom guaranteed under the Constitution of India. In this regard, the study will be undertaken with the reference of the Digital India program of the Government of India as it is based on the collection of personal information and the concern of the informant about the security and safety of the collected information.

V. OBJECTIVES

With the justification of the problem statement, few objectives are framed, these are:

a. To identify and examine the position of privacy and data protection as a human right from the Indian perspective.

b. To analyze the importance/impact of privacy and data protection in the accomplishment of the Digital India Programme (DIP).

c. To suggest a suitable policy & implementation framework for the protection of privacy and personal data.

VI. METHODOLOGY

In order to attain the research objectives, the researchers have adopted both doctrinal and non-doctrinal methodology. For the purpose of the doctrinal study, an inquiry into the constitutional provisions, legal rules, principles, and doctrines governing the privacy issues are undertaken to ascertain their relationships with informational privacy, i.e., data protection as a human right. The analytical method is employed to critically assess the statutory provisions, judicial pronouncements, policies, and doctrines relating to privacy and data protection laws. It has helped the researcher to identify the gaps and to structure a new legal paradigm on the subject matter. The researcher has also traced the evolutionary process that led to the origin of privacy and data protection laws. The researcher has found that this is helpful to discover crucial clues as to why the protection of personal information of individuals needs to be addressed as a paramount legal concern in this technologically advanced age and also to understand the need for the right-based exposition.

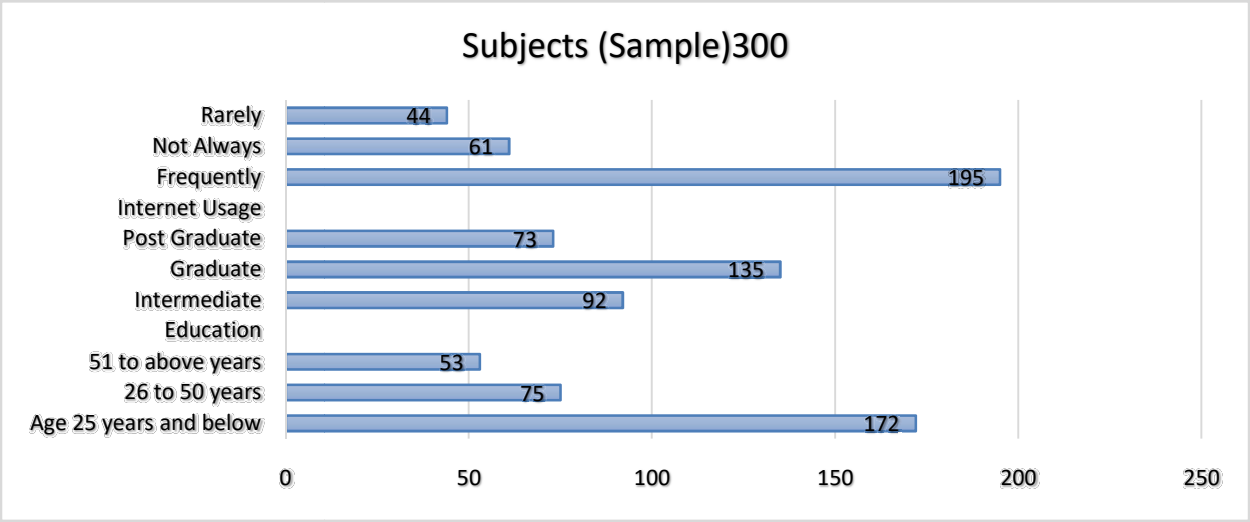
The researchers have conducted an empirical study, which ensured the validity and the authenticity of the emerging issues of privacy and data protection laws on the Digital India Programme. A structured questionnaire was framed according to the research objectives. The qualitative analysis is performed on the questionnaire-based survey. This survey is done with different stakeholders. Interview methods are used for data collection. These methods are chosen because of the direct access, one-to-one interaction with the stakeholders. It has facilitated an in-depth understanding of the Digital India Programme implementation process and privacy and data protection issues within it.

VII. SAMPLE

The samples do not show statistically representative of any particular community or technology users. Chart 1 summarizes the demographic information of the subjects. Subjects were statistically similar with respect to the usage of the Internet. Subjects were mostly general public, college-educated, and experienced Internet users. Therefore, it need not rule out the possibility that some of the differences observed among the subjects may be attributed to differences in gender, age, internet user, or education.

There are three broad groups categorized based on age, education, and internet usage. Further, each category is divided into groups based on different factors. In the age category, the samples are divided into three groups based on age. In the education category, the samples are divided into three groups based on educational qualifications. Lastly, in the internet usage category, the samples are divided into three groups based on the regularity of use of the Internet.

Chart 1.



VIII. INTERVIEW

The interviews conducted through one-on-one open-ended questions to gain insights into people's views regarding privacy and data protection. The interviews were conducted within India. The subject's sample was distinguished by their age, education, gender, internet user. Selected subjects were segregated into three categories with their age difference who were between below 25 years, 26 to 50, and above 50 years old. The interview made a total of 300 subjects, recorded their interviews, and produced in the form of text transcripts. This interview focused on the rights perspective of privacy and data protection.

This interview questionnaire was designed to analyze the right approach to privacy, data protection, and digital India. And, also on awareness and concerns about privacy for individual personal information, especially related to privacy, data protection, and digital India. Open-ended questions covered the following attributes:

1. General understanding and concerns about privacy and data protection.
2. Sharing personal information- consent aspect
3. Relief level of public sharing of information – different types of data
4. Awareness of Laws and Policies and the need for privacy and data protection laws.
5. Trust on government or agency authorized to collect information
6. Concerns about identity sharing with the government by Digital India Programme.

IX. SURVEY RESULT AND ANALYSIS

The empirical analysis is being done on the privacy and data protection and Digital India program. This research analysis helped to provide policy suggestions for India. In order to have accurate empirical analysis, the sample set is carefully collected by taking people from all sections of life and profession. The sample responses are collected and analyzed impartially. Conducting empirical analysis of the collected sample responses, this analysis shows the emphasis given by individuals to protect their privacy and personal data. The importance of privacy /data protection and digitization of India are interlinked among the six-notions set by the researcher to conduct a precise vibrant study. All six notions have their significance to identify the very basis of the conclusiveness of the study.

The interviews with samples/subjects are done in India. Interview methodology is loosely based on the mental model methods that are used in creating value communications. Likert scale is followed for the preparation of the questionnaire.

IX.I DIFFERENT ATTRIBUTE ANALYSIS

The analysis of the right based approach is carried out in six different segments in this. These are discussed as follows:

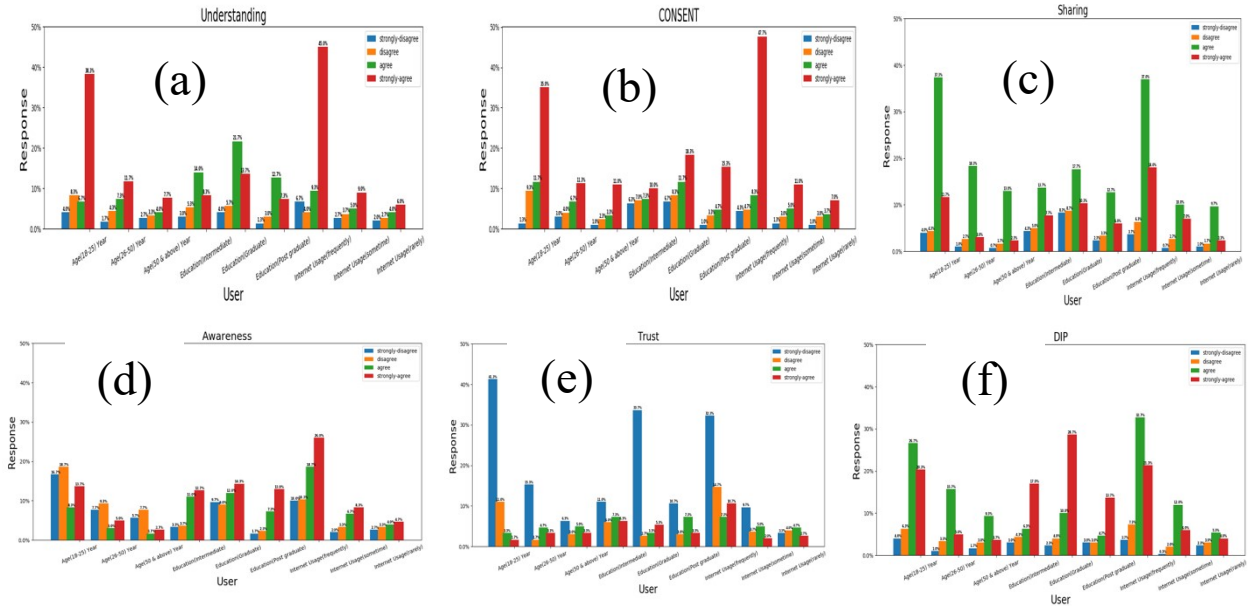


Fig.1

General Understanding and Concerns about Privacy and Data Protection {Fig 1(a)}.

The general understanding and concern about the privacy and data protection of an individual are inclined towards the security of information. So, with the responses of the sample according to the questionnaire, which is shown below in Graph (understanding), the samples across all the age groups have strongly agreed to protect privacy and data protection. In the age group, the first category (age 18 to 25 years) are more acquainted with the understanding of privacy as per the response collected. The reason behind that this category is equipped with the knowledge of technology and the loopholes therein. The samples across all the education categories have agreed to the protection of privacy and personal data. The graduate and post-graduate groups understand the nuances of privacy due to educational qualifications.Samples across all the internet user's categories have also strongly consented for the same. The percentage of the analysis is more aligned to strongly agree that they are concerned for the privacy and data protection.

Sharing Personal Information- Consent Aspect {Fig. 1(b)}

Consent for data sharing of information for a specific purpose is highlighted in this analysis. Here, the respondents have been asked to give views on giving consent to share the data for a pre-defined target, and the collected data should not be used for other purposes. The analysis appears to be divergent based on the concern of the people belonging to a particular age group. Different categories have expressed their view to get consent for every data collection and use of their personal information. In the age group, the first category (age 18 to 25 years) is more concerned about this than the third category (age 50 and above years). Older people do not keep themselves abreast of the latest technology. Thus, they are least concerned about the sharing of information for other purposes. But in the second group, all the three categories have significantly endorsed that there should be consent before sharing the information for a different purpose. In the third group, frequent users of the Internet have stressed consent before using the data for other purposes. The third internet usage group had strongly expressed positive response for the consent aspects by the frequent users. At the same, all three groups have heartily agreed with the consent aspect. Hence, all categories have more or less strongly agreed that the user consent issues should be taken and considered before sharing their data.

Relief Level of Public Sharing of Information – Different Types of Data {Fig 1.(c)}

The comfort level of the samples for sharing information publicly depends on various factors. The factors may be the use of different modern technology and taking benefit out of that. Indeed, the benefit of interest is the primary concern for the individual for making public his/her personal information. Personal information may be the factor to grow his business, peer group popularity, and respect/dignity of the individual. With the analysis of these factors, it is found that all groups' categories are in agreeable disposition. For example, the first age group of 18 to 25 years wants to become more famous by sharing their achievements in public, but the third category of age 51 and above are not interested in doing the same. In the internet usage group, frequent internet users are ready to share their information to some extent to the public as they know the consequences. But in the same group, the sometime-users of the Internet are pretty reluctant about this sharing. This analysis brings in a point that the people will accept the public sharing of information. It will further get strengthened by a promising legal regime which aims at the protection of data. Such a statutory scheme will build the confidence of the people in the system and will facilitate the government to employ technology for better governance for quality of life.

Awareness of Laws and Policies and Need for Privacy and Data Protection Laws {Fig. 1(d)}.

In terms of awareness level of the laws and policies on privacy and data protection, the responses are different in every category. By analysis of age group, the first category (18 to 25 years' age) and second category (26 to 50 years' age) have some knowledge of the laws and policies. In terms of education level group, the responses are inclined towards strongly agree. The graduate category of the respondent is more accustomed to the laws and policies. It is endorsed that the samples of post-graduation degree are better acquainted with privacy laws and policies. The same is also reflected in the response of frequent internet users, they are familiar with the laws and policies. Even the samples who rarely use the Internet are concerned about their personal information and privacy. The analysis conveys the trust of people on the law and legal system and reiterates the requirement of a specific law on data protection.

Trust on Government or Agency Authorize to Collect Information {Fig.1(e)}

The word 'trust' can be termed as here confidence to share something; it is only applied for privacy and data protection. By referring to the responses of the age groups, the first category (18 to 25 years of age) respondents have expressed the trust in negation. The second category (26 to 50 years of age) respondent has a similar viewpoint, but some of the respondents have some faith in government in specific issues like national security. And the third category (51 years and above) responses are more or less the same in relation to trust. The reaction of the samples on the education category also communicates the least reliance on the government agency. The category of internet usage indicated strong reservations to accept the fact that the government could protect the information. The sample responses are systematically analyzed to depict the fact that samples are not ready to keep their complete trust in government. This analysis is a telling one. It communicates that the enactment of law may change the perception of the people.

Concerns about Identity Sharing with Government by Digital India Programme {Fig. 1(f)}.

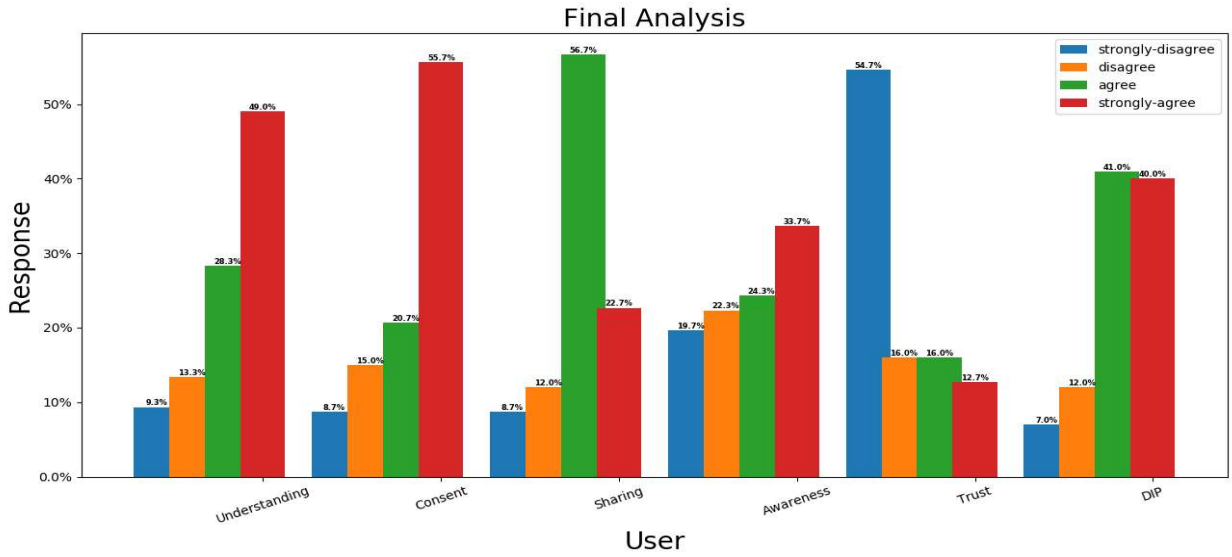
Ambiguity related to the protection of privacy and information in the Digital India Programme has created more confusion than clarity. Respondents of the sample survey also

spoke about this fact. Indeed, the concerns arose with the sharing of personal information with the government for getting the benefit of different social schemes. Sample responses analyzed so far, the first age group (18 to 25 years of age) have expressed their interest to hold and share personal information. The second category (26 to 50 years of age groups) is agreed on the sharing of personal information to get the benefits. To get the benefit out of schemes, individuals are sharing the information with the governments. The samples have expressed apprehension about the treatment of collected information by the government after completion of the welfare scheme. Will they still be used by the government or to be shared with the third-party agency? In the education category, the samples have indicated disapproval in identity sharing with the government under Digital India Programme. Every educational institution has made it mandatory to share the Aadhaar information for necessary identity purposes. This Aadhaar is the fundamental parameter to recognize and identify a persons' eligibility to benefit from any scheme provided by the government. The internet users' category also showed their reservation to share personal information.

Final Analysis

With the analysis of the six factors/notions (above fig.1), it is found that people are more inclined towards the protection of personal data. The acceptability towards the right to privacy as a fundamental right will make the State liable and will make it obligated towards privacy and personal data. The people are increasingly becoming aware of informational privacy with the adoption of technology in day-to-day life. Around 50 % of the respondents have exhibited their understanding of this issue. On the sharing of personal information, it must not be available to other organizations without any regulation or restrictions. Out of the total 55.67, percent of the respondent are strongly agreed for the consent clause to be added in sharing agreement. With the comfort level of public sharing, 56.67 percent of responses have clearly shown that the information available in the public domain must be guided by the principle of fairness so that the purpose of collection and usage should match. Any sharing of the collected information needs to be conditional, based on the public good. The ratio of awareness of the knowledge of laws and regulation is relatively average by 19.67 percent, 22.33 percent, 24.33 percent, and 33.67 percent across all the categories. With that response, it can be figured out that the awareness level is required to increase as the technology demands. In relation to the trust of the government agencies or organizations, the sample response is varying from each other. There are few concerns reflected by the sample

responses like organizational, technical security measures, and privacy policy. For that, the 54.67 percent responses are strongly disagreed on the trust factor/notion. About the Digital India Programme of the government, the sample responses are relatively similar as per the percentage of responses, and the trust to share the information is marginally equal on both the category. One aspect is that those who are willing to take advantage of the scheme they have to share the information. And the other segment is that who are not taking the advantage they are not interested in sharing their information.



X. CRITICAL ANALYSIS OF DIGITAL INDIA PROGRAMME (DIP)

Digital India is an initiative to build digital infrastructure and provide Internet access and online services to every citizen along with digital literacy to empower them to utilize the digital services effectively and avail all the government benefits efficiently. But due to gaps in its structure and services its effectiveness and thus it's enormous potential are diluted and could bring adverse effects to the security of the entire digital data in India. As an essential means of storing key documents such as Voter ID Card, Pan Card, BPT Card, Driving License, educational certificates, etc. in the cloud was introduced by Digi-Locker, for instance. This service would be provided to the citizens who are Aadhaar cardholders. The government of India would maintain the central repository for this service. Hence, personal information should be in the custody of the state actor. A state player may legally or illegally utilize this information at any point of time as necessary.

XI. EFFECT OF PRIVACY AND DATA PROTECTION ON DIGITAL INDIA

There is some futuristic effect of privacy and data protection on Digital India, and these are as follows:

1. The massive database of personal information is stored in public domains with protective firewalls around it. This will enable faster access to the authenticated user but at the same give opportunity to the hacker to steal information.

2. Personal information of the individual is stored in the public domain, because of that, the market structure of the State can be presumed. The future analytic decision for the development, needs, and the possibility of the human being can be shaped positively or negatively.

3. The privacy of the human being may not be in the hands of the individual. In the future, the individual may not be able to create any barriers to protect his/her privacy.

4. In future, the human can be categorized into two categories, one who wants to protect his private life but will not be able to preserve and other who don't even care about their personal private life.

5. With the technological up-gradation, the different new schemes of Digital India may require the up-gradation or forming of a new policy framework as the older versions may not be able to protect the personal information.

6. The third-party implication to collect, process, and disclose of personal information has made human being vulnerable. Countless organizations maintain records about us. They store documents and photos with cloud service providers. Credit card companies keep detailed records of our purchases. Our location information is available to telecommunications companies. Our Web surfing activity is in the hands of ISPs. Merchants such as Flipkart, Amazon have records about our purchases of books and movies and other things. Surprisingly, human beings are not able to understand the importance of this data, if this information falls into the hands of a third party may cause adverse effects to the individual.

7. This is a significant concern in which even the developed economies struggle to prevent. India being vulnerable to cyber-attacks, how the government is going to avoid these kinds of attacks were the stakeholders and people's concern. The whole

measures against cyber-attacks lie in spreading awareness among the people on how to use the Internet and personal data. The government must prevent its sensitive data from cyber-terrorism by using to latest technologies.

XII. CONCLUSION AND SUGGESTION

Privacy is a culturally sophisticated problem in our society, continually developing with time. It continually evolves with the changing state practices and judicial trends. Indeed, the concept of privacy is conflict-ridden, and thus, it keeps on perplexing the minds of the scholars who try to define it with precision. It is a fact that the centuries of cultural turmoil have made Indians more privacy-conscious than other western societies and to a certain extent conservative. Thus, in India, the legislature has the responsibility to consider our societal structure before framing any privacy laws. Additionally, a comprehensive legal framework on privacy law will contribute to raising the confidence of the people for whom the government designs the welfare program.

In this context, needless to mention that the personal data or information is very sensitive and important. But unscrupulous public and private players of our society are always playing around with our personal information. The sharing of personal information of an individual makes him particularly vulnerable in the society because the privacy breach and openly sharing of information will likely to put him in a 'Zero Privacy Zone'. Similarly, state surveillance and search in the personal property of an individual is a breach of the civil rights of that individual, as his right to privacy cannot be trampled by arbitrary and unreasonable state action.

For the comprehensive goal of privacy protection, it is required to maintain the balance between the sharing and respecting the importance of data privacy, which in turn can be ensured by forming proper data usage regulations within the organizational set up (public or private). Also, the idea of concurrent sharing and protecting data can only be possible when the data protection laws are followed rigidly based on the accepted principles. Also, the government needs to tap the benefit of technology for better implementation of the welfare program due to the large and diversified population with asymmetrical economic growth.

So far, the Indian judiciary has interpreted Article 21 to include the right to privacy. The analysis of the judicial approach reveals that every Indian citizen has a right to make his own

decisions. Thus, it can be said that the autonomy and dignity of the individual are the salient features of the right to privacy. True, that the people can claim and exercise their rights in the court of law. But the remedy may still elude them if such claims demand judicial action beyond the permissible limit set by the Constitution. Judiciary must conform to the constitutional mandate in interpreting certain key principles of privacy law: as the principles of privacy always support or protect individual autonomy and dignity.

XIII. FUTURE PERSPECTIVE

Today, every organization is maintaining personal records in such a way that any individual can be distinctly recognized. Similarly, the sensitive information embedded in the judicial documents should be protected in such a way that an individual does not face adverse social consequences. It is suggested that the need for data protection cannot be varied according to the position of the institutions of the country. Because the core component of a right cannot be given differential interpretation. The same protection may be accorded to both private and public domains. Advancement of technology also poses significant challenges as new sources are constantly being identified, and fresh methods of data collection are being introduced. Because of this, the experts throughout the world are required to be on their toes to tackle delicate issues emanating from those processes of advancements.

e-ISSN 2582-4570

EMERGING TECHNOLOGIES AND LAWS TO UPLIFT RIGHT TO PRIVACY

Dr. Narender Kumar Bishnoi[*] *Arvind Singh Kushwaha*[**]

Abstract

The issue of privacy is one of the rising legal concerns which requires an extra layer of protection of laws to encounter the ongoing technological changes which is affecting the individual's information including data. The misuse of technology in the administering of information presents crucial concerns most about the right to privacy. Recent application of Pegasus spyware raised the concern bar further as to how much protection can be granted as part of fundamental right. There is an extreme demand of practical regulations in the management of these challenges which must be formulated expeditiously corresponding to the set principles of freedom, liberty and human rights. The author in this paper have followed the foundations of privacy, through different international and national legal frame work along with areas recognising protection as privacy under Article 21 of the Indian Constitution. The paper essentially centres around the law of technological advancement of this right as a Fundamental right. The idea of security of such protection as data is the greatest possible level of requirement in this instinctively progressing time of today's world.

I. INTRODUCTION

The aspect of human rights remains one of the utmost concerns at every historical instance of time. These anthropological rights are of inherent nature which are available to every human being, irrespective of their race, sex, caste, religion, nationality, culture, dialectal etc. From time to time, these rights had been widened to include eachrelated viewpoint. The horizon of these rights is extended to inclusion of the right to human dignity, life, liberty, right to work, education, freedom from slavery and torture, freedom of opinion and expression, and countless additional civil liberties.[1]Human rights are universal, inalienable, interrelated, interdependent and indivisible in nature[2] which are intended to accomplish economic, social

[*] Assistant Professor of Law, Campus Law Centre, University of Delhi
[**] Ph.D. (Law) Scholar, University of Delhi

[1]UN Global Issues | Human Rights. Available at: https://www.un.org/en/global-issues/human-rights(last visited on Dec 09, 2021).

[2]UN Human Rights Office of the High Commissioner | Human Rights Indicators – A Guide to Measurement and Implementation. Available at: https://www.ohchr.org/documents/publications/human_rights_indicators_en.pdf(last visited on Dec 09, 2021).

and cultural rights.[3]Every person is entitled to these rights without any form of prejudice. Several occurrences can be indeed brought herein throughout the history to show the concern.

One of such fragments of human rights is the Right to privacy which brought utterly a challenging view by inclusion of it as a fundamental right. The privacy is linked with information secrecy, bodily discretion, communication space and territorial seclusionof any person. Yet, the right to privacy likewise other rights requires compatibility to legal and institutional standards related to ethics, law and human rights.The continuous rise of threats to privacy at many events such as at globalization, convergence and transmission of data over internet showed the necessity of identifying it as a basic right which must be accessible to all, and this issue is now at larger focus than at any point of time.[4]The importance of recognition of such rights are specially required contemplating the use of identity and private information in cyberworld. The present efforts might not be longer suitable to guard privacy principle, in chunk because "*big data enables new, non-obvious, unexpectedly powerful uses of data*".[5]

The rights related to privacy are not isolate in nature rather it had links with other social and economic factors, as these rights ensure: -

a. Protection against unauthorized spying
b. Protection against giving out and misuse of personal data and information
c. Protection against freedom of speech and expression
d. Protection against rights related to reputations
e. Boundaries over social media and internet-based platforms

[3] Human Rights Committee general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant and Committee on Economic, Social and Cultural Rights general comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para.1). Available at: https://digitallibrary.un.org/record/533996?ln=en (last visited on Dec 09, 2021).

[4]Simon Davies "*Re-engineering the right to privacy: how privacy has been transformed from a right to a commodity*", in Agre and Rotenberg (ed) "*Technology and Privacy: the new landscape*", MIT Press, 1997 p.143.

[5]Executive Office of the President of the United States, "*Big Data: Seizing Opportunities, Preserving Values*", May 2014 available at: www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf, p. 54 (last visited on Dec 09, 2021).

II. INTERNATIONAL FRAMEWORK

The 1948 UDHR[6] through Article 12 documented the modern privacy laws benchmark at international level by covering territorial, honour, and reputation privacy primarily. After its inclusion in UDHR, outlines of such right were also found in numerous later international frameworks. The ICCPR 1967[7] convention set out the privacy right under Article 17[8] by giving importance to principle of data collection whereby the collection of such data shall ensure no abuse of sensitive data. This trend was further continued by UN Convention on migrant workers (Article 14)[9] and UN Convention on Protection of the Child (Article 16)[10] which adopted similar set of words. The American Convent on Human Rights under Article 11[11]also sets the privacy rights in the same manner as UDHR. The General Comment No. 16 by Human Rights Committee (1988)[12] focused upon regulation of privacy rights by law. This general comment incorporated the collection, holding and assembling of personal and private information available on computers, servers, and other devices. It was also recommended that the states shall safeguard the personal information of individual to extent that it doesn't ends up in the hands of wrong user or unauthorised person and such safeguard shall be ensured through legal modes. Furthermore, every concerned individual shall be able to control his/her personal data.

[6]UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited on Dec 09, 2021).

[7]UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited on Dec 09, 2021).

[8] Article 17. 1. No one shall be subjected to *arbitrary or unlawful interference* with his *privacy*, family, home or correspondence, nor to unlawful attacks on his *honour and reputation*. 2. Everyone has the right to the protection of the law *against such interference or attacks*.

[9]Article 14. No migrant worker or member of his or her family shall be subjected to *arbitrary or unlawful interference* with *his or her privacy*, family, home, correspondence or other communications, or to unlawful attacks on his or her *honour and reputation*. Each migrant worker and member of his or her family shall have the right to the protection of the law *against such interference or attacks*.

[10]Article 16. 1. No child shall be subjected to *arbitrary or unlawful interference* with *his or her privacy,* family, home or correspondence, nor to unlawful attacks on his or her *honour and reputation*. 2. The child has the right to the protection of the law *against such interference or attacks*.

[11]Article 11. Right To Privacy. 1. Everyone has the right to have his *honor respected* and his *dignityrecognized*. 2. No one may be the object of *arbitrary or abusive interference* with his *private* life, his family, his home, or his correspondence, or of unlawful *attacks on his honor or reputation*. 3. Everyone has the right to the protection of the law *against such interference or attacks*.

[12]General Comment No. 16 by Human Rights Committee. Available at: http://ccprcentre.org/page/view/general_comments/27798 (last visited on Dec 09, 2021).

The issue of privacy in digital age was elaborated by UN OHCHR through resolution 68\167 adopted by General Assembly.[13] The submitted report by Human Rights Council in 69th session (2014)gave perspective of the privacy rights in circumstance of internal and international observation and interference of communication and personal digital data on high level. The report also stated that the even non-state assemblies are progressing towardhigh tech surveillance proficiencies which continuously threatens the individual liberty and privacy. OECD Council (1980, updated later in 2013) under chairmanship of Justice MD Kirby also recommended fortification of privacy and trans-border surge of personal data.[14]The recommendations also included list of principles to be maintained as basic principles of national application. Moreover, there is required international cooperation for observances of principles set forth.

On regional level, both the European Commission of Human Rights and the European Court of Human Rights are exclusively enthusiastic in enforcement of right to privacy and had constantly worked toward the expansion of the idea. In the case of *X v. Iceland*[15], the ECHR stated that the private life doesn't end to individual only instead it extends to "*the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality*." The execution of General Data Protection Regulation (2018) delivered significant safeguard of data protection and privacy in the European Union regional zone. Additionally, the enforcement of Federal Data Protection Act, 1977 among European countries provides further protection to data. At present, Germany continues as one of the strictest countries to have laws related to privacy.

III. RIGHT TO PRIVACY IN INDIAN LEGAL FRAMEWORK

Neither the constitution of India nor any other Indian laws specifically mention the right to privacy though protections were given to individuals to respect the individual liberty under Article 21 and other laws. Likewise other rights associated with Article 21, this right was also extracted out of the bare words of Article 21 as intrinsic part. However, this right is also

[13]UN General Assembly | Resolution No. 68/167. The Right to Privacy in Digital Age. Available at: https://undocs.org/A/RES/68/167 (last visited on Dec 09, 2021).
[14]OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Available at: https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm (last visited on Dec 09, 2021).
[15]5 Eur Commin HR 86.87 (1976)

subject to few restrictions under the head 'procedure established by law'. The journey of recognition of this right can be observed through respective case laws:

1. *M.P. Sharmav. Satish Chandra*[16]: In 1950s, right to Privacy was claimed by the petitioner based on the Fourth American Constitutional Amendment against the principle of Self-incrimination under Article 20(3). However, the Hon'ble Supreme Court denied the protection under Article 20 as it might defeat the statutory provisions for searches and there is no legitimate obligation to follow the American constitution.
2. *Kharak Singh* v. *State of Uttar Pradesh*[17]*:* In the presentcase, though the Court relied on the United States judgment based on right to privacy, this judgment took a different approach by referring Article 21. The Hon'ble Supreme Court observed that the Indian Constitution doesn't guarantee right to privacy and an attempt to ascertain the movements of an individual by authorized agency is not an infringement of fundamental rights which are provided under the Part III of the Constitution.
3. *Gobind* v. *State of Madhya Pradesh*[18]*:* It was observed by Hon'ble Supreme Court that the issue related to privacy is an emanation of personal liberty, but it can be absolute in nature and a broad connotation of privacy will advancesignificant issues about the modesty of judicial dependence on a right which is not explicitly guaranteed under the Constitution.
4. *Justice K.S. Puttuswamy* v. *Union of India*[19]*:* It was decided by nine-judge bench of the Apex Court whereby it was held that right to privacy is sheltered as fundamental rights underneath Article 21 of the Indian Constitution. This landmark judgement introduced ramifications throughout both State and non-State actors and this judgement resulted into passing of a comprehensive laws and policies on privacy.

To keep pace with the ongoing developments, laws are required to be developed accordingly. This rule of interpretation is timeless and applies to almost every new emerging law which provide protection to the concerned individuals. The issue of privacy is not left untouched by this principle. Throughout time we came across to develop it as part of fundamental right, yet there is continuous need to protect this right considering ongoing changes in day-to-day world. When this issue was firstly raised in *MP Sharma*(1954) case, issue of privacy was concerned with self-incrimination principle. In the subsequent case of *Kharak Singh*(1964), it

[16] 1954 SCR 1077.
[17] 1964 SCR (1) 332.
[18] 1975 SCR (3) 946.
[19] (2017) 10 SCC 1: AIR 2017 SC 4161.

was associated with Article 21 as part of individual liberty. In the case of *Gobind Singh* (1975), the Supreme Court took a narrower approach by recognizing the right to privacy, yet they didn't declare it as fundamental right. However, the landmark case of *Puttuswamy* (2017), also commonly referred as Aadhar Judgement, expressly referred privacy right as a part of important rights under the Constitution. In furtherance to it, the case judgment also bound the state and non-state actors.

Apart from the Constitution, this trend can also be observed in other Indian laws. The Information Technology Act, 2000[20] along with the Indian Penal Code, 1860[21] and the Code of Criminal Procedure, 1973[22] protected the privacy of an individual from others by prescribing punishment. The IT Act of 2000 was significant introduction of new provisions against cybercrimes committed in cyberspace. The trend can be seen by introduction of these enactments in three different years covering almost a gap of 140 years, yet these laws are pioneering in nature which are being enjoyed till now. Additionally, time to time amendments in the provisions of these enactments keeps them updated to challenge new issues. For eg. The IT Amendment of 2008 and later introduction of Intermediaries guidelines and Interception in 2008, 2011, 2018 and 2021. However, these laws were primarily dealing with the relations between two individuals or one individual with an agency, but it doesn't cover the relations between an individual and government. The latter matter was covered under the constitution after the Aadhar Judgement. The introduction of privacy right as fundamental right laid an extra layer of protection against the government.

As there was shift of identity on the internet and other media platforms over period, the laws were required to keep pace with the technology. The communication surveillance is primarily covered under the Telegraph Act, 1855[23] (with respect to interception of calls) and Information Technology, 2000 (with respect to interception of electronic data). The telegraph Act even though of 1855 contains the basic required principles and mechanism required to protect interest of "public safety". The surveillance over telephone calls played an important role to eliminate the conspiracy affecting public interest at initial stage. This scenario was not covered under traditional laws and the communication over telephones showed a loophole. However, within a short span of time, the law covered the gap and became even stronger. Rule 419A was introduced in the Telegraph Rules, 2007 which enhanced the procedural

[20] Act No. 21 of 2000.
[21] Act No. 45 of 1860.
[22] Act No. 2 of 1974.
[23] Act No. 13 of 1885.

safeguards and laid down guidelines for interceptions. A similar legislative intent is represented under Section 69 of the IT Act[24] whereby it provides for interference, monitoring and decryption of digital data and information in public interest including sovereignty, integrity, defence and security of India, State and friendly nations, public order etc. This trending aspect can also be observed not only in criminal laws but also in civil laws whereby law recognized the communication and transmission of data over such connections. For e.g. Recipient rule, performance of online agreements, purchase and selling via shopping websites etc.

The issue of Data Protection is a new character of the privacy right in the virtual-world or cyberworld. Such data includes not only identity of individual but also his all details and data used by him. An individual makes his digital identity whenever he/she logs in on the internet-based platform using technology. The details entered by user are a matter of private right and breach of it is like injury to the victim. Though this part has been legally recognized in several countries, this issue is not yet covered by any data protection specific Indian laws. Since the enactment of European Union GDPR in 2018, concern was raised over the data protection. In Indian legal context, we had the case of *Puttuswamy* (2017)[25], which further pushed the question of safety of individual's data. With reference to this matter, the *Personal Data Protection Bill, 2019* was proposed in Lok Sabha on Dec 11, 2019. Few Highlights of the Bill are:

1. Divided data into 3 categories – personal, sensitive and critical data.

[24]Section 69. Power to issue directions for interception or monitoring or decryption of any information through any computer resource. -
(1) Where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.
(2) The procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.
(3) The subscriber or intermediary or any person in-charge of the computer resource shall, when called upon by any agency referred to in sub-section (1), extend all facilities and technical assistance to-
(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or
(b) intercept, monitor, or decrypt the information, as the case may be; or
(c) provide information stored in computer resource.
(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.
[25](2017) 10 SCC 1: AIR 2017 SC 4161.

2. Emphasis more on protection of personal data than protection of non-personal data.
3. To cover the gap as the present IT Act 2000 applies only to companies and not to the Government.
4. Regulates Individual's personal data and processing, collection and storage of personal information in form of data.
5. Use of *consent* by data principal for processing, collection and storage of his/her data.
6. Provided obligations for data fiduciaries for purpose, collection and storage limitations.
7. Made the offence punishable with fine and for grievance purposes, set up of Data Protection Authority comprising of field experts.
8. Power to exempt of any of agencies by the Government.

The bill will repeal Section 43A of the IT Act[26] which provides for compensation against failure of protection of data. The bill purposely intends to cover the ambit of personal data protection; however, the effectiveness of this bill is yet to be determined as it hasn't been implemented yet. Prior to this bill, there were two other related bills also which were introduced in the Houses earlier but not enacted yet i.e., Personal (Protection) Bill, 2013 and Data (Privacy and Protection) Bill, 2017. Thus, enactment of this bill remains one of the major concerns.

Recently on Dec 16, 2021, the Joint Parliament Committee on Personal Data Protection Bill, 2019 under the chairmanship of Shri P.P. Chaudhary presented recommendations on the bill introduced.[27]Few of the highlights of the recommendations were:

1. The Bill introduced will substantially cover the issue of privacy as fundamental right which emerged from the *Puttuswamy* judgment and also as under the recommendations of *Justice BN Sri Krishna* Committee (also known as *Data Protection Committee*)[28].

[26] Section 43A. Compensation for failure to protect data. Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

[27]Press Release (dt. 16 Dec 2021). Joint Committee on the Personal Data Protection Bill, 2019. Available at: http://164.100.47.193/lsscommittee/Joint%20Committee%20on%20the%20Personal%20Data%20Protection%20Bill,%202019/pr_files/Press%20Release%20on%20the%20presentation%20Report.pdf(last visited on Dec 17, 2021).

[28]A free and Fair Digital Economy. Report by Justice BN Srikrishna. Available at: https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf (last visited on Dec 17, 2021).

2. The Bill shall cover both personal as well as non-personal data which shall be upheld by the Data Protection Authority (DPA).
3. The Bill shall be implemented in phase wise manner within a period of 24 months. This will benefit the legislative interest to overcome issues within time.
4. There shall be specific principles to guide and handle the data breach going on. Furthermore, the Committee enlisted 4 principles in order to maintain the right to privacy.
5. For sharing the personal data and sensitive personal data, there shall be a requirement of prior consent.
6. The Social media platforms shall be treated as publishers and such platforms shall be regulated under the bill.
7. There shall be alternative financial system in India as Ripple in USA and INSTEX in European Union etc. which will protect privacy as well as digital economy.
8. For faster procedure, the committee recommended that there shall be issuance of notice of breach within 72 hours of becoming aware of it.
9. The Data Protection Officer plays a vital role; thus, they shall be holding a key position in the management of company who must have adequate technological knowledge.
10. There shall be a system of single window for dealing with the subjects of complaints, penalties, compensation etc.

The incorporation of these recommendations will considerably improve the present condition as well as the intensifying issues of data breach. The committee also focused upon establishment of quite a few authorities assigned with different roles to cover the technical, legal, practical, management and academic aspect of the breaches. The inclusion of experts from earlier mentioned background which will keep the authorities efficient in order to deal with foreseeable events. Within the recommendations, the commission also focused upon the issue of liability by counting every person liable. Furthermore, the committee also asked the government to localize the technology in order to have a better hold of the offences taking places through data leaks.

In Mid Sept 2021, the issue of surveillance was uncovered further by the detection of use of Pegasus Project by the Government of India. This issue was raised before 3-judges bench of

the hon'ble Supreme Court through the case of *Manohar Lal Sharma v. Union of India*[29].It was argued by the petitioner that the Pegasus spyware was being misused by targeting journalists, ministers and opposition party members for their personal gain and not for public interest which is against the recently professed fundamental right to privacy. The Government had not denied the usage of the spyware but on July 22, 2021, IT Minister stated that Pegasus reports had '*no factual basis*', sufficient checks and balances are placed, and the power of surveillance is permitted under the Telegraph Act and IT Act. In the recent order dt. Oct 27, 2021, the Supreme Court noted that there are three key imperatives lying with the snoop allegations i.e.,"right to privacy of citizens, freedom of press and limits of national security as an alibi." The Hon'ble court also rejected the contentions linked with national security. Mentioning about the right to privacy, the hon'ble court stated that

> "*Privacy is not the singular concern of journalists or social activists…. In a democratic country governed by the rule of law, indiscriminate spying on individuals cannot be allowed except with sufficient statutory safeguards, by following the procedure established by law under the Constitution*."[30]

On the other hand, Pegasus running Israeli organization, NSO Group had acknowledged the involvement with Indian Government. However, the Israeli government had classified this spyware as cyber-arms and only national governments had access to purchase the spyware after the authorisation of the Israeli government. In response to the facts, the Supreme Court ordered an independent probe into the dispute by a 3-member committee. The case hasnot been decided yet.

IV. RIGHT TO BE FORGOTTEN

Right to be Forgotten is another dimension of Rights connected to privacy whereby it professesthe idea of removal of personal information over public platforms.Right to be forgotten arises from right to privacy under Article 21 and partially from Article 14. This right is more explicit aboutsafety of online data available in public domain, and it mentions that it should be limited to search engines only whereas the right to privacy has a much wider explanation of protecting all personal and sensitive information of individuals.This right

[29] Writ Petition (Crl) no. 314/2021.
[30] Ibid. Order Dt. Oct 27, 2021, Para 32 and Para 36.

gained importance from the case of *Google* v. *AEPD and Mario Costeja González*[31] whereby it was codified later into GDPR in addition to the right to erasure.

It was noted by the Apex Court, in the *Puttuswamy's* case[32], that right to be forgotten cannot exist in sphere of the justice administration predominantly in the context of judgments delivered by the Courts. However, an exception is provided for protection of identity of victims in sexual offences which cannot be disclosed without permission of the court.[33] This issue was also reflected in a recent 2021 case of *Jorawer Singh Mundy* v. *Union of India*[34], whereby the appellant moved to court for removal of his name from judgments after his acquittal in a 2013NDPS case as it affected his professional life. In such scenario, it may be notice that the names cannot be removed completely from the judgments. In another recent case of July 2021, *Ashutosh Kaushik* v. *Union of India*[35], the petitioner moved to the Hon'ble High Court of Delhi for deletion of his videos, photos and related articles on the internet quoting his '*right to be forgotten*'. After consideration of the facts, the Court vide order dt. 22 July 2021 delivered notice seeking instructions to get rid of all the posts, videos and articles related to him across the internet.

In an ongoing case of *Jaideep Mirchandani & Anr.* v. *Union of India & Ors*.[36], the Respondent has enlightened that the right associated with privacy also comprises of right to be forgotten. Furthermore, this part is covered in the Personal Data Protection Bill, 2019 which is yet to be enforced. The Centre contended that the IT Act, 2000 also cover this ambit whereby there shall be blocking and removal of such unlawful information and data from an intermediary. Similar to *Jorawar Singh case*[37], the main issue revolves around the removal of concerned decision and new articles published earlier from the internet.

The right to be forgotten existence depend upon balance among conflicting rights of personal information and right to free expression. In the present digital age, data is a treasured resource that should be regulated as per law and without a proper legislation, there are some varying and irregular adjudications from the courts, which resulted into ambiguity to form an appropriate position.

[31]Court of Justice of EU, C-131/12 (decided on May 13, 2014)
[32](2017) 10 SCC 1: AIR 2017 SC 4161.
[33]*Nipun Saxena* v. *Union of India*, (2019) 2 SCC 703.
[34] Writ Petition (Civil) 3918/2021.
[35] Writ Petition (Civil) 6970/2021.
[36]Writ Petition (Civil) 12620/2021.
[37]Supra Note 34.

V. FINAL REMARKS

The debate of privacy protection profoundly taps off in the physical as well as new digital world with the requirement for information security laws and social equality of security of each person, irrespective of any discrimination. Privacy is a significant element to life, liberty and freedom and an innate part of the essential human rights sacred in the Constitution. It exists likewise amongst all peopleindependent of class, caste, sex etc. In any case, the reality the security is certainly not a flat out right, yet an attack should be founded on lawfulness, need and proportionality for defending this appreciated right and such an intrusion should be legitimized by law.

The term 'privacy' had a broad meaning which covers almost each aspect of day-to-day activities performed by an individual. Few of the international conventions explicitly mentioned the right to privacy but they are mentioned in narrower manner. It is left for the states to cover the gap whereby a responsibility arises against the states to include it under the basic and traditional laws. In Indian context, this vision was not incorporated by the constituent assembly while forming the constitution, nevertheless, with the development we came across to encompass it as part of fundamental right under Article 21. It is yet to be integrated with other rules, laws and policies as conceptualized by the Supreme Court in Aadhar case judgment. Additionally considering the way that the period we live in is the time of data and few out of every odd data we have is needed to be given and certain limitations and protection are needed to such information and data and thus the right to privacy becomes considerable. The idea of protection of privacyof data is the greatest possible level of requirement in this instinctively progressing time of the 21st century.

Like other rights, the rights to privacy comes with few limitations and restrictions as it cannot be absolute in nature. If it is made absolute, the concept of anonymity will overshadow the human right related to privacy and will open floodgate for the number of lawsuits which might defeat the ultimate purpose of protection of data. On the other hand, whenever the data or information is collected, it is very problematic task to keep it anonymous. This problem becomes more larger when it is done with large data sets which calls for more advanced technological efforts to re-identify ostensibly '*anonymous'*information.

Vice Regal Lodge

Law Centre-II
Umang Bhawan (North Campus)
University of Delhi
Phone No.: 011-27667052
Email ID: pic@lc2.du.ac.in
Website: www.lc2.du.ac.in