Volume 5, Number I, 2021

ISSN: 2581-7582

MNLU, Nagpur Contemporary Law Review

CLR

MNLU, Nagpur

Contemporary Law Review

Volume 5, Number I **2021**

Note to Contributors: Manuscripts, Editorial correspondence and Style-sheet requisitions should be addressed to the Editor, Contemporary Law Review (CLR), The Maharashtra National Law University Nagpur, Waranga, PO: Dongargaon (Butibori), Nagpur-441108, Maharashtra, India, for soft material use E-mail : clr@nlunagpur.ac.in.

Price Rs. 300/- (Rupees three hundred) or US $ 50 (US Dollar Fifty)

Mode of Citation : 5CLR2021<Page No.>

RNI No. : MAHENG/2018/76048 **ISSN: 2581-7582**

UGC-CARE List (Social Science) Sr. No. 72

MNLU, Nagpur

Contemporary Law Review

Volume 5, Number I 2021

A Biannual Faculty Peer Reviewed Journal

of

MAHARASHTRA NATIONAL LAW UNIVERSITY
NAGPUR

Table of Contents

MESSAGE FROM THE PATRON

The pursuit and promotion of excellence in academic research has always been a vision and mission of Maharashtra National Law University, Nagpur. The university, though only five years young, has made remarkable strides in pushing boundaries in the advancement of legal education and research in India. The university owes immense gratitude for the academic strides it has made to Hon'ble Shri Justice B.R. Gavai, Judge, Supreme Court of India and Chancellor of the university. Under the enlightened leadership of the Hon'ble Chancellor, the students of the university have gained wings, and the teaching and non-teaching staff have gained guidance to march forward towards pushing excellence in the field of legal education not only at the national level, but also matching global standards.

The best way to survive change, according to university, is to initiate it. And it is with this conviction that we have worked tirelessly over the years to improve upon our previous achievements and elevate the university's standing among India's premier professional institutions. The new horizon of legal education will meet society's future needs, and the university will fulfil those needs. This university has a unique characteristic of progress since its inception and the working environment and dedication shown by the faculty members and other non-teaching staff are always welcome.

The flagship journal of the university, Contemporary Law Review (CLR) is an endeavour of the university towards fulfilling its vision and mission of enhancing the quality of legal education and research in India. CLR's inception had an objective of inspiring legal researchers to pursue academic legal writing which entails critical thinking, objective analysis and devising of ingenious suggestions to detangle legal conundrums. The present issue of CLR, like its predecessors, is comprised of enriching and thought-provoking contributions by erudite legal scholars, enthusiastic legal researchers and dynamic law students. These contributions not only undertake meticulous analysis of the chosen arena of law, but also make original suggestions to address issues and challenges that remain unresolved. I heartily congratulate the Editorial Board of the journal for selecting the contributions that highlight contemporary legal issues and challenges from myriad areas of law for publication.

The current issue of CLR, with academic writings on a wide range of critical legal issues, would evoke interest in readership ranging from members of the Bar and Bench, law students, members of legal academia, research scholars as well as legal enthusiasts seeking to explore interdisciplinary facets of the legal issues deliberated upon. The readership of the journal is encouraged enthusiastically to share their reviews and feedback with the editorial board of the journal, helping them to improve the journal with each issue. I extend my heartfelt gratitude to the Hon'ble

members of the Editorial Advisory Board for extending their able guidance to the members of the Editorial Board. I am also grateful to each member of the editorial board of faculty colleagues for their sincere efforts in ensuring intellectually enriching contributions are selected for publication; upholding the academic merit of the journal. I extend my sincere gratitude to the contributors whose scholarly contributions have been culminated into the present issue of the journal.

(Vijender Kumar)

EDITORIAL

In the article titled "*E-Courts, E-Lawyering and E-Filing of Cases: Need of the Hour*", Prof. (Dr.) Vijender Kumar, Ms. Ashwini Kelkar and Ms. Divita Pagey analyses the significance of e-courts in India. The administration of justice in the COVID-19 pandemic has been examined in a comprehensive manner. The authors deal with a need to effectively deal with an increase in utilisation of information and communication technology in the virtual justice delivery system in the country. The article also enunciates the international perspective of the e-filing of cases and e-lawyering in various jurisdictions across the world. This article explains the various substantive as well as procedural aspects regarding the filing of cases, submission of documentary evidences, dress code for lawyers etc. in the virtual mode.

In the article titled "*Academic Integrity, Plagiarism and Copyright Issues*", Prof. (Dr.) V.K. Ahuja explains the threat of plagiarism in higher education in India which is responsible for a deplorable condition of academic and research work. The article critically analyses the University Grants Commission (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations 2018. The article deals with the various aspects in the said regulation relating to objectives, scope, exclusion of content from plagiarism, self-plagiarism which has been explained inclusively. Plagiarism in light of copyright laws is analysed in this article which provides an understanding to the applicability of these laws on practices of plagiarism. The author has also suggested certain amendments in the mentioned Regulation of 2018 which will improve the quality of research.

In the article titled "*Role of Judiciary in Indian Economic Development*", Mr. Shubham Gajanan Kawalkar has explained the Indian judicial system with the help of judicial independence and judicial review. The article analyses the judicial independence along with its types- de facto and de jure and explains the relationship between the conducive growth of an economy and judicial independence. The article also analyses the function of judicial review which is quintessential for keeping a check on the legislative acts by the judiciary which is important for the economic growth. The author recommends, with the help of need of judicial reforms which is classified into Common Propositions and Judicial Engineering, that unless a sound judicial system is not developed in India, economic development will not take place in the country.

In the article titled "*Antitrust Implications of Online Restaurant Aggregators and Food Delivery Platforms: Tough to Digest*", Ms. Richa Phulwani enunciates the growth of online food-tech industry in contemporary India which has led to a need of changes in the existing legal

framework of competition laws. With the advent of online food industries, there is a threat of increase in anti-competitive practices such as predatory pricing. The article analyses the abuse of dominant position by online food sectors with the help of various examples. The article emphasises on collective dominance as a measure which will prove fruitful in the prevalent market conditions.

In the article titled "*Co-Operative to Conflict Federalism During COVID-19 Pandemic in India: A Critical Analysis*", Ms. Shreya Tripathi articulates the importance of co-operative federalism in India by explaining the evolution, nature and features of the Indian federal structure. The article presents an analysis of the quasi-federalism which is a blend of federal and unitary characteristics. The article also analyses the role of judiciary in resolution of Centre-State conflicts in legislative matters with the help of doctrines like pith and substance, and colorable legislation. The author emphasises the impact of COVID-19 pandemic on federalism and has stressed that the nature of federalism has turned from co-operative to conflict federalism. The article explains this nature with the help of various judicial pronouncements.

In the article titled "*Pre-Censorship of Over-the-top Platforms: A Need of the Contemporary Times*", Ms. Shubhangi Agarwal and Ms. Stuti Sinha explains the need of having an adequate legal framework for governing Over-the-Top (OTT) platforms. The article analyses the increasing use of OTT services by the people which has posed a threat to the existing laws. The article explains that due to a lack of regulatory mechanism for OTT, the content generation may be obscene or not suitable for the audiences, and hence the content should be censored on these platforms as well. The author also explains the regulatory mechanism for OTT platforms in other countries like China, Australia etc.

In the article titled "*Legal Issues in Working of Payments Banks in India: An Analysis*", Mr. Himanshu Chandra analyses the nature and working of Payments banks in light of the significance of the digital operations of a bank. The author emphasises the various advantages of payments banks and the laws and regulations governing these banks. However, the article also explains the issues and challenges for the effective operation of payments banks like technological issues, lack of customer awareness and other legal challenges. The article also analyses the need of enlarging the existing legal mechanism to be inclusive of payments banks in a comprehensive manner.

In the article titled "*Decoding the Status of Non-Performing Assets in Electricity Sector and Searching for a Way Forward*", Dr. Manish Yadav and Mr. Sumit Kumar Malviya have explained an increase in Non-Performing Assets (NPAs) in the electricity sector which has led to various issues and challenges. The article explains reforms under the Insolvency and

Bankruptcy Code 2016 and the guidelines issued by the Reserve Bank of India from time-to-time in governing NPAs. The article analyses the present legal framework governing NPAs and the lacunas in law. Further, the article also provides various recommendations and emphasises the need to refurbish the National Electricity Policy in order to have enormous economic growth.

In the article titled "*Gamut of Freedom of Expression vis-à-vis Palisade of Censorship Laws in India: A Contemporary Perspective*", Ms. Sonia B. Nagarale has expressed that with an advent of social media from the traditional media, there has been a change in the understanding of freedom of speech and expression as enshrined under the Constitution of India. The article analyses the ambit of free speech in light of censorship laws which scrutinises and prohibits the information to be published or telecasted if it is of objectionable nature. The article also analyses the criminal justice system with the help of various laws. The article enunciates that there is a need to maintain a balance between free speech and public interest at large.

In the article titled "*Fallacies of Trade Secret Protection in India: The Way Forward*", Ms. Pallavi Tiwari has analysed the importance of protection trade secrets. The author enunciates that India does not have a separate legal framework for governing trade secrets and hence there are several issues and challenges. The article also analyses that the present issues relating to trade secrets are decided on the basis of judicial pronouncements and borrowed doctrines from other legal systems. Further, the article draws a comparative analysis of the practices prevalent for trade secret protection in United Kingdom and United States.

In the article titled "*Regulatory Framework for Prohibition of Benami Transactions in Indian Real Estate Sector: An Analysis*", Mr. Sumit Bamhore has explained the nature and concept of benami transactions. The article analyses that the primary challenge in the real estate sector is the use of black or unaccounted money. The article emphasises on the Benami Transaction (Prohibition) Amendments Act 2016 and its importance in ensuring a robust legal framework for governing benami transactions in India. Further, the article analyses the need for effective implementation of the said law in order to ensure that corruption in real estate transactions is reduced significantly in the Indian real estate sector.

In the article titled "*Adultery vis-à-vis Spousal Maintenance in India*", Ms. Nikita Barooah analyses adultery as a ground of divorce under different personal laws. The author explains the impact of the judicial decision by the Supreme Court of India in *Joseph Shine v. Union of India* which decriminalised adulterous act. The article also critically analyses the mentioned judgment due to its decriminalisation of adultery; however, it still remains as a ground of divorce under the existing laws. The article enunciates the maintenance granted to the spouse under personal laws along

with a bar to maintenance in the form of adultery. Further, the article expresses the significance of pre-nuptial agreements in the contemporary society for lesser conflicts between the parties.

In the article titled "*Massacre of Innocents and Negligence of China: Possible Legal Remedy with Reference to Victims of COVID-19 Pandemic in India*", Mr. Sandip Sumbhate has emphasised the widespread unrest caused due to the COVID-19 pandemic in 2019 which resulted in deaths and various other impact on health of individuals across the world. The article analyses the role of China in spread of the pandemic which caused various issues. The article also analyses the need for an Independent International Adjudicatory Body which will prioritise humanity over sovereignty. The author has also urged the international community to come together in these unprecedented times of pandemic for greater humanity.

In the article titled "*The Assisted Reproductive Technology (Regulation) Bill 2020: Legal and Ethical Issues*", Ms. Shruti Kandoi has analysed the provisions of the Bill in light of the rights and obligations of the parties involved. The article emphasises the significance of Assisted Reproductive Technology for couples who wish to start their family. The article also expresses the need of having a stringent legal mechanism which will efficiently deal with the legitimacy of the child, rights of the mother, etc. The article enunciates that the personal laws and the Indian Evidence Act 1872 should be amended to ensure the legitimacy and welfare of the child born through this technology.

In the Case comment titled "*Case Comment on Indian Hotel and Restaurant Association v. State of Maharashtra 2019 SCC OnLine SC 41*", Dr. Vijay P. Tiwari has analysed the validity of Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (working therein) Act 2016 which was decided by the Supreme Court of India in this case. The author has emphasised that the judgment is a welcome step in ensuring equality of opportunity for women in the contemporary India wherein the Constitution of India protects their dignity and rights. The case comment also throws light on the significance of constitutional morality which is quintessential for every individual.

(Editorial Committee)

E-COURTS, E-LAWYERING AND E-FILING OF CASES: NEED OF THE HOUR

Vijender Kumar,[♣] *Ashwini Kelkar*[♠] *and Divita Pagey*[♦]

Abstract

The justice delivery system in India is witnessing numerous challenges and opportunities in the contemporary times, impelling the functioning of courts to undergo an overhaul. The COVID-19 pandemic has propelled the need for establishment of an efficient electronic mode of working of courts which will cater to the interests of lawyers as well as clients. In light of recent developments, the paper attempts to enunciate the significance of e-courts in India. Further, the paper has discussed the international perspective of e-working of courts including e-lawyering and e-filing of cases. The paper strives to examine the efficacy of e-courts by taking into consideration various factors. Thus, the paper also attempts to highlight the role of information and communication technology which is quintessential for upgrading the functioning of the judiciary for overcoming contemporary issues and challenges.

Keywords: Information and Communication Technology (ICT), E-court, E-lawyering, E-filing, Open Court Principle, Online Dispute Resolution (ODR).

Introduction

The unprecedented challenges of the COVID-19 pandemic have resulted in several changes in the functioning of courts throughout the globe. The traditional working system of the courts and justice delivery system in India is also undergoing a sea change. However, Indian courts had not utilised Information and Communication Technology (ICT) in various aspects of delivery of justice, such as filing of cases, lawyering and hearing of cases, prior to the onset of the pandemic. The issues and challenges posed by the pandemic caused the judiciary to reconsider its traditional working system and employ newer technologies to overcome these challenges. Hence, the pandemic has unearthed the imminent need to establish a functional and effective e-court system in India. Although there are technological impediments standing in the way of the functioning of courts in e-mode, these impediments can be overcome by technological advancements and e-management. Keeping in view these challenges, the functioning of e-courts, along with an e-filing system and

♣ Professor of Law and Vice-Chancellor, Maharashtra National Law University, Nagpur, e-mail: vc@nlunagpur.ac.in.

♠ Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail: ashwini@nlunagpur.ac.in.

♦ Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail: divita@nlunagpur.ac.in.

mainstreaming of e-lawyering, needs to be promoted. The pandemic has shown a new path and has given rise to a plethora of opportunities in enhancing the use of ICT in a renewed manner.

A paradigm shift in the work ethics, practices and filing procedures in courts has been witnessed in the times of pandemic, due to the engagement of e-lawyering and e-filing of cases. Lawyers have been arguing their cases through online platforms without hampering the interests of their clients. Lawyers and clients have access to e-courts from the vicinity of their homes. Thus, the nature of lawyering has been revamped to a great extent which facilitates the working of lawyers in various aspects. It is imperative that the access to the technology should be utilised not by a handful of lawyers, but by all which will ensure that the rights of the lawyers and clients remain intact.

Dr. A.P.J. Abdul Kalam, former President of India, initiated and promoted the introduction of ICT in the Indian judicial system in 2007.[1] Dr. Kalam launched the National e-courts projects for enabling the courts to be computerised for speedy and effective implementation of justice delivery system. Dr. Kalam's e-courts project encouraged the judiciary to keep pace with technological advancements and enhance its efficiency. The significance of e-courts has now been realised more than ever due to the pandemic which has compelled the judicial system to work tirelessly to secure the ends of justice. Further, various emerging technologies and their adoption in the functioning of courts across India has proved pivotal in effective delivery of justice to the citizens. One such technology which has become an asset in the contemporary period is Artificial Intelligence (AI). The role of AI in tackling contemporary challenges has been significantly deliberated upon in recent times. The technology can be utilised for speedy justice and fast-tracking the process of disposal of pending cases by the judiciary. However, the said technology cannot replace the human mind in administration of justice.[2] Hence, there should be harmonised efforts by advanced technology as well as the human mind for providing justice to the citizens. In the light of the prevalent pandemic in the country, India's first e-resource centre (*Nyaya Kaushal*) has become operational at Judicial Officers Training Institute (JOTI), Nagpur, which facilitates e-filing of cases in courts. Apart from the e-resource centre, four chambers for lawyers and e-court of transport department have also been operating to facilitate the functioning of e-courts.[3] This is a unique measure which aids litigants in seeking speedy access to justice.

---

1 Raj Kumar Bhardwaj, "*The Indian Judicial System: Transition from Print to Digital*", LEGAL INFORMATION MANAGEMENT, Vol. 13 No. 3, 2013, p. 204.

2 "*Possibility of Developing Artificial Intelligence for Court System, says CJI Bobde*", INDIA TODAY, January 12, 2020, https://www.indiatoday.in/india/story/artificial-intelligence-court-system-cji-bobde-1636116-2020-01-12, (visited on February 4, 2021).

3 Vivek Deshpande, "*CJI Bobde: E-hearing Facilities Must Spread to Prevent Inequality in Dispensing Justice*", THE INDIAN EXPRESS, October 31, 2020, https://indianexpress.com/article/india/pandemic-induced-digital-justice-

In light of the present situation in India, the paper attempts to enunciate the need for efficient functioning of e-courts in India by taking into consideration various factors required for the optimum utilisation of technological advancements. The paper is an attempt to discuss the functioning of e-courts, along with e-filing and e-lawyering, which is being adeptly relied on for the smooth functioning of the judiciary in the times of pandemic. The paper has further elaborated on the international perspective by explaining various rules and provisions adopted for the e-courts in different countries. The issues and challenges relating to the infrastructure required for the e-courts have been examined, as India is still a work in progress with respect to full-fledged operation of e-courts. Thus, the paper has analysed various facets of functioning of justice delivery system with the aid of ICT contrivances.

E-Courts: 'Enabling and Empowering' Indian Judiciary

E-Courts utilise technology which assists the lawyers, judges and the litigants to have virtual access to the justice delivery system in the country. The meaning and nature of e-courts have not been defined under any statute however, the term 'court' is statutorily recognised, and e-courts merely employ the tools of ICT to administer courts' proceedings. A Parliamentary Standing Committee has discussed the nature of e-court while encompassing various facets of it. It stated that an e-court is more of a service than a place and its primary elements are that it is a government entity which comprises of judges who are the presiding officers for adjudication.[4] The Indian Evidence Act 1872 defines court,[5] which implies inclusion of e-courts within its ambit. Section 20 of the Indian Penal Code 1860 defines 'court of justice' which includes duty of a judge and his power to act judicially. Thus, although a court administered through virtual mode is squarely covered within the definition and understanding of 'court' (since courts remain actual, but functioning became virtual), it is only in the compelling circumstances of the pandemic that the potential of e-courts in the administration of justice was realised with a renewed vigor. Under the 'National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary-2005', an 'e-courts project' is being spearheaded by e-Committee of the Supreme Court of India. The motto of the said e-Committee is to adopt ICT

---

dispensation-an-irreversible-change-cji-bobde-6911611/, (visited on November 5, 2020).

4 One-Hundred Third Report, Chapter 1-Virtual Courts, "*Functioning of Virtual Courts/Court Proceedings Through Video Conferencing*" (Interim Report), PARLIAMENTARY STANDING COMMITTEE ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE, RAJYA SABHA, PARLIAMENT OF INDIA, September 11, 2020, p. 1.

5 Section 3 of the Indian Evidence Act 1872 defines court as: "*Court includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence*".

initiatives to 'enable and empower' the Indian judiciary.[6] However, there are many issues and challenges that remain to be addressed for the efficacious functioning of e-courts in India.

Introduction of E-Courts in India

In India, the first e-court was inaugurated in 2016 in Hyderabad. Apart from being an e-court, it also encourages a paper-free court.[7] Further, a unique digital facility known as the 'Inter-Operable Criminal Justice System' was, for the first time, used in the Karimnagar district court in Telangana. The facility enables the police authorities to provide the First Information Reports (FIR) and charge-sheets to the concerned magistrate of the district within a short span of time with the assistance of this technology. Thus, this is a unique technology which facilitates working of the criminal justice system.[8]

E-court introduces an opportunity to go beyond the four walls of the courtrooms. It can enhance and fast-track the judicial process by quicker means of e-filing of cases and speedy delivery of justice. The National Judicial Data Grid (NJDG) manages the functioning of digital courts in India. NJDG assists in enhancing the transparency in the judicial delivery system in India by keeping a record of the pending cases. It also maintains a record of cases at district courts and high courts.[9]

Adherence to the Open Court Principle in E-Courts

The Constitution of India does not explain or refer to the principle of open courts in India. However, the Constitution provides that "*No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open Court.*".[10] The Constitution of India specifies that the judgments shall be pronounced in open courts, but does not refer to the open court hearings.

Open court principle implies that the justice delivery process of courts will be open for public. It means that the cases can be observed by the public including the media in order to bring transparency and accountability in the

6 E-Committee, Supreme Court of India, "*Information and Communication Technology in Indian Judiciary*", https://ecommitteesci.gov.in/about-department/introduction/, (visited on March 11, 2021).

7 "*Country's First e-court Opened at Hyderabad High Court*", THE HINDUSTAN TIMES, July 18, 2016, https://tech.hindustantimes.com/tech/news/country-s-first-e-court-opened-at-story- mj9EyVgHThqgD4z6jpQqkM.html, (visited on July 1, 2020).

8 "*In a First, Karimnagar District goes Digital*", THE TIMES OF INDIA, September 17, 2019, https://timesofindia.indiatimes.com/city/hyderabad/in-a-first-karimnagar-district-court-goes-digital/articleshow/71168600.cms, (visited on July 1, 2020).

9 "*With Digital Courts soon to Become a Reality, we might Achieve our Paperless Dreams*", INDIA TODAY, April 16, 2018, https://www.indiatoday.in/education-today/gk-current-affairs/story/with-digital-courts-soon-to-become-a-reality-we-might-achieve-our-paperless-dreams-1213109-2018-04-16, (visited on July 1, 2020).

10 Article 145(4) of the Constitution of India.

justice delivery system. The High Court of Kerala and High Court of Bombay are the first in the country to lead an example in live streaming of cases.

In one of the judgments of *Swapnil Tripathi v. Supreme Court of India*,[11] the apex court emphasised on live streaming of cases to the public. The issue was related to live streaming of court cases related to the constitutional and national importance. The court also issued guidelines for live streaming of specific cases. The apex court noted that technology plays a pivotal role in providing justice to the public. Further, the court emphasised that,

> *By providing "virtual" access of live court proceedings to one and all, it will effectuate the right of access to justice or right to open justice and public trial, right to know the developments of law and including the right of justice at the doorstep of the litigants. Open justice, after all, can be more than just a physical access to the courtroom rather, it is doable even "virtually" in the form of live streaming of court proceedings and have the same effect.*[12]

The pandemic has refurbished the justice delivery system of the country due to the online functioning of courts on a daily basis. After a lockdown was declared in the country as a measure to control the spread of COVID-19 pandemic, the courts started working in an online mode. The judges of the Supreme Court have also been hearing the arguments of lawyers and delivering the judgments on the official online platform of the court. However, the apex court has been functioning from its seat at Delhi as per the Constitution of India. Further, the Constitution of India has given power to the Chief Justice of India and the President to appoint any place other than Delhi for the seat of Court, if there are any circumstances necessary to do so.[13] Therefore, it becomes imperative to understand that whether a court functioning in online mode may fall within the ambit of Article 130 of the Constitution.

Further, the Code of Criminal Procedure 1973 has specifically incorporated a provision for open courts. It provides that,

> *The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular*

11 (2018) 10 SCC 639.

12 *Ibid*, para 12.

13 Article 130 of the Constitution of India states that: "*The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint*".

> *person, shall not have access to, or be or remain in, the room or building used by the Court*.[14]

However, Section 327(2) of the Code also provides that certain offences relating to rape and certain matrimonial matters shall be held in-camera. This provision should also be applicable to the e-courts in India as it clearly lays down that for the purposes of inquiry and trial if any offence, a criminal court will be deemed to be an open court. The Code of Civil Procedure 1908 also provides a provision for a place of trial to be open courts. The provision provides that, "*The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open court, to which the public generally may have access so far as the same can conveniently contain them*".[15] It also gives power to the presiding judge to decide in a particular case if the public or any person should not have access to the trial.

The feasibility of open court principle increases manifold when the litigants cannot remain present physically in the courts. Open court principle needs to be staunchly supported in the virtual world keeping in mind the urgent need of the same. The said principle is practically effortless to comply with in the physical environment in which judges, lawyers, accused, victim, and other people have an opportunity to hear the cases. However, this principle may face impediments in times when the entire administration of justice system is being done virtually.

All the above mentioned provisions have given the validity to open court principle in India to increase the transparency of working of courts. These provisions will also be beneficial in an online working of courts, if the administration of justice system of the country is well equipped with the technological advancements.

Embracing Paperless Courts

The Indian judiciary from the subordinate courts to the highest court is dependent on papers for filing of applications, cases, affidavits, *vakalatnama*, etc. There are piled up cases in courts which are listed for hearing. The significance of papers in courts can be seen at various stages of court proceedings, or even before the initiation of proceedings. Papers are used for communication of legal notices, pre-trial stages, filing of plaints and written statements, to name a few. However, it must be realised that due to technological advancements, there is a possibility to go paperless courts gradually.

Recently, the Supreme Court in one of its e-court proceedings did not use paper for hearing the matters. The court proceedings operated through the use of laptop for the entire day. The judges also made notes with the help of laptop and the proceedings happened without any technological disturbance.[16] This is one

14 Section 327(1) of the Code of Criminal Procedure 1973.

15 Section 153-B of the Code of Civil Procedure 1908.

16 Dhananjay Mahapatra, "*In a First, Virtual Court Goes Completely Paperless in SC*", https://timesofindia.indiatimes.com/india/in-a-first-virtual-court-goes-completely-paperless-in-sc/articleshow/76146213.cms, (visited on June 30, 2020).

glaring example of the optimum utilisation of information technology being used in the courts. Hon'ble Shri Justice D.Y. Chandrachud virtually inaugurated two e-courts for traffic *challans* at Delhi.[17] The first attempt of such kind was made in 2019 with inauguration of an e-application for traffic *challan*. These e-courts were a part of second phase of e-court project in Delhi. It has made the payment of *challan* easy by installation of 389 cameras by the Delhi police which capture the cases of over-speeding and violation of traffic rules. Moreover, the 'Department-Related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice', in its 107th Report, has recommended that the e-Court project be continuously upgraded by making e-courts more litigant friendly by deploying Artificial Intelligence and Blockchain to automate routine judicial process.[18]

The service of summons/notices through online application of instant messaging WhatsApp, e-mail and fax has been permitted by the Supreme Court of India.[19] The court further stated that the blue tick feature of WhatsApp can be used to prove that a service of summons or notices has reached under the Indian Evidence Act. Earlier, the Bombay High Court has also allowed the use of this application in case the defendant is not replying to the notice or due to any other reason notice cannot be served.[20]

Encouraging Online Alternate Dispute Resolution

The resolution of disputes out of the court is resolved through the Alternate Dispute Resolution (ADR) mechanism. In the contemporary era, due to the advancement in the Information and Communication Technology (ICT), ADR methods utilises the virtual platform for resolution of disputes. It is imperative that the digital policy of the country requires working in tandem with the judicial system to be able to provide justice in through virtual mode.[21] When ADR mechanism applies ICT mechanism, especially in negotiation and mediation process, it is known as the Online Dispute Resolution (ODR). Legal

17 "*Two Virtual Courts Launched to Settle Traffic Challans*", THE HINDU, May 14, 2020, https://www.thehindu.com/news/cities/Delhi/two-virtual-courts-launched-to-settle-traffic-challans/article31578149.ece, (visited on July 4, 2020).

18 One Hundred Seventh Report, "*Demands for Grants of Ministry of Law and Justice for 2021-22*", DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE, RAJYA SABHA, PARLIAMENT OF INDIA, p. 70.

19 "*Supreme Court allows Email, Fax, Instant Messaging apps like 'Whatsapp' for Service of Notices, Summons*", THE ECONOMIC TIMES, July 10, 2020, https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-allows-email-fax-instant-messaging-apps-like-whatsapp-for-service-of-notices-summons/articleshow/76898274.cms, (visited on July 25, 2020).

20 *Madhav Vishwanath Dawalbhakta v. Bendale Brothers* 2018 (6) BomCR 619.

21 "*Use of Technology in Justice System*", CONFEDERATION OF INDIAN INDUSTRY, 2020, p. 45.

disputes can be settled by using the online platform or software wherein two parties can directly engage with each other virtually.[22]

Mediation is one of the methods adopted by the courts for a speedy resolution of disputes. In India, pre-litigation mediation is utilised under the Consumer Protection (Amendment) Act 2019, the Commercial Courts Act 2015 and the Companies Act 2013, respectively. Online mediation enables the parties to resolve their disputes on a same online platform even in cases when the parties are thousand miles away. It is convenient, cost-effective and efficiently utilises the time and expertise of mediators. It also protects the confidentiality of the parties wherein their issues can be resolved amicably. In 2019, India signed the Singapore Mediation Convention (SMC) to promote the international mediation for settlement of disputes.[23] The Singapore model of mediation is based on mandatory mediation or pre-institution mediation which we have also adopted in some statutes. The same principle of mediation can also be effectively applied in the virtual platform making the parties comfortable for resolution of their issues outside the courts.

Online Dispute Resolution is a viable solution wherein the parties do not have to be physically present to resolve their disputes. With the advancement and need for better technology, ODR has gained momentum in the present times. ODR also gives autonomy to the parties involved to decide the electronic platform on which arbitration may be conducted, and the parties do not have the physical barrier of location. The contracts entered through online mode are also given validity if the documents are signed electronically as required under the Information Technology Act 2000.[24]

In one of its unique initiatives by the government, the NITI *Aayog* in collaboration with Agami and Omidyar Network India decided to work together with the stakeholders to facilitate the resolution of disputes virtually. A meeting was conducted on June 6, 2020, involving senior judges of the Supreme Court, Secretaries from the ministries of the government, legal practitioners, members from the industry, general counsels of leading enterprises etc. Hon'ble Shri Justice D.Y. Chandrachud, Judge, Supreme Court of India expressed his opinion regarding technology and access to justice and said that, "*Above all there needs to be a fundamental change in the mindset- look upon dispute resolution not as relatable to a place, namely a court, where justice is 'administered' but as a service that is availed of*.". Further, it was expressed in the meeting that, "*Making ODR or ADR voluntary may defeat the purpose. It should be made mandatory [for specified categories], and it should cover about three [sessions]*

22 A. Mohamed Mustaque, "*Online Dispute Resolution with Special Emphasis on Mediation in India*", (2012) 4 SCC J-7, p. J-9.

23 "*Singapore Convention on Mediation enters into Force*", THE LEAFLET, September 14, 2020, https://www.theleaflet.in/singapore-convention-on-mediation-enters-into-force/#, (visited on September 20, 2020).

24 Section 5 of the Information Technology Act 2000.

so that parties don't feel that it's a mere formality.".[25] The meeting aimed at the creation of a mechanism wherein the parties will get a speedy and cost-effective justice. There were other eminent members who also expressed their opinion in relation to the economic revival post pandemic times in which online resolution will be of great aid. Mr. Amitabh Kant, CEO, NITI *Aayog* has also expressed his opinion regarding the online dispute resolution at a webinar organised by Indian Dispute Resolution Centre (IDRC). He said that "*we are at the cusp of transformative change, and with alterations necessitated by the pandemic; technology will play a key role in widening equity and affordability*".[26]

In India, there is no legislative enactment which specifies the role of mediators in an online platform for resolution of disputes. Section 9 of the Family Courts Act 1984 requires the physical presence of the parties involved either in a matrimonial discord or a custody battle. Further, the Information Technology Act 2000 provides for the enforcement of contracts made virtually. However, the Act is not comprehensive to cover the online mechanism for dispute resolution. In cases where the ODR mechanism can be applied effectively, it should be promoted keeping in mind the interest of the parties.

E-Lawyering: Role of Information and Technology

The growth of technology over the past few years has had a profound impact on the legal profession. Lawyers cannot remain oblivious to internet and its efficacy in the day-to-day functioning of the court. The e-lawyering with the aid of Laptops, I-Pad, Tablets, Smart Phones, etc., has become a need of the hour in the prevalent circumstances. E-lawyering has assumed humongous importance in the light of contemporary developments in India. E-lawyering means the utilisation of electronic means and tools for the profession of a lawyer. It is different from conventional lawyering as it involves web-based technologies for interacting with the clients albeit the professional relationship remains the same. E-lawyering does not use the physical infrastructure of courts, but utilises online platforms, defending the clients.[27]

E-lawyering has also removed the geographical barriers whereby lawyers and clients are not required to be physically present in courts, but can access the courts virtually. There are many advantages of e-lawyering which can be very cost-effective, if implemented efficiently. It is also an opportunity for young

25 https://pib.gov.in/PressReleasePage.aspx?PRID=1630080#:~:text=In%20a%20first%2C%20NITI%20Aayog,online%20dispute%20resolution%20in%20India.&text=ODR%20can%20help%20resolve%20disputes%20efficiently%20and%20affordably, (visited on July 25, 2020).

26 Ajmer Singh, "*NITI Aayog decides to work with Key Stakeholders on Online Dispute Resolution Framework*", THE ECONOMIC TIMES, June 28, 2020, https://economictimes.indiatimes.com/news/economy/policy/niti-aayog-decides-to-work-with-key-stakeholders-on-online-dispute-resolution-framework/articleshow/76676139.cms?from=mdr, (visited on July 25, 2020).

27 Wisdom Okereke Anyim, "*E-Lawyering and Virtual Law Practice: A Paradigm Shift for Law Library System*", LIBRARY PHILOSOPHY AND PRACTICE (E-JOURNAL), 2019, pp.1-3.

lawyers to enter the profession of litigation through which they can represent the people virtually. Litigation thus, has to be practiced in light of the e-courts which enable the justice delivery system to not be hampered due to unprecedented circumstances, such as the COVID-19 pandemic.

Issues and Challenges in Functioning of E-Courts in India

The pandemic has compelled the judges, court officials and lawyers to work from their homes virtually. Although the complete physical justice delivery system by the judiciary will not be replaced by the e-courts even in future, there are issues and challenges which require to be tackled with preventive measures which will be beneficial for the parties, victims, lawyers, court officials and the judges. A uniform set of rules and regulations for the virtual/digital courts, e-filing, virtual hearing, etc. may be conceptualised for greater efficacy in the modern technologically developed era.

The online system of courts has also witnessed instances in which a required decorum has not been followed by the lawyers, accidentally or otherwise. A cordial and respectful relation between bar and bench is necessary for any legal system, be it physical or virtual. Hence, in order to have an orderly working environment, the members of the legal fraternity have to address these issues with an iron hand. Also, the e-courts should have a systematic technological set-up to ensure that litigating parties get the required assistance. E-courts can only operate effectively when there is an access to internet with a suitable bandwidth and without any hindrances. Therefore, those who are involved in an e-court must have access to sound technological aids and familiarity with the contemporary changes.

The bar and the bench function as two pillars of the judicial system which work in unity for justice administration at different levels. In the physical environment of the courts or tribunals, the judges and lawyers are on different sides while performing their roles to the best of their abilities. A respectful bar and bench relationship can reach its zenith if lawyers and judges perform their duties professionally and impartially. In *P.D. Gupta v. Ram Murti*,[28] it was held that "*Administration of justice is not something which concerns the Bench only. It concerns the Bar as well.*".[29] Therefore, bar and bench should work harmoniously for promoting the cause of justice.

However, the bar and bench relationship has come under a sea change after the pandemic has hit the nation. Cases are heard by the judges virtually by the means of different technologies and software. There is no physical presence of lawyers, judges and clients in courts due to the uncertain times. During this difficult situation, the justice delivery system suffered for some time, but the courts have started functioning through video-conferencing technology. There are some instances of professional misconduct by the lawyers virtually which hampers the above said relationship.

28 AIR 1998 SC 283.

29 *Ibid*, para 14.

It has to be kept in mind that for an efficient and smooth working of the courts, realisation of one's own responsibilities is pivotal. In one of the instances of professional misconduct, a lawyer wore a vest and appeared for an anticipatory bail plea before the judge of the High Court.[30] The court reminded that even in an online platform, decorum has to be maintained by the lawyers. A proper uniform is a must even appearing virtually for a case.

E-Courts, E-Lawyering and E-Filing of Cases: International Perspective

The present times of COVID-19 pandemic have made us realise the importance of technology in e-filing, lawyering and administration of courts. Hence, the said change impels the Indian court system to devise a reformed infrastructure, training and cogent mechanisms for recording evidence and cross-examinations to be adopted by the e-courts.[31] There are various countries which have adopted the latest technological developments in the judicial process. India can take inspiration from these legal systems of the world having exceptional and developed virtual judicial systems. In order to adopt an efficient court system in India, it is of great utility to study and analyse the best practices in the e-court system adopted by various jurisdictions around the globe during the COVID-19 pandemic.

Filing and Management of Court Cases

Electronic Filing

In the United States, since the late 1990s, the Case Management/Electronic Case Files (CM/ECF) has been employed by the courts for electronic filing and management of documents.[32] The CM/ECF allows electronic filing of court documents *via* the internet, as well as maintenance of electronic records of court documents. The CM/ECF has completely revolutionised the filing and management of court cases and brought the system to cope with the advancements of the digital era.[33] Moreover, the electronically maintained court records are available for inspection, and can be downloaded by attorneys and the public at large *via* the internet by using the 'Public Access to Court Electronic Records' (PACER) system at an affordable cost of ten cents per

30 Hamza Khan, "*Lawyer Appears in Online Hearing in Vest, Draws High Court Judge's Ire*", THE INDIAN EXPRESS, April 26, 2020, https://indianexpress.com/article/india/lawyer-appears-in-online-hearing-in-vest-draws-hc-judges-ire-6379368/, (visited on July 3, 2020).

31 Pramod Kumar Dubey, "*Virtual Courts: A Sustainable Option?*" BAR AND BENCH, April 12, 2020, https://www.barandbench.com/columns/virtual-courts-a-sustainable-option, (visited on June 17, 2020).

32 "*25 Years Later, PACER, Electronic Filing Continue to Change Courts*", UNITED STATES COURTS, https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts, (visited on August 22, 2020).

33 "*FAQs: Case Management / Electronic Case Files*", UNITED STATES COURTS, https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf#faq-What-is-CM/ECF?, (visited on August 22, 2020).

page.[34] The legal rules regulating electronic filing are: Rule 5(e) of the Federal Rules of Civil Procedure; Rule 5005(a) of the Federal Rules of Bankruptcy Procedure; Rule 25(a) of the Federal Rules of Appellate Procedure; and, Rule 49(d) of the Federal Rules of Criminal Procedure. These rules empower courts to allow or require documents to be filed by electronic means by formulation of local rule. Courts may also issue a general order stipulating the relevant procedures to be complied with for electronic filing in that court. Individual court rules and procedures are generally available on their websites. Moreover, the Model Rules of Professional Conduct issued by the American Bar Association have mandated that lawyers are obligated to develop competency not only in the law and its practice, but also in technology.[35]

In the United Kingdom, the Practice Direction made under rules 5.5, 7.12 and 51.2 of the Civil Procedure Rules provides for an 'Electronic Working Pilot Scheme', which is supposed to remain operative from November 16, 2015 to April 6, 2021, in the Chancery Division of the High Court, the Commercial Court, the Technology and Construction Court, the Circuit Commercial Court, and the Admiralty Court, at the Royal Courts of Justice, Rolls Building, London; the Central Office of the Queen's Bench Division at the Royal Courts of Justice; the B&PCs District Registries; and, the Senior Courts Costs Office. This Electronic Working has enabled parties to file documents online 24 hours a day every day all year round and issue proceedings, except during planned or unplanned periods of 'down-time'.[36] In order to file documents electronically, lawyers on behalf of their clients, or litigants in-person, can use CE-File, for which they need to register upon payment of an online fee at the time of submission of their claims or appeals.[37] In the Central Office of the Queen's Bench Division, London, the use of CE-File has been made compulsory for professional court users from July 1, 2019.[38] Further, the court records are maintained electronically through CaseMan[39] (County Court Case Management

34 *Ibid.*

35 Don Macaulay, "*What is a Lawyer's Duty of Technology Competence?*", SMART LAWYER, February 2, 2018, http://www.nationaljurist.com/smartlawyer/what-lawyers-duty-technology-competence, (visited on August 22, 2020).

36 Practice Direction 510, "*The Electronic Working Pilot Scheme*", http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51o-the-electronic-working-pilot-scheme, (visited on August 22, 2020).

37 "*CE-File System Information and Support Advice*", https://www.gov.uk/guidance/ce-file-system-information-and-support-advice, (visited on August 22, 2020).

38 "*Electronic Working and the Courts Electronic Filing System: Tracker*", PRACTICAL LAW, THOMSON REUTERS, https://uk.practicallaw.thomsonreuters.com/4-581-1926?transitionType=Default&contextData=(sc.Default)&firstPage=true, (visited on August 22, 2020).

39 https://data.gov.uk/dataset/c1841b03-0067-40e2-b51a-10002603f941/caseman-county-court-case-management-system, (visited on August 22, 2020).

System); FamilyMan[40] (Family Courts Case Management System), where the names and details of the parties, details of solicitors and the status of their cases, can be accessed electronically through these systems.

The Ontario Superior Court of Justice has permitted all criminal filings with the Superior Court of Justice to be made electronically, by sending an email to the trial coordinators.[41] In the European Union, many pilot schemes have been introduced to facilitate court users to start a case by sending an e-mail (Czech Republic, Finland, Latvia and Serbia) or by filling and submitting an online form (Ireland, Lithuania and Switzerland).[42] The Federal Court of Australia provides for a range of electronic services to facilitate administration of justice, namely, 'e-Lodgment' or electronic lodgment, which provides for the facility of electronic filing for the Federal Court of Australia, as well as for the general federal law jurisdiction of the Federal Circuit Court of Australia; 'Federal Law Search, which provides a secure portal for litigants to inspect information from the case management and document management systems; 'e-Courtroom', an on-line courtroom; 'Casetrack', the case management system; 'ECF', or electronic court file; and, 'the message agent' which provides the connectivity and interface between all these electronic systems.[43]

Electronic Signatures

Electronically signed documents are being accepted by the Ontario Superior Court of Justice. The electronic signature comprises of electronic information identifying the signatory, as well as the date and place of signing.[44]

Electronic Service

In the United States, Rules 5(b) and 77 of the Federal Rules of Civil Procedure, Rules 25 and 26 of the Federal Rules of Appellate Procedure, Rules 45 and 49 of the Federal Rules of Criminal Procedure, and Rules 7005, 9014 and 9022 of the Federal Rules of Bankruptcy Procedure permit the service of

40 https://data.gov.uk/dataset/006a15d9-3924-4ac4-b77e-b4a996b7eebe/familyman-family-courts-case-management-system, (visited on August 22, 2020).

41 "*Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media*", May 1, 2020, https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/#B_SUSPENSION_OF_IN-COURT_HEARINGS_AND_JURY_TRIALS, (visited on July 5, 2020).

42 "*Use of Information Technology in European Courts, European judicial systems Efficiency and quality of Justice*", CEPEJ Studies No. 24, European Commission for the Efficiency of Justice, p. 30, https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680788229, (visited on August 22, 2020).

43 Craig Reilly, "*E-filing, the Application of an Electronic Court File (ECF) and the Potential for the Role of the ECF for Case Management*", JUSTICE WITHOUT BARRIERS: TECHNOLOGY FOR GREATER ACCESS TO JUSTICE, May 2015, pp. 21-22, https://aija.org.au/wp-content/uploads/2017/07/Reilly.pdf, (visited on August 22, 2020).

44 *Supra* n. 41.

documents by electronic means with the consent of parties.[45] In the United Kingdom, the 'Electronic Working Pilot Scheme', in Rule 8.1 provides that the "*Court will electronically return the sealed and issued claim form or originating application to the party's Electronic Working online account and notify the party that it is ready for service*", and Rule 8.2 stipulates that unless the Court orders otherwise, any document filed or issued using Electronic Working, "*shall be served by the parties and not the Court*".[46]

The Ontario Superior Court of Justice has also dispensed with the requirement for personal service and permitted service of all materials to the adverse parties *via* e-mail with the requirement of providing with proof of service.[47] In the European Union, information technology may be used to notify about summons for hearings and pre-hearing appointments, such as in the cases of mediation or conciliation.[48]

Open Court Principle in E-Courts

The Ontario Superior Court of Justice has been conducting court proceedings only "*in-writing, or by telephone or video conference*" during the COVID-19 pandemic with the help of trial coordination staff. The Hon'ble Court has prescribed that any media personnel or member of public seeking to observe or hear an e-court proceeding is permitted to send a request *via* e-mail to the local courthouse staff prior to the hearing, while providing their contact details. However, some e-court proceedings are barred from being accessed by the general public or the media due to operation of existing law or court order and recording of an e-court hearing without the permission of court is prohibited by Section 136 of the Courts of Justice Act 1990.[49]

In Singapore, the Supreme Court has provided the required electronic infrastructure to conduct electronic hearing of cases in all its courtrooms. Lawyers may also take aid of electronic technology in their presentation of cases. Further, the software 'Skype' is employed by the Duty Registrars to hear non-contentious cases and by lawyers to participate in virtual hearings by video conferencing from their offices. Furthermore, the Supreme Court consists of five 'Technology Courts', which are equipped with advanced technologies, such as plasma screens and video cameras for more effective video conferencing experience; linking-up of lawyers' laptops to the court's audio-visual systems, in order to project evidence onto monitors and screens for simultaneous viewing by everyone; and, visualisers which facilitate in the capturing and magnification of images of 3D objects or physical documents. Further, the Supreme Court is equipped with the 'Digital Transcription System', which is an integrated system providing for digital audio recording of the court hearings and also allowing

45 *Supra* n. 33.
46 *Supra* n. 33.
47 *Supra* n. 41.
48 *Supra* n. 42.
49 *Supra* n. 41.

judges to execute the search and playback function to review the audio recording and the corresponding annotations after the hearings.[50]

Examination of Witnesses

In the United States, Rule 43(a) of the Federal Rules of Civil Procedure requires that testimony of witness is to be taken in 'open' court. There is no specification regarding the means of transmission of such testimony; therefore, mere audio transmission without video may be deemed sufficient in certain cases. However, video transmission tends to be ordinarily preferred, depending upon the cost of the dispute, the economic status of the parties and other justifications according to the circumstances of the case. In cases of virtual transmission of witness testimonies, safeguards are to be adopted to ensure that the identity of the deposing witness is verified, and that the transmission is clear and disruption-free. Moreover, prior notice regarding the deposition of witness virtually, or through audio or audio-video transmission should be given to all the parties concerned.[51]

In Canada, examination of witnesses has been permitted to be conducted through video conferencing after the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*,[52] in which the Court resounded the need for a "*culture shift*" in order to create an environment that promotes "*timely and affordable access to the justice system*", by incorporating in the justice system proportional procedures "*tailored to the needs of the particular case*", and making it reflect the "*modern reality*".[53] Relying on the decision of the Supreme Court, the Ontario Superior Court of Justice, in *Ranjit Kumar Chandra v. Canadian Broadcasting Corporation*,[54] observed:

> *The use of video or similar technologies does not now represent a significant deviation from the general principle favouring oral evidence in court. Such evidence is given orally, under oath or affirmation, and is observable "live" as it would be with the witness present in the courtroom. Questions are asked and answers are given in the usual way. The witness can be closely observed and most if not all of the visual and verbal cues that could be seen if the individual was physically present can be observed on the screen. The evidence is received by the court and heard and*

50 https://www.supremecourt.gov.sg/services/visitor-services/court-facilities/technology, (visited on August 22, 2020).

51 "*Notes of Advisory Committee on Federal Rules of Civil Procedure- 1996 Amendment*", https://www.law.cornell.edu/rules/frcp/rule_43, (visited on August 22, 2020).

52 2014 SCC 7 (CanLII).

53 Andrew Hyland, "*Hryniak v. Mauldin: Summing up Summary Judgment*", CANLIICONNECTS, https://canliiconnects.org/en/commentaries/26862, (visited on August 22, 2020).

54 2015 ONSC 5385, https://www.canlii.org/en/on/onsc/doc/2015/2015onsc5385/2015onsc5385.pdf, (visited on August 22, 2020).

> *understood by counsel and any members of the public who may be present in the courtroom at the time…Available technologies include not only the ability to examine a witness but, also, to put to that witness in a contemporaneous way documents and other exhibits.*[55]

The Court, therefore, permitted the defendants in the said case to adduce trial evidence by video conference, subject to certain terms. The Court held that taking of evidence by video conferencing should be permitted by courts only when it is not possible for a witness to give evidence in person, and that the court shall have to determine in each case whether such permission should be granted, after taking into consideration the circumstances of the case, and also appropriateness of the proposed arrangements for video conferencing. Further, the court may impose such conditions as it may deem fit in each case.

The Family Court of Australia has issued a guide providing for detailed instructions regarding the use of technologies such as, Microsoft Teams and AAPT Teleconferencing for smooth functioning of virtual family court proceedings. Further, the guide has laid down guidelines for conduct of virtual proceedings, subject to the discretion of the presiding officer of court. The guidelines prescribe that witnesses in e-courts should follow the court etiquettes, and address the judges and counsels in a similar manner as in physical hearings. In order to ensure that the witnesses are free from any external influence while testifying, they are expected to be alone in a secure room with doors closed. While testifying, witnesses are not ordinarily permitted to eat or drink anything except water, nor are they permitted to speak to their counsel during the testimony; they are permitted to take notes of the hearing, and are expected to carry a blank paper which they should place face-down on the desk or stand while testifying. It is the duty of counsel appearing in e-courts to ensure that his witness in a virtual hearing is given prior access to relevant documents and is well-prepared for the hearing, thereby avoiding unnecessary delay and technological lapses. In case the presiding judge requires a particular witness to remain absent during deliberation or argument on an issue, the witness may be asked to mute their computer or otherwise be virtually ejected from the meeting and invited to re-join after the objection has been obviated.[56]

Documentary Evidence

The Federal Court of Australia has issued guidelines for filing additional documentary evidence in virtual appeals and full court hearings titled, 'Special Measures Information Note: Appeals and Full Court Hearings'. According to the guidelines, parties to a matter seeking to introduce additional materials, not included in the Appeal Book should take leave from the court to tender the document electronically through modes, such as, the sharing function on Microsoft Teams; a nominated file sharing service; or by email, as well as to

55 *Ibid*, para 20-21.

56 Patricia Hughes, "*Virtual Court Proceedings: Fictional and the Real Thing*", SLAW, May 12, 2020, http://www.slaw.ca/2020/05/12/virtual-court-proceedings-fictional-and-the-real-thing/, (visited on June 17, 2020).

share the same with adverse parties.[57] In New South Wales and Tasmania, there are dedicated legislations regulating the electronic submission of evidence through audio-visual links, namely, the Evidence (Audio and Audio-Visual Links) Act 1998, and the Evidence (Audio and Audio-Visual Links) Act 1999. The provisions of these legislations are applicable to the submission of oral as well as documentary evidence electronically.[58]

In Singapore, documentary evidence can be filed electronically, either in the form of scanned documents onto the Community Justice and Tribunals System (CJTS), or in the form of audio or video recordings, according to the 'Instructions on Filing on Documents and Evidence'. According to the said instructions, 'the important part(s) of each recording that the party wishes to bring to the Judge's attention must be identified and transcribed' in the format prescribed in the instructions. Further, if certain words in such recordings are in any language other than English, an official English translation of such words is also required to be provided along with the recording. Furthermore, in order to support the statements of the transcript, "*screenshots of the important frame(s) in the video recording*" are also required to be provided.[59]

Dress Code for Lawyers

The 'Special Measures Information Note: Appeals and Full Court Hearings' requires the lawyers appearing before judges virtually, to follow the dress codes required of them to be followed in physical courts. Lawyers who wear gowns in physical courts are expected to wear gowns during virtual proceedings as well, and other participants are expected to dress professionally. On the contrary, the Ontario Superior Court of Justice requires counsel and judges to wear business attire, but has excused standing up at the commencement of the hearing.[60]

Procedure for Court Hearings

The Courts of Nova Scotia have adopted the COVID-19 Recovery Plan, which includes the functionalisation of e-courts. The virtual Supreme Court has been established and operationalised due to the collaborative efforts of the Judiciary, the Department of Justice Court Services Division and the Digital Services team of Nova Scotia.[61] E-courts are held by conducting remote hearings *via* technologies such as, telephone, video and communications

57 *Ibid.*

58 "*Use of Technology in the Justice System*", CONFEDERATION OF INDIAN INDUSTRY, May 2020, p. 41.

59 "*Instructions on Filing on Documents and Evidence*", https://www.statecourts.gov.sg/cws/CDRT/Pages/Instructions-on-Filing-of-Documents.aspx, (visited on August 22, 2020).

60 *Supra* n. 51.

61 "*COVID-19: Supreme Court Offering Virtual Hearings and Settlement Conferences*", May 7, 2020, https://www.courts.ns.ca/News_of_Courts/documents/NSSC_Virtual_Court_NR_05_07_20.pdf, (visited on July 5, 2020).

platforms like Skype, or a combination of such technologies. Lawyers have been encouraged to use e-courts in all civil, criminal and family matters, provided the prescribed criteria are met.

The criteria for conducting virtual hearings are threefold: *one*, all parties to the matter should be represented by counsel; *two*, the matter should be of such nature that it can be dealt with in three days or less; and, *three*, all the parties to the matter should consent to a virtual hearing, or a Judge should order the conduct of a virtual proceeding in the matter.[62] Although in May 2020, the Supreme Court had commenced e-court proceedings for civil matters, of a non-urgent nature, and which did not involve the taking of *viva voce* evidence, such as cross-examination, or documentary evidence; by a notification dated June 10, 2020, the e-court proceedings have been expanded to include trial matters, which include the admitting of *viva voce* evidence, as well as documentary exhibits through the virtual mode.[63] Apart from e-court cases, the court also conducts e-Skype settlement conferences at all locations of the Supreme Court. E-court hearings are arranged after lawyers contact the 'local scheduler' to get their hearings scheduled.

The 'E-Hearings Task Force' in Ontario has developed guidelines for the 'Best Practices for Remote Hearings'[64] which the participants in an e-court hearing are expected to adhere to, subject to the discretion of the presiding Judges, the peculiar facts and circumstance of each matter, and the rules of professional conduct for lawyers. The scope and application of the 'Best Practices' extends to those hearings which are logistically and legally appropriate for virtual hearings. Although the guidelines do not prescribe a fixed criteria to determine which matters would be so appropriate, they recognise that it may be inappropriate to conduct virtual hearing of matters dealing with sensitive information, such as criminal and child protection matters; and, matters which are not feasible for virtual hearing due to personal impediments of parties, including but not limited to, access to the requisite technology, and difficulties experienced due to physical or mental disability, or language barriers. The guidelines are general in application and are not limited to the virtual hearing during the COVID-19 pandemic alone. Further, the guidelines are applicable to both lawyers, as well as to self-represented litigants.

The 'Best Practices' guidelines, first and foremost, have laid down the fundamental requirement of virtual hearings: "*Remote hearings require civility, professionalism, cooperation, communication and collaboration between*

62 "*Virtual Courts, The Court of Nova Scotia*", https://www.courts.ns.ca/Virtual_Court.htm, (visited on July 5, 2020).

63 "*COVID-19: Supreme Court (General Division) Expands Virtual Court Initiative*", June 10, 2020, https://www.courts.ns.ca/News_of_Courts/documents/NSSC_Expanding_Virtual_Court_06_10_20.pdf, (visited on July 5, 2020).

64 "*Best Practices for Remote Hearings*", May 13, 2020, https://www.courts.ns.ca/News_of_Courts/documents/Best_Practices_for_Remote_Hearings_13_May_2020_FINAL_may13.pdf, (visited on July 5, 2020).

parties, both before and during the hearing".[65] Flexibility is an essential requirement for the conduct if virtual hearings, as there may be delays and inconvenience due to technical glitches caused by poor internet connectivity and amateur technological skills of the participants.[66]

Pre-Hearing Preparation

Prior to the hearing, it is advisable for parties to a matter to discuss with each other and arrive at a consensus regarding the crucial issues, such as, the format of hearing (which issues are to be argued orally, and which through written submissions); imparting of training regarding use of technological platform to all participants; the court services required to be provided at the time of hearing, such as the need for court interpreter; the format, and technology employed, for the documents to be exchanged; and, special information regarding the confidentiality or sensitivity of certain documents. Further, all relevant documents, evidence, pleadings, etc. should be systematically organised and made accessible electronically to the judges as well as parties to the matter.

Preliminary Hearing

The presiding judge in an e-court hearing has the discretion of conducting a preliminary hearing, so as to arrive at an agreement among the parties regarding the protocol to be followed during virtual hearings on the matter, prior to hearing the merits of the matter. The preliminary hearing is aimed at determining the mode in which documents would be exchanged electronically; how documents would be shown to witnesses testifying during examination-in-chief and examination-in-cross; and, whether the documents are sought to be password-protected.

The preliminary hearing may also determine the issues of fact and law on which the parties intend to argue the matter; the documents and evidence to be submitted; the technical settings of the virtual hearing, such as, use of camera and microphones; availability of break-out rooms; identification of participants on the virtual platform; logistics of the hearing; permission and restrictions regarding access to the recording of hearing; and, attendance of clients. The hearing may entail a reminder by the court regarding the court etiquettes to be followed to uphold dignity and propriety of e-court hearings. Lawyers are expected to prepare and advise their clients and witnesses also regarding the same.

Hearing

During e-court proceedings, lawyers are supposed to adhere to all rules of professional conduct, and not take undue advantage of technical glitches. No recording of the e-court proceeding is supposed to be made by any party using any technology, without the permission of the court.

Post-Hearing

65 *Ibid*, p. 5.
66 *Ibid*.

If e-court proceedings are interrupted due to technological glitches, the judge may permit the making of written submissions, taking into account the facts and circumstances of the matter.

E-Courts in India: Future Road Map

The advent of the video-conferencing technology is not a new phenomenon in India. The Supreme Court of India has also referred to the use of it on several instances. The technology primarily assists in situations in which the parties are situated at very far places from each other and it is not pragmatic for them to attend every date of appearance given by the court in the case. Video-conferencing has been used in the United States since several years which has helped in facilitating the disputes of litigants as well as the lawyers. It is similar to a normal call between two people; however, in video-conferencing, the image of person is displayed live with the help of camera and microphone making it more effective.[67]

The pivotal role of this technology has been realised specially after the outbreak of pandemic. The Supreme Court of India is also functioning virtually with the aid and assistance of online platforms, audio and video facility *via* internet. The former Chief Justice of India conducted a virtual hearing from his residence to hear an urgent matter relating to the *Rathyatra* which is organised at Jagannath Puri. It was a historic day as it was for the first time in India that a Chief Justice of India heard the matter virtually at his residence with the other two Supreme Court judges of the bench were at their respective office chambers.[68] The apex court has become a torch bearer for the cause of speedy justice even in the difficult times by proving that e-courtrooms can also function effectively.

In *State of Maharashtra v. Praful B. Desai*,[69] the apex court held that electronic evidence can be recorded through video conferencing. The court held that evidence recorded through the means of online facility will be included under Section 3 of the Indian Evidence Act 1872 which defines evidence. Thus, this case was first of its kind which set a precedent that evidence can also be recorded through the online mode subject to certain conditions.

In *Krishna Veni Nagam v. Harish Nagam*,[70] the apex court directed that in matters relating to marriages, custody of a child or any other dispute arising out of matrimonial discords, the facility of video-conferencing should be made available to the parties. In this case, the wife was residing at Hyderabad along

67 Setlur B.N. Prakash, "*E Judiciary: A Step towards Modernization in Indian Legal System*", JOURNAL OF EDUCATION AND SOCIAL POLICY, Vol. 1 No. 1, 2014, p. 118.

68 Vaibhav Ganjapure, "*In a first, CJI Bobde hears Puri Rath Yatra case at his city home through video link*", THE TIMES OF INDIA, June 23, 2020, https://timesofindia.indiatimes.com/city/nagpur/in-a-first-cji-bobde-hears-puri-rath-yatra-case-at-his-city-home-through-video-link/articleshow/76517680.cms, (visited on June 28, 2020).

69 (2003) 4 SCC 601.

70 (2017) 4 SCC 150.

with her child and parents, while the husband was residing at Jabalpur. The court stated that it is not feasible to transfer the pending cases in every situation. There may be situation in which either of the parties may be facing difficulties. In such cases, the option of video conferencing should be utilised. The court further held that every District Court should have an official e-mail ID which can assist the litigants.

A Constitution bench of the Supreme Court comprising of five judges also heard a matter through the technology of video-conferencing. The judges were wearing masks and maintained social distancing norms. The matter was relating to providing reservation to in-service candidates in post graduate medical degree courses. This was the first time post-lockdown that the Supreme Court judges sat in one court hall.[71] Thus, this marks a step in the direction of establishing an e-judicial system in India.

The Supreme Court of India has issued guidelines under the power conferred by Article 142 of the Constitution of India. The guidelines state that those who do not have the said facility will be assisted, and that arguments can also be recorded at the trial as well as the appellate stage through the said facility. The court has specifically stated that the use of video-conferencing facilities shall be used during the times of the pandemic in order to ensure that access to justice is not denied to anyone.[72] The apex court has set a precedent in such difficult and uncertain times that the delivery of justice should remain uninterrupted. The Supreme Court has also expressed in some judicial pronouncements, the effectiveness of ICT and its tremendous impact on the profession of law. However, the issue which needs to be scrutinized is the admissibility and legality of arguments, electronic evidences, technical difficulties, etc.

Conclusion

The COVID-19 pandemic has made us realise the significance of technology for providing justice to citizens of the country. The e-court which was earlier an exception has now become a rule or 'new normal' for the administration of justice. It has been aptly observed that, "*High-technology courtrooms and technology-augmented litigation are reflections of the understood, but rarely voiced, nature of legal practice. Legal practice, especially litigation and adjudication, is a highly sophisticated form of information management*."[73] Therefore, law-makers, judges, legal practitioners and academicians have to

71 Abraham Thomas, "*Supreme Court Holds First 'Virtual' Constitution Bench Hearing*", THE HINDUSTAN TIMES, July 15, 2020, https://www.hindustantimes.com/india-news/supreme-court-holds-first-virtual-constitution-bench-hearing/story-6OIJDbbzpliujLFjz1z3mI.html, (visited on July 22, 2020).

72 Harsh Chopra, "*Supreme Court's Video Conferencing Guidelines: A Welcome Step*", THE LEAFLET, April 21, 2020, http://theleaflet.in/supreme-courts-video-conferencing-guidelines-a-welcome-step/, (visited on June 23, 2020).

73 Jack B. Lederer, "*The Road to the Virtual Courtroom? A Consideration of Today's and Tomorrow's High Technology Courtrooms*", SOUTH CAROLINA LAW REVIEW, Vol. 50 No.3, p. 803.

deliberate upon the adequacy and effectiveness of e-courts in India. In the landmark judgment of *Anuradha Bhasin v. Union of India*,[74] the Supreme Court held that the right to internet is a fundamental right which receives protection under Article 19(1)(a) of the Constitution of India. If any restriction is put on the said right, it has to be in consonance with the reasonable restrictions enshrined under Article 19(2) of the Constitution.[75] The judgment will have far reaching consequences and impact on the access to justice.

Various courts under the umbrella of Supreme Court as well as the judges and the lawyers have been working tirelessly for safeguarding the objective of justice. The Delhi High Court in one of its press releases, stated that it has heard approximately 13,000 cases between April and July 2020, during the time of pandemic. Further, registration of around 21000 cases/applications was also carried out by the court.[76] Also, 67000 cases were also heard in the district courts, out of which judgments were delivered in 3700 cases.[77] It is not possible to predict at this juncture whether a complete transition to e-courts is possible or feasible, nonetheless it is undeniable that the opportunity provided by the pandemic is immense to deliberate upon the justice dispensation system, and that the system is currently standing at the threshold of a drastic change.[78] Therefore, the issue which needs to be addressed in a long run is the viability of e-courts in India. The Supreme Court and other courts in the country may soon start carrying out their work in physical mode. However, even in the physical mode of courts, there should be optimum utilisation of advanced technological resources. E-filing of cases and applications may be made compulsory by the courts to avoid inconvenience caused to the parties. Further, online appearance of parties and lawyers may also be encouraged keeping in mind the changing nature and working pattern of courts. However, this approach will require an overhaul of the existing conventional methods being used for providing justice to the citizens.

****

74 2020 SCC OnLine SC 25.

75 *Ibid.*

76 "*Delhi HC Listed 13K Cases for Virtual Hearings during COVID-19 Pandemic*", OUTLOOK: THE NEWS SCROLL, August 21, 2020, https://www.outlookindia.com/newsscroll/delhi-hc-listed-13k-cases-for-virtual-hearings-during-covid19-pandemic/1920377, (visited on August 22, 2020).

77 *Ibid.*

78 Pinky Anand, "*How Real?*", SUNDAY GUARDIAN, May 9, 2020, https://www.sundayguardianlive.com/legally-speaking/virtual-courts-real, (visited on June 17, 2020).

ACADEMIC INTEGRITY, PLAGIARISM AND COPYRIGHT ISSUES

V.K. Ahuja[♣]

Abstract

The practice of unchecked plagiarism in higher education brought the quality of academic and research work to a very low standard in India in the past. Copy-paste without any acknowledgment of source became the general practice to conduct research work. Nevertheless, a comparative smaller section of the people engaged in doing serious quality research. The lack of rules on academic integrity and the non-availability of software to detect plagiarism added fuel to the fire. In order to prevent academic theft and plagiarism as well as to promote academic integrity in the works produced by the students, faculty and researchers of the Higher Educational Institutions, the University Grants Commission notified the much-needed University Grants Commission (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations 2018 on July 31, 2018. The paper makes a critical analysis of the Regulations and also discusses the related copyright issues.

Keywords: Academic Integrity, Plagiarism, Higher Education, Self-Plagiarism, Academic Theft.

Introduction

The menace of plagiarism in higher education brought the quality of academic and research work to an extremely low standard in India in the past. A practice was developed over the years where students and teachers, while creating their works used substantial portions of other persons' works without proper acknowledgment. Copy-paste became the general practice with only some people doing serious research. While writing dissertation or thesis, the students used to borrow heavily from earlier published works without acknowledgement as they did not have the fear that they might be caught. A tendency was there in the minds of people that by making cosmetic or superficial changes in the earlier works, they will reproduce a new work and claim that work as their own.

The lack of rules regarding academic integrity and the non-availability of software to detect plagiarism added fuel to the fire. Pages after pages were quoted in the dissertations and theses and the works used to be created in no time. Substantial portion was quoted in the articles from the earlier published works without acknowledgement. Since the works were copied from the printed books which were available offline, it was difficult to detect plagiarism in those works. Apart from that, the dissertations and theses were converted into books by persons other the students themselves. In some of the cases, the disputes

♣ Vice-Chancellor, National Law University and Judicial Academy Assam, e-mail: vkahuja2002@yahoo.co.in.

between the students/researchers and their supervisors came to light where the students/ researchers levelled charges against their supervisors for appropriating their works.

In order to prevent academic theft and plagiarism and to promote academic integrity in the works produced by the students, faculty, researchers and staff (hereinafter referred to as stakeholders) of the Higher Educational Institutions (hereinafter referred to as HEIs), the University Grants Commission (hereinafter UGC) notified the much needed University Grants Commission (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations 2018 (hereinafter referred to as 2018 Regulations) on July 31, 2018.

The article critically analyses the provisions of 2018 Regulations *vis-à-vis* the provisions of the Copyright Act 1957 and the case law regarding copyright infringement. Further, the article discusses the shortcomings of these regulations and the possibilities for bypassing the software meant for detecting the plagiarism by the stakeholders. The paper also discusses various ways for promoting the culture of academic integrity in the country.

UGC Regulations on Prevention of Plagiarism 2018

The mandate of UGC, *inter alia* is to determine and maintain "*standards of teaching, examination and research in universities*".[1] In other words, UGC is duty bound to "*coordinate and determine the standards of higher education*" in terms of UGC Act 1956.[2] The UGC therefore notified the 2018 Regulations on July 31, 2018 which came into force from the same date.

Objectives of 2018 Regulations

The 2018 Regulations have threefold objectives. Firstly, the Regulations create awareness among stakeholders regarding responsible conduct of research, thesis, dissertation, promotion of academic integrity and prevention of misconduct which also includes plagiarism in their academic work. The term Academic Integrity is defined to mean the intellectual honesty in proposing, performing, and reporting any activity, which leads to the creation of intellectual property.[3]

Secondly, the regulations mandate the establishment of institutional mechanism by way of education and training for the aforesaid purposes.

Thirdly, systems must be developed for the purpose of detecting plagiarism and to set up mechanisms for preventing plagiarism and also punishing stakeholders who are alleged to have committed plagiarism.

The objectives of 2018 Regulations are therefore creating awareness among stakeholders regarding conduct of research in a responsible manner, etc.;

1 "*Mandate*", UNIVERSITY GRANTS COMMISSION, https://www.ugc.ac.in/page/Mandate.aspx, (visited on January 10, 2021): Section 12 of the University Grants Commission Act 1956.

2 Preamble to the UGC Regulations on Prevention of Plagiarism 2018.

3 Rule 2(a) of the UGC Regulations on Prevention of Plagiarism 2018.

educating and training stakeholders by establishing institutional mechanism; and developing systems for the detection of plagiarism for preventing plagiarism and punishing stakeholders for plagiarism by setting up mechanisms.

Duties of Higher Educational Institutions to Enhance Awareness

The regulations recommend all HEIs to create a mechanism for the purposes of enhancing awareness regarding prevention of plagiarism, promotion of academic integrity, and a responsible conduct of academic and research activities. This is essential to sensitize students, researchers, teaching and non-teaching staff so that a culture of academic integrity is developed, and the quality of research is enhanced. It is noteworthy that plagiarism check is being made mandatory for thesis and dissertation as well as for articles in HEIs. The HEIs should conduct regular programs for staff and students on regular basis in this regard.[4]

The HEIs are required to instruct stakeholders regarding proper attribution, seeking permission of the author wherever necessary, acknowledgement of source[5] compatible with the needs and specificities of disciplines and in accordance with rules, international conventions and regulations governing the source.[6]

Sensitisation/awareness programs are to be conducted by all HEIs in every semester on responsible conduct of research, dissertation, theses, promotion of academic integrity and ethics in education for stakeholders.

HEIs are required to include the cardinal principles of academic integrity in the UG/PG/Master's degree curricula as a compulsory course work/module. For Masters and Research Scholars, the HEIs shall also include elements of responsible conduct of research and publication ethics as a compulsory course work/module. The HEIs are also required to include elements of responsible conduct of research and publication ethics in Refresher as well as Orientation Courses which are organized for faculty and staff. The stakeholders are to be trained for using plagiarism detection tools and reference management tools.

For the purpose of plagiarism detection, modern technologies equipped facility is to be established by all HEIs. The HEIs are also required to encourage stakeholders to register themselves on international researcher's registry systems.

---

4 Rule 4 of the UGC Regulations on Prevention of Plagiarism 2018.

5 Rule 2(p) of the UGC Regulations on Prevention of Plagiarism 2018 defines source to mean "*the published primary and secondary material from any source*" It also includes "*written information and opinions gained directly from other people, including eminent scholars, public figures and practitioners in any form whatsoever as also data and information in the electronic form be it audio, video, image or text*".

6 Rule 5 of the UGC Regulations on Prevention of Plagiarism 2018.

Exclusions from Plagiarism

While making similarity checks for the purpose of finding out plagiarism in the work, the following will have to be excluded:[7]

(i) The quoted work which has been reproduced in the work of stakeholders with necessary permission or attribution or both. The 2018 Regulations did not mention the limits of quoted work that may be included. However, it does not mean that the quoted work is unreasonably high. It is therefore, suggested that there should be some limits on the quoted portions and the stakeholders do not rely heavily on the quoted portions in their research work, otherwise the work may turn out to be a compiled work lacking originality.

(ii) The Regulations allow all references, bibliography, table of content, preface and acknowledgements" to be excluded while checking plagiarism. In fact, this was the most common complaint of the persons doing research that plagiarism checking software are finding similarity in the bibliography and references also. The Regulations have rightly excluded them.

(iii) In addition to above, "all generic terms, laws, standard symbols and standard equations" are to be excluded. The anti-plagiarism software does a mechanical work and catches all the aforesaid terms, words, and symbols. The titles of legislations, terms like "persons with disabilities", etc. are taken into account by such software. The exclusion of the aforesaid was essentially required to do a meaningful research.

The research works of stakeholders are required to be based on original ideas. Such works must include abstract, summary, hypothesis, observations, results, conclusions, and recommendations. Further, it should not have similarities with other works. It is also noteworthy that the Regulations exclude a 'common knowledge'[8] or coincidental terms to the extent of fourteen consecutive words. This again gives a great relief to the stakeholders.

It is appropriate to explain the term *script* which includes research paper, thesis, dissertation, chapters in books, full-fledged books, and any other similar work, submitted for assessment/opinion leading to the award of master and research level degrees or publication in print or electronic media by stakeholders of an HEI.

The script, however, does not include assignments/term papers/project reports/course work/essays and answer scripts etc..[9] The exclusion of the aforesaid from the definition of script makes it clear that no plagiarism check is required in these cases. The purpose of these exclusions is to give students and

7 Rule 7 of the UGC Regulations on Prevention of Plagiarism 2018.

8 Rule 2(d) of the UGC Regulations on Prevention of Plagiarism 2018 defines the term common knowledge to mean "*a well-known fact, quote, figure or information that is known to most of the people*".

9 Rule 2(o) of the UGC Regulations on Prevention of Plagiarism 2018.

researchers relief on the ground that rigorous work is not required in the aforesaid works. The exclusion does not seem to be a healthy decision. It is *sine qua non* to develop a habit of academic integrity in the students before they reach to the level of writing a dissertation or thesis or articles for publication. If copy-paste practice is allowed to them at the time of writing term papers, assignment, project reports, etc., then it will be difficult to expect responsible conduct from them at the time of doing research. One can understand excluding answer scripts but no other works.

At the time of writing dissertations or thesis, the students or researchers are asked to follow plagiarism rules and make their work free from plagiarism. At this stage, they feel quite uncomfortable and some of them adopt unethical practices to avoid their work catching plagiarism. For example, some of the students and researchers use quotations but they hide the inverted comas, as a consequence of which the quoted portion is not caught by the anti-plagiarism software. As already stated, there is no restrictions on the quantum of quotations, all quotations will have to be excluded by the software.

Some of them connect various words by putting a letter in between them and then hide those letters so that it seems all right but the software may not be able to catch it as many words are connected and made one word. Further, the letter 'l' is replaced by numeral '1' and letter 'o' is replaced by numeral '0' at certain places to take some portions out of plagiarism.

Curbing and Handling of Plagiarism

The HEI is to declare and implement the mechanism which is technology based using software in order to ensure that at the time of submission any document which may include dissertation, thesis, publications, etc. is not plagiarised. The aforesaid mechanism is to be made accessible to all persons conducting research in the HEI.

At the time of submission of dissertation, thesis or other documents, every student will be required to submit an undertaking to the HEI to the effect that his/her work is original and not plagiarised. The undertaking so submitted by the student is to indicate that his/her work has been checked through anti-plagiarism software which was approved by that HEI. The HEI is to develop an anti-plagiarism policy and upload it on its website homepage after getting it approved from its statutory bodies/authorities.

The Regulations also obligate the supervisor to submit a certificate to the effect that the work of his/her researcher is not plagiarised. The soft copies of the dissertations and theses of the Masters and Research programs are to be submitted to the Information and Library Network (hereinafter referred as INFLIBNET) by HEI within a period of one month from the award of degree. Such copies of the dissertations and theses are to be hosted by INFLIBNET in the "digital repository" under the 'Shodh Ganga E-Repository'. An Institutional Repository is to be created by HEIs on their institutional websites which must

include paper/publication/theses/dissertation as well as other in-house publications.[10]

Where a plagiarism case is suspected by a member of the academic community who has appropriate proof about it, the same will be reported to Departmental Academic Integrity Panel (hereinafter referred as DAIP) which will then investigate such matter. After investigation, it will submit its recommendations to the Institutional Academic Integrity Panel (hereinafter referred as IAIP). The HEI authorities are also empowered to take *suo motu* notice of plagiarism and initiate proceedings in accordance with the regulations. The HEI can also initiate proceedings on the basis of examiner's findings. The IAIP will investigate all such cases.[11]

Various Levels of Plagiarism and Penalties

The Regulations lay down four levels of plagiarism which are to be quantified into Level 0, Level 1, Level 2, and Level 3. The similarities found in the work up to 10% will fall in Level 0. Such similarities are considered as minor similarities and do not attract any penalty.

Level 1 covers similarities which are more than 10% but restrict up to 40%. In Level 2, similarities more than 40% but restricted up to 60% will be covered. Lastly, similarities above 60% will fall under Level 3.

Except for Level 0 similarities, there will be different penalties for the similarities found in Level 1 to Level 3.[12] The penalties are to be imposed on faculty members, researchers, students of Master's as well as research programs, and staff. However, no penalties to be imposed unless 'academic misconduct' has been proved beyond doubt and the person concerned has exhausted every avenue of appeal. It is essential that such a person must be provided adequate opportunity to defend his/her case in a manner which is fair or transparent.

Plagiarism in Thesis and Dissertations

Where plagiarism is detected in dissertation and thesis, the IAIP is to impose penalty on the basis of level of the plagiarism. There will be no penalty up to 10% similarities. In case of 10% to 40% similarities, the student will be required to submit within 6 months a revised script. Where the similarities are between 40% to 60%, the student concerned in such a case will be barred for one year from submitting his/her revised script. The registration of such student will be cancelled where similarities are found to be more than 60%.[13] In case of repeated plagiarism, the penalty will be one level higher than the previous level. If the earlier plagiarism was covered under highest level, the penalty for that level remain operative. Where plagiarism is proved after the degree or credit has been awarded, then the same is to be put in 'abeyance' for IAIP recommended period approved by the Head of that student's Institution.

10 Rule 6 of the UGC Regulations on Prevention of Plagiarism 2018.
11 Rule 9 of the UGC Regulations on Prevention of Plagiarism 2018.
12 Rule 12 of the UGC Regulations on Prevention of Plagiarism 2018.
13 Rule 12.1 of the UGC Regulations on Prevention of Plagiarism 2018.

Plagiarism in Academic and Research Publications

In case of plagiarism in academic and research publications, there will be no penalty up to 10% similarities. In case of 10% to 40% similarities, the teacher concerned will have to withdraw the manuscript. Where the similarities are between 40% to 60%, not only that the manuscript is to be withdrawn, but also one annual increment be denied, and that teacher will be debarred to act as a supervisor for two years. In case of more than 60% similarities, in addition to withdrawal of manuscript and denial of two annual increments successively, that teacher will be denied the opportunity to become supervisor for 3 years.

For repeated plagiarism, not only the manuscript be withdrawn, but the teacher concerned will be punished for one level higher. In case of highest level of repeated plagiarism, not only the punishment of that level be operative but also the disciplinary action will be initiated by the institution which may include suspension/termination in accordance with service rules.

Where plagiarism is proved after the benefit or credit has been obtained, then the same is to be put in 'abeyance' for IAIP recommended period approved by the Head of that Institution.[14]

The regulations mandate all HEIs to develop a plagiarism check mechanism for every paper publication/thesis/dissertation of the stakeholders. Plagiarism check is to be made before forwarding or submitting such work. This is a good provision as it will inform the stakeholders well in advance about the quantum of plagiarism so that they could rework on plagiarised portion and bring the plagiarism down to the permissible limits.

Where Head of an HEI is accused of plagiarism, the Controlling Authority of such HEI will take a suitable action in accordance with the regulations. In case Head of Department or any Authority at the level of institution is accused of plagiarism, the IAIP shall recommend a suitable action in accordance with the Regulations which is to be approved by the Institution's Competent Authority.

The DAIP or IAIP member is to excuse himself/herself from any meeting or discussion/investigation if a case of plagiarism is taken up against him/her on a complaint.

The regulations failed to provide any penalties in cases where *stakeholders* played tricks to avoid plagiarism. The Regulations should have contained provisions to suitably punish the *stakeholders* for adopting such tricks. The provisions relating to punishment in this regard could have worked as deterrent for all *stakeholders*. It is submitted that the Regulations should be amended to take care of such unethical practices.

Notification of Academic Integrity Panels

It is mandatory for every Department of HEI to notify a Departmental Academic Integrity Panel (hereinafter referred as DAIP). The DAIP consists of

14 Rule 12.2 of the UGC Regulations on Prevention of Plagiarism 2018.

a Chairman and two members. The Chairman will be the Head of the Department whereas one of the members will be a senior academician from other Department duly nominated by Head of the HEI, and the other member will be a person who is well versed with various tools to detect plagiarism duly nominated by the Head of Department. The members will have a tenure of two years. The allegation of plagiarism is to be decided by following the principles of natural justice. The level of plagiarism is to be assessed by DAIP and consequently the penalties will also be recommended by it. The DAIP is liable to submit its detailed report after investigation including recommendations on penalties to IAIP within 45 days from the receipt of complaint/initiation of the proceedings.[15]

Like DAIP, Institutional Academic Integrity Panel (hereinafter referred as IAIP) will also to be notified by the HEI. The IAIP shall consist of a Chairman and three members. The chairman shall either be Pro-Vice Chancellor, Dean or a senior academician of that HEI. One of the members shall be a senior academician, the second member shall be from outside the HEI, and the third member shall be a person who is well versed with various tools to detect plagiarism. All the three members shall be nominated by the Head of the HEI. The Chairman of IAIP and DAIP cannot be the same person. The tenure of all of them is to be 3 years. The DAIP recommendations are to be considered by IAIP. The plagiarism cases shall also be investigated by the IAIP in accordance with the Regulations and the principles of natural justice are to be followed by it.[16] The DAIP recommendations may be reviewed by IAIP with "due justification. The IAIP is liable to submit its detailed report after investigation including recommendations on penalties to the Head of the HEI within 45 days from the receipt of DAIP recommendation/complaint/initiation of the proceedings.[17]

Self-Plagiarism

The UGC Regulations of 2018 mandates the prevention of plagiarism in the academic works and research. Plagiarism is defined in the regulations to mean "*the practice of taking someone else's work or idea and passing them as one's own*".[18] The regulations did not prevent 'Self-plagiarism' or 'Text-recycling' which is a common practice in India. Self-plagiarism takes place when a person uses his/her earlier work by modifying the title and making certain changes by keeping the essence of the earlier work and claiming the modified work as new work. Sometimes many publications are claimed from one single work only by adding some new contents to the old one and changing the structure of the old work. Sometimes a work is broken into several pieces and those pieces are claimed as new works after some modifications. This is done to show a greater

15 Rule 10 of the UGC Regulations on Prevention of Plagiarism 2018.

16 According to Rule 2(j) of the UGC Regulations on Prevention of Plagiarism 2018 provides that the IAIP shall "*investigate allegations of plagiarism at the institutional level*" in exceptional cases.

17 Rule 11 of the UGC Regulations on Prevention of Plagiarism 2018.

18 Rule 2(l) of the UGC Regulations on Prevention of Plagiarism 2018.

number of publications and claiming credits for them at the time of new appointment or promotions.

In order to overcome the problem of self-plagiarism, the UGC published a public notice on self-plagiarism[19] in accordance with global standards relating to ethical publishing which have been developed by leading institutions and Committee on Publication Ethics (hereinafter referred as COPE. It states that self-plagiarism/text-recycling is reproduction either in whole or in part by someone of his/her own previously published work without providing adequate citation and proper acknowledgment and claiming that reproduced work as original and new work for the purpose of taking academic advantage. The UGC states that the self-plagiarised work is not to be accepted.

The UGC further explains self-plagiarism/text-recycling to include (i) republishing the earlier published paper without providing due and full citation; (ii) publishing from a previous longer work an excerpted/smaller work without providing due and full citations with an objective to claim more publications; (iii) reuse of data without providing due and full citation which already been used in an earlier published work; (iv) publishing smaller sections of a larger/longer study by breaking it up and claiming them as new work without providing due and full citation; (v) paraphrasing by someone of his/her earlier published work without providing due and full citation of the earlier original work.

The UGC makes it clear that no new number will be added to one's 'Citation Index' or 'H-Index' in global academia by self-citations. The UGC has strongly advised that in case of award of research degrees, selections, promotions, and credit allotment, the decisions of Vice-Chancellors, Screening Committees, Selection Committees, Internal Quality Assurance Cells (hereinafter referred as IQACs) and those experts who get involved in academic performance/evaluation and assessment must be based on the fact that the published work submitted by the applicants are free from self-plagiarism.

This notice of UGC is a welcome step and aims to end the bad practices of self-plagiarism. By explaining the meaning of self-plagiarism, the UGC has tried to end all types of manipulations which were being adopted by many people. Where a particular number of published papers were required for promotion or otherwise, self-plagiarism was the most convenient mode to get the desired numbers. It had been a common practice in India for long that applicants would break their dissertations, theses, project reports into several parts and give them shape of articles and claim them as their altogether new works. The prevention of self-plagiarism will enhance academic integrity and nurture an academic culture where works published once will not be recycled in order to claim more works. The earlier works of a researcher can be quoted by him/her in the later works, but due acknowledgment should be made of the first

19 University Grants Commission, "*Public Notice on Self-plagiarism*", April 20, 2020, https://www.ugc.ac.in/pdfnews/2284767_self-plagiarism001.pdf., (visited on September 30, 2020).

work. Further, one should quote his earlier work in the same manner as he/she quotes the works of others. In other words, only fair dealing should be allowed to the extent permissible or acceptable in academic circles.

Plagiarism under Copyright Law

The Copyright Act 1957 does not use the expression plagiarism. It uses the expression infringement of copyright which is different from plagiarism. The infringement of copyright takes place in those works in which the copyright subsists. In other words, there will be no infringement of copyright in those works which have fallen into public domain after the expiry of copyright term. For example, if the work of Guru Rabindranath Tagore, which had already fallen into public domain, is reproduced substantially by someone without acknowledgement, it may not be called as copyright infringement but will be considered as an act of plagiarism. It may violate moral rights of the author under the Copyright Act 1957 but will not be called as copyright infringement.

Under 2018 Regulations, the term plagiarism is defined to mean "*the practice of taking someone else's work or idea and passing them as one's own*".[20] The plagiarism, therefore may happen with any work whether copyright subsists in that work or not. The definition of plagiarism is broad under the 2018 Regulations as it refers to taking of someone's work or idea. It is important to note that anti-plagiarism software may not be able to detect plagiarism in the work which is not copied but is based on the ideas of a person other than the author himself/herself.

On the other hand, what is prohibited under the Copyright Act 1957 is reproduction of the work of some other person without his permission and claiming that reproduced work as one's own.[21] Reproduction of a work is different from copying a work. The term 'copy' is defined as "*which comes so near to the original as to give every person seeing it the idea created by the original*".[22] In *Mishra Bandhu Karyalaya v. Shivratanlal Koshal*,[23] the court observed that a *copy* was that which came so near the original as to suggest the original to the mind of the reader.[24]

The reproduction, on the other hand, means taking substantial portion out of the work of someone and claiming that portion as one's own work. In *British Northrop v. Texteam Blackburn*,[25] the court explained the meaning of reproduction by stating that "*there must be a high degree of similarity before one thing can be said to be reproduction of another; but minor or trivial differences will not prevent one work from being a reproduction of another. It may be that reproduction has much the same meaning as copy, and that it suffices for a reproduction if it makes a substantial use of the features of the*

20 Rule 2(l) of the UGC Regulations on Prevention of Plagiarism 2018.
21 Sections 14 and 51 of the Copyright Act 1957.
22 *Hanfstaengl v. W.H. Smith and Sons* (1905) 1 Ch.D. 519.
23 AIR 1970 MP 261.
24 *Mohendra Chandra Nath Ghosh v. Emperor* AIR 1928 Cal 359.
25 (1974) RPC 57.

original work in which copyright subsists".[26] The question whether a person has taken a substantial part or not depends much more on the quality than the quantity of what he has taken.[27] In *Johnslone v. Bernard Jones Publications Ltd. Beauehamp*,[28] while explaining the meaning of the term 'Substantial', the court held that it was a question of fact and degree and it did not denote the bulk or the length of the extracts. A short extract may be a vital part of the work. In *FE Engineering & Consultancy Pvt. Ltd. v. LG Cable Ltd.*,[29] the Court stated that the law on infringement was well-settled and well-crystallised. Quality and substantiality are the two touchstones on the basis of which such allegations are to be tested.[30]

The Copyright Act 1957 protects expressions not *ideas*. In *Donoghue v. Allied Newspaper Ltd*.,[31] Farwell J. stated that "*[I]f the idea, however brilliant and however clever it may be, is nothing more than an idea, and is not put into any form of words, or any form of expression …, then there is no such thing as copyright at all. It is not, until it is reduced into writing, … that you get any right to copyright at all, and the copyright exists in the particular form of language in which … the information or the idea is conveyed to those who are intended to read it or to look at it*".

In *Cherian P. Joseph v. Prabhakaran*,[32] the court stated that copyright in a work was not infringed if someone took the essential idea from that work and developed his own work. In *Harnam Pictures N.V. v. Osborn*,[33] the court held that there was no copyright in ideas, schemes or systems or method and the copyright was confined only to the subject.

Under copyright law, there is no copyright in ideas, and anyone can develop an idea which has not been put in some material form. Taking ideas from the work of someone and developing one's own work is permissible under copyright law provided the person taking the idea does not rely on the work of other and develop his work independently. In *Institute for Inner Studies v. Charlotte Anderson*,[34] the Delhi High Court held that the copyright vested in original expression of idea and not in idea itself. Therefore, the only way or manner of presentation of an idea was protected by copyright law.[35]

In order to prove infringement of copyright, the plaintiff is required to prove that the defendant has reproduced from his work. Therefore, causal connection between the works of plaintiff and defendant is to be proved to establish infringement of plaintiff's copyright by the defendant.

---

26 *Ibid*, p. 72.
27 *Ladbroke v. William Hill* (1964) 1 WLR 273, p. 276.
28 (1938) 1 Ch. 599.
29 2002 (25) PTC 577 (Del).
30 *Ibid*, p. 582.
31 (1937) 3 Ch.D. 503.
32 AIR 1967 Ker 234.
33 (1967) 1 WLR 723; (1967) 2 All ER 324.
34 2014 (57) PTC 228 (Del).
35 *Ibid*, p. 285.

It is noteworthy that in some of the cases similarity found between the works of plaintiff and defendant may be due to the fact that both the parties might have used a common source or that they had arrived at their results independently by putting their time and labour.[36] In such a case, there shall be no infringement of copyright.

The Copyright Act 1957 also allows fair dealing with a work for the purpose of private research, not commercial research. Fair dealing is also allowed for the purposes of 'criticism or review' either of that work or of any other work.[37] The term 'fair dealing' has not been defined under the Act. The Act does not lay down any limit on the work to be quoted for the aforesaid purpose. It depends on the purpose of the work. It however, does not mean that the entire work may be full of quotations and one's own contribution is negligible. In *Hubbard v. Vosper*,[38] Lord Denning made following observations: [39]

> *You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. … If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other consideration may come to mind. But, after all is said and done, it must be a matter of impression*.

Although Copyright Act 1957 and UGC Regulations of 2018 do not mention about the quantum which can be borrowed by someone in his/her research work, which should not be excessive or unreasonable. Excessive quotations with proper acknowledgement may result in the plagiarism-free work because the software excludes quotations. In such a case, it is required to check the work manually. On the other hand, excessive quotations may not be treated as fair dealing under the Copyright Act and may result in infringement of copyright.

Conclusion

The 2018 Regulations were need of the hour to prevent academic theft, promote academic integrity and develop a culture in higher education where teachers, students, researchers and staff will contribute to quality academic and research works. The impact of these regulations will be visible in near future. All the theses and dissertations are being checked for plagiarism. The articles are also being checked for plagiarism which is an exceptionally good trend. After the UGC adopted Academic Performance Index (hereinafter referred as API) scheme for promotion under Career Advancement Scheme (CAS), large number of sub-standard online and offline journals emerged who were publishing all works without plagiarism check by charging fee from the writers.

36 *Corelli* v. *Gray* (1913) 29 TLR 116.
37 Section 52(1)(a) of the Copyright Act, 1957.
38 (1972) 2 Q.B. 84 (C.A.).
39 *Ibid*, p. 94.

All sorts of manipulations were adopted by these journals. Some of the online journals published articles in back date also to make applicants eligible for promotion from the back date. These predatory journals are also responsible for promoting sub-standard and plagiarised research.

The 2018 Regulations exclude term papers, assignments, course work, essays, and project reports from the definition of script. This does not seem to be a good initiative. If we introduce these regulations to students and researchers at the time of writing thesis and dissertations, it would be exceedingly difficult for them to adopt it and they may indulge in some unethical practices. It is submitted that the students and teachers should be sensitised about the academic theft, plagiarism and academic integrity from school level only. They should be taught about dos and don'ts for academic works including assignments. They should be motivated for doing quality work. Similarly, at college and university levels, the students should be motivated to produce plagiarism-free quality assignments, term papers etc. A liberal approach may be adopted in cases of assignment, term papers, assignments, etc. A message is required to be sent to them that copying the work of some other person and claiming such work to be one's own is academic theft. Therefore, they should acknowledge any content which is taken from the works of other persons. This will nurture a culture of academic integrity and the students shall be motivated to produce quality research work. It is important to note that if we want to prevent plagiarism in HEIs, the initiative is to be taken at the school level by sensitizing students.

All HEIs should discuss these regulations threadbare in Orientation and Faculty Development Programs conducted by them from time to time. Further, the Regulations do not talk about the quantum of quotations which can be used by one in the academic or research work. It is submitted that there should be some cap on the quoted portion borrowed from other sources otherwise a culture will develop of compilation rather than quality research.

The 2018 Regulations should have provided for penalty and the cancellation of entire work in case the teacher, researcher, student or staff has played tricks to bypass plagiarism. Any manipulation to make the work plagiarism free should be strictly dealt with.

To sum up, with the adoption of 2018 Regulations, it is expected that the quality of the academic and research work will increase. The writer of a work will have the feeling that the days of committing academic theft without consequences are over. In all probabilities, the focus will be shifted from quantity to quality. Now people will concentrate more on quality of their work rather than producing works in bulk. The impact of the Regulations will be visible in near future. The Regulations should be amended in the light of suggestions made in this article.

***

ROLE OF JUDICIARY IN INDIAN ECONOMIC DEVELOPMENT

Shubham Gajanan Kawalkar ♣

Abstract

Judicial Independence refers to the absence of foreign interventions in maintaining judicial autonomy whereas Judicial Review enables the judiciary to assess the executive action in accordance with the check and balance mechanism provided under the Constitution of India. The paper discusses the nature of relationship between the judiciary and economic development wherein, it critically analyses the Indian judicial system in the light of Judicial Independence and Judicial Review along with suggesting the reformative measures in the form of Common Proposition and Judicial Engineering to establish its relationship with economic development of the nation. Further, the paper discusses the overburdened Indian judicial system and its impact on the development of economy with the help of relevant judicial pronouncements.

Keywords: Judicial Independence, Judicial Review, Economic Impact, Market Value, Judicial Engineering, Economic Development.

Introduction

Albert Einstein has said, "*If I knew what I was doing it wouldn't be called research*". It was this statement that compelled the author to study the Indian judicial system and suggest reformative measures to make it more progressive in its impact on the country's economic development. Further, the author's attention was called to what Ronald Coase said, "*If you torture the data long enough, it will confess.*"[1] After exploring the data, the author decided to torture the data long enough, so that it will confess and establish the researcher's idea that Indian judicial system helps in country's economic development. The rationale for encouraging judicial reform is that such reforms should significantly improve the economic performance of the nation. Judicial reform includes making judicial branch independent, enhancing the speed of processing of cases, increased access to dispute resolution mechanism, professionalisation of bar and bench, etc. Economics and legal scholars suggests that the judicial system plays a vital role in the maintaining the rule of law as well as in economic development.[2] In addition, efficient and reliable dispute resolution is considered to be the primary and important service provided by courts. This dispute resolution technique is important in economic progress/development for many reasons. Of course, the dispute resolution is

♣ Ph.D. Research Scholar at School of Law, Bennett University, Greater Noida, e-mail: shubhamkawalkarias@gmail.com.

1 R.H. Coase, HOW SHOULD ECONOMISTS CHOOSE?, 1st ed. 1982, p. 16.

2 Richard E. Messick, "*Judicial Reform and Economic Development: A Survey of the Issues*", THE WORLD BANK RESEARCH OBSERVER, Vol. 14 No. 1, 1999.

considered as private good but reasonably, one can ask why public courts are necessary. Further, the private parties often rely on non-government dispute resolution mechanism because of its limited scope.[3] Many economists have also emphasised that the market value of the country must be interconnected with the judicial system and reforms in judicial system which would ultimately lead towards economic development. If there is speedy and proper disposal of cases and remedies are available to the aggrieved parties in case of breach of contract or any prevailing law, then many investors tend to invest in the nation reposing their faith in the reliable and trustworthy justice delivery system. In such a way, economic development is the implied outcome of maintaining developed judicial system. Thus, the author believes and supports the view that economic development of the country depends upon the efficient and reliable justice delivery system. Similarly, it can be said that the relationship between judicial reform and development is equally important for political and economic development.

The author has gone through various studies, which though have attempted to evaluate the role of judiciary in economic development with the help of concepts like judicial independence and judicial review,[4] but have failed to explain the relation between them and have not provided/substantiated the solution with proper judicial pronouncements. In addition, the studies have failed to explain how the judiciary helps in the economic development and what could be the ways to achieve the objective of economic development. Similarly, few studies have tried to acknowledge importance of sound judicial system for good governance and economic growth, and also discussed actual effect of judicial reform on economic performance,[5] but have failed to put all judicial reformative measures in systematic format. Therefore, the author addresses the relation of judiciary and economic development along with the impact of judicial reform in economic development and their inter-connection. Further, the paper discusses the pre-requisites for successful judicial reforms as well as practical feasibility of enforcement mechanism in India.

Indian Judicial System: Rationale for Judicial Reform

Judicial reform plays crucial role in developing legal system and in making transition economy more market friendly. Legal reform includes drafting, or revising commercial codes, bankruptcy statutes, company laws through regulatory agencies, etc. However, there is difference between judicial and legal reform, though the two are interconnected. The central focus of judicial reform

3 Mathew Stephenson, "Judicial Reform in Developing Countries: Constraints and Opportunities, Francois Bourguignon and Boris Pleskovic (eds.), ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS: BEYOND TRANSITION, 1st ed. 2007, pp. 311-328.

4 Kaitlyn Sill, "*Economic Development and the Judiciary*", WESTERN POLITICAL SCIENCE ASSOCIATION, Annual Meeting Paper, 2010, Available at SSRN: https://ssrn.com/abstract=1580500, (visited on June 9, 2021).

5 *Supra* n. 2.

is to strengthen judicial governance and entities such as public prosecutor and public defender offices, bar associations, law schools etc.[6]

Maintaining Independence of Judiciary

The budget allocation or funds transfer for judicial system are done by Ministry of Justice and other executive departments.[7] Judicial independence is maintained by giving judges timely salary and perks. It is essential for the maintenance of independence of judiciary that judges' selection and appointment is insulated from executive influences. The core of independence of judiciary lies in the power to declare acts of executive or legislature in violation of Constitution of India.[8]

Speedy Disposal/Processing of Cases

To reduce case backlogs and accelerates disposal of cases, case management training, computers and other technological advancement would be helpful to the Judges.

Access to Dispute Resolution Mechanism

Court costs can be reduced if use of mediation services and other alternatives to resolve dispute is promoted. Also, transfer of non-contentious matters, such as probate of uncontested wills, and the registration of property to administrative agencies would also prove beneficial as the court will get more time to dispose contentious cases.

Professionalise Bar and Bench Relation

Market economy demands can be fulfilled with in-service training for judges, lawyers, and other legal professionals. Establishing more law schools having adequate resources and modified curriculum incorporating the contemporary economical aspect would aid in professionalising prospective members of the bar and bench.

Judicial Independence, Judicial Review and Economic Development

Assuring independence of judiciary would not directly attract additional investment, however potential investors' trust in the functioning of the Indian Judiciary may impact their investment behaviour.[9] Judicial Independence (JI)

---

6 M. Dakolias, "*A Strategy for Judicial Reform: The Experience in Latin America*", World Bank Technical Paper, WORLD BANK, Washington, D.C, 1996, p. 319; Ibrahim F.I. Shihata, THE WORLD BANK IN A CHANGING WORLD: VOLUME II: SELECTED ESSAYS AND LECTURES, 1st ed. 1995.

7 *Ibid*.

8 *Supra* n. 2.

9 Lars P. Feld and Stefan Voigt, "*Economic Growth and Judicial Interpretation: Cross Country Evidence Using A New Set of Indicators*", April 2003, https://poseidon01.ssrn.com/delivery.php?ID=129083126005064123016068122096005095064092003080021035106067116095100110123037035061054127055066012115087000073111032095066054097065103018024090020009092126063012 08

can be classified into two types, i.e., *de jure* and *de facto*. *De jure* JI can be derived by looking at the letter of law, whereas *de facto* JI is exercised by judges and justices according to their conscience, reflection and can be seen in their judicial decisions' impact on government behaviour / policy.[10]

The two indicators of JI are:

De jure : focusing on legal foundation of judicial independence.

De facto : focusing on the factually ascertainable degree of judicial independence.

Montesquieu's theory of separation of power developed the concept of judicial independence which has been criticised by Hamilton, Madison and Jay, who were the authors of the Federalist Papers. Judicial independence's impact on economy is measurable with the help of two indicators *de jure* and *de facto* independence. According to *de jure* indicator, independence of superior court is deduced from legal documents and *de facto* indicator measures the degree of independence the superior court fully enjoy. *De jure* indicator does not impact the economic growth, on the contrary *de facto* judicial independence positively influences the real GDP per capita growth. Thus, judicial independence matters for economic growth and if that it is the matter, economists must not ignore the role whenever the issue of constitutional design is discussed.[11]

Impact of Judicial Independence on Economic Growth

Judicial Independence (JI) can be measured with amount of discretion that judges have while delivering judgment.

Judicial Independence ⟶ Discretion of Judges/*De facto* indicator

The importance of judicial independence for economic growth and development is that judges presume that whatever the decisions or judgement they are giving would be implemented by the legislature or executive branches. Judges do not have to anticipate negative impact of their decisions like a) being expelled, b) being paid less, or c) being made less influential. Importance of JI in economic growth can be distinguished in three archetypical interaction situations:

(i) In case of conflict between citizens: If contracting parties voluntarily entered the contract and other party didn't follow that contract, impartial dispute resolution is necessitated. Having faith in impartiality of judiciary, saves the transaction cost while negotiating the contract.

60640110961251151000010930800810841251001230250981121090791130950011030960830 94&EXT=pdf&INDEX=TRUE, (visited on February 15, 2021).

10 *Ibid.*

11 Lars P. Feld and Stefan Voigt, "*Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary*", January 2006, https://www.researchgate.net/publication/237619174_Judicial_Independence_and_Economic_Growth_Some_Proposals_Regarding_the_Judiciary1, (visited on February 15, 2021).

(ii) Conflict between Government and Citizens: Citizens rely on the institution which it sees are morally upright. Judiciary has to always uphold the rule of law while settling disputes between government and citizens.

(iii) Conflict between Government branches: Independent judiciary solves the conflict between government branches by upholding the rules laid down in constitution.

Judicial Independence is conducive to economic growth because it contributes to reduction of uncertainty in performance of various government functions. If the representatives of government follow the letter of law, then uncertainty can be reduced and citizen expectations can be met in real sense. JI could be utilised as a device to covert promises- for example, to respect property rights and abstain from expropriation- into credible commitments.[12]

Judicial Review and Impact on Economic Growth

According to Hans Kelson, "Grundnorm" is the supreme law in the state. The Constitution of India is considered the supreme law of land in India. Also, H.L.A. Hart, as a positivist, emphasised that Constitution is the touchstone for all other laws. Article 13 of the Constitution provides, 'Any law which is inconsistent with fundamental right should be void'. The constitutionality of law should be checked by the Supreme Court, if it is inconsistent then it would be declared unconstitutional, hence called as 'Judicial Review'. The judiciary reviews the decisions of legislature and executive and if it violates basic structure of the Constitution then the laws or acts should be declared void. The judicial review is one of the basic features of the Constitution as has been discussed in the case of *Keshvananda Bharti v. State of Kerala*;[13] *Indira Nehru Gandhi v. Raj Narain*;[14] and *Raja Rampal v. Hon'ble Speaker, Loksabha*.[15]

Judicial Review is the judiciary's ability to declare acts of government unconstitutional.[16] Judicial Review has no impact unless constitutionally enumerated property exists.[17] Judicial review ensures that legislature will make law in consonance with the Constitution. 'Behavioral Theory' is generally provided by economists to predict how people respond to laws. To revise, repeal, and interpret laws, response of people always works.[18] An essay on law and economics describes the law as cathedral- a large, complex, beautiful, mysterious, and sacred building.[19] Judicial review certainly helps in economic

12 *Ibid.*
13 AIR 1973 SC 1461.
14 AIR 1975 SC 2299.
15 (2007) 3 SCC 184.
16 *Supra* n. 4.
17 *Supra* n. 2.
18 Robert Cooter and Thomas Ulen, LAW AND ECONOMICS, 6th ed. 2016.
19 Guido Calabresi and A. Douglas Melamed, "*Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*", HARVARD LAW REVIEW, Vol. 85 No. 6, 1972, pp. 1089-1128.

development. For example, if legislature made one law which in case of breach has more severe punitive punishment, the question will arise what will happen to the safety or price of product in future. Economists were of the view that punitive punishment is equivalent to imposing monetary fine.[20] Therefore, the author finds that there is direct relation of laws made by parliament, action of judicial review by Indian judicial system and growth of economy in the country.

Economic Development and Progressive Judicial Reforms

Robert Cooter and Thomas Ulen, in their book 'Law and Economics' discuss about the relation between law and economics. They have emphasised that there is a direct relation. For example, if someone committed crime then he may be charged with provisions of Indian Penal Code 1860, for which he a monetary fine may be imposed. Judiciary also plays vital role in country's economic development as it affects the foreign direct investment, market value, per capita income GDP, etc.[21] Interdependency between judiciary and economics affects economic development, in such a way that whatever the judgment delivered by Supreme Court and High Court either have positive, negative or no impact on country's economic growth. Therefore, to have impartial judicial system on which investor and general public have faith is the need of the day.[22] Contemporary Indian Judicial System demands reforms in their system due to various reasons such as backlogs – pendency of the cases, delay in processing of cases, issue of transparency, rising corruption in lower judiciary, lack of technological advancement, etc. A country's judicial systems plays a vital role in ensuring quality of economic performance.[23] An efficient, effective, honest and sound judiciary is essential for economic development. In other words, economic development will be slow or non-existent without judicial reform.

The author submits suggestions for judicial reform that can be categorised into two: Common Propositions and Judicial Engineering. Further, Common Propositions is further classified into Public Reason, Justice as Fairness and Practical Reasonableness, etc. Prof. Amartya Sen, economist and Nobel laureate, in his book 'Idea of Justice' explained the importance of 'Public Reason' in every judicial system, to have rapid economic development. Prof. Amartya Sen described that for legislature while making laws and judiciary while deciding any particular case, public opinion/reason must not be ignored.[24]

---

20 *Supra* n. 18.

21 Kenneth W. Dam, "*The Judiciary and Economic Development*", October 2006, https://poseidon01.ssrn.com/delivery.php?ID=395120024115021001084109121007002011041045065082089058076119025005079025110067065085102103107025106019053123073118078085065001021068064041115031004027114081104088052016072014073075112024113014120112081012127066064095085118008073007127022006110083&EXT=pdf&INDEX=TRUE, (visited on February 16, 2021).

22 *Supra* n. 2.

23 Nitin Potdar, "*Judiciary: The Biggest Economic Bottleneck*", HINDU BUSINESS LINE, February 20, 2015.

24 Amartya Sen, THE IDEA OF JUSTICE, 1st ed. 2010.

In *A.K. Gopalan v. State of Madras*[25] and *Maneka Gandhi v. Union of India*,[26] Hon'ble Supreme Court makes literal and thereafter, liberal interpretation of laws. Also, in the case of *Shah Bano v. Mohammed Ahmed Khan*,[27] and *Shayara Bano v. Union of India*,[28] Hon'ble SC taken into consideration public reason but with different extent. Similarly, in postal office bill case the then President of India, Giani Zail Singh did not assent a particular legislation with taking due consideration of public opinion. Though, with the judgment given by Supreme Court in NJAC case, *Supreme Court Bar Association v. Union of India*,[29] there were opinions of many legal luminaries, executive officials and political leader as well, that public reason had not been taken into consideration.

Prof. John Rawls in his book 'Justice as Fairness: A Restatement', explains the concept of justice as fairness. He has described the concept of justice with two principles- liberty and equality, second sub-divided into fair equality of opportunity and the difference of opinion.[30] According to Rawls, concept of justice as fairness must be take into consideration while delivering judgement.[31] Prof. John Finnis in his book called 'Natural Law and Natural Rights' explains the conceptual analysis of term 'Justice'. According to him, Seven Common Goods + Three Methodological Requirement = Justice; in which he emphasised on 'Practical Reasonableness' which is one of common goods.[32] According to Finnis, judicial system always has to take decisions with due consideration of practical reasonableness. It is a major component to avoid injustices.[33]

The author strongly believes that if these 'Common Propositions' are utilised with 'Judicial Conscience' in the Indian Judicial System by Judges while delivering judgements, then good judicial governance will be a reality which will ultimately help towards country's rapid economic development. When the judicial system is efficient and effective, economic growth is obvious. 'Judicial Engineering' is the concept in which the author asserts that it will be another category of progressive reformative measures in the Indian judicial system. With the help of concept of judicial engineering, judicial system can be made more honest, sound, transparent, corruption free, more techno advanced and digital, and it also helps for allocation or maintenance of funds, for growth of per capita income, human capital and GDP of the country.[34] Judicial Engineering includes some important components such as Judicial Discipline, Judicial Discretion, Judicial Decorum, Judicial Conscience, Judicial Certainty,

25 AIR 1950 SC 27.
26 AIR 1978 SC 597.
27 AIR 1985 SC 945.
28 (2017) 9 SCC 1.
29 AIR (2016) 4 SCC 1.
30 John Rawls, JUSTICE AS FAIRNESS: A RESTATEMENT, 1st ed. 2001.
31 Erin Kelry (ed.), John Rawls, JUSTICE AS FAIRNESS: A RESTATEMENT, 1st ed. 2001.
32 John Finnis, NATURAL LAW AND NATURAL RIGHTS, 1st ed. 1980.
33 Paul Craig (ed.), John Finnis, NATURAL LAW AND NATURAL RIGHTS, 2nd ed. 2011.
34 *Supra* n. 21.

Judicial Choice Making, Judicial Credibility, Judicial Error, Judicial Activism and Judicial Delay, etc. The author is of the view that proper 'Judicial Management' of all these components will certainly have positive impact on the economic growth of the country. This judicial engineering model is having somehow indirect relation with Richard Messick's mechanism of informal enforcement which buttresses the rule of law and assures entrepreneurs that contracts will be enforced.[35]

Judicial Overburdening and Economic Development

According to Prof. Dr. N.R. Madhava Menon,[36] there are total 18 million cases filed in every year, out of that 13 to 16 million could be disposed of, naturally adding 4 to 5 million cases every year creates a burden over the judiciary. On an average, the Supreme Court of India dealt with 40 to 45 thousand cases a year whereas US Supreme Court dealt with 250 cases a year only. In addition, there are only 13 judges for a million population in India whereas in America it is 56 judges. This contradiction shows how there is excessive burden on judiciary. This pressure/overburden certainly results in a major obstacle for social, political and mainly economic development of country.

Impacting Development

The data indicates that an overburdened judiciary has a negative effect on economic and social development, which leads to lower per capita income and private economic activity, higher poverty and crime rates, etc.

Impacting Investment in Economy

Quality, Independence and Efficiency are the key components of effective justice systems. These components act as a structural condition to achieve sustainable development. Timely, predictable and enforceable judicial decisions help to build trust and stability, and impact investment in the economy in a business environment which is conducive to entrepreneurial activity and investment. The progressive reform in judicial system (efficient judicial system) helps in intellectual property right cases, insolvency cases, and labour laws. It also impacts the business dynamics and Foreign Direct Investments (hereinafter referred as FDI).[37]

Impacting Trade

Though World Trade Organisation (hereinafter referred as WTO) agreement is lengthy and complex but there are some simple and fundamental principles which are the foundation of multilateral trading system. In Indian judicial system as well, though Constitution is complex and lengthy but there are basic

35 *Supra* n. 2.

36 Vivek Nair, "*Prof. (Dr.) N.R. Madhava Menon (Documentary)*", YOUTUBE, September 16, 2009, https://www.youtube.com/watch?v=NDYOnxp7jBg, (visited on February 21, 2021).

37 Dimitri Lorenzani and Federico Lucidi, THE ECONOMIC IMPACT OF CIVIL JUSTICE REFORMS, 1st ed. 2014.

principles which form its core. It is crucial that judicial system must adopt universal approach while delivering judgement which decides the country's development and impacts on investment in economy, importantly trade. Indian judicial system is considered as a global institution in contemporary era due to its efficient and effective way to deliver justice.

Retrospective Taxation Case

This is the classic case of judicial system impacting country's economic development, investment and trade. In 2007, Vodafone bought 67% share in India, for the business of mobile telephony. Thereafter, first time government had raised demand to pay Rs.7,990/- Cr. in capital gains and withholding the tax from Vodafone. Consequently, High Court of Bombay declared judgement in favour of Income Tax Department. Thereafter, Vodafone went to Supreme Court to challenge the high court decision. In 2012, Hon'ble Supreme Court held that Vodafone Group's interpretation of The Income Tax Act 1961 was true and did not have to pay any taxes for the stake of purchase. But then Finance Minister circumvented Supreme Court's decision by amending Finance Act, given power to the Income Tax Department to act retrospectively. The Act was passed and Vodafone finally paid.[38] Why this case is important is because here, not only parliament but also judiciary played crucial role, therefore role of judiciary in countries economic development is undeniable and always appreciated in Indian context.

Conclusion

Former Judge of Supreme Court of India, Hon'ble Shri Justice B.N. Shrikrishna had said at International Society of Indian Law Firms that "*There is imminent needs of judges well versed in economics to man the judicial system in India*".

The Preamble to the Constitution of India itself comprises of the words *Justice, Social, Economic and Political*. 'Economic Justice' is the core objective of Constitution of India and it can be achieved only with proper implementation of economic principles by Judges while delivering justice. Economic development of the country depends upon the efficient and reliable justice delivery system. Efficient judicial system always reduces the burden of judiciary and makes a positive impact on the country's economic development and investment, trade, etc. Finally, to conclude the author submits that study of judicial independence, judicial review and economic development, in addition to, suggestion of progressive reformative measures for judicial reform such as common propositions- public reason, justice as fairness, practical reasonableness and judicial engineering- judicial decision, discretion, decorum, conscience, certainty, choice making, credibility, error, activism, delay and most importantly, 'judicial management' directly impact on the economic development of the country in the form of GDP, per capita income, human capital, market value, etc. Judicial pronouncement and remarks made by judges

38 (2012) 6 SCC 613.

while delivering judgments certainly prove helpful in economic growth. Judicial system is the biggest economic bottleneck which plays pivotal role in deciding pace and quality of economic performance, therefore attempt has been made by the author through this paper to suggest measures to remove bottleneck or hindrance in country's economic development.

***

ANTITRUST IMPLICATIONS OF ONLINE RESTAURANT AGGREGATORS AND FOOD DELIVERY PLATFORMS: TOUGH TO DIGEST

Richa Phulwani[♣]

Abstract

The unparalleled growth of online food-tech sector has led to an economic quagmire for the brick-and-mortar restaurants in India. Although, it is still at a formative stage, its dynamic nature has attracted various anti-trust and competition implications regarding its alleged anti-competitive behaviour and abuse of its dominant position. It is also noted that the nascent stage of the industry calls for cautious intervention to prevent the hinderances in the development and growth of the sector. Therefore, the authors in this paper attempts to study these implications along with the pre-eminent problems to assess the existing competition law framework in India with its adequacy for the needs of online food-tech sector and evaluates the need for sector-specific guidelines to come into place. The paper sheds light on the current propositions of law with respect to delineation of relevant market in the online sector, hesitancy of recognising the concept of Collective Dominance and heavy discounting practises which characterises this sector, among others.

Keywords: Anti-trust Implications, Dominance, Relevant market, Collective Dominance, Food-Tech Sector.

Introduction

The online food-tech industry has seen an unprecedented growth in India during the past demi-decade. It is set to become a USD 8 billion industry by the end of the year 2022.[1] This revolution has been a result of easy availability of a diverse range of cuisines coupled with the choice of having them anytime and anywhere. In addition, mobile applications like 'Zomato' and 'Swiggy' have gained threshold in these times of ever-increasing digitalisation and reliance on e-commerce. India's food-tech industry has finally transcended the boundaries of urban areas and is no longer just a metropolitan phenomenon. In fact, in 2019, the e-commerce food sector in non-metro cities grew seven times faster than its metro counterparts.[2]

♣ Student, ILS Law College, Pune, e-mail: richaphulwani@yahoo.com.

1 Somdatta Saha, "*Indian Online Food Industry to Hit 8-Billion-Dollar Mark by 2022*", NDTV FOOD, January 29, 2020, https://food.ndtv.com/news/indian-online-food-delivery-industry-to-hit-8-billion-dollar-mark-by-2022-report-2171615, (visited on June 16, 2020).

2 Thomas Reardon and Bart Minten, "*The Quiet Revolution in India's Food Supply Chains*", IFPRI Discussion Paper 1115, September 2011, https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/124942/filename/124943.pdf, (visited on June 16, 2020).

The advent of on-demand food delivery ventures has elicited great convenience to the consumers, but its relationship with the offline sector is far from ideal. The offline restaurateurs routinely argue that the online aggregators, often backed and financed by multinational companies, abuse their dominant position, and indulge in anti-competitive practices.[3] Therefore, considering the meteoric rise of this industry, there exists a growing need to harmonise the online and offline channels to ultimately benefit the consumer and in turn boost the economic prowess of the industry.

Keeping in mind the unique nature of the digital industry, one cannot resist to ask whether the existing legal framework really suffices the dynamic needs of this market or, would the sector be better off if tailor-made rules are adopted for it. Therefore, the paper attempts to study the various anti-trust and competition issues that arises in the online food delivery sector and the potential way forward.

Business Models of Online Food Delivery Platforms

The business archetype of the online food delivery applications may appear to be simple and straight forward but, with deeper delving it is pertinent that such businesses are in fact a complex structure of innumerable activities, all working in tandem to deliver fast, fresh and obviously delicious food. Therefore, to assess the pre-eminent problems between the online and offline food delivery sector, it is essential to understand the functioning of the online food delivery sector through its business model. The business model of online food delivery sector can be majorly classified into following four types:

Order-Only Model

The online venture acts as a limited aggregator between the offline restaurant and the customer under this model. The order-only venture basically provides the customer with a listing of restaurants and gives them the option of browsing through various cuisines as well as verifying and comparing the prices, reviews, and ratings before placing their order. Once the order is placed by the customer, the venture connects the order with the concerned restaurant. The said order is then delivered by the team of the restaurant itself. During this process, the online enterprise gains a fixed amount of fee for each order value and some of them also charge a separate fee for listing. Food Panda is an example of order-only business model.

End-to-End Model

In end-to-end model, the entire value chain is handled by the food delivery partner which is the offline restaurant itself. From the step one of cooking to the last step of delivery, the entire operation is initiated and executed by the restaurant *via* its own website or software application. Dominos and McDonalds

3 Ratna Bhushan, "*Zomato, Swiggy and Others Eating into our Business: Restaurants*", ETECH, January 3, 2019, https://economictimes.indiatimes.com/news/internet/zomato-swiggy-others-eating-into-our-business-restaurants/67358478, (visited on June 16, 2020).

operates under this model and in order to control the entire value chain, have introduced personalised online applications for its customers. The customer can directly place an order through such an application which will be delivered by the team of the restaurant itself. This model ensures a flexible and independent structure. To encourage customers for using the personalised applications, the restaurants provide additional beneficial offers.

Aggregator Model

Under this model, the aggregator functions *vis-à-vis* the offline restaurant. By acting as aggregators, the e-commerce platform not only takes the food order but also delivers it to the customer. The aggregator provides a listing of restaurants and cuisines on its platform and allows the users to browse and compare the options to be able to choose and place an order. Once the order is confirmed by the customer, the aggregator passes it to the restaurant and delivers it as well. The aggregator is specifically responsible for collecting the order from the restaurant and delivering it to the customer. The online food delivery platforms like Zomato and Swiggy are the examples of aggregator model, having their respective delivery teams to carry on the operation efficiently. The restaurant can choose to partner with one or more delivery platforms according to their requirement. The aggregators charge a commission for their delivery service which is usually fixed in accordance with the value of each order and some of them separately charge a fee for providing listings and advertisements of the restaurants on their website.

Cloud Kitchen

Cloud Kitchens are the most important trend in the food-tech industry. Cloud kitchens could be described as *pseudo* food-joints. They have a centralised kitchen for several brands/food items with no store fronts. Cloud kitchens have become a source for low-budget development into having various cuisines simultaneously. This is to attract and deliver to the customers easily, various food options from a single kitchen. The trend of cloud kitchen has been dynamic; it has not only caught up with the big players in the food-tech sector but has become a growth frontier for them as well. As per National Restaurant Association of India (hereinafter referred as NRAI) report, during financial years 2016-2019, the delivery marketplaces raised 90% of the total funding, while the remaining proportion was equally split between cloud kitchen and other business models in the food tech industry.[4] 'The good bowl', owned by Swiggy is an example of cloud kitchen. Food giants like 'FreshMenu' partner with restaurants for a centralised delivery-only kitchen, whereas on the other hand enterprises like 'Eatsome' and 'Faasos' have given a private label to their cloud kitchen facilities.

4 Bhumika Khatri, "*CCI Delves into Discounting, Anti-Competitive Practices in Foodtech, Food Delivery*", INCH42, January 10, 2020, https://inch42.com/buzz/cci-delves-into-discounting-anti-competitive-practices-in-foodtech-food-delivery-in-india, (visited on June 16, 2020).

The Cloud kitchen model has been lucrative for the food-tech sector, but there are several new inclusions that unequivocally point towards the progress of this industry. Table booking websites and applications have also gained momentum in recent time; Mobile applications like 'DineOut' and 'Eazydiner' are the market players in this subject. Food delivery sector has also been able to satisfy the customer's demand for home-made food delivery as well. Metropolitan cities are now able to get the benefit of fresh home-made food with local-run applications that allow the users to sell and buy cooked food in and around their neighbourhoods. Online platforms have also not hesitated in providing ancillary services to the offline restaurants such as advertising their products, uploading their food photographs, packaging, uploading menus on their applications, etc.

Antitrust Implications for the Conduct of Online Food Delivery Services

In January 2019, around 500 restaurants filed a petition before the Competition Commission of India (hereinafter referred as CCI) alleging anti-competitive practices including deep discounting and abuse of dominance by food delivery applications like Zomato, Swiggy, UberEats, etc.[5] This was followed by NRAI's widely popular 'LogOut Campaign' in August 2019 wherein, about 2,000 restaurants opted out of 'buy one get one' (popularly known as '1+1') deals under Zomato Gold and the 50 per cent discounts schemes on food and drinks. The campaigners alleged that the food aggregators were indulging in unfair practices and the restaurant owners had to face huge losses for the same. The restaurateurs *inter alia* alleged that food giants like Zomato, DineOut, etc. abuse their dominant position by indulging in anti-competitive practices.

Section 4(2) of the Competition Act 2002 (hereinafter referred as 'the Act') defines abuse of dominant position. There are two main kinds of abuse envisaged under the act; first relates to actions taken by an incumbent dominant firm to exploit its position of dominance by charging higher privies, limiting supplies, etc. This is a kind of 'exploitative abuse'[6] and second relates to actions protecting its position of dominance by making it difficult for new potential entrants to pierce the market by acts of predatory pricing, loyalty rebates etc., thus practising 'exclusionary abuse'.[7]

For an inquiry into an allegation of contravention under Section 4, a sequential three step method is followed. Firstly, there shall be delineation of the relevant market in which the enterprise is alleged to be dominant. Secondly, it shall be investigated if the enterprise is indeed dominant in that relevant

5 *Supra* n. 3.

6 Alison Jones and Brenda Sufrin, EU COMPETITION LAW, 7th ed. 2019.

7 European Commission, "*Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*", OFFICIAL JOURNAL OF THE EUROPEAN UNION, Vol. 45 No. 2, 2009, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29, (visited on February 24, 2019).

market using the parameters laid down under the Act. Only once these two factors are established do the Competition authorities proceed to investigate whether the conduct of the enterprise amounts to Abuse as laid under the Act or not. Further, Section 3 of the Act prohibits all agreements between parties that cause or are likely to cause Appreciable Adverse Effect on Competition (hereinafter referred as 'AAEC') in India. This section classifies anti-competitive agreements into following two categories:

(i) Horizontal agreements between enterprises that are at the same stage of production chain and operate in the same market. Such agreements are presumed to have AAEC.[8]

(ii) Vertical agreements between enterprises which are at different stages of production chain. Such agreements are not *per se* void but are decided under 'rule of reason'.[9]

Although, the CCI is yet to take cognisance of the petition forwarded by the restaurateurs, but the authors try to lay down the potential anti-trust concerns and the obstacles that could arise during investigation.

Delineation of Relevant Market

The pivotal enquiry in a case of alleged abuse of dominance is whether, the accused party is in a dominant position in the relevant market.[10] The concept of relevant market under the Act includes the 'relevant product market' wherein, all products or services that are regarded as being substitutable by consumers, by reason of characteristics, prices and intended use, and the 'relevant geographic market' i.e., an area in which the conditions of competition are distinctly homogeneous.[11]

Relevant Market in Online Services

The delineation of relevant market in case of online services has been a conundrum for the competition authorities. The expansive web of e-commerce forces the authorities to consider various factors and then decide whether online services are a separate relevant market on their own or whether they are in the same market as that of their brick-and-mortar counterparts. To determine the 'relevant product market', the CCI should consider all or any of the following factors mentioned under Section 19(7) of the Act *viz*., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialised producers and classification of industrial products.[12]

The CCI, in multiple cases, has held the online and offline services as part of the same relevant market. It observed that buyers tend to weigh the options available to them in offline and online markets before making a final decision,

8 *Uniglobe v. TAFI* 2011 Comp LR 400.
9 *Mahindra and Mahindra v. Union of India* (1979) 2 SCC 529.
10 S.M. Duggar, GUIDE TO COMPETITION LAW, Vol. 2, 7th ed. 2018, p. 499.
11 Section 19 of the Competition Act 2002.
12 *Saint Gobain v. Gujarat Gas Co. Ltd.* 2015 Comp LR 431.

considering the differences in discounts and shopping experience. A significant increase in price in one segment causes the buyer to shift to the other segment. This is a classical economic model to assess the demand substitution, which is known as 'Small but Significant and Non-transitory Increase in Price' (hereinafter referred as SSNIP) Test.[13] Therefore, it is considered that "*these two markets are different channels of distribution of the same product and are not two different relevant markets*".[14]

In a case, where it was contended that if a particular book was exclusively distributed through an e-commerce platform, it was not substitutable by another book sold by a physical bookstore. Thus, the books do not form part of the same relevant market. The CCI rejected this argument, holding that individual products cannot be construed as a relevant market by themselves.[15] Similarly, in a case filed by the Real Estate Brokers' Association of India against online platforms like MagicBricks.com, 99acres.com, etc., it was held that these online platforms and the offline traditional brokers offer similar services to customers and are merely alternative channels of delivering the same product and hence, form part of the same relevant market.[16]

Contrary to this, the CCI has delineated 'the market for online search advertising in India' as the relevant market in its *prima facie* evaluation of the cases filed against Google, alleging abusive conduct in advertising. In this case, the Commission distinguished the online search market from the offline modes of advertising.[17] The Commission has also held 'radio cabs service' to be a relevant market by itself, on the ground that its peculiar characteristics like "*convenience in terms of time saving, point-to-point pick and drop, pre-booking facility, ease of availability even at obscure places, round the clock availability, predictability in terms of expected waiting/journey time etc. are not substitutable with other modes of road transport*".[18] However, in another case filed by Meru cabs against Uber alleging anti-competitive practices in the city of Kolkata, the CCI changed its stance and concluded that radio taxis and yellow cabs were indeed part of the same relevant market.[19]

Considering the inconsistent approach by the CCI in its various decisions, it is uncertain as to how the CCI will delineate the relevant market in the context of food-tech sector. On assessing all the factors laid down in relation to the food industry, where brick-and-mortar restaurants are also listed online and are available to the viewer or buyer of food items, the two kinds of enterprises could be said to function in the same relevant market under circumstances. Therefore, food delivery as a service is what should constitute the relevant market, notwithstanding whether the service providers are offline or online.

---

13 *Hoffmann-La Roche v. Commission* 1979 E.C.R 461.
14 *Ashish Ahuja v. SnapDeal* 2014 SCC OnLine CCI 65.
15 *Mohit Manglani v. Flipkart India (P) Ltd.* 2015 SCC Online CCI 61.
16 *CREBAI v. Magicbricks.com* 2016 Comp LR 855.
17 *Albion v. Google Inc.* 2018 Comp LR 807.
18 *Fast Track Call Cab v. ANI Technologies* 2017 Comp LR 667.
19 *Meru Travel Solutions Pvt. Ltd. v. ANI Technologies* 2017 Comp LR 694.

Assessing Dominant Position

Dominance in general term means 'power or influence over the other'. Under Competition law, dominance is contemplated under Section 4 of the Act as a position of strength enjoyed by an enterprise in a relevant market, which enables it to:

(i) Operate independently of the competitive forces prevailing in the relevant market; or

(ii) Affects its competitors or consumers or the relevant market in its favour.[20]

The dominance or monopoly power is gazed on the ability of an enterprise to operate independently of competition or the ability to raise or control the prices.[21] Further, whether an enterprise enjoys dominant position in a relevant market depends upon several factors. Market share of an entity is one of the leading factors for deciding the dominant position of an enterprise.[22] An undertaking with high market share over a long period of time constitutes an important preliminary indication of the existence of a dominant position.[23] However, the threshold for market share to constitute dominance is not defined nor is market share determinative of dominance on its own. The CCI has recognised certain internationally accepted principles in this regard. In Schott Glass Case[24], CCI recognised the 'Akzo Principle of Dominance' which was established in one of the judgements[25] under the EU Competition law. The principle states that there is a presumption of a company being dominant if it holds a market share of 50 per cent or more. It is important to understand that market power or dominance of an enterprise in a marketplace is not prohibited by the Competition Act 2002, neither is it held wrongful like the Monopolies and Restrictive Trade Practices Act 1969. The Section 19(4) of the Competition Act 2002 lays down several factors other than market share which need to be given due consideration while assessing the dominant position of an enterprise, like size and resources of an enterprise and the competitors, barriers to entry, dependence of consumers, etc. However, with rights come responsibilities and therefore, where an enterprise enjoys dominant position in a marketplace, it owes a special responsibility to not allow its conduct to impair the genuine competition of that marketplace.[26]

The food-tech industry is currently engaged in a battle of the titans. Due to the recent Zomato-UberEats merger, Zomato now has approximately 55% of

20 Section 4 of the Competition Act 2002.
21 *United Brands Co. v. Commission* 1978 E.C.R 207.
22 *Supra* n. 10, p. 504.
23 *Irish Sugar Plc. v. Commission* 1999 E.C.R II-02969.
24 *Kapoor Glass (India) Pvt. Ltd. v. Schott Glass India Pvt. Ltd.* 2012 SCC OnLine CCI 16.
25 *Akzo Nobel Chemicals Ltd. v. Commission* 2010 E.C.R I-08301.
26 *Atlantic Container Line v. Commission* 2003 E.C.R II-03275; *France Telecom v. Commission* 2009 E.C.R I-02369.

the market share of, while Swiggy has a 60% revenue share.[27] The maintenance of large market shares puts the enterprise in a position of strength and makes it an unavoidable trading partner- classic features of being dominant.[28] It is thus clear that Zomato and Swiggy are the major players in this market, effectively creating a duopolistic market. No other player comes close to this duo in terms of size or consumer preference. Both these platforms also have foreign investors infusing large capital regularly. A leading undertaking with 'Deep Pockets' will be able to utilise this capital to protect itself from its competitors and act independently of prevailing market forces.[29] But the dilemma faced by the Competition authorities during investigation will be recognition of dominant position. Effectively, both Zomato and Swiggy have captured the market and are in a position of strength to indulge in the alleged practices, but Indian law does not recognise 'Collective Dominance'.

In the case of Meru Travels,[30] the question of 'collective dominance' was raised. It was contended that Ola and Uber collectively held dominant position in the radio service taxi marketplace. The Commission rejected this argument by holding that the concept of collective dominance is not sanctioned in India. Even in the case of Flipkart, the CCI was of the view that none of the e-commerce platforms were individually dominant and therefore there was no need for an investigation into the alleged abuse of dominance by these firms.[31] This raises pertinent issues about whether it is possible for more than one firm to be dominant in a relevant market, a question that is particularly relevant in the context of network industries that are largely dominated by a few big players. Most jurisdictions around the world recognise collective dominance and firms have been held to be collectively dominant where the oligopolistic nature of the market is such that they behave in a parallel manner, thereby appearing to the market as a collective entity even in the absence of any agreement or links between them.[32] Hence, unless collective dominance is recognised under Indian law, it is virtually impossible to determine the dominant position of enterprises in digital oligopolistic markets.

Predatory Pricing *vis-à-vis* Deep Discounting

The concept of deep discounting as an anti-competitive practice has been an enigma in the sphere of e-commerce and so for the online food delivery sector. Brick-and-mortar restaurants have repeatedly raised the possibility of getting

27 Sanchita Dash, "*Swiggy Says it's the Most Loved Brand and Doesn't Need Discounts*", BUSINESS INSIDER, January 24, 2020, https://www.businessinsider.in/business/startups/news/swiggy-top-executive-says-it-doesnt-need-discounts/articleshow/73575887.cms, (visited on June 16, 2020).

28 *Arshiya Rail Infrastructure Ltd. v. Ministry of Railway* 2012 Comp LR 937; *Hofmann v. Commission* 1979 E.C.R 00461.

29 Barry J Rodger and Angus MacCulloch, COMPETITION LAW AND POLICY IN THE EC AND UK, 5th ed. 2014, p. 132.

30 *Supra* n. 19.

31 *Supra* n. 15.

32 *Bertelsmann v. Commission* 2008 E.C.R I-4951.

wiped off from the market due to the excessive discounts offered by online food delivery platforms. The petition[33] filed before the CCI *inter alia* alleged that the online food delivery sector indulges in predatory pricing by offering deep discounts to its customers thus foreclosing the market for small restaurateurs who cannot provide such appealing discounts. These discounts, as alleged by the physical restaurants are so much so that the online food sphere suffers loss at the cost of luring customers and building network. The 'LogOut Campaign' was a result of one such incident of deep discounting. Whenever the effects of conduct of an enterprise adversely affect the customers, that conduct can be termed as abusive. For example, abusive conduct through hidden prices charged directly or indirectly or through conduct that reduces the intensity of existing competition or potential competition.[34] Predatory pricing is defined to mean the provision of goods or services, at prices below cost, with a view to reduce or eliminate competition.[35] Therefore, the main essence of the section is not pricing below cost, but that the conduct should be such that it could lead to the exclusion of other players, hindering competition in that market. The CCI has determined following three conditions that have to be satisfied to ascertain whether the practice of a dominant firm constitutes predatory pricing:

(i) The price being offered for the goods or service should be lower than the average cost of production of the product or acquisition of service.

(ii) Such kind of manipulation in the price of the product was done with the intention of wiping out competitors from the market.

(iii) A substantial plan exists with a motive of recovering or to recoup the losses incurred due to dropping the prices by jacking the prices high again after eliminating the competitors from the market.[36]

Thus, while considering the allegations of brick-and-mortar restaurateurs against the online platforms for aggressive pricing, the main question is whether the conduct of online platforms is intended to wipe off the physical restaurants from the market or to secure a place for themselves.

The CCI released 'Market Study on E-commerce in India' (hereinafter referred to as 'the Study') in January 2020. This study was a response to the necessity for identifying various competition law issues plaguing in the e-commerce sector. The study was primarily carried out in three sectors i.e., food, accommodation, and lifestyle. It was observed in the study that 83% of physical restaurants have an online presence with online sales accounting for nearly 29% of their overall revenue. The quick service restaurants and casual diners are most common amongst others since their growth and survival is significantly

33 *Supra* n. 3.
34 *Supra* n. 10, p. 537.
35 Section 4(2)(a)(ii) of the Competition Act 2002.
36 *Transparent Energy Systems Pvt. Ltd. v. TECPRO Systems Ltd. 2013 Comp LR 681.*

dependent upon the online services.[37] Keeping in mind these statistics, it is evident that the online platforms are mainly composed of offline restaurants. Additionally, the traditional restaurants are now largely dependent upon online services for advertisements, customer visibility and receiving reviews and ratings. It will thus be correct to state that both the online and offline modes are interdependent for their survival and strategic development. This makes it clear that the practice of predatory pricing by online mode cannot *per se* exclude the offline players as they are mainly a platform for these restaurants and private labels.

Another intriguing element while discussing predatory pricing is the revenue collection of these food applications. In the financial year 2019-20, Swiggy reported a six-fold rise in its annual losses i.e., Rs.2,363/-Cr. compared to Rs.397/-Cr., in the previous financial year, however, its revenue grew three-fold to about Rs.1,128/-Cr. from Rs.417/-Cr.[38] Meanwhile, Zomato reported a loss of Rs.1,001/-Cr. on revenue of Rs.1,397/-Cr. in the financial year 2019.[39] These statistics certainly raise eyebrows as to the business plan of these food platforms wherein, with losses exceeding multi millions, one may question the economic rationale behind providing deep discounts to the consumers. Similarly, the selling below average variable cost does not hold any economic rationale except in special circumstances like recession, trying to establish a foothold in a new market, etc. In case of a dominant player, these conditions do not apply, and the only discernible reason is that they are suffering losses to drive out the competitors from the market. It is what they may consider 'collateral damage' in the long run, as once these food applications capture the market and foreclose it for other competitors, they will be able to recuperate all losses due to lack of competitive forces in the market and be the ultimate winner. The discounts are mostly purportedly funded by platforms for consumer on-boarding.

On the other hand, it is also interesting to understand that online delivery platforms are usually based on internet-backed marketing concepts like providing food at an exceptionally low price as compared to the physical restaurants to get momentum in the market at their nascent stage. In addition to this, most of the start-ups have private equity funds and investors and hence, can afford giving such heavy discounts. The industry is particularly technology driven and promotes innovation and utilisation of artificial intelligence which should also be considered while looking at the cost effectiveness model of the

37 Competition Commission of India, "*Market Study on E-Commerce Key Findings and Observations*", MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, January 8, 2020, https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf, (visited on June 16, 2020).

38 Chitranjan Kumar, "*Swiggy's Parent Firm Reports Rs.2,363 Crore Loss in FY 19*", BUSINESS TODAY, December 16, 2020, https://www.businesstoday.in/current/corporate/swiggy-parent-firm-reports-rs-2363-crore-loss-in-fy19/story/392155.html, (visited on June 16, 2020).

39 *Ibid*.

industry *vis-à-vis* its offline counterparts, which allows it to undertake innovative pricing strategies.

Even in the market study, *inter alia* 'deep discounting' has been listed as one of the major issues hindering the pro-competitive potential of e-commerce. Although, the study failed to lay down a strict definition of the term 'deep discounting', it was successful at identifying the extent to which the practice of deep discounting is harmful in competition. In order to assess the issue of aggressive discounting, it has to be viewed from the perspective of whether higher discounts are offered as an incentive to forge exclusive contracts and to curb multi-homing by service providers. There is an apprehension amongst sellers that platforms use discounts as a discriminatory device. For instance, the exclusive partners were believed to be receiving higher discounts on their products. This creates unfavourable conditions for the other sellers. Secondly, when intermediary platforms offer discounts over and above the price set by the seller, the seller loses control over the final price that is being offered to the customer, which also affects price and sales through other channels. As per the market study, the sellers also have no control even when they are themselves funding the discounts as it is the platforms that reportedly determine the structure and scheme of these discounts.[40]

The CCI too has made a considerable shift in recognising whether excessive discounting comes under the ambit of anti-competitive practices. Recently, in *Delhi Vyapar Mahasangh v. Flipkart Internet Pvt. Ltd.*,[41] CCI ordered investigation against Internet giants, Flipkart and Amazon on accounts of deep discounting, exclusive agreements and related issues. Previously, CCI had dismissed investigation against Flipkart for similar anti-competitive practices stating that the nascent stage of e-commerce market necessitates any intervention to be carefully tested.[42] The Competition Commission can evaluate such vertical agreements under Section 3(4) of the Act to decide whether such discounts lead to unhealthy competition. Further, in case an enterprise is dominant in each marketplace, discriminatory discounts could be assessed under Section 4(2) of the Act.

Decisively, the essence of deep discounting as an anti-competitive practice lies in the nature of the discounts, the intention of the food delivery platforms and the effect of the same on the competition which depends upon the facts of each case. It is important that legitimate price competition is not hindered under the garb of anti-competitive discounting. The Competition Law is not a law of equalisation of the competitors but only a law to curb any anti-competitive practices.[43]

---

40 *Supra* n. 37.

41 *Delhi Vyapar Mahasangh v. Flipkart Internet Pvt. Ltd.* 2020 SCC OnLine CCI 3.

42 *All India Online Vendors Association v. Flipkart Internet Pvt. Ltd.* 2018 Comp LR 1122.

43 *Supra* n. 28.

Unfair Contractual Terms

The contractual agreements between the online platforms and the restaurants are also a major cause of concern. It has been alleged by the restaurateurs that the platforms determine and revise the terms of engagement unilaterally, causing harm to the business interest of the service providers.[44] The terms of the contract are also allegedly unfair and discriminatory. Section 3 of the Act regulates anti-competitive agreements and as previously mentioned, it governs both vertical and horizontal agreements. Another compelling effect of the delineation of relevant market will be its effect on the type of agreements between the platforms. If the offline restaurants and online platforms are considered to be a part of the same relevant market, considering the fact that both provide similar service of delivery of food and are substitutable, any agreement between them will be a horizontal agreement and will be *per se* illegal. However, if both are placed in separate relevant markets in different stages of the production chain, the restaurant being the producer and the online platform being the service provider (delivery agent), the agreements between them will be vertical, determined on a rule of reason basis. Following are some of the unfair terms of contracts as alleged by the restaurants:

Exclusive Agreements and Refusal to Deal

The online food delivery applications list down a few restaurants that are available exclusively on their platform alone. This is a result of the Exclusive Distribution Agreement signed between the platform and the restaurant. The Exclusive Distribution Agreements are governed under Section 3(4) read with Section 3(1) of the Act. As per Section 3(4)(c) of the Act, 'Exclusive Distribution Agreement' includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.[45] In order to bar an exclusive distribution arrangement, it must be shown that the arrangement causes an AAEC. When a manufacturer indulges in the practise of exclusive dealing, his competitor is prevented access to that market and the dealers are denied the freedom to handle competing products. In this process, the consumer is also restricted in his choice among the number of competing products.[46]

An exclusive distribution agreement entered between a vendor and the e-commerce platform has generally been considered to not cause an AAEC on account of it not leading to any entry barriers within the market.[47] In case of online food delivery services, restaurants enter into these agreements when exclusivity is incentivised by platforms by way of offering better terms of engagement, such as lower commission/service fee charged and business assurance. For example, when a Restaurant 'X' enters a contract with Zomato agreeing to not list its restaurant on any other food delivery application, Zomato

44 *Supra* n. 37.
45 Section 3(4)(c) of the Competition Act 2002.
46 *Supra* n. 10, p. 381.
47 *Supra* n. 15.

either reduces the subscription fees to be paid by the restaurant or favourably displays the restaurant on its software application. This creates barriers in inter brand competition.

Bundling of Services

The other unfair contract term found in the food service segment is the mandatory bundling of delivery service with listing service. This requires the restaurants who wanted to list on a platform to also register necessarily for the platform's delivery services. The courts have held[48] the three conditions are essential in respect of anti-competitive contractual tie-in arrangement under Section 3(4) i.e., (i) presence of two separate services capable of being tied; (ii) sufficient economic power of the seller with respect to the tied service to restrain free competition in the market; and (iii) the arrangement must affect a 'not insubstantial' amount of commerce. Since, Zomato and Swiggy are the biggest players in the market with an ascendancy that allows them considerable sway over the market, the restaurateurs have no option but to avail the tied in services of these platforms to increase their visibility and business.

Data Masking for In-house Kitchens/Cloud Kitchens

It has been alleged that, while restaurants are required to pay huge tariffs to get their products listed, the food applications prominently display their own private labels and cloud kitchens on their platforms. Swiggy has started its own in-house kitchen, 'The Bowl Company', while Zomato introduced 'Zomato Kitchen'. It is claimed that the applications unethically divert the customers to their own kitchens. As a result of being the platform owner, these brands have critical customer data, which is not shared by the platforms with restaurants, while the same is mined for launching and promoting the platforms' own cloud kitchens. This amounts to 'misusing the customer database' and raises severe concerns about platform neutrality. Similarly, the dual role played by platforms creates an inherent conflict of interest between the platform's role as an intermediary on one hand and a market participant on the other, giving them the incentive to leverage their control over the platform in favour of their own/preferred vendors to the disadvantage of other sellers.[49] It is averred that platform owned labels and some other preferred sellers are constantly given preferential treatment in terms of order of ranking, listings and ratings as compared to the other.

Acquisition of UberEats by Zomato

In January 2020, Zomato acquired UberEats for USD 350 million.[50] The CCI recently ordered a probe into this transaction to gauge its possible anti-

48 *Sonam Sharma v. Apple Inc.* 2013 Comp LR 346.

49 *Supra* n. 37.

50 Aditi Shrivastava, "*Zomato Acquires Uber Eats in All Stock Transaction*", ECONOMIC TIMES, January 22, 2020, https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/zomato-acquires-uber-eats-in-an-all-stock-transaction/articleshow/73465982.cms, (visited on June 16, 2020).

competitive effects.[51] Acquisitions, amalgamations, and mergers of enterprises under certain circumstances are defined as Combination under Section 5 of the Act. The need to regulate combinations arises from the premise that the company emerging because of the combination has the potential to abuse the power and market share it acquires and eventually eliminate competition in the relevant market. Horizontal mergers have the most potential to directly curtail competition in the market since the number of competing firms reduce and the emerging company exercises more effective control over the market.[52] Combinations that are likely to have an AAEC on competition within India are void by virtue of Section 6 of the Act.

Now, with the elimination of UberEats, the competition has stifled to majorly two players and the customers of the company will shift to either of the two dominating entities. This would virtually create a situation of duopoly. These platforms will then have the power to abuse their dominant position and provide appealing discounts to the consumers thereby creating huge barriers for entry of new companies in the food delivery sector. This will confer great control of market price on the existing platforms, and they may choose to reduce the discounts and offers, being aware that there are few competitors in the market that the consumers can switch to. While two strong players ensure competitiveness in the market, it has been observed that in such a market, rivals are interdependent and are bound to match one another's marketing strategy. As a result, price competition between them will be minimal or non-existent.[53]

In addition to the consumers, the combination will also have an adverse impact on the restaurants as consolidation of this market will further reduce the little bargaining power held by the restaurants. Since the online orders account for a major percentage of their revenue, they will be forced to adhere to the conditions of these platforms. Hence, the acquisition of UberEats by Zomato *prima facie* shows AAEC and must be subjected to the scrutiny of the Competition Commission.

Renewed Foreign Direct Investment E-Commerce Policy 2018

The renewed Foreign Direct Investment (hereinafter referred as FDI) Policy laid down conditions for e-commerce platforms which came into effect from February 2019. The policy sets out guidelines to provide a fair playing field to all vendors of an e-commerce marketplace platform and prevent distortionary effects through means of price, inventory or vendor control. The policy demarcates what constitutes a marketplace model and an inventory-based model. Inventory based model of e-commerce is an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to

51 "*Trouble for Zomato: CCI Probes Possibly Anti-Competitive Uber Eats Acquisition*", NEWS18, May 22, 2020, https://www.news18.com/news/tech/trouble-for-zomato-cci-probes-possibly-anti-competitive-uber-eats-acquisition-2632713.html, (visited on June 16, 2020).

52 Richard Whish and David Bailey, COMPETITION LAW, 7th ed. 2012, p. 810.

53 *Rajasthan Cylinders v. Union of India* (2018) SCC OnLine SC 1718.

the consumers directly.[54] Marketplace based model of e-commerce means providing of a platform by an e-commerce entity on an electronic network to act as a facilitator between the buyer and seller.[55]

As per the policy, foreign investment is allowed in the 'Marketplace' model alone. Hence, an e-commerce platform which has foreign investment cannot exercise ownership or control over the inventory sold on its platform.[56] This raises questions over the conduct of food platforms like Zomato and Swiggy which despite having significant foreign funding, indulge in selling their own products on the platform through their private labels and cloud kitchens.

The most remarkable feature of this policy is that it bans e-commerce marketplaces from directly or indirectly influencing the sale price of goods or services and mandates them to maintain a level playing field. [57] This is in sharp contrast to the acts of the food tech platforms wherein these platforms have majority control over the discounting policy and schemes.

Further, e-commerce marketplace entities also cannot mandate any seller to sell any product exclusively on its platform only, which again renders the 'Exclusive' restaurants on these platforms in contravention of this policy. While it has been over a year since the policy was implemented, food tech platforms have not conformed to these regulations, citing uncertainty regarding whether this policy applies to the food delivery services or not as there is still an on-going debate whether they fall under the literal definition of the term 'e-commerce marketplace' or not.

The Way Forward

The NRAI president, Mr. Rahul Singh aptly encapsulated the essence of the issue, stating that technology must be an enabler of privileges, and not a privilege itself. It is indeed understood that food delivery applications and e-commerce in general are at a nascent stage in India. Thus, any intervention must be with caution to not stifle the innovation and growth of digital era. However, it is also equally important that these online platforms compete with the traditional offline sector in a level playing field and not in a catbird seat. What is also evident is that the current competition law framework and regulations are not ideally equipped to deal with the peculiarities and the issues of the online economy.

The delineation of relevant market in the e-commerce sector needs a uniform set of parameters and guidelines based on the degree of substitutability with its offline counterparts. The discounting mechanism of the online sector, which has

---

54 Department of Industrial Policy and Promotion, "*Review of the Policy on Foreign Direct Investment in e-commerce*", PRESS NOTE NO. 2 (2018 SERIES), MINISTRY OF COMMERCE AND INDUSTRY, https://dipp.gov.in/sites/default/files/pn2_2018.pdf, (visited on August 20, 2020).

55 *Ibid*, p. 2.

56 *Ibid*.

57 *Ibid*, p. 3.

been the most contentious issue, deserves cogent and unambiguous adjudication by the authorities. Collective dominance as a concept too needs the attention of the authorities and its applicability in India should be reconsidered. Until then a substance over form analysis ought to be preferred while investigating potential abuse practices. The food tech industry should take the lead in becoming an enabler and not an obstructer in creating a free and fair market for all.

***

CO-OPERATIVE TO CONFLICT FEDERALISM DURING COVID-19 PANDEMIC IN INDIA: A CRITICAL ANALYSIS

Shreya Tripathi[♣]

Abstract

Federalism is the basic structure of the Constitution of India. The popular sovereignty coupled with constitutional sovereignty has bestowed upon it a non-derogable character, which cannot be abrogated even by any constitutional amendment. The unique feature of Indian Federalism is twofold: firstly, the division of powers between state and centre is sanctioned by the Constitution of India under Article 246; Secondly, unlike Traditional Federal Constitution wherein there are separate Constitutions for different states, India has one Constitution governing the whole of India including its constituent states, providing for the division of powers but at the same time is overlaid by unitary features such as the emergency provisions, thus exhibiting an element of coordination and co-operative behaviour in exercise of power. Thus, India follows 'pragmatic federalism' or 'quasi federalism' or 'co-operative federalism'. However, a disturbing trend was observed, in an unprecedented COVID-19 pandemic wherein various instances indicated that the co-operative federalism has given way to conflict federalism, endangering the very foundation of federal structure of the Constitution of India. Hence, this paper is an attempt to analyse the nature of federalism and the remarkable role of judiciary in endeavouring to preserve the golden thread of Co-operative federalism.

Keywords: Federal Structure, Co-operative Federalism, Conflict Federalism, Division of Powers, Role of Judiciary.

Introduction

> *Centralisation leads to blood pressure at the Centre and anaemia at the periphery. The inevitable result is morbidity and inefficiency. Indeed, centralisation does not solve but aggravates the problems of the people*.[1]

The above-mentioned quote highlights the unfortunate ramifications of over-centralisation of powers in the hands of the Centre. In the contemporary times, newspapers are flooded with headlines i.e., 'Can state laws challenge the constitutional validity of a central law?', 'Has the mechanism of co-operative federalism been eroded in COVID -19 times?', etc. All these questions have left

♣ Student, Maharashtra National Law University, Nagpur, e-mail: shreyatripathi.204@gmail.com.

1 Inter-State Council Secretariat, "*Commission on Centre-State Relations*", MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, 1988, p. 544, http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/, (visited on January 22, 2021).

us to ponder over the situation of Centre-State Conflict and the institutional role of courts in addressing such questions of Centre-State turmoil. Doubtless to say, all these questions have once again left us to discuss the nature of federalism enshrined under the Constitution of India and how there has been a shift from traditional federalism to co-operative federalism, leaving room open for both Centre and State to exercise powers in their defined area delimited by the Constitution of India. Despite such a comprehensive and well-designed scheme of constitutional provisions ensuring federal structure of the country, it would not be wrong to say that Centre-State conflict has not ceased to occur.

Even after 50 decades of Constitution coming into force, a significant question has been left before us to ponder over i.e., Has the intention of makers of the Constitution of India to ensure smooth functioning of Centre-State relations by devising co-operative federalism stood the test of time?[2] What is the judicial trend in resolving such disputes and have the courts been able to bring about some standard or yardstick to weigh upon such matters of Centre-State Conflict? Thus, considering these questions, the author attempts to discuss the concept of federalism that outlined the constitutional provisions for Centre-State relations in legislative matters. Further, the author has also critically analysed the noteworthy role of judiciary in resolving such disputes with special focus on Centre-State conflicts in COVID-19 pandemic.

Nature of Federalism under the Constitution of India

"*Federalism can flourish only among communities imbued with a legal spirit and trained to reverence the law*".[3] Etymologically speaking, the term Federalism is derived from the Latin word '*foedus*'[4] meaning 'League' or a 'treaty'[5]. It has been defined as "*accommodation of human associations and co-existence of multiple loyalties and identities and about shared and divided authority*".[6]

The rule of law is the pillar of any democratic society. In a democratic country like India, it is quintessential in order to secure law and order in the society. However, if we see the history of India, at the time it was under the sovereign authority of *Rajas*, there were conflicts related to the exercise of power. What were the reasons behind such conflict of powers?[7] The answer lies in the famous saying of Lord Acton i.e., "*Power tends to Corrupt; Absolute*

2 A.B. Mathur, "*Federalism in India: A Comparative Approach*", THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 4, No. 3, 1987, pp. 433-437.

3 *Keshvananda Bharti v. State of Kerala* AIR 1973 SC 1461, para 568.

4 Charlton Lewis and Charles Short (rev.), William Freund, A LATIN DICTIONARY, 1st ed. 1956, 1st imp. 1975.

5 P.G.W. Glare (ed.), Oxford Latin Dictionary, 1st ed. 1983.

6 M.A. Laskar, DYANAMICS OF INDIAN FEDERALSIM: A COMPREHENSIVE HISTORICAL REVIEW, 1st ed. 2015, pp.18-20.

7 V.N. Shukla, CONSTITUTION OF INDIA, 1st ed. 1982, p. 484.

power corrupts Absolutely".[8] To further substantiate, Aristotle, Montesquieu, Blackstone were of the view that that for the existence of liberty, power should not be concentrated in the hands of one.[9] Hence, the genesis of the Federation traces back to historical times.

The Hon'ble Supreme Court in *Rameshwar Prasad v. Union of India*,[10] held that the word 'Federation' has no definite meaning. However, the crux of the federal form of government is the division of power between the state government and central government. Furthermore, the Supreme Court in *Government of NCT of Delhi v. Union of India*,[11] held that federalism is a form of governance wherein there is a distribution of power between central and regional units with each of them independent in its own sphere and coordinating with each other.

The source of the federal character of the Constitution of India is the Government of India Act 1935 which provided for creation of separate lists in order to demarcate the powers of central government and the provinces.[12] The Constitution of India under Article 246, Part X has provided for a very elaborative mechanism of distribution of power between the state and the Centre by creating three lists- Union List, State List and Concurrent List. Article 246(1) provides for the exclusive legislative power of the central government with respect to subjects enumerated in Union List. The Union list has 99 subjects such as Defence, Foreign Affairs, etc. and Article 246(3) provides for the exclusive legislative power of the state government with respect to subjects enlisted in State List which consists of 61 items. Article 246(2) provides for the power of the State Government and the Central Government to make laws for subject matters enlisted under Concurrent list which consists of 52 items.[13] In light of such extensive powers conferred, it will not be wrong to say that the institution of judiciary is confronted with various instances to determine disputes of legislative competence between Centre and State. The Supreme Court has original jurisdiction by virtue of Article 131 of the Constitution of India (Section 204 of Government of India Act 1935) to entertain disputes between Centre and State. The expression "*dispute involves any question (whether of fact or law) on which the existence or extent of a legal right depends*" is indicative of the fact that the nature of the dispute should not be political but should involve legal rights.[14]

---

8 David R. Sorensen, "*Power Tends to Corrupt: Thomas Carlyle, Lord Acton, and the Legacy of Frederick the Great*", CARLYLE STUDIES ANNUAL, No. 29, 2013, pp. 81-114.

9 *Supra* n. 7.

10 AIR 2005 SC 4301.

11 (2018) 8 SCC 501.

12 Mauro Mazza, "*Some Observations on Indian Federalism in Comparative Perspective*", BEIJING LAW REVIEW, Vol. 23 No. 1, 2015, pp. 24-26.

13 M.P. Jain, INDIAN COSNTITUTIONAL LAW, 8th ed. 2018, p. 535.

14 A.K. Koul, "*Article 131 of the Indian Constitution: Some Observations*", JOURNAL OF INDIAN LAW INSTITUTE, Vol. 13 1971, pp. 122-126.

Evolution of Nature of Federalism

The Constituent Assembly which convened on December 13, 1946 officially endorsed the principle of federalism as the structure of the new India, when it supported the resolution offered by Pandit Jawaharlal Nehru wherein it opined that:

> "*...the said territories...shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent in the Union*".[15]

In a similar vein, Dr. B.R. Ambedkar, the chief architect of the Constitution of India explained the position of Indian Federalism in following words:

> *The basic principle of federalism is that the legislative and executive authority is partitioned between the center and the States not by any law to be made by the center but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent upon the center for their legislative or executive authority. The center and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the center too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the center and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the center and the Units by the Constitution*.[16]

With due passage of time, the Supreme Court through a catena of judicial precedents made a significant contribution to understand the evolution of the nature of the Indian Federalism. In *State of West Bengal v. Union of India*,[17] the Supreme Court held that Constitution of India is not based upon 'Traditional Federal Constitution' wherein there are separate Constitutions for different states. In India, there is one Constitution governing the whole of India including its constituent States. In *State of Karnataka v. Union of India*,[18] the Supreme Court observed that the Constitution of India exhibits the features of 'Pragmatic Federalism', meaning thereby, providing for the division of powers but at the same time is overlaid by unitary features such as the emergency provisions wherein the central government has the power to displace state governments. In

15 Benjamin N. Schoenfeld, "*Federalism in India*", THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 20 No. 1, 1959, pp. 52-62.

16 B.N. Srikrishna, "*Beyond Federalism*", INDIA INTERNATIONAL CENTRE QUARTERLY, Vol. 38, No. 3/4, 2011-2012, pp. 386-407.

17 AIR 1963 SC 1241.

18 AIR 1978 SC 68.

S.R. Bommai v. Union of India,[19] the Court held that the Constitution of India is 'Quasi-Federal'. This is so because it is an amalgamation of unitary and federal features. Thus, the court explained the essence of federalism as distribution of powers between the State and the Centre, each being controlled by the Constitution of India. Underpinning the significance of the federal nature of the Constitution of India, the Supreme Court in *UCO Bank v. Dipak Debbarma*,[20] held that there is a need to preserve the federal character of the constitution in order to prevent any transgression of power.

It can be observed on the basis of the above-mentioned judicial pronouncements that though the Constitution of India envisages the characteristics of federalism like dual governments, distribution of powers between the Centre, creation of three lists, at the same time, it includes some unitary features as well. Keeping in mind this peculiar situation of India, the Supreme Court in *Government of NCT of Delhi v. Union of India*,[21] held that ours is a federation which incorporates the element of coordination, realism making it a co-operative federalism.

Centre-State Dispute in Legislative Matters: Mapping the Judicial Trends

The Hon'ble Supreme Court in exercise of its power under Article 131 of the Constitution of India has meticulously and efficiently resolved Centre-State disputes on legislative matters by propounding certain principles such as principle of reconciling entries, doctrine of pith and substance, doctrine of colorable legislation,[22] etc. In an attempt to critically analyse its role, it becomes necessary to look into the application of such doctrines and principles.

Principle of Reconciling Entries

The court while interpreting the effect of non-obstante clause under Article 246(1) of the Constitution of India was of the view that it ensures that Union power prevails over state in case of overlapping interests of Union and State powers. But in *In Re the C.P. and Bearra Act*,[23] it was held that the non-obstante clause should be used as a last resort in case of inevitable or irreconcilable conflict between lists. This principle was employed by the Hon'ble Supreme Court in *State of Bombay v. F.N. Balsara*,[24] wherein a dispute relating to Entry no. 41 of List-I and Entry no. 8 of List-II was in question. To reconcile the entries, the court narrowly construed the term 'import' under List-I to give effect to the state entry. It held that "*the word 'import' by itself could not include sale or possession of article imported into country by a person residing in the territory in which it was imported and hence held that it will be covered under state list*".

19 AIR 1994 SC 1918.
20 (2017) 2 SCC 585.
21 *Supra* n. 11.
22 M.P. Jain, INDIAN COSNTITUTIONAL LAW, 8th ed. 2018, p. 536.
23 AIR 1939 FC 1.
24 AIR 1951 SC 318.

In a similar vein, the Hon'ble Supreme Court in *Tika Ramji v. Uttar Pradesh*,[25] validated the Act of Uttar Pradesh which was enacted to regulate the supply of sugarcane to the factories. In this case, by applying the principle of reconciling the entries (Entry no. 52 of List-I; 24 and 27 of List-II; and 33 of List-III), the court held that *firstly*, states have comprehensive regulatory power covering all aspects of any industry falling within the domain of state and the states can regulate raw materials for such industries under Entry no. 27 of List-II as, 'goods' and also the finished product; *secondly*, as regards centrally controlled industries, process of manufacture and control over finished product fall under List-I; and *thirdly*, concerning raw materials of these industries, power lies under Entry no. 27 of List-II, except for commodities listed under concurrent list which the Centre may regulate.

The subject matter of education has been an important area wherein Supreme Court applied the principle of reconciling entries. The relevant entries in this regard are Entry no. 63-66 of List-I and 25 List-III. In light of this, the question of courts of judicature were faced in three most important judgments which are as follows: In *Gujarat University* case,[26] the court gave an expansive interpretation to central entry on deciding the question of regional language as an exclusive medium of instruction. The court applied the tests of adequate textbooks, journals, availability of competent teachers, capacity of students to imbibe as standards to be investigated while prescribing regional language as medium of instruction. In the case of *Chitralekha v. Mysore*,[27] wherein Supreme court held that admission of less qualified students in preference to more qualified ones will bound to impair academic standards. The same line of ratio was upheld in case of *D.A.V. College v. State of Punjab*.[28]

After a careful reading of these three cases, one point becomes clear i.e., If the central government proposes to conduct an All-India Basic Standard Test for admission, it would be governed by Entry no. 66 of List-I and any State law inconsistent therewith will be invalid. This position again highlights that though education is a matter wherein both State and Central Government can legislate but *dicta* of the courts very succinctly indicate that it is ultimately the Centre which has been given preference. In author's opinion, this approach of judiciary is rooted in the phrase 'United We Stand, Divided We Fall'.

Mining area and Development was another pertinent subject matter of dispute between Centre-State. In *State of West Bengal v. Union of India*,[29] constitutional validity of Centre's Coal Bearing Areas (Acquisition and Development) Act 1957 was challenged. It authorised the union government to compulsorily acquire land and related properties, including coal, owned by the State. While interpreting the word 'property' in Entry no. 42 of List-III, the court held that it is nowhere indicated in the provisions of the Constitution that

25 AIR 1956 SC 676.
26 AIR 1963 SC 703.
27 AIR 1964 SC 1283.
28 AIR 1971 SC 1737.
29 AIR 1963 SC 1241.

the term 'property' be construed in a narrow sense; it must accordingly be held to include property belonging to the States also, thus observed that the impugned Act was not *ultra vires* as it was within the Centre's competence. In a similar vein, the Supreme Court in *Hingir Rampur Coal Co. v. State of Orissa*,[30] held that:

> *...if a central act has been passed which contains a declaration by Parliament as required by Entry 54, and if such declaration covers the field occupied by the impugned Act, the impugned Act will be ultra vires not because of any repugnance between the two statutes but because the State Legislature has no jurisdiction to pass a law.*

The above proposition was reiterated in the case of *State of Orissa v. MA Tullock and Co*.[31] Further, in a significant judgment of *State of West Bengal v. Kesoram Industries Ltd.*,[32] the SC held that "*...Section 2 of the Mines and Minerals Regulation Act 1957 Act indicates the assumption of Centre's control in public interest is for (i) regulation of mines, (ii) development of minerals, and (iii) to the extent hereinafter provided*." Emphasising further, the SC said, "*...No state legislature shall have the power to enact any legislation touching: (i) regulation of mines, (ii) development of minerals, and (iii) to the extent provided by the 1957 Act*". In a similar vein, the Supreme Court in the case of *Monnet Ispat and Energy Pvt. Ltd. v. Union of India,*[33] held that any legislation by the State after such declaration, trespassing the field occupied in the declaration in the form of law by parliament cannot constitutionally stand.

Doctrine of Pith and Substance

The Doctrine of Pith and Substance is a tool employed by courts of judicature to resolve Centre-State disputes on legislative competencies. The doctrines provide that if the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another legislature. Applying the said doctrine in *Krishna v. State of Madras,*[34] the Supreme Court upheld the validity of Tamil Nadu Prohibition Act 1937, even though the procedure and principles contained in the Act were quite different from those specified under Code of Criminal Procedure 1973 and the Indian Evidence Act 1872 (Central Acts enlisted under Concurrent list). In this case, it appears that the court seems to have gone excessively far in validating the State law. In the opinion of the author, this will set a bad precedent because States would be at liberty to formulate their own brand of procedure and evidence for trial of offences created by their own laws under List-II, thus destroying element of uniformity of laws.

30 AIR 1961 SC 459.
31 AIR 1964 SC 1284.
32 (2004) 10 SCC 201.
33 (2012) 11 SCC 1.
34 AIR 1957 SC 297.

Doctrine of Colorable Legislation

The Doctrine of Colorable Legislation is another tool employed by court of judicature to resolve Centre-State disputes on legislative competencies. The doctrine provides that where the legislature is incompetent to enact a particular law within the constitutional limits, and it enacts the law under the guise of or colors the law with a purpose which will still permit it to accomplish its goal, that law will be invalid. The genesis of the doctrine can be traced back to latin maxim; '*Quando aliquid prohibetur ex directo, prohibetur et per obliqum*', meaning thereby, one cannot perform an act indirectly which he cannot perform directly.[35] Elucidating the etymological meaning of the term 'Colorable Legislation', the Hon'ble Supreme Court in *R.S. Joshi, S.T.O. Gujarat v. Ajit Mills Ltd.,*[36] held that:

> "*Conceptually, 'colorability' is bound up with incompetency. 'Colour', according to Black's Legal Dictionary, is 'an appearance, semblance or simulation, as distinguished from that which is real... a deceptive appearance ... a lack of reality'. A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is maya…*"[37]

A classic case on this is *K.C. Gajapati Narayan Deo v. State of Orissa,*[38] wherein certain provisions of Bihar Land Reform Act 1950 (hereinafter the Act) was in question on ground of colorable legislation. Through the medium of Section 23(f) of the Act, the government was deducting a fixed proportion of amount from the assets of ryots of villages and justified their collection by virtue of Entry no. 42 of List-III. Calling the definite amount deducted as 'Arbitrary Figure' and terming the action of the government as a fraud on the Constitution of India, the court held that Entry no. 42 of List-III merely empowers to legislate on matters of acquisition and requisition of property and allows to determine the principle for calculating compensation and not to deduct a specific and definite amount. The court reiterated that the basis of the doctrine is the competency of the legislature to enact a legislation. The question of *bona fide* or *mala fide* on the part of legislature is immaterial if the legislature is competent to enact a law. Thus, the courts have played a very crucial role in maintaining the equilibrium between the powers of State and Centre.

COVID-19 Pandemic: Fragile Federalism and the Role of Judiciary

The world is engulfed in the loop of deadly COVID-19 pandemic leaving its footprints in nearly all sectors of socio-economic-political importance. This unprecedented situation came as a challenging point to test the efficacy of co-operative federalism in India. Unfortunately, instead of co-operative federalism, various instances during the pandemic reveal the other side of conflict federalism. This is wherein the role of judiciary becomes instrumental in

35 *Ibid.*
36 AIR 1977 SC 2279.
37 *Ibid.*
38 AIR 1953 SC 375.

resolving the disputes in question. Doubtless to say, COVID-19 pandemic has left its footprint in education sector as well. With the escalating cases of Coronavirus round the country, the education sector was faced with a daunting task of formulating guidelines and academic calendar. During the pandemic, the Supreme Court was confronted with a very significant question of dispute over Entry no. 66 of List-I (Co-ordination and Determination of Standards in Institutions for Higher Education or Research and Scientific and Technical Institutions) in the case of *Praneeth K. v. University Grants Commission*.[39] The moot question in the instant case was that whether the University Grants Commission (hereinafter referred as UGC) guidelines requiring Universities to complete the examinations by end of September, 2020 shall override the decision of the State Government/Universities of not holding examinations? In the said case, basically, there were two prongs of arguments on behalf of petitioner i.e., *Firstly*, it was contended that the UGC guidelines of conducting examinations in the wake of pandemic is violative of Article 14 and Article 21 of the Constitution of India and endangers the health and safety of students. *Secondly*, Entry no. 66 of List-I by which UGC is framed has restrictive application and its scope is confined to determine the standards in Universities and has no right to decide on question of conducting examination. For this purpose, the reliance was placed on *Modern Dental College and Research Centre v. State of Madhya Pradesh.*[40]

The Supreme Court rejected the contentions of the petitioner and underpinning the significance of education held that "*Universities are the organs of civilization*". In order to make provision for the coordination and determination of standards in University, University Grants Commission (UGC) is a statutory body established under University Grants Commission Act 1956.

Relying upon the judgments pronounced in the case of *Professor Yashpal v. State of Chhattisgarh*,[41] and *Maa Vaishno Devi Mahila Mahavidyalaya v. State of Uttar Pradesh*, [42] the Supreme held that:

> *The settled view therefore, is that inspite of incorporation of Universities under the State, the whole gamut of the University including quality of education, research, curriculum, standard of examination, evaluation being carried on will not come within the purview of the State legislature. It is the responsibility of the Parliament to ensure that proper standards are maintained in institutions of Higher education.*[43]

Most importantly, interpreting the constitutional principles of federalism, the court held that UGC has been enacted in pursuance of Entry no. 66 of List-I and despite the State legislature being component to enact laws on Education (Concurrent Subject) including Universities, it should be subject to Entry no. 66

39 2020 SCC OnLine SC 688.
40 2016 7 SCC 353.
41 2005 5 SCC 420.
42 2013 2 SCC 617.
43 *Supra* n. 39, para 52.

of List-I. The UGC guidelines framed in light of such will have precedence over State laws being consistent with guidelines. Thus, UGC guidelines being statutory and within the legislative competence of Parliament under Entry no. 66 of List-I will have an overriding effect on State University guidelines and Laws.

The Supreme Court through this judgment has reiterated the constitutional principles of federalism enshrined under Article 246(1) of the Constitution of India. Taking a cue from its earlier decisions and interpreting the non-obstante clause under Article 246(1), the court held that when there is an inevitable conflict between State and Union powers, the Union power will prevail.

Another pertinent question which was on the forefront concerning federalism during pandemic is in relation to Section 11 of the Disaster Management Act 2005 which provides for the creation of 'National Plan' and under Section 6(2) empowers Central Government to issue binding guidelines for the implementation of the Plan with a rider of a positive mandate on the Centre to consult States before formulation of any such plan and also to represent the State's views in regards to binding guidelines. This provision ensures the essence of co-operative federalism. Unfortunately, in practice it has led to erosion. However, no such plan was formulated by Centre as it opted for issuing ad-hoc guidelines issued to the State thus bypassing the legislative mandate of consulting State.

Though this matter has not been brought before the court but it should be borne in mind that even though the Constitution of India has provided for parliamentary supremacy under Article 246(1) and (2), nevertheless one cannot give go-by to the principles of federalism which has been held to be a basic feature of Constitution of India.[44] In this regard it is significant to highlight the decision of the Supreme Court in *ITC Ltd. v. Agricultural Produce Market Committee*,[45] wherein it was emphasised that the constitution deserved to be construed in a manner that "*it doesn't whittle down the powers of the State Legislature and preserves the federalism while also upholding Central supremacy*".[46]

Critical Appraisal

Needless to mention, the author points very clearly to the fact that there have been glaring issues of Centre-State conflict in legislative matters and the institution of judiciary has made a remarkable contribution in resolving such disputes by employing various doctrines like doctrine of pith and substance, doctrine of colorable legislation and principle of reconciling conflicting entries. After critically analysing the judicial pronouncements, the judicial trend indicates a mixed response in resolving Centre-State conflict. There is no consistent line of interpretation on these matters. The courts have sometimes

44 D.D. Basu, CONSTITUTION OF INDIA, 14th ed. 2011, p. 1686.
45 (2002) 9 SCC 232.
46 *Supra* n. 44.

ruled in favour of the states, and at times in favour of the Union, while occasionally with mixed results.

Even in an unprecedented phase of pandemic, the Court adhered to the constitutional principles and judicial attitude of the court which showcases that even in times of pandemic, one cannot be permitted to betray the constitutional vision of co-operative federalism. Nevertheless, comparatively, the courts of judicature have upheld the supremacy of parliament in majority of disputes. This is not to be construed in light of promoting 'Centralist State or Centralist Ideology' but should be interpreted to appreciate the outstanding role of judiciary in shaping Centre-State relations in legislative matters with the "*politico-economic logic of building India as a unified nation*" [47] to enable the Centre to play the role of nation builder. These rulings indicate that there are two principles intertwined in the concept of federalism i.e., self-rule and shared-rule;[48] and judiciary tries to assimilate both these principles to uphold the constitutional spirit of co-operative federalism. This flexible yet delicate approach of the judicial decisions in accordance with constitutional provisions has tried to harmoniously construct the State and Centre legislative powers with a view that "*it doesn't whittle down the powers of the State Legislature and preserves the federalism while also upholding Central supremacy*".[49] This judicial behavior signifies exactly what has been the viewpoint of Dr. Ambedkar, the chief architect of the Constitution of India. He construed the word 'Federalism' not as a complete independence or total dependence of States but interdependence between the State and Centre for maintaining harmony, stability and prosperity.

Conclusion

Though there are judicial inconsistencies, but one aspect which binds all judgment is 'the golden thread of Co-operative Federalism running through each and every judgment'. Hon'ble Shri Justice P.N. Bhagwati said that, "*The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society.*" These words are worth mentioning in the light of significant contribution of judiciary as the 'Guardian of the Constitution of India' and 'Interpreter of the Constitution of India'. Repeatedly, with its intellect and legal acumen, the institution of judiciary has endeavored to strike out an equilibrium in powers of State and Central Government. Its commitment to imbibe the spirit of co-operative federalism in the true functioning of democracy is noteworthy and nonpareil.

It has proved true through the words of Hon'ble Shri Justice Subba Rao that "*the Court has the constitutional power and the correlative duty- a difficult and delicate one-to prevent encroachment either overtly or covertly by the Union on*

47 Pritam Singh, FEDERALISM, NATIONALISM AND DEVELOPMENT, 1st ed. 2008, p. 100.

48 Harihar Bhattacharya, FEDERALISM IN ASIA, 1st ed. 2020, pp.19-22.

49 *Supra* n. 44.

State fields or vice versa, and thus maintain".[50] Through the landmark judgments, judiciary has played a remarkable role in resolving the turmoil between Centre-State relations on legislative matters, thus ensuring that the flame of co-operative federalism adorns the Constitution of India in reality.

***

50 R.S. Morkhandikar, "*The Supreme Court and Federation in India*", THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 25 No. 3/4, 1964, pp. 224-230.

PRE-CENSORSHIP OF OVER-THE-TOP PLATFORMS: A NEED OF THE CONTEMPORARY TIMES

Shubhangi Agarwal[♣] *and Stuti Sinha*[♦]

Abstract

In this paper, the authors have discussed the regulatory aspect of the Over-the-top (hereinafter referred as OTT) Services. The main point of concern is the lack of adequate legislation over availability of objectionable, obscene and socially degrading audio/audio-video contents. At present, the Information Technology Act 2000, the Indian Penal Code 1860 and the Universal Self-Regulation Code 2020, primarily govern contents on OTT platforms. Though a commendable step, the Self-Regulation Code suffers from a lot of grey areas and does not give adequate solutions to the problems surrounding the content on OTT platforms. Moreover, where Online Curated Contents have found a place under the definition of OTT Platforms given in the Code, the User Generated Contents have been kept completely out of the purview, thereby, making a large section of popular websites like YouTube, Facebook, Instagram, Twitter, etc., run without any censorship or scrutiny over them. Therefore, the paper attempts to highlight the emergent need of an appropriate legislation in place of a Self-Regulation Code of OTT platforms by analysing the effectiveness of the Code along with the judicial and government perspective in this regard. Further, the authors compare the regulatory measures employed in other nations to suggest effective and feasible solutions to the existing problems.

Keywords: Over-the-top Platforms, Objectionable Content, User Generated Content, Self-Regulation Code, Online Curated Content, Censorship.

Introduction

With the COVID-19 pandemic in existence, brick and mortar has been replaced by e-commerce quite heavily. The major benefiter of this is the Over-the-Top[1] platforms. India's considerable audience is being served by around 35 video service providers currently,[2] so much so that the multiplex operators are despondent about movies being released on this platform and have expressed their sentiment in the statement recently released by the Producers Guild of

♣ Advocate, High Court of Judicature at Allahabad, Lucknow Bench, e-mail: shuadi99.shubhangi@gmail.com.

♦ Associate, Dave & Associates, Vasai, e-mail: stuti.sinha1395@gmail.com.

1 Hereinafter referred as OTT.

2 Pawan Jhabakh and Salai Varun, "*How and Why OTT Platforms 'Censor' Themselves*", THE NEWS MINUTE, June 25, 2020, https://www.thenewsminute.com/article/how-and-why-ott-platforms-censor-themselves-127306, (visited on December 5, 2020).

India.[3] As this shift takes place, it becomes extremely crucial to analyse the regulations in place for these OTT platforms.

Recently, Advocate K. Suthan filed a Public Interest Litigation[4] in the Madras High Court asking for a pre-censorship authority for social media and OTT platforms. This is not the first time that a case on this subject matter has been filed in the court, there have been around six similar cases, which have either been dismissed by the court or deferred[5] for hearing due to the pendency of a similar case in the Supreme Court. Advocate Suthan though also takes into consideration the inclusion of user-generated content in the demanded scope for censorship,[6] which is often disregarded when talking about OTT. The public internet that started in the 1980's, has the capacity to carry a range of services that a consumer of telecom services would require,[7] be it related to education, information or entertainment. It is impossible to think of our daily lives without internet. Internet has changed the way media is consumed.

The term Over-the-Top (OTT)[8] Services refers to "*applications and services which are accessible over the internet and ride on operators' networks offering internet access services*"[9]. Though the term is often used for video-on-demand platforms, it also refers to audio streaming, video calling and internet-based messaging services.[10] It bypasses traditional media distribution channels, for the

3 "*Multiplex Chain INOX "Disappointed" by Film Going Directly to OTT*", OUTLOOK THE NEW SCROLL, May 14, 2020, https://www.outlookindia.com/newsscroll/multiplex-chain-inox-disappointed-by-film-going-directly-to-ott/1834761, (visited on October 15, 2020); "*Producers Guild Statement to Theatre Owners on Digital Release: We Need to Stay in Business*", INDIA TODAY, May 15, 2020, https://www.indiatoday.in/movies/bollywood/story/producers-guild-statement-to-theatre-owners-on-digital-release-we-need-to-stay-in-business-1678274-2020-05-15#:~:text=After%20multiplex%20chain%20INOX%20expressed,need%20to%20stay%20in%20business., (visited on October 15, 2020).

4 Aroon Deep, "*Lawyer Files PIL in Madras HC Seeking Pre-censorship of Social Media, OTT Platforms*", https://www.medianama.com/wp-content/uploads/affidavit.docx.pdf, MEDIANAMA, July 30, 2020, https://www.medianama.com/2020/07/223-madras-high-court-social-media-ott-regulation/, (visited on December 5, 2020).

5 *Ibid*.

6 *Ibid.*

7 Telecom Regulatory Authority of India, "*Regulatory Framework for Over-the-Top (OTT) Services*", March 27, 2015, https://trai.gov.in/sites/default/files/OTT-CP-27032015.pdf, (visited on December 8, 2020).

8 ITU Secretary General, "*Report for the Fifth WTPF-2013*", WORLD TELECOMMUNICATION/ICT POLICY FORUM, May 14-16, 2013, https://www.itu.int/en/wtpf-13/Pages/report-sg.aspx, (visited on December 8, 2020).

9 *Supra* n. 7.

10 Meghan McAdams, "*What is OTT? -Understanding the Modern Media Streaming Landscape*", TAPJOY, April 28, 2019, https://www.tapjoy.com/resources/what-is-ott/, (visited on December 5, 2020).

consumer to enjoy the services leisurely at one's whims as far as one has a working internet connection. Thus, emulating telecommunication providers through "increased accessibility, customer-centric pricing and multiple social features."[11] Never before has there been so many ways of accessing content with so much of magnitude.

Some examples of OTT Media taking over traditional media is as follows:[12]

- Email took over post;
- Amazon Prime and Netflix took over cable channels;
- WhatsApp and Zoom took over call and telephone services and SMS; and
- YouTube talking over music and video broadcasters.

With this, OTT platforms have seen an unparalleled growth. The same boom, coupled with Voice over Internet Protocol (hereinafter referred as VoIP) and a largely unregulated Market,[13] has left many economies battling over the appropriate laws and regulations to administer the same and the Government of India is one of them. The growth of this platform can be attributed to the "delayering" of the content or applications, which are now no more network and service specific as there is merging of the same.[14] The OTT platform looks forward to becoming a USD 5 Billion worth of market in India by 2023[15] and seeing the multitudinal and complex issues that surround these OTT platforms, be it social media or the Online Curated Content channels, some level of government intervention and rules and regulations becomes an unavoidable necessity. Recently, in the early part of 2019, the Supreme Court had issued notice to the Central Government for hearing related to regulation of the content available on the OTT media platform.[16] It had been noted that these unlicensed

---

11 C. Barkley, "*Is Regulation the Answer to the Rise of Over the Top (OTT) Services? An Exploratory Study of the Caribbean Market*", ITU KALEIDOSCOPE: TRUST IN THE INFORMATION SOCIETY, 2015.

12 *Ibid.*

13 *Ibid.*

14 ITU Telecommunication Development Bureau, "*Regulating 'Over-the-top' Services*", ICT REGULATION TOOLKIT, July 14, 2015, http://www.ictregulationtoolkit.org/2, (visited on December 8, 2020).

15 ET Bureau, "*Indian OTT Market can hit $5 Billion in 5 years, says Boston Consulting Group*", THE ECONOMIC TIMES, November 21, 2018, https://economictimes.indiatimes.com/tech/internet/indian-ott-market-can-hit-5-billion-in-5-years-says-boston-consulting-group/articleshow/66722045.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, (visited on December 21, 2020).

16 *Justice for Rights Foundation v. Union of India* SLP(C) 10937/2019, https://main.sci.gov.in/supremecourt/2019/12024/12024_2019_Order_10-May-2019.pdf, (visited on December 6, 2020); "*SC Issues Notice on Plea for Regulation of Internet Streaming Platforms Such as Netflix, Hotstar Etc.*", LIVELAW, May 10, 2019, https://www.livelaw.in/news-updates/sc-issues-notice-on-plea-for-regulation-of-internet-streaming-platforms-such-as-netflix-hotstar-etc-144960?infinitescroll=1, (visited on December 6, 2020).

platforms go unregulated and hence it is unfair to broadcasters, consumers, cable operators and Direct to Home (hereinafter referred as D2H) network owners alike.[17]

Current Scenario in India

Former Position of OTT Content Regulation

The plea filed in the Delhi High Court by the Non-Governmental Organisation (hereinafter referred as NGO) i.e., Justice for Rights,[18] in the year 2018, averred that not only do the OTT platforms show their content "*unlicensed, unregulated and uncertified*",[19] but they also run without any guidelines concerning the same. On the same lines, as a response to an Right to Information (hereinafter referred as RTI), the Central Government informed that the online platforms do not require any license from the Ministry of Information and Broadcasting[20] and is not regulated by the same.

Current Position of OTT Content Regulation

Presently, there are three codes of self-regulation for the OTT platforms, namely, Code of Best Practices for Online Curated Content Providers[21] 2019,[22] Code of Self-Regulation for Online Curated Content Providers 2020[23] and the recently introduced Universal Self-Regulation Code Online Curated Content Providers 2020[24] brought by IAMAI.

---

17 Bhumika Khatri, "*Supreme Court Issues Notice to Centre to Regulate OTT Content*", INC42, May 10, 2019, https://inc42.com/buzz/supreme-court-centre-regulate-ott-content/, (visited on December 8, 2020).

18 *Justice for Rights Foundation v. Union of India* WPC No. 11164/2018, http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=31068&yr=2019, (visited on December 6, 2020).

19 *Ibid*, para 1, 4 and 6.

20 RTI Application, MOIAB/R/2016/50541, October 25, 2016 and Information sought under RTI Act 2005, No. I-11011/17/2016-DO(FC), December 2, 2016; Aroon Deep, "*I&B Ministry: We are not Considering Censorship of Hotstar and Netflix*", MEDIANAMA, December 13, 2016, https://www.medianama.com/2016/12/223-ib-ministry-not-considering-censorship-hotstar-netflix/, (visited on December 6, 2020).

21 Hereinafter OCCP.

22 Rashi Varshney, Code of Best Practices for Online Curated Content Providers, IAMAI January 2019; "*Hotstar, Netflix, Eros Now and five others sign 'Code of Best Practices' under IAMAI*", YOURSTORY, January 17 2019, https://yourstory.com/2019/01/hotstar-netflix-sign-iamai-code, (visited on December 8, 2020).

23 Nikhil Pahwa, "*IAMAI's New Code for Online Content Streaming Sets Up a Self-Regulatory Body, Incorporates Penalities*", MEDIANAMA, February 4, 2020, https://www.medianama.com/2020/02/223-iamai-content-code-dccc/, (visited on December 8, 2020).

24 Aroon Deep, "*Summary: IAMAI's Self-Regulation Code for Online Curated Content Platforms*", MEDIANAMA, September 5, 2020, https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/, (visited on December 8, 2020).

The initial code was signed by nine streaming services agreeing on some 'best practices' to avoid censorship by the government. This code allowed these OTT platforms to discontinue or suspend any content that goes against what is banned by the Indian courts or applicable laws, disrespects the national emblem and flag, hurts religious sentiments, promotes terrorism and show minors indulging in sexual activity.[25] The Code included a provision for a complainant to seek redressal, wherein, through login and viewing details, the complainant could point out to the streaming platform, the content that concerned him and the platform would respond within 10-30 days. The Ministry of Information and Broadcasting[26] and the Ministry of Electronics and Information Technology[27] could also forward the complaints to these platforms.[28]

The succeeding Code brought on February 2020 removed the provision relating to religious sentiments and widened the restriction by including "*Content which promotes and encourages disrespect to the sovereignty and integrity of India*".[29] The Code also required the signatories to include some safety features like age classification[30]and content descriptor.[31] The Code also included parental access controls for the signatories or alternate measures to adopt like PIN or password to allow access of certain contents meant for adult viewing only,[32] though it was not mandatory. It also introduced a redressal mechanism, wherein the complainants including the National Consumer Helpline of India and Ministry of Communications along with the MIB and MEITY could directly or indirectly[33] communicate their redressal to the OTT platforms. For the redressal of these complaints, the streaming platforms needed to create a department called the Digital Content Complaint Forum,[3435] which would receive the complaints as well as address compliance issues by these companies. The forum will respond on the complaint within 10-30 days.[36] The Code also added a second tier called the Digital Content Complaint Council,[37]

25 Namita Singh, "*IAMAI's Regulatory Code for OTT Platforms Outlining Principles and Seeking a Creation of Grievance Redressal; will it lead to Self-Censorship?*", MEDIANAMA, January 17, 2019, https://www.medianama.com/2019/01/223-iamai-ott-regulation-video-platforms/, (visited on December 11, 2020).

26 Hereinafter referred as MIB.

27 Hereinafter referred as MEITY.

28 *Supra* n. 22.

29 *Supra* n. 23, p. 7.

30 *Supra* n. 23, p. 7.

31 *Supra* n. 23, p. 8.

32 *Supra* n. 23, p. 8.

33 *Supra* n. 23, p. 6.

34 Hereinafter referred as DCCF.

35 *Supra* n. 23, p. 9.

36 *Supra* n. 23, p. 10.

37 Hereinafter referred as DCCC; Aroon Deep, "*Summary: IAMAI's Self-Regulation Code for Online Curated Content Platforms*", MEDIANAMA, September 5, 2020, https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/, (visited on December 8, 2020).

which would have nine nominated members[38] with a retired judge of the Supreme Court or the High Court as its chairperson.[39] It would deal with all the issues not resolved by the DCCF, examine the complaints forwarded by the government or cases taken up *suo moto*,[40] decide and accord penalties[41] as per Part C, Section 11.[42]

The latest Code, having about fifteen signatories,[43] mentions that the primary legislation governing online content is Information Technology Act 2000.[44] It introduces detailed age classification i.e., all ages, 7+, 13+, 16+, and 18+[45] and requires the signatories to mention any mature content featured on the show. It differentiates curated content from user-generated content[46] and governs only the former. The Code further states that online content constitutes private viewing and not public viewing, as it is available on-demand[47] and hence should not be subjected to the laws applicable on the latter. It also provides for a two-tier internal complaints mechanism wherein the signatories would have to set up a Consumer Complaints Department,[48] an Internal (or Appellate) Committee, and an Advisory Panel.[49] The complaints are to be disposed of within 15-30 days[50] and if an OTT platform makes changes on their own volition, the complaint is deemed to be *void-ab-initio*.[51] Once a year, on request of the MIB or MEITY, the OTT platforms would have to share the details of the complaints received, within 30 days of such request.[52]

38 *Supra* n. 23, p. 11.
39 *Supra* n. 23, p. 11.
40 *Supra* n. 23, p. 12.
41 Shuchi Bansal, "*Opinion | Video Streaming Firms Fight over Self-Regulation*", LIVE MINT, October 02, 2019, https://www.medianama.com/2020/02/223-streaming-video-iamai-digital-content-code-netflix-amazon-hotstar/, (visited on December 21, 2020).
42 *Supra* n. 35, p. 11.
43 *Supra* n. 24, p. 1.
44 *Supra* n. 24.
45 *Supra* n. 24, p. 12.
46 *Supra* n. 24, p. 9.
47 *Supra* n. 24, p. 10.
48 Hereinafter referred as CCD.
49 *Supra* n. 24, p. 12.
50 *Supra* n. 24, p. 13.
51 *Supra* n. 24, p. 13.
52 *Supra* n. 24, p. 14.

Few Previous Instances of Censorship on OTT Media in India

(i) Netflix released Angry Indian Goddess which was censored in India (later reversed)[53] (2017);
(ii) Amazon Prime Video in India self-censored Marvelous Mrs. Maisel[54] (2018);
(iii) Apple TV+ released in India with certain Titles censored[55] (2019);
(iv) Hotstar took down the Koffee with Karan episode that featured Hardik Pandya and K.L. Rahul[56] (2019);
(v) Amazon Prime deleted an episode of Madam Secretary which showcased Hindu Nationalism and Kashmir[57] (2019);
(vi) Hotstar deleted an episode of Late Night with Jon Oliver as it was PM Modi Centric[58] (2020);
(vii) Netflix censored Vikings in Media and blurred nudity and meats[59] (2020); and
(viii) Netflix censored Mission Impossible: Fallout and removed Kashmir from it[60] (2020).

---

53 Alex Marshall, "*Netflix Expands into a World Full of Censors*", THE NEW YORK TIMES, October 31, 2019, https://www.nytimes.com/2019/10/31/arts/television/netflix-censorship-turkey-india.html, (visited on December 15, 2020).

54 Simantini Dey, "*Dirty Picture: Why is Amazon Prime Video in India Self-Censoring the Marvelous Mrs. Maisel?*", NEWS18 BUZZ, December 13, 2018, https://www.news18.com/news/buzz/dirty-picture-why-is-amazon-prime-video-self-censoring-the-marvelous-mrs-maisel-1972591.html, (visited on December 18, 2020).

55 Aroon Deep, "*Apple TV+ In India Is Very Cheap, But Censored. Is It Worth It?*", FILM COMPANION, November 3, 2019, https://www.filmcompanion.in/features/bollywood-features/apple-tv-in-india-is-very-cheap-but-censored-is-it-worth-it/, (visited on December 21, 2020).

56 "*Hotstar Takes down Koffee with Karan Episode Featuring Hardik Pandya and KL Rahul*", INDIA TODAY, January 11, 2019, https://www.indiatoday.in/television/top-stories/story/hotstar-takes-down-koffee-with-karan-episode-featuring-hardik-pandya-and-kl-rahul-1428381-2019-01-11, (visited on December 20, 2020).

57 Aditya Mani Jha, "*In Act of Self-censorship, Amazon Prime Deletes Episode of CBS Show Madam Secretary Which Deals with Hindu Nationalism and Kashmir*", FIRSTPOST, November 19, 2019, https://www.firstpost.com/entertainment/in-act-of-self-censorship-amazon-prime-deletes-episode-of-cbs-show-madam-secretary-which-deals-with-hindu-nationalism-and-kashmir-7673661.html, (visited on December 15, 2020).

58 Akhil Arora, "*Hotstar Nukes PM Modi-Centric Episode of Last Week Tonight with John Oliver*", NDTV: GADGETS360, February 25, 2020, https://gadgets.ndtv.com/entertainment/ news/hotstar-modi-last-week-tonight-john-oliver-bjp-caa-nrc-rss-hitler-censorship-episode-2185364, (visited on December 17, 2020).

59 Aroon Deep, "*Netflix Censors Vikings in India, Blurs Nudity and Meat*", MEDIANAMA, June 1, 2020, https://www.medianama.com/2020/06/223-netflix-censors-vikings-india-nudity-meat/, (visited on December 13, 2020).

60 Malvika Gurung, "*Netflix Starts Censoring Hollywood Movies in India; These Scenes Were Censored Silently*", TRAK.IN, July 1, 2020,

There have also been instances where due to the receiving of backlash that stems from religious or moral outrage[61] Online Curated Content[62] industry had to take down the impugned content.

The MIB Minister, Prakash Javdekar, in a meeting set up with the industry giants in March, 2020, gave a deadline of 100 days to the OTT platforms to abide by the rules of the Digital Content Complaint Council (DCCC).[63] The 100-day period passed without any comment from the government. Later in September, IAMAI released the new Universal Self-Regulation Code signed by 15 OTT platforms. The signatories include OTT platforms like Hoichoi, AltBalaji, Zee5, Viacom18, MX Player, Hungama with 9 others.[64] According to the statement released by IAMAI, the Code is effective from August 15, 2020.[65] The CCD, set up by this Code, can receive complaints from the government bodies and agencies[66] and it would be the 'first point of contact' for the complainants in regards to complaints about the violation of the code by any signatory i.e. violation of the requirements of age classification, content

---

https://trak.in/tags/business/2020/07/01/netflix-start-censoring-hollywood-movies-in-india-these-scenes-were-censored-silently/, (visited on December 18, 2020).

61 Aroon Deep, "*Exclusive: In a First, Netflix Censors Hollywood Film in India, Cuts Kashmir from Mission Impossible: Fallout*", MEDIANAMA, June 26, 2020, https://www.medianama.com/2020/06/223-netflix-censors-india-mission-impossible-kashmir/, (visited on December 18, 2020); Aroon Deep, "*ALT Balaji and ZEE5 Censor Web Series After Public Backlash*", MEDIANAMA, June 8, 2020, https://www.medianama.com/2020/06/223-alt-balaji-and-zee5-censor-web-series-after-public-backlash/, (visited on December 18, 2020); Harshit Rakheja, "*'Boycott Netflix' Trends On Twitter After Outrage Over Alleged 'Hinduphobic' Content*", INC42, June 29, 2020, https://inc42.com/buzz/boycott-netflix-trends-on-twitter-after-outrage-over-alleged-hinduphobic-content/, (visited on December 18, 2020).

62 Hereinafter OCC.

63 Aroon Deep, "*I&B Ministry Gives OTT Industry 100 Days to Create Adjudicatory Authority"*, MEDIANAMA, March 3, 2020, https://www.medianama.com/2020/03/223-ib-ministry-gives-ott-industry-100-days-to-create-adjudicatory-authority/, (visited on December 14, 2020); Hemani Sheth, "*Centre Gives OTT Platforms 100 days to Put Self-regulatory Code in Place: Report*", BUSINESS LINE, March 3, 2020, https://www.thehindubusinessline.com/info-tech/centre-gives-ott-platforms-100-days-to-put-self-regulatory-code-in-place-report/article30969669.ece#, (visited on December 19, 2020).

64 *Supra* n. 24, pp. 1-15; "*OTT Players Sign Self-Regulatory Code under the Aegis of IAMAI*", BUSINESS LINE, September 4, 2020, https://www.thehindubusinessline.com/news/15-ott-players-sign-self-regulatory-code-under-the-aegis-of-iamai/article32525442.ece, (visited on December 17, 2020).

65 *Supra* n. 24, p. 10; "*Netflix, Amazon Prime Video, 13 others Adopt Self-Regulation Code: IAMAI*", YOURSTORY, September 6, 2020, https://yourstory.com/2020/09/netflix-amazon-prime-video-self-regulation-code-iamai, (visited on December 16, 2020).

66 *Supra* n. 24, p. 12.

descriptors, synopsis available and access controls.[67] The Internal or Appellate committee works as the first step in the absence of CCD or as an appellate authority for the decision taken by a platform's CCD. The platforms, depending on the nature or number of the complaints, may have more than one Internal/Appellate committee.[68] Each OTT platform is also required to have an Advisory Panel, with at least one independent member, to evaluate complaints and advise on decisions to be taken in a particular case by the CCD and/or the Internal Committee. Through this Code, the platforms aim to strike a balance between 'preserving independence' of the creators and 'protecting the interests of the consumers' [69] by providing them a grievance redressal system.[70]

The complainant would have to submit the complaint in writing with his name, E-mail ID, user login-ID, title of the content, date of viewing and a brief description of how the content violates the code, if he approaches the CCD.[71] In case the Online Content provider[72] feels that the complaint is in line with the code, an acknowledgement has to be given within 48 hours and a reply in 15 days of the receipt of the complaint, which may be extended to 30 days. If not consistent with the code, the Provider would reply with a tentative timeline for the complainant to receive a response.[73] If a Provider takes any action regarding the complaint of his volition, the complaint will be deemed void, but a fresh complaint may be filed by the consumer.[74]

The 3 bodies may give any or all of the following solutions:

(i) Reclassify age rating of relevant content, and/or;
(ii) Include a warning card or disclaimer in content descriptors, and/or; and
(iii) Edit synopsis of relevant content.

With the striking down of Section 66A[75] of the Information Technology Act 2000 (hereinafter the IT Act) there have arisen categories of objectionable and provocative content. There has been a shift from wanting to regulate the content online to the regulation of the circulation of content.[76] The Central government can currently block online content under Section 69A of the IT Act.[77] One of

67 *Supra* n. 24, p. 12.
68 *Supra* n. 24, p. 12.
69 Megha Mandavia, "*Self-Censorship: Streaming Soon on Netflix, Hotstar, Jio*", THE ECONOMIC TIMES, December 28, 2018, https://economictimes.indiatimes.com/industry/media/entertainment/self-censorship-streaming-soon-on-netflix-hotstar-jio/articleshow/67280441.cms?from=mdr, (visited on December 14, 2020).
70 *Supra* n. 24, p. 11.
71 *Supra* n. 24, p. 13.
72 Hereinafter Provider.
73 *Supra* n. 24, p. 14.
74 *Supra* n. 24, p. 14.
75 Section 66A of the Information Technology Act 2000.
76 Siddharth Narrain, "*Social Media, Violence and the Law: 'Objectionable Material' and the Changing Contours of Hate Speech Regulation in India*", CULTURE UNBOUND, Vol. 10 Issue 3, 2018, p. 388.
77 Section 69A of the Information Technology Act 2000.

the most common ground for invoking the same is 'disturbance of public order'.[78]

The penalty and imprisonment is attracted for:

(i) Publishing or transmitting obscene material in electronic form;[79]
(ii) Publishing or transmitting of material containing sexually explicit act etc. in any electronic form;[80] and
(iii) Publishing or transmitting of material depicting children sexually explicit act, etc., in any electronic form.[81]

The procedure to be followed herein comes from the Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules 2009 (hereinafter Blocking Rules) and the liability and its exemption for the Intermediaries are governed by Section 79 of the IT Act.[82]

A due diligence framework is given by the Information Technology (Intermediary Guidelines) Rules 2011[83] as notified by the Department of Electronics and Information Technology,[84] to be complied with the intermediaries regarding the data being facilitated or distributed by the intermediary in any electronic form. These provisions also apply to OTT platforms as they are recognised as intermediaries under the IT Act. [85] There are also some provisions in the IPC that criminalise any voluntary and malicious act done to insult or disgrace any religious belief [86] and the act of circulation of defamatory content.[87]

In the PIL filed by the NGO i.e., Justice for Rights, the Delhi HC had dismissed the need for any external regulation with the existence for the IT Act in place.[88] However, is the IT law enough to regulate content available on the online platforms? Also, are the self-regulation codes in place currently, the correct substitute to a central legislation? For example, despite sexual and explicit content, obscene in its nature, being prohibited under Section 67 of the

78 *Ibid.*
79 Section 67 of the Information Technology (Amendment) Act 2008.
80 Section 67A of the Information Technology (Amendment) Act 2008.
81 Section 67B of the Information Technology (Amendment) Act 2008.
82 Arun Chinmayi and Arpita Biswas, "*Hate Speech Laws in India*", CENTRE FOR COMMUNICATION GOVERNANCE, NATIONAL LAW UNIVERSITY, DELHI, 2018, https://www.latestlaws.com/wp-content/uploads/2018/05/NLUD-Report-on-Hate-Speech-Laws-in-India.pdf, (visited on December 10, 2020).
83 Hereinafter referred as Intermediary Guidelines.
84 Rule 3 of the Information Technology (Intermediary Guidelines) Rules 2011.
85 Ashima Obhan and Bambi Bhalla, "*OTT Platforms brought under Government Regulation*", LEXOLOGY, 18 November, 2020, https://www.lexology.com/library/detail.aspx?g=26788eb0-f5f5-4e2e-b85e-a4602e1fa6a3, (visited on 25 December 2020).
86 Section 295A of the Indian Penal Code 1860.
87 Sections 499 and 500 of the Indian Penal Code 1860.
88 *Justice for Rights Foundation v. Union of India* WPC No. 11164/2018, http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=31068&yr=2019, p. 4, (visited on December 6, 2020).

IT Act,[89] there are still content with 'frontal nudity' and 'erotic content'[90] in gross violation of the same and is rather flourishing during the Pandemic,[91] without any action being taken against them.[92]

User Generated Content

The growing popularity of social networking and video streaming platforms has given rise to a significant change in the manner we utilise social media these days. People use these platforms for sharing news, documents information and even videos and pictures of themselves. These platforms are user-friendly and faster than other modes and have a direct impact on all of us in the way information is transferred instantly through the said medium, be it Instagram, Facebook or even YouTube. User Generated Content (hereinafter referred as UGC) allows creative way of interactions and a possibility to create new businesses.

UGC refers to any content created by an unpaid contributor. As per the new Self-regulation Code, UGC content is "*directly uploaded and/ or self-published on a platform by users or third parties who hold rights on behalf of users*."[93]About 2.4 times the consumers think user created content are more authentic than those uploaded by paid brands [94] and about 92% of the people prefer and trust content that is user generated.[95] The latest draft of the Self-Regulation Code by the IAMAI differentiates between user generated content and curated content.[96] By doing this, it applies the new regulation only to

89 Section 67B of the Information Technology (Amendment) Act 2008.

90 Aditi Sharma, "*Why Are Indian Streaming Platforms Full of Erotic Content?*", BINGE DAILY, September 9, 2020, https://www.bingedaily.in/article/why-are-indian-streaming-platforms-full-of-erotic-content, (visited on December 18, 2020).

91 Harshit Rakheja, "*India's Emerging Erotic OTT Market Flourishes Amidst Pandemic*", INC42, July 25, 2020, https://inc42.com/buzz/indias-emerging-erotic-ott-market-flourishes-amidst-pandemic/, (visited on December 18, 2020).

92 Dipti Nagpaul, "*Why Are Local Indian Streaming Platforms So Full of Erotic Content? An Investigation*", VICE, July 1, 2020, https://www.vice.com/en/article/ep4pep/indian-local-streaming-platforms-erotica-sex, (visited on December 18, 2020).

93 *Supra* n. 24, p. 9.

94 Christina Newberry, "*A Marketer's Guide to Using User-Generated Content on Social Media*", HOOTSUITE, March 12, 2019, https://blog.hootsuite.com/user-generated-content-ugc/, (visited on December 18, 2020); "*Stackla Survey Reveals Disconnect Between the Content Consumers Want & What Marketers Deliver*", BUSINESS WIRE, February 20, 2019, https://www.businesswire.com/news/home/20190220005302/en/Stackla-Survey-Reveals-Disconnect-Content-Consumers-Marketers, (visited on December 18, 2020).

95 "*Consumer Trust in Online, Social and Mobile Advertising Grows*", NEILSEN, November 4, 2012, https://www.nielsen.com/us/en/insights/article/2012/ consumer-trust-in-online-social-and-mobile-advertising-grows/, (visited on December 18, 2020).

96 Aroon Deep, "*Summary: IAMAI's Self-Regulation Code for Online Curated Content Platforms*", MEDIANAMA, September 5, 2020,

curated content that includes subscription video on demand, advertising model and transactional models.[97] It leaves UGC out of its purview even though it's an extremely important and one of the most effectual parts of the OTT platforms.

YouTube is the largest User Generated Content Video-on-Demand (hereinafter referred as VoD) service.[98] One of the most popular online video streaming websites in the world, it facilitates its users to create their own channels, subscribe to multiple channels, upload videos, and watch videos available on the website. The YouTube Channel Karuppar Koottam is one such example, where the adverse effects of a regulatory void were visible. The channel was embroiled in controversy for maligning Lord Muruga and there were complaints filed against the channel. As a response to the protests and complaints, four people of the channel were arrested by the cybercrime branch and YouTube removed all the videos of that channel.[99] This is not the only example of objectionable content being freely uploaded and accessible. There have been many such similar instances. Jake Paul, a content creator followed across the globe mostly by teenagers uploaded a video of a hanging body, in the infamous Aokigahara forest, known for its suicides. He was seen laughing while filming that body. The video was subsequently removed but not before it already had millions of views.[100] Similarly, there are many famous Youtubers like Ajay Nager, who in his channel 'Carryminati', uploads roasting videos and uses extremely abusive, sexist and homophobic language.[101] His most viewed video is a rap song 'Yalgaar', which is accused by rapper-singer Babu Haabi's to be plagiarised from his creation 'Bobocanta' from 2016.[102] In a similar kind of video, Shubham Misra, a YouTube user, in a video he uploaded in July 2020, is seen cussing and giving rape threats for 2 minutes straight to a Comedian

---

https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/, (visited on December 18, 2020).

97 *Ibid*.

98 Meeyoung Cha, et al., "*I Tube, You Tube, Everybody Tubes: Analysing the World's Largest User Generated Content Video System*", PROCEEDINGS OF THE 7th ACM SIGCOMM CONFERENCE ON INTERNET MEASUREMENT, 2007, p. 1.

99 "*All Videos of Karuppar Koottam Channel Removed from YouTube for now*", THE NEWS MINUTE, July 21, 2020, https://www.thenewsminute.com/article/all-videos-karuppar-koottam-channel-removed-youtube-now-129124, (visited on December 25, 2020).

100 "*Logan Paul: Outrage over YouTuber's Japan dead man video*", BBC, January 2, 2018 https://www.bbc.com/news/world-asia-42538495, (visited on December 25, 2020).

101 Navya Singh, "*Know All About YouTuber CarryMinati's Controversial Video, Why Is He Trending on Twitter*", THE LOGICAL INDIAN, May 19, 2020, https://thelogicalindian.com/news/carryminati-objectionable-video-21185, (visited on December 25, 2020).

102 Ritika Handoo, "*Trending: YouTuber Carry Minati's New Rap Song 'Yalgaar Ho' Copied from Babu Haabi Song, Claims Comedian Kunal Kamra*", ZEE NEWS, June 12, 2020, https://zeenews.india.com/people/trending-youtuber-carry-minatis-new-rap-song-yalgaar-ho-copied-from-babu-haabi-song-claims-comedian-kunal-kamra-2289501.html, (visited on December 25, 2020).

Agrima Joshua as a reaction to a very old content of hers. The video had lakhs of views before it was removed.[103] He has over 3,00,000 subscribers over YouTube and has also been recognised by the platform with a Silver Creator Award.[104] There are also other YouTube videos like those of Vikas Pathak, who uploads his content on his channel Hindustani Bhau, where he resorts to hurling abuses and make problematic statements like threatening to insert the Pakistani flag inside a female YouTubers vagina.[105] If this were a traditional media platform, this video would not have passed the Censor Board but as it was an unregulated platform like YouTube, it was uploaded, seen and shared by many, including young impressionable minds before it was flagged and consequently removed, from the user's account.

YouTube follows a post-review mechanism i.e., if a content violates its content policy and is brought to the attention of the platform's officials, only then will the platform take action.[106] Thus, there is no pre-censorship of such objectionable content which is uploaded by users in the lieu of views or otherwise. Another issue with this mode of regulation is that though these videos are removed from the main channel of the user, some of its viewers create copies of these videos which still float on unregulated platform.

Users like Vikas Phatak have not only been using YouTube but also other UGC friendly OTT platform like Facebook and Instagram, where he was recently banned due to his violent content full of hate and bigotry.[107] Mocking this action, Mr. Pathak had uploaded a video on YouTube saying he will be back on the platform. This action shows how users act reckless and insouciant due to the lack of regulations and legislations in place that may stop them from abusing these OTT platforms and uploading content that goes against the IT Act or even the USRC. Facebook, Instagram and Tiktok have also been platforms, which have been aiders to such user generated content due to lack of pre-censorship. The lack therein has required them to take late action for videos like

---

103 Pankhuri Shukla, "*Shubham Mishra's YouTube Is India's Rape Culture in a Nutshell*", THE QUINT, July 13, 2020, https://www.thequint.com/neon/hot-take/agrima-joshua-controversy-shubham-mishra-youtube-rape-culture-india, (visited on December 26, 2020).

104 Kunal Purohit, "*YouTube Hatemongers Are India's New Stars*", FOREIGN POLICY, August 25, 2020, https://foreignpolicy.com/2020/08/25/india-youtube-stars-hatemongers-nationalism/, (visited on December 26, 2020).

105 Suvo Pradhan, "*Pakistani Sajida Ahmed and Hindustani Bhau Funny Conversation on India*", YOUTUBE, August 23, 2019, https://www.youtube.com/watch?v=4kyJT0C-oCo, (visited on December 25, 2020).

106 Megha Mandavia, "*Self-Censorship: Streaming soon on Netflix, Hotstar, Jio*", THE ECONOMIC TIMES, December 28, 2018 https://economictimes.indiatimes.com /industry/media/entertainment/self-censorship-streaming-soon-on-netflix-hotstar-jio/articleshow/67280441.cms?from=mdr, (visited on December 28, 2020).

107 "*Hindustani Bhau vs Kunal Kamra: Who said what before former's Instagram Account Suspension*", DNA, August 21, 2020, https://www.dnaindia.com /television/photo-gallery-hindustani-bhau-vs-kunal-kamra-who-said-what-before-former-s-instagram-account-suspension-2838604, (visited on December 27, 2020).

a man suiciding on camera,[108] the videos spreading false news on the Corona Virus pandemic,[109] or the Instagram user, Santoshi Shetty offering therapy, without having any experience in the science of psychology, for Rs.1500/- INR.[110] These examples are proof of the failure of the post review system. Evidently, without pre-censorship they cannot moderate the data being uploaded and being shared by viewers in large numbers.

Minor's Account

In India, there have often been concerns on accounts of minors in social media platforms. The Delhi High Court, expressing its concern on the matter, had also asked for an explanation from Union Government in 2013 regarding the presence of accounts of children below the age of 18 years on social networking sites like Google and Facebook. The interesting fact is that the Delhi High Court, vide its Order dated August 23, 2013 stated,

> *With regard to the issue of whether children can open accounts with social networking sites such as Facebook and Orkut, there is no dispute that children below the age of 13 years are not permitted to open such accounts. It is not in dispute that if it comes in the knowledge of any person that a child below the age of 13 years has opened such an account he may make a complaint to the social networking site who shall then take appropriate action, after verification, for deletion of that account.* [111]

On one hand, the order of the court is appreciable for giving directions to the social networking sites to take appropriate action, including deletion of account, on receiving complaints against an account made by a child below the age of

---

108 Devin Coldewey, "*Graphic Video of Suicide Spreads from Facebook to Tiktok to Youtube as Platforms Fail Moderation Test*", TECHCRUNCH, September 13, 2020, https://techcrunch.com/2020/09/13/graphic-video-of-suicide-spreads-from-facebook-to-tiktok-to-youtube-as-platforms-fail-moderation-test/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHZCjPnUpfYgLozkqTvHqahSLLQLsChRNwxjEyMNnsIeVeBMGUSSZSpcz7n2M8QC_BPgwjlb9nHVbLfVI2Ij8CRqHF5zoKD24p37_phPM8j8K9XZ-KjMG5B8QSIOXXzsSh3ixVXMemW2VMdokvxfg6kdXun2paEaA6780nee-voY, (visited on December 26, 2020).

109 Sam Shead, "*Facebook, Twitter and YouTube Pull 'false' Coronavirus Video After it goes Viral*", CNBC, July 28, 2020, https://www.cnbc.com/2020/07/28/facebook-twitter-youtube-pull-false-coronavirus-video-after-it-goes-viral.html, (visited on December 26, 2020).

110 Krishna Priya Pallavi, "*Fashion influencer Santoshi Shetty Bashed for Offering Therapy for Rs 1,500 on Instagram"*, INDIA TODAY, July 9, 2020, https://www.indiatoday.in/lifestyle/what-s-hot/story/fashion-influencer-santoshi-shetty-bashed-for-offering-therapy-for-rs-1-500-on-instagram-1698715-2020-07-09, (visited on December 28, 2020).

111 *K.N. Govindacharya v. Union of India* W.P.(C) 3672/2012, http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=93344&yr=2016, (visited on December 10, 2020).

13, while on the other hand, it fails to state why the age bar is brought down to thirteen from eighteen. Moreover, no emphasis has been placed by the courts on whether the contents that these platforms show should be controlled or not.

As far as making an account on these platforms are concerned, anyone can make an account with their "*name, email or mobile phone number, password, date of birth and gender*".[112] There is no policy to check if the person signing up is above 13 or not, except the user putting his own date of birth which he may very well lie about. The only confirmation they require is of the Email ID, which in turn, only requires an available address, password and the name of the user.[113] Further, age classification and rating of the content that can be uploaded or watched are not even a consideration.

Need of Censorship

The content we choose to see in the theatres or on television is subject to the certification and broadcasting rules; the Central Board of Film Certification[114] controlling the former and Cable Television Network Regulation Act and Rules governing the latter ensuring that the content is suitable for its audience.[115] However, what we watch online, on the OTT platforms, is unregulated due to the lack of any special regulations in place regarding the same. The content, hence, is easily available to the public, without any filters with respect to its audience. The MIB recently stated that the Central Board of Film Certification is only responsible for the certification of films for theatrical release and its powers do not extend to the online content on OTT platforms.[116] This is a problematic scenario due to the absence of legislation on content regulation to prevent inappropriate content for public viewing.

As per a survey by YouGov, 57% of the population thinks that censorship be introduced for the content on the OTT platforms.[117] They believe that a lot of

112 Help Centre, "*Creating An Account*" *FACEBOOK*, https://www.facebook.com/help/570785306433644?helpref=hc_global_nav, (visited on 19 December 2020); Help Center, "*How do I Create An Instagram Account*", INSTAGRAM, https://help.instagram.com/155940534568753?helpref=search&sr=12&query=I%20think%20my%20Instagram%20account%20has%20been%20hacked (visited on December 19, 2020); Help Center, *"Create A Youtube Channel*", YOUTUBE HELP, https://support.google.com/youtube/answer/1646861?hl=en, (visited on December 19, 2020).

113 FAQ, "*How to Create Email Account*", MAIL.COM https://www.mail.com/mail/create-email-account/, (visited on December 19, 2020); Help Center, "*Create A Gmail Account*", GMAIL, https://support.google.com/mail /answer/56256?hl=en, (visited on December 19, 2020).

114 Hereinafter CBFC.

115 "*About Us*", CBFC, https://www.cbfcindia.gov.in/main/about-us.html, (visited on December 19, 2020).

116 *Supra* n. 20.

117 IANS, "*57% Indians Want censorship for Netflix, Hotstar: Survey*", ECONOMIC TIMES, November 3, 2019, https://brandequity.economictimes.indiatimes.com/news/media/57-indians-want-censorship-for-netflix-hotstar-survey/71874930, (visited on December 21, 2020).

inappropriate content for public viewing and offensive in its nature is being produced hence, a better quality of content would be produced with appropriate changes. Taking the first step in this direction, the Government of India[118] released a notification wherein it amended the Government of India (Allocation of Business) Rules 1961 by including two entries in the second schedule, after Entry 22:

> *VA. DIGITAL/ONLINE MEDIA*
> *22A.Films and Audio-Visual programmes made available by online content providers.*
> *22B.News and current affairs content on online platforms.* [119]

Thus, bringing the OTT platforms under the purview of the MIB from the MEITY. This means that now the content may be regulated *via* a legislation if the ministry so desires.

Critique of IAMAI Codes

The Codes released by the IAMAI suffer from a lot of arbitrariness. They plague from a lack of definition for terms such as 'deliberate', 'disrespect', 'exhibition' and 'distribution'. This creates a lacuna by creating a scope of vague censorship at the whims and fancies of the content regulators. It even mentions the phrase 'promotes and encouraging terrorism' but fails to define it. This phrase is also not defined in other acts like the Unlawful Activities Prevention Act 1967, Unlawful Activities (Amendment) Prevention Act 2019, Terrorist and Disruptive Activities (Prevention) Act 1987, Prevention of Terrorism Act 2002, etc. With this ambiguity in mind, what would a platform showing content related to the complex subject of terrorism do? For example, can we say that Ghoul (A Netflix starrer), which shows the interaction of terrorists with military officers in the background of Military detention units, is promoting terrorism?[120] Or is the famous Netflix series, Sacred Games, which deals with the religious and political scenario of India, showing the aspects of Terrorism, nuclear bombs, Muslim-Hindu communal problems, etc., [121] encouraging violence against state? How much of it should be regulated by self-regulation? Moreover, many of the scenes shown are explicit sexual scenes, which were not addressed by these codes highlighting the vagueness of the code.

---

118 Hereinafter GOI.

119 Cabinet Secretariat, "*Notification*", S.O. 4040 (E), November 9, 2020.

120 Sushovan Sircar, "*How Will Netflix, Hotstar & Co Impose Vague Self-Censorship Code?*", THE QUINT, January 31, 2019, https://www.thequint.com/entertainment/how-will-netflix-hotstar-alt-balaji-impose-iamai-self-censorship-code, (visited on December 20, 2020).

121 Aroon Deep, "*In 8 scenes, how a Sacred Games Episode Would Change because of the TV Content Code*", MEDIANAMA, October 4, 2019, https://www.medianama.com/2019/10/223-sacred-games-censored/, (visited on December 20, 2020).

The Internet Freedom Foundation had written to the IAMAI[122] and had called them to reconsider the proposal for the initial 2019 Code. They said that the proposal was made by a few companies without public consultation. In absence of experts, academicians, scholars or even other contributors to media and hence, the interests of the most of the stakeholders remained under-represented in this code, which also appears to be the case with the new codes.

Though, the Codes have provisions for parental access controls for the signatories like PIN or password to allow access of certain contents meant for adult viewing only,[123] yet they still heavily rely on their members to take 'reasonable efforts in good faith' to regulate their own contents. The USRC, even though signed by the platforms on September 4, 2020 would technically be applicable on their signatories after one year from the date of signing of the code.[124] The platforms who do not have parental controls are given 2 year to introduce such features in their respective platform.[125] It provides the platform a good span of time to go unregulated/uncensored and with the existent vagueness and lack of penalty in the new Code; the platforms get an easy pass to continue offering objectionable content.

Even the MIB, recently, advised IAMAI to 'look at' the structures of Broadcasting Content Complaints Committee[126] and the News Broadcasting Standards Authority[127] for their regulation.[128] The MIB rather supported the last arrangement of the two-tier system containing of the DCCC over the current one, as it had the power to penalise and take down content, which the existing CCD (as mentioned above) lacks. This view is also shared by Hon'ble Smt. Justice. Prathiba M Singh, Judge Delhi High Court.[129] The CCD would be an internal committee as opposed to the DCCC which included members from

122 Letter to IAMAI on "*Code of Best Practices for Online Curated Content Providers*", INTERNET FREEDOM FOUNDATION, January 17, 2019, https://internetfreedom.in/online-video-streaming-and-tv-are-not-the-same-so-why-is-the-iamai-trying-to-make-it-so/, (visited on February 15, 2020).

123 *Supra* n. 24, p. 12.

124 *Supra* n. 24, p. 13.

125 Aroon Deep, "*Summary: IAMAI's Self-Regulation Code for Online Curated Content Platforms*", MEDIANAMA, September 5, 2020, https://www.medianama.com/2020/09/223-iamai-occp-self-regulation-summary/, (visited on December 22, 2020).

126 *Hereinafter BCCC.*

127 *Hereinafter NBSA.*

128 Aroon Deep, "*RTI: I&B Ministry advised IAMAI to look at BCCC structure for guidance on content regulation*", MEDIANAMA, November 30, 2020, https://www.medianama.com/2020/11/223-ib-ministry-iamai-bccc/, (visited on December 22, 2020).

129 Pratibha M. Singh, "*Fast Track Digital*", FICCI DIGITAL, Wednesday, November 25, 2020 https://www.youtube.com/watch?v=Avh8kohe5io&t=1819s, (visited on 23 December, 2020); Aroon Deep, "*Justice Prathiba M Singh calls for Adjudicatory Mechanism for Streaming Services, Broadcasters*", MEDIANAMA, November 27, 2020 https://www.medianama.com/2020/11/223-justice-prathiba-m-singh-streaming-regulation/, (visited on December 23, 2020).

National Level Statutory Commissions, Courts, and experts in the field of Online Content along with the representatives of these OCCPs. This would have ensured a transparent and credible system for compliance and censorship.

The online streaming platforms like Mubi, Ditto TV, the Viral Fever, BIGFlix by Reliance Entertainment, Viu, Vuclip, etc., which are the non-signatories, are not regulated by the Code, which makes otherwise objectionable or offensive content, accessible at one's disposal, undisputed. Due to this regulatory vacuum, it has a lot of content that includes profanity and nudity, which would otherwise be censored in traditional media or be age restricted as per the codes. The same is easily available to anyone who has access to these platforms, irrespective of their age; all one needs to do is have a subscription of these services.

In 2012, it was proposed in the Indecent Representation of Women (Prohibition) Amendment Bill 2012, that the legislation be widened to include the new forms of media as well.[130] The government also proposed to amend Section 79 of the IT Act, to add internet censorship in line with what is banned by the court or is disrespectful to the national flag and emblem.[131] They proposed that the companies should take down any content marked inappropriate by the authorities.[132] It also added that if these companies receive a complaint from any law enforcement agency, they should track the origin of the content and then block access to that content within a day.[133] But the same is yet to be implemented.

Self-regulation that is offered to these OTT platforms is firstly, offered only to curated content, hence, OTT platforms like Facebook, YouTube and Instagram, which have huge amount of content for viewers' access, are free from honouring any such regulation. Furthermore, the new Code is only applicable to the signatories thus, leaving many platforms to continue with their practices *status quo*. Secondly, it gives the OTT platform a scope to act according to their whims and fancies. In absence of proper definition and definite guidelines gives room for misuse of OTT platforms. The new self-regulation Code relies on the signatory's 'reasonable efforts in good faith' to implement their guidelines. While not compulsory for all OTT platforms, the

130 Ministry of Women and Child Development, "*WCD Proposes Amendments to Widen the Scope of Indecent Representation of Women (Prohibition) Act 1986*", PIB DELHI, Monday, June 4, 2018, https://pib.gov.in/PressReleasePage.aspx?PRID=1534316#:~:text=The%20Government%20of%20India%20has,or%20in%20any%20other%20manner, (visited on December 23, 2020).

131 S. Shanti, "*Majority of Indians Feel Censorship Should Be Mandatory for OTT Platforms*", INC42, October 31, 2019, https://inc42.com/buzz/majority-of-indians-feel-censorship-should-be-mandatory-for-ott-platforms/, (visited on December 23, 2020).

132 Rules 3(8) and 3(9) of the Draft Information Technology (Intermediary Guidelines (Amendment) Rules) 2018.

133 Rule 3(8) of the Draft Information Technology (Intermediary Guidelines (Amendment) Rules) 2018.

signatories are also given a lot of ease to work around the regulation. Lack of uniformly agreed definition, like the first Code, the other two superseding Codes have a minimal scope to address the vagueness and arbitrariness due to absence of legislation.

In addition, the USRC gives a lot of ease to the signatories to eschew from the given guidelines. It gives them a flexibility of two years to bring the 'access control mechanism' in their platforms, if the provider decides to introduce them.[134] Thus, it is not compulsory for the regulator to introduce the same. Any past representation or actions taken by the platform would not clash with the Code,[135] if any platform had received any complaint against its product and decided not to remove the same, that product remains in place despite the profanity, sexual violence or disrespect of the national sovereignty, if any. The Code also allows the complaint against the OTT Platforms to be disposed of by the CCD or the Internal Committee, if during the pendency of the complaint, the platform voluntarily decides to take action on the content.[136] This, according to the USRC, would not be seen as an admission of wrongdoing[137] and also provides the OTT platforms opportunity escape from the unacceptable contents, by making minor changes like adding a disclaimer or slightly editing the content description etc.

Effect on Minors

Studies[138] show that children and teenagers are highly affected by the violence depicted in shows and movies. The effects may result into these children becoming immune to the visual effects of violence as well as perceiving violence as a way to resolve problems. There are also possibilities where children imitating the act of violence.[139] There are substantial evidences gathered by way of extensive research that shows that media violence is one of the major contributing factors in aggressive behaviour, desensitisation to violence, nightmares, anxiety,[140] and fear of being harmed among children.[141] Contents, being viewed, may also be associated to the suicidal behaviour in the

134 *Supra* n. 126.

135 *Supra* n. 24, p. 13.

136 *Supra* n. 24, p. 13.

137 *Supra* n. 24, p. 13.

138 "*TV Violence and Children*", AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 2014, https://www.aacap.org/AACAP/Families_and_Youth /Facts_for_Families/FFF-Guide/Children-And-TV-Violence-013.aspx#:~:text=Extensive%20viewing%20of%20television%20violence,to%20imitate%20what%20they%20see, (visited on December 26, 2020).

139 *Ibid*.

140 Kamini C. Tanwar and Ms. Priyanka, "*Impact of Media Violence on Children's Aggressive Behaviour*", INDIAN JOURNAL OF RESEARCH, Vol. 5 No. 6, 2016, pp. 241-245.

141 Council on Communications and Media, "*Policy Statement-Media Violence*", AMERICAN ACADEMY OF PAEDIATRICS, Vol. 124 No. 5, 2009, pp. 1495-1503.

person who is viewing it.[142] In addition, the content can be attributed to being one of the major reasons behind the degrading performance of children in schools.[143]

One of the basic concerns that accompany these platforms are that they do not employ any steadfast means to confirm the age of the viewer before exposing him/her to a multitude of content which can be highly disturbing for the viewers, especially those below the age of 18 years. The age verification on most of these platforms works on the assumption that if the subscriber has a valid Credit/Debit Card or a valid email-ID, he/she is an adult, which is immensely problematic and flawed at multiple levels. This shows an ignorance towards the existence of Minor as a Bank Account Holder, who can transact with the help of debit cards issued in their names and also, the fact that there might be minors who use their parent's accounts to watch the shows online. This also shows ignorance towards minors having E-mail IDs that may be used to sign up for these platforms. Choosing whether the user is a child or not lies on the user, which is again flawed in its assumption[144] because reasonably a child with even the minimum inquisitiveness about the nature of the contents of such media would never enter real age. The most that has been done by the OTT Service Providers, in this regard, is showing a feeble warning which might go unnoticed most of the times. They lack the strength and conspicuity that such warnings must exhibit while warning the audience about the possible harms, to which that they are subjecting themselves.

As per Section 8.2[145] of the USRC, the content providers have to display a guidance message or a descriptor 'wherever necessary', informing the viewer of the nature of the content, so that they can make an informed decision. The same though, does not answer the problem of age verification and easy availability of content not fit for the viewer in question. It provides the choice of viewing a particular content through the platforms hence, the platforms do not require to apply access controls like PINS and Passwords on age-restricted content,[146] it gives an unreined access of content to minors with an curious and receptive brain.

Apart from the Online Streaming platforms, there are plethora of video broadcasting and social networking websites, where a person can subscribe to the videos as well as upload and float anything as their own content.

142 M.G. Geeta and P. Krishnakumar, "*Television and Suicidal Behavior*", INDIAN PEDIATR, Vol. 42, 2005, pp. 837-838.

143 M. Ray and P. Malhi, "*Adolescent Violence Exposure, Gender Issues and Impact*", INDIAN PEDIATR, Vol. 43, 2006, p. 607-612.

144 Melanie Weir, "*How to Add a Profile on Netflix to Share your Account with Friends and Family*", BUSINESS INSIDER, March 16, 2020, https://www.businessinsider.com/how-to-add-a-profile-on-netflix?IR=T, (visited on December 28, 2020).

145 *Supra* n. 24, p. 12.

146 *Supra* n. 126.

YouTube,[147] Facebook, TikTok, Instagram,[148] etc., are few of the most popular examples of these platforms. There is no doubt that some of these websites can be, as the National Society for the Prevention of Cruelty to Children states, "*a dangerous place for younger children, potentially exposing them to bullying, inappropriate content or grooming*".[149] As per the survey conducted by NSPCC on nearly 1,700 children, it was found that 1,380 were of the view that the social media sites are not employing requisite protective measures towards the children and they have often come across pornographic contents and contents propagating self-harm, bullying and hatred.[150]

Though YouTube has a child safety policy under which the violent and sexually explicit contents are categorised as 'age restricted contents' and are not available for viewing by children below the age of 18, to disable the restricted mode, one only needs to sign-in to their Gmail account. YouTube also provides guidelines in its policy to determine what contents must be avoided from uploading on the platform failing which the content can be taken down by the website on being reported by the viewers.[151] But this policy, as stated above leads to a lot of the content already being viewed by lakhs of people and copies of the original content being created, due to which, even if the video is removed from the main channel of the uploader it is still available on other channels. For example, the AIB roast video, though removed from the main channel after the backlash it received for the obscene and vulgar content,[152] is still available as a copy on the channel of Amol Gupta[153] or Ashish Mishra,[154] etc., and has millions of views.

147 Janice Waldron, "*User-generated Content, YouTube and Participatory Culture on the Web: Music Learning and Teaching in Two Contrasting Online Communities*", MUSIC EDUCATION RESEARCH, Vol. 15 No. 3, 2013, pp. 257-274.

148 Help Center, "*Terms of Use*", Instagram, https://help.instagram.com/581066165581870/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Privacy%20and%20Safety%20Center, (visited on December 20, 2020).

149 *Hereinafter NSPCC.*

150 Paul Harper, "*How Old do you have to be for Snapchat, Facebook, Instagram Accounts? Social media age restrictions explained"*, THE SUN, January 21, 2020, https://www.thesun.co.uk/tech/4136922/age-restrictions-facebook-snapchat-twitter-instagram/#:~:text=Nearly%20all%20social%20networking%20sites,how%20they%20could%20use%20data, (visited on December 20, 2020).

151 Google Transparency Report, HOW YOUTUBE USES TECHNOLOGY TO DETECT VIOLATIVE CONTENT: CHILD SAFETY, https://transparencyreport.google.com/youtube-policy/featured-policies/child-safety?hl=en, (visited on December 20, 2020).

152 "*AIB Speaks out After Removing Video*", THE HINDU, February 4, 2015, https://www.thehindu.com/news/aib-speaks-out-after-removing-video/article6856852.ece, (visited on December 19, 2020).

153 Amol Gupta, "*AIB Knockout the Roast of Arjun Kapoor and Ranveer Singh 1080p*", YOUTUBE, February 2, 2015, https://www.youtube.com/watch?v=SvyAEqQtC7Q (visited on December 19, 2020).

Thus, the lack of pre-censorship does not address the issue of regulating the content based on age, morality, national respect or any other restriction provided on the right to the freedom of speech through Article 19(2) of the Constitution of India.[155] The requirement of reporting a content, for it to be removed, shifts all the burden from the platform's shoulders, who should be the one checking if the content being uploaded is compliant with their policies, to the customer's, who may or may not report the given content depending on if they find it problematic, if they have watched it, the demographic of the audience etc.

Traditional Service Providers versus Over-the-Top Service Providers

Lack of regulation of the OCCPs is also unfair to the Traditional Service Providers[156] who are in direct competition to these Online Service Providers, as they pay the cost for infrastructure, spectrum management and the license fees for the use of the spectrum,[157] all the while being actively subjected to the laws and regulations regarding content regulation and censorship in place, while the OTT services mostly function unbridled. TRAI published a Consultation Paper in the year 2018[158] on the same lines wherein they discussed about the growth of the OTT Platform and the association between traditional service providers and OTT and the need of reform in the current regulatory framework.

The traditional media is censored under the Cinematograph Act 1952.[159] The CBFC is given the power to decide if the film should be certified for public viewing or not.[160] The High Court of Bombay in the case of Garware Plastics and Polyesters Ltd. held that even content people see in Dish Antenna TVs in the privacy of their home or even content on DVDs and VCRs are subject to certification from CBFC. The court avers that:

> *Even if there is no audience gathered to watch a film in a cinema hall but there are individuals or families watching a film in the confines of their homes, such viewers would still do it as members of the public and at the point at which they view the film that would be an 'exhibition' of such film.*[161]

But the USRC avers that as the content on the OTT platforms are on a 'pull' basis rather than on a 'push' basis, the customer makes the choice of 'pulling' the content on the basis of the information they have.[162] As it is based on the pull model, also known as the on-demand model, it is available for viewing to

---

154 Ashish Mishra, "*AIB Knockout -The Roast of Arjun Kapoor and Ranveer Singh*", YOUTUBE, February 9, 2015, https://www.youtube.com/watch?v=c314NOBTGhE, (visited on December 19, 2020).

155 Article 19(2) of the Constitution of India.

156 Hereinafter TSP.

157 *Supra* n. 2.

158 *Supra* n. 7.

159 Hereinafter CG Act.

160 Sections 3, 4 and 5-A of the Cinematograph Act 1952.

161 *Garware Plastics and Polyesters Ltd. v. M/s Telelink* 91 BOMLR 139 (1989).

162 *Supra* n. 24, p. 10.

the user at a particular point of time, and hence only qualifies to be private viewing.[163] Through this, the code dismisses the Bombay HC's judgement, through which we may have considered OTT platforms to be subjected to the Cinematograph Act 1952.

Thus, we are brought to the question of whether in this competitive setup, are we killing the TSPs by giving an upper hand to the OTT Platforms, *via* lack of regulation.

Steps Taken by Other Nations

China

The Great Firewall of China (hereinafter referred as GFW) prevents the denizens of China, access to websites like Google and Facebook.[164] China blocked the same after the 2009 riots in the western province of Xinchiang.[165] They apply 'network filtering' which includes some blacklisted words through which the GFW cleaves the access of the website by the user[166] i.e., keyword filtering.[167] Some of these words include Egypt,[168] Ai WeiWei,[169] Zengcheng,[170]

163 *Supra* n. 24, p. 10.

164 "*How to Bypass Internet Censorship*", FLOSS MANUALS, Tuesday, May 31, 2011, http://en.flossmanuals.net/_booki/bypassing-censorship/bypassing-censorship.pdf, (visited on December 22, 2020); Cale Guthrie Weissman, "*Harvard Team Releases Paper Detailing China's Internet Censorship Tendencies, Internet filtering in China*", OPENNET INITIATIVE, Monday, June 18, 2012, https://opennet.net/blog/2012/06/harvard-team-releases-paper-detailing-chinas-internet-censorship-tendencies, (visited on December 22, 2020); "*Internet Filtering in China*", OPENNET INITIATIVE, June 15, 2009, http://opennet.net/sites/opennet.net/files/ONI_China_2009.pdf, (visited on December 22, 2020).

165 Ben Blanchard. "*China Tightens Web Screws After Xinjiang Riot*", REUTERS, July 6, 2009, https://in.reuters.com/article/us-china-xinjiang-internet/china-tightens-web-screws-after-xinjiang-riot-idUSTRE5651K420090706, (visited on December 22, 2020).

166 Antonio M. Espinoza and Jedidiah R. Crandall, "*Work-in-Progress: Automated Named Entity Extraction for Tracking Censorship of Current Events*", USENIX WORKSHOP ON FREE AND OPEN COMMUNICATIONS ON THE INTERNET, 2011.

167 Rebecca MacKinnon, "*China's Censorship 2.0: How Companies Censor Bloggers*", FIRST MONDAY, Vol. 14 No. 2, 2009.

168 Edward Wong and David Barboza, "*Wary of Egypt Unrest, China Censors Web*", NEW YORK TIMES, January 31, 2011, https://www.nytimes.com/2011/02/01/world/asia/01beijing.html, (visited on December 22, 2020).

169 Benjamin Gottlieb, "*Ai Weiwei's Release Accentuated by Web Censorship, Terse State-media*", CNN, June 24, 2011, http://edition.cnn.com/2011/WORLD/asiapcf/06/23/aiweiwei.release.china/index.html, (visited on December 22, 2020).

170 Michael Kan, "*China Blocks Some Web Searches About Migrant Protests*", PCWORLD, Tuesday, June 14, 2011, https://www.pcworld.com/article/230244/article.html, (visited on December 22, 2020).

Occupy Beijing,[171] Occupy Wall Street,[172] etc. The Chinese government also relies on the domestic companies to keep their content in order, through penalties, shutdowns and even criminal liability.[173] People have also faced deletion of their messages,[174] including agitational images and videos.[175] The Chinese government also instructs its domestic social media companies like Sino Weibo to remove all content, whatsoever, related to certain keywords.[176] Thus any message, for or against a particular political outtake is removed as far as its seen to be sensitive in nature or comes in the given keyword list.[177]

Singapore

In Singapore, the OTT Platforms are regulated by the Content Code of Practices for OTT and Video-on-demand services, issued by Infocomm Media Development Authority (hereinafter referred as IMDA).[178] This Code, provides for classification[179] of content on the OTT Platforms as:

- G: for General;
- PG: for Parental Guidance;
- PG13: for Parental Guidance for Children Below 13;
- NC16: for No Children Below 16 years of age;
- M18 for Mature Audiences (18 and above) only; and
- R21 for Content Restricted to People of 21 years and above only.

---

171 Sandra Hernandez, "*The "Occupy" Series: Sina Weibo's New List of Banned Search Terms*", CHINA DIGITAL TIMES, October 21, 2011, https://chinadigitaltimes.net/2011/10/the-%E2%80%9Coccupy%E2%80%9D-series-sina-weibo%E2%80%99s-new-list-of-banned-search-terms/, (visited on December 22, 2020).

172 *Ibid.*

173 Jedidiah R. Crandall, et al., "*Concept Doppler: A Weather Tracker for Internet Censorship*", IN PROCEEDINGS OF THE 14TH ACM CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY, 2007; David Bamman, et al., "*Censorship and Deletion Practices in Chinese Social Media*", FIRST MONDAY, Vol. 17 No. 3, 2012.

174 Nicholas D. Kristof, "*Banned in Beijing!*", NEW YORK TIMES, January 22, 2011, https://www.nytimes.com/2011/01/23/opinion/23kristof.html, (visited on December 22, 2020).

175 Brook Larmer, "*Where an Internet Joke is Not Just a Joke*", NEW YORK TIMES, October 26, 2011, https://www.nytimes.com/2011/10/30/magazine/the-dangerous-politics-of-internet-humor-in-china.html, (visited on December 22, 2020).

176 Sandra Severdia, "*Directives from the Ministry of Truth: July 5-September 28, 2011*", CHINA DIGITAL TIMES, October 20, 2011, http://chinadigitaltimes.net/2011/10/directives-from-the-ministry-of-truth-july-5-september-28-2011, (visited on December 22, 2020).

177 *Supra* n. 174.

178 IMDA, "*Content Code for Over-The-Top, Video-On-Demand and Niche Services*", Monday, April 29, 2019, https://www.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT-VOD-Niche-Services-Content-Code-updated-29-April-2019.pdf?la=en, (visited on December 24, 2020).

179 *Ibid*, p. 2.

The content rated NC16[180] and above can only be offered by the OTT Platforms if they provide for an effective parental lock system for the same and the content rated R21 have to be locked by default which can be unlocked with an R21 PIN.[181] Furthermore, for the OTT platforms to offer R21 rated content, they must employ an efficient age verification mechanism.[182] To ensure that the viewer has awareness about the nature of content, the code says that the rating, along with the elements[183] (the reason for certain rating) of the content, has to be prominently displayed on the screen before the viewing of content.[184] The Code also makes it a must for these platforms to comply with the laws of Singapore and not to put the national or public interest and national or public security at stake and also to not sabotage the racial and religious harmony in the country.[185] For the same the OTT platforms have to apply for a 5 year Niche Television Service License.[186]

Australia

Australia follows the dual scheme of classification and complaint-based mechanism to regulate the OTT sector under the Broadcasting Services Act 1992 (hereinafter referred as BSA). The online content in Australia is subject to the provisions of Schedule 5 and Schedule 7 of the BSA. Under the Classification (Publications, Films and Computer Games) Act 1995, a Classification Board has been established[187] which is authorized to classify the content.[188] The classification of the content is based on the classifiable elements[189] and the degree of those elements.[190] The contents can be rated[191] as:

- GENERAL (G)- Suitable for all;
- PARENTAL GUIDANCE (PG)- Not recommended for viewing by people under the age of 15 without parental guidance;
- MATURE (M)- Not recommended for viewing by children below the age of 15;
- MATURE ACCOMPANIED (MA 15+)- Legally restricted to people over the age of 15;

180 *Ibid*.
181 *Ibid*.
182 *Ibid.*
183 *Ibid*, p. 5.
184 *Ibid*, p. 2.
185 *Ibid*, p. 4.
186 IMDA, Over the Top (OTT) TV (Niche) Services.
187 Section 45 of the Classification (Publications, Films and Computer Games) Act 1995.
188 Section 3A of the Classification (Publications, Films and Computer Games) Act 1995.
189 Department of Communication and the Arts, "*How A Rating is Decided*", https://www.classification.gov.au/classification-ratings/how-rating-decided, (visited on December 26, 2020).
190 *Ibid*.
191 Section 7(2) of the Classification (Publications, Films and Computer Games) Act 1995.

- RESTRICTED (R 18+)- Legally restricted to adults due to offensive content;
- RESTRICTED (X 18+)- Legally restricted to adults due to sexually explicit content; and
- REFUSED CLASSIFICATION (RC)- Cannot be sold, advertised or imported in Australia.

Australia has also opened doors for self-regulation by the OTT platform Netflix. Netflix has contrived a self-certifying tool that rates the content on the platform in consonance with the Australian Laws. After due monitoring of the consistency of this feature, a report was released in 2019 giving green signal to Netflix's tool.[192]

United Kingdom

In the United Kingdom, there is still no specific legislation on the subject and OTT Platforms are governed by the same law as that of conventional TV services.[193] However, British Board of Film Certification (hereinafter referred as BBFC) went ahead to allow the OTT platforms to self-certify their content, like Australia, reducing the role of BBFC as an auditing body to check whether these certifications are in consistence with that of BBFC or not, once every month, while also use the British age rating symbols.[194] They are also required to list the level of distressing images and sexual images in a BBC style info box.[195]

Recently, U.K. Government proposed[196] a new and comprehensive regulatory framework in regards to online content.[197]As per the proposed framework, an independent regulator would be appointed to implement, oversee and enforce the new regulatory framework[198] and set out Codes of practice for the content providers and encouraging education and awareness about online safety.[199] The companies would be required to exercise due diligence in making

192 Department of Infrastructure, Transport, Regional Development and Communications, Australian Government, "*Australia Leading the Way with Netflix on Classification, Australian Classification*", November 15, 2019, https://www.classification.gov.au/about-us/media-and-news/news/australia-leading-way-netflix-classification, (visited on December 26, 2020).

193 Bhagavatula Naga Sai Sriram and Sandhiya K, "*Censorship in OTT Platforms: The Necessity*", PEN ACCLAIMS, Vol. 11 2020, pp. 1-11.

194 Jim Waterson, "*Netflix to Set its Own Age Ratings for Film and Television Programmes*", THE GAURDIAN, Thursday, March. 14, 2019, https://www.theguardian.com/media/2019/mar/14/netflix-to-set-its-own-age-ratings-for-film-and-television-programmes, (visited on December 26, 2020).

195 *Ibid.*

196 UK Department for Digital, Culture, Media & Sport, "*White Paper on Online Harms*", February 12, 2020, https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper, (visited on December 20, 2020).

197 *Ibid*.

198 *Ibid*.

199 *Ibid*.

their platforms safe for the users and also employ an easy and efficient user complaints system.[200]

Taking into account the demographic and cultural diversity of India, it is not wrong to say that the desired regulation ought to come from the government, who are elected by the majority of the entire population to work for the people and has representation from the entire population density, and not private platforms whose ultimate objective is to earn profits. China seems to be practicing an extreme form of censorship, wherein, it regulates by either completely prohibiting certain platforms or keyword filtering, through which, certain words would not yield any search result and even lead to deletion of private messages of users of the social media platforms existing in China. Instead, the models adopted by Singapore and Australia seem to be a good precedent for India to follow. Both Singapore and Australia 'compulsorily' require the OTT platforms to classify their content as per age as well as require them to list the nature and the elements of the content they will consume. It is also a 'must' for these platforms to comply with the laws of their lands while displaying a particular content on their platforms. The scenario in United Kingdom is also not far from the same. The content in UK has to be certified by the BBFC, who has now, to lessen its burden, allowed the platforms to regulate themselves, but with a condition of regular checks and balances by the BBFC thus, attributing a compulsory and legislative nature to the self-regulations undertaken by the OTT platforms.

Stages to Implement a Regulation/Legislation for the OTT Platforms[201]

Stage-I: Understanding the Market

We would first need to identify the stakeholders of the market, which would include the owners of OTT, VoIP, the Traditional Services, the Government, the Public, etc. Along with the same we will have to take into consideration the issues that concerns them, the relevant acts currently in place, the loopholes (if any), any limitations etc. We need to carry out proper assessments to analyse the resources required for the 'regulatory development project design'.

Stage-II: Understanding of the Field (OTT media)

Then we need to proceed to an extensive examination of the regulations that are in place in a district, a country or internationally. We would also have to study the interconnection between these laws and the need for 'formal coordination and management'. We need to study the technical know-how and the actions we can take for them. Thus, the key product of this stage would be a guiding framework that we would get by comparing regulations and legislations that would help us in further developing a scrupulous legislation.

Stage-III: Understanding of the Regulatory Process

In this stage, we build the substructure for the regulation for India that will help us facilitate working for an effective implementation of the regulation in an

200 *Ibid*.
201 *Supra* n. 11.

efficacious and supportive manner. This process would involve cooperation and expertise from many different agencies. This would result in a well-regulated measure essential to make, approve and execute regulations, decide on the obligations, liabilities and the governing body(s).

Stage-IV: Scheme of Regulations

This stage would include formulating and fine- tuning the regulatory process with the help of the last three processes. The last three stages would also be analysed to further examine the supplementary questions;

- if the regulation in question can suitably apply on the status quo and/or; and
- how the regulation in question and the improvements made therein can be informed to the stakeholders?

This will result in a draft legislation, which can be revised in the further stages.

Stage-V: Assessment and Examination

This stage includes a thoroughgoing of the newly designed legislation and any supporting regulations or legislations that exist. It would be done by the fundamental regulators of the process that would include the government, the telecommunication providers, the OTT content providers and to some extent, even the consumers. This will result in a new and refined legislation with increased adroitness of its application and process.

Stage-VI: Execution

This stage includes the acceptance and the subsequent application of the regulation/ legislation in question. This includes the final applicability of the law and the amendment of legislations, if any. This stage would thus, result in the final and refined legislation in place.

Stage-VII: Oversee and Assess

This stage includes the assessment of the regulation, the environment and identification for any chance of improving the given legislation, in the light of the 'dynamism of the market' and the profusely developing technology market. Another process paramount to this stage is designing legal and sanctioned processes to constantly asses the legislation in question and any other processes in play used by its stakeholders. This stage would thus, result in guidance to be given to the stakeholders on the application of the legislation in question.

Conclusion

Technology is ever evolving and internet has become like a virtual residence of everyone who uses it. Today with the affordable rates of internet, social media and the other OTT platforms have become second to oxygen for every human being. Moreover, the participatory nature of these platforms has changed the way content is produced and made available. The situation of COVID-19 has led to a drastic growth in the business model of the OTT platforms and has seen a rampant increase in the number of subscriptions and viewership. Therefore, it is needed that the virtual space for the netizens is kept safe.

As of now, India is at a stage where there is no concrete law formulated yet and for the time being IAMAI has come up with the Universal Code of Self-Regulation, 2020 and the Code of Self-Regulation, 2020. However, in absence of any clear provision or legislation for content regulation, it cannot be put into full force. An OTT regulation requires a multi-dimensional approach to comprehend the complicated and dynamic nature of the OTT market.

As defined perfectly by Finn Brunton,

> "*... [Social media practices] reflect something genuinely new, and as yet not clearly theorized, distinct equally from Habermasian communal conversation-as-deliberation as from the blandly managerial product, shaped by layers of human talent for the broadest possible distribution, of Adorno and Horkheimer's Kulturindustrie.*"
>
> - Spam: A Shadow History of the Internet[202]

An effective regulation can avoid market failure, foster effective competition, protect consumer interest and increase access to technology and services.[203] The growing competition between the OTT service providers and telecos is evident and so is the regulatory imbalances because where the telecos have to adhere to Universal Service and other regulatory obligations, there is no such compulsory obligation that the OTT service providers have to adhere to.[204] The traditional modes like theatrical films and television shows have to adhere to the standards and rules given in special legislations formulated for the content offered by them. This also affects their position in the market as it limits the scope of variety in the content shown by them as compared to that of OTT platforms, which are free from the hassles of such rules and regulations. Furthermore, as the content on OTT platforms can be viewed privately, it makes it more difficult to keep a check on what is being viewed and who is viewing.

There is no denying that the OTT services are here to stay. The convenience of its usage makes it a more preferred mode of entertainment over theatrical films and we can see the theatrical cinema shrivel in its functioning. It will not be unfair to say that with the growth of technology, both the platforms will have to learn to coexist with one another. But for the same, the authors believe that the OTT platforms should have some compulsory regulations, *via* government legislations to ensure fair competition between the TSPs and the OTTs.

The drastic growth of OTT today can be largely attributed to the lack of regulation in place for the OTT platforms. They have the liberty and advantage

---

202 Finn Brunton, SPAM: A SHADOW HISTORY OF THE INTERNET, 1st ed. 2013.

203 Colin Blackman, Lara Srivastava, "*Telecommunications Regulation Handbook*", THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT / THE WORLD BANK, INFODEV AND THE INTERNATIONAL TELECOMMUNICATION UNION 10th ANNIVERSARY EDITION, 2011, https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-TRH.1-2011-PDF-E.pdf, (visited on December 15, 2020).

204 *Supra* n. 8.

of zero intrusions for what they call 'creative liberty' wherein they can show anything as content which can be against the moral fiber of the society or excessive violence and sexual content, or anything against the national 'sovereignty and integrity of India'. Films in India are certified by the Censor Board of Film Certification (hereinafter referred as CBFC) and television content is subject to censorship by Broadcasting Complaints Council Channel (hereinafter referred as BCCC). On similar lines, the OTT platforms should have an independent body that certifies or censors their content. The latest code of self-regulation brought by the IAMAI allows only for a two-tier internal complaint body, the CCD and the Appellate Committee, which assess the complaints received on the violation of the code. Nonetheless, based on the complaints received, it can only reclassify the content as per age, add a warning before the content or edit its synopsis. The CCD is still not given a power to censor objectionable content as a mode of grievance redressal or impose any financial penalty on them unlike the DCCC in the last code, which was given the power to impose financial penalties in exceptional situations, involving recurring violations of the code.[205] This easy access of the platforms by a large amount of people and with most of the platforms working for increased user traffic and subscriptions, a complaint seems like a step taken too late. The content will:

(i) be watched by many viewers, before steps are taken to regulate the content; and
(ii) even if regulated, the content can be copied or shared through other platforms, especially platforms with majority of user generated content like YouTube and Dailymotion, which do not face the brunt of this code and hence, be available for further viewing. Thus, defeating the whole purpose of regulating it.

Therefore, we need a body to check the content before it is uploaded on the OTT platforms in a similar manner to that of the traditional Media.

In addition to that, we should also bring the content of UGC in the purview of the said legislation, as the same platform is also plagued by the all the cons of Curated Content, but does not even have a regulatory code that they can be a signatory to. Relying on the attention of the users for its activities, and hence, retaining the users by increasing their activity, these content providers barely take any stringent measures to control content in violation of their policies, unless faced by extreme pressure from the public. Knowing that copies exist on their own platforms, they do not take any action on the content available, as the content is not the problem for the platforms, it is the public outrage. Due to their lack of following up on their own policies of control for the type of content uploaded for public viewing, the authors are of the view that content uploaded 'view for all' or publicly should also be regulated by the said legislation and classified by age by the independent regulatory body.

205 *Supra* n. 24, p. 15.

If we are to believe that the OTT platforms will strictly adhere to the Self-regulation code and censor their content themselves, or even classify the same on the basis of age as according to the code, it still is encircled with arbitrariness and vague descriptions, due to lack of precise definition of terms, which might not only leave a lot of lacunae in the applicability of the code but also sweep within its ambit of censorship, a lot of non-objectionable content.

The authors suggest that we aim to come up with a regulatory scheme like that of the countries such as Singapore and United Kingdom. Singapore firstly classifies its content to three parts, OTT Services, Video on Demand Services and Niche Services. Then it makes it compulsory for all the content providers as above to obtain a license for providing the services. With that, it makes them compulsorily follow a code, which is extremely detailed and well defined through annexures, also defining age classification in every genre of content provided. The code would apply with the other regulations, codes, legislations and license conditions in place concomitantly, thus, making it compulsory for these OTT platforms to keep the law of the land in mind when floating a content online. On similar lines, the first step to take, considering the status quo, should be the removal of ambiguity with clearly and precisely defined terms of classification and warnings. We should also bring the OTT platforms under the licensing rule similar to that of TV channel broadcasters, which is valid for 10 years and requires the licensee to comply with the programming and advertising code.[206]

United Kingdom, on the other hand, ensures keeping a check on 'faulty' self-regulation by these platforms through the routine check by the BBFC, which examines that the platforms are in line with the regulation of the BBFC and proposes to set up an independent regulatory body to make a new regulation framework to make sure the platforms are a safe space for its visitors. Thus, at present, even with the existence of a self-regulating code, we can appoint an independent body like the BBFC to, routinely, examine if the OTT platforms are following the guidelines as provided by the code, taking away the unbridled power from the hands of the platforms and balance it with the need of censorship.

Therefore, as the Self-Regulation code does not address the myriad of problems that comes along with showing content unregulated on the OTT platforms, the authors suggest the setting up of an independent body for OTT platforms responsible for age classification, access verification and pre-censorship. The independent body should also be given the power to routinely examine the platforms, to ensure that they are in line with the guidelines so provided and take up action *suo moto*. Though bringing the Digital content under the purview of MIB from the MEITY is a step towards the right direction, the authors believe that not the contemporary code, but a proper legislation, compulsorily applicable to all the OTT platforms, with clearly defined provisions, is the solution to the dilemmas attached with the OTT platforms and

206 The Cable Television Networks (Regulation) Act 1995.

the streaming of its content in India. Furthermore, unlike the Self-Regulation code, this legislation should be applicable on both the curated content as well as the publicly available user generated content.

***

LEGAL ISSUES IN WORKING OF PAYMENTS BANKS IN INDIA: AN ANALYSIS

Himanshu Chandra[♣]

Abstract

Since past few years, the Reserve Bank of India (hereinafter referred as RBI) has endeavoured to accelerate the 'financial inclusion' and 'digitalisation of India' by taking unprecedented initiatives, like 'niche/differentiated' banking system viz. Payments Banks. Based on the recommendations of Nachiket Mor Committee,[1] *eleven Payments banks were given in-principle license*[2] *with a view to transform the mobile phone users into bank account holder. Though, RBI is not issuing the payments banks a full-service bank license which is innovative and still untested on several accounts. This paper presents a case for the examination of regulatory and legal framework of Payments Bank. Therefore, the present research dwells into the examination of regulatory and legal framework of Payments Bank. Further, it tries to highlight the fundamental principles governing Payments Banks and the issues relating thereto.*

Keywords: Payments Bank, Full-Service Bank License, Regulatory Framework, Niche Banking, Payment System.

Introduction

The fundamental idea underlying behind the unique concept of payments bank is that it is a bank where there is no existence of the actual bank. Although India has a long history of financial incorporation schemes, but when it comes to bringing its jeopardised people for using financial services and banks, India had very minimal success.[3] As per Reserve Bank of India (hereinafter referred as RBI) data, after China, in India, most people are not associated with the banking field. There are many lower-income people, who work in an

♣ Ph.D. Scholar, National Law School of India University, Bengaluru, e-mail: himanshuchandra@nls.ac.in.

1 "*Report of Committee on Comprehensive Financial Services for Small Businesses and Low Income Households*", RESEVE BANK OF INDIA, January 7, 2014, https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1367CCF0114.pdf, (visited on October 10, 2020).

2 "*RBI Grants In-Principle Approval to 11 Applicants for Payments Banks*", RESEVE BANK OF INDIA, August 19, 2015, https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR4373D581F56D7B64BD08F4162D299E33EDF.PDF, (visited on October 10, 2020).

3 Sharita Forrest, "*Study Examines India's Policies for Financial Inclusion of the Unbanked",* ILLINOIS NEWS BUREAU, May 5, 2020, https://news.illinois.edu/view/6367/808477#:~:text=Doctoral%20student%20Gaurav%20R.,of%20its%20citizens%20remained%20unbanked., (visited on October 17, 2020).

unorganised sector and lives in rural areas, and most of the times they migrate to other cities or abroad in the job search. Thus, RBI, conceptualised the payments bank's idea, to achieve the vision of digital India, by going to the places where actual banks cannot and eventually it will increase the invasion of financial services.

The payments bank does not involve any credit risk, as it operates at a very minimal scale than an actual bank. It can perform many banking functions but cannot give loans or issue credit cards. Apart from operating through physical branches, payments bank operates digitally, mainly on mobile phones and other devices using the internet. The significant motive for establishment of the payments bank are to assure payments and allowance services to the migrant labour workforce and low-income households, by starting up small savings accounts of small business holders as well as workers of the unorganised sector to ensure their financially inclusiveness.[4] With this objective in mind, the Indian government aims towards the opportunity of digitalisation of India to reach out the every resident of India with the banking services. This will provide financial services to those who have limited access or no access at all. Lack of wide reach is one of the major limitations of commercial banks and launching of payments banks certainly removes this limitation.

The network and reach of the company for setting up of the Payments Bank is one of the important factors which were considered by RBI. As of now, only eleven companies were approved, out of 41 of those applied to obtain a payments bank license. It has been seen that licenses to the payment bank were granted to companies those deals with services of mobile telecommunication, supermarket services, prepaid wallet services, etc., to serve the tiny businesses and individuals who have less or no access to banks otherwise. According to RBI, a payment bank has the capability of being set if it shall fulfil the following conditions that are Firstly, Rs.100/- Cr. should be the minimum capital investment and secondly, the promoter's stake needs to be minimum 40% for the first five years, and at last, 25% of its branches should be there in the unbanked rural area.[5]

Concept of Payments Banks

The payments bank in India has a long year of experience. Starting from September 2013, when the Committee on Comprehensive Financial Services for Small Business and Low-Income Households was formed by the RBI.[6] The said committee was led by Nachiket Mor, the then member on the Reserve Bank's Central Board of Directors. The final suggestions were submitted by the

4 Hemant Singh, "*What are the key features of Payments Banks in India?*", JAGRANJOSH, April 1, 2020, https://www.jagranjosh.com/general-knowledge/what-are-the-key-features-of-payments-banks-in-india-1520858287-1, (visited on October 17, 2020).

5 "*Guidelines for Licensing of Payments Banks*", RESERVE BANK OF INDIA, November 27, 2014, https://rbi.org.in/scripts/bs_viewcontent.aspx%3FId%3D2900, (visited on October 17, 2020).

6 *Supra* n. 1.

committee on January 7, 2014 wherein it elaborated upon the creation of a novel type of bank called 'Payment Bank'. In the same year, in July, a draft for guidelines was created by RBI to govern payments bank while inviting remarks from major contributor and the public at large. The final guidelines were issued on November 27, 2014. The RBI bring forth the list of entities, there were 41 applicants in February 2015 those have applied for a payment bank licence. A statement for evaluating the licence applications was made by an 'External Advisory Committee' (hereinafter referred as EAC) which was led by Nachiket Mor. During the presentation of the budget, on February 28, 2015, it was proclaimed that India Post will utilise its large network to run payments bank. Thereafter, in July 2015, EAC submitted its conclusion, and the applicant entities were scrutinised for their financial record statistics and governance matters. On August 29, 2015, the RBI gave 'in-principle' licenses to eleven entities to launch payments bank. The aforesaid license had the validity of 18 months within which the entities were required to satisfy the essential prerequisite and were prohibited to involve in banking activities during the period. After being satisfied with the fulfilment of the conditions, the RBI proposed to issue full-service bank licenses to the payments bank under Section 22 of the Banking Regulation Act 1949.[7]

It is pertinent for the payments bank to be registered under the Companies Act 2013[8] before obtaining the license as payments bank and the requirements under the Companies Act 2013 needs to be followed by payments bank *viz*. Rs.100/- Cr. is the minimum capital requirement and the stake is required to menial at least 40% for the first five years. In pursuant to the rules of Foreign Direct Investment in private banks in India, the foreign shareholding shall be allowed in these banks. Banking Regulation Act 1949 shall regulate the voting rights and this voting right of any shareholder is limited to 10% which can be increased to 26% by RBI. Similarly, 25% of its branches should be in the unbanked rural area. To differentiate the payment banks from other types of bank, it is required to use the term 'Payments Bank'.[9]

Payments Banks also come under the head of 'Niche' of 'Differentiated' Banking.[10] Differentiated banking refers to the condition where the banking system is classified under two groups i.e., Payments Bank and Small Bank, where both these groups have the common purpose of extending financial inclusion. It was estimated that India's domestic remittance market is about Rs.800-900/- billion and growing. As the transfer of money is made feasible *via* mobile phones, a significant number of people including migrant labour shifted

7 Section 22 of the Banking Regulation Act 1949.

8 Section 8 of the Companies Act 2013.

9 "*Guidelines for Licensing of Small Finance Banks in the Private Sector*", RESERVE BANK OF INDIA, November 27, 2014, https://rbidocs.rbi.org.in/rdocs/Content/PDFs/SMFGU271114.pdf, (visited on October 20, 2020).

10 "*Differentiated Banks-Small Finance Banks vs Payment Banks*", CLEARIAS, September 30, 2017, https://www.clearias.com/differentiated-banks-small-finance-banks-payment-banks/, (visited on October 20, 2020).

to this new platform. Payments bank also carry out a substantial role in executing the Direct Benefit Transfer (hereinafter referred as DBT) Scheme of Government of India, where subsidies on education, health care are paid directly to beneficiaries' account. In the contemporary era, the payments banks have become popular in many developing countries, for example, in Kenya, Vodafone M-Pesa is utilised by many people to store money, to trade in e-commerce, and transfer funds to friends or relatives, etc.[11] The entities eligible to start their business as per the RBI directives as payments bank includes Non-Banking Prepaid Instrument Issuers, Mobile Telecom Companies, Non-Banking Finance Companies (hereinafter referred as NBFCs), Corporate Business Correspondents as well as Co-Operatives and Supermarket Chains. Similarly, NBFCs, Micro-Finance Institutions, Individuals with experience of Banking and Finance Societies for ten years and Local Area Banks qualify for starting Small Bank. The minimum paid-up capital of Rs.100/- Cr. is required for both payments bank and small bank. In comparison to the scheduled commercial banks, the differentiated banks require to maintain higher capitalisation levels. Apart from maintaining a balance between technology and serving underprivileged customers, these banks are also required to be a high-tech organisation. Through this banking system with the succour of digital revolution, financial inclusion is set to be a reality.

Payments Banks are sometimes confused with prepaid wallets. E-wallets are generally not banks, but they are just online wallets used for keeping money to facilitate transactions. Similar to payments bank, the e-wallets like 'Pay Zapp' by HDFC Bank and 'M-Pesa' by Vodafone and ICICI bank allows the users to function activities such as withdrawal of cash at ATMs or banks and fund transfer, however, they do not give interests on the deposited money.

Guidelines and Regulations

The payments bank is registered as a public limited company under the Companies Act 2013 and are not a commercial bank, and it also need to obtain a license under Section 22 of the Banking Regulation Act 1949, in addition to obtaining a special permit by RBI to operate as a payments bank. All the works that is carried on by commercial banks are done by the payments bank, however, payments bank operates under the following limitation:[12]

(i) Payments banks are allowed receive the money of the people as the deposit same as the commercial bank, however the limit is fixed, and it is fixed upto maximum of Rs.1/- lakh from a customer.
(ii) ATM or debit cards can be issued by payments bank to their customers but not allowed to issue a credit card.
(iii) Payments banks are also given permission to provide both current and savings accounts services to their customers.
(iv) Payments banks are not authorised to furnish loans or lending services to customers.

11 *Ibid.*
12 *Supra* n. 5.

(v) Payments banks are not authorised to accept deposits from the Non-Resident Indians (hereinafter referred as NRIs). In other words, we can say that people of Indian origin who have settled outside the India are not allowed lay down their money in the payment banks.

(vi) Payments banks are also authorised to make personal payments and receive a sum of money from the cross border on the current accounts.

(vii) As other commercial bank does, payments banks are also allowed to deposit the amount in the form of a Cash Reserve Ratio (hereinafter referred as CRR) with RBI.

(viii) A minimum of 75% of its demand deposits in government securities and treasury bills will be invested by Payments Banks with upto one year maturity and keep a maximum of 25% for operational purposes in currents and fixed deposits with any other commercial banks.

(ix) The provision of utility bill payments to its customers and the general public is also provided by Payments Bank.

(x) Payments banks are not allowed to start subsidiaries to undertake Non-Banking Financial Services activities.

(xi) With the RBI's approval, payments bank is able to work as a partner with other commercial banks and also, they can sell pension products, mutual funds, and insurance products.

(xii) Internet banking and mobile banking facility to their customers are also provided by Payments banks.

(xiii) Payments banks are also authorised to become representative of any bank, however it need to follow the additional guidelines of the RBI.

(xiv) The payments banks can accept remittances such as RTGS/NEFT/IMPS to make and to receive remittances from multiple banks through payment mechanism approved by RBI.

(xv) Forex services at charges can also be offered by Payments Bank even lower than bank and they are also providing forex cards to travelers, can be used as debit or ATM card all over India.

Development of Payments Banks in India

The total number of 11 applicants were given in-principle approval by the RBI to initiate payment banks in the country on November 27, 2014. However, at present, only six banks are functional i.e., India Post Payments Bank Ltd., Airtel Payments Bank Ltd., NSDL Payments Bank Ltd., Fino Payments Bank Ltd., Jio Payments Bank Ltd., and Paytm Payments Bank Ltd. The first company to begin this service is Airtel Payments Bank. An interest rate of 7.25% per annum on deposits of savings account was offered by this Payments Bank Ltd.[13] There is no requirement of maintaining minimum balance in savings account. Airtel Payment Bank also facilitates free virtual Debit Card.

13 "*Airtel Payments Bank Announces Additional Benefit on Savings Deposits*", AIRTEL, December 2, 2016, https://www.airtel.in/press-release/12-2016/airtel-payments-bank-announces-additional-benefit-on-savings-deposits, (visited on October 17, 2020).

The account number of the customer can be the digit of the mobile number of the customer. The bank also introduced an Airtel Payments Bank app and online debit card in association with Mastercard which can be used only at online merchant portals that accept Mastercard. Customers may also get a free personal accidental insurance cover (it is through a tie-up with Bharti AXA General Insurance Co. Ltd.) of Rs.1/- lakh at the time of opening a savings account. Airtel Payments Bank also provides numbers of services like making transfers, paying utility bills, mobile/DTH recharge, online shopping, FASTag, etc. Recently, the withdrawal of cash at any banking point is the new features of Airtel Payments Bank.

The India Post Payments Bank offers 2.75% per annum interest on the savings account.[14] Any person who is above the age of eighteen year with access to Aadhar and PAN card can open a savings account with India Post Payments Bank. A savings account with zero balance can also be start by customers, and there is no requirement of maintaining an average monthly balance in accounts. Customers also provided with free monthly e-statements. Easy bill payments and recharges can be made with India Post Payments Bank. For an amount below Rs.10,000/-, India Post Payments Bank provides doorstep banking services by levying a nominal fee of Rs.15-35/- per visit.

The FINO Payments Bank Ltd is one of the Payments Bank. Interest on savings accounts in FINO Payments Bank can be get at 2.75% per annum.[15] Therefore, by opting for a sweep account facility, earning of up to 7.25% per annum can be made. There is no requirement in maintaining any minimum monthly average balance. Customers are being provided with free Platinum/Classic RuPay Debit Card along with insurance of two lakh rupees in case of accidental Insurance death or permanent disability due to accident. Instant fund transfer with minimal through Immediate Payment Service (hereinafter referred as IMPS) at nominal charges across any bank in India can be done. This payment bank also provides services such as depositing, transferring funds, receiving funds, withdrawing, shopping, bill payments, etc.

Apart from providing e-wallet service, Paytm also add payments bank in their business model. Customer are facilitated to deposit up to Rs.1/- lakh in savings and current accounts by Paytm Payments Bank. Besides providing free access to digital Paytm Debit Cards, it also offers a range of other financial services like Insurance, Loans, Mutual Funds of partner banks. Customers can request to get a physical Debit Card issued on a request. There is no requirement of maintaining a minimum balance in Paytm Payments Bank. It

14 K Ram Kumar, "*India Post Offers Higher Interest Rate on Savings Deposit than Subsidiary Bank*", BUSINESSLINE, May 3, 2020, https://www.thehindubusinessline.com/money-and-banking/india-post-offers-higher-interest-rate-on-savings-deposit-than-subsidiary-bank/article31494682.ece, (visited on October 17, 2020).

15 "*Rate of Interest on Savings Bank Account*", FINO BANK, September 4, 2020, https://www.finobank.com/pdf/rate_of_interest_on_savings_bank_account_converted_20200904170617.pdf, (visited on October 18, 2020).

offers 2.75% rate of interest per annum on money deposited in a savings account and by using a fixed deposit facility up to 7% rate of interest in Payments Bank can be earned.[16] However, with effect from November 9, 2020, Paytm Payments Bank reduced interest rate on savings account deposits by 50 basis points to 3.5 percent. The payments bank also announced a fixed deposit scheme, on which its customers can earn an interest of up to 7.5% on their deposits though Paytm's partner bank[17] as the Reserve Bank of India recently reduced the repo rate. The Paytm Payments Bank also made a statement that even during the coronavirus lockdown, the bank has received over Rs.600/- Cr. in fixed deposits.[18] Therefore, with high interest rate of 7%, Paytm Payments Bank has attracted many users to create fixed deposit accounts. The volatility in other asset classes during this period, resulted in increased moving their savings into the fixed deposits. Recently, the bank had also crossed Rs.1000/- Cr. in savings accounts, with over 57 million account holders. It was also claimed by the company that in every district of India the bank has a debit cardholder and is one of the biggest RuPay card issuers in the country.[19]

One of the major sources of earning for the commercial bank is lending of funds. However, payments bank cannot earn by lending money. On the other hand, payments banks make money through activities like Interest Arbitrage wherein, by depositing the money with some other bank and government deposits, payments bank makes money and provides interest rates greater than that is provided by the other payments bank. This is usually done by companies dealing in prepaid wallet services which invest the deposited money in an escrow account at a partner bank. Another source of income for the payments bank is transaction commission by charging customers a certain percentage of their transaction. For example, if the transacted amount is between Rs.10/- and Rs.4,000/- Airtel Payments Bank charges Rs.5-25/- and if it is above Rs.4000/- then 0.65% of the withdrawal amount. There are also various other services which bear a charge. As Payments bank are not allowed to lend or start a subsidiary to lend money. Therefore, they partner with other organisation to sell their products like investments and insurance and earn money through it. By timing up with the existing banks, Payments banks also sell their loan services. Finally, same as commercial banks, through the Point of Sale (hereinafter referred as POS) terminals and resultant Merchant Discount Rate (hereinafter

16 Sanchita Dash, "*Paytm Payments Bank Corners ₹600 Crore in Fixed Deposits by Offering Highest Interest Rate*", BUSINESSINSIDER INDIA, May 8, 2020, https://www.businessinsider.in/business/startups/news/paytm-payments-bank-corners-600-crore-in-fixed-dposits-by-offering-highest-interestrate/articleshow/75621778.cms?utm_s%20ource=contentofinterest&utm_medium=text&utm_campaign=cppst. (visited on October 18, 2020).

17 "*Paytm Payments Bank Cuts Interest Rate On Savings Account Deposits To 3.5%*", BLOOMBERGQUINT, October 10, 2019, https://www.bloombergquint.com/business/paytm-payments-bank-cuts-interest-rate-on-savings-account-deposits-to-3-5-pc, (visited on October 18, 2020).

18 *Supra* n. 16.

19 *Supra* n. 16.

referred as MDR), the payments bank make money by commissions from transactions.

Issues and Challenges

The payments bank has many benefits such as Zero Balance Account, Higher Interest Rate, Convenient, Safe and Secure, Same Account Number as Mobile Number, Cashback and Discount offers including additional benefits like Free Accidental Insurance Cover. Despite having various benefits, there are many issues and challenges involved in the effective operation of payments bank including lack of customer awareness, lack of incentives for agents, lack of infrastructure, technological issues are some of the challenges faced in the effective working of the payments banks in India. In addition, the following challenges are pertinent in the effective functioning of payments bank in India:

(i) Initially the income stream is restricted to efficiency of operations and charges on remittances, which leads to low revenue and lending businesses cannot be undertaken if there is low revenue.
(ii) There is limitation in the potential to make money from the deposit base. As there is requirement of investing minimum 75 per cent of its 'Demand Deposit Balances' into government securities.
(iii) As there are most of the services which are offered by banks that payments banks offered and hence, for payments banks to offer a novel and different proposition will not seem to be easy.
(iv) Kisan Vikas Patra, Gold Bonds, etc., are some of the saving instruments which have good returns as compared to payment banks.
(v) Learning from Jan Dhan Yojna has explicit that several fake accounts have remained inactive and thus have ill-effect on the viability of the payments banks.[20]

Legal Challenges

Apart from the above challenges for the payments bank there are many legal issues involved in the working of these Payments bank. Use of Internet has been increased by many business to reach customer, get payment with higher speed, process orders and at low cost and in greater volumes than they could *via* traditional marketing channels.[21] These small value purchases plays crucial character in the proliferation of retail sales on the Internet.[22] Online payments are being offered by lee number of retail and several business's sites. As greater the marketing and product ordering takes place on the Internet, more businesses

20 V. Anantha Nageswaran, "*Lesson from Pradhan Mantri Jan Dhan Yojna*", LIVE MINT, August 29, 2017, https://www.livemint.com/Opinion/a2JcrrxPY6O9VVfYrV9MiL/Lessons-from-Pradhan-Mantri-Jan-Dhan-Yojana.html, (visited on October 20, 2020).

21 "*Sizing Inter-Company Commerce*", FORRESTER, July 28, 1997, https://www.forrester.com/%20index-./%201997/reports/ju97btr.htm&ID=6815, (visited on October 17, 2020). Analysing the Efficiency of Internet Based Business to Business Commerce.

22 "*Jupiter Communications Digital Commerce*", QEIP.COM, 1997, http://www.jup.com/tracks/commerce/ pricing.html, (visited on October18, 2020).

accepting payments directly at their websites.[23] by keeping in mind the increasing need of the time, a substantial number of different technologies are available or are being developed to authorised businesses to accept payments in this method. Various legal issues developed surrounding the different kinds of existing and emerging Internet Payment system in the working of the Payments Bank. From the standpoint of payment system users those include online merchants and purchases. consumers and the system providers, financial institutions, and non-bank service providers.[24]

Consumer Protection is one of the significant issues in the working of these Payments Bank. There are many rights and responsibilities of the Consumer as a user and beneficiaries.[25] There should be laws and rules that addressed the liability of the cost of unauthorised use of card. From the holder's perspective, it is pertinent to mention that the legal rules should furnish a great benefit by restricting the holder's liability for unauthorised use and providing other protections tend to put together that it is easier for the holder to challenge unauthorised negotiations. Consumers must be provided with the protections such as declaration of the terms and conditions of a transfer service is required, consumer liability for unauthorised transfers, requiring receipts and periodic account statements, limiting, authorising error resolution procedures, and limiting the uncalled issuance of access devices. Dispute Resolution is also one of the issues relating to the working of Payments Bank. It addressed the problem of the consumer with goods or services which has been credited to any card, and the consumer has made a *bonafide* effort to sort out the difficulty with the merchant, the consumer has the authority to withhold payment. Since the majority of the People in India is not tech-savvy and they do not know how to handle the Internet Payment Bank services properly. At times, there is Disclosure need to make by the consumers regarding their personal details, account details and transactions details. Data protection and Privacy is the major issue while dealing with it, as majority of the people are reluctant to disclose the above-mentioned details as they are afraid of the breach of data. The concern about the use and safe keeping of the card data that payments bank system collects need to be done by both users and providers. In buyer start-off systems, the information is there only at the payment provider and in trader start-off systems, at both the merchant and the payment provider, the information is there in an unconverted form. There have been multiple situations where large quantity of card numbers from service providers and merchants and working on the internet have stolen by hackers. At present, private contract governed the data protection and privacy. For instance, at the time of signing up for receiving

23 Robert F. Stankey, "*Internet Payment System: Legal System: Legal Issues Facing Businesses, Consumer and Payment Service Providers*", COMMLAW CONSPECTUS, Vol. 6, 1998, pp. 11-24.

24 *Ibid*.

25 Task Force on Stored Value Card, "*A Commercial Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money*", BUSINESS LAWYER, Vol. 52 No. 2, 1997, pp. 653-727.

services users of Internet services get their data protection rights from those agreements. And the consideration made by Government has been increasing with relation to ways to protect data that is sent through the internet. And at this juncture, it is important to see that what role government must take in forming these protections. The payments bank system is styled to authorised over the Internet, the bank account's holders to transfer money from their accounts. For instance, on the Internet purchasers are being allowed by debit-based systems to send directions to its bank to make payments from its checking account to the merchant's account. Through traditional bank payment systems, this debit-based system generally processes transactions, such as the automated clearing house, a data of each and central database keep every transaction in extension to any records maintained by the payor.[26] Hence to transfer funds between bank accounts, different ways has been used by the Internet. Another issue is related to Error Resolution. It is important that certain course of action in investigating errors related to electronic funds transfer has been followed by financial institutions during Payment banks transaction.

Available Recourse

The Banking Ombudsman Scheme 2006 lays down an effective grievance redressal mechanism for the resolution of complaints which relate to certain services which are rendered by payments banks *vis-à-vis* non-adherence to guidelines prescribed by Reserve Bank of India with regards to online banking in India. Some of the situations are as below:

(i) Delaying online payment/fund transfer;
(ii) Conducting unauthorized electronic payment/fund transfer;
(iii) Delay in crediting the proceeds to parties' accounts, non-payment of the deposit or non-observance of the directives and guidelines passed by the RBI, if any, applicable to rate of interest on deposits in any savings, current or other account maintained with the bank;
(iv) Levy of charges, without informing the same to the consumer;
(v) Not adhering to the guidelines of Reserve Bank with respect to ATM/Debit Card and Prepaid Card operations within India, including, refusal to accept or delay in accepting payment towards taxes, as required by Reserve Bank of India/ Central Government;
(vi) Forcing the closure of a deposit accounts without due notice;
(vii) Refusing to close an account or causing delay in the same;[27]
(viii) Non-adhering to the fair practices, which are otherwise required by the banks to be adopted;
(ix) Non-adherence to the provisions of the Code of Bank's Commitments to Customers issued by Banking Codes and Standards Board of India and as adopted by the bank;
(x) Non-adherence to Reserve Bank guidelines on banking activities like sale of insurance /mutual fund /other third-party investment products

26 *Ibid.*
27 R.K. Gupta, CREDIT APPRAISAL AND ANALYSIS OF FINANCIAL STATEMENTS, 2nd ed. 2017.

with regard to (a) improper, unsuitable sale of third-party financial products; (b) non-transparency /lack of adequate transparency in sale; and (c) non-disclosure of grievance redressed mechanism available;

(xi) delay or refusal to facilitate after sales service; and

(xii) any other matter relating to the violation of the directives issued by the Reserve Bank in relation to banking or other services.

Any individual who has a complaint against the bank on any of the grounds referred may, himself or through his approved agent submit the same to the Banking Ombudsman inside whose ward the branch or office of the bank grumbled against is found.

Settlement of Complaint

As soon as it might be practicable to do, the Banking Ombudsman will send a duplicate of the objection to the branch or office of the bank named in the complaint, under counsel to the nodal official and attempt to advance a settlement of the complaint and may follow such method as he may think just and legitimate. For example, he may require a gathering of bank or the concerned auxiliary and the complainant together to advance a neighbourly goal.

(i) In case a complaint is not settled by an agreement within the perceived period of one month from the date on which the complaint has been received or such period as allowed by the Banking Ombudsman may allow the parties, he may, after affording the parties a reasonable opportunity to present their case, pass an Award or reject the complaint.

(ii) The Banking Ombudsman will be required to consider the various evidence which may be placed before such officer by the parties, including:[28] principles concerning the banking law as well as its practice, directions passed by RBI, and instructions as well as guidelines issued by the RBI, factors which in are found to be relevant to such a complaint, which is made by the complainant.

(iii) The award shall mention such reasons, which were taken into consideration by the officer entrusted with the proceeding.

(iv) The Award passed shall provide for directions, for the performance of various obligations or any such amount, which shall be paid by the bank, in the form of compensation for making good the loss, which has been suffered by the complainant, due to the default which has been committed by the bank against such a complaint.[29]

(v) The Banking Ombudsman may likewise grant remuneration, not surpassing rupees 0.1 million to the complainant, considering the loss of the complainant's time, costs acquired by the complainant, provocation and mental desolation endured by the complainant.

---

28 *Ibid*.

29 C. Vijai, "*A Research on Indian Banking Ombudsman Scheme*", TEST ENGINEERING AND MANAGEMENT, Vol. 81, 2019, pp. 6222-6226.

(vi) A duplicate of the Award will be sent to the complainant and the bank.
(vii) An honour will pass and be of no impact except if the complainant outfits to the bank worried inside a time of 30 days from the date of receipt of duplicate of the Award, a letter of acknowledgment of the Award in full and last settlement of his case.[30]

Way Forward

It is commonly believed that the Internet payments are not regulated novelty, and this is the major reason behind the reluctance of not using the Payment bank services. And we are well versed with the fact that this Internet payments system are distinct from the traditional system, so it is important to develop the methods of assessing the merits and dangers of this system. Keeping in view the various challenges and the legal issues involved, it is important to adjust and enlarge the existing laws, rules and regulations related to this method, so that the aims of setting up the payments bank is to be achieved and the weaker section of the country can be strengthening, and in the economic development of the country they can also give their contribution.

***

30 *Ibid.*

DECODING THE STATUS OF NON-PERFORMING ASSETS IN ELECTRICITY SECTOR AND SEARCHING FOR A WAY FORWARD

Manish Yadav[♣] *and Sumit Kumar Malviya*[♠]

Abstract

The Electricity Sector has witnessed a surge in the Non-Performing Assets (hereinafter referred as NPAs). They have the potential to disrupt the economy as the power sector contributes a majority of share to the stock of NPAs in the country. To regulate the volume of NPAs in the country, the RBI issued a circular which was challenged by the stressed asset owners as being against Banking Regulations. The quashing of the February 12, 2018 Circular by the Supreme Court was regarded as a welcome step. However, the threat of an unstable framework with multiple loopholes still looms over the electricity sector. In this background, the authors discuss the status of NPAs in the Electricity Sector and the regulatory framework that exists for the control of these stressed assets. Further, the authors extensively discuss the potential loopholes that exists in the entire framework of laws relating to the NPAs and recommend various solutions that would assist in strengthening the way in which the stressed assets are dealt in the country which would result in the growth of the Electricity Sector.

Keywords: Non-Performing Assets, Electricity Sector, Power Sector, Reserve Bank of India, National Electricity Policy, Stressed Assets.

Introduction

The power sector is under immense scrutiny because of the volume of Non-Performing Assets (hereinafter referred as NPAs) from the sector.[1] The major problems of the sector ranges from failure in political leading and the poor utilisation of resources to unstable financial issues. Since the sector does not have an internal mechanism like that in steel or cement sector.[2] A lot of external factors contribute towards the issues that exist in this sector. The structure of power sector is overly complex and there cannot be simple solution or approach

♣ Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail: manishyadavlaw@nlunagpur.ac.in.

♠ Assistant Professor of Economics, Maharashtra National Law University, Nagpur, email Id: sumitkumar@nlunagpur.ac.in.

1 Federation of Indian Chambers of Commerce and Industry, "*Reviving Stressed Assets in Power Sector 2019*", POWER AND COAL DEPARTMENT, GOVERNMENT OF INDIA, http://ficci.in/spdocument/23139/Report_Reviving-Stressed-Assets-in-Power-Sector-ficci.pdf, (visited on December 15, 2020).

2 "*Financial Institutions: Soundness and Resilience*", FINANCIAL STABILITY REPORT, June 2019, https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/06FSRCHAPTER24945D69340154F559C8A68A24FE5377E.PDF, (visited on December 15, 2020).

that can fix the problems in the sector and resolve the problem of stressed assets in the sector. Simple solutions like fast elimination of the current stakeholders will lead to huge losses for the financial institutions, therefore, there is a requirement of series of regulatory measures that can strengthen the sector economically.[3]

To facilitate this discussion, the paper is divided into four parts wherein, Part-I discusses the basic concept of NPAs and the economic implications of the NPAs in electricity. Having understood the basic premise of the NPAs, the author in Part-II, discusses about the condition of NPAs and the factors that contributed the rise of NPAs in the Electricity Sector. The Part-III discusses the existing regulatory framework and various laws governing NPAs in India. The regulatory measures are discussed under two heads, under Insolvency Bankruptcy Code 2016 (hereinafter refereed as IBC) and under the system of Reserve bank of India (hereinafter referred as RBI) guidelines. This part also discusses the RBI guidelines on the ruling of Supreme Court with regards the same. Finally, Part-IV concludes with recommendations that can be potential suggestions to help in strengthening the regulatory framework relating to the NPAs in Electricity Sector.

Non-Performing Assets

The rise of NPAs in the power sector is a matter of scrutiny. However, before delving in that discussion, it is imperative to understand about NPAs and the economic implications related to the NPA problem in India. The lending facility of the financial institutions like the bank, depending on the performance of the borrowing, can be classified on the following:[4]

(i) standard asset: it is a loan where the repayment of the borrowing is made in regular instalments.
(ii) non-performing assets.

As per Reserve Bank of India, "*a Non-Performing Assets (NPA) is a loan or an advance where interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of term loan. An asset, including a leased asset, becomes non-performing when it ceases to generate income*".[5] The concept of NPAs started during mid-2000s. The then economic status of the country was highly promising with new corporations and sectors were granted loans on the basis on the recent performances of the industries.[6] The easy availability of the loans and other financial instruments, the industries began

3 *Ibid.*

4 Standing Committee on Finance, "*Sixty-Eighth Report on Banking Sector in India-Issues, Challenges and the way forward including non-performing assets/stressed assets in banks/financial Institutions*", Ministry of Finance, August, 2018, http://164.100.47.193/lsscommittee/Finance/16_Finance_68.pdf, (visited on November 20, 2020).

5 *Ibid.*

6 "*The Festering Twin Balance Sheet Problem*", ECONOMIC SURVEY 2016-17, pp. 82-104, https://www.indiabudget.gov.in/budget2017-2018/es2016-17/echap04.pdf, (visited on November 20, 2020).

financing from these external sources than from internal sources. However, when the global financial crisis hit the economy in the 2008s, the repayment capability of the industries decreased and led to a problem that became to be called as 'India's Twin Balance Sheet Problem'.[7] This phrase was referred to indicate a problem when the both the corporate sector and the financial instruments come under financial stress.

Rise of Non-Performing Assets in India and its Economic Implications

The rise in NPA occurs when the undertaking for which such loan was undertaken starts to lose its profit-making capacity. To deal with this situation, the banks started a new practice, where the fresh borrowings are issued to enable the corporations to pay the interest.[8] What follows is that the borrowing are henceforth, not recognised as NPAs, but it did not help to eliminate the prime cause of unprofitability of the sectors.[9] In the light of such desperate situations, frauds started to erupt contributing to the further rise of these assets without these frauds meeting their true fate.[10] There has been a stark rise in the volume of NPAs in the country, the gross value of NPAs in India have witnessed a steep rise.[11] In the recent years, the capacity of the banks to lend finances has been severely affected because of the rising NPAs.[12]

A rise in the NPAs indicates that increasingly a portion of the assets have ceased to generate income, in turn reducing the profitability. This requires a sector to make extra provisions for the losses.[13] Making extra provision for losses means less and less money or resources can now be invested in the actual

7 *Ibid.* India has been trying to solve its Twin Balance Sheet problem-overleveraged companies and bad-loan-encumbered banks-using a decentralised approach, under which banks have been put in charge of the restructuring decisions. But decisive resolutions of the loans, concentrated in the large companies, have eluded successive attempts at reform. The problem has consequently continued to fester: NPAs keep growing, while credit and investment keep falling. Perhaps it is time to consider a different approach-a centralised Public Sector Asset Rehabilitation Agency that could take charge of the largest, most difficult cases, and make politically tough decisions to reduce debt.

8 Amarjit Chopra and Sabyasachee Dash, "*The NPA Conundrum*", THE STATESMAN, November 30, 2020, https://www.thestatesman.com/opinion/the-npa-conundrum-1502938071.html, (visited on December 15, 2020).

9 Deepanshu Mohan and Raghu Vinayak Sinha, "*India's Tryst with a Rising Debt Overhang*", THE WIRE, 18 April 18, 2017, https://thewire.in/banking/indias-tryst-with-a-rising-debt-overhang-the-other-side-of-npa-crisis, (visited on October 15, 2020).

10 *Ibid.*

11 *Supra* n. 4.

12 Ahita Paul, "*Examining the Rise of Non-Performing Assets in India*", THE PRS BLOG, September 13, 2018, https://www.prsindia.org/content/examining-rise-non-performing-assets-india, (visited on August 13, 2020).

13 *Supra* n. 4.

operation of the business. A low profitability is bound to follow. There can be various reasons, internal or external, for the rise of NPAs in any sector.[14]

Non-Performing Assets in Electricity Sector

The problem of rising NPAs in the power sector has been an issue for the financial institutes in India.[15] They account for, approximately, 40-60 billion dollars of assets.[16] The growing NPAs in the electricity sector or the power sector is a threat to the entire financial institution of bank.[17] It has, in a way,

14 *Supra* n. 4.

15 George Mathew, "*Regulatory Measures, Resolutions Help Reduce NPAs in Energy Sector in 2019*", THE INDIAN EXPRESS, March 8, 2020, https://indianexpress.com/article/business/economy/regulatory-measures-resolutions-help-reduce-npas-in-energy-sector-in-2019-6304455/, (visited on August 1, 2020). About 18.03% (Rs.1,06,908/- CR.) of the Electricity Sector is classified as NPA until September 2019. In 2018, the percentage was 20.3% (Rs.1,22,170/- Cr.). Though there has been a decline, it has not been substantial. The desperate condition of the sector with regards to NPA can be understood by the fact that the volume of bank loan has increased from Rs.46,627/- Cr. in 2017 to Rs.1,22,170/- Cr. in 2018. This is equivalent to a rise of 162%. This has made banks turn away from extending financial support to projects from power sector. A CEO of a nationalised bank has noted, in the case of power, whatever exposure we have, that has already been recognised. Some of the exposures in power have been recognised as NPA. Resolutions of two or three major ones will be before March 31. We are not taking fresh exposure in power. In the thermal sector, there will not be any more exposure and, in hydel, it will be to a certain extent. This is because of the lessons we have learnt so no exposure to both telecom and power.

16 Standing Committee on Energy, "*Thirty-Seventh Report on Stressed/ Non-Performing Assets in Electricity Sector*", Ministry of Power, March 2018, http://164.100.47.193/lsscommittee/Energy/16_Energy_37.pdf, (visited on February 18, 2020). According to the Standing Committee, about 17,000 MW of plants which are under construction have been stopped for a period of 3 years. The reason for the same is there is a blockage of finances that has been experienced that are necessary for the smooth functioning of the projects. The slowdown in the sector is further accelerated by the fact that the plants with the capacity of around 19,000MW, which accounts for 43% of the total capacity have still not been linked with power purchase agreements. It is also observed that there has been a stress of around Rs.5.9/-lakh Cr. to the scheduled commercial banks and around 86% of that exposure can be attributed to industries of power sector. The 34 stressed assets identified in the power sector accounts to about Rs.1.75/-lakh Cr., which is equivalent to 32% of the exposure in the power sector taken together. It is also imperative to mention here that it is critical for the power plants with huge capital and investment as well as long gestation period to be completed on time so that the developers can avoid the overruns that can emanate from such time and cost factors. However, in the past, there has been a lot of cases when the developers must suffer such overruns and the delay in the construction of such projects can be attributed to delay in receiving clearances or financial stress. In some projects, overruns account for 65% of the total value of the project. This has further added to the volume of stressed assets in the country.

17 "*Top Five Sectors with Most Exposure to Banks NPAs; What Can be Done?*", ZEEBIZ, June 13, 2017, https://www.zeebiz.com/india/news-top-five-sectors-with-

lead to the reduced ability of the banks to lend. The power sector accounts to almost 35% of the NPAs of the banking sector.[18] The Standing Committee on Energy[19] in 2018 report submitted that as on 2017, the NPA in power sector amounted to RS. 37,941. It is a clear signal that it has made this sector a major contributor in the problem of twin balance sheet of the country.[20] With regard to the crisis, it has been noted that,

> *The crisis in the sector has grown in tandem with the growth of private power in the Indian grid. In 2002, privately-owned generating assets were only about 10.5%; today (July 2018) these are 45.2%. As the share of private generation has grown, so has the crisis of the electricity sector. Out of the 75,000 MW of private power thermal assets, the Standing Committee of Parliament on Energy in its Report (August 2018), believes that 60,000-65,000 MW may be under financial stress, most of it funded by public sector banks.*[21]

There are reasons that can be attributed to the rising volume of stressed assets generated by the thermal sector can be many such as the Enron Economics, the loopholes in the Electricity Act, 2003 and the inefficiency of the State Electricity Board has pushed the Electricity in this crisis. The rise of NPA is a follow up the same crisis.[22] A few major reasons can be listed as follows[23]-

(i) Change in the demand of power.
(ii) Change in the supply cycle.
(iii) Change in the laws or governmental regulations.
(iv) Potential or availability of financing.

---

most-exposure-to-banks-npas-what-can-be-done-17462, (visited on September 20, 2020). Steel, power, telecom, textile, and infrastructure sector accounts for about 60% of the NPAs in the Indian Economy.

18 *Ibid.*

19 *Supra* n. 16.

20 "*Power Sector NPAs a Class of Their Own*", THE ECONOMIC TIMES, January 2, 2019, https://economictimes.indiatimes.com/blogs/et-editorials/power-sector-npas-a-class-of-their-own/, (visited on December 21, 2020).

21 Prabir Purkayastha, "*The Crisis in Electricity Sector is Not Just About NPA*", https://www.newsclick.in/crisis-electricity-sector-not-just-about-npas, September 6, 2018, (visited on November 10, 2020). While total loan outstanding of the energy sector amounted to Rs 5,93,052 crore, State Bank of India accounted for a major share of the exposure at Rs.1,97,359/- Cr. Among other banks, Bank of Baroda has an exposure of Rs.36,588/- Cr., Canara Bank Rs.32,915/- Cr., Bank of India Rs 31,272 crore, PNB Rs.31,070/- Cr. and HDFC Bank Rs.29,866/- Cr., according to the RBI data.

22 Moksh Ranawat and Aman Guru, "*The Problem of Non-Performing Assets in the Power Sector: 'Brighter' Times Ahead?*", INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS, January 15, 2019, https://www.irccl.in/single-post/2019/01/15/the-problem-of-non-performing-assets-in-the-power-sector-brighter-times-ahead, (visited on December 21, 2020).

23 *Supra* n. 16.

(v) The dynamics involved in the supply of fuel.
(vi) The volume of capital cost involved.
(vii) Disruptions in construction.
(viii) Institution of legal action relating to contractual, or tariffs issues coupled with bank and financial issues.
(ix) Disruption in the supply of coal because of the problems related to allocation process or linkages.
(x) Lack of PPAs with the required institutions (State DISCOMS).
(xi) Aggressive bidding by developers in PPA.
(xii) Delay in the implementation of the projects.
(xiii) Inability of the developers to put in capital.

These factors, not exhaustively, but apparently, results in the rise of NPA in the thermal sector. However, it is also noteworthy that the thermal sector has been the most underperforming sector in the Indian electricity generation sector.[24] As recent as in the year 2019, the thermal sector had extremely less capacity (less than 60%) consistently over the past years along with financial leverage which makes the debt servicing nearly impossible. The problem is accelerated by the losses incurred by the electricity distribution companies who often fail to comply with payments or negotiate the tariffs on the power purchase agreements.[25]

The Government has recognised 34 stressed or NPAs assets with a generation capacity of 40GW in the country.[26] The cases of these stressed assets amounting to over Rs.1.8/- lakh Cr. are for determination or so to say, resolution under the Insolvency and Bankruptcy Code under the jurisdiction of National Company Law Tribunal.[27] It includes projects like the Amarkantak Thermal Power Plant[28] that is stressed that because of the excessive

24 *Supra* n. 16. The power plants or power generating industries which are privately manged and operated show a strikingly high volume of NPAs, which stood at Rs.1.72/- lakh Cr. in 2019. If we add accumulated loss of the power industries, which is as high as Rs.4/- lakh Cr. (and the amount of that the state governments defaulted under the Uday Scheme, which us around Rs.2.32/- lakh Cr.), then the total losses suffered by the electricity sector will amount to no less than Rs.8/- lakh Cr.

25 Charlton Media Group, "*Non- Performing Assets Burden India's Thermal Power Sector*", ASIAN POWER, January-March 2020, https://issuu.com/charlton_media/docs/ap_q1_2020/s/10229949, (visited on December 11, 2020).

26 *Ibid.*

27 At this point, it is important to appreciate the difference between NPAs and Stressed Assets. NPAs are a category of stressed assets, like a subset. A stressed asset includes non-performing assets as well as those assets which are capable of landing into the arena of NPAs because of various factors, that is to say, those assets which have the potential to become NPAs.

28 Manka Bedi, "*Thermal Power Plants in Koradi, Nashik Among 12 NPAs in Country*", THE TIMES OF INDIA, December 19, 2019, https://timesofindia.indiatimes.com/city/nagpur/thermal-power-plants-in-koradi-nashik-among-12-npas-in-country/articleshow/72876867.cms, (visited on June 11, 2020).

diversification of the company and the poor financial health of the company and Buxar Power Plant[29], which has been stressed because of the high costs of new technological advancement and the inability of the company to cope up it made the company land in a situation where the promoters and the banks were burdened with the NPAs.[30]

The status of the NPAs in the Thermal Power Generation Sector according to the 37th Parliamentary Standing Committee's Report on Energy[31] can be summarised as follows:

TOTAL NUMBER OF THERMAL POWER PROJECTS	**34**
Total Stressed Capacity (MW)	**40,130**
Commissioned Capacity (MW)	24,405
With PPAs	16,129
Without PPAs	8,279
Under Construction Capacity (MW)	**15,725**
COAL LINKAGE	
Linkage Available (MW)	11,050
Block allotted but under dispute (MW)	3,830
Imported Coal (MW)	1,800
Linkage Required (MW)	7,725
Linkage allotted/ in process under SHAKTI (MW)	6,150

In the light of the dire situation, the NTPC has refused to undertake any new project apart from the ones currently under its ambit. Even private corporations like Tata have been of the same opinion since 2018.[32] In this backdrop, there is need for not only cautious investment but also serious re-evaluation of existing projects that are under construction. There is also a need by the non-coal states to invest in cheaper, renewable, or sustainable sources of energy or to import electricity.[33]

29 "*Buxar Thermal Power Station*", GLOBAL ENERGY MONITOR, January 1, 2020, https://www.gem.wiki/Buxar_Thermal_Power_Station, (visited on July 5, 2020).

30 *Ibid.*

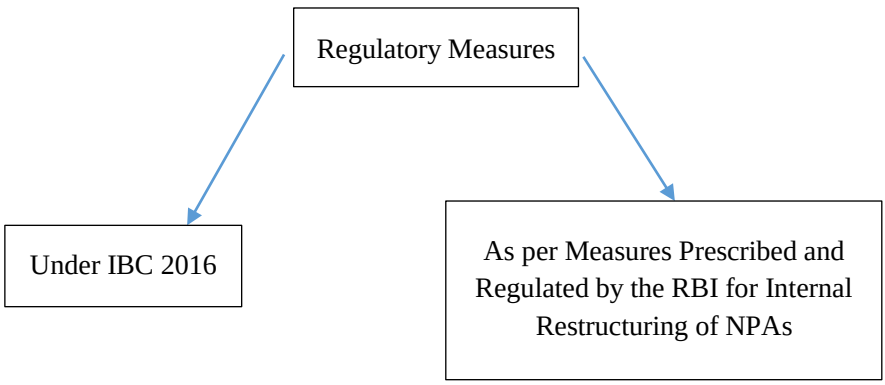
31 *Supra* n. 16.

32 *Supra* n. 20.

33 Tim Buckley, et al., "*Seriously Stressed and Stranded: The Burden of Non-Performing Assets in India's Thermal Power Sector*", INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS, December 18, 2019, http://admin.indiaenvironmentportal.org.in/reports-documents/seriously-stressed-and-stranded-burden-non-performing-assets-indias-thermal-power, (visited on January 10, 2020).

Overview of the Regulatory Measures

In order to deal with the situation various regulatory measures have been adopted. These can be classified under two heads:[34]



Reforms under Insolvency and Bankruptcy Code 2016

The Insolvency and Bankruptcy Code 2016 is an effective measure for debt recovery against the companies which have failed to make good of the loan of Rs.1/- lakh and above by an application to the National Company Law Tribunal (NCLT).[35] However, this measure takes is a measure that is to be adopted once the insolvency proceedings are to be initiated and is not a remedy as to regulate or reduce the occurrence of such NPAs.

Guidelines of Reserve Bank of India

The Reserve Bank of India has often rolled out various schemes like Strategic Debt Restructuring and Lenders Forum Plan and Scheme for Sustainable Restructuring of Stressed Assets (S4A).[36] The RBI aims to revisit the policies that deal with the stressed asset timely.[37] In fulfilment of this objective, the RBI issued a circular on February 12, 2018 in order to determine whether an asset had become stressed or not and through this circular, the apex bank abolished all the schemes and instead rolled out a framework through

34 *Supra* n. 22.

35 Section 4(1) of the Insolvency and Bankruptcy Code.

36 "*Scheme for Sustainable Structuring of Stressed Assets*", RESERVE BANK OF INDIA, June 13, 2016, https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT422B1EE9DF2D4B5484487065B8FB94B5EC9.PDF, (visited on August 10, 2020).

37 "*RBI Withdraws CDR, SDR, S4A, JLF Schemes to Restructure Defaulted Loans*", THE ECONOMIC TIMES, February 13, 2018, https://economictimes.indiatimes.com/news/economy/policy/rbi-withdraws-cdr-sdr-s4a-jlf-schemes-to-restructure-defaulted-loans/articleshow/62891543.cms, (visited on September 7, 2020).

which "*lenders were to classify a loan as stressed on just one day of default, whilst bankers were required to mandatorily refer all accounts holding over Rs2,000 crore ($280m) in loans to the National Company Law Tribunal (NCLT) or bankruptcy court, if those companies had failed to resolve non-payment problems within 180 days of default." and it also obligated the banks to pass a resolution plan for insolvent accounts held by them within a period of 180 days since date of default, failing which the account has to be referred to the IBC within 15 days*".[38]

This deadline was initially 270 days as prescribed under the IBC where the borrower or asset developer could resolve the non-payment through various schemes like SDR or S4R.[39] This measure by RBI was very severe and faced a lot of criticism.[40] This circular also had the potential to disrupt the electricity sector as it brought around 34 power sector companies under the ambit of IBC.[41] This also instilled the argument that the outside control of the sector is causing the reasons that is leading to the reasons for increasing NPAs. Because of the loopholes in the schemes of the RBI regarding the issue of bankruptcy, there has been rise in the NPAs as lenders effectively misused the framework and hid the stressed assets.[42] Because of the issues related to it, it was challenged in the case of *South East UP Power Transmission Company Limited v. Reserve Bank of India*,[43] the Supreme Court ordered 'a Status Quo' on RBI Circular as an interim. This prevented banks from instituting proceedings under IBC under further notice.[44] Later, the Circular was challenged mainly two grounds:

(i) The difference between 'Genuine Defaulters' and 'Wilful Defaulters' was not appreciated in the Circular. In reality, there exists difference between the two. A wilful defaulter is the one who fails to repay the loan even when he holds the capacity to pay back the borrowing. On

38 "*Resolution of Stressed Assets-Revised Framework*", RESERVE BANK OF INDIA, February 12, 2018, https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/131DBRCEC9D8FEED1C467C9FC15C74D01745A7.PDF, (visited on January 10, 2020).

39 *Ibid.*

40 *Supra* n. 22.

41 Shantanu Nandan Sharma, "*How RBI's Feb 12 Circular Changed the Way Banks Dealt with Stressed Assets*" THE ECONOMIC TIMES, February 10, 2019, https://economictimes.indiatimes.com/industry/banking/finance/banking/how-rbis-feb-12-circular-changed-the-way-banks-dealt-with-stressed-assets/articleshow/67920150.cms?from=mdr, (visited on June 12, 2020).

42 *Ibid*.

43 *South East U.P. Power Transmission Company Ltd. v. U.P. Power Transmission Corporation Ltd.* 2019 SCC OnLine All 5421.

44 Shayan Ghosh, '*Supreme Court Quashes RBI's 12 February Circular on One Day Default*, LIVE MINT, April 2, 2019, https://www.livemint.com/news/india/supreme-court-strikes-down-rbi-s-february-12-circular-on-bad-loan-resolution-1554182052362.html, (visited on March 10, 2020).

the contrary, a genuine defaulter is a borrower who fails to pay back the loan on account of the reasons on which the borrower has no effective control. There is a need to appreciate this difference while making laws.[45]

(ii) The time limit prescribed for a debt over Rs.2000/- Cr. in the circular is strictly 180 days. This was also challenged for have being inconsistent with the Banking Regulation (Amendment) Act 2017.[46] These provisions give the power to the apex bank for rolling out guidelines or directions, as and when required, relating to the issues of NPAs in banking sector.[47]

It was also contended that the circular is against Article 14 and Article 21 of the Constitution as the circular failed to distinguish between the different loan accounts on account of the debt owed by it.[48] In this regard, it is imperative to note that the Central Government under the Reserve Bank of India Act 1934[49] is empowered to issue directions to the bank in public interest. The section reads as "*(1) The Central Government may from time to time give such directions to the Bank as it may, after consultation with the Governor of the Bank, consider necessary in the public interest*".[50] This is however an extreme measure, and the government usually does not interfere with the working of the RBI. The same was not resorted in this case well.

On April 2019, the Supreme Court in *Dharani Sugar and Chemicals Ltd. v. Union of India*,[51] quashed the circular and ordered to invalidate all the actions that were taken under this order since it was first implemented. No doubt, the decision gave relief to the stressed owners. However, it was noticed that "*it leaves the Indian financial sector hostage to open-ended promoter delays and gaming of the system and prevents the speedy resolution of decade-old poor investment decisions. As a result, the banking system remains hamstrung, stymying India's enormous economic growth potential*".[52] After the Supreme Court declared the circular as unconstitutional, the RBI, in June 2019, diluted the requirement of the February 12, 2018 Circular.[53] The new version of the circular diluted several harsh provisions and incorporated the provisions seeking consent of the borrowers. It also offers liberty in terms of implementation of the

45 *Ibid.*
46 Section 35AA and Section 35AB of the Banking Regulation (Amendment) Act 2017.
47 *Ibid.*
48 *Supra* n. 44.
49 Section 7(1) of the Reserve Bank of India Act 1934.
50 *Ibid*.
51 *Dharani Sugar and Chemicals Ltd. v. Union of India* (2019) 5 SCC 480.
52 *Ibid.*
53 Krishan Singhania and Sarjana Pandey, "*Supreme Court Strikes Down the RBI Circular of 12 February 2018*", MONDAQ, May 17, 2019), https://www.mondaq.com/india/insolvencybankruptcy/806358/supreme-court-strikes-down-the-rbi-circular-of-12th-february, (visited on March 5, 2020).

asset resolution plan and provides temporary reprieve to the genuine defaulters after considering genuine factors.[54]

Road Ahead: Recommendations and Conclusion

Having understood the severe problems that surround the NPAs in the power sector and the dire need for reform, the author recommends the following changes to revamp the condition in the electricity sector.

Separation and Delicensing: Correcting the Negative Impact

The Separation of transmission and distribution channel resulted in a situation where the state governments cannot have control over the production as they own the distribution channel.[55] At times, when the production and distribution chain does not match, the state governments had to buy it from private players or National Thermal Power Corporation Ltd. (hereinafter referred as NTPC), at a higher cost, incurring losses for the states. De-licensing, as well has resulted in creation of surplus quantity. The production is more than what the distribution companies can absorb resulting in creation of stressed assets.[56] Therefore, the crisis did not emanate because of the inefficiency of the

54 Samanwaya Rautray and Sarita C Singh, "*Supreme Court Quashes RBI Circular on Debt Resolution*", THE ECONOMIC TIMES, April 3, 2019, https://economictimes.indiatimes.com/industry/banking/finance/banking/supreme-court-strikes-down-rbis-february-12-circular-on-defaulting-firms-calls-it-illegal/articleshow/68682597.cms?from=mdr, (visited on July 11, 2020).

55 Standing Committee on Energy, "*Thirty-Seventh Report on Stressed/ Non-Performing Assets in Electricity Sector*", Ministry of Power, March 2018, http://164.100.47.193/lsscommittee/Energy/16_Energy_37.pdf, (visited on February 18, 2020).

56 *Ibid.* Rajesh Kumar and Nishank, "*A Missed Opportunity: A critique of the Report on 'Stressed/ Non-Performing Assets in Electricity Sector' by Parliamentary Standing Committee on Energy (March 2018)*", CENTRE OF FINANCIAL ACCOUNTABILITY, September 16, 2018, https://www.cenfa.org/publications/a-critique-of-report-on-stressed-non-performing-assets-in-electricity-sector/, (visited on August 1, 2020); https://www.cenfa.org/wp-content/uploads/2018/09/Parliamentary-Standing-Committee-on-Energy.pdf, (visited on August 1, 2020). The Report was criticised for adopting a casual and non-critical attitude in respect of situations when the bank is unable to recover borrowings from the defaulters. There is a need to make the entire process of granting loans and its repayment transparent and this point was not included in the Report. A transparent system will prevent the public money that is wasted in the name of various projects. Another aspect which the report did not consider was the delicensing of industries. The delicensing issue caused increase in the number of power plants which ultimately leads to many of them turning into stressed assets. The over projection of the industries has been ignored by the Committee in its report. Most importantly, the Committee neglected the aspect of alternative sources of generation of Electricity like various renewable energy as an obligation to Paris Agreement to which India is a signatory. There is also no fixation of responsibility on the entities that are responsible for the rise of NPAs in the sector. The solutions recommended were more market-oriented solutions rather than being in the nature of welfare state that is preserving the public money.

government utilities. It began when the cost of production and distribution of the electricity overpowered the ability of the public to pay.

Solution

Having understood the defect in distribution and production channels, the solution to lower this deficit is to look at the 'Economies of Scale', that is to say, construction of huge plants and expansion of manufacturing units in order to reduce the cost of per unit of electricity. This has been successfully adopted by China[57] and the nation has brought down the cost of per unit of electricity by building massive plants. India, on the other hand, India could not test of 'Efficiency' especially during the period of 1990 to 2003 as the lack of expansion of plants and the induction of private capital through public banks now stands stressed. Therefore, the solution to this problem is to resort to economies of scale.

Dichotomy of Regulatory Problems

The setting of a power plant is a delicensed activity. The decision as to setting of a plant is entirely based on the assessment undertaken by the developer. All the activities from arranging the inputs like land resources, water and fuel, clearances, Power Purchase Agreements is done by the developer.[58] The profits too, in such cases are dependent on a variety of factors like economic status of the country, the laws related thereto, the demand and supply

---

The Executive Director of CFA noted that, "*The Standing Committee had a chance to get to the bottom of the NPA crisis in the power sector, recommend actions for course correction, fix responsibility and radically change the pattern in which power projects are approved and financed without looking at the fundamentals. Unfortunately, it failed to do so and it remains as a document where the diagnosis and prescription both turned out to be wrong. It is quite surprising that the Parliamentary Standing Committee did not see a problem with the de-licensing approach in power sector, brought by the Electricity Act, 2003. One of the biggest reasons for the current stress in the power sector stems from the fact that dozens of private companies with no prior experience in this sector had tried to be part of the mad rush for grabbing a pie in power generation, which has eventually resulted in power plants lying idle due to absence of PPAs and poor demand for power*." Critics have noted that, "*When a body of the stature of Parliamentary Standing Committee takes a matter in its own hands to come up with recommendations to address the problems facing the power sector, it is naturally expected that the Committee would come out with some strong and concrete solutions, which would help in addressing the crisis. However, after going through the entire report, the lack of any tangible recommendations turns out to be an acute disappointment. The Committee could have been more critical in its approach*."

57 Sriram Balasubramanian, "*NPA Resolution: What can RBI Learn from China's Strategy Against Bad Loans*", LIVE MINT, May 10, 2017, https://www.livemint.com/Opinion/THhRqYhQRV5ftaTs5aHp7H/NPA-resolution-What-RBI-can-learn-from-Chinas-strategy-aga.html, (visited on May 13, 2020).

58 *Supra* n. 16.

patterns etc. This leads to aggressive bidding by developers as there is over estimation of the demand of electricity leading to losses.[59]

Solution

In such a scenario, there must be a proper framework to overlook the activities of the electricity sector, especially in relation to ways adopted by the developers in order to outdo the profits.

Lack of Due-Diligence on the Part of Banks

The report by Government of India on the status of NPAs in Electricity sector is also because of the fault of the banks. The banks often fail to exercise prudence while determining the amount of loan and its considerations.[60]

Solution

There is a need to revisit the mechanism and the framework that allots, monitors, and supervises the loan given to the power plants. There is a need to introduce credit rating system in all commercial banks to ascertain the credit risk of the projects and allot the risk weight so that banks are diligent while granting loans to power plants that don't end up being categorised as NPAs.[61]

Classification of Assets as NPAs

Currently, if there is a delay in the fulfilment of the obligation or the debt even by a minor margin of let's say, a day, it leads to the assets (in this case, the power project) is classified as 'de-rated' as per Income Recognition of Asset Classification norms of the Reserve Bank of India.[62] The bank charges penal interest as the rating goes down instead of supporting the asset which ultimately adds to the number of NPAs in electricity sector as it aggravates the situation rather than making it economically viable.[63]

Solution

The Banks must adopt a more considerate approach and as recommended by the Government of India, in order for Banks to classify them as NPAs and take further action, it must consider and take into account all the factors that contributed in order to make that asset NPA and not just timely implementation of the projected plant and thereafter take steps and prevent it from becoming an NPA. There must be implementation of various correctional policies of various levels, like rectification, alternate recovery mechanism or restructuring keeping the entire situation in mind.[64] Alternatively, there must be personalised norms

---

59 *Supra* n. 16.

60 *Supra* n. 33.

61 *Supra* n. 33.

62 "*Prudential norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances*", RESERVE BANK OF INDIA, July 1, 2015, https://rbidocs.rbi.org.in/rdocs/notification/PDFs/101MC16B68A0EDCA9434CBC239741F5267329.PDF, (visited on November 10, 2020).

63 *Ibid.*

64 Federation of Indian Chambers of Commerce and Industry, "*Reviving Stressed Assets in Power Sector*", POWER AND COAL DEPARTMENT, GOVERNMENT

regarding the charging of interest keeping in mind the factors involved in making the asset an NPA. The focus must be to make sure that the asset is not places in that category.[65] The Committee set up by the Government for the study of NPA in electricity sector noted that,

> *The credit related issues are deregulated, and banks are required to take credit related decisions based on their internal assessment of the commercial viability of loan within their approved policies and relevant regulatory guidelines. However, Reserve Bank of India and Department of Banking Supervision check the implementation and enforcement of guidelines at various stages. Non-compliance of guidelines are communicated to the respective banks by the RBI with a view to make required provisions putting in place the requisite monitoring and control mechanism. The compliance of banks to these observations are tracked through monitoring action plan/risk mitigation plan. Banks' internal audit, concurrent audit and statutory audit verify the instructions on income recognition, classification and provisioning norms as laid down by the RBI.*[66]

It further noted that,

> *Sufficient checks and balances have been introduced with regard to the lending by the banks. Despite this provision, it is felt that due prudence has not been observed by the banks while considering the loan. Therefore, the process and stages of granting a loan along with the criteria for loan grant needs a revisit. A realistic and comprehensive approach should be taken keeping in view of the vital factors necessary for the exercise. The Committee, therefore, recommend that the process of grant of loan, supervisory mechanism and its subsequent monitoring should be given a relook to make it more realistic and productive.*[67]

Strategic Debt Restructuring

After an asset or a project has been labelled and classified as NPA, there are a serious of correctional or remedial measures that are perused like that of Strategic Debt Restructuring (SDR) wherein the on account of change of ownership, there is restructuring of accounts.[68] This method is resorted to when the company which has borrowed the loan is unable to pay back owing to

---

OF INDIA, http://ficci.in/spdocument/23139/Report_Reviving-Stressed-Assets-in-Power-Sector-ficci.pdf, (visited on October 9, 2020).

65 *Ibid.*

66 *Supra* n. 16.

67 *Supra* n. 16.

68 "*Strategic Debt Restructuring Scheme*", RESERVE BANK OF INDIA, June 8, 2015, https://rbidocs.rbi.org.in/rdocs/notification/PDFs/SDRS62783F81DA523634E0D8AF43D088360A754.PDF, (visited on January 12, 2020).

inefficiency in operation or management. Even though it looks effective, it is not an effective solution to the NPA problem.[69]

Solution

To make the process efficient with respect to NPA issue, there must be change in the manner in which operation and the management of the plant is conducted. Any deviation from the operation and management must only be considered only after it is proved that the plant has been classified as stressed because of operational inefficiency.

Availability of Coal

The availability of coal is again a critical factor that determines the volume of NPAs. The coal allocation is presently done under the SHAKTI[70] allocation scheme which is an auction-based allocation. In order to be eligible for such allocation, there must be a recommendation by the Ministry of Power in the form of Letters of Assurances (LOAs). It is noted by the Committee set up for studying the study of NPAs in electricity in India, that out of the 34 stressed assets, there has been delay in the availability of the coal to the potential promoters, despite the allocation process issues, the Letters of Assurances were not issued after three months.[71]

Solution

The Coal India Limited must play a key role in this aspect. It must be the responsibility of Coal India that the promoter or potential player must be obligated to make sure that the coal is made available to them in a timely manner. There must be availability of the coal to these plants to run at 85% efficiency to discourage the generation of stressed assets. Further, the plants must be allowed to run on at least 15-20% of the imported coal if the plants can remain economically stable even after such import but primarily must be dependent on local coal.[72]

National Electricity Policy

There is an urgent requirement for balanced development in electricity sector. There has been excessive attention on the aspect of generation activities and the delicensing of the generation sector but the activities and the issues relating to regulatory challenges, heavy clearances, land resources, availability of coal, inefficient plants etc. have been ignored. The Electricity Policy must be revamped to include all these aspects and therefore must be balanced and inclusive. The Committee note that the Banking Regulation Act 1949[73] empowers RBI to issue directions to banking companies regarding conduct of

69 *Supra* n. 1.

70 *Supra* n. 64.

71 Pramod Deo, "*NPA Burden on Power Sector*", DNA INDIA, November 17, 2018, https://www.dnaindia.com/analysis/column-npa-burden-on-power-sector-2686482, (visited on December 10, 2020).

72 *Supra* n. 60.

73 Section 35A of the Banking Regulation Act 1949.

their affair. From time to time, RBI also revises its guidelines keeping in view the prevailing macro-economic situation, systematic risk, and an assessment of the health of the banking system.

These recommendations along with other series of regulatory measures must be observed in order to improve the state of NPAs in the electricity sector so that the enormous economic value of the sector can be utilised to its full potential.

***

GAMUT OF FREEDOM OF EXPRESSION *VIS-À-VIS* PALISADE OF CENSORSHIP LAWS IN INDIA: A CONTEMPORARY PERSPECTIVE

Sonia B Nagarale[♣]

Abstract

In the contemporary era, growth of media and entertainment industry can be seen at national as well as global level and it operates in different ways to control, motivate and provide the information to people. There are various mediums of distribution of content through media outlets throughout the world. There is a constant need to control the content over media especially through Legislations, Regulations and Judicial Institutions. In Indian context, the constitutional mandate coupled with various laws are available to control the content over all types of media including digital platform. The Constitution of India guarantees to all its citizens fundamental right to freedom of speech and expression with reasonable limitations applicable to media. Censorship over media by law is not a new concept for India. Therefore, legal control over the media via censorship is a primary authority which regulates various types of entertainment and media channels. Additionally, the laws governing censorship in India extend to penalties provided under sedition, defamation, cyber law, etc. The paper elaborates on the concept of censorship, restraint under the Constitution of India, a dysfunctional criminal justice system, lack of clarity in laws and various statutory provisions in India with special reference to existing gaps and necessary amendments for effective mechanism for censorship laws in India.

Keyword: Media, Censorship Laws, Freedom of Speech and Expression, Regulatory mechanism, Digital Platform.

Introduction

> *Freedom after the speech- that is really what freedom of speech is all about. You are allowed to speak, speak as much as you like, but there is a fellow waiting there to nab you and out you in so you can't speak again.*
>
> *Fali Nariman*[1]

The visionaries who have made prophecies about the Information Age[2] and the 21st century had hardly ever realised the precise magnitude of carriers of

♣ Assistant Professor, Department of Law, Savitribai Phule Pune University, Pune, e-mail: s.nagarale@unipune.ac.in.

1 Randeep Choudhary, "*On World Press Freedom Day, A Look at What Indian Journalists Have to Deal With*", THE PRINT, May 3, 2019, https://theprint.in/features/on-world-Press-freedom-day-a-look-at-what-indian-journalists-have-to-deal-with/230621/?amp, (visited on January 1, 2021).

such information, *viz*. media. Perhaps, for the human beings this journey of 'Stone Age to Information age' was never planned, nevertheless information age brought with itself media age. However, media age due to its unbridled and omnipresent character attracted the stoning upon themselves. Day-by-day incidences of attacks on media houses and ever-raging public opinion against media and reporting are becoming 'new-normal' of today's time. Thus, it will not be gainsaying to summarise the whole evolution of mankind from Stone Age to Stone Age *via* media. For some, this might appear as euphemism which tends to take the colour of pessimism, but contemporary world can no longer spare itself from the stare of media.

The euphoric celebrations of the information and technology era might have overshadowed the gigantic challenges of media for certain period; however, the challenges are worth noticing. In contemporary era the growth of media and entertainment industry can be seen at national as well as global level and it operates in different ways to control, motivate and provide the information to the people.

The transition of electronic media to digital media has generated novel forms of mediums for distribution of infotainment *viz*. online platforms, social media, Over-the-top (hereinafter referred as OTT)[3], etc., resulting in the media industry being dictated by the economic practices. Thus, the exponential growth of the digital media has also raised plethora of concerns for regulation traversing the traditional boundaries of age-appropriate, illegal content, fake news, children's online safety as well as privacy paradox extending to establishing the liability of intermediaries.

Additionally, one can observe the importance of media not only as a democratic institution, the fourth pillar, but recently with the rise of social media influencers, the impact on the information provided to the society promotes pluralism by giving the effective, enforceable right to utter, know and argue as a fundamental freedom of speech and expression. Strangely, media has become a dual weapon which acts as a sword while attacking on someone, at the same time plays the role of armor and protects its own unbridled attacks on someone's character. As soon as this characteristic of media was identified, the endeavors of fencing were started. It was widely accepted that, no freedom can be absolute, even media cannot exercise its freedom of speech in uncontrolled manner. There is a constant need to control the content over media especially through Legislations and Regulations. In Indian context, in consonance with constitutional mandate, various laws are available to control the content over

---

2 Also known as the Computer Age, Digital Age, or New Media Age is a historical period that began in the mid-20th century, characterised by a rapid epochal shift from the traditional industry established by the Industrial Revolution to an economy primarily based upon information technology

3 "*Over-The-Top*", The term was first coined by telecoms industry analyst Dean Bubley who first published a report on it in February 2012, https://en.wikipedia.org/wiki/Telco-OTT#cite_note-5, (visited on January 3, 2021).

media of all types. However now, it has become a challenge for State to control the content available over media in digitised form.

Constitutional Mandate

The Constitution of India guarantees to all its citizens fundamental right to freedom of speech and expression under Article 19(1)(a). However, this fundamental right is not absolute, and it can be restricted by State on grounds mentioned under Article 19(2).[4] Unlike Constitution of United States of America, freedom of Press is not expressly mentioned in the Constitution of India, rather the scope of Article 19(1)(a) encapsulates freedom of Press as well. While explaining, Dr. B.R. Ambedkar, Chairman of the Constituent Assembly's Drafting Committee argued that:

> *The Press has no special rights which aren't to be given or which aren't to be exercised by the citizens in his individual capacity. The editors of the Press or the manager are all citizens and therefore when they choose to write in newspapers, they are merely exercising right to expression and in my judgement therefore no special mention is necessary of the freedom of Press at all*.[5]

This observation of the makers of the Constitution of India clearly shows the spirit of equality garnered under constitutional mandate. Therefore, even on the parameter of the freedom of speech and expression, the aforesaid analysis by Dr. Ambedkar is omnipotent and ought not to be overlooked. Moreover, the reasonable limitations on the exercise of the fundamental right available to media are applicable on the grounds mentioned under Article 19(2).[6] These restrictions pave way for the censorship of media.

Concept of Censorship and Legislative Measures

Censorship is a mode to control media content. The term 'Censorship' is derived from the word 'Censor' which is derived from Latin word *Censere* which literally means 'to assess'.[7] In the context of media censorship, it means the suppression of speech or deletion of communicative materials which may be considered objectionable, harmful or sensitive as determined by a censoring authority.

---

4 Article 19(2) of the Constitution of India states that: "*Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the 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*".

5 B. Shiva Rao (ed.), THE FRAMING OF INDIA'S CONSTITUTION: A STUDY, 2nd ed. Vol. 5, 2010, p. 203.

6 *Ibid*, p. 301.

7 "*Censorship*", MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/censorship, (visited on January 3, 2021).

Censorship over media by law is not a new concept for India. Even in the pre-Constitution era, British government brought many laws to censor content available in print media which includes Press and Books. The Regulation of 1799 was enacted by British Parliament to put severe censorship on all newspapers. Press and Registration of Books Act 1867 came into existence to regulate the operation of printing Presses, newspapers and their registration in India. The aim of Vernacular Press Act 1878 was to curtail the freedom of Indian language Press. The Newspaper (Incitement to Offences) Act 1908 empowered local authorities to confiscate newspapers, which published objectionable materials serving as incitement to violence. Official Secrets Act 1923 compelled media to disclose their sources. And finally, Indian Press (Emergency Powers) Act 1931 gave powers to provincial Governments to suppress Civil Disobedience Movement. It can be stated here that the aim of British government to censor print media was to suppress freedom movement.

This backdrop of censorship was constructively utilised by the makers of the Constitution of India while keeping press on the equal pedestal to that of an individual. However, whilst re-assessing the roots of censorship, it is noteworthy that the era of emergency in India stalled the ambit of media and government. One of the earliest repressive measures adopted by the Government of India following the declaration of emergency in 1975 on the ground of Internal Disturbance was a censorship order,[8] under the Defense of India Rules 1971.[9] Nevertheless, as a matter of tracing the viability of censorship, the judicial approach is imperative in this regard. The Supreme Court of India in *Sakal Papers v. Union of India*,[10] whilst scrutinising whether the scheme of censorship should be made applicable to freedom of press held that there should be balance between freedoms guaranteed under Article 19(1)(a) and restrictions under Article 19(2) while putting censorship on Press. All the grounds mentioned under Article 19(2) are applicable to Press for its censorship. In *Brij Bhushan v. State of Delhi*,[11] Section 7(i)(c) of East Punjab Safety Act 1949 authorised restriction on freedom of Press on the ground that it is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order. When State Government of Punjab imposed pre-censorship on an English language weekly in the name of public safety and order, Supreme Court struck down above mentioned Act on the ground that pre-censorship was an unjustifiable restriction on the liberty of the Press and held that Section 7(i)(c) could not fall within the purview of Article 19(2). In *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P) Ltd.*,[12] wherein the debenture issue of Reliance Petrochemicals Ltd. was sub-judice in nature, by applying 'clear and present danger' test the

8 "*Central Censorship Order*", S.O. 275(E), June 26, 1975, https://egazette.nic.in/WriteReadData/1975/O-1210-1975-0049-54061.pdf, (visited on February 16, 2021).

9 Madhavi Goradia Diwan, FACETS OF MEDIA LAW, 2nd ed. 2015, p. 64.

10 AIR 1962 SC 305.

11 AIR 1950 SC 129.

12 AIR 1989 SC 190.

Supreme Court put injunction on Press from publishing any article, comment, report or editorial, questioning the legality of proposed debenture issue. Whereas in *Sahara India Real Estate Corporation Ltd. v. SEBI*,[13] the Supreme Court suggested that prior-restraint or pre-censorship was recognised and permissible even in relation to news-publication. Thus, judicial approach has always promoted the harmonious equilibrium while protecting media freedom against the censorship.

There are some statutory provisions apart from Constitution of India talking about censorship of media. Section 95A of Criminal Procedure Code 1973 empowers State Government to forfeit Book or Newspaper.[14]

Criminal Justice System and Censorship

The Indian Penal Code 1860 (hereinafter referred as IPC) prescribes some offences which upkeep the unbridled and irresponsible depiction by media, as follows:

(i) Section 124-A[15] of IPC makes Sedition as an offence. Having the backdrop of enactment through British Government, this provision still restrains anti-government activities. However, the pellucid judicial insights clarify that, unless the expressions of disaffection or disloyalty to the government were accompanied by incitement to violence or a tendency to disturb public peace, the offence of sedition could not be made out.[16]

(ii) Section 292 of IPC states the offence of Obscenity which is the restriction on the right to free speech in the interest of decency and morality.[17] Supreme Court defined Obscenity as "*the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive*".[18]

13 AIR 2012 SC 3829.

14 Section 95 of the Criminal Procedure Code 1973 states that: "*Power to declare certain publications forfeited and to issue search warrants for the same. Where- (a) any newspaper, or book, or (b) any document, wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code(45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be*".

15 Section124A of the Indian Penal Code 1860.

16 *Kedar Nath Singh v. State of Bihar* AIR 1962 SC 955.

17 Section 292 of the Indian Penal Code 1860.

18 *Ranjit Udeshi v. State of Maharashtra* AIR 1965 SC 881.

(iii) Defamation is an injury to a person's reputation and constitutes criminal offence under Section 499 of IPC.[19] If the content published by media attracts Section 499 of IPC, then that content can be censored. Defamation is prescribed as restriction under Article 19(2) also. Online defamation is the result of advent of social media.[20] Section 66A of Information Technology Act 2000 criminalised sending of offensive messages through a computer or other communication devices. In November 2012, two young women were booked for making certain utterances on Facebook on Bandh following death of a prominent political leader in Maharashtra under section 66A of Information Technology Act 2000. However, this draconian character of Section 66A of the Information and Technology Act 2000 was challenged in *Shreya Singhal v. Union of India*,[21] and finally the Apex Court scrapped the impugned provision with harsh remarks on the loose drafting and excessively general character of the provision.

Above-mentioned censorship laws with the base of Article 19(2) are applicable to print as well as electronic media. But taking into consideration increased effect of Cinema and Television, separate statutory laws have been formed for their censorship.

The Cinematograph Act 1952 regulates cinema in India. Central Board of Film Certification categorise films into A, A/U, U and S certification in accordance with their suitability for exhibition with or without excisions.[22] The justification for this censorship is that the social interest of the people overrides individual freedom.[23] With times, certain tests are evolved by judiciary to apply censorship on Cinema. Some important of them are sex and nudity are not always obscene,[24] the aversion defense test,[25] contemporary and national standards test, opinion of experts, etc.

Cinema and Censorship

In India, censorship by prior restraint is justified under the Cinematograph Act 1952.[26] Such prior restraint must be reasonable and permissible in law. For example, in case relating to Black Friday movie,[27] the High Court of Bombay

19 Section 499 of the Indian Penal Code 1860 states that: "*Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person*".

20 *Supra* n. 9, p. 157.

21 AIR 2015 SC 1523.

22 Section 5 of the Cinematograph Act 1952.

23 *K.A. Abbas v. Union of India* AIR 1971 SC 481.

24 *Maqbool Fida Hussain v. Raj Kumar Pandey* 2008 Cri. LJ 4107 (Del.).

25 *Bobby Art International v. Om Pal Singh Hoon* AIR 1996 SC 1846.

26 *Supra* n. 9, p. 290.

27 *Mushtaq Moosa Tarani v. Govt. of India* 2005 SCC OnLine Bom 385.

postponed the release of the film based on 1993 Bombay blast till TADA[28] Court delivered its verdict. This pre-censorship was upheld by Supreme Court. In recent times people have observed censorship controversies with regard to films like Udta Punjab,[29] Lipstick under my Burkha,[30] etc. One more trend regarding Cinema censorship is the concept of Extra-Constitutional Censorship. Sometimes after the clearance and certification from CBFC, State Government does not allow screening of film yielding to the fringe or fundamentalist groups. Such Extra-Constitutional Censorship is subversive to the rule of law.[31] Some films which went through such Extra-Constitutional Censorship are Aarakshan, Vishwaroopam, Padmavat, etc.

However, with the changing times and mammoth evolution in the technological forefront, the nature of information and entertainment industry saw a radical change. As a mainstream channel of entertainment, theater and cinema halls started losing its prominence so as their public nature. The cinema which explicitly meant public means became a matter of small screen of personal devices. Even the television which meant to be a common device of entertainment in a household has been dethroned by the personal smart phones. This unprecedented evolution of media redefined the notions of entertainment, information and the privacy itself.

Television Broadcasting, Information Technology *vis-à-vis* Censorship

In a common parlance, the arena of Television broadcasting in India has been largely governed under the Cable Television Networks (Regulation) Act 1995. This enactment thoroughly deals with TV Content and thereby warranted the Program Code and Advertising Code in respect of programme and advertisements transmitted by cable operators.[32] These both the Codes have stemmed though Article 19(2) of the Constitution of India. Thus, on one hand the aforesaid enactment is a sole enactment which comprehensively deals with the nation's television industry and its sanctity. However, the changing contours of media in the wake of numerous OTT platforms the public viewing of media has marginally shrunk into private and individual viewing. Moreover, the 'private subscription' to access the OTT platforms once again underlined that, 'what to see' is a matter of individual choice. This sizably private and individualist character became USP[33] of media in a lesser time.

---

28 Terrorist and Disruptive Activities (Prevention) Act 1987.

29 *Phantom Films Pvt. Ltd. v. The Central Board of Film Certification* 2016 SCC OnLine Bom 3862.

30 *Sudhirbhai Mishra v. CBFC*, F.No. 2/4/2017-FCAT, https://mib.gov.in/sites/default/files/FCAT%20Order%20Lipstick%20Under%20My%20Burkha_0.pdf, (visited on February 25, 2021).

31 *Supra* n. 9, p. 294.

32 Sections 5 and 6 of the Cable Television Networks (Regulation) Act 1995.

33 "*Unique Selling Preposition, Definition of 'Unique Selling Proposition'*", THE ECONOMIC TIMES, https://economictimes.indiatimes.com/definition/unique-selling-

Thus, difficulty in censorship of online content is the result of advent of technology. Social Media has increased this risk. The legal provision to regulate Online Content in India emanates from Information Technology Act 2000 Sections 67A, 67B, 67C which prescribes penalty and imprisonment for publishing or transmitting obscene material, sexually explicit material and material depicting children in sexually explicit acts. However, the above mentioned, substantive provisions are focused on content without providing for right of access to content, primarily regulating the infotainment service provider- intermediaries based on contractual relationship between the platform and the consumer rather being technologically neutral. Apart from these provisions, there is lack of regulatory system for censorship of online content.

Conclusion

The constitutional notion of freedom of speech and expression as a source for the implicit freedom of press mandates analogical references to the exercise of censorship of media, by the authorities, especially to subside the opposing views, existing conceptions, and institutions at large. According to the World Press Freedom Index, 2020 published by Reporters without Borders India ranked 142 out of 180 countries wherein a number of factors like media independence, protection of journalists, protection of sources, religious intolerance, online freedoms have been utilized to demonstrate the extensive power and use of censorship on media. The censorship power yielded by the authorities extends to internet which facilitates circulating news, information with demand for net neutrality and unblocking of websites. the challenge extends to bring digital platforms within the purview of censorship laws since the increasing number of viewers and its corresponding impact on revenue for owners and telecom operators. The Limitations of existing Censorship laws with regard to Netflix, Hotstar is dependent on Platform to Business practices (hereinafter referred as P2B) and Platform to Consumer (hereinafter referred as P2C) relations. The contemporary digital media market is dominated by platforms namely, Google, Amazon, Apple and Facebook and the streaming services offered. However, the legal issues circumscribe the operative sphere as including first party request for information, obtaining first party responses, third party rights and data portability. The domain of P2B and P2C relations also includes scrutinising the business practices, anti-competitive market practices, predatory pricing, exclusionary conduct, 'Gate-Keeping'. The gate-keeper position facilitates entrenchment of market power-dynamics expanding the dominance over the potential competitions and end-users or viewers. These abusive measures adversely affect the citizens fundamental right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India since the fundamental right is mutually inclusive of right to make informed choices emanating from right to information and constitutional censorship. Additionally, the legal framework stipulates different liabilities, duties based on production

proposition#:~:text=Definition%20of%20'Unique%20Selling%20Proposition,competing%20brands%20in%20the%20market, (visited on January 5, 2021).

and distribution of content *via* films, entertainment and news television channels and newspaper.

In 18th century, the Montesquieu coined *Trias Politica* or 'separation of power' doctrine for the smooth functioning of three organs of the state, *viz.*, legislature, executive and judiciary, respectively. However, India whilst adopting this separation of power within its constitutional mandate and polity, preferred the blend of the 'checks and balance'. Thus, unlike United States of America, India does not provide for the watertight compartment amongst the three estates of the State. Moreover, this check and balance is considered as the pillar of the democracy in India. Now, by and large, when the new 'fourth estate' i.e., media, has gained its position in the democratic set up of India, it becomes imperative to form a strong convergence of media into the loop of checks and balance mechanism. When the first three estates are embraced with each other, it is worth warranting that, media being fourth estate should join the club with adequate checks and balances. Indeed, the freedom of media is considered as a sign of healthy democracy, and the excessive restrictions on media are unwarranted. However, the unbridled horse of freedom of media should also be adequately fenced by appropriate censorship. To that effect, there is a need to strike a balance between creative freedom and general interest of the public at large.

***

FALLACIES OF TRADE SECRET PROTECTION IN INDIA: THE WAY FORWARD

Pallavi Tiwari[♣]

Abstract

Trade Secret is a concept to which we come across every day. It is essentially the special ingredient used in by the businesses such as McDonald's for its burger or the recipe to make KFC chicken, which if disclosed to the competitors in the market would cause immense loss to the holders of these special methods of production. Thus, companies make every effort to protect the trade secret through which it enjoys its goodwill in the market. India does not have a specific legal provision for the protection of trade secret and is dealing it with the help of common law doctrines and judicial pronouncements. On the other hand, nations like United States and United Kingdom have been pragmatic in recognising trade secret laws and developed a separate statute, which is appropriate in the contemporary era to deal with the issues relating to theft of trade secret. The author analyses the existing trade secret regulatory framework in India. Further, it examines the best practices of the trade secret protection in United Kingdom and United States. Finally, it highlights the necessary measures for ensuring improved protection for trade secret and confidential information of the companies, by developing an effective trade secret law in India.

Keywords: Trade Secret, Confidential Information, Undisclosed Information, Intellectual Property Rights.

Introduction

Trade secret can be any formula, any information, any set of rules to perform a task or even the process to make a dish. The most common example of trade secret is the case of Coca-Cola which has been protecting its trade secret of how the drink is made since several years. In *American Express Bank Ltd. v. Ms. Priya Puri*,[1] trade secret was defined as "*... formulae, technical know-how or a peculiar mode or method of business adopted by an employer which is unknown to others*".

Trade secret can include anything, but the most precise definition is given by the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred as TRIPs) under the title 'Undisclosed Information' and there are three essential factors to decide whether something falls under trade secret or not? The first factor is of secrecy i.e., the information should be secret and not in the public domain or known to people who have gained the

♣ Assistant Professor of Law, Mangalayatan University, Jabalpur, e-mail: pallavitiwari75@gmail.com.

1 *American Express Bank Ltd. v. Ms. Priya Puri* 2006 SCC OnLine Del 638.

information very easily. Secondly, it should give the owner some commercial advantage over the competitors and thirdly, the trade secret holders should have taken some reasonable efforts to protect the information.[2]

The world is making a progress in the field of trade secret protection, as recently, United Kingdom (hereinafter referred as UK) developed a legislation for the protection against trade secret violations. Similarly, United States (hereinafter referred as US) has remarkably formulated trade secret related legislations in the past and deals with it very earnestly. UK earlier relied on doctrines and mostly judicial pronouncements to protect trade secrets. On the other hand, US is one of the most advanced nations with respect to trade as well as protection of trade secrets and recently they have adopted a new version of trade secret legislation known as Defend Trade Secrets Act 2016.

Till now, India does not have legislation related to trade secret protection, though in the past the legislators have tried to cover it under numerous legislations. In 2008, India saw a light with respect to protection of confidential information and know-how by the National Innovation Act 2008, but it was unsuccessful. In the past, India has relied on legal mechanisms governing contracts, copyrights, and unfair competition practices to deal with the issues of trade secret violation. Therefore, due to the absence of dedicated legal mechanism, courts have faced various issues to formulate the subject matter of trade secret leading to ambiguous decisions in relation to determination of a definition of trade secret. As per the Trade Secrets Protection Index (hereinafter referred as TSPI), India has ranked exceptionally low, because as per the index, the countries which do not have a dedicated legislation or remedies for trade secret violation, are recognised as unpretentious in the progress of their trade related activities.[3]

Therefore, the present study deals with the existing legal framework relating to trade secret protection in India and the judicial pronouncements for determining the subject matter of trade secret in India along with the newly developed legislative framework in US and UK. Further, the paper analyses the existing legal mechanism in the light of the best practices adopted by US and UK. Finally, the author suggests few legal provisions that should be considered while developing the law for the protection of trade secret in India.

Trade Secret Protection in India

During the discussions under the TRIPs with respect to providing trade secret and confidential information the status of an Intellectual Property Right, US argued that it is important to protect trade secret and confidential information. However, India was against this opinion as it regarded trade secret

2 Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1995.

3 Mark Schultz, "*Enhancing Trade Secret Protection in India*", ISBINSIGHT, https://isbinsight.isb.edu/enhancing-trade-secret-protection-in-india/, (visited on June 22, 2020).

only as a property and not as 'Intellectual Property'.[4] During the negotiations with TRIPs, India relied on contractual obligations to protect trade secret and expressed that a separate Intellectual Property regime was unnecessary and unwarranted.[5]

In 2004, the Satwant Reddy Committee[6] was constituted to provide recommendations on 'data exclusivity' majorly related to agro-chemicals and pharmaceuticals, but it failed to produce the results due to intense opposition.[7] Further, a discussion triggered about the importance of trade secrets under the National Intellectual Property Rights Policy 2016.[8] It aimed to develop a trade secret protection policy in India to strengthen the trading activities. The US-India Trade Policy Forum, which met at New Delhi in October 2016, also discussed the possibility of a trade secret regime in India and stressed about its serious necessity.[9] Although, India lacks in a dedicated legislation for the protection of trade secrets but, few steps have been taken in the past to develop the feasible environment for effective protection of trade secrets in India.

The National Innovation Act 2008

It is the first legislation introduced by the Government of India dealing with the aspects of confidential information and know-how. Chapter-VI of the Act contains provisions relating to protection of confidential information and its infringement along with remedies thereof. It also mentions about the duty of third parties who receive information under trust i.e., Section 8(3)[10] which provides that "*parties may nevertheless enforce any rights in Confidential Information arising in equity or as a result of circumstances imparting the*

4 Eric Wang, "*Guide to Going Global: IPT Full Handbook*", DLA PIPER, https://www.dlapiperintelligence.com/goingglobal/corporate/handbook.pdf (visited on January 28, 2020).

5 "*Standards and Principles Concerning the Availability Scope and Use of Trade-Related Intellectual Property Rights: Communication from India*", MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND, July 10, 1989, https://www.wto.org/gatt_docs/English/SULPDF/92070115.pdf, (visited on January 29, 2020).

6 Satwant Reddy and Gurdial Singh Sandhu, "*Report on Steps to be Taken by Government of India in the Context of Data Protection Provisions of Article 39.3 of Trips Agreement*", May 31, 2007, https://chemicalsnic.in/sites/default/files/DPBooklet.pdf, (visited on June 10, 2020).

7 Elizabeth A. Rowe and Sharon K. Sandeen, TRADE SECRECY AND INTERNATIONAL TRANSACTIONS, 1st ed. 2015.

8 "*National Intellectual Property Rights Policy*", DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE, May 12, 2016, https://dipp.gov.in/sites/default/files/national-IPR-Policy2016-14October2020.pdf, (visited on March 10, 2020).

9 "*India's Protection to the Secrets of Trade*", KHURANA AND KHURANA, August 26, 2017, http://www.khuranaandkhurana.com/2017/08/26/indias-protection-to-secrets-of-trade/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original, (visited on April 10, 2020).

10 Section 8(3) of the National Innovation Act 2008.

obligation of confidence".[11] It also has important provisions related to maintenance of confidentiality of information by Courts by prohibiting the release of the confidential information in the judgements. It also provided the obligation for the parties to protect the disclosure of confidential information.[12]

Apart from this, the National Innovation Act 2008 had many other shortcomings. Firstly, under Section 11 of the Act,[13] there are exceptions under which the trade secret holder had to disclose the information in the public interest and thereby defying the objectivity of the legislation. Further, public interest has not been defined in the Act and thereby leaving the power with government to decide the circumstances for disclosure of trade secret to the public. Furthermore, the Act does not provide the definition of 'trade secrets', although confidential information is defined as per TRIPS.[14] Further, the definition of innovation is not clear as it only talks about 'process'.[15] Similarly, under Section 8(2) of the Act the government has been given immense power to interfere with the rights of the trade secret holder and has control over the information as well as its storage.[16] Section 14 debars any act done under good faith from the purview of infringement caused to trade secret holder.[17] Thus, there are high chances that such a good-faith exception can be misused by the infringer and the trade secret holder is left with no remedy.[18]

India majorly relies on contract law and the doctrine of equitable duty of trust and confidence as well as other related doctrines to deal with trade secret matters. This pattern is remarkably similar to the English law followed in UK till they have recently adopted a legislation for the protection of trade secret. India has three different ways to deal with trade secret violation:

(i) In case of absence of contract between parties companies have relied on copyright, as Section 16 of the Act[19] talks about duty of confidence whether or not copyright can be given to a particular subject matter.
(ii) The second way is to deal with the help of the contract laws where Section 27 of the Act comes into play.

---

11 Faizanur Rahman, "*Trade Secrets Law and Innovation Policy in India*", MANUPATRA, http://docs.manupatra.in/newsline/articles/Upload/E8134C85-E745-414C-91AA-3E05D6B95581.1-H__civil.pdf, pp. 119-131, (visited on May 10, 2020).

12 Ravinder Chhaba and Shyam Sunder Chhaba, "*Inadequacy of the Trade Secret's Protection Laws in India and the Legal Regime Existing in the U.S.*", MANUPATRA, http://www.manupatra.com/roundup/369/Articles/Inadequacy.pdf, (visited on May 15, 2020).

13 Section 11 of the National Innovation Act 2008.

14 Section 2(3) of the National Innovation Act 2008.

15 Section 1(4) of the National Innovation Act 2008.

16 Section 8 of the National Innovation Act 2008.

17 Section 14 of the National Innovation Act 2008.

18 Vandana Pai and Ramya Seetharaman, "*Legal Protection of Trade Secrets*", (2004) 1 SCC (Jour) 22.

19 Section 16 of the Copyright Act 1957.

(iii) Sometimes, criminal law has also been referred to in cases of trade secret violation.

Inter-Section of Indian Contract Act 1872 with Trade Secret

These are the most common type of litigation in trade secret cases, as the issues are generally between trade secret owner who is the employer, and the employee has a chance to get to know that trade secret wherein he/she reveal it in future to the other competitors in the market. Therefore, the employers develop non-compete clauses when they enter into an agreement with the employees. Through non-compete clause employer makes sure that the employee shall not work with the competitor in the same relevant market during specified period and shall not disclose the trade secret to the competitor. Although, a lot of factors needs to be considered in relation to possession of the information while leaving the company and whether the employee has been forbidden to work with some competitor merely on the basis of false apprehension in the mind of the employer. All these issues have been considered by courts while deciding whether a matter must be protected as trade secret and whether the employee should be subjected to the restrictions. If restriction for employee is considered, Section 27 of the Indian Contract Act 1872 has an obvious attraction wherein it clearly provides that no contract can be enforced if it puts a restriction on the practice of trade of any person. It also comes with an exception which states that:

> *Saving of agreement not to carry on business of which goodwill is sold. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.*[20]

Therefore, an employer can restrict an employee from carrying on a similar business within his relevant market where he is operating, but the reasonability must be decided by the court. Thus, repeatedly courts have interfered to decide whether the employees can be restricted or not or whether the conditions applied by employer are reasonable or not.

The courts have also relied on the fact that, if the employer is restricting an employee to take up similar work or do similar business, because there is a risk of an information being disclosed, it is very important to determine whether the information is actually confidential or not and whether the employer has taken sufficient steps to protect it or it easily came to the knowledge of the employee while performing his work.[21] This criteria of reasonable steps taken to protect the information has also been considered under TRIPS, the US trade secret

20 Section 27 of the Indian Contract Act 1872.

21 *Supra* n. 12.

legislations and the UK laws on trade secret.[22] Further, a distinction between secret information and ordinary information was made in *Ambience India Pvt. Ltd. case*,[23] wherein it was observed that:

> *…trade secret and confidential information which the employee has acquired in the course of his employment should not reach others in the interest of the employer. However, routine day-to-day affairs of the employer which are in the knowledge of many and are commonly known to others cannot be called trade secret.*[24]

Thus, it is a general perception of courts that any covenant in restraint of trade is violative of Section 27 of the Act but under *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.*,[25] the stand taken by the court was different as the observation made was pro-employer and it was stated that even if the employee resigns the covenant to stop him from taking up work in competitor's business was valid and that the information was not general in nature but a secretive one and needed to be protected. However, in cases of trade secret the opinions of judges have been diverse. In *VFS Global Services Pvt. Ltd. v Mr. Suprit Roy*,[26] the High Court of Bombay was of the view that "*limitations on the use of trade secrets during or after termination of employment do not amount to a 'restraint on trade' under section 27 of the Indian Contract Act and are thus valid in such circumstances*".[27] In a similar case the Gujarat High Court with respect to trade secret has laid down that the negative covenants extended beyond the employment period are void and against Section 27 of the Indian Contract Act 1872.[28] In *Krishan Murugai v. Superintendence Co. of India Pvt. Ltd.*,[29] it was observed that employers can apply negative covenants on employee only during employment but not after it has ended, as it would restrict his right to work.

Hence, these trends in judicial pronouncements makes it clear that there is no uniform law with respect to protection of trade secrets of employers as well as there is no certainty regarding the reasonability that is provided under Section 27 of the Indian Contract Act 1872 and it has to be decided by courts which is highly discretionary. Further, whatsoever non-compete clauses are laid down by employers to protect their trade secrets from being disclosed by employees are generally struck down by Section 27 of the Indian Contract Act 1872. This

---

22 Richard Brait and Bruce Pollock, "*Confidentiality, Intellectual Property and Competitive Risk in the Employment Relationship*", THE CANADIAN BAR REVIEW, Vol. 83 No. 3, 2004, pp. 585-632.

23 *Ambiance India Pvt. Ltd. v. Shri Naveen Jain* (2005) 81 DRJ 538.

24 *Ibid*, p. 540.

25 *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.* AIR 1967 SC 1098.

26 *VFS Global Services Pvt. Ltd. v. Mr. Suprit Roy* (2008) 3 Mah LJ 266.

27 *Ibid*.

28 *Sandhya Organic Chemicals Pvt. Ltd. v. United Phosphorus Limited* AIR 1997 Guj 177.

29 *Superintendence Company of India (P) Ltd. v. Krishan Murgai* AIR 1980 SC 1717.

brings the remedies to trade secret violation to zero and it is highly unreliable and ambiguous in nature.

India has seen a lot of trade secret litigation be it the Coca-Cola case or the case of Jet Airways against its own employee where they restrained their employee to take up job in any other aviation company and to return all the documents, the employee held with him. The court was of the opinion that "*the plaintiff had altered the information as per their convenience and also it would cause irreparable loss to the employees to sit idle for all the time of the judgment and that there was no fault of the defendant as he had no option other than to take up a new job. Whereas when balance of convenience is seen the plaintiff would not suffer much harm and they had also not come to court clean. Thus, no injunction was granted to the plaintiff*".[30] This proves that court has most of the time been employee friendly in their approach and thus the requirement of a proper statute for trade secret protection is urgent to clearly define what shall constitute as trade secret violation and maintain a balance between the protection of the rights of employer and employee.

Copyright Law and Doctrine of Equitable Duty of Trust

Generally, the doctrine of equitable duty of confidence or trust was used in cases where there was no prior agreement between the trade secret holder and the person who disclosed the information. The first judgment involving the inter-section of equitable duty of trust and copyright law was the *John Richard Brady* judgment.[31] The plaintiff in this case was making a new product and was in a contract with the defendants but the patent was not given on the product. The plaintiff under the contract disclosed the details of the patent to the defendant and later it was revealed that the defendant had started manufacturing the similar product. Thus, the plaintiff sued them for copyright infringement and breach of equitable duty of trust as it was expected from the defendant to keep the information as secret. The court relied on the case of *Saltman Engineering*,[32] which is a landmark English Judgment in the area of trade secret and observed that the defendants had breached the equitable duty of trust and also observed copyright violation. The *Saltman Enginneering* case is a very landmark judgment, wherein it was observed that, "*but what makes it (the information) confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process*".[33] This was the first case where court observed that duty of confidence still exists even if there is no contract.

Another case which involved copyright law and the equitable duty of trust doctrine is the case of *Zee Telefilms Ltd and Film v. Sundial Communications*

30 *Jet Airways (I) Ltd. v. Mr. Jan Peter Ravi Karnik* 2000 SCC OnLine Bom 241.

31 *John Richard Brady v. Chemical Process Equipments* AIR 1987 Del. 372.

32 *Saltman Engineering Co v. Campbell Engineering Co*. (1963) 3 All E.R. 413.

33 Prashant Reddy T., "*The 'Other IP Right': Is It Time to Codify the Indian Law on Protection of Confidential Information?*", JOURNAL OF NATIONAL LAW UNIVERSITY DELHI, Vol. 5 No. 1, 2018, pp. 1-21.

Pvt. Ltd.[34] This is one of the precedent cases as it implies that even if there is an absence of a contract between the parties but still there can be a case of breach of trust.

Thus, copyright is one of the ways which has been used by companies to protect their secret information which can include client database, as in the case of *Burlington v. Rajnish Chibber*,[35] it was held that the copyright is for a limited term, eventually comes into the public domain and to be protected under copyright the work needs to pass the test of originality which is not the case for trade secret protection. Something may not be original but can be protected under trade secret if gives some commercial advantage to the secret holder. Also, copyright protects only the work *per se* and not the underlying information which can also be a secret and disclosure of which can lead to loss to a company.

Criminal Law and Protection of Trade Secret Information

As far as the Indian Penal Code 1860 is concerned, trade secret cases can be dealt under theft,[36] criminal misappropriations,[37] and criminal breach of trust.[38] Further, the Securities and Exchange Board of India (hereinafter SEBI) (Prohibition of Insider Trading) Regulations (1992) prohibit disclosure of information held by insiders or trust holders of a company.[39] Section 405 which deals with criminal breach of trust in intersection with cheating has been used by employers to protect their information when it apprehended by them that the ex-workers shall disclose the information to their competitors but later on this proceeding was quashed by the court, as courts consider just on the basis of apprehension involving criminal remedies is way too harsh over the employees.[40]

In *Hemal R. Shah v. State of Gujarat,* the employers had relied on Section 381 Indian Penal Code 1860 which deals with "*theft by a clerk or servant of property in possession of master*". The case involved the usage of client lists by ex-employee where the Gujarat High Court held that client lists are not confidential information and that such restraining clauses in employment contracts are not allowed in India and thus such a criminal punishment shall not be allowed. [41]

34 *ZEE Telefilms Ltd. v. Sundial Communications* 2003 (27) PTC 457 (BOM).
35 *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber* 1995 PTC (15) 278.
36 Section 378 of the Indian Penal Code 1860.
37 Section 403 of the Indian Penal Code 1860.
38 Section 405 of the Indian Penal Code 1860.
39 Regulation 3(1) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 2015.
40 *Pramod Son of Laxmikant Sisamkar and Uday Narayanrao Kirpekar v. Garware Plastics and Polyester Ltd* (1986) 3 Bom CR 411.
41 *Hemal R. Shah v. State of Gujarat* 2013 SCC OnLine Guj 2678.

The Information Technology Act 200 also provides for data protection under Sections 43A[42] and 72A.[43] But these provisions make it mandatory that the parties need to be bound in a contract. Some cases where IT Act has been used to protect important information are: Mphasis BPO Fraud case[44] which dealt with unauthorized use of computer resource and *Kumar v. Whiteley*,[45] on unlawful access and changes to the computer database.[46]

International Regulatory Framework for Trade Secret Protection

The international trade secret regime was started with the Roman Legislation by the concept of *Actio Servi Corrupti* where a third party might have coerced an ex-employee to reveal any trade secret. Other than this, TRIPs has also recognized trade secret but gives the name undisclosed information to it. There were other agreements before TRIPs which dealt with either trade secrets or undisclosed information.

North American Free Trade Agreement

This agreement dealt with Canada, United States and Mexico and the aim was to create a free market and remove trade barriers. It was the first agreement which talked about trade secrets. Article 1711[47] of the North American Free Trade Agreement (hereinafter referred as NAFTA) states that, "*A Party may require that to qualify for protection a trade secret must be evidenced in documents, electronic or magnetic means, optical discs, microfilms, films or other similar instruments*." As per this provision trade secret can be defined as, "*information which has secrecy has commercial value and reasonable steps have been taken to protect it*." But there were many limitations for trade secret

42 Section 43A of the Information Technology Act 2000 provides that: "*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*".

43 Section 72A of the Information Technology Act 2000 provides that: "*Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both*".

44 Abhay Vaidya, "*India's first BPO scam unraveled*", THE TIMES OF INDIA, April 23, 2005, https://timesofindia.indiatimes.com/home/sunday-times/deep-focus/indias-first-bpo-scam-unraveled/articleshow/1086438.cms, (visited on September 13, 2021).

45 *Kumar v. Whiteley* 119 (2005) DLT 596.

46 *Ibid*.

47 Article 1711 of the North American Free Trade Agreement 1994.

protection under NAFTA because of which it did not prove to be beneficial for a long time. One of such conditions was that it should be in a tangible form so anything which was commercially benefiting a company but was just in the mind of the owner could not be qualified as a trade secret. Other one was that the party causing misappropriation can only be held guilty if he knew that that his activity was illegal or was extremely negligent to know the same. [48]

Paris Convention and Trade Secret Protection

This convention became the basis for trade secret protection under TRIPs. It deals with unfair competition under Article 10bis[49] and Article 1[50] mentions about industrial property and while discussing it expressly it provides for confidential information as well. [51]

Agreement on Trade Related Aspects of Intellectual Property Rights

As NAFTA did not prove to be sufficient to protect trade secret TRIPs had to come into picture. It was signed in 1994 following the Uruguay Rounds of Negotiation. It defines trade secret as, 'undisclosed information', and under Article 39[52] it mentions that for something to be qualified as undisclosed information it should possess,

(i) Secrecy;
(ii) Commercial Value; and
(iii) Reasonable Efforts to Maintain Secrecy.[53]

These attempts to define the subject matter of trade secret has been widely followed across the globe in the national legislations like US, UK and also find relevance in judicial pronouncements given in India. But the third point of reasonable efforts to protect secrecy has been interpreted by the countries as per their laws.

World Intellectual Property Organisation and Trade Secret Protection

The World Intellectual Property Organisation (hereinafter referred as WIPO) on its website under the title 'What is a Trade Secret' covers the subject matter of trade secret protection, as, "*sales methods, distribution methods, consumer profiles, advertising strategies, lists of suppliers and clients, and manufacturing processes*".[54] It mentions that any information that gives a competitive edge

48 Article 507 of the North American Free Trade Agreement 1994.
49 Article 10bis of the Paris Convention for the Protection of Industrial Property 1883.
50 Article 1 of the Paris Convention for the Protection of Industrial Property 1883.
51 "*Approaches to the Protection of Trade Secret*", ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT: OECD, https://www.oecd.org/sti/ieconomy/Chapter3-KBC2-IP.pdf, (visited on February 22, 2020).
52 Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1995.
53 Manish Yadav and Sarvesh Kumar Shahi, LAW RELATING TO TRADE SECRET AND TECHNOLOGY TRANSFER, 1st ed., 2017.
54 "*What is a Trade Secret?*", WORLD INTELLECTUAL PROPERTY ORGANISATION,

over other players in the market to a company shall be treated as a trade secret. It also discusses how the unfair competition norms across nations can be used to protect trade secret and breach of the confidential information is an unfair practice. Further, it mentions about various ways to protect trade secret information and that there is no requirement of registration for the same.

Need for a New Age Trade Secret Legislation in India

Despite having so many legislations which India has been relying upon since time immemorial including the contract act, the copyright law, the patent law but still there is absence of trade secret focused legislation. But all the above-mentioned legislations have various lacunae. As far as the contract terms as concerned Section 27 poses a restriction on non-compete clause with employers use to prohibit ex-employees from disclosing the secret information. The issues with copyright law have been discussed in the above section as it does not prove to be an appropriate law to deal with trade secret protection. Criminal law on the other hand is considered too harsh on employees and their rights and often rejected by courts. But lack of criminal remedies make the defaulters believe that they can do as they wish with the information of their previous employers and sometimes cause great loss to the companies, which was suggested in the Fairfest case also.[55] Further anti-trade secret law arguers contend that patent law is sufficient to protect trade secret but they don't realise that patent is for a limited period only, there are cases of compulsory license in it and continuous use of it is required under the Act, publication is also essential in patent law which defies the purpose of the trade secret legislation that we aim for. The trade secret law does not require elements of novelty, non-obviousness as per patent law and thus easy to protect.

India has been relying on judicial pronouncements but since it depends on the discretion of the Judges there is neither a particular definition of trade secret nor what shall be come under its subject matter is very clear as of now.[56] The National Innovation Act 2008 which has never been passed after its inception also did not prove to be important for trade secret protection, leaving India with no trade secret legislation and thus we need a law for the same as early as possible.[57]

Thus, in the further sections the author shall bring forward two best trade secret legislations one of US on which many countries across the globe have relied upon and the other is the current UK legislation. Although there are many other nations from which India can take example but US has always taken trade secret protection seriously and it shall give a great insight to how to develop a

---

https://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm, (visited on February 15, 2020).

55 *Fairfest Media Ltd. v. ITE Group* 2015 (2) CHN (CAL) 704.

56 Abhinav Kumar, et. al., "*Legal Protection of Trade Secrets: Towards a Codified Regime*", JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, Vol. 11, 2006, pp. 397-408.

57 *Supra* n. 18.

trade secret legislation in India. UK on the other hand being a very recent law has brought a lot of new changes on how trade secret can be protected which shall be dealt with in the upcoming sections of the article.

Trade Secret Legislations in United States and United Kingdom

United States is one of the nations which goes back on a long history with respect to trade secret legislations. It had several trade secrets laws and has been progressing day-by-day in this area, as they have developed the Defend Trade Secret Act 2016, which is the recent initiative by US that focuses on the current aspects of trade secret protection. The US 301 reports have repeatedly found a reference to India's stand on trade secret protection and how India lacks in having an investment friendly Intellectual Property regime due to the absence of a strong trade secret law.[58] UK on the other hand until 2018 has always been similar to India in its approach towards trade secret protection. It has majorly relied on doctrines and judicial pronouncements for trade secret protection. But recently, it has also currently developed a new law relating to trade secret protection with many extraordinary provisions.

Trade Secret Legislations in United States

The most important case of US with respect to trade secret protection is *Peabody v. Norfolk*,[59] where importance of workplace information was investigated, and emphasis was given on how it can be protected. As far as the laws are concerned, the following laws replicate the history of trade secret protection in US.[60]

The Restatement of Torts Act 1939

Under this law, Section 757 and 758 provided for trade secret protection and its misappropriation. This law and the case of *Vickery v. Welch*,[61] were the first to acknowledge the protection of trade secrets in US. Section 757 of Restatement of Torts Act 1939 in its clause (b) provides for trade secret protection as:

> *(1) the degree to which knowledge is known beyond the business of the trade secret holder; (2) the degree to which the trade secret is known to workers and those interested in the business of the holder; (3) the extent to which knowledge is protected by the information holder; (6) the effortlessness or trouble with which the information may be accurately developed or duplicated by others.*[62]

58 "*Special 301 Report*", OFFICE OF THE UNITED STATED TRADE REPRESENTATIVE, April 2020, https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf, (visited on May 15, 2020).

59 *Peabody v. Norfolk* 98 Mass. 452 (1868).

60 David W. Quinto and Stuart H. Singer, TRADE SECRETS, 1st ed. 2009.

61 *Vickery v. Welch* 36 Mass. 523 (1837).

62 Section 757(b) of the First Restatement of Tort 1939.

These were strong provisions to make a foundation for the trade secret protection in the US but did not find a place in the further laws as there were separate laws made for unfair competition and trade secret protection in the upcoming times and thus leading to the enactment of the Uniform Trade Secrets Act 1979.

The Uniform Trade Secrets Act 1979

As per the Uniform Trade Secrets Act 1979 (hereinafter referred as UTSA) trade secret can be defined as:

> *Trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy*.[63]

As per the previous position in Restatement of Torts Act 1939, the information had to be in continuous use to be protected as trade secret but under UTSA the information can be in actual or potential use (negative information) and thus creating a beneficial situation for people who wanted to protect trade secret information. The Restatement of Torts Act 1939 proved to be very inconsistent amongst nations and thus UTSA had to come into existence. With few modifications, UTSA relied on the Restatement of Torts Act 1939 to an exceptionally large extent. Thus, UTSA proved to be a very efficient law till date to protect trade secrets and to determine the subject matter for trade secrets.

The Restatement (Third) of Unfair Competition 1995

This was introduced after UTSA to give a common law approach to trade secret litigation working in combination with UTSA. The aim was to broaden the scope of subject matter under trade secret which was mentioned under UTSA. As per Section 39,[64] trade secret is defined as, "*any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.*" The amount of efforts taken to keep the information as a secret and to make it valuable should not be absolute but it should be sufficient and thus here it goes against the previous legislations of US and relaxes the reasonability factor under the trade secret legislations. Section 41 also provided that in order to gain protection the information should be given under a duty of trust. [65]

The Economic Espionage Act 1996

As per the Economic Espionage Act 1996 (hereinafter referred as EEA), trade secret is defined as,

---

63 Section 1(4) of the Uniform Trade Secrets Act 1979.

64 Section 39 of The Restatement (Third) of Unfair Competition 1995.

65 Section 41 of The Restatement (Third) of Unfair Competition 1995.

> *all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if-*
>
> *(A) the owner thereof has taken reasonable measures to keep such information secret; and*
>
> *(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public*.[66]

Going by the definition, when the EEA is compared with the previous legislations of US it gives a broader definition of trade secret. The Act also establishes two offences with respect to trade secret information *"(1) theft of a trade secret for the benefit of a foreign agency, and (2) trade secret theft intended to impose an economic advantage on another party*". In addition, the Act mentioned about cases where trade secret misappropriation can be upheld wherein it provides that:

> *(1) the deliberate and/or knowledgeable theft, possession, degradation, alteration or replication of (2) a trade secret relating to a product or service used or intended for use in interstate or foreign trade (3) with the intention of converting trade secrets and (4) the intention to injure others.* [67]

The EEA was also beneficial because it did not only provide against misappropriation of trade secret information but also if any third party receives any trade secret information and uses it knowingly. The access of such information has been considered as violation of the trade secret. Recently, the need for a federal statute relating to trade secret protection arose in US which gave birth to the Defend Trade Secret Act 2016.

Defend Trade Secrets Act 2016

The US authorities felt that there was a need to make trade secret a federal issue, so that trade secret misappropriation cases can be directly filed in US federal courts.[68] The courts can now under Defend Trade Secrets Act 2016 (hereinafter referred as DTSA) can issue *ex parte* orders, "*only in extraordinary circumstances," for the "seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action*".[69] However, under DTSA there is a requirement to prove that there is an

66 Section 1839(3) of the Economic Espionage Act 1996.
67 Section 1832 of the Economic Espionage Act 1996.
68 Section 1836 of the Defend Trade Secrets Act (DTSA) 2016.
69 Section 2 of the Defend Trade Secrets Act (DTSA) 2016.

apprehension of misappropriation of trade secret and that there is some misappropriation actually going on.[70]

One of the important matters covered under the DTSA which India can also take advantage of if there is a law made in India, is the concept of whistleblower immunity. This is a very recent step and it protects the whistleblower that shall disclose the information of a company and not be sued for trade secret misappropriation.[71] The only condition is that the employer has to make the employee aware of this immunity while signing a contract.[72] Another essential factor which is very new in trade secret regime is the criminal liability which DTSA supports and thus, India can also include this to make people take trade secret protection seriously.

Apart from these laws US has also relied upon some doctrines like 'breach of confidence or breach of fiduciary duty',[73] because most of the trade secret cases involve employer-employee relationship where some information has been given to the employee under trust.[74] But establishing such relationship is not possible in every case because there might be a third party involved and for this a robust regulatory mechanism is needed.[75] The employees sometimes use the doctrine of 'inevitable disclosure' to contend that it is highly impossible for them to avoid disclosing the information in their new job as it has become a part of their skill. This doctrine was observed in the case of Eastman Kodak.[76]

Trade Secret Legislations in United Kingdom

As far as European Union or UK is concerned, it has always relied on common law principals with respect to trade secret protection. It has given a lot of remarkable judgments and laid down many doctrines which have been followed by different countries in the long run. The European Union rejected TRIPs recommendations to have a trade secret law and followed the duty of equitable trust doctrine to analyse trade secret violation cases.[77] As per Article 81(3) of the Treaty of Rome,[78] "*know how is defined as a package of non-patented practical information, resulting from experience and testing, which is*

70 Section 2(3)(A) of the Defend Trade Secrets Act (DTSA) 2016.

71 Renee Inomata, "*Whistleblower Immunity Required Under Defend Trade Secret Act*", BURNS AND LEVINSON LLP, http://www.inhouseadvisor.com/2016/05/26/whistleblower-immunity-required-under-defend-trade-secretsact/#, (visited on May 05, 2020).

72 Section 1836(2)(A)(IV) of the United States Code 2018.

73 *Snepp v United States* 444 U.S. 507 (1980).

74 Pamela Samuelson, "*Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*", CATHOLIC UNIVERSITY LAW REVIEW, Vol. 38 No. 2, 1989, pp. 365-400.

75 Paul S. Atkins, "*Speech by Sec Commissioner: The Sarbanes-Oxley Act of 2002: Goals, Content, And Status of Implementation*", U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/news/speech/spch020503psa.htm, (visited on June 1, 2020).

76 *Eastman Kodak Co. v. Powers Film Products*, Inc. 189 App. Div. 556.

77 *Kitechnology BV v. Unicor GmbH Plastmaschinen* (1995) FSR 765.

78 Article 81(3) of the Treaty of Rome 1957.

secret, substantial and identified".[79] Such terms as 'secret,' or 'substantial' were described in Article 2 Para 10 of Commission Regulation No. 2659/2000 as follows: "*secret means that the know-how is not widely known or readily accessible*;…*substantial means that the know-how includes knowledge that is necessary for the manufacture of contract products or the application of contract processes*".[80]

AKZO v. Commission is one of the landmark cases of European Union regarding trade secret information belonging to a business.[81] Another important case which has repeatedly been referred to by India as well is *Faccenda Chicken v. Fowler*.[82] It lays down how information gathered during employment can be used and memorizing the information and later using it for other person's benefit is against the doctrine of trust. Any information which is in public domain cannot be regarded as secret information and thus not a trade secret.[83] It also describes three kinds of information that can be protected under trade secret:[84]

> *1. Information which, because of its trivial character or its easy accessibility from public sources, cannot be regarded as confidential; 2 Information which an employee must treat as confidential, but which, once learned, reasonably remains in the employee's head and becomes part of his skill and experience; and 3 Specific trade secrets so confidential that a continuing duty of confidence applies even beyond the termination of employment or the service contract.*[85]

The trade secret cases in UK are generally framed under the following categories:

(i) Breach of contract.
(ii) A claim based on negligence where there is a breach of trust.
(iii) A claim based on the doctrine of equity and equitable trust.

Thus, it depends on case-to-case basis in UK to give a remedy for trade secret violation and it is very discretionary in nature. UK although had the Official Secrets Act 1923 which dealt with unauthorized disclosure of information and was similarly adopted by India as well but in both the nations it

---

79 Commission Regulation No. 2659/2000 published with the Official Journal No. L 304 of December 5, 2000 provides that 'know how' term was also mentioned with Commission Regulation No. 772/2004 on the application of Article 81(3) of the EC Treaty to categories of technology transfer agreements, published with the Official Journal L 123 of April 27, 2004.

80 Article 2 Para 10 of Commission Regulation No. 2659/2000 as published with the Official Journal No. L 304 of December 5, 2000.

81 *AKZO v. Commission* 1986 E.C.R. 1965, [1987] 1 C.M.L.R. 231 (1986).

82 *Faccenda Chicken v. Fowler* [1986] 1 All ER 625.

83 "*Fact Sheet Trade Secrets: An Efficient Tool for Competitiveness*", EUROPEAN IPR HELPDESK, www.iprhelpdesk.eu (visited on March 15, 2020).

84 *Supra* n. 46.

85 *Faccenda Chicken Ltd v. Fowler* (1985) 1 All ER 724.

proved to be futile with respect to protection of trade secret information. UK has now and again relied on the 'springboard doctrine' which was observed in the case of *QBE Management Services (UK) Ltd. v. Dymoke*.[86] This doctrine basically stands for the notion that if a person gets to know any secret information under some trust he/she shall not disclose it or use it for his/her own benefit. This doctrine has been extremely popular in UK cases and has also been followed in India in the recent case of *InPhase v. ABB*.[87] In this case, the Court relied on *Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh*,[88] where it was observed that:

> *a person, who obtained information in confidence, is not allowed to use it as a springboard for activities detrimental to the persons who made the confidential communication, it was held that breach of confidential information depended upon the broad principle of equity that he who receives information in confidence shall not take unfair advantage of it.*

Thus, India has repeatedly relied on the UK doctrines for trade secret litigation in the country. EU has currently approved the new directive governing trade secret information and thus moving one step ahead of the traditional judicial way of dealing with this class of IP. The directive is named as the, "*Directive of The European Parliament and Of the Council on the Protection of Undisclosed Know-how and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure*", which came up in 2016.[89] Very similar to TRIPs, UTSA and the DTSA, the directive also mentions about the definition of trade secret and it is analyzed that it more consistent in nature and also covers a broad subject matter and thus is beneficial to small companies to protect their information as trade secret.[90]

Since it is a recent law, it covers the recent issues relating to Intellectual Property regime of the nation, for example it talks about 'reverse engineering' and 'independent discovery' which can also be a way which competitors may use to gain advantage of someone's trade secret.[91] Similar to DTSA, it mentions about whistleblower protection and India can take examples from these to develop a new law which could fit well in the current Intellectual Property

86 *QBE Management Services (UK) Ltd. v. Dymoke* (2012) EWHC 80 (QB).

87 *InPhase Power Technologies (P)Ltd. v. ABB India* AIR 2017 Kar 20.

88 *Bombay Dyeing* and *Manufacturing Co. Ltd. v. Mehar Karan Singh* 2010 (112) BOM LR 3759.

89 Taylor Vinters, "*The New Trade Secrets Directive: Its Meaning and Impact*", COMMERCIAL, INTELLECTUAL PROPERTY, TECHNOLOGY, https://www.taylorvinters.com/article/the-new-trade-secrets-directive-its-meaning-and-impact, (visited on March 15, 2020).

90 J Lapousterle, et. al, "*What Protection for Trade Secrets in the European Union?: A Comment on the Directive Proposal*", EUROPEAN INTELLECTUAL PROPERTY REVIEW, Vol. 38 No. 5, 2016, pp. 255- 261.

91 Directive (EU) 2016/943 of the European Parliament and the Council of June 8, 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against their Unlawful Acquisition, Use and Disclosure.

regime of the country. Another important provision is how trade secret can be protected in cases of court proceedings and how can a safe trial be held. Time limits for proceedings and what shall be reasonable means to stop employees are all mentioned under the act keeping in mind the common law approach being followed by EU since forever.[92] As far as remedies are concerned for trade secret violation the directive talks about monetary benefits being given to trade secret holder for loss of income, infringement of moral rights of the owner and also any case of undue advantage shall be looked into.[93] Other remedies are of search and seizure and also grant of injunction.

When EU adopted these directives in 2016 it also informed the member nations to adopt a similar law. UK also adopted regulations pertaining to trade secret protection and even Brexit did not affect the adoption of these laws. As trade secret was not mentioned under the no-deal agreement between EU and UK signed when Brexit was announced it did not affect the implementation of these trade secret laws.[94] The law of UK was named as The Trade Secrets (Enforcement, etc.) Regulations 2018 becoming the most recent law relating to trade secret protection. These regulations were very consistent with the trade secret directive in EU and most of the provisions were similar. The definition used by the Regulations was very similar to TRIPs and was given as "*is secret and, as a result, has commercial value has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret*".[95]

The issue here was whether with the implementation of these new laws whether the old judicial pronouncements and doctrines would be given away. To this the Government said that the doctrines and old judicial decisions will run hand in hand with the new Regulations for better protection of trade secret information.[96] The Government also observed that in cases of ambiguity the old precedents shall be followed to interpret the laws. The remedies shall be more of corrective in nature and shall give compensatory benefits rather than granting injunctions against people whose guilt is still not proven. This is to save the employees from loss as they shall not be stopped from taking any further work.

---

92 Article 7 of the Directive (EU) 2016/943 of the European Parliament and the Council of June 8, 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against their Unlawful Acquisition, Use and Disclosure.

93 Article 6 of the Directive (EU) 2016/943 of the European Parliament and the Council of June 8, 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against their Unlawful Acquisition, Use and Disclosure.

94 Geeta Daswani, "*Trade Secrets, its Significance and a Comparative Analysis of Trade Secret Protection in Different Jurisdictions*", https://dx.doi.org/10.2139/ssrn.2869715, (visited on February 26, 2020).

95 Regulation 2 of the Trade Secrets (Enforcement, etc.) Regulations 2018.

96 "*Brexit and… Trade Secrets*", WOMBLE BOND DICKINSON, https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/brexit-and-trade-secrets3/7, (visited on April 1, 2020).

TQ Delta LLC v. Zyxel Communications UK Limited,[97] laid down a very important aspect of trade secret litigation as since it is a secret information it should only be allowed to be accessed by limited people involved in the proceedings to save the disclosure of information. [98]

Thus these laws of UK and US can be a great guiding factor to formulate trade secret legislation in India with accurate modifications that the country shall require. The suggestions for the same are made by the author in the upcoming sections.

Suggestions for a Strong Trade Secret Regime in India

India does not have its own trade secret law and has always relied on judicial pronouncements and doctrines borrowed from foreign nations to decide over instances of trade secret violations. US has continuously built pressure over Indian Government to develop a trade secret friendly Intellectual Property regime to help companies who invest in India. India also in the current news of 2020 as published in economic times has observed that since US has the best trade secret protection regime and has continuously persuaded India to discuss the trade secret protection criteria, whenever Indian Government shall make a law on trade secret it shall read into the US law on trade secret and how it has been beneficial to the country.[99] Also US has one of the best, variant and oldest trade secret regime and has many laws to deal with trade secret violation as discussed in the previous leg of the article. Thus the author has focused on the US laws of UTSA and DTSA to suggest provisions that can be included if ever a trade secret law comes into India.

UK on the other hand has always followed the common law approach similar to India while dealing with trade secret protection. One additional advantage of relying on UK law is that is very current and comprises of very extraordinary provisions of whistleblower protection, reverse engineering. Furthermore, US also has relied on the age old doctrines of UK to formulate its laws relating to trade secret protection because UK has the best common law principles dealing with trade secret protection. Other than these US and UK provide for protection of trade secret information while proceedings in court are in force. Thus India can rely on these laws in the following manner:

1. Definition of Trade Secret and Confidential Information: It is important to mention both the definitions in the act and how their subject matter differs. The definition of trade secret can be relied upon TRIPS, the UTSA on

97 *TQ Delta LLC v. Zyxel Communications UK Limited* (2018) EWHC 1515 (Ch).

98 "*UK Adopts New Trade Secrets Legislation*", TRADING SECRETS, https://www.tradesecretslaw.com/2018/06/articles/international-2/uk-adopts-new-trade-secrets-litigation/ 3/3, (visited on March 20, 2020).

99 Dilasha Seth, "*Government Seeks US Data Before Deciding on Trade Secrets Law*", THE ECONOMIC TIMES, https://m.economictimes.com/news/economy/foreign-trade/government-seeks-us-data-before-deciding-on-trade-secrets-law/articleshow/47169012.cms, (visited on January 29, 2020).

which most of the other laws rely and is the best suited definition of trade secret.

"*Trade Secret*" means information which—

(i) is secret and is not in the public domain and known to people who deal with such information,
(ii) has some commercial advantage, and
(iii) adequate measures have been taken by the owner to protect it.

2. Subject matter of trade secret needs to be defined: This subject matter of trade secret can be relied upon the above-mentioned acts like DTSA, and the current UK regulations as they offer wider protection to trade secrets. It can as following: "*(i) any original idea, concept, recipe, thinking, algorithm, tactics and practice; (ii) it must have some economic advantage over the competitors; (iii) it must define the basis of the business.*" If it not original and copied from someone or is a secret information of someone else and is reverse engineered by the infringing body, then it shall not qualify as trade secret. Thus, India needs to develop the subject matter for trade secret protection, and it is important to keep in mind that the information should have commercial value which goes by the US and UK law as well.

3. The act needs to define what misappropriation is by taking examples from the UTSA and the NI Bill 2008. It can be defined as

(i) someone who has obtained the information by illegal means and has reason to believe that he has obtained the information by illegal means;
(ii) disclosing any information which has been obtained in confidential position from the owner of it:
(iii) relying on improper means to gain the information; or
(iv) where a person has gained the information knowing that the other person has illegally gained the information and thereby suing it further
(v) obtained the information from someone who has obtained the information under a duty of trust and then disclosed it when the duty was over.

Thus, third party liability can also be fixed in such a manner which has been very conveniently provided in UK and US laws.

4. Relying on the new corrective remedies relating to trade secret violation under DTSA and the new UK regulations, India can also imbibe these remedies as granting injunctions always cannot be possible and sometimes the employee can also not be guilty but still has to stop working because of injunctions. The other better remedies relying on these laws can be:

(i) Restrict any further use of the information in his new job.

(ii) Prohibit the person from using the information for production or selling or marketing of goods.

(iii) Withdrawal of the good which have used the information in its formation from the relevant market and if this does not work then the destruction of goods.

(iv) The infringing material can be removed from the infringing goods.

(v) If the trade secret holder asks for the goods which have been produced using his trade secret, then he shall be granted those *via* Court order.

(vi) Compensation and Damages can also be awarded if all these measures fail and the last resort can be imprisonment also in exceptional circumstances.

5. Regarding compensation or damages it should be kept in mind that the compensation paid should not more than the royalties that would be paid if there is a case of licensing. Other than this Court shall decide the compensation amount relying on the factor that the loss should be made good of the trade secret holder. The assessment of damages shall be done in a fair manner and keeping in mind the suffering of the owner with respect to his income. This was also mentioned under the NI Bill 2008.
6. The Court before passing any order as mentioned in point 5, shall delve into the subject matter of trade secret and decide whether it was a secret information or not and it has been illegally obtained, and that there has been unauthorized use of the same. UK regulations provide for the subject matter of trade secret very accurately and make it mandatory for the courts to rely on this subject matter to decide any trade secret protection case. Further it must be investigated whether proper care was taken to protect the information and the reasonable interests of the parties and the public can also be investigated in extreme circumstances. This was another remarkable point given in NI Bill but it has to be kept in mind that the public interest criterion does not become a loophole in the law. Also interim orders can be passed to prevent any further disclosure of information.
7. There has to be limitation period or prescriptive period in the new law which is also there in the other mentioned legislations and also in other IP laws. It should be clearly advised what can be the starting and ending point of this period. The UTSA, NI Act 2008 and the UK regulations have also mentioned about how the statute of limitations shall apply to trade secret cases.
8. Another most important provision which should be included in the new legislation is protection of confidentiality of confidential information in court proceedings. This can be done by stopping someone who has control of information from divulging the information further by making a specific provision for the same. Limiting the number of people involved in the proceeding can also help by conducting in-camera proceeding. As per the new UK law, the number of individuals having access to proceedings and information should be fixed and at least one individual from each party and the lawyers of the parties to the proceedings should only be a part of the same. For this the NI Bill also recommended some provisions and India should imbibe the same. Indian legislators while framing the trade secret law can also refer to UTSA which refers to "Preservation of Secrecy" and can include some measures to protect trade secret information in a proceeding.

9. Other than this third party liability should also be fixed by involving the age old doctrine of confidentiality and trust in the statute and punishment can be fixed for the same. Since there is no law for the same as of now only contractual relationships are contested in India at a higher level in cases of trade secret violation. This can be gathered from the NI Bill 2008 under its Section 8(3) which mentions that third party can be held liable even if there is no contractual relationship.
10. It also needs to be mentioned that how this new law would run along with other laws of the nation which is always mentioned in any IP related statute in India.
11. To conduct the proceedings and other activities under the new statute there should be rules governing the same, similar to the Patent Rules.
12. For the definition clause, NI Bill 2008 can be extremely helpful as it provides definition of misappropriation, confidential information, innovation, mis-appropriator under its Section 2.

Thus, Indian lawmakers can rely on these suggestions to formulate a trade secret law as they come from our own NI Bill 2008 and the best foreign legislations relating to trade secret protection. These can be suitably modified to make India a trade secret friendly nation and to enhance the trust of companies who invest in India.

Conclusion

In the recent case of TCS with a US company Epic Systems, where the main issue goes back to 2014, the argument used by the US based company was that TCS employees in 2012-2014 had accessed the web portal of the US company without seeking approval of the plaintiff in the first place and that they had also downloaded many documents from their portal. In his article, Professor V.K. Unni has very beautifully summarised the battle and how the requirement of trade secret protection is increasing day-by-day. Although, in this case the US Court of Appeals stated that the number of damages asked by Epic Systems from the US based subsidiary of TCS was 'constitutionally excessive' and thus brought them down to a lesser amount. Professor V.K. Unni mentions that India should start taking trade secret protection seriously as other IP rights are concerned and build a strong regulatory framework to protect trade secret information.[100]

As of now India relies on the contract law or on the equitable duty of trust to protect trade secret. Contract law is used for damages and doctrine of equity is used with respect to injunction and specific performance. India does not have a trade secret law per se and relies on judicial pronouncements mostly to deal with trade secret violation cases. Since India does not have its own law it is very ambiguous to decide what exactly falls under trade secret and confidential information. Any information that has been kept secret cannot be qualified as

100 V.K. Unni, "*An Epic Battle Against TCS: The Growing Significance of Trade Secret Protection*", TIMES NOW, https://www.timesnownews.com/business-economy/companies/article/an-epic-battle-against-tcs-the-growing-significance-of-trade-secret-protection/641662, (visited on January 10, 2021).

confidential information and the subject matters needs to be decided. For this, the author has referred to many judicial pronouncements and laws of the trade secret friendly nations of US and UK to formulate a certain subject matter of trade secret to be protected. Due to the absence of a law in India, it is difficult to determine the remedy in trade secret cases therefore, every judgment comes up with a different remedy and creating confusion in trade secret litigation. In most of the judgments, only interim relief is given and there is no final remedy awarded to the trade secret holder.

While deciding any new law for the nation it is important to keep the public interest in view. The UK and US laws as discussed above are very modern in their approach, cover almost all aspects of trade secret litigation and how traders can benefit through them is also considered by these laws. Indian legislators can rely on these laws by studying how it has impacted the common public and how we can implement such laws in India with some modifications to gain the trust of investors that they wish to seek while they come into the Indian market.

While making such a law it is important to keep in mind that the scope of protection of trade secret should not be very narrow or too wide. It is important to analyze the impact of the new law on employees and it should be made sure that their rights are not violated in the approach of giving safeguard to traders. It was also stated in the Golikari judgment[101] that employee interest cannot be put at stake. Further public interest should be kept in mind but all the power should not be given in the hands of Government to decide in which cases trade secret has to be disclosed. In cases of injunction or any other remedy awarded like search and seizure proper rules should be made and they should be adhered to so that the person who is not yet guilty should not suffer any harm.

This article presents a diverse stand of Indian Courts on protection of trade secret information which puts forward the IP regime of India as weak and ambiguous and thus there is an urgent need to formulate a trade secret legislation in India as US, UK and other nations have in their countries so that India can have a trade friendly IP regime.

***

101 *Supra* n. 25.

REGULATORY FRAMEWORK FOR PROHIBITION OF BENAMI TRANSACTIONS IN INDIAN REAL ESTATE SECTOR: AN ANALYSIS

Sumit Bamhore[♣]

Abstract

The expansion of Indian real estate sector depicts a rapid increase in demand due to growing need for housing properties and increasing employment opportunities. On the other hand, the increasing benami transactions have been experienced in the last two decades which lead to the deliberation on averting the benami transactions in Indian real estate sector. In view of the need for effective legal mechanism, the Government of India took a historic step in the year 2016 by introducing an amendment to the Benami Transaction (Prohibition) Act 1988, to ensure stringent legal mechanism for effectively restricting the ever-increasing benami transactions in Indian real estate sector. Therefore, firstly, the paper examines the concept of benami transactions and its acknowledgment in Indian context. Secondly, it analyses the evolution of regulatory mechanism governing benami transactions in India. Finally, it analyses the new provisions of recently introduced Benami Transaction (Prohibition) Amendments Act 2016 in the light of improved and transparent measures to ensure effective control over the benami transactions in Indian real estate sector.

Keywords: Benami, Benamidar, Benami Transactions, Ostensible Owner, Initiating Officer, Adjudicating Authority.

Introduction

The overall growth of any nation can be assessed based on the sustainable development of its infrastructures which compliments the development of other sectors of the economy. The Indian economy has been considered as one of the genuinely reformed economies of the world wherein, the real estate sector plays a stimulative role in realising the desired necessities for infrastructural and housing requirements of the region.[1] The expansion of real estate sector represents the rapidly increasing demand for urban infrastructure because of growing need for housing properties and employment opportunities. In India, both real estate and infrastructure sectors have been the two largest employers, which experienced tremendous progress over the last two decades.[2] It has been an area of attraction for the corporate houses, policy makers as well as major financial institutions of the nation. The technological improvements and the

♣ Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail: sbamhore10@nlunagpur.ac.in.

1 Nilanjan Banik, THE INDIAN ECONOMY: A MACROECONOMIC PERSPECTIVE, 1st ed. 2015, pp. 117-118.

2 Anupama Nanda, RESIDENTIAL REAL ESTATE: URBAN AND REGIONAL ECONOMIC ANALYSIS, 1st ed. 2019, pp. 25-36.

innovative techniques have brought a massive change in the Indian real estate industry.

The real estate sector appears to be reinforcing India's core infrastructure by providing housing, commercial, and industrial estate, thus benefiting individuals, economy, and the society at large. However, the black money or the unaccounted money can easily be invested in the highly vulnerable real estate sector, and benami deals are reported to be a chief source of black money generation in Indian real estate sector.[3] The figure of benami transactions in the real estate industry has exploded in recent years, and there has been a lot of talk about how to stop benami transactions and black money and it has been observed that bribes are often offered as benami properties, which is illegal and jeopardises the system's functioning and regulation.[4] Some of the negative consequences of owning a Benami property include property price inflation, fictional and fake ownerships, lender loss of confidence, particularly private lender loss of confidence, unaffordable housing, and so on. In the past, a Benami transaction was legal except in a few limited circumstances. There was no law in place in India to regulate and prosecute benami transactions, which were thriving. However, in the twentieth century, a law prohibiting Benami Transactions was enacted i.e., Benami Transaction (Prohibition) Act 1988 (hereinafter referred as Principal Act) with the intention of prohibiting the benami transactions in Indian real estate sector.

Recently, Real Estate (Regulation and Development) Act 2016 (hereinafter referred as RERA), which ensured much-needed accountability and transparency in the real estate sector, was implemented in India as one of the key reforms. It pledged to improve and enhance the protection towards the home buyers by ensuring that they receive their property on time, as promised by the builder.[5] As a result, home buyer's trust is increased, and it is easier to produce long lasting development brands and real estate projects that are high-quality and delivered on time.[6] This depicts that, the administrative framework in India is constantly evolving, resulting in severe regulatory compliance. Similarly, it follows the universal parameters for conducting commercial business, making regulators more aggressive and uncompromising in their enforcement of current laws. Similarly, with over 70 million workers which are forward or backward linked with over 275 sectors and ancillary industries, the real estate sector has risen to become India's third largest contributor to the

3 K. Gowri Shankar and B.V.S. Prasad, INDIAN REAL ESTATE: TRENDS, CHALLENGES AND PROSPECTS, 1st ed. 2008, pp. 3-19.

4 Malvikka Arya and Rishabh Manocha, "*Promoting Investment: Governance of Properties with Rera and Benami Law*", BHARATI LAW REVIEW, Vol. 6, No. 2, 2017, pp. 188-200.

5 A. Subhasini and M. Yokesh, "*Benami Transaction Act in Real Estate on Black Money*", INTERNATIONAL JOURNAL OF PURE AND APPLIED MATHEMATICS, Vol. 120 No. 5, 2018, pp. 297-309.

6 Basanta Kumar, et al., "*Reform in the Indian Real Estate Sector: An Analysis*", INTERNATIONAL JOURNAL OF LAW AND MANAGEMENT, Vol. 60 No.1, 2018, pp. 55-68.

economy.[7] Therefore, effective land governance and the preservation of land records are required for the smooth operation of an economic system to verify land agreements and eliminate illegal land transactions. However, the rapid urbanisation in India has been one of the most important factors in the elusive land transaction-related issues.

The Government of India took a historic step in the year 2016 by introducing an amendment to the principal Act i.e., Benami Transaction (Prohibition) Amendments Act 2016, to ensure stringent legal mechanism for effectively restricting the ever-increasing benami transactions in Indian real estate sector. Its three main goals are to clearly define the constitution of a benami transaction, establish the appropriate adjudicating authorities, and establish an appellate tribunal to deal with benami transactions, appeals, and determining the penalty for contraventions.[8] Similarly, except in cases where transactions are entered into the name of Karta of Hindu Undivided Family, spouse, child, brother or sister, or any linear ascendant or descendent after the Amendment of 2016, it prohibits any transactions by any person.[9] The then Finance Minister, Mr. Arun Jaitley, first presented the new Act as a Bill in the Lok Sabha on May 13, 2015. The matter was then referred to the Finance Standing Committee, which submitted its report on April 28, 2016. Thereafter, the bill was passed by the Lok Sabha on July 27, 2016 and Rajya Sabha on August 2, 2016.[10] This law acts as a deterrent to benami transactions. Anyone found guilty of a benami transaction is subject to a sentence of rigorous imprisonment as well as a hefty fine of up to twenty five percent of the property's fair market value.[11] It also defines what constitutes a benami transaction, who is a benamidar, and what constitutes benami property. Further, it provides the agencies responsible for investigating benami transactions, as well as the offences and deciding on the fines that may be imposed.

The present paper is an attempt to study and analyse the regulation governing the benami transactions in India real estate sector based on the

---

7 Navadha Pandey, "*India to be 3rd Largest Construction Market Globally by 2030: Report*", THE HINDU: BUSINESSLINE, January 17, 2018, https://www.thehindubusinessline.com/news/real-estate/india-to-be-3rd-largest-construction-market-globally-by-2030-report/article9008113.ece, (visited on January 12, 2021).

8 Deepa Khare, "*A Study of the Benami Transactions (Prohibition) Amendment Act 2016*", ITATONLINE, February 13, 2018, https://itatonline.org/articles_new/a-study-of-the-benami-transactions-prohibition-amendment-act-2016/, (visited on January 15, 2021).

9 Section 2(9)(A)(b)(i), (ii) and (iii) of the Benami Transactions (Prohibition) Amendment Act 2016.

10 Timsy Jaipuria, "*Lok Sabha passes Benami Transactions (Prohibition) Amendment Bill 2015*", HINDUSTAN TIMES, July 27, 2016, https://www.hindustantimes.com/business-news/lok-sabha-passes-benami-transactions-prohibition-amendment-bill-2015/story-ObDfL1TCQGzSG1OcZ4fzpN.html, (visited on December 20, 2020).

11 Section 53(2) of the Benami Transactions (Prohibition) Amendment Act 2016.

primary and secondary sources using the official documents of Ministry of Finance, Legislative provisions for prohibition of benami transactions, reports and academic research papers, factual and statistical data related to evolution of the regulatory framework for controlling the benami transactions in Indian real estate sector in India.

The author argues that the regulatory framework for prohibition of benami transaction has significantly evolved to curb the increasing benami transactions in Indian real estate sector. The entire study is propelled by the key assumption that the Benami Transaction (Prohibition) Amendments Act 2016 is an attempt to establish stringent regulatory framework for prohibition of benami transaction by widening the scope of benami transactions and providing severe penal liabilities. In the light of the above assumption, the paper tries to analyse the new provisions of the Benami Transaction (Prohibition) Amendments Act 2016 in relation to the improved and transparent measures to ensure effective control over the benami transactions in Indian real estate sector.

Benami Transactions

The word 'Benami' comes from Persian lexicon which means 'anonymous', 'nameless', or 'property without a name'.[12] The term 'benami transaction' refers to a transaction in which one person pays for property that is then transferred to/held by another.[13] The person who pays for the property is the final beneficiary of the property, either directly or indirectly, but his name is not recorded as the legal owner of the property in such transactions. The person who buys the property in his or her name is known as the 'benamidar', the property is known as the 'benami property', and the person who funded the purchase is known as the 'real owner'. This allows the payer/beneficiary to accomplish undesirable goals such as using black money, avoiding tax payments, or avoiding payments to creditors. In *T.P. Petherpermal Chetty v. R. Muniandy Servai*,[14] the Privy Council held that the person who purchases the property in his name and has ostensible title, i.e., the benamidar, is nothing more than an incognito for the true owner who has the beneficial ownership of the property.

The peculiar feature of Benami Transactions is that there is no intention of benefiting the person in whose name the property is transacted and he is known as 'Benamdar', which is merely an incognito for the person in whose name valuable actual ownership of the property vests. There are, however, distinctions between ostensible owner and benamidar under the Transfer of Property Act 1882.[15] An ostensible owner is someone who has all the signs of ownership but is not actually the owner. It can be extremely difficult to establish

12 Report No. 57 of the Law Commission of India on "*Benami Transaction*", MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, GOVERNMENT OF INDIA, August 1973, p. 2, https://lawcommissionofindia.nic.in/51-100/Report57.pdf, (visited on December 25, 2020).

13 Section 9(A)(a) of the Benami Transactions (Prohibition) Amendment Act 2016.

14 1908 SCC OnLine PC 5.

15 Section 41 of the Transfer of Property Act 1882.

whether someone is an ostensible owner or a real owner. In the case of *Jayadayal Poddar v. Bibi Hazra*,[16] the Supreme Court stated that whether a person is an ostensible owner or not is a subjective issue that must be determined based on facts and circumstances. According to the Court, certain factors must be considered when determining whether a person is the ostensible owner *viz*., determining the source of funds for purchasing the property; determining the nature of possession of the property after completion of purchasing activities; examining the motives and reasons behind entering into a benami transaction; identifying the relationship between the real owner and the benamidar to assess the relationship of ostensible owner and real owner; analysing the conduct of the parties in relation to the property to identify the utility of the property by ostensible owner or real owner; and the custody of the original title deeds of the property. Similarly, in the case of *Thakur Bhim Singh v. Thakur Kan Singh*,[17] the Hon'ble Supreme Court stated that:

> *Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case, there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons.*[18]

The Supreme Court expanded on the idea of a 'Benami Transaction' in this case by considering mainly two kinds of transactions under its purview. To begin with, when a person purchases a property in the name of another person with no intention of benefiting that other person and second, when the owner of the property executes a conveyance in favour of someone else without intending to transfer the property's title. In addition, there are numerous factors that contribute to the execution of benami transactions and on considering the nature of the transaction, while these transactions are not forever harmful, they can have disastrous consequences if they go beyond their legal limits.

16 AIR 1974 SC 171.
17 (1980) 3 SCC 72.
18 *Ibid*, p. 74.

Acknowledgement of Benami Transactions in India

The joint Hindu family and Karta system was one of the reasons for the origin and growth of benami transactions in India. Although, the first instance of benami transactions in India occurred in the eighteenth century, when the Britisher had colonised India. However, the benami transactions have been legal in India since before the British colonial period, and court rulings have upheld their legality. In the case of *Gopeekrist Gosain v. Gungapersaud Gosain*,[19] it was held that the benami transactions were a part of India's custom and therefore must be recognised unless otherwise provided by law. Further, in the case of *Gur Narayan v. Sheo Lal Singh*,[20] Privy Council opined that, "*The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the Benami system, is and has been a common practice in the country. There is nothing inherently wrong with it…So long, therefore, as a Benami transaction does not contravene the provisions of the law the Courts are bound to give it effect*".[21] In addition, in *Musammat Bilas Kunwar v. Dasraj Ranjit Singh*,[22] Privy Council held that, the benami transactions were deemed unobjectionable, and highlighted its resemblance to English Legal System's doctrine of resulting trust.

The benami transactions began to be carried out with the unlawful intent of defrauding creditors or evading taxes as time went on. Insolvent people or people who were not allowed to deal through the benamidar bought properties and then tried to reclaim possession after the transaction was completed. The importance of this issue was considered by the courts, and in *T.P. Petherpermal Chetty v. R. Muniandy Servai*,[23] the Privy Council held that, when the real owner uses benamidar as an alias to hide his debt and defraud creditors, the benamidar became more than a mask. The court may as well refuse to allow the true owner to reclaim his identity, which he had previously abandoned to defraud others and reclaim the property. Relying on this decision of privy council, in the case of *Surasaibalini Debi v. Phanindra Mohan Majumdar*,[24] the Hon'ble Supreme Court observed that "*No doubt, for the purpose of deciding whether property could be recovered by the assertion of a real title there is a clear distinction between cases where only an attempt to evade a statute or to commit a fraud has taken place and cases where the evasion or the fraud has succeeded and the impermissible object has been achieved*".[25] Therefore, the court emphasised the significance of the fact that whether benami transaction was entered into to evade taxes and became a source of black money and corruption to determine its legality of benami transaction in the light of the intent of the real owner of the property.

19 1854 SCC OnLine PC 8.
20 (1918-19) 46 IA 1.
21 *Ibid*, p. 9.
22 AIR 1915 PC 96.
23 1908 SCC OnLine PC 5.
24 AIR 1965 SC 1364.
25 *Ibid*, para 28.

Evolution of Regulatory Mechanism Prohibiting Benami Transactions

In the year 1973, the Law Commission of India[26] reviewed and analysed the issue of Benami Transactions in its report wherein, to understand the historical background and validity of Benami Transactions, the law commission explained their origin, development, essence, and judicial recognition. The growth of Benami transactions, according to the commission, was due to defrauding creditors and evading taxes. The law commission looked at the state of the law in the English legal system and clarified what the notion of resulting trust meant. Further, the commission recommended that the doctrine of benami transactions be abolished in India and that benamidar should be considered as the true owner.[27] Additionally, it expressed that, the law should reject the benami nature of the transactions outright. As a result, a claim by a person claiming to be the true owner against the person who holds the title would be null and void. However, the commission recommended an exception for Joint Hindu families based on the consideration that the Karta is a manager of the Hindu undivided family therefore he could buy and manage property for the benefit of the family members.[28] Accordingly, a separate law was proposed, under which no claim or right of recovery of property by a person claiming to be the real owner against the benamidar was permitted. Moreover, the commission recommended the repealing of specified Sections of the Indian Trust Act 1882,[29] the Civil Procedure Code 1908,[30] and the Income Tax Act 1961,[31] as they were no longer required. In response to the law commission's report, on May 19, 1988, the President passed an ordinance titled Benami Transactions (Prohibition Right to Recover Property) Ordinance 1988.

However, the second law commission report on benami transactions,[32] criticised the ordinance and opined that, making the ostensible owner a real owner, and depriving the real owner of his beneficial interest is not justified by the state. It went on to express that making the benamidar the real owner would not benefit the state because the property would still be in the hands of the benamidar.[33] Therefore, the state would remain deprived of the illegal property and purpose of legislation will defeat, thereby law commission pointed the glaring lacunae in the ordinance. Furthermore, it was pointed in the report that,

---

26 Report No. 57 of the Law Commission of India on "*Benami Transaction*", MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, GOVERNMENT OF INDIA, August 1973, https://lawcommissionofindia.nic.in/51-100/Report57.pdf, (visited on December 25, 2020).

27 *Ibid*, p. 37.

28 *Ibid*, p. 38.

29 Sections 82 of the Indian Trust Act 1882.

30 Section 66 of the Civil Procedure Code 1908.

31 Section 281-A of the Income Tax Act 1961.

32 Report No. 130 of the Law Commission of India on "*Benami Transactions: A Continuum*", MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, August 1988, https://lawcommissionofindia.nic.in/101-169/Report130.pdf, (visited on December 25, 2020).

33 *Ibid*, para. 5.6.

the ordinance only barred the real owner from taking legal action against the benamidar for property recovery, but it did not prevent benamidar from transferring the property back to the real owner.[34] For example, a benami owner may be considered the actual owner by court order, but the benamidar may later transfer the property back to the original owner. In such case, the original owner would reclaim control, and the effect of the court's decision as well as any law would be nullified. Therefore, when the benamidar would be declared as the true owner, the property would return to the original owner, and the situation returns to square one. The ordinance's purpose would be defeated by such an apparent loophole, and the ordinance would be reduced to a 'Paper Tiger'.[35]

The law commission believed that there should be an enforcement mechanism in place to ensure that when an act is turned into an offence, it is catered effectively. Further, in order to administer justice, the machinery must be efficient and vigilant. The machinery must examine and hear all issues relating to benami transactions before making a decision while resolving the dispute. The commission opined that, in terms of tax laws, there was an adequate equipment in place, but civil justice administration was lacking. There was a need of an effective enforcement machinery for the administration of justice in a society which was developing in an orderly manner, with the focus on developmental planning.[36] Accordingly, the commission submitted various recommendations and after incorporating the relevant recommendations of the Law Commission the new Act i.e., Benami Transaction (Prohibition) Act 1988 was enacted to forbid the benami transactions in India.

Benami Transactions (Prohibition) Act 1988

The benami transaction was defined as a transaction in which property is transferred to one person for a consideration paid or given by another person under the Benami Transactions (Prohibition) Act 1988. It further provided that, Benami transactions are illegal, and anyone who engages in one faces a sentence of up to three years in prison, a fine, or both. Further, the actual owner was not entitled to recover property held benami from benamidar, and estates held benami were not subject to confiscation under the regime of Benami Transactions (Prohibition) Act 1988. However, it was discovered during the course of framing the rules for implementing certain provisions of the Act, that it would be impossible to frame the rules without presenting comprehensive legislation and repealing the existing Act due to flaws in the legislation.

Although, the Benami Transaction (Prohibition) Act 1988 claimed to cover all benami transactions, but it only specified what institutes a benami transaction and did not explain what institutes a 'Cartel of Benami Transactions'. For example, the benami transactions that are taking place in the contemporary era are not one-of-a-kind, as defined by the Benami Transaction (Prohibition) Act 1988 and are extremely complex to identify. Further, the

34 *Ibid*, para. 5.8.
35 *Ibid*, para. 5.2.
36 *Ibid*, para. 5.19.

modern benami transactions are taking place as a series of transactions in the form of arrangements at multiple levels and points of the real estate market. Therefore, it becomes extremely tough to implement the legal provision at every point in the series of transactions that takes place as a benami transaction.

The Indian government has played a key role in identifying and removing redundant laws from the list of statutes and the introduction of Benami Transaction (Prohibition) Amendment Act 2016 was in the light of the goal of the government to remove outdated laws for ensuring effective governance.[37] Almost after twenty-eight years, the legal provision dealing with benami transaction was amended to ensure the elimination of susceptibilities of the provisions under Benami Transaction (Prohibition) Act 1988.

Benami Transactions (Prohibition) Amendment Act 2016

The rationale behind introducing an amendment to the Benami Transaction (Prohibition) Act 1988 in place of enacting a fresh Act was the legislative intent, which was to bring the benami transactions, on which no action was taken under the Benami Transaction (Prohibition) Act 1988, under the purview of benami transactions under the Benami Transactions (Prohibition) Amendment Act 2016 to ensure consequential action against such dealings. Further, in the light of Article 20 of the Constitution of India, the provisions would have been declared unconstitutional, if it would be included as the repeals and savings provision.[38] As a result, no action could have been possible against any benami transaction that transpired between the period of enactment of Benami Transaction (Prohibition) and the repealing Act. Therefore, since no action could be possible without a special provision in the repeals and savings clause, the benami transactions entered during a period of twenty-eight long years would have been granted immunity. Subsequently, the Ministry of Law, Government of India emphasised on amending the existing legal provision i.e., Benami Transactions (Prohibition) Act 1988 with an intention of including all the dealings in relation to benami transactions committed in the past twenty-eight years.[39] Accordingly, the current legal provision was enacted i.e., Benami Transactions (Prohibition) Amendment Act 2016 as an amendment to the Benami Transaction (Prohibition) Act 1988.

The growth of black money in the Indian real estate sector has been experienced owing to the deficiency of the administrating authorities to implement the legal provisions, rather than the absence of legal provision. In other words, the Benami Transaction (Prohibition) Act 1988 was passed by Parliament twenty-eight years ago, but despite the request of Central Vigilance Commission to empower it under the Act and prescribe rules for its effective implementation, the then Government of India had never considered effective

37 Monika Jain, "*Evolution of Benami Transactions: Critical Analysis Relation to TPA*", NATIONAL JOURNAL OF REAL ESTATE LAW, Vol. 1 No. 2, 2018, pp. 5-12.

38 *Supra* n. 32, para. 5.9.

39 Satyendra Kumar Verma and Ankita Nirwani, "*A Legal Critical Analysis of Benami Transaction Act 1988*", INTERNATIONAL JOURNAL OF ENGINEERING SCIENCE AND COMPUTING, Vol. 10 No. 9, 2020, pp. 27320-27324.

operationalisation of the Act.[40] Contextually, the government further claimed that legal provisions had not been made effectually operative imputable to apparent flaws and pitfalls in the Act. As a result, recently the lawmakers introduced an amendment to the Benami Transaction (Prohibition) Act 1988 i.e., Benami Transactions (Prohibition) Amendment Act 2016, in accordance with contemporary circumstances and necessities in order to prevent all the benami transactions in Indian real estate sector. The amendment has introduced noteworthy modifications to the Benami Transaction (Prohibition) Act 1988 and presented new set of rules and powers to discourage benami transactions and confiscate benami properties. Similarly, the scope of benami transactions has been expanded, as well as the reprimands and consequences have been strengthened under the recent amendment in the light of ensuring effective implementation of legal provision to prohibit the benami transactions in India. Therefore, it is pertinent to deliberate on the key amendments that have cemented the significant evolution of regulatory framework to control increasing existence of benami transactions in Indian real estate sector.

Prohibition of Benami Transactions

The benami transactions are made illegal, and anyone who involves in such benami transaction will be prosecuted under several provisions of the Benami Transactions (Prohibition) Amendment Act 2016. Similarly, all the benami transactions are made illegal which are subject to confiscation by the Central Government.[41] Once confiscated, the benamidar would not be able to re-transfer such properties. In the event of a violation, all transfers would be considered null and void as well as are subject to the monitoring of the prescribed authorities.[42] The government may assign an assistant or deputy income-tax commissioner as the Initiating Officer of an investigation into a suspected benami transaction.[43] The officer would then refer the case to an adjudicating authority. The adjudicating authority is required to decide within a year if the property is proved to be benami. However, if a person has declared his undisclosed income in his Income Tax returns in accordance with the Finance Act 2016 it will not be considered as a benami transaction.[44] Hence, the recently amended Act provides a broader definition of a benami transaction by labelling

40 Mayur B. Nayak, et al., "*Prohibition of Benami Property Transactions Act, 1988 (As Amended): An Overview*", BOMBAY CHARTERED ACCOUNTANTS' JOURNAL, 2017, http://www.bcajonline.org/catdescription.php?Catid=17326&cid=75, (visited on December 16, 2020).

41 Section 5 of the Benami Transactions (Prohibition) Amendment Act 2016.

42 Sections 6(1) and (2) of the Benami Transactions (Prohibition) Amendment Act 2016.

43 Section 2(19) read with Section 23 of the Benami Transactions (Prohibition) Amendment Act 2016.

44 Section 190 of the Finance Act 2016 read as: "*The provisions of the Benami Transactions (Prohibition) Act 1988 (45 of 1988) shall not apply in respect of the declaration of undisclosed income made in the form of investment in any asset, if the asset existing in the name of a benamidar is transferred to the declarant, being the person who provides the consideration for such asset, or his legal representative, within the period notified by the Central Government*".

all the benami transaction as legal subject to investigation by the designated authorities.

Establishment of Authorities

The Act allows the government to assign an assistant or deputy income-tax commissioner to lead a benami transaction inquiry under the Act known as Initiating Officer.[45] Subsequently, the officer refers the matter to the adjudicating authority established under the Act, who has the duty to determine, within one year, whether the property or asset transaction was benami, thus the Act emphasises on the time bound adjudication.[46] A chairperson and at least two other members constitutes the adjudicating authority wherein, only former members of the Indian Revenue Services, not below the rank of commissioner of Income Tax, or Indian Legal Services, not below the rank of Joint Secretary, are eligible to serve as members or chairs of the adjudicating authority.[47] It is the responsibility of the administrator to retain the confiscated property in his or her possession until the matter is settled. The adjudicating authorities is also authorised to seize such property once an order issued under this Act becomes final. Further, it would be the responsibility of designated officers, nominated among the income-tax officers, to administer and dispose of the confiscated property.[48]

The Act establishes a dedicated Appellate Tribunal with a power to accommodate the appeals against the decision of the adjudicating authority. The Central Government is entitled to establish such appellate tribunal comprising of one chairperson, a sitting or retired judge of a High Court, along with two other members as judicial member and administrative member.[49] The judicial member may be appointed as the members of the appellate tribunal wherein, he/she has previously served as an Additional Secretary or equivalent position in the Indian Legal Service. Similarly, the administrative member may be appointed as the members of the appellate tribunal wherein, he/she has previously served as Chief Commissioner of Income tax or equivalent position in income tax department. [50]

Further, to try the offences punishable under the Act, the Central Government has the power to establish a Special Court. It can be instituted with the approval of the Chief Justice of the respective High Court, and one or more Session Courts may be designated as Special Court or Special Courts which enjoys the similar powers as of Criminal Court under Code of Criminal Procedure 1973. According to the Act, every trial must be held as early as

45 Section 2(19) of the Benami Transactions (Prohibition) Amendment Act 2016.
46 Section 7 read with Section 26(7) of the Benami Transactions (Prohibition) Amendment Act 2016.
47 Sections 8 and 9 of the Benami Transactions (Prohibition) Amendment Act 2016.
48 Sections 28 and 29 of the Benami Transactions (Prohibition) Amendment Act 2016.
49 Sections 30 and 31 of the Benami Transactions (Prohibition) Amendment Act 2016.
50 Section 32 of the Benami Transactions (Prohibition) Amendment Act 2016.

possible, and the Special Court is required to be determined to complete the trial within the period of six months from the date of filing the complaint.[51]

Moreover, while trying a suit involving benami transactions, the authorities established under the Act enjoys the similar powers as of Civil Court under the Code of Civil Procedure 1908.[52] The authorities may solicit the assistance of any police officer or officers from the Central or State Governments and such officer(s) are obligated to help these authorities in their workings.[53]

Attachment of Benami Property

The Initiating Officer, if has reasons to deem that a person is a *benamidar* in respect of a property based on material possession, he may issue a notice to the person requiring him to show cause, why the property should not be treated as benami property within the specified period after recording the reasons in writing. In the event, when the Initiating Officer suspects that the person in possession of the benami property will alienate it during the notice period and if the identity of the beneficial owner is known to the Initiating Officer, a copy of the notice may also be served on him, revealing the provisional attachment of the property, with the prior approval of the Approving Authority, for a period not exceeding ninety days from the date of issuance of notice.[54] Further, the adjudicating authority may retain the attachment of the property until a final decision is made. However, if the property is held to be benami, the Adjudicating Authority will maintain the attachment order of the initiating officer.[55] The Adjudicating Authority, on being satisfied that some part of the properties referred to him are benami property but is unable to locate it, he shall record a finding to the best of his ability as to which part of the properties is held benami. Finally, only in the circumstances where the adjudicating authority determines that the attached property is not benami, he would order the attachment to be revoked.[56]

Confiscation of Benami Property

The Act has introduced the provisions related to confiscation of benami properties to ensure stringent legal environment for creating the required deterrence in the real estate sector. It proves that, if the property is proved to be a benami property in the opinion of the Adjudicating Authority, it has the power to seize such benami property after serving a notice to all the person concerned for giving them the opportunity to be heard. However, prior to advancing with the confiscation of such benami property, within thirty days of receiving references from the initiating officer, the Adjudicating Authority is required to issue a notice to the benamidar, beneficial person as well as any interested party, including a banking company along with any person who has made a

51 Section 50 of the Benami Transactions (Prohibition) Amendment Act 2016.
52 Section 19 of the Benami Transactions (Prohibition) Amendment Act 2016.
53 Section 19(4) of the Benami Transactions (Prohibition) Amendment Act 2016.
54 Sections 24(1), (2) and (3) of the Benami Transactions (Prohibition) Amendment Act 2016.
55 Section 26(3)(c)(ii) of the Benami Transactions (Prohibition) Amendment Act 2016.
56 Sections 26(3)(c)(i) and (4) of the Benami Transactions (Prohibition) Amendment Act 2016.

claim in respect of the property to furnish such documents, particulars, or evidence as it considered necessary.[57]

Nevertheless, there is also an option available of appealing against the decision of the Adjudicating Authority to the Appellate Tribunal and then to the High Court.[58] The consequence of such confiscation of the benami properties is that all rights and title to such benami property would completely vest in the Central Government, free of all encumbrances, and without compensation. Any such property transfer shall be declared as null and void and the administrator appointed by the Central Government would take the possession of the benami property and manage the assets, including disposal of the property in the light of the directive given by the competent authority.

Penalties for Benami Transactions

The robust penal obligations were one of the necessities that were highlighted by the Law Commission of India to control the increasing benami transactions in the Indian real estate sector. Therefore, in the light of the recommendations of the Law Commission of India in both of its report, the Act has provided a stricter penal provision for the violation in relation to the benami transactions. The Act provided that when any person executes the benami transaction to marmalise the objectives of the provisions of the Act or who persuades any person to engage in the benami transaction would be considered as an offender of benami transaction[59] and be liable towards the punishment of laborious imprisonment for a term of not less than one year extending upto the limit of seven years, along with the fine of up to twenty-five percent of the market value of the property.[60]

Further, the Act specifies that the person who needs to provide the information according to the provisions of the Act, if knowingly provides any false information to any authority or furnishes any false document in any proceeding shall be penalised with laborious imprisonment for a term of not less than six months extending upto the limit of five years, along with the fine of up to ten percent of the fair market value of the property.[61]

On the other hand, considering the penal provisions under the Benami Transaction (Prohibition) Act 1988, it specified that the penalty for indulging into the benami transactions amounted to the imprisonment of up to three years, or a fine, or both. Therefore, the introduction of such stringent provision for violation of legal provisions related to prohibition of benami transaction suggests that the legislative intent behind the amendment was not only to widen the scope of benami transaction but also to ensure the creation of deterrence in the real estate market.

Therefore, after analysing various new provisions under the Benami Transactions (Prohibition) Amendment Act 2016, it is apparent that it has

57 Section 24(5) of the Benami Transactions (Prohibition) Amendment Act 2016.
58 Sections 30 and 49 of the Benami Transactions (Prohibition) Amendment Act 2016.
59 Section 53(1) of the Benami Transactions (Prohibition) Amendment Act 2016.
60 Section 53(2) of the Benami Transactions (Prohibition) Amendment Act 2016.
61 Section 54 of the Benami Transactions (Prohibition) Amendment Act 2016.

supplemented the required muscle and teeth to the original Act prohibiting the benami transaction in India which was introduced twenty-eight long years back in 1988. The amended Act of 2016 is more severe in nature as it includes provisions to penalise the persons who engage in benami transactions, including the person who initiates the transaction and the benamidar, as well as all the people who facilitates such transactions, with rigorous penalties.

Conclusion

The increasing dimension of corrupt practices have long been a social ill that has afflicted the entire world to varying degrees. India has not been immune from the affliction of the corruption scourge. Corruption infiltrated the heart of the economy, threatening the social equality which is a foundation of the Constitution of India. Due to the parallel economy created through black money, the gap between the rich and the poor has widened and the benami transactions equally have contributed negatively on the economy of the nation. Therefore, on closer inspection, Benami Transactions (Prohibition) Amendment Act 2016 seems to be capable in terms of tackling the legal flaws of the Act of 1988. Similarly, the proper implementation would create a huge deterrent effect on the society. The key objective of the legislatives behind the enactment of the Act of 2016 is to ensure re-routing of the unaccounted/black money back into the financial system and seizing the benami properties. The amended Act of 2016 provides a widened definition of benami transactions, establishment of adjudicating authorities, creation of an appellate tribunal along with the consequences of engaging in benami transaction.

The amendment to the legal provisions prohibiting benami transactions in India is expected to have a long-term effect on the real estate industry of the nation as it expected to increase the use of the correct name in property transactions. Further, in addition to stringent provisions the amended Act of 2016 is expected to help in controlling the real estate prices as it would reduce the transactions that were previously done in cash by wealthy investors to hide their unaccounted wealth in real estate by entering the benami transactions. As a result, the amended Act would reduce the flow of black money, resulting in the prevention of corruption.

The enactment of Benami Transactions (Prohibition) Amendment Act 2016, it is quite clear that the legislatives have taken the significant first step toward eradicating widespread corruption in the real estate industry in relation to benami transactions. However, minimal number of actions against the person engaged in such illegal activities reflects that there was no visible effect of the amended Act on controlling the benami transactions in Indian real estate sector. Similarly, the threat of confiscation of benami properties, on one hand, instils fear in the minds of the people, while on the other hand, the legal provision relating to exemption for declaration of the benami properties looks to be a profitable incentive. Therefore, there is an urgent need to consider working at the grassroots level to entirely eradicate the existence of benami transactions in Indian real estate sector.

***

ADULTERY *VIS-À-VIS* SPOUSAL MAINTENANCE IN INDIA

Nikita Barooah[♣]

Abstract

Marriage is considered as sacred commitment and adultery or marital infidelity shatters the very core of a marriage. The Supreme Court of India, in Joseph Shine v. Union of India decriminalised adultery by striking down Section 497 of the Indian Penal Code 1860 which dealt with the offence of adultery. However, it remains as a ground for divorce in all the personal laws in India. In addition to being a ground for divorce, adultery sometimes referred to as unchastity, also justifies barring of spousal maintenance. Spousal maintenance is financial support provided by one spouse to the other during the subsistence of a marriage or after a divorce. In this paper the author has dealt significantly with all the criminal, quasi-criminal and personal laws in India dealing with spousal maintenance and how 'adultery' acts as an impediment for a spouse to receive maintenance.

Keywords: Marriage, Adultery, Spousal Maintenance, Criminal Law, Personal Laws.

Introduction

'Marriage', one of the oldest and most universal of all human institutions, is believed to formally recognise the union of a man and a woman as partners in a personal relationship to the exclusion of all others. It has been defined as "*the legal union of a couple as husband and wife*".[1] In a marriage, both the spouses are expected to be loyal to each other, sanctifying their relationship with 'trust' as the lodestone. 'Adultery', the most creative of sins,[2] is defined in Black's Law Dictionary as "*voluntary sexual intercourse of a married person with a person other than the offender's husband or wife, or by a person with a person who is married to another person*", shatters that 'trust'. The sin of inconsistence between two married persons is called double adultery and if only one of the persons is married it is called single adultery.[3] Adultery, infidelity, cheating have several legal and social consequences.

'Adultery' was an offence in Criminal law under Section 497 of the Indian Penal Code 1860. However, the scope of its definition did not permit either of the spouses to prosecute each other; it only punished the wife's male paramour. This obvious inequity led the Hon'ble Supreme Court to strike it down as unconstitutional in 2018. In matrimonial jurisprudence, the general meaning of

♣ Research Scholar, National Law University and Judicial Academy, Assam, e-mail: nikita.barooah@gmail.com.

1 Bryan A. Garner (ed.), BLACK'S LAW DICTIONARY, 11th ed. 2019, p. 11.

2 Deborah L. Rhode, ADULTERY: INFIDELITY AND THE LAW, 1st ed. 2016.

3 M.N. Das (rev.), A.N. Saha, MARRIAGE AND DIVORCE, 6th ed. 2002, p. 256.

'Adultery' is voluntary sexual intercourse between a married person and a person of the opposite sex, the two persons not being married to each other.[4] All the personal laws in India provide for adultery as a matrimonial wrong, a reason strong enough to invalidate a marriage through a decree of divorce.

The personal laws also provide for maintenance to either husband or wife in certain conditions. 'Spousal Maintenance' is financial support provided by one spouse to the other during the subsistence of a marriage or after a divorce. Several laws have been framed for providing 'Maintenance' to a spouse in the event that the marriage between them is in trouble. On the other hand, provisions have been incorporated in several enactments dealing with spousal maintenance, where 'adultery or 'unchastity' when proven, will act as a bar for granting maintenance to the erring spouse. Recently, the Supreme Court, in *Rajnesh v. Neha*,[5] issued a slew of directions for payment of interim maintenance and the criteria for determining the quantum of maintenance in matrimonial cases.

Decriminalising Adultery

In India, 'Adultery' was incorporated as an offence in Section 497 of the Indian Penal Code 1860 (hereinafter referred as IPC); it defined 'adultery' and prescribed the punishment for the same, while Section 198(2) of the Code of Criminal Procedure 1973 (hereinafter referred as CrPC) dealt with the procedure for the prosecution of offences relating to Adultery. Section 497 of the Indian Penal Code 1860 provides that:

> *Adultery- Whoever has sexual intercourse with a person who is or whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punished as an abettor.*

Section 198 of the Code of Criminal Procedure 1973 provides that:

> *Prosecution for offences against marriage. –*
> *(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:*
> *(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable underSection 497 or Section 498 of the said Code:*

4 *Ibid,* p. 251.
5 (2021) 2 SCC 324.

> *Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.*

A Writ petition was filed in the Supreme Court of India in *Joseph Shine v. Union of India*,[6] challenging the constitutional validity of Section 497 of IPC and 198(2) of Cr.PC, on several grounds. Firstly, Section 497 of IPC included the act of sexual intercourse by a married man with another married woman who was not his wife as a criminal offence while overlooking as an offence the same act committed with an unmarried woman. Secondly, sexual intercourse with a married woman with the consent of her husband did not amount to the offence of adultery and was exempted from the ambit of the provision, implying thereby that a married woman was the property of her husband and that the marital relationship was nothing more than a master-servant relationship. Thirdly, when both the partners had consensual sexual intercourse, there was no rational for penalising only the man. Fourthly, the assumption that women were incapable of committing adultery was irrational and perverse amounting to institutionalised discrimination. Fifthly, Article 15(3) of the Constitution of India permits affirmative action in favour of women and was not meant to exempt married women from the liability of punishment in criminal offences and hence Section 497 could not be interpreted as a beneficial provision under the said Article. Sixthly, Section 198(2) of Cr.PC considered only the husband to be an 'aggrieved person' and allowed him to initiate criminal prosecution under Section 497 negating a similar right to the aggrieved wife leaving her with no remedy in law to prosecute her infidel husband.

On September 28, 2018, a five-judge Constitution bench of the Supreme Court of India decided the case and opined that Section 497 was an anachronistic law which denied substantive equality to women,[7] which considered a married woman to be the property of her husband devoid of independent sexual agency.[8] These qualities, founded on patriarchal social values, were violative of Article 14 of the Constitution of India. The provision, too, violated the non-discrimination principle embodied under Article 15 of the Constitution of India as it was based on gender stereotypes with respect to the role of women in a marriage. It also lacked an adequately determining principle to criminalise consensual sexual activity.[9] Further, it denied women the constitutional guarantees of dignity, liberty, privacy, sexual autonomy which was intrinsic to Article 21 of the Constitution of India.[10] The court stated that changes in social, cultural, moral, economic and political values, coupled with the evolving notions of transformative constitutionalism and constitutional

6 (2019) 3 SCC 39.
7 *Supra* n. 6, pp. 167-168.
8 *Supra* n. 6, p. 39.
9 *Supra* n. 6, pp.167-168.
10 *Supra* n. 6, pp.167-168.

moralism, would not support such a provision.[11] The global trend was also in favour of treating adultery as a civil wrong and a ground for divorce.[12] The court *vide* four separate concurring judgments, unanimously struck down Section 497 of IPC and Section 198(2) of CrPC to the extent of its application to the offence of adultery, as being violative of Articles 14, 15 and 21 of the Constitution of India. The outcome of this judgement is that adultery is no longer a criminal offence but exists as a civil remedy as a matrimonial wrong and as a ground for divorce in the personal laws in India. The legislature, however, has not effaced the provisions from the statute books till date.

Adultery in Personal Laws as a Ground for Divorce

Personal laws provide matrimonial remedies to people on grounds of religion, caste, creed or local tribal customs. Personal Law regulates marriage, divorce, maintenance, among other things, with respect to Indian citizens and most of the legal rights and remedies of married persons are derived from them. Adultery in matrimonial law is one of the principal grounds for divorce and has been defined as consensual sexual intercourse between a married person and another person of the opposite sex during the subsistence of the marriage.[13]

In Hindu law, marriage is treated as a *samskara* or a sacrament.[14] The Hindu Marriage Act 1955 (hereinafter referred as HMA) is a comprehensive legislative enactment which codifies the law relating to marriages between two Hindu persons and provides for the rights, liabilities and obligations arising from such a marriage. Section 13(1)(i) of the Act states that either spouse may file a petition for dissolution of marriage by a decree of divorce on the ground that the other party has had 'voluntary sexual intercourse with any person other than his or her spouse after the marriage had been solemnized'.

In Muslim law, marriage is purely a civil contract and a woman married under this law is entitled to obtain a decree for dissolution of marriage or divorce as provided in the Dissolution of Muslim Marriages Act 1939. Section 2 of the said Act deals with all the grounds on which a divorce can be granted, while Section 2(viii)(b) of the Act specifically provides that if the husband 'associates with women of ill repute or leads an infamous life', it would amount to cruelty to the wife and she can file for a divorce on that reason.[15] Where a man accuses his wife of adultery and the said allegation cannot be proved, that would be sufficient cause for a wife to file for divorce against her husband. In a situation, where a man himself has committed adultery, but has accused his wife of the same, it would then become a ground for the wife to seek divorce on the grounds of cruelty.[16]

---

11 *Supra* n. 6, p. 39.
12 *Supra* n. 6, p. 39.
13 Satyajeet A. Desai (rev.), Dinshaw Fardunji Mulla, PRINCIPLES OF HINDU LAW, 21st ed. 2011, p. 906.
14 *Ibid*, p. 818.
15 *Zafar Hussain v. Ummat Ur Rahman* (1919) 41 All 278.
16 *Abbas v. Rabia* AIR 1952 All 145.

The Divorce Act 1869 is the codified law regulating divorce amongst Christian persons who have solemnised their marriage in India. Section 10 of the Act provides for the grounds on which a marriage can be dissolved and Section 10(1)(i) of the said Act specifically provides that either the husband or wife can present a petition for divorce on the ground that the other spouse has committed adultery. Section 11 of the Act further makes it mandatory for the party who is filing the petition for divorce on the ground of adultery to make the alleged adulterer/adulteress a co-respondent except, in cases where the petitioner husband is excused from doing so if his wife who is the respondent is leading a life of a prostitute or, in the case of the wife being the petitioner, the respondent husband is leading an immoral life, or if the name of the adulterer or adulteress is not known or is dead.

The Parsi Marriage and Divorce Act 1936, deals with marriage and divorce of Parsis in India. Section 32(d) of the Act specifically states that any married person can sue for divorce on the ground that the other spouse has committed adultery since the marriage.

The Mizo Marriage, Divorce and Inheritance of Property Act 2014 is applicable to Mizo people who hail from the State of Mizoram and deals with the laws relating to marriage, divorce, and inheritance amongst them. Section 13(i) of the said Act provides for adultery as a ground for dissolution of marriage which can be obtained when either the husband or wife presents a petition before the Court of law. The Special Marriage Act 1954 is an enabling statute applicable to the people of India, irrespective of their religion, which provides for registration of a marriage solemnised in any form. Section 27(2)(a) of the Act is a gender-neutral provision and states that a petition for divorce may be presented by either of the spouses on the ground that the other spouse has 'had voluntary sexual intercourse with any person other than his or her spouse' after the solemnisation of the marriage.

Maintenance in Matrimonial Matters

Maintenance laws have been enacted as a measure of social justice and in matrimonial jurisprudence, 'maintenance' is a term used to denote 'spousal support' by providing recourse to dependent wives for their financial support. Courts can grant two types of maintenance: (a) Maintenance *pendente lite* which is the amount to be paid during the pendency of the matrimonial proceeding; and (b) Permanent alimony which is the consolidated payment made by the husband to the wife towards her maintenance for life. The objective of granting maintenance is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage.[17] It is often seen that when a marriage breaks down, the husband pays nothing for the support of his wife and children and the wife has to fall back upon her parents and relatives for her immediate needs.[18] Maintenance provides speedy remedy

17 *Supra* n. 5.

18 *Kusum Sharma v. Mahinder Kumar Sharma* (2014) 214 DLT 493.

for the supply of food, clothing and shelter to the deserted wife[19] and to ensure that the indigent litigating spouse is not handicapped in defending or prosecuting the case due to want of money. Several criteria must be taken into consideration by the court while determining the quantum of maintenance to be awarded.

Legislations Dealing with Maintenance of Spouse

The legislations in India which have been framed on the issue of spousal maintenance are the Hindu Marriage Act 1955 (hereinafter referred as HMA), the Hindu Adoptions and Maintenance Act 1956 (hereinafter referred as HAMA), the Muslim Women (Protection of Rights on Divorce) Act 1986 (hereinafter referred as MWPRD Act), the Divorce Act 1869 (hereinafter referred as DV Act), the Mizo Marriage, Divorce and Inheritance of Property Act 2014 (hereinafter referred as MMDIP Act), the Special Marriage Act 1954 (hereinafter referred as SMA), Section 125 of the Code of Criminal Procedure 1973 (hereinafter referred as Cr.PC) and the Protection of Women from Domestic Violence Act 2005 (hereinafter referred as PWDVA). Apart from the personal laws applicable to them, the latter three enactments provide a statutory remedy to women irrespective of their religious faiths.[20]

Hindu Laws

The provisions dealing with maintenance in the Hindu Marriage Act 1955 are gender-neutral and allow either of the spouses to claim maintenance from the other spouse. Section 24 of the Act empowers the court to grant maintenance *pendente lite* and expenses for litigation proceedings to the spouse if it appears that the applicant does not have independent income sufficient for his or her support during the pendency of the case. Section 25 of the Act empowers the court to provide permanent alimony and maintenance at the time of passing a decree in a matrimonial proceeding on an application made by either spouse. The maintenance shall be granted on the basis of the applicant's own income and the income of the other spouse and the conduct of the parties to the proceeding.

Most matrimonial laws allow a Hindu wife to obtain maintenance from her husband only as an adjunct to proceedings for divorce or judicial separation. However, the Hindu Adoptions and Maintenance Act 1956 deals with the maintenance of a Hindu wife during the subsistence of a marriage without any matrimonial proceeding pending between the parties. Section 18 of the Act deals with the maintenance of a Hindu wife and Section 18(1) provides that the husband must maintain his wife during her lifetime and entitles the wife to claim maintenance from her husband during her lifetime. Section 18(2) specifies the circumstances under which the wife is entitled to live separately from her husband without forfeiting her right to claim maintenance and Section 18(2)(e) specifically states that if the husband 'keeps a concubine in the same house in which his wife is living or habitually resides with a concubine

19 *Bhuwan Mohan Singh v. Meena* AIR 2014 SC 2875.

20 *Supra* n. 5.

elsewhere', it will be ground enough for the wife to live separately and her husband has the obligation to maintain her.

A Hindu wife may claim maintenance under one or more of the afore-mentioned statutes since each of these enactments have been framed with a specific object and purpose and provide an independent and distinct remedy. For instance, a Hindu wife may claim maintenance under the HAMA 1956 and also in a substantive proceeding for either judicial separation, restitution of conjugal rights or dissolution of marriage, under the HAMA 1955.

Muslim Laws

Under Muslim law, maintenance is called 'Nafaqa'; and it includes food, clothing, and lodging. The Muslim Women (Protection of Rights on Divorce) Act 1986 deals with the rights of Muslim women who had been divorced by or have obtained a divorce from their husbands.[21] Muslim personal law imposes limited obligation on the husband to maintain his divorced wife. Section 3(a) of the Act provides that a divorced woman shall be entitled to a reasonable maintenance from her former husband only during the period of *Iddat* and according to Section 3(c) she is also entitled to receive an amount equal to her *Mahr* or *Dower* agreed to be paid to her at the time of marriage. Under Section 2(ii) of the Dissolution of Muslim Marriage Act 1939, a Muslim wife can seek dissolution of her marriage on the ground that her husband has failed to provide maintenance and has neglected her for a period of two years during the subsistence of the marriage. Under the Muslim law, the husband is bound to maintain his wife so long as she is faithful to him and performs her marital duties.[22]

Christian Laws

Under the Christian law, the provisions dealing with maintenance are provided for in the Divorce Act 1869. Section 36 of the Act is gender-specific and allows only the wife to claim alimony *pendente lite* and expenses for the proceeding from her husband during the pendency of the case. Under Section 37 of the Act, the court may order permanent alimony (gross or annual) to be paid by the husband to the wife in cases where the wife has obtained a decree of divorce or a decree of judicial separation from him. Further, the court may also pass an order directing the husband to pay maintenance to his wife on a weekly or monthly basis. The court shall take into consideration the financial standing and conduct of the parties while passing such orders for maintenance and, in future, it may also modify or suspend any such order if there is a change in circumstances of either of the spouses.

Parsi Laws

Under the Parsi law, the provisions dealing with maintenance are provided

21 "*Maintenance in Muslim Law*", LAW TIMES JOURNAL, May 7, 2019, http://lawtimesjournal.in/maintenance-in-muslim-law/, (visited on November 23, 2020).

22 *Supra* n. 3, p. 686.

for in the Parsi Marriage and Divorce Act 1936. Section 39 of the Act is a gender-neutral provision and allows either of the spouses to file a case for granting 'Alimony *pendente lite*' against the other spouse on the ground that they do not have sufficient income to support themselves and for litigation expenses. Section 40 of the Act provides that at the instance of either spouse, a court at the time of passing a decree may grant 'permanent alimony and maintenance' to the other spouse for their lifetime after taking into consideration the defendant spouse's income and other property.

Mizo Laws

Section 16(1) of the Mizo Marriage, Divorce and Inheritance of Property Act 2014 is a gender-neutral provision and deals with spousal maintenance, wherein either spouse who is unable to maintain herself or himself, may file an application for permanent alimony and maintenance from the other spouse. While granting such amount the court shall take into consideration both the applicant's and respondent's income and other property, the conduct of the parties and other circumstances of the case. Further, the court may also secure such payment by making a charge on the immoveable property of the respondent.

Secular Laws

The Special Marriage Act 1954 is a secular legislation applicable to all persons who solemnise their marriage in India under this Act. The provisions dealing with maintenance in this Act are gender-specific and only permit the wife to claim maintenance from her husband. Section 36 of the Act provides for a wife to claim *pendente lite* maintenance if she does not have sufficient independent income to support herself and for legal expenses. Section 37 of the Act specifies that at the time of passing the decree, after taking into consideration the financial status of both the wife and the husband, the conduct of the parties and other relevant circumstances, the court may award permanent alimony to the wife whereby the husband is obliged to pay maintenance to the wife for her lifetime.

Under Section 125 the Code of Criminal Procedure 1973 a wife belonging to any religion can claim maintenance from her husband irrespective of the personal laws applicable to the parties. The primary justification for its inclusion in the Code of Criminal Procedure 1973, is that it provides a speedy and effective remedy against a husband who neglects or refuses to maintain his dependent wife despite being financially capable of doing so. It is aimed to ensure that the neglected wife is prevented from starvation and destitution and consequently being driven to a life of vagrancy, immorality and crime for her subsistence.[23] The proceedings under this section are civil in nature and a self-contained summary procedure is prescribed in Section 126 of Cr.PC for the courts to follow while granting maintenance to the wife.

The Protection of Women from Domestic Violence Act 2005 (hereinafter referred as PWDVA) stands on a separate footing from the laws discussed

23 *Bhagwan Dutt v. Kamla Devi* (1975) 2 SCC 386.

above and provides relief to certain women who have been subjected to 'domestic violence'.[24] It is applicable to women (aggrieved person)[25] who are or have been in a domestic relationship[26] with an adult male person (respondent)[27] where both parties have lived together in a 'shared household'[28] and are related by consanguinity, marriage or a relationship in the nature of marriage. An aggrieved wife or female living in a relationship in the nature of marriage can file a complaint against her husband or the male partner. Section 20 of the Act provides that the court may order the respondent to pay 'monetary relief' to the aggrieved woman for expenses or losses incurred as a result of domestic violence. The court may grant an amount that would be adequate, reasonable taking into consideration the standard of living to which the aggrieved person wasaccustomed to. The amount awarded by the Court under this Act would be in addition to an order of maintenance granted under Section 125 Cr.PC, or any other maintenance order passed under any other Act.

Adultery/Unchastity as a Bar to Maintenance

Adultery is considered to be a marital wrong and is *raison d'être* for denial of maintenance/alimony to a spouse or a justification for granting the same to the innocent spouse. The following enactments have incorporated provisions which specifically bar maintenance onthe grounds of unchastity or adultery of the spouse. Section 25(3) of the Hindu Marriage Act 1955 is a gender-neutral provision which allows either spouse to present a petition before the court to vary, modify or rescind any order passed for maintenance on the ground that the husband has had sexual intercourse with any woman outside wedlock in case the wife is the petitioner and that the wife had not remained chaste, if the petitioner is the husband.

Section 18(3) of the Hindu Adoptions and Maintenance Act 1956 categorically states that if a Hindu wife is unchaste, then she shall not be entitled to a separate residence and maintenance from her husband. A Muslim wife is not entitled to claim maintenance under the Muslim law if she has 'eloped with another man'.[29] However, a Muslim wife can sue for a divorce on the ground that her husband has falsely charged her with adultery and this is called *Lian* or imprecation.[30] Section 40(3) of the Parsi Marriage and Divorce Act 1936 specifies that, the spouse against whom an order of maintenance has been passed can file a petition before the Court to vary, modify or rescind such order on the grounds that the 'wife has notremained chaste' or the husband has had 'sexual intercourse with any woman outside wedlock'. Section 16(2) of the Mizo Marriage, Divorce and Inheritance of Property Act 2014 specifically states that court may vary, modify or rescind any order of

24 Section 2(g) of the Protection of Women from Domestic Violence Act 2005.
25 Section 2(a) of the Protection of Women from Domestic Violence Act 2005.
26 Section 2(f) of the Protection of Women from Domestic Violence Act 2005.
27 Section 2(q) of the Protection of Women from Domestic Violence Act 2005.
28 Section 2(s) of the Protection of Women from Domestic Violence Act 2005.
29 *Supra* n. 21.
30 *Supra* n. 3, p. 688.

maintenance passed infavour of the wife, when the husband presents a petition and proves that she was 'not leading a chaste life'.

Section 37(3) of the Special Marriage Act 1954 specifically provides that when the husband presents a petition and proves that his wife she was not 'not leading a chaste life', the court may vary, modify or rescind any order of maintenance which was passed in favour of the wife. Section 125(4) the Code of Criminal Procedure 1973 emphatically states that the wife shall not be entitled to interim maintenance or maintenance from her husband if she is 'living in adultery'. Section 125(5) further states that, if it is proved that the wife in whose favour an order of maintenance has already been passed under this section, is living in adultery, the magistrate shall cancel the order.

Nature of Adultery

From a reading of the various provisions appraised, it can be seen that 'Adultery' plays a very important role in granting or barring spousal maintenance. Further, it can be seen that it is a ground for divorce in all the personal laws in India. The word 'unchaste' has been used in several of the statutes to deny maintenance to a wife. Judgments in family law cases have repeatedly and uniformly reiterated the significance of 'chastity' while being indifferent to or even sympathetic towards adulterous or violent husbands, indicating that women are relegated to the status of secondary citizens and are inferior partners in a marriage and whose qualifications are inferior to those of the husband.

Adultery, which takes various forms like one-night stands, habitual philandering or long-term committed extramarital relationships, is a leading cause of domestic violence and divorce. In most cases the children bear the brunt. To determine the ideal level of sexual morality that would promote general happiness and well-being is extremely difficult. Adultery is a serious allegation casting aspersion on the character of the spouse and affecting the reputation in the society. The burden of proving adultery in the court is always on the person alleging adultery as there is a presumption of innocence[31] in favour of the other spouse. In most cases, the evidence available is only circumstantial. For instance, letters written by a paramour indicating illegitimate intimacy, or the fact that the notice of proceedings against the wife was received by the wife at the paramours' address, or the fact that the husband is living with another woman as a spouse, imply the existence of adulterous life. Such circumstantial evidences may not be sufficient to prove adultery.

Significance and Need of Prenuptial Agreements and No-Fault Divorces

The institution of marriage was elevated to the level of inviolability to ensure the continuance of a civilised society and all instruments of law were directed at preserving this characteristic. However, the inviolability concept is changing; the time-tested moral and social values on which the institution of marriage rests upon is being questioned and the State is perplexed in the face of all this.

31 *Sullivan v. Sullivan* (1956)1 All ER 611.

Prenuptial Agreement

A prenuptial agreement or premarital agreement, sometimes called 'prenup' or 'prenupt', refers to an agreement between two parties before they enter the sacramental or contractual relationship of marriage, to provide for all possible contingencies in the event of the marriage not working. Such agreements, signed voluntarily, without any duress, coercion or undue influence,[32] delineate the rights and liabilities of spouses especially in financial matters, like listing the ownership to properties of either party, procedure for divorce, and conditions relating to child adoption or its maintenance. The salient feature of prenuptial agreements is the absence of certainty of events that may follow. They protect the wealth and assets acquired before marriage, shield spouses from each other's debt, safeguard the family business, allow the continuation of professional practice, provide for child custody, lay out divorce procedure, and so on.[33]

The major advantage of entering into a prenuptial agreement is that, irrespective of the marital law under which the couples marry, it helps to minimise litigation and ward off the after-effects discussed above that follow a separation. While 'prenups' may deter false accusations by unscrupulous spouses, they are especially useful in minimising the unfortunate side effects of women misusing Section 498A of the Indian Penal Code 1860, or the provisions of the Protection of Women from Domestic Violence Act 2005, for blackmail and extortion of money. Importantly, a prenuptial agreement protects the men from unreasonable divorce settlements.

In India, the institution of marriage has exaggerated sacred connotations. For a couple about to start life together, death and divorce are abstract concepts and the very thought of entering into a prenuptial agreement would appear repugnant to the sanctity of the institution of marriage, sounding more like a business proposition to them. A large majority of the people are illiterate and questioning traditional beliefs is unthinkable; for them, a prenuptial agreement would seem preposterous and could be rejected ab-initio. Even the suggestion of a prenuptial agreement would signify the absence of mutual trust which is the foundation ofany relationship. Eventually, when death or divorce happens, the distribution of matrimonial properties is left to the law of the land and ultimately, the court. While the justice delivery system endeavors to distribute the parties' properties equitably, it cannot be denied that the process is tedious, time consuming and cost-intensive. It would therefore be productive if the parties to a marital contract are educated to the desirability of entering into a prenuptial agreement dissociating it from the belief that the beginning is faulty when it begins with lack of trust.

32 Vijender Kumar, "*Quest for Prenuptial Agreement in Institution of Marriage: A Socio-Legal Approach*", 60(4) *JILI* 406 (2018).

33 *Ibid*, p. 407.

No-Fault Divorce

In India, the institution of marriage is believed to be a lifelong commitment ending with the death of a spouse; however, this view is now being challenged considering the increase in the number of divorce cases whereby, family values and parenting roles are also being sought to be redefined. No-Fault divorce means that the spouse asking for a divorce does not have to prove that the other spouse did something wrong or require reasons like desertion, cruelty, adultery, impotence or insanity to separate from each other and only have to state that they have serious 'irreconcilable differences', with no hope of resumption of spousal duties and that they cannot stay married to each other. The Supreme Court of India has a distinct nomenclature for it: 'irretrievable breakdown of marriage'.

The Law Commission in its 71st Report had suggested that 'irretrievable breakdown of marriage' should be added as a ground to Section 13(1) of the Hindu Marriages Act 1955, whereby a Hindu marriage should be allowed to be dissolved if the husband and wife have lived apart for a period of 5 to 10 years and the marriage has irretrievably broken down dueto incompatibility or clash of personality or other reasons.[34] Presently, divorce on the grounds of 'irretrievable breakdown of marriage' can only be granted by the Supreme Court under Article 142 of the Constitution of India. In the case of *Naveen Kohli v. Neelu Kohli*,[35] the Supreme Court had made a recommendation to the Union of India to consider bringing an amendment in the Hindu Marriage Act 1955, to incorporate irretrievable breakdown of marriage as a ground for divorce; but nothing has been done so far.

Instead, 'irretrievable breakdown of marriage' as a ground for divorce has been criticised on the ground that irretrievable breakdown allows the spouses, or even one spouse, to terminate the marriage at his or her will and hence will transform marriage from a union for life into one which can be ended at pleasure. Another criticism advanced was that it was contrary to the basic principle that no man should be able allowed to take advantage of his own wrong; a spouse who was responsible for the breakdown of the marriage should not be able to rely on such breakdown in order to obtain a divorce against his or her partner's will.[36] Eventually, when a marriage is no longer desirable, a no-fault divorce or 'irretrievable breakdown of marriage' as a ground for terminating the marriage without attributing a reason for the split, will remove the specter of guilt. It will end the practice of rewarding the supposedly 'innocent' party and punishing the supposedly 'guilty party'. Legislations

34 Report No. 71 of the Law Commission of India on "*The Hindu Marriage Act, 1955-Irritrievable Breakdown of Marriage as a Ground of Divorce*", April 1978, https://lawcommissionofindia.nic.in/51-100/index51-100.htm, (visited on November 29, 2020).

35 AIR 2006 SC 1675.

36 Kapil Kishore Kaushik, "*Irretrievable Breakdown of Marriage vis-vis Hindu Law in India*", http:/www.legalserviceindia.com/legal/article-1873-.html, (visited on January 12, 2021).

sanctifying no-fault divorces will reduce the levels of bitterness between feuding couples and move towards fairer financial settlement as the concept of alimony will be replaced by 'spousal support' or maintenance.[37]

Conclusion

The Joseph Shine case which decriminalised adultery and rendered the moral sting attached to it futile, has set in motion certain social and legal ramifications as a result thereof. It is argued that this judgement may lead to an increase in adulterous relationships. The prevailing section had barred both the spouses from filing cases against each other when one of them is involved in an extra-marital sexual relationship and hence it cannot be determined whether Section 497 IPC acted as a deterrent or not. Many spouses prefer that the offending partner be punished by law rather than seek annulment of their marriage.

Proving Adultery by spouses in a Court is a tedious task and such cases are long drawn. A question that begs an answer is: if adultery is good enough a ground for divorce and justification for granting spousal maintenance, then why should it be decriminalised? Has the Supreme Court of India underrated the impact of Adultery in marriages by stating that it should not be a criminal offence in India? The legislature, however, has not effaced the provisions from the statute books till date. The following issues have not found closure; under Section 125(4) CrPC, there is an express embargo on the right of the wife to claim maintenance based on the allegations of Adultery and under Section 125(5) the magistrate can cancel an order of maintenance made in favour of the wife, on the grounds that the said wife is living in adultery. Adultery has been decriminalised and hence there is no definition for the term Adultery in the criminal law in India, which will pose a serious problem for the women claiming spousal maintenance under Section 125 of CrPC.

In common parlance, adultery means sexual intercourse with a person of the opposite sex other than the spouse. Hence, will same-sex relationships constitute adultery within the meaning of divorce laws? Is there a substantial distinction between homosexual and heterosexual extramarital sexual activity? After all, both fall within the scope of marital misconduct.[38] What rights do live-in partners in 'relationships in the nature of marriage' have with regard to adultery? Can adultery be considered 'grave and sudden provocation' to absolve a spouse from criminal liability or reduce his culpability in cases of homicide, grievous hurt or criminal intimidation? This article could unsympathetically be branded a staccato narrative; that it has simply listed the laws and enunciated about the content and scope of each of them, codified under compelling circumstances. But it could not have been stated differently, lest it be accused of unjustifiably comparing laws of a certain genre that have evolved over time

37 Kimberly A. Faust and Jerome N. McKibben, "Marital Dissolution Divorce, Separation, Annulment and Widowhood", Marvin Sussman, et al. (eds.), HANDBOOK OF MARRIAGE AND THE FAMILY, 2nd ed. 1999, p. 481.

38 *Supra* n. 2.

depending on the prevailing socio-economic practices, conveniences and necessities. The article seeks to give a glimpse of how adultery as a marital wrong is dealt with, the differential treatment meted out to a similar situation by different sets of laws and the consequences of adultery on spousal maintenance. It could perhaps encourage the reader to wish for different possibilities like pre-nuptial agreements and no-fault divorces in India.

***

MASSACRE OF INNOCENTS AND NEGLIGENCE OF CHINA: POSSIBLE LEGAL REMEDY WITH REFERENCE TO VICTIMS OF COVID-19 PANDEMIC IN INDIA

Sandip Sumbhate[♣]

Abstract

In the year 2019, the world has experienced first glimpses of the effect of a novelty virus i.e., Severe Acute Respiratory Syndrome Coronavirus 2 popularly known as SARS-CoV-2. The effects of the worldwide spread of the virus has affected in all spears of individual's life ranging from physical, emotional, financial as well as social. Based on the report submitted by China to WHO in December 2019 regarding the leak of virus, it is evident that China has played a substantial role in spreading the virus to the entire world. Therefore, the paper analyses the available legal recourse on the genocide caused owing to coronavirus by highlighting the liabilities of China as a principal accountable for the spread of virus. Further, the paper analyses the issues like appropriate adjudication forum, kind of petition, quantum of compensation, an appeal to international community and finally sums up with some suggestions.

Keywords: COVID-19, Genocide, Coronavirus, Compensation, Legal Recourse, Adjudication Forum.

Introduction

As long as there is human life on earth, history would never forget the worldwide mayhem caused by Covid-19 outbreak by the release of coronavirus from the Wuhan city of China,[1] as it is the first epicenter declared by World Health Organisation (hereinafter referred as WHO), later shifting this epicenter to Italy[2] and United States,[3] taking number of innocent human lives, jobs, economic losses of several countries. There are various conspiracy stories that are popping up on international platform with several cross over allegations against China which would be an entirely different topic of investigation and research, but it is versatile truth that first case of coronavirus death has been

♣ Advocate, High Court of Bombay Bench at Nagpur, e-mail: sumbhate@gmail.com.

1 Hengbo Zhu et al., "*The Novel Coronavirus Outbreak in Wuhan, China*", GLOBAL HEALTH RESEARCH AND POLICY, March 2, 2020, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7050114/, (visited on May 10, 2020).

2 James Gallagher, "*Coronavirus: Europe now Epicenter of the Pandemic, says WHO*", *BBC NEWS*, March 13, 2020, https://www.bbc.com/news/world-europe-51876784, (visited on May 10, 2020).

3 Tim Loh, "*U.S. Now Has the World's Deadliest Coronavirus Outbreak on Bloomberg*", BLOOMBERG, April 11, 2020, https://www.bloomberg.com/news/articles/2020-04-11/u-s-now-has-the-world-s-deadliest-coronavirus-outbreak, (visited on May 10, 2020).

reported in Wuhan City of China.[4] There are various grounds like morality, global governance and protection from next deadly pathogen to mandate accountability of China in coronavirus outbreak.[5] There are sufficient evidences to establish that China did everything it could do to safeguard its citizens while making people of other countries vulnerable to Covid-19, it ranges from permission for celebration of New Lunar Year on January 18, 2020 in Wuhan City, and later permitting its some of the infected people to travel to all over world, meanwhile mysterious death of Dr. Li Wenliang, who was reprimanded after sharing information on social media and posthumous exoneration of him by Chinese Government after world took notice of atrocities against the doctors and medical workers, boost the strength of arguments favouring China legally accountable for spread of the virus causing pandemic.[6] The International Health Regulations (hereinafter referred as IHR) are an international law laid down by WHO which helps countries work together to save lives and livelihoods caused by the international spread of diseases and other health risks. IHR mandates duty upon States to notify WHO of events that may constitute a public health emergency of international concern and take preventive steps against the spread of infectious disease.[7] Therefore, it was an obligatory responsibility upon China to report this case promptly to WHO considering new virus species causing fast spreading infectious respiratory illness. Failure of china in reporting the first case in a timely manner, and deliberately avoiding required quarantine as well as containment procedure of first victim who died on November 17, 2019 in Hubei Province, China, as reported by South China Morning Post proves gross negligence of China and opens a pandora of suspicious intent of China, which has triggered a silent global war, a result of dogmatic aggressive policies of China to establish its economic prowess in a zeal to become world's superpower.

The death toll all over the world is increasing day-by-day and no one knows where this would stop given the speedy spread of the novel virus, mutation, and mortality characteristics of the virus. The guidelines are issued as a Covid control protocol throughout the world which led to complete lockdown, affecting the socio-economic activities of major population of world. India, as it is also a part of globalisation, is not immune to this uncalled calamity with a second largest population with increasing cases of the infection, affecting lakhs and struggling to prepare for several thousand daily deaths.

---

4 "*Rolling Updates on Coronavirus Disease (COVID-19)*", WORLD HEALTH ORGANISATION, May 4, 2020, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen, (visited on May 15, 2020).

5 Michael Auslin, "*Why China Must be Held Accountable for the Coronavirus Pandemic*", NATIONAL REVIEW, March 31, 2020, https://www.nationalreview.com/2020/03/coronavirus-pandemic-china-must-be-held-accountable/, (visited on May 15, 2020).

6 Hollie McKay, "*How China can be held Legally Accountable for Coronavirus Pandemic*", FOX NEWS, March 20, 2020, https://www.foxnews.com/world/china-legally-accountable-coronavirus, (visited on May 15, 2020).

7 Articles 2, 4, 5 and 7 of the International Health Regulations 2005.

The author sensitised with the impact of Covid-19 pandemic and find themselves deeply disappointed for the pain incurred to a larger population of different countries of the world including India, and therefore, the author is analysing the expansion of legal dimension to an underlying negligent act which was seen evident in delay in containment of 'patient zero'[8] and lockdown of 'ground zero'[9] which triggered contagious effects of deadly disease to other parts of world having its simultaneous effects on curtailment of basic human rights like freedom of speech, movement , trade and ultimately threat to life. The worldwide population including India had come to standstill and it gave feeling that entire world has turned into a 'Highly Sensitive Infectious Disease Microbiology Laboratory' where every person is a scientist who has a fear to get contracted with Covid-19 for his error in sanitisation and sterilisation. Total 222 countries with an infected population of about 168,011,339/- and 3,488,194/- deaths is a latest figure till this ink sheds down[10] and number is expected to rise further, and it would be beyond the wild guess of expert statistician.

The author took itinerary to search for origin of Covid-19 pandemic, it was found to have its existence in 'Wild Wet Market' area of Wuhan city of China which was reported to WHO in the month of December 2019.[11] The etiology of disease was traced to travel from Bats to Pangolins and then to Human being from where it shot its trajectory to a world population due to migration of Chinese workers to Italy and other countries.

In finding a cause of World Pandemic, the despicable act of hiding information and failure of containment of 'patient zero' that is a first patient of COVID-19 by People's Republic of China under the presidency of Xi Jinping is one of the crucial issues in establishing this case, and another important issue that would cause pain to advocacy group and law fraternity is the issue of missing 'Justice' in a clear case of crime against humanity where innocents were sacrificed for their no fault. Addressing this issue would uplift 'Humanity' to new heights.

The doctrine of Strict Liability,[12] Absolute Liability,[13] Vicarious Liability, [14] and Battery[15] from a law of tort[16] are powerful legal weapons in favour of any

8 Ciaran Mcgrath, "*Coronavirus Breakthrough: 'Patient Zero' at Wuhan Market Revealed*", EXPRESS, March 27, 2020, https://www.express.co.uk/news/world/1261371/coronavirus-patient-zero-wuhan-market-china-covid19-pandemic, (visited on May 20, 2020).

9 Joseph Young, "*Top Scientist Declares Ground-Zero China a Coronavirus 'Green Zone'*", CCN, March 9, 2020, https://www.ccn.com/top-scientist-declares-ground-zero-china-a-coronavirus-green-zone/, (visited on May 20, 2020).

10 "*Covid-19 Coronavirus Pandemic*", WORLDOMETER, https://www.worldometers.info/coronavirus/, (visited on May 25, 2021).

11 *Supra* n. 4.

12 *Rylands v. Fletcher* (1868) UKHL 1.

13 *M.C. Mehta v. Union of India* 1987 SCR (1) 819.

14 *Donoghue v. Stevenson* (1932) A.C. 562.

15 *Fagan v. Metropolitan Police Commissioner* (1968) 3 All ER 442.

State including India to bring China to Justice. To the contrary China has limited instruments of defense such as to invoke Right of Fair Trial and Doctrine of Prohibition of Self-Incrimination,[17] as it has signed an International Covenant of the Civil and Political Rights (hereinafter referred as ICCPR)[18] and lost a right to take support of these provisions on international adjudicating platform. The major stumbling block in application of these doctrines are, firstly, the jurisdictional issues, as in this case a real 'culprit' is sitting far away in a place which is also Sovereign State and enjoys Sovereign immunity for a trial against a murder of innocents. Secondly, a type of application to be submitted to a court, an international adjudicating platform to undertake a task of trial of mass genocide. Thirdly, quantum of compensation in terms of dollar for the loss caused to human life and property of petitioner country, here in question is India. Lastly, appeal to international community to show alacrity and swiftness to bring criminal to justice and safeguard 'Humanity' which is in dire danger never seen before in history of world. In this regard, the author focusses on importance and quick delivery of justice, as delayed justice denies a time to enjoy a juice of golden fruit of Justice.

Appropriate Adjudicating Platform and Its Complexities

History would never forget China for its unprecedented crime against humanity as it had crushed basic human right that is 'right to life'- in its true and all other allied meanings- of innocents not only in India but all over the World. To ensure restoration of this precious right to their citizens is a matter of utmost priority for the government of India. The urgency is necessity to uphold 'right to justice' a lofty ideal enshrined in preamble of Constitution of India and United Nation's Declaration of Human Rights to reinforce faith in judicial system of India and in turn of the World. The given task as it seems superficially is not an easy one, given the complexity of facts of underlined Case and the bumpers lying on tread mill of due process of law.

To seek justice, a victim in India would knock the door of Apex Court in India wherein Constitution of India under Article 138 provides for the enlargement of jurisdiction for the international crime, but as this is a unique case of negligence by a Sovereign State China, it would be head hammering for any legal team to enforce provisions of Law of Tort, which is not codified , and

16 "*International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities)*", UNITED NATION, https://legal.un.org/ilc/documentation/english/a_cn4_543.pdf, (visited on June 5, 2020).

17 Article 9(4) of the International Covenant on Civil and Political Rights, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, (visited on June 10, 2020).

18 International Covenant on Civil and Political Rights", UN TREATIES COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND, (visited on June 10, 2020).

particularly when common innocent people are crushed in Sovereign State like India by a 'butcher'- Head of Communist Sovereign State- sitting far away from the place of crime who was smart enough to maintain social distancing in commitment of crime against humanity. The Covid-19 disease is imported in India not by the country of its origin but by the citizens of Italy who are themselves a victim of this tragedy. In this situation, it would be arduous task for Indian advocacy team to establish vicarious liability on China under a doctrine of 'Respondent Superior' as it is not a simple matter involving servant-master relationship, but it is a matter between two Sovereign State. No sovereign state having criminal intent would accept to become 'Master' that succumbs to doctrine of 'Respondent Superior' which would delay the justice to victims of human crime.

Poor and common people of India who are daily bread winners has nothing to do with International Law or Geo political tensions that happens on global platform. These along with the middle-class people have become a soft target of Covid-19 pandemic in India even if they are at no fault. Territorial restrictions to adjudicate upon a matter are a major hurdle for these victims. Apex Court of India has limited power under Article 138 of the Constitution of India to resolve international dispute.[19] The Case in question is a crime against a humanity or culpable genocide which requires independent international adjudicatory body which would have powers to punish defendant and trigger deterrent effect to induce fear in any State which would restrain it from such inhumane act in future.

Given the complex fabric structure of the matter, and even with the powers vested with Supreme Court of India under Article 138 of the Constitution of India, it would be a time-tested question that how far individual through Government of India would succeed for Justice by praying in highest temple of justice in India. It would otherwise would become futile exercise by the victim. The only ray of hope for the victim would then lie on international courts.

The only remedy that affected Sovereign State, for its victims, must seek is in International Court of Justice (hereinafter referred as ICJ),[20] the jurisdiction[21] to this court depend upon members of United Nation and parties to Charter of United Nations. States which are not parties to Charter can also invoke jurisdiction of this Court. Some countries have compulsory jurisdiction, here in this matter both China and India enjoy compulsory jurisdiction. [22] Under the United Nations Charter, ICJ has limited advisory powers[23], ICJ has powers to

19 Article 138 of the Constitution of India.

20 "*International Court of Justice*", UNITED NATIONS, https://www.icj-cij.org/en/court, (visited on June 12, 2020).

21 *Ibid*.

22 "*States Entitled to Appear Before the Court*", INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/states-entitled-to-appear, (visited on June 20, 2020).

23 "*Advisory Jurisdiction*", INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/advisory-jurisdiction, (visited on June 20, 2020).

adjudicate upon genocide committed under Article III and specific powers which are vested to ICJ under Article IX of Convention on the Prevention and Punishment of the Crime of Genocide.[24] There would be doubts about a Independency of ICJ to conduct fair trial, when China is permanent member of Security Council of United Nations and hence on 'delivery of justice' oozing out from such institution in its true sense. Such doubts could be overshadowed by installing bench of judges who are independent, upright and does not have any relations with States bringing COVID-19 dispute before them.

There are several theories which defies existence of 'International Law', it is probably unjust, not because it is in place but because of question of a zeal of member nations to enforce their Sovereignty. Citizens and common people residing in any countries would render and reassure themselves of existence of this law only if such law becomes strong enough and has ability to provide justice against the violation of human rights, nevertheless, violators of human rights could be Sovereign State including its Head. The purpose behind installation of Charter of United Nations so called 'Magna Carta' got shattered because it failed to resist violence against mankind and peace on international platform. It would get defeated further, if violation of human rights continues and it would not be exaggeration for peacefully leaving community in any part of the world, including India, to demand for its uninstallation. As it otherwise would be in consonance of doctrine of *Lex injusta non est lex and Lex non a rege ests violanda.* Unadequate law cannot allow a doctrine of *Pacta sunt servanda*. In this matter it is worth to ponder over a theory of Law propounded by St. Thomas Aquinas.[25]

The International Criminal Court[26] (hereinafter referred as ICC) established under Rome Statute 2002,[27] with 123 member States, has jurisdiction to prosecute against individual, crime against humanity, war crimes, etc. Unfortunately, India and China are both non-signatory and non-members of Rome statute.[28] Both the countries have only ratified[29] Paris based Human

24 Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide 1951 reads as: "*Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*".

25 "*An Unjust Law Is No Law At All: Excerpts From "Letter From Birmingham Jail*", INTERCOLLEGIATE STUDIES INSTITUTE, https://isi.org/intercollegiate-review/an-unjust-law-is-no-law-at-all-excerpts-from-letter-from-birmingham-jail/, (visited on June 20, 2020).

26 Article 1 of the Rome Statue of International Criminal Court 1998.

27 Preface to the Rome Statue of International Criminal Court 1998.

28 "*States Parties to the ICC*", ABA-ICC PROJECT, https://www.aba-icc.org/about-the-icc/states-parties-to-the-icc/, (visited on June 10, 2020).

29 "*Convention on the Prevention and Punishment of the Crime of Genocide*", UNITED NATIONS TREATY COLLECTION, https://web.archive.org/web/20121020233944/http://treaties.un.org/Pages/ViewDet

Rights Convention on the Prevention and Punishment of the Crime of Genocide.[30] In the absence of parties to Rome Statute and Paris Convention on the Prevention and Punishment of the Crime of Genocide, ICC has powers to provide jurisdiction for the proceedings of trial in crime of genocide, crimes against humanity or war crimes against State under its complimentary and cooperative policy, but with a rider of reference from members of security council of United Nation.[31] The Covid-19 outbreak, being historical humanitarian disaster, there is limited scope and expectation that allegedly responsible member of Security Council of UN or its friend country would make a reference to ICC for initiating Trial of crime against humanity even if China, which is a main culprit and has direct nexus with the Case in hand, due to its vested powers to possess immunity in undergoing such Trial by its single vote, very well known in the form of 'right to veto' under Article 27 of UN Charter.[32] Having been analysed existing provisions in UN laws, ICJ which is a supreme 'Justice' delivering institution for resolving international disputes among States, has powers to uphold 'Rule of Law' which is more wider in scope and overrides over a narrow man-made legislative provisions like single veto vote or voting system in Security Council of UN.

The victim or individual being an ordinary human being who lost his entire life is so feeble that it is beyond his thought process and capacity of his effort to fight for this unimaginable calamity. He would be forced to remain silent and accept *force majeure* for his no fault. This would erode his faith not only on Judicial System but also on almighty "GOD".

After skimming through available world jurisdictional platforms, with an objective to find highest temple of Justice on world, it reveals that there are limited international platform to render justice to victims of Covid-19 outbreak who in the absence of it are left abandoned with open sky and two feet of land under it as their shelter waiting for a food from delivery boys of God. In such a heart-shaking situation, it is extremely urgent for global leaders to join hands for raising independent justice delivery platform to address the pain of innocent people who are victimised for their 'no wrong'.

To restore the faith in judicial system, international community will have to have come together and establish a dedicated independent court on international platform. Such court shall have mandate from United Nations, which also need to exercise quick legal reforms to become strong and all its members and non-members would exercise compulsory jurisdiction for the purpose of restoring

---

ails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, (visited on June 10, 2020).

30 Convention on the Prevention and Punishment of the Crime of Genocide 1951.

31 "*How the Court Works*", INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess, (visited on June 10, 2020).

32 "*Voting System*", UNITED NATIONS SECURITY COUNCIL, https://www.un.org/securitycouncil/content/voting-system, (visited on June 10, 2020).

justice to victims of genocide or crime against humanity. This is necessary to establish peace in world and uphold the lofty ideals of preamble and various provisions of Charter of United Nations.[33]

Type of Petition

Evolution of science and technology brought the countries together with a pristine idea of human development to participate in a process of globalisation having a positive objective to ensure exchange of goods and services along with immigration of human being. In this sacrosanct process, no country would have thought about the adverse effect it could cause in the form of infliction of injury to one nation by a tortuous act with a criminal intent by neighbouring or member nation. Nevertheless, ICJ and ICC are the global adjudicatory bodies to address the issue of international crime, in this case international crime against humanity, a type of petition to be submitted to these courts is very crucial aspect of due procedure in law to avoid undue delay in rendering justice to victims of this crime.

Global homicide of innocents by China is a clear case of simultaneous act of both Tort and Crime. Unprecedented Genocidal act has various shades of colour, one of the Torts with an evidence of first case of infection of coronavirus released from Wuhan National Virology Laboratory which is supervised and established under Republic of China and other black colour of criminality as is visible in the form of innocent deaths occurred due to Covid-19 pandemic.

India so far has 26,948,874/- infections with 3,07,249/- deaths at the time of writing this paper, further how far it will go is unpredictable. The loss in terms of life and money is yet to assess but it is done for sure that it would be irreparable and legal remedies like compensation are weak words to say justice is done to victims. It is a high responsibility incurred upon India to not to miss any legal weapon to fight for delivering justice to the victims of notorious seem to be world war. If it wants to ensure Justice in its true sense to its victims then it should demand for death sentence to President of Republic of China by invoking doctrine of vicarious liability taking a support of Maxim *Respondent Superior*, only then it would uphold and keep intact philosophy of justice that justice shall not only be done but it shall also seem to have been done.

The chronological order of events from the beginning itself, that is right from a detecting a patient of Covid-19, its treatment in china city hospital, WHO announcement to continue to travel from China to various parts of world, primitive success in control and lockdown of disease in Wuhan city of Hubei province and boasting this win to other parts of world[34] is a series of facts and

33 Zenon Stavrinides, "*Human Rights Obligations Under the United Nations Charter*", THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, Vol. 3 No. 2, 1999, pp. 38-48.

34 Bethany Allen-Ebrahimian, "*Timeline: The Early Days of China's Coronavirus Outbreak and Cover-up*", AXIOS, March 18, 2020, https://www.axios.com/timeline-the-early-days-of-chinas-coronavirus-outbreak-

evidence that reinforces *Res ipsa Loquitur*, a Latin maxim which means facts speaks of themselves. This is a foremost reason that the researchers initiate this paper with a presumption that the China under a Presidentship of Xi Jinping is *prima facie* a reason having its place of origin and cause of action, nevertheless, that cause of action may arises at remote place in Wuhan City of China. On January 7, 2020, China identified a novel SARS-CoV-2 virus from coronavirus family and reported to WHO, from thereon cases were reported from US, France, Nepal, and several other countries, and on January 30, 2020, WHO declared global health emergency.[35] This is another evidence to direct a needle towards China leading in global pandemic. *Qui facit per alium facit per se* a Latin maxim is fit to uphold *cremia ex post facto non diluitur* doctrine.

This is thus a clear case of criminal negligence for the delay in informing to WHO and other part of world which has not only caused tremendous loss of human life and money to different countries of world and it invites doctrines of *Ubi jus ibi remedium* meaning thereby where there is a right there is a legal remedy and *Ubi Culpa est, ibi poena suesse debet* meaning thereby where the crime is committed, there the punishment should be inflicted.

Petitions are the request letter to a Judges sitting in a temple of Justice and it is also a part of due process of law. Niceties and technicalities of petitions are well known to experienced legal team and writing on this part would be a futile exercise which is supposed to be carried on in this paper but deliberately avoided to attract attention of law expert on specific issue related to legal remedy of this said case. Legal team from India fighting for this case has to perform considerable research for the kind of petition to be submitted in ICJ or ICC or any other court like tribunal set up in Nuerenberg Trial.[36] This is essential because this is 'once in a history' case of worldwide genocide more heinous and brutal than that occurs in any war between two visible enemies, more ghastly and abominable than that occurred in history of world like Nazi crime, Yugoslovia and Rwanda Case.

Some of the relevant Cases of Genocide that occurred worldwide after establishment of United Nation are Nuerenberg Trial,[37] Genocides in Yugoslovia,[38] Rwanda Genocide,[39] and Myanmars Rohingya crisis[40] where

---

and-cover-up-ee65211a-afb6-4641-97b8-353718a5faab.html, (visited on June 21, 2020).

35 *Supra* n. 4.; James Gallagher, "*Coronavirus Declared Global Health Emergency by WHO*", BBC, January 31, 2020, https://www.bbc.com/news/world-51318246, (visited on June 21, 2020).

36 "*Trials of War Criminals Under Military Tribunals*", NUERNBERG MILITARY TRIBUNALS, Vol. 3, 1951, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf, (visited on June 21, 2020).

37 Hans Leonhardt, "*The Nuremberg Trial: A Legal Analysis*", THE REVIEW OF POLITICS, Vol. 11 No. 4, 1949, pp. 449-476.

38 Marko Attila Haore, "*A Case Study in Underachievement: The International Courts and Genocide in Bosnia-Herzegovina*", GENOCIDE STUDIES AND PREVENTION: AN INTERNATIONAL JOURNAL, Vol. 6 No. 1, 2011,

international adjudicating platforms were come to rescue with the backing of UN to provide the justice to victims of genocide and punish the perpetrators of crime against humanity.

An exemplary court proceeding for the cause of 'Justice' that history would remember is Nuerenberg Trial,[41] also known as 'Justice Case' held just after World War-II by the allied forces like United Kingdom, United States of America, and Russia to prosecute political, economic, military and judicial leaders of Nazi Germany for their crime against Humanity, War crime and Halocaust, also marked as Nazi Crimes, held under Control Council Law No. 10.

The Balkan War[42] which was erupted in 1991 after a death of President Tito led to disintegration of Yugoslovia, formed after German occupation in World War-II, into Serbia and Kosova in 1999 after efforts of NATO and UN peacekeepers. This nearly decade long war will be remembered in history for its multiple war conflicts between former Yugoslovia, Croatia Slovenia, Bosnia, Serbia and nearly 1,00,000/- deaths and inhumane crime like sexual violence, rape, and assault by Serbian Army under the order of their military leaders. This war has its origin in surrendering sovereignty of States of Bosnia-Herzegovina, Serbia, Montenegro, Croatia, Slovenia and Macedonia into Federal Republic of Yugoslavia in post-World War-II era and later claiming independence by Serbian Armed Forces into Serbia.[43]

A special tribunal was set up for the prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of Former Yugoslavia since 1991 called International Criminal Tribunal for the former Yugoslavia (hereinafter referred as ICTY), the trial of perpetrators involved in it, is famous as Bosnian Case.[44] The main characteristic of this Court was that it was established by United Nations Security Council

---

https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1085&context=gsp, (visited on June 26, 2020).

39 "*Rwanda- Country Case Study Update*", GOV.UK, October 16, 2014, https://www.gov.uk/government/case-studies/rwanda-country-case-study-update, (visited on June 26, 2020).

40 A.K.M. Ahsan Ullah, "*Rohingya Crisis in Myanmar: Seeking Justice for the "Stateless"*", JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE, Vol. 32 No. 3, 2016, pp. 285-301.

41 *Supra* n. 31.

42 "*A Short Story of Upsurge of Rebellion Group in Former Yugoslavia titled "Balkans War: A Brief Guide*", BBC, March 18, 2016, https://www.bbc.com/news/world-europe-17632399, (visited on June 26, 2020).

43 "*Bosnian Genocide*", HISTORY.COM, September 30, 2019, https://www.history.com/topics/1990s/bosnian-genocide, (visited on June 26, 2020).

44 "*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*", INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/case/91/judgments, (visited on June 26, 2020).

under a Resolution 827[45] having had its powers to punish violators of laws of customs of war, genocide and crime against humanity.

Rwandan Case[46] is another prominent blot in a history of genocide in post-World War-II era, some one million people Tutsi, Twa and moderate Hutu in Rwanda were slaughtered by Rwandan Patriotic Front (hereinafter referred as RPF), a rebel group composed of Tutsi Refugees- during Rwandan Civil War in 1994. The United Nations established the International Criminal Tribunal for Rwanda for prosecution of high-level members of government and armed forces just on the line of ICTY in its *suo motu* capacity, as most of the countries were quite oblivious to the fact of human genocide in Rwanda, the reason could be best known to them. The exceptional response by France in Rwandan Civil War although it was limited to humanitarian crisis attracts word of appreciation.[47]

The latest in a series of crime against humanity is Myanmar's Crisis[48] characterised by so called ethnic cleansing in the name of Rohingya Genocide. Some 6,00,000/- Rohingyas were under a threat of Genocide after some 7,40,000/- Rohingya fled to Bangladesh. The apathy of international community to stop the Rohingyas culling was noteworthy to mention here. It was an effort of West African nation of Gambia to move ahead under a leadership of Gambian Minister of Justice Abubaccar Tambadou who showed exemplary moral courage to stop Myanmar's brutal ethnic cleansing campaign and risked China's wrath in doing so. The Case has gained its extraordinary importance for dragging Myanmar Government in ICJ by a third country like Gambia which has no concern in domestic affairs of Myanmar, but jumped in on moral ground of humanity i.e., to prevent brutal Rohingya Genocide and punish those who are responsible for commitment of crime against humanity.[49]

To maintain law and order in India, Supreme Court is a highest court in India and it has created a niche not only in India but in a world by justice to common people from India and abroad. Concepts like Public Interest Litigation or Class Action Suit has been well acclaimed by International Community. To

---

45 "*Resolution 827*", UNITED NATIONS SECURITY COUNCIL RESOLUTIONS, http://unscr.com/en/resolutions/doc/827, (visited on June 26, 2020).

46 Eric J. Shaw, "*The Rwandan Genocide: A Case Study*", THE UNITED STATES NAVAL WAR COLLEGE, May 2012, https://www.researchgate.net/publication/264154954_The_Rwandan_Genocide_A_Case_Study, (visited on June 26, 2020).

47 "*International Response*", HISTORY.COM, September 30, 2019, https://www.history.com/topics/africa/rwandan-genocide, (visited on June 22, 2020).

48 Ismail Suardi Wekke, et al., "*Muslim Minority in Myanmar: A Case Study of Myanmar Government and Rohingya Muslims*", WALISONGO: JURNAL PENELITIAN SOSIAL KEAGAMAAN, Vol. 25 No. 2, 2017, pp. 303-324.

49 Param-Preet Singh and Amy Braunschweiger, "*Interview: Landmark World Court Order Protects Rohingya from Genocide: How a Small African Nation Took on Myanmar's Crisis- and Won*", HUMAN RIGHTS WATCH, https://www.hrw.org/news/2020/01/27/interview-landmark-world-court-order-protects-rohingya-genocide, (visited on June 27, 2020).

extend this concept on International Judicial Platform is a challenging task for law advocacy experts and law fraternity from India. In this context, to elaborate this concept in consonance with Public Interest litigation, a concept of National Interest Litigation in its new and juvenile form would be one of the innovations in type of petition or litigation to be submitted to International Adjudicatory body by an injured Sovereign State against the other State where cause of action arises. Again, a lot of research is required to be done to bolster and beautify this novel concept to avoid and rule out any possibility of rejection at its submission in International Judicial Platform.

Quantum of Compensation

An economic and social havoc that has been caused by COVID-19 outbreak is certainly beyond the capacity of imagination of political leaders of world. Several lives have been lost and billions of dollars from the stock markets of world have been wiped away. The damage this COVID-19 outbreak has caused is unprecedented against an injury caused to every individual residing on earth.

As of now, every country is finding a solution in law to sue China, US is a first country which has filed a 20 trillion dollar suit against China, highest even greater than the GDP of China.[50] US state of Missouri has filed a lawsuit against China for the charges of suppressed information, arrest of whistleblowers and denial for contagious nature of corona virus that led to the loss of lives and caused "irreparable damage" to countries globally.[51] The Ministry and Chinese Government denied the charges swiftly and dismissed lawsuit as mere absurdity.[52] In India, Mumbai lawyer Ashish Sohani, practising in High Court of Bombay moved to ICC against China for its failure in 'containment of COVID-19 outbreak' and crime against humanity seeking damages of 2.5 Trillion Dollar on behalf of Government of India.[53] Germany claimed damages of 149 billion euros with specifications of affected areas, for

50 Anwesha Madhukalya, "*$20 Trillion Lawsuit Against China! US Group says Coronavirus is Bioweapon*", BUSINESS TODAY, April 2, 2020, https://www.businesstoday.in/current/world/usd-20-trillion-lawsuit-against-china-us-group-says-coronavirus-bioweapon/story/399071.html, (visited on June 29, 2020).

51 "*US State Files Lawsuit Against China on COVID-19 Handling*", THE ECONOMIC TIMES, April 23, 2020, https://economictimes.indiatimes.com/news/international/world-news/us-state-files-lawsuit-against-china-on-coronavirus-handling/articleshow/75286051.cms, (visited on June 29, 2020).

52 "*'Very Absurd' Says China After Missouri Files Lawsuit Against Country's Coronavirus Response*", TIME, April 22, 2020, https://time.com/5825362/china-coronavirus-lawsuit-missouri/, (visited on June 29, 2020).

53 Vijay Tagore, "*Andheri Lawyer Moves Intl Court Against China Over Coronavirus*", MUMBAIMIRROR, April 18, 2020, https://mumbaimirror.indiatimes.com/coronavirus/news/andheri-lawyer-moves-intl-court-against-china-over-coronavirus/articleshow/75211989.cms, (visited on June 29, 2020).

the economic loss incurred upon it due to COVID-19 outbreak in its largest tabloid newspaper, Bild.[54]

The doctrine *of injuria sine damnum* and *ubi jus ibi remedium* and *qui facit per alium facit per se, qui facit per alium est perinde ac si facit per se ipsum* in law of tort can be invoked by an injured Sovereign State in its 'National Interest Litigation' to get the compensation. The crime against humanity is a heinous crime which cannot be forgiven just because it is committed or operated from remote place or in foreign land. Provisions of United Nations Declarations of Human Rights would be rendered useless if a person performing criminal act, even if he is performing in in the interest of public residing in his sovereign state, on foreign land can remain scot free. This, if allowed to happen on International Judicial platform, would not only erode faith on man-made laws but it will also become a cause for the complete collapse of law and order of world. Jurisprudential Concepts of Natural Law particularly positivism in natural law theory propounded by Professor H.L.A Hart says Law is a point of intersection between law as is laid down and law as is ought to be. This Jurisprudence weighing more on or having a longer segment of line containing 'Ought To be law' eradicates jurisdictional boundaries to bestow justice to victims of crime against humanity. Humanity has no boundaries hence powers to adjudicate on crime against humanity cannot be restricted within certain territorial boundaries or it cannot be denied just because it has not appropriated platform.

COVID-19 human massacre is a clear case of world genocide carried by government of Republic of China under a leadership of Xi Jinping who is responsible for the outbreak and shall be held liable and registered as culprit of this whole havoc. This allegations has its support of evidence that the china government completely failed to quarantine and isolate 'patient zero' a first infection or cause of nuisance for word pandemic COVID-9 from which this deadly outbreak of corona virus spread like a wild fire all over the world engulfing whatever is coming to its way like innocent human beings and property.[55] The motive was to establish China as world super power which is clearly visible with the rise in stock market of China.

Compensation is a monetary punishment a part of deterrent theory in science of criminology or criminal justice delivery system which fluctuates with the intensity of civil wrong and gravity of crime. This unforeseeable manmade disaster is a result of concurrent act of Tort and Crime which has its origin in Wuhan city of China under a leadership of Xi Jinping lifetime president of

---

54 "*China Owes Germany 149 Billion Euros in Coronavirus Damages*", THE WEEK, April 20, 2020, https://www.theweek.in/news/world/2020/04/20/china-owes-germany-149-billion-euro-in-coronavirus-damages.html, (visited on July 3, 2020).

55 Josephine Ma, "*Coronavirus: China's First Confirmed Covid-19 Case Traced Back to November 17*", SOUTH CHINA MORNING POST, March 13, 2020, https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back, (visited on July 3, 2020).

China.[56] The gross negligence is very much evident by the fact that China has deliberately hided crucial information about the a etiology, virulence and related virucidal effects of corona virus including its incubation period and mortality rate.

To decide on the quantum of compensation for the loss of human lives and economies of affected countries would require assessment by the Highest Auditing and Accounting Authority of respective countries and it would be matter of painstaking effort with utmost priority once the entire world safely comes out of this historical crisis. As India has not remain immune to infection by corona virus, to quantify the loss caused to human life and property in India would be a matter to be assessed by Comptroller and Auditor General of India (hereinafter referred as CAG) with its power and functions well defined in constitution of India.[57] To provide a guideline the right measure would be a loss in percentage of Gross Domestic Production (hereinafter referred as GDP) till it restores current level of percentage of GDP.

A question of finding or raising- in its absence- a appropriate temple of justice in world to provide justice to victims of Covid-19 is a crucial issue on international platform. The answer to this could lie in existing justice delivery mechanism established under UN Charter.[58] The cursory study of laws of UN shows that International Court of Justice and International Criminal Court are the appropriate places to seek justice (against human crime) which are well established and had powers to adjudicate on matters of crime related to violators of human rights,[59] but it is marred with serious flaw of having limited powers to prosecute permanent members of Security Council of UN with 'veto' powers, if they themselves or one of their friend countries are involved in such crimes.[60] This statement directs to none other than 'China' who is a main culprit of causing genocide all over the world for its negligence in spreading COVID- 19 due to failure of timely containment of Corona virus infected patients. Any member other than alleged member, if exercises a power of 'veto' for not acceding to Tribunal set up for this noble cause, could cause severe dismantling of such Courts at its inception. It is pivotal to point out here is that exercise of 'veto' power cannot be given precedence over a 'Rule of Law' which is more pristine and divine. Myanmar's crisis of Rohingya's Genocide and Rwandan Genocide, Nuerenberg Trial, Yugoslavia Genocide cases could provide guiding light and spirit to bring China and its perpetrators to justice who is evidently responsible for corona virus outbreak.[61] Researchers urge International Judicial

56 Stephen Mcdonell, "*China's Xi Allowed to Remain 'President for Life' as Term Limits Removed*", BBC, March 11, 2018, https://www.bbc.com/news/world-asia-china-43361276, (visited on July 5, 2020).

57 Articles 148-151 of the Constitution of India.

58 Article 92 of the United Nations Charter 1945.

59 Article 35 of the Statute of the International Court of Justice 1945.

60 Articles 23 and 27 of the United Nations Charter 1945.

61 Nectar Gan, et al., "*Beijing Tightens Grip Over Coronavirus Research, Amid US-China Row on Virus Origin*", CNN, April 26, 2020,

Fraternity and in turn Government of India along with International community to come together to provide justice to innocent victims of COVID-19 outbreak in India and to uphold a Justice for the cause of 'Humanity' leaving aside for the time being their economic interest or other repercussions.

Appeal to International Community for Justice

'Howsoever you may be high, but the law is above you' is a shortest interpretation to elaborate 'Rule of Law' a lofty ideal to support the existing judicial systems in the World and it is very well imbued in Constitutions of democratic countries of world. It is also a lung, vital organ of human body which exhales a fragrance of Justice. Professor H.L.A. Hart in his positivism of natural law theory propounds, Justice shall not only be done but it shall also seem to have done and it should emanate from Law. What is Law is a question which is answered by eminent jurists in penumbral theories of law but a modern theory of law that is positive law theory or theory of positivism as propounded by Professor Hart says Law is a juxtaposition of two rivers one is Law as is laid down and other is Law as is ought to be.[62]

To apply a Law in its both forms that is man-made legislations and morality in this given case is a very sensitive task. It would suggest that pan containing Morality weighs high as compared to pan containing man-made legislations in a two-pan weighing Scale of Justice. In this context, Constitution of India, a supreme and extraordinary legislation of India - could provide guiding spirit for the constitutions of different countries of world. Keshavananda Bharti Case[63] is a worldwide acclaimed case where judges decided a case not on the basis of law as is laid down but on the basis of innovative principles of jurisprudence like Basic Structure Doctrine. Another leading case ADM Jabalpur Case[64] which is referenced in various judgments of Supreme Court of India and Apex Courts of various countries wherein iconic dissenting view by Hon'ble Justice H.R. Khanna, a monumental personality who espoused principles of Justice is appreciated by New York Times,[65] not for its final order of the Case but for the unbiased fearless opinion of Justice Khanna, supporting on the principles of morality and altruism.

This unique Case of 'war against humanity' waged by China without giving notice to countries affected attracts a guidance from theories of Justice. Theory of Justice as' it ought to be' propounded by Michael Sandel is a worth to elaborate here. He says Justice is judgmental and it should have its basis for a procedure to common good rather than its foundation on Utilitarianism i.e.,

---

https://edition.cnn.com/2020/04/12/asia/china-coronavirus-research-restrictions-intl-hnk/index.html, (visited on June 10, 2020).

62 Robert S. Summers, "*Professor H. L. A. Hart's "Concept of Law"*", DUKE LAW JOURNAL, Vol. 1963 No. 4, 1963, pp. 629-670.

63 *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

64 *Additional District Magistrate v. S.S. Shukla* 1976 AIR 1207.

65 William Borders, "*Mrs. Gandhi Bars Critic from Post*", THE NEW YORK TIMES, January 29, 1977, https://www.nytimes.com/1977/01/29/archives/mrs-gandhi-bars-critic-from-post.html, (visited on June 6, 2020).

theory of greater happiness for greater number or Rights based theory i.e., freedom of rights. He explains as to how the molecular structure of Justice should be where he gives preference to Justice as it 'ought to be' He elaborate this by mentoring justice is not only about the right way to distribute the things but it is also about right way to value things.[66]

International Judicial Platforms like ICJ and ICC at this time of crisis seem to have deficit of man-made legislations which is supposed to have provisions to carry out a trial of Head of any Sovereign State for his crime against humanity specifically when, even if, he has remote nexus to commitment of heinous and notorious crime of genocide of innocents all over the world.

Researcher in this paper painstakingly urges to international community which has been affected by corona virus epidemic to quickly come together to punish a butcher who attempts to override principles of 'Rule of Law' and escape justice delivery systems so far existing in the world. The possible next step would be to quickly take a call either for amendments in existing international legislations providing more powers to it to bring such tyrants to justice for his commitment of crime against humanity or to launch a new international legislation having Tribunal for speedy trial in UN or outside of UN for the purpose of Justice delivery to innocent victims of Covid-19 tragedy. Such International legislation shall also ensure that it has powers to prosecute a guilty whoever he may be including Head of Sovereign State. This is necessity of time to reinforce and uphold a pristine concept of 'Rule of Law' for ensuring complete justice to victims of international society including India which otherwise would entirely crumble a divine concept 'Justice' in the eyes of common people residing in any part of world.

Suggestions

The pandemic spread due to Covid-19 outbreak has its many shades of black color right from unexpected war waged on human beings against an invisible enemy corona virus swallowing human lives day by day on world map, as it is a novel corona virus, a less study has been carried out on etiology, incubation period, viability in different atmospheric conditions, surfaces and lastly hapless fight of human race for its very existence with only weapon left with them is their inherent immunity having said that with no other concrete treatment in medical science as of now. Despite having so many dimensions, researcher is concerned with legal dimension of this Covid-19 outbreak.

Negligence and Nuisance caused to other part of world population by China Province is an issue in question to adjudicate upon by any adjudicatory body devised for this purpose wherein cause of action arises against China under the leadership of President Xi Jinping for the life-threatening injury caused and spilled in different parts of the countries of the world with very few exceptions.

In this context it is worth to acclaim suggestion as need for coordinated action of world similar to that carried by International Atomic Energy Agency in Chernobyl incidence given the fact that Covid-19 outbreak and nuclear

66 Michael Sandel, JUSTICE: WHAT'S THE RIGHT THING TO DO, 1st ed. 2008.

fallouts from nuclear atomic research Centre in Russia are analogous in type of governance, and the way of handling the tragic incidence in pre and post man-made disaster.[67] Following are some of the suggestions for, government of various countries including India and highest advocacy groups of respective countries to fix the culprit and its government i.e., Republic of China for providing a speedy Justice to victims of various countries including India.

International Court of Justice and International Criminal Court have limited provisions and scope to punish the Head of Sovereign State even if he has committed a crime with a motive to establish his social political and economic prowess on a global map. One of the options to stretch such personality to such International Court would be to form a bench of Independent Judges in a country of China where a cause of action arises i.e., release of corona virus and negligence in reporting of first infected patient that is 'patient zero' from the Wuhan city of China while remaining other nearby cities unaffected.

Other concurrent option would be to make amendments in UNDHR to provide powers to International Court of Justice for carrying out trial against any such tyrant who commits crime against humanity.

Considering the intensity and alacrity of dragon to gobble up human beings and property coming to its way, it would be humanitarian act on the part of international community to establish a separate independent international Tribunal or Court as quickly as possible similar on the line of Tribunal set up in Nuremberg Trial. Such international court or tribunal shall have approval of United Nations.

A complete reform in Universal Declaration of Human Rights (hereinafter referred as UNDHR) is an urgent step required to be taken to secure peace and healthy life of people of member and non-member countries. For this purpose, suggestion from various Human Rights Commissions working in different countries shall be invited. A highest punitive measure like life time imprisonment and compensation to the extent of loss of human life and property shall be incorporated in amended provisions of UNDHR.

Highly suffered countries shall come together to form an Independent group just like existing G20, SAARC and BRICS and sign a common international treaty incorporating strict socio-political sanctions along with stringent economic sanctions to ensure safety, security, and good health of innocent people of these countries.

Speedy Justice to innocent victims of Covid-19 tragedy is an urgent need of hour, researchers in this regard wish to urge to call emergency meeting of member states of General Assembly and Security Council of United Nations and arrive at consensus to constitute a bench of Judges who would have all the powers to dispose a matter of tragic incidence of Covid-19 outbreak. Such an

67 Serhii Plokhy, "*The World Stopped Another Chernobyl by Working Together: Coronavirus Demands the Same*", THE GUARDIAN, May 5, 2020, https://www.theguardian.com/commentisfree/2020/may/05/prevent-coronavirus-chernobyl-international-disaster, (visited on July 6, 2020).

independent bench of Judges shall also have a power to decide on quantum of compensation and punishment to accused Sovereign State and Its Head. This idea may be innovative in its nature could render Justice to family members of victims who lost lives in this tragedy. Such bench of Judges shall have immunity on jurisdictional boundaries which could even sit in space to safeguard ulterior noble cause of 'Humanity' in historical trial for crime against humanity.

Given the evil nature of this genocide, which is historically callous, gruesome, and unforgivable in years to come, author anticipates that international policy makers, governments of democratic countries and human right groups would make this part of consultation in framing policies to ensure peace, law and order, and good health of common people of democratic countries. This exercise would further bolster a doctrine of self-incrimination (prohibition) encompassing a legal maxim 'Let hundred guilty be acquitted but one innocent shall not be punished'.

This research, an outcome of never-seen man-made Covid-19 tragedy, discovers that there is a black hole in a galaxy of international law which is identified as absence of Independent International Adjudicatory Body which shall have powers to have given precedence to Humanity over Sovereignty. Researchers hope international community would come together and spare their time to establish such International Courts or Tribunal which shall have powers to adjudicate upon crime against humanity and such courts shall have powers to unmask a Sovereignty Veil and to strip of sovereign immunity when particularly there is attack on Humanity and Human rights and its values.

Finally, the author concludes with the urge to international community to reinforce fundamentals of 'Rule of Law', a basic skeleton and body of 'Human Rights' reincarnated with Justice as its soul. This shall become 'Humanity' as 'Grundnorm', a real *dharma* of human being.

The author leaves further scope to develop any other methodology in international criminal administration system to find new ways in law to impose deterrent effect on such miscreants. It also leaves a room for the establishment of strong, unconquerable and invincible International Appellate Tribunal. To sum up, the author positively supports the exploration of other legal dimensions to keep 'H' for Humanity to adorn its first place in a periodic table of Juridical science of 'law and justice' or 'law of justice'.

***

THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL 2020: LEGAL AND ETHICAL ISSUES.

Shruti Kandoi[♣]

Abstract

The Assisted Reproductive Technology (Regulation) Bill 2020 ("ART") introduced by The Ministry of Family and Welfare on September 14, 2020 in Lok Sabha dots its credit to the draft bills of 2008 to 2017 & Indian Council for Medical Research ("ICMR") guidelines. ART is the last recourse for an infertile couple/ woman to conceive through artificial insemination of embryo. The Bill aims to protect the rights and interest of the stakeholders such as donor, couple, woman, clinics and banks. The author opines that the bill faces challenges in achieving a balance between the medical advancements and ethical/legal aspects. It addresses key issues such as definition of couple, legitimacy and consanguinity of child born through ART, possibility of cloning in embryonic stem cell research, pre-implantation diagnosis and counselling. The author recommends that necessary amendments be made in the bill, personal laws and Indian Evidence Act to avoid conflict on legitimacy. Further it is suggested that the term couple should include LGBT couples. Nevertheless, adequate parameters must be set out for counselling. Lastly, the bill must address the issue of cloning and prohibit reproductive cloning.

Keywords: Assisted Reproductive Technology, Cloning, Legitimacy, Consanguinity.

Introduction

Clinically, the term infertility is described as "*a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse*."[1] Infertility is a serious issue which brings along with it social stigma, economic challenges and health implications.[2] Many couples across the globe suffer from the issue of childlessness or infertility.[3] A study was undertaken by National Health Family Survey on the issues of infertility, wherein it observed that an increase in the age of first marriage or use of contraceptives or termination of pregnancy lead

♣ Advocate, Bombay High Court, e-mail: shruti.kandoi21@gmail.com.

1 F. Zegers-Hochschild, et al., (rev.), "*International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009*", Vol. 92 No 5, 2009, p. 1522.

2 "*National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India",* Indian Council for Medical Research and National Academy of Medical Sciences (India), 2005, p. 3.

3 Patrick Präg and Melinda C. Mills, "Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross Border Reproductive Care", Michaela Kreyenfeld and Dirk Konietzka (eds.), CHILDLESSNESS IN EUROPE. PATTERNS, CAUSES, AND CONTEXTS, 1st ed. 2017, p. 289.

to the issue of childlessness.[4] In modern times, infertility rate is very high since couples are surrounded by smoking, excessive alcohol, environment pollutants and toxins.[5]

Assisted Reproductive Technology[6] ("ART") is one of the most prominent developments in the field of bio-technology and with the use of ART, an infertile couple/ woman can have a child. Thus, it brings a ray of hope for infertile couples by giving them a chance to bear a child. However, it is pertinent to note that ART only helps an infertile couple to reproduce; it doesn't cure the medical condition of infertility.[7] ART can be carried out through number of procedures and the approved list of such procedures are set out in guidelines of Indian Council for Medical Research ("ICMR") which are as under:

1. Artificial insemination with husband's semen (AIH);
2. Artificial insemination with donor's semen (AID);
3. In-Vitro fertilization and embryo transfer (IVF-ET) and IVF associated techniques;
4. Oocyte donation (OD) or embryo donation (ED); and
5. Intrauterine insemination with husband's or donor's semen (IUI-H or IUI-D) and others.[8]

The article's objective is to comprehend the impact of the bill on stakeholders and discusses its legal implications. The article studies and analyses the bill vis-à-vis ICMR guidelines and United Kingdom legislation on ART known as Human Fertilisation and Embryo Act, 1990 ("HEFA"). It attempts to discuss certain key and significant provisions in the bill which either needs clarity or amendment. Further, the article discusses on whether LGBT couples are eligible for ART services under the ambit of commissioning couple. Furthermore, it seeks to find if there is any ambiguity and lapses in the provisions of the bill relating to the eligibility laid for commissioning couple and/or woman for availing ART. The article attempts to find whether the bill addresses the concern of legitimacy and consanguinity faced by a child born through ART. Moreover, it studies whether the bill covers the relevant issues of eugenics and cloning under pre-implantation diagnosis and embryonic stem cell research respectively. The article also covers the aspect of cloning under the

4 S. Ganguly and S.Unisa, "*Trends of Infertility and Childlessness in India: Findings from NFHS Data",* Facts views and Vision in ObGyn, Vol. 2 No. 2, 2010, pp. 131-138, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4188020/, (visited on November 21, 2020).

5 As provided World Health Organisation (WHO) in "*Infertility*", September 14, 2020, https://www.who.int/news-room/fact sheets/detail/infertility, (visited on January 2, 2021).

6 Section 2(c) of Assisted Reproductive Technology (Regulation) Bill 2020.

7 Chanyika Shah," *Regulate technology, not lives: a critique of the draft ART (Regulation) Bill",* Indian Journal of Medical Ethics [Online], Vol. 6 No. 1, 2009, https://ijme.in/articles/regulate-technology-not-lives-a-critique-of-the-draft-art-regulation-bill/?galley=html, (visited on November 30, 2020).

8 *Supra* n. 2, pp. 24-28.

International law. Lastly, it analyses the lacunae in the provision relating to professional counselling provided to the patients. The author attempts to highlight and elaborate the issues/lacunae with the help of illustrations.

Need for Legislation

ART is known to mankind for almost four decades. The 1st child in the world born through ART procedure (In-Vitro Fertilization (IVF)) was in UK in 1978[9] and the second child was born on August 6, 1986 in India.[10] In India, with increasing infertility rate, the demand of ART started soaring. With the advancing technology, multitudes of legal and ethical complications also started surfacing hence it was necessary to regulate it.[11] Therefore, to regulate this growing demand and to protect it from potential exploitation, ICMR laid guidelines in 2005 titled "*National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India"* to regulate and supervise ART clinics and banks in India.[12] The guidelines attempted to cover the aspect of national registry, accreditation of ART clinics, procedures, legal lacunae, counselling and others. However, since the guidelines lacked force of legal enactment it wasn't statutorily binding on the stakeholders.[13]

The Ministry of Health and Family Welfare (MHFW) recognised the difficulties of ICMR guidelines in addition to the potential exploitation of the blooming market of ART services in India. Hence, it issued draft bills on ART in 2008, 2010, 2014 and 2017 respectively.[14] Unfortunately, none of the bills

were introduced in the Parliament. Overall primary infertility rate in India is about 3.9% to 16.8%[15] and there are nearly 27.5 million Indian couples who

9 Raymond C. O'Brien, "*Assessing Assisted Reproductive Technology*", 27 CATH. U. J. L. & TECH, 1 (2018), p. 4.

10 *Supra* n. 2, p. 4.

11 *Supra* n. 2, p. ix.

12 *Supra* n. 2, p. x.

13 Alice George and Aviral Chauhan, *"Surrogacy Bill and ART Bill: Boon or Bane?"*, Cyril Amarchand and Mangaldas India Corporate Blog, April 1, 2019, https://corporate.cyrilamarchandblogs.com/2019/04/surrogacy-bill-and-art-bill-boon-or-bane/, *See also* Anil Malhotra, "*Ending discrimination in surrogacy laws*", THE HINDU [Online], November 2, 2016, https://www.thehindu.com/opinion/op-ed/Ending-discrimination-in-surrogacy-laws/article11640850.ece, (visited on November 30, 2020).

14 Alice George and Aviral Chauhan, *"Surrogacy Bill and ART Bill: Boon or Bane?"*, Cyril Amarchand and Mangaldas India Corporate Blog, April 1, 2019, https://corporate.cyrilamarchandblogs.com/2019/04/surrogacy-bill-and-art-bill-boon-or-bane/, *See also* Anil Malhotra, "*Ending discrimination in surrogacy laws*", THE HINDU [Online], November 2, 2016, https://www.thehindu.com/opinion/op-ed/Ending-discrimination-in-surrogacy-laws/article11640850.ece, (visited on November 30, 2020).

15 Zahid, "*Infertility"*, National Health Portal, August 5, 2016, https://www.nhp.gov.in/disease/reproductive-system/infertility#:~:text=Infertility%20is%20%E2%80%9Ca%20disease%20of,WHO%2DICMART%20glossary*).&text=Secondary%20infertility%20means%20th

suffer from infertility issues[16]. Further, the growth of this industry can be reflected with a high number enrolment of 539 ART clinics with national registry.[17] This development echoed that India had become a "*Global Fertility Industry*".[18] Therefore, to regulate the ART clinics and banks and to protect the woman and children from exploitation a revised and final version of the ART Bill titled as "*Assisted Reproductive Technology (Regulation) Bill, 2020*" ("Bill") was introduced in Lok Sabha on September 14, 2020.[19] Presently, the Bill is pending before the standing committee for recommendations.[20]

Overview of the ART Bill

The Bill had a long overhaul journey from ICMR guidelines in 2005 to four drafts bills since 2008. It proposes establishment of the Board and Registry for the purposes of regulation and supervision of clinics and banks.[21] It not only lays down the procedures for ART but also provides provision for offences and penalties. The Bill's conclusive aim is to protect the woman and children from exploitation.[22] It comprises of six Chapters and 46 sections and defines key terms such as commissioning couple, ART, artificial insemination, infertility, woman, gamete, embryo and others.

Under the Bill, ART is defined as an artificial insemination of embryo[23] or gamete[24] in reproductive system of a woman's body for pregnancy.[25] It states

---

at%20the,and%20failed%20to%20conceive%20later, (visited on November 15, 2020).

16 Sahil Gupta, "*The Challenges for fertility treatment in India"*, INDIAN EXPRESS [ONLINE], November 4, 2019, https://indianexpress.com/article/parenting/health-fitness/fertility-treatment-in-india-challenges-6102164/, (visited on December 20, 2020).

17 See National Registry of ART Clinics and Banks In India "*List of Enrolled Assisted Reproductive Technology (ART) Clinics",* Indian Council for Medical Research, https://main.icmr.nic.in/national-registry-of-art , (visited on November 15, 2020)

18 Assisted Reproductive Technology (Regulation) Bill 2020, p. 16.

19 Ministry of Health and Family Welfare, "*The Assisted Reproductive Technology (Regulation) 2020"*, PRS Legislative Research, https://www.prsindia.org/billtrack/assisted-reproductive-technology-regulation-bill-2020, (visited on November 5, 2020).

20 Ministry of Health and Family Welfare, "*The Assisted Reproductive Technology (Regulation) 2020"*, PRS Legislative Research, https://www.prsindia.org/billtrack/assisted-reproductive-technology-regulation-bill-2020, (visited on November 5, 2020).

21 Assisted Reproductive Technology (Regulation) Bill 2020.

22 Assisted Reproductive Technology (Regulation) Bill 2020.

23 Section 2(i) of the Assisted Reproductive Technology (Regulation) Bill 2020 defines "embryo" as *"a developing or developed organism after fertilisation till the end of fifty-six days from the day of fertilisation"*.

24 Section 2(j) of the Assisted Reproductive Technology (Regulation) Bill 2020 define "*gamete" means sperm and oocyte*".

25 Section 2(c) of the Assisted Reproductive Technology (Regulation) Bill 2020 defines *""assisted reproductive technology" with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by*

that the benefits of ART can be availed by an infertile married couple termed as "commissioning couple"[26] and/or "individual" collectively known as "patients"[27]. It also states that a person who donates his gamete for ART is known as "gamete donor".[28]Further, it attempts to harmonise the surrogacy bill and ART Bill by establishment of common National and State board which is broadly covered in chapter II. Under chapter III and IV of the Bill the procedure for registration and duties of ART clinics and banks are set out. Lastly chapter V and VI deals with offences & penalties and miscellaneous provisions respectively.

Bill vis-à-vis ICMR Guidelines

The ICMR issued 2 important guidelines on ART, one on regulation of ART clinics and banks and other on stem cell research. The guidelines on ART lay down the rules for the functioning, establishment and registration of ART Clinics and banks in India, procedures under ART, screening of patients, counselling and others. It provides an elaborate list of approved method for ART procedures which is to be followed by the clinics. It also states that if any new procedure is to be adopted then prior approval for the same has to be taken by the clinic.[29] In regards to the banks, it states that the bank must take donor's gamete only when the donor is medically fit as prescribed and shall maintain all the records relating to the donor.[30] The banks shall provide the donor's gamete as and when the ART clinics request for the same. Secondly, the guideline on stem cell research discusses the key issue of cloning in embryonic stem cell research and lays rules governing it. Therefore, these guidelines not only attempt to cover the medical concerns but also underline key legal issues pertaining to ART.

With an attempt to cover both the guidelines, the Bill has taken a holistic view on ART as it relies on delegated legislation on many aspects such as framing of standard protocols and requirements to be fulfilled by ART clinics and banks[31], manner for carrying out research on gamete/embryo[32] etc.

---

handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman".

26 Section 2(g) of the Assisted Reproductive Technology (Regulation) Bill 2020 states "*commissioning couple" means an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank."*.

27 Section 2(q) of the Assisted Reproductive Technology (Regulation) Bill 2020 defines patients as: "*an individual or couple who comes to any registered assisted reproductive technology clinic for management of infertility*".

28 Section 2(k) of the Assisted Reproductive Technology (Regulation) Bill 2020 defines gamete donor as "*a person who provides sperm or oocyte with the objective of enabling an infertile couple or woman to have a child*.".

29 *Supra* n. 2, pp. 23-31.

30 *Supra* n. 2, pp. 65-68.

31 Section 15(4) of the Assisted Reproductive Technology (Regulation) Bill 2020.

32 Section 28 and Section 30 of the Assisted Reproductive Technology (Regulation) Bill 2020.

Nevertheless, the Bill takes a notch further in defining the term "infertility" by widening its scope in comparison to the guidelines. For instance, ICMR guidelines define the term infertility "*as failure to conceive after at least 1 year of unprotected coitus*"[33]and in the Bill the definition comprises of ICMR definition in addition to "*other proven medical condition preventing a couple from conception*" [34] such as "*ectopic pregnancy.*"[35]

Legal Issues in the Bill

Though the Bill protects the rights and interests of stakeholders effectively, it fails to address certain key issues. Unfortunately, few legal concerns which are observed in ICMR guidelines are not addressed in the Bill such as issues of consanguinity and counselling.[36] The article focuses on key issues which require attention in the nascent stage of the Bill such as:

Commissioning Couple and/ or Individual

The Bill states that ART facility can be obtained by "patients" and defines it as "*an individual or couple who comes to any registered assisted reproductive technology clinic for management of infertility*".[37] A couple who can avail the services is known as "commissioning couple" which means an infertile married couple. Besides the term "individual" is not specifically defined in the Bill but upon referring to the latter provisions of the Bill it refers to "woman" only.[38] The term woman is defined as-

> *Any woman above the legal age of marriage and below fifty years*[39] *who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank.*[40]

The difficulty with the above stated provision of the Bill is that it specifies the age limit for a woman as an individual who may avail ART facility; but it fails to specify whether the set age barrier is applicable to a married woman under the ambit of commissioning couple or not. To understand the effect of the lacunae, the author has drawn some illustrations:-

Illustration I:- A and B, a married couple is assessed as an infertile couple. A (husband) is 52 years old and B (wife) is 51 years old. There are two possibilities:

---

33 *Supra* n. 2, p.8. See also Section 2(m) of the Bill.
34 Section 2(m) of the Assisted Reproductive Technology (Regulation) Bill 2020.
35 *Supra* n. 2, p. 6. Ectopic Pregnancy is defined as "*A pregnancy in which implantation takes place outside the uterine cavity*."
36 *Supra* n. 2, pp. 22-24.
37 Section 2(q) of the Assisted Reproductive Technology (Regulation) Bill 2020.
38 Section 21 and Section 22 of the Assisted Reproductive Technology (Regulation) Bill 2020.
39 Section 21(g)(i) of the Assisted Reproductive Technology (Regulation) Bill 2020
40 Section 2(x) of the Assisted Reproductive Technology (Regulation) Bill 2020

(i) First possibility, the couple preserved embryo (Fertilised gamete of the donor and couple) with an intention to use it in near future and after 4 years approaches the clinic to use it for ART services.

(ii) Second possibility, the couple wants to avail ART services instantly without the preservation.

By virtue of the Bill, in either of the cases the clinic will face dilemma as to whether the couple is eligible to avail the ART facility as it is unclear whether age limitation of 50 years is applicable to a married woman in commissioning couple.

As per the illustration, if the couple is considered to be eligible then it will be in contravention to age limitation of below 50 years set out in Section 21(g) for "woman". If not eligible then it would give arise to further doubts as the provision on freezing of embryos/gametes lays the limitation of 10 years[41] for storing and using and in the instant case it is used within the limitation period of 10 years. Further, the Bill excludes LGBT couples from availing ART services.[42] Another key point is that though the Bill permits woman individually/single woman to avail ART services, it disallows lesbian couple. The author tries to demonstrate it with an illustration below:

A and B Hindu females under 40 years of age are living together as a married couple for nearly 2 years. The couple wants to avail ART services for having a child and requests the clinic for the same. Whether the couple will be eligible for ART facility as a commissioning couple or individually under the ambit of an "individual"?

To further elaborate on the above illustration in legal context, it is essential to understand that the Bill require a couple to be a married infertile couple to qualify for availing ART services. The term marriage finds recognition under the personal laws for instance, Hindu Marriage Act, 1955 recognises a marriage which is solemnised between a man and a woman in addition to fulfilment of other conditions.[43] Thus, personal law does not recognise marriage between same genders. Notwithstanding, the Supreme Court in the case *Navtej Singh Johar v. Union of India*[44] recognized the relationships of LGBT couples in India but till date neither the personal law is amended nor any special law has been enacted to this effect. Thus, the Bill excludes LGBT couples which inherently infringe their "*right to privacy*"[45]and "*right to beget a child*"[46].

---

41 Section 28 of the Assisted Reproductive Technology (Regulation) Bill 2020.

42 Prabha Kotiswaran, "*Assisted Reproductive Technology Bill needs a thorough review",* INDIAN EXPRESS [Online], October 9, 2020, https://indianexpress.com/article/opinion/columns/assisted-reproductive-technology-regulation-bill-surrogacy-6716444/, (visited on December 16, 2020).

43 See Section 5(iii) of Hindu Marriage Act 1955.

44 (2018) 10 SCC 1.

45 Justice K.S. Puttaswamy v Union of India (2017) 10 SCC 1, pp. 123-125.

46 Rakesh Vishan and Swati Vishan, *"Human Cloning: Perspectives, Ethical Issues and Legal Implications"*, Bharati Law Review, January-March, 2017, p. 75,

Furthermore, in regards to latter part of illustration, the Bill allows a single woman to access ART services which means that though A and B together as couple cannot avail ART services, they can do so individually. For this reasons there is a lack of foresight on part of the framers of the Bill as it is in conflict with the Hindu Marriage Act. Therefore, these questions need to be addressed by the legislation otherwise the ambiguity and confusion will open Pandora of legal complications.

Legitimacy of the Child born through ART

The ultimate objective of the Bill is to regularise the medical advancement but it neglects to highlight upon the issue of legitimacy of a child born through ART. Under Hindu law, a child is considered legitimate when the child is born within the wedlock and/or by valid adoption[47] irrespective whether the Hindu marriage is valid, void or voidable[48]. Further, the legislators have recognised a relationship through adoption and by blood inclusive of both legitimate and illegitimate.[49] Similarly, the Bill considers a child born through ART to be biological child of the couple who shall be entitled to all the rights and privileges of a natural child.[50] Both Hindu marriage Act and the Bill are silent on the aspect of the legitimacy of child born through ART to a single woman. Therefore, by virtue of the same, it will be incorrect to imply that a child born through ART to a single woman will also be considered to be her biological child with all rights and privileges in absence of law.

Further, even though the child born through ART to commissioning couple is considered to be a legitimate child and all the ties with the donor is severed, still the legal issue of consanguinity which deals with blood relations from common ancestors continues to persist. Under the Bill, the information of donor is confidential which is maintained by the bank and national registry. The illustration below attempts to explain the issue:-

A (husband) and B (wife) a Hindu married couple is infertile and eligible for ART services. For the procedure under ART a donor's gamete is requested from the ART bank and the same after the fertilisation is injected into B's body. The donor "C" consents in writing that he shall not have any parental right over child.[51] A boy child is born through ART to A and B and on attaining adulthood wishes to marry a girl who falls within the prohibited degree[52]/sapinda relationship[53] of "C". Whether such marriage can be lawfully solemnised?

Such marriage cannot be solemnised as Hindu Marriage Act prohibits a marriage between persons related to each other either by prohibited degrees or

---

http://docs.manupatra.in/newsline/articles/Upload/643BE339-561C-43C6-838A-F8AD6AA1A8CF.pdf, (visited on December 5, 2020).

47 See Section 3 of the Hindu Marriage Act 1955.

48 Section 16 of the Hindu Marriage Act 1955.

49 Section 3(g) of the Hindu Marriage Act 1955.

50 Section 31 of the Assisted Reproductive Technology (Regulation) Bill 2020.

51 Section 31(2) of the Assisted Reproductive Technology (Regulation) Bill 2020.

52 Section 3(g) of Hindu Marriage Act 1955.

53 Section 3(f) of Hindu Marriage Act 1955.

sapinda relationship[54] as this may lead to recessive genetic disability/disorder in future generations.[55] Moreover, the Bill is silent on this legal and ethical complication and there is no exception to disclose the information of donor sans breaching the agreement of confidentiality. Uniquely, in United Kingdom under HEFA the similar issue is addressed. In HEFA the concerned authority is statutorily bound to maintain a confidential registry containing the information of donor, parents and children born through ART.[56] However, the act provides exceptional circumstance under which disclosures of confidential information is permitted such as on the request of the applicant to the authority for the purposes of knowing whether the intended spouse/civil partner/person with intimate relationship is genetically related to the applicant or not.[57]A similar approach can be adopted by India to avoid the issue of consanguinity.

The Bill allows a couple/woman and donor to freeze the gamete or embryo[58] and states that such frozen embryo or donor gamete can be preserved for a span of not more than 10 years.[59] This implies that the embryo or gamete of donor can be used any time before the completion of 10 years. Further, the Bill lays the condition that for using any cryopreserved embryo or gamete, consent of all the parties in writing is mandatory specifically when any of the parties is dead or incapable[60] and any child born through ART to be a legitimate and biological child of the commissioning couple.[61] Not to mention, there is a possibility that a child by ART may be born after a period of 280 days from the dissolution (death or divorce) of marriage but before 10 years. Conversely, The Indian Evidence Act, 1872, u/s. 112 would consider such a child to be illegitimate as he is born after 280 days of dissolution (death or divorce) of marriage[62] whereas Bill considers such child to be biological and legitimate child of couple. Hence, the Bill is inconsistent with The Indian Evidence Act.[63]

Pre-Implantation Genetics Diagnosis and Pre Implantation Genetics Testing

The pre-implantation genetics testing and diagnosis is conducted on an embryo before artificially inseminating it into a woman's reproductive body to determine whether such embryo is suffering from genetic defect. The Bill defines Pre-implantation genetics diagnosis as "*the genetic diagnosis when one or both genetic parents have a known abnormality and testing is performed on*

54 Section 5 of Hindu Marriage Act 1955.

55 A.H. Bittles, "*Endogamy, consanguinity and community genetics*", Journal of Genetics, Vol. 81(3) December 2002, pp.91-98

56 Alicia Ouellette, et al. (rev.), *"Lessons across the pond: Assisted Reproductive Technology in United Kingdom and United States*", American Journal of Law & Medicine, Vol. 31(4) 2005, pp. 419-446.

57 Section. 31ZB of the Human Fertilisation and Embryo Act 1990.

58 Section 22 of the Assisted Reproductive Technology (Regulation) Bill 2020.

59 Section 28 of the Assisted Reproductive Technology (Regulation) Bill 2020.

60 Section 22(2) of the Assisted Reproductive Technology (Regulation) Bill 2020.

61 Section 31 of the Assisted Reproductive Technology (Regulation) Bill 2020.

62 Section 112 of Indian Evidence Act 1872.

63 *Supra* n. 2, p. 75.

an embryo to determine if it carries a genetic abnormality"[64] and Pre implantation genetics testing as "*a technique used to identify genetic defects in embryos created through in-vitro fertilisation before pregnancy"*[65]

Therefore, if the embryos suffer from any genetic abnormality, it may be donated to the research laboratory for research purposes with the consent of couple[66] as such embryos cannot be transferred into woman's uterus and to avoid "therapeutic abortions"[67]. [68] But the Bill neither categorically specifies if the couple has an option to destroy such embryos nor sets out the parameters of genetic disorders/abnormality. If it is not addressed then it might promote eugenics.[69] In general, eugenics aims to promote superior generation in the population by manipulating the human genes and for this purpose it eliminates population belonging to biologically inferior/weak genes.[70]

Counseling

Section 21 clause (c) sub-clause (i) of the Bill states that the commissioning couple and/or a woman must be provided professional counselling about the ART procedures, advantages and disadvantages, implications, risk of multiple pregnancy, medical side-effects, cost etc. so that the couple/woman arrive at an informed decision.[71] The Bill doesn't provide for any mechanism to keep a check on the counselling provided to ensure a fair and impartial counselling. The Bill neither defines the term "professional counselling" nor prescribes any set qualification/ eligibility for a professional counsellor. Significantly, HEFA requires the professional counsellor must report to an independent body which is neither ART clinics nor ART banks for the purpose of fair and impartial counselling to couple/ single woman.[72]

64 Section 25 of the Assisted Reproductive Technology (Regulation) Bill 2020.
65 Section 25 of the Assisted Reproductive Technology (Regulation) Bill 2020.
66 Section 25 of the Assisted Reproductive Technology (Regulation) Bill 2020.
67 Federica Cariati, et al., "*The evolving role of genetic tests in reproductive medicine*", Journal of Translational Medicine, 17 August 14, 2019, https://doi.org/10.1186/s12967-019-2019-8, (visited on December 21, 2020).
68 Elpida Fragouli, "*Pre implantation genetic diagnosis: present and future"*, J Assist Reprod Genet, Vol. 24(6) 2007 June, pp. 201-207, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3454965/ , (visited on December 23, 2020).
69 Prabha Kotiswaran, "*Assisted Reproductive Technology Bill needs a thorough review*", INDIAN EXPRESS [Online], October 9, 2020, https://indianexpress.com/article/opinion/columns/assisted-reproductive-technology-regulation-bill-surrogacy-6716444/, (visited on December 16, 2020).
70 Daniel J Kevles, "*Eugenics and human rights*", BMJ. Vol. 319 (7207) August 14, 1999, pp. 435–438, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1127045/, (visited on December 27, 2020).
71 The Assisted Reproductive Technology (Regulation) Bill 2020, p. 16 and 17 See also Section 21(c)(i) of the Assisted Reproductive Technology (Regulation) Bill 2020.
72 *Supra* n. 2, p. 22.

Further, the Bill fails to provide professional counselling to a female donor in spite of being aware that the procedure for retrieval of oocyte from a woman's body involves complications and risks such as severe abdominal pain, bleeding, ovarian hyper stimulation syndrome and in some cases death.[73]

Cloning

The Bill under section 25 provides that an embryo can be donated for research purposes with the approval of the commissioning couple or woman after genetic diagnosis. On the positive side, the Bill allows research on such embryos which suffer from genetic abnormality or inheritable life threatening disease but without any specific regulations and rules. It overlooks the undying implications associated with research such as cloning. The ICMR guidelines on stem cell research define cloning as a "*process of creating genetically identical copy of a biological unit (e.g. a DNA sequence, cell, or organism) from which it was derived, especially by way of bio-technological methods.*"[74] Such methods include cloning by somatic cell nuclear transfer[75], reproductive cloning[76] and therapeutic cloning.[77] Furthermore, the legislators failed to address a critical issue of cloning through somatic cell nuclear transfer (SCNT). In this method, the mother's chromosomes are removed from the egg and what remains is an empty nucleus. The empty nucleus is now modified by adding onto the chromosomes of the adult whom he/she wish to clone thereby substituting the genetics of biological father or mother. The modified nucleus acts as an embryo

73 Priyanka Vora, "*Swelling, bleeding and even death – women who donate their eggs face many medical risks*", Scroll in, July 20, 2018, https://scroll.in/pulse/881927/swelling-bleeding-and-even-death-women-who-donate-their-eggs-face-many-medical-risks, (visited on January 5, 2021).

74 "*National Guidelines for Stem Cell Research"*, Indian Council of Medical Research & Department of Biotechnology, 2017, p. 48.

75 "*National Guidelines for Stem Cell Research"*, Indian Council of Medical Research & Department of Biotechnology, defines cloning by somatic cell nuclear transfer as "*involves replacing an oocyte's nucleus with the nucleus of the adult cell to be cloned (or from an embryo or fetus) and then activating reconstituted oocyte for further development. The oocyte genetically reprograms the transferred nucleus, enabling it to direct development of a whole new organism*", p. 48.

76 "*National Guidelines for Stem Cell Research"*, Indian Council of Medical Research & Department of Biotechnology, defines reproductive cloning as "*The embryo developed after Somatic Cell Nuclear Transfer (SCNT) is implanted into the uterus (of the donor of the ovum or a surrogate recipient) and allowed to develop into a fetus and whole organism. The organism so developed is genetically identical to the donor of the somatic cell nucleus*", p. 49.

77 "*National Guidelines for Stem Cell Research"*, Indian Council of Medical Research & Department of Biotechnology, defines therapeutic cloning as "*The development of the embryo after donor-sourced Somatic Cell Nuclear Transfer (SCNT) until the blastocyst stage and embryonic stem cells are derived from the inner cell mass. These stem cells could be differentiated into desired tissue using a cocktail of growth and differentiation factors. The generated tissue/cells could then be transplanted into the original donor of the nucleus avoiding rejection*", p. 49.

and is left for fertilization to be inserted later on into a woman's body.[78] Cloning thereby can lead to an army of identical people which would be nothing short of an irreversible man-made disaster.

The issue of cloning is major concern which is addressed at international platform and it opined that the use of such technology can have catastrophic effect on the mankind and thus it prohibited the use of embryonic stem cell for cloning purposes. Article 11 of Universal Declaration on the Human Genome and Human Rights states as under;

> *Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organizations are invited to co-operate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected*.[79]

Further in the 59th General Assembly of United Nations Declaration of Human Cloning, India took the stand of supporting the ban but kept its options open for therapeutic purposes.

> *India remained totally opposed to reproductive cloning owing to the doubtful nature of its safety, success, utility and ethical acceptability, he said. However, the merits of therapeutic cloning were considered on a case-by-case basis within the bioethical guidelines laid down with the approval of the National Bioethical Committee. The Declaration voted upon today was non-binding and did not reflect agreement among the wider membership of the General Assembly. India's approach to therapeutic cloning, thus, remained unchanged*.[80]

ICMR guidelines enumerate and elaborate list of permissible, restrictive and prohibitive research practices on stem cell.[81] Under the guidelines it prohibits reproductive cloning, human line gene therapy etc. and permits research for therapeutic purposes. However, neither the Bill explicitly addresses the concern of cloning nor it lays down any mechanism for determining the procedure and approval standards for embryonic stem cell research.

---

78 Karen L. Goldstein & Caryn H. Okinaga, "*Assisted Reproductive Technology"*, GEO. J. GEZNDER & L, 3 (2002), pp. 428-429.

79 "*Universal Declaration on Human Genome and Human Rights"*, Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twenty-ninth session, November 11, 1997; endorsed by General Assembly resolution 53/152 of December 9, 1998.

80 "*General Assembly Adopts United Nations Declaration on Human Cloning",* GA/1033, March 8, 2005, https://www.un.org/press/en/2005/ga10333.doc.htm, (visited on January 10, 2020).

81 *Supra* n. 2, pp. 22-25.

Particularly addressing the embryonic stem cell research, United Kingdom under HEFA has laid out procedure for carrying out research on "embryonic stem cell"[82] which as follows:

> *In UK in terms of process, a research program must first obtain approval from a Research Ethics Committee (equivalent to Institutional Review Boards in North America) before applying for a license from the HFEA. It must then submit an application explaining the objectives and protocols of the study, why the study requires the use of human gametes or embryos, and why the study is necessary. Completed applications are peer reviewed and returned to the applicant for comments before the license committee reviews them. For successful applications, the HFEA conducts inspections and reviews progress reports and a final report.*[83]

By and large with the medical advancement on embryonic stem cell research it becomes mandatory and important to address the issue of cloning and provide necessary measures to restrict it.

Conclusion

The ART Bill, 2020 have been through a long overdue journey with all the drafts and comments. It is appreciated that the revised Bill though not elaborative, but it attempts to provide legislation for all the stakeholders such as commissioning couple/individual, ART clinics and banks and donors. However, legislators have slept over some pertinent legal complications arising out of the Bill. The author suggests that the definition of commissioning couple to be amended to bring LGBT couple within the ambit and to specify whether the age limitation of 50 years applicable to a woman covers married woman so as to avoid ambiguity.

Further, concrete parameters must be set for couple/woman besides infertility and age to protect the interest of child such as financial stability, mental stability, creation of fund to secure the child in event of divorce of parents/ abandonment and to keep a scrutiny on family post ART treatment for a certain time period. The author in above suggestion was inspired by the Adoption laws prevailing in India. The law must aim to avoid any ambiguity and such vagueness in the Bill will compel the judiciary to venture on untraversed path for judicial interpretation.

---

82 *Supra* n. 2, defines Embryonic stem cell as "*Cells derived from the inner cell mass up to the stage of blastocysts. These cells can be cultured indefinitely under in vitro conditions that allow proliferation without differentiation, but have the potential of differentiating into any cell of the three embryonic germ layers (ectoderm, mesoderm and endoderm)*", p. 50.

83 Alicia Ouellette, et al. (rev.), *"Lessons across the pond: Assisted Reproductive Technology in United Kingdom and United States*", American Journal of Law & Medicine, Vol. 31(4) 2005, p. 429.

Law aims to safeguard the welfare of the child and therefore, it is suggested that amendments may be carried out in personal laws, the Bill and Indian Evidence Act to legitimatize a child born *via* ART to a single woman and to a couple after 280 days of dissolution of marriage. Further, even though the donor has no legal right over the child as all the ties are severed, still blood ties can never be severed/uprooted by the law and hence the issue of consanguinity will always persist. In a similar way, the law pertaining to adoption also addresses the issue of consanguinity. For instance an adoption under the Hindu law states that an adopted child is prohibited to enter into matrimonial relationship with any person whom he/she could not have married had he/she born in the same family.[84]

Furthermore, the author opines that the India may adopt the UK legislation HEFA on disclosure of the information of any relations with an intended spouse upon an application submitted by an applicant to the national registry. But only the partial and relevant information must be disclosed so to avoid any conflict with the provisions of confidentiality. Additionally, the Bill while dealing with pre-implantation genetic diagnosis and testing must lay down the parameters for genetic disorders/abnormality so as to avoid any ethical complication of eugenics.

The Bill should extend professional counselling to the donor and must lay out a mechanism to keep a check and balance on the professional counsellor. Further, it must lay parameters for qualification and eligibility of professional counsellor. Furthermore, to ensure that fair and impartial counselling is provided to the patients, the counsellor must report to an independent authority with the details of case and counselling provided.

Lastly the Bill should clarify that whether it will have retrospective or prospective effect and must specify the purposes and procedures for embryonic stem cell research. The Bill must prohibit and impose penalty along with punishment for the offences pertaining to illegal research on embryos for the purposes of cloning. Further, to evaluate the bonafide objective of embryonic stem cell research the Bill must adopt HEFA provision under which an independent committee is established for the approving any form of research.

In the final analysis, the Bill is a much awaited pit stop in ART but is still long distant to achieve its goals. It seems to be adopted and inspired from ICMR guidelines in most of it parts. However, there are major lacunae in the Bill which should have been addressed at the time of drafting. To broadly phrase the Bill is unclear on a number of aspects as they form part of delegated legislation by virtue of being administrative and procedural in character. The Bill raises many regulatory and legal concerns and if not addressed, it will act as a catalyst for numerous litigations on enactment.

84 Section 12 of the Hindu Adoption and Maintenance Act 1955.

The above mentioned recommendations, if adopted by way of enactment, it would definitely guide the Medical professionals, Advocates, Judges and the last but not the least the individuals involved in this process as donor and donee, with the wisdom to protect the larger interest of the life of child.

***

CASE COMMENT ON *INDIAN HOTEL AND RESTAURANT ASSOCIATION V. STATE OF MAHARASHTRA* 2019 SCC OnLine SC 41

Vijay P. Tiwari[♣]

Background, Issues and Contentions

Indian Hotel and Restaurant Association v. State of Maharashtra 2019 SCC OnLine SC 41 has come to the apex court by way of Writ petition filed under Article 32 of the Constitution of India for violation of fundamental rights enshrined in Articles 14, 15, 19 (1)(a), 19 (1)(g) and 21 of the Constitution of India. Three writ petitions were filed in the apex court - Writ Petition (Civil) No. 576 of 2016; Writ Petition (Civil) No. 24 of 2017 and Writ Petition (Civil) No. 119 of 2017 – all petitions have been clubbed together and disposed of by the common judgment since similar issues and prayers were raised in all three petitions. The petitions were heard by a division bench consisting of Hon'ble (Dr.) Justice A.K. Sikri and Hon'ble (Mr.) Justice Ashok Bhushan. The judgement was authored and delivered by Hon'ble (Dr.) Justice A.K. Sikri on behalf of both the judges on January 17, 2019.

The state of Maharashtra has enacted Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (working therein) Act 2016[1] (MAHARASHTRA ACT No. XII OF 2016) and have framed rules[2] under the Act for the purpose of "*prohibition of obscene dance in hotels, restaurants, bar rooms and other establishments and to improve the conditions of work, protect the dignity and safety of women in such places with a view to prevent their exploitation*".[3]

However, according to the petitioners, the Act violates their Fundamental Rights guaranteed under Articles 14, 15, 19 (1)(a), 19 (1)(g) and 21 of the Constitution of India. According to them there are a number of legislations already in existence to regulate dance bars,[4] and hence no new legislation is

---

♣ Associate Professor of Law, Maharashtra National Law University, Nagpur, e-mail: vpt@nlunagpur.ac.in.

1 http://bombayhighcourt.nic.in/libweb/acts/Stateact/2016acts/2016.12.pdf, (visited on January 28, 2019).

2 http://bombayhighcourt.nic.in/libweb/acts/Stateact/2016acts/2016.12.pdf, (visited on January 28, 2019).

3 *Ibid*, objective of the Act, p. 1.

4 The activities of the eating houses, permit rooms and beer bars are controlled by the following regulations: (i) The Bombay Municipal Corporation Act; (ii) The Bombay Police Act, 1951; (iii) The Bombay Prohibition Act, 1949; (iv) The Rules for Licensing and Controlling Places of Public Entertainment, 1953; (v) The Rules for Licensing and Controlling Places of Public Amusement other than Cinemas; (vi) And other orders as are passed by the Government from time to time. The restaurants/dance bar owners also have to obtain licences/permissions as listed below: (i) Licence and registration for eating house under the Bombay Police Act, 1951; (ii) Licence under the Bombay Shops and Establishment Act, 1948 and the

needed. It was also contended that the State Government is trying to impose its own morality and completely ban the dance bars and to also defy the orders of the apex court as follows:

> *Mr. Jayant Bhushan, learned senior counsel began his submissions with a fervent plea that the respondent State was bent upon banning altogether dance performances in the bars/permit homes or restaurants etc. His argument was that earlier two attempts of identical nature made by the respondents failed to pass the constitutional muster. The provisions of Sections 33A and 33B inserted vide Amendment Act, 2005 to the Bombay Police Act, 1951 had been struck down as unconstitutional being in contravention of Articles 14 and 19(1)(g) of the Constitution. In spite thereof, the State did not grant licences to any person including the petitioners. This deliberate inaction on the part of the State led to filing of the contempt petition by the petitioners in which notice was issued on May 05, 2014. After receiving the notice in the said contempt petition, the State brought on the statute book Section 33A in another avtar by amendment Act on June 25, 2014. According to the petitioners, it was verbatim similar to Section 33A which was already held unconstitutional and it is, for this reason, in Writ Petition (Civil) No. 793 of 2014 wherein constitutionality of this provision was challenged, this Court passed orders dated October 15, 2015 staying the operation of newly added Section 33A of the Bombay Police 27 Act. Thereafter, on November 26, 2015, this Court directed licences to be granted in two weeks. In order to frustrate the aforesaid directions of this Court, respondents came up with 26 new conditions for grant of licence. As the petitioners had objection to some of the conditions, another application was moved in Writ Petition (Civil) No. 9793 of 2014. After orders dated March 02, 2016 were passed by the Court modifying some of the said 26 conditions, on April 18, 2016, this Court granted*

---

rules made thereunder; (iii) Eating house licence under Sections 394, 412-A, 313 of the Bombay Municipal Corporation Act, 1888; (iv) Health licence under the Maharashtra Prevention of Food Adulteration Rules, 1962; (v) Health licence under the Mumbai Municipal Corporation Act, 1888 for serving liquor; 22 (vi) Performance licence under Rules 118 of the Amusement Rules, 1960; (vii) Premises licence under Rule 109 of the Amusement Rules; (viii) Licence to keep a place of public entertainment under Section 33(1) clauses (w) and (y) of the Bombay Police Act, 1951 and the said Entertainment Rules; (ix) FL III licence under the Bombay Prohibition Act, 1949 and Rule 45 of the Bombay Foreign Liquor Rules, 1953 or a Form E licence under the Special Permits and Licences Rules for selling or serving IMFL and beer; (x) Suitability certificate under the Amusement.

> *one week time to the respondents to comply with its directions. Again, with intention to frustrate the effect of the judgment of this Court, the respondents passed the impugned legislation and also framed impugned rules thereunder*.[5]

On the other hand, it was contended on behalf of the State Government that "*several women performers are victims of illegal trafficking, or minors, and dance bars are used for soliciting flesh trade*." It was suggested that bar girls hail from depraved backgrounds, and hence, vulnerable to prostitution and other offences under the Immoral Traffic (Prevention) Act, 1956."[6] It was also contended that "*different dance bars are being used as meeting points of criminals and pick-up points of the girls.*"[7] And hence, the State government has enacted the Act whose "*objectives* are *lawful and in larger public interest, particularly in the interest of women working at such places*". The Act, according to the respondent state sought to achieve the following objectives:

> *(a) prohibit obscene dance in hotels, restaurants, bar rooms and other establishments;*
> *(b) improve the conditions of work of women dancers and other women working therein; and*
> *(c) protect the dignity as well as safety of such women*.[8]

Judgement and Analysis

Meaning of Obscene Dance

Section 2(8) (i) of the Act,[9] was challenged on the ground that the expression "*arouse the prurient interest of the audience*" is vague, and incapable of giving precise meaning. After having compared the definition of word 'obscene' as given in section 294 of IPC, and also by referring various dictionary meanings and cases decided by Courts in US, South Africa and India, the apex court held that "*it cannot be said that a dance which is aimed at arousing the prurient interest of the audience is vague term, incapable of definite connotation,*" meaning thereby the provision is constitutionally valid.

---

5 https://www.sci.gov.in/supremecourt/2016/22533/22533_2016_Judgement_17-Jan-2019.pdf, para 22, p. 26, (visited on January 28, 2019).

6 *Ibid.*, para 20, p.18.

7 *Ibid.*

8 *Supra* n. 5, para 58, p. 56.

9 According to Section 2(8) of the Act, "obscene dance" means a dance that is obscene within the meaning of section 294 of the Indian Penal Code and any other law for the time being in force and shall include a dance,– (i) which is designed only to arouse the prurient interest of the audience ; and (ii) which consists of a sexual act, lascivious movements, gestures for the purpose of sexual propositioning or indicating the availability of sexual access to the dancer, or in the course of which, the dancer exposes his or her genitals or, if a female, is topless;

No Intelligible Differentia between Dance Bar and Discotheque or Orchestra

The next issue was whether Section 6(4)[10] of the Act is violative of equality clause enshrined in the Constitution. According to this section the licence for 'discotheque or orchestra' as well as for 'dance bar' cannot be granted for the same place.

The petitioners' argument that "*there is no rational for such a provision*", was upheld by the court because the respondents could not give any valid justification for such arbitrary and irrational provision, which has no nexus with the purpose sought to be achieved by the Act. And hence, the court has struck down section 6 (4) of the Act as unconstitutional.[11]

Repugnancy with Central Act

Another important issue was whether punishment provided under Section 8(2)[12] of the Act is "*discriminatory and offends Article 14 of the Constitution*",

10 According to Section 6(1) of the Act, a person desirous to obtain the licence under this Act shall fulfil the eligibility criteria as prescribed and shall make an application complete in all respect in the format prescribed. (2) The licensing authority may, if it deems fit, grant the licence under this Act to such person, on payment of such fees and on such terms and conditions and subject to such restrictions as may be prescribed. The licencing authority may, after recording the reasons in writing, refuse to grant any such licence : Provided that, the licensing authority shall take a decision on the application within a period of one month from the date of the receipt of application complete in all respect. (3) The licence shall be issued to the eligible applicant in the format prescribed under the signature of licensing authority. (4) Notwithstanding anything contained in the Maharashtra Police Act, no licence shall be granted for Discotheque or Orchestra, in the place for which the licence under this Act is granted, nor a licence shall be granted under this Act for the place for which a licence for Discotheque or Orchestra has been granted.

11 *Supra* n. 5, para 90, p. 89.

12 According to Section 8(1) of the Act, the owner or proprietor or manager or any person acting on his behalf, who uses the place in contravention of section 3 shall, on conviction, be punished with imprisonment for a term which may extend to five years or fine which may extend to rupees twenty-five lakhs, or with both; and in case of continuing offence, further fine of rupees twenty-five thousand for each day during which the offence continues. *(2) The owner or proprietor or manager or any person acting on his behalf, shall not allow any obscene dance or exploit any working woman for any immoral purpose in any place and the person committing such act shall, on conviction, be punished with imprisonment for a term which may extend to three years or a fine which may extend to rupees ten lakhs, or with both; and in case of continuing offence, further fine which may extend to rupees ten thousand for each day during which the offence continues*. (3) The offences under sub-sections (1) and (2) shall be cognizable and non-bailable and triable by a Judicial Magistrate of the First Class. (4) No person shall throw or shower coins, currency notes or any article or anything which can be monetized on the stage or

since the State Act provides the punishment with imprisonment for a term which may extend to three years or a fine which may extend to rupees ten lakhs, on the other hand the Central Act (Section 294 of the Indian Penal Code 1860) provides the punishment with imprisonment for a term which may extend to three months for the same offence. Section 8(2) of the Act provided punishment that "*The owner or proprietor or manager or any person acting on his behalf, shall not allow any obscene dance or exploit any working woman for any immoral purpose in any place and the person committing such act shall, on conviction, be punished with imprisonment for a term which may extend to three years or a fine which may extend to rupees ten lakhs, or with both; and in case of continuing offence, further fine which may extend to rupees ten thousand for each day during which the offence continues*" which, according to the petitioners, is in contravention of the central act, (Section 294 of the Indian Penal Code 1860), which provides punishment of only three months imprisonment for the same offence. However, this contention was rightly rejected by the apex court because the State Act provides the punishment for permitting the use of the place for obscene dance and not for the offence created under Section 294 of the Indian Penal Code 1860.

Throwing/Showering Coins, Currency Notes or any article on the Dancer

The next issue was whether throwing or showering coins, currency notes or any article or anything which can be monetized on the stage or handing over personally such notes, to a dancer could be banned or treated as an offence? It should be noted that Section 8(4) prescribed six months' punishment for this offence and also for its abetment. Further stipulation in these provisions is that "*any tip to be given should be added in the bill only and is not to be given to the performers etc*". The justification given by the State is that *"showering of money etc. is a method of inducement (for prostitution), which has to be curbed keeping in view that Act aims to protect the dignity of women*".[13]

The apex court has given a very good judgement by stating that "*insofar as throwing or showering coins, currency notes etc. is concerned, the provision is well justified as it aims at checking any untoward incident as the aforesaid Act has tendency to create a situation of indecency.*" Further the apex court held

---

hand over personally or through any means coins, currency notes or any article or anything which can be monetized, to a dancer or misbehave or indecently behave with the working women or touch her person, in any place. Any person who commits such act or abets the commission of such acts shall, on conviction, be punished with imprisonment for a term which may extend to six months or a fine which may extend to rupees fifty thousand, or with both. (5) The offence punishable under sub-section (4) shall be non-cognizable and bailable and triable by a Judicial Magistrate of the First Class. (6) Any person who contravenes any of the provisions of this Act for which no other punishment has been provided, shall, on conviction, be punished with imprisonment for a term which may extend to three months or fine which may extend to rupees twenty-five thousand, or with both.

13 *Supra* n. 5, para 92, p. 91.

that "*Therefore, whatever money, any appreciation of any dance performance, has to be given, can be done without throwing or showering such coins etc.*" But the apex court set aside the provision which mandated that the tips should also be added in the bills, because the court held that "*it may not reach to the rightful recipient and may also impose undue restrictions on the contracting power of the employer and performer on the one hand and the visitor on the other hand.*" Certain provisions of the rules[14] were also challenged; one such provision was which mandated that only "*a person with 'good character' and 'antecedents' and without any history of 'criminal records' in the past ten years*" was held to be unconstitutional because "*the terms 'good character' or 'antecedents' or 'criminal record' are not definite or precise.*"[15]

Challenge to the Validity of the Provision Providing for Non transparent stage in Bar Room

Another important question, which the researcher feels, was not rightly decided by the apex court was the provision which stipulated that the "*stage in bar room has to be with non-transparent partition between hotel, restaurant and bar room area.*"[16] The well settled principle of the interpretation of the statutes is that the courts should believe in the constitutionality of the statute unless otherwise proved. This provision, might not have direct relation with the objective of the Act, however, it has direct nexus with the area and the fee prescribed for granting the licences. Suppose, the fee for 'dance bar' with the seating capacity of 25 people is Rs 10,000/-. Obviously, the fee would be more for 'dance bar' with the seating capacity of 50 or 100 people. Now, in this country, which is badly known for black money and tax evasion, the licence seeker, may seek the licence of 'dance bar' only for 25 people and the guests seating in other areas may also enjoy the songs being sung in the dance bar. By following the decision of the apex court, the state government may lose revenue, which is very important for a state like Maharashtra, where farmers are taking extreme step of suicide due to poverty. The researcher feels that the state of Maharashtra should seek review of this portion of the judgement, on the grounds mentioned herein before.

Challenge to distance of One Km.

The researcher completely agrees with the apex court when it struck down the provision which provided that "*the place where dance is to be performed shall be at least one km away. from the educational and religious institutions*" for the fact that it would indeed be difficult to find any place which is one km away from either an education institution or a religious institution.[17]

14 *Supra* n. 2.

15 *Supra* n. 5, para 95, p. 92.

16 *Supra* n. 5, para 97, p. 93.

17 *Supra* n. 5, para 98, p. 94.

Challenge to the provision of having Written Contract of Employment and Monthly Salary

Another important provision under challenge was the condition No.2 of Part B, which imposes an obligation on the employers to the effect that working women, the dancers and waiters/waitresses must be employed under a written contract on a monthly salary. This was held to be unconstitutional because it imposed unreasonable restriction on the terms and conditions of the employment. A performer, might like to take the payment on per performance basis, or may be weekly or fortnightly basis. So, putting the condition of 'monthly' was unreasonable. However, the other part of the condition, which provides for "*a written contract as well as depositing of the remuneration in the bank accounts is concerned, appears to be justified as it would make the conditions on which such working women, dancers and waiters/waitresses are employed, transparent thereby eliminating or minimising any chances of exploitation or other disputes.*"[18]

Challenge to the Timing Prescribed by the Rules

The challenge to the condition No. 9 of Part B which prescribes timing of such dance performances only between 6 pm to 11:30 pm, was not accepted by the apex court for the fact that the condition does not seem to be 'manifestly unreasonable' and the state has "*power restrict the time of dance performances'…Also the court held that "a period of 6 pm to 11:30 pm for dance performances is quite sufficient and substantial as it allows 5½ hours of such performances.*"[19]

Challenge to the Serving of Liquor in Bar Rooms

The apex court did not find any fault in serving liquor and held that *"the State is more influenced by moralistic overtones under wrong presumption that persons after consuming alcohol would misbehave with the dancers".*[20] The apex court found justification for this reasoning that the alcohol is served by women waitresses in bars also, and the ban on them had been held to be unreasonable.[21] While agreeing with the decision and reasoning of the apex court, the researcher wants to state that some condition on the upper limit of serving/consumption liquors should have been mandated to avoid untoward incidents.

Challenge to the provision of compulsory CCTV Cameras in Bar Rooms

The provision for having CCTV in the 'dance bar', was rightly held to be *"invasion of privacy and is, thus, violative of Articles 14, 19(1)(a) and 21 of the Constitution.*" The apex court rightly held that, "*if the security is the issue, the CCTV cameras could be put at the entrance*" and not inside the dance bar.[22]

---

18 *Supra* n. 5, para 99, p. 95.

19 *Supra* n. 5, para 100, p. 96.

20 *Supra* n. 5, para 101, pp. 96-97.

21 *Supra* n. 5, para 101, pp. 96-97.

22 *Supra* n. 5, para 102, p. 97.

Conclusion

It is one of the most welcome decisions of the apex court which has upheld the right to equality of the women of modern India to choose a profession of their choice without any hindrance and held that "*total prohibition of dance in beer bars is unconstitutional*". The apex court has rightly observed that the state has power to regulate the practise of any profession, or to carry on any occupation, trade or business on the grounds given in the Constitution. However, in the impugned Act, the measures appear to be regulatory in nature, but the real consequences and effect is to prohibit such dance bars and hence, are unconstitutional. It has rightly been said by Thomas Jefferson in his letter written to James Madison from Paris on September 6, 1979 that *'the earth belongs to the living, and not to the dead'*,[23] and hence no one should try to impose once own traditional morality, but we should ensure and impose the constitutional morality as enshrined in the Preamble to the Constitution of India.

***

23 https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison, (visited on January 29, 2019).

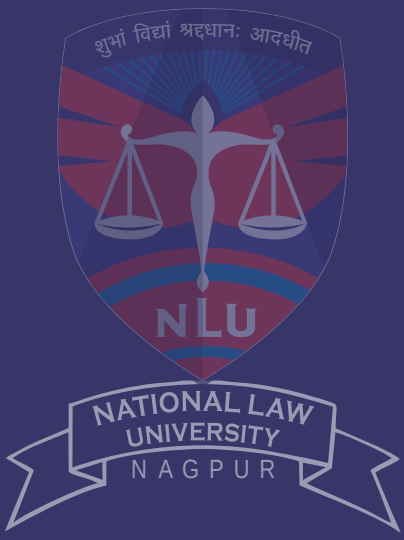
FORM-IV

Statement of Ownership and other particulars about the
MNLU, Nagpur CONTEMPORARY LAW REVIEW

Place of Publication	:	Nagpur
Periodicity of Publication	:	Bi-Annually
Printer's Name	:	Maharashtra National Law University, Nagpur, Waranga, PO: Dongargaon (Butibori), Nagpur-441108, Maharashtra.
Nationality	:	Indian
Address	:	Maharashtra National Law University, Nagpur, Waranga, PO: Dongargaon (Butibori), Nagpur-441108, Maharashtra.
Publisher's Name	:	Dr. Ashish J. Dixit Registrar Maharashtra National Law University, Nagpur, Maharashtra.
Editor's Name	:	Dr. Himanshu Pandey Associate Professor of Law
Nationality	:	Indian
Address	:	Maharashtra National Law University, Nagpur, Waranga, PO: Dongargaon (Butibori), Nagpur-441108, Maharashtra.
Owner's Name	:	Maharashtra National Law University, Nagpur

I, Ashish J. Dixit, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
Ashish J. Dixit
Registrar



www.nlunagpur.ac.in